

No. 08-1448

In The
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, Governor of the
State of California, and EDMUND G. BROWN, JR.,
Attorney General of the State of California,
Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION
and ENTERTAINMENT SOFTWARE ASSOCIATION,
Respondents.

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

**BRIEF OF THE RUTHERFORD INSTITUTE,
AMICUS CURIAE IN SUPPORT OF
RESPONDENTS**

John W. Whitehead
Counsel of Record
Rita M. Dunaway
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Counsel for Amicus Curiae

QUESTIONS PRESENTED

1. Does the First Amendment bar a state from restricting the sale of violent video games to minors?

2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994), is the state required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the state can prohibit the sale of the games to minors?

TABLE OF CONTENTS

Questions Presented	i
Table of Contents	ii
Table of Authorities	iv
Interest of Amicus Curiae.....	1
Summary of the Argument	2
Argument.....	3
I. The Court Should Reject The State’s Newly-Asserted Justification That The Act Supports Parental Authority.	3
A. The State Did Not Cite An Interest In Enhancing Parental Authority As Its Original Justification For The Act.	3
B. Upholding The Act Will Ultimately Undermine The Parent-Child Relationship By Allowing The State To Usurp Parental Authority.	4
II. If The Court Accepts The State’s Argument For The Extension Of <i>Ginsberg</i> , It Will Create A Chilling Effect on All Forms Of Media.....	8

III. The Act Cannot Pass Constitutional Muster Under A Strict Scrutiny Analysis Because The Cited Research Does Not Support The State's Asserted Compelling Interest In Preventing Harm To Minors.	10
A. The Current Research Is Insufficient To Establish A Causal Link Between Violent Video Game Use And Aggressive Behavior.....	10
B. The State Has Presented No Evidence That Violent Video Games Harm Minors.....	13
C. The State's Reliance On Pornography Research Is Misplaced Because Research On The Effects Of Pornography Is More Reliable Than Is The Research On Violent Video Games. ...	14
IV. The Act Cannot Pass Constitutional Muster Under A Strict Scrutiny Analysis Because It Is Not The Least Restrictive Means Of Achieving The State's Interests.	17
Conclusion	24

TABLE OF AUTHORITIES

Cases

<i>Bragdon v. Abbott</i> , 524 U.S. 624 (1998)	4
<i>Ginsberg v. New York</i> , 390 U.S. 629 (1968)	3, 8, 17
<i>H.L. v. Matheson</i> , 450 U.S. 398 (1981)	4
<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944)	7
<i>R.A.V. v. City of St. Paul, Minn.</i> , 505 U.S. 377 (1992)	18
<i>Turner Broadcasting System, Inc. v. F.C.C.</i> , 512 U.S. 622 (1994)	i
<i>United States v. Playboy Entm't Group, Inc.</i> , 529 U.S. 803 (2000)	18, 24
<i>Video Software Dealers Assn. v. Schwarzenegger</i> , 556 F.3d 950 (9 th Cir. 2009)	3

Constitutional Provisions

U.S. Const. Amend. I	passim
----------------------------	--------

Statutes

Cal. Bus. & Prof. Code § 20650(b)	21
Cal. Civ. Code §§ 1746-1746.5	2

Other Authorities

Bernard E. Whitley, Jr. & Mary E. Kite, <i>The Psychology of Prejudice and Discrimination</i> (2006)	15, 16
--	--------

- Craig A. Anderson, *An Update on the Effects of Playing Violent Video Games*, 27 *J. of Adolescence* 113 (2004)10
- Dolf Zillman, *Effects of Prolonged Consumption of Pornography*, in *Pornography: Research Advances and Policy Considerations* 127 (Dolf Zillmann & Jennings Bryant eds., 1989)16
- Douglas A. Gentile, et al., *The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance*, 27 *J. of Adolescence* 5 (2004)12
- Entm't Software Ass'n, *Computer and Video Game Ratings and the Law*, http://www.theesa.com/policy/effective_ratings_system_argument.asp (last visited Jul. 19, 2010)20
- Entm't Software Rating Bd., & Parent Teacher Ass'n, *A Parent's Guide to Video Games, Parental Controls and Online Safety*, 5 *available at* http://www.esrb.org/about/news/downloads/ESRB_PTA_Brochure-web_version.pdf (last visited Jul. 20, 2010)22
- Entm't Software Rating Bd., *Consumer Research*, <http://www.esrb.org/about/awareness.jsp> (last visited Jul. 20, 2010)24

Entm't Software Rating Bd., Education & Outreach, http://www.esrb.org/about/education.jsp (last visited Jul. 20, 2010).....	21
Entm't Software Rating Bd., ESRB Retail Council "Ratings Education and Enforcement Code," at 2 (Jun. 21, 2006), <i>available at</i> http://www.esrb.org/retailers/downloads/erc_code.pdf	20
Entm't Software Rating Bd., ESRB Retail Council, http://www.esrb.org/retailers/retail_council.jsp (last visited Jul. 20, 2010).....	20
Entm't Software Rating Bd., Game Ratings & Descriptor Guide, http://www.esrb.org/ratings/ratings_guide.jsp (last visited Jul. 19, 2010)	19
Entm't Software Rating Bd., Public Service Announcements, http://www.esrb.org/about/psa.jsp (last visited Jul. 20, 2010).....	21
Entm't Software Rating Bd., Retailers, http://www.esrb.org/retailers/index.jsp (last visited Jul. 20, 2010).....	21
Eric Uhlmann & Jane Swanson, <i>Exposure to Violent Video Games Increases Automatic Aggressiveness</i> , 27 J. of Adolescence 41 (2004).....	11

- Fed. Trade Comm'n, A Report to Congress, Marketing Violent Entertainment to Children: A Fifth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (Apr. 2007), *available at* <http://www.ftc.gov/bcp/online/edcams/ratings/reports.htm>.....22
- Fed. Trade Comm'n, Undercover Shoppers Find It Increasingly Difficult for Children to Buy M-Rated Games (May 2008), *available at* <http://www.ftc.gov/opa/2008/05/secretshop.sh> tm.....23
- Ind. Univ. Sch. Of Med., *Aggressive Youths, Violent Video Games Trigger Unusual Brain Activity* (December 2, 2002).....11, 14
- Jeanne B. Funk, et al., *Violence Exposure in Real-Life, Video Games, Television, Movies, and the Internet: Is There Desensitization?*, 27 *J. of Adolescence* 23 (2004).....11, 14
- John L. Sherry, *The Effects of Violent Video Games on Aggression: A Meta-Analysis*, 27 *Hum. Comm. Res.* 409 (2001).....12
- Michael Flood & Clive Hamilton, The Australia. Institute, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects* (2003)16, 17

- Neil M. Malamuth & James V. P. Check, *The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment*, 15 *J. of Res. in Personality* 436 (1981).....15, 16
- Note, *Faulting San Andreas: The Call to Arms for Sensible Regulation of Video Games*, 29 *Hastings Comm. & Ent. L.J.* 121, 146 (2006).....22
- Victor C. Strasburger & Barbara J. Wilson, *Children, Adolescents, and the Media* 159 (2nd ed. 2002).....17

INTEREST OF *AMICUS CURIAE*¹

Since its founding over 25 years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking about religion or defending the rights of individuals against illegal searches and seizures, The Rutherford Institute offers assistance—and hope—to thousands.

¹ Counsel of record to the parties in this case have consented to the filing of this brief, and letters of consent have been filed with the Clerk pursuant to Rule 37. No counsel to any party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae* and its counsel have contributed monetarily to its preparation or submission.

The case now before the Court concerns the Institute for two reasons. First, the Institute is concerned about the increasing dependency of individuals upon the state to inform moral decisions and to provide for an expanding scope of individual needs, including traditional parenting responsibilities. The Institute believes that rather than empowering parents, the net effect of Cal. Civ. Code §§ 1746-1746.5 (“the Act”) will be to undermine the parent-child relationship. Second, the Institute is concerned about the erosion of First Amendment freedom that has been proposed by the State of California. Any such proposal represents an extremely serious undertaking that ought to be viewed with suspicion as a matter of libertarian principles.

SUMMARY OF THE ARGUMENT

While the State of California (“the State”) asserts in its brief that the Act is justified by its interest in promoting parental authority to restrict child access to violent video games, the record does not indicate that this was, in fact, the legislature’s motivation in passing the law. While on its face, the State’s proffered interest provides some sympathy for the State’s case, critical analysis exposes the speciousness of this stated justification. Rather than enhancing parental authority, it is far more likely that the Act will hinder good parenting by fostering in parents a false sense of security. When it comes to parenting, the Institute submits that government

agencies and regulations are simply no substitute for the watchful eyes of moms and dads.

In addition to the serious public policy concerns the Act poses, the law is constitutionally infirm. Unless the Court chooses to substantially extend its decision in *Ginsberg v. New York*, 390 U.S. 629 (1968), thereby eroding First Amendment protection for all forms of media containing violent content, the Act is subject to strict scrutiny because it is content-based. The Act cannot survive strict scrutiny for two reasons. First, the research cited by the State cannot support its asserted compelling interest in “preventing violent, aggressive, and antisocial behavior.” *Video Software Dealers Assn. v. Schwarzenegger*, 556 F.3d 950, 961 (9th Cir. 2009). Second, the Act is not the least restrictive means by which the State might achieve its stated objectives.

ARGUMENT

I. The Court Should Reject The State’s Newly-Asserted Justification That The Act Supports Parental Authority.

A. The State Did Not Cite An Interest In Enhancing Parental Authority As Its Original Justification For The Act.

Petitioner’s Brief repeatedly cites the State’s interest in promoting parental authority as a primary justification for the Act. However, a review of the Ninth Circuit’s opinion reveals that this was not one of the State’s asserted interests supporting the Act. *Id.*, 556 F.3d at 954. In the lower court, the

interests proffered by the State to support the Act were “(1) preventing violent, aggressive, and antisocial behavior; and (2) preventing psychological or neurological harm to minors who play violent video games.” *Id.*

Inasmuch as the State’s interest in promoting parental authority was not asserted below, *Amicus* submits that the Court should not now consider it as a justification for the Act. *See Bragdon v. Abbott*, 524 U.S. 624, 658 n. 1 (1998) (noting that the Court has rarely addressed arguments not asserted below); *H.L. v. Matheson*, 450 U.S. 398, 442 n. 34 (1981) (refusing to consider interests not asserted below).

B. Upholding The Act Will Ultimately Undermine The Parent-Child Relationship By Allowing The State To Usurp Parental Authority.

Our nation is well on its way to becoming a “nanny state.” As ever-expanding federal and state governments regulate more and more aspects of our daily life, each generation of Americans in turn becomes conditioned to expect and depend upon a higher level of government regulation. *Amicus* submits that this is a dangerous trend, particularly where the fundamental parent-child relationship is involved.

As things now stand, governments have an incredible amount of influence over the nation’s children through the public education system. Modern public school curricula encompasses far more than reading, writing and arithmetic; subjects such as family life, sex education, and even

character development are now included in public school curricula. Unfortunately, many parents not only tend to endorse the public system's assumption of authority to teach these topics, but are led to rely upon public schools to guide children on these matters that were traditionally the ambit of parents. To the extent that the state's foray into the inculcation of morals in the nation's youth represents the replacement of direct parental involvement in their own children's upbringing, *Amicus* submits this weakens the American family.

This case is not about whether or not violent video games are suitable for children. As the State's brief points out, the rating system employed by the video game industry constitutes a clear acknowledgment that some games are absolutely inappropriate for minors. (Pet. Br. 47). What this case *is* about is whether the State should be permitted to intervene to preclude minors from obtaining violent video games based on its own judgment regarding the possible effects of the games on minors. Inasmuch as the State purports to rely on research data pointing to a correlation between violent games and violent children as its rationale for restricting minors from obtaining such games, the State is acting not as a parent's helper, but rather is assuming an aspect of parental decision-making for itself.

In fact, parents have all the authority they need to preclude their children not only from buying these games, but from playing them at all. It is the parent who directs the child's freedom of movement and daily activities. While it is a tragic reality that many parents are not sufficiently invested in their

roles as such to protect their own children from harmful influences, the State has not cited this consideration as its justification for the Act. If this is, in fact, its real motivation, then the State is disingenuous in now claiming that it merely seeks to “promot[e] parental authority to restrict [minors from obtaining violent games].” (Pet. Br. 6). The state does not promote the authority of parents by assuming the authority for itself. On the other hand, while the desire of legislators to fill a protective void for children of disengaged parents is understandable, it surely raises a host of serious concerns regarding the propriety of governmental parenting.

In addition to these concerns, the greater danger presented by the Act is the State’s general usurpation of parental prerogatives. As our nation’s parents are increasingly led to rely upon judgment-based decisions that the state makes for their children, parents are likely to become oblivious to their children’s desperate need for good, old-fashioned, personal parenting. The Act will tend to lull even well-meaning parents into a false sense of security—into believing that parental supervision is unnecessary because there is no way minors can obtain the offensive games. In fact, the reality is that poorly-supervised minors will have ample opportunity to play the games with or without the Act. These children need only find a single friend or classmate whose parent or older sibling is willing to purchase the game on behalf of the minors. With or without the Act, the exposure of children to violent content will turn on the degree of parental involvement. But if the Act is upheld, many parents will have one more excuse to disengage. *Amicus*

submits that what America's children need is not a state that parents, but parents who do.

Rather than usurp the traditional role of parents, using the force of law to determine when young people become mature enough to purchase blood-and-guts games for themselves, it would be far more constructive for the state to educate parents about the shocking nature of many games, the dangers posed by them, and the attendant necessity for parental awareness of and control over which games children are playing. In this way, the state might truly empower parents with information and, in the best case scenario, foster meaningful family conversations through which virtually bloodthirsty young people might ultimately be converted into compassionate, responsible adults.

As this Court has eloquently stated before, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). *Amicus* asks the Court to reaffirm the responsibility and authority of parents—not the state—to protect their children from exposure to inappropriate media. If the Court instead upholds the Act, it will likely produce the unintended consequence of fostering complacency and a false sense of security among the parents whom the legislature purportedly seeks to empower.

II. If The Court Accepts The State's Argument For The Extension Of *Ginsberg*, It Will Create A Chilling Effect on All Forms Of Media.

Although the Act restricts access to violent video games in particular, the State's arguments for the legal basis for doing so have implications beyond the instant context. The Act thus threatens freedom of expression through books, movies, television shows, and music. While *Amicus* assumes that concerns over exposure to violence would be heightened where the exposure involves minors' virtual participation in the violence, the State has not proposed limiting principles that would prevent the State from expanding violence regulation to other media. The authority claimed by the State could be employed to restrict minors' access to a wide range of artistic expression. Therefore, even if the Court holds that the Act is constitutional, its decision should be crafted to avoid threatening other artistic media.

Indeed, the State has, in the course of defending the Act, implicitly claimed the authority to regulate other media. On appeal to the Ninth Circuit, the State claimed that although there was not substantial evidence supporting regulating video games more strictly than other forms of media, "the Constitution allows the Legislature to address the harmful effects media violence has on children *one phase at a time*." Reply Brief of Appellant-Petitioner at 10, *Video Software Dealers Ass'n v. Schwarzenegger*, No. 07-16620 (9th Cir. Feb. 26, 2008) (emphasis added). Elsewhere the State asserted that its legislature may "address the serious problems associated with children's exposure

to extremely violent material *one medium at a time* as their harmful effects are established.” Reply Brief of Appellant-Petitioner at 11, *Video Software Dealers Ass’n v. Schwarzenegger*, No. 07-16620 (9th Cir. Feb. 26, 2008) (emphasis added).

Adoption of the State’s proposed standard for evaluating restrictions on distribution of violent content will facilitate the regulation of other forms of media that legislators may target. In fact, the California Senate Judiciary Committee noted that “some supporters of the bill readily agree that the bill’s proposed regulations on violent video games should be expanded to movies, songs, and books.” S. 2005 Leg.-1179, Reg. Sess., at pt. 5 (Ca. Sept. 8, 2005).

If the Act is upheld, then musicians, movie producers, and book publishers must adjust their artistic expression in order to avoid potential restrictions on retail sales. If the Court holds that the Act is constitutional without explaining clear boundaries on the legislature’s authority, then artists in all media will face uncertainty about the scope of their First Amendment rights. That uncertainty is likely to hinder artistic expression. The Court should continue to foster artistic innovation by refusing to compromise constitutional protection of free speech. If the Court ultimately chooses to uphold the Act, *Amicus* urges the Court to explicitly limit the holding to video games, thereby protecting other media from a less-rigorous constitutional scrutiny.

III. The Act Cannot Pass Constitutional Muster Under A Strict Scrutiny Analysis Because The Cited Research Does Not Support The State's Asserted Compelling Interest In Preventing Harm To Minors.

A. The Current Research Is Insufficient To Establish A Causal Link Between Violent Video Game Use And Aggressive Behavior.

Longitudinal experimental studies conducted over a number of years are necessary to truly understand whether a causal relationship exists between violent action and violent video game use. *See* Craig A. Anderson, *An Update on the Effects of Playing Violent Video Games*, 27 *J. of Adolescence* 113, 121 (2004). As Craig Anderson, the State's expert, wrote, "when one considers violent video game research by itself, a glaring empirical gap emerges: the lack of longitudinal studies." *Id.* In the absence of longitudinal research, the State has attempted to link violent video game use to aggressive behavior through short-term and correlational studies.

Short-term and correlational studies not only fail to fill the "empirical gap" left by the absence of longitudinal research, such studies clearly reveal the need for long-term research to determine whether a relation exists between aggression and violent video games. For example, the State cites one short-term study in which researchers found that individuals who had just played violent video games associated more with aggression than those who had played non-violent video games. Eric Uhlmann & Jane

Swanson, *Exposure to Violent Video Games Increases Automatic Aggressiveness*, 27 J. of Adolescence 41, 45 (2004). The problem here is that participants were tested almost immediately after playing the violent video games. This provides no indication of how long the association with aggression lasts, how strong the association is days and weeks after playing the game, or whether the initial association will ever translate into aggressive behavior. Short-term studies cannot answer such questions, and, thus, without longitudinal research the State cannot demonstrate a causal link between violent video games and aggressive behavior.

The State also relies heavily on studies that fail to meet general standards of reliability or employ flawed methodologies. For instance, one cited study of the reactionary patterns of participants diagnosed with conduct disorders was never peer reviewed, and the researchers themselves noted the need for a “more controlled study.” See Ind. Univ. Sch. Of Med., *Aggressive Youths, Violent Video Games Trigger Unusual Brain Activity* (December 2, 2002). The State also cited several flawed correlational studies. In one study, researchers utilized the uncorroborated self-reports of fourth- and fifth-graders to determine the children’s frequency of violent video game use and their feelings of desensitization to violence. Jeanne B. Funk, et al., *Violence Exposure in Real-Life, Video Games, Television, Movies, and the Internet: Is There Desensitization?*, 27 J. of Adolescence 23, 27 (2004). Another study’s correlation depended upon the *level* of violence in each video game the participants played as rated by the participants. Douglas A. Gentile, et al., *The*

Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance, 27 *J. of Adolescence* 5, 11 (2004). Such subjective measures cannot be expected to yield valid data. Furthermore, any correlational study will typically indicate only an association and not a causation. A correlational study cannot prove that a violent video game caused a child to act violently. It may simply indicate that an already violent child chose to play a violent video game, or that after playing the game the child gave in to the urgings of a third party to act violently.

Despite the shortcomings of the State's short-term and correlational research, the State's expert claims that his meta-analyses reveal a causal relationship between video game violence and aggression. However, other researchers have explained that the lack of consistent research standards across experiments makes it very difficult to obtain reliable conclusions from a meta-analysis. See John L. Sherry, *The Effects of Violent Video Games on Aggression: A Meta-Analysis*, 27 *Hum. Comm. Res.* 409, 414 (2001) (explaining time to play games has ranged from five to seventy-five minutes during an experiment, and measures of aggression are rarely consistent). Thus, like the short-term and correlational research, the State's expert's meta-analysis is insufficient to show that playing violent video games causes a violent response.

It is worth noting that relying on the meta-analysis in this case produces additional concerns. The same meta-analysis relied upon by the State claimed that the correlation of television and

aggression was over twice that of video games and aggression. *Id.* If this meta-analysis is used to sustain the Act here, it will likely have broad implications for other forms of protected expression. This risk to First Amendment freedom clearly is not justified by unreliable studies.

In the final analysis, the State has failed to produce any psychological or sociological evidence sufficient to establish a causal link between using violent video games and aggressive behavior. Longitudinal studies, which simply do not exist, are necessary to establish this link. Many of the short-term and correlational studies cited by the State are flawed or unreliable. Similarly, the State's expert's meta-analysis utilizes a scientifically unsound methodology. The State argues that it should not be required to prove a causal link in order to justify the Act. However, its unreliable research must not be allowed to sustain the heavy burden of proof borne by a government seeking to uphold restrictions on First Amendment rights.

B. The State Has Presented No Evidence
That Violent Video Games Harm
Minors.

The State has relied heavily on short-term and correlational studies that attempt to relate violent video games to an increase in aggression. However, none of these studies indicate any actual harm to either the adolescents playing the video games or to third parties. *See supra*, Part III (A). Without this link nearly all of the aggression studies are irrelevant.

The State may claim that the changes in brain patterns noted in the Indiana School of Medicine study cited above demonstrate a physical change toward aggression that is proof of harm to minors. However, because the participants in that study were previously diagnosed with a conduct disorder, it is unclear whether any increased aggression resulted from an environmental trigger or was the result of differences in brain patterns. Ind. Univ. Sch. of Med., *supra*. Even in the aforementioned study, which correlates some desensitization to violence with violent video game use, Funk, et al., *supra*, at 23, there is no indication that desensitization lead or would lead to violent behavior. Thus, the State ultimately fails to present any psychological evidence that establishes violent video games cause actual harm to individuals, adolescents or adults.

C. The State's Reliance On Pornography Research Is Misplaced Because Research On The Effects Of Pornography Is More Reliable Than Is The Research On Violent Video Games.

The State has tried to justify a reliance on the psychological research it presents in this case based upon this Court's (and even the California Legislature's) past reliance on the social sciences to permit the restriction of First Amendment rights and create legal distinctions between minor's and adults. One of the most apparent and closely related instances of this is the restriction of pornography under the obscenity standard. But while current psychological research supports this regulation of pornography, it does not support regulating violent

video games. The research concerning pornography utilizes a more sound methodology and more persuasively shows that actual harm results from viewing obscene sexual material.

One risk pornography presents is an increased endorsement of the rape myth, a belief that women enjoy forced sex. Researchers have conducted several experimental studies indicating that pornographic materials cause viewers to endorse the rape myth. *See, e.g.,* Neil M. Malamuth & James V. P. Check, *The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment*, 15 *J. of Res. in Personality* 436, 441 (1981) (finding men who viewed sexually violent films more likely to endorse the rape myth and accept interpersonal violence against women). Though not necessarily longitudinal studies, these studies used reliable methods (such as a control group, *see id.* at 438) and were controlled experiments demonstrating that the effects of viewing pornography extended beyond the laboratory setting. The Malamuth and Check study, for example, showed that even several days after viewing violent pornography men were still more likely to endorse the rape myth. *Id.* Other studies have demonstrated that persons holding unfavorable biases against a certain population segments can subconsciously create negative behavioral changes in interactions with the members of that segment which are readily observable. *See* Bernard E. Whitley, Jr. & Mary E. Kite, *The Psychology of Prejudice and Discrimination* (2006). Studies also show that many women and some men feel heightened alienation upon viewing the degrading portrayal of women in pornographic films. *See*

Michael Flood & Clive Hamilton, The Australia. Institute, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, at 49 (2003).

Unlike the studies utilized by the State in this case, these studies of pornography viewing demonstrate real-world harm. Endorsing the rape myth several days after viewing pornography can result in aggressive behavior towards women. *See* Malamuth and Check, *supra*, at 441. The other cited studies show clear damage to interpersonal relationships, *see* Whitley, Jr. & Kite, *supra*, and self-image., *see* Flood & Hamilton, *supra*, at 49. Additionally, experimental subjects who endorse the rape myth (as a result of viewing pornography in the experiment) report that they would give more lenient sentences to convicted rapists than would control subjects, and they exhibit less sympathy with and compassion for rape victims. Dolf Zillman, *Effects of Prolonged Consumption of Pornography*, in *Pornography: Research Advances and Policy Considerations* 127, 136 (Dolf Zillmann & Jennings Bryant eds., 1989).

Another potential harm of pornography viewing is that it could lead to unsafe sexual practices. While research is ongoing, one experiment demonstrated that teens who were shown videos with explicit sexual practices believed that those practices were more acceptable than did the control subjects. *See* Flood & Hamilton, *supra*, at 38. Additionally, scientific polling has shown that teenagers who have watched more pornography believe their peers to be more sexually active than they actually are. *See*

Victor C. Strasburger & Barbara J. Wilson, *Children, Adolescents, and the Media* 159 (2nd ed. 2002). Viewers were also more likely to engage in sexual intercourse, and to have a positive attitude toward recreational sex. See Flood & Hamilton, *supra*, at 38.

While these studies are correlational and not long-term experimental studies, the research is highly persuasive and suggestive of potential harm. Its methodological techniques have traditionally been more precisely executed, leaving fewer concerns about the experiments' validity. The effects of pornography research have extended beyond the laboratory. Most importantly, the research has shown that pornography is firmly linked with tangible harms such as aggressive sexual attitudes. While the research on pornography tends to persuasively indicate that minors and others are likely to be harmed by viewing pornography, the same cannot be said of the research on violent video games.

IV. The Act Cannot Pass Constitutional Muster Under A Strict Scrutiny Analysis Because It Is Not The Least Restrictive Means Of Achieving The State's Interests.

The Ninth Circuit correctly held that because the variable *Ginsberg* standard applies only to obscenity, the Act is subject to strict scrutiny. *Amicus* submits that the Act cannot survive strict scrutiny because it is not the least restrictive means of achieving the State's interests. In fashioning its violent video game regulations, California ignored less restrictive

alternatives such as promoting and enhancing the safeguards that already exist to protect children from video games that parents might find objectionable.

The legislative history surrounding the passage of the Act reveals that the California legislature did not adequately consider the effectiveness of existing measures to protect children from inappropriate content—or how it might enhance the effectiveness of those measures—before enacting this law that requires a relaxation of First Amendment principles. Specifically, California might have opted to promote the Entertainment Software Rating Board’s (“ESRB”) rating system or even proposed suggestions for increased participation and industry enforcement of the system.

While the State certainly has an interest in helping parents protect children from being exposed to violent video games, it has not adequately explained why the ESRB system—or some enhanced variation thereof—is insufficient to achieve this goal. This Court has held that a state must justify the rejection of less restrictive alternatives in order for a content-based regulation of speech to survive strict scrutiny. *See, e.g., R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395 (1992); *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000). The Court should view the State’s decision to ignore less restrictive means with particular suspicion where, as here, the State is asking the Court to adjust constitutional standards in order to uphold the Act.

It is imperative that the State rely on a narrowly-tailored system that protects children instead of a broadly applicable law that creates a chilling effect on a wide variety of speech and expression. In this case, the least restrictive means of achieving the State's goal of protecting children is to leave the power to regulate violent video games in the hands of the industry's own ESRB and to empower parents to understand the system. *Amicus* submits that in a freedom-loving nation such as ours, only as a last resort should government seek to weaken First Amendment principles through regulations—even those based on noble intentions. A far superior alternative exists: government can work with industry trade groups and agencies to increase the effectiveness of the industry's own voluntary regulatory systems. State legislatures might even invite public participation in such an effort, thus bringing the full force of marketplace demand to bear on game manufacturers and retailers. In addition to providing more deference to First Amendment values, four practical advantages of the existing system counsel in favor of leaving violent video game regulation to the ESRB and parents.

First, the ESRB uses concrete terms that are more easily understood, applied, and limited than the vague terms that the Act employs. The ESRB system informs video game purchases by two methods. Entm't Software Rating Bd., Game Ratings & Descriptor Guide, http://www.esrb.org/ratings/ratings_guide.jsp (last visited Jul. 19, 2010). The ESRB provides both a rating symbol to suggest the ages of players for which the game is appropriate and content

descriptors to indicate what elements in the game prompted the rating. *Id.* The rating is expanded on ESRB's website to provide parents with more information explaining the game's rating and what it means. Entm't Software Ass'n, Computer and Video Game Ratings and the Law, http://www.theesa.com/policy/effective_ratings_system_argument.asp (last visited Jul. 19, 2010).

Second, the ESRB is committed to educating parents about the ratings system and ensuring that they are equipped to use it effectively when making video game purchasing decisions for their children. The ESRB joined major video game and computer software retailers to form a group known as the ESRB Retail Council ("ERC"). Entm't Software Rating Bd., ESRB Retail Council, http://www.esrb.org/retailers/retail_council.jsp (last visited Jul. 20, 2010). The ERC instituted a code that directs each member to fully support the ESRB ratings system and educate store patrons about how the system works. *Id.* As part of the ERC directive, each retailer is to display signs in conspicuous locations that explain the ESRB rating system and the store's policy to refuse sales of Mature-rated video games to children under seventeen. Entm't Software Rating Bd., ESRB Retail Council "Ratings Education and Enforcement Code," at 2 (Jun. 21, 2006), *available at* http://www.esrb.org/retailers/downloads/erc_code.pdf In furtherance of these requirements, the ESRB provides retailers with signage in multiple languages to guarantee that parents are exposed to the ratings system when entering a store to make a video game purchase. Entm't Software Rating Bd.,

Retailers, <http://www.esrb.org/retailers/index.jsp> (last visited Jul. 20, 2010). The in-store signage is designed to supplement the rating sticker that is affixed to every video game box. The State has already taken one step toward enhancing the effectiveness of in-store education by passing a statute requiring every retailer to prominently display information about the rating system. *See* Cal. Bus. & Prof. Code § 20650(b).

The ESRB's dedication to educating parents about the rating system extends to initiatives designed to reach parents at home. The ESRB has created and aired public service announcements on national, regional, and statewide levels. Entm't Software Rating Bd., Public Service Announcements, <http://www.esrb.org/about/psa.jsp> (last visited Jul. 20, 2010). These public service announcements have reached millions of parents via television, radio, print, outdoor locations, and the Internet. *Id.* In addition, the ESRB has partnered with many third-party organizations to provide education through channels most likely to reach parents. Groups such as the Parent Teachers Association and *Parenting* magazine have helped ensure that the ESRB is able to educate parents about the rating system. Entm't Software Rating Bd., Education & Outreach, <http://www.esrb.org/about/education.jsp> (last visited Jul. 20, 2010).

This outreach shows clear signs of success as parents are increasingly aware of and able to apply the rating system. The Federal Trade Commission ("FTC") conducted independent studies focused on determining the effectiveness of the ESRB rating

system. The FTC compared a study it had conducted in 2000 to a study it conducted in 2006 and found that the ESRB rating system had gained tremendous support and application during the six-year span. Fed. Trade Comm'n, *A Report to Congress, Marketing Violent Entertainment to Children: A Fifth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (Apr. 2007), *available at* http://www.ftc.gov/bcp/online/edcams/ratings/report_s.htm. Awareness of the ESRB rating system rose from 61% in 2000 to 87% in 2006. *Id.* at 27. 85% of parents restricted the types of games their children could play in 2006 as opposed to only 63% of parents in 2000. *Id.* After examining all the data, the FTC noted that “[o]verall the results of the parent and child surveys reflect positively on the ESRB system.” *Id.*

Third, the new generation of video game consoles allows parents to utilize a password system to control what types of video games their children can play without direct parental supervision. Entm't Software Rating Bd., & Parent Teacher Ass'n, *A Parent's Guide to Video Games, Parental Controls and Online Safety*, 5 *available at* http://www.esrb.org/about/news/downloads/ESRB_PTA_Brochure-web_version.pdf (last visited Jul. 20, 2010). Games are embedded with the ESRB's rating so the system will recognize how the game is rated and respond accordingly if the parent has set up the parental controls. Note, *Faulting San Andreas: The Call to Arms for Sensible Regulation of Video Games*, 29 *Hastings Comm. & Ent. L.J.* 121, 146 (2006). For instance, if a parent does not want a child to play a

game rated Teen or above, the parent can set up this preference and the video game system will not allow the child to play any game rated Teen or above. *See generally* A Parent's Guide to Video Games, *supra* (explaining how to set up the parental controls on each next generation video game console).

Fourth, retailers are increasingly consistent in applying their minimum age requirements for purchasing violent video games thanks to pressure from the public and the ESRB. The FTC conducted mystery shopper audits designed to test the efficacy of retailers' policies to refuse sales of Mature-rated video games to children under the age of seventeen. Fed. Trade Comm'n, *Undercover Shoppers Find It Increasingly Difficult for Children to Buy M-Rated Games* (May 2008), *available at* <http://www.ftc.gov/opa/2008/05/secretshop.shtm>. This study found that the rate at which retailers enforce their age requirement policies increased dramatically between the years 2000, when they only enforced their policies 15% of the time, and 2008, when they enforced their policies 80% of the time. *Id.* Although retailer enforcement is not universal, it is dramatically better when applied to video games than when applied to other media, such as tickets to R-rated movies or the sale of R-rated DVDs. *Id.* The dramatic increase in enforcement is a direct result of increased public pressure to protect children and increased focus by the ESRB to train retail employees.

The State asserts that the Act should be upheld as constitutional because the ESRB and parents cannot control the video games children play (Pet.

Br. 58). This assertion presumes that the ESRB rating system is ineffective and that parents do not act upon the rating information they are given. But the statistics show otherwise. Entm't Software Rating Bd., Consumer Research, <http://www.esrb.org/about/awareness.jsp> (last visited Jul. 20, 2010). The FTC found that 89% of parents are involved in the purchase or rental of video games for their children. *Id.* 98% of parents feel the ESRB rating system is either very helpful or somewhat helpful, and 98% of parents are either very confident or somewhat confident that the ESRB rating information accurately describes the content of the video game. *Id.* Furthermore, “[a] court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.” *Playboy*, 529 U.S. at 824.

Rather than rely on an argument for the erosion of First Amendment standards, the State should use the least restrictive means to achieve its interest by working with parents and the ESRB to fortify the current regulatory system. The State should take advantage of the ESRB's proven willingness to work with states to educate citizens about the existing rating system.

CONCLUSION

The record calls into question whether the State's motivation for passing the Act was truly to enhance parental authority or rather to usurp that authority and replace the State's own judgment for that of parents. Either way, *Amicus* believes that the

actual, long-term effect of the Act will be to undermine parents' roles in the lives of their children. By purporting to ensure that minors will not play violent games unless their parents specifically consent (an impossible undertaking), the State effectively gives the nod to parents to go to sleep at the wheel. Surely, a nation of disengaged parents poses an even greater threat to our young people than exposure to violent games.

Finally, the Act cannot pass constitutional muster under strict scrutiny, which remains the appropriate level of review for its content-based restrictions. The cited research does not support the State's claim that the regulation is justified by a compelling interest in preventing harm to the minors who play the games, and the Act is not the least restrictive means of achieving any of the State's asserted objectives.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Rita M. Dunaway
Doug R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888
Counsel for Amicus Curiae