No. 08-1448

In The Supreme Court of the United States

ARNOLD SCHWARZENEGGER, Governor of the State of California, and EDMUND G. BROWN Jr., 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

PETITIONERS' BRIEF

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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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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 556 F.3d 950 (9th Cir. 2009). The decision of the district court granting Respondents' motion for summary judgment (Pet. App. 40a-65a) is unreported. The decision of the district court granting Respondents' motion for a preliminary injunction (Pet. App. 66a-92a) is reported at 401 F. Supp. 2d 1034 (N.D. Cal. 2005).

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2009. The petition for writ of certiorari was filed on May 19, 2009, and was granted on April 26, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech." This provision applies to the states through the due process clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). California Civil Code sections 1746-1746.5, prohibiting the sale of violent video games to minors, are reproduced in the

Appendix to the petition for writ of certiorari. Pet. App. 93a-100a.

STATEMENT

1. California Civil Code sections 1746-1746.5 (the Act) prohibit the sale or rental of "violent video games" to minors under 18. The Act defines a "violent video game" as one that depicts "killing, maiming, dismembering, or sexually assaulting an image of a human being" in a manner that meets all of the following requirements: (1) A reasonable person, considering the game as a whole, would find that it appeals to a deviant or morbid interest of 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. The Act does not prohibit a minor's parent or guardian from purchasing or renting such games for the minor. Pet. App. 96a.

The Act provides for a penalty of up to $1,000 per violation, which may be lowered in the discretion of the court. The penalty does not apply to any person who is employed solely in the capacity of a salesclerk or other similar position, provided he or she does not have an ownership interest in the business in which the violation occurred and is not employed as a manager in the business. Pet. App. 98a.

In passing the Act, the California Legislature sought to reinforce the right of parents to restrict children's ability to purchase offensively violent video games. In doing so, the Legislature considered numerous studies, peer-reviewed articles, and reports from social scientists and medical associations that establish a correlation between playing violent video games and an increase in aggressive thoughts and behavior, antisocial behavior, and desensitization to violence in both minors and adults. JA 116-43. The Legislature also considered the Federal Trade Commission's report that the video game industry specifically markets M-rated (Mature) video games to minors, that 69% of 13- to 16-year-old children were able to purchase M-rated games, and that only 24% of cashiers asked the minor's age. JA 817-89.

The record contains examples of the violent content of various video games that may be covered by the Act. For example, the district court described one of the games in the record:

> The game involves shooting both armed opponents, such as police officers, and unarmed people, such as schoolgirls. Girls attacked with a shovel will beg for mercy; the player can be merciless and decapitate them. People shot in the leg will fall down and crawl; the player can then pour gasoline over them, set them on fire, and urinate on them. The player's character makes sardonic comments during all this; for example, urinating

> on someone elicits the comment "Now the flowers will grow."

Pet. App. 78a (internal citation omitted).

2. Respondents, representing the video game and software industries, brought a facial challenge to the Act. On Respondents' motion for a preliminary injunction and the parties' cross-motions for summary judgment, the United States District Court for the Northern District of California ruled that, absent sexual content, violence alone cannot be considered unprotected speech under the First Amendment, even when the restriction is limited to minors. Pet. App. 53a-58a, 86a-89a. As a content-based restriction on speech, the district court reviewed the Act under a strict scrutiny standard. Applying that standard, the district court concluded that, although protecting the physical and psychological well-being of minors is a compelling governmental interest, the State failed to demonstrate a sufficient causal connection between minors playing the covered games and the harm sought to be avoided by the Act. Pet. App. 58a-60a. The district court also held that the Act was not the least restrictive means of achieving the compelling interest in that the State did not demonstrate that parental controls available on some new versions of gaming consoles would be less effective. Pet. App. 60a-62a. The district court therefore held that the Act was facially unconstitutional under the First Amendment and permanently enjoined its enforcement. Pet. App. 39a.

3. The Court of Appeals for the Ninth Circuit affirmed. The court rejected the State's argument that the Act only covers speech that should not be entitled to First Amendment protection as to minors and should be reviewed under the same flexible standard that is applied to restrictions on the sale of sexual material to minors under *Ginsberg v. New York*, 390 U.S. 629 (1968). Pet. App. 15a-23a. Under *Ginsberg*, the Act would be upheld so long as it was not irrational for the Legislature to determine that the video games covered by the Act are harmful to minors. *Ginsberg*, 390 U.S. at 641. The court below acknowledged that the *Ginsberg* Court "offered two justifications for applying this rational basis standard: (1) 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'"; and (2) the state's "'independent interest in the well-being of its youth.'" Pet. App. 18a (quoting *Ginsberg,* 390 U.S. at 639-40). But the court distinguished *Ginsberg* nevertheless, concluding that the case applies only to sexual material, not violent material. Pet. App. 19a-22a. The court thus reviewed the Act under strict scrutiny and held that the State's evidence failed to establish a sufficient direct causal connection between violent video games and the physical and psychological harm to minors that the Act is intended to prevent. Pet. App. 27a-32a. The court of appeals also affirmed the district court's finding that, even assuming a direct causal connection had been shown, the Act was not the least

restrictive means of preventing the identified harm to minors. Pet. App. 32a-34a.

SUMMARY OF ARGUMENT

California's prohibition on the sale of offensively violent video games to minors is constitutional. Whatever First Amendment value these games may possess for adults, such games are simply not worthy of constitutional protection when sold to minors without parental participation. There is no sound basis in logic or policy for treating offensively violent, harmful material with no redeeming value for children any different than sexually explicit material.

The Act promotes parental authority to restrict unsupervised minors' ability to consume a narrow category of material in order to protect minors' physical and psychological welfare, as well as their ethical and moral development. California has a vital interest in supporting parental supervision over the amount of offensively violent material minors consume. The Act ensures that parents – who have primary responsibility for the well-being of minors – have an opportunity to involve themselves in deciding what level of video game violence is suitable for a particular minor. In doing so, the Act does not impinge upon the rights of adults, as it was deliberately structured to accommodate parental authority over minors while leaving access by adults completely unfettered.

It is well-recognized that the societal values served by the freedom to consume expressive material do not justify recognizing a constitutional right for minors of the same magnitude as that for adults – and this should be true whether the expressive material is sexually explicit or offensively violent. Instead, while minors certainly enjoy the protection of the First Amendment, it is a more restricted right than that assured to adults, who may judge for themselves what level of sexually explicit or violent material they should consume.

I. The First Amendment permits states to restrict minors' access to offensive and harmful violent video games absent parental supervision.

A. Because the State has a vital interest in reinforcing parents' authority to direct the upbringing of children in order to protect their physical and psychological welfare, as well as their ethical and moral development, restrictions on minors' access to offensively violent material are constitutionally permissible. The First Amendment rights of minors are not coextensive with the rights of adults. This precious right presupposes the capacity of the individual to make a reasoned choice as to whether to consume specific speech. Minors lack such capacity, and their liberty is best protected when the government reinforces parental authority and involvement in choices that can affect minors' well-being, including their moral and intellectual growth. Therefore, laws that prohibit the sale to minors of violent material that is patently offensive, appeals to a

minor's deviant or morbid interest, and lacks serious socially redeeming value for minors should properly be reviewed under the standard set forth by this Court in *Ginsberg v. New York*, 390 U.S. 629 (1968). If the regulated material satisfies the above criteria, it should make no constitutional difference whether the material depicts sex or violence. Under the *Ginsberg* standard, the Act must be upheld so long as it was not irrational for the California legislature to determine that exposure to the material regulated by the statute is harmful to minors.

Application of the *Ginsberg* standard, as opposed to strict scrutiny, is critical to ensuring that parents, who have the primary responsibility for minors' well-being, will receive the support of laws designed to aid in the discharge of that responsibility. Children occupy a unique place in civil society, and any application of the law must reflect this fact. The First Amendment rights of minors are not always co-extensive with the rights of adults. Because the parts of the brain involved in behavior control continue to mature through late adolescence, speech may have a deeper and more lasting negative effect on a minor than on an adult. Application of strict scrutiny would effectively ignore many undeniable distinctions between adults and minors.

B. The *Ginsberg* standard of review properly balances the rights of minors with states' interest in reinforcing parents' prerogative to direct the upbringing of children. Parents are entitled to such reinforcement in their efforts to protect their children

from expressive material that is just as harmful, if not more so, as sexual material. Applying the *Ginsberg* standard in this context respects the parental role over children. Application of strict scrutiny, on the other hand, would improperly elevate the rights of minors to consume offensive material to a level that has never been recognized before by this Court.

The primary interests served by strict scrutiny are misplaced in this context. This searching level of review applies to ensure that the rights of adults to partake in a robust marketplace of ideas are not curtailed without an overwhelming justification. But this Court has consistently recognized that parents must be permitted, with governmental assistance, to help shape that marketplace for minors given their underdeveloped sense of responsibility and vulnerability to negative influences. This holds true even for regulations on material with no sexual component, such as profanity. The *Ginsberg* standard properly accounts for fundamental differences in the inherent vulnerabilities and susceptibilities to negative influences between adults and minors.

The First Amendment has never been understood as guaranteeing minors unfettered access to offensively violent material. Such material shares the same characteristics as other forms of unprotected speech, especially sexually explicit material. Throughout history, many states have enacted laws that regulate the sale of both sexual and violent material to minors. Such restrictions reflect society's understanding that violent material can be just as harmful

to the well-being of minors as sexually explicit material. This is further reflected in the fact that violence can strip constitutional protection from otherwise protected material. Sexually explicit material that would be otherwise protected for distribution to adults can be considered obscene given the violent nature of its depiction. No rational justification exists for treating violent material so vastly different than sexual material under the First Amendment when reviewing restrictions on distribution to minors.

C. The Act properly supports parental authority over minors while serving fundamental societal interests. The Act also serves to eliminate the perceived societal approval of minors purchasing and playing offensively violent video games – a distinct harm to the development of minors recognized by social science and this Court. Allowing minors to legally purchase such games implies societal approval. The Act eliminates any possibility of such an imprimatur.

Technological and scientific advancements reaffirm society's long-standing concerns with minors' unsupervised exposure to violent material. Today, minors have access to intensely graphic, realistic, offensive violence in the games covered by the Act. And social science has developed to a point where a correlation can be demonstrated between minors who play violent video games and physical and psychological harm. Respondents' own system of self-regulation of the sale of video games recognizes that certain video games are inappropriate for minors

given the level of violent content available during game play. Indeed, through their rating system, Respondents apparently agree that minors should not be able to purchase games where the violent content reaches the level of "intense violence," which can include human decapitation, torture, burning, and general mayhem as depicted in the State's physical exhibit lodged with the Court.

II. The First Amendment does not require states to demonstrate proof of a direct causal link between violent video game play and harm to minors. If the government must defend a regulation on speech to minors as a means of preventing anticipated harms under strict scrutiny, a proper application of this level of review requires that the state legislature draw reasonable inferences based on substantial evidence. The social science considered by the California Legislature was more than sufficient to justify its decision to restrict minors' unfettered access to offensively violent video games.

III. The Act is the least restrictive means of serving the State's compelling interests. The California Legislature properly relied upon the FTC's report to Congress that, even with the video game industry's efforts to voluntarily restrict the sale of M-rated video games to minors, a majority of children ages 13 to 16 were still able to purchase such games from retailers. California was not required to simply accept the status quo in the face of such evidence, and its efforts to implement a more effective

means of preventing minors from purchasing offensively violent video games survives judicial review.

ARGUMENT

I. THE FIRST AMENDMENT PERMITS STATES TO RESTRICT THE SALE OF OFFENSIVELY VIOLENT VIDEO GAMES TO MINORS

As this Court unequivocally held in *Ginsberg v. New York*, 390 U.S. 629 (1968), states may properly restrict minors' access to material that is fully protected as to adults. This ruling, and the reasoning supporting it, is equally applicable to regulations on minors' access to offensively violent material. Such material, like obscenity, is harmful to minors and has little or no redeeming social value for them. Parents are entitled to support of the law in their efforts to protect minors from this material in order to direct their ethical and moral development. Because the State is only limiting this material with respect to its sale to minors, strict scrutiny does not apply to the California Act. Rather, history, tradition, and our continuing understanding of the inherent vulnerability and susceptibility of minors to negative influences confirm that California should be allowed to restrict minors' access to offensively violent material as it has done here.

In *Ginsberg*, this Court held that States may restrict the sale of offensive sexual material to children,

notwithstanding that the First Amendment fully protects such material as to adults. The court below erred when it held that the *Ginsberg* analysis is limited to sexual images. *Ginsberg* does not turn on the difference between sexual images and other forms of speech. Like much of the Court's jurisprudence before and after *Ginsberg* – often having nothing to do with sexual material – this case is premised upon society's traditional interest in protecting children from harm and helping parents direct their children's moral and social development. California's statutes restricting the sale of offensively violent video games to children serve precisely these interests. Violent video games, like sexual images, can be harmful to minors and have little or no redeeming social value for them. When sold to minors, offensively violent material must be recognized as a "categor[y] of speech that [has] been historically unprotected, but [has] not yet been identified or discussed as such in our case law." *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010). The Court should adopt the *Ginsberg* standard here so that the States may support parents' efforts to protect children from this material as part of their long-recognized duty to direct their ethical and moral development.

A. The First Amendment Allows the Government to Enact Restrictions That Prevent Harm to Children and Enable Parents to Guide Their Children's Upbringing

1. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech." Laws that restrict the content of speech are presumptively invalid, and the government has the burden of proving otherwise. *Stevens*, 130 S. Ct. at 1584. "From 1791 to the present, however, the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,'" including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Id*. The prevention and punishment of speech that falls into these traditional categories "has never been thought to raise any constitutional problem." *Id*. (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). "Context," moreover, "is all-important," *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978), and the Court also has allowed the government to regulate the content of offensive speech that could harm children, even though the speech would have been fully protected in other contexts.

Such regulations are constitutionally permissible, in part, because this Court has recognized that minors' First Amendment rights are often less extensive than those of adults. The liberty of human expression guaranteed by the First Amendment – the freedom to choose for oneself what to publish, read, or view in

order to promote a free trade in ideas – presupposes the capacity of the individual to make a reasoned choice. *Ginsberg*, 390 U.S. at 649 (Stewart, J., concurring). The proper interpretation of the First Amendment recognizes the fact that minors are not possessed of mental faculties equivalent to adults, and reflects society's well-established understanding that for certain narrowly-defined areas of expressive material, minors lack the capacity to make a reasoned choice. The right of parents to involve themselves in such decisions is entitled to the support of the law.

This Court has recognized that children occupy a unique place in civil society. This principle has borne itself out in two ways in the Court's precedent: (1) a recognition that parents must have substantial freedom to direct the upbringing of their children; and (2) a recognition that minors' rights may be curtailed in ways that the rights of adults cannot. Consistent with these principles, this Court has recognized that the First Amendment rights of minors are not "co-extensive with those of adults." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, n. 11 (1975); *see also Tinker v. Des Moines School Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring). Indeed, "[i]t is well-established that a State or a municipality can adopt more stringent controls on communicative materials available to youths than to those available to adults." *Erznoznik*, 422 U.S. at 212. Accordingly, the government can bar the sale of sexual material

to minors even when, in other contexts, the First Amendment would protect the material.

In *Ginsberg*, a store owner was convicted of violating a New York statute prohibiting the sale to minors material the state legislature found to be harmful to minors, although it was not obscene as to adults. 390 U.S. at 634. The statute at issue was directed at images of simple "nudity" as well as sexual depictions – "girlie magazines," as the Court referred to them. *Id*. at 645-47. The statute defined the term "harmful to minors" as a description or representation, "in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it: (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." *Id*. at 646.

Although the New York law at issue in *Ginsberg* would not have survived judicial scrutiny had it applied to adults, this Court upheld the law because it targeted purchases only by minors. *Id*. at 639-46. The Court recognized the state's power to define obscenity in a variable manner – using one definition applicable to adults and a more broad definition applicable only to minors. Thus, the *Ginsberg* Court applied the following standard: "To sustain state power to exclude material defined as obscene by [the statute] requires only that we be able to say that it

was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Id.* at 641.

The Court focused on the offensive, harmful nature of the speech when consumed by children, rather than on the sexual content of the speech. *See id*. at 673 (Fortas, J., dissenting) (objecting that the majority did not determine whether the magazines were actually obscene under the new standard). Specifically, the Court cited two interests that justify a relaxed application of the First Amendment.

> First of all, 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. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

Id. at 639 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). Accordingly, "The 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." *Ginsberg*, 390 U.S. at 639. The Court noted that the statute "expressly recognizes the parental role in assessing sex-related material harmful to minors according 'to prevailing standards in the adult community as a whole with respect to what is suitable material

for minors.' Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." *Id*.

The second interest that justified a relaxed standard is that the "State also has an independent interest in the well-being of its youth." *Id.* at 640. While supervision of children is best left to parents, parental guidance "cannot always be provided," and society has "a transcendent interest in protecting the welfare of children." *Id*. (quotations omitted). The Court cited *Prince v. Massachusetts*, 321 U.S. 158 (1944), which upheld the enforcement of Massachusetts's child labor law against the guardian of a nine-year-old girl for this fundamental, yet self-evident proposition. There, the Court "recognized that the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'" *Ginsberg*, 390 U.S. at 640-41 (quoting *Prince*, 321 U.S. at 165).

Consequently, *Ginsberg* turns on two interests that focus on children and parents rather than on any inherent difference between sexual speech and other forms of speech that may harm children. This Court has continued to focus on these interests in assessing the constitutionality of regulations that seek to protect minors from the potentially harmful effects of otherwise protected speech.

In a case that involved offensive words, not sexual images, this Court held that the government

could regulate speech that would be otherwise fully protected, in part because of potential harm to children. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court considered the FCC's authority to proscribe radio broadcasts that it found "indecent but not obscene." *Id*. at 729. The speech was a radio broadcast of George Carlin's twelve-minute monologue "Filthy Words," a satirical discussion of swear words that "you can't say on the public . . . airwaves." *Id*. Notably, while some of the words had sexual connotations ("fuck"), others did not ("piss," "shit"), nor did the case involve sexual images, as in *Ginsberg*. *See Pacifica*, 438 U.S. at 767 (" . . . the Carlin monologue is obviously not an erotic appeal to the prurient interests of children . . . and [is] therefore not obscene" as to them) (Brennan, J., dissenting).

In upholding the FCC's authority to regulate the broadcasting of such material, the Court focused not only on the unique qualities of broadcast media, but also on the potential harm to minors in the listening audience. The Court found that the language at issue – the seven dirty words – "could have enlarged a child's vocabulary in an instant." *Id*. at 749. Citing *Ginsberg*, the Court noted "the government's interest in the 'well-being of its youth' and in supporting 'parents claim to authority in its own household,'" which along with the "ease with which children may obtain access to broadcast material . . . amply justify" a more flexible application of the First Amendment. *Pacifica*, 438 U.S. at 749-50 (quoting *Ginsberg*, 390 U.S. at 639-40).

2. In focusing on the interests of parents and children, *Ginsberg* and *Pacifica* are not novel. This Court often considers society's traditional interests in supporting parents and protecting children when determining the scope of a variety of constitutional rights.

a. The Court has specifically invoked these interests in the context of public schools. Although students do not "shed their constitutional rights at the schoolhouse gate," *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), it is well settled that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Veronica School Dist. 47J v. Acon*, 515 U.S. 646, 656 (1995) ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere . . . "). Although this is due in part to "the special characteristics of the school environment," *Hazelwood School District. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quotation omitted), the treatment of students' rights in the school setting also reflects "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children." *Fraser*, 478 U.S. at 684.

Accordingly, the Court has considered cases involving student speech in public schools in this context and has often shown flexibility toward public school officials in regulating offensive speech of

various types. Like parents, "public education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." *Fraser*, 478 U.S. at 681 (quotation omitted). "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially acceptable behavior." *Id*. Although the Court has upheld a student's right to wear an armband to protest the Vietnam War, *Tinker*, 393 U.S. at 506, it has allowed school officials to sanction students for their lewd comments made to fellow students, *Fraser*, 478 U.S. 675, to remove books from a school library that officials deemed vulgar, *Board of Education v. Pico*, 457 U.S. 853 (1982), and to sanction a student for displaying a banner ("BONG HiTS 4 JESUS") when school officials reasonably concluded it promoted drug use, even though the student himself described the banner as mere "nonsense" and members of the Court variously described it as "cryptic," "ambiguous," "silly," and "ridiculous." *Morse v. Frederick*, 551 U.S. 393, 401, (2007). Notably, none of these cases involved speech that would have met *Ginsberg*'s variable obscenity standard.

Although school cases present their own unique circumstances, the flexibility that the Court allows public school officials is instructive here. If public schools may permissibly restrict students' free speech

rights, then the State of California should be allowed no less authority when they pass legislation designed to do nothing more than reinforce parents' right to directly control the upbringing of children. To hold otherwise would effectively grant public schools (arms of the state) greater authority to directly restrict minors' speech rights than a state itself has when it acts to reinforce parental rights over their own children. After all, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince*, 321 U.S. at 166. Parents are entitled to the law's support no less than public school teachers.

b. Reviewing the law more broadly, society's interest in protecting children from harm from a variety of sources, not just obscenity, and assisting parents in this important task is well-established in our Nation's history and traditions.

It is not simply in the First Amendment arena that minors' rights are restricted. Society recognizes the utility and legitimacy of a differential between the rights of minors and the rights of adults because minors are not *sui juris*. They cannot vote, *see* U.S. Const. amend. XXVI, and thus "might be considered politically powerless to an extreme degree." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 472 n. 24 (1985) (Marshall, J., concurring in part). And in California as in many states and the District of Columbia, minors generally cannot marry without parental consent, Cal. Fam. Code § 301; 23 Pa. Stat.

Ann. § 1304; N.Y. Dom. Rel. Law § 7; D.C. Code § 46-411, serve on a petit jury or grand jury, Cal. Code Civ. Proc. § 197; Cal. Pen. Code § 893, obtain a chauffer's license or drive a school bus, Cal. Veh. Code §§ 12515, 12516, purchase tobacco, Cal. Pen. Code § 308(b), play bingo for money, Cal. Pen. Code § 326.5(e), or execute a will. Cal. Prob. Code § 6220. And, of course, states may restrict their access to sexually explicit, harmful material. *E.g.*, Cal. Pen. Code §§ 313; 313.1; 313.2; *Ginsberg*, 390 U.S. 629.

Such laws, many of which could encroach upon fundamental rights in other contexts, present no constitutional problems because this Court "long has recognized that the status of minors under the law is unique in many respects" and "'children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children.'" *Belotti v. Baird*, 443 U.S. 622, 633-34 (1979) (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)). This Court has jealously guarded the "unique role in our society of the family, the institution by which we inculcate and pass down many of our most cherished values, moral and cultural. . . ." *Belotti*, 443 U.S. at 634 (internal quotation omitted). To foster this relationship "requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of

children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id*.

The decisions in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), demonstrate an understanding by this Court that the Constitution guarantees parents full authority to direct their children's development. In *Pierce*, the Court held unconstitutional Oregon's compulsory education law, which required every parent of a child between the ages of 8 and 16 years to send their children to a public school. 268 U.S. at 529. The Court found that such a requirement "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. Recognizing the separate, and sometimes conflicting, roles of the state and the parent, the Court noted that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id*. at 535.

In *Wisconsin v. Yoder*, the Court rejected the state of Wisconsin's argument that exempting Amish children from compulsory public education up to the age of 16 would fail to recognize the substantive right of the child to a secondary education and would curtail the power of the State as *parens patriae* to extend the benefit of secondary education to children

regardless of the wishes of their parents. 406 U.S. at 229-30. Instead, the Court recognized that it was the parents' rights, not those of their children, which would determine Wisconsin's power to mandate compulsory public education. *Id*. at 230-31.

It is upon these foundational principles that we, as a society, recognize that parental authority over minors is the bastion of ultimate liberty in adulthood. "Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal 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." *Belotti*, 443 U.S at 638-39.

In addition to reflecting the interests of parents in directing the upbringing of their children, this Court's jurisprudence has specifically identified the physiological reasons why minors are not yet capable of exercising the full panoply of constitutional rights. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court recognized three important differences between adults and minors under eighteen which compel states to apply differing legal standards that will accommodate such differences: "First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are

more understandable among the young. These qualities often result in impetuous and ill considered actions and decisions.'" *Id*. at 569. Second, the Court found that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." *Id*. And third, the Court noted that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* Notably, the Court based its holding on research produced by social science – the same type of social science relied upon by the California Legislature (JA 144 *et seq*.) – recognizing that the susceptibility of minors to harmful effects of external influences, well beyond that of adults, justifies differentiations in treatment in the eyes of the law.

Just recently in *Graham v. Florida*, 130 S. Ct. 2011 (2010), this Court reaffirmed the importance of these distinguishing factors: "As compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" *Id*. at 2026 (internal citations omitted). The Court also recognized that these "salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects

unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id*. (internal citation omitted). The Court relied upon social science in assessing the physiological differences, noting that "Developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Id*. (internal citations omitted).

These same concerns illustrate why allowing minors unrestricted access to offensively violent material is particularly antithetical to the goals of society. If minors are "more vulnerable or susceptible to negative influences," *id*., that will be equally true of the offensively violent video games that would be restricted under the Act. Similarly, because the adolescent brain is still developing and "the character of a juvenile is not as well formed as that of an adult," *Roper*, 543 U.S. at 569, the California Legislature should have the flexibility to limit children's access to a narrow category of offensively violent video games that depict and even reward gruesome violence such as decapitations, torture, and mutilation.

This Court's continuing concerns with the unique status of minors under the law, the societal interest in protecting them from harmful material, and the fundamental right of parents to direct their moral and ethical growth are all addressed by the Act. Applying the standard of review set forth in *Ginsberg*

to the facts of this case will allow California to lend support of the law to promote these critical concerns.

B. The *Ginsberg* Standard Strikes the Proper Balance Between Minors' Rights and the States' Interest in Helping Parents Direct the Upbringing of Their Children.

Ginsberg should be applied to the Act. It is an established, 40-year-old standard that strikes an appropriate balance between the relevant interests. Strict scrutiny, on the other hand, would nullify any meaningful evaluation of those interests. Moreover, the type of violent material at issue here is similar to other forms of unprotected speech, and offensive violence may certainly be a feature of sexual material that can be regulated under *Ginsberg*.

1. Applying the *Ginsberg* standard to violent material aimed at children, rather than exclusively to sexual material, furthers the very same interests repeatedly recognized by this Court. The *Ginsberg* standard, which was built upon established constitutional principles that have since been set forth with particularity in *Miller v. California*, 413 U.S. 15 (1973), strikes a careful balance between the rights of minors and the fundamental interests of parents and the State. It allows States to restrict minors' access to patently offensive material that appeals to their deviant interest, unless it has serious redeeming value for minors. The constitutionality of such a regulation

should not turn on empirical evidence, but on society's recognition of the importance of the parental role in assessing the appropriateness of such material given the distinct characteristics of the child or adolescent.

Application of strict scrutiny, on the other hand, would improperly elevate the right of minors to purchase material that may be more harmful than the magazines at issue in *Ginsberg*, while minimizing fundamental interests of parents and the State. To apply strict scrutiny to the Act would impede the States' ability to assist parents in protecting minors in the face of new and developing media. Such an unrealistically searching level of judicial review is often described as "strict in theory, but fatal in fact," *Fullilove v. Klutznick*, 448 U.S. 448, 507 & 519 (1980) (Powell, J., concurring in judgment; Marshall, J., concurring in judgment), and would place a nearly insurmountable hurdle in the path of legitimate, well-reasoned legislation that seeks to protect minors.

In First Amendment jurisprudence, strict scrutiny often applies to ensure that the rights of adults to partake in a robust marketplace of ideas are not restricted by the government absent justifications of the highest order. However, the individual right to consume speech is inextricably intertwined with the expressive material's worthiness of constitutional protection in any given context. For example, when traditionally obscene material is at issue, the First Amendment rights of individuals give way to the states' right to prevent the material's public dissemination.

Thus, in the seminal case *Roth v. United States*, 354 U.S. 476 (1957), this Court held that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Id.* at 484; *see also Miller*, 413 U.S. at 23 ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."). *Ginsberg* and *Pacifica*, however, make clear that, when children are the audience, other interests are also relevant. Strict scrutiny properly applies where there is both a right to receive the material by the audience, and the material itself is worthy of constitutional protection considering the audience to which it is directed. Neither of these elements is present when California restricts the sale of offensively violent video games to minors.

As this Court recognized in *Ginsberg*, the governmental interest served by restricting minors' access to certain expressive material is not limited to protecting them from physical or psychological harm. It also assists in preventing the impairment of minors' "ethical and moral development." *Ginsberg*, 390 U.S. at 641. Surely the First Amendment cannot be applied in a manner that would require empirical proof of how expressive material impacts such nebulous concepts as one's ethics or morals. Instead, a legislative body should be permitted to act cautiously in the interests of society if it rationally determines that offensively violent video games depicting brutal and sadistic acts committed by the game player are likely to harm the development of a child. The Court

emphasized a similar point in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973): "The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex." *Id.* at 63. The Court's reasoning applies just as well to video games marketed directly to children that contain crass commercial exploitation of violence.

Application of strict scrutiny to regulations that take account of the fundamental differences between minors and adults would simply nullify the distinctions themselves. When the audience to which it is sold consists of minors, offensively violent material does not merit strict scrutiny. The *Ginsberg* standard properly balances the rights of minors and adults with the rights of parents and the States, and provides the appropriate level of protection to which the expressive material is entitled given its audience.

2. The *Ginsberg* standard also should apply here because offensively violent material, when marketed to minors, shares similar characteristics with other forms of unprotected speech. The rationale underlying the Court's refusal to extend the First Amendment's protections to certain categories of speech applies equally with regard to offensively violent material sold to minors. As a society, we have historically understood that obscenity, which has varied in definition over time, is outside the

protection of the First Amendment. At the time of the framing of the Constitution, every State criminalized blasphemy or profanity as well, and the vast majority provided for the prosecution of libel. *Roth*, 354 U.S. at 482 & n. 11-12. This was so despite the fact that 10 of the 14 States that ratified the Constitution guaranteed the freedom of expression. *Id*. at 482 n. 10. Those who drafted the First Amendment saw no conflict between guaranteeing the freedom of expression and laws prohibiting speech that had harmful effects on the citizenry, such as obscene gestures and blasphemous language.[1] Similarly, federal law has consistently criminalized the transportation of obscene materials across state lines. The first federal obscenity statute, the Tariff Act of 1842, forbade the importation of "indecent and obscene" pictorial matter and authorized confiscation. *Manual Enterprises, Inc. v. Day* 370 U.S. 478, 483 n. 5 (1962). And in 1865 Congress passed a statute barring from the

[1] The laws prohibiting blasphemy and profanity were aimed at the effects of such laws on society. For instance, the Massachusetts statute outlawing profanity states that such speech "has a natural tendency to weaken the solemnity and obligation of Oaths" and "to loosen the bonds of civil society." Ch. 33, Laws of Mass. (1789). As this Court has noted, while "[t]he tendency to deprave is not the characteristic which makes a publication obscene," it is "the justification for the intervention of the common law." *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 485 (1962). As a result, as one of the first decisions expounding on the definition of obscenity in England observed, for a matter to be obscene, it must "deprave and corrupt those whose minds are open to such immoral influences." *Regina v. Hicklin* (1868) L.R. 3 Q.B., at 371.

mails obscene books, pamphlets, pictures and prints as well as other "vulgar and indecent" publications. 13 Stat. 504, 507 (1865); *see also* Kevin W. Saunders, *Violence as Obscenity*, 106-08 (1996).

The First Amendment, of course, was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth*, 354 U.S. at 484. Nevertheless, "States have a legitimate interest in prohibiting the dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller*, 413 U.S. at 18-19 (1973).[2] Similarly, so-called "fighting words" are "not in any sense proper communication of information or opinion safeguarded by the Constitution." *Chaplinsky*, 315 U.S. 568, 572 (1942). Offers to engage in illegal behavior are also unprotected, since "offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection." *United States v. Williams*, 553 U.S. 286, 298 (2008).

As is true of these other forms of unprotected speech, offensively violent speech aimed at minors can be harmful, and our Nation's traditional interest

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[2] Professor Tribe notes that "[a]t one time or another, obscenity has been made the object of criminal law in all fifty states." Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, ch. 12, n. 15 (2d ed. 1988).

in protecting minors outweighs any benefit derived from such speech. History amply supports this conclusion. In addition to regulating the distribution of sexual material, especially as to minors, many states have regulated violent material as well. These laws reflect a societal understanding that violent material can be just as harmful to the well-being of minors as sexually explicit material. Illinois, for example, made it a crime to exhibit to minors publications principally devoted to "illustrating or describing immoral deeds," or made up of accounts of "criminal deeds" or "pictures and stories of deeds of bloodshed, lust, or crime." Illinois Act June 3, 1889, Laws 1889, p. 114; 720 Ill. Comp. Stat. 670/1 (2008). Similarly, Michigan prohibits the sale to minors of prints "devoted to the publication of criminal news, police reports, or criminal deeds" as "tending to corrupt the morals of youth," and this law traces its roots to 1881. *See* Mich. Penal Code, Act 328 of 1931, § 750.142; section 5 of Act 260 of 1881, How., § 2002. *See also* Ohio Rev. Code. § 2905.34 (1963 Supp.) ("No person shall knowingly . . . show to a minor . . . [any material] principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime.").[3]

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[3] Of course, California is just one of nine states and municipalities to pass laws restricting minors' access to violent video games in recent years. *See* 21 Okla. Stat. §§ 1040.76-.77; 2005 Mich. Public Act 108; La. Rev. Stat. 14:91.14; Minn. Stat. § 325I.06; Ill. Crim. Stats. 5/12A-5(a), 5/12A-10(e), 5/12B-15; Rev. Code Wash. 9.91.180; City-County Council of the City of Indianapolis

(Continued on following page)

Many of these laws make an explicit connection between violent material and obscene speech. This relationship between sex and violence was well articulated by the Rhode Island legislature in its preamble to the amendments to its obscenity statute of 1956:

> It is hereby declared that the publication, sale and distribution to minors of comic books devoted to crime, sex, horror, *terror, brutality and violence*, and of pocket books, photographs, pamphlets, magazines and pornographic films devoted to the presentation and exploitation of illicit sex, lust, passion, *depravity, violence, brutality*, nudity and immorality are a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state.

Rhode Island P.L. 1956, chap. 3686, quoted in *State v. Settle*, 90 R.I. 195, 198-99 (1959) (emphasis added). Even today, the State of Ohio's obscenity statute defines material that is "harmful to juveniles" as not only obscenity, but representations of "extreme or bizarre violence, cruelty, or brutality." Ohio Rev. Code, § 2907.01(E)(3); *see also* Tenn. Code Ann. § 39-17-901 (defining "harmful to minors" as including representations of "nudity, sexual excitement, sexual conduct,

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and Marion County General Ordinance No. 72 (July 10, 2000); St. Louis County Ordinance No. 20,193 (Oct. 26, 2000).

excess violence or sadomasochistic abuse"); Section 524 of The Penal Code of June 24, 1939, P.L. 872 as amended 18 P.S. § 4524 (Penn.) ("Obscene literature consists of any writing . . . or other printed paper devoted to the publication and principally made up of criminal news, police reports or accounts of criminal deeds, or pictures of stories of deeds of bloodshed, lust or crime.").

These restrictions reflect society's understanding that, just like sexual material, violent material can be harmful to the well-being of minors. In the context of distribution to minors, sexual material is not the only pig to enter the parlor. And a state's ability to regulate such material does not depend upon proof that it is obscene. *Cf. Pacifica*, 438 U.S. at 750-51. Society has never considered such material appropriate for distribution to minors. As discussed more fully below, and in accord with society's long-standing concerns, modern social science shows that consumption of violent material, and video games specifically, is significantly linked to increases in aggressive behavior, aggressive cognition, aggressive affect, cardiovascular arousal, and decreases in helping behavior. JA 479-80. These harms, while intrinsically detrimental to the individuals themselves, can manifest as an automatically aggressive response to others, resulting in hostility, verbal arguments, and physical fighting. JA 600-01. The societal interest in assisting parents in protecting minors from such harmful, offensive material has a long tradition in this country and is well-founded.

3. Finally, when determining whether the *Ginsberg* standard should apply to offensively violent material as well as sexual material, it is important to note that violence already plays a major role in First Amendment jurisprudence. Otherwise protected sexual material can qualify as obscenity, even as to adults, based upon the violent nature of its depiction. Images of extreme sexual torture, for example, can be considered obscene by the prevailing standards of any given community. *See, e.g.*, *State v. Reece*, 110 Wash. 2d 766 (1988) (upholding store manager's conviction for selling obscene magazines, defined to include depictions of "violent or destructive sexual acts"). In many cases, but for the violent content, the sexual nature of the material would not be legally obscene. The presence of violence can be the determining factor in finding otherwise-protected sexual material deviant, prurient, shameful, or morbid, and can cause protected material to become patently offensive. Violence can remove all redeeming social value from otherwise protected material. *Id.*; *see also* La. Rev. Stats. Ann. § 14:106(a)(6) (defining obscenity in part as "sexually violent material" including "whippings, beatings, torture, and mutilation of the human body"); Ga. Code Ann. § 16-12-80(b)(3)(E) (defining obscenity as "[s]exual acts of flagellation, torture, or other violence"); Ohio Rev. Code § 2907.01(F)(3) (defining "harmful to juveniles" as including depictions of "bizarre violence, cruelty, or brutality" that tends to arouse minors).

Admittedly, these existing obscenity laws link violence with sexual material. Nevertheless, if violent content can strip otherwise protected material of its constitutional protection, then offensively violent content alone should be considered unprotected expression, at least with respect to its sale to minors. The harms averted and societal interests promoted through the regulation of sexual and violent material are merely two sides of the same coin. It would be ironic indeed if the First Amendment were interpreted to permit states to assist parents in protecting minors from sexual material – depictions of images and acts that they may legally engage in after the age of majority – yet prohibit them from protecting minors from offensively violent material – depictions of acts that they may never legally engage in.

C. The Act Properly Reinforces Parental Authority Over Minors, and Comports With Both the Traditional and the Present Understanding of the First Amendment Rights of Minors

1. The Act Serves Fundamental Societal Interests

Applying the principles underling *Ginsberg v. New York*, 390 U.S. 629 (1968) and its progeny, and recognizing the vital interests of the State and the rights of parents to direct the upbringing of their children, the Act comports with the requirements of the First Amendment. Through its limited application, the Act properly allows the State to reinforce

parental authority over minors to protect them from offensive and harmful material. Parents are entitled to such reinforcement because the California Legislature rationally determined that offensively violent material is just as harmful to minors, if not more so, as sexual material.[4]

By definition, the Act covers only those video games where the player can kill, maim, dismember, or sexually assault an image of a human being in a manner that a reasonable person, considering the game as a whole, would find (1) appeals to a deviant or morbid interest of minors, (2) is patently offensive to prevailing standards in the community as to what is suitable for minors, and (3) causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.[5] Pet. App. 96a. As with obscenity, fighting words, and other forms of

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[4] In *Ginsberg*, this Court recognized that "there is no lack of 'studies' which purport to demonstrate that obscenity is or is not 'a basic factor in impairing the ethical and moral development of . . . youth and a clear and present danger to the people of the state.' But the growing consensus of commentators is that 'while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either." 390 U.S. at 641 (internal citation omitted).

[5] The Act also contains a secondary definition of covered games, but only one definition need be met. Petitioners conceded below that this secondary definition does not provide an exception for material that has serious redeeming value for minors, as the primary definition so provides, and may therefore be unconstitutionally broad. This section of the Act, however, is severable. Cal. Civ. Code § 1746.5.

unprotected speech, the violent video games covered by the Act, by definition, add nothing to the free exchange of ideas for minors, do not represent a step to the truth, and any benefit to be derived from them by minors is clearly outweighed by the societal interest in order and morality. *Cf. Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). Whatever First Amendment value these games may possess for adults, they are simply not worthy of constitutional protection when sold to minors.

The Act also serves to eliminate the perceived societal approval of minors playing offensively violent video games – a distinct developmental harm recognized by this Court. In *Ginsberg*, the Court cited the Columbia University Psychoanalytic Clinic in reporting on the independent harm to developing egos when minors perceive a societal approval of viewing pornography:

> Dr. Gaylin emphasizes that a child might not be as well prepared as an adult to make an intelligent choice as to the material he chooses to read: '(P)sychiatrists . . . made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit

> implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval-another potent influence on the developing ego.'

Ginsberg, 390 U.S. at 642 n. 10. By prohibiting minors from independently purchasing the covered video games, the Act serves to remove any possible imprimatur of societal approval. The Act thus serves to leave the minor's identification process in the hands of the parents without any contradictory message from the State.

The Act allows California to carry on this Court's tradition of supporting parental rights over minors. Particularly with respect to material that can cause a child or adolescent to be more prone to aggressive, antisocial behavior, California has a strong interest in allowing parents to ensure that their children will not be exposed to violent video games without their knowledge and consent, allowing them to direct the upbringing of their children in the manner they see fit. Further, the Act is limited to minors, who do not always have the same First Amendment rights as adults. As with pornographic speech, California may properly limit minors' access to the offensive violence in certain video games so long as it is not irrational for the Legislature to determine that the video games covered by the Act are harmful to minors. *Ginsberg*, 390 U.S. at 641. As is made clear from the studies in the record, discussed below, it was entirely rational for California to make this determination.

2. Advancements in Technology and Social Science Reaffirm Society's Long-Standing Concerns With Minors' Exposure to Violent Material

This Court has never suggested that a State may not regulate minors' unfettered access to offensively violent material.[6] And given the quantum leaps in

[6] *Winters v. New York*, 333 U.S. 507 (1948), is not to the contrary. There, the Court reviewed a defendant's conviction under a statute prohibiting the distribution of publications (to adults as well as minors) "principally made up of criminal news reports, police reports, or accounts of criminal deed, or pictures, or stories of deeds of bloodshed, lust or crime." *Id*. at 508. This Court struck down the statute on vagueness grounds. *Id*. at 519. Notably, however, the Court made clear that it was not holding that a state "may not punish circulation of objectionable printed matter, assuming it is not protected by the principles of the First Amendment," or that states are "prevented by the requirement of specificity from carrying out their duty of eliminating the evils to which, in their judgment, such publications give rise." *Id*. at 520. It was not the statute's objective that troubled the Court, only the terms employed to achieve it. The Court never took issue with the statute's aim of restricting the distribution of "collections of criminal deeds of bloodshed or lust . . . so massed as to become vehicles for inciting violent and depraved crimes against the person. . . ." *Id*. at 513. In the 60 years since *Winters* was decided, violent material has become profoundly more graphic and interactive, and goes well beyond reading "accounts of criminal deeds" taken from police reports. *See* Petitioners' Video Game Violence compilation DVD, lodged with the Court.

technology and social science since this Court last considered a State's attempt to regulate access to violent material, this Court should confirm that such regulations, if narrowly drawn and limited to minors, comport with the First Amendment.

The level of graphic detail and realism contained in many modern violent video games is without historical parallel. As noted by one journalist, "[a]s the systems that run video games become more powerful, developers are able to add more complex elements to these games. The big one: Realism. [¶] With advanced 3D graphics, the characters in some modern games look so lifelike it's actually frightening. But beyond just the graphics, creators have also been trying to make the game play more realistic as well." *See* Robert Janelle, *Video Game Realism* (Sept. 5, 2007) http://videogames.suite101.com/article.cfm/video_game_realism (last visited July 6, 2010). Describing the level of realism in one video game, the writer notes, "[H]ave you been shot? You'll have to dig the bullet out with a combat knife, apply disinfectant, suture the wound shut and finally, apply a band-aid." *Id.* Such realism adds to the violent, horrific nature of many video games available to minors.

Moreover, research has shown how media violence generally, and video game violence specifically, can lead to aggressive, antisocial behavior and feelings. As far back as 1972, the Surgeon General testified before Congress that "the overwhelming consensus and the unanimous Scientific Advisory Committee's report indicates that televised violence,

indeed, does have an adverse effect on certain members of our society." JA 235-36. More recently, in a 2000 joint statement, the American Academy of Pediatrics, the American Academy of Child & Adolescent Psychiatry, the American Psychological Association, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association stated that 30 years of research demonstrates that entertainment violence has negative impacts on children:

> At this time, well over 1000 studies – including reports from the Surgeon General's office, the National Institute of Mental Health, and numerous studies conducted by leading figures within our medical and public health organizations – our own members – *point overwhelmingly to a causal connection between media violence and aggressive behavior in some children. The conclusion of the public health community, based on over 30 years of research, is that viewing entertainment violence can lead to increases in aggressive attitudes, values and behavior, particularly in children*.

JA 378 (emphasis added). The group concluded that children who are exposed to violence are more likely to use violence to resolve conflicts. They are more likely to be desensitized to violence, and are more likely to mistrust others. Researchers have found that youths who watch violent scenes in television and movies "subsequently display more aggressive behavior, aggressive, thoughts, or aggressive emotions than

those who do not." JA 247. Similar findings have been made with respect to violent music lyrics (JA 271) and, as discussed in Part II, violent video games.

3. Respondents' Own System of Self-Regulation Recognizes That Certain Video Games Are Not Appropriate for Minors Given the Level of Violent Content

The traditional understanding of the proper place of violence in the spectrum of material that is appropriate for minors continues today. And it is even demonstrated by the Respondents' own rating system. The Entertainment Software Ratings Board (ESRB) gives video games ratings from EC (Early Childhood) up to AO (Adults Only), which represent age-based recommendations to retailers. JA 95. Violent content is a factor considered by the ESRB in every single rating.

For example, games will receive a rating of M (Mature) if they "contain intense violence, blood and gore, sexual content, and/or strong language." *Id*. The ESRB even rates games based solely upon violent content, absent any sexual component: games will receive a rating of E 10 + (Everyone 10 and older) if they contain "minimal cartoon, fantasy or mild violence and/or infrequent use of mild language." *Id*. Respondents' own rating system thus acknowledges that, as a society, we continue to believe that there exists a level of violent content in expressive material

that is not appropriate for consumption by minors absent parental guidance.

Nowhere is this better exemplified than in the ESRB's rating of the video game *Postal II*. The ESRB gave this game a rating of M (Mature) and provides the following description: "Blood and Gore, Intense Violence, Mature Humor, Strong Language, Use of Drugs."[7] But the industry's attempt at self-regulation does not begin to describe the game's violent content. As demonstrated in Petitioner's Video Game Violence video compilation (lodged with the Court by Petitioners), the violence in *Postal II* includes torturing images of young girls, setting them on fire, and bashing their brains out with a shovel, for no reason other than to accumulate more points in the game. In one scene in *Postal II*, the player (who sees through the eyes of the shooter) looks through a scope on an assault rifle and sees a very realistic image of a person's face. The player then shoots the victim in the kneecap. As the player watches the victim attempt to crawl away, moaning in pain, the player pours gasoline on the victim and lights him on fire. As the burning victim continues to crawl, the player urinates on the victim, and says "That's the ticket." After noting that it "smells like chicken," the player again looks at the victim through the scope on the gun, and again sees a realistic human face, on fire, crawling

[7] *See* http://www.esrb.org (enter the term "Postal II" in the search box to reveal ESRB's rating and description of the game).

toward him. The player then shoots the victim in the face, which turns into charred remnants of a human image. In another scene, the player hits a woman in the face with a shovel, causing blood to gush from her face. As she cries out and kneels down, the player hits her twice more with the shovel, this time decapitating her. The player then proceeds to hit the headless corpse several more times, each time propelling the headless corpse through the air while it continues to bleed.

With regard to their distribution to minors, both sexually explicit and violent material exist at the periphery of the First Amendment. Neither represents an essential part of any exposition of ideas for minors absent parental guidance, nor does their social value represent a step to truth. Accordingly, like obscene material, offensively violent material sold to minors should not receive a level of First Amendment protection that would trigger strict scrutiny. California must be allowed to reinforce parents' right to direct the upbringing of their children by protecting them from material that Respondents themselves believe is inappropriate for minors. Properly interpreted, the First Amendment poses no barrier to California's efforts to limit the unfettered access of minors to offensively violent video games through the Act.

II. THE FIRST AMENDMENT DOES NOT DEMAND PROOF OF A DIRECT CAUSAL LINK BETWEEN EXPOSURE TO VIOLENT VIDEO GAMES AND HARM TO MINORS

When the government defends a regulation on speech as a means of preventing anticipated harms, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), properly requires reviewing courts to uphold legislators' predictive judgments of harm when they have "drawn reasonable inferences based on substantial evidence." *Id*. at 666. The court below imposed a far more stringent standard of proof that will affect future cases on a broad variety of subjects. Petitioners ask this Court to reject the heightened standard of proof imposed by the lower court. Requiring legislative bodies to come forward with proof of direct causation of harm to minors would effectively eliminate the States' ability to help parents protect the health and welfare of minors when the protective measure touches upon protected rights.

Never has this Court required a legislative body to come forward with proof of a direct causal nexus between offensive material and physical or psychological harm to minors. Such an evidentiary requirement would presumably entail experimentation on minors in order to justify legislation seeking to protect them from harm. In order to show direct causation, researchers would theoretically be required to isolate a minor from all other forms of violence (be it media violence, school violence, or family violence)

while exposing the minor only to violent video games in order to determine whether such exposure directly causes the negative physical and psychological impacts observed by the existing literature. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009) (refusing to require Congress to come forward with studies where minors are intentionally exposed to indecent television broadcasts, isolated from all other indecency). Such a study would be as unethical as it is impracticable. By effectively requiring it, the Ninth Circuit placed California in a situation where it could only justify a law prohibiting the sale of violent video games to minors through the use of a study that can never be performed.

Instead, any interpretation of the First Amendment must recognize that responsible, rigorous social science uses field experiments, cross-sectional correlation studies, longitudinal studies, and meta analyses combining the results of other studies to form conclusions regarding causation. Minors can be observed and surveyed regarding the violent material they consume, their interactions with other children and teachers, and their school performance. Correlations can then be obtained and professional opinions formed regarding the impact that the consumption of violent material has on minors. From those professional opinions, responsible social scientists can also draw valid conclusions regarding the impact that consumption of violent material can have on the physical and psychological well-being of minors. Legislative bodies must be permitted to rely on this

established process in formulating social policy. A proper application of the *Turner* standard permits them to do so.

In *Turner*, this Court upheld federal must-carry broadcast provisions requiring cable television systems to dedicate a portion of their channels to the transmission of local broadcast stations. 512 U.S. at 666. In defending the regulation, the government relied upon Congress's legislative finding that, absent mandatory carriage rules, "the continued viability of local broadcast television would be 'seriously jeopardized.'" *Id*. at 665. The Court accepted the government's justification for the regulation, recognizing that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Id*. This Court held that in reviewing government regulations on speech, a court "must accord substantial deference to the predictive judgments" of the legislative body. *Id*. A state's predictive judgments, therefore, are properly upheld so long as the reviewing court finds that "in formulating its judgments, [the state] has drawn reasonable inferences based on substantial evidence." *Id*.

Most recently, this Court acknowledged that the government cannot be expected to obtain the unobtainable when it acts to protect minors from the harmful effects of indecent broadcast media. In *Fox Television Stations*, this Court held 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. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency." 129 S. Ct. at 1813. Importantly, the Court noted that "[i]t is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. . . . It is something else to insist upon obtaining the unobtainable." *Id*. Therefore, this Court held that "Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity." *Id*.

Never has this Court demanded proof of direct causation of harm to minors in order to justify a regulation on the speech they may consume absent parental guidance. However, the opinion of the court below does just that. In this case, the court of appeals purported to apply the standard set forth in *Turner Broadcasting System* in reviewing the Act (Pet. App. 25a-32a), when it held that the State failed to prove the existence of a compelling governmental interest because "the evidence presented by the State does not support the Legislature's purported interest in preventing psychological or neurological harm. Nearly all of the research is based on correlation, not evidence of causation. . . . None of the research establishes

or suggests a causal link between minors playing violent video games and actual psychological or neurological harm." Pet. App. 31a-32a. The court of appeals found the State's evidence fatal to its case because only a correlation, not direct causation, was established. In the absence of direct causation, the court held that the State failed to demonstrate the existence of a compelling interest. Pet. App. 31a.

But by requiring proof of a direct causal link, the court below effectively narrowed the *Turner* standard. Indeed, the deference that the *Turner* Court intended to provide to legislative bodies was replaced in the decision below with an insurmountable hurdle. Under existing social science, empirical evidence of direct causation required by the Ninth Circuit may well prove unobtainable.

Although there have been even more studies since the California Legislature passed the Act, the evidence before it definitely established a correlation between playing violent video games and increased automatic aggressiveness, aggressive thoughts and behavior, antisocial behavior, and desensitization to violence in minors and adults. For instance, in a 2004 study involving over 600 eighth and ninth grade students, researchers asked students to rank how violent a video game was on a 7-point scale, and were then asked how many hours they played that game per week. JA 600, 611-13. The students were then asked how often they had gotten into an argument with a teacher on a 4-point scale, ranging from "almost daily" to "less than monthly" and were asked

if they had gotten into a physical fight in the last year. Students' trait hostility (the relatively permanent internal characteristic of anger and aggression) was also measured. Those students who played violent video games more often were more likely to argue with their teachers and more likely to have been involved in a physical fight. Significantly, those students with low trait hostility who played more violent video games were *more* likely to argue with teachers or engage in fights than students with higher trait hostility who did not play violent video games, suggesting a causal connection between playing violent video games and aggressive behavior. JA 633.

Similar results were obtained in a study of 130 undergraduate students, who were randomly assigned to play one of 10 video games, half of which were violent, and half of which were not. JA 479, 493-94. After playing the game for 20 minutes, they were asked to fill in a missing letter to complete a word that could be either aggressive or non-aggressive, such as explo_e, which could be explore or explode. Those individuals who played a violent video game were more likely to complete the word in a violent, aggressive way than those who had played a non-violent game. Researchers also observed greater increases in blood pressure for those who were playing the violent video games. Another study of 150 fourth and fifth graders found that playing violent video games was correlated with lower empathy as well as stronger pro-violence attitudes. JA 705-06.

These studies and the others considered by the California Legislature are not isolated instances, as revealed by meta-analyses of multiple studies.[8] A 2004 meta-analysis of all studies containing data testing a possible connection between exposure to violent video games and aggressive behavior showed that "there is considerable correlational and experimental evidence linking exposure to violent video games with increases in aggressive behavior and to several aggression-related variables." JA 558. In a separate meta-analysis, researchers concluded that "exposure to violent video games is significantly linked to increases in aggressive behavior, aggressive cognition, aggressive affect, and cardiovascular arousal, and to decreases in helping behavior." JA 577. Moreover, researchers concluded that "[m]ethodologically weaker studies yielded smaller effect sizes than methodologically stronger studies, suggesting that previous meta-analytic studies of violent video games underestimate the true magnitude of observed deleterious effects on behavior, cognition, and affect." *Id*.

Certainly, Respondents would not dispute that video games, given their interactive nature, can be excellent mechanisms for teaching minors a variety of subject matters. The California Legislature considered the research that supports this conclusion. JA

[8] In a meta-analysis, researchers aggregate the results of numerous different studies, which has the benefit of a much larger sample size.

382, 414-16 (concluding that playing violent video games leads to greater hostile attribution bias and increased aggressive behaviors – "exemplary" teaching of aggression). But just as the interactive nature of video games makes them exemplary teachers in positive contexts, it is this interactive nature that also poses a special risk to minors when the games contain extreme violence. As noted in an article by two professors, video games are especially effective at leaving lasting impressions on the player:

> Visual or auditory changes, such as edits that change the angle of camera view or sound effects, make us look at them. Increasing the frequency of edits has been shown to improve recognition memory (up to a point . . . there is an optimal level). Furthermore, provocative scenes of sex and violence not only capture one's attention, but also supply vivid visual images, which are known to create better memory than the same information provided verbally (e.g., Paivio & Begg, 1981). Active participation in aggressive or provocative scenes in video games increases physiological arousal (e.g., Ballard & Weist, 1996; Gwinup, Haw, & Elias, 1983; Lynch, 1994; Lynch, 1999; Murphy, Alpert, & Walker, 1992; Segal & Dietz, 1991). This physiological responding in the context of "playing fun games" is likely to condition one's emotions to such activities, not unlike other addictive "highs."

JA 395-96.

In short, the studies considered by the Legislature conclusively establish a connection between playing violent video games and increases in aggressive behavior in children. Absent intrusive, unethical, and possibly illegal experimentation on minors, social science might never be able to discover a single environmental variable that causes automatic aggression, increased aggressive behavior, antisocial behavior, desensitization to violence, and poor school performance. *See*, *e.g.*, studies beginning at JA 144, 232, 479, 577, 600, 646, 705. Perhaps this environmental variable would remain elusive even if these experiments were performed. But such testing cannot be demanded by the First Amendment. This Court should reverse the opinion below, and reaffirm that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broadcasting System, Inc.*, 512 U.S. at 666.

III. THE ACT IS THE LEAST RESTRICTIVE MEANS OF SERVING THE STATE'S COMPELLING INTERESTS

The Act represents the least restrictive means through which the State can effectively achieve its goals of helping parents direct the upbringing of children and protecting them from harm caused by playing offensively violent video games. The court of appeals erred in holding otherwise.

Specifically, the court of appeals held that even assuming the State had demonstrated the existence of a compelling interest, the mere "possibility that an enhanced education campaign about the ESRB rating system directed at retailers and parents" could be a less restrictive means to achieve the government's interests, and therefore the Act could not survive strict scrutiny. Pet. App. 33a. The court also appeared to hold that because new gaming consoles would contain parental controls, the Act was not the least restrictive means of achieving the legislature's goals. *Id*. at 32a-33a. Neither holding is correct.

When California passed the Act in 2005, the legislature had considered the Federal Trade Commission's report to Congress on the marketing of violent media to children. JA 130, 140, 746. The FTC reported that in 2000, 85% of children ages 13 to 16 where able to purchase M-rated video games without being accompanied by an adult. JA 816. As of 2004, the FTC reported that "Sixty-nine percent of the children were able to purchase M-rated games, and more than half (56%) of the youngest shoppers – 13-year-olds – were able to buy an M-rated game." *Id*. The FTC found that "[e]ven among those retailers with programs in place to restrict sales, 55% of the unaccompanied children were able to buy violent M-rated games." *Id*. at 817. Ultimately, the FTC reported that although these results reflected improvement over the years, "the numbers still fall short of what might be expected given the multi-year effort by

the ESRB to encourage retailers to adopt restrictive sales policies." *Id*.

Moreover, Respondents themselves acknowledged that the ESRB's rating system is entirely voluntary, and not all video game publishers submit their games to the ESRB for ratings. *See* Entertainment Software Rating Board, *Frequently Asked Questions*, http://www.esrb.org/ratings/faq.jsp (last visited July 6, 2010). Thus, for games receiving no ESRB rating, no amount of educational campaigning will impact the sale of such games to minors. And parental controls now available on some gaming consoles would apparently be useless. Moreover, any child with a computer or gaming console connected to the Internet can easily search the World Wide Web for instructions on how to bypass the parental control feature of any console.[9]

As the Court recognized in *Ashcroft v. American Civil Liberties Union*, "the court should ask whether the challenged regulation is the least restrictive means among available, *effective* alternatives." 542 U.S. 656, 666 (2004) (italics added). Here, California demonstrated that the Act, through the imposition of civil penalties, was the only effective means of

[9] For example, a Google search for the terms "xbox 360 parental control bypass" (actual search not in quotes) returned multiple web site links containing instructions on how to perform the bypass. *See, e.g.*, http://forum.teamxbox.com/showthread.php?t=357331 (containing directions on parental control bypass).

ensuring that parents have the ability to involve themselves at the initial stage of the process. The California Legislature was not willing to simply maintain the status quo, hoping that purported industry efforts would eventually eliminate children's access to offensively violent video games. The proper application of the First Amendment in this context permits the State to intervene when the industry fails.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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