No. 08-1448

In the Supreme Court of the United States

ARNOLD SCHWARZENEGGER,
GOVERNOR OF CALIFORNIA, ET AL., PETITIONERS

v.

ENTERTAINMENT MERCHANTS ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.; INDEPENDENT FILM AND TELEVISION ALLIANCE; LUCASFILM LTD.; NATIONAL ASSOCIATION OF THEATRE OWNERS, INC.; DIRECTORS GUILD OF AMERICA, INC.; PRODUCERS GUILD OF AMERICA; SCREEN ACTORS GUILD; WRITERS GUILD OF AMERICA, WEST, INC.; AND AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS AS AMICI CURIAE SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

Page

Interest of amici curiae 1
Statement 5
A. Early efforts at censorship 6
B. The Production Code and continued efforts at censorship 7
C. The rating system 9
Summary of argument 12
Argument 14
California's prohibition on the sale of violent video games to minors is unconstitutional 14
A. Depictions of violence are not categorically excluded from First Amendment protection 14
B. California's statute does not survive strict scrutiny because it is not narrowly tailored to serve a compelling governmental interest 21
C. If California's statute were upheld, it would have a chilling effect on the motion picture industry 26
Conclusion 30

TABLE OF AUTHORITIES

Cases:

American Amusement Machines Association v. *Kendrick*, 244 F.3d 572 (7th Cir. 2001) 16, 19
Ashcroft v. *ACLU*, 542 U.S. 656 (2004) 24
Citizens United v. *FEC*, 130 S. Ct. 876 (2010) 19
Engdahl v. *City of Kenosha*, 317 F. Supp. 1133 (E.D. Wis. 1970) 12
Entertainment Software Association v. *Blagojevich*, 469 F.3d 641 (7th Cir. 2006) 19

Page

Cases—continued:

Entertainment Software Association v. *Swanson*, 519 F.3d 768 (8th Cir. 2008) 16, 19
Ginsberg v. *New York*, 390 U.S. 629 (1968) 15, 18, 22
Interactive Digital Software Association v. *St. Louis County*, 329 F.3d 954 (8th Cir. 2003) 16
Interstate Circuit, Inc. v. *City of Dallas*, 390 U.S. 676 (1968) 27
Joseph Burstyn, Inc. v. *Wilson*, 343 U.S. 495 (1952) 7
Miller v. *California*, 413 U.S. 15 (1973) 20
MPAA v. *Specter*, 315 F. Supp. 824 (E.D. Pa. 1970) 12
Mutual Film Corp. v. *Industrial Commission of Ohio*, 236 U.S. 230 (1915) 7
R.A.V. v. *St. Paul*, 505 U.S. 377 (1992) 24
Reno v. *ACLU*, 521 U.S. 844 (1997) 21, 25
Sable Communications of California, Inc. v. *FCC*, 492 U.S. 115 (1989) 21
Superior Films, Inc. v. *Department of Education*, 346 U.S. 587 (1954) 8
Swope v. *Lubbers*, 560 F. Supp. 1328 (W.D. Mich. 1983) 12
Times Film Corp. v. *Chicago*, 365 U.S. 43 (1961) 28
United States v. *Kilbride*, 584 F.3d 1240 (9th Cir. 2009) 20
United States v. *Playboy Entertainment Group*, 529 U.S. 803 (2000) 21, 22
United States v. *Stevens*, 130 S. Ct. 1577 (2010) 15, 20
Winkelman v. *Parma City School District*, 550 U.S. 516 (2007) 22

Constitution, statute, and rule:

U.S. Const. Amend. I ..... *passim*
Cal. Civ. Code § 1746(d)(1)(A) (2010) 20, 27
Sup. Ct. R. 37.6 5

Page

Miscellaneous:

Gerald R. Butters, *Banned in Kansas: Motion Picture Censorship, 1915-1966* (2007).....8, 16, 17
Classification and Rating Administration, *Classification and Rating Rules* (last visited Sept. 17, 2010) <tinyurl.com/cararules> 10
Classification and Rating Administration, *The Movie Rating System: Its History, How It Works and Its Enduring Value* (last visited Sept. 17, 2010) <tinyurl.com/ratingsystem> .....*passim*
Comment, *Censorship of Motion Pictures*, 49 Yale L.J. 87 (1939) 6, 7
Federal Trade Commission, *Marketing Violent Entertainment to Children: A Workshop on Industry Self-Regulation* (Oct. 29, 2003) <tinyurl.com/ftcworkshop> 11
Federal Trade Commission, *Undercover Shop Finds Decrease in Sales of M-Rated Video Games to Children* (Mar. 30, 2006) <tinyurl.com/ftcpressrelease> 11
H.J. Forman, *Our Movie Made Children* (1933).....8
Jane M. Friedman, *The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry*, 73 Colum. L. Rev. 185 (1973).....6, 11
Vince Horiuchi, *Gaming the Movies*, Salt Lake Trib., May 27, 2010 28
John Horn, *Getting Game*, L.A. Times, Feb. 26, 2009, at E1 28
Kyontze Hughes, First Amendment Center, *Rating & Labeling Entertainment* (May 2006) <tinyurl.com/otherratings> 12
Internet Movie Database, *The Hurt Locker* (last visited Sept. 17, 2010) <tinyurl.com/imdbhurtlocker> 26

Page

Miscellaneous—continued:

Internet Movie Database, *Lara Croft: Tomb Raider* (last visited Sept. 17, 2010) <tinyurl.com/imdbtombraider> 29
Leonard J. Leff & Jerold L. Simmons, *The Dame in the Kimono: Hollywood Censorship and the Production Code* (2d ed. 2001) .....*passim*
The Movies in Our Midst: Documents in the Cultural History of Film in America (Gerald Mast ed. 1982) 7
MPAA, *The Authority of the Federal Trade Commission to Regulate the Advertising and Marketing of Motion Pictures Depicting Violence* (Oct. 24, 2000) 11
MPAA, *The Motion Picture & Television Industry Contribution to the U.S. Economy* (Apr. 2010) <tinyurl.com/mpaaeconomy> 4
Supreme Court Upholds Validity of Municipal Ordinance Requiring Submission of All Motion Pictures for Censorship Prior to Exhibition, 61 Colum. L. Rev. 921 (1961) 9
Video Games Inspired by Hollywood: Film Spin-Off Is Not a Guarantee for Success for Video Games, Screen Digest, May 2008, at 135 .....28, 29

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INTEREST OF AMICI CURIAE

The Motion Picture Association of America, Inc. (MPAA), is a not-for-profit trade association that serves as the primary voice for the American motion picture industry. Its members include Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLLP; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc. MPAA's members and

their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets. The MPAA was founded in 1922, in response to intensifying efforts by state and local governments to censor American motion pictures. Several decades later, the MPAA played a central role in the establishment of the industry's voluntary movie rating system, which was designed to deter efforts at government censorship by providing the public with clear and concise information about the content of motion pictures. The MPAA continues to work to ensure First Amendment protection for movie content, while also assisting the public in making informed decisions about the motion pictures it wishes to see.

The Independent Film and Television Alliance (IFTA) is the nonprofit trade association for the independent film and television industry worldwide. IFTA's membership includes 150 independent film and television production, finance, and distribution companies. IFTA members finance, produce, and distribute about 500 feature films and countless hours of television programming annually.

Lucasfilm Ltd. is a fully integrated film and entertainment company. Founded in 1971 by George Lucas, Lucasfilm is responsible for some of the best-known motion pictures of our time, including the *Star Wars* and *Indiana Jones* series and *American Graffiti*.

The National Association of Theatre Owners, Inc. (NATO), is the largest motion picture exhibition trade organization in the world, representing owners and operators of more than 30,000 movie screens in all fifty states. NATO's members include the ten largest movie theater operators in the United States and hundreds of smaller, independently owned theater companies. NATO partnered with the MPAA to create the voluntary

movie rating system in 1968, and its members continue to serve as the primary source of education and enforcement of that system.

The Directors Guild of America, Inc., was founded in 1936 to protect the economic and creative rights of directors. Over the years, its membership has expanded to include over 14,000 people, encompassing not only directors but also unit production managers, assistant directors, associate directors, stage managers, and production associates. The members of the Directors Guild make vital contributions to the production of feature films, television programs, documentaries, news and sports programs, commercials, and content made for new media. The Directors Guild seeks to protect the legal, economic, and artistic rights of directorial teams, and serves as an advocate for their creative freedom.

The Producers Guild of America is the nonprofit trade group that represents, protects, and promotes the interests of all members of the producing team in film, television, and new media. The Producers Guild has over 4,500 members who work together to protect and improve their careers and the industry.

Screen Actors Guild (SAG) is the Nation's largest labor union representing working actors. Established in 1933, SAG represents more than 125,000 actors who work in motion pictures and television, industrials, commercials, video games, music videos, and all other new media formats. In its 77-year history, SAG has grown to encompass 20 branches across the country in addition to its offices in Hollywood and New York. SAG's brand is recognized the world over and embodies its commitment to enhancing actors' working conditions, compensation, and benefits. Headquartered in Los Angeles, SAG is a powerful, unified voice for artists' rights and is a proud affiliate of the AFL-CIO.

The Writers Guild of America, West, Inc., is a labor organization representing approximately 11,000 professional writers in the motion picture, television, and new media industries. The Writers Guild's mission is to protect the economic and creative rights of the writers it represents.

The American Federation of Television and Radio Artists (AFTRA) represents the people who entertain and inform America. In 32 locals across the country, AFTRA represents actors, singers, journalists, dancers, announcers, comedians, disc jockeys, and other performers in television, radio, cable, sound recordings, music videos, commercials, audio books, non-broadcast industrials, interactive games, and all formats of digital media. Founded in 1937, AFTRA today provides its more than 70,000 members nationally with a forum for bargaining strong wages, benefits, and working conditions, and the tools and upward mobility to pursue their careers with security and dignity. From new art forms to new technology, AFTRA members embrace change in their work and craft to enhance 21st-century American culture and society.

Together, amici represent a broad cross-section of the motion picture and television industries, which make a significant contribution to popular culture and the American economy. The motion picture and television industries consist of some 95,000 businesses involved in all aspects of production, distribution, and promotion. In 2008, the motion picture and television industries collectively supported some 2.4 million jobs in the United States, providing over $140 billion in wages. And they generated over $15 billion in tax revenue for the federal and state governments. See MPAA, *The Motion Picture*

& Television Industry Contribution to the U.S. Economy (Apr. 2010) <tinyurl.com/mpaaeconomy>.[1]

STATEMENT

The history of the motion picture industry serves as a vivid illustration of the threat to First Amendment rights from the impulse to control and censor new forms of media—a threat reflected in the statute at issue before the Court. From the advent of motion pictures, a variety of state and local governments sought to restrict their content for the asserted purpose of protecting moviegoers from being exposed to harmful material. In response to that patchwork of regulation, the motion picture industry initially imposed its own form of censorship, which proved to be unworkable. Ultimately, the concerns that originally animated efforts at censorship were successfully addressed by a voluntary regime that provides the public with accurate information about the content of motion pictures. That widely praised regime—which has been in operation for more than four decades—allows parents and other moviegoers to make informed decisions about which motion pictures contain appropriate content, and does so in a way that does not compromise First Amendment rights. While the rating system itself is now a familiar and established part of American life, we begin with a brief account of the history leading to its adoption and of the operation of the system.

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than the amici, their members, or their counsel made such a monetary contribution. The parties have entered blanket consents to the filing of amicus briefs, and copies of their letters of consent are on file with the Clerk's Office.

A. Early Efforts At Censorship

By the early 1920s—even before the first "talking" motion pictures were shown—there were a host of state and local censorship boards across the country that reviewed the content of motion pictures before permitting them to be shown within their respective jurisdictions. Predictably, the resulting patchwork of regulation created a minefield for filmmakers and exhibitors; each censorship board applied different standards. For example, at the time, a woman could smoke onscreen in Ohio, but not in Kansas; a pregnant woman could appear onscreen in New York, but not in Pennsylvania. Even when censorship boards in different jurisdictions were applying substantively similar regulations or criteria, each board would often demand different changes, leading to further confusion. See Classification and Rating Administration, *The Movie Rating System: Its History, How It Works and Its Enduring Value* 3 (*Movie Rating System*) (last visited Sept. 17, 2010) <tinyurl.com/ratingsystem>; Leonard J. Leff & Jerold L. Simmons, *The Dame in the Kimono: Hollywood Censorship and the Production Code* 3-4, 32 (2d ed. 2001) (Leff & Simmons); Comment, *Censorship of Motion Pictures*, 49 Yale L.J. 87, 92 (1939) (*Censorship of Motion Pictures*).

As a result, it was virtually impossible for filmmakers and exhibitors to predict in advance whether particular motion pictures would successfully run the gauntlet of censorship boards. In light of the variation and indefiniteness in the applicable standards, filmmakers were forced to tailor their motion pictures to what they guessed would be the most restrictive standards, particularly given the considerable costs of making changes once production was completed. See Jane M. Friedman, *The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry*,

73 Colum. L. Rev. 185, 187 (1973) (Friedman); *Censorship of Motion Pictures* 91-92. Filmmakers and exhibitors had little recourse in the face of efforts to censor the content of motion pictures, because this Court at the time took the position that motion pictures were not entitled to First Amendment protection. See *Mutual Film Corp.* v. *Industrial Comm'n of Ohio*, 236 U.S. 230, 243-245 (1915).[2]

B. The Production Code And Continued Efforts At Censorship

Soon after its establishment in 1922, the MPAA embarked upon a campaign to preempt government censorship by promoting a uniform system of voluntary industry self-regulation. In 1927, the MPAA endorsed an advisory list of "Don'ts and Be Carefuls" for filmmakers. That list identified the following subjects to avoid:

> [P]rofanity, nudity, drug trafficking, sex perversion, white slavery, miscegenation, sex hygiene and venereal diseases, scenes of actual childbirth, children's sex organs, ridicule of the clergy, and offenses against a race, creed, or nation.

Leff & Simmons 8. Although the list of topics to be avoided altogether was primarily focused on specific types of sexual content, the MPAA also promulgated a somewhat broader list of topics to be handled with "special care," which included various types of criminal, immoral, and sexual conduct. See *The Movies in Our*

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[2] This Court later overruled the *Mutual Film* decision, holding that motion pictures were a form of speech protected by the First Amendment. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 500-502 (1952).

Midst: Documents in the Cultural History of Film in America 213-214 (Gerald Mast ed. 1982).

In 1930, the MPAA incorporated those advisory lists into a system of private censorship that became known as the Production Code (or the Hays Code). The Production Code espoused the philosophy that motion pictures ought not to "lower the moral standards" of their viewers, and it contained a list of prohibited topics and words. Gerald R. Butters, *Banned in Kansas: Motion Picture Censorship, 1915-1966*, at 188 (2007) (Butters). As the MPAA explained almost sixty years ago in an amicus brief to this Court, the Production Code was intended to serve as a "workable alternative to official restraint." MPAA Br. at 2, *Superior Films, Inc.* v. *Department of Education*, 346 U.S. 587 (1954) (No. 217). As it was implemented, the Production Code not only set out standards for the content of motion pictures, but also established a system whereby the Production Code Administration (an arm of the MPAA) would review both scripts and finished motion pictures and either approve or disapprove them, depending on its judgment as to whether a given motion picture was "moral" or "immoral." As a practical matter, no motion picture could secure widespread release without the Administration's seal of approval. See Leff & Simmons 20, 54-55; *Movie Rating System* 5, 37-38; H.J. Forman, *Our Movie Made Children* (1933).

The Production Code Administration vetoed scripts that contained even slightly objectionable content. And it continually battled with filmmakers over the use of mild profanity, depictions of marital discord, and insinuations of homosexuality. In one protracted episode, the Administration issued warnings to the producer of *Gone with the Wind* for the use of profanity in Rhett Butler's famous last line, "Frankly, my dear, I don't give a

damn." The producer argued that the line should be retained and prevailed only after an appeal to the MPAA's board. See Leff & Simmons 82, 91, 100-107.

Over time, filmmakers increasingly bridled at the Production Code Administration's decisions, and there was increasing public demand for motion pictures that were denied the Administration's seal of approval. The industry therefore began searching for a more workable alternative to the Production Code that would serve the goal of informing the public about potentially objectionable content without directly imposing creative restrictions on the content itself. See Leff & Simmons 100-107; Recent Developments, *Supreme Court Upholds Validity of Municipal Ordinance Requiring Submission of All Motion Pictures for Censorship Prior to Exhibition*, 61 Colum. L. Rev. 921, 922 (1961).

C. The Rating System

In 1968, the MPAA, working in conjunction with NATO, devised the idea of a voluntary rating system. The primary objective of the system is to inform parents about movie content so that they can make effective decisions concerning their children's exposure to mature or controversial material. See *Movie Rating System* 6.

The operation of the rating system is straightforward. Filmmakers agree to submit their motion pictures to the Classification and Ratings Administration (CARA), an independent organization financed by rating fees. Movie ratings are determined by a full-time board of eight to thirteen members; when they join the board, the raters are parents of children between the ages of five and seventeen, and they have no prior affiliation with the motion picture industry. The raters are tasked with determining the suitability of motion pictures for different audiences; they are asked to consider both the

content and themes of a motion picture and to give particular consideration to sexual content and nudity, violence, drug use, and adult language. The raters take into account the totality of the circumstances, and the standards they apply are intended to be flexible and adaptable over time. See *Movie Rating System* 8, 12.

Filmmakers agree to use the resulting ratings on all marketing and promotional materials. In addition, NATO's members have agreed to enforce the ratings by refusing to admit children to "R"-rated motion pictures unless they are accompanied by a parent or guardian (and refusing to admit children to "NC-17"-rated motion pictures at all). Retailers that sell or rent movies have also agreed to participate in enforcement. See Classification and Rating Administration, *Classification and Rating Rules* (last visited Sept. 17, 2010) <tinyurl.com/cararules>.

Since its initial adoption, the rating system has evolved in response to changing social norms and parental concerns. For example, in 2007, CARA added adult smoking to the list of considerations taken into account in the rating process. In addition, the rating system itself has been modified to increase the specificity and detail of the information provided. Not only has the rating system added new rating classifications (most notably, "PG-13" as an intermediate category between "PG" and "R"), but each motion picture now also receives a "rating descriptor," which specifically identifies the particular elements that form the basis for the rating. For example, *Saving Private Ryan* was rated "R" for "intense prolonged realistically graphic sequences of war violence" and for "language." That modification enables CARA to provide parents not only with an overall assessment of the suitability of a motion picture for differ-

ent audiences, but also with an explanation for its assessment. See *Movie Rating System* 11, 17.

The movie rating system has received widespread praise and recognition for its effectiveness. According to survey data, some 75% to 80% of parents believe that the rating system accomplishes its intended purpose: namely, to allow parents to make informed determinations regarding the level of mature or controversial material that they wish to allow their children to see, while permitting filmmakers to retain discretion over the content of their motion pictures. See *Movie Rating System* 7.

The movie rating system has also served as an important model for the development and enforcement of the voluntary rating system used by the video game industry. In fact, the effectiveness of the movie rating enforcement system, as implemented by movie theater operators, was recognized at a Federal Trade Commission hearing, in the course of which video game retailers were encouraged to develop a similar program. See Federal Trade Commission, *Marketing Violent Entertainment to Children: A Workshop on Industry Self-Regulation* 211-212 (Oct. 29, 2003) <tinyurl.com/ftcworkshop>. Video game retailers responded favorably and later took steps to improve their enforcement efforts. See Press Release, Federal Trade Commission, *Undercover Shop Finds Decrease in Sales of M-Rated Video Games to Children* (Mar. 30, 2006) <tinyurl.com/ftcpressrelease>.

In fact, some states and localities have gone so far as to attempt to codify all or part of the system into law. See Friedman 230 (discussing "statutes which incorporate the X or R ratings as the substantive standard for that which is to be regulated"). The MPAA has explained, however, that the rating system is "not intended to function as * * * a method of categorizing films as protected or unprotected speech." MPAA, *The Authori-*

ty of the Federal Trade Commission to Regulate the Advertising and Marketing of Motion Pictures Depicting Violence 21 (Oct. 24, 2000). Accordingly, courts have uniformly rejected government efforts to implement legally enforceable restrictions that track the movie rating system, on the ground that "[the] standards by which the movie industry rates its films do not correspond to the * * * criteria for determining whether an item merits constitutional protection or not." *Swope* v. *Lubbers*, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983) (citation omitted); accord *Engdahl* v. *City of Kenosha*, 317 F. Supp. 1133, 1136 (E.D. Wis. 1970); *MPAA* v. *Specter*, 315 F. Supp. 824, 826 (E.D. Pa. 1970).

The motion picture industry thus relies on a system of voluntary compliance with, and self-enforcement of, the rating system, which protects the American public by providing information so as to enable it to make informed decisions about the motion pictures it wishes to see. That system serves as a model not only for the rating system for video games, but also for other rating systems across the entertainment industry. See Kyontze Hughes, First Amendment Center, *Rating & Labeling Entertainment* (May 2006) <tinyurl.com/otherratings>.

SUMMARY OF ARGUMENT

Amici agree with respondents that California's prohibition on the sale of violent video games to minors is invalid under the First Amendment. Amici file this brief to bring to the Court's attention the history of unsuccessful efforts to regulate the content of motion pictures, culminating in the voluntary adoption of the widely praised movie ratings system, and to warn of the potential chilling effect on the motion picture industry of a ruling in petitioners' favor.

A. To begin with, the Court should reject petitioners' contention that depictions of violence, either generally or "with respect to sale to minors," are categorically excluded from First Amendment protection. The Court has consistently rebuffed efforts to carve out new categories of unprotected speech and has made clear that only speech that has historically been unprotected can be treated as outside the scope of the First Amendment. There is no historical tradition of regulating depictions of violence comparable to the tradition of regulating obscenity or other categories of unprotected speech, either more generally or with specific reference to the motion picture industry. Petitioners' proposed categorical exclusion would not be limited to the particular medium of video games, and it would require courts to engage in the difficult enterprise of determining which depictions of violence could be regulated and which could not. There is no valid basis for that constitutional innovation.

B. Under the applicable framework for First Amendment analysis, petitioners cannot show that California's statute is narrowly tailored to serve a compelling governmental interest. While parents have a legitimate interest in directing the upbringing of their children, petitioners have failed to show that the government's assistance is necessary to serve that interest. And the fundamental lesson of the motion picture industry is that a system of self-regulation can sufficiently enable parents to make informed judgments concerning movie content. The movie rating system has widely been praised for its effectiveness, and society's long experience with the movie rating system demonstrates that a properly designed voluntary rating system can serve the relevant parental interest without the need for content-based government regulation.

C. Finally, if this Court were to hold that California's statute is valid, it would have a dramatic chilling effect on the motion picture industry. If the Court's reasoning is not confined to the particular medium of video games, state and local governments could attempt to impose similar restrictions on depictions of violence in other media, including motion pictures. Such restrictions would have an obvious chilling effect, particularly given the inherent amorphousness of restrictions of that type and the potential for a patchwork of nationwide regulation. And that chilling effect would reach motion pictures even if the Court were to attempt to limit the scope of its decision to depictions of violence in video games, in light of the increasingly symbiotic relationship between video games and motion pictures and the increasingly blurred lines between different forms of media more generally. In sum, under settled First Amendment principles, California's statute is invalid, and the judgment of the court of appeals should be affirmed.

ARGUMENT

CALIFORNIA'S PROHIBITION ON THE SALE OF VIOLENT VIDEO GAMES TO MINORS IS UNCONSTITUTIONAL

A. Depictions Of Violence Are Not Categorically Excluded From First Amendment Protection

Most ambitiously, petitioners contend (Br. 12) that the Court should treat "offensively violent material" as the equivalent of obscenity—and that the Court should therefore uphold California's prohibition on the sale of violent video games to minors without regard to the strict-scrutiny framework ordinarily applicable to content-based restrictions on speech. Amici agree with respondents that the Court should reject that sweeping contention.

1. This Court has consistently resisted efforts to carve out new categories of speech that are categorically excluded from First Amendment protection. Only last Term, in *United States* v. *Stevens*, 130 S. Ct. 1577 (2010), the Court squarely rejected the contention that "depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment." *Id.* at 1584. The Court acknowledged that it had previously held certain categories of speech, including obscenity, to be "fully outside the protection of the First Amendment." *Id.* at 1586. At the same time, however, the Court made clear that those exclusions were limited to categories of speech that had historically been understood to be unprotected. *See id.* at 1584 (noting that, "[f]rom 1791 to the present, * * * the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations") (second alteration in original; internal quotation marks and citation omitted). Although the Court left open the possibility that "there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law," it ultimately held that depictions of animal cruelty did not qualify as such a category. *Id.* at 1586.

2. Depictions of violence, like depictions of animal cruelty, do not constitute a category of unprotected speech, either generally or "with respect to * * * sale to minors." Pet. Br. 38.[3] Perhaps most importantly,

[3] In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court clarified that material that does not constitute obscenity with regard to adults could still constitute obscenity with regard to minors. See *id.* at 636. Petitioners seemingly contend (Br. 12) that the same approach could be applied to depictions of violence, with the result that

there is no historical tradition of regulating depictions of violence comparable to the tradition of regulating obscenity or the other categories of speech that have been held to be unprotected. In support of the proposition that "many states have regulated violent material," petitioners cite only two nineteenth-century statutes prohibiting the depiction of criminal activity more generally. Br. 34. Even in the modern day, however, only nine States have enacted laws similar to California's prohibiting the sale of violent video games to minors, see Pet. Br. 34 n.3—and lower courts have consistently invalidated or enjoined those laws under established First Amendment principles. See, *e.g.*, *Entertainment Software Association* v. *Swanson*, 519 F.3d 768, 772 (8th Cir. 2008); *Interactive Digital Software Association* v. *St. Louis County*, 329 F.3d 954, 961 (8th Cir. 2003); *American Amusement Machines Association* v. *Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001).

Notably, there is little evidence of a historical tradition of regulating depictions of violence in the specific context of the motion picture industry. The earliest significant efforts at censorship, in the 1920s, focused primarily on sexual content—at a time when women's traditional roles were challenged by new clothing styles, open discussion of female sexuality, and changing social and political norms. See, *e.g.*, Butters 148, 153 (noting that, "[o]f all the subject matter most critiqued and con-

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only restrictions on the distribution or viewership of depictions of violence *to minors* would be upheld. That limitation, however, does not alter the fact that petitioners are seeking a categorical exclusion from First Amendment protection for a particular type of content—*i.e.*, certain "depictions of violence" that, in petitioners' view, constitute content whose regulation is not subject to strict scrutiny. See pp. 21-25, *infra*.

demned by the [Kansas censorship board], the depiction of impressionable young women being led to immorality, or sexually liberated young women having a good time, frustrated them the most"); p. 6, *supra*. While state and local censorship boards also sought to eliminate depictions of criminal activity, their focus was on the illegal nature of the actions shown, rather than on violence *per se*. See, *e.g.*, Butters 153. Unsurprisingly, then, the MPAA's 1927 list of "Don'ts and Be Carefuls" for filmmakers—which formed the basis of the Production Code that would remain in effect for several decades—advocated the complete prohibition of sexual content and profanity, but suggested only that "special care" be exercised with regard to depictions of violence. See pp. 7-8, *supra*.

Over the next several decades, although state and local censorship boards did order filmmakers to delete some scenes depicting violence and criminal activity, they primarily targeted scenes then viewed as risqué—such as a scene in which "Joan Crawford drop[ped] her skirt for a hot Charleston in *Our Dancing Daughters*," or another in which "[a filmmaker] set afire a theater in *Paris* so that chorines could flee the dressing rooms undressed." Leff & Simmons 8. In its effort to centralize and make uniform the restrictions imposed by the patchwork system of local censorship, the Production Code Administration followed suit and primarily emphasized the removal of sexual content from motion pictures. See *id.* at 59-65. Other themes—including "toilet humor," criminal activity, and profanity—were also targeted by the Production Code Administration, but neither as consistently nor as prominently as sexual content. See *id.* at 77, 105, 155; Butters 153.

As support for the Production Code declined in the 1950s, the difference between the Code's primary and

secondary targets crystallized: in 1956, the MPAA eliminated most of the outright prohibitions contained in the Code, leaving only the prohibitions against nudity, sexual perversion, and venereal disease. See Leff & Simmons 224-225. When the MPAA implemented the voluntary rating system, replacing the Production Code, it focused on sexual content. The adoption of the movie rating system, in fact, came immediately after this Court's decision in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), which upheld the prohibition of the sale to minors of *obscene* materials. See *Movie Rating System* 6. In the history of efforts to regulate the motion picture industry, therefore, there is scant support for the proposition that depictions of violence have traditionally been understood to be unprotected.

3. Petitioners' proposed categorical approach suffers from two additional flaws that counsel against its adoption—both of which have a direct bearing on the motion picture industry.

a. If this Court were to hold that depictions of violence are categorically excluded from First Amendment protection, such a principle could not logically be limited to the particular medium of video games. Indeed, in arguing for such a categorical approach, petitioners do not propose any such limitation. See, *e.g.*, Pet. Br. 12 (contending that the rule of *Ginsberg* "is equally applicable to regulations on minors' access to offensively violent material" on the ground that "[s]uch material, like obscenity, is harmful to minors and has little or no redeeming social value for them"); *ibid.* (further contending that "history, tradition, and our continuing understanding of the inherent vulnerability and susceptibility of minors to negative influences confirm that California should be allowed to restrict minors' access to offensively violent material as it has done here").

Under petitioners' approach, therefore, the government would presumably be empowered to proscribe the distribution or viewership of depictions of violence in motion pictures, television, and books, as long as the content qualified as sufficiently "violent" to trigger the categorical exclusion. This Court has taken such broader ramifications into account in invalidating other restrictions on speech, and it should do so here as well. See, *e.g.*, *Citizens United* v. *FEC*, 130 S. Ct. 876, 904 (2010) (noting that, under the government's rationale, it "could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books"). Lower courts, moreover, have recognized that difficulty in the specific context of invalidating statutes like the one at issue here. See *Entertainment Software Association*, 519 F.3d at 772 (stating that, "[a]lthough some might say that it is risible to compare the violence depicted in [video games] * * * to that described in classical literature, such violence has been deemed by our court worthy of First Amendment protection"); *American Amusement Machines Association*, 244 F.3d at 575-576 (noting that "[c]lassic literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial"); *Entertainment Software Association* v. *Blagojevich*, 469 F.3d 641, 650 (7th Cir. 2006) (stating that "there is serious reason to believe that a statute sweeps too broadly when it prohibits a game that is essentially an interactive, digital version of the *Odyssey*").

b. If this Court were to hold that depictions of violence are categorically excluded from First Amendment protection, moreover, lower courts would be forced to draw difficult distinctions between protected and unprotected content. The statute at issue in this case defines the prohibited violent video games by loose analogy to

the definition of "obscenity" in *Miller* v. *California*, 413 U.S. 15 (1973). See Cal. Civ. Code § 1746(d)(1)(A) (2010) (considering whether "[a] reasonable person * * * would find that [the game] appeals to a deviant or morbid interest of minors"; whether "[i]t is patently offensive to prevailing standards in the community as to what is suitable for minors"; and whether "[i]t causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors"). Assuming, *arguendo*, that the line between protected and unprotected content lies roughly where California has drawn it (and further assuming that a statute drawing that line would not be unconstitutionally vague, but see pp. 27-28, *infra*), a court would have to apply some analogue to the notoriously slippery *Miller* factors—which would present the same difficulties as, or even greater difficulties than, the application of the actual *Miller* factors in the context of obscenity. Cf., *e.g.*, *United States* v. *Kilbride*, 584 F.3d 1240, 1250-1255 (9th Cir. 2009) (discussing the lingering uncertainty as to whether national or local "community standards" should be applied to Internet obscenity).

More broadly, such an approach would inevitably require a court to weigh the potential harm of permitting minors to be exposed to depictions of violence against the artistic value of motion pictures and other works of which such depictions may be either an essential or incidental element. Indeed, petitioners seem to concede as much. See, *e.g.*, Br. 6 (referring to "offensively violent, harmful material with no redeeming value for children"). That mode of analysis, however, would require courts to pass judgment on the artistic value of motion pictures and other works with violent content. In *Stevens*, the Court expressly cited that concern in refusing to expand the list of categorical exclusions from First Amendment protection to include depictions of animal cruelty. See

130 S. Ct. at 1585 (stating that "[t]he 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").

In short, there is no reason to deviate from the conventional First Amendment framework in analyzing restrictions on speech with violent content. Petitioners' effort to add depictions of violence to the short list of categories of speech that are excluded from First Amendment protection should therefore be rejected.

B. California's Statute Does Not Survive Strict Scrutiny Because It Is Not Narrowly Tailored To Serve A Compelling Governmental Interest

As a content-based restriction on speech, California's prohibition on the sale of violent video games to minors can be upheld only if petitioners can show that the statute is narrowly tailored to serve a compelling governmental interest. See, *e.g.*, *United States* v. *Playboy Entm't Group*, 529 U.S. 803, 813 (2000); *Reno* v. *ACLU*, 521 U.S. 844, 874 (1997); *Sable Commc'ns of Cal., Inc.* v. FCC, 492 U.S. 115, 126 (1989). Petitioners make only a halfhearted effort to satisfy that stringent standard, and amici agree with respondents that petitioners have failed to do so.

1. Although petitioners are somewhat circumspect about articulating the relevant governmental interest, they ultimately take the position (Br. 56) that the California statute serves the compelling governmental interest of "helping parents direct the upbringing of children and protecting them from harm caused by playing offensively violent video games." To be sure, amici agree that parents have a legitimate interest in directing the up-

bringing of their children. See, *e.g.*, *Winkelman* v. *Parma City School District*, 550 U.S. 516, 529 (2007).[4]

In order to argue, however, that there is a derivative *governmental* interest in assisting parents in directing the upbringing of their children (much less a compelling interest), petitioners must at a minimum show that the government's assistance is necessary: *i.e.*, that, absent government intervention, parents cannot adequately exercise their authority. See *Ginsberg*, 390 U.S. at 639. That principle flows not only from the requirement that there be a compelling governmental interest in the first place, but also from the requirement that any government regulation be narrowly tailored to serve that interest. Thus, this Court has made clear that, where the parental interest in directing the upbringing of their children can be served by providing parents with more information concerning potentially objectionable content, "a court should not presume parents, given full information, will fail to act." *Playboy*, 529 U.S. at 824. And where government regulation is in fact required, any such regulation should "support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id.* at 815.

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[4] To the extent that petitioners suggest (Br. 56) that the government has a discrete interest in "protecting [children] from harm caused by playing violent video games," amici agree with respondents that petitioners have made an insufficient showing of a correlation between the playing of violent video games and actual violence or other antisocial behavior. Insofar as petitioners contend otherwise (Br. 43-45), they rely on broad assertions concerning the effects of depictions of violence in the media more generally. That contention, however, would seemingly support a prohibition on the distribution or viewership of depictions of violence in any form. See pp. 18-19, *supra*.

2. The fundamental lesson of the movie rating system is that a system of self-regulation can be sufficient, without additional government regulation, to enable parents to make informed judgments concerning the suitability of exposing their children to violent or other potentially objectionable content. As discussed above, the movie rating system is one means of enabling parents to do so, by providing them with substantial and readily accessible information concerning the content of motion pictures that their children may wish to see. See pp. 9-11, *supra*. That information comes not only in the form of a rating, which serves as a shorthand recommendation regarding the suitability of a motion picture for audiences of particular age groups, but also in the form of a "rating descriptor," which provides detailed information concerning the particular elements that serve as the basis for the rating. See pp. 10-11, *supra*. The rating system is designed to be flexible and responsive to the changing and sometimes differing concerns of American parents. See *ibid.* And the rating system is supported by a voluntary enforcement regime, through which theater owners refuse to admit children to "R"-rated motion pictures unless they are accompanied by a parent or guardian (and refuse to admit children to "NC-17"-rated motion pictures at all). See p. 10, *supra*.

The movie rating system has been widely recognized as an effective means of enabling parents to make informed judgments concerning the suitability of movie content, taking into account their child's level of maturity and individual sensitivities. As discussed above, an overwhelming majority of parents believe that the rating system accomplishes that very purpose. See p. 11, *supra*. In fact, it is no overstatement to say that the rating system has become part of the fabric of American life, with the result that the average person on the street

could readily identify the significance of a "PG" or "R" rating.

3. It is well established that, where strict scrutiny is applicable, the government bears the burden of demonstrating that less restrictive alternatives to the challenged regulation would be insufficient to serve the asserted governmental interest. See, *e.g.*, *Ashcroft* v. *ACLU*, 542 U.S. 656, 665 (2004); *R.A.V.* v. *St. Paul*, 505 U.S. 377, 382-383 (1992). In this case, therefore, petitioners bear the burden of demonstrating, first, that the voluntary rating system adopted by video-game manufacturers is insufficient to enable parents to exercise their right to make informed judgments concerning the suitability of exposing their children to violent content, and, second, that there is no less restrictive means of serving that interest short of the blunt tool of an outright prohibition of sales to minors.

Petitioners hardly even try to make the requisite showings. Petitioners contend only that some video-game manufacturers do not participate in the rating system and that, as of ten years ago, retail enforcement of the rating system was imperfect. See Br. 56-59. Even assuming that showing were sufficient to establish that the current video-game rating system is inadequate, petitioners fail to show that any inadequacy could not be remedied through other means: for example, by providing support for an educational campaign for parents and retailers about the rating system, which would help to address the asserted deficiencies by creating incentives for manufacturers to participate and retailers to enforce the ratings more stringently. See Pet. App. 33a. Petitioners also fail to show that the asserted deficiencies could not be (and have not in fact been) remedied through technological means, such as the now-ubiquitous parental controls on game consoles that can be used to

prevent minors from playing video games with violent or other potentially objectionable content. Cf. *Reno* v. *ACLU*, 521 U.S. 844, 877 (1997) (noting, in invalidating provisions of the federal Communications Decency Act, that filtering software enabling parents to prevent children from accessing inappropriate Internet content "will soon be widely available") (citation omitted).

The experience of the motion picture industry demonstrates that a properly designed voluntary rating system can serve the parental interest in making informed judgments about age-appropriate content without the need for government-imposed restrictions on content. There is no reason to permit government regulation in this case simply because it involves a new form of media, rather than a more established form such as motion pictures or books. As the history of the motion picture industry illustrates, see pp. 5-12, *supra*, the advent of new forms of media is often closely followed by efforts to control and censor those media, out of concern that they will have harmful effects. The efforts of a limited number of States to prohibit the sale of violent video games merely constitute the latest chapter of that saga. And absent a substantial showing that government intervention is required, there is no valid basis for arrogating to the state the authority to make judgments concerning the suitability of certain content for minors. Because petitioners' showing falls far short of that required to satisfy the stringent standard applicable to content-based restrictions on First Amendment rights, the court of appeals correctly held that California's prohibition on the sale of violent video games to minors is invalid.

C. If California's Statute Were Upheld, It Would Have A Chilling Effect On The Motion Picture Industry

Finally, if this Court were to hold that California's statute is valid either because depictions of violence are categorically excluded from First Amendment protection or because the statute survives strict scrutiny, it would have a dramatic chilling effect on the motion picture industry and other industries in which depictions of violence are a component of artistic expression.

1. As explained above, if the Court were to uphold California's statute (particularly on the ground that depictions of violence are categorically excluded from First Amendment protection), its reasoning could not logically be limited to the particular medium of video games. See pp. 18-19, *supra*. Absent such a limitation, moreover, state and local governments would be free to impose similar restrictions on the depictions of violence in other media—for example, by imposing sanctions on theater owners that permit minors to see motion pictures with violent content.

Scenes depicting violence, however, have played a substantial role in some of the most important motion pictures both of this generation and of prior ones. For example, *The Hurt Locker*, an independently financed and produced film depicting the work of an Army bomb-disposal unit in post-invasion Iraq, won the 2009 Academy Award for Best Picture. *The Hurt Locker* opens with a gripping scene in which an Army officer is eventually killed after unsuccessfully attempting to dispose of a remote-controlled bomb, and the movie is built around other scenes in which the bomb-disposal unit attempts to dispose of bombs with varying degrees of success. See Internet Movie Database, *The Hurt Locker* (last visited Sept. 17, 2010) <tinyurl.com/imdbhurtlocker>. *The Hurt Locker* received an "R" rating for "war violence"

and "language," meaning that children were not permitted to attend unless they were accompanied by a parent or guardian. But if California's statute were upheld, it is entirely possible that state or local governments could seek to prohibit children from seeing motion pictures such as *The Hurt Locker*—even though parents could readily have concluded that *The Hurt Locker* was an appropriate motion picture for older children in light of its unquestionable educational and artistic value. Indeed, it is entirely possible that state or local governments could seek to prohibit children from seeing motion pictures that are specifically targeted to younger audiences, such as the *Star Wars* or *Lord of the Rings* series, but that still contain some degree of violent content.

The chilling effect on the motion picture industry from such restrictions would be obvious. And it would be particularly acute to the extent that the restrictions require regulators or courts to consider whether a particular depiction of violence offends prevailing community standards, or whether it causes the motion picture as a whole to lack serious artistic value—as does California's statute prohibiting the sale of violent video games to minors. See Cal. Civ. Code § 1746(d)(1)(A) (2010). As this Court has recognized with specific reference to the motion picture industry, such amorphous regulatory requirements would have particularly pernicious chilling effects; indeed, they would likely be unconstitutionally vague. See *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 684 (1968) (noting that, "[i]f [a filmmaker] is unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a

significant portion of the movie-going public" and instead "might choose nothing but the innocuous").[5]

A constitutional regime that permitted restrictions on depictions of violence, moreover, would leave the motion picture industry subject to the same patchwork of regulation that bedeviled the industry upon its inception. See pp. 6-7, *supra*. To avoid the uncertainty associated with differing or even conflicting regulations, filmmakers would be forced to produce motion pictures that complied with the most restrictive regulations. See *Times Film Corp.* v. *Chicago*, 365 U.S. 43, 74 (1961) (Warren, C.J., dissenting) (noting that the chilling effect of censorship on the motion picture industry is particularly acute "due to the large financial burden that must be assumed by [motion pictures'] producers"). And motion picture exhibitors and theater owners might be deterred from showing motion pictures that contain content close to the regulatory line out of concern about potential criminal or civil sanctions. The inevitable result would be a dramatic curtailment of content with considerable artistic value—content that, when viewed by adults, would indisputably be entitled to First Amendment protection.

2. Finally, that chilling effect would ensue even if the Court were to attempt to limit the scope of its decision to depictions of violence in video games, in light of the increasingly symbiotic relationship between video games and motion pictures and the increasingly blurred line between different forms of media more generally. See, *e.g.*, Vince Horiuchi, *Gaming the Movies*, Salt Lake Trib., May 27, 2010; John Horn, *Getting Game*, L.A. Times, Feb. 26, 2009, at E1; *Video Games Inspired by*

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[5] Amici agree with respondents that the California statute at issue in this case is itself unconstitutionally vague. See Resp. Br. 57-61.

Hollywood: Film Spin-Off Is Not a Guarantee for Success for Video Games, Screen Digest, May 2008, at 135. In recent years, numerous motion pictures have been made into successful video games, including *The Matrix*, *The Fast and the Furious*, and the *Lord of the Rings* trilogy, as have even older motion pictures such as *Dirty Harry*. Many of those games contain excerpts of movie content or even special content, using the same sets and actors as the movie but filmed explicitly for the video game. Conversely, filmmakers have been making a growing number of motion pictures based on video games: for example, after many years of popularity, the video game *Tomb Raider*, which features an antiquities collector who procures artifacts by using her skills in combat, was made into the film *Lara Croft: Tomb Raider*, starring Angelina Jolie. See Internet Movie Database, *Lara Croft: Tomb Raider* (last visited Sept. 17, 2010) <tinyurl.com/imdbtombraider>.[6] Whether the motion picture or the video game comes first, the increasing overlap in visual elements, themes, and storylines renders it more difficult to draw clear lines between the two media. At a minimum, therefore, any restrictions on the content of video games would inevitably have some effect on the content of corresponding motion pictures.

There is no reason for the Court to enter this jurisprudential minefield. The experience of the motion picture industry teaches that concerns about exposing mi-

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[6] *Lara Croft: Tomb Raider* received a "PG-13" rating for "action violence" and "some sensuality." Other video games that have recently been made into motion pictures include *Doom*, *Driver*, *Fear Effect*, *Mortal Kombat*, *Prince of Persia*, *Splinter Cell*, *Spy Hunter*, and *World of Warcraft*. All of those motion pictures received "PG-13" or "R" ratings.

nors to violent content can be addressed through a system of self-regulation that does not require restrictions on content. And the application of familiar First Amendment principles dictates that California's efforts to address those concerns in the context of the video game industry through the blunt tool of an outright prohibition are invalid, because the prohibition is not narrowly tailored to serve a compelling governmental interest. The Court should therefore invalidate California's statute and affirm the court of appeals.[7]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[7] While all of the amici fully support the position of respondents in this case, the views of some of the amici diverge with regard to the relationship between the First Amendment and individuals' rights of publicity. This case, however, does not present the Court with the opportunity to resolve that issue.