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Ninth Circuit to Address Constitutionality of Content-Based Regulation of Video Games

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The Ninth Circuit will issue an opinion addressing the constitutionality of content-based regulation on the sale and rental of violent video games in the next few months. Since policymakers are expressing growing concerns over the possible effects of violent video games on the psychological and emotional well-being of children, this decision is expected to play an important role in determining what boundaries, if any, constitute permissible regulation of video game content. The statute at issue is a 2005 California law that would prevent minors from renting or purchasing violent video games that depict serious injury to human beings in a manner that is “especially heinous, cruel, or depraved.” Retailers who rent or sell such games in violation of the act would face a maximum fine of \$1,000 for each violation. Shortly after this law was enacted, its constitutionality was challenged by the Video Software Dealers Association and the Entertainment Software Association, two trade associations that represent companies in the video game industry. The groups argued that video games are protected speech under the First Amendment and that the act constituted an impermissible restriction on such speech. The district court agreed with these arguments, holding that the law was unconstitutional and granting a permanent injunction against its enforcement. While it is difficult to predict how the Ninth Circuit will rule on this issue, the Eighth Circuit recently addressed the constitutionality of a Minnesota statute functionally similar to the challenged California law. (Interestingly enough, the Entertainment Software Association was a party in that case as well.) In that case, the court found that video games are a form of protected speech, comparable to literature and film. Because the regulations were content-based, focusing on the presence of violent themes and imagery, the court reviewed the legislation under a “strict scrutiny” standard. To be upheld under this standard of review, the law needs to be “narrowly tailored” to serve a “compelling interest.” Since the Supreme Court has held that the psychological well-being of children qualifies as a “compelling interest”, the Eighth Circuit found that element satisfied. The decision therefore focused on whether the legislation was “narrowly tailored,” a question that involved both the breadth of the legislation and its causal connection to the aforementioned goal. As was the case in the California district court decision, the Eighth Circuit found that the statutory language did not effectively isolate troubling content and that the scientific link between violent video games and psychological harm to children lacked sufficient proof. Consequently, the Eighth Circuit found the regulation to be unconstitutional. If

the Ninth Circuit follows the precedent set forth by the Eighth Circuit, regulators will have a difficult time tailoring legislation to meet this stringent standard. On the other hand, if the court finds all or portions of these regulations permissible, software developers may feel compelled to curtail particular forms of violence in video games and retailers may need to alter their current sales and rental practices. While this decision may provide temporary clarity to the industry and regulators, these constitutional issues will not be definitively resolved until they reach the Supreme Court.

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