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

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AND THE MEDIA INSTITUTE

IN SUPPORT OF RESPONDENTS

Robert M. O'Neil
J. Joshua Wheeler*
The Thomas Jefferson Center for
the Protection of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
434-295-4784

*Counsel of Record for *Amici Curiae*

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STATEMENTS OF INTEREST OF *AMICI*[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country. The Center is familiar with the issues presented in this appeal having filed as *amicus curiae* in two other cases involving restrictions on violent video games: *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) and *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

The Media Institute is an independent, nonprofit research organization located in Arlington, Va. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, a competitive communications industry, and journalistic excellence. The Institute has participated as *amicus*

[1] Pursuant to S. Ct. R. 37.6, the *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties' written consent to the filing of *amicus curiae* briefs is on file with the court.

curiae in numerous court proceedings, including cases before the United States Supreme Court and federal courts of appeal.

SUMMARY OF ARGUMENT

Whatever lingering confusion may have existed concerning the origins of categories of speech unprotected by the First Amendment, it was eliminated by this Court's decision last Term in *United States v. Stevens*, 130 S. Ct. 1577 (2010). Yet despite seeking to add to the list of unprotected categories of speech, Petitioners reference *Stevens* only twice in their brief on the merits. Pet. Br. 13, 14. This paucity is understandable; any more extensive analysis of *Stevens* would foreclose Petitioners' argument that California Civil Code §§ 1746-1746.5 (the California Act) passes constitutional muster. Indeed, the two passages cited by Petitioners are merely general statements about the unprotected categories' roots in American history and tradition. When viewed in context of the decision as a whole, the two *Stevens* passages cited by Petitioners oppose–rather than support–a determination that the California Act is consistent with this Court's First Amendment jurisprudence.

By its plain meaning, the California Act is a content-based restriction on speech that does not fall under any of the established categories of unprotected speech. As such, it is presumptively invalid and subject to strict scrutiny. *See City of Los Angeles v. Alameda Books*, 535 U.S. 425, 434 (2002);

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 817-18 (2000); *R. A. V. v. St. Paul,* 505 U.S. 377, 382, 395 (1992)*; Video Software Ass'n, et. al. v. Schwarzenegger, et al.*, 556 F.3d 950, 958 (2009). In an effort to avoid this degree of review, Petitioners urge this Court to adopt an open-ended approach to First Amendment analysis: Rather than requiring the government prove that unwelcome speech falls within an established exception to free speech, courts should consider creating a new category of unprotected expression anytime government claims it has a rational basis for wanting to suppress speech. This Court rejected such an approach in *Stevens* and it should do so in this case.

Petitioners attempt to temper the novel nature of their argument by casting it in terms of traditional First Amendment analysis. Specifically, Petitioners argue that restricting the access of minors to violent video games is no different than restricting their access to obscene materials, approved by this Court in *Ginsberg v. New York*, 390 U.S. 629 (1968). Beyond the similarity of limiting the access of minors to expressive materials, examination of this Court's reasoning in *Ginsberg* reveals little support for the restrictions set forth in the California Act.

Although Petitioners raise a number of issues defending the California Act, each of those issues is addressed in the opinion of the Court of Appeals and the Brief of Respondents. Rather than repeating those analyses, *amici* The Thomas Jefferson Center for the Protection of Free Expression and The Media

Institute believe they could best assist this Court by briefly elaborating solely on the inappositeness of Petitioners' reliance on this Court's decisions in *United States v. Stevens* and *Ginsberg v. New York*.

ARGUMENT

I. PETITIONERS ADVOCATE AN APPROACH TO ASSESSING CONTENT-BASED RESTRICTIONS ON SPEECH THAT WAS SPECIFICALLY REJECTED IN *UNITED STATES v. STEVENS*.

In asking this Court to uphold the California Act, Petitioners seek no less than the legal recognition of a new content-based category of expression outside the range of First Amendment protection. Perhaps recognizing that just last Term this Court rejected the creation of new categories of unprotected expression simply because government deems the speech "valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor" (*see Stevens*, 130 S. Ct. at 1586), Petitioners assert an historical basis for the unprotected status of video games directed toward minors containing "offensively violent material." Pet. Br. 13. This historical link, argue Petitioners, places the speech targeted by the California Act among the "*well-defined and narrowly limited* classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Stevens*, 130 S. Ct. at 1584 (citing *Chaplinsky v. New*

Hampshire, 315 U.S. 568, 571-72 (1942)) (emphasis added).

In making this argument, however, Petitioners confuse analogy to historical tradition with history itself. The primary evidence Petitioners claim demonstrates that access by minors to "offensively violent material" is among the "categories of speech that have been historically unprotected" (*Stevens*, 130 S. Ct. at 1586), is an analogy to this Court's analysis in *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding restrictions on access by minors to obscene materials). Yet access by minors to expressive materials is not a category of speech. While it is true that *Ginsberg* recognizes that obscene materials in the hands of minors may not be obscene in the hands of adults, the fact remains that the speech at issue was obscenity–a *category* of speech deemed unprotected by American history and tradition. *Ginsberg*, 390 U.S. at 635 (citing *Roth v. United States*, 354 U.S. 476, 485 (1957). Petitioners provide no valid evidence that access by minors to "offensively violent materials" is a category of speech that has been historically unprotected.

Indeed, Petitioners' claim is seriously weakened by the fact that so much of their argument is based on the alleged minimal value that violent materials offer when in the hands of minors. For example: "Whatever First Amendment value these games may possess for adults, such games are simply not worthy of constitutional protection when sold to minors without parental participation." Pet. Br. 6.

"Violent video games, like sexual images, can be harmful to minors and have little or no redeeming social value for them." Pet. Br. 13. Similarly, Petitioners center much of their argument balancing the value of offensively violent material with the alleged harmful effects it has on children. "As is true of … other forms of unprotected speech, offensively violent speech aimed at minors can be harmful, and our Nation's traditional interest in protecting minors outweighs any benefit derived from such speech." Pet. Br. 34. This value-laden "balancing of interests" approach to First Amendment analysis was specifically rejected in *Stevens*. "[T]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document 'prescribing limits, and declaring that those limits may be passed at pleasure.'" *Stevens*, 130 S. Ct. at 1585 (quoting *Marbury v. Madison*, 1 Cranch 137, 178, 2 L.Ed. 60 (1803)); *see also Winters v. New York,* 333 U.S. 507, 510 (1948).

The core of Petitioners' argument is found in the statement that "[t]here is no sound basis in logic or policy for treating offensively, violent harmful material with no redeeming value for children any different than sexually explicit material." Even if there were some merit to the substance of this statement (a point effectively disputed in the Brief of Respondents, 31-33), it is does not justify a shift in

First Amendment jurisprudence. As *Stevens* makes clear, First Amendment analysis is not about courts setting new policy by analogy to existing unprotected categories of speech; it is about determining whether a particular category of speech itself has been historically unprotected. If history can provide no such evidence, then the restriction on that category of speech is presumptively invalid and subject to strict scrutiny. *See* e.g. *Alameda Books*, 535 U.S. at 434.

II. THE COURT OF APPEALS APPROPRIATELY LIMITED THE *GINSBERG* STANDARD TO SEXUAL IMAGERY.

In their brief, Petitioners make the extraordinary statement that "this Court *unequivocally* held in *Ginsberg v. New York* … [that] states may properly restrict minors' access to material that is fully protected as to adults." Pet. Br. 12 (emphasis added). In fact, *Ginsberg* makes no such sweeping pronouncement concerning the relative First Amendment rights of children and adults. Rather, the decision is explicitly limited to minors' access to obscene materials:

> We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State. It is enough for the purposes of this case that we

> inquire whether it was constitutionally impermissible for New York ... to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see.

Ginsberg, 390 U.S. at 636-37. Consequently, the Circuits that have considered the issue have uniformly refused to apply *Ginsberg* in cases involving the regulation of violent materials. *See Schwarzenegger*, 556 F.3d 950; *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992).

These courts soundly have held to the distinction between violence and obscenity reflecting the disparate rationales for regulating each category of speech. Governmental attempts to regulate violent materials seek to prevent the harmful psychological effects and violent behavior alleged to result from their use. *See James v. Meow Media, Inc.* 300 F.3d 683, 698 (6th Circuit 2002); *Kendrick*, 244 F.3d at 575. Obscenity is regulated because of its offensiveness and not because of some psychological harm it allegedly inflicts on the viewer. *Kendrick*, 244 F.3d at 574-75. Thus, "no proof that obscenity is harmful is required … to defend an obscenity statute against being invalidated on constitutional grounds." *Id.* at 575. Because violent material is not regulated based on its offensiveness, but rather to prevent its

alleged harmful effects, it should be held to a different and higher standard of review. Indeed, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), this Court has already determined the appropriate standard for assessing regulations of speech that could induce people to violence, one of the harms allegedly caused by offensively violent material. *See* Pet. Br. 36.

Moreover, as the Ninth Circuit recognized in the case below, this Court has made clear that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Schwarzenegger*, 556 F.3d at 958 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975)). Although the scope of speech to which children have access may not be coextensive with that of adults, the same First Amendment principles govern:

> Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.

Erznoznik, 422 U.S. at 213-14.

In *Ginsberg,* the Court provided two justifications for regulating minors' access to sexual material: (i) "the legislature [can] properly conclude that parents and others … who have primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility," and (ii) the State has an "independent interest in the well-being of its youth." *Ginsberg*, 390 U.S. at 639-40. Contrary to Petitioners' assertion (*see* Pet. Br. 18), the *Ginsberg* holding does not authorize the use of a standard lesser than strict scrutiny anytime government alleges these justifications are present. *Ginsberg* involved the defining of an already established unprotected category of expression as it applied to minors. In determining that the definition of obscenity could vary based on the age of the person viewing it, the Court was still working with a category of speech that was never intended to be protected by the First Amendment. *See Ginsberg*, 390 U.S. at 638). Hence, regulations of such speech need not require the degree of scrutiny that is necessary for assessing regulations of protected speech. The California Act is aimed at regulating the content of speech never previously recognized as unprotected. As such, it should be evaluated with strict scrutiny. To hold otherwise would allow government to regulate speech by mere allegation, without proving that the regulation serves the purposes of aiding parents in raising children and promotes the well-being of children.

A comparison of the practical applications of limiting minors' access to obscenity and violent video games reveals further evidence of the ill-advisability of treating the variable standard of *Ginsberg* as interchangeable with a category of speech not contemplated in the decision. *Ginsberg* dealt with "girlie" magazines and other obscene materials that were easily seen by minors. *Ginsberg*, 390 U.S. at 631. Such magazines may feature sexual content on the cover, allowing children to see the material simply by entering a store. Once a minor has purchased the material, it can be easily secreted within the home or viewed outside the home in the course of the minor's ordinary daily activities. As such, an age-based restriction on purchasing obscene materials offers practical assistance to parents in prohibiting their children from viewing such items. It is the rare circumstance that the same case could be made for the purchase of violent video games. Children cannot view the contents of a video game without a video game console or computer, the cost of which is in the hundreds of dollars. *See* http://www.consumersearch.com/video-game-consoles/compare (visited September 16, 2010). The video games themselves are also relatively expensive: *Red Dead Redemption* for example, retails for $55.99 on Amazon.com. *See* http://www.amazon.com/Red-Dead-Redemption-Playstation-3/dp/B001SGZL2W (visited September 16, 2010). Most children do not have access to this amount of money without obtaining it from their parents or guardians. Those who do are typically much older and therefore, under the theory espoused by Petitioners, are less likely to suffer from the alleged harms caused by exposure to such

material because they are closer to the age of majority.

Even when a minor has a game console and a copy of a video game, his ability to use them outside his parents' knowledge or control is largely eliminated by constraints of time and space. Parents can confiscate games or consoles or use the parental controls built into game consoles to limit minors' access to video games. Ultimately, parents have much greater ability to shield children from violent video games than from obscene sexual material.

This Court has emphasized the traditional value placed on parents' freedom to guide the upbringing of their children rather than assigning this role to the state. *Meyer v. Nebraska*, 262 U.S. 390, 400-403 (1923); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). In *Reno v. American Civil Liberties Union*, the Court found the existence or even possibility of parental control a significant answer to concerns regarding minors' access to obscene material on the Internet, noting that "currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing material which the *parents* believe is inappropriate will soon be widely available." 521 U.S. 844, 877 (1997) (citation omitted) (emphases in original). Thus, a restriction on minors' First Amendment rights that is justified as assistance to parents falls far short of meeting its burden when parents already have at their disposal ample means for supervising the

content of video games their children play. While government may assist parents in their responsibilities, such assistance should not be "an unbridled license to regulate what minors read and view." *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 959-60 (8th Cir. 2003).

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to affirm the judgment of the Ninth Circuit Court of Appeals.

/s/ J. Joshua Wheeler

Robert M. O'Neil
J. Joshua Wheeler*
The Thomas Jefferson Center for
the Protection of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
434-295-4784

The Media Institute
2300 Clarendon Blvd.
Suite 602
Arlington, VA 22201
703-243-5700

*Counsel of Record