No. 08-1448

IN THE

Supreme Court of the United States

ARNOLD SCHWARZENEGGER, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California,
Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,
Respondents.

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

BRIEF OF *AMICUS CURIAE* COMMON SENSE MEDIA IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

PAGE

INTEREST OF AMICUS CURIAE..... 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT..... 3

A. JUVENILE MINDS ARE DIFFERENT FROM ADULT MINDS IN CONSTITUTIONALLY SIGNIFICANT WAYS THAT SPEAK DIRECTLY TO THE ISSUES AT STAKE HERE..... 3

B. THE FREE EXPRESSION CLAUSES DO NOT PROHIBIT THE STATE FROM BANNING THE SALE OF VIOLENT VIDEO GAMES TO MINORS..... 10

C. FREEDOM OF EXPRESSION IN THE ERA OF THE FRAMING OF THE CONSTITUTION AND BILL OF RIGHTS WOULD NOT HAVE ENCOMPASSED THE DISTRIBUTION OF ENTERTAINMENT MATERIALS TO CHILDREN..... 12

CONCLUSION..... 17

TABLE OF AUTHORITIES

PAGE

CASES:

American Amusement Machines Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001)..... 7

American Amusement Machines Ass'n v. Kendrick, 115 F.Supp.2d 943, 964 (S.D. Ind. 2000), rev'd, 244 F.3d 572 (7th Cir. 2001), cert. denied, 534 U.S. 994 (2001).... 7

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)..... 11

Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)..... 4

Employment Division v. Smith, 494 U.S. 872 (1990)..... 12

Ginsberg v. New York, 390 U.S. 629 (1968)..... 5

Graham v. Florida, 130 S.Ct. 2011 (2010)... 3, 4

Morse v. Frederick, 551 U.S. 393 (2007)... 11

Parham v. J.R., 442 U.S. 584 (1979)..... 11

Prince v. Massachusetts, 321 U.S. 158 (1944)..... 12

Roper v. Simmons, 543 U.S. 551 (2005)... 3, 4

Tinker v. Des Moines Independent Community School Dist., 393 U S. 503 (1969)..... 10, 11

Wilson v. Midway Games, Inc., 198 F.Supp.2d 167 (D. Conn. 2002)..... 7

Winters v. New York, 333 U. S. 507 (1948)..... 16

OTHER AUTHORITIES:

Craig A. Anderson, et al., *Violent Video Game Effects on Aggression, Empathy, and Pro-Social Behavior in Eastern and Western Countries: A Meta-Analytic Review*, 136 (no. 2) Psychological Bulletin 151 (2010)..... 5, 7

Aristotle, *Politics* (Richard Kraut, trans. 1997)..... 13

Michelle J. Fleming & Debra J. Rickwood, *Affects of Violent Versus Nonviolent Videogames on Children's Arousal, Aggressive Mood, and Positive Mood*, 31 J. Applied Soc. Psych. 2047 (2001)..... 8

D. Gentile, et al, *The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance*, 5-22 J. Adolescence 27 (2004)..... 7

Thomas Jefferson, *Letter to Tom Jefferson Randolph, Washington, November 24, 1808, reprinted in* Edward Boykin, *To the Girls and Boys: Being the Delightful, Little-Known Letters of Thomas Jefferson to and from His Children and Grandchildren* (1964)..... 14

Ralph Ketcham, *James Madison: A Biography* (1971)..... 15

W.G. Kronenberger et al., *Media Violence and Executive Functioning in Aggressive and Control Adolescents,* 61 J. Clinical Psych. 725 (2005)..... 8

John Locke, *Some Thoughts Concerning Education* (John W. & Jean S. Yolton, eds. 1989)..... 13, 14

Plato, *The Republic* (Benjamin Jowett, trans. 2000)..... 13

Jean-Jacques Rousseau, *Émile* (Barbara Foxley, trans. 1911)..... 14

Kevin W. Saunders, *Saving Our Children*

from the First Amendment (2003)..... 11

Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences and Juvenile Justice*, 2005 Utah L. Rev. 695..... 8

Kevin W. Saunders, *Violence As Obscenity: Limiting the Media's First Amendment Protection* (1996)..... 15

Barbara Strauch, *The Primal Teen: What the New Discoveries About the Teenage Brain Tell Us about Our Kids* (2008)..... 8

V. Strasburger, et al, *Health Effects of Media on Children and Adolescents*, Pediatrics (2010)..... 5

INTEREST OF *AMICUS CURIAE*[1]

Common Sense Media is the nation's leading non-partisan, not-for-profit organization dedicated to improving the media lives of kids and families. We provide the trustworthy information, education, and independent voice families need to thrive in a world of media and technology. Common Sense exists because our nation's children spend more time with media than they do with their families or in school, which profoundly impacts their social, emotional, and physical development. Put simply, Common Sense helps families and kids have a choice and a voice about the media they consume.

Common Sense recognizes that in a vast media world, there are many great resources, but also some that are potentially negative or even dangerous for children. In 2008, we outlined some of the negatives in a meta-analysis prepared by Yale University School of Medicine, the National Institutes of Health, and the California Pacific Medical Center, entitled "The Impact of Media on Child and Adolescent Health."

For more than seven years, Common Sense has worked to inform tens of millions of families and educators

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[1] Pursuant to Supreme Court Rule 37.2, amicus states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Letters reflecting the consent of the parties have been filed with the Clerk.

across the United States, and to help them choose media content that is appropriate for children. The widely recognized value of our media reviews and parent tips is reflected in the rapid growth of our organization. Common Sense now has more than 12,000 reviews, and more than 1.4 million unique visitors come to our website each month to obtain reviews and non-partisan, educational information that will help them decide whether a movie, videogame, website, mobile phone application, or other media content is appropriate for their children.

Common Sense Media provides parents with information about the media their children are consuming. Common Sense also works to inform policymakers and industry leaders about other ways we can empower parents – including the statute in this case.

SUMMARY OF ARGUMENT

The First Amendment rights of children as an audience are clearly limited with regard to entertainment materials such as violent video games or should apply with lesser strength.

Children are more likely to be harmed by the effects of exposure to violent video games than adults, and the potential damage to their psychological development differs from any damage caused to adults. Denying the existence of a right of children to obtain violent video games would strengthen parents' ability to determine what content is appropriate for their children, and would be consistent with this Court's precedents. There is no historical evidence or any other support for the proposition that the Framers or the

founding generation would have recognized a constitutionally protected right for children to purchase violent video games. Indeed, the proposition, once articulated, seems absurd. Everything the Framers understood with regard to the nature of children and the development of their character supports shielding children from negative influences.

ARGUMENT

A. JUVENILE MINDS ARE DIFFERENT FROM ADULT MINDS IN CONSTITUTIONALLY SIGNIFICANT WAYS THAT SPEAK DIRECTLY TO THE ISSUES AT STAKE HERE.

Recognizing the many critical ways in which juvenile minds differ from adult minds, this Court has held in recent years that states are constitutionally compelled, in some circumstances, to ensure that their laws reflect the scientific evidence and widely-held understanding that the minds of juveniles and adults are simply not the same. *See*, *e.g.*, *Graham v. Florida*, 130 S.Ct. 2011 (2010) (barring sentence of life imprisonment without the possibility of parole for juveniles convicted of non-homicidal offenses); *Roper v. Simmons*, 543 U.S. 551 (2005) (barring juvenile death penalty). This case involves much of that same basic science about cognitive development and many of those same wide-held understandings about the fragility of youth. Unlike those cases, however, the matter now before the Court involves a State that has affirmatively embraced these differences and enacted a carefully-tailored law in response. The differences between juvenile and adult minds that *compel* differential

treatment in *Graham* and *Roper* surely *tolerate* differential treatment here.

In striking down the juvenile death penalty in *Roper*, the Court relied on some realities about differences between juveniles and adults that "any parent knows and [that] the scientific and sociological studies...tend to confirm." *Roper*, 543 U.S. at 569. One of these differences, the Court explained, is that "[y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Ibid* (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). And another key difference the Court cited is that "the character of a juvenile is not as well formed as that of an adult." *Ibid.*[2]

The Court relied on these principles again last Term in *Graham*, where it held that a sentence of life imprisonment without possibility of parole for a juvenile offender who did not commit homicide is constitutionally excessive. Once again, the Court relied on a body of scientific knowledge, writing that "[n]o recent data provide reason to reconsider the Court's observation in *Roper* about the nature of juveniles...[and] developments in psychology and brain science continue to show fundamental differences between

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[2] The Court recognized that "[d]rawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have attained a level of maturity some adults will never reach." *Roper*, 543 U.S. at 1197. Nonetheless, the Court recognized that "a line must be drawn" and that the "age of 18 is point where society draws the line for many purposes between childhood and adulthood. *Id. at 1998.*

juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 130 S.Ct. at 2026 (citing Brief for American Medical Association et al. as *Amici Curiae* 16-24; Brief for American Psychological Association et al. as *Amici Curiae* 22-27).

The differences between juvenile and adult minds do not only impact the back-end question of how a state can punish a juvenile who commits a heinous act. These differences also affect the policies states may adopt to promote the health developments of juvenile minds and help prevent violence among those who are, as the Court has recognized, uniquely incapable of resisting outside influences, including those that promote violence.

A great number of scientific studies have established the effects that exposure to media violence has on juveniles. A study published this year in *Pediatrics* outlined how the "relationship between media violence and real-life aggression is nearly as strong as the impact of cigarette smoking on lung cancer: not everyone who smokes will get lung cancer, and not everyone who views media violence will become aggressive themselves. However, the connection is significant." Strasburger, V., Jordan, A., and Donnerstein, E., "Health Effects of Media on Children and Adolescents," *Pediatrics* (2010).

The scientific data on the effect of violent video games is particularly compelling. A recent meta-analysis published in *Psychological Bulletin* examined 136 such studies, involving over 130,000 subjects. *See* Craig A. Anderson, et al., *Violent Video Game Effects on Aggression, Empathy, and Pro-Social Behavior in Eastern and Western Countries: A Meta-Analytic Review*, 136 (no. 2)

Psychological Bulletin 151 (2010). The study concluded that "regardless of research design... VGV [video game violence] exposure was significantly related to higher levels of aggressive behavior." *Id.* at 161. Thus, something more is at work here than aggressive children enjoying violent video games. According to the authors of the study, "the finding of a significant longitudinal affect...shows that playing violent video games can increase aggression over time." *Id.* at 162.[3]

Violent video game play was also found, in the meta-analysis, to be significantly related to increases in aggressive thoughts. This is important, because "the repeated activation of aggressive thoughts...is the most likely route to relatively permanent changes in the person, because the activation of aggression-related knowledge structures becomes more automatic and chronic with repetition and eventually becomes part of the person's personality." *Id.* at 155.

The meta-analysis reinforces the positions taken by health organizations such as the American Academy of Pediatrics, the American Psychological Association, The Australian College of Paediatrics, and the Canadian Paediatric Society, and governmental agencies such as the U.S. Office of the Surgeon General and the U.S. Department

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[3] Video games have now been in existence long enough to allow for longitudinal studies to be included with laboratory experiments and demographic studies. While there were differences in the quality of the studies included in the meta-analysis, the authors conclude that "[C]ontrary to claims by videogame industry representatives, some gamers, and a few researchers, in general it is not the methodologically poor studies that tend to yield big effects. Rather, methodologically superior studies tend to yield larger effects." *Id.* at 170.

of Health and Human Services. *See* Craig A. Anderson, *supra*, at 151.

Other recent studies support the conclusions of the meta-analysis.[4] A study published in the *Journal of Adolescence* found that "adolescents who expose themselves to greater amounts of video game violence were more hostile, reported getting into arguments with teachers more frequently, were more likely to be involved in physical fights, and performed more poorly in school." D. Gentile, P. Lynch, J. Ruh Linder, and D. Walsh, "The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance," *Journal of Adolescence*, volume 27, pp. 5-22, (2004).[5]

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[4] Experimental studies in which children who are given the opportunity to play violent video games consistently demonstrate more post-game physical aggressiveness than children in a control group have been criticized for measuring aggressiveness rather than violence. For example, Judge Posner, writing for the court in *American Amusement Machines Ass'n v. Kendrick*, 244 F.3d 572, 578-79 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001), said "[t]he studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive..." But, as the district court in that same case noted, "it is completely unremarkable that an academic study would use proxy variables to stand in for measures of actual, harmful aggression. The prospect of controlled experiments with human subjects that could result in aggression inflicting actual harm raises a few ethical issues, to put it mildly. Surely the constitutionality of a law does not depend on whether such experiments have been conducted." *American Amusement Machines Ass'n v. Kendrick* 115 F.Supp.2d 943, 964 (S.D. Ind. 2000), rev'd, 244 F.3d 572, 578-79 (7th Cir. 2001), cert. denied, 534 U.S. 994 (2001).

[5] Although not every study has found a relationship between violent video game play and violence, the lack of significant effect is easily explained in some instances. For example, in *Wilson v. Midway Games,*

In addition to these specific studies, more general developments in neuroscience have shed light on the harm exposure to violent video games can have on juveniles. It has become clear that the physical development of the human brain does not end in early childhood; at the time of puberty, it undergoes a process of overdevelopment of synapses in the region of the brain governing inhibition and judgment, with a paring of synapses in adolescence. For a non-technical explanation of this development, *see* Barbara Strauch, *The Primal Teen: What the New Discoveries About the Teenage Brain Tell Us about Our Kids* (2008); Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences and Juvenile Justice*, 2005 Utah L. Rev. 695. Moreover, environment appears to affect that development. A study at the University of Indiana School of Medicine shows that exposure to media violence leads to deficiencies in development in this region of the brain. *See* W.G. Kronenberger et al., *Media Violence and Executive*

Inc., 198 F.Supp.2d 167 (D. Conn. 2002), the court noted an Australian study purporting not to find any correlation between aggression and playing a violent video game. The authors of that very study acknowledged, though, that they chose, for ethical reasons, to use a game that was not very violent and that this choice diminishes the import the study has on the impact of truly violent games. Michelle J. Fleming & Debra J. Rickwood, *Effects of Violent Versus Nonviolent Videogames on Children's Arousal, Aggressive Mood, and Positive Mood*, 31 J. Applied Soc. Psych. 2047 (2001)

Functioning in Aggressive and Control Adolescents, 61 J. Clinical Psych. 725 (2005).

This impressive body of scientific literature confirms the validity of the State's interests in protecting juveniles from exposure to images that can have profound impact on their behavior and development. The same reasons that compel treating children differently in certain criminal contexts apply here. Not only is the ability to exercise judgment and inhibition not fully developed, the direction of that development may be unclear. The irresponsible child may become a responsible adult, and the death penalty or a sentence of life without the possibility of parole should not implicitly deny that possibility. Concerns over the influences children face are the obverse side of the same coin. If children are more likely than adults to change in rather fundamental ways with regard to responsibility, care must be taken with regard to the influences that will determine the direction and outcome of that change.

The science has become clear, and this Court has used it to override legislative determinations with regard to juvenile justice. The science is just as clear for considerations of limitations the legislature may choose to impose on the access of children to violent video games. The evidence is so clear that, even if the Court were to conclude that the First Amendment applies with equal strength to children as to adults, it should be sufficient to meet strict scrutiny in demonstrating the necessity of shielding children from these

influences to avoid damaging their psychological well-being and brain development.[6]

B. THE FREE EXPRESSION CLAUSES DO NOT PROHIBIT THE STATE FROM BANNING THE SALE OF VIOLENT VIDEO GAMES TO MINORS.

As long as violent video game limitations do not prohibit parents from purchasing or renting games for their children, they actually strengthen parental rights. Without such limitations, the person most directly deciding which games a child may purchase is the retailer. The parent is put to the task of constant surveillance to be sure that the child is not purchasing a game that is unacceptably violent. With restrictions, it is the parent who decides whether or not the child may purchase a game, since the direct sale would be prohibited, and it is a decision that is implemented at a particular instance, as opposed to the constant surveillance required if the retailer makes the decision.

Tinker v. Des Moines Independent Community School Dist., 393 U S. 503 (1969) is consistent with limiting the access of children to violent video games. While *Tinker* recognized First Amendment rights on the part of children, it did so in the context of political speech, and in the context of

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[6] In the event the Court should decide the current state of the science is not adequate to justify the regulations at issue, that should be recognized as a contingent conclusion, *i.e.,* a conclusion that at present the science is inadequate. The further development of psychological or neuroscience studies may, in the future, remedy any such perceived inadequacies.

children as the creators of expression, not as the audience. In addition, later cases, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Morse v. Frederick*, 551 U.S. 393 (2007), recognized that other forms of speech might merit less protection. It has been argued elsewhere, *see* Kevin W. Saunders, *Saving Our Children from the First Amendment*, at 250-53, that the real flaw in the school system's behavior in *Tinker* was in skewing a political debate in the community by allowing only one side to be presented in school. Even expanding that analysis to include the sort of speech that concerned Justices Alito and Kennedy in *Morse* would only require a prohibition against skewing the debate on social, as well as political, issues. *See* 551 U.S. at 422-23 (Alito, J., concurring). Justice Alito did also rely on concerns over safety posed by speech advocating illegal drug use, *id.* at 423, but there are concerns of at least equal strength with regard to violent video games. In terms of political and social issues, both the majority opinion and the concurrence by Justice Alito note that this advocacy of drug use did not constitute political speech advocating a position on the war on drugs or the legalization of marijuana. This distinction, as applied to violent video games, would point to full protection for speech, even by or to children, regarding the political issue of limits on the access of children to such games, while allowing limits on actual access.

Recognizing that in some cases children should enjoy lesser free expression rights is consistent with all the lines of cases decided by this Court, and is also in accord with the Court's decisions in other areas. For example, parents may have their children committed to mental hospitals under procedures that would be clearly inadequate for a spousal relationship. *See Parham v. J.R.,* 442 U.S. 584 (1979).

Furthermore, whatever the eventual outcome of Second Amendment cases, any right to purchase or possess firearms will presumably not extend to children. While a parent might want to buy a hunting rifle for a mature minor, the idea that a gun dealer could sell a firearm directly to a young child is beyond the pale.

There are also areas within the confines of the First Amendment in which age makes a difference. Under the Free Exercise Clause, even prior to *Employment Division v. Smith*, 494 U.S. 872 (1990), the free exercise rights of minors were less fully protected than those of adults. For example, a minor, who also claimed to be a minister of her faith, could be prohibited under state law from distributing periodicals, including religious tracts, *see Prince v. Massachusetts*, 321 U.S. 158 (1944), a result that clearly would not stand for an adult.

C. FREEDOM OF EXPRESSION IN THE ERA OF THE FRAMING OF THE CONSTITUTION AND BILL OF RIGHTS WOULD NOT HAVE ENCOMPASSED THE DISTRIBUTION OF ENTERTAINMENT MATERIALS TO CHILDREN.

The Framers clearly understood that children's rights as an audience for entertainment could be limited, including in terms of violence.

At the time of the framing of the Constitution and the Bill of Rights, the ideas of widely read philosophers and of the Framers themselves with regard to children would have included that children should be sheltered from harmful content. Writings of that time show a concern over the development of character in children and an understanding of

the need to shield them from negative influences. These views on the difference between children and adults should continue to guide our understanding of the First Amendment.

Moreover, the writings of philosophers in the general milieu and widely read by the Framers make it clear that those in the founding generation would not have seen children as enjoying a right to obtain whatever entertainment materials might appeal to them and that vendors would not have had a right to provide whatever wares they might wish directly to children.

Plato asks in *The Republic*, and answers in the negative, "[A]nd shall we just carelessly allow children to hear any casual tales which may be devised by casual persons, and to receive into their minds ideas for the most part of the very opposite of those which we would wish them to have when they are grown up?" Plato, *The Republic* 49 (Benjamin Jowett, trans. 2000). Aristotle was in accord. Addressing entertainment, he said that "it should not be granted to younger people to witness iambus or comedy..." Aristotle, VI *Politics* II33 (Richard Kraut, trans. 1997). Clearly, neither of the greatest classical philosophers saw children as possessing a right as an audience to entertainment that would cause them harm.

Philosophers more contemporaneous with the framing were perhaps even clearer with regard to the need to protect children from negative influences, including violence. In *Some Thoughts Concerning Education*, John Locke expressed particular concern over children learning violence.

> *Give me a blow that I may beat him*, is a Lesson, which most Children every Day hear: and in it is thought nothing, because their

> Hands have not Strength to do any Mischief. But I ask, Does not this corrupt their Minds? Is this not the way of Force And Violence, that they are set in? And if they have been taught, when little, to strike and hurt others by Proxy and incouraged to rejoyce in the harm that they have brought upon them, and see them suffer, are they not prepar'd to do it, when they are strong enough to be felt themselves, and can strike to some purpose?

John Locke, *Some Thoughts Concerning Education* 105 (John W. & Jean S. Yolton, eds. 1989). This passage could not be more on point. It expresses the concerns of legislators, now backed up by psychological science, that experiencing virtual violence, or as Locke would put it, violence by proxy, increases the chance that children will become violent.

Jean-Jacques Rousseau makes similar points. He agrees that children learn through experience and says "As soon as the child begins to take notice, what is shown him must be carefully chosen." Jean-Jacques Rousseau, *Émile* 30 (Barbara Foxley, trans. 1911). He, too, expressed particular concern over violence, arguing that it would have a potentially strong impact. "The explosive passions produce a great effect upon the child when he sees them; their outward expression is very marked; he is struck by this and his attention is arrested." *Id.* at 60.

The Framers themselves expressed similar ideas about the need to protect children from negative and harmful influences. Thomas Jefferson, in a letter to Tom Jefferson Randolph, advised him to "be very select in the society you

attach yourself to, avoid taverns, drinkers, smokers, idlers and dissipated persons generally..." Thomas Jefferson, *Letter to Tom Jefferson Randolph, Washington, November 24, 1808, reprinted in* Edward Boykin, *To the Girls and Boys: Being the Delightful, Little-Known Letters of Thomas Jefferson to and from His Children and Grandchildren* 186 (1964).

In a letter to his college friend William Bradford, James Madison advised Bradford to "shun those impertinent fops that abound in every City to divert you from your business and philosophic amusements." Ralph Ketcham, *James Madison: A Biography* 4 (1971).

It is clear that any view of the scope of the protections of the First Amendment based on what the Framers thought would not have included a right of children as an audience to whatever entertainment materials they might desire. Thinkers raised in the philosophical and religious environment of the 18th century simply would not have given children free rein in choosing their entertainment.

In addition, the broadly construed legal and historical concept of obscenity in the constitutionally relevant periods prior to the adoption of the First and Fourteenth Amendments illustrates that obscenity was not considered limited to sexual matters, particularly as it applied to minors. Rooted in prohibitions on religious blasphemy, colonial obscenity laws remained amorphous and expansive, and several state statutes banned a wide range of "vice and immorality" in the period between the Bill of Rights and the adoption of the Fourteenth Amendment. Kevin W. Saunders, *Violence As Obscenity: Limiting the Media's First Amendment Protection* 99 (1996).

Beyond the broad construction of obscenity in the constitutionally important period, several early 19th century

New England laws prohibited materials "manifestly tending to the corruption of the morals of youth." *Id.* at 100. The *Ginsberg* Court drew on this history and precedent in formulating its "variable obscenity" doctrine to distinguish between adults and minors. The pertinent legal history therefore supports obscenity restrictions on a range of objectionable materials, including violence, and demonstrates that the protection of minors has been considered of particular importance.

While it has lately become recognized that the protection afforded free expression must extend to entertainment, the distinction between children and adults remains clear, as does the distinction between children as creators and children as an audience. The extension of the First Amendment to entertainment was established in *Winters v. New York*, 333 U. S. 507 (1948). There, the Court concluded that the line between entertaining and informing was too elusive to delimit the protections of the First Amendment. Interestingly, the statute at issue in *Winters* was one that addressed and limited generally violent publications, those containing pictures and stories involving bloodshed, lust or crime. While the statute was declared unconstitutional on vagueness grounds, the Court warned against the conclusion that depictions of violence could not be regulated under a properly drawn statute, stating that "[n]either the states nor Congress are prevented by the requirement of specificity from carrying out their duty of eliminating evils to which, in their judgment, such publications give rise." *Id.* at 520. This possibility can only become stronger when a state seeks to limit only access by children.

For anyone guided by history, the conclusion that children as an audience do not have constitutionally protected right to violent video games is inevitable.

CONCLUSION

The arguments offered should be sufficient to justify the conclusion that the First Amendment does not protect a right of children as an audience to obtain violent video games.

Children can be harmed by their media experiences in ways that go far beyond any impact on adults. Parents have a special role in raising their children, and the California statute recognizes that role, and further empowers parents. If the right of children as an audience to harmful media is not protected by the First Amendment, then clearly the concerns that motivate the legislatures will justify the restrictions.

Finally, it is inconceivable that the Framers would have accepted the existence of children's rights as an audience for harmful materials. Everything they knew about children led to the conclusion that children needed to be shielded from negative influences, including violence. Even if this Court should conclude that children do enjoy First Amendment rights with regard to entertainment, the arguments offered would support the conclusion that those rights should have less strength than similar rights for adults. If the conclusion is that legislative restrictions must meet a heightened, but not strict, scrutiny, the science should certainly stand up to that level of scrutiny.

Respectfully submitted,

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