Nos. 06-1012, 06-1048, 06-1161 (cons.)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ENTERTAINMENT SOFTWARE ASSOCIATION;
VIDEO SOFTWARE DEALERS ASSOCIATION;
ILLINOIS RETAIL MERCHANTS ASSOCIATION,

Plaintiffs-Appellees,

vs.

ROD BLAGOJEVICH, in his official capacity as Governor of the State of Illinois; LISA MADIGAN, in her official capacity as Attorney General of the State of Illinois; and RICHARD A. DEVINE, in his official capacity as State's Attorney of Cook County,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois
Case No. 05 C 4265
The Honorable Judge Matthew F. Kennelly

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT GOVERNOR ROD BLAGOJEVICH

Michael J. Kasper
Special Assistant Attorney General
222 North LaSalle Street, Suite 300
Chicago, IL 60601
Tel.: 312-704-3292
Fax: 312-968-4944

Patrick E. Deady
Laura C. Liu
Special Assistant Attorneys General
Hogan Marren Ltd.
180 N. Wacker Drive, Suite 600
Chicago, IL 60606
Tel.: 312-946-1800
Fax: 312- 946-9818

ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No. 06-1012

Short Caption: Entertainment Software Association v. Rod Blagojevich, et al., 05 C 4265

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following a docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item # 3):

Rod Blagojevich, Governor of the State of Illinois

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Michael J. Kasper, Special Assistant Attorney General
Patrick E. Deady, Special Assistant Attorney General
Laura C. Liu, Special Assistant Attorney General

(3) If the party or amicus is a corporation: N/A

==========

/s/

Attorney's Printed Name: Michael J. Kasper Date: January 20, 2006

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).
Yes X

Address: 222 N. LaSalle St., Suite 300, Chicago, Illinois 60601

Phone Number: (312) 704-3292 Fax Number: (312) 368-4944

E-Mail Address: mjkasper60@aol.com

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Michael J. Kasper, Special Assistant Attorney General
Patrick E. Deady, Special Assistant Attorney General
Laura C. Liu, Special Assistant Attorney General

(3) If the party or amicus is a corporation: N/A

==========

/s/

Attorney's Printed Name: Patrick E. Deady Date: January 17, 2006

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).
Yes X

Address: 180 N. Wacker Drive, Suite 600, Chicago, Illinois 60606

Phone Number: (312) 946-1800 Fax Number: (312) 946-9818

E-Mail Address: ped@hmltd.com

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Patrick E. Deady, Special Assistant Attorney General
Laura C. Liu, Special Assistant Attorney General

(3) If the party or amicus is a corporation: N/A

==========

/s/

Attorney's Printed Name: Laura C. Liu Date: January 17, 2006

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).
Yes X

Address: 180 N. Wacker Drive, Suite 600, Chicago, Illinois 60606

Phone Number: (312) 946-1800 Fax Number: (312) 946-9818

E-Mail Address: lcl@hmltd.com

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this action under the general federal question jurisdiction provided in 28 U.S.C. § 1331. The federal question is whether various provisions of Illinois Public Act 94-0315 violate the First and Fourteenth Amendments to the United States Constitution. The district court also had subject matter jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) in that Plaintiffs allege that various provisions of Public Act 94-0315 violate their right to equal protection of the laws. (Doc. 1.)[1]

The Defendants are Rod Blagojevich, in his official capacity as Governor of the State of Illinois; Lisa Madigan, in her official capacity as Attorney General of the State of Illinois; and Richard Devine, in his official capacity as State's Attorney of Cook County, Illinois.

On December 2, 2005, the district court entered its final judgment Order in favor of Plaintiffs, pursuant to Federal Rule of Civil Procedure 58, ordering a permanent injunction against the Illinois Sexually Explicit Video Games Law, 720 ILCS 5/12B-1 *et seq.*, and the Illinois Violent Video Games Law, 720 ILCS 5/12A-1 *et seq*. (Doc. 101; A-55.) No motions for a new trial, or to alter or amend the December 2, 2005 judgment, were filed. On January 3, 2006, Defendant Rod Blagojevich filed his Notice of Appeal of the district court's judgment insofar as it pertains to the Illinois Sexually Explicit Video Games Law, which was docketed

[1] Citations to the Record on Appeal are as follows: "Doc. ___," where "Doc." is followed by the number of the docket entry and the appropriate page or paragraph number. Citations to the Appendix are as follows: "A-____," where "A-" is followed by the appropriate page number.

in the Court of Appeals as Case No. 06-1012. (Doc. 102.) On January 4, 2006, Defendant Lisa Madigan filed her Notice of Appeal of the district court's judgment insofar as it pertains to the Illinois Sexually Explicit Video Games Law and her immunity from suit, which was docketed in the Court of Appeals as Case No. 06-1048. (Doc. 109.) On January 17, 2006, within 14 days of the filing of defendants' notice of appeal, pursuant to Federal Rule of Appellate Procedure 4(a)(3), Defendant Richard Devine filed his Notice of Appeal of the district court's judgment insofar as it pertains to the Illinois Sexually Explicit Video Games Law, which was docketed in the Court of Appeals as Case No. 06-1161. (Doc. 116.) The Court of Appeals, on its own motion, ordered these appeals consolidated for purposes of briefing and disposition. (Doc. 120.)

This Court has jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The issue on appeal is whether the district court erred when it found the Illinois Sexually Explicit Video Games Law unconstitutional and permanently enjoined its enforcement.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the Illinois Sexually Explicit Video Games Law's restriction on the sale or rental of sexually explicit video games to minors violate the First and Fourteenth Amendments to the United States Constitution?

2. Is the Illinois Sexually Explicit Video Games Law unconstitutionally vague?

3. Do the Illinois Sexually Explicit Video Games Law's requirements of providing signs, brochures, and labels related to sexually explicit video games constitute compelled speech in violation of the First and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Relevant to this appeal, this action concerns the constitutionality of the Illinois Sexually Explicit Video Games Law (the "SEVGL"), 720 ILCS 5/12B-1 *et seq.*, a part of Illinois Public Act 94-0315 that governs the sale of sexually explicit video games to minors. Plaintiffs Entertainment Software Association, Video Software Dealers Association, and Illinois Retail Merchants Association (collectively "Plaintiffs") filed an action in the district court for declaratory and injunctive relief, alleging that the SEVGL violated the First and Fourteenth Amendments to the United States Constitution and that the SEVGL unconstitutionally delegated authority under the Due Process Clause. (Doc. 1.) Plaintiffs moved for a preliminary injunction against the operation of the SEVGL. (Doc. 20.) Defendant Attorney General Lisa Madigan moved to dismiss the Complaint because she was immune from suit and because the Complaint failed to state a claim for declaratory relief. (Doc. 42.) Defendant Governor Rod Blagojevich moved to dismiss the Complaint for lack of standing and to dismiss Count IV, relating to the improper delegation of authority, for failure to state a claim. (Doc. 45.) Defendant State's Attorney Richard Devine moved to dismiss for lack of justiciability. (Doc. 51.) Defendant Governor Rod Blagojevich further

moved for partial summary judgment as to the portion of the Complaint related to the SEVGL (Doc. 63), which motion was joined by Defendant Attorney General Lisa Madigan. (Doc. 58.)

The district court denied the motions to dismiss of Defendants Madigan and Devine on immunity and jurisdictional grounds. (Doc. 98.) Following a hearing on the merits, the district court denied the remaining motions to dismiss and Defendant Blagojevich's motion for partial summary judgment, entering a final judgment in favor of Plaintiffs and permanently enjoining the enforcement of the SEVGL. (Doc. 101; A-55.) The district court held that the SEVGL's restriction on the sale or rental of video games to minors was an unconstitutional abridgment of free speech; that the SEVGL was unconstitutionally vague; and that the SEVGL's provisions on signage, brochures, and labeling regarding sexually explicit video games constituted compelled speech in violation of the First Amendment. (Doc. 100, Findings of Fact and Conclusions of Law (A-2).)

STATEMENT OF FACTS

On July 25, 2005, Illinois Governor Rod Blagojevich signed into law Public Act 94-0315. (Doc. 82, Defendant's Local Rule 56.1 Statement, p. 6, ¶ 27.) Public Act 94-0315, among other things, created the Illinois Sexually Explicit Video Games Law, 720 ILCS 5/12B-1 *et seq*. (the "SEVGL"), which regulates video games with sexually explicit content that are sold in Illinois. The SEVGL was enacted by the Illinois General Assembly after consideration of testimony,

governmental reports, and other evidence that demonstrated the rapid growth of video games with mature content, and the relative ease with which minors were purchasing these games despite supposed industry self-regulation intended to limit the sale of such mature games.

Sexually Explicit Video Games

Defendants admitted into the record below copies of several sexually explicit video games that would be covered by the SEVGL, as well as fair and accurate still photographs from scenes in those games. (Doc. 66, Exhibit A to Defendant's Local Rule 56.1 Statement; Doc. 87, Exhibit B to same.) The nation's best-selling video game, *Grand Theft Auto: San Andreas*, features a graphic sexual encounter between a man and woman, including oral sex and vaginal intercourse in a number of sexual positions. The woman—naked from head to toe—moans ecstatically throughout the episode and cries out in climax in conclusion. The player controls such factors as the pace of the sexual thrusts, his or her own view of the encounter, and the sexual positions. The upper right-hand corner of the screen tracks the level of the protagonist's "excitement" as he reaches climax. (Doc. 66, 87.)[2]

The Entertainment Software Ratings Board (the "ESRB"), an arm of the Entertainment Software Association (the "ESA") that provides a ratings system for video games, initially labeled *San Andreas* with an M-rating for "mature," meaning that it was not suitable for children under 17. After the national outcry

[2] In another scene in *San Andreas*, the protagonist has sex with a prostitute and then—for bonus points—physically assaults the prostitute and robs her of her money. (Doc. 66.)

over this graphic sexual imagery, however, the industry changed the rating to "AO" for "adults only," limiting it to ages 18 and older. (Doc. 82, Defendant's Local Rule 56.1 Statement, ¶¶ 17-18.)

In the meantime, *Grand Theft Auto: San Andreas* was the best-selling video game of 2004 with 5.1 million copies sold nationally—despite the fact that the game was only on the market the last seven weeks of the year. (Doc. 69, Exhibit D to Local Rule 56.1 Statement, at BL 271-273.) The Federal Trade Commission estimates that *75 percent of boys 17 and under* have played at least one of the *Grand Theft Auto* games. (Doc. 69 at BL 169, FTC Report, *Marketing Violent Entertainment to Children: A Fourth Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (July, 2004).)

Leisure Suit Larry: Magna Cum Laude follows a man's efforts to get women drunk so he can have sex with them. One scene features full frontal male nudity of "Larry" as he watches two women engage in sex acts. In another, a woman has intercourse with a sex toy that "Larry" has fastened to a teddy bear. (Doc. 66, 87.)

The Guy Game: Uncut and Uncensored uses images of real women in its game. The player answers trivia questions and is rewarded by watching footage of actual women stripping. In fact, a judge in Texas issued a restraining order against the game when it was discovered that one of the girls stripping in the

video was a minor, which made the game child pornography. (Doc. 82, ¶ 19; Doc. 66, 87.)

The Industry's Targeting of M-Rated Games to Children

Among the voluminous information and testimony considered by the General Assembly on this issue (*see* Doc. 69) was the 2004 FTC Report previously mentioned. The FTC found that the video game industry consistently placed advertisements for its M-rated games in magazines with "a sizeable readership among teens and older children" and on television shows "with large teen audiences." (Doc. 69 at BL 163.) Additionally, "nearly all of the game companies placed ads for M-rated games on websites popular with teens." (*Id*.)

The video-game industry routinely sold M-rated games to unsupervised children. In earlier undercover operations conducted by the FTC in 2000 and 2001, "unaccompanied children ages 13-16 were able to buy M-rated games 85% (2000) and 78% (2001) of the time." (*Id*. at BL 168.) In its most recent report, the FTC found that 69 percent of children were able to buy M-rated games, broken down by age as follows:

FTC Mystery Shop Results by Age—Electronic Games
Q: Was the shopper able to make the purchase?

	13 years old	**14 years old**	**15 years old**	**16 years old**	**Total**
Yes	**56%**	**77%**	**66%**	**85%**	**69%**
# shoppers	68	47	62	48	225

(*Id*. at BL 169.) Similar results have been found specifically in Illinois. In 2002, the Illinois Attorney General conducted an undercover "secret shopper"

operation and found that 32 out of 32 children, ranging in age from 13 to 15, were able to purchase M-rated games. (Doc. 82, p. 6, ¶ 25 and Exhibit C attached thereto.) In 2005, the Illinois State Crime Commission, in conjunction with a north-suburban state legislator, conducted an operation where a 15-year-old boy was able to buy M-rated games at 11 out of 15 retailers, a "success" rate of 73 percent. (Doc. 69 at BL 268-270.)

This combination of targeted advertising to children and incredibly lax self-regulation produced entirely predictable, but no less shocking findings by the FTC:

- a staggering 87 percent of "tween" and teen boys (and 46 percent of girls) have played an M-rated game;
- younger children (ages 13-15) are more likely to have played these games than older children (ages 16-17);
- according to *industry* data, nearly *40 percent* of M-rated games purchased in 2002 were for children under 17;
- 75 percent of boys 17 and under have played at least one of the *Grand Theft Auto* games, all of which are either M-rated or rated "AO" (adults only).

Id. at BL 169.

The Legislative Response: The SEVGL

The SEVGL, passed in response to the evidence recited above and other evidence contained in the legislative record (Doc. 69), governs the sale of sexually explicit video games. At the outset, however, it is important to note what the SEVGL does *not* do. The SEVGL does not ban minors from playing, or even possessing, sexually explicit video games. It does not prohibit an adult

from giving these games to minors or allowing minors to play them. Rather, the SEVGL simply prohibits a retailer from *selling or renting* sexually explicit video games *to minors* (persons under the age of eighteen). Moreover, as specified with regard to each provision below, a violation of any part of the SEVGL is not a felony or even a misdemeanor, but rather only a petty offense subject to nothing more than a fine. The law's substantive provisions include:

(1) Restricted Sale or Rental of Video Games. The SEVGL prohibits the knowing sale or rental of a sexually explicit video game to a person under eighteen. 720 ILCS 5/12B-15(a). Retail sales clerks will violate this provision only if they have complete, not constructive, knowledge that the person is a minor and sold or rented the video with the specific intent to do so. 720 ILCS 5/12B-15(d). However, if a minor uses fake identification to falsely cause the clerk to believe he or she is an adult, the sales clerk is immune from liability. 720 ILCS 5/12B-20(2). Moreover, if the sexually explicit video game was rated by the ESRB as "EC, E10+, E, or T"—ratings which mean, respectively, that the games are suitable for early children, everyone over the age of ten, everyone over the age of six, or everyone over the age of thirteen—then the sales clerk is shielded from liability. 720 ILCS 5/12B-20(4).[3]

A violation of this sale/rental restriction constitutes a petty offense with a maximum fine of $1,000. 720 ILCS 5/12B-15(a).

[3] The only other ESRB ratings are "M," or "mature," meaning suitable for those over seventeen, and "AO," or "adults only," meaning suitable for those over eighteen. In other words, the sales clerk cannot be found liable for selling or renting a sexually explicit video game unless, among other things, the game was labeled "M" or "AO" by the ESRB. *See* http://www.esrb.org/esrbratings_guide.asp.

(2) Labeling. The SEVGL requires that retailers label all sexually explicit video games with a solid white "18" outlined in black. 720 ILCS 5/12B-25(a). However, as cited above, if the sexually explicit video game has been rated by the ESRB as "EC, E10+, E, or T," the retailer is shielded from liability for failing to label the game. 720 ILCS 5/12B-20(4).

A violation of this provision constitutes a petty offense subject to a maximum fine of $500 for the first three violations and $1,000 thereafter. 720 ILCS 5/12B-25(b).

(3) Signage. Retailers must post a sign, of at least 18 by 24 inches, informing consumers that "a video-game rating system created by the Entertainment Software Ratings Board is available to aid in the selection of a game." 720 ILCS 5/12B-30. The ESRB currently provides retailers with point-of-purchase "bin signs" and "counter pads" that nearly satisfy the size requirement and contain sufficient language to satisfy this provision. *See* http://www.esrb.org/retailer/retailer_orderform.asp. Retailers (or anyone else) can also download these materials, free of charge, and manipulate their size and shape. *See* http://www.esrb.org/downloads/counter_pad.pdf.; http://www.esrb.org/downloads/bin_sign.pdf.

A violation of this signage provision constitutes a petty offense subject to a maximum fine of $500 for the first three violations and $1,000 thereafter. 720 ILCS 5/12B-30(c).

(4) Provision of Brochures. Upon request, retailers must provide consumers a brochure explaining the ESRB ratings system. 720 ILCS 5/12B-35.

The ESRB currently offers retailers a brochure on its website that fits this requirement, a 3¾ by 8½ inch, two-sided "pocket guide" that explains the ESRB ratings to consumers. *See* http://www.esrb.org/retailer/retailer_orderform.asp. This guide also is available to be downloaded by retailers (or anyone else, for that matter) free of charge, to be manipulated to any size or form. *See* http://www.esrb.org/downloads/pocket_guide.pdf.

A violation of the brochure provision constitutes a petty offense subject to a maximum fine of $500 for the first three violations and $1,000 thereafter. 720 ILCS 5/12B-35(b).

Finally, Public Act 94-0315, which enacted the SEVGL, contains a severability clause, providing that if any provision of this Act is found unconstitutional, the remainder of the Act shall not be affected. P.A. 94-0315, § 98 (Ill. 2005).

SUMMARY OF ARGUMENT

The district court erred in finding the sale/rental provision of the SEVGL unconstitutional. The State has a compelling interest in assisting parents in protecting their children from sexually explicit material. By simply restricting the sale or rental of sexually explicit video games to adults, and not banning these games to anyone, the SEVGL is narrowly tailored because it permits full adult access to these games and allows parents to supervise and approve what sexually indecent material their children view. The district court erred by failing to distinguish between an outright ban on indecent material versus a

restriction on its sale to minors, and by failing to focus on the correct factors in determining whether a law is narrowly tailored under the First Amendment.

The district court erred in finding that the SEVGL is unconstitutionally vague. The Supreme Court has upheld similar minor-indecency statutes against vagueness challenges. The SEVGL's provisions are clear, and they closely track definitions of indecent material provided by the Supreme Court. The district court failed to even employ the vagueness standard, instead striking down the law merely because, in its view, the SEVGL was overbroad. Such a determination is not only erroneous but irrelevant to a vagueness analysis.

The district court erred in finding that the SEVGL's disclosure provisions constituted "compelled speech" in violation of the First Amendment. These provisions, providing for product labels and informational signs and brochures related to the product, clearly regulate commercial speech and should be examined under the rational-basis standard. Each of these provisions is rationally related to the interests of the State to help parents oversee what indecent material their children view. The district court erred by finding that these provisions did not regulate commercial speech, and thereby analyzing these provisions under a strict-scrutiny standard.

ARGUMENT

Where, as here, there are no disputed questions of fact, the constitutionality of a state statute presents a pure question of law subject to a *de novo* review by this Court. *International College of Surgeons v. City of Chicago*,

153 F.3d 356, 367 (7th Cir. 1998). Each of the questions presented in this appeal—the constitutionality of the SEVGL's sale/rental restriction; the vagueness of the SEVGL; and the constitutionality of the SEVGL's disclosure requirements—are purely questions of law subject to this Court's *de novo* review.

I. THE SALE/RENTAL PROVISION OF THE SEVGL IS CONSTITUTIONAL.

Because the SEVGL merely restricts the sale of sexually explicit video games to minors, the SEVGL is narrowly tailored to serve the State's compelling interest in supporting parental oversight over what indecent material their children view. The SEVGL does not ban these video games to anyone and places the decision firmly in the hands of parents and other adults to decide whether minors should view these games.

The district court, while conceding that the State has a compelling interest here, failed to properly apply the Supreme Court's standards for determining whether the law is narrowly tailored. The court did not distinguish between an outright ban on such material (a ban which would include adult consumers) versus a mere restriction on the sale of this material to minors. The district failed to consider the fact that the SEVGL does not prevent a single adult from enjoying this material. Because it failed to apply the proper standards articulated by the Supreme Court, the district court erred in finding that the SEVGL is not narrowly tailored to advance the State's compelling interests. The judgment below should be reversed.

A. Background On Adult And Minor Obscenity Laws

In *Roth v. United States*, 354 U.S. 476 (1957), the Supreme Court held that "obscene" material does not enjoy First Amendment protection. In reaching its determination, the Court noted that obscenity had long been deemed to be "utterly without redeeming social importance" and therefore provided no contribution to the marketplace of ideas protected by the First Amendment. *Id*. at 484. Nine years later, in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413 (1966), the Court refined the definition of obscenity such that material was obscene if (1) the dominant theme of the material, taken as a whole, appealed to a prurient interest in sex; (2) the material was patently offensive because it affronted contemporary community standards relating to the description or representation of sexual matters; and (3) the material was utterly without redeeming social value. *Id*. at 418.

In 1968, the Supreme Court sustained a law that applied the obscenity doctrine to minors. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court considered a state law that prohibited the sale of "girlie" magazines to individuals under the age of seventeen. The statute in question defined material as "harmful to minors" if the material:

> "(1) predominantly appeals to the prurient interest of minors;
>
> (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and
>
> (3) is utterly without redeeming social importance for minors."

Id. at 633. The New York law in *Ginsberg*, in large part, adopted the *Memoirs* definition of obscenity but applied it to minors. The Court upheld this statute because the state had compelling interests in both protecting children from indecent material and in assisting parents in supervising what their children read, *id*. at 639-40, and because the law restricted the sale of this material only to minors while permitting adults to buy it for themselves or their children. *Id*. at 634-45, 639. This formulation in the New York law has become known as a "minor obscenity" or "variable obscenity" formulation, essentially applying the obscenity doctrine to minors.

In *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court modified the adult standard for obscenity to its present form. The Court essentially changed only the third prong of the *Memoirs* definition, such that, rather than showing that the material was "utterly without redeeming social value," the government need only prove that the subject material lacks "serious literary, artistic, political, or scientific value." *Id*. at 25.

The Court has never commented on what effect, if any, *Miller* has on the *Ginsberg* test for obscenity as to minors. *See*, *e.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n.10 (1974). Courts have upheld minor-obscenity statutes, however, that contained the *Ginsberg* formulation with the *Miller* refinement to the third prong. *See*, *e.g.*, *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990).

Since at least 1978, the Supreme Court has considered attempts by the states and, primarily, Congress and federal regulators to regulate non-obscene expression in various media forms. *See*, *e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (sustaining a regulation on indecent radio broadcasts). As various technologies, such as cable television and the internet, have advanced at an exponential pace, Congress and other governmental entities have made a number of attempts to prevent the flow of sexually indecent material to minors in particular. In considering the regulation of indecent material to minors, the Court has applied a strict-scrutiny standard to First Amendment challenges. That is, the regulation must advance a compelling state interest, and the law must be narrowly tailored to further that compelling interest without trampling unnecessarily on the rights of *adults* to partake in this material. *Sable Communic. of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

B. The SEVGL Satisfies The First Amendment Because It Advances Compelling State Interests And Is Narrowly Tailored To Further Only Those Interests.

The sale/rental provision of the SEVGL, 720 ILCS 5/12B-15, passes even the strictest constitutional muster. It is beyond dispute that the State has a compelling interest in shielding children from indecent sexual material and in assisting parents in protecting their children from that material. The provision is extremely narrowly tailored in that it does not ban this material from anyone—not adults, not minors—and burdens this so-called speech in the least restrictive manner by simply prohibiting the sale of this material only to minors,

not to adults. Thus, even if this Court were to apply strict scrutiny to the sale/rental provision of the SEVGL, this provision should be upheld.

As the cases discussed below demonstrate, the Supreme Court has never invalidated a law that expressly, and practically, limited *only minors* from accessing indecent sexual communication. Even laws that had the effect of burdening adult speech to some extent have been upheld. Only where laws had the practical effect of banning or significantly restricting *adult* access to the material have courts invalidated legislation because it was not narrowly tailored to the goal of protecting minors from that speech. Because the SEVGL's sale/rental provision is expressly and practically limited to minors' ability to purchase or rent sexually explicit video games, without affecting adult access in any way, the provision satisfies the First Amendment.

1. The State's Interests Are Compelling.

The SEVGL promotes two compelling interests of the State: (1) protecting minors from sexually indecent material, and (2) assisting parents in protecting their children from this same harm. 720 ILCS 5/12B-5. The Supreme Court has long recognized that each of these interests is compelling. Even the district court tacitly acknowledged as much by "[a]ssuming," without further comment, "that the state has a compelling interest that justifies regulating the material prohibited by the SEVGL." (Opinion, Doc. 100, at 47 (A-48).)

The Supreme Court "has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in

the structure of our society." *Ginsberg*, 390 U.S. at 639. "The State also has an independent interest in the well-being of its youth." *Id*. at 640. *See also Pacifica*, 438 U.S. at 749 ("The government's interest in the well-being of its youth and in supporting parents' claim to authority in their own household justif[y] the regulation of otherwise protected expression."). Protecting children from sexually indecent, non-obscene material is "an extremely important justification, one that this Court has often found compelling," *Denver Area Educ. Telecommunic. Consortium v. FCC*, 518 U.S. 727, 743 (1996), and which the Supreme Court has "repeatedly recognized" in any number of contexts. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 875 (1997).

The harm from sexually explicit material is self-evident and does not require scientific or empirical support. The Court "do[es] not demand of legislatures 'scientifically certain criteria of legislation'" in this area. *Ginsberg*, 390 U.S. at 642-43. Such harm is "evident beyond the need for elaboration." *New York v. Ferber*, 458 U.S. 747, 756 (1982). The Supreme Court has never demanded any empirical data that sexually indecent material is harmful to children; the Court has accepted the fact as self-evident. *See*, *e.g.*, *Pacifica*, 438 U.S. at 749; *Denver Area*, 518 U.S. at 743; *Sable*, 492 U.S. at 124; *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001).

The State's compelling interest is not limited to the restriction of material that fits within the three-pronged definition of "minor obscenity" as articulated in *Ginsberg v. New York*, 390 U.S. 629. As discussed above, under *Ginsberg*,

material is obscene to minors if it (1) predominantly appeals to the minor's prurient interest in sex; (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and (3) lacks serious artistic, literary, political or scientific value with respect to minors. *Id*. at 633. To the contrary, in the context of minors, the Supreme Court has consistently held that the State's compelling interests apply equally to non-obscene, sexually indecent material—that is, to the regulation of sexual communication that does not contain all three elements of the *Ginsberg* formulation.

For example, *Denver Area* recognized these compelling interests in the context of a law restricting television programming that showed "sexual or excretory activities or organs in a patently offensive manner"—a definition that lacked *Ginsberg*'s first and third prongs and part of the second prong. *Denver Area*, 518 U.S. at 735. *Accord Pacifica*, 438 U.S. at 732 (sustaining governmental interests in restricting the broadcast of "indecent" radio communications describing, "in terms patently offensive … sexual or excretory activities and organs."). In *Sable*, the Court again recognized these compelling interests in construing a statute that banned "indecent" dial-a-porn phone messages, a definition which did not satisfy a single prong of *Ginsberg*. *Sable*, 492 U.S. at 126.

The Court likewise acknowledged these compelling interests in reviewing legislation regulating "indecent" transmissions or "patently offensive" displays

on the internet, neither of which fully encapsulated even a single prong of the *Ginsberg* formulation. *Reno*, 521 U.S. at 859-60 n.25. The Court recognized these compelling governmental interests in construing legislation regarding both cable television and virtual child pornography, neither of which definitions of indecency satisfied even a single prong of *Ginsberg*. *U.S. v. Playboy*, 529 U.S. 803, 811, 826-27 (2000); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246, 251 (2002). In none of these cases did the Supreme Court indicate that the government's compelling interest only applied to the regulation of material that was obscene for minors.

Moreover, the Supreme Court has recognized these compelling interests throughout a wide range of expressive media, never suggesting that the government's interests in protecting minors was limited to only certain modes of communication. As the cases above illustrate, the Court has long acknowledged the government's compelling interests in protecting children from indecent material, and in assisting parents in doing so, in such media as telephone communications (*Sable*), the internet (*Reno*), cable television (*Playboy* and *Denver Area*), radio broadcasts (*Pacifica*), and magazines, films, or any other media in which virtual child pornography might appear (*Free Speech Coalition*). Far from suggesting that the government's compelling interests are limited to any single medium, the Court in *Sable* articulated this broadly applicable test:

> Sexual expression which is indecent but not obscene is protected by the First Amendment …. The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to

> further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. The interest extends to shielding minors from the influence of literature that is not obscene by adult standards.

Sable, 492 U.S. at 126. Thus, when the government seeks to restrict the sale of non-obscene, sexually explicit material to minors, the question is not whether it has compelling interests in doing so; those interests are firmly established. Rather, the only question is whether the regulation is narrowly tailored to advance those interests.

2. The SEVGL Is Narrowly Tailored Because It Restricts Only Minors' Access To Sexually Explicit Video Games And Does Not Restrict Adults' First Amendment Rights In Any Way.

As the cases below demonstrate, a law protecting minors from indecent material is narrowly tailored if the restriction is limited to the group that will be harmed by this material: minors. The Supreme Court has never invalidated a "harmful to minors" law restricting indecent material when the effect of that law was limited to minors. It is only when the restriction extends to adults that the Supreme Court has invalidated the law.

Still, in some cases the Supreme Court has even upheld restrictions on minor access to indecent material when they place some burden on the speech rights of adults, too. It is in this context that the particular form of expressive medium has played a role. With the majority of media regulations considered by the Court—*e.g.* regulations concerning telephone communications, radio broadcasts, the internet, and cable television—the purveyor and the recipient

engaged in an anonymous transaction over phone lines, cable wires or cyberspace. The source of the speech could not identify the recipient, much less verify the recipient's age. As such, the government often faced great difficulties in drafting a law that screened out minor recipients of this material without also screening out adults. Facing this nearly impossible task, the government opted to simply ban this material from *everyone*—adults and minors alike—such that adults were reduced to enjoying only that which children could enjoy.

Fortunately, in the context of the video-game medium, this Court need not engage in a balancing of circumstantial factors in determining whether an incidental restriction on adults' First Amendment rights is justified—because adults are not impacted by the SEVGL in any way whatsoever. The purchase of a video game is a personal, face-to-face transaction between the seller and buyer. The retailer need only check the buyer's identification to verify his or her age. Adults are perfectly free to purchase or rent these games for themselves *or* for their children. The SEVGL is narrowly tailored because its effect is perfectly drawn to impact only the subject group—minors—while leaving fully intact the First Amendment rights of adults. Because the State indisputably has a compelling interest in helping parents shield their children from sexually indecent expression, and because the SEVGL advances only that interest without any incidental burden on adults, the law is narrowly tailored and satisfies the First Amendment.

The Supreme Court has repeatedly emphasized that "harmful to minors" indecency legislation runs afoul of the Constitution *only* when it impacts the rights of *adults* to engage in the indecent communication. For example, *Sable* invalidated a blanket prohibition on all non-obscene, "indecent" dial-a-porn communications *not* because it banned these communications to children, but because it banned them to adults: "the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages." *Sable*, 492 U.S. at 131. Moreover, the Court noted that the FCC had put in place effective means of filtering out minor callers through credit-card, access-code, and scrambling rules. *Id*. at 129. Thus, the government could not excuse its total ban on indecent phone-sex communications that prohibited adult communications as well. Implicit but obvious in the Court's reasoning is that a prohibition on indecent speech would have easily passed constitutional muster had it been limited to children. *See id*. at 131 (the law had "the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear").

Likewise, in *Butler v. Michigan*, 352 U.S. 380 (1957), the Court invalidated a blanket prohibition on material "manifestly tending to the corruption of the morals of youth" because the law denied *adults* the right to this material. Justice Frankfurter famously wrote that to ban this material from adults as well as children was "to reduce the adult population of Michigan to

reading only what is fit for children." *Id*. at 383. *See also id.* ("Surely this is to burn the house to roast the pig.").

In *Playboy*, 529 U.S. 803, the Court invalidated a complete ban on "sexually-oriented" cable programming between the hours of 6:00 am and 10:00 pm. "In other words, for two-thirds of the day, no household in those service areas could receive the programming, whether or not the household or the viewer wanted to do so." *Id*. at 807. The law was not narrowly tailored because the 16-hour-a-day ban impacted the rights of adults, as well as minors, to view this material. Moreover, the law was not narrowly tailored because there was a logical, less restrictive alternative available short of a complete ban: "targeted blocking," which allowed individual households to block the programming, thus placing the decision in the hands of adults to decide, for themselves and their children, whether the material was welcome in their home. *Id*. at 815. Given an obviously narrower way to accomplish the restriction of this material to minors, "the objective of shielding children [did] not suffice to support a blanket ban" that included adults. *Id*. at 814.

Similarly, *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004), upheld a preliminary injunction against a law that prohibited posting material on the internet that was harmful to minors. The law was not narrowly tailored because it burdened adults' rights to view this content, and because a less restrictive alternative was available that would not impact the First Amendment rights of adults: "filtering" technology, which allowed individual computers to

prevent minor access to indecent material, thus allowing parental control over what children viewed while allowing adults the unrestricted right to view the material themselves. *Id*. at 666-67.

There is no better, or narrower, way to advance the compelling interest of assisting parental authority over what indecent material their children view than to place the decision of what sexually explicit video games their children will play squarely in the hands of adults. By merely limiting the *sale* of these games to adults, the SEVGL does not ban them even from minors, but allows parents and other adults to make responsible decisions for minors. It was the failure of the government regulations in *Sable*, *Playboy*, and *Ashcroft v. ACLU* to give this discretion to adults that doomed those restrictions. Instead, in each of those decisions, the government simply banned the material entirely—to adults and children—in the name of protecting minors. Significantly, in each of these decisions, the law was not narrowly tailored because the Court could identify some form of a "screening" technology that placed control in the hands of adults to decide for themselves and their children what material to enjoy. Because the purchase of a video game occurs face-to-face and not over a communication line or wire, the SEVGL easily accomplishes the goal of distinguishing between minors and adults.

In this regard, the SEVGL is much like the ban on the sale of "girlie" magazines to minors that was upheld in *Ginsberg*, 390 U.S. 629. The Court there emphasized that the law "[did] not bar [the vendor] from stocking the

magazines or selling them to persons 17 years or older," *id*. at 634-35, nor did it "bar parents who so desire from purchasing the magazines for their children." *Id*. at 639. Likewise, the SEVGL does not prevent vendors from stocking sexually explicit video games and selling them to adults, who may allow their children to play these games if they so desire.

Moreover, the Supreme Court has even upheld regulations that effectively banned *adults* from partaking in indecent material in the name of protecting minors from this material. For example, *Pacifica* found the FCC's daytime ban on "indecent" speech sufficiently tailored. By limiting the broadcast of comedian George Carlin's "seven dirty words" monologue to evenings, the order protected minors who might hear the broadcast in the afternoon while not altogether prohibiting adults from hearing it. *Pacifica*, 438 U.S. at 750. The Court recognized that the FCC Order, while intended to protect children, could have the effect of an outright ban that included adult listeners but reasoned that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words." *Id.*, n.28.

In *Denver Area*, the Court upheld a congressional statute that allowed cable access operators to *ban* programming depicting "sexual or excretory activities or organs in a patently offensive manner." *Denver Area*, 518 U.S. at 734. The fact that the law could potentially result in an outright ban of the programming to adults, as well, did not render it unconstitutional because

adults could get the same or similar entertainment from tapes, theaters, or a satellite dish. *Id*. at 745. Thus, the law satisfied strict scrutiny.

Lower courts have also concluded that "harmful to minors" laws imposing some burden on adults' First Amendment rights were nevertheless constitutional. Laws banning offensive material in sidewalk vending machines satisfied strict scrutiny because adults could get the same material from other distributors such as adult bookstores. *Crawford v. Lungren*, 96 F.3d 380, 388-89 (9th Cir. 1996); *State v. Evenson*, 33 P.3d 780, 788 (Ariz. App. 2001). Laws requiring vendors to cover up their displays of offensive material were narrowly tailored because adults could go to adults-only stores to view them, or they could purchase them and unwrap them at home. *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389, 1395 (8th Cir. 1986); *M.S. News Co. v. Casado*, 721 F.2d 1281, 1288 (10th Cir. 1983). The court in *People v. Hsu*, 99 Cal. Rptr. 184, 194 (Cal. App. 2000), upheld a prohibition on the transmission of sexually explicit material over the internet for the purpose of seducing a minor because the law did not prohibit adult-to-adult communications.

It is true, as the district court noted, *see* Opinion, Doc. 100, at 47 (A-48), that in each of these lower court decisions, the laws contained all three prongs of the *Ginsberg* formulation. But that distinction is irrelevant; the analysis was precisely the same as in the indecency cases. Like those cases, the lower courts here grappled with the burden placed on adult free-speech rights in the name of

advancing the compelling interests of protecting children. These courts' discussion of the narrow tailoring of the laws is applicable here.

The instant case presents a far stronger case favoring constitutionality than in *Pacifica* and *Denver Area*, and for that matter, any of the cases cited above. In both *Pacifica* and *Denver Area*, the laws were narrowly tailored despite the fact that adults were deprived of this material, too. Here, adults are not deprived in any way at all. In the other cases cited above, the laws at issue were flat bans on speech, including adult speech. *See Sable*, 492 U.S. 115 (blanket prohibition on indecent dial-a-porn); *Playboy*, 529 U.S. 803 (blanket prohibition for two-thirds of the day on indecent programming); *Ashcroft v. ACLU*, 542 U.S. 656 (complete ban on internet material). None of those governmental restrictions made any accommodation for adult access to the material.

Here, in contrast, there is no ban whatsoever. The SEVGL does not ban sexually explicit video games even to minors. It does not require vendors to remove all such games from their shelves. It simply prohibits the sale or rental of these games to minors. This is a particularly effective way to promote the compelling interest in helping parents to supervise what their kids are watching and playing—by only allowing parents or other adults to purchase these games.

Moreover, because the video-game purchase does not involve a transaction over cyberspace or cable wires, but rather involves a personal interaction, the SEVGL does not impact any adult speech whatsoever in the name of protecting

minors. A retailer need only request age verification from the purchaser. The SEVGL could not be more narrowly tailored. There is simply no possibility that an adult will be denied access to these sexually explicit video games.

Given that the State indisputably has compelling interests in protecting children from indecent sexual expression and in helping parents do the same, and given that the SEVGL accomplishes those precise goals without affecting a single adult whatsoever, there can be no question that the SEVGL is constitutional. The district court erred in holding otherwise.

C. The District Court Erred By Misreading Supreme Court Precedent And By Failing To Account For The Narrow Reach Of The SEVGL.

The district court misapplied the Supreme Court's test for judging the regulation of sexually indecent material in the context of minors. The Opinion reads as if the State may never restrict indecent, non-obscene material from minors except in the specific context of *broadcasting*. Worse yet, to the extent that a distinction between the video-game medium and other forms of media exists, the district court failed to appreciate the *relevant* distinction—that the SEVGL can easily distinguish between adult and minor consumers, given the unique aspect of the video-game purchase. The district court failed to analyze the extent to which *adult* rights are abridged by the SEVGL.

The court concluded, under controlling Supreme Court precedent, that the strict-scrutiny standard was applicable. The district court then at least acknowledged the State's argument "that the SEVGL is narrowly tailored

because it does not infringe on adults' access to these materials." (Opinion, Doc. 100, at 47 (A-48).) But the court did not address this argument beyond this brief reference. The court, for example, never considered the extent to which the SEVGL burdens adult speech (which is none at all). Nor did the court consider that the SEVGL is not a ban, but merely a restriction that places the purchase decision in the hands of parents, which directly and narrowly advances a recognized compelling interest in supporting parental authority over their children's viewing decisions.

The court ignored those critical points altogether and proceeded to reject the State's argument simply because "the cases [Defendants] cite"—which in the district court's mind meant only *Pacifica* and *Denver Area*—were distinguishable because they arose in the context of broadcasting. (*Id*.) The district court then leaped to the conclusion that, "by omitting the 'as a whole' limitation on the second prong and omitting the third prong entirely, the SEVGL regulates an unconstitutionally vague amount of speech and is therefore not narrowly tailored." (*Id*.)

The district court's analysis was incomplete. Moreover, the brief analysis the court did offer was incorrect.

First, as discussed above, the Supreme Court has *never* suggested that permissible governmental regulation of indecent communications is limited to the broadcasting context. There is, to be sure, a critical distinction between the

broadcasting and video-game media, but it is one that eluded the district court and which favors upholding the SEVGL.

The unique context of broadcasting was important in *Pacifica* and *Denver Area* because *adults* were being denied access to the subject material, and in determining whether the law was as narrowly tailored as it could be, the Court had to consider those obvious circumstances. *See Pacifica*, 438 U.S. at 748-49; *Denver Area*, 518 U.S. at 743-44. The Court found, in those cases, that the restrictions were narrowly tailored, despite intrusion on *adult* speech rights, because there was no narrower way to accomplish the compelling interest of protecting minors—if the Court did not allow the methods the government had chosen, there would be *no* way to do it. For example, in *Pacifica*, the Court noted that "broadcasting is uniquely accessible to children," who could simply flip a switch to access the material, and there was no way to distinguish between minors and adults at the *source* of the communication—the provider of the radio broadcast. *Pacifica*, 438 U.S. at 749. In contrast, the Court noted, "[o]ther forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children." *Id.*

A video-game store is no different than a bookstore or motion picture theater in that the distinction between adult and minor consumers can be identified at the point of purchase. Indeed, in distinguishing the unique context of broadcasting, the Court in *Playboy* (which, unlike the court below, did not

consider cable television to be "broadcasting" in the sense that radio is) focused on this same point, which favors Defendant's position and contradicts the district court's reasoning:

> There is, moreover, a key difference between cable television and the broadcasting media, which is the point on which this case turns: Cable systems have the capacity to block unwanted channels on a case-by-case basis. The option to block reduces the likelihood, so concerning to the Court in *Pacifica*, that traditional First Amendment scrutiny would deprive the government of all authority to address this sort of problem. The corollary, of course, is that targeted blocking enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners . . . .

Playboy, 529 U.S. at 815 (citations omitted). Because the video-game medium involves a face-to-face transaction, where the distinction between adult and minor purchasers can be made without a sweeping ban that includes adults, the SEVGL's sale/rental restriction has the effect of the blocking technology referenced in *Playboy*. Like that technology, the SEVGL's restriction "enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Playboy*, 529 U.S. at 815. Thus, while the district court may have correctly identified a distinction between broadcasting and this case, it failed to realize that this is a distinction that favors *upholding* the SEVGL due to the ease in distinguishing between adult and minor purchasers of video games.

Second, the district court's complaint that the SEVGL fails to include the "as a whole" portion of the second prong of the *Ginsberg* test reflects a fundamental misunderstanding of that prong. In the district court's mind, the

second, "patently offensive" prong of the *Ginsberg* formulation requires "that the *material* be considered 'as a whole.'" (Opinion, Doc. 100, at 47 (A-48) (emphasis added).) That is simply wrong. The second prong of the *Ginsberg* test requires that material be "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors." *Ginsberg*, 390 U.S. at 633. The phrase "as a whole" pertains to the *community* as a whole, not a review of the *material* as a whole. Certainly the *Memoirs* standard for adult obscenity, from which the New York law in *Ginsberg* borrowed, made no mention of the *material* as a whole. *See Memoirs*, 383 U.S. at 418.

To the contrary, "the *Memoirs-Ginsberg* test for whether the material is 'patently offensive' refers specifically to the objectionable portion of the work in question and does not, indeed, cannot logically, be evaluated on the basis of the work as a whole." *American Booksellers*, 919 F.2d at 1503 n.18. The material, in other words, need not be *entirely* filled with patently offensive images; it need only contain patently offensive images within it. Thus, the district court's criticism that the SEVGL "omits the 'as a whole' limitation on the second prong" of *Ginsberg*, thereby "eliminat[ing] the requirement that the material be considered as a whole," Doc. 100 at 47 (A-48), was based on a misreading of *Ginsberg*.[4]

[4] In the current *adult* obscenity formulation, the second prong relating to "patently offensive" material does not contain the "as a whole" language at all, even as to the "community." *See Miller*, 413 U.S. at 24. Thus, the omission of this language in the SEVGL does not rise to a constitutional infirmity as applied to minors.

Third, contrary to the district court's reasoning, the fact that the SEVGL's definition of "sexually explicit" goes beyond what is obscene for minors is not a death knell under the First Amendment. The fact that the SEVGL lacks the "serious value" prong of the *Ginsberg* test is not the end of the inquiry; it is the beginning. It simply means that the material regulated is indecent, but not obscene, for minors. That, in turn, merely means that, under current Supreme Court precedent, the SEVGL must satisfy strict scrutiny. It must be narrowly tailored to advance its concededly compelling interests.

As discussed at length above, the requirement of narrow tailoring means that adults cannot be prohibited from viewing this material. The district court did not consider the extent to which the SEVGL impacted adults, however; it simply considered how much it impacted *minors*. The Supreme Court has considered a number of laws that restricted indecent material to minors—using definitions of indecency that did not even approach the *Ginsberg* formulation—and never even hinted that the law might be unconstitutional because of the amount of speech restricted from minors.

Contrary to the district court's assertion, sexually explicit video games with serious artistic value would *not* be "prohibited for minors under the SEVGL." (Opinion, Doc. 100, at 48 (A-49).) If parents want to buy such games for their children, they are free to do so. The district court's failure to distinguish between an outright ban and a restriction on the sale of that material to only adults was error. The SEVGL is a restriction on minors' right to

play these video games only to the extent that their parents *wish* that right to be restricted.

The only Supreme Court decision on which the district court relied was *Reno*, 521 U.S. 844. *Reno*, which concerned two provisions of the Communications Decency Act (the "CDA") regarding internet communications, is obviously distinguishable on several grounds. First and foremost, though the provisions were justified in the name of protecting minors, the statute in fact banned non-obscene adult speech as well as that of minors. *Id*. at 874 ("In order to deny minors access to potentially harmful speech, [the law] effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."). For example, the CDA outlawed adults from displaying an offensive word or image on their own computer in the presence of a minor. *Id*. at 877. Adults could not use an indecent word in a group e-mail or chat room that included even a single minor. *Id*. at 876. Given that the internet obviously did not permit a face-to-face exchange between the sender and recipient of a chat-room message, "in the absence of an age verification process, the sender [would be] charged with knowledge that one or more minors will likely view it" and thus would be subject to criminal liability. *Id*. The concurring justices, contrasting the CDA with the statute in *Ginsberg*, wrote that, while the *Ginsberg* law made it a crime to sell a "girlie" magazine to a minor, the CDA was more "akin to a law that makes it a crime for a bookstore owner to sell pornographic magazines to *anyone* once a minor enters his store."

Id. at 893 (O'Connor, J., concurring in part) (emphasis added). The CDA's impact on adult speech, alone, distinguishes *Reno* from the SEVGL, which does not restrict adult speech in any way.

Nor was the amount of regulated adult speech in *Reno* insignificant or merely incidental; the CDA's breadth was "wholly unprecedented" and "threaten[ed] to torch a large segment of the internet community." *Id*. at 877, 882. The law covered not only images but "any comment, request, suggestion, proposal …or other communication." *Id*. at 859-60 n.25. The CDA "extend[ed] to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library." *Id*. at 878. The publication of George Carlin's "seven dirty words" could result in a felony prosecution. *Id*. at 878. The law covered not only commercial speech and entities but also nonprofit groups and individuals. *Id*. at 877.

Reno, if anything, supports Defendant's position that the government may restrict indecent expression from minors provided it does not restrict it from adults:

> It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to *adults*. As we have explained, the government may not "reduc[e] the adult population … to … only what is fit for children."

Reno, 521 U.S. at 875 (emphasis added, citations omitted). It was the CDA's intrusion into adult speech—the inability of the CDA to permit adult access while denying minor access—that rendered it invalid. *See also id.* at 871 n.37

(noting that "the statute does not indicate whether the 'patently offensive' and 'indecent' determinations should be made with respect to minors or the population as a whole" and that Congress "expressly rejected amendments that would have imposed such a 'harmful to minors' standard."); *id.* at 855-56 (noting the district court's finding that there was no effective way to determine an internet user's age through e-mail, chat rooms, or the like).

This district court, however, failed to appreciate this distinction. The court relied on *Reno* because "[o]ne of the many reasons that the Court overturned [the CDA] provisions was that the definition of prohibited material did not include the 'serious value' prong of the *Miller* test for obscenity." (Opinion, Doc. 100, at 48 (A-49).) But the Supreme Court was not writing of the breadth of this law as it affected minors; it was complaining of the CDA's intrusion on *adult* speech. *See Reno*, 521 U.S. at 877-78. If this was not perfectly clear from the context, the Supreme Court explicitly cautioned that it was *not* deciding this issue as it pertained to minors: "[W]e need neither accept nor reject the government's submission that the First Amendment does not forbid a blanket prohibition on all 'indecent' and 'patently offensive' messages communicated to a 17-year-old—no matter how much value the message may contain and regardless of parental approval." *Id*. at 878.[5]

The district court erred by interpreting *Reno*'s discussion on this subject as if it applied to minors. In any event, *Reno* would be distinguishable for other

[5] Two concurring justices wrote that they would answer that question and hold that the First Amendment does not forbid such a ban. *Reno*, 521 U.S. at 895 (O'Connor, J., concurring).

reasons as well. First, that case involved a flat ban on indecent communications, unlike the SEVGL, which is simply a restriction on the sale of sexually explicit video games to minors. Minors are not prohibited from possessing the game or even playing it; they simply cannot purchase it. Second, the CDA in *Reno* made no accommodation for parental approval of minors' engagement in this material. In distinguishing *Ginsberg*, which permitted parents to purchase "girlie" magazines for their children, the Court noted that "[u]nder the CDA, by contrast, neither the parents' consent—nor even their participation—in the communication would avoid application of the statute." *Reno*, 521 U.S. at 865. Thus, under the CDA, a parent could not allow her 17-year-old to obtain information on the internet that the parent deemed appropriate, nor could the parent send her 17-year-old college freshman information on birth control over e-mail. *Id*. at 878. Here, in contrast, the SEVGL places the control firmly in the hands of parents to decide whether their children should play these video games. This is entirely consistent with the well-recognized, compelling state interest in assisting parents in supervising what indecent material their children may view.

Third, as with *Playboy*, *Sable*, and *Ashcroft v. ACLU* discussed above, in *Reno* the Court identified parental-control technology, allowing parents to block children's access to indecent websites, that would soon become widely available. *Id*. at 855. In this case, in contrast, a retailer's request for a valid form of identification from a video-game purchaser will accomplish that same goal. Fourth, the CDA in *Reno* governed not only commercial entities but nonprofit

entities and even individuals sending a single e-mail or joining a chat room. The SEVGL, on the other hand, only governs video-game retailers. *Reno*, therefore, is patently distinguishable for a variety of reasons and explicitly clarified that it was *not* ruling on the precise point for which the district court cited it.

The district court's reference to *Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne*, 473 F.2d 1297 (7th Cir. 1973), does not alter the conclusion that the SEVGL is constitutional. The district court cited *Cinecom* only for its conclusion that the strict-scrutiny standard applied. (Opinion, Doc. 100, at 44 and n.9 (A-45-46).) Defendants acknowledge that, under controlling Supreme Court precedent, the strict-scrutiny standard is applicable. To the extent the district court may have relied upon *Cinecom* for any other purpose, such reliance was erroneous.

Cinecom does not accurately state current law on the regulation of indecent material to minors. The case was decided in 1973, before any of the long line of indecency cases cited above were decided, at a time when only *Ginsberg* had been handed down. This Court recognized, in fact, that the Supreme Court had yet to pass on the question of the government's ability to regulate non-obscene material to minors. *Cinecom*, 473 F.2d at 1301. This Court's holding that the government could not restrict material to minors beyond what was considered "obscene for minors" is clearly no longer the law. Such a blanket holding flies in the face of *Pacifica* and *Denver Area*, as well as the litany of cases that, in discussing the narrow tailoring of the law, focused not

on the amount of speech restricted from minors but on the amount of speech restricted from adults.

In any event, *Cinecom* is distinguishable for a variety of reasons. First, that case involved a blanket ban on indecent images on the screens of drive-in movie theaters that could be viewed from a public street. The "threshold problem" this Court recognized was that this complete ban restricted this material from adults as well as children. *Id.* at 1299. In addition, the ordinance there was far broader, encompassing any depiction of bare buttocks or breasts without any requirement that such exhibition be lewd or erotic, and not including a single prong of the *Ginsberg* formulation. *Id.* at 1299, 1301 ("any exhibition of the described nudity, regardless of context, [was] prohibited"). *Cinecom* is inapposite.

The SEVGL easily satisfies the First Amendment. The State has compelling interests in protecting minors from sexually indecent expression and in assisting parents in supervising what indecent expression their children may view. The SEVGL narrowly advances these compelling interests, not by prohibiting this material from minors but by limiting the sale or rental of these games to parents and other adults, who are empowered to decide whether their children should be permitted to play these sexually graphic video games. Because it is narrowly tailored to achieve compelling interests, the SEVGL is constitutional. The district court's holding should be reversed.

II. THE SEVGL IS SUFFICIENTLY DEFINITE TO SATISFY THE CONSTITUTION.

The Due Process Clause does not impose an "insuperable obstacle to legislation" requiring mathematical precision of terms. *U.S. v. Petrillo*, 332 U.S. 1, 7 (1947). Rather, a statute satisfies the Due Process Clause when it affords a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The district court, however, did not even apply this standard in concluding that the SEVGL is unconstitutionally vague.

The SEVGL defines a "sexually explicit" video game as one that:

> the average person, applying contemporary community standards would find, with respect to minors, is designed to appeal or pander to the prurient interest and depict or represent in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act or a lewd exhibition of the genitals or post-pubescent female breast.

720 ILCS 5/12B-10(e).

The district court did not identify a single word in this definition that was confusing, or that a person of ordinary intelligence would fail to understand. Rather, the district court merely held the definition to be vague because it lacked the "serious value" prong of the obscenity test. This holding was erroneous.

In *Denver Area*, 518 U.S. 727, the Court sustained legislation that did not contain the "serious value" prong of the *Miller* test. The law was aimed at programming that "describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community

standards." *Id*. at 734. The Court rejected the vagueness challenge despite squarely recognizing that the language omitted *Miller*'s "serious value" prong. *Id*. at 752.

Additionally, as did the Court in *Denver Area*, this Court should note that the SEVGL's definition of "sexually explicit" closely tracks definitions suggested by the Supreme Court in *Miller*, 413 U.S. 15, which set the current standards for defining adult obscenity with its three-pronged test. *Miller* suggested definitions of speech that could constitutionally be deemed patently offensive:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Id. at 25. The SEVGL's definition of "an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act or a lewd exhibition of the genitals or post-pubescent female breast" borrows liberally, to say the least, from *Miller*. 720 ILCS 5/12B-10(e). Regardless, there is nothing uncertain or confusing in the definition of "sexually explicit," and under *Denver Area*, the omission of the "serious value" prong does not render it unconstitutionally vague.

The district court, however, cast aside *Denver Area* with this one-sentence distinction: "*Denver Area* involved a regulation of broadcast programming, a unique medium in which children can unknowingly encounter explicit images and statements without even seeking them out." (Opinion, Doc. 100, at 50 n.11

(A-51).) This point, if it has any relevance at all, surely has nothing to do with whether the SEVGL is *vague*. The district court did not explain why similar language would not be difficult for a cable-television provider of ordinary intelligence to understand in *Denver Area*, but somehow would be difficult for a video-game retailer of ordinary intelligence to comprehend in this case. The district court did not explain why this language would be clear in a context where children could unknowingly encounter indecent images, but unclear when minors have to walk into a store to purchase a video game.

In effect, the district court did not apply the Fifth Amendment vagueness standard, but rather a First Amendment overbreadth standard. By focusing on the absence of the "serious value" prong, the district court, in essence, held that the SEVGL regulated too much speech. How much speech is restricted, however, has nothing to do with how clearly the law is defined. The question is whether a person of ordinary intelligence can understand the language. *Grayned*, 408 U.S. at 108-09.

Indeed, the only case the district court cited on this point, *Reno*, 521 U.S. 844, was decided on overbreadth grounds, not vagueness. *Id*. at 864 ("we conclude that the judgment should be affirmed without reaching the Fifth Amendment [vagueness] issue."). While the Court did discuss ambiguities in the statute—ambiguities that do not exist in the SEVGL—the Court did not find the CDA provisions to be unconstitutionally vague. *See also id*. at 870 ("Regardless of whether the CDA is so vague that it violates the Fifth Amendment," many

ambiguities concerning the scope of coverage made it overbroad). Rather, the Court invalidated the law because of its breathtaking reach into protected *adult* expression. The CDA was unconstitutionally overbroad, not unconstitutionally vague.

In any event, though *Reno* is not a vagueness case, its discussion of the ambiguities in the CDA does not control the vagueness analysis in this case. The primary ambiguity in the CDA was that it had two different provisions in Section 223, one of which banned the transmission of "indecent" material (Section 223(a)) and the second of which banned the display of material that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" (Section 223(d)). *Id*. at 871. But these standards clearly overlapped; they would both apply, for example, to an e-mail containing a description of a sex act. The Court feared that this difference in language would "provoke uncertainty among speakers about how the two standards relate to each other." *Id*. This fear was exacerbated because the term "indecent" was not defined in any way. *Id*., n.35. Moreover, neither of the terms indicated whether the determinations as to "indecent" and "patently offensive" should be made with respect to minors or the population as a whole; people were left to guess. *Id*., n.37. In this regard, the CDA provisions were virtually impossible to comprehend. The SEVGL, however, suffers from none of these flaws.

As for the absence of certain prongs of the *Miller* formula, the Court in *Reno* complained of problems in the CDA that were specific to a federal law and which are not present with the SEVGL. First, in *Reno*, the CDA's "patently offensive" prong of the *Miller* test did not include the "critical requirement" that the proscribed material be "specifically defined by applicable state law." *Reno*, 521 U.S. at 873. That problem does not exist here, where the SEVGL governs only a single state.

Second, the CDA did not contain the "serious value" prong from the *Miller* formulation, which was of particular concern in *Reno* because that prong sets a national floor for socially redeeming value, as opposed to the other prongs, which are judged by community standards state-by-state. *Id*. The absence of the third prong was especially meaningful in the context of a federal statute, as the risk of arbitrary enforcement from state-to-state was substantial—particularly in the context of regulating the *internet*, with users numbering 40 million at the time of trial in *Reno* and projected to climb to 200 million users, throughout the nation, by 1999. *Id*. at 850, 873. Without *some* standard establishing a national floor, an internet provider, a website host, the sender of an e-mail, or a participant in a chat room could be subjected to fifty different standards simultaneously, which would chill an extraordinary amount of protected speech by all but the most daring of adults. It simply cannot be said that the same concern arises in the context of the SEVGL, which governs the retail sales of video games to minors, and only minors, in only one state.

The only other SEVGL provision Plaintiffs singled out for attack is the phrase "complete knowledge" in paragraph (d) of the sale/rental provision and in the affirmative defenses available to a video game retailer. 720 ILCS 5/12B-15(d) (a sales clerk cannot be prosecuted for a prohibited sale/rental unless he has "complete knowledge" that the purchaser was a minor); 720 ILCS 5/12B-20 (immunizing the retailer if the sales clerk had such "complete knowledge"). The district court did not reach this issue, having found the term "sexually explicit" to be unconstitutionally vague. (Opinion, Doc. 100, at 49 (A-50).)

These provisions are not remotely vague. A person of ordinary intelligence would easily conclude that "complete knowledge" means *actual* knowledge, as opposed to constructive knowledge. It is not enough, in other words, that a sales clerk should have known the person to be a minor—he must know, as a certainty, that the purchaser is a minor.[6]

Ginsberg rejected a vagueness challenge to the New York law prohibiting a vendor from "knowingly" selling sexually explicit material to minors, where "knowingly" was defined as not only actual knowledge but "reason to know, or a belief or ground for belief which warrants further inspection or inquiry" of the both the minor's age and the indecency of the material. *Ginsberg*, 390 U.S. at 646 (citing New York Penal Law § 484—h(1)(g)). That definition, which was held not vague, is far less definite than SEVGL's requirement of complete knowledge.

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[6] "Complete" means "having all necessary or normal parts, components, or steps; entire." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

The SEVGL is not unconstitutionally vague. The district court's judgment should be reversed.

III. THE DISCLOSURE PROVISIONS OF THE SEVGL DO NOT COMPEL SPEECH AND SATISFY THE FIRST AMENDMENT.

A. The Disclosures Required Under the SEVGL Are A Form Of Commercial Speech Governed By A Rational-Basis Test.

The disclosure provisions of the SEVGL require retailers of video games to do three things to ensure that video games with sexually explicit material are not distributed to minors without adult consent or supervision: (1) label all sexually explicit video games with a solid white "18" outlined in black, 720 ILCS 5/12B-25; (2) post signs in the store informing consumers that a video game rating system is available to aid in the selection of games, 720 ILCS 5/12B-30; and (3) upon request, provide consumers with a brochure explaining the rating system. 720 ILCS 12B-35.

In ruling that the disclosure provisions of the SEVGL violated the First Amendment, the district court first found that the disclosures were not a form of commercial speech. (Opinion, Doc. 100, at 50-51 (A-51-52).) The court based this decision on its belief that the "18" sticker "tells parents nothing about the actual content of the games, and it creates the appearance that minors under eighteen are prohibited from playing such games." (*Id.*) The Court also felt that the labeling requirements required retailers to make a "subjective evaluation" of the content of the games before deciding whether or not to affix a label. (*Id.* at 51 (A-52).)

The court erred in concluding that the disclosures do not constitute commercial speech because of a perceived lack of clarity and factual information. Those characteristics do not define whether speech is commercial or non-commercial. The disclosure provisions of the SEVGL involve commercial speech because they are directly linked to a commercial transaction and because they do not involve the "exposition of ideas," *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942) or relate to the interests of "truth, science, morality and arts in general," *Roth v. United States,* 354 U.S. at 484, and do not operate to "suppress[] dissent, confound[] the speaker's attempts to participate in self-governance or interfer[e]with an individual's right to define and express his or her own personality." *National Electrical Manufacturers Ass'n. v. Sorrell*, 272 F.3d 104, 114 (2nd Cir. 2001).

The disclosures simply provide product information so that sexually explicit material does not unknowingly wind up in the hands of minors. As such, the disclosures are not subject to a heightened level of scrutiny. Rather, the First Amendment is satisfied so long as there is a "rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose." *Sorrell,* 272 F.3d at 115; *see also Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 (1985).

Furthermore, as the Supreme Court noted in *Zauderer*, there are "material differences between disclosure requirements and outright prohibitions on speech." *Zauderer*, 471 U.S. at 650. Commercial disclosure requirements are

treated differently from restrictions on commercial speech because mandated disclosure of accurate commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting liberty interests. *Sorrell*, 272 F.3d at 113-114.

Therefore, the signage, labeling and brochure provisions of the SEVGL not only constitute commercial speech; they are the most benign type of commercial speech—mandated disclosure of product information. Indeed, as the court in *Sorrell* recognized, such speech has the effect of *enhancing* First Amendment values:

> Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the marketplace of ideas. Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is required than where truthful, nonmisleading commercial speech is restricted.

Id. at 114 (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996)).

Here, as in *Sorrell*, the signage, labeling and brochure provisions of the SEVGL constitute commercial disclosures. Accordingly, the disclosure provisions of the SEVGL are to be examined under a rational relationship test and not by the strict scrutiny standard that the district court applied in this case.[7]

[7] The court below was correct in treating the disclosure issue as separate and distinct from the other portions of the statute. The public act contains a severability clause (P.A. 94-0315, § 98) that permits the disclosure provisions to stand even if the rest of the

B. The Disclosure Provisions In The SEVGL Are Rationally Related To The State's Interest in Keeping Sexually Explicit Material Out Of The Hands Of Minors Without Adult Consent Or Supervision.

Balanced against Plaintiffs' limited constitutional right not to disclose more product information than they would prefer is the State's interest in prohibiting the exposure of sexually explicit material to minors without adult consent or supervision. The State's compelling interest in limiting the exposure of sexually explicit material to minors cannot seriously be contested. *See*, *e.g.*, *Denver Area*, 518 U.S. at 743; *FCC v. Pacifica Foundation*, 438 U.S. at 749.

Under a rational-basis test, the disclosure provisions need only have a rational connection between the means utilized and the end sought. See *Sorrell*, 272 F.3d at 116; *Zauderer*, 471 U.S. at 652 n.14. As explained above, Plaintiffs have only a very limited constitutional right to not provide information about their product. There is also an obvious link between the disclosure requirements and the goal of informing consumers about sexually explicit content. Accordingly, the disclosure requirements of the SEVGL are constitutional.

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statute fails. *See*, *e.g.*, *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 1005 (7th Cir. 2002).

1. The Signage Requirement Is Constitutional.

The SEVGL's signage provision requires retailers to post a sign informing consumers "that a video game rating system, created by the Entertainment Software Ratings Board, is available to aid in the selection of a game." 720 ILCS 5/12B-30. Remarkably, the district court found that this requirement did *not* constitute the provision of "purely factual and uncontroversial information" subject to a rational-basis test. (Opinion, Doc. 100, at 50 (A-51) (quoting *Zauderer*, 471 U.S. at 651).) The district court did not specify what, precisely, was controversial or lacking in fact about the entirely truthful—indeed, innocuous—content of this sign. Such a finding was erroneous.

This provision is more than rationally related to the State's interest in assisting parental authority over what material their children view. This provision educates consumers that an entire ratings system has been set up to inform them about the content of these games. If the industry stands by its ratings system, as it appears to do, it is difficult to understand why it complains about a sign simply notifying customers of the system's *existence*. The fact that it requires retailers to provide "somewhat more information than they might otherwise be inclined to present" does not make the requirement unconstitutional. *Zauderer*, 471 U.S. at 650. Government-mandated distribution of truthful product information to promote public awareness is not "compelled speech." *Environm. Defense Center, Inc. v. United States EPA*, 344

F.3d 832, 848-50 (9th Cir. 2003) (sustaining regulations requiring cities to distribute educational materials on the impact of stormwater discharges).

Nor is the signage requirement unduly burdensome. Retailers are merely required to place a placard at points of sale informing consumers that there is a rating system available to help them make informed decisions about video games. The ESRB already offers retailers "bin signs" and "counter pads" that meet this requirement. *See* http://www.esrb.org/retailer/retailer_orderform.asp. Retailers can also download these materials, free of charge, and manipulate their size and shape. *See* http://www.esrb.org/downloads/counter_pad.pdf.; http://www.esrb.org/downloads/bin_sign.pdf.[8]

Regardless, in light of the staggering number of minors who have purchased these mature video games, the State's desire to highlight the existence of the ESRB ratings system is certainly rational.

2. The Label Provision Is Constitutional.

The district court found that the label requirement did not withstand strict scrutiny because: (a) the "18" sticker lacked sufficient information and could potentially be misconstrued; (b) the sticker would "contradict [retailers'] own opinion about the content of the game;" and (c) in deciding whether or not to affix a sticker on a video game, the question of whether a game is or is not sexually explicit is left to the "subjective evaluation" of the retailer. (Opinion, Doc. 100, at 50-52 (A-51-53).) The district court was simply wrong.

[8] Defendant cited to the ESRB website in the district court, in response to Plaintiffs' Motion for Preliminary Injunction. (Doc. 68, p. 24.)

First, the moniker "18" is an indication to children, parents and sales clerks, that the content of the game includes material that is defined by state law to include sexually explicit material. There is nothing "subjective" about this determination; retailers are not asked to make their *own* judgments about what constitutes sexual explicitness, but rather to apply a state law that provides the definition.

Nor does the sticker force retailers to provide a message with which they disagree. The district court's example was a retailer being forced to "put[] the '18' label on a T-rated game considered appropriate for thirteen-year-olds." (Opinion, Doc. 100, at 52 (A-53).) That scenario is a fallacy. The SEVGL immunizes any retailer from liability if his failure to label the game was because the game was labeled "EC, E10+, E, or T by the Entertainment Software Ratings Board." 720 ILCS 5/12B-20(4). This immunity provision also belies the district court's finding that "[t]he labeling provision requires retailers to play thousands of hours of video games in order to determine whether they must be labeled." (Opinion, Doc. 100, at 51 n.12 (A-52).) Retailers would not even have to *consider* labeling any games unless they contained "M" (mature) or "AO" (adults only) ratings, both of which ratings should already indicate to retailers that the video games contain material unsuitable for those ages seventeen and younger. (*See* Statement of Facts, *supra* at p. 9, n.3.) While it may be true that some video games are not rated under the ESRB system, it is not unfair or overly burdensome to require retailers to become familiar with a product before placing

it in the stream of commerce. This is especially true when a product contains graphic sexual displays and is marketed in a manner that makes it likely that the product will wind up in the hands of minors.

Moreover, the label is no more confusing than the ratings applied to many video games according to standards established by the Entertainment Software Association ("ESA"). The label is a simple, clear and concise means of allowing parents to make an informed decision about whether minors should be playing the video game. The label is also more prominent than the ESRB rating, which, if applied at all, can easily be lost among packaging content.

The district court's determination that the mandated labels "force retailers to affix a label that may obscure their own message about the content of the game (i.e., the ESRB ratings)," Opinion, Doc. 100, at 52 (A-53), is without merit. The ESA is a private entity, and the ESRB ratings are voluntary standards. They could be withdrawn or altered at any time. Even if they were not, the State is not required to conform its mandated disclosures around a private association's disclosures. The tail cannot wag the dog. It would be ironic if an industry could create a system that is routinely violated by its members (Doc. 69, pp. BL 163, 168-69, 268-70) and then complain of a clear government-mandated disclosure on the basis that it conflicts in some way with those insufficient private disclosures.

Curiously, the district court found that "defendants have offered no evidence that there is any actual confusion or deception of parents or children

about the ESRB rating system or the content of the games necessitating these measures." (Opinion, Doc. 100, at 51 (A-52).) What the court ignored, however, was a mountain of findings by the state and federal government that the industry was targeting the marketing of mature video games to minors, and that retailers were routinely *violating* the spirit of the ESRB ratings by selling mature video games to minors. (Doc. 69, pp. BL 163, 168-69, 268-70.) What is clear from these findings is that the industry cannot be trusted to self-police.

The label requirement is more than rationally related to the state's compelling interests in protecting children and in assisting in parental authority over what their children view. The district court's ruling to the contrary was erroneous.

3. The Brochure Requirement Is Constitutional.

The brochure requirement requires that retailers provide to customers, upon request, a brochure explaining the ESRB ratings system. 720 ILCS 5/12B-35. The brochures simply ensure that the ESA rating system is capable of being utilized effectively by consumers and is only required to be distributed upon request. Contrary to the district court's finding, the industry and retailers are not forced to present this material "in a manner mandated by the State." (Opinion, Doc. 100, at 52 (A-53).) Neither the size, format, or content of this brochure is circumscribed by the State; the SEVGL simply requires explanatory material in some form.

It is difficult to fathom how the district court could view this requirement as unduly burdensome. Indeed, the Entertainment Software Ratings Board already markets to retailers a 3¾ by 8½ inch "pocket guide," among other materials, that gives a full explanation of each of the ESRB ratings for customers to utilize as they peruse the video-game selections. *See* http://www.esrb.org/retailer/retailer_orderform.asp. This guide also is available to be downloaded by retailers free of charge, to be manipulated to the desired shape and size. *See* http://www.esrb.org/downloads/pocket_guide.pdf.

In any event, requiring the provision of educational, uncontroversial materials to inform the public does not violate the First Amendment. *Environm. Defense Center*, 344 F.3d at 848-50. The brochure provision easily satisfies the First Amendment.

The district court erred in finding that the disclosure provisions of the SEVGL violated the First Amendment. The district court's decision on the disclosure requirements should, therefore, be reversed.

CONCLUSION

For all of these reasons, Defendant Governor Rod Blagojevich respectfully requests that this Court reverse the district court's judgment.

Respectfully submitted,

Defendant-Appellant
Governor Rod Blagojevich

By: /s/
One of his attorneys

Michael J. Kasper
Special Assistant Attorney General
222 North LaSalle Street, Suite 300
Chicago, IL 60601
Tel.: 312-704-3292

Patrick E. Deady
Laura C. Liu
Special Assistant Attorneys General
Hogan Marren Ltd.
180 N. Wacker Drive, Suite 600
Chicago, IL 60606
Tel.: 312-946-1800

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32(a)

1. The undersigned certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 13,875 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The undersigned certifies that 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 2000 in Century Schoolbook font, 12-point font size.

/s/

Michael J. Kasper
222 North LaSalle Street, Suite 300
Chicago, IL 60601
Tel: 312-704-3292

Dated: February 24, 2006

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

The undersigned certifies that all of the documents required by Circuit Rule 30(a) and (b) are contained in this Appendix.

/s/

Michael J. Kasper
Special Assistant Attorney General
222 North LaSalle Street, Suite 300
Chicago, IL 60601
Tel.: 312-704-3292

Dated: February 24, 2006

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)(1)

The undersigned certifies that, to his knowledge, the documents contained in this Appendix are not available to him electronically.

/s/

Michael J. Kasper
Special Assistant Attorney General
222 North LaSalle Street, Suite 300
Chicago, IL 60601
Tel.: 312-704-3292

Dated: February 24, 2006

CERTIFICATE OF SERVICE

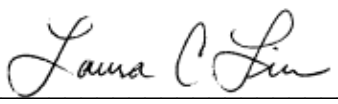
The undersigned, an attorney, certifies that she served a true and accurate copy of the foregoing **Brief and Required Short Appendix of Defendant-Appellant Governor Rod Blagojevich** to the below listed counsel via electronic mail and by next day courier delivery, on this 27th day of February, 2006.

David P. Sanders
Jenner & Block, LLP
One IBM Plaza
Chicago, Illinois 60611-7603
dsanders@jenner.com

Paul M. Smith
Katherine A. Fallow
Duane Pozza
Jenner & Block, LLP
601 13th Street, NW, Suite 1200
Washington, DC 20005
psmith@jenner.com
kfallow@jenner.com
dpozza@jenner.com

Stephen L. Garcia
Jeffrey S. McCutchan
Louis R. Hegeman
Patrick T. Driscoll, Jr.
Cook County State's Attorney
500 Richard J. Daley Center
Chicago, IL 60602
sgarcia@cookcountygov.com

Andrew L. Dryjanski
Ellecia L. Parsell-Burke
LeeAnn Richey
Rachel Jana Fleischmann
Office of the Illinois Attorney General
100 West Randolph Street, 13th Floor
Chicago, IL 60601
ADryjanski@atg.state.il.us



Laura C. Liu