

No. 06-3217

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In the United States Court of Appeals  
for the Eighth Circuit

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Lori Swanson, in her official capacity as  
Attorney General for the State of Minnesota.

Appellant,

vs.

Entertainment Software Association; and  
Entertainment Merchants Association,

Appellees.

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On Appeal from the United States District Court  
for the District of Minnesota

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**OPPOSITION TO PETITION FOR REHEARING EN BANC**

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## INTRODUCTION

This Court has now twice held that the First Amendment does not permit the government to restrict access to video games on the basis of their expressive content. *See Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) (“*IDSA*”); *Entertainment Software Ass'n v. Swanson*, --- F.3d ---, No. 06-3217, 2008 WL 696550 (8th Cir., Mar. 17, 2008) (“*ESA*”). In doing so, it has joined the unanimous rank of courts reaching the same result in the face of similar laws. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) (“*AAMA*”); *Entm't Merchants Ass'n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006) (“*Foti*”); *Video Software Dealers Ass'n v. Schwarzenegger*, No. C-05-04188 RMW, 2007 WL 2261546 (N.D. Cal., Aug. 6, 2007) (“*Schwarzenegger*”); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006) (“*Granholm*”); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005) (“*Blagojevich*”); *Video Software Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004) (“*Maleng*”).

The State nevertheless seeks rehearing of the panel decision, arguing that video games are not protected by the First Amendment, and that there is a need for clarification of the applicable evidentiary standard. Neither argument warrants en banc review. The panel properly followed this Court's prior rulings in *IDSA* that

video games are protected speech, much like movies and books, and that laws restricting distribution of such games trigger, and fail, strict scrutiny. The State's suggestion that the panel impermissibly heightened the evidentiary standard is a red herring because the *IDSA* panel applied the substantial evidence standard the State endorses and the panel here was powerless to "heighten" that standard. Moreover, the State has *admitted* that it has *no* evidence that video games cause harm and thus cannot satisfy the substantial evidence standard. In any event, the Minnesota law is unconstitutional on several other grounds the panel did not address. This Court should therefore deny the petition.

**I. THERE IS NO BASIS FOR RECONSIDERING THIS COURT'S HOLDINGS THAT VIDEO GAMES ARE PROTECTED BY THE FIRST AMENDMENT.**

The State first asks this Court to overrule the determination by the *IDSA* and *ESA* panels that expression in video games is protected by the First Amendment. *See IDSA*, 329 F.3d at 957 (video games "are as much entitled to the protection of free speech as the best of literature") (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)); *ESA*, 2008 WL 696550, at \*3-\*4. This holding is consistent with that of every other court to have considered a violent video games law. *E.g.*, *AAMA*, 244 F.3d at 577-79; *Foti*, 451 F. Supp. 2d at 829-30; *Granholm*, 426 F. Supp. 2d at 651; *Blagojevich*, 404 F. Supp. 2d at 1056; *Maleng*, 325 F. Supp. 2d at 1184-85. But the State instead invokes a handful of outdated arcade zoning cases to argue

that video games do not merit First Amendment protection. Petition at 6-7. In the decades since those cases were decided, courts have consistently recognized that modern video games contain expressive content just like the books and movies the State concedes are protected. *Foti*, 451 F. Supp. 2d at 829-30; *Granholm*, 426 F. Supp. 2d at 651; *Blagojevich*, 404 F. Supp. 2d at 1056. Indeed, it is difficult to see how the State can contend that video games lack expressive content when the law in question here (unlike the laws at issue in the old cases cited by the State) explicitly restricts them *because* of their content. R. App. 44-48 (explaining that video games are rated based on their content).<sup>1</sup>

To be sure, some games, like some books and movies, contain violence, but that is insufficient to take them out of the purview of the First Amendment.<sup>2</sup> The law is clear that expression does not lose its protected status simply because it is distasteful or violent. *E.g.*, *Winters v. New York*, 333 U.S. 507, 510 (1948); *Video*

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<sup>1</sup> As the evidence that Plaintiffs submitted to the district court shows, video games, in fact, are often based upon books and movies, which are themselves protected by the First Amendment. For example, both *Resident Evil 4* and *Tom Clancy's Rainbow Six* contain detailed plots and battles of good against evil, and each parallels a movie (*Resident Evil*) or a book (*Rainbow Six*) that minors in Minnesota are legally able to obtain without restriction. R. App. 32-34, 40-41. Another game, *God of War* – also submitted into evidence by the State – provides a storyline drawn from Greek mythology. *Id.* 37-38.

<sup>2</sup> Tellingly, the State claims that *The Punisher* video game is a “far cry from the types of stories ... found in books and movies,” Petition at 6, but in fact *The Punisher* also is a book and a movie. *See, e.g., The Punisher* (Columbia TriStar 2004) (rated “R” “for pervasive brutal violence”).

*Software Dealers Ass'n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992); *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 66 (2d Cir. 1997).

Moreover, even if “grossly repugnant” games could be denied First Amendment protection – and there is no basis in Supreme Court precedent for such an exception – Minnesota’s law extends far beyond the handful of games the State claims meet that standard. The Minnesota Act would penalize any game rated “M” or “AO” by the voluntary ratings board, and the evidence submitted in the district court below establishes, for example, that a game could be rated “M” on the basis of strong language or “mature humor.” R. App. 47. Thus, even accepting the State’s erroneous and constricted view of the First Amendment, the law would penalize many games that have no relationship to the State’s purported interests, and thus would still be unconstitutional.

**II. THIS COURT SHOULD NOT REHEAR EN BANC THE EVIDENTIARY SHOWING REQUIRED TO SATISFY STRICT SCRUTINY.**

The State also asks the Court to grant en banc rehearing to address the evidentiary standard applicable when the government seeks to justify a content-based ban on speech on the ground that it causes harm to recipients. The Court should reject this invitation. The causal requirement adopted by the *IDSA* and *ESA* panels is correct, and it is the same strict scrutiny standard used by courts around the country. That alone is reason enough for this Court to deny the petition. But

this case is particularly ill-suited for reconsidering the evidentiary standard for three additional reasons. First, the State conceded in the district court that it had *no* evidence that video games caused harm to minors. *Add.* at 7. So any refinement of the applicable evidentiary standard could not matter. Second, the evidence the State relies upon has been roundly rejected as insufficient in every court in which it has been presented. Third, the district court's judgment is supported by alternative grounds. En banc review is therefore unwarranted. *E.g., Payne v. United States*, 359 F.3d 132, 135 (2d Cir. 2004) ("Because the outcome of the instant case does not turn on the matter [for which en banc review is urged] we [will not] call for in banc reconsideration.").

**A. Strict Scrutiny Requires The State To Present Substantial Evidence That Video Games *Cause* Harm To Minors.**

In *IDSA* -- decided not five years ago -- a panel of this Court reviewed and enjoined a similar ban on video games. In doing so, it held that strict scrutiny required that the State show that "substantial evidence" supported the restrictions it sought to impose on protected expression. *IDSA*, 329 F.3d at 959. The panel explained that this requirement meant that "the [government] must come forward with empirical support for its belief that 'violent' video games *cause* psychological harm to minors." *Id.* (emphasis added). The district court, quoting *IDSA*, imposed precisely the same test on the State in this case. *App.* at 6. The *ESA* panel itself

quoted the same language from *IDSA* in affirming the district court. *ESA*, 2008 WL 696550, at \*3.

The State does not quarrel with this evidentiary standard. Instead, it complains about some language in the *ESA* panel opinion that it claims imposes a higher level of “statistical certainty.”<sup>3</sup> But any correction of that language would be meaningless in this case, since the State is unable to satisfy the standard it acknowledges is legally required.<sup>4</sup> There is no dispute that the State is unable to offer any evidence showing that video games cause harm to minors: it conceded that point in the district court. App. at 7 (“The State itself acknowledges ... that it is entirely incapable of showing a causal link between the playing of video games and any [harm to minors.]”). Instead, the State relies upon evidence that it claims shows a *correlation* between video games and aggressiveness in minors (and, as discussed below, the evidence fails to show even this). That evidence is not close to sufficient under any articulation of the strict scrutiny standard. Because any

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<sup>3</sup> Although the State refers at times to the “heightened evidentiary standard of [*IDSA*],” Pet. 12, it simultaneously recognizes that *IDSA* never imposed such a heightened standard, *id.* at 10 (asserting that there is “no indication” that the *IDSA* panel “believed it was establishing a new heightened evidentiary standard” or “believed that it was departing from any strict scrutiny analysis precedents”).

<sup>4</sup> Any such correction would also be unnecessary. The panel opinion in this case, read as a whole, makes clear that it intended to do nothing more than follow *IDSA*. But to the extent the panel may have overstated or disagreed with that well-established standard articulated in *IDSA*, the panel lacked the power to change the law in this Circuit and heighten that standard. *Jackson v. Ault*, 452 F.3d 734 (8th Cir. 2006). The *IDSA* standard remains the governing rule.

such correlation could just as well reflect the fact that more aggressive minors tend to prefer more violent games, it does not show that the law actually serves the asserted purpose of preventing harm.

As the *IDSA* panel recognized, content-based restrictions are “presumptively invalid,” and the government must carry the heavy burden of showing that they are “necessary” to further a compelling government interest. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). That burden requires, *inter alia*, that the State present substantial evidence that the speech it seeks to regulate *is causing* the harm it seeks to alleviate.<sup>5</sup> Otherwise, it has not shown that its asserted interest is being served.

Evidence of causation is particularly important here because the harm that the State alleges is that video games make minors act violently. App. at 6 (noting that the State relies primarily on a study purporting to show a link between video games and aggressive, violent behavior by minors). The State, however, may regulate protected expression on a violence-prevention rationale only where it can show that the expression is both intended and likely to cause imminent violence.

*Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Leaving aside the fact that State

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<sup>5</sup> The State cites two cases for the proposition that scientific certainty is not required to satisfy strict scrutiny. One, *Schleifer v. City of Charlottesville*, 159 F.3d 843, 849 (4th Cir. 1999), did not involve a content-based restriction. The other, *Ginsberg v. New York*, 390 U.S. 629, 641-43 (1968), concerned material that was unprotected obscenity for minors. So these cases are inapposite to this strict scrutiny case. In any event, the State does not claim that they support the elimination of a requirement that the State present substantial evidence of causation in this case.

cannot even begin to show that video games are *intended* to cause imminent violence, the second prong of *Brandenburg* expressly requires proof of causation.

Yet as the State has conceded, the evidence it proffered, which is no different from that offered in numerous other courts, simply does not constitute substantial evidence of causation. The State relied primarily on a 2004 “meta-study” by Dr. Craig Anderson. The district court found the study to be “completely insufficient” and noted that the study itself conceded that there are “glaring empirical gaps” and insufficient data to support “truly sensitive tests of ... susceptibility to violent video game effects.” Add. at 6-7. Other courts to have reviewed Dr. Anderson’s data have been similarly skeptical. In *Blagojevich*, for example, the court reviewed extensively Dr. Anderson’s 2004 meta-study and cited numerous concerns with his methodology, including the fact that he “had ignored research that reached conflicting conclusions,” and failed to eliminate “the most obvious alternative explanation: aggressive individuals may themselves be attracted to violent video games.” 404 F. Supp. 2d at 1062, 1063. *See also Granholm*, 426 F. Supp. 2d at 653 (“Dr. Anderson’s studies have not provided any evidence that the relationship between violent video games and aggressive behavior exists.”).

Moreover, Dr. Anderson’s studies shed no light on the games actually restricted by the Act. The Act bans minors from purchasing any game rated “M”

or “AO.” None of Dr. Anderson’s work (nor any other evidence presented by the State) focuses on the effect of these games in particular. And, as noted above, a game may receive a “M” or “AO” rating without containing any violent content whatsoever, making Dr. Anderson’s conclusions about violent games irrelevant.

**B. The Judgment Is Independently Supported By Other Grounds.**

In any event, the district court’s judgment is supported by additional grounds that are entirely unrelated to the evidentiary point that the State raises. Like every other court to have reviewed a ban on violent video games, the district court found that the Act was unconstitutional because, given the numerous other forms of media that expose children to violence, “there is no showing that restricting video games alone would alleviate the State’s concern about Minnesota’s children.” Add. at 8. That determination is undoubtedly correct. *Granholm*, 426 F. Supp. 2d at 654; *cf. AAMA*, 244 F.3d at 579 (“violent” video games “are a tiny fraction of the media violence to which modern American children are exposed”).

The Act also unconstitutionally delegates authority to the ESRB -- a private organization -- to determine which games are illegal for minors to purchase. Add. at 9-10. As the District Court explained, the State may not vest a private body with the power to determine what expression may be legally viewed by the public. *Id.* See also *Swope v. Lubbers*, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983) (rejecting a state institution’s effort to prohibit the showing of “X”-rated movies on campus,

stating that “it is well-established that the Motion Picture ratings may not be used as a standard for a determination of constitutional status”); *Potter v. State*, 509 P.2d 933, 935-36 (Okla. Crim. App. 1973); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wis. 1970).

Given that the en banc review of the evidentiary issue would not result in a finding that the Act is constitutional, such review is not warranted here.

### CONCLUSION

For the reasons set forth above, this Court should deny the State’s petition for rehearing en banc.

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/s/  
Matthew S. Hellman