No. 08-1448

In The
Supreme Court of the United States

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

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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The statute attacked by respondents shares nothing in common with the statute at issue in this case. Respondents and their amici paint an alarming picture of government censorship of both classic and contemporary art and literature, ignoring the level of extreme violence depicted in the narrow category of video games that is actually covered by the Act.[1] The Act narrowly targets a distinct audience susceptible to unique harms through use of an established three-prong test that carefully ensures that speech with serious literary, artistic, political, or scientific value for minors will *not* be regulated. Just as with laws governing the regulation of obscenity and offensive sexual depictions, the Act's reach is narrowly circumscribed by its express terms.

Petitioners ask this Court to permit states to regulate minors' ability to independently purchase a narrow category of offensively violent material, just as the Court has done for sexual material. This material represents either depictions that are not within the area of protected speech as to minors, *cf., Ginsberg v. State of New York*, 390 U.S. 629 (1968), or depictions that may be regulated in respect to minors "because of their constitutionally proscribable content" for minors, *cf., R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992), or both. The important point is that the First Amendment should not be understood

[1] As has been the case in petitioners' earlier filings, the word "Act" refers to California's statutory scheme in issue, Cal. Civ. Code § 1746-1746.5.

either to guarantee retailers a constitutional right to sell offensively violent video games to unaccompanied minors, or to guarantee minors the right to independently purchase this limited class of video games.

ARGUMENT

I. The *Ginsberg* Standard Should Be Extended to Validate California's Regulation of the Narrow Category of Violent Video Games Covered by the Act

A. The Act Only Covers Video Games Depicting Violent Content That Is Patently Offensive for Minors, Appeals to Their Deviant or Morbid Interest, and Causes the Game to Lack Serious Redeeming Value for Them

In *Ginsberg v. State of New York*, 390 U.S. 629 (1968), this Court held that parents' authority to direct the rearing of their children, along with a state's independent interest in protecting the well-being of those children, fully supported New York's restriction on the commercial sale of sexually-explicit material to minors that the legislature determined to be harmful.[2] California asks this Court to extend this standard to the commercial sale of offensively violent

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[2] Defined as patently offensive, appealing to a minor's prurient, shameful or morbid interest in sex, and lacking any redeeming social importance for minors. 390 U.S. at 631.

video games to minors and uphold the Act. Such an extension is fully supported by the governmental and social interests reaffirmed by this Court in *Ginsberg*. The terms employed by the Act to accomplish this extension are more than adequate to inform a reasonable person of the level of video game violence that is covered.

As in *Ginsberg*, the Act covers only commercial transactions entered into by minors outside the presence of parents. It does not ban adults from purchasing any expressive material, and it prohibits no one from viewing it. The only material covered by the Act represents the violence equivalent of sexual obscenity; video games sold to minors that are not offensively violent will retain their full First Amendment protection. Respondents themselves go to great lengths to ensure that minors cannot purchase these games on their own, insisting that parents make the informed purchase for them by including descriptions of the level of violent content contained in rated games. And the Act will, as respondents acknowledge, target only the 8 to 17 percent of minors who purchase video games outside the presence of a parent. Resp. Br. 9 (noting that evidence suggests parents are present when minors purchase video games between 83 to 92 percent of the time). So for the vast majority of minors whose parents purchase video games for them, the Act will have no impact whatsoever. In the limited context of these commercial transactions, the Act simply advances the fundamental right of parents

to direct their children's development in a manner best suited to the individual needs of the child.

The Act does not prohibit minors from purchasing the Bible, *Harry Potter*, children's stories such as *Snow White*, or other literary writings and media. The Act patently protects such works when sold to minors and adults alike. Petitioners agree that the literature discussed in Respondents' brief is fully protected by the Constitution, and it will remain so under the Act. The material covered by the Act cannot be fairly analogized to the types of speech that have been historically protected. In truth, the video games subject to the Act's restrictions have no historic parallel other than obscenity. It would not be a misnomer to refer to the material covered by the Act as "obscene violence."[3]

The Act applies, first, only to violent gaming content that includes the killing, maiming, dismembering, or sexually assaulting of an image of a human being in a manner that a reasonable person would find appeals to a deviant or morbid interest of minors. Cal. Civ. Code § 1746 (d)(1)(A)(i). Application of this

[3] As this Court noted in *Miller v. California*, obscenity is commonly defined as " '1a: disgusting to the senses . . . b: grossly repugnant to the generally accepted notions of what is appropriate . . . 2: offensive or revolting as countering or violating some ideal or principle' " and " '[o]ffensive to the senses, or to taste or refinement, disgusting, repulsive, filthy, foul, abominable, loathsome.' " 413 U.S. 15, 20, n. 2 (1973). Violent material can surely be depicted in a manner that meets these definitions.

prong of the Act is straightforward. A reasonable person can make this judgment through application of a common understanding and definition of the applicable terms. Does the violent content appeal to a minor's interest in violence that is abnormal or departs from established norms or social customs as to what level of violence is appropriate for minors?[4] As respondents note, and petitioners concur, common understandings can indeed play a significant role in First Amendment jurisprudence. There is no reason to believe these common understandings of the terms employed by the Act cannot be applied to violent content depicted in video games.

Second, and only if the first prong is satisfied, the Act will apply to a game if the violent content, as defined, is patently offensive to prevailing standards in the community as to what is suitable for minors. Cal. Civ. Code § 1746 (d)(1)(A)(ii). Again, application of this element is straightforward. This Court has applied limiting constructions to the types of actions that a jury may find "patently offensive" under the sexual obscenity test, including "descriptions of ultimate sexual acts, normal or perverted, actual or simulated," "descriptions of masturbation," etc. *See Miller v. California*, 413 U.S. 15, 25 (1973). Here, the Act places limiting terms in the text of the statute itself, namely, killing, maiming, dismembering, or

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[4] *See* Black's Law Dictionary 462 (7th ed. 1999) (defining "deviance" as "[t]he quality or state of departing from established norms, esp. in social customs.").

sexually assaulting an image of a human being. Cal. Civ. Code § 1746 (d)(1). The Act operates only within this narrowly defined, identifiable context.

Finally, if the first two prongs are satisfied, the Act will apply only to games where the patently offensive, deviant level of violence causes the game as a whole to *lack serious literary, artistic, political, or scientific value* for minors. Cal. Civ. Code § 1746 (d)(1)(A)(iii). Like the law governing the regulation of obscenity, this third prong, drawn from *Miller*, ensures that the societal value of violent video games will be judged by a national standard, and will not be subject to the degree of local acceptance by an individual community. This Court noted in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), that the third prong of the test "is particularly important because, unlike the 'patently offensive' and 'prurient interest' criteria, it is not judged by contemporary community standards." *Id*. at 873. Thus, "the serious value requirement allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 579 (2002) (internal quotations omitted). Respondents can therefore be assured that, so long as the video games they import into or distribute within California can reasonably be said to meet a national minimum for socially redeeming value for minors, no labeling is required under the Act.

The terms employed by the Act to accomplish its purpose were developed through decades of litigation and numerous decisions of this Court. Although the Act replaces "prurient" interest in sex with "deviant" interest in violence, the social interests served through the use of these terms are the same when a state acts to protect minors. Parents are in the best position to judge whether material that appeals to minors' deviant interest in violence is appropriate for their child's particular stage of development, no less so than with sexual material appealing to minors' prurient interest in sex. Both categories of expressive material can negatively impact a child's development. In these two specific categories, the rights of parents must take precedence over both the preferences of minors and the asserted rights of commercial retailers.

B. The Historic Prevalence of Violent Depictions in Art and Literature Provides No Basis to Shield the Material Covered by the Act from Regulation in Respect to Minors

Respondents suggest that because there is a level of violence that has historically played a role in children's literature, no level of violent content exists which could justify regulations upon the direct sale of violent video games to minors. This argument misses the point. As noted above, Petitioners agree that violent content has historically played an important role in literature, movies, art, and even in some video games. While stories such as "How the Children

Played Butcher with Each Other" by the Brothers Grimm often depict incredibly brutal violence, as amici First Amendment Lawyers Association themselves note, "The Brothers Grimm utilized extreme violence in their stories in the attempt to deter bad behavior in children." First Amendment Lawyers Ass'n Br. 14. Such literature often attempts to teach children important life lessons, such as not mimicking the violent behavior they witness, whether real or fantasy. While the level of violence in such literature can be intense, it enjoys constitutional protection because it has literary and artistic value. In contrast, violent video games that satisfy all three prongs of the Act will, by definition, lack such value for minors and represent an adult invasion of children's culture, no less so than the sexually-explicit magazines at issue in *Ginsberg*. In such situations, no constitutional principles are served by allowing minors to purchase this material without parental involvement.

As with violent content, sexual content has also played a significant role in great art and literature throughout history. Such material forms an important part of American culture, even for purposes of educating minors in the classic works of Renaissance artists and writers. In fact, a short trip to the National Gallery of Art will reveal many nude paintings and other art work involving sex. And many famous literary works contain graphic depictions of sex. John Cleland's *Fanny Hill* contains numerous, graphic descriptions of the characters of the book engaged in various sexual acts, often with highly evocative

language. Yet the proliferation of sexual material throughout society has never been accepted by this Court as an excuse to protect the commercial sale of offensively sexual material to minors.

Despite the prevalence of obscene literature since at least 1821, *see Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting), it was not until 1968 that the Court recognized society's compelling interest in protecting minors from material that is sexual but not obscene. The prevalence of sexually-explicit material in society did not serve to protect it from regulation as to minors, and neither should the prevalence of violent material do so today.

Instead, it must be recognized that, just as with sex, violent material can be depicted in a manner that falls outside the protection of the First Amendment in respect to minors. This is certainly true in the context of video games. In fact, one "Top 10" list published online in 2009[5] rates the top 10 "most violent video games." Number three on the list is the video game *Manhunt*. The author describes the level of violence in the game quite bluntly: "[T]he player sneaks around a 3-D environment and commits heinous acts of murder as part of a sadistic form of entertainment. Decapitation, steel-object-to-the-brain impaling and even the ability to jam a sickle up an unsuspecting victim's ass was part of the Manhunt experience.

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5. *See* http://www.askmen.com/top_10/videogame/archive1.html.

Violence indeed."[6] Number four on the list is *MadWorld*, which the author describes as follows:

> What's black and white and red all over? Your victims as they're splattered against the wall after being skewered on a lamppost. Or perhaps the answer could include disposing of your enemies in a meat grinder, or playing darts using only your opponents and a baseball bat. Whatever the stylish kill, this video game means serious business on the violence factor. Maybe the blood splatter on a black-and-white backdrop really highlights the ferociousness and gratuitous violence, but any game with flavors of *The Running Man* and a protagonist with a chainsaw on his arm usually have violent potency.[7]

While there is certainly a level of violence available in video games that is not patently offensive, appealing to a minor's deviant interest, it should be beyond argument that there is also a level that is. Far from representing a "fundamental part of our history, culture, and politics" for minors (Resp. Br. 20), no societal or constitutional interest is served by ensuring to minors the right independently to purchase, or to respondents the right to sell to minors, games meeting the Act's narrow definition. The important place in American culture that is occupied by expression

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[6] http://www.askmen.com/top_10/videogame/top-10-most-violent-video-games_3.html.

[7] http://www.askmen.com/top_10/videogame/top-10-most-violent-video-games_4.html.

depicting violence provides no basis for overturning California's narrow prohibition on the commercial sale of offensively violent video games to minors. As with sex, depictions of violence can go so far as to lose all constitutional protection with respect to minors.

C. The First Amendment Should Not Be Used to Frustrate State Efforts to Ensure that Parents Have The Opportunity To Direct The Development and Upbringing of their Children in Respect to the Purchase of Violent Video Games

At its core, the Act does no more than regulate a commercial transaction between video game retailers and minors when the game meets the Act's narrow definition. Society is best served by an interpretation of the Constitution that leaves the responsibility of directing the development and upbringing of minors with the parents, not one that allows the profits of video game manufacturers and retailers to take precedence.

Respondents cannot identify any constitutional value that is served by permitting them to engage in a commercial transaction with an unaccompanied minor for the sale of an offensively violent video game. Yet under respondents' reasoning, the Constitution must be interpreted in a manner that guarantees them a right to engage in such a transaction. Presumably, this newly crafted right – finding its existence in the First Amendment – would trump even a parent's right to object to the sale. A proper

interpretation of the First Amendment rejects such an absurd result.

Respondents have failed to identify any historical evidence supporting their assertion that the Constitution guarantees them the right to sell offensively violent material to minors. Instead, they rely upon the notion that shielding minors from access to such violence will prevent them from becoming "well-functioning, independent-minded adults and responsible citizens. . . ." Resp. Br. 25, quoting *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 576-77 (7th Cir. 2001). This line of reasoning fails for at least two reasons.

First, and most importantly, it is the role of parents, not respondents or the marketplace – nor indeed, the state – to determine whether a patently offensive violent video game that lacks serious redeeming value is suitable for an individual minor. Such a decision is best left to the parents, who can make this determination based upon the child's relative maturity and phase of development. The Act assists parents by ensuring they are informed of the level of offensive violence depicted in the games through the labeling requirement, which allows parents to then make informed decisions as to whether to purchase and allow their children to play a covered game.

Second, respondents' apparent view that the development of minors is promoted by unfettered access to offensively violent video games is directly

contradicted by their own efforts to prevent minors from purchasing even M-rated games. Under the rule of law proposed by respondents, they would have a constitutional right to sell minors an offensively violent video game, over the objection of a parent, even though their own rating system recommends they refrain from doing so. Respondents cite to no precedent that could support such an application of the Constitution.

Applying the *Ginsberg* framework to the Act's regulation of commercial transactions with minors ensures that parents, and not minors or retailers, can carry out their important role of directing the development of children. This Court should extend the standard established in *Ginsberg* to the material covered by the Act.

II. Minors Occupy a Special Place in Civil Society, Which Demands that Constitutional Principles Be Applied with Sensitivity and Flexibility

Notably absent from respondents' brief is *any* discussion of the well-established principle that minors occupy a truly unique place in our civil society, such that application of the law must take into account fundamental differences between adults and minors. Instead, respondents ask this Court to treat minors no differently than adults. But as this Court has repeatedly recognized, scientific and sociological studies show that youth under the age of 18 lack

maturity and have an underdeveloped sense of responsibility. *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham v. Florida,* 130 S. Ct. 2011, 2026 (2010). And minors are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . ." *Roper*, 543 U.S. at 569. Ultimately, we know that there are fundamental differences between juvenile and adult minds. *Graham*, 130 S. Ct. at 2026. These differences are not rendered meaningless when First Amendment concerns are at issue. To the contrary; it is in the realm of consumption of expressive material that the Court has relied upon these differences to craft sensitive, flexible rules that permit parents to direct the upbringing of children while empowering governments to aid parents in this important endeavor. *See Ginsberg*, 390 U.S. at 638; *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Morse v. Frederick*, 551 U.S. 393 (2007); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

Respondents do not address the impact unsupervised consumption of offensively violent media can have on a minor's developing mind. Instead, they make two bold, yet entirely unpersuasive assertions. First, they claim that minors' unfettered access to the violent video games covered by the Act is not a "significant societal problem." Resp. Br. 35. Second, they claim that parents do not need the assistance of the State in helping protect children in their absence. *Id*. at 36-37. Not so. Indeed, in contrast to respondents' position, the political branches of the federal

government are acutely aware of parents' need for governmental assistance in protecting minors from the societal problems posed by the increase in violent media.

For over a decade, the federal government has been investigating the marketing and sale of violent media to our country's youth. In 1999, President Clinton asked the Federal Trade Commission and the Department of Justice to undertake a study of whether the movie, music recording, and computer and video game industries market, advertise, and sell products with violent content to our youth. *See* FTC, Marketing Violent Entertainment To Children, p. i (Sept. 2000), *available at* http://www.ftc.gov/reports/violence/vioreport.pdf (FTC 2000 Report). The FTC Report aptly describes the concerns acted upon by the State of California in 2005:

> Scholars and observers generally have agreed that exposure to violence in entertainment media alone does not cause a child to commit a violent act and that it is not the sole, or even necessarily the most important, factor contributing to youth aggression, anti-social attitudes and violence. Nonetheless, there is widespread agreement that it is a cause for concern. The Commission's literature review reveals that a majority of the investigations into the impact of media violence on children find that there is a high correlation between exposure to media violence and aggressive, and at times violent, behavior. In addition, a number of research

> efforts report that exposure to media violence is correlated with increased acceptance of violent behavior in others, as well as an exaggerated perception of the amount of violence in society.

Id. at i-ii. Yet to date, despite having introduced multiple bills dealing with the marketing and sale of violent video games to minors,[8] Congress has failed to pass any legislation responsive to these concerns. But where Congress has failed, the State of California has succeeded.

Respondents dismiss the country's decade-long concern about the impact of violent media on children as simply a waste of resources on a problem that does not exist. This glib dismissal of the legitimate concerns of countless parents and legislators is not surprising. There is no reason to believe that the video game industry's profit motives would be aligned with the concerns of parents and elected representatives

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[8] *See, e.g.*, Video Game Rating Act of 1994, S. 1823, 103rd Cong. (1994); Video Game Rating Act of 1994, H.R. 3785, 103rd Cong. (1994); Protect Children from Video Game Sex and Violence Act, H.R. 669, 108th Cong. (2003); Video Game Decency Act of 2007, H.R. 1531, 110th Cong. (2007); Children Protection from Video Game Violence and Sexual Content Act, H.R. 2958, 110th Cong. (2007); Truth in Video Game Rating Act, S. 568, 110th Cong. (2007); Parents' Empowerment Act, H.R. 3899, 110th Cong. (2007).

who believe parents should have the tools to guide the development of their children.[9]

The 2009 FTC Report found that, for the first time, video game marketing plans included "cross-promotional arrangements with quick service restaurants." FTC 2009 Report, p. 26, *available at* http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf. Such plans call for the marketing of violent video games with quick service restaurants, whereby the M-rated (for violence) game Halo 3 "was heavily cross-promoted with Burger King, Mountain Dew, and 7-Eleven Slurpees." *Id*. The FTC found that these types of promotions "likely appeal to many teens under age 17." *Id*. The FTC also reported that evidence demonstrated that "40% of twenty top-selling M-rated games (with a content descriptor for violence) were advertised on websites highly popular with children 2-12 or teens 13-16." *Id*. at 25.

In the face of these aggressive, indeed unprecedented, marketing techniques, Respondents' assertion that parents need no assistance in protecting minors from offensively violent video games is remarkable.

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[9] A 2010 poll conducted by Zogby International surveying 2,100 adults shows that "72 percent of adults support a ban on the sale of ultra-violent video games to minors; 65 percent of parents say that they're concerned about the impact of ultra-violent video games on their kids; [and] 75 percent of parents would give the video game industry a negative rating when it comes to how they protect kids from violent video games." (*Results available at* http://www.zogby.com/Soundbites/ReadClips.cfm?ID=19412).

Given the unique vulnerabilities of minors and the child-centric marketing efforts being employed by the respondents' industry, parents need the State's assistance now more than ever.

III. The Act Is the Least Restrictive Means of Serving the State's Compelling Interests

California has a compelling interest in preventing minors from purchasing video games covered by the Act without the involvement of a parent. In this regard, California's interest is no different than that of New York at issue in *Ginsberg*. The Act's direct sales restriction serves to assist parents in screening their children's access to offensively violent video games. Respondents ignore these important interests served by the Act. Permitting direct sales to minors directly undercuts the interests sought to be promoted by the State, as voluntary industry efforts have been shown to fail for a significant portion of minors.

There is no evidence in the record demonstrating the percentage of minors who purchase the limited class of offensively violent video games covered by the Act. Of course, this is because these games had yet to be identified as such. The industry's own ratings fail to differentiate between violence and the offensive violence covered by the Act, combining both under the rating "M" for mature. So when California passed the Act, the legislature considered the best evidence then available, including multiple FTC reports, which showed that, even for M-rated games, unaccompanied

minors were able to make purchases between 69 percent and 85 percent of the time from 2000 to 2004. JA 130, 140, 746, 816.

The California Legislature was fully aware that well over half of all unaccompanied minors under 17 years of age were able to purchase M-rated video games in violation of the industry's voluntary policies. This non-compliance rate is a far cry from achieving the State's interest in ensuring offensively violent video games are not sold to minors. But even if that percentage has dropped to 20 percent today after over a decade of industry efforts (Resp. Br. 9), the State's interest in helping parents protect these minors is no less compelling. Moreover, the 20 percent non-compliance rate may well understate how many minors can purchase M-rated video games. As the FTC reported in 2009, Toys 'R' Us failed to enforce the sales restriction 44 percent of the time. FTC 2009 Report, p. 28. Minors can certainly learn which vendors are more likely to sell offensively violent video games without checking identification. A 20 percent non-compliance rate could thus mean that many more video games are being improperly sold to minors than this figure would suggest. More importantly, even a 20 percent non-compliance rate is far from inconsequential.

Respondents and amici also point to parental involvement as a way of achieving California's goals. California, of course, welcomes the active involvement of parents in determining which games are suitable for their children; aiding these parents when

they cannot be present for the purchase is a principle purpose of the Act. Indeed, in the 83 percent of cases where a parent accompanies a minor to a store to buy a video game (Resp. Br. 9), the Act is effectively inapplicable, since the parent can purchase the game for the minor. It is only where a parent is *not* present that the Act has any effect, and that is precisely the point: to ensure that minors do not have access to the most violent video games unless approved by their parent. The fact that parents and guardians are often involved in minors' purchase and use of a video game thus does not render the Act invalid; rather it underscores how the Act is narrow in its application.

The fact that some game consoles may now have parental controls that permit a parent to attempt to restrict the types of games played is insufficient to protect the interests served by the Act. First and foremost, there is no evidence in the record as to the efficacy of such controls, as these controls were still under development at the time of the Act's passage in 2005. It appears that only one console containing such controls emerged at the end of the year following the Act's passage.[10] Moreover, there is substantial

[10] According to the ESRB, gaming consoles containing parental controls include the Microsoft Xbox 360, Nintendo Wii, and Sony Playstation 3. (*See* A Parent's Guide To Video Games, Parental Controls, and Online Safety, *available at* http://www.esrb.org/about/news/downloads/ESRB_PTA_Brochure-web_version.pdf.) None of these consoles were available at the time the Act was signed into law in October of 2005. *See, e.g.*, http://www.joystiq.com/

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reason to believe that such controls will not adequately address the interests promoted by the Act. A quick search on Google reveals that a user has to simply press a series of buttons on the controller of an Xbox to reset the password needed to override the parental settings.[11] Similar searches produce written instructions for the Sony Playstation 3 and Nintendo Wii.[12] In fact, multiple video clips demonstrating how to bypass parental controls on gaming consoles appear on YouTube.[13] Put simply, once a minor purchases a game, the parental controls are of limited use, especially for a minor with even modest technological aptitude.

Ultimately, there is no less restrictive means to ensure parental control of access to offensively violent video games by their children than prohibiting the direct sale of those games to minors. No other available alternative adequately serves California's interest.

2005/09/15/all-xbox-360-launch-dates-announced-in-us-on-nov-22/ (noting Xbox 360 not available until November 22, 2005).

[11] http://www.biline.ca/xbox-faq.htm#1.

[12] *See, e.g.*, http://www.gamespot.com/pages/forums/show_msgs.php?topic_id=26467378 (Playstation 3); http://wii.marcansoft.com/parental.psp (Wii).

[13] *See, e.g.*, http://www.yutube.com/watch?v=CFIVfVmvN6k&sns=em (Xbox 360); http://www.youtube.com/watch?v=Samf3N0J4&feature=youtube_gdata_player (Wii).

IV. To the Extent the Act Applies to Online Sales, Its Reach Is Properly Limited to Commercial Transactions with Minors; It Permits Adults To Purchase Games for Minors; and It Leaves Adult Access Unrestricted

Although application of the Act has yet to be construed by a state or federal court, the language and purpose of the Act indicate that its restrictions apply to online sales of violent video games. Section 1746 defines a video game as any "electronic amusement device that utilizes a computer, microprocessor, or other similar electronic circuitry." The definition would appear to include both video games purchased online and physically shipped to a purchaser's home, as well as games that are purchased and downloaded or played online. Thus, under the Act an online game that meets the definition of violent video game may not be sold to a minor. Cal. Civ. Code § 1746.1(a). Notably, however, the Act only covers the "sale" or "rental" of a violent video game to a minor; non-commercial transactions are not regulated. Section 1746.1 provides affirmative defenses for alleged violations. For example, a retailer who demands and is shown evidence of a purchaser's age may reasonably rely upon such evidence as a defense to prosecution under the Act. *Id*. Such evidence may include, but is not limited to, "a driver's license or an identification card issued . . . by a state or the Armed Forces of the United States." *Id*.

In a footnote, respondents argue for the first time on appeal that, should the Act be construed to apply to online sales, it "would raise the same kinds of problems that have limited regulation of sexual content on the Internet" citing *Ashcroft* and *Reno*. Resp. Br. 51 n. 21. Not so.

The federal statute at issue in *Reno* prohibited any transmission (commercial or not) of obscenity, as well as "indecent" and "patently offensive messages" to persons under 18 years of age. 521 U.S. at 858-60. The statute had no exemption for parents wishing to obtain indecent material for their children, was not limited to commercial transactions, and did not contain the three narrow prongs of the *Miller* test. *Id*. at 865. The Court ultimately found that the statute would bar even adult access to protected speech on the Internet: "In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *Id*. at 874.

The federal statute at issue in *Ashcroft* flatly prohibited the "posting, for 'commercial purposes,' of World Wide Web content that is 'harmful to minors.'" 542 U.S. 656, 661 (2004). In affirming the preliminary injunction, the Court held that such a blanket prohibition, carrying penalties of up to $50,000.00, would likely restrict all adult access to protected speech and that less restrictive means such as "filters" could serve the government interest in protecting children. *Id*. at 667-70.

Here, the Act carries none of the risks presented by those federal regulations. First, the Act is limited in reach through the use of the *Miller* test. Second, the Act only applies to commercial transactions with minors. And third, the Act permits parents to purchase covered video games for their children. Respondents' half-hearted claim that no regulation can be crafted that can permissibly protect minors from harmful material sold via the Internet is, as this Court noted in *Ashcroft*, 542 U.S. at 672 wrong: "On a final point, it is important to note that this opinion does not hold that Congress is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials."

Here, online retailers can comply with the Act by taking simple age-verification measures for sales shipped to California and online transactions. Importantly, as this Court noted in *Reno* thirteen years ago, age verification for Internet sales is possible and practical for commercial sales – the only activity covered by California's Act: "Technology exists by which an operator of a Web site may condition access on the verification of requested information such as a credit card number or an adult password." *Reno*, 521 U.S. at 856; *see also* Jack L. Goldsmith, Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 809-12 (March 2001) (noting the ease with which Internet content providers can implement age and geographic location verification measures). Thus, to the extent the Act applies to online sales, it properly restricts only minors' access

to the covered games through a commercial transaction in which age and location can easily be verified, while leaving adult access to such games unfettered.

*   *   *

For the foregoing reasons and those stated in petitioners' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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