NEW YORK LAW SCHOOL
MOOT COURT ASSOCIATION

CHARLES W. FROESSEL INTRAMURAL COMPETITION 2010

BENCH BRIEF

CONFIDENTIAL

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010

DOCKET NO. 481516/10

THE TOWN OF SWEETWATER,

Petitioner/Cross Respondent,

- against -

DUBROFF INTERACTIVE,

Respondent/Cross Petitioner.

On Writ of Certiorari to the
Court of Appeals for the Thirteenth Circuit

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INTRODUCTION

Welcome to the 34th annual Charles W. Froessel Intramural Moot Court Competition. The competition is sponsored each year by the New York Law School Moot Court Association to develop the art of appellate advocacy. The competition affords participants an opportunity to put their research and writing abilities to a practical test, present oral arguments in an atmosphere that simulates an appellate courtroom, and address and analyze unresolved and controversial areas of law.

This year, the competition centers on two constitutional law issues under the First Amendment regarding the government's ability to restrict sales of sexual online games to minors. Both issues weigh in on a national controversy. Although these issues were inspired by an actual case pending before the Supreme Court, Schwarzenegger v. Entertainment Merchants Association, where Petitioner Schwarzenegger seeks to pass a law preventing minors from purchasing extremely violent video games, the issues are not identical.

This Bench Brief is available only to competition judges. It includes the relevant facts and essential background information necessary to judge this competition. Please ask the competitors as many of the sample questions as you choose, as well as any questions of your own.

Thank you for your participation!

ACKNOWLEDGEMENTS

The Moot Court Association wishes to show our gratitude to Professors Nadine Strossen and Elise Boddie for their valuable time and advice in crafting this fact pattern. The Moot Court Association also thanks our faculty advisor, Professor Susan Abraham, for her continued dedication, guidance, and invaluable contribution to the Association. The Moot Court Association is deeply indebted to all of our faculty advisors for their guidance, but the final work product is that of the students, for which we accept both credit and responsibility.

The 2010 Froessel Co-Chairs, Co-Authors, and Executive Editors wish to thank Cambridge Peters, Chair, and William Daks, Vice-Chair, for their contributions to the success of this competition. They also wish to extend a special thanks to Matthew Dubroff, Alumni Relations and Media Chair, for his technical assistance.

Thanks are also due to all the members of the Moot Court Association for helping to make this competition a success.

If you have any questions prior to or during the Froessel Competition, please direct them to:

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I. SUMMARY OF THE RULES

General Competition Information:

1. The Froessel Competition is open only to New York Law School students who wish to compete for a position on the New York Law School Moot Court Association. Each student must compete in two preliminary rounds. Students advance based on combined written and oral scores. The final four students will compete in the final round, to be held at New York Law School on Sunday, September 26, 2010 at 2:00 p.m.

2. All competitors have written a simulated Supreme Court brief based on the facts that follow. The brief counts for fifty percent (50%) of the competitor's total score in the preliminary rounds and a lesser percentage in the advanced rounds. Each student is scored individually in oral arguments. Neither briefs nor brief scores are made available to the judges of the oral argument rounds.

3. For each round, competitors are randomly assigned an issue and side to argue.

Judging Guidelines:

1. Each competitor may speak for fifteen minutes and must speak for a minimum of ten minutes. Where necessary to complete an argument, the Chief Justice may allow additional time at his or her discretion. Rebuttal time may only be reserved by counsel for petitioner. Rebuttal time may be deducted from the time allotted to either or both petitioner speakers. The timekeeper will notify the judges when time has expired.

2. Sample questions are provided for judges. Judges are encouraged to interrupt competitors during their argument to ask questions. Questions should be short and to the point. Please note that many of the competitors have not yet studied constitutional law.

3. After all four competitors finish the round, the timekeeper will escort the competitors outside the room while the judges complete their score sheets. Judges should score competitors on the basis of individual oral arguments using the score sheet provided. Judges must never score on the basis of whether the argument would ultimately win or lose. Rather, judges may score the substance of the argument, strategic choices made, how well the argument was presented, and quality of responses to questioning.

4. After the judges have completed the score sheet, competitors will return for constructive criticism. Please keep your feedback brief, as rooms are scheduled for subsequent rounds and classes.

II. THE FACTS AND RELEVANT STATUTE

Adventures in Chebowski Land (Adventures) is a popular video game[1] which is played solely over the Internet. The game is a combination of a social network and a massive multiplayer online game. It features main character, Jeffrey Chebowski, as a sloth-turned-sleuth hired to investigate a missing person case. The game's sexual themes and unique development has caused outrage among concerned parents.

Adventures was created by Dubroff Interactive, a video game company which specializes in online-gaming. The development of the game was primarily conducted by a team of MIT fraternity brothers interning for Dubroff. The college students conceived of the idea for a video game to accelerate an adolescent's understanding of societal norms, similar to the pledging process at their frat.[2] To ensure this effort was well executed, Dubroff's team consulted with controversial psychiatrist, Catie Crimaldi. Crimaldi, known for her laissez-faire approach to cognitive psychology, summarizes the game as follows: "The operative premise is that adolescents will do bad things; it is a natural part of the learning process. While most adolescents do learn, some take longer and cause disruptions in class, often ending up with troubled lives because of the early bad choices they make. In *Adventures*, adolescents can develop online friendships, engage in rebellious behavior, and see real-world consequences all within the protective parameter of the video game world." Although Crimaldi had her license to practice psychiatry in California revoked two years ago after prescribing medicinal marijuana to hyperactive young children, her research is still praised by colleagues.

What Dubroff produced was a sexually charged and commercially successful online video game that is very popular among teens. This success seemed particularly triumphant given that the game was mostly created by college students and was completed within a year and a half (three years less than most role-playing games). Many speculate, however, that the game is attractive because it is grounded in inappropriate sexuality. The game features scenes involving drug use, castration, and sex addiction. Several characters in the game work in the pornography industry, such as lead character Bunny and supporting character Jackie Freeborn. Due to its mature content, the game was rated R by the Entertainment Software Rating Association (ESRA)[3], as intended only for "Responsible Audiences." A particularly controversial level in the game features a lengthy conversation regarding pedophilia. Another level allows users to experiment with sexual relationships in the level titled "Bathrobe Wars." Virtual birth control is available for the exchange between characters in this level, but is not wholly effective; as a consequence, virtual pregnancies can occur. Although the sexually explicit content in this game is obvious, no nudity is ever depicted. Several of the characters in the game are voiced by sex phone operators and numerous scenes include spicy saxophone solos reminiscent of a 1970's-era

[1] The term "video game" is broadly construed to include all games played through an electronic interface including console, computer, and browser based games.
[2] For a more detailed description of the game's development, see Exhibit B.
[3] The ESRA is a self-regulatory organization that assigns content ratings for entertainment software in the United States and Canada. The rating system is strictly voluntary but almost all game manufacturers comply.

pornography film. Despite the subject matter, the game has received high ratings from gaming critics. [4]

Not all are happy about *Adventures*. In the State of Froessel lies the quaint town of Sweetwater, a simple place of eight thousand known for its Amish crafted cabinets and nationally recognized Apple Blossom Festival. Early last year, this charming township received an unwelcomed reality check as Sweetwater saw a steep rise in teen pregnancy. The cause for this trend is not completely understood. However, since the publication of recent studies illustrating the correlation between raucous teenage behavior and the sale of *Adventures*, townspeople of Sweetwater assert that videogames are to blame.[5] After the discovery of a pregnancy pact involving several fourteen-year-old girls, the locals of Sweetwater decided enough was enough. Parents lobbied Sweetwater Mayor Farrah Kalin to propose an ordinance to the local town council protecting the sanctity of their youth from the terrors of videogames. Kalin pledged full support to her frustrated constituents since she herself was made a grandmother in 2008 after her teenage daughter gave birth to Trucker Kalin out of wedlock. The result of the shared outrage was the creation of the "Video Game Indecency Act" (VGIA). The law provides, in pertinent part:

> It shall be unlawful for any person knowingly to sell . . . to a minor any obscene gaming product within Sweetwater. Any violation of this ordinance is punishable, per offense, by a fine of up to one thousand dollars …"obscene" means the quality of any game which (1) the adult community of Sweetwater would consider the material or performance as a whole appeals to the prurient interest of juveniles; (2) the material or performance is patently offensive to prevailing standards in the adult community of Sweetwater as a whole with respect to what is suitable for juveniles; and (3) the material or performance, when considered as a whole, lacks serious literary, artistic, political, or scientific value for juveniles. [6]

There was little opposition to the VGIA in Sweetwater when signed and the law still continues to receive broad support. After all, Sweetwater is a town with a strong conservative voting record which Mayor Kalin boasts is rooted in its strong religious values. Her statement has merit, as the town of Sweetwater is almost completely comprised of members of the Old Order Amish and Newly Reformed Mennonite religions. As a result, locals of Sweetwater have focused their civic participation on social customs and family values rather than on demands for public utilities (three out of ten residents choose to live without electricity). The town has several laws based on religious principles, including a modest public dress code and a ban on teaching evolution in its public schools. Most adults in town ostensibly consider the VGIA a proper standard by which to raise children, and thus seem to have no desire to change the law.

Dubroff Interactive CEO LeRoy Arko vehemently opposes the VGIA. In a recent press conference, he claimed that Sweetwater's law unconstitutionally burdens the First Amendment rights of its under-eighteen-year-old users. Arko added that he "was not going to let a bunch of

[4] For a more detailed description of the game's content, see Exhibit A.
[5] See Exhibit B.
[6] A complete text of the statute follows this section.

slack-jawed yokel politicians from Sweetwater upend history and hurt American business. This aggression will not stand."

Mayor Kalin initially responded to Arko's comments by attempting to broker a deal with the gaming giant. Kalin sat down with Arko and Good Morning Froessel host, Katie Furic, to show that enacting the VGIA was the only means left to keep kids safe. On the show, Kalin presented studies which showed that existing safeguards had failed. Specifically, Kalin demonstrated that the ESRA ratings are not uniformly enforced by merchants and optional parental codes in game consoles and computers proved ineffective because they were regularly hacked by technology-savvy children. Kalin also pointed out that the popularity of laptops and their increasing transportability made it impossible for parents to know what computers their children were using or to control their on-line behavior. Arko did not dispute Kalin's conclusions. He replied "that's life" and steadfastly refused to abide by the VGIA. Dubroff Interactive subsequently filed suit seeking an injunction to prevent enforcement of the VGIA.

Sweetwater Town Ordinance Ch. 47 STO § 1776 – Video Game Indecency Act

1. Definitions. As used in this section:

(a) "Commercially Distribute" means to rent or distribute for consideration within a store or over the Internet.

(b) "Minor" means any person under the age of seventeen years.

(c) "Obscene" means that quality of any game, pictorial, verbal or other material or performance describing or representing nudity, sexual conduct, sexual excitement, or sado-masochistic abuse in any form to which all of the following apply:
(1) The adult community of Sweetwater would consider whether the material or performance, as a whole, appeals to the prurient interest of juveniles.
(2) The material or performance is patently offensive to prevailing standards in the adult community of Sweetwater as a whole with respect to what is suitable for juveniles.
(3) The material or performance, when considered as a whole, lacks serious literary, artistic, political, or scientific value for juveniles.

(d) "Gaming Product" means any game, program or electronic device which creates an interactive game capable of being played, viewed, or experienced on or through a computer, gaming system, console, television or other technology.

(e) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:
(1) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and
(2) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable attempt to verify the age of such minor.

2. It shall be unlawful for any person knowingly to sell or commercially distribute for monetary consideration to a minor any obscene gaming product within Sweetwater.

3. Any violation of this ordinance is punishable, per offense, by a fine of up to one thousand dollars.

4. Unless a waiver is signed by the defendant in person in open court, and with the approval of the court, every trial under this ordinance must be a jury trial.

III. PROCEDURAL HISTORY

Dubroff Interactive filed suit seeking an injunction to prevent enforcement of the VGIA. Dubroff challenged the statute on the grounds that the ordinance violated a minor's First Amendment right to free speech by misapplying the Supreme Court's definition of obscenity. Additionally, Dubroff challenged § 1(c)(1-2) of the VGIA claiming it unconstitutionally restricted the definition of obscenity to the local Sweetwater community. The District Court for the District of Froessel found in favor of Sweetwater on both issues.

First, the Court held that Supreme Court precedent under Ginsberg v. New York and Miller v. California allows a local government to craft obscenity laws that penalize the sale of certain sexual material to minors. The Court held that Sweetwater's law was constitutional under Miller and Ginsberg because the statute comports with the three prongs of the Miller test. The Court then determined that the restriction on speech was justified, as it was an effort to control the secondary effects that sexual video games produced, namely the increase in teen pregnancy. Therefore, the Court concluded, the town need only satisfy an intermediate level of scrutiny by showing that the law satisfies an important governmental interest. The Court agreed that preventing teenage pregnancy was an important governmental interest.

Secondly, the Court held that § 1(c)(1-2) of the VGIA was constitutional because although the game was played over the Internet, a local community standard was still the most appropriate standard for determining whether an obscenity exists. The Court relied on Miller v. California, Ashcroft v. ACLU, and most recently U.S. v. Little, in deciding that a local standard, rather than a national standard, provides the most appropriate review of whether certain material is obscene.

On appeal, Dubroff Interactive asked the Court of Appeals for the Thirteenth Circuit to review both issues. A majority of the Court upheld the lower Court's ruling as to the first issue. The Appellate Court agreed that the VGIA was a constitutional obscenity law and even asserted that the law would pass strict scrutiny if deemed to be a content-based restriction on speech. On the second issue, the Thirteenth Circuit Court reversed the district court, ruling that the applicable standard for determining whether potentially obscene materials transmitted over the Internet has met the Miller test should be based on a national community standard, citing U.S. v. Ashcroft and U.S. v. Kilbride. Judge Roth wrote a separate concurring opinion agreeing that a national standard was appropriate but dissenting from the majority's holding that the VGIA was a constitutionally crafted obscenity law. Roth argued the law is a content-based restriction on speech and that it would fail strict scrutiny because it does not represent a narrowly tailored means of satisfying a compelling governmental interest.

The Town of Sweetwater petitioned the Supreme Court for certiorari, arguing that the Thirteenth Circuit erroneously reversed the District Court by finding that a national standard should be applied to the first two prongs of the Miller test. Dubroff cross-petitioned on the first issue, arguing that the VGIA is unconstitutional as it is content-based and could not pass strict

scrutiny. It further argues that even if the court reviewed the law under an intermediate scrutiny test, it could not pass muster.

In 2010, this Court granted the petitions of both Sweetwater and Dubroff Interactive for a Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit on the following issues:

1) Does the VGIA fail scrutiny under a constitutional analysis for depriving minors of their free speech without offering an adequate governmental interest or narrowly tailoring the remedy to meet that interest?
2) Is it permissible for a town ordinance to mandate that a jury, sitting in an obscenity trial for material disseminated over the Internet, apply a local community standard under the Miller-Ginsberg framework?

The Supreme Court reviews these issues *de novo*.

IV. OVERVIEW OF ISSUES

Below is a brief overview of the issues raised in this appeal before the United States Supreme Court.

ISSUE I: FREE SPEECH
(Speakers 1 & 3)

Summary of the Law

I. Whether the Material in the Video Game *Adventures* is Obscene Under the Miller/Ginsberg Test and Therefore Subject to Government Regulation.

Generally, governmental bodies may not restrict the content of speech unless it falls under certain well delineated exceptions to the First Amendment. U.S. Const. amend. I. Obscenity is one well-delineated exception which is not protected by the First Amendment. Miller v. California, 413 U.S. 15 (1973). The Supreme Court has proffered a three-part test to determine whether particular expression satisfies the test for obscenity: (1) whether the average person, applying contemporary standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes sexual conduct or excretory functions in a patently offensive way; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Miller, 413 U.S. at 24.

Courts usually apply the Miller test strictly, but governments have slightly greater latitude when creating laws which restrict content to minors. In Ginsberg v. City of New York, the Supreme Court held that governments can craft different obscenity laws for adult and minor audiences. 390 U.S. 629 (1968). The Ginsberg Court held that although certain magazines with nude photographs were not necessarily obscene to adults, the material may still be obscene to minors because the state has a greater interest in censoring material available to children, and because minors do not have completely matured rights under the First Amendment. Id. at 641.

After Miller, courts have reconciled Miller and Ginsberg by requiring governments to show that a law defining obscenity for minors passes the three prongs of the Miller test, albeit a less stringent application under Ginsberg. The application of the Miller-Ginsberg standard is one of the few tests which provide a categorical exclusion of protected first amendment speech. This categorical exclusion is a testament to the fact that the Supreme Court has been less likely to protect sexually-oriented expression than other forms of speech. See e.g., F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978) (held radio broadcast containing indecent language could be constitutionally restricted by FCC regulation); Bethel School District v. Fraser, 478 U.S. 675 (1986) (held public school could constitutionally suspend student for giving speech laden with sexual innuendos).

The Miller-Ginsberg standard, however, does not seem to reconcile easily with modern Supreme Court and Circuit Court precedent. In R.A.V. v. City of St. Paul, the Court famously

held content-based restrictions on unprotected categories of speech were subject to strict scrutiny. 505 U.S. 377 (1992). The Court found a statute banning the use of cross-burning to be unconstitutional because the statute "prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." Id. at 381. Despite the broad holding, the majority in R.A.V. carved out an exception and held content discrimination may be permissible when "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." Id. at 388. The majority then offered an example as it pertains to obscenity, holding that "a state might choose to prohibit only that obscenity which . . . involves the most lascivious displays of sexual activity." Id.

The Court in R.A.V. seemed to leave governments seeking to regulate obscenity with the following two options: (1) ban material which is the "most lascivious" in nature; or (2) prevent the dissemination of material only vis-a-vis a content-neutral law.

Our case is about whether a town law preventing a minor's access to certain video games infringes on the free speech rights of minors as guaranteed by the First Amendment. If the video game is objectionable enough to satisfy all three prongs of the Miller-Ginsberg test, the sale of *Adventures* may presumably be restricted to minors as obscene. If the material is not considered obscene for minors, than the VGIA must prove to be content-neutral or face strict scrutiny in order to survive. However, the first issue in our case invariably begs a question which, when following different Supreme Court precedents, may yield different answers. That question is: By demanding that the standard of obscenity in content-based laws must now be "most lascivious," did the Court in R.A.V. implicitly overrule the variable standard in Ginsberg?

Recent rulings striking down age-based video game regulations seem to say yes. Half a dozen laws restricting the sale of sexually explicit or extremely violent video games have been proposed by state or municipal governments, and all of them have been struck down. Entm't Software Ass'n v. Blagojevich, 469 F.3d 641 (7th Cir. Ill. 2006); Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001); Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992); Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003); Entm't Software Ass'n v. Swanson, 519 F.3d 768 (8th Cir. 2008). None more famous than California Civil Code § 1746, which was enjoined from enforcement by a California district court after the statute was reviewed under strict scrutiny in lieu of the more government-friendly Miller-Ginsberg standard. Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034 (N.D. Cal. 2005), aff'd, 556 F.3d 950 (9th Cir. 2009).

Naturally, Governor Schwarzenegger would be back. His petition for a writ of certiorari was granted by the Supreme Court of the United States on April 26, 2010. Although Schwarzenegger aims to classify violent video games rather than sexual video games as obscene for minors, the case's fate at the Supreme Court will presumably solve issues related to our fact pattern. Until Schwarzenegger is heard this fall, the following arguments can be expected from our competitors as they attempt to navigate obscenity law in the age of video games.

Petitioner's Argument (Sweetwater): The Material in *Adventures* is Obscene Under the Miller/Ginsberg Standard.

Petitioner should articulate that the game, although perhaps not obscene for adults, is obscene for minors under the Miller-Ginsberg test. Petitioner will first argue that the game as a whole appeals to the prurient interest because it contains explicit sexual material including subjects such as pedophilia and castration. The Supreme Court defines prurient interest as a "shameful or morbid interest in nudity, sex, or excretion" as opposed to material that "provoke[s] only normal, healthy sexual desires." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985). Petitioner will argue that the material in *Adventures* is obscene under this definition because pedophilia and castration do not provoke normal healthy sexual desires, and the abundance of sexual situations in the game arouses an unhealthy interest in sex especially considering the target audience of *Adventures* is comprised of minors. Petitioner will also stress that this prong of the Miller test is applied using "contemporary community standards," Miller, 413 U.S. at 25, and therefore a proper analysis of "prurient" must be defined using the average person in the small Amish town of Sweetwater, Froessel. Petitioner will then argue that the game depicts or describes sexual conduct in a patently offensive way as it contains discussions related to sex addiction and pornography. Memoirs v. Massachusetts, the Supreme Court case which served as a pre-cursor to Miller, describes patently offensive material to be that which "affronts contemporary community standards relating to the description or representation of sexual matters." 383 U.S. 413, 418 (1966). In discussing this prong, Petitioner should refer to the discussions of pedophilia and castration, and other sexual material in the game. Petitioner should emphasize that what is considered to be patently offensive under this prong is also determined by the contemporary community standard. Finally, Petitioner should argue that the game has no redeeming value. To satisfy this prong, competitors should concentrate on the game's development. Exhibit A states that the game was created by a team which included a disgraced psychiatrist and a group of fraternity brothers in college. The facts also state that both contributors marketed the game as sexual, while there is no indication of any political, scientific, artistic, or literary motivation for creating the game.

Integral to this entire argument is the fact that the town is only attempting to classify the game as obscene to minors. This caveat allows the Miller test to be applied less stringently (i.e. what the prevailing adult community considers patently offensive for a minor; whether the game appeals to the prurient interest in a minor).

Respondent's Argument (Dubroff): the material in *Adventures* is not obscene under the Miller/Ginsberg standard.

The Supreme Court has been reluctant to define content as obscene, because defining material as obscene invariably restricts speech. The content of this game probably does not pass a strict application of the Miller test. Unlike the magazines in Ginsberg, this game does not display nudity. Also, the game only discusses castration and pedophilia; it does not display such content or argue in favor of it. Lastly, the prong of redeeming value in Miller is highly subjective, proof of which lies in the fact that the Supreme Court has asserted that this prong of the Miller test is to be determined by a national, rather than a local, community standard. Pope v. Illinois, 481 U.S. 497, 500 (1987). Respondent can argue that video games can be both

cathartic and educational for minors, evidenced in exhibit A by the game's developmental focus on a child's natural learning environment. Moreover, Respondent will emphasize that even laws proscribing obscenities must be narrowly tailored to achieve their purported interest per the Court's holding in R.A.V.

II. Whether the VGIA Can Pass Intermediate Scrutiny Based on the Secondary Effects of the Video Game if *Adventures* is Not Considered to be Obscene.

The Supreme Court's holding in R.A.V. is consistent with the long-standing precedent that governments may regulate sexually-oriented expression through content-neutral means. A subcategory of content-neutral restrictions is those based on harmful secondary effects of sexually oriented expression. If the restriction on speech is based on the secondary effects of the prohibited material rather than on the content of that material, then intermediate scrutiny should apply and the VGIA will survive, assuming the government can argue that the law serves an important interest.

The secondary effects doctrine was first addressed in Young v. American Mini Theatres, 427 U.S. 50 (1976). In Young, the Court considered whether a zoning ordinance based on a distinction between motion picture theaters that exhibit sexually explicit "adult" movies and those that do not is unconstitutional because it is based on the content of communication protected by the First Amendment. The Court held the ordinance in that case to be content-neutral and constitutional as the restriction was a reasonable attempt to regulate crime, which occurred around adult theaters. Id.

The Supreme Court case following Young which coined the term "secondary effects" was City of Renton v. Playtime Theatres, 475 U.S. 41, 49 (1986). Renton involved a similar zoning ordinance regulating adult theatres in a Seattle suburb. The Court held that the regulation was constitutional because "zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." Id. at 49.

The most recent decisions handed down by the Supreme Court under the secondary effects doctrine are City of Erie v. Pap's A.M., 529 U.S. 277 (2000) and City of L.A. v. Alameda Books, 535 U.S. 425, 442 (2002). Erie involved a city ordinance which made it a summary offense to intentionally appear nude in public. The Court upheld the statute, finding the ordinance was content-neutral because it regulated conduct alone, did not target an erotic message, and petitioner's interest in preventing harmful secondary effects associated with adult entertainment establishments was not related to the suppression of the erotic message conveyed by nude dancing. See generally, Pap's A.M., 529 U.S. 277. In City of L.A. v. Alameda Books, the city of Los Angeles enacted an ordinance which banned multiuse adult establishments from operating within a concentrated area due to the increase in crime associated with adult businesses. The Court upheld the ordinance, finding that the city may rely on a study it conducted to demonstrate that its ban on multi-use adult establishments serves its interest in reducing crime.

Petitioner's Argument (Sweetwater): the VGIA is a Content-Neutral Law Which Restricts the Manner in Which Video Games are Sold and Should thus Satisfy Intermediate Scrutiny.

Petitioner will argue in the alternative that the VGIA is a law which regulates sexual video games because it aims to curb the harmful secondary effects of teen pregnancy and anti-social behavior caused by playing the video game. Because the game targets secondary effects and not content, Petitioner will argue that only intermediate scrutiny must apply as held by Young and its aforementioned progeny. In application, Petitioner will likely focus on the evidence in Exhibit B. Assuming this law is content-neutral, this evidence may suffice under a secondary effects argument. Petitioner must also emphasize that the games sought to be regulated by Sweetwater contain sexually-oriented expression. This is vital to Petitioner's argument because the Supreme Court has only accepted the secondary effects theory when those secondary effects stem from sexually-oriented expression. E.g., Boos v. Barry, 485 U.S. 312 (struck down D.C. ordinance prohibiting derogatory signs from being displayed near embassies after finding the restriction was based on content rather than the secondary effects of offending diplomats).

Petitioner's secondary effects argument has merit but is also vulnerable to attack. The VGIA appears to regulate sexual content rather than the time, place, manner or effect of video games. However, Petitioner can exploit the ambiguous definition of content-neutral. Petitioner may concede that the VGIA identifies sexual content, but the law regulates the manner in which video games are sold based on the harmful secondary effects produced by the material in this game, just as the zoning regulations functioned in cases like Renton, Alameda Books, and Pap's A.M. As Young first stated "even though the First Amendment protects communication in this area [adult films] from total suppression . . . the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." Young, 427 U.S. at 70-71. Therefore, a law may identify content if it regulates based on time, manner, or place. Petitioner may also support this secondary effects analysis by arguing that the Supreme Court's definition of content-neutral may no longer be settled law. See Alameda, 535 U.S. at 444 (KENNEDY, J. and SOUTER, J. opined that the definition of content-neutral is imprecise and may need re-evaluation).

Respondent's Argument (Dubroff): the VGIA is a Content-Based Regulation and Therefore Strict Scrutiny Must be Applied.

Respondent will argue that the VGIA is a content-based regulation and therefore strict scrutiny rather than intermediate scrutiny should be applied. Respondent will most likely cite to R.A.V. where the Court held laws restricting even unprotected categories of speech must survive strict scrutiny if they are based on content. The VGIA is content-based as it seeks to regulate content, not time, place, or manner. The laws in Renton, Alameda Books, and Pap's A.M. were zoning ordinances which validly regulated the "place" where adult matter was sold. Although the effect of these laws may be similar to the effect of the VGIA, the laws are not the same and therefore should not be judged under the same standards of scrutiny.

III. Whether the VGIA can Pass Strict Scrutiny as a Restriction on Speech if *Adventures* is not Considered to be Obscene.

If the VGIA is found to be a content-based restriction on speech, and *Adventures* fails to meet the test for obscenity, then strict scrutiny must apply. To survive strict scrutiny, the government must offer a compelling governmental interest and show that the law was narrowly tailored to achieve that interest. United States v. Playboy, 529 U.S. 803 (2000). In Playboy, the Court held an FCC ordinance requiring cable companies to fully scramble sexual-oriented programming to be unconstitutional under strict scrutiny because the alternative, in which viewers could order signal blocking on a household basis, was less restrictive. See generally, Id., 529 U.S. 803.

Surviving strict scrutiny is extremely difficult. The Supreme Court has never issued an opinion where a restriction on speech has clearly passed strict scrutiny. However, the Court has affirmed FCC regulations which restrict indecent speech without necessarily labeling them as obscene, thus appearing to engage in a strict scrutiny analysis without actually labeling the analysis as such. The Court most famously held this way in FCC v. Pacifica, where it found the FCC was justified when it restricted George Carlin's "Filthy Words" broadcast. 438 U.S. 726 (1978). The Court accepted as compelling the government's interests in: 1) shielding children from patently offensive material; and 2) ensuring that unwanted speech does not enter one's home. The Court gave the FCC broad leeway to determine what constituted indecency. See Id. at 748-750.

The holding of Pacifica is rather narrow, however. FCC regulations have been permitted more leeway in general when regulating speech due to the pervasive nature of television and radio broadcasts. The Court alluded to this principle most recently in Turner Broadcasting v. FCC. In Turner, the Court found permissible an FCC regulation which forced cable companies to carry local programming due to the "unique physical limitations of the broadcast medium." 512 U.S. 622, 637 (1994).

Petitioner's Argument (Sweetwater): The VGIA Furthers a Compelling Governmental Interest and Does So in a Narrowly Tailored Manner.

Petitioner would argue that the VGIA satisfies strict scrutiny because the law both serves a compelling governmental interest and represents a narrowly tailored means of achieving that interest. Petitioner would first argue that the interest of protecting children from online indecency is compelling according to the Supreme Court.

The Court has found the protection of children to be a compelling governmental interest in several cases. In Pacifica, the Court found the protection of children to be worthy of an FCC regulation. See Pacifica, 438 U.S. at 749 ("the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression"). More recently in Sable Communications of California, Inc. v. FCC, the Court found that "there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." 492 U.S. 115, 125 (1989). In

Sable, the FCC imposed a blanket prohibition on indecent interstate commercial telephone messages. Petitioner offered sexually oriented prerecorded telephone messages through Pacific Bell. The Court found the governmental interest behind the FCC regulation to be compelling, but the law was struck down for not being narrowly tailored.

Petitioner's ultimate challenge in surviving strict scrutiny is to show that the VGIA is a narrowly tailored means of furthering the compelling interest of protecting the well-being of minors. Petitioner would ultimately make this a fact-intensive argument, claiming the VGIA represents a narrowly tailored means of achieving this interest as the record is clear that other means of protecting children have failed to achieve this interest. It will be imperative for Petitioner to distinguish the VGIA from other video game laws which have been struck down by federal courts for failing to satisfy the narrowly tailored prong of strict scrutiny. In Entm't Software Ass'n v. Blagojevich, a federal court struck down a similar video game law to the VGIA because the state failed to consider less restrictive attempts to increase awareness of the video game ratings system. 469 F.3d 641, 651 (7th Cir. 2006) ("If Illinois passed legislation which increased awareness of the ESRB system, perhaps through a wide media campaign, the already-high rate of parental involvement could only rise"). Petitioner will distinguish the VGIA from the law in Blagojevich by focusing on the fact that Mayor Kalin, before enacting the VGIA, attempted to find other resolutions with Dubroff Interactive CEO, LeRoy Arko.

Petitioner may also argue that these cases may have been incorrectly decided. The majority of the cases were found to fail strict scrutiny for failing to show causation. Entm't Software Ass'n v. Swanson, 519 F.3d 768, 772 (8th Cir. 2008) ("Interactive Video requires us to hold that, having failed to come forth with incontrovertible proof of a causal relationship between the exposure to such violence and subsequent psychological dysfunction, the State has not satisfied its evidentiary burden"), citing Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003) The standard of "incontrovertible proof of a causal relationship" has never been held to be law by the Supreme Court, and Petitioner should emphasize this point.

Lastly, Petitioner will strongly emphasize the point that many of the games argued to be obscene by local governments, including those in Interactive Digital and Swanson, were violent rather than sexual. It is important to note that displays of violence alone have never been held to be obscene, while the Court has treated laws regulating sexually-oriented expression as a well-documented exception to protected first amendment speech, especially when the audience is comprised of minors.

Respondent's Argument (Dubroff): The VGIA Fails to Satisfy a Compelling Governmental Interest in a Narrowly Tailored Manner.

Respondent will argue that very rarely does a law restricting speech pass strict scrutiny. The only regulations which have are the aforementioned FCC regulations which are not similar to laws restricting video game sales. Respondent will also emphasize the fact that every government that has tried to restrict violent or sexual video games to children has failed constitutional scrutiny, such as Swanson, Interactive, and Blagojevich. Respondent will claim that the VGIA is indistinguishable from the laws in those cases which were premised on unstable

studies which failed to further the government's compelling interest. See Swanson, 519 F.3d at 770 ("the State's evidence was largely based on flawed or inapposite studies and thus failed to establish its claim that playing violent video games causes lasting harm to the psychological well-being of minors").

In closing, it would behoove Respondent to emphasize the importance of free speech and the dangers posed by restricting speech which has not been carved out as an obscenity.

ISSUE II: COMMUNITY STANDARD (Speakers 2 & 4)

Summary of the Law

I. Whether States or Smaller Political Subdivisions Are Permitted to Define Obscenity, for the Purposes of Regulating Online Content, According to Local Standards

The VGIA specifies that, regarding video games, "(1) The adult community of Sweetwater would consider whether the material or performance, as a whole, appeals to the prurient interest of juveniles. (2) The material or performance is patently offensive to prevailing standards in the adult community of Sweetwater as a whole with respect to what is suitable for juveniles." At issue is whether the Town of Sweetwater may specify the applicable community standard, local or national, under the three-pronged Miller-Ginsberg obscenity test. These elements of the VGIA correspond with the first two prongs of Miller: "(1) whether the average person, applying contemporary standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes sexual conduct or excretory functions in a patently offensive way" Courts have traditionally applied a local and not nationwide level of community to these first two prongs while the third prong of Miller "Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value" is judged against a national standard. See generally, Reno v. ACLU 521 U.S. 844 (1997).

Traditionally, it is permissible, under Miller, for states to regulate the sales of materials which may be obscene. However, in deciding United States v. Kilbride, the 9th Circuit treats materials distributed over the Internet differently. Kilbride dealt with a mass emailing campaign in which potentially obscene images were emailed to citizens across the country. See generally, 584 F.3d 1240 (9th Cir. 2009). The 9th Circuit held that a national standard was required when a mass emailing containing objectionable images was emailed nationwide. Id. The 9th Circuit found support for their decision in the opinions of Justice O'Connor and Justice Breyer in Ashcroft v. ACLU, 535 U.S 564 (2002). In Ashcroft, the Court dealt with the broader question of whether having undefined community standards rendered the Child Online Protection Act overly broad. The Court decided that the law was not overly broad; however, the Court failed to form a majority on what those community standards should be. Instead, the Court issued splintered opinions where Justices O'Connor and Breyer intimated that a national standard was preferable to local standards.

Shortly after the 9th Circuit decided Kilbride, the 11th Circuit returned to the traditional view set forth in Miller that a community standard was equivalent to a local standard. United States v. Little, 2010 U.S. App. LEXIS 2320 (11th Cir. 2010). In Little, the Court found that a pornographer who distributes material over the Internet and through the mail should be judged by the standards of the Middle District of Florida, the jurisdiction where the DVDs were mailed and where a server which hosted some of the website's content was located. This circuit split forms the nexus of the community standards issue.

Should the Miller-Ginsberg obscenity test remain the applicable test for obscenity? In the last 15 years, cases such as Reno v. ACLU and Ashcroft v. ACLU have dealt with Congress's attempts to regulate access to adult material on the Internet. The problem in Reno v. ACLU was that the statute, the Communications Decency Act (CDA), violated the freedom of speech provisions of the First Amendment by overly restricting adults' access to non-obscene adult materials when less restrictive means existed. Sable, 492 U.S. at 126 Congress tried again with the Child Online Protection Act (COPA) which only restricted commercial material displayed on the Internet deemed harmful to minors. ACLU v. Ashcroft, 322 F.3d 240, 245 (3d Cir. 2003) The court again found that Congress failed to use the least restrictive means and that Congress had failed to show that COPA was more effective than less restrictive alternatives. Id. at 247, 265

None of these cases directly dealt with whether the Internet effectively changed the determination of what constitutes the applicable community standards. That is what this case is attempting to address. Because this is really a case of changed circumstances (i.e. the rise of Internet usage) effectively creating a case of first impression, the arguments in this section, while based on case law, should also feature policy arguments about practicability in the twenty-first century.

At the center of the Little / Kilbride circuit split lies the issue of whether the various opinions in Ashcroft are dicta or are controlling precedent. Whether a statement is considered obiter dicta is important in this analysis. The competitors should reflect an understanding of dicta in their arguments.

With the exception of Ashcroft, the Supreme Court's jurisprudence has indicated that a local community standard applies to the first two prongs of Miller and that the third prong judged under a national community standard.

Petitioner's Argument (Sweetwater): Advocating for a Local Standard

The Petitioner will argue that the standard should be local in nature and should point out that the portions of the Ashcroft decision relied upon by the Respondent are merely dicta. They should cite to the 11th Circuit in Little, which refused to adopt the reasoning of Kilbride, saying the 9th Circuit relied upon dicta. Further, that the traditional understanding of Miller was that the first two prongs were evaluated using a local community standard, citing to Reno or to Pope v. Illinois, 481 U.S. 497 (1987).

The policy argument is that unless there is some level of local control, the Internet would reflect the lowest common denominator. Absent a state or local standard, more conservative jurisdictions would be subjected to the profanities of the least restrictive jurisdictions and they would be powerless to stop it.

Respondent's Argument (Dubroff):Advocating for a National Standard

Respondent should rely on Ashcroft v. ACLU, which the 9th Circuit used in deciding Kilbride, especially the opinions of Justices O'Connor and Breyer, who reasoned that a "national standard" should be used for laws involving distribution of obscene material over the Internet. Respondent should focus on the possibility of a small jurisdiction acting as a censor for the entire Internet. They should argue that anything less than a national standard could potentially suppress an inordinate amount of expression. Respondent should also address why the portion of the Ashcroft decision they rely upon is not dicta.

In Miller, the Court held national standards were unascertainable. The Respondent should address whether this is true and postulate a basis for a national standard. A good argument would also point out that the purpose for a "community" standard was to avoid having particularly sensitive individuals apply their own heightened standards, such as the standards of the Town of Sweetwater. See Roth, 354 U.S. at 489.

II. Whether the Nature of the Internet, its National Footprint and Reach, Makes the Application of Miller Impossible

If this Court were to apply Miller only to physical media and not electronic media, there would then be two competing standards: Miller for physical media and something new for electronic. This could cause issues with regulating potentially obscene content. The same result could occur if the relevant level of community, under Miller, is different for electronic versus physical media.

Petitioner's Argument (Sweetwater): Miller Cannot Be Inconsistently Applied

Whether particular expression is deemed obscene depends upon the nature of the content, not the method of delivering that content. A change in the distribution method does not change whether the content is or is not obscene. It would be inconsistant to permit a city to ban a movie from a rental store yet permit these same videos to be downloaded from the store's website for use on a person's laptop. Essentially, if Miller does not apply to the Internet yet continues to apply to other avenues of distribution, it would follow that speech would be restricted based on the method of delivery rather than on the content. This is unacceptable as Miller has proved to be a workable standard for almost forty years.

Petitioner should argue that creating a national obscenity standard is impossible, because each and every American believes that he or she represents the average American. Asking someone in Sweetwater and in New York City what the typical American believes to be obscene would result in two different answers. This is akin to the divergent images commonly associated with conservatives and liberals and reflected in disparate views on the teaching of evolution and

coastal elitism. Residents of different parts of the country simply have a wide range of views on many issues and most tend to see themselves as being representative of the majority.

Respondent's Argument (Dubroff): In Order to Determine Whether Materials Transmitted Over the Internet are Obscene, Miller Requires a National Standard

If the local standard was permitted, the application of a local Amish community's understanding of obscenity would act as a censor on the whole of the nation in terms of material published on the Internet. This effectively gives a town like Sweetwater a veto power on material that is legal and acceptable in the jurisdictions within which it was created. For example, a theater presenting a play with explicitly sexual language / themes might be deemed acceptable to the city in which the theater was located. However, when the theater hosting the play posts pictures and video clips from it on its website, intending that local people view them, the theater has effectively broadcast these materials into the Sweetwaters of this country, potentially violating a law of which they had no knowledge. Not only would they not have knowledge of the law, the standards would be unknowable to them as they are not residents of Sweetwater and not privy to what may be considered obscene by the adult community of Sweetwater. This would unconstitutionally chill protected First Amendment expression on the Internet. See Ashcroft, 542 U.S. at 672.

III. State's Traditional Police Power

States traditionally have the power to regulate the distribution of obscene or pornographic media especially when the state's interest is protecting children. This is reflected in the longstanding cases of both Miller and Ginsberg. It is this very power that is at issue due to the changed manner in which information is transmitted over the Internet. States historically may exercise this power over speech in limited areas such as commercial, 44 Liquormart v. R.I., 517 U.S. 484 (U.S. 1996) and through time and place zoning restrictions. Renton, 475 U.S. 41; Young, 427 U.S. 50.

Petitioner's Argument (Sweetwater): The Right to Draft Laws to Protect the Citizenry

The Court, in Footnote 13 of the Miller decision, stated that "[o]bscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population . . ." Miller. One year later, in Hamling, the Court clarified the Miller community standard for obscenity, finding that it is local (the community standard applies to the first two prongs of Miller, the third has a national basis). Hamling dealt with a mailing of pornographic brochures and affirmed that Miller's statewide community standard was applicable. This establishes that a local standard may be applied.

If we do not entrust this power to the states or locales within the states, who will have the power to limit the materials transmitted over the Internet? States would have the ability to stop the video-rental store, stop the movie house, and stop the news stand from distributing obscene materials, but the very same or worse materials would be freely downloadable through the Internet for consumption on any computer or Internet-ready device. States need the ability to protect their children. This is a recognized compelling interest and forms the basis for the Miller-

Ginsberg rubric. States and smaller geographic divisions need to be able to regulate that which is obscene.

Respondent's Argument (Dubroff): the Right to Be Left Alone

States do have a right to regulate what their citizens can either produce or consume when that material is obscene. However, in the case at hand, the town of Sweetwater is attempting to regulate the material its citizens are consuming by fining an out-of-state producer. This is very different from traditional obscenity cases in which the issue was a local one, and local community standards were both logical and easily applicable. See generally, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Jacobellis v. Ohio, 378 U.S. 184 (1963); Smith v. United States, 431 U.S. 291(1977); Roth v. United States, 354 U.S. 476 (1957); Miller, 413 U.S. 15; Hamling, 418 U.S. 87. These cases all had a party physically bringing the material into the local jurisdiction. This was the paradigm, the only manner for materials to be widely disseminated at that time. In the case at hand, the party need not bring anything into the jurisdiction. A teen sitting in Sweetwater can access materials in all fifty states and numerous other countries. The providers in those other states and countries just have to post the material on their local webpage and it is instantly available everywhere the Internet reaches. Therefore, this Court must use a national standard in order to prevent the most restrictive jurisdiction from becoming a defacto national censor.

V. SAMPLE QUESTIONS AND ANSWERS

SPEAKER I

Petitioner (The Town of Sweetwater) - Free Speech Issue

1. ***Doesn't the complete lack of nudity in this game undermine your argument that it is obscene?***

   Respectfully, no, Your Honors. Although obscenity often feature nudity, this Court found in Kaplan v. California (1973) that objectionable material in books qualified as obscene despite that lack of pictorial content. Also, in Sable Communications v. FCC (1989), this Court opined that sexual prerecorded messages, although not obscene for adult audiences, could very well be obscene to children under Ginsberg v. City of New York if a regulation were drawn without unnecessarily interfering with First Amendment freedoms. The VGIA is an example of that regulation because it meets the standards of Miller and does not affect adults wishing to purchase video games.

2. ***How can you say that this game, as a whole, has no artistic, literary, or scientific value? Maybe this video game is the present generation's Tropic of Cancer?***

   Your Honors, Miller asks whether the material has any serious literary, artistic, or political value as a whole. This game does not add any serious value to society as a whole. It was created by college fraternity students with the overarching objective of exposing minors to sexual content. That objective was reached in the form of crude, deviant sexual behavior like sadomasochism, pedophilia, and sex-addiction. Any intellectual conversation which accompanies these topics occurs sparingly and humorously. Therefore, this game cannot be said to, as a whole, contain serious artistic, literary, or scientific value.

3. ***If we find that this material is not obscene, do you lose?***

   Not necessarily, Your Honors. The VGIA represents a justifiable restriction based on the harmful secondary effects caused by sexual video games. Even if the content in *Adventures* were found by this Court not to be obscene, the law should be upheld because it is based on enough empirical data to survive the intermediate standard of review articulated by this Court in City of L.A. v. Alameda Books (2002) and City of Erie v. Pap's A.M. (2000).

4. ***Intermediate scrutiny seems to be inappropriate here. After all, this is a law which targets the sexual content of the video game rather than the time, place, and manner of how a video game is sold, correct?***

   Your Honors, this law regulates the manner in which video games are sold based on the harmful secondary effects produced by the material in this game. This law functions almost indistinguishably from how the zoning regulations functioned in cases like Renton, Alameda Books and Pap's A.M. In these cases just as in ours, producers of

sexual material are having the manner in which they disseminate their product regulated based on the occurrence of harmful effects from otherwise unregulated sexual material.

5. ***The secondary effects argument has rarely been applied. If we choose not to buy your argument, do you lose?***

Not necessarily, Your Honors. The VGIA aims to satisfy a compelling state interest, the protection of the mental and physical well-being of minors from sexual material. This Court held such interest was compelling in Sable Communications of California, Inc. v. FCC (1989). It aims to satisfy this interest in the narrowest way possible, by imposing civil fines on merchants who sell sexual video games to minors. This is the narrowest means possible because as Mayor Kalin has articulated on television, alternative modes of protecting children such as using parental codes and voluntary rating systems for game manufacturers, have failed. This law serves a compelling governmental interest which is narrowly tailored to achieve that interest, and should therefore survive strict scrutiny.

6. ***Strict scrutiny is aptly named. Rarely does a law pass strict scrutiny, especially a law which restricts speech. Why does the evidence in Exhibit B make this law constitutional?***

The evidence in Exhibit B shows there is a causal connection between playing sexual video games and anti-social behavior. The connection found in a Froessel State College study also seems to reflect the same view of several doctors around the nation as shown in the journal article mentioned in Exhibit B shows. This evidence is greater than the evidence offered by governments in similar cases which have failed strict scrutiny, such as Entertainment Software Association v. Blagojevich.

7. ***The study in Exhibit B seems incomplete. Women are the ones who get pregnant. Where is the information regarding the effect the video game has on women?***

Your Honor is correct that the study in Exhibit B does not contain effects on women. However, the article in Exhibit B does contain anecdotal evidence from a teenage girl who played the game and subsequently got pregnant because the game "awoke something in her." Furthermore, Your Honor, the evidence produced by the government under a strict scrutiny standard of review has never been held by this court to necessarily be irrefutable. This standard was something created by the Seventh Circuit in American Amusement Machine Association v. Kendrick. That standard conflicts with those cases held by the Supreme Court to have survived strict scrutiny.

8. ***This law does not seem to be narrowly tailored. Explain to me why it is.***

As Mayor Kalin has articulated on television, alternative modes of protecting children such as using parental codes for children and using voluntary rating systems for game manufacturers, have failed. Moreover she made this point while attempting to reach out to Dubroff CEO LeRoy Arko at finding another possible means to tailor this law. Arko could not find one, leading to a presumption that the VGIA is the narrowest means possible of protecting children from the sexual matter in certain video games.

SPEAKER II
Petitioner (The Town of Sweetwater) — The Community Standard

1. ***If this Court adopts a local standard for determining obscenity, how do we protect the First Amendment rights of those who reside in a jurisdiction where certain speech is permissible but may be heard or read in a jurisdiction where it is not permissible? And what about the chilling effect of those local standards?***

   Your Honors, this Court has already decided this issue. In Miller, this Court pointed to a state's traditional police power as a basis for policing obscenity. In Hamling, this Court again said that a local standard was applicable. As recently as in Reno, this Court reiterated that the first two prongs of Miller were to be judged according to local standards. It is up to the producers of material to ensure that they do not distribute their products into jurisdictions where they are not desired. The producers have a right to produce, but that does not correspond to an unmitigated right to distribute material that is in many, if not all, jurisdictions considered to be obscene.

2. ***Has the nature of the Internet changed the manner in which obscenity should be policed?***

   No, Your Honors, the fundamental point is the same; the Internet is just a means of transmission. At its basis, there is still a party permitting minors to view material that is not suitable for them. We do not protect obscenity because it is easy or because some people do not like it. We do not protect it because it is not the type of speech this Court has found worthy of protection. It is the content of the speech that matters, not the manner in which it was transmitted.

3. ***Does the manner in which it is distributed make policing it impossible?***

   Your Honors, it might make it more difficult, but here the town of Sweetwater found a party that was channeling obscenities into it and enacted a popular piece of legislation to ban it. Dubroff Interactive sought an injunction when the town was going to prosecute. The statute worked; the town was going to enforce its law.

4. ***Should this Court distinguish whether or not Miller is applicable based on whether the party actively markets the material in the subject jurisdiction or merely permits those in the subject jurisdiction access?***

   Your Honors, when the United States v. Little was decided, the 11th Circuit found a local standard was appropriate when an out-of-state corporation was selling DVDs through its webpage, and that a court could examine materials on that web page in order to determine whether the test for obscenity was met. This is the correct decision, because

states have a right to protect their citizens from obscene materials. The material is the issue, not the means of getting it into the state.

5. ***In Little, the servers were located in the jurisdiction and physical media was also ordered for delivery there, right?***

While it is true that the server was located in the jurisdiction, the case did not turn on that point.

6. ***If this Court were to adopt a national standard, do you lose?***

No. If Your Honors were to adopt a national standard, the citizens sitting on a jury would still be derived from a local populace. When asked to apply a national standard, the average citizen would be likely to assume his or her own beliefs to be indicative of the national perspective and then apply those beliefs. Because a local standard is inescapable, this Court should not adopt a standard that would never be applied. Instead, it should make official the only standard that a sitting jury would apply.

7. ***Is the third prong of Miller sufficient to protect the majority of the states from a minority attempting to act as a national censor?***

Your Honors, as this Court correctly pointed out in Reno v. ACLU, the third prong of Miller does act as a check on the first two prongs. It can be seen as redeeming material that would otherwise be obscene. A judge and jury sitting in a rural, morally conservative jurisdiction might find something to be obscene, but then an appellate court reviews the decision. An appellate court has a broader geographic range and is more in tune with prevailing national norms than more insular, local courts may be. Because of this, the appellate courts would ensure that material containing serious literary, artistic, political or scientific value is not found to be obscene.

8. ***Define prurient.***

Your Honors, prurient means "marked by or arousing an immoderate or unwholesome interest or desire; especially: marked by, arousing, or appealing to sexual desire" Merriam-Webster. The Supreme Court has defined prurient to mean a "shameful or morbid interest in nudity, sex, or excretion." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985).

9. ***Wasn't the purpose of adopting a community standard to avoid having the material in question judged by particularly sensitive individuals and isn't that what occurs when you have citizens from Sweetwater acting as a national censor?***

Your Honors, the town of Sweetwater is composed of average Americans from the heartland of this great country. They represent this country's wholesomeness and their desires should be reflected. Sweetwater perhaps represents a more conservative view. There is no other way to protect the sensitivity of a community with high standards.

SPEAKER III

Respondent (Dubroff) – Free Speech Issue

1. ***The law states that material can be defined as obscene for minors while not necessarily obscene for adults. Why does this material not qualify as obscene for minors?***

   Your Honors, the content featured in Ginsberg v. New York was nude magazines. This material in this case does not contain any visible nudity anywhere, only allusions to sexual situations. This does not qualify as obscene, even for minors.

2. ***Did Ginsberg require nudity in declaring matter obscene for minors? What about movies today. Kill Bill Volume 1 didn't have nudity but access to the movie showing was restricted to those under age 17. Why didn't Quentin Tarantino sue the Motion Picture Association of America?***

   Your Honors, Ginsberg did not specifically require nudity but the requirements for what is considered obscene for minors is difficult to ascertain because Ginsberg predates Miller. It makes more sense to use a slightly less stringent version of Miller as a guideline when determining whether certain material is obscene. The reason why movie ratings that prevent children from seeing extreme violence when unaccompanied by an adult is permitted is that the First Amendment applies to governmental bodies and not to private parties. The ratings system is a privately administered voluntary system which all parties choose to abide by. Its manageability should serve as an indicator that censorship functions better when it is administered by private parties rather than by government.

3. ***Don't several scenes involving the discussion of sex addiction, castration, and pedophilia qualify as appealing to the prurient interest?***

   Merriam-Webster defines prurient as marked by or arousing an immoderate or unwholesome interest or desire, especially marked by, arousing, or appealing to sexual desire. The Supreme Court has defined prurient interest as a "shameful or morbid interest in nudity, sex, or excretion" as opposed to material that "provoke[s] only normal, healthy sexual desires." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985).

   The content in this game is certainly sexual, but it is not shown to an extent or to a level of unwholesomeness which can be described as prurient. The levels involving discussions of pedophilia are just that; they are discussions. The scenes discussing castration involve threats, but nothing which can be described as appealing to an immoderate or unwholesome desire.

4. ***The doctrine of secondary effects may not be perfect, but it allows towns to enforce safeguards on an inordinate amount of adult businesses if harmful effects are demonstrated. Secondary effects are demonstrated here, perhaps better than they were in Pap's and Alameda. Shouldn't we review this law under intermediate scrutiny?***

   Respectfully, no, Your Honors. The laws in Alameda and Pap's were zoning ordinances which regulated the land on which adult stores could operate. The VGIA is

not a zoning ordinance. Its purpose is to regulate the sale of merchandise based on the content of that merchandise. It is less like Alameda and Pap's and more like the near-dozen of video game laws which have been struck down as unconstitutional around the country.

5. ***It may not be common for laws restricting speech to satisfy strict scrutiny, but this seems like it could. There is a compelling interest here and the state seems to narrowly tailor that interest, does it not?***

Your Honor, the state may offer a compelling interest but it certainly does not achieve this interest in a narrowly tailored fashion. Mayor Kalin alludes to alternative, allegedly dysfunctional, means of protecting minors from these games, but there is no evidence that these alternative means have actually been tested. More importantly, Your Honors, these are alternative means of preventing children from viewing games, not preventing teen pregnancy. If the town truly wants to find the narrowest means possible to curb teen pregnancy, it will teach sex education in school, have parents discuss the matter with their children, or even provide contraception.

SPEAKER IV

Respondent (Dubroff) — The Community Standard

1. ***If this Court decides to adopt a national standard for obscenity, must we do away with Miller?***

Your Honors, the Miller standard is still applicable, as it always has been to locally derived instances of obscenity. The Respondent asks only that this Court recognize that Miller is impossible to apply to media transmitted over the Internet, because Miller permits local standards, and the Internet has an international reach. This would only affect the relevant determination of community. Your decision would simply shift the standard to a national level of community.

2. ***How then would or should a town protect its citizens from the effects of obscene materials?***

Your Honors, while it is understandable that a town would seek control over questionable Internet-based media, the Respondent asserts that issues of individual liberty—the ability for consenting adults to consume certain materials, materials that are not considered obscene in their jurisdictions—trumps the town's concerns. It is a simple matter for concerned parents to install a filter on their routers or computers. It is the parent's duty to keep their children protected, not to abdicate their responsibility and force their town or their state to assume their role in policing their child's activities.

3. ***Would the Petitioner's point be mitigated if this Court decided that statewide obscenity standards were sufficiently broad?***

Your Honors, if this Court were to adopt such a standard, it would be a positive step. However, it would fall short of what is actually required. A statewide obscenity standard would pose a problem in a state such as New York, for example, where the majority of the residents live in the more liberal metropolitan area, while the rest of the

state may be more conservative. While adoption of a national standard suffers from these same problems, it has the benefit of some tangible statistics.

4. If this Court adopts a local standard, do you lose?

Your Honors, if this Court were to adopt a local standard, the Respondent would have a more difficult case. However, the Respondent must point out that the Miller test also specifies that the community standard must be contemporary. See generally, Miller, 413 U.S. at 15. The town of Sweetwater is simply not contemporary. It is an anachronism, existing decades behind the rest of the country in many facets of modern life. Its residents have not been raised with any modern media but have been thrust into the modern world ill-adapted to accept the ways of the outside world.

5. Why is the third prong of Miller insufficient to protect the majority of the states from a minority attempting to act as a national censor?

Your Honors, as this Court correctly pointed out in Reno v. ACLU, the third prong of Miller does act as a check on the first two prongs. It can be seen as redeeming material that would otherwise be obscene; however, this third prong is still subjective. A jury sitting in a morally conservative jurisdiction might be so repulsed by any given speech that they do not properly apply the third prong of Miller. An appellate court not having seen the material in question could simply agree with the statements of the jury as has occurred here.

6. How much of a redeeming value does an otherwise obscene piece of work need before it is redeemed?

Your Honors, the work must be taken as a whole and as a whole the presence of any of literary, artistic, political or scientific value must redeem it.

7. So one line of poetry could redeem a video game? What about 29 levels of clear obscenity and one level full of literary, artistic, political or scientific values? Where do we draw the line?

Your Honors, there is no bright line test. Under Miller each case needs to be examined individually. For this reason, it would be useful if this Court were to articulate a clearer standard. Otherwise we are left with little more than Justice Stewart's famous quip, "I know it when I see it."

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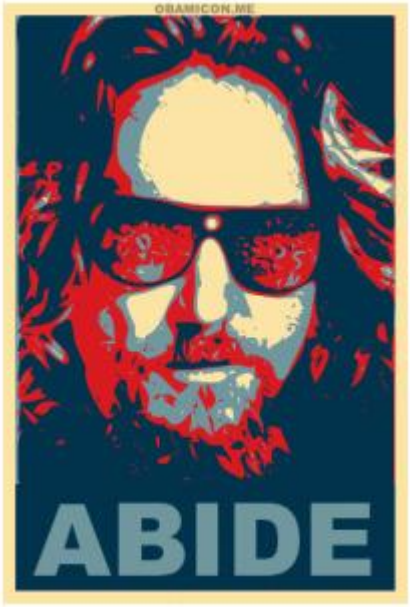
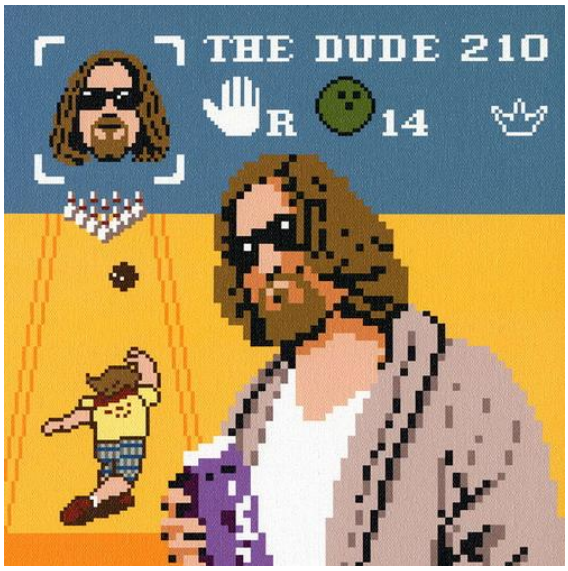
EXHIBIT A

Computer World – This Week in Gaming Reviews

Dubroff's Newest Online Game, *Adventures in Chebowski Land,* lives up to the giga-hype. By Bobby Hagstrom





Synopsis:

Adventures in Chebowski Land is the revolutionary new game created by Dubroff Interactive. The game is a combination of a social network and a massive multiplayer online game. It features main character, Jeffrey Chebowski, as a local sloth-turned-sleuth hired to investigate a missing person case. Chebowski's quest appears easily understood at first; retrieve the wife of a famous philanthropist from her kidnappers and claim the reward offered in exchange. But as players will see, the path to heroism is paved with deceit and mistaken identity.

Level 1 – Your Roll

Our adventure begins when Jeffrey Chebowski is accosted in his own home by henchmen hired by pornography kingpin Jackie Freeborn. Players are immediately thrust into a modern battle scenario where they must make a choice: Fight back with a bowling ball or attempt to reason with Freeborn's henchmen. If players survive, they are introduced to the character Bunny for the first time. Bunny's introduction is somewhat hasty, as she promptly offers Chebowski "oral services" in exchange for one thousand dollars.

Level 2 – Her Life is in Your Hands

Chebowski meets Los Angeles' most prominent philanthropist, The Millionaire. In their meeting, Chebowski learns that The Millionaire's wife, Bunny, has been kidnapped and is being held for ransom. Players must choose their next course of action: Accept The Millionaire's request to retrieve Bunny unharmed or smoke a marijuana cigarette.

Level 3 – Walter Crogchik

Chebowski teams up with sidekick and Vietnam Veteran Walter Crogchik. The two men drink beer and discuss their plot to retrieve Bunny when they are suddenly confronted by their bowling opponent and known pedophile, Smokey. Players must decide whether to settle their dispute through pacifism, or by firing Croghik's handgun at Smokey. In anticipation of this decision, Chebowski and Crogchik discuss Smokey's criminal history as a pedophile, where players learn that Smokey served time in prison for exposing himself to an eight-year-old.

Level 4 – The Drop-Off

Chebowski and Croghik attempt to exchange the ransom for Bunny at a deserted intersection. The plan goes awry however and a firefight ensues between the kidnappers and Chebowski and Crogchik. During the battle, a provocative young blonde woman dressed scantily in a short red dress has her toe blown off.

Level 5 – Little Larry

A day after their failed rescue operation, Chebowski has his car stolen along with the ransom money. The clues lead Chebowski and Crogchik to the house of Larry, a handsome high school student who prides himself on impregnating his female classmates. To find the missing ransom, players choose to interrogate Larry non-violently, castrate Larry, or destroy Larry's Corvette.

Level 6 – Bathrobe Wars

Chebowski meets privately with The Millionaire's daughter, Maude. Maude informs Chebowski that her philanthropist father is a phony, and her allegedly kidnapped mother-in-law is a sex addict who owes a sizeable debt to Jackie Freeborn. Maude suddenly refuses to answer any more questions. To retrieve further information, players at this point choose to either fight Maude or to get into bed with her. The second option leaves both Chebowski and Maude under covers where they seem to engage in "pillow talk" regarding subjects such as Chebowski's sordid young adulthood.

Level 7 – Malibu Mêlée – the Final Level

Chebowski and Crogchik reunite to storm Freeborn's Malibu compound. The two face a series of foes in this level including seductive pornography stars and nihilist militia. Players have a series of

choices to make in this level, for instance whether to accept or reject Jackie Freeborn's gentlemanly offer of a White Russian, which Crogchik fears may be poisoned. Ultimately, Crogchik and Chebowski must face-off against Freeborn and Larry on a pornography set in order to understand who is behind the kidnapping of Bunny.

Development:

Adventures is not your average role-playing video game. For starters, the game only took one-and-a-half years to create, which is a whopping three years less than most role-play games. Also, most of the work was conducted not by Dubroff's knowledgeable and experienced staff in Needham, Massachusetts, but by a team of MIT fraternity brothers interning for Dubroff. The college kids conceived of the idea for a video game to accelerate an adolescent's understanding of societal norms, similar to the pledging process at their frat. We reached Lambda Epsilon president Paul Polatschek for comment on his creation. "Bro[ther]s are going to drink. They're going to smoke weed. They're going to have sex. We wanted to have fun with these realities when forging a virtual reality."

To ensure this effort was validly executed, Dubroff's team reached out to controversial psychiatrist, Catie Crimaldi. Crimaldi, known for her laissez-faire approach to cognitive psychology, summarizes the game as follows: "The operative premise is that adolescents will do bad things; it is a natural part of the learning process. While most adolescents do learn, some take longer and cause disruptions in class, often ending up with troubled lives because of the early bad choices they make. In *Adventures*, adolescents can develop online friendships, engage in rebellious behavior, and see real-world consequences all within the protective perimeter of the video game world. " Crimaldi had her license to practice psychiatry in California revoked two years ago after prescribing medicinal marijuana to hyperactive young children. Crimaldi's research is still however considered top-notch, proof of which may lie in the sales of *Adventures*.

Controversy:

Adventures has sparked controversy due mainly to its sexual nature. For example, one aspect of the game is where users can experiment with sexual relationships in the Bathrobe Wars level. Virtual birth control is available for the exchange between Chebowski and Maude in this level but not wholly effective and as a consequence virtual pregnancies can occur. Although the sexual situation in the level is obvious, no nudity is shown.

The game in general has other sexual themes as well. Several of the characters' voices are narrated by sex phone operators and numerous scenes include spicy saxophone solos reminiscent of a 1970's-era pornography film.

Verdict:

Adventures is crude, funny, disgusting, thought-provoking and perhaps inappropriate for certain audiences. That is why we love it. The game is one of the freshest ideas in years, and what it lacks in special effects it makes up for in healthy doses of reality. Parents who choose not to buy their children games involving sex, drugs, violence, and alcohol are sufficiently warned by the game's R rating. However these parents may want to keep in mind they could be shutting their children off from more than just a game.

EXHIBIT B

The Froessel Times – Local

Farmtown's Fields Not All that is Being Fertilized in Sweetwater; Research Points to Video Game.

Adventures in Chebowski Land is the latest critically acclaimed internet-based game from Dubroff Interactive, a company which has profited largely by selling young people their own social skills back to them over the Internet. *Adventures* continues this trend, but some say the sexual themes in the game are causing local youths to become too social. Since 2007, when *Adventures* was first released, the pregnancy rate for teenagers in Froessel has risen from 0.3% to 24.4%.[7] Also interesting is the rate of teen pregnancy specifically for video game users.

Two recent surveys indicated that teen pregnancies are up significantly among users of *Adventures*. In the first study, a well known condom manufacturer used a poll on Dubroff users to determine pregnancy rates. It found the self reported pregnancy rate was 2.5 times the national average. Most alarming was the rate for those 13-15-year-olds, which was 4 times the national average, while the condom usage rate was only half the national average. The second survey was conducted by a graduate student at Froessel State University where she interviewed teenagers at a local mall and a local bowling alley. She found that teens who reported hanging out in the bowling alley were twice as likely to get pregnant than those who preferred the mall. What is the connection? The bowling alley, of course, is lead character Jeffrey Chebowski's favorite hangout in *Adventures*. These teens were also 5 times more likely to report that their favorite game was *Adventures in Chebowski Land.*

Are these rates mere coincidence? Famed child psychologist and brain biologist Quincy Quine says no. In a recent study led by Dr. Quine at Froessel State University, researchers observed a noticeable increase in the testosterone levels male college students playing sexually charged video games shortly after playing. "It can be a natural, zesty enterprise. The effect is very similar to pornography; in some cases it's stronger because videogame users interact with the game and with other users. They are not merely spectators," said Quine. Quine is not alone in holding her belief, either. Three doctors writing for the New England Journal of Medicine argued that the correlation between playing sexual video games and participating in sexual acts was no coincidence.[8]

Town residents don't particularly want to see if the medical community is correct. Last week, five 14-year-old girls formed a pregnancy pact wearing t-shirts printed with the slogan "Larry's ladies." The phrase, according to the girls, was a reference to the *Adventures* character Larry, a sexually active teenage heartthrob cast as a villain in the game. Upon questioning, one

[7] Wasilla General Hospital birth records, 09/15/2007 – 06/30/2008
[8] Smith,Brooks,Weaver, The Digitial Act of Love; Coitus in the 21st century, NEJM 04/01/2009

of the teenagers attempted to explain why these girls would want to start motherhood so early. "I can't, like, completely explain it. Although we all planned to, like, get pregnant together, the idea stemmed from kind-of like an uncontrollable urge we all had. The game, like, awoke something, inside of us."

So is this the evidence which foes of video games have sought to support a ban on these games? Although there is no current law restricting the sale of similarly sexual video games to minors, this may change. Rumor has it that Sweetwater Mayor Farrah Kalin's daughter Cambridge is both a huge fan of *Adventures* and an expectant mother. Stay tuned.