

No. 08-1448

In the Supreme Court of the
United States

ARNOLD SCHWARZENEGGER, in his official
capacity as Governor of the State of
California, and EDMUND G. BROWN, JR.,
in his official capacity as Attorney
General of the State of California,
Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and
ENTERTAINMENT SOFTWARE ASSOCIATION,
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE PROGRESS & FREEDOM
FOUNDATION AND THE ELECTRONIC
FRONTIER FOUNDATION AS *AMICI*
CURIAE IN SUPPORT OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae The Progress & Freedom Foundation, through the undersigned counsel, hereby states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

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INTEREST OF THE *AMICI CURIAE*¹

Amici consist of the following non-profit 501(c)(3) organizations that seek to preserve First Amendment rights by advancing less restrictive alternatives to regulation of speech and requiring government firmly establish the need for speech controls:

Founded in 1993, The Progress & Freedom Foundation (PFF) is a market-oriented non-profit think tank that studies the digital revolution and its implications for public policy. Its mission is to educate policymakers, opinion leaders and the public about issues associated with technological change, based on a philosophy of limited government, free markets and individual sovereignty. PFF regularly publishes a comprehensive catalogue of parental control tools and methods² and has filed numerous *amicus* briefs in free speech cases.

Founded in 1990, the Electronic Frontier Foundation (EFF) is a member-supported, non-profit legal foundation that litigates to protect free speech and privacy rights in the digital world. As part of its mission, EFF has often served as counsel or *amicus* in key cases addressing constitutional and statutory rights of privacy in electronic communications.

¹ Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

² ADAM THIERER, PARENTAL CONTROLS & ONLINE CHILD PROTECTION, Version 4.0 (2009), *available at* <http://pff.org/parentalcontrols/>.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici respectfully urge this Court to affirm the Ninth Circuit’s decision holding that the statute in this case³ violates the First Amendment.

1. This Court has long held that content-based regulation of speech must yield to less restrictive means that do not affect First Amendment interests of speakers and willing listeners. Here, *amici* explain how a highly descriptive content rating system, an extensive array of parental empowerment tools, numerous household media control methods, and enforcement of existing consumer deception laws together constitute a less restrictive alternative to California’s law. Indeed, survey research conducted by the Federal Trade Commission shows that the videogame industry’s official rating and labeling system is not only widely recognized and used by parents but is also well enforced. Whatever the state’s interest, parents today already have the capacity to choose and control their children’s videogame consumption based on their own household standards. Government can help build awareness of parental control tools and methods, and punish deception, but there is no Constitutional justification for restricting this new and evolving form of speech.

2. Videogames are speech fully protected by the First Amendment, and both the “violence” and “interactivity” feared by California are integral, expressive aspects of books, plays and movies, as well as videogames. Every state “violent” videogame law

³ “A person may not sell or rent a video game that has been labeled as a violent video game to a minor.” CAL. CIV. CODE § 1746.1(a).

has therefore failed strict scrutiny, and the Ninth Circuit’s decision was wholly consistent with the considered judgment of numerous courts. *Amici* fear that California’s age-based restrictions will migrate to the Internet, where the ineffectiveness of age-verification tools could inspire identity-verification requirements that would chill adults’ access to fully protected speech.

3. The laboratory research on which California bases its legislative findings—to which California now asks this Court to defer—does not support harm to any compelling state interest. Social scientists hotly debate the methodological validity of media-violence research, and that research defines “violence” and “aggression” in ways that conflict with society’s understandings: Research that classifies the well-known children’s videogame “Super Mario Brothers” as “violent” is of dubious relevance to real-world concerns about violence. Moreover, *Turner* deference is completely inapplicable to content-based regulation of fully protected speech.

California’s legislature has succumbed to moral panic, as lawmakers have so often done when confronted with the media of a new generation. Speech is undoubtedly powerful, and new forms of speech are always controversial. Time and again, however, the feared harms of new forms of expression have proven to be fears, not harms. This case is no different.

ARGUMENT**I. Parental Control Tools, Household Media Control Methods, Self-Regulation and Enforcement of Existing Laws Constitute Less Restrictive Means of Limiting Access to Objectionable Content than Government Regulation of Constitutionally Protected Speech**

A decade ago, this Court decided that “targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners ... targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.” *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 815 (2000);⁴ *id.* at 824 (“It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.”).

Here, a highly descriptive content rating system, an extensive array of parental empowerment tools, numerous household media control methods, and enforcement of existing consumer deception laws together constitute a less restrictive alternative to California’s law. Because “[t]echnology expand[ed] the capacity to choose” in this area, this Court cannot

⁴ *See infra* at 23 (discussing First Amendment interests of adults affected by application of the law to online sales).

“assume the Government is best positioned to make these choices for us,” *id.* at 818, and must uphold the Ninth Circuit.

A. The Videogame Industry’s Official Rating and Labeling System is Highly Descriptive, Widely Recognized, and Extensively Utilized

Amicus Eagle Forum asserts: “parents have no way of screening video game content for offensive material.” Brief for Eagle Forum Education & Legal Defense Fund as *Amicus Curiae* 19. But parents need not actually play a game to “screen” it. The videogame industry’s rating and labeling system provides an effective, less-restrictive method of labeling content so that individuals can make content consumption decisions for themselves and their children.

The Entertainment Software Rating Board (ESRB) is a self-regulatory rating and labeling body that rates over 1,000 games per year in most years; it rated 1,677 games in 2008 and has rated a total of 19,650 games.⁵ ESRB applies six different rating symbols to games it rates (or a “Ratings Pending” (RP) placeholder).

ESRB employs 30+ “content descriptors” to give consumers highly detailed information about game content before purchase—especially parents who simply want to glance at the back of each game container to quickly gauge the appropriateness of the title for their children. ESRB requires that game publishers display ratings in advertising and mar-

⁵ ESRB, www.esrb.org/ratings/search.jsp (last visited Sept. 15, 2010).

keting materials in all media, and fully disclose all pertinent content to ESRB. Companies that do not comply can be fined by ESRB or subject to other sanctions, including product recall.⁶ ESRB's website also allows parents to enter the name of any game and retrieve its rating and content descriptors.⁷

ESRB and industry continue to promote awareness of these ratings and labels, including:

- A free “ESRB Rating Search Widget” easily installed on the PC that launched March 2008 allows users to instantly search for any game title and retrieve its rating and content descriptors.⁸
- Game “rating summaries,” launched November 2008, offer a “supplementary source of information about game content that parents can use when considering which games to purchase for their children.”⁹ These can be accessed through ESRB's website or search widget, and explain to parents and players the context and relevant content that led to ESRB's assignment of a specific rating.

⁶ ESRB, *Principles and Guidelines for Responsible Advertising Practices*, www.esrb.org/ratings/principles_guidlines.jsp.

⁷ ESRB, *ESRB Game Ratings*, www.esrb.org/ratings/search.jsp.

⁸ ESRB, *ESRB Entertainment Software Widget*, www.esrb.org/about/widget/widget-consumer.jsp.

⁹ ESRB, *ESRB Announces New Video Game Rating Summaries*, Press Release, Nov. 12, 2008, www.esrb.org/about/news/downloads/ESRB_Rating_Summaries_Release_11.12.08.pdf.

- A free iPhone app, launched December 2009, “giving parents instant, on-the-spot access to its new rating summaries right at the store when making decisions about which games to give as gifts.”¹⁰

Surveys have shown most parents find the ratings and labels helpful: In 2008, 86% of American parents of children who play videogames were aware of the ESRB ratings and 78% consult the ratings regularly when buying games for their families.¹¹ As Exhibit 1 illustrates, these results have been generally increasing steadily since Hart Research Associates began conducting these surveys for ESRB in 1999.

Surveys conducted by the Entertainment Software Association (ESA), which represents the videogame industry, have also shown high parental involvement: The average videogame purchaser is 40 years old, and parents are present 93% of the time when games are purchased or rented.¹² Of parents surveyed, 76% said they find videogame console parental controls useful and 86% of the time children

¹⁰ ESRB, *ESRB Releases Free Rating Search App For iPhone*, Press Release, Dec. 1, 2009, www.esrb.org/about/news/downloads/ESRB_Rating_Search_app_release_12.1.09.pdf.

¹¹ ESRB, *Consumer Research: ESRB Survey: Parental Awareness, Use & Satisfaction*, www.esrb.org/about/awareness.jsp.

¹² ENTERTAINMENT SOFTWARE ASSOCIATION, *ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY: 2010 SALES, DEMOGRAPHICS AND USAGE DATA 3, 6* (2010), *available at* www.theesa.com/facts/pdfs/ESA_Essential_Facts_2010.PDF.

receive their parents' permission before purchasing or renting a game.¹³

The Federal Trade Commission (FTC) found in 2007 that:¹⁴

- 89% of parents are involved in the purchase or rental of a videogame for their child;
- 87% of parents were aware of the ESRB videogame ratings system;
- 73% use ratings “all,” “nearly all” or “most of the time” when buying games;
- 87% reported being “very” to “somewhat” satisfied with ESRB ratings; and
- 93% said ESRB ratings are “moderately” to “very easy” to understand.

ESRB also takes extensive steps to self-regulate and police its own rating and labeling system. ESRB's Advertising Review Council (ARC) monitors compliance with ESRB guidelines and restricts marketing of ESRB-rated games through its “Principles for Responsible Advertising” and “Advertising Code of Conduct.”¹⁵

Through its “OK to Play?” education campaign, ESRB provides materials to retailers, including an employee training manual, a quiz about the rating

¹³ *Id.* at 6.

¹⁴ FTC REPORT TO CONGRESS, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN 28-9 (April 2007), *available at* www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf.

¹⁵ ESRB, *Principles and Guidelines for Responsible Advertising Practices*, www.esrb.org/ratings/principles_guidelines.jsp.

system, and signage displayed at 13 top national retailers who account for nearly 90% of all game sales.¹⁶ Prominent retailers involved include Wal-Mart, Best Buy, Target, Toys-R-Us, and Game Stop. That in-store signage is reproduced as consumer advertising in magazines, newspapers, and websites. In 2005, ESRB also created the ESRB Retail Council:¹⁷ Participating retailers commit to supporting ESRB's game sales policies and to twice-annual audits to test compliance with store policy and signage requirements.

ESRB also works with third-party groups to promote awareness of its system. For example, ESRB partners with the Parent-Teacher Association (PTA) to "encourage and enable state and local PTAs to educate their community's parents about the [ESRB] ratings."¹⁸ In this education campaign, 1.3 million brochures were distributed to 26,000 PTAs nationwide in both English and Spanish. The ESRB and PTA websites offer additional online support and downloadable manuals and educational materials.¹⁹ In 2008, ESRB produced and distributed to PTAs na-

¹⁶ ESRB, *ESRB Statement on the MediaWise Video Game Report Card*, Press Release, Nov. 23, 2004, www.esrb.org/about/news/news_archive.jsp#11232004.

¹⁷ ESRB, *ESRB Retail Council*, www.esrb.org/retailers/retail_council.jsp.

¹⁸ Parent Teacher Association, *PTA and ESRB Launch Nationwide Video Game Ratings Educational Partnership*, Press Release, Nov. 15, 2006, www.pta.org/ne_press_release_detail_1163547309281.html.

¹⁹ ESRB, *ESRB and PTA*, www.esrb.org/about/pta_partnership.jsp.

tionwide a booklet entitled, “A Parent’s Guide to Video Games, Parental Controls and Online Safety.”²⁰

ESRB has developed several TV public service announcements endorsed by federal lawmakers²¹ and state attorneys general²² in which public officials encourage parents to use the videogame ratings when buying games for their children and to use parental controls on gaming devices.²³

ESRB’s education and awareness-building efforts have helped reduce underage game purchases. Since 2000, the FTC has surveyed the marketing and advertising practices of major media sectors (movies, music and videogames) in its annual *Marketing Violent Entertainment to Children* report,²⁴ using teenage “secret shoppers” to test point-of-sale enforcement of voluntary media rating systems (MPAA, ESRB, RIAA). These reports show dramatic im-

²⁰ ESRB, *ESRB and PTA Launch New National Campaign to Educate Parents about Game Ratings, Parental Controls and Online Video Game Safety*, Press Release, April 21, 2008, www.esrb.org/about/news/downloads/ESRB-PTA%20Press%20Release_4.21.08_F.pdf.

²¹ ESRB, *Senators Hillary Rodham Clinton and Joe Lieberman Join ESRB to Launch Nationwide Video Game Ratings TV PSA Campaign*, Press Release, Dec. 7, 2006, www.esrb.org/about/news/12072006.jsp.

²² *Kansas Attorney General Teams Up with ESRB on Ratings Awareness*, GAMEPOLITICS.COM, Jun. 9, 2009, www.gamepolitics.com/2009/06/09/kansas-attorney-general-teams-esrb-ratings-awareness

²³ These videos can be viewed at the “Media Library” on the ESRB website. ESRB, *Media Library*, www.esrb.org/about/media_library.jsp.

²⁴ Past FTC reports can be found at: www.ftc.gov/reports/index.shtm.

provements in ESRB ratings enforcement: Whereas 85% of undercover minors were able to purchase an M-rated videogame in 2000, only 20% could do so in 2008.²⁵ Of course, the number of minors who *actually* buy videogames is smaller still, since few kids buy games without their parents present.

B. Third-Party Pressure, Ratings and Advice Supplement Parental Control Technologies and the Official Industry Rating System

Parents can find detailed videogame reviews and information about the specific types of content that kids will see or hear in a game at websites like Common Sense Media,²⁶ What They Play,²⁷ Gaming With Children,²⁸ Game Pro Family,²⁹ Children's Technology Review,³⁰ and others listed at www.esrb.org/about/resources.jsp. User-generated reviews on sites like Amazon.com³¹ and Metacritic.com³² feature excellent product summaries, often by other parents, that help parents decide which games are appropriate for their children.

²⁵ FTC, *Undercover Shoppers Find it Increasingly Difficult for Children to Buy M-Rated Games*, Press Release, May 8, 2008, www.ftc.gov/opa/2008/05/secretshop.shtm.

²⁶ Common Sense Media, *Video Game Reviews*, www.common sense media.org/game-reviews.

²⁷ www.whattheyplay.com

²⁸ www.gamingwithchildren.com

²⁹ <http://gpfamily.blogfaction.com>

³⁰ <http://childrenstech.com>

³¹ www.amazon.com

³² www.metacritic.com

C. Self-Regulation and Deceptive Advertising Laws Already Effectively Prevent Circumvention of the Videogame Ratings System

Amicus Eagle Forum asserts: “The California statute provides the only effective way to guard against manufacturers’ slipping inappropriate material into video games.”³³ Yet the incident cited by Eagle Forum actually proves both the rarity of this problem and the effectiveness of less-restrictive legal alternatives to the California law.

When *Grand Theft Auto: San Andreas* was released for Sony PlayStation in 2004, it included a hidden sex scene as a minigame dubbed “Hot Coffee.” Unlike standard “Easter Eggs”—generally whimsical or surreal common features consistent with a game’s ratings that can only be accessed via obscure and undocumented commands—this minigame, written during internal prototyping, had been rendered inaccessible without complicated software modifications. It is common practice in the industry to block activation of, rather than remove, sections of code not intended for consumer use.³⁴

Within six weeks of the minigame’s discovery by hackers, ESRB re-rated the game from Mature (M) to Adults Only 18+ (AO). Two weeks later, the developer released a downloadable software patch for the game, received by all Internet-connected game consoles and PCs, that made the offending content

³³ Brief for Eagle Forum Education & Legal Defense Fund as *Amicus Curiae* 20.

³⁴ Rom’s Rants, *My Take on “Hot Coffee,”* July 20, 2005, www.romsteady.net/blog/2005/07/my-take-on-hot-coffee.html.

completely inaccessible. Another two weeks later, the developer issued a mandatory recall for the game. Within a year, the FTC settled deceptive advertising charges against the developer, requiring them to fully disclose all hidden content to game ratters or the public.³⁵ The incident sent a powerful signal to game developers: Both industry and government will punish any attempt to circumvent the ESRB ratings system. No such controversy has occurred since.

D. Parental Control Technologies Empower Parents to Manage Videogame Consumption

The ESRB rating system not only informs parents; it directly facilitates “targeted blocking” that is far more sophisticated than the on/off control the Court deemed adequate in *Playboy*. 529 U.S. at 815. Major game console developers (Microsoft,³⁶ Sony,³⁷ and Nintendo³⁸) all recognize the digitally embedded ESRB ratings and offer blocking tools in their new gaming systems,³⁹ as do Microsoft⁴⁰ and Apple⁴¹ in

³⁵ Take-Two Interactive Software, Inc., F.T.C. No. 052 3158 (June 2, 2006), *available at* www.ftc.gov/os/caselist/0523158/0523158Take-TwoInteractiveandRockstarConsentAgreement.pdf.

³⁶ Xbox, *Introduction to Family Settings*, www.xbox.com/en-US/support/familysettings/xbox360/familysettings-intro.htm.

³⁷ PlayStation, *PlayStation 3 User’s Guide*, <http://manuals.playstation.net/document/en/ps3/current/basicoperations/parentallock.html>.

³⁸ Nintendo, *Parental Controls*, www.nintendo.com/consumer/systems/wii/en_na/settingsParentalControls.jsp.

³⁹ See Mike Musgrove, *A Computer Game’s Quiet Little Extra: Parental Control Software*, WASH. POST, Dec. 23, 2006, at

their operating systems. For example, the Microsoft Xbox 360 and the Nintendo Wii consoles allow parents to enter the ESRB rating level they believe suits their children—so that no game rated above that level can be played. If a parent set the rating threshold on their child’s videogame console or personal computer to T for Teen, no games rated Mature (M) or Adults Only (AO) could be played on the console unless a password is first entered. Sony’s system for the PlayStation 3 console and PlayStation Portable (PSP) works only slightly differently: A 1-11 scale is used worldwide, but corresponds to the ESRB system. (Roughly speaking, “2” on the Sony scale means “EC” while “10” means “AO”).⁴²

Other console and PC parental control tools allow parents to password-restrict device access, purchases of new games or add-ons, chat functionality, and when and for how long children can play videogames—all of which facilitate parental supervision. An estimated 75% of parents surveyed found such tools to be useful.⁴³

D1, *available at* www.washingtonpost.com/wp-dyn/content/article/2006/12/22/AR2006122201278.html.

⁴⁰ Microsoft Windows, *Choose Which Games Children Can Play*, <http://windows.microsoft.com/en-us/windows7/Choose-which-games-children-can-play>.

⁴¹ Apple, *Find Out How: Parental Controls*, www.apple.com/findouthow/mac/#parentalcontrols.

⁴² For the entire equivalency scale, *see* ESRB, *Sony PlayStation 3 and PlayStation Portable*, www.esrb.org/about/parentalcontrol-ps3psp.jsp.

⁴³ ENTERTAINMENT SOFTWARE ASSOCIATION, *ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY: 2008 SALES, DEMOGRAPHICS AND USAGE DATA 8* (2008), www.theesa.com/facts/pdfs/ESA_EF_2008.pdf.

E. Parents Utilize a Wide Variety of Non-Technical Household Media Rules and Methods to Control Videogame Consumption

Surveys confirm that household-level “media consumption rules” and informal parental control methods often substitute for, or supplement, parental control technologies. These rules include: (1) “where” rules (assigning a place for media consumption); (2) “when and how much” rules (creating a media allowance); (3) “under what conditions” rules (carrot-and-stick incentives); and, (4) “what” rules (specifying the content kids are allowed to consume). Many households reject technical blocking tools in favor of these household media rules; others simply shun certain media and communications technologies altogether.

A 2003 survey found that “Almost all parents say they have some type of rules about their children’s use of media.”⁴⁴ A 2007 survey found that 59% of parents limit how long their kids can play videogames and 67% have rules for the kinds of videogames they can play.⁴⁵ A 2010 ESA survey revealed even greater parental involvement: 83% of parents have placed time limits on videogame playing in their homes and 97% of parents report always or

⁴⁴ KAISER FAMILY FOUNDATION, ZERO TO SIX: ELECTRONIC MEDIA IN THE LIVES OF INFANTS, TODDLERS AND PRESCHOOLERS 9 (Fall 2003), www.kff.org/entmedia/entmedia102803pkg.cfm.

⁴⁵ AMANDA LENHART & MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, TEENS, PRIVACY, AND ONLINE SOCIAL NETWORKS 9 (2007), www.pewinternet.org/PPF/r/211/report_display.asp.

sometimes monitoring which games their children play.⁴⁶

Finally, because most videogames cost \$40-60, parents can exercise their “power of the purse” to control what is brought into the home, and have a strong financial incentive to do so.

II. Videogame Content is Constitutionally Protected Speech Deserving Strict Scrutiny

California’s law regulates non-obscene speech that deserves full First Amendment protection. Although the law’s supporters insist it merely facilitates parental control over objectionable retail purchases, in fact, the law would necessarily affect other media and the free speech rights of adults, especially online.

A. Game Expression and Interactive Media is Expressive Speech Fully Protected by the First Amendment

Every court challenge to state “violent” videogame laws has ultimately accorded videogame content full First Amendment protection. Videogames “are expressive and qualify as speech for purposes of the First Amendment”⁴⁷ and “are just as entitled to First Amendment protection as is the finest literature.” *Entm’t Merchs. Ass’n v. Henry*, No. 06-675 2007 U.S. Dist. LEXIS 69139, at *9 (W.D. Okla. 2007). “They contain original artwork, graphics, mu-

⁴⁶ ENTERTAINMENT SOFTWARE ASSOCIATION, ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY: 2008 SALES, DEMOGRAPHICS AND USAGE DATA 6 (2008), www.theesa.com/facts/pdfs/ESA_EF_2008.pdf.

⁴⁷ *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1184 (W.D. Wash. 2005).

sic, storylines, and characters similar to movies and television shows, both of which are considered protected free speech.” *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 651 (E.D. Mich. 2006).

Several such decisions rejected arguments that the interactivity of videogames distinguishes them from previous entertainment media. “[T]he presence of increased viewer control and interactivity does not remove these games from the release of First Amendment protection.” *Henry*, 2007 WL 2743097, at *5. Perhaps most notably, in *Kendrick*, Judge Posner argued:

[T]his point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader’s own.⁴⁸

Moreover, “video games contain creative, expressive free speech, inseparable from their interactive functional elements, and are therefore protected by the First Amendment.” *Granholm*, 426 F. Supp. 2d at 651.

⁴⁸ *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

B. Depictions of Violence Have Always been Part of Literature and Media But Have Never Been Regulated Under Ginsberg's Obscenity Standard

It is a myth that videogames reflect a new, inordinate societal preoccupation with violent entertainment. Shakespeare's plays reveal how deeply this instinct is ingrained in the human psyche. How many pretend-knives have been plunged into how many backs over the last four centuries? *Julius Caesar*, *King Lear*, *Macbeth*, and *Titus Andronicus*, in particular, contain scenes of extreme violence, murder, and even mutilation. Yet, such plays are available in almost every school and library in America, and their scenes are regularly acted out by high school students. Yet, California would not allow such students to buy videogame versions of these plays.

Harold Schechter has meticulously documented the prevalence of violent fare throughout the history of art and entertainment, noting that even "the supposedly halcyon days of the 1950s" were replete with violent media, much of it aimed at children.⁴⁹ For example, the top-rated television program of 1954, Disney's *Davy Crockett* series (aired Wednesday nights at 7:30 p.m. to target elementary school children before they went to bed), "contained a staggering amount of graphic violence," including scalplings, stabbings, "brainings," hatchet and tomahawk blows, and so on.⁵⁰

⁴⁹ HAROLD SCHECHTER, SAVAGE PASTIMES: A CULTURAL HISTORY OF VIOLENT ENTERTAINMENT 137 (2005).

⁵⁰ *Id.* at 24-5.

Perhaps then, as Judge Posner suggested in *Kendrick*, nothing much has really changed throughout the history of art and entertainment: “Self-defense, protection of others, dread of the ‘undead,’ fighting against overwhelming odds—these are all age-old themes of literature, and ones particularly appealing to the young.”⁵¹ He continued: “To shield 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.”⁵²

Similarly, the co-founders and directors of the Harvard Medical School Center for Mental Health and Media, argue:

The threads of violence are woven throughout the fabric of children’s play and literature from a very early age. We sing them to sleep with lullabies that describe boughs breaking, cradles falling and babies plummeting helplessly to earth. We entertain them with fairy tales in which a talking wolf devours a girl’s grandmother and an old woman tries to roast children alive in her oven. Even religious instruction is replete with stories about plagues, pestilence, jealousy, betrayal, torture and death.

While the stories and songs may be different, the underlying themes are generally the same in cultures throughout the world. Ogres, monsters, sexual infidelities, beheadings, thievery, abandonment, cannibalism,

⁵¹ *Kendrick*, 244 F.3d at 578.

⁵² *Id.* at 577.

drownings—such was the stuff of children’s literature long before video games.⁵³

Kutner and Olson conclude that “children are drawn to violent themes because listening to and playing with those frightening images helps them safely master the experience of being frightened. This is an important skill, perhaps even a life-saving one.”⁵⁴ Indeed, this is entirely normal; even healthy. Children might imagine themselves to be role-playing or living out fantasies in the imaginary worlds created by videogame designers:

One of the functions of stories and games is to help children rehearse for what they’ll be in later life. Anthropologists and psychologists who study play, however, have shown that there are many other functions as well—one of which is to enable children to pretend to be just what they know they’ll *never* be. Exploring, in a safe and controlled context, what is impossible or too dangerous or forbidden to them is a crucial tool in accepting the limits of reality. Playing with rage is a valuable way to reduce its power. Being evil and destructive in imagination is a vital compensation for the wildness we all have to surrender on our way to being good people.⁵⁵

⁵³ LAWRENCE KUTNER & CHERYL K. OLSON, GRAND THEFT CHILDHOOD: THE SURPRISING TRUTH ABOUT VIOLENT VIDEO GAMES AND WHAT PARENTS CAN DO 118-9 (2008).

⁵⁴ *Id.* at 121.

⁵⁵ GERALD JONES, KILLING MONSTERS: WHY CHILDREN NEED FANTASY, SUPER-HEROES, AND MAKE-BELIEVE VIOLENCE 11 (2002).

As Judge Posner concluded in *Kendrick*, “People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.”⁵⁶

Thus, it would be foolhardy to attempt to apply the *Ginsberg* obscenity standard to depictions of violence in media.

C. This Case Has Profound Ramifications for Many Other Forms of Expression and Other Communications and Media Platforms

1. Other Forms of Media Content are Increasingly Intertwined with Videogame Content

Videogames today are not a discrete category of visual entertainment. With a rich combination of cinematic visuals, epic story-telling, and engrossing soundtracks, videogames are increasingly part movie, part record, and part book. The *Lord of the Rings* movie and videogame series both drew on the famous J.R.R. Tolkien novels, just as *The Godfather* videogames and movies were inspired by the novel of the same name. California Governor Arnold Schwarzenegger, who signed the California bill into law, is most famous for having starred in *The Terminator* movies, which also inspired a wide variety of videogames rated “Teen” for their violent content.)

But videogames have also inspired movies, music, books, and comics.⁵⁷ The *Star Wars* movies in-

⁵⁶ *Kendrick*, 244 F.3d at 577.

⁵⁷ *Movie-themed Video Games Transforming the Industry*, NIELSENWIRE, June 29, 2009,

spired a diverse array of novels and comics in addition to a long line of games. Many other notable games have inspired books, comics, and/or movies, including: *Prince of Persia*, *Resident Evil*, *Tomb Raider*, *Doom*, *Final Fantasy*, *Halo*, and *Gears of War*. The characters and storylines in the books, comics, and movies based on these games often closely track the videogames that inspired them. Increasingly, therefore, games are developed along parallel tracks with these other media.

If the First Amendment permitted California to prohibit the sale of violent videogames to minors, would it not also permit the state to restrict minors' access to violent books, comics, movies, or even theme park attractions?⁵⁸ *Not* to regulate those other forms of media while regulating videogame content would produce the "type of facial underinclusiveness [that] undermines the claim that the regulation materially advances its alleged interests." *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 833 (M.D. La. 2007). The Court cannot carve out videogames for special treatment; upholding the Cali-

<http://blog.nielsen.com/nielsenwire/consumer/movie-themed-video-games-transforming-the-industry>.

⁵⁸ *The Terminator* movies and video games inspired "Terminator 2: 3D," an attraction at Universal Studios in Orlando, Florida. The show features cinematic action combined with real-life actors who run throughout the arena firing shotguns at cybernetic robots that come out of the walls and floors. During some segments, smoke fills the chamber and the seats and floors vibrate violently as battles take place on stage and on-screen. The actor hosting the show is choked to death by a cyborg. Arnold Schwarzenegger filmed segments for the cinematic portions of the attraction, which children are admitted to without restriction. See Universal Studios Hollywood, Terminator 2:3D, www.universalstudioshollywood.com/attraction_terminator.html.

ifornia law would permit censorship of other media, especially as media converge.

2. *Given the Shift to Online, California's Law Would Require Mandatory Online Age Verification*

Although California's law appears to cover only videogame sales and rentals made in retail outlets, limiting the law to offline sales would make the law dramatically underinclusive. It would be easily circumvented because videogame content is increasingly sold directly and downloaded through gaming consoles connected to the Internet. But applying the law online would likely require mandatory age verification of *all* online gamers because the law prohibits any sale or rental to a minor, even if the vendor had no evidence that the buyer was a minor.⁵⁹

This would raise the same constitutional issues that caused the Court to enjoin the Child Online Protection Act, which sought to restrict minors' access to online materials deemed "harmful to minors." *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656 (2004). The Court found COPA's age verification requirements to burden the speech of adults and websites, despite being ineffective in preventing children from accessing pornography. *Id.* at 666-67.⁶⁰ Yet, the extension of

⁵⁹ CAL. CIV. CODE § 1746.1(a). "Proof that a defendant, or his or her employee or agent, demanded, was shown, and reasonably relied upon evidence that a purchaser or renter of a violent video game was not a minor ... shall be an affirmative defense," *id.* § 1746.1(b) but the law otherwise imposes strict liability.

⁶⁰ *See, e.g.,* Internet Safety Technical Task Force, *Enhancing Child Safety and Online Technologies* 29-31 (Dec. 2008) (discussing limited efficacy of age verification); Brief Of *Amici Curiae* Computer & Communications Industry Association,

California's videogame statute would necessitate a similar regulatory regime for online game sales because distinguishing children from adults in anonymous online environments essentially requires requiring *all* users to prove they are not children. It is unlikely the California law would survive a COPA-like challenge.⁶¹

III. The State Has Not Established a Compelling Government Interest in Restricting the Sale of Videogames to Minors

California has not shown, and cannot show, any compelling governmental interest furthered by its content-based restrictions on videogames. Instead, California claims the First Amendment permits courts to defer to legislative findings of harm. The Court should reject this transparent attempt to evade strict First Amendment review. First, the research upon which California's legislative findings are based does not establish harm to minors. Second, *Turner* deference is never appropriate when the legislature targets content. California's unwarranted reliance on flawed empirical research demonstrates the wisdom of the principle that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

Consumer Electronics Association, Information Technology Industry Council, TechAmerica, Center For Democracy & Technology, and Digital Liberty Project 18-21 (same) ("CDT Brief").

⁶¹ See CDT Brief at 21-26.

A. The State Has Not Satisfied Its Burden of Proof

1. *The State of California's Enactment Represents a Classic Case of "Moral Panic" Legislation Based on Conjectural Harms*

In 2009, the United Kingdom Department for Children, Schools and Families concluded:

Concerns about the harmful effects of popular culture on children and young people have a very long history, dating back well before electronic technology. These concerns reflect much more general anxieties about the future direction of society; but, as several studies have shown, they can also be inflamed and manipulated by those with much broader political, moral or religious motivations. These concerns occasionally reach the level of a 'moral panic', in which particular social groups and practices are publicly demonised – often on the basis of what are ultimately found to be quite spurious accusations.⁶²

Indeed, from the waltz to rock-and-roll to rap music, from movies to comic books to videogames, from radio and television to the Internet and social networking sites—each new media has spawned a fresh debate about potential harm to kids.⁶³ *The*

⁶² DEPARTMENT FOR SCHOOLS, CHILDREN AND FAMILIES (U.K.), THE IMPACT OF THE COMMERCIAL WORLD ON CHILDREN'S WELLBEING, 25 (2009), <http://publications.dcsf.gov.uk/eOrderingDownload/00669-2009DOM-EN.pdf>.

⁶³ "New media are often met by public concern about their impact on society and anxiety and polarisation of the debate

Economist found that “opposition to gaming springs largely from the neophobia that has pitted the old against the entertainment of the young for centuries.”⁶⁴ They noted:

Novels were once considered too low-brow for university literature courses, but eventually the disapproving professors retired. Waltz music and dancing were condemned in the 19th century; all that was thought to be ‘intoxicating’ and ‘depraved’, and the music was outlawed in some places. Today it is hard to imagine what the fuss was about.⁶⁵

Inevitably, these social and cultural debates become political debates, especially if a full-blown “moral panic” or “techno-panic” ensues.⁶⁶ This seems

can lead to emotive calls for action.” BYRON REVIEW ON CHILDREN AND NEW TECHNOLOGY & DEPARTMENT FOR CHILDREN, SCHOOLS AND FAMILIES, [U.K.], SAFER CHILDREN IN A DIGITAL WORLD 3 (2008), www.dfes.gov.uk/byronreview/pdfs/Final%20Report%20Bookmarked.pdf. For other examples, see Tom Standage, *Those Darn Kids and Their Darn New Technology*, WIRED, April 2006, at 114-5; JAMES A. MONROE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* (2003).

⁶⁴ *Breeding Evil?* THE ECONOMIST, Aug. 6, 2005, available at www.economist.com/PrinterFriendly.cfm?story_id=4247084.

⁶⁵ *Id.*

⁶⁶ Alice Marwick, *To Catch a Predator? The MySpace Moral Panic*, 13 FIRST MONDAY 2 (June 2008), www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2152/1966; Anne Collier, *Why Technopanics are Bad*, NET FAMILY NEWS, April 23, 2009, www.netfamilynews.org/2009/04/why-technopanics-are-bad.html; Wade Roush, *The Moral Panic over Social Networking Sites*, TECHNOLOGY REVIEW, Aug. 7, 2006, www.technologyreview.com/communications/17266; Adam Thierer, *Parents, Kids & Policymakers in the Digital Age:*

to be the case with the California law, especially considering its sponsor’s claim that videogames “teach [children] to do the very things we put people in jail for.”⁶⁷

2. *Social Science Has Established No Firm Link between Exposure to Depictions of Violence and Real-World Acts of Violence or Aggressive Behavior*

To establish a compelling interest in regulating violent videogame speech, California must prove a definitive link between exposure to depictions of violence and real-world violence or aggressive behavior.

Instead, California has misinterpreted well-known empirical social science research, making two dangerous errors. First, California incorrectly equates laboratory findings of “aggressive” feelings and behavior with real-world violent behavior—defining “violent” so broadly as to reach the majority of videogames, not to mention popular media. Second, California incorrectly views any statistically significant relationship between violent videogame play and aggression—whether small or large, correlative or causal—as compelling evidence that videogames are injurious, damaging, or otherwise detrimental to children.

Safeguarding Against ‘Techno-Panics,’ INSIDE ALEC, July 2009, at 16-7, www.alec.org/am/pdf/Inside_July09.pdf.

⁶⁷ *California Advances Bill on Violent Video Games*, REUTERS, May 6, 2005 (quoting California Sen. Leland Yee). *See also*, DAVE GROSSMAN & GLORIA DEGAETANO, STOP TEACHING OUR KIDS TO KILL (1999).

a. *The Research Does Not Define or Measure “Aggression” or “Violence” as Commonly Understood*

Most parents would be surprised to know that media-violence researchers consider the videogame “Super Mario Brothers” to be violent. Yet Super Mario Brothers “involve[s] considerable violence in the sense that the player typically spends a considerable amount of time destroying other creatures,” although “it is not classified as violent by many people.”⁶⁸ These researchers define “violent media” as “those that depict characters intentionally harming other characters who presumably wish to avoid being harmed.”⁶⁹ Thus, “traditional Saturday-morning cartoons (e.g., ‘Mighty Mouse,’ ‘Road Runner’) are filled with violence.”⁷⁰ Even “many cartoonish E-rated children’s games are violent. They’re just not bloody. You know, you shoot a ray gun and things

⁶⁸ Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings and Behaviors in the Laboratory and in Life*, 78 J. OF PERSONALITY AND SOC. PSYCH. 772, 779 (2000).

⁶⁹ Craig A. Anderson, Akira Sakamoto, et al., *Longitudinal Effects of Violent Video Games on Aggression in Japan and the United States*, 122 PEDIATRICS e1067, e1068 (2008) (noting that the general public thinks of “violent media” as “only those [] that include graphic images of blood and gore”).

⁷⁰ Craig A. Anderson & B.J. Bushman, *Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Physiological Arousal, and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature*, 12 PSYCHOLOGICAL SCIENCE 353, 354 (2001).

disappear, and there's happy music and bright colors."⁷¹

Under this definition, greater than 90% of games currently classified as E10+, appropriate for everyone aged 10 and older, contain violence.⁷² By contrast, "football is no longer aggression. You can play it in kind of an aggressive way, but you're not actually intending to injure the other people."⁷³

Media-violence research also relies on artificial proxies for real-world aggression and violence. In a common experimental paradigm, "aggressive" behavior is modeled as delivering a "noise blast" to an unknown, unseen (and unreal) opponent in an experimenter-rigged competitive "game" that a subject plays immediately after playing either a violent or non-violent videogame.⁷⁴ The hypothesis is that subjects who played the violent videogame will deliver louder noise bursts in the second game.

Similarly, "aggressive thoughts" are often modeled as laboratory behaviors, such as the increased percentage of trials on which players complete a word puzzle with a letter that results in an aggressive, rather than a neutral, word. For example, com-

⁷¹ Matt Peckham, *Violent Cases: A Conversation with Doug Gentile, Part One*, PCWORLD.COM, Apr. 13, 2007, <http://blogs.pcworld.com/gameon/archives/004098.html> (quoting Prof. Gentile, Assistant Professor of Psychology at Iowa State University and co-author of *VIOLENT VIDEO GAME EFFECTS ON CHILDREN AND ADOLESCENTS* (2007) (with Craig Anderson and Katherine Buckley)).

⁷² Anderson & Sakamoto, *supra* note 69, at e1067 (citation omitted).

⁷³ Peckham, *supra* note 71.

⁷⁴ See, e.g., Anderson & Dill, *supra* note 68, at 784.

pleting the word puzzle “explo_e” with the word “explode” supposedly signifies aggressive thoughts, while completing it with the word “explore” does not.⁷⁵ Kutner and Olson rightly criticize this approach:⁷⁶

Their logic assumes that the subjects in these experiments—usually college students who participate to earn some spending money or to get credit for a class—cannot tell the fantasy from reality and don’t know that “punishing” a person with a mild electric shock or a 9mm pistol will lead to different outcomes. Can someone who delivers a brief blast of noise really be said to have the same malicious intent as someone who shoots a convenience store clerk or stabs someone in a bar fight?⁷⁷

The research also shows that the aspect of violent media targeted by California and most disturbing to concerned parents—the realistic depiction of violence—predicts neither aggression nor violence. “[W]e’ve assumed that what matters is how realistic the violence is. But ... what we found is that even the children's games that included violence [by their definition] had the same size effect as T-rated games, which are more graphic, and the same size effect as

⁷⁵ See, e.g., Craig A. Anderson, N. Carnagey, et al, *Violent video games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior*, 36 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 199, 208 (2004)).

⁷⁶ Lawrence Kutner & Cheryl K. Olson, GRAND THEFT CHILDHOOD: THE SURPRISING TRUTH ABOUT VIOLENT VIDEO GAMES AND WHAT PARENTS CAN DO 65 (2008).

⁷⁷ *Id.* at 65.

M-rated games in other studies that we've done."⁷⁸ Rather, "what seems to matter is whether the game includes aggressive content even if the game violence was not at all graphic, gory, or realistic."⁷⁹ Here again, California's law is facially underinclusive given its purported rationale: It targets realistic depictions of violence even though realism is irrelevant.

b. *The Research Does Not Show That "Violent" Videogames Harm Minors*

Clearly, "violence" and "aggression" in the social science literature bear little resemblance to real-world aggression or violence. But California also fails to appreciate the vast differences between statistical significance and effect size, and between correlation and causation.

First, California confuses statistically significant experimental findings with real-world harm. Nearly every introductory statistics course or textbook, however, takes pains to distinguish between the concepts of significance (the probability a given effect occurred by chance) and effect size, or "real world" meaning.⁸⁰

⁷⁸ Peckham, *supra* note 71.

⁷⁹ Craig Anderson, Douglas Gentile, & Katherine Buckley, VIOLENT VIDEO GAME EFFECTS ON CHILDREN AND ADOLESCENTS 66-67 (2007); *id.* at 67 ("We were also somewhat surprised that there was no apparent difference between the children and the college students. Many people have assumed that children are more vulnerable to media violence effects, but it seems that the college students were just as affected.").

⁸⁰ See, e.g., ROGER E. KIRK, STATISTICS: AN INTRODUCTION 333 (1999) ("statistically significant results are not necessarily important, large, or even useful. What is needed is a meas-

For instance, in the “noise blast” experiments, the difference in loudness between violent and non-violent videogames was approximately 10 decibels,⁸¹ about the difference between the sound of a refrigerator hum (40dB) and the sound of rainfall (50dB).⁸²

This effect, while statistically significant, is small. Similarly, participants in the word choice study made significantly more “aggressive” word completions after playing violent videogames (14.7% aggressive words) than after playing nonviolent videogames (12.5% aggressive words).⁸³ But while this 2.2% difference is of interest to social scientists modeling aggression, it has little real-world meaning.

The conflation of statistical significance with effect size is especially pernicious here because there are no established clinical thresholds beyond which aggressive behavior is considered pathological within experimental contexts.

Second, it is not enough to suggest the *possibility* of a causal correlation: As every statistician and social scientist recognizes, correlation does not necessarily equal causation. “[B]ecause two phenomena are both disturbing and coincident in time does not make them causally connected,” notes Dr. Stuart Fischhoff of the Media Psychology lab at Californian

ure of the practical significance of results. Unfortunately, such a measure does not exist. However, measures of effect magnitude can assist a researcher in deciding whether results are practically significant.”).

⁸¹ Anderson, Carnagey, et al., *supra* note 75, at 221, Table II.

⁸² American Tinnitus Association, last accessed on August 3, 2010, at www.ata.org/about-tinnitus/how-loud-too-loud.

⁸³ Anderson, Carnagey), et al, *supra* note 75 at 208.

State University in Los Angeles.⁸⁴ See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 317 (2002) (correlational evidence “suffers from its inability to establish a causal connection between the correlated phenomena. It is frequently the case that two phenomena are positively correlated precisely because they are both caused by some third phenomena.”).

Indeed, no such link has been clearly established in the “scientific” literature on this subject. The literature is ambiguous at best and perhaps even leans against the “causal hypothesis” that media violence causes aggression.

The most comprehensive review of major literature on the impact of movie and television media violence on aggression revealed that “the results do not support the view that exposure to media violence causes children or anyone else to become aggressive or to commit crimes; nor does it support the idea that it causes people to be less sensitive to real violence.”⁸⁵ After reviewing all the laboratory experiments, field experiments, longitudinal studies, and other studies conducted through 2002, the author concluded that “not one type of research provided the kind of supportive evidence that is ordinarily required to support a hypothesis. Not one found 90% supportive or 80% supportive or 70% supportive or even 50%. In fact, regardless of the method used, fewer than half the studies found results that sup-

⁸⁴ GERALD JONES, *KILLING MONSTERS: WHY CHILDREN NEED FANTASY, SUPER-HEROES, AND MAKE-BELIEVE VIOLENCE* 28 (2002).

⁸⁵ JONATHAN L. FREEDMAN, *MEDIA VIOLENCE AND ITS EFFECT ON AGGRESSION: ASSESSING THE SCIENTIFIC EVIDENCE* x-xi (2002).

ported the [causal] hypothesis—sometimes considerably fewer than half.”⁸⁶

Similarly, the most recent meta-analysis “does not find support for either a causal or correlational link between violent media and subsequent aggression in viewers” and stressed that “media violence effects research may be driven by poor methodology, including inadequate aggression measures and failure to consider third variables.”⁸⁷ Laboratory studies that “take account of potentially confounding ‘third’ variables such as personality, family violence, or genetics ... consistently find that the link between video game violence and aggression is greatly weakened by the inclusion of ‘third’ variables.”⁸⁸

Indeed, even researchers relied on by California recognize that “the correlational nature of [this study] means that causal statements are risky at best. It could be that the obtained videogame violence links to aggressive and nonaggressive delinquency are wholly due to the fact that highly aggres-

⁸⁶ *Id.* at 200-201.

⁸⁷ Christopher J. Ferguson & John Kilburn, *The Public Health Risks of Media Violence: A Meta-Analytic Review*, 154 J. OF PEDIATRICS 759, 762 (May 2009), www.tamtu.edu/~cferguson/MVJPED.pdf; see also Steven D. Levitt & John A. List, *What Do Laboratory Experiments Measuring Social Preferences Reveal About the Real World?* 21 J. ECON. PERSP. 2 (Spring 2007) 153-174, 154.

⁸⁸ Christopher Ferguson, *The School Shooting / Violent Video Game Link: Causal Relationship or Moral Panic?*, 5 J. INVESTIGATIVE PSYCH. OFFENDER PROFIL. 5, 25-37, 27 (Dec. 2009), www.gameinsociety.com/public/The_school_shooting_-_violent_video_game_link.pdf

sive individuals are especially attracted to violent videogames.”⁸⁹

Other studies have attempted to measure real-world violence relative to violent media exposure. For instance, one study examined videogame store sales and localized reports of violence, concluding that “most crimes decrease in a county as the number of game stores increases” and suggesting *subsidies* for increased game consumption by youth rather than prohibition.⁹⁰

Given the obvious weakness of the media-violence research on showing any link to actual harm to children, California also relies on neurological studies finding some reduction of neural activity in the brain’s frontal lobes as a result of playing “violent” videogames.

This reliance is misplaced because these effects are not harmful; rather, the brain may simply become more efficient: “[l]ess cortical activation without a behavioral deficit implies that fewer neurons are necessary to produce the same response.”⁹¹ Studies suggest that such neural efficiency is associated with the expertise of highly trained athletes, dancers, and musicians. “The key concept is that of increasing automaticity: controlled processes are attention demanding, conscious and inefficient, whereas

⁸⁹ Anderson & Dill, *supra* note 68, at 782.

⁹⁰ Michael R. Ward, *Video Games and Crime*, CONTEMPORARY ECON. POL., <http://onlinelibrary.wiley.com/doi/10.1111/j.1465-7287.2010.00216.x/full>

⁹¹ Joshua A. Granek, Diana L. Gorbet, & Lauren E. Sergio, *Extensive Video-Game Experience Alters Cortical Networks for Complex Visuomotor Transformations*, 46 CORTEX 1165, 1166 (2010), <http://tinyurl.com/3xfnkhx>.

automatic processes are rapid, smooth, effortless, demand little attentional capacity and are difficult to consciously disrupt.”⁹² Accordingly, “extensive practice over a long period of time leads experts to develop a focused and efficient organization of task-related neural networks, whereas novices have difficulty filtering out irrelevant information.”⁹³

Anyone who has played modern videogames knows that they require intricate perceptual-motor coordination. Thus, this neurological effect likely represents nothing more than skilled videogamers handling complexity better than novices. There is no harm here.

3. *Almost Every Social or Cultural Indicator of Importance Has Been Improving Even as Videogame Use Among Youth Has Increased*

Whatever lab experiments suggest, evidence of a link between depictions of media violence and real-world violence simply does not appear in real-world data. The FBI’s research reports show that violent crime rates have fallen steadily over the past two decades and that the juvenile crime rate has fallen 36% since 1995 (and the juvenile murder rate has plummeted by 62%)⁹⁴—even as videogame consump-

⁹² Kielan Yarrow, Peter Brown, & John W. Krakauer, *Inside the Brain of an Elite Athlete: The Neural Processes That Support High Achievement in Sports*, 10 NATURE REVIEWS NEUROSCIENCE 585, 588 (2009).

⁹³ John Milton, Ana Solodkin, Petr Hluštík, & Steven L. Small, *The Mind of Expert Motor Performance is Cool and Focused*, 35 NEUROIMAGE 804, 804 (2007); *see also id.* at 810.

⁹⁴ FBI, CRIME IN THE UNITED STATES (2008), www.fbi.gov/ucr/cius2008/index.html.

tion has exploded: “youth exposure to just about all forms of media is up. The amount of time they spent with videogames rose from an estimated 26 minutes in 1999 to 73 minutes in 2009.”⁹⁵

Indeed, real-world data trends show stunning drops in crime during a period of increased exposure to videogames. The FBI’s latest crime report revealed even more stunning declines in crime with violent crimes declining by 5.5% relative to 2008.⁹⁶ Exhibit 4 shows the percentage declines by overall crime category for the past four years, and the subsequent tables and charts depict the declines for various categories of crime over the past 15-25 years.⁹⁷

This real-world evidence makes the State’s claim of a compelling interest for regulation highly dubious: no positive statistical correlation between gaming and real-world acts of violence or aggression has been proven.

B. *Turner* Deference Cannot Be Applied Here

California argues that, in requiring proof of causation (rather than mere correlation), the Ninth Circuit misapplied *Turner Broad. Sys., Inc. v. FCC*, 512

⁹⁵ KAISER FAMILY FOUNDATION, GENERATION M2: MEDIA IN THE LIVES OF 8- TO 18-YEAR-OLDS (Jan. 2010), www.kff.org/entmedia/8010.cfm.

⁹⁶ FBI, *Preliminary Annual Uniform Crime Report of 2009* (May 24, 2010), www.fbi.gov/ucr/prelimsem2009/index.html.

⁹⁷ Surprisingly, these declines occurred in the midst of one of the most significant economic downturns that America has experienced in decades. See Charlie Savage, *U.S. Crime Rates Fell Despite Economy*, N.Y. TIMES, May 24, 2010, www.nytimes.com/2010/05/25/us/25crime.html?_r=2&hp.

U.S. 622, 666 (1994). *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 962 (9th Cir. 2009) (applying *Turner*).

California's argument fails for two simple reasons. First, California has cited no persuasive authority for applying *Turner* deference to content-based restrictions under strict scrutiny—and for good reason: The First Amendment does not permit deference to legislative findings on the primary effects of protected speech on its audience. Second, California's legislative findings are not supported by substantial evidence and do not reflect the critical exercise of sound judgment that might warrant such deference. California's problem was not that the Ninth Circuit required proof of causation, but that the evidence is itself deeply flawed.

1. *Turner Deference Does Not Apply to Content-Based Restrictions on Speech, and No Authority Holds Otherwise*

“Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.” *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *id.* at 844 (“Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.”).

California's law is a content-based restriction on speech. *See, e.g., Playboy*, 529 U.S. at 811-812 (a law that “focuses *only* on the content of the speech and the direct impact that speech has on listeners ... is the essence of content-based regulation”) (internal quotation marks and citations omitted) (emphasis in original). *Amici* cite no persuasive authority for

Turner deference where strict scrutiny is required of a content-based restriction on protected speech.

This should surprise no one: Because content-based regulation of speech is presumptively invalid, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-118 (1991), deference to legislative findings about the primary effects of protected speech is incoherent.

One reason lies in the differences between strict and intermediate scrutiny. Strict scrutiny's least-restrictive-means requirement seeks to minimize speech loss even where a compelling government interest exists, while intermediate scrutiny's narrow-tailoring requirement accepts a range of trade-offs between speech and a substantial government interest. Some deference to legislative fact-finding makes sense when such trade-offs are allowed, but not when costs to speech are being minimized. *See Playboy*, 529 U.S. at 815 (“[T]he lesser scrutiny afforded regulations targeting the secondary effects of crime ... has no application to content-based regulations targeting the primary effects of protected speech.”) (citations omitted).

Similarly, in *Reno v. ACLU*, 521 U.S. 844 (1997), this Court rejected deference to legislative findings, instead asserting “an ‘over-arching commitment’ to make sure that Congress has designed its statute to accomplish its purpose ‘without imposing an unnecessarily great restriction on speech.’” *Id.* at 876 (quoting *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996)). The Court cited district court findings to demonstrate “incorrect factual premises” relied upon by Congress. *Reno*, 521 U.S. at 876.

Here, California seeks to use empirical studies to show that “violent” videogames are harmful, and thus low-value speech, or that graphic depictions of violence lack serious value. This attempt must be rejected: “the First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.” *United States v. Stevens*, 130 S.Ct. 1577, 1585 (2010); *id.* at 1591 (“Most of what we say to one another lacks ‘religious, political, scientific, educational, journalistic, historical, or artistic value’ (let alone serious value)”) (emphasis in original).

Decades ago, this Court rejected a similar argument about “vulgar” speech, explaining that the First Amendment protects the “emotive” force or function of expression, and that “governmental officials cannot make principled distinctions in this area.” *Cohen v. California*, 403 U.S. 15, 25-26 (1971).

2. *The California Legislature’s use of Empirical Evidence Here Does Not Reflect the Critical Exercise of Sound Predictive Judgment and Warrants No Deference*

This Court’s precedents amply refute California’s call for substantial deference to its legislative findings. But as shown above, California’s legislative findings deserve no deference in the first place.

First, the record here is sparse compared to the “record of tens of thousands of pages’ of evidence” developed through “three years of pre-enactment hearings... as well as additional expert submissions, sworn declarations and testimony, and industry doc-

uments” in support of the complex must-carry provisions in *Turner. Playboy*, 529 U.S. at 822.

Second, unlike in *Turner*, California made no “predictive judgments” based on “vast amounts of data.”⁹⁸ Rather, the legislature relied upon a modest number of social science studies that all other courts had correctly rejected. The legislature did not so much apply its own critical analysis skills to the evidence (weighing disparate findings objectively and drawing conclusions based on the totality of the evidence) as outsource its reasoning to one side of a genuine scientific debate.

The First Amendment does not permit California to misinterpret social science simply because the actual state of the science is inconclusive; this Court should not defer to these legislative findings.

CONCLUSION

The judgment of the Ninth Circuit overturning California’s unconstitutional restrictions on video-game speech should be affirmed.

⁹⁸ *Turner*, 512 U.S. at 665-6 (quoting *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985)).

Respectfully submitted.

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APPENDIX A - EXHIBITS

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Exhibit 1: Parental Awareness & Use of Videogame Ratings is High

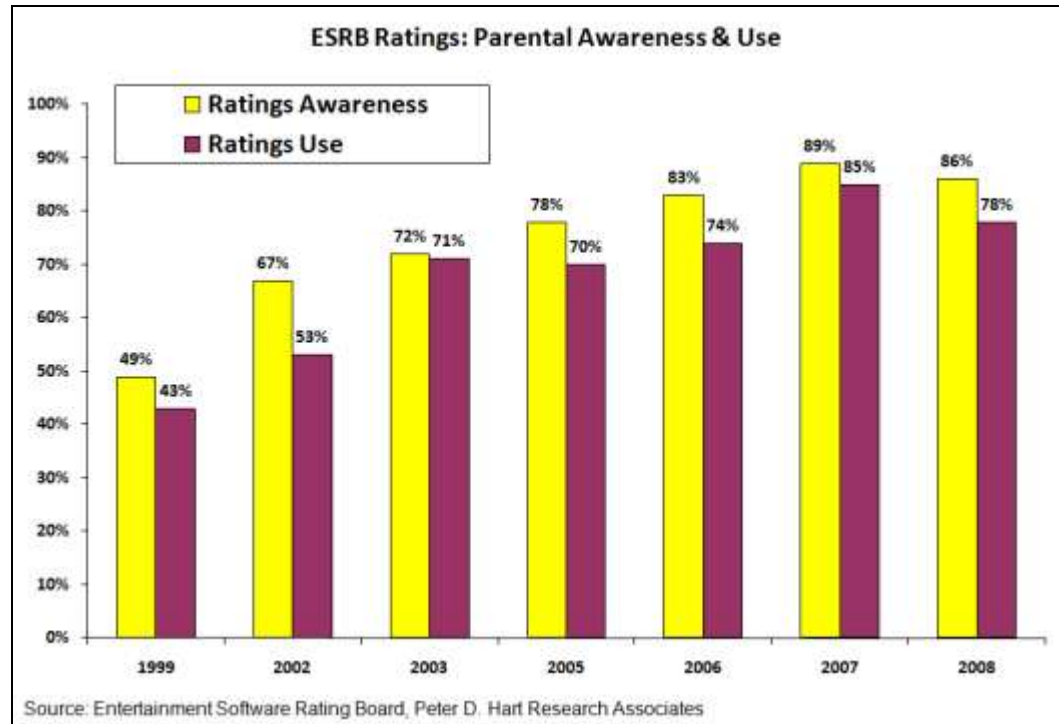


Exhibit 2: FTC “Secret Shopper” Surveys Show Improved Retailer Enforcement

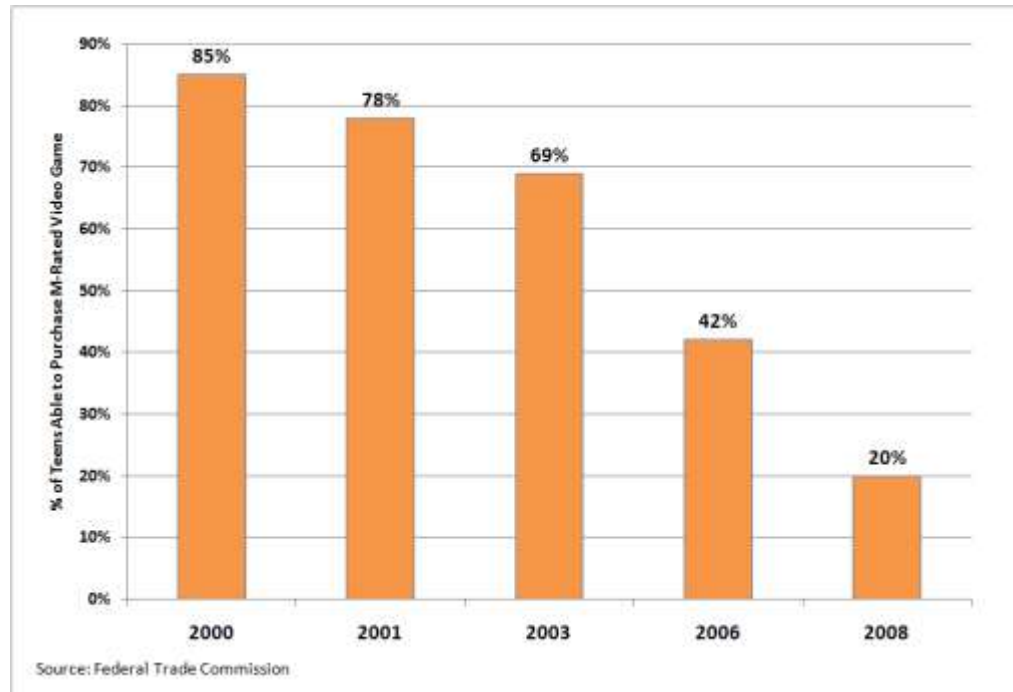


Exhibit 3: Comparison of Youth Violence and Videogame Sales 1996-2005

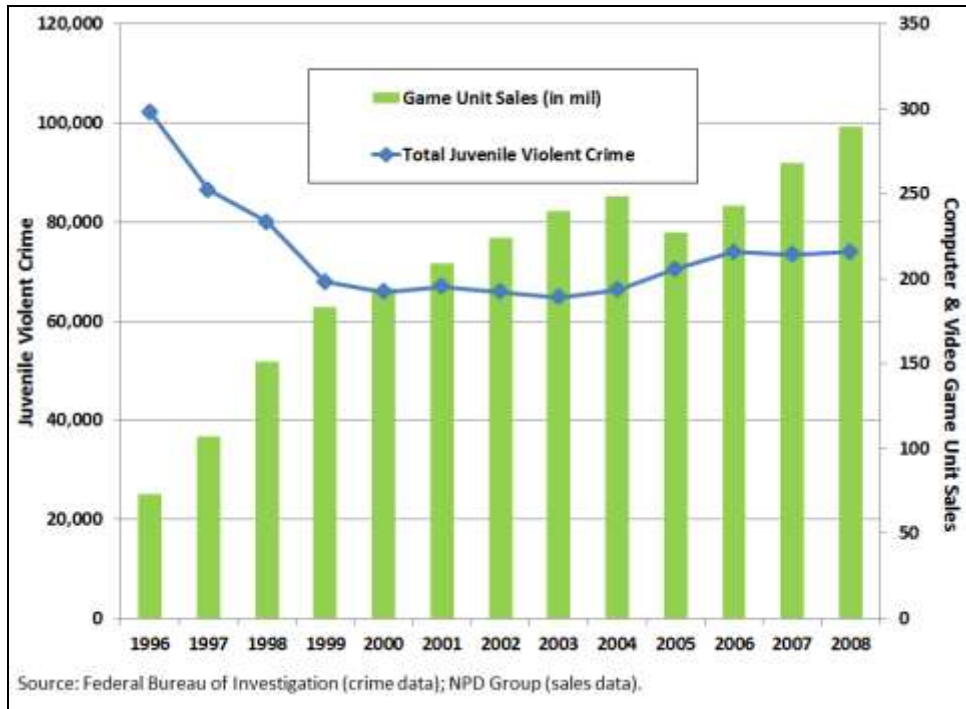


Exhibit 4: Year-Over-Year Percentage Change in Violent Crime 2005-2009

Years	Violent crime	Murder	Forcible rape	Robbery	Aggravated assault	Property crime	Burglary	Larceny-theft	Motor vehicle theft	Arson
2006/2005	+1.9	+1.8	-2.0	+7.2	-0.2	-1.9	+1.3	-2.6	-3.5	+2.1
2007/2006	-0.7	-0.6	-2.5	-0.5	-0.6	-1.4	-0.2	-0.6	-8.1	-6.7
2008/2007	-1.9	-3.9	-1.6	-0.7	-2.5	-0.8	+2.0	+0.3	-12.7	-3.6
2009/2008	-5.5	-7.2	-3.1	-8.1	-4.2	-4.9	-1.7	-4.2	-17.2	-10.4

Exhibit 5: Juvenile Violent Crime Data 1995-2008

	Murder	Forcible Rape	Robbery	Aggravated Assault	Total Juvenile Violent Crime	Change from Previous Year
1995	2,560	4,190	44,508	64,334	115,592	
1996	2,172	4,128	39,037	56,894	102,231	-12%
1997	1,731	3,792	28,069	52,870	86,462	-15%
1998	1,470	3,769	23,400	51,360	79,999	-7%
1999	919	3,182	18,735	45,080	67,916	-15%
2000	806	2,937	18,288	43,879	65,910	-3%
2001	957	3,119	18,111	44,815	67,002	2%
2002	806	2,937	18,288	43,879	65,910	-2%
2003	783	2,966	17,900	43,150	64,799	-2%
2004	1,065	3,038	18,554	43,611	66,268	2%
2005	929	2,888	21,515	45,150	70,482	6%
2006	956	2,519	26,092	44,424	73,991	5%
2007	1,011	2,633	26,324	43,459	73,427	-1%
2008	974	2,505	27,522	42,969	73,970	1%
% change 95-08	-62%	-40%	-38%	-33%	-36%	

Source: Federal Bureau of Investigation, *Crime in the United States, various years*

Exhibit 6: Total Juvenile Violent Crime Data 1995-2008

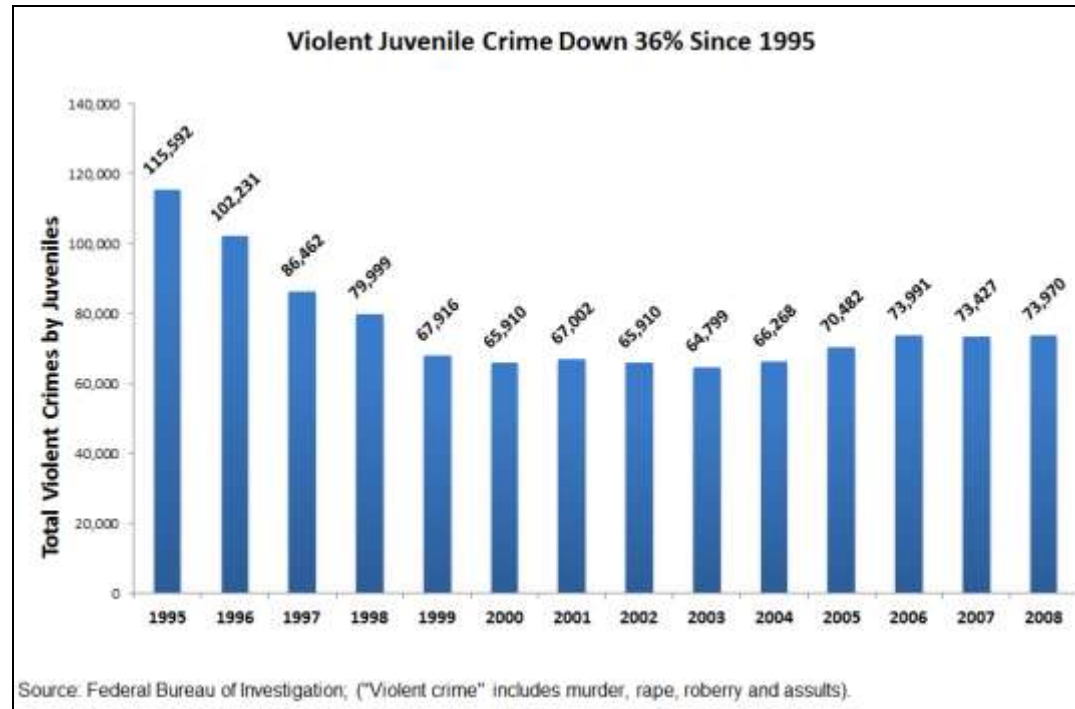


Exhibit 7: Overall Violent Crime Rate 1986-2008

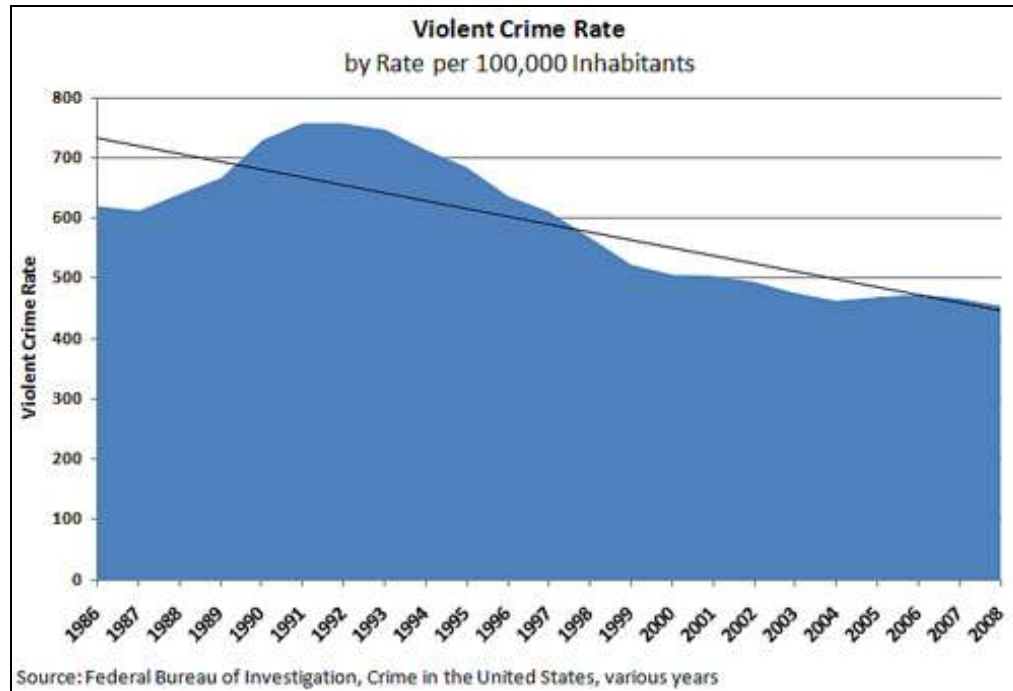


Exhibit 8: Overall Forcible Rape Rate 1986-2008

