

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No. 06-3217

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**MIKE HATCH, in his official capacity as  
Attorney General of the State of Minnesota**

**Appellant,**

v.

**ENTERTAINMENT SOFTWARE ASSOCIATION and  
ENTERTAINMENT MERCHANTS ASSOCIATION,**

**Appellees.**

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**On Appeal from the United States District Court  
For the District of Minnesota**

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**BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE  
EXPRESSION, ASSOCIATION OF AMERICAN PUBLISHERS, INC.,  
COMIC BOOK LEGAL DEFENSE FUND, FREEDOM TO READ  
FOUNDATION, MAGAZINE PUBLISHERS OF AMERICA, MOTION  
PICTURE ASSOCIATION OF AMERICA, INC., NATIONAL  
ASSOCIATION OF RECORDING MERCHANTISERS, NATIONAL  
ASSOCIATION OF THEATRE OWNERS, INC., PUBLISHERS  
MARKETING ASSOCIATION, AND RECORDING INDUSTRY  
ASSOCIATION OF AMERICA  
AS *AMICI CURIAE* IN SUPPORT OF APPELLEES**

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## **STATEMENT**

American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation (“FTRF”), Magazine Publishers of America, Motion Picture Association of America, Inc. (“MPAA”), National Association of Recording Merchandisers (“NARM”), National Association of Theatre Owners, Inc. (“NATO”), Publishers Marketing Association, and Recording Industry Association of America (“RIAA”) submit this *amicus* brief in support of Appellees, urging that this Court affirm the decision of the court below that Minn. Stat. §325I.06 (2006) (the “Minnesota Act”) is unconstitutional.<sup>1</sup> This brief is submitted upon written consents, attached hereto, of counsel to both Appellants and Appellees.

## **INTEREST OF AMICI**

*Amici’s* members (hereinafter “*amici*”) publish, produce, distribute, sell and are consumers of books, magazines, motion pictures, sound recordings, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific and entertaining. Libraries and librarians represented by FTRF provide such materials to readers and viewers.

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<sup>1</sup> A description of the *amici* is attached as Appendix A.

Materials published, distributed and sold by members of *amici* include depictions of violence that appear to fall within the Entertainment Software Rating Board ("ESRB") Mature (M) rating, were the ESRB ratings to be applied to such material. These range from popular motion pictures such as "Flags of our Fathers," "Saving Private Ryan," "The Terminator" and "Rambo," starring well-known actors such as Tom Hanks, Arnold Schwarzenegger and Sylvester Stallone, to documentaries about wars and the Holocaust, to photographs in books, magazines and newspapers about recent terrorist attacks. These expressive materials are, and should be, protected by the First Amendment. Based on the reasoning proposed by the State, were this Court to reverse the decision below and depart from its own precedents, such materials could be subject to regulation based on their content, thus substantially chilling activities of *amici* that heretofore have been clearly protected by the First Amendment. *Amici* have a significant interest in ensuring that the body of law regarding "harmful to minors" speech on sexual matters not be expanded to intense violence, blood and gore and that it not be extended to restrict protected speech that legislators believe is emotionally harmful to minors.

If accepted by this Court, the State's argument that depictions of violent action can be regulated and censored, even if they are "speech," would carve an enormous new exception into the First Amendment bedrock upon which *amici* depend for the creation and dissemination of a wide variety of constitutionally protected material in all media. It departs dramatically from First Amendment jurisprudence and threatens a vast array of mainstream motion pictures, television programs, books, magazines, and works in other media that contain violent imagery no more shocking than that available every day on the news. The current violence in Iraq and elsewhere in the Middle East, for example, is gruesome, gut-wrenching, and tragic, but it is real, and few would contend that it should be excised from the media to spare the sensibilities of minors. Likewise, the realistic violence in movies like "Saving Private Ryan" or in books about the Civil War and World War II should not be denied full constitutional protection because some fear its effect on minors.

*Amici* believe that we do ourselves, our children, and the First Amendment a grave disservice by allowing the government, based on deeply flawed, unfounded studies, to regulate material that hitherto has enjoyed full constitutional protection. Rather than allowing the mantra of "obscene speech" to shield restrictions on any



speech that lawmakers deem unsuitable for children from meaningful judicial scrutiny, this Court should reaffirm the First Amendment protection of communications that include descriptions or depictions of violence.

A further significant constitutional flaw in the Minnesota Act, as the district court properly found, is its incorporation of ratings issued by private voluntary associations into the criminal construct. *Amici* MPAA and RIAA also use voluntary ratings in connection with their members' expressive works. Members of other *amici* deal with products bearing such voluntary ratings. Not only is the incorporation of such ratings systems an unconstitutional delegation, but it will discourage future use of such ratings, depriving parents of the information and guidance they provide. In addition, the Minnesota Act incorporates definitions which, while they may be appropriate for use by private organizations in a voluntary rating program, are unconstitutionally vague when inserted into a governmental regulatory scheme.

Many of the *amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws infringing on First Amendment rights. *See, e.g., Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383 (1988); *PSINet, Inc. v. Chapman*, 342 F.3d 227 (4<sup>th</sup> Cir. 2004); *Am. Booksellers Found. v. Dean*, 342

F.3d 86 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149 (10<sup>th</sup> Cir. 1999); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8<sup>th</sup> Cir. 1992); *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7<sup>th</sup> Cir. 1985) *aff'd*, 475 U.S. 1001 (1986); *Am. Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *Village Books v. Bellingham*, No. C88-1470 (W.D. Wash. Feb. 9, 1989); *Am. Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993); *Leech v. Am. Booksellers Ass'n*, 582 S.W.2d 738 (Tenn. 1979). They also strongly believe it important to assert the values of the First Amendment in this case as *amici*.

## ARGUMENT

### I.

#### **VIDEO GAMES, EVEN WHEN THEIR CONTENT INCLUDES SCENES OF VIOLENCE, ARE PROTECTED BY THE FIRST AMENDMENT**

In defiance of all applicable precedents both in this Circuit and elsewhere, the State attempts to create a new exception to the First Amendment for “violent video games.”<sup>2</sup> The district court properly rejected the State’s effort to deny First

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<sup>2</sup> Despite this Court’s precedent and the settled law in other circuits, the State also argues that videogames are not speech. *Amici* endorse Appellants’ argument as to the incorrectness of that conclusion. It is particularly strange (continued on next page)

Amendment protection to certain expressions of violent action conveyed to persons under eighteen, and this Court should do so as well.

**A. Expression of Violent Action Is a Protected Form of Speech and Any Content-Based Regulation of Such Speech Must Pass Strict Scrutiny**

There is no constitutional basis for regulation of material depicting “intense violence” or “blood and gore,” even if those terms could be defined precisely. The depiction or description of violence is not one of the few narrowly delineated categories of speech excluded from the protection of the First Amendment:

As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (KENNEDY, J., concurring). While these categories may be prohibited without violating the First Amendment, none of them includes the speech prohibited by the CPPA.

*Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002).

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(cont.)

to argue that video games are not speech and, at the same time, to argue that viewing their content harms minors.

Every court, including this Court, that has considered the issue<sup>3</sup> has invalidated attempts to regulate material solely based on violent content, regardless of whether that material is called “violence,” “excess violence” or included within the definition of “obscenity.” *See, e.g., Winters v. New York*, 333 U.S. 507, 508, 511 (1948) (First Amendment protects pictures and descriptions of “deeds of bloodshed, lust or crime”); *Interactive Digital Software Ass’n v. St. Louis County, Mo.*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Eclipse Enters. v. Gullota*, 134 F.3d 63, 66 (2nd Cir. 1997) (declining “any invitation to expand these narrow categories of speech to include depictions of violence”); *Video Software Dealers Ass’n v. Webster*, 968 F.2d at 688 (“[V]ideos depicting only violence do not fall within the legal definitions of obscenity for either minors or adults.”); *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985); *Interstate Circuit, Inc. v. City of Dallas*, 366 F.2d 590 (5th Cir. 1966), *vacated on other grounds*, 391 U.S. 53 (1968).

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<sup>3</sup> Other than a judge in the Eastern District of Missouri whose decision was reversed by this Court and a judge in the Southern District of Indiana whose decision was reversed by the Seventh Circuit. *Interactive Digital Software Ass’n v. St. Louis County, Mo.*, 329 F.3d 954 (8th Cir. 2003) reversing 200 F. Supp. 2d 1126 (E.D. Mo. 2002); *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), reversing 115 F. Supp. 2d 943 (S.D. Ind. 2000).

The State argues (*see* Br. 19-20) that *Ginsberg v. New York*, 390 U.S. 629 (1968) holds that “there is no First Amendment protection for [any] material that ‘is patently offensive to prevailing standards in the adult community as a whole with regard to what is suitable material for minors.’” This takes language from *Ginsberg* out of context. The quote from *Ginsberg* is from part of the Court’s opinion quoting a portion of the New York statute under consideration in that case. In that statute, the quoted phrase is limited to “nudity, sexual conduct, sexual excitement, or sado-masochistic abuse,”<sup>4</sup> making it abundantly clear that the *Ginsberg* holding is limited to explicit sex, as stated by the court below. And, given the presumption that speech is protected from content-based regulations, *RAV v. City of St. Paul*, 505 U.S. 377, 382 (1992), one cannot, as the State seeks to do, start from the modest exception created by *Ginsberg* to a broader concept of harmfulness.

Content-based regulation of violent expression such as the Minnesota Act must pass strict scrutiny – *i.e.*, it must “promote a compelling interest” and use the “least restrictive means to further the articulated interest.” *Sable Commc’ns, Inc. v. FCC*, 492 U.S. 115, 126 (1989). Moreover, even if the State has a compelling

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<sup>4</sup> *Ginsberg*, 390 U.S. 629, App. A at 646.

interest, the regulation must be “carefully tailored” to achieve the stated purpose.

*Id.* The district court properly found that the Minnesota Act fails to pass strict scrutiny.

**B. First Amendment-Protected Communications Cannot Be Restricted Based on Their Emotional or Psychological Impact**

In *Ginsberg*, the Supreme Court adopted the concept of “variable obscenity” or “obscenity for minors,” which subsequently was engrafted onto the three-part obscenity test set forth in *Miller v. California*, 413 U.S. 15 (1972). The *Ginsberg/Miller* analysis rests on the fact that “[o]bscenity is not within the area of protected speech.” *Ginsberg*, 390 U.S. at 635, citing *Roth v. United States*, 354 U.S. 476, 485 (1957). Both *Ginsberg* and *Miller* involved the regulation of obscene materials – materials that have a “specific judicial meaning which derives from the *Roth* case, i.e., obscene material ‘which deals with sex.’” *Miller*, 413 U.S. at 20 n.2, citing *Roth*, 354 U.S. at 487.<sup>5</sup> It is obscene sexual material as defined first by *Roth* and then *Miller*, not violent material, that has been held to be

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<sup>5</sup> The *Miller* Court further stated that “[u]nder the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law, as written or construed.” 413 U.S. at 27 (emphasis added).

unprotected by the First Amendment for almost 50 years. *See Roth*, 354 U.S. 476; *Miller*, 413 U.S. 15.

Contrary to the State's position, First Amendment-protected speech cannot be restricted based on its emotional or psychological impact on some readers or game players. As Justice Kennedy stated in *Ashcroft v. Free Speech Coal.*, 535 U.S. at 245:

Congress may pass valid laws to protect children from abuse, and it has. *E.g.*, 18 U.S.C. §§ 2241, 2251. The prospect of crime, however, by itself does not justify laws suppressing protected speech. ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech") (internal quotation marks and citation omitted). It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities.

As the Seventh Circuit stated in *American Booksellers Ass'n v. Hudnut*, 771 F.2d at 330:

Racial bigotry, anti-semitism, violence on television, reporters' biases - these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture,

the great censor and director of which thoughts are good for us.

Neither of these precedents are mentioned by the State in its brief.

Neither *Ginsberg* nor any other Supreme Court decision allows government to limit minors' First Amendment rights to a category of speech whenever government believes that it will protect the emotional and physical harm of children, or, in its view, assist parents in guarding their children's well-being. Any such rule would be a slippery slope that would obviate the First Amendment rights of minors. "Harmful to minors" is not any content that a legislature might believe could potentially result in harm to some minors. It is instead a legal term of art that was, in the statute at issue in *Ginsburg*, the formulation used by the New York legislature to define obscenity for minors with respect to sexual explicit material under consideration in *Ginsberg*. It does not mean actual emotional or physical harm to a minor.

This Court should reject the reasoning of the State and conclude, as has this and every other appellate court to have addressed the issue, that regulation of material based solely on its description or depiction of violent action is unconstitutional.



## II THE MINNESOTA ACT IMPROPERLY DELEGATES LEGISLATIVE POWER

The Minnesota Act prohibits the purchase by a minor of any video game rated “M” or “AO” by the Entertainment Software Rating Board (“ESRB”). These designations, developed privately and voluntarily without any legislative direction, are incorporated directly into the Minnesota Act as standards of harmfulness to children in a manner that constitutes an unconstitutional delegation of legislative power. There is no mechanism for any individual to challenge a rating as too restrictive or unjustified; there is no mechanism for the State to challenge a rating as too lenient or inappropriate.

The incorporation of private ratings into criminal statutes has been repeatedly found to be constitutionally unacceptable. *See, e.g., Motion Picture Ass’n of Am. v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wisc. 1970); *Drive In Theatres, Inc. v. Huskey*, 305 F. Supp. 1232 (W.D.N.C. 1969) *aff’d* 435 F.2d 228 (4th Cir. 1970). *Specter* and *Drive In Theaters* both involved, as does this case, adoptions of private ratings directly into a criminal statute. However, the U.S. Supreme Court has held that an enforcement scheme that gives even an implied legal effect to standards set outside

the state's own criminal regulation of illegal conduct is just as improper as express adoption of those standards. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

In *Bantam*, the Supreme Court considered the activities of a state "Commission to Encourage Morality in Youth," which compiled and circulated lists of "objectionable" publications. *See* 372 U.S. at 59 n.1. The Commission's lists created no express presumption, rebuttable or otherwise, that distributors of the listed publications were subject to criminal sanction under state obscenity laws. Yet the Court still found the coercive and inhibiting effect of the Commission's non-reviewable designations unacceptable, even though actual sanctions could come only after a trial. *See* 372 U.S. at 67.

*Engdahl* struck down a town law even when the delegated standards were not binding, as they are here. 317 F. Supp. 1133. In *Engdahl*, movies classified by an industry rating board as unsuitable for minors were prohibited to minors under town law unless a film distributor persuaded a statutory Board of Appeals that the film did not violate standards set out in the law. The court in *Engdahl* held that use of the standards did not "meet the constitutional requirements." *Id.* at 1136.

The State relies on *Borger v. Bisciglia*, 888 F. Supp. 97 (E.D.Wisc. 1995). However, the *Borger* court itself recognized that “a private organization’s rating system cannot be used to determine whether a movie receives constitutional protection.” *Id.* at 100. It is thus clear that, under the applicable precedents, this legislative delegation is unconstitutional.

There also are possible unintended consequences. The purpose of ratings is to inform parents and thus assist them in making more knowledgeable purchasing decisions. As the ESRB web site explains, it is to “provide accurate and objective information ... so you can make an informed purchase decision.” <http://www.esrb.org/ratings/ratings-guide.jsb> (last visited Nov. 7, 2006). By incorporating the ESRB ratings into a statute, the Minnesota Act creates an incentive for the rating boards either to relax their standards or even eliminate them altogether — exactly the opposite of what Minnesota intended in promulgating the Act.

The purpose of the Minnesota Act is to inhibit access by a class of customers (minors) to a class of products identified under a harmfulness standard legislated by the State. If upheld, one effect of the Minnesota Act would be to undermine the intended function of the rating systems by inhibiting access by some customers to

some games without a finding by any duly constituted authority that those games actually violate the legislated standard. The State should not be surprised if the industry concludes that the ratings, thus co-opted and turned against their creators, and likely bringing with them disputes and litigation, should either be weakened or eliminated altogether. There is nothing to prevent the industry from doing either.

Were this to occur, a likely result would be a video game market in which parents and children receive no industry guidance toward age-appropriate games, or receive guidance that varies ever more widely from the present standard. This Court should avert the possibility of such an outcome by voiding the Minnesota Act.

**III.**  
**EVEN IF THE DELEGATION TO THE ESRB WAS**  
**NOT UNCONSTITUTIONAL, THE TEST**  
**INCORPORATED BY THE MINNESOTA ACT**  
**WOULD BE UNCONSTITUTIONALLY VAGUE**

“Where a statute imposes criminal penalties, the standard of certainty is higher.” *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983). As the Supreme Court stated in *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), a law is void for vagueness under the due process clause of the Fifth Amendment if its

prohibitions are not clearly defined. The Court provided the following extensive explanation of the three reasons why a vague law is unconstitutional:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly . . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abuts' upon sensitive areas of basis First Amendment freedoms, it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . . than if the boundaries of the forbidden areas were clearly marked.

*Id.* at 108-09 (footnotes omitted); *see also Smith v. California*, 361 U.S. 147, 151 (1959) (“[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.”) Even when, as here, the statute “nominally imposes only civil penalties,”

perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally

protected rights. If ... the law interferes with the right of free speech or association, a more stringent vagueness test should apply.

*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

The definitions set forth by the ESRB, and thus incorporated by the State, do not meet this test. With respect to violent content, M-rated videos “may contain intense violence [or] blood and gore.”<sup>6</sup> Intense violence is defined as “graphic and realistic depictions of physical conflict” which “[m]ay involve extreme or realistic blood, gore, weapons and depictions of human injury and death.” Blood and gore is defined as “depictions of blood or the mutilation of body parts.”

With respect to violent content, AO-rated videos “may include prolonged scenes of intense violence” which is defined as set forth above.

While such definitions may be perfectly acceptable for use by a private organization for its own use in providing advisory ratings, when incorporated in the Minnesota Act they are unconstitutionally vague as shown below.

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<sup>6</sup> ESRB Game Ratings and Descriptor  
([http://www.esrb.org/ratings/ratings\\_guide-print.jsb](http://www.esrb.org/ratings/ratings_guide-print.jsb), accessed 11/4/2006).

1. The definition of “Intense Violence” has a number of components, each of which may well be independent of the others:
  - a) *graphic and realistic-looking depictions of physical conflict*: There is no contextual element with respect to physical conflict. Would a game concerning an Olympic boxing match be ratable “AO” or would it also have to be bloody?
  - b) *extreme or realistic blood*: What is “extreme blood?” Is that a quantitative or qualitative test? How does blood become unrealistic?
  - c) *gore*: This apparently means thick or clotted blood.<sup>7</sup> Does this mean any amount of thick or clotted blood may make a video ratable as M?
  - d) *weapons*: Presumably this modifies physical conflict. Is every “prolonged realistic conflict” involving weapons ratable as “AO”?  
Does this exclude all games having a military scenario?
  - e) *depictions of human injury and death*: Again this is a very broad and undefined term.
  
2. “Blood and Gore” is defined, in part, as “depictions of blood.” Neither context nor quantity are defined. Potentially, hospital scenes, accident scenes, and battle scenes are all potentially ratable as “M.”

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<sup>7</sup> *Webster’s Third New International Dictionary* 980 (1986) 2<sup>nd</sup> definition.

If the Court affirms the “intense violence/blood and gore” formula for the regulation of violent video games, there would be no legal impediment to its application to other expressive media, including books and magazines. The potential application of the test to the vast panoply of the materials *amici* produce magnifies concern with the lack of any reasonably certain objective meaning for the ESRB’s rating scheme’s operative terms.

The language of the Minnesota Act provides no opportunity for people, such as those represented by the *amici*, to determine whether particular material is covered. As a direct result of the quintessentially vague language, such legislation will have a chilling effect on distributors and others who deal with valuable, mainstream works. As the Supreme Court has noted, “[u]ncertain meanings” inevitably lead citizens to “ ‘steer far wider of the unlawful zone’ . . . . than if the boundaries of the forbidden areas were clearly marked.” *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

Given the subjectivity of its ratings, the ESRB may well have developed internal guidelines to provide consistency and to narrow the apparent breadth of the language. That is perfectly fine for a voluntary group applying ratings without state sanctions. However, the State of Minnesota cannot avoid the constitutional



mandate against vagueness by incorporating, by reference, such private standards into a speech-restricting statute.

### CONCLUSION

By reason of the foregoing, *amici* respectfully urge this Court to affirm the order below holding the Minnesota Act unconstitutional.

Dated: November 28, 2006

Respectfully submitted,

Michael A. Bamberger  
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Counsel for *Amici*

Of Counsel,  
Rachel G. Balaban

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Eighth Circuit Rule 28A(c), the undersigned certifies that this brief complies with the applicable type-volume limitations and that this brief contains 3993 words, exclusive of the table of contents, the table of authorities, the signature block, the certificates of compliance and service, and the Appendix. (If the Appendix is included in the word count, the brief contains 4524 words.)

This certificate was prepared in reliance on the word count of the word-processing system used to prepare this brief, Microsoft Word 2002.

  
Michael A. Bamberger

Dated: November 28, 2006

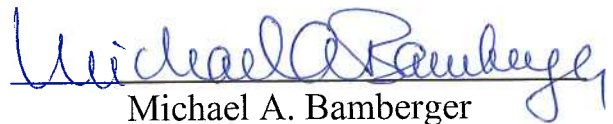
## CERTIFICATE OF SERVICE

I, Michael A. Bamberger, hereby certify that two copies of the foregoing *Amici* Brief as well as a virus-free CD-ROM (which has been scanned for viruses) containing the full text of the brief, has been served by Federal Express to each of the following:

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Dated: November 28, 2006

## **APPENDIX A: THE *AMICI***

**American Booksellers Foundation for Free Expression** (“ABFFE”) was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

**Association of American Publishers, Inc.** (“AAP”) is the national association of the United States book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly associations. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, scholarly journals, computer software, and electronic products and services. The AAP represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

**The Comic Book Legal Defense Fund** (“CBLDF”) is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, represents over 1,000 comic book authors, artists, retailers,

distributors, publishers, librarians, and the readers located in Minnesota, throughout the country and the world.

**Freedom to Read Foundation** (“FTRF”) is an organization established in 1969 by the American Library Association to promote and defend First Amendment rights, support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and help shape legal precedent for the freedom to read on behalf of all citizens.

**Magazine Publishers of America** (“MPA”) is the industry association for consumer magazines. Established in 1919, the MPA represents more than 230 domestic publishing companies with approximately 1,400 titles, more than 80 international companies, and more than 100 associate members

**Motion Picture Association of America** (“MPAA”) is a not-for-profit corporation founded in 1922 for the purpose of promoting the interest of the motion picture industry in the United States and helping the industry maintain high standards and public goodwill.

**National Association of Recording Merchandisers** (“NARM”) serves the music retailing community in the areas of advocacy, networking, information, education, and promotion. The Association’s members include retailers,

wholesalers, distributors, and suppliers of products and services, as well as individual professionals and educators in the music business field.

**National Association of Theatre Owners, Inc.** (“NATO”) is the largest exhibition trade organization in the world, representing over 500 members with more than 29,000 movie screens in all 50 states, and additional cinemas in more than 40 countries worldwide. NATO’s membership includes the largest cinema chains in the world, as well as hundreds of small, independent theaters.

**Publishers Marketing Association** (“PMA”) is a trade association representing more than 3,000 publishers across the United States and Canada. Many of PMA’s members are small, independent publishers who publish a variety of works, including many concerning controversial topics or involving experimental approaches to writing, which more mainstream publishers have not acquired.

**Recording Industry Association of America, Inc.** (“RIAA”) is a trade association whose member companies produce, manufacture and distribute over 90% of the sound recordings sold in the United States. The RIAA is committed to protecting the free expression rights of its member companies.

**Sonnenschein**  
SONNENSCHN NATH & ROSENTHAL LLP

*Rachel G. Balaban*  
212.768.6921  
rbalaban@sonnenschein.com

November 22, 2006

**VIA U.S. MAIL AND FACSIMILE (651-282-5832)**

Michael J. Vanselow, Esq.  
Deputy Attorney General  
State of Minnesota  
445 Minnesota Street, Suite 1100  
St. Paul, Minnesota 55101-2128


Re: Mike Hatch v. Entertainment Software Association, et al., No. 06-3217

Dear Mr. Vanselow:

I am writing to confirm your consent to our filing an amicus brief in the above-referenced matter on behalf of a number of media trade associations.

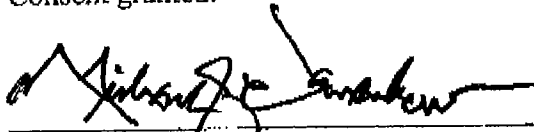
Would you please confirm the above by countersigning a copy of this letter and sending it to me by facsimile and U. S. Mail.

Sincerely yours,



Rachel G. Balaban

Consent granted:

  
\_\_\_\_\_  
Michael J. Vanselow, Esq.

cc: Michael Bamberger, Esq.

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# Sonnenschein

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November 22, 2006

**VIA FACSIMILE**

Paul M. Smith, Esq.  
Jenner & Block, LLC  
601 13<sup>th</sup> Street NW, Suite 1200  
Washington, D.C. 20005

Re: Mike Hatch v. Entertainment Software Association, et al., No. 06-3217

Dear Mr. Smith:

I am writing to confirm your consent to our filing an amicus brief in the above-referenced matter on behalf of a number of media trade associations.

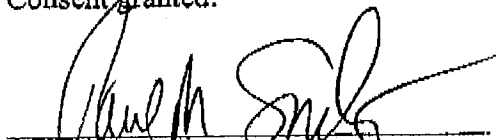
Would you please confirm the above by countersigning a copy of this letter and sending it to me by facsimile and U. S. Mail.

Sincerely yours,



Rachel G. Balaban

Consent granted:



Paul M. Smith, Esq.

cc: Michael Bamberger, Esq.

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