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IN THE  
**Supreme Court of the United States**

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ARNOLD SCHWARZENEGGER, In His Official Capacity  
as Governor of the State of California, and  
EDMUND G. BROWN JR., In His Official Capacity as  
Attorney General of the State of California,  
*Petitioners,*

v.

VIDEO SOFTWARE DEALERS ASSOCIATION AND  
ENTERTAINMENT SOFTWARE ASSOCIATION,  
*Respondents.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

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**MOTION FOR LEAVE TO FILE  
BRIEF *AMICUS CURIAE* OUT OF TIME IN  
SUPPORT OF THE PETITION FOR  
WRIT OF CERTIORARI AND BRIEF OF  
*AMICUS CURIAE* OF CALIFORNIA STATE  
SENATOR LELAND Y. YEE, Ph.D.,  
ASSISTANT PRESIDENT *pro TEMPORE*,  
THE CALIFORNIA PSYCHOLOGICAL  
ASSOCIATION, AND THE CALIFORNIA  
PSYCHIATRIC ASSOCIATION  
IN SUPPORT OF PETITIONERS**

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No. 08-1448

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**MOTION FOR LEAVE TO FILE A BRIEF  
AS *AMICUS CURIAE* OUT OF TIME  
IN SUPPORT OF THE PETITION  
FOR WRIT OF CERTIORARI**

Pursuant to Rules 37.2(b) of the Rules of the Supreme Court, California Senator Leland Y. Yee, Ph.D., Assistant President pro Tempore, The California Psychological Association, and the California Psychiatric Association respectfully moves this Court for leave to file the accompanying *amicus curiae* out of time in support of the Petition for Writ of Certiorari submitted by Petitioner Arnold Schwarzenegger, in his official capacity as Governor of the State of California, and Edmund G. Brown Jr. in his official

capacity as Attorney General of the State of California. Respondents have not granted consent, thereby making this motion necessary.

On May 19, 2009, the Petition for Writ of Certiorari was filed. On June 2, 2009, the Court, granted Respondents' request for an extension to file a response to the Petition for Writ of Certiorari. The Court's extended this response to July 22, 2009.

Counsel for *amicus curiae* misread Rule 37.2(a) to permit the filing of its brief up to July 22, 2009. Specifically, Rule 37.2(a) provides that an *amicus curiae* brief in support of a petitioner or appellant shall be filed within 30 days after the case is placed on the docket *or a response is called for by the Court*, whichever is later, and that time will not be extended. (emphasis added). Counsel for *amicus curiae* understood the Court's extension for the Respondents' response to be the date *called for by the Court* thereby extending the filing of the *amicus curiae* brief as well.

Notwithstanding this misinterpretation, it is respectfully submitted that leave to file this brief out of time should be granted because the issues presented in the Petition for Writ of Certiorari, as augmented by this attached brief, are of national importance which warrant this Court's review.

Indeed, this Petition encompasses constitutional questions with far reaching national implications regarding protecting the children of the United States from the negative lasting impact of interactive violent video games. The importance of this Petition is easily grasped by a simple survey of the state and local legislation which have been enacted to address the dangers associated with interactive violent videos games. These percolating constitutional questions

surfacing nationwide all concern narrowing a minor's access to violent interactive video games. Hence, not only is the time ripe for the Court to grant certiorari, but there are compelling reasons to do so.

Respondents are not prejudiced by granting this Motion for Leave to File this *amicus curiae* Brief supporting the Petition for a Writ of Certiorari. Counsel for the Respondents objected to the filing of this *amicus curiae* brief because it was untimely. It is no surprise, however, that Senator Yee and the organizations have weighed in because they have long been advocates of the legislation at issue. In fact, certainly known to Respondents, Senator Yee is the author of the California statute at the core of this case.

We respectfully submit that the Respondents' ground for objection is far outweighed by the numerous factors supporting the Court's granting leave to file this *amicus curiae* brief supporting the Petition.

For the above reasons, respectfully request that this motion for leave to file the attached brief *amicus curiae* out of time be granted.

Respectfully submitted,

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*Psychological Association, and*

*The California Psychiatric*

*Association*

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## QUESTIONS PRESENTED

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

The questions presented are:

1. Does the First Amendment permit statutory limits on the sale and rental of violent video games to minors when compelling reasons exist to support such state restrictions?
2. Should the flexible standard that is applied to restrictions on the sale of sexual material to minors under *Ginsberg v. State of New York*, 390 U.S. 629 (1968) equally apply to a State's regulation of harmful, interactive extremely violent video games?

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## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	iv
INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF THE ARGUMENT.....	3
ARGUMENT.....	7
I. THIS COURT HAS ACKNOWLEDGED SOCIETY'S RATIONAL AND COMPEL- LING INTEREST IN DISTINGUISH- ING AND LIMITING THE RIGHTS ENJOYED BY MINORS.....	9
II. VIOLENT VIDEO GAMES ARE HARM- FUL TO MINORS ALLOWING THE STATE CLEAR JUSTIFICATION IN REGULATING CHILDREN'S ACCESS TO THESE TO MATERIALS.....	11
CONCLUSION .....	15

## TABLE OF AUTHORITIES

CASES	Page
<i>Erznoznik v. City of Jacksonville</i> , 422 U.S. 205 (1974).....	10, 11
<i>FCC v. Pacifica Foundation</i> , 438 U.S. 726 (1978).....	10
<i>Ginsberg v. State of New York</i> , 390 U.S. 629 (1968).....	i, 4
<i>Ropers v. Simmons</i> , 543 U.S. 551 (2005).....	10
<i>Video Software Dealers Ass’n v. Schwarzenegger</i> , 556 F.3d 950 (9th Cir. 2009).....	4
CONSTITUTIONS	
U. S. Const. amend. I .....	i, 3, 7
STATUTES AND LEGISLATIVE HEARINGS	
California Civil Code sections 1746-1746.5. ....	i, 4, 7
<i>The Impact of Interactive Violence on Children</i> : Hearing Before the Commerce Committee, 106th Congress (March 21, 2000) (statement of Craig A. Anderson, Ph.D., Director, Center for the Study of Violence, Department of Psychology at Iowa State University).....	13
Before the Subcommittee on the Constitution, Civil Rights, and Property Rights of the United States Senate Judiciary Committee, Congress, (March 29, 2006) (statement of Senator Leland Y. Yee).....	5
RULES	
Sup. Ct. R. 10.....	7, 8
Sup. Ct. R. 37.6(b) .....	1

## TABLE OF AUTHORITIES

OTHER AUTHORITIES	Page
Committee on Public Education, " <i>Media Violence</i> ," American Academy of Pediatrics, Volume 108, Number 5, (November 2001).....	14
Craig A. Anderson, Ph.D, thousands of studies available at <a href="http://www.CraigAnders">http://www.Craig Anders</a> .....	12
Craig A. Anderson, Ph.D, " <i>Violent Video Games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior</i> ," Advances in Experimental Social Psychology, Vol. 36 (2004) .....	14
<i>Legislative Tracker</i> , available at <a href="http://www.GamePolitics.com">http://www.GamePolitics.com</a> regarding Video Game Health Labeling Act of 2009.....	8

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**INTEREST OF *AMICUS CURIAE* <sup>1</sup>**

Senator Leland Y. Yee is the author of the California statute which is at the core of this case. He

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<sup>1</sup> Pursuant to Rule 37.6 of the Supreme Court of the United States, counsel for amicus curiae authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus, its members, or its counsel make any monetary contribution to the preparation or submission of this brief.

serves the California Senate as the Assistant President pro Tempore. Prior to involvement in elected office, Senator Yee earned a doctorate degree in Developmental Psychology at the University of Hawaii and then worked in various mental health and school settings.

Prior to serving in the California Legislature, Dr. Yee spent eight years on the San Francisco Unified School District Board of Education where he worked for the improvement of the education system for school children. During his tenure in the Legislature, Senator Yee has fought for children, mental health services, working families, open government, and civil rights. In addition to authoring legislation protecting minors from the harmful effects of ultra-violent video games, Senator Yee has passed other laws geared to safeguarding children.<sup>2</sup> Likewise, of equal interest is the fact that Senator Yee has worked to defend and guarantee the constitutional right of free speech.<sup>3</sup>

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<sup>2</sup> Most notably, in 2004, he authored legislation protecting children from being exploited through prostitution and has been acknowledged for his work by receiving the Special Friend of Children Award by the National Association of School Psychologists.

<sup>3</sup> For his legislative and community efforts, Senator Yee has also been honored with the Freedom of Information Award by the California Newspaper Publishers Association. In addition, as result of his work for public access, open government and free speech rights, Californians Aware named Yee "Senator Sunshine." His legislation includes laws protecting high school and college teachers and other employees from retaliation by administrators as a result of student speech. In fact, Senator Yee authored legislation making California the first state in the nation to specifically prohibit censorship of college student press, including school newspapers and broadcast journalism.

The California Psychiatric Association is a non-profit corporation whose member psychiatrists are medical doctors specializing in the comprehensive care of adults and children with mental and emotional disorders that stem from biological and psychosocial causes, including those with drug and other addictions. The Association is dedicated to the prevention and treatment of mental disorders; to the furtherance of psychiatric education and research; and to the furtherance of psychiatric procedures for the public welfare. The Association has approximately 3,500 members, and is a component, Area 6, of the American Psychiatric Association, the largest professional association of psychiatrists in the United States.

The California Psychological Association and the California Psychiatric Association, as with Senator Yee, are concerned about the mental health of children.

Simply put, not only do *amicus* have a direct and vital interest in the specific statute before the Court, but additionally have a longstanding interest in safeguarding the mental well-being of children.

### **SUMMARY OF ARGUMENT**

By any measure, California has a compelling interest in protecting the physical and psychological care of minors. When juxtaposed against the backdrop of protecting the First Amendment, this Court has held that the Constitution does not confer the protection on communication aimed at children as it does for adults. When weighing the conflicting concerns of minors this Court correctly carved a flexible standard of review and not a strict scrutiny approach. We know, of course, that a state can prohibit the sale

of sexually-explicit material to minors under a “variable obscenity” or “obscenity as to minors” standard. *Ginsberg v. New York*, 390 U.S. 629 (1968). Just as it was rational for the State to conclude that that type of material was harmful to minors, the restrictions to assist parents in protecting their children’s well-being is, in a practical sense, no different than the concerns supporting California’s enactment of California Civil Code Sections 1746 – 1746.5.

Indeed, restricting the sale and rental of extremely violent interactive videos to minors advances the very same societal interests understood in *Ginsberg*. Contrary to the Ninth Circuit’s decision not to step beyond the perception that *Ginsberg* was meant exclusively to apply to sexually explicit materials and not to equally harmful materials depicting violence, the Court should grant certiorari to address what clearly is a question of first impression. *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009).

Needless to say, the world is much different today than it was in 1968 when *Ginsberg* was decided. What *has* remained for the past 40 years, however, is the understanding that the First Amendment does not protect harmful materials to minors.

In 2006, a Federal Trade Commission study revealed that nearly 70 percent of 13 to 16 year olds are able to successfully purchase Mature or M-rated video games. These M-rated games, labeled by the industry as such in an attempt to “police” the distribution of harmful videos, are designed specifically for adults. The content in these type of games enable the user to murder, burn, and maim law enforcement officers, racial minorities, members of clergy as well as sexually assault women.



In his March 29, 2006 testimony submitted to the Subcommittee on the Constitution, Civil Rights, and Property Rights of the United States Senate Judiciary Committee, Senator Yee noted that the interactive nature of video games is vastly different than passively listening to music, watching a movie, or reading a book. With interactive video games, the child becomes a part of the action which serves as a potent agent to facilitate violence and overtime learns the destructive behavior. This immersion results in a more powerful experience and potentially dangerous learned behavior in children and youth. In fact, often times it is the same technology that our military and police use to simulate and train for real life battle conditions and violent law enforcement confrontations in the community.

Moreover, there is a practical side in favor of the State's effort to regulate the sale or rental of violent video games to children. Parents can read a book, watch a movie or listen to a CD to discern if it is appropriate for their child. These violent video games, on the other hand, can contain up to 800 hours of footage with the most atrocious content often reserved for the highest levels and can be accessed only by advanced players after hours upon hours of progressive mastery.

Just as the technology of video games improves at astonishing rates, so to does the body of research consistently demonstrate the harmful effects these violent interactive games have on minors. Over three thousand peer-reviewed studies, produced over a period of 30 years documenting the effects of screen violence (including violent video games), have now been published in the professional journals of the American Academy of Pediatrics, American Academy

of Child and Adolescent Psychiatry, American Psychological Association, American Medical Association, American Academy of Family Physicians, and the American Psychiatric Association and others.

These data suggest very strongly that participating in the playing of violent video games by children and youth increase aggressive thought and behavior; increase antisocial behavior and delinquency; engender poor school performance; desensitize the game player to violence; and reduced activity in the frontal lobes of the brain.

Notably, extended play has been observed to depress activity in the frontal cortex of the brain which controls executive thought and function, produces intentionality and the ability to plan sequences of action, and is the seat of self-reflection, discipline and self-control.

The United States Surgeon General has also warned of a demonstrated link between screen violence and subsequent physical aggression in children and adolescents that is stronger than the link between second hand smoke and cancer.

Finally, new data shows that the intensity of interactive video games may be habituating and that 2-3 hour sessions of intense interactions with video games raise adrenaline levels in children and produces extended physiological arousal. In the medical community concern has been raised at prolonged and regularly repeated states of adrenalized arousal and hyper-vigilance involved in children watching violent video games and the possible harmful effects on still developing bodies and brains.

As a society, we understand the clear commonsense reasons to prohibit the sale of alcohol, tobacco, fire-

arms, driver's licenses and pornography to minors. That same common sense approach applies in the foundation and enactment of California Civil Code Sections 1746 – 1746.5. Given that the First Amendment does not protect the State's restriction on the sale or rental of harmful violent video games to minors, the Court should grant *certiorari* and uphold the statutory safeguards necessary in this modern day world.

### ARGUMENT

Numerous reasons support granting the Petition for *Certiorari* in order to confirm that the free speech protections of the First Amendment are not violated when States properly restrict the sale and rental of violent video games to minors. Indeed, although there are no clear conflicts among the circuit courts on this issue, other guidelines employed by this Court warrant granting *certiorari*.

For example, in exercising its discretion whether to grant *certiorari*, Rule 10 of the Supreme Court Rules instructs that the Court's jurisdiction will be granted for compelling reasons. The nation's interest in the health of its children, along with this admittedly significant constitutional question, easily qualifies the issues in this case as compelling.

Additionally, while there have been several court decisions striking down legislation similar to the state statute in this case, there currently exist active or proposed legislation enacting varying degrees of restriction on violent video games in other States. Specifically, the *Legislative Tracker* webpage at <http://www.GamePolitics.com> lists the numerous pieces of local, state and federal legislation that exist which address in some fashion the growing concern sur-

rounding violent video games. For example, according to *Legislative Tracker*, Massachusetts, New York, Utah, Pennsylvania, Maryland, Georgia, as well the House of Representatives with the *Video Game Health Labeling Act of 2009* all have active or proposed legislation addressing in some manner society's concerns with a minor's access to violent video games. <http://www.GamePolitics.com>

In other words, one part of the country may restrict what is otherwise unfettered in an other part of the country. Coupled with this practical "conflict" application of law, the increasing number of state and possible federal laws proscribing a minor's access to violent video games makes this percolating issue, if not already, an issue to be eventually taken up by the Court.

Moreover, the identified factors in Rule 10, while not fully measuring the character of the reasons for this Court's granting *certiorari*, include a scenario where a United States Court of Appeals has decided important questions of federal law contrary to this Court's relevant decisions. The appellate court's misapplication of the strict scrutiny test as well as its reluctance to correctly apply this Court's reasoning seen in *Ginsberg* further warrants *certiorari* in this case.

**I. THIS COURT HAS ACKNOWLEDGED  
SOCIETY'S RATIONAL AND COMPEL-  
LING INTEREST IN DISTINGUISHING  
AND LIMITING THE RIGHTS ENJOYED  
BY MINORS.**

The courts have long agreed that there is an overriding justification in protecting children from conduct pervasive in society. Without questions, restricting a minor's access to gambling, smoking and alcohol serve the community's interest in both protecting a minor's development as well as safeguarding against the individual and widespread collateral consequences which flow from a minor's early addiction to these vices.

As a general proposition, many constitutional rights vary in the degree to which the exercise of the right by minors is protected from government abridgment. For example, minors do not have the right to exercise the franchise. Similarly, a minor's right to have an abortion may be subject to regulations that would be rejected as unduly burdensome if they were applied to adult women. Thus, there is a recognized foundation for distinguishing between minors and adults in analyzing the constitutionality of regulations.

This foundation comports with the common sense intuition that, because children lack maturity to make wise judgments, their autonomy deserves less respect from the state than does the autonomy of adults. While paternalistic state regulations are correctly viewed as demeaning when applied to adults, there are considered appropriate, if not necessary, for children.

In *Ginsberg*, of course, this Court concluded that the state had greater authority to limit the exercise of protected freedoms because children were involved and, in relying on its precedents, recognized that “the State has an interest ‘to protect the welfare of children’ and to see that they are ‘safeguarded from abuses’ which might prevent their ‘growth into free and independent well-developed men and citizens.’”

As it relates to expressive materials, there is no language from this Court suggesting that the state’s interest in protecting minors from such material *is limited* to speech with sexual content. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) a case concerning restrictions on films depicting nudity from being shown in drive-in movies, the Court was unwilling to protect minors from brief exposure to such images.

However, the alleged harm caused by the minimal exposure to nude images a child passing by a drive-in theater might witness cannot realistically be compared to harm resulting from repeated and long term exposure to violent video games. In fact, in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court supported an FCC determination that the radio broadcast of a George Carlin monologue containing “filthy words” could be restricted precisely because it was accessible to young children.

Children, this Court has acknowledged, are different in the eyes of the law because of brain development. *Ropers v. Simmons*, 543 U.S. 551 (2005). Under the “evolving standards of decency” test, the Court held that it was cruel and unusual punishment to execute a person who was under the age of 18 at the time of the murder. Writing for the majority, Justice Kennedy cited a body of sociological and

scientific research that found that juveniles have a lack of maturity and sense of responsibility compared to adults. Adolescents were found to be over-represented statistically in virtually every category of reckless behavior.

In *Ropers*, the Court noted that in recognition of the comparative immaturity and irresponsibility of juveniles, almost every state prohibited those under age 18 from voting, serving on juries, or marrying without parental consent. The studies also found that juveniles are also more vulnerable to negative influences and outside pressures, including peer pressure. They have less control, or experience with control, over their own environment. This unequivocal commonsense approach by the Court to constitutional matters and children should be likewise applied in addressing the deepening dangers to minors from violent video games.

In sum, “[A] state or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults.” *Erznoznik*, at 212. Here, California’s control on the sale or rental of violent video games to minors fall within the permissible advancement of a significant, if not compelling, public interest in protecting the development and mental health of minors.

## **II. VIOLENT VIDEO GAMES ARE HARMFUL TO MINORS ALLOWING THE STATE CLEAR JUSTIFICATION IN REGULATING CHILDREN’S ACCESS TO THESE TO MATERIALS.**

There have been thousands of studies in the area of the effects of violent video games on children. Craig A. Anderson, Ph.D., Director, Center for the Study of

Violence, Department of Psychology at Iowa State University has been a leader in this area of study. On his website, Dr. Anderson describes the results of his studies and research. See <http://www.CraigAnderson.org>

In researching the association between media violence and aggressive behavior, Dr. Anderson, along with others, has determined that there is a significant relation between exposure to media violence and aggressive behavior. He believes that “Exposing children and adolescents (or “youth”) to violent visual media increases the likelihood that they will engage in physical aggression against another person. “By “physical aggression” we mean behavior that is intended to harm another person physically, such as hitting with a fist or some object. A single brief exposure to violent media can increase aggression in the immediate situation. Repeated exposure leads to general increases in aggressiveness over time. This relation between media violence and aggressive behavior is causal.”

Moreover, Dr. Anderson concluded, repeated consumption of media violence over time increases aggression across a range of situations and across time because of several related factors:

1. It creates more positive attitudes, beliefs, and expectations regarding aggressive solutions to interpersonal problems. In other words, youth come to believe that aggression is normal, appropriate, and likely to succeed.
2. It also leads to the development of aggressive scripts, which are basically ways of thinking about how the social world works. Heavy media



violence consumers tend to view the world in a more hostile fashion.

3. It decreases the cognitive accessibility of non-violent ways to handle conflict. That is, it becomes harder to even think about nonviolent solutions.

4. It produces an emotional desensitization to aggression and violence. Normally, people have a negative emotional reaction to conflict, aggression, and violence, and this can be seen in their physiological reactions to observation of violence (real or fictional, as in entertainment media). For example, viewing physical violence normally leads to increases in heart rate and blood pressure, as well as to certain brain wave patterns. Such normal negative emotional reactions tend to inhibit aggressive behavior, and can inspire helping behavior. Repeated consumption of media violence reduces these normal negative emotional reactions.

5. Repetition increases learning of any type of skill or way of thinking, to the point where that skill or way of thinking becomes fairly automatic. Repetition effects including learning how to aggress.

In his March 21, 2000 testimony before the United States Commerce Committee hearing on the "The Impact of Interactive Violence on Children," Professor Anderson at the outset stated what his extensive research revealed:

"Though there are many complexities in this realm of behavioral research, there is one clear and simple message that parents, educators, and public policy makers such as yourselves need to

hear: Playing violent video games can cause increases in aggression and violence.”

Repeatedly thinking about violent characters, choosing to be aggressive, enacting that aggressive choice, and being rewarded for it can be conceived as a series of learning trials influencing a variety of types of aggressive knowledge structures. “*Violent Video Games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior*,” *Advances in Experimental Social Psychology*, Vol. 36 (2004).

The American Academy of Pediatrics also, with numerous others, concludes that exposure to violence in media, including violent video games, can contribute to aggressive behavior, desensitization to violence, nightmares and fear of being harmed. “*Media Violence*,” American Academy of Pediatrics, Volume 108, Number 5, (November 2001). The study by the American Academy of Pediatrics found that American children between 2 and 18 years of age spend an average of 6 hours and 32 minutes each day using media, including video games.

Predicated on years of studies and research, the American Psychological Association formally recognized the serious negative impact of violent video games on this nation’s children and passed its Resolution “On Violence in Video Games and Interactive Media.” This prestigious association of experts concluded not only that there are long term negative effects on children in playing these violent video games, but that the industry, the public, parents, caregivers and educational organizations had a responsibility to intercede in this epidemic. The California statute authored by Senator Yee and enacted into law was a response to that call for assistance

given our children's unfettered access to violent video games.

In the end, commonsense tells us what this mountain of research reveals. Society has a direct, rational and compelling reason in restricting a minor's access to violent video games. This Court has never directly dealt with this precise issue, but its precedent in protecting children clearly leads one to believe that the Court will agree and reverse the lower court thereby upholding California's statute.

### CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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