No. 06-3217

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Mike Hatch, in his official capacity as
Attorney General of the State of Minnesota,

Appellant,

vs.

Entertainment Software Association;
and Entertainment Merchants Association,

Appellees.

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

APPELLANT'S BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case is about whether Appellant State of Minnesota can constitutionally restrict the rental or purchase of violent and sexually explicit video games by minors under age 17 in furtherance of the State's compelling interests in protecting the psychological well-being and moral and ethical development of its children. Appellees Entertainment Software Association and Entertainment Merchants Association brought this action asserting that Minnesota's Restricted Video Games Act violates the First and Fourteenth Amendments to the Constitution of the United States.

The district court incorrectly held that that the Act violates the First and Fourteenth Amendments and, therefore, is unconstitutional. Consequently, the district court granted a permanent injunction in favor of Appellees, enjoining the effectuation and enforcement of the Act, which prompted this appeal.

Appellant requests 20 minutes of oral argument per side due to the importance of the constitutional issues presented.

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JURISDICTIONAL STATEMENT

Appellees' claims arise under the First and Fourteenth Amendments to the United States Constitution. The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983. This Court has jurisdiction over Appellant's appeal under 28 U.S.C. § 1291.

This appeal is taken from the final order and judgment of the district court, entered on July 31, 2006, granting Appellees' application for a permanent injunction enjoining the effectuation and enforcement of Minn. Stat. § 325I.06 (2006), which disposes of all the parties' claims. Appellant's Notice of Appeal was filed on August 29, 2006, within the 30 days permitted by Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

I. Are video games a protected form of speech under the First Amendment, or unprotected entertainment like other games that do not enjoy First Amendment Protection?

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975);
Interactive Digital Software Ass'n v. St. Louis County, Mo., 329 F.3d 954 (8th Cir. 2003);
There to Care, Inc. v. Comm'r of Ind. Dep't of Revenue, 19 F.3d 1165 (7th Cir. 1994);
America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170 (E.D.N.Y. 1982);
U.S. CONST. amend. I.

II. Are patently offensive violent video games, which have the effect of debasing and brutalizing human beings, unprotected obscene speech as to minors?

FCC v. Pacifica Found., 438 U.S. 726 (1978);
Miller v. California, 413 U.S. 15 (1973);
Ginsberg v. New York, 390 U.S. 629 (1968);
Interactive Digital Software Ass'n v. St. Louis County, Mo., 329 F.3d 954 (8th Cir. 2003);
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III. Is the Minnesota Restricted Video Games Act narrowly tailored to serve the State's compelling interests in protecting the psychological well-being and moral and ethical development of minors from harmful violent video games?

Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997);
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U.S. CONST. amend. I.

IV. Is the Minnesota Restricted Video Games Act's adoption of the Entertainment Software Rating Board's ("ESRB") rating system an

unconstitutional delegation of legislative authority where the ESRB operates pursuant to clear and ascertainable standards?

Borger v. Bisciglia, 888 F. Supp. 97 (E.D. Wis. 1995);
Motion Picture Ass'n of Am., Inc. v. Specter, 315 F. Supp. 824 (E.D. Pa. 1970);
Engdahl v. City of Kenosha, Wis., 317 F. Supp. 1133 (E.D. Wis. 1970);
U.S. CONST. amend. XIV, §1.

STATEMENT OF THE CASE

On June 6, 2006, Appellees Entertainment Software Association ("ESA") and Entertainment Merchants Association ("EMA") commenced this action against Appellant Mike Hatch, in his official capacity as Attorney General of the State of Minnesota (hereinafter "State of Minnesota" or "State"),[1] in the United States District Court for the District of Minnesota, pursuant to 42 U.S.C. § 1983, alleging that the Minnesota Restricted Video Games Act, Minn. Stat. § 325I.06 (2006),[2] violates the First and Fourteenth Amendments to the U.S. Constitution.

Appellees filed a motion for a temporary restraining order and/or a preliminary injunction on June 13, 2006, to enjoin the law from taking effect as scheduled on August 1, 2006. At the July 11, 2006 hearing on the motion, the

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[1] A suit against a state official acting in his official capacity is the equivalent of a suit against the State itself. *See Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989).

[2] The parties and the district court have heretofore cited the Minnesota Restricted Video Games Act to Minn. Stat. § 325I.07, as it was designated in S.F. 785, 84th Leg., Reg. Sess. (Minn. 2006). However, as enacted, the Act has been designated Minn. Stat. § 325I.06 (2006). *See* 2006 Minn. Laws ch. 246; (Add. 17).

parties agreed that the district court could consider the motion as an application for a permanent injunction. On July 31, 2006, the district court granted a permanent injunction in favor of Appellees, enjoining the effectuation and enforcement of Minn. Stat. § 325I.06 (2006). Appellant State of Minnesota then brought this appeal, timely filing its Notice of Appeal on August 29, 2006.

STATEMENT OF THE FACTS

I. THE GROWTH AND PREVALENCE OF VIDEO GAMES

There has been extraordinary growth in the video game industry in the last several decades. In 2004, Americans spent $7.3 billion on video games.[3] Ninety-two percent of American children ages two to 17 play these games, and the average American child spends nine hours each week playing video games.[4]

II. VIDEO GAME INDUSTRY RATINGS

In response to congressional concerns about the violent content of certain video games, the video game industry formed the Interactive Digital Software Association ("IDSA") in 1994, which became the Entertainment Software

[3] *See* Lorraine M. Buerger, *The Safe Games Illinois Act: Can Curbs on Violent Video Games Survive Constitutional Challenges?*, 37 Loy. U. Chi. L. J. 617, 618 (2006).
[4] *Id.*

Association ("ESA") the following year.[5] In order to stave off government regulation of their industry, the IDSA created the Entertainment Software Rating Board ("ESRB"), which rates video games.[6] Virtually all video game publishers submit their games to the ESRB for rating. (Add. 3). To receive an ESRB rating, game publishers must fill out a detailed questionnaire explaining the content of the game and provide videotaped footage of the game including the most extreme content and an accurate representation of the game as a whole.[7]

The ESRB assigns its ratings based on reviews made by a randomly-selected group of three trained reviewers, whose proposed ratings are then evaluated by consumer focus groups. (Add. 3). The specially trained raters are required to undergo "extensive training" on the rating system before rating games.[8] The raters work independently in reviewing the game footage and recommending the rating and content descriptors.[9] Once the ESRB confirms a consensus of the three or more trained raters, it issues an official rating to the game publisher.[10] Game publishers may challenge any rating with which they disagree. (Add. 3). The FTC

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[5] *See* Nathan Phillips, *Interactive Digital Software Ass'n v. St. Louis County: The First Amendment and Minors' Access to Violent Video Games*, 19 Berkeley Tech. L. J. 585, 593 (2004).
[6] *Id.* at 594.
[7] *See* ESRB, *Frequently Asked Questions*, *at* http://www.esrb.org/ratings/faq.jsp (last visited Oct. 15, 2006).
[8] *Id.*
[9] *Id.*
[10] *Id.*

has determined that the ESRB's video game rating system is the "most comprehensive" of entertainment industry rating systems.[11]

All games reviewed by the ESRB are given one of six possible ratings: EC (Early Childhood), E (Everyone), E+10 (Everyone 10 and Older), T (Teen), M (Mature), or AO (Adults Only). (Add. 3). In addition to the rating, games are assigned content descriptors to indicate content that contributed to the particular rating.[12] An AO rating indicates that the game has content that should be played by persons age 18 or older and may contain prolonged intense violence and/or graphic sexual content and nudity.[13] An M rating indicates that the game has content that may be suitable for persons age 17 or older and may contain intense violence, blood and gore, sexual content and/or strong language.[14]

By way of example, a few of the games that have received M ratings include:

§ *Postal 2: Apocalypse Weekend* (M-rated) -- The ads for this game boast that new weapons will enable you "to hack your enemies to meaty bits!" It involves a game character who commits violent acts against unarmed civilians. Other features in the *Postal* series include:

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[11] *See* FTC, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Gaming Industries* (September 2000), http://www.ftc.gov/reports/violence/vioreport.pdf.

[12] *See* ESRB, *Game Ratings & Descriptor Guide*, *at* http://www.esrb.org/ratings/ratings_guide.jsp (last visited Oct. 15, 2006).

[13] *Id.*

[14] *Id.*

urinating on people to make them vomit in disgust, using cats as shotgun silencers, and playing fetch with dogs using human heads.

§ *The Punisher* (M-rated) -- Game player is able to jam knives into victims' sternums and pull up to increase the damage, cut off heads, ram a character's open mouth onto a curb, run a character over with a forklift, rip a character's arms off with an industrial hook, and set a character on fire in an electric chair.

§ *Resident Evil: 4* (M-rated) -- Game player uses a special blood-splattered chain saw controller designed for playing the game, which includes chainsaw decapitations and impalements, and characters ripping off other character's throats and biting off their heads.

§ *Manhunt* (M-rated) -- Game player's character is James Earl Cash, a convicted serial killer facing execution. The execution is ordered to be faked so that a character named "The Director" can use Cash as a star in a series of snuff films. As the Cash character kills other characters, by suffocating them with a plastic bag, slicing them up with a chainsaw, shooting them point blank with a nail gun, stabbing them in the eyeballs with a glass shard, or beheading them with a cleaver, The Director makes comments such as "You're really getting me off, Cash" and "You're really doing it for me! Why I ain't been this turned on since ...Well, let's not go there." The game has two difficulty settings: fetish and hardcore.

§ *God of War* (M-rated) -- Game features disembowelment, mouth-stabbing, eye-gouging, severed limbs, and human sacrifice.[15]

These are but a few of many comparably revolting and demented M-rated video games currently available to be purchased or rented by Minnesota's children.

[15] These video games were included as exhibits in the record below and have been transmitted by the district court to the clerk of this Court.

III. MINORS' ACCESS TO M-RATED VIDEO GAMES

The ESRB states that it has engaged in a widespread and voluntary effort to educate consumers on its ratings and has encouraged "store-by-store" policies of restricting the sale of M-rated games to persons under age 17.[16] Thus, *some* retailers voluntarily enforce the ESRB ratings system by prohibiting children under age 17 from renting or buying M- and AO-rated games. (Add. 3).

Notwithstanding this voluntary enforcement of the ESRB ratings, minors under age 17 are still able to purchase or rent M-rated games. (Add. 3). In fact, the Federal Trade Commission ("FTC") recently reiterated to Congress its concern over how readily children can buy M-rated video games in stores.[17] In 2004, the FTC reported the results of a mystery shopper survey conducted on its behalf, which found that 69 percent of unaccompanied children ages 13 to 16 were able to purchase M-rated games.[18] In a follow-up survey released earlier this year, while

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[16] *See* ESRB, *Enforcement*, *at* http://www.esrb.org/ratings/enforcement.jsp (last visited Oct. 15, 2006).

[17] *See Violent and Explicit Video Games: Informing Parents and Protecting Children: Hearing Before the House Comm. on Energy and Commerce Subcomm. on Commerce, Trade and Consumer Protection*, 109th Cong. (June 14, 2006) (written statement of the FTC), http://energycommerce.house.gov/108/Hearings/06142006hearing1912/hearing.htm.

[18] *Id*. In another 2004 shopper survey, the National Institute on Media and the Family found that boys as young as age seven were able to purchase M-rated games 50 percent of the time. *See* David Walsh et al., *Ninth Annual MediaWise*
(Footnote Continued on Next Page)

the FTC saw some improvement, they still found that 42 percent of children were able to buy M-rated games.[19]

IV. THE MINNESOTA RESTRICTED VIDEO GAMES ACT

On May 31, 2006, Minnesota Governor Tim Pawlenty signed the Minnesota Restricted Video Games Act, Minn. Stat. § 325I.06 (2006), ("Minnesota Act," or "Act") into law. (Add. 2, 17). The Minnesota Legislature enacted this law to protect the psychological well-being and ethical and moral development of the State's children. In relevant part, the Act provides that "A person under the age of 17 may not knowingly rent or purchase a restricted video game. A person who violates this subdivision is subject to a civil penalty of not more than $25." (Add. 17). The Act defines "restricted video game" to mean a video game rated M or AO by the ESRB. *Id.* The Act also requires retailers selling or renting video games to post a sign advising of the above-referenced prohibition.[20] *Id.* Had the

(Footnote Continued From Previous Page)
Video Game Report Card, National Institute on Media and the Family (Nov. 23, 2004), http://www.mediafamily.org/research/report_vgre_2004.shtml.

[19] *See* written statement of the FTC *supra* note 17.

[20] While the district court found the sign requirement of the Minnesota Act to be unconstitutional, it did so only because it found that the substantive prohibition of the Act was unconstitutional. The district court properly recognized that were it not for the unconstitutionality of the substantive prohibition, the sign requirement, which merely requires a recitation of state law, would otherwise be constitutional. Accordingly, the State does not intend to further address this issue.

district court not enjoined enforcement of the Act, it would have become effective on August 1, 2006. (Add. 2, 17).

SUMMARY OF THE ARGUMENT

Appellees commenced this lawsuit against the State of Minnesota to protect their desire and alleged right to sell children violent and sexually explicit video games -- games that they themselves admit are inappropriate for children and should not be purchased by those under age 17. Not only is the irony of this striking, but Appellees' First Amendment challenge to the Minnesota Restricted Video Games Act is legally flawed.

The Act does not violate the First Amendment because video games, like board games and sports, are pure entertainment that do not convey any ideas or information sufficient to bring them within the protection of the First Amendment; or because violent video games are patently offensive material obscene as to minors, and the Act is rationally related to protecting children from such harmful speech.

Alternatively, assuming that violent video games are fully protected by the First Amendment, as it applies to minors, the Act is constitutional because it is narrowly tailored to serve the State's compelling interests in protecting minors' psychological well-being and moral and ethical development. For purposes of strict scrutiny analysis, the State's interests are sufficiently compelling in this

regard because they are supported by substantial empirical evidence from which the State has reasonably inferred that exposure to violent video games is associated with increased aggression and desensitization in minors.

The district court erred by rejecting the State's evidence of harm for failing to establish a causal link between violent video game exposure and increased aggression and desensitization, because requiring proof of a causal relationship improperly demands scientific certainty of legislation that is unsupported by First Amendment jurisprudence, particularly as it relates to minors. The district court also erred in concluding that the Act is not narrowly tailored because it distinguishes video game violence from other forms of media violence. The Legislature reasonably determined that the increased harm posed by violent video games because of their interactivity warranted a distinction between violent video games and other passive media violence such that the Act is not fatally underinclusive.

The district court also erroneously held that the Act's incorporation of the Entertainment Software Rating Board's ("ESRB") Mature ("M") and Adults Only ("AO") ratings unconstitutionally delegates authority to the ESRB. The ESRB ratings process is clear, comprehensive, and operates pursuant to ascertainable standards. Accordingly, the Act's incorporation of the ESRB's M and AO ratings

provides a reasonable basis for determining which video games are inappropriate for minors to rent or purchase on their own.

STANDARD OF REVIEW

While this Court generally reviews a district court's grant of a permanent injunction for abuse of discretion, where, as in this case, the determinative question is purely legal, this Court's review is *de novo*. *See Qwest Corp. v. Scott*, 380 F.3d 367, 370 (8th Cir. 2004). In particular, this Court reviews *de novo* the constitutionality of a statute under the First Amendment. *See Ways v. City of Lincoln, Neb.*, 274 F.3d 514, 518 (8th Cir. 2001); *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 461 (8th Cir. 1999).

ARGUMENT

I. THE VIDEO GAMES RESTRICTED BY THE MINNESOTA ACT ARE NOT EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

In *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, one panel of this Court concluded that video games are protected forms of expression under the First Amendment. 329 F.3d 954, 957-58 (8th Cir. 2003). The State respectfully disagrees and, for the reasons that follow, asks this Court to reconsider the issue and hold that video games are a form of entertainment that, like other games, are not entitled to First Amendment protection.

Appellees, as the parties seeking the protection of the First Amendment, have the burden of demonstrating that the First Amendment even applies to the

allegedly expressive conduct at issue, and there is no presumption that all conduct is expressive. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). In fact, the First Amendment does not protect everything that is expressive. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 376 (1968) (First Amendment does not protect burning of draft card). It is undisputed that the First Amendment protects some forms of entertainment, in addition to political and ideological speech. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981). For example, "motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works," are protected by the First Amendment. *Id.* However, the First Amendment does not protect all forms of entertainment. Rather, "[e]ach medium of expression … must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

In particular, the First Amendment does not, as a general matter, protect games. *See There to Care, Inc. v. Comm'r of Ind. Dep't of Revenue*, 19 F.3d 1165, 1167 (7th Cir. 1994) (bingo is not "speech" protected by the First Amendment). More specifically, numerous courts have concluded that the First Amendment does not protect video games. For example, the federal court in *America's Best Family Showplace Corp. v. City of New York*, flatly rejected the argument that video

games are protected by the First Amendment because they depict visual and audio presentations on a screen involving a fantasy experience similar to a motion picture. 536 F. Supp. 170, 173 (E.D.N.Y. 1982). The court reasoned that:

> [I]t seems clear that before entertainment is accorded First Amendment protection there must be some element of information or some idea being communicated.
>
> . . .
>
> In no sense can it be said that video games are meant to inform. Rather, a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element. That some of these games 'talk' to the participant, play music, or have written instructions does not provide the missing element of 'information.'

Id. at 173-74 (internal citations omitted). Other state and federal courts have reached the same conclusion. *See, e.g., Malden Amusement Co. v. City of Malden*, 582 F. Supp. 297, 299 (D. Mass. 1983) (same); *Kaye v. Planning and Zoning Comm'n, City of Westport*, 472 A.2d 809, 812 (Conn. 1983) (same); *Caswell v. Licensing Comm'n for Brockton*, 444 N.E.2d 922, 925-27 (Mass. 1983) (same); *People v. Walker*, 354 N.W.2d 312, 316 (Mich. Ct. App. 1984) (same); *Tommy and Tina Inc. v. Dep't of Consumer Affairs of New York*, 459 N.Y.S.2d 220, 226-27 (N.Y. Sup. Ct. 1983) (same).

The federal district court in *Interactive Digital Software Ass'n v. St. Louis County, Mo.* relied on this same reasoning in correctly concluding that video games are not protected speech. 200 F. Supp.2d 1126 (E.D. Mo. 2002). In a

thorough and well-reasoned consideration of this issue and the games before the court, the district court concluded that:

- § A new medium like video games needs to at least communicate some ideas and there must be a likelihood that others will understand that there has been some type of expression. *Id.* at 1132-33.

- § The fact that some video games play music, have written instructions, or audibly "talk" to the player does not alone provide the missing element of information. *Id.* at 1133.

- § The mere technological advancements over pinball and other games reflected in video games do not accord them First Amendment protection. *Id.*

- § The video games did not convey ideas, expression or anything else that could possibly amount to speech and have more in common with board games and sports than motion pictures. *Id.* at 1134.

- § The transformation of a game (*e.g.,* baseball) to a video form does not magically make the video game speech; rather it remains a game that does not express ideas or information unrelated to the game itself. *Id.*

- § Violent video games do not have any more expressive elements just because they are violent -- "'violence' does not automatically create expression." *Id.* at 1134-35.

- § Just because video games include "creative" scripts and backgrounds does not mean they convey protected speech. Every new product on the market came from a creative concept. *Id.* [21]

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[21] *See also See* Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games*, 57 SMU L. Rev. 139, 157 (2004) (noting that if First Amendment protection were based on mere artistic creativity, it would protect such things as color schemes, clothing and landscape designs, and furniture arrangements).

In rejecting the district court's conclusion that video games are not protected speech, the panel of this Court first concluded that "if the First Amendment is versatile enough to shield 'the painting of Jackson Pollock, the music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,'" it must also extend to video games. *Interactive Digital Software Ass'n*, 329 F.3d at 957. This is simply a conclusion devoid of any analysis, which ignores the Supreme Court's teaching that "[e]ach medium of expression … must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd.*, 420 U.S. at 557. The panel stated that video games contain stories, imagery, themes and messages like books and movies, but did not explain how these games differ from other types of games or expression that are not protected speech. *See Interactive Digital Software Ass'n*, 329 F.3d at 957.

The panel also concluded that video games are not unprotected just because they are interactive. *Id.* This reasoning is flawed. Video games are not unprotected simply because they are interactive. While the interactive nature of these games certainly makes them more harmful, as discussed in Argument III.B. *infra*, this feature does not appreciably affect the issue of whether these games communicate information like other protected speech, or are, in fact, merely games like board games, pinball, and arcade games that contain so-called plots and

backgrounds, which are merely incidental to the principal game-playing function of the games.

As the district court correctly concluded in *Interactive Digital Software Ass'n*, video games are much more like board games, pinball, and arcade games than books or movies, the latter of which convey information or ideas. The so-called creative story lines and audio and visual background graphics in these video games merely provide an incidental back-drop to what is, in the final analysis, merely a game. *See, e.g., Caswell*, 444 N.E.2d at 927 ("it appears that any communication or expression of ideas that occurs during the playing of a video game is purely inconsequential"). In fact, these story lines and visual and audio backgrounds have no purpose or value other than to facilitate the video game's violent "game" functions -- namely, interactive shooting, kicking, punching, stabbing, strangling, torturing, and raping. As one legal commentator aptly explained, a ban on children shooting at a target range would surely not raise any First Amendment problems.[22] The same should, therefore, hold true with respect to a ban on the same type of violent activity by children while sitting in their homes playing video games.[23]

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[22] *See* Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 L. Rev. Mich. St. U. Det. C.L. 51, 105 (2003).
[23] *Id*.

Another legal commentator points out that before recognizing new categories of protected entertainment speech, such as video games, courts should scrutinize the value of that speech in comparison to the type of political speech which the First Amendment protects the most staunchly.[24] He concludes that the First Amendment should not be extended and applied to mere games lest the Court dilute the protection of this important right and stifle valuable speech amid low-value speech.[25]

II. VIOLENT VIDEO GAMES ARE UNPROTECTED OBSCENE SPEECH AS TO MINORS.

The panel of this Court in *Interactive Digital Software Ass'n* also concluded that violent video games cannot be considered obscene, because the legal definition of obscenity for purposes of First Amendment analysis has no application outside the context of sexually explicit material. 329 F.3d at 958. In so concluding, the panel relied on the prior observation of another panel of this

[24] *See* Garry, 57 SMU L. Rev. at 160-61.

[25] *Id.* This approach has support from the Supreme Court's cases concerning unprotected obscene speech. For example, in *Miller v. California*, the Court noted that:

> to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free speech and free press….'

413 U.S. 15, 34 (1973) (quoting *Breard v. Alexandria*, 341 U.S. 622, 645 (1951)).

Court in *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992), that "'[m]aterial that contains violence but not depictions or descriptions of sexual conduct cannot be obscene.'" *Id*. Again, the State respectfully disagrees with the panels' conclusion and, for the reasons that follow, asks this Court to reconsider this issue and hold that violent video games are unprotected obscene speech as to minors.

It is well-settled that the First Amendment does not protect certain classes of speech, including speech that is regarded as obscene. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). This is because obscenity, like other classes of unprotected speech, is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Id*. at 572. *See also Roth v. United States*, 354 U.S. 476, 484 (1957) ("implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance").

It is equally well established that material that is not obscene to adults can be obscene to children. The Supreme Court made this clear in *Ginsberg v. New York*, 390 U.S. 629, 633-34 (1968), in which adopted the concept of variable obscenity and held that there is no First Amendment protection for material that "is patently offensive to prevailing standards in the adult community as a whole with regard to

what is suitable material for minors."[26] The Supreme Court subsequently relied on *Ginsberg* to uphold the power of the government to regulate broadcast material that was merely indecent, though not necessarily obscene, given the ease with which children could obtain access to it, in *FCC v. Pacifica Found.*, 438 U.S. 726, 749-51 (1978). The Court found that although not entirely outside the protection of the First Amendment, "patently offensive" words relating to sex and excretion "offend for the same reasons that obscenity offends," and have the "effect of debasing and brutalizing human beings." *Id.* at 745-46. The Court's decisions in *Ginsberg* and *Pacifica* thus establish that the State has the power to protect children from "patently offensive" material that is not obscene as to adults.

The State recognizes that the Supreme Court has thus far only applied the legal definition of obscenity to works depicting or describing sexual conduct or expression that is significantly erotic. *Miller v. California*, 413 U.S. 15, 24 (1973); *Cohen v. California*, 403 U.S. 15, 20 (1971). However, the Supreme Court has never ruled that violent material cannot be unprotected obscene speech. *See Winters v. New York*, 333 U.S. 507 (1948) (invalidating a law restricting violent

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[26]In reaching this conclusion, the Court reasoned that the state's power to adjust the definition of obscenity with respect to minors was clear because the Court has "recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults,'" *Id*. at 638 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)); and "[t]he well-being of its children is of course a subject within the State's constitutional power to regulate," *Ginsberg*, 390 U.S. at 639.

publications as vague but warning against taking its ruling as a conclusion that a properly drawn statute could not stand up to constitutional scrutiny).

Moreover, the rationale for not extending First Amendment protection to obscenity as it relates to sexually explicit material applies with equal force to graphically violent video games. In particular, such graphic violence, like sexually explicit material, can be said to be "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572. It may also be "patently offensive," with the "effect of debasing and brutalizing human beings." *Pacifica*, 438 U.S. at 745-46. It is noteworthy that the Supreme Court in *Miller* recognized that limiting obscenity to material dealing with sex "does not reflect the precise meaning of 'obscene' as traditionally used in the English language." 413 U.S. at 18 n.2. The Court noted that "obscene" has been variously defined as "disgusting to the senses," "grossly repugnant to the generally accepted notions of what is appropriate," "offensive or revolting as countering or violating some ideal or principle," and "offensive to the senses, or to taste or refinement, disgusting, repulsive, filthy, foul, abominable, loathsome." *Id.* Thus, adhering to the

traditional definition of obscenity would surely allow for graphically violent video games to be deemed obscene, at least with respect to minors.[27]

In *Interactive Digital Software Ass'n*, the panel rejected the county's argument that violent video games are obscene as to minors by simply concluding that material that does not depict or describe sexual conduct cannot be obscene, because prior cases have not recognized that non-sexual expression can be obscene. 329 F.3d at 958. The Court did not consider or explain *why* violent material cannot be every bit as offensive to minors as sexual material.[28] Certainly, violent video games can be just as or more offensive to minors than speech that is sexually explicit. Compare, for example, the offensiveness or harm likely

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[27] As one commentator notes, it is not the focus on sex that makes a depiction obscene. Rather, it is the treatment of human beings in a dehumanizing way. The ordinary meaning of the word "obscene" and the policy reasons for restricting such material can apply with equal weight to violent material. *See* Gregory K. Laughlin, *Playing Games with the First Amendment: Are Video Games Speech and May Minors' Access to Graphically Violent Video Games Be Restricted?*, 40 U. Rich. L. Rev. 481, 527-31 (2006).

[28] Judge Posner's similar analysis of this issue in *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) has been widely attacked. *See* Saunders, 2003 L. Rev. Mich. St. U. Det. C.L. at 91-92 (arguing that Judge Posner, whether he does or does not personally find violent depictions offensive, may have failed to recognize the degree to which the public does find such images offensive."); Laughlin, 40 U. Rich. L. Rev. at 537 (arguing that Judge Posner's opinion does not adequately recognize that the well-being of children may be impaired by expression that is not sexually explicit); Phillips, 19 Berkeley Tech. L. J. at 601 (Judge Posner's decision is inconsistent with the principles in *Ginsberg*). Interestingly, even Judge Posner acknowledged in *Kendrick* that some violent material may indeed be obscene. 244 F.3d at 575. He just did not find the specific games in the record before him sufficiently revolting. *Id*.

generated by a 'girlie' magazine photo or George Carlin's "Seven Filthy Words" comic routine[29] with that generated by video games that depict, for example, the bloody slaughter of humans and animals, urination and defecation, rape, decapitation, mutilation, and disembowelment. While such material is certainly "patently offensive" and has the "effect of debasing and brutalizing human beings" even under a standard applicable to adults, it is unquestionably obscene as applied to children.

The Minnesota Act only restricts rentals or purchases of video games by minors, and the State is able to restrict speech that is offensive as to minors that might not be offensive to adults.[30] Because the violent video games restricted under the Minnesota Act are obscene as to minors, the State need only act rationally in restricting such violent games. *See Ginsberg*, 390 U.S. at 641 (states may restrict children's access to material that is deemed obscene as to minors if it is rational for the legislature to find that exposure to the material is harmful to minors). The Minnesota Act necessarily satisfies *Ginsberg*'s rational basis test because, as set forth below, it also satisfies the heightened burden imposed by strict scrutiny.

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[29] Those were the subjects of the offensive speech at issue in *Ginsberg* and *Pacifica*, respectively. *See Ginsberg*, 390 U.S. at 634; *Pacifica*, 438 U.S. at 729.
[30] *See* Phillips, 19 Berkeley Tech. L. J. at 588 (*Ginsberg* and its progeny make clear that minors' access to violent video games can be regulated even though the same games can be viewed by adults).

III. THE MINNESOTA ACT MUST SURVIVE STRICT SCRUTINY BECAUSE IT IS NARROWLY TAILORED TO SERVE THE STATE'S COMPELLING INTERESTS IN PROTECTING THE PSYCHOLOGICAL WELL-BEING AND MORAL AND ETHICAL DEVELOPMENT OF MINORS FROM HARMFUL VIOLENT VIDEO GAMES.

Assuming for purposes of this argument that violent video games are protected speech, the State may nonetheless constitutionally restrict minors' access to such speech if the restriction satisfies strict scrutiny. *See Interactive Digital Software Ass'n*, 329 F.3d at 958. To satisfy strict scrutiny, the State must demonstrate that the Act "is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end." *Id.*

In applying strict scrutiny to a restriction on minors' access to speech, it is imperative that this Court consider the different constitutional standards that apply with respect to minors in light of their vulnerability and special developing status. The district court failed to recognize this distinction. The Supreme Court has developed a dichotomy between the First Amendment rights accorded to adults and minors in recognition of "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979). Specifically with respect to children's First Amendment rights, the Court has noted that:

> [A]t least in some precisely delineated areas, a child – like someone in a captive audience – is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such premise, I should suppose, that a State may deprive children of other rights – the right to marry, for example, or the right to vote – deprivations that would be constitutionally intolerable for adults.

Id. at 635 n. 13 (quoting *Ginsberg*, 390 U.S. at 649-50 (Stewart, J., concurring in result)).

Accordingly, "[t]he First Amendment rights of minors are not 'co-extensive with those of adults.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.11 (1975) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring)). While minors are entitled to a significant measure of First Amendment protection, it is well-settled that the State can adopt more stringent controls on materials available to minors than on those available to adults. *Erznoznik*, 422 U.S. at 212.

Bearing in mind the more limited First Amendment rights of minors, the Minnesota Act must survive First Amendment strict scrutiny because it is narrowly tailored to serve the State's compelling interests in protecting the psychological well-being of minors and fostering their ethical and moral development.

A. The State's Interests in Protecting the Psychological Well-Being and Moral and Ethical Development of Minors are Compelling.

It is unquestioned that the State has a compelling interest in "safeguarding the psychological well-being of minors." *Interactive Digital Software Ass'n*, 329

F.3d at 958 (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). The Supreme Court has recognized that this interest "extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable*, 492 U.S. at 126 (citing *Ginsberg*, 390 U.S. at 639-40 and *New York v. Ferber*, 458 U.S. 747, 756-57 (1982)). In *New York v. Ferber*, the Court explained that "it is evident beyond the need for elaboration" that the State's interest in safeguarding minors' physical and psychological well-being is a compelling interest and, accordingly, the Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." 458 U.S. at 756-57.

The State's independent compelling interest in the ethical and moral development of its children is equally well-recognized. *See Ginsberg*, 390 U.S. at 640-41 (recognizing the State's independent interest in protecting the welfare of children and safeguarding them from harm that may prevent their growth into independent and well-developed citizens); *Prince*, 321 U.S. at 442 ("It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.").

The Minnesota Act, in furtherance of these interests, restricts minors' access to violent video games that are harmful to minors' psychological well-being and

moral and ethical development. In this regard, the State's interests are actually compelling because the harm to minors from exposure to violent video games is real, based on substantial supporting empirical evidence of harm. *See Interactive Digital Software Ass'n*, 329 F.3d at 958-59 (for interest to be more than "compelling in the abstract," the government show that the recited harms are "real, not merely conjectural," based on "'substantial supporting evidence' of harm") (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664, 666 (1994) ("*Turner I*")).

1. To Demonstrate That Its Interests Are Compelling, the State Need Only Show That There is Substantial Empirical Evidence From Which the State May Reasonably Infer That Violent Video Games Are Harmful to Minors.

In *Interactive Digital Software Ass'n*, the Eighth Circuit panel recognized that the State may, under strict scrutiny analysis, constitutionally restrict protected speech upon a showing of "'substantial supporting evidence' of harm." 329 F.3d at 959 (citing *Turner I*, 512 U.S. at 666 (1994). To satisfy this "substantial evidence" standard, the State may not rely solely on "anecdote and supposition," but must come forward with empirical support for its belief that the speech at issue is harmful to minors. *Id*. While the State must provide substantial empirical evidence of harm, such evidence need not establish the harm with scientific certainty. *See Ginsberg*, 390 U.S. at 642-43 ("We do not demand of legislatures scientifically certain criteria of legislation."). Rather, in reviewing the

constitutionality of a statute under this substantial evidence standard, a court's "sole obligation is 'to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence.'" *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("*Turner II*") (citing *Turner I*, 512 U.S. at 666). "Even in the realm of First Amendment questions where [the legislature] must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end …." *Turner II*, 520 U.S. at 196.

The district court determined that despite the fact that in *Interactive Digital Software Ass'n*, the Eighth Circuit adopted *Turner's* "substantial supporting evidence of harm" standard for purposes of strict scrutiny analysis, the State's reliance on *Turner's* definition of that standard -- "reasonable inferences based on substantial evidence" -- is misplaced because *Turner* involved an intermediate scrutiny analysis. (Add. 5-6). This conclusion misapprehends the relevant inquiry. It is not the meaning of the substantial evidence standard that is at issue -- that standard is "reasonable inferences based on substantial evidence" – even for strict scrutiny analysis of a violent video game restriction. *See, e.g., Video Software Dealers Ass'n v. Maleng*, 325 F. Supp.2d 1180, 1187 (W.D. Wash. 2004) (employing *Turner's* reasonable inferences from substantial evidence standard in strict scrutiny analysis of a violent video game restriction); *Entm't Software Ass'n*

v. Blagojevich, 404 F. Supp.2d 1051, 1072 (N.D. Ill. 2005) (same); *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp.2d 1034, 1046 (N.D. Cal. 2005) (same). Rather, the issue is the nature and quantum of empirical evidence that is required in order to be "substantial supporting evidence of harm" in the context of this strict scrutiny case.

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 144 (2003) (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000)). It is neither novel nor implausible for the State to restrict minors' access to materials that are reasonably believed to be harmful to them. *See, e.g., Pacifica*, 438 U.S. at 749-50; *Ginsberg*, 390 U.S. at 641-43. Accordingly, the Supreme Court has never required scientifically certain proof of harm in order to uphold restrictions on minors' access to such materials.[31] *See Id*. Under established principles concerning the First Amendment rights of minors, the Legislature is not required to establish a causal link between exposure to violent video games and

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[31] As a practical matter, legislatures would be effectively unable to regulate if scientific proof of causation were required to pass laws where the legislature sought to prevent harm. Such an absurd result would be contrary to the "fundamental principle of legislation" that legislatures are "under no obligation to wait until the entire harm occurs but may act to prevent it." *Turner II*, 520 U.S. at 212.

harm to minors, as such a requirement would improperly impose upon the Legislature the need to establish harm with scientific certainty. *See Ginsberg*, 390 U.S. at 642-43. Thus, the district court's holding to the contrary was in error.[32]

2. The Minnesota Act is Based on Substantial Empirical Evidence From Which the State Has Reasonably Inferred That Violent Video Games Are Harmful to the Psychological Well-Being and Moral and Ethical Development of Minors.

In *Interactive Digital Software Ass'n*, the Eighth Circuit panel concluded that the violent video game restriction in that case was not supported by substantial evidence of harm:

> The County's conclusion that there is a strong likelihood that minors who play violent video games will suffer deleterious effect on their psychological health is simply unsupported in the record. It is true that a psychologist appearing on behalf of the County stated that a recent study that he conducted indicates that playing violent video games 'does in fact lead to aggressive behavior in the immediate situation … that more aggressive thoughts are reported and there is frequently more aggressive behavior.' But this vague generality falls far short of a showing that video games are psychologically deleterious. The County's remaining evidence included the conclusory comments of county council members; a small number of ambiguous, inconclusive, or irrelevant (conducted on adults, not minors) studies; and the testimony of a high school principal who

[32] Quoting *Interactive Digital Software Ass'n*, 329 F.3d at 959, the district court concluded that the State is required to "provide substantial, actual 'empirical support for its belief that 'violent' video games *cause* psychological harm to minors.'" (Add. 6) (emphasis added). To the extent that the panel in *Interactive Digital Software Ass'n* imposed a requirement of a scientifically certain causal link, it too improperly imposed a burden that is inconsistent with the Supreme Court's First Amendment jurisprudence as it relates to minors.

> admittedly had no information regarding any link between violent video games and psychological harm.

329 F.3d at 958-59.

More specifically, the empirical evidence before the Eighth Circuit was apparently limited to Dr. Craig Anderson's testimony concerning a study he conducted with Dr. Brad Bushman in which they found that playing violent video games led to increases in aggressive behavior and thoughts and decreases in pro-social behavior.[33] *See Interactive Digital Software Ass'n*, 200 F. Supp.2d at 1137. Dr. Anderson also testified about media violence research generally, the concerns specific to interactive video games, and the research of a Lt. Colonel Dave Grossman on the subject of violent video games. *Id*.

While the panel in *Interactive Digital Software Ass'n* found that this admittedly very limited amount of evidence in the record before it was insufficient to constitute substantial evidence of psychological harm, in the three years since that decision, the body of empirical social scientific research has grown considerably, and now provides more than substantial evidence from which the

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[33] It appears that the study referred to is Craig A. Anderson & Brad J. Bushman, *Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Physiological Arousal, and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature*, 12 Psychol. Sci. 353 (2001) (App. 179).

Minnesota Legislature could reasonably have inferred that exposure to violent video games is harmful to minors' psychological well-being.

In 2004, Dr. Anderson published an updated meta-analysis of empirical studies that included data testing a potential link between violent video game exposure and one of five outcome variables: aggressive behavior, aggressive cognition, aggressive affect, helping behavior, and physiological arousal. *See* Craig A. Anderson, *An Update on the Effects of Playing Violent Video Games*, 27 J. Adolescence 113, 115 (2004) (App. 1). Dr. Anderson's analysis of 44 existing studies showed that there was a significant effect on each of the outcome variables from exposure to violent video games, specifically, that "[p]laying violent video games was associated with increases in aggressive behaviour, aggressive cognition, aggressive affect, and physiological arousal, and with decreases in helping behaviour." *Id*. at 118; (App. 6, 11-13). Moreover, when Dr. Anderson limited the studies to those with the methodologically best samples, the average effect sizes were greater than those found in methodologically weaker samples, particularly with respect to aggressive behavior[34] and aggressive affect. *Id*. at 118-19; (App. 6-7). From this meta-analysis, Dr. Anderson made three important findings:

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[34] With respect to aggressive behavior, Dr. Anderson found that the best estimate of the effect size from exposure to violent video games is "larger than the effect of condom use on decreased HIV risk, the effect of exposure to passive smoke at
(Footnote Continued on Next Page)

> First, as more studies of violent video games have been conducted, the significance of violent video game effects on key aggression and helping-related variables has become clearer. Second, the claim (or worry) that poor methodological characteristics of some studies has led to a false, inflated conclusion about violent video game effects is simply wrong. Third, video game studies with better methods typically yield bigger effects, suggesting that heightened concern about deleterious effects of exposure to violent video games is warranted.

Id. at 120; (App. 8).

Dr. Anderson's updated meta-analysis provides much stronger support for the findings that exposure to violent video games is linked to increased aggression than did his original meta-analysis that was before the Eighth Circuit. Specifically, the updated meta-analysis, although it tested the same outcome variables, included a number of additional studies and employed a best practices approach, which differentiated methodologically best samples from methodologically weaker samples that were not differentiated in the original meta-analysis. *See Id*. at 119; (App. 7).

The district court found Dr. Anderson's updated meta-analysis insufficient to demonstrate a causal link between exposure to violent video games and increased aggression in minors. (Add. 6). Apart from improperly imposing a standard of scientific certainty, the district court's criticisms of the study are

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work and lung cancer, and the effect of calcium intake on bone mass." *Id*. at 120; (App. 8).

unwarranted. First, the district court states that "The article, itself, reports that the body of violent video game literature is not sufficiently large to conduct a detailed meta-analysis of a specific feature." *Id*. What the article actually reports in the cited context, is that with respect to the meta-analytic methodology:

> If the research literature being reviewed is sufficiently large, then specific methodological weaknesses [of the existing studies] can be coded and statistically analysed as well. The violent video game literature was not sufficiently large for Anderson and Bushman (2001) to conduct such a detailed meta-analyses of specific methodological features, and this is still the case. … However, one can create a list of important methodological weaknesses, categorize each study according to whether or not it has at least one such shortcoming, and then examine the average effect size of the "best" studies to see whether they tend to yield larger or smaller effects than do "all" studies.

Anderson, 27 J. Adolescence at 114-15; (App. 2-3). Dr. Anderson employed such a "best" practice approach, taking into account "[t]he most common methodological complaints highlighted by the video game industry and associated critics," and found that the effect sizes were greater in studies with the methodologically best samples.[35] *Id*. at 115, 119; (App. 3, 7).

Second, the district court quotes the article for the proposition that "'[t]here still is not a large enough body of samples in this domain for truly sensitive tests of

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[35] Dr. Anderson further states that "these results suggest that effect size estimates that include methodologically weaker studies [his original meta-analysis, for example] underestimate the true effect sizes of exposure to violent video games. There is no evidence that the weak studies produce artifactually large effects in this research domain." Anderson, 27 J. Adolescence at 119; (App. 7).

potential age differences in susceptibility to violent video games effects.'" (Add. 6). However, Dr. Anderson went on to state that, with respect to age, "preliminary analyses of the present data suggest no strong differences in effect size." Anderson, 27 J. Adolescence at 117; (App. 5).

Third, the district court points out that Dr. Anderson has recognized "the lack of longitudinal studies as a 'glaring empirical gap' in video game research." (Add. 6). That gap, however, does not diminish the results of the numerous experimental and correlational studies that have shown a link between violent video game exposure and psychological harm to minors.[36] Moreover, as Dr. Anderson notes, longitudinal studies of media violence generally have consistently linked exposure to media violence to increased aggression, and it "[i]s a mistake to dismiss existing longitudinal studies of media violence effects, of course, because they are highly relevant to understanding and predicting the effects of repeated exposure to violent video games." Anderson, 27 J. Adolescence at 121; (App. 9). In short, the district court failed to recognize that "the 'perfect' study doesn't exist in any domain of science, including video game research." *Id.*

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[36] In fact, Dr. Anderson concluded that the correlational studies reveal a significant link between exposure to violent video games and increased aggression and the *experimental studies reveal that the link is causal*. Anderson, 27 J. Adolescence at 113; (App. 1) (emphasis added). Moreover, "there is little evidence of consistent differences in effect sizes of experimental versus correlational samples. *Id.* at 119; (App. 7).

at 115; (App. 3). The absence of such a "perfect study" does not, however, preclude state regulation of minors' access to violent video games.

Specifically with respect to video games, Dr. Anderson's significant meta-analysis adds to the already established consensus of the public health community concerning the effect of entertainment violence on children.[37] In 2000, six preeminent medical and public health organizations[38] noted that "well over 1000 studies … point overwhelmingly to a causal connection between media violence and aggressive behavior in some children," and that although less research had been done on the impact of violent video games and other interactive media, "preliminary studies indicate that the negative impact may be significantly *more severe* than that wrought by television, movies or music." Am. Acad. of Pediatrics et al., Joint Statement on the Impact of Entertainment Violence on Children, Congressional Public Health Summit (2000) (emphasis added) (App. 44).

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[37] The effect of exposure to media violence generally has been the subject of social scientific research for decades. *See* Kevin W. Saunders, *The Cost of Errors in the Debate Over Media Harm to Children*, 3 Mich. St. L. Rev. 771, 772-73 (2005) ("[t]here seems no longer to be any real debate on the issue in the scientific community, and there is a consensus view that there is a connection between media violence and aggression in the real world"). As Dr. Anderson suggests, this large body of research supporting the consensus on the relationship between media violence and harm to minors generally is an appropriate consideration in addressing the effect of violent video games.

[38] The six organizations are the American Medical Association, the American Academy of Pediatrics, the American Psychological Association, the American Psychiatric Association, the American Academy of Family Physicians, and the American Academy of Child & Adolescent Psychiatry.

Moreover, based on a substantial body of research demonstrating the negative effect of media violence generally, and interactive video games in particular, on children's psychological health, the American Psychological Association adopted a resolution in 2005, resolving, among other things, to "advocate for the reduction of all violence in videogames and interactive media marketed to children and youth." Am. Psychol. Ass'n, Resolution on Violence in Video Games and Interactive Media (August 17, 2005) (App. 46).

Recent research has in fact demonstrated a significant negative impact on the psychological well-being of minors from media violence, including violent video games. In particular, a number of new studies utilizing minor participants have been published since the Eighth Circuit's decision in *Interactive Digital Software*, including:[39]

- Douglas A. Gentile et al., *The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance*, 27 J. Adolescence 5 (2004) (App. 51). This study of 600 eighth and ninth-grade students found that those with more exposure to video game violence were more hostile, were more likely to engage in aggressive behaviors such as physical fights and arguments with teachers, and performed more poorly in school.

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[39] The State relies primarily on studies involving minor participants in light of the Eighth Circuit's pronouncement in *Interactive Digital Software Ass'n*, that it considers studies conducted on adults to be "irrelevant" to establishing a link between violent video game exposure and psychological harm to children. 329 F.3d at 959.

- William G. Kronenberger et al., *Media Violence Exposure in Aggressive and Control Adolescents: Differences in Self- and Parent-Reported Exposure to Violence on Television and in Video Games*, 31 Aggressive Behav. 201 (2005) (App. 69). This study of 54 adolescents aged 13-17 found a relationship between violent television and video game exposure and Disruptive Behavior Disorder in adolescents. The researchers summarized that their results "support prior findings of an association between media violence exposure and serious aggressive behavior, suggesting that both video game and television media violence exposure are independently related to aggression in adolescents and that this relationship is not explained by gender, IQ or age." *Id*. at 214; (App. 82).

- William G. Kronenberger et al., *Media Violence Exposure and Executive Functioning in Aggressive and Control Adolescents*, 61 J. Clinical Psychol. 725 (2005) (App. 85). This study of 54 adolescents aged 13-17 found a relationship between higher exposure to media violence and weaknesses in executive functioning[40] in both control and aggressive adolescents.

- Vincent P. Mathews et al., *Media Violence Exposure and Frontal Lobe Activation Measured by Functional Magnetic Resonance Imaging in Aggressive and Nonaggressive Adolescents*, 29 J. Comput. Assist. Tomogr. 287 (2005) (App. 98). This study of 71 adolescents aged 13 to 17, which used functional magnetic resonance imaging (fMRI) to investigate the association between exposure to media violence and brain activation in aggressive and nonaggressive adolescents, found that "media violence exposure may have an influence on brain functioning[41] whether or not trait aggression is present." *Id*. at 291; (App. 102).

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[40] The researchers explain that "executive functioning" is a neuropsychological process involving the ability of an individual to "inhibit, regulate, direct, plan, and execute behavior," and note that, therefore, "failure or deficit in the executive functioning is likely to underlie impulsive, poorly planned, aggressive behavior." *Id*. at 726; (App. 86).

[41] Specifically, the fMRI brain images showed decreased activity in the frontal cortex, which has been linked to poorer attention and self-control. *See* Press
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- John P. Murray et al., *Children's Brain Activations While Viewing Televised Violence Revealed by fMRI*, 8 Media Psychol. 25 (2006) (App. 106). This study used fMRI to measure the brain activity of eight children aged 9-13 while they viewed televised nonviolent and violent video sequences. The study found that "TV violence viewing transiently recruits a network of brain regions involved in the regulation of emotion, arousal and attention, episodic memory encoding and retrieval, and motor programming." *Id.* at 26; (App. 107). The study suggests that this brain activation pattern may explain prior findings that children frequently exposed to media violence are more likely to engage in aggressive behavior, because "[s]uch extensive viewing may result in a large number of aggressive scripts stored in the long-term memory in the posterior cingulate, which facilitates rapid recall of aggressive scenes that serve as a guide for overt social behavior." *Id.*

Dr. Anderson's meta-analysis, the unanimous consensus of the public health community, and the above additional studies constitute substantial empirical evidence from which the State could reasonably determine that violent video games are psychologically harmful to minors.

The consensus of the public health community and recent scholarship also provide substantial empirical evidence from which the State could reasonably determine that violent video games are harmful to minors' moral and ethical development. In their 2000 Joint Statement to Congress, the medical and public health organizations recognized that "prolonged viewing of media violence can

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Release, Indiana University School of Medicine, Media Violence Linked to Concentration, Self-Control (June 9, 2005) (App. 104).

lead to emotional desensitization toward violence in real life." (App. 44). Recent social scientific studies support that, specifically with respect to video games, desensitization to violence may occur. For example, a study employing a sample of fourth and fifth-grade students found that violent video game exposure is associated with "lower empathy and stronger proviolence attitudes." Jeanne B. Funk et al., *Violence Exposure in Real-Life, Video Games, Television, Movies, and the Internet: Is There Desensitization?*, 27 J. Adolescence 23, 33 (2004) (App. 121). The researchers state that:

> This finding provides further support for concern about children's exposure to video game violence, particularly if granted that lower empathy and stronger proviolence attitudes indicate desensitization to violence. In violent video games empathy is not adaptive, moral evaluation is often non-existent, but proviolence attitudes and behaviors are repeatedly rewarded. Even if children with pre-existing lower empathy and stronger proviolence attitudes are simply drawn to violent video games, this exposure is unlikely to improve empathy or decrease proviolence attitudes.

Id. at 33-34; (App. 131-32).[42] Similarly, a recent study of 231 eighth-grade students found that acceptance of physical aggression as normative increased with exposure to violent video games. *See* Barbara Krahé & Ingrid Möller, *Playing*

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[42] Findings from a study of 66 children age five to twelve published a year earlier also suggested that long-term violent video game exposure "may be associated with lower empathy in some children, a possible indication of desensitization." *See* Jeanne B. Funk et al., *Playing Violent Video Games, Desensitization, and Moral Evaluation in Children*, 24 Applied Developmental Psychol. 413, 432 (2003) (App. 138).

Violent Electronic Games, Hostile Attributional Style, and Aggression-Related Norms in German Adolescents, 27 J. Adolescence 53 (2004) (App. 162).

Apart from the psychological harm associated with exposure to violent video games, these findings concerning desensitization to violence provide substantial empirical evidence from which the State has reasonably inferred that violent video games are harmful to minors' ethical and moral development.[43]

The district court in this case, and other federal district courts that have recently considered this issue, have rejected the government's reliance on this growing body of social scientific evidence, concluding that the studies fail to establish a causal link between exposure to violent video games and harm to minors' psychological well-being or ethical and moral development. *See, e.g., Schwarzenegger*, 401 F. Supp.2d at 1046; *Blagojevich*, 404 F. Supp.2d at 1074;

[43] The State's compelling interest in this regard has been addressed at length by at least one legal commentator. *See* Laughlin, 40 U. Rich. L. Rev. 481 (2006). Professor Laughlin notes that "psychological harm is not the same as impairment to ethical or moral development," in that a person may be psychologically healthy and still be unethical or immoral according to society's ethical and moral standards. *Id*. at 534. Furthermore, "even though playing violent video games may not create a pathology resulting in future psychological problems and possibly even violent acts towards others, it may nonetheless cause one to develop an insensitivity toward one's fellow human beings and their suffering." *Id*. at 534-35. Relying on the principles of *Ginsberg* and *Pacifica*, Professor Laughlin concludes that "[p]arental and societal interest in rearing minors to value and respect their fellow humans, rather than to debase the value of others by participating in games in which they commit brutal acts of violence against very human-looking characters as a form of entertainment, is sufficient to support restrictions." *Id*. at 538.

Entm't Software Ass'n v. Granholm, 404 F. Supp.2d 978, 982 (E.D. Mich. 2005). However, by requiring proof of a causal relationship, those courts improperly demanded scientific certainty, a standard unsupported by the Supreme Court's First Amendment jurisprudence, particularly as it relates to minors.[44] *See Ginsberg*, 390 U.S. at 642-43.

In light of minors' special constitutional status, where, as here, the Legislature seeks to impose a reasonable regulation on the First Amendment rights of minors, substantial evidence demonstrating a correlation between the subject of the regulation (exposure to violent video games) and harm to minors (increased aggression and desensitization to violence) should be sufficient to sustain the regulation. Indeed, the Supreme Court has found correlational evidence to be substantial in other First Amendment contexts that did not deal with minors. *See,*

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[44] Legal commentators have criticized the courts for imposing a requirement of scientific certainty in these cases, noting that such a standard is inconsistent with the First Amendment principles set forth by the U.S. Supreme Court in cases such as *Ginsberg* and *Pacifica*. *See, e.g.,* Bonnie B. Phillips, Note, *Virtual Violence or Virtual Apprenticeship: Justification for the Recognition of a Violent Video Game Exception to the Scope of First Amendment Rights of Minors*, 36 Ind. L. Rev. 1385, 1389 (2003) (noting that "requiring … definitive scientific proof that violent video games cause[] psychological harm to children, reject[s] the longstanding 'Ginsberg principle,' which supports a finding of a compelling interest where government actors have placed content-based access barriers to material that could be deemed harmful to minors, without conclusive proof of psychological harm, provided the barriers' restrictions do not offend the First Amendment rights of adults."); Laughlin, 40 U. Rich. L. Rev. at 526 ("To require a high degree of scientific certainty of harm is likewise to misread or to ignore the body of cases which address the issue of the states' ability to restrict expression received by minors.").

e.g., Turner II, 520 U.S. at 208-09 (noting Congress' reliance on empirical research that confirmed a "direct correlation").

Given the State's ability to regulate speech that is harmful to minors to a greater degree under well-established First Amendment principles, and the growing body of empirical evidence allowing reasonable inferences that exposure to violent video games is associated with increased aggression and desensitization to violence in minors, the Minnesota Act is supported by substantial evidence of harm. Consequently, the State's interests are sufficiently compelling to withstand strict scrutiny under the First Amendment.

B. The Minnesota Act is Narrowly Tailored to Serve the State's Compelling State Interests.

For a restriction designed to protect minors from harmful speech to be narrowly tailored, it must not result in "an unnecessarily broad suppression of speech addressed to adults." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 875 (1997). The Minnesota Act has no impact whatsoever on speech addressed to adults. The Act only restricts rentals or purchases of video games by children under age 17, and in so doing, it does not prevent parents from purchasing or renting restricted games for their children if they so desire. In *Reno*, the Court considered that the law at issue in that case applied to minors under age 18, rather than age 17, and did not provide for parental consent or participation as a means to

limit its application in determining that the law was not narrowly tailored.[45] The Minnesota Act does not suffer from either of those deficiencies. Additionally, the Act does not impose any criminal or civil liability on Appellees or their retailers for furnishing restricted games to minors. Rather it imposes a de minimis $25 civil penalty on minors who violate the Act. Thus, to the extent that the Minnesota Act does not burden adult's speech in any way, it is narrowly tailored to serve its interests in protecting children from harm.

The Act also applies only to M and AO-rated video games, which constitute no more than 12 to 15 percent of all video games rated by the ESRB and purchased at retail.[46] Moreover, by incorporating these ESRB ratings, the Act is applicable to only those video games that the industry itself has already determined are not

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[45] Several commentators have also observed that an act restricting video game sales should only apply to persons under age 17. *See, e.g.,* Scott A. Pyle, *Is Violence Really Just Fun and Games?: A Proposal for a Violent Video Game Ordinance that Passes Constitutional* Muster, 37 Val. U. L. Rev. 429, 484 (2002); Laughlin, 40 U. Rich. L. Rev. at 527.

[46] In 2005, only 12 percent of games rated by the ESRB were given an M-rating (less than one percent received an AO-rating), and M-rated games accounted for only 15 percent of all 2005 video game sales. *See* ESRB, *Rating Category Breakdown*, *at* http://www.esrb.org/about/categories.jsp (last visited Oct. 15, 2006); ESA, *2006 Essential Facts About the Computer and Video Game Industry*, http://www.theesa.com/archives/files/Essential%20Facts%202006.lpdf. *See also* William Li, Note, *Unbaking the Adolescent Cake: The Constitutional Implications of Imposing Tort Liability on Publishers of Violent Video Games*, 45 Ariz. L. Rev. 467, 501 (2003) (proposing that a video game regulation limiting minors' access to M-rated games only would be narrowly tailored because M-rated games comprise only a small percentage of all video game sales).

suitable for minors because of their sexual and/or violent content.[47] Consequently, the Minnesota Act is by far the most narrowly tailored Act of any of the other state, county or municipal violent video game acts which have been the subject of other litigation around the country.

Nonetheless, the district court determined that the Act is underinclusive to the extent that it restricts only violent video games and not other types of violent media that may be harmful to children. (Add. 7-8). However, even in the First Amendment context, the legislature "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McConnell*, 540 U.S. at 207-08 (quoting *Buckley v. Valeo*, 424 U.S. 1, 105 (1976)). While underinclusiveness may be more objectionable when First Amendment rights involved, it is not fatal where the State has clear reasons for the distinctions made. *See Erznoznik*, 422 U.S. at 215.

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[47] The State's adoption of the ESRB rating standards thus avoids the inevitable vagueness challenge Appellees would assert with regard to any other standard the State might incorporate in a statute. *See, e.g., Blagojevich*, 404 F. Supp.2d at 1076 (arguing that an Illinois statute limiting the sale and rental of "violent" video games to minors was unconstitutionally vague due to the imprecision of the word "violent"). In fact, the court in *Granholm* concluded that it was seriously problematic that retailers could not rely on the ESRB standards to determine what video games could not be sold to minors. 404 F. Supp.2d at 983. Numerous commentators have also persuasively argued that state legislatures should use the ESRB's well-developed ratings standards in crafting legislation regarding the sale of video games to minors. *See, e.g.*, Li, 45 Ariz. L. Rev. at 503-504 (use of ESRB scheme would provide clear, precise standards preferable to arbitrary definitions of violence); Phillips, 36 Ind. L. Rev. at 1411 (same).

The Minnesota Act distinguishes violent video games from other forms of violent expression because the interactive nature of video games presents different difficulties. *See Interactive Digital Software Ass'n*, 329 F.3d at 957. Particularly, the unique interactive nature of violent video games serves to make them more harmful than other passive forms of media violence such as television and movies.[48] This interactivity is a clear reason for the Legislature's choice to address the greater harm posed by exposure to violent video games. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (recognizing that the greater capacity for harm of one form of expression as compared to others is relevant to determining the permissible scope of regulation). Therefore, the Minnesota Act is not fatally underinclusive.

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[48]*See What's in a Game? State Regulation of Violent Video Games and the First Amendment: Hearing Before the S. Judiciary Comm. Subcomm. on the Const., Civil Rights & Prop. Rights*, 109th Cong. (March 29, 2006) (written testimony of Dr. David S. Bickham, Research Scientist, Center on Media and Child Health), http://judiciary.senate.gov/hearing/cfm?id=1824 ("While the large body of research on violent television and film provide a solid foundation for our understanding of the effects of violent video games, there are reasons [including their educational value, interactivity, rewards system and requirement of complete attention] to believe that the influences of violent video games are stronger than those of other forms of screen violence.").

IV. THE MINNESOTA ACT'S ADOPTION OF THE ESRB RATINGS IS NOT AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY BECAUSE THE ESRB OPERATES PURSUANT TO CLEAR AND ASCERTAINABLE STANDARDS.

While the Legislature cannot completely delegate the authority to make law, it is fully able to authorize an agency or board to fill in the details, provided that the body to which that power is delegated operates pursuant to clearly ascertainable rules. *See, e.g., Engdahl v. City of Kenosha*, *Wis.*, 317 F. Supp. 1133, 1135-36 (E.D. Wis. 1970) (rejecting incorporation of Motion Picture Association of America ("MPAA") ratings into state statute where Association's ratings process and standards unclear or nonexistent); *Motion Picture Ass'n of Am., Inc. v. Specter*, 315 F. Supp. 824, 826 (E.D. Pa. 1970) (rejecting adoption of MPAA ratings because they are "lacking in any ascertainable standards"). In this case, the ESRB unquestionably operates according to clearly defined rules and procedures. Thus, the constitutional infirmity in cases concerning the MPAA ratings -- the absence of sufficiently ascertainable processes and standards -- is simply is not present here. Moreover, even government adoption of the MPAA ratings has not been found unconstitutional in all circumstances.

In *Borger v. Bisciglia*, 888 F. Supp. 97 (E.D. Wis. 1995), the court upheld a school district's incorporation of the MPAA ratings system into school board policy. The school board's policy was that no film rated R, N17, or X could be shown in school. *Id.* at 98. Rejecting the delegation of authority argument, the

court upheld the school board's use of the rating system as a "reasonable way of determining which movies are more likely to contain harsh language, nudity, and inappropriate material for high school students." *Id.* at 100-01. The court emphasized the high school setting, holding that the school board's grounds for its movie decisions needed only to be reasonable. *Id.*

Similarly, here the Act is intended to protect minors. Thus, the Legislature's use of the ESRB's standards must only be a reasonable way of determining which video games are appropriate for minors. As in *Borger*, the Act's use of the ESRB's well-developed ratings is an entirely reasonable and precise way to identify material inappropriate for minors.

The district court completely ignored *Borger* in erroneously holding that the Act's incorporation of the ESRB ratings is an improper delegation of authority. Additionally, the district court's determination that the ESRB does not use ascertainable standards ignores that the ESRB rating system is the "most comprehensive" of entertainment industry rating systems, which employs extensively trained reviewers to confer not only a rating, but also specific content descriptors, on games submitted by virtually all game publishers. Even Appellees would argue that he ESRB rating process is thus not lacking in any ascertainable standards. As such, those ratings are a reasonable way for the Legislature to identify violent material that is inappropriate for minors.

CONCLUSION

For the foregoing reasons, the district court's order permanently enjoining the effectuation and enforcement of the Minnesota Restricted Video Games Act, Minn. Stat. § 325I.06 (2006), should be reversed.

Dated: ___________________

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CERTIFICATE OF COMPLIANCE
WITH FRAP 32(a)(7)(B) AND
8th Cir. R. 28A(c)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,361 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14 pt Times New Roman font.

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