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July 18, 2008

Governor David Paterson  
The Executive Chamber  
State Capitol  
Albany, New York 12224

Re: A.11717/S.6401-A

Dear Governor Paterson:

We write on behalf of the New York Civil Liberties Union and the National Coalition Against Censorship to express opposition to A.11717/S.6401-A – legislation related to the rating and distribution of video games – and to urge that you veto this legislation.

This proposed law would directly involve the state in the regulation of video games based upon the expressive content depicted. The bill would prohibit the sale of a video game unless its rating is displayed on the packaging;<sup>1</sup> establish an “advisory council on interactive media and youth violence” that is given a broad mandate to make recommendations regarding video ratings established by the Entertainment Software Rating Board (ESRB), including the nature of content that should be rated and the “effectiveness” and “accuracy” of such ratings;<sup>2</sup> and require that video game consoles sold at retail include a mechanism that would permit the user to block the display of video games that have been given “certain ratings” or that depict what the bill refers to, in equally vague language, as “certain content.”<sup>3</sup>

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<sup>1</sup> See Section 3, which would amend Section 611 of the General Business Law.

<sup>2</sup> See Section 2, which would add Section 554 to the Executive Law.

<sup>3</sup> See Section 1, which would add Section 396-kk to the General Business Law. The “blocking mechanism” is referred to in subparagraph 2 of Section 396-kk.

To comprehend fully the scope and reach of this proposed regulatory scheme, each of these provisions must be read in relation to the others. The proposed law would involve agents of the state in reviewing the criteria used by the ESRB to establish video-game ratings, whose display in video-game packaging would be required by the state as a condition of sale. This scheme will clearly have the effect of coercing industry to adopt state-sanctioned ratings, with the implicit threat of further regulation if the industry fails to comply. Finally, consumers – adults and youth – would view video games on consoles that must include a mechanism that can block the display of video games that have been assigned a particular rating or that depict certain unspecified content. Read in this way, it is clear that the legislation proposes an ambitious scheme that will implicate the state in regulating the way videos are sold at retail, and viewed in one’s home, based upon content that is protected from such regulation by the First Amendment. Such a scheme is presumptively unconstitutional. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

Federal courts have ruled that retailers cannot be required to post labels on video games on the ground that such requirements constitute compelled speech that is constitutionally prohibited. *See, e.g., Software Entertainment Association v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), *aff’d* 469 F. 3d 641 (7<sup>th</sup> Cir. 2006); *Entertainment Software Ass’n v. Swanson*, 443 F. Supp. 2d 1065 (D. Minn. 2006) *aff’d* \_\_\_ F.3d \_\_\_ No. 06-3217, 2008 WL 696550 (8<sup>th</sup> Cir., March 17, 2008). And yet a content-based rating system would, in effect, be engineered into video game consoles under the proposed legislation, which requires that video game control systems must be capable of blocking the display of video content based upon its rating. What’s more, the bill would place the entire regulatory scheme under the direction of a sixteen-member board with a broad mandate to analyze and evaluate both the content of video games and the ratings given to video games by the ESRB, an independent, private entity, voluntarily established by the entertainment industry.

Both the intent of this legislation and its underlying justification are misguided. The intent is clearly indicated in the bill’s title: to regulate the “dissemination of violent and indecent video games to minors.” The regulation is directed at the problem of violent conduct. To this end, the bill charges the advisory council on interactive media and youth violence with facilitating a coordinated intergovernmental effort to prevent youth violence – a mandate that all but invites the advisory council to seek ways to limit and control the distribution of video games with violent content. It is equally clear from the bill’s language that this mandate is premised upon the assumption that exposure to violent images, as they appear in some video games, leads to violent conduct. However, both judicial rulings and scientific research have rejected the bill’s rationale. The Supreme Court has repeatedly struck down attempts by government to censor or regulate violent speech or expression; and scientific studies have soundly debunked the notion that viewing violent images in print or electronic media causes violent conduct. We briefly address these two issues in turn.

While First Amendment case law protecting speech and expression includes exceptions for obscene material, the Supreme Court has never created a similar exception for violent speech and images.<sup>4</sup> This is true even where minors are concerned. Sixty years ago, in *Winters v. New York*, 333 U.S. 507 (1948), the Court established that such material is fully protected by the First

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<sup>4</sup> New York Penal Law §235.20-23 prohibits the dissemination of indecent material to minors.

Amendment, *regardless of its social worth*. The ruling in *Winter* addressed a statute that imposed criminal penalties for printing, publishing, or disseminating “criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust, or crime.” *Id.* at 508. The state claimed the criminal sanction was justified as an effort to prevent “juvenile delinquency.” Even though the Court could “see nothing of any possible value to society in these magazines,” it nonetheless found that “they are as much entitled to the protection of free speech as the best of literature.” *Id.* at 510.

There are compelling reasons to give violent imagery and graphic descriptions broad constitutional protection against government regulation. Otherwise, a great deal of literature, art, media, and other material would be vulnerable to censorship. For example, graphic depictions of violence can be found in the Bible, *The Odyssey*, and *Agamemnon*; in Faulkner's *Light in August*, and James Dickey's *Deliverance*; in films such as *Paths of Glory*, *The Seventh Seal*, and *The Godfather*; in Picasso's *Guernica* and almost all religious art depicting the Crucifixion and religious martyrdom; and in the theater arts, including for example productions of Shakespeare's *Macbeth*, *Henry V*, and *Titus Andronicus*.

The lower courts have also consistently declined to treat violent content as an exception to the types of speech and expression protected under the First Amendment. For example, in *Eclipse Enterprises, Inc. v. Gulotta*, 134 F. 3d 63 (2d Cir. 1997) the Second Circuit held unconstitutional an ordinance forbidding the sale of “heinous crime” trading cards to minors. Virtually every court that has ruled on legislation regulating violent content in entertainment has held it unconstitutional. See *Entertainment Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entertainment Merchants Ass'n v. Henry*, No. 06-675, 2006 WL 2927884 (W.D. Okla. Oct. 11, 2006) (preliminary injunction); *Entertainment Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006); *Entertainment Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), *aff'd* 469 F.3d 641 (7th Cir. 2006); *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005) (preliminary injunction); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) (“IDSA”); *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) (“AAMA”) (Posner, J.).

The proposed legislation seeks to regulate video games based upon the premise that viewing violent images causes violent conduct. This underlying justification is reflected in the bill's charge to the state-appointed advisory council that it make recommendations on “media and youth violence related issues,” focusing its attention on “any relationship” between the use of interactive media and “violent tendencies” in youth. Based upon this inquiry, the advisory council is directed to review, and to make recommendations regarding, the ESRB's system of rating video games. However, the assumption that there is a causal relationship between viewing content deemed to be violent and engaging in violent conduct has been rejected by every court to consider it to date, based on a considerable body of scientific research. See, e.g., *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), *aff'd* 469 F. 3d 641 (7<sup>th</sup> Cir. 2006), *Entertainment Software Ass'n v. Hatch*, 443 F. Supp 2d 1065 (D. Minn. 2006), *Entertainment Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006).

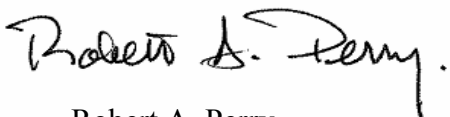
The directors of the Harvard Medical School Center for Public Health and Media have recently published a searching inquiry into the question of a causal relationship between viewing violence depicted in video games and engaging in actual violence. The authors conclude that that “many of [these] claims are based on scanty evidence, inaccurate assumption, and pseudoscience. Much of the current research on violent video games is both simplistic and agenda driven.”<sup>5</sup>

If the state legislature seeks to prevent youth violence, there are few initiatives that would be less effective in accomplishing this objective than to enact a regulatory scheme that involves the state in regulating the content of video games. This remedy is all but irrelevant to the underlying causes of the problem. If this legislation is made law, however, it will prove effective in suppressing the First Amendment rights of adults and youth who seek to purchase and view video games, as well as the rights of the creators and sellers of video games.

We close by asking that your review of this legislation take into account that it has been adopted without hearings, meaningful debate, or an opportunity for interested members of the public to address the many issues of constitutional law and media technology implicated by the bill. The legislation had received no attention in the Assembly until the last scheduled day in the legislative session; it was then raced through three committee votes in the Assembly before the same process was duplicated in the Senate. The legislature’s formal deliberative process regarding this bill comprised less than twenty-four hours. A flawed legislative process, not surprisingly, has led to flawed legislation.

We urge you to exercise your veto when A.11717/S.6401-A is delivered to your desk.

Yours sincerely,



Robert A. Perry  
Legislative Director  
New York Civil Liberties Union



Joan Bertin  
Executive Director  
National Coalition Against Censorship

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<sup>5</sup> Lawrence Kutner., PhD And Cheryl K. Olson, ScD, *Grand Theft Childhood: The Surprising Truth about Violent Video Games and What Parents Can Do* (2008), p. 55.