IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ENTERTAINMENT SOFTWARE ASSOCIATION; VIDEO SOFTWARE DEALERS ASSOCIATION; and ILLINOIS RETAIL MERCHANTS ASSOCIATION,	)	
Plaintiffs,	)	
vs.	)	Case No. 05 C 4265
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,	)	Judge Matthew F. Kennelly
Defendants.	)	

PLAINTIFFS' AGREED MOTION FOR LEAVE TO FILE AN EXCESS LENGTH REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs Entertainment Software Association, Video Software Dealers Association, and Illinois Retail Merchants Association ("Plaintiffs"), move this Court, pursuant to Rule 7.1 of the Local Rules of the United States District Court for the Northern District of Illinois, for entry of an order granting them leave to file an 18-page reply brief in support of Plaintiffs' Motion for a Preliminary Injunction. In support of this motion, Plaintiffs state that the Defendants agree to the relief requested in this motion, and further state as follows:

On July 25, 2005, Plaintiffs filed a Complaint challenging the constitutionality of Illinois Public Act 94-0315 (Ill. 2005) (hereinafter, the "Act"), which would impose content-based restrictions on the distribution of video games in Illinois.

On August 28, 2005, Plaintiffs filed a Motion for a Preliminary Injunction to enjoin Defendants Rod Blagojevich, Lisa Madigan, and Richard Devine ("Defendants") from enforcing the Act pending final adjudication of the claims in the Complaint. Plaintiffs filed an opening memorandum in support of their Motion for a Preliminary Injunction.

On October 7, 2005, Defendants filed response briefs to Plaintiffs' Motion for Preliminary Injunction. Defendant Blagojevich sought leave to file a 25-page response brief ("Response Brief"), along with five expert declarations, in response to Plaintiffs' request for an injunction concerning the Act's restrictions on "violent" video games. On the same day, Defendant Blagojevich filed a Motion for Partial Summary Judgment concerning the Act's restrictions on "sexually explicit" video games, along with a request for leave to file a 23-page brief in support of that Motion for Partial Summary Judgment. To respond to Plaintiffs' arguments in their Preliminary Injunction Motion concerning the Act's restrictions on "sexually explicit" video games, Defendant Blagojevich incorporated by reference his summary judgment brief into his Response Brief. Accordingly, Defendant Blagojevich's arguments in response to Plaintiffs' Motion for a Preliminary Injunction span nearly 50 pages.

Defendant Madigan has filed a motion to join in both Defendant Blagojevich's response to Plaintiffs' Motion for a Preliminary Injunction and his Motion for Partial Summary Judgment. Defendant Devine has filed a four-page brief in response to Plaintiffs' Motion for a Preliminary Injunction, raising separate arguments from the other Defendants.

Plaintiffs have drafted a reply memorandum ("Reply") in support of their Motion for a Preliminary Injunction and in response to Defendants' arguments in their response briefs and in the Governor's Motion for Partial Summary Judgment. A copy of the Reply is attached hereto as Exhibit A. Although they have endeavored to be extremely concise in their presentation,

Plaintiffs cannot present, in the manner they believe will be most helpful to the Court, all of their arguments in the 15 pages allowed by Local Rule 7.1. Plaintiffs thus request that the Court grant them leave to file the attached 18-page Reply.

The additional three pages Plaintiffs seek are necessary to present fully and fairly the numerous constitutional issues raised in this case of enormous public importance, and to address the arguments, factual assertions, and expert opinions raised in Defendant Blagojevich's two briefs and attachments.

Plaintiffs respectfully submit that the Reply is concise, free of repetition, and addresses only the pertinent points and authorities necessary for a resolution of the important constitutional issues that this case raises.

8. David P. Sanders, one of the attorneys for Plaintiffs, represents that on October 17, 2005, he communicated about this motion with Michael Kasper, Andrew Dryjanski, and Stephen Garcia, counsel for the Defendants, and that they informed Mr. Sanders that Defendants do not object to the relief requested in this motion.

WHEREFORE, Plaintiffs respectively request that this Court grant them leave to file an 18-page reply brief in support of their Motion for a Preliminary Injunction.

Respectfully submitted,

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

s/ David P. Sanders
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Dated: October 17, 2005

EXHIBIT A

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REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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MISCELLANEOUS

Plaintiffs Entertainment Software Association ("ESA"), Video Software Dealers Association ("VSDA"), and Illinois Retail Merchants Association ("IRMA") (collectively, "Plaintiffs") submit this reply in support of their motion for a preliminary injunction.[1]

INTRODUCTION

Plaintiffs' opening brief demonstrated that they are entitled to a preliminary injunction barring the enforcement of the unconstitutional restrictions on "violent" and "sexually explicit" video games found in Illinois Public Act 94-0315 ("the Act"). If the Act is allowed to go into effect on January 1, 2006, it will impose unprecedented *criminal* sanctions against retailers for selling, renting, or failing to label expression fully protected by the First Amendment, and will cause a vast chilling of free expression. This irreparable harm, combined with Plaintiffs' likelihood of success on their challenge to the Act, warrant a preliminary injunction. *See American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) ("*AAMA*").

In responding to Plaintiffs' motion, the State makes three important concessions.[2] *First*, the State acknowledges that strict scrutiny applies to Plaintiffs' First Amendment challenge to the Act's restrictions on "violent" video games, and essentially concedes the same for the Act's restrictions on "sexually explicit" games. Therefore, the *State* bears the burden of justifying the Act's content-based restrictions on speech. *Second*, the State acknowledges that it cannot prove

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[1] In support of this reply, Plaintiffs are submitting three expert declarations in a separate appendix: Declaration of Jeffrey H. Goldstein ("Goldstein Decl."), Declaration of Dmitri Williams ("Williams Decl."), and Declaration of Howard C. Nusbaum (Nusbaum Decl.).

[2] The Attorney General has joined in the Governor's response brief and has incorporated the Governor's arguments by reference. Therefore, this reply memorandum applies to both the Governor and the Attorney General, whom Plaintiffs refer to collectively as "the State."

State's Attorney Devine has not responded to Plaintiffs' motion for preliminary injunction on the merits, relying instead on the same basic argument made in his motion to dismiss – namely, that the State's Attorney has no intention to "prosecute any criminal complaints filed under the Act," at least not prior to a ruling "on plaintiffs' constitutional challenges to the Act," but not ruling out the possibility of an eventual prosecution under the Act. Devine PI Mem. at 4. As Plaintiffs explained in their response to the State's Attorney's motion to dismiss (which Plaintiffs incorporate herein by reference), the Act's very existence causes Plaintiffs irreparable harm even in the absence of imminent prosecution. *See* Plaintiffs' Opp. to Devine Mot. to Dismiss, at 12-13. In the First Amendment context, the mere existence of a statute regulating expression based on content creates a risk of chilling and self-censorship, providing Plaintiffs not only with standing to sue, but also with the irreparable harm warranting an injunction against Defendant Devine. *See id.* at 10-14.

any compelling interest in preventing real-world violence to justify the Act's restrictions. *See* Blagojevich Mem. at 20 (citing *AAMA*, 244 F.3d at 575). Thus, the stated goals of preventing "violent, asocial, or aggressive behavior," Act § 12A-5(a)(1), are on their face insufficient to sustain the Act. *Third*, the State offers no response to Plaintiffs' claim (and evidence) of the Act's likely chilling effect on protected expression. Thus, the State has failed to rebut Plaintiffs' showing of the requisite irreparable harm for an injunction.

The State's remaining arguments lack merit. Having disavowed any argument that the Act furthers a government interest in preventing real-world violence, the State attempts to defend the Act's restrictions on expression solely as a means to prevent psychological "harm" to minors. But the psychological research on which the State relies for this argument – largely the work of the State's expert, Dr. Anderson – has been rejected as a basis for restricting expression by all other courts considering similar laws (including the Seventh Circuit in *AAMA*), and that evidence remains insufficient here. Given the insufficiency of this psychological research, the State also points to recent "neurophysiological" research, Blagojevich Mem. at 1, as evidence of a compelling interest. But despite the State's heated rhetoric, this preliminary research supports no conclusion about *any* causal relationship between "violent" video games and brain functions.

In any event, the "harm" defense proposed by the State simply cannot serve to justify censoring protected speech. A State attempt to control individuals' thoughts, feelings, or viewpoints is precisely the kind of government action that the First Amendment prohibits. If anything, the State's argument proves too much, because the research findings relied upon by the State are not limited to particular media or to particular games, or even to children. Were the State's "evidence" of harm enough to sustain the Act, it would logically follow that the government could regulate nearly any violent expression – for adults and children alike – in movies, music, television or art. The Court should firmly reject that radical notion, as Seventh Circuit precedent dictates. *See AAMA*, 244 F.3d at 578-79.

Even if the State could show a compelling state interest – which it cannot – the Act would fail because it is not narrowly tailored, and because it is unconstitutionally vague. The State's brief wholly fails to overcome these additional constitutional hurdles.

The Act's restrictions on "sexually explicit" video games are similarly indefensible and should also be enjoined. As Plaintiffs explained in their opening brief, no court has ever sustained a "harmful to minors" statute that, as here, lacks a "serious value" prong to prevent the

suppression of worthy expression. Critical here, any of the State's alleged concerns about sexual video game content can be addressed by the Act's standalone "harmful to minors" statute, which conforms to Supreme Court precedent and which Plaintiffs do not challenge.

ARGUMENT

I. THE ACT'S RESTRICTIONS ON "VIOLENT" AND "SEXUALLY EXPLICIT" VIDEO GAMES VIOLATE THE FIRST AMENDMENT.

The State concedes that strict scrutiny applies to the Act's content-based regulation of "violent" video games, *see* Blagojevich Mem. at 5, and essentially concedes the same for the Act's restrictions on "sexually explicit" games, *see* Blagojevich SJ Mem. at 6, 16 n.6. The challenged provisions of the Act are thus "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and the State bears the burden of proving that these provisions are necessary to serve a compelling state interest and narrowly tailored to achieve that end, *see, e.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000); *AAMA*, 244 F.3d at 576 (the justifications "must be compelling and not merely plausible"). Contrary to the State's intimation, *see* Blagojevich Mem. at 8, Plaintiffs need not "disprove" the State's alleged harms.

Strict scrutiny requires that the Court independently judge whether the General Assembly's "findings" and the State's factual assertions are supported. *See, e.g.*, *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989) (in the First Amendment context, "whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law"); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 844 (1978) (absent judicial scrutiny of legislative findings, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified").

The State has not come close to satisfying these exacting standards. Far from drawing "reasonable inferences based on substantial evidence," *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994), the General Assembly looked at a one-sided subset of scientific research, and even that biased research does not support the sweeping claims about the harm caused by "violent" video games made by the General Assembly and the State. But even assuming the truth of the conclusions reached by the State's experts, the State has provided no valid justification for restricting fully protected expression – let alone the specific subset of video games targeted by the Act. As *all* courts reaching the question have concluded, the Act's

content-based regulation is unconstitutional. *See AAMA*, 244 F.3d 572; *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) ("*IDSA*"); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004) ("*VSDA*").

A. The Restrictions on "Violent" Video Games Are Unconstitutional.

1. The State Cannot Prove a Compelling Interest.

a. Interests in Preventing Real-World Violence and Psychological Harm Are Insufficient and Foreclosed by Precedent.

The State concedes that a "preventing real-world violence rationale" is foreclosed by Seventh Circuit precedent. *See* Blagojevich Mem. at 20 (citing *AAMA*, 244 F.3d at 575). This concession is of critical importance, because to the extent the State seeks to regulate expression for its alleged relationship to real-world violence, it must satisfy the stringent standard of *Brandenberg v. Ohio*, 395 U.S. 444 (1969), which requires proof that "violent" video games are likely to cause real-world violence, *id.* at 447. By not even attempting to show that scientific research supports what *Brandenberg* requires, the State essentially acknowledges that the General Assembly had no basis for finding that "minors who play video games are more likely to . . . [e]xhibit violent, asocial, or aggressive behavior." Act § 12A-5(a)(1).

The State's only remaining defense of the Act is based on a claim that the regulated content causes "physiological and neurological harm to minors." Blagojevich Mem. at 21. But the State's "harm" argument is really nothing more than a recasting of the foreclosed justification of preventing real-world violence, as the "harm" about which the State is concerned is the potential for the games to make minors behave more *aggressively.* For example, the State argues that the General Assembly relied on studies purporting to show that exposure to "violent" media impacts mental processes like "impulse control, self-regulation, choice, attention and concentration." Blagojevich Mem. at 10. But that argument is predicated on an *assumption* that such impacts on the brain will lead to real-life *aggression* – a justification that the State has acknowledged will not support the Act, *see* Blagojevich Mem. at 20 (citing *AAMA*).

To the extent the State's "harm" rationale is anything other than a repackaged claim that "violent" video games will lead to real-world violence, it appears to be impermissible thought control – *i.e.*, a claim that the State can censor content that it thinks will contribute to imperfect personalities or philosophies. That rationale is impermissible, because the government does not have a generalized power to limit minors' exposure to creative works that it thinks will be

psychologically "harmful." Indeed, minors generally enjoy the same First Amendment rights as adults to be free from content-based governmental regulation of the speech they utter or receive, *see, e.g.*, *McConnell v. Federal Election Commission*, 540 U.S. 93, 231 (2003), with the exception of certain "harmful to minors" sexual speech that is not the subject of the Act's challenged restrictions. As the Seventh Circuit has observed, not only is a "harm" justification foreign to the First Amendment, but "[t]o shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming." 244 F.3d at 577.

The State urges the Court to view its "harm" justification as novel, Blagojevich Mem. at 20, but it is not. In fact, the Seventh Circuit in *AAMA* has already expressly considered and rejected "the potential psychological harm to children of being exposed to violent images" as a constitutionally sufficient rationale. *AAMA*, 244 F.3d at 576. Citing the research of Dr. Anderson – the State's expert here – *AAMA* held that the "studies do not support the ordinance," even if they show that "violent" video games cause individuals "to feel[] aggressive." *Id.* at 578. The court noted that, as here, no research establishes "that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments." *Id.* at 578-79. Because the State's claim of "harm *to its citizens* from these games is implausible, at best widely speculative," *id.* at 579 (emphasis added), *AAMA* – and its rejection of Dr. Anderson's research as a basis for regulation – is controlling.[3]

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[3] The research and conclusions presented by Dr. Anderson in this case remain essentially unchanged from what was offered in *AAMA*. As he has testified previously, Dr. Anderson's basic claim is that "exposure to media violence" – of all types – "is a risk factor for aggression and violence." Anderson Decl. ¶ 7. But, as Dr. Anderson concedes, "human aggression, especially the most extremely violent forms of it, is influenced by many risk and resilience factors," including "a history of antisocial or aggressive behavior, positive attitudes and beliefs about aggression, maladaptive parenting styles, weapon availability, low IQ, neighborhood crime, and antisocial peers." *Id.* ¶ 17. Thus, Dr. Anderson does not claim that media violence – never mind the "violent" video games restricted by the Act – is responsible for real-world aggressive behavior; rather, "several risk factors" must be in place. *Id.*

Although Dr. Anderson suggests that a causal effect between "violent" video games and real-world violence is well-established, *see id.* ¶ 52, he himself has conceded that "longitudinal research is badly needed" before strong causal claims can be made about "violent" video games, Legislative Record, Ex. D to Blagojevich Mot. for Partial Summary Judgment, at BL 551. This is so because the correlational studies upon which Dr. Anderson's report relies expressly caution against drawing causal conclusions, and the few experimental studies that exist suggest, at most, that exposure to certain video games in a laboratory setting may lead to *temporary* increases in

The Eighth Circuit in *IDSA* likewise rejected a "psychological harm" justification materially indistinguishable from the one relied on by the State here. Once again considering the work of Dr. Anderson, *IDSA* conclusively held that "[t]he County's conclusion that there is a strong likelihood that minors who play violent video games will suffer a deleterious effect on their psychological health is simply unsupported in the record," and expressly rejected Dr. Anderson's research as "fall[ing] far short of a showing that video games are psychologically deleterious." 329 F.3d at 958-59. Contrary to the State's assertion, *see* Blagojevich Mem. at 20, the Eighth Circuit's determination that allegations of diffuse "psychological harm" do not justify restriction of expression under the First Amendment supports an injunction here.

VSDA similarly supports invalidation of the Act. Although the Washington statute at issue in *VSDA* restricted a different subset of "violent" video games than those targeted by the Act, the court in that case similarly considered and rejected the research of Dr. Anderson as justifying the statute under basic First Amendment principles. As the court explained, "neither causation nor an increase in real-life aggression is proven by these studies," and thus research is needed "to determine the long-term effects of playing violent video games on children and adolescents." 325 F. Supp. 2d at 1188. Here, as in *VSDA*, "[m]ost of the studies on which

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certain *proxies* for aggression. *See, e.g.*, Goldstein Decl. ¶¶ 11-12, 32-36, 68; Williams Decl. ¶¶ 11-17, 28-29. Dr. Anderson purports to acknowledge that "[c]urrently, there are no published longitudinal studies that examine the effects of violent video games." Anderson Decl. ¶ 32. To be precise, Dr. Anderson should have stated that there are no such studies that *support his theory of causation*, as he neglected to mention a recent (and much-publicized) longitudinal study by Plaintiffs' expert, Dr. Williams, that found *no* negative impact from exposure to "violent" video games. *See* Goldstein Decl. ¶ 44; Williams Decl. ¶¶ 18-19. Instead of grappling with results that conflict with his own theory, Dr. Anderson simply alludes to Dr. Williams' study as "inappropriate." Anderson Decl. ¶ 30; *see* Goldstein Decl. ¶ 44 & n.5. Dr. Anderson also references his own as-yet published "longitudinal" study (tracking children during a school year) as a basis for regulation, *id.* ¶ 34, but, even assuming that study's validity despite its numerous flaws, *see* Williams Decl. ¶¶ 21-27, it at most shows that the preliminary longitudinal research (performed over relatively short time periods, compared to longitudinal studies in other contexts) is conflicting and mixed, *see, e.g.* Goldstein Decl. ¶ 69.

In sum, Dr. Anderson's report lacks credibility – among other reasons, because it fails to address the substantial contrary evidence to and actual criticisms of his work, accepting as "true experts," Anderson Decl. ¶ 7, only those who agree with him. *See* Goldstein Decl. ¶ 63; Williams Decl. ¶ 34. But even accepting Dr. Anderson's conclusions as true – that "violent" games, like all "violent" media, have some diffuse and aggregate effect on aggression – those conclusions do not justify suppressing the video games singled out by the Act.

defendants rely have nothing to do with video games," and *no* study is specific to the subset of games regulated by the Act. *See id.* As the court reasoned in *VSDA*, it simply is insufficient to claim – as the State's experts do here – that "prolonged exposure to violent entertainment media is one of the constellation of risk factors for aggressive or anti-social behavior." *Id.*

b. The "Frontal-Lobe" Research Offered by the State's Experts Does Not Prove Harm, Let Alone a Compelling Interest to Justify the Suppression of Expression.

The State nevertheless attempts to avoid the overwhelming weight of this precedent by pointing to "frontal-lobe" research described by Drs. Kronenberger and Murray in their expert reports.[4] But even a cursory review of the "frontal-lobe" research presented to the General Assembly and offered to this Court reveals that it does not support the Act's restrictions on expression. To begin with, the conclusions drawn by the State's experts about the causal meaning of neurological data (such as fMRI images) depend completely on their uncritical acceptance of the generalized claims of psychological "harm" made by Dr. Anderson and others, *see* Kronenberger Decl. ¶¶ 9-12; Murray Decl. ¶¶ 8-18; Nusbaum Decl. ¶ 8. As noted above, these underlying claims of harm have been rejected by courts as a basis for restricting expression, and they carry no greater weight simply for their repetition as part of reports about preliminary fMRI research.

In attempting to justify the Act's restrictions on "violent" games based on so-called "frontal lobe" effects, the State relies most heavily on Dr. Kronenberger, a clinical psychologist who has participated in team studies on the possible effects of "violent" media on brain functioning. Dr. Kronenberger's declaration is based on a small handful of fMRI studies that have not been widely accepted in the scientific community (only one is published and peer-reviewed). As explained in the report of Plaintiffs' expert Dr. Nusbaum, the research on which Dr. Kronenberger relies is not based on accepted and established science in this area, and Dr. Kronenberger's opinion is based on a number of fundamental misunderstandings about brain

[4] The State has also submitted expert reports from Dr. Rich and Dr. Kalnin, but these reports add nothing to the analysis. Dr. Rich is a practicing pediatrician with no expertise in psychology or neurology. *See* Rich Decl. ¶¶ 1-5. His summary of the social science research concerning media and video game violence should thus be given no independent weight. Dr. Kalnin's testimony has been offered merely to authentic the various fMRI images referenced by Dr. Kronenberger, and contains no independent opinion concerning any "harm" caused by "violent" video games. *See* Kalnin Decl. ¶ 8.

functioning and neurocognitive psychology. *See generally* Nusbaum Decl. But even if this research were taken at face value, it would not support the Act's restrictions on "violent" video games. The research conducted by Dr. Kronenberger, by his own admission, "shows a correlation" between media violence and brain functioning, "but it does not pinpoint the cause." Press Release, Indiana Univ. School of Medicine, Self-Control May Be Affected By Violent Media Exposure, May 26, 2005, *available at* http://medicine.indiana.edu/news _releases/ viewRelease.php4?art=339&print=true. Indeed, according to Dr. Kronenberger, there are several possible explanations for his findings, including the possibility that "teens with poor executive functioning skills seek out violent media, exposure to violent media reduces executive functioning skills, or some unknown variable is at work." *Id.* Further, and critically, Dr. Kronenberger's research measured subjects' *combined* exposure to television and video games, and thus shows nothing about the alleged effects of "violent" video games in particular. *See* Kronenberger Decl. ¶¶ 42-43, 45; Nusbaum Decl. ¶¶ 12, 44, 45.

Dr. Murray's research also fails to support the State's claimed compelling interest. Dr. Murray has reviewed the literature on media violence and conducted *one* fMRI "pilot study," involving the viewing of a "violent" *movie* (the PG-rated *Rocky IV*) by a sample of *eight* children. *See* Murray Decl. ¶¶ 29-33. From this extremely limited pool of data, Dr. Murray makes the sweeping conclusion that "it is clear that video violence and video game violence experiences can lead to changes in attitudes and values about using violence to solve conflicts and thereby lead to increases in aggressive behavior." *Id.* ¶ 52. That Dr. Murray is willing to draw such patently unsupported conclusions about the alleged effects of "violent" video games absent *any* research or experience specific to video games – as opposed to other media, *see* Nusbaum Decl. ¶ 12 – should discredit his opinion on his face. By refusing even to consider or account for the substantial conflicting evidence, neither the State, nor its experts, nor the General Assembly can be said to have drawn the "reasonable inferences based on substantial evidence" demanded by the First Amendment. *Turner*, 512 U.S. at 666.

c. The State's Evidence Is Not Specific to Video Games, Let Alone Those Games Targeted by the Act.

Notably, none of the expert testimony of "harm" presented by the State is specific to video games, let alone the particular category of "violent" games covered by the Act. Although all of the State's experts speculate as to why "violent" video games may have more harmful

effects than other "violent" content, they have failed to substantiate those claims with any meaningful research. *See, e.g.*, Anderson Decl. ¶¶ 39-43 (citing several unsubstantiated "theoretical reasons" that "violent" video games have greater effects than other media); Murray Decl. ¶ 52 (reaching conclusions about "video game violence" absent any research specific to video games); Kronenberger Decl. ¶¶ 42-45 & n.1 (reaching conclusions about "violent" video games, including those covered by the Act, without any findings specific to video games).

Were the expert testimony submitted in this case sufficient justification for the Act's restrictions on "violent" speech, then the State would logically be able to regulate *any* type of "violent" media – television, movies, art, music, and books – based on such claims of "harm." Indeed, the General Assembly appeared to contemplate such an outcome. *See* Legislative Record, Ex. D to Blagojevich Mot. for Partial Summary Judgment, at BL 47-48 (hereinafter "BL __") (the Act's sponsor, stating in 3/16/05 House Debate that the State could restrict books like *A Clockwork Orange* "if we showed enough empirical data with [*A Clockwork*] *Orange* that showed that it affected children's brains . . . neurologically the way video games did"). The logical extension of the State's argument here makes clear that the Act's restrictions on "violent" games cannot be squared with the First Amendment. *See AAMA*, 244 F.3d at 577.

2. The State Has Not Satisfied the Other Demands of Strict Scrutiny.

a. The Act Does Not Directly Advance the State's Interests.

Not only has the State failed to prove a compelling state interest in fact, but it has failed to meet the other demands of strict scrutiny: that the Act *directly advance* any compelling interest in a *narrowly tailored* manner. Indeed, the State offers no response to Plaintiffs' argument that the Act does not advance the State's purported goals because the State has singled out a subset of video games for regulation, even though a wide range of media make comparable violent expression. *See AAMA*, 244 F.3d at 579 (noting that "violent" video games "are a tiny fraction of the media violence to which modern American children are exposed"). Thus, under the Act, it may be unlawful for a 16-year-old to buy or rent the *Resident Evil IV* or *Tom Clancy's Rainbow Six 3* video games, *see* Price Decl. ¶¶ 11-17, 38-43, even though it would be entirely lawful for that same teen to buy or rent *Resident Evil* and Tom Clancy movies, and to purchase Tom Clancy books. Such differential treatment of similarly situated media is strong evidence that the Act's true goal is to punish a disfavored speaker – not to advance the State's asserted interests. *See, e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

b. The Act Is Not Narrowly Tailored Because the State Has Not Proved Less Speech-Restrictive Alternatives to be Ineffective.

The Act's restrictions on "violent" games are also not narrowly tailored because the State has failed to establish that "a plausible, less restrictive alternative . . . will be ineffective to achieve its goals," *Playboy*, 529 U.S. at 816 – for example, educational efforts concerning the video game industry's self-regulatory Entertainment Software Rating Board ("ESRB") rating system. The State's rejection of this alternative appears to be based on the assertions that "most retailers sell these video games to minors regardless of the ESRB" and that "children will enter the store without their parents." Blagojevich Mem. at 23; *see id.* at 1-2. What the evidence actually shows, however, is that the ESRB ratings are enforced by retailers *most of the time*, and that parents are involved in the great majority of their children's video game purchases.

As Plaintiffs explained in their opening brief, the ESRB rating system is well-respected and widely used. *See* Plaintiffs' Opening Mem. at 3-4; Lowenstein Decl. ¶¶ 4-11. In its initial report in 2000 surveying rating systems for various media, the Federal Trade Commission ("FTC") called the ESRB system the "most comprehensive of the three industry systems studied by the Commission," "widely used by industry members," and "revised repeatedly to address new challenges, developments, and concerns regarding the practices of its members." FTC, Marketing Violent Entertainment to Children, at 37 (Sept. 2000), *available at* http://www.ftc.gov/reports/violence/vioreport.pdf. That report also made the crucial observation that *parents are involved in 83% of video game purchases for minors*. *See id.* at 42. Recent research similarly indicates that "92% of the time parents are present at the time games are purchased or rented." Entertainment Software Ass'n, Essential Facts About the Computer and Video Game Industry, at 7 (2005), *available at* http://www.theesa.com/files/2005EssentialFacts.pdf. And, while some "M" games are quite popular, "M" games do not dominate the industry; rather, 53% of all games sold in 2004 were rated "E," 30% were "T," and only 16% percent were "M." *Id.* at 4. Thus, far from establishing the crisis claimed by the State's brief, the actual facts show no "proliferation of graphic video games to children," Blagojevich Mem. at 1 – and certainly no "proliferation" that is not fully supervised by parents and ultimately under their control.

In dismissing reliance on the ESRB system, the State rests heavily on a 2004 FTC report. *Id.* at 2-3. But the State's brief ignores the FTC's observation in that report that the video game industry has continually improved its practices, and is performing *better* than its peer retail

industries – movies and music. *See, e.g.*, BL 171-72. For example, the State misleadingly claims that the video game industry "is more than happy to sell M-rated games to unsupervised children," pointing to the industry's 69% score in the FTC's "secret shopper" test, Blagojevich Mem. at 3, but fails to mention that movie and music retailers had *worse* results (81% and 83% failure rates, respectively), BL 140, and that the FTC noted the video game industry's "progress" on this issue, BL 141. The State also ignores contrary evidence in the legislative record: Dr. David Walsh, an outspoken critic of the video game industry, reported in his National Institute on Media and the Family's 2004 "Video Game Report Card" that minors were *turned down* from purchasing M-rated games *66% of the time*. *See* BL 236-37. Similarly neglected by the State are the FTC's remarks in its 2004 report that "the electronic game industry has adopted numerous standards that limit children's exposure to ads for Mature-rated products," BL 171, that "[t]he industry is actively enforcing those standards and penalizing those companies found to be in noncompliance," *id.*, and that "the game industry's rating disclosure requirements go far to ensure that parents have access to rating information when considering product purchases." BL 141. Thus, far from proving the ESRB system to be ineffective (as is the State's burden), the FTC's 2004 report shows the video game industry to be a *leader* in self-regulation.

c. The Act Is Also Not Narrowly Tailored Because it Will Impair the Rights of Adult Speakers and Willing Recipients.

The State claims that narrow tailoring is present because this case is *unlike* prior cases striking down laws to shield minors from sexual speech "because the rights of *adults* to access this material was significantly burdened or banned outright." Blagojevich Mem. at 22. But the Act is precisely like the regulations invalidated in *Sable* and *Playboy*, the cases on which the State relies.[5] As in those cases, the Act's vague restrictions will restrict protected expression from reaching not only minors, but adults as well, as game creators, distributors and retailers

[5] In *Playboy*, the Supreme Court struck down a federal law imposing restrictions on non-obscene sexually explicit material on cable television that would have affected adults' access, because a "voluntary blocking regime" was a less-speech-restrictive alternative, even though the voluntary regime (like the voluntary ESRB system here) "require[d] a consumer to take action" and would not function "perfectly." 529 U.S. at 824; *see id.* ("[A] court should not presume parents, given full information, will fail to act."). In *Sable*, the Supreme Court struck down a federal law banning non-obscene sexually explicit phone messages that would have affected adults' access, because less-speech-restrictive alternatives existed, despite the possibility that absent an outright ban "enterprising youngsters could and would evade the rules and gain access to communications from which they should be shielded." 492 U.S. at 128.

respond to the Act's threat of criminal penalties by self-censoring or otherwise restricting access to *any* potentially offending game, and, conceivably, by pulling "M" games off the shelves altogether. *See* Lowenstein Decl. ¶ 16; Andersen Decl. ¶¶ 9-11, 15, 17; Price Decl. ¶¶ 9-10.

The only authorities cited by the State in support of its claim that adult speech may be suppressed based on a claim of "harm" to minors are inapposite cases not involving strict scrutiny or arising in contexts – such as broadcasting – not at issue here. *See* Blagojevich Mem. at 21-22. For instance, in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 745 (1996), the plurality opinion cited by the State approved a federal statute allowing cable operators voluntarily to restrict content, based on the "complex balance of interests" at issue among various speakers (including broadcast programmers and cable operators), *id.* at 747, as well as the "'uniquely pervasive presence'" of broadcast and cable programming, *id.* at 744 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978)). Neither a balance of interests or broadcasting is at issue here. Rather, the Act is akin to another provision of the federal statute that was *struck down* by the Court in *Denver Area* (in a portion of the case unmentioned by the State), where the statute did not "simply permit, but rather require[d], cable system operators to restrict speech." 518 U.S. at 753. It is *that* unconstitutional ban in *Denver Area* that is akin to the Act's content restrictions here.

B. The Restrictions on "Sexually Explicit" Video Games Are Unconstitutional.

The State's argument that Plaintiffs are unlikely to prevail on their challenge to the Act's restrictions on "sexually explicit" video games is equally meritless.[6] As Plaintiffs have explained, *see* Opening Mem. at 16-17, the Act's "sexually explicit" restrictions – which single out video games from *all* other media – are foreclosed by Supreme Court precedent, which requires prohibitions of "harmful to minors" sexual material to contain a "serious value" prong, so as to eliminate vagueness and prevent chilling of protected expression. *See Reno v. ACLU*, 521 U.S. 844, 864-66 (1997); *Miller v. California*, 413 U.S. 15, 24-25 (1973); *Ginsberg v. New York*, 390 U.S. 629, 633, 636-43 (1968). The Act similarly lacks the recognized requirement that

[6] Rather than directly respond to Plaintiffs' preliminary injunction arguments against enforcement of the Act's "sexually explicit" provisions, the Governor filed a motion for summary judgment concerning the Act's "sexually explicit" provisions, along with a 23-page brief, and incorporated that brief by reference in his response to Plaintiffs' preliminary injunction motion. *See* Blagojevich Mem. at 1 n.1. Plaintiffs will respond to the Governor's extensive summary judgment argument in due course; in this reply, Plaintiffs merely reiterate why they are plainly entitled to a preliminary injunction under controlling law.

the sexually explicit material appeal to minors' prurient interest predominantly or "as a whole." *Reno*, 521 U.S. at 872 (quoting *Miller*, 413 U.S. at 24); *see, e.g.*, *Ginsberg*, 390 U.S. at 632-33.

Not only are the Act's "sexually explicit" restrictions unlawful, but they are completely unnecessary – other than for the impermissible purpose of targeting a disfavored speaker. Section 11-21 of the Act, which Plaintiffs do not challenge, sets forth a separate "harmful to minors" statute that meets the three-pronged constitutional test for regulating sexually explicit speech, and expressly covers video games along with other media. *See* Act § 11-21(a). Thus, *all* of the government interests asserted by the State in its summary judgment brief – from the asserted need to shield children from explicit sexual images generally, Blagojevich SJ Mem. at 7-9, to the State's concerns about particular video game content, *id.* at 3-4 – can be fully and constitutionally addressed by Section 11-21 of the Act. Because Section 11-21 already serves the State's asserted interests, the only apparent reason for adopting the separate "sexually explicit" provisions for video games is to suppress constitutionally protected video games that do not satisfy the requirements of Section 11-21 – *i.e.*, those with serious literary, artistic, social, and/or scientific value, and/or those that do not predominantly appeal to the prurient interest of minors. Such singling out of the video game industry as a disfavored speaker is neither a legitimate nor compelling justification for the "sexually explicit" restrictions.

Although the State attempts to argue that there is no constitutional requirement of a "serious value" prong, it provides no support for that claim where, as here, a statute seeks to *criminally prohibit* the dissemination of certain content to minors. Rather, the only cases cited by the State upholding bans on "indecent" sexual speech absent a "serious value" prong arose in the inapposite context of "'uniquely pervasive'" broadcast programming, *Denver Area*, 518 U.S. at 744 (quoting *Pacifica*, 438 U.S. at 748). *See* Blagojevich SJ Mem. at 7-8 (citing *Denver Area* and *Pacifica*). Considerably more on point is *Reno v. ACLU*, 521 U.S. 844 (1997), in which the Court invalidated an indecency statute lacking a "serious value" prong, noting that this requirement "critically limits the uncertain sweep of the obscenity definition," *id.* at 873, and that its absence would lead to the impermissible result of suppressing "large amounts of nonpornographic material with serious educational or other value," *id.* at 877. The Act would have the same impermissible result, leading to the potential suppression of such games as the critically acclaimed *God of War* – a sophisticated game based on Greek mythology that contains

brief but important sexual content, *see* Price Decl. ¶ 33 – despite that the game has "serious value" and does not "predominantly" appeal to any prurient interest.[7]

The State strains further still in arguing that the Act's restrictions on "sexually explicit" video games are narrowly tailored. As described above, the Act's restrictions are certain to lead to the suppression of expression to adults and children alike, and they therefore are not narrowly tailored. *See supra* pp. 11-12. The State's narrow tailoring argument relies largely on cases not applying the strict scrutiny standard that governs here, *see* Blagojevich Mem. at 10-11 (citing *Ginsberg* and related cases), as well as the puzzling and incorrect assertion that the Act's "sexually explicit" restrictions "only involve[] commercial speech," *id.* at 14. Rhetoric aside, the State has failed to demonstrate a legitimate interest in regulating "sexually explicit" expression beyond that already properly regulated by Illinois law, and has failed to justify such restrictions as narrowly tailored. Thus, the Act's "sexually explicit" provisions should be enjoined.

C. The Act's Labeling, Signage, Brochure, and Check-Out Requirements Are Unconstitutional Content-Based Burdens on Speech.

The State offers no independent defense of the Act's labeling, signage, brochure and check-out requirements as they relate to "violent" video games. Thus, for the reasons articulated above, the Court should enjoin not only the Act's outright restrictions on the sale or rental of "violent" games, but also the various additional restrictions related to "violent" games, such as those involving cash-register prompts and labeling. None of the State's proposed additional restrictions on "violent" games is supported by a valid state interest, let alone a compelling one.

With respect to the context of "sexually explicit" video games, the State attempts to justify the Act's additional restrictions "for the same reasons that the sale/restriction provision is justified." Blagojevich SJ Mem. at 18. But, as explained above, the Act's restrictions on "sexually explicit" video games *fail* constitutional scrutiny. For those same reasons, the State also should be enjoined from enforcing the Act's other restrictions on "sexually explicit" games.

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[7] The State claims that *Reno* does not require all of the *Miller* prongs for a law restricting "sexually explicit" expression as to minors. *See* Blagojevich SJ Mem. at 15. But the Supreme Court's invalidation in *Reno* of a statute seeking to outlaw sexually explicit content targeted at minors rested heavily on the absence of all of the *Miller* prongs (and the law's concomitant vagueness). Moreover, *Miller* and *Ginsberg* (which is merely an analog of *Miller* as to minors) together compel the conclusion that all of the *Miller* prongs are required to criminally prohibit "sexually explicit" content as to minors. It is the State that cites no case upholding a "harmful to minors" regulation absent the *Miller* prongs.

The State also suggests that even assuming the unconstitutionality of the sale and rental restrictions for "sexually explicit" games, the labeling requirement could somehow survive. *See id.* That is not so. Absent a compelling government interest, the State cannot require a speaker to express a message that he would not voluntarily make. *See, e.g. Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Contrary to the State's bald assertion that "[t]his is not 'compelled speech,'" because the Act "does not require retailers to recite the Pledge of Allegiance or endorse a state motto," Blagojevich SJ Mem. at 17, the protection against compelled speech extends to *all* statements, whether of fact or opinion. *See Riley*, 487 U.S. at 797-98 (refusing to distinguish cases "simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech"). This is particularly so where, as here, the speaker disagrees with the message (*i.e.*, that the labeled games are inappropriate for minors), the message conflicts with other information the speaker provides voluntarily (*i.e.*, the ESRB ratings and content descriptors), and the compelled expression (*i.e.*, a prominent "18" label) will have a chilling effect on the speaker's expression. *Cf. Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (upholding a disclosure requirement of *factual* information necessary to "prevent[] deception of consumers"). Even for the compelled messages with which video game manufacturers and retailers may not disagree – for example, the existence of the ESRB system – the video game industry already provides this information to consumers voluntarily, removing any justification for requiring that information by government fiat. There is simply no need – compelling or otherwise – for the State's labeling, signage, brochure and check-out restrictions.

II. THE ACT IS UNCONSTITUTIONALLY VAGUE.

The State does not seriously defend the Act against Plaintiffs' vagueness challenge. Rather, the State attempts to distract from the key point: the Act's vague terms are susceptible of widely different interpretation by retailers and state officials, and thus will lead to the suppression and chilling of expression fully protected by the First Amendment. Because the statute does not make clear what content is prohibited, it is unconstitutionally vague. *See, e.g.*, *VSDA*, 325 F. Supp. 2d at 1191 (striking down a "violent" video game regulation for vagueness).

The State's main legal retort is that "Plaintiffs confuse vagueness under the Fourteenth Amendment with an overbreadth challenge under the First Amendment." Blagojevich SJ Mem. at 19. This simply is not so. Plaintiffs challenge the Act's vagueness under both the First and

Fourteenth Amendments because, as the Supreme Court has long recognized, "standards of permissible statutory vagueness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432 (1963); *see, e.g.*, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998) ("Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards."). Thus, the State cannot distinguish *Reno v. ACLU*, 521 U.S. 844 (1997) – in which the Court struck down for vagueness a law that, like the Act's "sexually explicit" restrictions, lacked a "serious value prong" – simply by arguing that *Reno* was a First Amendment case, *see* Blagojevich SJ Mem. at 19. This is a First Amendment case too, and under *Reno*, the Act's "sexually explicit" restrictions cannot stand.

Similarly, the State makes the baseless assertion that "Plaintiffs direct the Court to no supporting case law" for their vagueness claim concerning the Act's definition of "violent" video games. Blagojevich Mem. at 23. But the State simply refuses to address Plaintiffs' citation of *VSDA*, in which Washington State's "violent" video game law was struck down for vagueness, *see* Plaintiffs' Opening Mem. at 23, instead relying on the conclusions of a district court opinion that was *reversed* on appeal, *see* Blagojevich Mem. at 23. As the court held in *VSDA* – in language directly applicable to the Act's definitions at issue here (such as "human" and "serious physical harm") – "[n]ot only is a conscientious retail clerk (and her employer) likely to withhold from minors all games that could possibly fall within the broad scope of the Act, but authors and game designers will likely 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were clearly marked.'" 325 F. Supp. 2d at 1191 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)).[8]

The State is simply wrong that Plaintiffs' vagueness claim is "preposterous" and based on "wild hyperbole." Blagojevich Mem. at 23, 24. In contrast to the State's mere assertions that the Act is not vague, Plaintiffs have provided sworn testimony of a leading game developer and the President of Plaintiff VSDA (a leading trade association of video game retailers), to substantiate Plaintiffs' claim of vagueness and to demonstrate the Act's chilling effect. *See* Andersen Decl. ¶¶ 9-11; Price Decl. ¶¶ 7-10. Indeed, it is particularly ironic for the State to claim that "[a] person of ordinary intelligence would understand that . . . a 'part-animal' or 'part-alien' is not

[8] It is beside the point whether the ESRB's voluntary standards would be unconstitutionally vague if enacted into the law. *Cf.* Blagojevich Mem. at 23. The ESRB system is an effort in industry self-regulation, not a basis for criminal sanctions, and thus any vagueness in that system is tolerable because it does not separate what is lawful from what is unlawful.

human," Blagojevich Mem. at 24, given that the Act's sponsor in the General Assembly has stated publicly that the Act's language actually *covers* some unspecified class of non-humans – for example, "an alien that looks like human which is an alien." BL 21 (3/16/05 House Debate). If anything, the State's apparent conflict with the General Assembly about the proper interpretation of the Act is strong evidence of its vagueness. It certainly undermines any claim that Plaintiffs' confusion is exaggerated.

The truth of the matter is that the General Assembly was well aware of the Act's vagueness, but decided to pass the legislation anyway – for the illegitimate purpose of "sending a message." As one legislator explained before voting in favor of the Act, "[t]he interpretation of the statute is vague and because of that courts all over this country have held bills that look just like this unconstitutional," but "today I'm gonna vote for this Bill knowing it's unconstitutional," because "[a] strong message has to be sent." BL 11-12 (3/16/05 House Debate). As in *VSDA*, the Act is unconstitutionally vague and its enforcement should therefore be enjoined.

III. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION.

The State neither addresses the legal standards applicable to a preliminary injunction motion, nor does anything to rebut Plaintiffs' argument that – in addition to Plaintiffs' likelihood of success on the merits – the equities all weigh heavily in favor of an injunction here. *See* Plaintiffs' Opening Mem. at 23-24. If the Act is permitted to go into effect, Plaintiffs' members and willing recipients of their expression will suffer irreparable harm, because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 507 (7th Cir. 1998) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)). As in the materially indistinguishable case *AAMA*, 244 F.3d at 580, a preliminary injunction is warranted here.[9]

[9] Contrary to the State's suggestion, Plaintiffs intend no waiver of their equal protection and due process arguments (Counts III and IV of the Complaint) because they have not briefed those arguments in support of their motion for a preliminary injunction. *Cf.* Blagojevich Mem. at 25. Far from a signal that Plaintiffs "think . . . little" of these arguments, *id.*, Plaintiffs' briefing choices reflect space constraints and the strength of their primary First Amendment arguments.

CONCLUSION

For the reasons above, as well as those articulated in Plaintiffs' opening brief, Plaintiffs request that this Court grant a preliminary injunction.

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