No. 07-16620

United States Court of Appeals for the Ninth Circuit

VIDEO SOFTWARE DEALERS ASSOCIATION;
ENTERTAINMENT SOFTWARE ASSOCIATION,
Plaintiffs-Appellees,

– v. –

ARNOLD SCHWARZENEGGER, in his official capacity as Governor, State of California; EDMUND G. BROWN, JR., in his official capacity as Attorney General, State of California,
Defendants-Appellants,

– and –

GEORGE KENNEDY, in his official capacity as Santa Clara County District Attorney; RICHARD DOYLE, in his official capacity as City Attorney for the City of San Jose; ANN MILLER RAVEL, in her official capacity as County Counsel for the County of Santa Clara,
Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NO. C 05 4188 RMW
THE HONORABLE RONALD M. WHYTE, DISTRICT JUDGE

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., COMIC BOOK LEGAL DEFENSE FUND, ENTERTAINMENT CONSUMERS ASSOCIATION, FREEDOM TO READ FOUNDATION, NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, AND RECORDING INDUSTRY ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF APPELLEES [AFFIRMANCE]

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Rules of Appellate Procedure, *amici curiae* state that there is no such corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT

Amici submit this *amicus curiae* brief in support of Appellees, urging that this Court affirm the decision of the court below that California's violent video game law, California Civil Code §§ 1746 - 1746.5 (2006) (the "California Act" or "Act"), is unconstitutional.[1] *Amici* include:

American Booksellers Foundation for Free Expression ("ABFFE"). ABFFE was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

Association of American Publishers, Inc. ("AAP"). AAP is the national association of the United States book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly associations. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, scholarly journals,

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1 *Amici* have contemporaneously filed a Motion for Leave to File this *amicus curiae* brief which is not opposed by Appellees or Appellants.

computer software, and electronic products and services. The AAP represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Comic Book Legal Defense Fund ("CBLDF"). CBLDF is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and the readers located in Minnesota, throughout the country and the world.

Entertainment Consumers Association ("ECA"). ECA is a national non-profit membership organization established to serve the needs of those who play computer and video games. Formed in 2006, the ECA is an advocacy organization for consumers of interactive entertainment.

Freedom to Read Foundation ("FTRF"). FTFR is an organization established in 1969 by the American Library Association to promote and defend First Amendment rights, support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and help shape legal precedent for the freedom to read on behalf of all citizens.

National Association of Recording Merchandisers ("NARM"). NARM is the leading trade association for music retailers, wholesalers, distributors, record labels, multimedia suppliers, suppliers of related products and services, and individual professionals and educators in the music business. The Association advances the promotion, marketing, distribution, and sale of music by providing its members with a forum for diverse meeting and networking opportunities, information, and education to support their businesses, as well as advocating for their common interests. NARM's retail members operate thousands of physical and digital storefronts that account for about 85% of the music sold in the U.S. market. Established in 1958, NARM is celebrating its 50th Anniversary this year.

Publishers Marketing Association ("PMA"). PMA is a trade association representing more than 3,000 publishers across the United States and Canada. Many of PMA's members are small, independent publishers who publish a variety of works, including many concerning controversial topics or involving experimental approaches to writing, which more mainstream publishers have not acquired.

Recording Industry Association of America, Inc. ("RIAA"). RIAA is a trade association whose member companies create, manufacture and/or

distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. The RIAA is committed to protecting the free expression rights of its member companies.

INTEREST OF *AMICI*

Amici's members (hereinafter "*amici*") publish, produce, distribute, sell and are consumers of books, magazines, motion pictures, sound recordings, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific and entertaining. Libraries and librarians represented by the Freedom to Read Foundation provide such materials to readers and viewers.

Materials published, distributed and sold by members of *amici* include depictions of violence that appear to fall within the Entertainment Software Rating Board ("ESRB") Mature (M) rating, were the ESRB ratings to be applied to such material. These range from popular motion pictures such as "No Country for Old Men" and "Sweeney Todd," nominated this year for various academy awards, "Flags of our Fathers," directed by Clint Eastwood and "Saving Private Ryan," "The Terminator" and "Rambo," starring well-known actors such as Tom Hanks, Arnold Schwarzenegger and Sylvester Stallone, to documentaries and books about wars and the Holocaust as well

as to photographs in books, magazines and newspapers about recent terrorist attacks. These expressive materials are, and should be, protected by the First Amendment. Based on the reasoning proposed by the State, were this Court to reverse the decision below and depart from precedent of the U.S. Supreme Court and Courts of Appeal across the nation, such materials could be subject to regulation based on their content, thus imposing a risk of liability on, and substantially chilling expressive activities of, *amici* or their members that heretofore have been protected by the First Amendment. *Amici* thus have a significant interest in ensuring that the body of law regarding "obscenity for minors" or "harmful to minors" speech on sexual matters not be expanded to regulate material containing violent content and that it not be extended to restrict protected speech that legislators believe is emotionally harmful to minors.

If accepted by this Court, the State's argument that depictions of violent action can be regulated and censored would carve an enormous new exception into the First Amendment bedrock upon which *amici* depend for the creation and dissemination of a wide variety of constitutionally-protected material in all media. The Act departs dramatically from settled First Amendment jurisprudence and threatens a vast array of mainstream motion

pictures, television programs, books, magazines, and works in other media that contain violent imagery no more shocking than that available every day on the news. The ongoing violence in the Middle East, for example, is gruesome, gut-wrenching, and tragic, but it is real, and few would contend that it should be excised from the media to spare the sensibilities of minors. Likewise, the realistic violence in such movies as "Saving Private Ryan" and "Schindler's List" or in books about the Civil War and World War II should not be denied full constitutional protection because some fear its effect on minors.

Amici believe that we do ourselves, our children, and the First Amendment a grave disservice by allowing the government, based on deeply flawed studies, to regulate violent material that always has enjoyed full constitutional protection. In an effort to regulate such speech, the State urges this Court to ignore decades of judicial precedent and become the first circuit court to extend the variable obscenity standard established by the U.S. Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968) to the regulation of violent content in video games. As did the court below, this Court should reject the State's effort to shield content-based restrictions on

speech that it deems unsuitable for children from meaningful judicial scrutiny.

Under the appropriate strict scrutiny standard, the California Act is unconstitutional as it fails to promote a compelling state interest using the least restrictive means possible. In addition, the tests set forth in the Act, and the terms contained therein, used to determine whether a video game's content transforms it into a "violent video game," subject to regulation, are unconstitutionally vague. A further significant constitutional flaw in the Act is its labeling provision. The Act imposes an unconstitutional content-based labeling requirement that is not narrowly tailored to achieve the State's purported objective and ignores the less restrictive alternative of relying on the voluntary ratings established by the ESRB which are used by some of the *amici* in connection with their members' expressive works.

Many of the *amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws infringing on First Amendment rights. *See, e.g.*, *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383 (1988); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Video Software Dealers Ass'n v. Webster*,

968 F.2d 684 (8th Cir. 1992); *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd,* 475 U.S. 1001 (1986); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *Village Books v. Bellingham*, No. C88-1470, slip op. (W.D. Wash. Feb. 9, 1989); *Am. Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993); *Leech v. Am. Booksellers Ass'n*, 582 S.W.2d 738 (Tenn. 1979). They also strongly believe it important to assert the values of the First Amendment in this case as *amici.*

ARGUMENT

I.
VIDEO GAMES, EVEN WHEN THEIR CONTENT INCLUDES SCENES OF VIOLENCE, ARE PROTECTED BY THE FIRST AMENDMENT

In defiance of the precedent well-established by the U.S. Supreme Court and Courts of Appeal across the United States, the State attempts to create a new exception to the First Amendment for "violent video games." The district court properly rejected the State's effort to deny constitutional protection to certain expressions of violent action conveyed to persons under the age of eighteen that heretofore have been presumed protected under the First Amendment. This Court should do so as well.

A. Depiction of Violent Action Is a Protected Form of Speech and Any Content-Based Regulation of Such Speech Must Pass Strict Scrutiny

There is no constitutional basis for the regulation of material that depicts the "killing, maiming, [or] dismembering" of an "image of a human being" by, among other things, "inflict[ing] serious injury" – even if those terms could be defined precisely, which the Act fails to do. As the Supreme Court has held, there only are a few narrowly delineated categories of speech excluded from the protection of the First Amendment:

> As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (KENNEDY, J., concurring).

Ashcroft v. Free Speech Coal., 535 U.S. 234, 245-46 (2002).

Thus, under the long tradition of the First Amendment, depictions of violent action – like any other speech that does not fall within these specified categories of unprotected speech – are presumed protected from any content-based regulation. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). In fact, every challenge to regulate material solely based on violent content,

regardless of whether that material is called "violence," "excess violence" or included within the definition of "obscenity," "obscenity for minors" or "harmful to minors" has been unsuccessful. *See, e.g.*, *Winters v. New York*, 333 U.S. 507, 508, 511 (1948) (First Amendment protects pictures and descriptions of "deeds of bloodshed, lust or crime"); *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Eclipse Enters. v. Gulotta*, 134 F.3d 63, 66 (2d Cir. 1997) (declining "any invitation to expand these narrow categories of speech to include depictions of violence"); *Video Software Dealers Ass'n v. Webster*, 968 F.2d at 688 ("[V]ideos depicting only violence do not fall within the legal definitions of obscenity for either minors or adults."); *Am. Booksellers Ass'n*, 771 F.2d 323; *Interstate Circuit, Inc. v. City of Dallas*, 366 F.2d 590 (5th Cir. 1966), *vacated on other grounds*, 391 U.S. 53 (1968); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), *aff'd,* 469 F.3d 641 (7th Cir. 2006); and *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d

1180 (W.D. Wash. 2004). *See also Video Software Dealers Ass'n v. Schwarzenegger*, No. C-05-04188, 2007 WL 2261546, at *2 (N.D. Cal. Aug. 6, 2007) (citing certain of these authorities).

The State argues that this Court simply should ignore this precedent and become the first circuit court to extend the variable obscenity standard established in *Ginsberg*, 390 U.S. 629 (1968) to the regulation of violent content in video games. (*See* Appellants' Brief ("Br."), 12-15.) The same argument was made and rejected in many of the cases cited above, and the Court should do so here as well. If the Court were to affirm the State's formula for the regulation of violent video games, there would be no legal impediment to its application to other expressive media, including books and magazines. For example, some of the *amici* produce or distribute materials that depict "image[s] of a human being" engaging in the type of violent activity censored by the Act. §1746(d)(1). The potential application of the test to the vast panoply of the materials *amici* produce goes well beyond the parameters established in *Ginsberg*.

The New York statute at issue in *Ginsberg* was limited to depictions of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse. *See Ginsberg*, 390 U.S. 629, App. A at 646. In *Ginsberg,* the Supreme

Court specifically noted that in considering the statute at issue, it had "no occasion ... to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State" and therefore, expressly limited its holding to the right of a state "to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see." *Id.* at 636-37. Given the presumption that speech is protected from content-based regulation, *see R.A.V.*, 505 U.S. at 382, one cannot, as the State seeks to do, exploit the narrow exception created by *Ginsberg* for the purpose of establishing a far broader concept of harmfulness that intrudes on heretofore protected speech.

Content-based regulation of constitutionally-protected violent expression such as the Act must pass strict scrutiny – *i.e.*, it must "promote a compelling interest" and use the "least restrictive means to further the articulated interest." *Sable Commc'ns, Inc. v. FCC*, 492 U.S. 115, 126 (1989). The State has not come close to meeting this extremely high threshold. Moreover, even if the State has a compelling interest, the regulation must be "carefully tailored" to achieve the stated purpose. *Id.* The district court properly found that the Act fails to survive strict scrutiny.

See Video Software Dealers Ass'n, 2007 WL 2261546, at *10-12 ("[T]he evidence does not establish the required nexus between the legislative concerns about the well-being of minors and the restrictions on speech required by the Act").

B. First Amendment-Protected Communications Cannot Be Restricted Based on Their Emotional or Psychological Impact

In *Ginsberg*, the Supreme Court adopted the concept of "variable obscenity" or "obscenity for minors," which subsequently was framed by the three-part obscenity test set forth in *Miller v. California*, 413 U.S. 15 (1972). The *Ginsberg/Miller* formulation rests on the fact that "[o]bscenity is not within the area of protected speech." *Ginsberg,* 390 U.S. at 635, *citing Roth v. United States*, 354 U.S. 476, 485 (1957). Both *Ginsberg* and *Miller* involved the regulation of obscene materials – materials that have a "specific judicial meaning which derives from the *Roth* case, i.e., obscene material 'which deals with sex.'" *Miller*, 413 U.S. at 20 n.2, *citing Roth*, 354 U.S. at

487.[2] It is obscene sexual material as defined first by *Roth* and then *Miller*, not violent material, that has been held to be unprotected by the First Amendment for almost 50 years. *See Roth*, 354 U.S. 476; *Miller*, 413 U.S. 15.

In its brief, the State claims that its desire in "helping parents protect the physical and psychological well-being of minors" is a compelling state interest and therefore, the Act survives strict scrutiny. (Br., 25.) As other courts have found – examining this same purported interest as a justification for imposing a content-based regulation on protected speech (*see supra* pp. 10-11) – such a desire does not constitute a compelling state interest. Contrary to the State's position, First Amendment-protected speech cannot be restricted based on its emotional or psychological impact on some readers or game players. As Justice Kennedy stated in *Free Speech Coal.*, 535 U.S. at 245:

> Congress may pass valid laws to protect children from abuse, and it has. *E.g.*, 18 U.S.C. §§ 2241, 2251. The prospect of crime, however, by itself

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[2] The *Miller* Court further stated that "[u]nder the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." 413 U.S. at 27 (emphasis added).

> does not justify laws suppressing protected speech. ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech") (internal quotation marks and citation omitted). It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities.

As the Seventh Circuit stated in *Am. Booksellers Ass'n*, 771 F.2d at 330:

> Racial bigotry, anti-semitism, violence on television, reporters' biases - these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.

Notably, these precedents are not mentioned by the State in its brief.

Neither *Ginsberg* nor any other Supreme Court decision allows government to limit minors' First Amendment rights to a category of speech whenever it believes that it will protect the emotional and physical harm of children, or, in its view, assist parents in guarding their children's well-being. *See also Am. Amusement Mach. Ass'n*, 244 F.3d at 575-76 (striking down the act regulating "violent video games" and in so doing, finding that unlike the basis for regulating obscenity, the State's "belief that violent

video games cause temporal harm by engendering aggressive attitudes and behavior, which might lead to violence" is not a compelling state interest). Any such rule would amount to a slippery slope that would obviate the First Amendment rights of minors. Moreover, the State's purported justification simply is not logical. Under the Act, while a minor would be barred from accessing video games depicting, for example, scenes from the brutally violent riots that occurred in Los Angeles in 1992 or other depictions of real world violence, *i.e.*, suicide bombings or other murderous events, he or she is free to consume all other forms of media that provide depictions, or actual historic footage, of such events.

"Harmful to minors" is not any content that a legislature might believe could potentially result in harm to some minors. It is instead a legal term of art that was, in the statute at issue in *Ginsberg*, the formulation used by the New York legislature to define obscenity for minors with respect to sexually explicit material. The First Amendment sets strict limits on permissible paternalism by the government; the Act clearly exceeds those limits.

This Court should reject the reasoning of the State and conclude, as has every other appellate court to have addressed the issue, that regulation of

material based solely on its description or depiction of violent action is unconstitutional.

II.
THE CALIFORNIA ACT IS UNCONSTITUTIONALLY VAGUE

As the Supreme Court stated in *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), a law is void for vagueness under the due process clause of the Fifth Amendment if its prohibitions are not clearly defined. The Court provided the following extensive explanation of the three reasons why a vague law is unconstitutional:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly . . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statue 'abut(s) upon sensitive areas of basis First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . . than if the boundaries of the forbidden areas were clearly marked.

Id. at 108-09 (footnotes omitted); *see also Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) ("The vagueness of the CDA is matter of special concern ... the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.") (citations omitted); *Smith v. California*, 361 U.S. 147, 151 (1959) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.") Even when the statute "nominally imposes only civil penalties,"

> perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If ... the law interferes with the right of free speech or association, a more stringent vagueness test should apply.

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

Under this well-established framework, the California Act is unconstitutionally vague. As the district court found, certain of the terms in the Act are "broad and not sufficiently narrow." *Video Software Dealers*

Ass'n, 2007 WL 2261546, at *10. Under the Act, a person cannot sell a "violent video game" to a minor if it includes, among other things, the "killing," "dismembering," or "maiming" of an "image of a human being" if those acts are depicted in a manner that fall under either of two distinct tests. §1746(d)(1)(A) and (B). The first is the *Ginsberg/Miller* formulation which, as discussed above, is and should be limited to the regulation of obscene material "which deals with sex" (*Miller*, 413 U.S. at 20, n. 2). *See* §1746(d)(1)(A). The second test regulates violent content in video games if it is depicted in a manner that "[e]nables the player to virtually inflict serious injury . . . in a manner which is especially heinous, cruel, or depraved in that it involves serious physical abuse to the victim." §1746(d)(1)(B).[3] The term "image of a human being" – which is part of either of the above tests – apparently is not limited to what appears to be an actual living human being. *See Video Software Dealers Ass'n*, 2007 WL 2261546, at *10. This term is especially vague in the context of the video

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[3] While in its Brief (*see* fn. 1, p. 4), the State apparently concedes that this second test may be "unconstitutionally broad," for the reasons discussed in the Appellees' brief at pages 24-26, which *amici* incorporate and adopt by reference, the Court should affirm the district court's opinion holding that the California Act is unconstitutional in its entirety.

game medium where video game characters that appear to be human beings may be zombies, aliens, or some other type of creature, and might transform from human beings to other beings and vice versa throughout the course of the game. Examples of such videogames include Resident Evil, Jade Empire and God of War.

The first test applying the *Ginsberg/Miller* formulation – specifically established to determine whether sexual depictions constitute "obscenity for minors" – is unconstitutionally vague as applied to depictions of any violent activity that includes "killing," "maiming," or dismembering." §1746, (d)(1)(A). Depictions of any such activity easily could appeal to the "morbid interest of minors," without being more precisely defined. *See Video Software Dealers Ass'n*, 968 F.2d at 690 (rejecting the extension of the *Ginsberg/Miller* formulation to depictions of violence and finding the phrase " 'tendency to cater or appeal to morbid interests in violence . . .'" to be "elusive"); *Entm't Software Ass'n*, 426 F. Supp. 2d at 655-56 ("The lack of precision among these definitions will subject Michigan retailers to steep civil and criminal liability if they guess wrongly about what games the Act covers.").

Under the second test, video games containing violent activity only are barred from persons under the age of 18 if the player is able to inflict "serious injury" which is "especially heinous, cruel or depraved . . ." on the "image of the human being." §1746(d)(1). The term "cruel" is defined as inflicting a "high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim." §1746(d)(2)(A).[4] In the virtual video game world, how do you determine whether a character actually has suffered a "high degree of pain" or "serious physical abuse," defined further as "significant or considerable amount of injury or damage" involving, among other things, "extreme physical pain"? §1746(d)(2)(A)(D).

The vague language of the California Act provides no opportunity for people, such as those represented by the *amici*, to determine whether particular material is covered. As a direct result, such legislation undoubtedly will have a chilling effect on distributors and others who deal with valuable, mainstream works. As the Supreme Court has noted, "[u]ncertain meanings" inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . . than if the boundaries of the forbidden areas were

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[4] The fact that the California Act provides these definitions further demonstrates that the test based on the *Ginsberg/Miller* formulation alone is unconstitutionally vague.

clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (*quoting Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

III.
THE LABELING REQUIREMENT OF THE CALIFORNIA ACT IS UNCONSTITUTIONAL

The California Act imposes an unconstitutional labeling requirement. In its brief, the State maintains that there is no less restrictive means of achieving its purported objective than to require that each violent video game "that is imported into or distributed into California for retail sale" be labeled with a solid white '18' outlined in black and with dimensions no less than 2 inches by 2 inches "displayed on the front face of the video game package." §1746.2; s*ee also* Br., 45-48. These requirements constitute compelled speech that do not survive strict scrutiny; they are not narrowly tailored as other less restrictive means are readily available to ensure that parents are informed of the violent content in certain video games. *See Entm't Software Ass'n*, 469 F.3d at 651-53 (affirming the district court's holding that a substantially similar labeling requirement was compelled speech and failed strict scrutiny and in so doing, finding "the State has not demonstrated that it could not accomplish this goal with a broader educational campaign about the ESRB system . . . Indeed, at four square

inches the '18' sticker *literally* fails to be narrowly tailored - the sticker covers a substantial portion of the box").

The voluntary ratings established by the ESRB are widely used, including by some of the *amici* in connection with their members' expressive works. These ratings inform and assist parents in making more knowledgeable purchasing decisions. *See* http://www.esrb.org/ratings/ratings_guide.jsp (last visited Feb. 11, 2008) (the ratings "provide concise and impartial information ... so consumers, especially parents, can make an informed purchase decision"). In its brief, while the State at first unjustifiably dismisses the ESRB ratings (*see* Br., 46-47) in claiming that the labeling provision is constitutionally sound, it later points to the ESRB ratings and the terminology used therein as support for the California Act and its terminology. (*See* Br., 51.)[5] The State also recognizes that the cover of video games sold in California presently display the ESRB ratings. (*See* Br., 54.) The ESRB rating system provides a sound basis to achieve the State's purported objective.

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[5] Of course, the ESRB's voluntary rating system does not have to pass the same constitutional muster as a State-imposed requirement carrying steep civil penalties.

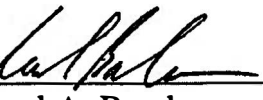
While *amici* can and do look to the ESRB ratings for guidance, the imposition of the labeling provision along with the Act's other vague requirements and threat of monetary sanctions, undoubtedly will lead to self-censorship and result in an impermissible chilling effect on the creation and distribution of constitutionally-protected material with violent content to both adults and minors.

CONCLUSION

By reason of the foregoing, *amici* respectfully urge this Court to affirm the decision below holding the California Act unconstitutional.

Dated: February 12, 2008

Respectfully submitted,



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