

No. 08-1448

IN THE
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, in his official capacity as
Governor of the State of California, and EDMUND G.
BROWN, JR., in his official capacity as Attorney General of
the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION
and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

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

**BRIEF *AMICI CURIAE* OF CONSUMER ELECTRONIC
RETAILERS COALITION, RETAIL INDUSTRY LEADERS
ASSOCIATION, AND STATE RETAILER FEDERATIONS
IN SUPPORT OF RESPONDENTS**

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QUESTIONS PRESENTED

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

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

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

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STATEMENT OF INTEREST OF AMICI¹

Consumer Electronics Retailers Coalition (“CERC”) is a not-for-profit public policy organization that includes major specialist and general retailers of consumer electronics products, and retailer associations. Established in 1991 as an informal coalition, and incorporated in 2003, CERC members bring unique and expert perspectives to policy issues facing the consumer electronic retail industry and their customers.

Retail Industry Leaders Association, Inc. (“RILA”), established in 1969 as the Mass Retailing Institute, represents the interests of retailers, product manufacturers, and service suppliers. Its 600 member companies include the largest and fastest growing companies in the retail industry, and account for more than \$1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

Amici state retailer federations include the Arkansas Grocers and Retail Merchants Association, California Retailers Association, Colorado Retail Council, Illinois Retail Merchants Association, Iowa Retail Federation, Louisiana Retailers Association,

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 respective members, or their counsel made a monetary contribution to its preparation or submission.

Maine Merchants Association, Maryland Retailers Association, Minnesota Retailers Association, Nebraska Retail Federation, North Carolina Retail Merchants Association, Ohio Council of Retail Merchants, Retailers Association of Massachusetts, South Carolina Retail Association, Texas Retailers Association, Utah Retail Merchants Association, Virginia Retail Merchants Association, and Washington Retail Association. These not-for-profit trade associations were formed to represent the interests of the retail community before local, state, and federal government, and to provide retailers large and small with information and advocacy with respect to legislative and regulatory actions affecting retailer and business interests.

Members of the *amici* are among the largest and smallest sellers of entertainment products, including electronic video games. Collectively, these companies operate tens of thousands of physical locations in urban, suburban, and rural communities around the United States and in other countries of the world, and reach consumers online through many of the largest retail “stores” on the internet.

Retail sale of works subject to First Amendment protections constitutes a significant portion of the domestic economy. According to government and industry estimates, in 2009 the electronic game industry constituted a \$20 billion market segment in the United States.² Retail commerce more generally in

² Press Release, NPD Group, Inc., 2009 U.S. Video Game Industry and PC Game Software Retail Sales Reach \$20.2

expressive works sold in the United States (such as books, recorded music, motion pictures, and magazines) reached \$881 billion.³ Thus, the outcome of this case potentially will have a significant impact not only on First Amendment jurisprudence, but also on interstate commerce and the operations of retailers nationwide from mass retail chains to independent stores.

Not all members of the *amici* sell video games, and not all members that offer video games will sell mature-rated video games. Some retailers prefer to offer consumers access to a broad inventory of products that includes new and used video games of mature content. Such decisions reflect the retailers' assessments of the markets in which they operate, as well as the companies' judgments as to the goals and public images of their respective businesses, and as to how best to build customer loyalty.

Major member companies of the *amici* that sell video games implement stringent voluntary policies not to sell games labeled as "M" ("Mature") by the Entertainment Software Ratings Board ("ESRB") to any person under 17 years of age without parental

Billion (Jan. 14, 2010), http://www.npd.com/press/releases/press_100114.html.

³ U.S. Bureau of Economic Analysis, U.S. Dep't of Commerce, National Economic Accounts, Table 2.4.5U. Personal Consumption Expenditures by Type of Product, http://www.bea.gov/national/nipaweb/nipa_underlying/TableView.asp?SelectedTable=17&FirstYear=2009&LastYear=2010&Freq=Qtr&ViewSeries=Yes (last visited Sept. 14, 2010).

consent, both in physical retail stores and in online commerce. In “mystery shopper” audits by the Federal Trade Commission and the ESRB Retail Council, these efforts have proved robust and effective. Retailers’ websites provide information to parents as to the meaning of the ESRB ratings and the meaning of the supplementary ESRB “content descriptors,” and explain companies’ policies with respect to restricting such sales to minors. In addition, companies’ websites educate parents as to the availability and use of “parental block” technologies on the various brands of video game consoles that enable parents to prevent the play of games with mature ratings.

The *amici* file this brief in support of the principles of the First Amendment. Absent proof of compelling state interests, and that the legislative proscriptions are the least restrictive means to achieve those interests, governments should not be empowered to restrict public access to expressive works based on content. It perhaps is unfortunate, but ultimately irrelevant, that this case concerns “violent” video games whose content some customers and retailers may find offensive. As this Court has observed, the Constitution does not safeguard only popular or wholesome ideas and images. To protect free speech, First Amendment rights must also be preserved for content that some find distasteful. “The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly. It follows that all content-based restrictions on speech must give us more than a moment’s pause.” *United States v. Playboy Entm’t, Inc.*, 529 U.S. 803, 826 (2000).

The California statute is but one of many unconstitutional laws that seek to hold retailers liable for sales of certain video games, without parental permission, to persons younger than 18. Each of these laws has been found a content-based restriction that impermissibly restricts the First Amendment rights of minors. Each statute would premise liability on subjective statutory terms that attempt to define proscribed imagery according to vague descriptors and “community standards” that vary by locale and over time. Such indefinite standards create serious issues for national retailers, both in physical stores and online. The threat of liability under these statutes, and inconsistencies in their terms and provisions from state-to-state, would compel many retailers simply to stop carrying these games -- thus also limiting what speech is available to adults.

The *amici* submit that existing efforts of retailers -- to restrict sales of mature video games to minors, to educate and inform parents about the content of video games, and to empower parents to block access to games they consider inappropriate for their children -- provide an effective less restrictive alternative that makes state regulation, and the specific impositions on free speech rights at issue in this case, unnecessary and constitutionally impermissible.

ARGUMENT

I. Retailers Provide Effective Less Restrictive Alternatives By Voluntarily Restricting Sales to Minors and Helping Parents Supervise Minors' Access to Mature Video Games.

Retailers play a vital role in promoting the purposes of the First Amendment. Retailers provide creators and the public with efficient access to a vast market for works that implicate First Amendment rights – books, DVDs, music, and video games. Second perhaps only to public libraries, retailers open the gateway for consumers to discover, acquire, and experience content that educates, informs, challenges, and entertains.

First Amendment rights apply to minors as well as adults. *See Erznoznik v. Jacksonville*, 422 U.S. 205, 212-13 (1975). *See also, Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001). Courts uniformly have held that video games constitute expression protected by the First Amendment, and are analytically indistinguishable from other protected media. *See Entm't Software Ass'n v. Swanson*, 519 F.3d 768, 772 (8th Cir. 2008); *Interactive Digital Software Assoc. v. St. Louis Cty., Mo.*, 329 F.3d 954, 957 (8th Cir. 2003), *citing Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002); *Am. Amusement Mach.*, 244 F.3d at 577. *Accord Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 830 (M.D. La. 2006); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004). Numerous books and articles have analyzed the expressive qualities of videogames, and their power to convey

complex systems and ideas.⁴ Whereas movies and books present an author's prescribed narrative, video game users' actions have consequences that can influence the course of the narrative as well as the outcome.

Video games implicate First Amendment rights in other ways as well. Increasingly, digital video games marketed by retailers have a social networking component that enables multiple players to communicate directly with each other from physically remote locations. Game consoles such as the Microsoft X-Box or the Sony PlayStation connect to the internet so that games can be played with friends across the city, the country, or the world. And, players can "chat" with these other players via these internet-connected game consoles. Video game technology has been at the vanguard of developing social network communications environments where players interact in and outside the

⁴ See, e.g., Dr. Ian Bogost, *Persuasive Games: The Expressive Power of Videogames*, MIT Press (2007); McKenzie Wark, *Gamer Theory*, Harvard University Press (2007). A recent article noting the popularity of war video games in which gamers engage in simulated first-person combat in Afghanistan and Iraq (sometimes from the perspective of American or enemy forces) asks whether video games today "are successfully conveying an experience of war to audiences in a way that is at least as effective and affecting as the war stories told in literature or film?" Chris Suellentrop, *War Games*, The N.Y. Times Sunday Magazine, Sept. 12, 2010, at 62, 64. And a magazine article and accompanying videogame enabled the user to assume the role of Somali pirates to make rational business choices in seizing ships and negotiating ransom in a game called "Cutthroat Capitalism." Scott Carney, *An Economic Analysis of the Somali Pirate Business Model*, Wired Magazine (July 13, 2010) http://www.wired.com/politics/security/magazine/17-07/ff_somali_pirates.

games in ways protected by the First Amendment freedoms of speech and electronic assembly.

Members of the *amici* recognize that parents may deem the content of certain video games to be inappropriate for younger audiences. For that reason, retailers have stepped up to their responsibility to inform and protect their customers. Retailers empower parents to make intelligent decisions, with and for their children, about their families' entertainment choices, in a number of ways:

- Retailers support the voluntary ESRB ratings system. These ratings ensure that parents have easily understandable information available to them on the face of the game boxes as to the nature of the content in video games. Weekly newspaper advertising inserts of various retailers inform parents of ratings for particular games as well as how to learn more about the ratings system in general, and encourage consumers to learn and to use the ESRB rating system to make intelligent purchasing decisions.
- Retailers inform parents of the meaning and implications of both the ESRB ratings and the additional "content descriptors" that provide more granular information concerning the content of games. Retailers provide brochures in their stores and pages on their websites that explain the ESRB ratings and descriptors. Some retailer websites

feature search functions allowing the user to type in the name of the game so as to retrieve ratings and content descriptor information.⁵

- On various retailer websites, pages offering particular games for sale give parents additional information about the content of particular games, such as more detailed plot descriptions and customer comments about the games.
- Retailer websites can instruct parents how to use “parental block” technology in various game consoles.⁶

⁵ See Target Corporation, *ESRB Game Ratings & Content Descriptors*, http://www.target.com/ESRB-Game-Ratings-Product-Warranty/b/13309611/ref=sc_fe_l_5_1042122_27?node=13309611; (last visited Sept. 14, 2010), Best Buy Co. Inc., *What do ESRB ratings mean?* <http://www.bestbuy.com/site/null/null/pcmcat150500050005.c?id=pcmcat150500050005&h=387> (last visited Sept. 14, 2010); Walmart Stores, Inc., *ESRB Ratings*, http://www.walmart.com/cservice/esrb_ratings.jsp (last visited Sept. 14, 2010); Amazon.com, Inc., *ESRB: Understanding Video Game Ratings*, http://www.amazon.com/gp/feature.html/ref=amb_link_85825731_2?ie=UTF8&docId=71576&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=left-10&pf_rd_r=0BDXXY3F8E36B6Z1QREB&pf_rd_t=101&pf_rd_p=496315851&pf_rd_i=468642 (last visited Sept. 14, 2010).

⁶ See e.g., Best Buy Co. Inc., *Family Gaming Resources*, <http://www.bestbuy.com/site/Misc/Video+Games+for+Kids+and+Families/pcmcat106200050008.c?id=pcmcat106200050008> (last visited Sept. 14, 2010).

- Retailers explain their sales policies online, including their policies that prevent unauthorized sales to minors, and that explain their choice whether to sell certain types of games.⁷
- Most importantly, retailers have successfully implemented policies and protections to prevent the sale to minors of video games rated for persons over the age of 17. Store clerks are trained to check the age identifications of persons seeking to purchase games rated “M” for mature, and are required to refuse, without parental consent, to sell such games to any persons under 18. And several of the above-cited retailer websites describe how retailers prompt clerks to check customer identification, via a reminder on the video screen of the cash registers triggered by a bar code scan of “M” and “AO” rated video games.
- Retailers also restrict minors’ ability to purchase mature games from their

⁷ See, e.g., Target Corporation, *Target Stores Mature-Rated Games Policy*, http://www.target.com/Mature-Rated-Games-Policy-Product/b/14306571/ref=sc_fe_l_5_1042122_28?node=14306571 (last visited Sept. 14, 2010); Walmart Stores, Inc., *ESRB Ratings*, http://www.walmart.com/cservice/esrb_ratings.jsp (last visited Sept. 14, 2010); Best Buy, Co. Inc., *ESRP PSA*, http://images.bestbuy.com/BestBuy_US/en_US/images/musicmovi egame/videogames/features/esrb_dunn.wmv (last visited Sept. 14, 2010).

internet websites. Online commerce requires use of a credit card which, in addition to mandatory age verification requirements, puts the purchasing decision in the hands of persons who are 18 or older or have parental consent.

- Members of the *amici* participate in the ESRB Retail Council, and subscribe to a voluntary code of conduct that incorporates these and other commitments concerning disclosure, information, sales restrictions, and compliance.⁸

Video game retailers, including members of the *amici*, began implementing these policies as early as 2000, and have made impressive progress over the last decade. Members of the ESRB Retail Council submit to biannual “mystery shopper” audits which show, as of May 2010, greater than 80 percent aggregate industry compliance with both in-store signage and sales policy enforcement.⁹ The most recent Federal Trade Commission report similarly confirms that retailers (including members of the *amici*) have implemented “robust” systems to restrict sales to minors, and that

⁸ ESRB, *ESRB Retail Council: Ratings Education and Enforcement Code* (June 21, 2006), http://www.esrb.org/retailers/downloads/erc_code.pdf.

⁹ ESRB, *ESRB Retail Council*, http://www.esrb.org/retailers/retail_council.jsp (last visited Sept. 14, 2010).

“retailers are strongly enforcing age restrictions on the sale of M-rated games.”¹⁰

Where, as here, industries voluntarily collaborate to educate and empower parents through ratings information, retail restrictions, and technological controls within the home, there exist clear, recognized, and effective less restrictive alternatives to legislation. Thus, even if the state could demonstrate a compelling state interest in the legislation (which, as the district court and the Ninth Circuit found, it could not), or that the legislation was not impermissibly vague (which both courts held it to be), these efforts demonstrate that highly effective less restrictive alternatives to legislation exist. On this basis alone, the California statute should be held invalid and in violation of the First Amendment.

Courts recognize that such voluntary retailer actions constitute effective less restrictive alternatives to the broad content-based regulations proposed by California and other states. *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 651-52 (7th Cir. 2006) (restrictions on video game sales are not narrowly tailored where state could have passed laws increasing

¹⁰ FTC, “Marketing Violent Entertainment to Children: A Sixth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries,” at iv, 27 (December 2009). Notably, the FTC recognizes the Constitutional flaws in statutory requirements, and recommends voluntary methods of enforcement with respect to video game sales: “Given important First Amendment considerations, the Commission supports private sector initiatives by industry and individual companies to implement these suggestions.” *Id.* at v.

awareness of ESRB rating system; citing evidence that under ESRB parents are involved in video game purchase decisions 83 % of time). *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 654-55 (E.D. Mich. 2006) (promoting ESRB ratings is a reasonable alternative to regulation); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d at 833 (encouraging awareness of rating system and availability of parental controls). See also *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2004) (website filtering a less restrictive alternative); *United States v. Playboy Entm't, Inc.*, 529 U.S. 803 (availability of parental blocking a less restrictive alternative).

As the Court observed a decade ago, measures to inform parents and enable parents to block unauthorized access by minors can constitute less restrictive alternatives to regulation:

It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.

Playboy Entm't, 529 U.S. at 824.

These efforts and others have protected minors from exposure to inappropriate video content, and put parents in control of decisions over their families' entertainment choices. The *amici* submit that such voluntary education and enforcement efforts already

have proven more effective to achieve the statutory goals of empowering parents and protecting children. The existence of such less restrictive alternatives demonstrates that California cannot meet its burden under strict scrutiny to justify regulating retail sales based on the content of video games.

II. Laws Such as the California Statute, Based on Vague, Subjective, Localized Standards, Do Not Comport With the Realities of National Retail Businesses.

Members of the *amici* operate nationwide and international businesses. Many of these stores are able to offer lower prices to consumers because of efficiencies achieved through coordination on a national level of purchasing, inventory control, advertising, training, sales, promotion, and service. Moreover, each store projects a uniform image that reflects the national store brand and defines differences from its competitors. Members of the *amici* also offer product information and sales through their presence on the internet, which by definition has a national footprint and portrays a uniform image and inventory to citizens of every state.

Nationwide retail commerce thrives in a legislative and regulatory environment that is uniform and certain. Laws such as the California statute disrupt this flow, making it impossible for retailers to implement these laws in ways that promote First Amendment values for adults as well as children; and, ironically, resulting in less predictable or effective enforcement for parents and retailers alike.

A. Vague and inconsistent state video game laws would threaten commerce on a national level.

State video game laws passed (and overturned) to date have threatened retailers' national operations in two ways. First, the laws failed to provide clear guidance to retailers as to what content would be subjected to the restrictions. Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, at 108 (1972). Video game laws have applied vague standards to the classification or labeling of "violent" games, and have correctly been held to be unconstitutionally vague. See *Entm't Merchants Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d at 654; *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d at 835-836.

Second, even if the various statutes were not unconstitutionally vague, the inconsistencies among the various state requirements and prohibitions further compound a retailer's dilemma. The disparate requirements imposed by these state laws (had they been upheld) illustrate the challenges facing retailers to know what type of conduct invokes the law; what game titles are or are not covered by the law; how such games are supposed to be labeled; and, what such labels are supposed to mean. For example:

Definition of Covered Content

California	<p>Defines “violent video game” as: —incorporating requirements of appeal to “deviant or morbid” interests of minors, being patently offensive to prevailing community standards, and, lacking as a whole serious literary, artistic, political, or scientific value for minors; —embedding separate definitions of subjective terms such as “cruel,” “depraved,” “heinous,” “serious physical abuse,” and “torture”; and, —listing “pertinent factors” as to whether actions are especially “heinous, cruel, or depraved,” which include infliction of “gratuitous” violence.¹¹</p>
Indianapolis, Indiana	<p>“Graphic violence,” defined as “visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed,</p>

¹¹ Cal. Civil Code §§ 1746-1746.5. On appeal, the State apparently conceded that several of these definitional conditions could not pass muster.

	mutilation, maiming or disfiguration.” ¹²
Louisiana	The average person, applying community standards, would find that the game as a whole appeals to the minor’s “morbid interest in violence,” and depicts violence in a manner patently offensive to prevailing standards in the adult community with respect to what is suitable for minors. ¹³
Michigan	“Ultra-violent” game described as “continually and repetitively depicts extreme and loathsome violence.” ¹⁴

¹² City-County General Ordinance No. 72, 2000, amending §§ 831-1, 831-5, 831-6 and 831-8, and adding new § 831-7 to Chapter 831 of the Revised Code Of The Consolidated City And County for the City of Indianapolis and Marion County, Indiana, *held unconstitutional in Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572.

¹³ La. Rev. Stat. Ann. § 14:91.14, *held unconstitutional in Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823.

¹⁴ Mich. Comp. Laws Ann. §§ 722.685-693, *held unconstitutional in Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646.

St. Louis County, Missouri	“Graphically violent” ¹⁵
Nassau County, New York	“Indecent crime material” that depicts a heinous crime or criminal, and which appeals to the depraved interest of minors in crime. ¹⁶
Oklahoma	Prohibits sales of video games with “inappropriate violence,” defined within one of nine disjunctive categories, including: --“glamorized or gratuitous”; --“graphic” and used to “shock or stimulate” or is “not contextually relevant to the material”; --“trivializes the serious nature of realistic violence”; --“does not demonstrate the consequences or effects of realistic violence”; --uses “brutal weapons” to inflict

¹⁵ St. Louis County Ordinance No. 20,193 (Oct. 26, 2000), held unconstitutional in *Interactive Digital Software Assoc. v. St. Louis Cty., Mo.*, 329 F.3d 954. An earlier Missouri law addressing sales and rental of videocassettes imposed liability based on whether the average person would find that the content has a tendency to cater or appeal to “morbid interests” in violence for persons under the age of 17. *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684 (8th Cir. 1992).

¹⁶ Nassau County Local Law 11-1992, held unconstitutional in *Eclipse Enter. Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997). The referenced law applied to trading cards describing crimes or criminals, not violent video games.

	<p>the “maximum amount of pain and damage”;</p> <p>--“endorses or glorifies torture or excessive weaponry”; <i>or</i></p> <p>--“depicts lead characters who resort to violence freely.”¹⁷</p>
Washington	<p>Realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer.¹⁸</p>

¹⁷ Okla. Stat. Ann. § 1040.75, *held unconstitutional in Entm’t Merchants Ass’n v. Henry*, No. Civ-06-675-C, 2006 WL 2927884 (W.D. Ok. Oct. 11, 2006). These standards, if applied to traditional media, could have sanctioned characters as diverse as Johnny Rambo, Wile E. Coyote, and The Three Stooges.

¹⁸ Wash. Rev. Code Ann. § 9.91.180, *held unconstitutional in Video Software Dealers Ass’n. v. Maleng*, 325 F. Supp. 2d 1180. The law also did not define “public law enforcement officer,” thus potentially applying to depictions of the gunfight at the OK Corral, the classic TV series “Gunsmoke,” or rebel attacks on the Imperial Army in the “Star Wars” series.

Labeling

Several of the invalidated statutes, including the California law, would have imposed mandatory labeling requirements that are inconsistent with the uniform, nationally-implemented, voluntary ESRB approach. These inconsistencies as to the content, meaning, and placement of the labels would hinder retailers' ability to comply with the resulting patchwork of laws.

Type of Labeling Required/Not Required

Louisiana, ¹⁹ Michigan, ²⁰ Missouri, ²¹ Washington ²²	Each retailer must judge the content for itself. Statutes do not refer to ESRB or other labels.
Minnesota ²³	Reliance on existing ESRB labels
California, ²⁴ Illinois ²⁵	Requires application of a separate label

¹⁹ See *supra* note 13.

²⁰ Mich. Pub. Acts No. 108, § 1 *et. seq.*, held unconstitutional in *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646.

²¹ See *supra* note 15.

²² See *supra* note 18.

²³ Minn. Stat. Ann. § 3251.06, subd 3, held unconstitutional in *Entm't Software Ass'n v. Swanson*, 519 F.3d 768.

²⁴ See *supra* note 11.

²⁵ 720 Ill. Comp. Stat. 12B-25a (Jan. 1, 2006) held unconstitutional in *Entm't Software Ass'n v. Blagojevich*, 469 F.3d at 643.

Size of Label²⁶

California ²⁷	2” by 2” square on the front of the box.
Illinois ²⁸	4” by 4” square on the front of the box.

Meaning of the Label

California ²⁹	“18” label refers to “violent” content.
Illinois ³⁰	“18” label refers to either “violent” or “sexually explicit” content, or both.

It would be far-fetched to contend that these statutes, each using different, but equally vague and subjective, terms, could somehow be susceptible to a single, reliable interpretation by retailers, state authorities, the courts, or the “communities” whose standards ostensibly were to be applied. Such inconsistent labeling requirements similarly defy implementation in a consistent policy and program by a

²⁶ Ironically, these labels could comply with the law yet obscure the title of the game, or the ESRB rating and content descriptor label, which gives parents and adults better information than a mere suggested age rating.

²⁷ See *supra* note 11.

²⁸ See *supra* note 25.

²⁹ See *supra* note 11.

³⁰ See *supra* note 25.

national retailer. Yet the penalties under these statutes for failure to comply are substantial. Civil fines against retailers range as high as \$1,000 per sale (about 15 times the retail price of many popular video games); and the Louisiana statute adds criminal penalties including imprisonment for up to one year, with or without hard labor.

B. Mandatory labeling requirements create additional snares for retailers.

The existing voluntary ESRB labeling program was designed so that an independent board reviews, describes, and rates the video game content according to objective criteria. The ESRB ratings system gives retailers assurance that the games they sell will be categorized in a manner that is uniform, predictable, and informative to parents.

As noted above, several laws would have imposed a labeling requirement directly on the retailers to pass judgment over the content (independent of the ESRB guidance), and to restrict minors' access to that content in accordance with unknown and indefinable community standards. Retailers carry hundreds of thousands of products (known as "SKU's" or "stock-keeping units"). They cannot know with sufficient certainty the content of each segment of each of the thousands of media products they sell. Retailers must rely on information provided by the manufacturer.

Mandatory labeling requirements raise their own First Amendment problems. Freedom of speech prohibits the government also from telling people what they must say. *Rumsfeld v. Forum for Academic and*

Institutional Rights, Inc., 547 U.S. 47 (2006). Thus, courts have invalidated requirements for video game labeling, signs, and brochures, because they are intended to convey non-factual information reflecting subjective and controversial judgments. See *Entm't Software Ass'n v. Blagojevich*, 469 F.3d at 651-2 (violation of First Amendment to require retailer application of an adhesive label on video game box, and to require in-store signage and brochure requirements).

If a court were to uphold generally legislation that restricts sales to minors, while striking labeling requirements under the First Amendment, retailers would confront a chaotic environment with no rational solutions. Retailers could have no way other than through litigation to know whether they correctly applied the key statutory terms to the hundreds of video games they sell. Undoubtedly, some retailers would cautiously label some as “violent,” while other retailers might believe incorrectly that the content of certain games did not merit the label. Over-inclusive labeling would offend the First Amendment, while under-inclusive labeling fails to achieve the purposes of the statute. This also would place an equally-impossible burden on state authorities entrusted with attempting to enforce retailer compliance. And, ironically, the resulting confusion and uncertainty would undermine retailers’ current successful voluntary efforts using the ESRB ratings to inform parents and prevent sales to minors.

C. Inconsistencies among state regulations will create a retail environment that is highly chaotic, unduly restrictive, and ultimately less effective at protecting family interests.

If the California statute is upheld, or if the Court permits individual state regulation based on gaming content, experience shows that different states would enact different and potentially conflicting rules governing, *inter alia*, the appearance, content, and application of labels, or age requirements, or identification requirements. Such state or community-based variations would be impossible for a national retailer to accommodate and implement effectively. Presented with a patchwork of disparate, potentially conflicting, requirements, national retailers likely would respond by seeking the most cautious, overly restrictive, approach. Either they would create their own composite code combining the most restrictive provisions under each of the laws or, more likely, would simply remove the games from their inventory even for adults. Neither of these self-censoring outcomes serves the purposes of the First Amendment.

Moreover, even if retailers could abide a Balkanized regulatory environment on a state-by-state or county-by-county basis, the end result likely would be far less effective than the voluntary efforts retailers already implement nationwide. The same games could be sold to minors in one state but not in another; and different retailers could reach different conclusions as to what could be sold even within the same state or community. Such a result would only confuse parents and consumers, and undermine implementation of the current consistent use of the ESRB ratings. Thus,

allowing state-by-state regulation of content could lead to greater uncertainty, inconsistent protections, and greater burdens on those tasked with enforcing the law, and hence on the state and federal courts.

III. Strict Scrutiny Should Continue to Apply to Content-Based Restrictions that Implicate First Amendment Rights.

Although the statute at issue in this case arises in a particular context involving depictions of violence, the principle at stake applies across the board to any content that might be found objectionable by some segment of the populace. During the last century, courts were asked to rule upon legislative and private efforts to ban public access to a panoply of creative works. This Court responded instead by zealously preserving the right to publish and sell a spectrum of protected speech. These protections are crucial to retailers that provide consumers with access to expressive works. Many of the works initially proscribed by legislation or challenged in litigation – such as *Ulysses* by James Joyce, *Lady Chatterley's Lover* by D.H. Lawrence, or *Howl* by Allen Ginsburg – are recognized as literary or genre classics, despite initial legislative or judicial findings that these works lacked any artistic merit or social value. Hence, legislatures and courts plummet headlong down a slippery slope when attempting to define intangible, inherently subjective, factors such as community standards and aesthetic significance.

A content-based restriction of protected speech is presumptively invalid under the First Amendment. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010);

R.A.V. v. St. Paul, Minn., 505 U.S. 377, 382. (1992). “[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v. Am. Civil Liberties Union*, 535 U. S. 564, 573 (2002) citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) (internal quotation marks omitted). “It is rare that a regulation restricting speech because of its content will ever be permissible.” *Playboy Entm’t.*, 529 U.S. at 818. Restrictions on selling obscene materials to minors have been permissible under the First Amendment because obscenity falls into the category of unprotected speech. *United States v. Stevens*, 130 S. Ct. at 1584; *R.A.V.*, 505 U.S. at 382-83 (recognizing confined categories of unprotected speech to obscenity, fighting words, defamation, and direct incitement of lawlessness).

By contrast, this Court has held that material depicting violent content generally is protected by the First Amendment. *See Winters v. New York*, 333 U.S. 507, 508-510 (1948). In the last term, this Court held that while legislatures clearly have the power to prohibit acts of cruelty toward animals, it does not follow that they can proscribe *depictions* of such acts. *United States v. Stevens*, 130 S. Ct. at 1585-1586. Consequently, courts consistently have rejected suggestions to apply rational scrutiny standards, applicable to obscenity, to other types of content, including descriptions or depictions of violence. *See, e.g., Interactive Digital Software Ass’n.*, 329 F.3d at 958; *Entm’t Software Ass’n v. Granholm*. 426 F. Supp. 2d at 652. Instead, courts have applied and upheld strict scrutiny for works based on non-obscene content, including violent content, even as to minors.

[S]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors.

Erznoznik v. Jacksonville, 422 U.S. at 213-14. No compelling reason has been shown in this case to justify departing from the existing rule.

Singling out video games over all other media sets a dangerous precedent. As the Seventh Circuit observed, all media is in some sense “interactive” and entitled to protection. *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d at 577. *Accord Interactive Digital Software Ass’n.*, 329 F.3d at 957. *Accord Entm’t Software Ass’n v. Foti*, 451 F. Supp. at 830. Courts invalidating content-based restrictions of video games have cited depictions of “extreme” violence in the works of Homer and Shakespeare, and even in the Bible. *Entm’t Software Ass’n v. Swanson*, 519 F.3d at 772; *Interactive Digital Software Assoc.*, 329 F.3d at 957; *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d at 577. *See Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d at 1185. Indeed, the descriptions of video games in briefs of the state and their *amici* are uncomfortably close to, if not indistinguishable from, aberrant behavior depicted in now-classic books and motion pictures such as Anthony Burgess’ *A Clockwork*

Orange or the Stanley Kubrick film based on it, or Quentin Tarantino's "Pulp Fiction."

Legislation such as the California law cannot be justified by subjective judgments as to what depictions may be "devoid" of moral or aesthetic merit. While one court described a popular video game, "Grand Theft Auto III," as "filth,"³¹ the updated version of the game was given a serious and more nuanced review in the *Wall Street Journal* by a Pulitzer Prize-winning novelist, who observed: "GTA IV doesn't have to be 'Moby-Dick' or 'Beloved' to be the Greatest Game of a Lifetime or even to be worthy of discussion."³² Academics compare the structure and narrative of video games to classics of ancient literature.³³

Nor is the debate over how violence in a new medium may influence children a new phenomenon. The California statute, in its purpose and effect, evokes unsuccessful legislative attempts in the 1930's (the early years of the new interactive medium of that day –

³¹ *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d at 1190.

³² Junot Diaz, 'Grand' but no 'Godfather,' *The Wall Street Journal* (June 28, 2008), <http://online.wsj.com/article/SB121460385251911957.html>.

³³ See, e.g., *Living Epic: Video Games in the Ancient World*, the blog by Roger Travis, Associate Professor of Classics at the University of Connecticut (last visited Sept. 14, 2010), <http://livingepic.blogspot.com/>. See also, Benjamin Popper, *Dante Alighieri: Epic Poet, Ass Kicker*, *The Atlantic*, Feb. 2010, <http://www.theatlantic.com/magazine/archive/2010/02/dante-alighieri-epic-poet-ass-kicker/7936/>.

the “talkies”) to ban the showing of gangster films. Furor over unrepentant violent characters in films such as “Little Caesar” impelled voluntary censorship of Howard Hawks’s 1932 classic “Scarface.”³⁴ Such film industry agitation and public indignation seems as quaint today as it was unfounded then. Film historians today recognize such genre films as classics of the American cinema, and urge restoration of initially-censored films to their original intended directors’ cuts. This Court considered, and invalidated, analogous legislative attempts to prevent theaters from showing “sacrilegious” films. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). Such events from the not-too-distant past illustrate precisely why legislatures remain ill-suited to make objective assessments – or to require retailers to make *subjective* assessments -- as to long-term social value based on short-term political pressures.

Retailers must remain free to exercise their own judgment as to what CDs, movies, books and games to carry for their respective customer bases, and let customers vote with their wallets. Some retailers choose not to carry mature content, including mature and adult video games, or CDs with parental advisory warnings. But others prefer to offer consumers access to all such products, and to provide their customers

³⁴ *See* American Film Institute Catalog of Feature Films, <http://www.afi.com/members/catalog/10top10View.aspx?bhcp=1&Movie=1134> (last visited Sept. 14, 2010). Fears that gangster films glorified gang violence led to release of the film under the homiletic title, “Scarface: The Shame of a Nation,” with an altered ending in which the antagonist faces a judge’s gavel rather than a riddle of police bullets.

with facts and descriptions to inform their purchasing decisions.

Blunt legislative instruments and threats of liability such as those in the California law may influence retailers' decisions to not carry these works at all, and as a result reduce adult choice to that which is fit for children. *See Butler v. Michigan*, 352 U.S. 380, 383 (1957). This concern was recognized by other federal courts in the context of video game legislation analogous to the California law now before the Court:

The lack of precision among these definitions will subject Michigan retailers to steep civil and criminal liability if they guess wrongly about what games the Act covers. Retailers will respond by either self-censoring or otherwise restricting access to any potentially offending video game title. ... Such behavior will deprive access to such expression by adults as well as minors.

Entm't Software Ass'n v. Granholm. 426 F. Supp. 2d at 656.

The real problem is that the [retailer] might know everything there is to know about the game and yet not be able to determine whether it can legally be sold to a minor. ... Not only is a conscientious [retailer] likely to withhold from minors all games that could possibly fall within the broad scope of the Act, but authors and game designers will likely 'steer far

wider of the unlawful zone ... than if the boundaries of the forbidden area were clearly marked.”

Video Software Dealers Ass’n v. Maleng, 325 F. Supp. 2d at 1191, *citing Grayned v. City of Rockford*, 408 U.S. at 109.

The California law cannot survive strict scrutiny. Moreover, no reason has been shown in this case to depart from the strict scrutiny test. The breadth and imprecision of the California law requirements further offend the First Amendment, as its threats of civil liability will likely compel self-censorship by game developers and retailers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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