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

REPLY BRIEF OF DEFENDANT-APPELLANT ROD BLAGOJEVICH

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Despite their overstated charge of "censorship" through the "blunt instrument" of the State, Plaintiffs concede that the SEVGL simply gives authority to parents to decide what sexually explicit video games their children access. The *State* does not decide which sexually graphic video games minors can play; *parents* do. Notwithstanding how broadly Plaintiffs try to frame the issue, the question presented here is nothing more than this: Whether a law permitting adults full access to indecent material, to make the purchase decision for themselves and their children, is constitutional. Every court, save the court below, has answered that question in the affirmative. This Court should reverse the district court's judgment.[1]

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

A. The SEVGL Employs The Least Restrictive Means To Advance The State's Compelling Interests.

The lesson from the case law is clear: A law that lets parents—not the government—make decisions on the purchase of sexual material for themselves and their children is a narrowly-drawn, constitutional safeguard. Plaintiffs concede that the SEVGL does not stop a single adult from buying these games for themselves or for their children. (Pl. 28, 29.) That concession is decisive. The SEVGL is narrowly tailored to advance its compelling interests.

[1] The Governor will cite Plaintiffs' Response as "Pl.," the Governor's principal brief as "Gov.," and the *amicus curiae*'s brief as "AC," followed by the page number.

1. The Sale/Rental Restriction Is Functionally Indistinguishable From Approved, Constitutional Measures In Other Media That Permit Parents To Control Children's Access To Sexual Material.

Parents can prevent their children from viewing a graphic scene of oral copulation on cable television by telling the cable operator to block that adult-oriented channel. *U.S. v. Playboy Entm't Group*, 529 U.S. 803, 815 (2000). Parents can shield their children from viewing this sexual depiction on the internet with filtering technology. *Ashcroft v. ACLU*, 542 U.S. 656, 666-67 (2004). Parents could protect their children from seeing solicitations for such erotic conduct in the U.S. mail by having the Postmaster direct the vendor to stop sending it to their home. *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 738 (1970). Parents stopped their children from engaging in a simulation of such a sex act over the telephone due to adult-identification codes and scrambling rules, *Sable Communic. of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989), and now can do so because sex-phone lines require pre-subscription by adult homeowners before the lines can be accessed. *Dial Information Services Corp. v. Thornburgh*, 938 F.2d 1535, 1542 (2nd Cir. 1991); *see also Fabulous Assoc., Inc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 788 (3rd Cir. 1990) (upholding similar pre-blocking of sex phone lines under state statute).

None of these measures has been held to constitute "censorship." To the contrary, each of these measures has been upheld as narrowly-drawn, constitutional safeguards to let parents decide what sexual material their children may view. If Plaintiffs have their way, however, parents will not have the similar option to shield

their children from a shockingly graphic scene of oral copulation in a video game such as *Grand Theft Auto: San Andreas*.

The SEVGL simply accomplishes, in the context of video games, what the government has been permitted to do with these other media. The only difference is that video games are not transmitted from an outside source into the home, like cable television, internet, the mail, or telephone signals. They are not even necessarily *played* in the home; these games are available for play on personal computers, which obviously includes portable laptop computers. Because a video game can be both purchased and accessed outside the home, parents have no realistic safeguard, in the home, to restrict their children's access to these video games.

Because it cannot place the safeguard in the home, the SEVGL supports parental prerogative in the least restrictive way by regulating at the retail outlet—the point of purchase. This has precisely the same impact as those other regulations. Indeed, a restriction at the store, during a face-to-face transaction, allows for an easy distinction between adults and children without restricting the sale of these games to adults at all. *See Ginsberg v. New York*, 390 U.S. 629 (1968) (adult-sale restriction on nude magazines imposed at point of purchase); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (noting that restrictions on indecent material at "[b]ookstores and motion picture theaters" are much easier to make, consistent with the First Amendment, because "offensive expression may be withheld from the young without restricting the expression at its source"); *id*. at

758-59 (Powell, J., concurring) (noting that "a physical separation of the audience" during a face-to-face transaction allows for easy distinction between minor and adult purchaser).

That this safeguard is imposed by law does not make it "censorship;" it does not make the SEVGL's restriction different from these safeguards for other media. The credit-card, access-code and scrambling rules were *mandated* by the FCC, yet the Second Circuit specifically found that each of these mandates was constitutional: "In each case, adults continue to have access to the materials, with minimal inconvenience, while minors' access is restricted." *Carlin Communic., Inc. v. FCC*, 837 F.2d 546, 557 (2nd Cir. 1988), *aff'd sub nom. Sable*, 492 U.S. 115. The Supreme Court relied on that holding in finding these measures to be proper means to advance the government's interests. *Sable*, 492 U.S. at 128-29.

Similarly, the more recent innovation of pre-blocking sex-phone lines, which could be unblocked only at a homeowner's request, was a permissible, least restrictive option. *Dial Information*, 938 F.2d at 1542; *Fabulous Assoc.*, 896 F.2d 780. The Third Circuit reasoned that

> the decision a parent must make is comparable to whether to keep sexually explicit books on the shelf or subscribe to adult magazines. No constitutional principle is implicated. *The responsibility for making such choices is where our society has traditionally placed it—on the shoulders of the parent*.

Id. at 788 (emphasis supplied). In *Playboy*, the FCC *required* that cable operators block any channel at the subscriber's request. The lower court found that this mandate "[was] not restrictive of anyone's First Amendment rights." *Playboy*

Entm't Group v. U.S., 30 F.Supp. 2d 702, 718 (D. Del. 1998), *aff'd*, *Playboy*, 529 U.S. 803. Likewise, Congress *mandated* that, at the request of parents, solicitors of sexually erotic material could not mail such solicitations to that home, but the Court upheld this mandate. *Rowan*, 397 U.S. at 738 (noting that, instead of Congress setting up a wall, in fact the legislation "permits a *citizen* to erect a wall") (emphasis supplied).[2]

Indeed, the SEVGL's restriction is *narrower* than these other safeguards. The technology in *Playboy* blocked *every* program on that channel from adults and minors. Pennsylvania's and Congress's sex-phone blocking kept *all* such phone lines segregated to both parent and child. In *Rowan*, the homeowner request to cease sexually explicit solicitations stopped them from ever reaching the mailbox, affecting adult and child alike. In each case, parents faced an all-or-nothing proposition for themselves and their children.

In contrast, the SEVGL lets parents make decisions on a game-by-game basis. The parent may consent to their children playing a particular sexually explicit video game while denying consent to another—all the while leaving adults free to buy the games for themselves.

The SEVGL's sale/rental provision is the functional equivalent of those other government-mandated safeguards and is even more narrowly tailored. The district court's complete failure to even apply this analysis was error.

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[2] In *Ashcroft*, the Supreme Court relied on the lower court's holding that the internet filtering technology served the government's compelling interests "without imposing the burden on constitutionally protected speech that [the subject law] imposed on adult users." *ACLU v. Reno*, 31 F.Supp. 2d 473, 497 (E.D. Penn. 1999); *Ashcroft*, 542 U.S. at 666-67.

2. The SEVGL's Limited Restrictions Are Constitutional Regardless Of A Rigid Adherence To *Ginsberg*.

There is no dispute that parents have the right to control what sexual material their children may view. A parent has every right to decide that their child should not play a particular video game, no matter how "valuable" the game "as a whole" may be, if it contains even a *single* depiction of erotica that the parent finds inappropriate for their child. As then-Circuit Judge Ruth Bader Ginsburg wrote: "Some material that has significant social value may contain language and descriptions as offensive, from the perspective of parental control over children's exposure, as material lacking such value." *Action for Children's Television v. FCC* ("*ACT I*"), 852 F.2d 1332, 1340 (D.C. Cir. 1988) (upholding FCC definition of "indecency" against overbreadth attack despite its failure to include "serious value" requirement in its "indecency" definition).

No one could plausibly deem this *parental* discretion invidious "censorship." The SEVGL simply gives that parental authority the force of law, in the only meaningful way it could when the child can both purchase and play that game away from home.

This is the fundamental point that Plaintiffs, the *amici curiae*, and the district court overlooked. The SEVGL does not "ban" or "censor" video games with serious artistic value. Minors' access to these video games is not dependent on governmental fiat; it is dependent on *parental* fiat. *See Carlin*, 837 F.2d at 557 ("No censor of the content is involved" in the FCC sex-phone regulations); *Rowan*, 397 U.S. at 737 ("the mailer's right to communicate is circumscribed only by an

affirmative act of the addressee"); *Benkendorf v. Village of Hazel Crest*, 1987 WL 10569 at *5 (N.D. Ill. 1987) (Marshall, J.) (noting that in *Rowan*, "[c]rucial to the Court's approval was that the individual—not the government" decided whether sexually explicit material could be shielded from children).

As the *amici curiae* concede, the Supreme Court has *never* invalidated a law empowering parents to freely access sexual material, and to decide whether their children should view it. (AC 5.) Such a measure falls squarely in line with the compelling interest in "[h]elping parents exercise their 'primary responsibility for their children's well-being' with 'laws designed to aid in the discharge of that responsibility.'" *Action for Children's Television v. FCC* ("*ACT III*"), 58 F.3d 654, 661 (D.C. Cir. 1995) (quoting *Ginsberg*, 390 U.S. at 639).

As then-Judge Ginsburg explained in rejecting Plaintiffs' precise argument here, *see ACT I*, 852 F.2d at 1339, where a law lets parents decide whether sexual material is suitable for children, there is no constitutional requirement that the definition of "indecency" contain a "serious value" component:

> [I]t is not the prevailing view that the degree of protection the First Amendment provides [in the context of minor access] depends on the Court's judgment as to the 'value' of the speech in question.
>
> * * * *
>
> We have upheld the FCC's generic definition of indecency [that material could be indecent even if it had serious value] in light of the sole purpose of that definition: to permit the channeling of indecent material, in order to shelter children from exposure to words and phrases that parents regard as inappropriate for them to hear.

Id. at 1340 n.11 and 1340.

The district court (and Plaintiffs) relied solely on *Reno v. ACLU*, 521 U.S. 844 (1997), for the proposition that the SEVGL is not narrowly tailored. (A-47-48; Pl. 22.) Among the numerous reasons that *Reno* is distinguishable, as discussed in the Governor's principal brief, the most critical distinction is that the law there did not give *parents* the option to control what sexual material their children viewed. Rather, Congress made the decision for them, banning indecent material to both minors *and* adults. Giving *parents* control over what sexual material their children access is not censorship, and it does not offend the First Amendment.

For these same reasons, Plaintiffs are wrong that the SEVGL fails to account for age differences among minors. (Pl. 24.) It is the *parent* who, in her discretion, may account for the age of her children and any other factor she deems relevant in deciding the propriety of a sexual video game. Nor is the choice of age seventeen arbitrary; it was the age cut-off chosen, for example, in *Ginsberg* and *Sable*. *See ACT III*, 58 F.3d at 664 (rejecting Plaintiffs' argument here and noting the "broad national consensus that children under the age of 18 need to be protected from exposure to sexually explicit materials").

3. The "Alternative" Offered By Plaintiffs Is No Alternative At All.

The "alternative" Plaintiffs offer is the status quo—that the State trust the industry to self-regulate. This argument should be rejected, first, because the status quo has been an abysmal failure, and second, because the Supreme Court has never required that the government trust a self-interested industry to police itself as an alternative to narrow, carefully-drawn governmental regulation.

The most recent findings by the FTC and the State revealed that minors as young as thirteen can easily purchase mature video games away from adults. The FTC's "secret shopper" test showed that more than half of 13-year-olds (56%), more than three-quarters of 14-year-olds (77%), two-thirds of 15-year-olds (66%), and a whopping 85 percent of 16-year-olds were able to buy M-rated games without an adult present. (Doc. 69 at BL 169.) In Illinois, the Attorney General's 2002 undercover operation found that *every one of the thirty-two shoppers, aged 13 to 15,* was able to purchase the M-rated game. (Doc. 82, p. 6, ¶ 25 and Exhibit C attached thereto.) The Illinois State Crime Commission found, in 2005, that an unsupervised 15-year-old succeeded 73 percent of the time in purchasing the M-rated game. (Doc. 69 at BL 268-270.)

Plaintiffs claim there is no problem here, relying, like the district court, on a single statistic in an earlier FTC Report showing that 83 percent of all video game purchases are made with the parents present. (Pl. 16.) Putting aside that the cited report was in 2000, as opposed to the 2004 Report the Governor cites, this six-year-old statistic is meaningless, in any event, because it does not distinguish between video games of different ratings. It includes video games rated E, EC, E10+, and T—games suitable for toddlers, pre-teens and young teens. It is hardly surprising that six-year-olds do not purchase video games themselves. That statistic does not explain away the FTC's and the State's uncontested findings that minors can easily purchase these *mature* video games without parental consent or knowledge, despite the industry's supposedly tough self-regulation.

Plaintiffs also argue that educating parents is a lesser restrictive option. (Pl. 21, 30.) But a mother's detailed knowledge of the finer points of *All Nude Glamour* does her no good if her child is buying the video game without her knowledge or consent. Parents need more than education; they need a say in which video games their children buy.

Nor is the State required to place the protection of minors in the hands of a voluntary, self-interested industry. The Supreme Court has never required the State to defer to the very retailers who profit from the sale of this material. Each of the lesser restrictive means approved by the Court concerned parental options that were either mandated by the government, *Playboy*, 529 U.S. at 809-810 and *Sable*, 492 U.S. at 129, or were available to parents irrespective of the industry. *Ashcroft*, 542 U.S. at 666-67.

In determining whether an "alternative" is the least restrictive means, "the focus should be on the *goals* as well as the means. The goal here is to prevent access to indecent messages by children. The means must be *effective* in achieving that goal." *Dial Information*, 938 F.2d at 1542 (emphasis supplied). Where the industry has freely permitted minor access to mature video games, allowing them to continue to do so is not effective in the slightest.

The ESA is a voluntary association, with voluntary ESRB ratings that could be modified or withdrawn at any time, without any legislative or regulatory input whatsoever. The ratings could be become more lenient, or they could disappear altogether. More importantly, without the force of law behind those ratings,

retailers can continue to sell mature video games to unaccompanied minors without consequence. The Constitution does not require the State to trust the fox to guard the henhouse.

Plaintiffs claim the SEVGL will "override" parental consent. (Pl. 28.) That argument hardly warrants discussion. A law that puts the right exclusively in the hands of parents—not the government—to decide which sexually explicit games their children may play directly and narrowly promotes parental authority. Indeed, it is the *status quo* that overrides parental authority.

B. The State Is Not Required To "Prove" Its Compelling Interests.

As previously explained, the Supreme Court has consistently recognized the government's compelling interest in helping parents protect children from indecent sexual material, regardless of whether the subject law covered one, two, or none of the *Ginsberg* prongs. (Gov. 18-20.) *See also Fabulous Associates*, 896 F.2d at 787 ("There is little question" of this compelling interest); *ACT I*, 852 F.2d at 1340.

Plaintiffs ask this Court to overrule over thirty years of Supreme Court precedent and hold that the State must "prove" this compelling interest. (Pl. 19-21.) As previously explained, this argument is flat wrong. (Gov. 18.) *See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973) ("Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data"); *ACT III*, 58 F.3d at 661-62 ("the Supreme Court has never suggested that a scientific demonstration

of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech.").

Plaintiffs first cite *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) and *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003). Neither of those cases involved the regulation of sexual expression and, therefore, provide no support whatsoever.

Plaintiffs' citations to *Denver Area* and *Playboy* are misleading. A close reading of the majority opinion in *Playboy* and Justice Stevens' lone concurrence in *Denver Area* reveal that in each instance, the discussion concerned *not* whether the government had to "prove" the harm caused by sexually explicit material, but rather whether the government's chosen remedy was the *least restrictive way* to address it. *Playboy*, 529 U.S. at 822-23; *Denver Area Educ. Telecommunic. Consortium v. FCC*, 518 U.S. 727, 771-73 (1996) (Stevens, J., concurring). For this same reason, the quotation from *Erzoznik v. City of Jacksonville*, 422 U.S. 205 (1975), is inapplicable. In writing that "the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors," the Court was plainly *not* holding that the government must "prove" its compelling interests, but rather that its blanket ban on drive-in movies containing even non-erotic nudity, a ban which included *adults*, was not the least restrictive means. *Id.* at 214.

C. The *Cinecom* Decision Is Clearly Distinguishable And, In Any Event, No Longer States Controlling Law On The Regulation Of Sexually Indecent Communications To Minors.

As discussed in the Governor's principal brief, *Cinecom Theaters Midwest States, Inc. v. City of Fort Wayne*, 473 F.2d 1297 (7th Cir. 1973), is distinguishable for a variety of reasons. (Gov. 39-40.) To the extent that *Cinecom* could be interpreted to hold that the State may not regulate sexual material to minors that falls short of the "minor obscenity" doctrine in *Ginsberg*, however, that 1973 holding does not state current law.

If minors had an unqualified right to access sexually indecent material, *Pacifica* and *Denver Area* would have been decided differently. Instead of engaging in a lengthy discussion about children's access to radio and the distinctions between anonymous radio transmissions compared to face-to-face purchases in retail stores, *Pacifica*, 438 U.S. at 749, and instead of noting the governmental interest in supporting parental authority over what their children read and hear, *id*., the Court would have simply held that children had an absolute right to hear the "seven filthy words" and, therefore, the FCC regulation was invalid.

Likewise, rather than accepting without hesitation the government's compelling interest in giving parents authority over what sexual material their children access, the Court in *Sable*, *Playboy*, and *Ashcroft* would have simply held that children have an unqualified right to view this material and, for *that* reason, the subject regulation was invalid. Instead, the Court based its decisions *solely* on the availability of lesser restrictive means to accomplish that interest, all of which

gave adults discretion over their children's access. *Sable*, 492 U.S. at 128-29; *Playboy*, 529 U.S. at 815; *Ashcroft v. ACLU*, 542 U.S. at 666-67.

The ordinance in *Cinecom* is patently distinguishable from the SEVGL. To the extent that *Cinecom* could be interpreted to hold that the government may not regulate sexual material to minors unless that regulation rigidly follows the "minor obscenity" formula, that 33-year-old holding is clearly no longer an accurate statement of the law.

D. Plaintiffs' Other Arguments Are Equally Without Merit.

1. The District Court's "Findings" Are Not Subject To A "Clearly Erroneous" Standard But A *De Novo* Review.

Plaintiffs incorrectly claim the district court's "findings of fact" are subject to a "clearly erroneous" standard. (Pl. 11.) But there was no trial on the SEVGL—the trial only covered the violent-video game legislation. The Governor moved for partial summary judgment on the SEVGL, and Plaintiffs responded in writing. The court ruled on the SEVGL based on written and oral arguments only, and considering attachments such as affidavits and the record before the General Assembly. This is the very definition of summary judgment, granted *sua sponte* in favor of Plaintiffs.

To the extent the judge made any "findings," they were simply references to the FTC Reports or affidavits submitted pursuant to the Rule 56 statements, which this Court can read as easily as the district court. This Court is not required to "defer" to the district court's selective reading of the FTC Reports; like any other

summary judgment case, this Court applies a *de novo* standard. *Lifton v. Board of Educ.*, 416 F.3d 571, 575 (7th Cir. 2005).[3]

2. The State Is Not Required To Regulate All Forms Of Media Simultaneously.

Plaintiffs once again attempt to impose new requirements on the State, complaining that the SEVGL does not also regulate other forms of expressive media. (Pl. 25.) The State is not required to solve all the problems with expressive media in one public act. "Legislatures may implement their program step by step," "deferring complete elimination of the evil to future regulations." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). The State "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young v. American Mini-Theatres*, 427 U.S. 50, 71 (1976) (zoning regulation of adult theaters did not violate equal protection).

This doctrine is particularly true here, where "'each medium of expression presents special First Amendment problems.'" *Denver Area*, 518 U.S. at 742 (quoting *Pacifica*, 438 U.S. at 748). The Governor has already outlined, above, the many differences between the video-game medium and such media as television, the internet, and telephones. Nothing in the Constitution requires the State to regulate everything under the sun at the same time.

Nothing in *Florida Star v. BJF*, 491 U.S. 524 (1989), supports Plaintiffs' argument. There, the Court held that a law forbidding publication of a rape victim's

[3] Plaintiffs, in a sleight of hand, try to make it seem as if the trial related to the SEVGL, too. But the video game and the "written testimony" (read: affidavit) they reference (Pl. 6) were part of the record pertaining to the Governor's motion for partial summary judgment. The trial had nothing to do with the SEVGL.

name by an "instrument of mass communication" violated the First Amendment because it covered a newspaper or television broadcast but *not* a leak to a reporter or information exchanged via backyard gossip. *Id*. at 540. In other words, the *exact same information* could be communicated in some ways but not others. *Florida Star* is inapposite.

3. The SEVGL Does Not Burden Retailers Or Chill Expression.

Plaintiffs reference another law currently in effect. Section 11-21 of the Illinois Criminal Code, "Harmful Material," prohibits selling, loaning, or even giving to minors certain material which is obscene for them. 720 ILCS 5/11-21(b). This provision includes video games that are obscene for minors, 720 ILCS 5/11-21(a), a point that defeats a number of Plaintiffs' arguments.

For example, Plaintiffs complain of the supposed chilling effect of the SEVGL (Pl. 29) and the fact that retailers would be "burdened" by having to scrutinize every video game to determine whether that game falls under the SEVGL. (Pl. 27, 34.) But retailers *already* have to become familiar with their sexual video games to satisfy Section 11-21, a law currently in effect. And if retailers are "chilled" by the SEVGL into not selling sexually explicit video games, it is hard to imagine why they would not *already* be "chilled" by Section 11-21, a violation of which is a Class A misdemeanor for a first offense and a Class 4 *felony* for subsequent offenses. 720 ILCS 5/11-21(e).[4]

[4] Under the "Harmful Material" law, no person may sell, loan, or in any way give (without or without consideration) to a minor any obscene material, be it pictures, drawings, sculptures, films, electronic depictions, books, or magazines. 720 ILCS 5/11-21(a)

In their hyperbolic discussion of the "burden" placed on retailers, Plaintiffs also miss that the SEVGL provides an affirmative defense that shields retailers from liability if the game they sold was rated by the ESRB as E, EC, E10+ or T. 720 ILCS 5/12B-20. This provision, which protects retailers from innocent mistakes caused by inaccurate ESRB ratings, means that in determining whether games are covered by the SEVGL, retailers need only examine games rated "M" or "AO." Moreover, Plaintiffs assure us, without support, that "games are almost always rated 'M' on the basis of *violent* content," which still further limits the scope of video games affected. (Pl. 19 [emphasis in original].) Adding in the fact that each game has content descriptors, including one for "strong sexual content" ("graphic references to and/or depictions of sexual behavior, possibly including nudity"), Plaintiffs' complaint about the SEVGL's "burden" is grossly overstated.[5]

4. Plaintiffs' Citation To A Newspaper Article Regarding Future User Restrictions Does Not Support Plaintiffs' Position.

For the first time on appeal, Plaintiffs cite a newspaper article discussing the possibility of user restrictions being built into future video-game consoles. (Pl. 31 n.8.) This material should be stricken because it is hearsay and because it is outside the record. *Chicago Firefighters Local 2 v. City of Chicago*, 249 F.3d 649, 654 (7th Cir. 2001) (newspaper article offered for truth of matter asserted is inadmissible hearsay); *U.S. v. Elizalde-Adame*, 262 F.3d 637, 640-41 (7th Cir. 2001)

(definition of "material"), (b). In contrast, the SEVGL simply limits the *retail sale* of sexually indecent video games, in line with the State's interest in promoting parental authority over children's access to indecent material.

[5] *See* http://www.esrb.org/ratings/ratings_guide.jsp**.** for a list of all ESRB content descriptors.

(circuit court will not consider factual material outside the record, never presented to the district court). Plaintiffs, the industry association for video-game makers, can hardly claim they just "discovered" this "information." If the Court even considered entertaining this document as "evidence," the Court should vacate the judgment and remand the case to the district court for a hearing.[6]

Even if the material in this article were true, however, this half-measure would clearly be ineffective. According to this article, these controls, whenever they come into being, only relate to some, not all, future video-game consoles and, even more notably, *do not apply to personal computers*. That is a significant point, because even by Plaintiffs' own estimates, at least fifty-five (55) video games rated "M" or "AO," containing "strong sexual content," are sold for personal computers, and the vast majority of those games are sold *exclusively* for personal computers. Sellers of these sexually explicit video games have clearly seen the financial wisdom of tailoring these games to laptop computers that can be accessed away from the home.[7]

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[6] Indeed, the district court clearly did not conduct *any* analysis of whether the SEVGL employs the least restrictive means to advance its admittedly compelling interests. Rather, the district court simply held that the SEVGL regulated "too much" speech. The Governor believes that the SEVGL clearly employs the least restrictive means as a matter of law, requiring an outright reversal. At the very minimum, however, the district court should be required to make *some* finding to the contrary before its decision is upheld by this Court.

[7] The ESRB website, previously cited below and on appeal, permits a search of all available video games, with search restrictions for ratings, content, and platform. A search for sexually explicit video games sold for personal computers shows 55 games, such as *Playboy: The Mansion*, *All Nude Nikki*, and *WET—The Sexy Empire*, most of which are sold only for PCs. This search can be duplicated by restricting the search to "M" or "AO" ratings, "strong sexual content", and "Windows PC" and "Macintosh" platforms. *See* http://www.esrb.org/ratings/search.jsp.

The SEVGL does not distinguish among platforms; it prevents children from buying these games, in the first instance, without parental consent. *See Rowan*, 397 U.S. at 738 (noting the individual homeowner should not "have to risk that offensive material come into the hands of children before it can be stopped"); *Dial Information Services*, 938 F.2d at 1542 ("It always is more effective to lock the barn *before* the horse is stolen") (emphasis in original).

But most significantly, this half-measure, assuming it even existed, would require a parent to spend several hundred dollars for a new, state-of-the-art game console; in contrast, the SEVGL allows parental control *without spending a single dollar*. This is no small criticism. The Third Circuit rejected adult-access codes in Pennsylvania because they required consumers to buy new touch-tone telephones, whereas pre-blocking technology did not cost parents any money: "Although the price of the additional equipment may not appear burdensome to the Commonwealth, we must not forget that the First Amendment is not available 'merely to those who pay their own way.'" *Fabulous Assoc.*, 896 F.2d at 787 (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943)). Parental control should not be contingent on the ability to afford the latest technology on sale. *See Carlin*, 837 F.3d at 556-57 (credit-card provisions did not cost consumer money; phone de-scrambler could be purchased for about fifteen dollars); *Playboy*, 529 U.S. at 809-810 (government mandated that channel blocking be offered free of charge); *Rowan*, 397 U.S. at 737 (parent need only contact the Postmaster to ban indecent mail).

Assuming it even exists, a "safeguard" that applies to only some video-game platforms, requiring the expenditure of hundreds of dollars for new equipment, is no viable alternative to the SEVGL's direct empowerment of parents to decide—without spending any money—whether their children should access these sexually explicit video games.

5. The SEVGL Does Not Delegate Authority To The ESRB To Decide What Material Is Covered By The Law.

The *amici curiae*, alone, argue that the SEVGL unconstitutionally permits the ESRB to decide what subject matter is prohibited. (AC 11.) The district court did not base its opinion on this ground, nor do Plaintiffs raise it on appeal. An *amicus* may not raise new arguments before the Court. *Cellnet Communic., Inc. v. FCC*, 149 F.3d 429, 443 (9th Cir. 1998); *U.S. v. Sturm, Ruger & Co.*, 84 F.3d 1, 6 (1st Cir. 1996).

Regardless, the SEVGL does not let the ESRB decide what is regulated under state law. Whether a video game falls within the SEVGL's reach depends *solely* on whether it fits the definition of "sexually explicit" under the Act. 720 ILCS 5/12B-10(e). In an attempt to reasonably limit its application, however, the General Assembly provided an affirmative defense to retailers who rely on ESRB ratings that mistakenly rate a sexually-explicit video game below an "M" or "AO" rating. If the game is rated "EC, E10+, E or T," a retailer can defend itself successfully. 720 ILCS 5/12B-20.

A law that simply limits the scope of its applicability based on private standards is not an unconstitutional delegation of authority. *Thomas Cusack Co. v.*

City of Chicago, 242 U.S. 526, 531 (1917) (upholding law allowing private parties to "remove" billboard zoning restriction, not "impose" restriction); *Currin v. Wallace*, 306 U.S. 1, 16 (1939) (statute limiting Agriculture Secretary's regulation of tobacco unless two-thirds of growers approve it merely "prescrib[ed] the conditions of its application" and was constitutional); *Kentucky Div., Horsemen's Benevolent & Protective Ass'n v. Turfway Park Racing Ass'n*, 20 F.3d 1406, 1416-17 (6th Cir. 1994) (upholding statute prohibiting off-track betting, which permitted local horsemen's groups to waive prohibition). That is no different than a federal law requiring gubernatorial approval for enforcement of certain congressional provisions, which this Court has upheld. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. U.S.*, 367 F.3d 650, 659 (7th Cir. 2004). Indeed, in *People v. Leura*, 103 Cal. Rptr. 2d 438, 442-43 (Cal App. 2001), the court held that a pornographic film law with an affirmative defense if the movie was rated by the MPAA did not unconstitutionally delegate authority to that private association.

One would expect that *amici* so concerned with the scope of the SEVGL would applaud such a self-imposed limitation. This affirmative defense vastly limits the number of video games a retailer need consider in complying with the SEVGL. Regardless, their argument has no legal merit.

II. THE SEVGL IS NOT VAGUE.

Neither the district court nor Plaintiffs identified a single word that was vague or confusing in the SEVGL. That is a notable omission, because a law is vague only if it fails to give a "person of ordinary intelligence a reasonable

opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The district court's sole basis for finding the SEVGL vague was its omission of the "serious value" and "as a whole" prongs. (A-50-51.)

But the fact that an indecency definition did not include such language did not render it vague in *Denver Area*, 518 U.S. at 752. Likewise, both the Ninth and Second Circuits rejected vagueness challenges to an FCC "indecency" definition not containing a "serious value" or "as a whole" prong. *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 875 (9th Cir. 1991); *Dial Information*, 938 F.2d at 1540-41 (defining "indecency" as "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards").

As already explained in the Governor's principal brief, *Reno v. ACLU* , 521 U.S. 844, explicitly was *not* a vagueness case; it was an overbreadth case. *Id*. at 864. Part of the overbreadth problem was the uncertainty of the law's scope, given that two different definitions of "indecency" could apply simultaneously and incompatibly. *Id*. at 871 and nn. 35-37. (*See* Gov. 44.)

As *Reno* illustrates, the uncertainty of a law's terms can render its application overbroad, but the district court reasoned conversely: the law's perceived "overbreadth" somehow made it "vague." The breadth of the SEVGL, however, has literally nothing to do with whether a reasonable person could understand its terms. *See Willis v. Town of Marshall*, 426 F.3d 251, 261 (4th Cir. 2005) (vagueness and overbreadth are "separate and distinct doctrines, subject in

application to different standards and intended to achieve different purposes"); *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (vagueness and overbreadth are "two different doctrines"). The district court applied the wrong standard and reached the wrong result. This Court should reverse that judgment as well.

III. THE DISCLOSURE PROVISIONS ARE CONSTITUTIONAL.

The Governor, in his principal brief, explained why the label, signage, and brochure provisions of the SEVGL are constitutional. The Governor, here, will limit discussion to distortions advanced by both Plaintiffs and the *amici curiae*. Clearly, each of these disclosure provisions is subject to a rational-basis review and easily satisfies the test.

A. The Affirmative Defense Applies To The Label Provision.

Plaintiffs wrongly claim that the safe-harbor affirmative defense does not apply to the label provision. (Pl. 34, n.9.) That provision, as previously explained, provides an affirmative defense "*to any prosecution arising under this Article*" if a sexually explicit video game was pre-labeled by the ESRB short of an "M" or "AO" rating. 720 ILCS 5/12B-20(4) (emphasis supplied). The fact that the SEVGL refers to the "video game sold or rented" does not limit this affirmative defense to the sale or rental of the game; it simply reflects that only games *available* for sale or rental will be implicated. That, after all, is why the games are in the stores—they are not being displayed for show, but for sale or rental. This defense "to any prosecution arising under this Article" applies equally to the label and sale/rental provisions. *Id*.

B. The Disclosure Provisions Are Not Burdensome.

The affirmative defense to the label requirement is only one reason why Plaintiffs' claim that "the burden placed on retailers is enormous" (Pl. 34) is pure hyperbole. Retailers need only *consider* placing labels on games with "M" or "AO" ratings, and given that the ESRB descriptors contain one for "strong sexual content," retailers could avoid considering games rated "M" or "AO" for violence only, too.

But most significantly, retailers *already* have to comply with an admittedly constitutional "Harmful Material" law that requires retailers to review games for material that is obscene for minors. 720 ILCS 5/11-21. When Plaintiffs complain of retailers having to judge whether a game is "sexually explicit" (Pl. 34), they fail to mention that retailers already have this obligation. Moreover, because the "Harmful Material" law contains the *Ginsberg* standard (for video games and many other materials), retailers *already* have to determine whether these video games lack serious value, too. The salient point is that the SEVGL does not put retailers to any burden *beyond what they already face*, currently, under an admittedly constitutional law.

The provision of brochures or signs is not burdensome, particularly considering that most of these materials are available to retailers via download from the ESRB website, as documented in the Governor's principal brief. (Gov. 10-11, 56.) Plaintiffs, whose claimed "alternative" to the SEVGL is to educate parents, show their true colors here, resisting laws that require them to *inform parents* of

the ESRB ratings and to give out a brochure upon request that *educates parents* about them. This complete resistance to reform should be kept in mind when the Court considers Plaintiffs' request that the State trust the industry to self-regulate.

C. The Rational-Basis Test Governs This Analysis.

Neither *Riley v. Nat'l Fed'n of the Blind of NC, Inc.,* 487 U.S. 781, 795 (1988) nor *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California,* 475 U.S. 1 (1986) supports Plaintiffs' position that "any message that alters the content of what the compelled party would otherwise express is subject to strict scrutiny." (Pl. 32.) In *Riley*, the Court applied strict scrutiny *only* because the disclosures regarding charitable contributions were "inextricably intertwined" with fundraising activity and, therefore, the ability to inform and persuade on social and public-policy issues. *Riley*, 481 U.S. at 796. In *Pacific Gas*, the government ordered the utility to "help disseminate the hostile views" of a consumer group by requiring the company to include the consumer group's newsletter in its billing envelope. *Pacific Gas*, 475 U.S. at 14. Nothing in those cases supports the notion that all such speech is subject to strict scrutiny.

Again, whether speech is "commercial" depends on whether it is connected to a commercial transaction. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). (*See* Gov. 48-50.) The disclosures in this case simply provide product information about the content of video games sold in commerce. This is commercial speech in its purest form and is subject only to rational-basis scrutiny. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626,

650-51 (1985); *National Electrical Manufacturer's Ass'n, v. Sorrell*, 272 F.3d 104, 114 (2nd Cir. 2001).

Regardless, informing consumers of the existence of an ESRB ratings system and explaining what those ratings mean are purely factual and uncontroversial. The label is merely a reflection that the video game contains material that subjects it to a sale restriction. That is not a subjective opinion; it is a fact. Retailers remain free to distribute the video games with any message of their own, including their disagreement with the rating system or with how the State defines "sexually explicit." If Plaintiffs and the district court are correct that the label could be misinterpreted as a "stigma," nothing stops the retailer from explaining what the label means, in their brochure or otherwise.

The *amici curiae* claim that the disclosures should not be treated as if they were a "required list of ingredients on a jar of jam." (AC 10.) If anything, there is *more* justification for a label where the product contains material—sexually indecent images—that is consistently regarded as harmful to minors.

Video games are products. Helping a parent learn what is inside that product is not "compelled speech," even if the retailer would rather not disclose it. Each of these disclosure provisions are rationally related to a legitimate—indeed, compelling—state interest.

CONCLUSION

For all of these reasons, this Court should reverse the district court's judgment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he served a true and accurate copy of the foregoing Reply Brief of Defendant-Appellant Rod Blagojevich to the below listed counsel by having one digital PDF version of the Brief in CD-ROM form and two paper copies of the Brief delivered by UPS next day delivery, on April 26, 2006.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P 32(a)(7)

The undersigned certifies that he has complied with the above-referenced rule, and that according to the word processor used to prepare this brief, Microsoft Word, this brief contains 6,908 words and therefore complies with the type-volume limitations in Fed. R. App. P. 32(a)(7).

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CERTIFICATE OF COMPLIANCE WITH CIR. R. 31(e)

The undersigned certifies that he has complied with Circuit Rule 31(e) by uploading a digital PDF version of the Defendant-Appellant's Brief on the Seventh Circuit website and by furnishing a digital PDF version of the Defendant-Appellant's Brief in CD-ROM form to Plaintiffs-Appellees.

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