No. 08-1448

IN THE

Supreme Court of the United States

ARNOLD SCHWARZENEGGER, GOVERNOR OF CALIFORNIA, ET AL.,
Petitioners,

—v.—

ENTERTAINMENT MERCHANTS ASSOCIATION, ET AL.,
Respondents.

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

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL COALITION AGAINST CENSORSHIP AND THE NATIONAL YOUTH RIGHTS ASSOCIATION FOR THE RESPONDENTS

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and this nation's civil rights laws. The ACLU of Northern California, the ACLU of Southern California, and the ACLU of San Diego and Imperial Counties are regional affiliates of the ACLU. The ACLU has appeared before this Court in numerous First Amendment cases as direct counsel and *amicus curiae*, including *Reno v. ACLU*, 521 U.S. 844, 875 (1997), and *Ashcroft v. ACLU*, 535 U.S. 564 (2002); 542 U.S. 656 (2004), both involving statutes designed to block minors from accessing certain kinds of speech.

The National Coalition Against Censorship (NCAC) is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding in 1974, NCAC has worked through education and advocacy to protect the First Amendment rights of thousands of

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[1] The parties have lodged blanket consents with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel 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 this brief's preparation or submission.

authors, teachers, students, librarians, readers, artists, museum-goers, and others around the country. Because of its concern that minors are particularly vulnerable to incursions on their freedom of speech and access to information, NCAC has established the Youth Free Expression Project, which works with young people and their teachers and parents to protect their right to read, speak, and think freely.

NCAC has tracked countless incidents involving censorship in the name of protecting children. Opinions about what kind of material children should be protected from are highly subjective and varied. Some parents object to sex, others to violence, others to religious references, still others to material involving race, ethnicity, and national origin, depictions of historical events, and characters thought to be bad role models. These concerns are not limited to television and video games, but extend to books and art as well. California's contention that it can restrict young people's access to protected expression if it has a "reasonable basis" to believe that the expression might pose *some* harm to *some* minors thus threatens a wide range of material. NCAC joins this brief to assist the Court in understanding the dangers posed by the statute under review.[2]

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[2] NCAC's members include organizations such as the Authors Guild, College Art Association, Dramatists Guild, Lambda Legal, PEN American Center, and the Society of Children's Book Writers and Illustrators. The views presented in this brief, however, are those of

The National Youth Rights Association (NYRA) is a youth-led, non-profit organization committed to defending the civil rights and liberties of young people in the United States. NYRA believes certain basic rights transcend age or status limits, including those rights protected by the First Amendment, and previously joined an *amicus curiae* brief in *Safford Unified School District v. Redding*, 129 S.Ct. 2633 (2009).

STATEMENT OF THE CASE

This case is a First Amendment challenge to a California law designed to prevent minors from purchasing "violent video games." The law requires that any violent video game "that is imported into or distributed in California for retail sale" be labeled with a two inch by two inch label marked "18." Cal. Civ. Code § 1746.2 (2006). No person may then "sell or rent" a game with that label to a person under eighteen. Cal. Civ. Code § 1746.1(a) (2006).

Sellers may avoid liability if they "reasonably rely" on a driver's license or other government issued ID. Cal. Civ. Code § 1746.1(b) (2006). A sales clerk is not liable, only someone with an ownership interest in the store. Cal. Civ. Code § 1746.3 (2006). Parents, grandparents, aunts, uncles, and legal guardians of a minor may sell or rent

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NCAC alone and do not necessarily represent the views of any of its members.

violent video games to them. Cal. Civ. Code § 1746.1(c) (2006).

Violent video games are defined as:

> a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that …
>
> (i) A reasonable person, considering the game as a whole, would find appeals to a deviant interest of minors.
>
> (ii) [I]s patently offensive to prevailing standards in the community as to what is suitable for minors. [and]
>
> (iii) [C]auses the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.[3]

Actions to enforce the statute may be brought by "any city attorney, county counsel, or district attorney." Cal. Civ. Code § 1746.4 (2006). The penalty is a fine of "up to one thousand dollars." Cal. Civ. Code § 1746.3 (2006).[4]

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[3] There is an alternative definition of "violent video games" but California has conceded it is unconstitutional. Pet. Br. 39 n.5.

[4] It is not clear whether this is a criminal statute or a civil statute. It is not in the criminal code, but involves prosecution by the DA and can lead to substantial fines. There is ancient California law that a statute that imposes a fine is criminal even if not found in the criminal code. *Dyer v. Placer County*, 27 P. 197 (1891).

The statute was challenged by plaintiffs who create and distribute video games. The district court declared the statute unconstitutional and its holding was affirmed by the court of appeals. *Entm't Merchs. Ass'n v. Schwarzenegger,* 410 F. Supp. 2d 1034 (N.D. Cal. 2005), *aff'd* 556 F.3d 950 (9th Cir. 2009). Similar statutes have been declared unconstitutional by other courts of appeals. *E.g. Interactive Digital Software Ass'n v. St. Louis*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001). This Court granted *certiorari* on May 19, 2009.

SUMMARY OF ARGUMENT

1. California has written a statute that bans the sale of "violent video games" to minors without expressly addressing on-line sales, which represent a large and growing share of the market. Such online sales can take a variety of forms. For example, it is possible to purchase a box version of the game and have it shipped to the buyer. It is also possible to download the game electronically. And, increasingly, it is possible to play online without the need to download the game's software to your computer. Regardless of

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If it is a civil statute, then conviction can be based on a preponderance of the evidence, not guilt beyond a reasonable doubt. It is not clear if a defendant in a case under this statute would be entitled to a jury trial. *Compare* Cal. Penal Code § 19.6 *with People v. Anderson*, 191 Cal. App.3d 207, 236 Cal. Rptr. 329, 332 (1987).

which method is used, however, it is not possible for the online seller or game host to know the age of the online buyer.

a. If the statute applies to online sales, it will inevitably burden the First Amendment rights of adults as well as minors, as this Court has found in related contexts. Unable to distinguish between adults and minors, a prudent seller can avoid the risk of liability only by ceasing all online sales. And, because it is not possible to determine the location of someone downloading a game or playing it online, those offering downloading or online game play must refuse service not only to all Californians, regardless of age, but everyone throughout the world. Under this Court's holdings in *Butler v. Michigan*, 352 U.S. 380 (1957), and *Reno v. ACLU*, 521 U.S. 844, 875 (1997), that result is clearly unconstitutional.

b. If the statute does not apply to online sales, downloading, and playing, then it is wildly ineffective in achieving any governmental purpose. Using their computers, minors can and do access video games, "violent" and otherwise, in numerous other ways. In addition, the statute does not prevent minors from accessing violent video games at their neighbor's or friend's, nor does it prevent minors from accessing violent images in other media. If limited to in-store sales, therefore, the California statute abridges First Amendment rights without advancing the state's asserted goal in any meaningful way. The violation of First Amendment rights is especially unjustified

given ample evidence that the vast majority of parents do not need this statute (and may not want it) and that alternatives exist that are far more effective for those parents who do want to block their children from accessing violent games.

2. The California statute is also unconstitutional because its effort to define violent video games by reference to this Court's definition of obscenity is both legally unsupportable and unworkable in practice. Borrowing from obscenity law (while omitting the critical link to sex), California has defined a violent video game as one that appeals to the "deviant" interests of minors. If this definition is intended to distinguish a healthy interest in violence from an unhealthy one, it is clearly incapable of reliable application. Like obscenity law, the statute requires that the game be judged "as a whole." How is a game that can take up to 50 hours to play and has many different routes to the end (some of which any given player may not ever play) to be judged "as a whole?" And without the ability to judge the game as a "whole," how can the "value" of the game be assessed, as California law requires? Finally, the statute treats all minors (people under 18) as identical. But, there is a widespread recognition that material may be entirely suitable for a 17 year old but not for a child of five or 10 years old. If 17 year olds are deemed the appropriate reference point (and there is no basis for that conclusion under the law), then it is doubtful that any speech has value

for an 18 year old but lacks value for a 17 year old, depriving the statute of any practical application. Conversely, if the speech is judged by the standards applicable to a five year old, then 17 year olds will be deprived of speech to which they are constitutionally entitled. All of these problems lead inevitably to the conclusion that, even on its own terms, the statute will result in censorship that has no basis at all and is therefore unconstitutional.

3. Finally, California's argument that a statute may restrict First Amendment rights of minors if the legislature's acts are not irrational is both unprecedented and dangerous. This Court should forcefully reject it, just as it recently rejected a similar challenge to core First Amendment principles in *United States v. Stevens*, 130 S.Ct. 1577 (2010).

ARGUMENT

Throughout this litigation, petitioners have candidly acknowledged that the constitutional theory they are advancing can only be sustained by a judicial decision that goes "boldly . . . where no court has gone before." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 961 (9th Cir. 2009) (noting petitioner's concession). Having failed to convince the lower courts, they now ask this Court to recognize a new category of speech ("violent video games") and make illegal sale of that speech to a category of

people ("minors"). The specifics of petitioner's claim may be novel, but attempts to create new exceptions to the First Amendment are hardly new. *See, e.g., United States v. Stevens*, 130 S. Ct. at 1585 (discussing Government's argument that depictions of animal cruelty "should be added to the list" of unprotected speech). This Court has been vigilant in rejecting such pleas and should do so here.

I. IF CALIFORNIA'S BAN APPLIES TO THE ONLINE SALE OR USE OF VIDEO GAMES, IT IS UNCONSTITUTIONAL PURSUANT TO *BUTLER V. MICHIGAN* AND *RENO V. ACLU*.

The statute challenged in this case provides that no one may "sell or rent" a "violent video game" in California to a minor. Cal. Civ. Code § 1746.1(a) (2006). There is nothing in the statute that exempts sale or use of video games online; nor is there anything that specifically includes online transactions. In a statute that severely penalizes constitutionally protected expression, that central ambiguity is troubling in its own right. But, to the extent that the statute may be interpreted to reach online sales or use, it is plainly unconstitutional for the same reason that this Court has struck down other efforts to regulate online speech to minors: it inevitably restricts the online speech of adults, as well.

A large number of online sites sell video games. A search of Amazon.com shows over 85,000 results in just the video game store. *Video Games*, amazon.com, http://www.amazon.com (select "Video Games" from "Search" drop-down menu; then follow "Go" hyperlink) (last visited Sept. 2, 2010). There are a vast number of other sites that also sell video games online. *See*, *e.g.*, *Video Games*, Toys "R" Us, http://www.toyarus.com/shop/index.jsp?categoryId=2255974 (last visited Sept. 10, 2010); *Game Downloads*, GameStop, http://www.gamestop.com/gamedownloads (last visited Sept. 10, 2010); purchasing video games, http://www.purchasing-video-games.com (last visited Sept. 10, 2010).

These sites carry video games such as Grand Theft Auto, mentioned by California and its *amici*. *See Video Software Dealers*, 556 F.3d at 955 (noting inclusion of Grand Theft Auto excerpts in video compilation submitted by Appellants); Br. of *Amicus Curiae* Eagle Forum Education & Legal Defense Fund In Support of Petitioners at 13, 20. Many will sell a video game on a disk in a box; many will also allow downloading of the game directly to the consumer. *See, e.g., Game Downloads*, GameStop, *supra*. Many of these sites will allow a user to rent a video game with a business model similar to that of Netflix.com, shipping video games to a renter for a monthly fee. *E.g.*, All Game Rentals .com, http://www.allgamerentals.com (last visited Sept. 2, 2010).

In addition, there are many sites that allow game users to play the games online. Steam, found at www.steampowered.com, is one example. Users join Steam and can then play popular games, including Grand Theft Auto, online. Typically, between 1 and 2.5 million people are playing games on Steam at any one time. *Steam & Game Stats*, Steam, http://store.steampowered.com/stats/ (last visited Sept. 2, 2010). The manufacturer of Halo asserts that there have been 1 billion games of Halo 3 played online. Urk, *One BILLION Served*, BUNGiE, (Mar. 2, 2009, 3:54 p.m.), http://www.bungie.net (follow "Top News" hyperlink on "About Us" drop-down menu; then follow "2009" hyperlink; then follow "March" hyperlink; then follow "One BILLION Served" hyperlink). The future is represented by sites such as onlive.com which are now offering online play that does not even require downloading of the game software but utilizes game software that remains on onlive.com's servers or "in the cloud."

On its face, the statute does not contain any requirement that the person selling or renting the game know that the buyer or renter is a minor. *See* § 1746.1(a)-(b). There is no way for online sellers to know the ages of buyers. *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 800 (E.D. Pa. 2007), *aff'd sub nom. American Civil Liberties Union v. Mukasey*, 534 F.3d 181 (3d Cir. 2008). Similarly, there is no way for an online seller of downloads or online game host site to know whether the buyer is in California. *Id.* at 808. As a result,

online sellers must refuse to sell "violent video games" to anyone in California, including adults, if the game is being shipped to California. If the game is being downloaded or played online, to avoid potential liability, online sellers would have to refuse to sell or rent "violent video games" to everyone in the world, including adults.

That is precisely the effect, banning speech to adults in the name of protecting children, which this Court has repeatedly found renders a statute unconstitutional. *Butler v. Michigan*, 352 U.S. 380 (1957); *Reno v. ACLU*, 521 U.S. 844. If this statute does apply to online speech, it does precisely that and is therefore unconstitutional for the same reason.

II. IF THE STATUTE DOES NOT APPLY TO ONLINE SALES, IT SERVES NO PURPOSE EXCEPT TO ABRIDGE THE CONSTITUTIONAL RIGHTS OF MINORS.

The statute prohibits the sale or rental of a video game contained in a package to which a sticker labeling it "18" (signifying that it is a "violent video game") has been attached. §§ 1746.1(a), 1746.2. But, if a game is downloaded, or if the game is played online, there is no "package." There is no box for the manufacturer to label and no box for the seller

to consult.[5] For this reason, and for the reasons suggested above, respondents reasonably assume that the statute applies only to store or online sales of boxed products, not to online downloads or online play. Resp. Br. 51 n.21. If so, the statistics cited above suggest that the statute will be wildly ineffective in its stated purpose. As noted previously, there are a multitude of ways that minors can access "violent video games" without actually purchasing a game in a box. This fact, combined with other problems in the statute, leads inescapably to the conclusion that the statute will not serve any useful purpose. At the same time, problems inherent in the effort to define a new category of unprotected speech will inevitably mean that the statute cannot be enforced without severely infringing the First Amendment rights of minors.

A. The Statute Fails to Serve Even Its Asserted Purpose If It Does Not Apply To Online Sales And Game Play.

California relies almost exclusively on the idea that the governmental purpose served by the statute is to assist parents in shielding their children from "violent" video games, as the state has defined that term. Pet. Br. 38-41. California does occasionally suggest that there is an independent state interest in

[5] It is technologically possible to embed a label in the data stream of the game. Whether this would constitute compliance with the statute, which requires a two inch by two inch label, is doubtful.

protecting minors. *Id.* at 40. However, the claim that harm to minors is sufficient to justify independent government action, cannot be reconciled with the express language in the statute permitting parents and even aunts and uncles to sell or rent the games to minors, or the state's acknowledgment that parents can purchase the games for their children. § 1746.1(c); Pet. Br. 38-41. Recognizing this logical inconsistency in any assertion by the state of an independent interest in protecting children leads California to emphasize the assistance they believe the statute provides parents.

What California ignores is that there are many parents who do not share the state's concern. Up to forty percent of parents familiar with the industry rating systems allow their children under seventeen to play games rated Mature. Fed. Trade Comm'n, *Marketing Violent Entertainment to Children* 28 (2007). For those parents, the statute does nothing but create another burden, requiring them to go with their children to buy or rent games they are willing to have their children play.

For the subset of parents who share California's views, some will not be affected because video games require hardware purchases (such as Xbox or PlayStation) that can cost $200 to $300 and parents would have to approve buying that hardware. What help has the statute provided to these parents? Very little. If the statute does not apply to online sales, downloading, or online game

playing, it does not prevent minors from accessing "violent video games." Indeed such access is probably easier through online sources that do not require a trip to the local store. And, of course, the statute does nothing to prevent minors from playing "violent" video games outside the home with others who may have access to them. Given the statistics of online use and the other loopholes, the statute at best offers these parents a false sense of assurance.

Second, there is additional evidence that parents do not need or desire the assistance that California purports to provide. According to the most recent federal government statistics, eighty-five percent of parents are already involved in the decision to purchase a particular video game. Fed. Trade Comm'n, *supra*, at 29. Seventy-six percent report that they have played all or part of the game purchased in their family. *Id.* at 29. For parents who wish to limit the video games that their children play at home, video game hardware now includes parental controls that can be one hundred percent effective in blocking access to material according to an industry rating system. Under this Court's decisions, the state may not assume that the this alternative will be unsuccessful, *see United State v. Playboy*, 529 U.S. 803, 824-25 (2000), nor use the failure of some parents to activate parental controls, whether intentionally or inadvertently, as a basis for imposing a broad and indiscriminate censorship scheme. *See also Ashcroft v. ACLU*,

542 U.S. 656, 669 (2004) ("The need for parental cooperation does not automatically disqualify a proposed less restrictive alternative.").

In short, the assistance that the statute provides to parents, if any, is minimal at best.

B. The Statute's Definitional Terms Highlight The Threat To Minors' First Amendment Rights

To its credit, California has attempted to define the games it has banned for sale to minors. However, it has done so by borrowing (and often altering) terms created for and applied in very different contexts to ban a category of speech never before successfully made illegal. *Compare* § 1746(d)(1)(A) *with Miller v. California*, 413 U.S. 15, 24 (1973). In doing so, it has created terms that are so imprecise that they will inevitably lead to a chilling effect on the visual artists who create games, the manufacturers who produce them, and the retailers who sell them. The effect will be not only to restrict the rights of the visual artists who create the games, but also to deprive minors of a substantial amount of speech to which they are constitutionally entitled.

1. In *Miller*, the Court defined obscenity to be speech about sex that is "prurient." *Miller*, 413 U.S. at 24. Prurience connotes speech that is designed to or does sexually arouse. Prurience certainly presents difficulties. What is prurient to one person may well not be prurient to another. But, the

statute in this case attempts to reach speech that is not designed to and does not sexually arouse. California has modified the *Miller* language to prohibit speech that "appeals to a deviant or morbid interest of minors." § 1746 (d)(1)(A)(i). This is not an objective standard (violence that is deviant or morbid) but a subjective one (violence that "appeals to a deviant or morbid interest of minors"). It is not an individual standard (this child approaches the game with a deviant or morbid interest) but a standard applicable to all (or a majority of? or a significant number of?) minors. It is not a standard that has been applied by courts over the years so as to have achieved some precision. It is new and untested.

"Deviant" could be interpreted to be statistical, *i.e.* refer to speech about violence that appeals to a minority of the minors viewing or playing the game. If so, the criterion has nothing to do with any interest that California advances and it is inconceivable that any jury could determine that a game did or did not meet that criterion. It would also then definitionally prevent a majority of minors from accessing games that even California thinks would not harm them. "Deviant or morbid" could be interpreted to be synonyms for "unhealthy." Perhaps California is trying to distinguish a healthy interest in violence from an unhealthy interest in violence. That, of course, suggests there can be a healthy interest in very serious violence (see §1746(d)(1)), even for minors. If,

California is conceding that some minors would play a particular violent game with a healthy interest and other minors would play the identical game with an unhealthy interest, then the statute's terms become impossible to apply. Even if someone could distinguish a healthy from an unhealthy interest in violence with respect to a particular minor, a jury could not make that distinction for all minors.

Finally, California may argue that the criteria can be inferred from the explicitness of the violent acts. And, perhaps California believes some depictions of violence are "deviant" or unhealthy for all minors. But, California has not made those arguments and each presents serious problems. For example, is viewing an explicit news video depicting a violent terrorist act deviant or morbid? And, if not, does it become deviant or morbid if that explicit video is embedded in a video game? How is a jury to make that determination? California has simply failed to provide a definition that is sufficiently precise to be applied with any consistency.

2. A second criterion of the statute is that its violence "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." § 1746(d)(1)(A)(iii). This criterion presents at least two problems: (1) how do you measure value "as a whole" with respect to a video game and (2) how do you measure the "value" of "violent video games?"

"As a whole." In *Miller*, this Court held that the obscenity of a book or magazine must be judged by determining that the work "as a whole" is prurient and lacks value. *Miller*, 413 U.S. at 24. If this requirement did not exist, an entire 300 page book could be made illegal just because it has one page or two pages that are prurient, offensive and seen as lacking value. Application of the "as a whole" requirement is thus critical, but also relatively simple to apply in the context of a book or magazine.

The statute in this case, tracking *Mille*r, requires that game be "deviant or morbid" "as a whole" and lack value "as a whole." Justice Kennedy has noted the difficulty of applying the "as a whole" part of the *Miller* test in contexts other than books or magazines. *Ashcroft v. ACLU*, 542 U.S. at 592 (Kennedy, J., concurring). Applying it to video games is difficult, if not impossible. Video games often take hours to play to completion. Such play can last as long as fifty hours or more. Rio Waye, *The Longest Video Games To Beat of All Time*, Helium, http://www.helium.com/items/1757848-the-longest-video-games-to-beat-of-all-time (last visited Sept. 10, 2010). A game also usually has multiple story lines. A player who takes one action at one stage of the game will take one route forward and a player who takes a different action at the same stage of the game will take a different route forward, as this description of Grand Theft Auto makes clear:

> The open, non-linear environment allows players to explore and choose how they wish to play the game, the game involves choices you make, whether or not to kill someone, or steal, so the game involves choices. Although storyline missions are necessary to progress through the game and unlock certain content and parts of the city, they are not required, as players can complete them at their own leisure. When not attempting a storyline mission, players can free-roam, giving them the ability to do activities. Side missions such as locating and destroying criminals in the police car database or participating in street races can keep the player occupied for hours. Free-roaming also includes going around the city, and doing many, many things, like buying, driving, walking, etc.
>
> It is possible to have multiple active missions, as some missions run over the course of several days and require the player to wait for further instructions or events. The player can also attempt a variety of optional side missions.

Grand Theft Auto IV, Wikipedia, http://en.wikipedia.org/wiki/Grand_Theft_Auto_IV (last visited Sept. 3, 2010).

In addition, the progress of the game is affected by the skill of the player. Less skillful players may end up blocked or diverted; more

skillful players may be able to move forward in various different directions. For many players, who do not successfully ever complete the game, they will never see the game "as a whole." Does the "whole" of the game include those portions that only some players encounter and other players never see? If one player successfully resolves a hostage crisis through negotiation and another player, taking a different path, responds with graphic violence that ends with the death of the hostages, how is the jury to decide the value or deviance of the game as a "whole," even assuming it concludes that the latter path is deviant in its explicit depiction of violence?

There are enormous practical problems with applying the "as a whole" language to a video game. It is unlikely that an average juror will be able to play the game to completion. Will the government hire an expert who can play every branch of the game in front of the jury day after day after day? Will the expert deliberately go down every route including those that dead-end? Will the expert make the mistakes and suffer the consequences that inexperienced gamers suffer? How will appellate courts review judgments of trial courts given that the appellate courts must review First Amendment factual findings de novo and given that presumably the "value" part of the statute's definition presents an issue of law? *E.g.*, *Pope v. Illinois*, 481 U.S. 497 (1987); *Bose Corp. v. Consumers Union*, 466 U.S. 485

(1984). Will appellate judges attempt to play the entire game?

The difficulty of applying the "as a whole" requirement to video games is vividly illustrated by California's submissions in this case. According to the Court of Appeals, California submitted "a videotape that contains several vignettes" from certain games. *Video Software Dealers*, 556 F.3d at 955. California has lodged with this Court a "video compilation," presumably the same game excerpts to which the Court of Appeals has referred. Pet. Br. 46. In other words, California has not even attempted to illustrate to any court in this case that there is a single video game that is violent (or "deviant or morbid") "as a whole." Instead, California appears to be relying on an interpretation of the statute directly contradicted by its language because of the recognition that the "as a whole" requirement in the statute cannot be reliably or practically applied.

"Value": The difficulty of judging the value of a video game is also far greater than the difficulty of judging the value of a book or magazine. There is a great deal of evidence that video games, including those that are violent, are valuable in a variety of ways, sometimes independent of the content and sometimes because of the content. For example, video games can play a role in making friends, in channeling competition, in peer-teaching, in regulating feelings, in achieving mastery, and in providing a safe outlet for anger or other strong emotions.

Cheryl Olson, *Children's Motivations for Video Game Play in the Context of Normal Development*, 14 Rev. Gen. Psychol. 180 (2010); *see also* Steven Johnson, *Everything Bad is Good for You* (2006) (video games prepare people for life by placing you in an environment where you don't know and must discern the rules in order to succeed); Gerard Jones, *Killing Monsters* (2002).

One of the a*mici*, the National Youth Rights Association, asked readers of its website to comment on the value of video games and violent video games in particular. *Schwarzenegger v Gamers – Help Us Fight Back*, national youth rights association (August 11, 2010, 2:11 p.m.), http://blog.youthrights.org/2010/08/11/schwarzenegger_v_gamers_help_us_fight_back/#comments. The range of "value" seen by those who played the games while minors and are still playing them is impressive. Many of the contributors saw important political components to the games. The game Halo, for example, was described as involving enemies who are trying to destroy humans as a result of extreme religious beliefs. Success is achieved, in part, by learning teamwork. Ethical problems are raised by one of the enemy who sees the error of his ways and cooperates with humans. Narella, Comment to *Schwarzenegger v Gamers*, *supra* (Aug. 12, 2010, 5:16 p.m.).[6] One contributor described a

[6] Halo, like many of the games, exists not only in game form but in book form as well (books which minors can freely buy in California). *E.g.*, Eric Nylund, *Halo: The*

portion of ModernWarfare 2 in which a soldier is asked by his commander to perform a horrible act. When he follows the order, the result is that he dies and war ensues, raising questions about following unjust orders. Adam, Comment to *Schwarzenegger v Gamers*, *supra* (Aug. 13, 2010, 12:02 p.m.). Another commentator defends the Grand Theft Auto games because they "Paint a brutal picture of street crime, gang violence, and drug abuse. Prominently feature corrupt politicians and law enforcement officials. Include parody and political commentary, particularly on the radio stations. Among the subjects that are criticized on the radio [heard in the game]: right-wing media, left-wing media, militarism, celebrity role models, Scientology, poverty, journalistic integrity, counter-terrorism measures, youth crime, immigration, homosexuality and heteronormativity, and more." Mikkel Paulson, Comment to *Schwarzenegger v Gamers*, *supra* (Aug. 13, 2010, 9:37 p.m.).

Independent of content, contributors noted that, as one put it, "many strategy games (like Starcraft) are intellectually stimulating like chess. You have to develop strategies to beat your opponent, counter your opponent's strategies and occasionally recover from your own screw ups. You do this all on the fly too. It's a mental exercise really." Matt,

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Fall of Reach (2001). The fact that book versions are treated differently from video game versions further illustrates the difficulties with California's decision to single out video games from all forms of media.

Comment to *Schwarzenegger v Gamers*, *supra* (Aug. 12, 2010, 2:45 p.m.). Other contributors movingly asserted that they found a socially useful outlet for violent thoughts by playing such games. *See* Alexx Souter, Comment to *Schwarzenegger v Gamers*, *supra* (Aug. 15, 2010, 1:21 a.m.); SoulRiser, Comment to *Schwarzenegger v Gamers*, *supra* (Aug. 13, 2010, 2:29 p.m.).

This anecdotal reporting is supported by other sources, as well. For example, the *New York Times* found Grand Theft Auto IV to be "richly textured and thoroughly compelling work of cultural satire disguised as fun." Seth Schiesel, *Forget it, Niko, It's Liberty City, a Dystopian Dream*, N.Y. Times, Apr. 28, 2008, at E1.

Postal 2, another often criticized game, contains a segment in which the protagonist has to vote and finds a confusing ballot with jokes about chads. Fwiffo, *Postal 2*, Game Over Online (Apr. 7, 2003, 1:07 p.m.), http://game-over.net/reviews.php?id=827. Reviewers have mixed views on the game. One reviewer thought that "it's almost as much a political product as a game product…something akin to, dare I say, the art house indie flicks in the film industry." *Id*. Another said the "game is obviously an attempt to poke fun at these issues but they are handled in such an unintelligent manner…." Richard Clifford, *Postal 2: Decidedly Controversial FPS Gets the Ferrago Verdict*, play.tm (May 20, 2003), http://play.tm/review/1631/postal-2/.

Amici do not suggest that these games have value or do not have value, only that the question of determining value of something as multi-faceted and complex as a video game is at best difficult, and not easily subject either to objective determination or consistent application.

***"for minors"*:** Each of the definitional subsections in the statute includes the phrase "for minors." Thus, the game must appeal to the "deviant or morbid interest of minors," must be patently offensive "as to what is suitable for minors," and must lack "value for minors." § 1746(d)(1)(A). "Minors" includes anyone "under 18 years of age." § 1746(a). It thus includes five year olds and 17 year olds. It treats a six year old child living with his or her parents identically to a 17 year old person, emancipated and living with a spouse and raising children.

There is a wide societal consensus that there is material that is not appropriate for younger children but is appropriate for teens. Thus, video rating systems, like those for movies and television, distinguish older and younger minors, applying different standards to different age groups. *Game Ratings & Descriptor Guide*, Ent. Software Rating Board, http://www.esrb.org/ ratings/ratings_guide.jsp (last visited Sept. 3, 2010); *What Each Rating Means*, Motion Picture Ass'n Am., http://www.mpaa.org/ratings/what-each-rating -means (last visited Sept. 10, 2010) (movies); *About the TV Ratings and V-Chip*, TV Parental Guidelines, http://www.tvguide

lines.org/ (last visited Sept. 10, 2010) (television). California's statute makes no such distinctions. Therefore, what standard should a jury apply? Can the jury find a game to be a "violent video game" because it is, for example, patently offensive for a five year old even if it is not patently offensive for a 17 year old? If so, the 17 year old is being deprived of speech to which he or she is unquestionably constitutionally entitled. If the five year old standard can be applied, the statute prevents older minors from seeing material that they have a constitutional right to see in order to protect much younger minors. That is precisely analogous to this Court's repeated holdings that adults cannot be deprived of material in order to protect minors. *Cf. Butler*, 352 U.S. 380; *Reno v. ACLU*, 521 U.S. 844.

Alternatively, are the standards to be judged by the standard of a 17 year old? If so, there are two consequences. First, there will be speech sold to minors and available to five year olds that many will think inappropriate for that age group. Second, it is virtually impossible to imagine a game that, for example, lacks value for a 17 year old but has value for an 18 year old. *Ashcroft v. ACLU*, 542 U.S. at 678 (Breyer, J. dissenting). Indeed, this precise issue arose in *Ashcroft*. On remand, the government asserted that the statute was to be judged as to the oldest minor. Asked to produce a single web page that lacked value for a 16 year old but had value for a 17 year old (and similarly for the other parts of the definition), the government

conceded that no such web pages existed.[7] In effect, in *Ashcroft*, the government was conceding that any speech covered by that harmful to minors statute was also legally obscene. Here, however, if the statute is judged by the oldest minor (here a 17 year old), and if there is nothing that lacks value for a 17 year old but has value for an 18 year old, then older minors are being deprived of speech to which they are entitled. The paper-thin or non-existent border here is not between harmful to minors and obscenity but between alleged harmful to minors and fully constitutionally protected material.

There are certainly areas in which the law must make arbitrary distinctions on the basis of age. U.S. Constitution, Amendment 26. Indeed, in some contexts, categorical age limits are constitutionally compelled. *E.g., Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment categorically prohibits the execution of juvenile murderers). Here, there is a strong societal consensus that minors are not a single group for purposes of accessing speech and that maturity levels differ widely. There is

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[7] The government's concession came in Answers to Interrogatories. Those answers are contained in the Joint Appendix submitted to the Court of Appeals for the Third Circuit in *ACLU v. Mukasey*, No. 07-2539 (534 F.3d 181 (3d Cir. 2008)) the last court of appeals decision in the case challenging the Child Online Protection Act (COPA). J.A. 1645-1678. *Amici* can lodge those pages of the Appendix with the Court upon request.

also a strong social consensus that parents are best situated to determine the maturity of their own children. The alternative of allowing parents to make the decisions rather than imposing a one-size-fits-all system is both feasible and more effective. Where everyone agrees that even older minors do have First Amendment rights, where the most likely interpretation of the statute either renders the statute a complete nullity or inevitably deprives minors of those rights, and where a more sensible and effective alternative exists, the statute cannot be justified. *Ashcroft v. ACLU*, 542 U.S. at 667. In a First Amendment context, where restrictions on speech inevitably produce chill, the harm from this statute to the rights of minors and to the visual artists who produce video games is obvious and renders it unconstitutional. *Reno v. ACLU*, 521 U.S. at 871-72.

III. CALIFORNIA'S DEFENSE OF THE STATUTE EVISCERATES THE FIRST AMENDMENT FOR MINORS.

All parties appear to agree that minors have at least some First Amendment rights. *Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503 (1969). The reasons for that protection were summarized by Judge Posner in another opinion striking down efforts to restrict the sale of "violent" video games to minors:

> Children have First Amendment rights. This is not merely a matter of pressing

> the First Amendment to a dryly logical extreme. The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion. …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 is aware. To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.

Am. Amusement Mach. Ass'n, 244 F.3d at 576-77 (citations omitted). Many of the lower courts, in evaluating curfew ordinances, have required that any curfew ordinance include a provision protecting the rights of minors to engage in First Amendment activity after curfew. *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048 (7th Cir. 2004); *Nunez ex rel. Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997); *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. 1981); *Qutb ex rel Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993).

California, however, proposes that the Court hold that everyone under the age of 18 has no First Amendment rights "so long as it was not irrational for the California legislature to determine that exposure to the [banned] material is harmful to minors." Pet. Br. 8. The "irrationality" standard, among the most lax imaginable, would largely eliminate any First Amendment rights for anyone under 18.

This Court has on numerous occasions applied strict scrutiny to viewpoint and content-based restrictions designed to protect minors. *Cf. Butler v. Michigan,* 352 U.S. 380 (1957); *Bolger v. Youngs Drug Products*, 463 U.S. 60 (1983)*, Sable Comm. v. FCC*, 492 U.S. 115 (1989); *U.S. v. Playboy,* 529 U.S. 803 (2000); *Reno v. ACLU*, 521 U.S. at 875. These and other cases recognize that viewpoint and content discrimination is suspect in all circumstances and must be closely scrutinized. Indeed, a restriction directed solely at the speech rights of minors, if "based … on viewpoint restrictions, raises a host of serious concerns." *Morse v. Frederick***,** 551 U.S. 393, 426 (2007) (Breyer, J., concurring in the result). It is not sufficient to say that the speech at issue may cause harm. That "does not itself constitute a satisfying explanation…." *Id.* at 427. Because state imposed content and viewpoint restrictions on minors raise such serious constitutional concerns, it is up to parents to decide "what their children may say and hear." *Morse v.*

Frederick, 551 U.S. at 424 (Alito, J., concurring.)[8]

The Court has similarly rejected the argument that the government may justify a content or viewpoint-based restriction because parents might not adequately supervise their children. *Sable*, 492 U.S. 115; *Reno v. ACLU*, 521 U.S. 844; *Playboy*, 529 U.S. 803. Nor is it relevant that a regulation merely burdens but does not suppress certain speech: "When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression." *Playboy*, 529 U.S. at 826. If that were not the rule, a public school could remove all books about sexual orientation if they were available in the public library or bookstore, on the theory that the material has not been suppressed and those who are interested can gain access to it. The school has nonetheless crossed the line drawn by the First Amendment, by making it more difficult for students to gain access to certain material because of its content and ideas.

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[8] In addition, parents have the right to direct their children's upbringing and education without state interference. *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923). This represents another basis for rejecting the state's argument that it can make a decision about minors' access to protected expression and impose an affirmative obligation on parents to overcome the state's determination.

It is not difficult to find vast categories of speech that someone thinks need to be restricted in order to protect children. Marjorie Heins, *Not in Front of the Children* (2001); David Hajdu, *The Ten-Cent Plague* (2008); Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 Vanderbilt L. Rev. 427 (2000). Anthony Comstock, among the first and most vigorous proponents of banning certain kinds of speech to protect children, criticized "dime novels and serialized tales; story papers; books, theatrical performances and pictures (including the classics) that might 'arouse in young and inexperienced minds lewd and libidinous thoughts;' illustrated newspapers depicting crimes; information about contraception; stage plays of 'beastly character;' chewing gum containing prizes; and candy lotteries." Ross, *supra*, at 443. California cites a variety of statutes and ordinances passed to protect children from speech that would now be easily found unconstitutional. Pet. Br. 34-36 (immoral deeds; criminal deeds; stories…of crime; comic books "devoted to crime, sex, horror, terror…;" pocket books devoted to "immorality"). The MPAA rating system for movies not only rates for sex and violence, but also drug use. *What Each Rating Means*, *supra*. Rap music, more recently, was the subject of censorship efforts. *Luke Records Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992). Similarly, there have been efforts to limit trading cards and card games. Ross, *supra*, at 438 n.37. Parents in some schools have sought

to ban Halloween or Harry Potter books or any other speech reminiscent of witchcraft as harmful. *See Top Ten Most Frequently Challenged Books of 2002*, American Library Association, http://www.ala.org/ala/issues advocacy/banned/frequentlychallenged/21stcen turychallenged/2002/index.cfm (last visited Sept. 10, 2010). There have been efforts to prevent children from being able to read many of the classics of literature, including *I Know Why the Caged Bird Sings*, *Beloved*, and *Of Mice and Men*. Heins, *supra*, at 4. Parents have sought to limit sex education, contraception, and information about homosexuality. Heins, *supra*, at 77, 137-156. This Court has been required to address statutes aimed, in part, at protecting children from speech about tobacco. *Lorrilard v. Reilly*, 533 U.S. 525, 566 (2001). One of the *amici*, NCAC, compiles a list of challenges to book censorship efforts, many of which are based on the desire to protect children. *Our Activities*, National Coalition Against Censorship, http://ncac.org/p.php?rel=3929 (last visited Sept. 10, 2010). One court, citing this Court's decision in *Ginsberg*, has found that it can restrict abortion protestors from chanting words such as "murder" when small children are present. *Bering v. SHARE*, 721 P.2d 918, 921 (Wash. 1986).

Each new medium of communications brings calls for censorship to protect children. This Court initially rejected First Amendment protection for movies as "capable of evil…" *Mut. Film Corp. v. Industrial Comm'n*, 236

U.S. 230, 243 (1915). In the early 1950s, supported by social science studies and Congressional reports, there was an extensive effort to prevent minors from accessing comic books. Hajdu, *supra.* Automated telephone services prompted litigation over efforts aimed at protecting children. *Sable*, 492 U.S. 115. Cable TV resulted in a flood of litigation over efforts to protect children. *Playboy*, 529 U.S. 803; *Denver Area v. FCC*, 518 U.S. 727 (1996). As California emphasizes, TV and radio have been the subject of efforts at censorship to protect children. *FCC v. Pacifica Fdt*, 438 U.S. 726 (1978); *Fox Television v. FCC*, No. 06-1760-ag, 06-2750-ag, 06-5358-ag., 2010 WL 2736937 (2nd Cir. July 13, 2010). More recently, Congress (and many states) passed laws attempting to censor speech on the Internet in order to protect children. *Reno v. ACLU*, 521 U.S. 844; *Ashcroft v. ACLU,* 542 U.S. 656. In most instances those efforts have failed, as they should, and there is no evidence that minors have suffered as a result.

Given the extensive evidence that there will always be new efforts to create categories of speech that can be banned (*United States v. Stevens*, 130 S. Ct. 1577) the standard proposed by California, that any speech can be banned to minors if the legislature's actions are not irrational, is dangerous indeed. Such a lax standard will inevitably lead to more and more laws preventing minors from various types of speech. That result cannot be reconciled with the First Amendment and should be vigorously rejected. *Id.*

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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