

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ARNOLD SCHWARZENEGGER, GOVERNOR :

4 OF CALIFORNIA, ET AL., :

5 Petitioners :

6 v. : No. 08-1448

7 ENTERTAINMENT MERCHANTS :

8 ASSOCIATION, ET AL. :

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10 Washington, D.C.

11 Tuesday, November 2, 2010

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

16 APPEARANCES:

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19 Petitioners.

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

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ZACKERY P. MORAZZINI, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	PAUL M. SMITH, ESQ.	
7	On behalf of the Respondents	26
8	REBUTTAL ARGUMENT OF	
9	ZACKERY P. MORAZZINI, ESQ.	
10	On behalf of the Petitioners	56
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:04 a.m.)

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

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

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

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

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

25 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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ability 4:9 51:2 56:25 able 43:3 49:25 54:10,17 59:22 above-entitled 1:13 61:6 abridging 16:5 37:6 absolutely 12:1 18:8 abundance 49:21 accept 11:24 acceptable 28:12 46:9 access 3:14,16,21 7:3 17:2 22:25 23:8 48:17 54:1 56:25 57:4 60:17 acknowledge 47:14 acknowledged 36:22 act 20:2,3,7,9 23:20 23:21 40:15 59:13 59:15,19,21 60:3 60:13 acted 27:17 acting 6:1 25:5 41:5 57:11 action 19:1 actively 33:5,12 activities 6:11 actor 41:4 acts 19:8,15 40:5 60:6 actual 50:12 adding 41:7 additional 29:22,24 address 29:21 50:3 56:24 addressed 20:17 50:7 adds 40:19 adjust 27:23 admit 29:16 adolescence 59:1	adopt 4:8 adopted 17:11 38:6 41:24 adult 5:25 47:13,15 53:6 adults 8:24 25:21 28:6 47:22 48:1 advance 55:23 advertising 21:1 advisory 24:3 affect 16:16 afford 57:3 age 9:24 10:1 11:10 55:5 ages 36:3 aggression 6:12 aggressor 5:25 ago 45:11 agree 9:11,13 21:24 Agreed 4:24 AL 1:4,8 Alito 9:23 10:12 17:3,7 23:7,15,18 34:24 35:7,19 37:2 37:16 38:2 48:14 48:20 49:7 51:11 53:20 allow 22:25 35:15 35:18 53:5 54:1 allowed 17:2 50:24 51:4 allowing 50:6 alternative 25:12 44:3 alternatives 48:25 altogether 21:15 Amendment 8:14 16:4,12,20 17:11 18:21,22 26:13,16 33:16,23 34:7,12 34:15,23 35:5,18 37:5,12,18 38:6,10 40:23 41:19 42:13 42:15 43:13,16,23	44:10,15,17 45:3 American 16:11 18:10,11 29:12,13 amount 14:2 amounts 59:1 ample 31:3 analogy 19:4 analysis 37:13 Anderson 7:7 29:5 29:14 36:19 android 59:25 answer 29:19 30:16 34:6 37:22 49:7,12 49:13 51:10,10,18 answering 7:6 anybody 17:10,13 43:3,19 53:5 apologize 18:1 apparent 47:1 apparently 35:2 appeal 46:24 appealing 21:21 47:17 appeals 9:21 11:15 46:6 appear 39:25 41:4 APPEARANCES 1:16 appears 6:16 applicable 3:24 applications 41:15 applied 10:8 42:1,6 42:7 45:20 48:7 60:23 applies 12:9 41:23 48:22 apply 9:2 12:10 26:14 41:19 42:15 42:20 44:9,15 45:1 47:2 appreciate 58:13 approach 41:24 42:23 approached 42:18	appropriate 10:14 10:15 30:13 38:9 46:7 48:12 56:9 appropriateness 24:16 36:1 area 14:18 15:9 27:20 44:7,9 50:20 50:25 53:18 54:21 55:18 argue 35:19 37:4 44:20 arguing 43:8 50:2 argument 1:14 2:2,5 2:8 3:3,7 7:25 8:5 19:12 21:15 26:6 42:4 44:8,11,23 48:15,15,18 56:20 arguments 45:18,21 47:11 ARNOLD 1:3 art 58:14 artificial 38:10 artistic 11:19 28:20 47:4,8 57:8,13,14 58:2,5,9,12 asked 23:25 53:8 asking 15:8 16:10 18:24 26:15 37:14 asks 4:7 aspect 40:20 58:10 aspects 29:20 30:9 32:8 assaulting 12:19 assessing 55:4 association 1:8 3:5 18:10,11 29:12,13 35:1 assuming 50:7 51:8 attached 35:9 attempt 21:17 attempting 48:6 Attorney 1:17 at-large 27:15 audience 9:1	authority 4:1 35:17 37:11 authorize 53:17 authorizing 53:18 authors 6:10 available 7:3 12:17 25:16 30:12 53:22 average 10:13 11:4 11:6 avoiding 34:6 awake 52:20 aware 23:17 24:9 27:13 45:11,12 a.m 1:15 3:2 61:5
				B
				babies 30:5 back 4:20 12:4,16 17:25 18:18,23 27:21 31:21 43:4 53:9 60:12 bad 16:14 24:2 30:5 32:2 35:21,22 balance 58:9 ban 5:2 barrier 22:23 23:8 base 9:21 60:6 based 26:11 27:21 37:12 40:1 54:7 basically 22:17 46:17 basis 13:25 27:18 49:3 battle 60:13 beautiful 47:8 beauty 8:7 14:17 beg 33:6 behalf 1:18,20 2:4,7 2:10 3:8 26:7 56:21 beholder 47:7 beings 60:9 believe 5:13 6:8 7:23 10:10 14:6

15:21 17:15,24 18:19 23:10 24:17 25:14,24 37:5 58:19 believes 11:4 belongs 24:4 Bible 36:25 big 10:20,23 bill 31:14 black 37:21 block 54:1,1 board 24:25 body 20:20 21:6 book 38:7 books 5:8 26:19,24 38:18,22 48:8 boundaries 27:23 brand-new 26:16 Breyer 11:13 12:1,2 18:2,9,17,24 28:13 29:2,24 31:20 32:14,20 43:7 44:16,21 51:10,17 55:9,12,17 56:1 brief 20:16 59:14 briefing 25:19 briefs 12:6 bring 30:22 bringing 50:14 brings 25:20 broad 42:19 broader 43:1 Bugs 7:8,10 build 15:17 Bunny 7:8,10 buy 11:21,22 28:23 30:6,6 31:24 32:1 32:4,4 39:24 51:3 53:22 buying 31:16 49:18 49:21 50:14 buys 22:8 bypass 25:22 30:16 bypassing 25:20	C C 2:1 3:1 California 1:4,18 3:11,15 4:7 5:13 5:22 6:13,21 8:22 10:9,19,20,24 15:16 19:23 21:25 22:7,14,23 23:1,8 23:10,12 24:2,2,12 25:4 26:10,12 27:6 34:25 35:8 37:14 53:21 54:3,13 60:8 60:8 California's 8:8 10:7 19:21 20:20 23:20 23:21 25:2 57:1,6 60:4 call 24:4,12 43:17 46:18 calls 45:7 candidate 58:19,22 59:9 capable 50:6 care 40:4 careful 19:2 carefully 53:16 cartoon 7:13 cartoons 7:20 36:24 52:15 case 3:4,24 15:19 19:24 20:25,25 21:19,22 28:8 31:7 31:7 37:4 40:1 41:22 42:2 48:1,10 57:24 61:3,5 cases 31:8 42:8 47:19 categories 14:18 category 3:17 5:5 8:10,15,16 14:4 31:19 38:8 43:17 46:19 53:6 54:11 54:11 caused 23:2 38:22	causes 58:8 censor 25:5 censored 38:24 censors 24:25 censorship 24:13 35:12 century 38:17 certain 3:17 15:4,4 18:12 20:11 41:5 certainly 8:10 21:17 28:8 42:24,25 57:3 cetera 28:21 43:18 44:8,9 challenge 33:22 41:11,11,16 60:22 challenged 20:3 Chaplinsky 18:25 character 60:11 characters 39:11 charged 11:2 Chief 3:3,9 5:18 6:18 26:2,5,8,23 27:9,17 30:15 33:2 33:21 34:5,10,14 41:10,13,21 42:9 42:17 49:6,11,14 50:18,23 51:5,11 51:19,25 52:4,7 54:20 55:2 56:17 56:23 60:25 61:3 child 10:2 11:21 26:25 27:1,2 28:15 28:15 30:22 31:24 31:25 40:25 41:2 57:11 children 4:2,5 5:6 6:25 7:22 16:16 18:13 22:11 28:1 28:18 29:15 30:1,2 30:14 32:3,10,15 32:24,25 33:4,11 36:2 38:14 43:18 48:13 49:17 50:12 51:21 52:9,11,20	children's 19:18 child's 27:4 40:15 choose 29:17 choosing 15:17 chopped 60:11 cigarettes 52:1,2,5 52:7 circuit 20:2,12,19 21:5 35:13 48:10 Circuit's 21:18 cite 20:25 City 48:10 civil 35:2,8 claim 3:25 43:4 clarification 20:1 class 10:11 58:16 clear 13:14 41:18 48:14 49:7 clearly 8:19 12:7 36:18 43:1 clerk 22:24 clerks 58:25 clip 7:17 clips 13:6 25:21 close 45:2 closer 40:1 Code 23:11 cognizable 35:25 combination 40:18 come 29:10 30:1 43:3 45:2 53:4,9 comic 5:8 38:18,22 coming 38:13 40:20 comment 14:14 commission 35:12 48:11 commits 40:5 committing 19:15 40:16 common 27:14,18 28:13,14,21 30:7 31:20,21,22 community 11:3,17 compelling 44:1	45:5 50:2 compete 39:5 completely 40:23 47:6 comply 13:11 computer 30:25 computer-savvy 54:3 computer-simulat... 59:25 concede 21:17 conceded 21:20 concern 6:13 19:9 60:4 concerned 3:14,16 7:2 13:8,9 16:2,3,4 19:24 concerns 30:13 concession 21:9 conclude 52:11 conclusion 29:10 conflict 56:11 Congress 7:1 16:4 37:5 53:2,8,9 consensus 14:21,23 15:9,17 consider 10:9 11:5 24:11 considerable 59:1 considered 38:8 57:16,21 Constitution 8:25 9:4 34:4,23 41:16 constitutional 26:17 constitutionality 54:6 constitutionally 42:6 construed 10:7 60:23 consumer 21:4 contemplated 38:5 contend 26:13 content 25:7 26:11
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36:3 context 10:5 41:20 continually 6:15 continue 60:13 contrary 18:14,15 contributing 41:6 control 21:13 controllable 24:20 controlled 48:24 controls 25:15,20 25:22 30:10,17 31:5 convene 13:18 convince 54:18 convinced 13:24 COPA 31:7 cordon 19:2 correct 19:17 20:13 21:18 42:3 47:23 correspond 55:6 cost 31:10,11 57:1 cost-benefit 37:12 counsel 60:25 country 18:5 32:11 33:4,11 38:12,22 45:9 counts 12:5,22 course 13:12 16:16 40:8 54:21 court 1:1,14 3:10,12 3:20 4:7 17:2 18:4 18:24 19:1 20:2,12 20:13,21 23:3 26:9 26:15,21 27:11,17 28:10 31:6 33:8,15 35:12 37:9 41:19 47:1 48:5 57:24 59:12 60:24 courts 18:5 46:13,15 cover 14:5 covered 8:10 12:8 12:14 13:2,3,15 14:3,7 59:13,15,19 60:13	covers 12:17 14:5 crafted 3:20 create 16:10 18:12 32:10 33:15 37:11 created 33:18 creating 24:12 creation 47:8 53:17 creative 40:20 41:7 creature 60:2 crime 38:16 45:7,8 criminal 13:13 20:9 criminals 38:15 crush 42:2,19 current 36:10 51:8 cut 5:7 55:6 cutting 58:3	delinquency 38:21 demonstrates 5:23 deny 26:17 depart 7:21 departing 4:16 depictions 15:20 60:9 depth 29:7 Deputy 1:17 describe 12:12 described 32:1 33:25 59:14 describes 26:20 description 33:9 37:20 descriptions 38:7 designed 14:15 47:17 despite 49:18,19 determine 41:3 determined 4:10 52:8 developed 15:20 48:18 developing 6:16 development 3:19 4:2,11 9:18 19:19 22:10 27:4 developmental 23:2 deviant 3:16 4:9,12 4:13,15 5:10,14 9:16 12:5 15:19 24:5,6 26:22 47:2 dialogue 40:21 difference 5:4 32:17 32:18,19,23 33:3 46:4 different 8:13 19:8 27:3 30:19 32:12 36:1,3,3,3,24 37:19 41:8 46:9 56:5 differentiate 53:12 differs 3:12 51:7	difficult 25:11 47:14 53:11 direct 4:1 22:10 directed 9:10 40:14 57:7,7 59:21 directly 9:18 44:5 disagree 49:22 disagreement 29:5 29:6 discover 55:19 discretion 35:17 discussions 14:25 14:25 dismembering 12:18 disobeying 50:13 disposing 37:23 distinction 26:24 35:25 distinctions 10:24 distribution 26:11 distributors 25:6 district 20:12 33:8 doing 25:3 27:1,2 30:21 33:14 38:1,2 39:15 44:6 53:1 dollars 55:24 57:3 Doom 45:10 Dr 29:4,5 36:19 draw 34:22 35:24 43:4,12 46:8 54:20 54:25 57:5 drawn 42:22 drinking 15:24,25 16:14 55:3 driving 55:3 D.C 1:10,20	19:21 effective 44:4 effects 36:23 egregious 9:14 either 41:15 element 30:18 41:7 elements 30:19 41:6 eliminated 48:3 empowered 45:7 48:25 enacted 17:16 enacting 6:14 18:21 encourage 32:15 encouraged 32:10 enemies 37:23 enforced 38:18 enforcement 17:22 enforcing 23:16 English 12:13 34:22 43:5 enjoy 17:7 enormous 38:23 ensure 22:14 ensures 8:9 ensuring 22:22 entered 17:22 entertainment 1:7 3:5 7:14,15,18 entirely 15:8 33:16 38:10 entitled 22:10 envisioned 37:17 episode 7:8 equally 3:23 equivalent 39:4 erect 22:23 especially 6:2 9:21 ESQ 1:17,20 2:3,6,9 ESRB 35:11 essentially 55:10 57:8 established 4:16,17 7:21 et 1:4,8 28:20 43:18
---	--	--	--	---

44:7,9 evening 52:22 events 39:10,12 40:17 41:3,7 eventually 53:7 evidence 5:23 18:20 27:7 29:18 45:16 50:12,16 eviscerating 58:4 exactly 37:9,14 39:11 40:9 48:15 example 5:20 51:20 exception 16:19,21 17:12 26:16 27:21 27:23 33:16,17,20 34:12,22 44:14,16 46:2 exceptions 37:11 excessive 15:23 excruciating 28:17 Excuse 57:12 exemplary 6:9,11 6:12 exercise 31:3 exercising 29:22 35:5 exist 43:20 existing 16:25 44:14 50:5 exists 35:11 expect 45:21 experience 36:17 experimented 55:17 expert 13:5 29:17 experts 43:9 explicit 32:24 46:5 46:23 expose 33:12 exposed 7:23 18:13 58:21 exposure 23:4 35:21 35:22 expression 36:16 55:5	expressive 26:11,18 26:20 expressly 57:7 extend 5:10 extent 46:16 eye 47:7 <hr/> F <hr/> face 11:25 19:1 52:14 facial 33:22 41:11 41:16 60:22 fact 6:25 15:18 16:24 20:24 23:20 36:22 43:3 48:23 50:13 factor 57:15,20 facts 48:22 factually 46:4 fails 41:16 fair 11:9 43:9 fairy 4:22 5:8 8:2,11 fall 33:8 falling 38:14 falls 21:22 Families 36:1 family 30:25 36:4 Fathers 18:20 favor 43:9 FCC 52:18,24 feature 32:9 60:1 features 54:1 Federal 60:24 feedback 60:20 feint 44:19 felt 27:22 Ferguson 29:4 field 8:14 fighting 18:6,6,25 19:4,7 figure 33:19 51:8 53:5 films 5:7 32:24,25 find 18:19 39:15	42:5 58:23 fine 36:22 54:10 finely 55:7 fire 33:10 34:19 40:6,13 first 3:4,25 8:1,13 16:4,12,20 17:10 18:21,22 26:13,16 32:9 33:16,23 34:7 34:12,15,23 35:5 35:17 37:5,11,18 38:6,9 39:2,6 40:23 41:19 42:13 42:15 43:12,16,23 44:10,14,17 45:3,4 45:10,25 51:11 55:16 56:2 fit 22:11 43:20 fits 54:11 five 30:19 five-minute 7:17 flexible 8:25 flyleaf 57:25 focus 44:22 follow 56:2 forbid 31:23 forever 60:14 form 5:11 forth 5:16 40:16 forward 36:8 found 12:7 20:15,21 21:5 31:6 founding 18:20 27:22 free 26:15 freedom 16:5,6,8 37:6 freewheeling 37:10 front 22:23 FTC 7:1 fully 45:6,11 52:3 fundamental 3:23 6:13 22:21 46:3 further 23:22	<hr/> G <hr/> G 3:1 game 4:13,14 9:25 10:1 11:14 12:9,14 13:6,15,24 18:22 28:15 30:22,24 33:24 34:2 35:16 39:7 40:3,4,15,17 40:19,22 41:1 42:5 42:12 43:2 47:6 48:17 53:14,22 54:18,19 55:7,8,22 55:23,25 57:3,7,11 58:8,20,24 59:9,12 59:15,17 60:2 games 3:18 4:9 5:7 5:9,20,24 6:5,9,10 6:22 7:24 9:19 10:23 11:12 12:10 12:11,17,20 13:2,2 13:10,25 14:7 17:5 18:12 19:14 20:22 24:7 26:19,25 29:7 29:9 31:4,16 32:1 35:1,3,21,22 36:21 36:23 37:21 39:2,3 39:4,9,19,19,20 39:24 42:11 45:9 47:4 49:18,21 50:14,20 52:10 53:25,25 54:2,11 56:8,25 57:1,2,8 59:14 60:18 gas 58:4 gasoline 33:9 gather 22:1 37:4 General 1:18 generally 19:19 generations 14:20 Gentile 6:8,8 getting 54:7 Ginsberg 3:13,20 10:6 16:25 22:9 23:4,5,22,23 27:11	46:4 47:13,15,21 48:9 Ginsberg-like 26:16 Ginsberg-type 23:13 Ginsburg 5:4 10:19 11:1 18:23 19:6 20:1 21:25 23:12 23:24 24:10 27:24 28:4 52:17 Ginsburg's 5:19 girlie 27:25 43:22 give 47:18 given 19:12 21:15 46:11,12 48:22,23 gives 40:19 46:19 glorification 15:24 Glucksberg 41:14 go 12:16 15:8 17:25 18:23 28:23 30:6 31:24,25 32:4 35:14 36:8 44:25 51:6 53:22 goes 23:22 27:21 going 5:2 18:18 19:14 28:12,16 31:21 33:15,18 38:15 39:16,18 43:3 45:12 48:11 48:11 49:18 50:9 51:2 53:17 54:6,10 54:17 56:11 57:10 57:13 58:1,14 good 24:1 35:20 42:23 43:11,25 gore 22:3 government 21:2 24:19,24 35:14 governmental 20:23 GOVERNOR 1:3 grant 26:15 graphic 32:25 33:2 48:17 graphically 37:24
--	--	--	---	--

gratuitous 28:17 30:4 32:3 55:13 great 14:15 58:13 greatly 48:25 grim 4:22 Grimms 4:21 5:8 8:2 8:11 grinder 37:23 ground 37:4,8 group 9:24 11:11 groups 7:1 29:10 grow 36:21 guarantee 18:21 guarantees 9:4 guess 36:15 54:5 59:13 guidance 3:15 gun 37:1	helps 41:4 highest 51:20 highlight 16:24 hinged 20:19 historic 17:15 historical 8:17 18:19 46:2,11 historically 7:23 9:3 history 29:23 32:11 38:12 46:1 48:5 hitting 33:5 holding 20:19 home 29:25 30:1,22 30:24 50:15 53:24 homes 45:12 Honor 4:15,24 5:3 5:12,21 6:8,23 8:6 8:22 10:4,16 12:24 13:4,16 14:10 15:20 17:14,23 20:18 21:24 22:9 24:15 25:14 27:5 28:7,25 30:10,19 31:12 37:8 38:12 40:8 41:12 42:4 44:13,25 45:19 47:23 49:13 51:8 52:3 55:1,21 57:23 58:9,20 59:20 60:21 hope 30:2 horrible 11:23 hour 28:19 hours 52:20,22 house 31:5 household 4:1 huge 18:14 32:18 human 36:18 39:14 59:18,22,24 60:9 hundreds 55:24 hunting 42:18 hurt 29:15 hurting 39:13	<hr/> I <hr/> iconic 58:24 idea 52:10 53:7,19 identify 54:10 illegal 20:22 Illinois 36:20 ill-defined 26:18 images 39:24 imagine 27:25 28:16 36:15 immediate 19:1 immediately 60:11 immemorial 33:14 impact 6:24 27:3 importance 11:18 important 22:13,15 28:9 32:8 35:24 54:12 impose 28:17 56:11 inappropriate 34:2 include 16:7,8 37:22 includes 12:18 including 45:8 incorporated 5:13 incorporating 8:7 23:21 increase 29:11 independent 4:3 indicates 15:10 indication 17:10 individual 6:1 14:11 industry 13:24 38:23 59:9,16 inflicted 31:1 59:22 information 56:15 initially 9:17 instance 18:4 39:2 instances 4:5 instinct 9:21 instructed 10:9,11 11:10 13:5 instructing 25:21 insuperable 34:21 intend 21:17	intended 18:21 intensity 14:1 intent 60:17 interactive 5:23 interest 4:4 19:7,13 19:13,16,18,22 44:1 46:6,24 interesting 21:8 interests 11:16 22:21 47:18 interfere 56:15 interfering 56:14 internal 19:22 Internet 25:20 38:25 interpret 25:11 interrupt 30:16 Interstate 35:13 48:9 intoned 38:21 intrinsic 19:22 introduction 45:8 involve 22:15,22 58:3 involved 28:5 43:22 involving 43:17 issue 3:11,12 7:17 8:23 10:6 16:25 19:9 23:5,22 26:10 42:18 43:24	15:9 juries 10:16 24:16 24:20,21,22 jury 10:8 11:2,10 13:5,9,12,12,19 54:18 58:23 Justice 3:3,9 4:12 4:17,21 5:1,4,18 5:19 6:4,18,19 7:5 7:6,12,20,25 8:12 9:6,12,14,15,23 10:12,19 11:1,6,9 11:13 12:1,2,3,4 12:15,21 13:1,8,18 13:21,23 14:3,8,13 15:14,23 16:23 17:3,4,7,8,18,21 18:2,9,17,18,23 18:24 19:6,10,20 19:25 20:1,5,6,9 20:14,16 21:8,16 21:20,25 22:1,6,12 22:17 23:7,12,15 23:18,24 24:10,11 24:19,24 25:2,9,17 25:23,25 26:2,5,8 26:23 27:9,17,24 28:4,13 29:2,24 30:15 31:9,13,20 32:14,20 33:2,21 34:5,10,14,24 35:7 35:19 36:5,13 37:2 37:3,16 38:1,2 39:1,18 40:2,10,13 40:25 41:10,13,21 42:9,17 43:7 44:16 44:21 45:15,17,23 46:13,15 47:10,20 47:24 48:14,20 49:2,5,6,7,11,14 49:16,23 50:8,18 50:23 51:5,10,11 51:12,17,19,25 52:4,7,17 53:20
---	---	---	---	--

54:20 55:2,9,12,17 55:21 56:1,17,23 57:12,16,17,20 58:2,12,17,22 59:4 59:5,8,17,23 60:6 60:10,19,20,25 61:3 justify 49:10 juvenile 38:21	59:5,11 Kombat 58:17,24	let's 11:16 30:4 44:21 level 3:16 4:25 6:1 7:2,22,23 15:18 17:17 25:7 43:6 58:6,7 levels 53:12 licensing 35:17 life 54:23 60:12 light's 25:10 limit 48:16 51:2 55:19 60:17 limitation 38:9 limited 25:25 39:22 39:23 43:25 56:3 limiting 60:7 line 43:12 46:9 47:15 54:9,21,25 list 29:14 34:25 literary 11:19 28:20 literature 6:24 little 7:13 48:4 60:1 live 8:3 living 44:2 long 14:22 21:3 22:7 27:19 29:13 39:21 57:22 58:4 59:10 look 4:19 8:14 12:20 12:25 13:17 25:6 27:7 39:3 59:10,10 looked 29:3,6 41:24 looking 17:15 36:25 lot 23:15 29:7 47:19 love 32:14 low 8:16 lyrics 9:7 38:25	28:4 48:8 maim 40:11,11 maimed 59:19 60:11 60:14 maiming 12:18 27:2 40:5,16 58:3 main 37:8 majority 14:15 36:21 manner 9:22 22:11 53:13 manufacturer 9:25 10:2 11:4 13:14,22 manufacturers 25:5 margins 15:6 market 45:10 marshaled 27:6 material 3:14,22 8:10 9:20,20 14:10 14:12,22,24 15:15 15:22 16:24 17:17 22:25 23:1,5,5,9 23:19 24:16 25:4,6 27:24 28:10 58:10 materials 5:6,10 15:4 21:14 matter 1:13 27:14 34:15 61:6 mature 14:4,6 35:1 mean 4:21 5:5 8:4 12:12 18:3 32:14 32:16 meaning 47:1 58:22 meant 14:5 59:9 meat 37:23 media 6:25 7:2 medium 37:17 38:11 mediums 38:13 meets 5:16 25:8 Merchants 1:7 3:5 merciless 33:6 mercy 33:6 meta 18:14 Miller 5:14 8:8	12:24 23:22 46:18 46:21 57:10 Miller-type 43:21 millions 55:24 mind 10:2 13:12 36:18 minor 5:24 11:4,6 20:10 22:2,24 34:10 40:5 minors 3:14,19 4:9 6:2,6 7:3 8:23 9:1 9:4,18,21,23 10:5 10:9,11 11:11 15:19,19,25 17:2 17:14 19:14,23 21:14,22 22:25 23:2,4,8,19,20 24:8,17 25:21 33:24 34:3,3,8,12 35:4,21,22 40:3 42:11 46:7,10 47:18 48:16 50:24 51:2,3 56:25 57:3 58:15 60:17 minor's 3:16,21 minutes 30:17 31:2 56:19 misleading 20:24 21:4,7 misses 5:18 modern-day 39:4 moment 43:15 Monopoly 39:4 month 6:17 moral 19:18 27:4 Morazzini 1:17 2:3 2:9 3:6,7,9 4:15,19 4:24 5:3,12,21 6:7 6:23 7:11,20 8:6 8:22 9:11,13,17 10:4,16 11:1,9 12:1,3,15,23 13:4 13:16,23 14:6,9 15:14 16:23 17:14
K	L	M		
Kagan 6:4,19 12:3 12:15,21 13:1 14:3 14:8 19:10,20 36:5 36:13 39:1,18 58:17,22 59:4,8 Kagan's 7:6 Kennedy 14:13 15:14 25:9,17,23 25:25 45:17,23 46:13,15 47:10 key 15:21 42:25 kid 22:2 40:11 kids 22:4 35:15 49:21 50:9 kill 40:11 killed 60:14 killing 9:9 12:18 27:2 40:6 kind 11:18 12:11 24:2,6 45:2 46:2 54:20 kinds 12:22 18:12 knew 16:13 know 7:5 8:3 9:19 9:20 13:10,14,19 13:21,24 15:12 16:13 17:4,8,23 18:1,19 24:1,7,25 32:16 33:22 34:5 36:9 39:5 47:1,12 47:12,13,24 48:1 50:24 51:7 52:4 55:22 58:23,24	59:5,11 Kombat 58:17,24 label 20:11,23 21:6 labeling 10:22 20:2 20:17 21:3,9,12,22 lack 46:11 58:8 language 12:16 34:22 43:5 53:12 larger 28:11 latch 19:4 late 38:16 Laughter 4:23 11:8 13:20 15:13 17:6 22:5 24:23 28:3 32:22 44:24 52:6 59:3,7 law 3:11,12,21 4:8 8:8 10:6,6,7 13:11 13:13 15:19 16:5 19:13,16,18 20:20 20:25 21:6 22:18 22:21 23:11,13,22 25:12 26:10,14 31:22 34:16,17 36:1,8 37:6 39:22 39:23,23 40:3,14 41:18 42:15,20 43:1,1 48:7 50:18 51:8 54:6 57:1,6 60:7,17 laws 48:6 lawyers 21:1 leave 42:21 left 46:24,25 leg 33:7 legislation 38:17 legislature 4:10 5:22 6:13 7:9 29:18 34:17 legislatures 18:5 lesser 21:11 letters 10:20	let's 11:16 30:4 44:21 level 3:16 4:25 6:1 7:2,22,23 15:18 17:17 25:7 43:6 58:6,7 levels 53:12 licensing 35:17 life 54:23 60:12 light's 25:10 limit 48:16 51:2 55:19 60:17 limitation 38:9 limited 25:25 39:22 39:23 43:25 56:3 limiting 60:7 line 43:12 46:9 47:15 54:9,21,25 list 29:14 34:25 literary 11:19 28:20 literature 6:24 little 7:13 48:4 60:1 live 8:3 living 44:2 long 14:22 21:3 22:7 27:19 29:13 39:21 57:22 58:4 59:10 look 4:19 8:14 12:20 12:25 13:17 25:6 27:7 39:3 59:10,10 looked 29:3,6 41:24 looking 17:15 36:25 lot 23:15 29:7 47:19 love 32:14 low 8:16 lyrics 9:7 38:25 M M 1:20 2:6 26:6 machines 25:19 Madison 17:4,9 MadWorld 59:14 magazine 43:22 magazines 27:25	28:4 48:8 maim 40:11,11 maimed 59:19 60:11 60:14 maiming 12:18 27:2 40:5,16 58:3 main 37:8 majority 14:15 36:21 manner 9:22 22:11 53:13 manufacturer 9:25 10:2 11:4 13:14,22 manufacturers 25:5 margins 15:6 market 45:10 marshaled 27:6 material 3:14,22 8:10 9:20,20 14:10 14:12,22,24 15:15 15:22 16:24 17:17 22:25 23:1,5,5,9 23:19 24:16 25:4,6 27:24 28:10 58:10 materials 5:6,10 15:4 21:14 matter 1:13 27:14 34:15 61:6 mature 14:4,6 35:1 mean 4:21 5:5 8:4 12:12 18:3 32:14 32:16 meaning 47:1 58:22 meant 14:5 59:9 meat 37:23 media 6:25 7:2 medium 37:17 38:11 mediums 38:13 meets 5:16 25:8 Merchants 1:7 3:5 merciless 33:6 mercy 33:6 meta 18:14 Miller 5:14 8:8	12:24 23:22 46:18 46:21 57:10 Miller-type 43:21 millions 55:24 mind 10:2 13:12 36:18 minor 5:24 11:4,6 20:10 22:2,24 34:10 40:5 minors 3:14,19 4:9 6:2,6 7:3 8:23 9:1 9:4,18,21,23 10:5 10:9,11 11:11 15:19,19,25 17:2 17:14 19:14,23 21:14,22 22:25 23:2,4,8,19,20 24:8,17 25:21 33:24 34:3,3,8,12 35:4,21,22 40:3 42:11 46:7,10 47:18 48:16 50:24 51:2,3 56:25 57:3 58:15 60:17 minor's 3:16,21 minutes 30:17 31:2 56:19 misleading 20:24 21:4,7 misses 5:18 modern-day 39:4 moment 43:15 Monopoly 39:4 month 6:17 moral 19:18 27:4 Morazzini 1:17 2:3 2:9 3:6,7,9 4:15,19 4:24 5:3,12,21 6:7 6:23 7:11,20 8:6 8:22 9:11,13,17 10:4,16 11:1,9 12:1,3,15,23 13:4 13:16,23 14:6,9 15:14 16:23 17:14

17:20,23 18:8,17 19:6,11,20 20:5,8 20:14,18 21:16,23 22:9,13,20 23:10 23:14,17 24:9,15 25:2,14,18,24 26:3 26:4 56:19,20,22 57:15,18,23 58:6 58:15,19 59:4,8,20 60:3,16,21 61:2 morbid 11:15 12:5 12:13 47:2 48:2 morning 3:4,24 4:7 Mortal 58:17,23 move 12:23 movie 48:12 movies 5:20 6:6,20 6:21 8:1 15:24 16:15 26:19,24 29:7 35:15 38:19 48:3 murder 40:16 murderers 36:17 music 9:7,8 muster 42:22 M-rated 56:8	never 8:3 16:7,11 16:12 38:18 53:21 53:23 56:5 new 3:12,13 6:19 8:4 10:6 15:9 16:11 23:23 25:18 26:15 31:12 33:16,17 37:11,16,17 38:11 38:12 43:16 44:7,7 44:9 48:7 53:18 57:1 nice 24:14 Ninth 20:19 21:5,18 non-content 40:1 non-narrative 39:19 non-obscene 58:1 normal 4:14 norms 4:16,17 7:21 note 6:10 54:13 novels 38:16 November 1:11 nudity 17:1 46:23 number 56:8 numbers 10:23	47:3 office 23:15 24:3,13 oh 8:2 okay 5:1 10:21,21 11:25 12:2,15 16:21,22 21:21 22:8 32:3 51:17 57:22 58:5 old 10:10 11:7 30:7 58:16 ones 16:21 24:8 31:6 open 42:21 59:12 opinion 21:18 24:3,6 opinions 15:10 opportunity 31:3 opposed 4:13 59:18 opposite 36:19 options 12:17 59:22 oral 1:13 2:2,5 3:7 26:6 order 13:10 ordinance 48:10 57:6 ordinary 48:3 original 9:8 12:4 ought 53:1,16 55:10 outer 27:23 outlaw 7:10 outside 3:15,22 overbreadth 41:25 overbroad 41:25 42:21 overcome 54:3 overreacting 38:13 over-restrictive 54:15	panderers 14:11 parallel 14:19 Pardon 17:20 parent 3:15,22 11:21 22:8,14,15 28:14,22 30:6,23 31:3,23 parental 25:15,20 25:22 30:10,17 31:3,5,17 parenting 7:1 parents 3:25 4:4,5 22:2,18,22 29:1,22 29:25 30:1,11,20 33:13,17 45:6,11 48:24 49:24 50:13 50:15 53:23,25 54:1 56:13 parole 54:23 part 10:22 21:9 44:6 60:1 partial 17:1 particular 13:15 16:20 27:20 28:10 50:20 parts 20:2 pass 24:25 26:15 28:9 34:17 42:22 passages 36:25 passed 17:16 passes 34:25 passively 27:1 patently 5:15 15:18 PAUL 1:20 2:6 26:6 Pediatric 18:11 29:13 pedigree 46:2,11 Penal 23:11 penalties 13:13 55:24 penalty 35:2,8 54:21 55:25 people 7:12 9:9 16:11 18:13 31:16	32:15 33:5,7 34:1 36:17,21 38:13 39:5 40:6 47:16 53:13 56:4 58:4 people's 47:17 percent 30:21 36:16 45:10 50:9 perfectly 22:8 50:6 period 31:2 permission 31:17 35:15 permit 21:13 permits 3:21,25 4:8 person 10:13 39:13 39:14 40:24 59:25 Petitioners 1:5,19 2:4,10 3:8 56:21 physical 60:6 pick 51:6 picture 31:24 37:1 place 31:2 plain 12:12 play 13:6 35:15 39:24 41:5,6 Playboy 31:7 played 29:23 30:24 31:4 58:20 player 12:18 40:19 40:22 playing 11:11 36:21 39:7 50:15 54:2 59:2 please 3:10 26:9 plenty 45:15 49:17 plot 39:11 40:4,14 40:18 41:3 57:7,8 57:13,14,18,22 plummeting 45:9 Plus 31:5 point 7:19 8:18 11:9 14:14 19:25 21:23 43:8,10,14,15 49:7 56:24 57:5 pointed 55:21
<hr/> N <hr/> N 2:1,1 3:1 naked 31:25 32:4 47:16 narrative 39:10,19 39:22 narrow 8:10 narrowing 60:7 narrowly 42:22 nature 5:23 46:12 57:9,11,18,19 necessarily 26:19 necessary 11:14,24 21:3 need 21:10 29:22,24 33:17 50:2 needs 49:10 53:15	<hr/> O <hr/> O 2:1 3:1 objection 22:7 obscene 6:1 9:15 16:25 23:6 27:25 28:5 57:25 obscenity 10:5,18 14:18 15:2,3,16 16:7,13 17:1 19:5 27:15,16 28:12 45:18,20,24 46:17 47:11,14,25 55:18 58:7 obvious 14:19 obviously 39:17 occur 39:12 41:7 occurring 39:10 offensive 5:15 14:24 15:18 26:22 39:16	<hr/> P <hr/> P 1:17 2:3,9 3:1,7 56:20 packaging 56:12,15 PAGE 2:2 painful 28:17	panderers 14:11 parallel 14:19 Pardon 17:20 parent 3:15,22 11:21 22:8,14,15 28:14,22 30:6,23 31:3,23 parental 25:15,20 25:22 30:10,17 31:3,5,17 parenting 7:1 parents 3:25 4:4,5 22:2,18,22 29:1,22 29:25 30:1,11,20 33:13,17 45:6,11 48:24 49:24 50:13 50:15 53:23,25 54:1 56:13 parole 54:23 part 10:22 21:9 44:6 60:1 partial 17:1 particular 13:15 16:20 27:20 28:10 50:20 parts 20:2 pass 24:25 26:15 28:9 34:17 42:22 passages 36:25 passed 17:16 passes 34:25 passively 27:1 patently 5:15 15:18 PAUL 1:20 2:6 26:6 Pediatric 18:11 29:13 pedigree 46:2,11 Penal 23:11 penalties 13:13 55:24 penalty 35:2,8 54:21 55:25 people 7:12 9:9 16:11 18:13 31:16	32:15 33:5,7 34:1 36:17,21 38:13 39:5 40:6 47:16 53:13 56:4 58:4 people's 47:17 percent 30:21 36:16 45:10 50:9 perfectly 22:8 50:6 period 31:2 permission 31:17 35:15 permit 21:13 permits 3:21,25 4:8 person 10:13 39:13 39:14 40:24 59:25 Petitioners 1:5,19 2:4,10 3:8 56:21 physical 60:6 pick 51:6 picture 31:24 37:1 place 31:2 plain 12:12 play 13:6 35:15 39:24 41:5,6 Playboy 31:7 played 29:23 30:24 31:4 58:20 player 12:18 40:19 40:22 playing 11:11 36:21 39:7 50:15 54:2 59:2 please 3:10 26:9 plenty 45:15 49:17 plot 39:11 40:4,14 40:18 41:3 57:7,8 57:13,14,18,22 plummeting 45:9 Plus 31:5 point 7:19 8:18 11:9 14:14 19:25 21:23 43:8,10,14,15 49:7 56:24 57:5 pointed 55:21

<p>point's 43:11</p> <p>political 11:19 47:4</p> <p>Pong 39:7</p> <p>pornography 52:21</p> <p>portions 20:3</p> <p>portray 41:4</p> <p>portrayals 16:8</p> <p>portrayed 37:25 59:18</p> <p>portrays 26:20</p> <p>position 33:21,23 34:1,9,14 48:19,21</p> <p>possibility 42:21</p> <p>possible 30:5 34:21</p> <p>possibly 33:19 37:17</p> <p>Postal 12:8 42:14 59:12</p> <p>potential 19:3</p> <p>pour 33:9</p> <p>pouring 58:4</p> <p>precise 15:1,5,6</p> <p>precision 43:6</p> <p>presence 3:22</p> <p>present 4:6 27:10</p> <p>presented 3:17 5:22 9:22</p> <p>presents 38:4</p> <p>President 7:1</p> <p>pressure 38:23</p> <p>presumably 6:21 12:8</p> <p>pretty 43:11</p> <p>prevent 21:3</p> <p>preventing 19:8,14</p> <p>primary 19:22</p> <p>principle 5:10 18:2</p> <p>prior 35:16</p> <p>private 35:11</p> <p>probably 51:24</p> <p>probe 14:16</p> <p>problem 14:20 24:1 34:21 44:1 45:5,5 48:23 49:9 50:1,4</p>	<p>50:6,7 53:15,21 54:4,9</p> <p>produced 38:17</p> <p>producer 13:9 59:24</p> <p>prohibit 33:24</p> <p>prohibited 58:18</p> <p>prohibition 16:11</p> <p>promoted 21:12 37:21</p> <p>promotes 4:3</p> <p>prong 57:9</p> <p>prongs 5:13 8:7 12:24 23:21 25:8</p> <p>proof 49:17,20,23</p> <p>proper 27:22</p> <p>prophylactic 8:9</p> <p>proposition 50:1</p> <p>proscribable 47:21</p> <p>proscribed 47:25</p> <p>proscription 23:18</p> <p>prosecuted 56:5</p> <p>prospect 56:14</p> <p>protect 4:4 33:11 34:7</p> <p>protected 15:5 19:13 40:23 46:9 52:3</p> <p>protecting 19:18</p> <p>protection 26:17</p> <p>provided 7:17</p> <p>provoke 18:9 19:1</p> <p>pro-social 6:11</p> <p>prurient 11:15 46:6 46:24 47:17</p> <p>Psychiatric 29:12</p> <p>Psychological 18:10 29:12</p> <p>publishing 55:22</p> <p>punted 53:7,9</p> <p>purchase 4:9</p> <p>purchasing 30:21,22</p> <p>purpose 20:23</p> <p>put 50:19,20 53:6 60:1</p>	<p>Q</p> <p>question 5:19 7:6 9:2 12:4 18:18 29:21 33:14 38:4 51:11 52:9,19 60:20</p> <p>questioning 42:10</p> <p>questions 14:15 15:1 23:25 25:11</p> <p>quite 4:22 18:3 25:3 36:19</p> <p>quotation 57:24</p> <p>R</p> <p>R 3:1</p> <p>raft 38:17</p> <p>raised 56:25</p> <p>range 12:17 31:11 59:21</p> <p>rap 9:6,8</p> <p>rate 13:25 14:1</p> <p>rated 14:7 51:20</p> <p>rates 35:1</p> <p>ratified 16:12,12 37:18</p> <p>rating 49:19</p> <p>ratings 14:4 30:20 45:13 56:10,12</p> <p>reach 51:21</p> <p>reaction 15:12</p> <p>read 12:6 37:19</p> <p>reading 33:8 36:25 37:24 38:22</p> <p>reads 37:5</p> <p>ready 7:3</p> <p>real 54:11</p> <p>reality 36:19</p> <p>really 13:21 35:20 35:22 37:3 43:17 54:5 57:6,10</p> <p>realm 25:4</p> <p>reason 29:1 34:20 35:20 41:23 43:25</p> <p>reasonable 21:12</p>	<p>58:23</p> <p>reasonably 47:15</p> <p>reasons 3:23 60:5</p> <p>REBUTTAL 2:8 56:20</p> <p>recognition 17:17</p> <p>recognize 8:25 28:9</p> <p>recognized 23:3</p> <p>record 6:7 27:10,12 36:20 48:23 50:12 52:9,12,13,16</p> <p>red 37:22 39:24</p> <p>redeeming 11:18 28:19 47:4</p> <p>reference 15:2,3 46:20 47:11</p> <p>referenced 41:22</p> <p>referred 40:21</p> <p>referring 25:15</p> <p>regard 19:7 22:24 23:4 47:22</p> <p>regarding 6:9,17,24 17:12 21:1</p> <p>regulate 3:21 6:21 6:22 17:2 18:5,6 39:12,16 48:6</p> <p>regulated 8:17 9:3</p> <p>regulates 57:2</p> <p>regulating 8:20 39:22 40:7</p> <p>regulation 15:15 19:21 45:6 53:18</p> <p>released 6:17</p> <p>remainder 26:1</p> <p>remaining 56:19</p> <p>remember 52:21</p> <p>rental 57:2</p> <p>require 21:2 46:8</p> <p>required 45:2</p> <p>requirement 20:10</p> <p>requirements 20:17</p> <p>requires 10:22</p> <p>requiring 45:5</p> <p>reserve 26:1</p>	<p>respect 3:13 18:25 28:6 30:9 45:18 47:13</p> <p>Respondents 1:21 2:7 26:7</p> <p>restraint 35:16 49:20</p> <p>restrict 4:8 54:17 55:10,13</p> <p>restricted 52:19 55:14</p> <p>restricting 56:7</p> <p>restriction 20:21 21:10,11,13</p> <p>restrictive 25:12 44:3</p> <p>restricts 26:10</p> <p>retail 22:24</p> <p>retailer 49:19</p> <p>retailers 18:22</p> <p>review 30:23 48:12</p> <p>rid 9:6</p> <p>right 9:5 18:16,22 22:7,19 28:22 35:4 35:23 41:17 43:7 44:21 51:13,14,17 54:4 58:4 59:12</p> <p>rightfully 11:2</p> <p>rights 8:23,24 35:6</p> <p>rises 21:22</p> <p>ROBERTS 3:3 5:18 6:18 26:2,5,23 27:9,17 30:15 33:2 33:21 34:5,10,14 41:10,13,21 42:9 42:17 49:6,11,14 50:18,23 51:5,19 51:25 52:4,7 54:20 55:2 56:17 60:25 61:3</p> <p>rock 38:25</p> <p>role 29:23</p> <p>room 53:23</p> <p>rule 3:20,25 4:3,8</p>
--	--	---	---	--

53:18 rules 15:5 53:14 55:23 56:1,3,3,6 ruling 20:4 run 42:8	27:20 30:8 scientific 6:24 11:19 scientists 38:20 scope 33:19 53:19 score 52:18 screen 8:4 41:4 scrutiny 21:13 44:17 45:1,20 48:22 49:4 51:15 se 32:13 search 25:20 secondly 4:3 secretly 50:14 Section 23:11 sections 20:6 see 12:14,25 19:14 22:11 25:9 44:5 56:4 Seeing 37:24 sees 23:1 self-censored 38:24 sell 11:20,22 20:22 34:3,18 40:3 43:19 60:2 seller 24:1,7 selling 20:10 35:3 Senate 38:21 send 50:10 sense 9:16 21:18 27:14,18 28:13,14 28:21 30:8 31:21 31:21,22 32:5,12 37:7 51:16 sentenced 54:23 separate 13:1 21:10 39:18 series 30:11 serious 11:18 43:11 seriously 26:12 served 20:23 22:21 services 21:2 set 5:16 33:9 34:18 39:12 40:13 sets 39:4	setting 40:6 sex 14:22 15:22 32:17,24 46:23 47:16,16 53:1 58:11 60:5 sexual 3:14 9:20 14:10,11,21,24 15:15,15,20 23:1,4 23:8,19 24:16 25:4 58:10 sexually 12:19 46:5 shameful 11:15 shelf 51:7,21 shooting 33:7 shovel 33:6 show 6:5 16:15 31:18 showing 36:6,7 45:2 shown 16:15 45:4 shows 52:16 53:5 shred 27:6 side 29:14 40:21 sides 27:13,20 sign 29:13 significant 15:7 23:3 31:7 significantly 44:4 similar 10:6 23:20 25:3 31:6 58:11 60:5 similarities 15:21 simple 25:19 43:22 49:12 simply 11:14 28:10 50:16 single 57:24 sit 16:18 28:16 sitting 26:25 sky 38:14 small 28:18 56:8 smaller 56:8 Smith 1:20 2:6 26:5 26:6,8 27:5,12,19 28:2,7,25 29:20	30:9,18 31:11,15 32:7,18,23 33:13 33:22 34:1,9,11,20 35:5,10,24 36:5,12 36:15 37:8 38:11 39:1,9,21 40:8,12 40:17 41:2,10,12 41:18 42:3,16,24 44:13,19,25 45:19 45:25 46:14,21 47:12,23 48:4,19 48:21 49:3,9,13,16 49:22 50:5,10,22 51:1,6,15,23 52:2 52:5,12,18 53:3 54:5,25 55:4,16,20 56:6,18 61:1 smoking 16:15,15 social 7:13 17:16 27:8 28:19 38:20 47:4 societal 14:21,23 19:7 sociological 29:17 sold 24:8 42:12,14 solution 50:3 solutions 50:5 solve 49:10 solved 53:16 somebody 50:11 55:21 somewhat 27:15 28:11 songs 9:8 sorry 40:12 Sotomayor 7:5,12 7:20 8:12 9:6,12 9:14,15 17:18,21 19:25 20:6,9,14,16 21:8,16,20 45:15 49:2,5,16,23 50:8 59:17,23 60:7,10 60:19 sought 22:23	speaking 40:25 special 5:9 43:20 specifically 38:5 42:1 44:12 speech 8:15,16 9:3 16:5,6,8 17:12 37:6 38:8 39:2,8 40:7,10 43:24,24 52:3,3,5 spend 23:15 spent 53:3 58:25 spillover 19:3 spring 60:12 standard 5:14 8:8,9 8:24 9:1 11:3 12:24 25:3 47:2 57:10 standards 26:14 43:13 44:10 46:18 46:22 stands 10:1 start 15:16,17 started 38:16,18 47:20 starting 50:1 state 8:18 9:12 19:12,15,17,23 22:6,13 27:6,10,12 28:21,25 31:17,22 31:23 34:17,25 36:6 37:14 39:11 46:18 48:16 49:8 49:15 50:2,3,19 56:11 59:11 60:23 States 1:1,14 3:21 4:3,8 17:2,15 37:10 statute 6:14 10:1,22 12:8,9,16,16 14:5 14:16,17 15:2,11 17:19,22,24 41:25 42:22 43:4 55:10 58:18 60:22 statutes 8:18 17:15
---	---	--	---	---

45:18 step 56:2 Stevens 8:14 37:10 41:22 42:18 Stick 55:12 store 50:21 stores 49:18 street 38:20 strict 21:13 44:17 45:1,20 48:21 51:15 strike 42:20,25 striking 20:20 strongly 43:10 struck 8:19 20:2 21:6 35:12 structure 46:25 struggled 46:15 struggling 46:16 studies 6:5,16 7:6 18:15 29:3 36:10 36:13 52:14 study 6:8,20 7:7,10 52:18 stuff 22:3 subject 55:23 submit 10:4,8 26:18 40:22 43:2 submits 8:23 submitted 25:19 61:4,6 subset 26:18 56:8 substantial 5:22 sufficient 36:7 sufficiently 58:21 suggest 27:7 36:10 44:13 suggested 6:20 16:21 55:9 suggesting 7:16 46:3 suggests 18:20 suitable 11:17 sung 9:9	supervise 49:25 Supervising 1:17 supervision 31:4 support 52:10,13 suppose 6:19,19 16:1,17 27:2 supposed 18:16 29:16 31:1,1 supposing 5:5 Supreme 1:1,14 sure 5:21 9:17 13:13 19:11 20:8 57:21 58:25 surely 52:12 susceptible 43:5,8 suspect 54:16,16 system 35:11 45:13 49:19 50:11	tennis 39:7 tenor 42:10 terms 5:16 terrible 55:15 test 37:13 41:14,14 44:18 50:11 55:9,9 55:11 57:14 58:14 testers 50:13 testified 36:19 testimony 13:5 tests 41:19 43:23 Thank 26:2,4 32:20 56:16,17,22 60:25 61:2 they'd 56:2 thing 12:7 22:8 24:12,21,21 37:19 37:24 38:3 42:25 43:16,20 47:25 48:2 52:25 55:15 things 18:14 28:8 29:8 30:11 39:5 43:18 46:22 55:12 55:18 56:3 think 4:19 5:18 8:6 10:13,16 11:2,2,10 13:4 17:3 18:13,15 18:18 20:12 23:7 25:1,10 28:23 29:1 29:14,19 32:2,8 34:2 35:20,24 36:9 39:1,6 42:4,5,11 45:1 48:4 51:23 53:1,2,14,15,16 54:8 55:6,8,20 58:17 59:15 60:4 60:16,19 thinking 38:14 third 38:3 57:9 thoroughly 29:4 thought 15:11 17:5 17:9,10 21:11 41:21 three 5:13,16 8:7	12:24 23:21 time 8:4 14:23 15:20 23:16 26:1 30:21 30:25 33:14 37:18 38:5,9 59:1 today 3:11 14:15 15:2 19:9 26:12 30:12 37:8 today's 28:1 told 54:13 tolerably 46:4 tools 45:13 top 17:24 51:21 59:11 torture 30:4 32:3 44:2 55:14 tortured 59:19 torturer 28:16 torturing 12:19 28:17 43:18 total 44:7 55:13 totally 37:19 44:9 tradition 8:17,20 33:3,10 traditional 43:12,23 44:9,17 transform 35:10 36:16 treated 45:24 trial 36:20 tried 31:18 32:2,15 true 27:7 28:8 trust 14:11 truth 4:22 try 13:19 34:3 53:9 trying 44:20 46:12 53:4,11 55:5 Tuesday 1:11 turned 38:15 TV 39:7 53:5 TVs 53:23 twice 48:5 two 3:23 18:14 20:6 22:20 29:20 30:9	46:22 type 34:16 types 12:19 53:12 typical 11:10
<hr/>				
U				
<hr/>				
unacceptable 46:10 unaware 50:16 unconstitutional 20:13 unconstitutionally 42:7 understand 19:5,11 19:12 32:9,16,20 36:9 understood 16:6,7 27:3 42:10 uniquely 7:2 United 1:1,14 37:10 unprotected 46:10 upbringing 4:2,11 22:11 urinate 33:10 use 34:22 39:5 41:14 43:23 45:13 50:3 53:11 usual 26:13 utilizes 14:17				
<hr/>				
V				
<hr/>				
v 1:6 3:5 23:23 37:10 48:7 vague 14:16 15:11 34:16 vagueness 16:3,3 23:25 25:11 value 7:13 8:16 11:19 28:20 47:5,6 52:14 57:8,13,14 values 36:4 variable 10:18 28:11 variety 30:11 31:8 various 32:7				

vast 36:21 42:8 vastly 38:13 54:15 vendors 35:3 victim 39:14 video 3:18 4:9,13,14 5:7,9,19,24 6:5,9 6:10,22 7:9,16,24 9:19,25 10:23 11:14 12:9,10,11 12:14,17 13:6,24 13:25 17:5 18:12 18:22 20:11 25:21 26:19,25 29:7,9 32:1 33:24 34:7,18 35:1,21,22 37:20 39:2,6,19,19,20 40:3,4,15,17 47:4 47:6 48:17 50:20 50:21 52:10 53:22 53:25,25 54:2 57:2 59:9,12,15,17,24 60:2 videos 24:3,14 31:9 42:2,19,19 44:2 51:20 58:3 view 24:3,17 violate 42:15 violated 38:10 violates 42:13 violence 3:17 4:18 4:25 5:14,15,16 6:2 7:7,22,24 8:2 8:21 9:9 12:5,5,13 12:20,22 14:1,2,22 15:18,21 16:9,14 17:9,12 18:10,12 19:8 24:5 26:21 28:18 29:11 32:9 32:12,17 33:1,2 34:12 38:7 39:13 44:15 45:23 46:8,9 46:10,20 47:2,3,3 48:2 52:19,25 53:12,13 58:7,8,11	60:5,8 violent 4:9,13,14 5:6 5:10,24,24 6:9,20 6:25 7:2,8 9:3,8,19 9:20 13:2,2,3,15 17:17 19:15 22:3,4 22:25 24:5 25:7 35:22 36:25 40:5 42:12 45:8 48:6,17 50:20 53:5 54:2 60:9 Voltaire 57:25 voluntary 35:11 49:19,19 Vulcan 59:18 V-chip 25:13,24 V-chips 25:23	49:24 went 45:10 we'll 3:3 56:4 we're 21:21 39:16 52:25 54:5 60:6 we've 8:2,3 26:12 whit 36:23 52:14 white 25:9 37:21 willing 11:24 59:11 59:13 win 44:10 Winters 48:7 woman 31:25 32:4 women 28:18 wonderful 24:21 41:9 word 9:16 words 18:6,6,25 19:4,7 work 25:23 26:20 46:19 58:1,1,25 works 26:11,18 32:10 36:18 46:4 47:8,15 48:6 55:4 55:8 world 36:16 45:6,11 worse 43:21 worst 24:21 wouldn't 11:13 13:21 54:16 56:2,6 59:20 wrong 55:25 Wynn 8:20	50:15 53:4 58:16 York 3:12,13 10:6 23:23 48:7 young 5:25 25:21	21:6 54:9,22,23 55:7 56:4 58:16 18-year-old 11:23 54:18 18-year-olds 20:22 54:22 19th 38:17 1900s 17:25 1950s 38:19,20 1960s 48:8
			<hr/> Z <hr/> ZACKERY 1:17 2:3 2:9 3:7 56:20 Zauderer 20:25 21:1	
			<hr/> \$ <hr/> \$1,000 55:25 \$50 31:11,14 53:22 \$60 31:12 57:1	
			<hr/> 0 <hr/> 0 11:7 08-1448 1:6 3:4	
			<hr/> 1 <hr/> 10-year-old 10:3,15 34:18 42:14 10-year-olds 54:14 10:00 52:22 10:04 1:15 3:2 11:04 61:5 12-year-old 10:22 11:22 13 30:7 13-year-old 28:15 28:23 30:16 31:24 31:25 32:5 13-year-olds 31:13 15 45:11 16 50:11 54:7,9 16-year-old 31:19 54:3 16-year-olds 53:21 17 54:9 55:8 17-year-old 10:3,14 42:12 54:19 17-year-olds 10:25 54:7,14,16 56:10 18 10:10,20,23,23 11:7,16,16,17,20	
				<hr/> 2 <hr/> 2 1:11 12:8 42:14 59:12 20 50:8 200 37:12 2010 1:11 26 2:7
				<hr/> 3 <hr/> 3 2:4 313.1 23:11
				<hr/> 4 <hr/> 4 56:19 4-year-olds 10:25
				<hr/> 5 <hr/> 5 30:17 5-year-old 58:13,13 5-year-olds 54:14 54:15 55:11 50 45:9 56 2:10
				<hr/> 7 <hr/> 7-year-old 10:21 75 36:16
				<hr/> 8 <hr/> 8-year-old 10:15 80 18:13
				<hr/> 9 <hr/> 9 11:7

90 30:21