No. 08-1448

IN THE

Supreme Court of the United States

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

v.

ENTERTAINMENT MERCHANTS ASSOCIATION, *et al.*,
Respondents.

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

BRIEF FOR *AMICI CURIAE* RHODE ISLAND, ARKANSAS, GEORGIA, NEBRASKA, NORTH DAKOTA, OKLAHOMA, PUERTO RICO, SOUTH CAROLINA, UTAH AND WASHINGTON SUPPORTING RESPONDENTS

JOSEPH M. LIPNER
ELLIOT BROWN
MICHAEL FEHNER
AARON LISKIN
Irell & Manella LLP
1800 Ave. of the Stars, Ste. 900
Los Angeles, CA 90067-4276
(310) 277-1010
jlipner@irell.com

PATRICK C. LYNCH
Counsel of Record
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903
(401) 274-4400
PLynch@riag.ri.gov

[Additional Counsel Listed On Inside Cover]

September 17, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

DUSTIN MCDANIEL
Attorney General
State of Arkansas
200 Tower Bldg.
323 Center St.
Little Rock, AR 72201-2610

THURBERT E. BAKER
Attorney General of Georgia
132 Judicial Building
40 Capitol Square, SW
Atlanta, GA 30334-1300

JON C. BRUNING
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, NE 68509

WAYNE STENEHJEM
Attorney General
State of North Dakota
State Capitol, 600 E.
Boulevard Ave.
Bismarck, ND 58505-0040

W.A. DREW EDMONDSON
Attorney General of
Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105-
4894

GUILLERMO A. SOMOZA-
COLOMBANI
Attorney General of the
Commonwealth of Puerto
Rico
GPO Box 902192
San Juan, PR 00902-0192

HENRY MCMASTER
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549

MARK L. SHURTLEFF
Utah Attorney General
350 N. State St., Ste. 230
Salt Lake City, UT 84114-
2320

ROBERT M. MCKENNA
Attorney General
State of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*

The *amici* States are dedicated to protecting the welfare of their young citizens and their parents intelligently, efficiently, and within the bounds of the First Amendment. The States' right to regulate conduct is unquestioned: yet in this narrow circumstance in which government wishes to silence speech based on the content of that speech, exacting Constitutional standards must be met.

Recognizing and following these standards serves the States' interests here, as this content-based restriction would not enhance law enforcement but would hinder it. The restrictions on free speech that California has attempted to impose would lead to an expensive new enforcement regime, in which law enforcement personnel would become culture critics charged with policing games containing simulated violence but judged to be lacking sufficient redeeming artistic or political value. This unnecessary incursion into issues of speech perversely would deplete resources and distract from law enforcement's task of policing actual violence. It would furthermore legitimize criminal defendants' attempts to evade responsibility for breaking the law by invoking the "video game made me do it" defense.

The undersigned believe the benefits of better law enforcement are better served by applying well-established First Amendment principles to the current case and not by creating a brand-new category of free speech restrictions. Accordingly, the *amici* States' interests justify this submission.

SUMMARY OF THE ARGUMENT

The road to unconstitutional and unwise over-regulation is paved with good intentions. Here, the manner in which California has acted – no matter how laudable its goals – runs afoul of the fundamental precept that government "shall make no law . . . abridging the freedom of speech." U.S. Const., amend. I.

California is correct that States have broad authority and responsibility to regulate conduct. It is also undoubtedly true that minors can and should be treated differently than adults in many areas of behavior, so that, for example, they are not allowed to drink alcohol, marry or vote before a certain age. Yet these and almost all other areas of State regulation of conduct do not restrict speech, and thus they are not subject to well-established rules of First Amendment jurisprudence which forbid the abridgement of free speech rights.

As this Court held last Term, the decision as to whether the government should be involved in judging speech was answered in the negative over two hundred years ago. "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *United States v. Stevens*, 559 U.S. ___, 130 S. Ct. 1577, 1585 (2010). The debate over California's statute takes place within this peculiar First Amendment arena.

This Court has held that a content-based restriction on speech shall be subject to strict scrutiny, and shall survive only if it is demonstrably the least

restrictive means of achieving the government's goal. All speech, whether lowbrow or high, enjoys the protection of the First Amendment. Abandoning the standard of strict scrutiny for content regulation because it is felt that some video games "go too far" in allowing the player to cause a fictional character to engage in simulated violence in a virtual world would require a restructuring of traditional views of First Amendment rights, and reversal of several of this Court's most important cases.

The undersigned are charged with enforcing their States' criminal laws in addition to upholding the federal and their respective constitutions. Here, altering First Amendment jurisprudence to uphold the California law would work against the goal of effective law enforcement in several different ways.

First, law enforcement resources would be drained by the creation of a new administrative scheme to set up, administer, and prosecute. The Act encourages, and demands in California, law enforcement personnel to spend resources reviewing video games to determine not only whether they are offensively violent, but also whether they have sufficient artistic or other value to counter that virtual violence. Armed with these subjective determinations, these officials are then directed to surveil retailers covertly to discover violations of the new law. Thereafter, novel criminal charges would need to be brought and substantiated on top of an existing caseload, with courts and juries forced to ponder the same subjective, cultural questions of whether a video game contains too much virtual violence and too little redemptive art.

In addition to diverting law enforcement resources away from the myriad responsibilities already facing law enforcement officials, California's statute legitimizes the off-loading of personal responsibility on to a video game. The Act would give credence to a criminal defense seeking exculpation or mitigation based on behaviors a criminal supposedly learned as a minor from playing video games. Video-game defenses are becoming more and more prevalent. An official State endorsement of the pseudo-scientific theory that there is a causal connection between criminal behavior and childhood play of video games that simulate violence would declare open season for criminals to advance arguments that responsibility lies not with them, but with some distant computer programmer. Contrary to the dire warnings that violent video games will spawn a new generation of criminals, Department of Justice statistics show steadily decreasing rates of violent crime in the video game era, so that the empirical data shows no reason to interrupt or jeopardize the success law enforcement has recently enjoyed with such crimes.

Moreover, the need to create a new subset of video game police and an undercover "sting" network seems especially slight when an effective system to prevent minors from gaining access to games that are appropriate for mature audiences is already in place and working. In contrast to the studies and arguments presented by California and its *amici*, the Federal Trade Commission ("FTC") has found that the video game industry "continues to have the strongest self-regulatory code" among all sectors of the entertainment industry, and that the Entertainment Software Rating Board ("ESRB") guidelines are rigorously and effectively enforced. FTC, *Marketing Violent Entertainment to Children: A Sixth Follow-up Review*

of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries iii (2009), http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf. Under the ESRB standards, consumers swipe or show their drivers' licenses to buy mature-rated games – the California law contemplates the same type of safeguard. Thus, the statute seeks to replace effective self-regulation with a duplicative program of *State* oversight. The ESRB standards are the very definition of a "less restrictive means," which serves to disqualify governmental meddling in this particular area. Further, consoles contain parental controls which can block the playing of mature-rated games, and gaming systems are built to refuse to allow unrated games to load.

At base, whether parents believe their children have sufficient maturity to play a given video game is up to the parents, not the government. Parents deserve, *if they so desire*, assistance in protecting their children from unwanted influences. Yet there is no requirement that the government must be the only entity that can provide such aid, or is even the best at doing so. And what one family may see as "assistance," others may see as unwelcome paternalism or a displacement of parental authority.

Quick fixes such as the California statute cause more practical and constitutional problems, in expanding unneeded regulatory activity and hindering law enforcement, than they solve. The potential negative impacts on State government and State citizens are important enough that the undersigned feel compelled to voice their concerns, notwithstanding the obvious political risk of being erroneously tagged as supporting the selling of these games to minors.

ARGUMENT

I. ONLY CONTENT-BASED REGULATION OF SPEECH IS AT ISSUE HERE.

The current case deals with a narrow and well-defined issue: content-based regulation of speech. The opinion cited by California in its questions presented to this Court summarizes the framework of the inquiry:

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. . . .
>
> For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens on speech because of its content.

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-42 (1994) (citations omitted).

Only content-based restrictions trigger these considerations. In all other areas, "[t]his Court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression," and well it should. *Winters v. New York*, 333 U.S. 507, 517 (1948).[1] The First Amendment is unique, and applying carefully bounded First Amendment jurisprudence will not affect the States' well-recognized rights to govern in general.

Three points made by California and its supporting states relating to these broad principles are well-taken – but do not support the Act's constitutionality. *First*, supporting parents in an attempt to raise their children, as well as protecting the welfare of the children themselves, are State responsibilities and legitimate goals. *Second*, minors are sometimes deemed to be incapable of making a reasoned decision as to whether to accept speech or not. *Third*, there are indeed circumstances where even the most exacting level of scrutiny can be met.

---

[1] In *Winters*, the Court struck down a statute barring the distribution of obscene materials. In doing so, the Court stated: "We recognize the importance of the exercise of a state's police power to minimize all incentives to crime, particularly in the field of sanguinary or salacious publications with their stimulation of juvenile delinquency." *Id*. at 510. *Amici* agree that the States' powers to reduce crime remain just as vibrant and crucial today. Only the "principles of unrestricted distribution of publications" establish "the particular importance of a maintenance of standards of certainty in the field of criminal prosecution for violation of statutory prohibitions against distribution." *Id*. In that context, the *Winters* Court concluded: "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Id*.

None of these observations, taken separately or together, justifies the Act or cures its inherent problems. To the contrary, these very considerations establish the shortcomings of the Act.

A. Parental Rights Are Paramount.

First, States have the right and responsibility to not only help parents, but to safeguard the welfare of children. Yet especially in the First Amendment context, "support" is not supposed to mean "supplant." The right of parents to raise their children as they see fit has enjoyed special – and constitutional – prominence. "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." *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). Mothers and fathers enjoy the parental privilege to make decisions about their children's upbringing.

Telling a child, "You can't play that game because it's bad for you," represents parental authority. Telling a child, "You can't play that game because there is a law against offensive simulations of violence without sufficiently redeeming artistic value," represents governmental authority. There is no need to abridge First Amendment rights in order for the government to play the role that parents should and do play at home in connection with access to video games.

As the Court commented in striking down a law on First Amendment grounds: "a court should not presume parents, given full information, will fail to act." *United States v. Playboy Entm't Group, Inc.*,

529 U.S. 803, 824 (2000). In *Playboy*, Congress had enacted a statute to protect children from pornographic images on cable television. The Court indicated that Congress had to prove that a means less restrictive than blocking signals – specifically, educating parents and allowing them greater options to block the channels themselves – would not be as effective. *Playboy*, 529 U.S. at 816, 823-25. Congress could not bear this burden, and so the regulation was struck down in favor of the private option of the industry increasing education efforts so parents could apply standards in the home.

California and its *amici* attempt to rely on cases concerning public schools, cases holding that the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); Petitioners' Brief ("Pet. Br.") at 20. These cases add little to the current analysis. As *amicus* Louisiana points out in its brief supporting the Act, the Court has indicated that "schools may regulate some speech 'even though the government could not censor similar speech *outside the school*.'" Brief for *Amici Curiae* Louisiana, *et al*. ("Louisiana Br.") at 17 (emphasis added) (quoting *Morse v. Frederick*, 551 U.S. 393, 405-06 (2007), and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)). These cases recognize that there are special rules governing schools the government operates or oversees. By their terms, they do not suggest that governments may in general take over the job of parenting at the cost of First Amendment freedoms.

Nor does *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), alter the balance between parents and government in determining what content a minor should

receive. In *Pacifica*, the Court recognized how often that children – even those too young to read – were exposed to broadcasting. 438 U.S. at 748-49.[2] A teenager who goes to a store to buy a game is making an individual choice, rather than being subjected to unintentional exposure, and it strains belief to suggest that children too young to read would escape the effective industry system described in Section II.A, below.[3]

In short, parents are the appropriate guardians of the content of the video games that their children play at home. They are uniquely well-suited to do so effectively and appropriately, and without any concerns about the abridgement of First Amendment rights.

---

[2] Even broadcasting may not need the same protection in light of V-chip technology. The Second Circuit recently noted that there are options to block programs containing indecent speech that did not exist at the time of *Pacifica* in 1978. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 2010 WL 2736937, at *8 (2d Cir. July 13, 2010); *see also Playboy*, 529 U.S. at 815 (noting that targeted blocking is less restrictive than government banning speech, and that the option to block minimizes *Pacifica*'s concern that "traditional First Amendment scrutiny would deprive the Government of all authority" to address problems of unwanted exposure).

[3] Eagle Forum would go a step further in arguing that children with video games become a "captive audience," relying on *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). Brief of *Amicus Curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Br.") at 21-23. Yet in *Sable*, the Court stated that "[t]here is no 'captive audience' problem," because the callers to the challenged dial-in adult services, will typically not be unwilling listeners, in contrast to the inability of the recipient to avoid the broadcasting in *Pacifica*. 492 U.S. at 127-28.

B. The States' Well-Established Right To Regulate Minors Does Not Support The Act's Abridgement Of First Amendment Rights.

Second, regulation may sometimes treat minors differently than adults. As this Court has recognized, the First Amendment rights of minors are not coextensive with adults' rights and a State may determine that a child is not possessed of the full capacity for choosing speech. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 & n.11 (1975) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring) and *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring)).

However, "[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." *Erznoznik*, 422 U.S. at 213-14. "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 214 (footnote omitted). "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (rejecting state regulation on publication of alcohol prices even under a more lenient advertising standard).

The Act is the most troubling type of abridgement of free speech rights; namely, the State telling children and parents what value judgments to make. California admits that it is regulating speech because

it does not like its content, asserting that "such games are *simply not worthy of constitutional protection* when sold to minors without parental participation." Pet. Br. at 6 (emphasis added).

The assumptions in this statement do not stand up to analysis. California's attempt to define what "such games" are has already failed: California concedes that approximately half of the statute, in which an alternative definition of "violent video game" is used, is likely an unconstitutional abridgment of speech. Pet. Br. at 39 n.5. While California went beyond simply classifying games as "violent," and attempted to provide examples of what content should be banned for minors, vagueness will always be present – and definitions will always be elusive – when the government is trying to dictate what speech cannot be heard by a segment of the population.

Moreover, "[i]n assessing whether a minor has the requisite capacity for individual choice *the age of the minor is a significant factor.*" *Erznoznik*, 422 U.S. at 214 n.11 (emphasis added) (citing *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 741 (1970) (Brennan, J., concurring)). The standards of the ESRB employ a number of age levels, while California's statute treats all minors as being at the same stage of mental development. Thus, the ESRB system is not only a less restrictive alternative but also a better constitutional fit.

As a rhetorical matter, *amici* express unrealistic concerns about very young children buying mature games. Louisiana states that "makers of *Postal*[2] likely never intended its hyperbolic violence to be taken seriously," but that ten-year-olds would not grasp the satire. Louisiana Br. at 2. Eagle Forum similarly notes that government has "a substantial

interest in facilitating parental authority over an '8-year-old child.'" Eagle Br. at 15. This is only rhetorical posturing. No one presents any evidence that "such games" are targeting, or are being sold to, children ages 8 to 10. In addition, the FTC's most recent statistics (laid out in Section II.A, *infra*) show that in 2008, only 20% of children ages 13 to 16 were able to buy Mature-rated games, and that parents participated in well over 80% of the purchasing decisions.

C. The First Amendment Is Not Absolute.

Third, the application of strict scrutiny is not synonymous with the notion that every regulation must be struck down. Child pornography has been rightfully classified as "fully outside the protection of the First Amendment." *Stevens*, 130 S. Ct. at 1586 (discussing *New York v. Ferber*, 458 U.S. 747 (1982)). The Court explained that *Ferber* was a "special case" because the market for child pornography was "intrinsically related" to the crime of child abuse. *Id*. (citing *Ferber*, 458 U.S. at 759, 761). The First Amendment does not and should not provide a shield of full immunity for conduct that may be called "speech" yet represents unlawful behavior.

Yet even *Stevens*, which involved video-recording conduct violating animal cruelty laws, held that the criminalization of the videos could not stand. *Stevens* cautioned that "*Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." 130 S. Ct. at 1586. With the lack of an underlying actual criminal element, and with the lack of similar restrictions on depictions of violence in other media, the justification for creating an exceptional category targeting offensive content in

video games is non-existent. The Act's sole focus on video games sold in stores which are also not "artistic" enough is an arbitrary category that is dictated by political considerations. It excludes violent but "value-laden" video games.[4] It excludes books, comic books, music, no matter how violent, and even excludes video games sold over the Internet. Though it fixes nothing, it raises the specter of censorship for any media that finds itself at the center of a politically charged societal debate. This Court has consistently recognized that the Constitution blocks entry to this slippery slope.

Indeed, data on actual crime suggests that there is no need to limit First Amendment rights with respect to simulations of violence in video games in order to control actual criminal conduct. If there were a causal connection between simulated violence in video games and real-world crime, one would anticipate a surge in the violent crime rate as video games became ubiquitous. Yet the opposite has happened.

In the video game era, adult and juvenile crime rates have steadily declined nationwide. According to a recent Department of Justice study, juvenile arrest rates for violent crime were lower in 2007 than 1980, and the arrest rate in 2004 was nearly 50% down from its 1994 peak. Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *Statistical Briefing Book, Juvenile Arrest Rate Trends*

---

[4] While the Act's inclusion of a savings clause for video games with redeeming values is intended to satisfy First Amendment scrutiny, it exposes a damaging evidentiary question: none of California's purported evidence shows that games with artistic merit are any less "dangerous" than video games with no such value. Thus, the part of the Act California is trying to save highlights the lack of a reason to save it.

(2009), http://www.ojjdp.ncjrs.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05201. Similarly, there has been a dramatic decline in students ages 12 to 18 reporting violent crimes both in and away from schools. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Indicators of School Crime and Safety: 2009* 82 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/iscs09.pdf (rate of violent crime per 1,000 students at school dropping from 59 in 1993 to 26 as of 2007, and, away from school, dropping from 70 in 1993 to 20 in 2007). The overall violent crime victimization rate shows a similar decrease. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *National Crime Victimization Survey Violent Crime Trends, 1973-2008*, http://bjs.ojp.usdoj.gov/content/glance/tables/viortrdtab.cfm (last visited Sept. 9, 2010) (showing a historic low of 19.3 victimizations per 1000 people age 12 and above in 2008, dropping from 51.2 in 1994, and 52.3 in 1981). Finally, violent crime has dropped in 2007, 2008, and 2009. Fed. Bureau of Investigation, U.S. Dep't of Justice, *Crime in the United States, 2009, Preliminary Annual Uniform Crime Report, January through December, Table 3* (2010), http://www.fbi.gov/ucr/prelimsem2009/table_3.html.

One piece of pseudo-"evidence" adduced as "proof" that violent, non-artistic video games can create criminals must be refuted in no uncertain terms – as it does a profound disservice to the United States armed forces and is without foundation. Two *amicus* briefs point to the United States military's use of video games in the "first-person shooter" genre as purported proof that they must necessarily make soldiers more violent, with one opining that "[t]hese video games are useful to the military precisely *because* they incite participants to kill." Eagle Br. at 10 (emphasis in original); Brief of *Amicus Curiae* of

California State Senator Leland Y. Yee, Ph.D., *et al*. ("Yee Br.") at 26-27. In fact, the use of video games as training tools serves to prove that the United States military has seen value and few ill effects from them. The military does not need video games to teach soldiers how to shoot: there are real bullets and real guns for that. Video games depicting combat – regardless of their artistic or aesthetic values – teach strategy and leadership skills that can be transferred from a virtual environment to a real one, without exposing soldiers to unacceptable risks in training. It is certainly not in the armed forces' interests to create a generation of violent, uncontrollable killers who ignore regulations, and that is just as certainly not what they are doing. These *amici*'s assumption that anything used by the United States military must promote violence is a baseless and ill-reasoned one.

II. THERE IS NO REASON TO BURDEN LAW ENFORCEMENT WITH VIDEO GAME CENSORSHIP RESPONSIBILITY.

The lack of a justification for placing a subset of video games with particular content outside of the First Amendment is further apparent when one looks at the practical realities of enforcement, and the less restrictive means available to achieve California's stated goal.

States have a broad right to make laws that they deem appropriate and need not justify the wisdom or effectiveness of any particular law. But in the First Amendment arena, the less-restrictive-means inquiry leads to an examination of how the law would actually operate, as well as how other alternatives would work. Here, California's legislation will do little more than duplicate the efforts of the successful

ESRB self-regulatory scheme while draining state resources for no good reason.

A. The Less Restrictive Means Of The ESRB System Makes The New Enforcement Regime Unnecessary.

> When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute. . . . The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished.

Ashcroft v. ACLU, 542 U.S. 656, 665-66 (2004) (citing *Reno v. ACLU*, 521 U.S. 844, 874 (1997)).

This Court has been clear that the less-restrictive-means analysis requires a close look at what the industry and consumers have done and plan to do. The analysis, at the very least, prefers effective self-regulation over untested governmental regulation. *See Reno*, 521 U.S. at 874, 877 (rapidly improving private computer technology allowed parents to dictate what their children could access online, which constituted a less restrictive means than criminalizing certain indecent messages); *see also Playboy*, 529 U.S. at 815 (private technology allowing parents and viewers to block certain channels was a less restrictive means than dictating the hours during which sexually explicit content could be shown). And that is the scenario presented by the evidence here.

Current FTC studies show that the ESRB self-regulatory scheme is having remarkable success in keeping Mature games out of the hands of young children. The FTC's most recent report tracks the marked improvement in the ESRB's enforcement program. FTC, *Undercover Shoppers Find It Increasingly Difficult To Buy M-Rated Games*, May 8, 2008, http://www.ftc.gov/opa/2008/05/secretshop.shtm. In 2008, only 20% of children age 13 to 16 were able to purchase Mature games, down from 42% in 2006, 69% in 2003, 78% in 2001, and 85% in 2000. *Id.* The FTC has thus stated that the video game industry has the strongest self-regulatory code in the entertainment space. FTC, *Marketing Violent Entertainment to Children (Sixth Follow-up)*, at iii. In their briefs, California (p. 51) and Dr. Yee (p. 4) rely on old data from earlier FTC studies regarding the ESRB system, while ignoring the updated measurements showing the remarkable improvements in retailer compliance.

The success of the ESRB's self-regulatory scheme is amply demonstrated by comparing its enforcement rate against that of the government's regulation of the sale of alcohol to minors. A 2005 Mothers Against Drunk Driving study, similar to the FTC mystery-shopper checks, revealed that 18% of retailers sold alcohol to people under the age of 21. Remarks of Glynn Birch, MADD National President, *21 Turns 21: Night of Compliance*, July 18, 2005, http://www.madd.org/docs/NOC_remarks-Glynn-Birch.pdf. Despite the fact that the sale of alcohol to minors has been illegal for many years, and that the devastating effects of alcohol consumption by minors such as drunk driving deaths and injuries are established facts, the success rate of self-regulation in preventing potentially inappropriate game sales is

nearly identical. With the ESRB system demonstrating marked year-over-year gains, it may now outpace the government's prevention of underage alcohol consumption. Further, the similar levels of successful enforcement suggest that the act of making video game sales as illegal as alcohol sales will not guarantee stricter compliance.

The FTC has also found that parents are involved in more than 80% of video-game purchases for minors in any event, so that intimations of mass numbers of children furtively buying games without tapping their parents' financial resources are inaccurate. FTC, *Marketing Violent Entertainment to Children: A Fifth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* 28-29 (2007), http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf.

The system actually used for verifying a buyer's age makes sense, and reminds retailers of the age restrictions. At the time of the last study, out of eight major retailers, "seven have implemented point-of-sale register systems that prompt the cashier to request photo identification when an M-rated game is scanned for purchase." FTC, *Marketing Violent Entertainment (Sixth Follow-up)*, at 27-28; *see also* Respecttheratings.com, Ratings and Descriptors, GameStop/EB Games Rating Policy, http://www.respecttheratings.com/ratings.html (last visited Sept. 9, 2010) ("When a Mature game is scanned, an ESRB advisory appears on the register screen requiring employees to ask any under-age customer for a valid photo ID, unless accompanied by a parent or guardian.")[5]

[5] For all practical purposes, the only change that would occur under California law is that for the games deemed inappro-

Further, the ESRB system does not simply use a "mature"/"non-mature" classification as the Act is forced to do. The ESRB system is more nuanced, as it references various age-levels – "T" for teenager-appropriate play, "10+" for ages 10 and up, and so on – that give parents more of a guide as to the propriety of the game to their particular children. It would be hard to argue against the concept that different standards are warranted for different age groups and among children at varying stages of cognitive and moral development. *Erznoznik*, 422 U.S. at 214 n.11. This is what the industry already does, but the Act does not: under the Act, a game would have to be labeled "18+" if it were "offensively violent" for any minor (and lacked sufficient artistic value), even for a pre-schooler.

California argues that ESRB's rating system is voluntary, and not all games are rated. Pet. Br. at 58. Yet California fails to mention that major retailers do not sell unrated games, as they have properly made that determination for business reasons instead of by governmental mandate. California does not seriously contest that virtually all games sold in the United States are rated, or that major retailers do not even sell "Adults Only" games. *See, e.g.*, Target.com, Target Stores Mature-Rated Games Policy, http://www.target.com/Mature-Rated-Games-Policy-Product/b?ie=UTF8&node=14306571 (last visited Sept. 9, 2010) (Target only carries games with ESRB ratings, and does not carry "adults only" merchandise); Walmartstores.com, "Mature" Merchandise: Music, Video Games and Movies, http://walmartstores.com/pressroom/news/8234.aspx (last visited

---

priate under California law, retailers will be required to turn everyone away ages 17 and under, instead of ages 16 and under.

Sept. 9, 2010) ("All of [the games] that we carry are rated by the [ESRB] and we carry no adult-rated video or computer software games."); *see also*, *e.g.*, ESRB, Frequently Asked Questions, http://www.esrb.org/ratings/faq.jsp#3 (last visited Sept. 9, 2010). California also fails to mention that standard gaming consoles contain parental controls that enable parents to block teen- or mature-rated games from being played on them, much like the blocking technology employed in *Playboy*,[6] or that console companies require that all games sold on their platforms be ESRB-rated. *E.g.*, *id.*

Having the government mandate, upon pain of a criminal prosecution, that a retailer continue to do what it is already doing seems especially gratuitous in the First Amendment arena. Effective self-regulation is something State governments should celebrate. Indeed, the money that would be spent creating this regime of video game regulation seems better targeted to supporting law enforcement in its efforts to deter and prosecute real violent behavior.

B. The Act Creates A New Regulatory Regime, With Law Enforcement As Constitutional Arbiters.

California attempts to bring the illusion of objectivity and precision to what is necessarily an amorphous subject. The Act requires state-appointed video game authorities to make a number of necessarily sub-

---

[6] *See* PTA & ESRB, *A Parent's Guide to Video Games, Parental Controls and Online Safety* 5-9 (2008), http://www.esrb.org/about/news/downloads/ESRB_PTA_Brochure-web_version.pdf; Scott Steinberg, *Video Games: How to Setup Parental Controls*, Digital Trends, Jan. 27, 2009, http://www.digitaltrends.com/how-to/video-games-how-to-setup-parental-controls/.

jective value judgments. The video games must be sufficiently reviewed and determined to meet the test of simulated violence disapproved by the Act, being both "appeal[ing] to a deviant or morbid interest in minors" and "patently offensive" as to minors, according to prevailing community standards. Cal. Civ. Code § 1746(d)(1)(A)(i)-(ii). Further, law enforcement would be charged with determining the "literary, artistic, political or scientific value for minors" of the game as a whole. Cal. Civ. Code § 1746(d)(1)(A)(iii).

Vague bounds on speech serve to chill permissible speech: the problem lies in the fact that vagueness means "[p]eople 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" *Citizens United v. FEC*, 558 U.S. 50, 130 S. Ct. 876, 889 (2010) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). The immediate concern of the *amici* is how law enforcement can be expected to devote resources to not only engage in cultural critiques of video games, but then, apparently, conduct undercover "sting" operations in order to snare violators. Law enforcement personnel simply have better things to do than play video games and philosophize about their artistic merit. The tasks assigned to them by this Act do not even lend themselves to an "I know it when I see it" standard, as the depictions with which California is concerned are, according to its *amici*, often hidden in so-called "Easter eggs" within the games or higher levels of game play that would take hours and game-playing skill to reach.

Further, once law enforcement expends the necessary money and manpower to go through this process (and there is a virtual guarantee that different

conclusions will be reached by different authorities), the criminal courts will be presented with a new kind of claim. Prosecutors and courts would find themselves poring over games to secure or debate a criminal conviction in an area where "reasonable doubt" appears to be the very nature of the beast. While *amici* see this process as a time-consuming and expensive hassle to solve a problem that seems to have already been solved by the ESRB, this Court has articulated the constitutional dimension: "The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable." *Citizens United*, 130 S. Ct. at 891.

In addition to the unenviable task of determining which games meet the highly subjective standards of violence (without artistic merit) disapproved by the Act and the burden of prosecuting costly criminal suits, state officials will run the risk of civil liability resulting from the classification of certain games as "patently offensive" and lacking any "literary, artistic, political or scientific value for minors." Those aggrieved by a negative classification will doubtless run to court and force States to incur significant additional costs by claiming not only constitutional violations but business damages through overweening governmental interference as well. The law enforcement cost outstrips the questionable benefit of having the government itself dictate and enforce another minimum age requirement in retail stores.

Much ink has been and will be spilled in this case debating what the government must show in order to regulate the content of speech. In this narrow

context, however, the less-restrictive alternative is apparent and the facts regarding its effectiveness should be undisputed, so that the Act fails whatever standard is used.

III. THE ACT INTERFERES WITH THE STATES' ABILITY TO ENFORCE EXISTING CRIMINAL LAWS AND RESPONSIBILITIES.

Amici States want to see criminals held accountable for their actions. This Act, however, will hinder their enforcement of existing criminal laws. California's prosecution of the sale of video games to minors, coupled with its imprimatur on the theory that video games (without sufficient artistic merit) cause violent and aggressive behavior, will produce the unintended consequence of legitimizing a "video game made me do it" defense to criminal prosecution. Defense attorneys will have the option of blaming a video game played when the defendant was a minor as an exculpatory defense or a mitigating factor in sentencing, encouraging violent offenders to argue that they acted under the debilitating influence of such games.

Video games are only the latest in a long line of media scapegoats that defendants have used to attempt to escape personal responsibility. Criminal defendants have been blaming their illegal conduct on music, movies, books and other media for decades if not centuries. Although these types of defenses have been largely rejected as inappropriate, California's attempted endorsement of the assumption that video games cause violent behavior unintentionally gives State approval, and a new lease on life, to a long-discredited excuse.

A. California's Law May Unintentionally Turn A Baseless "Twinkie Defense" Into An Increasingly Functional Criminal Defense.

The Seventh Circuit observed that "[t]he studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 578-79 (7th Cir. 2001). More recent scholarship has not filled this void. Yet defense attorneys, zealously representing their clients, will undoubtedly seize upon the Act to craft a video-game defense – taking what should be no more than a Twinkie defense, and giving it State-sponsored legitimacy. Criminal defendants have attempted to avoid responsibility for their actions by blaming everything from sugar to demonic possession.[7] In the realm of entertainment, defendants have attempted to blame a wide variety of sources including *The Catcher in the Rye*, violent television, movies, the internet, rap music, heavy metal, and the Beatles.[8]

---

[7] *See* ABC News, *'Twinkie Defense' Psychiatrist Stabbed*, Oct. 9, 2000, http://abcnews.go.com/US/story?id=90484&page=1 (The "Twinkie Defense" is derived from a psychiatrist's testimony that a diet of junk food and soda contributed to Dan White's murder of San Francisco Mayor George Moscone and Supervisor Harvey Milk.); Allen Hicks, *Murder Suspect Charged, Man Accused In Death Said Demon Controlled Him*, Marshfield News-Herald, Oct. 4, 2003, at A1.

[8] *See, e.g.*, Paul L. Montgomery, *Lennon Murder Suspect Preparing Insanity Defense*, N.Y. Times, Feb. 9, 1981, at B12 (discussing obsession of John Lennon's killer with *The Catcher in the Rye*); *Zamora v. State*, 422 So. 2d 325, 328 (Fla. Dist. Ct. App. 1982) (noting that defense counsel argued insanity based on exposure to violent television); Chuck Philips, *Rap Defense Doesn't Stop Death Penalty*, L.A. Times, July 15, 1993, at F1; John W. Whitehead, *Charles Manson's Race War: The Beatles*

Most every day, the entertainment world and all of its varied genres are accused of being the true cause of an individual's decision to break the law.[9] Video games are merely the latest and most trendy excuses. However, if the Act succeeds in creating a category of entertainment on which criminals can blame their crimes, other media will not be far behind.

The data of which *amici* are aware provide no legitimate reason to treat video games differently from other forms of media. A 2002 study of 37 school attacks found that only 12 percent of the attackers exhibited interest in violent video games, whereas 27 percent showed interest in violent movies, and 24

---

and Helter Skelter, Huffington Post, Aug. 3, 2009, http://www.huffingtonpost.com/john-w-whitehead/charles-mansons-race-war_b_249914.html (noting that Manson blamed the Beatles' *White Album* for the killings).

[9] *See, e.g.*, Katrina K. Wheeler, *13-Year-Old Boy Bites 11 Students at Middle School: Father Blames 'Twilight' Film*, Examiner.com, Mar. 27, 2009, http://www.examiner.com/pop-media-in-national/13-year-old-boy-bites-11-students-at-middle-school-father-blames-twilight-film (father blaming a movie, based on a series of novels, for his son's act of biting classmates); Eric Choy & Susie L. Morris, *Is 'Matrix' to Blame for Teen Violence*, ABC News, July 10, 2003, http://abcnews.go.com/Health/story?id=116720&page=1 (questioning whether *The Matrix* was responsible for teen plot to kill peers); Sean Michaels, *Slipknot Blamed for Inspiring School Shooting*, Guardian.co.uk, Aug. 21, 2008, http://www.guardian.co.uk/music/2008/aug/21/slipknot.school.killing (blaming the band Slipknot for a school attack involving a "sword-wielding schoolboy," killing one student and wounding three other people); Dan Noyes, *Accused Man's Mom Blames Fox News for Behavior*, ABC KGO-TV, Apr. 7, 2010, http://abclocal.go.com/kgo/story?section=news/iteam&id=7374140 (mother of 48-year-old man that was arrested for threatening Nancy Pelosi over health care legislation blamed Fox News for inciting her son, leading to the criminal threats).

percent showed interest in violent books. U.S. Secret Serv. & U.S. Dep't of Educ., *The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States* 22 (May 2002), http://www.secretservice.gov/ntac/ssi_final_report.pdf. Although some of the attacks pre-dated the supposed emergence of violent video games, that fact simply shows horrific school shootings existed before the video game era, and unfortunately will likely exist long after video games cease to be the whipping boy for some societal ills.[10]

Moreover, there is an ever-increasing level of cross marketing between movies, the internet, video games, books and music. Video games, books, and movies are regularly based on other forms of entertainment. There is little sense in restricting the sale of *Postal* the game, while allowing the same minor to purchase *Postal* the movie, but even less sense in moving into other areas of entertainment so as to create a rap-music defense, violent-book defense, or violent-movie defense in criminal cases.

There are numerous and growing examples of criminal defendants testing the video-game defense waters. In a recent California case, a convicted criminal argued on appeal that he should have been allowed to plead not guilty by reason of insanity,

---

[10] Members of this Court have adroitly recognized the urge to play politics with the First Amendment based on the scandal *du jour*, and how that urge is rebuffed: "Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring); *Playboy*, 529 U.S. at 830-31 (Thomas, J., concurring) (quoting *Denver*, 518 U.S. at 774).

because he commited the acts while under the belief that he was following the goals of the video game *Grand Theft Auto*. *People v. Henning*, 100 Cal. Rptr. 3d 419, 423 (Cal. Ct. App. 2009). In Alabama, a defense attorney argued that the defendant did not intentionally kill the victim; the attorney claimed that the defendant "had immersed himself in video games and lived in 'a different world than you and I.'" Holly Hollman, *Video Game Killing? Defense Claims Suspect in Halloween Murder Lived in Fantasy World*, Decatur Daily, Feb. 27, 2008, http://www.decaturdaily.com/stories/5921.html. In Michigan, attorneys for an 18-year-old on trial for beheading his victim claimed that he was under the influence of the game *Hitman*. GamePolitics.com, *Video Game Made Me Do It: Defendant In Beheading Trial Blames Hitman*, Apr. 11, 2008, http://www.gamepolitics.com/2008/04/11/video-games-made-me-do-it-defendant-beheading-trial-blames-hitman. In Ohio, a man was found guilty of murdering his mother and attempting to murder his father; his defense was that his actions were caused by the popular game *Halo*. Kevin Freeman, *Teen Who Killed Mother Over Video Game Gets 23 Years To Life*, Fox 8 News, June 16, 2009, http://www.fox8.com/news/wjw-news-daniel-petric-sentenced,0,644171.story.

Despite the fact that these defenses have typically been rejected, there are signs that the video game defense is gaining traction and complicating prosecutions. *See*, *e.g.*, GamePolitics.com, *Judge Comes Down Hard on Video Games in Halo 3 Murder Trial*, Jan. 13, 2009, http://www.gamepolitics.com/2009/01/13/judge-comes-down-hard-video-games-halo-3-murder-trial. In Tennessee, two teenagers blamed *Grand Theft Auto* for causing them to shoot at cars – resulting in the death of a motorist. *See* David

Kushner, *Grand Death Auto: Two Kids, 13 and 15, Killed an Innocent Highway Motorist. Was a Violent Computer Game Responsible – or Their Sad Lives?*, Salon, Feb. 22, 2005, http://www.salon.com/technology/feature/2005/02/22/gta_killers/index.html. The judge determined that the boys acted stupidly but without intent to kill, allowing them to plead guilty to reckless homicide and reckless endangerment. *See id.* (noting that for the first time, the video game defense seemed to work).[11] While *amici* do not wish to abolish the insanity defense, given the near ubiquitous playing of video games, they do not wish to see it baselessly expanded to play a role in virtually every criminal prosecution.[12]

Effective law enforcement means being able to place responsibility for intentional criminal acts on the actors, instead of casting about for someone or something else to blame – and California's Act works against this crucial interest. In some high-profile school shooting cases, families of the victims tried to shift responsibilty from the killers to the manufacters of video games and other forms of entertainment. For example, parents of victims in a Kentucky school shooting sued video game, movie production, and internet content providers. *James v. Meow Media, Inc.*, 300 F.3d 683, 687 (6th Cir. 2002). The Sixth

---

[11] *See also* Terry Bosky, *The Video Game Defense*, Palm Beach Post, Blogs, Aug. 27, 2008, http://www.palmbeachpost.com/blogs/content/shared-blogs/palmbeach/powerup/entries/2008/08/27/ (discussing prevalence of the video game defense, why good lawyers should raise the defense, and the situations in which the defense is most effective).

[12] This defense will be available to youth and adults alike, as adults will simply claim that they have been obsessed with these games since youth and became delusional as a result.

Circuit quickly recognized the implications for law enforcement:

> The system of criminal liability has concentrated responsibility for an intentional criminal act in the primary actor, his accomplices, and his co-conspirators. By imposing liability on those who did not endeavor to accomplish the intentional criminal undertaking, tort liability would diminish the responsibility placed on the criminal defendant. *The normative message of tort law in these situations would be that the defendant is not entirely responsible for his intentional criminal act*.

Id. at 694 (emphasis added). *See also Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1268 (D. Colo. 2002) (dismissing tort claims against video game and movie producers stemming from the Columbine shootings). California's law, based on the premise that video games make children violent, would also be an acknowledgement that criminal defendants lack responsibility for their actions. Further, it would lend legitimacy to a rash of civil lawsuits in state and federal courts, such as the recent case in which video-game maker NCSoft is being sued for making *Lineage2* "too addictive." *See* Mike Thompson, *Lineage II Junkie Sues NCsoft For His Addiction*, The Escapist, Aug. 20, 2010, http://www.escapistmagazine.com/news/view/102914-Lineage-II-Junkie-Sues-NCsoft-for-His-Addiction (plaintiff claiming that the game was so addictive that it caused him to log over 20,000 hours of play, making him unable to function in his daily life).

The danger inherent in the Act's unfounded premise has been exacerbated by those stating – despite the lack of any conclusive evidence – that

playing violent video games is almost as strong of an indicator toward youth violence as gang membership, and is a stronger indicator of youth violence than having abusive parents, a record of prior violence, or engaging in substance abuse. Eagle Br. at 3. Yet unlike the imaginary world of video games and other entertainment, gangs use actual guns, deal in actual drugs, and commit countless homicides and other crimes involving real victims as part of their membership.[13] Those crimes, while on the decline according to government data, represent law enforcement's central mission. California's Act does not.

If this Court accepts California's argument that games encourage and cause violent behavior in impressionable youth, this will function as a nationwide signal that appropriate criminal prosecutions just got more difficult to procure.

B. This Court Can And Should Consider The Detrimental Impact On Law Enforcement.

This Court has weighed law enforcement concerns in its First Amendment jurisprudence, and has every reason to do so here. In *Ashcroft v. Free Speech Coalition*, the Court struck down a law aimed at expanding the prohibition on child pornography as a violation of the First Amendment. 535 U.S. 234, 258

---

[13] "Criminal gangs commit as much as 80 percent of the crime in many communities, according to law enforcement officials throughout the nation." Nat'l Drug Intelligence Ctr., U.S. Dep't of Justice, *National Gang Threat Assessment: 2009* iii (2009), http://www.justice.gov/ndic/pubs32/32146/32146p.pdf. Typical gang-related crimes include alien smuggling, armed robbery, assault, auto theft, drug trafficking, extortion, fraud, home invasions, identify theft, murder, and weapons trafficking. *Id.*

(2002). One Justice noted that the Government's most persuasive argument was that the Child Pornography Protection Act would protect against persons escaping conviction by raising a defense that images were computer-generated, not of actual children, thereby raising a reasonable doubt as to guilt. *Id.* at 259 (Thomas, J., concurring). In *Stevens* and *Free Speech Coalition*, the Court refused to allow legislation that violated the First Amendment despite the potentially beneficial impact on law enforcement. Here, California has created the converse situation – law enforcement and First Amendment interests are aligned in rejecting the inappropriate expansion of a barrier to appropriate prosecutions. Thus, by affirming the decisions below, two flaws are resolved.

CONCLUSION

The decision of the Ninth Circuit is correct, stands on solid legal grounds, and should be affirmed.

Respectfully submitted,

PATRICK C. LYNCH
Counsel of Record
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903
(401) 274-4400
PLynch@riag.ri.gov

Counsel for State Amici Curiae

September 17, 2010