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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:

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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 will 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 development of their children; and
3 secondly, this rule promotes the State's independent
4 interest in helping parents protect the wellbeing 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 --

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: Some of the Grimm's fairy
22 tales are quite grim, to tell you the truth.

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

25 JUSTICE SCALIA: Are they okay? Are you

1 going to ban them, too?

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

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

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

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

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

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

1 violence, if you will, is especially harmful to minors.
2 It --

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

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

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

17 JUSTICE KAGAN: Suppose a new study
18 suggested that movies were just as violent. Then,
19 presumably, California could regulate movies just as it
20 could regulate video games?

21 MR. MORAZZINI: Well, Your Honor, there is
22 scientific literature out there regarding the impact of
23 violent media on children. In fact, for decades, the
24 President, Congress, the FTC, parenting groups, have
25 been uniquely concerned with the level of violent media

1 available to minors that they have ready access to.

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

8 MR. MORAZZINI: No --

9 JUSTICE SOTOMAYOR: There are people who
10 would say that a cartoon has very little social value;
11 it's entertainment, but not much else. This is
12 entertainment.

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

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

22 JUSTICE SCALIA: That same argument could
23 have been made when movies first came out. They could
24 have said, oh, we've had violence in Grimm's fairy
25 tales, but we've never had it live on the screen. I

1 mean, every time there's a new technology, you can make
2 that argument.

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

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

19 MR. MORAZZINI: Your Honor, California
20 submits that when the rights of minors are at issue and
21 not the rights of adults, the standard should be more
22 flexible. The Constitution should recognize that when
23 the audience is minors the same standard should not
24 apply. Therefore, the question should not be whether or
25 not historically violent speech was regulated, but

1 whether or not the Constitution guarantees minors a
2 right.

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

8 MR. MORAZZINI: I would agree --

9 JUSTICE SOTOMAYOR: Could the State --

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

12 JUSTICE SOTOMAYOR: Why isn't that obscene
13 in the sense that you are using the word, or deviant?

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

20 JUSTICE ALITO: When you talk about minors,
21 what are you -- what age group are you talking about?
22 If a video game manufacturer has to decide under your
23 statute how to -- where its game stands, what age of a
24 child should the manufacturer have in mind? A
25 17-year-old? A 10-year-old?

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

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

13 MR. MORAZZINI: Your Honor, I think juries
14 and judges do this every day in the --

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

22 MR. MORAZZINI: Justice Ginsburg, and I
23 think rightfully so. I think a jury would be charged
24 with perhaps the standard of what the community believes
25 an average minor. So the would consider --

1 JUSTICE SCALIA: An average minor is halfway
2 between 0 and 18; is that 9 years old?

3 MR. MORAZZINI: Fair point, Justice Scalia.
4 I think a jury could be instructed as to the typical age
5 group of minors that are playing these games.

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

19 MR. MORAZZINI: Justice Breyer, absolutely.

20 JUSTICE BREYER: Okay.

21 JUSTICE KAGAN: Mr. Morazzini, could I take
22 you back to Justice Scalia's original question, which
23 was what counts as deviant violence or morbid violence.
24 Because I read your briefs all the way through and the
25 only thing that I found you said that was clearly

1 covered by this statute was Postal 2. But presumably
2 the statute applies to more than one video game. So
3 what else does it apply to? How many video games? What
4 kind of video games?

5 I mean, how would you describe in plain
6 English what morbid violence is, what you have to see in
7 a video game for it to be covered?

8 MR. MORAZZINI: Okay. Justice Kagan, I
9 would go back to the language of the statute, and the
10 statute covers video games where the range of options
11 available to the player includes maiming, killing,
12 dismembering, torturing, sexually assaulting, and those
13 types of violence. So I would look to games where --

14 JUSTICE KAGAN: So anything that has those
15 kinds of violence counts?

16 MR. MORAZZINI: No, and then we would move
17 to the three prongs of the Miller standard, Your Honor.
18 We would look to see --

19 JUSTICE KAGAN: Well, so how do we separate
20 violent games that are covered from violent games just
21 as violent that are not covered?

22 MR. MORAZZINI: Well, Your Honor, I think a
23 jury could be instructed with expert testimony, with
24 video clips of game play, and to judge for
25 themselves whether --

1 JUSTICE SCALIA: I'm not concerned about the
2 jury judging. I'm concerned about the producer of the
3 games who has to know what he has to do in order to
4 comply with the law. And you are telling me, well a
5 jury can -- of course a jury can make up its mind, I'm
6 sure. But a law that has criminal penalties has to be
7 clear. And how is the manufacturer to know whether a
8 particular violent game is covered or not?

9 MR. MORAZZINI: Well, Your Honor --

10 JUSTICE SCALIA: Does he convene his own
11 jury and try it before -- you know, I really wouldn't
12 know what to do as a manufacturer.

13 MR. MORAZZINI: Justice Scalia, I am
14 convinced that the video game industry will know what to
15 do. They rate their video games every day on the basis
16 of violence. They rate them for the intensity of the
17 violence.

18 JUSTICE KAGAN: So is what is covered here
19 the mature category in the ratings? Is that what this
20 statute covers? Is that what it's meant to cover?

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

23 JUSTICE KAGAN: Some but not all.

24 MR. MORAZZINI: But not all.

25 Your Honor, just like with sexual material,

1 we can -- we can trust individual panders of sexual
2 material to judge whether or not it's a --

3 JUSTICE KENNEDY: Let me just make one
4 comment on that point. It seems to me all or at least
5 the great majority of the questions today are designed
6 to probe whether or not this statute is vague. And you
7 say the beauty of the statute is that it utilizes the
8 categories that have been used in the obscenity area,
9 and that there's an obvious parallel there.

10 The problem is, is that for generations
11 there has been a societal consensus about sexual
12 material. Sex and violence have both been around a long
13 time, but there is a societal consensus about what's
14 offensive for sexual material and there are judicial
15 discussions on it. Now, those judicial discussions are
16 not precise. You could have had the same questions
17 today with reference to an obscenity statute, and we
18 have -- we have said that, with reference to obscenity
19 there are certain -- that there are certain materials
20 that are not protected. Those rules are not precise at
21 the margins and some would say not precise in a more
22 significant degree as well.

23 But you are asking us to go into an entirely
24 new area where there is no consensus, no judicial
25 opinions. And this is -- and this indicates to me the

1 statute might be vague, and I just thought you would
2 like to know that -- that reaction.

3 MR. MORAZZINI: Justice Kennedy, as with
4 sexual -- the regulation of sexual material and
5 obscenity, we had to start somewhere. California is
6 choosing to start now. We can build a consensus as to
7 what level of violence is in fact patently offensive for
8 minors, is deviant for minors, just as the case law has
9 developed over time with sexual depictions. Your Honor,
10 I believe the key is the similarities violence has with
11 sex.

12 JUSTICE SCALIA: What about excessive
13 glorification of drinking, movies that have too much
14 drinking? Does it have an effect on minors? I suppose
15 so.

16 I -- I am not just concerned with the
17 vagueness. I am concerned with the vagueness, but I am
18 concerned with the First Amendment, which says Congress
19 shall make no law abridging the freedom of speech. And
20 it was always understood that the freedom of speech did
21 not include obscenity. It has never been understood
22 that the freedom of speech did not include portrayals of
23 violence.

24 You are asking us to create a -- a whole new
25 prohibition which the American people never -- never

1 ratified when they ratified the First Amendment. They
2 knew they were -- you know, obscenity was -- was bad,
3 but -- what's next after violence? Drinking? Smoking?
4 Movies that show smoking can't be shown to children?
5 Does -- will that affect them? Of course, I suppose it
6 will.

7 But is -- is that -- are -- are we to sit
8 day by day to decide what else will be made an exception
9 from the First Amendment? Why -- why is this particular
10 exception okay, but the other ones that I just suggested
11 are not okay?

12 MR. MORAZZINI: Well, Justice Scalia, I
13 would like to highlight the fact that the material at
14 issue in Ginsberg was not obscene. Under no existing
15 definition of obscenity was the partial nudity that this
16 Court allowed States to regulate minors' access to --

17 JUSTICE ALITO: Well, I think what
18 Justice Scalia wants to know is what James Madison
19 thought about video games.

20 (Laughter.)

21 JUSTICE ALITO: Did he enjoy them?

22 JUSTICE SCALIA: No, I want to know what
23 James Madison thought about violence. Was there any
24 indication that anybody thought, when the First
25 Amendment was adopted, that there -- there was an

1 exception to it for -- for speech regarding violence?
2 Anybody?

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

7 JUSTICE SOTOMAYOR: What's the earliest
8 statute?

9 MR. MORAZZINI: Pardon?

10 JUSTICE SOTOMAYOR: What's the earliest
11 statute and how much enforcement was --

12 MR. MORAZZINI: Your Honor, I don't know the
13 earliest statute off the top of my head. I believe they
14 go back into the early 1900s, perhaps later. I
15 apologize, but I don't know that --

16 JUSTICE BREYER: Well, on the principle, I
17 mean, it's been quite some years, hasn't it, before this
18 -- since this Court has held that one instance that
19 courts -- that the country, legislatures, can regulate
20 are fighting words? And we regulate fighting words,
21 don't we?

22 MR. MORAZZINI: Absolutely.

23 JUSTICE BREYER: Because they provoke
24 violence. And the American Psychological Association
25 and the American Pediatric Association have said that

1 certain kinds of video games here create violence when
2 children are exposed. There are 80 people who think to
3 the contrary, there are two huge things of metastudies
4 that think that -- not to the contrary. All right. So
5 what are we supposed to do?

6 MR. MORAZZINI: Well, Justice Breyer, I
7 think, in going back to Justice Scalia's question, I
8 find it hard to believe and I know of no historical
9 evidence that suggests that our Founding Fathers in
10 enacting the First Amendment intended to guarantee video
11 game retailers a First Amendment right --

12 JUSTICE GINSBURG: Can I go back to what
13 Justice Breyer was asking? Because this Court, with
14 respect to the fighting words, Chaplinsky's "in your
15 face," provoked an immediate action, the Court has been
16 very careful to cordon that off so it doesn't have this
17 spillover potential. So you -- you didn't latch on to
18 fighting words. Your analogy is to obscenity for
19 teenagers, as I understand it.

20 MR. MORAZZINI: Yes, Justice Ginsburg. With
21 regard to fighting words, the -- the societal interest
22 in preventing acts of violence is -- is different than
23 the concern at issue here today.

24 JUSTICE KAGAN: So could I just make -- make
25 sure I understand that, Mr. Morazzini, because as I

1 understand the State has given up its argument that the
2 interest protected by this law is an interest in
3 preventing minors who see these games from going out and
4 committing violent acts themselves; that the State is
5 not saying that that's the interest in the law; is that
6 correct? That instead the State is saying that the
7 interest in the law is in protecting children's moral
8 development generally?

9 MR. MORAZZINI: Justice Kagan, we welcome
10 that as -- as an effect of California's regulation, but
11 the primary interest was the internal intrinsic harm to
12 minors. That's what the State of California is deeply
13 concerned with in this case.

14 JUSTICE SOTOMAYOR: Can I have a point of
15 clarification? Justice Ginsburg talked about the
16 labeling parts of this act. The circuit court struck
17 those portions of the act. You have not challenged that
18 ruling.

19 MR. MORAZZINI: Justice --

20 JUSTICE SOTOMAYOR: There are two sections
21 to the act. One is a criminal act for selling to a
22 minor, and the other is a requirement that you label in
23 a certain way each video. The district court said both
24 were -- I think the circuit court said both were
25 unconstitutional, correct?

1 MR. MORAZZINI: Yes, Justice Sotomayor.
2 They found --

3 JUSTICE SOTOMAYOR: And your brief has not
4 addressed the labeling requirements at all.

5 MR. MORAZZINI: Well, we didn't, Your Honor,
6 because one holding of the Ninth Circuit hinged upon the
7 other. In striking down the body of California's law,
8 the restriction on the sales, the court found that since
9 it's not illegal to sell these games to 18-year-olds,
10 that the governmental purpose served behind the label
11 itself was -- was in fact misleading. So under the
12 Zadora case law, I don't have the case cite before me,
13 but under Zadora regarding lawyers' advertising of -- of
14 services, it -- the government can require the labeling,
15 so long as it's necessary to prevent misleading the
16 consumer.

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

20 JUSTICE SOTOMAYOR: That's an interesting
21 concession on your part, that the labeling doesn't have
22 a need separate from the restriction on sale. I would
23 have thought that if you wanted a lesser restriction,
24 that you would have promoted labeling as a reasonable
25 strict scrutiny restriction to permit the control of

1 sale of these materials to minors; but you seem to have
2 given up that argument altogether.

3 MR. MORAZZINI: Justice Sotomayor, I
4 certainly did not attempt or intend to concede that the
5 Ninth Circuit's opinion was correct in any sense in this
6 case.

7 JUSTICE SOTOMAYOR: Well, you have conceded
8 it by not appealing it. But we're not -- your case on
9 labeling rises and falls on the sale to minors?

10 MR. MORAZZINI: At this point, I would
11 agree, Your Honor.

12 JUSTICE GINSBURG: Does --

13 JUSTICE SCALIA: I gather that -- that if --
14 if the parents of the minor want the kid to watch this
15 violent stuff, they like gore, they may even like
16 violent kids --

17 (Laughter.)

18 JUSTICE SCALIA: -- then -- then the State
19 of California has no objection? Right? So long as the
20 parent buys the thing, it's perfectly okay.

21 MR. MORAZZINI: Your Honor, under Ginsberg
22 they are entitled to direct the development and the
23 upbringing of their children in the manner they see fit.

24 JUSTICE SCALIA: Yes.

25 MR. MORAZZINI: It's important to the State

1 of California that the parent -- that we ensure that the
2 parent can involve themselves in this important
3 decision.

4 JUSTICE SCALIA: So that's basically all
5 this is, is a -- a law to help parents, is that right?

6 MR. MORAZZINI: It's one of the two
7 fundamental interests that are served by this law, yes,
8 ensuring that parents can involve themselves in the
9 front end. California sought to erect a barrier in
10 between a retail sales clerk and a minor with regard to
11 violent material, just as we allow for minors' access to
12 sexual material, because California sees that the
13 developmental harm that could be caused to minors is no
14 less significant than that recognized by this Court in
15 -- in Ginsberg with regard to minors' exposure to sexual
16 material. Now, again, the material at issue in Ginsberg
17 was not obscene.

18 JUSTICE ALITO: Do you think there is any
19 barrier in California to minors' access to sexual
20 material?

21 MR. MORAZZINI: I believe California has a
22 law, Penal Code Section 3.3.1.

23 JUSTICE GINSBURG: California has a Ginsberg
24 type law.

25 MR. MORAZZINI: Yes.

1 JUSTICE ALITO: Does your office spend a lot
2 of time enforcing that?

3 MR. MORAZZINI: I'm not aware,
4 Justice Alito. But there is a proscription on the sale
5 of sexual material to minors. It is defined as harmful
6 to minors, similar to California's act. In fact,
7 California's act in incorporating the three prongs of
8 Miller goes even further than the Ginsberg law at issue,
9 in Ginsberg, New York law.

10 JUSTICE GINSBURG: Is there -- you've been
11 asked questions about the vagueness of this and the
12 problem for the seller to know what's good and what's
13 bad. California -- does California have any kind of an
14 advisory opinion, an office that will view these videos
15 and say, yes, this belongs in this, what did you call
16 it, deviant violence, and this one is just violent but
17 not deviant? Is there -- is there any kind of opinion
18 that the -- that the seller can get to know which games
19 can be sold to minors and which ones can't?

20 MR. MORAZZINI: Not that I'm aware of,
21 Justice Ginsburg.

22 JUSTICE SCALIA: You should consider
23 creating such a one. You might call it the California
24 office of censorship. It would judge each of these
25 videos one by one. That would be very nice.

1 MR. MORAZZINI: Your Honor, we -- we ask
2 juries to judge sexual material and its appropriateness
3 for minors as well. I believe that if -- if we can view
4 the --

5 JUSTICE SCALIA: Do we let the government do
6 that? Juries are not controllable. That's the
7 wonderful thing about juries, also the worst thing about
8 juries.

9 (Laughter.)

10 JUSTICE SCALIA: But -- but do we let
11 government pass upon, you know, a board of censors? I
12 don't think so.

13 MR. MORAZZINI: Justice Scalia, California's
14 not doing that here. The standard is quite similar to
15 that in the sexual material realm. California is not
16 acting as a censor. It is telling manufacturers and
17 distributors to look at your material and to judge for
18 yourselves whether or not the level of violent content
19 meets the prongs of this definition.

20 JUSTICE KENNEDY: I can see your white light
21 is on. But even if we get past what I think are
22 difficult questions about vagueness and how to interpret
23 this law, isn't there a less restrictive alternative
24 with the -- the V-Chip?

25 MR. MORAZZINI: Your Honor, I believe you

1 are referring to the parental controls that are
2 available on some of the new machines?

3 JUSTICE KENNEDY: Yes.

4 MR. MORAZZINI: As we submitted in our
5 briefing, a simple internet search for bypassing
6 parental controls brings up video clips instructing
7 minors and young adults how to b pass the parental
8 controls.

9 JUSTICE KENNEDY: V-Chips don't work?

10 MR. MORAZZINI: I believe the V-Chip is
11 limited to television, Justice Kennedy.

12 If I could reserve the remainder of my time.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr.
14 Morazzini.

15 MR. MORAZZINI: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Smith.

17 ORAL ARGUMENT OF PAUL M. SMITH

18 ON BEHALF OF THE RESPONDENTS

19 MR. SMITH: Mr. Chief Justice, and may it
20 please the Court:

21 The California law at issue restricts the
22 distribution of expressive works based on their content.
23 California, as we have heard today, does not seriously
24 contend that it can satisfy the usual First Amendment
25 standards that apply to such a law. Instead it's asking

1 this Court to grant it a new free pass, a brand-new
2 Ginsberg-like exception to the First Amendment that
3 would deny constitutional protection to some ill-defined
4 subset of expressive works, and I submit not just video
5 games, but necessarily movies, books and any other
6 expressive work that describes or portrays violence in a
7 way that some court somewhere, some day, would decide is
8 deviant and offensive.

9 CHIEF JUSTICE ROBERTS: What about the
10 distinction between books and movies may be that in
11 these video games the child is not sitting there
12 passively watching something; the child is doing the
13 killing. The child is doing the maiming. And I suppose
14 that might be understood to have a different impact on
15 the child's moral development.

16 MR. SMITH: Well, Your Honor, it might. The
17 State of California has not marshalled a shred of
18 evidence to suggest it's true. And if you look at the
19 social science --

20 CHIEF JUSTICE ROBERTS: What was the state
21 of the record that was present before the Court in
22 Ginsberg?

23 MR. SMITH: The state of the record was that
24 they were aware of science on both sides and made a
25 judgment that as a matter of common sense they could

1 decide that obscenity, even somewhat at-large obscenity
2 --

3 CHIEF JUSTICE ROBERTS: So the Court acted
4 on the basis of common sense?

5 MR. SMITH: Yes. It said as long as there
6 is science on both sides, but in that particular area,
7 which is an exception based -- that goes back to the
8 founding, they felt that it was proper for them to
9 adjust the outer boundaries of the exception.

10 JUSTICE GINSBURG: But the material wasn't
11 obscene. They were girlie magazines, I imagine to
12 today's children they would seem rather tame, the
13 magazines involved. But they were definitely not
14 obscene with respect to adults.

15 MR. SMITH: Your Honor, that's certainly
16 true. But one of the things about the case that is
17 important to recognize, is they didn't pass on the
18 particular material before the Court. They simply said,
19 is this somewhat larger definition of variable obscenity
20 going to be acceptable to --

21 JUSTICE BREYER: Talking about common sense,
22 why isn't it common sense to say that if a parent wants
23 his 13-year-old child to have a game where the child is
24 going to sit there and imagine he is a torturer and
25 impose gratuitous, painful, excruciating, torturing

1 violence upon small children and women and do this for
2 an hour or so, and there is no social or redeeming
3 value, it's not artistic, it's not literary, et cetera,
4 why isn't it common sense to say a State has the right
5 to say, parent, if you want that for your 13-year-old,
6 you go buy it yourself, which I think is what they are
7 saying.

8 MR. SMITH: Well, Your Honor, the State has
9 to have some reason to think that parents --

10 JUSTICE BREYER: It does, it does. What it
11 has is -- and I have looked at the studies, perhaps not
12 as thoroughly as you. But it seemed to me that
13 Dr. Ferguson and Dr. Anderson are in a disagreement.
14 They aren't in that much of a disagreement actually, but
15 they have looked in depth at a whole lot of video games,
16 not movies they are talking about or other things; they
17 are talking about video games.

18 And both groups come to the conclusion that
19 there is some tendency to increase violence. And the
20 American Psychiatric -- Psychological Association, the
21 American Pediatric Association, sign on to a long list
22 on I think it is the Anderson side that this does hurt
23 children.

24 I have to admit that if I'm supposed to be a
25 sociological expert, I can't choose between them. If I

1 can say could a legislature have enough evidence to
2 think there is harm, the answer is yes.

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

7 JUSTICE BREYER: Yes. They need additional
8 help because many parents are not home when their
9 children come home from school. Many parents have jobs,
10 we hope. And when their children are there, they do
11 what they want. And all this says is that if you want
12 that gratuitous torture of, let's say babies, to make it
13 as bad as possible, what you do, parent, is you go buy
14 it; don't let him buy it on his own, and he's 13 years
15 old. Now, what's the common sense or what's the science
16 of that?

17 MR. SMITH: Well, two aspects. With respect
18 to parental controls, Your Honor, there is a whole
19 variety -- a whole series of things that parents have
20 available to them and are using today to deal with any
21 concerns they have about what's appropriate for their
22 children.

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

1 MR. SMITH: That is one element of about
2 five different elements, Your Honor. If I could talk
3 about -- there is the ratings. Parents are doing the
4 purchasing 90 percent of the time. Even if the child
5 does the purchasing, they bring the game home, the
6 parent can review it.

7 The game is being played in the home on the
8 family television or computer most of the time. Any
9 harm that is supposed to be inflicted on them is
10 supposed to take place over a period of years, not
11 minutes, so the parent has ample opportunity to exercise
12 parental supervision over what games are being played in
13 the house. Plus there is the parental controls, which
14 are similar to the ones that the Court has found to be
15 significant in the Playboy case, in the COPA case, a
16 whole variety of cases.

17 JUSTICE SCALIA: How much do these videos
18 cost?

19 MR. SMITH: They cost in the range of \$50 or
20 \$60 when new, Your Honor.

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

23 MR. SMITH: It seems very likely that the
24 people, if there are any out there buying games without
25 parental permission -- which the State, by the way, has

1 not even tried to show -- they are likely in the
2 16-year-old category.

3 JUSTICE BREYER: You are away from the
4 common sense. If you are going back to the common sense
5 of it, what common sense is there in having a state of
6 the law that a State can forbid and says to the parent
7 that the child, the 13-year-old, cannot go in and buy a
8 picture of a naked woman, but the 13-year-old child can
9 go in and buy one of these video games as I have
10 described? I have tried to take as bad a one as I could
11 think of, gratuitous torture of children. Okay. Now,
12 you can't buy a naked woman, but you can go and buy
13 that, you say to the 13-year-old. Now, what sense is
14 there to that?

15 MR. SMITH: Well, there is various aspects
16 of this that I think it's important to understand.
17 First of all, violence has been a feature of works that
18 we create for children and encouraged them to watch
19 throughout the history of this country. We have a very
20 different sense of whether violence per se --

21 JUSTICE BREYER: You mean love is not
22 something that people have tried to encourage children
23 to understand and know about? I mean, what's the
24 difference between sex and violence? Both, if anything
25 --

1 MR. SMITH: There is a huge difference. The
2 difference is --

3 JUSTICE BREYER: Thank you. I understand
4 that.

5 (Laughter.)

6 MR. SMITH: We do not -- the difference is
7 we do not make films for children in which explicit sex
8 happens. We do make films for children in which graphic
9 violence happens.

10 CHIEF JUSTICE ROBERTS: Graphic violence.
11 There is a difference. We do not have a tradition in
12 this country of telling children they should watch
13 people actively hitting schoolgirls over the head with a
14 shovel so they'll beg with mercy, being merciless and
15 decapitating them, shooting people in the leg so they
16 fall down.

17 I'm reading from the district court
18 description: Pour gasoline over them, set them on fire
19 and urinate on them. We do not have a tradition in this
20 country. We protect children from that. We don't
21 actively expose them to that.

22 MR. SMITH: And parents have been doing that
23 since time immemorial. The question before this Court
24 is whether you are going to create an entirely new
25 exception under the First Amendment, whether parents

1 need to have such a new exception created, and whether
2 or not if you are going to do it you could possibly
3 figure out what the scope of that exception is.

4 CHIEF JUSTICE ROBERTS: Is it your position
5 -- I know this is a facial challenge, Mr. Smith. So is
6 it your position that the First Amendment could not
7 prohibit the sale to minors of the video game that I
8 just described?

9 MR. SMITH: My position is that most people
10 would think that that's an inappropriate game for
11 minors. We do not try to sell it to minors, but the
12 Constitution should not be --

13 CHIEF JUSTICE ROBERTS: I know you don't,
14 but what is -- you are avoiding the answer. Does the
15 First Amendment protect the sale of that video to
16 minors?

17 MR. SMITH: My position --

18 CHIEF JUSTICE ROBERTS: A minor?

19 MR. SMITH: My position is that there is not
20 a violence exception to the First Amendment for minors
21 and there should not be.

22 CHIEF JUSTICE ROBERTS: So your position is
23 that the First Amendment does not, cannot, no matter
24 what type of law, whether this one is vague or not, that
25 the State legislature cannot pass a law that says you

1 may not sell to a 10-year-old a video in which they set
2 schoolgirls on fire.

3 MR. SMITH: And the reason for that is there
4 is no possible way, it's an insuperable problem, to use
5 the English language to draw an exception to the
6 Constitution, to the First Amendment, that would --

7 JUSTICE ALITO: What if the State passed a
8 -- what if California took the list of video games that
9 your association rates as mature and said there's a
10 civil penalty. And you apparently don't want your --
11 you don't want vendors selling those games to minors,
12 isn't that right?

13 MR. SMITH: Exercising our First Amendment
14 rights, we have decided --

15 JUSTICE ALITO: You don't want that. And
16 what if California said there is a civil penalty
17 attached to that?

18 MR. SMITH: What that would do is transform
19 the ESRB, the private voluntary system that exists, into
20 the censorship commission that this Court struck down in
21 Interstate Circuit. When the government does that and
22 you have to go to them for permission to allow kids into
23 the movies or to play this game, it is a prior
24 restraint. You have way too much discretion. It's a
25 licensing authority that the First Amendment doesn't

1 allow.

2 JUSTICE ALITO: You seem to argue that there
3 really is no good reason to think that exposure to video
4 games is bad for minors, exposure to really violent
5 video games is bad to minors; is that right?

6 MR. SMITH: I think it's important to draw a
7 distinction between harm that could be cognizable under
8 the law and appropriateness. Families have different
9 judgments that they make about their children at
10 different ages and with different content and different
11 family values.

12 JUSTICE KAGAN: Well, Mr. Smith, is there
13 any showing that the States could make that would
14 satisfy you, that would say yes, that's a sufficient
15 showing for this law to go forward?

16 You know, I understand that you think that
17 the current studies don't suggest much of anything about
18 harm.

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

20 JUSTICE KAGAN: But are there studies that
21 would be enough?

22 MR. SMITH: Well, I guess I can imagine a
23 world in which exposure could transform 75 percent of
24 the people who experience it into murderers. That's
25 clearly not the way the human mind works. Here the

1 reality is quite the opposite. Dr. Anderson testified
2 in the Illinois trial, which is in the record, that the
3 vast majority of people playing the games will grow up
4 and be just fine. And in fact, he acknowledged that the
5 effects of these games are not one whit different from
6 watching cartoons on television or reading violent
7 passages in the Bible or looking at a picture of a gun.

8 JUSTICE SCALIA: You really don't want to
9 argue the case on that ground. I gather you don't
10 believe that the First Amendment reads, "Congress shall
11 make no law abridging the freedom of speech except those
12 that make sense." Is that --

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

20 JUSTICE ALITO: But we have here a new -- a
21 new medium that cannot possibly have been envisioned at
22 the time when the First Amendment was ratified. It is
23 totally different from -- it's one thing to read a
24 description of -- as one of -- one of these video games
25 is promoted as saying, "What's black and white and red

1 all over? Perhaps the answer could include disposing of
2 your enemies in a meat grinder." Now, reading that is
3 one thing. Seeing it as graphically portrayed --

4 JUSTICE SCALIA: And doing it.

5 JUSTICE ALITO: -- and doing it is still a
6 third thing.

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

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

19 It started with the crime novels of the late
20 19th century, which produced this raft of legislation
21 which was never enforced. It started with comic books
22 and movies in the 1950s. There were hearings across the
23 street in the 1950s where social scientists came in and
24 intoned to the Senate that half the juvenile delinquency
25 in this country was being caused by reading comic books,

1 and there was enormous pressure on the industry. They
2 self -- they self-censored. We had television. We have
3 rock lyrics. We have the Internet.

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

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

21 JUSTICE KAGAN: So are we going to separate
22 video games into narrative video games and non-narrative
23 video games?

24 MR. SMITH: You don't have to, as long as
25 the law is limited to regulating narrative. That's what

1 this law is limited to. Now, if the law said you
2 shouldn't buy -- play games that have red images that
3 appear in them, or something else that was somehow
4 non-content based, that might be a closer case.

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

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

13 JUSTICE SCALIA: It's not speech. You were
14 saying, you just can't let the kid maim -- maim, kill,
15 or set on fire.

16 MR. SMITH: I'm sorry?

17 JUSTICE SCALIA: What the law would be
18 directed at is not the plot, not the video game itself,
19 but the child's act of committing murder, maiming, and
20 so forth.

21 MR. SMITH: Well, the events in a video game
22 -- what happens in the plot is a combination of what the
23 game gives you and what the player adds to it. There is
24 a creative aspect coming at it from the other side.
25 It's often referred to as a dialogue between the player

1 and the game. I would submit that both are completely
2 protected by the First Amendment. Just as a person --

3 JUSTICE SCALIA: The child is speaking to
4 the game?

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

13 CHIEF JUSTICE ROBERTS: Mr. Smith, your
14 challenge is a facial challenge?

15 MR. SMITH: Yes, Your Honor.

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

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

24 CHIEF JUSTICE ROBERTS: I thought we
25 referenced them last year in the Stevens case, and the

1 only reason we didn't have to decide which applies is
2 because we adopted an approach that looked at
3 overbreadth and said this statute is overbroad, and
4 specifically didn't decide whether it could be applied
5 in that case to crush videos.

6 MR. SMITH: That's correct, Your Honor, but
7 I think it's -- there is no argument here, I don't
8 think, that if you can find one game out there to which
9 this can constitutionally be applied, even though it
10 would also be unconstitutionally applied with the vast
11 amount of other cases --

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

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

21 CHIEF JUSTICE ROBERTS: And the way we
22 approached the issue in Stevens, where we had hunting
23 videos and crush videos, would say that it's too broad
24 to apply the law to everything, so we strike it down,
25 it's overbroad, but leave open the possibility that a

1 more narrowly-drawn statute might pass muster.

2 Why isn't that a good approach here?

3 MR. SMITH: You certainly could do that.

4 Certainly, the key thing is if you strike down this law,
5 because this law is clearly much broader than any one
6 game, I would submit to you, though, that there is no
7 way that, in fact, anybody is going to be able to come
8 back and draw a statute that gets to what they claim,
9 because the English language is not susceptible at that
10 level of precision.

11 JUSTICE BREYER: It's not susceptible.

12 Throughout you have been arguing your point, which is
13 fair. You have some experts who favor you and you make
14 that point very strongly, and your point's a pretty good
15 one and a serious one, that it's very hard to draw this
16 line under traditional First Amendment standards. But I
17 would like you to deal with their point for a moment.
18 And I take it their point is: There is no new First
19 Amendment thing here.

20 There is a category -- call them X -- which
21 really are involving things like torturing children, et
22 cetera. Maybe you don't like to sell them to anybody.
23 You have an X or some special thing. But they exist,
24 and they fit within a Miller-type definition. They are
25 much worse than the simple girlie magazine that was

1 involved there, and they will use traditional First
2 Amendment tests. That is to say, there is speech at
3 issue, that speech is being limited, it is being done
4 for a good reason, compelling interest -- namely, this
5 problem with the X videos and the torture and living it
6 through -- and there is no less restrictive alternative
7 that isn't also significantly less effective.

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

16 MR. SMITH: Your Honor, they do not suggest
17 that there is any existing exception to the First
18 Amendment that would apply to --

19 JUSTICE BREYER: This is not an exception.
20 It is the traditional strict scrutiny First Amendment
21 test.

22 MR. SMITH: Well, they make a feint at
23 trying to argue --

24 JUSTICE BREYER: Let's -- to get you to
25 focus on it, I'll say I've made the argument.

1 MR. SMITH: There you go, okay. Your Honor,
2 I think if you apply strict scrutiny here they do not
3 come close to the kind of showing that would be required
4 under -- under the First Amendment.

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

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

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

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

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

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

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

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

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

1 would apply a standard like deviant violence, morbid
2 violence, offensive violence, let alone decide which
3 video games have a redeeming social, political.
4 Artistic value. The value of a video game is completely
5 in the eye of the beholder. Some would say they are
6 beautiful works of artistic creation; others would
7 say --

8 JUSTICE KENNEDY: You can make all those
9 arguments with reference to obscenity.

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

18 JUSTICE SCALIA: And you started Ginsberg
19 with something that is prescribable even with regard to
20 adults.

21 MR. SMITH: Correct, Your Honor.

22 JUSTICE SCALIA: You know that there is such
23 a thing as -- as obscenity, which can be proscribed even
24 -- even as to adults. Whereas in this case, I don't
25 know that there's such a thing as morbid violence

1 which could be eliminated from ordinary movies.

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

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

17 MR. SMITH: My position is --

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

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

24 JUSTICE SOTOMAYOR: So when you say --

25 MR. SMITH: There isn't any basis to say

1 scrutiny is satisfied.

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

5 MR. SMITH: Because there is no problem it
6 needs to solve that would justify --

7 CHIEF JUSTICE ROBERTS: Could I just have a
8 simple answer?

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

10 CHIEF JUSTICE ROBERTS: There is nothing the
11 State can do.

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

19 MR. SMITH: I just --

20 JUSTICE SOTOMAYOR: And there is proof that
21 some parents, as well intentioned as they may or may not
22 be, have not been able to supervise that. So I --
23 starting from the proposition that there is a problem,
24 it's a compelling State need, why are you arguing that
25 there is no solution that the State could use to address

1 that problem?

2 MR. SMITH: The -- the existing solutions
3 are perfectly capable of allowing this problem to be
4 addressed, assuming it is a problem. And I --

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

7 MR. SMITH: That's when they send in
8 somebody who's 16 to test the system. There isn't any
9 evidence at all in this record that actual children, not
10 testers, are in fact disobeying their parents and
11 secretly buying these games, bringing them into the home
12 and playing them for years without their parents unaware
13 of it. There is simply no evidence of that at all.

14 CHIEF JUSTICE ROBERTS: Could you have a law
15 that says the State has to put -- the dealers have to
16 put the violent video games in a particular area of the
17 video store? That is not -- and then -- you know, and
18 minors are not allowed in that area?

19 MR. SMITH: Well, if what you are saying is
20 you are going to have a limit on the ability of minors
21 to buy them because of walled off, and minors are not
22 allowed to go pick them off the shelf --

23 CHIEF JUSTICE ROBERTS: Yes.

24 MR. SMITH: -- then I don't know how that
25 differs from the current law, Your Honor, assuming you

1 could figure out --

2 JUSTICE BREYER: Your answer -- your answer
3 to the first question of Justice Alito and the Chief
4 Justice was yes, isn't that -- that you are saying that
5 there is nothing they can do? So now, am I right about
6 that or am I not right?

7 MR. SMITH: Yes. Strict scrutiny does not
8 make sense.

9 JUSTICE BREYER: I am right. Okay. All I
10 wanted was an answer to that.

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

15 MR. SMITH: I would think that that's
16 probably not --

17 CHIEF JUSTICE ROBERTS: That's what they do
18 with cigarettes or something, isn't it?

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

21 CHIEF JUSTICE ROBERTS: I know that
22 cigarettes are not speech, Mr. Smith. Cigarettes are
23 something that we have determined are harmful to
24 children. The question is, you say the record doesn't
25 support the idea that these video games are harmful to

1 children. Some of us may conclude that it does.

2 MR. SMITH: Well, truly the record doesn't
3 support it. The record says that if -- even if you take
4 the studies at face value, it is not one more whit less
5 more harmful than watching television cartoons. That's
6 what the record shows.

7 JUSTICE GINSBURG: But on that -- on that
8 score, Mr. Smith, there is a study by the FCC. The
9 question is whether violence can be restricted during
10 the hours when most children are awake, just the way
11 pornography is. I don't remember what -- what are the
12 hours, that -- something like from 10:00 in the evening?

13 I don't -- but didn't the FCC say, yes, we
14 could do the same thing for violence that we are doing
15 for sex, except we don't think we ought to do it, we
16 think Congress should do it?

17 MR. SMITH: What they did was they spent
18 several years trying to come up with a definition that
19 would allow anybody to figure out which violent TV shows
20 have to be put into this violent adult category and
21 which don't, and they eventually punted and said, we
22 have no idea to do that; Congress asked us to do it; we
23 cannot do it; and they punted it back to Congress to try
24 to come up with a definition.

25 This is a very difficult task, trying to use

1 language to differentiate levels of violence or types of
2 violence in a manner that would in some way tell people
3 what the rules of the game are. I think even if you
4 think that there is some problem out there that needs to
5 be solved, you ought to think very carefully about
6 whether or not you are going to authorize some creation
7 of a new rule authorizing regulation in this area, when
8 nobody will have any idea what the scope of it is.

9 JUSTICE ALITO: And you say there is no
10 problem because 16-year-olds in California never have
11 \$50 available to go buy a video game, and because they
12 never have TVs in their room and their parents are
13 always home watching what they -- they do with their
14 video games, and the parents -- and the video games have
15 features that allow parents to block access to -- to
16 block the playing of violent video games, which can't be
17 overcome by a computer-savvy California 16-year-old,
18 that's why there is no problem, right?

19 MR. SMITH: I guess if what we are really
20 going to do is judge the constitution of this law based
21 on what 16- and 17-year-olds are getting and whether
22 that would be harmful to them, I think the problem there
23 is the line between 16 and 17 and 18 is so fine, that
24 you are not going to be able to identify any real
25 category of games that fits into that category. And

1 it's important by the way to note that California hasn't
2 told us whether we should judge 5-year-olds,
3 10-year-olds, 17-year-olds. If it's 5-year-olds, it's
4 vastly overrestrictive; if it's 17-year-olds I suspect
5 -- I suspect it wouldn't restrict anything because
6 nobody is going to be able to convince a -- jury, well,
7 this is an 18-year-old game, not a 17-year-old game.

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

13 MR. SMITH: You do draw that line, Your
14 Honor.

15 CHIEF JUSTICE ROBERTS: And we do it for
16 drinking; we do it for driving.

17 MR. SMITH: But here you were assessing
18 works of expression, deciding to decide what age they --
19 they would correspond to, and I don't think you can cut
20 it that finely and say well, this is an 18 game; this is
21 only a 17 game. I just don't think that works. So if
22 that's the test, the test Justice Breyer suggested it
23 ought to be, then the statute essentially would restrict
24 nothing. If the test is 5-year-olds --

25 JUSTICE BREYER: Stick to the X things,

1 maybe. Maybe it would restrict the total gratuitous
2 torture. And if that's what it restricted, why is that
3 such a terrible thing?

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

5 JUSTICE BREYER: And if as you experimented
6 with other things, as they did in the obscenity area,
7 you could discover you could limit it to that.

8 MR. SMITH: I think the maybe is telling,
9 though, Your Honor. Somebody, as Justice Scalia would
10 point out, in publishing a game has to know what -- what
11 -- what the rules of the game are in advance. Subject
12 to hundreds of millions of dollars of penalties, this is
13 \$1,000 a game penalty. If --

14 JUSTICE BREYER: Well, you have your rule,
15 so why wouldn't the first step be they would follow your
16 rules? Your rules. The X things would be limited to
17 people who are over 18, and let's see if we ever get
18 prosecuted for a different one. And you might never.

19 MR. SMITH: Our rules wouldn't help you at
20 all. They say that they are only restricting a smaller
21 number, a small subset of M-rated games, which by the
22 way, we say are appropriate for 17-year-olds. So these
23 ratings that the state wants us to impose are going to
24 conflict with the ratings that are already on the
25 packaging which are being used by parents every day to

1 make these judgments. So it's actually interfering.
2 The prospect of it would interfere with the information
3 already on the packaging.

4 CHIEF JUSTICE ROBERTS: Thank you, Mr.
5 Smith.

6 Mr. Morazzini, you have four minutes
7 remaining.

8 REBUTTAL ARGUMENT OF ZACKERY P. MORAZZINI
9 ON BEHALF OF THE PETITIONERS

10 MR. MORAZZINI: Thank you,
11 Mr. Chief Justice.

12 I wanted to address one point that has been
13 raised about minors' ability to access these games.
14 Yes, new games do cost \$60, but California's law also
15 regulates the rental of these video games, which is just
16 a few dollars per game. So minors certainly can afford
17 them and can access them.

18 But I also wanted to draw out the point that
19 California's law really is not an ordinance that is
20 directed to a plot of a game. It's expressly directed
21 to games with essentially no plot, no artistic value.
22 This is the helpful nature of the third prong of the
23 Miller standard. So it really is only going after the
24 nature of the game where the child is --

25 JUSTICE SCALIA: Excuse me. If it has a

1 plot it has artistic value, is that going to be the test
2 for artistic value? Anything that has a plot?

3 MR. MORAZZINI: That would be one factor to
4 be considered, Justice Scalia.

5 JUSTICE SCALIA: Well --

6 MR. MORAZZINI: The nature of a plot.

7 JUSTICE SCALIA: One factor to be
8 considered, sure. But you were not telling us that so
9 long as it has a plot it's okay?

10 MR. MORAZZINI: No, Your Honor. As this
11 Court held in the Jacobilus case, a single quotation
12 from Voltaire on the fly leaf of an otherwise obscene
13 work was not going to make that work non-obscene.

14 JUSTICE SCALIA: You can't have artistic
15 videos that involve maiming and cutting off heads and
16 eviscerating people, right, so long as its artistic it's
17 okay.

18 MR. MORAZZINI: If the level of the violence
19 just as an obscenity, if the level of violence causes
20 the game as a whole to lack the artistic, it is a
21 balance, Your Honor, just as it is with sexual material.
22 Each aspect -- that is why violence and sex --

23 JUSTICE SCALIA: Artistic for whom, for a
24 5-year-old? What a 5-year-old would appreciate as great
25 art, is that going to be the test?

1 MR. MORAZZINI: Again, minors as a class.
2 So those under 18-years-old.

3 JUSTICE KAGAN: You think Mortal Combat is
4 prohibited by this statute?

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

8 JUSTICE KAGAN: It's a candidate, meaning,
9 yes, a reasonable jury could find that Mortal Combat,
10 which is an iconic game, which I am sure half of the
11 clerks who work for us spend considerable amounts of
12 time in their adolescence playing.

13 JUSTICE SCALIA: I don't know what she's
14 talk about.

15 MR. MORAZZINI: Justice Kagan, by candidate,
16 I meant that the video game industry should look at it,
17 should take a long look at it. But I don't know off the
18 top of my head. I'm willing to state right here in open
19 court that the video game Postal II, yes, would be
20 covered by this act. I'm willing to guess that games we
21 describe in our brief such as MadWorld would be covered
22 by the act. I think the video game industry --

23 JUSTICE SOTOMAYOR: Would a video game that
24 portrayed a Vulcan as opposed to a human being, being
25 maimed and tortured, would that be covered by the act?

1 MR. MORAZZINI: No, it wouldn't, Your Honor,
2 because the act is only directed towards the range of
3 options that are able to be inflicted on a human being.

4 JUSTICE SOTOMAYOR: So if the video producer
5 says this is not a human being, it's an android computer
6 simulated person, then all they have to do is put a
7 little artificial feature on the creature and they could
8 sell the video game?

9 MR. MORAZZINI: Under the act, yes, because
10 California's concern, I think this is one of the reasons
11 that sex and violence are so similar, these are base
12 physical acts we are talking about, Justice Sotomayor.
13 So limiting, narrowing our law here in California, there
14 in California to violence -- violent depictions against
15 human beings.

16 JUSTICE SOTOMAYOR: So what happens when the
17 character gets maimed, head chopped off and immediately
18 after it happens they spring back to life and they
19 continue their battle. Is that covered by your act?
20 Because they haven't been maimed and killed forever.
21 Just temporarily.

22 MR. MORAZZINI: I would think so. The
23 intent of the law is to limit minors' access to those
24 games.

25 JUSTICE SOTOMAYOR: Isn't that feedback to

1 Justice Scalia's question?

2 MR. MORAZZINI: Your Honor, this is a facial
3 challenge. This statute has not been applied and not
4 even been construed by a state or federal court below,
5 but.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 MR. MORAZZINI: Thank you.

8 CHIEF JUSTICE ROBERTS: The case is
9 submitted.

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

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