UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

INTERACTIVE DIGITAL SOFTWARE ASSOCIATION; MISSOURI RETAILERS ASSOCIATION; VIDEO SOFTWARE DEALERS ASSOCIATION; AMERICAN AMUSEMENT MACHINE ASSOCIATION; AMUSEMENT & MUSIC OPERATORS ASSOCIATION; INTERACTIVE ENTERTAINMENT MERCHANTS ASSOCIATION; BFC ENTERPRISES, INC.; J. S. MORRIS AND SONS NOVELTY COMPANY; VENDING ENTERPRISES, INC., d/b/a MIDWEST ENTERPRISES; and WONDER NOVELTY CO.,	)	Cause No. 4:00CV2030 SNL
Plaintiffs,	)	
v.	)	
ST. LOUIS COUNTY, MISSOURI; GEORGE R. WESTFALL, in his official capacity as County Executive of St. Louis County, Missouri; and RONALD A. BATTELLE, in his official capacity as Chief of Police of St. Louis County, Missouri,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Interactive Digital Software Association ("IDSA"), Missouri Retailers Association ("MRA"), Video Software Dealers Association ("VSDA"), American Amusement Machine Association ("AAMA"), Amusement & Music Operators Association ("AMOA"), Interactive Entertainment Merchants Association ("IEMA"), BFC Enterprises, Inc. ("BFC"), J. S. Morris and Sons Novelty Company ("Morris"), Vending Enterprises, Inc., d/b/a Midwest

Enterprises ("Midwest"), and Wonder Novelty Co. ("Wonder"), by and through their attorneys, hereby submit this memorandum in support of their motion for summary judgment, seeking a judgment declaring unconstitutional St. Louis County Ordinance No. 20,193 (Oct. 26, 2000) (hereinafter, the "Ordinance"), amending Chapter 602 of the St. Louis County Revised Ordinances by adding new sections 602.425 through 602.460.

The challenged Ordinance, which was enacted into law on October 26, 2000, and will take effect on or about December 1, 2001,[1/] imposes criminal penalties on the distribution of certain video games, including both arcade-style and home games, based solely on their alleged "graphically violent" content. As explained below, this restriction on the content of the burgeoning video game medium, based on local government officials' apparent disapproval of the ideas and messages contained in certain games, violates the First Amendment.

The Eighth Circuit has made clear that content-based restrictions of "violent" speech, even when imposed in the name of protecting children from perceived harms, are subject to strict scrutiny. See Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992). On March 23, 2001, in a case involving an Indianapolis ordinance very similar to the Ordinance at issue in the instant case, the Seventh Circuit confirmed that video games depicting violence are speech and that the social science evidence relied on by the City of Indianapolis — which, being the product of precisely the same expert who testified before St. Louis County, was no more speculative and implausible than the evidence relied upon here — was insufficient to uphold that ordinance. See American Amusement Mach. Ass'n v. Kendrick, – F.3d –, 2001 WL 283041 (7th

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1/ As originally enacted, the Ordinance was to go into effect on April 26, 2001. On March 27, 2001, however, the St. Louis County Council passed a bill delaying the effective date.

Cir. 2001). The St. Louis Ordinance cannot survive First Amendment scrutiny. As explained below, defendants (collectively, the "County") cannot satisfy their burden of demonstrating both that they have a compelling interest in regulating "graphically violent" video games and that the challenged provisions are narrowly tailored to advance that interest. Accordingly, Plaintiffs' motion for summary judgment should be granted.

FACTS

Plaintiffs are companies or associations of companies that create, publish, distribute, sell, rent, and/or make available to the public video games, including both computer and arcade games, and related software. (Amended Compl. ¶¶ 8-18.) The video games at issue here are a modern form of artistic expression. (Lowenstein Dec. ¶ 10.) Like movies, today's video games are rich combinations of narrative, storyline, music, and graphic design. (Lowenstein Dec. ¶ 10.) The creative process of developing video games resembles that of other forms of protected expression. In particular, a video game begins as a creative concept in the minds of the game developers, who brainstorm, collaborate, and sketch scripts. (Lowenstein Dec. ¶ 13.) The game is brought to life by teams of artists, who draw sketches of characters and create "story boards," which are visual presentations of the action sequences and plot that are used to form the story presented through the game. (Lowenstein Dec. ¶ 13.) The story lines and themes guide the development of concept art, which is then transformed into digital art presenting the characters and backgrounds. (Lowenstein Dec. ¶ 14.) The final product contains extensive plot and character development. (Lowenstein Dec. ¶ 14.) Even games without explicit plots or story lines, such as puzzle games, contain visual art, graphic design and sound elements that constitute a form of aesthetic expression akin to music or abstract art. (Lowenstein Dec. ¶ 14.)

Viewers' reactions to video games are similar to their reactions to other art forms. (Lowenstein Dec. ¶ 15.) Video games create a world of fantasy, in which the player's imagination and emotions are stimulated and his or her interest is engaged as a result of the combination of themes, sounds, images, characters, and/or storyline that a specific game contains. (Lowenstein Dec. ¶ 15.) The video game medium, like the film, visual art, and music media, has been both the topic of academic commentary and discourse (Lowenstein Dec. ¶ 17) and the subject of artistic recognition both within and outside the video game industry. (Lowenstein Dec. ¶ 16.) Moreover, the video game medium is in the process of rapid technological evolution and advancement, allowing game creators to most faithfully realize their creative concepts, inspiring continued creativity among creators, and enhancing the experience of viewers. (Lowenstein Dec. ¶ 18.)

The challenged provisions of the Ordinance restrict access to and control the display of video games based solely on the visual expression that the artists choose to include in the storyline and theme. Among other restrictions, the Ordinance makes it a crime knowingly to sell, rent, make available, or permit the "free play" of games deemed "harmful to minors" to any unaccompanied person under the age of 17. See Ordinance § 602.440. "Harmful to minors" is defined as:

> a video game that predominantly appeals to minors' morbid interest in violence or minors' prurient interest in sex, is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, lacks serious literary, artistic, political or scientific value as a whole for minors, and contains either graphic violence or strong sexual content.

Id. § 602.430(c).[2/] "Graphic violence" is defined further, as:

> the visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration.

Id. § 602.430(d). The Ordinance provides that anyone "convicted of a violation" of these provisions "shall be fined not more than One Thousand Dollars ($1,000.00) or imprisoned . . . for not more than one year, or punished by both such fine and imprisonment." Id. § 602.455.

Several key terms are left completely undefined. For example, the Ordinance does not explain what the phrase "minors' morbid interest in violence" means. It also does not define the term "patently offensive" other than stating that it involves what the adult community believes to be "suitable" for minors. Nor does it define "graphic violence" in any meaningful way; although the Ordinance provides a definition for that term, that definition contains terms — "human-like being," "realistic," and "serious injury" — that do not, when applied to a medium that relies almost entirely on animation and inherently fanciful characters and factual scenarios, provide a standard that readily can be applied by game developers or distributors. (Lowenstein Dec. ¶¶ 28-29; Bishop Dec. ¶¶ 11-12).

Tacitly recognizing that the Ordinance's definitions fail to provide meaningful guidance, the Ordinance functionally delegates the scope of its proscriptions to non-governmental industry rating systems. In the case of non-arcade games, the Ordinance functionally leaves the meaning of its definitions to the Entertainment Software Rating Board ("ESRB"), a non-governmental body that has developed a standardized rating system for games, by creating a "rebuttable

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2/ Plaintiffs do not challenge the provisions of the Ordinance insofar as they are applied solely to sexual content.

presumption" that games designated by the ESRB as "AO" — signifying the ESRB's determination that such games contain content suitable only for adults — or "M" — signifying that such games contain content that may be suitable for users age 17 and older — are "harmful to minors." (Ordinance § 602.450; Lowenstein Dec. ¶ 19 & Ex. G.) However, the rating system operated by the ESRB, and particularly the "AO" and "M" ratings upon which the Ordinance relies, are not designed to measure the degree (if any) to which a particular game is "harmful." (Lowenstein Dec. ¶¶ 21, 25, 26). The ratings are informational, designed merely to notify parents and other potential consumers in simple, descriptive terms what type of content is contained within various games. (Lowenstein Dec. ¶ 22 & Ex. G ("The ESRB ratings are not meant to tell you what to buy or rent or to serve as the only basis for choosing a product").)[3/]

The Ordinance neither sets forth any guidelines concerning the character of a game rated "AO" or "M" nor requires that the present ESRB standards remain unchanged. In addition, the ESRB ratings themselves provide no such guidance and, if anything, it appears that the "AO" and "M" categories include many games not covered by the Ordinance itself. (Lowenstein Dec. ¶¶ 27-28.) For example, games often are rated "M" even where they lack any appreciable violent

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3/ The ESRB rating system divides games into five categories based on the review of game content by trained raters. (Lowenstein Dec. ¶¶ 23-24 & Ex. G.) With respect to their violent content, titles rated "Early Childhood (EC)" have content that "may be suitable for persons ages 3 and older" and contains "no material that parents would find inappropriate." Titles rated "Everyone (E)" have content that "may be suitable for persons ages six and older." Titles rated "Teen (T)" have content that "may be suitable for persons ages 13 and older" and "may contain violent content . . . ." Titles rated "Mature (M)" have content that "may be suitable for persons ages 17 and older" and "may contain more intense violence" than games in the "T" category. Titles rated "Adults Only (AO)" have content "suitable only for adults" and "may contain graphic depictions of . . . violence." In the "content descriptors" that accompany the ratings, "violence" is defined only as "depictions of aggressive conflict." (Lowenstein Dec. Ex. G.) The ESRB recently has begun defining "violence" as "scenes or activities, which involve violent acts." (Lowenstein Dec. ¶ 22 n.1.)

content; they may be given such a rating if they contain, among other things, "strong language," "mature sexual themes," "comic mischief," or gambling. (Lowenstein Dec. ¶ 27 & Ex. H.) Other games rated "M" contain "animated" violence but not "realistic" violence according to the ESRB's "content descriptors," which are short descriptive phrases that accompany the ratings (Lowenstein Dec. ¶ 22); the Ordinance restricts only "realistic" violence. (Compare Lowenstein Dec. ¶ 28 & Ex. I, with Ordinance § 602.430(d) ("Graphic violence" requires visual depiction of "realistic serious injury") (emphasis added)).[4/] Moreover, even with respect to the meaning of "violence," the ESRB ratings do not clarify the vague commands found in the Ordinance. The ratings state simply that games in the "M" category "may include more intense violence" than games in the "T" category, which itself states merely that titles in that category "may contain violent content." (Lowenstein Dec. Ex. G.) "Violence" is not defined and is described in the ESRB's "content descriptors"only as "depictions of aggressive conflict," (Lowenstein Dec. ¶ 22 & n.1, & Ex. G), or as "scenes or activities, which involve violent acts." (Lowenstein Dec. ¶ 22 n.1.).

The Ordinance creates a similar delegation in the case of arcade games, by setting up a "rebuttable presumption that arcade games rated 'red' by the [American Amusement Machine Association ("AAMA"), Amusement & Machine Operators Association ("AMOA"), and/or the International Association of Family Entertainment Centers ("IAFEC")] are harmful to minors." Ordinance § 602.450-2. Like the ESRB rating system, the arcade industry's rating system is not premised on any determination whether games are "harmful" to minors or anyone else. (Bishop

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4/ The ESRB's content descriptors no longer distinguish between "animated" violence and "realistic" violence, but games that were rated when such a distinction was made continue to contain those content descriptors. (Lowenstein Dec. ¶ 22 & n.1.)

Dec. ¶ 9.) Indeed, the arcade rating system is not age-based; it merely provides information concerning the general content of each game. (Bishop Dec. ¶ 9.) Moreover, as the arcade industry's "Guide To Coin-Operated Video Games" makes clear, games may be given a "red" sticker for containing either "Animated Violence Strong," "Lifelike Violence Strong," "Sexual Content Strong," or "Language Strong." (Bishop Dec. ¶¶ 7, 13 & Ex. A.) Plainly, then, a "red" sticker applies to a broader range of games than is warranted by the Ordinance's rebuttable presumption. (Bishop Dec. ¶ 13.) And, even the definition of "Lifelike Violence Strong" is broader than the definition of "graphic violence" as set forth in the Ordinance: a game contains "Lifelike Violence Strong" if it "[c]ontains scenes of strong violence involving human-like characters which result in bloodshed, serious injury and/or death to the depicted character(s)." (Bishop Dec. Ex. A.) For these reasons, the arguments set forth below in the context of the ESRB rating system or the home video game industry apply with equal force to the arcade rating system and the arcade game industry.

Plaintiffs maintain that some of the content displayed by the video games created, published, distributed, rented, sold and/or made available to the public by them or their members, while fully protected by the United States Constitution, may include scenes that may be deemed by law enforcement officials in St. Louis County to meet the statutory tests for speech "harmful to minors" set forth above, thus subjecting Plaintiffs or their members to the threat of prosecution and creating a chilling effect on their rights to freedom of expression.

STANDARDS FOR SUMMARY JUDGMENT

Rule 56(a) of the Federal Rules of Civil Procedure allows a party seeking to recover upon a claim to, "at any time after the expiration of 20 days from the commencement of the action . . . ,

move with or without supporting affidavits for a summary judgment." Fed. R. Civ. P. 56(a). This Court shall grant such a motion if the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party's burden is simply to point out, by reference to pleadings and/or evidence, that there is no genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986); City of Mt. Pleasant, Iowa v. Associated Elec. Coop., 838 F.2d 268, 273-74 (8th Cir. 1988). Once the moving party has done so, the burden shifts to the nonmoving party to go beyond its pleadings and show, by affidavit or by "depositions, answers to interrogatories, and admissions on file," that there is a genuine issue of fact to be resolved at trial. Celotex, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)).

As discussed below, the Ordinance's restriction of speech on the basis of its allegedly violent content is subject to strict scrutiny, see Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992), requiring the County to prove that its Ordinance is necessary to serve a compelling state interest and is narrowly tailored to serve that interest. See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991). Because the County has the burden of proving the validity of its Ordinance, it may not merely rest on denials or allegations in its pleadings – or conclusory statements in the Preamble to its Ordinance – to make a sufficient factual showing with respect to each material element of its case. See, e.g., Buettner v. Arch Coal Sales Co., 216 F.3d 707, 718 (8th Cir. 2000); Lefkowitz v. City-Equity Group, Inc., 146 F.3d 609, 611 (8th Cir. 1998); accord Celotex, 477 U.S. at 323.

ARGUMENT

I. THE CHALLENGED PROVISIONS OF THE ORDINANCE IMPROPERLY RESTRICT SPEECH PROTECTED BY THE FIRST AMENDMENT

A. Video Games Depicting Violence Are Necessarily Expressive, and Therefore Are Speech Constitutionally Protected from Content-Based Regulation.

There can be little doubt that video games are speech within the meaning of the First Amendment. The Seventh Circuit recently so concluded in its decision in American Amusement Machine Ass'n v. Kendrick, – F.3d –, 2001 WL 283041 (7th Cir. 2001) (hereafter "AAMA"), involving an ordinance regulating the content of video games that was strikingly similar to the Ordinance at issue here. In AAMA, the City of Indianapolis passed an ordinance restricting the access of minors to certain arcade games based on their alleged graphically violent content. The Indianapolis ordinance contained parental and guardian consent provisions, as well as provisions regarding warning signs, similar to the instant Ordinance, and contained definitions of what is "harmful to minors" and what constitutes "graphic violence" that were virtually identical to those in this Ordinance.

In enjoining the enforcement of the Indianapolis ordinance, the Seventh Circuit, in a unanimous opinion authored by Chief Judge Posner, concluded that video games, including violent ones, are speech protected by the First Amendment. The court discussed at length the video games that the city had submitted in support of the ordinance, and concluded that these games contained stories, imagery, "age-old themes of literature," and messages, "even an 'ideology,' just as books and movies do." AAMA, 2001 WL 283041, at *5-6.

The St. Louis Ordinance on its face confirms that video games must contain speech, because the restrictions regulate the content of the games.[5/] The Preamble to the Ordinance suggests that the content of certain games "causes children to imitate violent behavior, glorify violent heroes, become desensitized to violence and learn that violence is rewarded." Ordinance, Preamble ¶ 2. Although Plaintiffs flatly reject this belief, the belief is premised on an assumption that the interactive video game medium possesses communicative and expressive capabilities.[6/]

5/ The County's Answer to Plaintiffs' Amended Complaint appears to concede that video games are expressive. Compare Amended Complaint ¶ 24 ("The challenged provisions of the Ordinance seek to regulate the content of a certain medium of expression (defined as 'video games' under the Ordinance) . . . based solely on the content of the expression depicted or contained therein.") (emphasis added), with Answer ¶ 1 (admitting "the truth of the statements made in Paragraph[] . . . 24").

6/ The structure of the Ordinance also makes clear the County's assumption that games are expressive. Specifically, the Ordinance restricts only those games that are "harmful to minors," further defined as:

> a video game that predominantly appeals to minors' morbid interest in violence . . . , is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, lacks serious literary, artistic, political or scientific value as a whole for minors, and contains . . . graphic violence . . . .

Ordinance § 602.450(c). The term "harmful to minors" is defined solely in reference to a game's expressive content, and, as discussed below, is an unconstitutional modification of the test for permissible content-based regulation of obscenity set forth in Miller v. California, 413 U.S. 15, 24 (1973) (law regulating works depicting or describing sexual conduct must ask: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.") (citations omitted).

"Protected expression" for First Amendment purposes is expression that relates to the "market in ideas, . . . broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions — scientific, political, or aesthetic — to an audience whom the speaker seeks to inform, edify, or entertain." Swank v. Smart, 898 F.2d 1247, 1251 (7th Cir. 1990). Although a new medium, the video game medium is no less expressive than its motion picture, music, or aesthetic art counterparts. Like movies, which are unquestionably protected, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952), video games tell stories and entertain audiences through the use of complex pictures and sounds, and sometimes through text as well. (Lowenstein Dec. ¶ 10.) The thematic ideas, plots, and characters for video games either are drawn from successful works in other media or, more often, are developed specifically for the video games in a process comparable to the movie script development process. (Lowenstein Dec. ¶ 12; Bishop ¶ 5.) Even games that do not contain a complex narrative theme employ graphic design and sound elements that constitute a form of aesthetic expression akin to music or abstract art that clearly qualifies as protected expression within the First Amendment. See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (First Amendment protects communication even where "a narrow, succinctly articulable message" is not evident; if concept of speech were limited to expression conveying a "particularized message," it "would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll"); Joseph Burstyn, Inc., 353 U.S. at 501 (speech "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression"); see also Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1996) (visual art "is as wide ranging in

its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection").[7/]

The fact that video games, while unquestionably "artistic," are also designed to entertain, does not alter their status as speech. Expression designed to entertain is protected by the First Amendment. See, e.g., Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."); Joseph Burstyn, Inc., 343 U.S. at 501 (under First Amendment, the "'line between the informing and the entertaining is too elusive . . . . What is one man's amusement, teaches another's doctrine.'") (quoting Winters v. New York, 333 U.S. 507, 510 (1948)); accord Time, Inc. v. Hill, 385 U.S. 374, 388 (1967). The First Amendment's protection of artistic expression therefore extends to games, see Watters v. TSR, Inc., 715 F. Supp. 819, 821 (W.D. Ky. 1989), aff'd on other grounds, 904 F.2d 378 (6th Cir. 1990); Hammerhead Enters., Inc. v. Brezenoff, 707 F.2d 33 (2d Cir. 1983), as well as to a wide range of other activities and media, even where no overt message is immediately apparent and entertainment appears to be the principal attraction. See Reno v. ACLU, 521 U.S. 844, 849-53 (1997) (Internet); Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (rock music);

7/ See, e.g., Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) (non-obscene nude dancing in a coin-operated booth); Kaplan v. California, 413 U.S. 115, 119-20 (1973) ("[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection."); Bery, 97 F.3d at 694 (apolitical painting, drawing and sculpture); Reed v. Village of Shorewood, 704 F.2d 943, 950 (7th Cir. 1983) (rock & roll music, "even if it had no words"); Tacynec v. City of Philadelphia, 687 F.2d 793, 796 (3d Cir. 1982) (string band performance); IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 390-91 (4th Cir. 1993) (college fraternity's "ugly woman contest").

Joseph Burstyn, Inc., 343 U.S. at 501 (motion pictures); see also American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) (television), aff'd, 475 U.S. 1001 (1986). In short, whether games inspire the imagination, ennoble the spirit, provide entertainment, or instead leave some viewers unimpressed or even offended, they are expression received by an audience, and are equally worthy of full First Amendment protection. See Winters v. New York, 333 U.S. 507, 510 (1948).

Certainly the fact that games portray violence does not take them out of the category of protected expression. As the Seventh Circuit made clear in AAMA, depictions of violence are an age-old literary device: "[c]lassic literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial." 2001 WL 283041, at *3. Citing examples ranging from Homer's The Odyssey, to The Divine Comedy, to War and Peace, to the stories of Edgar Allen Poe and the horror movies made from novels by Mary Wollstoncraft Shelley and Bram Stoker, the court concluded that "[v]iolence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and how," a theme which "engages the interest of children from an early age." Id. at *5.

B. The Challenged Provisions Are Content-Based and Therefore Are Subject to Strict Scrutiny.

It is equally clear that the challenged provisions regulate games based on their content. The content-based nature of the Ordinance is evident from the fact that it restricts minors' access to certain video games, but not others, precisely because of the messages or images contained in certain games, and because of the supposed harm that flows from them. See, e.g., Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 134 (1992) (regulation is content-based

where, to determine whether a particular publication is "harmful," the state "must necessarily examine the content of the message that is conveyed," predict the "reaction" of viewers, and "make judgment only on that basis") (quotations omitted).

Content-based regulations of speech, such as those found in the Ordinance, strike at the core of First Amendment protection. See United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878, 1893 (2000); Texas v. Johnson, 491 U.S. 397, 414 (1989); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972). "It is rare that a regulation restricting speech because of its content will ever be permissible." Playboy Entm't Group, 120 S. Ct. at 1889. Content-based regulations are presumptively invalid, and may be upheld only if the government can prove that such restrictions are necessary to achieve a compelling state interest, and are narrowly tailored to further that interest.

An exception to this presumption of unconstitutionality exists for a few "narrowly limited classes of speech" that lack full protection under the First Amendment, and that, accordingly, may be regulated based on their content without a further showing by the government. Gooding v. Wilson, 405 U.S. 518, 522 (1972) (internal quotation and citation omitted); see also, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (collecting cases and stating that only these classes of speech "can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content"). "Violent" or "graphically violent" speech, however defined, is not one of these limited categories. See, e.g., Winters, 333 U.S. at 510 (depictions of violence in magazine, even if containing "nothing of any possible value to society," are "as much entitled to the protection of free speech as the best of literature"); see also Eclipse Enters., Inc. v. Gulotta, 157 F.3d 63, 66-67 (2d Cir. 1997); Zamora v. Columbia Broadcasting Sys., 480 F. Supp.

199 (S.D. Fla. 1979) (dismissing claim that television violence caused minor to become desensitized to violent behavior and thus caused him to kill, noting that plaintiff did not allege facts sufficient to show that speech did not fall into one of the areas not afforded constitutional protection); accord AAMA, 2001 WL 283041, at *5 (violent descriptions and images are a "recurrent, even obsessive theme of culture both high and low").

One of these excluded categories is speech that is obscene as to everyone, see Miller v. California, 413 U.S. 15, 23 (1973), and speech that is obscene as to minors — i.e., "harmful to minors," see Ginsberg v. New York, 390 U.S. 629, 641 (1968).[8/] The Ordinance evidently attempts to fit "violent" speech within that category. See supra note 6 (comparing Miller standard with relevant provisions of Ordinance). However, it is settled law in this Circuit that obscenity

> encompasses only expression that "depict[s] or "describe[s] sexual conduct." Miller, 413 U.S. at 24; see Roth v. United States, 354 U.S. 476, 487 (1957); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 n.10 (1975) (expression must be erotic to be obscene). Material that contains violence but not depictions or descriptions of sexual conduct cannot be obscene.

Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 688 (8th Cir. 1992) (emphasis added).

In Video Software Dealers Ass'n, the Eighth Circuit struck down a Missouri statute similar in structure and language to the instant Ordinance but restricting the rental or sale of

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8/ Unlike obscene speech, speech "obscene as to minors" is not in fact unprotected; rather, the restriction of such speech is subjected to less rigorous scrutiny than is the restriction of fully protected speech. See Ginsberg, 390 U.S. at 640-43. The distinction is irrelevant here, however, because the Eighth Circuit has held that violent speech may not be obscene as to minors. See Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 688 (8th Cir. 1992) (restrictions of violent speech to minors must satisfy strict scrutiny); accord Erznoznik v. City of Jacksonville, 422 U.S. 205, 214 n.10 (1975).

"violent" video cassettes rather than video games. The Court held that the allegedly "violent" speech was entitled to full First Amendment protection, squarely rejecting the arguments that the obscenity doctrine has any application to non-sexual violent content and that the state's interest in protecting children entitled it to a lower level of scrutiny. See id. at 688 ("[V]ideos depicting only violence do not fall within the legal definition of obscenity for either minors or adults.") (emphasis added). The Court then struck down the statute, concluding that it failed to meet strict scrutiny, that it was unconstitutionally vague and was not saved from vagueness by adopting the test for obscenity set forth in Miller, and that it unconstitutionally "penaliz[ed] video dealers regardless of their knowledge of a video's contents." Id. at 688-90. The Video Software Dealers Ass'n decision is controlling here.

The Eighth Circuit's holding accords with an unbroken line of Supreme Court decisions refusing to open the obscenity doctrine to a broader scope of materials. See, e.g., Miller, 413 U.S. at 23-24 (confining the "permissible scope" of a state's regulation of obscene materials "to works which depict or describe sexual conduct"); Cohen v. California, 403 U.S. 15, 20 (1971) ("Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic."); Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966) (to be obscene, "the dominant theme of the material . . . [must] appeal to a prurient interest in sex"). See also Erznoznik v. City of Jacksonville, 422 U.S. 205, 214 n.10 ("under any test of obscenity as to minors," the expression at issue "must be, in some significant way, erotic") (citations omitted); Eclipse Enters., Inc. v. Gulotta, 157 F.3d 63, 66 (2d Cir. 1997) ("We decline any invitation to expand these narrow categories of [unprotected] speech to include depictions of violence."); United States v. Thoma, 726 F.2d 1191, 1200 (7th

Cir. 1984) (refusing to deem obscene "[d]epictions of torture and deformation," which are "not inherently sexual," without proof "how such violence appeals to the prurient interest").[9/]

Because violent speech does not fall within any category of unprotected speech, it is entitled to full First Amendment protection for adults and non-adults alike. See Video Software Dealers Ass'n, 968 F.2d at 688. This principle was made clear more than fifty years ago in Winters v. New York, 333 U.S. at 510, and has been repeatedly reaffirmed. See, e.g., Eclipse Enters., 134 F.3d at 66; American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985) (violence on television is protected speech), cited with approval in Video Software Dealers Ass'n, 968 F.2d at 688; cf. R.A.V., 505 U.S. at 391 (hate speech including cross burning). Accordingly, the County's attempt to define the regulated violent speech by reference to Miller and Ginsberg does not insulate the Ordinance from strict scrutiny.

C. The Ordinance Fails Strict Scrutiny.

As content-based restrictions of fully protected expression, the challenged provisions of the Ordinance bear a heavy presumption of unconstitutionality. Playboy Entm't Group, 120 S. Ct. at 1886. To overcome the applicable strict scrutiny, the County must prove that the provisions are "necessary" to serve a compelling state interest, and are narrowly tailored to serve

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9/ In AAMA, the Seventh Circuit intimated that, at some hypothetical point, depictions of violence may become so "disgusting, embarrassing, degrading, or disturbing" as to be labeled "obscene." 2001 WL 283041, at *3. This dicta is directly at odds with the Eighth Circuit's holding in Video Software Dealers Ass'n, and must therefore be ignored. In any event, the Seventh Circuit made clear that the "violence" present in modern video games could not rise to the level of obscenity even on the looser standard that the Eight Circuit has rejected. See AAMA, 2001 WL 283041, at *3. For present purposes, the key point of the Seventh Circuit's discussion is that, in accordance with the Eighth Circuit's jurisprudence, regulation of the type of depictions of violence found in video games must satisfy strict scrutiny, and not the standards set forth in either Miller or Ginsberg. See AAMA, 2001 WL 283041, at *4-5.

that interest. R.A.V., 505 U.S. at 395; Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991); Roth, 354 U.S. at 488; AAMA, 2001 WL 283041, at *4-5; Eclipse Enters., 134 F.3d at 67. That the government purports to act to protect minors reduces neither the danger of censorship nor the level of judicial scrutiny. See Video Software Dealers Ass'n, 968 F.2d at 689; AAMA, 2001 WL 283041, at *4-5. The evidence presented to the County in the hearings leading to the passage of the Ordinance reveals that the County cannot meet this standard.

1. The County's Interest in Preventing Youth Violence and Disruptive Behavior Is Categorically Insufficient to Support the Ordinance's Broad Restriction of Speech.

Apparently, the County's principal purpose in restricting minors' access to certain video games is to curtail youth violence and other disruptive behavior. See Ordinance, Preamble ¶ 1 (noting that exposure of children to violence "has been correlated with violent behavior"); id. ¶ 2 (alleging link between prolonged playing of violent video games and violent behavior); id. ¶ 3 (stating that "violence by and between children has become a severe threat to the physical and emotional health of children"); id. ¶ 4 (positing "disruptive behavior" in schools by video game players). The County's findings about a linkage to youth violence, which were based on the thinnest of legislative records, do not bear up under any real scrutiny. But in order to resolve this case, the Court need not conduct a battle of the experts on whether there is some statistical linkage between youth violence and playing certain video games. That kind of linkage, even if it existed, would be categorically insufficient to justify banning speech based on its content.

First Amendment jurisprudence has a well-established set of standards for judging when it is permissible for the government to ban or punish speech based on a concern that it will cause

recipients to break the law. Under those standards, even speech that expressly advocates lawless activity cannot be the basis for criminal liability, unless the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Thus, the Brandenburg test precludes punishing speakers based solely on a prediction — however well founded — that speech of a given content tends in the aggregate to encourage undesirable behavior. Even speech alleged to have actually caused specific incidents of violence has universally been accorded freedom from government interference where the Brandenburg test was not satisfied, even when minors were the affected listeners. See, e.g., Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1199-200 (9th Cir. 1989) (non-obscene pornography alleged to cause violence against women not actionable without satisfying Brandenburg standard); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1024 (5th Cir. 1987) (rejecting argument that "a less stringent standard than the Brandenburg test be applied in cases involving non-political speech that has actually produced harm").[10/]

These cases reflect the principle that, except where the Brandenburg imminence requirement is satisfied, the government cannot, in principle, defend suppression of speech on the

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10/ See also Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991) (rejecting claim under Brandenburg that content of rock lyrics caused suicide), aff'd, 958 F.2d 1084 (11th Cir. 1992); Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199 (S.D. Fla. 1979) (dismissing claim that television violence caused minor to become desensitized to violent behavior and thus caused him to kill, noting that plaintiff did not allege facts sufficient to show that speech did not fall into one of the areas — such as incitement — not afforded constitutional protection); Watters v. TSR, Inc., 715 F. Supp. 819, 822 (W.D. Ky. 1989) (dismissing suit alleging that publisher of game Dungeons & Dragons caused son's suicide, noting that "ideas expressed in one work which may drive some people to violence or ruin, may inspire others to feats of excellence or greatness"), aff'd on other grounds, 904 F.2d 378 (6th Cir. 1990); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) (claim that violent motion picture caused murder failed to meet Brandenburg test); McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 997, 1005 (1988).

ground that its content will tend to motivate recipients to engage in undesirable or unlawful behavior. Such an asserted state interest, based on recipients' reactions to the content of speech, is inherently illegitimate under the First Amendment as a basis for limiting freedom of speech. Instead, the remedy for such possible negative effects of speech — except where "imminent lawless action" is sought and likely to occur — is more speech, not government censorship. See Texas v. Johnson, 491 U.S. at 419 ("'If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.'") (quoting Whitney v. California, 274 U.S. 357, 377 (1927)); accord Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)); see also Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) ("'[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.'") (quoting FCC v. Pacifica Found., 438 U.S. 726, 745 (1978)).

For example, the government might be able to show that publication of works supporting the need for armed resistance to existing civil authorities will tend to increase the number of people who actually engage in such resistance. But such a justification would be categorically insufficient to justify a content-based ban. Similarly, proof that the distribution of magazines like *Playboy* and *Penthouse* increases the level of sexual misconduct in the country — even if such proof could be marshaled — would not justify a ban of those publications.

Nothing in the Ordinance limits its scope to video games that are directed at producing imminent violence.[11/] Indeed, it is hard to imagine how the Brandenburg exception could ever be applied to punish the creator of a book, movie, video game, or other form of expression that does not involve in-person exhortation, both because the exception turns on an evaluation of the particular context in which speech advocating lawlessness is uttered, see Hess v. Indiana, 414 U.S. 105, 108-09 (1973) (no advocacy where expression is "not directed to any person or group of persons"), and because recorded expression can always be countered by more speech, see McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 997, 1002 n.10 (1988); see also AAMA, 2001 WL 283041, at *3 (notion that video games "incite" violence is "to use the word 'incitement' metaphorically," because there was no showing that games actually produce lawless activity). Nor does the Ordinance require that a particular game be "likely" to produce immediate lawless action. And such a requirement would be untenable, as millions of people, including minors, play "violent" video games without then engaging in any lawless action, much less immediate lawless action. When applying the First Amendment, the "likely" impact of speech must be judged by its effect on the "average person, rather than a particularly susceptible or sensitive person." Miller, 413 U.S. at 33; see Roth, 354 U.S. at 489 (holding that the impact of speech cannot be measured by its effect on "particularly susceptible persons"). Accordingly, the County's interest in forestalling youth violence, compelling as it may be, cannot be the basis for the sweeping content-based regulation set forth in the Ordinance.

11/ Even if some video games could be construed by some as advocating "illegal action at some indefinite future time," that kind of advocacy is fully protected by the First Amendment. Hess v. Indiana, 414 U.S. 105, 108 (1973).

2. The County's Interest in Protecting the "Physical and Emotional Health of Children" Unconnected to Violent Behavior Also Is Categorically Insufficient to Support the Ordinance's Restriction of Speech.

In justifying the restriction of speech, the Ordinance's preamble also states, generically, that the County has a "compelling interest in protecting the physical and emotional health of children." Ordinance, Preamble ¶ 5. While the government certainly has such an interest in the abstract, see Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989), this does not give the government carte blanche to prevent minors from viewing or receiving speech that it labels "harmful." See Playboy Entm't Group, 120 S. Ct. at 1886 ("Where the designed benefit of a content-based restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails."); cf. Simon & Schuster, 502 U.S. at 119 (the fact that government has broad compelling interest in depriving criminals of profits of their crimes does not necessarily mean that government has more narrow interest in ensuring that criminals do not profit from storytelling about their crimes before their victims are compensated).[12/] Otherwise, the government would be free to censor any material directed to minors merely by labeling it "harmful" to their well-being, an outcome that would fly in the face of the broad First Amendment freedoms that minors possess. See, e.g., Erznoznik, 422 U.S. at 213-14 ("Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be

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12/ See ACLU v. Reno, 929 F. Supp. 824, 882 (E.D. Pa. 1996) (state interest in protecting children "is as dangerous as it is compelling. Laws regulating speech for the protection of children have no limiting principle, and a well-intentioned law restricting protected speech on the basis of its content is, nevertheless, state-sponsored censorship. Regulations that drive certain ideas or viewpoints from the marketplace for children's benefit risk destroying the very political system and cultural life that they will inherit when they come of age.") (citations and quotation marks omitted), aff'd, 521 U.S. 844 (1997).

suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.") (footnote omitted); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506-507 (1969); id. at 511 ("In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."); see generally Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); AAMA, 2001 WL 283041, at *5 ("People are unlikely to become well functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.").[13/]

On its face, the only "harms" the Ordinance identifies — apart from non-imminent, non-likely violent conduct, as addressed above — are that children exposed to violence allegedly will "glorify violent heroes" and "become desensitized to violence." Ordinance, Preamble ¶ 2. But even assuming some linkage between video games and such purported "harms," these simply are not the types of harms that can justify a ban on video games any more than they could ban depictions of violence in the Bible, Homer's The Odyssey, or any other works that depict violence and may produce responses in young people that some would consider undesirable or

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13/ See also, e.g., Cinecom Theatres Midwest States, Inc. v. City of Fort Wayne, 473 F.2d 1297, 1302 (7th Cir. 1973) ("a child's freedom of speech is too important to be overriden by an ordinance expressing the community's view of what it considers as material harmful to its youth"); Interstate Circuit, Inc. v. City of Dallas, 366 F.2d 590 (5th Cir. 1966) (striking down ordinance regulating motion pictures deemed "harmful to minors" because of depictions of "brutality, criminal violence or depravity"), vacated on other grounds, 391 U.S. 53 (1968).

"harmful." Cases that have recognized a compelling interest in protecting minors' well-being have done so only regarding speech that, unlike violent speech, is categorically afforded less constitutional protection as to children, see, e.g., Sable Communications, 492 U.S. at 126 ("compelling interest" in protecting minors' physical and psychological well-being "extends to shielding minors" from "[s]exual expression" that is indecent but "not obscene by adult standards") (citing Ginsberg, 390 U.S. at 639-640); New York v. Ferber, 458 U.S. 747, 757 (1982) (interest in protecting well-being of minors extends to preventing "sexual exploitation and abuse of children" found in child pornography), or in forums, inapplicable here, in which the government has traditionally been given broader latitude to regulate, see, e.g., Reno v. ACLU, 521 U.S. at 866-67 (noting that government interest in protecting minors' well-being justified regulation of a particular offensive radio broadcast in "a medium which as a matter of history had 'received the most limited First Amendment protection'") (quoting FCC v. Pacifica Found., 438 U.S. 726, 748 (1978)); Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (interest in protecting well-being of minors extends to enforcement of child labor laws).

No case has extended this "compelling interest" to the protection of children from depictions of violence. As noted by the Seventh Circuit in AAMA,

> Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault are aware. To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.

2001 WL 283041, at *5.

The challenged provisions at bottom restrict access to a new, technologically burgeoning, medium of expression seemingly because the County deems it inappropriate. But both the Supreme Court and the Eighth Circuit have determined that fully protected speech "'cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.'" Video Software Dealers Ass'n, 968 F.2d at 689 (quoting Erznoznik, 422 U.S. at 213-14); see also Texas v. Johnson, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). As the Supreme Court recently summarized:

> The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.

Playboy Entm't Group, 120 S. Ct. at 1889. This remains true whether the speech in question is perceived to be "not very important" or, indeed, whether it is viewed by many to be "shabby, offensive, or even ugly." Id. at 1893; accord Simon & Schuster, 502 U.S. at 118 ("The fact that society may find speech offensive is not a sufficient reason for suppressing it.") (quotations omitted).

3. Even If the County's Purported Justifications Were Not Categorically Insufficient on Their Face, The Empirical Support Considered by the Council Does Not Establish a Real Harm That Is Furthered by the Ordinance's Restrictions.

Even if the County could justify restricting minors' access to protected speech based on findings that the speech will cause some measurable long-term increase in lawless behavior or affect the mental health and well-being of young people — and it cannot — strict scrutiny requires the most compelling evidence that these effects are both severe and directly attributable to the speech being censored. See AAMA, 2001 WL 283041, at *4-5 (government must present "compelling," not "merely plausible," basis for believing the violent video games actually cause harm to game players or to the public at large). The County must be able to show that its "regulation will in fact alleviate these harms in a direct and material way." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994). Even in an intermediate scrutiny situation, where the Government has not singled out speech based on content, the Supreme Court has stated that "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." Id. (internal quotation marks omitted). Rather, it must prove that the asserted harm is real, and must show that, at the time it passed the challenged law, it had before it proof of the problem that it sought to address. See Playboy Entm't Group, 120 S. Ct. at 1891 ("This is not to suggest that a 10,000 page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and supposition.").

Here, the hearings before the County Council did not come close to showing that the Council had before it proof of any problem attributable to video games. (See Markels Decl. ¶¶ 5-8). Certainly nothing in the findings set forth in the Ordinance's preamble suggests that it had any such proof. See, e.g., Eclipse Enters., 134 F.3d at 68 ("Other than contested studies concerning TV violence, the conclusory and contradictory testimony of its own experts, and conclusory testimony of community activists, the County did not provide any support for its contention that the crime trading cards are either harmful to minors or contribute to juvenile crime."). At most, the materials on which the County relied show nothing more than a highly ambiguous correlation between exposure to media violence and aggressive behavior or emotional desensitization toward violence in some — but by no means all, or even most — children. (Markels Dec. ¶ 6). This is far from the degree of proof required by strict constitutional scrutiny.[14/]

Again, the Seventh Circuit's decision in AAMA is instructive. Cautioning against the danger that the government's asserted harms are merely pretexts, the Seventh Circuit concluded that the social science research found in psychological studies reported by Professor Anderson and Karen E. Dill "do not support the ordinance." 2001 WL 283041, at *7. As the Seventh Circuit noted, this evidence, which appears to have been the same evidence on which Professor Anderson relied in testifying in support of the instant Ordinance, does not conclude that "video

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14/ Similarly, in order to support a broad restriction to all minors, the County's evidence must show harm to all age groups under 17 years. Otherwise, the Ordinance is overinclusive for unnecessarily invading protected expression to those not harmed. See Reno v. ACLU, 521 U.S. at 878 ("It is at least clear that the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute."). The government may not simply restrict the access of all minors to an entire category of protected expression under a general theme of protecting minors.

games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere." Id. Nothing in Professor Anderson's testimony before the St. Louis County Council — the only testimony purporting to show the harms of violent video games — purported to draw more definite conclusions. He testified only that, at most, there was some short-term correlation between playing violent video games and aggressive feelings or behavior. (Markels Dec. ¶ 6.) He acknowledged, however, that any such correlation is comparable in magnitude to many other types of stimuli found in the real world. (Markels Dec. ¶ 6.) He certainly never testified that video games actually cause anyone to become violent, and plaintiffs know of no studies that draw such a causal conclusion. For this reason alone, the Ordinance cannot pass strict scrutiny. Accord AAMA, 2001 WL 283041, at *7.

Another particular problem with the Ordinance, if defended as a measure to prevent youth violence and promote the well-being of young people, is that its focus only on video games is so narrow. Omitted is any effort to regulate the other potential influences on youth that common sense suggests are at least as likely as video game play to affect the interests being asserted. For example, depictions of violence are found not only in video games but on television, in the movies, in books, magazines, music and visual art, and on the Internet. But these are all left unaffected, even though the very AMA statement apparently cited in the preamble to the Ordinance expressly acknowledges that minors' exposure to video games is far less than their exposure to other entertainment media (television, movies, and music), and that the studies addressing the impact of violent video games is "preliminary." See Donald E. Cook, M.D., et al., Joint Statement on the Impact of Entertainment Violence on Children (July 26, 2000), available at http://www.aacap.org/Web/aacap/press_releases/2000/0726.htm. Professor Anderson himself

confirmed that most studies concerning media violence concern television, and that the studies involving video games were sparse. (See Markels Dec. ¶ 6.)

Such "regulation in preference to other material that is no less noxious," Eclipse Enters., 134 F.3d at 68, is problematic in principle, see id. (noting that "[t]he First Amendment imposes a high standard of precision on legislative efforts to regulate content-based speech"). It also heightens concerns about whether the Ordinance can be said to advance the state interests at all. See, e.g., Florida Star v. B.J.F., 491 U.S. 524, 540 (1989) (striking down statute that restricted dissemination by the mass media, but not by others, of rape victims' identities, noting that "facial underinclusiveness" of statute undermined claim that State appellee was in fact serving its purported interests; imposition of restrictions on a single medium "simply cannot be defended on the ground that partial prohibitions may effect partial relief"); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104-05 (1979) (statute insufficiently tailored to interest in protecting anonymity where it restricted only newspapers, not electronic media or other forms of publication, from identifying juvenile defendants); see also Florida Star, 491 U.S. at 541-42 (Scalia, J., concurring in part) ("[A] law cannot be regarded as protecting an interest 'of the highest order,' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (citation omitted).[15/]

15/ Even under the less-rigorous scrutiny given to commercial speech, courts have examined the degree to which statutes address the asserted interest. See Rubin v. Coors Brewing Co., 514 U.S. 476, 489 (1995) ("exemptions and inconsistencies" in alcohol labeling ban "bring into question the purpose of the . . . ban"); City of Ladue v. Gilleo, 512 U.S. 43, 52-53 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government's rationale for restricting speech in the first place").

Again, the recent Seventh Circuit decision in AAMA found it significant that the studies purporting to show a correlation between media violence and aggression "are not evidence 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," and that violent video games are both a small — and rather tame — "fraction of the media violence to which modern American children are exposed." 2001 WL 283041, at *7. As this and other cases suggest, it will rarely if ever be possible to defend a law under strict scrutiny that singles out for restriction one category of speech unless the singled-out category has effects that are unique. No one could claim that the effects, if any, of media violence are uniquely limited to video games.

4. In Any Event, the County Cannot Prove That the Challenged Provisions Are Narrowly Tailored to Promote These Interests.

Even assuming the interests asserted here could justify a speech restriction and that there were a sufficient basis to believe that the Ordinance would advance those interests, the County would also have to demonstrate that the restrictions are narrowly tailored to remedy the harm, Video Software Dealers Ass'n, 968 F.2d at 689, and that no less restrictive means are available. Playboy Entm't, 120 S. Ct. at 1888-89. See generally Video Software Dealers Ass'n, 968 F.2d at 691 ("When First Amendment freedoms are at stake, the Supreme Court has 'repeatedly emphasized that precision of drafting and clarity of purpose are essential.'") (quoting Erznoznik, 422 U.S. 217-18). Only in the most extreme cases will any content-based regulation of speech meet that test, and this is not such a case.

First, as we discuss in the next section, the Ordinance is so vague and overbroad that it could be read to cover a very large subset of existing video games — not just some core group

that are especially violent or graphic. See Reno v. ACLU, 521 U.S. at 871-72 (vagueness "undermines the likelihood that the [Ordinance] has been carefully tailored to the . . . goal of protecting minors"). But even if that were not the case, the narrow tailoring requirement would require a showing that the County considered and correctly rejected less restrictive means for accomplishing its goals. That showing could not be made here. For example, the only justification advanced in the hearings for singling out video games for regulation (over motion pictures, for example) was the sponsoring councilman's view that people are more familiar with the motion picture rating system than with either the ESRB or the arcade rating systems. (Markels Dec. ¶ 9.) If the Ordinance's principal focus were to raise awareness of these newer rating systems, or to inform parents of the County's concerns about the effects of violent video games, a promotional campaign would appear sufficient to accomplish this goal. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507-08 (1996) (plurality op.) (striking down ban on advertising alcohol prices because less restrictive alternatives, including "educational campaign" or "counterspeech" may accomplish equally effectively government's objective of inflating prices to reduce demand); Playboy Entm't Group, 120 S. Ct. at 1892 ("A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.").[16/] In any event, the County was required at least to have considered the efficacy of less restrictive alternatives, see Sable

16/ Cf. Gralike v. Cook, 191 F.3d 911, 921 (8th Cir. 1999) (invalidating state constitutional amendment directing notation on ballot for any candidate for federal office who does not promote term limits, because less restrictive means are available to further interest in voter education: "Missouri could institute voluntary programs, such as debates or voter information guides, to provide information about candidates' views on term limits and other important issues."), aff'd, 121 S. Ct. 1029 (2001).

Communications, 492 U.S. at 129-30, but never did so. In fact, the County expressly rejected the IDSA's offer to work with the County to help educate parents and other consumers about the ESRB rating system. (Markels Dec. ¶ 10.)[17/]

D. The Challenged Provisions of the Ordinance Are Unconstitutionally Vague and Overbroad.

A second, and independent, basis for granting plaintiffs' motion for summary judgment is that several of the Ordinance's terms are impermissibly vague, and accordingly are likely to restrict a far broader range of video games than even the County would claim it is seeking to regulate. The Constitution demands that statutes be set forth with "sufficient definiteness that ordinary people can understand what conduct is prohibited." Kolender v. Lawson, 461 U.S. 352, 357 (1983); see also Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 168 (1972); Video Software Dealers Ass'n, 968 F.2d at 689. That precision is essential to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Particularly exacting

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17/ Finally, the Ordinance is not narrowly tailored because several of its pertinent provisions contain no scienter element as to the contents of a given game. See Ordinance § 602.440-1 ("unlawful knowingly to sell or rent a video game which is harmful to minors to a minor . . ."); id. § 602.440-2 ("unlawful for any person or entity knowingly to admit a minor to a Restricted-17 area of an arcade . . ."); id. § 602.440-3 ("unlawful knowingly to permit the free play of a video game which is harmful to minors by any minor"); compare id. § 602.435 ("Owners and managers of arcades containing video games which they know to be harmful to minors shall place all such games separate and apart from those video games which are not harmful to minors . . . .") (emphasis added). The Eighth Circuit has made clear that laws imposing criminal penalties for dissemination of unprotected speech "must contain a knowledge requirement," Video Software Dealers Ass'n, 968 F.2d at 690, and the "knowledge requirement" refers to knowledge of the regulated item's contents, id. ("By penalizing video dealers regardless of their knowledge of a video's contents, the statute presents a hazard of self-censorship.") (citing Smith v. California, 361 U.S. 147, 153 (1959)). Here, the challenged provisions at most require knowledge only as to the sale, rental, or availability of a given game, and not as to its contents.

precision is demanded of legislation that, as here, imposes criminal penalties in an area in which free speech rights are at issue — in order to avoid excessive censorship of constitutionally protected expression. See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982); NAACP v. Button, 371 U.S. 415, 433 (1963) (government may regulate speech "only with narrow specificity"); Video Software Dealers Ass'n, 968 F.2d at 689-90 ("A stringent vagueness test applies to a law that interferes with the right of free speech."). Garner v. White, 726 F.2d 1274, (8th Cir. 1984) ("Greater specificity is required of laws imposing criminal penalties and those infringing on constitutionally protected rights."). The fact that the government's stated purpose is the protection of children does not relax this standard. See Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 689 (1968); Video Software Dealers Ass'n, 968 F.2d at 690.

Several terms in the Ordinance, such as "graphic violence," Ordinance § 602.430(d), "minors' morbid interest in violence," id. § 602.430(c), and "suitable material for minors," id., either are inherently vague or are defined in such a way as to fail to provide fair notice. There is no legislative history to guide such interpretation. "[W]ithout legislative history revealing precisely what the [government] intended to regulate, a state court would have no basis for limiting the unconstitutionally vague provisions of the Act." Video Software Dealers Ass'n v. Webster, 773 F. Supp. 1275, 1282 (W.D. Mo. 1991), aff'd, 968 F.2d 684, 688 (8th Cir. 1992). Here, the hearings leading to the Ordinance's passage were devoid of any discussion of the specific criteria set forth by the challenged provisions. (Markels Dec. ¶ 11.) These facts, taken together, create an unwarranted chilling effect on protected speech and render the Ordinance unconstitutionally vague. Retailers will necessarily respond to the uncertainty embodied in the

Ordinance, and the criminal penalties the Ordinance imposes, by either removing or otherwise restricting the access to any potentially offending video game title that could be deemed to be "harmful to minors" by some law enforcement official.

1. Several Of the Ordinance's Terms Lack the Precision Required of Content-Based Restrictions of Speech.

"Minors' Morbid Interest in Violence." Under the Ordinance, for a video game to be deemed "harmful to minors," it must "appeal[] to minors' morbid interest in violence." Ordinance § 602.430(c). It was precisely this term that the Eighth Circuit concluded was impermissibly "elusive" in Video Software Dealers Ass'n, 968 F.2d at 690. See also Video Software Dealers Ass'n, 773 F. Supp. at 1281 (statute lacks requisite specificity because, inter alia, term "morbid" is not defined), aff'd, 968 F.2d 684, 689 (agreeing with district court that statute is vague). The Ordinance, in short, contains no enforcement criteria explaining or limiting the term "minors' morbid interest in violence."

It cannot be said that the term has a commonly understood meaning — indeed, Plaintiffs have been unable to locate a case preceding Video Software Dealers Ass'n in which the term "minors' morbid interest in violence" or some equivalent was used. This stands in stark contrast to the term "prurient interest" in the Miller standard after which the Ordinance was plainly modeled. In the area of obscenity, the term "appeals to the prurient interest" has been defined by the Supreme Court as material "having a tendency to excite lustful thoughts," Roth, 354 U.S. at 488 n. 20, as opposed to provoking "only normal, healthy sexual desires," Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985). See generally Winters, 333 U.S. at 518 (noting difference "between permissible uncertainty in statutes caused by describing crimes by words

well understood through long use in the criminal law" and "the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct"). No similar parameters can be gleaned from the term "morbid interest in violence." In Winters v. New York, the Supreme Court struck down as vague a statute prohibiting the distribution of tales of criminal deeds of bloodshed and lust "so massed as to become vehicles for inciting violent and depraved crimes against the person" and appealing "to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake." 333 U.S. at 513, 518-19. If the terms in the New York statute were impermissibly vague, the term "appeals to minors' morbid interest in violence" is equally so. The Ordinance does not give "ordinary people" of "ordinary intelligence" any hint as to how to determine what a "morbid interest in violence" is and how to distinguish it from a presumably "normal, healthy" interest in violence, much less a minor's interest in video games generally, in aliens, in science fiction, in fantasy, in cartoon-like animation, or simply in competition. (Bishop Dec. ¶ 12; Lowenstein Dec. ¶ 7.) Because this prong of the Ordinance's quasi-Miller test is meaningless, the entire definition fails for vagueness. See Luke Records, Inc. v. Navaro, 960 F.2d 134, 136 (11th Cir. 1992).

"Graphic Violence." In an apparent effort to address one of the infirmities in the statute struck down in Video Software Dealers Ass'n, 968 F.2d at 690 (noting that "the statute fails to specifically define 'violence'"), the Ordinance contains a definition of "graphic violence":

> the visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration.

Ordinance § 602.430(d). This definition raises more questions than it answers. For example, visual depictions fall within that definition only where they contain "realistic" serious injury. In a medium that relies heavily on animation and computer graphics to convey the story and engage the imagination, at what point does a depiction cross the line from fanciful to "realistic"? See AAMA, 2001 WL 283041, at *7 ("The characters in the video games in the record are cartoon characters, that is, animated drawings. No one would mistake them for photographs of real people . . . ."). The same problem plagues the term "human-like," a term ill-suited to a medium that relies extensively on extra-terrestrial or simply make-believe life forms and characters. The Ordinance offers no clues as to how these terms are to be construed, leaving game creators and distributors to guess, for example, whether a game involving animated injury to a two-legged alien being is a "realistic" injury to a "human-like" being. Additionally, it is nearly impossible to reconcile the term "serious injury" with the term "bloodshed," which certainly could be read to cover several injuries of which reasonable people could disagree as to their seriousness. In short, although the Ordinance defines violence, it does so in a way that is so subjective that it fails to provide the types of objective criteria that would put ordinary people on notice as to what it prohibited. See, e.g., Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 532 (Tenn. 1993) (term "excess violence," defined as "the depiction of acts of violence in such a graphic and/or bloody manner as to exceed common limits of custom and candor, or in such a manner that it is apparent that the predominant appeal of the material is portrayal of violence for violence's sake," struck down as "entirely subjective" and therefore vague). Moreover, the inherent vagueness of the term "graphic violence" necessarily renders the term "harmful to minors" — which is defined in part as including "graphic violence" — impermissibly vague.

"Patently Offensive." The term "patently offensive," as used in the Ordinance, also is vague. Under the test set forth in Miller, the phrase "patently offensive" is defined with reference to the particular speech – speech depicting or describing sexual conduct – being regulated. See Miller, 413 U.S. at 24 (permissible regulation limited to a work that "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law") (emphasis added). By contrast, the Ordinance here contains no such limitation; it restricts access to speech that "is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors," if the speech also happens to contain "graphic violence." Ordinance § 602.430(c).

This definition is vague, even under the inapplicable Miller standard, for two reasons. First, it does not require that the "graphic violence" itself be "patently offensive." See Reno v. ACLU, 521 U.S. at 846 (noting that "[t]he second Miller prong reduces the inherent vagueness of its own 'patently offensive' term by requiring that the proscribed material be 'specifically defined by the applicable state law'" and be applied only to "sexual conduct"). Second, the term "patently offensive" is not defined except by reference to what the "adult community" deems "suitable" for minors. Plaintiffs are left without any legislative guidance as to what is "suitable"; they know only that suitability is not necessarily a function of the game's violent content. For example, a game that appears to the "adult community" to condone theft, or witchcraft, or sacrilege, or sedition, could be read to be proscribed — so long as some bloodshed or other "graphic violence" is present — as not "suitable" for minors. Just like the Missouri statute struck down in Video Software Dealers Ass'n, the St. Louis County Ordinance "is basically prohibiting

the rental or sale of 'offensive' videos containing any form of violence." 968 F.2d at 690.[18/] Such prohibition is facially unconstitutional. Id.

2. The Vagueness of these Terms, and Therefore Their Chilling Effect on Speech, Are Compounded By the Ordinance's Effective Delegation to the ESRB and the Arcade Industry the Issue of Whether a Game is "Harmful to Minors."

The vagueness and thus the "chilling effect" inherent in the above definitions is exacerbated by the Ordinance's "rebuttable presumption" that games rated "M" or "AO" by the ESRB, or "red" by the arcade rating system, are "harmful to minors." Ordinance § 602.450.

As explained above, the Ordinance neither sets forth the definition of "AO," "M, or "red," nor addresses the effect, if any, of the ESRB or the arcade industry changing its rating system. This, in essence, improperly leaves the question of whether a game is harmful to minors entirely to the unfettered discretion of the ESRB and the arcade industry. See Forsyth County, 505 U.S. at 129-30 (stating that an "impermissible risk of suppression of ideas" exists where "an ordinance . . . delegates overly broad discretion to the decisionmaker"); see also Papachristou, 405 U.S. at 168; see also Grayned, 408 U.S. at 108-09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . .").[19/] Indeed, in order to avoid the rebuttable presumption, and therefore expose its

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18/ See also, e.g., Motion Picture Ass'n of Am. v. Specter, 315 F. Supp. 824, 826 (W.D. Pa. 1970) (striking down criminal statute regarding motion picture exhibition because, inter alia, standard "suitable for family or children's viewing" is undefined and is "patently vague and lacking in any ascertainable standards").

19/ Similar ordinances, enacted shortly after the Motion Picture Association of America ("MPAA") implemented a private motion-picture rating system in 1968, were invalidated for attempting to incorporate the MPAA ratings into law. See, e.g., Engdahl v. City of Kenosha, 317 F. Supp. 1133 (E.D. Wis. 1970) (enjoining enforcement of ordinance prohibiting unaccompanied minors from viewing "adult" motion pictures where ordinance created rebuttable presumption

members to a lessened threat of criminal punishment, the video game industry would be well-served by either abolishing the rating systems entirely or at least ensuring that very few games are subject to the rebuttable presumption, a result that would appear to run contrary to the County's articulated goal of raising awareness of the video game rating systems.

Moreover, the current definitions found in the rating systems do not clarify the definitions found in the Ordinance. The "AO" and "M" ratings seem to encompass far more games than the Ordinance's language appears to cover. For example, games may be rated "M" for content having nothing to do with depictions of violence, if they contain "comic mischief," "strong language," sexual themes, or gambling. (Lowenstein Dec. ¶ 27 & Ex. H.) Even for games given an "M" rating for violence, it is impossible to know whether such violence actually rises to the level set forth in the Ordinance; the ESRB's content descriptors state simply that the "M" category "may include more intense violence." (Lowenstein Dec. Ex. G.) "Violence" is described in the ESRB's "content descriptors" only as "aggressive conflict" or "scenes or activities" involving "violent acts," (Lowenstein Dec. ¶ 22 & n.1, & Ex. G); "intense violence" is undefined. (Lowenstein Dec. Ex. G.). Thus, if Plaintiffs and others follow these ratings to restrict access to video games, far more speech will be restricted than even that apparently covered by the Ordinance. Nevertheless, the Ordinance's rebuttable presumption effectively makes the ESRB's standards the ones that Plaintiffs and others must follow to avoid criminal prosecution. A similar situation exists with respect to games rated "red" by the arcade industry. (Bishop Dec. ¶ 13.)

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that motion pictures rated "R" or "X" by MPAA were "adult"); Motion Picture Ass'n of Am. v. Specter, 315 F. Supp. 824 (W.D. Pa. 1970).

It is no answer that a distributor may rebut a charge that an "AO," "M," or "red" rated game is "harmful to minors." The Ordinance provides for criminal penalties, including prison time, for violations of its terms. Ordinance § 602.455. Because the sanctions are so great, speakers who are threatened with criminal penalties likely will choose not to speak rather than test the proper scope of the regulation. See Lowenstein Dec. ¶¶ 28-29; Bishop Dec. ¶ 14; see also, e.g., Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) ("The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded . . . ."); NAACP v. Button, 371 U.S. at 433 ("The threat of sanctions may deter [exercise of constitutional rights] almost as potently as the actual application of sanctions."). Accordingly, the necessary result of these sweeping and ambiguous terms is that Plaintiffs and others distributing video games containing any appreciable violence will "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." Grayned, 408 U.S. at 109. This is the hallmark of an unconstitutionally vague statutory scheme.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be granted.

Respectfully submitted,

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