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 LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF THE *AMICUS*[1]

Amicus Curiae First Amendment Lawyers Association ("FALA") is a non-profit association incorporated in Illinois, with over 180 members throughout the United States, Canada, and Europe. Its membership predominately consists of attorneys whose practice emphasizes the defense of First Amendment rights, and related liberties. FALA members have litigated cases involving a wide spectrum of such rights, including free expression, free association, and privacy issues.

Members of FALA frequently litigate cases before this Court, and as in this case, are often enlisted to represent or support parties before this Court after certiorari is granted. The Free Speech cases briefed and argued by FALA members include such landmark decisions such as *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

Of particular relevance to the issues before the Court in this case, FALA members have briefed and argued virtually every major case in the realms of

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[1] Pursuant to Supreme Court Rule 37.6, no person or entity, other than the *Amicus Curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of the brief. Both parties have consented to the filing of this brief, and those consents have been filed separately with this Court.

obscenity, censorship and adult entertainment, including, in chronological order:

Roth v. United States, 354 U.S. 476 (1957)

Kaplan v. California, 413 U.S. 115 (1973)

United States v. Orito, 413 U.S. 139 (1973)

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)

Hamling v. United States, 418 U.S. 87 (1974)

Hicks v. Miranda, 422 U.S. 332 (1975)

Young v. American Mini Theatres, 427 U.S. 50 (1976)

Ward v. Illinois, 431 U.S. 767 (1977)

Splawn v. State of California, 431 U.S. 595 (1977)

Marks v. United States, 430 U.S. 188 (1977)

Pinkus v. United States, 436 U.S. 293 (1978)

Vance v. Universal Amusement Co., Inc., 445 U.S. 308 (1980)

New York v. Ferber, 458 U.S. 747 (1982)

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985)

New York v. P.J. Video, Inc., 475 U.S. 868 (1986)

Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986)

Pope v. Illinois, 481 U.S. 497 (1987)

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989)

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990)

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)

Alexander v. United States, 509 U.S. 544 (1993)

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994)

City of Erie v. Pap's A.M., 529 U.S. 277 (2000)

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000)

City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001)

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002)

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002)

FALA also submitted an *amicus* brief in the recent case of *U.S. v. Stevens*, 559 U.S. ___, 130 S.Ct. 1577 (2010), which, like the instant case, involved a governmental attempt to restrict speech based solely on its violent content. FALA has followed the cases interpreting violent video game regulation closely and

was intrigued by this Court's decision to grant certiorari in the case at bar; having very recently held that a statute attempting to utilize violence as a basis for content regulation does not comport with the First Amendment. *Id.* The membership is concerned with the arguments asserted in Petitioners' Brief, which urges this Court to extend the limited, narrow exception made for regulation of erotic speech to violent video games. Never in First Amendment jurisprudence has violence served to support a constitutional regulation on expressive material, and all of the Circuit Court decisions interpreting violent video game regulations agree that no exception may be constitutionally made for interactive media.

FALA anticipates that this Court will agree that violence does not constitute a basis for stripping expressive material of First Amendment protection, consistent with the opinions of the lower courts throughout the Nation that have considered this issue. However, the Association offers its perspectives on the wisdom of extending the rationale for regulating sexually explicit material to violent media, and related concerns, in light of FALA members' half-century of experience with the impact of First Amendment doctrine upon free expression.

SUMMARY OF ARGUMENT

This case involves a novel attempt to restrict First Amendment protection from a category of

speech. Petitioners urge this Court to consider violence as a basis for depriving interactive media of its presumed constitutional protection. This Court recently rejected a similar request to create a category of unprotected speech based on violence in *Stevens*, 130 S.Ct. at 1585. The restrictions proposed by Petitioners in this case should be rejected under the same reasoning utilized by this Court in *Stevens* to invalidate a law banning depictions of animal violence.

Petitioners' attempt to draw parallels between regulation of sexually-oriented speech, and violent content, are unavailing. This Court has never tolerated a restriction on speech based solely on its violent characteristics. Petitioners' reliance on *Ginsberg v. New York,* 390 U.S. 629 (1968) as a basis for upholding §1746, *et seq.*, *Cal. Civ. Code*, is misplaced. The *Ginsberg* rationale – prohibiting certain sexually-oriented communications deemed harmful to minors from being distributed to juveniles – is limited in category and narrow in scope. It is based, in part, on prior precedent holding that obscene materials do not enjoy First Amendment protection. The underlying, historical justifications for regulating sexually explicit speech do not translate to the realm of violence. Beginning with the early obscenity decisions, and continuing through *Miller* and its progeny, this Court has focused on concepts of modesty and decency as the bases for tolerating a limited exception to full First Amendment protection, in regards to erotic

communications. The historical justifications for regulating obscenity and "harmful" materials simply do not apply to depictions of violence.

The subject of violence is pervasive throughout historical literature – including stories written for children. Even fairy tales written by The Brothers Grimm included graphic depictions and descriptions of violence, utilized as a means to punish villains and enforce morality. Any paternalistic attempt by Petitioners to shield juveniles from exposure to concepts involving violence, whether in video games or other forms of media, will leave them ill-equipped to function in the modern world.

Ultimately, parents retain the primary obligation of controlling media consumption by their children. This Court should not condone Petitioners' attempt to supplant primary parental responsibilities by imposing government-mandated restrictions on the dissemination of interactive media involving violence. Upholding the challenged statute would permit the state to override the decision of those parents who authorize their teenagers to purchase or rent the restricted games. Petitioners' attempt to forge new ground in media censorship should be rejected by this Court under well-established First Amendment principles.

The statute's reliance on the "prevailing standards in the community" as a basis for defining the

video games covered by the law constitutes an independent basis for invalidation. The inconsistent decisions regarding the geographic scope of the relevant "community" in obscenity cases illustrates the concerns with utilizing that problematic concept to regulate an entirely new category of depictions, i.e., violence. Retailers of videogames sold in California will be unable to discern, in advance, which community's standards will be applied in evaluating whether a particular game is "patently offensive." §1746(d)(A)(ii). The amorphous and inconsistently-applied concept of community standards utilized in the statute renders it vague in all its applications. The chilling effect imposed upon retailers, who are faced with self-censorship in attempting to comply with the community standards determination, renders the statute overbroad as well.

Should this Court consider allowing violence to serve as a basis for restricting expressive communications consistent with strict scrutiny review, and otherwise find the statute not to be vague and/or overbroad, FALA asserts that a reliance on national (as opposed to local or state) community standards must be read into the statute, in order to address First Amendment concerns. As online sale and distribution of video games begins to overtake brick and mortar retail distribution, the impact of the statute on Internet retailers must be considered. Web publishers and distributors do not have the ability to

geographically block consumers in certain "communities" from receipt of digital media. In the event that some formulation of local community standards were accepted as the basis for determining whether a video game is "patently offensive" under the statute, such circumstance would create a "heckler's veto" by the most restrictive community whose standards would have to be utilized by online publishers. In other words, the inability to geographically target online distribution of video games renders distributors subject to the most restrictive community's standards. Accordingly, in the event that this Court considers upholding the statute in the face of the numerous other legal challenges asserted in this case, only reliance on national standards could address the legal concerns generated by Internet retail distribution.

ARGUMENT

I. This Court should reject the state's invitation to extend the *Ginsberg* analysis to violent material.

Petitioners ask this Court to make an unprecedented judicial leap by extending the rationale set forth in *Ginsberg v. New York*, 390 U.S. 629 (1968), approving a restriction on the sale of obscene material deemed "harmful to minors," to authorize similar

restrictions on video games, solely based on their violent characteristics.[2] Never has this Court authorized governmental regulation of a category of media, premised exclusively on violent content. *Ginsberg* and its progeny carved out an exceedingly narrow exception to the principle that all expressive communications are presumed to be protected by the First Amendment, given society's traditional treatment of erotic communications.

Over time, only a limited few "exceptions" to the First Amendment's protection of speech have been recognized by this Court. The justification utilized to exempt these limited subjects from constitutional protection is premised on the assumption that they are "of such slight social value as a step to truth that any benefit that might be derived from them is clearly outweighed by the social interest in order and morality." *R.A.V. v. City of St. Paul, Minnesota,* 505 U.S. 377, 385 (1992), citing *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). Historically, the recognized limits on free speech protection involve; defamation, incitement of violence, obscenity, and child pornography. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002). Notably, since the 1960's, this Court has narrowed (not expanded) the scope of the traditional categorical exceptions for defamation and obscenity. *R.A.V., supra* at 382.

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[2] PB at 12-19.

Content-based regulations, such as the challenged California statute restricting video games based on violence, are presumptively invalid under the First Amendment to the United States Constitution. *R.A.V.*, 505 U.S. at 382. In order to overcome this presumption, content-based restrictions on speech must survive strict judicial scrutiny, which requires the government to demonstrate that the law is narrowly tailored to promote a compelling interest and uses the least restrictive means to accomplish its goals. *See, e.g., Hill v. Colorado,* 530 U.S. 703 (2000); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). The government bears the burden of identifying the compelling interest justifying the law and must come forward with facts and evidence to establish that the statute is narrowly drawn to specifically serve that interest. *Reno v. ACLU,* 521 U.S. 844 (1997). Where the designed benefit of a content-based restriction on speech is to shield the sensibilities of listeners, the general rule is that the right of expression prevails even where no less restrictive alternative exists. *Playboy Entertainment Group, supra* 529 U.S. at 813. "We are expected to protect our own sensibilities 'simply by averting [our] eyes.'" *Id.* citing *Cohen v. California,* 403 U.S. 15 (1971). The challenged statutory prohibition on sale or rental of video games to minors, based solely on the level of violence contained in the game, constitutes a content-based restriction on speech that must be evaluated using strict scrutiny review. Consequently, all of the circuit courts of appeal that have considered violent video game restrictions have

correctly concluded that the laws do not meet constitutional muster, when subjected to strict scrutiny.[3]

Petitioners seek to avoid strict scrutiny review – presumably because they recognize the statute is doomed to fail if the correct standard of review is applied.[4] Tellingly, Petitioners argue that "offensively violent speech aimed at minors can be harmful, and our nation's traditional interest in protecting minors *outweighs* any benefit derived from such speech."[5] Essentially, Petitioners are suggesting that this Court engage in a balancing test, weighing the benefit derived from the speech at issue against the nation's interest in protecting minors. This Court recently rejected a similar balancing test proposed by the government in *Stevens*, 130 S.Ct. at 1585. There, the petitioner suggested a simple balancing test for determining the applicability of First Amendment protection of speech: "Whether a given category of speech enjoys First Amendment protection depends on a categorical balancing of the value of the speech against its societal cost." *Id.* citing *Brief for the United States* at 8. This Court called such a free-flowing test

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[3] *James, et al. v. Meow Media, Inc.*, 300 F.3d 683, 696 (6th Cir. 2002); *American Amusement Machine v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *ESA v. Swanson*, 519 F.3d 768 (8th Cir. 2008); *ISDA v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *VSDA v. Webster,* 968 F.2d 684 (8th Cir. 1992); *ESDA v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006); *VSDA v. Schwarzenegger,* 556 F.3d 950 (9th Cir. 2009), *cert. granted*, 559 S.Ct. 1448 (2010).

[4] PB at 12-13.

[5] PB at 33-34 (emphasis added).

for determination of First Amendment protection "startling and dangerous." *Id.* Petitioners' proposal to utilize the limited *Ginsberg* rationale – relating to sexually-oriented materials – as a basis for stripping yet another category of speech from First Amendment protection, should be flatly rejected for the same reasons recently announced by this Court in *Stevens.*

Notably, the boundaries between the vast plateaus of protected expression and the narrow "holes" carved up by the exceptions, are abrupt constitutional cliffs, not broad and gentle slopes of decreasing protection. Accordingly, where expression falls on the protected side of the constitutional boundary, even just by a bit, it remains fully protected by the First Amendment. *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 251 (2002). Merely because this Court has recognized a strong societal interest in prohibiting minors from consuming sexually-oriented materials that are found to be "harmful," this narrow exception should not be utilized as an entrenching tool to chip away at constitutional protection of free expression afforded to video games, solely because of fantasy violence committed on an "image of a human being." §1746(d)(1), *Cal. Civ. Code.* "Different factors come into play, also, where the interest at stake is the effect of erotic expression upon children." *Ginsberg*, 390 U.S. at 638 n.6, citing Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 938-39 (1963).

FALA members are exceedingly familiar with the struggle that this Court engaged in to piece together

an acceptable legal test for determining obscenity, *vel non*, of materials – for both adults and minors. As noted by this Court in *Miller v. California,* 413 U.S. 15 (1973): "We have seen 'a variety of the views among the members of the court unmatched in any other course of constitutional adjudication.'" *Miller,* 413 U.S. at 22. This Court struggled with the "*Roth* Test," the "*Memoirs* Test," the "*Redrup* policy," and ultimately settled on the three-pronged obscenity test announced in *Miller*. Interestingly, Justice Brennan, the original architect of the early obscenity theories, abandoned his position, and maintained – in *Miller* – that no formulation of the Court, the Congress, or the states, could adequately distinguish between material unprotected by the First Amendment and protected expression. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 83 (1973) (Brennan, J., dissenting). Various justifications have been advanced for the adoption of laws regulating sexually explicit material; from enforcement of morality,[6] to protection of juveniles, to guarding the unwilling adult from inadvertent exposure. *Paris Adult Theatre I v. Slaton,* 413 U.S. at 57-58. However, this Court has never found such justifications sufficient outside the narrow realm of sexually-oriented communications.

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[6] The continued viability of the morality justification for obscenity law is in substantial doubt after this Court's ruling in *Lawrence v. Texas,* 539 U.S. 588 (2003), holding that enforcement of a moral code is not sufficient justification for statute's impacting fundamental liberties.

Petitioners now seek to inflate the *Ginsberg* rationale to the point where it reaches violent media. Given the monumental problems and continuing controversy surrounding the dubious experiment with stripping certain sexually-oriented material of its constitutional protection, this Court should reject Petitioners' invitation to open yet another Pandora's Box of censorship by approving a statute restricting the dissemination of interactive media based solely on its violent content.

As noted by Judge Posner in *American Amusement Machine v. Kendrick*, 244 F.3d at 577:

> Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales by Grimm, Andersen, and Perault is aware. To shield children right up to the age of eighteen 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.

The Brothers Grimm utilized extreme violence in their stories in the attempt to deter bad behavior in children. For example, in "The Robber Bridegroom," a young woman watches in horror as her betrothed and his accomplices drag a young girl to their lair, rip off

her clothes, lay her on a table, hack her body to pieces, and sprinkle them with salt.[7] The authors often made it a point to add or intensify violent episodes in subsequent editions of their fairy tales. For example, it was only in the second edition of the story of Cinderella that her stepsisters' eyes were pecked out by doves, in vivid detail, "for being so wicked and false."[8] Similarly, in the second edition of the Rumpelstiltskin story, the character becomes so beside himself with rage that he tears himself in two. *Id.*

However, issues such as pregnancy and illicit sexual relationships made the Grimm's uncomfortable. *Id.* This is but one example of how violence has historically been treated much differently than sexual content with respect to children. The historical justification for treating sexually explicit materials differently than all other categories of speech involved society's desire to regulate offensive material that people find "disgusting" or "degrading." *James, et al. v. Meow Media, Inc.*, 300 F.3d at 698 (refusing to extend obscenity jurisprudence to violent, as opposed to sexually explicit, material), citing *Kendrick*, 244 F.3d at 574. Obscene and "harmful" material is regulated in an attempt to put a limit on the extent to which the community's sensibilities can be shocked by

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[7] Maria Tatar, *The Hard Facts of the Grimms' Fairy Tales*, 2nd Ed. (1987).

[8] *Id.* citing *The Nursery and Household Tales,* 2nd Ed. (1814).

speech, but not as a protection against behavior that the speech creates. *Id.*

Violent speech can only be regulated if it falls within the category of speech designed to incite violence. *R.A.V. v. City of St. Paul,* 505 U.S. at 384-85. The test for determining whether speech constitutes an unprotected incitement to violence was set forth in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), which permits the states to regulate only that speech which is "directed to inciting or producing imminent lawless action that is likely to incite or produce such action." As held in the numerous cases to have considered the issue, violent video games fall "well short of this threshold." *Meow Media* at 698; *Kendrick,* at 572; *ESA v. Granholm,* 426 F.Supp.2d 646 (E.D. Mich. 2006); *EMA v. Henry,* 2006 WL 2927884 (W.D. Okla. 2006); *ESA v. Swanson*, 519 F.3d at 768; *ISDA v. St. Louis County*, 329 F.3d at 954; *Webster*, *supra*; *ESA v. Foti*, 451 F.Supp. 823 (M.D. La. 2006); *VSDA v. Maleng*, 325 F.Supp.2d 1180 (W.D. Wash. 2004); *ESDA v. Blagojevich*, 469 F.3d at 641; *VSDA v. Schwarzenegger,* 556 F.3d 950 (9th Cir. 2009) *cert. granted* 559 S.Ct. 1448 (2010). Petitioners do not claim that the violent video games they seek to regulate meet the *Brandenburg* incitement standard. Instead, they argue that the regulation should be upheld under the same rationale used to justify obscenity laws.

As noted in *VSDA v. Maleng,* 325 F.Supp.2d at 1185, "the historical justifications for the obscenity exception simply do not apply to depictions of

violence." Certain sexually explicit materials were excluded from First Amendment protection because "lewd speech has very little, if any, impact on the free expression of ideas, and government regulation of the sexually obscene has never thought to raise constitutional problems." *Id.*[9] In crafting the original obscenity decisions, this Court focused on enforcement of "decency" and preserving "the interest of the public and the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." *Paris Adult Theatre I*, 413 U.S. at 58. While this Court observed that there was no scientific data to conclusively demonstrate that exposure to sexually-oriented material adversely affects the consumers of such material, it was more concerned with the "right of the nation and of the states to maintain a *decent* society." *Id* (citations omitted) (emphasis added). The concepts of decency and indecency have traditionally referred to erotic or sexual matters, not violence. *Black's Law Dictionary*, 5th Ed., defines "indecent" as:

> Offensive to common propriety; offending against modesty or delicacy; grossly vulgar;

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[9] FALA does not concede that these historical justifications for regulating sexually explicit speech are valid, or that no constitutional concern exists with such regulation – but merely seeks to identify the traditional justifications for regulating obscenity and harmful materials for the purpose of evaluating the impropriety of extending those justifications to regulation of violent media.

> obscene; lewd; unseemly; unbecoming; indecorous; unfit to be seen or heard.

Similarly, the offense of "indecent exposure" contemplates exposure of one's private parts (i.e. sexual organs) in a lewd manner. *Id.*; *see also, e.g.*, *Minn. Stat.* §617.23 (2009); §800.03, *Fla. Stat.* (2009). Judicial justifications for obscenity laws based on concepts of 'decency' have, therefore, typically been associated with sex, not violence. The underlying rationale for treating sexually-oriented materials differently than all other forms of communication is likely based on a pervasive and deep-rooted sense of modesty regarding sex and nudity that dates back to ancient history. Fantasy violence has simply not impacted civilized society's collective sense of propriety in the same way that open and explicit representations of sexual matters have. FALA is not suggesting that societal taboo's surrounding sexual expression are appropriate, healthy, or consistent with First Amendment values. It merely observes that the justifications and policy considerations for shielding minors from sexually-oriented materials simply do not translate to allow a similar approach for violent content.

This Court struggled for decades with the proper constitutional approach toward regulating obscene materials before settling on the *Miller* Test. It should resist Petitioners' invitation to unleash a new judicial cancer, by permitting states to regulate the violent content of movies, magazines, books, websites, and video games. "The First Amendment was designed 'to

invite dispute,' to induce 'a condition of unrest,' to 'create dissatisfaction with the conditions as they are,' and even to stir 'people' to anger." *Miller*, 413 U.S. at 44 (Douglas, J., dissenting) (quoting *Terminiello v. Chicago*, 337 U.S. 1 (1949)). Leaving aside the vagaries generated by the non-defined terms in §1746 seeking to describe a "violent video game," the general proposition of regulating violent expression should be flatly discarded as creating an impermissible conflict with cherished First Amendment rights.

II. The challenged statute constitutes an attempt by the state government to supplant the role of parents – who have the primary obligation to rear their children – by controlling the content of media purchased and consumed by minors.

Petitioners argue that the challenged statute merely "supports,"[10] "reinforces,"[11] and "assists,"[12] parents in their effort to control the types of media their minor children intake. However, instead of supporting the child-rearing role of parents, the statute *supplants* that role, by forcibly substituting the decision of the government for that of the parent.

Petitioners expressly recognize that parents have the primary responsibility for the well-being of their

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[10] PB at 6; 12.

[11] PB at 7.

[12] PB at 9.

children.[13] FALA agrees with this proposition; however, it disagrees with the impact of the law at issue. Section 1746.1 imposes a restraint on the availability of a specific category of speech to minors. In recognizing that the parents are the primary decision-makers with respect to minors' access to media, Petitioners must also accept the reality that some parents may deem certain video games, i.e., those covered by the statute, appropriate for their children – particularly those in their later teen years. By imposing a flat ban on the sale of so-called "violent video games" to all minors, the state fails to make room for those parents who have made the informed decision to permit their teenagers to purchase or rent the regulated media. The statute makes a half-hearted attempt to address this concern by allowing parents (along with grandparents, aunts, uncles, or legal guardians) to purchase or rent the games themselves for the minor. However, such regulation does not allow for acquisition of the media by minors whose parents have given them permission to obtain the restricted game, and more importantly, imposes an intolerable barrier to the free flow of information in the marketplace of ideas. The statute therefore creates a circumstance where the government, not the parent, makes the decision whether a minor can access specified types of expression. Such governmental paternalism is inconsistent with both the free expression rights of minors

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[13] PB at 8; 17.

and the rights of adults to make the primary decisions with regard to the custody, care, and nurture of their children. *See, Tinker, et al. v. Des Moines Independent Community School District, et al.,* 393 U.S. 503 (1969); *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944).

Petitioner argues that it should have the same freedom to regulate minors' access to video games in the general marketplace as it does with student speech in the public school setting.[14] Petitioners assert: "To hold otherwise would effectively grant public schools (arms of the state) greater authority to directly restrict minors' speech rights than a state itself has when it acts to reinforce parental rights over their own children."[15] Petitioners' argument in this regard turns student speech jurisprudence on its head. It is precisely because of the unique pedagogical interests of educational institutions that a greater restriction on expressive activity by students is tolerated in the school setting. *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 681-82 (1986). Petitioners' proposal would permit the same level of restriction on minors' expressive activities irrespective of whether the minor is in school or in the general public.

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[14] PB at 21-22.

[15] PB at 22.

This Court has never suggested that the same restrictions on speech found to be constitutionally permissible in *Bethel* and *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988) would be tolerated outside of a school setting. As noted by Petitioners, "the Constitution guarantees parents full authority to direct their children's development."[16] Accordingly, the effort by Petitioners to interfere with this parental authority by deciding, *ab initio*, what video games should be made available to minors in the marketplace, should be recognized as inconsistent with such authority. Parents should be supported in their decision to expose their children to a wide range of topics and issues to prepare them for adulthood. As noted by Judge Posner in *Kendrick*: "People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble." *Kendrick* at 577.

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[16] PB at 24.

III. The use of "prevailing standards in the community" as a basis for triggering applicability of the statute renders it overbroad, and imposes a substantial chilling effect on the distribution of video game content; both online and in the traditional retail environment.

A. Although *Miller* permitted the use of community standards as a valid factor in determining whether sexually oriented material can be declared obscene, reliance on any determination of the "prevailing standards in the community" to determine whether a video game loses its First Amendment protection is unworkable and renders the statute unconstitutionally vague and overbroad.

Notably, the statute can be triggered alternatively by the game allowing the player to inflict serious injury upon images of human beings, or by meeting a modified *Ginsberg* "harmful to minors" test that includes a determination of whether the violence is "patently offensive to prevailing standards in the community as to what is suitable for minors." §1746(d)(A)(ii). FALA members have substantial experience with the difficulties created by any test that delineates the scope of constitutional protection for media based on "community standards." As noted *supra,* FALA members have litigated many of the major cases involving obscenity and "harmful" material before numerous courts of appeal, as well as this

Court. The obscenity test established by *Miller,* which also relies on application of community standards, has produced the absurd result of the identical film being declared legally obscene in one jurisdiction, and constitutionally protected in another.[17]

The concept of community standards has only been approved by this Court as a factor for evaluating legality of sexually explicit media, in the context of distribution of 'hard copies' of allegedly obscene material into or from a particular jurisdiction in which the defendant has chosen to do business. The general rule, as announced by this Court, with respect to application of "contemporary community standards" is that no precise geographical area need be applied in defining the concept for a jury. *Hamling v. United States,* 418 U.S. 87, 105 (1974). Instead, this Court has permitted the trial courts to either define the relevant community for the jury, or allow jurors to determine for themselves where the geographic boundaries of the community lie. *Id. Hamling, supra*; *Jenkins v. Georgia,* 418 U.S. 153, 157 (1974).

The community standards applied in *Miller*, itself, included those prevalent in the entire state of California. *Miller,* 413 U.S. at 30-31. Later cases have

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[17] For example, compare *People of the State of New York v. Mature Enterprises, Inc.,* 76 Misc.2d 660, 332 N.Y.S.2d 346 (N.Y. 1974) (*Deep Throat* found constitutionally obscene) with *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132 (2d Cir. 1983) (*Deep Throat* included in list of films found *not* to be obscene under prevailing community standards).

predictably struggled with identifying the proper geographic scope of the community. For example, in *Skyywalker Records, Inc. v. Navarro,* 739 F.Supp. 578, 587-88 (S.D. Fla. 1990), *rev'd on other grounds,* 960 F.2d 134 (11th Cir. 1992), the United States District Court for the Southern District of Florida, again evaluating 'hard copies' of material sold in a specific local community, held that the jury must apply the standards of a tri-county area consisting of Palm Beach, Broward, and Dade Counties (which coincided with the boundary of the jury pool for that court). *Both* of the parties in that case asserted that a smaller geographic community should be used; that of Broward County alone, but the court disagreed, holding that "the boundaries of the relevant community under *Miller* are a matter for judicial, not legislative, determination." The Florida Supreme Court, in *Davidson v. State,* 288 So.2d 483, 486-87 (Fla. 1973), considered the appropriate scope of the geographic community in an obscenity case involving the shipment of tangible 'hard copies' of allegedly obscene materials. While acknowledging that it would have been permissible to employ statewide standards, the court in *Davidson* indicated that, at least in the context of mailing hard copies of materials to a specific address, it was also constitutionally permissible to apply the community standards of the *county* in which the materials were shipped. *Id.* As noted above, this Court in *Jenkins* also authorized the trial courts to provide *no* instruction on the scope of the community – leaving the determination solely to the jurors. *Jenkins*, 418 U.S. at 157; *see also, Airline*

Adult Video v. St. Charles Parish Council, 609 So.2d 320, 322 (La. Cir. Ct. App. 1992) (rejecting reliance on 'parish' standards, in favor of jury-determined community boundaries). Thus, a defendant facing a prosecution premised on application of a 'community standard' may be judged by the community standards of the entire state; a county; some geographic area in-between; or the jurors' own concept of the relevant community.

The above-cited cases illustrate the inconsistency in how the troublesome concept of community standards has been interpreted and applied by the courts in obscenity cases. Any attempt to import the community standards concept as a factor for identifying violent video games is doomed to constitutional failure. A distributor of so-called 'violent video games' in California will be unable to ascertain in advance which geographic communities' standards will be applied in the event of a prosecution. Under the challenged statute, it is incumbent upon the retail distributor of video games in California to determine whether a particular game meets the definition of the statute, and whether it has been properly labeled with the "18" identifier. Irrespective of whether the game contains the "18" label, a retailer may still be found liable for selling or renting a violent video game to a minor if a court or a jury should, at some future time, determine that the game meets the definition set forth in §1746(d), based partly on application of "prevailing standards in the community."

It is axiomatic that individuals are entitled to fair notice of conduct that is proscribed by a statute so the individual can conform his or her behavior to the dictates of the law. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). "Vague laws trap the innocent by not providing fair warning." *Id.* Given the inconsistent manner in which the concept of community standards has been applied in the obscenity context, the courts will no doubt struggle similarly with attempting to define the relevant "prevailing community" whose standards relating to violence should be applied in determining whether a particular video game is "patently offensive" under §1746(d)(A)(ii). It would not be surprising for the same video game to be found "patently offensive" by one jury, and not "patently offensive" by another in the same geographic area – simply based on differing notions of the level of violence that may be accepted by prevailing community standards. As noted by Justice Stevens in *Ashcroft*, *supra*, the potential for inconsistent and arbitrary application of the concept of community standards, itself, renders the statute substantially overbroad. *Ashcroft*, 542 U.S. at 674. The amorphous notion of community standards – particularly when combined with the undefined concepts of "deviant" and/or "morbid" in the definitional provisions of the statute, renders it vague in all its applications, in addition to overbroad. *See*, *Chicago v. City of Morales*, 527 U.S. 41, 71 (1999) (Breyer, J., concurring) (ordinance was vague in all its applications where its terms provided undue discretion to law enforcement in every instance). Reliance on a

concept such as "community standards" to separate protected from unprotected expression cannot stand – particularly outside the realm of obscenity.

B. The inability of online game retailers to geographically select the communities in which their games are made available for sale and download, at a minimum requires the application of national as opposed to local, community standards.

Section 1746.1 prohibits any "person" from selling or renting a video game that has been labeled as a "violent video game" to a minor. The statute, on its face, applies to *all* methods of sale and/or rental of video game content, including dissemination and delivery via the World Wide Web. Digital downloading of computer games has surged in recent years and has now reached parity with traditional brick and mortar retail sales.[18] Accordingly, the restriction on sale or rental of violent video games is just as likely to be applied to an online retailer in today's market environment.

In addition to the problems associated with arbitrary and inconsistent determinations of the geographic makeup of the community discussed

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[18] Chris Morris, *PC games surge in digital download*, VARIETY, July 22, 2010, http://www.variety.com/article/VR1118022025.html (last visited Sept. 10, 2010).

supra, a relatively new and unique constitutional concern has arisen with respect to application of community standards as a basis for evaluating expressive materials made available digitally, whether via the World Wide Web or other Internet-connected devices. This Court first recognized the concern in its decision invalidating the indecency provisions of the Communications Decency Act ("CDA") in *Reno v. ACLU,* 521 U.S. 844 (1997). The provision at issue in *Reno* attempted to regulate indecent or offensive communications on the Internet by relying on contemporary community standards to define the contours of the regulated expression. *Reno,* 521 U.S. at 858-60. In invalidating the statute on grounds of facial overbreadth, this Court listed as one of the considerations "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Id* at 877-78. This would undermine the underlying rationale for incorporating the community standards element in the first instance; i.e., to allow each community to decide for itself what level of sexually explicit material to tolerate in the marketplace. *Miller*, 413 U.S. at 32-33.

The issue next presented itself in this Court's fractured decision in *Ashcroft v. ACLU,* 535 U.S. 564 (2002). There, this Court considered the constitutionality of the Child Online Protection Act ("COPA"), the successor to the CDA, which limited its application to material "harmful to minors" transmitted via the

World Wide Web "for commercial purposes." *Ashcroft,* 535 U.S. at 569. The Third Circuit Court of Appeal's decision leading up to this Court's consideration of the case held that the use of contemporary community standards, alone, rendered the Act unconstitutionally overbroad. *ACLU v. Reno*, 217 F.3d 162, 173-74 (3d Cir. 2000). The circuit court observed that "web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users." *Id* at 175. While this Court found that COPA's reliance on community standards does not "by itself" render the statute substantially overbroad under the First Amendment, *Ashcroft* 535 U.S. at 585, a majority of the sitting justices in that case viewed the application of local community standards as generating serious constitutional concerns.[19]

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[19] Justice O'Connor, in her specially concurring opinion, expressed concern over the possibility that use of local community standards will cause problems for regulation of obscenity on the Internet for adults as well as children, in future cases. *Id.* at 587. Justice Breyer agreed with Justice O'Connor that "adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the nation." *Id.* at 590. The remaining Justices in the majority joined with Justice Kennedy, who expressed concern over the national variation in community standards, and its particular burden on Internet speech. The lone dissenter, Justice Stevens, found that *any* reliance on community standards, even national standards, would not obviate the unconstitutional variances in the standards applied by jurors. *Id.* at 607 n.3.

The most recent circuit court decision to address the online community standards issues was *United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009). There, the Ninth Circuit Court of Appeals applied the *Marks* rule announced in *Marks v. United States,* 430 U.S. at 193, to divine the holding from the fractured decision in *Ashcroft*: "When a fragmented court decides a case and no single rational explaining the result enjoys the assent of five Justices, 'the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Kilbride*, at 1254, citing *Marks*, quoting *Gregg v. Georgia,* 428 U.S. 153, 169 n.15 (1976). The *Kilbride* case involved one of the first prosecutions for distribution of "SPAM" email containing obscene materials. In determining whether the emails were obscene, the court was required to consider a challenge to the jury instructions delivered by the trial court, and in so doing determine whether a local or national community should be utilized when evaluating material transmitted via the World Wide Web. In applying the *Marks* rule, the Ninth Circuit concluded that the holding in *Ashcroft* required that a national community standard must be applied in regulating obscene speech on the Internet. *Kilbride* at 1254. The court noted the constitutional problems identified by the five Justices in *Ashcroft* in applying local community standards to regulate obscenity and expressed "grave constitutional doubts" as to the use of such standards in online obscenity cases. *Id.* Accordingly, the court held that juries evaluating online obscenity must apply the standards

of the nation as a whole, as opposed to a local community. *Id.*

FALA vigorously asserts that the challenged statute is patently unconstitutional, and cannot survive strict scrutiny given its attempt to strip video game media of its constitutional protection based solely on violent content. However, in the event that this Court were to consider expanding the categories of speech that can constitutionally be regulated by the government to include violent video games, the statute must be read to include a requirement of evaluating such media distributed via the Internet by national, as opposed to local, community standards. Online distributors of video game content throughout the United States, and throughout the world, will be unable to deduce the potentially conflicting community standards relating to the level of violence that is acceptable for viewing by minors – to the extent such standards can be said to exist.[20]

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[20] FALA does not concede that any viable community standard can be articulated or understood in this regard, particularly in light of the increasing lack of any articulable standards that can be quantified as shared by residents in a particular geographic area. For a critical discussion of the concerns generated by current use of community standards in obscenity cases, *see*, DeAnn M. Kalich; Rhonda D. Evans; Craig J. Forsyth, "Empirical Evidence, Community Standards, and the Boundaries of Obscenity: A Test Case," *Deviant Behavior*, 1521-0456, Volume 31, Issue 7, 2010, pp. 579-95.

Even if online video game retailers could divine the existence of some homogenous standard pertaining to violence, based on geographic location, they could not select their intended recipients in such a way so as to control distribution of their product by such location. The Court of Appeals for the Third Circuit has recognized that Web publishers do not have the means to limit consumption of digital material based on geographic location of the user. *Reno*, 217 F.3d at 175. Any attempt to identify the existence of community standards relating to violence is complicated by the fact that violence has never been approved as a valid basis for restricting or regulating the content of media. Accordingly, unlike obscenity and harmful materials, video game retailers do not have decades of case law and statutory interpretation available for such analysis. While FALA agrees with the position of former Justice Stevens in *Ashcroft* that irrespective of how the community is defined, any attempt to regulate material based on application of community standards renders the statute unconstitutional, FALA asserts that at a minimum, national community standards must be utilized to evaluate whether a particular video game falls within the purview of the challenged statute.

CONCLUSION

For all the foregoing reasons, the judgment of the circuit court below should be affirmed on grounds that the statute is facially unconstitutional under the First Amendment.

Respectfully submitted,

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