

Client Alert

Latham & Watkins Litigation Department

Game Over for California's Video Game Law

Introduction

Gamers and game developers can breathe a sigh of relief. On June 27, 2011, the US Supreme Court delivered its long-awaited opinion in *Brown v. Entertainment Merchants Association*, striking down a California law that banned the sale or rental of violent video games to minors. However, the opinion affects more than just minors and those who profit from the sale of games — more generally, it reaffirms the Court's strict First Amendment jurisprudence and issues a warning to legislators wishing to impose content regulations.

Background

Against the backdrop of other states having passed similar laws,¹ California enacted a law prohibiting the sale or rental of violent video games to minors, which was to take effect on January 1, 2006. The law addressed video games that allow the player to kill, maim, dismember or sexually assault an image of a human being, so long as 1) those acts are depicted in a manner that a reasonable person would find that it appeals to a "deviant or morbid interest of minors," 2) it is "patently offensive to prevailing standards in the community as to what is suitable for minors" and 3) "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors."²

However, the law allowed a minor's "parent, grandparent, aunt, uncle, or legal guardian" to purchase or rent a violent video game for the minor.³

Many courts in other jurisdictions had considered similar laws restricting minors' access to violent video games, and found that they were unconstitutional.⁴ After Governor Schwarzenegger signed the law, the Video Software Dealers Association and the Entertainment Software Association brought a pre-enforcement challenge, alleging that the law was unconstitutional.⁵ The district court agreed with plaintiffs, finding that the violent video games law was unconstitutional and permanently enjoined the Governor and others from enforcing it.⁶ The Ninth Circuit agreed.⁷ California petitioned the Supreme Court, which granted certiorari.

Given the relatively settled nature of the law in the lower courts, the Court's decision to take the case in the first place might have been influenced by the support given to California's position by a number of other states. Attorneys General from 11 states submitted a brief in support of California's petition for certiorari, insisting that such statutory restrictions do not implicate the First Amendment.⁸ These states claimed that "[o]ther courts have made the same mistake" of finding that such statutory restrictions run afoul of the First Amendment.⁹

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In a 7-2 decision, the Court struck down the law, with Justice Scalia delivering the majority opinion. The Court found, and California conceded, that video games qualify for First Amendment protection.¹⁰ Because California's law purported to regulate the content of speech, it was subject to "strict scrutiny" by the Court: to pass muster, the law must be *narrowly tailored* to promote a *compelling government interest*.¹¹

The Court found that preventing violence in minors by way of prohibiting the sale of violent video games was not compelling, given that there was no evidence that playing violent video games actually *caused* violence.¹² Like other courts that had considered the issue, it found that while the scientific research demonstrated a *correlation* between exposure to violent video games and harm to minors, the evidence did not rise to causation.¹³

California claimed that it had a compelling interest in assisting with parental supervision of their children's exposure to violence. But the Court was not persuaded that the law actually met a substantial need of parents who want to restrict their children's access to violent video games.¹⁴ The Court noted that the video game industry already has in place a voluntary rating system, the effect of which "does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home."¹⁵

Moreover, the Court found that California's law was not narrowly tailored, in that it was both overinclusive and underinclusive. It was overinclusive because some parents might not care whether their children are exposed to violent video games (or believe that such exposure causes violence), so the law imposed "what the State thinks

parents *ought* to want."¹⁶ The law also was underinclusive because it allowed children access to these violent video games so long as a parent or guardian approved; and it did not exclude cinematic or other portrayals of violence, even though studies had shown that these works also might have an effect on children's behavior.¹⁷

Concurrence

Justice Alito and Chief Justice Roberts concurred, but believed that because the law's definition of "violent video games" was "impermissibly vague" there was "no need to reach the broader First Amendment issues addressed by the Court."¹⁸

A law must give "fair notice" to individuals of prohibited behavior so they know the parameters of what they are allowed to do. Alito and Roberts concluded that California's violent video games law failed to put constituents on notice, given the statute's failure to define terms such as "deviant" and "morbid"¹⁹ and to distinguish between "young children and adolescents who are nearing the age of majority."²⁰

The concurrence also was wary of the majority's dismissal of the possibility that playing violent video games might yield a different experience than reading violent books or watching violent movies.²¹ Justices Alito and Roberts stressed the "realistic alternative worlds," "strikingly realistic" audiovisual features, and the high likelihood that video games will include "sensory feedback" in the near future — such as a vest or other device that allows the player to feel blood splattering from dismembering another.²²

The Dissents

Justice Thomas authored one of the two dissents in the case. Thomas would have upheld California's violent video games law because (in his view²³) at the time the Constitution was written,

the “freedom of speech” did not include a “right to speak to minors (or a corresponding right of minors to access speech) without going through the minors’ parents.”²⁴ Thomas asserted that the Founders believed that parents had “complete authority over their minor children,” and because the California law left the discretion of the purchase or rental of such video games in the hands of the “minor’s parent, grandparent, aunt, uncle, or legal guardian,” he would have found that it did not run afoul of the First Amendment.²⁵

Justice Breyer authored the other dissent. As to the vagueness issue that motivated the concurrence, Breyer found that the California statute was similar enough to the obscenity statute upheld in precedent, *Ginsberg v. New York*, 390 U.S. 629 (1968), and even if there were any vagueness problems, the state courts could “cure them through interpretation.”²⁶ Breyer found no reason to treat state regulation of obscenity (which does not run afoul of the First Amendment) different from state regulation of violent video games.²⁷ Because California’s violent games law was modeled, almost word for word, on the obscenity statute upheld in *Ginsberg* (“morbid interest,” “patently offensive to prevailing standards,” “without redeeming social importance”), Breyer failed to see how the statute was void for vagueness.

Breyer agreed that video games were protected First Amendment expression, and sought to apply the same strict scrutiny standard as the majority. However, Breyer’s concept and application of strict scrutiny diverged from that of the majority. Breyer preferred to apply the test more fluidly, *balancing* the three considerations — speech-related interests, compelling interests and possible alternatives — instead of “mechanically” applying the strict scrutiny test.²⁸

Breyer found that strict scrutiny was satisfied: (1) the statute only prohibits a child (without parental or guardian assistance) from buying a certain type of video game;²⁹ (2) California has a compelling interest in deterring minors from playing violent video games that might influence result in violent behavior;³⁰ and (3) there is no “less restrictive” alternative, given that the industry’s voluntary system of labeling games was ineffective in preventing sales to minors.³¹

Implications of the *Brown* Decision

For content and game developers, the *Brown* opinion provides a shield against future attacks. The Court found that the violence in video games is protected First Amendment expression, and that California could not show a compelling interest in curtailing such expression.

Notably, not only did California’s evidence fail to demonstrate any causation between exposure to violent video games and subsequent violent behavior, but also the Court suggested that, even if such causation were present, there still would not exist a compelling interest. That is because California’s evidence of causation also suggested that exposure to violent video games had the same effect as watching cartoons starring Bugs Bunny, playing non-violent video games like Sonic the Hedgehog or viewing a picture of a gun.³²

Brown serves as a warning to state legislators considering restrictions on minors’ access to violent video games. The Court had strong words for California’s law, deeming it “unprecedented and mistaken,”³³ and characterizing California’s efforts as “the latest episode in a long series of failed attempts to censor violent entertainment for minors.”³⁴

More generally, the Court's decision strongly reaffirmed minors' rights under the Constitution. In several places in its opinion, the majority stressed the right of minors to access protected materials. The government may only bar the dissemination of protected materials to minors in "relatively narrow and well-defined circumstances," video games not being one of them.³⁵

Endnotes

- ¹ Illinois, Indiana, Michigan, Louisiana, Missouri, Minnesota, Oklahoma and Washington are just some of the states that have unsuccessfully attempted to enforce laws restricting the dissemination of violent and/or sexually explicit video games.
- ² *Brown v. Entm't Merchants Ass'n*, No. 08-1448, slip. op. at 1 (U.S. June 27, 2011) (citing California Assembly Bill 1179 (2005) and Cal. Civ. Code Ann. §§ 1746-1746.5 (2009)).
- ³ *Id.*
- ⁴ See, e.g., *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), writ for certiorari denied by 534 U.S. 994 (2001) (Indianapolis ordinance limiting minors' access to video games that depicted violence found unconstitutional); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. 2006) (Louisiana law that prohibited sale, lease or rental of video or computer games that appealed to minors' morbid interest in violence found unconstitutional); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006) (Michigan law barring dissemination of "ultra-violent explicit video games" found unconstitutional); see also *Entm't Software Ass'n v. Swanson*, 519 F.3d 768, 769 (8th Cir. 2008) (Minnesota Restricted Video Games Act found unconstitutional).
- ⁵ *Brown v. Entm't Merchants Ass'n*, No. 08-1448, slip. op. at 2 (U.S. June 27, 2011).
- ⁶ *Video Software Dealers Ass'n v. Schwarzenegger*, 2007 U.S. Dist. LEXIS 57472 (N.D. Cal. Aug. 6, 2007).
- ⁷ *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009).
- ⁸ Brief for Louisiana, Connecticut, Florida, Hawaii, Illinois, Maryland, Michigan, Minnesota, Mississippi, Texas and Virginia as Amici Curiae Supporting Petitioners, *Brown v. Entm't Software Ass'n*, No. 08-1448 (U.S. June 27, 2011).
- ⁹ *Brown v. Entm't Merchants Ass'n*, No. 08-1448, slip. op. at 4 n5 (U.S. June 27, 2011).
- ¹⁰ *Id.* at 2.
- ¹¹ *Id.* at 11-12.
- ¹² *Id.* at 11-12.
- ¹³ *Id.* at 12-13.
- ¹⁴ *Id.* at 15.
- ¹⁵ *Id.* at 15-16.
- ¹⁶ *Id.* at 16.
- ¹⁷ *Id.* at 14-15, 17-18.
- ¹⁸ *Brown v. Entm't Merchants Ass'n*, No. 08-1448, slip. op. at 2 (U.S. June 27, 2011) (Alito, J., concurring).
- ¹⁹ *Id.* at 7.
- ²⁰ *Id.* at 8.
- ²¹ *Id.* at 12.
- ²² *Id.* at 12-13.
- ²³ *Brown v. Entm't Merchants Ass'n*, No. 08-1448, slip. op. at 7-8 n.3 (U.S. June 27, 2011) (majority) (noting that Justice Thomas ignores prior precedent and fails to cite any "case, state or federal," supporting his Founders-era view of minors' rights).
- ²⁴ *Brown v. Entm't Merchants Ass'n*, No. 08-1448, slip. op. at 2 (U.S. June 27, 2011) (Thomas, J., dissenting).
- ²⁵ *Id.* at 15.
- ²⁶ *Brown v. Entm't Merchants Ass'n*, No. 08-1448, slip. op. at 8 (U.S. June 27, 2011) (Breyer, J., dissenting).
- ²⁷ *Id.* at 7.
- ²⁸ *Id.* at 9.
- ²⁹ *Id.* at 10.
- ³⁰ *Id.* at 12 (violent games may "reward[] [children] for being violently aggressive in play, and thereby often teaching them to be violently aggressive in life").
- ³¹ *Id.* at 17.
- ³² *Id.* at 13.
- ³³ *Brown v. Entm't Merchants Ass'n*, No. 08-1448, slip. op. at 6 (U.S. June 27, 2011) (majority).
- ³⁴ *Id.* at 17.
- ³⁵ *Id.* at 7. See also *id.* at 17 ("Even where the protection of children is the object, the constitutional limits on governmental action apply.").

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