No. 08-1448

IN THE
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California, and EDMUND G. BROWN, JR., in his official capacity as Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CORPORATE DISCLOSURE STATEMENT

Respondent Entertainment Merchants Association, through its undersigned counsel, hereby states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

Respondent Entertainment Software Association, through its undersigned counsel, hereby states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The California statute at bar is the latest in a long history of overreactions to new expressive media. In the past, comic books, true-crime novels, movies, rock music, and other new media have all been accused of harming our youth. In each case, the perceived threat later proved unfounded. Video games are no different. They are a widely popular form of expression enjoyed by millions of people. As such, under the First Amendment, they cannot be censored absent the most compelling justification, based on firm evidence of harm, through a narrowly tailored statute where there is no less-restrictive alternative.

California asks the Court to withdraw First Amendment protection from some ill-defined subset of video games, at least as to minors, based on the same sort of unsupported claims that animated past efforts to regulate new media. This Court should reject California's dangerous proposal. As the Court has long recognized, it is not the role of government to decide which expressive materials are "worthy" of constitutional protection. Pet. Br. 6. And there is no reason to think parents need California's "assistance" in deciding which expression is worthwhile for their children. Nor is there any empirical basis for singling out video games for special regulation.

Nothing in *Ginsberg v. New York*, 390 U.S. 629 (1968), or this Court's school speech or broadcasting cases supports California's sweeping argument for a new category of unprotected speech subject to

content-based censorship. Unlike explicit sexuality, violence is not and never has been a taboo subject for children. It is therefore impossible to craft statutory language that adequately demarcates the line between violence that is "appropriate" for minors and violence that is not. This Court should decline California's invitation to create a new and potentially boundless exception to the First Amendment, especially where, as here, there is no evidence of any real problem in need of government intervention.

STATEMENT

A. The Nature Of Video Games

Video games are a modern form of artistic expression. A video game is an interactive software program that a player experiences on a screen, such as a television or computer monitor. Like films, video games incorporate dialogue, music, visual images, plot, and character development. J.A. 13. Like the best of literature, they often involve classic themes that have captivated audiences for centuries, such as good-versus-evil, triumph over adversity, struggle against corrupt powers, and quest for adventure. *Id.*

Unlike the viewer of a film or the reader of a book, the player of a video game has some control over the story. For example, a movie about D-Day – like *Saving Private Ryan* – might depict a protagonist risking his life in battle, gaining the respect of fellow soldiers, and facing moral dilemmas, with scenery and music enhancing the story. *Medal of Honor: Frontline*, a video game about D-Day, has

all of these elements, but differs because the player exercises some control over the choices made by the protagonist and the subsequent story development when confronted with various challenges, like landing on Omaha Beach. J.A. 65. For example, while a D-Day storyline requires the player to storm the beach, the player may attempt to travel that distance over a range of routes, quickly or slowly, fighting or avoiding conflict, taking risks to save others or focusing on preserving himself. In this respect, playing a video game is like improvising a performance of a musical score, because the player engages in and contributes to the expressive activity rather than passively consuming it. Video game play is also like a musical performance in that it requires an element of physical skill and virtuosity, such that accomplished players have more expressive options than novices.[1]

More than two-thirds of American households include at least one player of video games – a term that encompasses games created both for specialized game consoles and handheld devices (*e.g.*, the Nintendo Wii, Sony PlayStation, or Microsoft Xbox 360 consoles, and the Nintendo DS and Sony PlayStation Portable handheld game systems) and

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[1] Respondents submitted six games into the record: *Medal of Honor: Frontline*, *God of War*, *Tom Clancy's Rainbow Six 3*, *Jade Empire*, *Resident Evil IV*, and *Full Spectrum Warrior*. Respondents also submitted videotapes of more than two-and-a-half hours of excerpted game play from the six games (in contrast to the five minutes of excerpts submitted by California), and have lodged a DVD with the Court containing the game play excerpts.

for personal computers. Entertainment Software Association, Industry Facts, *available at* http://www.theesa.com/facts/index.asp (last visited Sept. 9, 2010). The average age of a player is 34. *Id.* Forty percent are women. *Id.* American consumers spend more than $10 billion a year on video games. *Id.*

As games have grown more popular, they have become more varied. For example, in one popular series called *The Sims*, the player designs an alter ego who lives an ordinary life, makes friends, and takes on a profession. Jamin Brophy-Warren, *Do the Sims Dream of Electric Sheep?,* Wall St. J., May 29, 2009, at W7. *God of War*, one of the games Respondents submitted into the record, is drawn directly from Greek mythology and depicts the battles of the protagonist Kratos, who fights gods and mythical beasts in a quest to redeem his own brutal past. J.A. 73-76.

Other games in this increasingly sophisticated medium mirror film and book genres. As a review of a western-themed game titled *Red Dead Redemption* observed:

> Like our own, the world of Red Dead Redemption . . . is one in which good does not always prevail and yet altruism rarely goes unrewarded. This is a violent, unvarnished, cruel world of sexism and bigotry, yet one that abounds with individual acts of kindness and compassion. Like our own, this is a complex world of ethical range and subtlety where it's not always clear what the right thing is. . . .

> Riding along in the desert, you may see two groups of men shooting it out. Whether to intervene is your choice. If you do, it may not be clear which are the good guys. . . . Do you help?

Seth Schiesel, *Way Down Deep in the Wild, Wild West*, N.Y. Times, May 17, 2010, at C1.

Some games are based directly on popular books and movies. For example, *Rainbow Six 3* (another game in the record) is based on the Tom Clancy novel *Rainbow Six*. Both the novel and the video game concern a clandestine anti-terrorist group composed of American ex-special-forces soldiers. J.A. 78-80. Several video games have also been based on *The Terminator*, a popular movie series in which Petitioner Schwarzenegger portrayed an android-like creature sent back in time as part of a future war between humans and computers.

Indeed, video games have become so popular that books and movies are now increasingly based on them. One example is the successful film *Prince of Persia: Sands of Time*, which, like the video game on which it is based, follows the adventures of an ancient Persian prince who acquires a magical dagger that allows him to reverse time. *See "Prince Of Persia" Is Highest-Grossing Video Game Movie*, USA Today, June 28, 2010, *available at* http://content.usatoday.com/communities/entertainment/post/2010/06/prince-of-persia-is-highest-grossing-video-game-movie-ever-/1.

Like other media, video games may depict violence. Thus, the soldiers in *Medal of Honor* attack

Nazis; the unit in *Rainbow Six 3* fights terrorists; the redeemed outlaw hero of *Red Dead Redemption* kills members of his old gang; and the Prince of Persia battles human and non-human foes. Some games depict violence in graphic detail – as do some movies (such as *Saving Private Ryan*, *The Godfather*, *The Wild Bunch*) and some classic literature (such as *The Red Badge of Courage*, *Titus Andronicus*, *The Iliad*). And a few games, like *Postal 2* (which is virtually the only video game mentioned in Petitioners' brief), include satire or content intended to provoke or offend – much as "transgressive" works in other media are intended to be provocative. The vast majority (82 percent) of games sold, however, are rated as suitable for children under seventeen. http://www.theesa.com/facts/index.asp.

Like other software products, video games can be purchased on a physical DVD in a store or through a website. Increasingly, games can be purchased for direct download over the Internet without obtaining a physical copy (similar to buying a song on iTunes) or played entirely online without downloading. Many games can be played online cooperatively with other players anywhere in the world, including friends, family, or new acquaintances on social network sites like Facebook. *See*, *e.g.*, Michael S. Rosenwald, *FarmVille, Other Online Social Games Mean Big Business, and Bonding*, Wash. Post, Aug. 3, 2010, at B01 (describing Facebook games and noting that "middle-age women are disproportionately represented in game use on Facebook").

B. The Video Game Industry's Rating System And Technological Controls

The video game industry has adopted a rating system to inform consumers about the content of each game. That system – which the Federal Trade Commission has called the "most comprehensive" of industry-wide media rating systems – is implemented by the Entertainment Software Rating Board ("ESRB"), an entity established by respondent Entertainment Software Association. J.A. 84. The ESRB gives one of six age-specific ratings to each game: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teen); M (Mature 17+); and AO (Adults Only 18+). J.A. 86. It also assigns content descriptors, such as "Crude Humor," "Strong Language," "Cartoon Violence," "Intense Violence," and "Suggestive Themes," among over two dozen others, J.A. 95, 878-79, and provides online ratings summaries for all titles rated since July 2008. *See* FTC, Marketing Violent Entertainment to Children 27 (Dec. 2009), *available at* http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf ("FTC 2009 Report").

The purpose of the rating system is to empower consumers and parents to make informed choices about the games they buy, rent, or play. J.A. 85. Like the movie rating system, ESRB ratings are not legally mandated, but essentially all game publishers submit their games for ratings, which are displayed on their game packages. J.A. 85-86, 89. A recent FTC report found that 87 percent of surveyed parents are aware of the ESRB ratings; of those, 73

percent use them "all," "nearly all," or "most of the time" when buying games, 87 percent are "very" to "somewhat" satisfied with them, and 93 percent find them "moderately" to "very" easy to understand. FTC, Marketing Violent Entertainment to Children 27, 29, C-18 (April 2007), *available at* http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf ("FTC 2007 Report").

All major video game retailers, and countless smaller stores, have joined in voluntary efforts to educate consumers about the ESRB system, to prevent individuals under age 17 from buying or renting games rated "M" absent parental consent, and to avoid carrying or providing to minors "AO"-rated games. J.A. 47; FTC 2009 Report at 27-28, 44. Most retailers will not sell games that have not been rated by the ESRB. *See* Entertainment Software Rating Board, Frequently Asked Questions, *available at* http://www.esrb.org/ratings/faq.jsp#2 (last visited Sept. 9, 2010). The ESRB also bars marketing of M- and AO-rated games in media where a significant portion of the audience consists of minors. FTC 2009 Report at 24.

The ESRB system has been remarkably effective. The 2009 FTC study found that "the video game industry outpaces the movie and music industries in the three key areas that the Commission has been studying for the past decade":

"(1) restricting target-marketing of mature-rated products to children;"

"(2) clearly and prominently disclosing rating information;" and

"(3) restricting children's access to mature-rated products at retail."

Id. at 30. Specifically with respect to retail sales, the FTC found that when unaccompanied mystery shoppers under 17 were sent into retail establishments to try to buy M-rated games, they were turned away 80 percent of the time. *Id.* at 28.[2] By comparison, unaccompanied minors were denied R-rated movie tickets 72 percent of the time, *id.* at 13, and were unable to purchase R-rated DVDs 46 percent of the time, *id.* at 14.

Moreover, the fact that a small percentage of minors acting as FTC mystery shoppers were able to buy M-rated games does not mean that many minors in the real world actually buy games of which their parents disapprove. The record evidence shows that parents are present during 83 percent of game purchases by minors, J.A. 87, and a more recent survey puts that figure at 92 percent, FTC 2007 Report at 29. The FTC has consistently noted the "high level of parental involvement in selecting and purchasing video games for their children." *Id.* at 28. That is not surprising, given that all but the oldest minors likely would lack the means to buy games (which typically cost in the range of $50-$60 for new titles) without their parents.

[2] The State relies on earlier (and superseded) FTC reports from 2000 and 2004, *see* Pet. Br. 57, and simply ignores the FTC's most recent reports showing that ratings are enforced by retailers the vast majority of the time and that the video game industry is at the forefront of effective ratings enforcement.

Parents also have technological tools to restrict what games their children play. The Microsoft Windows operating system and the current generation of game consoles and handheld game systems contain parental control settings that allow parents to decide what type of games may be played on them (*e.g.*, only those games rated T or lower). *See* Pet. App. 54a-55a; PTA & ESRB, *Parent's Guide to Video Games, Parental Controls and Online Safety*, at 6-9, *available at* http://www.esrb.org/about/news/downloads/ESRB_PTA_Brochure-web_version.pdf.

C. The Act

On October 7, 2005, Petitioner Schwarzenegger signed into law Assembly Bill 1179, codified at Cal. Civ. Code §§ 1746-1746.5 (the "Act"). The Act restricts the sale or rental of "violent video games" to minors and imposes a labeling requirement on them.

The Act defines a "[v]iolent video game" as one "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that meets one of two sets of criteria. *Id.* § 1746(d)(1). The first set of criteria – the only portion defended by the State – targets any depiction that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." *Id.* § 1746(d)(1)(A).

The Act requires anyone who imports into or distributes within California a "violent video game" to place a 2-inch square "18" label on the front of the game's packaging. *Id.* § 1746.2. The Act also makes it illegal for a California retailer to sell or rent a game labeled "18" to a minor under the age of 18. *Id.* § 1746.1. Violations of the labeling or retail provisions are punishable by a civil fine of up to $1,000. *Id.* § 1746.3. The Act provides an affirmative defense if a retailer can prove it relied on evidence, such as a driver's license, that the purchaser or renter was 18 or older. *Id.* § 1746.1.

According to its preamble, the Act purportedly serves two purposes: "preventing violent, aggressive, and antisocial behavior" and "preventing psychological or neurological harm to minors who play violent video games." J.A. 34-35. The Act recites "findings" that "[e]xposing minors to depictions of violence in video games" makes them "more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior," and that "[e]ven minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games." J.A. 34.

The Act is enforceable by district, county and city attorneys. Pet. App. 99a. Arguably, those who distribute or sell video games may also face suit by private citizens under Cal. Civ. Code § 1750, which authorizes suits, including class actions, to redress injuries caused by mislabeled products, providing for

awards of compensatory and punitive damages and attorneys' fees.

D. Procedural History

Respondents brought a pre-enforcement challenge alleging that the Act violates the First Amendment and is unconstitutionally vague. Pet. App. 71a. The district court entered a preliminary injunction, holding that the Act was a content-based restriction on expression that was subject to and failed strict scrutiny. Pet. App. 88a-92a. The court then granted summary judgment to Respondents. It concluded that the Act did not use the least restrictive means to accomplish its goals, and that the State's social science failed to demonstrate that the Act would further those goals in the first place. Pet. App. 60a-62a.

The Ninth Circuit affirmed. The court began by rejecting California's claim that *Ginsberg v. New York*, 390 U.S. 629 (1968), permitted government to treat violent expression as obscenity for minors. Pet. App. 20a. The court then found that the Act failed strict scrutiny. Among other shortcomings, it held that California's social science evidence about the effects of video games could not support a reasonable inference that the games were harmful to minors. Pet. App. 27a-32a. The court found that the work of Dr. Craig Anderson – the primary researcher upon whom California relies – was "significantly undermine[d]" by his own concessions about, *inter alia*, the "glaring empirical gap" in video game research. Pet. App. 28a. The court concluded that, although "we do not require the State to demonstrate

a 'scientific certainty,' the State must come forward with more than it has." Pet. App. 32a.

Further, the court found that the Act was unconstitutional because it was not the least restrictive means of furthering California's interest. The court held that California had not taken account of various means of reinforcing the industry's system of self-regulation, and had failed to address the fact that all modern video game systems contain controls allowing parents to specify what games may be played. Pet. App. 32a-33a.

SUMMARY OF ARGUMENT

1. Video games, a form of expression as rich in content as books and movies, are fully protected by the First Amendment. As with literature, art, movies, comic books, television, and theater, some video games depict violence, and those depictions are likewise wholly protected by the First Amendment. The Act restricts this protected speech based on its content. Under longstanding First Amendment doctrine, the Act is presumptively unconstitutional and subject to strict scrutiny.

2. Tacitly conceding that the Act cannot withstand strict scrutiny, California argues that "offensively violent" video games should be placed outside the protection of the First Amendment, at least as to minors. This Court recently rejected a similar argument in *United States v. Stevens*, 130 S. Ct. 1577 (2010), emphatically refusing the government's proposal that it should use ad hoc balancing to decide whether portrayals of animal cruelty are constitutionally unprotected.

California argues nonetheless that the government may restrict *minors'* access to "offensive" materials, regardless of whether those materials depict violence. But there is no free-floating state power to censor "[un]worthy" materials for minors. Pet. Br. 6. To the contrary, minors' First Amendment rights are generally coextensive with those of adults, except in narrow, well-defined circumstances not present here. California's argument is not saved by the fact that the State is purportedly acting to assist parents. That justification could justify a ban on virtually anything, including the sale of particular books to minors without parental consent. Parents certainly have the right to determine what expression they want their minor children to experience. But that parental prerogative does not give the government the right to decide what is worthy for minors to view. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000) ("The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control."). The Court should continue to put its trust in parents in the first instance, rather than politicians.

California also argues more narrowly that, under *Ginsberg v. New York*, offensive depictions of violence are not entitled to First Amendment protection as to minors. But *Ginsberg* held only that the scope of the category of sexual obscenity – already a recognized category of unprotected expression – might vary as between minors and adults. *Ginsberg* did not hold that other categories of expression, entirely protected as to adults, could

be restricted for minors. Moreover, the State's analogy to obscenity fails because depictions of violence, unlike obscenity, have played a long-standing and celebrated role in expression properly consumed by minors, from Greek myths to the Bible to *Star Wars* and *Harry Potter*. A new exception for depictions of violence would threaten access to these materials. California's assertion that it will regulate only "offensive" depictions of violence compounds the First Amendment problem, as "offensiveness" will invite viewpoint discrimination, with depictions of violence committed by malefactors rather than "good guys" being deemed offensive.

Certainly there is no evidence of a problem warranting the creation of a new First Amendment exception. California has not demonstrated that parents currently have trouble monitoring the games their children play. Nor has California shown that video games are harmful to minors. Instead, the social science research California cites has been discredited by every court to have considered it. California's studies do not show that video games are the cause of any harm or that they are any different from any other media.

In the end, California's arguments merely restate the attacks that have been mounted against every new medium as it has emerged, including the true-crime novel, motion pictures, and the Internet. In each case, the claim has been that the new medium will be destructive to minors, and in each case the Court has applied the protections of the First Amendment. Video games are no different. The

relative strength of California's purported interest in protecting minors is part of the strict scrutiny analysis, not a reason to jettison it.

3. The Ninth Circuit correctly held that the Act fails strict scrutiny. California has not shown that the Act materially addresses a specific harm that the State has a legitimate interest in targeting. Its argument that the courts should defer to predictive judgments about the impact of violent speech cannot be squared with the central premise of strict scrutiny, which is that the courts must carefully scrutinize content-based bans on speech to guard against censorship of unpopular views or subjects. California also fails to demonstrate the absence of less-restrictive alternatives for achieving its stated goals. The State ignores the industry's successful self-regulatory efforts, parents' level of involvement in game-purchasing decisions, and the availability of technological parental controls, all of which achieve the State's purported goals without government interference. And the State wholly failed to consider sponsoring its own educational campaign to reinforce existing voluntary industry efforts.

4. Finally, the Act is invalid for the independent reason that it is unconstitutionally vague. Its proscriptions – using terms such as "an image of a human being" and "appeal[ing] to a deviant or morbid interest of minors" – have no clear boundary in the context of a medium that is highly diverse and often fanciful. As a result, the law will chill a far broader array of speech than even California purports to target. Over the past century, the Court

has struck down similarly vague attempts to restrict minors' access to non-sexual books and movies. *E.g.*, *Winters v. New York*, 333 U.S. 507 (1948); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968). This law is no different.

ARGUMENT

I. Video Games, Including Those That Depict Violence, Are A Form Of Expression Fully Protected By The First Amendment.

A. Video Games Are Fully Protected Expression.

California has never contested that video games are expression entitled to First Amendment protection. No other conclusion is possible. Video games contain narrative, artwork, and music. They are "a story-laden" medium, Pet. App. 16a, and typically explore the same themes that animate books and movies. When a state seeks to regulate distribution of video games based on the events and images portrayed, strict First Amendment scrutiny presumptively applies, just as with other expressive media. *E.g.*, *Stevens*, 130 S. Ct. at 1584; *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *Playboy*, 529 U.S. at 813.

It makes no difference that video games are primarily intended to entertain. This Court has long recognized that popular expressive entertainment is entitled to full-throttled First Amendment protection. As the Court explained in striking down a New York ordinance forbidding the sale of pulp fiction and true-crime novels (or "stories of deeds of bloodshed, lust, or crime"):

> What is one man's amusement, teaches another's doctrine. 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, 333 U.S. at 510; *see also*, *e.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (following *Winters* and holding that motion pictures are fully protected by the First Amendment).

These principles apply equally to an interactive medium like video games. Indeed, if anything, the interactive aspect of video games heightens the First Amendment values at stake, because playing a game involves expressive activity not only by the game creators but by the player as well.[3] Further, as Judge Posner explained, "[a]ll literature . . . is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own." *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001)

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[3] *Amicus* Eagle Forum argues that video games are unprotected because players engage in the physical act of manipulating a keyboard or controller. But the Act regulates content, not that physical act. Many forms of expression, such as playing the violin or singing an aria, likewise require physical skill or virtuosity, but that does not give government a license to regulate their content. *See Texas v. Johnson*, 491 U.S. 397, 406 (1989) (government may not "proscribe particular conduct because it has expressive elements").

("*AAMA*"). California fundamentally distorts bedrock First Amendment principles when it suggests that video games are entitled to lesser protection because their interactivity *increases* the impact of their expression on the viewer. Pet. Br. 55. Plainly, the Government is not entitled to regulate speech on the ground that it is particularly effective at conveying its message.[4]

B. Depictions Of Violence Are Protected Expression.

Depictions of violence in video games – like all other media – are fully protected by the First Amendment. In *Stevens*, the Court powerfully reaffirmed that the First Amendment leaves unprotected only a handful of "historic and traditional categories long familiar to the bar," including "obscenity," "incitement," and "defamation." 130 S. Ct. at 1584. "'From 1791 to the present' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.'" *Id.* (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382-83 (1992)) (alterations in original).

As *Stevens* makes clear, depictions of violence have never been considered a category of unprotected expression. 130 S. Ct. at 1584-86. Unlike obscenity, depictions of violence have played a central and

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[4] Nor is there the slightest support in the social science for the claim that interactivity heightens the purportedly harmful effects of violent works. *See infra* at pp. 41-42.

celebrated role in literature – whether it be the "*Odyssey*, with its graphic descriptions of Odysseus's grinding out the eye of Polyphemus with a heated, sharpened stake, killing the suitors, and hanging the treacherous maidservants;" or "*The Divine Comedy* with its graphic descriptions of the tortures of the damned; or *War and Peace* with its graphic descriptions of execution by firing squad, death in childbirth, and death from war wounds." *AAMA*, 244 F.3d at 577; *see also* Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. Chi. L. Rev. 1857, 1866 (2007) ("[I]mages of violence are a fundamental part of our history, culture, and politics.").

California nevertheless contends that depictions of violence either are obscenity, Pet. Br. 31-33, or have historically been regulated as the equivalent of obscenity, *id.* at 33-37. Both contentions are meritless.

This Court has unambiguously held that obscenity is limited to "works which depict or describe sexual conduct." *Miller v. California*, 413 U.S. 15, 23-24 (1973); *see Cohen v. California*, 403 U.S. 15, 20 (1971) ("Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic."); *Roth v. United States*, 354 U.S. 476, 487-88 (1957); *Swearingen v. United States*, 161 U.S. 446, 451 (1896). California's citation to two 19th-century obscenity statutes referring to "vulgar" or "indecent" materials, Pet. Br. 32-33, hardly suffices to demonstrate that depictions

of violence alone can ever be obscene.[5] And the fact that some depictions of sexual obscenity may involve violence, Pet. Br. 39, does not mean that violence, standing alone, is obscene.

Nor has violence historically been regulated as equivalent to obscenity. "[T]he United States has a long history of regulating obscene expression, but it has no tradition of regulating violent speech." Stone, 74 U. Chi. L. Rev. at 1866. *See* Thomas G. Krattenmaker & L. A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 Va. L. Rev. 1123, 1199 (1978) (surveying early colonial laws, including those cited in *Roth*, and finding no evidence of prohibitions on depictions of violence).

In the 1880s some states did pass laws attempting to censor depictions of criminal behavior. But these laws, and later attempts to censor movies in the 20th century, were ultimately found to violate the First Amendment. *See Winters*, 333 U.S. at 511 (law struck down was originally passed in 1884 and had "lain dormant for decades"); *Joseph Burstyn*, 343 U.S. at 501-02; *infra* pp. 44-46. By 1948, this Court declared that the "true-crime" tales at issue in

[5] Under the common law, obscene libel was defined broadly to prohibit "whatever outrages decency and is injurious to public morals," but its application was limited to sexual matters. Frederick F. Schauer, *The Law of Obscenity* 10-11 (1976). Although California cites a smattering of pre-1880s statutes, Pet. Br. 31-33, none encompassed violent materials, as *Roth* recognized in reviewing the history of obscenity. *Roth*, 354 U.S. at 482-89.

Winters were "as much entitled to the protection of free speech as the best of literature." 333 U.S. at 510; *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (holding government may not regulate description of true crime based on content).

California cites some of these statutes in an effort to manufacture a tradition of regulation of depictions of violence. Pet. Br. 34-36. But it ignores that these laws are constitutionally unenforceable. For example, California claims inaccurately that "[e]ven today," Ohio's obscenity statute, Ohio Rev. Code § 2907.01(E)(3), defines material "[h]armful to juveniles" to include representations of "extreme or bizarre violence, cruelty, or brutality." Pet. Br. 35. But in 2002, a federal court held that language unconstitutional precisely because "the First Amendment forbids government from preventing juveniles from being exposed to depictions of violence," and the language was later removed from the statute. *Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932, 947 (S.D. Ohio 2002). Similarly, the cited Tennessee statute, which California claims bars the sale of materials containing "excess violence" to minors, had that very language invalidated by the Tennessee Supreme Court. *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 (Tenn. 1993).[6] California even cites the *preamble* of a Rhode

[6] The other cited statutes (from Pennsylvania, Michigan, and Illinois, and an earlier Ohio statute), all contain language materially identical to the statute struck down in *Winters*.

Island statute that contains no actual regulation of non-sexual violent materials. Pet. Br. 35.

In sum, with or without elements of violence, video games are as fully protected by the First Amendment as every other mode of expression.

II. The Court Should Reject The State's Unprecedented Plea To Carve Out First Amendment Exceptions For "Offensively Violent" Video Games.

Despite the foregoing, California insists that it has the authority to ban speech to minors that it deems potentially harmful. Recognizing it cannot satisfy strict scrutiny, California argues that some expression to minors, even if entirely non-sexual in content, is unprotected by the First Amendment. As in *Stevens*, the position advanced by the State here "is startling and dangerous." 130 S. Ct. at 1585.

California's argument takes a variety of forms. At times it seems to say that the government has a right to restrict any expression it finds "offensive" for minors. Pet. Br. 7. At other times, the argument seems to be limited to "offensively violent" expression. *Id.* at 9-10. And at still other times, it seems to be limited to "offensively violent" video games. *Id.* at 10-11.

We explain below why each of these three arguments fails, but it is critical to recognize the radical nature of California's position, however articulated. California asserts the power to decide that certain otherwise-protected, non-sexual content is so offensive that it is "simply not worthy of

constitutional protection" as to minors. Pet. Br. 6. But content-based restrictions are presumptively unconstitutional precisely because "opinions and judgments, including esthetic and moral judgments . . . are . . . not for the Government to decree, even with the mandate or approval of a majority." *Playboy*, 529 U.S. at 818. California thus would turn the very rationale for strict scrutiny into an excuse to avoid it.

This argument has almost no stopping point because so many expressive works contain violent depictions or other content that someone could deem offensive for minors. California, for example, has argued that a game based on the *Iliad* could perhaps be regulated if it contained only battle scenes, 9th Cir. Oral Argument at 6:12-6:33, *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002212, and cites with approval decades-old statutes barring the dissemination of true crime novels, Pet. Br. 34-35. Accepting California's position would thus justify censorship of a wide range of expressive materials by states and localities around the country, a result anathema to the First Amendment.

A. The Government Does Not Have Unfettered Power To Ban Speech To Minors.

California's arguments for rational-basis scrutiny are incorrect in principle, and not saved by California's claim that it is merely assisting parents.

1. The general rule is that "[m]inors enjoy the protection of the First Amendment." *McConnell v. FEC*, 540 U.S. 93, 231 (2003), *overruled on other*

grounds by Citizens United v. FEC, 130 S. Ct. 876 (2010). They "are possessed of fundamental rights which the State must respect" and "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 511 (1969). Minors are participants in the marketplace of ideas, and are "unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble." *AAMA*, 244 F.3d at 576-77. When Justice Jackson wrote for the Court that "if there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion," he did so to enforce the right of minors not to salute the flag at school. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 581 (2001) ("We have held consistently that speech 'cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.'" (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975)).

Thus, "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors]." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975). The school and broadcasting cases relied on by California drive the point home. Far from recognizing a boundless power to censor "offensive" material, the cases prove the rule that government

may treat expression as unworthy of protection as to minors only in special circumstances.

For example, California relies on *Bethel School District Number 403 v. Fraser*, 478 U.S. 675 (1986), which upheld regulation of lewd comments at school. But the world is not a schoolhouse, and this Court recently emphasized that *Fraser* would have come out differently had the comments been made outside of school. *Morse v. Frederick*, 551 U.S. 393, 405 (2007). The school speech cases turn on "the special characteristics of [that] environment," and do not reflect some generalized power to regulate expression for minors. *Id.* (quoting *Tinker*, 393 U.S. at 506); *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (schools may regulate some speech "even though the government could not censor similar speech outside the school"). Indeed, even in school, expression may not be censored simply because it is considered "offensive." The Court rejected that argument in *Morse*, noting that "much political and religious speech might be perceived as offensive to some." 551 U.S. at 409.

Similarly, the Court has allowed greater regulation of broadcast content to protect minors, citing concerns about the "invasive" nature of broadcasting. *See FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978). But the Court has always emphasized that the unique First Amendment treatment of broadcasting cannot be generalized to other expressive situations. *FCC v. Fox Television Stations, Inc.* 129 S. Ct. 1800, 1806 (2009); *Reno v. ACLU*, 521 U.S. 844, 869 (1997) ("[T]he Internet is

not as 'invasive' as radio or television . . . . [C]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden." (internal quotation and citation omitted)); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127-28 (1989) ("Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message.").[7] In every other context in which minors can be exposed to expression – *e.g.*, in public places, making a telephone call, watching cable television, accessing the Internet – the Court has not freely allowed the government to censor speech it deems inappropriate for minors, instead relying on parents to control access in the first instance. *See Cohen*, 403 U.S. at 16 n.1; *Sable*, 492 U.S. at 127-28; *Playboy*, 529 U.S. at 815; *Reno*, 521 U.S. at 869. Hence, the power upheld in *Pacifica* cannot be transformed into a power to censor speech to minors outside the broadcast context.[8]

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[7] One of the Court's concerns with broadcast expletives is that even fleeting, de-contextualized exposure can undermine the control that parents have over their children's exposure to certain content – that children will simply repeat words that they hear. *See Fox Television,* 129 S. Ct. at 1812-13. That concern does not exist with video games, which have no similar short-term effect and which parents are effectively able to monitor. *Infra* at pp. 36-37.

[8] California's recitation of cases involving minors outside the First Amendment context is not relevant, because these cases do not remotely suggest that minors may lose all of their First Amendment rights. Pet. Br. 22-28. Any special interest that government has in protecting minors can and must be factored

2. California protests it is acting only to assist parents, Pet. Br. 22, but that is no answer. Any restriction on disfavored content could be rationalized in that way.

It is undisputed that parents have the right to determine the materials and viewpoints to which their children should be exposed. It does not follow, however, that *government* may determine in the first instance which expression is "worthy" of protection.[9] The First Amendment leaves "these judgments . . . for the individual to make, not for the Government to decree." *Playboy*, 529 U.S. at 818; *see also R.A.V. v. St. Paul*, 505 U.S. 377, 394 (1992) (government may not "handicap the expression of particular ideas"); *Barnette*, 319 U.S. at 642 (government may not decide what is orthodox for minors).[10]

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into the strict scrutiny analysis; it is not a reason to treat expression as unprotected altogether.

[9] The two cases that California invokes to justify its "helping parents" rationale do not support its position. In both cases, the Court struck down compulsory education laws on the ground that government could not *interfere* with parental prerogatives to educate their children. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 229-31 (1972). That is an entirely different proposition than allowing government to regulate protected expression in the guise of helping parents.

[10] For the same reason, California is off the mark when it seeks to justify the Act based on the fact that Respondents have chosen to rate video games and to encourage retailers to enforce the rating. Pet. Br. 45. That is not an invitation for the government to impose its own speech regulations. *Playboy*, 529 U.S. at 817.

California also makes the remarkable assertion that it will be giving "offensive" materials the "imprimatur of societal approval" unless it censors them. Pet. Br. 41. That argument gets the First Amendment backwards. Government cannot restrict protected expression to ensure that it lacks the "imprimatur of societal approval." Such regulation distorts the marketplace of ideas in just the way the First Amendment forbids. Only individuals (and parents), not the government, are entitled to decide which expression is worthwhile. *See Playboy*, 529 U.S. at 817-18.

That is especially true because so many different forms of expression are considered inappropriate for minors by at least some parents. For example, many parents are opposed to their minor children reading classic works of American literature like *The Adventures of Huckleberry Finn* because of racial epithets in that book. *See* Dan Cryer, *Why Is Huck So Controversial?*, Newsday, Oct. 15, 1996, at A33; *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1029-30 (9th Cir. 1998). Others object to discussions of evolution or, conversely, of creationism. *See, e.g.*, Michael Winerip, *Evolution's Lonely Battle in a Georgia Classroom*, N.Y. Times, June 28, 2006, at B9. Still others sincerely believe that popular works like the *Harry Potter* series should be off limits because they celebrate a perceived pagan worldview. *See* Holly Kurtz, *Harry Potter Expelled from School*, Denver Rocky Mountain News, Nov. 6, 1999, at 6A. That does not mean a legislature could require some or all of these

works to be kept in the "adults only" section of bookstores.

Ultimately, when government regulates expression in the name of assisting parents, it usurps their role and favors the preferences of some parents over those of others. That is simply another presumptively impermissible form of censorship, and it is a reason to apply strict scrutiny, not to bypass it.

B. California's Claimed Right To Censor "Offensively Violent" Expression Directed At Minors Is Historically Baseless And Constitutionally Improper.

At times, California backs away from claiming the right to regulate offensive material generally and instead asserts the right to regulate the supposedly distinct category of "offensive violence." But that narrower approach is still fundamentally contrary to the established First Amendment framework, as reiterated in *Stevens*.

1. California's categorical exception argument relies primarily on *Ginsberg*, which California would extend beyond graphic sexual portrayals to include violent expression. But *Ginsberg* dealt only with a preexisting and traditional category of unprotected expression: obscenity. The Court reasoned that the standard for what constitutes obscenity may be somewhat broader for minors because minors approach sexual material differently on account of their age. Consequently, *Ginsberg* "adjust[ed] the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interest. . .' of such

minors." 390 U.S. at 638 (citation omitted). It was on that basis that the Court applied rational-basis review to materials falling within the definition of obscenity for minors. *Id.* at 639, 643.[11]

Ginsberg expressly disclaimed any holding beyond obscenity. *Id.* at 636-37 ("We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State."). And its treatment of the boundaries of obscenity cannot be read to authorize the creation of *new* categories of unprotected expression to minors. The power to regulate obscenity is not a license to regulate depictions of violence, or any other form of protected expression. *Stevens*, 130 S. Ct. at 1586 (there is no "freewheeling authority to declare [what is] outside the scope of the First Amendment"). California's attempt to derive that power from *Ginsberg* is just a variant of the United States' "startling and dangerous" claim in *Stevens* that any expression can be regulated provided that the government finds it to be sufficiently valueless. *Id.* This Court should reject that notion here just as it did in *Stevens*.

2. Moreover, California's attempt to equate portrayals of violence with sexual materials ignores an important reality: violence, unlike explicit descriptions of sex, is a central feature of expression intended for minors. Eliminating depictions of

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[11] *Ginsberg* also noted the legislature's interest in helping parents monitor their children's access to sexual materials, but only after concluding that the materials were obscene as to minors and applying rational-basis review. *Id.* at 639.

sexual obscenity from children's literature would hardly require any revision because they are so rare; in contrast, eliminating depictions of violence, even extreme violence, would require dramatic change. *AAMA*, 244 F.3d at 578 (depictions of sex, as opposed to depictions of violence, are "an adult invasion of children's culture").

To take just a few examples, *Hansel and Gretel*, one of Grimms' Fairy Tales, recounts how children murder a witch by locking her in a burning oven. Jakob Grimm & Wilhelm Grimm, *Grimms' Tales for Young and Old* 56 (Ralph Manheim trans. 1977) ("*Grimms' Tales*"). *Snow White*, another of the Tales, ends with the evil Queen being forced to wear red-hot iron shoes until she dies from pain. *Id.* at 184. The Greek myths and Ovid's *Metamorphoses*, long fixtures of high school humanities classes, contain violence of the harshest variety.[12] And of course the Bible includes some of the most famous

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[12] Consider this passage from the *Metamorphoses*:

> The princess willingly her throat reclin'd,
> And view'd the steel with a contented mind;
> But soon her tongue the girding pinchers strain,
> With anguish, soon she feels the piercing pain: . . .
> In vain she tries, for now the blade has cut
> Her tongue sheer off, close to the trembling root.
> The mangled part still quiver'd on the ground,
> Murmuring with a faint imperfect sound: . . .
> The piece, while life remain'd, still trembled fast,
> And to its mistress pointed to the last.

Ovid, *Story of Tereus, Pronce, and Philomela in Metamorphoses*, Bk. VI, 187 (John Dryden *et al.* trans., Harper & Bros. ed. 1872)

depictions of violence in Western culture. *E.g., Judges* 16 (Samson's decimation of the Philistines); 1 *Samuel* 17 (David slays Goliath and cuts off his head).

Contemporary tales for children are no less violent. Generations of children have watched violent movies like *Star Wars* and *Lord of the Rings* (and Westerns and serials before that). Harry Potter witnesses the violent death of his teacher, Dumbledore, at the hands of so-called "Death Eaters." J.K. Rowling, *Harry Potter and the Half-Blood Prince* (2005). Likewise, William Golding's *Lord of the Flies* (1954), which depicts torture and killing *by children*, is commonly assigned in middle and high school because it deals with social impulses towards violence.

California's claim that depictions of violence should be treated like sexual obscenity thus fails not only because it would impermissibly create a new category of unprotected expression, but also because the expression at issue is a recurring theme in works for minors.

3. California argues that it seeks to regulate only "offensive" violence, but that hardly solves the First Amendment problem. As explained above, it is not the government's role to determine which expression is sufficiently offensive to be unworthy of First Amendment protection. *See supra* Part II.A; *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002) ("It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities."); *Simon & Schuster*, 502

U.S. at 118 (government has no legitimate interest in "suppressing descriptions of crime out of solicitude for the sensibilities of readers"); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression.").

If anything, the government's targeting of "offensive" depictions heightens the First Amendment problem. The clear risk is that disapproval of specific viewpoints will become a proxy for what is offensive – "the censor is set adrift upon a boundless sea . . . with no charts but those provided by the most vocal and powerful orthodoxies." *Joseph Burstyn*, 343 U.S. at 504-05. And that risk is not lessened because minors are involved. *See Interstate Circuit*, 390 U.S. at 688 (striking down law restricting speech to minors where "[t]he only limit on the censor's discretion is his understanding of what is included within the term 'desirable, acceptable, or proper" (quoting *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 701 (1959) (Clark, J., concurring in result)).

The briefing in this case illustrates the danger. California and its *amici* focus considerable attention on a single game, *Postal 2*. But as the Ninth Circuit observed, it is impossible to assess the entirety of *Postal 2* based on the few snippets of game play submitted by California. Pet. App. 9a-10a. In fact, *Postal 2* is a satire that was designed to be "over the top" and offensive to mainstream sensibilities. Regardless, what is obviously motivating California's attacks on *Postal 2* is not its level of violence – as

compared, for example, to the game *Medal of Honor's* portrayal of the landing on Omaha Beach. The differentiating factor is the game's *message*, *i.e.*, the fact that the protagonist may behave criminally rather than heroically, while uttering racist and sexist comments. *Cf. R.A.V.*, 505 U.S. at 394. The conduct and views expressed in the *Postal 2* excerpts submitted by California may be offensive, but they do not justify a new exception to the First Amendment that would allow the government to pick and choose among portrayals of violence using criteria that virtually guarantee viewpoint discrimination.

C. There Is No Support For The Claim That Minors' Access To Violent Video Games Is A Significant Societal Problem Justifying Exempting Them From Constitutional Protection.

California does no better when it focuses specifically on violent video games as the target of needed regulation. In fact, its efforts to show that there is a significant social problem meaningfully addressed by the Act are fruitless.

First, California's emphasis on assisting parents, while allowing them to make final choices about the games their children will play, means that the State has no regulatory interest unless parents are in fact experiencing difficulty monitoring their children and making those choices. But California has not even attempted to make such a showing. And the facts show otherwise.

Second, the evidence that video games cause any real harm to minors is paltry at best. The research cited by California has been resoundingly rejected by every court to have looked at it, and it both underproves and overproves the State's claims: it does not show that video games cause actual harm to minors, and it purports to find the same measured effects for a wide array of stimuli, including games designed for small children, television cartoons, or even a picture of a gun. If evidence of this sort were sufficient to justify treating expression as unprotected, the First Amendment would mean very little.

Third, history teaches that every new form of media is met with concern that it will undo the youth of the nation. Pulp novels, movies, and the Internet have all been subject to similar attempts at censorship, complete with purported social science support. In each case, this Court has refused to take the "starch" out of strict scrutiny review, and has treated the regulations as presumptively unconstitutional. *Ashcroft*, 542 U.S. at 670; *Playboy*, 529 U.S. at 830-831 (Thomas, J., concurring). California's request for special dispensation for video games should be similarly rejected.

1. California Has Failed To Show That Parents Need Government Involvement In Monitoring The Video Games Their Children Play.

California has eschewed any interest in preventing minors from playing violent games that their parents have purchased or approved. And it

offers no evidence of a serious problem with minors secretly disobeying their parents in this area. As noted above, nearly all video games played by minors are purchased for them *by their parents*. *Supra* at p. 9. The exceptions presumably are confined to the oldest minors who have the necessary funds and the ability to get to stores without their parents. Even in those exceptional cases, minors are not necessarily attempting to buy games that would qualify as "violent video games" under the Act, nor are they necessarily acting without parental permission. And even when they attempt to do so, assuming the games are rated "M," the sale most likely will not go through because of voluntary retailer enforcement of the ESRB rating system.

Moreover, to cause the harm California claims, the very few "violent video games" clandestinely purchased by minors would have to be played over an extended period of time, providing further opportunity for parental supervision. And those games may be played on consoles, PCs, or handheld devices with technological controls that parents can enable to prevent such games from being played in their absence. *Supra* at p. 9. In sum, there are ample opportunities for parents to intervene if they so choose.

2. California Has Also Failed To Show That Violent Video Games Are Harmful To Minors.

California has vacillated as to precisely what harm it claims is at issue. Although the Act's preamble speaks of a need to prevent "violence" by

minors, California has largely disclaimed a violence-prevention rationale, presumably because video games could not possibly be viewed as "incitement" as defined in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Instead, California focuses on a more amorphous harm – causing increased "aggressive thoughts and behavior" in minors. Pet. Br. 3, 42-45.

However the harm is defined, California has failed to demonstrate that it exists. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists closely affiliated with him. *See* J.A. 122-27, 133-43 (article bibliography from Legislature). Dr. Anderson testified before a district court considering a challenge to a similar law in Illinois, and his testimony is in the record here. J.A. 1206-1339. The Illinois district court, along with every court to have considered Dr. Anderson's and similar research, concluded that the research does not show that violent video games are harmful to minors in any material way. *See Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1063 (N.D. Ill. 2005), *aff'd*, 469 F.3d 641 (7th Cir. 2006); *see also* Pet. App. 63a-64a (district court below); *AAMA*, 244 F.3d at 578-79; *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 958-59 (8th Cir. 2003); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 832-33 (M.D. La. 2006); *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065, 1070 (D. Minn. 2006), *aff'd*, 519 F.3d 768 (8th Cir. 2008); *Entm't*

Software Ass'n v. Granholm, 426 F. Supp. 2d 646, 653 (E.D. Mich. 2006).[13]

As the Ninth Circuit described in detail, there are numerous flaws with these studies. *First*, most of the studies do not even attempt to prove that video games cause minors to act aggressively. Instead, they attempt to establish a correlation by asking participants to describe their level of aggressive behavior and also their frequency and degree of exposure to violent video games. Some studies have found a small degree of correlation between preference for violent games and aggressive personal behavior – though many other studies have not. *See* J.A. 1487, 1493-1504, 1507-10.[14] The problem with

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[13] Dr. Anderson has made public statements about the effects of video games that go much further than his own peer-reviewed publications. For example, as the *amicus* brief of Senator Yee *et al.*, notes, at 10 & n.5, Anderson testified before a congressional committee in 2000 that "video games can cause increases in aggression and violence." That same year he published an article saying the "research to date on video game effects is sparse and weak," J.A. 147, and four years later he published another article pointing to a "glaring empirical gap" in video game research – the absence of the kind of longitudinal studies that can provide information about causation, J.A. 596.

[14] Since the district court's decision in this case, the number of studies finding no correlation has continued to grow, in part as a response to the flawed methodologies in the studies relied on by the State. *See, e.g.*, Christopher J. Ferguson *et al.*, *Violent Video Games and Aggression: Causal Relationship or Byproduct of Family Violence and Intrinsic Violence Motivation?*, 35 Criminal Justice and Behavior 311 (2008); Christopher J. Ferguson *et al.*, *A Multivariate Analysis of Youth Violence and Aggression: The Influence of Family, Peers, Depression and Media Violence*, 155 J. of Pediatrics 904 (2009).

even those studies finding some correlation is that "it is impossible to know which way the causal relationship runs: it may be that aggressive children may also be attracted to violent video games." *Blagojevich*, 404 F. Supp. 2d at 1074. This shortcoming is conceded even by the studies in the record. *See, e.g.,* J.A. 632-33, 638, 706, 1052-53.[15]

Second, the experimental studies cited by California are no more compelling. The cited experiments have participants play either a violent or a non-violent game and then seek to determine if they are feeling more aggressive in the next few minutes, using various proxies. For example, Dr. Anderson relies on "sound blast" studies, which measure the length or decibel level of a noise blast that a participant administers to a fake opponent immediately after playing different video games.[16] There is no evidence that these miniscule sound blast differences translate into any real-world effects. J.A. 1506-07. In fact, many experimental studies

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[15] For example, California highlights the Gentile *et al.* (2004) study. Pet. Br. 56. But the authors *explicitly* disclaimed any showing of causation in the study itself. J.A. 632-33. Further, the correlations in the study are weak, and when gender is taken into account, the correlation between violent video game exposure and physical fights or arguments with teachers is essentially zero. *See* Christopher J. Ferguson, *Media Violence Effects: Confirmed Truth, or Just Another X-File?*, 9 J. of Forensic Psychology Practice 103, 110 (2009).

[16] Other studies measure aggression by examining the letter a participant fills in to complete a word (*i.e.*, H_T could be "HIT" or "HAT"), Pet. Br. 53 – another poor proxy for actual aggression. J.A. 1490-92.

may be measuring excitement from playing the game, rather than aggression. J.A. 1414-16; *see* Christopher J. Ferguson *et al.*, *Violent Video Games, Catharsis Seeking, Bullying, and Delinquency: A Multivariate Analysis of Effects*, 56 Crime & Delinquency 1, 3 (2010).

Third, Dr. Anderson and his colleagues have published a series of "meta-analyses," which combine these unpersuasive experimental and correlational studies together and calculate an overall effect size. But combining flawed studies does not make the flaws go away. J.A. 1147, 1429-30, 1517-18; *see also* Matthias Egger *et al.*, *Uses and Abuses of Meta-Analysis*, 1 Clinical Medicine 478, 480 (2001). Moreover, some meta-analyses show little to no effect from video game exposure, and one found a negative relationship between the amount of video game play and aggression. J.A. 1430, 1508. The Anderson meta-analyses have also been criticized for excluding studies that show no effect (and thus likely do not get published) and including studies that do not control for other variables like gender. *See* Christopher Ferguson *et al.*, *Violent Video Games and Aggression: Causal Relationship or Byproduct of Family Violence and Intrinsic Violence Motivation?*, 35 Criminal Justice and Behavior 311 (2008).

Fourth, even taking the "effect sizes" claimed by Dr. Anderson *et al.* at face value, they are both very small and no different from the results produced in studies of other media. Pet. App. 64a; *see, e.g.*, *AAMA*, 244 F.3d at 579; *Blagojevich*, 404 F. Supp. 2d at 1063; *Hatch*, 443 F. Supp. 2d at 1070. There is

thus no support for the claim that video games, because they are interactive, somehow cause more significant problems than other media. In fact, Dr. Anderson conceded in his Illinois testimony that the "effect sizes" for television and video game "violence" are essentially the same. J.A. 1263. He also admitted that the increases in "aggression" he purported to measure would also result from a "very large number" of stimuli other than video games. J.A. 1315-16; *see also* J.A. 1511-12. Further, many of the sources cited by California, including the 2000 joint associational statement, *see* Pet. Br. 44, concern media violence generally rather than any particular harm associated with video games.[17]

Fifth, the credibility of Dr. Anderson's findings is further undermined by his statements that even playful images of violence such as those found in Bugs Bunny cartoons or E-rated games create the same "effect" sizes as more violent video games. J.A. 1270, 1304, 1313-15. Dr. Anderson admits that even *viewing a picture of a gun* has the same aggressive effect as playing a violent video game. J.A. 1315-16, 150. And one of his fellow researchers claims to find nearly identical links between aggressive behavior and *reading violent passages in the Bible*. *See* Brad J. Bushman *et al.*, *When God Sanctions Killing: Effect of Scriptural Violence on Aggression*, 18

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[17] That statement has been widely criticized by social scientists who are members of those very organizations for overstating the findings of the studies and failing to reflect any sort of member consensus. *See, e.g.*, Jonathan L. Freedman, *Media Violence and Its Effect on Aggression: Assessing the Scientific Evidence* 8-21 (2002).

Psych. Science 204, 206 (2007) (purporting to find "compelling evidence that exposure to a scriptural depiction of violence or to violence authorized by deity can cause readers to behave more aggressively"); J.A. 137-39 (legislative history citing Dr. Bushman's studies). Thus, the research does not justify focusing on only some subset of video games or any media. If the social science is to be believed, virtually any form of "violent" expression could be suppressed in the name of avoiding the marginal increases in aggressive thinking and behavior the State supposedly targets here.[18]

3. Instead Of Identifying A True Harm To Minors, California Is Repeating The Same Failed Arguments That Have Been Used In The Past To Attack New Forms Of Expression.

Rather than identifying a true harm to minors, California is replaying attacks that have been launched against new forms of media going back many decades. California's concerns that video games are different or dangerously "realistic," Pet. Br. 43, echo historical concerns raised about other new media that we now view as unwarranted.

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[18] The Legislature also made a finding that playing violent games makes it more likely that a person will experience "a reduction of activity in the frontal lobes of the brain," relying on research from the University of Indiana. J.A. 34, 1452. One of those researchers testified in the Illinois trial, however, leading the judge to find that "there is barely any evidence at all, let alone substantial evidence" of this supposed effect. *Blagojevich*, 404 F. Supp. 2d at 1074; *see* J.A. 1475-76.

For example, the 19th-century true-crime novel was claimed to cause emulation by young delinquents. Noted morals crusader Anthony Comstock wrote:

> The leading characters are youthful criminals, who revel in the haunts of iniquity . . . . Read before the intellect is quickened or judgment matured sufficient to show the harm of dwelling on these things, they educate our youth in all the odious features of crime . . . . What is the result? . . . . Our Court rooms are thronged with infant criminals – with baby felons.

Anthony Comstock, *Frauds Exposed; or How the People Are Deceived and Robbed, and Youth Corrupted* 437 (1880).

By the middle of the 20th century, the dime novel was thought relatively tame, but the comic book was seen as a new danger. *E.g.*, Sterling North, *A National Disgrace (And a Challenge to American Parents)*, Chi. Daily News, May 8, 1940, at 21 ("The old dime novels . . . were classic literature compared to the sadistic drivel pouring from the presses today. Badly drawn, badly written and badly printed – a strain on young eyes and young nervous systems – the effect of these pulp-paper nightmares is that of a violent stimulant." (*quoted in* David Hajdu, *Ten-Cent Plague: The Great Comic-Book Scare and How It Changed America* 40-41, 44 (2008), which notes that the article was reprinted in dozens of newspapers)). Highly publicized Senate Committee hearings highlighted the testimony of prominent psychiatrist

Frederic Wertham, linking comic books to juvenile delinquency. *Juvenile Delinquency (Comic Books): Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary,* 83d Cong., 2d Sess. 79-96 (1954).

Movies have also been a focus of criticism, with the State of New York arguing to this Court in *Joseph Burstyn* that film presented a special danger to youth.

> [T]he vibrant, vivid, graphic portrayal in a motion picture has an impact that the lecturing voice of a speech, the cold type of the written page, the still picture in a magazine does not. Add to that the setting in which the movie is viewed – the darkened theatre, the relaxed receptive mood, the complete concentration on the presentation, the company of a sizable or even vast audience, all simultaneously silently focusing on the screen. Add also the vast numbers which the motion pictures reach . . . made up of men and women together, of teen age boys and girls together, of adolescent boys and girls together, and of children.

Brief of Appellee at 41, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (No. 522), 1952 WL 82542.

This Court rightly rejected that argument, holding that "[e]ven if one were to accept" "that motion pictures possess a greater capacity of evil . . . it does not follow that [they] should be disqualified from First Amendment protection." *Joseph Burstyn*,

343 U.S. at 780. Today, the argument that depictions of violence in novels, comic books or movies should be deprived of First Amendment protection as to minors is untenable. Social science pronouncements theorizing great harm from these now-familiar media seem implausible. *See, e.g.,* Brandon S. Centerwall, *Television and Violence: The Scale of the Problem and Where to Go From Here,* 267 J. of Am. Medical Ass'n. 3059, 3061 (1992) (a much-publicized and later much-criticized article using comparison of U.S. and South Africa to "demonstrate" that minors' exposure to television in 1950s and 1960s was responsible for a doubling of violent crime in the U.S.); J.A. 265 (Anderson *et al.* acknowledging that Centerwall failed to consider "other factors that might have influenced national crime rates at the same time").

Video games are no different. Minors do not mimic the scenarios they observe in video games any more than they do with comic books. *See AAMA*, 244 F.3d at 578-79; J.A. 1518. They may engage in play based on video games, just as they have done with fantasy literature for ages, *cf.* Sharon Otterman, *At Camp, Make-Believe Worlds Spring Off The Page*, N.Y. Times, July 16, 2010, at A1, but that is not the same thing as engaging in violent or anti-social behavior. J.A. 1489.

The reality is that 67 percent of all American households now play video games. Since the emergence of graphically violent games 15 years ago, juvenile violent crime has *declined precipitously*. *See* Bureau of Justice Statistics*, Key Facts at a*

Glance, http://bjs.ojp.usdoj.gov/content/glance/offage.cfm (last visited Sept. 9, 2010). California should not be given free rein to regulate protected expression based on unfounded, and largely outmoded, fears.

III. THE ACT FAILS STRICT SCRUTINY.

As the Court of Appeals correctly held, the Act cannot survive strict scrutiny. Strict scrutiny requires that California articulate a compelling state interest, prove that the Act actually serves that interest and is "necessary" to do so, and show that the Act is narrowly tailored to serve that interest. *R.A.V.*, 505 U.S. at 395. California bears the burden of proof on each point, *see Playboy*, 529 U.S. at 818, and it cannot come close to carrying its burden.[19]

A. California Cannot Show That The Act Materially Advances A Compelling Interest.

1. California fails to show an actual harm to minors that the Act materially addresses. Some of its claimed goals are illegitimate: although the government has a compelling interest in protecting the well-being of minors, California does *not* have a compelling interest in shielding minors from constitutionally protected expression that it deems

[19] The analysis below shows the Act would in fact fail to satisfy *any* form of heightened scrutiny, including intermediate scrutiny. The Act lacks a legitimate purpose, fails to "materially advance" its stated goals, and is more extensive "than necessary to serve the interests that support it." *Lorillard Tobacco*, 533 U.S. at 555-56 (quotation marks omitted).

offensive. *Supra* Part II.A-B. And to the extent that California seeks to regulate *conduct* resulting from expression, it must show that the regulation satisfies the *Brandenburg* standard, which it plainly does not. *See Brandenburg,* 395 U.S. at 447 (incitement limited to expression both intended and likely to cause imminent lawlessness).

California also focuses on preventing psychological injury to minors. However, as discussed above, California does not show a significant problem of minors playing violent video games without parental knowledge or approval, and its evidence of supposed harm to minors from playing such games is not credible. *Supra* Part II-C.

California claims that the Ninth Circuit improperly imposed a "heightened standard of proof requirement." Pet. Br. 48.[20] But the court merely applied the usual rigorous strict-scrutiny requirements, which would mean little if the State did not have to prove that the law actually addressed a specific harm. *See R.A.V.*, 505 U.S. at 382; *Playboy*, 529 U.S. at 813. For example, in *Playboy*, the Court closely scrutinized government evidence of "signal bleed" in sexually explicit programming,

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[20] California claims that experiments in support of its case would be "intrusive, unethical, and possibly illegal," but that concern is misplaced. Pet. Br. 56. Each day, millions of adults and minors play games depicting violence. The social science researchers cited by California regularly have children play violent games they claim cause aggressive effects. J.A. 1506-10. California's problem is not that harm is impossible to show under strict scrutiny, it is that there is no harm to be shown.

citing the lower court's finding that the government had "presented no evidence on the number of households *actually* exposed to signal bleed and thus has not quantified the *actual extent* of the problem of signal bleed." 529 U.S. at 820 (emphasis added; quotation omitted). The Court made clear that "the Government must present more than anecdote and supposition. *The question is whether an actual problem has been proved in this case*." *Id*. at 822-23 (emphasis added); *see also Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010) (requiring proof that expenditures actually lead to or create appearance of *quid pro quo* corruption); *Free Speech Coalition*, 535 U.S. at 250, 253 (rejecting argument that virtual child pornography caused actual child abuse in part because the "causal link is contingent and indirect" and holding that government must show "a significantly stronger, more direct connection").

Unable to defend the evidence on its merits, California instead asks the Court to adopt a deferential approach to "legislators' predictive judgments of harm," essentially allowing the legislature to review a diverse array of social science studies and decide which ones to credit. Pet. Br. 48. Tellingly, California cites no strict-scrutiny cases here, and its plea for a lower burden of proof cannot be reconciled with that level of judicial review. *See Playboy*, 529 U.S. at 820; *Landmark Commc'ns, Inc. v. Virginia,* 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"); *Sable*, 492 U.S. at 129 ("[W]hatever deference is due legislative findings would not foreclose our independent

judgment of the facts bearing on an issue of constitutional law.").

California argues that this Court's decision in *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 665 (1995), requires "substantial deference" to the State's "predictive judgment" that certain violent video games cause harm to children. Pet. Br. 48-56. But that is wrong. To begin, *Turner* involved content-neutral regulations of speech, and thus the Court applied intermediate, not strict, scrutiny. 512 U.S. at 661-62.

Moreover, the regulations in *Turner* involved a "regulatory scheme[] of inherent complexity" and required Congress to make "assessments about the likely interaction of industries undergoing rapid economic and technological change." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997). Given this context, it is no surprise that the Court was willing to defer somewhat to Congress's "*predictive* judgments when enacting nationwide *regulatory* policy." *Id.* (emphasis added). This case is not comparable. A court is at least as well suited as a legislature to determine whether social science or any other evidence points to an "actual problem," *Playboy*, 529 U.S. at 822-23, that the restriction addresses.

This Court's decision in *Fox Television* also does not support the State's call for deference. That case did not address the First Amendment claims at all and, instead, applied the deferential arbitrary-and-capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *See Fox Television*, 129 S.

Ct. at 1811-12; *see also supra* at pp. 26-27 (discussing unique issues with broadcast regulation). *Fox* did not purport to weaken strict scrutiny and allow government to ban speech based on its content without proof of actual harm.

2. The Act fails under the material advancement prong for another reason: violent video games represent only "a tiny fraction of the media violence to which modern American children are exposed." *AAMA*, 244 F.3d at 579. California has singled out video games even though a broad set of media contain similar depictions of violence. Its *own evidence*, taken at face value, indicates that the effect of exposure to violent video games is the same as exposure to other media containing violence. *Supra* at pp. 41-42. But while the Act might ban a 16-year-old from buying or renting Tom Clancy's *Rainbow Six 3* video game, it would still allow him to buy or rent Tom Clancy's movies or books.[21] This selective treatment of similar speech underscores that California's ultimate purpose in enacting the law was to target and punish a disfavored speaker, rather than achieve its asserted purpose. *See, e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

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[21] In addition, the Act apparently does not apply to games that are acquired or played online. If not, then it is underinclusive for that additional reason, and is likely to become nearly useless in a few years. On the other hand, any effort to regulate access of minors to violent games online would raise the same kinds of problems that have limited regulation of sexual content on the Internet. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004); *Reno v. ACLU*, 521 U.S. 844 (1997).

B. The Act Is Not Narrowly Tailored.

The Act fails strict scrutiny for the additional reason that it threatens to censor a wide range of fully protected expression. Even if there were some subset of extreme depictions of violence that could be restricted as to minors – which California has not come close to showing here – the Act's sweep is so broad that it would reach a huge range of expression that has never been thought inappropriate for minors. *See Stevens*, 130 S. Ct. at 1592 (striking down animal crush video ban because even if depictions of "extreme animal cruelty" could be constitutionally regulated, the law in question reached other, protected depictions). This significant overbreadth necessarily means that the Act is not narrowly tailored.

The Act's overbreadth is most clear in the case of 17-year-olds. Because the Act prohibits the sale of games that are offensive to "minors," a game deemed "offensive" to a very young minor presumably must be labeled with an "18" sticker and restricted from sale to an older minor. The one-size-fits-all system thus draws no distinctions between a 17-year-old and a pre-schooler, in contrast to the ESRB system. Even California's brief does not go so far as to claim an interest in shielding 17-year-olds from exposure to descriptions and portrayals of warfare (historical and contemporary) and violent crime in the days or weeks before they become eligible to vote and enlist in the military. That is another reason for striking down the Act. *Cf. Reno*, 521 U.S. at 875 (holding

that the government cannot restrict speech for adults based on what is appropriate for young children).

C. The Act Is Not The Least-Restrictive Means Of Accomplishing California's Goals.

California also fails to carry its burden of proving that no less-restrictive alternatives exist for achieving its stated goals. *Playboy*, 529 U.S. at 823-24; *Ashcroft*, 542 U.S. at 670.

1. As the courts below noted, California failed to show that current voluntary ESRB ratings efforts are ineffective, much less to consider whether an educational campaign reinforcing them would be a better alternative than outright suppression of speech. In fact, the current self-regulatory regime is highly effective at limiting sales to minors, and the FTC studies show both that parents are involved in monitoring what video games their children buy and play, and that they understand and utilize the ESRB rating system. *Supra* at pp. 7-9. California has not remotely met its burden to show otherwise. *Playboy*, 529 U.S. at 824 ("A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.").

California also has ignored the availability of technological solutions that enable parents to limit a child's access to video games based on the intensity and amount of violent content they contain, thereby enhancing parental supervisory authority. *Supra* at p. 9. Filtering at the console level affords far more precision than even Internet filtering systems that the Court has identified as less-restrictive means of

protecting minors from inappropriate content. *See Ashcroft*, 542 U.S. at 668-69; *see also Playboy*, 529 U.S. at 815 ("[s]imply put, targeted blocking is less restrictive than banning"). California suggests that clever children may be able to disable the controls, Pet. Br. 58, but provides no evidence to support this suggestion and carry its burden. *See* 542 U.S. at 669; *Playboy*, 529 U.S. at 824; *Sable*, 492 U.S. at 130-31; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (1996) (plurality) (identifying less-restrictive alternatives, such as an "educational campaign" or "counterspeech").

2. The Act supplants a uniform and familiar voluntary rating system, which provides information to adults and draws distinctions among minors of different ages, with a novel and unpredictable standard that cannot be interpreted in advance. J.A. 48. Indeed, California's "18" label may physically obscure some of the ESRB ratings and content information on game packaging, and will create consumer confusion regarding the existing ratings. J.A. 47-48. The Act will therefore have the perverse effect of undermining the quality and availability of information currently provided to parents and minors about game content.

Moreover, the Act could result in self-imposed restrictions on the game content made available to adults. A retailer who faces substantial civil penalties in the event that a clerk intentionally or negligently sells a proscribed game to a minor may simply not carry the game in the first place. Likewise, video game creators will be induced to

create games that do not contain expression that risks running afoul of the Act, further narrowing the range of expression available to adults. J.A. 63-64. And that problem will only worsen as other states and localities pass their own laws with their own proscriptions and different terminology to describe the games being regulated.

IV. THE ACT IS UNCONSTITUTIONALLY VAGUE.

The Act is unlawful for an independent reason: it is unconstitutionally vague and will broadly result in the chilling of protected speech. The Act is therefore unacceptable under the First Amendment and Due Process Clause.

A. This Court Has Repeatedly Struck Down As Vague Statutes That Purport To Regulate Offensive Expression.

Restrictions on protected expression must be clear in their scope to comply with the First Amendment. *See Reno*, 521 U.S. at 871-72 (the vagueness of a "content-based regulation of speech . . . raises special First Amendment concerns because of its obvious chilling effect on free speech"); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967). Thus, the Court has frequently struck down on vagueness grounds speech bans aimed at protecting minors, recognizing that:

> [i]t is essential that legislation aimed at protecting children from allegedly harmful expression – no less than legislation enacted with respect to adults – be clearly drawn and that the standards adopted be reasonably

> precise so that those who are governed by the law and those that administer it will understand its meaning and application.

Interstate Circuit, 390 U.S. at 689 (quotation omitted; alterations in original); *see also Winters*, 333 U.S. at 518-19; *Joseph Burstyn*, 343 U.S. at 497, 504-05 (striking down restriction on "sacrilegious" film). Indeed, in *Interstate Circuit*, 390 U.S. at 683, the Court described a long line of cases striking down as unconstitutionally vague attempts by states and localities to classify and restrict films. *E.g.*, *Gelling v. Texas*, 343 U.S. 960 (1952) (per curiam); *Superior Films, Inc. v. Dep't of Educ. of Ohio*, 346 U.S. 587 (1954); *Commercial Pictures Corp. v. Regents of Univ. of N.Y.*, 346 U.S. 587 (1954) (per curiam); *Holmby Prods., Inc. v. Vaughn*, 350 U.S. 870 (1955) (per curiam).

The law struck down in *Winters* was aimed at books containing "criminal news or stories of deeds of bloodshed, or lust, so massed as to become vehicles for inciting violent and depraved crimes." 333 U.S. at 518. The legislature expressed the same kinds of concerns that California asserts here – that provocative descriptions of true crime would be psychologically harmful and stimulate destructive behavior by minors. *See id.* at 529-31 (Frankfurter, J., dissenting). The Court struck down the law as "too uncertain or indefinite" to be constitutional, noting that it could be applied to "[c]ollections of tales of war horrors, otherwise unexceptionable." *Id.* at 519-20.

Likewise, in *Interstate Circuit*, the statute targeted films "[n]ot suitable for young persons," including a category of films "[d]escribing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons." 390 U.S. at 681. The statute imposed a monetary penalty on any distributor showing a film "not suitable" to those under 16. *Id.* at 680. The Court found the definition of prohibited speech to be unconstitutionally vague, and made clear that a law intended to protect minors has no special leeway in this regard. *Id.* at 689 ("The permissible extent of vagueness is not directly proportional to . . . the extent of the power to regulate or control expression with respect to children.").

B. The Act Is Inherently Vague.

The Act is no clearer than those in *Winters* or *Interstate Circuit*. It uses terms – including "killing, maiming, dismembering, or sexually assaulting an image of a human being," and "appeal[ing] to the deviant or morbid interest of minors" – that are vague and ambiguous, and provide little guidance to game creators and distributors.[22]

First, it is not clear what would constitute "killing, maiming, dismembering, or sexually

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[22] Though the Court of Appeals did not need to address this issue, other courts have expressed concerns about the vagueness of similar laws attempting to regulate video game violence. *E.g.*, *Blagojevich*, 404 F. Supp. 2d at 1077; *Granholm*, 426 F. Supp. 2d at 656; *Foti*, 451 F. Supp. 2d at 836.

assaulting an image of a human being" in an often fanciful medium. Games often include zombies, aliens, demi-gods, or cartoonish characters like Super Mario, all of whom may appear human but then transform into other beings (and vice versa) over the course of the game. J.A. 68-69, 72, 75-76 (noting examples in record in *Resident Evil 4*, *Jade Empire*, and *God of War*). Moreover, in many cases it will not be clear whether the "image of the human being" can be harmed in a way that falls within the statute. Does "killing" a character who immediately springs back to life count? If the game allows the player to crush a super villain with a boulder, has a maiming occurred if the villain regenerates his strength? It is impossible to answer these questions by examining the statutory text.

Second, although the Act uses language that attempts to mirror the *Miller* standard, its application to depictions of violence is unclear and provides no meaningful guidance to game creators and distributors. Sexual obscenity is a narrowly defined category that has accrued meaning over time, but the meaning of "deviancy" and "morbidity," for example, in the context of violent expression is entirely undefined. *See Winters*, 333 U.S. at 518 (noting that there may be a "permissible uncertainty" in using language to describe sexual obscenity that is "well understood through long use in the criminal law"). Is it deviant or morbid to blow up an attacking zombie; to kill a rebel soldier using a sniper; to break the arm of an opponent in a fighting game? Is it deviant or morbid for the fictional Jack Bauer from the television show and video game *24* to

torture terrorists to extract time-sensitive information? Is it patently offensive to have a game that allows the character to chop off the head of an enemy? And would it be less patently offensive if that game depicted the myth of Perseus and Medusa, as opposed to some other less famous act of violence? There is no obvious answer.[23]

Likewise, the Act's requirement that the game "as a whole" lack "serious literary, artistic, political, or scientific value for minors" will be hard to apply when violence is part of the story. Would unusually beautiful depictions suffice to create "artistic value"? *Cf.* Nicholson Baker, *Painkiller Deathstreak*, New Yorker, Aug. 9, 2010, at 53-54 (describing a "visual glory hallelujah of a game"). Is it enough for the game to refer to political controversies about violence?[24] We are left to wonder.

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[23] California suggests that "realistic" depictions of violence may be more inappropriate. Pet. Br. 43. But another State or prosecutor may believe that violent depictions that *fail* to show the consequences of violence are worse – and some have. *See, e.g., Entm't Merchants Ass'n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097, at *1 (W.D. Okla. Sept. 17, 2007) (striking down an Oklahoma statute that defined and restricted violent video games based, *inter alia*, on whether game "trivializes the serious nature of realistic violence"). The standard is not predictable.

[24] Such a possibility is far from speculative. *Postal 2*, which California describes but did not introduce into the record in its entirety, contains various attempts at satire. For example, the player's character visits a video game studio where citizens protest with anti-video game signs, and a real-world politician is mocked for his stance on video game violence. *See* Espen Aarseth, *The Game and its Name: What is a Game Auteur?*, *in*

Indeed, California itself has no clear idea which games are or are not covered by the Act. It asserts it is regulating only a "narrow category of material," Pet. Br. 6, but it invokes research that draws no distinctions among violent games (including cartoonish games designed for small children). California refused in the lower courts to say whether the six games introduced into the record by Respondents would be covered by the Act. J.A. 1549-50, 1572. And in this Court, it is only willing to say, even with regard to the games *it* submitted (including the much-discussed *Postal 2*), that they "*may* be covered by the Act." Pet. Br. 3 (emphasis added).

Thus, it will be impossible for game makers to know which games will trigger the law's restrictions. The availability of public enforcement in multiple jurisdictions and the possibility of private suits will create substantial pressure to rate more and more games as appropriate only for those 18 and older. Choosing not to impose such limits, in any borderline case, would risk massive civil penalties of up to $1,000 per game sold in California. As a result, minors would soon be deprived of independent access not just to the most violent and controversial games but to many other more mainstream products currently intended for teenagers or even younger players.

Visual Authorship: Creativity and Intentionality in Media 261, 267-68 (Torben Kragh Grodal, Bente Larsen, & Iben Thorving Laursen eds. 2004); John Breeden II, *Review, Postal 2*, Wash. Post., Apr. 20, 2003, at H9.

The chilling effect on speech will only be exacerbated under the laws that will come next if "offensively violent" speech is declared to be outside the protection of the First Amendment as to minors. Although the Act gives some protection to retailers who rely on a publisher's or distributor's determination that a given game can be sold to minors, the next law may not. Requiring retailers to view all the content of a product that contains dozens of hours of game play and is accessible only to a skilled player, to try to apply amorphous standards to the "range of options" available to a player, would impose a nearly impossible burden. J.A. 92. The only rational response might well be to stop selling video games to minors altogether. Movies and books have been targets before, *see Winters*, *Interstate Circuit, supra*, and will likely come next. The Court should not go down this road.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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