

Testimony of

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March 29, 2006

UNITED STATES SENATE
SENATE JUDICIARY COMMITTEE
HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS
"WHAT'S IN A GAME? STATE REGULATION OF VIOLENT VIDEO GAMES AND THE FIRST AMENDMENT"
TESTIMONY OF PAUL M. SMITH
WEDNESDAY, MARCH 29, 2006

I appreciate the opportunity to appear before the Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights to discuss the constitutionality of state regulation of violent video games.

My perspective is that of an appellate advocate who has litigated First Amendment issues for the better part of three decades. Most recently I have been involved in litigation regarding the constitutionality of state laws that ban minors from purchasing or renting so-called "violent" video games. In each case I have been involved with, as well as every other to consider the issue, courts have struck down as unconstitutional legal restrictions on minors' access to "violent" video games. See *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) ("IDSA"); *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002); *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) ("AAMA") (Posner, J.); *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005); *Entertainment Software Ass'n v. Granholm*, 404 F. Supp. 2d 978 (E.D. Mich. 2005); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 167 (D. Conn. 2002); *Sanders v. Acclaim Entm't Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002). In fact, just recently, courts in Illinois, California, and Michigan have enjoined similar laws, holding that the First Amendment forbids such content-based regulation.

These cases have established beyond dispute that video games, just like books, movies, and television, are fully protected expression under the First Amendment. See, e.g., *Schwarzenegger*, 401 F. Supp. 2d at 1045; *IDSA*, 329 F.3d at 957-58 (video games as protected as "the best of literature"); *James*, 300 F.3d 683, 695-96 (the First Amendment protects against the regulation of video games' "expressive content" or "communicative aspect"); *AAMA*, 244 F. 3d 572, 577-78 (describing in detail video games' expressive qualities); *Maleng*, 325 F. Supp. 2d at 1184-85. Like motion pictures and television programs, video games tell stories and entertain audiences through the use of complex pictures, sounds, and text. 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. These games often contain storylines and character development as detailed as (and sometimes based on) books and movies. Id. These games frequently involve familiar themes such as good versus evil, triumph over adversity, and struggle against corrupt powers. Although video games are largely designed to entertain, they also can inform, and even promote certain viewpoints. See, e.g., *AAMA*, 244 F.3d at 578 (describing a "feminist" video game that has "a message, even an 'ideology,' just as books and movies do").

Laws that restrict the expressive medium of video games based on "violent" content strike at the core of First Amendment protection and are subject to "strict scrutiny." See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826-27 (2000); *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Such content-based regulation of speech and expression is "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Repeatedly, courts have struck down parallel laws attempting to restrict the distribution of "violent" video games because they failed to meet the exacting standards of strict scrutiny, namely that the law must support a compelling interest on the basis of substantial evidence, and that it must directly advance that interest while being narrowly tailored. See *Blagojevich*, 404 F. Supp. at 1076; *Schwarzenegger*, 401 F. Supp. 2d at 1046; *Granholm*, 404 F. Supp. 2d at 982-983; *ISDA*, 329 F.3d at 958-59; *AAMA*, 244 F.3d at 576-77; *Maleng*, 325 F. Supp. 2d at 1190.

There is no exception to these First Amendment principles because these laws target minors' access to video games. Minors have a constitutional right to access protected speech, with the narrow exception of certain sexual speech that does not apply here. *Erznoznik*, 422 U.S. at 212-214 ("In most circumstances, the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors."); *IDSA*,

329 F.3d at 959-60 (holding that ordinance restricting minors' access to "graphically violent" video games violated minors' First Amendment rights); AAMA, 244 F.3d at 576 ("Children have First Amendment rights."); Maleng, 325 F. Supp. 2d at 1186. As Judge Posner observed in AAMA, preserving children's First Amendment rights is "not merely a matter of pressing the First Amendment to a dryly logical extreme. . . . People are unlikely to become well-functioning, independent-minded adults, and responsible citizens if they are raised in an intellectual bubble." AAMA, 244 F.3d at 576-77. The State has no authority to censor material in order to achieve a desired effect in minors. Moreover, a law barring purchases of particular expressive works based on their content also violates the rights of the creators and would-be sellers of those works.

Every court to have considered the issue has found "violent" video game laws would not pass constitutional muster because the government lacks a legitimate and compelling interest in restricting video game content. Under well-settled First Amendment principles, expression may not be censored on the theory that it will cause some recipient to act inappropriately, unless it falls into the narrow category of speech "directed to inciting" and "likely" to incite "imminent" violence. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The courts have uniformly held that restrictions on video games do not satisfy the stringent requirements of the *Brandenburg* standard. See, e.g., *James*, 300 F.3d at 698 (the "glacial process of personality development" allegedly affected by "violent" video games "is far from the temporal imminence" required by *Brandenburg*); AAMA, 244 F.3d at 575 (no evidence that "violent video games incite youthful players to breaches of the peace," as Supreme Court precedent requires); *Blagojevich*, 404 F. Supp. 2d at 1073-74 (holding that Illinois statute did not satisfy *Brandenburg*).

The courts also have rejected the argument that restrictions on "violent" video games can be justified as a means to prevent "psychological harm" to minors. See, e.g., *Blagojevich*, 404 F. Supp. 2d at 1074-75; *IDSA*, 329 F.3d at 958-59; AAMA, 244 F.3d at 578-79; Maleng, 325 F. Supp. 2d at 1187. That is because the government does not have a legitimate, much less compelling, interest in controlling minors' "thoughts" or "attitudes." *Blagojevich*, 404 F. Supp. 2d at 1074. The Supreme Court has said that the government cannot suppress minors' speech "solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-214 (1975). As the federal court in Illinois recently observed, "[i]n this country, the State lacks the authority to ban protected speech on the ground that it affects the listener's or observer's thoughts and attitudes." *Blagojevich*, 404 F. Supp. 2d at 1074; see also AAMA, 244 F.3d at 575.

In terms of the substantial evidence requirement, the laws restricting distribution of video games to minors are typically justified on the basis of social science claims that minors who are exposed to depictions of violence in video games are more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior. Yet every court to have considered this evidence has found it wanting. The most recent example is the court in *Blagojevich*, which systematically reviewed and found unpersuasive the evidence of Illinois's two main expert witnesses, Dr. Craig Anderson and Dr. William Kronenberger. *Blagojevich*, 404 F. Supp. at 1059-67. The court concluded that "neither Dr. Anderson's testimony nor his research establish a solid causal link between violent video games exposure and aggressive thinking and behavior. [And] even if one were to accept the proposition that playing violent video games increases aggressive thoughts and behavior, there is no evidence that this effect is at all significant." *Id.* at 1063. In his testimony, Dr. Anderson had conceded that there was no evidence that more graphic violence is more harmful than cartoonish violence, that minors are more vulnerable to effects than adults, or that video games have greater effects than television, movies or other media. He also agreed that the vast majority of minors playing violent video games will grow up and suffer no ill effects. The Court was even less impressed by Dr. Kronenberger's work regarding brain activity, finding it "unpersuasive [and unable to] support the weight he attempts to put on them via his conclusions." *Id.* at 1067. Indeed, Dr. Kronenberger has repeatedly conceded that his research does not show that playing "violent" video games causes the brain patterns observed by his research team. *Blagojevich*, 404 F. Supp. 2d at 1074. These conclusions are consistent with the other courts that have considered such evidence. *Schwarzenegger*, 401 F. Supp. 2d at 1046; *Granholtz*, 404 F. Supp. 2d at 982.

State legislatures in considering such legislation routinely ignore social science research that contradicts and undermines the conclusions of Dr. Anderson and others. For example, the court in *Blagojevich* concluded that the failure of the Illinois Legislature to consider "any of the evidence that showed no relationship or a negative relationship between violent video game play and increases in aggressive thoughts and behavior," along with its failure to take into account research that is critical of the work of Dr. Anderson and others, "further undermine defendants' claim that the legislature 'made reasonable inferences' from the scientific literature based on 'substantial evidence.'" *Blagojevich*, 404 F. Supp. 2d at 1063; Maleng, 325 F. Supp. at 1188-89 ("[T]he Court finds that the Legislature's belief that video games cause violence . . . is not based on reasonable inferences drawn from substantial evidence.").

These laws are also constitutionally flawed because they ignore less speech-restrictive alternatives to furthering their purported goals, including parental controls, increased self-regulation, and increased awareness of the industry's

voluntary rating system. See *Playboy*, 529 U.S. at 824 ("A court should not . . . presume parents, given full information, will fail to act."); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (1996) (plurality op.) (striking down advertising ban because of less restrictive alternatives such as an "educational campaign" or "counterspeech"). Indeed, the Federal Trade Commission has concluded that the video game industry is performing better in its ratings efforts than its peer retail industries - music and movies - that are not subject to state restrictions involving violence. FTC, Report to Congress: Marketing Violent Entertainment to Children, at 28-29 (July 2004) ("FTC Report"); see also *Blagojevich*, 404 F. Supp. 2d at 1075 (citing FTC report and noting that minors are more easily able to purchase other types of media rated for mature audiences than purchase M-rated video games).

Courts have also consistently found it problematic that violent video game legislation would single out video games from all other media containing violent images. Depictions of violence are found not only in video games, but in movies, books, magazines, music, and art, and on television and the Internet. See *AAMA*, 244 F.3d at 579 ("violent" video games "are a tiny fraction of the media violence to which modern American children are exposed," as well as "not very violent compared to what is available to children on television and in movie theaters today"); *Blagojevich*, 404 F. Supp. 2d at 1075 (finding no evidence demonstrating that video games are more harmful than any other media). Legislation that left those other media unaffected - even if it could otherwise be justified - would be constitutionally problematic because it would heighten concerns about whether the bill advances the purported interests at all. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). Such laws cannot possibly materially advance their goals by preventing a 16-year-old from buying or renting the *Resident Evil IV* or Tom Clancy's *Rainbow Six 3* video games, when the same teen may lawfully buy or rent *Resident Evil* and Tom Clancy movies, and purchase Tom Clancy books.

Professor Kevin Saunders, effectively recognizing that the strict scrutiny standard cannot be met, has argued that sufficiently violent games (and other forms of expression) should be treated as falling in the class of works (heretofore limited to sexually explicit material) called "harmful to minors" or "obscenity as to minors." A ban on distribution to minors of a work that is "harmful to minors" triggers no First Amendment scrutiny. But the law provides no support for vastly extending that category beyond the realm of sexually explicit material to include violent content. To the contrary, the Supreme Court has made clear that the sine qua non of "obscenity" is graphic sexual depictions. E.g., *Cohen v. California*, 403 U.S. 15, 20 (1971) ("Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic."); *Miller v. California*, 413 U.S. 15, 24 (1973) ("[W]e now confine the permissible scope of [obscenity] regulation to works which depict or describe sexual conduct."). And the lower federal courts have repeatedly refused to go further and treat violent materials as obscene as to minors. E.g., *IDSA*, 329 F.3d at 958 ("Simply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults."); *AAMA*, 244 F.3d at 575-76 ("The notion of forbidding . . . pictures of violence . . . is a novelty, whereas concern with pictures of graphic sexual conduct is the essence of the traditional concern with obscenity.").

Another legal failing of state "violent" video game laws is that they are unconstitutionally vague. The Constitution demands that statutes be set forth with "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Such laws typically restrict games that depict "violence" towards humans or human-like creatures. But in the world of video games, characters that appear to be human beings may actually be zombies, aliens, gods, or some other fanciful creature, and might transform from humans to other beings and vice versa over the course of the game. *Blagojevich*, 404 F. Supp. 2d at 1077 ("As a mechanism for regulating a fanciful medium, however, this definition [of "human-on-human violence"] leaves video game creators, manufacturers, and retailers guessing about whether their speech is subject to criminal sanctions."). Moreover, the laws penalize games where the player may intend to cause suffering or inflict pain. While such terms have a discernible meaning in the real world, they cannot be so easily applied in the virtual world of video games. For example, it is difficult if not impossible to measure whether a "high degree of pain" is being inflicted to a character that may, for example, possess superhuman characteristics, and at any rate is only an image on a video screen.

Blagojevich, 404 F. Supp. 2d at 1077 n.8 ("It is likely, however, that the term 'serious physical harm' is also vague given the difficulty of determining what actions are harmful to characters that appear human, but can automatically recover from injuries, regrow limbs, and spring back to 'life.'") Indeed, it would be simply impossible for video game manufacturers and distributors to determine the "intent" of every possible player of a particular video game, such as whether a player will specifically intend abuse. These laws therefore subject video game makers and retailers to a gray zone of liability (and often criminal liability) that they have no way of navigating. And as a consequence, the laws create a chilling effect where manufacturers and retailers steer far away from any game that could remotely fall under the law's scope, further stifling protected speech.

Finally, it is worth noting that the proposed federal legislation restricting access to video games fares no better than the state regulations that have been struck down. The federal "Family Entertainment Protection Act" would impose federal penalties on the sale or rental of a video game rated "M - Mature" or "AO - Adults Only" by the Entertainment

Software Rating Board ("ESRB") to minors under the age of 17. Like the state laws, the federal act would impose a content-based restriction on expression that is fully protected by the First Amendment. The fact that the Act would restrict games already rated "Mature" or "Adults Only" by the voluntary ratings industry does not make it constitutional. To the contrary, by codifying the ESRB's voluntary ratings, without any attendant definitions or standards, the Act would create another constitutional problem: it would violate due process and unlawfully delegate legislative authority to a private entity. See, e.g., *Borger v. Bisciglia*, 888 F. Supp. 97, 100 (E.D. Wis. 1995) ("[A] private organization's rating system cannot be used to determine whether a movie receives constitutional protection."). For these reasons, similar laws, enacted shortly after the Motion Picture Association of America ("MPAA") implemented a private motion-picture rating system in 1968, were invalidated for attempting to incorporate the MPAA ratings into law. See, e.g., *Engdahl v. City of Kenosha*, 317 F. Supp. 1133, 1135 (E.D. Wis. 1970). The ESRB's dynamic standards - although sufficiently clear for a private, voluntary rating system - are not designed or intended for use as a bright-line delineation between legal and illegal content.

The government may not cede the authority to decide which category of speech may be restricted - assuming it could be restricted at all - to a private entity unguided by legislative standards. The result is an impermissibly vague statutory scheme that violates the First and Fourteenth Amendments. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992) (stating that an "impermissible risk of suppression of ideas" exists where "an ordinance . . . delegates overly broad discretion to the decisionmaker"); cf. *Interstate Circuit v. Dallas*, 390 U.S. 676, 678 (1968) (striking film board's standards for ultimately determining whether material was "suitable" or "not suitable" for children); *Engdahl*, 317 F. Supp. at 1136; *Specter*, 315 F. Supp. at 826; *Watkins*, 191 S.E.2d at 144.

For all of these reasons, I urge this subcommittee and Congress not to support the type of unconstitutional regulation that has been consistently struck down in courts around the country. Children and their parents, and not the government, should be making the decisions about what type of expression children should be exposed to. That is the freedom the First Amendment guarantees and that is the reason every such restriction on video games has been struck down.

Thank you.