

No. 08-1448

In The
Supreme Court of the United States

—◆—

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

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION
and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

—◆—

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

—◆—

**BRIEF OF *AMICUS CURIAE* VINDICIA, INC.,
IN SUPPORT OF RESPONDENTS**

—◆—

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QUESTIONS PRESENTED

California Civil Code sections 1746-1746.5 prohibit the sale of violent video games to minors under 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. The respondent industry groups challenged this prohibition on its face as violating the Free Speech Clause of the First Amendment. The court of appeals affirmed the district court's judgment permanently enjoining enforcement of the prohibition.

The questions presented are:

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. FCC*, 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?

RULE 29.6 DISCLOSURE

Amicus Curiae Vindicia, Inc., has no parent corporations. No publicly traded company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Authorities	iv
Interest of <i>Amicus Curiae</i>	1
Summary of Argument	2
Argument	4
I. Video Game Content Is A Form Of Speech Protected By The First Amendment	4
II. The Act’s Restrictions On Video Game Sales Unduly Burden Adult Speech.....	6
A. Video Games Are Primarily And Per- vasively Enjoyed By Adults, Largely Online	7
B. The Act’s Application to Online Gaming Is Vague And Particularly Harmful	10
III. Parental Controls Offer An Effective And Less Restrictive Alternative To Statutorily Imposed Age Verification Requirements For Online Video Gaming.....	17
Conclusion.....	22

TABLE OF AUTHORITIES

Page

CASES

<i>Ashcroft v. ACLU</i> , 535 U.S. 564 (2002).....	4
<i>Ashcroft v. ACLU</i> , 542 U.S. 656 (2004).....	6, 11, 21
<i>California v. LaRue</i> , 409 U.S. 109 (1972)	4
<i>Erznoznik v. City of Jacksonville</i> , 422 U.S. 205 (1975).....	4
<i>Jenkins v. Georgia</i> , 418 U.S. 153 (1974)	4
<i>Joseph Burstyn, Inc. v. Wilson</i> , 343 U.S. 495 (1952).....	4, 5, 6
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997)	6, 7, 11, 12, 17
<i>Schacht v. United States</i> , 398 U.S. 58 (1970)	4
<i>Schad v. Borough of Mount Ephraim</i> , 452 U.S. 61 (1981).....	4
<i>Se. Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975).....	4, 5
<i>United States v. ALA</i> , 539 U.S. 194 (2003)	11
<i>United States v. Playboy Entm't Group, Inc.</i> , 529 U.S. 803 (2000).....	6
<i>United States v. Stevens</i> , 130 S. Ct. 1577 (2010)	17
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989).....	4
<i>Young v. Am. Mini Theatres, Inc.</i> , 427 U.S. 50 (1976).....	4

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

CAL. CIV. CODE § 1746.1.....	12
CAL. CIV. CODE § 1746.1(a)	10
CAL. CIV. CODE § 1746.1(b)	13

OTHER AUTHORITIES

AMANDA LENHART ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, PEW RESEARCH CENTER, TEENS, VIDEO GAMES AND CIVICS 38 (Sept. 16, 2008), <i>available at</i> http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Teens_Games_and_Civics_Report_FINAL.pdf	18, 19, 20
AMANDA LENHART ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, PEW RESEARCH CENTER, INTERNET PROJECT DATA MEMO: ADULTS AND VIDEO GAMES 1 (Dec. 7, 2008), <i>available at</i> http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Adult_gaming_memo.pdf	7, 9, 19
AppData, http://www.appdata.com (last visited Sept. 15, 2010).....	9, 13
Barbara Ortutay, <i>Video Game Sales Top \$21 Billion in 2008</i> , ASSOCIATED PRESS, Jan. 15, 2009, http://www.msnbc.msn.com/id/28682836	8

TABLE OF AUTHORITIES – Continued

	Page
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ENTM'T SOFTWARE ASSOC., 2009 SALES, DEMOGRAPHIC AND USAGE DATA: ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY 2, <i>available at</i> http://www.theesa.com/facts/pdfs/ESA_EF_2009.pdf	8
Facebook, http://www.facebook.com (select the Farmville or Mafia Wars gaming application) (last visited Sept. 15, 2010)	10
Hasbro, http://www.hasbro.com/hasbrokids/ (last visited Sept. 15, 2010).....	10
Microsoft X-Box, http://www.xbox.com/en-US/support/familysettings (last visited Sept. 15, 2010)	20
Nielsen Company, WHAT AMERICANS DO ONLINE: SOCIAL MEDIA AND GAMES DOMINATE ACTIVITY Aug. 2, 2010, <i>available at</i> http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity/ (last visited Sept. 15, 2010)	9

TABLE OF AUTHORITIES – Continued

	Page
Nintendo, http://www.nintendo.com/corp/parents.jsp (last visited Sept. 15, 2010).....	20
PARENT TEACHER ASSOC. & ENTM'T SOFTWARE RATING BD., A PARENT'S GUIDE TO VIDEO GAMES, PARENTAL CONTROLS AND ONLINE SAFETY, <i>available at</i> http://www.esrb.org/about/news/downloads/ESRB_PTA_Brochure-web_version.pdf	20
PC GAMING ALLIANCE, THE PCGA PRESENTS: THE PC GAMING INDUSTRY IN 2008 (2009), <i>available at</i> http://www.pcgamingalliance.org/RESOURCES/Articles/tabid/397/Default.aspx	9
Press Release, THE NPD GROUP, INC., 2009 U.S. VIDEO GAME INDUSTRY AND PC GAME SOFTWARE SALES REACH \$20.2 BILLION (Jan. 14, 2010), <i>available at</i> http://www.npd.com/press/releases/press_100114.html	8
Sony Playstation, http://us.playstation.com/support/parents/index.htm (last visited Sept. 15, 2010).....	20
The New Instant Action – Real PC Gaming in Your Browser, http://www.instantaction.com/ (last visited Sept. 15, 2010).....	10
Walt Disney's Pirates of the Caribbean Game, http://piratesonline.go.com/#/account_services/parental_controls_faq.html (last visited Sept. 15, 2010).....	20

TABLE OF AUTHORITIES – Continued

	Page
World of Warcraft Sign-Up Page, https://us.battle.net/account/creation/wow/signup/ (last visited Sept. 15, 2010).....	20
World of Warcraft, http://www.worldofwarcraft.com/index.xml (last visited Sept. 15, 2010).....	10

INTEREST OF *AMICUS CURIAE*¹

Belmont, California based Vindicia, Inc., founded in 2003, develops and offers on demand strategic billing solutions for online merchants. Many of Vindicia's merchant clients sell and distribute entertainment products and content, including video games.

The California law at issue in this case substantially impacts Vindicia, its customers, and the consumers they serve online using computers and portable device platforms, by creating uncertainty regarding the legal status of video game expression. Further, the Act's age verification mandate jeopardizes significant modes of online commerce.

For the first time in the game industry's history, growth in online gaming is outpacing console and PC-based revenues, reflecting a convergence of (1) significant growth in the popularity of the gaming medium as a form of entertainment and communication;

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. The parties have consented to the filing of this brief in letters on file in the Clerk's office. 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 *amicus curiae* or their counsel made a monetary contribution to its preparation or submission.

(2) significant technological advances rendering on-line gaming a viable platform; and (3) the forging of innovative business models, like free-to-play (or “freemium”).

Vindicia seeks to inform the Court of significant issues presented by the application of this law in the internet domain. The challenged law imposes a substantial impact on the vibrant and innovative game industry, and on the burgeoning community of gamers for which Vindicia provides a forum for entertainment, societal discourse and exchange of ideas.



SUMMARY OF ARGUMENT

Video games, rivaling movies and music as the leading form of entertainment in the United States, are a form of expression protected under the First Amendment. That some video game content, like some motion picture or other artistic expression, may not be suitable for children is not surprising, as contrary to conventional wisdom, video games are primarily enjoyed by adults. However, California’s statutory restrictions on the sale of video games to minors are unconstitutional because they overly burden the legitimate speech of adult video game players.

Among the many flaws present in the California statute, the Act’s age verification requirement by sellers prior to making a sale of so-called “violent

video games” presents interpretive challenges. This age verification clause, and its catch-all affirmative defense for sellers who “reasonably” rely upon evidence that a purchaser is not a minor, is unconstitutionally vague. In a predominantly Internet-based market, age verification can only be accomplished by requesting players to declare their age or provide personally-identifying information. But requiring proof of age through verification of personally-identifiable information substantially interferes with and limits legitimate adult expression. In particular, such schemes jeopardize the increasingly popular “freemium” business model of providing game content, in which games are initially free to play, but charge a premium to those consumers who wish to engage the game at a deeper level.

The legislation also fails constitutional scrutiny because there are less restrictive means to limit minors’ access to violent content. In addition to a robust voluntary rating system implemented by the industry, parental oversight and involvement in children’s decisions offers the best and least-restrictive alternative to restricting minor access to age-inappropriate content. Parental monitoring and involvement in children’s decisions about appropriate games to play are the most effective means to ensure children are accessing age-appropriate

content. Technological innovation cannot substitute for responsible, effective parenting.

ARGUMENT

I. Video Game Content Is A Form Of Speech Protected By The First Amendment.

This Court has consistently held that entertainment, like political and ideological speech, is entitled to First Amendment protection. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Schacht v. United States*, 398 U.S. 58 (1970); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *see also California v. LaRue*, 409 U.S. 109, 118 (1972); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 61-62 (1976).

This broad category of speech encompasses, but is not limited to, “motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works,” *Schad*, 452 U.S. at 65, as well as music, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). Of course, motion pictures, music, and dramatic works frequently contain significant political and social expression that seeks to persuade, protest, debate, and educate in addition to merely entertain.

Accordingly, nothing would justify the exclusion of video game content from the First Amendment's protection. Video games contain and convey artistic, musical and literary content, providing a sensory and communicative experience for their audience akin to the forms of entertainment specifically recognized by this Court as protected speech. Video games afford both designers and players a means of expression. Game designers convey a visual and aural message not unlike other artists, authors and musicians. Game players not only absorb this expression, they respond to the expressive content in turn as they engage in the game. Accordingly, the expressive rights of video game creators and players are entitled to full protection under the First Amendment.

Ratified in 1791, the First Amendment predates many current modes of expression, but does not specifically enumerate any modes of "speech." Accordingly, the question of whether a particular entertainment medium merits First Amendment protection occasionally arises before this Court. *See, e.g., Joseph Burstyn*, 343 U.S. at 501-02 (movies); *Se. Promotions, Ltd.*, 420 U.S. at 557-58 (live theater).

Concerns regarding government regulation intended to protect minors from allegedly negative influences of entertainment likewise come before this Court on occasion. As early as 1952, in *Joseph Burstyn*, this Court determined that motion pictures were entitled to First Amendment protection despite the argument that "motion pictures possess a greater capacity for evil, particularly among the youth of a

community, than other modes of expression.” 343 U.S. at 502. The Court stated:

Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.

Id. Just as this Court prohibited a total ban on movies for minors based on a general assertion of harm, the purported harm to minors who play violent video games cannot be a basis to categorically deny First Amendment protection to video games as a medium of expression.

II. The Act’s Restrictions On Video Game Sales Unduly Burden Adult Speech.

The challenged law significantly curtails adult speech and limits adults’ access to legitimate content. Although this Court has recognized a governmental interest in protecting children from harmful materials, it has consistently found that this governmental interest does not justify an unnecessarily broad suppression of speech addressed to adults. *Reno v. ACLU*, 521 U.S. 844, 875 (1997); *see also United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000); *Ashcroft v. ACLU*, 542 U.S. 656 (2004). The mere fact that speech is regulated for the important

purpose of protecting children does not foreclose inquiry into a regulation's validity. *Reno*, 521 U.S. at 875. Accordingly, the Act is invalid because it fails to strike an adequate balance to protect legitimate adult speech.

A. Video Games Are Primarily And Pervasively Enjoyed By Adults, Largely Online.

Video games are largely an adult pastime. Although some popular perceptions rooted in the early days of video games conceive that video games are predominantly played by children and teens, the children who played video games thirty or more years ago have grown up with the industry, which has expanded its appeal to all age levels.

According to the Pew Internet & American Life Project, over half of all American adults play video games, and one in five adults plays video games on a daily basis. AMANDA LENHART ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, PEW RESEARCH CENTER, INTERNET PROJECT DATA MEMO: ADULTS AND VIDEO GAMES 1 (Dec. 7, 2008), *available at* http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Adult_gaming_memo.pdf.pdf. [hereinafter PEW ADULT GAMES MEMO]. Eighty-one percent of all adults between 18 and 29 play video games, with sixty percent of players being between 30 and 49 years of age. *Id.* at 2. Three-quarters (75%) of video game players are over 18, with nearly half of all players in the United

States being between the ages of 18 and 49. ENTM'T SOFTWARE ASSOC., 2009 SALES, DEMOGRAPHIC AND USAGE DATA: ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY 2, *available at* http://www.theesa.com/facts/pdfs/ESA_EF_2009.pdf.

Given the prevalence of video gaming among adults, the size of the video game industry is, as expected, quite significant. With over twenty-one billion dollars in annual sales of video game systems, software, and accessories, video games are as popular an entertainment medium as movies and music in the United States. Barbara Ortutay, *Video Game Sales Top \$21 Billion in 2008*, ASSOCIATED PRESS, Jan. 15, 2009, <http://www.msnbc.msn.com/id/28682836>; *see also* Press Release, THE NPD GROUP, INC., 2009 U.S. VIDEO GAME INDUSTRY AND PC GAME SOFTWARE SALES REACH \$20.2 BILLION (Jan. 14, 2010), *available at* http://www.npd.com/press/releases/press_100114.html.

While historically, the only way to purchase video games was to buy individual software, or “boxed” video games, for computers or home game consoles, the Internet has made the video game purchase experience quite varied. Games are increasingly distributed and sold through the Internet and allow players to access purchased games either by one-time computer download or directly online through proprietary websites. Video games are also increasingly purchased and downloaded via mobile phone applications.

The technological advances facilitating online game play has caused the Internet video game

market to explode. Of the \$10.7 billion in revenues generated from sales of video gaming PC software, reportedly 70% of those sales (roughly \$7 billion) were made through online gaming and digital game downloads. PC GAMING ALLIANCE, THE PCGA PRESENTS: THE PC GAMING INDUSTRY IN 2008 (2009), *available at* <http://www.pcgamingalliance.org/RESOURCES/Articles/tabid/397/Default.aspx>. In fact, online gaming is one of the top reasons Americans access the Internet. A recent Nielsen Company report reveals that gaming is a leading online pastime for Americans, representing 10% of the overall time spent on the Internet, up 10% from last year alone. Nielsen Company, WHAT AMERICANS DO ONLINE: SOCIAL MEDIA AND GAMES DOMINATE ACTIVITY, Aug. 2, 2010, *available at* http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity/ (last visited Sept. 15, 2010).

Second only to social networks, Internet gaming surpasses even the amount of time people spend emailing. *Id.* Conservative estimates put the number of daily online game players in the hundreds of millions. *See, e.g.*, AppData, <http://www.appdata.com> (last visited Sept. 15, 2010). Nearly a quarter (23%) of American adults play video games online, representing nearly half (43%) of the overall adult gaming population. PEW ADULT GAMES MEMO, *supra*, at 4.

Several options are available for players to game online. Proprietary gaming websites offer paid subscriptions for online gaming, pay-as-you-go plans (known as “microtransactions”), and free online

playable content (known as “free-to-play” or “freemium”). The freemium model in particular has become a popular gaming platform and business model, giving players free access to basic gameplay, while charging a fee to extend gameplay; to access premium or additional features; or to obtain virtual currency, tokens, or goods to enhance game play.

Online players may obtain website memberships to play either individually or with a group of players. *See, e.g.*, World of Warcraft, <http://www.worldofwarcraft.com/index.xml> (last visited Sept. 15, 2010); The New Instant Action – Real PC Gaming in Your Browser, <http://www.instantaction.com/> (last visited Sept. 15, 2010); Hasbro, <http://www.hasbro.com/hasbrokids/> (last visited Sept. 15, 2010). Social media networks like Facebook allow online gamers to play directly through the social networking site and to join in collaborative play with others in their network. *See, e.g.*, Facebook, <http://www.facebook.com> (select the Farmville or Mafia Wars gaming application) (last visited Sept. 15, 2010).

B. The Act’s Application to Online Gaming Is Vague And Particularly Harmful.

The Act fails to take into account the vast array of distribution platforms in which video games are sold. The Act states simply, “A person may not sell or rent a video game that has been labeled as a violent video game to a minor.” CAL. CIV. CODE § 1746.1(a). This legislation is crafted to apply to all video games.

However, the Act makes no mention of how this regulation would be applied to varying digital platforms and distribution, *e.g.*, video game home consoles, smartphone applications and Internet gaming sites. The Act does not account for the unique features of each platform, namely how sales of, access to, and use of video games on each of these platforms differs, nor does the Act evaluate how its application will disparately impact each medium.

Such a one-size-fits-all regulatory approach to vastly different media is fraught with problems, both practical and constitutional. The Act's failure to address the different ways in which people enjoy video games is impermissibly vague because the primary forum for gaming – the Internet – is not adequately contemplated by the Act.

This Court is well aware of the constitutional concerns posed by the regulation of Internet content. *See Reno*, 521 U.S. 844; *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *United States v. ALA*, 539 U.S. 194 (2003); *Ashcroft v. ACLU*, 542 U.S. 656 (2004). Where content-based regulation of Internet subject matter is at issue, this Court takes great care to evaluate available technologies and to determine whether less restrictive measures may be taken to ensure that an undue burden is not placed on protected speech.

For example, in *Reno v. ACLU*, the Court found that the Communications Decency Act, which prohibited the transfer of obscene sexual content to

minors, was unconstitutional, in part because it impermissibly interfered with “adult-to-adult communication.” 521 U.S. at 876. This was so because,

[g]iven the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be minor – and therefore that it would be a crime to send the group an indecent message – would surely burden communication among adults.

Id. The Court found that the lack of existing technology to *effectively* verify the age of the message recipient and the expense for commercial and non-commercial Internet speakers to comply with the verification requirement would “inevitably curtail a significant amount of adult communication on the Internet,” particularly where user-based, parent-controlled software would less restrictively provide protection for children from obscene speech. *Id.* at 876-77.

The same problems doom the California law. Once a video game is labeled “violent,” it is clear that a seller should not sell the game without proof that the person is not a minor. CAL. CIV. CODE § 1746.1. Yet the legislation is silent as to the criteria required to comply with the age-verification provision and, critically, lacks a sufficient, specific enumeration of acceptable forms of evidence to establish the

purchasers' age. The Act provides only one example of adequate age verification: a customer's production of a driver's license or other identification issued by a state or the U.S. Armed Forces. CAL. CIVIL CODE § 1746.1(b).

Requiring proof in the form of a driver's license or other government-issued identification, as the Act suggests, might be a relatively straightforward process for in-person game purchases. However, it is logistically impossible with online transactions, and the law is silent as to acceptable alternatives.

This uncertainty is especially problematic in online gaming platforms. In the Internet-based video game market, age verification is commonly accomplished by requesting that players either declare their age or provide personally-identifying information. Without the opportunity to physically see a purchaser and to verify his or her age in a reliable manner, online game sellers face significant and unique cost barriers to comply with the Act, which will seriously impair the largest sector of the gaming market: adults.

The top games on social network platforms, many of which operate under the "freemium" model, can have upwards of 2.5 million active users daily. *See* AppData, <http://www.appdata.com> (last visited Sept. 15, 2010) (providing daily updated statistical metrics for Facebook game application use). In this context,

any form of mandated age verification for every participant would prove administratively problematic.²

Online age-verification requirements would be particularly destructive of the freemium business model. Under the freemium model, consumers are able to sample a wide array of interactive games, reserving the choice to pay only for those games in which they wish to become more deeply involved. And to sustain the economic viability of the games, developers are able to effectively market the game to a wider array of people who might be willing to pay for its premium content, but would never do so if required to pay up-front to sample the game. The freemium model thus enables consumers to sample more than they could otherwise afford, and enables developers to market games that, if they were to be

² Due to the difficulty of verifying age online, there is also a high likelihood that children, particularly older minors, will be able to circumvent the age-verification process. As children experience technology at younger and younger ages and become more technologically savvy, it is reasonable to expect that they will find ways to bypass these verification systems entirely, or, at a minimum, falsify a birth date to access content. And although requiring a credit card would prevent younger children from viewing violent material, teenagers may already have credit cards in their parents' name and/or may access their parents' cards for use on gaming sites. The State's interests are more effectively accomplished through other means. *See* discussion *infra*, Part III.

available only on a traditional purchase-gateway model, could not attract a viable market.

The key to freemium, however, is that the games must truly be freely-accessible to sample. Most adults will not provide personally-identifying information, and especially not a credit card number, to casually sample something that is supposedly free. Freemium's viability depends on making a clear distinction between free and paid content, which is defeated if the game developer must request payment information at the game's entry-level free stage.

Moreover, in the freemium setting, it is unclear at what point the seller is considered to have made a "sale" for purposes of applying the Act. Thus, tracking compliance is difficult. And it is unclear how far the responsibility for compliance extends. Is a retail seller solely responsible for ensuring compliance, or does the Act extend to online game distributors and, possibly, companies such as Vindicia, that engage in billing for online sales? To avoid legal liability in the face of the statute's vagueness, many game companies would opt to overcomply, either by requiring upfront age verification, regardless of the video's content, or by not offering the content online at all. In either scenario, legitimate adult speech would be deterred. Consequently, the age-verification provisions overly restrict speech in their failure to account for various business models and accessibility options involved in online video game play.

The law's impact on freemium distribution and consumption highlights another point of concern. Few industries have transformed themselves as completely and rapidly as has the video game industry. A danger of improperly regulating technological innovation is that it is difficult to envision all of the possible implications and outcomes of a particular development. In this instance, vague statutory language creates uncertainty about how to interpret and apply regulation to ever-evolving technological developments among video game publishers, retailers, and all supporting technology industries. The fear of liability deters innovators from exploring and implementing new technologies.

Impeding technological advances developed for the video gaming community potentially limits broader applications for society as a whole. But the First Amendment secures not only existing modes of expression, it allows new modes of protected expression to develop organically, free from the threat of criminal prosecution.

Additional complexity is added by the fact that the Act limits distribution of video games into and outside of the state. The uncertainty of how to address or resolve these issues will result in sellers overcompensating to ensure compliance by refusing to sell video games in states with content-based regulations. And given the Internet's nature, which is not geographically-contained, the result could be one state dictating a lowest common denominator of

online content, depriving other states and communities of access to expression they might welcome. Consequently, expression will be dramatically curtailed, chilling adults' right to access these games and preventing video game creators from exercising their right of expression. *Cf. United States v. Stevens*, 130 S. Ct. 1577, 1587-92 (2010).

III. Parental Controls Offer An Effective And Less Restrictive Alternative To Statutorily Imposed Age Verification Requirements For Online Video Gaming.

The Act's significant impact on online adult speech is also constitutionally unsound because the State's interest in protecting children from the harmful effects of video game violence may be addressed through less restrictive, more effective means. The burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. *Reno*, 521 U.S. at 874. With a robust voluntary rating system implemented by the industry and several educational and technological resources available to aid in parental control, parental involvement in children's video game play is the most effective manner to ensure children are accessing age-appropriate content.

Most American parents are involved in children's decisions about video games. A Pew Internet & American Life Project study found that 90% of parents sometimes or always know what games their children play. AMANDA LENHART ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, PEW RESEARCH CENTER, TEENS, VIDEO GAMES AND CIVICS 38 (Sept. 16, 2008), available at http://www.pewinternet.org/~media/Files/Reports/2008/PIP_Teens_Games_and_Civics_Report_FINAL.pdf. [hereinafter Pew Teen Video Game Report].

Further, there appears to be a strong correlation between a child's age and parental awareness of the child's video game activity. Parents of younger teens are more likely to always know what games their children are playing than parents of older teens: 63% of parents of teens between the ages of 12 and 14 always know what games their children are playing, as opposed to 48% of parents with teens between the ages of 15 and 17. *Id.* at 36.

Indeed, many parents actively participate in video game play with their children. Fifty-seven percent of parents play video games with their children, with 2% playing always, 29% sometimes, and 26% rarely. PEW TEEN VIDEO GAME REPORT, *supra*, at 38. Again, there is a correlation between the child's age and parental involvement. Parents of younger teens are more likely to play video games with their children than are parents of older teens – 34% of parents of children aged 12 to 14 play video games

with their children, compared with 27% of parents of teens aged 15-17. *Id.* at 38.

Of course, unlike the situation that may have prevailed thirty years ago, the world of video games is no impenetrable mystery to parents. Considering the prevalence of video gaming among adults, it is no surprise that a majority of parents play video games on an at least occasional basis. Indeed, parents are more likely than other adults to play video games: 66% of parents play video games, compared with 47% of adults who are not parents. PEW ADULT GAMES MEMO, *supra*, at 4. Accordingly, parents are familiar with the video games available in the market and have a good understanding of what may or may not be appropriate for their children.

Research also shows that one significant benefit of parental involvement with their children's video game play is that when violent content is encountered, parents are able to explain and contextualize any negative messages that children might receive. PEW TEEN VIDEO GAME REPORT, *supra*, at 38. When parents participate in media with their children, parents are able to impart their values and beliefs about the acts and messages within the media form. *Id.* at 37.

The video game industry's voluntary ratings system has proven to be an effective resource for parents. Fifty-five percent of parents check ratings

before allowing their children to play a game. *Id.* Sixty-seven percent of parents under the age of 40 always check ratings. *Id.* Consequently, it would appear that the younger a child is, the more likely a parent is to check on the appropriateness of game content.

Available technological tools further assist parents in monitoring children's access to content. Video game console systems offer parental controls for online game interactions. *See* PARENT TEACHER ASSOC. & ENTM'T SOFTWARE RATING BD., A PARENT'S GUIDE TO VIDEO GAMES, PARENTAL CONTROLS AND ONLINE SAFETY, *available at* http://www.esrb.org/about/news/downloads/ESRB_PTA_Brochure-web_version.pdf (detailing the ESRB's video game rating system and providing step-by-step instructions for setting up parental controls on various gaming consoles); *see also* Nintendo, <http://www.nintendo.com/corp/parents.jsp> (last visited Sept. 15, 2010); Microsoft X-Box, <http://www.xbox.com/en-US/support/familysettings> (last visited Sept. 15, 2010); Sony Playstation, <http://us.playstation.com/support/parents/index.htm> (last visited Sept. 15, 2010). Online gaming websites also offer parental control features. *See, e.g.*, Walt Disney's Pirates of the Caribbean Game, http://piratesonline.go.com/#!/account_services/parental_controls_faq.html (last visited Sept. 15, 2010) (parental controls for Disney Pirates of the Caribbean online game); World of Warcraft Sign-Up

Page, <https://us.battle.net/account/creation/wow/signup/> (last visited Sept. 15, 2010) (World of Warcraft account set up age verification).

In addition, filtering software, available through internet service providers or others via download or in-store purchase, provide options for greater parental control of children's access to content on the Internet. In most instances, filtering software offers parents the option of tailoring restricted content, including the ability to block select websites. These tools are extremely helpful to parents navigating the world of video game material available to children. See BERKMAN CENTER FOR INTERNET & SOCIETY AT HARVARD UNIVERSITY, INTERNET SAFETY TECHNICAL TASK FORCE, ENHANCING CHILD SAFETY & ONLINE TECHNOLOGIES: FINAL REPORT OF THE INTERNET SAFETY TECHNICAL TASK FORCE TO THE MULTI-STATE WORKING GROUP ON SOCIAL NETWORKING OF STATE ATTORNEYS GENERAL OF THE UNITED STATES 37-38 (Dec. 31, 2008), *available at* http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report.pdf. [hereinafter ISTTF FINAL REPORT].

This Court often looks to the viability of less-restrictive, currently available technological alternatives to regulate harmful content. In its second consideration of the Child Online Protection Act, this Court upheld an injunction and remanded the case for trial because, *inter alia*, the factual record did not reflect the then-current technology available. *Ashcroft v. ACLU*, 542 U.S. 656, 671 (2004). The Court

reasoned that additional fact-finding would allow for the identification of better filtering software that provided a less restrictive alternative to content-based restrictions. The past five years have seen dramatic transformations in both video gaming technology and digital security tools for the Internet. The universe of less restrictive alternatives is ever-expanding, while the need for content regulation of the Internet, if any, is inexorably diminishing.



CONCLUSION

California's regulation of access to protected video game content is unconstitutional. The State's approach is unconstitutionally vague, and imposes heavy burdens upon video game creators and retailers that could be avoided through the use of less restrictive regulatory mechanisms. Failing to take into account the myriad distribution platforms and sales methods in the gaming industry, the Act disrupts significant popular methods of marketing and consuming video game content, chilling the speech of

game producers and players, preventing expressive creativity and restricting adult access to protected game content.

The judgment below should be affirmed.

Respectfully submitted,

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