07-16620

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIDEO SOFTWARE DEALERS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California; BILL LOCKYER, in his official capacity as Attorney General of the State of California; 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, and ANN MILLER RAVEL, in her official capacity as County Counsel for the County of Santa Clara,

Defendants-Appellants.

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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Parents are certainly the first line of defense when it comes to protecting children from harmful material. But no constitutional principles are served if the First Amendment is understood as forcing parents to face this daunting task alone. The Constitution should not be used as justification for stripping states of their ability to help parents protect children from the harmful effects of playing extremely violent video games.

Neither the Supreme Court nor this Court has addressed whether extremely violent material – material that, absent a sexual component, otherwise meets the established definition of obscenity – may be considered obscene as to minors. This appears to present a question of first impression for the Court, and its resolution deserves more analysis than the mere regurgitation of non-binding opinions from out-of-circuit courts offered by Plaintiffs. The State Defendants have presented this Court with a thoughtful, reasoned approach to analyzing the constitutionality of California's violent video game law that properly balances the rights of children and adults with the rights of the states and parents.

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ARGUMENT

I. IN THE LIMITED CONTEXT OF THE SALE TO MINORS, VIDEO GAMES THAT ARE SO VIOLENT THEY APPEAL TO A DEVIANT OR MORBID INTEREST OF MINORS, ARE PATENTLY OFFENSIVE UNDER COMMUNITY STANDARDS, AND LACK ANY LITERARY, ARTISTIC, POLITICAL OR SCIENTIFIC VALUE FOR MINORS ARE NOT ENTITLED TO FIRST AMENDMENT PROTECTION.

The definition of "violent video game" established by California ensures, *ab initio*, that only material that is unworthy of protection as to minors will come within the parameters of the Act. *See* Civ. Code § 1746 (d)(1)(A) (hereafter the "Act"). Plaintiffs' concerns that children will be prohibited from purchasing video games that parallel "great literature" or track "Homeric epics in content and theme" (Pltfs.' Br. at pp. 6-7) are completely unfounded. Great literature surely has literary value for minors in all communities, which by definition exempts such games from the Act.

Notably, Plaintiffs fail to address or even acknowledge the fact that only a narrow subset of extremely violent video games is targeted by the Act. *See* ER 162; Physical Exhibit (VHS) "Video Game Violence Sampler." For example, the video tape included in the legislative record contains video clips of interactive play of the video game "Postal 2," as well as others. *Ibid*. As is shown by multiple clips of actual game play, there exists a subset of extremely violent video games

(Postal 2, in particular) that appear to have absolutely no storyline other than for the player to kill, maim, dismember, or assault as many other characters as possible for no apparent reason. *Ibid*. Plaintiffs do not even attempt to explain how prohibiting children from purchasing these games will somehow prevent them from becoming "well-functioning, independent-minded adults and responsible citizens. . . ." Pltfs.' Br. at p. 19 (quoting *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 576-77 (7th Cir. 2001)). Nor can they, as the Act allows children to continue to purchase video games where the violent content occurs in a context that is otherwise in line with community standards, is not patently offensive, or contains artistic, literary, or social value for minors.

Plaintiffs argue that the State Defendants fail to recognize the differing rationales underlying the regulation of sexual versus violent material. Pltfs.' Br. at p. 23. These rationales might differ as to adults, but the rationales for regulating sexually explicit material and violent material are exactly the same in the context of minors: Promoting "the well-being of [the state's] children" by helping parents protect them from "material [that] might be harmful." *Ginsberg v. State of New York*, 390 U.S. 629, 639 (1968).

The social interests sought to be protected by laws restricting children's access to sexually explicit material apply with equal force to extremely violent material.

The Supreme Court has continuously embraced the premise that sexually explicit material has adverse effects upon children who, by their very nature, are intellectually and emotionally less mature than adults. *Id*., at 641; *see also Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (noting that its prior cases "recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children . . . from exposure to sexually explicit, indecent, or lewd speech.") Yet in the context of sexually explicit material, there is a noticeable lack of scientific evidence supporting a causal nexus between a child's exposure to such material and any resulting physical or psychological harm. Indeed, it appears the Supreme Court has never required *any* empirical proof of harm when children are involved.[1/]

In stark contrast, as the record demonstrates, there is a large and continuously developing body of social science that supports California's concern that children who play extremely violent video games can become automatically aggressive, experience increased aggressive thoughts and behavior, engage in antisocial behavior, become desensitized to violence, and perform poorly in school. ER 196-

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1. *See, e.g., Action for Children's Television v. F.C.C.*, 58 F.3d 654, 661-62 (D.C. Cir. 1995) (en banc) ("the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech.")

889. Nonetheless, in apparent disregard of this robust body of research, courts across the nation have given *less* First Amendment protection to sexually explicit material than to violent material. This archaic and irrational dichotomy can no longer be justified, if ever it was. First Amendment jurisprudence must acknowledge that extremely violent material can be *more* harmful to children than obscene or indecent sexually explicit material. Analyzing California's violent video game law under the variable obscenity standard set forth in *Ginsberg v. State of New York*, as described in Appellants' Opening Brief, will eliminate this unsupportable dichotomy and allow states to assist parents in protecting their children from the harmful effects of violent material to the same extent as sexually explicit material.

As Justice Frankfurter recognized over fifty-five years ago, "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). "Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental

role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Belloti v. Baird*, 443 U.S. 622, 638-39 (1979).

Here, the only games covered by the Act are, by definition, those with no redeeming value whatsoever for children. Whatever First Amendment value these games may possess for adults, such games are simply not worthy of constitutional protection when sold to children. There is no sound basis in logic or policy for treating violent material with no redeeming value for children any different from sexually explicit material. Therefore, the Act is properly reviewed under *Ginsberg v. State of New York*, which it unquestionably survives. *See* AOB at 20-22.

II. THE OUT-OF-CIRCUIT OPINIONS CITED BY PLAINTIFFS ARE NEITHER BINDING NOR PERSUASIVE.

Plaintiffs blithely argue at several junctures that "numerous other Courts of Appeal and district courts have unanimously rejected governmental attempts to restrict video game expression based on its content." Pltfs.' Br. at 11. However, this statement over-simplifies the legal argument and mis-portrays the issue as judicially foreclosed. But the fact of the matter is that the cases cited by Plaintiffs have different evidentiary records, reflect different procedural postures, and address differing language in the particular statutes at issue.

For example, in reviewing a ruling on a preliminary injunction motion, the court in *American Amusement Machine Association v. Kendrick* stated that "[i]t is conceivable though unlikely that in a plenary trial the City can establish the legality of the ordinance. . . . If the games used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries (as several of the games in the record appear to be), a more narrowly drawn ordinance might survive a constitutional challenge." 244 F.3d 572, 579-580 (7th Cir. 2001). In fact, neither the statute at issue in *Kendrick* nor in any other case relied upon by Plaintiffs is identical to the statute at issue here. *See id.* at p. 573 (describing statute); *Entertainment Merchants Association v. Henry*, No. CIV-06-675-C, 2007 U.S. Dist. LEXIS 69139 (W.D. Okla. Sept. 17, 2007) (same); *Entertainment Software Association v. Hatch,* 443 F. Supp. 2d 1065, 1067 (D. Minn. 2006) (same).

These differences are not inconsequential. For example, the language of the statute at issue in *Video Software Dealers Association v. Maleng*, was deemed too narrow because it only regulated video games in which the player killed, injured, maimed or otherwise caused physical harm to a human form who is depicted as a law enforcement officer. 325 F. Supp. 2d 1180, 1189-1190 (W.D. Wash. 2004). Even so, the Court in *Maleng* went on to note that a state "probably" could impose

a restriction on the dissemination of video games to children under 18 if the games contained sexually explicit images and "maybe" if the games contained violent images, "such as torture or bondage, that appeal to the prurient interest of minors." *Id.* at 1190. Moreover, in *Interactive Digital Software Association v. St. Louis County*, there is no indication that the same evidence available to the California legislature was available to the legislating body in St. Louis County. 329 F.3d 954, 957, 959 (8th Cir. 2003) (St. Louis ordinance was passed in 2000, whereas here the Act was passed in 2005). Thus, contrary to Plaintiffs' statements, these cases do not describe any settled principles of law; rather, a close reading of the cases confirms that this is truly an unsettled area of the law that other courts have posited remains open to a narrow and carefully crafted legislative enactment. **III. EVEN IF THIS COURT DECLINES TO APPLY THE VARIABLE OBSCENITY STANDARD, THE ACT SURVIVES STRICT SCRUTINY**.

A. The Act Promotes A Compelling State Interest.

Plaintiffs argue that the Act cannot survive review under strict scrutiny because, as they bluntly put it, the State's interests in "preventing violent, aggressive, and antisocial behavior," and "preventing psychological or neurological harm" to children are "not compelling." Pltfs.' Br. at p. 27 ("But regardless of the emphasis, neither of these purported interests can save the Act . . . because the interests are not compelling. . . .") Fortunately, both the court below

and the Supreme Court flatly disagree with Plaintiffs' unfounded position. *See* ER 1-A at 014-015 ("the Act nevertheless passes the first requirement of strict scrutiny as the government has a compelling interest in protecting the physical and psychological well-being of minors."); *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.")

B. The State's Interests Are Promoted By The Act.

Plaintiffs' main argument appears to be that this Court should simply reject the body of social science relied upon by the Legislature because other courts have rejected similar evidence. Plaintiffs offer no independent analysis on the topic, but instead simply regurgitate the unsupported findings of other courts. Pltfs.' Br. at 32-38.

Notably, the court below found the States' evidence credible and acknowledged that exposing children to extreme violence can be harmful. ER 1-A at 017. The obstacle for the court below, however, was that in its opinion the evidence did not adequately single-out video games from other forms of violent media. *Ibid*. ("this court is not as doubtful as other courts have been as to the legislature's power to restrict the access of minors to violent video games or as skeptical of Dr. Anderson's conclusions."). But even assuming the social science

concerning the unique harm caused by violent video games as compared to other media is still evolving, the Constitution allows the Legislature to address the harmful effects media violence has on children one phase at a time.

"Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). To this extent, the Supreme Court has consistently upheld a legislature's prerogative to deal with significant societal problems one aspect at a time. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488-489 (1955). In *Williamson*, the Supreme Court recognized that "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think . . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson*, 348 U.S. at 489.[2/]

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2. Although the Court was assessing the parties' equal protection claim in *Williamson*, the reasoning and logic of this holding are no less compelling in the present context. *See, e.g. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52-53 (1986) (city allowed to focus regulation on adult theaters and need not address all adult business at the same time).

Here, it may well be the case that all violent media that otherwise meet the definition for obscenity are harmful to children. It certainly does not follow, however, that the Constitution prohibits states from dealing with the problem one medium at a time. No rational public policy would be served by such a limitation. California must be allowed to address the serious problems associated with children's exposure to extremely violent material one medium at a time as their harmful effects are established.

C. The Act Advances The State's Interests Through The Least Restrictive Means.

Plaintiffs essentially argue that constitutional principles are best served by allowing children to continue purchasing extremely violent video games because apparently some of the "new" gaming consoles include parental controls that allow parents to limit their child's access to some games based upon the games' ESRB ratings. Pltfs.' Br. at 47. This argument fails for multiple reasons.

First, nothing in the record establishes that these controls actually existed at the time the Act was passed into law.[3/] Secondly, Plaintiffs themselves

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3. Plaintiffs' citation to "ER 51" to support their factual assertion appears to be in error, as nothing at page 51 of Appellants' Excerpts, nor page 51 of Appellees' Supplemental Excerpts, addresses gaming console controls. As the State Defendants argued below, the only "evidence" regarding such console controls presented below was Plaintiffs' citation to their own press release indicating "new" future consoles may contain such controls. ER 1261.

acknowledge that the ESRB rating system is voluntary, and not all video game publishers submit their games to the ESRB for rating. Pltfs.' Br. at 8. Thus, for games receiving no ESRB rating, the console controls would apparently be useless. Allowing children to purchase these extremely violent video games on the dubious assumptions that (1) the children have also purchased "new" game consoles, (2) the new game consoles have parental controls allowing parents to restrict access to certain games, and (3) the games purchased by the children have been rated such that the console's parental control feature can have any meaning at all, cannot seriously be considered an effective alternative to simply restricting children's ability to purchase these games at the outset. And finally, any child with a computer or gaming console connected to the Internet can easily search the World Wide Web for instructions on how to bypass the parental control feature of any console.[4/] There is simply no less restrictive means that is *as effective* as the Act in achieving the compelling interests at stake.

IV. THE ACT IS NOT REVIEWED UNDER *BRANDENBURG*.

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4. For example, a Google search for the terms "xbox 360 parental control bypass" (not in quotes) returned multiple web site links containing instructions on how to perform the bypass. *See, e.g.,* http://xbox360.thegamereviews.com/article-39-Xbox-360-Error-Codes.html

The court below properly held that the Act was not subject to review under *Brandenburg v. Ohio*, 395 U.S. 444 (1969). ER 1-A at 014. Plaintiffs' argument to the contrary, however, attempts to mischaracterize the State's true interest in preventing harm to children themselves from playing games covered by the Act as instead somehow an attempt to prevent children from engaging in lawless action. Pltfs.' Br. at 28. This argument is nothing more than a transparent, indeed circular, attempt to subject the Act to the heightened review required under *Brandenburg*.

The statute at issue in *Brandenburg* was the Ohio Criminal Syndicalism statute which prohibited "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Brandenburg*, 395 U.S. at 444-445 (quoting Ohio Rev. Code Ann. § 2923.13). In contrast to the Act, the statute in *Brandenburg* sought to prohibit speech that advocated lawlessness. The Supreme Court held that, in order to survive judicial review, the statute must only prohibit speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*, at 447. The *Brandenburg* standard is thus only applicable in situations where the government seeks to prohibit speech in order to

protect third parties from violence that might be incited by the speech.

Here, the Act does not seek to regulate violent video games based upon a theory that such games advocate or are likely to incite imminent lawlessness by children. The Act is expressly aimed at protecting children themselves from the harmful effects of the games. The physical and psychological well-being of children is the concern of the Act. The Act itself expressly states, "(b) [e]ven minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games. (c) The state has a compelling interest in preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games." ER 21-25 (Ch. 638, § 1 Stats. 2005 (AB 1179)). The *Brandenburg* standard is simply inapposite under these circumstances.

V. IF FOUND UNCONSTITUTIONAL, THE SECONDARY DEFINITION OF "VIOLENT VIDEO GAME" CONTAINED IN THE ACT IS PROPERLY SEVERABLE.

The definition of "violent video game" contains two separate, independent clauses, either of which is severable from the Act. The Act's own severability clause provides as follows: "The provisions of this title are severable. If any provision of this title or its application is held to be invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid

provision or application." Civ. Code § 1746.5. Plaintiffs correctly acknowledge that this Court should look to state law to determine if a statutory provision is severable (Pltfs.' Br. at 24), but they fail to properly apply the test. Under established California precedent, invalid portions of a statute may be severed from the valid portion where the invalid provisions are (1) grammatically, (2) functionally and (3) volitionally separable from the remaining statute. *See, e.g.*, *Hotel Employees and Restaurant Employees International Union v. Davis*, 21 Cal. 4th 585, 613 (1999). A provision is grammatically separable if it is distinct and separate and can be removed as a whole without affecting the wording of any of the measure's other provisions. *Ibid*. A provision is functionally separable if it is not necessary to the measure's operation and purpose. *Ibid*. And a provision is volitionally separable if it is not of critical importance to the measure's enactment. *Ibid*.; *see also Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 822 (1989); *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal. 3d 296, 320 (1979); *Santa Barbara School Dist. v. Superior Court of Santa Barbara County*, 13 Cal. 3d 315, 331 (1975).

Contrary to plaintiffs' argument, severing the secondary definition from the Act is both grammatically and functionally possible, as the two definitions for

"violent video game" are provided in the disjunctive by use of the term “either.” Civ. Code § 1746 (d)(1). Thus, the secondary definition of "violent video game" can be deleted in its entirety, along with the conjunctive term “either,” and the primary definition can independently exist without reference to the severed portion.

Moreover, the secondary definition of "violent video game" is volitionally severable. A provision is volitionally severable if it appears that the valid portions would have been adopted had the legislative body foreseen the partial invalidity of the statute. *Calfarm Ins. Co. v. Deukmejian, supra*, 48 Cal. 3d at 821-22. Here, there is no indication that the legislative intent behind the Act was an "all or nothing" approach; to the contrary, the fact that the Legislature included the express severability clause demonstrates it intended to retain as much of the Act as possible in the event some portion of it were to be found invalid. *See Santa Barbara School Dist. v. Superior Court of Santa Barbara County, supra*, 13 Cal. 3d at 331 (finding that the proponents of a proposition for desegregation would be happy to achieve at least some substantial portion of their purpose even if a portion was invalid and stating that a severability clause is not conclusive, but it "normally calls for sustaining the valid part of the enactment"); *Sonoma County Organization of Public Employees*, 23 Cal. 3d at 320 (holding that a statute containing a

severability clause meets the requirements for severance because the unconstitutional portions of the statute could be mechanically severed).

Here, the unequivocal intent expressed in the Act is to restrict the ability of children to purchase extremely violent video games. ER 21-25 (Ch. 638, § 1 Stats. 2005 (AB 1179)). The Act, as severed, accomplishes the Legislature's goal. Therefore, the secondary definition is properly severable from the Act.

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CONCLUSION

For all of the foregoing reasons, the Act survives judicial review in all

respects. Therefore, the district court's order granting summary judgment in favor of Plaintiffs was improper as a matter of law and should be reversed by this Court, and summary judgment on all causes of action in favor of the State Defendants should be granted.

Dated: February 22, 2008

Respectfully submitted,

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