No. 08-1448

In The Supreme Court of the United States

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

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* ID SOFTWARE LLC IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Id Software LLC ("Id Software") is a limited liability corporation organized under the laws of Delaware.[1] It has been recognized as a pioneer in the creation and development of video games. *See Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1109 n.1 (9th Cir. 1998). Id Software has also been active in explaining why the First Amendment protects video games as much as any other artistic medium, having been a party in *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002), and *Sanders v. Acclaim Entm't Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002). It also submitted a brief *amicus curiae* in *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003).[2] In addition, two briefs submitted in the instant case make specific, negative references to Id Software's work. *See* Brief of *Amicus Curiae* Eagle Forum Educ. & Legal Def. Fund in Support of Petitioners, 2010 WL 2895470, at *11, 13 ("Eagle Forum") (referring to the video game *Doom*); Brief of *Amici*

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[1] No counsel for a party wrote this brief in whole or in part, nor did any person or entity, other than *amicus curiae*, its counsel, or its corporate affiliates, make a monetary contribution to its preparation or submission. The parties have given their written consent to the submission of this brief. Evidence of such consent is on file with the clerk.

[2] Id Software LLC is a subsidiary of ZeniMax Media Inc., a corporation organized under the laws of Delaware. On June 23, 2009, Id Software LLC acquired substantially all of the assets of Id Software, Inc. All references herein to "Id Software" prior to June 23, 2009, are to Id Software, Inc.

Curiae California State Senator Leland Yee, Ph.D. et al., 2010 WL 2937557, at *13 (referring to the video game *Wolfenstein 3D*). These *amici* have thus put Id Software's interests directly at issue.[3]

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[3] *Doom* is widely seen as having revolutionized the medium. *See* Thierry Nguyen, *The CGW Hall of Fame*, Computer Gaming World, Feb. 1, 2001, at 62 (emphasis added):

> For the population at large, the events that people knew would change history were the assassination of J.F.K. and the fall of the Berlin Wall. For gamers, it was seeing Doom. . . . Doom was the product of a small group of developers at id Software, but we all know who created the underlying technology. John Carmack's reputation as a programming wunderkind was founded the moment Doom went live (and subsequently crashed several servers due to overwhelming demand). *This is all the more remarkable considering that most of his programming knowledge was self-taught.*

In its brief, *amicus* Eagle Forum asserts that *Doom* was responsible for the tragedy at Columbine, despite the fact that a federal court sitting in Colorado reached precisely the opposite conclusion in a published decision. *See Sanders v. Acclaim Entm't Inc.*, 188 F. Supp. 2d at 1276. As the court concluded in that case, "no reasonable jury could find that the Video Game and Movie Defendants' conduct resulted in Mr. Sanders' death in the natural and probable sequence of events." *Id.* (internal quotation marks omitted). *See* Brief of *Amicus Curiae* Eagle Forum in Support of Petitioners, at *11.

Citing David Grossman, Eagle Forum also makes the untoward claim that "the Marine Corps use a modified version of [*Doom*] to teach recruits how to kill." *Id.* The thesis behind Lt. Colonel Grossman's claim has been ably refuted. As Henry Jenkins of the Massachusetts Institute of Technology asks, "where is meaning, interpretation, evaluation, or expression in Grossman's model? Grossman assumes almost no conscious

(Continued on following page)

This brief addresses the issues raised by California's Civil Code § 1746 *et seq*. from the perspective of individuals who create and develop video games, whose livelihood depends on such activity, and one of whose primary forms of expression consists of such activity. The statute under review not only threatens their expression, but also threatens to destabilize an artistic movement of which these individuals form part of the vanguard.[4] A decision by this Court affirming the Ninth Circuit would protect important constitutional interests, confirm the status of video games

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cognitive activity on the part of the gamers, who have all of the self-consciousness of Pavlov's dogs." Henry Jenkins, *Fans, Bloggers, and Gamers: Exploring Participatory Culture* 211 (2006).

[4] Id Software plays a prominent role in the world of video games, and its simplest decisions can have ramifications across the medium. *See* Seth Schiesel, *Going a Few Rounds With the Newest Console*, N.Y. Times, Oct. 8, 2005, at D7 (reviewing a trade show):

> It is difficult to overstate the long-term importance of Id Software's announcement here that for much of the development for the next version of its Castle Wolfenstein series, the company is using the [Xbox] 360's software-creation tools rather than PC software tools. "The Xbox 360 is the first console that I've ever worked with that actually has development tools that are better for games than what we've had on PC," John Carmack, Id's technical director, said in a videotaped announcement. In the world of game development, that was a bombshell akin to one of the snobbiest restaurants in Paris's announcing that it would start recommending mostly American wines.

as a fully protected form of expression, and substantially serve the interests of Id Software.

SUMMARY OF ARGUMENT

As a matter of content and form, video games are a projection of such traditional media as literature and film, both of which the First Amendment protects in full. In fact, the themes on which video games rely are staples of fiction. *See Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577-78 (7th Cir. 2001) (*Kendrick*) (giving the examples of "[s]elf-defense, protection of others, dread of the 'undead,' [and] fighting against overwhelming odds"); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 957 (8th Cir. 2003) (*IDSA*). This being true, this Court could not deny full protection to video games without making an artificial distinction among forms of art.

This Court would not ask whether a book or film lacks serious value, either for minors or for adults. The First Amendment fully protects such works, leaving the individual to decide what his or her expressive fare will be. As this Court has made clear, the First Amendment does not permit any department of the government, or even a majority of the voters, to dictate the expressive activities of others. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000); *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949) (observing that a weakened First

Amendment "would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups"). In fact, this Court should abhor such a notion, if only to avoid the nightmare of having to make the kind of ephemeral distinctions that such an endeavor would entail. In light of this, and in light of the conceptual continuity between video games and traditional artistic media, the state may not regulate video games for an asserted lack of "serious . . . value" unless it can overcome strict scrutiny. Cal. Civ. Code § 1746(d)(1)(A).

Numerous lower courts have reached this very conclusion, and this Court should confirm the correctness of their decisions. Video games are a form of art presumptively entitled to the protection of the First Amendment. Moreover, this exercise of freedom falls into no category of unprotected speech. They are not incitement under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), and *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam); they are not obscene as per *Miller v. California*, 413 U.S. 15, 23-24 (1973); they do not constitute "variable obscenity" under *Ginsberg v. New York*, 390 U.S. 629, 641 (1968), which requires an explicit sexual component; and they are not "fighting words" within the rubric of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and *Cohen v. California*, 403 U.S. 15, 20 (1971).

The distinctive characteristics of video games do not affect the foregoing analysis. A game can be every

bit as expressive as any other work of art. In addition, to seek to deny protection to video games because of their interactivity mistakes a virtue for a flaw. As more than one court has recognized, expression is enhanced by interactivity. *See*, *e.g.*, *Kendrick*, 244 F.3d at 577 ("All literature . . . is interactive; the better it is, the more interactive.").

ARGUMENT

I. VIDEO GAMES HAVE THE SAME CLAIM TO CONSTITUTIONAL PROTECTION AS TRADITIONAL FORMS OF CREATIVE EXPRESSION.

No legislature subject to the First Amendment could prohibit a minor from purchasing a copy of the *Iliad*. After all, the *Iliad* is a bedrock of western civilization and a staple of many a curriculum. But the *Iliad* – actually read – is not a polite book. People die horrible deaths in this epic, after they have cooperated with their killers, after they have begged for mercy, after we have learned about their loving families. Consider the fate of Dolon, a young man caught spying by the Greeks. After he has helped his captors, revealing his comrades' positions, he learns that Diomedes will do away with him:

> With that, just as Dolon reached up for his chin
> to cling with a frantic hand and beg for life,
> Diomedes struck him square across the neck –

> a flashing hack of the sword – both tendons snapped and the shrieking head went tumbling into the dust.

Homer, *The Iliad*, Book 10, Lines 523-27 (Robert Fagles trans. 1990) (*Fagle's Iliad*). To describe this scene as "graphic" or "violent" – "a flashing hack of the sword" – "both tendons snapped" – a "shrieking head went tumbling into the dust" – is almost superfluous. The imagination allows us to see and hear Dolon's decapitation.

The *Iliad* is full of such images, for Homer does not flinch in his descriptions. A god does not simply walk in anger. Instead, "arrows clang[ ] at his back as [he] quake[s] with rage." *Id.*, Book 1, Line 53. And this goes as much for violence as for anything else. In the *Iliad*, as Fagles has noted:

> There is no attempt to gloss over the harsh realities of the work of killing . . . and no attempt, either, to sentimentalize the pain and degradation of violent death. . . . Men die in the *Iliad* in agony; they drop, screaming, to their knees, reaching out to beloved companions, gasping their life out, clawing the ground with their hands; they die roaring, like Asius, raging, like the great Sarpedon, bellowing, like Hippodamas, moaning, like Polydorus.

Id., Introduction, at 26. Rodney Merrill makes a similar observation in his translation:

> The musical energy of Homer sounds, too, in the varieties of suffering and death, grimly precise in detail. No poet has looked

> more directly at the horrors of warfare. Men get struck in the back between the shoulders; through the buttocks into the bladder; through the neck and up through the teeth, severing the tongue; into the skull, shattering the brain. Arms get cut off, the blood gushing out; heads are severed and sent rolling through the army.

Homer, *The Iliad* 18, Introduction (Rodney Merrill trans. 2007) (*Merrill's Iliad*). In short, the *Iliad* – an ineluctable part of our cultural canon – is gruesome.

A person might respond that Homer should sanitize his violence, that he should tell his story without being graphic. Homer chooses the contrary. "The *Iliad*," Fagle notes, "accepts violence as a permanent factor in human life and accepts it without sentimentality, for it is just as sentimental to pretend that war does not have its monstrous ugliness as it is to deny that it has its own strange and fatal beauty. . . ." *Fagles' Iliad*, Introduction, at 29.

Needless to say, the First Amendment fully protects the *Iliad* as a work of creative expression, for minors as well as for adults. In precisely the same way, the First Amendment would protect the *Iliad* – or the epic story of the Spartans at Thermopylae – as a comic book. *Cf. Winters v. New York*, 333 U.S. 507, 508, 510 (1948) (recognizing "pictures, or stories, of deeds of bloodshed, lust or crime" as protected expression); *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 66-67 (2d Cir. 1997) (same for trading cards depicting "heinous crimes"); *see also* Frank Miller & Lynn

Varley, *300* (1998) (graphic novel of Thermopylae). And so too would the First Amendment protect a film of the *Iliad*, or of Thermopylae, as much for minors as for adults. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); *see also 300* (Warner Bros. Pictures et al. 2007) (cinematic adaptation of the graphic novel). The question then arises how a video game with the same expressive characteristics can somehow lose commensurate protection. The answer must be that it cannot. Although video games entertain, they are also a significant medium of artistic expression, and should be protected under the First Amendment as much as comparable arts.

In their current state, video games bear many of the same formal qualities as books and film, including attention to plot, characters, dialogue and setting. With these qualities in mind, the authors of a video game create narrative parameters in a fictional world to reflect their vision, and the player navigates through the game in relation to these parameters. As with other artistic media, a successful video game creates for the player a rhythm through the story it tells, using both visual and aural tableaux, including such facets as animated figures, props, architecture, landscape, narration and music. And, like other narrative forms of art, including polyphonic music, video games draw a thematic arc from exposition to climax and denouement. Consider the following description of one of Id Software's most famous titles, *Doom*, where the hero (*i.e.*, player) navigates through

a surreal, dangerous world in the hope of understanding why an experiment has gone awry:

> *Doom* . . . comprises environments filled with realistic details, details that flesh out laboratories, torture rooms, infernal landscapes, and military installations. Such visual details are accompanied by sound effects that include background music, the alien-monsters' cries of attack, and groans of pain coming from the hero's aching body. The result is an atmosphere of suspense, action, horror, and grueling tension. The movements of the hero further enhance the player's convincing experience of the alien world.

Angela Ndalianis, *Neo-Baroque Aesthetics and Contemporary Entertainment* 100 (2004) (Ndalianis). As the foregoing makes evident, video games present fictional worlds that immerse their audiences in a broad range of aesthetic possibilities. And each technological advance enhances the immediacy and scope of such possibilities. *See* Nic Kelman, *Video Game Art* 17 (2005) (Kelman) ("As the medium most closely tied to technological advancement for its execution – more so, even, than film – the boundaries of [video games'] limitations have exploded outward exponentially, exactly in sync with advances in electronic engineering."); *Thirteenth Annual Technical Excellence Awards*, *After Hours*, PC Magazine, Vol. 15, No. 22, Dec. 17, 1996, at 139 (citing Id Software for *Quake*) ("Quake is the first game of its kind to offer true 3-D graphics: You can move and look anywhere in what

feels like a completely immersive graphical environment.").

As with any form of art, video games draw inspiration from other media. Their narrative, for instance, often derives from myths, and their basic texture is cinematic. "With the 'hero of a thousand faces' almost always at the center of video games," writes Kelman, "we see familiar recurring themes: the triumphant underdog, the common man caught up in (and important to) events on a global scale, the outsider proving he is not so much odd as he is special, the unavoidable prophecy fulfilled, hard work rewarded, and so on." Kelman at 41. Along similar lines, Ndalianis has described *Doom* and *Doom II* as "an amalgam of action, science fiction, and horror film genres, with specific reference . . . to *Alien* (with its hybrid science fiction, horror, combat, and action structure) and to *Evil Dead II* (a film that also meditates on the slippery nature of horror)." Ndalianis at 101 (footnote omitted).

At the same time, video games often provide the template for artists working in other media. Consider film, video games' closest artistic relative. As the members of this Court may know, Id Software's *Doom* was later made into a film starring Dwayne "The Rock" Johnson. *See Doom* (Universal Pictures 2005); *Doom* (Id Software 1993). Likewise, the cinematic character Lara Croft, played by Angelina Jolie, originated in the video game *Tomb Raider*. *See Lara Croft: Tomb Raider* (Mutual Film Co. 2001); *Tomb Raider* (Core Design 1996) (video game). A more recent

example of video games' influence on film is *Scott Pilgrim vs. The World*. In this film, the hero – much like Hercules – must overcome the seven former boyfriends of his new love, Ramona Flowers. *See Scott Pilgrim vs. The World* (Big Talk Films et al. 2010). "Video-game-style," observes Siobhan Synnot of *Scotland on Sunday*, "Scott must rise through the levels of battling boyfriends, transforming during each fight into a physics-bending computer star with a punch like Donkey Kong. . . ." Siobhan Synnot, *Scott Pilgrim Vs The World: Game on for Pilgrim's Progress*, Scotland on Sunday, Aug. 22, 2010, at 28. The film contains a variety of "gaming and social networking conceits," notes Betsy Sharkey of the *Los Angeles Times*, "among them snarky comments on screen to help the older-or-other-generationals among you, and provide those in the know with a laugh." Betsy Sharkey, '*Scott Pilgrim' Puts Its Game Face On*, L.A. Times, Aug. 13, 2010, at D3.

The thematic elements of video games have even translated into theater. This past summer, the off-Broadway production *Game Play* converted iconic video games into comic vignettes. As Seth Schiesel of the *New York Times* asks in his review:

> What if the gorilla in Donkey Kong is really an abusive, down-on-his-luck meathead straight out of a Tennessee Williams script who keeps his handicapped blond paramour (the princess) captive in their top-floor apartment, periodically thrashing the Italian building superintendent (Mario), who

> attempts to climb the stairs to alleviate the woman's suffering?
>
> What if Pac-Man is really a gluttonous German burgher out to gorge himself while dodging the ghosts of those he has so callously wronged, à la Dickens?
>
> What if the pilots in Asteroids are merely profane technicians existentially trapped within a corporation that knows nothing more than to send them into the void to shoot rocks, until they become smaller rocks and smaller rocks, until they become nothing?

Seth Schiesel, *Tragedy and Comedy, Starring Pac-Man*, N.Y. Times, Jul. 16, 2010, at C1; *see also id.* ("[*Game Play*] is the most ambitious effort I know of to fuse the techniques and live presentation of theater with the themes, structures and technology of interactive electronic entertainment, also known as video games.").

Video games, then, have the same formal properties as traditional forms of expression. This being the case, a decision to deny full constitutional protection to video games, in addition to being impossible to square with what the First Amendment already embraces, would eviscerate what is perhaps the most vibrant, growing and influential sector of the artistic world today.

II. THIS COURT SHOULD CONFIRM THAT THE FIRST AMENDMENT PROTECTS VIDEO GAMES AS MUCH AS ANY OTHER ARTISTIC MEDIUM.

Over the last decade, many lower courts have correctly recognized that video games are a form of expression presumptively entitled to the protection of the First Amendment. *See*, *e.g.*, *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 957-58 (8th Cir. 2003) (*IDSA*); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 651 (E.D. Mich. 2006); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1056 (N.D. Ill. 2005). These decisions are not surprising, given this Court's observation in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a particularized message, would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." 515 U.S. 557, 569 (1995) (Souter, J., for a unanimous Court) (internal quotation marks and citation omitted).

Moreover, the video games subject to the statute do not fall into any category of unprotected expression. First, they are not incitement. They do not meet the test of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), and *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam), by way of direction, intent, likelihood or imminence. Second, they are not

obscene as per *Miller v. California*, 413 U.S. 15, 23-24 (1973). Nor do they constitute "variable obscenity" under *Ginsberg v. New York*, 390 U.S. 629, 641 (1968). Finally, they are not "fighting words" within the rubric of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and *Cohen v. California*, 403 U.S. 15, 20 (1971). They are therefore fully protected by the First Amendment, and the state may not restrict access to them on the basis of their content, unless it adopts means narrowly tailored to serve a compelling public interest. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992); *see also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). A contrary holding, allowing the government to regulate video games on the basis of their content without satisfying strict scrutiny, would make a hash of this Court's jurisprudence, destabilize a vibrant artistic medium, and subject courts to the impossible task of classifying individual works of art according to their assessed social value.

The foregoing citations to authority are hardly boiler plate. The purpose of *Brandenburg* and *Hess*, for example, is to draw as much expression as possible within the protective ambit of the First Amendment as befits the government's basic authority to preserve civil order. In addition, these cases provide maximum clarity as to what the Constitution protects before people express themselves. Not much

expression is "likely" to provoke "imminent" lawless conduct, and a speaker or artist has enormous editorial control over whether he or she "direct[s]" or "intend[s]" such conduct. *Brandenburg*, 395 U.S. at 447; *Hess*, 414 U.S. at 109. Loosening or blurring the protections these cases provide would have massive destructive impact on freedom of expression, not only for people who create video games, but also for people who make films and TV shows, record music and even write books. As this Court observed only last term, the "guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, 130 S.Ct. 1577, 1585 (2010); *see also Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment) ("When we leave open the possibility that various sorts of content regulations are appropriate, we discount the value of our precedents and invite experiments that in fact present clear violations of the First Amendment. . . .").

Similarly, the purpose of *Miller* and *Ginsberg* is to carve out from the scope of the First Amendment a narrow category of speech defined at a minimum to include some form of sexually explicit expression. In *Miller*, this Court expressly limited its holding to "works which depict or describe sexual content." 413 U.S. at 24. Although this Court did not provide

similar express language in *Ginsberg*, it emphasized that the statute under review in that case "simply adjust[ed] the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of [the minors to whom the statute applied]." 390 U.S. at 638 (internal quotation marks and ellipsis omitted). The case itself was about the sale of "two 'girlie' magazines," and, notable here, no other form of expression was at issue. *Id.* at 631.

In any case, sexually explicit expression is materially distinct from violent imagery and therefore merits distinct treatment. For one thing, this Court has never excluded a category of expression from the scope of the First Amendment simply because of its violent content. *See Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004) ("[T]here is no indication that [depictions of violence] have ever been excluded from the protections of the First Amendment. . . ."). This Court has recently emphasized the distinction between protected *representations* of violence and unprotected *acts* of violence. *See Stevens*, 130 S.Ct. at 1585 (noting that, although "the prohibition of animal cruelty itself has a long history in American law. . . . we are unaware of any similar tradition excluding *depictions* of animal cruelty from 'the freedom of speech' codified in the First Amendment"); *see also Kendrick*, 244 F.3d at 575-76 ("The notion of forbidding not violence itself, but pictures of violence, is a novelty. . . .").

Moreover, sexually explicit speech simply does not play the same role in our cultural canon as violent imagery. A rule allowing the government to restrict minors' access to speech that meets the test of *Ginsberg*, therefore, effects no radical damage to the canons of our culture. A rule revising *Ginsberg* somehow to include violent imagery, however, would leave our canon in shambles. As the court correctly observed in *Maleng*:

> Sexually-explicit materials were originally excluded from the protections of the First Amendment because the prevention and punishment of lewd speech has very little, if any, impact on the free expression of ideas. . . . The same cannot be said for depictions of violence: such depictions have been used in literature, art, and the media to convey important messages throughout our history. . . .

325 F. Supp. 2d at 1185. As Marjorie Heins has noted, "violence is an eternal theme in literature, art, popular entertainment and even games invented by children at play." Marjorie Heins, *Blaming the Media: Would Regulation of Expression Prevent Another Columbine?*, 14 Media St. J. 14, 15 (2000).

This Court should confirm that the First Amendment applies as much to video games as it does to books, film, graphic novels and polyphonic music – artistic media with which it shares many characteristics. Among other things, therefore, this Court should confirm that the category of "variable obscenity"

under *Ginsberg v. New York* is limited to sexually explicit speech, for the reasons given above. This being the case, California has no more authority to ask whether a video game "lack[s] serious literary, artistic, political, or scientific value for minors" than it has to ask the same question about a film. Cal. Civ. Code § 1746(d)(1)(A). The First Amendment would not turn its back on a bad film – complete with bad acting, bad dialogue, bad sets, and a bad score. As the members of this Court are no doubt aware, such films exist. As the critic J. Hoberman observes, "[o]bjectively bad movies are usually made against all odds in a handful of days on a breathtakingly low budget. Such extreme austerity enforces a delirious pragmatism: homemade sets, no re-takes, tacky special effects, heavy reliance on stock footage." J. Hoberman, *Bad Movies*, *reprinted in American Movie Critics: An Anthology From the Silents Until Now* 519 (Phillip Lopate ed. 2006) (*American Movie Critics*). And yet the First Amendment would protect such films, because our courts do not judge among works that otherwise fall within a protected medium. These are lines the First Amendment will not allow the courts or any other department of the government to draw.

III. VIDEO GAMES' DISTINCTIVE CHARACTERISTICS DO NOT EXCLUDE THEM FROM FULL CONSTITUTIONAL PROTECTION.

No aspect of video games as a distinct medium undermines their claim to full protection. Their

status as games, for example, is irrelevant. "Dungeons and Dragons" is a game, but at least one court has properly recognized it as a form of expression entitled to constitutional protection. *See Watters v. TSR, Inc.*, 715 F. Supp. 819, 821 (W.D. Ky. 1989), *aff'd on other grounds*, 904 F.2d 378 (6th Cir. 1990). Similarly, the Second Circuit correctly recognized that the First Amendment protected the game "Public Assistance – Why Bother Working for a Living?" *See Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 34-35 (2d Cir. 1983).

Nor is video games' status as interactive a reason to deny them full protection. For one thing, with the advent of the DVD, film is no longer necessarily passive. A viewer may choose to watch the same scene many times in a row, or skip scenes he or she does not like. As David Bordwell, a professor at the University of Wisconsin-Madison, has written, this has intriguing implications for mysteries:

> In a mystery film, say there's a clue at the half-hour mark. During a theatrical screening, we're moved forward with no time to ponder it. Watching the DVD lets us pause the film, ponder the clue as long as we like, and maybe track patiently back to earlier scenes to test our suspicions about what that clue means.

David Bordwell, *New Media and Old Storytelling*, *reprinted in American Movie Critics* at 724. And the day will come, Bordwell suggests, when studios will take such usages into account. Perhaps they will be

more careful to lay the foundation for a clue. *See id.* at 727 ("[T]he viewer's possibility of rewatching a film with little fuss encourages ambitious filmmakers to 'load every rift with ore,' to pack details that might not be noticed on a single viewing. One of my examples is the 8:2 motif in *Magnolia*."). Although interactivity is already a feature of video games, Bordwell's hypothesis suggests that film may develop comparable functionalities.

Even if the distinction between "passive" film and interactive video games persists, it does not diminish the latter's claim to full constitutional protection. As many have observed, "interactivity" is inherent to the appreciation of art. As Judge Posner noted in *Kendrick*:

> *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.

244 F.3d at 577 (emphasis added); *see also Wilson v. Midway Games, Inc.*, 198 F.Supp. 2d 167, 181 (D. Conn. 2002) ("The nature of the interactivity set out in [the] complaint . . . tends to cut in favor of First Amendment protection, inasmuch as it is alleged to *enhance* everything expressive and artistic about

Mortal Kombat: the battles become more realistic, the thrill and exhilaration of fighting is more pronounced.").

Consider again the *Iliad*. The *Iliad* evokes a powerful reaction precisely because it draws the reader – or the listener – into the narrative. As Merrill explains:

> It would not be accurate to say that the music softens or 'aesthetically transmutes' the unpleasantness [of the imagery] – on the contrary, it makes the wounds excruciatingly visible. But it keeps us fascinated in two ways: first, by letting us hear the matter in measured rhythm; second, by imparting an almost ritual quality to the actions on account of the [poetic devices]. Reading aloud a passage . . . will make these points clearer, as well as revealing how the grisly deaths are often both intensified and relieved by short accounts of the dead men's happy and prosperous lives before they came to Troy.

Merrill's Iliad, Introduction, at 18.

Others have made similar observations. As Alexander Pope wrote in the preface to his translation of the *Iliad*, the "unequal'd fire and rapture . . . is so forcible in *Homer*, that no man of a true poetical spirit is master of himself while he reads him." *The Iliad of Homer* 4, Preface (Alexander Pope trans., Steven Shankman ed. 1996). Pope continues:

> What [Homer] writes, is of the most animated nature imaginable; every thing moves,

> every thing lives, and is put in action. If a council be call'd, or a battle fought, you are not coldly inform'd of what was said or done as from a third person; the reader is hurry'd out of himself by the force of the Poet's imagination, and turns in one place to a hearer, in another to a spectator.

Id.; *see also* Matthew Arnold, *On Translating Homer* 3 (1896) ("[A]ll great poets affect their hearers powerfully, but the effect of one poet is one thing, that of another poet another thing. . . .").

As Pope and Arnold attest, video games are certainly not alone in transporting their audience, in "affect[ing] their [audience] powerfully." At the end of the day, therefore, petitioners' objections to video games reduce to acute anxiety over one medium of violent imagery among many. In fact, at least one scholar has observed that critics of video games tend to be more exercised by thematically rich games than by thematically poor ones. "Without fail," writes Henry Jenkins, a professor at the Massachusetts Institute of Technology, "the works that moral reformers cite are not the ones that are formulaic but those that are thematically rich or formally innovative." Henry Jenkins, *Fans, Bloggers, and Gamers: Exploring Participatory Culture* 204 (2006) (Jenkins). "It is as if," he goes on, "the reformers responded to the work's own provocation to think about the meaning of violence but were determined to shut down that process before it ever gets started." *Id.*

Needless to say, the First Amendment does not allow people to assuage their anxiety – even acute anxiety – by suppressing the expressive rights of others. As this Court has noted, the First Amendment precludes even a majority from deciding for everyone else what is palatable or correct as a normative matter. This is not because such matters are unimportant, but instead because – at least in the context of expression – they are not the government's business. As Justice Kennedy emphasized in *United States v. Playboy Entertainment Group, Inc.*, "[t]he Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of view. The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed." 529 U.S. 803, 818 (2000). Who knows what expression will enable the minors of today, or of the next generation, to prepare for the demands of adulthood?

The First Amendment proceeds from the assumption that no one can answer this question well enough to dictate to others. Many of today's minors already live in a violent world, or may be on the verge of one. Some, for example, may be only a year or two away from service in the military. To be sure, parents are important to the picture, but minors have an independent and compelling claim to the protections of the First Amendment. As Judge Posner correctly observed in *Kendrick*, "[p]eople are unlikely to become well-functioning, independent-minded adults

and responsible citizens if they are raised in an intellectual bubble." 244 F.3d at 577. To give one example, the ability to isolate and take on a fictional nemesis is an important aspect of human nature. As Kelman writes:

> As any book on formula screenwriting will tell its reader, for a satisfactory resolution of an action-based narrative, the protagonist must eventually come face-to-face with a single person whom he or she can defeat. It is not enough to solve problems or overcome obstacles – the narrative is not complete until the nemesis has been conquered. In mythological traditions, this formula, of course, predates film, by many millennia. What is *The Iliad* without Hector? What is *Beowulf* without Grendel or *Moby-Dick* without Moby-Dick?

Kelman at 227-28. Also important is the ability to engage violence as a serious subject. "Historically," Jenkins writes, "cultures have used stories to make sense of senseless acts of violence. Telling stories about violence can, in effect, remove some of its sting and help us comprehend acts that shatter our normal frames of meaning." Jenkins at 216. In sum, video games make a powerful contribution to the world of art and expression, and this Court should confirm that they lie fully within the protective scope of the First Amendment.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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