

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VIDEO SOFTWARE DEALERS
ASSOCIATION et al.,

Plaintiffs,

v.

NORM MALENG et al.,

Defendants.

NO. C03-1245L

PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT

Note for Hearing: Friday, October 10, 2003
Time of Hearing: 9:00 a.m.

Oral Argument Requested

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1 Plaintiffs hereby move for summary judgment pursuant to Fed. R. Civ. P. 56(a),
2 based on all of the evidentiary materials placed before the Court in support of Plaintiffs'
3 prior motion for a preliminary injunction. As we show, there is no need for a trial for the
4 Court to hold that H.B. 1009, 58th Leg., Reg. Sess. (Wash. 2003) (hereinafter, "H.B. 1009"
5 or "the Act") is facially unconstitutional.
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10 I. INTRODUCTION

11 The Court is familiar with Plaintiffs' challenge to H.B. 1009, and has already
12 determined, in its July 10, 2003 Order Granting Plaintiffs' Motion for a Preliminary
13 Injunction ("Injunction Order"), that H.B. 1009 raises serious constitutional questions. The
14 Act forbids the sale or rental to persons under age 17 of computer and video games
15 (hereinafter called "video games") containing depictions of scenes where the player's
16 character may inflict harm on "public law enforcement officers." It thus constitutes a
17 "presumptively invalid" content-based regulation, R.A.V. v. City of St. Paul, 505 U.S. 377,
18 382 (1992), and indeed was enacted for the express purpose of preventing disfavored
19 messages from reaching young people. Such a law violates the "bedrock principle
20 underlying the First Amendment . . . that the government may not prohibit the expression of
21 an idea simply because society finds the idea itself offensive or disagreeable." Texas v.
22 Johnson, 491 U.S. 397, 414 (1989).
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36 The Act fails strict scrutiny: The justifications offered by the State are insufficient
37 both on their face and because of a lack of evidence that the Act actually serves those
38 purposes in a narrowly tailored way. Moreover, the Act's vagueness—which the State has
39 all but conceded—provides an independent basis for the Court to rule in Plaintiffs' favor.
40 The current record establishes these constitutional infirmities, and no evidence the State can
41 offer will suggest that a trial might lead to another outcome. This conclusion is consistent
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1 with that of all federal courts addressing similar attempts at regulating "violent" video
2 games. See Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 956-58
3 (8th Cir. 2003) ("IDSA") (M. Arnold, J.); American Amusement Mach. Ass'n v. Kendrick,
4 244 F.3d 572, 577-78 (7th Cir.), cert. denied, 534 U.S. 994 (2001). Because no evidence
5 supports the Act's "seemingly arbitrary" prohibition, Injunction Order at 7, there is no
6 genuine issue of material fact for trial, and Plaintiffs are entitled to summary judgment.
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12 II. STATEMENT OF FACTS

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14 Plaintiffs are companies or associations of companies that create, distribute, sell,
15 and/or rent video games. Compl. ¶¶ 12-20.¹ They bring this action to assert their own First
16 Amendment rights as well as those of their willing listeners. Id. ¶ 20. Because "plaintiffs
17 have identified various injuries that they . . . will suffer as soon as the Act becomes
18 effective," the Court has already held in its Injunction Order that Plaintiffs have standing to
19 bring this facial challenge, Injunction Order at 2, and that they also "have standing to assert
20 the First Amendment rights of their consumers, the minors who are deprived of access under
21 the Act," id.
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30 Because video games contain "story lines, detailed artwork, original scores, and a
31 complex narrative which evolves," the Court has further held that they are "expressive and
32 qualify as speech for purposes of the First Amendment." Id. at 4. We therefore will not
33 recite here the extensive record evidence establishing that video games should receive the
34 same level of First Amendment protection as books, movies and other expressive media.
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46 ¹ The name of one of the plaintiffs—the Interactive Digital Software Association, an association of
47 developers and publishers of video games—has been changed to the Entertainment Software Association.

1 Video game storylines often include law enforcement officers of various kinds. Such
2 personnel range from uniformed police officers (such as Chief Wiggum in The Simpsons'
3 Roadrage and the futuristic officers in Minority Report: Everybody Runs), to intelligence
4 officers (such as security operatives in Tom Clancy's Splinter Cell), to ancient guards (such
5 as the Romans in Age of Empires), to military "police" (such as the Gestapo occupying
6 France in Medal of Honor: Frontline), to zombies in police officer garb (as in Resident
7 Evil II). Declaration of Ed Fries in Support of Plaintiffs' Motion for a Preliminary
8 Injunction ("Fries Decl.") ¶¶ 26, 69. Whether such officers are "good" or "bad" is not
9 always obvious and may change as the plot and characters in a game develop. For example,
10 in Minority Report: Everybody Runs (based on the movie Minority Report), the player
11 assumes the role of the head of a futuristic police squad in Washington, D.C., who is framed
12 and thus must battle members of his own police force—who are mistakenly pursuing him—
13 to clear his name and save the world from nefarious forces. Id. ¶¶ 26, 29-34. Some video
14 games allow the player's character to "injure" or "kill" police officers; in other games,
15 players can "injure" or "kill" characters who are not police officers, but who may or may not
16 be considered "law enforcement officers"; and in other games, the player can take actions
17 that may or may not be viewed as inflicting "injury" on an identifiable law enforcement
18 officer—such as running a police car off the road. Id. ¶¶ 26-28.

19 House Bill No. 1009 restricts the distribution to minors of video games if their
20 content includes "realistic or photographic-like depictions of aggressive conflict in which
21 the player kills, injures, or otherwise causes physical harm to a human form in the game who
22 is depicted, by dress or other recognizable symbols, as a public law enforcement officer."
23 Act § 2. The Act does not define several of its key terms, including "public law
24 enforcement officer," "human form," "realistic or photographic-like . . . depiction," or

1 "physical harm." Id. A violation of the Act's prohibition, which the Act places within
2 Washington's criminal code, see Ch. 9.91 RCW (Misc. Crimes), constitutes a "civil
3 infraction." Act § 2. A violation of the Act "shall" be punished by a "maximum penalty and
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5 default amount" of \$500. Act § 3.
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9 The Act recites two purposes the Legislature thought it was serving: "foster[ing]
10 respect for public law enforcement officers," and "curb[ing] hostile and antisocial behavior
11 in Washington's youth." Act § 1. The Legislature also stated, without further elaboration,
12 that "there has been an increase in studies showing a correlation between exposure to violent
13 video and computer games and various forms of hostile and antisocial behavior." Act § 3.
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15 But nothing in the legislative record or the record of this case indicates that the Legislature
16 actually reviewed any studies. Nor do any studies exist that could establish the kind of
17 compelling justification required to uphold the constitutionality of the Act.
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25 **III. ARGUMENT**

26 **A. SUMMARY JUDGMENT STANDARD**

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28 The State has the burden of proof at trial to establish that H.B. 1009 passes First
29 Amendment scrutiny. See, e.g., United States v. Playboy Entm't Group, 529 U.S. 803, 816-
30 17 (2000). Thus, to survive Plaintiffs' summary judgment motion, the State must come
31 forward with sufficient evidence to create a genuine issue of material fact on each and every
32 "element essential to [its] case." Brother Records, Inc. v. Jardine, 318 F.3d 900, 909 (9th
33 Cir. 2003) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)); Underwager v.
34 Channel 9 Australia, 69 F.3d 361, 365 (9th Cir. 1995). Such evidence would have to include
35 "specific facts showing that there is genuine issue for trial." Celotex Corp., 477 U.S. at 324
36 (internal quotation marks omitted). The State "must demonstrate with evidence that is
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47 'significantly probative' or more than 'merely colorable' that a genuine issue of material fact

1 exists for trial." FTC v. Cyberspace.com, LLC, No. C00-1806L, 2002 WL 32060289, at *1
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3 (W.D. Wash. July 10, 2002) (Lasnik, J.) (quoting FTC v. Gill, 265 F.3d 944, 954 (9th Cir.
4 2001)). Bare allegations, speculation, or conclusions, or even a "scintilla" of evidence, are
5 insufficient to meet this burden. See Nelson v. Pima Community College, 83 F.3d 1075,
6 1081 (9th Cir. 1996); Columbia Pictures Indus., Inc. v. Professional Real Estate Investors,
7 Inc., 944 F.2d 1525, 1529 (9th Cir. 1991), aff'd, 508 U.S. 49 (1993); Forsberg v. Pacific
8 Northwest Bell Tel. Co., 840 F.2d 1409, 1419 (9th Cir. 1988). The State cannot meet its
9 burden here, as there are no genuine issues of material fact on any of the elements of its
10 case, much less all of the elements.
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19 **B. H.B. 1009 IS AN UNPRECEDENTED CONTENT- AND VIEWPOINT-**
20 **BASED RESTRICTION OF EXPRESSION THAT VIOLATES THE**
21 **FIRST AMENDMENT.**
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23 As already noted, this Court has held that video games merit full First Amendment
24 protection, agreeing with all other federal courts to have reached the question in comparable
25 cases. See, e.g., IDSA, 329 F.3d at 956-58 ("the pictures, graphic design, concept art,
26 sounds, music, stories, and narrative present in video games" entitle such games to First
27 Amendment protection); James v. Meow Media, Inc., 300 F.3d 683, 695-96 (6th Cir. 2002)
28 (finding "little difficulty in holding that the First Amendment protects video games" where
29 the games are targeted based on their "communicative aspect"), cert. denied, 123 S. Ct. 967
30 (2003); AAMA, 244 F.3d at 577-78. The Court has also recognized, and the State has
31 conceded, that H.B. 1009 regulates speech based on content, because the law restricts only
32 "violent" video games, defined by the Act as games containing depictions of violence
33 toward "public law enforcement officers." See Defendants' Response in Opposition to
34 Motion for Preliminary Injunction ("State PI Opp.") at 11 n.8.; Injunction Order at 4.
35 Indeed, the Act regulates not just based on content, but also, more perniciously, on
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1 viewpoint. As the Act expressly states, it was designed as a means of "foster[ing] respect
2 for law enforcement officers," Act § 1, by censoring only those games with depictions in
3 which the player's character may act violently toward such governmental officials.
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6 Because H.B. 1009 is a content-based restriction of speech, it is "presumptively
7 invalid," Injunction Order at 4 (citing R.A.V., 505 U.S. at 382), and must satisfy strict
8 scrutiny, see Playboy, 529 U.S. at 811-12. As the Court has explained, see Injunction Order
9 at 4, the State must (1) articulate a legitimate and compelling state interest; (2) prove that
10 H.B. 1009 actually serves that interest and is "necessary" to do so (i.e., prove that the
11 asserted harms are real and would be materially alleviated by the Act); and (3) show that
12 H.B. 1009 is narrowly tailored to achieve that interest. See, e.g., R.A.V., 505 U.S. at 395-96;
13 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664-65 (1994) (state interest must actually
14 be served by challenged statute); Simon & Schuster, Inc. v. Members of the N.Y. State
15 Crime Victims Bd., 502 U.S. 105, 118 (1991). In addition, as the Court has made clear,
16 "[w]here the challenged legislation restricts or limits freedom of speech, . . . courts must
17 ensure that the legislature's judgments are based on reasonable inferences drawn from
18 substantial evidence." Injunction Order at 6 (citing, inter alia, Turner, 512 U.S. at 666).²
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40 ² Indeed, in the present strict scrutiny case, Turner's demand that there be an evidentiary basis for
41 government regulation of speech applies with even more force. Conversely, Turner's statement that "courts
42 must 'accord substantial deference to the predictive judgments' of the legislature," Injunction Order at 6
43 (quoting Turner, 512 U.S. at 666), must be viewed within Turner's more relaxed context of intermediate
44 scrutiny and should not be applied in the context of strict scrutiny. This is particularly true here, where the
45 Legislature enacting H.B. 1009 came nowhere close to "amass[ing] and evaluat[ing] . . . vast amounts of data
46 bearing upon" a "complex and dynamic" issue—the context for deference envisioned by the Supreme Court in
47 Turner. 512 U.S. at 665-66 (internal quotation marks and citation omitted).

1 The State does not come close to satisfying this exacting test. Nor is it conceivable
2 that it could do so at trial. Accordingly, a grant of summary judgment for Plaintiffs is
3 warranted.
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7 **1. The State Does Not Have a Compelling Interest in Restricting**
8 **Access to the Targeted Games.**
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10 Probably because it only served to highlight the unconstitutionality of the Act, the
11 State has already abandoned reliance on one of the justifications stated in the Act—
12 "foster[ing] respect for law enforcement officers." See Injunction Order at 5 & n.3. Instead,
13 the State now alleges compelling interests in "discouraging criminal violent behavior" and
14 promoting "the well-being of its youth." Id. at 5. This new approach is constitutionally
15 invalid as well.
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22 **(a) "Discouraging Criminal Violent Behavior" as a**
23 **Justification**
24

25 With respect to its rationale of "discouraging criminal violent behavior," the State
26 must meet the extremely stringent compelling interest standard set forth in Brandenburg v.
27 Ohio, 395 U.S. 444 (1969). See, e.g., James, 300 F.3d at 699 ("Federal courts, however,
28 have generally demanded that all expression, advocacy or not, meet the Brandenburg test
29 before its regulation for its tendency to incite violence is permitted."). Brandenburg holds
30 that the government has a compelling interest in regulating expression, based on a concern
31 that it will cause listeners to engage in unlawful or violent behavior, only if the government
32 can prove that such expression is "directed to inciting or producing imminent lawless action
33 and is likely to incite or produce such action." Ashcroft v. Free Speech Coalition, 122 S. Ct.
34 1389, 1403 (2002) (quoting Brandenburg, 395 U.S. at 447) (emphasis added). This exacting
35 standard reflects the core principle that "[t]he mere tendency of speech to encourage
36 unlawful acts is not a sufficient reason for banning it." Id.
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1 The relevant finding by the Legislature in the Act simply ignores these constitutional
2 principles. The Legislature found only an increase in the number of studies showing a
3 "correlation between exposure to violent video and computer games and various forms of
4 "hostile and antisocial behavior." Act § 1 (emphasis added). The Legislature thus did not
5 comment on any linkage to actual violence or make any causal claim at all. But even if it
6 had done so, the finding would have been insufficient because the Legislature did not, and
7 obviously could not, find that video games—works designed for entertainment played safely
8 every day by millions—are directed at inciting violence and likely to do so. Brandenburg in
9 this context absolutely precludes reliance on something short of that—i.e., a determination
10 that a given category of video games may motivate some small number of players to engage
11 in an increased amount of "copycat" violent behavior. That is no more permissible than it
12 would be to ban books advocating revolution, or pamphlets expressing hate toward
13 particular racial or ethnic groups, both of which may increase the chance that someone,
14 somewhere will engage in violence.

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29 Courts confronting comparable efforts to regulate or penalize video games based on
30 their "violent" content have agreed that Brandenburg's requirements cannot be met by
31 alleging a correlation between game play and real life violence. For example, Judge Posner
32 explained that, absent concrete proof by the government that particular video games have a
33 literal effect of "incit[ing] youthful players to breaches of the peace," Supreme Court
34 precedent dictates that such games may not be prohibited based on the mere assertion that
35 violence may occur. AAMA, 244 F.3d at 575. Similarly, the Sixth Circuit has concluded
36 that "violent" video games "fall[] well short" of the Brandenburg threshold, because the
37 "glacial process of personality development" allegedly affected by "violent" video games "is
38 far from the temporal imminence that we have required to satisfy the Brandenburg test."
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1 James, 300 F.3d at 698; see Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167, 182 (D.
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3 Conn. 2002) (at worst, video games "amount[] to nothing more than advocacy of illegal
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5 action at some indefinite future time," and thus do not satisfy Brandenburg (quoting Hess v.
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7 Indiana, 414 U.S. 105 (1973))); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264,
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9 1279 (D. Colo. 2002) (refusing to "dilute the Brandenburg test" in the context of "violent"
10
11 video games).³

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13 Moreover, even if Brandenburg were not the applicable test, the State has failed to
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15 offer any evidence that game play causes any violence at all. See Playboy, 529 U.S. at 822
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17 ("The question is whether an actual problem has been proved in this case.").⁴ The State has
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19 cited a handful of academic articles, which are then summarized and characterized in
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21 testimony before the United States Congress, see State PI Opp. Exhs. A-E, but none of these
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23 materials proves a link between video games and violence—as Courts of Appeals
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25 considering the very research cited by the State have recognized. See, e.g., IDSA, 329 F.3d
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27 at 958-59 (considering testimony of Anderson and concluding that his studies' claims of
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29 increased aggression do not support proscribing speech); AAMA, 244 F.3d at 578-79
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31 (considering current studies, including some relied upon by the State here, and describing
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33 the city's "claim of harm to its citizens from these games" as "implausible, at best wildly
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38 ³ In an analogous context—the attempted regulation of non-obscene pornography based on, among
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40 other things, allegations that such materials may lead to the infliction of violence on women—the Ninth Circuit
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42 has similarly concluded that such regulation falls short of what Brandenburg requires, and thus fails First
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44 Amendment scrutiny. See Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1199-1200 & n.8 (9th Cir. 1989)
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46 (noting the "equivocal evidence" of any "causal relationship between pornographic materials and violent
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48 actions").

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50 ⁴ The anecdotal, baseless hearsay of interested parties who believe that violent games have caused
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52 certain acts of violence, relied upon by the State, see, e.g., State PI Opp. at 12 n.9; id. at Exh. H, cannot be the
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54 basis for censoring speech. Playboy, 529 U.S. at 822 ("[T]he government must present more than anecdote
55
56 and supposition.").

1 speculative"); id. (existing studies "do not find that video games have ever caused anyone to
2 commit a violent act"). Rather, as the Court recognized, these studies, taken in their most
3 favorable light, at most show that depictions of violence in all sorts of media may "have an
4 immediate and measurable effect on the *level of aggression* experienced by viewers and may
5 have an enhanced effect on youngsters." Injunction Order at 7 (emphasis added).⁵ But a
6 form of entertainment can hardly be banned, even for minors, because it stimulates people to
7 feel aggressive. See, e.g., IDSA, 329 F.3d at 958; AAMA, 244 F.3d at 577.

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10 In fact, many of the studies—those that study correlations between game play and
11 other behaviors over time—do not claim causation at all, much less causation to real-life
12 violence. For example, the Anderson & Dill paper, State PI Opp. Exh. D, reports
13 correlations between game play and personality features and academic achievement. The
14 authors explicitly caution that "causal" conclusions about such studies are "risky at best."
15 Id. at 782. Similarly, the Buchanan study cited by the State, State PI Opp. Exh. E, focuses
16 on "relational aggression"—in contrast to physical violence—and notes its own
17 "limitations," including that the "findings reported here are correlational and do not merit
18 casual [sic] assessment," id. at 9.

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21 By contrast, the evidence supplied by the Plaintiffs includes a careful and thorough
22 review of the existing literature concluding that "media violence does not cause aggression,
23 or if it does the effects are so weak that they cannot be detected and must therefore be
24 vanishingly small." Jonathan L. Freedman, Media Violence and Its Effect on Aggression:
25 Assessing the Scientific Evidence, x-xi, 200-01 (2002); see Plaintiffs' Reply to State
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⁵ Although using the term "youngsters" to describe the studies' findings, the Court also recognized that one of the main studies relied upon by the State concerning the alleged effect of "violent" video games concerned college students, not "youngsters." Injunction Order at 7.

1 Opposition to Plaintiffs' Motion for a Preliminary Injunction ("Plaintiffs' PI Reply") Exh. A
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3 (article by Christopher Ferguson discussing the "long history of human violence" predating
4 any violent media). Testimony at the same federal Congressional hearing relied upon by the
5 State, see State PI Opp. Exh. B, refuted the State's claim of a "scientific connection between
6 violent video games and real world violence," State PI Opp. at 4. See Plaintiffs' PI Reply
7
8 Exh. B (testimony of Jeffrey Goldstein explaining why the results of the studies cited by the
9 State do not support the conclusions those studies reach). Indeed, Washington's own
10 Department of Health conducted an expansive study of "violent" video games in 2000, in
11 response to a legislative request, and concluded that "the research is not supportive of a
12 major public concern that violent video games lead to real-life violence." See id. Exhs. C, D
13 (executive summary and full study, entitled Video Games and Real-Life Aggression: A
14 Review of the Literature). The Washington study's conclusion is consistent with a 2001
15 Surgeon General report stating that "media violence has a relatively small impact on
16 violence," and that no research supports the notion that violent media leads to subsequent
17 violent behavior. See
18 <http://www.surgeongeneral.gov/library/youthviolence/chapter4/appendix4bsec3.html>. It is
19 also consistent with the Government of Australia's conclusion that "only weak and
20 ambiguous evidence" exists concerning "effects of aggressive content" in video games, and
21 that any such effects "are unlikely to be substantial." Kevin Durkin & Kate Aisbett,
22 Computer Games and Australians Today (Office of Film and Literature Classification 1999).

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41 More to the point, absolutely no research, cited by the State or otherwise, purports to
42 study the effects of the particular video games at issue here—those in which the player may
43 choose to act violently toward law enforcement officers. So there is no basis for the
44 supposition that such games cause harm to police officers or anyone else.
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(b) The "Well-Being of Youth" as a Justification

As noted above, the State now asserts a "second" compelling interest in protecting the "well-being of its youth." Injunction Order at 5. The specific harm to minors' "well-being" that the State seeks to prevent is the "development of aggressive personality." State PI Opp. at 13 (quoting the Anderson and Bushman study, State PI Opp. Exh. C). But this fear that individuals may develop "aggressive tendencies and anti-social behaviors," Injunction Order at 6, appears to be no more than a repackaging of the insufficient justification just discussed—the concern that game play will cause listeners to engage in unlawful or violent behavior. See id. (noting that the State's two justifications merged into a "public safety" rationale).

To the extent the second justification is broader, it is even more troubling and less persuasive. An asserted need to protect minors from psychological harm has been rejected as a potential justification of censorship of violent video games by every court that has reached the question. See IDSA, 329 F.3d at 958-59; AAMA, 244 F.3d at 578-59.⁶ The government does not have a generalized power to limit minors' exposure to creative works that it thinks will be the most psychologically beneficial. Minors generally enjoy the same First Amendment rights as adults to be free from content-based governmental regulation of speech they utter or receive. See, e.g., Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-14 (1975). The only context in which concerns about psychological harm can justify

⁶ Indeed, it is ironic that the State now relies on such a rationale, because throughout the legislative process and this litigation, the State has attempted to distinguish H.B. 1009 from the attempted "harmful to minors" regulations of video games that were ultimately deemed unconstitutional by federal appeals courts. See, e.g., State PI Opp. at 14-15; id. at Exh. A (May 14, 2003 Letter from Rep. Dickerson, to Gov. Locke) (articulating "[d]ifferences between [H]B 1009 and laws previously found unconstitutional," and recognizing that courts have struck down "harmful to minors" regulations of "violent" video games for lack of a compelling interest).

1 censoring expression accessed by minors is in the context of sexually explicit speech, which
2 becomes unprotected as to minors if it meets the description of what is "harmful to minors."
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4 See Ginsberg v. New York, 390 U.S. 629 (1968). Ginsberg is an extension of the obscenity
5 doctrine, and the "harmful to minors" doctrine cannot be uprooted from that context and
6 applied to violent speech or any other non-sexual speech of which the State happens to
7 disapprove for minors. Unlike obscene speech, speech depicting violence is fully protected.
8
9 See Winters v. New York, 333 U.S. 507, 510 (1948). Accordingly, the sexual "harmful to
10 minors" cases cited by the State and referenced by the Court in its Injunction Motion, see,
11 e.g., Injunction Order at 5 (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115,
12 126 (1989)), do not support a compelling interest in this case. See IDSA, 329 F.3d at 959.

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14 In any event, as explained above, the State has come forth with no evidence of real
15 "harm" to minors sufficient to meet strict scrutiny. See supra, at 9-11. In fact, as Judge
16 Posner observed in AAMA, it might well be more harmful to seek to insulate minors from
17 violent content: "To shield children right up to the age of 18 from exposure to violent
18 descriptions and images would not only be quixotic, but deforming." 244 F.3d at 577.

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31 **2. Even If the State Has Articulated a Compelling Interest in**
32 **Theory, H.B. 1009 Neither Advances Any Such Interest in a**
33 **Direct and Material Way Nor Is Narrowly Tailored.**
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35 Assuming that the State's justifications for H.B. 1009 were not facially illegitimate,
36 the Act nonetheless violates the First Amendment because it does not materially advance the
37 State's purported interests. Nor is the Act narrowly tailored, as the State has bypassed other,
38 less restrictive means of achieving its alleged goals. For each of these reasons, H.B. 1009
39 fails strict scrutiny.
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1 **(a) H.B. 1009 Does Not Advance the State's Purported**
2 **Interests.**

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4 As the Court previously explained, even if the State could articulate a compelling
5 interest, it must show that its proposed regulation will "alleviate the supposed threat in a
6 direct and material way." Injunction Order at 6; see id. at 5 (citing Turner, 512 U.S. at 664-
7 65). That is, the Act must actually "serve" the alleged state interest. Republican Party of
8 Minnesota v. White, 536 U.S. 765, 776 (2002). Thus, "[i]t is not enough to show that the
9 Government's ends are compelling; the means must be carefully tailored to achieve those
10 ends." Sable, 492 U.S. at 126 (emphasis added). Under this standard, H.B. 1009 fails
11 scrutiny, because the Act does not serve the interests asserted, let alone in a "direct and
12 material way." Cf. Injunction Order at 8 ("serious questions" whether the Act will "alleviate
13 the perceived harm").

14 The State has yet to explain how the Act's regulation of video games depicting
15 violence toward law enforcement officers will serve the State's broad purported compelling
16 interests—preventing actual violence and ensuring minors' well-being. Indeed, there is
17 absolutely no "fit" between the Act and the harms alleged, particularly because the State has
18 produced no evidence or studies demonstrating any causal link between "violent" games and
19 real-world violence, never mind evidence specific to law enforcement officers. Thus, as the
20 Court has recognized, the Act is a "seemingly arbitrary" regulation, Injunction Order at 7,
21 one "barely tailored to serve [its asserted] interest at all," White, 536 U.S. at 776.

22 Moreover, as the Court has explained, the Act is both over- and under-inclusive,
23 Injunction Order at 7—strong evidence that the Act fails to advance the State's purported
24 interests, see, e.g., Florida Star v. B.J.F., 491 U.S. 524, 540 (1989) ("facial
25 underinclusiveness" of a regulation undermines the claim that the regulation serves its
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1 alleged interests). On one hand, the Act "sweep[s] too broadly" by "restrict[ing] access to
2 games which mirror mainstream movies," including games "specifically rated as appropriate
3 for teenagers." Injunction Order at 8. On the other hand, depictions of violence—including
4 violence against law enforcement officers—are found not only in video games, but also in
5 movies, books, magazines, music, art, as well as on television and the Internet. See, e.g.,
6 AAMA, 244 F.3d at 579 ("violent" video games "are a tiny fraction of the media violence to
7 which modern American children are exposed"). Indeed, much of the body of research
8 relied upon by the State is not specific to video games, but pertains to media violence
9 generally. See, e.g., State PI Opp. Exh. B. (statement of Craig Anderson). Yet, as this Court
10 recognized, the countless depictions of violence (and violence toward law enforcement
11 officers) in other media, are left unaffected by H.B. 1009. See Injunction Order at 7 ("The
12 state has not made any attempt to regulate the total amount of violence to which minors are
13 exposed nor has it attempted to regulate all of the graphic violence depicted in video
14 games. . . .").

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29 Faced with this striking disconnect between H.B. 1009's narrow prohibition and the
30 broad compelling interests it claims to serve, the State has consistently responded as
31 follows: "The language of the statute was intentionally narrow in order to pass
32 constitutional muster." State PI Opp. at 15. This retort simply misses the point, because
33 regardless of how narrow or broad a regulation may be, that regulation must have some
34 logical relationship to the asserted state interest, and directly and materially serve that
35 interest, in order to survive First Amendment scrutiny. See, e.g., White, 536 U.S. at 765,
36 776; Turner, 512 U.S. at 664-65; Injunction Order at 5-6. But, as this Court observed, the
37 restriction here "will have no effect at all on the other channels through which violent
38 representations are presented to children, nor will it keep minors from playing extremely
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1 violent video games: only those involving police officers would be off-limits." Injunction
2 Order at 7-8. Because the State can suggest no link between the narrow class of expressive
3 works it has selected for regulation and the harms it seeks to prevent, the State's refrain
4 simply highlights the lack of "fit" between its alleged interests and the arbitrary nature of the
5 category of speech it seeks to censor. For this reason alone, Plaintiffs are entitled to
6 summary judgment.
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12 **(b) H.B. 1009 Is Not Narrowly Tailored.**

13 The State's "narrow tailoring" argument reveals its misunderstanding of, and failure
14 to comply with, the Constitution's actual requirement of narrow tailoring. Although it is true
15 that H.B. 1009 narrowly targets one particular type of violent speech—indeed, so much so
16 that it regulates speech based on viewpoint—that has absolutely nothing to do with the
17 narrow tailoring that strict scrutiny demands. "Narrow tailoring" in the Constitutional sense
18 requires that regulation of speech be limited to what is necessary to achieve the legislature's
19 end, and that the State explain the rejection of less speech-restrictive alternatives, see, e.g.,
20 R.A.V., 505 U.S. at 395; Playboy, 529 U.S. at 813.
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30 H.B. 1009 is not narrowly tailored. As the Court recognized, the Act's prohibition is
31 overbroad, as "it would restrict access to games which mirror mainstream movies" and ones
32 that "are specifically rated as appropriate for teenagers." Injunction Order at 7-8. In
33 addition, as discussed in more detail below, the Act's provisions, though ostensibly
34 "narrowly" confined to games involving violence toward law enforcement officers, are so
35 vague that they could be read to cover a large subset of existing video games. See Reno v.
36 ACLU, 521 U.S. 844, 871-72 (1997) (vagueness "undermines the likelihood that the [Act]
37 has been carefully tailored to the . . . goal of protecting minors"). And, regardless of
38 vagueness, the narrow tailoring requirement requires the State to prove that a "plausible, less
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1 restrictive alternative . . . will be ineffective to achieve its goals." Playboy, 529 U.S. at 816.
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3 The State cannot make such a showing here, where such an alternative exists: awareness-
4 raising measures concerning the video game rating system, which provides guidance to
5 parents and others about the content of video games. See id. at 824 ("A court should not . . .
6 presume parents, given full information, will fail to act."); 44 Liquormart, Inc. v. Rhode
7 Island, 517 U.S. 484, 507-08 (1996) (plurality op.) (striking down advertising ban because
8 of less restrictive alternatives such as an "educational campaign" or "counterspeech"). In
9 any event, the State was required at least to have considered the efficacy of less restrictive
10 alternatives, see Sable, 492 U.S. at 129-30, but never did so. Rather, the State refused to
11 entertain Plaintiffs' offer to work with the State to help educate consumers about the video
12 game rating system.
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22 In sum, the State cannot show that the Act serves any compelling government
23 interest in a narrowly tailored manner. Rather, the Act is a "seemingly arbitrary" regulation
24 of expression, Injunction Order at 7—one impermissibly designed "to protect the young
25 from ideas or images that a legislative body thinks unsuitable for them." Erznoznik, 422
26 U.S. at 213-14. Further factual development will do nothing to remedy these constitutional
27 flaws. Accordingly, H.B. 1009 fails strict scrutiny, and summary judgment should be
28 entered for Plaintiffs.
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37 **C. H.B. 1009 IS UNCONSTITUTIONALLY VAGUE.**

38 The Act is unconstitutional on another, independent ground: vagueness. Because
39 several of the Act's terms are impermissibly vague and place the burden of compliance on
40 game retailers, the Act will restrict a far broader range of video games than even the State
41 claims it is seeking to regulate. The Constitution demands that statutes be set forth with
42 "sufficient definiteness that ordinary people can understand what conduct is prohibited."
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1 Kolender v. Lawson, 461 U.S. 352, 357 (1983). Such precision is essential to "give the
2 person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that
3 he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Exacting
4 precision is demanded of legislation imposing penalties where free speech rights are at issue.
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6 See NAACP v. Button, 371 U.S. 415, 433 (1963) (noting dangers, "in the area of First
7 Amendment freedoms," of "the existence of a penal statute susceptible of sweeping and
8 improper application").
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Several key terms in the Act either are inherently vague or are defined in such a way
as to fail to provide fair notice. For example, the core of the Act's prohibition concerns
depictions of "public law enforcement officer[s]," but that term has no easily understood
meaning in the context of a medium where the action takes place in a wide variety of
fictional and historical settings. For example, in a James Bond game, do secret agents meet
that definition? What about military officers? Military officers serving as civilian law
enforcement? Do "enemy" officers or security guards qualify? What if a villain in the game
disguises himself as a police officer? What if the player's role in the game is that of a police
officer, and the player may accidentally "harm" his partner?

The same sorts of interpretive problems plague the term "human form"—which is ill
suited to a medium that relies extensively on extra-terrestrial or make-believe life forms and
characters—and the term "realistic or photographic-like . . . depictions" of violence—which
has no clear meaning in a medium in which all depictions are obviously computer-generated
and thus inherently unrealistic.

Rather than attempt to rebut these charges of vagueness, the State has effectively
conceded that H.B. 1009 is vague. Upon Plaintiffs' request for clarification in their
injunction motion, the State responded: "If the statute contained precise language . . . ,

1 designers and makers of a video game could certainly design around such a precise
2 definition, eviscerating the intent of the statute." State PI Opp. at 16. This response can
3 only be interpreted as an admission that the State has crafted H.B. 1009 vaguely in order to
4 create a chilling effect on expression. If the legislature's true intent in passing H.B. 1009
5 were merely to restrict games depicting violence toward "law enforcement officers," it
6 would not matter that game designers could "design around such a precise definition," as
7 long as the games did not offend the precise terms of a properly defined statute.
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14 This interpretation of the State's response is confirmed by the legislative record,
15 which, far from shedding light on how to interpret these terms, actually indicates the hope of
16 the Act's proponents that the Act's terms will be confusing to the average person, will be
17 interpreted more broadly than as provided, and will, accordingly, chill speech. See Hearing
18 Before the Senate Committee on Children and Family Services and Corrections (Apr. 1,
19 2003) (statement of Rep. Dickerson) ("The practical effect of passing this legislation,
20 although written very narrowly, I believe, will be much greater and will take in violence
21 toward women."); Hearing Before the House Juvenile Justice and Family Law Committee
22 (Jan. 22, 2003) (statement of Rep. Dickerson) (the Act's effect will be that "retailers will
23 have to do what they say they're doing already and that is not allow any M-rated games to be
24 sold to underage children," not just those games involving violence to law enforcement
25 officers). Thus, not only will the Act's vagueness impermissibly cause Plaintiffs and others
26 to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas
27 were clearly marked," Grayned, 408 U.S. at 109 (quotation marks omitted; alteration in
28 original), but the Act's framers actually intended this forbidden effect.
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44 Accordingly, as this Court noted, "it is not at all clear how defendants will interpret
45 and enforce the statute." Injunction Order at 2. Moreover, stores and store clerks will be
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1 subject to steep liability if they wrongly guess about what games the Act covers. Game
2 creators, distributors, and retailers will respond to the uncertainty in the Act, and the
3 penalties the Act imposes, by either self-censoring or otherwise restricting access to any
4 potentially offending video game title. See Fries Decl. ¶¶ 8-9. Some range of games will
5 not be made (or will be made differently) and some games will not be stocked at all. See id.
6 ¶ 9. Such understandable, self-protective behavior will prevent access to such expression
7 not only by children, but also by adult customers as well—whose right to enjoy "violent"
8 video games is undisputed by the State. Taken together, the vague terms used in the Act
9 itself and the Act's legislative history create an unwarranted chilling effect on protected
10 speech and render the Act unconstitutionally vague.
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21 **D. THE ACT IS AN UNLAWFUL PRIOR RESTRAINT.**

22 The challenged provisions of the Act also constitute an unconstitutional prior
23 restraint. It is blackletter law that prior restraints on expression are "the most serious and the
24 least tolerable infringement on First Amendment rights," Nebraska Press Ass'n v. Stewart,
25 427 U.S. 539, 559 (1976), and thus are presumptively unconstitutional, see, e.g.,
26 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975). In determining
27 whether a regulation is a prior restraint, courts look to "substance and not to mere matters of
28 form, and . . . in accordance with familiar principles . . . [statutes] must be tested by [their]
29 operation and effect." Near v. Minnesota ex rel. Olson, 283 U.S. 697, 708 (1931). The
30 "operation and effect" of the Act render it a prior restraint on speech. The Act imposes stiff
31 penalties for those who engage in covered expression. The Act is also vague, making it
32 likely that authorities will enforce the Act on an ad hoc basis. In effect, video game retailers
33 will be restrained from selling a great number of video games—some ultimately covered by
34 the statute, and some not—and the only way a retailer can be confident of avoiding
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1 prosecution for selling or renting a game is to consult with local authorities before doing so.
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3 Because a Ninth Circuit decision departs from these principles, see Free Speech Coalition v.
4 Reno, 198 F.3d 1083, 1096-97 (9th Cir.), aff'd on other grounds, 535 U.S. 234 (2002),
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6 Plaintiffs seek to preserve this claim and argument but rely primarily on the constitutional
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8 deficiencies identified above.
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10 IV. CONCLUSION

11 For the foregoing reasons, the Court should enter summary judgment for Plaintiffs.
12

13 DATED: September 15, 2003.
14

15
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CERTIFICATE OF SERVICE

On September 15, 2003, I caused to be served upon counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the following documents: **Plaintiffs' Motion for Summary Judgment; and Order Granting Plaintiffs' Motion for Summary Judgment.**

HAND DELIVERY

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 15th day of September, 2003.

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