07-16620

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIDEO SOFTWARE DEALERS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Plaintiffs-Appellees,

v.

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California; BILL LOCKYER, in his official capacity as Attorney General of the State of California; GEORGE KENNEDY, in his official capacity as Santa Clara County District Attorney, RICHARD DOYLE, in his official capacity as City Attorney for the City of San Jose, and ANN MILLER RAVEL, in her official capacity as County Counsel for the County of Santa Clara,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. C 05 4188 RMW
The Honorable Ronald M. Whyte, District Judge

APPELLANTS' OPENING BRIEF

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SUMMARY OF ARGUMENT

California's violent video game law properly seeks to protect children from the harmful impacts of playing a narrow category of interactive video games that, by definition, are so violent that they appeal to a deviant or morbid interest of children and are patently offensive to prevailing community standards. These games lack any serious literary, artistic, political, or scientific value for children, and a substantial body of research has concluded that they have harmful impacts on the children that play them.

The Legislature's effort to assist parents in the fight to keep these harmful video games out of the hands of children survives plaintiffs' First Amendment challenge under all levels of judicial review. The law survives review under the variable obscenity standard established by the Supreme Court in *Ginsberg v. State of New York* 390 U.S. 629 (1968), because it was rational for the Legislature to determine, based upon existing social science, that the violent video games covered by the law are harmful to children. Even if the law were subject to strict judicial scrutiny, as plaintiffs argue, it would survive in any event because it is also narrowly tailored to serve the State's compelling interest in protecting children. Additionally, the law's terms are not impermissibly vague because they are sufficiently clear to inform the plaintiffs as to what is being prohibited. And

finally, the law's labeling provision, requiring simply that covered games be labeled with an "18" on the front cover, is a constitutionally permissible requirement for conveying factual information to retailers and consumers.

Therefore, the district court's order granting summary judgment in favor of plaintiffs should be reversed, and summary judgment in favor of defendants should be granted.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. sections 1331 and 1343 because the complaint alleged violations of the First Amendment to the Constitution, and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution. The district court issued its order granting plaintiffs' motion for preliminary injunction on December 21, 2005, and issued its order granting plaintiffs' motion for summary judgment and denying defendants' motion for summary judgment on August 6, 2007. The district court entered a final judgment in favor of plaintiffs on August 14, 2007, disposing of all parties' claims. Defendants filed their notice of appeal on September 14, 2007, in compliance with rule 4(a)(1) of the Federal Rules of Appellate Procedure. This Court has jurisdiction pursuant to 28 U.S.C. section 1291 over the final decision of the district court.

STATEMENT OF ISSUES

This appeal presents the Court with the following issues: (1) Whether the First Amendment prohibits California from limiting the ability of children to purchase, outside the presence of a parent, a narrow category of exceedingly violent video games in order to protect the health and welfare of children; (2) whether the law, which targets only purchases by children, is subject to and survives judicial review under the variable obscenity standard articulated by the Supreme Court in *Ginsberg v. State of New York*, 390 U.S. 629 (1968); (3) whether the law would in any event survive judicial review under the strict scrutiny standard; (4) whether the law's carefully crafted terms and definitions provide a person of ordinary intelligence a reasonable opportunity to know what is required by its provisions; (5) whether the law's labeling provision, requiring that covered violent video games be labeled with an "18" on the front packaging, is a constitutionally permissible limitation on commercial speech; and (6) whether the law denies plaintiffs equal protection of the law.

STATEMENT OF THE CASE

This appeal concerns constitutional challenges to California's violent video game law, California Civil Code sections 1746 - 1746.5, duly enacted as Chapter 638 of the Statutes of 2005 by the Legislature. Excerpts of Record (ER)

21-25. The district court entered a preliminary injunction prohibiting enforcement of the law on December 21, 2005. ER 1115-1132; Docket Sheet (DS) 58. The district court thereafter entered a permanent injunction, after hearing cross-motions for summary judgment, on August 14, 2007. ER1353-73; DS 106, 107.

STATEMENT OF FACTS

On October 7, 2005, Governor Arnold Schwarzenegger signed Assembly Bill 1179 into law, which was to take effect on January 1, 2006, as California Civil Code sections 1746 - 1746.5 (hereafter "the Act").[1/] Former Assembly Member Leland Yee, Ph.D, originally introduced the Act as Assembly Bill 450 on February 15, 2005. ER 156. Later during the same legislative session, Assembly Bill 1179 was gutted and amended, and replaced with the language of Assembly

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1. The Act defines "violent video game" as a video game in which "the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following: (A) Comes within all of the following descriptions: (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors. (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors. (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." Civ. Code § 1746(d)(1)(A). The Act also contains a secondary definition of covered games, but only one definition need be met. The State Defendants concede this secondary definition does not provide an exception for material that might have some redeeming value to minors, as the primary definition so provides, and may therefore be unconstitutionally broad. This section of the Act, however, is severable. Civ. Code § 1746.5.

Bill 450.[2/] AB 1179 was passed by the Assembly on September 8, 2005, with a vote of 66 ayes, 7 noes, and was passed by the Senate that same day with a vote of 22 ayes, 9 noes. ER 143, 152.

The Act prohibits the sale of a narrow category of violent video games, as defined, to children under 18 years of age unless accompanied by a parent or guardian. The Act also requires that an "18" be placed, as specified, on the front of video games sold in the state that meet the violent video game definition.

In passing the Act, the Legislature relied upon an extensive body of peer-reviewed research, articles, studies, reports, and correspondence from leading social scientists and medical associations – the best evidence available in the field – explaining the negative consequences when children play interactive violent video games, as opposed to simply viewing passive violent media. ER 196-889. The Legislature targeted violent video games specifically due to their unique capacity to cause children to experience automatic aggressiveness, increased aggressive thoughts and behavior, antisocial behavior, desensitization to violence, and reduced activity in the frontal lobes of the brain. ER 148.

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2. ER 119 ("On September 2, 2005, the last day for amending bills without a rule waiver, the author gutted and amended AB 1179 (Yee) to insert the language largely identical to the text of AB 450.").

The Video Software Dealers Association and the Entertainment Software Association ("Plaintiffs") filed a complaint for declaratory and injunctive relief on October 17, 2005, prior to the effective date of the Act. ER 2-25; DS 1. Plaintiffs named as defendants, in their official capacities, Governor Arnold Schwarzenegger, former Attorney General Bill Lockyer[3/], Santa Clara County District Attorney George Kennedy, Santa Clara County Counsel Ann Miller Ravel, and San Jose City Attorney Richard Doyle. *Ibid*. The Governor and Attorney General (hereafter "State Defendants") appeared and defended the constitutionality of the Act throughout the district court proceedings.

STANDARD OF REVIEW

The district court's grant of summary judgment in favor of Plaintiffs, finding the Act unconstitutional, is reviewed *de novo*. *California First Amendment Coalition v. Calderon* 150 F.3d 976, 980 (9th Cir. 1998). This Court's review is governed by the same standard applied by the lower court on summary judgment under rule 56(c) of the Federal Rules of Civil Procedure. *Ibid*. Therefore, this Court must determine whether there are any genuine issues of material fact in dispute and whether the district court correctly applied the substantive law. *Ibid*.

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3. Pursuant to FRCP 25(d)(1), Attorney General Edmund G. Brown Jr. is substituted in for former Attorney General Bill Lockyer.

ARGUMENT

I.

THE ACT IS SUBJECT TO JUDICIAL REVIEW UNDER THE VARIABLE OBSCENITY STANDARD SET FORTH BY THE U.S. SUPREME COURT IN *GINSBERG V. STATE OF NEW YORK*

It defies logic to suggest that our founding fathers intended to adopt a First Amendment that would guarantee children the right to purchase a video game wherein the player is rewarded for interactively causing the character to take out a shovel and bash the head of an image of a human being, appearing to beg for her life, until the head severs from the body and blood gushes from the neck. Or guarantee children the right to purchase a video game where the player can cause the character to wound an image of a human being with a rifle by shooting out a kneecap, pour gasoline on the wounded character, and then set the character on fire while the character appears to be alive and suffering. ER 162; Physical Exhibit (VHS) "Video Game Violence Sampler."

Instead, the proper, more reasoned approach to First Amendment jurisprudence recognizes that the rights of minors are not coextensive with those of adults. States must be allowed to legislate to protect the health and welfare of children with certain universally recognized differences between adults and children in mind. The liberty of human expression guaranteed by the First

Amendment – the freedom to choose for oneself what to publish, read, or view – presupposes the capacity of the individual to make a reasoned choice. And the law recognizes that in certain narrowly defined areas of expressive material, children lack the capacity to make a reasoned choice. It is in these narrow areas that the variable obscenity standard applies.

The variable obscenity standard allows for a variation on the concept of obscenity, or unprotected material, in focusing on the material's impact on children. Thus, material which may not be considered obscene as to adults may nevertheless be considered obscene as to children. *Ginsberg v. State of New York*, 390 U.S. at 636-43. Applying the variable obscenity standard of review here to the Act preserves the liberty guaranteed by the First Amendment while allowing states to fulfill their duty to protect the health and welfare of children. The court below erred as a matter of law in rejecting the variable obscenity standard and reviewing the Act under strict scrutiny. ER 1360-65; DS 106.

A. The First Amendment Rights Of Minors Are Not Coextensive With Those Of Adults

The law recognizes that the First Amendment rights of children are not coextensive with those of adults. The Constitution therefore reserves to the states the right – indeed the duty – to exercise their police power to make necessary differentiations in the law as between adults and children in order to protect the

health and welfare of children.[4/] Plaintiffs' challenge to the Act, however, proceeds on the premise that children are no different from adults. Plaintiffs thus seek to protect the rights of children to purchase video games that are so violent that by definition they appeal to a deviant or morbid interest of children, are patently offensive to prevailing community standards as to what is suitable for children, and lack any serious literary, artistic, political, or scientific value for children. Plaintiffs' position, if adopted by the Court, would nullify important, well recognized distinctions between the respective mental capacities and vulnerabilities of adults and children.

The Constitution permits states to prohibit children of differing ages from smoking, drinking, and driving. States may even prohibit children from engaging in such fundamental activities as voting, marrying, or engaging in sexual intercourse. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part). Children are not *sui juris*. Thus, the law recognizes and accommodates the fact that children are not possessed of mental faculties equivalent to adults. The Supreme Court recently reconfirmed the importance of these differences in holding that the Constitution prohibits states

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4. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the people." U.S. Const., amend. X.

from executing minors. In *Roper v. Simmons*, the Supreme Court recognized three important differences, supported by existing social science, between adults and children under eighteen:

> First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson*, *supra*, at 367, 113 S.Ct. 2658; see also *Eddings*, *supra*, at 115-116, 102 S.Ct. 869 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. [¶]
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> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure . . . . This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003). [¶]
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> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, Identity: Youth and Crisis (1968).

Roper v. Simmons, 543 U.S. 551, 569 (2005). The Supreme Court based its holding on research produced by social science – the same type of social

science relied upon by the California Legislature – recognizing that the susceptibility of minors to harmful effects of external influences, well beyond that of adults, justifies differentiations in treatment in the eyes of the law.

That the differentiations touch upon First Amendment freedoms does not render the state action per se invalid. "[E]ven where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . .'" *Ginsberg v. State of New York*, 390 U.S. 629, 638 (1968) (quoting *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170 (1944)). Indeed, "'regulations of communication addressed to [children] need not conform to the requirements of the first amendment in the same way as those applicable to adults.'" *Id*. at 639 (quoting Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 938-39 (1963)). The Supreme Court has firmly established that "the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

In furtherance of these bedrock principles, the Supreme Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982). Indeed, the Supreme Court has held "that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity." *Ibid*. (citing *Prince v. Commonwealth of Massachusetts*, *supra*). Legal differentiations are often necessary to protect minors, even from expressive materials: "It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975). Thus, regulations of communication addressed to children must be reviewed with these firmly established principles in mind. The district court below erred as a matter of law in abandoning these principle and subjecting the Act to strict scrutiny rather than the variable obscenity standard set forth in *Ginsberg v. State of New York*. ER 1360-65; DS 106.

B. The Variable Obscenity Standard Permits States To Legislate To Protect Children From The Negative Influences Of Expressive Material To An Extent Well Beyond That Permitted For Adults

That states may legislate to protect minors from harmful external

influences is firmly established by precedent. In *Ginsberg v. State of New York*, a store owner was convicted of violating a New York statute prohibiting the sale to minors material the legislature found to be "harmful to minors." 390 U.S. at 631. The statute at issue was directed at material containing simple "nudity" as well as sexual depictions – "girlie" magazines, as the Court referred to them. *Id*. at 645-47. The statute defined the term "harmful to minors" as a description or representation, "in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it: (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors." *Id.* at 646.

Although there was no question that the New York law at issue in *Ginsberg* would not have survived judicial scrutiny had it applied to adults, the Supreme Court upheld the law under the "variable obscenity" or "obscene as to minors" standard, because the law targeted purchases by children under 17. *Id*. at 639-46. The standard developed by the Court recognizes a state's power to define obscenity (material receiving no First Amendment protection) in a variable manner – using one definition applicable to adults and a more broad definition applicable

only to minors. Thus, the Supreme Court set forth the standard of review as follows: "To sustain state power to exclude material defined as obscene by [the statute] requires only that we be able to say that it was *not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors*." *Ginsberg*, 390 U.S. at 641 (emphasis added).

In upholding the law under this variable standard, the Court cited with approval the reasoning of the New York Court of Appeals:

> [M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.

Id. at 390 U.S. at 636 (quoting *Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71, 75 (1966)). The Court held that the "legislature could properly conclude that parents and others, teachers for example, who have the primary responsibility for children's well-being are entitled to the support of the laws designed to aid discharge of that responsibility." *Id*. at 639.

In the instant case, the Legislature gave proper deference to the Supreme Court's dichotomy: defining the violent video games covered by the Act as those

the community considers obscene as to minors, but not limiting adult access to such games. Civ. Code section 1746(d)(1). *Ginsberg* establishes the governing analytical framework and provides the appropriate standard of review applicable to the Act.

C. Violent Material May Properly Be Considered Obscene Or Unprotected Material When Directed To Children, Subject To Review Under The Variable Standard

Material need not be sexual to be considered obscene; it is the harm to the children that is critical. Consider a video game where the player is rewarded for causing the character to dismember and decapitate, with a chainsaw, another character appearing as an image of a lifeless, beaten, blood-soaked female. Now consider the same gaming sequence, but this time the image of the blood-soaked female is nude. There is no rational basis for reviewing a state's child-protection regulation of the first sequence under strict scrutiny, but reviewing a regulation of the second sequence under *Ginsberg*'s variable obscenity standard. This Court should reject such an irrational and irresponsible approach to First Amendment analyses of states' efforts to protect children.[5/]

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5. Although the Act includes the descriptor "sexually assaulting" as an additional game option beyond the violent content which subjects games to the Act, the State Defendants believe that the intent of the Legislature was primarily to address violent material. Therefore, it is the State Defendants' position that the Act cannot be severed to preserve only the "sexually assaulting" language to the exclusion of purely violent material with no sexual component as listed in the

The Supreme Court has never expressly incorporated violent images (absent a sexual element) into the "obscene as to minors" exception, but neither has it rejected this logical extension. By definition, sexual material can be considered obscene and unprotected when the average person, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest, depicts or describes, in a patently offensive way, conduct specifically defined by the applicable state law which, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973). If the Supreme Court's language can be interpreted as providing a definition of *when* sexually explicit material loses its protected status and becomes obscene, there is no reason the definition cannot properly be applied to determine *when* violent material similarly loses its protected status and becomes obscene. *See generally* Kevin W. Saunders, *Media Self-Regulation of Depictions of Violence: A Last Opportunity*, 47 Okla. L. Rev 445, 459 (1994).

Applying the Supreme Court's language as a general definition of *when* expressive material becomes obscene would comport with the ordinary understanding of the word "obscene," as well as the historical context in which the founding fathers adopted the First Amendment.

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definition of "violent video game." Civ. Code, § 1746(d)(1).

> As a term of ordinary language, "obscene" has a broader extension than both sex and violence, as in talk of a company making obscene profits. But even more rigorous examinations of the word, based on its derivation, would include violence with sex. The derivation of the word "obscene" has been argued to be either from "ob caenum," or "on account of filth" or simply "filth," or from "ab scaena" or "off the stage," which could mean either "not to be openly shown on the stage of life" or instead "off the theatrical stage." Professor Harry Clor offers an analysis of the word "obscene" that speaks to both the idea of filth and the "off the stage of life" derivation. He suggests that obscene depictions are those that offer "a degradation of the human dimensions of life to a sub-human or merely physical level." Further, obscene literature is, for Clor, that which "presents, graphically and in detail, a degrading picture of human life and invites the reader or viewer, not to contemplate that picture, but to wallow in it.

Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 Mich. St. L. Rev. 51, 80 (footnotes omitted). Professor Saunders states that, under the ordinary understanding of the term, "it is not the focus on sex that can make a depiction obscene; it is the treatment of human beings in a purely physical way with regard to acts or activities that also have great emotional or spiritual importance." *Id*. at 81. Thus, for example, "[a] death scene that considers human values concerning life and death and relationships to those close to the departed does not have a sole focus on the physical that is present in the slasher film, and sufficient violence for its own sake should be considered as obscene as explicit sexual depictions for their own sake." *Ibid*.

Such an interpretation of obscenity also comports with the founding fathers' understanding regarding material considered unprotected by the First Amendment at the time of its enactment. The founding fathers never intended the First Amendment to prohibit all attempts by the government to regulate speech. Some speech, according to Justice Brennan, had historically been considered unprotected, and that status did not change with the adoption of the Bill of Rights:

> The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to publish 'any filthy, obscene, or profane song, pamphlet, libel or mock sermon' in imitation or mimicking of religious services. [¶] In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance.

Roth v. U.S., 354 U.S. 476, 482-83 (1957) (footnotes omitted). As Justice Brennan explained in *Roth*, sexual material was not the only material considered unprotected.

Professor Saunders conducted an examination of the historical context in which the First Amendment was adopted and concludes that concerns for violent depictions were every bit as prevalent as concerns for sexual material at the time:

> The history that was said to justify the obscenity exception then justifies an exception that encompasses violence rather than one limited to sex.

> The law in the Constitutional era and the era of the Bill of Rights denied protection to obscenity, but obscenity had not acquired a narrow focus on sex. The era in which that focus developed is a constitutionally irrelevant time, and the fact that the states continued to suppress violent material, some even continuing to call it obscene, provides as long a history of addressing concerns of violent depiction as that for addressing sex.

Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 Mich. St. L. Rev. 51, 85; *see also* Kevin W. Saunders, *Violence as Obscenity: Limiting the Media's First Amendment Protection* 87-104 (Duke University Press 1996). The concept of obscenity at the time the First Amendment was adopted included violent, not just sexual, material. No compelling reason exists today to stretch the concept of obscenity to exclude extreme violence, especially when states legislate to protect children.

It appears that the only time the Supreme Court was confronted with legislation seeking to regulate access to violent material, it struck down the law on vagueness, not First Amendment grounds. *See Winters v. New York*, 333 U.S. 507 (1948). In *Winters*, the Supreme Court reviewed a defendant's conviction under a statute prohibiting the distribution of publications "principally made up of criminal news reports, police reports, or accounts of criminal deed, or pictures, or stories of deeds of bloodshed, lust or crime." *Id*. at 508. The statute prohibited such distribution to adults and minors alike. *Ibid*. The Supreme Court struck down the statute on vagueness grounds. *Id*. at 519. Notably, the Supreme

Court made clear that it was holding neither that a state "may not punish circulation of objectionable printed matter, assuming it is not protected by the principles of the First Amendment," nor that states are "prevented by the requirement of specificity from carrying out their duty of eliminating the evils to which, in their judgment, such publications give rise." *Id*. at 520. It was not the statute's objective that troubled the Court, only the terms employed to achieve it.

This Court should understand the Supreme Court's jurisprudence on obscenity as providing a definition of *when* sexual material becomes obscene, and recognize that there is no reason the definition cannot properly be applied to determine *when* violent material becomes obscene as to minors. Such a reading of the First Amendment comports with the ordinary understanding of obscenity and carries out the intent of the founding fathers when they established the protections represented in this precious amendment.

II.

THE ACT SURVIVES JUDICIAL REVIEW UNDER *GINSBERG*

Under *Ginsberg v. State of New York*, to sustain state power to prohibit minors from purchasing excessively violent material "requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." 390 U.S. at 641. To be sure, the

harm to be addressed need not be severe. The statute upheld in *Ginsberg* did not expressly seek to protect children from physical harm, but instead sought merely to protect children from exposure to materials that would "impair[ ] [their] ethical and moral development. . . ." *Ibid*. The Supreme Court doubted that this legislative finding "expresse[d] an accepted scientific fact," yet concluded that the legislature could properly limit minors' ability to purchase such material. The Act here unquestionably survives review under *Ginsberg* because the California Legislature was presented with substantial evidence demonstrating the harmful impact playing violent video games has on minors.

As explained more fully below, the Legislature was presented with substantial evidence – including myriad peer-reviewed articles, studies, reports, and correspondence from leading social scientists and medical associations – analyzing the harmful impacts of media violence, and specifically the unique interactive nature of violent video games, on minors and young adults. *See infra*, § IV (b). The research shows that playing violent video games increases aggressive behavior and cognition, and leads to aggressive affect, cardiovascular arousal, and decreases in helping behavior. *See generally* ER 639-48 (Anderson, *An Update on the Effects of Playing Violent Video Games*, Journal of Adolescence, 24 (2004) 113-122); ER 388-96 (Gentile, et al., *The Effects of Violent Video Game*

Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance, Journal of Adolescence 27 (2004) (provided in full at ER 860-877)). In the face of this extensive evidence, it cannot be said that it was irrational for the Legislature to determine that the violent video games covered by the Act are harmful to minors.

III.

APPLICATION OF STRICT SCRUTINY TO THE ACT WOULD NULLIFY FUNDAMENTAL DISTINCTIONS BETWEEN ADULTS AND MINORS AND IMPEDE CALIFORNIA'S RIGHT TO PROTECT THE HEALTH AND WELFARE OF CHILDREN

To apply strict scrutiny to the Act, or to myriad other laws that seek to protect the health and welfare of children but touch upon protected freedoms, would impede California's right to protect children and to assist parents in protecting their children in the face of new and developing media of obscenely violent expression. Such an unrealistically searching level of judicial review is often described as "strict in theory, but fatal in fact." *Fullilove v. Klutznick*, 448 U.S. 448, 507, 519 (1980) (Powell, J., concurring in judgment; Marshall, J., concurring in judgment). Many states would face nearly insurmountable hurdles were strict scrutiny to apply to their attempts to protect children from the harmful effects of obscenely violent interactive material.

In the First Amendment context, strict scrutiny often applies to ensure that

the rights of adults to receive information and ideas worthy of constitutional protection are not overly restricted by the government. However, this individual right is inextricably intertwined with the expressive material's worthiness of constitutional protection in any given context. For example, when traditionally obscene material is at issue, the First Amendment rights of individuals give way to the states' right to prevent the material's public dissemination. Thus, in the seminal case *Roth v. U.S.*, 354 U.S. at 484, the Supreme Court held that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *See also Miller v. California*, 413 U.S. at 23 ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.") Thus, strict scrutiny properly applies only where there is both a right to receive the material by the audience, and the material itself is worthy of constitutional protection considering the audience to which it is directed.

In the present context, application of strict scrutiny would be misplaced because there is simply no redeeming social importance in allowing children to purchase the exceedingly narrow category of ultra-violent video games defined by the Act. In this limited context, the violent video games are not worthy of the level of constitutional protection provided by strict scrutiny.

Instead, it must be recognized that material which is protected for distribution to adults does not receive the same level of protection from restrictions upon its distribution to children. The concept of obscenity or of unprotected matter varies according to the group to whom the questionable material is directed or from whom it is quarantined. *Ginsberg*, 390 U.S. at 636. Application of a variable standard of constitutional protection properly balances the rights of children and adults with the rights of the states and parents, and provides the appropriate level of protection to which the expressive material is entitled in the specific context. To find otherwise here would ignore the Supreme Court's guidance to defer to states' and communities' efforts to protect children from obscenity.

IV.

THE ACT ALTERNATIVELY SURVIVES STRICT SCRUTINY

The Act alternatively survives strict scrutiny because the State has a compelling interest in preventing harm to minors caused by the unique interactive media of video games, and the Act is narrowly tailored to serve this interest. *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). The court below properly held that the Act promotes the State's compelling interest in protecting children. ER 1365-66; DS 106. However, the court erred as a matter of law in holding that the Act does not choose the least restrictive means to achieve

its compelling interest, and does not actually further that interest. Specifically, the court erred in holding: (1) That the State must show that 18 is the proper age limit (ER 1367); (2) that the phrase "image of a human being" is unconstitutionally broad (*ibid*.); (3) that the State has not shown that the Act will accomplish its goal more effectively than existing industry self-regulations (*ibid*.); and (4) that the State failed to show that the Act will actually further the State's compelling interest (*id*. at 1368-69).

A. The State Has A Compelling Interest In Protecting Children

Reviewed under strict scrutiny, the Act must promote a compelling state interest. As the district court confirmed, California has a compelling interest in helping parents protect the physical and psychological well-being of minors. ER 1365-66; DS 106. And the Legislature precisely articulated the interest sought to be achieved by the Act:

> The Legislature finds and declares all of the following: (a) Exposing minors to depictions of violence in video games, including sexual and heinous violence, makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior. (b) Even minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games.

ER 22; 2005 Ca. Legis. Serv. Ch. 638 (A.B. 1179, § 1).

The Supreme Court has "recognized that there is a compelling interest in

protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable Communications*, 492 U.S. at 126. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). This compelling interest is not limited to helping parents protect the developing minds of children from exposure to traditionally obscene material, but includes simple nudity (*Ginsberg*, 390 U.S. at 645-47 ("girlie" magazines)) and even "filthy words" (*F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 741-44 (1978)). The Supreme Court recognizes that parents, not society, are entitled to choose the appropriate material for their individual children to view or hear. *Ibid*. And parents are entitled to the assistance of state laws in this battle.

The State's interest extends beyond protecting children from physical or psychological harm, and includes protecting them from exposure to material that would "impair[] [their] ethical and moral development . . . ." *Ginsberg*, 390 U.S. at 641. And the State's interest is promoted even when existing social science can neither prove nor disprove a direct causal link between a child's exposure to the material and the harm or other ethical and moral implications. *Ibid*. ("[T]he growing consensus of commentators is that while these studies all agree that a

causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either. We do not demand of legislatures scientifically certain criteria of legislation." (internal quotations omitted).)

As described above, these established principles are grounded in the recognition that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). To assist parents in this regard, the Supreme Court has affirmed that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. . . . [P]arents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Ginsberg*, 390 U.S. at 639.

Thus, the State has a compelling interest in assisting parents in their fight to limit children's exposure to material that can cause automatic aggressiveness, increased aggressive thoughts and behavior, antisocial behavior, desensitization to violence, and poor school performance.

B. Substantial Evidence Demonstrates That The Act Promotes The State's Compelling Interest

The legislative record is flush with peer-reviewed articles, studies, reports, and correspondence from leading social scientists and medical associations analyzing the impact of media violence, and specifically violent video games, on minors and young adults. Articles by Dr. Craig A. Anderson, Ph.D.[6], along with articles by many other respected psychologists, psychiatrists, and scholars, explain the methodologies used and results obtained in researching the impact of video game violence on children. The legislative record contains no less than twenty-three published articles authored by Dr. Anderson and many other social scientists explaining the harmful impacts playing violent video games has on minors.[7] The district court below erred as a matter of law in holding that the evidence relied upon by the Legislature did not demonstrate that the Act would actually further the State's compelling interest. ER 1368-69; DS 106.

For example, in 2004 (nearly four years after Judge Posner's opinion in *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001)

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6. Dr. Anderson is a Distinguished Professor and Chair of the Iowa State University Department of Psychology. *See* http://www.psychology.iastate.edu/faculty/caa/. He has been publishing articles on the effects of violent video games on minors since 2000.

7. ER 211-15 ("Violent Video Game Bibliography").

striking down a similar but less specific law), Dr. Anderson reported that an "updated meta-analysis reveals that exposure to violent video games is significantly linked to increases in aggressive behaviour, aggressive cognition, aggressive affect, and cardiovascular arousal, and to decreases in helping behaviour."[8/] Dr. Anderson explained that "[e]xperimental studies reveal this linkage to be causal. Correlational studies reveal a linkage to serious, real-world types of aggression. Methodologically weaker studies yielded smaller effect sizes than methodologically stronger studies, suggesting that previous meta-analytic studies of violent video games underestimate the true magnitude of observed deleterious effects on behaviour, cognition, and affect." ER 639.

The Legislature was presented with other evidence demonstrating the causal relationship between violent video games and the harm caused to minors. One such article, a comprehensive meta-study (the statistical practice of combining the results of a number of studies that address a set of related research hypotheses) concluded that "[t]hough the number of studies investigating the impact of violent video games is small relative to the number of television and film studies, there are sufficient studies with sufficient consistency (as shown by the meta-analysis results) to draw some conclusions . . . . The experimental studies demonstrate that

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8. ER639-48 (Anderson, *An Update on the Effects of Playing Violent Video Games*, Journal of Adolescence, 24 (2004) 113-122).

in the short term, violent video games cause increases in aggressive thoughts, affect, and behaviour; increases in physiological arousal; and decreases in helpful behaviour."[9/]

In another study where 607 eighth and ninth grade students from four schools were analyzed, research demonstrated that "[a]dolescents who expose themselves to greater amounts of video game violence were more hostile, reported getting into arguments with teachers more frequently, were more likely to be involved in physical fights, and performed more poorly in school."[10/]

The legislative record contains further research showing that playing violent video games increases "automatic aggressiveness," even in adults. In a study conducted using 121 college students, the results showed "[w]hile most video game enthusiasts insist that the games they play have no effect on them, their exposure to scenes of virtual violence may influence them automatically and unintentionally."[11/] The study concluded that "[d]espite the misleading debate in

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9. ER 307-09 (Anderson, et al., *The Influence of Media Violence on Youth*, Psychological Science in the Public Interest, Vol. 4, No. 3, pp. 91-93 (December 2003)).

10. ER 860 (Gentile, et al., *The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance*, Journal of Adolescence 27 (2004) 5-22, p. 5).

11. ER 885 (Uhlmann & Swanson, *Exposure to Violent Video Games Increases Automatic Aggressiveness*, Journal of Adolescence, 27 (2004) 41-52, p.

the news media over whether exposure to violent television, movies and video games leads to an increase in aggressive behavior, the empirical evidence that it does so has become overwhelming." ER 886-87.

The legislative record also contains research demonstrating that violent video games can lead to desensitization to violence in minors.[12/] Desensitization is "the attenuation or elimination of cognitive, emotional, and ultimately, behavioral responses to a stimulus." ER 784. The article reported specific findings that, as between violent video games, movies, televisions, and Internet content, "[r]egression analyses indicated that only exposure to video game violence was associated with (lower) empathy." *Id*. at 746. Empathy is "the capacity to perceive and to experience the state of another [and] is critical to the process of moral evaluation." *Id*. at 749. Evidence in the legislative record plainly demonstrates a "[r]elationship[] between lower empathy and social maladjustment and aggression in youth . . . ." *Ibid*.

Other research in the legislative record demonstrates the impact violent video games have on brain activity. One such study, conducted over a two-year

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48).

12. ER 140 (Senate Rules Committee analysis of AB 1179); ER 211-15 ("Violent Video Game Bibliography"); ER 746-62 (Funk, et al., *Violence Exposure in Real-Life, Video Games, Television, Movies, and the Internet: Is There Desensitization?*, Journal of Adolescence 27 (2004) 23-39).

period and reported by the Indiana University School of Medicine, concluded that "[t]here appears to be a difference in the way the brain responds depending upon the amount of past violent media exposure through video games, movies and television."[13/] For minors previously diagnosed with disruptive behavior disorders (DBD), the research demonstrated "less brain activity in the frontal lobe while the youths with DBD watch violent video games." The frontal lobe "is the area of the brain responsible for decision-making and behavior control, as well as attention and a variety of other cognitive functions." Brain function was also altered in non-DBD youth. ER 324.

The evidence regarding the negative impacts playing violent video games has on children is bolstered by the unanimous position taken by multiple professional medical associations. By correspondence dated April 15, 2005, the American Academy of Pediatrics informed the Legislature that "early studies on video games indicate that the effects of child-initiated virtual violence may be even more profound than those of passive media, such as televisions. . . . The time has passed for contemplating and discussing whether violence in video games and other media are harmful to our children. Action is needed." ER 478. The California Psychiatric Association informed the Legislature as follows:

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13. ER 324 (*Aggressive Youths, Violent Video Games Trigger Unusual Brain Activity*, Indiana University School of Medicine (December 2, 2002)).

> We believe that your legislation will provide a significant step towards decreasing child and adolescent aggression and violence. We believe it could also result in fewer child and adolescent behavioral, aggression and violence problems in homes, schools and communities. Were your bill to become law we would also expect to see a lessening of not only aggression, but symptoms of anxiety, depression, agitation and social isolation for many young people already predisposed to behavioral problems or with Severely Emotionally Disturbed diagnoses, or with Severe Persistent Mental Illness.

ER 271.

Moreover, Plaintiffs' own expert witness, Professor Dimitri Williams, relied upon by Plaintiffs in the court below, previously testified in federal court that "most experts would agree that we have established covariation" showing that with people who play more violent video games, some tend to exhibit greater aggression. ER 1273 (*citing* Nov. 14, 2005 trial transcripts from *Entertainment Software Ass'n. v. Blagojevich*, Williams' direct). Professor Williams admitted that his position is "not that these games do not lead to [increased aggression], only that [he has not] professionally been convinced of that yet." *Ibid.* Notably, Professor Williams testified that he is familiar with the work of Dr. Craig Anderson, whose extensive research was relied upon by the Legislature, and "absolutely" considers him to be "an expert" in his field. *Ibid*. Professor Williams himself admitted that Dr. Anderson's General Aggression Model is "the most cited theory in [the] literature" existing in the field. *Ibid*.

Additionally, the United States District Court for the Western District of Washington reviewed similar research and came to the same conclusion as the California Legislature. In *Video Software Dealers Ass'n v. Maleng*, the court expressly found that existing evidence and expert opinions supported the finding that "the depictions of violence with which we are constantly bombarded in movies, television, computer games, interactive videos games, etc., have some immediate and measurable effect on the level of aggression experienced by some viewers and that *the unique characteristics of video games, such as their interactive qualities, the first-person identification aspect, and the repetitive nature of the action, makes video games potentially more harmful to the psychological well-being of minors than other forms of media*." 325 F. Supp. 2d 1180, 1188 (W.D. Wash. 2004) (emphasis added).

In *Maleng*, the court struck down the violent video game ordinance not because existing research did not support the state's finding that such games cause harm to minors, but because the court found that "there has been no showing that exposure to video games that 'trivialize violence against law enforcement officers' is likely to lead to actual violence against such officers."[14/] *Ibid*. The act at issue

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14. In *Maleng*, the ordinance prohibited distribution of video games involving depictions of the player killing, injuring, or otherwise physically harming someone who appears to be a law enforcement officer, but did not prohibit the "vile portrayals of mutilation and murder of other persons (often

in *Maleng* did not seek to prevent harm to minors, it sought to prevent minors from inflicting harm on law enforcement officers – an interest that is separate and distinct from that sought to be advanced by California. *See id.* at 1186. In the instant case, California is seeking to prevent harm to minors, not to prevent them from committing violent acts.

It is true that other courts have considered older research and, with little original analysis, found it insufficient to meet the strict scrutiny standard.[15/] And some courts have simply rejected outright the notion that it is ever appropriate for the state to assist parents in determining what expressive material is appropriate for their children. Judge Posner, for example, writing for the panel in *American Amusement Machine Ass'n v. Kendrick*, stated in dicta that "shield[ing] children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it." 244 F.3d at 577.

Judge Posner's dicta has no application here for two reasons. First, the

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women and minorities) unregulated and widely available to minors." *Id*. at 1189

15. *See generally Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *Entertainment Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005).

research relied upon in *Kendrick* was from 2000 and prior (when Dr. Anderson first began publishing on the effects of violent video games). Here, California had the benefit of over five years of additional research and publications on the subject. Second, the Act does not itself "shield" children from anything. The State is simply assisting parents in making the determination as to whether their children should be allowed to purchase and play the video games covered by the Act. The Act does not prohibit children from playing or possessing the covered video games. Rather, the Act simply takes that decision out of the hands of children and store clerks and places it in the hands of parents – where it properly belongs – by insisting that a parent or guardian make the purchase. Interestingly, Judge Posner failed to explain how helping parents determine for themselves whether their children should play games that are so violent that they appeal to a child's deviant or morbid interest can under any circumstances be "deforming" or "leave them unequipped to cope with the world." *Id.* at 577. Such dicta is entirely unsupportable and should be rejected by this Court.

Automatic aggressiveness, increased aggressive behavior, antisocial behavior, desensitization to violence, poor school performance, reduced activity in the frontal lobes of the brain – each represents a distinct harm to the developing minds of children. And prevailing social science points directly to violent video

games as a major culprit. Presented with such substantial evidence demonstrating the harm being caused, the Legislature could not simply ignore the deleterious effects these video games are having on children.

The Legislature's finding that the video games covered by the Act cause harm to children is supported by substantial evidence. It would have been irresponsible for the Legislature to refuse to act in the face of such overwhelming evidence.

C. The State Is Not Required To Perform Experiments On Children, Exposing Them To Patently Offensive Video Games That Appeal To A Deviant Or Morbid Interest In Children, In Order To Support The Act

Plaintiffs' foundational premise that no legislation in this area could be valid in the absence of proven effects in controlled physical experiments producing indisputable results is absurd. ER 1258. Never has a state been required to perform experiments on children in order to justify legislation seeking to protect them from harm. No responsible governing body would ever consider doing so. The very premise of the idea is absurd – inflict harm on children just to see for sure that the children will be harmed. But Plaintiffs have nonetheless steadfastly maintained in the court below that, absent such indisputable proof, the First Amendment prohibits the State from ever finding a compelling interest in this case. Their position is untenable, at best, and reveals that Plaintiffs would not accept *any*

practical level of justification as sufficient to limit their commercial pursuits.

Plaintiffs' position is also belied by existing Supreme Court precedent. To wit, it is beyond argument that the Supreme Court allows states to regulate children's exposure to sexual material despite the lack of indisputable (indeed, any) evidence of harm. *Ginsberg*, 390 U.S. 629. The law does not require a state to demonstrate a scientifically proven direct causal link between such exposure and the harm to be prevented – such as a child becoming prematurely sexually active from viewing the material. States are allowed to take action despite an absence of scientific certainty establishing a direct causal link between the expressive material and the harm to be prevented. *Id*. at 641. The law does not require states to use children as guinea pigs, exposing them to material that prevailing social science has found to cause harm, in order to justify legislation seeking to protect them from such harm.

Instead, the law recognizes that responsible, rigorous social science uses field experiments, cross-sectional correlation studies, longitudinal studies, and meta-analyses combining the results of other studies to form conclusions regarding causation. Indeed, entire scientific fields (e.g., astronomy) are based on correlational data obtained through observation. Children can be observed and

surveyed regarding the video games they play, their interactions with other children and teachers, and their school performance, and correlations can be obtained and professional opinions formed regarding the impact that playing violent video games has on children. From those conclusions, responsible social scientists can also form opinions and draw valid conclusions regarding the impact that playing ultra-violent video games, those covered by the Act, can have on children.

Absent intrusive, unethical, and possibly illegal experimentation on children, social science might never be able to discover a single environmental variable that causes automatic aggression, increased aggressive behavior, antisocial behavior, desensitization to violence, and poor school performance. Perhaps this environmental variable would remain elusive even if these experiments were performed. But such is not demanded by the First Amendment. All that is required is that the legislative body consider the available evidence, and draw reasonable inferences from the evidence considered. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994). The Supreme Court recognizes that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Ibid*. Once the legislative

body does so, courts "must accord substantial deference to the predictive judgments" of the legislative body. *Ibid.*

In the instant case, the Legislature considered the very best evidence available regarding the harmful effects that playing violent video games has on children. The Legislature's determination that assisting parents in combating the deleterious effects of playing the video games covered by the Act represents a compelling interest is supported by the prevailing view in the professional community. The Legislature was not required to demand laboratory experiments wherein children would be forced to play video games in which they are rewarded, for example, when their character bashes an image of a women with a shovel until the head pops off. ER 162; Physical Exhibit (VHS) "Video Game Violence Sampler." The First Amendment does not demand such an absurdity. It cannot be said that, in siding with the prevailing view of the healthcare community and myriad studies, the State's determination that action was necessary was not a reasonable inference based upon substantial evidence.

D. The Act Is Narrowly Tailored To Serve The State's Interest

The Act represents the least restrictive means through which the State can effectively achieve its goal of helping parents protect their children from harm caused by playing violent video games. In doing so, the Act is neither over- nor

under-inclusive in its reach.

1. The Act Only Applies To Video Games Because Of Their Unique Interactive Nature

Video games are uniquely interactive. The player controls the characters in first-person, causing them to shoot, stab, beat, stomp, run over, or ignite the opponent. Often this is the entire point of the game. The American Academy of Pediatrics advised the Legislature that "early studies on video games indicate that the effects of child-initiated virtual violence may even be more profound than those of passive media, such as television." ER 282. The California Psychiatric Association mirrored these concerns when it advised the Legislature that violent content in "interactive media" has "more significantly severe negative impacts than those wrought by television, movies, or music." ER 279-81. The California Psychological Association informed the Legislature that the research "point[s] overwhelmingly to a causal connection between media violence and aggressive behavior in some children" and that "[t]he interactive nature of video games exacerbates this problem." ER 278. And according to the American Psychological Association, "violent video games may be more harmful than violent television and movies because they are interactive, very engrossing and require the player to identify with the aggressor . . . ."[16/] The district court below erred as a matter of

16. http://www.apa.org/releases/videogames.html (last accessed 12/21/07).

law in holding that video games are not uniquely harmful to children given their interactive nature. ER 1368-69.

Plaintiffs likely would not dispute that video games, given their interactive nature, can be excellent mechanisms for teaching minors a variety of subject matters. The Legislature considered the research that supports this conclusion.[17/] But just as the interactive nature of video games makes them exemplary teachers in positive contexts, it is this interactive nature that also posses a special risk to minors when the games contain extreme violence.

Focusing the Act on interactive video games is the only means through which the Legislature could attempt to remedy the exacerbated harm caused thereby. Although the Legislature was presented with evidence that extreme violence in other forms of media can also cause harm to minors, substantial evidence supports the determination that the interactive nature of video games poses a special risk. The Legislature was more than justified in focusing on this narrow medium of violent material. As the Supreme Court has itself recognized, "differences in the characteristics of new media justify differences in the First

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17. ER 363-77 (Gentile & Gentile, *Violent Video Games as Exemplary Teachers*, paper presented at Biennial Meeting of the Society for Research in Child Development, April 9, 2005) (concluding that playing violent video games leads to greater hostile attribution bias and increased aggressive behaviors -- "exemplary" teaching of aggression).

Amendment standards applied to them." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969).

2. The Act Properly Covers Only A Narrow Category Of Video Games

It is possible that certain violent video games not covered by the Act also have deleterious effects on children. However, by definition such games do not "appeal to a deviant or morbid interest of minors," or are not "patently offensive to prevailing community standards," or they actually possess some "literary, artistic, political, or scientific value for minors." Civ. Code section 1746(d)(1)(A). It was not improper or under-inclusive for the Legislature to determine that the harm caused by games meeting the Act's definition outweighed any possible benefit to children playing them, whereas the potential benefit of games not meeting the definition may outweigh the harm caused thereby. The Legislature was careful not to limit the ability of children to purchase expressive material that possesses some redeeming qualities for children. Plaintiffs cannot persuasively criticize the Legislature for not doing *more* to protect the children.

3. The Act Does Not Restrict Adult Access To The Covered Games

The Act poses none of the problems raised in prior Supreme Court precedent where the government sought to regulate indecent speech as to minors, but also prohibited adult access to the covered material. *See United States v.*

Playboy Ent. Group, 529 U.S. 803, 812-17 (2000) (regulation of "signal bleeding" of indecent programing invalid because it also prohibited adult access); *Sable Communications, supra*, 492 U.S. at 127 (ban on "dial-a-porn" to protect minors struck down for prohibiting adult access to protected speech). Here, the Act is specifically limited to children. Adult access to video games remains unimpeded.

Moreover, in those instances where parents or guardians desire their children to have access to such games, they remain free to purchase the games for the child. By allowing for this safe harbor, the Act hits only the specifically desired target – children whose parents do not want them exposed to extremely violent video games. Alternative avenues for children's access to the covered games, facilitated by parental involvement, are written into the Act. Thus, any burden placed on children is minimal, and no burden is placed on adults.

4. Minors Under Age 18 Are The Proper Target Of The Act

As discussed above in section I. A, the Supreme Court has recognized the fundamental differences between adults and minors under 18. The Supreme Court accepted the fact that there is a "lack of maturity and an underdeveloped sense of responsibility" in those under 18 which "often result in impetuous and ill-considered actions and decisions." *Roper v. Simmons*, 543 U.S. at 569 (internal quotation omitted). The Supreme Court found that those under 18 "are more

vulnerable or susceptible to negative influences and outside pressures" and "have less control, or less experience with control, over their own environment." *Ibid*.

These fundamental differences between adults and those under 18, recognized as controlling in *Roper*, are no less relevant here in the context of protecting minors from harm. As the Supreme Court recognized in *Roper*, "[d]rawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Id*. at 574. Here, the Legislature properly drew a bright line in order to carry out its responsibility to protect children under 18 from harm.

5. No Less Restrictive Means Exist To Achieve The State's Compelling Interest

The most effective way to help parents ensure their children are not able to purchase harmful violent video games without their consent is to require, through threat of civil penalty, that retail store clerks not sell covered games (those clearly labeled with an "18" on the front cover as required by the Act) to children under 18. Existing industry ratings and self-regulation carry no similar penalty for

violation.

The Entertainment Software Ratings Board (ESRB) self-regulates ratings and sales of video games. ER 94-95. Video games receive ratings from "EC" for Early Childhood to "AO" for Adults Only. *Id*. at 95. The ESRB believes games rated "AO" contain "content that the ESRB suggests should only be played by users 18 and older." *Id*. at 96. But the presence of industry self-regulation has limited relevance in this case. The self-imposed ratings simply do not carry the force of a state law, the violation of which subjects the offender to civil penalty. The ESRB's ratings are mere "suggestions" to retailers. *Ibid*. Indeed, the Legislature considered substantial evidence demonstrating that the effectiveness of the video game industry's so-called self-regulation is simply unacceptable.

The Senate Judiciary Committee analysis raised the issue, stating, "[t]he author acknowledges that the ESRB rating system is currently in place, but argues that its implementation has been unsatisfactory." ER 122. In fact, the Legislature considered that "[r]ecent studies show that the voluntary rating and enforcement system implemented by self-regulatory associations or entertainment producers have had limited success on decreasing youth access to Mature (M) rated video games." ER 128. They were also made aware that "[d]uring 2004, the National Institute on Media and the Family had children between the ages of seven and

fourteen attempt to purchase M-rated games in thirty-five stores. Youth succeeded 34% of the time. While the overall purchase rate was 34%, boys as young as seven were able to buy M-rated games 50% of the time." *Ibid*. The Legislature was also aware that "a nationwide undercover survey of stores completed by the Federal Trade Commission in 2003 corroborated these findings. In this study, 69% of unaccompanied 13 to 16-year-olds purchased M-rated games and only 24% of cashiers asked the youth's age." *Ibid*.

The ineffectiveness of the industry's attempts to self-regulate should come as no surprise to Plaintiffs. According to a Federal Trade Commission ("FTC") report to Congress, cited to the Legislature in the Senate Judiciary Committee analysis, the industry specifically markets M-rated (Mature) games to minors.[18/] The FTC report states, "[a]ccording to industry data, nearly 40% of M-rated games purchased in 2002 were for children under 17." ER 798. Although Plaintiffs claimed below that they have implemented new enforcement provisions, the FTC report concluded that "[t]he industry is actively enforcing those standards and penalizing those companies found to be in noncompliance. Yet those standards permit, and, in fact, industry members continue to place, advertisements in television and print media with substantial youth audiences." ER 799.

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18. ER 765-857 (FTC July 2004 Report, at 791-99).

The Legislature was not willing to simply maintain the status quo, hoping that purported industry efforts would eventually eliminate children's access to extremely violent video games. The Act is thus narrowly tailored to ensure that, through threat of civil penalty, only with parental knowledge will children have access to the most extremely violent video games. No less restrictive means of achieving this goal exists.

V.

THE TERMS OF THE ACT ARE NOT VAGUE, BUT PROVIDE PLAINTIFFS A REASONABLE OPPORTUNITY TO KNOW WHAT IS BEING PROHIBITED

Plaintiffs' claim that the terms used by the Act do not sufficiently put them on notice of what is required of them fails as a matter of law. ER 17. A law's terms are sufficiently precise where they provide "a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1979); *see also Daily v. Bond*, 623 F.2d 624, 626 (9th Cir. 1980) (a statute is not unconstitutionally vague if it gives fair warning of the proscribed conduct).

In reviewing a commercial regulation for facial vagueness, the principal inquiry is whether the law affords fair warning of what is proscribed. *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489 (1982) (law prohibiting sale of

certain drug paraphernalia contained some ambiguities, but was sufficiently clear to provide notice and thus not impermissibly vague). In *Village of Hoffman Estates*, the Supreme Court recognized that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action . . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Id.* at 498-99 (footnotes omitted).

Here, the key terms of the Act are defined with precision such that a person of ordinary intelligence will understand their meaning and application. An ordinary person, using common sense, is capable of determining which games fall into the "violent video game" category. The Act's definitions provide in relevant part:

> (1) "Violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:
> (A) Comes within all of the following descriptions:
> (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.
> (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.
> (iii) It causes the game, as a whole, to lack serious literary, artistic,

political, or scientific value for minors.

Civ. Code section 1746(d). The Act provides a secondary definition, but only one definition need be met to fall within the parameters of the Act. *Ibid*.

A person of ordinary intelligence is capable of playing or viewing a video game and determining if the level of violence available to the player meets the definition contained in the Act. Does the game allow a player to kill, maim, dismember, or sexually assault an image of a human being?[19/] Would a reasonable person, considering the game as a whole, find that it appeals to a deviant or morbid interest of minors? Is the game patently offensive to prevailing standards in the community as to what is suitable for minors? And does the violence cause the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors? A person of ordinary intelligence can surely apply this straight forward test to any video game. The definition is simply a variation of the established test for obscenity.

Importantly, the video game industry *already* independently reviews and rates the level of violence in video games for all platforms. ER 93-102 (Lowenstein Dec.) For more than ten years the ESRB has had a rating system for

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19. The district court held that the term "image of a human being" is too broad. ER 1367. But a person of ordinary intelligence, and especially the body that already rates video games, is capable of determining whether the character at issue in a video game represents an image of a human being.

video games, and the rating system offers actual ratings for age appropriateness of content and short descriptive phrases. *Id*. at 95. Under this rating system, the ESRB rates certain games as "AO" (Adults Only), and games with this designation contain material that the ESRB suggests should only be played by users 18 and older. *Ibid*. In making these determinations, the ESRB states that "AO" games "have content that should only be played by persons 18 years and older. Titles in this category may include prolonged scenes of intense violence and/or graphic sexual content and nudity." *Id*. at 103-05. The ESRB defines "intense violence" as "graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons, and depictions of *human injury* and death." *Id*. at 104 (emphasis added). A distinction is made by the ESRB between "intense violence" and "violence;" the latter being defined as "scenes involving aggressive conflict." *Ibid*. Thus, the industry is already reviewing and rating video games based on violent content. The requirements of the Act may require a similar process of reviewing and rating the video games, based on the Act's own definitions and guidelines.

The definitions in this statute require common sense judgment. The parameters of the statute are sufficiently clear to give notice to an ordinary person applying the Act. Mathematical precision in the defining terms is not required to

meet the constitutional standard, and a certain amount of flexibility in the statute is permissible. Of course, "[i]t will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question.'" *Grayned*, 408 U.S. at 110-11 n. 15 (internal citations omitted). But the terms used in California's violent video game law are ones with a common, straightforward understanding and meaning. Therefore, as a matter of law, the Act's definition of violent video game is not impermissibly vague.

VI.

THE ACT'S LABELING REQUIREMENT IS PROPER

The Act provides that each covered video game "that is imported into or distributed into California for retail sale shall be labeled with a solid white '18' outlined in black. The '18' shall have dimensions of no less than 2 inches by 2 inches" and "shall be displayed on the front face of the video game package." Civ. Code section 1746.2. Because the Act's labeling requirement impacts only the commercial speech aspect of the covered video games, it is subject to and survives judicial scrutiny under *Zauderer v. Office of Disciplinary Counsel of The Supreme Court of Ohio*, 471 U.S. 626 (1985).

In *Zauderer*, the Supreme Court upheld a requirement that attorneys advertising services on contingent-fee basis disclose that clients will have to pay

costs even if their lawsuits are unsuccessful. *Id.* at 652-53. The Court held that, in reviewing government mandated disclosure requirements of factual information in advertising, the "constitutionally protected interest in not providing any particular factual information in . . . advertising is minimal." *Id.* at 651. The Court set forth the appropriate level of judicial review for such disclosure requirements on commercial speech: "we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Ibid.* And when "the possibility of deception is . . . self-evident . . . we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.'" *Id.* at 652-53 (internal citation omitted). This standard of review is appropriate because "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . . ." *Id.* at 651.

By its plain language, the labeling provision of the Act applies only to covered video games that are "for retail sale" in California. Civ. Code § 1746.2. The cover of a video game displayed for retail sale is the prime advertising space which easily communicates messages to potential consumers and retailers. "[A]dvertising pure and simple" constitutes commercial speech for purposes of

First Amendment analysis. *Zauderer*, 471 U.S. at 637. Because the Act's labeling provision impacts the purely commercial aspect regarding retail sales of the covered video games, it is subject to review under *Zauderer*.

The Act's labeling requirement serves the self-evident purpose of communicating to consumers and store clerks that the video game cannot be legally purchased by anyone under 18 years of age. This requirement is necessary, in part, because of the misleading effect of the ratings included on the cover of video games by the industry itself. The cover of video games sold in California presently display the ESRB's independent, self-imposed ratings. ER 94-96. Such ratings only reflect the industry's recommendation of the appropriate age group of the particular games and do not communicate any factual information regarding the legality of the sale of the game to children. It is self-evident that individuals and store clerks could be deceived by the ESRB rating appearing on the cover of a game subject to the Act's restrictions, believing that an “M” or “AO” rating can legally be sold to children. Absent the “18” label appearing on the cover of such games, consumers and store clerks would have essentially no way of knowing whether or not a child could legally purchase the game. Thus, the labeling requirement is reasonably related to the State's interest in preventing deception to consumers and retailers, and thus survives the applicable judicial scrutiny.

VII.

THE ACT DOES NOT DENY PLAINTIFFS EQUAL PROTECTION OF THE LAW

Plaintiffs' claim that the Act violates the Equal Protection Clause because it regulates only the sale of violent video games and not other forms of violent media is entirely without merit. ER 18. The district court erred as a matter of law in denying the State Defendants summary judgment on this claim.

The Supreme Court "has long recognized that each medium of expression presents special First Amendment problems." *F.C.C. v. Pacifica Foundation*, 438 U.S. at 748. Various forms of media are necessarily different than others. Indeed, the Supreme Court has frequently upheld differential treatment on the sound theory that a legislature may deal with one part of a problem without addressing all of it at the same time. *Erznoznik v. City of Jacksonville*, 422 U.S. at 215; *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488-89 (1955). In *Williamson*, the Supreme Court recognized that "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think . . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson*, 348 U.S. at 489.

A legislative enactment that does not create a suspect classification or impinge upon a fundamental right need only be shown to bear some rational relationship to a legitimate government interest. *City of Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1989) (upholding, under rational basis review, dance hall regulation limiting use to patrons between 14 and 18 years of age). In the instant case, the Act creates no suspect classification and does not implicate a fundamental right. The right to sell violent video games to children cannot be considered a fundamental right under any circumstances. Therefore, the Act is to be reviewed under rational basis.

The Act's requirement that covered video games must be sold only to persons 18 or older plainly bears a rational relationship to the State's legitimate interest in protecting children from the harmful effects of playing the covered games. Moreover, even if the Act were subject to heightened judicial scrutiny under the Equal Protection Clause, it is constitutional for the same reasons set forth in section IV, above. Therefore, as a matter of law, the Act does not violate Plaintiffs' right to equal protection of the laws.

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CONCLUSION

For all of the foregoing reasons, the Act survives judicial review in all respects. Therefore, the district court's order granting summary judgment in favor of Plaintiffs was improper as a matter of law and should be reversed by this Court, and summary judgment on all causes of action in favor of the State Defendants should be granted.

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)