

No. 08-1448

In the Supreme Court of the United States

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

v.

ENTERTAINMENT MERCHANTS ASSOCIATION, ET AL.

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

**BRIEF OF THE CATO INSTITUTE AS *AMICUS
CURIAE* SUPPORTING RESPONDENTS**

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Entertainment Software Ratings Bd., <i>Game Ratings & Descriptor Guide</i> , at http://www.esrb.org	28, 29, 30, 31, 32
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Federal Trade Commission, <i>Marketing Violent Entertainment to Children: A Sixth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries: A Report to Congress</i> (Dec. 2009)	<i>passim</i>

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Microsoft, <i>What can I control with Parental Controls?</i> , at http://windows.microsoft.com/en-US/windows-vista/What-can-I-control-with-Parental-Controls	34
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INTEREST OF THE AMICUS CURIAE¹

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. Cato has a substantial interest in this case because the California law at issue, if upheld, has the potential to erode First Amendment rights and insert the heavy hand of government into the individual choices of consumers, businesses, and parents.

SUMMARY OF ARGUMENT

This case concerns a California statute that seeks to protect minors by making it illegal to sell a “violent video game” to anyone under the age of 18.²

¹ No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae* and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

² Under the statute,

“violent video game” means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:

(1)

According to petitioners, video games represent a uniquely violent entertainment phenomenon that merits unique restrictions on free speech. But the kinds of concerns raised against violence in video games are not unique or novel; they have been raised repeatedly in the past about other new entertainment forms, including dime novels, movies, radio drama, comic books, television, and popular music. Invariably, the best response has been industry self-regulation and parental involvement.

The most effective self-regulatory systems have been found to involve age-based ratings, detailed content description, and vigorous retailer enforcement. Such systems prevent minors from accessing mature content without parental consent while providing parents with the information necessary to decide for themselves the amount of exposure that is appropriate for their children.

(A) Comes within all of the following descriptions:

- (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.
- (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.
- (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

(B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.

Cal. Civ. Code § 1746(d)(1).

The video game industry already has such a system, one that incorporates the most effective attributes of other entertainment industries' self-regulatory mechanisms while avoiding those elements that can limit their impact. Respected sources (including the Federal Trade Commission) have called the video game industry's ratings and enforcement regime the most effective industry self-regulation in the entertainment field today, and it is one that is continually improving. Moreover, most of the remaining shortcomings identified with the video game industry's system would not be addressed by the California statute. The current self-regulatory scheme is therefore a vastly preferable alternative to a restrictive law that impinges on free speech and would likely do more harm than good.

ARGUMENT

I. Recurring Controversies About Violence In Entertainment Demonstrate That Statutory Prohibition Is Not Warranted

Despite petitioners' attempts to depict video games as a new and uniquely violent entertainment phenomenon, many of the concerns and issues in this case are anything but new, but date back centuries, if not millennia. As Judge Richard Posner noted in rejecting an Indianapolis law restricting violent video games, violence has infused popular entertainment from our earliest days:

Classic literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial.

* * * *

* * * Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault are aware.

Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 575, 577 (7th Cir.), cert. denied, 534 U.S. 994 (2001).

Indeed, a story in the first collection of *Nursery and Household Tales* by the Brothers Grimm, titled "How the Children Played Butcher with Each Other," reads in its entirety:

A man once slaughtered a pig while his children were looking on. When they started playing in the afternoon, one child said to the other: "You be the little pig, and I'll be the butcher," whereupon he took an open blade and thrust it into his brother's neck. Their mother, who was upstairs in a room bathing the youngest child in the tub, heard the cries of her other child, quickly ran downstairs, and when she saw what had happened, drew the knife out of the child's neck and, in a rage, thrust it into the heart of the child who had been the butcher. She then rushed back to the house to see what her other child was doing in the tub, but in the meantime it had drowned in the bath. The woman was so horrified that she fell into a state of utter despair, refused to be consoled by the servants, and hanged herself. When her husband returned home from the fields

and saw this, he was so distraught that he died shortly thereafter.

Jacob Grimm & Wilhelm Grimm, *The Annotated Brothers Grimm* 372 (Maria Tatar, ed., Norton 2004) (1812).

Other nursery tales from the Brothers Grimm contain similarly graphic depictions. The Grimms' version of "Cinderella," for example, tells of Cinderella's stepsisters slicing off parts of their feet with a knife in order to fit into the slipper, only to have their deception discovered when the prince noticed that "blood was spurting" from the shoe. *Id.* at 125-26. At the story's end, the stepsisters' eyes are pecked out by doves, punishing them "for their wickedness and malice with blindness for the rest of their lives." *Id.* at 127.

The Grimms' tales were criticized for their content and some critics urged parents to keep the stories out of the hands of children. *Id.* at xxxix. In response, the Grimms toned down or removed many of the more lurid parts in later editions. *Id.* at xlii. The Grimms, however, did more to eliminate sexual references than depictions of violence, and sometimes increased the degree of violence suffered by wrongdoers to emphasize aspects of morality. *Id.* at xliii-xlv.

The Grimms' tales, of course, were far from the first entertainment to contain representations of violence. Homer's *Odyssey*, in Judge Posner words, contains "graphic descriptions of Odysseus's grinding out the eye of Polyphemus with a heated, sharpened stake," *Kendrick*, 244 F.3d at 577, and much of

Shakespeare's entertainment, in its non-bowdlerized form,³ is not for the faint of heart. And for as long as there has been violence in popular entertainment, there has been criticism that violent content is inappropriate for minors.

It is not the purpose of this brief to discuss the validity of such concerns, but a brief summary of depictions of violence in entertainment through history demonstrates that there is nothing novel about the present controversy. Similar concerns in the past were largely addressed without legislation that restricted speech. In each instance, the controversial new medium was portrayed as petitioners attempt to portray video games: as a unique and grave threat to morals and safety.

A. Dime Novels and Penny Dreadfuls Were Thought to Corrupt the Young

In the mid-to-late 1800s, the "dime novel" and "penny dreadfuls" first brought inexpensive literary entertainment to the masses. They were decried as overly violent and harmful to young readers. Dime novels averaged, by one estimate, some twenty killings per novel, and were often blamed for antisocial conduct. Harold Schechter, *Savage Pastimes: A Cultural History of Violent Entertainment* 33 (2005). Newspaper articles of the time are replete with tales like that of 13-year old Ernest Rossies of Brooklyn, N.Y., who fired a gun during a robbery and whose "friends say that he is the victim of dime novel lit-

³ In 1818, Thomas Bowdler published *The Family Shakespeare*, an expurgated version of Shakespeare's work intended to be more appropriate for women and children.

erature.” *Thirteen Year Old Desperado*, N.Y. Times, Feb. 6, 1896, at 1. A similar newspaper account reports that “Daniel McLaughlin, fifteen years[,] * * * sought to emulate the example of the heroes of the dime novels and ‘held up’ Harry B. Weir in front of 3 James Street last night.” *City and Suburban News*, *New York*, N.Y. Times, Jan. 27, 1890, at 2.

In England, “penny dreadful” publications (so named because of their price and content) were condemned for glorifying criminals and reveling in graphic depictions of violent behavior. They were blamed for youthful delinquency by the media and parents alike. “There isn’t a boy or a young lad tried at our Courts of Justice whose position there is not more or less due the effect of unwholesome literature upon his mind,” opined the recorder for the City of London in 1885. James B. Twitchell, *Preposterous Violence: Fables of Aggression in Modern Culture* 169 (1989) (quoting Sir Thomas Chambers in the periodical *The Boy’s Own Paper*).

The popularity of such fare, and its perceived impact on the young, caught the attention of Anthony Comstock, renowned Post Office Inspector and member of the New York Society for the Suppression of Vice. While Comstock is better known for his vehement opposition to sexual content, he also campaigned against cheap popular literature out of fear that its violent portrayals would lead minors toward “corruption and criminality.” Anthony Comstock, *Traps for the Young* ix (1883).

B. Movie Violence Was Initially Viewed as Even More Harmful Than Dime Novels

The arrival of moving pictures sparked similar concerns about their depictions of violence. As the *New York Times* wrote in 1909:

The days when the police looked upon dime novels as the most dangerous of textbooks in the school for crime are drawing to a close. They have found a new subject for attack. They say that the moving picture machine, when operated by the unscrupulous, or possibly unthinking, tends even more than did the dime novel to turn the thoughts of the easily influenced to paths which sometimes lead to prison.

Moving Pictures as Helps to Crime, N.Y. Times, Feb. 21, 1909.

One of the very first films to feature a narrative storyline, *The Great Train Robbery*, was denounced for its violence and blamed for real-life imitators, even when there was no evidence that criminals had seen it. Schechter, *supra*, at 119. That film contained some seven killings in its roughly ten-minute length, including one victim who was struck repeatedly in the head with a lump of coal and thrown off a train, and another who was shot in the back at close range. *The Great Train Robbery* (Edwin S. Porter 1903).

Concern over depictions of sexual content and violence prompted several states to censor film content, restrictions that this Court upheld because such movies could “be used for evil.” *Mutual Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 242

(1915). Parental concerns, as well as the fear of additional censorship, prompted the creation of the Hays Code in 1930, which provided a seal of approval to films only in the absence of certain forbidden elements. Open-mouth kissing and verbal profanity, for example, were not allowed, and criminals were not permitted to escape justice. Under the Code, films were simply approved or disapproved based upon whether they were deemed “moral” or “immoral.” Jacob Septimus, *The MPAA Ratings System: A Regime of Private Censorship and Cultural Manipulation*, 21 Colum.-VLA J.L. & Arts 69, 71 (1996-97).

In 1952, this Court overruled *Mutual Film* and extended full First Amendment protection to movies, declaring that even were the Court to “accept the hypothesis [that] motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression[,] * * * it does not follow that motion pictures should be disqualified from First Amendment protection.” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). Despite that ruling, in 1965, the City of Dallas enacted the first movie classification regulation designed solely to protect children. This Court, in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968), struck down the City’s ordinance as violative of the First Amendment. Justice Marshall, writing for the majority, expressed support in dictum for a voluntary age-based classification scheme for movies. *Id.* at 690.

Dissatisfied with the Hays Code, and following the suggestion of Justice Marshall, the Motion Pic-

ture Association of America (“MPAA”), in conjunction with the National Association of Theater Owners, created a voluntary age-based rating system. The MPAA system was designed to free filmmakers from the strictures of the Hays Code while enabling parents to decide for themselves whether a film’s content is suitable for their children.

C. Radio Violence Was Considered Harmful Because Of Its Intensity And Audio-Only Format

Much like film, radio dramas were also criticized for bringing sensational fare into the home. *Radio Gore Criticized for Making Children’s Hour a Pause That Depresses*, Newsweek, Nov. 8, 1937, at 26. In 1941, pediatrician Dr. Mary Preston released a study concluding that a majority of children had a “severe addiction” to radio crime drama. Mary I. Preston, *Children’s Reactions to Movie Horrors and Radio Crime*, 19 J. of Pediatrics 145, 147-49 (1941). According to Preston, children obsessed over the horror and violence presented in such programs, often identifying with criminals and daydreaming about murder and mayhem.

Preston believed that exposure to this “indigestible mass forced into [a child’s] mental craw” through radio and films had made children callous. *Id.* at 149. As proof, she quoted comments from 10-year-olds such as, “I don’t mind killings now even when they are sawed up,” and “Murders are best. Shooting and gangsters next. I liked the Vampire sucking out blood very much.” *Id.* at 158, 163.

Others argued that the radio medium was even more harmful to children than movies because its aural-only character made young listeners visualize the horror in their heads. This interactivity, according to critics, resulted in depictions that were more intense, and made it more difficult for listeners to distinguish radio violence from reality. Schechter, *supra*, at 130 (citing Lyman Bryson in *The Journal of Adult Education*, 1932).

D. Comic Books Were Considered More Dangerous Than Previous Mediums

Just as depictions of violence in films and radio were decried as “different” and more damaging than those of earlier entertainment forms, similar claims were leveled against comic books in the 1940s and ‘50s. The crusade against comics was led by New York psychiatrist Dr. Fredric Wertham, who placed the blame for teenage degeneracy largely on comic book consumption:

A thirteen-year-old boy in Chicago has just murdered a young playmate. He told his lawyer, Samuel J. Andalman, that he reads all the crime comic books he can get hold of. He has evidently not kept up with the theories that comic-book readers never imitate what they read. He has just been sentenced to twenty-two years in jail; while the comic-book publishers who killed his mind with thoughts and methods of murder, and their experts who say his reading was good for him, continue as before.

Fredric Wertham, *The Comics . . . Very Funny!*, *Saturday Review*, May 29, 1948, at 6, 8.

Wertham asserted that while youth may have always relished sensational entertainment, comics were “an entirely new phenomenon” because of their numbers, their extreme depictions of “violence, cruelty, sadism, crime, beating, promiscuity, sexual perversion, race hatred, contempt for human beings, descriptions of every conceivable crime, every method of concealing evidence, and every way to avoid detection,” and their widespread acceptance by adults. Fredric Wertham, *It’s Still Murder: What Parents Still Don’t Know About Comic Books*, Saturday Review, Apr. 9, 1955, at 11, 12. Said Wertham, “Never before in the history of civilized countries have adults been more deficient in their duty to the young.” *Id.* at 46.

Complaints by Wertham and others led to repeated Congressional hearings at which many witnesses attributed violent behavior to consumption of comics. One mother testified that her 16-year old son, who along with friends had murdered a gas station attendant, had been a “good boy” before falling under the influence of comic books and “girlie magazines”:

We definitely feel that these books were a contributing factor – if not more than that * * *. He never got into trouble. But a few months before this [murder] he started reading these things. He would just lie on the bed and read his comic books or just stare at the ceiling.

Crime of Boy Linked to Lurid Magazines, N.Y. Times, Dec. 9, 1952, at 38.

Despite such testimony, Congress's final recommendation was to rely on industry self-regulation. In response, the industry devised the Comics Code Authority in 1954. The Authority laid out voluntary guidelines prohibiting the use of certain violent images and words in comic books and requiring, among other things, that good always prevail over evil. Code of the Comics Magazine Association of America, Code for Editorial Matter, General Standards Part A (6) (1954).⁴

E. Television and Rock Music Also Have Been The Focus Of Great Concern

With the arrival of television came familiar concerns about the effects of violent content. As early as 1954, the U.S. Senate held hearings on the impact of television programs on juvenile crime. *Juvenile Delinquency (Television Programs): Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 83d Cong., 2d Sess. (1954). Congress has intermittently held hearings on this topic ever since. John P. Murray, *The Impact of Televised Violence*, 22 Hofstra L. Rev. 809, 809-10 (1993-94). Studies and reports on television violence have been conducted by, among others, the U.S. Surgeon General, the National Research Council, the National Commission on the Causes and Prevention of Violence, the American Psychological Association,

⁴ Some efforts to create alternatives to contemporary comic books contain a note of irony. In 1948, a group of parents concerned about the content of popular crime comics began publishing their own comic books depicting the fairy tales of, among others, the Brothers Grimm. *New War Started on Crime Comics*, N.Y. Times, Dec. 5, 1948, at 65.

psychiatry professor Albert Bandura, and psychology professors Robert Liebert and Robert Baron. *Id.* at 810-14.

It would require hundreds of pages to summarize the myriad findings of those reports which are, unsurprisingly, not entirely consistent. But it suffices to say that numerous researchers concluded there was a correlation between children watching depictions of violence on television and aggressive behavior toward others. Despite that, the ultimate governmental response to violence on television has not been to impose censorship but to encourage the industry to establish its own voluntary system to enable parents to make decisions for their families.

In 1990, Congress passed the Television Program Improvement Act granting antitrust immunity to broadcasters in order to enable them to jointly set guidelines “designed to alleviate the negative impact of violence in telecast material.” 47 U.S.C. § 303c. In the Telecommunications Act of 1996, Congress further required the television industry to devise a voluntary rating system, similar to that for film, to categorize programs based on the presence of violence or other sensitive content or allow the Federal Communications Commission to provide its own. Pub. L. No. 104-104, § 551(b), 110 Stat. 56, 140 (1996). The industry responded with the TV Parental Guidelines, a set of age-based ratings for television programs. The current version of the Guidelines went into effect on October 1, 1997.

In the 1980s, many parents and teachers became concerned about the effects of music with “explicit”

lyrics, generally concerning sex, violence, and substance abuse. Tipper Gore and other parents founded the Parents Music Resource Center and persuaded the Senate Commerce, Technology, and Transportation Committee in 1985 to hold hearings on the lyrics of popular music. This led to the Recording Industry Association of America (“RIAA”) adopting “parental advisory” logo standards, which encourage music producers to place warning stickers on packaging containing songs deemed to have explicit content. RIAA, *Parental Advisory Label (“PAL”) Program*, at http://www.riaa.com/parental_advisory.php.

The PAL program has not quelled criticism of popular music, however, and many continue to assert that rap and heavy metal music glorify violent crime and desensitize the young. For example, some critics have blamed the musician Marilyn Manson for school shootings after at least one perpetrator was found to be a fan. Andrew Gumbel, *Boy, 14, Kills Himself After Shooting Four In School Rampage*, *Indep.*, Oct. 11, 2007.

F. Video Game Violence Is Not Materially Different From Depictions In Previous Mediums

Petitioners argue that regulation of video game content is warranted because the “level of graphic detail and realism contained in modern violent video games is without historic parallel,” and the interactive nature of video games distinguishes them from other mediums depicting violence. Pet’r Br. 43, 55. Such a claim strikes a familiar chord and, in the

words of Judge Posner, is “erroneous.” *Kendrick*, 244 F.3d at 577. While critics of cheap fiction and movies and radio and comics claimed that each of those new mediums presented a unique potential for harm, the only real difference is the method of depiction. As Judge Posner observed:

All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader’s own.

Id.

Most video games are, at bottom, creative stories. Some believe that video games more fully immerse the user in the story than other forms of entertainment, but all forms are, in one way or another, participatory. The fact that video games are different than earlier entertainment mediums does not by itself establish that they are more dangerous for youth or warrant regulation. Instead, criticism of video games is part of a recurrent cycle of initial denunciation before eventual acceptance of new entertainment mediums.

Harold Schechter, in the book *Savage Pastimes*, contextualized the current controversy over video game violence:

That today’s antipop crusaders denounce movie and video violence because it is visual – while

their counterparts in the 1930s attacked radio crime shows because they were transmitted aurally – and Victorian reformers deplored the dime novel because it was written in a sensational, subliterate style – leads one to conclude that it doesn't really matter *what* the medium is. The real issue is that there will always be people who are incensed by violent entertainment, whether it is transmitted via sound or image, print or pixel; and that the current uproar over popular culture is simply part of a never-ending cycle of outrage that will undoubtedly go on into the future, when today's controversial cinematic and video shoot-'em-ups will come to seem as harmless as the average episode of *The Shadow* or *Captain Midnight*.

Schechter, *supra*, at 130.

Amicus curiae does not suggest that lawmakers are misguided in their efforts to safeguard California's children. We merely note that these kinds of concerns have been raised repeatedly in the past about new mediums, and the best response has invariably been industry self-regulation—particularly self-regulation that affords parents the ability to decide for themselves the amount of exposure to violence that is appropriate for their children.

The Federal Trade Commission has echoed this view, repeatedly affirming its support for “private sector initiatives by industry and individual companies” to address concerns about violence in films, music, and video games. Federal Trade Comm'n, *Marketing Violent Entertainment to Children: A*

Sixth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries: A Report to Congress at v (Dec. 2009) (“*FTC 2009 Report*”); see also *id.* at 32 (“Although the Commission has identified areas where the entertainment industry can improve its self-regulatory programs, in light of First Amendment considerations, the Commission continues to support self-regulatory efforts to implement these recommendations.”); see also Federal Trade Comm’n, *Marketing Violent Entertainment to Children: a Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries: A Report of the Federal Trade Commission* 52 (Sept. 2000) (“*FTC 2000 Report*”) (“Because of First Amendment protections afforded to these products, industry is in the best position to provide parents with the information they need”).

Indeed, the video game industry already has an effective self-regulatory system overseen by the Entertainment Software Ratings Board (“ESRB”). Before explaining the ESRB system and its effectiveness, it is worth briefly surveying other industries’ voluntary rating regimes to show which aspects have been deemed most productive.

II. Voluntary Ratings Systems Successfully Help Parents Limit Their Children's Exposure To Violent Content

A. The MPAA Rating System Is Effective Because It Is Age-Based, Provides Specific Content Information, And Is Widely Used And Enforced

The ratings system most similar to the ESRB model is the film industry's MPAA system, which is well established as a useful tool to help parents make decisions about their children's movie viewing while protecting the free expression of ideas.

1. The MPAA Is An Age-Based System With Content Descriptors

The MPAA system is a judgment-neutral system designed to give parents information about a film's content and help them determine whether a movie is suitable for children of certain ages. Ratings are meant for parents only, and their purpose is not to promote certain behaviors or beliefs, serve as a guardian of morality, or pass judgment on whether a film is "good" or "bad." Classification & Rating Admin., *About Us*, at http://www.filmratings.com/filmRatings_Cara/#/about/ ("CARA, *Film Ratings*").⁵

⁵ The present system includes film ratings of G (all ages admitted); PG (parental guidance suggested; some material may not be suitable for children); PG-13 (parents strongly cautioned; some material may be inappropriate for children under 13); R (restricted; under seventeen requires accompanying parent or adult guardian); and NC-17 (no one under seventeen admitted). CARA, *Film Ratings*.

In response to criticism that letter ratings alone did not provide parents enough information, the MPAA added more detailed descriptors in 1990 for any rating beyond “G.” There is no set list of descriptors, but examples include:

- *Piranha 3D* – “Rated R for sequences of strong bloody horror violence and gore, graphic nudity, sexual content, language and some drug use”;
- *Eat Pray Love* – “Rated PG-13 for brief strong language, some sexual references and male rear nudity”;
- *Alice in Wonderland* – “Rated PG for fantasy action/violence involving scary images and situations, and for a smoking caterpillar.”

CARA, *Film Ratings*. The descriptors are required to appear in television ads and previews and in newspaper and magazine advertisements five inches or higher in size. *FTC 2009 Report, supra*, at 9.

Raters are parents unaffiliated with the film industry, and their job is to “reflect what they believe would be the majority view of their fellow American parents in assigning a rating to a film.” CARA, *Film Ratings*. They view submitted films in their entirety and the rating is determined by vote. The film’s producer can then accept the rating, appeal it to an industry board, revise and resubmit the film, or release it without a rating.

2. The MPAA Rating System Is Widely Used And Generally Effective

The MPAA system has been in place since 1968 and is now “well established with the American public.” *FTC 2000 Report, supra*, at 6. Several examinations of the system have concluded that parents use the ratings in making decisions about their children’s viewing habits. In 2002, a study found that 69% of parents “always” check the rating and 15% of parents “often” check before allowing their children to see a movie. Douglas A. Gentile & David A. Walsh, *A Normative Study of Family Media Habits*, 23 J. Applied Developmental Psychol. 157, 169 (2002). More recently, the FTC’s 2009 report found that 76% of parents reported using the system all or most of the time when deciding whether to let their children view a movie. Only 9% of parents reported that they “rarely” or “never” use the rating system. *FTC 2009 Report, supra*, at 16.

While films can be released without a rating, MPAA members have pledged to submit all of their films and only release them in theaters as rated. CARA, *Film Ratings, supra*. Unrated films are generally given only limited release because about 85% of theaters participate in the MPAA system.⁶ Richard M. Mosk, *Motion Picture Ratings in the United*

⁶ While 195 films were released without ratings in 2009, representing 37.4% of total film releases, they accounted for only 0.3% of gross film receipts because they were shown on fewer screens and had lower attendance. Box Office Mojo, *Yearly Box Office*, at <http://www.boxofficemojo.com/yearly/?view2=mpaa&chart=byyear&yr=2009&view=releasedate&p=.htm>.

States, 15 *Cardozo Arts & Ent. L.J.* 135, 138 (1997). Minors’ access to NC-17 and R-rated films is restricted at these theaters.⁷

Since 2000, the FTC has tracked theater compliance through “undercover shops” to see if unaccompanied minors are able to obtain tickets to R-rated films. In 2009, the FTC found that theaters denied admission to R-rated movies to 72% of underage buyers, representing an 11% improvement over 2006 and an 18% improvement over 2000, *FTC 2009 Report, supra*, at 19, suggesting that enforcement and compliance are improving. See also Federal Trade Comm’n, *Marketing Violent Entertainment to Children: A Fifth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries: A Report to Congress* 8 (Apr. 2007) (“*FTC 2007 Report*”).

3. The MPAA Rating System Has Not Been Free From Criticism

The MPAA system has been subject to some criticism. The primary complaints are that the raters are not as a statistical matter sufficiently representative of the American public; that ratings can appear inconsistent or arbitrary and the ratings method is not transparent; that ratings assignments are subject to “ratings creep,” an increase in tolerance for mature content; and that ratings are not detailed enough and do not address many specific issues that concern parents—primarily depictions of

⁷ G, PG, and PG-13 are considered parental guidance ratings and theaters thus do not enforce any age requirement. CARA, *Film Ratings, supra*.

alcohol and tobacco use. Although some concerns were addressed in 2007 when MPAA added tobacco use as a consideration in determining a film's rating, CARA, *Film Ratings, supra*, some contend that further progress could be made.⁸

Concerns about lack of detail may be due, in part, to the fact that while film content descriptors (such as those citing depictions of tobacco use) were added to film ratings in 1990, the descriptors were not included in most promotional material until the FTC urged the MPAA to do so in 2001.⁹ The descriptors are still not included in small-print ads and may be difficult to read when displayed in TV advertisements. *FTC 2009 Report, supra*, at 9. As a result, parents are less aware of film content descriptors (and accordingly use them less) than simple letter ratings. Even so, the MPAA system is generally viewed as an effective alternative to government regulation, since it is well known, well understood, and commonly used by parents. Indeed, the only entertainment rating system considered as effective is

⁸ Depictions of smoking do not require assignment of a particular rating, and some critics contend that the system does not do enough for parents wishing to limit their children's exposure to tobacco content. Jennifer J. Tickle et al., *Tobacco, Alcohol, and Other Risky Behaviors in Film: How Well do MPAA Ratings Distinguish Content?*, 14 J. Health Comm. 756 (2009).

⁹ See Federal Trade Comm'n, *Marketing Violent Entertainment to Children: A One-Year Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries: A Report to Congress 8-9* (Dec. 2001) ("*FTC 2001 Report*").

the ratings system for video games. *FTC 2009 Report, supra*, at iii.

B. The Television and Music Rating Systems Still Have Room To Improve

The television and music industries have parental guidance systems as well, but theirs are less established and generally considered less effective than those of the MPAA and ESRB, due primarily to their methodology and lack of descriptive content information.

The present TV Parental Guidelines provides for seven categories, including

- TV-Y7 – program is designed for children age 7 and above;
- TV-PG – program contains material that parents may find unsuitable for younger children;
- TV-14 – program contains some material that many parents would find unsuitable for children under fourteen years of age; and
- TV-MA – program is designed to be viewed by adults and therefore may be unsuitable for children under seventeen.

TV Parental Guidelines, *Understanding the TV Ratings*, at <http://www.tvguidelines.org/ratings.htm>.

As with the MPAA system, ratings above the one appropriate for the youngest audiences (here, TV-PG, TV-14, and TV-MA) are supplemented with content labels indicating that a show contains violence, sex, adult language, or suggestive dialogue (designated by the letters “V,” “S,” “L,” or “D”). *Id.* Rat-

ings are presented using a ratings icon, usually located in the upper-left corner of the screen during a program's first fifteen seconds. TV Parental Guidelines, *Frequently Asked Questions*, at <http://www.tvguidelines.org/faqs.htm>.

The Guidelines are designed to be used in conjunction with the V-Chip (for "ViewControl"), a filtering device parents can use to block reception of rated programs. *Id.* All television sets sold in the United States since 2000 include V-Chip capability. When a parent blocks a particular age-based rating, all categories above that rating will also be blocked. *Id.*

The methodology for rating TV programs differs from the ESRB and MPAA systems. Rather than using a single independent board to assign ratings, TV programs are rated by individual broadcast networks, stations, or program producers. Their primary guidance for determining the appropriate rating is the ratings category descriptions themselves. *Id.* Ordinarily, a network provides a "pre-rating" for each show before sending it to a local affiliate. The local broadcaster can revise the network's pre-rating, although most simply accept it. Douglas A. Gentile et al., *Media Ratings for Movies, Music, Video Games, and Television: A Review of the Research and Recommendations for Improvements*, 16 *Adolescent Med. Clinics* 427, 432-33 (2005). The possibility exists, however, for different networks, and even different affiliates of the same network, to assign different ratings to the same program. *Id.*

While many parents find the ratings helpful, studies have also found that parents are often un-

aware of the TV ratings or the meaning of them. For example, a decade after the system's introduction, one report found that only 11% of parents knew that "FV" indicated violent fantasy depictions in children's programming. Victoria Rideout, *Parents, Children and Media: A Kaiser Family Foundation Survey* 8 (Kaiser Family Found. Publ'n No. 7638, 2007). Many parents thought "FV" denoted "family viewing." *Id.* See also Patricia M. Figliola, Cong. Research Serv., RL32729, *V-Chip and TV Ratings: Monitoring Children's Access to TV Programming* 8 (2005).

The system has also been criticized because of the complexity of using the V-Chip. A 2006 study found that fewer than 10% of parents use the V-Chip, with many finding it confusing to program. Ronda M. Scantlin & Amy B. Jordan, *Families' Experiences with the V-Chip: An Exploratory Study*, 6 J. Fam. Comm. 139, 139-40 (2006).

The RIAA's Parental Advisory Label Program, like the TV ratings system, does not rely on an independent ratings board. While the RIAA puts forth advisory standards, individual record companies and artists decide which releases should receive a "PAL," a notice affixed on packaging material indicating that the recording may contain strong language or depictions of violence, sex, or substance abuse. "*PAL*" Program, *supra*. PALs do not generally contain information about what specific content prompts the label, although some music companies use an "enhanced PAL" that provides additional descriptors such as "Strong Language" or "Sexual Content." *FTC 2009 Report, supra*, at 19. Participating

merchants are not supposed to sell music with a PAL sticker to anyone under 17 unaccompanied by an adult.

The Federal Trade Commission has repeatedly criticized the PAL system for failing to rate material based upon age groups, failing to provide information about the type of content involved, and for inadequate enforcement at the retail level. *Id.* at 20-23. In FTC's 2009 undercover "shop," 72% of unaccompanied minors were able to purchase PAL-labeled music. *Id.* at 22.

III. The ESRB Voluntary Rating System And Parental Controls Are An Effective Alternative To Legislation

The ESRB rating system incorporates the most effective attributes of the MPAA ratings while improving on that system by furnishing additional information and stronger enforcement mechanisms. The ESRB system also avoids some of the elements that have limited the impact of the music and television ratings systems. The result is a system about which the FTC has recently observed, "[o]f the three entertainment sectors, the electronic game industry continues to have the strongest self-regulatory code." *FTC 2009 Report, supra*, at iii. Furthermore, the ESRB has continued to improve the ratings system in response to public concerns. As the FTC noted:

the video game industry outpaces the movie and music industries in the three key areas that the Commission has been studying for the past decade: (1) restricting target-marketing of mature-rated products to children; (2) clearly and promi-

nently disclosing rating information; and (3) restricting children's access to mature-rated products at retail.

Id. at 30. Moreover, most of the remaining shortcomings identified with the current ESRB system would not be addressed by the California statute. The ESRB is therefore a vastly preferable alternative to a restrictive law that impinges on free speech.

A. The ESRB System Provides Age Ratings, Content Descriptors, And Summaries

Much like the film and TV ratings systems, the ESRB system uses an age-based rating method, assigning every game one of the following ratings:

- EC (Early Childhood), which is suitable for ages three and over and contains no material that parents would find inappropriate;
- E (Everyone), which is for ages six and older and may contain minimal cartoon, fantasy, or mild violence and may infrequently use mild language;
- E10+ (Everyone 10+), which is for ages ten and over and may contain more cartoon, fantasy, or mild violence and mild language or minimal suggestive themes;
- T (Teen), which is for ages thirteen and older and may contain violence, suggestive themes, crude humor, minimal blood, simulated gambling, and infrequent strong language;

- M (Mature), for ages seventeen and over and which may contain intense violence, blood and gore, sexual content, and strong language;
- AO (Adults Only), which is for ages eighteen and older and may include prolonged scenes of intense violence and graphic sexual content and nudity.

ESRB, *Game Ratings & Descriptor Guide*, at http://www.esrb.org/ratings/ratings_guide.jsp

In addition, the ESRB, like the MPAA system, provides detailed content descriptors, such as:

- Fantasy Violence - Violent actions of a fantasy nature, involving human or non-human characters in situations easily distinguishable from real life;
- Animated Blood - Discolored and/or unrealistic depictions of blood;
- Comic Mischief - Depictions or dialogue involving slapstick or suggestive humor;
- Simulated Gambling - Player can gamble without betting or wagering real cash or currency.

Id. Notably, there are content descriptors for depictions of (or references to) alcohol and tobacco use, *id.*, subjects on which many parents say they want information. See *supra* p. 23. Both the age rating and content descriptors are prominently displayed on packaging material, as well as on most video game retailer websites. ESRB, *supra*.

Furthermore, a more comprehensive description of game contents, the “rating summary,” is available on the ESRB website, through a cell phone application, and in bimonthly parental emails. Such game summaries have been described as a “quantum leap” forward for parental guidance, offering “a level of information not provided by any of the other major media rating systems, and * * * they represent an unprecedented resource for parents.” Nat’l Inst. on Media & Family, *13th Annual MediaWise Video Game Report Card* 8 (2008), available at http://www.crisisconnectioninc.org/pdf/2008_video_game_report_card.pdf. (“*Video Game Report Card*”).¹⁰

B. An Independent Panel Rates Nearly Every Game And The System Is Well Enforced by Retailers

Although—as with the MPAA system—game producers are not legally required to submit games

¹⁰ The following is an example of a summary for an “M” rated game:

Medal of Honor - This is a first-person shooter [game], set in the modern day, in which players join an elite army squadron hunting down enemy forces in Afghanistan. Players use machine guns, missiles, sniper rifles, and grenades to kill enemy soldiers and take out targeted facilities. Realistic gunfire, explosions, and cries of pain are heard during the frequent and fast-paced combat. Soldiers emit large splashes of blood when they are shot; enemies can be shot after they are killed, resulting in flailing motions and more blood effects. In multiplayer, players can choose to play as either coalition or enemy forces. Language such as “f**k” and “sh*t” can be heard in the dialogue.

ESRB, *Rating Information: Medal of Honor*, at <http://www.esrb.org/ratings/synopsis.jsp?Certificate=29877>.

for rating, game consoles made by major manufacturers are designed so that they will not play a game without an ESRB rating. As a consequence, the vast majority of video games are submitted to ESRB. Adam Thierer, Progress & Freedom Found., *Parental Controls & Online Child Protection: A Survey of Tools & Methods* 88, 99 n.251 (2009). Once a game is rated, a game manufacturer is “legally bound, by contract, to disclose all pertinent content.” See ESRB, *Enforcement*, at <http://www.esrb.org/ratings/enforcement.jsp>.

As with the film system, ESRB’s ratings are assigned by an independent panel of specially trained adult raters who are not themselves “gamers” and who “typically have experience with children through prior work experience, education or by being parents or caregivers themselves.” ESRB, *FAQ*, at <http://www.esrb.org/ratings/faq.jsp#14>. ESRB raters review a video sample and written answers to a questionnaire submitted by the game manufacturer. *Id.* The sample must contain representative content from the game, including content not meant to be accessed by players. *Id.* After a rating is assigned, a manufacturer may accept the rating, refine the game’s content and resubmit, or appeal to an appeals board consisting of publishers, retailers and other professionals. *Id.* They can also release a game without a rating but, as noted above, the game will then not play on most game consoles.

Following a game’s release, ESRB staff and raters may follow up by playing the game to ensure that the video sample was accurate and complete. Unlike other rating systems, the ESRB can enforce the re-

quirement of complete and accurate submissions through heavy fines (up to \$1 million) and other sanctions against game manufacturers. See www.esrb.org/ratings/enforcement.jsp. The ESRB can also change a game's rating post-release and require the manufacturer to recall and relabel packaging and promotional materials. *Id.* The ESRB has changed ratings post-release twice in recent years, and the risk of such a costly action creates a powerful deterrent to withholding information relevant to rating. The maker of *Grand Theft Auto: San Andreas* incurred some \$24.5 million in recall costs when the ESRB changed the game's rating after discovering hidden mature content. Press Release, Federal Trade Comm'n, *Makers of Grand Theft Auto: San Andreas Settle FTC Charges* (June 8, 2006).¹¹

Once games are in stores, the system depends on retailers' voluntary enforcement of the ratings for any purchaser of an M-rated game who appears to be under 17. The most recent FTC study found that retailers do so roughly 80% of the time, 8% higher than theater enforcement of R-rated film restrictions, and more than 60% better than enforcement of the music industry's PAL mechanism. *FTC 2009 Report, supra*, at iv. More importantly, according to the FTC, compliance is improving, and retailers now have a

¹¹ Moreover, because ESRB ratings are included in advertising and marketing material, a false submission by a game manufacturer that results in an incorrect rating can subject the manufacturer to charges of unfair or deceptive trade practices under the Federal Trade Commission Act, 15 U.S.C. § 45(a). While rare, this also occurred in connection with the *Grand Theft Auto: San Andreas* game.

“robust system” in place “[t]o assist parents in their gate-keeping role.” *Id.* at 13, 27-28.

C. The ESRB System Is Widely Understood, Accurate And Effective, Particularly In Combination With Parental Controls

As with the MPAA system, the ESRB system is well established and widely understood. The most recent FTC data indicate that 87% of parents are aware of the system; 73% of that number (61% of parents overall) said they review the rating most or all of the time before their child plays a video game for the first time. *FTC 2007 Report, supra*, at 27. Awareness levels of the ESRB system have risen significantly since 2000, when only 61% of parents were aware of it. *Id.* Although recognizing that “[u]niform agreement among parents about game ratings is unrealistic,” *id.* at 31, the FTC found that 64% of parents familiar with the system agreed that “most or all of the time” the ratings matched their personal view of whether a game was suitable for children, and another 24% agreed with the ratings “some of the time.” *Id.* at 29. The FTC found that parents “generally appear to be using ESRB ratings as a decision-making tool in conjunction with their own separate monitoring of their children’s game-playing habits.” *Id.* at 31.

The FTC has found striking consensus among parents about the utility of ESRB ratings. Sixty percent of parents familiar with the system considered it “good” or “excellent” at informing them about the level of violence in a game, and 87% reported being “very” or “somewhat” satisfied with ESRB rat-

ings. *Id.* at 29. Meanwhile, 94% of parents found the ratings “moderately” or “very” easy to understand. *Id.*

In addition to point-of-purchase restrictions on sales of mature-themed games to minors, the computer and gaming industries have developed parental controls for current PC systems and major game consoles that allow parents to monitor and manage their children’s game play. These controls allows parents to limit access to the Internet, limit games by ESRB age rating, and limit the amount of time the child can play.¹² And in contrast to V-chip technology, parents appear to understand and appreciate video game parental controls. The most in-depth survey of its kind (admittedly conducted by a private survey firm on behalf of respondent ESA), which gathered data from 1,200 households nationally, found that 76% of parents found video game parental controls “useful.” Entertainment Software Ass’n, *Essential Facts About the Computer and Video Game Industry* 6 (2010) available at http://www.theesa.com/facts/pdfs/ESA_Essential_Facts_2010.pdf. Microsoft, manufacturer of the Xbox game consoles, also has an ongoing public service campaign to educate parents on the use of parental controls. *Video Game Report Card, supra*, at 8; Xbox, *Family Settings, supra*.

¹² See Microsoft, *What can I control with Parental Controls?*, at <http://windows.microsoft.com/en-US/windows-vista/What-can-I-control-with-Parental-Controls>; Xbox, *Family Settings*, at <http://www.xbox.com/en-US/support/familysettings/default.htm>; Nintendo, *Parental Controls*, at http://www.nintendo.com/consumer/systems/wii/en_na/settingsParentalControls.jsp.

D. The ESRB System is Responsive to Public Concerns

While no parental guidance mechanism is immune to criticism, the ESRB, more than any other entertainment ratings system, has evolved in response to public concerns, continually refining and improving its rating system. In 2005, for instance, the ESRB added the older “Everyone” category (E10+), and changed its rules to require that video samples include content not meant to be accessed by players. The ESRB also increased its fine for misrepresenting game content to a maximum of \$1 million and, in 2007, changed from part-time to full-time game raters. Then in 2008, the ESRB added the comprehensive rating summaries in order to provide parents with more information.¹³

E. Most Potential Weaknesses In The Current ESRB System Are Not Addressed By The California Legislation

The ESRB system is not perfect, of course. Critics contend that it suffers from some of the same in-

¹³ Because of these and other recent changes, older research into the effectiveness of the ESRB rating system may be dated and inaccurate. For example, the oft-cited studies by Kimberly Thompson and Kevin Haninger criticizing the accuracy of ESRB content descriptors have been addressed by the comprehensive rating summaries. See, *e.g.*, Kevin Haninger & Kimberly M. Thompson, *Content and Ratings of Teen-Rated Video Games*, 291 *J. Am. Med. Ass’n* 856 (2004); Kimberly M. Thompson & Kevin Haninger, *Violence in E-Rated Video Games*, 286 *J. Am. Med. Ass’n* 591 (2001). Moreover, because of the ESRB’s demonstrated responsiveness to criticism, many potential issues are likely to be voluntarily addressed by the ESRB in the future.

herent vulnerabilities as the MPAA system or the TV and music systems. Most of the weaknesses cited by critics, however, would likely be present in any type of ratings system and, moreover, are not addressed by the California legislation.

For example, since the ESRB rating system is voluntary, critics note that not every game is rated. Some programmers of online games and mobile phone games do not submit games for rating. *FTC 2007 Report, supra*, at iv; *Video Game Report Card, supra*, at 9. The California legislation would likely have very little impact on these sorts of games, however, because it only applies to those who “sell or rent a video game that has been labeled a violent video game to a minor.” Cal. Civ. Code § 1746.1(a).

Other critics have voiced concerns about the accuracy of a system that relies on game producers to submit samples of content rather than having the raters play games in their entirety before rating them. *FTC 2007 Report, supra*, at 18. Some members of Congress even introduced a bill that would require ESRB raters to play games in their “entirety.” Truth in Video Game Rating Act, H.R. 5912, 109th Cong. (2006). But because video games are inherently variable depending on the user’s skill and choices, requiring raters to play the entire game would be impractical, if not impossible. And as non-gamers themselves, it is unlikely that raters would be able to play games at their highest skill levels.¹⁴

¹⁴ The ESRB reasonably concluded that it is important to use non-gamers who have experience with children rather than gamers because non-gamers are more likely to represent the

Moreover, because of the significant contractual penalties for misrepresenting a game's content, the potential for a costly recall if a game's rating is changed post-release, and the virtual certainty that its true content will become public, there is little incentive under the ESRB system to conceal the true nature of a video game. Because the California legislation would also require someone to review the games in order to decide whether sales to minors would violate the law, that review would be subject to all the same limitations and criticisms.

Some critics argue that the ESRB ratings are subject to the possibility of ratings creep. But if such concerns are valid, it is difficult to see how those seeking to enforce the California statute would avoid a similar phenomenon. Someone must determine what a "reasonable person" would consider deviant or of morbid interest to minors, patently offensive to prevailing community standards, and lacking in any literary, artistic, political, or scientific value. Cal. Civ. Code § 1746(d). Such a subjective determination could be susceptible to the same type of variability. It would be preferable that any such variability manifest itself through a voluntary ratings scheme which parents can backstop through personal monitoring than through a legal penalty.

Finally, some critics contend that the parental controls are too limited, too confusing, and easily circumvented by tech-savvy children. See, e.g., Mike Musgrove, *A Computer Game's Quiet Little Extra:*

average parent's view of what game content is appropriate for children. *FTC 2007 Report, supra*, at 19.

Parental Control Software, Wash. Post, Dec. 23, 2006, at D1. But it is unclear that circumvention is possible in a significant number of cases, and it seems likely that many such concerns will be resolved as technology advances. Parents are also becoming increasingly familiar with the controls, and, as noted, one survey found that 76% found them useful. ESA, *Essential Facts*, *supra*, at 6. And in any event, no automated control will ever replace the need for parental involvement and supervision over a child's gaming activities. Parental controls are meant as a second line of defense after a child already has a video game in his or her possession. Meanwhile, the California legislation would not offer any solutions to these issues, and might make it less likely that game manufacturers will feel the need to address them.

CONCLUSION

It is evident that the video game industry is serious about giving parents control over minors' exposure to depictions of violence. The ESRB system is the most comprehensive, effective, and responsive parental guidance system in the entertainment field today. In fact, the National Institute on Media and the Family has stated that given all of the improvements to the ESRB system over the past few years, the Institute has "increasingly shifted [its] attention to the role of parents" in protecting children from age-inappropriate content. *Video Game Report Card*, *supra*, at 2.

Concerns over violence in popular entertainment and its effect on minors have been present for centu-

ries. The appropriate response has always been industry self-regulation and parental involvement—and that is true here as well. The current ratings system effectively affords parents the ability to control their children’s exposure to violence while avoiding unwarranted limitations on free expression. California’s legislation would at best be a poor substitute for the voluntary system, and likely would do far more harm than good.

Respectfully submitted.

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