STATE’S INTEREST IN CHILD PROTECTION VS. FREE SPEECH

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For decades, lawmakers have debated about how to protect children from possible harmful effects of violence in the media.\(^1\) The debate has now centered on violent video games. More than two-thirds of American households include at least one player of video games.\(^2\) These popular games cater to all age ranges and vary in theme, with some games depicting graphic violence. In 2005, California Governor Arnold Schwarzenegger signed into law Assembly Bill 1179 (the Act), which restricts the sale or rental of “violent video games” to minors and imposes a labeling requirement on them.\(^3\) The Act does not prohibit a minor’s parent or guardian from purchasing or renting a violent game for a minor, but it imposes a penalty of up to $1,000 per violation.\(^4\) The California Legislature considered social science studies and reports that establish a correlation between playing violent video games and an increase in aggressive thoughts and behavior in minors and adults.\(^5\)

An organization representing video game sellers challenged the law, claiming that it violated the First Amendment rights of minors. The Ninth Circuit agreed with this argument, ruling that the law was subject to strict scrutiny and that it was unconstitutional on its face because there are less restrictive means of furthering California’s interest. The court also ruled that the social science evidence that the state relied upon could not support a reasonable inference that the games were harmful to minors.\(^6\) The Supreme Court granted certiorari in the case and heard oral arguments on Nov. 2.

I. First Amendment Protection As Applied to Minors

The video games merchants association and California agree that video games are a modern form of artistic expression protected under First Amendment Free Speech rights.\(^7\) The issues before the Supreme Court are whether video games can be regulated based on the images and events they depict and what level of scrutiny is appropriate.

Entertainment Merchants Association argues the Act fails strict scrutiny because California cannot articulate a compelling state interest and prove that the Act actually serves that interest in a narrowly tailored way.\(^8\) The organization also claims that there are less restrictive means to protect children and help parents control their children’s exposure to violent media, particularly an industry-wide rating system that the video game industry has used since 1994. .

\(^1\) [Link](http://www.questia.com/googleScholar.qst?jsessionid=ABAAB14167C76691EA2351722A711F1F.inst1_3b?docId=96517785)
\(^2\) Respondent brief p. 3
\(^3\) Id. at 10
\(^4\) Petitioner’s brief p. 3
\(^5\) Id.
\(^6\) [Video Software Dealers Ass’n v. Schwarzenegger](http://www.questia.com/googleScholar.qst?jsessionid=ABAAB14167C76691EA2351722A711F1F.inst1_3b?docId=96517785), 556 F.3d 950 (2009)
\(^7\) Respondents p. 2
\(^8\) Respondent’s brief p. 47
Entertainment Merchants argues that California failed to show that the rating system is ineffective.\(^9\)

California argues that the California law should not be subjected to strict scrutiny; instead, the state argues that the Court should use the less rigorous standard used in *Ginsberg v. New York*, 390 U.S. 629 (1968), to assess the constitutionality of laws that limit minors’ access to sexually-oriented material.\(^10\) In *Ginsberg*, a storeowner was convicted of violating a New York statute that prohibited the sale of “girlie magazines” to minors but not to adults. The magazines were not obscene and could not be banned from sale to adults. The Supreme Court upheld Ginsberg’s conviction, holding that states may restrict the sale of offensive sexual material to children even though it is protected speech as to adults.\(^11\) California argues that *Ginsberg* means that minors’ rights under the First Amendment are not coextensive with the rights of adults. The First Amendment right presumes that an individual has the capacity to make rational choices when they are consuming speech, and California says minors lack that capacity.\(^12\) Therefore, state argues, it may limit minors’ access to violent video games to help parents direct their children’s choices as a means of fostering their sound moral and intellectual development.\(^13\) The state argues that *Ginsberg* strikes a balance between the rights of minors and the interests of parents and the state in protecting children\(^14\) and that its rationale applies to state efforts to limit minors’ access to violent materials.

Entertainment Merchants responds that *Ginsberg* expressly disclaimed the idea that its holding applied to anything except sexually explicit materials and that the case does not authorize the Court to create new categories of unprotected speech.\(^15\) Unlike explicit sexuality, violence has never been a taboo subject for children, and the video gamers claim it would be impossible to draw a line between violence that is appropriate for children and violence that is not.\(^16\) They point out that violence has never been recognized as a category of unprotected speech.\(^17\) Entertainment Merchants also argues that the government cannot restrict protected expression to support parents’ authority over their children’s welfare because what individuals have dramatically differing opinions about what is for children. For this reason, they argue that the legislation unconstitutionally limits parental authority to decide which expression is worthwhile.\(^18\) They note that some parents have considered *The Adventures of Huckleberry Finn* and *Harry Potter* inappropriate and say that it is not the role of the government to favor the preferences of some parents over those of others.\(^19\) Finally, Entertainment Merchants claims that minors’ First Amendment rights are coextensive with those of adults and that the government

\(^9\) Respondents’ brief p. 53  
\(^10\) Petitioner’s brief p. 5  
\(^12\) Petitioner’s brief p. 7  
\(^13\) Id.  
\(^14\) Id. at 28  
\(^15\) Respondent’s brief p. 31  
\(^16\) Id.  
\(^17\) Id. at 19, Stevens citation  
\(^18\) Id. at 29  
\(^19\) Id. at 30
can only restrict their rights in narrow and well-defined circumstances, such as regulating speech made in schools or through broadcasting.\textsuperscript{20}

II. Establishing a Link Between Violent Video Games and Harm to Minors

California contends that the Act should be upheld because there is a causal connection between media violence and aggressive behavior in children.\textsuperscript{21} The state argues that under \textit{Turner Broadcasting System, Inc. v. FCC}, 512 U.S. 622 (1994), the government can regulate speech to prevent anticipated harms if it has drawn reasonable inferences based on substantial evidence.\textsuperscript{22} California cites studies that show there is a relationship between playing violent video games and aggressive and anti-social behavior among minors. The state claims it is not required to show a direct causal nexus between “offensive material” and physical or psychological harm to minors,\textsuperscript{23} in part because to do so require unethical and impractical experimentation on minors.\textsuperscript{24}

Entertainment Merchants asserts that \textit{Turner} does not apply in this case because the law at stake in that case involved a content-neutral regulation of speech which was subject to intermediate, not strict, scrutiny.\textsuperscript{25} Instead, Entertainment Merchants argues that California has the burden to prove violent video games do cause increased aggressive thoughts and behavior in minors.\textsuperscript{26}

CONCLUSION

The Supreme Court will decide whether a state is allowed to restrict the sale of violent video games to minors or if these games are protected speech under the First Amendment. California argues that the First Amendment does not protect these games because the government has an interest in limiting minors’ access to violent material. California also claims that there is no need to demonstrate a direct causal connection between violent video games and harm to minors. In contrast, Entertainment Merchants argues that violent video games are protected under the First Amendment because minors have the same free speech rights as adults. The Supreme Court's decision will affect the extent of minors' constitutional rights, the power of states to control which materials children are exposed to, and the availability of media with violent content.\textsuperscript{27}

\begin{itemize}
  \item \textsuperscript{20} Respondent’s brief p. 25-26
  \item \textsuperscript{21} Petitioner’s brief p. 44
  \item \textsuperscript{22} Id. at 48
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} Id.
  \item \textsuperscript{25} Respondents p. 50
  \item \textsuperscript{26} Id. at 38
  \item \textsuperscript{27} http://topics.law.cornell.edu/supct/cert/08-1448
\end{itemize}