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 the 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 CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

ROBIN S. CONRAD
AMAR SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

LISA S. BLATT
Counsel of Record
CHRISTOPHER S. RHEE
R. REEVES ANDERSON
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every business sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber files briefs as amicus curiae in cases that raise issues of vital concern to the Nation's business community.[1]

This case presents a question of significant importance to the Chamber's members concerning the standard of review for a content-based restriction on speech. The First Amendment's protection of speech is integral to the work of American businesses. The First Amendment protects the right of businesses to engage in commercial speech to promote their goods and services and to engage in political speech to advocate for their interests. Further, a large segment of the American economy is

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[1] Pursuant to S. Ct. R. 37.6, counsel for amicus curiae affirm that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief.

directly involved in the creation, promotion, and distribution of expressive content. Businesses face a serious threat if, as California argues here, the government may restrict protected speech by proffering only a rational basis for the restriction, rather than by satisfying the traditional test of strict scrutiny. The Chamber has an interest in ensuring that the boundaries of the First Amendment remain stable and clear to guard against the risks of disrupting businesses with the prospect of legal uncertainty.

SUMMARY OF ARGUMENT

The Chamber fully supports the State of California's goal to shield children from age-inappropriate material and to empower parents with the tools to foster their child's healthy development. When the government attempts to achieve its goals by imposing content-based restrictions on speech, however, this Court's long-settled First Amendment jurisprudence has required the government to satisfy the traditional standard of strict scrutiny. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.").

Under strict scrutiny, the government may regulate the content of constitutionally protected speech to promote a compelling interest "if it chooses the least restrictive means to further the articulated interest." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). California's video game law fails this test.

California's law fails strict scrutiny because a ban on the sale or rental of violent video games to minors is not the least restrictive alternative to protecting them from age-inappropriate media content. Industry self-regulation is a highly effective and less restrictive alternative. The video game industry voluntarily has established a private, independent review board that reviews and rates nearly every video game sold in the United States for its subject matter, including violent content. Major national retailers have voluntarily agreed to prohibit the sale or rental to minors of any video game that is unsuitable for children under 17.

Parental control software likewise is an effective and less restrictive alternative to prohibiting protected speech. Computers and major game consoles contain control settings that empower parents to restrict which classifications of games their children may play. In short, private industry and normal market forces have been enormously successful in facilitating parental control over the types of video games to which their children could be exposed.

In the face of overwhelming evidence of less restrictive alternatives, California seeks to avoid the traditional standard of strict scrutiny altogether. It argues instead for a minimalist standard of review that would uphold a State's content-based speech restriction if the State has a rational basis for restricting the content from minors. This the Chamber does not support. California's approach is without precedent, and nothing in this Court's obscenity decision of *Ginsberg v. New York*, 390 U.S.

629 (1968), justifies a watered-down review of government regulation of protected speech.

Upholding California's law under a rational basis review would invite a host of unwanted consequences. Other regulators could similarly seek rational basis review for other types of speech restrictions that long have been understood to be subject to rigorous strict scrutiny. Businesses need predictable, limited, and well-defined standards of liability in order to invest in the development of new content and new media. Malleable constitutional standards foster uncertainty; uncertainty adds risk; and risk discourages innovation and production. Because even minor sanctions can chill constitutionally protected speech, the boundaries of the First Amendment must remain stable and clear.

California's video game law unconstitutionally would chill businesses from engaging in protected speech. Attempting to apply inherently vague and subjective statutory criteria, businesses would face civil penalties up to $1,000 for failing to accurately assess a video game's appeal to the "deviant or morbid interest of minors," Cal. Civ. Code § 1746(d)(1)(A)(i), for example, or for failing to determine the prevailing community standards for "offensive[ness]," *id.* § 1746(d)(1)(A)(ii). Rather than risk being second-guessed by the government as to the application of those uncertain and vague criteria, businesses might well choose to change video game content or leave the market altogether. To protect manufacturers and retailers from exposure to liability simply because they engage in a business that distributes speech, the Court must continue to

apply strict scrutiny to content-based speech restrictions.

ARGUMENT

California's video game law has two basic components. First, it prohibits the sale or rental of violent video games to anyone 17 years old or younger, and makes those acts punishable by a civil penalty up to $1,000. Cal. Civ. Code §§ 1746(a), 1746.1(a), 1746.3. The law bans sales or rentals to minors even when the minor is accompanied by or has the consent of a parent, legal guardian, other relative, or adult. Second, the law requires that all violent video games imported or distributed in California include a label to signify that they are for adults only. *Id.* § 1746.2. The law does not specify whether the producer, importer, or distributor is responsible, jointly or severally, for adding the label. See *id.*

Although the Chamber fully supports the State's laudable intent to ensure that minors view age-appropriate material, California has chosen unconstitutional means to further its goals.

I. LESS RESTRICTIVE ALTERNATIVES RENDER CALIFORNIA'S LAW UNCONSTITUTIONAL

Where the government regulates protected speech based on its subject matter, this Court applies a well-settled standard: the government "may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to

further the articulated interest." *Sable*, 492 U.S. at 126. This vigorous standard of review serves as an important check against governmental abuse. *Citizens United*, 130 S. Ct. at 898 ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.").

California's outright ban of the sale or rental of violent video games to anyone aged 17 or under fails to satisfy strict scrutiny. There are at least two alternatives that are highly effective and less restrictive: (1) the video game industry's rating system, and (2) content-control software that already exists in computers and major game consoles.

Responding to the concerns of parents and other consumers, the video game industry years ago voluntarily instituted a widespread form of self-regulation. Due to those efforts, parents are advised of the content of video games, and they accordingly may exercise control over what video games their children may bring into the home.

The industry's independent review board—the Entertainment Software Rating Board (ESRB)—evaluates nearly every commercial video game sold in the United States for its subject matter, including violent content. The ESRB assigns a designated rating to each game and labels the game with the appropriate content warning. Industry-approved age ratings include "EC" (Early Childhood), "E" (Everyone), "E10+" (Everyone 10 and Older), "T" (Teen [13+]), "M" (Mature [17+]), and "AO" (Adults Only [18+]). Pet. App. 10a n.9. At the behest of the

video game industry, major retailers such as Amazon.com, Best Buy, Target, and Walmart have voluntarily agreed to prohibit the rental or sale of "Mature" and "Adults Only" video games to unaccompanied minors, much like cinemas prohibit ticket sales to "R-rated" movies to children. Other cooperating businesses include Blockbuster, GameStop, Hastings Entertainment, Sears/Kmart, Shopko, Trans World Entertainment, and Toys "R" Us. ESRB, *Retail Partners*, available at http://www.esrb.org/retailers/partners.jsp (last accessed Sept. 16, 2010).

California obscures the effectiveness of industry self-regulation by citing outdated government statistics. See Pet. Br. 57 (citing 2000 and 2004 studies). A December 2009 report by the Federal Trade Commission ("FTC") *lauded* the video game industry for its effective efforts to shield children from inappropriate game content: "To assist parents in their gate-keeping role, video game retailers have implemented a robust system of checking for age identification when unaccompanied children attempt to buy M-rated games." Federal Trade Commission, *Marketing Violent Entertainment to Children: A Report to Congress* 27 (Dec. 2009) ("2009 FTC Report"). The FTC found that "[m]ajor game retailers continue to prevent most children from being able to purchase M-rated games without parental permission." *Id.* at 30.

The FTC concluded that "the video game industry continues to do an excellent job of clearly and prominently disclosing rating information in television, print, and Internet advertising and on

product packaging." *Id.* at 29. The FTC further praised private industry for "(1) restricting target-marketing of mature-related products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children's access to mature-related products at retail." *Id.* at 30.

Currently, 89% of parents are involved in the purchase or rental of video games for their children. Federal Trade Commission, *Marketing Violent Entertainment to Children: A Report to Congress* 28 (Apr. 2007) (most recent government survey results). As these statistics show, the industry's ongoing campaign has been tremendously successful in increasing retailers' and parents' awareness of video game content and in facilitating parental control over the content that enters their home.

The ESRB ratings system empowers parents to decide for themselves what is suitable content for their children. It is a far more effective tool for exercising control over video game content than the blunt instrument employed by the State of California. In contrast to the detailed ESRB ratings, the California law recognizes no gradations of violent content and admits no gradations of maturity level among children. The law thus prohibits the commercial sale or rental of any "violent video game" to any minor 17 years old or under. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.11 (1975) ("In assessing whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor."). Lacking even an exemption for parental consent, the law forces very mature minors to purchase or rent games that are suitable

only for younger children. The law does not enhance parental choice.

Likewise, parental control software is a preferable and less restrictive alternative to prohibiting protected speech. Currently, major game consoles—including PlayStation 3, PlayStation Portable (PSP), Xbox, Xbox360, Wii, and Nintendo DSi—contain parental controls. The Windows operating system also offers parental controls for computer-based games. Using the ESRB ratings, parents have the ability to restrict which classifications of games their children may play. The Court has repeatedly endorsed the same type of filtering technology as a less restrictive alternative to sanctions in *Ashcroft v. ACLU*, 542 U.S. 656, 666-670 (2004) (Internet filtering software), *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 824-826 (2000) (television v-chip), and *Reno v. ACLU*, 521 U.S. 844, 879 (1997) (Internet filters).

California argues that parental controls are ineffective alternatives for two reasons. First, California warns that children can learn how to bypass parental controls by searching for circumvention instructions online. That hypothetical concern has no more merit with video games than it did with parental filters to the Internet in *Ashcroft v. ALCU* and television in *Playboy*. As the Court acknowledged, alternatives need not be perfect to be effective. See *Ashcroft v. ACLU*, 542 U.S. at 669 ("The Government's burden is not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective."); *Playboy*, 529 U.S. at 824

("It is no response that voluntary blocking . . . may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective.").

Second, California posits that parental controls "would apparently be useless" for video games not rated by the ESRB. Pet. Br. 58. But the market has already addressed this concern. Although the ESRB ratings are voluntary, the ESRB rates almost all games sold at retail in the United States. For example, the game *Postal 2*—which the State of California discusses frequently in its brief—is rated "M" (for mature). Pet. Br. 46. Moreover, several video game systems permit parents to block "unrated" games entirely. Thus, parents are already well-equipped with both the information and the technology to decide for themselves what video game content to permit in their homes. *Playboy*, 529 U.S. at 824 ("[A] court should not presume parents, given full information, will fail to act.").

Because California cannot "prove that the[se] alternative[s] will be ineffective to achieve its goals," *id.* at 816, the government has not satisfied its constitutional burden of strict scrutiny. California's law thus violates the First Amendment.

II. THE CREATION OF A NEW CATEGORY OF UNPROTECTED SPEECH WOULD CHILL BUSINESSES FROM INNOVATING, DEVELOPING, AND INVESTING IN MASS MEDIA

In the face of overwhelming evidence that private industry self-regulation and market forces are less restrictive alternatives to government regulation, California seeks an exemption from strict scrutiny. Instead, it seeks a minimalist rational basis review that ordinarily applies to government economic regulation. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955). California's proposal would affect a sea change in this Court's settled First Amendment jurisprudence.

Only a few "well-defined and narrowly limited classes of speech" are beyond the protection of the First Amendment: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942)). By seeking rational basis review, California in effect proposes that the Court create a new category of unprotected speech for violent video games when viewed by minors. That approach threatens to upend the First Amendment's dependable legal framework and cast doubt on the scope of free expression—a disconcerting prospect for numerous American businesses involved in the creation, promotion, or distribution of expressive content.

A. California's "Harmful to Children" Rationale Would Upend the First Amendment

In advocating for a new exception to the First Amendment, California contends that violent video games "are likely to harm the development of a child." Pet. Br. 30. California argues that the State may "help shape [the] marketplace" of ideas to which children are exposed "given [minors'] underdeveloped sense of responsibility and vulnerability to negative influences." Pet. Br. 9. And California reasons that the First Amendment permits a State to restrict the sale or rental of violent video games because they are "harmful to minors and ha[ve] little or no redeeming social value." Pet. Br. 12.

California's reading of the First Amendment would inject tremendous uncertainty into an area of heretofore settled constitutional law. Businesses have long understood that "[s]peech 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." *Erznoznik*, 422 U.S. at 213-214. California would have the Court abandon this rule and adopt an open-ended "harmful to minors" standard for content-based restrictions on expression. Although California here argues for a First Amendment exemption for only "offensively *violent* material," Pet. Br. 9 (emphasis added), nothing in the "harmful to minors" standard would prevent federal, state, and local governments from moving to prohibit other

content they deem harmful, whether in video games or other forms of media.

For the numerous American businesses that are directly or indirectly involved in the media and entertainment industry, California's request is a chilling prospect. Speech that may be "harmful" to minors is hardly limited to violent speech. Depictions of drug use, expression of racial hatred, diatribes by anti-American groups, verbal abuse, and non-violent criminal behavior might also be considered damaging to the development of young children. As California itself notes, state governments early in our Nation's history criminalized blasphemy and profanity based on the same desire to control speech that they viewed as harmful. Pet. Br. 32.

California also offers no rationale that would limit its position to the medium of video games. Children are exposed to violence in television programming, movies, literature, newspapers, magazines, comic books, and music. According to the Kaiser Family Foundation, "TV remains the dominant type of media content consumed [by children], at 4:29 [hours] a day, followed by music/audio at 2:31, [and] computers at 1:29." Kaiser Family Foundation, News Release: *Daily Media Use Among Children and Teens Up Dramatically From Five Years Ago* (Jan. 20, 2010), available at http://www.kff.org/entmedia/entmedia012010nr.cfm (last accessed Sept. 16, 2010). Video games are fourth on that list. See *id.*

Anyone with an Internet connection can quickly access vast amounts of "offensive" and "harmful" content if they are so inclined. If the First Amendment does not protect violent video games sold or rented to minors, then governments could seek similar First Amendment exemptions from other types of "harmful" content that is available to children in other forms of media. See, e.g., Pet. Br. 22 (arguing that society has an "interest in protecting children from harm from a variety of sources").

California undoubtedly is acting with noble intentions to countermand aspects of popular culture that may negatively influence children during their formative years. But as well-intentioned as California's motives might be, this Court has never accepted social conditioning as a legitimate rationale for the suppression of speech.

The Court forcefully affirmed this notion last term in *Stevens*:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

> * * *
>
> *Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation.

130 S. Ct. at 1585, 1591.

B. California's Proposed Exception to the First Amendment Would Stifle the Media Industry

For businesses that generate, market, or distribute mass media content, California's reading of the First Amendment would create an environment of substantial uncertainty that would chill free expression. First, California's video game law requires businesses to make a series of highly subjective and difficult judgments that are subject to second-guessing: whether game content meets the legal threshold of violence; whether it appeals to deviant or morbid interests; whether it is patently offensive to prevailing standards in the community; and whether it lacks serious literary, artistic, political, or scientific value. See Cal. Civ. Code § 1746(d)(1). And, for the reasons noted above, businesses involved directly or indirectly in other media industries would be vulnerable to the recognition of additional areas of "harmful" expression that fall outside of the First Amendment. Under these circumstances, businesses would face powerful incentives to minimize their legal exposure

and steer away from content that others might find offensive.

California's reading of the First Amendment would adversely affect a significant sector of the economy. In 2008, American consumers spent over $52 billion on retail music, movies, and video games. 2009 FTC Report, *supra*, at 2, 19, 23. In 2009 alone, the publishing, motion picture, recorded music, broadcasting, telecommunications, and web search portal industries collectively added $633.8 billion of value to the U.S. economy. U.S. Bureau of Economic Analysis, *Gross Domestic Product by Industry Accounts 1998-2009: Value Added by Industry* (May 25, 2010), available at http://www.bea.gov/industry/gpotables/default.cfm (last accessed Sept. 16, 2010). American industry dominates the worldwide market for generating mass media content, in no small measure due to the Nation's historic commitment to freedom of expression.

Consumer spending by minors also represents a substantial segment of the American market. In 2005, teenagers contributed approximately $160 billion in spending to the economy. Teenage Research Unlimited, Press Release: *TRU Projects Teens Will Spend $159 Billion In 2005* (Dec. 15, 2005), available at http://www.tru-insight.com/pressrelease.cfm?page_id=378 (last accessed Sept. 16, 2010). Thirty five percent of video game players are teenagers. Piper Jaffray, News Release: *19th Semi-Annual Taking Stock With Teens Survey* (Apr. 13, 2010).

Upholding California's video game law would threaten to stunt the continuing success of American mass media industries by blurring the boundary between constitutional and unprotected expression. Businesses need predictable, limited, and well-defined standards of liability. When businesses create and develop expressive content, they do so with prospective expectations about the meaning of free speech. If businesses anticipate or worry that the parameters of the First Amendment might change—based on isolated social science data, for example—then the likelihood increases that they will refuse to invest in certain markets at all. Uncertainty adds risk, and risk discourages innovation and production.

This Court has long recognized that uncertainty and variation in the boundaries of the First Amendment "inhibit the exercise of (those) freedoms" by "lead[ing] citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal formatting and citations omitted). To avoid penalties and fines, businesses will often remain silent rather than communicate words, ideas, or images that might arguably be found unlawful. *Reno v. ACLU*, 521 U.S. at 872. Even minor sanctions can chill constitutionally protected speech. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) (citing *Wooley v. Maynard*, 430 U.S. 705 (1977)). To guard against the risk of silencing protected speech, the boundaries of the First Amendment must be clear and firm.

The contours of the First Amendment have been historically quite stable. In recent decades, the Court has rebuked multiple attempts to restrict speech where the government asserted its interest in protecting the sensibilities of children. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (Child Online Protection Act); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (virtual child pornography); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (regulations requiring "scrambling" or restricting sexually-oriented programming on cable television); *Reno v. ACLU*, 521 U.S. 844 (1997) (Communications Decency Act); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (indecent commercial telephone messages).

California's video game law well illustrates how legal uncertainty can chill businesses from engaging in protected speech. Under the law, businesses in the chain of production and distribution face fines for failing to accurately assess a video game's classification as violent, a game's appeal to deviant or morbid interests of minors, and what is patently offensive to prevailing standards in the community regarding minors (among other statutory criteria). Cal. Civ. Code § 1746(d)(1). It would be impossible for businesses to apply those criteria with any reasonable degree of certainty or precision.

For example, businesses could face the question whether the video game *Lego Star Wars* meets the statutory definition of a "violent video game" because Lego characters bearing the likeness of actors in the Star Wars franchise "dismember[]" each other into piles of Lego bricks. *Id.* Business could also be faced

with the question whether the violence depicted in the game *The Godfather*, which permits players to reenact gruesome episodes from the acclaimed movie and book of the same name, causes the game as a whole to lack serious literary or artistic value for minors. *Id.* § 1746(d)(1)(A)(iii).

Forced to make highly subjective judgments about the deviant or morbid interest of minors or the prevailing standards in the community as to what is suitable for minors, *id.* § 1746(d)(1)(A), and faced with the prospect of being second-guessed in court, many businesses might understandably choose to scale back their video game content or leave the market altogether. If upheld, the California law is likely to have a ripple effect in other media industries, for example as movie and television producers grapple with the prospect that their content might also be deemed harmful to minors and lacking in any social value. In the interests of shielding children, California will have succeeded in stifling the marketplace of ideas.

"It is essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application." *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 689 (1968) (citation omitted). California's inherently vague regulation of speech unconstitutionally burdens businesses. Those burdens are particularly unjustified when the

industry's self-regulation and parental control software are highly effective and do not limit speech.

III. NO PRECEDENT SUPPORTS CALIFORNIA'S PROPOSED RATIONAL BASIS STANDARD

With a dearth of support for its position, California relies principally on this Court's decision in *Ginsberg v. New York*, which upheld restrictions on the distribution of sexual content when viewed by minors. 390 U.S. at 637. But *Ginsberg* is narrowly confined to the context of obscenity, *i.e.*, speech that the First Amendment has never protected. In contrast, the First Amendment protects other kinds of speech that many consider harmful, including violent speech. See, e.g., *Winters v. New York*, 333 U.S. 507, 510 (1948); *Stevens*, 130 S. Ct. at 1584. The other cases cited by California, addressing broadcasting, public schools, and the criminal law, are inapposite.

A. *Ginsberg* Applies Only to Obscene Speech

Ginsberg upheld a New York criminal obscenity statute that prohibited the sale to minors of magazines depicting nudity, even though the magazines were admittedly not obscene when viewed by adults. 390 U.S. at 631-633. In holding that the definition of obscene material could vary depending on the audience—such that material that is not obscene for adults may still be obscene for minors—the Court recognized that New York's law "simply adjusts the definition of obscenity." *Id.* at 638.

Violent video games cannot be restricted on the theory that they qualify as obscene. Obscenity is limited to speech depicting sexual conduct. See, e.g., *Miller v. California*, 413 U.S. 15, 24 (1973) ("[W]e now confine the permissible scope of such [obscenity] regulation to works which depict or describe sexual conduct."); *Cohen v. California*, 403 U.S. 15, 20 (1971) ("Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic."); see also *Reno v. ACLU*, 521 U.S. at 873; *Erznoznik*, 422 U.S. at 213 n.10.

Ginsberg also does not permit restriction of protected speech on the rationale that it might be harmful to minors. *Ginsberg* holds that the scope of obscenity may be defined differently if the audience is a minor. California, of course, does not seek to change the definition of violence depending on the audience, but rather seeks to have a category of *protected* speech rendered unprotected when distributed to minors. As discussed, California's position, if logically extended, would apply to other types of expression and to other types of media, as long as the State could rationally claim that the speech is harmful to minors.

This Court's precedents foreclose California's creative interpretation of *Ginsberg*. In *Interstate Circuit, Inc. v. Dallas*, issued the same day as *Ginsberg*, the Court pointedly noted that "the phrase 'harmful to minors' [in *Ginsberg*] is specifically and narrowly defined in accordance with tests this Court has set forth for judging *obscenity*." 390 U.S. at 683 n.10 (emphasis added).

Similarly, in *Erznoznik*, the Court invalidated a city ordinance that prohibited drive-in movie theaters from exhibiting films containing nudity when the screen was visible from a public place. 422 U.S. at 211-212. Recognizing that the city sought to "protect[] minors from this type of visual influence," the Court held that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Id.* at 212-213. The Court applied heightened scrutiny and invalidated the ordinance because it was not narrowly tailored to shield minors from obscenity. *Id.* at 212-214.

B. The First Amendment Applies to Depictions of Violence

The depiction of violence, unlike obscenity, is constitutionally protected speech. In *Winters v. New York*, the Court invalidated a New York law that prohibited the distribution of printed media depicting "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes." 333 U.S. at 518. In language particularly apt to this case, the Court stated: "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Id.* at 510. The Court contrasted violent depictions with unprotected categories of speech by noting that the violent magazines "are equally subject to control if they are lewd, indecent, obscene or profane," *id.*—that is to say, if violent magazines contain otherwise *un*protected speech.

Last term the Court reaffirmed that speech depicting violence enjoys constitutional protection. In *United States v. Stevens*, the Court held that the First Amendment extends to graphic depictions of animal cruelty, despite the "gruesome" nature of such speech. 130 S. Ct. at 1583, 1586. Acknowledging the possibility that existing categories of unprotected speech are not exhaustive, the Court concluded that violent "depictions of animal cruelty" was not a "historically unprotected" class of speech. *Id.* at 1586.

Winters and *Stevens* thus foreclose a rational basis review of California's law. Video games depict virtual—not real—violence involving fictitious characters. The same First Amendment protections that extend to depictions of real violence to live animals in *Stevens* equally extend to simulated violence against only digital victims. Cf. *Free Speech Coal.*, 535 U.S. at 250 (holding that virtual child pornography is protected "speech that records no crime and creates no victims by its production").

C. The Other Decisions Cited by California Are Inapposite

California also contends that the Court may broadly curtail the First Amendment rights of minors because the law generally accords special treatment to children. See, e.g., Pet. Br. 8 ("Application of strict scrutiny would effectively ignore many undeniable distinctions between adults and minors."). In effect, California is arguing for a First Amendment's kids menu—a position that the Court has firmly rejected. See, e.g., *Erznoznik*, 422

U.S. at 212-213 ("[M]inors 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." (citation omitted)). Moreover, California's law restricts the speech rights of minors *and* the rights of retailers, video game designers, producers, and marketers.

California cites cases that involve broadcast radio, public schools, and even non-speech rights in an effort to demonstrate that children have lesser First Amendment rights. However, none of these unique contexts suggests that the government has the authority to impose a content-based prohibition on speech for children without satisfying the traditional test of strict scrutiny.

California relies heavily on *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)—a precedent that the Court itself has described as "emphatically narrow." *Sable*, 492 U.S. at 127; see also *Pacifica*, 438 U.S. at 750 ("emphasiz[ing] the narrowness of [the] holding").[2] *Pacifica* upheld the government's authority to restrict indecent speech on the public airwaves. The Court reasoned that in the "unique"

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[2] The *Pacifica* decision has been subjected to "voluminous" scholarly criticism. Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L. J. 245, 293 (2003); see also STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 80 (1990) ("Most people with any first amendment bones in their bodies are troubled by the *Pacifica* case.").

setting of broadcast radio, 438 U.S. at 748, the government may shield an audience from exposure to such unwanted "verbal shock treatment," *id.* at 757 (Powell, J., concurring).

Pacifica does not justify California's ban on violent video game sales and rentals to minors. The Court's "special justifications" for regulating broadcast media—scarcity of available frequencies, history of extensive government regulation, and broadcasting's "invasive" nature, *Reno v. ACLU*, 521 U.S. at 868—have no application to video games. There is no risk that video games might confront captive audiences with unwanted ideas; people consciously choose to purchase or rent video games *because* of their content, not in spite of it. Compare *Pacifica*, 438 U.S. at 748 (broadcast radio "confronts" people with unwanted content "in the privacy of the home"). Playing a video game, like "[p]lacing a phone call," "is not the same as turning on a radio and being taken by surprise by an indecent message." *Sable*, 492 U.S. at 128 (distinguishing *Pacifica* and invalidating federal law that restricted indecent commercial telephone messages).

The other cases cited by California similarly provide no support for creating a new category of unprotected speech. One set of cases addresses "the constitutional rights of students in public school." Pet. Br. 20. In schools, students' rights generally yield to pedagogical concerns because public schools are limited forums in which the government may regulate speech based on content. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-273 (1988). The public education context thus might be relevant

if California sought to restrict a student's access to video games in a school setting. California's law, of course, is far broader than that.

As California itself acknowledges, "school cases present their own unique circumstances." Pet. Br. 21. For example, a school may prohibit an indecent lecture delivered at a high school assembly, but "[h]ad [the student] delivered the same speech in a public forum outside the school context, it would have been protected." *Morse v. Frederick*, 551 U.S. 393, 404-405 (2007) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682-683 (1986)). Restrictions in limited forums have no application to private commercial transactions such as video game sales. Simply put, minors' rights, including freedom of expression, "are different in public schools than elsewhere." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995).

California also relies on a litany of state restrictions on minors' rights to vote, marry, serve on a grand jury, drive a school bus, purchase tobacco, play bingo for money, and execute a will. Pet. Br. 22-23. California argues that this Court has noted the special characteristics of minors in the context of abortion, *Bellotti v. Baird*, 443 U.S. 622 (1979), compulsory education, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), life imprisonment, *Graham v. Florida*, 130 S. Ct. 2011 (2010), and the death penalty, *Roper v. Simmons*, 543 U.S. 551 (2005). These cases offer no support for the proposition that depictions of virtual violence is a "categor[y] of speech that ha[s] been historically unprotected" when distributed to minors. *Stevens*, 130 S. Ct. at 1586. Ironically, in

most of the cases cited by California the Court considered the special characteristics of children in order to *expand* the rights of minors, not restrict them.

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California clearly has a legitimate interest in protecting children from harm. But the First Amendment requires that a content-based restriction on speech must satisfy strict scrutiny. Because the speech restriction here is not the least restrictive alternative, California's law violates the First Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ROBIN S. CONRAD
AMAR SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

LISA S. BLATT
Counsel of Record
CHRISTOPHER S. RHEE
R. REEVES ANDERSON
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
lisa.blatt@aporter.com

Counsel for Amicus Curiae