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IN THE SUPREME COURT OF THE UNITED STATES

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ARNOLD SCHWARZENEGGER, GOVERNOR :  
OF CALIFORNIA, ET AL., :  
Petitioners :

v. : No. 08-1448

ENTERTAINMENT MERCHANTS :  
ASSOCIATION, ET AL. :

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Washington, D.C.

Tuesday, November 2, 2010

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:04 a.m.

APPEARANCES:

ZACKERY P. MORAZZINI, ESQ., Supervising Deputy Attorney  
General, Sacramento, California; on behalf of  
Petitioners.

PAUL M. SMITH, ESQ., Washington, D.C.; on behalf of  
Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 08-1448, Schwarzenegger v. Entertainment Merchants Association. Mr. Morazzini.

ORAL ARGUMENT OF ZACKERY P. MORAZZINI  
ON BEHALF OF THE PETITIONERS

MR. MORAZZINI: Mr. Chief Justice, and may it please the Court:

The California law at issue today before this Court differs from the New York law at issue in Ginsberg in only one respect: Where New York was concerned with minors' access to harmful sexual material outside the guidance of a parent, California is no less concerned with a minor's access to the deviant level of violence that is presented in a certain category of video games that can be no less harmful to the development of minors.

When this Court in Ginsberg crafted a rule of law that permits States to regulate a minor's access to such material outside the presence of a parent, it did so for two fundamental reasons that are equally applicable this morning in this case.

First, this rule permits parents' claim to

1 authority in their own household to direct the  
2 upbringing and the development of their children; and,  
3 secondly, this rule promotes the States' independent  
4 interest in helping parents protect the well-being of  
5 children in those instances when parents cannot be  
6 present.

7 So this morning, California asks this Court  
8 to adopt a rule of law that permits States to restrict  
9 minors' ability to purchase deviant, violent video games  
10 that the legislature has determined can be harmful to  
11 the development and the upbringing --

12 JUSTICE SCALIA: What's a deviant -- a  
13 deviant, violent video game? As opposed to what? A  
14 normal violent video game?

15 MR. MORAZZINI: Yes, Your Honor. Deviant  
16 would be departing from established norms.

17 JUSTICE SCALIA: There are established norms  
18 of violence?

19 MR. MORAZZINI: Well, I think if we look  
20 back --

21 JUSTICE SCALIA: I mean, some of the Grimms'  
22 fairy tales are quite grim, to tell you the truth.

23 (Laughter.)

24 MR. MORAZZINI: Agreed, Your Honor. But the  
25 level of violence --

1 JUSTICE SCALIA: Are they okay? Are you  
2 going to ban them, too?

3 MR. MORAZZINI: Not at all, Your Honor.

4 JUSTICE GINSBURG: What's the difference? I  
5 mean, if you -- if you are supposing a category of  
6 violent materials dangerous to children, then how do you  
7 cut it off at video games? What about films? What  
8 about comic books? Grimms' fairy tales?

9 Why are video games special? Or does your  
10 principle extend to all deviant, violent materials in  
11 whatever form?

12 MR. MORAZZINI: No, Your Honor. That's why  
13 I believe California incorporated the three prongs of  
14 the Miller standard. So it's not just deviant violence.  
15 It's not just patently offensive violence. It's  
16 violence that meets all three of the terms set forth  
17 in --

18 CHIEF JUSTICE ROBERTS: I think that misses  
19 Justice Ginsburg's question, which was: Why just video  
20 games? Why not movies, for example, as well?

21 MR. MORAZZINI: Sure, Your Honor. The  
22 California Legislature was presented with substantial  
23 evidence that demonstrates that the interactive nature  
24 of violent -- of violent video games where the minor or  
25 the young adult is the aggressor, is the -- is the

1 individual acting out this -- this obscene level of  
2 violence, if you will, is especially harmful to minors.  
3 It --

4 JUSTICE KAGAN: Well, do you actually have  
5 studies that show that video games are more harmful to  
6 minors than movies are?

7 MR. MORAZZINI: Well, in the record, Your  
8 Honor, I believe it's the Gentile and Gentile study  
9 regarding violent video games as exemplary teachers.  
10 The authors there note that video games are not only  
11 exemplary teachers of pro-social activities, but also  
12 exemplary teachers of aggression, which was the  
13 fundamental concern of the California Legislature in  
14 enacting this statute.

15 So, while the science is continually  
16 developing -- indeed, it appears that studies are being  
17 released every month regarding --

18 CHIEF JUSTICE ROBERTS: What was the --

19 JUSTICE KAGAN: And suppose -- suppose a new  
20 study suggested that movies were just as violent. Then,  
21 presumably, California could regulate movies just as it  
22 could regulate video games.

23 MR. MORAZZINI: Well, Your Honor, there is  
24 scientific literature out there regarding the impact of  
25 violent media on -- on children. In fact, for decades,

1 the President, Congress, the FTC, parenting groups have  
2 been uniquely concerned with the level of violent media  
3 available to minors that they have ready access to.

4 So --

5 JUSTICE SOTOMAYOR: I don't know -- is that  
6 answering Justice Kagan's question? One of the studies,  
7 the Anderson study, says that the effect of violence is  
8 the same for a Bugs Bunny episode as it is for a violent  
9 video. So can the legislature now, because it has that  
10 study, say we can outlaw Bugs Bunny?

11 MR. MORAZZINI: No --

12 JUSTICE SOTOMAYOR: And there are people who  
13 would say that the cartoon has very little social value;  
14 it's entertainment but not much else. This is  
15 entertainment.

16 I'm not suggesting that I like this video,  
17 the one at issue that you provided the five-minute clip  
18 about. To me, it's not entertainment, but that's not  
19 the point. To some, it may well be.

20 MR. MORAZZINI: Justice Sotomayor, cartoons  
21 do not depart from the established norms to -- of a  
22 level of violence to which children have been  
23 historically exposed to. We believe the level of  
24 violence in these video games --

25 JUSTICE SCALIA: That same argument could

1 have been made when movies first came out. They could  
2 have said, oh, we've had violence in Grimms' fairy  
3 tales, but we've never had it, you know, live on the  
4 screen. I mean, every time there's a new technology,  
5 you can make that argument.

6 MR. MORAZZINI: Well, Your Honor, I think  
7 that's the beauty of incorporating the three prongs of  
8 the Miller standard into California's law. This  
9 standard is very prophylactic and ensures that only a  
10 narrow category of material will be covered, certainly  
11 not Grimms' fairy tales.

12 JUSTICE SOTOMAYOR: How is this any  
13 different than what we said we don't do in the First  
14 Amendment field in Stevens, where we said we don't look  
15 at a category of speech and decide that some of it has  
16 low value. We decide whether a category of speech has a  
17 historical tradition of being regulated. Now, other  
18 than some State statutes that you point to, some of  
19 which are very clearly the same as those that we struck  
20 down in Wynn, where's the tradition of regulating  
21 violence?

22 MR. MORAZZINI: Your Honor, California  
23 submits that when the rights of minors are at issue and  
24 not the rights of adults, the standard should be more  
25 flexible. The Constitution should recognize that when



1 the audience is minors, the same standard should not  
2 apply. Therefore, the question should not be whether or  
3 not historically violent speech was regulated, but  
4 whether or not the Constitution guarantees minors a  
5 right --

6 JUSTICE SOTOMAYOR: Could you get rid of rap  
7 music? Have you heard some of the lyrics of some of the  
8 rap music, some of the original violent songs that have  
9 been sung about killing people and about other violence  
10 directed to them?

11 MR. MORAZZINI: I would agree that it --

12 JUSTICE SOTOMAYOR: Could the State --

13 MR. MORAZZINI: I would agree it's  
14 egregious, Justice Sotomayor. However --

15 JUSTICE SOTOMAYOR: Why isn't that obscene  
16 in the sense that you're using the word, or deviant?

17 MR. MORAZZINI: Well, I'm not sure initially  
18 that it's directly harmful to the development of minors  
19 in the way that we know that violent video games can be.  
20 We know that violent material, like sexual material,  
21 appeals to a base instinct in -- in especially minors.  
22 It has -- it can be presented in a manner that --

23 JUSTICE ALITO: When you talk about minors,  
24 what -- what are you -- what age group are you talking  
25 about? If a video game manufacturer has to decide under

1 your statute how to -- where its game stands, what age  
2 of -- of a child should the manufacturer have in mind?  
3 A 17-year-old? A 10-year-old?

4 MR. MORAZZINI: Your Honor, I would submit  
5 that, just like in the obscenity context for minors, a  
6 law similar to the New York law at issue in Ginsberg,  
7 though California's law hasn't been construed or  
8 applied, I would submit that the jury would be  
9 instructed to consider minors as a whole. In California  
10 that's under 18 years old. So I believe they would just  
11 be instructed minors as a class, not --

12 JUSTICE ALITO: How can they -- how can they  
13 do that? Isn't the average person likely to think that  
14 what's appropriate for a 17-year-old may not be  
15 appropriate for a 10-year-old or an 8-year-old?

16 MR. MORAZZINI: Your Honor, I think juries  
17 and judges do this every day in the  
18 variable obscenity --

19 JUSTICE GINSBURG: But California doesn't do  
20 that. California has in big letters "18." So it's not  
21 -- is it okay for a 7-year-old? Is it okay for a  
22 12-year-old? Part of this statute requires labeling  
23 these video games in big numbers "18." So it's 18, and  
24 California doesn't make any distinctions between  
25 17-year-olds and 4-year-olds.

1                   MR. MORAZZINI: Justice Ginsburg, and I  
2 think rightfully so. I think a jury would be charged  
3 with -- with perhaps the standard of what the community  
4 believes an average minor. So the manufacturer would  
5 consider --

6                   JUSTICE SCALIA: Because the average minor  
7 is halfway between 0 and 18, is that 9 years old?

8                   (Laughter.)

9                   MR. MORAZZINI: Fair point, Justice Scalia.  
10 I think a jury could be instructed as to the typical age  
11 group of minors that are -- that are playing these  
12 games.

13                   JUSTICE BREYER: Why wouldn't you, if  
14 necessary, simply say that -- that a -- a video game  
15 that appeals to the prurient, shameful, or morbid  
16 interests of those 18 or under, but let's take 18, and  
17 it's not suitable in the community for those 18, and it  
18 has no redeeming importance of any kind, no serious  
19 literary, artistic, political, or scientific value for  
20 those 18, that at least as to those, you can't sell it  
21 without -- the parent can buy it, but the child can't  
22 buy it. So you can't sell to a 12-year-old something  
23 that would be horrible for an 18-year-old. Is that --  
24 would you be willing to accept that, if necessary, to  
25 make this okay on its face?

1 MR. MORAZZINI: Justice Breyer, absolutely.

2 JUSTICE BREYER: Okay.

3 JUSTICE KAGAN: Mr. Morazzini, could I take  
4 you back to Justice Scalia's original question, which  
5 was what counts as deviant violence or morbid violence?  
6 Because I read your briefs all the way through, and the  
7 only thing that I found was -- you said was clearly  
8 covered by this statute was Postal 2. But presumably  
9 the statute applies to more than one video game. So  
10 what else does it apply to? How many video games? What  
11 kind of video games?

12 I mean, how would you describe in plain  
13 English what -- what morbid violence is, what you have  
14 to see in a video game for it to be covered?

15 MR. MORAZZINI: Okay, Justice Kagan, I would  
16 go back to the language of the statute, and the statute  
17 covers video games where the range of options available  
18 to the player includes maiming, killing, dismembering,  
19 torturing, sexually assaulting, and those types of  
20 violence. So I would look to games where --

21 JUSTICE KAGAN: So anything that has those  
22 kinds of violence counts?

23 MR. MORAZZINI: No, and then we would move  
24 to the three prongs of the Miller standard, Your Honor.  
25 We would look to see what --

1 JUSTICE KAGAN: Well, so how do we separate  
2 violent games that are covered from violent games just  
3 as violent that are not covered?

4 MR. MORAZZINI: Well, Your Honor, I think a  
5 jury could be instructed with expert testimony, with  
6 video clips of game play, and to judge for  
7 themselves whether --

8 JUSTICE SCALIA: I'm not concerned about the  
9 jury judging. I'm concerned about the producer of the  
10 games who has to know what he has to do in order to  
11 comply with the law. And you're telling me, well, a  
12 jury can -- of course, a jury can make up its mind, I'm  
13 sure. But a law that has criminal penalties has to be  
14 clear. And how is the manufacturer to know whether a  
15 particular violent game is covered or not?

16 MR. MORAZZINI: Well, Your Honor, if we  
17 look --

18 JUSTICE SCALIA: Would he convene his own  
19 jury and -- and try it before -- you know --

20 (Laughter.)

21 JUSTICE SCALIA: I -- I really wouldn't know  
22 what to do as a manufacturer.

23 MR. MORAZZINI: Justice Scalia, I'm  
24 convinced that the video game industry will know what to  
25 do. They rate their video games every day on the basis

1 of violence. They rate them for the intensity of the  
2 violence, the amount --

3 JUSTICE KAGAN: So is what's covered here  
4 the -- the mature category in the ratings? Is that what  
5 this statute covers? Is that what it's meant to cover?

6 MR. MORAZZINI: I believe that some mature-  
7 rated games would be covered, but not all.

8 JUSTICE KAGAN: Some, but not all.

9 MR. MORAZZINI: But not all.

10 Your Honor, just like with sexual material,  
11 we can -- we can trust individual panders of sexual  
12 material to judge whether or not it's a -- it's in --

13 JUSTICE KENNEDY: Let me just make one  
14 comment on that point. It seems to me all or at least  
15 the great majority of the questions today are designed  
16 to probe whether or not this statute is vague. And you  
17 say the beauty of the statute is that it utilizes the  
18 categories that have been used in the obscenity area and  
19 that -- that there's an obvious parallel there.

20 The problem is, is that for generations  
21 there has been a societal consensus about sexual  
22 material. Sex and violence have both been around a long  
23 time, but there's a societal consensus about what's  
24 offensive for sexual material, and there are judicial  
25 discussions on it. Now, those judicial discussions are

1 not precise. You could have had the same questions  
2 today with reference to an obscenity statute, and we  
3 have -- we have said that with reference to obscenity,  
4 there are certain -- that there are certain materials  
5 that are not protected. Those rules are not precise at  
6 the margins, and some would say not precise in a more  
7 significant degree as well.

8 But you're asking us to go into an entirely  
9 new area where there are no consensus, no judicial  
10 opinions. And this is -- and this indicates to me the  
11 statute might be vague, and I just thought you'd like to  
12 know that -- that reaction.

13 (Laughter.)

14 MR. MORAZZINI: Justice Kennedy, as with  
15 sexual -- the regulation of sexual material and  
16 obscenity, we had to start somewhere. California is  
17 choosing to start now. We can build a consensus as to  
18 what level of violence is in fact patently offensive for  
19 minors, is deviant for minors, just as the case law has  
20 developed over time with sexual depictions. Your Honor,  
21 I believe the key is the -- the similarities violence  
22 has with sex. This is material --

23 JUSTICE SCALIA: What about excessive  
24 glorification of drinking, movies that have too much  
25 drinking? Does that have an effect on minors? I

1     suppose so.

2                     I -- I am not just concerned with the  
3     vagueness. I am concerned with the vagueness, but I'm  
4     concerned with the First Amendment, which says Congress  
5     shall make no law abridging the freedom of speech. And  
6     it was always understood that the freedom of speech did  
7     not include obscenity. It has never been understood  
8     that the freedom of speech did not include portrayals of  
9     violence.

10                    You're -- you're asking us to create a -- a  
11     whole new prohibition which the American people never --  
12     never ratified when they ratified the First Amendment.  
13     They knew there were -- you know, obscenity was -- was  
14     bad, but what's next after violence? Drinking?  
15     Smoking? Movies that show smoking can't be shown to  
16     children? Does -- will that affect them? Of course, I  
17     suppose it will.

18                    But is -- is that -- are -- are we to sit  
19     day by day to decide what else will be made an exception  
20     from the First Amendment? Why -- why is this particular  
21     exception okay, but the other ones that I just suggested  
22     are not okay?

23                    MR. MORAZZINI: Well, Justice Scalia, I  
24     would like to highlight the fact that the material at  
25     issue in Ginsberg was not obscene. Under no existing



1 definition of obscenity was the partial nudity that this  
2 Court allowed States to regulate minors' access to --

3 JUSTICE ALITO: Well, I think what  
4 Justice Scalia wants to know is what James Madison  
5 thought about video games.

6 (Laughter.)

7 JUSTICE ALITO: Did he enjoy them?

8 JUSTICE SCALIA: No, I want to know what  
9 James Madison thought about violence. Was there any  
10 indication that anybody thought, when the First  
11 Amendment was adopted, that there -- there was an  
12 exception to it for -- for speech regarding violence?  
13 Anybody?

14 MR. MORAZZINI: Your Honor, as to minors, I  
15 believe, looking at some of the historic statutes States  
16 had passed, had enacted in the past, there was a social  
17 recognition that there is a level of violent material --

18 JUSTICE SOTOMAYOR: What's the earliest  
19 statute?

20 MR. MORAZZINI: Pardon?

21 JUSTICE SOTOMAYOR: What's the earliest  
22 statute and how much enforcement was entered?

23 MR. MORAZZINI: Your Honor, I don't know the  
24 earliest statute off the top of my head. I believe they  
25 go back into the early 1900s, perhaps later. I

1 apologize, but I don't know that --

2 JUSTICE BREYER: But, on the principle, I  
3 mean, it's been quite some years, hasn't it, before this  
4 -- since this Court has held that one instance that  
5 courts -- that the country, legislatures, can regulate  
6 are fighting words? And we regulate fighting words,  
7 don't we?

8 MR. MORAZZINI: Absolutely.

9 JUSTICE BREYER: Because they provoke  
10 violence. And the American Psychological Association  
11 and the American Pediatric Association have said that  
12 certain kinds of video games here create violence when  
13 children are exposed. There are 80 people who think to  
14 the contrary. There are two huge things of meta-  
15 studies that think that -- not to the contrary. All  
16 right. So what are we supposed to do?

17 MR. MORAZZINI: Well, Justice Breyer, I  
18 think, in going back to Justice Scalia's question, I  
19 find it hard to believe, and I know of no historical  
20 evidence that suggests, that our Founding Fathers, in  
21 enacting the First Amendment, intended to guarantee  
22 video game retailers' First Amendment right --

23 JUSTICE GINSBURG: May I go back to -- to  
24 what Justice Breyer was asking? Because this Court,  
25 with respect to the fighting words -- Chaplinsky and "in

1 your face" and provoke an immediate action -- the Court  
2 has been very careful to cordon that off so it doesn't  
3 have this spillover potential. So you -- you didn't  
4 latch on to fighting words. Your analogy is to  
5 obscenity for teenagers, as I understand it.

6 MR. MORAZZINI: Yes, Justice Ginsburg. With  
7 regard to fighting words, the -- the societal interest  
8 in preventing acts of violence is -- is different than  
9 the concern at issue here today.

10 JUSTICE KAGAN: So could I just make -- make  
11 sure I understand that, Mr. Morazzini, because, as I  
12 understand, the State has given up its argument that the  
13 interest protected by this law is an interest in  
14 preventing minors who see these games from going out and  
15 committing violent acts themselves; that the State is  
16 not saying that that's the interest in the law; is that  
17 correct? That instead the State is saying that the  
18 interest in the law is in protecting children's moral  
19 development generally?

20 MR. MORAZZINI: Justice Kagan, we welcome  
21 that as -- as an effect of California's regulation, but  
22 the primary interest was the internal intrinsic harm to  
23 minors. That's what the State of California is deeply  
24 concerned with in this case.

25 JUSTICE SOTOMAYOR: I have a point of

1 clarification. Justice Ginsburg talked about the  
2 labeling parts of this Act. The circuit court struck  
3 those portions of the Act. You have not challenged that  
4 ruling.

5 MR. MORAZZINI: Justice --

6 JUSTICE SOTOMAYOR: There are two sections  
7 to the Act.

8 MR. MORAZZINI: Sure.

9 JUSTICE SOTOMAYOR: One is a criminal act  
10 for selling to a minor, and the other is a requirement  
11 that you label in a certain way each video. The  
12 district court said both were -- I think the circuit  
13 court said both were unconstitutional, correct?

14 MR. MORAZZINI: Yes, Justice Sotomayor.  
15 They found --

16 JUSTICE SOTOMAYOR: And your brief has not  
17 addressed the labeling requirements at all.

18 MR. MORAZZINI: Well, we didn't, Your Honor,  
19 because one holding of the Ninth Circuit hinged upon the  
20 other. In striking down the body of California's law,  
21 the restriction on the sale, the court found that since  
22 it's not illegal to sell these games to 18-year-olds,  
23 that the governmental purpose served behind the label  
24 itself was -- was in fact misleading. So under the  
25 Zauderer case law -- I don't have the case cite before

1 me -- but under Zauderer regarding lawyers' advertising  
2 of -- of services, it's -- the government can require a  
3 labeling, so long as it's necessary to prevent  
4 misleading the consumer.

5           The Ninth Circuit found that because they  
6 struck down the body of our law, that the "18" label  
7 would be misleading. So that --

8           JUSTICE SOTOMAYOR: That's an interesting  
9 concession on your part, that the labeling doesn't have  
10 a need separate from the restriction on sale. I would  
11 have thought that if you wanted a lesser restriction,  
12 that you would have promoted labeling as a reasonable  
13 strict scrutiny restriction to permit the control of  
14 sale of these materials to minors, but you seem to have  
15 given up that argument altogether.

16           MR. MORAZZINI: Justice Sotomayor, I  
17 certainly did not attempt or intend to concede that the  
18 Ninth Circuit's opinion was correct in any sense in this  
19 case.

20           JUSTICE SOTOMAYOR: Well, you have conceded  
21 it by not appealing it, but okay. We're not -- your  
22 case on labeling rises and falls on the sale to minors?

23           MR. MORAZZINI: At this point, I would  
24 agree, Your Honor.

25           JUSTICE GINSBURG: Does California --

1 JUSTICE SCALIA: I gather that -- that if --  
2 if the parents of the minor want the kid to watch this  
3 violent stuff, they like gore, they may even like  
4 violent kids --

5 (Laughter.)

6 JUSTICE SCALIA: -- then -- then the State  
7 of California has no objection, right? So long as the  
8 parent buys the thing, it's perfectly okay.

9 MR. MORAZZINI: Your Honor, under Ginsberg,  
10 they're entitled to direct the development and the  
11 upbringing of their children in the manner they see fit.

12 JUSTICE SCALIA: Yes.

13 MR. MORAZZINI: It's important to the State  
14 of California that the parent -- that we ensure that the  
15 parent can involve themselves in this important  
16 decision.

17 JUSTICE SCALIA: So -- so that's basically  
18 all this is, is a -- a law to help parents; is that  
19 right?

20 MR. MORAZZINI: It's one of the two  
21 fundamental interests that are served by this law, yes,  
22 ensuring that parents can involve themselves in the  
23 front end. California sought to erect a barrier in  
24 between a retail sales clerk and a minor with regard to  
25 violent material, just as we allow for minors' access to

1 sexual material, because California sees that the  
2 developmental harm that could be caused to minors is no  
3 less significant than that recognized by this Court in  
4 -- in Ginsberg with regard to minors' exposure to sexual  
5 material. Now, again, the material at issue in Ginsberg  
6 was not obscene.

7 JUSTICE ALITO: Do you think there's any  
8 barrier in California to minors' access to sexual  
9 material?

10 MR. MORAZZINI: I -- I believe California  
11 has a law, Penal Code Section 313.1.

12 JUSTICE GINSBURG: California has a  
13 Ginsberg-type law.

14 MR. MORAZZINI: Yes.

15 JUSTICE ALITO: Does your office spend a lot  
16 of time enforcing that?

17 MR. MORAZZINI: I'm not aware,  
18 Justice Alito. But there is a proscription on the sale  
19 of sexual material to minors. It's defined as harmful  
20 to minors, similar to California's Act. In fact,  
21 California's Act, in incorporating the three prongs of  
22 Miller, goes even further than the Ginsberg law at issue  
23 in Ginsberg v. New York.

24 JUSTICE GINSBURG: Is there -- you've been  
25 asked questions about the vagueness of this and the

1 problem for the seller to know what's good and what's  
2 bad. California -- does California have any kind of an  
3 advisory opinion, an office that will view these videos  
4 and say, yes, this belongs in this -- what did you call  
5 it -- deviant violence, and this one is just violent but  
6 not deviant? Is there -- is there any kind of opinion  
7 that the -- that the seller can get to know which games  
8 can be sold to minors and which ones can't?

9 MR. MORAZZINI: Not that I'm aware of,  
10 Justice Ginsburg.

11 JUSTICE SCALIA: You should consider  
12 creating such a thing. You might call it the California  
13 office of censorship. It would -- it would judge each  
14 of these videos one by one. That would be very nice.

15 MR. MORAZZINI: Your Honor, we -- we ask  
16 juries to judge sexual material and its appropriateness  
17 for minors as well. I believe that if -- if we can view  
18 the --

19 JUSTICE SCALIA: Do we let the government do  
20 that? Juries are not controllable. That's the  
21 wonderful thing about juries, also the worst thing about  
22 juries. But --

23 (Laughter.)

24 JUSTICE SCALIA: But do we let government  
25 pass upon -- you know, a board of censors? I don't



1 think so.

2 MR. MORAZZINI: Justice Scalia, California's  
3 not doing that here. The standard is quite similar to  
4 that in the sexual material realm. California is not  
5 acting as a censor. It is telling manufacturers and  
6 distributors to look at your material and to judge for  
7 yourselves whether or not the level of violent content  
8 meets the prongs of this definition.

9 JUSTICE KENNEDY: I can see your white  
10 light's on. But even if we get past what I think are  
11 difficult questions about vagueness and how to interpret  
12 this law, isn't there a less restrictive alternative  
13 with the -- a V-chip?

14 MR. MORAZZINI: Well, Your Honor, I believe  
15 you're referring to the parental controls that are  
16 available --

17 JUSTICE KENNEDY: Yes.

18 MR. MORAZZINI: -- on some of the new  
19 machines. As we submitted in our briefing, a simple  
20 Internet search for bypassing parental controls brings  
21 up video clips instructing minors and young adults how  
22 to bypass the parental controls, so --

23 JUSTICE KENNEDY: So V-chips don't work.

24 MR. MORAZZINI: I believe the V-chip is  
25 limited to television, Justice Kennedy.

1 If I could reserve the remainder of my time.

2 CHIEF JUSTICE ROBERTS: Thank you, Mr.

3 Morazzini.

4 MR. MORAZZINI: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Smith.

6 ORAL ARGUMENT OF PAUL M. SMITH

7 ON BEHALF OF THE RESPONDENTS

8 MR. SMITH: Mr. Chief Justice, and may it  
9 please the Court:

10 The California law at issue restricts the  
11 distribution of expressive works based on their content.  
12 California, as we've heard today, does not seriously  
13 contend that it can satisfy the usual First Amendment  
14 standards that apply to such a law. Instead, it's  
15 asking this Court to grant it a new free pass, a  
16 brand-new Ginsberg-like exception to the First Amendment  
17 that would deny constitutional protection to some  
18 ill-defined subset of expressive works and, I submit,  
19 not just video games, but necessarily movies, books, and  
20 any other expressive work that describes or portrays  
21 violence in a way that some court somewhere, some day,  
22 would decide is deviant and offensive.

23 CHIEF JUSTICE ROBERTS: What about -- the  
24 distinction between books and movies may be that, in  
25 these video games, the child is not sitting there

1 passively watching something; the child is doing the  
2 killing. The child is doing the maiming. And I suppose  
3 that might be understood to have a different impact on  
4 the child's moral development.

5 MR. SMITH: Well, Your Honor, it might. The  
6 -- the State of California has not marshaled a shred of  
7 evidence to suggest it's true. And if you look at the  
8 social science --

9 CHIEF JUSTICE ROBERTS: What was -- what was  
10 the state of the record that was present before the  
11 Court in Ginsberg?

12 MR. SMITH: The state of the record was that  
13 they were aware of science on both sides, but made a  
14 judgment that as a matter of common sense, they could  
15 decide that obscenity, even somewhat at-large  
16 obscenity --

17 CHIEF JUSTICE ROBERTS: So the Court acted  
18 on the basis of common sense?

19 MR. SMITH: Yes. It said as long as there's  
20 science on both sides, but in that particular area,  
21 which is an exception based -- that goes back to the  
22 founding, they felt that it was -- it was proper for  
23 them to adjust the outer boundaries of the exception.

24 JUSTICE GINSBURG: But the material wasn't  
25 obscene. They were girlie magazines. I imagine to

1 today's children they would seem rather tame --

2 MR. SMITH: Well --

3 (Laughter.)

4 JUSTICE GINSBURG: -- the magazines  
5 involved. But they were definitely not obscene with  
6 respect to adults.

7 MR. SMITH: Well, Your Honor, that's  
8 certainly true, but one of the things about the case  
9 that is important to recognize, they didn't pass on the  
10 particular material before the Court. They simply said,  
11 is this somewhat larger a definition of variable  
12 obscenity going to be acceptable to --

13 JUSTICE BREYER: Talking about common sense,  
14 why isn't it common sense to say that if a parent wants  
15 his 13-year-old child to have a game where the child is  
16 going to sit there and imagine he's a torturer and  
17 impose gratuitous, painful, excruciating, torturing  
18 violence upon small children and women, and do this for  
19 an hour or so, and there is no social or redeeming  
20 value, it's not artistic, it's not literary, et  
21 cetera -- why isn't it common sense to say a State has  
22 the right to say, parent, if you want that for your  
23 13-year-old, you go buy it yourself. Which I think is  
24 what they're saying.

25 MR. SMITH: Well, Your Honor, the State has

1 to have some reason to think that parents --

2 JUSTICE BREYER: It does, it does. What it  
3 has is -- and I've looked at the studies, perhaps not as  
4 thoroughly as you, but it seemed to me that Dr. Ferguson  
5 and Dr. Anderson are in a disagreement. They aren't in  
6 that much of a disagreement actually, but they've looked  
7 in depth at a whole lot of video games, not movies  
8 they're talking about or other things; they're talking  
9 about video games.

10 And both groups come to the conclusion that  
11 there is some tendency to increase violence. And the  
12 American Psychiatric -- Psychological Association and  
13 the American Pediatric Association sign on to a long  
14 list on -- I think it's the Anderson side that this does  
15 hurt children.

16 I have to admit that if I'm supposed to be a  
17 sociological expert, I can't choose between them. But  
18 if I can say could a legislature have enough evidence to  
19 think there's harm, the answer is yes.

20 MR. SMITH: There is two aspects of harm.  
21 The one I was about to address was the question of  
22 whether parents need additional help in exercising the  
23 role that they have played throughout the history --

24 JUSTICE BREYER: Yes. They need additional  
25 help because many parents are not home when their

1 children come home from school. Many parents have jobs,  
2 I -- we hope. And -- and when -- when their children  
3 are there, they do what they want. And all this says  
4 is, if you want that gratuitous torture of, let's say  
5 babies, to make it as bad as possible, what you do,  
6 parent, is you go buy it; don't let him buy it on his  
7 own, and he's 13 years old. Now, what's the common  
8 sense or what's the science of that?

9 MR. SMITH: Well, two aspects. With respect  
10 to parental controls, Your Honor, there's a whole  
11 variety -- a whole series of things that parents have  
12 available to them and are using today to deal with any  
13 concerns that they have about what's appropriate for  
14 their children.

15 CHIEF JUSTICE ROBERTS: I don't want to  
16 interrupt your answer, but any 13-year-old can bypass  
17 parental controls in about 5 minutes.

18 MR. SMITH: That is one element of about  
19 five different elements, Your Honor. And if I could  
20 talk about them -- there is the ratings. Parents are  
21 doing the purchasing 90 percent of the time. Even if  
22 the child does the purchasing, they bring the game home,  
23 the parent can review it.

24 The game is being played in the home on the  
25 family television or computer most of the time. Any

1 harm that's supposed to be inflicted on them is supposed  
2 to take place over a period of years, not minutes, so  
3 the parent has ample opportunity to exercise parental  
4 supervision over what games are being played in the  
5 house. Plus there is the parental controls, which are  
6 very similar to the ones that the Court has found to be  
7 significant in the Playboy case, in the COPA case, in a  
8 whole variety of cases.

9 JUSTICE SCALIA: How much do these videos  
10 cost?

11 MR. SMITH: They cost in the range of \$50 to  
12 \$60 when new, Your Honor.

13 JUSTICE SCALIA: Not too many 13-year-olds  
14 walk in with a \$50 bill, do they?

15 MR. SMITH: It seems very likely that the  
16 people, if there are any out there, buying games without  
17 parental permission -- which the State, by the way, has  
18 not even tried to show -- they are very likely in the  
19 16-year-old category. The --

20 JUSTICE BREYER: You're away from the common  
21 sense. If you're going back to the common sense of it,  
22 what common sense is there in having a state of the law  
23 that a State can forbid and says to the parent the  
24 child, the 13-year-old, cannot go in and buy a picture  
25 of a naked woman, but the 13-year-old child can go in

1 and buy one of these video games as I have described?  
2 I've tried to take as bad a one as I could think of,  
3 gratuitous torture of children. Okay? Now, you can't  
4 buy a naked woman, but you can go and buy that, you say  
5 to the 13-year-old. Now -- now, what sense is there to  
6 that?

7 MR. SMITH: Well, there's -- there's various  
8 aspects of this that I think it's important to  
9 understand. First of all, violence has been a feature  
10 of works that we create for children and encouraged them  
11 to watch throughout the history of this country. We  
12 have a very different sense of whether violence  
13 per se --

14 JUSTICE BREYER: You mean love is not  
15 something that people have tried to encourage children  
16 to understand and know about? I mean, what's the  
17 difference between sex and violence? Both, if anything?

18 MR. SMITH: There's a huge difference. The  
19 difference is --

20 JUSTICE BREYER: Thank you. I understand  
21 that.

22 (Laughter.)

23 MR. SMITH: We do not -- the difference is  
24 we do not make films for children in which explicit sex  
25 happens. We do make films for children in which graphic



1 violence happens --

2 CHIEF JUSTICE ROBERTS: Graphic violence.  
3 There is a difference. We do not have a tradition in  
4 this country of telling children they should watch  
5 people actively hitting schoolgirls over the head with a  
6 shovel so they'll beg with mercy, being merciless and  
7 decapitating them, shooting people in the leg so they  
8 fall down -- I'm reading from the district court  
9 description -- pour gasoline over them, set them on  
10 fire, and urinate on them. We do not have a tradition  
11 in this country. We protect children from that. We  
12 don't actively expose them to that.

13 MR. SMITH: And -- and parents have been  
14 doing that for -- since time immemorial. The question  
15 before this Court is whether you're going to create an  
16 entirely new exception under the First Amendment,  
17 whether parents need to have such a new exception  
18 created, and whether or not, if you're going to do it,  
19 you could possibly figure out what the scope of that  
20 exception is.

21 CHIEF JUSTICE ROBERTS: Is it your position  
22 -- I know this is a facial challenge, Mr. Smith. So is  
23 it your position that the First Amendment could not  
24 prohibit the sale to minors of the video game that I  
25 just described?

1                   MR. SMITH: My position is that most people  
2 would think that that's an inappropriate game for  
3 minors -- we do not try to sell it to minors -- but that  
4 the Constitution should not be --

5                   CHIEF JUSTICE ROBERTS: I know you don't,  
6 but what is -- you're avoiding the answer. Does the  
7 First Amendment protect the sale of that video to  
8 minors?

9                   MR. SMITH: My position --

10                  CHIEF JUSTICE ROBERTS: A minor?

11                  MR. SMITH: -- is that there is not a  
12 violence exception to the First Amendment for minors,  
13 and there should not be.

14                  CHIEF JUSTICE ROBERTS: So your position is  
15 that the First Amendment does not, cannot, no matter  
16 what type of law, whether this one is vague or not, that  
17 the State legislature cannot pass a law that says you  
18 may not sell to a 10-year-old a video in which they set  
19 schoolgirls on fire.

20                  MR. SMITH: And the reason for that is  
21 there's no possible way, it's an insuperable problem, to  
22 use the English language to draw up an exception to the  
23 Constitution, to the First Amendment, that would --

24                  JUSTICE ALITO: But what if -- what if a  
25 State passes a -- what if California took the list of

1 video games that your association rates as mature and  
2 said there's a civil penalty? And you apparently don't  
3 want your -- you don't want vendors selling those games  
4 to minors; isn't that right?

5 MR. SMITH: Exercising our First Amendment  
6 rights, we have decided --

7 JUSTICE ALITO: You don't want that. And,  
8 now, what if California said there's a civil penalty  
9 attached to that?

10 MR. SMITH: What that would do is transform  
11 the ESRB, the private voluntary system that exists, into  
12 the -- the censorship commission that this Court struck  
13 down in Interstate Circuit. When you -- when the  
14 government does that and you have to go to them for  
15 permission to allow kids into the movies or to play this  
16 game, it is a prior restraint. You have way too much  
17 discretion. It's a licensing authority that the First  
18 Amendment doesn't allow.

19 JUSTICE ALITO: You seem to argue that --  
20 that there really is no good reason to think that  
21 exposure to video games is -- is bad for minors,  
22 exposure to really violent video games is bad to minors;  
23 is that right?

24 MR. SMITH: I think it's important to draw a  
25 distinction between harm that could be cognizable under

1 the law and appropriateness. Families have different  
2 judgments that they make about their children at  
3 different ages and with different content and different  
4 family values, and that's what --

5 JUSTICE KAGAN: Well, Mr. Smith, is there  
6 any showing that the State could make that would satisfy  
7 you, that would say, yes, that's a sufficient showing  
8 for this law to go forward?

9 You know, I understand that you think that  
10 the current studies don't suggest much of anything about  
11 harm.

12 MR. SMITH: No, they don't.

13 JUSTICE KAGAN: But -- but are there studies  
14 that would be enough?

15 MR. SMITH: Well, I guess I can imagine a  
16 world in which expression could transform 75 percent of  
17 the people who experience it into murderers. That's  
18 clearly not the way the human mind works. And here the  
19 reality is quite the opposite. Dr. Anderson testified  
20 in the Illinois trial, which is in the record, that the  
21 vast majority of people playing the games will grow up  
22 and be just fine. And, in fact, he -- he acknowledged  
23 that the effects of these games are not one whit  
24 different from watching cartoons on television or  
25 reading violent passages in the Bible or looking at a

1 picture of a gun.

2 JUSTICE ALITO: So why --

3 JUSTICE SCALIA: But you really don't want  
4 to argue the case on that ground. I -- I gather you  
5 don't believe that the First Amendment reads: Congress  
6 shall make no law abridging the freedom of speech except  
7 those that make sense. Is that --

8 MR. SMITH: Your Honor, my main ground today  
9 is exactly that, that this Court said last year in  
10 United States v. Stevens it doesn't have a freewheeling  
11 authority to create new exceptions to the First  
12 Amendment after 200 years based on a cost-benefit  
13 analysis, and this is -- this is a test of that. This  
14 is exactly what the State of California is asking you to  
15 do.

16 JUSTICE ALITO: But we have here a new -- a  
17 new medium that cannot possibly have been envisioned at  
18 the time when the First Amendment was ratified. It is  
19 totally different from -- it's one thing to read a  
20 description of -- as one of these -- one of these video  
21 games is promoted as saying, "What's black and white and  
22 red all over? Perhaps the answer could include  
23 disposing of your enemies in a meat grinder." Now,  
24 reading that is one thing. Seeing it as graphically  
25 portrayed --

1 JUSTICE SCALIA: And doing it.

2 JUSTICE ALITO: -- and doing it is still a  
3 third thing.

4 So this presents a question that could not  
5 have been specifically contemplated at the time when the  
6 First Amendment was adopted. And to say, well, because  
7 nobody was -- because descriptions in a book of violence  
8 were not considered a category of speech that was  
9 appropriate for limitation at the time when the First  
10 Amendment was violated is entirely artificial.

11 MR. SMITH: We do have a new medium here,  
12 Your Honor, but we have a history in this country of new  
13 mediums coming along and people vastly overreacting to  
14 them, thinking the sky is falling, our children are all  
15 going to be turned into criminals.

16 It started with the crime novels of the late  
17 19th century, which produced this raft of legislation  
18 which was never enforced. It started with comic books  
19 and movies in the 1950s. There were hearings across the  
20 street in the 1950s where social scientists came in and  
21 intoned to the Senate that half the juvenile delinquency  
22 in this country was being caused by reading comic books,  
23 and there was enormous pressure on the industry. They  
24 censored -- they self-censored. We have television. We  
25 have rock lyrics. We have the Internet.

1 JUSTICE KAGAN: Mr. Smith, do you think all  
2 video games are speech in the first instance? Because  
3 you could look at these games and say they're the  
4 modern-day equivalent of Monopoly sets. They're games.  
5 They're things that people use to compete. You know,  
6 when you think about some of them -- the first video  
7 game was Pong. It was playing tennis on your TV. How  
8 is that speech at all?

9 MR. SMITH: The games that we are talking  
10 about have narrative, events that are occurring,  
11 characters, plot. And that's exactly what the State has  
12 set out to regulate here. It says if these events occur  
13 here -- there is violence, one person is hurting another  
14 person -- it has to be a human being who's the victim --  
15 and it's doing it in a -- in a way that they find  
16 offensive in some way, we're going to regulate it. So,  
17 obviously, what --

18 JUSTICE KAGAN: So are we going to separate  
19 video games into narrative video games and non-narrative  
20 video games?

21 MR. SMITH: You don't have to, as long as  
22 the law is limited to regulating narrative. That's what  
23 this law is limited to. Now, if the law said you  
24 shouldn't buy -- play games that have red images that  
25 appear in them, or something else that was somehow

1 non-content based, that might be a closer case.

2 JUSTICE SCALIA: Well, what -- what about a  
3 law that says you can't sell to minors a video game --  
4 it doesn't care what the plot is, but no video game in  
5 which the minor commits violent acts of maiming,  
6 killing, setting people on fire? What about that?  
7 Would that -- would that be regulating speech?

8 MR. SMITH: Well, of course, Your Honor.  
9 That's exactly what -- what --

10 JUSTICE SCALIA: It's not speech. You're  
11 saying you just can't let the kid maim -- maim, kill --

12 MR. SMITH: I'm sorry. Were you --

13 JUSTICE SCALIA: -- or set on fire. What  
14 the law would be directed at is not the plot, not the  
15 video game itself, but the child's act of -- of  
16 committing murder, maiming, and so forth.

17 MR. SMITH: Well, the events in a video game  
18 are -- what happens in the plot is a combination of what  
19 the game gives you and what the player adds to it.  
20 There's a -- there's a creative aspect coming at it from  
21 the other side. It's often referred to as a dialogue  
22 between the player and the game. I would submit that  
23 both are completely protected by the First Amendment.  
24 Just as a person actually --

25 JUSTICE SCALIA: The child is speaking to



1 the game?

2 MR. SMITH: No. The child is helping to  
3 make the plot, determine what happens in the events that  
4 appear on the screen, just as an actor helps to portray  
5 what happens in a play. You're acting out certain  
6 elements of the play, and you're contributing to the  
7 events that occur and adding a creative element of your  
8 own. That's what makes them different and in many ways  
9 wonderful.

10 CHIEF JUSTICE ROBERTS: Mr. Smith, your --  
11 your challenge is a facial challenge?

12 MR. SMITH: Yes, Your Honor.

13 CHIEF JUSTICE ROBERTS: So that under --  
14 whether you use the Salerno test or the Glucksberg test,  
15 if there is either one or any applications that would  
16 satisfy the Constitution, the facial challenge fails.  
17 Right?

18 MR. SMITH: Very clear under the law of this  
19 Court that those tests don't apply in a First Amendment  
20 context if the -- the --

21 CHIEF JUSTICE ROBERTS: I thought we  
22 referenced them last year in the Stevens case, and the  
23 only reason we didn't have to decide which applies is  
24 because we adopted an approach that looked at  
25 overbreadth and said this statute is overbroad and

1 specifically didn't decide whether it could be applied  
2 in that case to -- to crush videos.

3 MR. SMITH: Well, that's -- that's correct,  
4 Your Honor, but I think it's -- there's no argument  
5 here, I don't think, that if you can find one game out  
6 there to which this can constitutionally be applied,  
7 even though it would also be unconstitutionally applied  
8 under the vast run of other cases --

9 CHIEF JUSTICE ROBERTS: Well, I  
10 understood -- the tenor of much of the questioning, I  
11 think, is that there may be games and may be minors --  
12 maybe a less violent game sold to a 17-year-old, perhaps  
13 that violates the First Amendment, but something like  
14 Postal 2 sold to a 10-year-old might -- might well not  
15 violate the First Amendment to apply this law to that.

16 MR. SMITH: Well, that may be --

17 CHIEF JUSTICE ROBERTS: And the way we  
18 approached the issue in Stevens, where we had hunting  
19 videos and crush videos, would say that it's too broad  
20 to apply the law to everything, so we strike it down,  
21 it's overbroad, but leave open the possibility that a  
22 more narrowly drawn statute might pass muster.

23 Why -- why isn't that a good approach here?

24 MR. SMITH: You certainly could do that.

25 Certainly, the key thing is that you strike down this

1 law, because this law is clearly much broader than any  
2 one game. I would submit to you, though, that there's  
3 no way, in fact, anybody is going to be able to come  
4 back and draw a statute that gets to what they claim,  
5 because the English language is not susceptible of that  
6 level of precision.

7 JUSTICE BREYER: All right. So it's not  
8 susceptible. Throughout you've been arguing your point,  
9 which is fair. You have some experts who -- who favor  
10 you, and you make that point very strongly, and your  
11 point's a pretty good one and a serious one, that it's  
12 very hard to draw this line under traditional First  
13 Amendment standards.

14 But I'd like you to deal with their point  
15 for a moment. And I take it their point is: There is  
16 no new First Amendment thing here. There is a  
17 category -- call them X -- which really are involving  
18 things like torturing children, et cetera. Maybe you  
19 don't like to sell them to anybody. You have them X'd  
20 or some special thing. But they exist, and they fit  
21 within a Miller-type definition. They are much worse  
22 than the simple girlie magazine that was involved there.  
23 And they will use traditional First Amendment tests;  
24 that is to say, there is speech at issue, that speech is  
25 being limited, it is being done for a good reason,

1 compelling interest -- namely, this problem with the X  
2 videos and the torture and living it through -- and  
3 there is no less restrictive alternative that isn't also  
4 significantly less effective.

5 See, I want you to deal with that directly,  
6 because what you have been doing for the most part is  
7 saying we have to be in some new, total new area, et  
8 cetera. But their argument is you don't have to be in  
9 some totally new area, et cetera. Apply traditional  
10 First Amendment standards, and we win. That's their  
11 argument, and I'd like to hear what you have to say  
12 about that, specifically.

13 MR. SMITH: Your Honor, they do not suggest  
14 that there's any existing exception to the First  
15 Amendment that would apply to violence.

16 JUSTICE BREYER: This is not an exception.  
17 It is the traditional strict scrutiny First Amendment  
18 test.

19 MR. SMITH: Well, they make a feint at  
20 trying to argue that --

21 JUSTICE BREYER: All right. Then let's --  
22 to get you to focus on it, I'll say I've made the  
23 argument.

24 (Laughter.)

25 MR. SMITH: There you go. Your Honor, I

1 think if you apply strict scrutiny here, they do not  
2 come close to the kind of showing that would be required  
3 under -- under the First Amendment.

4 First of all, they have not shown any  
5 problem, let alone a compelling problem, requiring  
6 regulation here in a world where parents are fully  
7 empowered already to make these calls, where crime,  
8 including violent crime, since the introduction of these  
9 games, has been plummeting in this country, down 50  
10 percent since the day Doom first went on the market  
11 15 years ago; in a world where parents are fully aware  
12 of what's going on in their homes and aware of the  
13 ratings system and can use all the other tools that we  
14 have talked about --

15 JUSTICE SOTOMAYOR: But they have plenty of  
16 evidence that --

17 JUSTICE KENNEDY: Why couldn't you make the  
18 same arguments with respect to the obscenity statutes?

19 MR. SMITH: Well, Your Honor, because  
20 obscenity doesn't have strict scrutiny applied to it, if  
21 it did, I expect you could make the same arguments, if  
22 there were --

23 JUSTICE KENNEDY: Why shouldn't violence be  
24 treated the same as obscenity?

25 MR. SMITH: Well, because, first of all, we

1 don't have the same history of it. There's no  
2 historical pedigree of that kind of an exception. And,  
3 as I was suggesting earlier, there's a fundamental  
4 difference factually, which is Ginsberg works tolerably  
5 well because we take everything that's sexually explicit  
6 and appeals to a prurient interest, and we say over  
7 here, it's not appropriate for minors.

8                   Violence would require you to draw a much  
9 different line between acceptable protected violence and  
10 unacceptable unprotected violence for minors, and that  
11 given the lack of historical pedigree but also just  
12 given the nature of what you're trying to do --

13                   JUSTICE KENNEDY: Well, the courts --

14                   MR. SMITH: -- that's a --

15                   JUSTICE KENNEDY: The courts struggled for  
16 many, many years and are to some extent still struggling  
17 with obscenity. They came up with basically what we  
18 might call the Miller standards. And -- and the State  
19 has said this gives us a category that we can work with,  
20 with reference to violence.

21                   MR. SMITH: And if you take the Miller  
22 standards and you take two things out of it -- you take  
23 out of it explicit sex and nudity, and you take out an  
24 appeal to prurient interest -- what do you have left?  
25 You have left -- what you have is a structure with no

1   apparent meaning.  There is no way to know how a court  
2   would apply a standard like deviant violence, morbid  
3   violence, offensive violence, let alone decide which  
4   video games have a redeeming social, political, artistic  
5   value.

6                   The value of a video game is completely in  
7   the eye of the beholder.  Some would say they're  
8   beautiful works of artistic creation; others would  
9   say --

10                   JUSTICE KENNEDY:  You could make all those  
11  arguments with reference to obscenity.

12                   MR. SMITH:  Except that you know -- we know,  
13  we all know, at least with respect to Ginsberg -- adult  
14  obscenity, I would acknowledge, is a very difficult  
15  line.  Adult -- Ginsberg works reasonably well, because  
16  if it has sex in it and naked people having sex in it  
17  and it's designed to be appealing to people's prurient  
18  interests, you don't give it to minors.  And you don't  
19  have a lot of cases out there about that.

20                   JUSTICE SCALIA:  Well, and you started  
21  Ginsberg with something that is proscribable even with  
22  regard to adults.

23                   MR. SMITH:  Correct, Your Honor.

24                   JUSTICE SCALIA:  You know that there is such  
25  a thing as -- as obscenity, which can be proscribed even

1 -- even as to adults; whereas in this case, I don't know  
2 that there's such a thing as morbid violence which could  
3 be eliminated from ordinary movies.

4 MR. SMITH: Let me -- I think a little  
5 history is helpful here. This Court has twice dealt  
6 with laws attempting to regulate violent works in the  
7 past. One was in *Winters v. New York*, where law applied  
8 to magazines and books, and one was in the 1960s. On  
9 the very day *Ginsberg* came down, in the Interstate  
10 Circuit case, the City of Dallas had an ordinance where  
11 there was going to be a commission that was going to  
12 review each movie and decide if it was appropriate for  
13 children.

14 JUSTICE ALITO: Let me be clear about  
15 exactly what your argument is. Your argument is that  
16 there is nothing that a State can do to limit minors'  
17 access to the most violent, sadistic, graphic video game  
18 that can be developed. That's your argument?

19 MR. SMITH: My position is --

20 JUSTICE ALITO: Is it or isn't it?

21 MR. SMITH: My position is that strict  
22 scrutiny applies, and that given the facts in the  
23 record, given the fact that the -- the problem is  
24 already well controlled, the parents are already  
25 empowered, and there are greatly less alternatives out



1     there --

2                     JUSTICE SOTOMAYOR:    So, when you --

3                     MR. SMITH:    -- there isn't any basis to say  
4     scrutiny is satisfied.

5                     JUSTICE SOTOMAYOR:    So, when you say that --

6                     CHIEF JUSTICE ROBERTS:    So, just to be  
7     clear, your answer to Justice Alito is, at this point,  
8     there is nothing the State can do?

9                     MR. SMITH:    Because there's no problem it  
10    needs to solve that would justify --

11                    CHIEF JUSTICE ROBERTS:    Could I -- could I  
12    just have a simple answer?

13                    MR. SMITH:    The answer is yes, Your Honor.

14                    CHIEF JUSTICE ROBERTS:    There's nothing the  
15    State can do.

16                    JUSTICE SOTOMAYOR:    Mr. Smith, how can you  
17    say that?  There's plenty of proof that -- that children  
18    are going into stores and buying these games despite the  
19    voluntary rating system, despite the voluntary retailer  
20    restraint by some.  There's still proof out there, and  
21    an abundance of it, that kids are buying the games.

22                    MR. SMITH:    I disagree.

23                    JUSTICE SOTOMAYOR:    And there's proof that  
24    some parents, as well-intentioned as they may or may not  
25    be, have not been able to supervise that.  So I --

1 starting from the proposition that there is a problem,  
2 it's a compelling State need, why are you arguing that  
3 there is no solution that the State could use to address  
4 that problem?

5 MR. SMITH: The -- the existing solutions  
6 are perfectly capable of allowing this problem to be  
7 addressed, assuming it is a problem. And I would --

8 JUSTICE SOTOMAYOR: But it's still about 20  
9 percent of sales are going to kids.

10 MR. SMITH: That's when they send in  
11 somebody who's 16 to test the system. There isn't any  
12 evidence at all in this record that actual children, not  
13 testers, are in fact disobeying their parents and  
14 secretly buying these games, bringing them into the  
15 home, and playing them for years with their parents  
16 unaware of it. There's simply no evidence of that at  
17 all.

18 CHIEF JUSTICE ROBERTS: Could you have a law  
19 that says the State has to put -- the dealers have to  
20 put the violent video games in a particular area of the  
21 video store?

22 MR. SMITH: There -- there is --

23 CHIEF JUSTICE ROBERTS: That is not -- and  
24 then -- you know, and minors are not allowed in that  
25 area.

1                   MR. SMITH: Well, if what you're saying is  
2 you're going to have a limit on the ability of minors to  
3 buy them because of walled off, and minors are not  
4 allowed --

5                   CHIEF JUSTICE ROBERTS: Yes.

6                   MR. SMITH: -- to go pick them off the  
7 shelf, then I don't know how that differs from the  
8 current law, Your Honor, assuming you could figure  
9 out --

10                  JUSTICE BREYER: Your answer -- your answer  
11 to the first question of Justice Alito and the Chief  
12 Justice was yes, isn't that -- that you are saying  
13 there's nothing they can do. So now, am I right about  
14 that or am I not right?

15                  MR. SMITH: Yes. Strict scrutiny does not  
16 make sense --

17                  JUSTICE BREYER: I am right? Okay. All I  
18 wanted was an answer to that.

19                  CHIEF JUSTICE ROBERTS: So they can't say,  
20 example, all the -- all the highest rated videos have to  
21 be on the top shelf out of the reach of children. Can  
22 they do that?

23                  MR. SMITH: I would think that that's  
24 probably not --

25                  CHIEF JUSTICE ROBERTS: That's what they do

1 with cigarettes or something, isn't it?

2 MR. SMITH: Except that cigarettes are not  
3 speech, Your Honor. This is fully protected speech.

4 CHIEF JUSTICE ROBERTS: I know that  
5 cigarettes are not speech, Mr. Smith.

6 (Laughter.)

7 CHIEF JUSTICE ROBERTS: Cigarettes are  
8 something that we have determined are harmful to  
9 children. The question is, you say the record doesn't  
10 support the idea that these video games are harmful to  
11 children. Some of us may conclude that it does.

12 MR. SMITH: Well, surely the record doesn't  
13 support it. The record says that if -- even if you take  
14 the studies at face value, it's not one whit more  
15 harmful than watching television cartoons. That's what  
16 the record shows.

17 JUSTICE GINSBURG: But on that -- on that  
18 score, Mr. Smith, there is a study by the FCC. The  
19 question is whether violence can be restricted during  
20 the hours when most children are awake, just the way  
21 pornography is. I don't remember what -- what are the  
22 hours, that -- something like from 10:00 in the evening  
23 until --

24 I don't -- but -- but didn't the FCC say,  
25 yes, we could do the same thing for violence that we're

1 doing for sex, except we don't think we ought to do it;  
2 we think Congress should do it?

3 MR. SMITH: What they did was they spent  
4 several years trying to come up with a definition that  
5 would allow anybody to figure out which violent TV shows  
6 have to be put into this adult category and which don't,  
7 and they eventually punted and said we have no idea how  
8 to do that; Congress asked us to do it; we cannot do it;  
9 and they punted it back to Congress to try to come up  
10 with a definition.

11 This is a very difficult task, trying to use  
12 language to differentiate levels of violence or types of  
13 violence in a manner that would in some way tell people  
14 what the rules of the game are. I think, even if you  
15 think that there's some problem out there that needs to  
16 be solved, you ought to think very carefully about  
17 whether or not you're going to authorize the creation of  
18 some new rule authorizing regulation in this area, when  
19 no one will have any idea what the scope of it is.

20 JUSTICE ALITO: And you say there's no  
21 problem because 16-year-olds in California never have  
22 \$50 available to go buy a video game and because they  
23 never have TVs in their room, and their parents are  
24 always home watching what they -- they do with their  
25 video games, and the parents -- and the video games have

1 features that allow parents to block access, to block  
2 the playing of violent video games, which can't be  
3 overcome by a computer-savvy California 16-year-old;  
4 that's why there's no problem, right?

5 MR. SMITH: I guess, if what we're really  
6 going to do is judge the constitutionality of this law  
7 based on what 16- and 17-year-olds are getting and  
8 whether that would be harmful to them, I think the  
9 problem there is the line between 16 and 17 and 18 is so  
10 fine, that you're not going to be able to identify any  
11 real category of games that fits into that category.

12 And it's important, by the way, to -- to  
13 note that California hasn't told us whether we should  
14 judge it for 5-year-olds, 10-year-olds, 17-year-olds.  
15 If it's 5-year-olds, then it's vastly over-restrictive;  
16 if it's 17-year-olds, I suspect -- I suspect it wouldn't  
17 restrict anything because nobody is going to be able to  
18 convince a -- jury, well, this is an 18-year-old game,  
19 not a 17-year-old game.

20 CHIEF JUSTICE ROBERTS: We draw that kind of  
21 line of course in the death penalty area, don't we?  
22 Between 18-year-olds? You are under 18; you can't be  
23 sentenced to life without parole; if you were over 18,  
24 you can.

25 MR. SMITH: You do draw that line, Your

1 Honor.

2 CHIEF JUSTICE ROBERTS: And we do it for  
3 drinking; we do it for driving.

4 MR. SMITH: But here you're assessing works  
5 of expression and trying to decide what age they -- they  
6 would correspond to, and I don't think you can cut it  
7 that finely and say, well, this is an 18 game; this is  
8 only a 17 game. I just don't think that works. So if  
9 that's the test, the test Justice Breyer suggested it  
10 ought to be, then the statute essentially would restrict  
11 nothing. If the test is 5-year-olds --

12 JUSTICE BREYER: Stick to the X things,  
13 maybe. Maybe it would restrict the total gratuitous  
14 torture. And if that's what it restricted, why is that  
15 such a terrible thing?

16 MR. SMITH: Well, first of all --

17 JUSTICE BREYER: And as you experimented  
18 with other things, as they did in the obscenity area,  
19 you could discover you could limit it to that.

20 MR. SMITH: I think the "maybe" is telling,  
21 though, Your Honor. Somebody, as Justice Scalia pointed  
22 out, in publishing a game has to know what -- what to --  
23 what the rules of the game are in advance, subject to  
24 hundreds of millions of dollars of penalties. There's a  
25 \$1,000 a game penalty if you have the wrong --

1 JUSTICE BREYER: Well, you have your rules,  
2 so why wouldn't the first step be they'd follow your  
3 rules? Your rules. The X things would be limited to  
4 people who are over 18, and we'll see if we ever get  
5 prosecuted for a different one. And you might never.

6 MR. SMITH: Our rules wouldn't help you at  
7 all. They say that -- that -- they're only restricting  
8 a smaller number, a small subset of M-rated games,  
9 which, by the way, we say are appropriate for  
10 17-year-olds. So you have -- these ratings that the  
11 State wants us to impose are going to conflict with the  
12 ratings that are already on the packaging which are  
13 being used by parents every day to make these judgments.  
14 So it's actually interfering -- the prospect of it would  
15 interfere with the information already on the packaging.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
18 Smith.

19 Mr. Morazzini, you have 4 minutes remaining.

20 REBUTTAL ARGUMENT OF ZACKERY P. MORAZZINI

21 ON BEHALF OF THE PETITIONERS

22 MR. MORAZZINI: Thank you,

23 Mr. Chief Justice.

24 I wanted to address one point that has been  
25 raised about minors' ability to access these games.



1 Yes, new games do cost \$60, but California's law also  
2 regulates the rental of these video games, which is just  
3 a few dollars per game. So minors certainly can afford  
4 them and can access them.

5 But I also wanted to draw out the point that  
6 California's law really is not an ordinance that's  
7 directed to a plot of a game. It's expressly directed  
8 to games with essentially no plot, no artistic value.  
9 This is the helpful nature of the third prong of the  
10 Miller standard. So it really is only going after the  
11 nature of the game where the child is acting out --

12 JUSTICE SCALIA: Excuse me. If it has a  
13 plot, it has artistic value? Is that going to be the  
14 test for artistic value? Anything that has a plot?

15 MR. MORAZZINI: It will be one factor to be  
16 considered, Justice Scalia.

17 JUSTICE SCALIA: Well --

18 MR. MORAZZINI: The nature of the plot and  
19 the nature of the --

20 JUSTICE SCALIA: Yes, one factor to be  
21 considered, sure. But you're not telling us that, so  
22 long as it has a plot, it's okay?

23 MR. MORAZZINI: No. Your Honor, as this  
24 Court held in the Jacobellis case, a single quotation  
25 from Voltaire on the flyleaf of an otherwise obscene

1 work was not going to make that work non-obscene.

2 JUSTICE SCALIA: You can't have artistic  
3 videos that involve maiming and cutting off heads and  
4 eviscerating people, and pouring gas, right? So long as  
5 its artistic, it's okay.

6 MR. MORAZZINI: No, if the -- if the level  
7 of the violence -- just as in obscenity, if the level of  
8 the violence causes the game as a whole to lack the  
9 artistic -- it's -- it's a balance, Your Honor, just as  
10 it is with sexual material. Each aspect -- that's why  
11 violence and sex are so similar --

12 JUSTICE SCALIA: Artistic for whom? For a  
13 5-year-old? What a 5-year-old would appreciate as great  
14 art, is that going to be the test?

15 MR. MORAZZINI: No. Again, minors as a  
16 class. So those under 18 years old. Those under --

17 JUSTICE KAGAN: Do you think Mortal Kombat  
18 is prohibited by this statute?

19 MR. MORAZZINI: I believe it's a candidate,  
20 Your Honor, but I haven't played the game and been  
21 exposed to it sufficiently to judge for myself.

22 JUSTICE KAGAN: It's a candidate, meaning,  
23 you know, yes, a reasonable jury could find that Mortal  
24 Kombat -- which is, you know, an iconic game, which I'm  
25 sure half of the clerks who work for us spent

1 considerable amounts of time in their adolescence  
2 playing.

3 (Laughter.)

4 MR. MORAZZINI: Justice Kagan --

5 JUSTICE SCALIA: I don't know what she's  
6 talking about.

7 (Laughter.)

8 MR. MORAZZINI: Justice Kagan, by  
9 "candidate," I meant that the video game industry should  
10 look at it, should take a long look at it. Now -- but I  
11 don't know off the top of my head. I'm willing to state  
12 right here in open court that the video game Postal 2,  
13 yes, would be covered by this Act. I'm willing to guess  
14 that games we described in our brief, such as MadWorld,  
15 would be covered by the Act. I think the video game  
16 industry --

17 JUSTICE SOTOMAYOR: Would a video game that  
18 portrayed a Vulcan, as opposed to a human being, being  
19 maimed and tortured -- would that be covered by the Act?

20 MR. MORAZZINI: No, it wouldn't, Your Honor,  
21 because the Act is only directed towards the range of  
22 options that are able to be inflicted on a human being.

23 JUSTICE SOTOMAYOR: So if the -- if the  
24 video producer says this is not a human being, it's an  
25 android computer-simulated person, then that doesn't --

1 all they have to do is put a little part or feature on  
2 the creature and they could sell the video game?

3 MR. MORAZZINI: Under the Act, yes, because  
4 California's concern -- I think this is one of the  
5 reasons that sex and violence are so similar. These are  
6 base physical acts we're talking about, Justice  
7 Sotomayor. So limiting, narrowing our law here in  
8 California -- there in California -- to violence,  
9 violent depictions against human beings --

10 JUSTICE SOTOMAYOR: So what happens when the  
11 character gets maimed, head chopped off, and immediately  
12 after it happens they spring back to life and they  
13 continue their battle? Is that covered by your Act?  
14 Because they haven't been maimed and killed forever.  
15 Just temporarily.

16 MR. MORAZZINI: I would think so. The  
17 intent of the law is to limit minors' access to those  
18 games --

19 JUSTICE SOTOMAYOR: You think so? Isn't  
20 that feedback to Justice Scalia's question?

21 MR. MORAZZINI: Well, Your Honor, this --  
22 this is a facial challenge. This -- this statute has  
23 not been applied, has not been even construed by a State  
24 or Federal court below, but --

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Smith.

2 MR. MORAZZINI: Thank you.

3 CHIEF JUSTICE ROBERTS: The case is  
4 submitted.

5 (Whereupon, at 11:04 a.m., the case in the  
6 above-entitled matter was submitted.)

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