THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME: *SCHWARZENEGGER V. ENTERTAINMENT MERCHANTS ASSOCIATION*

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I. INTRODUCTION

Society instinctively censors the unfamiliar. Time and time again, new media—from books to music to interactive technology—spark debates regarding children's vulnerability to increasingly effective vehicles for damaging subject matter, resulting in the passage of laws that regulate the distribution and sale of ostensibly dangerous materials.[1] *Schwarzenegger v. Entertainment Merchants Association*[2] is yet another case arising from concerns about the impact of new forms of media and the messages they carry. As for inflammatory true-crime novels, comic books, and movies, now video games with violent content are perceived as a threat to a child's healthy development, and therefore requiring government regulation.[3] The Supreme Court's decision in *Entertainment Merchants Association* likely will help to resolve the issue of whether the government should involve itself in the regulation of such media—particularly with regard to depictions of violence in video games.

The increasing popularity of video games, and apparent accessibility of violent games, directed legislative attention to the

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1. Brief of the Progress & Freedom Found. and the Elec. Frontier Found. as Amici Curiae in Support of Respondents at 25–26, Schwarzenegger v. Entm't Merchs. Ass'n, No. 08-1448 (U.S. Sept. 17, 2010).

2. Schwarzenegger v. Entm't Merchs. Ass'n, No. 08-1448 (U.S. argued Nov. 2, 2010).

3. Brief of Respondents at 1, Schwarzenegger v. Entm't Merchs. Ass'n, No. 08-1448 (U.S. Sept. 10, 2010).

question of whether their violent content is a form of protectable speech, subject to strict scrutiny upon judicial review. The State of California argues that video games should not be subject to strict scrutiny review because such a standard does not take into account the overarching need to restrict minors' access to offensive materials and preserve the State's ability to empower parents to protect "minors in the face of new and developing media."[4] The Supreme Court, which has been criticized for straying from the doctrine of stare decisis of late,[5] must be guided by the weight of First Amendment jurisprudence on expressive entertainment and allegedly harmful and unprotected forms of speech.

II. FACTS AND PROCEDURAL HISTORY

On October 17, 2005, associations of video game developers, publishers, distributors, and retail and rental companies (collectively, EMA) filed suit in the United States District Court for the Northern District of California for declaratory relief[6] against a newly-enacted state law.[7] The California statute imposed restrictions on the sale or rental of "violent video games" to minors and required warning labels on packaging for mature video games.[8] EMA brought the action under the First and Fourteenth Amendments, arguing that the statute was unconstitutional as a content-based restriction of expression and was unconstitutionally vague in violation of the Equal Protection Clause.[9] The district court ultimately granted EMA's motion for summary judgment, permanently enjoining any enforcement of the statute.[10] The statute did not survive strict scrutiny review, and the court left the equal protection claims unaddressed.[11]

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4. Petitioners' Brief at 28–29, Schwarzenegger v. Entm't Merchs. Ass'n, No. 08-1448 (U.S. July 12, 2010).

5. Steven R. Shapiro, ACLU Legal Director, Tradeoffs of Candor: Does Judicial Transparency Erode Legitimacy?, Remarks at Symposium Held at the N.Y.U. Sch. of Law (Mar. 11, 2008), *in* N.Y.U. ANN. SURV. AM. L., 2009, at 469–70 (discussing the Roberts Court's decisions that were inconsistent with preexisting rulings).

6. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 955 (9th Cir. 2009), *cert. granted sub nom.* Schwarzenegger v. Entm't Merchs. Ass'n, 130 S. Ct. 2398 (2010).

7. CAL. CIV. CODE §§ 1746–1746.5 (West 2010).

8. *Id.*

9. *Video Software Dealers Ass'n*, 556 F.3d at 955.

10. *Id.* at 955–56.

11. *Id.* at 956.

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision.[12] The Ninth Circuit held that: (1) the statute was indeed subject to strict scrutiny, rather than to the *Ginsberg* variable obscenity standard,[13] (2) the statute failed under strict scrutiny because the State did not demonstrate a compelling interest and did not tailor the law to be the least-restrictive means for furthering the alleged interest, and (3) the labeling requirement constituted "impermissibly compelled speech."[14]

There is a consensus among district and circuit courts in favor of striking down such laws abridging minors' expression rights under strict scrutiny.[15] In light of this unanimity and other landmark speech cases,[16] the Supreme Court will rule on (1) whether states may restrict the distribution and sale of video games with violent content to minors and (2) whether the standard of review for such a state regulation is strict scrutiny.[17]

III. LEGAL BACKGROUND

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[18] The Due Process Clause of the Fourteenth Amendment incorporates this protection to apply to the States.[19] Although State legislatures have passed measures restricting expressive entertainment in print and other media, the Court has recognized this category of speech as entitled to full First Amendment protection.[20] Government may not bar speech based on objectionable

12. *Id.* at 953.

13. *See infra* notes 26–30 and accompanying text.

14. *Video Software Dealers Ass'n,* 556 F.3d at 967.

15. *See* Brief in Opposition at 12, Schwarzenegger v. Entm't Merchs. Ass'n, No. 08-1448 (U.S. July 22, 2009) ("California was not the first state to try to restrict distribution of video games it considered too violent for minors. Such laws have proved politically popular, but every one has been struck down under the First Amendment.").

16. *See infra* notes 19–25, 67, 68 and accompanying text.

17. Petitioners' Brief, *supra* note 4, at i.

18. U.S. CONST. amend. I.

19. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[F]reedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

20. *See, e.g.*, Winters v. New York, 333 U.S. 507, 510 (1948) (holding that magazines containing crime stories are entitled to First Amendment protection); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952) (holding that motion pictures fall within the "First Amendment's aegis").

content, except with respect to a few specific categories.[21] These narrow categories traditionally include "obscenity," "defamation," "fraud," "incitement," "and speech integral to criminal conduct . . . ."[22] Furthermore, the Court has taken both content and context into account when reviewing the regulation of offensive speech that has the potential to harm children.[23] For the most part, First Amendment protections apply consistently to all individuals regardless of age,[24] but the Court recognizes several differences between adults' and children's ability to process speech, such that the rights of minors may be curtailed according to their vulnerabilities.[25]

The Supreme Court acknowledged the need to protect children from harmful speech in *Ginsberg v. New York*.[26] In *Ginsberg*, the Court upheld a state statute that restricted the sale of "girlie magazines" to minors, for whom the state legislature found such material to be obscene and harmful.[27] The law at issue defined the phrase "harmful to minors" to describe representations containing "nudity, *sexual* conduct, *sexual* excitement, or sadomasochistic abuse" that "(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors."[28] Although the materials at issue in *Ginsberg* may not have been considered obscene and harmful to adults, the Court recognized the need for a variable obscenity standard that accounted for the vulnerability of minors.[29] In order to uphold the statute at issue, the Court held that it only needed to determine "it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."[30] The Court carefully limited the scope of the decision to the regulation of sex materials and

21. R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) ("[O]ur society . . . has permitted restrictions upon the content of speech in a few limited areas . . . .").

22. United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (citations omitted).

23. *See* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978) (justifying "special treatment of indecent broadcasting" that is accessible to children).

24. Erznoznik v. Jacksonville, 422 U.S. 205, 214 (1975).

25. *Id.* at 214 n.11 ("The First Amendment rights of minors are not 'co-extensive with those of adults.'" (quoting Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 515 (1969) (Stewart, J., concurring))).

26. Ginsberg v. New York, 390 U.S. 629 (1968).

27. *Id.* at 643.

28. *Id.* at 646 (emphasis added).

29. *Id.* at 641.

30. *Id.*

declined to extend the lenient standard to any other areas of expression, such as violence, by reaffirming that obscenity covers only sexual subject matter.[31]

United States v. Stevens[32] expanded the protection afforded to violent speech. The Court grappled with a federal statute criminalizing the production, sale, and possession of "certain depictions of animal cruelty" that show "maimed, mutilated, tortured, wounded, or killed" animals.[33] The Court not only determined that the criteria listed in the statute were so broad as to prohibit even lawful conduct, but, more significantly, it also declined to create a new carve-out for portrayals of animal cruelty.[34] The Court asserted that the government is not permitted "to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor."[35] Freedom of speech is a transcendent value, and "the benefits of [First Amendment] restrictions on the Government outweigh the costs."[36] Because the Court refused to recognize a new exception to First Amendment protection, the Court reviewed the statute under "existing doctrine"[37] and found it unconstitutional.

In *Entertainment Merchants Association*, the California statute at issue (the Act) regulates the sale or rental of "violent video games" to minors, requires content-rating labels on game packaging, and imposes civil penalties for inappropriate sales.[38] As defined by the Act, a "violent video game" involves "killing, maiming, dismembering, or sexually assaulting an image of a human being . . . ."[39] Also, the depictions in the game must be such that: "(i) [a] reasonable person, considering the game as a whole, would find [they] appeal[] to a deviant or morbid interest of minors"; "(ii) [they are] patently offensive to prevailing standards in the community as to what is suitable for minors"; and "(iii) [they] cause[] the game, as a whole, to

31. *See id.* at 636–37 ("We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State . . . .") (citation omitted).
32. United States v. Stevens, 130 S. Ct. 1577 (2010).
33. *Id.* at 1582 (emphasis added).
34. *Id.* at 1586.
35. *Id.*
36. *Id.* at 1585.
37. *Id.* at 1586.
38. CAL. CIV. CODE §§ 1746–1746.5 (West 2010).
39. *Id.* at § 1746(d)(1).

lack serious literary, artistic, political, or scientific value for minors."[40] These criteria mirror those in the controversial obscenity statute in *Ginsberg*. The Act's preamble states that the legislature was responding to the concern that exposure to violent video games is likely to lead to heightened aggression in minors.[41] The State asserted that it had a "compelling interest in preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors . . ." because even those who do not commit violent acts are expected to suffer psychological harm from exposure to violent video games.[42]

IV. HOLDING

On appeal, the State asked the Ninth Circuit to "boldly go where no court has gone before" and apply *Ginsberg*'s variable obscenity standard to the context of violent expression.[43] The Ninth Circuit refused to read *Ginsberg* beyond the traditional scope of restrictions on sexually-offensive speech.[44] Instead, it maintained the Supreme Court's application of the variable obscenity standard to sexual expression alone and did not extend the standard to violent expression.[45] The Ninth Circuit, like other circuit courts, was not convinced of the arguable similarity between the two forms of expression.[46]

The Ninth Circuit further held that strict scrutiny was the applicable standard of review, as violent video games are a protected form of speech.[47] The panel assessed the State's interest in protecting the physical and psychological well being of minors, particularly focusing on actual physiological harms to children playing violent video games.[48] Finding the social science studies on which the State relied fraught with methodological problems and, at best, only demonstrating statistically weak links, the court concluded that the

40. *Id.* at § 1746(d)(1)(A).

41. A.B. 1179, ch. 638, § 1 (Cal. 2005).

42. *Id.*

43. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 955 (9th Cir. 2009), *cert. granted sub nom.* Schwarzenegger v. Entm't Merchs. Ass'n, 130 S. Ct. 2398 (2010).

44. *Id.* at 967.

45. *See* Ginsberg v. New York, 390 U.S. 629, 641 (1968) (relying on the definition of obscenity in Roth v. United States, 354 U.S. 476, 486–87 (1957)).

46. *See Video Software Dealers Ass'n*, 556 F.3d at 960 (summarizing circuit courts' unwillingness to broaden the definition of obscenity to cover violent content).

47. *Id.* at 957–58.

48. *Id.* at 961.

State failed to meet its burden of demonstrating a causal link between exposure to video-game violence and psychological or neurological harm.[49] Even if the State carried its first burden of showing a compelling interest, the Ninth Circuit held that it still would strike down the statute because the State did not show that less-restrictive alternatives were unavailable.[50] The court suggested that a combination of existing measures, such as the Entertainment Software Rating Board (ESRB) rating system, parental controls on gaming platforms, and education campaigns for retailers and parents, could be as-effective yet less-restrictive means to achieve the State's goals. Because the State insisted on enforcement mechanisms that were the most effective measures possible, as opposed to appropriately tailored, the court held that the Act failed under strict scrutiny review.[51]

V. ARGUMENTS

The debate before the Supreme Court revolves around the question of whether depictions of violence in video games are protected forms of expression, and, if so, whether restricting the sale of such games violates the First Amendment.[52]

A. California's (Petitioner's) Arguments

The State's primary concern is parents' ability to make choices and exercise authority in their children's upbringing.[53] Society has a well-established interest in protecting children and assisting parents in directing their children's development.[54] By restricting the latter's unsupervised access to violent video games, parents can maintain control in childrearing.[55] Where minors lack the moral and social capacity to participate constructively and reasonably in the marketplace of ideas, parents are entitled to support from the State to guide their children's choices.[56] The State argues that it is incorrect to limit the application of *Ginsberg* to the realm of sexual expression,

49. *Id.* at 964.
50. *Id.* at 964–65.
51. *Id.* at 965.
52. Petitioners' Brief, *supra* note 4, at 6–12.
53. *Id.* at 12–13.
54. *Id.* at 13.
55. *Id.* at 12–13.
56. *See id.* at 14–15 (arguing that minors' mental faculties are not on par with that of adults, and that parents have the right to participate in the choices their children make).

and insists that excessively violent material be recognized as a "categor[y] of speech that [has] been historically unprotected, but [has] not yet been identified or discussed as such in our case law."[57] *Ginsberg*'s variable obscenity standard ought to be extended to uphold restrictions on minors' access to violent speech, particularly in video games.[58]

The State argues that *Ginsberg* is about the potentially harmful nature of speech in general, rather than solely addressing sexual content. Thus, *Ginsberg* is ripe for extension to other types of allegedly harmful content in other forms of media.[59] Where there is both a constitutional parental right to claim authority over childrearing and an independent state interest in the well being of minors, the State argues that its protective measures should be subject to *Ginsberg*'s variable obscenity standard.[60] The State construes other speech cases involving minors to emphasize the importance of parents' constitutional role in protecting children against potential harms over the significance of the Court's historically narrow definition of the word "obscene."[61]

While leading the Court to revisit a number of landmark cases that justify different treatment of adults and minors, the State bifurcates the constitutional protection of speech for two separate audiences.[62] Legal restrictions on children's access to violent video games will support parents' aims in enabling their children to fully grow and mature.[63] The State says that the age-based differences "*compel* states to apply differing legal standards," and to accommodate minors' rash decision making and susceptibility to certain media.[64]

The vulnerability of children calls for the recognition of an existing but as-yet unidentified carve-out for violent speech, which is similar to other forms of unprotected speech and to which the

57. *Id.* at 13 (quoting United States v. Stevens, 130 S. Ct. 1577, 1586 (2010)).
58. Petitioners' Brief, *supra* note 4, at 28.
59. *See id.* at 16–17.
60. *Id.* at 18.
61. *See id.* at 18–22 (discussing offensive broadcast and school speech precedents and suggesting that the rulings for those cases rest on the need to protect children from potential harm, whatever it may be, and on school officials' authority to act *in loco parentis*).
62. *Id.* at 23–24.
63. *Id.* at 25.
64. *See id.* at 25–26 (emphasis added) (noting minors' susceptibility to "the harmful effects of external influences").

Ginsberg standard should apply.[65] The State contends that the constitutionality of a statute that regulates minors' exposure to "offensive material that appeals to their deviant interest . . . should not turn on empirical evidence, but on society's recognition of the importance of the parental role."[66] The State construes *Turner Broadcasting System, Inc. v. Federal Communications Commission*[67] and *Federal Communications Commission v. Fox Television Stations, Inc.*[68] to support a relaxed approach to empirical studies of finding harm.[69] Legislators appear to have some leeway to predict future events and their likely impacts,[70] and they may determine whether exposure to indecent speech in video games harms children even when gathering data is not methodologically reasonable.[71] The State finds the First Amendment's broad protections incongruent with requiring empirical proof of impacts on morality and ethics, as they are subjects that are not easily defined.[72] It should be sufficient to rely on a legislature's rational determination of what types of expression will likely harm minors.[73] Under a lower level of scrutiny, like that provided in *Ginsberg*, establishing a correlative relationship would be sufficient to uphold the Act.[74]

The State analyzes sexually-explicit materials that have been labeled "obscene" and finds they would not have been categorized as such but for the violence that permeated their content.[75] Empirical bases aside, the State infers that because the presence of violence is often what makes protected speech no longer protectable, violent

65. *Id.* at 28.
66. *Id.* at 28–29.
67. Turner Broad. Sys., Inc. v. Fed. Commc'n Comm'n, 512 U.S. 622 (1994) (predicting that local broadcasting would be jeopardized without mandatory carriage rules, and holding that content-neutral must-carry provisions are subject to an intermediate level of scrutiny).
68. Fed. Commc'n Comm'n v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009) (accepting scant empirical evidence of the harmful effects of exposing children to broadcast profanity, and finding the FCC's orders banning the broadcasting of any indecent language neither arbitrary nor capricious).
69. Petitioners' Brief, *supra* note 4, at 48–50.
70. *Turner Broad. Sys.*, 512 U.S. at 665–66.
71. *Fox Television*, 129 S. Ct. at 1813.
72. Petitioners' Brief, *supra* note 4, at 30.
73. *Id.*
74. *Id.* at 56.
75. *Id.* at 37.

content standing alone should also fall into the category of unprotected expression with respect to access by minors.[76]

Finally, the State argues the Act protects minors by using the least restrictive means necessary, rather than the most restrictive means as the Ninth Circuit held.[77] The Act is narrowly tailored because it is triggered only in instances of sales or rentals to minors who are not accompanied by their parents.[78] The existing ESRB and technological restrictions to access have not prevented sales of excessively violent games to minors without parental consent, and, without the full voluntary cooperation of game publishers and sellers, the State must step in to restrict children's access to potentially harmful products.[79]

B. EMA's (Respondents') Arguments

Because depictions of violence are protected forms of expression under the First Amendment and because there is tenuous support for the claim of harm to minors, the Act is subject to and fails strict scrutiny.[80] EMA points to *United States v. Stevens*, in which the Court recently reaffirmed that the historically recognized carve-outs are limited to their traditionally understood definitions and boundaries.[81] While the Court's holding in *Stevens* acknowledged the possible existence of speech categories that have yet to be identified by the courts, there is no evidence that violent expression is among them.[82] An overwhelming volume of precedent establishes that obscenity is limited to sexual expression.[83]

The tradition of regulating depictions of sex stands in stark contrast to the lack of history of regulated violent expression.[84] While sexual expression involving violent acts is unprotected, it does not stand to reason that violence alone is also obscene and unprotected, and therefore ought to be equated with obscenity.[85] In fact, "violence,

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76. *Id.* at 38.
77. *Id.* at 38–39.
78. Petitioners' Reply Brief at 19–20, Schwarzenegger v. Entm't Merchs. Ass'n, No. 08-1448 (U.S. Oct. 8, 2010).
79. Petitioners' Brief, *supra* note 4, at 57–58.
80. Brief of Respondents, *supra* note 3, at 19, 47.
81. United States v. Stevens, 130 S. Ct. 1577, 1584–86 (2010).
82. *Id.*
83. *E.g.*, Miller v. California, 413 U.S. 15, 23–24 (1973); Cohen v. California, 403 U.S. 15, 20 (1971); Roth v. United States, 354 U.S. 476, 487–88 (1957).
84. Brief of Respondents, *supra* note 3, at 21.
85. *Id.*

unlike explicit descriptions of sex, is a central feature of expression intended for minors" as evidenced by the pervasive depictions of violence in children's literature and films.[86] To find non-sexual materials unworthy of constitutional protection for their offensive content potentially validates regulations that censor expression in all manner of media—a trend that "is startling and dangerous."[87]

EMA narrowly construes *Ginsberg* as addressing obscenity only as it is traditionally defined.[88] *Ginsberg* did not allow the government to regulate protected forms of expression or to create new carve-outs with regard to minors.[89] EMA paints the picture of a slippery slope in which the exercise of "freewheeling authority"[90] to create exceptions to First Amendment protections sends "the censor . . . adrift upon a boundless sea . . . with no charts."[91]

While the State insists the Act is necessary for parents to exercise their constitutional right to raise their children by controlling their access to certain media, the government must not determine "in the first instance which expression is 'worthy' of protection."[92] The government may claim to help parents, but it actually assumes the role of the parents entirely by prescribing appropriate or excessive levels of violent content.[93] "[O]pinions and judgments, including esthetic and moral judgments . . . are . . . not for the Government to decree," and the Court should recognize that the Act is presumptively invalid like any other content-based restriction.[94]

Furthermore, EMA argues that the State cannot claim a compelling interest where the purported "significant societal problem" is not proven to exist.[95] EMA does not accept the State's relaxed standard for empirical findings, but puts far more stock in solid empirical evidence to prove harm to minors.[96] The research presented in support of the Act "has been resoundingly rejected by

86. *Id.* at 31–32.
87. *Stevens*, 130 S. Ct. at 1585.
88. Brief of Respondents, *supra* note 3, at 30.
89. *Id.* at 31.
90. United States v. Stevens, 130 S. Ct. 1577, 1586 (2010).
91. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504–05 (1952).
92. Brief of Respondents, *supra* note 3, at 28.
93. *See id.* at 30 ("[Government] usurps [the parents'] role and favors the preferences of some parents over those of others.").
94. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000).
95. Brief of Respondents, *supra* note 3, at 35.
96. *Id.* at 36.

every court to have looked at it."[97] Social science research on video games has been challenged and largely discredited as it shows no more than a weak correlation between the degree of exposure to violent video games and aggression, and "'it is impossible to know which way the causal relationship runs.'"[98] On the other hand, there is reliable statistical evidence of game-consuming behaviors among children and their parents strongly suggesting that parents have every opportunity to supervise the purchasing and playing of video games in their households.[99]

Finally, by applying strict scrutiny to the presumptively invalid statute, EMA argues that the State has not only failed to articulate a compelling state interest but also failed narrowly tailored the Act to serve the purported interest.[100] EMA reiterates that the Act is not the least restrictive means of achieving the State's aims and points to the industry's highly effective self-regulation and parental involvement as sufficient to police children's consumption of video games.[101]

VI. ANALYSIS AND LIKELY DISPOSITION

In *Schwarzenegger v. Entertainment Merchants Association*, the Supreme Court is unlikely to stray from the well-beaten path of protecting violent speech under the First Amendment. Rather, the Court likely will hold that the *Ginsberg* standard should be applied only in the context of sexual expression. Although the *Ginsberg* Court conceded that there might be other areas in which the standards for speech regulation will vary for adult and minor audiences, this case is unlikely to create a new variable standard with regard to violent content.[102] The arguments for cabining the application of the *Ginsberg* standard are persuasive because obscenity has never covered content beyond that of a sexual nature. Indeed, violence has long been a feature of children's entertainment whereas sexual content has not.[103] Although individuals may find both obscenity and violence offensive

97. *Id.*

98. *Id.* at 38–40 (quoting Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1074 (N.D. Ill. 2005), *aff'd*, 469 F.3d 641 (7th Cir. 2006)).

99. *Id.* at 37.

100. *Id.* at 47.

101. *Id.* at 53–54.

102. Ginsberg v. New York, 390 U.S. 629, 636 (1968) ("We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State.").

103. *See supra* note 86 and accompanying text.

or immoral, these similar reactions are insufficient to subject obscene and violent content to the same standard of review.

It is significant that this case closely follows *United States v. Stevens*.[104] There, the Court refused to add a carve-out for depictions of violence against animals as the category was not "of such slight social value as a step to truth that any benefit may be derived from [it] is clearly outweighed by the social interest in order and morality."[105] *Stevens* serves as a stepping-stone to establishing a general principle that restrictions on any depiction of violence, in any medium, will be subject to strict scrutiny.

Because the State asks the Court to go where no court has gone before, its argument is largely policy-driven. During oral arguments, the State's counsel cited two reasons for regulating minors' access to violent video games: to bolster parents' authority over their children's upbringing and to help parents protect their children when unsupervised.[106] The State claims that the Act is intended to place authority back in the hands of parents excluded from their children's choices of media and entertainment.[107] This, however, is only an issue if violent video games actually harm children. The Act's preamble declares that the State has an interest in preventing harm to minors due to exposure to violence depicted in video games.[108] What the Court should address is whether the purported dangers posed to minors actually exist and, if so, what protective measures are appropriate.

Where children are described as vulnerable, and parents' rights to childrearing are made an issue, it is tempting to downplay the need for concrete evidence of harm. However, without causal evidence of the new media actually harming children, the Court likely will not recognize the Act as furthering a compelling state interest. Furthermore, without a clear showing of the deficiencies of all alternative measures to protect minors from the purported harm, the

104. Lyle Denniston, *Court to Rule on Violent Video Games*, SCOTUSBLOG (Apr. 26, 2010, 10:05 AM), http://www.scotusblog.com/?p=19152 ("The Court apparently had been holding the case until it decided another First Amendment case involving violent expression—*U.S. v. Stevens* (08-769).").

105. United States v. Stevens, 130 S. Ct. 1577, 1585 (2010) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992)).

106. Transcript of Oral Argument at 3–4, Schwarzenegger v. Entm't Merchs. Ass'n., No. 08-1448 (U.S. Nov. 2, 2010).

107. Petitioners' Brief, *supra* note 4, at 12–18.

108. A.B. 1179, ch. 638, § 1 (Cal. 2005).

Act does not meet the narrow-tailoring requirement of strict scrutiny. Although the State argues that the Act will impact only the sale and rental of games deemed harmful to minors, and will only target minors who attempt to access violent video game content while unaccompanied,[109] the Court will "not uphold an unconstitutional statute merely because the Government promised to use it responsibly."[110] The Court likely will strike down the Act for failing strict scrutiny.

Nearly all of the analysis by the State and EMA revolved around standards of review, but the Court resurrected the issue of vagueness during oral arguments. The justices turned their attentions to how video game developers and distributors will struggle with interpreting the statute in order to comply with it.[111] The language describing the types of games covered by the law (such as "deviant") are not easy to define,[112] and it is unclear how the legislature differentiated video games from other media to limit the Act from reaching violent material in other formats.[113] Distinguishing different levels of violence, which is necessary as only certain "offensively violent" content would be subject to regulation, is even more problematic.[114] Video game manufacturers would also struggle with defining their audience, particularly with regard to age subgroups of minors, each of which could be more or less susceptible to negative influences than the other.[115] These issues merit the Court's attention, despite the lower courts' neglect of the vagueness issue.[116] It is therefore possible that the constitutionality of the statute will be decided on due process grounds, rather than clarifying how violent subject matter, transmitted in new forms of media, will be regulated. It would not be the first time that the Court has offered a narrow ruling with limited applicability.

If the Court does not invalidate the Act on vagueness grounds, a majority of the Court is likely to rely heavily on *Stevens* to find that violent video games are a form of speech protected by the First Amendment. *Stevens* demonstrates the Court's unwillingness to

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109. Petitioners' Reply Brief, *supra* note 78, at 3.
110. *Stevens*, 130 S. Ct. at 1591.
111. Transcript of Oral Argument, *supra* note 106, at 13.
112. *Id.* at 4.
113. *Id.* at 5.
114. *Id.* at 13–14.
115. *Id.* at 9–11.
116. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 955–56 (9th Cir. 2009), *cert. granted sub nom.* Schwarzenegger v. Entm't Merchs. Ass'n, 130 S. Ct. 2398 (2010).

create a carve-out for violent speech.[117] The statute at issue was struck down by an 8-to-1 majority of the Roberts Court,[118] and the justices in that majority probably will invalidate the Act here on similar grounds. The Roberts Court likely will not apply a softened standard of review to a content-based speech regulation[119] of any medium.

There is a "history in this country of new mediums coming along and people vastly overreacting to them, thinking the sky is falling, [and that] our children are all going to be turned into criminals."[120] Today's objection to video games' conveyance of violent speech and effort to curtail minors' access "springs largely from the neophobia that has pitted the old against the entertainment of the young for centuries."[121] As long as the Court is not diverted entirely by the vagueness question, *Schwarzenegger v. Entertainment Merchants Association* may settle the debate over depictions of violence that would otherwise arise repeatedly with the development of new media and vehicles of expression.

117. *See supra* notes 32–34 and accompanying text.

118. United States v. Stevens, 130 S. Ct. 1577, 1582 (2010).

119. *See* J. Robert Abraham, *Saving* Buckley: *Creating a Stable Campaign Finance Framework*, 110 COLUM. L. REV. 1078, 1088–91 (2010) ("[R]ecent decisions of the Roberts Court include rigorous scrutiny of campaign finance restrictions based upon the type of speech they burden . . . .").

120. Transcript of Oral Argument, *supra* note 106, at 37.

121. Brief of the Progress & Freedom Found. and the Elec. Frontier Found., *supra* note 1, at 25–26 (quoting *Breeding Evil?*, THE ECONOMIST, (Aug. 4, 2005), http://www.economist.com/PrinterFriendly.cfm?story_id=4247084).