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Setting the stage: Arnold Schwarzenegger and video games prepare for battle in the United States Supreme Court

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ABSTRACT

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Video games often feature a character that evolves into an iconic superhero. In a strange twist of fate, the video game medium will have the opportunity to become a superhero itself. The recording, comic book, and movie industries have rallied around video games as the case of Arnold Schwarzenegger vs. Entertainment Merchants Association and Entertainment Software Association reaches the Supreme Court of the United States. The case concerns a 2005 California ban on the sale of violent video games to minors. The law was later overturned by the District Court and the 9th Circuit Court on appeal. At issue is whether the law violates the First Amendment of the Constitution. Do video games deserve the full protection of the Constitution as a legitimate form of speech, or should it be limited due to its alleged effects on the psychological well-being of minors? This Article will look at the impact this case may have when it reaches the Supreme Court, an analysis of the issues that will be argued, and the history of legislation involving violent video games.

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1. Introduction

Eric David Harris and Dylan Bennet Klebold were two unpopular and misfit high school kids in Littleton, Colorado. The two friends spent their time together playing online video games such as *Doom* and *Quake*, as well as listening to hardcore heavy metal groups such as Rammstein, Nine Inch Nails, and Marilyn Manson.¹ On April 20, 1999, Harris and Klebold walked into their high school and, armed with two 9-mm rifles and two 12-gauge shotguns, opened fire on their classmates and teachers, killing 12 students and one teacher, and injuring 24 others. In the aftermath of the tragedy, parents and lawmakers struggled to understand why this had happened. People began pointing fingers at a variety of possible culprits, including the social climate at their school where they were bullied and harassed,

violence in films (such as the *Basketball Diaries*, where Leonardo DiCaprio's character dreams of wearing a trench coat and shooting his classmates in the school hallways), and the gothic subculture.² However, the factor which received by far the most media coverage was that of their obsession with video games.

In the years following the Columbine massacre, video games would see growing media scrutiny and governmental restrictions. In many ways it was a firestorm of their own making, aided in part by constant envelope pushing and more controversial material. One thing is for sure – with the growth of video game legislation and a political climate which views video games as a social ill, the stage is set for a showdown between the proponents of free speech, and those who seek to restrict it for the purposes of protecting minors.

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¹ Matt Richtel, *NEWS WATCH: Game Makes on the Defensive after the Columbine Shootings*, N.Y. Times, April 29, 1999, available at <http://www.nytimes.com/1999/04/29/technology/news-watch-game-makers-on-the-defensive-after-the-columbine-shootings.html%3Dscp=1&sq=Richtel&st=nyt>.

² Janelle Brown, *Doom, Quake, and Mass Murder*, Salon Magazine, <http://www.salon.com/technology/feature/1999/04/23/gamers/index.html> (last updated Apr. 23, 1999).

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On Nov. 2, 2010, the Supreme Court of the United States will hear oral arguments on *Arnold Schwarzenegger v. Entertainment Media Association*. While the California governor is more widely known for his epic and also quite violent movie roles, he is the named petitioner for this case in support of a California law banning the sale of violent video games to minors. Banning violent video games has always generated controversy and outrage on both sides of the issue. This Article will examine the legal issues that will be up for argument before the nine Justices of the Supreme Court. Part I offers a look at the fate of several laws aimed at violent video games and minors in the United States and whether they have withstood public and judicial scrutiny. Part II will look at the legal issues and procedural history of the California cases specifically. Part III will analyze the legal arguments which will be up for argument in front of the Supreme Court and analyze how the Court might hold.

2. A history of violent video game legislation

Despite the public outcry demanding that lawmakers take action to ban violent video games, particularly in the wake of the Columbine massacre, many of the subsequent responses in the United States have been unsuccessful.³ The reason for this is that video games fall under the shield of the First Amendment of the United States Constitution, which states in part that “Congress shall make no law ... abridging the freedom of speech.”⁴ So far the First Amendment has protected video games from restrictions barring access by minors. The types of legislation in the United States regarding video games and minors fall into two general categories: rating requirements and restrictions on access. Rating requirements deal with the obligation by either manufacturers or retailers to clearly label whether the content in the game is age-appropriate. Restrictions on access involve either the bar on sales of video games to minors or the refusal to sell the video game at all in a specific geographical market, or the limitation of access to games through licensing or zoning regulations.

2.1. Rating requirements

Generally, rating requirement legislation by itself has not been opposed by the video game industry. In 1994, the video game industry established a voluntary system of rating by the Entertainment Software Rating Board (hereafter “ESRB”).⁵ The ESRB ratings are based on age-appropriateness which retailers are then free to use in exercising sales discretion. The rating system is also meant to function as a guide for parents similar to the rating system used by the Motion Picture Association of

America. The ESRB Rating system has been criticized for failing to halt the creation of objectionable content or adequately informing parents of the actual content of games.⁶ Furthermore, without intervention from retailers and parents, minors can still have access to violent video games. On the other hand, certain retailers have been known to ban games based on their rating, or set internal policies for ensuring that games are only sold to the appropriate age group.⁷

Laws which fall into this category may require retailers or rental stores to place signs notifying customers about the rating system and explaining what the various ratings mean. Information in the form of pamphlets or booklets explaining the system must also be made available to consumers upon request. Most laws which fit under the category of rating requirements follow the ESRB framework, with one notable exception. California created a separate rating requirement which would have required a label affixed to games which fit under their definition of violent. That requirement, as linked to the statute banning the sale of those violent video games to minors, is discussed below.⁸ Laws falling under the category of rating requirements have been passed in New York,⁹ Washington,¹⁰ and Georgia¹¹ and are still current law as of this date.

2.2. Restrictions on access

In contrast, laws which restrict the sale or distribution of video games (to minors and adults) have had a much harder time withstanding scrutiny. In all, the courts have ruled twelve times since the year 2000 against governments trying to impose a ban that limits access to the sale of video games, resulting in a total of \$2.15M of taxpayer money paid to the industry for legal fees, as well as costs of appeals and man-hours.¹²

⁶ Kimberly Thompson, et al., *Content and Ratings of Mature-Rated Video Games*, Archives of Pediatrics & Adolescent Medicine, Vol. 160, No. 4 (Apr. 2006) (“We believe that current discussions about restricting children’s access to violent games may miss the reality that both T-rated and M-rated games contain significant amounts of violence.”).

⁷ Walmart Terms of Use: Video, Movie, TV Program and Computer Game Ratings, available at <http://www.walmart.com/cp/Terms-of-Use/538449> (“<http://Walmart.com> does not sell games rated “AO: Adult Only” or movies rated NC-17.”)

⁸ See *infra*, Section 3.

⁹ Act of July 21, 2008, 2008 N.Y. Laws ch. 299 (amending the general business law and the executive law, in relation to rating video games and disseminating violent and indecent video games to minors). This law, while controversial when it was passed, has also been criticized for being “without teeth”. To the extent it penalizes dissemination of violent and indecent games to minors, it requires only that video game manufacturers install a parental lock on gaming consoles, a feature which is already widely available on all gaming platforms. The rest of the law mirrors the rating requirement laws in other states. See Dennis McCauley, *The Political Game: NY video game bill barks, doesn’t bite*, at <http://www.joystiq.com/2008/06/30/the-political-game-ny-video-game-bill-barks-doesn-t-bite/>.

¹⁰ Wash. Rev. Code Ann. §19.188.040 (West 2005).

¹¹ Ga. Code Ann. §16-12-103(f)(2005).

¹² *Essential Facts About Video Games and Court Rulings*, Report by the Entertainment Software Association, available at <http://www.theesa.com/facts/pdfs/EF CourtsandRulings2010.pdf>.

³ *Video Software Dealers Ass’n v. Arnold Schwarzenegger*, 401 F. Supp. 2d 1034, 1039(N.D. Cal. 2005) (“California is not the first state to attempt to limit minors’ access to violent video games... [T]he Seventh and Eighth Circuits have found specific ordinances on the subject run afoul of the First Amendment...Several district courts have also struck down similar ordinances.”)

⁴ U.S. Const. amend. I.

⁵ Kelly Anders, *Marketing and Policy Considerations for Violent Video Games*, Journal of Public Policy & Marketing, Vol. 18 (2), at 271 (Fall 1999).

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