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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VIDEO SOFTWARE DEALERS
ASSOCIATION; INTERACTIVE DIGITAL
SOFTWARE ASSOCIATION;
WASHINGTON RETAIL ASSOCIATION;
INTERACTIVE ENTERTAINMENT
MERCHANTS ASSOCIATION;
INTERNATIONAL GAME DEVELOPERS
ASSOCIATION; and HOLLYWOOD
ENTERTAINMENT CORPORATION,

Plaintiffs,

v.

NORM MALENG, in his official capacity as
King County Prosecuting Attorney; GARY
LOCKE, in his official capacity as Governor of
the State of Washington; and CHRISTINE O.
GREGOIRE, in her official capacity as Attorney
General of the State of Washington,

Defendants.

NO.

PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR:
June 27, 2003

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Plaintiffs Video Software Dealers Association ("VSDA"), Interactive Digital
Software Association ("IDSA"), Washington Retail Association ("WRA"), Interactive
Entertainment Merchants Association ("IEMA"), International Game Developers Association
("IGDA"), and Hollywood Entertainment Corporation, move this Court, pursuant to Federal

1 Rule of Civil Procedure 65, for an order preliminarily enjoining Defendants and their officers,
2 employees, and representatives from enforcing H.B. 1009, 58th Leg., Reg. Sess. (Wash.
3 2003) (hereinafter, the "Act"). The Act was signed into law on May 20, 2003, and is due to
4 take effect on July 27, 2003. This motion is based on the argument herein, the attached
5 declarations, and the complaint and other records in this case. A proposed order
6 accompanies this motion.
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12 Washington's unprecedented legislation forbids the sale or rental of certain "violent"
13 computer and video games ("video games") to individuals under age 17 based on the content
14 and viewpoint of those games. The Act defines "violent" games to include only those games
15 with scenes of violence depicting harm to "public law enforcement officers," and only when
16 the player's character is depicted causing the harm. Such explicit content and viewpoint
17 discrimination violates the "bedrock principle underlying the First Amendment . . . that the
18 government may not prohibit the expression of an idea simply because society finds the idea
19 itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989). That rule is
20 especially salient where, as here, the government is expressly censoring speech for the
21 purpose of fostering greater "respect" for one category of government officials. The
22 Constitution forbids restricting speech in an attempt to control what individuals think of their
23 government and its officials. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1403
24 (2002) ("First Amendment freedoms are most in danger when the government seeks to
25 control thought or to justify its laws for that impermissible end.").

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41 This Court should enjoin the Act. Plaintiffs present a compelling case of likely
42 success on the merits of their constitutional challenge. Indeed, similar attempts to regulate
43 "violent" computer and video games, as well as "violent" speech in other entertainment
44 media, have been deemed invalid by every federal court to have reached the question.
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1 In addition to frequently involving intricate storylines, computer and video games also
2 feature the artwork of some of the best graphic artists. (Fries Decl. ¶ 14.) The typical game
3 contains many different animated or computer-generated illustrations. (Fries Decl. ¶ 14.) At
4 various points in the story, game play may also include movie-like clips – sometimes actual
5 clips from movies related to the game – which advance the storyline or the character's
6 development. (Fries Decl. ¶ 14.) Computer and video games also contain music, much of it
7 original, which enhances the artistic expression of the game just as movie soundtracks do.
8 (Fries Decl. ¶ 14.) For instance, *Medal of Honor: Frontline* features over 70 minutes of
9 original orchestral music by composer Michael Giacchino, and in *Grand Theft Auto: Vice*
10 *City*, the player can listen to a variety of radio stations while driving or flying through Vice
11 City. (Fries Decl. ¶¶ 39, 53.)

12 Computer and video games engage the imagination of viewers and place them into a
13 world of fantasy. Many games allow the game player to become an active participant in
14 shaping the unfolding narrative. (Fries Decl. ¶¶ 12-13.) For example, *Tom Clancy's Splinter*
15 *Cell* permits a player assuming the role of a National Security Agency operative, while
16 searching for lost agents in the Former Soviet Republic of Georgia, to make a variety of
17 choices that affect how the storyline unfolds and that highlight the complexities of a lawless
18 political climate. (Fries Decl. ¶¶ 41-46.) Even games that do not center on a complex
19 narrative use graphic and sound elements to create an experience for the game player that
20 provokes curiosity and evokes a sense of mood. (Fries Decl. ¶ 16.) Moreover, these games,
21 while designed to entertain, can also inform. For example, *Age of Empires II: The Age of*
22 *Kings*, which enables a player to lead a variety of historical civilizations, informs players
23 about the 1000 years of history between the fall of Rome and the Middle Ages. (Fries Decl.
24 ¶¶ 17, 83-88.)

1 Not only are computer and video games themselves expression, but the creative
2 process of developing these games resembles that of other forms of expression protected
3 under the First Amendment, such as movies, books, and music. (Fries Decl. ¶ 16.)
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5 Increasingly, computer and video games are being recognized for their aesthetics and
6
7 complexity: art museums mount exhibits on computer and video games as art, prominent art
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9 schools and universities offer courses and degree programs in game design, awards programs
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11 recognize computer and video game artists who excel in their craft, and academic
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13 conferences and scholarship are devoted to exploring the expression in computer and video
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15 games (Fries Decl. ¶¶ 18-21.)
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18 As with other literature, computer and video game storylines often include law
19 enforcement officers of various kinds. Such personnel range from uniformed police officers
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21 (from Chief Wiggums in *The Simpson's Roadrage* to the futuristic officers in *Minority*
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23 *Report: Everybody Runs*), to intelligence officers (such as James Bond and his allies and
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25 enemies in the CIA and the KGB), to ancient guards (such as the Romans in *Age of*
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27 *Empires*), and military "police" (such as the Gestapo in France in *Medal of Honor:*
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29 *Frontline*). As with other literature, sometimes these officers are the "good guys";
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31 sometimes they are the "bad guys"; sometimes there are some of each; and sometimes the line
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33 between "good" and "bad" is difficult to define and changes as the plot and characters
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35 develop. For example, in *Minority Report: Everybody Runs* (based on the movie, *Minority*
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37 *Report*), the player assumes the role of the head of a special police squad in Washington,
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39 D.C. in the year 2054. Because the player's character is framed, he must then battle these
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41 same police (who are mistakenly pursuing him) if he is to clear his name and save the world
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43 from nefarious forces. (Fries Decl. ¶¶ 25, 28-33.)
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46 Computer and video games include all of the expressive elements of movies and
47 television, with the additional element that the player participates in the expression, often

1 shaping the course of the plot and its outcome. These games thus possess a creative capacity
2 that can even surpass that of the more traditional entertainment media. (Fries Decl. ¶ 22.)
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4 **B. The Challenged Statute**
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6 The Washington Legislature passed House Bill No. 1009 in late April, and Governor
7 Locke signed the Act into law on May 20, 2003. The Act is unprecedented, restricting the
8 distribution of video games based solely on their expressive content and allegedly anti-law
9 enforcement viewpoint. Specifically, the Act makes illegal the rental or sale of "violent"
10 computer and video games to those under age 17. It defines "violent" games as only those
11 containing "realistic or photographic-like depictions of aggressive conflict in which the player
12 kills, injures, or otherwise causes physical harm to a human form in the game who is depicted,
13 by dress or other recognizable symbols, as a public law enforcement officer." Act § 2. The
14 Act leaves other key terms undefined. For example, it does not explain the meaning of such
15 ambiguous terms as "realistic or photographic-like. . . depictions," "physical harm," "human
16 form," and "public law enforcement officer." Although the Act makes a violation of this
17 prohibition a "civil infraction," Act § 2, it places the prohibition within Washington's criminal
18 code, see Ch. 9.91 RCW (Misc. Crimes). The Act provides that a violation of its terms
19 "shall" be punished by a "maximum penalty and default amount" of \$500. Act § 3.
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34 The Act claims to serve two purposes: "curb[ing] hostile and antisocial behavior in
35 Washington's youth," and "foster[ing] respect for public law enforcement officers." Act § 1.
36 With regard to the first of these purposes, the Act purports to find that "there has been an
37 increase in studies showing a correlation between exposure to violent video and computer
38 games and various forms of hostile and antisocial behavior," Act § 3, but cites no evidentiary
39 support for this claim. The Act's justification for the second purpose is even more sparse,
40 stating only that "some video and computer games focus on violence specifically against
41 public law enforcement officers such as police and fire fighters," without any evidence
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1 whatsoever that "violent" games involving law enforcement officers pose any particular risk.
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3 Id. Finally, the Act gives no indication that other means of regulating minors' access to
4 "violent" games – ones less invasive of First Amendment freedoms than the Act's prohibition,
5 such as educating consumers about the video game rating system – were considered and
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7 rejected by the Legislature.
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10 III. ARGUMENT

11 A plaintiff is entitled to a preliminary injunction upon showing "either (1) a
12 combination of probable success on the merits and the possibility of irreparable harm; or (2)
13 that serious questions are raised and the balance of hardships tips in its favor." Sammartano
14 v. First Judicial Dist. Court, 303 F.3d 959, 965 (9th Cir. 2002) (quotation omitted). These
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16 "two formulations represent two points on a sliding scale in which the required degree of
17 irreparable harm increases as the probability of success decreases." Id. (quotation omitted).
18 Finally, "where the public interest is involved, the district court must also examine whether
19 the public interest favors the plaintiff." Id. (quotation omitted).
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28 Plaintiffs easily satisfy these standards. They have a strong case on the merits and
29 face irreparable harm. Accordingly, an injunction is warranted.
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31 A. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF 32 THEIR FIRST AND FOURTEENTH AMENDMENT CLAIMS, GIVEN 33 THE ACT'S UNPRECEDENTED CONTENT- AND VIEWPOINT- 34 BASED INVASION OF FIRST AMENDMENT RIGHTS AND ITS 35 VAGUE TERMS.

36 1. Computer and Video Games Constitute Expression Protected By 37 The First Amendment.

38 Computer and video games clearly constitute protected expression. See, e.g.,
39 American Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577-78 (7th Cir.) ("AAMA")
40 (describing in detail video games' expressive qualities, including their ability to convey "age-
41 old themes of literature," messages, and ideologies, "just as books and movies do"), cert.
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1 denied, 534 U.S. 994 (2001). In most instances, they are aptly described as an interactive
2 form of story-telling. See, e.g., Sony Computer Entm't Am., Inc. v. Bleem, LLC, 214 F.3d
3 1022, 1028 (9th Cir. 2000) (describing these games as "involv[ing] plots that can be
4 controlled interactively by the player and may elapse over several hours"); Micro Star v.
5 Formgen Inc., 154 F.3d 1107, 1109 (9th Cir. 1998) (same, with respect to the "immensely
6 popular" video game "Duke Nukem 3D," in which "the player assumes the personality and
7 point of view of the title character" and "explore[s] a futuristic city infested with evil aliens
8 and other hazards").

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The computer and video game medium is as expressive as film, music, and fine arts,
each of which is unquestionably entitled to full First Amendment protection. See Hurley v.
Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (First
Amendment "unquestionably" protects "painting of Jackson Pollock, music of Arnold
Schoenberg, or Jabberwocky verse of Lewis Carroll"); Schad v. Borough of Mount Ephraim,
452 U.S. 61, 65 (1981) (First Amendment protects expression in the form of
"[e]ntertainment, as well as political and ideological speech"; "motion pictures, programs
broadcast by radio and television, and live entertainment, such as musical and dramatic works
fall within the First Amendment guarantee" (citations omitted)). Like those other media,
computer and video games "may affect public attitudes and behavior in a variety of ways,
ranging from direct espousal of a political or social doctrine to the subtle shaping of thought
which characterizes all artistic expression." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495,
501 (1952) (recognizing that movies are protected expression). The fact that video games
are a relatively new medium of expression makes them no less protected, as, for example, the
Eighth Circuit recognized in striking down attempted regulation of "violent" video games.
See Interactive Digital Software Ass'n v. St. Louis County, No. 02-3010, slip op. at 4 (8th
Cir. June 3, 2003) ("IDSA") ("The mere fact [of] a novel medium is of no legal

1 consequence."). Rather, as initially happened with movies and the Internet, video games'
2 relative novelty heightens the risk of unconstitutional regulation. See Burstyn, 343 U.S. at
3 502 (according motion pictures protected status and overruling earlier decision to the
4 contrary); Reno v. ACLU, 521 U.S. 844, 850, 870 (1997) (refusing to "qualif[y] the level of
5 First Amendment scrutiny that should be applied" to the Internet, a "unique and wholly new
6 medium" (quotation omitted)).
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12 Indeed, the statute at issue here singles out video games for suppression based on
13 whether they contain a particular content. See Act § 2 (regulating video or computer games
14 with "violent" content, defined to include only depictions of violence directed at "public law
15 enforcement officers"). Moreover, according to the Act, these games are singled out for
16 censorship because they are allegedly correlated with "various forms of hostile and antisocial
17 behavior" and reduce "respect for public law enforcement officers." Act § 1. It thus could
18 not be clearer that Washington seeks to regulate a particular category of disfavored
19 expression based on that expression's message and alleged impact on its viewers. See IDSA,
20 slip op. at 4 (concluding that computer and video games receive First Amendment protection,
21 and "find[ing] it telling that the County seeks to restrict access to these video games precisely
22 because their content purportedly affects . . . thought or behavior").
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34 Numerous courts have recognized that the depiction of "violence" – including in
35 computer and video games – constitutes expression protected under the First Amendment.
36 For example, in a unanimous opinion by Judge Posner, the Seventh Circuit preliminarily
37 enjoined as unconstitutional an Indianapolis ordinance purporting to regulate games with
38 violent content. See AAMA, 244 F.3d at 577-79 (likening "violence" in video games to
39 "violence" in other media); id. at 575-76 ("[t]he notion of forbidding not violence itself, but
40 pictures of violence, is a novelty"). Similarly, the Sixth Circuit had "little difficulty in holding
41 that the First Amendment protects video games" where the games are targeted based on their
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1 "communicative aspect." James v. Meow Media, Inc., 300 F.3d 683, 695-96 (6th Cir. 2002)
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3 (noting such games' "expressive content" and "communicative aspect"), cert. denied, 123 S.
4 Ct. 967 (2003). The Eighth Circuit recently joined this consensus, finding "the pictures,
5 graphic design, concept art, sounds, music, stories, and narrative present in video games" –
6 including games containing "violence" – entitled to full First Amendment protection. IDSA,
7 slip op. at 4-5 (recognizing violent video games are "as much entitled to the protection of
8 free speech as the best of literature") (quoting Winters v. New York, 333 U.S. 507, 510
9 (1948) (violent magazines)); accord Eclipse Enters., Inc. v. Gulotta, 134 F.3d 63, 66-67 (2d
10 Cir. 1997) (violent trading cards); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264,
11 1279 (D. Colo. 2002) (accord "full First Amendment protection" to video games); Wilson
12 v. Midway Games, Inc., 198 F. Supp. 2d 167, 181 (D. Conn. 2002) (same).

22 **2. The Act Fails Strict Scrutiny And Violates The First Amendment.**

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24 **a. Because The Act Regulates Expression Based on Content**
25 **And Viewpoint, It Must Survive the Most Exacting First**
26 **Amendment Scrutiny.**

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28 The Act restricts access to expression based on "violent" content, and thus requires
29 exacting First Amendment scrutiny. See United States v. Playboy Entm't Group, Inc., 529
30 U.S. 803, 811 (2000) (describing a situation in which the "overriding justification for the
31 regulation is concern for the effect of the subject matter on young viewers" as "the essence of
32 content-based regulation" requiring strict scrutiny). Such content-based regulation of speech
33 and expression is "presumptively invalid." R.A.V. v. City of St. Paul, 505 U.S. 377, 382
34 (1992). Indeed, "[i]t is rare that a regulation restricting speech because of its content will
35 ever be permissible." Playboy, 529 U.S. at 818; see Texas v. Johnson, 491 U.S. at 414. With
36 respect to this strict standard, it matters not that the Act restricts speech to minors, because,
37 like adults, minors have a First Amendment right to be free from content-based governmental
38 regulation of the speech they utter or receive. See Erznoznik v. City of Jacksonville, 422
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1 U.S. 205, 213-14 (1975); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506-
2 07, 511 (1969).
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4 In this case, however, the Act does not just regulate based on content. Even more
5 perniciously, the Act regulates based on the viewpoint expressed by the games. It targets
6 only those games that include depictions of violence aimed at depictions of "public law
7 enforcement officers," and only when inflicted by the player's character. Act § 2. Because
8 the Act restricts access only to those games exhibiting violence toward law enforcement
9 officers – that is, toward the government – while allowing all other games depicting violence
10 to be sold to minors, the Act discriminates against a particular, "anti-government" viewpoint.
11 See Sammartano, 303 F.3d at 971 ("Our cases have recognized that, where the government is
12 plainly motivated by the nature of the message rather than the limitations of the forum or a
13 specific risk within that forum, it is regulating a viewpoint rather than a subject matter.").
14 Such singling out of a particular viewpoint for regulation – particularly an "anti-government"
15 viewpoint – runs directly counter to the most central First Amendment precepts. See
16 Gerritsen v. City of Los Angeles, 994 F.2d 570, 578 (9th Cir. 1993) (curtailing "controversial
17 or anti-government" speech is an "impermissible" government interest). As the Supreme
18 Court has made plain, "[v]iewpoint discrimination is . . . an egregious form of content
19 discrimination," and "[w]hen the government targets not subject matter, but particular views
20 taken by a speaker on a subject, the violation of the First Amendment is all the more blatant."
21 Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). Indeed,
22 "[t]he government must abstain from regulating speech when the specific motivating ideology
23 or the opinion or perspective of the speaker is the rationale for the restriction." Id.
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25 To justify the Act under strict scrutiny, Defendants must (1) articulate a compelling
26 state interest; (2) prove that the Act is "necessary" to serve that interest (i.e., prove that the
27 asserted harms are real and would actually be alleviated by the regulation); and (3) show that
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1 the Act is narrowly tailored to serve that interest. R.A.V., 505 U.S. at 395; Turner Broad.
2 Sys., Inc. v. FCC, 512 U.S. 622, 664-65 (1994); Simon & Schuster, Inc. v. Members of the
3 N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991). The State cannot come close to
4 meeting these demanding requirements.
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8 **b. The State Does Not Have A Legitimate – Let Alone**
9 **Compelling – Interest in Restricting Access To The**
10 **Targeted Games.**
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12 In the statute itself, the Legislature claimed to further two state interests. The first
13 was "curbing hostile and antisocial behavior" of minors supposedly caused by exposure to
14 games in which the player acts violently toward a law enforcement officer. The second was
15 "fostering respect for law enforcement officers." Neither interest approaches a
16 constitutionally sufficient rationale. As to the former, extremely stringent standards apply to
17 government regulation of speech based on a concern that it will cause listeners to engage in
18 unlawful or "antisocial" behavior. A law justified in this way must meet the long-established
19 standards set forth in Brandenburg v. Ohio, 395 U.S. 444 (1969). See James, 300 F.3d at
20 699 ("Federal courts, however, have generally demanded that all expression, advocacy or
21 not, meet the Brandenburg test before its regulation for its tendency to incite violence is
22 permitted."). The Brandenburg test requires the government to prove that expression "is
23 directed to inciting or producing imminent lawless action and is likely to incite or produce
24 such action." Free Speech Coalition, 122 S. Ct. at 1403 (quoting Brandenburg, 395 U.S. at
25 447). Thus, the government may not punish speakers based solely on a prediction or
26 suspicion that their words will tend, in the aggregate, to encourage undesired behavior.
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28 Indeed, it is a core First Amendment principle that "the mere tendency of speech to
29 encourage unlawful acts is not a sufficient reason for banning it." Id. Here, the Act regulates
30 supposedly "violent" speech without coming close to meeting Brandenburg's dictates. See
31 Brandenburg, 395 U.S. at 447. Rather, the Act is ostensibly based on the Legislature's
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1 conclusory "finding" of a "correlation between exposure to violent video and computer
2 games and various forms of hostile and antisocial behavior." Act § 1. Even assuming that
3 such a finding was based on any reliable evidence, the essence of the Brandenburg principle is
4 that the government may not suppress content based on a "finding" that the speech – whether
5 it be books advocating violent revolution, pamphlets expressing hate toward particular racial
6 or ethnic groups, or works of imagination depicting violent actions – tend, in the aggregate,
7 to increase the chances that some person, somewhere will act unlawfully. Rather, the content
8 must be "likely" to produce "imminent" violence – a standard that can hardly be met by
9 games played safely every day by millions. The bar to reliance on predictions of future
10 antisocial behavior is particularly clear where, as here, the works at issue are not even
11 "directed" to inciting lawlessness, as required by Brandenburg, because video game makers'
12 primary purpose is to entertain. See, e.g., James, 300 F.3d at 698 (video games makers do
13 not "'intend' to produce violent action by the consumers"). Absent that element, the
14 "incitement" exception to the First Amendment simply does not apply.

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Courts confronting statutes and lawsuits that, like the Act, seek to regulate computer and video games based on their "violent" content, agree that Brandenburg's requirements cannot be met by alleging a link between such games and real life violence. For example, in AAMA, Judge Posner explained that, absent concrete proof by the government that particular video games have a literal effect of "incit[ing] youthful players to breaches of the peace," as required by Supreme Court precedent, such games may not be prohibited based on the mere assertion that violence may occur. AAMA, 244 F.3d at 575. He reasoned that "[c]lassic literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial," and that "[t]he notion of forbidding not violence itself, but pictures of violence, is a novelty," id. at 575-76 – a novelty in plain tension with the Constitution's requirement that actual violence must be intended, likely, and

1 imminent for speech to be restricted. Moreover, he refused to distinguish video games as
2 "interactive," noting that "[a]ll literature . . . is interactive; the better it is, the more
3 interactive," as it "draws the reader into the story, makes him identify with the characters,
4 invites him to judge and quarrel with them, to experience their joys and sufferings as the
5 reader's own." Id. at 577; see IDSA, slip op. at 5 (noting that "some books, such as the pre-
6 teen oriented 'Choose Your Own Nightmare' series . . . can be every bit as interactive as
7 video games").

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14 Similarly, in James the Sixth Circuit concluded that allegedly "violent" video games
15 "fall[] well short" of the Brandenburg threshold. James, 300 F.3d at 698. As the Sixth
16 Circuit incisively explained, the "glacial process of personality development" allegedly
17 affected by "violent" video games "is far from the temporal imminence that we have required
18 to satisfy the Brandenburg test." Id.; see Wilson, 198 F. Supp. 2d at 182 (at worst, video
19 games "amount[] to nothing more than advocacy of illegal action at some indefinite future
20 time," which is insufficient to satisfy Brandenburg (quoting Hess v. Indiana, 414 U.S. 105
21 (1973)); Sanders, 188 F. Supp. 2d at 1279 (refusing to "dilute the Brandenburg test" by
22 finding that "violent" video games meet that test). In an analogous context – the attempted
23 regulation of non-obscene pornography based, among other things, on allegations that such
24 materials may lead to the infliction of violence on women – the Ninth Circuit has similarly
25 concluded that such regulation falls short of the Brandenburg requirements, and thus fails to
26 survive First Amendment scrutiny. Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1199-
27 1200 & n.8 (9th Cir. 1989) (explaining that the "equivocal evidence" of any "causal
28 relationship between pornographic materials and violent actions" fails to show the likelihood
29 of causing imminent unlawful action required under Brandenburg); see also, e.g., American
30 Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329-30 (7th Cir. 1985) (regulation failed to
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1 satisfy Brandenburg because any violent "effects depend on mental intermediation"), aff'd,
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3 475 U.S. 1001 (1986).

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5 As noted, the Legislature also attempts to justify censorship as necessary to "foster
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7 respect for public law enforcement officers." Act § 1. Indeed, Governor Locke recognized
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9 this as the goal of the Act, explaining that the Act "foster[s] an environment where young
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11 people respect those who uphold the law," and that the Act is needed to "reinforce this
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13 message." May 20, 2003 Press Release, available at [http://access.wa.gov/news](http://access.wa.gov/news/2003/May/n2003420_5997.asp)
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15 /2003/May/n2003420_5997.asp. But this "foster[ing] respect" rationale is illegitimate. The
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17 government cannot suppress speech because it communicates a message of "disrespect" for
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19 the government and its agents. To allow such a justification would all but eliminate the First
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21 Amendment as we know it. See Sheehan v. Gregoire, No. C02-1112C, slip. op. at 14 (W.D.
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23 Wash. May 22, 2003) (striking down a 2002 Washington Act prohibiting the distribution,
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25 with an "intent to harm or intimidate," information about law enforcement officers, and
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27 stating that "[t]hought-policing is not a compelling state interest recognized by the First
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29 Amendment"). As the Supreme Court has explained, "First Amendment freedoms are most
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31 in danger when the government seeks to control thought or to justify its laws for that
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33 impermissible end." Free Speech Coalition, 122 S. Ct. at 1403.

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35 This principle has equal force when censorship is directed at minors. As Judge Posner
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37 explained in AAMA: "Now that eighteen-year-olds have the right to vote, it is obvious that
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39 they must be allowed the freedom to form their political views on the basis of uncensored
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41 speech before they turn eighteen, so that their minds are not a blank when they first exercise
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43 the franchise." 244 F.3d at 577. Imagine a law, for example, that forbade any "violent"
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45 television show that "fostered disrespect" for the President or Congress. Such a law would
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47 be intolerable under our constitutional system.

1 c. **Even Assuming That The State, In Theory, Could Have A**
2 **Compelling Interest In Regulating "Violent" Speech, The**
3 **Act Fails First Amendment Scrutiny Because It Does Not**
4 **Identify Or Address A Real Problem And Is Not Narrowly**
5 **Tailored.**
6

7 Even assuming that the State's justification based on a perceived linkage between
8 violent content and antisocial behavior were not facially illegitimate, the Act would fail First
9 Amendment scrutiny because it does not advance the State's purported interest. Nor is the
10 Act narrowly tailored, as the State has bypassed other, less restrictive means of achieving its
11 goal.
12

13 To survive strict scrutiny, the government must first prove that an "actual problem"
14 exists, and must do so with more than "anecdote and supposition." Playboy, 529 U.S. at 823.
15 Second, the Act's provisions must actually and materially address the alleged government
16 interest. See, e.g., Florida Star v. B.J.F., 491 U.S. 524, 540 (1989) (striking down statute
17 that restricted dissemination by the mass media, but not by others, of rape victims' identities,
18 and noting that "facial underinclusiveness" undermined the claim that the statute actually
19 served its purported interests); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664-65
20 (1994) (even under intermediate scrutiny, speech regulation must advance "real" harm to
21 "material degree"). Here, there is both insufficient evidence of a "real world" problem (the
22 effects of "violent" games on minors), and a complete disconnect between the alleged
23 problem and the Act's prohibition, which extends only to games depicting violence against
24 one narrow category of "victim."
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26 The existing research concerning "violent" video games fails to establish any link
27 between exposure to such games (of any sort) and subsequent violent behavior against
28 anyone. See AAMA 244 F.3d at 578-79 (existing scientific studies "do not support" the
29 regulation of "violent" video games, because these studies "do not find that video games have
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1 ever caused anyone to commit a violent act"); IDSA, slip op. at 6 (determining that a county
2 regulation of "violent" games because of the games' alleged effects on minors lacked "the
3 'substantial supporting evidence' of harm that is required before an ordinance that threatens
4 protected speech can be upheld"). Indeed, Washington's own Department of Health
5 conducted an expansive study in 2000, in response to a legislative request, and concluded
6 that "the research evidence is not supportive of a major public concern that violent video
7 games lead to real-life violence." Wash. State Dep't of Health, Video Games and Real-Life
8 Aggression: A Review of the Literature (May 2000). Moreover, counsel know of no
9 research suggesting that depictions of violence specifically against law enforcement officers
10 cause real life violence.
11

12 Furthermore, the Act and its legislative history make no attempt to explain how
13 regulation of video games alone will serve the statute's purported interest. Depictions of
14 violence – including violence against law enforcement officers – are found not only in video
15 games, but in movies, books, magazines, music, and art, as well as on television and the
16 Internet. See, e.g., AAMA, 244 F.3d at 579 ("violent" video games "are a tiny fraction of the
17 media violence to which modern American children are exposed," as well as "not very violent
18 compared to what is available to children on television and in movie theaters today"). But
19 these other media – as well as all video games depicting "violence" not directed at law
20 enforcement officers – are all left unaffected by the Act. Under the Act, for example, a minor
21 would be barred from buying or renting the *Minority Report* video game (because it is
22 possible for a player to "harm" the futuristic officers wrongly pursuing him), but that same
23 minor could legally rent and view the PG-13 rated *Minority Report* movie, which contains a
24 similar plot and "violence" as the video game. Such differential regulation of comparable
25 expression not only is problematic in principle, but it heightens concerns about whether the
26 Act advances the purported interests at all. See, e.g., Florida Star, 491 U.S. at 540.
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1 Finally, even assuming that the Act serves a theoretically compelling interest and that
2 the Act's prohibition actually advances that interest, the Act fails strict scrutiny because it is
3 not narrowly tailored. See Playboy, 529 U.S. at 815. As discussed in more detail below, the
4 Act's prohibitions, though ostensibly limited to the narrow class of computer and video games
5 depicting violence against law enforcement officers, are so vague that they could be read to
6 cover a large subset of existing video games. See Reno v. ACLU, 521 U.S. at 871-72
7 (vagueness "undermines the likelihood that the [Act] has been carefully tailored to the . . .
8 goal of protecting minors"). And, regardless of vagueness, the narrow tailoring requirement
9 requires the State to prove that "a plausible, less restrictive alternative" to banning such
10 games "will be ineffective to achieve its goals." Playboy, 529 U.S. at 816. The State cannot
11 make such a showing here, where a plausible, much less restrictive means of regulating
12 minors' access to "violent" video games exists: awareness-raising measures concerning the
13 video game rating system, (Lowenstein Decl. ¶¶ 4-18.), which provides guidance, to parents
14 and others, similar to that of the well-known movie rating system. See Playboy, 529 U.S. at
15 824 ("A court should not assume a plausible, less restrictive alternative would be ineffective;
16 and a court should not presume parents, given full information, will fail to act."); 44
17 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507-08 (1996) (plurality op.) (striking down
18 ban on advertising alcohol prices because of less restrictive alternatives, such as an
19 "educational campaign" or "counterspeech"). In any event, the State was required at least to
20 have considered the efficacy of less restrictive alternatives, see Sable Communications of
21 Cal., Inc. v. FCC, 492 U.S. 115, 129-30 (1989), but never did so. In fact, the State expressly
22 rejected Plaintiffs' offer to work with the State to help educate consumers about the video
23 game rating system, which not only provides age-based ratings, but also offers
24 comprehensive "content descriptors" that signal content that may be of concern to parents
25 and consumers. (Lowenstein Decl. ¶¶ 15-18.)

1 In sum, the State cannot show that the Act serves any compelling government interest
2 in a narrowly tailored manner. Rather, the Act impermissibly attempts "to protect the young
3 from ideas or images that a legislative body thinks unsuitable for them." Erznoznik, 422 U.S.
4 at 213-14. Accordingly, the Act fails strict scrutiny under the First Amendment.
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8 **3. The Act Is Unconstitutionally Vague.**
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10 The Act is unconstitutional on another, independent ground: vagueness. Because
11 several of the Act's terms are impermissibly vague and place the burden of compliance on
12 game retailers, the Act will restrict a far broader range of video games than even the State
13 claims it is seeking to regulate. The Constitution demands that statutes be set forth with
14 "sufficient definiteness that ordinary people can understand what conduct is prohibited."
15 Kolender v. Lawson, 461 U.S. 352, 357 (1983). Such precision is essential to "give the
16 person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that
17 he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Exacting
18 precision is demanded of legislation imposing penalties where free speech rights are at issue.
19 See NAACP v. Button, 371 U.S. 415, 433 (1963) (noting dangers, "in the area of First
20 Amendment freedoms," of "the existence of a penal statute susceptible of sweeping and
21 improper application"). Finally, the fact that the government's stated purpose relates to
22 children does not relax this exacting constitutional standard. See Interstate Circuit, Inc. v.
23 City of Dallas, 390 U.S. 676, 689 (1968).
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38 Several key terms in the Act either are inherently vague or are defined in such a way
39 as to fail to provide fair notice. For example, the core of the Act's prohibition concerns
40 depictions of "public law enforcement officer[s]." However, this term has no easily
41 understood meaning in the context of video games, in which the action takes place in a wide
42 variety of fictional and historical settings. For example, in a James Bond game, do the secret
43 agents meet that definition? What about military officers? Military officers serving as civilian
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1 law enforcement? Do "enemy" officers or security guards qualify? What if a villain in the
2 game disguises himself as a police officer? What if the player's role in the game is that of a
3 police officer, and the player accidentally "harms" his partner? And what is a "recognizable
4 symbol" for a law enforcement officer? Would damage to a police car qualify even if no
5 officer is visible?
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10 The same sorts of interpretive problems plague the term "human form," a term ill-
11 suited to a medium that relies extensively on extra-terrestrial or make-believe life forms and
12 characters – creatures which may be depicted as having only some "human" characteristics.
13 Is Superman a "human form"? Can a part-animal or part-alien creature be "human" in form?
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16 Moreover, the Act only covers "realistic or photographic-like . . . depictions" of
17 violence – a term with no evident meaning in a medium in which all depictions are obviously
18 computer-generated and thus inherently unrealistic. See AAMA, 244 F.3d at 579 (explaining
19 that because video game characters "are cartoon characters, that is, animated drawings[,] . . .
20 . [n]o one would mistake them for photographs of real people"). Because the term "realistic"
21 must, in the context of the Act, mean something other than what it ordinarily means
22 (otherwise, nothing would be covered), its meaning will not easily be discerned by a store
23 owner or clerk. (Halpin Decl. ¶ 7.) Similarly, the Act covers depictions of "physical harm," a
24 term entirely at odds with a non-physical medium in which all "action," including any
25 depiction of "harm," is entirely imaginary. What would be "physical harm" in a medium that
26 relies heavily on animation and computer imagery? Would a cartoon character hitting an
27 officer with a frying pan be covered, when it is clear, moments later, that the officer has fully
28 "recovered" from the "harm" inflicted?
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45 The Act offers no clues as to how these terms are to be construed, leaving game
46 retailers and others to guess, for example, whether a game involving a temporary injury to a
47 two-legged alien disguised as a futuristic military officer is a "realistic . . . physical harm" to a

1 "human form" depicted as a "public law enforcement officer." (Halpin Decl. ¶¶ 6-7.)

2 Because the Act's definition of "violence" raises more questions than it answers, and fails to
3 "give the person of ordinary intelligence a reasonable opportunity to know what is
4 prohibited," Grayned, 408 U.S. at 108, the Act is unconstitutionally vague. See Sheehan,
5 slip. op. at 17 (striking down "a statute that demands self-censorship" because of its vague
6 prohibitions and thus "impermissibly sacrifices the public interest in the free exchange of
7 speech and ideas").
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10 Moreover, the legislative record, far from shedding light on how to interpret these
11 terms, actually indicates the hope of the Act's proponents that the Act's terms will be
12 confusing to the average person, will be interpreted more broadly than as provided, and will,
13 accordingly, chill speech. See Hearing Before the House Juvenile Justice and Family Law
14 Committee (Jan. 22, 2003) (statement of Representative Dickerson, the Act's primary
15 sponsor) (stating that the Act's effect will be that "retailers will have to do what they say
16 they're doing already and that is not allow any M-rated games to be sold to underage
17 children," not just those games involving violence to law enforcement officers). Thus, not
18 only will the Act's vague wording impermissibly cause Plaintiffs and others to "steer far wider
19 of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked,"
20 Grayned, 408 U.S. at 109 (quotation omitted), but the Act's framers actually intended this
21 forbidden effect.
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38 Stores and store clerks will be subject to steep liability if they wrongly guess about
39 what games the Act covers. Game creators, distributors, and retailers will respond to the
40 uncertainty in the Act, and the penalties the Act imposes, by either self-censoring or
41 otherwise restricting access to any potentially offending video game title. (Halpin Decl. ¶¶ 9-
42 11; Fries Decl. ¶¶ 8-9.) Some range of games will not be made (or will be made differently)
43 and some games will not be stocked at all. (Halpin Decl. ¶¶ 10-11; Fries Decl. ¶ 9.) Such
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1 understandable, self-protective behavior will deprive access to such expression not only to
2 children, but to adult customers as well – whose right to enjoy "violent" video games is
3 undisputed by the State. Taken together, the vague terms used in the Act itself and the Act's
4 legislative history create an unwarranted chilling effect on protected speech and render the
5 Act unconstitutionally vague.
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10 **4. The Act Is An Unconstitutional Prior Restraint.**
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12 The challenged provisions of the Act also constitute an unconstitutional prior
13 restraint. It is blackletter law that prior restraints on expression are "the most serious and the
14 least tolerable infringement on First Amendment rights," Nebraska Press Ass'n v. Stewart,
15 427 U.S. 539, 559 (1976), and thus are presumptively unconstitutional, see, e.g.,
16 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975). In determining
17 whether a regulation is a prior restraint, courts look to "substance and not to mere matters of
18 form, and . . . in accordance with familiar principles . . . statutes must be tested by [their]
19 operation and effect." Near v. Minnesota, 283 U.S. 697, 708 (1931). The "operation and
20 effect" of the Act render it a prior restraint on speech. The Act imposes stiff penalties for
21 those who engage in covered expression. The Act is also vague, making it likely that
22 authorities will enforce the Act on an *ad hoc* basis. In effect, computer and video game
23 retailers will be restrained from selling a great number of video games – some ultimately
24 covered by the statute, and some not – and the only way a retailer can be confident of
25 avoiding prosecution for selling or renting a game is to consult with local authorities before
26 doing so. Because a Ninth Circuit decision departs from these principles, see Free Speech
27 Coalition v. Reno, 198 F.3d 1083, 1096-97 (9th Cir.), aff'd on other grounds, 122 S. Ct.
28 1389 (2002), Plaintiffs seek to preserve this claim and argument but rely primarily on the
29 constitutional deficiencies identified above.
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1 **B. PLAINTIFFS WILL SUFFER IMMEDIATE AND IRREPARABLE**
2 **HARM, AND THE PUBLIC INTEREST WILL SUFFER, ABSENT A**
3 **PRELIMINARY INJUNCTION AGAINST ENFORCEMENT OF THE**
4 **ACT.**
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7 Plaintiffs have demonstrated a very strong likelihood of success on the merits: The
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9 Act is an unprecedented attempt at viewpoint-specific regulation of protected expression, and
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11 courts across the country have determined that such restrictions on allegedly "violent" video
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13 games violate the First Amendment. Because of the strength of their merits case, Plaintiffs
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15 need only show "a possibility of irreparable harm," under the Ninth Circuit's well-settled
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17 standards. Sammartano, 303 F.3d at 965 (quotation omitted). But Plaintiffs have shown
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19 much more than a mere "possibility" of harm because it is established law that "[t]he loss of
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21 First Amendment freedoms, for even minimal periods of time, unquestionably constitutes
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23 irreparable injury." S.O.C., Inc. v. County of Clark, 152 F.3d 1136, 1148 (9th Cir. 1998)
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25 (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)).
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27 Furthermore, "a party seeking preliminary injunctive relief in a First Amendment
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29 context can establish irreparable injury sufficient to merit the grant of relief by demonstrating
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31 the existence of a colorable First Amendment claim." Sammartano, 303 F.3d at 973
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33 (quotation omitted). As the Ninth Circuit has explained, "when the harm claimed is a serious
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35 infringement on core expressive freedoms, a plaintiff is entitled to an injunction even on a
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37 lesser showing of meritoriousness." Id. at 974. Because Plaintiffs "have not only stated a
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39 colorable First Amendment claim, but one that is likely to prevail[,] they have thus established
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41 the potential for irreparable injury" entitling them to a preliminary injunction. Brown v.
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43 California Dep't of Transp., 321 F.3d 1217, 1225 (9th Cir. 2003).
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45 Not only will Plaintiffs suffer immediate and irreparable harm to their First
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47 Amendment freedoms, but the public will suffer similarly. "Courts considering requests for
preliminary injunctions have consistently recognized the significant public interest in

1 upholding First Amendment principles," Sammartano, 303 F.3d at 974, because First
2 Amendment questions quite often have a substantial impact on non-parties to a case. As in
3 Sammartano, "[t]he ongoing enforcement of the potentially unconstitutional regulations," id.
4 at 974, will not simply affect Plaintiffs, but will affect countless video game creators,
5 distributors, retailers, and consumers throughout Washington State, and even beyond, all of
6 whom will suffer infringements on their First Amendment rights to produce and view the
7 expression contained in a wide array of video games.
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14 **IV. CONCLUSION**

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16 For the foregoing reasons, Plaintiffs respectfully request that this Court grant a
17 preliminary injunction.
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20 RESPECTFULLY SUBMITTED this 5th day of June, 2003.
21

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