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20 UNITED STATES DISTRICT COURT
 21 FOR THE NORTHERN DISTRICT OF CALIFORNIA

22 VIDEO SOFTWARE DEALERS
 23 ASSOCIATION and ENTERTAINMENT
 24 SOFTWARE ASSOCIATION,

25 Plaintiffs,

26 vs.

27 ARNOLD SCHWARZENEGGER, in his official
 28 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)

PLAINTIFFS' NOTICE OF MOTION
 AND MOTION FOR A PRELIMINARY
 INJUNCTION; MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT THEREOF

NOTICE OF MOTION AND MOTION

TO ALL DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 2, 2005, at 9:00 a.m., or as soon thereafter as this matter may be heard, in Courtroom 6 of this Court, located at 280 South First Street, San Jose, California 95113, plaintiffs Video Software Dealers Association (“VSDA”) and Entertainment Software Association (“ESA”) will, and hereby do, respectfully move for a preliminary injunction preventing Defendants and their officers, employees, and representatives from enforcing Chapter 638, Statutes of 2005 (Cal. 2005) (hereinafter, the “Act”).

VSDA and ESA (collectively “Plaintiffs”) move for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 on the following grounds:

1. The Act was signed into law on October 7, 2005, and is due to take effect on January 1, 2006. The Act places criminal penalties on the sale or rental of “violent” video games to individuals under age 18 and imposes other burdens on the expression of video game retailers and manufacturers.

2. Plaintiffs are associations of companies that create, publish, manufacture, import, distribute, sell, and/or rent video games. On October 17, 2005, Plaintiffs filed a three-count Complaint seeking to invalidate the Act under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. As set forth in the Complaint, the Act is unlawful because it violates Plaintiffs’ constitutionally guaranteed rights to freedom of expression and equal protection, and because it is unconstitutionally vague.

3. Plaintiffs are entitled to a preliminary injunction because they are likely to succeed on the merits of their constitutional challenge to the Act, and because the equities weigh strongly against enforcement of the Act. Similar efforts to regulate video games based on their expressive content have been struck down by every court that has considered this issue, including the Seventh and Eighth Circuits, and a District Court in the Ninth Circuit. *See American Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 579-80 (7th Cir. 2001); *Interactive Digital Software Ass’n v. St. Louis*

1 County, 329 F.3d 954, 957 (8th Cir. 2003); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d
2 1180, 1184-85 (W.D. Wash. 2004).

3 4. The Act is subject to strict scrutiny because it imposes content-based restrictions on
4 expression protected by the First Amendment. The Act's restrictions on "violent" video games fail
5 strict scrutiny, because they are unsupported by a compelling state interest that is materially advanced
6 by narrowly tailored means. In addition, the Act is unconstitutionally vague, and the Act
7 unconstitutionally compels expression through burdensome and unnecessary labeling requirements.

8 5. The equities weigh strongly in favor of an injunction. Plaintiffs and their members
9 will suffer irreparable harm if the Act is allowed to go into effect, because the loss of First
10 Amendment freedoms, for any amount of time, constitutes irreparable injury. The First Amendment
11 rights of members of the public will be similarly impaired.

12 This Motion is based on this Notice of Motion and Motion, the attached Memorandum of
13 Points and Authorities, the declarations submitted herewith, detailing the Act's chilling effect on
14 protected expression, copies of sample video games that might be impermissibly censored under the
15 Act, videos of sample representative game play of those games, the Court's papers and files in this
16 case, the arguments of counsel, and any other matters the Court may consider.

17 For each of these reasons, Plaintiffs request that this Court enter a preliminary injunction
18 enjoining all Defendants to this action, and their officers, employees, and representatives, from
19 enforcing, or directing the enforcement of Chapter 638, Statutes of 2005 (Cal. 2005), until resolution
20 of this action or further order of this Court.

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF MOTION AND MOTION i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES ivi

INTRODUCTION 1

FACTUAL BACKGROUND 3

 A. The Nature Of Video Games..... 3

 B. The Video Game Industry’s Well-Established Voluntary Rating System..... 3

 C. The Challenged Statute. 4

 1. *The “Violent” Video Game Ban.* 4

 2. *The Act’s Labeling Restrictions.* 5

ARGUMENT 6

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS, GIVEN THE ACT’S SWEEPING CONTENT-BASED INVASION OF FIRST AMENDMENT RIGHTS AND UNCONSTITUTIONAL VAGUENESS..... 6

 A. Video Games Constitute Expression Protected By The First Amendment..... 6

 B. The Act’s “Violent” Video Game Restrictions Fail The Brandenburg Standard..... 7

 C. The Act’s “Violent” Video Game Restrictions Fail Strict Scrutiny. 10

 1. *The State Has No Legitimate, Much Less Compelling, Interest In Controlling Minors’ Thoughts Or Feelings.* 10

 2. *The Act Does Not Materially Advance The State’s Interests And Is Not Narrowly Tailored.* 12

 C. The Act’s Labeling Provisions Are Unconstitutional. 14

 D. The Act Is Unconstitutionally Vague..... 15

II. THE EQUITIES STRONGLY SUPPORT AN INJUNCTION..... 18

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 13

American Amusement Machine Ass’n v. Kendrick, 244 F.3d 572 (7th Cir. 2001) i, 1, 2, 6, 7, 8, 9, 11, 12, 13

American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986)..... 9-10

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)..... 8, 11

Association of National Advertisers v. Lundgren, 44 F.3d 726 (9th Cir. 1994) 10

Boos v. Barry, 485 U.S. 312 (1988)..... 11

Brandenburg v. Ohio, 395 U.S. 444 (1969)..... 8

Brown v. California Department of Transportation, 321 F.3d 1217 (9th Cir. 2003) 18

Dworkin v. Hustler Magazine Inc., 867 F.2d 1188 (9th Cir. 1989)..... 8, 9

Eclipse Enterprises, Inc. v. Gulotta, 134 F.3d 63 (2d Cir. 1997) 7

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)..... 11

Florida Star v. B.J.F., 491 U.S. 524 (1989)..... 12

Ginsberg v. New York, 390 U.S. 629 (1968)..... 12

Grayned v. City of Rockford, 408 U.S. 104 (1972)..... 15-16

Interactive Digital Software Ass’n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003) i-ii, 1, 6, 7, 8, 10, 12

James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002)..... 2, 7, 8, 9, 12

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 11

Kolender v. Lawson, 461 U.S. 352 (1983)..... 15

Leidholdt v. L.F.P. Inc, 860 F.2d 890 (9th Cir. 1988) 8

McConnell v. Federal Election Commission, 540 U.S. 93 (2003)..... 11

Miller v. California, 413 U.S. 15 (1973) 12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NAACP v. Button, 371 U.S. 415 (1963)..... 16

National People’s Action v. Village of Wilmette, 914 F.2d 1008 (7th Cir. 1990)..... 18

Ohio ex rel. Celebrezze v. Nuclear Regulatory Commission, 812 F.2d 288 (6th Cir. 1987)..... 18

Pacific Gas & Electric Co. v. Public Utilities Commission of California, 475 U.S. 1
(1986)..... 14, 15

Perez-Funez v. District Director, INS, 611 F. Supp. 990 (C.D. Cal. 1984) 18

Podolsky v. First Healthcare Corp., 50 Cal.App.4th 632 (Cal. Ct. App. 1996)..... 2

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 10

Reno v. ACLU, 521 U.S. 844 (1997)..... 16

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988)..... 14

S.O.C., Inc. v. County of Clark, 152 F.3d 1136 (9th Cir. 1998) 2, 6, 18

Sammartano v. First Judicial District Court, 303 F.3d 959 (9th Cir. 2002) 6, 18, 19

Sanders v. Acclaim Entertainment, Inc., 188 F. Supp. 2d 1264 (D. Colo. 2002) 2, 7

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105
(1991)..... 10

Texas v. Johnson, 491 U.S. 397 (1989) 1, 11

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 11

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) 10, 12, 13

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 10, 13

United States v. United Foods, Inc., 533 U.S. 405 (2001)..... 14

Video Software Dealers Ass’n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash.
2004) ii, 1, 2, 6, 7, 8, 9, 10, 12, 13, 18

Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167 (D. Conn. 2002) 2, 7

Winters v. New York, 333 U.S. 507 (1948)..... 7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATUTES

Cal. Bus. & Prof. Code § 20650 14, 15

LEGISLATIVE MATERIAL

Chapter 638, Statutes of 2005 (Cal. 2005)..... 4, 5, 6, 7, 11, 12, 16

1 **INTRODUCTION**

2 Plaintiffs Entertainment Software Association (“ESA”) and Video Software Dealers
3 Association (“VSDA”) submit this memorandum in support of their motion, pursuant to Federal Rule
4 of Civil Procedure 65, for a preliminary injunction preventing Defendants and their officers,
5 employees, and representatives from enforcing Chapter 638, Statutes of 2005 (Cal. 2005)
6 (hereinafter, the “Act”). The Act was signed into law on October 7, 2005, and is due to take effect on
7 January 1, 2006.

8 Plaintiffs are entitled to a preliminary injunction under controlling legal principles. Plaintiffs
9 are likely to succeed on their claim that the Act is unconstitutional. California’s sweeping legislation
10 places substantial penalties on the sale or rental of “violent” video games to individuals under age 18
11 and imposes additional burdens on the expression on those who make, distribute, and sell or rent
12 video games. Such content discrimination violates the “bedrock principle underlying the First
13 Amendment . . . that the government may not prohibit the expression of an idea simply because
14 society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

15 If allowed to go into effect, the Act would impose an unprecedented – and unconstitutional –
16 scheme of censorship on fully protected speech, one that singles out expression in video games from
17 all other media that may contain depictions of “violence.” Indeed, the Act may well restrict the sale
18 of “T”-rated video games based on popular movies – such as the *James Bond* franchise, and video
19 games based on Governor Schwarzenegger’s blockbuster *Terminator* trilogy.

20 Not only would the Act restrict the sale or rental of “violent” video games based on the
21 content of those games, but it also would require any video game manufacturer, distributor or
22 importer who distributes video games in California – essentially *every* video game maker – to
23 determine whether the games meet the statutory definition of “violent,” and if so, to place a large
24 sticker on the game packaging that obscures other important information.

25 Every previous attempt to restrict video games based on their content has been struck down as
26 violating the First Amendment. *See Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d
27 954 (8th Cir. 2003) (“*IDSA*”); *American Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir.
28 2001) (Posner, J.) (“*AAMA*”); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180 (W.D.

1 Wash. 2004) (“VSDA”); *cf. James v. Meow Media, Inc.*, 300 F.3d 683, 696 (6th Cir. 2002) (refusing
2 to permit tort liability for video games on First Amendment grounds); *Sanders v. Acclaim Entm’t,*
3 *Inc.*, 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002) (same); *Wilson v. Midway Games, Inc.*, 198 F.
4 Supp. 2d 167, 181 (D. Conn. 2002) (same). Like its predecessors in other jurisdictions, the Act
5 cannot withstand the strict constitutional scrutiny triggered by its content-based burdens on protected
6 speech.

7 The Act is also impossibly – and unconstitutionally – vague. In defining which games are
8 subject to restriction, the Act attempts to squeeze its prohibitions into the three-prong test for the
9 narrow sexually explicit “harmful to minors” category of speech – which has *never* been extended to
10 “violent” speech, and which has no meaning as applied to depictions of violence – and also seeks to
11 import language from sentencing guidelines governing when the *death penalty* should be imposed.
12 This latter framework is unprecedented in the speech context, and is so hopelessly vague that the Act
13 should be struck down on vagueness grounds alone. *See VSDA*, 325 F. Supp. 2d at 1191 (invalidating
14 Washington state law restricting “violent” video games on the independent ground of
15 unconstitutional vagueness).

16 The equities also weigh strongly in favor of an injunction. *See, e.g., AAMA*, 244 F.3d at 580.
17 Plaintiffs and their members will suffer irreparable harm if the Act is allowed to go into effect,
18 because “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably
19 constitutes irreparable injury.” *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998)
20 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)). The First Amendment rights of
21 members of the public — whose rights are also at stake in this facial challenge — will be similarly
22 impaired. Accordingly, the Act must be enjoined.¹

23
24
25 ¹ In addition, absent injunctive and declaratory relief, Plaintiffs’ members might be subjected to
26 a multitude of lawsuits under Cal. Bus. & Prof. Code § 17200, which has been interpreted to
27 grant a broad private right of action to individuals harmed by an entity’s alleged failure to
28 comply with a state statute. *See, e.g., Podolsky v. First Healthcare Corp.*, 50 Cal.App.4th
632, 647 (Cal. Ct. App. 1996). The Act’s inherently vague terms would mean that Plaintiffs’
members could be subject to suit based on a wide and contradictory range of legal theories
about what games are covered by the Act. The potential for numerous civil lawsuits only
serves to underscore the need for immediate injunctive relief.

FACTUAL BACKGROUND

A. The Nature Of Video Games.

Plaintiffs are associations of companies that create, publish, manufacture, distribute, import, sell, and/or rent video games. Compl. ¶¶ 11-12. They bring this action because, if allowed to go into effect, the Act will censor distribution of some of Plaintiffs’ creative works, based solely upon their expressive content. *Id.* ¶ 14. In this facial challenge, Plaintiffs also assert the rights of willing listeners. *Id.* ¶ 15.

Video games are a modern form of artistic expression. Like motion pictures and television programs, video games tell stories and entertain audiences through the use of complex pictures, sounds, and text. *See* Price Decl. ¶¶ 4-5.² Video games feature the artwork of leading graphic artists, as well as music — much of it original — that enhances the game’s artistic expression in the same way as movie soundtracks. *Id.* These games often contain storylines and character development as richly detailed as (and sometimes based on) books and movies. *Id.* ¶¶ 4-5, 61. Like great literature, these games frequently involve familiar themes such as good versus evil, triumph over adversity, struggle against corrupt powers, and quest for adventure. *Id.* ¶¶ 4, 23-66.

B. The Video Game Industry’s Well-Established Voluntary Rating System.

Like other popular media, such as motion pictures and music, the video game industry has adopted a voluntary and widely used rating system for video games. *See* Lowenstein Decl. ¶¶ 4-10. That system — which the FTC has called the “most comprehensive” of industry-wide media rating systems — is implemented by the Entertainment Software Rating Board (“ESRB”), a self-regulatory body that assigns independent ratings and descriptions for video game content. *Id.* ¶¶ 4-5. The ESRB system includes not only letter ratings (EC, E, E10+, T, M, and AO), but also numerous

² In support of their Motion, Plaintiffs are submitting the Declaration of Ted Price (“Price Decl.”), President and CEO of Insomniac Games, Inc.; Declaration of Crossan R. Andersen (“Andersen Decl.”), President of Plaintiff VSDA; and Declaration of Douglas Lowenstein (“Lowenstein Decl.”), President of Plaintiff ESA. Plaintiffs are also submitting copies of video games that may be deemed to be covered by the Act’s restrictions, along with taped recordings of representative play of those games. The declarations and supporting materials are being submitted as a separate appendix to the memorandum in support of Plaintiffs’ Motion.

1 “content descriptors,” descriptive phrases that give consumers and parents additional information
 2 about a game’s contents. *Id.* ¶¶ 7-8. The purpose of the ESRB system is to provide easily understood
 3 information about games to consumers and parents — not to dictate what is ultimately appropriate for
 4 individuals of different ages. *Id.* ¶ 6. Like the movie rating system, the ESRB system is entirely
 5 voluntary; nonetheless, nearly all video game publishers submit their games for rating. *Id.* Similarly,
 6 video game retailers throughout the nation are part of a widespread and voluntary effort to educate
 7 consumers about the ESRB system and to require parental consent for the sale of “M” games to
 8 individuals under age 17. *See* Andersen Decl. ¶ 18.

9 **C. The Challenged Statute.**

10 **1. The “Violent” Video Game Ban.**

11 The Act imposes a civil penalty of up to \$1,000 on any person who “sell[s] or rent[s] a video
 12 game that has been labeled as a violent video game to a minor.” Act, § 1746.1(a). “Violent” video
 13 games are defined by the Act as those “in which the range of options available to a player includes
 14 killing, maiming, dismembering, or sexually assaulting an image of a human being,” if the actions
 15 depicted meet one of two sets of criteria. Act, § 1746(d)(1). Under the first set of criteria, the
 16 violence depicted in the game must “appeal to a deviant or morbid interest of minors,” be “patently
 17 offensive to prevailing standards in the community as to what is suitable for minors,” and “cause[]
 18 the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.” *Id.*
 19 § 1746(d)(1)(A). Under the second provision, a game will be restricted if the actions depicted enable
 20 “the player to virtually inflict serious injury upon images of human beings or characters with
 21 substantially human characteristics in a manner which is especially heinous, cruel or depraved in that
 22 it involves torture or serious physical abuse to the victim.” *Id.* § 1746(d)(1)(B). Those terms are
 23 further defined as follows:

24 (A) “Cruel” means that the player intends to virtually inflict a high
 25 degree of pain by torture or serious physical abuse of the victim in
 26 addition to killing the victim.

27 (B) “Depraved” means that the player relishes the virtual killing or
 28 shows indifference to the suffering of the victim, as evidenced by
 torture or serious physical abuse of the victim.

1 (C) “Heinous” means shockingly atrocious. For the killing depicted
2 in a video game to be heinous, it must involve additional acts of torture
or serious physical abuse of the victim as set apart from other killings.

3 (D) “Serious physical abuse” means a significant or considerable
4 amount of injury or damage to the victim’s body which involves a
5 substantial risk of death, unconsciousness, extreme physical pain,
6 substantial disfigurement, or substantial impairment of the function of a
7 bodily member, organ, or mental faculty. Serious physical abuse,
unlike torture, does not require that the victim be conscious of the
8 abuse at the time it is inflicted. However, the player must specifically
intend the abuse apart from the killing.

9 (E) “Torture” includes mental as well as physical abuse of the
10 victim. In either case, the virtual victim must be conscious of the abuse
at the time it is inflicted; and the player must specifically intend to
11 virtually inflict severe mental or physical pain or suffering upon the
victim, apart from killing the victim.

12 (3) Pertinent factors in determining whether a killing depicted in a
13 video game is especially heinous, cruel, or depraved include infliction
of gratuitous violence upon the victim beyond that necessary to commit
14 the killing, needless mutilation of the victim’s body, and helplessness
of the victim.

15 *Id.* §§ 1746(d)(2), (3).

16
17 The Act’s “violent” video game ban purportedly serves two purposes: “preventing violent,
18 aggressive, and antisocial behavior” and “preventing psychological or neurological harm to minors
19 who play violent video games.” *Id.* § 1(c). Furthermore, the Act purports to make “findings” that
20 “[e]xposing minors to depictions of violence in video games” makes them “more likely to experience
21 feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to
22 exhibit violent antisocial or aggressive behavior,” and that “[e]ven minors who do not commit acts of
23 violence suffer psychological harm from prolonged exposure to violent video games.” *Id.*

24 §§ 1(a),(b).

25 **2. The Act’s Labeling Restrictions.**

26 In addition to imposing substantial penalties on persons who sell or rent “violent” video
27 games to minors, the Act imposes an additional, content-based burden on speech that is unsupported
28 by a compelling state interest. The Act provides that “[e]ach violent video game that is imported into

1 or distributed in California for retail sale shall be labeled with a solid white ‘18’ outlined in black.
 2 The ‘18’ shall have dimensions of no less than 2 inches by 2 inches” and must be placed on the face
 3 of the video game package. Act, § 1746.2. Failure to label a “violent” video game subjects a
 4 manufacturer, distributor or importer to a \$1,000 penalty. Act, § 1746.3.

5 ARGUMENT

6 A plaintiff is entitled to a preliminary injunction upon showing “either (1) a combination of
 7 probable success on the merits and the possibility of irreparable harm; or (2) that serious questions
 8 are raised and the balance of hardships tips on its favor.” *Sammartano v. First Judicial Dist. Court*,
 9 303 F.3d 959, 965 (9th Cir. 2002) (quotation marks omitted). These “two formulations represent two
 10 points on a sliding scale in which the required degree of irreparable harm increases as the probability
 11 of success decreases.” *Id.* (quotation marks omitted). “[W]hen the harm claimed is a serious
 12 infringement on core expressive freedoms, a plaintiff is entitled to an injunction even on a lesser
 13 showing meritoriousness.” *Id.* at 974.

14 Here, the First Amendment injuries worked by the Act unquestionably constitute irreparable
 15 harm supporting an injunction. *See S.O.C., Inc.*, 152 F.3d at 1148. Indeed, every previous attempt to
 16 restrict the distribution of “violent” video games has been enjoined on First Amendment grounds.
 17 *See AAMA*, 244 F.3d at 580 (affirming district court’s grant of a preliminary injunction, noting a
 18 “strong likelihood of ultimate victory,” irreparable harm to the plaintiffs if the law were allowed to go
 19 into effect, and “the entirely conjectural nature of the benefits of the ordinance to the people of
 20 Indianapolis”); *IDSA*, 329 F.3d at 960 (reversing district court’s refusal to enjoin ban on “violent”
 21 video games); *VSDA*, 325 F. Supp. 2d at 1191 (ordering permanent injunction against statewide
 22 restriction on “violent” video games, following preliminary injunction).

23 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR** 24 **CLAIMS, GIVEN THE ACT’S SWEEPING CONTENT-BASED INVASION** 25 **OF FIRST AMENDMENT RIGHTS AND UNCONSTITUTIONAL VAGUENESS.**

26 **A. Video Games Constitute Expression Protected By The First Amendment.**

27 Several circuit and district courts – including the Sixth, Seventh, and Eighth Circuits, and the
 28 United States District Court for the Western District of Washington – have unequivocally held that
 the First Amendment protects the expression in video games. *See AAMA*, 244 F.3d at 577-78; *IDSA*,

1 329 F.3d at 957 (noting that “[t]he mere fact” that video games “appear in a novel medium is of no
2 legal consequence”); *VSDA*, 325 F. Supp. 2d at 1184-85 (such games “are expressive and qualify for
3 the protections of the First Amendment”); *James*, 300 F.3d at 696 (confirming that the First
4 Amendment protects the communicative aspect of video games, and rejecting attempts to impose tort
5 liability on “violent” video games); *Sanders*, 188 F. Supp. 2d at 1279 (same); *Wilson*, 198 F Supp. 2d
6 at 181 (same). Indeed, modern video games involve “intricate” story lines, “detailed artwork,”
7 “original scores,” and an evolving narrative. *VSDA*, 325 F. Supp. 2d at 1184; *see also AAMA*, 244
8 F.3d at 577-78 (noting that video games convey “age-old themes of literature,” messages, and
9 ideologies, “just as books and movies do”). Moreover, the Act’s content-based restrictions
10 themselves demonstrate that the targeted games constitute protected expression, because “it is the
11 nature and effect of the message being communicated by these video games which prompted the state
12 to act in this sphere.” *VSDA*, 325 F. Supp. 2d at 1184.

13 That the Act restricts depictions of violence makes no difference as a matter of First
14 Amendment scrutiny. Depictions of violence are entitled to full constitutional protection. *See*
15 *AAMA*, 244 F.3d at 575-76 (“The notion of forbidding not violence itself, but pictures of violence, is
16 a novelty.”); *IDS*, 329 F.3d at 958 (strict scrutiny applies to content-based restrictions on “violent”
17 video games); *VSDA*, 325 F. Supp. 2d at 1186 (same); *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63,
18 66 (2d Cir. 1997) (declining to “expand the[] narrow categories of [unprotected] speech to include
19 depictions of violence” in trading cards). Indeed, in the context of “violent” magazines, characterized
20 by the state as collections of “bloodshed” and “crime,” the Supreme Court has stated that violent
21 expression is “as much entitled to the protection of free speech as the best of literature.” *Winters v.*
22 *New York*, 333 U.S. 507, 510 (1948).

23 **B. The Act’s “Violent” Video Game Restrictions Fail The Brandenburg**
24 **Standard.**

25 The Act restricts video games based on the Legislature’s belief that video games can lead to
26 violence. *See* Act § 1(c), (c) (finding that exposure to violent video games causes minors to “exhibit
27 violent[,] antisocial[,] or aggressive behavior,” and asserting that the State has a “compelling interest
28 in preventing violent, aggressive, and antisocial behavior”). As a result, to survive constitutional

1 scrutiny, the Act must meet the stringent standards of *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
 2 *See, e.g., James*, 300 F.3d at 698 (“In protecting against the propensity of expression to cause
 3 violence, states may only regulate that speech” which meets the *Brandenburg* standard); *see also*
 4 *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1199 (9th Cir. 1989) (efforts to restrict speech
 5 based on its “tendency to cause others to engage in undesirable acts” must meet the *Brandenburg*
 6 test); *cf. Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 894 (9th Cir. 1988) (speech not actionable simply
 7 because it is “[b]ase and malignant”) (quotation marks omitted).

8 Under *Brandenburg*, the government may regulate expression based on a concern that it will
 9 cause unlawful or violent behavior *only* if the government can prove that such expression ““is
 10 *directed to* inciting or producing *imminent* lawless action and is *likely* to incite or produce such
 11 action.”” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (quoting *Brandenburg*, 395
 12 U.S. at 447) (emphasis added). As the Supreme Court has explained, “[t]he mere tendency of speech
 13 to encourage unlawful acts is not a sufficient reason for banning it.” *Id.* Thus, the government may
 14 not punish speakers based solely on a prediction or suspicion that their words will tend, in the
 15 aggregate, to encourage undesired behavior.

16 Yet that is exactly what the Act purports to do. Here, the Act regulates speech ostensibly
 17 based on the Legislature’s conclusory “findings” that “minors” who play violent video games are
 18 “more likely to . . . exhibit violent antisocial or aggressive behavior.” Act, § 1(a). Even assuming
 19 that such findings were based on any reliable evidence, which they are not,³ the State would fail to

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 21 ³ The Act’s vague “legislative findings” ignores a substantial body of conflicting evidence
 22 about the purported effects of “violent” video games. Indeed, every court considering the
 23 issue has concluded that the research fails to establish any causal link between exposure to
 24 such games and subsequent harm to anyone. *See IDSA*, 329 F.3d at 959 (finding law lacking
 25 “the ‘substantial supporting evidence’ of harm that is required before an ordinance that
 26 threatens protected speech can be upheld”); *AAMA*, 244 F.3d at 578-79 (scientific studies “do
 27 not support” the regulation of “violent” video games, because these studies “do not find that
 28 video games have ever caused anyone to commit a violent act”); *VSDA*, 325 F. Supp. 2d at
 1188 (finding that “the current state of the research cannot support the . . . Act because there
 has been no showing that exposure to video games . . . is likely to lead to actual violence”).
 But even accepting the Legislature’s purported “findings” – that video games lead to “violent,
 asocial, or aggressive behavior” by minors – they would not demonstrate the level of
 “imminence” required by the *Brandenburg* standard. *See, e.g., James*, 300 F.3d at 698; *cf.*
Dworkin, 867 F.2d at 1199 n.8 (“At best, the scientific evidence concerning the causal
 relationship between pornographic materials and violent actions is ambiguous and

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1 meet the *Brandenburg* standard based on such aggregate effects. *See Dworkin*, 867 F.2d at 1199.
2 First, as the Sixth Circuit has observed, video games, designed for entertainment, are not “directed”
3 to inciting violence. *See, e.g., James*, 300 F.3d at 698 (video game makers do not “‘intend’ to
4 produce violent actions by the consumers, as is required by the *Brandenburg* test”). Second, the
5 purported basis for the Act – that long-term exposure to “violent” video games increases violent or
6 aggressive behavior in some small percentage of at-risk persons – falls far short of establishing a risk
7 of “imminent” violence. *Id.* (holding that the “glacial process of personality development” allegedly
8 affected by “violent” video games “is far from the temporal imminence that we have required to
9 satisfy the *Brandenburg* test”). Finally, there is absolutely no finding by the Legislature that video
10 games, which are played safely every day by millions, are “likely” to produce “imminent” violence.
11 *Id.* at 699; *see also AAMA*, 244 F.3d at 575.

12 Partly for these legal reasons, the Seventh Circuit in *AAMA* rejected the government’s
13 argument that a “violent” video game ban was justified because video games “incite youthful players
14 to breaches of the peace.” 244 F.3d at 575. Likewise, the District Court for the Western District of
15 Washington observed that the “Supreme Court and the Ninth Circuit have expressly rejected the idea
16 that the possibility of *future* harm can justify the regulation of speech.” *VSDA*, 325 F. Supp. 2d at
17 1187 n.3 (emphasis added). And in an analogous context – the attempted regulation of non-obscene
18 pornography based, among other things, on allegations that such materials may lead to the infliction
19 of violence on women – the Ninth Circuit concluded that such regulation falls short of the
20 *Brandenburg* requirements, and thus cannot survive First Amendment scrutiny. *Dworkin*, 867 F.2d
21 at 1199-1200 & n.8 (explaining that the “equivocal evidence” of any “causal relationship between
22 pornographic materials and violent actions” fails to show the likelihood of causing imminent
23 unlawful action required under *Brandenburg*); *see also American Booksellers Ass’n v. Hudnut*, 771
24 F.2d 323, 329-30 (7th Cir. 1985) (regulation failed to satisfy *Brandenburg* because any violent

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27 [Footnote continued from previous page]
28 unvalidated. Such equivocal evidence is insufficient to establish the ‘clear and present danger’
required in order for any of the exceptions to general first amendment principles to apply.”).

1 “effects depend on mental intermediation”), *aff’d*, 475 U.S. 1001 (1986). As in *Dworkin*, the State
2 cannot demonstrate that the Act meets the *Brandenburg* standards; accordingly, it must be enjoined.

3 **C. The Act’s “Violent” Video Game Restrictions Fail Strict Scrutiny.**

4 To the extent that the Legislature articulated some purpose for the Act going beyond a
5 supposed reduction in violent behavior, such additional justifications also fail constitutional scrutiny.
6 Because the Act restricts access to expression based on its content, it is subject to the most exacting
7 First Amendment scrutiny. *See IDSA*, 329 F.3d at 958 (“Because the ordinance regulates video
8 games based on their content . . . we review it according to a strict scrutiny standard.”); *VSDA*, 325 F.
9 Supp. 2d at 1186. Such content-based regulation of expression is “presumptively invalid.” *R.A.V. v.*
10 *City of St. Paul*, 505 U.S. 377, 382 (1992); *see also VSDA*, 325 F. Supp. 2d at 1186. “It is rare that a
11 regulation restricting speech because of its content will ever be permissible.” *United States v.*
12 *Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000).

13 Under the strict scrutiny standard, the State must (1) articulate a compelling state interest; (2)
14 prove that the Act actually serves that interest and is “necessary” to do so; and (3) show that the Act
15 is narrowly tailored to serve that interest. *R.A.V.*, 505 U.S. at 395; *Turner Broad. Sys., Inc. v. FCC*,
16 512 U.S. 622, 664-65 (1994); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims*
17 *Bd.*, 502 U.S. 105, 118 (1991); *Ass’n of Nat’l Advertisers v. Lundgren*, 44 F.3d 726, 739-40 (9th Cir.
18 1994). The Legislature’s judgments are not to be accepted without question; rather, the Legislature
19 must have “drawn reasonable inferences based on substantial evidence.” *Turner*, 512 U.S. at 666; *see*
20 *also, e.g., VSDA*, 325 F. Supp. 2d at 1187-88. Moreover, the State “must do more than simply ‘posit
21 the existence of the disease sought to be cured.’ It must demonstrate that the recited harms are real,
22 not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and
23 material way.” *Turner*, 512 U.S. at 664 (citation omitted). The State cannot satisfy its burden of
24 establishing any of the prongs of the strict scrutiny standard.

25 **I. The State Has No Legitimate, Much Less Compelling, Interest In**
26 **Controlling Minors’ Thoughts Or Feelings.**

27 The Act includes a finding that exposure to “violent” video games makes minors “more likely
28 to experience feelings of aggression” and posits a “compelling” state interest in protecting against

1 “psychological and neurological harm” to minors. Act §§ 1(a), (c). Even assuming that this
 2 justification is anything more than a repackaging of the “preventing real-life” violence rationale, it
 3 still amounts to an illegitimate effort to restrict access to expression based on consumers’ anticipated
 4 “psychological” reaction to that content. The First Amendment forbids governmental restrictions on
 5 speech based on the provocative or persuasive effect of that speech on its audience. *See Boos v.*
 6 *Barry*, 485 U.S. 312, 321 (1988) (O’Connor, J., joined by Stevens & Scalia, JJ.) (striking ban on
 7 picketing near embassies where purpose was to protect the emotions of those who reacted to the
 8 picket signs’ messages); *Texas v. Johnson*, 491 U.S. at 408-09 (interest in protecting bystanders from
 9 feeling offended or angry is not sufficient to justify ban on expression). An effort by the State to
 10 censor speech in order to promote citizens’ “well-being” amounts to nothing more than improper
 11 thought control. As the Supreme Court has noted, “First Amendment freedoms are most in danger
 12 when the government seeks to control thought or to justify its laws for that impermissible end.” *Free*
 13 *Speech Coalition*, 535 U.S. at 253.

14 Like adults, minors have a First Amendment right to be free from content-based governmental
 15 regulation of the speech they utter or receive. *See, e.g., McConnell v. Federal Election Comm’n*, 540
 16 U.S. 93, 231 (2003) (“Minors enjoy the protection of the First Amendment”); *Erznoznik v. City of*
 17 *Jacksonville*, 422 U.S. 205, 213-14 (1975); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S.
 18 503, 506-07, 511 (1969). The government does not have a generalized power to limit minors’
 19 exposure to creative works based on a belief that they may be psychologically harmful. Such works
 20 “may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a
 21 political or social doctrine to the subtle shaping of thought.” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S.
 22 495, 501 (1952).⁴ Thus, the State simply may not restrict protected expression merely because it
 23 dislikes the way it shapes individuals’ thoughts and attitudes—or brain neuron firing patterns.⁵

24 _____
 25 ⁴ As Judge Posner has explained, there is a serious “danger of allowing government to control
 26 the access of children to information and opinion,” as “[p]eople are unlikely to become well-
 27 functioning, independent-minded adults and responsible citizens if they are raised in an
 28 intellectual bubble.” *AAMA*, 244 F.3d at 577.

⁵ The Act’s unsupported “finding” concerning the effect of video games on the “frontal lobes”
 of the brain and its correlated alleged “interest” in protecting minors from “neurological

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1 The Act nevertheless partly cloaks its speech restrictions in “harmful to minors” language,
 2 Act § 1746(d)(1)(A), in an effort to exploit the narrow subset of sexually explicit speech that the
 3 Supreme Court has held the government may regulate consistent with the First Amendment. *See,*
 4 *e.g., Ginsberg v. New York*, 390 U.S. 629, 636-43 (1968) (permitting relaxed “harmful to minors”
 5 regulation of certain explicit sexual expression). But the “harmful to minors” category of speech is
 6 limited to sexual materials and has no application to the “violent” material that the State seeks to
 7 regulate here. Indeed, courts have repeatedly rejected similar arguments that depictions of violence
 8 can be regulated under the “harmful to minors,” or obscenity, exceptions to the protections of the
 9 First Amendment. *See IDSA*, 329 F.3d at 958 (“[D]epictions of violence cannot fall within the legal
 10 definition of obscenity for either minors or adults.”); *AAMA*, 244 F.3d at 578-79 (concerns underlying
 11 *Ginsberg* do not apply with respect to “violent” video games); *VSDA*, 325 F. Supp. 2d at 1185
 12 (explaining that *Ginsberg* is limited to sexually explicit expression); *James*, 300 F.3d at 698
 13 (“declin[ing] to extend [its] obscenity jurisprudence to violent, instead of sexually explicit,
 14 material.”); *cf. Miller v. California*, 413 U.S. 15, 24 (1973) (“[W]e now confine the permissible scope
 15 of [regulation of obscene materials] to works which depict or describe sexual conduct.”).

16 **2. The Act Does Not Materially Advance The State’s Interests And Is**
 17 **Not Narrowly Tailored.**

18 Even assuming that the State’s justifications for the Act were not facially illegitimate and
 19 unsupported by evidence, the Act would still fail First Amendment scrutiny. First, the State would
 20 have to demonstrate that the Act’s restrictions actually and materially address the alleged government
 21 interests. *See, e.g., Turner*, 512 U.S. at 664-65; *VSDA*, 325 F. Supp. 2d at 1189. Here, the fact that
 22 the State has singled out video games — even though a wide range of media make comparable
 23 violent expression available to minors — is strong evidence that the Act fails to advance the State’s
 24 interests. *See, e.g., Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (the “facial underinclusiveness”

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 26 [Footnote continued from previous page]

27 harm,” *see* Act §§ 1(a), (c), represents nothing more than a transparent attempt to repackage
 28 in the language of neuroscience the same psychological harm rationale that other courts have
 already rejected. *See, e.g., IDSA*, 329 F.3d at 958; *AAMA*, 244 F.3d at 579. The State’s
 attempt to censor protected expression is no more constitutional for the change in
 terminology.

1 of a regulation undermines the claim that the regulation serves its alleged interests); *VSDA*, 325 F.
2 Supp. 2d at 1189 (explaining that “the Act is too narrow in that it will have no effect on the many
3 other channels through which violent representations are presented to children”).⁶ As the Seventh
4 Circuit observed, “violent” video games “are a tiny fraction of the media violence to which modern
5 American children are exposed.” *AAMA*, 244 F.3d at 579. But the Act leaves these other media
6 unaffected. Under the Act, for example, a minor could be legally barred from buying or renting a
7 video game containing “violent” content, but that same minor could legally buy or rent the movie and
8 book on which the video game was based. *See, e.g.*, Price Decl. ¶¶ 4, 61 (noting that the M-rated
9 game *Tom Clancy’s Rainbow Six 3* is based on writer Tom Clancy’s highly successful novels, and
10 that the Act may cover “T”-rated games such as the *Terminator* games).

11 Moreover, the Act fails strict scrutiny because it is not narrowly tailored. The narrow
12 tailoring requirement requires the State to prove that “a plausible, less restrictive alternative” to
13 banning such games “will be ineffective to achieve its goals.” *Playboy*, 529 U.S. at 816. The State
14 cannot make such a showing here, where several such alternatives exist, such as encouraging
15 awareness of the voluntary ESRB video game rating system, which provides guidance to parents and
16 other consumers, and implementing technological solutions that allow parents to restrict access based
17 on ESRB ratings. *See generally* Lowenstein Decl.; *Playboy*, 529 U.S. at 824 (“A court should not
18 assume a plausible, less restrictive alternative would be ineffective; and a court should not presume
19 parents, given full information, will fail to act.”); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484,
20 507-08 (1996) (plurality op.) (striking down ban on advertising alcohol prices because of less
21 restrictive alternatives, such as an “educational campaign” or “counterspeech”). The State, in fact,
22 rejected Plaintiffs’ offer to work with it to help educate consumers about the well-established and
23 comprehensive ESRB system and to assist in implementing effective technological controls for

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25 ⁶ Such differential regulation of comparable expression invokes the specter of impermissible
26 viewpoint discrimination. *See, e.g.*, *Playboy*, 529 U.S. at 812 (striking down a regulation that
27 targeted “adult” cable channels, but permitted similar expression by other speakers, and
28 holding that “[l]aws designed or intended to suppress or restrict the expression of specific
speakers contradict basic First Amendment principles”); *Turner*, 512 U.S. at 659
 (“Regulations that discriminate among media, or among different speakers within a single
medium, often present serious First Amendment concerns.”).

1 parents. *See* Lowenstein Decl. ¶ 20-23. Moreover, the State only recently enacted a law requiring
 2 retailers to post signs indicating the availability of a video game rating system. *See* Cal. Bus. & Prof.
 3 Code § 20650; *see also* Andersen Decl. ¶ 15. Despite this enactment of a less restrictive alternative,
 4 the State chose not to allow the signage law to have its intended effect, but instead passed the much
 5 more restrictive Act.

6 C. The Act's Labeling Provisions Are Unconstitutional.

7 The Act's provisions requiring labeling of "violent" video games – under the threat of
 8 substantial fines – unconstitutionally compel speech of video game manufacturers, distributors, and
 9 retailers. The Supreme Court has long recognized that "[j]ust as the First Amendment may prevent
 10 the government from prohibiting speech, the Amendment may prevent the government from
 11 compelling individuals to express certain views." *United States v. United Foods, Inc.*, 533 U.S. 405,
 12 410 (2001). Because compelled messages alter the content of what the compelled party would
 13 otherwise express, they are considered content-based regulation under the First Amendment and
 14 require strict scrutiny. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).
 15 This protection extends not only to political or ideological speech, *see Pacific Gas & Electric Co. v.*
 16 *Public Utilities Commission of California*, 475 U.S. 1 (1986) ("PG&E"), but to *all* statements,
 17 whether of fact or opinion, *see Riley*, 487 U.S. at 797-98.

18 The Act's requirement that manufacturers, distributors and importers place a large "18" label
 19 on all "violent" video games compels video game manufacturers, distributors, and retailers to channel
 20 the State's message that minors are not entitled to access them — even if manufacturers and retailers
 21 disagree with this proposition. *See* Lowenstein Decl. ¶ 13-14; Andersen Decl. ¶ 17. The labeling
 22 requirement — like the sale and rental restrictions — is inconsistent with the voluntary rating system
 23 used by Plaintiffs.⁷ The "18" label, which imparts no substantive information (other than a
 24 _____

25 ⁷ At a fundamental level, the "18" label conflicts with the ESRB rating system because it
 26 suggests that certain games are categorically inappropriate for individuals under 18, whereas
 27 the ESRB ratings are intended only as a guide to parents and consumers. *See* Andersen Decl.
 28 ¶¶ 12-14. The "18" label also conflicts with the specific classifications of the ESRB system.
 For example, the "18" label may be required for certain games classified as "E 10+" or "T" by
 the ESRB, *see* Price Decl. ¶ 7, even though the ESRB system indicates that such games may
 be suitable for ages 10 and up. Similarly, games rated "M" by the ESRB may be suitable for

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1 stigmatizing message), is contrary to and may physically obscure the detailed information concerning
2 the ESRB rating and content descriptors on the game packaging. *See* Andersen Decl. ¶ 12;
3 Lowenstein Decl. ¶ 15. The conflict between the labels mandated by the Act and the existing labels
4 used by Plaintiffs’ members will be inherently confusing to parents and other consumers who are the
5 intended beneficiaries of the information conveyed by the voluntary rating system. In all cases, the
6 label represents a message that video game retailers have not chosen for themselves. “Such forced
7 association with potentially hostile views burdens” their expression and “risks forcing [them] to
8 speak where [they] would prefer to remain silent.” *PG&E*, 475 U.S. at 18.

9 Not only would the labeling provision unconstitutionally burden the expression of video game
10 retailers, creators, and manufacturers, but it would also create a substantial chilling effect on First
11 Amendment rights. For example, the Act appears to place the burden of labeling on individual video
12 game manufacturers, distributors, and importers, each of whom must decide which games fit within
13 the Act’s vague terms. Some, in an abundance of caution and out of fear of substantial penalties, may
14 label a far wider range of games than even those arguably covered by the Act. *See* Andersen Decl.
15 ¶¶ 7-11; Lowenstein Decl. ¶¶ 16-18; Price Decl. ¶¶ 7-9. Such a framework fails as a matter of
16 constitutional law.

17 **D. The Act Is Unconstitutionally Vague**

18 The Act is unconstitutional on an independent ground: vagueness. Because many of the Act’s
19 key terms are impermissibly vague and place the burden of compliance on game retailers, the Act
20 will restrict a far broader range of expression than even the State claims it is seeking to regulate. The
21 Constitution demands that statutes be set forth with “sufficient definiteness that ordinary people can
22 understand what conduct is prohibited.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Such
23 precision is essential to “give the person of ordinary intelligence a reasonable opportunity to know
24 what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*, 408 U.S. 104, 108

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27 ages 17 and up, but the “18” label prohibits 17-year-olds from buying or renting such games.
28 Furthermore, the “18” label conflicts with the California law that requires retailers to post
signs about video game rating systems. *See* Cal. Bus. & Prof. Code § 20650; *see also*
Andersen Decl. ¶ 15.

1 (1972). In particular, exacting precision is required of restrictions in the context of protected
2 expression. *See Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (explaining that a vagueness “content-
3 based regulation” of speech “raises special First Amendment concerns because of its obvious chilling
4 effect on free speech”); *NAACP v. Button*, 371 U.S. 415, 433 (1963).

5 The Act is rife with terms that are inherently vague or are defined in such a way as to fail to
6 provide fair notice. For example, the Act prohibits games which depict violence against “an image of
7 a human being,” and/or “characters with substantially human characteristics.” Act §§ 1746(d)(1),
8 (d)(1)(B). Those terms are particularly ill-suited for a medium that relies extensively on animated,
9 extra-terrestrial, and fantastic forms and characters — which may be depicted as having only some
10 “human” characteristics, or which may be “human” at some times and not others. For example, in
11 *God of War*, the player assumes the role of Kratos, a Spartan commander in Ancient Greece who
12 “dies” at various points in the game, but continues battling various gods and other entities;
13 eventually, the player learns that Kratos is actually the son of Zeus. *See Price Decl.* ¶¶ 46-54.
14 Because Kratos is the son of a god, and thus able to keep battling while “dead,” would he be
15 considered to have “substantially human characteristics” within the meaning of the statute? Would
16 the gods that he battles fall within the Act’s restrictions? Similarly, in *Resident Evil IV*, part of a
17 popular series of video games that have inspired feature films, the vast majority of enemies in the
18 game are zombies and mutants with human characteristics. *See id.* ¶¶ 30-37. Would zombies and
19 mutants be viewed as having “substantially human characteristics” within the meaning of the Act?
20 And, in *Jade Empire*, which takes the player’s character on an adventure through a mythical Chinese
21 kingdom, both the player’s character and the enemy forces possess magical abilities and transform
22 into non-humanoid creatures. *See id.* ¶¶ 38-45. Does this game contain violence “against an image
23 of a human being” as defined by the Act? Can a part-animal or part-alien creature be “human”?

24 The Act is plagued with numerous other vague terms. For example, the Act would restrict the
25 distribution of, and require the labeling of, video games that appeal to the “deviant or morbid interest
26 of minors.” What does that term mean in the context of depictions of violence in video games? *Price*
27 *Decl.* ¶ 9; *Lowenstein Decl.* ¶ 17. Likewise, the Act defines “cruel” as “that the player intends to
28 *virtually inflict* a high degree of pain by torture or serious physical abuse of the victim in addition to

1 killing the victim.” Act, § 1746(d)(2)(A). How can a player “virtually inflict” physical or mental
2 pain? Price Decl. ¶¶ 13, 15. In defining depictions that may be considered “heinous” under the Act,
3 the Act refers to the “consciousness” of the “virtual victim.” Act, § 1746(d)(2)(C). But how can a
4 “virtual victim” be “conscious” of anything? At what point does a computerized image experience a
5 “high degree of pain”? See Andersen Decl. ¶ 11; Price Decl. ¶¶ 12, 16. Similarly, the Act defines
6 “depraved” as “that the player relishes the virtual killing or shows indifference to the suffering of the
7 victim, as evidenced by torture or serious physical abuse of the victim.” Act, § 1746(d)(2)(B). It
8 would be simply impossible for video game manufacturers and distributors to determine the “intent”
9 of every possible player of a particular video game. Price Decl. ¶ 15; Lowenstein Decl. ¶ 19;
10 Andersen Decl. ¶ 11. These terms – which are only representative examples of the Act’s confusing
11 terms – have no clear meaning, especially in the context of video games. Not only are the terms
12 themselves vague, but the Act itself does not even purport to make the definition of “violent video
13 games” exclusive. Instead, the Act generally uses the word “includes” to modify the specific
14 examples of behavior covered by the definition. The open-ended definition does not confine the range
15 of depictions that trigger the “violent video game” label. Persons of ordinary intelligence are thus
16 forced to guess at the meaning and scope of the Act.

17 The ambiguous nature of the Act’s definitions, coupled with the likelihood that they will be
18 interpreted inconsistently, will result in many games rated by the ESRB as potentially suitable for
19 teenagers and children being considered “violent video games” subject to the Act’s restrictions.
20 Therefore, the Act’s definitions may be held to cover many “T”-rated video games presently
21 available for commercial sale or rental to individuals under eighteen years of age, such as the *James*
22 *Bond* games, *Terminator 3: The Redemption*, *Minority Report*, and *Medal of Honor: Frontline*. See
23 Price Decl. ¶ 19.

24 Game creators, distributors, manufacturers, and retailers will respond to the uncertainty in the
25 Act, and the penalties the Act imposes, by either self-censoring or otherwise restricting access to *any*
26 potentially offending video game title. See, e.g., Lowenstein Decl. ¶ 18; Andersen Decl. ¶¶ 7-11, 17;
27 Price Decl. ¶¶ 18-20. As the federal district court in Washington stated, in striking down a similar
28 video game ban as unconstitutionally vague, “[n]ot only is a conscientious retail clerk (and her

1 employer) likely to withhold from minors all games that could possibly fall within the broad scope of
2 the Act, but authors and game designers will likely ‘steer far wider of the unlawful zone . . . than if
3 the boundaries of the forbidden area were clearly marked.’” *VSDA*, 325 F. Supp. 2d at 1191 (quoting
4 *Grayned*, 408 U.S. at 109 (alteration in original)). Such understandable, self-protective behavior will
5 deprive access to such expression not just to minors, but to adult customers as well — whose right to
6 access “violent” video games could not be questioned by the State.

7 **II. THE EQUITIES STRONGLY SUPPORT AN INJUNCTION.**

8 Not only have Plaintiffs demonstrated a virtually certain likelihood of success on the merits,
9 but the other prerequisites to injunctive relief are easily met here. Plaintiffs, their members, and
10 willing listeners will all suffer irreparable harm if the Act’s restriction of protected expression goes
11 into effect. As the Ninth Circuit has unequivocally held, “[t]he loss of First Amendment freedoms,
12 for even minimal periods of time, unquestionably constitutes irreparable injury.” *S.O.C., Inc.*, 152
13 F.3d at 1148 (quoting *Elrod*, 427 U.S. at 373 (plurality)). And no adequate remedy at law exists for
14 Plaintiff’s claims. See *Perez-Funez v. District Director, INS*, 611 F. Supp. 990, 1003 (C.D. Cal.
15 1984) (collecting cases); see also *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm’n*, 812 F.2d
16 288, 290 (6th Cir. 1987) (injunctive relief is appropriate where “legal remedies prove inadequate.”);
17 *National People’s Action v. Village of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990) (“[I]njunctions
18 are especially appropriate in the context of first amendment violations because of the inadequacy of
19 money damages.”).

20 Furthermore, “a party seeking preliminary injunctive relief in a First Amendment context can
21 establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a
22 colorable First Amendment claim.” *Sammartano*, 303 F.3d at 973 (quotation marks omitted). As the
23 Ninth Circuit has explained, “when the harm claimed is a serious infringement on core expressive
24 freedoms, a plaintiff is entitled to an injunction even on a lesser showing meritoriousness.” *Id.* at
25 974. Because Plaintiffs “have not only stated a colorable First Amendment claim, but one that is
26 likely to prevail[,] they have thus established the potential for irreparable injury” entitling them to a
27 preliminary injunction. *Brown v. California Dep’t of Transp.*, 321 F.3d 1217, 1225 (9th Cir. 2003).

28

1 Finally, the balance of equities (including the public interest) weighs heavily in favor of an
2 injunction. Not only will Plaintiffs suffer immediate and irreparable harm to their First Amendment
3 freedoms, but the public will suffer similarly. "Courts considering requests for preliminary
4 injunctions have consistently recognized the significant public interest in upholding First Amendment
5 principles," *Sammartano*, 303 F.3d at 974, because First Amendment questions quite often have a
6 substantial impact on non-parties to a case. As in *Sammartano*, the State's enforcement of an
7 unconstitutional statute will not simply impact Plaintiffs, but will affect countless video game
8 creators, publishers, manufacturers, distributors, importers, retailers, and consumers through the State
9 of California and beyond, all of whom will suffer infringements on their First Amendment rights to
10 produce and view the expression contained in a wide array of video games. The equities compel an
11 injunction here.

12 **CONCLUSION**

13 For the foregoing reasons, Plaintiffs respectfully request that this Court grant a preliminary
14 injunction.

15 Respectfully submitted.

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