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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VIDEO SOFTWARE DEALERS ASSOCIATION 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)

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs Video Software Dealers Association and Entertainment Software Association ("Plaintiffs") respectfully submit this reply in support of their motion seeking summary judgment to enjoin Cal. Civil Code § 1746 (2005) (the "Act").

INTRODUCTION

The State's defense of the Act turns the First Amendment on its head. Under the First Amendment, the government may not restrict protected speech in order to prevent violence or to influence behavior except upon the most stringent showing of need. Yet the State claims this authority relying on a body of evidence that has been rejected as unpersuasive by every court to have looked at it. Moreover, in blatant disregard of the requirements of strict scrutiny and its presumption of unconstitutionality, the State claims that this Court must accept, without question, the Legislature's selective interpretation of a one-sided subset of social science research. No aspect of the State's argument can be squared with First Amendment doctrine, as every other court has concluded. *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005) ("*Blagojevich*"); *Entertainment Software Ass'n v. Granholm*, No. 05-73634, --- F. Supp. 2d ---, 2006 WL 901711 (E.D. Mich. Mar. 31, 2006), ("*Granholm*"); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) ("*IDSA*"); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) ("*AAMA*"); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004). At bottom, the State seeks to do precisely what the First Amendment prohibits: to restrict unpopular speech on unsubstantiated grounds. The State has failed to carry its burden and Plaintiffs are therefore entitled to summary judgment in their favor.

I. THE ACT FAILS STRICT SCRUTINY.

A. The State Has Not Shown That Even A Legitimate Interest Underlies the Act.

The State's opposition brief skips over strict scrutiny's threshold requirement: that the State act on the basis of a compelling interest. If the interest is not compelling, no amount of evidence can save the Act. That is precisely the case here, because the State has failed to point to even a *legitimate* interest that underlies the Act. That failure by itself is enough to grant Plaintiffs summary judgment.

The Act cannot be sustained as a means to prevent minors from behaving aggressively. That purported interest amounts to the same thing as saying that the targeted speech carries too much risk of causing recipients to be violent. The State's continued disavowal of an interest in preventing minors from engaging in violence is belied by its repeated assertions that the research shows that "violent" video games cause minors to act more aggressively. *See* State Opp. at 5-7 (referring to purported findings of increased "aggressive behavior," "aggressive thoughts," "automatic aggressiveness," "hostil[ity]," and "linkage to serious, real-world types of aggression."); *see also* Pls.' Opp. at 3-4 (cataloging references to increased aggression in the State's opening brief). But Plaintiffs have already pointed out that curbing aggression or violence by recipients is a categorically illegitimate basis for restricting expression, unless the State can demonstrate that video games are "directed to inciting or producing the imminent lawless action and [are] likely to incite or produce such action." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)); *see also Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1199 (9th Cir. 1989) (efforts to restrict pornography based on its "tendency to cause others to engage in undesirable acts" must meet the *Brandenburg* test).

The State has not even attempted to show that video games are either intended or likely to cause imminent violence. Thus, to the extent the Act is premised on violence-prevention grounds, it should meet the same fate as every other attempt to regulate violent video games on this basis. *See Blagojevich*, 404 F. Supp. 2d at 1073 (finding that Illinois had come "nowhere near" to satisfying *Brandenburg*); *Granholm*, 2006 WL 901711, at *4 (striking down Michigan statute because "video game producers do not intend for the consumers to commit violent actions" and because the State has failed to prove that video games have ever caused anyone to commit a violent act, let alone present a danger of imminent violence); *James v. Meow Media*, 300 F.3d 683, 698 (6th Cir. 2002) ("[The] glacial process of personality development [that violent video games allegedly affect] is far from the temporal imminence that we have required to satisfy the *Brandenburg* test.").

The State attempts to evade *Brandenburg* by arguing that the Act is concerned not with the harm to others caused by increased aggression, but the harm minors themselves suffer by becoming more aggressive. But *Brandenburg* would be meaningless if the government could always recast its

concern with aggression as a concern for the well-being of the aggressor. The State cites no authority for its attempted end-run around this fundamental First Amendment doctrine. To the contrary, *Brandenburg* has consistently been applied to protect speech claimed to have an adverse effect upon listeners. *E.g.*, *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 328-30 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (assuming that pornography has a deleterious effect on those exposed to it but striking down anti-pornography law under *Brandenburg* because there had been no showing that such materials were likely to lead to imminent violence). Thus, as numerous other courts have found, *Brandenburg* is the relevant standard to evaluate the State's claim, and there is no question that the State has fallen short of meeting that standard.

The State's attempt to frame its interest as one of protecting against other psychological or developmental harms to minors themselves is unsupported and not even a legitimate interest, let alone a compelling one adequate to survive strict scrutiny. As discussed *infra*, the State has not provided substantial evidence showing that "violent" video games have a deleterious effect on children, but even assuming that some connection could be shown, it is not the State's place to pick and choose the expression children are exposed to in an effort to shape their thoughts or personalities. As *Blagojevich* put it, "[i]f controlling access to allegedly 'dangerous' speech is important in promoting the positive psychological development of children, in our society that role is properly accorded to parents and families, not the State." *Blagojevich*, 404 F. Supp. 2d at 1075.

The notion that protected speech can be restricted because it affects personality is utterly foreign to the First Amendment. "The government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.'" *Free Speech Coalition*, 535 U.S. at 253, (quoting *Stanley v. Georgia*, 394 U.S. 557, 566 (1969)). Yet that is exactly the rationale the State advances for the Act. State Opp. at 5-7 (describing findings purporting to show "desensitization," "decreases in helping behaviour," "lower empathy," and "antisocial behavior"). If "[t]he mere tendency of speech to encourage *unlawful* acts is not a sufficient reason for banning it," *Free Speech Coalition*, 535 U.S. at 253 (emphasis added), how can the State claim a compelling interest in restricting speech to promote "empathy"?

If the State's view were accepted, the notion of protected speech would have little meaning, as such speech could always be regulated if it caused "undesirable" attitudes on the part of the listener. Whether the State describes its remaining interest as preventing asocial attitudes, or fine-tuning minors' sense of empathy, bedrock First Amendment principles forbid the State to ban speech based on how listeners will react to it. *See Boos v. Barry*, 485 U.S. 312, 321 (1988) (O'Connor, J., joined by Stevens & Scalia, JJ.) (striking ban on picketing near embassies where purpose was to protect the emotions of those who reacted to the picket signs' message); *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (interest in protecting bystanders from feeling offended or angry is not sufficient to justify ban on flag-burning). Indeed, under the government's view, the State could permissibly regulate "a minor's access to games about embezzling [or] shoplifting" – or a whole host of books or films or magazines – on this basis. *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1045 (N.D. Cal. 2005). As this Court noted, "[n]o court has previously endorsed such a limited view of minors' First Amendment right[s]." *Id.* Not all speech protected by the First Amendment is pleasant or universally acclaimed, and some of it may trigger negative thoughts – such as anger, despair, isolation, or envy – but that is not a permissible basis for regulation. "Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us." *Hudnut*, 771 F.2d at 330.

It is particularly telling that although the State indignantly insists that it has a compelling interest in shaping minors' personalities by restricting protected speech, the State's opposition fails to cite a *single* case in support of that supposedly self-evident proposition. *Ginsberg v. New York*, 390 U.S. 629 (1968), is not apposite because that case is the exception that proves the rule: although the government may restrict certain obscene materials for minors without satisfying strict scrutiny, under that "harmful to minors" doctrine, the narrow paternalistic role for government is limited to material with sexual content. *See IDSA*, 329 F.3d at 959-60 ("Nowhere in *Ginsberg* (or any other case that we can find, for that matter) does the Supreme Court suggest that the government's role in helping parents to be the guardians of their children's well-being is an unbridled license to governments to regulate what minors read and view."). In any other context, First Amendment limitations on governmental action are in general "no less applicable when [the] government seeks to control the

flow of information to minors." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975); *see McConnell v. Federal Election Comm'n*, 540 U.S. 93, 231 (2003) ("Minors enjoy the protection of the First Amendment.").

In sum, the State cannot meet the *Brandenburg* test for restricting speech to protect aggression, and its claimed interest in protecting minors from some nebulous form of "psychological harm" is simply not legitimate. As a result, the State has not demonstrated even a legitimate interest, and thus cannot satisfy strict scrutiny. Even if the State could show that its "psychological harm" interest were supported by substantial evidence – and, as discussed below, it cannot – such an interest cannot be divorced from an illegitimate interest in controlling minors' thoughts and feelings. Plaintiffs are entitled to summary judgment on this ground alone.

B. No Substantial Evidence Supports The Act.

Even assuming there were a potentially legitimate interest here, the evidence relied upon by the Legislature would be inadequate to sustain the Act. The State essentially asks this Court to defer, without question, to its reliance on a one-sided body of research concerning the so-called effects of "violent" video games. Putting aside that the State relies on a set of research that has been consistently rejected by the courts as insufficient to support the type of speech restriction at issue here, the State's argument is nothing more than an attempted end-run around strict scrutiny. As the Supreme Court has made clear, strict scrutiny means that the Act is presumptively unconstitutional. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). It is the *State's* burden to put forward substantial evidence and support the reasonable inferences it would draw from it. The State is thus wrong to claim that the Legislature's reading of the evidence (however truncated and biased) must be given deference absent an affirmative showing by Plaintiffs.

The State relies on *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) for its claim of deference. Yet that case applied intermediate scrutiny, and thus to the extent it discussed a greater level of deference to legislative judgments, those statements do not apply here. Instead, "[w]hen the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments *is reversed*," *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000) (emphasis added), and the government cannot

rely on supposition or probability, but must show "a significantly stronger, more direct connection." *Free Speech Coalition*, 535 U.S. at 253 (declining to uphold child pornography statute on basis of government claim that the speech at issue would encourage child predators). *Cf. Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 (1984) ("[Where] the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment . . . protect.") (internal quotation marks and citations omitted).

The State cannot claim that it has drawn "reasonable inferences based on substantial evidence" when it is has looked only at a biased subset of the materials. *Blagojevich*, 404 F. Supp. 2d at 1063. There can be no confidence in the Legislature's reasonableness when it has ignored all the evidence that undercuts its conclusions. *See id*. The State suggests that no such evidence exists, State Opp. at 5, but that is plainly incorrect, as demonstrated by the declarations submitted by Plaintiffs' experts. *See* Goldstein Decl. ¶¶ 44-45 (Ex. 4 to Pls.' S.J. Mot.) (describing, among other things, studies that "*offer no support for the hypothesis that children will report more aggressive mood after playing violent video games*," and that found that "*mood was significantly more positive after playing the violent game than after the paper-and-pencil game"*) (emphasis in original); *id.* ¶¶ 32-33 (collecting studies that found no adverse effects or correlations associated with video games); Williams Decl. ¶¶ 18-19 (Ex. 2 to Pls.' S.J. Mot.) (reporting that the longest video game study to date found that those who played "violent" game had no increase in aggressive thoughts or behaviors). Contrary to the State's arguments, State Opp. at 3, Plaintiffs are not arguing that the State must produce "100% bullet-proof" evidence in support of its claimed interest – but rather that it must make *reasonable* inferences based on all available evidence. Here, it is simply unreasonable for the Legislature to rely upon only that biased subset of research that supports its goal of restricting speech.

Moreover, the evidence that the Legislature did consider is insufficient on its face to support the Act. As Plaintiffs have already explained, even taken at face value, the work of Dr. Anderson and others does not demonstrate any causal long-term connection between "violent" video games and aggression. Pls.' S.J. Mot. at 10-14. Thus, the courts have rejected Dr. Anderson's work as

justification for governmental restraint on speech because it does not "establish a solid causal link between violent video game exposure and aggressive thinking and behavior." 404 F. Supp. 2d at 1063; *see also Granholm*, 2006 WL 901711, at *5 ("Dr. Anderson's studies have not provided any evidence that the relationship between violent video games and aggressive behavior exists."). Although the State makes a half-hearted attempt to highlight evidence beyond Dr. Anderson's discredited body of work, it is no more successful there. As Plaintiffs have already explained, Dr. Kronenberger's mostly unpublished "frontal lobe" research is purely correlative – not causal – and does not separate out the "effects" of video games from those of television; therefore, his research cannot qualify as substantial evidence, as the courts in *Blagojevich* and *Granholm* have concluded. *Blagojevich*, 404 F. Supp. 2d at 1065; *Granholm*, 2006 WL 901711, at *5. Similarly, correlative studies about individuals who play video games and display "automatic aggressiveness," "hostil[ity]," State Opp. at 6, or reduced "empathy," *id.* at 7, are not substantial evidence because they "have not eliminated the most obvious alternative explanation: aggressive individuals may themselves be attracted to violent video games."[1] *Blagojevich*, 404 F. Supp. 2d at 1063.

Accordingly, the bibliography relied upon by the Legislature – much of which consists of opinion articles, policy statements, and other non-scientific material, in addition to the flawed studies discussed above – does not constitute "substantial evidence" sufficient to justify the Act's restrictions on speech. Nor may the Act be defended by reference to the "expert" declarations improperly submitted by amicus Common Sense Media ("CSM"). Because CSM's filing runs afoul of the proper role of amicus, this Court should strike its brief and the declarations in their entirety. In any event, CSM's declarations and brief give no support whatsoever to the State's argument. As an initial matter, they are entirely focused on demonstrating how video games allegedly increase violence or affect minors' thoughts. Yet as explained above, *see supra* § 1.A., these are not even

[1] The State's insistence that the *Maleng* decision supports its argument is grossly misplaced. As this Court has already recognized, that decision "found that the State had not carried its burden of proving that games covered by the statute caused aggressive feelings or behavior." *Schwarzenegger*, 401 F. Supp. 2d at 1043 (citing *Maleng*, 325 F. Supp. 2d at 1189). As Plaintiffs have already pointed out, *Maleng* drew these conclusions generally, and not just with respect to encouraging violence against law enforcement officers. Pls. Opp. at 9, n.2.

legitimate bases for the State to act upon. And even if they were legitimate, the cited studies are not substantial evidence. Many merely rehash the inadequate evidence already in the legislative record or the same "meta-analyses" performed by Dr. Anderson and rejected by the courts. Declaration of Brad J. Bushman ("Bushman Decl.") ¶¶ 11-17; Declaration of Michael Ogden Rich ("Rich Decl.") ¶ 6; Declaration of Cary P. Gross ("Gross Decl.") ¶ 4. The rest present new studies that suffer from exactly the same flaws as the studies that have been previously rejected. For example, some rely on television research to make sweeping – and unsubstantiated – causal claims about video games. *See* Gross Decl. ¶¶ 4-5; Declaration of Thomas N. Robinson ¶ 3; Rich Decl., Exh. C. Still others impermissibly rely on merely correlative or short term experimental data to draw long-term causal conclusions. *See* Declaration of Sonya Brady ¶ 5; Declaration of Ute Ritterfeld ¶ 3; Bushman Decl. ¶¶ 9, 12.[2] And at least one of the experts relies on an *uncompleted* study to make definitive statements about the "effects" of video games. Gross Decl. In short, none of these studies is on point or persuasive substantial evidence. And, as with the Legislature's bibliography, missing from all the declarations is an acknowledgement of contrary evidence. Thus, even if this Court were to consider CSM's filings (and it should not), they would not constitute substantial evidence upon which a Legislature could reasonably draw inferences about the effect of violent video games on minors.

C. The Act Does Not Materially Advance Its Aims, Is Not Narrowly Tailored, And Ignores Less Restrictive Alternatives.

Plaintiffs are also entitled to summary judgment because the Act does not satisfy the other elements of strict scrutiny. The State continues to fail to explain how the Act can be said to materially advance its goals when it blocks the purchase of say, a *Resident Evil* video game, but allows the minor to rent a *Resident Evil* movie. "Video games consist of 'a tiny fraction of the media violence to which American children are exposed." *Granholm*, 2006 WL 901711 at *6 (quoting *AAMA*, 244 F.3d at 579). "[T]he underinclusiveness of this statute—given that violent images appear more accessible to unaccompanied minors in other media— indicates that regulating violent video

[2] As Plaintiffs' expert Howard Nusbaum has already explained, the study described by Ute Ritterfeld in his declaration used brain imaging techniques that could only show correlation at most, and which are subject to a host of alternative explanations. *See* Nusbaum Decl. (Ex. 3 to Pls.' S.J. Mot.).

games is not really intended to serve the proffered purpose." *See Blagojevich*, 404 F. Supp. 2d at 1075; *Florida Star v. BJF*, 491 U.S. 524, 540-41 (1989).

Similar problems plague the State's narrow-tailoring arguments. Although the State claims that the Act is narrowly tailored to the unique problem of interactive video games, it cites no studies supporting its claim about the effects of "interactivity." And in any event, Dr. Anderson has testified that the purported effects of exposure to "violent" television and video games are essentially the same. Anderson Test., 11/15/05 Tr. at 278-80. The State also cannot argue that the Act is narrowly tailored to reach only a well-defined subset of video games. Leaving aside the sweeping effect of the Act's open-ended vague terminology, *infra*, the Act is not narrowly tailored because there is zero evidence in the record demonstrating that the particular type of video game that the Act targets is a type that is distinctively harmful to minors. This lack of fit is an independent basis to strike down the Act.

Finally, the State's suggestion that Plaintiffs have failed to demonstrate the efficacy of less speech-restrictive alternatives ignores the fundamental point that under strict scrutiny, the *government* bears the burden of proving the absence of such alternatives. *E.g.*, *Playboy*, 529 U.S. at 816 ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."); *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005) ("[The government] cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice."). The State continues to overlook the fact that the video game industry does *better* than its media counterparts in ensuring that unaccompanied minors are unable to buy age-inappropriate material. *Blagojevich*, 404 F. Supp. 2d. at 1075; FTC, Report to Congress: Marketing Violent Entertainment to Children at 20, 23-24 (July 2004), available at http://www.ftc.gov/05/2004/07/040708 kidsviolencerpt.pdf. And it has not said a word about parental controls that will allow parents to limit which games the consoles will play. Having failed to address these alternatives or to satisfy any other aspect of the narrow-tailoring requirement, the State has failed to carry its burden. Plaintiffs are therefore entitled to summary judgment.

II. THE ACT'S LABELING PROVISIONS ARE UNCONSTITUTIONAL

Plaintiffs have already explained why the Act's labeling requirement compels speech in violation of the First Amendment. Pls.' S.J. Mot. at 18-20 (citing *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988) and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986)); Pls. S.J. Opp. at 17 (same). For the same reasons that apply to the rest of the Act, the labeling requirement cannot survive strict scrutiny and is unconstitutional. In its Opposition, the State does not even argue that the labeling provision could survive strict scrutiny, nor does the State argue that the labeling provisions could be independently justified if the rest of the Act is found unconstitutional. Indeed, the State all but concedes that the "18" label would constitute a *false* statement if the Court strikes down (as it should) the other provisions of the Act. State Opp. at 16.

Thus, the State's reliance on *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) is misplaced. *Zauderer* involved only the disclosure of "purely factual and uncontroversial information" designed to alleviate "consumer confusion or deception." 471 U.S. at 651. Here, the label "18" conveys a stigmatizing message that it is unlawful for minors to buy, or perhaps even play, such games. *See Blagojevich*, 404 F. Supp. 2d at 1081 (noting that similar "18" label "creates the appearance that minors under eighteen are prohibited from playing such games.").[3] But because the State may not constitutionally impose such restrictions under the First Amendment, that message is untrue and will only cause greater consumer confusion. The State's defense of the labeling requirement is premised on the constitutionality of the rest of the Act, and thus the labeling requirement must invalidated along with the rest of the Act.

III. THE ACT IS UNCONSTITUTIONALLY VAGUE.

The State's arguments on vagueness are likewise meritless. The State remains unable to specify what qualifies as an "image of a human being" in the context of video games. The best that

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[3] The State tries to distinguish the Act from the law in *Blagojevich* by pointing out that the Illinois law also imposed onerous signage display and brochure requirements. But that does not detract from *Blagojevich*'s holding that the Illinois labeling requirement – which is nearly indistinguishable from the California provision – amounted to unconstitutional compelled speech. 404 F. Supp. 2d at 1081.

the State can offer is the tautology that "[i]f the entity looks like a fanciful creature or an alien that is not an image of a human being," then it is not an "image of a human being." State Opp. at 18. That formulation does not help determine whether, for example, a zombie – a discolored or disfigured humanoid that is not considered to be "alive" – "looks like a fanciful creature" or like a human being. *See* Price Decl. ¶¶ 33-34, 36 (attached as Ex. 2 to Pls Mem. Sup. Prelim. Inj.) (describing *Resident Evil 4*). Nor is it clear whether or why a character identified as a god in a storyline should be described as an "image of a human being" when the god – a character that is by definition not a human – appears in human form. Price Decl. ¶ 53 (describing *God of War*). These are just two examples of the ambiguities created by the Act's restriction of a medium characterized by animation and fantasy, and the State has failed to show how the Act can be applied in an objective and predictable way.

Similarly unavailing is the State's argument that the term "serious physical abuse" is not impermissibly vague because that term has been applied in the criminal sentencing context. In the real world, the infliction of "serious physical abuse" may have a "common-sense core meaning" that a jury may understand, *see United States v. Jones*, 132 F.3d 232, 250 (5th Cir. 1998), *aff'd*, 527 U.S. 373 (1999), but when a player inflicts violence on an "image of a human being" with superhuman abilities, there is no common benchmark to decide whether the violence inflicts "extreme physical pain" or a "substantial risk of death." Act, § 1746(d)(2)(D). Likewise, given that players have a range of options when playing the game, there is no way for a retailer or distributor to predict in advance the "intent" of a player – whether the player, for example, "intend[s] the abuse, apart from the killing." *Id.*[4]

Finally, the State is wrong in suggesting that the Act may be upheld because the video game voluntary rating system uses certain content descriptors in an attempt to provide parents and other consumers with detailed information about games. *See* State Opp. at 18-19. Voluntary ESRB ratings

[4] Further, as explained in the Plaintiffs' Opposition to the State's Motion for Summary Judgment, at 16, it is also not clear when a game might appeal to a "deviant or morbid interest." Act, § 1746(d)(1)(A)(1). *See Granholm*, 2006 WL 901711, at *8 (finding similar language unconstitutionally vague).

do not have the force of law and while they may be written to be as informative as possible to consumers, a retailer or distributor is not penalized by the State if it is unable to determine the appropriate ESRB category in advance. Where the State seeks to restrict speech, the Constitution requires a level of clarity and notice that is absent here.

These ambiguities in the Act's definitions are not hypothetical – Plaintiffs described the difficulties of applying the Act to specific, existing games in their Motion for Summary Judgment, at 21-22. Given these problems, retailers and distributors will have no choice but to censor a wide range of games that might fall into the Act's vague terms. For these reasons, the Act should be held unconstitutional on vagueness grounds.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to deny summary judgment to the State and grant summary judgment in their favor and permanently enjoin the Act.

Respectfully submitted.

DATED: April 28, 2006

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