No. 08-1448

IN THE
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF CALIFORNIA, AND EDMUND G. BROWN JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION AND ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

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

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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

The questions presented are:

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

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

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INTEREST OF *AMICUS CURIAE*[1]

Eagle Forum Education & Legal Defense Fund ("EFELDF"), a nonprofit organization founded in 1981, is a pro-family group that has long advocated fidelity to the text of the U.S. Constitution. Its mission includes affirming the rights of parents to control the upbringing of their children, and the role of government in helping parents protect minors from

[1] This brief is filed with the filed written consent of all parties. Pursuant to its Rule 37.6, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

harmful influences, such as the extremely violent video games at issue in this case. EFELDF has a longstanding interest in defending First Amendment rights of free speech, but maintains that the First Amendment does not require the exacting standard of strict scrutiny with respect to judicial review of laws that help protect minors from violent video games.

EFELDF successfully filed an *amicus* brief in support of the *Petition for Certiorari* in this action.

SUMMARY OF ARGUMENT

Video games are *role-playing* activities that do not constitute free speech. Accordingly, the California statute at issue here need only satisfy the "rational basis" standard, which it easily does. This statute is also constitutional because it facilitates parental control over the upbringing of their children. Finally, children playing video games are the equivalent of a "captive audience," and the statute is constitutional by protecting this audience against image abuse.

The video game industry has quickly surpassed Hollywood in sales and influence. According to data from the Respondent Entertainment Software Association,[2] the computer/video game industry attained $11.7 billion in sales in 2008.[3] Children spend more

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[2] Tellingly, Respondent Entertainment Software Association declares that it "is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, personal computers, and the Internet." http://www.theesa.com/index.asp (viewed 7/13/10). This video game industry is not watching out for the interests of children.

[3] http://www.theesa.com/facts/index.asp (viewed 7/13/10) (Entertainment Software Association's own website).

time playing video games than watching television, and the time spent (wasted) is staggering: the average eighth-grade boy spends 23 hours a week playing video games – more than many part-time jobs – while the average girl spends 12 hours.[4] But unlike Hollywood movies and the television-watching of prior generations, video games entail active role-playing with simulations of an increasingly violent and disturbing nature, featuring decapitations, mutilations and other horrific violence. *See, e.g.*, *Pet. Br.* at 46-47.

Does playing violent video games lead to aggressive or violent behavior? Yes, and nearly as much as the other major indicator of youth violence: gang membership. Playing violent video games ranks almost as high as gang membership as the number one tell-tale sign among youth for a propensity to commit violence. *See Violent Video Game Effects, infra,* at 143 (utilizing for comparison purposes data from a 2003 report by the U.S. Department of Health and Human Services). Playing violent video games is a far bigger risk factor than other familiar indicators of youth violence. For example, playing violent video games is *three times* greater as a risk factor for aggressive/violent behavior than engaging in substance abuse, being from a broken home, having a low IQ or even having abusive parents. *Id.* Playing violent video games is nearly *two times* greater as a risk factor for aggressive/violent behavior than having a record of prior violence or being a large consumer of media violence. *Id.* The risk of harmful effects from

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[4] http://mentalhealth.about.com/cs/familyresources/a/videotv404.htm (viewed 7/13/10).

being exposed to violent video games is far greater than many other risks that receive more attention and regulation, such as exposure to lead, second-hand smoke, and asbestos. *See id.* at 144.

The State of California, like other states before it, has taken reasonable and modest steps to protect its children against the harm of increasingly violent video games, by passing the statute at issue here. This statute bans selling or renting video games labeled as violent to minors. A modest fine of up to $1000 may be imposed on the store itself, but not on a non-managerial employee lacking in an ownership interest, for violation of this limitation. Cal. Civil Code § 1746.3.

The decision below, like others before it, struck down this legal safeguard by declaring violent video games for children to be constitutionally protected free speech. But conduct is not free speech, and selling or playing video games no more constitutes free speech than selling or playing bingo and other forms of gambling. Playing a video game is conduct rather than constitutionally protected free speech.

Many studies confirm that violent video games can harm young people addicted to them and even others around them when the addict violently lashes out. Just as states properly regulate access by minors to pornography and gambling, states may constitutionally facilitate parental control over their children's access to violent video games. No heightened burden of justification for such laws is required; the State of California does not need to submit ironclad proof of potential harm from the games in order to help parents supervise their children with respect to a potentially harmful activity.

Children playing video games are akin to a captive audience, vulnerable to whatever image abuse the game may hurtle at them next as the player's game skill improves. Disturbing images are thrown at children, at the very youngest ages, by video game manufacturers trying to increase the shock value. Parents cannot easily view and screen the content because the images are based on the skill level of the player, which improves based on many hours of experience in playing the game. These games flash images at young players depending on the game-playing skills that they develop over time. The State of California may constitutionally prohibit those who profit from these games from selling and renting them directly to children.

ARGUMENT

Competing in a game is not free speech for First Amendment purposes, and selling or renting that game is not protected free speech either. Lower courts have given the billion-dollar video game industry a blank check in the name of free speech, and this has led to increasingly violent and harmful games in the hands of children. Shocking gore and disturbing images sell better than responsible entertainment, and the industry has raced to its lowest common denominator to the detriment of society. Nintendo, the early market leader in video games, once had family-friendly designs and adhered to a policy against "excessive blood and violence," but that caused it to lose out in the market to competitors producing more violent games. *Violent Video Game Effects*, *infra*, at 5 (inner quotes omitted). Now no game is too violent for the manufacturers and dealers. Decapitation,

mutilation, and mind-numbing image abuse dominate many popular games. *See, e.g.*, Pet. App. 78a. Internet gambling is not free speech, and neither are video games. The California statute is a constitutional regulation of conduct.

There are two additional and independent grounds for reversing the decision below, and upholding the constitutionality of the California statute. This statute enhances parental rights in protecting their children against harmful activities, and such protection is a valid exercise of state authority. In addition, children are a captive audience in these video games, and the state can protect captive audiences against shockingly offensive images.

I. VIDEO GAMES ARE NOT FREE SPEECH.

Video games are not constitutionally protected free speech. First, like gambling, video game sales and rentals are commercial conduct, not free speech. Second, violent video games incite violent behavior under a well-recognized exception to free speech.

This Court has never held that video games are free speech, and it should not do so here. "The Supreme Court has not specifically commented on whether video games contain expressive content protected under the First Amendment." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 958 n.11 (9th Cir. 2009). This Court should resolve this uncertainty by definitively holding that video games are not free speech, and thus the California statute restricting the distribution of violent video games to minors may be upheld under the rational basis standard.

There is no need to carve a new exception for free speech. Rather, the decision below should be reversed by declining to extend free speech protections to the gambling-like, violence-inducing conduct of playing video games.

A. LIKE GAMBLING, VIDEO GAME SALES AND RENTALS ARE CONDUCT, NOT PROTECTED FREE SPEECH.

Federal courts have repeatedly and justifiably rejected arguments that gambling and other role-playing conduct constitute protected free speech. Given that playing blackjack at a casino is not protected free speech, why should playing video blackjack or any other video game in an arcade be protected as free speech? It should not be. Likewise, purchasing or renting such video games to play elsewhere can no more constitute free speech than internet gambling can.

It is axiomatic that the First Amendment protections apply to speech rather than conduct. U.S. Const. amend. I ("Congress shall make no law … abridging *the freedom of speech*") (emphasis added). Playing a video game is conduct, as is collecting money for that game from the player, which is what the California statute regulates. As this Court has emphasized, it "is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall – *but such a kernel is not sufficient to bring the activity within the protection of the First Amendment*." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (emphasis added).

This Court has, of course, protected certain forms of "symbolic conduct" such as flag-burning, but this Court has repeatedly rejected the argument "that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). It is clear what someone is saying when he burns an American flag or a draft card. But what is the seller or renter of a video game saying to a teenage buyer? "Please waste more of your time on my addictive products"? If that were constitutionally protected free speech, then casino owners and tobacco sellers would be the next to assert it.

Even if the taking of someone's money for video games included some expressive elements, that would still fall far short of the free speech necessary to trigger strict scrutiny. Combating teenage addiction to time-consuming video games is plainly "a sufficiently important governmental interest" to "justify [the statute's] incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376. Limiting the type of "emotional gambling" exploited by video game manufacturers and retailers is just as worthy a governmental interest as regulating other types of conduct, such as adult gambling.

Moreover, the intentional inclusion of secret pornographic images to sell to children in video games, discussed in Point II.B *infra*, is potentially a criminal act and there is no First Amendment protection for conduct that facilitates a criminal act. *See Truchinski v. United States*, 393 F.2d 627, 634 (8th Cir.), *cert. denied*, 393 U.S. 831 (1968) (rejecting a First Amendment argument against a law prohibiting the use of interstate facilities to further the commission

of state criminal offenses); *Martin v. United States*, 389 F.2d 895, 897 (5th Cir.), *cert. denied*, 391 U.S. 919 (1968) (upholding the constitutionality of the Wire Act as applied to criminalize the receipt of a wager, because gambling was illegal where the wager was placed in Texas even though its receipt in Nevada was legal there).

The California statute at issue here does not prohibit the *playing* of video games, but only the taking of money in selling or renting violent video games to children. *See* Cal. Civil Code §§ 1746.1(a), § 1746.3 ("A person may not sell or rent a video game that has been labeled as a violent video game to a minor."). This statute in no way prevents a video game manufacturer or anyone else from engaging in any type of free speech. Instead, this statute properly regulates the conduct of taking money in connection with the conduct of playing violent video games.

B. MANY STUDIES CONFIRM THAT VIOLENT VIDEO GAMES ARE THE EQUIVALENT OF "FIGHTING WORDS" FOR KIDS WHO PLAY THEM.

Displaying a shockingly violent image to belligerent, misbehaving teenagers is conceptually identical to the utterance of "fighting words" to an adult. This Court held to be outside of First Amendment protection provocative words:

> which by their very utterance inflict injury or tend to incite an immediate breach of the peace. ... [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

As proof of the powerful effect of these games on even adults, both law enforcement and the military use similar video games to train officers and soldiers to kill more quickly and without hesitation. *See* Lt. Col. Dave Grossman and Gloria DeGaetano, *Stop Teaching Our Kids To Kill* 75 (1999) [hereinafter, *Grossman*] (noting that one video game advertises that it is "based on the same exacting technology used for aerospace, medical and military simulators. ... Psychiatrists say it is important to feel something when you kill."). These video games are useful to the military precisely *because* they incite participants to kill. Such incitement, regardless of its merits for military training, falls outside of the protections of free speech and into the exclusion established by *Chaplinsky*. The government should be able to ban terrorist-training video games.

Michael Carneal was 14 years old when he walked into a prayer group in Paducah, Kentucky in December 1997, and began shooting defenseless teenagers with a stolen gun. *See id.* at 75. There were several tell-tale signs that this massacre was incited by a violent video game. For example, he never moved his feet during his shootings, and never fired far to the left or right; instead, he fired only once at each target that appeared, just as a player of video games maximizes his game score by shooting only once at each victim, in order to hit as many targets as possible. *See id.* The killer's "tally" for his eight shots was three dead and one paralyzed, all struck in the head or upper torso by a 14-year-old "who, prior to stealing that gun, had never shot a real handgun in his life!" *Id.* In contrast, "the average experienced law en-

forcement office, in the average shootout, at an average range of seven yards, hits with approximately one bullet in five." *Id.* at 4.

There are many similar tragedies. One shooting that was widely publicized was the massacre at Columbine High School in April 1999. It was incited by the violent video game "Doom," with which the young killers were obsessed. Other examples, in addition to the Columbine and Paducah massacres, include Jonesboro, Arkansas (Mar. 1998), Springfield, Oregon (May 1998), Santee, California (Mar. 2001), Wellsboro, Pennsylvania (June 2003) and Red Lion, Pennsylvania (Apr. 2003). *See Violent Video Game Effects*, *infra*, at 3. Then there was the killing spree that paralyzed the D.C. area with sniper shootings in the Fall of 2002. That, too, was incited by violent video games. *See id.*

The manner in which the violent video game "Doom" incited the Columbine massacre is illustrative. First, the video game is so realistic and effective in training combat killing that the Marine Corps use a modified version of it (called "Marine Doom") to teach recruits how to kill." *Grossman*, *supra*, at 77. Moreover, the Marine Corps use it "as a tactical training device, as opposed to teaching motor skills" because "[i]ts primary value is in developing *the will to kill by repeatedly rehearsing the act until it feels natural*." *Id.* (emphasis added). Teenagers Dylan Klebold and Eric Harris played "Doom" and similar violent video games for "hundreds and hundreds of hours" before acting out the violence in real life at Columbine High School. *Id.* Indeed, "Eric Harris reprogrammed his edition of "Doom" so that it looked like his neighborhood, complete with the houses of the people he hated." *Id.*

Military training-like video games are not constitutionally protected free speech. In the hands of an adult working under the supervision of a drill sergeant, they may be useful. But in the hands of immature or disturbed teenage minds, they are a recipe for disaster. And in the hands of terrorists training kids to perform the next suicide mission, they are an anathema to free speech.

Studies repeatedly confirm how violent video games incite harm. *See* Craig Anderson, Douglas Gentile and Katherine Buckley, *Violent Video Game Effects on Children and Adolescents* (Oxford: 2007) [hereinafter, *Violent Video Game Effects*]. Reflecting how violent video games incite violent conduct in children within the *Chaplinsky* exception to free speech, studies have found more aggressive behavior by students who play violent video games.[5] *See also Amicus Curiae Brief By Eagle Forum Education & Legal Defense Fund in Support of the Petition for Certiorari* filed in this case on June 22, 2009; Craig Anderson, "Violent Video Games: Myths, Facts, and Unanswered Questions," APA Online (October 2003) ("Violent video games are significantly associated with: increased aggressive behavior, thoughts, and affect; increased physiological arousal; and decreased prosocial (helping) behavior," all of which supports the *Chaplinksy* exception with respect to minors).[6]

The billion-dollar video game industry can, of course, find researchers to defend it, just as the tobacco industry for decades denied a connection be-

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[5] http://www.medicalnewstoday.com/articles/67221.php (viewed 7/13/10).

[6] http://www.apa.org/science/psa/sb-anderson.html (viewed 7/13/10).

tween cigarettes and cancer. A leading book attempting to deny the harm caused by violent video games in children is Lawrence Kutner and Cheryl Olson, *Grand Theft Childhood: The Surprising Truth About Violent Video Games, and What Parents Can Do* (2008) [hereinafter, *Grand Theft Childhood*]. This book provides all sorts of advice for parents, absurdly assuming they have the time, ability and inclination to play these video games along with their children.

The authors implore parents to "learn[] some of the terms gamers use," such as the difference between "first-person shooter" (used in the games "Doom" and "Halo") and "third-person shooter" (used in the games "Grand Theft Auto" and "Tomb Raider"). *Id.* at 220. But not all households today are managed by parents having the time and inclination to play a video game at its various skill levels before allowing the children in the household to do likewise. Indeed, one in 50 children has a parent who is in jail, and many more have a single parent who is busy with a fulltime job and many other responsibilities. *See Grossman*, *supra*, at 17. Moreover, even parents who have the time and energy will still typically be unable to advance to the skill levels in the game needed to screen all the images that will be shown to a persistent child player. *See* Point II.B, *infra*. Only the video manufacturers and retailers can protect the children against image abuse; parents simply cannot effectively screen this material without a law like the California statute.

II. LAWS THAT ENHANCE PARENTAL RIGHTS, AS THE CALIFORNIA STATUTE DOES, ARE PRESUMPTIVELY VALID UNDER THE RATIONAL BASIS STANDARD.

The California statute constitutionally protects the intrinsic parental right to control the upbringing of children, a well-recognized constitutional objective. *See, e.g., Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("[T]hose who nurture [a child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."). The California statute facilitates the ability of parents to protect their own children from harmful video games. The decision below interferes with that parental right to decide whether a child should be playing violent video games, and for that reason it should be reversed.

As this Court explained with respect to regulating images in *Ginsberg*, "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." *Ginsberg v. State of New York*, 390 U.S. 629, 639 (1968).

Justice Breyer explained in dissent in the 5-4 *Playboy* decision that "over 28 million school age children have both parents or their only parent in the work force, where at least 5 million children are left alone at home without supervision each week." *United States v. Playboy Entm't Group*, 529 U.S. 803, 842 (2000) (Breyer, J., dissenting) (citing U.S. Dept. of Education, Office of Research and Improvement, Bringing Education into the After-School Hours 3 (summer 1999)). The California statute is consistent

with Justice Breyer's concern; it "offers independent protection for a large number of families" and the government has a substantial interest, even a compelling one, in "preventing, say, an 8-year-old child from watching virulent pornography without parental consent." *Id.* (citing numerous precedents of this Court to that effect). Government likewise has a substantial interest in facilitating parental authority over an "8-year-old child" intent on playing violent video games.

The opinion below erroneously limited to pornography the authority of a state to protect children against image abuse. 556 F.3d at 960. (Interestingly, the decision below never uses the term "pornography" in drawing its distinction between violent images and sexually explicit ones, even though many decisions of this Court have used that descriptive term.) But the justification for safeguarding children against image abuse is in no way cabined to only one type of image; the rationale explained in *Ginsberg* is far broader:

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children *justify reasonable regulation of the sale of material to them*.

Ginsberg, 390 U.S. at 640 (quoting *People* v. *Kahan*, 15 N. Y. 2d 311, 312, 206 N. E. 2d 333, 334 (Fuld, J., concurring), emphasis added). *See Ginsberg*, 390 U.S. at 640-41 ("[T]his Court, too, 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.'")

(quoting *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)).

State facilitation of parental control over violent video games is constitutional for two primary reasons. First, age restrictions on activities by children in analogous activities is well-recognized in other areas of law. Second, the uniquely pernicious characteristics of video games further underscore the constitutionality of the California statute.

A. The Constitutionality of Requiring Parental Approval Is Well Recognized in Other Areas.

Consent by minors in many analogous areas of law typically requires parental approval, as mandated by the State. *See, e.g.*, 10 Pa. Cons. Stat. § 305(d)(1) (a minor in Pennsylvania cannot play bingo "unless accompanied by an adult"). A minor in most states cannot give consent in marriage unless his or her parent or guardian approves. Federal law properly requires parental approval before certain minors enlist (and receive military video game training, as discussed above): "[n]o minor under the age of fourteen years shall be enlisted in the naval service; and minors between the age of fourteen and eighteen years shall not be enlisted for the naval service without the consent of their parents or guardians." *United States v. Williams*, 302 U.S. 46, 49 n.4 (1937) (quoting 34 U.S.C. § 161). The California statute at issue here mandates that minors cannot give consent to purchasing and viewing the disturbing, highly graphic and violent video game images.

Surely if parental approval for minors to play bingo is constitutional, then parental approval to play video games depicting violent decapitation or acts of

terrorism is likewise constitutional. Given that the State can constitutionally protect its minors against harmful game-playing, then there is even greater justification for State limits when the game-playing entails "image abuse" that may disturb that child for years. Game-playing does not become protected First Amendment free speech once violent images are added.

Even with respect to the controversial abortion industry, this Court has *unanimously* upheld state requirements of parental involvement when a minor considers terminating her pregnancy. There, as here, States have an undeniable "strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 326 (2006) (unanimous opinion written by O'Connor, J.) (quoting *Hodgson* v. *Minnesota*, 497 U.S. 417, 444-445 (1990) (opinion of Stevens, J.)).

A legislature does not need to cite million-dollar studies or take exhaustive testimony in order to justify requiring parental consent for a minor to play bingo, get married or serve in the military. The *Ginsberg* Court emphasized that harm need not be shown:

> [T]he 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." *We do not demand of legislatures "scientifically certain criteria of legislation*."

390 U.S. at 642-43 (footnote omitted, quoting *Noble State Bank* v. *Haskell*, 219 U.S. 104, 110 (1911), emphasis added). The court below erred in insisting on

special proof of harm to justify the California statute. 556 F.3d at 964.

As Justice Breyer emphasized in his dissent in *Playboy Entm't Group*, "It is difficult to reconcile today's decision with our foundational cases that have upheld similar laws, such as *FCC v. Pacifica Foundation*, 438 U.S. 726, 57 L. Ed. 2d 1073, 98 S. Ct. 3026 (1978), and *Ginsberg v. New York*, 390 U.S. 629, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968)." *Playboy Entm't Group*, 529 U.S. at 847 (Breyer, J., dissenting, italics added). The federal government protects children against vulgarities aired over radio, and yet states cannot protect children against far more disturbing images of pornography on television (the *Playboy* decision) or decapitation in violent video games? This inconsistency is not constitutional law.

As commentators have observed, there are ample justifications for upholding parental rights with respect to protecting children. In criticizing a Seventh Circuit decision by Judge Posner that struck down an Indiana ordinance regulating children's access to violent video games, Law Professor Rosalie Berger Levinson noted:

> [Judge Posner's] analogy to violent movies and television is inapt. Unlike television, it is feasible for a city to restrict access to violent video games without affecting adult access, and movies already have a rating system that denies minors access to unsuitable films. The fact that parental rights are protected by allowing access when children are accompanied by their parents, similar to the motion picture industry, further supports the validity of the ordinance.

Rosalie Berger Levinson, "State and Federal Constitutional Law Developments," 35 Ind. L. Rev. 1263, 1270 (2002) (referring to *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir.), *cert. denied*, 534 U.S. 994 (2001), citation omitted).

B. Because Game Content Is Based on Skill Level, and Secret Adult Content Sometimes Awaits Highly Skilled Users, Parents Need the Assistance of California in Protecting Their Children.

Video game manufacturers argue that parents alone should bear the burden of protecting their children, without the assistance of state laws like the one passed by California. "Let the parents do their job" is the canard often heard by promoters of completely unregulated video games. *See, e.g., Grand Theft Childhood, supra,* at 223 (in defending violent video games, preaching that parents "should be paying closer attention to a host of potential behavioral issues").

This argument fails because parents have no way of screening video game content for offensive material, even if they had the time to do so. Unlike a book or magazine, which a parent can flip through a book quickly, or a movie, which a parent can play in fast-forward mode for easy scanning, a video game requires skill to play it. Video games reveal content based on the skill levels of the players, thereby flashing *different* images at players as they advance in their playing ability. It requires a great deal of time and effort to progress to higher skill levels in order to view the images there. Some may never be able to progress to high skill levels to screen the content

there no matter how hard they try, in contrast with reading a book or viewing a movie.

Content known only to the manufacturers include the use of undisclosed "Easter eggs" in video games that secretly take players to sexually explicit images. Not even game reviewers are aware of these secret passageways to pornographic images, or what the content of those images is for children who discover them in the games based on their skill, not their maturity in being able to deal with the images.

For example, the video game "Grand Theft Auto: San Andreas" by Rockstar Games included an ostensibly innocuous Easter egg called "Hot Coffee," which leads to "sexual intercourse between the main character and his girlfriend."[7] Once discovered – long after many children had played the game – some retailers then pulled the game off of store shelves until a replacement version without the pornography was supplied.[8]

The California statute provides the only effective way to guard against manufacturers' slipping inappropriate material into video games. Parents cannot detect and screen for all of the offensive images in video games unless the law puts them on notice and prohibits bypassing them by selling or renting directly to children. Manufacturers, of course, have economic incentives to boost their sales and rentals by including shocking or titillating material, and the California statute properly guards against the abuses that result from that incentive.

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[7] http://www.sync-blog.com/sync/2010/03/hunt-for-easter-eggs-in-your-favourite-video-games.html (viewed 7/13/10).

[8] *Id.*

"Children have a very special place in life which law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). This protection is not only to guard against pornography. The State of California may constitutionally protect children against other forms of image abuse, including violent video games.

III. A MINOR BUYING AND PLAYING A VIDEO GAME IS THE LEGAL EQUIVALENT OF A NON-CONSENTING "CAPTIVE AUDIENCE," FOR WHICH REQUIRING ADULT CONSENT IS CONSTITUTIONAL.

Once a child becomes addicted to a video game, he then becomes the legal equivalent of a "captive audience" for which this Court has already extended protections from unwanted images or vulgarities. "[P]ublic displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid" are entitled to greater protection due to the "'captive audience' problem." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 128 (U.S. 1989).

Justice Stewart emphasized this issue in his concurrence in *Ginsberg*:

> When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees. So it was that this Court sustained a city ordinance prohibiting people from imposing their opinions on others "by way of sound trucks with loud and raucous noises on city streets." And so it was that my Brothers BLACK and DOUGLAS

> thought that the First Amendment itself prohibits a person from foisting his uninvited views upon the members of a captive audience. I think a State may permissibly determine that, at least in some precisely delineated areas, a child – like someone in a captive audience – is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.

390 U.S. at 649-650 (footnotes omitted) (Stewart, J., concurring).

The decision below erred in failing to recognize that free speech to a non-captive, adult audience may not constitute protected free speech to a *captive* audience of *children*:

> [M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter *may vary according to the group to whom the questionable material is directed or from whom it is quarantined*."

Ginsberg, 390 U.S. at 636 (emphasis added). *See also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n. 11 (1975) ("A state or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults.") (quotations omitted).

Violent video games contain graphic depictions of decapitation and mutilation, which can be aptly characterized as "image abuse" when flashed at children. Few would deny the truth in the observation that "a picture is worth a thousand words," and a disturbing image can be cause far more harm than a thousand words, particularly for children. As explained recent-

ly in the *New York Times*, a psychologist hired by a company that screens inappropriate internet images "reached some unsettling conclusions in her interviews with content moderators. She said they were likely to become depressed or angry, have trouble forming relationships and suffer from decreased sexual appetites. Small percentages said they had reacted to unpleasant images by vomiting or crying." Brad Stone, "Policing the Web's Lurid Precincts," *N.Y. Times* B1 (July 19, 2010). Flashing image abuse at a captive audience of children is not protected free speech.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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Dated: July 19, 2010