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.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWS EDITORS, THE FIRST AMENDMENT PROJECT, THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, THE RADIO-TELEVISION DIGITAL NEWS ASSOCIATION, THE SOCIETY OF PROFESSIONAL JOURNALISTS, AND STUDENT PRESS LAW CENTER, IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici (described in Appendix A) and the journalists that they represent have an interest in this case and in prohibiting expansion of unprotected categories of speech under the First Amendment. Establishing violence as a new, additional unprotected category of speech could severely affect news reporting. Furthermore, historical efforts to regulate new media and methods of communication repeatedly demonstrate that such efforts are both unconstitutional, because they violate the First Amendment, and unnecessary, because the perceived need to regulate the media eventually recedes.

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amicus curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the amicus made a monetary contribution to the preparation and submission of this brief; and that blanket written consent of all parties to the filing of *amicus curiae* briefs has been filed with the Clerk.

SUMMARY OF ARGUMENT

As this Court reaffirmed last term in *United States v. Stevens*, 130 S. Ct. 1577 (2010), attempts by legislative bodies to enact bans on entire categories of speech must be greeted skeptically by courts in this country. Furthermore, regulating violence in speech and expression rarely survives constitutional scrutiny, and courts have correctly refused to extend obscenity restrictions to depictions of violence. Allowing broad regulations of violence in this case would allow legislatures to push those restrictions beyond simply the sale of violent content to minors, thus affecting a wider range of expression.

History has demonstrated that new forms of media often are greeted with alarm. These immediate reactions are soon followed by claims of harm to viewers or listeners, particularly children, but initial reactions are usually tempered with time and with efforts by those producing the media to self-regulate how their products are distributed. This pattern is evident with violent video games, and a broad restriction of expression is an inappropriate means of addressing an overstated problem.

Allowing broad discretion to regulate violence in speech and expression would have devastating consequences for the news media, who seek to faithfully report on the conditions in an obviously violent world. Attempts to impose such content regulations have always been done in the name of protecting viewers from what is perceived as harmful imagery.

ARGUMENT

I. This Court should not create any new categories of unprotected speech, particularly when challenges to violent speech have been repeatedly rejected on First Amendment grounds.

The United States courts have always interpreted the First Amendment as meaning that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010). While there are exceptions to this important constitutional guarantee of freedom of expression, the unprotected categories of speech are extremely limited and only include "historic and traditional categories long familiar to the bar," such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Id.* Over the years, parties have claimed that violent speech does not deserve First Amendment protection, but the courts have consistently refused – and rightly so – to rule that violence should become an unprotected category of speech.

In fact, in *Stevens*, this Court very recently rejected a demand to establish a form of violent speech as an unprotected category under the First Amendment. The federal government asked this Court to declare depictions of animal cruelty to be unprotected based on a balancing test of the purported value of the speech against its costs to society. *Id.* at 1585. In response, this Court emphasized the strict limitations on establishing new categories of unprotected

speech, calling the government's proposed balancing test "startling and dangerous." *Id.*

Furthermore, in *Stevens*, this Court repeatedly emphasized that a key factor in determining whether speech is truly unprotected is whether it has historically been recognized as such. It noted that previous case law designating unprotected speech was grounded in an analysis of "a previously recognized, long-established category of unprotected speech" and declared that these cases could not be read "as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Id.* at 1586. It further ruled that while there might be some categories of speech that have been historically unprotected that have not yet been identified, depictions of violence were not among them. *Id.*

Much like depictions of animal cruelty, there is no historical tradition of excluding depictions of violence in video games or other forms of media from First Amendment protection. In fact, several courts have expressly stated that violence is not an unprotected category of speech, even when minors are involved. *See James v. Meow Media,* 300 F.3d 683, 698 (6th Cir. 2002) (declining "to extend our obscenity jurisprudence to violent, instead of sexually explicit, material"); *Video Software Dealers Ass'n v. Webster*, 773 F.Supp. 1275, 1280 (W.D. Mo. 1991) (noting that "[u]nlike obscenity, violent expression is protected by the First Amendment"). The U. S. Court of Appeals for the Second Circuit addressed this very issue in *Gulotta v. Eclipse Enterprises*, when it held that a county ordinance that prohibited the sale of trading cards depicting heinous crimes to minors was uncon-

stitutional. 134 F.3d 63, 69 (2nd Cir. 1997). Noting that the U.S. Supreme Court "historically has confined the categories of unprotected speech to defamation, fighting words, direct incitement of lawless action, and obscenity," the Second Circuit stated that it would "decline any invitation to expand these narrow categories of speech to include depictions of violence." *Id.* at 66. The court also noted that there was "no possibility that the First Amendment permits the banning of the sale of such cards to either adults or minors." *Id.* at 71. Likewise, in *Bookfriends, Inc. v. Taft,* the U. S. District Court for the Southern District of Ohio noted that "[c]ourts have held that the First Amendment forbids governments from preventing juveniles from being exposed to depictions of violence" and held that legislation prohibiting dissemination to juveniles of "harmful materials" violated the First Amendment. 223 F.Supp.2d 932, 949 (S.D. Ohio 2002).

While California's legislation is aimed at restricting the sale of violent video games only to minors, the effects of such a law will be similar to an outright ban on violent speech, because it will open the door for other challenges to its protected status. Furthermore, multiple courts have already considered this type of restricted legislation, and have already struck down laws banning the sale of violent video games to minors – laws almost identical to California's proposed legislation. In overturning these laws, the courts have again ruled that violence does not qualify as a category of unprotected speech. The U. S. District Court for the Western District of Washington in 2004, in striking down that state's proposed ban on the sale of violent video games, noted that depictions of violence "have been used in literature, art and the

media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the First Amendment or subject to government regulation." *Video Software Dealers Ass'n v. Maleng,* 325 F.Supp.2d 1180, 1185 (W.D. Wash. 2004). Similar reasoning echoes throughout the opinions of the other federal courts that have struck down such laws. *See, e.g., Entertainment Software Ass'n v. Blagojevich*, 404 F.Supp.2d 1051, 1076 (N.D. Ill. 2005) (noting that the violent speech at issue was protected); *Interactive Digital Software Ass'n v. St. Louis Co.,* 329 F.3d 954, 959 (8th Cir. 2003) (noting that violent material was not the same as obscene material and therefore, obscenity case law was not applicable because it involved unprotected speech).

The courts' continuous denials of demands to include violence as unprotected speech are well-founded. As the following sections demonstrate, protests against violent speech often come after it appears in new media or methods of communication, such as video games, comic books, theater, film, and music. After a period of time passes and society accepts the presence of the once-new media, the protests inevitably die down, with the alleged harms never having come to pass.

II. This Court should not eliminate First Amendment protection for violent speech based on society's current views of a new media, as history repeatedly demonstrates that initial fears of new media dissipate as the media becomes familiar.

Throughout this country's history, new media or methods of communication and expression have always been met with heavy suspicion, claims that the new media will result in the detriment of society and children, and attempts at banning or strict regulation of the media. In fact, organized campaigns to restrict materials have existed since the latter part of the 19th century, when the dime novel first appeared on the scene. Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society – From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741 (1992). *See also* Eric Nuzum, Parental Advisory 5 (2001). History has proven time and time again that the "ability to convey information through a newly devised medium, especially multi-sensorial media like films and video games, is a powerful tool that has the potential to create great anxiety in a society, which in turn leads to political pressures that are catalytic in the formation of laws." Jeffrey O'Holleran, *Blood Code: The History and Future of Video Game Censorship*, 8 J. Telecomm. & High Tech. L. 571 (2010).

The push for restrictive measures has always been greater when the media involved has appealed to children. As film, radio, and comic books were all introduced into popular culture, they quickly became part of children's lives, and hence, the subject of attack from "guardians of children's morality." Amy Kiste Nyberg, Seal of Approval: the History of the Comics Code viii (1998). Opposition to violence in new forms of media always arises, despite the fact that traditional stories, like classic literature, fairy tales, and biblical stories, include just as much, if not more, violence as some types of video games, comic books, and films. *See* Harold Schechter, Savage Pas-

times 1-14 (2005). These protests occur in each generation. In 1957, British scholar Margaret Dalziel criticized people for widely believing that modern publications such as comics, crime fiction, and "true confessions" love stories were so much worse than their counterparts of former days, but failed to take a long, hard look at the popular literature of the past. *Id.* at 17.

Whether the media involved is print media or visual media, the story is always the same – the new media appears on the scene, adults claim that it will negatively affect children, the legislature holds hearings and investigates methods of regulating the new media, courts hear cases attempting to restrict the dissemination of the media, the industry responds by suggesting some form of self-regulation, and the societal anxiety dissipates. As years pass, the media becomes ingrained in society until the idea that it was once considered destructive becomes difficult to imagine. For example, it would be difficult for most people today to imagine a high number of complaints about a prolonged kiss in a movie, as they occurred in the early 1900s. Blanchard, *supra*, at 761. Many times, the new media even becomes a cultural symbol of the era, such as the rock and roll music of the 1950s.

A. The opposition to dime novels and comic books was almost identical to the opposition to violent video games, and is highly instructive as to why this Court should not concede to the demand to regulate these games.

1. Dime novels.

Dime novels provide one of the best examples of overblown societal response to new media and how quickly opposition to new media is eliminated. Dime novels were short pamphlets of stories that are similar to today's popular genre fiction (e.g., mystery, romance, fantasy, and science fiction) and were among the first new forms of mass media to draw criticism from society in their time. Christine Jeffords, *Dime Novels: The Popular Paperback of the Nineteenth Century*, *available at* http://freepages.genealogy.rootsweb.ancestry.com/~poindexterfamily-/ChristinesPages/Dimers.html (last viewed 8/10/10). The novels were published beginning about the time of the Civil War and were popular from approximately 1860 to 1915. *Id.* Although dime novels were originally written for adults, publishers quickly began creating stories for children, focusing on the adventures of explorers, cowboys, soldiers, city detectives, and Western heroes like Jesse James and Billy the Kid. Nyberg, *supra*, at 2. *See also* Charles M. Harvey, *The Dime Novel in American Life*, 100 Atlantic Monthly 37 (1907) (noting that the "aim of the original dime novel was to give, in cheap and wholesome form, a picture of American wild life").

Almost immediately, dime novels for children drew protests from vice societies, led by Anthony Comstock, the head of the New York Society for the Suppression of Vice. Nyberg, *supra*, at 2. In Comstock's eyes, "these dime novels were leading youths down the path to destruction, for once a child had read such stories, no one could prevent a career of crime and the loss of an immortal soul." Blanchard, *supra*, at 757. His campaign against these dime nov-

els, which he called "devil-traps for the young," quickly escalated and was joined by judges, teachers, and church workers, who all claimed that reading the dime novel resulted in antisocial behavior in children. *Id.* Dime novels were also quickly – and unsuccessfully – blamed for violence in society. During an 1874 murder trial, it was suggested that dime novels prompted the defendant's actions – a claim that was quickly dropped when the defendant stated he had never read dime novels. *Id.* Another defendant on trial for murder tried to blame his actions on reading a certain book; however, when his claim was investigated, it was discovered that the named book was just a regular novel. *Id.* As one 1929 author noted, reading of dime novels "was the most useful explanation of crime, and the easiest excuse for the offender, until its place was taken by the cigarette, and then by the moving pictures." Edmund Pearson, Dime Novels: or Following an old trail in popular literature (1929), *available at* http://gaslight.mtroyal.ca/dimex01.htm (last viewed 8/1/10).

In response to societal pressure, Erastus Beadle, the head of one of the major dime novel publishing houses, established what may be the first self-regulation code for media industries. Beadle told his authors to follow certain rules when writing the stories – they needed to avoid "all things offensive to good taste," "subjects or characters that carry an immoral taint," and anything that "cannot be read with satisfaction by every right-minded person – old and young alike." Blanchard, *supra*, at 757-758. Beadle's self-regulation code was in essence duplicated by other, later media industries that faced opposition, from the new moving picture industry to television.

Beadle's code, combined with the passage of time, caused the once-offensive dime novels to become sanitized in the eyes of society. In fact, as the war against comic books escalated, the dime novels were held up as an example of more desirable children's literature. Literary critic Sterling North even wrote an editorial on May 8, 1940 arguing that the old dime novel could be considered "classic literature" compared with comic books. Nyberg, *supra*, at 4.

2. Comic books.

Comic strips, and later comic books, quickly followed dime novels as the primary target of criticism from social critics. The war against comic books is analogous to the war against violent video games today, particularly since they were regarded in the same manner, "as a danger to the health and well-being of their school-age audience, an incitement to bloodshed and vice." Schechter, *supra*, at 16. Likewise, Petitioners are claiming that violent video games are "likely to harm the development of a child." Petitioners' Brief, *Schwarzenegger v. Entertainment Merchants Assn.,* On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, filed Jul. 12, 2010, at 30.

Societal opposition to comics began in 1909, when an article in the *Ladies Home Journal* criticized the comics appearing in the Sunday newspaper, calling them "inane," "vulgar," and "nothing short of a national crime against our children." David Hajdu, The Ten-Cent Plague: The Great Comic-Book Scare and How it Changed America 12 (2008). However, comic strips quickly became normal in society; by the 1940s, "the juvenile pranksterism of old-style newspaper strips had become so ingrained in the popular

consciousness that it no longer seemed improper." *Id.* at 60. In fact, a childrearing expert, Josette Frank, even published a book claiming that comic strips were a necessary literary evil, noting that comic characters typically did something that a child was forbidden to do, with "swift retribution" following, and that the child could experience vicariously "the pleasure of transgression and the expiation of his guilty feelings through the pictured culprit who is punished." *Id.* at 60-61. She further noted that the reading appeared to fulfill a deep psychic need of childhood. *Id.* at 61.

While the protests against comic strips were dying down, the war against comic books was gearing up. Comic books first began to be sold on newsstands in 1933, with typical stories focusing on superheroes, science fiction, and crime. Kenneth A. Paulson, *Regulation Through Intimidation: Congressional Hearings and Political Pressure on America's Entertainment Media*, 7 Vand. J. Ent. L. & Prac. 61, 68 (2004). Religious leaders denounced the books, stating that the superheroes in the books were examples of fascism that would prepare a child to become the next Adolf Hitler and that a link between comic books and juvenile delinquency was clearly evident. Hajdu, *supra*, at 80. Many of the complaints against comic books – focusing on allegedly violent content and the lack of respect for parental authority – were similar to the complaints made against dime novels. *Id.* at 12.

In the late 1940s, critics of comic books began investigating ways to regulate the content of the books. Paulson, *supra*, at 69. The legislative efforts were stalled, however, by the U.S. Supreme Court decision in *Winters v. New York*. Murray Winters was con-

victed of possessing with intent to sell a magazine called *Headquarters Detective*, *True Cases from the Police Blotter*, under a New York law that prohibited selling any materials "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust, or crime." *Winters v. New York*, 333 U.S. 507, 508 (1948). The law was originally aimed at protecting minors from accessing criminal news and stories. *Id.* at 511. This Court overturned Winters' conviction, stating that the law violated both the First Amendment and the Fourteenth Amendment. *Id.* Specifically, this Court noted:

> We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.

Id. at 510. The Court's decision provided a presumption of protection under the First Amendment for comic books and led to laws similar to New York's being overturned in eighteen other states. Paulson, *supra*, at 69.

Despite this Court's decision, opponents of comic books attempted further regulation, and soon found a new leader in Dr. Fredric Wertham, the senior psychiatrist for New York City's Department of Hospitals and frequent author of papers and books claim-

ing that comic books were detrimental to society's youth. *Id.* Wertham claimed were that comic books offered "a correspondence course in crime" to children, exposed them to sexually abnormal ideas, and made children into perverts, but offered little evidence to support his claims.[2] Paulson, *supra*, at 69. In late 1953, the Senate Subcommittee on Juvenile Delinquency sent out a questionnaire to 2000 people, asking for opinions about the causes of juvenile delinquency. Paulson, *supra*, at 69-70. After Wertham published an article criticizing Batman comic books, a majority of the questionnaires stated that comic books were a cause. *Id.* at 70.

The Senate questionnaire led to an April 1954 hearing to investigate the content of comic books. *Id.* at 70. Despite the ruling in *Winters* that there was no difference between the freedom of the press and the freedom of expressing ideas in entertainment, the Senators claimed they were not infringing upon First Amendment rights because freedom of the press was not at issue. *Id.* at 71. Although the Senate heard from multiple witnesses with opposing viewpoints, the star witness Dr. Wertham told the Senate that if he wanted to teach children how to rape and seduce girls, how to cheat and rob people, and how to do any other known crime, he would enlist the help of the

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[2] *See also* HAJDU, *supra*, at 101 (noting that, for example, one of Wertham's reports claims that comic-book reading was a distinct influencing factor on juvenile delinquents, yet cites only one example of a child imitating behavior seen in a comic book – and none of the other subjects had even read comic books before or after becoming juvenile delinquents).

comic book industry. *Id.* Much of Wertham's testimony ended up being anecdotal evidence of the harm comic books caused; for example, he told the committee that two boys had attacked another boy and "twisted his arm so viciously that it broke in two places, and *just like in a comic book*, the bone came through the skin." Nyberg, *supra*, (emphasis added), *excerpt available at* http://www.crimeboss.com/-history03-2.html (last viewed 8/19/10). Even with Wertham's testimony, the Senate failed to recommend legislative action. *Id.* at intro., pg. *x.*

Wertham's battle was also failing in the courts, as several courts ruled that laws aimed at preventing the viewing and distribution of comic books, particularly for minors, were unconstitutional. In 1959, the Supreme Court of California ruled that an ordinance prohibiting the sale of circulation of any crime comic book to a minor was unconstitutional. *Katzev v. Los Angeles,* 341 P.2d 310, 318 (Cal. 1959). "Publications containing criminal news, accounts of criminal deeds, or pictures and stories of the bloodshed, lust, or crime are as much entitled to the protection of free speech as other literature," the court wrote, citing *Winters*. *Id.* at 315. The court also ruled that the record failed to show a clear and present danger that crime comic books would "injure the character of persons under the age of 18 years and inculcate in them a preference for crime." *Id.* at 315. In 1960, in the case of *Police Commissioner of Baltimore City v. Siegel Enterprises, Inc.,* a Maryland court overturned a law that made it illegal for stores to sell any crime books or comics to minors or to make crime comics visible from the street. 162 A.2d 727, 729-30 (Md. 1960). While acknowledging that some unprotected speech existed, the court also agreed with a previous

ruling that "[t]he right of young persons to read what they will, within the limits of permissible State or Federal action, is vital not only to them but to all our citizenry." *Id.* at 731. The Supreme Court of Washington also found that a statute that made it a criminal offense to sell comic books without a license was unconstitutional. *Adams v. Hinkle,* 322 P.2d 844 (Wash. 1958).

Like the dime novel industry, the comic book industry reacted to the growing pressure by establishing a code of self-regulation. The first Comic Book Code prohibited comic book artists from presenting authority figures such as government officials and judges in any way that would create disrespect for established authority, excessive bloodshed, and suggestive illustrations. Hajdu, *supra*, at 291-92. Although the code has been revised on a few occasions, it still stands as a method of self-regulation for the comic book industry today. *See* First Amendment Center, *Comic Books*, *available at* http://www.firstamendmentcenter.org/ (last viewed 6/30/10).

After the creation of the Comic Book Code, and as television began to attract the attention of new media critics, the opposition against comic books quickly died out. Hajdu, *supra*, at 330. In 1973, Wertham, who was once the most vocal opponent of comic books, published a book called The World of Fanzines, which glorified the comic book fan subculture. *Comic Books*, *supra.* Notably, he also recanted his earlier claims that comic books were the major cause of juvenile delinquency and reported instead that comic book readers often grew up to be normal, well-adjusted adults. *See* Robert Corn-Revere, *Regulating*

TV Violence: The FCC's National Rorschach Test, 22 Comm. L. 1, 25 (Fall 2004).

B. Movies, theater, and television have been opposed just as strongly as violent video games, but like comic books and dime novels, the opposition has greatly decreased.

1. Movies and television.

Complaints about another new medium of communication – film and motion pictures – arose at the same time dime novels were causing a stir. Because motion pictures were highly appealing to young people, adults quickly expressed concerns about corruption of children's morals and values. Paulson, *supra*, at 63. People protested scenes such as a "prolonged kiss" in a movie entitled *The Widow Jones*, and a 1907 editorial in the *Chicago Tribune* claimed that movies were nothing but "schools of crime where murders, robberies, and holdups are illustrated." Blanchard, *supra*, at 761. Movies were almost instantaneously blamed for most of the decade's social ills, including "liberated women" and disrespectful children. Blanchard, *supra*, at 778. Likewise, the public protested certain plays in the theater that were seen as indecent.

As with dime novels and comic books, many of the complaints against films were of scenes that are commonplace today. In 1900, the police closed down a play and arrested the lead actress on the charge of corrupting public morals because she acted out a scene where her lover carried her up the stairs to her bedroom, a curtain was lowered to denote the hours passing, and when the curtain was raised, the light-

ing indicated that it was now dawn and the actress was seen running out of the bedroom and down the stairs. Abe Laufe, The Wicked Stage: A History of Theater Censorship and Harassment in the United States 25 (1978). A 1931 version of Frankenstein – a movie which "hardly causes a reaction among most viewers today" – was banned because the scene where the monster drowns a little girl was deemed to be too violent and many people protested that the film would be traumatizing for children. Dawn B. Sova, Forbidden Films: Censorship Histories of 125 Motion Pictures 137 (2001).

Attempts at regulation were inevitable, and the first came in 1907, when the City of Chicago granted power to the chief of police to censor movies. Paulson, *supra*, at 63. Other cities followed suit, and two years later, the first censorship body, the National Board of Censorship of Motion Pictures, sprang forth. *Id.* at 63. Legal challenges to regulation were initially unsuccessful. In the earliest major case, *Mutual Film Corp. v. Industrial Commission of Ohio*, this Court said that the Ohio film censorship board was constitutional because the motion picture was not a form of true expression protected by the constitution, but instead was a commercial endeavor. 236 U.S. 230, 242 (1915). Challenges to the showing of movies arose throughout the country, threatening potentially devastating economic consequences to the brand-new industry.

The movie industry quickly responded by enacting a self-regulating Production Code in 1930. Paulson, *supra*, at 66. Key principles in the Code included: (1) never throwing the sympathy of the audience to the side of crime, wrongdoing, evil, or sin; (2) the

use of liquor, when not required by the plot or characterization, would not be shown; (3) excessive and lustful kissing and embraces will not be shown; (4) and profanity, including words like "Jesus," "hell," and "S.O.B." would not be used. *Id.* Producers of now-legendary movies, such as *Gone with the Wind*, *Casablanca*, and *A Streetcar Named Desire*, were told that they could not use certain lines, suggest sexual relationships between certain characters, or portray a character as a homosexual. *Id.*

Once again, however, the courts began to rule in favor of the entertainment industry. In 1948, this Court held that movies were a protected form of expression in *United States v. Paramount Pictures.* 334 U.S. 131, 166 (1948) (concluding, "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment"). Then, in 1952, this Court began reversing the trend of heavy regulation of movies when, in the case of *Joseph Burstyn, Inc. v. Wilson,* it determined that the New York Board of Regents could not ban the film *The Miracle* for being sacrilegious. 343 U.S. 495, 531 (1952). As the court noted:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.

Id. at 501. *Burstyn* was used in overturning other restrictive movie ordinances. For example, in 1959, this Court found in *Kingsley Int'l Pictures Corp. v. Regents of the University of the State of New York* that a New York statute requiring a denial of a license to exhibit motion pictures deemed to be immoral was unconstitutional. 360 U.S. 684, 690 (1959). Other courts followed in *Excelsior Pictures Corp. v. Regents of the University of the State of New York,* 2 A.D.2d 941, 943 (N.Y. App. Div. 1956) (court overturned a decision to refuse a license for a general exhibition of a film that showed nudity); *Hallmark Productions, Inc. v. Carroll,* 121 A.2d 584, 589 (Penn. 1956) (Pennsylvania Supreme Court held that a motion picture censorship statute is unconstitutional); *Paramount Film Distributing Corp. v. Chicago,* 172 F.Supp. 69, 72 (N.D. Ill. 1959) (invalidating a statute that authorized limited permits if it was found that a film was obscene and immoral only with regards to minors); *Brattle Films, Inc. v. Commissioner of Public Safety,* 127 N.E.2d 891, 892 (Mass. 1955) (holding that a statute authorizing a city manager to withhold a license to exhibit a film on Sunday was an unconstitutional prior restraint).

Furthermore, by the 1960s, society's values had begun to drastically change from what they were in the 1930s. Unwed couples were openly living together, teenagers and young adults were experimenting with drugs, and nudity was working its way into theatrical productions. Paulson, *supra*, at 67. *See also* Laufe, *supra*, at 164 (noting that in the 1970s, "the uninhibited freedom of expression was evident in the permissiveness of New York Officials and in the acceptance by audiences and critics of former taboos in several productions that opened to excellent reviews

and received recognition as distinguished dramas by winning major drama awards"). The trend continued into the 1970s with musicals such as *Grease* and *Bye-Bye Birdie*. *Grease*, a musical which satirizes the rock and roll era of the 1950s, actually provides a perfect example of how what was once highly objectionable becomes ingrained in society:

> In the 1920s, the vice brigade would have undoubtedly protested against Grease; newspaper editorials would probably have condemned the musical and called it an insult to the youth of America. In 1972, however, the earthy language had lost its shock value for most theatergoers. The critics, for the most part, ignored the dialogue and praised Grease for its lampoon of the 1950s, its rhythmic score, and its exuberant young cast.

Laufe, *supra*, at 166 (noting also that the musical "amused the young people who had grown up in the late 1950s but shocked some of their parents with the references to sex and pregnancy"). In order to keep up with the changing times, the Production Code was retired in 1968 and replaced with a new age-based rating system. Paulson, *supra*, at 67. That rating system is still in effect for movies today.

Meanwhile, courts have continued to reject efforts to regulate and control violent movies on First Amendment grounds. In 1991, a Missouri federal district court ruled that a state statute restricting dissemination to minors of video cassettes depicting violence to minors was unconstitutional. *Webster,* 773 F.Supp. at 1281. The law had been aimed at regulating so-called "slasher movies." *Id.* at 1280. In 1993, the Tennessee Supreme Court held that a part of a statute that criminalized the display of media, in-

cluding films and videocassettes containing "excess violence" to minors was unconstitutional. *Davis-Kidd Booksellers v. McWherter,* 866 S.W.2d 520, 522 (Tenn. 1993). As with dime novels and comic books, attempted regulation of movies typically failed because it violated the First Amendment.

2. Television

Naturally, as television became commonplace in American households, it also drew opposition. Although television violence attracted the attention of Congress in the 1950s, most legislators still focused on regulating film content. *See* Keisha L. Hoerrner, *The Forgotten Battles: Congressional Hearings on Television Violence in the 1950s* (Jun. 1999), *available at* http://www.scripps.ohiou.edu/wjmcr/vol02/2-3a-B.htm (last viewed 7/1/10). The first Congressional Hearing occurred in 1952, conducted by the House Committee on Interstate and Foreign Commerce's Federal Communications Commission Subcommittee, and produced only a brief final report stating that television was changing too rapidly to "pass any conclusive judgment" on it. *Id.* Additional hearings were held in the 1950s and 1960s, but it was not until 1972 that the government argued that there was a strong link between violence on television and violence in real life. Mark A. MacCarthy, *The N.A.B. Codes, Family Viewing Hour, and Television Violence,* 13 Cardozo Arts & Ent. L. J. 667, 677 (1995).

In response, the Federal Communications Commission pressured the television industry to adopt a "family viewing policy" that prohibited certain family-inappropriate programming during prime time. *Id.* at 679. The policy was abandoned after a series of court battles. *See e.g., Writers Guild of America West,*

Inc. v. Nat'l Ass'n of Broadcasters, 609 F.2d 355 (9th Cir. 1979). However, in 1996, Congress passed legislation requiring televisions to contain a "v-chip," which would allow parents to closely monitor programming for children. MacCarthy, *supra*, at 684. However, evidence shows that the v-chip technology is hardly ever used by parents. *Parents, Children, and Media,* Kaiser Family Foundation, *available at* http://www.kff.org/entmedia/upload/7638.pdf (last viewed 8/12/10).

As with movies and comic books, the courts struck down legal attempts to regulate violence on television. The U. S. Court of Appeals for the Seventh Circuit stated that "violence on television … is protected speech, however insidious. Any other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us." *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd mem.* 475 U.S. 1001 (1986). Television violence represents just one more admission by the courts that violent programming is protected on First Amendment grounds.

C. Music has also been repeatedly blamed for harming children, yet challenges to music content also typically violate the First Amendment.

As early as the turn of the twentieth century, adults have claimed that new types of music harm children. When the saxophone became popular in the 1920s, critics referred to it as "the devil's flute" and claimed that its "low, seductive tones would cause young girls to behave immorally." Eric Nuzum, Parental Advisory: Music Censorship in America 5

(2001). Jazz, ragtime, and blues music all met with significant resistance when they first entered the pop culture scene. Tracy Reilly, *The Spiritual Temperature of Contemporary Popular Music: An Alternative to the Legal Regulation of Death-Metal and Gangsta-Rap Lyrics,* 11 Vand. J. Ent. & Tech. L. 335, 343 (Winter 2009). In the 1940s, critics began claiming that music was the source of national increase in crime. *Id.* at 343.

The complaints against music escalated in the 1950s with the advent of rock and roll, which was aimed at a youthful audience. Parents expressed concern regarding the effects of "tribal, jungle beats" on their children. Nuzum, *supra*, at 6. Congressional representatives attempted to add certain rock records to the list of pornographic materials that were illegal to send through the federal postal service. *Id.* at 214. Interest groups suggested at congressional hearings that the rise in juvenile delinquency can be traced to listening to rock and roll music. *Id.* at 217. Observers mistook dancing at concerts for fighting and riots, leading to rumors that rock music caused young people to break out in spontaneous violence. *Id.* at 218. Florida police threatened Elvis Presley with arrest on obscenity charges if he did not stand still while performing. *Id.* The protests continued through the 1960s and 1970s, with critics protesting the socially-conscious songs and drug-oriented lyrics. Marilyn J. Flood, *Lyrics and the Law: Censorship of Rock-And-Roll in the United States and Great Britain*, 12 N.Y.L. Sch. J. Int'l & Comp. L. 399, 403 (1991).

The 1980s ushered in a new era of regulation for music, after heavy metal music became popular.

Reilly, *supra*, at 348. In 1985, the Parents' Music Resource Center ("PMRC") was formed to wage a war against heavy-metal lyrics, which were seen as introducing violence, suicide, and Satanism to society. Reilly, *supra*, at 347. Typically, the proponents of PMRC argued that the once-criticized music of the past was unprecedented compared to the current music – a co-founder of PMRC and the wife of the Secretary of the Treasury claimed that lyrics like Cole Porter's "the birds do it, the bees do it" could "hardly be compared" to lyrics that talked about having sex like a beast. *Id.* at 348. As with comic books, criminal defendants attempted to place blame for their actions on music; for example, a defendant who killed a Texas State Trooper unsuccessfully claimed that listening to rap music caused him to shoot the trooper. *Id.* at 355. The family of the victim also filed a lawsuit against the musician, claiming that his music incited illegal conduct, but the court held that the artist did not intend to incite violence, nor could the broadcast of an album three years after it is produced and sold over 400,000 copies be likely to incite violence. *Id.*

In 1985, the U.S. Senate Committee on Commerce, Science, and Transportation convened hearings on lyrical content of rock albums. Paulson, *supra*, at 73. Committee members insisted that they were neutral in the matter and that potential government regulation was not under consideration, but statements from Senators suggested otherwise. *Id.* at 73–74. State legislatures moved ahead with enacting statutes targeting music, but most of these were found to be unconstitutional. In 1985, San Antonio, Texas was one of the first cities to enact an ordinance aimed at rock and roll concerts; it prohibited unac-

companied minors from attending musical presentations constituting "obscene performances." Reilly, *supra*, at 379. Washington state enacted a statute designed to prevent obscene music, but the statute was found to be unconstitutional. *Id.* at 379-80. Texas, Maryland, and California all tried to pass legislation designed to prohibit state investment in any company that recorded or produced music found "objectionable," or that "glamorized various acts of violence." All were struck down. *Id.* at 380.

At the same time that the courts were striking down these unconstitutional statutes, the music industry was engaging in a self-regulating effort. Recording companies, for example, began to revise songs when radio stations started to ban music with drug lyrics in the 1960s. Flood, *supra*, at 404. In 1985, the Recording Industry Association of America agreed to include a warning label reading "Explicit Lyrics Parental Advisory" on certain albums, and in 1990, the organization introduced a standardized labeling system. *Id.* at 418. After the introduction of the system, multiple states withdrew legislation calling for a mandatory labeling system. *Id.* at 417-18. Furthermore, some musicians began releasing sanitized versions of their albums, expurgating the objectionable lyrics and negotiating with retailers on album art. Paulson *supra*, at 77.

The self-regulation of the music industry, and the passage of time, once again worked to quell the wave of opposition to new music genres. The same rock and roll songs that once drew such protests in the 1950s are now played regularly on "oldies" radio stations. While there is still some debate over the effects of music today, it is nowhere near the fever pitch it

reached in the 1980s and 1990s, particularly since the studies on music's effects on children are so contradictory. Reilly, *supra*, at 386-87. For example, for every researcher that claims there is a causal link between music and aggressive behavior, there is another one that finds that there is no connection between violent lyrics and similar resulting behavior in children. *Id*. Furthermore, many researchers have also pointed out that for studies that do show a link, the subjects of these studies are also influenced by a number of other factors, including unstable backgrounds, divorced parents, violence experienced at home, drugs, and arrest records. *Id*.

D. Video games are just another type of new media that, like the media before it, has created societal anxiety that will eventually be alleviated.

By examining the history and current status of dime novels, comic books, music, television, theater, and film, a pattern quickly becomes evident. Each of these types of media met with great resistance when they were first introduced, followed by proposed regulations and legislation, court rulings that restrictions upon the media violate the First Amendment, and finally, a self-regulation effort by the media industry in question. Video games have followed this same pattern since their inception.

This pattern is even more obvious when examining the previous judicial opinions on legislation attempting to ban the sale of violent video games. Besides the U. S. Court of Appeals for the Ninth Circuit, two other federal appellate courts and six federal district courts have struck down laws prohibited the sale of these types of games. Brief in Opposition

to Writ of Certiorari at 12, *Schwarzenegger v. Video Software Dealer's Ass'n,* No. 08-1448 (Jul. 22, 2009). In each case, the courts have found that video games are a form of creative expression entitled to protection under the First Amendment.[3] Furthermore, the courts have rejected the argument that the variable obscenity standard from *Ginsberg v. New York*, 390 U.S. 629 (1968), should be broadened to include violent expression rather than just obscenity.[4] Finally, these courts have all found that these video games laws should be rejected on First Amendment grounds for one or more of the following reasons: (1) the evidence failed to show that the alleged harm to minors was real; (2) the government's attempt to help parents protect the well-being of their children was not an excuse to restrict constitutionally-protected rights; (3) the laws were underinclusive; (4) less-restrictive alternatives existed to achieve the same

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[3] *See Entm't Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Entm't Merchants Ass'n v. Henry*, No. Civ-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), *aff'd*, 469 F.3d 641 (7th Cir. 2006); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

[4] *Id.*

goal; and (5) the statutory language describing the prohibitive conduct was unconstitutionally vague.[5]

Creating a new category of unprotected speech for violent video games, when federal courts around the country have repeatedly refused to do so, for a type of media that is drawing the same types of complaints that other types of new media drew when they were first introduced, would be a monumental mistake on the part of this Court. In the not-to-distant future, it is highly likely that these types of video games will no longer be an issue in society. As Harold Schechter, a professor who has studied this subject extensively, said in his 2005 book entitled *Savage Pastimes:*

> And indeed, the controversy raging today over video violence and rap – and that raged fifty years ago over horror comics and rock 'n' roll – has been taking place, in exactly the same terms, since mass-produced popular art first came into existence. I have little doubt that fifty years from now, parents will be raising a howl over virtual-reality shoot-'em-ups that allow their kids to actually feel the splatting blood from the blown-off head of a holographic zombie, and that they will pine for the idyllic days of 2004, when children enjoyed such harmlessly cartoonish pastimes as Resident Evil and Grand Theft Auto. From the vantage point of the present – when the latest state-of-the-art entertainments seem to offer unprecedented levels of stimulation and lifelike gore – yesterday's popular culture always seems innocent and quaint.

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[5] *Id.*

Schechter, *supra*, at 18. Even when the protests over violent video games diminish, as history demonstrates that they are certain to do, a ruling by this Court that allows this legislation to stand will remain. Such a ruling will threaten the First Amendment rights of existing and future new media that draws the ire of society.

III. Restricting the First Amendment rights of media with violent content is a direct threat to news organizations, who must cover violent stories to fulfill their duty of keeping the public informed.

Approving legislation that restricts minor's access to allegedly violent video games opens the door for restriction into other types of media with violent speech content, including news media. News stories may contain descriptions and photographs of violence during wars, criminal acts, descriptions of gang violence, and riots. Clay Calvert and Robert D. Richards, *Mediated Images of Violence and the First Amendment: From Video Games to the Evening News,* 57 Me. L. Rev. 91, 110 (2005). These stories and descriptions of violence are occasionally similar to violent video game content.

Although there is a heavy presumption against regulating freedom of the press, attacks on the news media for covering allegedly violent stories have occurred ever since campaigns against dime novels began. For example, Anthony Comstock, the well-known crusader against dime novels, also conducted campaigns "to force legitimate newspapers to stop carrying stories about football and boxing, sports

considered far too violent for the type of society that Comstock envisioned." Blanchard, *supra*, at 757. During the comic book hearings in the 1950s, William M. Gaines, the publisher of Entertaining Comics Groups, used newspapers as a demonstration of how children are exposed to violence. As he was testifying, Gaines held up a copy of a newspaper and discussed how newspapers covered murders and suicides in detail. *Id.* at 792. He also pointed out that "when you talk about banning comics, you are only a step away from banning crimes in the newspapers, because once you start to censor, you must censor everything," including "comic books, radio, television, and newspapers." *Id.*

Currently, multiple parties have attempted to blame the news media for an increase in youth violence, or suggested that the violent stories in the news media are similar to violent video games. One commentator, in defending video games, suggested that legislators should be "far more concerned about the effects of viewing a steady stream of real-life images of graphic violence, from photographs of torture in an Iraqi prison to videotapes of beheadings of United States' citizens in foreign countries, than … about the effects of viewing fictional images in a game." Calvert et al., *supra*, at 94. In a survey commissioned by *Time* magazine in 2000, the vast majority of parents surveyed responded "yes" to a question that asked them if they thought the way the news media portrayed violence was a major factor in causing youth violence. Clay Calvert, *Media Bashing at the Turn of the Century: The Threat to Free Speech after Columbine High and Jenny Jones*, 2000 L. Rev. Mich. St. U. Det. C.L. 151 (Spring 2000). At least one university psychologist, Leonard Berkowitz, has sug-

gested that intense media coverage surrounding violence incidents partially causes an increase in crime. *Id.* at 162. Other critics have claimed that crime news "exaggerates and sensationalizes violence." Lori Dorfman, Ester Thorson, and Jane Stevens, *Reporting Crime and Violence from a Public Health Perspective,* 2003 J. Inst. Just. Int'l Stud. 53, 54 (2003). *Amici* certainly do not agree with the claims that the news media is causing an increase in crime or affecting youth in this manner; however, these types of reports strongly suggest that the news media could become the next target of those attempting to regulate minors' access to violent materials.

If violence is deemed to be an unprotected category of speech as it applies to minors, there will be little standing in the way of the same critics making the argument that newspapers should not be sold to minors because they contain violent content. As demonstrated above, the groundwork has already been laid for them to make that claim. Even worse, it would become much easier to make the argument that violent content in newspapers should be censored. Petitioners, for example, already argue in their brief that the "First Amendment has never been understood as guaranteeing minors unfettered access to offensively violent material." Petitioners' Brief, *supra*, at 9. Such a general argument is quite dangerous, because people could attempt to apply it to other types of allegedly violent material, including news media, and therefore threaten the First Amendment protection of freedom of the press that is a necessary and vital component of society.

Like the various media industries before it, some news media organizations have attempted to revise

the methods by which they report violent and crime news. A television station in Austin, Texas, for example, instituted a policy to determine whether to cover a crime story on the local news based on one or more of five criteria, including determining whether action needed to be taken, whether there is a threat to children or to safety, whether there is a significant community impact, and whether the story will lead to a crime-prevention effort. Robert E. Shepherd, Jr., *Film at Eleven: The News Media and Juvenile Crime*, 18 QLR 687, 696-97 (1999). Certain newspapers in Virginia attempt to address violent crimes in the news through what is commonly known as a "public health model" – their stories will include, if possible, relationships between the victim and perpetrator, involvement of alcohol or other substances, and whether young people were involved. *Id.* at 697. *See also* Dorfman, *supra,* at 134 (discussing the public health model of crime reporting).

By examining different methods of reporting news, the news media is following the same self-regulation path as movies, comic books, dime novels, and music. There is no need to regulate violent materials in any of these areas, because media has been so responsive to society's concerns. Threatening the First Amendment protection of the news media by establishing violence as an unprotected category of speech, even if it is only within the context of the sale of violent materials to minors, is completely unnecessary, given the effectiveness of self-regulation.

CONCLUSION

Petitioners' claim that violence should be an unprotected category of speech is without merit. This Court, and many others, have deemed violent speech worthy of First Amendment protection. Furthermore, the opposition to and criticism of violent video games is nothing more than a repeat of the criticism that has been made against every type of new media that has been introduced into society since the advent of dime novels, more than 150 years ago. Ruling in favor of petitioners would result in a violation of the First Amendment as a reflection of current trends in society – a ruling that could greatly restrict the freedom of expression rights for many other organizations. This Court should find in favor of respondents.

Respectfully submitted,

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APPENDIX A

Descriptions of *amici:*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act ("FOIA" or "the Act") litigation since 1970.

With some 500 members, The American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The First Amendment Project ("FAP") is a non-profit organization based in Oakland, California, dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

The National Press Photographers Association("NPPA") is a non-profit organization dedicated to the advancement of photojournalism in its crea-

tion, editing and distribution. NPPA's almost 9,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

The Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The Student Press Law Center (the "SPLC") is a nonprofit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. The SPLC pro-

vides free legal assistance, information and educational materials for student journalists on a variety of legal topics. Because the SPLC's work focuses in part on the ability of student journalists to meaningfully participate in the discussion of issues of public concern impacting their lives free from untoward government censorship, the SPLC and its members have a special interest in the potential impact of any ruling emboldening schools to restrict journalistic speech describing violence and its consequences.