

# **EXHIBIT F**

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JUN 25 2003 DJ  
AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
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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 **CV03 1245**

PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR  
June 27, 2003

ORAL ARGUMENT REQUESTED

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CV 03-01245 #00000002

I. INTRODUCTION

Plaintiffs Video Software Dealers Association ("VSDA"), Interactive Digital  
Software Association ("IDSA"), Washington Retail Association ("WRA"), Interactive  
Entertainment Merchants Association ("IEMA"), International Game Developers Association  
("IGDA"), and Hollywood Entertainment Corporation, move this Court, pursuant to Federal

PLAINTIFFS' MOTION FOR PRELIMINARY  
INJUNCTION (NO ) - 1  
[41632-0001/SL031550 241]

**ORIGINAL**

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1 Rule of Civil Procedure 65, for an order preliminarily enjoining Defendants and their officers,  
2 employees, and representatives from enforcing H B 1009, 58th Leg , Reg Sess (Wash  
3  
4 2003) (hereinafter, the "Act") The Act was signed into law on May 20, 2003, and is due to  
5  
6 take effect on July 27, 2003 This motion is based on the argument herein, the attached  
7  
8 declarations, and the complaint and other records in this case A proposed order  
9  
10 accompanies this motion  
11

12 Washington's unprecedented legislation forbids the sale or rental of certain "violent"  
13  
14 computer and video games ("video games") to individuals under age 17 based on the content  
15  
16 and viewpoint of those games The Act defines "violent" games to include only those games  
17  
18 with scenes of violence depicting harm to "public law enforcement officers," and only when  
19  
20 the player's character is depicted causing the harm Such explicit content and viewpoint  
21  
22 discrimination violates the "bedrock principle underlying the First Amendment that the  
23  
24 government may not prohibit the expression of an idea simply because society finds the idea  
25  
26 itself offensive or disagreeable " Texas v Johnson, 491 U S 397, 414 (1989) That rule is  
27  
28 especially salient where, as here, the government is expressly censoring speech for the  
29  
30 purpose of fostering greater "respect" for one category of government officials The  
31  
32 Constitution forbids restricting speech in an attempt to control what individuals think of their  
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34 government and its officials Ashcroft v Free Speech Coalition, 122 S Ct 1389, 1403  
35  
36 (2002) ("First Amendment freedoms are most in danger when the government seeks to  
37  
38 control thought or to justify its laws for that impermissible end ")  
39

40 This Court should enjoin the Act Plaintiffs present a compelling case of likely  
41  
42 success on the merits of their constitutional challenge Indeed, similar attempts to regulate  
43  
44 "violent" computer and video games, as well as "violent" speech in other entertainment  
45  
46 media, have been deemed invalid by every federal court to have reached the question  
47



1 Moreover, Plaintiffs will suffer irreparable harm if the Act is allowed to go into effect  
 2  
 3 As the Ninth Circuit has recognized, the loss of First Amendment freedoms – for any amount  
 4  
 5 of time – constitutes irreparable injury. The Act's direct prohibition and its chilling effects  
 6  
 7 will immediately affect the First Amendment rights of game creators, distributors, retailers,  
 8  
 9 and players – all of whose rights are at stake in this facial challenge

## 10 II. FACTUAL BACKGROUND

### 11 A. The Nature of Video Games

12 Plaintiffs are companies or associations of companies that create, publish, distribute,  
 13  
 14 sell, and/or rent computer and video games. (Compl ¶¶ 12-20.) Many Plaintiffs and their  
 15  
 16 members do business in Washington, including in King County, and fear prosecution or loss  
 17  
 18 of audiences in King County. They bring this action because the Act threatens to censor  
 19  
 20 distribution of some of Plaintiffs' creative works, based solely upon their expressive content  
 21  
 22 and viewpoint. In this facial challenge, Plaintiffs also assert the rights of willing listeners  
 23  
 24

25 Computer and video games are a modern form of artistic expression. Like movies  
 26  
 27 and television, as well as other forms of expression, these games tell stories and entertain  
 28  
 29 audiences through the use of complex pictures and sounds, and sometimes through text  
 30  
 31 (Fries Decl ¶ 10.) Indeed, these games often contain storylines and character development  
 32  
 33 comparable to those of books and movies. A plot develops and dialogue among characters  
 34  
 35 takes place as the story of the game unfolds, often in response to actions taken by the player  
 36  
 37 (Fries Decl ¶ 13.) Like great literature, these games frequently involve themes such as good  
 38  
 39 versus evil, triumph over adversity, struggle against corrupt powers, and quest for adventure  
 40  
 41 (Fries Decl ¶ 11.) For example, in *Resident Evil II*, the player tries to save a city from a  
 42  
 43 virus – created by the sinister Umbrella corporation – that turns people into zombies. (Fries  
 44  
 45 Decl ¶¶ 65-69.) In *Medal of Honor Frontline*, the player fights as an American soldier  
 46  
 47 fighting to help liberate Europe from Hitler's control. (Fries Decl ¶¶ 23, 47-56.)

1 In addition to frequently involving intricate storylines, computer and video games also  
2 feature the artwork of some of the best graphic artists (Fries Decl ¶ 14 ) The typical game  
3 contains many different animated or computer-generated illustrations (Fries Decl ¶ 14 ) At  
4 various points in the story, game play may also include movie-like clips – sometimes actual  
5 clips from movies related to the game – which advance the storyline or the character's  
6 development (Fries Decl ¶ 14 ) Computer and video games also contain music, much of it  
7 original, which enhances the artistic expression of the game just as movie soundtracks do  
8 (Fries Decl ¶ 14 ) For instance, *Medal of Honor: Frontline* features over 70 minutes of  
9 original orchestral music by composer Michael Giacchino, and in *Grand Theft Auto Vice*  
10 *City*, the player can listen to a variety of radio stations while driving or flying through Vice  
11 City (Fries Decl ¶¶ 39, 53 )

12 Computer and video games engage the imagination of viewers and place them into a  
13 world of fantasy Many games allow the game player to become an active participant in  
14 shaping the unfolding narrative (Fries Decl ¶¶ 12-13 ) For example, *Tom Clancy's Splinter*  
15 *Cell* permits a player assuming the role of a National Security Agency operative, while  
16 searching for lost agents in the Former Soviet Republic of Georgia, to make a variety of  
17 choices that affect how the storyline unfolds and that highlight the complexities of a lawless  
18 political climate (Fries Decl ¶¶ 41-46 ) Even games that do not center on a complex  
19 narrative use graphic and sound elements to create an experience for the game player that  
20 provokes curiosity and evokes a sense of mood (Fries Decl ¶ 16 ) Moreover, these games,  
21 while designed to entertain, can also inform For example, *Age of Empires II The Age of*  
22 *Kings*, which enables a player to lead a variety of historical civilizations, informs players  
23 about the 1000 years of history between the fall of Rome and the Middle Ages (Fries Decl  
24 ¶¶ 17, 83-88 )



1 Not only are computer and video games themselves expression, but the creative  
2 process of developing these games resembles that of other forms of expression protected  
3 under the First Amendment, such as movies, books, and music (Fries Decl ¶ 16 )  
4  
5 Increasingly, computer and video games are being recognized for their aesthetics and  
6  
7 complexity art museums mount exhibits on computer and video games as art, prominent art  
8  
9 schools and universities offer courses and degree programs in game design, awards programs  
10  
11 recognize computer and video game artists who excel in their craft, and academic  
12  
13 conferences and scholarship are devoted to exploring the expression in computer and video  
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15 games (Fries Decl ¶¶ 18-21 )  
16  
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18 As with other literature, computer and video game storylines often include law  
19 enforcement officers of various kinds Such personnel range from uniformed police officers  
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21 (from Chief Wiggums in *The Simpson's Roadrage* to the futuristic officers in *Minority*  
22  
23 *Report Everybody Runs*), to intelligence officers (such as James Bond and his allies and  
24  
25 enemies in the CIA and the KGB), to ancient guards (such as the Romans in *Age of*  
26  
27 *Empires*), and military "police" (such as the Gestapo in France in *Medal of Honor*  
28  
29 *Frontline*) As with other literature, sometimes these officers are the "good guys",  
30  
31 sometimes they are the "bad guys", sometimes there are some of each, and sometimes the line  
32  
33 between "good" and "bad" is difficult to define and changes as the plot and characters  
34  
35 develop For example, in *Minority Report. Everybody Runs* (based on the movie, *Minority*  
36  
37 *Report*), the player assumes the role of the head of a special police squad in Washington,  
38  
39 D C in the year 2054 Because the player's character is framed, he must then battle these  
40  
41 same police (who are mistakenly pursuing him) if he is to clear his name and save the world  
42  
43 from nefarious forces (Fries Decl ¶¶ 25, 28-33 )  
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45

46 Computer and video games include all of the expressive elements of movies and  
47 television, with the additional element that the player participates in the expression, often

1 shaping the course of the plot and its outcome These games thus possess a creative capacity  
2 that can even surpass that of the more traditional entertainment media (Fries Decl ¶ 22 )  
3

4 **B. The Challenged Statute**  
5

6 The Washington Legislature passed House Bill No 1009 in late April, and Governor  
7 Locke signed the Act into law on May 20, 2003 The Act is unprecedented, restricting the  
8 distribution of video games based solely on their expressive content and allegedly anti-law  
9 enforcement viewpoint Specifically, the Act makes illegal the rental or sale of "violent"  
10 computer and video games to those under age 17 It defines "violent" games as only those  
11 containing "realistic or photographic-like depictions of aggressive conflict in which the player  
12 kills, injures, or otherwise causes physical harm to a human form in the game who is depicted,  
13 by dress or other recognizable symbols, as a public law enforcement officer " Act § 2 The  
14 Act leaves other key terms undefined For example, it does not explain the meaning of such  
15 ambiguous terms as "realistic or photographic-like depictions," "physical harm," "human  
16 form," and "public law enforcement officer " Although the Act makes a violation of this  
17 prohibition a "civil infraction," Act § 2, it places the prohibition within Washington's criminal  
18 code, see Ch 9 91 RCW (Misc Crimes) The Act provides that a violation of its terms  
19 "shall" be punished by a "maximum penalty and default amount" of \$500 Act § 3  
20  
21

22 The Act claims to serve two purposes "curb[ing] hostile and antisocial behavior in  
23 Washington's youth," and "foster[ing] respect for public law enforcement officers " Act § 1  
24 With regard to the first of these purposes, the Act purports to find that "there has been an  
25 increase in studies showing a correlation between exposure to violent video and computer  
26 games and various forms of hostile and antisocial behavior," Act § 3, but cites no evidentiary  
27 support for this claim The Act's justification for the second purpose is even more sparse,  
28 stating only that "some video and computer games focus on violence specifically against  
29 public law enforcement officers such as police and fire fighters," without any evidence  
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1 whatsoever that "violent" games involving law enforcement officers pose any particular risk  
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3 Id. Finally, the Act gives no indication that other means of regulating minors' access to  
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5 "violent" games – ones less invasive of First Amendment freedoms than the Act's prohibition,  
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7 such as educating consumers about the video game rating system – were considered and  
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9 rejected by the Legislature

### 10 III. ARGUMENT

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12 A plaintiff is entitled to a preliminary injunction upon showing "either (1) a  
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14 combination of probable success on the merits and the possibility of irreparable harm, or (2)  
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16 that serious questions are raised and the balance of hardships tips in its favor." Sammartano  
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18 v. First Judicial Dist. Court, 303 F.3d 959, 965 (9th Cir. 2002) (quotation omitted). These  
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20 "two formulations represent two points on a sliding scale in which the required degree of  
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22 irreparable harm increases as the probability of success decreases." Id. (quotation omitted).  
23  
24 Finally, "where the public interest is involved, the district court must also examine whether  
25  
26 the public interest favors the plaintiff." Id. (quotation omitted).  
27

28 Plaintiffs easily satisfy these standards. They have a strong case on the merits and  
29  
30 face irreparable harm. Accordingly, an injunction is warranted.

31  
32 **A. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF**  
33 **THEIR FIRST AND FOURTEENTH AMENDMENT CLAIMS, GIVEN**  
34 **THE ACT'S UNPRECEDENTED CONTENT- AND VIEWPOINT-**  
35 **BASED INVASION OF FIRST AMENDMENT RIGHTS AND ITS**  
36 **VAGUE TERMS.**  
37

38 **1. Computer and Video Games Constitute Expression Protected By**  
39 **The First Amendment.**  
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41 Computer and video games clearly constitute protected expression. See, e.g.,  
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43 American Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577-78 (7th Cir.) ("AAMA")  
44  
45 (describing in detail video games' expressive qualities, including their ability to convey "age-  
46  
47 old themes of literature," messages, and ideologies, "just as books and movies do"), cert.



1 denied, 534 U S 994 (2001) In most instances, they are aptly described as an interactive  
2 form of story-telling See, e.g., Sony Computer Entm't Am., Inc v Bleem, LLC, 214 F 3d  
3 1022, 1028 (9th Cir 2000) (describing these games as "involv[ing] plots that can be  
4 controlled interactively by the player and may elapse over several hours"), Micro Star v  
5 Formgen Inc., 154 F 3d 1107, 1109 (9th Cir 1998) (same, with respect to the "immensely  
6 popular" video game "Duke Nukem 3D," in which "the player assumes the personality and  
7 point of view of the title character" and "explore[s] a futuristic city infested with evil aliens  
8 and other hazards")

9 The computer and video game medium is as expressive as film, music, and fine arts,  
10 each of which is unquestionably entitled to full First Amendment protection See Hurley v  
11 Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U S 557, 569 (1995) (First  
12 Amendment "unquestionably" protects "painting of Jackson Pollock, music of Arnold  
13 Schoenberg, or Jabberwocky verse of Lewis Carroll"), Schad v Borough of Mount Ephraim,  
14 452 U S 61, 65 (1981) (First Amendment protects expression in the form of  
15 "[e]ntertainment, as well as political and ideological speech", "motion pictures, programs  
16 broadcast by radio and television, and live entertainment, such as musical and dramatic works  
17 fall within the First Amendment guarantee" (citations omitted)) Like those other media,  
18 computer and video games "may affect public attitudes and behavior in a variety of ways,  
19 ranging from direct espousal of a political or social doctrine to the subtle shaping of thought  
20 which characterizes all artistic expression " Joseph Burstyn, Inc v Wilson, 343 U S 495,  
21 501 (1952) (recognizing that movies are protected expression) The fact that video games  
22 are a relatively new medium of expression makes them no less protected, as, for example, the  
23 Eighth Circuit recognized in striking down attempted regulation of "violent" video games  
24 See Interactive Digital Software Ass'n v St Louis County, No 02-3010, slip op at 4 (8th  
25 Cir June 3, 2003) ("IDSA") ("The mere fact [of] a novel medium is of no legal

1 consequence ") Rather, as initially happened with movies and the Internet, video games'  
 2 relative novelty heightens the risk of unconstitutional regulation See Burstyn, 343 U S at  
 3  
 4 502 (according motion pictures protected status and overruling earlier decision to the  
 5  
 6 contrary), Reno v ACLU, 521 U S 844, 850, 870 (1997) (refusing to "qualif[y] the level of  
 7  
 8 First Amendment scrutiny that should be applied" to the Internet, a "unique and wholly new  
 9  
 10 medium" (quotation omitted))  
 11

12 Indeed, the statute at issue here singles out video games for suppression based on  
 13  
 14 whether they contain a particular content See Act § 2 (regulating video or computer games  
 15  
 16 with "violent" content, defined to include only depictions of violence directed at "public law  
 17  
 18 enforcement officers") Moreover, according to the Act, these games are singled out for  
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 20 censorship because they are allegedly correlated with "various forms of hostile and antisocial  
 21  
 22 behavior" and reduce "respect for public law enforcement officers " Act § 1 It thus could  
 23  
 24 not be clearer that Washington seeks to regulate a particular category of disfavored  
 25  
 26 expression based on that expression's message and alleged impact on its viewers See IDSA,  
 27  
 28 slip op at 4 (concluding that computer and video games receive First Amendment protection,  
 29  
 30 and "find[ing] it telling that the County seeks to restrict access to these video games precisely  
 31  
 32 because their content purportedly affects thought or behavior")  
 33

34 Numerous courts have recognized that the depiction of "violence" – including in  
 35  
 36 computer and video games – constitutes expression protected under the First Amendment  
 37  
 38 For example, in a unanimous opinion by Judge Posner, the Seventh Circuit preliminarily  
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 40 enjoined as unconstitutional an Indianapolis ordinance purporting to regulate games with  
 41  
 42 violent content See AAMA, 244 F 3d at 577-79 (likening "violence" in video games to  
 43  
 44 "violence" in other media), id. at 575-76 ("[t]he notion of forbidding not violence itself, but  
 45  
 46 pictures of violence, is a novelty") Similarly, the Sixth Circuit had "little difficulty in holding  
 47  
 that the First Amendment protects video games" where the games are targeted based on their



1 "communicative aspect " James v Meow Media, Inc., 300 F 3d 683, 695-96 (6th Cir 2002)  
 2 (noting such games' "expressive content" and "communicative aspect"), cert denied, 123 S  
 3 Ct 967 (2003) The Eighth Circuit recently joined this consensus, finding "the pictures,  
 4 graphic design, concept art, sounds, music, stories, and narrative present in video games" --  
 5 including games containing "violence" -- entitled to full First Amendment protection IDS,  
 6 slip op at 4-5 (recognizing violent video games are "as much entitled to the protection of  
 7 free speech as the best of literature") (quoting Winters v New York, 333 U S 507, 510  
 8 (1948) (violent magazines)), accord Eclipse Enters., Inc v Gulotta, 134 F 3d 63, 66-67 (2d  
 9 Cir 1997) (violent trading cards), Sanders v Acclaim Entm't, Inc., 188 F Supp 2d 1264,  
 10 1279 (D Colo 2002) (according "full First Amendment protection" to video games), Wilson  
 11 v Midway Games, Inc., 198 F Supp 2d 167, 181 (D Conn 2002) (same)

22 **2. The Act Fails Strict Scrutiny And Violates The First Amendment.**

23 **a. Because The Act Regulates Expression Based on Content**  
 24 **And Viewpoint, It Must Survive the Most Exacting First**  
 25 **Amendment Scrutiny.**

26 The Act restricts access to expression based on "violent" content, and thus requires  
 27 exacting First Amendment scrutiny See United States v Playboy Entm't Group, Inc., 529  
 28 U S 803, 811 (2000) (describing a situation in which the "overriding justification for the  
 29 regulation is concern for the effect of the subject matter on young viewers" as "the essence of  
 30 content-based regulation" requiring strict scrutiny) Such content-based regulation of speech  
 31 and expression is "presumptively invalid " RAV v City of St Paul, 505 U S 377, 382  
 32 (1992) Indeed, "[i]t is rare that a regulation restricting speech because of its content will  
 33 ever be permissible " Playboy, 529 U S at 818, see Texas v Johnson, 491 U S at 414 With  
 34 respect to this strict standard, it matters not that the Act restricts speech to minors, because,  
 35 like adults, minors have a First Amendment right to be free from content-based governmental  
 36 regulation of the speech they utter or receive See Erznoznik v City of Jacksonville, 422

1 U S 205, 213-14 (1975), Tinker v Des Moines Indep Cmty Sch Dist., 393 U S 503, 506-  
2  
3 07, 511 (1969)

4 In this case, however, the Act does not just regulate based on content Even more  
5  
6 perniciously, the Act regulates based on the viewpoint expressed by the games It targets  
7  
8 only those games that include depictions of violence aimed at depictions of "public law  
9  
10 enforcement officers," and only when inflicted by the player's character Act § 2 Because  
11  
12 the Act restricts access only to those games exhibiting violence toward law enforcement  
13  
14 officers – that is, toward the government – while allowing all other games depicting violence  
15  
16 to be sold to minors, the Act discriminates against a particular, "anti-government" viewpoint  
17  
18 See Sammartano, 303 F 3d at 971 ("Our cases have recognized that, where the government is  
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20 plainly motivated by the nature of the message rather than the limitations of the forum or a  
21  
22 specific risk within that forum, it is regulating a viewpoint rather than a subject matter ")  
23  
24 Such singling out of a particular viewpoint for regulation – particularly an "anti-government"  
25  
26 viewpoint – runs directly counter to the most central First Amendment precepts See  
27  
28 Gerritsen v City of Los Angeles, 994 F 2d 570, 578 (9th Cir 1993) (curtailing "controversial  
29  
30 or anti-government" speech is an "impermissible" government interest) As the Supreme  
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32 Court has made plain, "[v]iewpoint discrimination is an egregious form of content  
33  
34 discrimination," and "[w]hen the government targets not subject matter, but particular views  
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36 taken by a speaker on a subject, the violation of the First Amendment is all the more blatant "  
37  
38 Rosenberger v Rector and Visitors of Univ of Va., 515 U S 819, 829 (1995) Indeed,  
39  
40 "[t]he government must abstain from regulating speech when the specific motivating ideology  
41  
42 or the opinion or perspective of the speaker is the rationale for the restriction " Id

43  
44 To justify the Act under strict scrutiny, Defendants must (1) articulate a compelling  
45  
46 state interest, (2) prove that the Act is "necessary" to serve that interest (i.e., prove that the  
47  
asserted harms are real and would actually be alleviated by the regulation), and (3) show that



1 the Act is narrowly tailored to serve that interest RAV, 505 U S at 395, Turner Broad  
 2 Sys, Inc v FCC, 512 U S 622, 664-65 (1994), Simon & Schuster, Inc v Members of the  
 3 N Y State Crime Victims Bd, 502 U S 105, 118 (1991) The State cannot come close to  
 4 meeting these demanding requirements  
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7  
 8 **b. The State Does Not Have A Legitimate – Let Alone**  
 9 **Compelling – Interest in Restricting Access To The**  
 10 **Targeted Games.**  
 11

12 In the statute itself, the Legislature claimed to further two state interests The first  
 13 was "curbing hostile and antisocial behavior" of minors supposedly caused by exposure to  
 14 games in which the player acts violently toward a law enforcement officer The second was  
 15 "fostering respect for law enforcement officers " Neither interest approaches a  
 16 constitutionally sufficient rationale As to the former, extremely stringent standards apply to  
 17 government regulation of speech based on a concern that it will cause listeners to engage in  
 18 unlawful or "antisocial" behavior A law justified in this way must meet the long-established  
 19 standards set forth in Brandenburg v Ohio, 395 U S 444 (1969) See James, 300 F 3d at  
 20 699 ("Federal courts, however, have generally demanded that all expression, advocacy or  
 21 not, meet the Brandenburg test before its regulation for its tendency to incite violence is  
 22 permitted ") The Brandenburg test requires the government to prove that expression "is  
 23 directed to inciting or producing imminent lawless action and is likely to incite or produce  
 24 such action " Free Speech Coalition, 122 S Ct at 1403 (quoting Brandenburg, 395 U S at  
 25 447) Thus, the government may not punish speakers based solely on a prediction or  
 26 suspicion that their words will tend, in the aggregate, to encourage undesired behavior  
 27 Indeed, it is a core First Amendment principle that "the mere tendency of speech to  
 28 encourage unlawful acts is not a sufficient reason for banning it " Id Here, the Act regulates  
 29 supposedly "violent" speech without coming close to meeting Brandenburg's dictates See  
 30 Brandenburg, 395 U S at 447 Rather, the Act is ostensibly based on the Legislature's  
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1 conclusory "finding" of a "correlation between exposure to violent video and computer  
2 games and various forms of hostile and antisocial behavior " Act § 1 Even assuming that  
3 such a finding was based on any reliable evidence, the essence of the Brandenburg principle is  
4 that the government may not suppress content based on a "finding" that the speech – whether  
5 it be books advocating violent revolution, pamphlets expressing hate toward particular racial  
6 or ethnic groups, or works of imagination depicting violent actions – tend, in the aggregate,  
7 to increase the chances that some person, somewhere will act unlawfully Rather, the content  
8 must be "likely" to produce "imminent" violence – a standard that can hardly be met by  
9 games played safely every day by millions The bar to reliance on predictions of future  
10 antisocial behavior is particularly clear where, as here, the works at issue are not even  
11 "directed" to inciting lawlessness, as required by Brandenburg, because video game makers'  
12 primary purpose is to entertain See, e.g., James, 300 F 3d at 698 (video games makers do  
13 not "'intend' to produce violent action by the consumers") Absent that element, the  
14 "incitement" exception to the First Amendment simply does not apply

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Courts confronting statutes and lawsuits that, like the Act, seek to regulate computer  
and video games based on their "violent" content, agree that Brandenburg's requirements  
cannot be met by alleging a link between such games and real life violence For example, in  
AAMA, Judge Posner explained that, absent concrete proof by the government that  
particular video games have a literal effect of "incit[ing] youthful players to breaches of the  
peace," as required by Supreme Court precedent, such games may not be prohibited based on  
the mere assertion that violence may occur AAMA, 244 F 3d at 575 He reasoned that  
"[c]lassic literature and art, and not merely today's popular culture, are saturated with graphic  
scenes of violence, whether narrated or pictorial," and that "[t]he notion of forbidding not  
violence itself, but pictures of violence, is a novelty," id at 575-76 – a novelty in plain tension  
with the Constitution's requirement that actual violence must be intended, likely, and



1 imminent for speech to be restricted. Moreover, he refused to distinguish video games as  
 2 "interactive," noting that "[a]ll literature is interactive, the better it is, the more  
 3 interactive," as it "draws the reader into the story, makes him identify with the characters,  
 4 invites him to judge and quarrel with them, to experience their joys and sufferings as the  
 5 reader's own." Id. at 577, see IDSA, slip op. at 5 (noting that "some books, such as the pre-  
 6 teen oriented 'Choose Your Own Nightmare' series can be every bit as interactive as  
 7 video games")

8 Similarly, in James the Sixth Circuit concluded that allegedly "violent" video games  
 9 "fall[] well short" of the Brandenburg threshold. James, 300 F.3d at 698. As the Sixth  
 10 Circuit incisively explained, the "glacial process of personality development" allegedly  
 11 affected by "violent" video games "is far from the temporal imminence that we have required  
 12 to satisfy the Brandenburg test." Id., see Wilson, 198 F. Supp. 2d at 182 (at worst, video  
 13 games "amount[] to nothing more than advocacy of illegal action at some indefinite future  
 14 time," which is insufficient to satisfy Brandenburg (quoting Hess v. Indiana, 414 U.S. 105  
 15 (1973)), Sanders, 188 F. Supp. 2d at 1279 (refusing to "dilute the Brandenburg test" by  
 16 finding that "violent" video games meet that test). In an analogous context – the attempted  
 17 regulation of non-obscene pornography based, among other things, on allegations that such  
 18 materials may lead to the infliction of violence on women – the Ninth Circuit has similarly  
 19 concluded that such regulation falls short of the Brandenburg requirements, and thus fails to  
 20 survive First Amendment scrutiny. Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1199-  
 21 1200 & n.8 (9th Cir. 1989) (explaining that the "equivocal evidence" of any "causal  
 22 relationship between pornographic materials and violent actions" fails to show the likelihood  
 23 of causing imminent unlawful action required under Brandenburg), see also, e.g., American  
 24 Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329-30 (7th Cir. 1985) (regulation failed to

1 satisfy Brandenburg because any violent "effects depend on mental intermediation"), aff'd,  
2  
3 475 U S 1001 (1986)

4 As noted, the Legislature also attempts to justify censorship as necessary to "foster  
5 respect for public law enforcement officers " Act § 1 Indeed, Governor Locke recognized  
6  
7 this as the goal of the Act, explaining that the Act "foster[s] an environment where young  
8  
9 people respect those who uphold the law," and that the Act is needed to "reinforce this  
10  
11 message " May 20, 2003 Press Release, available at [http //access wa gov/news](http://access.wa.gov/news/2003/May/n2003420_5997.asp)  
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13 /2003/May/n2003420\_5997 asp But this "foster[ing] respect" rationale is illegitimate The  
14  
15 government cannot suppress speech because it communicates a message of "disrespect" for  
16  
17 the government and its agents To allow such a justification would all but eliminate the First  
18  
19 Amendment as we know it See Sheehan v Gregoire, No C02-1112C, slip op at 14 (W D  
20  
21 Wash May 22, 2003) (striking down a 2002 Washington Act prohibiting the distribution,  
22  
23 with an "intent to harm or intimidate," information about law enforcement officers, and  
24  
25 stating that "[t]hought-policing is not a compelling state interest recognized by the First  
26  
27 Amendment") As the Supreme Court has explained, "First Amendment freedoms are most  
28  
29 in danger when the government seeks to control thought or to justify its laws for that  
30  
31 impermissible end " Free Speech Coalition, 122 S Ct at 1403

32  
33 This principle has equal force when censorship is directed at minors As Judge Posner  
34  
35 explained in AAMA "Now that eighteen-year-olds have the right to vote, it is obvious that  
36  
37 they must be allowed the freedom to form their political views on the basis of uncensored  
38  
39 speech before they turn eighteen, so that their minds are not a blank when they first exercise  
40  
41 the franchise " 244 F 3d at 577 Imagine a law, for example, that forbade any "violent"  
42  
43 television show that "fostered disrespect" for the President or Congress Such a law would  
44  
45 be intolerable under our constitutional system  
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47



1                   c.     **Even Assuming That The State, In Theory, Could Have A**  
2                   **Compelling Interest In Regulating "Violent" Speech, The**  
3                   **Act Fails First Amendment Scrutiny Because It Does Not**  
4                   **Identify Or Address A Real Problem And Is Not Narrowly**  
5                   **Tailored.**  
6

7                   Even assuming that the State's justification based on a perceived linkage between  
8                   violent content and antisocial behavior were not facially illegitimate, the Act would fail First  
9                   Amendment scrutiny because it does not advance the State's purported interest. Nor is the  
10                  Act narrowly tailored, as the State has bypassed other, less restrictive means of achieving its  
11                  goal.  
12

13                  To survive strict scrutiny, the government must first prove that an "actual problem"  
14                  exists, and must do so with more than "anecdote and supposition." Playboy, 529 U.S. at 823.  
15                  Second, the Act's provisions must actually and materially address the alleged government  
16                  interest. See, e.g., Florida Star v. B.J.F., 491 U.S. 524, 540 (1989) (striking down statute  
17                  that restricted dissemination by the mass media, but not by others, of rape victims' identities,  
18                  and noting that "facial underinclusiveness" undermined the claim that the statute actually  
19                  served its purported interests), Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664-65  
20                  (1994) (even under intermediate scrutiny, speech regulation must advance "real" harm to  
21                  "material degree"). Here, there is both insufficient evidence of a "real world" problem (the  
22                  effects of "violent" games on minors), and a complete disconnect between the alleged  
23                  problem and the Act's prohibition, which extends only to games depicting violence against  
24                  one narrow category of "victim."  
25

26                  The existing research concerning "violent" video games fails to establish any link  
27                  between exposure to such games (of any sort) and subsequent violent behavior against  
28                  anyone. See AAMA 244 F.3d at 578-79 (existing scientific studies "do not support" the  
29                  regulation of "violent" video games, because these studies "do not find that video games have  
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1 ever caused anyone to commit a violent act"), IDSA, slip op at 6 (determining that a county  
2 regulation of "violent" games because of the games' alleged effects on minors lacked "the  
3 'substantial supporting evidence' of harm that is required before an ordinance that threatens  
4 protected speech can be upheld") Indeed, Washington's own Department of Health  
5 conducted an expansive study in 2000, in response to a legislative request, and concluded  
6 that "the research evidence is not supportive of a major public concern that violent video  
7 games lead to real-life violence " Wash State Dep't of Health, Video Games and Real-Life  
8 Aggression A Review of the Literature (May 2000) Moreover, counsel know of no  
9 research suggesting that depictions of violence specifically against law enforcement officers  
10 cause real life violence  
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21 Furthermore, the Act and its legislative history make no attempt to explain how  
22 regulation of video games alone will serve the statute's purported interest Depictions of  
23 violence – including violence against law enforcement officers – are found not only in video  
24 games, but in movies, books, magazines, music, and art, as well as on television and the  
25 Internet See, e.g., AAMA, 244 F 3d at 579 ("violent" video games "are a tiny fraction of the  
26 media violence to which modern American children are exposed," as well as "not very violent  
27 compared to what is available to children on television and in movie theaters today") But  
28 these other media – as well as all video games depicting "violence" not directed at law  
29 enforcement officers – are all left unaffected by the Act Under the Act, for example, a minor  
30 would be barred from buying or renting the *Minority Report* video game (because it is  
31 possible for a player to "harm" the futuristic officers wrongly pursuing him), but that same  
32 minor could legally rent and view the PG-13 rated *Minority Report* movie, which contains a  
33 similar plot and "violence" as the video game Such differential regulation of comparable  
34 expression not only is problematic in principle, but it heightens concerns about whether the  
35 Act advances the purported interests at all See, e.g., Florida Star, 491 U S at 540  
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1 Finally, even assuming that the Act serves a theoretically compelling interest and that  
2 the Act's prohibition actually advances that interest, the Act fails strict scrutiny because it is  
3 not narrowly tailored. See Playboy, 529 U S at 815. As discussed in more detail below, the  
4 Act's prohibitions, though ostensibly limited to the narrow class of computer and video games  
5 depicting violence against law enforcement officers, are so vague that they could be read to  
6 cover a large subset of existing video games. See Reno v ACLU, 521 U S at 871-72  
7 (vagueness "undermines the likelihood that the [Act] has been carefully tailored to the  
8 goal of protecting minors"). And, regardless of vagueness, the narrow tailoring requirement  
9 requires the State to prove that "a plausible, less restrictive alternative" to banning such  
10 games "will be ineffective to achieve its goals." Playboy, 529 U S at 816. The State cannot  
11 make such a showing here, where a plausible, much less restrictive means of regulating  
12 minors' access to "violent" video games exists: awareness-raising measures concerning the  
13 video game rating system, (Lowenstein Decl ¶¶ 4-18), which provides guidance, to parents  
14 and others, similar to that of the well-known movie rating system. See Playboy, 529 U S at  
15 824 ("A court should not assume a plausible, less restrictive alternative would be ineffective,  
16 and a court should not presume parents, given full information, will fail to act"), 44  
17 Liquormart, Inc v Rhode Island, 517 U S 484, 507-08 (1996) (plurality op) (striking down  
18 ban on advertising alcohol prices because of less restrictive alternatives, such as an  
19 "educational campaign" or "counterspeech"). In any event, the State was required at least to  
20 have considered the efficacy of less restrictive alternatives, see Sable Communications of  
21 Cal, Inc v FCC, 492 U S 115, 129-30 (1989), but never did so. In fact, the State expressly  
22 rejected Plaintiffs' offer to work with the State to help educate consumers about the video  
23 game rating system, which not only provides age-based ratings, but also offers  
24 comprehensive "content descriptors" that signal content that may be of concern to parents  
25 and consumers. (Lowenstein Decl ¶¶ 15-18.)

1 In sum, the State cannot show that the Act serves any compelling government interest  
 2 in a narrowly tailored manner. Rather, the Act impermissibly attempts "to protect the young  
 3 from ideas or images that a legislative body thinks unsuitable for them." Erznoznik, 422 U.S.  
 4 at 213-14. Accordingly, the Act fails strict scrutiny under the First Amendment.  
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8 **3. The Act Is Unconstitutionally Vague.**  
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10 The Act is unconstitutional on another, independent ground: vagueness. Because  
 11 several of the Act's terms are impermissibly vague and place the burden of compliance on  
 12 game retailers, the Act will restrict a far broader range of video games than even the State  
 13 claims it is seeking to regulate. The Constitution demands that statutes be set forth with  
 14 "sufficient definiteness that ordinary people can understand what conduct is prohibited."  
 15 Kolender v. Lawson, 461 U.S. 352, 357 (1983). Such precision is essential to "give the  
 16 person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that  
 17 he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Exacting  
 18 precision is demanded of legislation imposing penalties where free speech rights are at issue.  
 19 See NAACP v. Button, 371 U.S. 415, 433 (1963) (noting dangers, "in the area of First  
 20 Amendment freedoms," of "the existence of a penal statute susceptible of sweeping and  
 21 improper application"). Finally, the fact that the government's stated purpose relates to  
 22 children does not relax this exacting constitutional standard. See Interstate Circuit, Inc. v.  
 23 City of Dallas, 390 U.S. 676, 689 (1968).  
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38 Several key terms in the Act either are inherently vague or are defined in such a way  
 39 as to fail to provide fair notice. For example, the core of the Act's prohibition concerns  
 40 depictions of "public law enforcement officer[s]." However, this term has no easily  
 41 understood meaning in the context of video games, in which the action takes place in a wide  
 42 variety of fictional and historical settings. For example, in a James Bond game, do the secret  
 43 agents meet that definition? What about military officers? Military officers serving as civilian  
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