No._____

In the Supreme Court of the United States

ARNOLD SCHWARZENEGGER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF CALIFORNIA, AND EDMUND G. BROWN JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, PETITIONERS

v.

VIDEO SOFTWARE DEALERS ASSOCIATION AND ENTERTAINMENT SOFTWARE ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

California Civil Code sections 1746-1746.5 prohibit the sale of violent video games to minors under 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. The respondent industry groups challenged this prohibition on its face as violating the Free Speech Clause of the First Amendment. The court of appeals affirmed the district court's judgment permanently enjoining enforcement of the prohibition. The questions presented are:

1. Does the First Amendment bar a state from restricting the sale of violent video games to minors?

2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994), is the state required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the state can prohibit the sale of the games to minors?

LIST OF PARTIES

Petitioners are Arnold Schwarzenegger, in his official capacity as the Governor of the State of California, and Edmund G. Brown Jr., in his official capacity as the Attorney General of the State of California.

Respondents are the Video Software Dealers Association and the Entertainment Software Association.

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PETITION FOR A WRIT OF CERTIORARI

Arnold Schwarzenegger, in his official capacity as the Governor of the State of California, and Edmund G. Brown Jr., in his official capacity as the Attorney General of the State of California, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-38a) is reported at 556 F.3d 950 (9th Cir. 2009). The decision of the district court granting respondents' motion for summary judgment (App., *infra*, 40a-65a) is unreported. The decision of the district court granting respondents' motion for a preliminary injunction (App., *infra*, 66a-92a) is reported at 401 F. Supp. 2d 1034 (N.D. Cal. 2005).

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech." This provision applies to the states through the due process clause of the Fourteenth Amendment. *Gitlow v. People of the State of New York*, 268 U.S. 652, 666 (1925). California Civil Code sections 1746-

1746.5, prohibiting the sale of violent video games to minors, as defined, are reproduced in the Appendix to this petition. App., *infra*, 93a-100a.

STATEMENT

1. California Civil Code sections 1746-1746.5 (the Act) prohibit the sale or rental of "violent video games" to minors under 18. The Act defines a "violent video game" as one that depicts "killing, maiming, dismembering, or sexually assaulting an image of a human being" in a manner that meets all of the following descriptions: (1) A reasonable person, considering the game as a whole, would find that it appeals to a deviant or morbid interest of minors; (2) it is patently offensive to prevailing standards in the community as to what is suitable for minors, and; (3) it causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors. The Act does not prohibit a minor's parent or guardian from purchasing or renting such games for the minor. App., *infra*, 96a.

In passing the Act, the California Legislature considered numerous studies, peer-reviewed articles, and reports from social scientists and medical associations that establish a correlation between violent video game play and increased automatic aggressiveness, aggressive thoughts and behavior, antisocial behavior, and desensitization to violence in minors and adults. App., *infra*, 27a-31a. The Legislature also considered the Federal Trade Commission's report that the video game industry specifically marketed M-rated (Mature) video games to minors, that 69% of 13 to 16-year-old children were able to purchase M-rated games, and that only

24% of cashiers asked the minor's age. App., *infra*, 103a.

The record contains examples of the violent content of various video games that may be covered by the Act. For example, as the district court described one of the games depicted in the record:

> The game involves shooting both armed opponents, such as police officers, and unarmed people, such as schoolgirls. Girls attacked with a shovel will beg for mercy; the player can be merciless and decapitate them. People shot in the leg will fall down and crawl; the player can then pour gasoline over them, set them on fire, and urinate on them. The player's character makes sardonic comments during all this; for example, urinating on someone elicits the comment "Now the flowers will grow."

App., *infra*, p. 78a (internal citation omitted).

2. Respondents, representing the video game and software industries, brought a facial challenge to the Act. On respondents' motion for a preliminary injunction and the parties' cross-motions for summary judgment, the United States District Court for the Northern District of California ruled that, absent sexual content, violence alone cannot be considered unprotected speech under the First Amendment. App., *infra*, 53a-58a, 86a-89a. Therefore, the district court held that, as a content-based regulation of protected speech, the Act was subject to review under strict scrutiny. Applying strict scrutiny, the district court held that, although protecting the physical and psychological well-being of minors is a compelling governmental interest, the State failed to demonstrate a sufficient causal

connection between minors playing the covered games and the harm sought to be avoided by the Act. App., *infra*, 58a-60a. The district court also held that the Act was not the least restrictive means of achieving the compelling interest in that the State did not demonstrate that parental controls available on some new versions of gaming consoles would be less effective. App., *infra*, 60a-62a. The district court therefore held that the Act was facially unconstitutional under the First Amendment and permanently enjoined its enforcement. App., *infra*, 39a.

3. The Court of Appeals for the Ninth Circuit affirmed. The court rejected the State's argument that the Act only covers speech that should not be entitled to First Amendment protection and should therefore be reviewed under the same flexible standard that is applied to restrictions on the sale of sexual material to minors under *Ginsberg v. State of New York*, 390 U.S. 629 (1968). App., *infra*, 15a-23a. Under *Ginsberg*, the Act would be upheld so long as it was not irrational for the Legislature to determine that the video games covered by the Act are harmful to minors. *Ginsberg*, 390 U.S. at 641. The court of appeals instead reviewed the Act under strict scrutiny and affirmed the district court's finding that the State's evidence failed to establish a sufficient direct causal connection between violent video game play and the physical and psychological harm to minors sought to be prevented. App., *infra*, 27a-32a. The court of appeals also affirmed the district court's finding that, even assuming a direct causal connection had been shown, the Act was not the least restrictive means of preventing the identified harm to minors. App., *infra*, 32a-34a.

REASONS FOR GRANTING THE PETITION

This Court should grant review for three reasons. First, the extremely violent video games that would fall within the State's statutes should be subject to *Ginsberg's* variable standard for the same reasons that this Court applied the standard to sexual materials sold to minors: provided it was rational for the State to conclude that the material is harmful to minors, the restriction is justified by the State's strong interest in assisting parents in protecting the well-being of children. Second, this is an important issue with national implications, particularly in light of the growing evidence that these games harm minors and that industry self-regulation through the existing rating system has proven ineffective. Third, even assuming that strict scrutiny applies, the Ninth Circuit's decision conflicts with and narrows this Court's decision in *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994). When the government defends a regulation on speech as a means of preventing anticipated harms, *Turner* requires courts to uphold legislators' predictive judgments of harm when they have "drawn reasonable inferences based on substantial evidence." *Id.*, at 666. The court below required a far more stringent standard that will affect future cases on a broad variety of subjects.

Despite the lack of a split among the circuit courts,[1] this is an issue of national importance. To date, at least nine other states and local governments

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[1] *See Interactive Digital Software Ass'n v. St. Louis*, 329 F.3d 954 (8th Cir., 2003); *Entertainment Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir., 2008); *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir., 2001).

have enacted similar prohibitions. [2] Each has suffered the same fate, as no court has been willing to extend *Ginsberg*, notwithstanding the fact that violent video games can be just as harmful to minors as sexual material and should receive no greater protection under the First Amendment. After 40 years, this Court should consider extending *Ginsberg* to help states meet a new, modern threat to children.

I. THE *GINSBERG* STANDARD SHOULD APPLY TO EXTREMELY VIOLENT MATERIAL THAT IS SOLD TO MINORS, JUST AS IT DOES TO SEXUAL MATERIAL

In the limited context of distribution to minors, expressive material can be so excessively violent that, just like sexual material, it deserves no First Amendment protection. Accordingly, this Court should consider whether extremely violent material can be obscene as to minors even without a sexual element, and whether *Ginsberg* should thus be extended to apply to such material.

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[2] *See* note 3, *supra*; see also *Entertainment Merchants Ass'n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097 (W.D. Okla. 2007) (enjoining 21 Okla. Stat. §§ 1040.76-.77); *Entertainment Software Ass'n v. Granholm*, 426 F.Supp.2d 646 (E.D. Mich. 2006) (enjoining 2005 Mich. Public Act 108); *Entertainment Software Ass'n v. Foti*, 451 F.Supp.2d 823 (M.D. La. 2006) (enjoining La. R.S. 14:91.14); *Entertainment Software Ass'n v. Hatch*, 443 F.Supp.2d 1065, 1069 (D. Minn. 2006) (enjoining Minn. Stat. § 325I.06).; *Entertainment Software Association v. Blagojevich*, 404 F.Supp.2d 1051 (N.D. Ill. 2005) (enjoining Ill. Crim. Stats. 5/12A-5(a), 5/12A-10(e), 5/12B-15); *Video Software Dealers Association v. Maleng*, 325 F.Supp.2d 1180 (W.D. Wash. 2004) (enjoining Rev. Code Wash. 9.91.180).

A. Application of the *Ginsberg* Standard to Extremely Violent Material Would Carry On This Court's Longstanding Tradition of Upholding Special Protections For Children

Like other forms of unprotected speech recognized to date, the extremely violent video games at issue here serve "no essential part of any exposition of ideas, and are of such slight social value as a step to the truth" that the government must be allowed to regulate their dissemination to minors based upon content, without running afoul of the First Amendment. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942). By definition, the Act covers only a well-defined, limited class of speech – patently offensive violence that appeals to a deviant or morbid interest and has no socially redeeming value for minors. App., *infra*, 93a-94a. Such material is properly subject to review under the variable obscenity standard set forth in *Ginsberg v. State of New York*, 390 U.S. 629 (1968).

In *Ginsberg*, this Court held for the first time that material protected by the First Amendment (material that is not obscene) can lose its protected status when distributed to minors. *Id.*, at 639-646. At the outset, the Court accepted that the material at issue in *Ginsberg* – "girlie" magazines – was not obscene as to adults. *Id.*, at 634. But the Court recognized that a variable standard must be applied when states legislate to protect the well-being of their youth. *Id.*, at 638-639. The *Ginsberg* standard allows a state to define obscenity (material receiving no First Amendment protection) in a variable manner: using one definition applicable to adults and a broader definition applicable only to minors.

The Court set forth the standard of review as follows: "To sustain state power to exclude material defined as obscene by [the statute] requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Ginsberg*, 390 U.S. at 641. In broad language, the Court explained that "material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined." *Id.*, at 363.

Minors, of course, enjoy the protection of the First Amendment. But as this Court has repeatedly recognized, the First Amendment rights of minors are not coextensive with those of adults. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, n. 11 (1975); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring). *Ginsberg*'s reasoning is grounded on this principle. Therefore, "[E]ven where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . .'" *Ginsberg, supra*, 390 U.S. at 638 (quoting *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170 (1944)).

As Justice Frankfurter recognized over fifty-five years ago, "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

"Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Belloti v. Baird*, 443 U.S. 622, 638-39 (1979).

More recently, in *Roper v. Simmons*, 543 U.S. 551 (2005), this Court recognized the constitutionally significant, fundamental differences between adults and minors – differences the State contends mandate that minors be subject to greater regulation to ensure parents are given every opportunity to involve themselves in decisions that are important to a minor's healthy development into an adult. In *Roper*, this Court found that there is a "lack of maturity and an underdeveloped sense of responsibility" in those under 18 which "often result in impetuous and ill-considered actions and decisions." *Id.*, at 569 (internal quotation omitted). According to this Court, those under 18 "are more vulnerable or susceptible to negative influences and outside pressures" and "have less control, or less experience with control, over their own environment." *Id.*

Therefore, in the limited context of selling violent video games to minors, this Court should consider extending *Ginsberg* to permit states to treat extremely violent material the same as sexually explicit material. Doing so would allow states like California to give parents, rather than store clerks and industry groups, control over the decision to allow children to purchase extremely violent video games. Reviewing the Act under the variable

obscenity standard set forth by this Court in *Ginsberg v. State of New York*, *supra*, instead of strict scrutiny, will allow the State to fulfill its duty to assist parents in protecting the well-being of their children.

B. With Respect To Its Distribution To Minors, Excessively Violent Material Is No More Worthy Of First Amendment Protection Than Sexual Material

Violence already plays a major role in existing obscenity jurisprudence across the country in that sexually explicit material can qualify as obscenity based upon the violent nature of its depiction. Images of extreme sexual torture, for example, can be considered obscene by the prevailing standards of any given community. *See, e.g., State v. Reece*, 110 Wash.2d 766 (1988) (upholding store manager's conviction for selling obscene magazines, defined to include depictions of "violent or destructive sexual acts"). In many cases, but for the violent content, the sexual nature of the material would not be legally obscene. The presence of violence can be the determining factor in finding otherwise protected sexual material deviant, prurient, shameful, or morbid, and can cause protected material to become patently offensive when it otherwise would not be. Violence can remove all redeeming social value from otherwise protected material. *Id.*; *see also* La. Rev. Stats. § 14:106(a)(6) (defining obscenity in part as "sexually violent material" including "whippings, beatings, torture, and mutilation of the human body"); Ga. Code. Ann. § 16-12-80(b)(3)(E) (defining obscenity as "[s]exual acts of flagellation, torture, or

other violence"); Oh. Rev. Code § 2907.01(F)(3) (defining "harmful to juveniles" as including depictions of "bizarre violence, cruelty, or brutality" that tends to arouse minors).

Admittedly, these existing obscenity laws link violence with sexual material. But the State's point is that, logically, if violence can cause otherwise protected material to lose its constitutional protection, then violent images alone can lose their protection, at least with respect to their sale to minors.

The Act reaches only expressive material that this Court should recognize lies outside the circle of constitutional protection. The only games covered by the Act are those with violent content that is patently offensive, appeals to a deviant or morbid interest, and taken as a whole, causes the game to lack any redeeming social value for minors. App., *infra*, 93a-94a. The State asks this Court to consider whether games meeting this definition are worthy of any First Amendment protection with regard to their distribution to minors.

II. STRICT SCRUTINY SHOULD NOT BE APPLIED IN A MANNER THAT REQUIRES THE STATE TO DEMONSTRATE DIRECT CAUSATION BETWEEN VIOLENT VIDEO GAME PLAY AND THE RESULTING HARM TO MINORS

Even assuming the variable obscenity standard does not apply to the Act, the Court should accept this case, at a minimum, to clarify the quantum of evidence necessary to support a state's restriction on violent material sold to minors when such restrictions are reviewed under strict scrutiny.

The State argues that strict scrutiny should not be applied to require empirical evidence of a direct causal link between violent video game play and the harm to minors sought to be avoided. In *Turner Broadcasting System, Inc., supra*, 512 U.S. at 666, this Court upheld federal must-carry broadcast provisions requiring cable television systems to dedicate a portion of their channels to the transmission of local broadcast stations. In defending the regulation, the government relied upon Congress' legislative finding that, absent mandatory carriage rules, "the continued viability of local broadcast television would be 'seriously jeopardized.'" *Id.*, at 665. The Court accepted the government's justification for the regulation, recognizing that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Id.*

In reviewing government regulations on speech, a court "must accord substantial deference to the predictive judgments" of the legislative body. *Id.* A state's predictive judgments, therefore, must be upheld so long as the court finds that "in formulating its judgments, [the state] has drawn reasonable inferences based on substantial evidence." *Id.*

Although the court of appeals purported to apply the standard set forth in *Turner*, in reviewing the Act (App., *infra*, 25a-32a), it held that the State failed to prove the existence of a compelling governmental interest because "the evidence presented by the State does not support the Legislature's purported interest in preventing psychological or neurological harm. Nearly all of the research is based on correlation, not evidence of

causation. . . . None of the research establishes or suggests a causal link between minors playing violent video games and actual psychological or neurological harm." App. *infra*, 31a-32a. The court of appeals found the State's evidence fatal to its case because only a correlation, not direct causation, was established. In the absence of direct causation, the court of appeals held that the State failed to demonstrate the existence of a compelling interest. App., *infra*, 31a.

By requiring proof of a direct causal link, the court of appeals effectively narrowed the *Turner* standard. Indeed, the deference that *Turner* gives to states, as modified by the decision below, may now be an insurmountable hurdle in cases such as this. Under existing, responsible social science, such empirical evidence may prove unobtainable. Of course, the evidence considered by the California Legislature did not contain studies wherein children were insulated from all other forms of violent media and exposed only to violent video games. But the Legislature did consider substantial evidence that tends to establish a correlation between playing violent video games and increased automatic aggressiveness, aggressive thoughts and behavior, antisocial behavior, and desensitization to violence in minors and adults. App., *infra*, 27a-31a. Such evidence should be legally sufficient under *Turner Broadcasting System, Inc.*, *supra*, when the State legislates to assist parents in protecting the well-being of their children.

Notably, this Court recently opined that the government cannot be expected to obtain the unobtainable when it acts to protect children from the harmful effects of indecent broadcast media. In *F.C.C. v. Fox Television Stations, Inc.*, __ U.S.__ [129

S.Ct. 1800] (2009), this Court held that "[t]here are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency." *Id.*, at *1813. Importantly, the Court noted that "[i]t is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. . . . It is something else to insist upon obtaining the unobtainable." *Id.* Therefore, this Court held that "Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity." *Id.*

Those same evidentiary concerns are equally relevant not only here, but in other contexts as well. The court of appeals' narrow application of *Turner* could arguably be applied to invalidate other legislatively imposed restrictions based upon the predictive judgments of legislative bodies. Restrictions on a minor's ability to legally marry could face an uphill battle under the court of appeals' narrow standard. It is unlikely that a state could produce empirical proof that minors under the age of 18 or 16 are harmed by marrying. But under the court of appeals modification of *Turner*, such proof would be required.

The court of appeals effectively narrowed the rule set forth in *Turner*, and this Court's review is needed to re-establish the proper evidentiary

standard applicable when courts engage in their duty to review predictive judgments of legislative bodies.

CONCLUSION

For all of the forgoing reasons, the petition for a writ of certiorari should be granted.

Dated: May 18, 2009

Respectfully submitted

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