



**EXCERPTS FROM THE
ENTERTAINMENT SOFTWARE ASSOCIATION’S
BRIEF ON THE MERITS:**

Schwarzenegger v. Entertainment Merchants Association & Entertainment Software Association

“Video games, a form of expression as rich in content as books and movies, are fully protected by the First Amendment. As with literature, art, movies, comic books, television, and theater, some video games depict violence, and those depictions are likewise wholly protected by the First Amendment.”

New Media Has Always Been Subjected to Attempts at Censorship – and The Court Has Always Rejected These Efforts Under the First Amendment:

- “The California statute at bar is the latest in a long history of overreactions to new expressive media. In the past, comic books, true-crime novels, movies, rock music, and other new media have all been accused of harming our youth. In each case, the perceived threat later proved unfounded.” (p. 1)
- “[H]istory teaches that every new form of media is met with concern that it will undo the youth of the nation. Pulp novels, movies, and the Internet have all been subject to similar attempts at censorship, complete with purported social science support.” (p. 36)

Video Games Are a Popular Form of Modern Artistic Expression, Involving Classic Themes, Storylines, and Player Involvement and Are Fully Protected by the First Amendment:

- “Video games are a modern form of artistic expression. A video game is an interactive software program that a player experiences on a screen, such as a television or computer monitor.... Like the best of literature, they often involve classic themes that have captivated audiences for centuries, such as good-versus-evil, triumph over adversity, struggle against corrupt powers, and quest for adventure.” (p. 2)
- “California has never contested that video games are expression entitled to First Amendment protection. No other conclusion is possible. Video games contain narrative, artwork, and music. They are ‘a story-laden’ medium...” (p. 17)
- “[P]laying a video game is like improvising a performance of a musical score, because the player engages in and contributes to the expressive activity rather than passively consuming it. Video

game play is also like a musical performance in that it requires an element of physical skill and virtuosity, such that accomplished players have more expressive options than novices.” (p. 3)

- “California fundamentally distorts bedrock First Amendment principles when it suggests that video games are entitled to lesser protection because their interactivity *increases* the impact of their expression on the viewer.... Plainly, the Government is not entitled to regulate speech on the ground that it is particularly effective at conveying its message.... Nor is there the slightest support in the social science for the claim that interactivity heightens the purportedly harmful effects of violent works.” (p. 19)
- “Video games, a form of expression as rich in content as books and movies, are fully protected by the First Amendment. As with literature, art, movies, comic books, television, and theater, some video games depict violence, and those depictions are likewise wholly protected by the First Amendment.” (p. 13)
- “Tacitly conceding that the Act cannot withstand strict scrutiny, California argues that ‘offensively violent’ video games should be placed outside the protection of the First Amendment, at least as to minors. This Court recently rejected a similar argument in *United States v. Stevens...*” (p. 13)

Violence Has a Long-Standing Role in Expression Consumed by Children – from Greek Myths, to the Bible, to Harry Potter:

- “[T]he State’s analogy to obscenity fails because depictions of violence, unlike obscenity, have played a long-standing and celebrated role in expression properly consumed by minors, from Greek myths to the Bible to *Star Wars* and *Harry Potter*. A new exception for depictions of violence would threaten access to these materials. California’s assertion that it will regulate only ‘offensive’ depictions of violence compounds the First Amendment problem, as “offensiveness” will invite viewpoint discrimination, with depictions of violence committed by malefactors rather than ‘good guys’ being deemed offensive.” (p. 15)

Video Games Are Often Based on Books and Movies... But Are the Inspiration for Movies as Well:

- “Some games are based directly on popular books and movies.... [V]ideo games have become so popular that books and movies are now increasingly based on them. One example is the successful film *Prince of Persia: Sands of Time*, which, like the video game on which it is based, follows the adventures of an ancient Persian prince...” (p. 5)

As a Result, It's Not Surprising that Video Games Sometimes Depict Violence as Movies and Books Do:

- “Like other media, video games may depict violence. Thus, the soldiers in *Medal of Honor* attack Nazis; the unit in *Rainbow Six 3* fights terrorists; the redeemed outlaw hero of *Red Dead Redemption* kills members of his old gang; and the Prince of Persia battles human and non-human foes. Some games depict violence in graphic detail – as do some movies...” (pp. 5-6)

The Video Game Industry's Rating System Is Extremely Comprehensive and Provides Parents With the Tools Needed To Assess What Games Are Suitable for What Ages:

- “The video game industry has adopted a rating system to inform consumers about the content of each game. That system – which the Federal Trade Commission has called the ‘most comprehensive’ of industry-wide media rating systems – is implemented by the Entertainment Software Rating Board (‘ESRB’), an entity established by respondent Entertainment Software Association.... The ESRB gives one of six age-specific ratings to each game: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teen); M (Mature 17+); and AO (Adults Only 18+).... It also assigns content descriptors, such as ‘Crude Humor,’ ‘Strong Language,’ ‘Cartoon Violence,’ ‘Intense Violence,’ and ‘Suggestive Themes,’ among over two dozen others... and provides online ratings summaries for all titles rated since July 2008.” (p. 7)
- “A recent FTC report found that 87 percent of surveyed parents are aware of the ESRB ratings; of those, 73 percent use them ‘all,’ ‘nearly all,’ or ‘most of the time’ when buying games, 87 percent are ‘very’ to ‘somewhat’ satisfied with them, and 93 percent find them ‘moderately’ to ‘very’ easy to understand.” (pp. 7-8)
- “The record evidence shows that parents are present during 83 percent of game purchases by minors... and a more recent survey puts that figure at 92 percent... The FTC has consistently noted the ‘high level of parental involvement in selecting and purchasing video games for their children.’” (p. 9)

The Current Rating System Is Working To Keep Kids from Buying Games that Are Not Intended for Them -- California Could Not Show Parents Need Government Help:

- “All major video game retailers, and countless smaller stores, have joined in voluntary efforts to educate consumers about the ESRB system, to prevent individuals under age 17 from buying or renting games rated ‘M’ absent parental consent, and to avoid carrying or providing to minors ‘AO’-rated games.... Most retailers will not sell games that have not been rated by the ESRB.” (p. 8)
- “The ESRB also bars marketing of M- and AO-rated games in media where a significant portion of the audience consists of minors.” (p. 8)

- “The 2009 FTC study found that ‘the video game industry outpaces the movie and music industries in the three key areas that the Commission has been studying for the past decade’... ‘restricting target-marketing of mature-rated products to children’... ‘clearly and prominently disclosing rating information’... ‘restricting children’s access to mature-rated products at retail.’” (pp. 8-9)
- “Specifically with respect to retail sales, the FTC found that when unaccompanied mystery shoppers under 17 were sent into retail establishments to try to buy M-rated games, they were turned away 80 percent of the time.... By comparison, unaccompanied minors were denied R-rated movie tickets 72 percent of the time... and were unable to purchase R-rated DVDs 46 percent of the time...” (p. 9)

The Supreme Court Has Relied on Parents To Make Decisions About Content for Their Children:

- “In every other context in which minors can be exposed to expression – *e.g.*, in public places, making a telephone call, watching cable television, accessing the Internet – the Court has not freely allowed the government to censor speech it deems inappropriate for minors, instead relying on parents to control access in the first instance.” (p. 27)
- “Government cannot restrict protected expression to ensure that it lacks the ‘imprimatur of societal approval.’ Such regulation distorts the marketplace of ideas in just the way the First Amendment forbids. Only individuals (and parents), not the government, are entitled to decide which expression is worthwhile.” (p. 29)
- “That is especially true because so many different forms of expression are considered inappropriate for minors by at least some parents. For example, many parents are opposed to their minor children reading classic works of American literature like *The Adventures of Huckleberry Finn* because of racial epithets in that book.... Others object to discussions of evolution or, conversely, of creationism.... Still others sincerely believe that popular works like the *Harry Potter* series should be off limits because they celebrate a perceived pagan worldview.... That does not mean a legislature could require some or all of these works to be kept in the ‘adults only’ section of bookstores.” (pp. 29-30)

California’s Law Usurps Parental Authority:

- “Parents also have technological tools to restrict what games their children play. The Microsoft Windows operating system and the current generation of game consoles and handheld game systems contain parental control settings that allow parents to decide what type of games may be played on them (*e.g.*, only those games rated T or lower).” (p. 10)
- “[M]inors’ First Amendment rights are generally coextensive with those of adults, except in narrow, well-defined circumstances not present here. California’s argument is not saved by the fact that the State is purportedly acting to assist parents. That justification

could justify a ban on virtually anything, including the sale of particular books to minors without parental consent. Parents certainly have the right to determine what expression they want their minor children to experience. But that parental prerogative does not give the government the right to decide what is worthy for minors to view.” (p. 14)

- “The Court should continue to put its trust in parents in the first instance, rather than politicians.” (p. 14)
- “Ultimately, when government regulates expression in the name of assisting parents, it usurps their role and favors the preferences of some parents over those of others.” (p. 30)

California’s Arguments Are a Dangerous Attempt To Eviscerate First Amendment Protections and Open the Door to Censorship of Other Media:

- “California asks the Court to withdraw First Amendment protection from some ill-defined subset of video games, at least as to minors, based on the same sort of unsupported claims that animated past efforts to regulate new media. This Court should reject California’s dangerous proposal. As the Court has long recognized, it is not the role of government to decide which expressive materials are ‘worthy’ of constitutional protection.” (p. 1)

The Court Should Reject California’s Unprecedented Plea To Carve Out First Amendment Exceptions for “Offensively Violent” Video Games:

- “Recognizing it cannot satisfy strict scrutiny, California argues that some expression to minors, even if entirely non-sexual in content, is unprotected by the First Amendment.” (p. 23)
- “California’s argument takes a variety of forms. At times it seems to say that the government has a right to restrict any expression it finds ‘offensive’ for minors.... At other times, the argument seems to be limited to ‘offensively violent’ expression.... And at still other times, it seems to be limited to ‘offensively violent’ video games.” (p. 23)
- “[I]t is critical to recognize the radical nature of California’s position, however articulated. California asserts the power to decide that certain otherwise-protected, non-sexual content is so offensive that it is ‘simply not worthy of constitutional protection’ as to minors.... But content-based restrictions are presumptively unconstitutional... California thus would turn the very rationale for strict scrutiny into an excuse to avoid it.” (pp. 23- 24)
- “This argument has almost no stopping point because so many expressive works contain violent depictions or other content that someone could deem offensive for minors.... Accepting California’s position would thus justify censorship of a wide range of

expressive materials by states and localities around the country, a result anathema to the First Amendment.” (p. 24)

- “California argues that it seeks to regulate only ‘offensive’ violence, but that hardly solves the First Amendment problem. As explained above, it is not the government’s role to determine which expression is sufficiently offensive to be unworthy of First Amendment protection.” (p. 33)

The Supreme Court Has Said Only a Few Categories of Expression Are Unprotected... But Expressions of Violence Are Protected:

- “In *Stevens*, the Court powerfully reaffirmed that the First Amendment leaves unprotected only a handful of ‘historic and traditional categories long familiar to the bar,’ including ‘obscenity,’ ‘incitement,’ and ‘defamation.’” (p. 19)
- “Unlike obscenity, depictions of violence have played a central and celebrated role in literature...” (pp. 19-20)
- “California nevertheless contends that depictions of violence either are obscenity... or have historically been regulated as the equivalent of obscenity.... Both contentions are meritless.” (p. 20)

California Has Failed To Show Any Harm to Children:

- “California has not demonstrated that parents currently have trouble monitoring the games their children play. Nor has California shown that video games are harmful to minors. Instead, the social science research California cites has been discredited by every court to have considered it. California’s studies do not show that video games are the cause of any harm or that they are any different from any other media.” (p. 15)
- “[N]early all video games played by minors are purchased for them *by their parents*.... The exceptions presumably are confined to the oldest minors who have the necessary funds and the ability to get to stores without their parents. Even in those exceptional cases, minors are not necessarily attempting to buy games that would qualify as ‘violent video games’ under the Act, nor are they necessarily acting without parental permission. And even when they attempt to do so, assuming the games are rated ‘M,’ the sale most likely will not go through because of voluntary retailer enforcement of the ESRB rating system. Moreover, to cause the harm California claims, the very few ‘violent video games’ clandestinely purchased by minors would have to be played over an extended period of time, providing further opportunity for parental supervision. And those games may be played on consoles, PCs, or handheld devices with technological controls that parents can enable to prevent such games from being played in their absence.... In sum, there are ample opportunities for parents to intervene if they so choose.” (p. 37)

California's Scientific Research Has Been Routinely Rejected by Every Court that Has Reviewed It:

- “The research cited by California has been resoundingly rejected by every court to have looked at it, and it both underproves and overproves the State’s claims: it does not show that video games cause actual harm to minors, and it purports to find the same measured effects for a wide array of stimuli, including games designed for small children, television cartoons, or even a picture of a gun. If evidence of this sort were sufficient to justify treating expression as unprotected, the First Amendment would mean very little.” (p. 36)
- “California has vacillated as to precisely what harm it claims is at issue. Although the Act’s preamble speaks of a need to prevent ‘violence’ by minors, California has largely disclaimed a violence-prevention rationale... Instead, California focuses on a more amorphous harm – causing increased ‘aggressive thoughts and behavior’ in minors.... However the harm is defined, California has failed to demonstrate that it exists. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists closely affiliated with him.... The Illinois district court, along with every court to have considered Dr. Anderson’s and similar research, concluded that the research does not show that violent video games are harmful to minors in any material way.” (pp. 37-38)
- “As the Ninth Circuit described in detail, there are numerous flaws with these studies. *First*, most of the studies do not even attempt to prove that video games cause minors to act aggressively.... *Second*, the experimental studies cited by California are no more compelling.... *Third*, Dr. Anderson and his colleagues have published a series of ‘meta-analyses,’ which combine these unpersuasive experimental and correlational studies together and calculate an overall effect size. But combining flawed studies does not make the flaws go away.... *Fourth*, even taking the ‘effect sizes’ claimed by Dr. Anderson *et al.* at face value, they are both very small and no different from the results produced in studies of other media.” (pp. 39-41)
- “*Fifth*, the credibility of Dr. Anderson’s findings is further undermined by his statements that even playful images of violence such as those found in Bugs Bunny cartoons or E-rated games create the same ‘effect’ sizes as more violent video games.... Dr. Anderson admits that even *viewing a picture of a gun* has the same aggressive effect as playing a violent video game.... And one of his fellow researchers claims to find nearly identical links between aggressive behavior and *reading violent passages in the Bible.*” (p. 42)

In Fact, Violence by Juveniles Has Decreased Even as Video Game Usage Has Increased:

- “The reality is that 67 percent of all American households now play video games. Since the emergence of graphically violent games 15 years ago, juvenile violent crime has *declined precipitously.*” (p. 46)

California Is Singling Out Video Games Although They Took No Action Towards Other Violent Expression – They Would Allow Kids To Buy Tom Clancy Books or Movies, But Not Play a Video Game Based on the Same Story:

- “[V]iolent video games represent only ‘a tiny fraction of the media violence to which modern American children are exposed.’ ... California has singled out video games even though a broad set of media contain similar depictions of violence. Its *own evidence*, taken at face value, indicates that the effect of exposure to violent video games is the same as exposure to other media containing violence.... But while the Act might ban a 16-year-old from buying or renting Tom Clancy’s *Rainbow Six 3* video game, it would still allow him to buy or rent Tom Clancy’s movies or books. This selective treatment of similar speech underscores that California’s ultimate purpose in enacting the law was to target and punish a disfavored speaker, rather than achieve its asserted purpose.” (p. 51)

California Did Not Carefully Tailor Its Law:

- “The Act fails strict scrutiny for the additional reason that it threatens to censor a wide range of fully protected expression. Even if there were some subset of extreme depictions of violence that could be restricted as to minors – which California has not come close to showing here – the Act’s sweep is so broad that it would reach a huge range of expression that has never been thought inappropriate for minors.” (p. 52)
- “The Act’s overbreadth is most clear in the case of 17-year-olds. Because the Act prohibits the sale of games that are offensive to ‘minors,’ a game deemed ‘offensive’ to a very young minor presumably must be labeled with an ‘18’ sticker and restricted from sale to an older minor. The one-size-fits-all system thus draws no distinctions between a 17-year-old and a pre-schooler, in contrast to the ESRB system.” (p. 52)
- “Even California’s brief does not go so far as to claim an interest in shielding 17-year-olds from exposure to descriptions and portrayals of warfare (historical and contemporary) and violent crime in the days or weeks before they become eligible to vote and enlist in the military. That is another reason for striking down the Act.” (p. 52)

The California Law Could Limit Expression Available to Adults as Well:

- “[T]he Act could result in self-imposed restrictions on the game content made available to adults. A retailer who faces substantial civil penalties in the event that a clerk intentionally or negligently sells a proscribed game to a minor may simply not carry the game in the first place. Likewise, video game creators will be induced to create games that do not contain expression that risks running afoul of the Act, further narrowing the range of expression available to adults.” (pp. 54- 55)

- “The only rational response might well be to stop selling video games to minors altogether. Movies and books have been targets before... and will likely come next. The Court should not go down this road.” (p. 61)

The Supreme Court Has Repeatedly Struck Down as Vague Statutes that Purport To Regulate Offensive Expression:

- “Restrictions on protected expression must be clear in their scope to comply with the First Amendment.” (p. 55)
- “[The Act] uses terms... that are vague and ambiguous, and provide little guidance to game creators and distributors.” (p. 57)
- “[T]he Act is invalid for the independent reason that it is unconstitutionally vague. Its proscriptions – using terms such as ‘an image of a human being’ and ‘appeal[ing] to a deviant or morbid interest of minors’ – have no clear boundary in the context of a medium that is highly diverse and often fanciful. As a result, the law will chill a far broader array of speech than even California purports to target.” (p. 16)
- “[I]n many cases it will not be clear whether the ‘image of the human being’ can be harmed in a way that falls within the statute. Does ‘killing’ a character who immediately springs back to life count? If the game allows the player to crush a super villain with a boulder, has a maiming occurred if the villain regenerates his strength? It is impossible to answer these questions by examining the statutory text.” (p. 58)
- “California itself has no clear idea which games are or are not covered by the Act. It asserts it is regulating only a ‘narrow category of material,’... but it invokes research that draws no distinctions among violent games (including cartoonish games designed for small children). California refused in the lower courts to say whether the six games introduced into the record by Respondents would be covered by the Act.” (p. 60)

The California Law Could Open the Door to Massive Civil Fines and Litigation, Particularly Given the Law’s Vagueness:

- “Violations of the labeling or retail provisions are punishable by a civil fine of up to \$1,000.” (p. 11)
- “Arguably, those who distribute or sell video games may also face suit by private citizens under Cal. Civ. Code § 1750, which authorizes suits, including class actions, to redress injuries caused by mislabeled products, providing for awards of compensatory and punitive damages and attorneys’ fees.” (pp. 11-12)



- “Thus, it will be impossible for game makers to know which games will trigger the law’s restrictions. The availability of public enforcement in multiple jurisdictions and the possibility of private suits will create substantial pressure to rate more and more games as appropriate only for those 18 and older. Choosing not to impose such limits, in any borderline case, would risk massive civil penalties of up to \$1,000 per game sold in California.” (p. 60)
- “Requiring retailers to view all the content of a product that contains dozens of hours of game play and is accessible only to a skilled player, to try to apply amorphous standards to the ‘range of options’ available to a player, would impose a nearly impossible burden.” (p. 61)