GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL

May 23, 2005

OPINION OF THE ATTORNEY GENERAL

SUBJECT: Constitutionality of Bill 16-125, the "Youth Protection from Obscene Video Games Act of 2005"

Honorable Anthony A. Williams
Mayor of the District of Columbia
1350 Pennsylvania Avenue, N.W., 6th Floor
Washington, D.C. 20004

Dear Mayor Williams:

I. Introduction

This opinion is in response to your request for a legal review of the "Youth Protection from Obscene Video Games Act of 2005" (Bill 16-125) ("Video Games Bill" or "Bill"). The Video Games Bill was introduced on February 4, 2005, and was sponsored by eleven members and the Chair of the Council of the District of Columbia. The Bill would prohibit video and computer game retailers from selling, renting or furnishing certain violent or sexually-oriented video games to District youth based upon the ratings of the Entertainment Software Ratings Board ("ESRB"). A retailer who violated the provisions of the Video Games Bill would be subject to certain fines and suspension or revocation of its business license. Although the Council has not yet held a hearing on the measure, the presumptive purpose of the legislation is to reduce the theoretical harmful effects such games have on District youth and the community.

II. Summary of Conclusion

As currently drafted, it is unlikely that the Video Games Bill could withstand a constitutional challenge. By relying upon the ESRB rating system, the provisions of the Bill are overbroad and unlawfully abridge the First Amendment right to exercise free speech. While the Bill could be redrafted to restrict a minor's access to video or computer games with sexually explicit depictions that would constitute obscene material, it is unlikely that the prohibition on disseminating games with violent content to minors

could be satisfactorily modified to survive a constitutional challenge. More than half of the states and a number of local jurisdictions have proposed legislation that would similarly prevent minors from having access to video games with violent content. None has been successfully enacted and withstood judicial review. Any such restriction on the exercise of free speech must meet a compelling state interest and be narrowly tailored to address the specific problem identified by the state. Because it is unlikely that the District could demonstrate a compelling state interest in banning all depictions of violence, and because the rating system relied upon in the Bill lacks the requisite narrow tailoring, the Bill would not survive a court challenge. As an alternative, the Council could constitutionally limit the Bill's reach to specifically-defined obscene material or change its approach to encourage retailers to voluntarily restrict sales of certain games. The Bill in its current form, however, is unsupportable.

III. Discussion

A. The Youth Protection from Obscene Video Games Act of 2005

On February 4, 2005, twelve of the thirteen members of the Council of the District of Columbia introduced the "Youth Protection from Obscene Video Games Act of 2005" (B16-125).[1] The apparent goal of this legislation is to restrict the unlimited access that District youth now have to violent and sexually explicit video and computer games. The Video Games Bill would prohibit the sale or rental of certain video games to District youth, based on the ratings of the individual video games by the Entertainment Software Ratings Board ("ESRB").

The ESRB, formerly known as the Interactive Digital Software Association, is an independent, self-regulatory body that applies and enforces ratings among members of the video gaming industry. Publishers of video and computer games submit new games to the ESRB where a panel of three raters determine which of seven possible ratings will be assigned to the game. According to the ESRB website, ratings are established in the following manner:

> To get a game certified with an ESRB rating, publishers fill out a detailed questionnaire explaining exactly what's in the game, and submit it to ESRB along with actual videotaped footage of the game, showing the most extreme content and an accurate representation of the context and product as a whole. Working independently, three trained raters then view the game footage and recommend the rating and content descriptors they believe are most appropriate. ESRB then compares the raters' recommendations to make sure that there's consensus. Usually, the raters agree and their recommendation becomes final. However, when the raters recommend different ratings, additional raters may be requested to review the game in order to reach broader consensus. Once consensus on a rating and content descriptors is reached, ESRB issues an official rating certificate to the game's publisher.

[1] Only Ward 3 Councilmember Kathy Patterson did not co-sponsor the measure.

> When the game is ready for release to the public, publishers send copies of the final product to the ESRB. The game packaging is reviewed to make sure the ratings are displayed in accordance with ESRB standards. Additionally, ESRB's in-house game experts randomly play the final games to verify that all the information provided during the rating process was accurate and complete.

See ESRB Game Ratings, Frequently Asked Questions (Online at www.esrb.com).

The rating system used by ESRB consists of two parts: a rating symbol and content descriptors. The rating symbol is designed to provide parents with shorthand information about the content of particular games. Each video and computer game is assigned one of the following seven ratings, as described by the ESRB:

> **EC** (Early Childhood) – Titles rated EC have content that may be suitable for ages 3 and older. Contains no material that parents would find inappropriate.
>
> **E** (Everyone) – Titles rated E have content that may be suitable for ages 6 and older. Titles in this category may contain minimal cartoon, fantasy or mild violence and/or infrequent use of mild language.
>
> **E 10+** (Everyone 10+) – Titles rated E 10+ have content that may be suitable for ages 10 and older. Titles in this category may contain more cartoon, fantasy or mild violence, mild language and/or minimal suggestive themes.
>
> **T** (Teen) - Titles rated T have content that may be suitable for ages 13 and older. Titles in this category may contain violence, suggestive themes, crude humor, minimal blood and/or infrequent use of strong language.
>
> **M** (Mature) – Titles rated M have content that may be suitable for persons aged 17 and older. Titles in this category may contain intense violence, blood and gore, sexual content, and/or strong language.
>
> **AO** (Adults Only) - Titles rated AO have content that should only be played by persons 18 years and older. Titles in this category may include prolonged scenes of intense violence and/or graphic sexual content and nudity.
>
> **RP** (Rating Pending) – Titles rated RP have been submitted to the ESRB and are awaiting final rating. (This symbol appears only in advertising prior to a game's release.)

Along with the rating symbol, ESRB assigns each game one or more content descriptors to give potential purchasers more information about the content of the games. These content descriptors, along with the rating symbol, are prominently displayed on the outer packaging of the video or computer game. There are more than 25 content descriptors used by the ESRB ratings panels, some examples of which are:

- **Blood and Gore** - Depictions of blood or the mutilation of body parts.
- **Crude Humor** - Depictions or dialogue involving vulgar antics, including "bathroom" humor.
- **Intense Violence** - Graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons, and depictions of human injury and death.
- **Mature Humor** - Depictions or dialogue involving "adult" humor, including sexual references.
- **Mild Violence** - Mild scenes depicting characters in unsafe and/or violent situations.
- **Nudity** - Graphic or prolonged depictions of nudity.
- **Partial Nudity** - Brief and/or mild depictions of nudity.
- **Sexual Themes** - Mild to moderate sexual references and/or depictions. May include partial nudity.
- **Sexual Violence** - Depictions of rape or other sexual acts.
- **Strong Language** - Explicit and/or frequent use of profanity.
- **Strong Sexual Content** - Graphic references to and/or depictions of sexual behavior, possibly including nudity.
- **Use of Drugs** - The consumption or use of illegal drugs.
- **Use of Alcohol** - The consumption of alcoholic beverages.

ESRB, as a non-governmental, self-regulatory body, monitors compliance with the rating system and imposes penalties against manufacturers and publishers of qualifying computer and video games who fail to adhere to its guidelines. ESRB has no enforcement authority, however, against individual retailers who sell, rent or furnish these games to youth who are younger than the recommended age level.[2]

The Video Games Bill seeks to create a local enforcement scheme based on the ESRB rating system to prevent the sale or rental of games rated as "M" and "AO" to youth under the age of 17 and 18, respectively. While the Bill does not specifically state the Council's purpose behind the legislation, it is reasonable to assume that the Council wishes to limit the access District youth currently have to games with mature content, *i.e.*, intense violence, blood and gore, strong sexual content and nudity. Indeed, the Bill would restrict the sale of only those games bearing a rating of "M" or "AO". Specifically, the Video Games Bill:

- requires that any retailer that rents, sells, or furnishes video or computer games, with or without compensation, in the District of Columbia obtain a business license with an "entertainment" endorsement from the Department of Consumer

[2] It is unclear how and under what authority the ESRB imposes penalties on manufacturers and publishers of qualifying computer and video games who fail to comply with its guidelines. In addition, as noted on the ESRB website, "Although the ESRB does not have the authority to enforce the ratings at the retail level, [ESRB works] closely with retailers and game centers to encourage them to display ratings information and not sell or rent certain product to minors. In fact, many retailers have signed up for ESRB's Commitment to Parents program in which they pledge to use their best efforts not to rent or sell M-rated games to children under 17 without parental consent."

and Regulatory Affairs ("DCRA") pursuant to D.C. Official Code § 47-2851.01 *et seq.* (2004 Supp.);

- prohibits licensed businesses from renting, selling, or furnishing video or computer games rated as "M" (Mature) to persons under the age of 17;
- prohibits licensed businesses from renting selling, or furnishing video or computer games rated as "AO" (Adults Only) to persons under the age of 18;
- requires such licensed businesses to post
    - a written explanation of the ESRB ratings,
    - notice of the above age restrictions on the purchase or rental of games rated as "M" or "AO", and
    - the appropriate Basic Business License;
- creates a penalty scheme for violating the provisions of the Bill which includes
    - suspension or revocation of the retailer's business license,
    - a fine of not less than $1,000 and not more than $2,000 for the first violation,
    - a fine of not less than $4,000 and not more than $10,000 for each subsequent violation, and
    - a civil penalty of up to $1,000 for each unlicensed individual who violates the sales restriction.

As discussed more fully below, the Video Games Bill, as a content-based restriction on otherwise lawful speech, is unlikely to survive a constitutional challenge. While there are some modifications that could be made to the Bill to prohibit a minor's access to video and computer games that are sexually obscene, as that term has been defined in the case law, it is highly unlikely that any version of the Bill that restricts access to games with violent conduct will meet constitutional standards.

B. The Constitutional Standard

Unabridged free speech is a fundamental and cherished American right. Its importance is underscored by its placement as the First Amendment to the Constitution. ("Congress shall make no law...abridging the freedom of speech…." U.S. Const. Amdt. 1.) When determining whether government regulation impermissibly intrudes on the freedom of speech, a court must first consider whether the subject matter sought to be regulated concerns protected speech. As the courts have noted, not all communication is speech, nor is all speech protected. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (recognizing limited examples of unprotected speech). Once the determination is made that legislation seeks to regulate protected speech, the next step is to consider whether the restriction is content-based or content-neutral.

Content-based regulations, as the name would imply, restrict speech because of its content. *See Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63, 66 (2nd Cir. 1997). Content-based restrictions on speech are presumptively invalid unless the government can demonstrate that (1) the law is necessary to serve a compelling state interest and (2) it is narrowly drawn to achieve that end. *R.A.V, supra*, 505 U.S. at 382; *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989). Content-neutral regulations, by

contrast, are "promulgated without reference to the content of the regulated speech," *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994), and are subject to a less rigorous examination.

The Video Games Bill seeks to restrict the access of certain computer and video games to District youth. It is well established that games of this sort are considered speech, within the meaning of the First Amendment. Communications designed to entertain the listener, rather than to impart information or debate public affairs, are eligible for constitutional protection. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). As noted by the Eighth Circuit, "Whether we believe the advent of violent video games adds anything of value to society is irrelevant; guided by the first amendment, we are obliged to recognize that they are as much entitled to the protection of free speech as the best of literature." *Interactive Digital Software Association, et al. v. St. Louis County*, 329 F.3d 954, 957-58 (8th Cir. 2002) (internal quotations removed); *Winters v. New York*, 333 U.S. 507, 510 (1948).

Not all speech is protected, however. The Supreme Court has recognized that there are several categories of speech that do not deserve First Amendment protection: defamation with actual malice, fighting words, direct incitement of lawless action, and obscenity. *See R.A.V., supra*, 505 U.S. at 382-83. Therefore we must examine the bill in question to determine whether it seeks to regulate one of these limited categories of 'unprotected' speech.

As discussed above, the restrictions set forth in the Video Games Bill are directly tied to the ESRB rating system. Only games that are rated "M" (Mature) or "AO" (Adults Only) are subject to the restrictions set forth in the Bill. The ratings of these games are determined by the level of sexually explicit and violent conduct portrayed during the playing of the games. Although the title of the Bill is "Youth Protection from Obscene Video Games Act of 2005", the ESRB categories link sex and violence. Yet for purposes of constitutional analysis, violence and obscenity are two distinct categories. *See American Amusement Machine Association, et al. v. Kendrick*, 244 F.3d 572, 574 (7th Cir. 2001), cert. denied, 534 U.S. 994 (2001). Each is considered in turn below.

C. Obscenity

It has long been recognized that obscene speech is not protected by the First Amendment, *Miller v. California*, 413 U.S. 15, 24 (1973); *Kois v. Wisconsin*, 408 U.S. 229 (1972), although it was not clear for many years what constituted obscenity. After considering numerous individual cases and applying various standards, the Supreme Court of the United States established a "basic guideline" to be used by a trier of fact when determining whether a particular work is obscene:

(a) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Miller, *supra*, 413 U.S. at 24 (internal quotations and citations removed). Only those works that depict or describe sexual conduct fall into the category of materials that can be held obscene. *Id*. "If a state law that regulates obscene material is thus limited, as written or construed,...First Amendment values...are adequately protected by the ultimate power of the appellate courts to conduct an independent review of constitutional claims when necessary." *Id*. at 25.

Because obscene speech is unprotected, state legislatures are permitted to regulate access to obscene materials as long as there is a rational basis to do so. In *Ginsberg v. New York*, 390 U.S. 629, 638 (1968), the Supreme Court held that a state could adjust its definition of obscenity to meet the lawful goal of protecting its youth and permitted the regulation of speech that was not obscene for adults, but was found to be obscene when applied to minors. Although *Ginsberg* was decided before *Miller*, which established the current definition of obscenity, *Ginsberg* remains good law. Thus, states continue to have the lawful ability to "shield minors from the influence [of obscene material] that is not obscene by adult standards." *Sable Communications*, *supra*, 492 U.S. at 126; *see also New York v. Ferber*, 458 U.S. 747, 757 (1982).[3]

Even though the Video Games Bill purports to regulate 'obscene' video games that are available for sale to children, it is doubtful that the Bill, as currently drafted, would meet the tests set forth in *Miller* and *Ginsberg*. We start the analysis of the Bill with the understanding, as discussed above, that if any particular game is obscene – whether by traditional *Miller* adult standards or the relaxed *Ginsberg* youth standards – the Council may regulate or restrict its sale, as long as there is a rational basis to do so. The issue with the Video Games Bill, however, is that it does not provide a meaningful way to determine whether any particular video game is obscene.

First, the Video Games Bill bases its sales restriction on the ESRB rating system which does not clearly distinguish between those games that are sexually graphic and those that are extremely violent. A game rated as M (Mature) or AO (Adults Only) by the ESRB could very well contain no sexual content whatsoever. Because the rating system combines sexual and violent depictions, the ESRB rating is largely insufficient as a mechanism to identify those games which have explicit sexual conduct or would otherwise qualify as obscene for minors.

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[3] In *Ginsberg*, for example, the Supreme Court upheld a New York Penal Law prohibiting the knowing sale to minors of pictures: (a) that depicted specific kinds of female nudity (*i.e.,* the buttocks with less than a full opaque covering or the female breast with less than a fully opaque covering of any portion below the top of the nipple); and (b) that were harmful to minors in the sense meant by Supreme Court statements concerning the elements of obscenity (*i.e.,* the pictures predominantly appealed to the prurient interest of minors, patently offended prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and had utterly no redeeming social importance for minors). 490 U.S. at 632-33. The *Ginsberg* Court noted that, while such pictures could rationally be considered as obscene for minors, they were not obscene for adults. *Id.* at 634.

Second, even though the ESRB rating system includes content descriptors which give prospective purchasers some information about the content of the video or computer game, the Video Games Bill does not consider those descriptors in imposing sales restrictions. Thus, the Bill does not distinguish between games that have been rated M or AO because of, for example, Sexual Violence, Strong Language, Drug Use, or Alcohol Use.

Third, by using the ESRB rating system, the Council has failed to specifically define what material concerning sex – whether sexually explicit conduct, nudity, etc. – constitutes obscenity for purposes of District youth. As noted above, one of the factors in the *Miller* test as articulated by the Supreme Court is whether the "work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." *Miller, supra*, 413 U.S. at 24. *Ginsberg, supra*, 390 U.S. at 632-33, recognizes that work can also be obscene for minors if it depicts human nudity in a patently offensive way. Given the lack of detail contained in the ESRB rating system as to the specific sexual conduct or the nature of the nudity portrayed in a particular video game, it is doubtful that the rating system alone would satisfy the requirement that the sexual conduct or other offensive sexual material be 'specifically described,' in the applicable state law.

The Council may choose to redraft the Video Games Bill to more properly address the sale of 'obscene' video games to minors by further defining the term obscene in conformance with the dictates of *Miller* and *Ginsberg*. With clearer definitions, the Council could, indeed, regulate the sale of obscene games to minors. Before offering suggestions on how to redraft the Bill to pass constitutional muster, however, we consider the Bill's more problematic attempt to regulate the sale of games that portray violent conduct.

D. Depictions of Violence

The Video Games Bill, like legislation proposed in a number of other states and local jurisdictions, seeks to restrict the sale of video games that are not simply sexually explicit (and thus obscene as to minors), but also seeks to restrict those games that contain excessive violence. Obscenity and violence are two separate classes of potentially objectionable material, and are treated differently for purposes of constitutional analysis.[4]

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[4] Judge Posner of the Seventh Circuit, considering an Indianapolis ordinance that similarly sought to restrict a minor's access to sexually explicit and graphically violent video games, noted the difference between the purposes in protecting youth from obscene and violent material.

> The main worry about obscenity, the main reason for its proscription, is not that it's harmful,…but that it is offensive. A work is classified as obscene not upon proof that it is likely to affect anyone's conduct, but upon proof that it violates community norms regarding the permissible scope of depictions of sexual or sex-related activity.… No proof that obscenity is harmful is required either to defend an obscenity statute against being invalidated on constitutional grounds or to uphold a prosecution for obscenity. Offensiveness is the offense.… But offensiveness is not the basis on which Indianapolis seeks to regulate violent video games…. The basis of the ordinance, rather, is a belief that violent video games cause temporal harm by engendering

Unlike obscenity, violence or, more accurately, depictions of violence are protected speech under the First Amendment. *See Interactive Digital Software Association, supra; Video Software Dealers Association v. Maleng*, 325 F. Supp.2d 1180, 1186 (W.D. Wash. 2004). Thus, as described above, a state may not regulate violent images unless there is a compelling state interest and the regulation imposed is narrowly tailored to achieve that end.

Assuming that the 'compelling state interest' asserted by the Council in support of the Video Games Bill is the protection of minors from the harmful effects of violent video games, it would need to establish a demonstrable link between the violent games and the purported harm. Recent cases suggest that this will be difficult to establish and even more difficult to defend.

In *Interactive Digital Software Association, supra*, the Eighth Circuit considered a local statute similar to the Video Games Bill. The Court assessed whether there was a compelling state interest justifying the restriction on First Amendment speech. While the Court acknowledged that there were many theories about a connection between playing violent video games and committing violent acts, there was insufficient empirical data connecting them. As the Court noted, because content-based restrictions on speech are presumptively invalid under the First Amendment, the government must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." 329 F.3d at 958, citing *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion). The Court also rejected the argument that the ordinance served a compelling state interest because society in general believes that continued exposure to violence can be harmful to children. *Id*. at 959. Nor was it a compelling state interest that the statute assisted parents in their efforts to limit access to violent video games. ("[T]he question here is whether the County constitutionally may limit first amendment rights as a means of aiding parental authority. We hold that…it cannot." *Id*.)[5]

Other courts have similarly held that the potential reduction of violence does not justify infringing on a minor's access to depictions or descriptions of violence. In striking down an Indianapolis ordinance that restricted access of minors to violent video games, the Seventh Circuit noted:

> The video games at issue in this case do not involve sex, but instead a children's world of violent adventures. Common sense says that the City's claim of harm to its citizens from these games is implausible, at best wildly speculative. Common sense is sometimes another word for prejudice, and the common sense reaction to the Indianapolis ordinance could be overcome by social scientific evidence, but has not been. The ordinance curtails freedom of expression significantly and, on

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aggressive attitudes and behavior, which might lead to violence." *American Amusement Machine supra*, 244 F.3d at 574-75.

[5] In American Amusement Machine, the Court noted that the grounds for restricting violent expression must be "compelling" and not just "plausible." *Id.* at 577.

> this record, without any offsetting justification, "compelling" or otherwise. *American Amusement Machine, supra*, 244 F.3d at 579.[6]

Even more narrowly tailored justifications have failed to persuade the courts. In a recent federal court decision striking down a Washington State restriction on video games that depict violence against law enforcement officers, the United States District Court observed that there was little data supporting a link between these games and violence against law enforcement officers:

> The Court, along with virtually every entity that has considered this issue hopes that more research is done to determine the long-term effects of playing violent video games on children and adolescents. Although we do not demand of legislatures scientifically certain criteria of legislation, given the state of the existing research in this area, the Court finds that the Legislature's belief that video games cause violence, particularly violence against law enforcement officers, is not based on reasonable inferences drawn from substantial evidence. *Video Software Dealers, supra,* 325 F. Supp.2d at1188-89.

Given the consistent record of judicial skepticism, it is highly unlikely that the Council could assemble the requisite record to demonstrate the type of compelling interest needed to justify a content-based restriction on the sale of video games to minors. Although the Council has yet to hold a public hearing on the Bill, the record suggests that it will be difficult to support, and then ultimately to defend, such action. In any court challenge there will be an analysis of whether violent video games are linked to actual harm to the minors who play them or to the public at large. There is little reason to believe that the District could prevail in such a challenge. Indeed, while more than half of the states and a number of local jurisdictions have proposed legislation similar to the Video Games Bill, it appears that none has successfully enacted such a law. While some are pending, many have died in committee, been vetoed, or for other reasons withdrawn from the legislative process.[7] Bills that have been enacted by a state or locality have not withstood court

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[6] The Court in *American Amusement Machine*, noting that children have First Amendment rights (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-14 (1975)) considered the significant role that violent images play in the education and development of American children. Recognizing that some of the world's most important works of art, literature, and history are replete with images of violence, the Court pointed out that "[v]iolence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault are aware. To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it." *American Amusement Machine, supra*, 244 F.3d at 577.

[7] *E.g.*, in Connecticut the governor vetoed a bill that prohibited persons under 18 from operating point and shoot video games; in Maryland a bill that would prohibit sale of M and AO rated games to 17 and 18 year olds, respectively, was not voted out of committee; and in Florida a bill prohibiting sale or rental of adult video games to minors also died in committee. *But see* Illinois General Assembly Bill HB4023, which restricts the sale of obscene and violent video games to minors in the state of Illinois. As of the date of this opinion, the bill has passed the Illinois House and is awaiting action by the Illinois Senate. Governor Blagojevich has indicated that, if passed by the legislature, he would sign the measure.

challenge. No reported opinion could be found that upholds a governmental body's regulation of the sale or rental of video or computer games to minors based solely on the basis of violent content.[8]

Even assuming that the District could establish a compelling interest in enacting the Video Games Bill, there remains the constitutional hurdle of demonstrating that the regulations imposed by the Bill are the least restrictive to satisfy the compelling interest. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Communications, supra*, 492 U.S. at 126. Here, too, the Bill is vulnerable.

In relying exclusively on the ESRB ratings, the Council has not further defined the violent expressions in video games that it seeks to keep away from minors. As described above, while the ESRB does consider violence themes and depictions in determining a rating, it is unclear – from the ratings of M and AO alone – what specific depictions of violence are prohibited. For example, it is important to know whether the Council seeks to limit a minor's access to depictions of all violent acts, or only those violent acts that contain certain elements, (*e.g.*, excessive blood, bodily mutilation, dismemberment, or weapons) or whether the violence depicted must suggest a certain level of realism (*i.e.*, depictions of the victims and perpetrators of the violent acts relate to humans as opposed to animals, cartoon characters, fantastical beings, or androids). Because the ESRB ratings do not offer details of the level or nature of violence, it is unlikely that a court would find the class of material to be regulated by the Video Games Bill to be sufficiently narrow.[9] *See Reno v. ACLU*, 521 U.S. 844 (1997) (Court struck down statute limiting transmission of "indecent" and "patently offensive" material over the Internet as overbroad and an abridgement of First Amendment rights.)

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[8] *See American Amusement Machine, supra* (preliminary injunction granted to prevent enforcement of a bill that unconstitutionally restricted access of minors to video games depicting violence); *Interactive Digital Software Association, supra* (enjoined St. Louis County ordinance restricting sale or rental of graphically violent video games to minors because of infringement of First Amendment rights); *Video Software Dealers, supra* (finding law unconstitutional, court permanently enjoined State of Washington from enforcing law creating penalties for dissemination to minors of violent video games that target law enforcement characters); *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520 (Tenn. 1993) (upheld the constitutionality of a Tennessee statute prohibiting the retail display of materials considered harmful to minors after eliding the term "excessive violence" from the statute).

[9] In *American Amusement Machine, supra*, where the restriction on the sale of violent video games was found to be unconstitutional, the Court explained that some violent games might be more likely to survive a challenge than others.

> We have emphasized the "literary" character of the games in the record and the unrealistic appearance of their "graphic" violence. If the games used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries (as several of the games in the record appear to be), a more narrowly drawn ordinance might survive a constitutional challenge.

244 F.3d at 579-80.

In sum, it appears unlikely that the Video Games Bill, to the extent it seeks to restrict access of minors to M and AO rated video and computer games because of their violent content, would survive constitutional scrutiny. It is doubtful that the District could offer a compelling state interest to overcome the strong protections of the First Amendment. Moreover, even if a compelling interest was demonstrated, reliance on the ESRB rating system to define the class of restricted material would not satisfy a court that the statute was narrowly drawn to address the perceived problem.

E. Prior Restraint

The mechanism by which the Video Games Bill seeks to enforce its sales restrictions is the imposition of a licensing scheme for video and computer game retailers located in the District of Columbia. These retailers then would be subject to fines and license suspension and revocation for violations of the sales restrictions. Similar statutes have been challenged in other states on the ground that such a licensing scheme constitutes prior restraint of the exercise of free speech. On this score, the Video Games Bill is on stronger footing.

Despite the heavy presumption against measures that might restrain or inhibit the exercise of free speech, the courts have recognized that a state may impose valid time, place, and manner regulations, to regulate competing uses of public forums. *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 130 (1992). Any permit scheme controlling or impacting the exercise of protected speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication. *Id.*; *See United States v. Grace*, 461 U.S. 171, 177 (1983). The reasoning, as noted by the Supreme Court in *Forsyth County*, is as follows:

> If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion, by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted. *Forsyth County, supra*, 505 U.S. at 131 (internal quotes and citations omitted).

To minimize that risk, the licensing scheme must contain narrow, objective and definite standards to guide the licensing authority.[10] *Id.*

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[10] In *Forsyth County*, the Supreme Court affirmed a lower court's decision holding unconstitutional a Georgia ordinance that mandated permits for public protests and allowed the licensing authority to assess permit fees and the costs of police protection as needed to maintain public order. In finding an impermissible prior restraint of free speech the Court noted:

> The decision how much to charge for police protection or administrative time – or even whether to charge at all – is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some

The Video Games Bill does not appear to constitute an unlawful prior restraint on speech. The licensing requirement, and entertainment endorsement, contemplated by the Bill are subject to the objective criteria set forth in D.C. Official Code § 47-2851.01 *et seq.* (2004 Supp.). The licensing official must adhere to these criteria for the issuance and denial of a license. A license may not be denied to the retailer of video or computer games based on the content of the games or the unfettered discretion of the licensing official. This scheme seems to meet the limitations as set forth in *Forsyth County*, and thus would not constitute an unlawful prior restraint.

IV. Alternatives

As discussed above, it is unlikely that the Video Games Bill, as currently drafted, could withstand a constitutional challenge. Instead, the District might consider one or more of the following alternative courses of action in its attempt to limit the access of minors to obscene and/or violent video games.

- The Council could redraft the legislation to more narrowly restrict material that would be considered 'obscene' for District youth. While this approach would not cover video games with violent themes, it could limit youth access to games with explicit sexual themes, depictions, and nudity. To pass constitutional review, the Bill should track the *Miller* and *Ginsberg* standards by limiting its application to material that would be offensive to a youthful audience because taken as a whole the material appeals to the prurient interests of minors, depicts sexual conduct or nudity in a patently offensive way, and lacks any serious literary, artistic, political, or scientific value for minors. *Miller, supra*, 413 U.S. at 24; *Ginsberg, supra*, 390 U.S. at 639. The Bill should specifically identify the kinds of sexual images and depictions that are banned by including sufficiently detailed definitions (*e.g.*, definitions of nudity, sexual conduct, and sexual excitement). By including specific definitions, retailers would be on notice as to which games containing sexually explicit material may not be sold to minors.[11]

- As described above, it is unlikely that any attempt to limit a minor's access to video games that depict violence would survive constitutional challenge. It is more likely that such a future bill would withstand judicial review, however, if there were some empirical data that would support a "compelling" state interest to keep such games away from the District's youth. The Council may choose to require additional studies to determine what, if any, negative effects are

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> views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official.

Forsyth County, supra, 505 U.S. at 133.

[11] *See M.S. News Company v. Casado*, 721 F.2d 1281 (10th Cir. 1983) (Court upheld constitutionality of a Wichita, Kansas ordinance restricting the promotion of sexually oriented materials to minors that specifically defined the banned material.)

experienced by minors who play violent video games.[12] Even with such evidence, any subsequent bill should be narrowly drawn, with detailed definitions of the restricted violent depictions, to address the specific evidence of harm.[13]

- Short of restricting access to violent video games, the Council might establish a public education program to inform parents of ESRB ratings, giving them more information about the video games purchased and played by their children.[14] The Council might also develop incentives for video game retailers to voluntarily restrict access of minors to games rated M (Mature) and AO (Adults Only).

Sincerely,

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ROBERT J. SPAGNOLETTI
Attorney General

RJS/rjs

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[12] Congress is attempting to ascertain the same information through a legislative vehicle, H.R. 1145. An earlier congressional bill, House Bill 698, which would have restricted the sale of certain videos to minors, was not enacted.

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[13] *See* Illinois General Assembly Bill HB4023 which attempts to restrict the sale of obscene and violent video games to minors in the State of Illinois. The Illinois bill tracks the language outlined by the Supreme Court in *Miller* and *Ginsberg* for restricting the dissemination of obscene material to minors, and contains a very narrow definition of violence, limited to the realistic depiction of extreme human violence. The bill further recites a link between violent video games and harm to minors, and lists five compelling state interests in limiting a minor's access to such games. Interestingly, the bill does not rely on the ESRB video game ratings. It is currently awaiting passage by the Illinois Senate.

[14] *See* Oregon Resolution H.J.R. 21, urging owners of video arcades to restrict children's access to violent video games and encouraging the use of the ESRB rating system to identify violent video games.