No. 06-3217

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Entertainment Software Association;
Entertainment Merchants Association,

Appellees,

vs.

Lori Swanson, in her official capacity
as Attorney General of the State of Minnesota,

Appellant.

American Booksellers Foundation for Free Expression, et al.,

Amici Curiae on Behalf
of Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PETITION FOR REHEARING *EN BANC*

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INTRODUCTION

Appellant State of Minnesota submits this Petition for Rehearing *En Banc* requesting the entire Court to consider questions of exceptional importance: (1) whether extremely violent and patently offensive video games constitute expression protected by the First Amendment; and (2) if so, whether strict scrutiny requires the State to prove, by incontrovertible proof and with mathematical certainty, that exposure to extremely violent and patently offensive video games causes psychological harm to children. The panel in this case[1] answered these questions in the affirmative, stating that it was bound by the precedent set by another panel[2] of the Court in *Interactive Digital Software Ass'n v. St. Louis County,* 329 F.3d 954 (8th Cir. 2003) ("*Interactive Digital").* Nevertheless, the panel questioned the analysis of the *Interactive Digital* decision. *See, e.g.,* 2008 WL 696550 at *4 (stating that *Interactive Digital's* "requirement of such a high level of proof may reflect a refined estrangement from reality, but apply it we must"). Because of the importance of the issue of whether the State can lawfully restrict minors' access to extremely violent and patently offensive video games, this case should be considered by the entire Court.

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[1] The Honorable Roger L. Wollman, the Honorable Lavenski R. Smith, and the Honorable Duane Benton, Circuit Judges. The panel's decision is published at *Entm't Software Ass'n v. Swanson,* ___ F.3d. ___, No. 06-3217*,* 2008 WL 696550 (8th Cir. Mar. 17, 2008).

[2] *See Jackson v. Ault,* 452 F.3d 734, 736 (8th Cir.), *cert. denied,* __ U.S. __, 127 S. Ct. 946 (2007) (a panel of this Court may not overrule the decision of another panel).

FACTS AND PROCEDURAL HISTORY

On May 31, 2006, the governor of Minnesota signed into law the Minnesota Restricted Video Games Act, Minn. Stat. § 325I.06 (2006) (the "Act"). Subdivision 2 of the Act provides:

> A person under the age of 17 may not knowingly rent or purchase a restricted video game. A person who violates this section is subject to a civil penalty of not more than $25.

A "restricted video game" means a "game rated AO [adult only] or M [mature] by the Entertainment Software Rating Board." *See id.,* subd. 2. The Entertainment Software Rating Board ("ESRB") was established by the video game industry to classify video games based on their age-appropriateness. There are six possible ratings, including M (Mature) and Adults Only (AO). Retailers voluntarily enforce the ratings by educating consumers and preventing minors under 17 from acquiring games rated M or AO. Despite these efforts, a survey conducted in 2006 showed that 42 percent of children were still able to purchase video games rated M.[3]

Appellees Entertainment Software Association and Entertainment Merchants Association brought this action, alleging that Act violates the First and Fourteenth Amendments to the United States Constitution and seeking a permanent injunction to prevent it from becoming effective.

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[3] *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 Federal Trade Commission), http://energycommerce.house.gov/reparchives/108/Hearings/06142006hearing1921/hearing.htm.

The district court received into evidence several extremely violent and patently offensive video games. Two examples[4] are illustrative. First, in *The Punisher* (M-rated), the 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. *See* 2008 WL 696550 at *2. Second, in *Manhunt* (M-rated), the game player adopts the role of James Earl Cash, a serial killer facing execution. The execution is faked so that a character "The Director" can use Cash as a star in a series of snuff films. 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 eyeball with a glass shard, or beheading them with a cleaver. While the Cash character is killing the other characters, "The Director" makes comments about being "turned on" and "getting off." *See id.*

In the district court, the State also produced evidence to show that children's exposure to violent video games was associated with increases in aggressive behavior, aggressive cognition, aggressive affect, with physiological arousal, and with decreases in helping behavior. *See* Craig A. Anderson, *An Update on the Effects of Playing Violent Video Games*, 27 J. Adolescence 113, 118, Appellant's Appendix ("App.")[5] 6. The State introduced evidence of a joint statement of six medical and public health organizations indicating that "well over 1000 studies . . . point overwhelmingly to a causal connection between media violence and aggressive behavior in some children" and stating that preliminary research

[4] The panel's opinion describes several other examples of violent and patently offensive video games that were received into evidence. *See* 2008 WL 696550 at *2.

[5] "App." refers to Appellant's Appendix that accompanied the State's brief.

suggests that the impact is greater for violent video games than for 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). *See* App. 44.

On July 31, 2006, the district court granted a permanent injunction in favor of Appellees, enjoining the implementation and enforcement of the Act. The district court, following the precedent set in *Interactive Digital,* held that violent video games are protected speech, even for children. Add.[6] at 4. The district court applied strict scrutiny analysis to the Act. It found that even if the protection of minors from harm is a compelling State interest, the evidence produced by the State was insufficient proof that violent video games *cause* lasting harm to the psychological well-being of minors. *See id.* at 7.

On appeal to this Court, the panel affirmed the district court's decision. The panel noted that it was bound by the holding in *Interactive Digital*. Based on *Interactive Digital,* the panel therefore concluded that violent video games are protected free speech and that any restriction on the purchase or rental by minors of violent video games is subject to strict scrutiny analysis. *See* 2008 WL 696550 at *3. The panel held that the State has a compelling interest in the psychological well-being of its minor citizens. *See id.* at *4. But the panel stated that under *Interactive Digital,* it was *required* to hold that the State did not satisfy its evidentiary burden because it failed to show "statistical certainty of causation," i.e., "incontrovertible proof of a causal relationship between the exposure to such violence and subsequent psychological dysfunction." *See id.* Although the panel stated that the

[6] "Add." refers to Appellant's Addendum that was bound with the State's brief.

Interactive Digital's "high level of proof may reflect a refined estrangement from reality," *id.* at *4, it upheld the district court's injunction.

ARGUMENT

I. THE ENTIRE COURT SHOULD CONSIDER THE ISSUE OF WHETHER VIOLENT AND PATENTLY OFFENSIVE VIDEO GAMES CONSTITUTE EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

A threshold issue in Appellees' challenge to the constitutionality of the Act was whether the video games offered into evidence constitute expression protected by the First Amendment. Following the precedent set in *Interactive Digital,*[7] the panel held that the video games at issue in this case were protected free speech. *See* 2008 WL 696550 at *3, *4. Because of the importance of this issue, the entire Court should consider the issue of whether extremely violent and patently offensive video games constitute expression protected by the First Amendment.

The extremely violent content of the video games introduced into evidence in the district court may be fairly and accurately described as grossly repugnant, patently offensive, vile and revolting. For example, a child who is allowed to play *Manhunt* is "acting out" the part of a serial killer who is shooting another character point blank with a nail gun, suffocating another character with a plastic bag, stabbing another character in the eyeball

[7] In *Interactive Digital,* the panel reversed the district court's holding that the graphically violent video games received into evidence were not a protected form of speech under the First Amendment. *See Interactive Digital Software Ass'n v. St. Louis County*, 200 F. Supp.2d 1126, 1132-35 (E.D. Mo. 2002), *rev'd,* 329 F.3d 954 (8th Cir. 2003). In a well-reasoned opinion, the district court started with the proposition that "there must be some element of information or some idea being communicated in order to receive First Amendment protection," 200 F. Supp.2d at 1132, and concluded with the statement: "This Court reviewed four different video games, and found no conveyance of ideas, expression, or anything else that could possibly amount to speech." *Id.* at 1134.

with a shard of glass, and slicing up another character with a chain saw, all toward the goal of sexually "turning on" and "getting off" the character of "The Director." A child at the controls of *The Punisher* may cut off the heads of other characters, rip off arms with an industrial hook, and set a character in an electric chair on fire. This is a far cry from the types of stories, imagery, age-old themes of literature, messages, and ideology that are found in books and movies. *See Interactive Digital,* 329 F.3d at 957 (describing the video games in the record in *Interactive Digital).*

If the panel in this matter had not been constrained by the holding in *Interactive Digital,* the panel could have applied the proper analysis and held that extremely violent and patently offensive video games are not afforded First Amendment protection. The First Amendment does not, as a general matter, protect games. *See There to Care, Inc., v. Comm'r of Indiana Dep't of Revenue,* 19 F.3d 1165, 1167 (7th Cir. 1994) (bingo is an activity that does not convey ideas and is therefore not "speech" protected by the First Amendment); *see also Sunset Amusement Co. v. Bd. of Police Comm'rs,* 496 P.2d 840, 845-46 (Cal. 1972), *app. dismissed,* 409 U.S. 1121 (1973) (physical activity of roller skating in a public roller rink was not protected speech).

Video games are "games" which, like bingo, board games, sports and pinball constitute "pure entertainment, with no informational element." *America's Best Family Showplace Corp. v. City of New York,* 536 F. Supp. 170, 173 (E.D.N.Y. 1982) (rejecting a claim for First Amendment protection for video games). The game player's primary reason for utilizing the video game is entertainment and personal pleasure. *See Caswell v. Licensing Comm'n for Brockton,* 444 N.E.2d 922, 925 (Mass. 1983) (holding that plaintiff failed to demonstrate that video games import sufficient communicative, expressive or informative

elements to constitute expression protected by the First Amendment protection).[8] The extremely violent and patently offensive video games in the record in this proceeding are not designed to communicate or express ideas or information and, as such, should not be afforded First Amendment protection by this Court.

The panel in this case noted that "great literature includes many themes and descriptions of violence" and that "some might say that it is risible to compare the violence depicted in the [video game] examples offered by the State to that described in classical literature." *See* 2008 WL 696550 at *4. However, the panel stated: "[S]uch violence has been deemed by our court worthy of First Amendment protection, and there the matter stands." The reference to "our court" in this quote is a reference to the panel that decided *Interactive Digital.* The Court *en banc* is not constrained by the panel decision in *Interactive Digital* and should therefore reconsider this case.

II. THE ENTIRE COURT SHOULD CONSIDER THE APPROPRIATENESS OF THE HEIGHTENED EVIDENTIARY STANDARD THAT THIS CASE AND *INTERACTIVE DIGITAL* IMPOSE UPON THE STATE IN FIRST AMENDMENT CHALLENGES WHERE THE STATE'S COMPELLING INTEREST IS THE PSYCHOLOGICAL WELL-BEING OF CHILDREN.

Having held that violent video games were expression protected by the First Amendment, the panel in this case applied strict scrutiny to the Act. *See* 2008 WL 696550 at *3-4. Based on the holding of *Interactive Digital,* the panel's strict scrutiny analysis

[8] Other courts have also held that video games were not protected speech under the First Amendment. *See, e.g., Malden Amusement Co. v. City of Malden,* 582 F. Supp. 297, 299 (D. Mass. 1983); *Kaye v. Planning and Zoning Comm'n,* 472 A.2d 809, 812 (Conn. 1983); *People v. Walker,* 354 N.W.2d 312, 316 (Mich. Ct. App. 1984), *app. dismissed sub nom Walker v. City of Warren,* 474 U.S. 801 (1985); *Tommy and Tina Inc. v. Dep't of Consumer Affairs,* 459 N.Y.S.2d 220, 226-27 (N.Y. Sup. Ct. 1983), *aff'd,* 464 N.Y.S.2d 132 (N.Y.A.D. 1983).

applied a heightened standard of proof to the evidence that the State offered to show that exposure to violent video games causes psychological harm to children. *See id.* at *4. For the reasons discussed below, the heightened evidentiary standard applied in this case is contrary to well-established First Amendment jurisprudence and previous decisions of this Court. Further the decision, if allowed to stand, subjects the State in future cases to an unprecedented and unreasonably high evidentiary standard to meet whenever the psychological well-being of children is at issue in strict scrutiny analysis. Because of the importance of the State's interest in protecting the psychological well-being of children, the entire Court should consider whether a heightened evidentiary standard should have been be imposed in this case.

In general, in strict scrutiny analysis, the State is required to show that the challenged law is "necessary to serve a compelling state interest and . . . is narrowly tailored to achieve that end." *See R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992). Strict scrutiny requires the State to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 664 (1994) ("*Turner I"*). This burden is met if the State shows that the legislature based its conclusions upon "substantial evidence" of harm. *Turner Broad. Sys., Inc. v. FCC,* 520 U.S. 180, 195 (1997) ("*Turner II"*). In reviewing this evidence, the Court's "sole obligation is to 'assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence.'" *Id.,* quoting *Turner I,* 512 U.S. at 666.

In other First Amendment cases before this Court, the evidentiary standard applied to strict scrutiny analysis has properly been the "substantial evidence" standard of *Turner I* and

Turner II ("reasonable inferences based on substantial evidence).[9] However, as discussed below, the panel in this case, following *Interactive Digital,* departed from those precedents and used an unreasonably high evidentiary standard that requires the States to prove with mathematical certainty that the expression it seeks to regulate causes psychological harm to children.

In its strict scrutiny analysis, the panel in this case first noted that the State had shown a compelling State interest: "As did the *Interactive Digital* court, we accept as a given that the State has a compelling interest in the psychological well-being of its minor citizens." 2008 WL 696550 at *4. Next, the panel concluded that the State's evidence "provides substantial support for its contention that violent video games have a deleterious effect upon the psychological well-being of minors." *Id.* Notwithstanding this conclusion, the panel went on to state:

> Nevertheless, in light of the heightened standard of proof that *Interactive Digital* says must be applied, we conclude that the evidence falls short of establishing the *statistical certainty of causation* demanded thereby.

Id. (emphasis added). The panel further stated that *Interactive Digital* required it to hold that the State did not satisfy its evidentiary burden because it "failed to come forth with incontrovertible proof of a causal relationship between the exposure to such violence and subsequent psychological dysfunction." *Id.* The panel, believing it was bound by *Interactive Digital,* failed to explain why the *Turner* "substantial evidence" test was not the appropriate

[9] *See Excalibur Group, Inc. v. City of Minneapolis,* 116 F.3d 1216, 1221 (8th Cir.), *cert. denied,* 522 U.S. 1077 (1998) (upholding city ordinance regulating adults-only businesses against First Amendment challenge); and *Carver v. Nixon,* 72 F.3d 633, 644 (8th Cir.), *cert. denied.* 518 U.S. 1033 (1996) (striking down campaign contribution limits on First Amendment grounds).

standard here, nor did the panel justify why the elements of this case called for an evidentiary standard requiring statistical certainty of causation.

Interactive Digital involved a First Amendment challenge to a county ordinance restricting minors' access to graphically violent video games. *See* 329 F.3d at 956. As noted above, the *Interactive Digital* panel accepted the psychological well-being of minors as a compelling State interest. *See* 329 F.3d at 958. Quoting *Turner I,* the panel stated that the harm posited by the county must be "real, not merely conjectural," and that the county must demonstrate "that the regulation will in fact alleviate these harms in a direct and material way." *See id.,* quoting *Turner I*, 512 U.S. at 554. The panel then articulated the county's evidentiary burden with respect to showing psychological harm to minors as follows:

> Before the County may constitutionally restrict the speech at issue here, *the County must come forward with empirical support for its belief that "violent" video games cause psychological harm to minors.* In this case, as we have already explained, the County has failed to present the "substantial supporting evidence" of harm that is required before an ordinance that threatens protected speech can be upheld. [Citations omitted.] We note . . . that the County may not simply surmise that it is serving a compelling state interest because "[s]ociety in general believes that continued exposure to violence can be harmful to children [citations omitted]. Where first amendment rights are at stake, "the Government must present more than anecdote and supposition." [Citation omitted.]

329 F.3d at 959 (emphasis added), citing, *inter alia, Turner I,* 512 U.S. at 666; *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 822 (2000).

There is no indication in the *Interactive Digital* opinion that the panel believed it was establishing a new heightened evidentiary standard applicable in First Amendment cases involving the psychological well-being of minors: indeed, the text quoted above constitutes the entire discussion of the evidentiary standard. There is no indication that the *Interactive Digital* panel believed that it was departing from any strict scrutiny analysis precedents.

The use of "statistical certainty of causation" and "incontrovertible proof of a causal relationship" standards as the State's burden of proof in strict scrutiny analysis involving the psychological well-being of children radically departs from the well-settled "substantial evidence" standard established by the Supreme Court in *Turner I.* As recognized by the Fourth Circuit in *Schliefer by Schliefer v. City of Charlottesville,* 159 F.3d 843, 849 (4th Cir.), *cert. denied* 526 U.S. 1018 (1999), the requirement of *Turner I* that the harm must be real and that the regulation will alleviate the harms in a direct and material way "has never required scientific or statistical 'proof.'" There is no rationale under which laws designed to protect the psychological welfare of children should be singled out and treated differently with respect to the State's burden of proof.

The adoption of "statistical certainty of causation" and "incontrovertible proof of a causal relationship" standards also saddles State and local governments in the future with an unprecedented and unreasonably high evidentiary standard. If allowed to stand, this decision will jeopardize the efforts of state and local governments to enact reasonable restrictions on speech and expression designed to protect the psychological well-being of children.

The Supreme Court has never accepted "mere conjecture" as adequate to carry a First Amendment burden. *Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377, 392 (2000). But neither has it required scientifically certain proof of harm in order to uphold restrictions on minors' access to materials that the State reasonably believes are harmful to them. *See Schliefer,* 859 F.3d at 849; *Ginsberg v. New York,* 390 U.S. 629, 641-43 (1968) (Court does not demand of legislatures scientifically certain criteria of legislation). Between the two extremes of "mere conjecture" and scientific certainty lies the "substantial evidence" standard, which is the appropriate evidentiary standard to satisfy strict scrutiny in this case.

As previously noted, the panel in this case found that the State's evidence "provides substantial support for its contention that violent video games have a negative impact on the psychological well-being of minors." 2008 WL 696550 at *4. However, because the panel was bound to apply the heightened evidentiary standard of *Interactive Digital*, the panel affirmed the district court's decision. The Court *en banc* is not constrained by the panel decision in *Interactive Digital* and should therefore reconsider this case.

CONCLUSION

Based on the foregoing, the State of Minnesota respectfully requests that the Court rehear this appeal *en banc.*

Dated: March 28, 2008

Respectfully submitted,

s/ **Jocelyn F. Olson**

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CERTIFICATE OF SERVICE
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s/Jocelyn F. Olson_____

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