

No. 08-1448

IN THE
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, GOVERNOR OF THE STATE
OF CALIFORNIA, AND EDMUND G. BROWN JR.,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION AND
ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

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

**BRIEF OF *AMICUS CURIAE*
ACTIVISION BLIZZARD, INC.
IN SUPPORT OF RESPONDENTS**

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September 2010

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INTEREST OF THE *AMICUS CURIAE*¹

Activision Blizzard, Inc. is a California-based video game publisher whose game portfolio includes best-sellers such as the record shattering first-person shooters in the *Call of Duty* series; the *Guitar Hero* franchise; action sports titles including champion skateboarder Tony Hawk's *Tony Hawk: RIDE*; adventure games utilizing comic-book and motion-picture licensed characters and plots including *Spider-Man: Friend or Foe*, *X-Men Origins: Wolverine*, and *James Bond: Quantum of Solace*; family entertainment titles such as *Shrek Forever After*; and massively multiplayer online role-playing games such as *World of Warcraft* and *StarCraft*.

Activision Blizzard and its subsidiaries employ thousands of creative and skilled artists and innovators – writers, animators, visual designers, software architects, programmers, actors, set designers, sound and lighting technicians, and other professionals – in the United States and abroad, including well over 3,000 in California alone. The company's products are unique, with audio and visual elements, richness, and complexity often far in excess of comparable offerings from competing entertainment fields such as books, films, and music. The company's products combine “bleeding edge” technological developments, vivid and engrossing

¹ 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 *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

storytelling, and creative implementation to form works of art with true worldwide appeal.

Activision Blizzard's success in this regard is reflective of the accomplishments of the entertainment software industry as a whole. The company's growth from \$40 million in annual fiscal revenues in 1995 to \$5 billion in 2010 speaks volumes for the popularity of its products among millions of its consumers. *Call of Duty: Modern Warfare 2* garnered over \$550 million in retail sales in the first five days of its 2009 release (more than any entertainment product to date, whether film, music record, concert, or book), and went on to become the top-selling console game of the year in both the United States and Europe. *Modern Warfare 2* and *Guitar Hero III: Legends of Rock* each have earned well over \$1 billion in retail sales revenues. So too has *World of Warcraft*, which is the world's most popular online game, with approximately 11.5 million subscribers worldwide. One of Activision's wholly owned development studios, Neversoft, has created video game products with combined gross revenue sales since 1998 that exceed the entire domestic and international theatrical box office receipts of the *Star Wars* film franchise since the 1970s. Similar examples can be found throughout the entire video game industry.

The entertainment software industry has been an engine for U.S. economic growth, especially in California, and has contributed billions of dollars to national gross domestic product during the recent recession. It remains the most economically successful American cultural export in the Far East and is emerging as the future of popular culture worldwide.

Some of the games that Activision Blizzard publishes could be subject to the sales restrictions, labeling requirements, and attendant sanctions provided in California Civil Code §§ 1746-1746.5. For example, the company will release the next installment of the *Call of Duty* series, *Call of Duty: Black Ops*, on November 9, 2010. This is a first-person shooter game in which players assume the identities of American operatives involved in covert activities during the Cold War. The scenario of this game is similar to those found in many movies and books written in the past 40 years. Evil Nazi scientists controlled by mad men of the military elite prepare for world domination. It is up to the brave American elite soldiers to save the world from destruction. The game features realistic scenes of combat operations, not unlike those found in a typical *Rambo* or *James Bond* film, a Tom Clancy novel, or even a prime-time television series such as *24* or *Alias*.

As with previous titles in the *Call of Duty* franchise, Activision Blizzard expects to sell millions of units of *Call of Duty: Black Ops*, including in California, which alone is the largest U.S. video game market. Activision Blizzard therefore is a “speaker” potentially affected by the California statute at issue here, with a direct and concrete interest in this Court’s resolution of the constitutional questions this case presents.

SUMMARY OF ARGUMENT

This brief explains the origins, mechanics, and effectiveness of the video game industry’s self regulation through the Entertainment Software Rating Board (“ESRB”), an independent entity

established in the 1990s by respondent Entertainment Software Association (“ESA”).² The ESRB’s rating and enforcement scheme – which the Federal Trade Commission (“FTC”) has held up as a model of self-regulation for other media – provides two grounds for holding that California’s statute is unconstitutional.

First: California asserts an interest in “helping parents direct the upbringing of children and protecting them from harm caused by playing offensively violent video games.” Pet. Br. at 56. Because, however, the pre-existing ESRB rating and enforcement scheme effectively empowers parents to make informed decisions regarding the games their children play, the California statute – which flatly prohibits the sale to minors of games that meet the statutory definition – does not materially advance that interest beyond what the ESRB system already provides.

Speech restrictions can be upheld only if they “in fact alleviate . . . harms in a direct and material way.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). The ESRB’s rating system, as the FTC itself has concluded, is effective, vigorous, nimble, and responsive. California cannot demonstrate that its sales prohibitions materially advance its asserted interest any more effectively than the ESRB’s rating system, and so the speech restriction fails at the outset.

² Although no longer a member of the ESA, Activision Blizzard was a member during the ESA’s formative years and championed the development of the ESRB’s rating system.

Second: Even if California were correct that current self-regulation is not sufficiently effective, the proposed sale restrictions and labeling requirements are unconstitutional because they are not the “least restrictive” means to achieve the State’s goal. If strict scrutiny applies – as we believe it does – the California statute “is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.” *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (citation omitted).³ Here, California could have adopted any number of measures – such as encouraging or conducting advertising campaigns designed to ensure even higher rates of parental understanding of, and reliance on, the ESRB’s rating system – that are less restrictive than California’s outright ban on sales to minors and accompanying labeling and penalty provisions.

This brief describes the aspects of the ESRB’s rating and enforcement system that support these two grounds for invalidating California’s statute. As discussed below, the video game industry established the ESRB, and designed and implemented its rating and enforcement system, in response to the threat of federal legislation and a series of joint congressional hearings in the early 1990s. Satisfied that the ESRB,

³ Five times in the last two decades, this Court has emphasized that free-market solutions designed to provide parents greater control over children’s access to adult content are preferable to government bans on sales or distribution. *See Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *Denver Area Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000); *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

as established, addressed its concerns, Congress took no action to regulate the industry.

Since its establishment, the ESRB has augmented and improved its rating system and advertising guidelines to ensure that parents have ready access to information about game content. These measures include: (1) simple, easy-to-use rating icons that indicate age appropriateness; (2) “content descriptors” that indicate the types of content that influenced the rating category assigned or which may be of interest or concern to parents; and (3) beginning in 2008, plain-language rating summaries that provide specific examples of content that influenced assignment of the content descriptors displayed on the game’s packaging (and which are available on the ESRB’s website and mobile website). The ESRB vigorously enforces its rating system and advertising guidelines, and partners with retailers to help ensure that they, too, enforce their store policies not to sell or rent Mature-rated games to anyone under age 17 unaccompanied by a parent.

Finally, this brief provides evidence reflecting the remarkable effectiveness of these measures in ensuring that parents are involved in decisions about their children’s gaming. Indeed, the FTC, in a report to Congress issued in December 2009, gave the ESRB’s rating and enforcement system high marks for its effectiveness and trustworthiness in the eyes of parents.⁴ Given this, there is no need for the California statute.

⁴ See FTC, *Marketing Violent Entertainment to Children* at 29-30 (Dec. 2009), available at <http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf> (hereafter “FTC 2009 Report”).

ARGUMENT

I. THE ESRB'S RATING SYSTEM WAS DESIGNED TO MEET CONGRESSIONAL CONCERNS IDENTICAL TO THOSE THAT PROMPTED PASSAGE OF CALIFORNIA'S STATUTE.

Legislative interest in protecting children from the allegedly harmful effects of video game violence is not a new phenomenon. Congress voiced precisely such concerns in a series of hearings during the early 1990s, and called on the video game industry to create a voluntary rating system of its own as a means of providing parents with the information needed to make informed judgments about which video games to allow their children to play.

In December 1993, Senators Joseph Lieberman and Herb Kohl convened joint hearings before the Senate subcommittees they chaired in response to release of Ed Boon and John Tobias' *Mortal Kombat* and Sega's *Night Trap*, video games which the Senators believed contained depictions of violence inappropriate for young children. *See Rating Video Games: A Parent's Guide to Games*, Joint Hearings Before the Senate Subcomm. on Juvenile Justice and the Subcomm. on Regulation and Government Information, 103d Cong., S. Hrg. 103-887, at 2-3 (1993-1994) (hereafter "Joint Hearings"). Concerned that parents were purchasing these and similar games for their children without adequate information about what the games contained, Senators Lieberman and Kohl advised key members of the video game industry that they intended to introduce legislation mandating parental advisories with respect to video games if the industry did not establish an effective self-regulatory rating system of its own. Both Senators acknowledged the

threats to First Amendment freedoms that such government-mandated parental advisories would pose, and they therefore urged the industry to create a voluntary rating system that would address the concerns they had raised. *See id.* at 73.

In February 1994, Senator Lieberman introduced the Video Game Rating Act of 1994. *See* S. 1823, 103d Cong. (Feb. 3, 1994); *see also* H.R. 3785, 103d Cong. (Feb. 3, 1994) (House version of the bill). The Act would have created the Interactive Entertainment Rating Commission as a new Executive Branch agency charged, during its first year, with evaluating the video game industry's efforts to create a voluntary rating system. S. 1823, § 4(a). If the Commission determined that such efforts were insufficient "to adequately warn parents and users of the violence or sex content of video games" (*id.*), the Act would have empowered the Commission to "promulgate regulations requiring manufacturers and sellers of video games to provide adequate information relating to violence or sexually explicit content of such video games to purchasers and users." S. 1823, § 4(b).

Following introduction of this legislation, leading members of the video game industry pledged to develop a voluntary rating system that would obviate the need for government regulation. In July 1994, industry representatives returned to Congress to announce the results of the industry's efforts to develop a self-regulatory system similar in concept to the one adopted by the motion picture industry but tailored to the new medium of video games.

The central component of the industry's proposed rating system was the creation of an independent rating board – the ESRB – with the power to

determine final ratings for games before they reached store shelves. Under the direction of Dr. Arthur Pober, an educator and former head of the Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus, the ESRB conducted extensive focus groups with parents to test different rating concepts and gauge the type of content parents viewed as appropriate for different age groups. *See* Joint Hearings at 132. In addition, the ESRB consulted with a wide range of nationally recognized experts in child development and education and reviewed rating systems used in other countries and for other media. *Id.* at 132, 136-37, 140. Based on that research, the ESRB adopted a rating system (described in greater detail below) that includes both age-based rating categories and content descriptors – words or short phrases which indicate elements that may have triggered a rating or which may be of interest or concern to parents.

The proposed ESRB rating system met each of the criteria Senators Lieberman and Kohl had identified as essential to effective industry self-regulation. First, the ESRB was established as an independent entity separate from the ESA. *See* Joint Hearings at 132. No ESRB rating assignment has ever been subject to review by the ESA's board or its member companies. Game ratings, from the start, have been determined by a minimum of three, demographically diverse raters with no ties to the industry and whose identities remain anonymous, to insulate them from outside pressure.

Second, the rating system recognized differences in age between very young children and those who are older. *See* Joint Hearings at 133. Third, the system required prominent display of a game's rating on all

packaging, advertising, and promotional materials, and included an effective enforcement plan with strong penalties and sanctions. *Id.* Fourth, the system provided sufficient information to parents in the three areas that were the focus of the congressional hearings – violence, sex, and language – and indeed went further by providing information about alcohol use, tobacco use, and gambling as well. *Id.* The ESRB’s rating system also included an advertising code developed by Dr. Pober designed to ensure, among other things, that advertisements did not target audiences for whom a given game might not be appropriate. Finally, the industry agreed to undertake an intensive public education campaign to inform consumers about the new system. *Id.*

After hearing details of the proposed rating system, Senators Lieberman and Kohl stated that if the industry followed through with its plans, “then we can shelve the legislation that we have prepared to force a rating system into existence.” Joint Hearings at 126 (statement of Senator Lieberman). The Senators commended the industry for having “met the challenge that we set out before you,” and Senator Lieberman specifically praised the industry’s effort as “the most informative and comprehensive rating system for any entertainment medium in this country that I am aware of.” *Id.* at 145.

II. THE CURRENT ESRB RATING SYSTEM TAKES A COMPREHENSIVE APPROACH TO INFORMING PARENTS ABOUT GAME CONTENT AND REGULATING THE INDUSTRY'S INTERACTIONS WITH MINORS.

Since its inception in 1994, the ESRB's rating system has continued to evolve, becoming even more robust and responsive to parental concerns than it was upon launch. The ESRB's process for rating video games ensures consistency and reliability in the ratings it assigns. That process starts with trained, demographically diverse "raters" who have experience with children and who are not affiliated with any entity in the video game industry. They review materials submitted by the game publisher and reach consensus on a rating. The rating information provided for each game is highly informative, including: (1) a rating category indicating age appropriateness; (2) one or more of 30 different content descriptors indicating elements that may have triggered the rating or that may be of interest or concern to a parent; and (3) rating summaries that embellish upon the content descriptors by giving specific examples of content that triggered those descriptors, including the most extreme examples in each content area.

The ESRB's rating system is also comprehensive. It includes enforcement of a wide-ranging set of advertising guidelines – including guidelines that prohibit targeting advertisements to children (in print, on television, and online) for whom the game advertised would be inappropriate – and a rigorous system of points, fines, and sanctions to ensure compliance with its content disclosure and

advertising policies. Finally, the ESRB partners with retailers in support of their efforts to prevent the sale of Mature-rated games to unaccompanied minors.

A. The Process By Which Games Are Rated⁵

Video games are rated by the ESRB *before* they are released to the public. Typically, a publisher will begin the process of obtaining an ESRB rating while a game still is in the final stages of development.

Publishers must submit to the ESRB responses to a detailed questionnaire about the game, often supplementing those responses with lyric sheets, scripts, etc. The responses must affirmatively disclose “pertinent content,” a term of art defined by the ESRB to include any material that could bear upon the rating and content descriptors assigned to the game, including the most extreme examples of sexual content, violence, language, alcohol and tobacco use, as well as content that demonstrates the game’s context, such as setting, storyline, and game objectives. Publishers must also submit a DVD that captures all “pertinent content.”

These materials are first assessed by ESRB staff to ensure they are complete and accurate. Once that is confirmed, they are reviewed by at least three raters, who are employed by the ESRB as full-time staff and who have prior experience with children. The ESRB protects the anonymity of these raters, who must remain free from ties to individuals or companies involved in the video game industry.

⁵ See generally http://www.esrb.org/ratings/ratings_process.jsp.

After reviewing the rating materials, each rater first individually assigns the game a tentative rating category and content descriptors. The raters then discuss their tentative ratings and deliberate with one another to reach consensus, taking into account prior ratings of games with similar content in order to maintain parity and consistency. ESRB staff then conducts a “parity review,” comparing the raters’ recommendation to ratings historically assigned for games with similar content. Once the parity review is complete, the ESRB issues a rating certificate to the publisher with the game’s official rating. The publisher may either accept the rating as final or revise the game’s content and resubmit it to the ESRB, at which time the process starts anew.

B. Age-Specific Ratings, Content Descriptors, And Rating Summaries⁶

ESRB ratings have two equally important parts: (1) the rating symbol; and (2) the content descriptors.

The rating symbols indicate the ESRB’s recommendation as to the appropriate minimum age for players of a particular game. Game publishers must display a game’s rating by printing the ESRB’s official rating icon on the front of the game packaging.

There are six rating categories:

- **EC** for Early Childhood, *i.e.*, ages three and older
- **E** for Everyone, *i.e.*, ages six and older
- **E 10+** for Everyone 10+, *i.e.*, ages ten and older

⁶ See generally http://www.esrb.org/ratings/ratings_guide.jsp.

- **T** for Teen, *i.e.*, ages 13 and older
- **M** for Mature, *i.e.*, ages 17 and older
- **AO** for Adults Only, *i.e.*, ages 18 and older

Publishers in addition must display the assigned content descriptors (together with the rating icon) on the back of the packaging. The ESRB currently uses approximately 30 different content descriptors designed to inform parents of the nature of the material and the basis for the assigned rating. These include: “Blood,” “Crude Humor,” “Drug Reference,” “Intense Violence,” “Nudity,” “Sexual Content,” “Simulated Gambling,” and “Use of Tobacco.” Again, the ESRB mandates that publishers place content descriptors next to the official ESRB rating icons, making them instantly identifiable to consumers and parents. Both rating categories and content descriptors must also be displayed in all marketing materials as well.

In addition, in 2008 the ESRB began providing “rating summaries” for each video game assigned a rating. These summaries – which can range from a few sentences to several paragraphs, depending on the game content – provide straightforward descriptions of the specific content that led to the rating assignment, thereby alerting parents to content they might want to consider in determining whether a particular game is appropriate for their child. Unlike the rating symbol and content descriptors, these summaries are not on the game packaging. Parents can view them at the ESRB’s websites (traditional and mobile), through the ESRB rating search widget (a downloadable application found on numerous websites, including

parenting.org), or through use of a free iPhone application.⁷

C. Advertising Guidelines⁸

The ESRB, through its Advertising Review Council (“ARC”), also regulates industry advertising and marketing. Publishers agree by contract to abide by ARC Principles and Guidelines with respect to all games with ESRB ratings, and ARC can enforce compliance by requiring corrective actions and imposing fines.

ARC developed a number of “Principles” in support of its advertising guidelines that make clear that advertising campaigns should not market games to age groups for whom the game might be inappropriate: “[c]ompanies must not specifically target advertising for entertainment software products rated ‘Teen,’ ‘Mature,’ or ‘Adults Only’ to consumers for whom the product is not rated as appropriate.” ARC’s Principles also require truth-in-advertising: “An advertisement should accurately reflect the nature and content of the product it

⁷ The Rating Summary for Activision’s E10+ rated *Shrek Forever After*, for example, notifies parents that: “Punches, kicks, belly flops, and sword slashes are used to defeat enemies; power-ups and special skills are employed to stun enemies in the melee-style combat. Dialogue includes references to a ‘Magnus Rumpus,’ strange odors (a bean joke), and the line ‘Er, if it’s yesterday’s underwear, don’t sniff ‘em?’ One song contains the work ‘damn’ in the lyrics (e.g., ‘I don’t give a damn about my reputation’)” See <http://www.esrb.org/ratings/synopsis.jsp?Certificate=28774>.

⁸ See generally http://www.esrb.org/ratings/principles_guidelines.jsp.

represents . . . i.e., an advertisement should not mislead the consumer as to the product's true character." Furthermore, ARC's Principles help ensure that the content included in game advertisements does not offend the general public.

ARC issues detailed "Guidelines" that reflect and support the above Principles. The guidelines address various topics: violence, sex, alcohol and drugs, offensive expression, and insensitivity to religious beliefs and people with disabilities. The violence Guidelines, for example, prohibit the same sorts of depictions in advertising that might lead the ESRB to rate a game as "M" for Mature. The Guidelines do not allow "[r]epeated blows or gun shots inflicted on people/creatures . . . exploding body parts . . . depictions of fatal injuries and/or suicide . . . kicks to the groin." Nor do they allow "[e]xcessive and gratuitous amounts of blood and/or fleshy body parts, blood spurting from wounds," "[a]llusions or depictions of violent or degrading behavior toward women," "cruelty to animals," "dismemberment, decapitation," "[a]ssassination of a president or celebrity," "[p]eople/creatures on fire," and "weapon/bomb making."⁹

D. Enforcement¹⁰

The ESRB maintains authority to enforce publisher compliance with the rating system's content

⁹ These provisions in ARC's Principles and Guidelines cover many categories of potentially offensive content that the California statute (which does not purport to regulate marketing campaigns) does not even address.

¹⁰ See generally <http://www.esrb.org/ratings/enforcement.jsp>.

disclosure requirements and the ESRB's advertising guidelines, and it does so frequently and vigorously.

For example, ESRB staff play-test games after they have been released to the public, in order to confirm that the publisher's disclosure of "pertinent content" during the rating process was accurate and complete. If the ESRB determines that a publisher failed to make complete disclosure it can initiate an enforcement proceeding, which can result in revocation of the original rating, the imposition of monetary sanctions, and the ordering of corrective actions. The ESRB has utilized all of these potential sanctions, and on more than one occasion has ordered a game publisher to re-label all unsold inventory, including inventory that has already shipped to retailers.

The ESRB, through ARC, also monitors and, according to the FTC, "regularly"¹¹ enforces compliance with advertising guidelines and product labeling requirements by imposing monetary and other sanctions. Indeed, the ESRB issues over one hundred violations each year.¹² Although the majority of these violations are minor or technical in nature, the sheer number demonstrates the seriousness with which the ESRB undertakes its regulatory obligations.

¹¹ FTC 2009 Report at 29.

¹² FTC, *Marketing Violent Entertainment to Children* at 20 (Apr. 2007), available at <http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf> (hereafter "FTC 2007 Report").

E. Retail Partnerships¹³

The ESRB, through the ESRB Retail Council (“ERC”) also partners with major retailers to help ensure that they support the rating system by informing their customers about ESRB ratings and refusing to sell or rent M-rated games to customers under 17 without parental permission.¹⁴ Many of the nation’s largest and most influential retailers are members of the ERC, including Best Buy, Blockbuster Video, GameStop, Sears/Kmart, Target, and Walmart, representing 80% of all games sold at retail.

ERC members all pledge to support and comply with a “Ratings Education and Enforcement Code.”¹⁵ This detailed document outlines procedures to ensure retailer compliance with their store policies, which cover displaying signs in conspicuous locations explaining the ESRB rating system, training managers and employees regarding the ESRB system and sales policies with respect to games rated “Mature” by the ESRB, and disciplining employees who do not comply with those policies.

ERC members also agree to participate in at least two “mystery shop” audits per year, administered by an independent auditor (the same company engaged by the FTC to administer its own mystery shops), in which customers under age 17, apparently unaccompanied by an adult, attempt to purchase or

¹³ See generally http://www.esrb.org/retailers/retail_council.jsp.

¹⁴ ERC retailers do not currently stock AO-rated games.

¹⁵ See http://www.esrb.org/retailers/downloads/erc_code.pdf (hereafter “ERC Code”).

rent M-rated games in order to test the effectiveness of a retailer's enforcement policy. During these audits, "mystery shoppers" visit no fewer than 100 outlets of each member retailer. Overall results are shared among the ERC membership, including how a given retailer's level of enforcement compares to other (unidentified) ERC members, and individual ERC members are provided with store-level results for each of their respective outlets included in the audit. ERC members can thus use these audit results to modify their enforcement procedures and policies as necessary.

Retailers who do not have the funds or the necessary number of outlets (at least 100) to participate in the mystery shop audits can still participate in the ESRB's Retail Partner program. Retail Partners commit to many of the same policies as ERC members, including the prohibition on sales of M-rated games to minors under age 17; the main difference is that they are not subject to the mystery shop audits.¹⁶

III. THE ESRB'S RATING SYSTEM EFFECTIVELY BLOCKS MINORS' ACCESS TO VIOLENT VIDEO GAMES.

California relies on outdated statistics in its effort to convince the Court that the ESRB's rating system is flawed and should not be deemed an appropriate

¹⁶ The ESRB cannot itself discipline retailers. The ESRB Retail Council's Rating and Education Enforcement Code, however, provides that the Council itself may issue notices of deficiency to retail members who have failed to fulfill the obligations set forth in that code, and may terminate the membership of retailers that fail to demonstrate compliance.

less restrictive alternative to advance the State's interests. California claims an interest in "helping parents direct the upbringing of children and protecting them from harm caused by playing offensively violent video games." Pet. Br. at 56. Without conceding that video games cause any harm, Activision Blizzard submits that current statistics – including those from studies commissioned by the FTC – demonstrate that children cannot easily purchase violent video games and that California can easily advance its goals by supporting the existing ESRB system.

A. The ESRB And Its Retail Partners Effectively Prevent Unaccompanied Minors From Purchasing Violent Video Games.

California contends that the imposition of civil penalties is the "only effective" means available to prevent the sale of certain violent video games to minors without parental consent. Pet. Br. at 58-59. As explained below, however, the ESRB's partnerships with retailers, by which retailers commit to prohibiting the sale of M-rated games to minors, is a less restrictive and more effective alternative to the speech restriction California seeks to impose. It is exceedingly difficult for minors under the age of 17 to buy M-rated video games at the vast majority of game retailers unless accompanied by an adult. And it is virtually impossible for *anyone* – minors or adults – to buy AO-rated or unrated video games at brick-and-mortar retailers because (1) most such retailers – who are the only retailers covered by the California statute – refuse to carry AO-rated or unrated games, and (2) even more importantly, console manufacturers (*i.e.*, Microsoft, Nintendo, and

Sony) will not allow unrated or AO-rated games for their game systems to be published for retail distribution.

1. The vast majority of retailers prohibit the sale of M-rated games to minors.

California relies on statistics that are no longer accurate in an attempt to show that minors can purchase violent video games with relative ease. *See* Pet. Br. at 57. The most recent FTC report directly undermines the six- and ten-year-old statistics California cites.

In December 2009, the FTC reported that all eight of the major video game retailers it surveyed, which today represent 84% of the total market for games sold in the United States, employ policies preventing the sale of M-rated games to minors. FTC 2009 Report at 27, 44 n.179. Seven of the eight additionally employ a point-of-sale register system that prompts cashiers to ask for identification after scanning an M-rated game. *Id.* at 27-28. The FTC found broad compliance with the stated policy. In an FTC-commissioned mystery shop, retailers denied sales of M-rated games to 80% of unaccompanied underage shoppers. *Id.* at 28. GameStop, the largest game retailer in the United States – which accounts for 25% of video games sold nationally – attained a 91% denial rate. *Id.* at 28, app. § A-5 (Table 2E).

Retailers' stellar showing in the mystery shop audit led the FTC to commend video game retailers' "robust system of checking for age identification." *Id.* at 27. The FTC pointed to the video game industry as a model for other genres of entertainment, concluding that "the video game industry outpaces the movie and

music industries” in, among other things, “restricting children’s access to mature-rated products at retail.” *Id.* at 30.

The compliance rate reported in the 2009 FTC report represents a 433% increase from the retailers’ compliance level at the time of the FTC’s first report in 2000. And the results of the ERC’s most recent mystery shop, conducted in Spring 2010, reveal a continuing upward climb in compliance rates. ERC members denied purchase to minors 83% of the time (87% when the results are weighted by each participating retailer’s respective market share).¹⁷

In other words, the vast majority of retailers already effectively prohibit the sale of M-rated games to unaccompanied minors. Accordingly, parents who choose to allow their children to play M-rated games typically must play a role in their purchase. Indeed, 89% of minors who play video games report that their parents are present when they purchase or rent any game. FTC 2007 Report at 28. The ESRB and its retail partners have thus largely achieved – voluntarily – the very goal that California hopes to further through its statute: limiting minors’ access to violent video games without parental permission.

¹⁷ ERC Spring Audit 2010, *available at* http://www.esrb.org/retailers/retail_council.jsp.

2. Minors cannot purchase AO-rated games at retail because most retailers do not stock or sell AO-rated games and console manufacturers will not certify them.

As detailed above, retailers promote parental involvement in the purchase of M-rated games for children by requiring their presence at the point of purchase. With respect to AO-rated games, they go even further: they refuse to carry them in their stores.¹⁸ Moreover, because manufacturers of the major consoles and handheld devices will not certify an AO-rated game to play on any of their systems, even a brick-and-mortar retailer who wanted to carry AO-rated games would be relegated to a *de minimis* number of titles published for the PC. As a result, no one – adult or child – can purchase AO-rated games at retail, and AO-rated games therefore constitute an infinitesimally small segment of the video game market.

Out of the close to 20,000 ratings assigned by the ESRB since its inception, less than 1% of those ratings were issued as AO for either sexual or violent content, and less than 0.15% were games that received a “final” rating of AO.¹⁹ Moreover, not a

¹⁸ The ESRB does not require or promote this policy, requesting only that retailers prohibit the sale of M- or AO-rated games to unaccompanied minors 17 years of age or 18 years of age or younger, respectively. See ERC Code at 1.5.

¹⁹ Under the ESRB’s rating system, game publishers can either accept an ESRB-issued rating or modify the game and resubmit it to the ESRB in an effort to obtain a less restrictive rating. Resubmissions are treated identically to initial submissions and go through the same process described above. Given the lack of

single one of those games is available for sale at brick-and-mortar retailers.

In short, the two limitations discussed above – console manufacturers’ refusal to certify AO games and retailers’ unwillingness to sell them – severely limit the commercial viability of AO titles, which accounts for the dearth of AO-rated games on the market today.²⁰

3. The voluntary nature of the ESRB’s rating system has no bearing on a minor’s ability to purchase violent video games because most retailers will not sell unrated games.

California contends that retailers’ restrictions on the sale of M-rated games to minors cannot effectively advance the State’s interests because the ESRB’s rating system is voluntary, and unrated games therefore remain problematic. Pet. Br. at 58. The State’s argument misconstrues the current state of the video game industry. Parents – and the State – need not worry about children purchasing an

commercial viability for AO-rated games, publishers often choose to modify a game that has received an AO rating and resubmit it to the ESRB, with the desire of obtaining an M rating. Some publishers receiving an AO rating have modified and resubmitted the game numerous times until they achieve a commercially viable M rating. Thus, the number of AO ratings issued by the ESRB is greater than the number of AO ratings that are accepted as the final rating for the game.

²⁰ For further discussion of adult gamers’ limited access to AO-rated games, see Michael Thompson, *Manhunt 2’s AO Re-Release Shows Problems With Highest Rating*, ars technica (Nov. 9, 2009), <http://arstechnica.com/gaming/news/2009/11/manhunt-2s-ao-re-release-shows-problems-with-highest-rating>.

unrated game at Walmart, Best Buy, or other traditional brick-and-mortar game retailers because they do not stock or sell unrated titles. Any person – minor or adult – would be hard-pressed to find a single unrated game available for sale at the brick-and-mortar retail stores covered by the California statute.²¹

The FTC does not consider the retail sale of unrated games a threat to children. The FTC mystery shop surveys do not measure the sale of unrated games (although they do measure sales of unrated DVDs of movies), nor does the FTC even mention the availability of unrated games at retail for the simple reason that such games do not exist. The only games not rated by the ESRB that the FTC briefly mentions in its most recent report are downloadable games for mobile phones. FTC 2009 Report at 28-29.

Furthermore, California’s contention that parental control features are “useless” to stop children from playing unrated games on consoles is simply not true. *See* Pet. Br. at 58. Parental controls are included on all of the latest-generation game consoles and handhelds (Nintendo Wii, Nintendo DSi, Microsoft Xbox 360, Sony PlayStation 3, and Sony PSP), and are available for Microsoft Windows Vista and Windows 7 as well. The ESRB’s website contains a

²¹ Although the California statute would not cover any games other than those sold at brick-and-mortar retail stores, video games analogous to those sold at brick-and-mortar stores – which are available for purchase online through downloading services such as Direct2Drive (www.direct2drive.com), Steam (<http://store.steampowered.com>), or the websites of some major game publishers – all typically carry ESRB ratings.

resources page providing step-by-step instructions on how to set up and use the parental control settings on all of them, and includes a link to *A Parent's Guide to Video Games, Parental Controls and Online Safety*, an informational guide for parents jointly published by the ESRB and PTA.²² The parental controls feature allows parents to select the maximum ESRB rating they deem appropriate for their children, which blocks a child from playing a game with an ESRB rating above that level unless a passcode is entered. The parental controls map all unrated content (games, movies, TV shows, etc.) to the most restrictive rating available, so that if a parent sets his or her parental controls to block out all Mature-rated games, an unrated game would be blocked as well.

The ESRB's voluntary rating system, as utilized and enforced by retailers and game console manufacturers, works. Parents do not need the California statute to help curb the sale of unrated games to their children at retail because no one can purchase unrated games at brick-and-mortar retailers.

B. The ESRB's Rating System Effectively Empowers Parents To Make Informed Decisions About The Games Their Children Can Play.

California contends that the statute at issue here is a necessary means of "allowing [parents] to direct the upbringing of their children in the manner they see fit." Pet. Br. at 41. The ESRB's rating system,

²² See <http://www.esrb.org/about/resources.jsp>.

however, gives parents more tools – and more effective tools – to “direct the upbringing of their children” than California’s sales restrictions and labeling requirements, which are devoid of the nuance and communicative power of the ESRB system. Rather than simply preventing the sale of certain games to minors – which the ESRB system already accomplishes far better than the Act would – the ESRB’s rating system educates and informs parents about the content of every video game their children might want to purchase at retail.

1. Parents are aware of ESRB ratings, understand and trust the ESRB’s rating system, and consistently use ESRB ratings to inform their purchasing decisions.

Surveys have consistently shown that parents are highly familiar with the ESRB’s rating system. According to a March 2010 ESRB-commissioned survey of parents, administered by the independent research firm Peter D. Hart Associates, 86% of parents with children who play video games are aware of the ESRB’s rating system.²³ This result is consistent with a 2006 survey conducted by the FTC, which found that 87% of parents were aware of ESRB ratings. FTC 2007 Report at 27. The FTC also found a high degree of confidence in the ESRB’s ratings, with 87% of parents reporting that they were “very satisfied” or “somewhat satisfied” with the ratings. *Id.* at 29.

²³ *Consumer Research, ESRB Survey: Parental Awareness, Use & Satisfaction*, available at <http://www.esrb.org/about/awareness.jsp> (hereafter “ESRB Parent Survey 2010”).

In its brief in support of Petitioners, *amicus curiae* Eagle Forum Education & Legal Defense Fund argues that parents cannot trust the ESRB because it is not privy to ultra-violent or sexually-explicit content hidden by video game developers, citing the 2005 “Hot Coffee” incident. Eagle Forum Br. at 20. The Hot Coffee incident, however, proves just the opposite.

After the ESRB discovered an unauthorized, third-party modification to *Grand Theft Auto: San Andreas*, the ESRB quickly determined that this third-party modification allowed access to game code that had been “locked out” by the publisher (*i.e.*, not intended to be playable by purchasers of the game).²⁴ Although ESRB submission policies at the time did not specifically reference “locked out” content on the game disc, the ESRB revoked the game’s M rating and assigned the game a rating of AO, causing a de facto \$24.5 million recall when retailers pulled the game from shelves.²⁵ The ESRB then clarified its content disclosure policies to unambiguously require publishers to disclose in their submission materials any pertinent content contained on the game disc, whether or not such content was intended to be playable.²⁶ Publishers who fail to do so can now be subject to fines of up to one million dollars in addition

²⁴ When video games are created, game developers frequently “lock out” game code they ultimately do not wish to be part of final game play. They do this rather than “delete” such code since doing so increases the risk of compromising the stability of the remaining code.

²⁵ <http://www.gamespot.com/news/6152490.html>.

²⁶ <http://www.esrb.org/about/news/7202005.jsp>.

to corrective actions, including but not limited to product recall.²⁷

Far from damaging the ESRB's reputation, the Hot Coffee incident, coupled with the ESRB's rapid and effective response, increased the ESRB's standing with parents. In a survey taken just after the Hot Coffee incident, 91% of parents said their trust in the ESRB's ratings either stayed the same or increased.²⁸

Because the ESRB has cultivated a high level of trust in its rating system, today's parents rely heavily on ESRB ratings when making purchasing decisions for their families. Ninety-eight percent of parents who are aware of ESRB ratings find them either "very helpful" (76%) or "somewhat helpful" (22%) in choosing games for their children.²⁹ As a result, 75% of parents regularly check a game's rating before making a purchase, and 53% check every time. Even among parents who do not check the rating every time, only 7% cite disagreement with the ESRB ratings as the reason for their failure to check.

The FTC reported that 73% of parents who are aware of ESRB ratings use them "most or all of the time." FTC 2007 Report at 27. The FTC also found that parents who allow their children to play T- or M-rated games are more likely to use the ESRB's rating system than those who do not. *Id.* This finding

²⁷ http://www.esrb.org/about/news/downloads/pvtestimony_6_14_06.pdf, p. 6.

²⁸ http://www.esrb.org/about/news/downloads/pvtestimony_6_14_06.pdf, p. 9.

²⁹ ESRB Parent Survey 2010, available at <http://www.esrb.org/about/awareness.jsp>.

demonstrates that parents who actively screen for inappropriate content find the ESRB's rating system especially helpful.

2. A state-sponsored program to further educate parents about the ESRB's rating system would be a less restrictive and more effective means of achieving California's stated goal of parental empowerment.

The Ninth Circuit correctly held that “an enhanced education campaign about the ESRB rating system” is a less restrictive alternative means of empowering parents to guide their children's upbringing. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 965 (9th Cir. 2009). The overwhelming majority of parents are aware of and use ESRB ratings regularly in their purchasing decisions. A state-sponsored educational campaign could increase awareness and use of the ESRB's rating system to near-universal levels, giving parents all of the tools they need to make informed decisions about the games they allow their children to play.

As discussed above, every video game sold at retail displays one of the six ESRB age-rating categories on the front of the box. The rating category is repeated on the back of the box alongside, when assigned, one or more content descriptors. Of the 30 official ESRB content descriptors, almost a third (nine) describe violent content. Upon reading these descriptors, parents know immediately whether a game they are considering contains, for example, “cartoon violence,” “intense violence,” “fantasy violence,” or simply contains “violent references.”

Parents can also easily access more in-depth information about the content in a particular game by reviewing its ESRB rating summary (which is posted online at www.esrb.org) or, when shopping, by using their mobile device to search for the game on the ESRB's mobile website or rating search application. The FTC recently hailed the ESRB's rating summaries, stating in its report to Congress, "The Commission commends the ESRB for its new online ratings summaries This tool should enhance parental understanding of the ratings and the ratings process." FTC 2009 Report at 31. The ESRB introduced rating summaries relatively recently, but parents already rely on them in significant numbers.³⁰

The best way to illustrate how effectively the ESRB communicates information about game content to parents is to consider a specific example. For parents considering whether their children should play *Modern Warfare 2*, Activision Blizzard's highest-grossing 2009 release, the ESRB rating system provides ready access to the following information. The game's M-rating figures prominently on the front of the box.³¹ On the back of the box, ESRB content descriptors further indicate that the game contains "Blood, Drug Reference, Intense Violence, Language."

³⁰ In 2009 alone, [esrb.org](http://www.esrb.org) recorded 530,000 rating summary views.

³¹ See *Game Box Shot, Call of Duty: Modern Warfare 2*, GameSpot, <http://www.gamefaqs.com/ps3/951943-call-of-duty-modern-warfare-2/images/box-109829>. Activision Blizzard fully supports the ESRB's M-rating for *Call of Duty: Modern Warfare 2*, which indicates that the material may be suitable for persons 17 years of age and older.

Id. The ESRB's rating summary additionally provides a far more specific level of detail, including the following description of the game's most violent content:

This is a first-person shooter in which players assume the roles of members of an elite squadron on the trail of a Russian ultranationalist. Players defend the U.S. from Russian armed forces, engage in skirmishes and combat missions, and track the ultranationalist in an attempt to discover his true motivations and co-conspirators. Players use machine guns, sniper rifles, grenades, and missiles to kill enemy soldiers throughout the battlefields. Realistic gunfire, explosions, and cries of pain are heard during the frequent and fast-paced combat. The most intense depiction of violence occurs during a "No Russian" mission where players take on the role of an undercover Ranger: Several civilians are gunned down at an airport as players are given a choice to participate in the killings (e.g., players can shoot a wounded civilian that is crawling on the ground), or walk by and observe without opening fire. In either case, civilians scream and emit pools of blood as they are shot to death. Within the multiplayer portion of the game, players can unlock "emblems" to be used on their player name cards. Some of these emblems contain images that reference drugs (e.g., a cannabis leaf; a name card with a depiction of a joint).

Dialogue in the game contains profanity in both English (e.g., “sh*t”) and Russian (e.g., “f**k” and “motherf**ker”).³²

From the clear age rating to the numerous content descriptors to a detailed rating summary, the ESRB’s rating system ensures that parents who are considering whether to allow their children to play *Modern Warfare 2* have all of the information they need to make an informed decision. By contrast, California’s flat prohibition on the sale of certain violent video games at retail does not empower parents to guide their children’s upbringing as effectively as giving parents the information they need to make educated decisions about which games they should allow their children to play.

In sum, the ESRB’s rating system is a less restrictive alternative to achieving California’s stated goal of protecting children and empowering parents. As demonstrated above, the ESRB’s rating system provides parents with the tools they need to make informed purchase and rental decisions for their children. Moreover, because the ESRB’s rating system is coupled with retailer restrictions on the sale of M-rated games to minors, the California statute’s reliance on civil penalties alone cannot possibly prove as effective in achieving California’s goals as would state support of the existing ESRB system and retail partnerships.

³² *Rating Information, Call of Duty: Modern Warfare 2*, ESRB, <http://www.esrb.org/ratings/synopsis.jsp?Certificate=27566>.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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September 2010

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