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 *AMICI CURIAE* OF MARION B. BRECHNER FIRST AMENDMENT PROJECT AND PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT IN SUPPORT OF RESPONDENTS SEEKING AFFIRMANCE

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INTERESTS OF *AMICI CURIAE*

The Marion B. Brechner First Amendment Project ("Project"), formerly known as the Marion Brechner Citizen Access Project, is a nonprofit, non-partisan organization located at the University of Florida in Gainesville, Florida. Directed by attorney Clay Calvert, the Project is dedicated to contemporary issues of freedom of expression, including current issues affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition and freedom of thought.

The Pennsylvania Center for the First Amendment ("PaCFA") was established by the Pennsylvania State University in 1992 to promote awareness and understanding of the principles of free expression to the scholarly community, the media and the general public. Directed by attorney Robert D. Richards, the PaCFA's members publish books and scholarly articles on First Amendment topics. The PaCFA regularly tracks issues related to free expression, including the regulation of violent video games, and research generated from those projects is presented at national conferences and in law journals.[1]

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[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 have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Ninth Circuit in *Video Software Dealers Association v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), was correct in holding that California Civil Code Sections 1746 through 1746.5 (the "Act") are unconstitutional. In particular, the appellate court was right in deciding that the Act imposes: 1) an unconstitutional, content-based restriction on the First Amendment speech rights of both game-playing minors and the adults who create and produce the games, with respect to the sale and rental of video games that are labeled as violent; and 2) an unconstitutional, compelled-speech obligation on the First Amendment speech rights of video game retailers, with respect to the Act's labeling provision.

Amici thus urge the Court to: 1) affirm the Ninth Circuit's opinion, in both its reasoning and its result; 2) not carve out a new category of unprotected expression for violent-themed speech in the medium of video games by unnecessarily expanding the variable obscenity, harmful-to-minors doctrine created in *Ginsberg v. New York*, 390 U.S. 629 (1969) that applies to a very different form of content; and 3) continue to require that government entities, including California, must prove a direct causal link between violent video games and physical/psychological harm allegedly sustained by minors before they can prohibit or limit the sale of those games to minors without violating the First Amendment.

The Court now hears the instant case in the face of a wall of precedent developed by lower federal courts across the country – a wall built steadily and

unanimously during the past decade – that is stacked tall and sturdy against the constitutionality of similar laws restricting and limiting minors' access to violent video games. Starting in 2001 and moving through the present, such laws have been enjoined by several federal appellate courts in addition to the Ninth Circuit. See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001) (enjoining an Indianapolis, Ind., statute affecting minors' access to violent video games in arcades); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) (issuing a permanent injunction, on First Amendment grounds, stopping St. Louis County, Mo. from enforcing a regulation limiting minors' access to violent video games); and *Entm't Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008) (affirming a permanent injunction against a Minnesota violent video game statute). No federal appellate court has ever upheld such a law. In addition, laws limiting minors' access to violent video games repeatedly have been enjoined by federal district courts. See *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004) (enjoining a Washington state law limiting minors' access to certain violent video games); *Enm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1052 (E.D. Ill. 2005), *aff'd on other grounds*, 469 F.3d 641 (7th Cir. 2006); *Entm't Software Ass'n v. Granholm,* 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006) (enjoining a Louisiana law affecting minors' access to violent video games); and *Entm't Merchants Ass'n v. Henry*, No. Civ-06-675-C, 2007 U.S. Dist. LEXIS 69139 (W.D. Okla. Sept. 17, 2007) (issuing a permanent injunction against Oklahoma's law).

By granting the petition for a writ of certiorari in *Schwarzenegger*, the Court now stands primed to wade deeply into the culture war over media violence. This is a surreal, surrogate and substitute war, *Amici* contend, for addressing the problems of real-world violence, as California and other government entities play the media blame game by attacking the speech of corporate entities in the name of ostensibly protecting, in noble fashion, minors from content many adults fear and abhor. It also is a war over censorship to which the First Amendment freedom of speech stands counterposed. *Amici* urge the Court not to sacrifice or to give short shrift to First Amendment freedoms in the face of what might be considered well-intended, yet feel-good, legislation. *Amici* further assert that the Court should have faith in several matters – faith in the wisdom of parents and guardians to know what video games are and are not appropriate for their children to rent, purchase and play; faith in a voluntary, rigorous Entertainment Software Rating Board ("ESRB") rating system designed to help those parents and that assigns independent age ratings and content descriptors for video games; and faith in technological advances in game consoles that easily allow parents to block games carrying ESRB ratings to which parents object. Indeed, this Court recently reasoned that, "premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010). In the instant case, California disfavors a certain subject – violent video games – and, given the "mistrust of governmental power" recognized in *Citizens United*, the Court and, for that matter, society in general should instead trust parents and guardians to monitor

and to control the content their children purchase, rent and play.

Part I of *Amici's* argument below urges the Court to affirm the Ninth Circuit's opinion in *Schwarzenegger*, in both its reasoning and its result. In particular, it argues that strict scrutiny is the correct standard by which to evaluate California's content-based Act, that California has failed its burden of satisfying both prongs of that rigorous test and that, furthermore, the Act suffers from underinclusiveness in serving California's purported interests in protecting minors from alleged physical and psychological harm.

Part II then encourages the Court not to extend principles relating to the regulation of sexual expression, which is permissible under both *Miller v. California*, 413 U.S. 15 (1973), and *Ginsberg*, into the realm of violent-themed expression that is largely unregulated unless it constitutes an incitement to violence, fighting words or a true threat of violence. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (the government can prohibit advocacy of force or illegal action only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942) ("[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"); and *Virginia v. Black*, 538 U.S. 343, 359 (2003) (defining unprotected true threats as "those

statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"). As Judge Richard Posner observed nearly a decade ago in writing for a unanimous three-judge panel of the United States Court of Appeals for the Seventh Circuit when enjoining Indianapolis' video game ordinance, "Violence has always been and remains a central interest of mankind and a recurrent, even obsessive theme of culture both high and low." *Am. Amusement Mach. Ass'n*, *supra* at 577.

Part III then respectfully requests this Court to maintain a rigorous standard of proof of causation of harm before First Amendment protection for speech that otherwise receives full Constitutional protection may be abridged. In brief, California must prove that the harms it cites are real, that they are, in fact, directly caused by the speech California seeks to regulate, and that the regulation in question must directly and materially alleviate them, if those harms are, in fact, real.

In summary, there is little doubt that there are some people – including, perhaps, some California legislators – who do not play violent video games, who do not fully understand them as do minors and, thus, who find them repulsive and reprehensible. But as this Court has recognized, "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Without proof of direct causation of harm to minors from playing violent video games, and without choosing to embrace and to promote less

restrictive means of serving its alleged interests that are readily available to it, Petitioners are left with little to support their case, other than to ask this Court to break new legal ground. *Amici* strongly encourage the Court not to go down that uncharted path and to, instead, affirm the Ninth Circuit's ruling in *Schwarzenegger* and the long-standing principles regarding the presumptively unconstitutional nature of content-based laws.

ARGUMENT

I. The Ninth Circuit Correctly Ruled That the Act Violates the First Amendment

This part of the argument has three sections. Section A addresses the Act's unconstitutional ratings requirement, while Section B analyzes its unconstitutional labeling mandate. Section C then describes the underinclusiveness problem that fatally plagues the Act.

A. The Act's Restriction on the Sale of Violent Video Games Violates the First Amendment

This case affects two sets of First Amendment rights – the rights of retailers and distributors to freely sell the speech products that are violent video games, and the rights of minors to purchase those games free from government interference. Put more bluntly, the Act impacts both the right to speak and the correlative right to receive speech. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available

knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] the right to read"). Indeed, as this Court has recognized, "minors are entitled to a significant measure of First Amendment protection." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975).

This Court also has made it clear that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials" to minors. *Id.* at 213. And as Judge Richard Posner wrote in the process of striking down an Indianapolis law restricting minors' access to violent video games in arcades, "We are in the world of kids' popular culture. But it is not lightly to be suppressed." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 578 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

As a content-based regulation, the Act must pass the strict scrutiny standard of judicial review and this is something that it fails to do, as the Ninth Circuit correctly ruled. See Joel Timmer, *Violence as Obscenity: Offensiveness and the First Amendment*, 15 Comm. L. & Pol'y 25, 28 (2010) ("Courts have declared violent media content to be entitled to full First Amendment protection. Laws restricting such content generally are subjected to strict scrutiny, the standard typically applied to content-based restrictions on fully protected speech. Under strict scrutiny, the government must show that a restriction is necessary to achieve a compelling government interest and that the restriction is narrowly drawn to achieve that end").

In the instant case, Petitioners are unable to demonstrate causation of harm, be it physical or psychological, to minors stemming from playing violent video games, thus refuting their position that there is a compelling interest of the highest order sufficient to support the law. This failure to demonstrate harm using social science evidence is not surprising; as two professors recently observed, "the social sciences are much less successful than the physical sciences in terms of scientific goals such as prediction and explanation. This tendency certainly includes evidence from media effects research, a fact that mitigates against its applicability to policy issues generally, or more specifically, to constitutional free speech issues." Matthew D. Bunker & David K. Perry, *Standing at the Crossroads: Social Science, Human Agency and Free Speech Law*, 9 Comm. L. & Pol'y 1, 18 (2004).

But assuming *arguendo* such a compelling interest were to exist, the Act still fails to pass constitutional muster because it is not the least restrictive means of serving that interest. For example, the ESRB voluntary ratings and content descriptors, when coupled with technological developments in gaming consoles that allow parents to use the ESRB's system to block games with such ratings, provide a government-free solution to whatever problems California believes exist. Just as the voluntary ratings for movies used by the Motion Picture Association of America provide an informative and effective way of helping parents to determine what movie content is suitable for their children, so too do the much newer and methodologically rigorous ESRB ratings.

Finally, to contextualize this case, *Amici* emphasize that at a time when the country is fighting an open-ended war on terrorism involving real-life death and violence and, concomitantly, consuming those real-life images as they are published in newspapers, aired on television sets, and posted on the Internet, one might conclude that Petitioners would have other issues on which to focus besides the effects of viewing computer-generated, entertainment-based images of violence in a video game. Petitioners have failed to demonstrate how fictional images of fantasy violence are somehow harmful to minors, let alone any more harmful than images of real-life violence about which they apparently fail to worry. As described later in Section C, this goes directly to the Act's underinclusiveness.

B. The Act's Compelled-Speech Labeling Obligation Violates the Respondents' First Amendment Right Not to Speak

California Civil Code Section 1746.2 requires that "violent video games," as defined by the Act, carry a four-square-inch label that reads "18," signifying the minimum age a consumer must be to purchase that product. By mandating that this precise content appear on the front side of the game's packaging against the desire of Respondents, California has compelled speech in violation of the First Amendment. This Court long has held that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943).

Petitioners are prescribing content to which game producers object, despite "leading First Amendment precedents [that] have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.,* 547 U.S. 47, 61 (2006). It is well settled within this Court's jurisprudence that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Furthermore, this Court has observed that "[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views." *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). Indeed, the Court has recognized that "mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed. of the Blind of North Carolina*, 487 U.S. 781, 795 (1988). In summary, the Act violates Respondents' First Amendment right not to speak by forcing Respondents to agree with or to affirm a particular subjective message with which they disagree and with which that do not want to be associated. See Abner S. Greene, *The Pledge of Allegiance Problem*, 64 Fordham L. Rev. 451, 451 (1995) (this Court has interpreted the First Amendment to include an unenumerated "right not to speak, which prohibits the government from compelling expression in which the speaker does not wish to engage").

The Court has identified "two categories of cases" within its compelled-speech jurisprudence, and the

instant dispute falls squarely within the "true" compelled-speech grouping "in which an individual is obliged personally to express a message he disagrees with, imposed by the government." *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 557 (2005). The instant action thus is not, in other words, either a compelled-subsidy case or one involving the funding of government speech. *Id.* at 558-562.

At first blush, it may appear that California can rely on this Court's rulings in the commercial speech arena that permit compelled disclosure of "purely factual and uncontroversial information" in advertising provided the requirements "are reasonably related to the State's interest in preventing deception of customers." See *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 651 (1985). Yet, the "most prominent examples" of the type of information contemplated in this Court's rulings are "warning and nutritional information labels." See *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 651 (7th Cir. 2006) (citation omitted). In other words, the information that may be compelled in the context of commercial speech, consistent with the First Amendment, is *factual* information, such as calorie counts or vitamin content in food products or statements regarding toxins in cleaning products. See, e.g., *Nat'l Elec. Manufacturers Ass'n v. Sorrell,* 272 F.3d 104, 114 (2d Cir. 2001) *cert. denied,* 536 U.S. 905 (2002) (upholding requirements for listing mercury content because "mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests").

California's labeling requirement moves far beyond compelled factual information permitted under commercial speech doctrine. The determination of whether a particular game is a "violent video game" under the Act is a highly subjective finding – not a factual one subject to empirical verification such as a calorie count. As the discussion in Part II of the Argument later illustrates, California's definition of "violent video game" is fatally flawed because it conflates time-honored definitions of unprotected obscene speech with protected expression of violent images and content. The very idea that California is trying to expand this Court's variable obscenity jurisprudence to encompass violent themes moves the determination squarely outside the realm of fact into the murky waters of subjectivity.

The United States Court of Appeals for the Seventh Circuit recently considered a similar issue, and its reasoning is instructive here. Illinois required that "sexually explicit" video games be labeled with a number "18" sticker. The Seventh Circuit rejected the state's argument that the labeling provision simply required "purely factual disclosures." *Blagojevich*, 469 F.3d at 652. In striking down the mandate, the appellate court observed that "the State's definition of this term is far more opinion-based than the question of whether a particular chemical is within any given product." *Id.* Significantly, the Seventh Circuit highlighted just how subjective making the required determination would be. It suggested that "[e]ven if one assumes that the State's definition of "sexually explicit" is precise, it is the State's definition – the video game manufacturer or retailer may have an entirely different definition of this term." *Id.*

The same argument holds true with California's labeling requirement. The amorphous definition of "violent video game" provides little guidance to manufacturers and retailers who, unless trained in the art of applying the federal sentencing guidelines borrowed by California, are forced to guess whether a particular game should carry the "18" label. Consequently, *Amici* contend that California's labeling provisions in no way may be construed as a purely factual disclosure. To the contrary, the provisions should be considered outside the context of commercial speech, and instead be viewed solely as a true compelled speech mandate subject to heightened scrutiny. As such, the labeling requirement is an impermissible infringement on freedom of speech.

C. The Act is an Underinclusive Remedy for Any Alleged Harms

In the first appellate court decision invalidating restrictions on minors' access to violent video games nearly a decade ago, *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001), U.S. Court of Appeals Judge Richard Posner aptly dismissed the proffered evidentiary research purporting to prove that violent video games are somehow more problematic than other forms of media because of their interactivity. Judge Posner, writing on behalf of a unanimous three-judge panel for the Seventh Circuit, found that the studies offered by the City of Indianapolis "are not evidence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments." *Id.* at 579. In that single sentence, Judge Posner also telegraphed the more far-reaching constitutional concern that

singling out one form of violent media for legal sanction, while simultaneously giving a free pass to others, gives rise and credence to a claim of substantial underinclusiveness – and thus yet another basis upon which violent video game laws should be deemed invalid. Judge Posner's logic and reasoning in *Kendrick*, which this Court declined to disturb, remains equally as valid today as it was then.

Indeed, at least seven federal district courts have addressed the problem of the underinclusiveness of violent video game statutes, and the substance of each of their findings is remarkably consistent and directly on point. See *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (E.D. Ill. 2005); *Entm't Software Ass'n v. Granholm,* 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006) and *Entm't Merchants Ass'n v. Henry*, No. Civ-06-675-C, 2007 U.S. Dist. LEXIS 69139 (W.D. Okla. Sept. 17, 2007); *Video Software Dealers Ass'n v. Schwarzenegger*, No. C-05-04188 RMW, 2007 U.S. Dist. LEXIS 57472 (N.D. Cal. Aug. 6, 2007). Like the Seventh Circuit and Judge Posner, the judges in these cases found that the social science evidence failed to support the laws in question.

These courts correctly recognized that the violence a minor witnesses when playing a video game cannot logically or constitutionally be singled out as any more harmful – either physically or psychologically – than similar exposure to violent content in movies, on television, in books or, for that matter, in society itself. Without doubt, minors today are regularly bombarded

with violent images from a panoply of readily available media sources, ranging from movies downloaded directly to their iPods to stark *a la carte* offerings on YouTube to images of real-life violence on television news. Taking medium-specific steps to squelch a particular form of content simply seems futile in a high-tech, digital age when violent content is available on a multitude of media platforms. See Clay Calvert, *The Two-Step Evidentiary and Causation Quandary for Medium-Specific Laws Targeting Sexual and Violent Content: First Proving Harm and Injury to Silence Speech, then Proving Redress and Rehabilitation Through Censorship*, 60 Fed. Comm. L.J. 157, 182 (2008) ("tamping down such expression on one medium, when it surely will crop up on another, simply is fruitless, like engaging in a never-ending arcade game of Whac-a-Mole"). Jurists reviewing the laws regulating violent video games have properly posed the question: Why should this one form of media – video games – be treated differently from all the others?

Judge Robert S. Lasnik, when striking down Washington Revised Code Section 9.91.180 (2003) in *Maleng*, addressed this point by noting that "the Act is too narrow in that it will have no effect on the many other channels through which violent representations are presented to children." 325 F. Supp. 2d at 1189. Similarly, Judge Matthew F. Kennelly, in *Blagojevich*, wrote, "the underinclusiveness of this statute – given that violent images appear more accessible to unaccompanied minors in other media – indicates that regulating violent video games is not really intended to serve the proffered purpose." 404 F. Supp. 2d at 1075. In *Granholm,* Judge George Caram Steeh struck down 2005 Michigan Public Act Section 108 (2005),

finding that "[w]hile the State claims to try to protect the physical and psychological well-being of minors as well as prevent violent and asocial behavior, the Act fails to regulate other comparable forms of violent media from minors." 426 F. Supp. 2d at 654. In *Hatch*, Judge James M. Rosenbaum likewise found Minnesota Statute Section 325I.06 (2006) to be constitutionally infirm because "there is no showing whatsoever that video games, *in the absence of other violent media,* cause even the slightest injury to children." 443 F. Supp. 2d at 1070 (emphasis in the original). In *Foti,* Louisiana's violent video game law met a similar fate, with Judge James J. Brady observing that "[u]nder the Statute, for example, a minor could be legally barred from buying or renting an 'M'-rated video game containing violent content, but the same minor could legally buy or rent the movie or book on which the video game was based." 451 F. Supp. 2d at 833. In *Henry,* Judge Robin J. Cauthron mirrored that point, writing that "[a] minor who is prevented by the Act from buying or renting a video game containing "inappropriate violence" may still legally buy or rent the book or movie on which the game was based." 2007 U.S. Dist. LEXIS 69139, at *18.

The district court's decision in the instant case also recognized the faulty logic in allowing underinclusive violent video game laws. Judge Ronald M. Whyte found no proof that video games are "any more harmful than violent television, movies, internet sites or other speech-related exposures." 2007 U.S. Dist. LEXIS 57472, at *32.

If the purported rationale for prohibiting minors' access to violent video games is to protect them from

harm that allegedly arises due to exposure to violence, then these laws must fail because – as myriad federal courts have ruled – they are an underinclusive vehicle for serving those ends. This Court has found that underinclusiveness serves as a basis for invalidating laws that privilege one type of speech over another and that "[w]hile surprising at first glance, the notion that the regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles." *City of Ladue v. Gilleo,* 512 U.S. 43, 51 (1994) (emphasis in the original) (FN omitted). Additionally, the Court has observed that when there are "multitude of external stimuli that color their children's perception of sensitive subjects," a statute that provides "only the most limited incremental support for the interest asserted" may be held unconstitutional. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983). In the instant case, children are exposed to a multitude of violent-themed stimuli across many forms of media, and California's law provides only the most limited incremental support for the interests asserted.

More recently, this Court pointed out the fatal underinclusivness in the realm of federal campaign finance laws that "banned corporate speech in only certain media within 30 or 60 days before an election." *Citizens United v. Federal Elections Comm'n*, 130 S. Ct. 876, 911 (2010) ("the statute is both underinclusive and overinclusive. As to the first, if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time").

Moreover, Justice Antonin Scalia has suggested "that a law cannot be regarded as protecting an interest 'of the highest order,' and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star v. B.J.F.,* 491 U.S. 524, 541-542 (1989) (Scalia, J., concurring) (citation omitted). Yet, this is precisely what California attempts to do with its violent video game law.

California advances two compelling interests that California Civil Code Sections 1746 through 1746.5 supposedly serve: "(1) 'preventing violent, aggressive, and anti-social behavior'; and (2) "preventing psychological or neurological harm to minors who play violent video games.'" *Schwarzenegger*, 556 F.3d at 961. The state even clarified its position that "'[t]he physical and psychological well being of children is the concern of the Act,' as distinguished from the interest of protecting third parties from violent behavior.'" *Id.* If exposure to violence is the ill that must be cured, then allowing uncurbed violence in every other media format unquestionably leaves "appreciable damage" unprohibited.

To date, social scientists have been unable to parse out any purported damage to a minor caused by playing violent video games from that allegedly arising from the plethora of exposures to other images of violence or, quiet simply, social factors. As Judge Lasnik wrote in *Maleng,* "virtually all of the experts agree that prolonged exposure to violent entertainment media is one of the constellation of risk factors for aggressive or anti-social behavior (other factors include family problems, problems with peers at school and in the neighborhood, biological factors,

etc.)." 325 F. Supp. 2d at 1188. Social scientists, thus far, have failed to isolate the violent video game variable from other forms of violent entertainment or other powerful and impressionable social factors. Absent such isolation and proof of direct causation, the social science evidence to date in support of laws targeting violent video games founders.

While it might seem expedient for a state to single out a form of media that differs from the others in that the user controls a portion of the action, doing so runs afoul of established First Amendment principles, all the while not accomplishing the state's goals of alleviating the purported harms associated with exposure to violence. Although California may assert that it is allowed to move in step-by-step, slippery-slope-toward-censorship fashion against media images of violence, by first targeting video games and then moving on to other forms of media, "this one-step-at-a-time analysis is wholly inappropriate" where First Amendment interests are at stake. *City of Renton v. Playtimes Theatres, Inc.*, 475 U.S. 41, 58 (1986) (Brennan, J., dissenting).

Finally, the underinclusive nature of California's Act raises Equal Protection concerns by treating similarly situated speakers in dissimilar fashion. In particular and within the entertainment industry, speakers who convey violent-themed messages through CDs, television sets, movie screens, magazine pages and other forms of media are exempted from the reach of the Act while, in contrast, only those speakers who convey their violent-themed messages through the medium of video games are subject to regulation. This Court recently held that the First Amendment prohibits the disparate treatment of speakers who

wish to convey the same content. *Citizens United*, 130 S. Ct. at 898 (2010) ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others"). The Act thus is flawed.

In summary, *Amici* urge this Court to hold the California Act fatally underinclusive.

II. Sexually Explicit and Violent-Themed Speech Should Continue to be Treated Separately and Distinctly by This Court

In April in *United States v. Stevens*, 130 S. Ct. 1577 (2010), this Court refused to carve out another unprotected category of expression for depictions of animal cruelty from its free-speech, First Amendment jurisprudence. *Amici* now urge the Court to continue to reject any further expansion to the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

In particular, *Amici* encourage this Court to reject California's attempt to conflate and confuse unprotected sexual expression that is either obscene or child pornographic with protected violent media content. See *Roth v. United States*, 354 U.S. 476, 485 (1957) ("obscenity is not within the area of constitutionally protected speech or press"); *United States v. Williams*, 128 S. Ct. 1830, 1836 (2008) ("we have held that a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment" and "we have held that

the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults"); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-246 (2002) ("as a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children"). Specifically, California's Act amounts to a backdoor effort to expand this Court's variable obscenity jurisprudence initially fashioned more than four decades ago in *Ginsberg v. New York*, 390 U.S. 629 (1968), that prevents non-obscene yet sexually explicit content that is harmful to minors from reaching their hands, while still affording consenting adults access to it. See Kevin W. Saunders, *The Need For A Two (Or More) Tiered First Amendment To Provide For The Protection Of Children*, 79 Chi.-Kent L. Rev. 257, 261 (2004) ("*Ginsberg* allowed society to protect children from material that some see as harmful to them, while still allowing adult access"). The variable obscenity jurisprudence allows courts to have two definitions of obscenity – one for adults, as defined under *Miller v. California*, 413 U.S. 15 (1973), and one for minors, with states fashioning their own statutes and often borrowing from the three-pronged *Miller* test within them to define the content that is unsuitable for minors. See, e.g., Fla. Stat. § 847.001 (2010) (defining harmful to minors, in relevant part, as content that "(a) Predominantly appeals to a prurient, shameful, or morbid interest; (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and (c) Taken as a whole, is without serious

literary, artistic, political, or scientific value for minors"); Nev. Rev. Stat. Ann. § 201.257 (2009) (defining harmful to minors, in relevant part, as content that "predominantly appeals to the prurient, shameful or morbid interest of minors, is patently offensive to prevailing standards in the adult community with respect to what is suitable material for minors, and is without serious literary, artistic, political or scientific value").

But *Ginsberg* was a case about sexual expression – "some so-called 'girlie' magazines," as this Court wrote (*Ginsberg*, 390 U.S. at 631) – not violent expression. The entire doctrine of variable obscenity is made possible only because, as the Court observed in *Ginsberg*, "obscenity is not protected expression." *Id.* at 641. In stark contrast, this Court has never held that violent-themed speech falls outside of the ambit of First Amendment protection.

The bottom line is that the necessary condition that makes the variable obscenity doctrine possible – namely, a category of expression that lacks Constitutional protection – is absent when it comes to violent-themed speech. Variable obscenity is an off-shoot, in other words, of this Court's long-standing obscenity jurisprudence. California's Act attempts to create what amounts to a variable violence doctrine, but there simply is no violent-expression jurisprudence from which such an off-shoot can arise.

In an effort to stretch this Court's sexual expression jurisprudence to apply to violent expression, California Civil Code Section 1746 (2009) borrows from *Miller's* obscenity test by defining a violent video game, in relevant part, as one in which

the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that:

> (A) Comes within all of the following descriptions: (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors. (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors. (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors. *Id.*

This represents a brazenly bold bastardization and bootstrapping of the *Miller* test for obscenity, which provides that, in determining whether the content in question is obscene, the trier of fact must consider if: 1) the material, taken as a whole and viewed from the perspective of an average person, would appeal to a prurient interest, meaning a morbid or shameful interest; 2) the material is patently offensive; and 3) the material lacks serious literary, artistic, political or scientific value. *Miller*, 413 U.S. at 24. See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) ("prurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex").

Grafting the phrases "of minors" and "for minors" onto the *Miller* test and simultaneously swapping out sexual images and replacing them with violent-themed ones as the underlying regulated content may constitute clever crafting, but it is an unconstitutional

encroachment on the First Amendment. This is more than just Petitioners playing verbal gymnastics with *Miller*; it is Petitioners playing fast and loose with long-standing First Amendment principles. *Amici* thus urge this Court both to continue to make clear distinctions between sexual and violent expression and to reject Petitioners' efforts to conflate the two.

III. Proof of Causation of Harm Must Continue to be Required Before the Regulation of Violent Video Games Can Even be Considered

Amici urge the Court to accept the Ninth Circuit's standard and its ruling on the issue of causation of harm. In the instant case, the appellate court not only engaged in its own examination and analysis of several studies offered by California, but it suggested that proof of harm causation – not merely correlation – was required:

> Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology as they relate to the State's claimed interest. None of the research establishes or suggests a causal link between minors playing violent video games and actual psychological or neurological harm, and inferences to that effect would not be reasonable. In fact, some of the studies caution against inferring causation. Although we do not require the State to demonstrate a "scientific

> certainty," the State must come forward with more than it has.

Schwarzenegger, 556 F.3d at 963-964.

Just one year earlier, the United States Court of Appeals for the Eighth Circuit in *Entertainment Software Association v. Swanson,* 519 F.3d 768 (8th Cir. 2008), went even further on the evidentiary burden in striking down a Minnesota law targeting violent video games when it held "that the evidence falls short of establishing the statistical certainty of causation demanded." *Id.* at 772.

All of this concern for proof of harm comes with very good reason when it is contextualized historically. To this extent, it is important to emphasize that the types of concerns, fears and suspicions that apparently animate Petitioners' efforts at censorship are far from new. As two leading communication scholars write:

> In 1929, an estimated 40 million minors, including more than 17 million children under the age of fourteen, went to the movies weekly. Critics raised alarming questions about their effects. Were the picture shows destroying parents' control over their children? Were they teaching immorality? Films with unwholesome themes – horror, crime, immoral relationships, and the illegal use of alcohol (during Prohibition) – were especially troubling.

Melvin L. DeFleur & Everette E. Dennis, *Understanding Mass Communication: A Liberal Arts Perspective* 432 (6th ed. 1998).

Each new medium, it seems, causes concerns about its impact on minors. Perhaps this is natural, as one generation fears a new technology with which it is not familiar. But in just a few years, many lawmakers and judges across the country will have grown up playing video games, some of which were not violent and some of which probably were. Or perhaps the fear of new media merely reflects the fact that, as one leading First Amendment scholar and university president puts it, "[c]ensorship is a social instinct." Rodney A. Smolla, *Free Speech in an Open Society* 4 (1992).

Ultimately, the burden must continue to fall on the government to prove direct causation of harm allegedly stemming from a particular form of expression that otherwise receives full First Amendment protection. Even in the area of commercial speech, which is only subject to intermediate scrutiny rather than the heightened strict scrutiny standard by which laws targeting violent-themed speech must be measured, this Court has held that the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfeld v. Fane*, 507 U.S. 761, 770, 771 (1993). Justice Samuel Alito embraced this rigorous level of scrutiny in commercial speech cases while serving on the United States Court of Appeals for the Third Circuit in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).[2]

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[2] In declaring unconstitutional a Pennsylvania statute restricting advertisements for alcohol in college and university newspapers, then Judge Alito wrote for a unanimous three-judge panel that the Commonwealth of Pennsylvania relied only on speculation and conjecture and had not offered any evidence to show the law would

Furthermore, in the process of applying the lower standard of intermediate scrutiny to evaluate the constitutionality of government laws affecting the speech of cable system operators, this Court has held that the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

Even when it comes to regulating the speech of adult bookstores and sexually oriented businesses through zoning laws, government entities must put forth some evidence of harm. In particular:

> a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest [citation omitted]. This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance.

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438 (2002).

Surely if speech-restricting regulations analyzed under the intermediate scrutiny standard and imposed upon the expression of large cable companies, commercial advertisers, and adult businesses must be

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be effective. *Pitt News v. Pappert*, 379 F.3d 96, 107-108 (3d Cir. 2004).

justified by actual evidence showing real harms, then Petitioners and other governmental entities that seek to regulate speech that receives full First Amendment protection must demonstrate a higher standard of evidentiary proof. *Amici* thus urge this Court to affirm the Ninth Circuit's rigorous analysis of the question of causation of harm.

CONCLUSION

Rather than battling real-world violence and crime by hiring more police officers or by better enforcing already-on-the-books laws that target actual illegal conduct, Petitioners' have chosen, instead, to fight a surrogate battle over fictional, entertainment-based violence by adopting a statute that targets speech – not conduct – and that, in the process, jeopardizes First Amendment freedoms. Given the fatal underinclusiveness of this effort described in Part I of the Argument above, one must wonder whether California will next target images of real-life violence from the wars in Afghanistan and Iraq or whether it will attack its own Hollywood-centric film studios that churn out violent content like the *Terminator* movies starring Petitioner Arnold Schwarzenegger.

In addition, it is important to remember that the gaming generation is growing up. As its members begin to take the tools of power in this country – as they become lawmakers, law clerks, judges and policy makers – they may have a greater comfort level with the media they grew up with than do older generations who may fear new technologies. Until that time, however, the Court must hold the line on allowing such fears to trump First Amendment rights.

Amici thus respectfully request that the Court affirms the decision below of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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