TECHFREEDOM

**Comments from the National Coalition Against Censorship, American Booksellers Association for Free Expression, American Library Association Office for Intellectual Freedom, Center for Democracy and Technology, Comic Book Legal Defense Fund, and TechFreedom**

**On**

**Senate Bill No. 168**

**Joint Committee on Economic Development and Emerging Technologies**

**November 13, 2013**

We write to urge the joint Committee on Economic Development and Emerging Technologies not to approve Senate Bill No. 168, which would "establish a special commission to investigate video games as a form of media and as a training tool." In our view, the proposal is constitutionally flawed and seriously misguided.

The bill would create a special commission to "focus on video games that allow the player to simulate severe battery or killing ('killing games')" and to examine, among other things, the "social benefits" of such games and "any connection … between killing games and actual violence…." The commission is further charged with considering "the anticipated cost of any proposals to regulate video games."

The bill has serious constitutional infirmities. The most glaring one is that it singles out "killing games" for special study and scrutiny, violating the fundamental First Amendment principle that government may not target expression "because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (citations omitted). Government efforts to regulate violent content, in particular, have been repeatedly struck down on constitutional grounds. *See Winters v. New York*, 333 U.S. 507 (1948), *United States v. Stevens*, 130 S. Ct. 1577 (2010), and *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, (2011).

In *Brown v. EMA*, the Court invalidated a California statute that restricted the sale of violent video games to minors. The Court held that video games as a genre, including violent (or "killing") games, are entitled to full First Amendment protection. In reaching this result, the Court explicitly rejected several premises that underlie the present proposal: that a connection exists between playing violent video games and violent behavior; that the interactive nature of video games affects their legal status; and that government officials have the authority to assess the social value of expressive content. As discussed below, each of these premises lacks factual and/or legal support.

First, the Court rejected the assertion that exposure to violent video games causes violent behavior or causes players to become aggressive or anti-social. The Court observed that studies purporting to show a relationship between exposure to violent media and violent or anti-social behavior "have been rejected by every court to consider them, and with good reason: They do not prove that violent video games cause minors to act aggressively." To the extent the studies show any effect on "feelings of aggression, those effects are both small and indistinguishable from effects produced by other media." *Id.* at 2739-40. Indeed, as the Court noted, the evidence demonstrates similar effects from watching Bugs Bunny and Road Runner cartoons.[1]

Next, the Court rejected the claim that the interactive nature of video games distinguishes them for First Amendment purposes. The Court stated that "all literature is interactive" to a greater or lesser extent, and held that any difference is "more a matter of degree than of kind." *Id.* at 2738. Moreover, the Court noted that legislation focusing only on video games is "wildly underinclusive …which in our view is alone enough to defeat it." *Id.* at 2740. Even assuming *arguendo* that fantasy violence influences behavior, the Court found no justification for targeting violence in video games as opposed to violence in other forms of entertainment - or even news coverage.

With regard to the commission's charge to assess the "social benefits" of video games, the Court has consistently rejected the notion that First Amendment protections do not extend to "low value" speech, or that government officials have the authority to pass judgment on expressive content. More than sixty years ago, in a case involving regulation of "true crime" stories, the Court made clear that the government may not regulate expressive content based on its perceived benefits: "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Winters v. New York, id.* at 510.

More recently, in a case involving a federal law criminalizing depictions of animal cruelty, the Court rejected the government's claim that First Amendment protection depends on a "balancing of the value of the speech against its societal costs," finding such an argument "startling and dangerous." "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on Government outweigh the costs." *United States v. Stevens, id.* at 1585.

Of course, individuals are free to choose to play video games, or not; likewise, parents are free to direct their children's entertainment choices according to their own views and preferences. Government officials are precluded from interfering with these personal choices by imposing their own "opinions and judgments, including esthetic and moral judgments about art and literature….What the Constitution says is that these judgments are for the individual to make, not for the government to decree, even with the mandate or approval of a majority." *United States v. Playboy Entm't Group*, 529 U.S. 803, 818 (2000).

[1] As indicated in the written testimony on the current proposal submitted by a group of scholars in relevant fields, there have been no intervening research developments that would call the Court's conclusions into question.

This principle is fundamental to First Amendment jurisprudence, because "[a]ny other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us." *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd,* 475 U.S. 1001 (1986).

We strongly urge you to reject this flawed and unconstitutional proposal and instead to direct scarce state resources and attention to initiatives that are both legally permissible and more likely to promote effective violence-prevention strategies.


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