NEW YORK LAW SCHOOL MOOT COURT ASSOCIATION

34TH ANNUAL CHARLES W. FROESSEL

INTRAMURAL MOOT COURT COMPETITION

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010

DOCKET NO. 481586/10

DUBROFF INTERACTIVE,

Petitioner/Cross Respondent,

-against-

THE TOWN OF SWEETWATER

Respondent/Cross Petitioner,

On Writ of Certiorari to the

Court of Appeals for the Thirteenth Circuit

BRIEF FOR RESPONDENT/CROSS PETITIONER

Team #55

QUESTIONS PRESENTED

I. Did the U.S. Court of Appeals for the Thirteenth Circuit correctly hold that STO § 1776 does not unconstitutionally deprive minors of their free speech because it is justified by an adequate governmental interest and is narrowly tailored to meet that interest?

II. Is it permissible for a town ordinance to apply a local community standard for evaluating material disseminated over the Internet, under the Miller-Ginsberg framework for regulating obscenity as to minors?

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Plaintiff, Dubroff Interactive ("Dubroff") filed a suit seeking an injunction against the Town of Sweetwater ("Sweetwater") to prevent enforcement of Sweetwater ordinance Ch. 47 STO § 1776, the Video Game Indecency Act ("STO § 1776") in the United States District Court for the District of Froessel. Dubroff asked the court to declare the ordinance unconstitutional as it violated a minor's right to exercise free speech under the First Amendment. Additionally, Dubroff challenged § 1(c)(1-2) of the ordinance, arguing that the determination of obscenity according to the opinion of those in the town of Sweetwater is too limited and therefore unconstitutional. The District Court denied the injunction, ruling that STO § 1776 passes constitutional muster, and held a local community standard is appropriate when determining obscenity.

Dubroff then appealed to the Court of Appeals for the Thirteenth Circuit, which upheld the lower court's opinion that STO § 1776 was constitutional. However, it reversed on the standard for determining obscenity, ruling that a local standard was inappropriate. In it's holding, the Thirteenth Circuit reasoned that technological increases have made local community standards impossible to apply, and that a national standard is appropriate.

Justice Mancino delivered the opinion of the Court with Judge Roth dissenting in part and concurring in part. Both parties petitioned the Supreme Court for writ of certiorari. This court granted the petitions.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On March 6, 2010, Plaintiff, Dubroff, filed an action against the Town of Sweetwater in the United States District Court for the Thirteenth Circuit. Dubroff sought an injunction to prevent enforcement of STO § 1776, asking the court to declare the statute unconstitutional. 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. Dubroff further challenged § 1(c)(1-2) of the VGIA claiming it unconstitutionally restricted the definition of obscenity to the local Sweetwater community.

The District Court held that STO § 1776 passed constitutional muster and the relief sought by Dubroff was denied. The District Court reasoned that the statute did not unconstitutionally infringe upon a minor's free speech interest under the First Amendment, and that a local community standard is appropriate under the Miller-Ginsberg framework.

On June 15, 2010 Dubroff appealed to the Court of Appeals for the Thirteenth Circuit. The issues on appeal were: 1) Determining the applicable standard of review for restrictions on obscene speech: and, 2) Whether a local or national community standard should be applied in an obscenity case. The Thirteenth Circuit upheld in part and reversed in part the District Court's decision. The Thirteenth Circuit upheld the District Court's decision regarding the first issue, reasoning that STO § 1776 passed constitutional muster under a strict scrutiny review, and that the statute did not violate a minor's First Amendment right to free speech. The Thirteenth Circuit reversed the District Court's decision regarding the second issue, and adopted the Ninth Circuit's reasoning as articulated in Kilbride that a national community standard was appropriate.

Both parties now appeal to the United States Supreme Court, which has granted certiorari to the United States Court of Appeals for the Thirteenth Circuit.

STATEMENT OF THE FACTS

Sweetwater is a quaint town in the heart of the district of Froessel. Early last year, Sweetwater saw a steep rise in teen pregnancy. The cause for this was not completely understood, but a publication of a recent study, which showed a correlation between raucous teenage behavior and the sale of the videogame *Adventures in Chebowski Land* ("*Chebowski*"), shed some light on

the issue. After the discovery of a pregnancy pact involving several fourteen-year-old girls, the community of Sweetwater decided to take action. Sweetwater's Mayor, Farrah Kalin, proposed an ordinance to the local town council seeking to protect the sanctity of Sweetwater's youth from obscene videogames. In response, the legislature enacted STO § 1776, the "Video Game Indecency Act" which 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 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, and scientific value for juveniles."

Plaintiff Dubroff Interactive, an electronics company which specializes in online-gaming, released the controversial *Adventures in Chebowski Land*. The game is available in stores but played strictly over the Internet, and gives players the option to interact with thousands of other users simultaneously

in the game. *Chebowski* features controversial scenes involving drug use, castration, sex addiction, and even lengthy conversations regarding pedophilia.

STO § 1776 passed in the legislature with little opposition, and the bill was signed into law. It continues to receive broad support from the community. Dubroff's CEO, LeRoy Arko, however, publicly objected to the restrictions. Mayor Kalin appeared with Arko on a community news program, and discussed how STO § 1776 is the only way to keep children safe from obscene video games, as other safeguards had failed. She pointed out that the ease with which children can get online makes it difficult for parents to control online behavior. Arko did not dispute Kalin's conclusions, nor did he refute any of the evidence.

STO § 1776 restricts the sale of *Chebowski* by requiring manufacturers to verify the age of users logging on to play the restricted games over the Internet. For mature themes, the game was rated R by the Entertainment Software Rating Association. However, merchants have typically not enforced the purchase of R-rated games by minors, and optional parental codes in the game have proved ineffective because they can be hacked by children. Thus, may parents in Sweetwater feel that STO § 1776 is the only means left to protect their children from obscenity. The creator, Dubroff, objects to these restrictions.

SUMMARY OF THE ARGUMENT

I. This Court should uphold the decision of the Court of Appeals for the Thirteenth Circuit and find that STO § 1776 is constitutional, as it passes both intermediate and strict scrutiny review. STO § 1776 is a limited prohibition on the sale and distribution of certain video and on-line games deemed obscene to minors by local community standards. STO § 1776 withstands constitutional scrutiny under the First Amendment, as it applies to the states by the Fourteenth Amendment, because it does not abridge or prohibit the exercise of a minor's freedom of speech. STO § 1776 is not a content-based restriction, but is aimed at the secondary effects of obscenity on minors. Consequently, the proper standard by which to review STO § 1776 is intermediate basis. However, even if this Court holds that STO § 1776 is subject to a strict scrutiny review, STO § 1776 would satisfy such a burden. This Court should find that Sweetwater has a legitimate interest in the protection of their minors, and STO § 1776 is narrowly tailored to achieve that interest. As a result, STO § 1776 passes constitutional muster, and the findings of the Court of Appeals for the Thirteenth Circuit must be upheld.

II. This Court should reverse the decision of the Court of Appeals for the Thirteenth Circuit finding that local community standards of STO § 1776 were an improper basis for judging obscenity. After the holdings of this Court in Miller v. California and Ginsberg v. New York, Sweetwater's statute applies the correct community standards for evaluating Internet obscenity as to minors. Sweetwater enacted the local community standards in STO § 1776 pursuant to its Tenth Amendment power to protect its children from the dangers associated with playing online games. Furthermore, the Thirteenth Circuit's imposition of a national community standard on the Internet strangles diversity and would still fall short of being able to capture a concise definition of obscenity for the entire nation. However, even if this court should find that local community standards might subject obscenity determinations the least tolerant community, the Tenth Amendment still protects Sweetwater's right to regulate obscenity as to minors. Finally, technology exists that would allow Dubroff to restrict its area of dissemination, thus enabling it comply with multiple, varying regulations throughout the country. As such, the local community standards of STO § 1776 are not unconstitutional, and the holding of the Court of Appeals must be reversed.

POINT I

THE TOWN OF SWEETWATER'S QUALIFIED PROHIBITION OF THE SALE OF OBSCENE GAMING PRODUCTS TO MINORS WITHIN SWEETWATER DOES NOT UNCONSTITUTIONALLY RESTRICT A MINOR'S RIGHT TO FREE SPEECH UNDER THE FIRST AMENDMENT.

STO § 1776 is a limited prohibition on the sale and distribution of certain video and on-line games deemed obscene to minors by local community standards. STO § 1776 withstands constitutional scrutiny under the First Amendment, as it applies to the states by the Fourteenth Amendment, because it does not abridge or prohibit the exercise of a minor's freedom of speech. U.S. Const. amend. I, U.S. Cont. amend. XIV § 1. It is the position of Sweetwater that STO § 1776, analyzed under the framework of City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) and City of Erie v. Pap's A.M., 529 U.S. 277 (2000), is not a content-based restriction, but is aimed at the secondary effects of obscenity on minors. Consequently, the proper standard by which to review STO § 1776 is intermediate basis. However, even if this Court holds that STO § 1776 is subject to a strict scrutiny review, it would satisfy such a burden, because it is justified by a compelling government interest of the protection of minors, and is narrowly tailored to that interest. As a result, STO § 1776 is constitutional, and does not violate the First Amendment rights of minors.

It has been established by this Court that speech which is held to be obscene falls outside the category of protected

speech, under the standard enunciated by R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1973). Moreover, in Ginsberg v. New York, 390 U.S. 629 (1968) the Supreme Court determined that "the concept of obscenity might vary according to the group to whom the material was directed." Even though objectionable material might be deemed suitable for adults, the state has an interest in prohibiting that distribution when it involves minors. The Court came to this conclusion because it recognized obscenity poses a unique threat to minors. Specifically, the tangible and palpable secondary effects of obscenity in video games has been studied and documented, thus giving evidence for the dire need of legislation protecting minors, such as STO § 1776.

A. **STO § 1776 is Subject to an Intermediate Level of Review Established by the Supreme Court in Alameda Books and Pap's A.M. Because the Ordinance is Content-Neutral, and Aimed at the Secondary Effects of Obscenity on Minors.**

The District Court correctly held that STO § 1776 aims to "regulat[e] speech based on the secondary effects of certain sexual expression rather than on the content of that expression" Dubroff v. Sweetwater, 1492 F.Supp.3d 122 (2010). The Supreme Court has held that a statute preventing obscenity, which seems to facially violate the First Amendment, may be reviewed under an intermediate level of scrutiny if the statute is found to be aimed at preventing the harmful secondary effects of such obscenity. See City of Los Angeles v. Alameda Books, Inc., 535

U.S. 425 (2002) (reasoning that government may rely on evidence reasonably believed to be relevant' for demonstrating a connection between speech and a substantial government interest); City of Erie v. Pap's A.M., 529 U.S. 277 (2000) (reasoning that if the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy a "less stringent" standard). In both Alameda Books and Pap's A.M. the Court found that the statutes in question were content neutral because they were aimed at combating the secondary effects on the community.

Similarly in this case, Sweetwater is attempting to prevent the dangerous and irreversible secondary effects of sexually obscene video games on minors. STO § 1776 was proposed in response to surveys indicating an increase in pregnancy in Sweetwater during and after the release period of *Chebowski*, recent studies indicating a correlation between raucous teenage behavior and the sale of *Chebowski*, and upon the discovery of a pregnancy pact involving several fourteen-year-old girls who played *Chebowski*. During an interview with the local paper, the pregnant minors openly exclaimed that "The game…awoke something inside of us.[1]"

[1] See Exhibit B, Farmtown's Fields Not All that is Being Fertilized in Sweetwater; Research Points to Video Game, at v.

Moreover, in enacting STO § 1776, the Sweetwater legislature relied upon further the adverse impact of the game on minors from local and national studies, similar to that Alameda Books, where testosterone levels were noticeably increased after playing sexually charged video games. One researcher stated that "The effect [of playing *Chebowski*] is very similar to pornography," noting that in some cases the effect is even greater due to the interactive nature of certain video games.[2] See also Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986) (An appellant is not required to show specific adverse impact…but could rely on the experiences of other cities.) Consequently, STO § 1776 is content neutral because it is aimed at the detrimental secondary effects of obscenity in video games and should be subject to an intermediate level of review.

Based on the framework of Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 666 (1994) a statute must be upheld "so long as the court finds that in formulating its judgments, [the state] has drawn reasonable inferences based on substantial evidence." Sweetwater relied heavily upon surveys and studies presented to the legislature that showed a rise in teen pregnancy in its town among players of *Chebowski*. The District Court was correct in holding that Sweetwater satisfied its

[2] Id.

burden of drawing on reasonable inferences in enacting STO § 1776. Thus, STO § 1776 should be upheld as constitutional under an intermediate standard of review.

B. **Even if STO § 1776 is Found to Be Content-based, it Will Still be Upheld Under a Strict Scrutiny Review Because STO § 1776 is Justified by a Compelling Governmental Interest and is Narrowly Tailored to Achieve that Interest.**

Even if this Court finds that an intermediate standard of review is inappropriate, STO § 1776 will still survive the more stringent standard of strict scrutiny review. If a statute is found to regulate speech based on its content, a court subjects the statute to strict scrutiny, requiring that the statute be narrowly tailored to promote a compelling government interest. United States v. Playboy Entm't Group 529 U.S. 803 (2000); Sable Communications of Cal., Inc. v. F.C.C., 492 U.S. 115 (1989). Additionally, in order to be narrowly tailored, the statute must be the least restrictive means to achieve that interest. Id. at 126. Because STO § 1776 is justified by Sweetwater's compelling interest to protect minors, and it is narrowly tailored to achieve that interest, it should be upheld as constitutional and the Appeals Court decision regarding this issue should be affirmed.

1. The protection of children from sexually charged, obscene material in video games is a compelling governmental interest.

It has been established that protecting children from obscene or sexually explicit materials is a compelling governmental interest. U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) (Shielding children from indecent sexual material' is clearly a compelling interest); Ashcroft v. ACLU, 535 U.S. 564 (2002) (where the Court recognized a compelling interest in protecting minors from exposure to sexually explicit materials); Sable, 492 U.S. 115 (1989) (held that the government has a legitimate interest in protecting children from exposure to indecent dial-a-porn messages).

Sweetwater enacted STO § 1776 with the purpose of protecting minors from the unbridled, sexually explicit material found in the online gaming world. Dubroff, 1492 F.Supp. 3d at 2. The growing popularity of online communities, and increasing access to laptops for minors require the legislature to take appropriate steps in order to assist parents in their vigilance of protecting their children from obscenity. The Court in Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 646 (7th Cir. Ill. 2006) found that, "assisting parents in protecting their children from [indecent sexual material]" is a compelling governmental interest. This is echoed in the statement made by Justice Brennan in Ginsberg v. New York, 390 U.S. 629, 640:

"…the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting

the welfare of children justify reasonable regulation of the sale of material to them."

The Sweetwater legislature relied upon several studies and opinions in determining that there was a causal relationship between obscenity in video games and harm to minors. Even though there is substantial evidence of a link between obscenity and secondary effects, the Appeals Court found that proof of a causal relationship was not necessary to survive a strict scrutiny review. Dubroff, 669 F.5d at 12. The Appeals court found that "While we agree that strict scrutiny [is required]…we do not agree that a causal relationship must be proven between…obscene games and dangerous mental or physical health consequences in children" Id. at 12.

Consequently, STO § 1776 is justified by a compelling governmental interest. However, under a strict scrutiny review, "it is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends" Sable, 492 U.S. at 126.

2. STO § 1776 is narrowly tailored, because it only affects minors and alternative methods to protect those minors from obscene material have failed.

Once a compelling governmental purpose is found, in order to survive strict scrutiny, Sweetwater has the burden to show that STO § 1776 is narrowly tailored. It is generally accepted that "a statute is narrowly tailored only if it targets and

eliminates no more than the exact source of the 'evil' it seeks to remedy." Blagojevich, 469 F.3d 641. Additionally, the statute must be the least restrictive way to achieve the stated governmental purpose.

The court in Blagojevich ruled that the statue in question was "narrowly tailored because its effect is perfectly drawn to impact only the subject group [of] minors while leaving fully intact the First Amendment rights of adults" Blagojevich at 646. Similarly, STO § 1776 does not prohibit adults from purchasing and participating in *Chebowski* and other games that might be prohibited to minors.

This case is distinguished from the Court's decision in Sable because it does not involve a total ban on obscene video games. In Sable, the Court ruled a statute unconstitutional which denied "adult access to telephone messages which are indecent but not obscene," and found that it "far exceeds that which is necessary to limit the access of minors…" Sable, 492 U.S. 115 (1989). See also Butler v. Michigan, 352 U.S. 380 (1957) (Law in question was insufficiently tailored since it denied adults their free speech rights by allowing them to read only what was acceptable for children). STO § 1776 does not prohibit adults from purchasing *Chebowski*, nor does it prohibit a parent using their individual discretion in purchasing the game for their child's use. Additionally, Dubroff is not being

threatened with serious jail time or criminal charges. STO § 1776 merely imposes a fine of up to $1000. It is Sweetwater's position that the benefit of protecting minors from video games far outweighs the monetary fine that is imposed under STO § 1776. Thus, the statute is not overly restrictive.

Furthermore, STO § 1776 is the least restrictive means to protect children from obscene video games. Playboy Ent'm Group places an "especially heavy burden" on the government to explain "why a less restrictive provision would not be as effective as the challenged law" 529 U.S. at 813. However, the court in Entertainment Software Ass'n v. Swanson, 519 F.3d 772 stated that a "requirement of such a high level of proof may reflect a refined estrangement from reality." Here, studies were presented that showed "existing safeguards had failed." Dubroff, 1492 F.Supp. 3d at 4. Specifically, Entertainment Software Rating Association ratings were shown to be unenforced by merchants, and thus futile. Also, optional parental codes in game consoles and computers proved ineffective, as they were regularly hacked by technology-savvy children. Id at 4. Additionally, increase in the use of transportable laptops makes it nearly impossible for parents to regulate the material that is disseminated over the Internet to their children without a statute like STO § 1776. As a result, STO § 1776 satisfies a strict scrutiny review, and the opinion of the Appeals Court should be affirmed.

POINT II

STO § 1776 APPLIES THE CORRECT COMMUNITY STANDARDS FOR EVALUATING WHETHER INTERNET-DISSEMINATED MATERIALS ARE OBSCENE AS TO MINORS, CONSTRUCTED BY MILLER AND GINSBERG, AND THEREFORE, A LOCAL COMMUNITY STANDARD IS APPROPRIATE FOR THE INTERNET.

The Court of Appeals for the Thirteenth Circuit erred in finding that the local community standard articulated in STO §1776 is an improper basis for judging whether an Internet-based obscenity as to minors exists. The Tenth Amendment reads that "The powers not delegated to the United States by the Constitution…are reserved to the states respectively, or to the people." U.S. Const. amend. X. In Miller v. California, 413 U.S. 15 (1973), the Supreme Court held that obscenity is to be determined by applying 'contemporary community standards,' not 'national standards.' The Court also noted that constitutionally reserved regulatory power is one the States "have enjoyed and exercised continuously." Miller at 29. Five years prior, the Court ruled in Ginsberg v. New York, 390 U.S. 629 (1968), that States may regulate the dissemination of objectionable material as to minors.

The town of Sweetwater constitutionally enforces STO §1776 as an exercise of its local power to protect the general welfare of its minors. A State, and by extension its municipal governments, may uphold the moral fabric through legislation. See generally Roth v. United States, 354 U.S. 476 (1957) (States bear direct responsibility for protection of the local moral

fabric.); Paris v. Slaton, 413 U.S. 49 (1973) (With regard to regulation of obscenity, states have a right to maintain a decent society.) By publicly supporting the VGIA legislation, Sweetwater Mayor, Farrah Kalin, responded to parental concerns over both Sweetwater's recent increase in teen pregnancy and surveys and studies suggesting the social network, massive multiplayer online game, *Adventures in Chebowski Land*, has a connection to the pregnancies. During her appearance on television with Dubroff CEO LeRoy Arko, Mayor Kalin noted that minors' increasing use of laptops, a platform on which Chebowski is launched, have made it extremely difficult for concerned parents to effectively monitor the online activities of their children. Arko did not dispute Kalin's conclusion. Dubroff v. Sweetwater, 1492 F. Supp. 3d. 122 (2010), at 4. Consequently, even Arko recognizes that player interaction in the vast, virtual land of *Chebowski* poses risks for the safety and welfare of children. Thus, Sweetwater has a right to protect its youth from possible online exploitation in virtual worlds, like the one in *Chebowski*, where parents may not be able to successfully supervise their children.

In order for STO §1776 to be upheld as to its regulation concerning minors and the Internet, it must satisfy the holdings in both Ginsberg and Ashcroft. The Supreme Court determined in Ginsberg that a state has power to control the conduct of minors

more stringently than that of adults. In Ashcroft, the Court ruled that the application of a statute protecting minors from obscene speech online, by relying on community standards, was not facially overbroad. Ashcroft v. ACLU, 535 U.S. 564 (2002). If this court finds the VGIA to be substantially overbroad, then Sweetwater's power to apply local community standards in evaluating obscenity from the Internet is irrelevant, as a statute that is found to be substantially overbroad will be invalid under the First Amendment. Broadrick v Oklahoma, 413 U.S. 601 (1973). However, even if this court finds that Chebowski would be subject to obscenity standards of the least tolerant community in the nation, STO §1776 still satisfies Ginsberg's holding for regulating the dissemination of material as to minors and supports Sweetwater's Tenth Amendment power to regulate obscenity without the imposition of a uniform national community standard on the Internet. Therefore, STO §1776 should be found as constitutional.

The legality of a local community standard for evaluating obscenity on the Internet has resulted in divergent decisions among circuit courts in the United States. Therefore, the following analysis will begin with discussing whether a local or national community standard is preferable on this issue.

A. **Supreme Court Precedent Affirms the Local Community Standards for Judging Obscenity in STO § 1776.**

In Miller and Hamling v. United States, 418 U.S. 87 (1974), this Court established that a jury must now apply local community standards to measure obscenity, not national standards.[3] In particular, the Miller Court noted that requiring a State to hold an obscenity trial around evidence of a national community standard would "be an exercise in futility." Miller v. California, 413 U.S. 15 (1973), at 30, 32. Years later in Ashcroft, this Court determined local community standards can be applicable to the Internet, holding that a statute that applies to material displayed on the World Wide Web, and relies on community standards to identify material that is harmful to minors "does not by itself render the statute substantially overbroad for purposes of the First Amendment." Ashcroft v. ACLU, 535 U.S. 564, 585 (2002). Sweetwater has abided by those rulings in enacting STO § 1776. Nevertheless, in its determination that STO § 1776 is unconstitutional, the Court of Appeals for the Thirteenth Circuit ignored prior precedent, following only dicta in Ashcroft and a Ninth Circuit ruling in

[3] According to the District Court of Froessel, Dubroff did not raise an objection to § 1(c)(3) of the Sweetwater ordinance at issue, which differs from the third prong of the Miller test for obscenity (where a contemporary community standard would not apply) only in that it incorporates language pertaining to minors as in Ginsberg. Dubroff v. Sweetwater, 1492 F. Supp. 3d 122 (2010) at 8,9.

U.S. v. Kilbride, 584 F.3d 1240 (2009), where, in both instances, the courts advocated for a national standard to evaluate obscenity on the Internet. However, the text of STO § 1776 closely follows the local standards that were supported in Miller and Ashcroft. Further, the Circuit Court's imposition of a national standard is unworkable because it strangles diversity in material distributed online. See Mark C. Alexander, The First Amendment and Problems of Political Viability: The Case of Internet Pornography, 25 Harv. J.L. & Pub. Pol'y 977 (2002).

B. **Miller and Ashcroft Support Sweetwater's Local Community Standard for Evaluating Material Disseminated Over the Internet.**

In Miller, the Supreme Court vacated the judgment of the court below, holding that a jury's evaluation of materials based on the community standards of a State is constitutionally adequate. The Court specifically rejected the application of a national standard, stating "Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene…" Miller at 31, 32. Miller concerned the dissemination of sexually explicit material in interstate commerce, an action made illegal after the State of California passed a statute prohibiting the knowing distribution of obscene matter. The Court also maintained that

States have a legitimate interest in prohibiting dissemination of obscene material, where it carries "significant danger of exposure to juveniles." Miller at 18. Similarly, in Ashcroft, the U.S. Congress enacted a statute to prohibit the knowing distribution of obscene materials available to children on the Internet. The Court vacated the Third Circuit Court of Appeals' holding that the statute's use of contemporary community standards for identifying obscene material on the Internet made the statute substantially overbroad. Ashcroft at 586. This Court said just because "distributors of allegedly obscene materials may be subjected to varying community standards in the various judicial districts into which they transmit materials does not render a …statute unconstitutional." Ashcroft at 581, quoting Hamling v. United States, 418 U.S. 87 (1974) at 106.

Dubroff is like the appellant in Miller, who distributed obscene material for commercial sale in violation of a State statute that prohibited such dissemination, where the danger of exposing the material to minors was significant. Dubroff's online sale of the violent and sexually charged Chebowski to minors is a specific evil Sweetwater was trying to address when it enacted STO § 1776. Similarly, the statute in Ashcroft, which sought to protect minors online through application of contemporary community standards, is like the purpose of the Sweetwater ordinance to protect the sanctity of children by

preventing exposure to the terrors in interactive worlds like the one in *Chebowski*. Violation of STO § 1776 results in a lighter penalty than the statute in Ashcroft, which carried a civil find of up to fifty thousand dollars and a criminal penalty of up to six months in prison, whereas the Sweetwater law carries only a one thousand dollar fine, and no jail time. Ashcroft at 571. Both Miller and Ashcroft stand for the proposition that local community standards entitle juries to draw on their knowledge of the view of the average person in their community for making obscenity determinations. See Hamling at 104.

This case is distinguishable from U.S. v. Kilbride, where the Ninth Circuit used Justice O'Connor and Breyer's concurrences from Ashcroft in determining a national community standard should be applied to regulating obscene speech on the Internet. In Kilbride, the court followed the concern raised in Ashcroft's concurrences that adopting local standards for all communities in the country would provide the least tolerant community with the ability to make obscenity determinations for the whole nation. Kilbride at 1255. First, this case is guided by the holding of Ashcroft, not the concerns about a national community standard, which were "dicta and not the ruling of the Court." U.S. v. Little, 2010 U.S. App. LEXIS 2320 (11th Cir.). Secondly, notwithstanding the concerns of O'Connor and Breyer,

they were both willing to accept "the constitutional viability of local community standards in the absence of…substantial overbreadth based on the amount of speech covered…" U.S. v. Stagliano, 2010 U.S. Dist. LEIXS 14770, *12-3 (D. D.C. 2010). (Rejecting the reasoning in Kilbride that the Court is required to accept the view of O'Connor and Breyer). Here, the Thirteenth Circuit specifically found that Sweetwater's VGIA is not substantially overbroad, and is narrowly tailored under a strict scrutiny framework. Thus, Sweetwater's interest in protecting its children is not comparable to non-binding concerns over a hypothetical imposition of a national standard for the Internet.

1. The Thirteenth Circuit's Imposition of a National Community Standard on the Internet is Not Viable.

Adoption of a national community standard in Sweetwater for judging Internet obscenity will not produce actual uniformity. Given the size and diversity of the United States, it is not reasonable to expect that a standard could actually be articulated for all 50 states in a single formulation. Miller at 30. While the national standard has the seeming appeal of "giving every individual notice of what is forbidden and what is permissible," in reality "the individual is without clear guidance." Mark C. Alexander, The First Amendment and Problems of Political Viability: The Case of Internet Pornography, 25 Harv. J.L. & Pub. Pol'y 977, 1013 (2002). The Miller Court

articulated that the use of a national standard still implies that "materials found tolerable in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable." Miller at 34. Further, it is unlikely any community could produce a jury that is not only fully representative of the diverse opinions within our nation, but to find jurors who can also reach agreement on the national boundaries of the specific community in question. Finally, the imposition of a national standard ignores the long-standing Tenth Amendment regulatory interest of the community affected by the distribution to seek redress through legislation.

C. **The Enactment of STO § 1776 Maintains the State's Interest in Protecting Minors.**

Even if this Court were to find that evaluation of Internet obscenity could be subject to the least tolerant community, STO § 1776 may still be found constitutional. The statute is enacted through Sweetwater's permissible police power under the Tenth Amendment to protect its minors. As this Court stated in Prince v. Massachusetts, 321 U.S. 158, 170 (1944) "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." Thus, this Court need not determine whether or not STO § 1776 would affect obscenity as to adults, but whether the regulation is effective as to minors. Furthermore, this Court has never ruled that "government is

precluded from regulating obscene material passing in interstate commerce." U.S. v. Little, 2010 U.S. App. Lexis 2320, at 6. Finally, in direct contrast to the Thirteenth Circuit's assertion that the worldwide reach of the Internet prevents local standards from being applicable, web publishers, in fact, do have means to limit access to their content, based on geolocation technology.

1. Geolocation technology allows Dubroff to restrict its area of distribution.

Due to the availability of geolocation technology, the Thirteenth Circuit's statement that the meaning of Miller has changed in the age of the Internet is not supportable. Geolocation technology is computer software that cheaply, quickly, and accurately determines the geographic location of another party, even down to a city level. Anick Jesdanun, New technology limits access: Improved geolocation allows sites to block Internet users and divide the Web into smaller sections, Newsday, July 11, 2004, available at http://www.newsday.com. Geolocation's use in online gaming is on the rise, and it enables a company like Dubroff to comply with multiple and varying local regulations. See Kevin F. King, Geolocation and Federalism on the Internet: Cutting Internet Gambling's Gordian Knot. 11 Colum. Sci. & Tech. L. Rev. 41 (2010). In 2000, an international court determined that geolocation was sufficiently

effective to allow U.S. Internet search engine Yahoo! to implement it to prevent access-seekers in France from getting Nazi memorabilia from its site. LICRA v. Yahoo, County Court of Paris, interim court order of 20th of November 2000, available online at http://www.cdt.org/speech/international/001120yahoofrance.pdf. With the growing popularity of geolocation technology, the "nearly global Internet…will be replaced by an Internet taking account of geographic borders." Dan Svantesson, Geo-location Technologies – A Brief Overview, available online at: http://svantesson.org/svantesson20040906.doc. While Dubroff may be forced to incur some costs if it were to use geolocation technology, that doesn't render STO § 1776 unconstitutional, as "there is no constitutional impediment to enacting a law which may impose…costs on a medium electing to provide…messages…[The company] ultimately bears the burden of complying with the prohibition on obscene messages." Sable v. FCC, at 125. If Dubroff is allowed to continually distribute *Chebowski* to minors in Sweetwater, the implication is that online video game makers have a constitutional right to post sexually explicit material on the Internet. Such a position gives Dubroff constitutionally protected financial gain at the expense of minors.

The local community standards in STO § 1776 are a Tenth Amendment protected safeguard against the exploitation of

children. STO § 1776 satisfies a long line of Supreme Court precedent that supports local community standards and legislation aimed at the protection of minors. As a result, STO § 1776 must be upheld as constitutional.

Conclusion

For the foregoing reasons, this Court must uphold the decision of the Court of Appeals for the Thirteenth Circuit in regards to the first issue, and reverse the decision of the Court of Appeals for the Thirteenth Circuit regarding the second issue.

Respectfully Submitted,
By Team #55

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Attorneys for the
Respondent/Cross Petitioner
Submitted August 15, 2010

Attorneys for the Respondent/Cross Petitioner
New York Law School
185 West Broadway
New York, New York 10013

APPENDIX

Constitutional and Statutory Provisions

U.S. Const. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. XIV § 1

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State Statutory Provisions

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 sadomasochistic 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:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) 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.