No. 08-1448

In The Supreme Court of the United States

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California; 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

BRIEF OF *AMICUS CURIAE* FIRST AMENDMENT COALITION IN SUPPORT OF RESPONDENTS

GARY L. BOSTWICK
JEAN-PAUL JASSY*
KEVIN L. VICK
BOSTWICK & JASSY LLP
12400 Wilshire Blvd., Suite 400
Los Angeles, CA 90025
(310) 979-6059
jpjassy@bostwickjassy.com

Counsel for Amicus Curiae First Amendment Coalition

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*[1]

The First Amendment Coalition, formerly known as the California First Amendment Coalition, is a nonprofit organization (incorporated under California's nonprofit law and tax exempt under Section 501(c)(3) of the Internal Revenue Code) that is dedicated to freedom of expression, resisting censorship of all kinds, and to promotion of the "people's right to know" about their government so that they may hold it accountable. The Coalition is supported mainly by grants from foundations and individuals, but receives some of its funding from for-profit news media, law firms organized as corporations, and other for-profit companies.

[1] The parties have consented to the filing of *amicus curiae* briefs in support of either party, and their consents were filed with the Clerk on May 10 and 27, 2010. This brief was not written in whole or in part by counsel for any party, and no persons other than *Amicus* have made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Petitioners' primary justification for California Civil Code §§ 1746, *et seq*. ("the Act") is that violent video games *might* contribute to aggressive behavior in *some* minors.[2] This, Petitioners argue, is a reason to censor Respondents' speech to minors. Petitioners' contention cannot be squared with this Court's precedent.

The concept of "violent speech" is not new to this Court. Prior decisions already strictly circumscribe the regulation of speech that is purportedly likely to lead to violent or unlawful behavior. Petitioners completely ignore this critical precedent, which requires a showing that unlawful behavior following speech is not only theoretically possible, but that the speech is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Historically, this Court's approach to violent speech has not changed even where the government's stated interest is to protect minors. This Court repeatedly has rejected arguments similar to Petitioners' here, striking down laws that were unconstitutionally vague and overbroad despite the

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[2] *See* Petitioners' Brief ("PB") 36, 43-44, 52-54, 56; *see also Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 954 (9th Cir. 2009) (*Schwarzenegger*) (quoting Legislative finding to support the Act: "[e]xposing minors to depictions of violence in video games . . . makes those minors more likely . . . to exhibit violent antisocial or aggressive behavior").

government's argument that the primary rationale for the government's proposed censorship was to insulate minors from the effects of violent speech.

A decision in Petitioners' favor here would require creating a dangerously vague new category of unprotected speech. It would require revisiting and reversing decades-old precedent. The Court's tested and reasoned approach to speech in this field should not be disturbed. Video games are a rapidly evolving medium. Exceptions to the First Amendment could easily lag behind technology. Neither the First Amendment nor this Court's jurisprudence on violent speech, even as it applies to minors, leaves room for a result that would create new exceptions to the Constitution, particularly in a field that may be different by the time this Court's decision is entered.

ARGUMENT

THIS COURT ALREADY HAS SETTLED JURISPRUDENCE STRICTLY CIRCUMSCRIBING THE REGULATION OF "VIOLENT SPEECH"

The jurisprudence of speech as an incitement to violence and lawlessness is nearly a century old. It has evolved considerably from "encouraging an actual breach of law" banning indecent exposure, *Fox v. Washington*, 236 U.S. 273, 277-278 (1915), to the supposedly "clear and present danger" of urging resistance to the military draft, *Schenck v. United States*,

249 U.S. 47, 49-51 (1919), to the "bad tendency" of speech to bring about harmful results, *Abrams v. United States*, 250 U.S. 616, 629 (1919), to upholding convictions for merely "advocating" violent means, *Whitney v. California*, 274 U.S. 357 (1927), to a reformulated "clear and present danger test," that balanced the seriousness of the danger to the interest in free speech, *Dennis v. United States,* 341 U.S. 494, 510 (1951), finally to the seminal decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curium*).

In *Brandenburg*, this Court reversed the conviction of a Ku Klux Klan leader under Ohio's Criminal Syndicalism statute. 395 U.S. at 444-445. The Klansman appeared on film, accompanied by a pistol, a rifle, a shotgun, ammunition, and 12 other hooded figures carrying firearms, while making racial epithets to "[b]ury the niggers" and warning of "revengeance [*sic*]." *Id.* at 446. This Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is *directed to* inciting or producing *imminent* lawless action and is *likely* to incite or produce such action." *Id.* at 447 (emphasis added). Quoting that same passage, this Court recently reaffirmed the *Brandenburg* test, adding further that "[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (citing *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (*per curium*)).

Petitioners cannot satisfy any part of the *Brandenburg* test. They present no evidence or argument that any video games are "directed to" inciting "imminent" violence or other lawless action. Nor do Petitioners have support for the notion that such action is "likely" to occur. Without even referencing *Brandenburg* in their brief, Petitioners insist that they should not be forced to show that there is any imminent threat of harm or that harm is likely to occur. PB 48-56. Petitioners' position is a throwback to *Gitlow v. New York*, 268 U.S. 652, 671 (1925), where the Court held that, because the defendant's speech was proscribed by statute, the imminence or likelihood of harm was irrelevant under the First Amendment. That is no longer the law, and has not been for nearly half a century. As it has for the last 40 years, the *Brandenburg* test covers the field.[3]

For this Court to decide in Petitioners' favor it would have to narrow *Brandenburg*, create a heretofore unrecognized exception to that 41-year-old case,

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[3] Earlier this year, in *U.S. v. Stevens*, ___ U.S. ___, 130 S.Ct. 1577, 1584 (2010), this Court rejected the Government's argument that depictions of violence and cruelty to animals should be a new category of unprotected speech. *See id.* at 1586. This Court also cautioned that new categories of unprotected speech could not simply be created because the government believed that such speech was harmful to society: "[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *Id.* at 1585.

and reject the conclusions of every federal district and appellate court to have evaluated the constitutionality of restrictions on the content of video games.[4] It would have to make a categorical exception to the First Amendment for minors in the field of violent speech. That is something this Court has never done, and should not do now.

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[4] *See Schwarzenegger*, 556 F.3d 950; *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Entertainment Merchants Ass'n v. Henry*, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007); *Entertainment Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entertainment Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006); *Entertainment Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

THIS COURT'S PRECEDENT CANNOT BE SQUARED WITH A VAGUE NEW CATEGORY OF UNPROTECTED "VIOLENT SPEECH" PURPORTEDLY DESIGNED TO PROTECT MINORS

A. There Is No Precedent For Categorically Restricting Minors' Access To Content Outside The Contexts Of Schools, Indecency Over A Broadcast Medium, Or Sexually Obscene Materials

This Court has stated that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-213 (1975) (internal citation omitted). "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Id.* at 213-214. Under very narrow circumstances, the States may impose categorical restrictions on minors' First Amendment rights to access materials or speech. This Court's jurisprudence has limited those circumstances to three contexts: disruptive speech in schools, indecent material on broadcast radio and television during particular hours of the day, and speech that is

sexually obscene. Historically, the Court has been careful to stress that the unique characteristics of these contexts justify a departure from the otherwise inviolable protections of the First Amendment. Those characteristics are absent from the Act in this case, and Petitioners' analogies to the contrary fail.

In *Morse v. Frederick*, 551 U.S. 393, 410 (2007), this Court held that a high school principal had not violated a student's First Amendment rights by confiscating a banner promoting illegal drug use. In so holding, the Court emphasized that the student was waving the banner at a "school-sanctioned and school-supervised event," and it placed great weight on "the special characteristics of the school environment." *Id.* at 396, 408. The Court also noted that while some lewd and indecent speech by minors may be prohibited in schools, if the student speaker "delivered the same speech in a public forum outside the school context, it would have been protected." *Id.* at 405 (discussing *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

In a concurring opinion joined by Justice Kennedy, Justice Alito explained his view that the school principal's confiscation of the banner in *Morse* stood "at the far reaches of what the First Amendment permits" because "[i]n most settings, the First Amendment strongly limits the government's ability to suppress speech on the ground that it presents a threat of violence." *Morse*, 551 U.S. at 425 (Alito, J., concurring) (citing *Brandenburg*). It was only permissible because, "due to *the special features of the school*

environment, school officials must have greater authority to intervene before speech leads to violence." *Id.* at 425 (emphasis added). The justification for similar restrictions on speech do not extend outside the school setting. *See id.* at 424-425; *see also* PB 21 (Petitioners acknowledging that " . . . school cases present their own unique circumstances . . . ").

This Court also has approved limited restrictions on indecent, but not obscene, material over broadcast media during certain hours of the day. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*). Petitioners here try to draw an analogy to *Pacifica*. *See, e.g.,* PB 19-20. Again, however, the Court in *Pacifica* relied heavily on the "special justifications for regulation of the broadcast media that are not applicable to other speakers" in other media. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997) (holding that the Internet, for example, is unlike the broadcast medium, because the Internet is comparatively unregulated, is not scarce, is not invasive and does not suddenly appear "unbidden" or "by accident" the way broadcast radio and television might). The Court in *Pacifica* emphasized that broadcast radio and television are "*uniquely* pervasive" and "*uniquely* accessible to children, even those too young to read." *Pacifica*, 438 U.S. at 748-749 (emphasis added). Here, by contrast, children must have money and the wherewithal to purchase a video game system and a video game that can be played on it, and must make the conscious decision to load that video

game and play it on their own. That is not the same as simply turning on a radio.[5]

In *Ginsberg v. State of New York*, 390 U.S. 629, 646 (1968), this Court held that the States may restrict the dissemination of sexually-themed obscene material to minors where the material "(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors." Petitioners urge an extension of *Ginsberg* from sexually obscene speech to violent speech, *see* PB 8-9, 12-13, but the decision in *Ginsberg* explicitly contrasted sexually obscene materials, which may be restricted for dissemination to minors, with speech that may only be restricted if it poses a "clear and present danger." *Id.* at 641. This distinction undercuts Petitioners' proposition that *Ginsberg*'s holding is fungible such that it may be facilely transferred from sexually obscene speech to speech that supposedly might lead to violent behavior in some minors.[6]

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[5] Even under *Pacifica*, a child who stays awake late enough would be able to hear that which she might not otherwise hear earlier in the day. *See id.* at 733. Here, on the other hand, a 17-year-old would not be able to purchase a violent video game at any time.

[6] The decision in *Ginsberg* predates *Brandenburg* by one year, so, rather than the "clear and present danger" test, the

(Continued on following page)

Petitioners ask this Court to do what it has never done before: approve a categorical ban on minors' independent ability to access an entire class of otherwise protected material outside school grounds that is neither sexually obscene nor indecent speech over a broadcast medium that may be accessed "by accident" during waking hours. In order to advance this proposition, Petitioners hope to create the impression that a ban on the sale of violent video games is no different than the rigors of a school setting, limitations on pornography or restrictions on indecent material over the airwaves. Petitioners' proposition fails. This Court already has evaluated minors' access to violent speech, and it has consistently rejected the contention that shielding minors from violent speech is a sufficient justification to create any new exceptions to well-established First Amendment jurisprudence.

B. This Court Repeatedly Has Struck Down Laws Designed To Protect Minors From Accessing "Violent Speech"

In *Winters v. New York*, 333 U.S. 507, 508 (1948), this Court struck down a New York law that criminalized the distribution to minors of materials devoted to "criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." *Id.* at 508; *see also id.* at 511 (the law

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appropriate distinction now would be under the *Brandenburg* test.

"originally was aimed at the protection of minors from the distribution of [such] publications," but "was later broadened to include all the population"). The "principal reason for the enactment of the statute," like the Act here, was that such materials were "vehicles for inciting violent and depraved crimes." *Id.* at 513 (internal quotation marks omitted). This Court held that the law was unconstitutionally vague and uncertain because publishers and distributors could not reasonably ascertain before publication whether certain materials such as war tales and detective and crime stories would violate the law. *See id.* at 519-520. The Act here is similarly vague for reasons addressed in Respondents' Brief on the Merits.

Likewise, in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 682 (1968), this Court held that a city ordinance requiring the classification of motion pictures based on their perceived suitability for minors was "unconstitutionally vague." As with the Act in this case, one of the city's proffered justifications for the ordinance was to protect minors from materials "likely to incite or encourage crime or delinquency on the part of young persons." *Id.* at 681. But the Court struck down the ordinance and emphasized that the City was not excused from compliance with the First Amendment simply because the ordinance was designed to protect children:

> Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary

> purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children.

Id. at 689.[7]

Similarly, in *Butler v. Michigan*, 352 U.S. 380, 381 (1957), this Court held unconstitutional a State law criminalizing the dissemination of books "tending to incite minors to violent or depraved or immoral acts" or "to the corruption of the morals of youth." The Court held that the law was unconstitutionally overbroad and took an approach akin "to burn[ing] the house to roast the pig." *Id.* at 383.

In *Erznoznik*, the Court likewise held that an ordinance was unconstitutionally overbroad despite the government's attempt to justify its reach based on a desire to protect minors. *See* 422 U.S. at 213-214.

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[7] In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582 (2001), this Court held that a State law restricting the advertising of tobacco "may not avoid the application of strict scrutiny simply because it seeks to protect children." This Court also held that tobacco advertising restrictions that were meant to protect minors "clearly fail the *Brandenburg* test" even though the advertisements purportedly solicit future illegal activity (*i.e.*, minors using tobacco products), and further held that "[i]t is difficult to see any stopping point to a rule that would allow a State to prohibit all speech in favor of an activity in which it is illegal for minors to engage." *Id.* at 579-580. Here, the underlying conduct (playing video games) is legal, but the direct sale of the games to minors is illegal under the Act. Thus, California defaults to a system that censors as a first resort.

The Court reasoned that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Id.* at 214. Here, the Act is unconstitutionally overbroad because it lumps all persons under the age of 18 together in one group and prohibits the same video games for them all, regardless of age. *See id.* ("[i]n assessing whether a minor has the requisite capacity for individual choice" supporting more robust First Amendment rights, "the age of the minor is a significant factor").

Laws restricting minors' access to violent materials for the purported purpose of protecting those minors are closely scrutinized for the same constitutional infirmities that invalidate laws restricting the rights of adults. California is not relieved of its constitutional obligation to comply fully with the First Amendment simply because the Act is designed to protect children from violent speech, and this Court has never held otherwise.

C. Government Recommendations, Instead Of Criminal Penalties, Constitute A Less Restrictive Means To Further Petitioners' Interests

Content-based restrictions on speech such as the Act are subject to strict scrutiny and "must be narrowly tailored to promote a compelling Government

interest." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.*; *see also id.* at 814 ("the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative"). Moreover, "[w]hen a plausible, less restrictive alternative is offered to a content-based restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Id.* at 816.

Here, there are less restrictive alternative means to further the State's articulated interests in preventing harm to minors and criminal and antisocial behavior. First, the State could recommend in an advertising campaign that certain types of violent video games should not be purchased or sold to minors and publicize its recommendations as part of an educational campaign directed at retailers and parents, without creating criminal penalties for the purchase or sale of the games. Particularly when considered in conjunction with the voluntary video game ratings and descriptions already provided by the Entertainment Software Rating Board, the State's recommendations and educational campaign could help achieve the State's interests in protecting minors and preventing criminal conduct without resorting to censorship.

Second, parental controls on gaming systems could allow parents, rather than the government, to decide which sorts of games are suitable for their

children. *See Reno v. ACLU*, 521 U.S. 844, 876-877 (1997) (finding significant the fact that a reasonably effective method by which parents could prevent children from accessing Internet material that parents believed to be inappropriate "will soon be widely available"). Such parental controls and other types of less restrictive alternatives are likely to evolve rapidly.

The Court should not create new exceptions to the First Amendment in a context like videogames that is acutely subject to rapid technological change. Petitioners acknowledge that the industry changes rapidly. *See* PB 42-47. That could mean a watershed decision from this Court changing its jurisprudence on violent speech would lag behind a technological change that offers new and creative less restrictive alternatives beyond those already available. More importantly, the same rapid changes in technology that Petitioners lament as harmful may actually lead to changes in society's attitude toward permitting minors' access to violent video games and minors' responses to the same. *See City of Ontario v. Quon*, ___ U.S. ___, 130 S.Ct. 2619, 2629 (2010) ("[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior").

CONCLUSION

The Court should not depart from, or create any new exceptions to, its decades-old jurisprudence regulating speech directed to inciting or producing imminent lawless action. Rather, the Court should follow its precedent and err in favor of the First Amendment rights of minors and video game manufacturers. Video gaming, which is today largely based on a software purchase model, could readily shift to online gaming that is free to users because it is supported by advertising. The absence of a sales transaction could make the California law irrelevant, but a decision adverse to the First Amendment would have profound vestigial effects.

Respectfully submitted,

GARY L. BOSTWICK
JEAN-PAUL JASSY*
KEVIN L. VICK
BOSTWICK & JASSY LLP
12400 Wilshire Blvd., Suite 400
Los Angeles, CA 90025
(310) 979-6059

Counsel for Amicus Curiae
First Amendment Coalition

**Counsel of Record*

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