No. 08-1448

In the Supreme Court of the United States

ARNOLD SCHWARZENEGGER, Governor of the State of California, and EDMUND G. BROWN JR., Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

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

BRIEF OF FIRST AMENDMENT SCHOLARS (PROFESSORS COLE, KARST, POST, REDISH, VAN ALSTYNE, VARAT AND WINKLER) AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF FIRST AMENDMENT SCHOLARS IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are law professors who have written about the speech clauses of the First Amendment.[1] They teach at geographically diverse institutions and their perspectives on many issues are equally diverse. They share the conviction, however, that the First Amendment's free speech protections should not be undermined by imprecise legislation that responds to passing *causes célèbres* but that can have chilling effects that long outlast political and cultural fashion.

The *amici* are listed below along with their academic affiliations, which are included for informational purposes only. The views expressed in this brief are those of the *amici* alone, and do not necessarily reflect the views of the institutions where they teach.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. See S. Ct. R. 37.6. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The sponsors and defenders of the California statute restricting the sale of "violent video game[s]" to minors, CAL. CIV. CODE §§ 1746-1746.5 ("the Violent Video Games Act"), maintain that the law escapes invalidity because it mechanically mimics the terms of minor-specific obscenity laws that have been upheld against void-for-vagueness challenges. But obscenity standards applicable to depictions of sexual conduct and excretory functions cannot constitutionally be transplanted to the culturally far different context of simulated violence.

The Violent Video Games Act borrows language approved in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), which upheld a law that restricted the distribution of sexually themed material to minors. But the Court's opinion in *Ginsberg* rested on the premise that there was a broad and longstanding social consensus about what sort of sexually themed material was unsuitable for minors. It was this consen-

sus that clarified the facially vague terms of the *Ginsberg* statute sufficiently to meet the constitutional standards prevalent at the time.

No such broad and longstanding consensus exists as to materials that depict violence. Thus, even if the "prurient interest," "patent offensiveness," and "serious value" tests are clear enough under existing law—perhaps just barely clear enough—to pass muster for sexually themed material, similar formulations are not clear enough when it comes to portrayals of violence.

Obscenity standards are not easy to define and apply with predictability and precision, even when applied to sexually themed speech. But deprived of their legal and cultural context, and instead applied to depictions of violence, the words used in the legal tests for obscenity provide no practical guidance.

Sellers of video games cannot adequately predict whether a game will be found to "appeal[] to a deviant or morbid interest of minors," as opposed to an acceptable interest in competition and fictional entertainment, perhaps coupled with an interest in dark humor. CAL. CIV. CODE § 1746(d)(1)(A)(i). They cannot adequately predict whether the game will be found to be "patently offensive to prevailing standards in the community" with regard to which cartoonish (and often absurdly exaggerated) depictions of violence are "suitable for minors." *Id.* § 1746(d)(1)(A)(ii). And they certainly cannot adequately predict whether a game—one that may have programmed into it many hours of potential twists and turns that may or may not be exposed in a gameplayer's first-person narrative—will be found, "as a whole, * * * [to] lack serious literary, artistic, politi-

cal, or scientific value for minors." *Id.* § 1746(d)(1)(A)(iii).

Nor can video game creators or distributors simply transfer the common understanding underlying *Ginsberg* and this Court's obscenity jurisprudence to give meaning to the terms of the Violent Video Games Act. American culture has long treated depictions of violence and depictions of sex quite differently. Indeed, the differences are especially pronounced when it comes to the access of minors to materials with violent themes and those with sexual themes. Accordingly, terms that this Court has considered sufficiently definite in the context of depictions of sexual conduct remain vague when separated from their roots and applied to depictions of violence.

ARGUMENT

A statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "provide explicit standards for those who apply [it]." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). "[A] more stringent vagueness test" applies to statutes that "interfere[] with the right of free speech." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). This principle fully applies when the restricted audience consists of minors. As this Court recognized in voiding a different statute aimed in part at limiting minors' exposure to violent expression, "'it is * * * essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law

and those that administer it will understand its meaning and application.'" *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 689 (1968) (quoting *People* v. *Kahan*, 206 N.E.2d 333, 335 (N.Y. 1965) (Fuld, C.J., concurring)).

By parroting obscenity standards, the Violent Video Games Act indirectly seeks to draw clarity from the "universal judgment that obscenity should be restrained." *Roth* v. *United States*, 354 U.S. 476, 485 (1957). But no such "universal judgment" about violent speech exists. Accordingly, under this Court's First Amendment precedents, the Act does not provide the constitutionally mandated measure of fair notice.

A. Current Obscenity Jurisprudence Relies on the Existence of a Social Consensus Regarding Depictions of Sexual Conduct.

This Court and courts throughout the United States have long grappled with how to define obscenity. See Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 311-325 (2008) (tracing development of obscenity law in the United States); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-16, at 906-912 (2d ed. 1988); William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960). Indeed, as one scholar observed, "between 1966 and 1973, the Court disposed of thirty-one cases" by "summarily revers[ing], via per curiam decisions, any conviction that at least five Justices, applying their separate tests, found to be unconstitutional." Eric Jaeger, *Obscenity and the Reasonable Person: Will He "Know It When He Sees*

It?" 30 B.C. L. REV. 823, 839-840 (1989). The resulting obscenity standard—which extends only to depictions of sexual and excretory conduct (see *Miller* v. *California*, 413 U.S. 15, 24-25 (1973))—relies on this history and the development of a social consensus to give meaning to its terms.

The petitioners thus misplace their wholesale reliance on *Ginsberg*. In *Ginsberg*, this Court upheld a statute that prohibited the sale of depictions of nudity, sexual conduct, and sadomasochistic abuse that "(i) predominantly appeal[ ] to the prurient, shameful or morbid interest of minors, and (ii) [are] patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) [are] utterly without redeeming social importance for minors." 390 U.S. at 646. That law added "of minors" (or a similar phrase) to each element of the then-existing obscenity standard, a standard soon thereafter modified in *Miller*.[2] We use the term "the *Ginsberg / Miller* formula" to refer to the rote addition of "of minors" (or the like) to each element of the *Miller* test in order to regulate the sale of sexually explicit material to minors. See, *e.g.*, *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 387 (1988) (quoting addition of "to" or "for juve-

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[2] "The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24 (internal quotation marks and citations omitted).

niles" to each *Miller* element in Va. Code § 18.2-390(6) (1982)).

The Court upheld the *Ginsberg* statute against void-for-vagueness challenge on the ground that "the New York Court of Appeals construed [the terms of the statute] to be 'virtually identical to the Supreme Court's most recent statement of the elements of obscenity'" in *Roth*, *supra*, and that the statute therefore "gives 'men in acting adequate notice of what is prohibited[.]'" *Ginsberg*, 390 U.S. at 643 (quoting *Roth*, 354 U.S. at 492). And in *Roth*, the Court concluded that the obscenity test "'conveys sufficiently definite warning as to the proscribed conduct when measured by *common understanding and practices*.'" 354 U.S. at 491 (quoting *United States* v. *Petrillo*, 332 U.S. 1, 7-8 (1947)) (emphasis added).

The Court likewise quoted *Roth*'s "common understanding and practices" language in concluding that the test enunciated in *Miller* "provide[d] fair notice" of what was illegal. 413 U.S. at 27 & n.10. And the Court relied on that language in *Hamling* v. *United States*, 418 U.S. 87 (1974), when it concluded that pre-*Miller* obscenity law was not unconstitutionally vague. *Id.* at 110-11.

Thus, the current law of obscenity-as-to-minors depends for its meaning—and for its constitutionality—on the existence of a "common understanding" regarding what depictions of sexual conduct meet the elements of the obscenity standard for adults and as a consequence are entirely unprotected. That "common understanding" also provides guidance as to the constitutional limits on efforts to draw the line between material suitable for minors and that suitable only for adults. But there is no "common understanding" with respect to what (if any) depictions of vi-

olence would meet the elements of the Violent Video Games Act's standard as to adults (that is, without the *Ginsberg*-inspired qualifiers), much less for minors. Indeed, with few and transitory exceptions (such as the late-Victorian reaction to explicit crime literature, and the comic-book hysteria of the early 1950s), the regulation of minors' exposure to depictions of violence has been a matter for families rather than the States.

B. The *Ginsberg / Miller* Formula Is Made More Administrable Precisely Because of Its Proximity to the *Miller* Test.

The *Ginsberg / Miller* formula is also made more predictable by its proximity to the *Miller* test. "The statute at issue in *Ginsberg* did not create an entirely new category of unprotected speech * * * ." *Video Software Dealers Ass'n* v. *Maleng*, 325 F. Supp. 2d 1180, 1186 (W.D. Wash. 2004). Rather, the formula "simply adjusts the definition of obscenity" to assess "the appeal of this type of material * * * in terms of the sexual interests of * * * minors." *Ginsberg*, 390 U.S. at 638 (citations and internal quotation marks omitted). Material that is obscene as to minors is more or less near-obscene material, defined by how closely it approaches speech that would be obscene for adults. Thus, the *Ginsberg* "statute was not unconstitutionally vague" precisely because it "merely incorporated a modified form of the adult test of obscenity previously enunciated by the Court"—a test that was sufficient to justify banning speech altogether. *Freedom of Speech and Association: Obscenity*, 82 HARV. L. REV. 124, 124-26 (1968).

But here there is no similar test from which to draw meaning. No test permits the government to

categorically prohibit any expressive material as too violent even for adults. While the obscenity-as-to-minors standard rests on its relation to a category of speech that falls beyond First Amendment protection altogether, those categories are few and well-established. See *United States* v. *Stevens*, 130 S. Ct. 1577, 1584 (2010) (listing obscenity, defamation, fraud, incitement, and speech integral to criminal conduct). Indeed, because those "historic and traditional categories" are "long familiar to the bar," this Court has declined to expand the list to include categories without the same social and legal grounding. *Ibid.* Depictions of violence are not among those "historic and traditional categories" of speech that can be prohibited outright, so that there is no point of reference that could serve as a baseline for an expanded prohibition as to minors.

As a result, the people whom the Violent Video Games Act seeks to regulate entirely lack benchmarks for deciding whether a particular work is unsuitably violent for minors. And this is so even if their neighbors who sell sexually themed material have a sufficient basis for deciding whether that material is unsuitably sexual for minors.

Under this Court's current jurisprudence, where there is a historic basis for an exception to free speech rights along with a continuing tradition of community standards that define a category of speech that constitutionally may be abridged, the First Amendment may tolerate the difficult line-drawing and less-than-perfect notice associated with the law of obscenity. But the Constitution cannot accommodate similarly obscure boundaries between protected and potentially unprotected speech with respect to violence, as to which there is no historical

basis for an exception, and as to which there is no comparable tradition of community standards.

C. The Current Obscenity Standard Cannot Be Extended to the Culturally Distinct Context of Depictions of Violence.

1. *There Is No Developed Doctrine Supporting a Complete Ban on Depictions of Violence That Could Sustain Application of the* Ginsberg / Miller *Formula When Detached From Its Firm Roots in Obscenity Doctrine.*

By contrast with California's effort here to transplant the *Ginsberg / Miller* formula to the context of fictional portrayals of violence, this Court has recognized that "the *Miller* definition" itself is limited to "'sexual conduct.'" *Reno* v. *ACLU*, 521 U.S. 844, 873 (1997) (quoting *Miller*, 415 U.S. at 24). As the Seventh Circuit recognized, "[t]he notion of forbidding not violence itself, but pictures of violence, is a novelty"—at least where tests similar to the *Ginsberg / Miller* formula are concerned—"whereas concern with pictures of graphic sexual conduct is of the essence of the traditional concern with obscenity." *American Amusement Machine Ass'n* v. *Kendrick*, 244 F.3d 572, 575-76 (7th Cir. 2001).

This Court recognized a related point in striking down a prohibition on depictions of animal cruelty in *Stevens*: an ingrained social tradition of prohibiting offensive conduct does not necessarily reflect a similar, established social consensus supporting the prohibition of entirely fictional depictions of that conduct—much less what amount to well-rendered cartoon depictions. With violence to humans as with

cruelty to animals, "despite widespread bans on" the conduct itself, "there is no tradition, much less a common standard, excluding 'depictions' of" the same conduct "from the category of protected speech." *Stevens*, 130 S. Ct. at 1584. The sole exception is when (as in child pornography that uses real children) "the creation of the speech is itself the crime" that is depicted in it. *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 254 (2002). See *New York* v. *Ferber*, 458 U.S. 747, 759 (1982) (finding constitutional a prohibition of child pornography that uses real children and thus records actual crime).

Thus, it might be permissible to prohibit the "snuff" films that purportedly document actual murders that were solicited and committed in order to create the films (at least if the murders were real).[3] Those films would fall within the established category of "speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Stevens*, 130 S. Ct. at 1586 (quoting *Ferber*, 458 U.S. at 761-62, and *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490, 498 (1949)). But "there is no indication that [depictions of violence] have ever been excluded from the protection of the First Amendment or subject to

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[3] Compare Catharine A. MacKinnon, *Commentary: Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 33 n.61 (1985) (noting 1983 prosecution for snuff film) and 130 CONG. REC. 29169 (1984) (statement of Senator Specter introducing the Pornography Victims Protection Act) ("In the movies known as snuff films, victims sometimes are actually murdered."), with 2 JOSEPH W. SLADE, PORNOGRAPHY AND SEXUAL REPRESENTATION: A REFERENCE GUIDE 641 (2001) ("Frenzied searches and huge awards offered by the FBI and the Adult Film Association failed * * * to turn up any authentic snuff films * * *.").

government regulation," *Maleng*, 325 F. Supp. 2d at 1185, when the expression "creates no victims by its production." *Free Speech Coalition*, 535 U.S. at 250.[4] That is surely the case with animated depictions of violence in video games; when only virtual renderings of conduct are at issue, "there is no underlying crime at all." *Id.* at 254.

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[4] Justice Frankfurter's dissent in *Winters* v. *New York*, 333 U.S. 507 (1948), reported that in 1948 about half the states had laws banning the distribution of "any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime," *id.* at 521, though in practice they "ha[d] lain dormant for decades," *id.* at 511. Yet this uneven (and unenforced) series of prohibitions stands in sharp contrast with obscenity laws, which were present in almost all the states, *Roth*, 354 U.S. at 485 & n.16, and were enforced far more often than the crime story laws were, *Winters*, 333 U.S. at 513. Second, the Court held in *Winters* that the laws were themselves unconstitutionally vague, *id.* at 518-19, partly because they were *not* limited to sexually themed materials, *id.* at 520. See also *Interstate Circuit*, 390 U.S. at 681 (likewise striking down, again on vagueness grounds, a city ordinance that sought to regulate films that "[d]escrib[e] or portray[] brutality, criminal violence or depravity in such a manner as to be, in the judgment of the [Motion Picture Classification] Board, likely to incite or encourage crime or delinquency on the part of young persons"). And third, whatever social currents between 1880 and 1950 may have been reflected in the unconstitutional definitions in the crime-story statutes, the statutes' decades-long dormancy underscores their failure to embody abiding attitudes toward violent expression. Those laws, and the comparatively brief and inconsistent anti-violence passions they reflect, provide no practical guidance to a game designer or vendor confronted with the very different definition in the Violent Video Games Act today.

In any event, the prohibition of speech that is integral to criminal conduct bears no analytical relation to the obscenity-based standards in the Violent Video Games Act. And because there is no established history of altogether prohibiting depictions of violence, American society has not yet developed a "common understanding" of what depictions of violence violate community standards, appeal to a deviant or morbid interest, or lack serious value. Nor is there reason to believe that any consensus on objectionable depictions of sexual conduct can give adequate guidance about what depictions of violence are objectionable.

2. *American Law And Culture Treat Depictions of Violence Much Differently From Depictions of Sex.*

In fact, American culture accords radically different treatment to depictions of violence and depictions of sex. Few parents, for example, would strongly disapprove of their children's playing "Cops and Robbers"; but few would countenance their children's playing "Honeymooning Couples In The Bedroom," even if all the sex were as simulated as the violence in "Cops and Robbers." Indeed, children's theaters mount productions of the musical "Sweeney Todd"—where the protagonist-barber slits his customers' throats and bakes their flesh into meat pies—not just in New York or San Francisco, but in Fresno, California and Columbus, Ohio. See Donald Munro, *A Razor-sharp Production: Children's Troupe Takes on the Chilling "Sweeney Todd,"* FRESNO BEE 19, 2008 WLNR 14886164 (Aug. 8, 2008); Margaret Quamme, *Young Cast Accents Drama in Line with Bleak Subject*, COLUMBUS DISPATCH 08D, 2008 WLNR 13083269 (July 12, 2008) (discussing Colum-

bus Children's Theatre's production of Sweeney Todd). Yet no children's theater would produce a work with overtly sexual themes—much less one involving simulated sex.

Likewise, Hollywood movies—including ones rated PG-13 or below—have long been much more tolerant of depicting violence than sex. Even in the era of routine censorship by industry codes, religious organizations, and local governments, films depicting violence were rarely banned or censored. See TOM POLLARD, SEX AND VIOLENCE: THE HOLLYWOOD CENSORSHIP WARS 184 (2009). "[T]he movie industry's permissive approach to violence and its strict approach to sex" may reflect "the split 'frontier mentality' relating to violence and the 'puritan streak' relating to sex in the American psyche." Jacob Septimus, *The MPAA Ratings System: A Regime of Private Censorship and Cultural Manipulation*, 21 COLUM.-VLA J.L. & ARTS 69, 84 (Fall 1996) ("For European audiences the taboo is violence while sex is seen as acceptable, while for American audiences the taboos are vice versa.").

Similarly, in the *Ginsberg* era, the common assumption was that it was shameful and morbid even for adults to *watch or read* about sexual behavior that would be perfectly proper for them to *engage in*: A film graphically depicting a married couple having sex may well have been obscene in many jurisdictions, though the depicted act itself was legal (and of course socially necessary). See, *e.g.*, *State* v. *Lebewitz*, 202 N.W.2d 648, 649-650 (Minn. 1972) (affirming convictions of theater owner and manager for "exhibiting an obscene motion picture entitled 'The Art of Marriage,'" which depicted "actual sexual intercourse demonstrated by two nude allegedly mar-

ried male and female couples"); David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 53-54 (1974) ("It does not follow, of course, that obscene depictions are only of obscene acts. Normal hetero-sexual intercourse between a married couple is not typically viewed as obscene; but a public depiction of such intercourse would, by some people, be viewed as obscene."). But throughout American history, American society has had comparatively little objection to adults' viewing or reading about horrific violent behavior—such as piracy, torture, or murder—that would be criminally, even capitally punished, if engaged in.

Indeed, the one category of crime that until recently has been treated gingerly in American press accounts is sex crime. See HELEN BENEDICT, VIRGIN OR VAMP: HOW THE PRESS COVERS SEX CRIMES 27, 25 (1992) (up until the 1950s, "the press ran few stories about * * * sex crimes," unless "they occurred as the supposed reason for a lynching"). As a leading film critic observed, "those who believe in censorship are primarily concerned with sex, and they generally worry about violence only when it's eroticized." PAULINE KAEL, *Stanley Strangelove, in* DEEPER INTO MOVIES 373, 377 (1973).

And so petitioners and their *amici* predictably try to color the Court's perception of the broad and vague statute at issue by framing the objectionable content addressed by the Violent Video Games Act in a way that resonates with the *Miller* obscenity test's focus on sexual and excretory content. They cite scenarios in one game that involve the "[s]laughter [of] nude female zombies" (*Amicus* Br. of Louisiana, *et al.*, at 2), or the option of urinating on victims who

have been set afire (Pet. Br. 3). In doing so, they follow a well-worn course for proponents of speech-restricting statutes that are not phrased in terms of obscenity; the proponents invoke sexual elements in order to make the ban seem more familiar and acceptable to this Court's First Amendment jurisprudence. Cf. *Stevens*, 130 S. Ct. at 1591 (noting that "the Executive Branch announced that it would interpret" a statute prohibiting depictions of animal cruelty to apply only to depictions "'designed to appeal to a prurient interest in sex'") (quoting Statement by President William J. Clinton upon Signing H.R. 1887, 34 Weekly Comp. Pres. Doc. 2557 (Dec. 9, 1999)).

But of course the Violent Video Games Act is not limited to depictions of fictional violence with sexual overtones. And the overlap between sex and violence in some expressive works does not change the substantial differences in how depictions of sex and violence have been treated by American law and society.

One reason for the differing social and legal attitudes towards sexual content and violent content may be that people often watch or read pornography as a form of sexual stimulation—what one leading First Amendment scholar characterizes as a "sex aid" or "sexual surrogate." FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 181-82 (1982). The same may be true of games in which one pretends to engage in sexual acts. By contrast, watching or reading about violent acts, or playing games in which one pretends to engage in violent acts, is not itself a form of violence.

Of course, some think that the American cultural difference in attitudes towards sex and violence is

unwise. People who take this view may believe that society *should* be patently offended by depictions of violence when those are shown to minors.

But what is important under this Court's analysis is that American society *in fact* widely accepts, and has long accepted, many depictions of violence in contexts where it has not accepted similar depictions of sex. So even if there is a shared understanding of what sexually themed material ought not be distributed to minors—a shared understanding sufficient to give relatively clear meaning to laws that focus on sexually themed material—no similar understanding can sufficiently clarify laws that try to adapt the *Ginsberg/Miller* formula to depictions of violence.

3. *The Differing Cultural Treatments of Violence And Sex Exacerbate the Unconstitutional Vagueness of Efforts to Apply a* Miller*-based Test to Animations Depicting Violence.*

This divergence between attitudes towards depictions of sex and attitudes towards depictions of violence helps explain the problems in applying the elements of the *Miller* obscenity test to depictions of violence. Consider the "morbid interest" prong. Of course, depictions of violence are not objectionable because of an appeal to the "prurient interest" mentioned in *Miller*—the "'shameful or morbid interest in nudity, sex, or excretion.'" *Roth*, 354 U.S. at 487 n.20 (quoting A.L.I., Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957)). As a result, the Act simply replaces "prurient" with "deviant or morbid." CAL. CIV. CODE § 1746(d)(1)(A)(i). See generally Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL

RTS. J. 107, 174 (1994) (advocating restrictions on depictions of violence and suggesting that, "[s]ince 'prurient' seems to have developed an attachment to sexual activities, * * * the best approach might be to substitute 'morbid or shameful' for 'prurient.'").

But the term "morbid interest" has "no clear meaning" in the context of violent video games. *Entertainment Software Ass'n* v. *Foti*, 451 F. Supp. 2d 823, 836 (M.D. La. 2006); *Entertainment Software Ass'n* v. *Granholm*, 426 F. Supp. 2d 646, 656 (E.D. Mich. 2006). Indeed, "deviant" and "morbid" interests in depictions of violence are much more difficult to identify and measure than "prurient" interests in depictions of sexual conduct: "[W]hereas prurience has a common reference point—'sex' and sexual stimulation—the same is not true of violence. Violence may evoke a variety of emotional reactions. Some persons may be stimulated by violent images, others, however, may be disgusted or revolted. Still others, may discern social commentary or sarcasm from the scenes of violence." Benjamin P. Deutsch, *Wile E. Coyote, Acme Explosives and the First Amendment: The Unconstitutionality of Regulating Violence on Broadcast Television*, 60 BROOK. L. REV. 1101, 1155 (1994).

More broadly, the "appeal to the prurient interest" element of obscenity law captures an important facet of pornography: Much hard-core pornography is watched precisely because of a desire for sexual stimulation; there is little other appeal to it (especially when it lacks serious literary, artistic, political, or scientific value). But video games are chiefly played because they pose a challenge to the player. Whether the player is pretending to shoot Nazis, behead zombies, or race motorcycles, the underlying "interest" to

which the works "appeal" is the desire to play a game—to compete, whether against others or the computer.

The "deviant or morbid interest" test in the Act thus requires one to look at whether a game that chiefly appeals to minors' interest in competition also appeals to some other interest that is deviant or morbid—an inquiry for which no standards are given. And any shared understanding of how the "prurient interest" test may play out as to hard-core pornography, which is consumed for very different reasons, provides no help in furnishing such standards.

The brief of the state *amici curiae* further illustrates how hard it is to identify a common understanding of what depictions of violence appeal to a minor's deviant or morbid interests—as opposed to the minor's acceptable sense of humor or entertainment—and therefore are unsuitable for minors. The state *amici curiae* worry that "[t]en-year-olds * * * may fail to grasp the satiric content in an exploding cat." *Amicus* Br. of Louisiana, *et al.*, at 2.

But generations of ten-year-olds have spent Saturday mornings watching fictional images of a coyote being crushed under a boulder, thrown off cliffs, flattened by a truck, and, yes, exploding, after the dynamite he is holding detonates—as "the fleet-footed Road Runner and his constant pursuer, Wile E. Coyote" entertained on network television. JEFF LENBURG, THE ENCYCLOPEDIA OF ANIMATED CARTOONS 401 (1995).[5] Those who insist on explosions involving *cats* can find them as well, as Sylvester the

[5] See generally *To Beep or Not To Beep,* Looney Tunes: Golden Collection (DVD), Vol. 3, Disc 4.

Cat, in his pursuit of the canary Tweety, found himself shot in the rear end with a rifle, set ablaze after the rocket tied to his back exploded, and wounded by the detonation of the stick of dynamite he mistakenly swallowed.[6] Unsurprisingly, older minors may enjoy more elaborate (though still cartoonish) versions of the same theme, without having any trouble grasping the satire or dark humor in those depictions. And even the best-rendered video game is at bottom no more than a realistic cartoon.

Similarly, generations of minors have read the Spy vs. Spy comic strip in Mad magazine, where two spies try to kill each other with knives, grenades, guns, and bombs. See ANTONIO PROHIAS, SPY VS. SPY: THE COMPLETE CASEBOOK (2001). "[Video] games with their cartoon characters and stylized mayhem are continuous with an age-old children's literature on violent themes." *Kendrick*, 244 F.3d at 578.

The second prong of the current obscenity standard—"whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law" (*Miller*, 413 U.S. at 24)—similarly loses its meaning when applied to depictions of violence. Society has long found something offensive in the distribution to minors of sexually arousing material. But that view does not smoothly translate to a minor's viewing of depictions of violence.

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[6] *A Bird in a Guilty Cage*, Looney Tunes: Golden Collection (DVD), Vol. 2, Disc. 3 (rifle and dynamite); *Ain't She Tweet*, Looney Tunes: Golden Collection (DVD), Vol. 2, Disc. 3 (rocket). See also *Gift Wrapped*, Looney Tunes: Golden Collection (DVD), Vol. 2, Disc. 3 (shot in the face).

Section 1746(d)(1)(B) of the Violent Video Games Act helps illustrate this point. That section makes it illegal to distribute to minors any video game that "[e]nables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim"—a test borrowed from one of the aggravating circumstances that may make murderers eligible for the death penalty. Pet. App. 6a.[7] The State

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[7] Section 1746(d)(2)-(3) further defines some of the terms:

"(2) … (A) 'Cruel' means that the player intends to virtually inflict a high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim.

"(B) 'Depraved' means that the player relishes the virtual killing or shows indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.

"(C) 'Heinous' means shockingly atrocious. For the killing depicted in a video game to be heinous, it must involve additional acts of torture or serious physical abuse of the victim as set apart from other killings.

"(D) 'Serious physical abuse' means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse, unlike torture, does not require that the victim be conscious of the abuse at the time it is inflicted. However, the player must specifically intend the abuse apart from the killing.

"(E) 'Torture' includes mental as well as physical abuse of the victim. In either case, the virtual victim must be conscious of the abuse at the time it is inflicted; and the player must specifically intend to virtually inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

conceded that this section is invalid because it lacks an exception for material that has sufficient value to minors. *Id.* at 6a n.5. But even if that exception had been included, Section 1746(d)(1)(B) would be unenforceably vague; the deeper problem is that there is no clearly understood way of applying concepts from laws that govern *real* killing to laws that govern depictions of *fictional* behavior.

What does it mean to "intend[ ] to *virtually* inflict a high degree of pain by torture or serious physical abuse," CAL. CIV. CODE § 1746(d)(2)(A) (definition of "cruel") (emphasis added), on a nonexistent character who, being fictional, is incapable of feeling actual pain? What does it mean for a player to "relish[ ] the virtual killing," *id.* § 1746(d)(2)(B) (definition of "depraved"), given that there is no actual physical act to be relished? Is it enough that the player may "relish" receiving 15,000 points in the game for the fictional killing?

Likewise, what does it mean to "show[ ] indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim," CAL. CIV. CODE § 1746(d)(2)(B) (definition of "depraved"), given that there is no actual victim that actually suffers, and given that indifference to the reconfiguration of 1s and 0s inside a computer is actually a psychologically proper reaction? Excessive empathy for a cartoon character in a video game would be more psychologically disturbed. What does it mean when the law defines "torture" to mean "mental as well as

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"(3) Pertinent factors in determining whether a killing depicted in a video game is especially heinous, cruel, or depraved include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim."

physical abuse of the victim" in a situation where "the virtual victim [is] conscious of the abuse at the time it is inflicted," *id.* § 1746(d)(2)(E), given that "conscious[ness]" is not a meaningful characteristic of video game characters?

These definitions inadvertently illustrate—and highlight—the wide gulf between people's understanding of what is cruel, depraved, heinous, and thus "patently offensive" violence in real life, and what is "patently offensive" violence in fiction. Killing a real person by decapitating him is a horrific crime. Fictionally killing a fictional person-turned-zombie by fictionally decapitating a cartoon representation of the zombie is an act of no serious moral consequence to most people. There is therefore no reason to believe that there is any consensus about whether it is "deviant or morbid" for 17-year-olds to be "interest[ed]" in fictionally killing fictional zombies this way, or whether it is "patently offensive" under "community standards" for them to do so.

Moreover, this Court has observed that, under *Miller*, "juries [do not] have unbridled discretion in determining what is 'patently offensive.'" *Jenkins* v. *Georgia*, 418 U.S. 153, 160 (1974). Instead, *Miller* "fix[ed] substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to * * * a determination [that material was patently offensive]," *ibid.*, by including examples of what would satisfy the patent offensiveness prong:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

> (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of genitals.

Miller, 413 U.S. at 25.

But it is not clear that any such limiting principles could help determine what depictions of violence are patently offensive:

> Patently offensive sex can be described with specific reference to organs and acts, regardless of dramatic context. The same limiting references, however, cannot be applied to violence. There are no corollaries to sexual organs or acts that would help the trier of fact determine whether or not certain violent acts are offensive under the second prong of *Miller*. Quite simply, there are too many variations of violence to derive a consistent, predictable and constitutional sound determination of what is *too* violent.

Deutsch, *supra*, at 1156.

And even if such narrowing rules are theoretically available, the Violent Video Games Act does not contain them. The statute does focus on video games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being," but that clause is far from a sufficient limit on the statute's scope. CAL. CIV. CODE § 1746(d)(1). Indeed, by including "killing" a video image, it encompasses entire genres of first-person war or adventure games.

The sexual conduct specified in the *Miller* examples was (when *Miller* was decided) a relative rarity in most movies. The *Miller* language thus narrowed

the coverage of the statute to material that was fairly likely to be seen as appealing to the prurient interest, being patently offensive, and lacking serious value. Such narrowing helped "reduce[] the vagueness inherent in the open-ended term 'patently offensive.'" *Reno*, 521 U.S. at 873 (rejecting the application of the "patently offensive" element of *Miller* to a broader definition of indecent Internet communication).

On the other hand, mere "killing" of "an image of a human being" is commonplace in movies, including movies that are rated PG-13 or below. Indeed, "nearly all PG-13 films * * * contain significant amounts of violence," POLLARD, *supra*, at 187, as do such classics as the 1959 *Ben-Hur* and Errol Flynn's 1938 version of *The Adventures of Robin Hood*, which have never been seen as unsuitable for minors. See *ibid.* (reporting "high correlation between violent depictions and films made for children"). And it is commonplace in video games, including ones that have routine wargaming themes. The Act's limitation to depictions of "killing" and other conduct therefore does not suitably narrow the zone in which the Act's other, far vaguer, provisions come into play.

* * * * *

To the extent obscenity statutes are not unconstitutionally vague, they require the existence of a "common understanding" (*Roth*, 354 U.S. at 491) about what sexual material is offensive, appeals to the prurient interest, and lacks serious value. But there is no common understanding as to what depictions of violent—as opposed to sexual—conduct satisfy the elements of obscenity. The Act, which seeks to regulate depictions of violence simply by adapting

the existing obscenity standard, is therefore void for vagueness.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted.

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