

No. 08-1448

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IN THE  
**Supreme Court of the United States**

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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.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

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**BRIEF OF *AMICI CURIAE* ENTERTAINMENT  
CONSUMERS ASSOCIATION, COMPETITIVE  
ENTERPRISE INSTITUTE, CONSUMER ACTION,  
CONSUMER FEDERATION OF AMERICA, PUBLIC  
KNOWLEDGE AND STUDENTS FOR FREE CULTURE  
IN SUPPORT OF RESPONDENTS**

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## INTEREST OF THE AMICI CURIAE

*Amici Curiae* submit this brief in support of Respondents, urging the Court to affirm the judgment below that California’s law restricting the sale of certain video games to persons under eighteen, California Civil Code §§ 1746–1746.5 (2006) (the “California Act” or “Act”), is unconstitutional.<sup>1</sup> *Amici* are nonprofit, public interest organizations that advocate for consumer and citizen interests on a range of issues, including issues affecting consumers’ rights in matters of technology and media. *Amici* include:

**Entertainment Consumers Association (“ECA”).** Founded in 2006, the ECA is a nonprofit membership organization that represents consumers of interactive electronic entertainment, including video games. The ECA acts as the collective voice of video game consumers to communicate their concerns and advocate for their rights in the courts and the political arena.

**Competitive Enterprise Institute (“CEI”).** Founded in 1984, CEI is a public interest

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1. The parties have consented to the filing of this brief. 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*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

organization dedicated to advancing limited government and individual liberty.

**Consumer Action (“CA”).** CA has been a champion of underrepresented consumers nationwide since 1971. A nonprofit organization, CA focuses on consumer education that empowers low to moderate income and limited-English-speaking consumers. It also advocates in the media, in the courts, and before lawmakers to advance consumer rights and promote industry-wide change.

**Consumer Federation of America (“CFA”).** CFA is an association of nearly 300 nonprofit consumer organizations. Established in 1968, CFA works to advance consumer interests and pro-consumer policies by researching and reporting consumer issues and behavior, and by advocating about consumer concerns before the federal and state governments. CFA also educates the public, news media and policymakers about consumer topics, and supports consumer-oriented individuals and organizations in their work.

**Public Knowledge (“PK”).** PK is a nonprofit public interest organization devoted to protecting citizens’ rights in the emerging digital information culture, and focused on the intersection of intellectual property and technology. PK seeks to guard the rights of consumers, innovators and creators at all layers of our culture through legislative, administrative, grass-roots and legal

efforts, including regular participation in intellectual property cases.

**Students for Free Culture (“SFC”).** SFC is an international chapter-based student organization that promotes the public interest in intellectual property policy, and in information and communications technology policy. SFC has chapters at over forty colleges and universities in the United States and other countries.

As technology evolves, consumers are becoming more and more concerned with the government’s role in regulating access to innovative media. In particular, consumers of video games are becoming increasingly worried about their freedom to access and play video games. As demonstrated by a recent online petition, consumers consider experiencing a video game to be no different than reading a book, listening to music, seeing a movie or attending a play; they expect video games to be subject to First Amendment protections like any of these other forms of expression.<sup>2</sup> Yet California and other states have enacted legislation—and

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2. As of the date of filing, tens of thousands of consumers have signed on to the petition, and more are expected to sign on in the future. The petition will remain open for signature for video game users to continue to voice their concern about governmental threats to their First Amendment rights. The petition may be viewed at [http://action.theeca.com/p/dia/action/public/?action\\_KEY=1781](http://action.theeca.com/p/dia/action/public/?action_KEY=1781).

politicians and advocacy groups are pressing for legislation in other states—that would restrict consumers’ access to games that state officials personally find objectionable. If upheld, the California Act will not only adversely affect *amici* and the rights of their members in California, but also the rights of their members in the eleven other states supporting California before this Court, as well as the rights of their members in other states that will undoubtedly be pressured to follow suit. *Amici* wish to be heard to help vindicate the First Amendment rights of their members and all consumers.

### SUMMARY OF ARGUMENT

1. Video games are an expressive medium that deserves the same First Amendment protection as books, movies, plays and other forms of expression. People play video games because today’s games have the ability to tell emotionally engaging stories in ways comparable to literary or cinematic experiences. Beyond storytelling, there is a wide range of video games that consumers enjoy for different kinds of experiences, like educational games, music games and simulation games, all of which contain expressive content worthy of First Amendment protection.

Like every other expressive medium that came before it, video games sometimes use depictions of violence when communicating ideas. At times the violence depicted in any medium can be

intense, bloody and graphic—whether in works of unquestionable historic and literary value such as the film *Saving Private Ryan* or the novel *Crime and Punishment*, or in works of far more questionable value such as potboilers, pulp magazines and B-grade horror movies (and even then, value is often in the eyes of the beholder). Video games simply emulate these predecessors. Given its ubiquitous presence in art, literature and other forms of expression, the depiction of violence has never been exempted from First Amendment protection. There is no basis in law, logic, science or experience to create a “violence” exception for video games or any other form of protected expression. California’s attempt to squeeze violence into the obscenity exception of the First Amendment does not work. Violence is not “obscene” within the meaning of First Amendment jurisprudence, and the standards that govern obscenity were never meant to be extended to other categories of expression. *See Miller v. California*, 413 U.S. 15, 24 (1973) (confining scope of state obscenity laws to “works which depict or describe sexual conduct”). Because there is no precedent regarding violence, a reviewing state official’s (or perhaps a jury’s) individual view about a game’s content—both its use of violence and its supposedly countervailing serious literary, artistic, political or scientific value—would be the only deciding factor. This is impermissible under the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

There is nothing exceptional about the interactivity of video games that distinguishes them from other forms of expressive media, or that justifies content-based regulation of speech. Being able to interact with media content is not novel, as theater audiences well know. As technology progresses, so do the interactive features of all forms of media, such as, for example, e-books and movies on DVDs. Ultimately, interactivity is a matter of preference: some people prefer to read books, some prefer to watch movies, and some prefer to play video games. The choice should belong to the media consumer, not the state.

Video game consumers have First Amendment rights that must be protected from the state's interference. The First Amendment protects a person's right to choose what information or entertainment he or she wishes to receive, just as it protects a speaker's or author's right to speak or publish what he or she wishes to say. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Without this corollary right, the marketplace of ideas would not work, as speakers and publishers would not have audiences with whom to transact.

2. The California law cannot withstand strict scrutiny. As Respondents and other *amici* have fully addressed, neither of California's two purported interests warrants the Act's restriction on the marketplace of ideas. Parents do not need the state's assistance in controlling what video games their children play, since they already benefit from



an informative video game rating system and parental controls on consoles. And as every court to consider it has held, there is no reliable support for Petitioners' assertion that violence in video games causes harm to minors' physical and psychological well-being.

The Act is not subject to any lesser degree of scrutiny because it limits its restrictions to minors. The protections of the First Amendment, including the right of access to information, extends to minors to ensure, at a minimum, that they can effectively participate in society once they become adults. The government may not restrict the dissemination of protected expression to minors, except in narrow and circumscribed instances, such as school settings, that are not applicable to the California legislation. None of the traditional limitations on minors' rights cited by Petitioners or *amici*, such as marriage or ability to enter into contracts, implicate First Amendment rights.

In any event, the Act is not narrowly tailored to achieve California's stated goals. The legislation does not recognize the importance of age in drawing its restrictions, and limits access to 17½-year-olds to the same degree as 10-year-olds. The Act is underinclusive because it does not restrict the sale or rental to minors of movies or music, no matter how graphically or aggressively violent. The legislation is overinclusive because its restrictions turn on depictions of violence perpetrated on the vague term "image of a human being," which can be

read to extend to stylized humanoid forms, as well as stylized and cartoonish violence—both of which are easily distinguishable from the realistic violence that the Act seeks to restrict, and both of which are frequently used in video games.

Less restrictive and more effective alternatives are available to accomplish the state’s goals. The rating system promulgated by the industry’s self-regulatory Entertainment Software Rating Board (“ESRB”) and game console parental controls provide better information and more nuanced control to parents than the California legislation does. And unlike the Act, they are tailored to specific ages. These user-friendly mechanisms more than adequately serve California’s interests. Adding on California’s different standards will only lead to consumer confusion—confusion that will be compounded when other states inevitably layer their own differing standards and interpretations.

## ARGUMENT

### **I. VIDEO GAMES ARE AN EXPRESSIVE MEDIUM PROTECTED BY THE FIRST AMENDMENT.**

Video games are a form of expression protected by the First Amendment. Their content provides value to users in the form of entertainment, education, ideas and information. Although Petitioners do not contest this premise, there are

others that would have this Court hold otherwise.<sup>3</sup> (*See, e.g., Amicus Curiae Eagle Forum Education & Legal Defense Fund Br. 6.*) In order to protect the marketplace of ideas that is evolving from this stimulating new medium, this Court should hold that the First Amendment protects the content of video games, regardless of whether it includes depictions of violence.

Given the expressive content in video games, they are entitled to full First Amendment protection, and any content-based regulation of them is presumptively invalid. *See R.A.V.*, 505 U.S. at 382 (“The First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed.”) (citations omitted). The corollary right to receive information and ideas necessarily extends to video game users, who deserve the same First Amendment protection. *See Stanley*, 394 U.S. at 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”). The First Amendment mandates this right to receive information because the marketplace of ideas can only operate if content consumers are available to transact with content producers. *See*

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3. This Court has not yet specifically held that the First Amendment protects the expressive content contained in video games. *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F. 3d 950, 958 n.11 (9th Cir. 2009).

*Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). This right extends not only to political speech, but to artistic expression and entertainment as well. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *Winters v. New York*, 333 U.S. 507, 510 (1948).

A. Video Games, Like Books, Music, Movies And Other Forms Of Expression, Communicate Valuable Ideas.

Consumers play video games for their expressive and engaging content. New technology allows today's games to have the power to tell involving stories that integrate a combination of many other expressive media. They employ, among other features, text to convey information, dialogue to tell stories, music to set atmosphere, sound effects to create immersion, and artwork and moving images to render worlds for players to interact with.<sup>4</sup> Critics review these features of video games when

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4. See Smithsonian American Art Museum, *The Art of Video Games*, <http://americanart.si.edu/exhibitions/archive/2012/games/#news> (last visited September 14, 2010) (previewing a forthcoming American Art Museum exhibition regarding video games as an influential form of narrative art).

measuring their value for audiences.<sup>5</sup> Indeed, video games are now regularly reviewed and analyzed alongside other forms of art and entertainment, in publications many would consider guardians of culture, like the *New York Times*, the *Wall Street Journal*, the *New Yorker* and the *London Review of Books*.<sup>6</sup> Lower courts have relied on these story-

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5. See, e.g., Justin Calvert, *Grand Theft Auto IV Review*, Gamespot, Apr. 28, 2008, <http://www.gamespot.com/ps3/action/grandtheftauto4/review.html> (reviewing the video game *Grand Theft Auto IV* (Rockstar North 2008) and its various elements); David Clayman, *Assassin's Creed II Review*, IGN, Nov. 17, 2009, <http://xbox360.ign.com/articles/104/1045745p1.html> (reviewing the video game *Assassin's Creed II* (Ubisoft Montreal 2009) and its various elements); Seth Schiesel, *There Be Dragons, Among Other Things*, N.Y. Times, Jan. 4, 2010, at C1, available at <http://www.nytimes.com/2010/01/04/arts/television/04dragon.html> (reviewing the video game *Dragon Age: Origins* (BioWare 2009) and noting that “[e]ven more important to a great game of this sort is that it provide players with a world they actually care about saving . . . . That means setting, plot and personalities, and it is in these elements that *Dragon Age* is perhaps the best electronic game yet made.”).
  6. See, e.g., Chris Suellentrop, *War Games*, N.Y. Times Magazine, Sept. 12, 2010, at 62, available at <http://www.nytimes.com/2010/09/12/magazine/12military-t.html> (discussing forthcoming *Medal of Honor* (Danger Close 2010) video game and relationship to the war in Afghanistan, on which the game is based); Adam Najberg, *Halo: Reach Review—An Advance Look at the Video Game*, Wall St. J., Sept. 12, 2010, <http://blogs.wsj.com/speakeasy/2010/09/12/halo-reach-review-an-advance-look-at-the-video-game/> (reviewing video game *Halo: Reach* (Bungie 2010));

(Footnote continued on next page)

telling features in uniformly holding that video games are entitled to First Amendment protection. *See, e.g., Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 957 (8th Cir. 2003) (holding that the First Amendment protects video games because, like books and movies, they contain stories, imagery, themes and messages); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1184 (W.D. Wash. 2004) (same); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002) (same). Simply put, video games are a continuation in the evolution of protected expressive media, much like the motion pictures that preceded them. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).<sup>7</sup>

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(Footnote continued from prior page)

Nicholson Baker, *Painkiller Deathstreak*, New Yorker, Aug. 9, 2010, at 53 (reviewing several video games, including *Halo 3: ODST* (Bungie 2009), *Uncharted 2: Among Thieves* (Naughty Dog 2009), *Call of Duty: Modern Warfare 2* (Infinity Ward 2009), and others); John Lanchester, *Is it Art?*, London Rev. Books, Jan. 1, 2009, at 18–20, available at <http://www.lrb.co.uk/v31/n01/john-lanchester/is-it-art> (discussing relationship between video games and art).

7. As Respondents and other *amici* have discussed at length, government as well as society at large historically have overreacted to purported harms inflicted on youth by new forms of expressive media, such as comic books, rock and roll, and movies. *See, e.g., Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 244–45 (1915) (permitting state censorship of movies based in part upon their

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Video games can also go beyond storytelling and serve a variety of purposes for gamers. Indeed, people play video games because they provide a wide range of experiences. Some choose to play educational games like *The Oregon Trail* (The Learning Company, 5th ed. 2001) or the *Carmen Sandiego* series (various developers 1985–2009) because they offer adventure while teaching history and geography. Some video game users enjoy playing Christian games like *Left Behind: Eternal Forces* (Inspired Media Entertainment 2006) or *Catechumen* (N'Lightning Software 2000) because they resonate with personal religious beliefs and reference the Bible. Other users prefer action games that use mythology as their premise, like *Rune* (Human Head Studios 2000) or the *God of War* series (SCE Santa Monica 2005–10), which are based on, respectively, Norse and Greek mythology. Some people play strategy games like *Stronghold: Crusader* (Firefly Studios 2002) or *Civilization IV* (Firaxis Games 2005), which challenge their ability not only to lead simulated warfare but also to manage the resources that support their forces. Some players prefer less high-concept action games like *Postal²* (Running with Scissors 2003) or *Mortal*

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(Footnote continued from prior page)  
 capability of evil), *overruled by Joseph Burstyn, Inc.*, 343 U.S. at 502; *see generally* Christopher J. Ferguson, *Blazing Angels or Resident Evil? Can Violent Video Games Be a Force for Good?*, 14 Rev. Gen. Psychol. 68 (2010).

*Kombat vs. DC Universe* (Midway Games 2008), but even these test players' skill and strategy. Some choose to play music games like *Guitar Hero 5* (Neversoft Entertainment 2009) because they challenge players to perform on simulated instruments set to popular music. Some people even use exercise games like *Wii Fit* (Nintendo 2008) as an alternative to traditional gym workouts.

There are also simulation games that give players the ability to interact with and learn about a host of subjects. One example is *The Political Machine 2008* (Stardock 2008), which simulates the experience of running a 2008 presidential election campaign. Players learn about the process of campaigning as they are tasked to build campaign headquarters, give speeches, raise money, and approve ad campaigns while using limited resources. Similarly, *SimCity 4* (Maxis 2003) puts a player in the role of mayor of a fictional city. The player must build the city while managing its resources and budget, and consequently learns about city planning, budget management and municipal governance. These games may not have stories, but they certainly deliver ideas worthy of First Amendment protection.<sup>8</sup>

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8. There is even a simulation game available online that seeks to educate players about the Supreme Court, its decision-making process, and the complexity of First Amendment jurisprudence. The game, called *Supreme Decision*, puts

(Footnote continued on next page)



Some of the games mentioned above, like the *God of War* series, *Postal*<sup>2</sup>, and *Mortal Kombat vs. DC Universe*, include depictions of violence. They may or may not be excepted from California's Act under its serious-value exception. Cal. Civ. Code § 1746(d)(1)(A)(iii). Under California's scheme, this content-based decision would be up to the state—a dangerous practice the First Amendment shields against. *See R.A.V.*, 505 U.S. at 382. Contrary to Petitioners' claims, however, the use of violence in video games should not affect the First Amendment protection they deserve.

**B. Video Games Occasionally Communicate Ideas With Depictions Of Violence, A Characteristic That Does Not Affect First Amendment Protection.**

Violence is ubiquitous throughout history, and throughout the expression of thought in all its forms. As such, consumers, both adult and minor, are not strangers to it. Perhaps Judge Richard Posner put it

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 players in the shoes of a Supreme Court law clerk who must assist a Justice with a case based on *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). The game is part of a web-based education project known as iCivics, which was inspired by Justice Sandra Day O'Connor and uses video games to teach civics. *See* iCivics, <http://www.icivics.org/about> (last visited September 14, 2010).

best when he wrote in *American Amusement Machine Association v. Kendrick*: “Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault are aware.” 244 F.3d 572, 577 (7th Cir. 2001).

Certainly, history and the media used to record it are replete with violence. The public would be unable to comprehend the gravity of the June 6, 1944 invasion of Normandy without knowledge of its violence. Thus, books, movies, and now video games use extremely violent images to convey that event. The book *Band of Brothers* graphically describes the killing of a German soldier during the invasion: “Guarnere missed the third Jerry, but Winters put a bullet in his back. Guarnere followed that up by pumping the wounded man full of lead from his tommy-gun. The German kept yelling, ‘Help! Help!’ Winters told Marlarkey to put one through his head.” Stephen E. Ambrose, *Band of Brothers* 81 (Touchstone 2001). The HBO television adaptation of that book, as well as the lengthy and wrenching opening scene of the movie *Saving Private Ryan* (Amblin Entertainment 1998), similarly depict this kind of intense violence, showing graphic scenes of soldiers being killed and maimed in various ways. Likewise, the video games *Medal of Honor: Frontline* (EA Los Angeles 2002) and *Call of Duty 2* (Infinity

Ward 2005) attempt to convey the brutality of D-Day by using comparable images of soldiers being mowed down by machine gun fire as they land on Normandy beaches.

Media depictions of criminal violence also are filled with graphic images that video games seek to emulate. For example, as one court cites, the *Book of Judges* relates the story of Jael driving a peg through the temple of Sisera into the ground. *Entm't Software Ass'n v. Swanson*, 519 F.3d 768, 772 (8th Cir. 2008) (quoting from *Judges* 4:21 (NIV)). Another example is *Crime and Punishment*, where Dostoyevsky describes the murder of an old woman: “He struck once more, then again, full strength, with the blunt side of the ax, and on the top of her head. The blood gushed as from an overturned glass, and the body fell backward. . . . She was dead.” Fyodor Dostoyevsky, *Crime and Punishment* 74 (Sidney Monas trans., Signet Classic 1968) (1866). Movies like *The Godfather* (Alfran Productions 1972), based on the novel by Mario Puzo, also use graphic violence to depict criminal acts, like the scene in which Virgil Sollozzo stabs Luca Brasi in the hand while Brasi is garroted to death. Compare Mario Puzo, *The Godfather* 103 (New American Library 1969) (“The cord pulled tight, choking off Luca’s breath. His face became purple, the strength in his arms drained away. Tattaglia and Sollozzo held his hands easily now, and they stood there curiously childlike as the man behind Luca pulled the cord around Luca’s neck tighter and tighter.”). Video games like *The*

*Godfather* (EA Redwood Shores 2006), which is based on the movie and book, seek to imitate these scenes through their own graphic depictions of assassinations and violence.

While the novel *Crime and Punishment* and the film *The Godfather* are considered masterpieces, there are many other books and movies that have far less value than these titles, yet still enjoy First Amendment protection. *See Winters*, 333 U.S. at 510 (“What is one man’s amusement, teaches another’s doctrine. Though we can see nothing of any possible value to society in these magazines [that depict violence], they are as much entitled to the protection of free speech as the best of literature.”). The First Amendment does not ignore lowlier (at least in some eyes) forms of expression like potboilers or horror movies, or less expensive forms of expression like pulp magazines from the first half of the twentieth century, comic books or today’s graphic novels. Audiences have always enjoyed watching critically panned action movies filled with explosions and senseless violence simply because they find them fun to watch—even if social critics fear those movies glorify violence and antisocial behavior. The movie *Death Wish* (Dino De Laurentiis Co. 1974), for example—a graphically violent film that depicts a man stalking and murdering criminals in New York City in revenge for the brutal rape and murder of his wife and daughter (also seen on screen)—ran to packed and wildly cheering movie theaters in the crime-plagued cities

of 1974. Movie and social critics alike not only excoriated the movie but warned that it condoned vigilantism.<sup>9</sup> Yet it was entitled to full First Amendment protection. Like *Death Wish*, even though some games may have questionable value, they are just as deserving of First Amendment protection, no matter how much the government may desire to weigh their content against its perception of their value. *See United States v. Stevens*, 130 S. Ct. 1577, 1585–86 (2010) (discussing how the First Amendment does not weigh the quality of speech).

Given the omnipresent nature of violence and its use in expression, it makes sense that there is no special exception that exempts depictions of violence from First Amendment protection. Violence has never been categorized as “obscene” within the meaning of First Amendment jurisprudence. This Court has carefully limited “obscenity” to content depicting sexual conduct. *Miller*, 413 U.S. at 23–24. Unlike violence, minors have been traditionally restricted from access to depictions of sex, and thus a body of guiding definitions and authority has developed that government officials can use to regulate the sale to minors of such depiction. *See*

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9. *See, e.g.*, Vincent Canby, *Screen: ‘Death Wish’ Hunts Muggers: The Cast Story of Gunman Takes Dim View of City*, N.Y. Times, July 25, 1974, available at <http://movies.nytimes.com/movie/review?res=9804E3DB1131EF34BC4D51DFB166838F669EDE>.

*Ginsberg v. New York*, 390 U.S. 629, 643 (1968); *see also Miller*, 413 U.S. at 16–30. There are no similar rules for violence: “Classic literature and art, and not merely today’s popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial. The notion of forbidding not violence itself, but pictures of violence, is a novelty, whereas concern with pictures of graphic sexual conduct is . . . the traditional concern with obscenity.” *Am. Amusement*, 244 F.3d at 575–76; *see also Winters*, 333 U.S. at 519 (recognizing that, in legal context, indecency and obscenity do not encompass violence).

The Act’s “serious-value” exception, California Civil Code section 1746(d)(1)(A)(iii), modeled after the obscenity test laid out in *Miller*, does not save the legislation. This standard is not applicable to violent content. The Court in *Miller* specifically limited this test to “works which depict or describe sexual conduct.” 413 U.S. at 24. The Court recently reaffirmed this limitation in *United States v. Stevens*, when it invalidated a federal statute that criminalized the commercial creation, sale or possession of depictions of living animals being intentionally maimed, mutilated, tortured, wounded or killed. 130 S. Ct. at 1582, 1592. Although the statute contained an exception clause based on the *Miller* standard, the Court refused to allow the application of that standard to images depicting violence, noting that “[m]ost of what we say to one another lacks ‘religious, political, scientific, educational, journalistic, historical, or artistic value’

(let alone serious value), but it is still sheltered from government regulation.” *Id.* at 1591 (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971)).

As in *Stevens*, this Court should hold that including a serious-value exception clause does not make an otherwise unconstitutional restriction of expression permissible. In *Stevens*, the Court found that many hunting videos are recreational in nature and thus not within the ambit of serious value, yet merit full First Amendment protection. *Id.* at 1590–91. Many books and movies also are designed purely for entertainment purposes, yet enjoy full First Amendment protection. Likewise, many video games, including some that depict violence, primarily have entertainment value. They nevertheless deserve First Amendment protection as well, despite the fact that some government officials may believe they lack serious value.<sup>10</sup>

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10. In the controversial video game *Call of Duty: Modern Warfare 2*, one of the player’s characters is a U.S. commando who infiltrates a terrorist cell and participates in the terrorists’ massacre of civilians at an airport (and may choose whether to shoot or not). State officials conceivably might consider this game a candidate for restriction under the Act. Yet, as a review in the *New York Times* put it, the game is “intense, bloody, intelligent, painstaking in its design and inescapably gripping,” and its greatest innovation is the way it “manipulates the emotions of players.” Seth Schiesel, *Choices in Infiltrating a Terrorist Cell*, N.Y. Times, Nov. 11, 2009, at C1, available at <http://www.nytimes.com/2009/11/12/arts/television/12call.html>. The review describes the airport massacre scene as “the

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The Court should avoid any invitation to weigh the benefits of expressive media depicting violence against its costs, even assuming such benefits and costs can be measured in a reasonably objective way. (*See* Petrs.’ Br. 40.) The First Amendment does not protect speech that purportedly benefits society more than it hurts it; the First Amendment protects the value of free speech against the harm of government intrusion. *Stevens*, 130 S. Ct. at 1585.

**C. The Interactive Nature Of Video Games  
Does Not Affect Their Status Under  
The First Amendment.**

There is no reason to distinguish video games from other media merely because they seem more “interactive.” The fact that players use electronic controllers to navigate a digital world should not diminish First Amendment protection. If anything, the interactive nature of video games actually enhances their expressive content because it makes them more engaging to the user. *See Wilson*, 198 F.

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most provocative, forcefully uncomfortable and emotionally disturbing scene yet built into interactive entertainment.”  
*Id.* The First Amendment simply does not permit government officials to pass judgment about the artistic, political and social value of this kind of speech, no matter how controversial.



Supp. 2d at 181. The user, in effect, can “speak back” to the author.

Indeed, all media—books, music, plays, movies, television, internet websites, or any other form of expression—strive to be “interactive” in the sense of engaging the consumer as fully as possible. Each form of expression is at its best when it draws its user into its world, invites her to identify with its characters, and lets her experience the challenges that await its protagonists. *Interactive Digital Software Ass’n*, 329 F.3d at 957 (citing *Am. Amusement*, 244 F.3d at 577). This is not a new concept.

Theater has long used interactivity—also known as audience participation—as a way of drawing audiences into performances. For example, in Ayn Rand’s 1933 play, *Night of January 16th*, audience members were selected to play the role of jury members at each performance. The ending of the play varied as it depended on the verdict reached by each audience’s jury.<sup>11</sup> Today, improvisational comedy acts, like those performed by The Second City, utilize suggestions solicited from the audience

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11. See Ayn Rand Institute Three Plays, [http://www.aynrand.org/site/PageServer?pagename=objectivism\\_fiction\\_three\\_plays](http://www.aynrand.org/site/PageServer?pagename=objectivism_fiction_three_plays) (last visited September 14, 2010).

to create material for performances.<sup>12</sup> *Avant-garde* and experimental theater, as well as performance art, also make frequent use of audience participation.<sup>13</sup>

Interactivity is not limited to theater. Some books, like video games, already invite the reader to interact with them by making decisions, as in the *Choose Your Own Adventure* and *Choose Your Own Nightmare* series. See *Interactive Digital Software Ass'n*, 329 F.3d at 957–58; e.g., Edward Packard, *The Cave of Time (Choose Your Own Adventure #1)* (Bantam Books 1982) (1979); E.A.M. Jakab, *The Halloween Party (Choose Your Own Nightmare)* (Skylark 1995). Movies on DVD allow users to select alternate endings or scenes, or skip content that they do not wish to see. See *Interactive Digital Software Ass'n*, 329 F.3d at 957. As technology continues to evolve, all types of media are experimenting with, and increasing the use of, interactivity in order to further engage their users, such as, for example, multimedia e-books and more

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12. See The Second City Frequently Asked Questions, <http://www.secondcity.com/faq/> (last visited September 14, 2010).

13. See, e.g., The Museum of Modern Art, *Marina Abramović: The Artist is Present*, <http://www.moma.org/interactives/exhibitions/2010/marinaabramovic/index.html> (last visited September 14, 2010) (noting that visitor participation in artwork was encouraged during exhibition).

advanced media platforms and applications.<sup>14</sup> Given the rapid pace of advancement in technology, a ruling distinguishing video games based on their interactive nature would dangerously open up all types of media to government restriction based on content and format.

Petitioners' attempt to distinguish video games from other types of media is meritless. They claim that the interactive nature of video games can teach minors to be aggressive when they are exposed to extreme violence. (Petrs.' Br. 54–55.) Petitioners offer nothing but speculation to support this assertion. A wide chasm separates the moving of an analog stick and pushing of a button from loading live ammunition into a gun, aiming it at an actual human being, and pulling the trigger. *See Maleng*, 325 F. Supp. 2d at 1189 n.4 (finding that the only

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14. *See, e.g.*, Trevor Sheridan, *The Most Deluxe iPad App So Far—The Elements: A Visual Exploration*, AppAdvice, Mar. 29, 2010, <http://appadvice.com/appnn/2010/03/deluxe-ipad-app-elements-visual-exploration/> (reviewing iPad application that allows users to manipulate images of periodic table elements included with e-book); Julie Bosman, *E-Books Fly Beyond Mere Text*, N.Y. Times, July 29, 2010, at C1, *available at* <http://www.nytimes.com/2010/07/29/books/29ebook.html> (discussing multimedia e-books that integrate video with books, like *Nixonland* by Rick Perlstein, and noting that e-books with video, photos and other media could become widely available in the near future). At what point does an e-book become sufficiently “interactive” that, in Petitioners' view, it becomes subject to government content-based regulation?

things video games “teach” are “improved reaction time, eye/hand coordination, and how to score points in the game”). Playing laser tag or “cops and robbers” with water guns (neither which is regulated by the Act) would teach a minor to use a gun much better than a video game would.

Ultimately, authors use interaction simply as another tool to create engaging expressive content. No one can dispute that J.R.R. Tolkien’s *Lord of the Rings* trilogy (Houghton Mifflin 2002) (1954–55) can mentally transport a reader into Middle Earth and make the reader experience the harrowing adventure of its characters. Fans can complement that experience by watching Peter Jackson’s recreation of the trilogy on the movie screen, which gives stunning visual depiction to the world of Middle Earth. Video games like the immersive *Lord of the Rings Online* (Turbine 2007) takes this process one step further—they invite consumers to step into the shoes of a human, elf, dwarf or hobbit and experience adventures throughout Middle Earth.<sup>15</sup> Notably, all three media include graphic depictions of violence, but California’s Act would only potentially restrict access to the video game version. A consumer should be able to choose which of these

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15. See <http://www.lotro.com> (last visited September 14, 2010); Kevin VanOrd, *Lord of the Rings Online Review*, Gamespot, May 10, 2007, <http://www.gamespot.com/pc/rpg/middleearthonline/review.html>.

media to use when he wishes to explore the world of Middle Earth; the government should not have the ability to restrict his access to one because it is, in the government's view, more "interactive" than the others.

## II. CALIFORNIA'S CONTENT-BASED RESTRICTION ON THE DISSEMINATION OF VIDEO GAMES VIOLATES THE FIRST AMENDMENT.

Because video games, including ones that depict violence, are a form of expression entitled to full First Amendment protection, any attempt to regulate such speech based on content is subject to strict scrutiny. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The regulation will be upheld only when it seeks to promote a compelling government interest, is narrowly tailored to achieve that interest, and is the least restrictive alternative available that serves the legislature's asserted interest. *Id.*; *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). The Act fails each of these tests.

*First*, as Respondents and other *amici* have fully addressed, neither of California's two asserted interests justify the Act's restriction on speech. Parents do not need the state's assistance in controlling what kinds of video games their children play because they already enjoy excellent and highly effective tools that assist them with this task, such

as the ESRB rating system and video game console parental controls. And, as the court of appeals and district court below both found, there is no sound evidentiary support for Petitioners' assertion that violence in video games causes harm to the physical and psychological well-being of minors. *Video Software Dealers Ass'n*, 556 F.3d at 964; *Video Software Dealers Ass'n v. Schwarzenegger*, No. C-05-04188 RMW, 2007 U.S. Dist. LEXIS 57472, at \*32–33 (N.D. Cal. Aug. 6, 2007).<sup>16</sup>

The Act is not subject to any lesser degree of scrutiny because it purports to protect minors or impose content-based restrictions only on the dissemination of speech to minors.<sup>17</sup> As Respondents

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16. Given the widespread use of video games by adolescents and young adults, if Petitioners were correct, one would expect to see an upward national trend in youth violence. Just the opposite is true. For example, the juvenile arrest rate has declined by 33% since 1996, and the overall juvenile arrest rate was lower in 2008 than in 1980. U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Protection, *Juvenile Arrest Rate Trends* (Oct. 31, 2009), [http://www.ojjdp.ncjrs.gov/ojstatbb/crime/JAR\\_Display.asp?ID=qa05200](http://www.ojjdp.ncjrs.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200). Likewise, the number of fights on school grounds and elsewhere has decreased since 1993. Nat'l Ctr. for Educ. Statistics & Bureau of Justice Statistics, *Indicators of School Crime and Safety: 2009* at 48 (Dec. 2009), <http://nces.ed.gov/pubs2010/2010012.pdf>.

17. The restrictions on minors cited by Petitioners and their supporting state *amici*—*e.g.*, jury service, driving age, purchasing tobacco, *etc.*—do not even implicate the dissemination to minors of expression protected by the First Amendment. Indeed, these kinds of age restrictions

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and other *amici* have amply demonstrated, the First Amendment’s protections, including the corollary right to receive information, extend to minors. *Bd. of Educ. v. Pico*, 457 U.S. 853, 867–68 (1982) (plurality op.); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–13 (1975); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). While the rights of minors may not be fully co-extensive with the rights of adults, this Court has held that the government may not bar dissemination of protected expression to minors, except in narrow and circumscribed instances, such as in and around a school setting. *See Erznoznik*, 422 U.S. at 212–13 (citing *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); *Rabeck v. New York*, 391 U.S. 462 (1968)). None of these circumstances is present in this case.

*Second*, the Act is not narrowly tailored to achieve California’s stated interests of assisting

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involve conduct that manifests in the public realm; none of these limitations seeks to restrict *feeling* or *thought* as the California Act attempts to do. *See* 2005 Cal. Legis. Serv. Ch. 638, § 1(a) (A.B. 1179) (West) (legislative finding as basis for the Act that “[e]xposing minors to depictions of violence in video games . . . makes those minors more likely to experience feelings of aggression.”); *see also* *Petr’s*, Br. 53 (relying on a finding that students who played a violent video game for 20 minutes were more likely to complete the word “explo\_e” as “explode” instead of “explore”); *Amici Curiae* Cal. State Sen. Leland Y. Yee, Ph.D, *et al.* Br. 5 (“[P]articipating in the playing of violent video games by children increases aggressive thought and behavior.”).

parents and protecting minors. The Act fails to recognize that children of different ages have different maturities, and may comfortably be exposed to varying levels of violence. *See Erznoznik*, 422 U.S. at 214 n.11 (noting that age of a minor is a significant factor when assessing capacity for choice). For example, it is not rational to restrict a 17½-year-old from access to video games that depict violence to the same extent as a 10-year-old. *See Video Software Dealers Ass’n*, 2007 U.S. Dist. LEXIS at \*28. Yet this is exactly what California’s Act will do if it is upheld. By contrast, the more nuanced ESRB rating system calibrates ratings based on children’s different ages and maturities.

Moreover, the Act is underinclusive. The legislature expresses concern with the harm that violent images may cause to minors’ psychological and neurological health. *See* 2005 Cal. Legis. Serv. Ch. 638, § 1 (A.B. 1179) (West). Yet the Act extends its restrictions only to video games, despite the fact that extremely violent images are present in movies, television, the Internet, books, comic books and music lyrics. Cal. Civ. Code § 1746.1.

In addition, the Act’s definition of a “violent video game” is overinclusive. California claims to be concerned that minors may be desensitized to violence given the realism of current video games. (*See* Petrs.’ Br. at 43.) The Act’s restrictions, however, are triggered by images of violence upon an “image of a human being.” Cal. Civ. Code § 1746(d)(1). This is a vague and overbroad term that



goes far beyond the realm of realism when applied to video games. As the district court found, this term is “not limited to what appears to be an actual living human being.” *Video Software Dealers Ass’n*, 2007 U.S. Dist. LEXIS at \*29. In video games, most of the images used to depict human beings, as well as to depict violent acts committed against those beings, are actually stylized and easily distinguished from reality. *See, e.g., Am. Amusement*, 244 F.3d at 575 (discussing the “stylized and patently fictitious . . . cartoon-like depiction” of zombies used in the *House of the Dead* series). “Images of human beings” as used in the statute arguably include depictions of demons (*e.g., Devil May Cry* series (Capcom 2001–08)), zombies (*e.g., Resident Evil* series (Capcom 1996–2009)), aliens (*e.g., Mass Effect* series (BioWare 2007–10)), and stylized images of humanlike creatures (*e.g., Final Fantasy* series (Square Enix 1987–2010)). Indeed, the imprecision of the term will permit the Act to cover games that are fantastic in nature and pose no more risk of desensitizing minors to real violence than a *Road Runner and Wile E. Coyote* cartoon or a Roger Corman horror movie. *See, e.g. Maleng*, 325 F. Supp. 2d at 1190 (expressing uncertainty as to whether a game involving *The Simpsons* or *Looney Tunes* characters would be deemed realistic under a similar statute).

*Third*, the Act’s restrictions are not the least restrictive—let alone most effective—means available to California to accomplish its stated goals.

Respondents and other *amici* have addressed the effectiveness of the ESRB rating system and game console parental controls. From the perspective of consumers and parents, when deciding on the suitability of a game for a particular child, the ESRB rating system is far more valuable than the Act. Unlike the Act, which draws one hard line restricting games at age 18, the ESRB system recognizes the range of content available for different maturities by assigning age ratings to video games that span from early childhood (“EC”) to adults only (“AO”), and by using descriptors to provide additional detail regarding a variety of topics, including, for example, adult themes, tobacco and alcohol use, sexual content, and many others.<sup>18</sup> There are over a half-dozen descriptors relating to violence alone that convey with some precision the intensity of the content (*e.g.*, “Intense Violence—Graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons and depictions of human injury and death”).<sup>19</sup> Thus, ESRB’s system better informs parents of a video game’s content than the Act,

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18. ESRB Game Ratings & Descriptor Guide, [http://www.esrb.org/ratings/ratings\\_guide.jsp](http://www.esrb.org/ratings/ratings_guide.jsp) (last visited September 14, 2010).

19. *Id.*

thereby allowing more effective purchasing decisions.<sup>20</sup>

Moreover, parents have been using the ESRB system for over a decade, and have come to rely on it.<sup>21</sup> If upheld, the Act is likely to disrupt well-developed consumer expectations and cause customer confusion. For example, the Act may impose its “18” label upon a game that the ESRB labels as Teen (suitable for ages 13 and older), because it contains a representation of violence against a stylized character that looks human. The conflicting labels on the video game’s package would confuse parents and consumers. Additionally, each state may impose its own labeling system based on its own subjectively determined standards.<sup>22</sup> Different states may rate the same game differently. Some may draw different age-prohibition lines, resulting in a game being marked as appropriate for 16-year-olds in one state, but labeled as

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20. Parents can also use video game magazines, like *PC Gamer* or *Game Informer*, and video game websites, like [www.gamespot.com](http://www.gamespot.com) or [www.ign.com](http://www.ign.com), to learn more about the content of specific video game titles.

21. ESRB Consumer Research, <http://www.esrb.org/about/awareness.jsp> (last visited September 14, 2010).

22. Given that eleven other states are supporting California’s Act, there is a very real possibility that each of them may impose its own labeling requirements. Other states may feel political pressure to follow suit.

inappropriate for those under 18 in another state—both of which could differ from the ESRB rating. A parent or consumer researching that game on the Internet easily could become uncertain about what age the game is recommended for. If anything, a welter of state legislation like California's is likely to confuse, not assist, parents.

## CONCLUSION

The Court should affirm the judgment below.

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23. Patrick Hightower, Esq., of the ECA assisted in the preparation of this brief.