

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF OKLAHOMA**

(1) ENTERTAINMENT MERCHANTS	)	
ASSOCIATION and	)	
(2) ENTERTAINMENT SOFTWARE	)	
ASSOCIATION,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No.
	)	
(1) BRAD HENRY, in his official capacity	)	
as the Governor of the State of Oklahoma,	)	
(2) DREW EDMONDSON, in his official	)	
capacity as Attorney General of the State of	)	
Oklahoma,	)	
(3) C. WESLEY LANE, II, in his official	)	
capacity as District Attorney of Oklahoma	)	
County,	)	
	)	
Defendants.	)	

**COMPLAINT**

Plaintiffs Entertainment Merchants Association (“EMA”) and Entertainment Software Association (“ESA”), by and through their attorneys, aver and allege as follows:

**NATURE OF THE ACTION**

1. Plaintiffs are associations whose members include companies that create, publish, manufacture, distribute, sell, and/or rent video games to the public. Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief against enforcement of a new Oklahoma statute that significantly infringes upon constitutionally protected rights of free expression.

2. The challenged act, Oklahoma House Bill 3004 (hereinafter, the “Act”), was signed into law on June 9, 2006, and is due to go into effect on November 1, 2006. The Act criminalizes the sale, rental, dissemination, or display of video games based solely on their expressive content, in violation of the First Amendment. Specifically, the Act, which amends the state “harmful to minors” law, makes it a crime for anyone in Oklahoma to sell, rent, display or otherwise disseminate to a person under the age of 18 any “interactive video game or computer software” containing “inappropriate violence” as defined by the Act. Okla. Stat. tit. 21, §§ 1040.75, 1040.76; Act § 1(3). A person who violates the Act is subject to substantial criminal fines. *Id.* § 1040.77.

3. The Act violates the First Amendment and other provisions of the United States Constitution by imposing criminal penalties on the sale, rental, display, or dissemination of video games based solely on the content of those games. The First Amendment prohibits such content-based censorship. Not only does the Act directly restrict the dissemination and receipt of a considerable amount of fully protected expression, but, because of its numerous vague terms, the Act also creates a chilling effect on a great deal of speech, as game creators, publishers, manufacturers, distributors and retailers will respond to the Act’s uncertainty by self-censoring, depriving adults and children of access to undeniably protected expression. The Act’s blatant violation of First Amendment freedoms is starkly underscored by the fact that the Act appears to prevent *parents* from giving games that fall under the Act’s definition of “inappropriate violence” to their own children. Okla. Stat. tit. 21, § 1040.76 (prohibitions apply to any “person”).

4. Every previous governmental attempt to restrict video game expression based on “violent” content has been struck down as violating the First Amendment. *Am. Amusement*

*Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *Entertainment Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005) (“*Blagojevich*”); *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005) (preliminary injunction); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004); *see also James v. Meow Media, Inc.*, 300 F.3d 683, 696 (6th Cir. 2002) (rejecting attempts to impose tort liability on “violent” video games as inconsistent with the First Amendment); *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002) (same); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002) (same). As with these previous laws, the Act violates the First Amendment and must be struck down.

5. Because some of Plaintiff's members sell, rent, display, and/or otherwise disseminate video games that may fall within the statutory definition, they may be subject to prosecution under the Act. The Act will violate the First Amendment rights of Plaintiffs' members and their willing listeners not only through direct restriction, but also as a result of the Act's inevitable chilling effect on video game expression.

6. Plaintiffs maintain that (a) the Act is void and of no force and effect because it is unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States and thus actionable under 42 U.S.C. § 1983; and (b) Plaintiffs' members, as well as many citizens of Oklahoma, will suffer immediate, serious, and irreparable injury if the Act takes effect.

### **JURISDICTION AND VENUE**

7. This action arises under the Constitution of the United States, the First and Fourteenth Amendments thereto, and the laws of the United States, 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and 2202. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 and 1343(a)(3). This action is brought against the defendants in their official capacity pursuant to 42 U.S.C. § 1983.

8. Venue is proper in the Western District of Oklahoma. The Act will violate the First Amendment rights of willing customers residing in this district, and the injury to Plaintiffs' members will occur in this district. Many of Plaintiffs' members are located in and/or do business in this judicial district, and the claims thus arise in this district. Under information and belief, Defendants reside in this judicial district and/or are responsible for enforcing the Act within this judicial district.

### **PARTIES**

9. Plaintiff EMA is a not-for-profit international trade association dedicated to advancing the interests of the \$32 billion home entertainment industry. It was established in April 2006 through the merger of the Video Software Dealers Association and the Interactive Entertainment Merchants Association. EMA is incorporated in the State of Delaware and its principal place of business is Los Angeles, California. EMA represents more than 1,000 companies throughout the United States, Canada, and other nations. Its members operate more than 20,000 retail outlets in the U.S., including approximately 300 in Oklahoma, that sell and/or rent DVDs and computer and console video games. Membership comprises the full spectrum of retailers (from single-store specialists to multi-line mass merchants), distributors, the home video

divisions of major and independent motion picture studios, and other related businesses that constitute and support the home entertainment industry.

10. Plaintiff ESA is a nonprofit trade association organized under the laws of the State of Delaware with its principal place of business in the District of Columbia. A fundamental purpose of ESA is to serve and promote the business and public affairs interests of companies that publish entertainment software used for video games, including such companies' right to publish and distribute works of expression that are protected under the First Amendment to the United States Constitution and similar provisions of the constitutions of various states. ESA members include a number of entities that create, publish, produce, and/or distribute video games to owners and operators of sales and rental outlets within Oklahoma County and throughout Oklahoma.

11. The interests that Plaintiffs EMA and ESA seek to protect in this action are germane to the purposes of each organization, and neither the claims nor the forms of relief sought in this action require participation by individual members of Plaintiffs. One or more members of each association have standing to bring this action in their own right.

12. In this facial challenge to the Act, Plaintiffs have standing to assert not only their own rights and harm, but also that of the potential recipients of speech from Plaintiffs' members. The Act will cause irreparable harm to willing listeners—including both those under age 18 and adults—who will be deprived of the ability to receive speech from Plaintiffs' members.

13. Plaintiffs are threatened with immediate, serious, and irreparable injury as a result of the enactment and imminent enforcement of the Act. Once the Act is in force, Plaintiffs' members will be subject to liability for disseminating works fully protected under the First

Amendment. The Act will directly restrict the ability of video game creators, publishers, manufacturers, distributors and retailers to disseminate their constitutionally protected expression to willing listeners. The Act will also have an immediate and significant chilling effect upon constitutionally protected speech because those who sell, rent, display, or otherwise disseminate video games will, to avoid liability under the Act, refrain from offering for rental, sale or display a wide array of games, either to minors or to all customers. This will in turn chill video game creators, publishers, manufacturers, and distributors from creating, publishing, manufacturing and distributing works that may be considered to run afoul of the Act's vague definition of prohibited content.

14. Defendant Brad Henry is the Governor of the State of Oklahoma. As Governor, he is vested with the State's "Supreme Executive power" and "shall cause the laws of the State to be faithfully executed." Okla. Const. Art. 6, §§ 2, 8. This injunctive action is brought against Governor Henry in his official capacity. The Governor also possesses the statutory power "to employ counsel to protect the rights or interests of the state . . . and the counsel so employed by him . . . may prosecute offenses against the law of the state, and may institute and conduct proceedings before grand juries." Okla. Stat. tit. 74, Sec. 6.

15. Defendant Drew Edmondson is the Attorney General of the State of Oklahoma. He is the "chief law officer" of the State and has the duty to "prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court and Court of Criminal Appeals in which the state is interested as a party." Okla. Stat. tit. 74, §§ 18, 18b(A)(1). In addition, "the Attorney General shall, when requested by the Governor, have power and authority to institute and prosecute criminal actions . . ." *Id* § 18e. The Attorney General also has the authority "to

require the aid and assistance of district attorneys in their respective counties . . . .” *Id* § 18d. This injunctive action is brought against Attorney General Edmondson in his official capacity.

16. Defendant C. Wesley Lane, II is the District Attorney responsible for enforcing the law within Oklahoma County. The district attorney, assistant district attorneys, or special assistant district attorneys shall “prosecute all actions for crime committed in the district . . . .” Okla. Stat. tit. 19, § 215.4. This injunctive action is brought against District Attorney Lane in his official capacity.

## **BACKGROUND**

### **Video Games and the First Amendment**

17. The Act seeks to regulate the expressive medium of video games and limit access to certain video games based solely on the content of the expression depicted or contained therein.

18. Video games are a form of artistic expression much like other forms of protected expression, such as movies, books, and music. Video games contain extensive storylines and character development, comparable to that of books and movies. The storylines and plot, and associated dialogue among characters, continue throughout the game play and are an integral part of the game itself. Like the best of literature, the storylines often involve familiar themes such as good versus evil, triumph over adversity, struggle against corrupt governments and rulers, and/or quest for adventure. Expression in other media, such as movies and books, often draws thematic ideas directly from video games. Video games similarly draw and evolve themes and storylines from other media, such as movies and books.

19. Video games also feature the artwork of some of the best modern graphic artists. The typical video game contains many different animated or computer-generated illustrations. Video games also contain music, much of it original and performed by top musicians and orchestras. Like the music that plays during movies, the music in video games enhances and complements the expression conveyed by the images and dialogue, often in dramatic fashion.

20. The video game industry has developed a voluntary rating system designed to provide parents and other customers with information about the content of video games. The ratings are administered by the Entertainment Software Rating Board (“ESRB”), a private self-regulatory body formed in 1994 by ESA. ESRB independently applies and enforces ratings for video games. Game console manufacturers will not permit games to be published for their system unless they have an ESRB rating. Many major retailers will not stock games unless they have an ESRB rating.

21. ESRB gives one of six age-specific ratings to each game it rates: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teen – 13 and older); M (Mature – 17 and older); AO (Adults Only). The ESRB also assigns content descriptors to the game, such as “Cartoon Violence,” “Crude Humor,” “Fantasy Violence,” “Mild Violence,” and “Strong Language.”

22. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press,” U.S. Const. amend. I, and the prohibitions of the First Amendment apply to the State of Oklahoma, U.S. Const. amend. XIV.

23. The First Amendment shields verbal expression, written expression, visual expression, entertainment, art, and music. The protections of the First Amendment apply just as much to video games as they do to books, newspapers, films, theater, and music.

24. The First Amendment also protects expressions and depictions of violence devoid of obscene sexual content. Thus, video games depicting violence—like movies or illustrations that depict violence—are fully protected by the First Amendment.

25. The 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, 214 (1975).

#### **The Act’s Restrictions on Protected Speech**

26. The Act was passed by the Oklahoma Legislature on May 24, 2006, and was signed into law by Governor Henry on June 9, 2006. A true, complete, and accurate copy of the Act and the law it amends, Okla. Stat. tit. 21, §§ 1040.75 – 1040.77, are attached hereto as Exhibit 1, and are incorporated herein as if fully set forth. The Act is due to go into effect on November 1, 2006.

27. The Act restricts speech in violation of the First Amendment through a radical expansion of the State’s existing “harmful to minors” statute, which restricts the dissemination or display of sexually explicit materials to minors under the age of 18. Okla. Stat. tit. 21, § 1040.75. The Act amends the definition of “harmful to minors” in § 1040.75 to include “any description, exhibition, presentation or representation, in whatever form, of inappropriate violence.” Act § 1(2)(b). “Inappropriate violence” is limited to video games, and is defined by

the Act as: any description or representation, in an interactive video game or computer software, of violence which, taken as a whole, has the following characteristics:

- a. the average person eighteen (18) years of age or older applying contemporary community standards would find that the interactive video game or computer software is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors, and
- b. the interactive video game or computer software lacks serious literary, scientific, medical, artistic, or political value for minors based on, but not limited to, the following criteria:
  - (1) is glamorized or gratuitous,
  - (2) is graphic violence used to shock or stimulate,
  - (3) is graphic violence that is not contextually relevant to the material,
  - (4) is so pervasive that it serves as the thread holding the plot of the material together,
  - (5) trivializes the serious nature of realistic violence,
  - (6) does not demonstrate the consequences or effects of realistic violence,
  - (7) uses brutal weapons designed to inflict the maximum amount of pain and damage,
  - (8) endorses or glorifies torture or excessive weaponry, or
  - (9) depicts lead characters who resort to violence freely.

Act, § 1(3).

28. A “minor” is defined under the Act as “any unmarried person under the age of eighteen (18) years.” Act § 1. A “person” under the Act means “any individual, partnership, association, corporation, or other legal entity of any kind.” Act § 1(14).

29. The Act imposes criminal penalties on any “person” who knowingly sells, rents, displays, or otherwise disseminates a video game containing “inappropriate violence” (as defined above) to anyone under the age of 18. Okla. Stat. tit. 21, § 1040.76. The Act also forbids retailers from permitting minors who are present in a store from viewing video games that meet

the statutory definition of “inappropriate violence,” Act § 1(3), and requires retailers to keep such video games behind “blinder racks” that hide the lower two-thirds of the video game package. Okla. Stat. tit. 21, § 1040.76 .

30. A person convicted of violating the Act is “guilty of a misdemeanor” and shall be fined up to \$500 for the first or second offense. Okla. Stat. tit. 21, § 1040.77. A person convicted of a third or subsequent violation shall be fined up to \$1,000. *Id.* Each day that a violation occurs constitutes a separate offense. Multiple copies of the same title shall constitute a single offense. *Id.*

31. A person is liable under the Act if the individual knows, has reason to know, or believes that the video game contains content proscribed by the statute, and is aware of the age of the minor. Act § 1(13). The Act provides for the defense of “an honest mistake” where the defendant “made a reasonable attempt to ascertain the true age of such minor,” defined as “an attempt to ascertain the true age of the minor by requiring the production of a driver license, marriage license, birth certificate or other governmental or education identification card or paper and not relying solely on the oral allegations or apparent age of the minor.” Act, § 1(13), (15).

32. The Act contains no legislative findings, nor provides any rationale, in support of its restrictions on protected speech.

### **The Act Is Unconstitutional**

33. By criminalizing the sale, rental, display or dissemination of video games deemed to contain “inappropriate violence” to minors, the Act restricts video game expression based on

the content of those games. The Act therefore is subject to strict scrutiny, the most exacting level of scrutiny under the First Amendment.

34. The Act offers no interest—much less a compelling interest—in support of its restrictions on speech. Nor could the State demonstrate a compelling interest here. Every court to have considered the question has rejected the proposition that the government has a compelling interest in regulating minors’ access to video games. Instead, under the Constitution, the role of what games minors should be permitted to play is accorded to parents, not the government. Indeed, the Act’s restrictions on speech even extend to parents’ ability to choose video games for their children. Courts that have struck down essentially identical laws have also recognized that there is no substantial evidence supporting the claim that video games are “harmful” to minors.

35. The Act’s speech restrictions cannot be justified to prevent minors from behaving aggressively. The government may regulate speech to prevent violence *only* where speaker intends to cause imminent violence or lawlessness, and the speech is likely to have such an effect. The Act does not meet this stringent standard. The definition of “inappropriate violence” does not indicate that a game is intended and likely to cause imminent violence, and nor could it be shown that such games are intended and likely to cause imminent violence.

36. The Act is not the least restrictive means of achieving the State’s goals, as the Legislature refused to consider less speech-restrictive means of regulating minors’ access to “violent” video games, including those that were proposed by Plaintiffs (such as educational efforts, parental controls, and retailer enforcement initiatives).

37. The Act presents Plaintiffs' members with the possibility of arbitrary and discriminatory enforcement because the Act fails to set forth adequately specific standards to determine which video games contain "inappropriate violence" and fall within the Act's prohibitions. As a result, different people will almost certainly reach different, and conflicting, determinations as to which games are likely to be restricted by the Act.

38. The Act is rife with unconstitutionally vague terms and phrases which fail to give reasonable notice of what games are prohibited. The vague terms and phrases include, but are not limited to, "glamorized or gratuitous," "graphic violence that is not contextually relevant to the material," "consequences or effects of realistic violence," "brutal weapons designed to inflict the maximum amount of pain and damage" and "lead characters who resort to violence freely." These terms have no clear meaning in the context of video games. For example, how would a retailer assess whether a particular video game depicted "glamorized" violence? Would "glamorized" violence be more or less gory or bloody – more or less realistic? When is violence "not contextually relevant to the material"? Does that mean violence can only be depicted in a battlefield or war zone? At what point is a character resorting to violence "freely"? Does "freely" mean "of one's own accord," "without concern," or "often"? Further, the Act purports to apply to any "interactive video game or computer software," but those terms are undefined. These are only some of the interpretive problems raised by the Act's indefinite terms. Persons of common intelligence are forced to guess at the meaning and scope of the Act.

39. In addition to failing to give adequate notice of which video games are covered by the Act, the Act's inherently vague terms threaten to restrict an unconstitutionally broad swath of video games, including games rated "T" for "Teen," or even games rated "E" for "Everyone." The Act may be interpreted by State authorities to cover cartoon games in which the main

character punches or hits other characters (*i.e.* “resort[s] to violence freely”). And in a medium where characters—including animals or cartoon “humans”—often navigate challenges and use “violence” to overcome opponents, a broad range of games may be deemed to use “violence” as “the thread holding the plot of the material together.” By restricting an unconstitutionally broad range of speech, the Act violates the First Amendment.

40. Some of the content displayed by the video games created, published, distributed, rented, sold, and/or made available to the public by Plaintiffs’ members, while fully protected by the United States Constitution, may be deemed by law enforcement officials in Oklahoma, including the Defendants, to meet the Act’s definitions for “inappropriate violence,” thus subjecting Plaintiffs’ members to the threat of prosecution, and correspondingly impinging upon Plaintiffs’ members First Amendment right to create and disseminate protected expression. As a result, video game retailers will steer far away from even potentially prohibited games to avoid the Act’s criminal penalties. This will have the effect of reducing the number of games available for all individuals—both minors and adults—despite the fact these games are protected by the First Amendment.

41. In addition to the prohibition on the sale or rental of video games containing “inappropriate violence,” the Act will impose other significant burdens on freedom of expression. The Act imposes criminal penalties for *displaying* a prohibited video game in the store, “in such a way that minors, as a part of the invited general public, will be exposed to view such material” unless it is kept behind “blinder racks” so that the lower two-thirds is not exposed to view. § 1040.76(1). Thus, the Act assumes that it is harmful to minors simply to view the full packaging of many video games. Moreover, if allowed to go into effect, the Act will restrict retailers’ ability to offer consumers the chance to play sample segments of games or to show

game footage “previews” on monitors in their stores, for fear that the games may be interpreted as being covered by the Act. As a result, the Act will restrict the speech of video game retailers and publishers, and will prevent the expression of Plaintiffs’ members from reaching willing recipients, including both adult and minor consumers.

42. The Act would infringe the First Amendment rights of (i) businesses physically present in Oklahoma, including Plaintiffs’ members, who face the threat of prosecution if they do not comply with restrictions on their right to distribute constitutionally protected material, (ii) potential Oklahoma customers of businesses located in Oklahoma—including both those under 18 as well as adults—who, because of the Act’s restrictions, will be deprived of the opportunity to receive fully protected speech, and (iii) businesses located outside Oklahoma, including members of Plaintiffs, whose ability to distribute their creative works within Oklahoma will be burdened based on the content of those works of expression.

43. The Act cannot be defended as a means to aid parental authority. Minors have First Amendment rights that cannot be conditioned on parental consent. Regardless, the Act *hinders* parental authority. Because the Act’s prohibitions extend to any “person,” the Act would impose criminal penalties even on parents who decide to give the restricted video games to their own children. This blatant infringement of parental rights underscores the Act’s serious constitutional infirmities.

44. The Act threatens Plaintiffs’ members and other businesses that create, publish, display, manufacture, distribute, sell, or rent video games, as well as adults and those under 18 who wish to receive the speech in those games, with serious, immediate, and irreparable injury for which there is no adequate remedy at law.

45. In this facial constitutional challenge to the Act, Plaintiffs have standing to assert the rights of, and harm to, the potential customers of Plaintiffs' members.

46. The Act would cause Plaintiffs' members to be subjected to the deprivation of rights, privileges, and immunities secured to them by the Constitution and laws of the United States. The Act thus constitutes a deprivation of rights actionable under 42 U.S.C. § 1983.

47. In the event Plaintiffs prevail on any claims under the Constitution of the United States set forth in this Complaint, Plaintiffs are entitled to recover attorneys' fees under 42 U.S.C. § 1988.

## COUNT I

### **(First and Fourteenth Amendments—Freedom of Expression)**

48. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 47 as if fully set forth herein.

49. The Act would restrict access to video games based solely upon their "violent" content. The content of the expression made subject to these restrictions is not obscene or obscene as to minors. Nor does it fall within any other category of expression that may constitutionally be regulated based solely upon its content.

50. The Act imposes unconstitutional content regulation by prohibiting a person from disseminating any video game meeting the statutory definition of a video game containing "inappropriate violence" to any person under the age of 18, and by restricting the ability of retailers to display such games in their stores. The Act restricts the freedom of creators, publishers, manufacturers, distributors, and retailers of games, as well as purchasers, renters, and

other players of such games, to communicate and receive expression that is not constitutionally subject to regulation based upon its content. The Act's suppression of video games containing "inappropriate violence" is unsupported by any legislative finding, or underlying evidence, that exposure to such expression directed to and likely to cause imminent violent action by the game player, and nor could such a showing be made. Not only does the Act fail to serve a compelling governmental interest, but the Act is not narrowly tailored to serve any such interest, and the Legislature did not give adequate consideration to less speech-restrictive means of achieving its goals.

51. By its terms, the Act would appear to cover an unconstitutionally broad swath of fully protected expression. Further, the Act does not establish standards for determining which games contain content meeting the statutory definition of "inappropriate violence." The Act would impose upon those who disseminate video games the burden of determining whether each such video game meets the definition prior to publishing, distributing, or otherwise holding that game out to the public. The Act imposes upon every such person the risk of substantial criminal penalties. This burden and risk are aggravated by the vagueness of the statutory description of the regulated content. The Act thus would establish an unconstitutional scheme of censorship under which even works of expression that do not meet the statutory description in the Act would be suppressed because of the burden placed upon persons creating, selling, presenting, displaying or renting video games of determining the scope of the Act's coverage and because of the risk of erroneous determinations. Persons disseminating video games (and their respective distributors and suppliers) would be induced to refuse to include certain works in their inventories or on their premises, for fear of running afoul of the Act's ambiguous prohibitions. Imposition of this

burden and risk serves no compelling interest and is not narrowly tailored to serve any such interest.

52. For each of the reasons set forth above, and others, the Act is unconstitutional under the First Amendment to the United States Constitution, as applied to the State of Oklahoma by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Act would cause Plaintiffs' members to be subjected to the deprivation of rights, privileges, and immunities secured to them by the Constitution and laws of the United States. The Act thus constitutes a deprivation of rights actionable under 42 U.S.C. § 1983.

## COUNT II

### **(First and Fourteenth Amendments—Vagueness)**

53. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 52 as if fully set forth herein.

54. The Act is unconstitutionally vague in that many of the terms and phrases employed therein fail to give reasonable notice of the types of expression that would be restricted. The vague terms and phrases include, but are not limited to: "glamorized or gratuitous," "graphic violence that is not contextually relevant to the material," "consequences or effects of realistic violence," "brutal weapons designed to inflict the maximum amount of pain and damage" and "lead characters who resort to violence freely." These terms and phrases fail to provide clear meaning in the context of video games.

55. The unconstitutional vagueness of the Act will have a chilling effect on video game creators, publishers, manufacturers, distributors, and retailers and on those who seek to hear and view the prohibited games. In addition, the Act will impose substantial burdens upon

persons who sell, rent, or permit to be displayed, sold or rented video games, preventing them from exercising their constitutionally protected freedom of expression. The Act's vagueness is also likely to lead to enforcement by law enforcement officials on an unfair, subjective, and *ad hoc* basis. Because many of the Act's terms have no clear meaning, the Act will restrict a far broader range of video games than even the State claims it is seeking to regulate, as stores, store clerks, distributors and game developers will respond to this uncertainty and fear of prosecution by refusing to provide video games—to both adults and minors—that conceivably could be deemed to fall within the Act's prohibitions. As a result, Plaintiffs' members' protected expression will not reach willing recipients.

56. For each of the reasons set forth above, and others, the Act is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as well as the First Amendment to the United States Constitution, as applied to the State of Oklahoma by the Due Process Clause of the Fourteenth Amendment. The Act would cause Plaintiffs' members to be subjected to the deprivation of rights, privileges, and immunities secured to them by the Constitution and laws of the United States. The Act thus constitutes a deprivation of rights actionable under 42 U.S.C. § 1983.

### **COUNT III**

#### **(Fourteenth Amendment—Equal Protection)**

57. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 56 as if fully set forth herein.

58. The Act regulates and penalizes video game expression. These penalties, regulations and restrictions do not apply to other works of expression containing the same or

similar content, but communicated in other media, including, by way of example only, cable television, broadcast television, movies, books, magazines, and the like. Indeed, many of these other media—which compete with video games for consumers—contain expression that is based on video games that could fall within the prohibitions of the Act. Likewise, video games that could fall within the Act’s prohibitions may themselves be based on similar speech in other, unregulated media.

59. The Act arbitrarily and irrationally would establish a legislative scheme of classifications that burden fundamental rights and that are not closely related to any compelling state interest.

60. For the foregoing reasons, and others, the Act is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Act would cause Plaintiffs’ members to be subjected to the deprivation of rights, privileges, and immunities secured to them by the Constitution and laws of the United States. The Act thus constitutes a deprivation of rights actionable under 42 U.S.C. § 1983.

#### **DEMAND FOR RELIEF**

WHEREFORE, Plaintiffs demand that this Court enter a judgment in Plaintiffs’ favor and against Defendants as follows:

- (a) That this Court issue a declaratory judgment that the Act is void and of no force and effect;
- (b) That this Court issue a preliminary injunction and a permanent injunction against Defendants enjoining them from enforcing, or directing the enforcement of, the Act in any respect;
- (c) That Plaintiffs be awarded their attorneys’ fees under 42 U.S.C. § 1988;

- (d) That Plaintiffs be awarded their costs herein; and
- (e) That this Court order such other general and equitable relief as it deems fit and proper.

Dated: June 23, 2006.

/s/ Mack J. Morgan, III

Mack J. Morgan, III

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