No. 08-1448

In The
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF CALIFORNIA, et al.,
Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION, et al.,
Respondents.

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

BRIEF FOR *AMICI CURIAE* LOUISIANA, CONNECTICUT, FLORIDA, HAWAII, ILLINOIS, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, TEXAS AND VIRGINIA SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

California Civil Code sections 1746-1746.5 prohibit the sale of violent video games to minors under 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. The respondent industry groups challenged this prohibition on its face as violating the Free Speech Clause of the First Amendment. The court of appeals affirmed the district court's judgment permanently enjoining enforcement of the prohibition. The questions presented are:

1. Does the First Amendment bar a state from restricting the sale of violent video games to minors?

2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994), is the State required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the State can prohibit the sale of the games to minors?

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INTEREST OF STATE *AMICI*

The *amici* states are vitally interested in protecting the welfare of children and in helping parents raise them. The Ninth Circuit's decision in this case unreasonably restricts their authority to do that. Contrary to the Ninth Circuit's decision, states may—consistent with the First Amendment and this Court's longstanding precedents—prevent minors from buying or renting without parental approval a defined class of video games which invite players to commit digital homicide, torture, and rape. The *amici* states therefore have an interest this matter.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1975, a cutting-edge video game console allowed players to bounce an electronic ball back and forth on a television screen by rotating small knobs. This was *Pong*.[1] Things had changed by 2003. That year, a popular game called *Postal*[2] invited players to:

- Burn people alive with gasoline or napalm;
- Decapitate people with shovels and have dogs fetch their severed heads;
- Beat police to death while they beg for mercy;

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[1] *See* http://www.time.com/time/covers/1101050523/console_timeline/ (last visited July 8, 2010) (*Time* magazine timeline of video game development featuring Atari's 1975 release of the home version of *Pong*, which "introduce[d] at-home video games to the masses").

- Kill bald, unshaven men wearing pink dresses (in an "expansion pack" called *Fag Hunter*);
- Slaughter nude female zombies;
- Urinate on people to make them vomit; and,
- Shoot players with a shotgun that has been silenced by ramming it into a cat's anus.[2]

Postal^2 is made by a company called *Running With Scissors*, which promotes the game with the tag line: "[R]emember … it's only as violent as you are!"[3]

The makers of *Postal*^{2} likely never intended its hyperbolic violence to be taken seriously. Ten-year-olds, however, may fail to grasp the satiric content in an exploding cat. With that in mind, California

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[2] *See generally* http://www.postalnetwork.org (last visited July 8, 2010) (summarizing the game); *see also* http://www.ggmania.com/full.php3?show=5521 (last visited July 8, 2010) (*Gameguru* review, reporting that "one of the surprises in this game was the urination element").

[3] *See* http://www.amazon.com/Postal-2-Pc/dp/B00008RGR5/ref=sr_1_1?ie=UTF8&s=videogames&qid=1278606957&sr=8-1 (last visited July 8, 2010) (identifying manufacturer's product description); *see also* http://www.postalnetwork.org/postal2/overview.shtml (last visited July 8, 2010) (official game overview announcing that "[t]he game is as violent as you are!"). *Postal*^{2} has won numerous awards, including first place for "Most Violent Video Game Ever" (AskMen.com 2009), fifth place for "Goriest Headshots" (*Gamepro* 2009), and first place for "Top Ten Games You Can't Show Mom" (*Gametiger* 2004). *See* http://www. runningwithscissors.com/awards-and-honors (last visited July 8, 2010).

enacted a modest restriction in 2005 designed to prevent minors from buying games like *Postal*[2]. The law reaches only games that afford players a "range of options … [which] includes killing, maiming, dismembering, or sexually assaulting an image of a human being," and, in addition, that meet an "obscene-as-to-minors" test. *See* Pet. 2; CAL. CIV. CODE §§ 1746-1746.5.[4] California does not prevent adults from buying such games, however, nor does it bar a parent or guardian from buying them for minors. Pet. App. 96a.

A panel of the United States Ninth Circuit Court of Appeals held California's law infringes minors' freedom of speech. Pet. 3-4. The court applied strict scrutiny. *See* Pet. App. 27a-34a. It rejected the more lenient standard from *Ginsberg v. New York*, 390 U.S. 629 (1968), which affords government greater leeway to restrict distribution of indecent materials to minors. *See* Pet. App. 15a-23a.

Contrary to the Ninth Circuit's decision, the First Amendment does not bar California's law. Unlike other measures the Court has struck down, California leaves adult speech untouched. It also precisely delineates the materials subject to restriction. California has not simply barred minors from buying "violent" games. Instead, it restricts a disturbing subgenre of games that encourages players to commit graphic acts of

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[4] The obscene-as-to-minors test is drawn from *Ginsberg v. New York*, 390 U.S. 629, 646 (1968), and more generally from the Court's obscenity jurisprudence. *See infra* Part I.

homicide, rape, and sadism. This Court's precedents allow states to restrict commercial dissemination to minors of erotic materials. *See, e.g., Ginsberg*, 390 U.S. 629; *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978). Just as states may keep minors from buying *Penthouse* magazine, states may also keep them from buying *Postal*[2]. At bottom, then, the Ninth Circuit artificially limited *Ginsberg* and its progeny, and thus curtailed states' authority to place certain hyper-violent games out of juveniles' direct grasp.[5] *See infra* Part I.

California's law falls squarely within the limits on juvenile freedoms which this Court has upheld. In fundamental realms—such as voting, marriage, contracts, privacy, travel, juries, sentencing, and speech—states may (and sometimes must) treat minors in ways that would be inconceivable for adults. California's law is situated within this sensible and laudable tradition. If a state may restrict a minor's right to vote or to marry, then it may also restrict her ability to purchase graphically

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[5] Other courts have made the same mistake. *See, e.g., Entm't Software Ass'n v. Swanson*, 519 F.3d 768 (CA8 2008); *Interactive Digital Software Ass'n v. St. Louis*, 329 F.3d 954 (CA8 2003); *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (CA7 2001); *Entm't Merchants Ass'n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *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. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

violent video games. If a state may not impose the death penalty on minors—because they are "more vulnerable … to negative influences and outside pressures," *Roper v. Simmons*, 543 U.S. 551, 569 (2005)—then a state may also keep them from buying games which invite them to commit digital atrocities. *See infra* Part II.

At bottom, California's law permissibly seeks to reinforce the authority of parents. Limits on juvenile freedoms find their strongest justification when they simply help parents guide their own children as they see fit. California's law does this. It wants parents, and not the marketplace, to raise children. States may assist parents in many ways—for instance, by enacting curfews, by requiring parental consent to medical procedures, or by barring children from suing parents. In the same way, states may keep children from buying video games that encourage them to play at being sadists. *See infra* Part III.

States that do so betray no hostility to juvenile rights. Rather, they recognize that "[c]hildren have a very special place in life which law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). The First Amendment does not bar states from enacting a commonsense regulation such as California's, which bans no speech, which affects no adults, which carefully delineates its reach, and which reinforces parents' authority to police the products of popular culture their children consume.

ARGUMENT

I. MINORS DO NOT HAVE A FIRST AMENDMENT RIGHT TO BUY GRAPHICALLY VIOLENT MATERIAL AGAINST THEIR PARENTS' WISHES.

A state commits a cardinal sin against the First Amendment by "reduc[ing] the adult population … to … only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). California's law, however, does nothing of the sort. It simply restricts minors' unmediated commercial access to certain graphically violent video games. But it prevents no adult from buying or renting such games. It does not even stop minors from playing them. Rather, the law helps ensure that parents—and not the marketplace—ultimately decide whether their children play a game, such as *Postal*[2], in which players are encouraged to urinate on their victims before burning them alive.

The First Amendment permits California's commonsense measure. "It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (citing *Ginsberg*, 390 U.S. 629). Moreover, California's restriction is confined to "relatively narrow and well-defined circumstances," as the First Amendment requires, *see Erznoznik*, 422 U.S., at 213 (citing *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); *Rabeck v. New York*, 391 U.S. 462 (1968)), because it leaves adult speech untouched and because it targets a delineated class of materials.

A. California's law leaves adult speech untouched.

First, California's law reaches only minors. It curtails their direct commercial access to a defined class of materials, while not in any way restricting or burdening the production of such materials or their sale to adults. *Cf., e.g., United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000) (observing that "targeted blocking [of indecent communications] enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners"). The law thus avoids burdening *adult* speech, a defect which has often led the Court to invalidate as poorly tailored laws designed to protect minors.

It is thus nothing like the Michigan law in *Butler*, which imposed a blanket ban on public dissemination of literature with "a potentially deleterious influence upon youth." 352 U.S., at 383. Nor is it like the law, struck down in *Sable Communications, Inc. v. F.C.C.*, 492 U.S. 115, 126-31 (1989), that sought to protect minors from indecent telephone messages by banning them outright. *See id.*, at 131 (explaining that the ban "has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear"); *see also Bolger v. Young's Drug Prod. Corp.*, 463 U.S. 60, 73-74 (1983) (invalidating broad restriction on contraceptive advertisements because it "purg[ed] all mailboxes of unsolicited material that is entirely suitable for adults"). Nor, finally, is it like speech restrictions

that, while seeking to protect minors from indecent content, incidentally burden adult speech. *See, e.g., Ashcroft v. A.C.L.U.*, 542 U.S. 656, 660 (2004) (finding law burdened adult speech by requiring credit card or other means of age verification); *Playboy*, 529 U.S., at 826 (finding law burdened adult speech by forcing cable operators to time-channel content); *Reno v. A.C.L.U.*, 521 U.S. 844, 882 (1997) (finding law chilled adult speech by criminalizing transmission of indecent messages to minors).

California's law avoids the tailoring problems the Court condemned in those cases. It has neither the intent nor the effect of infantilizing the video game options of adults. Instead, by preventing juveniles from purchasing certain hyper-violent games, it simply empowers parents to decide what is "fit for [their] children." *Butler*, 352 U.S., at 383; *see infra* Part III.

B. California's law is limited to games that invite players' participation in graphic sadism.

Second, California's law is valid because it defines the restricted class of materials with the precision the First Amendment demands. It does not, for instance, bluntly restrict "violent" games. *Cf., e.g., Erznoznik*, 422 U.S., at 213-14 (explaining that an ordinance broadly targeting "nudity," as opposed to "sexually explicit nudity," would be overbroad). Rather, it removes from minors' immediate reach only games that cast players as participants in disturbing acts of sadistic violence—*i.e.*, games in which a player is invited to "kill[],

maim[], dismember[], or sexually assault[] an image of a human being," CAL. CIV. CODE § 1746(d)(1) (2006), and which fail an "obscene-as-to-minors" test drawn from the Court's precedents. *Id.*, at § 1746(d)(1)(A)(i)-(iii). *See, e.g., Ginsberg*, 390 U.S., at 646; *Miller v. California*, 413 U.S. 15, 24 (1973).[6]

California's restriction thus falls comfortably within the leeway afforded government by precedents such as *Ginsberg*, *Interstate Circuit*, and *Pacifica*. Those cases teach that,

> because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults.

Interstate Circuit, 390 U.S., at 690 (citing *Ginsberg*, 390 U.S. 629). Such restrictions further a state's interests in supporting parental authority and in minors' own well-being. *See, e.g., Ginsberg*, 390 U.S., at 639-40; *Pacifica*, 438 U.S., at 749; *see also infra* Parts II & III.

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[6] California's law would require games containing the defined violent content to meet all of the following descriptions: (1) "A reasonable person, considering the game as a whole, would find it appeals to a deviant or morbid interest in minors"; (2) "It is patently offensive to prevailing standards in the community as to what is suitable for minors"; and (3) "It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." *See* Pet. 2; Pet. App. 96a.

The Court has sustained restrictions like California's on concluding it was "not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Ginsberg*, 390 U.S., at 641. That analysis does not require any "scientific" demonstration of potential harm flowing to minors from the restricted materials. *See, e.g., id.*, at 642-43 (explaining that "[w]e do not demand of legislatures 'scientifically certain criteria of legislation'") (quoting *Noble State Bank v. Haskell*, 219 U.S. 104 (1911)); *cf. F.C.C. v. Fox Tele. Stations*, *Inc.*, 129 S. Ct. 1800, 1813 (2009) (explaining that "[t]here are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them").

California's law finds particularly strong support in *Pacifica*. There, the Court sustained F.C.C. discipline of a radio station for airing a profane (but not legally obscene) monologue during an afternoon broadcast. 438 U.S., at 739-40, 748-51. That government action was allowed to safeguard minors and their parents' authority, despite the fact that it made the speech less accessible to adults. *See id.*, at 750 & n.28 (observing that F.C.C. action "does not by any means reduce adults to hearing only what is fit for children" because "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words") (citing *Butler*, 352 U.S., at 383). In contrast to the sensitive issue of burdening *adult* speech, however, the Court thought it uncontroversial that the government

could bar *minors'* commercial access to such materials:

> Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children.

438 U.S., at 749-50 (citing *Ginsberg*, 390 U.S., at 640, 639).

California has done precisely what *Pacifica* deemed permissible under the First Amendment. It has defined a class of materials deemed harmful to minors and said that commercial sellers are "prohibited from making [such] … materials available to children." *Pacifica*, 438 U.S., at 749-50. The First Amendment permits this modest regulation and the Ninth Circuit erred by ruling otherwise.

C. Neither precedent nor logic support limiting *Ginsberg-Pacifica* to erotic materials.

In this case, the lower courts resisted application of the *Ginsberg-Pacifica* line based on the artificial rationale that those cases apply to sexually themed material only. *See* Pet. App. 15a-23a, 53a-58a, 86a-89a. But that limitation is neither inherent in those cases nor consistent with their underlying logic.

To begin with, in those cases the Court spoke in terms broader than the merely erotic. For instance, *Ginsberg* approvingly quoted a New York case that

described a state's interest in "preventing distribution to children of *objectionable material*" and of "books recognized to be suitable for adults." 390 U.S., at 636 (quoting *Bookcase, Inc. v. Broderick*, 218 N.E.2d 668, 671 (N.Y. 1966)) (emphasis added). Indeed, in a case decided the same day as *Ginsberg*, the Court described *Ginsberg* as allowing states to "regulate the dissemination to juveniles of … *material objectionable as to them*[.]" *Interstate Circuit*, 390 U.S., at 690 (emphasis added). *Pacifica* likewise spoke, not merely of sexual language, but of language that was "excretory," "vulgar," "indecent," "offensive," "shocking," "unseemly," and "not conforming to generally accepted standards of morality." *See, e.g.,* 438 U.S., at 739, 740 & n.14, 747-50. In the same vein, Justice Powell's concurrence explained that "speech from which society may attempt to shield its children is not limited to that which appeals to the youthful prurient interest." *Id.*, at 758 (Powell, J., concurring in part and concurring in the judgment).

Second, the laws in *Ginsberg* and *Interstate Circuit* themselves encompassed certain violent content. For instance, the New York law in *Ginsberg* restricted depictions, not only of sexual matters, but also of "sadomasochistic abuse," defined as "flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume." *See* 390 U.S., at 646 (app'x) (quoting N.Y. PENAL LAW § 484-h(1)(e) (1965)). Focusing even more pointedly on violence, the Dallas ordinance in *Interstate Circuit* restricted certain materials "[d]escribing or portraying brutality,

criminal violence or depravity." 390 U.S., at 691-92 (app'x) (quoting DALLAS CIV. & CRIM. ORD. § 46A-1(f)(1) (1960)). To be sure, neither decision specifically addressed these provisions. But neither did the Court suggest that those laws' violence-related components would be invalid to the extent they embraced more than purely erotic materials.

Finally, the underlying logic of these cases rejects confining them to erotic materials. *Ginsberg-Pacifica* drew strongly on the states' interest in reinforcing parental authority. *See, e.g., Ginsberg*, 390 U.S., at 639 (explaining that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"). Consequently, the Court reasoned that parents "are entitled to the support of laws designed to aid discharge of that responsibility." *Id.*; *see also infra* Part III. It would be arbitrary, however, to confine this state interest to sexual themes. The graphically interactive violence kept from minors' direct grasp by California's law is "as potentially degrading and harmful to children as representations of many erotic acts." *Pacifica*, 438 U.S., at 758 (Powell, J., concurring in part and concurring in the judgment). Parents, in other words, have just as keen an interest in guarding their children from *Postal*[2] as from *Penthouse*, and laws like California's may help them do so.

II. CALIFORNIA'S LAW FALLS WITHIN TRADITIONAL STATE LIMITS ON MINORS' FREEDOMS.

The law has never been blind to the fact that children are not adults. In fundamental realms—such as voting, marriage, contracts, privacy, travel, juries, sentencing, and speech—states may (and sometimes must) treat minors in ways that would be inconceivable for adults. California's law is situated squarely within this sensible and laudable tradition. It betrays no hostility to minors' constitutional rights, but rather recognizes that "[c]hildren have a very special place in life which law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring); *see also Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (plurality op.) (observing that "[t]he Court long has recognized that the status of minors under the law is unique in many respects").

Few rights are more fundamental than the rights to vote, to marry, to serve on a jury, or to contract. Yet states have traditionally limited minors' ability to participate in these basic forms of citizenship. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 581-587 (2005) (app'x B, C & D) (cataloguing state laws establishing minimum ages for voting, jury service, and marriage without parental or judicial consent); RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981) (discussing limitations on minors' right to contract).[7]

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[7] *See also, e.g.,* COLO. REV. STAT. § 13-22-101 (2009); FLA. STAT. ch. 743.07 (2009); IDAHO CODE § 29-101 (2010); IOWA

Even minors' control over their own bodies may often be restricted. Minors cannot unilaterally consent to most medical procedures.[8] In the same vein, parental consent laws may curtail minors' ability to have an abortion, subject to judicial bypass. *See Bellotti*, 443 U.S., at 643. And a minor may undergo heightened drug-screening protocols because his "school-related privacy interest, when compared to the privacy interests of an adult, has different dimensions." *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 840 (2002); *see also New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (observing that the school context "requires some easing of the restrictions to which searches by public authorities are ordinarily subject"); *and see Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656-57 (1995) (explaining that, "[p]articularly with regard to medical examinations and procedures, … 'students within the school environment have a lesser expectation of privacy than members of the population generally'") (quoting *T.L.O.*, 469 U.S., at 348 (Powell, J., concurring)).

Other examples abound. Minors do not have a right to jury trials in delinquency proceedings. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 545-51

CODE § 599.1 (2009); KAN. STAT. ANN. § 38-101 (2009) (generally addressing limits on minors' capacity to contract).

[8] *See, e.g.,* ALA. CODE § 22-8-4 (2009); CAL. FAM. CODE § 6922 (2004); DEL. CODE ANN. tit. 13, § 707 (2009); ME. REV. STAT. ANN. tit. 22, § 1503 (1998); N.Y. PUB. HEALTH LAW § 2504 (2005) (generally addressing parental consent to medical procedures).

(1971) (plurality op.). Curfew laws across the country permissibly restrict minors' right to travel. *See, e.g., Hutchins v. Dist. of Columbia*, 188 F.3d 531, 538 (CA DC 1999) (en banc plurality op.); *Qutb v. Strauss*, 11 F.3d 488, 492 (CA5 1993).[9] Statutory rape laws regulate minors' consensual sexual relations. *See, e.g., State v. Granier*, 765 So.2d 998, 1001 (La. 2000) (explaining that "[t]he policy underlying such a statute is a presumption that, because of their innocence and immaturity, juveniles are prevented from appreciating the full magnitude and consequences of their actions").[10] Even the Court's sexual autonomy jurisprudence, rooted in adult privacy, is nonetheless limited by this special vulnerability of minors. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (observing that "[t]he present case does not involve minors").

Juvenile impressionability has shaped the Court's Eighth Amendment jurisprudence. Recognizing that "'[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults,'" the Court has exempted minors from the death penalty and from life-without-parole sentences for non-homicide

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[9] *See also generally* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 553-58 (1997) (discussing curfew ordinances).

[10] *See also, e.g.,* ALA. CODE §§ 13A-6-70, 13A-6-61 (2009); CAL. PENAL CODE § 261.5 (2008); FLA. STAT. ch. 800.04 (2009); HAW. REV. STAT. § 707-730 (2009); MD. CODE ANN., CRIM. LAW §§ 3-302–3-308 (2009) (generally addressing statutory rape and minors' age-of-consent).

crimes. *See Roper*, 543 U.S., at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)); *see also Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010). As the Court reiterated last term in *Graham*, juveniles "'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" 130 S. Ct., at 2026 (quoting *Roper*, 543 U.S., at 569-70).

Juvenile speech is not immune from these well-established limitations. For instance, while minors retain First Amendment rights in public schools, officials may sometimes *ban* their speech. *See, e.g. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (holding that officials may suppress student speech if it will "materially and substantially disrupt the work and discipline of the school"). The Court has recognized that "[i]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Vernonia*, 515 U.S., at 656 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)). Such censoring of adult speech would obviously fail. *See, e.g., Cohen v. California*, 403 U.S. 15 (1971); *see also Morse v. Frederick*, 551 U.S. 393, 405-06 (2007) (commenting that the Court's case law has "acknowledged that schools may regulate some speech 'even though the government could not censor similar speech outside the school'") (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)). And yet, drawing on *Ginsberg*, the Court

> has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children.

Fraser, 478 U.S., at 684 (discussing *Ginsberg*, 390 U.S. 629, and *Bd. of Educ. v. Pico*, 457 U.S. 853, 871-872 (1982)). Nor has the Court artificially confined this principle to erotic material, but has validated states' concern to protect children "from exposure to sexually explicit, indecent, or lewd speech" as well as "vulgar and offensive spoken language." *Fraser*, 478 U.S., at 684 (discussing *Pacifica*, 438 U.S. 726); *see also supra* Part I.

California's law is thus no outlier: it falls within a tradition of permissible limitations on juvenile rights. "[Y]outh-blindness," this Court's case law teaches, "is not a goal in the allocation of constitutional rights" because "failing to take children's particular attributes into account in many contexts … would be irresponsible." *Ramos v. Town of Vernon*, 353 F.3d 171, 179-80 (CA2 2003) (citing, *inter alia*, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-31, at 1589 (2d ed. 1988)). This is one of those contexts. If a state may restrict a minor's right to vote or to marry, then it may also restrict her right to purchase graphically violent video games. If a state may not impose the death penalty on minors—because they are "more vulnerable … to negative influences and outside pressures," *Roper*, 543 U.S., at 569—then a state may also keep them from buying games which invite them to commit digital atrocities.

III. CALIFORNIA'S LAW FALLS WITHIN A TRADITION OF STATE REINFORCEMENT OF PARENTAL AUTHORITY.

Limits on juvenile freedoms find their strongest justification when they assist those persons—namely, parents—who have a far higher claim to authority over children than the state. *See, e.g., Bellotti*, 443 U.S., at 637 (plurality op.) (explaining that "the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors"). California's law does precisely this. It wants parents, and not the marketplace, to police children's participation in the graphic violence enacted and encouraged by certain video games. Its modest regulation, then, does not suppress speech or impose a paternalistic restraint on children, but instead aims to "support the right of parents to deal with the morals of their children as they see fit." *Ginsberg*, 390 U.S., at 639 & n.7 (quoting Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 413 n.68 (1963)).

Respect for parental authority has shaped the Court's jurisprudence. The truth that "[t]he child is not the mere creature of the state," *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925), is a fixed star in constitutional interpretation. "[T]he interest of parents in the care, custody, and control of their children … is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Bellotti*, 443 U.S., at 639 & n.18 (plurality op.) (suggesting the Court's decisions recognize "a

constitutional parental right against undue, adverse interference by the State") (and citing, *inter alia, Pierce*, *supra*; *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Ginsberg*, *supra*).

These basic precepts have influenced how the Court measures juvenile rights. *See, e.g., Parham v. J.R.*, 442 U.S. 584, 602 (1979) (explaining that "[o]ur jurisprudence historically has reflected Western civilization['s] concepts of the family as a unit with broad parental authority over minor children"). For instance, the Court has understood that state authority in the school context derives, in important part, from parental authority. *See, e.g., Vernonia*, 515 U.S., at 654 (observing that "a parent 'may … delegate part of his parental authority … to the tutor or schoolmaster of his child'") (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1769)); *see also Morse*, 551 U.S., at 413-16 (Thomas, J., concurring) (discussing role of *in loco parentis* doctrine). That helps explain why school officials may subject minors to more intrusive searches or censor their speech. *See, e.g., Vernonia*, 515 U.S., at 655 (observing that "we have acknowledged that for many purposes school authorities ac[t] *in loco parentis*"); *Fraser*, 478 U.S., at 683 (emphasizing that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse").

The same principle has also shaped the Court's understanding of juvenile rights outside schools. For instance, it explains why a court may be

required to weigh the advisability of parental consultation in deciding whether to authorize a minor's abortion. *See Bellotti*, 443 U.S., at 648 (plurality op.) (explaining that a court "may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby"); *see also Lambert v. Wicklund*, 520 U.S. 292, 295-96 (1997) (per curiam) (discussing *Bellotti*). *Bellotti* underscored that "[l]egal restrictions on minors, *especially those supportive of the parental role*, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Id.*, at 638-39 (plurality op.) (emphasis added); *see also Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 520 (1990) (op. of Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ.) (observing that "[i]t is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature"). For the same reasons, the Court has recognized the state's "undoubtedly substantial" interest in "aiding parents' efforts to discuss birth control with their children." *Bolger*, 463 U.S., at 73 (citing *H.L. v. Matheson*, 450 U.S. 398, 410 (1981); *Bellotti*, 443 U.S., at 637).

Critically, the Court's *Ginsberg-Pacifica* line of cases has upheld restrictions on juvenile speech by drawing on this interest in reinforcing parental authority. *See supra* Part I (explaining centrality of *Ginsberg-Pacifica*); *see also Bellotti*, 443 U.S., at 639 & n.18 (plurality op.) (placing *Ginsberg* in the

historical line of parental authority cases); *Fraser*, 478 U.S., at 684 (identifying in *Ginsberg* and *Pacifica* the *in loco parentis* doctrine). *Ginsberg* itself emphasized that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." 390 U.S., at 639. It therefore reasoned:

> [t]he legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.

Id.; *see also Pacifica*, 438 U.S., at 749 (reiterating that the state's interest in supporting parental authority "justified the regulation of otherwise protected expression"). As Justice Powell explained in his *Pacifica* concurrence, the state may prevent dissemination of vulgar speech to children and thereby "leav[e] to parents the decision as to what speech of this kind their children shall hear and repeat[.]" *Id.*, at 758 (Powell, J., concurring).

State and local governments act on this interest in reinforcing parental authority in many ways. Laws in numerous jurisdictions, similar to the New York law in *Ginsberg*, support parents' role in policing children's exposure to sexually themed materials.[11] Local curfew ordinances more broadly

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[11] *See generally* 93 A.L.R.3D 297 (1979) (discussing prevalence of statutes or ordinances prohibiting sale of obscene materials to minors); *see also, e.g., Commonwealth v. Rollins*, 799 N.E.2d 1287, 1289-90 (Mass. App. Ct. 2003)

reinforce parental supervision of juveniles. *See supra* Part II (discussing curfew laws).[12] As the Colorado Supreme Court explained, drawing directly from this Court's reasoning in *Bellotti*:

> Courts have recognized that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them. […] [C]ontrolling a minor's freedom of movement after 10:00 p.m. reinforces parental authority and encourages parents to take an active role in supervising their children.

People in interest of J.M., 768 P.2d 219, 223 (Colo. 1989) (relying on factors in *Bellotti*, 443 U.S., at 622-23).[13]

(addressing application of MASS. GEN. LAWS ch. 272, § 31 (2000)); *Athenaco, Ltd. v. Cox*, 335 F. Supp. 2d 773, 778 & n.2 (E.D. Mich. 2004) (addressing constitutionality of MICH. COMP. LAWS § 722.675 (2002)); *State v. Anderson*, 540 So.2d 974 (La. App. 2 Cir. 1989) (addressing application of LA. REV. STAT. ANN. § 14:91.11 (1989)).

[12] Such laws are more commonly enforced than one might suspect. One scholar reports that, in 2004, there were 137,400 arrests for curfew violations nationwide. *See* Miriam Aroni Krinsky, *Disrupting the Pathway from Foster Care to the Justice System—A Former Prosecutor's Perspectives on Reform*, 48 FAM. CT. REV. 322, 332 (2010).

[13] Other state supreme courts have followed the same rationale. *See, e.g., Sale ex rel. Sale v. Goldman*, 539 S.E.2d 446, 449 & n.5 (W. Va. 2000) (upholding city curfew ordinance whose stated purpose was to "reinforce and promote the role of the parent in raising and guiding children"); *City of Panora*

Falling in the same category are state laws requiring parental consent for medical treatment. *See supra* Part II (discussing medical consent laws); *see also, e.g., In re Estate of K.E.J.*, 887 N.E.2d 704, 716 (Ill. App. 1 Dist. 2008) (observing the "well established legal fact that in the majority of circumstances, a parent can give binding consent to medical treatment for a child"). Similarly, when states limit a minor child's ability to sue a parent for negligence, they do so to protect both parental authority and family harmony. *See*, *e.g.*, *Owens v. Auto Mut. Indem. Co.*, 177 So. 133 (Ala. 1937); *Dubay v. Irish*, 542 A.2d 711 (Conn. 1988); *Mroczynski v. McGrath*, 216 N.E.2d 137 (Ill. 1966); *Walker v. Milton*, 268 So.2d 654 (La. 1972). As a Texas court recently explained, this parental-immunity defense "prevent[s] the disruption or distortion of parental decision-making within the 'wide sphere of reasonable discretion which is necessary … to provide nurture, care, and discipline for their children[.]'" *Sepaugh v. LaGrone*, 300 S.W.3d 328, 333 (Tex. App.—Austin 2009, pet. filed Mar. 26, 2010).

In sum, an abiding respect for parental authority has shaped the Court's understanding

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v. Simmons, 445 N.W.2d 363, 370 (Iowa 1989) (upholding city curfew ordinance based in part on rationale that it "acts to make parents the primary agent of enforcement" and "could be said 'to promote family life by encouraging children to be at home'") (quoting Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. PENN. L. REV. 66, 67 (1958)); *City of Milwaukee v. K.F.*, 426 N.W.2d 329, 337-39 (Wis. 1988) (rejecting argument that municipal curfew interfered with parental authority).

that juvenile rights cannot always be absolute. Numerous state and local laws are premised on this understanding. California's law falls squarely within this longstanding, praiseworthy, and constitutional exercise of state authority. Children are creatures of their parents, not the state, but states may help parents fulfill their duties toward children. States do so by enacting curfews, or by requiring parental consent to medical procedures, or by preventing children from suing parents. States may also take the more modest step of keeping children from buying, without parental consent, video games that encourage them to pretend they are sadists.

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Over three decades ago, this Court explained that "[b]ookstores and motion picture theaters … may be prohibited from making indecent material available to children." *Pacifica*, 438 U.S., at 749 (citing *Ginsberg*, 390 U.S., at 640, 639). California's law does nothing more than that. It does so, furthermore, not to impose a paternalistic morality on children, but rather to help parents raise children according to their own good sense. Parents' concern over which cultural products their children consume does not arbitrarily stop with sex. It extends to violence, and in particular to the disturbingly interactive form of digital sadism targeted by California's law. States may help parents shield their children from these materials without violating the First Amendment.

CONCLUSION

The Court should reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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