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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VIDEO SOFTWARE DEALERS
ASSOCIATION; INTERACTIVE DIGITAL
SOFTWARE ASSOCIATION;
WASHINGTON RETAIL ASSOCIATION;
INTERACTIVE ENTERTAINMENT
MERCHANTS ASSOCIATION;
INTERNATIONAL GAME DEVELOPERS
ASSOCIATION; and HOLLYWOOD
ENTERTAINMENT CORPORATION;

Plaintiffs,

v.

NORM MALENG, in his official capacity as
King County Prosecuting Attorney; GARY
LOCKE, in his official capacity as Governor of
the State of Washington; and CHRISTINE O.
GREGOIRE, in her official capacity as Attorney
General of the State of Washington,

Defendants.

NO. 03-1245 L

COMPLAINT

Plaintiffs Video Software Dealers Association ("VSDA"), Interactive Digital
Software Association ("IDSA"), Washington Retail Association ("WRA"), Interactive
Entertainment Merchants Association ("IEMA"), International Game Developers Association

1 ("IGDA"), and Hollywood Entertainment Corporation, by and through their attorneys,
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3 complain and allege as follows:
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5 NATURE OF THE ACTION

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7 1. Plaintiffs are companies or associations of companies that create, publish,
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9 distribute, sell, rent, and/or make available to the public computer and video games. Plaintiffs
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11 bring this action pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief
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13 against enforcement of a new Washington statute that infringes upon constitutionally
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15 protected rights of free expression. The challenged act, Washington House Bill No. 1009
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17 (hereinafter, the "Act"), which amends Chapter 9.91 of the Revised Code of Washington
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19 ("RCW") by adding a new section and amends RCW 7.80.120(1)(a), was enacted into law on
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21 May 20, 2003, and is due to take effect on or about July 27, 2003. The Act restricts the
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23 distribution of computer and video games based solely on their expressive content and
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25 viewpoint, and some of Plaintiffs' computer and video games may be deemed to be subject to
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27 the Act's restrictions. Specifically, the Act makes illegal, and imposes penalties for, the rental
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29 or sale to those under the age of 17 of computer and video games containing illustrations of
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31 "aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a
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33 human form in the game who is depicted, by dress or other recognizable symbols, as a public
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35 law enforcement officer."

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37 2. The Act violates the First Amendment and other provisions of the United
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39 States Constitution by creating penalties for the distribution of computer and video games
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41 based solely on their particular "violent" content and viewpoint. The First Amendment
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43 prohibits such content- and viewpoint-based censorship, a principle that is especially salient
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45 where, as here, the government admits that it is censoring speech for the purpose of fostering
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47 greater "respect" for one category of government officials. Not only does the Act directly

1 restrict the dissemination and receipt of a considerable amount of fully protected expression,
2 but, because of its numerous vague terms, the Act also creates a chilling effect on a great deal
3 of speech, as game creators and retailers will respond to the Act's uncertainty by self-
4 censoring, depriving adults and children of access to undeniably protected expression.
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8 3. Computer and video games are a form of artistic expression much like other
9 forms of protected expression, such as movies, books, and music. They contain rich and
10 engaging combinations of narrative, storyline, music, and graphic design, which game
11 designers use to tell stories and entertain audiences. These various elements in computer and
12 video games are fully protected expression both individually and when combined.
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16 4. Computer and video games often contain extensive storylines and character
17 development, comparable to that of books and movies. The storylines and plot, and
18 associated dialogue among characters, continue throughout the game play and are an integral
19 part of the game itself. Sometimes the storyline depends on actions taken by the player. Like
20 the best of literature, the storylines often involve familiar themes such as good versus evil,
21 triumph over adversity, struggle against corrupt governments and rulers, and/or quest for
22 adventure. Expression in other media, such as movies and books, draws thematic ideas
23 directly from computer and video games. Computer and video games similarly draw and
24 evolve themes from other media.
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28 5. Computer and video games also feature the artwork of some of the best
29 modern graphic artists. The typical computer or video game contains many different
30 animated or computer-generated illustrations. At various points in the story, game play may
31 also include movie-like clips, which advance the storyline and character development.
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33 Computer and video games also contain music, much of it original and performed by top
34 musicians and orchestras. Like the music that plays during movies, the music in computer
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1 and video games enhances and complements the expression conveyed by the images and
2 dialogue, often in dramatic fashion.
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4 6. The development and production of computer and video games strongly
5 resembles the creative process involved in producing other works of art and expression, such
6 as movies. In particular, a computer or video game begins as a creative concept in the minds
7 of the game developers who brainstorm, collaborate, and sketch scripts and storylines. The
8 game is brought to life by teams of artists who draw sketches of characters and create "story
9 boards," which are visual presentations of the action sequences and plot that are used to form
10 the story presented through the game. The storylines and themes guide the development of
11 concept art, which is then transformed into digital art presenting the characters and
12 backgrounds.
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22 7. The computer and video game medium is in the process of rapid technological
23 evolution and advancement, allowing game creators to faithfully realize their creative
24 concepts, inspiring continued creativity among would-be creators, and enhancing the
25 experience of viewers.
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30 8. The Act is an unprecedented restriction on the content of this burgeoning
31 medium, based on state government officials' apparent disapproval of particular ideas and
32 messages reflected and depicted by certain computer and video games with violent content.
33 Specifically, the Act makes it a civil infraction punishable by a fine of up to \$500 to sell, rent,
34 or permit to be sold or rented, to someone under age 17, what the Act labels a "violent video
35 or computer game." The Act singles out speech not merely because of its "violent" *content*,
36 but also because of its particular *viewpoint*, by defining "violent" to include *only* depictions of
37 harm to public law enforcement officers. By punishing the distribution of certain computer
38 and video games based on content and viewpoint, the Act unconstitutionally restricts both the
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1 distribution and receipt of this medium of expression. The Act's vague terms also create a
2 chilling effect on a great deal more protected speech because game creators and retailers will
3 make less expression available for fear of violating the Act's ambiguous definition of
4 "violent."
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8 9. Plaintiffs maintain (a) that the challenged provisions of the Act are void and of
9 no force and effect because they are unconstitutional under the First and Fourteenth
10 Amendments to the Constitution of the United States and thus actionable under 42 U.S.C.
11 § 1983; and (b) that Plaintiffs and their members, as well as many citizens of Washington, will
12 suffer immediate, serious, and irreparable injury if the challenged provisions take effect.
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18 JURISDICTION AND VENUE

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20 10. This action arises under the Constitution of the United States, the First and
21 Fourteenth Amendments thereto, and the laws of the United States, 42 U.S.C. §§ 1983 and
22 1988, and 28 U.S.C. §§ 2201 and 2202. This Court has jurisdiction over the subject matter
23 of this action under 28 U.S.C. §§ 1331 and 1343(a)(3).
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28 11. Venue is proper in the Western District of Washington. Plaintiff Hollywood
29 Entertainment Corporation does business in King County through more than 25 retail
30 establishments, a number of IDSA's member companies (including several of its largest) are
31 located in King County, and the claims arose in this district. Defendants also reside in this
32 judicial district, and Defendant Maleng is responsible for enforcing the Act within King
33 County.
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PARTIES

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3 12. Plaintiff Video Software Dealers Association ("VSDA"), established in 1981,
4 is the not-for-profit international trade association for the \$20 billion home entertainment
5 industry. VSDA is incorporated in the State of Delaware and its principal place of business is
6 Los Angeles, California. VSDA represents more than 1,200 companies in the United States,
7 Canada, Europe, Asia, South America, and Africa. Its members operate more than 10,000
8 retail outlets in the U.S. that sell and/or rent DVDs, VHS cassettes, and console video games,
9 including approximately 250 outlets in Washington. The membership of VSDA comprises
10 the full spectrum of video retailers (from single-store operators to large chains), video
11 distributors, the home video divisions of major and independent motion picture studios, and
12 other related businesses that constitute and support the home video entertainment industry.
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22 13. Plaintiff Interactive Digital Software Association ("IDSA") is a nonprofit trade
23 association organized under the laws of the State of Delaware with its principal place of
24 business in the District of Columbia. A fundamental purpose of IDSA is to serve and
25 promote the business and public affairs interests of companies that publish entertainment
26 software used for computer and video games, including such companies' right to publish and
27 distribute works of expression that are protected under the First Amendment to the United
28 States Constitution and similar provisions of the constitutions of various states. IDSA
29 members include a number of entities that produce, distribute, and/or supply computer and
30 video games to owners and operators of sales and rental outlets within King County and
31 throughout Washington.
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42 14. Plaintiff Washington Retail Association ("WRA") is an organization whose
43 members are individuals and corporations engaged in general retail sales businesses, including
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1 the sale of computer and video games, and are located throughout Washington, including
2 within King County.
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4 15. Plaintiff Interactive Entertainment Merchants Association ("IEMA") is the
5 nonprofit U.S. trade association dedicated to serving the business interests of leading retailers
6 that sell interactive entertainment software (including computer and video games, multimedia
7 entertainment, peripherals, and other software). Member companies of the IEMA
8 collectively account for almost ninety percent of the \$10.2 billion annual interactive
9 entertainment business in North America.
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12 16. Plaintiff International Game Developers Association ("IGDA") is a nonprofit
13 association established by, and comprised of, computer and video game developers--the
14 individuals who design, plan, create, and author computer and video games--specifically to
15 foster the creation of a worldwide game development community. The IGDA's mission is to
16 build a community of game developers that leverages the expertise of its members for the
17 betterment of the industry and the development of the art form.
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20 17. The interests that Plaintiffs VSDA, IDSA, WRA, IEMA, and IGDA
21 (collectively, "the Association Plaintiffs," a subset of "Plaintiffs") seek to protect in this action
22 are germane to the purposes of each organization, and neither the claims nor the forms or
23 relief sought in this action require participation of individual members of Plaintiffs. One or
24 more members of each association have standing to bring this action in their own right.
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27 18. Plaintiff Hollywood Entertainment Corporation ("Hollywood") was
28 incorporated under the laws of Oregon in 1988. Hollywood is a specialty retailer of rentable
29 home videocassettes, DVDs, and computer and video games, and operates over 1,800
30 "Hollywood Video" superstores throughout the United States. Nearly 300 of these stores
31 include an in-store game department called "Game Crazy," which gives customers a place to
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1 buy, sell, and trade computer and video games. There are 27 Hollywood Video stores and 11
2 Game Crazy stores located within King County, Washington.
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4 19. Plaintiffs, and the members of Association Plaintiffs, are threatened with
5 immediate, serious, and irreparable injury as a result of the enactment and imminent
6 enforcement of the challenged provisions of the Act. Once the Act is in force, Plaintiffs and
7 their members will be subject to liability for disseminating works fully protected under the
8 First Amendment. The Act will have an immediate and vast chilling effect upon
9 constitutionally protected speech because those who sell, rent, or permit to be sold or rented
10 computer and video games (and their respective distributors and providers) will, to avoid
11 liability under the Act, refrain from offering for rental or sale a wide array of games. This will
12 in turn chill computer and video game distributors, publishers, and creators from developing,
13 publishing and distributing works that may run afoul of the Act's vague definition of
14 prohibited content.
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16 20. The Act will also cause irreparable harm to willing listeners--both under and
17 above age 17--who will be deprived of the ability to hear Plaintiffs' members' speech. In this
18 facial challenge to the Act, Plaintiffs have standing to assert not only their own rights and
19 harm, but also that of the potential recipients of Plaintiffs' members' speech.
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21 21. Defendant Gary Locke is the Governor of the State of Washington. As
22 Governor--the position in which "[t]he supreme executive power of th[e] state shall be
23 vested," Wash. Const. art. III, § 2--he is charged with the responsibility of "see[ing] that the
24 laws are faithfully executed." Wash. Const. art. III § 5. He also "supervise[s] the conduct of
25 all executive and ministerial offices," RCW 43.06.010(1), and "may require the attorney
26 general to aid any prosecuting attorney in the discharge of the prosecutor's duties."
27 RCW 43.06.010(7). This action is brought against Governor Locke in his official capacity.
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22. Defendant Christine O. Gregoire is the Attorney General of the State of Washington. In that capacity, she "[c]onsult[s] with and advise[s] the several prosecuting attorneys in matters relating to the duties of their office, and when the interests of the state shall require," she "attend[s] the trial of any person accused of a crime, and assist[s] in the prosecution." RCW 43.10.030(4). This action is brought against General Gregoire in her official capacity.

23. Defendant Norm Maleng is the King County Prosecuting Attorney. In that capacity, he prosecutes "civil infractions" within King County, section 7.80 RCW, including the "civil infraction" created by the Act and challenged by Plaintiffs. This action is brought against Attorney Maleng in his official capacity.

FACTS COMMON TO ALL CAUSES OF ACTION

24. The Act was passed by the Washington Legislature in late April 2003, and was signed into law by Governor Locke on May 20, 2003. A true, complete, and accurate copy of the Act is attached hereto as Exhibit 1, and is incorporated herein as if fully set forth. The Act is due to take effect on or about July 27, 2003.

25. The challenged provisions of the Act seek to regulate the content and viewpoint of a certain medium of expression (defined as "video and computer games" under the Act) and limit access to certain of those computer and video games based solely on the content and viewpoint of the expression depicted or contained therein.

26. The challenged provisions of the Act would present Plaintiffs' members with the possibility of arbitrary and discriminatory enforcement because the Act fails to set forth minimal standards for enforcement.

1 27. The First Amendment provides in part that "Congress shall make no law . . .
2 abridging the freedom of speech, or of the press," U.S. Const. amend. I, and the prohibitions
3 of the First Amendment apply to the State of Washington, U.S. Const. amend. XIV.
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6 28. The First Amendment shields verbal expression, written expression, visual
7 expression, entertainment, art, and music.
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10 29. The protections of the First Amendment include expressions and depictions of
11 violence devoid of obscene sexual content.
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14 30. The First Amendment protects expression in words, sounds, pictures, other
15 visual images, and video.
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18 31. The First Amendment protects expressions of violence depicted by the
19 medium of computer and video games.
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22 32. Computer and video games present an integrated visual medium of words,
23 pictures, videos, sound, and music.
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26 33. Computer and video games are a form of expression, including artistic
27 expression of scriptwriters, animators, and musicians.
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30 34. Computer and video games are accorded full protection as expression under
31 copyright law.
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34 35. The challenged provisions of the Act seek to suppress expression in the
35 computer and video game medium because of the perceived effect of the games' expression
36 on minors under the age of 17. Specifically, it suppresses this expression in an effort "to curb
37 hostile and antisocial behavior in Washington's youth and to foster respect for public law
38 enforcement officers." The Act seeks to suppress expression in games deemed "violent,"
39 which is defined by the Act as follows:
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1 "Violent video or computer game" means a video or computer
2 game that contains realistic or photographic-like depictions of
3 aggressive conflict in which the player kills, injures, or otherwise
4 causes physical harm to a human form in the game who is depicted, by
5 dress or other recognizable symbols, as a public law enforcement
6 officer.
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9 36. The challenged provisions of the Act would impose restrictions on freedom of
10 expression by making it unlawful for any "person" to sell, rent, or permit to be sold or rented
11 to a minor, any video or computer game they know to meet the description set forth in
12 Paragraph 35 hereof. The Act describes a "person" as a "retailer engaged in the business of
13 selling or renting video or computer games including any individual, partnership, corporation,
14 or association who is subject to the tax on retailers under RCW 82.04.250."
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18 37. The Act provides that any person who sells, rents, or permits to be sold or
19 rented to a minor, any video or computer game meeting the description set forth in Paragraph
20 35 hereof "shall" be fined up to \$500 for each violation.
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24 38. The Act targets only one subset of computer and video games that contain
25 illustrations of violence, by defining "violent video or computer games" to include only those
26 games with depictions of violence toward "public law enforcement officer[s]" and only when
27 harm is inflicted by the player's character. The Act does not define "public law enforcement
28 officer."
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32 39. The Washington Legislature undertook no fact-finding effort and provided no
33 factual support for its claims that the restricted computer and video games promote either
34 "hostile and antisocial behavior" or disrespect for "public law enforcement officers."
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38 40. Not only are "curb[ing] hostile and antisocial behavior" and "foster[ing]
39 respect for public law enforcement officers" invalid governmental interests for the restriction
40 of speech, but these interests are not served by the Act's prohibitions.
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1 41. The Act is not the least restrictive means of achieving any of the Legislature's
2 asserted goals, and the Legislature refused to consider less speech-restrictive alternatives of
3 regulating minors' access to "violent" computer and video games, including those that were
4 proposed by Plaintiffs and their members.
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8 42. The Act does not set forth adequately specific standards for determining
9 which computer and video games have sufficient "violent" content to fall within the Act's
10 prohibitions.
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14 43. Some of the content displayed by the computer and video games created,
15 published, distributed, rented, sold, and/or made available to the public by Plaintiffs or their
16 members, while fully protected by the United States Constitution, may include scenes that
17 may be deemed by law enforcement officials in Washington, including the Defendants, to
18 meet the statutory test set forth in Paragraph 35 hereof, thus subjecting Plaintiffs or their
19 members to the threat of prosecution, as well as creating a chilling effect on their rights to
20 freedom of expression.
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24 44. The challenged provisions of the Act would infringe the First Amendment
25 rights (i) of businesses physically present in Washington, including members of Plaintiffs,
26 which face the threat of prosecution if they do not comply with restrictions on their right to
27 distribute constitutionally protected expression, (ii) of would-be customers of those
28 businesses--including both those under 17 as well as adults--who, because of these
29 restrictions, will be deprived of the opportunity to receive fully protected speech, and (iii) of
30 businesses located outside Washington, including members of Plaintiffs, whose ability to
31 distribute their creative works within Washington will be burdened based on the content of
32 those works of expression.
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45. The challenged provisions of the Act threaten Plaintiffs, their members, and other businesses involved in the creation, distribution, display, sale, or rental of computer and video games, as well as adults and those under 17 who wish to receive the speech in those games, with serious, immediate, and irreparable injury for which there is no adequate remedy at law.

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46. In this facial constitutional challenge to the Act, Plaintiffs have standing to assert the rights of, and harm to, the would-be customers of Plaintiffs and their members.

Count I

(First and Fourteenth Amendments--Freedom of Expression)

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47. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 46 as if fully set forth herein.

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48. The challenged provisions of the Act would impose governmental restrictions upon access to computer and video games based solely upon the violent content, as well as the viewpoint, of the creative expression depicted. The content of the expression made subject to these restrictions is not obscene. The content of the works of expression made subject to these restrictions is not included in any other category of expression that may constitutionally be regulated based solely upon its content.

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49. Specifically, the Act imposes unconstitutional content and viewpoint regulation by absolutely prohibiting a person from selling, renting, or permitting to be sold or rented, any computer or video game meeting the description set forth in Paragraph 35 hereof, to any person under the age of 17. The Act restricts the freedom of creators, distributors, and publishers of games, as well as purchasers, renters, and other players of such games, to communicate and receive expression that is not constitutionally subject to regulation based upon its content. Moreover, the Act's stated purposes--"curb[ing] hostile and antisocial

1 behavior" and "foster[ing] respect for public law enforcement officers"--are plainly
2 impermissible under the First Amendment. Not only does the Act fail to serve a compelling
3 governmental interest, but the Act is not narrowly tailored to serve any such interest, and the
4 Legislature refused to consider less speech-restrictive means of achieving its goals.
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8 50. The Act does not establish standards for determining which games contain
9 illustrations meeting the description set forth in Paragraph 35 hereof. The challenged
10 provisions of the Act would impose upon every person who sells, rents, or permits to be sold
11 or rented computer and video games, the burden of determining whether each such computer
12 or video game meets the description set forth in Paragraph 35 hereof, prior to holding that
13 game out to the public. The challenged provisions impose upon every such person the risk of
14 substantial penalties. This burden and risk are aggravated by the vagueness of the statutory
15 description of the regulated content. The challenged provisions thus would establish an
16 unconstitutional scheme of censorship under which even works of expression that do not
17 meet the statutory description in the Act would be suppressed because of the burden placed
18 upon persons selling or renting computer and video games of determining the scope of the
19 Act's coverage and because of the risk of erroneous determinations. Persons selling, renting,
20 or permitting to be sold or rented computer and video games (and their respective
21 distributors and suppliers) would be induced to refuse to include certain works in their
22 inventories or premises, for fear of running afoul of the Act's ambiguous prohibitions.
23 Imposition of this burden and risk serves no compelling interest and is not narrowly tailored
24 to serve any such interest.
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42 51. For each of the reasons set forth above, and others, the challenged provisions
43 of the Act are unconstitutional under the First Amendment to the United States Constitution,
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1 as applied to the State of Washington by the Due Process Clause of the Fourteenth
2 Amendment to the United States Constitution.
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5 **Count II**

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7 **(First and Fourteenth Amendments--Vagueness)**

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9 52. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 51 as if
10 fully set forth herein.

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12 53. The challenged provisions of the Act are unconstitutionally vague in that many
13 of the terms and phrases employed therein, including but not limited to, the terms and phrases
14 "realistic or photographic-like depictions," "aggressive conflict," "kills, injures, or otherwise
15 causes physical harm," "human form," and "depicted, by dress or other recognizable symbols,
16 as a public law enforcement officer," have no clear meaning in the context of computer and
17 video games. Persons of common intelligence are, therefore, forced to guess at their meaning
18 and at the scope of the challenged provisions.
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21 54. The unconstitutional vagueness of the challenged provisions operates to chill
22 producers, designers, publishers, and distributors of computer and video games as well as
23 imposes substantial burdens upon persons who sell, rent, or permit to be sold or rented
24 computer and video games, preventing them from exercising their constitutionally protected
25 freedom of expression. The Act's vagueness is also likely to lead to enforcement by law
26 enforcement officials on an unfair, subjective, and ad hoc basis. Because many of the Act's
27 terms have no clear meaning, the Act will restrict a far broader range of computer and video
28 games than even the State claims it is seeking to regulate, as stores, store clerks, and game
29 developers will respond to this uncertainty and fear of prosecution by refusing to provide
30 computer and video games--to both adults and minors--that conceivably could be deemed to
31 fall within the Act's prohibitions.
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Count IV

(Fourteenth Amendment--Equal Protection)

59. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 58 as if fully set forth herein.

60. The challenged provisions of the Act regulate and restrict under the threat of substantial penalties certain works of expression presented through the medium of computer and video games. These same regulations, restrictions, and penalties do not apply to other works of expression containing the same or similar content, but communicated in other media, including, by way of example only, cable television, broadcast television, movies, books, magazines, and the like. Indeed, many of these other media publish expression that is based on computer and video games that could fall within the prohibitions of the Act; computer and video games that could fall within the Act's prohibitions may also themselves be based on similar speech in other, unregulated media.

61. The challenged provisions of the Act arbitrarily and irrationally would establish a legislative scheme that creates classifications that burden fundamental rights and that is not closely related to any compelling state interest.

62. For the foregoing reasons, and others, the challenged provisions of the Act are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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Count V

(Violation of 42 U.S.C. § 1983)

63. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 62 as if fully set forth herein.

64. The challenged provisions of the Act would cause Plaintiffs and their members to be subjected to the deprivation of rights, privileges, and immunities secured to them by the Constitution and laws of the United States. The challenged provisions thus constitute a deprivation of rights actionable under 42 U.S.C. § 1983.

65. In the event Plaintiffs prevail on any claims under the Constitution of the United States set forth in this Complaint, Plaintiffs are entitled to recover attorneys' fees under 42 U.S.C. § 1988.

PRAAYER FOR RELIEF

WHEREFORE, Plaintiffs demand that this Court enter a judgment in Plaintiffs' favor and against Defendants as follows:

- (a) That this Court issue a declaratory judgment that the challenged provisions of the Act are void and of no force and effect;
- (b) That this Court issue a preliminary injunction and a permanent injunction against Defendants enjoining them from enforcing, or directing the enforcement of, the challenged provisions of the Act in any respect;
- (c) That Plaintiffs be awarded their attorneys' fees under 42 U.S.C. § 1988;
- (d) That Plaintiffs be awarded their costs herein; and
- (e) That this Court order such other general and equitable relief as it deems fit and proper.

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RESPECTFULLY SUBMITTED this 5th day of June, 2003.

JENNER & BLOCK, LLC

Paul M. Smith

Deanne E. Maynard

Kathleen R. Hartnett

601 Thirteenth Street, N.W., Suite 1200

Washington, D.C. 20005

Phone: (202) 639-6000

Fax: (202) 639-6066

and

PERKINS COIE LLP

By: 

David J. Burman, WSBA #10611

Signe Brunstad, WSBA #30944

Attorneys for Plaintiffs