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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

VIDEO SOFTWARE DEALERS and ENTERTAINMENT SOFTWARE ASSOCIATION,

Plaintiffs,

vs.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California; BILL LOCKYER, in his official capacity as Attorney General of the State of California; GEORGE KENNEDY, in his official capacity as Santa Clara County District Attorney, RICHARD DOYLE, in his official capacity as City Attorney for the City of San Jose, and ANN MILLER RAVEL, in her official capacity as County Counsel for the County of Santa Clara,

Defendants.

Case No. C 05 4188 RMW RS

STATE DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: December 2, 2005
Time: 9:00 a.m.
Courtroom: 6

The Honorable Ronald M. Whyte

INTRODUCTION

Across the Nation, states and municipalities are attempting to respond to the public outrage over the extremely violent video games that more and more minors have ready access to and are able to purchase without parental knowledge. The State of California, after considering extensive research demonstrating the harmful effects violent interactive video games have on minors, joined the fight to protect their well-being. Instead of rushing through the legislative process, the California Legislature took its time, reviewed the relevant studies, considered the recent opinions of courts on these matters, and crafted a concise, narrowly-tailored law that balances the rights of adults and the welfare of minors. The resulting law, Chapter 638 of the Statutes of 2005 (the "Act"), received bipartisan support and was passed by an overwhelming majority. The Legislature received voluminous support for the Act from medical professionals, state and local governmental entities, children's organizations, constitutional law scholars, and citizens.

Set to take effect on January 1, 2006, the Act imposes civil penalties on any person who sells or rents a "violent video game," as defined, to a minor under the age of 18 unless it is sold or rented to a minor's parent, grandparent, aunt, uncle, or legal guardian. The Legislature determined that, notwithstanding the purported efforts of the video game industry to self-regulate minors' access to extremely violent video games that even the industry concedes are inappropriate for minors, only through threat of civil penalty backed by a state-wide law would it be possible to achieve the goal of protecting minors from the harmful effects of such games.

The Act is so carefully crafted that the only video games covered are those that appeal to the deviant or morbid interest of minors, are deemed to be patently offensive to minors by community standards, and lack any serious literary, artistic, political, or scientific value for minors, or those that are especially heinous, cruel, or depraved. This an exceedingly narrow category of violent video games.

The constitutionality of the Act appears to present matters of first impression for the Court. But the Act uses defining terms that, time after time, have withstood constitutional scrutiny. Existing precedent fully supports the State's efforts to protect the health and welfare of minors. Just as the technology of video games improves at exponential rates, so does the body of research

demonstrating the truly harmful effects these violent interactive games have on minors. Given this substantial research, the Act survives all levels of judicial scrutiny. Therefore, because plaintiffs, the Video Software Dealers Association and the Entertainment Software Association (collectively "Plaintiffs") are not likely to prevail on the merits of their challenges to the Act, their Motion for Preliminary Injunction should be denied.

STATEMENT OF ISSUES TO BE DECIDED AND RELEVANT FACTS

This Court must decide whether Plaintiffs are likely to prevail on their claim that the Act is facially unconstitutional. In opposing Plaintiffs motion, the State Defendants[1/] argue, (1) assuming that some covered games contain protected speech, the Act should be reviewed under the variable obscenity standard set forth by the Supreme Court in *Ginsberg v. State of New York*, 390 U.S. 629, 638 (1968); (2) the Act is supported by such extensive scientific and social research that it survives even the most rigorous level of strict scrutiny; (3) the Act's labeling requirements are constitutional; and (4) the Act is not impermissibly vague.[2/]

The relevant facts are as follows. Assembly Member Leland Yee, Ph.D, introduced Assembly Bill 450 on February 15, 2005. RJN, Ex. 7. Later during the same legislative session, Assembly Bill 1179 was gutted and amended, and replaced with the language of Assembly Bill 450.[3/] AB 1179 was passed by the Assembly on September 8, 2005, with a vote of 66 ayes, 7 noes, and was passed by the Senate that same day with a vote of 22 ayes, 9 noes. RJN, Ex. 5, p. 1; Exhibit 3, p.1. The Governor signed the bill into law on October 7, 2005. RJN, Ex. 6, p.1. The Act takes effect on January 1, 2006. Cal. Const., Art. IV, § 8(c)(2).

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1. "State Defendants" hereafter refers to defendants Governor Arnold Schwarzenegger and Attorney General Bill Lockyer.

2. State Defendants will assume, for purposes of this motion only, that games covered by the Act may contain some protected speech, but reserve the right to present the argument that video games do not constitute speech for First Amendment purposes at a later time.

3. RJN, Ex. 1, p. 2, ("On September 2, 2005, the last day for amending bills without a rule waiver, the author gutted and amended AB 1179 (Yee) to insert the language largely identical to the text of AB 450.").

ARGUMENT

In the Ninth Circuit, a party seeking a preliminary injunction must meet one of two tests. Under the first, the moving party must demonstrate that: "(1) the [moving party] will suffer irreparable injury if injunctive relief is not granted, (2) the [moving party] will probably prevail on the merits, (3) in balancing the equities, the [non-moving party] will not be harmed more than [the moving party] is helped by the injunction, and (4) granting the injunction is in the public interest." *Stanley v. University of Southern California*, 13 F.3d 1313, 1319 (9th Cir. 1994). In the alternative, the moving party demonstrate "either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." *Ibid*.

A plaintiff's evidentiary burden in seeking a provisional remedy in advance of trial is more rigorous, in particular, when the plaintiff seeks to enjoin governmental action taken in the public interest pursuant to statutory provisions. See *Thomas v. County of Los Angeles*, 978 F.2d 504, 508 (9th Cir. 1992). And in the context of a facial challenge, Plaintiffs "confront 'a heavy burden' in advancing their claim . . . . Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (internal citations omitted). Indeed, "[t]o prevail, respondents must demonstrate a substantial risk that application of the provision will lead to the suppression of speech." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). Under any standard, and especially under the more rigorous evidentiary standard applicable here, Plaintiffs' motion must be denied.

I. BECAUSE THE ACT APPLIES ONLY TO VIOLENT VIDEO GAMES DETERMINED TO BE HARMFUL TO MINORS, THE ACT IS SUBJECT TO REVIEW UNDER THE VARIABLE OBSCENITY STANDARD SET FORTH IN *GINSBERG v. STATE OF NEW YORK.*

A. The First Amendment Rights of Minors Are Narrower than Those of Adults Given the Government's Constitutional Authority to Protect Minors from Harm.

States may properly exercise their police power to make necessary differentiations in the law between adults and minors. States are constitutionally allowed to prohibit minors from smoking,

drinking, and driving. States constitutionally prohibit minors from marrying and voting. The law recognizes that minors are not possessed of mental faculties equivalent to adults. Just this year, the Supreme Court recognized the importance of these difference when it held that the Constitution prohibits states from executing minors. In *Roper v. Simmons*, the Supreme Court recognized three important differences, supported by existing science, between adults and minors under eighteen:

> First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson*, *supra*, at 367, 113 S.Ct. 2658; see also *Eddings*, *supra*, at 115-116, 102 S.Ct. 869 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. [¶]
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure . . . . This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003). [¶]
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, Identity: Youth and Crisis (1968).

Roper v. Simmons, __ U.S. __, 125 S.Ct. 1183, 1195 (2005). The Supreme Court based its findings on social science, recognizing that the susceptibility of minors to mental harm from external influences, well beyond that of adults, justifies differentiations in treatment in the eyes of the law.

That the differentiations impact First Amendment freedoms does render the state action per se invalid. "[E]ven where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . .'" *Ginsberg v. State of New York*, 390 U.S. 629, 638 (1968), quoting *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170 (1944). The Supreme Court has firmly established that "the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been

grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). In furtherance of this bedrock principle, the Supreme Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982). Indeed, the Supreme Court has "held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity." *Ibid*. Legal differentiations are often necessary to protect minors, even from expressive materials: "It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975).

That states may legislate to protect minors from harmful external influences is firmly established by precedent. In *Ginsberg v. State of New York*, a store owner was convicted of violating a New York statute prohibiting the sale to minors material the legislature found to be "harmful to minors." 390 U.S. at 631. The statute at issue was directed at material containing simple "nudity" as well as sexual depictions – "girlie" magazines. *Id*. at 645-47. The statute defined the term "harmful to minors" as a description or representation, "in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it: (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors." *Id.* at 646.

Although there was no question that the New York law would not survive judicial scrutiny had it applied to adults, the Supreme Court upheld the law under the "variable obscenity" or "obscene as to minors" standard. *Id*. at 639-46. This standard recognizes a state's power to define obscenity (material receiving no First Amendment protection) in a variable manner – using one definition applicable to adults and a more broad definition applicable only to minors. The Court cited with approval the reasoning of the New York Court of Appeals:

> "(M)aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults."

Ginsberg, 390 U.S. at 636, quoting *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 75 (1966).

In the instant case, the State of California has properly differentiated between minors and adults with respect to the purchasing of extremely violent video games that the Legislature determined to be harmful to minors. The Act, which applies only to minors, should be reviewed with this constitutionally permissible distinction in mind.

B. The Act Properly Incorporates a Variable Obscenity Standard to Limit Minors' Access to Extremely Violent Material Found to Be Harmful to Minors.

Consider a hypothetical video game where the player, using interactive controls, causes a female character in the game to fully disrobe. The player is then able to control the nude female character in a host of different ways, causing the character to engage in intercourse, for example. Under *Ginsberg*, a state could flatly prohibit minors from legally purchasing such a game. 390 U.S. at 631, 645-47 (upholding law prohibiting representations or descriptions of "nudity" in "whatever form").

Now consider a video game where the player, using interactive controls, is rewarded or advances for causing his character to take out a shovel and bash the head of an image of a human being, appearing to beg for her life, until the head severs from the body and blood gushes from the neck. The player is then allowed to continue bashing the image of the human corpse, knocking the decapitated body about the screen with a shovel. Or a video game where the player can cause his character to wound an image of a human being with a rifle by shooting out a kneecap, pour gasoline on the wounded character, and then set the character on fire while the character appears to be alive. See, e.g., Ex. A to Morazzini Decl., "Video Game Violence Sampler." Such a video game would lead a reasonable person to consider that the game as a whole appeals to a deviant or morbid interest of minors. Act, Civil Code, § 1746(d)(1)(A). The video game is so violent that it would be patently

offensive to prevailing community standards as to what is suitable for minors, and, considered as a whole, it lacks any serious literary, artistic, political, or scientific value for minors. *Ibid*. The video game is so extremely violent that a state legislature presented substantial evidence that when minors play the video game it causes them to exhibit violent antisocial or aggressive behavior, a reduction of activity in the frontal lobes of the brain, and psychological harm. Act, § 1.

Would the First Amendment tie the hands of states, prohibiting them from limiting minors' access to such video games by merely requiring parental consent before a minor may purchase such a game? Plaintiffs essentially argue 'Yes,' that although states may constitutionally limit minors' access to simple depictions of nudity, the First Amendment strictly prohibits states from limiting minors' access to such extremely violent video games. But such an interpretation of the First Amendment cannot represent what was intended by our founding fathers.

To the contrary. That states may legislate to protect minors from harm is firmly established. In *Ginsberg*, the Supreme Court upheld a statute based on its finding that it "was rational for the legislature to find that the minors' exposure" to material containing nudity "might be harmful." 390 U.S. at 639. The Court explained that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society . . . . The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility" 390 U.S. at 639.

The Supreme Court recognized that states must be allowed to adjust the definition of constitutionally unprotected material for minors to existing social realities in order to protect minors from harm, notwithstanding that such definitions cannot constitutionally apply to adults:

> We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather [the statute] simply adjusts the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in term of the sexual interests . . . ' of such minors . . . . That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . .'

390 U.S. at 638 (internal citations omitted).

The "harmful to minors" standard need not be limited to material that contains depictions of nudity or sex. The Supreme Court has never suggested that the special interest in sparing youth from the harmful effects of communicative material is limited sexual material. If the violent material sought to be restricted is limited to that which is found to be harmful to minors, the *Ginsberg* standard naturally applies. Such a conclusion logically follows, especially given the Supreme Court's recent recognition of the special vulnerability and susceptibility of minors to external influences. See *Roper v. Simmons*, 125 S.Ct. at 1190.

Judge Posner, writing for the Seventh Circuit Court of Appeals, recognized as much. In *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 576-77 (7th Cir. 2001), a case relied upon by Plaintiffs, the court in fact applied the *Ginsberg* standard to an ordinance designed to restrict minors' access to violent video games. *Ibid.* However, the court simply found that the city failed to produce sufficient evidence to justify the governmental interest asserted, stating:

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

Id. at 576. The court reviewed the evidence submitted by the city to support its purported compelling interest in protecting the general public, but simply found the city's evidence of harm to the public unsupported. *Id*. at 578-79. The importance of *Kendrick* is that the Seventh Circuit applied the *Ginsberg* standard to the ordinance at issue – directed at violent material – but held the ordinance invalid due to the city's failure to adequately support its asserted governmental interest. As Judge Posner bluntly opined, "Common sense says that the City's claim of harm to its citizens from these games is implausible, at best wildly speculative." *Id*. at 579. Importantly, the interest the city sought to further in *Kendrick* was different than the interest California seeks to further here. The ordinance at issue in *Kendrick* sought to prevent violence against law enforcement officers, thus requiring the city to prove that playing video games is likely to incite imminent lawless. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Here, the Act seeks to protect minors from the harmful effect of the video games. *Brandenburg* is thus not applicable.

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More recently, the United States District Court for the Western District of Washington recognized that a narrowly drawn law aimed at limiting minors' access to violent video games could pass constitutional scrutiny, even one directed only at violent material. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004). In *Maleng*, the court struck down a statute prohibiting the sale of video games to minors that allowed the player to kill or injure characters depicting "public law enforcement officers." *Id*. at 1189-90. However, the court recognized that it is possible to draft such a law in a manner that would pass constitutional muster if it were limited to "violent images, such as torture or bondage, that appeal to the prurient interest of minors." *Id*. at 1190. Moreover, the court outlined what it considered to be key factors in a constitutionally permissible violent video game regulation:

> – does the regulation cover only the type of depraved or extreme acts of violence that violate community norms and prompted the legislature to act?
> – does the regulation prohibit depictions of extreme violence against all innocent victims, regardless of their viewpoint or status? and
> – do the social scientific studies support the legislative findings at issue?

Id. at 1190. The *Maleng* court recognized that a law could be drafted, if supported by the evidence, in a manner that covers only that violent material which is found to meet the prevailing definition of obscenity and is harmful to minors.

In the instant case, the Act does just that. It limits minors' access only to the most extremely violent video games that the Legislature determined cause harm. The Act incorporates the Supreme Court's definition of obscenity, varied to the audience of minors, to ensure that only material that appeals to the deviant or morbid interest of minors is covered by the law. And the Act is completely viewpoint neutral – all extreme violence is covered. When a law, supported by substantial evidence, is crafted in such a manner that the only material regulated is that which is found to be obscene as to minors, it should be reviewed under the *Ginsberg* standard, regardless of whether it is limited to nudity or sex-based material. When legislating to protect minors, it is proper to include extremely violent, harmful material in a variable definition of obscenity. The Legislature properly found that exposure to extremely violent video games is no less harmful to minors than exposure to nudity or sex-related material.

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II. THE ACT SURVIVES SCRUTINY UNDER THE *GINSBERG* VARIABLE OBSCENITY STANDARD.

The California Legislature has defined the obscenity of the violent video games on the basis of their appeal to minors. The Act varies the definition of obscenity, applicable only to minors, to include extremely violent images in video games. The Act defines the term "violent video game" in part as follows:

> (1) "Violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:
> (A) Comes within all of the following descriptions:
> (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.
> (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.
> (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

Act, Civil Code, § 1746(d). The Act provides a secondary definition as follows, but only one need be met for purposes of the Act. *Id.* (d)(1)(B).

"To sustain state power to exclude material defined as obscene by [the statute] requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Ginsberg*, 390 U.S. at 641. Although the *Ginsberg* Court held that it was "doubtful" that the New York legislature's finding that "girlie" magazines were harmful to minors was based upon "accepted scientific facts," it also recognized that courts cannot "demand of legislatures 'scientifically certain criteria of legislation.'" *Id*. at 642 [internal citation omitted]. Thus, the Court held, "[w]e therefore cannot say that [the statute], in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm." *Id*. at 643. Thus, just as in *Ginsberg*, the Act's scope is limited to material which, by definition, is obscene as to minors. The Act's definition matches the Supreme Court's existing precedent of obscenity as to minors -- constitutionally unprotected material – while incorporating extreme violence. See *Miller v. California*, 413 U.S. 15, 24 (1973).

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The Legislature expressly found that the material covered by the Act is harmful to minors. Act, § 1. And the Legislature presented substantial evidence supporting its findings. See Section III (B) (i-iii), below. Certainly, this Court can find that "it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Ginsberg*, 390 U.S. at 642.

III. EVEN IF THE ACT WERE SUBJECT TO STRICT SCRUTINY, IT SURVIVES JUDICIAL REVIEW.

Assuming, *arguendo*, that the Act is subject to strict scrutiny under the First Amendment, it survives judicial review because it is narrowly tailored to serve a compelling state interest. *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002).

A. Protecting Minors from Harm Is Unquestionably a Compelling State Interest.

Plaintiffs are not likely to succeed on their claim that the state has presented no legitimate interest to support the Act. Plaintiffs boldly claim that the Act represents the Legislature's attempt to "control [] the thoughts or feelings of minors." Pltfs.' Mem. P & A Supp. Mot. Prelim. Inj. 10:25-28. Plaintiffs' position is disingenuous, at best, especially considering that the video game industry itself rates video games based upon their violent content and suitability for minors. In fact, the industry has two distinct ratings, M for Mature and AO for Adult Only, that express their own view that the games with these ratings are not suitable for minors. Lowenstein Decl. ¶ 9.

Here, the Legislature clearly expressed the state interest sought to be served by the Act – protecting minors from harm: "The state has a compelling interest in preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games." Act, § 1(c).

The Supreme Court has consistently held that protecting minors from harm is a compelling state interest. It has held that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *New York v. Ferber*, 458 U.S. 747, 756-757 (1982) (internal citation omitted). Thus, the Supreme Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Ibid.* (internal

citation omitted). It is beyond question that the Legislature's interest in protecting minors from harm is compelling for purposes of judicial review.

B. The Legislature's Determination That the Material Covered by the Act Is Harmful to Minors Is Based upon Substantial Evidence.

The Supreme Court has explained that "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Id*. at 666. Indeed, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000). The "Legislature must have drawn reasonable inferences based on substantial evidence.'" *Ibid*., quoting *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994) (plurality opinion).

In determining whether the Legislature drew reasonable inferences based upon substantial evidence, the Supreme Court in *Turner*, *supra*, held that courts "must accord substantial deference to the predictive judgments" of legislative bodies. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. at 665-666. The Court recognized that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Ibid*.

The legislative record of the Act includes and cites to dozens of relevant studies, articles, and reports supporting the finding that playing violent interactive video games can be harmful to minors.[4/] The Legislature also considered the Senate Judiciary Committee's analysis of the Act for the September 8, 2005 hearing, which recites the following as justification for the bill[5/]:

> Dozens of studies on violent video games, including an analysis of 54 independent samples with 4,262 participants, show five major effects: playing violent video

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4. Assembly Bill 1179 (Yee) was a "gut and amend" of Assembly Bill 450 (Yee) in essentially identical language. See to Request for Judicial Notice, Ex. 1, pp. 2-3. The Legislature was provided with multiple bibliographies, including a "Violent Video Game Bibliography" citing dozens of relevant studies. Appendix A, p. A014.

5. Evidence consisting of legislative hearings and floor debate is admissible to demonstrate the motive of the legislature in enacting the law. *Las Vegas Nightlife, Inc. v. Clark County, Nev.*, 38 F.3d 1100, 1102 (9th Cir. 1994).

> games leads to increased physiological arousal, increased aggressive thoughts, increased aggressive feelings, increased aggressive behaviors, and decreased pro-social or helping behaviors. These studies include experimental studies (that show playing violent video games actually causes increases in aggression), correlation studies (where long-term relations between game play and real-world aggression can be shown), and longitudinal studies (where changes in children's aggressive behaviors can be demonstrated) . . . . The American Academy of Pediatrics Policy Statement on Media Violence stated that playing violent video games accounts for a 13% to 22% increase in adolescent's violent behavior. When considering the negative impact violent video games have on youth, the evidence is strong: playingviolent video games has more effect on increased youth aggression than second-hand smoke has on causing cancer, or lead exposure links to decreased IQ.

RJN, Ex 1, pp. 5-6.

The quantum of empirical evidence considered by the Legislature supports its determination that playing the violent video games covered by the Act poses a special risk of harm to minors.

i. Playing Violent Interactive Video Games Leads to Antisocial or Aggressive Feelings or Behavior, Adversely Impacts School Performance, and Lessens Brain Activity in the Frontal Lobes of Minors.

The Legislature's findings were based in large part by the research conducted and reported by Dr. Craig A. Anderson, Ph.D.[6/], much of which is contained in the legislative record. See Appendix A, p. A014, "Violent Video Game Bibliography." The Legislature was referred to no less than twenty-three published articles authored by Dr. Anderson and his colleagues addressing the negative impacts playing violent video games has on minors. *Ibid*.

In 2004, Dr. Anderson reported that an "updated meta-analysis reveals that exposure to violent video games is significantly linked to increases in aggressive behaviour, aggressive cognition, aggressive affect, and cardiovascular arousal, and to decreases in helping behaviour."[7/] Moreover, "Experimental studies reveal this linkage to be causal. Correlational studies reveal a linkage to serious, real-world types of aggression. Methodologically weaker studies yielded smaller

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6. Dr. Anderson is a Distinguished Professor and Chair of the Iowa State University Department of Psychology. http://www.psychology.iastate.edu/faculty/caa/. He has been publishing articles on the effects of violent video games on minors since 2000.

7. See Appendix C, p. C091, Anderson, *An Update on the Effects of Playing Violent Video Games*, Journal of Adolescence, 24 (2004) 113-122.

effect sizes than methodologically stronger studies, suggesting that previous meta-analytic studies of violent video games underestimate the true magnitude of observed deleterious effects on behaviour, cognition, and affect." *Ibid*.

The Legislature was presented with evidence demonstrating the causal relationship between violent video games and the harm caused to minors. One such article, a comprehensive meta-study or statistical practice of combining the results of a number of studies that address a set of related research hypotheses, concluded that "Though the number of studies investigating the impact of violent video games is small relative to the number of television and film studies, there are sufficient studies with sufficient consistency (as shown by the mate-analysis results) to draw some conclusions . . . . The experimental studies demonstrate that in the short term, violent video games cause increases in aggressive thoughts, affect, and behaviour; increases in physiological arousal; and decreases in helpful behaviour. [8/]

In another article where 607 eighth and ninth grade students from four schools were analyzed, research demonstrated that "[a]dolescents who expose themselves to greater amounts of video game violence were more hostile, reported getting into arguments with teachers more frequently, were more likely to be involved in physical fights, and performed more poorly in school."[9/]

The Legislature was presented with further research showing that playing violent video games increases "automatic aggressiveness," even in adults. In a study conducted using 121 college students, the results showed "[w]hile most video game enthusiasts insist that the games they play have no effect on them, their exposure to scenes of virtual violence may influence them automatically and unintentionally."[10/] The study concluded that "[d]espite the misleading debate in

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8. Appendix A, p. A100, Anderson, et al., *The Influence of Media Violence on Youth*, Psychological Science in the Public Interest, Vol. 4, No. 3, pp. 91-93 (December 2003).

9. Appendix B, p. B028, provided in full in Appendix D, p. D001, Gentile, et al., *The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance*, Journal of Adolescence 27 (2004) 5-22, p. 5.

10. Appendix B, p. B064, provided in full at Appendix D, p. D019, Uhlmann & Swanson, *Exposure to Violent Video Games Increases Automatic Aggressiveness*, Journal of Adolescence, 27

the news media over whether exposure to violent television, movies and video games leads to an increase in aggressive behavior, the empirical evidence that it does so has become overwhelming." *Id*. at 49-50.

The Legislature was also presented with research demonstrating that violent video games can lead to desensitization in minors.[11/] Desensitization "means the attenuation or elimination of cognitive, emotional, and ultimately, behavioral responses to a stimulus." *Id*. at 25. One article reported specific findings that, as between violent video games, movies, televisions, and Internet content, "[r]egression analyses indicated that only exposure to video game violence was associated with (lower) empathy." *Id*. at 23 (internal citations omitted). Empathy is "the capacity to perceive and to experience the state of another [and] is critical to the process of moral evaluation." *Id*. at 26. Evidence demonstrates a "[r]elationship[] between lower empathy and social maladjustment and aggression in youth . . . ." *Id*. (internal citation omitted).

Other research considered by the Legislature demonstrates the impact violent video games have on brain activity. One such study, conducted over a two year period and reported by the Indiana University School of Medicine, concluded that "[t]here appears to be a difference in the way the brain responds depending upon the amount of past violent media exposure through video games, movies and television."[12/] For minors previously diagnosed with disruptive behavior disorders (DBD), the research demonstrated "less brain activity in the frontal lobe while the youths with DBD watch violent video games." *Ibid*. The frontal lobe "is the area of the brain responsible for decision-making and behavior control, as well as attention and a variety of other cognitive functions." *Ibid*. Brain function was also altered in non-DBD youth. *Ibid*.

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(2004) 41-52, p. 48.

11. Request for Judicial Notice, Ex. 2, Senate Rules Committee analysis of AB 1179, pp. 4-5; "Violent Video Game Bibliography," Appendix A, A014; Appendix E, p. E001, Funk, et al., *Violence Exposure in Real-Life, Video Games, Television, Movies, and the Internet: Is There Desensitization?*, Journal of Adolescence 27 (2004) 23-39.

12. Appendix A, p. A127, *Aggressive Youths, Violent Video Games Trigger Unusual Brain Activity*, Indiana University School of Medicine, December 2, 2002.

By correspondence dated April, 2005, the American Academy of Pediatrics informed the Legislature that "early studies on video games indicate that the effects of child-initiated virtual violence may be even more profound than those of passive media, such as televisions . . . . The time has passed for contemplating and discussing whether violence in video games and other media are harmful to our children. Action is needed." See Appendix A, p. A085.

Indeed, the United States District Court for the Western District of Washington recently came to the same conclusion as the Legislature. In *Maleng*, a case relied upon by Plaintiffs, the court expressly found that existing evidence and expert opinions supported the finding that "the depictions of violence with which we are constantly bombarded in movies, television, computer games, interactive videos games, etc., have some immediate and measurable effect on the level of aggression experienced by some viewers and that *the unique characteristics of video games, such as their interactive qualities, the first-person identification aspect, and the repetitive nature of the action, makes video games potentially more harmful to the psychological well-being of minors than other forms of media*. 325 F. Supp. 2d at 1188 (emphasis added).

In *Maleng*, the court struck down the video game ordinance not because existing research did not support the harm violent video games cause to minors, but because the court found that "the current state of the research cannot support the legislative determinations that underlie the Act because there has been no showing that exposure to video games that 'trivialize violence against law enforcement officers' is likely to lead to actual violence against such officers." *Ibid*.

In the instant case, the Legislature is seeking to prevent harm to minors, not to prevent them from committing violent acts. Automatic aggressiveness, increased aggressive thoughts and behavior, antisocial behavior, desensitization, poor school performance, reduced activity in the frontal lobes of the brain – each causes distinct harm to the developing minds of minors. And prevailing social science points directly to violent video games as a major culprit. Presented with such substantial evidence, the Legislature could not simply ignore the deleterious effects extremely violent video games are having on minors. The Legislature's finding that extremely violent video games covered by the Act cause harm to minors is supported by substantial evidence, Plaintiffs are not likely to succeed on their claim that the Act does not address a compelling state interest.

C. The Act Is Narrowly Tailored to Further the State's Interest.

Even under strict scrutiny, a content-based restrict on speech will survive judicial review if the legislature chose the least restrictive means available to further its compelling interest. *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Here, the Act is very narrowly tailored to protect the State's youth, as explained below.

i. The Act Applies Only to Video Games Given Their Unique Interactive Nature.

The Legislature had substantial evidence to determine that extremely violent video games, given their interactive nature requiring players to affirmatively cause characters to engage in extreme violence, pose a special risk of harm to minors beyond the passive viewing of television or movies.

Video games are uniquely interactive. The player controls the characters in first-person, causing them to shoot, stab, beat, stomp, run over, or ignite the opponent. Often this is the entire point of the game. The American Academy of Pediatrics advised the Legislature that "early studies on video games indicate that the effects of child-initiated virtual violence may even be more profound than those of passive media, such as television." See Appendix A, p. A085. The California Psychiatric Association mirrored these concerns when it advised the Legislature that violent content in "interactive media" have "more significantly severe negative impacts than those wrought by television, movies, or music." See Appendix A, p. A082. The California Psychological Association informed the Legislature that the research "point[s] overwhelmingly to a causal connection between media violence and aggressive behavior in some children" and that "[t]he interactive nature of video games exacerbates this problem." See Appendix A, p. A081. And according to the American Psychological Association, "violent video games may be more harmful than violent television and movies because they are interactive, very engrossing and require the player to identify with the aggressor . . . ."[13/]

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13. http://www.apa.org/releases/videogames.html.

Plaintiffs likely would not dispute that video games, given their interactive nature, can be excellent mechanisms for teaching minors a variety of subject matters. The Legislature considered the research that supports this conclusion.[14/] But just as the interactive nature of video games makes them exemplary teachers, it is this interactive nature that also posses a special risk to minors when the games contains extreme violence.

Focusing the Act on such interactive video games is the only means through which the Legislature could attempt to remedy the exacerbated harm caused thereby. Although the Legislature was presented with evidence that extreme violence in other forms of media can also cause harm to minors, substantial evidence supports the determination that the interactive nature of video games poses a special risk. The Legislature was more than justified in focusing on this narrow medium of violent material.

ii. The Type of Video Games Covered By The Act Are Exceedingly Narrow.

By definition, the Act covers only those games that, as a whole, a reasonable person would find appeal to a deviant or morbid interest of minors, are patently offensive by community standards as to what is suitable for minors, and lack serious literary, artistic, political, or scientific value for minors. Act, Civil Code, § 1746(d)(1). The Act provides an alternative definition with precise terms that cover only the most "especially heinous" depictions of violence on a substantially human character. Video games meeting either definition, an exceedingly narrow category of video games, contain little if any expression. Certainly no expression worthy of protection as to minors.

In contrast, the video game ordinance at issue in *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) relied heavily upon by Plaintiffs, applied to all "graphically violent video games," and was not narrowly drawn. *Ibid.* Because the Act at issue covers only an exceedingly narrow category of violent video games, it is narrowly tailored.

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14. Appendix B, p. B003, Gentile & Gentile, *Violent Video Games as Exemplary Teachers*, paper presented at Biennial Meeting of the Society for Research in Child Development, April 9, 2005 (concluding that playing violent video games leads to greater hostile attribution bias and increased aggressive behaviors -- "exemplary" teaching of aggression).

iii. The Act Does Not Restrict Adult Access to Any Video Games, and Does Not Prohibit Minors From Playing the Games, Only Purchasing Them Without Adult Supervision.

The Act poses none of the problems raised in prior Supreme Court precedent where Congress sought to regulate indecent speech as to minors, but also prohibited adult access to the covered material. See *United States v. Playboy Ent. Group*, 529 U.S. 803, 812-817 (2000) (regulation of "signal bleeding" of indecent programing invalid because it also prohibited adult access); *Sable Communications*, 492 U.S. at 127 (ban on "dial-a-porn" to protect minors struck down for prohibiting adult access to protected speech). Here, the Act is specifically limited to minors. Adult access to video games remains unimpeded.

And should parents or guardians desire minors to have access to such games, they can purchase the games for the minors. By containing this safe harbor, the Act hits only the specifically desired target – minors whose parents do not want their child exposed to the extremely violent video games. Alternative avenues for minors' access to the covered games are written into the Act. Thus, any burden placed on minors is minimal. They need only persuade their parent or guardian to purchase these games for them.

iv. No Less Restrictive Means Exists For Ensuring, Through Threat of Civil Penalty, That Minors Only Have Access to Extremely Violent Video Games With Parental Knowledge.

The presence of industry self-regulation has little, if any, relevance in this case. The self-imposed ratings described in detail by Plaintiffs simply do not carry the force of a state law, the violation of which subjects the offender to civil penalty.

The Legislature considered substantial evidence demonstrating that the effectiveness of the video game industry's self-regulation is simply unacceptable. The Senate Judiciary Committee analysis raised the issue, stating, "[t]he author acknowledges that the ESRB rating system is currently in place, but argues that its implementation has been unsatisfactory." RJN, Exhibit 1, p. 13. In fact, the Legislature considered that "[r]ecent studies show that the voluntary rating and enforcement system implemented by self-regulatory associations or entertainment producers have had limited success on decreasing youth access to Mature (M) rated video games." *Id*. at pp. 13-14. They were also made aware that "[d]uring 2004, the National Institute on Media and the Family had

children between the ages of seven and fourteen attempt to purchase M-rated games in thirty-five stores. Youth succeeded 34% of the time. While the overall purchase rate was 34%, boys as young as seven were able to buy M-rated games 50% of the time." *Ibid*. The Legislature was also aware that "a nationwide undercover survey of stores completed by the Federal Trade Commission in 2003 corroborated these findings. In this study, 69% of unaccompanied 13 to 16-year-olds purchased M-rated games and only 24% of cashiers asked the youth's age." *Ibid.*

The ineffectiveness of the industry's attempts to self-regulate comes as no surprise. According to a Federal Trade Commission ("FTC") report to Congress, cited to the Legislature in the Senate Judiciary Committee analysis, the industry specifically markets M-rated (Mature) games to minors.[15/] The FTC report states, "[a]ccording to industry data, nearly 40% of M-rated games purchased in 2002 were for children under 17." *Id*. at 27. Although Plaintiffs claim they have implemented new enforcement provisions, the FTC report concluded that "[t]he industry is actively enforcing those standards and penalizing those companies found to be in noncompliance. Yet those standards permit, and, in fact, industry members continue to place, advertisements in television and print media with substantial youth audiences." *Id*. at 28.

The Legislature was not willing to simply maintain the status quo, hoping that purported industry efforts would eventually eliminate minors' access to extremely violent video games. The Act is thus narrowly tailored to ensure that, through threat of civil penalty, only with parental knowledge will minors have access to the most extremely violent video games. No less restrictive means of achieving this goal exists.

V. THE BRANDENBURG STANDARD DOES NOT APPLY TO THE ACT.

The purpose of this Act, as stated by the Legislature, is to protect minors. The Act expresses its purpose as "preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games." Act, § 1(c). The *Brandenburg* standard, however, applies only when a statute seeks to prohibit "advocacy of the use

15. Appendix E, p. E020, FTC July 2004 Report, at pp. 20-28; Request for Judicial Notice, Exhibt 1, pp. 13-14.

of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). By contrast, the Act's prohibition is based on the Legislature's finding that violent video games cause harm to minors, and is not aimed specifically at preventing minors from committing immediate violent acts. Thus, the *Brandenburg* standard is inapplicable.

VI. THE ACT'S PRECISELY DEFINED TERMS ARE NOT IMPERMISSIBLY VAGUE

The Legislature carefully drafted the language of the Act to enable a person of ordinary intelligence to discern what types of violent video games could not be sold or rented to minors. A law is not unconstitutionally vague where it provides "a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1979); *see also Daily v. Bond*, 623 F.2d 624, 626 (9th Cir. 1980) (statute is not unconstitutionally vague if it gives fair warning of the proscribed conduct). The Due Process Clause, under which a vagueness challenge falls, does not present an "insurmountable obstacle to legislation" by demanding mathematical precision of terms. *U.S. v. Petrillo*, 322 U.S. 1, 7 (1947).

In reviewing a business regulation for facial vagueness, the principal inquiry is whether the law affords fair warning of what is proscribed. *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489 (1982). In *Flipside*, the Supreme Court recognized that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action . . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Id*. at 498-99 (footnotes omitted). Here, the key terms of the Act are defined with precision. An ordinary person, using common sense, is capable of determining which games meet the definition of "violent video game."

Plaintiffs argue that the terms of the Act are vague and do not provide fair notice, but this argument is contradicted by the fact that the ESRB already independently reviews and rates the content of entertainment software. Lowenstein Decl., ¶ 4. For more than ten years, the ESRB has

been rating computer and video games, and the rating system offers actual rating for age appropriateness of content and short descriptive phrases. Lowenstein Decl. ¶ 7. Certain games receive ratings of "AO" (Adults Only) and contain content that the ESRB suggests should only be played by users 18 and older. Lowenstein Decl. ¶ 8. The ESRB states that "AO" games "have content that should only be played by persons 18 years and older. Titles in this category may include prolonged scenes of intense violence and/or graphic sexual content and nudity." Lowenstein Decl. Exhibit A. The ESRB defines "intense violence" as "graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons, and depictions of human injury and death." A distinction is made by the ESRB between "intense violence" and "violence" which is defined as "scenes involving aggressive conflict." Lowenstein Decl., Exh. A.

Plaintiffs question whether an ordinary person would be able to determine whether three games, *God of War*, *Jade Empire* and *Resident Evil IV*, depict violence against an "image of a human being." Plaintiffs fail to mention that the ESRB has already made a distinction between these three games and the type of violence each contains. Although the three games are all rated "Mature" (17+), the ESRB has given *Resident Evil IV* and *God of War*[16/] content descriptors of "blood and gore, intense violence, language" and *Jade Empire* received a "blood and gore, violence." The "intense violence" descriptor for *Resident Evil IV* and *God of War* clearly state that this type of violence includes realistic-looking physical conduct and realistic blood, gore and weapons, and depictions of human injury and death. Therefore, the ESRB has determined that the violence in *God of War* and *Resident Evil IV* is more realistic-looking than the violence in *Jade Empire*. This undercuts Plaintiffs' assertion that the terms used in the Act are ill-suited for a medium that relies on animation and fantastic forms and characters because the ESRB makes distinction between realistic-looking physical conduct and merely "aggressive conduct." Thus, Plaintiffs' hypotheticals are disingenuous; whether there is a depiction of violence against an "image of a human being" and/or "characters with substantially human characteristics" is something an ordinary person, especially the ESRB, can determine.

16. *God of War* has additional descriptors of "nudity, sexual themes, strong language."

Additionally, Plaintiffs' argument that certain terms like "deviant or morbid interest of minors," "cruel," "heinous," "depraved," are not adequately defined is not persuasive. The Supreme Court has found that any vagueness in the statutory definition of "heinous, cruel, and depraved" is cured by the limitation that the statutory definition of the offense involve torture or serious physical abuse. *See Walton v. Arizona*, 497 U.S. 639, 654-55 (1990) (overruled on other grounds) (upholding a death penalty statute that used these definitions); *United States v. Jones*, 132 F.3d 232, 249-50 (5th Cir. 1998) (finding that similar definitions for cruel, depraved, heinous, serious physical abuse and torture were not unconstitutionally vague and did not lead to an arbitrary imposition of the death penalty). In this Act, the definitions for "heinous," "cruel" and "depraved" include qualifications requiring the act include torture or serious physical abuse of the victim and therefore survive the vagueness challenge as the death penalty statute in *Walton* survived. Moreover, the definitions for "serious physical abuse" and "torture" are almost identical to definitions used in a death penalty statute that survived a vagueness challenge in at least one Appellate Court. *See United States v. Jones*, 132 F.3d at 250. Finally, Plaintiffs cannot argue that "deviant or morbid interest of minors" is too vague because in *Ginsburg* a statute with essentially the same language survived a vagueness challenge. 390 U.S. at 643-46 (upholding a statute with the language "predominantly appeals to the prurient, shameful or morbid interest of minors"). Tellingly, Plaintiffs do not cite to a single case to support their argument that any of the specific terms contained in the Act are unconstitutionally vague.

Moreover, contrary to Plaintiffs' argument, the video game statute in *Maleng* is not similar to the one at issue here. In *Maleng*, the Act in question regulated only speech that depicted violence against law enforcement officers. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d at n. 2, (noting that "public law enforcement officers" was not clearly defined and there was a question of whether a firefighter was a public law enforcement officer). The Act in this case defines violent video game and does not specifically advocate against a certain type of violence -- the Act is viewpoint neutral.

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VII. THE ACT'S LABELING PROVISIONS ARE CONSTITUTIONAL.

Because the Act survives all levels of judicial scrutiny, its labeling requirements survive as well.[17/] It is beyond question that the State may constitutionally require harmful commercial products be labeled as such. Plaintiffs arguments to the contrary are unsupported.

"For commercial speech [to be protected by the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest." *Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). The requirement that "18" appear on the package is a method to inform the public that certain video games cannot legally be sold to anyone under 18. This requirement does not prevent the video games from being displayed or sold to those over the age of 18, and directly advances the state's interest in protecting minors.

Plaintiffs' suggestion that the Act should be declared unconstitutional because the "18" label conflicts with the voluntary ESRB rating system is not supported by fact or legal precedent. *See* Pltfs.' Mem. P & A Supp. Mot. Prelim. Inj., 14, n.7. A voluntary rating scheme designed by a business organization does not preempt a valid state law. Nor is the Act inconsistent with Cal. Bus. & Prof. Code § 20650. This Act requires that an "18" be placed on the front of a violent video game; § 20650 requires that video game retailers post a sign within the retail establishment informing consumers about a video game rating system. The video game retailers may simultaneously comply with § 20650 and the Act as there is nothing in § 20650 regarding what should be affixed to the front of a video game package.

VIII. THE EQUITIES WEIGH SHARPLY IN FAVOR OF THE STATE.

Should this Court enjoin a duly enacted law of the State, the State itself will suffer irreparable injury. "[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coalition for Economic Equity v. Wilson*, 122 F.3d 718,

17. As discussed fully, above, the Act meets the test of strict scrutiny.

719 (9th Cir. 1997). The equities tip sharply in favor of the State. The Legislature presented substantial evidence demonstrating that without the Act's restrictions going into effect, minors will continue to be able to purchase and play extremely violent video games, notwithstanding the industry's self-imposed regulations. The compelling public interest in protecting minors from the harm inflicted by the video games covered by the Act outweighs any purported potential harm to Plaintiffs.

CONCLUSION

For all of the foregoing reasons, the State Defendants respectfully request that this Court deny, in its entirety, Plaintiffs' motion for a preliminary injunction.

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