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 MICROSOFT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
SCOTT P. MARTIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

STATUTORY PROVISIONS INVOLVED 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. VAGUE RESTRICTIONS ON VIDEO GAMES ARE CONSTITUTIONALLY IMPERMISSIBLE AND UNDERMINE THE CREATIVE PROCESS 5

II. THE VAGUE TERMS OF THE CALIFORNIA STATUTE FORCE VIDEO GAME DEVELOPERS, PUBLISHERS, AND DISTRIBUTORS TO GUESS ABOUT ITS SCOPE 16

A. THE CALIFORNIA STATUTE'S REPEATED REFERENCES TO "MINORS" ARE VAGUE 16

B. EACH OF THE THREE PRONGS OF THE CALIFORNIA STATUTE IS VAGUE 18

C. THE UNIQUE FEATURES OF VIDEO GAMES COMPOUND THE CALIFORNIA STATUTE'S INHERENT VAGUENESS 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

ACLU v. *Ashcroft*,
322 F.3d 240 (3d Cir. 2003) 17, 18, 26

Am. Amusement Mach. Ass'n v. *Kendrick*,
244 F.3d 572 (7th Cir. 2001).....*passim*

Baggett v. *Bullitt*,
377 U.S. 360 (1964).....12

Bookcase, Inc. v. *Broderick*,
218 N.E.2d 668 (N.Y. 1966) 22

Citizens United v. *FEC*,
130 S. Ct. 876 (2010).....5, 13, 16

Connally v. *Gen. Constr. Co.*,
269 U.S. 385 (1926).....5, 16

Dombrowski v. *Pfister*,
380 U.S. 479 (1965).....13, 14

Entm't Software Ass'n v. *Granholm*,
404 F. Supp. 2d 978 (E.D. Mich. 2005).....14

Entm't Software Ass'n v. *Granholm*,
426 F. Supp. 2d 646 (E.D. Mich. 2006).....6, 11

Erznoznik v. *City of Jacksonville*,
422 U.S. 205 (1975).....22

FEC v. *Wisc. Right to Life, Inc.*,
551 U.S. 449 (2007).....5, 16

Ginsberg v. *New York*,
390 U.S. 629 (1968).....21, 22

Greyned v. *City of Rockford*,
408 U.S. 104 (1972).....12

Hamling v. *United States*,
418 U.S. 87 (1974).....24

Hannegan v. *Esquire, Inc.*,
327 U.S. 146 (1946).....26

In re Harris,
366 P.2d 305 (Cal. 1961).....25

Hurley v. *Irish-Am. Gay, Lesbian & Bisexual Group*,
515 U.S. 557 (1995).....6

Interactive Digital Software Ass'n v. *St. Louis County*,
329 F.3d 954 (8th Cir. 2003).....6, 9, 10, 11

Interstate Circuit, Inc. v. *City of Dallas*,
390 U.S. 676 (1968).....12

Joseph Burstyn, Inc. v. *Wilson*,
343 U.S. 495 (1952).....7

Keyishian v. *Bd. of Regents*,
385 U.S. 589 (1967).....13, 27

Kolender v. *Lawson*,
461 U.S. 352 (1983).....18

Marks v. *United States*,
430 U.S. 188 (1977).....20

Memoirs v. *Massachusetts*,
383 U.S. 413 (1966).....22

Miller v. *California*,
413 U.S. 15 (1973).....*passim*

NAACP v. *Button*,
371 U.S. 415 (1963).....4, 13, 29

Paris Adult Theatre I v. *Slaton*,
413 U.S. 49 (1973).....19

People v. *Kahan*,
206 N.E.2d 333 (N.Y. 1965).....12

Pope v. *Illinois*,
481 U.S. 497 (1987).....20, 23, 26

Reno v. *ACLU*,
521 U.S. 844 (1997).....12, 19

Se. Promotions, Ltd. v. *Conrad*,
420 U.S. 546 (1975).....13

Speiser v. *Randall*,
57 U.S. 513 (1958).....12

United States v. *Womack*,
509 F.2d 368 (D.C. Cir. 1974).....24

Video Software Dealers Ass'n v. *Webster*,
968 F.2d 684 (8th Cir. 1992).....21

Walker v. *City of Birmingham*,
388 U.S. 307 (1967).....13

Winters v. *New York*,
333 U.S. 507 (1948).....7, 9

STATUTES

47 U.S.C. § 231 (2000).....17

Cal. Civ. Code § 1746 .....*passim*

Cal. Civ. Code § 1746.1 .....2, 3, 15

Cal. Civ. Code § 1746.2 .....2, 3, 14

Cal. Civ. Code § 1746.3 .....3, 14, 15

Cal. Civ. Code § 1746.4 14

Cal. Civ. Code § 1780 14

OTHER AUTHORITIES

Ernest Adams, *The Designer's Notebook: How Many Endings Does a Game Need?*, Gamasutra, Dec. 22, 2004 11

Julie Bosman, *Choose Your Own Adventure Series Turns a Page*, N.Y. Times Media Decoder Blog, July 26, 2010 10

P. Heath Brockwell, Comment, *Grappling with* Miller *v.* California*—The Search for an Alternative Approach to Regulating Obscenity*, 24 Cumb. L. Rev. 131 (1993).....20

Clay Calvert & Robert D. Richards, *Stopping the Obscenity Madness 50 Years After* Roth *v.* United States, 9 Tex. Rev. Ent. & Sports L. 1 (2007).....20

Emily Campbell, *Obscenity, Music and the First Amendment: Was the Crew 2 Lively?*, 15 Nova L. Rev. 159 (1991) 20

Donald A. Downs, *The New Politics of Pornography* (1989).....20

Entm't Software Rating Board, *Game Ratings & Descriptor Guide* 24

Benjamin Franklin, *The Autobiography of Benjamin Franklin* (Charles W. Eliot ed., SoHo 2010) (1791).....23

C.S. Lewis, *An Experiment in Criticism* (Canto 2000) (1961).....11

James Lindgren, *Defining Pornography*, 141 U. Pa. L. Rev. 1153 (1993) 20

Lorne Manly, *Your TV Would Like a Word with You*, N.Y. Times, Nov. 19, 2006, § 2, at 1.....10

Edward Packard, *The Cave of Time* (1979).....10

H. Franklin Robbins, Jr. & Steven G. Mason, *The Law of Obscenity—or Absurdity?*, 15 St. Thomas L. Rev. 517 (2003).....20

Neil Strauss, *Policing Pop: Recording Industry's Strictest Censor Is Itself*, N.Y. Times, Aug. 1, 2000, at A1 15

BRIEF OF MICROSOFT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

Microsoft's mission is to enable individuals and businesses throughout the world to realize their full potential by creating technology that transforms the way people work, play, and communicate. Microsoft has long advanced that mission in the context of video games by positioning itself at the forefront of technology—including as an early innovator in computer gaming, and more recently by developing the popular Xbox and Xbox 360 video game consoles.

In addition to creating the technology that makes gaming possible, Microsoft develops and publishes video games for both its *Windows* operating system and the Xbox consoles. Video games released through Microsoft Game Studios include some of the most successful games in history, such as the *Halo* and *Age of Empires* series. Microsoft's games are available for purchase through retailers around the

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus*, Gibson, Dunn & Crutcher LLP, represented respondents in the lower courts but does not represent them before this Court; none of the attorneys who represent *amicus* before this Court were involved in the proceedings below, and none of the attorneys who represented respondents below authored any portion of this brief.

world, as well as through Microsoft's online store at store.microsoft.com.

The California Civil Code imposes labeling requirements on "[e]ach violent video game that is imported into or distributed in California for retail sale" and prohibits retailers from selling any game labeled as "violent" to persons under the age of 18. Cal. Civ. Code §§ 1746.1(a), 1746.2. Although the statute contains a lengthy definition of "violent video game," prolixity is no substitute for clarity, and the statutory definition offers none of the latter. Indeed, the terms of the definition are so unclear that those potentially subject to the statute, including Microsoft, can do no more than guess which video games might be covered.

Microsoft is concerned that uncertainty regarding the reach of the California statute forces video game developers, publishers, and distributors into either of two unacceptable positions. They may engage in self-censorship to mitigate the risk of facing substantial penalties—$1,000 *per violation* (*i.e.*, for "[e]ach . . . game" imported or distributed)—for concluding incorrectly that a particular game need not be labeled as "violent." Or they may prophylactically label any questionable games as "violent" and thereby shut those games out of retail channels unwilling to assume the $1,000-per-violation risk associated with selling them. Confronting potential speakers with this Morton's Fork undermines the creative process and is antithetical to the First Amendment.

STATUTORY PROVISIONS INVOLVED

Section 1746(d)(1)(A) of the California Civil Code provides, in relevant part:

> "Violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that . . . [c]omes within all of the following descriptions:
>
> (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.
>
> (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.
>
> (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

Section 1746.1(a) of the California Civil Code provides:

> A person may not sell or rent a video game that has been labeled as a violent video game to a minor.

Section 1746.2 of the California Civil Code provides, in relevant part:

> Each violent video game that is imported into or distributed in California for retail sale shall be labeled with a solid white "18" outlined in black. . . .

Section 1746.3 of the California Civil Code provides, in relevant part:

> Any person who violates any provision of this title shall be liable in an amount of up to one thousand dollars ($1,000), or a lesser amount as determined by the court. . . .

SUMMARY OF ARGUMENT

This Court has emphasized that "First Amendment freedoms need breathing space to survive." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). California's labeling requirement for "violent" video games suffocates creativity and expression in the comparatively new medium of video games by forcing video game developers, publishers, and distributors to self-censor rather than risk penalties for games that could conceivably fall within the statutory requirement.

Confronted with the vague terms in the California statute, video game makers are left to guess about the statute's scope and how it might conceivably be enforced. Yet rather than risk punishment for incorrect guesses, some companies would err on the side of caution and either alter the content of their games to avoid any possibility of penalties, or label as "violent" even games that they do not believe qualify as such under the statute—in either case reducing the availability of protected expression not only for minors but also for society as a whole.

This self-censorship would come at a great cost. Video games provide players with the opportunity to create—and indeed to control the creative process—through the interactions of their characters with others in the game, including both computer-controlled characters and characters controlled by other players. Restricting access to video games would thus deprive game developers and those who play their games of a critical instrument for expressing and exercising their creativity.

The First Amendment does not permit such limitations on constitutionally protected expression. Instead, it insists that statutes "'give the benefit of any

doubt to protecting rather than stifling speech.'" *Citizens United* v. *FEC*, 130 S. Ct. 876, 891 (2010) (quoting *FEC* v. *Wisc. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.)). Because the California statute falls well short of this requirement, the Court should invalidate it—if not because, as respondents correctly contend, its attempted restriction on "violent" content is an invalid content-based restriction on speech, then because that restriction is impermissibly vague.

ARGUMENT

I. VAGUE RESTRICTIONS ON VIDEO GAMES ARE CONSTITUTIONALLY IMPERMISSIBLE AND UNDERMINE THE CREATIVE PROCESS.

The California statute—like other attempts to restrict access to so-called "violent" video games—is problematic because people "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application." *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). As this Court has recognized, such uncertainty is particularly unacceptable in regulating expressive activity because it would "create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions" by the courts. *Citizens United* v. *FEC*, 130 S. Ct. 876, 891 (2010).

1. Before this Court, as before the Ninth Circuit, "[t]he State does not contest that video games are a form of expression protected by the First Amendment." Pet. App. 16a. Nor could it do so: The First Amendment is "versatile enough to 'shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,'" and there is "no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative

present in video games are not entitled to a similar protection." *Interactive Digital Software Ass'n* v. *St. Louis County*, 329 F.3d 954, 957 (8th Cir. 2003) ("*IDSA*") (quoting *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995)) (alteration in original).

Video games "contain stories, imagery, 'age-old themes of literature,' and messages, 'even an "ideology," just as books and movies do.'" *IDSA*, 329 F.3d at 957 (quoting *Am. Amusement Mach. Ass'n* v. *Kendrick*, 244 F.3d 572, 577–78 (7th Cir. 2001) (Posner, J.) ("*AAMA*")); *see also Entm't Software Ass'n* v. *Granholm*, 426 F. Supp. 2d 646, 651 (E.D. Mich. 2006) ("*ESA*") (video games "contain original artwork, graphics, music, storylines, and characters similar to movies and television shows"). Indeed, the parallels between video games and movies are so pronounced that each routinely provides material for the other; movies like *Prince of Persia: The Sands of Time* and *Lara Croft: Tomb Raider* originated as video games, for instance, whereas *GoldenEye 007* and *The Godfather* are video games derived from movies.[2] Like movies and television shows, video games therefore receive full constitutional protection under the First Amendment even though they are at

---

[2] Given this overlap, it is unsurprising that film actors routinely provide voices for video games. *Mass Effect 2*, for instance, features the voices of Martin Sheen (*Apocalypse Now*), Carrie-Anne Moss (*The Matrix* trilogy), Adam Baldwin (*Full Metal Jacket*), Shohreh Aghdashloo (*House of Sand and Fog*), and Seth Green (the *Austin Powers* series). *Grand Theft Auto: San Andreas* has a similarly impressive cast, including Samuel L. Jackson (*Pulp Fiction*), James Woods (*Once Upon a Time in America*), Peter Fonda (*Easy Rider*), Frank Vincent (*Raging Bull*), and Chris Penn (*Reservoir Dogs*).

least partly designed to entertain. *See Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501–02 (1952); *see also*, *e.g.*, *Winters* v. *New York*, 333 U.S. 507, 510 (1948) ("The line between the informing and the entertaining is too elusive for the protection of that basic right.").

Video games that contain "violence" nonetheless remain constitutionally protected, for a simple and obvious reason: "Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low." *AAMA*, 244 F.3d at 577 (citing, *e.g.*, the *Odyssey*, *The Divine Comedy*, *War and Peace*, *Frankenstein*, and *Dracula*). That is particularly true for American culture.

American film and literature have long glorified the violent days of the Wild West, as in Cormac McCarthy's *Blood Meridian*, *The Quick and the Dead*, and *The Good, the Bad, and the Ugly*. Violent westerns are not just tolerated by society; they are embraced. John Wayne won the Academy Award for Best Actor in *True Grit*, in which he portrayed a U.S. Marshal who (among other things) shoots and kills a horse thief who had himself just fatally stabbed another horse thief. *Butch Cassidy and the Sundance Kid*, which ends with the title characters charging into their certain deaths in a volley of gunfire, was nominated for Best Picture, as were the comparably violent *High Noon* and *The Alamo*.

Depictions of war in American film and literature likewise contain violence as an essential element of their artistic and thematic value. In James Fenimore Cooper's *The Last of the Mohicans*, for instance, the title character is stabbed to death (along with the daughter of a British army colonel); his killer, a

Huron chief, is then shot by a recurring character in Cooper's novels, who also appears in the similarly violent *The Deerslayer*. More recently, violence has been an important component of such critically acclaimed films as *Apocalypse Now*, in which a machete attack on Marlon Brando's character is juxtaposed with the ritual slaughter of a water buffalo, and *The Deer Hunter*, a Best Picture winner that, in addition to depicting violence in the Vietnam War, involves several scenes of Russian Roulette, which ultimately results in the shooting death of Christopher Walken's character. *Platoon*, *Schindler's List*, and *Saving Private Ryan*—all of which were nominated for the Academy Award for Best Picture, and the first two of which won it—also involve graphic depictions of violence.

Violence is not limited to the western and war genres. *The Godfather* and *The Godfather Part II* won Best Picture Oscars (and seven other Academy Awards) for their depictions of the Corleone crime family. And *The Silence of the Lambs* swept the top Oscar categories for its depiction of an FBI agent who captures a serial killer with the help of a convicted cannibal.

Video games, no less than books and movies, can use violence as a critical part of their expressive content. In *AAMA*, Judge Posner used *The House of the Dead*, a video game that could be played on Microsoft's *Windows* operating system, to illustrate how even "violent" games draw on and reflect recurrent cultural themes:

> The player is armed with a gun—most fortunately, because he is being assailed by a seemingly unending succession of hideous axe-wielding zombies, the living dead con-

> jured back to life by voodoo. The zombies have already knocked down and wounded several people, who are pleading pitiably for help; and one of the player's duties is to protect those unfortunates from renewed assaults by the zombies. His main task, however, is self-defense. Zombies are supernatural beings, therefore difficult to kill. Repeated shots are necessary to stop them as they rush headlong toward the player. He must not only be alert to the appearance of zombies from any quarter; he must be assiduous about reloading his gun periodically, lest he be overwhelmed by the rush of the zombies when his gun is empty.

244 F.3d at 577. Similar zombie-themed games have remained popular in the decade since *AAMA* was decided, including the *Dead Rising* series on Xbox 360.

As Judge Posner observed, "[s]elf-defense, protection of others, dread of the 'undead,' [and] fighting against overwhelming odds" are "all age-old themes of literature, and ones particularly appealing to the young." 244 F.3d at 577–78. Although *The House of the Dead* is perhaps not "distinguished literature," "popular culture . . . is not lightly to be suppressed." *Id.* at 578; *see also IDSA*, 329 F.3d at 958 ("Whether we believe the advent of violent video games adds anything of value to society is irrelevant; guided by the [First Amendment], we are obliged to recognize that 'they are as much entitled to the protection of free speech as the best of literature.'" (quoting *Winters*, 333 U.S. at 510)).

Eagle Forum—but, notably, not California—claims that video games lose their constitutional protection because they are purportedly "*role-playing*

activities that do not constitute free speech." Eagle Forum Br. 2 (emphasis in original). As the lower courts have concluded, however, "there is no justification for disqualifying video games as speech simply because they are constructed to be interactive." *IDSA*, 329 F.3d at 957; *see also*, *e.g.*, *AAMA*, 244 F.3d at 577 (same). Interactivity is the future of *all* media, as companies have long appreciated in developing technologies such as interactive television. *See*, *e.g.*, Lorne Manly, *Your TV Would Like a Word with You*, N.Y. Times, Nov. 19, 2006, § 2, at 1. And even those who work in older media have recognized the value of interactive works: "[S]ome books, such as the pre-teen oriented 'Choose Your Own Nightmare' series (in which the reader makes choices that determine the plot of the story . . . by following the instructions at the bottom of the page) can be every bit as interactive as video games." *IDSA*, 329 F.3d at 957–58.[3]

Contrary to Eagle Forum's assumption, "[a]ll literature . . . is interactive; the better it is, the more

---

[3] The same is true of the "Choose Your Own Adventure" books, one of the most popular children's series of the 1980s and 1990s. *See*, *e.g.*, Edward Packard, *The Cave of Time* 3 (1979) ("If you decide to start back home, turn to page 4. [¶] If you decide to wait, turn to page 5."); *see also* Julie Bosman, *Choose Your Own Adventure Series Turns a Page*, N.Y. Times Media Decoder Blog, July 26, 2010, http://mediadecoder.blogs.nytimes.com/2010/07/26/choose-your-own-adventure-series-turns-a-page (discussing "modern interactive books based on the series," which preserve "[t]he basic concept of the books—a suspenseful plot with dozens of possible endings, depending on which choices the reader makes"). There is considerable overlap between video games and these interactive books; *The Cave of Time*, for instance, was developed into a computer game for the Apple II and Commodore 64 systems in the mid-1980s.

interactive." *AAMA*, 244 F.3d at 577. "[L]iterature is most successful when it '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.'" *IDSA*, 329 F.3d at 957 (quoting *AAMA*, 244 F.3d at 577); *see also*, *e.g.*, C.S. Lewis, *An Experiment in Criticism* 137 (Canto 2000) (1961) ("We want to see with other eyes, to imagine with other imaginations, to feel with other hearts, as well as with our own."). In this respect, the interactive nature of video games "can be said to enhance the expressive elements even more than other media by drawing the player closer to the characters and becoming more involved in the plot of the game than by simply watching a movie or television show." *ESA*, 426 F. Supp. 2d at 651. That video games are *more* expressive than movies or books is hardly a justification for according them *less* constitutional protection.

Indeed, modern gaming technology creates the possibility for an unprecedented collaboration between the designer and the player. Whereas older video games typically required the player to complete a particular sequence of steps in a particular order, modern games may be nonlinear: Game designers have the technological ability to permit players to choose which tasks to complete in which order, perhaps even whether to complete a particular task at all, and to encode in the game multiple endings or side-plots to reflect the outcome of these choices. *See*, *e.g.*, Ernest Adams, *The Designer's Notebook: How Many Endings Does a Game Need?*, Gamasutra, Dec. 22, 2004, http://www.gamasutra.com/view/feature/2179/the_designers_notebook_how_many_.php ("If your game includes an interactive story, you may want multiple endings to reflect important actions

that your player has made in the course of the game, actions that she expects to have meaningful consequences."). In this sense, video games represent the expressive product of *both* the designer *and* the player, and limitations on video games are thus far more pernicious in their effect than comparable restrictions on movies or television shows.

2. This Court has long recognized that "the vagueness of [content-based] regulation[s]," such as the California statute at issue here, "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno* v. *ACLU*, 521 U.S. 844, 871–72 (1997). These concerns apply equally to statutes that are purportedly designed to protect minors: "'It is . . . essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise . . . .'" *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 689 (1968) (quoting *People* v. *Kahan*, 206 N.E.2d 333, 335 (N.Y. 1965) (Fuld, J., concurring)) (first omission in original).

a. When a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," the "uncertain meanin[g]" of the statute forces potential speakers to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)); *see also*, *e.g.*, *Greyned* v. *City of Rockford*, 408 U.S. 104, 109 & nn.6–8 (1972) (collecting cases). The result is self-censorship: Rather than risk violating a vague prohibition, speakers "limit their [speech] to that which is unquestionably safe," at the expense—for the speaker, and for society as a

whole—of protected speech that falls closer to the line. *Keyishian* v. *Bd. of Regents*, 385 U.S. 589, 609 (1967).

The problems caused by vague laws governing speech are particularly pronounced in the context of new media. New media are vulnerable to suppression through vague laws because the newness of the medium invariably means those proscriptions have yet to be cabined by reliable enforcement patterns or judicial construction. *Cf. Se. Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.").

To avoid such limitations on constitutionally protected speech, the Court has "molded both substantive rights and procedural remedies . . . to conform to [its] overriding duty to insulate all individuals from the 'chilling effect' upon exercise of First Amendment freedoms generated by vagueness." *Walker* v. *City of Birmingham*, 388 U.S. 307, 345 (1967). "Because of the sensitive nature of constitutionally protected expression," for instance, this Court has not required "those subject to overbroad regulations [to] risk prosecution to test their rights" because "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965). Similarly, "[b]ecause First Amendment freedoms need breathing space to survive," this Court has repeatedly held that "government may regulate in the area only with narrow specificity." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963); *see also*, *e.g.*, *Citizens United*, 130 S. Ct. at 891–92.

b. The concerns that motivated this Court to invalidate potentially chilling, vague statutes in other contexts apply with particular force to California's attempt to regulate "violent" video games.

The statute imposes a $1,000 penalty for each violation, Cal. Civ. Code § 1746.3, and "[e]ach violent video game that is imported into or distributed in California for retail sale" without the required labeling is a separate violation, *id.* § 1746.2. Because a video game publisher might sell multiple *millions* of copies of popular titles—of which a considerable number would be sold in California, the most populous state—it would face enormous potential liability for erroneously concluding that a video game is not "violent" under the California statute. And even if the publisher *correctly* declines to label a game as violent, the costs of litigation over the labeling requirement themselves could be substantial—particularly because the requirement possibly may be enforced by private parties, *see id.* § 1780(a), in addition to "*any* city attorney, county counsel, or district attorney," *id.* § 1746.4 (emphasis added). *See*, *e.g.*, *Dombrowski*, 380 U.S. at 487 ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.").

To avoid this potential liability, the publisher could self-censor in either of two ways: It could encourage its developers to alter the game's content, or it could label the game as "violent" despite its genuine belief to the contrary. *Cf. Entm't Software Ass'n* v. *Granholm*, 404 F. Supp. 2d 978, 983 (E.D. Mich. 2005) (noting, in the context of a similarly vague statute, that "without wholesale, indiscriminate refusals to sell video games to minors by store operators it appears impossible to protect sellers from

prosecution"). The adverse effect on the creative process is obvious in the former example, but it is equally pronounced in the latter.

If a publisher labels a video game as "violent," that would trigger the California statute's prohibition on sales of the game to minors. *See* Cal. Civ. Code § 1746.1(a) ("A person may not sell or rent a video game that has been labeled as a violent video game to a minor."). This prohibition, like the labeling requirement, is enforceable by a $1,000-per-violation penalty. *Id.* § 1746.3. Faced with this potential liability, few retailers would choose to carry games that have been labeled as "violent" when they could avoid any potential liability (and any need for additional staff training) simply by selling other games. Indeed, even in the absence of a statutory mandate, major retailers have declined to carry compact discs marked with an analogous "parental advisory" label for explicit lyrics. *See*, *e.g.*, Neil Strauss, *Policing Pop: Recording Industry's Strictest Censor Is Itself*, N.Y. Times, Aug. 1, 2000, at A1 (noting that such national retailers comprise "10 to 20 percent [of the market] for popular artists"). And because the largest retailers are national in scope and may prefer to order their inventory on a company-wide basis, there is a substantial risk that games labeled as "violent" might be shut out of *all* a national retailer's stores, not just its California ones.

To maximize the retail availability of its products, a video game publisher thus has a strong incentive to avoid labeling its games as "violent," even if that means forcing its developers to change video game content. *See*, *e.g.*, *Policing Pop*, *supra*, at A1 (noting that "[a]rtists are regularly asked to sing lyrics again, edit out particular words and even excise entire songs from albums" to ensure their albums

can be sold in stores that "refuse to carry albums with parental advisory stickers"). Because the definition of "violent" games under the California statute is so imprecise, distributors would be forced to "give the benefit of any doubt to . . . stifling speech"—a result the First Amendment plainly forbids. *Citizens United*, 130 S. Ct. at 891 ("First Amendment standards . . . 'must give the benefit of any doubt to protecting rather than stifling speech.'" (quoting *FEC* v. *Wisc. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.))).

II. THE VAGUE TERMS OF THE CALIFORNIA STATUTE FORCE VIDEO GAME DEVELOPERS, PUBLISHERS, AND DISTRIBUTORS TO GUESS ABOUT ITS SCOPE.

Almost every portion of the California statute contains terms "so vague that [persons] of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Connally*, 269 U.S. at 391.

A. THE CALIFORNIA STATUTE'S REPEATED REFERENCES TO "MINORS" ARE VAGUE.

The word "minors" itself renders the California statute impermissibly vague. The statute refers to "a deviant or morbid interest *of minors*," "prevailing standards . . . as to what is suitable *for minors*," and games that "lack serious literary, artistic, political, or scientific value *for minors*." Cal. Civ. Code § 1746(d)(1)(A) (emphases added). Under California law, a "minor" is simply someone "under 18 years of age." *Id.* § 1746(a). There are doubtless video games that are suitable for 17-year-olds that are unsuitable for toddlers, but the statute does not state *which* of these "minors" is relevant.

The Third Circuit's decision in *ACLU* v. *Ashcroft* is illustrative. 322 F.3d 240 (3d Cir. 2003), *aff'd*, 542 U.S. 656 (2004). The statute at issue there covered "'material that is harmful to minors,'" defined in part (like the California statute here) as speech that "'lacks serious literary, artistic, political, or scientific value *for minors*.'" *Id.* at 253 (quoting 47 U.S.C. § 231(e)(6)(C) (2000)) (emphasis in original). But because "[t]he term 'minor' . . . applies in a literal sense to an infant, a five-year old, or a person just shy of age seventeen," potential speakers "cannot tell which of these 'minors' should be considered." *Id.* at 254.

As the Third Circuit recognized, "[t]he type of material that might be considered harmful to a younger minor is vastly different—and encompasses a much greater universe of speech—than material that is harmful to a minor just shy of seventeen years old." 322 F.3d at 268. Some materials, for instance, "may have 'serious value' for, and not be 'patently offensive' as to, sixteen-year-olds," even though "[t]he same material . . . might well be considered 'patently offensive' to, and without 'serious value' for, children aged, say, ten to thirteen." *Ibid.*

The Third Circuit therefore "consider[ed] the use of the term 'minor' . . . to be impermissibly vague." 322 F.3d at 268 n.37. "Because the statute's definition of a minor is all-inclusive, and provides no age 'floor,'" potential speakers would be "forced to guess at the bottom end of the range of ages to which the statute applies." *Id.* at 269 n.37; *see also id.* at 254 (potential speakers "must guess at which minor should be considered in determining whether [their speech] has 'serious . . . value for [those] minors'" (quoting 47 U.S.C. § 231(e)(6)(C) (2000)) (omission and second alteration in original)). Such uncertainty would "dete[r] [potential speakers] from engaging in

a wide range of constitutionally protected speech," and "[t]he chilling effect caused by this vagueness offends the Constitution." *Id.* at 269 n.37.

Similarly here, the California statute provides no clues for video game developers, publishers, and distributors regarding which age range of "minors" they should consider in deciding whether to label their games. To avoid potential liability, they might be forced to assume the statute means *any* "minor," and therefore that it would consider "violent" even those games that satisfy the statutory definition only with respect to toddlers. This reading of the statute would render it substantially overbroad: Even assuming the First Amendment permits the government to restrict minors' access to "violent" content, that content remains protected speech, and the First Amendment prohibits the government from suppressing speech that would not be "violent" as to teenagers simply because it is inappropriate for toddlers. *See ACLU*, 322 F.3d at 255. Thus, to the extent the word "minors" is not vague, it simply reveals a related constitutional problem with the California statute. *See Kolender* v. *Lawson*, 461 U.S. 352, 359 n.8 (1983) (noting that the Court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines").

B. EACH OF THE THREE PRONGS OF THE CALIFORNIA STATUTE IS VAGUE.

Even assuming that the California statute's references to "minors" have a discernable meaning, the three prongs in which that word appears do not. No video game developer, publisher, or distributor could determine by anything other than guesswork whether a game "appeals to a deviant or morbid interest of minors," as judged by a hypothetical "rea-

sonable person"; whether a game is "patently offensive to prevailing standards . . . as to what is suitable for minors"; or whether a game "lack[s] serious literary, artistic, political, or scientific value for minors." Cal. Civ. Code § 1746(d)(1)(A).

In attempting to define "violent video game" using these three prongs, California drew heavily from the test for obscenity announced in *Miller* v. *California*, 413 U.S. 15 (1973). In *Miller*, this Court explained that the "basic guidelines" in determining whether speech qualifies as obscene are:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (internal quotation marks and citations omitted).

Even in the best of circumstances, *Miller*'s three prongs provide only the most modest of guidance to potential speakers. The Court settled on the *Miller* test after "[h]aving struggled for some time to establish a definition of obscenity," *Reno*, 521 U.S. at 872, and that test has been subject to persistent criticism by members of the Court ever since, *see Miller*, 413 U.S. at 37 (Douglas, J., dissenting) ("The Court has worked hard to define obscenity and concededly has failed."); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting) ("[O]ne cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably

obscure standards, have pronounced it so."); *Marks* v. *United States*, 430 U.S. 188, 198 (1977) (Stevens, J., dissenting) (characterizing "the present constitutional standards" as "intolerably vague"); *Pope* v. *Illinois*, 481 U.S. 497, 505 (1987) (Scalia, J., concurring) (noting "the need for reexamination of *Miller*"). Indeed, the *Miller* test is perhaps the most criticized legal standard of the past century. *See* James Lindgren, *Defining Pornography*, 141 U. Pa. L. Rev. 1153, 1159 (1993) ("The *Miller* test has been called vague, underbroad, and overbroad by various commentators.").[4]

But whatever the merits *vel non* of *Miller*'s test for obscenity, California's attempt to modify that test to address the value of particular speech for minors deprives *Miller* of even the limited clarity it would otherwise offer.

---

[4] *See also*, *e.g.*, Donald A. Downs, *The New Politics of Pornography* 20–21 (1989) (noting "[c]onfusion over the meaning of key parts of the *Miller* test—'prurience,' 'serious value,' 'patently offensive,' 'community standards'"); Clay Calvert & Robert D. Richards, *Stopping the Obscenity Madness 50 Years After* Roth *v.* United States, 9 Tex. Rev. Ent. & Sports L. 1, 20 (2007) (discussing the "troubling definitional problems with the *Miller* test"); H. Franklin Robbins, Jr. & Steven G. Mason, *The Law of Obscenity—or Absurdity?*, 15 St. Thomas L. Rev. 517, 531 (2003) ("No reasonable person could argue with a straight face that *Miller* defines obscenity with 'narrow specificity.'" (citing 413 U.S. at 27)); P. Heath Brockwell, Comment, *Grappling with* Miller *v.* California—*The Search for an Alternative Approach to Regulating Obscenity*, 24 Cumb. L. Rev. 131, 136 (1993) ("the failure of the *Miller* test lies partly in the vagueness of its standards"); Emily Campbell, *Obscenity, Music and the First Amendment: Was the Crew 2 Lively?*, 15 Nova L. Rev. 159, 237–38 (1991) ("There is no justifiable basis [under *Miller*] upon which to distinguish the 'bad stuff'—obscenity—from the 'tolerable stuff'—pornography.").

1. The California statute applies to video games that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors." Cal. Civ. Code § 1746(d)(1)(A)(i). The terms "deviant" and "morbid" are not defined by the statute, however, and it is completely opaque to potential speakers what those terms might mean.

The judgment about what is "deviant"—that is to say, especially abnormal—for a minor is subject to considerable debate. "Classic literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial." *AAMA*, 244 F.3d at 575. It is hardly clear whether some of these works might appeal to minors' "deviant" interests. Do minors have a "deviant" interest in the portions of the *Odyssey* containing "graphic descriptions of Odysseus's grinding out the eye of Polyphemus with a heated, sharpened stake"? *Id.* at 577. What about "graphic descriptions of the tortures of the damned" in *The Divine Comedy*? *Ibid.*

The statutory term "morbid" is no better. *See Video Software Dealers Ass'n* v. *Webster*, 968 F.2d 684, 690 (8th Cir. 1992) ("The phrase 'tendency to cater or appeal to morbid interests in violence for persons under the age of seventeen' is elusive."). California apparently borrowed this term from *Ginsberg* v. *New York*, which upheld a statute covering material that "predominately appeal[ed] to the prurient, shameful or morbid interest of minors." 390 U.S. 629, 646 (1968). But in *Ginsberg*, the state all but conceded it could not defend "morbid" on the statute's own terms; instead, the state argued that the statute had been construed by the New York courts as applying only to the *pruriently* morbid. *See* Appellee Br. 96, *Ginsberg*, 390 U.S. 629 (No. 67-47) ("What the enactors have forbidden by their drafts-

manship is the arousal of prurient morbidity or shamefulness[,] not other kinds of morbid interest . . . .”). The California statute contains no such limitation, however, because it is not limited to sexual content.[5]

Even if it were possible to determine whether a video game appealed to a “deviant” or “morbid” interest of *any particular minor*, however, the statute calls for this determination to be made with respect to *minors as a class*. A video game that appeals to particular interests of one minor might not appeal to the same interests in every other minor in California, and that is true even if it were possible—and it is not—to hold age and maturity levels constant. Yet the statute does not provide any guidance regarding which minors, or what percentage of minors, must be used to determine whether a game appeals to a deviant or morbid interest of “minors.” (Of course, whatever percentage is relevant, no video game developer, publisher, or distributor can reasonably be expected to determine whether its games appeal to particular interests of a given percentage of minors in California.)

---

[5] Consistent with the state’s brief, this Court’s decision upholding the *Ginsberg* statute rested entirely on the fact that “the New York Court of Appeals [had] construed th[e] definition to be ‘virtually identical to the Supreme Court’s most recent statement of the elements of obscenity’”—a proposition for which the Court cited *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418 (1966). *Ginsberg*, 390 U.S. at 643 (quoting *Bookcase, Inc.* v. *Broderick*, 218 N.E.2d 668, 672 (N.Y. 1966)). That this Court expressly disapproved the *Memoirs* test in *Miller* casts even further doubt on *Ginsberg*’s vagueness holding. *See Miller*, 413 at 24–25; *see also Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213 n.10 (1975) (“We have not had occasion to decide what effect *Miller* will have on the *Ginsberg* formulation.”).

The California statute is all the more problematic because it requires distributors to speculate about what a hypothetical "reasonable person" would believe to raise deviant or morbid interests in the unknowable class of minors. By taking inherently value-laden terms like "deviant" and "morbid," and layering on top of them an additional value judgment about what is "reasonable," the California statute sets an impossible standard for potential speakers to evaluate. *Cf.* Benjamin Franklin, *The Autobiography of Benjamin Franklin* 32 (Charles W. Eliot ed., SoHo 2010) (1791) ("So convenient a thing it is to be a reasonable creature, since it enables one to find or make a reason for everything one has a mind to do."). While a potential speaker could perhaps—at great expense and subject to considerable margins of error—determine the "average" views in a community through surveys, there is no comparable method to determine what is "reasonable."[6]

2. The California statute covers material that is "patently offensive to prevailing standards in the community as to what is suitable for minors." Cal. Civ. Code § 1746(d)(1)(A)(ii). But the decision about what is "suitable for minors" is necessarily made on a family-by-family basis—and indeed, in some cases, on a family-member-by-family-member basis.

Suitability judgments are subjective and personal, and there is no reason to expect that a video game developer, publisher, or distributor would be

---

[6] Indeed, not even the *Miller* test (for all its faults) would go so far. *Miller* uses a "reasonable person" standard only to evaluate the value of a work—to avoid prohibiting unpopular but nonetheless potentially valuable works—but it looks to an "average" member of the community for the remaining prongs. *See*, *e.g.*, *Pope*, 481 U.S. at 500.

able to determine how any particular family has drawn the balance, let alone whether the aggregation of these private judgments has somehow resulted in a "prevailing standar[d] in the community." That is precisely why the industry has instead developed a voluntary ratings system designed to provide guidance *to parents* as they determine what is suitable for *their own* children. *See* Entm't Software Rating Board, *Game Ratings & Descriptor Guide*, http://www.esrb.org/ratings/ratings_guide.jsp ("The Entertainment Software Rating Board . . . ratings are designed to provide concise and impartial information about the content in computer and video games so consumers, especially parents, can make an informed purchase decision.").

The critical flaw in the California statute is that it takes the community-standards test this Court developed for obscenity and attempts to adapt that test to video games by adding an insoluble "suitable for minors" inquiry. In obscenity cases, this Court presumes that members of a community will be able to determine whether a particular item falls short of "contemporary community standards" where they live. *Miller*, 413 U.S. at 24. That is, the test assumes community members can "draw on [their] own knowledge of the views of the average person in the community or vicinage" to "mak[e] the required determination." *Hamling* v. *United States*, 418 U.S. 87, 104 (1974).

Whatever the merits of the assumptions behind the community-standards test, there is at least *some* information a potential speaker could consider in attempting to discern the relevant standard. The speaker could consider, for instance, whether comparable materials were commonly purchased in the community. *See United States* v. *Womack*, 509 F.2d

368, 379 (D.C. Cir. 1974) (noting that a publication may be "so widely sold and . . . so generally available in the community as to warrant a finding of community acceptance"); *see also*, *e.g.*, *In re Harris*, 366 P.2d 305, 305 (Cal. 1961) (in bank) (holding that the trial court erred by excluding "comparable writings and publications purchased in the community").

To decide whether a particular video game is deemed "suitable for minors" in a particular community, however, a publisher or distributor could not look to sales data for other games. Sales of similar games to adults would be meaningless, of course, and even sales of similar games to minors would be of very limited probative value: The only games that a minor could purchase would be ones already determined by their creators to be "suitable" for minors. But even then, a video game developer could not be certain that the previous developers' judgments were in accord with an average member of the community. And the determinations of previous developers would be of no assistance to the developer of truly original content in his effort to determine whether an average member of the community would deem the new game "suitable" for minors. With so little information that potential speakers could even theoretically consult in trying to determine the statute's reach, they must instead resort to guesswork—precisely what the First Amendment forbids.

3. Finally, the California statute covers video games "lack[ing] serious literary, artistic, political, or scientific value for minors." Cal. Civ. Code § 1746(d)(1)(A)(iii). This, too, provides no meaningful guidance to video game developers, publishers, and distributors.

As an initial matter, the concept of "serious . . . value" is inherently subjective and therefore vague. The First Amendment "accommodat[es] . . . the widest varieties of tastes and ideas" because "[w]hat is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another." *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 157–58 (1946) ("What seems to one to be trash may have for others fleeting or even enduring values."). "[R]atiocination has little to do with esthetics," and therefore "it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can." *Pope*, 481 U.S. at 504–05 (Scalia, J., concurring). Thus, while *Miller* and its progeny have (for the time being) defined *obscenity* by reference to "serious literary, artistic, political, or scientific value," 413 U.S. at 24, the Court should not extend such an indeterminate approach to other types of speech.

The vagueness of the "serious . . . value" standard is compounded in this case because it turns on the value of particular works "for minors." The statute thus presumes that video games are age-specific—that is, some games with "serious . . . value" for a 17-year-old might not have such value for a younger child. But even assuming the statute referred to a particular age range of minors, *but see supra* Part II.A, there is no reason to believe it is even *possible* to determine when a particular game first has "serious . . . value" for a minor, *see*, *e.g.*, *ACLU*, 322 F.3d at 255 ("Even if the statutory meaning of 'minor' were limited to minors between the ages of thirteen and seventeen, [potential speakers]

would still face too much uncertitude as to the nature of material that [the statute] proscribes.").

The statute likewise assumes there are some video games that have "serious . . . value" for 19-year-old adults but that do not also have "serious . . . value" for 17-year-old minors. This is hardly a self-evident proposition, but in any event video game publishers are left to speculate about which games have value only for adults and not for older minors—and therefore can avoid the risk of making an incorrect guess only by altering the content of games that *by definition* have "serious . . . value" for adults. The First Amendment prohibits vague statutes to avoid precisely this sort of chilling effect. *See*, *e.g.*, *Keyishian*, 385 U.S. at 609.

C. THE UNIQUE FEATURES OF VIDEO GAMES COMPOUND THE CALIFORNIA STATUTE'S INHERENT VAGUENESS.

The California statute's vague terms would be problematic in any statute, but they are especially so in the context of video games—a context that renders unclear even terms that might in other contexts be pellucid. The seemingly clear statutory phrase "image of a human being" (Cal. Civ. Code § 1746(d)(1)) both illustrates the difficulty of adapting real-world concepts to video games and confirms that the California statute is impermissibly vague.

In the context of video games, in which the images displayed on screen are the product of the game designer's imagination unbounded by physical limitations, it is often meaningless to speak of "human being[s]." Characters may be depicted as having only some "human" characteristics, or they may be "human" at some times and not others; a game might present characters that are entirely robotic but that

have highly realistic "human" appearances. *See also supra* at 8–9 (discussing violence against zombies). The statute provides no guidance for video game developers, publishers, and distributors about whether violence against such fantastical or robotic characters might violate the statute—or indeed whether a depiction of a part-animal, part-alien, or robotic creature can ever be deemed an "image of a human being" under the statute.

For instance, in *Jade Empire*, a video game available on Microsoft's Xbox 360 console, both the player's character and the enemy forces possess magical abilities and transform into non-humanoid creatures. These are, of course, not traits of "human being[s]." But at least when the character appears in human form, that would arguably qualify as an "image of a human being" under the statute. Video game developers, publishers, and distributors are thus left to guess about the proper interpretation of this ambiguous phrase—at the risk of stiff civil penalties if they guess wrong. The First Amendment forbids states from forcing potential speakers to undertake this sort of guesswork.

* * *

Vagueness, even in a statute that imposes only labeling requirements and sales restrictions to minors, stifles creativity. The California statute does so in the extreme, as it repeatedly requires potential speakers to apply statutory terms that make little sense, or admit of no clear definition, in the context to which they are applied.

The result of this imprecise drafting can only be widespread chilling of protected expression. Faced with massive potential liability for failing to label games that a court might later deem to be "violent,"

video game designers, publishers, and distributors are forced either to alter game content or to label as "violent" any game that even approaches the statutory line, which in turn reduces retail availability of the game. Such self-censorship deprives society of the creative output of video game designers and removes from would-be players of those games—adults and minors alike—a uniquely powerful outlet for their own creativity.

This Court has repeatedly recognized that society is poorer when expression is not given the "breathing space" it requires "to survive," and therefore that the government may regulate expression "only with narrow specificity." *Button*, 371 U.S. at 433. California failed to heed this command.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
SCOTT P. MARTIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

Counsel for Amicus Curiae

September 17, 2010