No. 08-1448

IN THE
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF CALIFORNIA, *ET AL.*,
Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION, *ET AL.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* COMIC BOOK LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

LEGISLATIVE MATERIALS

OTHER

INTRODUCTION[1]

In defense of California's law prohibiting the sale of "violent" video games to persons under 18, Petitioners and their supporting *amici* advocate "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010).

They ask this Court to find that the First Amendment does not fully protect those under 18, so that the State may restrict speech in order to shape minors' "moral and intellectual growth." Petitioner's Brief 7, 30 ("Pet. Br."). Petitioners want "offensively violent material" to be designated as a "categor[y] of speech that [has] been historically unprotected" based on the assertion that such speech "can be harmful" and has "little or no redeeming social value." *Id.* at 13, 29-30, 40, 47. Such expanded authority is needed, they claim, to protect minors "in the face of new and developing media." *Id.* at 29, 55. And, although the speech restriction at issue is expressly content-based, Petitioners shun strict First Amendment scrutiny and advocate (at most) intermediate review of censorship decisions, *id.* at

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[1] All parties have consented to this *amicus curiae* brief and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* represents that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

48, and actually assert that such measures may be upheld if they are "not irrational." *Id.* at 8.

Such a proposed wholesale reversal of several fundamantal First Amendment principles is both "startling and dangerous." *Stevens*, 130 S. Ct. at 1585. Unfortunately, however, proposals like this are not unprecedented. The Comic Book Legal Defense Fund ("CBLDF") has had experience with similar attempts to undermine America's free speech traditions, and for that reason files this amicus brief.

INTEREST OF *AMICUS CURIAE*

CBLDF is a non-profit organization dedicated to the protection of the First Amendment rights of the comics art form and its community of retailers, creators, publishers, librarians and readers. With a membership that includes comic book creators, publishers, retailers, and aficionados, the CBLDF has defended dozens of First Amendment cases in courts across the United States, and led important education initiatives promoting comics literacy and free expression.

Given its mission and history, the CBLDF is well acquainted with the moral panics that engender efforts to protect children from "harmful" media influences. Widespread censorship was imposed by states and localities in the 1940s and 50s after supposedly scientific claims were made that comic books were responsible for increasing juvenile delinquency in the United States. Such long-discredited arguments seem quaint and amusing in the judgment of history, but they reveal the serious

damage that can be done when advocacy masquerades as science.

The experience of the comic book industry is particularly germane to the issues now confronting video games because history is repeating itself. Video games are now blamed for causing aggression and other harmful effects based on supposedly scientific studies, and the State has chosen censorship as its preferred solution. Petitioners are asking this Court both to lower the government's burden of proof generally and to adopt a more lax First Amendment standard "that will affect future cases on abroad variety of subjects." *Cf.* Pet. Br. 48.

Rather than accept this invitation to gut the First Amendment, the Court should use this opportunity to reaffirm that we must keep the "'starch' in our constitutional standards" because content-based prohibitions "have the constant potential to be a repressive force in the lives and thoughts of a free people," *Ashcroft v. ACLU*, 542 U.S. 656, 660, 670 (2004); that even where the government is certain the expression at issue lacks any possible value to society, such material is "as much entitled to the protection of free speech as the best of literature," *Winters v. New York*, 333 U.S. 507, 510 (1948); and that "[o]ur Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Stevens*, 130 S. Ct. at 1585.

SUMMARY OF ARGUMENT

California's bid to censor video games is the latest of a long history of moral panics that date back to the early nineteenth century. These recurring

campaigns are typified by exaggerated claims of adverse effects of popular culture on youth based on pseudo-scientific assertions of harm that are little more than thinly-veiled moral or editorial preferences. Such censorship crusades have been mounted against dime novels, ragtime music, cinema, comic books, television, and now, video games.

Past crusades leave behind a cultural sense of curious bemusement, as if it is difficult to imagine what all the fuss was about. But that does not prevent social reformers and state legislatures from latching on to the next *cause célèbre* that unquestionably will lead to the ruination of America's children unless decisive action is taken. Unfortunately, such cycles of outrage leave behind a legacy of censorship.

Much First Amendment jurisprudence developed in response to the phenomenon of the moral panic. This Court has struck down various restrictions on "violent" reading material, sacrilegious movies, and dangerous new communications technologies, and in the process erected high hurdles for government to clear when it seeks to restrict free expression.

Petitioners' defense of the California video game censorship is predicated on rolling back this First Amendment tradition. Failing to come up with convincing proof of psychological harms through social science to justify the law, the State seeks to eliminate strict scrutiny as the controlling First Amendment standard, and asks this Court to defer to legislative judgments about what best promotes children's ethical and moral development. But this

ignores that a central purpose of the First Amendment is to prevent the government from influencing individual attitudes and preferences.

Additionally, Petitioners seek to dismantle basic elements of First Amendment jurisprudence developed over the past six decades, including principles this Court reaffirmed as recently as last Term. The State asks this Court to find a new First Amendment exception for fictionalized violence, to reduce constitutional protections for minors, and to deem new communications media to be constitutionally suspect. All told, California's argument would undermine more First Amendment principles in a single case that any decision in living memory. This Court should reject the State's bid as being fundamentally antithetical to America's historic commitment to free expression.

ARGUMENT

I. A HISTORY OF CENSORSHIP ARISING FROM SUCCESSIVE MORAL PANICS EXPLAINS THE DEVELOPMENT AND IMPORTANCE OF STRICT FIRST AMENDMENT SCRUTINY

A. Censorship and Cycles of Outrage

Petitioners' claims that certain offensive speech is uniquely harmful to children, that minors lack the capacity to cope with ideas, and that neither they, nor the expression at issue, deserves First Amendment protection sound very familiar. Well they should, for we have heard it all before. *See generally* Margaret A. Blanchard, *The American*

Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society – From Anthony Comstock to 2 Live Crew, 33 Wm. & Mary L. Rev. 741 (1992).

This phenomenon even has a name among social scientists – it is called a "moral panic," in which:

> [a] condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; [and] socially-accredited experts pronounce their diagnoses and solutions.

Stanley Cohen, *Folk Devils and Moral Panics* 1 (3d ed. 2002). *See* Erich Goode & Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (1994). Some cultural historians have more specifically described the phenomenon as a "media panic." Kirsten Drotner, *Modernity and Media Panics*, *in Media Cultures: Reappraising Transnational Media* 42-62 (Michael Skovmand & Kim Christian Schroder, eds., 1992).

Concerns about the harmful effects of popular culture on children "have a very long history, dating back well before electronic technology."[2] Campaigns

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[2] U.K. Department for Children, Schools and Families and the Department for Culture, Media and Sport, *The Impact of the Commercial World on Children's Wellbeing – Report of an*

to protect children often are the product of "general anxieties about the future direction of society," but, "as several studies have shown, they can also be inflamed and manipulated by those with much broader political, moral or religious motivations." *Independent Assessment of Children's Wellbeing* at 25. *See* Drotner, *supra*, at 47 ("All later media panics are based on such political, social, and cultural discourses of power."). In such campaigns, "the exaggerated views of the medium's influence [are] not tempered by reality." Blanchard, *supra*, at 763.

Modern day fears about the supposed moral threat posed to the young by video games "have their roots in nineteenth-century anxieties about the 'ill-effects' of popular forms of amusement on the 'children of the lower classes.'" John Springhall, *Youth, Popular Culture and Moral Panics* 2 (1998). Accordingly, fears of "dime novels, movies and jazz music give way to fears of Elvis Presley, comic books, *Teenage Mutant Ninja Turtles* cartoons, and now to video games and the Internet." Christopher J. Ferguson & Cheryl K. Olson, *The Supreme Court and Video Game Violence: Will Regulation be Worth the Costs to the First Amendment?,* The Criminologist, July/August 2010, at 19.

Independent Assessment (Dec. 2009) at 25 (literature review by multidisciplinary panel of experts in psychology, sociology, history, education, media studies, and marketing) ("*Independent Assessment of Children's Wellbeing*") (*available at* http://www.childrensfoodcampaign.net/ImpactofCommercialWorldonChildrensWellbeingDec09.pdf).

Long before Anthony Comstock coined the phrase "devil-traps for the young" in his campaign against dime novels and other vices,[3] the phenomenon of the moral panic was well established. Such "cycles of outrage" can be traced to early claims that "a very large majority" of those who turn bad "may trace the commencement of their career in crime to their attendance in Penny Theatres." James Grant, *Sketches in London* (n.p. 1838) (quoted in Springhall, *supra*, at 9). *See also id.* at 11-37.

Likewise, "Penny Dreadfuls" began to appear in England and continental Europe in the mid-nineteenth century. Forerunner to the American dime novels, these mass-produced serialized stories about the exploits of Gothic villains, pirates, highwaymen, thieves, and murderers were designed to appeal to a youthful and mass audience. Springhall, *supra*, at 38-58. Penny Dreadfuls were scapegoated for provoking the commission of juvenile crimes ranging from theft to murder, and by the 1890s "among street boys, reading had become an almost criminal pursuit." *Id.* at 75, 93. In the United States, such claims were reprised in Anthony Comstock's assertions that dime novels were "the inspiration for all the antisocial behavior exhibited by the youth of the day." Blanchard, *supra*, at 757.

Another early American target of moralistic fervor was ragtime music, which was castigated in

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[3] Anthony Comstock, *Traps for the Young* 20 (Robert Bremner, ed., Harvard Univ. Press 1967) (1883).

1899 as "vulgar, filthy and suggestive music" that should be "suppressed by press and pulpit." John E. Semonche, *Censoring Sex: A Historical Journey Through American Media* 144 (2007). In a 1914 call to arms against jazz, the *Musical Observer* urged its readers to "take a united stand against the Ragtime Evil as we would against bad literature." *See*, *e.g.*, Peter Blecha, *Taboo Tunes: A History of Banned Bands & Censored Songs* 17 (2004).

Opponents compared the music to alcohol and other intoxicating substances, and in December 1933, a Washington State congressman introduced House Bill 194 in the legislature to empower the governor to impose a ban if it was determined that "our people are becoming dangerously demented, confused, distracted or bewildered by jazz music." It also provided that those convicted of being "jazzily intoxicated shall go before the Superior Court and be sent to an insane asylum." Blecha, *supra*, at 23.

That moral panic was captured perfectly in lyrics from *The Music Man*:

> One fine night, they leave the pool hall,
> Headin' for the dance at the Arm'ry!
> Libertine men and Scarlet women!
> And Rag-time, shameless music
> That'll grab your son and your daughter
> With the arms of a jungle animal instink!
> Mass-staria!

Meredith Wilson, Ya Got Trouble, *The Music Man* (1957).

Such concerns foreshadowed later campaigns against music, but by then, the critics had forgotten how foolish those efforts looked from a historical perspective. Blanchard, *supra*, at 824. Responding to demands like this, NBC in 1940 banned from the radio more than 140 songs because they allegedly encouraged "a disrespect for virginity, mocked marriage, and encouraged sexual promiscuity." Duke Ellington's *The Mooche* was blamed for inciting rape, and only the instrumental version of Cole Porter's *Love for Sale* could be aired. *Id.*

This drama played out again a couple of decades later in a two-year investigation by the Federal Communications Commission and six FBI field offices into the supposedly corrupting lyrics of the song "Louie Louie" by The Kingsmen. *See* Eric Predoehl, *The FBI Investigation of the Song "Louie Louie"* (1984) (collection of FBI reports obtained through FOIA request). The FBI finally concluded in 1966 that the song's lyrics were unintelligible (and therefore not obscene).[4]

The advent of cinema likewise "provided all the necessary ingredients for a 'moral panic'" with its attendant "full-blown conflict over moral values." Laura Wittern-Keller, *Freedom of the Screen* 18

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[4] *See* Blecha, *supra*, at 97-100. These findings did not prevent a middle school principal in 2005 from banning a marching band's *instrumental* performance out of concern for the song's supposedly "sexually explicit lyrics." Semonche, *supra*, at 138-42.

(2008). Movies with crime stories and depictions of cinematic violence would lead politicians, religious leaders, and social reformers to condemn the influence of motion pictures on children's morals and behavior. Lawrence Kutner & Cheryl K. Olson, *Grand Theft Childhood* 38 (2008). A 1907 *Chicago Tribune* editorial called movies "schools of crime where murders, robberies, and holdups are illustrated," and it called on city authorities to "suppress them at once." Blanchard, *supra*, at 761.

Given such strong editorial endorsement, it is not surprising that Chicago adopted the nation's first film censorship ordinance in 1907, requiring a police permit before any movie could be shown. *Id.* Other cities soon followed suit. In 1910, a committee in Cleveland reviewed some 250 films and declared that forty percent of them were unfit for children "because they focused on crime, drunkenness, and loose morals." *Id.* at 763. By 1926, seven states and at least 100 municipalities imposed pre-exhibition censorship on movies. Wittern-Keller, *supra*, at 22, 30.

This scenario was repeated in the episode in which CBLDF has the most direct connection – the panic over comic books. In the post-war years between 1948 and 1953, various crusaders stepped forward to blame an asserted increase in juvenile delinquency on "the preoccupation with violence and horror fostered by the wide distribution of sex, crime, and horror comic books." Note, *Regulation of Comic Books*, 68 Harv. L. Rev. 489 , 489-90 (Jan. 1955). Civic groups such as the PTA and the National Institute of Municipal Law Officers denounced

comics and ordinances were proposed in cities across the United States. In addition, public burnings of comic books were organized. David Hajdu, *The Ten-Cent Plague* 143-53 (2008); Springhall, *supra*, at 130. As a tragic irony, some of the public burnings were staged not long after the publication of Ray Bradbury's dystopian novel *Fahrenheit 451*, in which firemen had the job of burning books. Hajdu, *supra*, at 303-04.

By 1949, laws to regulate comic books – mostly designed to ban the sale of crime comics to minors – were pending in fourteen states, *id.* at 150, and eventually at least fifty U.S. cities would attempt to regulate the sale of comics. Kutner & Olson, *supra*, at 50. Various measures were adopted, including the circulation of blacklists by police or local prosecutors as part of organized programs "to drive certain publications from [the] community." *Regulation of Comic Books*, *supra*, at 495-96. In some jurisdictions, lists were derived based on recommendations from interested organizations, while other communities would establish advisory committees or "literature commissions" to identify suspect works. *Id.* Such methods proved to be highly effective "establishing a virtual censorship over reading matter by keeping it from reaching newsstands or by withdrawing it afterwards." *Id.* at 496.

In 1954, the Senate Judiciary Committee convened a special Subcommittee to Investigate Juvenile Delinquency in the United States and held

hearings on the topic of comic books and juvenile delinquency.[5] The star witness was psychiatrist Dr. Fredric Wertham, a vociferous anti-comic book crusader. His 1954 book, *Seduction of the Innocent*, became Exhibit A for the case against comic books. *See* Fredric Wertham, *Seduction of the Innocent* (1954); Amy Kiste Nyberg, *Seal of Approval: The History of the Comics Code* 50 (1998) (Wertham's book was the "primer of the American campaign" against comics).

Wertham was no stranger to the florid rhetoric of the moral crusader. Not to be outdone by his predecessor, Anthony Comstock, he proclaimed "Hitler was a beginner compared to the comic-book industry." *Senate Hearings* at 95. He posited that "as long as the crime comic books industry exists in its present forms there are no secure homes," *id.* at 84, and he took an exceedingly broad view of which comics fell into that category. For example, he described *Superman* comics as "particularly injurious to the ethical development of children" for engendering fantasies of "sadistic joy in seeing people punished over and over again" and for teaching "complete contempt of the police." *Id.* at 86.

Wertham previously had lobbied the State of New York to adopt a "public health" law prohibiting the

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[5] U.S. Congress, *Juvenile Delinquency (Comic Books): Hearings before the Subcommittee on Juvenile Delinquency*, 83d Cong., 2d Sess. (April 21-22 and June 24, 1954) ("*Senate Hearings*").

sale and display of crime comics to children under the age of 15, describing such materials as "the cause of a psychological mutilation of children." Springhall, *supra*, at 132. The legislature passed the proposed bill in March 1952, but Governor Thomas E. Dewey vetoed it. Dewey's veto memorandum cited this Court's then-recent decision in *Winters v. New York* and said that the bill violated the First Amendment. *See People v. Bookcase, Inc.*, 201 N.E.2d 14, 15-16 (N.Y. 1964).

At the federal level, the senate subcommittee's interim report adopted Wertham's rhetorical style and warned that crime and horror comic books "offer short courses in murder, mayhem, robbery, rape, cannibalism, carnage, necrophilia, sex, sadism, masochism, and virtually every other form of crime, degeneracy, bestiality, and horror." S. Rep. No. 84-62, at 7 (1955) ("*Senate Report*"). Ultimately, however, the committee, to its credit, rejected the notion of federal censorship as "totally out of keeping with our basic American concepts of a free press operating in a free land for a free people." *Senate Report* at 23. Instead, it endorsed a strict system of self-regulation that had a devastating impact on the comics industry.

Wertham failed to obtain the federal legislation he advocated and was unable to secure passage of the New York censorship bill. But he nonetheless was credited with persuading a number of states and cities to adopt such laws. Blanchard, *supra*, at 789; Kutner & Olson, *supra*, at 50; Springhall, *supra*, at 140. His actions and writings fueled a national movement to get comic books off the shelves, and

triggered police action against comic books in more than fifty cities. Nyberg, *supra*, at 34. And, although Wertham was deeply disappointed in the industry code that was adopted to forestall legislation, as a practical matter, the national system of informal censorship that resulted had a profound chilling effect.[6]

So goes the cycle of outrage in the typical moral panic. "Whenever the introduction of a new mass medium is defined as a threat to the young, we can expect a campaign by adults to regulate, ban or censor, followed by a lessening of interest until the appearance of a new medium reopens public debate." Springhall, *supra*, at 7. Despite this well-trodden path, the reaction carries with it "an intrinsic *historical amnesia*." Drotner, *supra*, at 52. "Every new panic develops as if it were the first time such issues were debated in public and yet the debates are strikingly similar." *Id.*; Springhall, *supra*, 7. At the same time, "preoccupation with the latest media fad immediately relegates older media to the shadows of acceptance." Drotner, *supra*, at 52.

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[6] The comics code had a devastating effect on the industry. Entire categories, such as horror comics, were terminated. Although not entirely due to the new content code, the number of comic book titles that were published dropped by forty percent, from around 500 in 1952 to approximately 300 in 1955. Springhall, *supra*, at 140-41. In 1955, for first time since the business began, no new publishers entered the comic book market. Nyberg, *supra*, at 124-25.

Repeating this pattern, the language describing media and video game violence is little changed from the moral panics of yesteryear. Taking a cue from Comstock and Wertham, Petitioners and their supporting *amici* give examples of games they consider the most lurid, and assert broad claims about the adverse effects of such materials on youth. On this basis, they assert that the speech – if it rises to that level at all – is undeserving of constitutional protection, and they ask this Court to uphold broad restrictions on freedom of expression.

Same as it ever was.

B. From Sin to "Science" and Back Again

While all moral crusaders over the decades have sought to protect children from bad influences that they claimed would cause them to commit crimes (or at least behave disrespectfully), Anthony Comstock, at least, was honest about his animating concerns. He wrote that "*Satan lays the snare, and children are his victims*." His overriding goal was to "awaken thought upon the subject of *Evil Reading*." Comstock, *supra*, at 5, 9. Put simply, Comstock's mission was to save children from the wages of sin. *Id.* at 239.

The purposes of social reformers did not change in the moral panics of the 20th Century, but the crusaders began to dress up their moralistic arguments with the trappings of science. Well, social science anyway.

In the well-rehearsed script of the typical moral panic, however, science has been used less as a tool

for understanding than as currency to be exchanged for political leverage. As a result, the policy debates in this area are a mélange of social science mixed with politics and advocacy, and rarely is there a clear dividing line between the researchers and the advocates. *See*, *e.g.*, David Trend, *The Myth of Media Violence* 45-49 (2007). The debate over media violence has followed the standard script, dominated by "reactionary rhetoric, flawed research, and distorted accounts of legitimate scientific studies." *Id.* at 48.

Some scholars have warned that such misuse of social science can do great damage when it is "weak in methodology, but strong in ideology" and that in such cases "social science runs the risk of becoming little more than 'opinion with numbers.'" Ferguson & Olson, *supra*, at 19-20. Criminologist David Gauntlett described this "opportunistic mixing of concerns about the roots of violence with political reservations about the content of screen media" as "a lazy form of propaganda." David Gauntlett, *Moving Experiences: Media Effects and Beyond* 147 (2d ed. 2005). *See also id.* at 130-35. Those who exploit such moral panics are dubbed "moral entrepreneurs." *Id.* at 127.

The panic over film censorship provides a clear example of the distortion of scientific claims in service of a political objective. In 1933, the Motion Picture Research Council published an exhaustive nine-volume scholarly study on the effects of movies on American children, commonly known as the Payne Fund studies. The project was undertaken with a goal of discrediting movies, but the

researchers actually reached more nuanced conclusions that were "about one-third unfavorable to the movies, about one-third favorable, and about one-third neutral." *Children and the Movies: Media Influence and the Payne Fund Controversy* 104 (Garth S. Jowett et al., eds., 1996). *See* Wittern-Keller, *supra*, at 58. Unfortunately, the researchers' reservations were forgotten as their work became part of the policy debates.

Not content to rely on the more dryly academic analysis, the Council also commissioned a book to summarize the research for popular consumption. *See* Henry James Forman, *Our Movie Made Children* (1935). The resulting work was more a polemic than an accurate digest of the study. "It twisted conclusions, omitted facts, and used inflammatory language to conclude that children's mental attitudes were changed by their viewing choices" and that films were "responsible for juvenile delinquency, promiscuity, and disrespect to parents." Wittern-Keller, *supra*, at 58. As such things go, "it was the popularized version that stuck in the minds of policymakers." *Id.* at 59.

The comic book panic followed the same pattern. Fredric Wertham's *Seduction of the Innocent* has been classed as "the archetypal reaction to a new mass medium," with its denunciation of comics as "morally contagious and sexually dangerous." Drotner, *supra*, at 45. Yet, despite its Comstockian prose and its unabashed purpose as part of the author's anti-comic book crusade, the book was presented as a work of "science." *See Seduction of the Innocent*, *supra*, (publisher's note to the original

edition) ("This book . . . is the result of seven years of scientific investigation"); *Senate Hearings* at 82 (Testimony of Dr. Fredric Wertham) ("This research was a sober, painstaking, laborious clinical study."). Due to its purportedly authoritative nature, Wertham's book was tremendously influential, not just in the United States, but in Canada and Europe as well. *Senate Hearings* at 251; Drotner, *supra*, at 45-46.

But *Seduction of the Innocent* was anything but scientific, and its findings have been thoroughly discredited. It consisted of random, undocumented, and unverifiable case studies of children who supposedly had been harmed by reading comic books. Springhall, *supra*, at 125. The examples were "carefully selected to support Wertham's conclusions about comic books," which were presented through the dramatic reconstruction of contrived dialogue. Nyberg, *supra*, at 96. Scholarly critiques noted that the book lacked any scientifically gathered research data or systematic inventory of comic book content, and concluded that, "[w]ithout such an inventory, the conjectures are biased, unreliable, and useless."[7]

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[7] *See, e.g.*, *Seduction of the Innocent: The Great Comic Book Scare*, *in Milestones in Mass Communication Research* 262, 264 (Shearon Lowery & Melvin DeFleur, eds., 1983); Patrick Parsons, *Batman and His Audience: The Dialectic of Culture, in The Many Lives of The Batman: Critical Approaches to a Superhero and His Media* 82 (Roberta E. Pearson & William Uricchio eds., 1991) (Wertham's claims were based on a "crude social learning theory model which either implicitly or explicitly assumed unmediated modeling effects").

Such evident weaknesses did not prevent Wertham from presenting his conclusions as if they represented a scientific consensus, despite the fact that "most professional social workers, psychologists, sociologists, and criminologists denied any direct link between mass media and delinquency." Nyberg, *supra*, at 20; *Senate Report* at 16-17. He confidently testified before Congress that his book provided "incontrovertible evidence of the pernicious influences on youth of crime comic books" and that "on this subject there is practically no controversy." *Senate Hearings* at 81, 90. He made such claims despite data that had been presented to the Senate that juvenile delinquency *actually declined* during the years that "crime comics" increased in popularity.[8]

This experience is virtually identical to current claims about media and video game violence. Channeling Wertham, advocates of increased regulation frequently make the claim that "the scientific debate is . . . over" about the impact of fictionalized violence. *E.g.*, *Violent Video Game Effects on Children and Adolescents* 4 (Craig A. Anderson et al., eds., 2007). Such present-day

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[8] U.S. Senate Special Committee to Investigate Organized Crime in Interstate Commerce, *A Compilation of Information and Suggestions Submitted to the Special Senate Committee to Investigate Organized Crime in Interstate Commerce Relative to the Incidence of Possible Influence There-on of So-Called Crime Comic Books During the Five-Year Period 1945 to 1950*, 81st Cong., 2d Sess. 137-48 (1950); Springhall, *supra*, at 131.

crusaders are prone to extravagant rhetoric, comparing their theories to such things as the link between smoking and health, Br. of Amicus Common Sense Media at 5, and asserting that to dispute their conclusions is to "argue against gravity." *See* Lawrie Mifflin, *Many Researchers Say Link is Already Clear on Media and Youth Violence*, N.Y. Times, May 9, 1999 (quoting Jeffrey McIntyre of the American Psychological Association). However, researchers in the field who have not signed on to this faux consensus caution that such "[g]randiose claims demand intense skeptical scrutiny." Ferguson & Olson, *supra*, at 19.

Contrary to the assertions of regulatory crusaders, there is nothing approaching a scientific consensus on the asserted link between electronic media or video games and violent behavior. Trend, *supra*, at 47-48; Kutner & Olson, *supra*, at 63; Joint State Government Commission of the Commonwealth of Pennsylvania, *The Report of the Task Force on Violent Interactive Video Games* (Dec. 2008) at 9, 12. Additionally, legislative endorsements by various professional associations have not been based on careful or in-depth reviews of the literature. [9]

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[9] *See*, *e.g.*, Ferguson & Olson, *supra*, at 19 (noting AAP statement based on minimal fact checking); Trend, *supra*, at 48 ("scores of respected humanities professors and intellectuals" sent "letters and petitions to groups like the AMA and the ACAP, imploring them to back down on blanket condemnations of violent movies and games").

Interdisciplinary reviews have found "long-running and often heated debates among researchers on the issue of media effects" about such fundamental issues as "how the key questions are to be framed, what might count as an answer, and what the implications of these answers might be in terms of what should be done." *Independent Assessment of Children's Wellbeing*, at 72. In particular, there is a "'stand-off' between researchers in the tradition of psychological effects research – which is particularly prominent in the United States – and researchers within disciplines such as sociology, anthropology and cultural studies." *Id.* at 72, 124-25. Looking at the issue more broadly, the UK government's recent review of the media effects literature found significant disagreement among scholars, and concluded that the evidence of a causal link between violent media content and violent behavior to be "weak and inadequate." *Id.* at 123.

Most importantly, real-world reductions in crime and violence contradict claims of widespread effects of video games on minors. During the past twenty years, "as video games became increasingly popular, and as technology allowed ever more detailed depictions of violence, youth violence rates have plunged – not only in the United States, but in most industrialized nations." Ferguson & Olson, *supra*, at 19. According to FBI statistics, since 1995, the juvenile crime rate has dropped by 36 percent, and

the juvenile murder rate has plummeted by 62 percent.[10]

Anti-violence crusaders in the past frequently would cite rising crime rates in the 1970s and 1980s as proof of their media effects theories. Now, however, the current decline in crime "has passed without comment by many of the same scholars." Ferguson & Olson, *supra*, at 19. As this case comes before the Court, crime rates continue to drop. Pete Yost, *No Answers as Crime Rates Are Falling*, Wash. Post, Sept. 14, 2010, at A-4 (noting FBI crime statistics showing a 5.3 percent decline in violent crime reports from 2009).

Given the persistent refusal of real world experience to corroborate their theories, Petitioners in this case and their supporting *amici* are trying to have it both ways. They argue that social science research is sufficient to support restrictions on speech, Pet. Br. 41-45, but their principal argument is that the government should not be required to present such data at all. *Id.* at 30, 48-52. Rather, they claim that courts should defer to legislative judgments about which games should be censored to protect the "ethical and moral development" of

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[10] Adam Thierer, *Violent Video Games & Youth Violence: What Does Real World Evidence Suggest?* Technology Liberation Front (Feb. 9, 2010) (http://techliberation.com/2010/02/09/violent-video-games-youth-violence-what-does-real-world-evidence-suggest/).

children, which they acknowledge are "nebulous concepts." *Id.* at 30.

When their arguments are reduced to their essence, Petitioners are asking this Court to return to the age of Anthony Comstock, in which the government could ban literature in order to save America's youth from sin.

C. Restricting Speech Under the First Amendment Requires More Than the Government's Moral Certainty

Under the First Amendment, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000). Any such regulations are presumptively invalid, and the government bears a heavy burden to prove that the harms it recites are real, and the restrictions adopted are the least restrictive means of serving a compelling interest. *Id.* at 816-18; *Reno v. ACLU*, 521 U.S. 844, 879 (1997).

These fundamental requirements are not affected by the State's claim that it is acting solely to promote the well-being of youth. Quite to the contrary, this Court developed each of these First Amendment principles in cases arising from earlier moral panics in which the government restricted speech for the very same purpose. *See, e.g.*, *Butler v. Michigan,* 352 U.S. 380, 381 (1957) (rejecting ban of material "'tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth'").

This Court rejected film censorship in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952), despite the argument that "motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression." It held that constitutional protection is not diminished by the fact that movies are commercial entertainment, and it found that the state must meet a "heavy burden" show otherwise. *Id.* at 501, 504. In the intervening years the Court has reaffirmed that "the burden of proving that [a] film is unprotected expression must rest with the censor." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

The same goes for reading material the state believes could predispose minors toward crime and aggression. This Court struck down a section of New York's penal law that was "aimed at the protection of minors from the distribution of publications devoted principally to criminal news and stories of bloodshed, lust or crime" in *Winters v. New York*, 333 U.S. at 511. Like California in this case, New York had sought to expand the concepts of indecency and obscenity to include descriptions or depictions of violence. *Id.* at 513-14. The Court rejected claims that such expression is unworthy of constitutional immunity, finding it "as much entitled to the protection of free speech as the best of literature." *Id.* at 510. The lower court had attempted to narrow the New York law, but this Court held it was unconstitutional because of "the utter impossibility of the actor or the trier to know where the new standard of guilt would draw the line between the

allowable and the forbidden publications." *Id.* at 519.

The Court has reaffirmed these basic First Amendment requirements each time the government's interest in protecting children assertedly is threatened by some new communications medium. Although the government may act to protect minors from dangers arising from media such as cable television or the Internet, it must do so "in a way consistent with First Amendment principles." *Playboy*, 529 U.S. at 826-27; *Reno*, 521 U.S. at 864-78.

The Ninth Circuit decision under review did nothing more than apply these well-established principles. *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 961-62 (9th Cir. 2009). The same is true of the other circuit court decisions that struck down similar video game regulations.[11]

Petitioners' argument that the Court should depart from strict scrutiny requirements because it is too difficult to meet the burden of proof simply misses the point of these holdings. It is *supposed* to

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[11] *Entertainment Software Ass'n v. Swanson*, 519 F.3d 768, 771-72 (8th Cir. 2008); *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 957-58 (8th Cir. 2003); *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576-77 (7th Cir. 2001).

be difficult because First Amendment exceptions are meant to be limited and rare.[12] Deferring to legislative judgments so long as they are "not irrational," Pet. Br. 8, and relying on the expert advice of "responsible social scientists" to address the admittedly "nebulous concepts" of ethics and morality, *id.* at 30, 49, are the very problems that fostered the development of strict scrutiny in the first place.

The First Amendment restricts government interference or control of expression precisely because "[i]t is through speech that our personalities are formed and expressed." *Playboy*, 529 U.S. at 817. Fundamentally, a central purpose of the First Amendment is to prevent government from guiding the "ethical and moral development" of its citizens. For that reason, this Court has stressed that First Amendment freedoms are most in jeopardy "when the government seeks to control thought or to justify its laws for that impermissible end." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002).

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[12] Dictum in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009), does not absolve the government of meeting the demands of strict scrutiny in this case. While this Court has not required scientific evidence supporting the impact on minors of obscene or indecent speech, that concept has never been extended outside that limited area. *Kendrick*, 244 F.3d at 575 (regulating depictions of violence raises "a different concern from that which animates the obscenity laws").

The Ninth Circuit distinguished the State's interest in protecting minors from actual psychological or neurological harm from that "in controlling minors' thoughts" and correctly found that the latter goal is not a legitimate governmental objective. *Schwarzenegger*, 556 F.3d at 962. *See Playboy*, 529 U.S. at 817-18 ("these judgments are for the individual to make, not for the Government to decree"). If this Court were to disagree and accept Petitioners' arguments for avoiding strict scrutiny, the cautionary lessons of past moral panics would be lost.

D. Censorship of the Past is Prologue

Congress declined to adopt a law regulating crime comic books in the 1950s because it recognized such a measure would be "totally out of keeping with our basic American concepts of a free press operating in a free land for a free people." *Senate Report* at 23. New York Governor Thomas Dewey likewise found that a state law banning such comics for minors would violate the First Amendment principles set forth in *Winters v. New York*. *See* Nyberg, *supra*, at 42-43. However, if California persuades this Court to reverse such strict scrutiny, the resulting license for state censorship will be overwhelming.

It is not hard to imagine what types of censorship regimes would spring up if this Court permitted states to regulate speech to promote children's moral development based on the advice of "responsible social scientists." Pet. Br. 49. Dr. Wertham had very definite ideas about the types of comic books would be harmful to minors. He wrote that stories of Batman and Robin help "fixate

homoerotic tendencies" with their living arrangement representing "a wish dream of two homosexuals living together." *Seduction of the Innocent*, *supra*, at 190-91. He added that the "Lesbian counterpart of Batman may be found in the stories of Wonder Woman and Black Cat." *Id.* at 192. He also criticized these comics for their depictions of violence. Superman was singled out for special criticism for "poisoning" the minds of children by undermining "the authority and the dignity of the ordinary man and woman." *Id.* at 97-98; *Senate Hearings* at 297. A continuing theme was that comic books contributed to disrespect for authority by subconsciously breeding "a special indifference to it."[13]

Unfortunately, it is not necessary to imagine how such theories might translate into practice. Across the country, laws inspired by Wertham's writings led to vast amounts of formal and informal censorship. In Massachusetts, the public prosecutor circulated lists of objectionable titles to news dealers based on the recommendation of an informal advisory committee. Georgia established a literature commission appointed by the governor to investigate sales of any publications "detrimental to the public

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[13] *Seduction of the Innocent*, *supra*, at 158. Even Wertham's admirers acknowledge that his work on comic books "was rife with negative comparisons to the type of culture that he personally preferred as a reader and art collector." Bart Beaty, *Fredric Wertham and the Critique of Mass Culture* 202 (2005).

morals." And Detroit implemented "a particularly active police censorship" in which "distributors never failed to withhold anything blacklisted." *Regulation of Comic Books*, *supra*, at 495-96.

The same pattern of arbitrary and excessive censorship recurred in America's failed experiment with film censorship. For example, Atlanta banned *Lost Boundaries*, a film about a black physician and his family who "passed" for white, on grounds that exhibition of the film would "adversely affect the peace, morals and good order" of the community; Ohio's censors deleted scenes of orphans resorting to violence in the film *It Happened in Europe*; the Chicago licensing board banned newsreel films of Chicago policemen shooting at labor pickets and refused a license to exhibit the film *Anatomy of a Murder*; and the New York film licensing board censored over five percent of the movies it reviewed. *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 69-72 (1961) (Warren, C.J., dissenting). Such examples are just the tip of the iceberg. *See generally* Edward DeGrazia & Roger Newman, *Banned Films*, at xviii, 177-381 (1982) (describing 122 representative examples of film censorship between 1908 and 1981).

Allowing states to regulate video games based on "reasonable" legislative judgments about what constitutes "offensive violence" would be no different. Judge Harry Edwards of the United States Court of Appeals for the D.C. Circuit has accurately described any attempt to fashion a constitutionally sound standard for regulating fictional violence as a "jurisprudential quagmire." *See* Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on*

Television, 89 Northwestern U. L. Rev. 1487, 1502-03 (1995). In addition to the "insurmountable problem in finding a generic definition of violence that is coherent and not overbroad," Judge Edwards explained social science data would be insufficient to match the supposedly harmful material with the legislative definition. *Id.* at 1492.

Inevitably, the gap between the assumed adverse impact and the statutory classification of the material would be filled in by legislators and social scientists' subjective and viewpoint-based judgments. That, at least, was the experience of the comic book and film industries, and it underscores the vital need to reaffirm strict First Amendment scrutiny in this case.

II. THIS COURT SHOULD NOT CREATE NEW EXCEPTIONS TO FIRST AMENDMENT PROTECTION

Strict scrutiny is not the only First Amendment doctrine Petitioners seek to topple. They also ask this Court to recognize a new category of unprotected speech, to find diminished constitutional protection for minors, and to reduce First Amendment protection from new and emerging media. Such a radical reconstruction of the law governing freedom of expression must be rejected.

A. Petitioners Provide No Basis for Creating a New Category of Unprotected Speech

Petitioners' demand that this Court recognize a new category of "historically unprotected" speech confirms their desire to return First Amendment law

to the era of Anthony Comstock. Pet. Br. 13-14. The State even asks the Court to reinstate the Victorian precedent *Regina v. Hicklin* (1868) L.R. 3 Q.B. at 371, and to recognize a new exception for depictions of violence because states initially had laws prohibiting profanity and blasphemy. Pet. Br. 32 & n.1.

If adopted, such vast changes would sweep away the basic foundations of First Amendment law. For nearly six decades, it has been settled that the Constitution cannot tolerate a ban on blasphemy. *Joseph Burstyn, Inc.*, 343 U.S. at 504-05. Nearly as long ago, the Court rejected the rule of *Hicklin*, which judged obscenity by the effect of isolated passages upon the most susceptible persons, as being "unconstitutionally restrictive of the freedoms of speech and press." *Roth v. United States*, 354 U.S. 476, 488-89 (1957).

Undaunted by the fact that historical "exceptions" on which they rely have not been recognized for several generations, Petitioners ask this Court to reverse course and find a new unprotected category based on the argument that depictions of violence lack sufficient value to be covered by the First Amendment. Pet. Br. 29-30, 40, 47. They make these claims notwithstanding this Court's refusal to extend the obscenity doctrine to descriptions of violence 62 years ago in *Winters v. New York*.

But the Court just last Term overwhelmingly rejected such "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 130 S. Ct. at 1586. Petitioners hope to find lurking in the past some

evidence that depictions of violence were "historically unprotected" yet not "specifically identified," Pet. Br. 14, but their argument is nothing more than wishful thinking. Most importantly, *Stevens* made crystal clear that an asserted lack of value does not disqualify recreational expression from First Amendment protection. The Court stressed that "*[m]ost* of what we say to one another" lacks value "but it is still sheltered from government regulation." *Stevens*, 130 S. Ct. at 1591.

Thus, the State provides no justification for this Court to chip away at the First Amendment

B. Petitioners Provide No Basis for Denigrating Childrens' First Amendment Rights

Petitioners' other major contention is that its regulation should be permitted because children lack significant First Amendment protection. Pet. Br. 15, 20-28, 41. This central theme of the State's case fails to account for the fact that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975) (citation omitted).

Petitioners make no serious attempt to show that their regulation of video games falls within the "narrow and well-defined circumstances" in which minors' First Amendment rights are not coextensive with those of adults. But their argument suffers from an even deeper flaw. They assume that social

science can operate as a universal solvent to dissolve the constitutional rights of a large segment of the population.

The State points to *Graham v. Florida*, 130 S. Ct. 2011 (2010) and *Roper v. Simmons*, 543 U.S. 551 (2005), in which this Court relied on psychological studies to limit the government's power to punish minors as adults. Pet. Br. 25-27. Amicus Common Sense Media picks up on this theme and asserts that "[t]he differences between juvenile and adult minds that *compel* differential treatment in *Graham* and *Roper* surely *tolerate* differential treatment here." Br. of *Amicus Curiae* Common Sense Media at 3-4. The obvious fallacy in this reasoning, however, is that different burdens of proof apply to individuals seeking to retain their rights, versus the government when it tries to take them away. *Cf.*, *FEC v. Wisconsin Right to Life*, *Inc.*, 551 U.S. 449, 474 (2007) ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor.").

There is absolutely no basis in our constitutional traditions to support the State's dangerous claim that the constitutional rights of millions of individuals can be hobbled based on "professional opinions [of] responsible social scientists." Pet. Br. 49. This argument is downright Orwellian, particularly when coupled with the government's freedom-canceling assumption that it has greater authority to act when it believes the speech is "worthless."

As Judge Richard Posner wrote in an earlier case striking down video game restrictions, children have First Amendment rights, and "[t]o shield children

right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it." *Kendrick*, 244 F.3d at 577. Such rights cannot be minimized on the pretext of "assisting" parents, as "the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary." *Id.*

The decision below followed Judge Posner's lead and held that the State's asserted interests cannot override minors' First Amendment rights, as did other circuits that addressed the issue. *Schwarzenegger*, 556 F.3d at 962. *See Interactive Digital Software Ass'n*, 329 F.3d at 960. This Court should do the same.

C. Petitioners Provide No Basis for Limiting First Amendment Protections for New Communications Technology

In addition to everything else, Petitioners seek to reverse the trend of First Amendment jurisprudence by arguing the state should have greater authority to restrict speech because of the assumed dangers of new media. Pet. Br. 29, 55. Once again, it seeks to justify censorship by embracing long-discarded constitutional doctrine that was formulated in response to an earlier media panic. *Compare*, *e.g.*, *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915), *with Joseph Burstyn, Inc.*, 343 U.S. at 503 (each medium may "present its own particular problems," but "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary").

This Court's modern jurisprudence makes quite clear that new technologies do not receive less constitutional protection, even when the government's asserted interest is to protect children. *Reno*, 521 U.S. at 870 ("our cases provide no basis for qualifying the level of scrutiny that should be applied to this medium"). More generally, this Court reaffirmed just last Term that "[t]he Framers may have been unaware of certain . . . forms of communication, but that does not mean that those . . . media are entitled to less First Amendment protection." *Citizens United v. FEC*, 130 S. Ct. 876, 906 (2010).

Accordingly, this Court should soundly reject Petitioners' bid to rewrite First Amendment jurisprudence by stripping away the protections forged in earlier media panics.

CONCLUSION

H.L. Mencken described Anthony Comstock as "the Copernicus of a quite new art and science," the professional vice crusader, "who first capitalized moral endeavour like baseball or the soap business, and made himself the first of its kept professors." H.L. Mencken, *Puritanism as a Literary Force, in A Book of Prefaces* 197, 255 (5th ed. 1924). Such moral entrepreneurs "come before a legislature with a bill ostensibly designed to cure some great and admitted evil, they procure its enactment by scarcely veiled insinuations that all who stand against it must be apologists for the evil itself, and then they proceed to extend its aims by bold interferences, and to dragoon the courts into ratifying these interferences, and to

employ it as a means of persecution, terrorism and blackmail." *Id.* at 251.

Now, after successive moral panics of the 20th Century, the land is awash with Lilliputian Comstocks, each vying to save America's children from the threat *du jour*. Today's crusaders come less from the pulpit than from university social science departments, but their goals and tactics remain the same. Yet, for all of the supposed science marshaled in support of censorship, the call to suppress video games at last comes down to an appeal by the State for government to control the moral development of its youth.

California should not be permitted to sell out America's First Amendment heritage simply because it succumbed to the latest moralistic campaign. This Court should heed journalist Heywood Broun's warning that "censorship of any sort should never be entrusted to professional crusaders." Heywood Broun & Margaret Leech, *Anthony Comstock: Roundsman of the Lord* 272-73 (1927).

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