

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VIDEO SOFTWARE DEALERS
ASSOCIATION, et al.,

NO. C03-1245L

Plaintiffs,

DEFENDANTS' RESPONSE IN
OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION

v.

NORM MALENG, et al.,

Defendants.

I. INTRODUCTION

The Defendants, Christine O. Gregoire, Attorney General, and Norm Maleng, King County Prosecuting Attorney, through their attorneys, hereby jointly file this Response in opposition to the Plaintiff's Motion for Preliminary Injunction. This case presents a facial challenge to legislation recently passed by the Washington State Legislature, Laws of 2003 ch. 365, ("the Violent Video Games Statute"), which imposes civil fines for the sale or rental of violent video games to minors. The Plaintiffs, video game industry trade associations and one retailer, assert that the statute violates their First and Fourteenth Amendments to the United States Constitution, and they seek a preliminary injunction prohibiting future application of the Violent Video Games Statute. Because the statute is constitutionally valid on its face, the Defendants oppose a preliminary injunction, and request that Plaintiffs' motion be denied.

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II. FACTS

Video games have emerged from their infancy into a technologically sophisticated realm of action, graphics, and lurid violence. Some interactive video games are not only extremely violent in content, but can be more accurately described as interactive criminal violence training sessions where the player increases his or her score by making choices of weapons and methods to increase the pain, humiliation, and torture inflicted upon another.

Real life examples of the effects of video game violence include well-publicized shootings and crime sprees in which violent video games play a prominent role. *See* Letter from Representative Mary Lou Dickerson to Governor Gary Locke at 4 (May 14, 2003) (attached as Exhibit A)¹. Merely to state the names of several towns (*e.g.*, Littleton, Colorado, Paducah, Kentucky, and Jonesboro, Arkansas) is to call to mind the horrific violence visited upon them by individuals with a penchant for violent video games.²

¹ Representative Dickerson was the prime sponsor of the law in question. Her letter to Governor Locke relates to the Governor's decision to sign the bill into law, and therefore constitutes a prominent part of the legislative history of the act. *See In re Marriage of Kovacs*, 121 Wn.2d 795, 807-08, 854 P.2d 629 (1993) (statements by prime sponsor are appropriately considered); *Dep't of Ecology v. Theodartus*, 135 Wn.2d 582, 594, 957 P.2d 1241 (1998) (governor's decision to sign or veto a bill is part of the legislative process).

² Craig A. Anderson, *Violent Video Games and Aggressive Thoughts, Feelings, and Behaviors* in CHILDREN IN THE DIGITAL AGE 101, 103 (Sandra L. Calvert, et al. eds., 2002). The cited chapter is available on line at <http://www.psychology.iastate.edu/faculty/caa/abstracts/2000-2004/02A.jcc.pdf>. Without attempting to elevate anecdote to science, it is significant that "in all three instances the shooters were students who habitually played violent video games." *Id.* The evidence supports a strong connection between such events and violent video games. *Id.* at 103-04.

While the violent nature of a game may not always be fully apparent from its packaging, the promotional materials accompanying at least some games illustrates their nature:

Not only do the games themselves often contain violent media, but the advertisements and enticements on the packaging and promotional material assault the eye with a barrage of violent messages. Some of the more egregious examples are the following games: Carmageddon claims it is "as easy as killing babies with axes;" Point Blank asserts that "it is more fun than shooting your neighbor's cat;" and Die by the Sword follows the motto, "Escape. Dismember. Massacre."

1 In 2003, the Washington Legislature enacted the Violent Video Games Statute, Laws of
2 2003 ch. 365,³ as an exercise of the State's police power interest in protecting the public
3 health, safety, and welfare. The new law, in essence, prohibits the sale or rental of any "violent
4 video or computer game to any minor." Laws of 2003, ch. 365, § 2(1). The term "violent
5 video or computer game" is defined as meaning "a video or computer game that contains
6 realistic or photographic-like depictions of aggressive conflict in which the player kills, injures,
7 or otherwise causes physical harm to a human form in the game who is depicted, by dress or
8 other recognizable symbols, as a public law enforcement officer." *Id.* at § 2(4).

9 In enacting the law, the Legislature set forth three specific factual findings.

- 10 • First, the Legislature found as a fact that, "there has been an increase in studies
11 showing a correlation between exposure to violent video and computer games and
12 various forms of hostile and antisocial behavior." Laws of 2003, ch. 365, § 1.
- 13 • Second, the Legislature found that, "[t]he entertainment software industry's ratings
14 and content descriptors of video and computer games reflect that some video and
15 computer games are suitable only for adults due to graphic depictions of sex and/or
16 violence." *Id.*
- 17 • Third, the Legislature found that, "some video and computer games focus on
18 violence specifically against public law enforcement officers such as police and fire
19 fighters." *Id.*

20 Based upon these legislatively-determined facts, the Legislature enacted the Violent
21 Video Games Statute in order to further "a compelling state interest to curb hostile and
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24 Kevin E. Brown, note, *Game Over! Legal Responses to Video Game Violence*, 16 NOTRE
DAME J. L. ETHICS & PUB. POL'Y 133, 136 (2002).

25 ³ While pending before the State Legislature, the act was identified as HB 1009. It
26 consists of three sections, which have not yet been codified in the Revised Code of
Washington.

1 antisocial behavior in Washington's youth and to foster respect for public law enforcement
2 officers." *Id.* The law takes effect on July 27, 2003. Wash. Const. art. II, § 1(c).

3 Contemporary scientific research demonstrates the magnitude of the problem addressed
4 by the Violent Video Games Statute. Testimony presented to a committee of the United States
5 Senate illustrates the scientific connection between violent video games and real world
6 violence. *The Impact of Interactive Violence on Children: Hearing Before the Committee on*
7 *Commerce, Science and Transportation*, 106th Congress., 2d Sess., Sen. Hrg. 106-1096
8 (March 21, 2000) (excerpts attached as Exhibit B).⁴ According to Dr. Craig Anderson of Iowa
9 State University, "Playing violent video games can cause increases in aggression and
10 violence." *Id.*, Exhibit B at 4. Additionally, "There are good reasons to expect that the effects
11 of exposure to violent video games will be even greater than the well-documented effects of
12 exposure to violent television and movies." *Id.* The following demonstrates how powerful the
13 influence of violence is:

14 [T]he effects of TV and movie violence on aggression are bigger than the
15 effects in the medical field and in other fields that we typically believe are really
16 huge. For instance, the effects of, again, TV and movie violence are bigger than
17 the effect of exposure to lead on IQ scores in children. They are bigger than the
effect of calcium intake on bone mass. They are bigger than the effect of
homework on academic achievement, and they are bigger than the effect of
exposure to asbestos on cancer.

18 *Id.* These effects are particularly strong as to minors. "One way to think about this is to
19 realize that the developing personality is like slowly hardening clay. Various life experiences,
20 including exposure to violent media, are like the hands that shape the clay. Changes in shape
21 are relatively easy to make at first, when the clay is soft, but later on changes become
22 increasingly difficult as the clay hardens." *Id.*, Exhibit B at 5.

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25 ⁴ The full hearing report is available on the Internet at: [http://frwebgate.access.gpo.gov/cgi-](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:78656.wais)
26 [bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:78656.wais](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:78656.wais). The excerpts attached to this
Response as Exhibit B are found at pages 32-39 of the printed transcript. The citations in text
are to the pages in the attached exhibit.

1 Scientific studies support the conclusion that violent video games promote aggressive
2 and violent behavior that both harms the minors exposed to such games and the society that
3 endures the violent consequences. Laws of 2003, ch. 365, § 1. Three of those studies are
4 attached as Exhibits to this Response:⁵

- 5 • Craig A. Anderson and Brad J. Bushman, *Effects of Violent Video Games on*
6 *Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Physiological Arousal,*
7 *and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature*, 12
8 PSYCHOLOGICAL SCIENCE 353 (2001) (attached as Exhibit C);
- 9 • Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings,*
10 *and Behavior in the Laboratory and in Life*, 78 JOURNAL OF PERSONALITY AND
11 PSYCHOLOGY 772 (2000) (attached as Exhibit D); and
- 12 • Audrey M. Buchanan, et al, *What Goes In Must Come Out: Children's Media Violence*
13 *Consumption at Home and Aggressive Behaviors at School*, Paper presented at the
14 International Society for the Study of Behavioral Development Conference, Ottawa,
15 Ontario, Canada (National Institute on Media and the Family, August 2002) (found
16 online at http://www.mediaandthefamily.org/research/report_issbd_2002.shtml)
17 (attached as Exhibit E).

18 The scientific literature “clearly support[s] the hypothesis that exposure to violent video
19 games poses a public-health threat to children and youths” Anderson and Bushman, 12
20 Psychological Science at 358. Scientific studies⁶ support a connection between playing video
21 games and “heightened levels of aggression,” lower levels of “prosocial behavior,” and “the
22 main mechanism underlying long-term effects on the development of aggressive personality—
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24 ⁵ These studies are also cited by the bill’s prime sponsor in her letter to the Governor
25 urging his signature. Exhibit A at 4.

26 ⁶ The Anderson and Bushman study is a “meta-analysis,” meaning that it accumulates
numerous studies on the subject, as opposed to merely reflecting a single study. Anderson and
Bushman, 12 Psychological Science at 353.

1 aggressive cognition.” *Id.* For this purpose, “aggression” is defined as meaning more than a
2 general sense of unpleasantness. “Aggression” means, “behavior intended to harm another
3 individual It is not an affect, emotion, or aggressive thought, plan or wish.” *Id.* at 354.

4 Decades of research into the effects of television and movie violence have “produced a
5 thoroughly documented and highly sophisticated set of research findings” supporting the
6 proposition that media violence increases aggression and acts as a significant risk factor in
7 youth violence. *Id.* at 354. The effect of violent video games is of even greater concern
8 because of its interactive nature and because, often unlike other media, the same games are
9 replayed repeatedly—even obsessively. “Each violent-media episode is essentially one more
10 learning trial. As these knowledge structures are rehearsed, they become more complex,
11 differentiated, and difficult to change.” *Id.* at 355. The earlier Anderson and Dill study
12 observed that, “Each time people play violent video games, they rehearse aggressive scripts
13 that teach and reinforce vigilance for enemies . . . , aggressive action against others,
14 expectations that others will behave aggressively, positive attitudes toward the use of violence
15 and beliefs that violent solutions are effective and appropriate.” Anderson and Dill, 78 *Journal*
16 *of Personality and Social Psychology* at 774.

17 There are at least three reasons why violent video games are more dangerous than other
18 violent media: (1) video game players identify, first person, with the aggressor; (2) video
19 games are interactive, and players participate directly in the violent action; and (3) video
20 games are addictive, and repeated play reinforces the characteristics taught by their aggressive
21 scripts. *Id.* at 788. Children who repeatedly play violent video games view the world as a
22 more hostile place and are more hostile themselves. Buchanan, Exhibit E at 2; *see also id.* at 9.
23 The relationship is one of cause and effect. “[E]xposure to violent video games *caused*
24 increases in aggressive behavior and aggressive thoughts, and decreases in prosocial [helping]
25 behavior.” Anderson, *supra* note 2, at 108 (emphasis in original). Further, “exposure to
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1 violent video games significantly increases aggressive behavior and aggressive cognition in
2 children, and significantly decreases their prosocial behavior.” *Id.* at 110.

3 Against this backdrop, Washington enacted the Violent Video Game Law as a curb
4 against hostile and antisocial behavior in youth and to foster respect for public law
5 enforcement officers. Laws of 2003, ch. 365, § 1.

6 III. LEGAL ARGUMENT

7 A. Legal Standard

8 A preliminary injunction is an equitable provisional remedy that may be granted in the
9 court’s discretion to preserve the status quo and prevent irreparable harm to the plaintiff before
10 the case is finally decided.⁷ The traditional test for injunctive relief rests upon four factors:
11 “(1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury to the
12 plaintiff if the preliminary relief is not granted; (3) a balance of hardships favoring the plaintiff,
13 and (4) advancement of the public interest.” *Los Angeles Memorial Coliseum Commission v.*
14 *National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). In the Ninth Circuit, the
15 requirements for a preliminary injunction have been compressed into a two-part test in which
16 the moving party bears the burden to prove either “(1) a likelihood of success on the merits and
17 the possibility of irreparable injury, or (2) that serious questions going to the merits were raised
18 and the balance of hardships tips sharply in [the moving party’s] favor.” *Sun Microsystems,*
19 *Inc. v. Microsolf Corp.*, 188 F.3d 1115, 1119 (9th Cir. 1999). The test is applied as a
20 “continuum in which the required degree of irreparable harm increases as the probability of
21 success decreases.” *Napa Valley Publishing Company v. City of Calistoga*, 225 F. Supp. 2d
22 1176, 1181 (N.D. Cal. 2002 (citations omitted)). If the preliminary injunction intersects with
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25 ⁷ Since this case was just filed earlier this month, the Defendants respond only to
26 Plaintiff’s Motion for Preliminary Injunction on a fairly limited record, with the expectation
that they will have an opportunity to fully address all of the issues as this matter proceeds.

1 the public's interest, "the court must examine whether the public's interest would be advanced
2 or impaired by the issuance of a preliminary injunction." *Id.*

3 The Plaintiffs in this case assert that the Violent Video Games Statute is
4 unconstitutional on its face. Complaint at Paragraphs 20 and 46; Plaintiffs' Motion for
5 Preliminary Injunction at 16 (referencing the statute as "facially illegitimate"). The distinction
6 of the Plaintiffs' action as a facial challenge impacts the standing requirements of the moving
7 party. "An ordinance or statute may be facially unconstitutional in one of two ways: either . . .
8 it is unconstitutional in every conceivable application, or . . . it seeks to prohibit such a broad
9 range of protected conduct that it is unconstitutionally overbroad." *Foti v. City of Menlo Park*,
10 146 F.3d 629, 635 (9th Cir. 1998)(en banc), quoting *Members of City Council v. Taxpayers for*
11 *Vincent*, 466 U.S. 789, 796, 104 S. Ct. 2118, 2124, 80 L. Ed. 2d 772 (1984).

12 In regard to the first type of facial challenge, "the plaintiff argues that the ordinance
13 could never be applied in a valid manner because it is unconstitutionally vague or
14 impermissibly restricts a protected activity." *Id.* "In such a case, the litigant has standing to
15 vindicate his own constitutional rights." *Id.* Under the second type of facial challenge,
16 plaintiff asserts that the statute is overbroad and may impact the "constitutionally protected
17 speech of third parties, even if his own speech may be prohibited." *Id.* Plaintiffs in this case
18 attempt to assert the rights of Washington citizens in general; however,

19 [e]mbedded in the traditional rules governing constitutional adjudication is the
20 principle that a person to whom a statute may constitutionally be applied will
21 not be heard to challenge that statute on the ground that it may conceivably be
22 applied unconstitutionally to others, in other situations not before the Court.

23 *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

24 If the Plaintiffs cannot show that the statute cannot be applied constitutionally, then
25 they must show denial of their own protected constitutional rights. Although the Complaint
26 and Plaintiffs' Motion for Preliminary Injunction contain broad allegations of unconstitutional
government regulation, the Plaintiffs have not shown any violation of their own rights under

1 the First Amendment. Because the Plaintiffs cannot meet their burden to obtain a preliminary
2 injunction at this early stage in the litigation, the Plaintiffs' motion should be denied.

3 **B. The Plaintiffs Are Not Likely To Succeed On The Merits Of Their Claims.**

4 1. Video Games are Not Protected Speech.

5 The Plaintiffs boldly assert that “[c]omputer and video games clearly constitute
6 protected expression.” Plaintiffs’ Motion for Preliminary Injunction at 7. However, the clear
7 holding of the cases favorable to the Plaintiffs on this issue is that entertainment *may* be
8 entitled to First Amendment protection. *Schad v. Mount Ephraim*, 452 U.S. 61, 65, 101 S. Ct.
9 2176, 2181, 68 L. Ed. 2d 671 (1981); *see also American Amusement Machine Association v.*
10 *Kendrick*, 244 F.3d 572, 574 (7th Cir. 2001)(plaintiff’s assertion that their video games are
11 entitled to full protection of the First Amendment since they are not obscene in the
12 conventional sense **not** compelling). Certainly, not all forms of entertainment are considered
13 protected speech. To come within the ambit of the First Amendment and gain protected status,
14 the entertainment must contain elements of communication as well as expression of some idea
15 or some information. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556-58, 95
16 S. Ct. 1239, 1245-46, 43 L. Ed. 2d 448 (1975).

17 The United States Supreme Court has never addressed the question of whether video
18 games constitute protected speech. *Marshfield Family Skateland, Inc. v. Town of Marshfield*,
19 450 N.E.2d 605 (Mass. 1983)(appeal to United States Supreme Court dismissed for want of
20 substantial federal question). The Ninth Circuit Court of Appeals has similarly not addressed
21 the issue. However, in this rapidly developing area of law, courts have come down on both
22 sides of this issue. This court should not find, for the first time in this jurisdiction, that video
23 games are speech that should be protected as a matter of law.

24 While some courts have found that video games are deserving of First Amendment
25 protection because they contain elements of communication and expression, other courts have
26 found that video games ““contain so little in the way of particularized form of expression’ that

1 [they] cannot be fairly characterized as a form of speech protected by the First Amendment.”
2 *America’s Best Family Showplace Corp. v. City of New York*, 536 F. Supp 170, 174 (E.D.N.Y.
3 1982), quoting *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852, 857 (2nd Cir. 1982). In
4 declining to extend protected speech status to video games, the court in *America’s Best* held
5 “[i]n no sense can it be said that video games are meant to inform. Rather, a video game, like a
6 pinball game, a game of chess, or a game of baseball, is pure entertainment with no
7 informational element.” *Id.* See also *Rothner v. City of Chicago*, 929 F.2d 297, 298 (7th Cir.
8 1991)(holding that video games provide “pure entertainment with virtually no informative
9 value or communicative or substantive ideas”).

10 The majority of state courts that have had the issue presented before them have
11 followed the holding of *America’s Best* that video games are not protected speech. *Tommy and*
12 *Tina, Inc. v. Department of Consumer Affairs of City of New York*, 459 N.Y.S.2d 220 (1983);
13 *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605, 609 (1983)(“any
14 communication or expression of ideas that occurs during the playing of a video games is purely
15 inconsequential”); *City of St. Louis v. Kiely*, 652 S.W.2d 694 (Mo. App. E.D., 1983)(video
16 games, as opposed to coin operated movie devices, are pure entertainment, with no
17 informational element); *Wen & Liz Corp. v. Board of Zoning Appeals of Town of Hempstead*,
18 463 N.Y.S.2d 493, 497 (1983)(“video games are not a form of speech protected by the First
19 Amendment”).

20 Even some courts that have held that video games are protected speech in some
21 particular contexts have specifically limited their holdings. See, e.g., *James v. Meow Media*,
22 300 F.3d 683 (6th Cir. 2002)(holding that video games fall under First Amendment should not
23 be interpreted as a broad holding on the protected status of video games); *American*
24 *Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 577-78 (7th Cir. 2001)(referring to the
25 content of “[m]ost of the video games in the record of this case”). Thus, there is no categorical
26 rule as to whether video games constitute protected speech in all cases. Indeed, “[e]xtending

1 First Amendment protection to video games certainly presents some thorny issues.” *James*,
2 300 F.3d at 696. The question may come down to a “factual determination of whether video
3 games import sufficient communicative, expressive or informative elements to constitute
4 expression protected under the First Amendment.” *Kaye v. Planning and Zoning Comm’n*,
5 *Town of Westport*, 472 A.2d 809, 811 (Conn. Super. 1983). Although any such test is
6 imprecise, various courts have addressed some of these elements. *See, e.g., Caswell v.*
7 *Licensing Comm’n for Brockton*, 387 Mass. 864, 444 N.E.2d 922, 926-27 (Mass. 1983)(it is
8 insufficient to show that “a player may strive to shoot down invaders” to demonstrate protected
9 expression, and protected status is not imparted merely because “video games are more
10 technologically advanced games than pinball or chess”); *James*, 300 F.3d at 696 (the manner in
11 which the player controls the game is among the features of a video game which is not terribly
12 communicative); *Wilson v. Midway Games*, 198 F. Supp 2d 167, 181 (D. Conn.
13 2002)(distinguishing between video games that are merely digitalized pinball machines and
14 those which convey information or evoke emotions by imagery, and holding only the latter
15 constitute protected speech). Because of the case-by-case nature of this analysis, a categorical
16 protection of all video games is not warranted.

17 2. The Statute is Based Upon and Supported By a Compelling State Interest.

18 The First Amendment protection of speech is not absolute. If the court were to find
19 that the Violent Video Games Statute regulates protected speech, the statute should be upheld
20 on its face as it is necessary to serve a compelling state interest and is narrowly tailored to meet
21 the purpose.⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992). The Legislature was
22 motivated to curb hostile and antisocial behavior in youths, including violence and aggression
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24 ⁸ This legal standard applies to content-based restrictions; while the Defendants
25 concede that the Violent Video Games Statute is content-based, the statute is viewpoint
26 neutral. The application of the statute turns on the content, not upon the viewpoint or message.
The Plaintiffs actually point this out by citing to examples of law enforcement officers in
particular video games who are “bad guys”. Plaintiff’s Motion for Preliminary Injunction at 5.

1 toward law enforcement officers. The state has a clear interest in reducing the real risk of
2 copycat or replicating behavior resulting in violence toward law enforcement officers. This
3 risk is not theoretical or hypothetical, but real. The studies cited in Section II of this Response
4 speak of the risks of violent events. See Exhibits A through E attached to this Response. Such
5 violent events have actually occurred, as recently as this month.⁹

6 The state's interest in discouraging criminal violent behavior is compelling. Further,
7 "states have an interest in the well-being of their youth." *Erznoznick v. City of Jacksonville*,
8 422 U.S. 205, 212, 95 S. Ct. 2268, 45 L.Ed.2d 125(1975). The United States Supreme Court
9 has "recognized that there is a compelling interest in protecting the physical and psychological
10 well-being of minors. This interest extends to shielding minors from the influence of literature
11 that is not obscene by adult standards." *Sable Communications of California v. F.C.C.*, 492
12 U.S. 115, 126, 109 S. Ct. 2829, 2836, 106 L.Ed.2d 93 (1989), quoting *Ginsberg v. New York*,
13 390 U.S. 629, 639-40, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968) and *New York v. Ferber*, 458
14 U.S. 747, 756-57, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982). Even the Court of Appeals for the
15 Eighth Circuit, in rejecting the argument that video games are not protected speech, conceded,
16 "[w]e do not question that the County's interest in safeguarding the psychological well-being
17 of minors is compelling in the abstract." *Interactive Digital*, __ F.3d __, No. 02-3010, slip op.
18 at 3 (8th Cir. June 3, 2003).. That court suggested that studies in the record did not support the
19 conclusion that video games caused psychological harm to minors or caused minors to commit
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22 ⁹ On June 4, 2003, a 12-year-old fifth grader in Pennsylvania brought firearms and
23 ammunition to school, then killed himself after friends wouldn't join him in a plan to shoot
24 students and faculty and take over the school. After this tragic incident, the boy's grandmother
25 stated that he was living the video game *Metal Gear Solid 2*, "[t]here's no doubt in my mind.
26 When I heard about the camouflage clothes and the guns, I knew for sure that's what it was.
It's all a scene from the video game, and he was re-enacting it." George Osgood, Expert
blames video games in boy's suicide, (Wellsboro, Pennsylvania) Star-Gazette, June 19, 2003.
Exhibit F.

1 violent acts. *Id.* See also *American Amusement Machine Ass'n*, 244 F.3d at 578-79. However,
2 a recent study in the record in this case concludes:

3 These results clearly support the hypothesis that exposure to violent video
4 games poses a public-health threat to children and youths, including college-age
5 individuals. Exposure is negatively associated with prosocial behavior.
6 Furthermore exposure is positively related to the main mechanism underlying
7 long term effects of the development of aggressive personality – aggressive
8 cognition.

9 Anderson and Bushman, 12 PSYCHOLOGICAL SCIENCE at 358, Exhibit C.

10 The Plaintiffs claim that the only way that a compelling interest can be shown is to
11 meet the standard in *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430
12 (1969). Plaintiffs' Motion for Preliminary Injunction at 13. Although the Plaintiffs do not cite
13 to the elements of the test referred to, it appears that they are mistakenly referencing the legal
14 standard for fighting words or true threats, a class of unprotected speech.¹⁰ If the statute at
15 issue regulated only true threats, which the Defendants concede that it does not, then it would
16 only regulate unprotected speech and the regulation would not be subject to any level of
17 constitutional scrutiny.

18 In order to show a compelling state interest, it is not necessary to meet the *Brandenburg*
19 test. This point is made clear by a case referenced by the Plaintiffs, *American Amusement*
20 *Machine Ass'n, supra*. In Judge Posner's opinion, he states that the constitution permits
21 punishment for "fighting words" (words likely to cause a breach of the peace), and determined
22 that violent video games did not meet that test, but then went on to say:

23 The Court in *Ginsburg* was satisfied that New York had sufficient grounds for
24 thinking that representations of nudity that would not constitute obscenity in the
25 consumers were adults were harmful to children. We must consider whether the
26 City of Indianapolis has equivalent grounds for thinking that violent video
27 games cause harm either to the game players or (the point the City stresses) the
28 public at large.

¹⁰ A true threat, which is not protected speech, is a statement which a reasonable person
to whom the maker communicates the statement would interpret as a serious expression of
intent to harm or assault. *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir.
1990).

1 The grounds must be compelling and not merely plausible.

2 *American Amusement Machine Ass'n*, 244 F.3d at 576.

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4 In a case issued by the United States Supreme Court the day of the filing of this
5 Response, the Court found that the Children's Internet Protection Act (CIPA) was not an
6 unconstitutional restriction of free speech. *U.S. v. American Library Ass'n, Inc.*, __ U.S. __,
7 __ S. Ct. __, 2003 WL 21433656 (2003). The Court recognized that the government's
8 compelling interest in protecting young library users from material inappropriate for minors,
9 even that which does not constitute obscenity for minors, and further found that the statute was
10 narrowly tailored to achieve that purpose. *Id.*

11 In this case, the Legislature made specific findings which support a compelling state
12 interest here. The harmful results of the exposure of violent video games to minors formed the
13 basis for the statute at issue. The Legislature made a finding that the concerns of the
14 psychological well-being of youths and the risk of harm to law enforcement officers are
15 compelling interests. There is no factual or legal basis to second-guess this compelling state
16 interest.

17 3. The Statute is Narrowly Tailored to Advance a Compelling Interest.

18 The Statute is narrowly tailored to further the State's legitimate interest. Because the
19 Legislature has narrowed the range of the statute's restrictions, the statute does not prohibit
20 more speech than is necessary to carry out the legislative intent. The statute contains no
21 penalty whatsoever on the sale, or rental of violent video games to adults. The statute does not
22 prohibit any person from creating, possessing, or playing any video games. Further, all violent
23 videogames are not subject to the statute. Rather, the statute addresses a specific harm: the risk
24 of aggressive, violent behavior by youth toward law enforcement.

25 The Violent Video Games Statute does not attempt to restrict the sale or rental of all
26 violent video games to minors. Moreover, it does not define violent video games in such a

1 way as to attempt to formulate a definition of obscenity to include violence. Those types of
2 prohibitions have proven unsuccessful in other courts. *See, e.g., Video Software Dealers Ass'n*
3 *v. Webster*, 968 F.2d 684 (8th Cir. 1992). The language in this statute, however, is not broad
4 and sweeping. It is directed to specific material which has proven to be harmful to the
5 community.

6 The Plaintiffs seem to argue that the Violent Video Games Statute alone will not curb
7 all violence or aggression against law enforcement officers. *See* Plaintiffs' Motion for
8 Preliminary Injunction at 17 ("the Act and its legislative history make no attempt to explain
9 how regulation of video games alone will serve the statute's purported interest"). While it may
10 be true that minors are exposed to violence in many ways, that does not make the statute overly
11 broad. The language of the statute was intentionally narrow in order to pass constitutional
12 muster. Although there are certainly many violent video games in the marketplace, and in fact,
13 many in the record of this case, a few minutes of video images of some of the games show why
14 the Legislature chose the language that it did. Attached to Exhibit G of this Response is a very
15 brief video segment containing clips of various video games which are part of the legislative
16 record. In the brief clips, the viewer can see that players earn points for choosing not just to
17 shoot a law enforcement officer to death, but to shoot the officer to the point of immobility, to
18 pour gasoline on the officer, light the officer on fire, and then, as the officer continues to
19 struggle to survive this tortuous exhibition, the player urinates on the officer.

20 The state's compelling interests are well documented by the studies linking violent
21 video games to actual violence, and the language of the statute was intentionally narrow in
22 order to allow all video games to be commercially available. Only a narrow class of video
23 games is restricted in its sale or rental to minors. Similar to the CIPA, which the United States
24 Supreme Court just found to be narrowly tailored to fulfill the compelling interest, the Violent
25 Video Games Statute proscribes only limited commercial conduct in order to effectuate its
26 specific purpose. *See U.S. v. American Library Ass'n, Inc., supra.*

1 4. The Statue is Not Void for Vagueness.

2 The First Amendment and Due Process Clause require that “laws give the person of
3 ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act
4 accordingly.” *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L.Ed.2d 222
5 (1972). The Constitution does not require “mathematical certainty” from statutory language
6 nor does it impose “impossible standards of clarity”. *Grayned* 408 U.S. at 110; *Kolender v.*
7 *Lawson*, 461 U.S. 352, 361, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) *citing United States v.*
8 *Petrillo*, 332 U.S. 1, 7-8, 67 S. Ct. 1538, 91 L. Ed. 1877 (1947).

9 The Plaintiffs argue that the Violent Video Games Statute fails to provide fair notice of
10 the conduct which would be subject to the imposition of a civil infraction. The Plaintiffs
11 ignore the first substantive provision of the statute which clearly states: “[a] person who sells,
12 rents, or permits to be sold or rented, any video or computer game **they know to be a violent**
13 **video or computer game** to any minor has committed a class 1 civil infraction” Laws of
14 2003, ch. 365, § 2(1)(emphasis added). Because of the statutory requirement that a person
15 know of the violent content in order to be charged with a civil infraction, the hypothetical
16 situations raised by the Plaintiffs are not relevant. If the statute contained precise language
17 defining, for instance, a public law enforcement officer, designers and makers of a video game
18 could certainly design around such a precise definition, eviscerating the intent of the statute.

19 The term “public law enforcement officer” is not vague. It is true that the language of
20 the statute does not require certain specific features of a public law enforcement officer, nor
21 does it distinguish between “good” law enforcement officers and “bad” ones. These
22 characteristics do not make the definition vague. A person of ordinary intelligence could likely
23 distinguish between characters who fit this definition and those that don’t. It may, however,
24 require that retailers become somewhat educated about the products they rent and sell. That
25 alone does not make the language unconstitutionally vague.

1 Plaintiffs also challenge the phrase “realistic or photographic-like . . . depictions” of
2 violence. It is difficult to believe that a person of ordinary intelligence would need a more
3 precise definition. Using a common-sense approach, “realistic” depictions are not real, but
4 attempt to portray real scenes and events. “Realistic” is defined as follows:

5 1. Tending to or expressing an awareness of things as they really are; *a*
6 *realistic appraisal of his chances.* 2. Accurately representing what is depicted
or described; *a realistic novel about ghetto life.*

7 *The American Heritage Dictionary* 1030 (2d college ed. 1982). It appears that the second
8 dictionary definition would apply here. In any event, there is no true ambiguity in the type of
9 depictions covered by the statute. A statute is not impermissibly vague just because it is
10 imprecise. *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S. Ct. 1686, 1688, 29 L. Ed. 2d
11 214 (1971).

12 Finally, the Plaintiffs assert that the term “physical harm” is vague. However, both
13 logically and practically, a depiction of physical harm can be determined by a person of
14 ordinary intelligence. The argument that the technology of video games alone blurs the
15 definitions of plainly stated language is not persuasive. Whether any particular characters,
16 scenes, or game, meet the definitions of the statute should be determined in the application of
17 the Violent Video Games Statutes, not at this stage of a facial challenge.

18 In *Grayned v. City of Rockford*, the United States Supreme Court rejected a void for
19 vagueness challenge and found an anti-noise ordinance clear as to what the ordinance as a
20 whole prohibited. *Grayned*, 408 U.S. at 110. The Court distinguished other cases in which it
21 found ordinances unconstitutionally vague due to subjective standards to define prohibited
22 conduct, such as unpopular viewpoints or annoyance to others. *Cox v. Louisiana*, 379 U.S.
23 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965); *Coates, supra*.

24 The statute does not rely on standards that would invite subjective or discriminatory
25 enforcement. The statute utilizes commonly understood words to effectuate its narrow
26

1 purpose. Although the examples Plaintiff's offer of terms they believe might be difficult to
2 interpret in enforcing the statute, those terms on their face are not unconstitutionally vague.

3 5. The Statute is Not a Prior Restraint on First Amendment Expression.

4 A prior restraint is, traditionally, an official licensing scheme that prohibits protected
5 speech before it occurs, requiring the speaker to seek prior government approval. At the
6 threshold, "[p]rior restraint describes administrative and judicial orders forbidding certain
7 communications before the communication occurs." *Free Speech Coalition v. Reno*, 198 F.3d
8 1083, 1097 (9th Cir. 1999) (citation omitted)¹¹. In the present case, Plaintiffs argue that the
9 Violent Video Games Statute is a prior restraint on speech because computer and video game
10 retailers will be restrained from selling video games for fear of violating the statute. *See*
11 Plaintiffs' Motion for Preliminary Injunction at 22. The Court of Appeals for the Ninth Circuit
12 has determined that the Child Pornography Prevention Act of 1996 (CPPA) did not constitute a
13 prior restraint because it did not "require advance approval for production or distribution of
14 [pornographic material] . . . and does not effect a complete ban on constitutionally protected
15 material". *Free Speech Coalition*, 198 F.3d at 1096 (italics added). In that pivotal case, the
16 Court of Appeals agreed with the district court's ruling on the timing required for a prior
17 restraint.

18 CPPA only penalizes speech after it occurs. As such it is not a prior restraint of
19 speech. The possibility of self-censorship and the contention that the CPPA has
a chilling effect do not amount to a prior restraint.

20 *Id.* at 1097 (citations omitted).

21 The Plaintiffs predict that the Violent Video Games Statute will produce a "chilling
22 effect" in the video game industry. Plaintiffs presume that creators or producers of video
23 games may engage in self-censorship because retailers are subject to civil infractions and,
24

25 ¹¹ The United States Supreme Court affirmed *Free Speech Coalition* on other grounds,
26 and passed on the prior restraint issue. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234;
122 S. Ct. 1389; 152 L. Ed. 2d 403 (2002).

1 therefore, may hesitate to sell certain video games containing violent themes. Plaintiffs rely on
2 research by the Federal Trade Commission that undermines this dire economic forecast, stating
3 that “parents are involved in the purchase and rental of the games their kids play 83 percent of
4 the time.” Exhibit H, Legislative Hearing Transcript.

5 The reality is that video game retailers will need to exercise more caution as a
6 consequence of the Violent Video Games Statute, but this is a small inconvenience compared
7 to the large financial return from interactive entertainment software.

8 The Violent Video Games Statute does not require artists or writers to seek government
9 approval prior to creating or producing a video game. Video game retailers may be penalized
10 for their specific conduct (i.e., selling prohibited violent video games to minors) but any civil
11 infraction would only occur after the video game had already been created. This regulation
12 does not operate as a prior restraint despite Plaintiffs’ argument that the Violent Video Games
13 Statute will produce a domino effect of self-censorship, and have a chilling effect on the
14 creators and makers of violent video games. *See Free Speech Coalition* at 1097. Moreover,
15 the statute does not completely ban violent video games, but restricts a narrow category of
16 violent subject matter from being sold to minors. *See Free Speech Coalition* at 1096.

17 The Plaintiffs’ describe the effect of the Violent Video Games Statute as follows: “The
18 Act imposes stiff penalties for those who engage in covered expression.” Plaintiffs’ Motion
19 for Preliminary Injunction at 22. That very description belies the argument that a prior
20 restraint occurs, because it recognizes that no penalty is issued until after the expression
21 occurs. Further, the above description misrepresents that those who engage in expression are
22 penalized. Under the Violent Video Games Statute, a penalty can only be imposed for a
23 business transaction of renting or selling a video game to a minor. There is no penalty
24 whatsoever in the statute that sanctions creative expression or prohibits playing a video game.¹²

25
26 ¹² Notably, none of the Plaintiffs in this action are creators of any video games.

1 Plaintiffs' argument that the Violent Video Games Statute is a prior restraint on speech is not
2 supported by the law.

3 In conclusion, the Plaintiffs have not shown a likelihood of success on the merits of
4 their First Amendment claim. Although the Complaint states a claim under the Fourteenth
5 Amendment, the Plaintiffs are apparently not relying upon the Fourteenth Amendment claim
6 for the purposes of the Motion for Preliminary Injunction. Even if there are some questions as
7 to the interpretation of specific terms, the entire Violent Video Games Statute need not be
8 struck down. As a general matter, if a court finds only part of a statute to be unconstitutional,
9 it should uphold the remainder unless it is clear that the Legislature would not have enacted the
10 remaining portion alone. *See, e.g., Leavitt v. Jane L.*, 518 U.S. 137, 116 S. Ct. 2068, 135 L.
11 Ed. 2d 443(1996); and *Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993).

12 **C. The Balance Of The Hardships And The Public Interest Weigh In Favor Of Denial**
13 **Of The Preliminary Injunction.**

14 In addition to the merits of the case, the balancing of the interests, including the public
15 interest, weigh in favor of denial of the preliminary injunction. The interests of the Plaintiffs
16 here, video industry trade associations and one retailer, are simply economic, while the
17 interests of the state are the protection of the psychological well-being of minors, and the
18 protection of public law enforcement officers who are at risk of being the target of a violent act
19 prompted by the training received by a video game.

20 The drastic step of preventing the state from effectuating duly enacted legislation
21 should not be taken lightly. In this case, the "hardship" that may be encountered by retailers is
22 to have a basic awareness of the product being sold or rented, and to avoid selling or renting to
23 minors. Prohibiting all applications of the statute before its effective date is an extreme
24 remedy. Allowing the state's narrow purpose to be effectuated would still allow for any
25 plaintiff, whether a retailer, video game designer, or consumer, to challenge the Violent Video
26 Games Statute as applied, if a civil infraction were issued under the statute.

1 Plaintiffs have made no attempt to show, even in general terms, potential harm that may
2 be suffered upon the effective date of the Violent Video Games Statute. Other than the
3 conclusory statements that the statute will have broad implications to creators, distributors,
4 retailers, and consumers, there is no evidence of direct harm to the Plaintiffs.

5 Plaintiffs attempt to claim irreparable harm to their own First Amendment freedoms. It
6 is unclear exactly what freedoms the Plaintiffs refer to here because the statute only restricts
7 the sale and rental of a very narrow class of video games to minors. There is no restriction on
8 the creation or playing of any video game, or the rental or sale of any game to an adult. The
9 Plaintiffs have not offered in the record any evidence of the volume of video games impacted
10 by this statute. The record does show that the interests of each of the Plaintiffs are purely
11 economic, and the only potential harm is apparently anticipated reduced sales or rentals.
12 However, even that potential harm is mitigated by the testimony of one of the Plaintiffs at the
13 hearing in this matter indicating that the vast majority of video sales and rentals are by adults:

14 . . .the different levels of video games are purchased predominantly by people
15 over 18. We found that over 90 percent of console games are purchased by
16 people 18 or above and over 97 percent of PC games are purchased by people
17 18 or above. The Federal Trade Commission has found that 80 percent of
parent are involved in the purchasing decisions and/or the purchase of all video
games . . .

18 Exhibit H at 12.

19 The Plaintiffs have not shown that the balance of hardships weigh in their favor. Their
20 only potential losses are economic, and there are no criminal sanctions associated with the
21 statute. The public interest clearly weighs in favor of allowing the statute to become effective
22 in order to meet the compelling interest of curbing violence against law enforcement.

23 IV. CONCLUSION

24 The Violent Video Games Statute is a valid exercise of the state's police power. It
25 seeks only to regulate a business transaction concerning video games which not only depict
26 violence, but have been shown to have violent results as the players attempt to recreate

1 criminal violent acts in real life. The Plaintiffs' Motion for Preliminary Injunction should be
2 denied.

3 DATED this 23rd day of June, 2003.

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1 CERTIFICATE OF SERVICE

2 I certify that I caused to be served a copy of DEFENDANTS' RESPONSE IN
3 OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION on all parties or their
4 counsel of record on the date below as follows:

5 Hand Delivered by: Jomel McNair

6 TO:

7 DAVID J BURMAN
8 SIGNE BRUNSTAD
9 PERKINS COIE
10 1201 3RD AVENUE SUITE 4800
11 SEATTLE WA 98101-3099

12 U.S. Mail, Postage Prepaid to:

13 KATHLEEN HARTNETT
14 DEANNE MAYNARD
15 PAUL SMITH
16 JENNER & BLOCK LLC
17 601 THIRTEENTH ST NW SUITE 1200
18 WASHINGTON DC 20005

19 I certify under penalty of perjury of the laws of the United States that the foregoing is
20 true and correct.

21 EXECUTED this 23rd day of June, 2003, at Olympia, Washington.

22 Katrina Toal
23 KATRINA TOAL
24
25
26