

MEMORANDUM

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Chicago
Dallas
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Washington, DC

To: Gamer Technology Law Conference Attendees

From: Katherine Fallow

Re: Government Attempts to Restrict Minors' Access to "Violent" Video Games – First Amendment Issues

In recent years, several state and local governments have passed laws restricting minors' access to "violent" video games. Each attempt has been struck down as violating the First Amendment. *See Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) ("IDSA"); *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) ("AAMA"); *ESA v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); *VSDA 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 Assn v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).¹ Just last year, three states – Illinois, California, and Michigan – passed such laws. The Illinois law has been permanently enjoined by the federal district court; the courts in Michigan and California have preliminarily enjoined the laws in those states, and plaintiffs have moved for summary judgment.

Video Games Are Protected Speech

Although in earlier cases defendants attempted to argue that video games were not entitled to any First Amendment protection, that defense has largely fallen by the wayside. That is because the courts have consistently held 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 1044; *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.

¹ *See also James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002) (rejecting tort claim against video game makers for harm caused by third parties, based on common law principles of causation and liability and First Amendment principles); *Sanders v. Acclaim Entm't Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002) (same); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 167 (D. Conn. 2002).

Strict Scrutiny Applied

As in any First Amendment case, the starting point is the level of scrutiny applicable to these kinds of laws. Plaintiffs have argued – and the courts have almost unanimously held – that because the laws restrict the expressive medium of video games based on their content, they are subject to “strict scrutiny.” *See, e.g., Blagojevich*, 404 F. Supp. 2d at 1056; *Schwarzenegger*, 401 F. Supp. 2d at 1045; *IDSA*, 329 F.3d at 958-59; *cf. United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 826-27 (2000); *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The Supreme Court has made clear that content-based regulations of speech are “presumptively invalid,” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and the government carries the burden of demonstrating that the law is narrowly tailored to further a compelling state interest, and that no less restrictive alternatives exist for furthering that interest. The courts have repeatedly struck down laws aimed at “violent” video games on the ground that they failed to meet the exacting standards of strict scrutiny. *See Blagojevich*, 404 F. Supp. 2d at 1075-76; *Schwarzenegger*, 401 F. Supp. 2d at 1045-46; *Granholm*, 404 F. Supp. 2d at 980; *IDSA*, 329 F.3d at 958-59; *AAMA*, 244 F.3d at 576-77; *Maleng*, 325 F. Supp. 2d at 1190.

Compelling State Interest

With regard to the first prong of the strict scrutiny analysis – whether there is a “compelling” state interest – the defendants have generally advanced two purported state goals. First, these laws are most frequently defended as a means to prevent minors from behaving violently. This asserted state interest is based on a belief that playing “violent” video games causes minors to act more violently or aggressively. As plaintiffs have responded in these cases, however, where the state seeks to censor speech on the theory that it will cause some recipient to engage in violence, it must meet the exceedingly narrow standard of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). *Brandenburg* holds that such speech may only be prohibited if it is “directed to inciting” and “likely” to incite “imminent” violence. But as several courts have recognized, the government cannot meet the *Brandenburg* standard in cases like these, because they cannot show that video games – which are played safely by millions every day – are “intended” to cause imminent violence. Nor can the state demonstrate that exposure to “violent” video games will cause minors to engage in imminent violence. *See, e.g., Blagojevich*, 404 F. Supp. 2d at 1073-74 (holding that Illinois statute did not satisfy *Brandenburg*); *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).

Second, laws restricting “violent” video games have also been defended as a means to prevent “psychological harm” to minors. But as plaintiffs have argued – and as several courts have agreed – the government does not have a legitimate, much less compelling, interest in controlling minors’ “thoughts” or “emotions.” *Blagojevich*, 404 F. Supp. 2d at 1074 (“In 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.”); *Schwarzenegger*, 401 F. Supp. 2d at 1045; *AAMA*, 244 F.3d at 575; *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-214 (1975) (government cannot suppress minors’ speech “solely to protect the young from ideas or images that a legislative body thinks unsuitable for them”). Courts have also held that this purported interest is not supported by the requisite substantial evidence. *E.g., Blagojevich*, 404 F. Supp. 2d at 1074 (holding, after an evidentiary hearing, that State failed to present substantial evidence to support

its claimed interests). The problem with the “psychological” health rationale is that the state could use it to justify a wide range of censorship on what minors can read, view or play. Such a result is inconsistent with well-established First Amendment principles and Supreme Court precedent.

Rejecting Lower Level of Scrutiny

Some government defendants have argued that minors’ access to “violent” video games may be restricted in the same manner as sexual “harmful to minors” material, which may be regulated consistent with the First Amendment. *See Ginsberg v. New York*, 390 U.S. 629, 639-43 (1968). Thus, defendants posit, these laws should not be subject to strict scrutiny. As plaintiffs have pointed out, however, the narrow category of obscene or “harmful to minors” material has always been confined to *sexual* speech. *See Miller v. California*, 413 U.S. 15, 23 (1973) (“[W]e now confine the permissible scope of [obscenity] regulation to works which depict or describe sexual conduct.”). Courts have repeatedly rejected attempts to shoehorn regulations of “violent” video games into the narrow categories of sexual “harmful to minors” or “obscene” speech, and have held that strict scrutiny applies. *See, e.g., Blagojevich*, 404 F. Supp. 2d at 1072; *IDSA*, 329 F.3d at 958; *AAMA*, 244 F.3d at 576; *cf. Winters v. New York*, 333 U.S. 507, 510 (1948) (depictions of violence, unlike obscenity, even if containing “nothing of any possible value to society,” are “as much entitled to the protection of free speech as the best of literature”).

Likewise, the courts have generally rejected defendants’ attempts to obtain a lower level of constitutional scrutiny because the laws target minors’, as opposed to adults’, access to protected expression. Minors have a constitutional right to access protected speech, with the narrow exception of the category of “harmful to minors” sexual speech, which, as explained above, 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 pointed out in his decision in *AAMA*, “to shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.” 244 F.3d at 577.

Narrow Tailoring & Less Restrictive Alternatives

In their constitutional challenges, plaintiffs have also argued that the laws fail the other prongs of the strict scrutiny analysis. For example, the laws would single out video games from all other media containing violent images. 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). In addition, courts require that a regulation of expression be the least speech-restrictive means available to achieve the bill’s end. Where options other than regulation exist but are unexplored – for example, a state promotional and educational campaign or technological parental controls – courts will not sustain the regulation of protected speech. *See Playboy*, 529 U.S. 803 at (“A court should not assume a plausible, less-restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.”). Because less restrictive means exist for furthering the State’s purported goals in this area, plaintiffs have argued that the restrictions on speech cannot withstand constitutional scrutiny.

Vagueness

Laws restricting “violent” video games have also been invalidated as 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 precision is essential to “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In particular, exacting precision is required of restrictions in the context of protected expression. *See Reno v. ACLU*, 521 U.S. 844, 871-72 (1997); *NAACP v. Button*, 371 U.S. 415, 433 (1963). Many of the laws contain definitions of “violent” video games that are inherently vague and subjective. Plaintiffs have argued – and courts have agreed – that these vague definitions fail to give retailers constitutionally sufficient notice as to which games fall under the proposed law. *See Blagojevich*, 404 F. Supp. 2d at 1076-77; *Granholm*, 404 F. Supp. 2d at 979; *Maleng*, 325 F. Supp. 2d at 1195.

Codification of Voluntary Rating System

Finally, there has been an attempt by some governments to incorporate the ESRB’s voluntary rating system into laws restricting minors’ access to “violent” video games. The Illinois and Michigan bills, for example, incorporated the ESRB system as an affirmative defense. Pending legislative proposals, moreover, would ban the sale of “M” or “AO” video games to minors under a certain age (17 or 18).

This type of legislative incorporation, far from curing the law’s constitutional problems, appears only to exacerbate them. By in essence codifying the ESRB’s voluntary ratings, without any attendant definitions or standards, such laws 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.”); *State v. Watkins*, 191 S.E. 2d 135, 143-44 (S.C. 1972), *vacated and remanded on other grounds*, *Watkins v. South Carolina*, 413 U.S. 905 (1973) (striking down state obscenity law as “offend[ing] procedural due process in that it vests the power to exempt a certain class of films from prosecution in the uncontrolled hands of the Motion Picture Association of America”); *Potter v. State*, 509 P.2d 933, 935 (Okla. Ct. Crim. App. 1973) (rejecting state obscenity statute’s exemption of MPAA-rated movies, explaining that “[a]ttempted delegation of legislative powers to private persons is repugnant to the due process requirement where it permits arbitrary exercise of powers by such individuals”). That is because 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.

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); *Motion Picture Ass’n of America v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970); *Drive In Theatres v. Huskey*, 305 F. Supp. 1232 (W.D.N.C. 1969), *aff’d*, 435 F.2d 228 (4th Cir. 1970); *cf. Watkins*, 191 S.E.2d 143-44 (striking down portion of obscenity law that created affirmative defense for films bearing the MPAA’s earlier Code Seal of Approval); *Potter*, 509 P.2d at 935 (same).

Conclusion

Laws restricting “violent” video games have been consistently struck down as contrary to well-established First Amendment principles. Despite the losing record in the courts, legislatures have continued to approve similar measures. It is all but certain that these laws will all be found unconstitutional.