No. 07-16620

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIDEO SOFTWARE DEALERS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,
Plaintiffs-Appellees,

vs.

ARNOLD SCHWARZENEGGER, in his official capacity of Governor of the State of California, and EDMUND G. BROWN, JR. in his official capacity of Attorney General of the State of California,
Defendants-Appellants, and

GEORGE KENNEDY, in his official capacity as Santa Clara County District Attorney; RICHARD DOYLE, in his official capacity as City Attorney for the City of San Jose; ANN MILLER RAVEL, in her official capacity as County Counsel for the County of Santa Clara,
Defendants.

On Appeal from the United States District Court
for the Northern District of California
No. C 05 4188 RMW
Hon. Ronald M. Whyte, District Judge

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Rules of Appellate Procedure, Video Software Dealers Association, now known as Entertainment Merchants Association, through its undersigned counsel, hereby states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

Pursuant to Rule 26.1 of the Rules of Appellate Procedure, Entertainment Software Association, through its undersigned counsel, hereby states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

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STATEMENT OF JURISDICTION

Plaintiffs agree that the State's Statement of Jurisdiction is correct, and add that their Complaint is also brought under 42 U.S.C. §§ 1983, 1988 and 28 U.S.C. §§ 2201, 2202.

COUNTERSTATEMENT OF ISSUES

1. Is California Civil Code §§ 1746-1746.5 (the "Act"), which is a content-based restriction on non-obscene speech to minors, subject to strict scrutiny under the First Amendment?

2. Does the Act fail strict scrutiny where the State has not articulated a legitimate, much less compelling, interest in restricting video game expression and has failed to support its claimed interest with substantial empirical evidence of alleged harm to minors caused by "violent" video games?

3. Does the Act, which singles out video games from all other forms of media for government censorship, materially advance the interests identified by the State, and is it narrowly tailored to address those interests, as required by strict scrutiny?

4. Is the Act's definition of a "violent video game" unconstitutionally vague, in that ordinary persons would be unable understand what conduct was prohibited by the Act?

5. Is the Act's requirement that so-called "violent video games" be labeled with an "18" sticker unconstitutional compelled speech under the First Amendment?

6. Do the State's arguments for granting summary judgment on Plaintiffs' equal protection claim fail as a matter of law?

COUNTERSTATEMENT OF THE CASE

On October 7, 2005, Governor Schwarzenegger signed into law Assembly Bill 1179, codified at Cal. Civ. Code §§ 1746-1746.5 (the "Act"). By its terms, the Act restricts the sale or rental of certain "violent" video games to minors and imposes labeling requirement on those games. On October 17, 2005, prior to the Act taking effect, Plaintiffs-Appellees Video Software Dealers Association (now known as Entertainment Merchants Association) and Entertainment Software Association (hereinafter, "Plaintiffs") commenced this action against Defendant-Appellants Arnold Schwarzenegger, in his official capacity as Governor of the State of California and Bill Lockyer,[1] in his official capacity as Attorney General of the State of California (hereinafter, the "State"), as well as three city and county defendants,[2] seeking declaratory and injunctive relief against the Act on the

[1] Pursuant to Fed. R. App. P. 43(c)(2), current Attorney General Edmund G. Brown, Jr. has been substituted as a party in place of former Attorney General Lockyer.

[2] The three city and county defendants in the district court were George Kennedy, in his official capacity as Santa Clara County District Attorney, Richard Doyle in

grounds that it violates the First and Fourteenth Amendments of the United States Constitution.

Plaintiffs filed a motion for a preliminary injunction on October 19, 2005, seeking to enjoin the Act before it became effective on January 1, 2006. On December 21, 2005, the district court granted the Plaintiffs' motion and enjoined the Act, in a decision reported at *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005). Excerpts of Record ("ER") 20A-36A.[3]

The parties filed cross-motions for summary judgment. On August 6, 2007, the district court issued an order granting Plaintiffs' motion for summary judgment and denying Defendants' motion for summary judgment, finding the Act unconstitutional and entering a permanent injunction against enforcement. ER 3A-19A. Judgment was entered on August 14, 2007. The State timely filed a Notice of Appeal on September 5, 2007.

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his official capacity as City Attorney for the City of San Jose, and Ann Miller Ravel, in her official capacity as County Counsel for the County of Santa Clara. None of these defendants has appealed.

[3] References to page numbers in Volume 1-A of the Excerpts of Record are abbreviated "[page]A"

COUNTERSTATEMENT OF FACTS

A. The Act.

The Act imposes a civil penalty of up to $1,000 on any person who "sell[s] or rent[s] a video game that has been labeled as a violent video game to a minor." Cal. Civ. Code § 1746.1(a).[4] A "violent video game" is defined by the Act as one "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that meets one of two sets of criteria. *Id.* § 1746(d)(1). The first set of criteria – the only portion defended by the State on appeal – requires that the depictions be such that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," be "patently offensive to prevailing standards in the community as to what is suitable for minors," and "cause[] the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." *Id.* § 1746(d)(1)(A). Under a second provision, which the State now concedes is unconstitutional but argues is severable, *see* Br. 4 n.1, a game is restricted if the actions depicted enable "the

[4] The State twice asserts that the Act does not ban the purchase or rental of games by minors who are accompanied by their parents. Br. 3, 5. That is incorrect. The Act prohibits minors from purchasing or renting restricted games regardless of who accompanies them at the time of the transaction. The Act's only exception for parental involvement comes in the provision that allows parents *themselves* to sell or rent games to their children. Cal. Civ. Code § 1746.1(c).

player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim." *Id.* § 1746(d)(1)(B).

The Act's "violent" video game ban purportedly serves two purposes: "preventing violent, aggressive, and antisocial behavior" and "preventing psychological or neurological harm to minors who play violent video games." ER 22; 2005 Cal. Legis. Serv. Ch. 638 (A.B. 1179 § 1(c)). Furthermore, the Act purports to make "findings" that "[e]xposing minors to depictions of violence in video games" makes them "more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior," and that "[e]ven minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games." *Id*. §§ 1(a), (b).

In addition to imposing substantial penalties on persons who sell or rent "violent" video games to minors, the Act imposes an additional, content-based burden on video games. The Act provides that "[e]ach violent video game that is imported into or distributed in California for retail sale shall be labeled with a solid white '18' outlined in black. The '18' shall have dimensions of no less than 2 inches by 2 inches" and must be placed on the face of the video game package.

Cal. Civ. Code § 1746.2. Failure to label a "violent" video game subjects a manufacturer, distributor or importer to a $1,000 penalty. *Id.* § 1746.3.

B. Plaintiffs And The Nature Of Video Games.

Plaintiffs are associations of companies that create, publish, distribute, sell and/or rent video games, including games that may be regulated as "violent video games" under the Act. ER 56-58, 94, 97-98. In this facial challenge, Plaintiffs also assert the rights of willing listeners. ER 5.

Video games are a modern form of artistic expression. Like motion pictures and television programs, video games tell stories and entertain audiences through the use of complex pictures, sounds, and text. ER 68, 69, 76-90. These games frequently contain storylines and character development as richly detailed as (and sometimes based on) books and movies. ER 76-90. Like great literature, these games often involve themes such as good versus evil, triumph over adversity, struggle against corrupt powers, and quest for adventure. *Id*.

Indeed, the games submitted into evidence by Plaintiffs – which may potentially be restricted by the Act based on their depictions of violence – demonstrate the expressive features of video games. For example, both *Resident Evil 4* and *Tom Clancy's Rainbow Six* contain detailed plots and battles of good against evil, and each parallels movies (*Resident Evil*) or a book (*Rainbow Six*) that minors in California are legally able to obtain without restriction. ER 78-80.

These games also contain depictions of violence; *Resident Evil 4*, for example, allows the main character to "kill" images of zombies or mutants. Another game, *God of War*, provides a storyline drawn from Greek mythology. ER 83-86; *see also Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 650 (7th Cir. 2006) (noting that *God of War* "tracks the Homeric epics in content and theme"). That game follows the adventures and travails of Kratos, a Spartan warrior, in his efforts to kill Ares, the God of War, in a complex quest that takes him through ancient Athens and Hades. ER 83-86.

C. The Video Game Industry's Voluntary Rating System.

Like other popular media, including motion pictures, television, and music, the video game industry has adopted a voluntary and widely used rating system for video games. ER 94-95. That system – which the Federal Trade Commission ("FTC") has called the "most comprehensive" of industry-wide media rating systems – is implemented by the ESRB, a self-regulatory body that assigns independent ratings and descriptions for video game content. *Id*. The ESRB gives one of six age-specific ratings to each game it rates: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teen); M (Mature); and AO (Adults Only). ER 95-96. The ESRB also assigns content descriptors to each game, such as "Crude Humor," "Language," "Suggestive Themes, "Cartoon Violence," and "Sexual Violence," among over two dozen others. ER 95, 104.

The purpose of the ESRB system is to provide easily understood information about games to consumers and parents to empower them to make informed choices about the games they may buy, rent, or play. ER 95. Like the movie rating system, the ESRB system is entirely voluntary; nonetheless, essentially all video game publishers submit their games for rating. *Id.* Similarly, video game retailers throughout the nation are part of a widespread and voluntary effort to educate consumers about the ESRB system and to implement a store-by-store policy of restricting the sale of "M" games to individuals under age 17. ER 60, 96.

D. The District Court's Decisions.

The district court issued two opinions, one granting a preliminary injunction against enforcement of the Act and one granting summary judgment for the Plaintiffs, denying summary judgment for the Defendants, and entering a final injunction against the Act.

In its decision granting the Plaintiffs' motion for a preliminary injunction, the district court recognized that video games are "protected by the First Amendment" and that "[c]hildren 'are entitled to a significant measure of First Amendment protection.'" ER 30A (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975)). The Court then considered and rejected the Defendants' argument that the deferential standard of review under *Ginsberg v. New York*, 390 U.S. 629 (1968), should be extended beyond restrictions on sexual speech to

minors and applied in this case. ER 30A-31A. Indeed, responding to Defendants' suggestion that "a state could regulate a minor's access to games about embezzling, bomb building, and shoplifting, without violating the First Amendment, if a causal connection with harm to children could be established," the court sharply disagreed, noting that "[n]o court has previously endorsed such a limited view of minors' First Amendment right[s]." ER 31A. Instead, the court concluded, consistent with all other courts to consider similar laws, that Act is subject to strict scrutiny under the First Amendment, and that the Act was unlikely to survive strict scrutiny. *Id.*

On summary judgment, the court reiterated that video games are expression protected under the First Amendment and that the Act is subject to strict scrutiny. ER 7A-8A. After deciding that the State had at least some compelling interest supporting the Act, the court concluded nevertheless that the Act was unconstitutional. The district court first held that the Act's second definition of "violent video game" in § 1746(d)(1)(B) was too broad because it contained "no exception for material for some redeeming value" and "could literally apply to some classic literature if put in the form of a video game." ER 15A. The court next held that the three-pronged definition of "violent video game" under § 1746(d)(1)(A), although more narrow, was still unconstitutionally broad. As the court noted, the Act does not distinguish between the age of the minor purchasing

or renting the game, but "[i]n light of the fact that, upon turning eighteen, one can vote and fight in a war, a showing needs to be made that an individual nearing the age of majority needs to be shielded from uncensored speech to the same extent as an early adolescent." ER 16A. Moreover, the court found the term "image of a human being" to be insufficiently narrow because it is "not limited to what appears to be an actual living human being." *Id*.

Second, the district court held that the State had failed to demonstrate that plausible, less restrictive alternatives would be ineffective to achieve the State's goals. In particular, the court held that the State failed to demonstrate that "industry labeling standards, either alone or combined with technological controls that enable parents to limit which games their children play" inadequately protect the State's interest. ER 16A-17A.

Third, the court held that the State could not show that the Act furthered the State's purported interests because the State's "evidence does not establish the required nexus between the legislative concerns about the well-being of minors and the restrictions on speech required by the Act." ER 18A. In particular, the court concluded that "there has been no showing that violent video games as defined in the Act, *in the absence of other violent media*, cause injury to children," that "the evidence does not establish that video games … are any more harmful than violent television, movies, internet sites or other speech-related exposures," and that

"[t]here has also been no detailed study to differentiate between the effects of violent videos [games] on minors of different ages." ER 17A-18A. Finally, addressing the labeling requirement, the court concluded that it need not resolve the parties' dispute over the level of scrutiny to apply in light of the court's holding that the Act is unconstitutional. ER 18A.

SUMMARY OF ARGUMENT

The district court correctly held that the Act violates the First Amendment on its face and must be permanently enjoined. In so holding, the district court joined the numerous other Courts of Appeal and district courts that have unanimously rejected governmental attempts to restrict video game expression based on its content. *See Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) ("*IDSA*"); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) ("*AAMA*"); *Entm't Merchants Ass'n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007) ("*Henry*"); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006) ("*Foti*"); *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006) ("*Hatch*"); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006) ("*Granholm"*); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005) ("*Blagojevich*"); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004) ("*Maleng*").

The Act's content-based restriction on protected speech plainly violates the First Amendment. The State's principal argument that deferential scrutiny should apply under the First Amendment – merely because the State disapproves of the message conveyed to minors by certain speech – is seriously flawed and has been rejected by every court to have considered the issue. No court has ever extended the lesser scrutiny afforded under *Ginsberg v. New York*, 390 U.S. 629 (1968), beyond the realm of sexual speech to minors, and indeed, doing so would blatantly infringe on minors' long-recognized free speech rights. Moreover, the State concedes for the first time on appeal that the second of the Act's two independent definitions of violent video games goes too far under even its eviscerated view of the First Amendment. Br. 1, n.4. Because that second definition is not severable under California law, its conceded invalidity provides another basis for affirming the district court's judgment to enjoin enforcement of the Act.

Apparently recognizing the weaknesses of its baseless argument that lesser scrutiny under the First Amendment should apply, the State argues, alternatively, that the Act satisfies strict scrutiny. But the State has not met, and cannot meet, the demands of strict scrutiny, for at least three reasons. *First*, the State has identified no compelling interest that the Act furthers. The State identifies two interests that the Act supports – "preventing violent, aggressive, and antisocial behavior" and "preventing psychological or neurological harm to minors who play violent video

games." While preventing violence and psychological harm are compelling interests at a general level, the State has no compelling basis for using censorship to accomplish these goals. The State's asserted concern for preventing violent behavior cannot possibly meet the stringent standard established in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) – a standard that the State does not even try to satisfy. Absent compliance with *Brandenburg*, the government may not restrict expression based on its content in order to affect the behavior of the listener. Yet that is precisely what the State's concern with alleged "psychological harm" amounts to: a claim that violent content affects minors' behavior and thoughts in ways that the State deems undesirable. As numerous courts have found, that is nothing more than a form of thought control that is foreign to the First Amendment.

Second, the evidence submitted by the State does not come close to constituting sufficient evidence of harm that would justify the Act's restrictions on speech. None of the studies the State has submitted as evidence establishes a causal relationship between depictions of media violence and adverse effects on minors. Nor do the studies show that violent video games pose any sort of unique "harm" to minors not caused by other violent media to which minors are regularly exposed. Indeed, the State's proffered evidence is riddled with caveats, fails to address studies reaching contrary conclusions, and has been unequivocally rejected

by other courts that reviewed it. Here, the State has failed to meet its burden of providing "substantial evidence" in support of its asserted interests.

Third, the Act is not narrowly tailored to address the State's asserted interests and the State has not met its burden of showing that the Act is the least speech-restrictive means of addressing those interests. The Act singles out video games for regulation without addressing other forms of media violence that the State itself contends are harmful to minors. Thus, the State has not shown that the Act's speech restriction will in fact materially alleviate the "harm" that the State has identified – exposure of minors to violence in the media. Further, as the district court held below, the State failed to meet its burden of showing that other less-speech-restrictive alternatives would not be sufficient to address the State's concerns by empowering parents to make informed decisions about what media their children watch or play. What the State mischaracterizes as an "effort to assist parents," Br. 1, is in fact outright censorship of protected speech based on the ill-founded assumption that parents are unable to supervise the activities of their own children.

In addition to failing strict scrutiny, contrary to the district court's suggestion otherwise, the Act should be held unconstitutional on the independent ground that the Act's definition of a "violent video game" is unconstitutionally vague and does not come close to providing sufficient notice of lawful conduct.

And finally, particularly given the Act's other constitutional infirmities, the Act's labeling requirement is clearly unconstitutional, as the district court correctly held.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*. *Prison Legal News v. Lehman*, 397 F.3d 692, 698 (9th Cir. 2005).

ARGUMENT

I. THE ACT DOES NOT REGULATE OBSCENITY FOR MINORS AND IS SUBJECT TO STRICT SCRUTINY.

The State does not deny that video games are a form of expression protected by the First Amendment. Nor could it, given the evidence presented and the overwhelming judicial authority holding as much. *See IDSA*, 329 F.3d at 958 (video games "'are as much entitled to the protection of free speech as the best of literature'") (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)); *AAMA*, 244 F.3d at 577-79; *James v. Meow Media, Inc.*, 300 F.3d 683, 695-96 (6th Cir. 2002); *Foti*, 451 F. Supp. 2d at 829-30; *Hatch*, 443 F. Supp. 2d at 1068; *Granholm*, 426 F. Supp. 2d at 651; *Blagojevich*, 404 F. Supp. 2d at 1056; *Maleng*, 325 F. Supp. 2d at 1184-85.[5]

[5] Even a cursory review of the games submitted by Plaintiffs in the record shows the rich imagery and narratives that characterize the games targeted by the Act. *See* ER 76-90.

Nor does the State deny that the Act restricts the expression in video games on the basis of their content. As the district court recognized, this makes the Act a content-based restriction on expression that is subject to strict scrutiny and "presumptively invalid." ER 7A-8A (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)). The State nonetheless urges an unprecedented approach: that the violent expression prohibited by the Act is actually unprotected obscenity for minors. That argument is squarely foreclosed by precedent and should be rejected by this Court.

A. Violent Expression Cannot Be Regulated As Obscenity For Minors.

The State's argument that violent video games constitute obscenity for minors is primarily based on *Ginsberg v. New York*, 390 U.S. 629 (1958). That case held that *sexually explicit* materials could be treated as obscenity for minors, even though they did not rise to the level of obscenity for adults.[6] *Ginsberg*, 390

[6] Under the *Ginsberg* formulation, material is obscene for minors where it "(i) predominantly appeals to the prurient, shameful, or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors, and (iii) is utterly without redeeming social importance for minors." 390 U.S. at 646. As the State notes, the Act contains two definitions of violent video games: the first tracks the *Ginsberg* definition, but (improperly) extends it to violent, rather than sexual expression. Cal. Civ. Code § 1746(d)(1)(A). The second definition is even broader and restricts games that are "especially heinous, cruel, or depraved." *Id.* § 1746(d)(1)(B). The State concedes that the second of these definitions restricts games that may have redeeming social value for minors, and thus is "unconstitutionally broad." Br. 4, n.1. Plaintiffs agree that this definition is

U.S. at 641. Every court to have considered the question has held that *Ginsberg*'s restrictions on sexually explicit material cannot be applied to allegedly violent video games. *IDSA*, 329 F.3d at 959 (refusing to apply *Ginsberg* and noting that violent video games, unlike the sexually explicit material in *Ginsberg*, are "protected speech"); *AAMA*, 244 F.3d at 576 (noting that "[c]hildren have First Amendment rights," and rejecting the application of *Ginsberg* in context of restrictions on violent expression); *Blagojevich*, 404 F. Supp. 2d at 1076 ("*Ginsberg* does not provide the state with general authority to regulate speech that is deemed harmful to minors; rather it concerned obscene material, which is not entitled to First Amendment protection."); *Maleng*, 325 F. Supp. 2d at 1185-86 (rejecting application of *Ginsberg* because that case involved regulation of "sexually explicit" material); *Granholm*, 426 F. Supp. 2d at 652 ("[N]either the Supreme Court nor Sixth Circuit has ever applied the *Ginsberg* test in cases that don't involve sexually explicit material."). The State ignores all of these precedents and instead tries to rewrite First Amendment law on the basis of two principles: that the State has plenary power to restrict First Amendment materials for minors, and that violent expression is obscenity. These principles are as sweeping as they are erroneous.

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unconstitutional, but disagree that the provision can be severed and therefore provides another ground for invalidating the Act as a whole. *See infra*.

1. The First Amendment's Protections Are Not Weakened For Minors.

The State argues that it has a broad power to determine what expressive materials are suitable for minors. Yet most of the citations the State marshals have nothing to do with the First Amendment, Br. 10-11, and the few that are concerned with the First Amendment are no more persuasive. For example, the State cites *Erznoznik v. City of Jacksonville* for the proposition that it is "well-settled" that government may regulate more stringently the dissemination of expressive materials for minors. *See* Br. 12. But *Erznoznik*'s sole citation for that proposition is *Ginsberg*, the very case that has been rejected by so many courts in the context of "violent" video games. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975). Indeed, *Erznoznik* immediately went on to state that "minors are entitled to a significant measure of First Amendment protection, … and only in *relatively narrow and well-defined circumstances* may government bar public dissemination of protected materials to them." *Id.* at 212-13.[7]

[7] The State's invocation of *New York v. Ferber* and its citation of *Prince v. Massachusetts* are even further afield. The former case upheld a restriction on child pornography – a context where abuse of children presents an entirely different issue from video games, 458 U.S. 747, 764 (1982). And the latter case upheld a general restriction on child labor which had the effect of limiting the ability of children to sell religious pamphlets – a far cry from the content-based based regulation at issue here. 321 U.S. 158, 160-161 (1944).

Instead, as the many cases striking down violent video game laws have made clear, states do not have the power to restrict non-sexual protected expression simply because they believe it to be harmful to minors. As the Eighth Circuit put it:

> Nowhere in *Ginsberg* (or any other case that we can find, for that matter) does the Supreme Court suggest that the government's role in helping parents to be the guardians of their children's well-being is an unbridled license to governments to regulate what minors read and view.

IDSA, 329 F.3d at 959-60; *see also AAMA*, 244 F.3d at 576-77 (recognizing that children "have First Amendment rights" and holding that to allow the State to regulate images of violence simply because it believed them harmful would "leave them unequipped to cope with the world as we know it); *Blagojevich*, 404 F. Supp. 2d at 1076 ("[T]he government cannot silence protected speech by wrapping itself in the cloak of parental authority.").

The State asserts that the application of strict scrutiny to the Act will interfere with its police powers. Br. 22-23. But the First Amendment properly acts as a limitation on those powers, as the many courts rejecting the State's position have explained. "Minors enjoy the protection of the First Amendment," *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 231 (2003), and they are "unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble." *AAMA*, 244 F.3d at 576-77.

"[H]istory has shown the dangers of giving too much censorship power to the State over materials intended for young persons." *Blagojevich*, 469 F.3d at 646-47 (citing *AAMA*, 244 F.3d at 577); *IDSA*, 329 F.3d at 959-60. In short, the State's claimed plenary power to decide what expression is harmful to minors is a fiction.

2. Violent Expression Is Not Obscenity For Minors.

The State's other response is to claim that violent expression *is* unprotected obscenity. That assertion flies in the face of repeated precedents from the Supreme Court limiting the obscenity doctrine to sexual expression. In *Miller v. California*, the Supreme Court set forth the modern test for obscenity and expressly held: "State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works *which depict or describe sexual conduct*." 413 U.S. 15, 23-24 (1973) (internal citations omitted) (emphasis added). "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." *Cohen v. California*, 403 U.S. 15, 20 (1971) (citing *Roth v. United States*, 354 U.S. 476 (1957)).[8] As noted above, every court

[8] The Courts of Appeals, too, have consistently rejected expanding the obscenity doctrine to include violence. *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992) ("[motion picture m]aterial that contains violence but not depictions or descriptions of sexual conduct cannot be obscene."); *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 66 (2d Cir. 1997) (declining to "expand the[] narrow categories of [unprotected] speech to include depictions of violence" in trading cards); *James*, 300 F.3d at 698 ("declin[ing] to extend … obscenity jurisprudence

to have considered the question has rejected the notion that violent expression in video games can constitute obscenity for minors (or adults). *IDSA*, 329 F.3d at 959-60; *AAMA*, 244 F.3d at 576; *Blagojevich*, 404 F. Supp. 2d at 1076; *Maleng*, 325 F. Supp. 2d at 1185-86; *Granholm*, 426 F. Supp. 2d at 652.

Ignoring the definition of obscenity formulated by the Supreme Court, the State attempts to rely on a hodge-podge of law review articles to craft its own novel definition of obscenity.[9] According to the State, violent as well as sexual expression may be obscene because both depict "the treatment of human beings in a purely physical way with regard to acts or activities that also have great emotional or spiritual importance." Br. 17 (quoting Kevin V. Saunders, *Regulating Youth Access to Violent Video Games*, 2003 Mich. St. L. Rev. 51, 81 (2003)).

While the State apparently believes that Professor Saunders's rationale justifies extending obscenity doctrine to depictions of violence, the argument is

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to violent, instead of sexually explicit, material" in a case involving tort liability for violent video game manufacturers); *United States v. Thoma*, 726 F.2d 1191, 1200 (7th Cir. 1984) (finding that "[d]epictions of torture and deformation are not inherently sexual" and holding that they did not constitute obscenity).

[9] The State does cite one Supreme Court obscenity opinion, *Roth*, for the truism that not "every utterance" was protected at the time of the Founding. Br. 18 (quoting *Roth v. United States*, 354 U.S. 476, 482-83 (1957)). But *Roth* famously defined obscenity as comprising depictions of "sex in manner appealing to the prurient interest," and fiercely defended the proposition that the First Amendment protects "unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion." 354 U.S. at 487, 484. *Roth* thus provides no support for the State here.

entirely without precedential support. The State's reasoning, in fact, smacks of the type of open-ended approach to obscenity that the Supreme Court has repeatedly rejected in favor of a "strictly limited" obscenity doctrine. *Miller*, 413 U.S. at 23-24; *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-47 (2002) (stressing the stringent requirements of the *Miller* test and declining to treat "virtual child pornography" as obscenity where it did not independently satisfy test); *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (refusing to treat as obscenity material limited by federal statute where proscribed material did not conform to *Miller* test); *cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65 (1963) (holding that the method a state uses to identify obscene materials must "scrupulously embody the most rigorous procedural safeguards" to prevent restriction of non-obscene materials).

This Court, too, has been careful to limit the obscenity doctrine to its proper boundaries. In *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188 (9th Cir. 1989), it declined to extend the obscenity doctrine to pornography that was non-obscene under *Miller*, but which was alleged to cause the "rape, batter[y], torture, brutal[ization], and sometimes kill[ing]" of women. *Id.* at 1199. In doing so, the Court stressed the narrowness of the *Miller* test, and the "fundamental principle" that the First Amendment is supposed to foster expression, not serve as a basis for limiting it. *Id*; *see also American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323,

328-329 (7th Cir. 1985) (rejecting argument that non-obscene pornography could prohibited on the ground that it was alleged to encourage violence).

Entirely missing from the State's argument is any recognition of the differing rationales underlying the regulation of sexual obscenity and violent expression. As the courts rejecting the expansion of the obscenity doctrine have explained, government's heightened authority to regulate sexual obscenity derives from the fact that such images are considered to be "offensive" to community norms. *AAMA*, 244 F.3d at 574. "A work is classified as obscene not upon proof that it is likely to affect anyone's conduct, but upon proof that it violates community norms regarding the permissible scope of depictions of sexual or sex-related activity." *Id*; *see also Roth*, 354 U.S. at 485-86 (upholding regulation of obscenity because it appealed to the "prurient interest" even though it was not alleged to lead to "antisocial conduct"). In contrast, California's law is predicated entirely on the supposed *effect* that violent video games will have. Act § 3(c) (asserting the State's compelling interest in "preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm"). As discussed in more detail below, where government seeks to regulate violent expression based on its supposed effect on listeners, it does not have the leeway it enjoys when regulating obscenity. Instead, the government must make a heightened showing under *Brandenburg* in order to justify the regulation.

In sum, no court has ever accepted the weakened "minors-only" First Amendment that the State proposes. The district court's application of the strict scrutiny standard should therefore be affirmed.

B. The State's Concession That Part Of The Act Is Unconstitutional Requires Invalidation Of The Act As A Whole.

In a footnote, the State concedes for the first time that the second of the Act's two definitions of a violent video game is unconstitutional. Br. 4, n.1. The footnote recognizes that the second definition, which restricts games that contain "especially heinous, cruel, or depraved" depictions of violence, may bar games that have redeeming social value for minors. As the State effectively admits, even if the *Ginsberg* definition of obscenity for minors could be extended to violent expression (and it cannot), the Act's second definition goes further than *Ginsberg* by restricting games that contain redeeming social value. While the State tersely claims that the concededly unconstitutional definition is severable under the Act's severability clause, Cal Civ. Code § 1746.5, that is not correct.

This Court looks to state law to determine if a statutory provision is severable. *Qwest Communications, Inc. v. City of Berkeley*, 433 F.3d 1253, 1259 (9th Cir. 2006) (citing *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996)). Under California law, a severability provision will be given effect only where it is (a) possible "functionally, mechanically, and grammatically to sever the invalid portion," and (b) where the "remainder of the enactment is complete in itself and

would have been adopted without the invalid portion." *Id.* (citing *Sonoma County Org. of Pub. Employees v. County of Sonoma*, 591 P.2d 1, 14 (Cal. 1979)). Neither condition is met here. First, severing the second definition is a mechanical and grammatical impossibility. The Act's plain wording states that a video game will violate the Act if "it does *either of the following*," and then sets forth each of the Act's definitions. Severing the second definition from the Act would thus result in a conundrum and grammatical error in which the Act refers to two independent conditions for violations, but provides only one definition.

Second, there is good reason to think that the Act would not have passed without the second definition. The legislative history provided by the State in an attempt to demonstrate the Legislature's particular concerns with video games shows that the Legislature repeatedly cited the unconstitutional definition as a critical part of the Act. For example, the Assembly Judiciary Committee Mandatory Information Worksheet explains that the Act responds to the First Amendment concerns identified in *Maleng* by "focus[ing] on games that contain violence that is 'heinous, atrocious, and cruel," and that the definition is important to "effectively address[] judicial concerns." ER 203. The same language is used in the AB450 Research Summary that was prepared for the benefit of the Legislature. ER 209. And legislative analysis provided at the Act's third reading stated that the Act "must be narrowly tailored," and cited the offending definition

as a means of accomplishing that goal. ER 219. The analysis emphasized that the definition used terms found in the federal death penalty statute and thus would help ensure that the Act would not be found "unconstitutionally vague." *Id*.

While it is clear that the Legislature erred in thinking that the offending definition would help ensure the Act's constitutionality, it is equally clear that the definition was a key component in convincing legislators to pass the Act. The importance of the definition to the Legislature, coupled with the mechanical and grammatical impossibility of removing the definition, means that the provision is not severable. Consequently, the State's concession provides an independent ground for affirming the district court's judgment.

II. THE ACT FAILS STRICT SCRUTINY.

The legal standards for strict scrutiny are well established. Content-based regulations of expression are "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000). Under the strict scrutiny standard, the State must (1) articulate a compelling state interest; (2) prove that the Act actually serves that interest and is "necessary" to do so; and (3) show that the Act is narrowly tailored to serve that interest. *R.A.V.*, 505 U.S. at 395; *IDSA*, 329 F.3d at 958; *Blagojevich*, 469 F.3d at 646. The legislature's judgments are not to be accepted

without question; rather, the legislature must have "drawn reasonable inferences based on substantial evidence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (plurality op.). Moreover, the State "must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 664 (citation omitted); *accord IDSA*, 329 F.3d at 958. Here, the Act comes nowhere near satisfying the demands of strict scrutiny.

A. The State Cannot Show That A Legitimate Compelling Interest Underlies The Act.

The Act's stated purpose is "preventing violent, aggressive, and antisocial behavior," and "preventing psychological or neurological harm." ER 22. In practice, the State's defense of the Act has been premised almost entirely on the proposition that video games cause minors to act aggressively, Br. 29-38, and very little on an independent claim of psychological harm. But regardless of the emphasis, neither of these purported interests can save the Act – both because the interests are not compelling, and because no substantial evidence demonstrates the harms are real.

1. The State Has Not Shown An Interest In Preventing Violence Satisfying *Brandenburg*.

The State's primary interest – reflected in the studies it cites – is in controlling aggression. *See, e.g.*, Br. 28-30 (discussing Anderson 2004 study correlating violent video game exposure with "aggressive behavior," "aggressive cognition," "aggressive affect," "physiological arousal," and decrease in "helping behavior"); *id.* 30 (discussing Gentile 2004 study correlating video game exposure with "hostil[ity]" and "aggressive behaviors such as physical fights and argument with teachers"). Indeed, the State repeatedly argues that the studies demonstrate a correlation between exposure to violent video games and "aggression" or "aggressive behavior." *Id.* 28-36.

While the prevention of violence, generally speaking, is a compelling state interest, the State has no compelling interest in preventing violence by restricting video games. That is because the State cannot meet the stringent test set by the Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), for laws that restrict speech on the theory that particular content will cause a violent or unlawful response. It is hornbook law that the government may not restrict speech to prevent violent behavior by recipients except where the targeted expression "'is *directed to* inciting or producing *imminent* lawless action and is *likely* to incite or produce such action.'" *Free Speech Coal.*, 535 U.S. at 253 (quoting *Brandenberg*, 395 U.S. at 447); *Dworkin*, 867 F.2d at 1199 (efforts to restrict speech based on its

"tendency to cause others to engage in undesirable acts" must meet the *Brandenburg* test). Under *Brandenburg*, the government must *prove* that the targeted expression "is directed to inciting or producing the imminent lawless action and is likely to incite or produce such action." *Free Speech Coal.*, 535 U.S. at 253 (quoting *Brandenburg*, 395 U.S. at 447) (internal quotation marks omitted). The State cannot, and has not even purported to make, this showing.[10]

There is no evidence in the record that video games, which serve to entertain, are intended to cause violence. Nor is there a scintilla of evidence even suggesting that video games, played by millions daily, are *likely* to cause imminent violence. As the court in *Blagojevich* put it when considering the same body of evidence relied upon by the State here: "Defendants have come nowhere near making the necessary showing in this case" to satisfy *Brandenburg*. *Blagojevich*, 404 F. Supp. 2d at 1073; *cf. James*, 300 F.3d at 690 (applying *Brandenburg* where plaintiff sought to impose liability on video game maker in tort context). This is hardly surprising, given that the research the State relies upon is concerned with

[10] Indeed, no court has ever credited the violence-prevention rationale as a justification for state regulation of video games. *See Blagojevich*, 404 F. Supp. 2d at 1073 (finding that the State had "come nowhere near" satisfying *Brandenburg*); *AAMA*, 244 F.3d at 575; *Granholm*, 426 F. Supp. 2d at 652; *Foti*, 451 F. Supp. 2d at 831-32; *Maleng*, 325 F. Supp. 2d at 1186-87; *cf. Dworkin*, 867 F.2d at 1199-1200 & n.8 (holding that the "causal relationship between pornographic materials and violent actions is ambiguous and unvalidated," and therefore does not establish a "clear and present danger" under First Amendment jurisprudence).

the "glacial process of personality development," rather than the "temporal imminen[ce] that we have required to satisfy the *Brandenburg* test." *James*, 300 F.3d at 698. For these reasons, the Act must be enjoined as an impermissible regulation of expression undertaken in the name of preventing violence.

2. Concerns About Psychological Harm Do Not Give The State A Basis For Restricting Protected Expression.

It is not clear that the State has really articulated a second, separate, justification for the Act when it talks about preventing psychological harm to minors. The evidence the State cites has a singular focus on a supposed link between video games and aggression. *See infra*. In any case, this second interest fails as well. Plaintiffs do not dispute that the State has a compelling interest in protecting minors from psychological harm at a general level. "But [that] does not provide a basis for restricting expression protected by the First Amendment. In this country, the State lacks the authority to ban protected speech on the ground that it affects the listener's or observer's thoughts and attitudes." *Blagojevich*, 404 F. Supp. 2d at 1074. As the district court recognized, the government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." ER 14A-15A (quoting *Free Speech Coalition*, 535 U.S. at 253). Expressive works like video games, film or literature certainly "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." *Joseph Burstyn, Inc.*

v. Wilson, 343 U.S. 495, 501 (1952). But with the exception of speech that is intended and likely to incite imminent violence, the State has *no* legitimate interest in censoring protected speech simply because it believes that it could lead to disfavored attitudes on the part of the listener. To the contrary, "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end." *Free Speech Coalition*, 535 U.S. at 253.

Numerous courts considering similar violent video games laws have reached the same conclusion. As the *IDSA* court explained at length,

> [S]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be 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 the government seeks to control the flow of information to minors. *Erznoznik v. Jacksonville*, 422 U.S. 205, 213 (1975). To accept the County's broadly-drawn interest as a compelling one would be to invite legislatures to undermine the [F]irst [A]mendment rights of minors willy-nilly under the guise of promoting parental authority.

329 F.3d at 960; *see also Foti*, 451 F. Supp. 2d at 831 ("The government may not limit minors' exposure to creative works based on a general belief that they may be 'psychologically harmful.'); *Blagojevich*, 404 F. Supp. 2d at 1075 ("If controlling access to allegedly 'dangerous' speech is important in promoting the positive psychological development of children, in our society that role is properly accorded to parents and families, not the State.").

As the district court recognized when it entered its preliminary injunction against the enforcement of the Act, the State's psychological harm rationale lacks a stopping point. During oral argument on Plaintiffs' motion for a preliminary injunction, the local Defendants suggested that the "harmful to minors" rationale would justify a censorship regime under which minors could be denied access to a broad range of books if the State could show that such books "harmed" children. But "[n]o court has previously endorsed such a limited view of minors' First Amendment rights." ER 31A. To the contrary, "[i]t is uncertain that even if a causal link exists between violent video games and violent behavior" – and for the reasons described below, such a link has *not* been established – "the First Amendment allows a state to restrict access to violent video games, even for those under eighteen years of age." *Id.*

B. The State's Evidence Does Not Support Its Asserted Interest In Protecting Minors.

The Act fails strict scrutiny for the additional reason that the evidence submitted by the State does not come close to constituting substantial evidence of harm to minors caused by violent video games. The State bears the burden under strict scrutiny of showing an actual harm that is addressed by the Act. *See Playboy*, 529 U.S. at 818 ("When First Amendment compliance is the point to be proved, the risk of nonpersuasion … must rest with the Government, not with the citizen."); *Turner*, 512 U.S. at 664 (the harm must be "real, not merely conjectural"

and the regulation must "in fact alleviate these harms in a direct and material way"). Not only does the State's evidence here fail to establish that video games, in the absence of exposure to other violent media, cause any perceived harm to children, but the evidence fails to establish *any* causal relationship between exposure to violent video games and any purported harm.

As the State points out, the Legislature purported to rely upon a body of social science research to "find" that minors are harmed by increased feelings of aggression, increased antisocial or aggressive behavior, and reduced activity in the frontal lobes of the brain, and otherwise "suffer psychological harm" even if they do not commit acts of violence. *See* Br. 25, 26, 28; ER 22, 211-15. The district court was presented with the State's evidence in support of the Act, as well as relevant testimony from the *Blagojevich* litigation at which the State's key experts testified.[11] Reviewing that evidence, the district court found, as numerous other courts have found, that the studies relied upon by the State are insufficient to justify the Act's restrictions on speech. *See* ER 17A-18A; *see also AAMA*, 244 F.3d at 578-79; *IDSA*, 329 F.3d at 958-59; *Blagojevich*, 404 F. Supp. 2d at 1063, 1073-74; *Hatch*, 443 F. Supp. 2d at 1069-70; *Granholm*, 426 F. Supp. 2d at 653; *Foti*, 451 F. Supp. 2d at 832-33.

[11] Plaintiffs submitted that testimony in support of summary judgment, and have included these submissions as supplemental Excerpts of Record (SER) at 73- 485.

As the district court noted, ER 32A, the evidence relied upon by the California Legislature in passing the Act consists overwhelmingly of articles by Dr. Craig Anderson, whose work has been heavily relied upon by those other states and localities that have sought to restrict "violent" content to minors. See ER 211-15. However, as courts have unequivocally held, Dr. Anderson's work does not demonstrate either a substantial or a causal connection between "violent" video games and aggression. *See* ER 17A ("[T]here has been no showing that violent video games as defined in the Act, *in the absence of other violent media*, cause injury to children."); *AAMA*, 244 F.3d at 578-79 ("The studies do not find that video 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."); *IDSA*, 329 F.3d at 958-59 (finding "vague generality" of increased aggression "falls far short of a showing that video games are psychologically deleterious"); *Blagojevich*, 404 F. Supp. 2d at 1063 ("[N]either Dr. Anderson's testimony nor his research establish a solid causal link between violent video game exposure and aggressive thinking and behavior."); *Hatch*, 443 F. Supp. 2d at 1070 ("It is impossible to determine from the data presented whether violent video games cause violence, or whether violent individuals are attracted to violent video games."); *Granholm*, 426 F. Supp. 2d at 653 ("Dr. Anderson's studies have not provided any evidence that the relationship between violent video games and

aggressive behavior exists.").[12] As the court in *Blagojevich*, which thoroughly reviewed the testimony and research of Dr. Anderson, concluded:

> defendants have failed to present substantial evidence showing that playing violent video games causes minors to have aggressive feelings or engage in aggressive behavior. At most, researchers have been able to show a correlation between playing violent video games and a slightly increased level of aggressive thoughts and behavior. With these limited findings, it is impossible to know which way the causal relationship runs: it may be that aggressive children may also be attracted to violent video games.

404 F. Supp. 2d at 1074. Even read charitably, this is light years from being a record of substantial evidence demonstrating a real harm or compelling state interest.[13]

Trying to escape this overwhelming body of authorities rejecting Dr. Anderson's research, the State suggests that other courts have relied only on "older" research. But the more recent studies cited by the State were considered – and rejected – by the district court in this case, as well as other courts in

[12] The State misreads the decision in *Maleng* in claiming that the court in that case "came to the same conclusion as the California Legislature." Br. 34. *Maleng* clearly found that "neither causation nor an increase in real-life aggression is proven by [the State's] studies" and struck down the video game regulation in question. *Maleng*, 325 F. Supp. 2d at 1188. That finding was not tied to the specific focus on aggression against law enforcement officers at issue in that case.

[13] The State cherry-picks quotes from the testimony of Dr. Dmitri Williams in the *Blagojevich* litigation in a strained attempt to bolster Dr. Anderson, but even those excerpts do not concede that Dr. Anderson has shown any sort of causal relationship between exposure to video game violence and aggression. Br. 33. Indeed, Dr. Williams flatly concluded otherwise. SER 200.

Blagojevich and successive cases. As these courts have concluded – and as demonstrated by Dr. Anderson's own testimony – the research falls far short of providing substantial evidence that exposure to "violent" video games in fact causes the alleged harm.

For example, in Dr. Anderson's 2004 meta-analysis (ER 639-48), he concedes that the video game literature is not sufficiently large to conduct a detailed meta-analysis of specific methodological features, ER 641, and he points out that "the lack of longitudinal studies" – that is, studies that track the subjects over an extended period of time – is "a glaring empirical gap." ER 647. [14] Analyzing this meta-analysis in detail, the court in *Hatch* correctly concluded that Dr. Anderson's analysis "is far too slight to bear the weight of the State's argument." *Hatch*, 443 F. Supp. 2d at 1069.[15]

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[14] Moreover, the Anderson 2003 article submitted by the State, *see* ER 297-323, is primarily concerned with *general* media violence, and the brief section on video games merely rehashes the findings of Dr. Anderson's 2001 article and then-forthcoming 2004 article. ER 307-09.

[15] The other studies cited by the State suffer from the same flaws. The Gentile 2004 study, ER 860-77, cited at Br. 30, acknowledges that it is "limited by its correlational nature," that "[i]nferences about causal direction should be viewed with caution," and that "[a]dditional experimental and longitudinal research is needed." ER 875. The Uhlmann 2004 study, ER 878-89, cited at Br. 30-31, which attempts to establish a relationship between playing a violent video game and "automatic self-concept," defined as "the extent to which one spontaneously associates the self with aggressive traits and actions," ER 880, is based on experiments with adults and explicitly relies for its conclusions on Dr. Anderson's research and theories. ER 885-87. And the Funk 2004 study, App. 746-62, cited

Not only does the State's evidence fail to show a causal relationship between exposure to video game violence and aggression, but, as the district court correctly held, the record is devoid of evidence demonstrating that video games are any more "harmful" than other violent media. The Seventh Circuit specifically found in considering Dr. Anderson's research that there was no evidence that video games "are any more harmful to the consumer or to public safety than violent movies or other violent, but passive, entertainments." *AAMA*, 244 F.3d at 579. The district court below and the courts in *Blagojevich* and other cases have reached the same conclusion. *See* ER 18A ("T]he evidence does not establish that video games … are any more harmful than violent television, movies, internet sites or other speech-related exposures."); *Blagojevich*, 404 F. Supp. 2d at 1063 ("Dr. Anderson also has not provided evidence to show that the purported relationship between violent video game exposure and aggressive thoughts or behavior is any greater than with other types of media violence, such as television or movies, or other factors that contribute to aggression, such as poverty."); *Hatch*, 443 F. Supp.

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at Br. 31, purports only to suggest a correlation between exposure to video game violence and "lower empathy and stronger proviolence attitudes" which might indicate "desensitization to violence," ER 756-57, and it admits that "desensitization is difficult to quantify" and that "relationships identified between sources of violence exposure and indicators of desensitization do not necessarily translate into causality." ER 758.

2d at 1070 ("There is no showing that restricting video games alone would alleviate the State's concern about … children.").[16]

The frontal lobe activity research cited by the State is no more persuasive – indeed, it has been given even less credence by courts that have considered it. Those courts have held that this research does not constitute "substantial evidence" supporting a restriction on speech. *See Blagojevich*, 404 F. Supp. 2d at 1065; *Granholm*, 426 F. Supp. 2d at 653; *Hatch*, 443 F. Supp. 2d at 1070. As the court in *Blagojevich* found, "there is barely any evidence at all, let alone substantial evidence, showing that playing violent video games causes minors to experience a reduction of activity in the frontal lobes of the brain which is responsible for controlling behavior." 404 F. Supp. 2d at 1074; *see also Granholm*, 426 F. Supp. 2d at 653 (reaching the same conclusion).

At best, the State's evidence rests on flimsy generalizations about experimental effects of exposure to video games that the State attempts to shade as "psychological harm." The conclusions of the State's studies cited here are no different in kind from those that the Eighth Circuit dismissed as "vague

[16] This conclusion was inescapable given that Dr. Anderson conceded in his *Blagojevich* testimony that the "effect sizes" for television and video game "violence" are essentially the same. SER 351-52. Dr. Anderson further admitted that increases in "aggression" could be the result of a large number of stimuli, and he has not done the research to compare the relative effects of any of these other factors. SER 400.

generalit[ies]" that "fall[] far short of a showing that video games are psychologically deleterious." *IDSA*, 329 F.3d at 959. Indeed, the core concern of the State's social science evidence is demonstrating a link between video games and actual violence, rather than psychological or neurological harm.[17] The State merely equates generalizations about marginal increases in aggressive behavior or thoughts with actual "psychological harm" to minors. Aside from being improper bases for restricting speech, *supra* at 30-32, those generalizations, even if credited, do not show sufficient "psychological harm" to minors to justify a restriction on speech.

Finally, recognizing the weaknesses of its research, the State improperly attempts to reverse the evidentiary burden. The State mistakenly claims that Plaintiffs' "foundational premise" would require controlled experiments on children and that it would not be "responsible" to obtain evidence demonstrating a clear causal link between "violent" video games and harm to minors. Br. 37-39. But as explained above, the reason every court has found the social science insufficient to support regulation of video games is not that they have imposed an unreasonable burden of proof, but rather that the State's evidence is riddled with caveats, susceptible to alternative (and indeed more probable) explanations, and

[17] *See* SER 3 (noting that Dr. Anderson's work is "generally concerned" with whether video games create "violent adolescents").

not specific to the effects of video games among other forms of media. The weaknesses of this evidence belie the State's offhand assertion that its evidence is as strong as the correlative evidence employed in astronomy, Br. 38 – a particularly dubious proposition given that the leading proponent of the State's evidence admits that "the vast majority of the kids … playing violent video games right now… are going to grow up and be just fine." SER 355. Compounding the limitations of the State's evidence are the numerous other studies that disprove the very connection the State claims exists.[18]

Indeed, the State fundamentally misconstrues the evidentiary standard that it must meet to satisfy strict scrutiny. The State argues that requiring substantial evidence that violent video games *cause* harm to minors is equivalent to requiring that the evidence show causation of that harm with "scientific certainty." Br. 38. The State confuses the legal point it must prove – that "violent" video games are actually the cause of the problem sought to be addressed by the State – with the

[18] Indeed, in relying almost exclusively on the work of Dr. Anderson and Dr. Kronenberger's team, the State wholly ignores a substantial body of literature either finding no effect of playing video games or finding a positive effect. *See* SER 20, 51. This further undermines the State's defense of the Act. As the court in *Blagojevich* concluded, the failure of the Illinois Legislature to consider "any of the evidence that showed no relationship or a negative relationship between violent video game play and increases in aggressive thoughts and behavior," along with its failure to take into account research that is critical of the work of Dr. Anderson and others, "further undermine defendants' claim that the legislature made 'reasonable inferences' from the scientific literature based on 'substantial evidence.'" *Blagojevich*, 404 F. Supp. 2d at 1063.

level of proof necessary to demonstrate causation, in this case "substantial evidence." *See IDSA*, 329 F.3d at 959 (holding that government "must come forward with empirical support for its belief that 'violent' video games *cause* psychological harm to minors"); *AAMA*, 244 F.3d at 578-79 (requiring finding of causation in social science research used to support law). To the extent that the State suggests that it may restrict speech based merely on a correlation between certain speech and harm to minors, without showing any sort of causal relationship, *see* Br. 38, that argument is based on *Ginsberg*, which is inapposite. *See supra* at 17. And the State's argument is particularly unavailing in light of the utter absence of evidence that video games are associated with any more "harm" than other forms of violent media to which minors are exposed on a daily basis.

The State gets the First Amendment backwards: rather than have it serve as a shield against restrictions on expression that the majority finds unpopular, the State would wield it against a subset of expression without any substantial evidence in support of its actions. For all these reasons, Defendants have failed to carry their burden of showing a compelling interest backed by substantial evidence, and the district court should be affirmed on this ground.

C. The Act Does Not Materially Advance The State's Purported Interests And Ignores The Availability Of Less Restrictive Alternatives.

Beyond its illegitimate and unsubstantiated goals, the Act fails to meet the other requirements of strict scrutiny. In order to survive strict scrutiny, the State must show that the Act materially advances the State's purported goals, and that it does so in a narrowly tailored way. *R.A.V.*, 505 U.S. at 395. As the district court correctly held, the State cannot satisfy its burden on either count.

First, the Act does not materially advance its stated goals. The State has singled out a subset of video games for regulation, despite the fact that a wide range of media contain 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"); *Blagojevich*, 404 F. Supp. 2d at 1075 (finding no evidence demonstrating that video games are more harmful than any other media). Indeed, the available evidence on the effects of exposure to violence in video games, particularly the evidence claiming "harm" to brain development rather than just a greater propensity for violence, fails to distinguish between exposure to violence in video games or in other media. SER 32, 38-39. And the Act cannot possibly materially advance its goals by preventing a 16-year-old from buying or renting the *Resident Evil IV* or *Tom Clancy's Rainbow Six 3* video games, when the same teen may lawfully buy or rent *Resident Evil* and Tom

Clancy movies, and purchase Tom Clancy books. *Granholm*, 426 F. Supp. 2d at 654 ("[i]t cannot be said that the Act materially advances these purported goals by preventing a minor from purchasing such video games as Resident Evil 4 or Doom 3, while they can still easily purchase the Resident Evil and Doom movies."); *Foti*, 451 F. Supp. 2d at 833 (holding that a claim of material advancement is "implausible" given that "a minor could be legally barred from buying or renting an 'M'-rated video game containing violent content, but the same minor could legally buy or rent the movie or book on which the video game was based").

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) (the "facial underinclusiveness" of a regulation undermines the claim that the regulation serves its alleged interests); *Blagojevich*, 404 F. Supp. 2d at 1075 ("[T]he underinclusiveness of this statute – given that violent images appear more accessible to unaccompanied minors in other media – indicates that regulating violent video games is not really intended to serve the proffered purpose [of giving parents the power to protect children from harmful images]."); *Granholm*, 426 F. Supp. 2d at 654 ("Not only does the Act not materially advance the State's stated interests, but it appears to discriminate against a disfavored "newcomer" in the world of entertainment media.").

Second, the Act is not narrowly tailored. "Narrow tailoring" in the constitutional sense requires that regulation of speech be limited to what is necessary to achieve the legislature's end, and that the State justify the rejection of less speech-restrictive alternatives, *see, e.g.*, *R.A.V.*, 505 U.S. at 395; *Playboy*, 529 U.S. at 813. The State does not come close to meeting its burden in this regard.

For one, there is no "fit" between the general representations of violence prohibited by the Act and the harms it seeks to remedy – and to be narrowly-tailored the fit must be precise. As the California Senate Judiciary Committee Report observed in its analysis of the law's constitutionality, "[b]ecause there does not appear to be a direct correlation between the proposed limitations and the negative effects discussed in the studies relied upon by the [Act's] author, it is unclear that the proposed definition of 'violent video game' is narrowly tailored to address the state's compelling interests, rather than simply tailored for the sake of a more 'narrow' statute." ER 929. Simply put, there is no connection between the Act's restrictions on expressive material and the harms it seeks to combat.

Further, the Act will almost certainly restrict access to games that should not be properly considered "violent" video games under the Act. Because the Act imposes penalties for incorrect determinations of whether a game should be classified as a "violent video game," there is a significant risk that games not falling within the Act's definition will be labeled as "violent," or pulled off the

shelves altogether to avoid any chance of liability. ER 98-99; ER 58-59; ER 70. Distributors will be required to review hundreds of hours of game play to determine if even one scene meets the definition. As a result, manufacturers and retailers will inevitably be cautious and overinclusive in restricting access to games depicting violence even if not regulated by the Act. The *Granholm* Court explained the problem well:

> The law would make the retailers themselves responsible for determining which games are considered ultra-violent. Since they could not determine this in advance, the retailers would likely steer clear of any game with the potential of such violence in order to avoid civil and criminal liability, thus denying constitutionally protected free speech to minors and adults

Granholm, 426 F. Supp. 2d at 654; *see also Foti*, 451 F. Supp. 2d at 834; *Blagojevich*, 404 F. Supp. 2d at 1076. Due to this chilling effect, the Act will suppress a broad swath of speech that is unrelated to the State's purported interests.

The State makes several specious arguments on appeal in an effort to claim that the Act is narrowly tailored. Their primary argument is that the Act is appropriately focused on video games because their "interactive" nature allegedly makes them especially dangerous. The courts have had no trouble rejecting this argument out of hand, and finding instead that "interactivity" increases the value of the expression, rather than reduces it. Judge Posner explained in *AAMA* that "all literature … is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story." 244 F.3d at 577. The *IDSA* Court

agreed, stating that the interactive quality of video games entitles them to more, rather than less First Amendment protection. 329 F.3d at 957. *See also Foti*, 451 F. Supp. 2d at 830*; Granholm*, 426 F. Supp. 2d at 651. In any case, any claim that interactivity is harmful would depend on a showing of evidence proving the point. And as explained above, and as the district court properly held, the State offered no substantial evidence showing that video games were harmful, let alone more harmful than less interactive media.

The State's other arguments on this point are quickly dealt with. The State claims that the Act is narrowly tailored because it does not impinge upon the First Amendment rights of adults. But that of course is untrue: adult game creators and retailers will avoid any game that might conceivably run afoul of the statute so as to avoid its penalties and the stigma of violating the law. This chilling effect thus bears upon children and adults alike. The State also claims that the Act appropriately draws a bright line of banning all minors 18 and under from purchasing the restricted games. But as the district court found, the State offered no substantial evidence documenting any harms caused by video games, let alone evidence showing that minors of all ages would be equally affected by the games. And finally, the State claims that the Act restricts only a narrow swath of games. But as discussed below, the Act's vague terms threaten to reach a wide variety of games.

Third, and relatedly, the Act is not the least restrictive means available to the State for accomplishing its goals. The district court held that the State failed to "demonstrate that the industry labeling standards, either alone or combined with technological controls that enable parents to limit which games their children play, do not equally address the state's interest[s]." ER 17A. That holding is correct. The FTC has found that parents are involved in 83% of video game purchases for minors. ER 48. Moreover, the FTC has found that over 80 percent of unaccompanied minors could purchase R-rated DVDs or CDs with explicit lyrics, which is "far more than were able to purchase M-rated video games." *Blagojevich*, 404 F. Supp. 2d at 1075. Today, ESRB's efforts in conjunction with retailers have made it so that unaccompanied minors are nearly *twice* as likely to be able to buy an R-rated DVD or explicit CD than a M-rated video game. *See* http://www.ftc.gov/opa/2007/04/marketingviolence.shtm.

Further, all three of the current-generation game consoles manufactured by Microsoft, Nintendo, and Sony include parental controls allowing parents to limit a child's access to games based on the games' ESRB rating. ER 51. The State has not even attempted to show that these new safeguards will be ineffective in helping parents limit children's access to games. Nor has the State presented evidence to show that assisting parents in understanding the current ratings guidelines would be ineffective in reaching its asserted goals. *See Playboy*, 529 U.S. at 824 ("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."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (1996) (plurality) (striking down ban on advertising alcohol prices because of less restrictive alternatives, such as an "educational campaign" or "counterspeech").

III. THE ACT'S DEFINITION OF "VIOLENT VIDEO GAMES" IS UNCONSTITUTIONALLY VAGUE.

The Act is unconstitutional for an independent reason: vagueness.[19] 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). Such 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). In particular, exacting precision is required of restrictions in the context of protected expression. *See ACLU*, 521 U.S. at 871-72 (explaining that the

[19] The district court did not directly address Plaintiffs' vagueness claim in its decision on summary judgment. The court noted that it had ruled that the Act was not vague in its opinion granting a preliminary injunction, a conclusion that Plaintiffs submit was incorrect. But the court also implicitly recognized the vagueness problems of the Act when it held that some terms in the Act "such as 'image of a human being' are broad and not sufficiently narrow." ER 16A. This Court may affirm the judgment of the lower court on any ground supported by the record, *Beeman v. TDI Managed Care Servs.*, 449 F.3d 1035, 1038 (9th Cir. 2006), and Plaintiffs submit that this Court should hold that the Act is unconstitutionally vague in addition to violating the First Amendment.

vagueness of a "content-based regulation of speech …. raises special First Amendment concerns because of its obvious chilling effect on free speech"); *NAACP v. Button*, 371 U.S. 415, 433 (1963). The Act fails to provide these basic constitutional protections.

As noted above, the Act contains two definitions of "violent" video games. Both are vague. The first definition restricts games that appeal to the "deviant and morbid" interest of minors. The statute does not define these terms, leaving retailers to guess at whether the appeal of a game goes to a minor's "deviant" and "morbid" interests. Similar language has been struck down as vague by other courts, which have noted that such terms have no defined meaning outside the context of sexually explicit obscenity. *Granholm*, 426 F. Supp. 2d at 655-56 (finding the term "morbid" to be vague in this context); *Foti*, 451 F. Supp. 2d at 835; *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992) (affirming district court's conclusion that statute lacks requisite specificity because, *inter alia*, term "morbid" was not defined). The same result should hold here.

Likewise, the Act's second definition – whose unconstitutionality the State concedes, *see supra* at 24-25, contains a host of vague terms. For example, the Act regulates "images of a human being." As detailed in the Declaration of Ted Price, video game characters that appear to be human beings may actually be zombies,

aliens, gods, or some other fanciful creature, and might transform from humans to other beings and vice versa over the course of the game. ER 70-71. Examples of such ambiguous characters abound in the games submitted by Plaintiffs, including *Resident Evil*, *Jade Empire*, and *God of War*. ER 73-86, 100. Therefore, even if some games contain characters that are readily identified as "human" – such as Full Spectrum Warrior – other more fantastical games make this exercise much more difficult, and are susceptible to varying and subjective interpretations, a fact that the district court recognized in holding that this definition was too broad. For these reasons, the court in *Blagojevich* held that the Illinois statute, which applied to video games showing "human on human" violence, was unconstitutionally vague. *Blagojevich*, 404 F. Supp. 2d at 1077 ("As a mechanism for regulating a fanciful medium, however, this definition [of "human-on-human violence"] leaves video game creators, manufacturers, and retailers guessing about whether their speech is subject to criminal sanctions."); *see also Granholm*, 426 F. Supp. 2d at 656; *Foti*, 451 F. Supp. 2d at 836. Likewise, here it is impossible to determine in advance whether a game depicting violence against part-human or super-human characters would run afoul of the Act.

Other vague provisions of the second definition include its restriction on games in which the "range of options available to a player" includes killing or seriously injuring another character in a way that involves "serious physical

abuse." In the realm of often fantastical video games, the term "serious physical abuse" could possibly be held to apply to a wide range of martial arts fighting, sword fights, and battles with (super)human characters. As one example, in *Resident Evil 4*, the player encounters both zombie and human enemies and, for strategic reasons in the game (such as conserving ammunition), may wound them in a way that appears to cause unconsciousness, would inflict "serious physical pain" on a real person, or impairs a bodily member such as a leg. *Compare* Cal. Civ. Code § 1746(d)(1)(B)(2)(D). Similarly, players in *Jade Empire*, in the process of fighting enemies with swords, may wound characters in ways that may impair body parts or cause extreme "pain" to the enemy character. Plaintiffs do not believe that any of these games should fall under the Act, but the fact that they might, and that it is utterly unclear which games are covered, underscores the Act's constitutional failings, and the concomitant chilling effect that it creates. *Granholm*, 426 F. Supp. 2d at 656.

The State's primary response on appeal is to claim that the Act cannot be unconstitutional because ESRB's own ratings are supposedly equally vague. But voluntary ESRB ratings do not have the force of law and while they may be written to be as informative as possible to consumers, a retailer or distributor is not penalized by the State if it is unable to determine the appropriate ESRB category in

advance. Where the State seeks to restrict speech, the Constitution requires a level of clarity and notice that is absent here.

In light of these difficulties in interpreting the Act, this Court should affirm the judgment of the district court on vagueness grounds as well.

IV. THE ACT'S LABELING REQUIREMENTS VIOLATE THE FIRST AMENDMENT.

As the district court correctly recognized, the Act's provisions requiring labeling of "violent" video games with a large "18" sticker – under the threat of substantial fines – cannot survive if the other challenged provisions are invalidated. Nor could the labeling requirement survive scrutiny under the First Amendment in any event. The Supreme Court has long recognized that "[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views." *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (citations omitted). Because compelled messages alter the content of what the compelled party would otherwise express, and in this case impose a message with which Plaintiffs strongly disagree, they are considered content-based regulation under the First Amendment and require strict scrutiny. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). This protection extends not only to political or ideological speech, *see Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986) ("*PG&E*"), but to *all* statements,

whether of fact or opinion, *see Riley*, 487 U.S. at 797-98; *see also Blagojevich*, 469 F.3d at 652 (applying strict scrutiny to and invalidating "18" labeling requirement for sexually explicit video games).

Given the injunction of the Act's other provisions, the requirement that manufacturers, distributors and importers place a large "18" label on all "violent" video games would demand a *false* statement, because the label would appear to describe a legal restriction on sales where no such restriction exists. And regardless of that injunction, the mandatory label compels video game manufacturers, distributors, and retailers to channel the State's message that minors should not even access or play certain video games – even if manufacturers and retailers vigorously disagree with this proposition. The required label does not even purport to convey purely factual or noncontroversial information – "it tells parents and children nothing about the actual content of the games, and it creates the appearance that minors under eighteen are prohibited from playing such games." *Blagojevich*, 404 F. Supp. 2d at 1081. As the Seventh Circuit concluded in invalidating a similar labeling requirement in Illinois, "[t]he sticker ultimately communicates a subjective and highly controversial message." *Blagojevich*, 469 F.3d at 652. "Such forced association with potentially hostile views burdens" expression and "risks forcing [retailers] to speak where [they] would prefer to remain silent." *PG&E*, 475 U.S. at 18.

For this and other reasons, the State's suggestion that the labeling restrictions are a valid regulation of commercial speech under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), *see* Br. 52-54, is meritless. *See* 471 U.S. at 651 (noting that standard of review in that case applied when State compelled disclosure of "purely factual and uncontroversial information" designed to dissipate consumer confusion); *Blagojevich*, 469 F.3d at 652 (concluding that *Zauderer* does not apply to similar video game labeling requirements). Rather than being "factual and uncontroversial," the question of whether a particular video game is "violent" is "far-more opinion-based" than a simple disclosure requirement, subject to competing interpretations, and "highly controversial." *Id*. at 652. And rather than dissipating consumer confusion, the labeling requirement *enhances* it by directly conflicting with the ESRB's current detailed rating system. ER 98-100. "Nothing in *Zauderer* suggests … that the State is equally free to require [entities] to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the [entity's] views." *PG&E*, 475 U.S. at 15 n.12.

Finally, not only is the labeling requirement unduly burdensome, but it is also not narrowly tailored to achieve the State's purported goals. Notably, it ignores the less restrictive alternative of relying on the voluntary ESRB rating system, which fully allows consumers to make choices based on the content of the

game. *See Riley*, 487 U.S. at 798-99 (law not narrowly tailored where potential donors could otherwise obtain information of which State sought to compel disclosure); *Blagojevich*, 469 F.3d at 652 (holding "18" sticker requirement not narrowly tailored given ESRB rating system); *supra* at 47.[20] Further, because the Act appears to place the burden of labeling on individual video game manufacturers, distributors, and importers, each of whom must decide which games fit within the Act's terms, some may, out of an abundance of caution and fear of substantial penalties, label a far wider range of games than even those arguably covered by the Act. *See* ER 57-59; 75-78; 98-100. Thus, the labeling requirement clearly infringes on First Amendment rights.

V. THE DISTRICT COURT PROPERLY DENIED SUMMARY JUDGMENT ON THE EQUAL PROTECTION CLAIM.

The State alone moved for summary judgment on Plaintiffs' equal protection claim and the district court did not reach the issue, but the State nevertheless contends on appeal that the district court erred in failing to grant summary judgment. Br. 55-56. It is clear that State's half-hearted arguments on these claims are not grounds for summary judgment. First, for the reasons discussed

[20] As the Seventh Circuit noted in *Blagojevich* in addressing a similarly-sized sticker requirement, "at four square inches, the '18'sticker *literally* fails to be narrowly tailored – the sticker covers a substantial portion of the box." 469 F.3d at 652. That label may obstruct important information on the game packaging itself, including information regarding the current rating system. ER 98.

above, *supra* at 32-41, no evidence supports the State's speculation that video games are different from other media in a way that justifies greater regulation. To the contrary, Plaintiffs have already demonstrated that video game expression is protected in the same manner as other media, and that the Act singles out video game content for censorship. *See supra* at 43. Further, when the State discriminates in a way that burdens fundamental rights – such as the First Amendment right to freedom of speech – the Equal Protection Clause requires that the State satisfy strict scrutiny. *See, e.g.*, *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997). For the same reasons the State cannot justify the Act under the First Amendment, it fails to satisfy the Equal Protection Clause. The State has not offered any legitimate, let alone compelling, justification to restrict fundamental First Amendment rights of expression. The State's argument for granting summary judgment on the equal protection claim thus fails as a matter of law.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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

Plaintiffs-Appellees certify that they complied with the above-referenced rule and that according to the word processor used to prepare this brief, Microsoft Word 2002, this brief, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 13,853 words, and therefore complies with the type-volume limitations in Fed. R. App. P. 32(a)(7).

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, there are no related cases pending in the Court of Appeals for the Ninth Circuit.

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on February 6, 2008, he served via next-day mail on the party below two copies of the foregoing Brief, and one copy of the Supplemental Excerpts of Record.

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