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Newbs Lose, Experts Win: Video Games in the Supreme Court

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Angela J. Campbell*

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I. INTRODUCTION

Newb: A term used to describe an inexperienced gamer/person/etc. Unlike a noob, a newb is someone who actually wants to get better.¹

In the five years since the Supreme Court found unconstitutional a California statute prohibiting the sale of ultra-violent video games to minors in *Brown v. Entertainment Merchants Ass'n*,² not a single jurisdiction has passed a law regulating the sale of violent video games to minors. The absence of legislation is striking in light of several subsequent and highly publicized shootings linked to violent video games. For example, after Adam Lanza shot and killed twenty elementary school students in Newtown, Connecticut, in December 2012, it was widely reported that Lanza spent most of his day in the basement playing violent video games such as *Call of Duty*.³

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1. *Newb*, URBANDICTIONARY, <http://www.urbandictionary.com/define.php?term=newb> [https://perma.unl.edu/23P7-NJHX].
 2. 564 U.S. 786 (2011). The name of this case below was *Video Software Dealers Ass'n v. Schwarzenegger*. In 2006, the Video Software Dealers Association (VSDA) merged with the Interactive Entertainment Merchants Association (IEMA) to create the Entertainment Merchants Association (EMA). After Jerry Brown became Governor of California in 2011, his name was substituted for Schwarzenegger. The Entertainment Software Association (ESA) was also party to this case along with VSDA and EMA. For simplicity, this Article will use EMA to refer to them collectively.
 3. N.R. Kleinfield, Ray Rivera & Serge F. Kovalski, *Newtown Killer's Obsession*, in *Chilling Detail*, N.Y. TIMES (Mar. 28, 2013), <http://www.nytimes.com/2013/03/29/nyregion/search-warrants-reveal-items-seized-at-adam-lanzas-home.html>. See also *The Contested Field of Violent Video Games: Research Roundup*, JOURNALIST'S RESOURCE (Jan. 31, 2015), <http://journalistsresource.org/studies/government/criminal-justice/value-violent-video-games-research-roundup> [https://perma.unl.edu/FVT8-XN7M] (reporting that "the man who killed 77 people in Norway in 2011 testified that he prepared for the assault by playing the first-person shooter video game *Call of Duty: Modern Warfare 2*").

After the Newtown shootings, some officials called for new legislation.⁴ New Jersey Governor Chris Christie, for example, sought legislation to limit the sale of violent video games to minors.⁵ West Virginia Senator John Rockefeller introduced a bill to fund the National Academy of Sciences to study the impact of violent video games and violent video programming on children.⁶ Utah Representative Jim Matheson introduced a bill that would have prohibited the sale or rental of video games to minors with an Entertainment Software Ratings Board (ESRB) rating of “adults only” or “mature.”⁷ But none of these measures passed.

Moreover, policymakers seem to have lost interest in even trying to pass legislation. After the shootings at the Washington Navy Yard in September 2013, for example, “cable news hosts quickly homed in on the shooter’s obsession with playing military-style online games, repeatedly asking whether it was a factor in the mass shootings.”⁸ This time, however, “that line of questioning was all but missing . . . on Capitol Hill, where hardly a word was uttered about video game violence.”⁹

It is not surprising states have given up trying to prevent the sale of violent video games to minors. The *Brown* decision found that

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4. See, e.g., Lou Kesten, *Shooting Renews Argument Over Video-Game Violence*, ASSOCIATED PRESS (Dec. 19, 2012), <http://finance.yahoo.com/news/shooting-renews-argument-over-video-game-violence-162448882—finance.html> [https://perma.unl.edu/58P3-XQPK].
 5. Jenna Portnoy, *Christie Issues Plan to Strengthen N.J. Gun Laws and Address Violence*, STAR-LEDGER (Apr. 22, 2013), http://www.nj.com/politics/index.ssf/2013/04/christie_gun_violence.html [https://perma.unl.edu/28M4-6EQY].
 6. Violent Content Research Act of 2013, S. 134, 113th Cong. (2013); Katy Bachman, *Rockefeller Plans to Reintroduce Bill to Study Violent Video Games*, ADWEEK (Jan. 14, 2013), <http://www.adweek.com/tv-video/rockefeller-plans-reintroduce-bill-study-violent-video-games-146523/> [https://perma.unl.edu/46J3-42D2].
 7. Video Games Ratings Enforcement Act, H.R. 287, 113th Cong. (2013). The ESRB was created in 1994 by the Entertainment Software Association after Senators Lieberman and Kohl held a hearing making clear they would pursue government regulation unless the industry started to self-regulate. William K. Ford, *The Law and Science of Video Game Violence: What was Lost in Translation?*, 31 CARDOZO ARTS & ENT. L.J. 297, 310-11 (2013). The ESRB assigns one of six age-based ratings to video games. *About ESRB*, ENTMT. SOFTWARE RATINGS BD., <http://www.esrb.org/about/> [https://perma.unl.edu/UAN7-W8XE]. They are: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teen); M (Mature 17+); and AO (Adults Only 18+). The ESRB may also include “content descriptors” such as “strong language” and “intense violence.” *ESRB Ratings*, ENTMT. SOFTWARE RATINGS BD., <http://www.esrb.org/ratings/> [https://perma.unl.edu/F4AC-34AM].
 8. Anna Palmer, *Video Game Violence Not in Play*, POLITICO (Sept. 23, 2013), <http://www.politico.com/story/2013/09/congress-video-game-violence-navy-yard-097131> [https://perma.unl.edu/3V8X-TM6F].
 9. *Id.* This author attributes the change as a “clear sign of the investment video game companies have made in making friends in Washington.”

“[b]ecause the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.”¹⁰ It is extremely difficult to meet the test for strict scrutiny.

In *Brown*, the majority concluded that California failed to meet the test because:

[t]he State’s evidence is not compelling. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games cause minors to act aggressively (which would at least be a beginning). Instead, “[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology.”¹¹

Much of the scholarly commentary before and after the *Brown* decision focused on whether social science research shows violent video games “cause” violence or other harmful effects in the real world. Dr. Craig Anderson, distinguished professor of psychology at Iowa State University, has published multiple studies finding that exposure to violent video games makes youths more aggressive and less caring.¹² His work has been relied on by states and localities in passing legislation regulating minors’ access to violent video games.¹³ But he is not alone; many other researchers have also found negative consequences from playing violent video games.¹⁴

10. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992)).

11. *Id.* at 800 (citing *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 964 (9th Cir. 2009)).

12. Anderson is coauthor of the book *VIOLENT VIDEO GAMES EFFECTS ON CHILDREN AND ADOLESCENTS* (2007). His website lists dozens of articles on video game violence, as well as articles on media violence more generally. *Works “In Press” & Publications Since 1995*, CRAIG A. ANDERSON, <https://public.psych.iastate.edu/caa/recpub.html> [<https://perma.unl.edu/5EZM-VTHZ>].

13. *See Vita: Craig A. Anderson*, IOWA ST. UNIV. (Aug. 2011), <https://public.psych.iastate.edu/caa/Vita.pdf> [<https://perma.unl.edu/RM4B-RHYY>].

14. *E.g.*, Brad J. Bushman et al., *There Is Broad Consensus: Media Researchers Agree That Violent Media Increase Aggression in Children, and Pediatricians and Parents Concur*, 4 *PSYCHOL. POPULAR MEDIA CULTURE* 200 (2014); Youssef Hasan et al., *The More You Play, The More Aggressive You Become: A Long-Term Experimental Study of Cumulative Violent Video Game Effects on Hostile Expectations and Aggressive Behavior*, 49 *J. EXPERIMENTAL SOC. PSYCHOL.* 224 (2013); Maxine M. Denniston et al., *Associations Between Electronic Media Use and Involvement in Violence, Alcohol and Drug Use Among United States High School Students*, 12 *WEST. J. EMERG. MED.* 310 (2011).

Dr. Christopher Ferguson is probably the most vocal and prolific critic of the research on video game violence.¹⁵ He has criticized researchers for making claims not supported by the data, failing to address or even mention research that reaches a different conclusion, and overstating causality.¹⁶ After the *Brown* decision, he called on the psychological community to view the decision as “an opportunity to learn from the mistakes made and to begin the process of scientific self-correction.”¹⁷ Anderson and others have responded to these criticisms.¹⁸ Nonetheless, the debate over the effects of video game violence continues.¹⁹

Other scholarship has examined whether courts correctly understand the scientific evidence on video game violence. William K. Ford, for example, concluded that “[o]n the whole, the courts did a mediocre job of assessing the scientific evidence.”²⁰ One problem was simply the large volume of research. Ford found that no court analyzed the entire literature on video game violence.²¹ Also, judges and lawyers lacked the training and background knowledge to understand scien-

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15. Ferguson holds a Ph.D. in clinical psychology from the University of Central Florida. *Chris Ferguson's Publications*, CHRIS FERGUSON, <http://www.christopherjferguson.com/pubs.html> [<https://perma.unl.edu/39WS-7NLT>]. He has taught at Texas A&M International University, and is currently an Associate Professor and Chair of Psychology at Stetson University. *Id.* His list of publications shows he has written or co-authored more than forty articles on the topic of video game violence since 2007. *Id.*
 16. *E.g.*, Christopher J. Ferguson, *Violent Video Games and the Supreme Court*, 68 *AM. PSYCHOLOGIST* 57 (2013).
 17. *Id.* at 71.
 18. *E.g.*, Brad J. Bushman & Craig A. Anderson, Understanding Causality in the Effects of Media Violence, 59 *AM. BEHAV. SCIENTIST* 1 (2015).
 19. *See, e.g.*, Malte Elson & Christopher J. Ferguson, *Does Doing Media Violence Research Make One Aggressive?*, *EUR. PSYCHOLOGIST* (2013), www.christopherjferguson.com/EP%20Review%20Part%202.pdf [<https://perma.unl.edu/44CV-GHBD>]. In response to the controversy, the American Psychological Association (APA) established a task force in 2013 to review its 2005 Resolution on Violence in Video Games and Interactive Media. *Resolution on Violence in Video Games and Interactive Media*, *AM. PSYCHOLOGICAL ASS'N*, <http://www.apa.org/about/policy/interactive-media.pdf> [<https://perma.unl.edu/4MFT-LD4X>]. The task force concluded that “[v]iolent video game play is linked to increased aggression in players but insufficient evidence exists about whether the link extends to criminal violence or delinquency.” Press Release, *Am. Psychological Ass'n, APA Review Confirms Link Between Playing Violent Video Games and Aggression* (Aug. 13, 2015), www.apa.org/news/press/releases/2015/08/violent-video-games.aspx.
 20. Ford, *supra* note 7, at 299; *see also* Clay Calvert et al., *Social Science, Media Effects & the Supreme Court: Is Communications Research Relevant After Brown v. Entertainment Merchants Association?* 19 *UCLA ENT. L. REV.* 293 (2012) (examining the effect the *Brown* decision will have on the use of social science evidence in First Amendment based cases).
 21. Ford, *supra* note 7, at 325–26.

tific literature.²² He suggests that judges are “insufficiently exposed to scientific writings that are forthcoming about their weaknesses or limitations,” which may explain why the courts “treated standard scholarly statements about the limitations of their work as something closer to admissions of failure.”²³ Ford cites the Ninth Circuit decision as an example of a court rejecting research due to readily admitted flaws.²⁴ Yet, the *Brown* majority opinion accepted that reasoning uncritically.²⁵ Others, however, have defended the majority’s dismissal of the scientific literature as properly recognizing “that correlational data are insufficient to overcome basic First Amendment principles.”²⁶

This Article focuses on the role of the lawyers using the framework described by Professor Richard J. Lazarus in his 2008 article, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*.²⁷ Lazarus argues the modern Supreme Court bar has come to be dominated by a small number of Supreme Court specialists. Because of their experience and superior knowledge of the Justices and Supreme Court practice, Supreme Court specialists are more likely to obtain outcomes desired by their clients, which are typically large corporations or industry trade associations.²⁸ Consistent with Lazarus’s finding, this Article shows the video game industry’s representation by a Supreme Court specialist in *Brown* gave it advantages over California that likely affected the outcome of the case.

Part II analyzes whether the counsel in *Brown* fit within Lazarus’s definition of a Supreme Court specialist. Part III provides background on the *Brown* case and the cases that came before it. Part IV compares the expert and non-expert representation in *Brown* by examining the parties’ briefs, the amicus briefs, and the oral argument. Finally, Part V explores whether the case might have come out differently if both sides had been represented by Supreme Court specialists.

22. *Id.* at 331–32. In *Entm’t Software Ass’n v. Hatch*, for example, the district court judge appeared not to know what a meta-analysis was or that the use of meta-analyses is widely accepted. *Id.* at 327.

23. *Id.* at 328–29.

24. *Id.* at 329.

25. See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 800 (2011).

26. Robert Corn-Revere, *Moral Panics, the First Amendment, and the Limits of Social Science*, 28 COMM. L. 4 (2011).

27. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008).

28. *Id.* at 1490–91. Others have drawn similar conclusions. See, e.g., Jeffrey L. Fisher, *A Clinic’s Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 151–61 (2013); Kedar S. Bhatia, *Top Supreme Court Advocates of the Twenty-First Century*, 2 J. L. 561 (2012); Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and its Effect on Certiorari*, 9 J. APP. PRAC. & PROCESS 175 (2007).

It concludes that with expert representation, California could have captured the five votes necessary to win, or at least obtained a narrower decision that would have allowed the legislature to try again to craft a law that could survive a constitutional challenge.

II. THE ADVANTAGE OF A SUPREME COURT EXPERT

Since the publication of Lazarus's article, Supreme Court practice has become even more concentrated in a small number of lawyers and law firms. A Reuters Special Report, *The Echo Chamber*, published in December 2014, documents this trend.²⁹ This study examined Petitions for Writs of Certiorari filed by private attorneys from 2004 through 2012. It found that "66 of the 17,000 lawyers who petitioned the Supreme Court succeeded at getting their clients' appeals heard at a remarkable rate. Their appeals were at least six times more likely to be accepted by the Court than were all others filed by private lawyers during that period."³⁰ Of the sixty-six lawyers, "51 worked for law firms that primarily represented corporate interests."³¹ Almost half (thirty-one out of sixty-six) attended law school at Harvard or Yale.³²

The Reuters study also examined all oral arguments by private attorneys during the last ten years. It identified only thirty-four lawyers who argued at least five cases. Within this group, eight lawyers argued fifteen or more cases.³³ Or put differently, eight lawyers accounted for almost twenty percent of all Supreme Court oral arguments by attorneys in private practice.³⁴ All but one of the eight had worked in the U.S. Solicitor General's office, or clerked for a Justice, or both.³⁵ Reuters further reports that the Justices "acknowledge the growing specialization of the Supreme Court bar, and they largely

29. The Echo Chamber consists of a series of articles by various authors. The entire series is available at *The Echo Chamber*, REUTERS, <http://www.reuters.com/investigates/special-report/scotus/#interactive-lawyers> [https://perma.unl.edu/MRS7-SM56].

30. Joan Biskupic et al., *At America's Court of Last Resort, a Handful of Lawyers Now Dominates the Docket*, in *The Echo Chamber*, *supra* note 29.

31. *Id.*

32. *Id.*

33. Janet Roberts, *Analyzing the Impact of the Supreme Court Bar*, in *The Echo Chamber*, *supra* note 29. The decade before, 30 attorneys accounted for 20% of arguments. *Id.*

34. Janet Roberts et al., *In an Ever-Clubbier Specialty Bar, 8 Men Have Become Supreme Court Confidants*, in *The Echo Chamber*, *supra* note 29. Overall, the percentage of cases featuring an oral advocate who clerked for a sitting justice increased from less than 20% in 1995 to almost 60% in 2010. *Id.* (graph "Familiar Faces").

35. *Id.*

welcome it,” because the “elite lawyers help them understand and sift through complex legal issues.”³⁶

Lazarus defines a Supreme Court expert as an attorney who has presented at least five prior oral arguments. Because Supreme Court arguments are rare, attorneys with five or more oral arguments likely filed far more briefs in the Supreme Court.³⁷ He also counts as a Supreme Court expert an attorney presenting oral argument for the first time if he or she is affiliated with a law firm or other comparable organization that has, in the aggregate, argued before the Court at least ten times, because that attorney “inevitably” will receive expert advice from professional colleagues.³⁸ Included within this category are the Office of the U.S. Solicitor General, law firms with a significant Supreme Court practice—such as Mayer Brown, Wilmer Hale, or Sidley Austin—and public-interest organizations with substantial Supreme Court experience.

A. California’s Counsel

Zachery P. Morazzini, supervising deputy attorney general, was the lead attorney representing California. Morazzini received his law degree from the University of the Pacific, McGeorge School of Law in 1999, and began working for the California Department of Justice in 2001.³⁹ He argued the *Brown* case in the Ninth Circuit, but had never argued before the U.S. Supreme Court.⁴⁰ In video game parlance, he was a “newbie” or “newb.” Because he had no prior experience before the U.S. Supreme Court, he does not qualify as a Supreme Court expert under Lazarus’s first prong.

The second prong—whether he was affiliated with an organization comparable to a law firm with ten Supreme Court arguments—is more difficult to assess. Lazarus notes that some states have established the position of a state solicitor general modeled after the U.S. Solicitor General.⁴¹ California is one of those states.⁴² California’s opening brief lists Deputy Solicitor General Gordon Burns, and its reply brief lists Solicitor General Manuel M. Medeiros, suggesting some

36. *Id.*

37. Lazarus, *supra* note 27, at 1502.

38. *Id.*

39. Zachary Morazzini, *Director—Office of Administrative Hearings*, CAL. DEP’T OF GEN. SERVS., <http://www.dgs.ca.gov/dgs/About/ExecRoster/ZackeryMorazzini.aspx> [https://perma.unl.edu/36MJ-RWB3].

40. This information was deduced after a Westlaw search for counsel of record before the Supreme Court did not return any results for his name.

41. Lazarus, *supra* note 27, at 1501.

42. Peter Page, *State Solicitor General Appointments Open Doors for Appellate Practitioners*, NAT’L L.J. (Aug. 18, 2008), <http://www.nationallawjournal.com/id=1202423731494/State-solicitor-general-appointments-open-doors-for-appellate-practitioners> [https://perma.unl.edu/Q8GG-KQ4F].

involvement by the state solicitor general's office. Morazzini, however, is identified on the briefs as supervising deputy attorney general, so he presumably was not in the state solicitor general's office.

To qualify under the second prong, Morazzini would have had to be in the state solicitor general's office or to have received substantial guidance from experienced Supreme Court advocates.⁴³ Because California's attorney general's office was facing budget cuts and staff layoffs during the time it was defending the video game law,⁴⁴ it is reasonable to conclude Morazzini lacked sufficient time and assistance to qualify as a Supreme Court expert.

B. Entertainment Merchant Association's (EMA) Counsel

By contrast, there is no question the lead counsel for the video game industry, Paul M. Smith, a partner at the Washington, D.C., law firm Jenner & Block, is a Supreme Court expert. Indeed, Lazarus even identifies Smith by name as one of the best Supreme Court advocates.⁴⁵

Smith fits the mold of a Supreme Court specialist. He graduated from Yale Law School in 1979.⁴⁶ After law school, he clerked for Judge Oakes on the Second Circuit and then for Justice Powell on the Supreme Court.⁴⁷ At the time of the *Brown* argument, Smith already had fourteen oral arguments in the Supreme Court.⁴⁸ Before leaving private practice to teach at Georgetown, Smith was a partner at the Washington, D.C., law firm Jenner & Block, where he headed the

43. Lazarus, *supra* note 27, at 1502, n.73 (explaining why an attorney working for a firm in a different location from the one with an aggregate of ten arguments would not qualify and why a faculty member would not qualify even if other faculty had done ten arguments).

44. Jerry Brown, who had been elected attorney general in 2006, made deep cuts in the budget of the attorney general's office. His website boasted that "[s]ince taking office in 2006, Brown has returned over \$231 million to the State treasury. Brown achieved these budget savings by freezing new hiring, eliminating nearly 800 positions, folding ten divisions into four, and strengthening controls on purchases. Brown decreased in-state travel by 47%, out-of-state travel by 72%, and overtime by 29%." *Jerry Brown Accomplishments as Attorney General*, UCLA DIG. LIBRARY (Aug. 12, 2012), http://digital.library.ucla.edu/websites/2010_995_002/jerry-brown-accomplishments-attorney-general/index.htm [<https://perma.unl.edu/84BE-RGJA>].

45. Lazarus, *supra* note 27, at 1557–58. See also Kedar S. Bhatia, *Top Supreme Court Advocates of the Twenty-First Century*, 2 J.L. 561, 571 (2012) (including Smith in listing of all advocates who argued before the Supreme Court at least five times from 2000 to 2010).

46. *Paul M. Smith*, THE FEDERALIST SOC'Y, <http://www.fed-soc.org/experts/detail/paul-m-smith> [<https://perma.unl.edu/7PFX-3Z6S>].

47. *Id.*

48. *Appellate and Supreme Court Practice*, JENNER & BLOCK, <https://jenner.com/practices/100> [<https://perma.unl.edu/L9YZ-527L>].

firm's appellate and Supreme Court practice.⁴⁹ The firm website described Smith as having had "a Supreme Court practice for nearly three decades. He has argued sixteen Supreme Court cases, including the *Brown* video game case in 2011, several important voting rights cases, and *Lawrence v. Texas*."⁵⁰ Thus, Smith personally qualifies as a Supreme Court expert.⁵¹

Smith also had substantial experience challenging the constitutionality of laws regulating violent video games. Smith's firm, Jenner & Block, represented the video game industry in all but one challenge to laws restricting minors' access to violent video games.⁵² Smith's name was listed on all the briefs filed by Jenner & Block. Smith argued the case below in the Ninth Circuit.⁵³ He also successfully argued a case in the Seventh Circuit challenging a similar statute passed by Illinois.⁵⁴

The video game industry could afford to pay for such high quality representation.⁵⁵ In 2010, the global video game industry was "more than twice the size of the recorded-music industry, nearly a quarter more than the magazine business and about three-fifths the size of the film industry, counting DVD sales as well as box-office receipts."⁵⁶ Litigating the *Brown* case in the Supreme Court alone cost the video game industry more than a million dollars in fees and expenses.⁵⁷ Smith alone billed \$253,550, at the rate of \$765 per hour.⁵⁸ Eight

49. *Id.*

50. *Id.*

51. Smith would also qualify as an expert under Lazarus's second prong because Jenner & Block attorneys have argued more than 100 cases before the Supreme Court. *See id.*

52. *See* Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 946 (2000). While Smith did not represent the plaintiff in *Kendrick*, he did file an amicus brief on behalf of the Interactive Digital Software Association.

53. Video Software Dealer's Ass'n v. Schwarzenegger, 556 F.3d 950, 952 (9th Cir. 2009).

54. Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 643 (7th Cir. 2006).

55. The video game industry is large and growing. "From 2005 through 2009, the computer and video game industry achieved real annual growth of 10.6% per year," compared to 1.4% for the entire US economy. Stephen E. Siwek, *Video Games in the 21st Century: The 2010 Report*, ENTMT SOFTWARE ASS'N 1, 3 (2010) [hereinafter Siwek Report].

56. Tim Cross, *All the World's a Game*, ECONOMIST (Dec. 10, 2011), <http://www.economist.com/node/21541164> [<https://perma.unl.edu/2J4Q-S977>].

57. Respondents' Motion for Attorneys' Fees and Expenses, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011) (No. 08-1448). This motion asked for \$1,144,602.64, and stated they planned to seek additional reimbursements for time spent in 2011. *Id.* Prior to the Supreme Court litigation, the District Court for the Southern District of California had ordered the State to pay \$324,840 to the industry counsel. Lyle Denniston, *A Rare Request for Supreme Court Fees*, SCOTUS BLOG, (July 25, 2011), <http://www.scotusblog.com/2011/07/a-rare-request-for-fees/> [<https://perma.unl.edu/22Rj-UD67>].

58. Respondents' Motion for Attorneys' Fees and Expenses, *supra* note 57.

other attorneys at Jenner & Block billed time ranging from \$314 to \$540 per hour.⁵⁹

In sum, the *Brown* case fits comfortably within the model that concerned Lazarus. The well-heeled corporate side was represented by expert Supreme Court counsel, while the other side, a cash-strapped state, was represented by an attorney with no Supreme Court experience.

III. BACKGROUND ON THE VIDEO GAME CASES

Prior to the *Brown* decision, eight states or localities had passed laws regulating minors' access to video games. The City of Indianapolis passed the first law in 2000 in reaction to the shootings at Columbine High School by young men who spent a lot of time playing violent video games.⁶⁰ The video game industry brought a facial challenge against this ordinance, as well as every subsequent law. In each case, the industry obtained a preliminary injunction, so none of the laws ever took effect. While some were appealed, *Brown* was the only one taken up by the Supreme Court.

A. Cases Prior to *Brown v. Entertainment Merchants Ass'n*

The Indianapolis ordinance at issue in *American Amusement Machine Ass'n v. Kendrick* forbade arcades from allowing minors unaccompanied by a parent to play games containing graphic violence considered "harmful to minors."⁶¹ The district court viewed the case as presenting three main issues.

First, it considered whether video games were entitled to protection under the First Amendment at all.⁶² The City argued that video games were "closely analogous to mechanical pinball machines or shooting galleries at a local fair," and were not protected by the First Amendment.⁶³ The court disagreed, noting that "at least some contemporary video games include protected forms of expression."⁶⁴

Second, the court considered the appropriate standard of review. The industry argued the ordinance was a content-based restriction on

59. *Id.* The ESA's website boasted that the software industry had recovered \$3,223,916 in legal fees from state and local taxpayers. *Essential Facts about Video Games and Court Rulings*, ENTMT SOFTWARE ASS'N, http://www.theesa.com/wp-content/uploads/2014/10/ESA_EF_VidGamesCourtRulings.pdf [https://perma.unl.edu/D25S-GBJH].

60. Gregory Kenyota, *Thinking of the Children: The Failure of Violent Video Game Laws*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 785, 792 (2008).

61. *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 946 (2000).

62. *Id.* at 950.

63. *Id.* at 952.

64. *Id.* at 954.

speech that should be reviewed under "strict scrutiny."⁶⁵ The City countered that the correct standard of review was set forth in the 1968 case, *Ginsberg v. New York*.⁶⁶

In *Ginsberg*, the Supreme Court upheld a facial challenge to a New York criminal statute prohibiting the sale of "girlie" magazines to minors. The New York statute used a modification of the three-part definition of obscenity set forth in *Roth v. United States*.⁶⁷ It defined the prohibited magazines as depicting nudity that "(i) predominantly appeals to the prurient, shameful or morbid interest of minors, (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors."⁶⁸ Since the magazines at issue were not obscene with respect to adults, they were protected under the First Amendment. Nonetheless, the Court upheld the statute. Although the Court did not specify the applicable standard of review, it essentially applied a form of rational-basis review.⁶⁹ This standard has come to be known as the "harmful to minors" or "variable obscenity" test.

The district court in *Kendrick* agreed that the *Ginsberg* standard applied to the Indianapolis ordinance.⁷⁰ Like the statute in *Ginsberg*, the ordinance was intended to serve the state interests in the well-being of youth and in parents' authority to direct their children's upbringing.⁷¹ It noted the "Supreme Court has consistently recognized such interests as substantial, and it has done so without requiring social science research definitively proving the danger of harm to children."⁷² Also like the New York law, the ordinance did not limit adults' access to the content, nor did it prevent parents who so desired from allowing their children to be exposed to the regulated material.⁷³

Applying the *Ginsberg* test, the district court upheld the statute. It concluded the ordinance was carefully tailored to address potential

65. *Id.* at 955.

66. *Id.*

67. 354 U.S. 476, 489 (1957).

68. 390 U.S. 629, 633 (1968) (emphasis added).

69. The Court declared that "if it was *rational* for the legislature to find that the minors' exposure to such material might be harmful," the statute was constitutional. *Id.* at 639 (emphasis added). It then found that the "legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id.* Moreover, it "was *not irrational* for the legislature to find that exposure to material condemned by the statute is harmful to minors," and the State "has an independent interest in the well-being of its youth." *Id.* at 640-41.

70. *Kendrick*, 115 F. Supp. 2d at 959.

71. *Id.* at 976.

72. *Id.* at 958.

73. *Id.* at 958-59.

harm to children without infringing upon other First Amendment interests because it did not significantly limit adults from using the games, did not engage in viewpoint discrimination, did not limit the expression of ideas, and only authorized civil enforcement.⁷⁴

The industry appealed and the Seventh Circuit reversed.⁷⁵ Judge Posner's decision for the Seventh Circuit rejected the analogy to *Ginsberg*:

These games with their cartoon characters and stylized mayhem are continuous with an age-old children's literature on violent themes. The exposure of children to the "girlie" magazines involved in the *Ginsberg* case was not. It seemed obvious to the Supreme Court that these magazines were an adult invasion of children's culture and parental prerogatives. No such argument is available here.⁷⁶

The Seventh Circuit also went on to reject the City's reliance on social science. Characterizing the social science as consisting "primarily of the pair of psychological studies . . . reported in an article by Craig A. Anderson & Karen E. Dill,"⁷⁷ it found

no indication that the games used in the studies are similar to those in the record of this case or to other games likely to be marketed in game arcades in Indianapolis. The studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive . . . [a]nd they do not suggest that it is the *interactive* character of the games, as opposed to the violence of the images in them, that is the cause of the aggressive feelings.⁷⁸

The different views of the district court and the Seventh Circuit on the three issues in *Kendrick* were repeated again and again, with subtle variations as other states and localities tried different approaches to restrict youth access to violent video games.⁷⁹ Yet, every one of

74. *Id.* at 946.

75. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

76. *Id.* at 578.

77. *Id.* (citing Craig A. Anderson & Karen E. Dill, *Personality Processes and Individual Differences—Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life*, 78 J. PERSONALITY & SOC. PSYCH. 772 (2000)).

78. *Id.* at 578–79.

79. The next locality to pass a law restricting minors' access to violent video games was St. Louis County, Missouri. The district court upheld that law on the grounds that video games were not protected expression, and even if they were, the ordinance was narrowly tailored to legitimate government objectives and was not unconstitutionally vague. *Interactive Dig. Software Ass'n v. St. Louis Cty.*, 200 F. Supp. 2d 1126 (E.D. Mo. 2002). However, the Eighth Circuit overturned this ruling, based in large part on the Seventh Circuit decision in *Kendrick*. *Interactive Dig. Software Ass'n v. St. Louis Cty.*, 329 F.3d 954 (8th Cir. 2003). Washington State was next to pass a law limiting the access of minors to violent video games. The VSDA brought a challenge, and the district court reluctantly concluded that "the Legislature's belief that video games cause violence, particularly violence against law enforcement officers, [was] not based on reasonable inferences drawn from substantial evidence." *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1189 (W.D. Wash. 2004). Next, a district court in Michigan struck down a similar provision, finding that because the legislature

these statutes was ultimately found unconstitutional by an appellate court applying strict scrutiny. And all of the courts cited Judge Posner's conclusion that the social science research was insufficient to meet strict scrutiny.⁸⁰

B. *Brown v. Entertainment Merchants Ass'n*

California Assembly Bill 1179 was drafted and introduced by Democratic Assembly Member Leland Yee in 2005.⁸¹ Assemblyman Yee received a PhD in Developmental Psychology and served on the San Francisco Unified School District Board of Education before becoming an Assemblyman.⁸² In introducing the bill, Yee explained the need for it:

Since teens are wiring the circuits for self-control, responsibility and relationships they will carry with them into adulthood, they are more impressionable than we thought. Active participation by youth in playing violent video games has a greater impact than watching television. Youth choose actions where they are rewarded for causing violence to another character. Repetition greatly increases learning and also causes youth to identify with the aggressor in the game.⁸³

failed to consider alternatives such as the ESRB ratings, it was not narrowly tailored. *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 654 (E.D. Mich. 2006). Minnesota then passed a law imposing fines on minors for renting or purchasing video games rated M for Mature or AO for Adults Only. But the video game industry obtained an injunction of this law as well. *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006), *aff'd sub nom.* *Entm't Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008). In 2005, Illinois passed a law requiring violent video games to be labeled with a 2-inch high "18" and imposing criminal penalties for selling or renting them to minors. The district court found that law unconstitutional because the State lacked evidence that violent video games incited violence or even caused feelings of aggression. *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1062 (N.D. Ill. 2005), *aff'd*, 469 F.3d 641 (7th Cir. 2006). In *Entm't Merchs. Ass'n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007), the district court found an Oklahoma statute prescribing criminal penalties for disseminating material considered "harmful to minors" was unconstitutionally vague. Finally, in *Entertainment Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006), the district court found that a Louisiana statute criminalizing distribution of video games appealing to minors' morbid interest in violence violated the First Amendment.

80. *E.g.*, *Interactive Dig. Software Ass'n*, 329 F.3d at 957; *Granholm*, 426 F. Supp. 2d 646 at 651-54; *Swanson*, 519 F.3d at 772; *Blagojevich*, 404 F. Supp. 2d at 1059-60, 1073-74; *Henry*, 2007 WL 2743097, at *6.
81. Matthew Yi, *Sale of Violent Videos to Minors Under Fire Proposed Law Would Impose \$1,000 Fines*, S.F. CHRON. (Feb. 16, 2005), 2005 WLNR 2179310.
82. Brief of Amicus Curiae of California State Senator Leland Y. Yee et al., at 1, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011) (No. 08-1448). Yee had been elected to the California Senate by the time the case reached the Supreme Court. In 2015, he pled guilty to charges of racketeering and admitted accepting bribes. Alexei Koseff, *Former State Sen. Leland Yee Pleads Guilty to Corruption Charge*, SACRAMENTO BEE (July 1, 2005).
83. *Violent Video Games: Sales to Minors: Hearing on AB 1179 Before the Cal. S. Judiciary Comm.*, 2005-2006 Reg. Sess. 5 (Cal. 2005) [hereinafter *Summary of*

Yee pointed to dozens of studies on violent video games. He said they showed five major effects: (1) increased physiological arousal; (2) increased aggressive thoughts; (3) increased aggressive feelings; (4) increased aggressive behaviors; and (5) decreased pro-social or helping behaviors.⁸⁴ He specifically cited the Policy Statement on Media Violence of the American Academy of Pediatrics that attributed a 13%–22% increase in adolescents' violent behavior to playing violent video games.⁸⁵ Yee contended that “playing violent video games has more effect on increased youth aggression than second-hand smoke has on causing cancer, or lead exposure links to decreased IQ.”⁸⁶

Yee's efforts to get legislation were likely helped by the controversy over the sexually explicit mini-game “Hot Coffee Mod” embedded in the M-rated video game *Grand Theft Auto: San Andreas*.⁸⁷ Senator Yee “cited the Hot Coffee mod as he lambasted” the ESRB for not rating *San Andreas* as “adults only” in summer 2005.⁸⁸

Yee and other California legislators were aware other states had found similar legislation unconstitutional. For example, the Senate Judiciary Report on AB 1179 noted that the bills' definition of “violent video games”

directly follows the *Ginsberg* obscenity standard, and applies the terms of the obscenity definition to video games where certain violent acts may be committed by a game character. It is questionable whether this definition is appropriate under existing law. Neither the *IDSA* or the *Maleng* decision is binding in California, but those decisions and the precedent upon which they rely may be persuasive to a California court.⁸⁹

Despite concerns about constitutionality, an amended version of the bill passed the California Assembly and the Senate on September 8, 2005.⁹⁰ The video game industry, which had actively lobbied against AB 1179, urged Governor Schwarzenegger to veto it. For example, the president of the Interactive Entertainment Merchants Association issued a statement saying in part:

We hope that Governor Schwarzenegger understands and appreciates the lengths to which our members who conduct business in the State of California

AB 1179], http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1151-1200/ab_1179_cfa_20050908_123731_sen_comm.html [https://perma.unl.edu/GK55-7NZE].

84. *Id.* at 56.

85. *Id.* at 6.

86. *Id.*

87. Brendan Sinclair, *Spot On: Leland Yee Talks Hot Coffee*, GAMESPOT (July 15, 2005), <http://www.gamespot.com/articles/spot-on-leland-yee-talks-hot-coffee/1100-6129209/> [https://perma.unl.edu/54DJ-CEDU]. The minigame portrayed sexual intercourse between the main character and his girlfriend after she asked him to come into her home for “coffee,” a euphemism for sex.

88. *Id.*

89. *Summary of AB 1179*, *supra* note 83, at 8.

90. AB 1179, 2005 Reg. Sess. (Cal. 2005), http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1151-1200/ab_1179_bill_20051007_chaptered.html [https://perma.unl.edu/7YQT-EKRT].

have gone to fulfill their social obligations on a voluntary basis. It was disheartening to see the bill pass the house and senate, but we refuse to believe that the Governor will allow this matter to become further politicized and divisive—leading only to a course which would inevitably cost the taxpayers valuable resources, and an unceremonious fate that has been played out in the court system.⁹¹

Nonetheless, Governor Schwarzenegger signed the bill on October 7, 2005. The law was to take effect on January 1, 2006.

1. *Before the District Court*

Ten days after the bill was signed, however, the Video Software Dealers Association (VSDA) sought a permanent injunction. The VSDA argued that video games are a form of protected expression, even for minors, that the Act's definition of "violent video game" was void for vagueness, and that the labeling provisions violated the First Amendment.⁹²

The district court reviewed the video game cases from other jurisdictions.⁹³ It rejected the State's claim that it should apply the *Ginsberg* standard, and opted to follow the "prevailing view . . . that limitations on a minor's access to violent expression are subject to strict scrutiny."⁹⁴ It concluded:

Whether, as the court in *Kendrick* indicated, the First Amendment may prevent a state from having a legitimate compelling interest in restricting the access of minors to violent video games, or, as the court in *Blagojevich* ruled, Anderson's research is insufficient to show such a compelling interest, the plaintiffs have shown they are likely to succeed on the merits of their claim that the Act violates the First Amendment, or at least that serious questions are raised.⁹⁵

Thus, it granted a preliminary injunction.⁹⁶

2. *Before the Ninth Circuit*

California appealed to the Ninth Circuit, again arguing for review under the *Ginsberg* standard. The Ninth Circuit found the appropriate standard of review was a question of first impression in the Circuit. Nonetheless, it rejected the State's argument, observing that *Ginsberg* was specifically rooted in obscenity jurisprudence, and that

91. Simon Carless, *IEMA Responds to AB 1179 California Games Bill*, GAMASUTRA (Sept. 12, 2005), http://www.gamasutra.com/view/news/97448/IEMA_Responds_To_AB1179_California_Games_Bill.php [<https://perma.unl.edu/9FK9-D784>].

92. Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034 (N.D. Cal. 2005) (granting preliminary injunction), *aff'd*, No. C-05-04188 RMW, 2007 WL 2261546 (N.D. Cal. Aug. 6, 2007).

93. *Id.* at 1043–44.

94. *Id.* at 1045.

95. *Id.* at 1046.

96. *Id.* at 1048. Subsequently, the Court granted summary judgment for the video game industry plaintiffs. Video Software Dealer's Ass'n v. Schwarzenegger, No. C-05-04188 RMW, 2007 WL 2261546 (N.D. Cal. Aug. 6, 2007).

obscene speech, as opposed to violent speech, was not protected under the First Amendment.⁹⁷

California argued, in the alternative, that the Act met strict scrutiny.⁹⁸ Its brief devoted more pages to that argument than to arguing for the *Ginsberg* standard.⁹⁹ First, California argued it had “a compelling interest in assisting parents in their fight to limit children’s exposure to material that can cause automatic aggressiveness, increased aggressive thoughts and behavior, antisocial behavior, desensitization to violence and poor school performance.”¹⁰⁰ Next, California argued that substantial evidence demonstrated that the Act promoted the State’s compelling interest. It described “the legislative record [as] flush with peer-reviewed articles, studies, reports, and correspondence from leading social scientists and medical associations analyzing the impact of media violence, and specifically violent video games, on minors and young adults.”¹⁰¹ It detailed the research conducted in the years following Judge Posner’s 2001 determination in *Kendrick* that the scientific evidence was insufficient to conclude a causal relationship existed.¹⁰² It also pointed out that professional medical associations, including the American Academy of Pediatrics and the California Psychiatric Association, supported the legislation.¹⁰³

Finally, California argued the law was narrowly tailored to serve the State’s interests.¹⁰⁴ It only applied to violent video games, not other forms of media such as television, because “the player controls the characters in first-person, causing them to shoot, stab, beat, stomp, run over, or ignite the opponent.”¹⁰⁵ The Act covered only a narrow category of video games and did not restrict adult access to those games. And because California maintained the ESRB’s voluntary ratings system was ineffective, no less restrictive means would achieve the State’s compelling interest.¹⁰⁶

The industry brief argued the Act failed strict scrutiny.¹⁰⁷ It noted that even though the Act had two stated purposes—to prevent violent and antisocial behavior and to prevent psychological or neurological

97. *Video Software Dealer’s Ass’n v. Schwarzenegger*, 556 F.3d 950, 957–61 (9th Cir. 2009).

98. Appellants’ Opening Brief, *Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009) (No. 07-16620), 2008 WL 412514.

99. *Compare id.* at 24–48 (arguing the Act met strict scrutiny), *with id.* at 7–22 (arguing for the *Ginsberg* standard of review).

100. *Id.* at 28.

101. *Id.*

102. *Id.* at 28–36.

103. *Id.* at 32–33.

104. *Id.* at 41–48.

105. *Id.* at 41.

106. *Id.* at 46–48.

107. Brief of Plaintiffs-Appellees at 26–48, *Schwarzenegger*, 556 F.3d 950 (No. 07-16620), 2008 WL 656626.

harm to minors—the State defended it solely on the second ground. But in any event, neither interest was compelling because “no substantial evidence demonstrates the harms are real.”¹⁰⁸ In particular, the industry argued, California failed to “establish any causal relationship between exposure to violent video games and any purported harm,”¹⁰⁹ or that video games are any more harmful than other violent media.¹¹⁰ Finally, the Act was not the least restrictive means because the State failed to show that the ESRB ratings, either alone or combined with parental controls, would not equally address the State’s interests.¹¹¹

The Ninth Circuit found that the Act did not pass strict scrutiny. It reasoned that whether California’s interest in preventing harm to minors was compelling depended on the effect of playing violent video games had on minors. The court rejected the studies cited by California, noting that “other courts have either rejected Dr. Anderson’s research or found it insufficient to establish a causal link between violence in video games and psychological harm.”¹¹² Thus, it concluded the State had failed to demonstrate a compelling interest. Moreover, even if the State had demonstrated a compelling interest, it failed to show the Act was narrowly tailored to serve that interest.¹¹³ Specifically, California failed to consider whether “an enhanced education campaign about the ESRB rating system directed at retailers and parents would help achieve government interests.”¹¹⁴

California filed a petition for writ of certiorari with the U.S. Supreme Court in May 2009, arguing the Court should grant review for three reasons. First, the statute should be reviewed under *Ginsberg*’s harmful to minors standard for the same reasons that standard applied to sexual materials sold to minors.¹¹⁵ Second, the issue was one of national importance, as evidenced by the large number of state and local regulations found unconstitutional by lower courts. No lower courts had been willing to extend *Ginsberg*, notwithstanding the fact violent video games can be just as harmful to minors as sexual materials.¹¹⁶ Finally, even assuming strict scrutiny applied, the Ninth Cir-

108. *Id.* at 27.

109. *Id.* at 33.

110. *Id.* at 37.

111. *Id.* at 47.

112. *Schwarzenegger*, 556 F.3d at 963. The Court also dismissed a study by Dr. Gentile as “suspect for similar reasons as Dr. Anderson’s work,” and found that a different study by Dr. Funk failed to show causation as opposed to correlation. *Id.* at 964.

113. *Id.* at 965 (citing *U.S. v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000)).

114. *Id.*

115. Petition for Writ of Certiorari at 5, *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786 (2011) (No. 08-1448).

116. *Id.* at 6.

cuit's decision conflicted with the Supreme Court's decision in *Turner Broadcasting System, Inc. v. FCC*.¹¹⁷

Turner involved a constitutional challenge to the "must-carry" provisions in the 1992 Cable Act, which required cable systems to retransmit local television stations.¹¹⁸ Finding the law to be content-neutral, the majority applied intermediate scrutiny.¹¹⁹ Under this level of scrutiny, the government must show the law serves a substantial government interest. Moreover, just because "the Government's asserted interests are important in the abstract does not mean, however, that the . . . rules will in fact advance those interests."¹²⁰ While the Court accords substantial deference under intermediate scrutiny to the predictive judgments of a legislature, it must assure that the legislature "has drawn reasonable inferences based on substantial evidence."¹²¹

The video game industry opposed certiorari, arguing the Ninth Circuit's decision was merely "a routine application of established First Amendment principles to a content-based ban on protected expression."¹²² Moreover, the Court had no reason to take the case because there was neither a circuit split nor unresolved legal questions.¹²³

The Supreme Court postponed deciding whether to hear the case until after its decision in *United States v. Stevens*.¹²⁴ In *Stevens*, the Court upheld a facial challenge to a federal statute criminalizing depictions of extreme animal cruelty for commercial purposes.¹²⁵ The language of that statute, like the California statute, was drawn from the Court's definition of obscenity in *Miller v. California*.¹²⁶ The Government argued in *Stevens* that depictions of animal cruelty, as a class, were like obscenity, and therefore categorically unprotected by the First Amendment. The Court, with only one dissent, rejected this argument, concluding that "[m]aybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that 'depictions of animal cruelty' is among them."¹²⁷

117. *Id.* at 5 (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994)).

118. *Turner*, 512 U.S. at 626.

119. *Id.* at 661–62.

120. *Id.* at 664.

121. *Id.* at 666. Thus, the *Turner* Court remanded for further proceedings on this question. *Id.* at 668.

122. Brief in Opposition to Writ of Certiorari at 1, *Schwarzenegger v. Entm't Merchs. Ass'n*, 559 U.S. 1092 (2009) (No. 08-1448), *rev'd sub nom. Brown*, 564 U.S. 786 (2011).

123. *Id.* at 2–3.

124. 559 U.S. 460 (2010).

125. *Id.* at 481–82.

126. *Id.* at 479 (citing 413 U.S. 15 (1973)).

127. *Id.* at 472.

The Court granted review in *Schwarzenegger v. Entertainment Merchants Ass'n* on April 26, 2010.¹²⁸

3. *Supreme Court*

The Supreme Court upheld the Ninth Circuit. Writing for the Court, Justice Scalia began with the premise that video games are a form of expression entitled to the same First Amendment protection as other media. Thus, California's law prohibiting the sale of excessively violent video games to minors was presumptively invalid.¹²⁹

The majority rejected California's argument that the statute should be evaluated under *Ginsberg's* harmful to minors test. Rather, the case was controlled by the Court's holding in *Stevens*, "that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."¹³⁰ *Ginsberg* was limited to obscenity, a category of speech that had historically been unprotected.¹³¹ The California statute, however, dealt with violence, and children's access to depictions of violence had not been historically restricted.¹³²

Justice Scalia concluded that California was unable to demonstrate the statute would pass strict scrutiny because "it acknowledges that it cannot show a direct causal link between violent video games and harm to minors."¹³³ He found the law "wildly underinclusive" because it singled out video game publishers as compared to distributors of books, movies, and other forms of media portraying violence.¹³⁴ At the same time, he found the law was "seriously overinclusive because it abridges the First Amendment rights of young people whose parents . . . think violent video games are a harmless pastime."¹³⁵ Moreover, parents did not need the law to restrict children's access to violent video games because the games were assigned age-based ratings by ESRB.¹³⁶

Justice Alito wrote a concurring opinion joined by Chief Justice Roberts, agreeing with the outcome. He thought the statute as drafted did not provide sufficient notice to sellers as to what was prohibited.¹³⁷ However, he rejected the majority's premise that video game violence was no different than violence depicted in a book.¹³⁸

128. *Schwarzenegger*, 559 U.S. 1092 (2010).

129. *Brown*, 564 U.S. 786, 790 (2011).

130. *Id.* at 791.

131. *Id.* at 793–94.

132. *Id.* at 794.

133. *Id.* at 799.

134. *Id.* at 802.

135. *Id.* at 805.

136. *Id.* at 803.

137. *Id.* at 805–07.

138. *Id.* at 806.

Justice Thomas dissented because, in his view, freedom of speech as understood by the Founders did not include the right to speak to a minor without going through the parent.¹³⁹ Justice Breyer dissented for a different reason; he thought the statute was not unconstitutionally vague, and on its face, survived strict scrutiny.¹⁴⁰

IV. COMPARISON OF EXPERT AND NON-EXPERT REPRESENTATION IN *BROWN*

Lazarus argues an experienced Supreme Court advocate will likely be more successful than the norm at the merits stage because he or she “knows how to better pitch and, very often, how to pitch a case differently than it has been pitched before.”¹⁴¹ He notes that what “will fly in the lower courts may well be a total nonstarter in the Supreme Court,” and the best Supreme Court advocates “are always ready to rethink and reformulate their legal position as necessary to maximize the odds of winning before the Court.”¹⁴²

As discussed in the next section, both sides made different arguments in the Supreme Court than they did in the Ninth Circuit. California dropped its claim that the statute met strict scrutiny. The EMA attorneys, according to their request for attorneys’ fees, engaged in “significant original research and briefing.”¹⁴³

A. Merits Briefs

The initial briefs on the merits give the parties an opportunity to frame the case. Framing a case is important because as Lazarus explains:

Supreme Court cases typically lend themselves to being pitched in multiple ways. The challenge the expert advocate faces is first, to conceptualize those several possibilities and, second, to determine which framework is the one that maximizes the chances of securing the minimum of five votes necessary for a favorable outcome. Doing so may require the development of entirely new legal arguments. It may require conceding away certain points and arguments, even ones successful below, or at least de-emphasizing them from obvious viewing.¹⁴⁴

For example, whether a case is viewed as an “environmental protection case” or a “plain meaning” case, can affect whether the party can obtain five votes.¹⁴⁵

Because the petitioner files the first brief, California had the opportunity to the frame the case in a manner most favorable to its side.

139. *Id.* at 822–23.

140. *Id.* at 846, 856.

141. Lazarus, *supra* note 27, at 1540.

142. *Id.*

143. Respondents’ Motion for Attorneys’ Fees and Expenses at 10, *supra* note 57.

144. Lazarus, *supra* note 27, at 1541 (citations omitted).

145. *Id.*

But it squandered this opportunity. Instead of providing the Court with an overview of its position at the outset, California's brief plunged right into boilerplate sections such as "Opinions Below" and "Jurisdiction."

By contrast, the first paragraph of EMA's brief set forth its view of the case.

The California statute at bar is the latest in a long history of overreactions to new expressive media. In the past, comic books, true crime novels, movies, rock music, and other new media have all been accused of harming our youth. In each case, the perceived threat later proved unfounded. Video games are no different. They are a widely popular form of expression enjoyed by millions of people. As such, under the First Amendment, they cannot be censored absent the most compelling justification, based on firm evidence of harm, through a narrowly tailored statute where there is no less-restrictive alternative.

The second paragraph succinctly told the Court why it should reject California's position.

California asks the Court to withdraw First Amendment protection from some ill-defined subset of video games, at least as to minors, based on the same sort of unsupported claims that animated past efforts to regulate new media. This Court should reject California's dangerous proposal. As the Court has long recognized, it is not the role of government to decide which expressive materials are "worthy" of constitutional protection.¹⁴⁶

1. *Statement of Facts*

The selection and presentation of facts in the Statement of Facts provides parties with another opportunity to frame the case in their favor. Supreme Court expert Eugene Gressman suggests that the "[s]tatement should contain, normally in chronological sequence, a recital of the facts of the case that are pertinent to the questions before the Supreme Court. . . . Counsel should select the arrangement that will best enable judges who, it should be assumed, know nothing of the facts to understand the case."¹⁴⁷ While the Statement should not be argumentative, "[t]his does not mean that the Statement cannot serve a persuasive function. A good lawyer will produce a Statement that is fair and adequate, and at the same time, to the extent that the facts permit, leaves the impression that right and justice demand a decision in his or her favor."¹⁴⁸

Many judges and scholars have commented on the importance of an effective Statement of Facts.¹⁴⁹ Brief writers are advised that "[w]hen writing the Statement of Facts, remember: the judge knows

146. Brief of Respondents at 1, *Brown*, 564 U.S. 786 (No. 08-1448).

147. EUGENE GRESSMAN, *SUPREME COURT PRACTICE* 712 (9th ed. 2007).

148. *Id.* at 713.

149. *See generally* Laurie A. Lewis, *Winning the Game of Appellate Musical Shoes*, 46 *WAKE FOREST L. REV.* 983 (2011).

nothing about this case.”¹⁵⁰ A former appellate judge advises: “Let the narrative of the facts tell a compelling story. The facts are, almost without exception, the heart of the case on appeal. They should be set forth as a story about a very real human situation.”¹⁵¹ Another judge explains that the “the opportunity to persuade” begins with the Statement of Facts because appellate judges are familiar the law, but “the facts often speak for themselves before the party has a chance to do so in the argument component of the brief.”¹⁵² But, as another author colorfully put it, the “notion that the facts, whether simple or complicated, speak for themselves is sheer nonsense. In reality there are as many ways of telling the story of any case as there are fleas on a dog.”¹⁵³

a. California’s Statement of Facts

California’s Statement of Facts was four pages compared to EMA’s almost eleven pages. It did not tell a story. Instead, it merely summarized the California statute, the purpose of the legislation, and what happened in the lower courts. It provided little context to understand why the California legislature enacted the law in the first place.

Nor did California’s Statement of Facts devote much effort to describing the violent video games that would be subject to the law. The only description of a violent video game in the Statement of Facts was a block quote from the district court decision granting a preliminary injunction for the industry.

The game involves shooting both armed opponents, such as police officers, and unarmed people, such as schoolgirls. Girls attacked with a shovel will beg for mercy; the player can be merciless and decapitate them. People shot in the leg will fall down and crawl; the player can then pour gasoline over them, set them on fire, and urinate on them. The player’s character makes sardonic comments during all this; for example, urinating on someone elicits the comment “Now the flowers will grow.”¹⁵⁴

The brief did not name the game or discuss why it was inappropriate for children. California did submit a short videotape showing “several vignettes from the games, *Grand Theft Auto: Vice City*, *Postal 2*,

150. *Id.* at 986 n.13 (quoting MYRON MOSKOVITZ, *WINNING AN APPEAL* (4th ed. 2007)).

151. *Id.* at 984 n.2 (citing Irving R. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 166 (1978)).

152. *Id.* at 986 n.11 (citing Clyde H. Hamilton, *Effective Appellate Brief Writing*, 50 S.C. L. REV. 581, 584–85 (1999)).

153. *Id.* at 984 n.4 (citing HAROLD R. MEDINA, *THE ORAL ARGUMENT ON APPEAL, IN ADVOCACY AND THE KING’S ENGLISH* 537, 540 (George Rossman ed., 1960)).

154. Petitioners’ Brief at 3–4, *Schwarzenegger v. Entm’t Merchs. Ass’n*, 559 U.S. 1092 (2010) (No. 08-1448) (citing *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1042 (N.D. Cal. 2005)), *rev’d sub nom. Brown*, 564 U.S. 786 (2011). Later, in the argument section of the brief, California described *Postal II* more vividly in giving an example of a game that the industry’s system of self-regulation recognized as inappropriate for minors. *Id.* at 45–46.

and *Duke Nukem 3D*,” to demonstrate the myriad ways that characters could kill or injure adversaries. But it did not describe the context within which the violence occurred.¹⁵⁵ Nor did the Statement of Facts tell the Justices about the substantial amount of research linking violent video games with harm to minors. In sum, California’s Statement of Facts failed to tell a story about why the California Legislature found it necessary to pass a law limiting minors’ access to extremely violent and inappropriate video games.

b. *EMA’s Statement of Facts*

In contrast, EMA’s brief told a story about how video games, even violent ones, are no different than other forms of “artistic” expression such as books and movies. It began by describing the nature of video games:

Video games are a modern form of artistic expression. A video game is an interactive software program that a player experiences on a screen, such as a television or computer monitor. Like films, video games incorporate dialogue, music, visual images, plot, and character development. Like the best of literature, they often involve classic themes that have captivated audiences for centuries, such as good-versus-evil, triumph over adversity, struggle against corrupt powers, and quest for adventure.¹⁵⁶

Next, EMA provided statistics to show that video games are popular among all ages,¹⁵⁷ and that the majority are appropriate for children.¹⁵⁸ It noted how video games often “mirror film and book genres,” and gave examples that were likely to be familiar to the Justices.¹⁵⁹ *God of War*, EMA explained, was based on Greek mythology and depicted “the battles of the protagonist Kratos, who fights gods and mythical beasts in a quest to redeem his own brutal past.”¹⁶⁰

EMA’s descriptions minimized the role of violence:

Some games depict violence in graphic detail—as do some movies (such as *Saving Private Ryan*, *The Godfather*, *The Wild Bunch*) and some classic literature (such as *The Red Badge of Courage*, *Titus Andronicus*, *The Iliad*). And a few games, like *Postal 2* (which is virtually the only video game mentioned in Petitioners’ brief), include satire or content intended to provoke or offend—

155. *Id.* at 11 (referencing the State’s physical exhibit lodged with the Court). Because the California Brief does not describe the content of the videotape, this description is from the Ninth Circuit’s decision. *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 955 (9th Cir. 2009).

156. Brief of Respondents, *supra* note 146, at 2 (citations omitted).

157. “More than two-thirds of American households include at least one player of video games,” the average age of a player is thirty-four, and forty percent of players are women. *Id.* at 3–4.

158. *Id.* at 6 (“The vast majority (82 percent) of games sold . . . are rated as suitable for children under seventeen.”).

159. *Id.* at 4–5.

160. *Id.* at 4.

much as “transgressive” works in other media are intended to be provocative.¹⁶¹

This last sentence both portrayed *Postal 2* as relatively harmless and called attention to the lack of examples in California’s brief.

EMA next tells how the video game industry voluntarily adopted a comprehensive, industry-wide ratings system to inform consumers about violent content. It describes this system as being “remarkably effective” in restricting children’s access to mature-rated video games without parental involvement.¹⁶²

c. A More Effective Statement of Facts

If California had been represented by a Supreme Court expert, he or she would have understood that more detailed descriptions of the extremely violent video games covered by the Statute would have helped California’s case. Because the Justices would likely know little about video games in general, or violent video games in particular, it was important to educate them. Armed with more information about violent video games, the Justices might have been more skeptical of EMA’s claim that playing violent video games was essentially the same as reading Greek myths or watching the movie *Saving Private Ryan*.¹⁶³

Justice Kagan has since admitted she knew little about video games prior to the *Brown* case.¹⁶⁴ She also described her colleagues as “not necessarily the most technologically sophisticated people,” who do not even use email.¹⁶⁵ When Justice Kagan asked at oral argument if the California statute would apply to *Mortal Kombat*, “an iconic game, which I’m sure half of the clerks who work for us spent considerable amounts of time in their adolescence playing,” Justice Scalia interjected, “I don’t know what she’s talking about.”¹⁶⁶

161. *Id.* at 6 (emphasis added).

162. *Id.* at 8–9.

163. Brief of Respondents, *supra* note 146, at 6–7. EMA had made the same or similar analogies in its Brief in the Ninth Circuit. Brief of Plaintiffs-Appellees at 6–7, *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2008) (No. 07-16620); Brief in Opposition at 5–7, *Schwarzenegger v. Entm’t Merchs. Ass’n*, 599 U.S. 1092 (2010) (No. 08-1448).

164. Fred Barbash, *Why Two Supreme Court Justices Played a Violent Video Game to Help Decide a Major Case*, WASH. POST (Sept. 18, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/18/how-and-why-justices-kagan-and-breyer-faced-off-in-a-violent-video-game-to-help-decide-a-major-case/> [https://perma.unl.edu/5UXS-2YBH].

165. Michelle R. Smith, *Kagan: Court Hasn’t Really ‘Gotten to’ Email*, ASSOCIATED PRESS (Aug. 20, 2013).

166. Transcript of Oral Argument at 57, *Schwarzenegger*, 599 U.S. 1092 (No. 08-1448). Justice Kagan was not personally familiar with *Mortal Kombat*. Seeking a concrete example to test the limits of the California statute, she asked her clerks to suggest a violent video game that most people would know about, and they sug-

Justice Kagan continued to press California's counsel to identify specific games "[b]ecause I read your briefs all the way through, and the only thing that I found—you said was clearly covered by this statute was *Postal 2*. But presumably the statute applies to more than one video game."¹⁶⁷ This exchange suggests the Justices would have better understood what California was trying to accomplish if California had provided more detail about violent video games.

Only Justice Alito and Chief Justice Roberts asked questions at oral argument that seemed to draw upon their own knowledge of video games. For example, Justice Alito challenged the EMA counsel:

And you say there is no problem because 16-year-olds in California never have \$50 available to go buy a video game, and because they never have TVs in their room, and their parents are always home watching what they . . . do with their video games, and the . . . video games have features that allow parents to block access, to block the playing of violent video games, which can't be overcome by a computer-savvy California 16-year old, that's why there is no problem, right?¹⁶⁸

They were also the only Justices with children young enough that they were likely to play video games.¹⁶⁹

Even so, Justice Alito conducted "considerable independent research to identify video games in which 'the violence is astounding.'"¹⁷⁰ Justice Alito uncovered examples such as

games in which a player can take on the identity and reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech. The objective of one game is to rape a mother and her daughters; in another, the goal is to rape Native American women. There is a game in which players engage in "ethnic cleansing" and can choose to gun down African-Americans, Latinos, or Jews. In still another game, players attempt to fire a rifle shot into the head of President Kennedy as his motorcade passes by the Texas School Book Depository.¹⁷¹

gested *Mortal Kombat*. HarvardLawSchool, *Associate Justice Elena Kagan Speaks with Dean Martha Minow*, YOUTUBE (Sept. 14, 2015), <https://www.youtube.com/watch?v=FWJkCDJMGH4> [<https://perma.unl.edu/56PZ-KFZC>] (view at approximately 25:55).

167. Transcript of Oral Argument, *supra* note 166, at 11–12 (emphasis added).

168. *Id.* at 52; *see also id.* at 29 (Chief Justice Roberts interrupted EMA counsel's discussion of parental controls noting that "any 13-year-old can bypass parental controls in about 5 minutes.").

169. In 2005 when California adopted the statute, Justice Alito had a 19-year old son and 17-year old daughter. *The Alito Children: In their own words*, UNDERNEATH THEIR ROBES BLOG (Nov. 1, 2005), http://underneaththeirrobes.blogs.com/main/2005/11/alito_kids.html [<https://perma.unl.edu/39HV-MV2Z>]. The Chief Justice's son was five and his daughter six in 2006. By the time of the decision, they would have been 10 and 11. Joan Biskupic, *Roberts Plays Dual Roles: Chief Justice and Father*, USA TODAY (June 26, 2006), http://usatoday30.usatoday.com/news/washington/2006-06-25-roberts_x.htm [<https://perma.unl.edu/QT5L-HJX5>].

170. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 789 (2011) (citations omitted).

171. *Id.* at 818–19 (citations omitted).

Justice Alito likely felt compelled to conduct his own research because California did not sufficiently convey the extreme violence in some video games.

Other Justices gathered facts on their own, as well. Justice Kagan disclosed that she and Justice Breyer played the violent video game that was most involved in the case.

So, he had his clerk set it up in his office, and I went over to his office and there we were—you know—killing everybody left and right . . . It's probably reflective of the fact that we did come out on different sides of this [case] . . . Justice Breyer, I remember, thought it was all really horrible, really disgusting, and repellant . . . And I was like “next round, next round.”¹⁷²

Justice Breyer also gathered facts about the psychological impact of playing such games. With the assistance of the Supreme Court library, he compiled and attached to his opinion two appendixes (pro and con) of peer-reviewed academic journal articles about psychological harm from playing violent video games.¹⁷³ If California had done a better job describing the problem the statute was designed to address, such additional research would not have been necessary. Moreover, the Justices might have been more receptive to California's arguments if they were convinced that the problem addressed by the statute was real and significant.

2. Arguments

After the Statement of Facts and before the Argument, briefs usually discuss the applicable standard of review. The standard of review governs the arguments that need to be made and the degree of evidence required. Often, the choice of a standard of review can determine the outcome.

a. Standards of Review

Courts generally employ one of three standards of review: rational basis, intermediate scrutiny, or strict scrutiny. Rational basis is a very deferential standard. The Court utilized rational-basis review in *Ginsberg*.¹⁷⁴ Most statutes survive rational-basis review. In recent years, however, courts have generally not applied rational-basis review to regulations affecting speech.¹⁷⁵

172. HarvardLawSchool, *Associate Justice Elena Kagan Speaks with Dean Martha Minow*, YOUTUBE (Sept. 14, 2015), <https://www.youtube.com/watch?v=FWJkCDJMGH4> [<https://perma.unl.edu/R2RU-MQNM>] (view at approximately 26:50).

173. *Brown*, 564 U.S. at 858–72.

174. See *supra* text accompanying note 69.

175. In 1969, the Court applied rational-basis scrutiny and upheld the FCC's “fairness doctrine,” which required broadcast stations to present both sides of controversial issues of public importance. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969). Then, in 1978, the Court upheld the constitutionality of an FCC action to enforce the statutory prohibition against broadcasting indecent language. *FCC v.*

When a regulation has an impact on speech, courts generally review it more carefully to protect any First Amendment interests that might be at stake. Courts first determine whether the statute is content-neutral or content-based.¹⁷⁶ The “principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.”¹⁷⁷

If the challenged statute is content-neutral, courts generally apply “intermediate scrutiny.”¹⁷⁸ A content-neutral statute will survive intermediate scrutiny if “it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”¹⁷⁹ This last prong does not require the regulation to be the “least speech restrictive means of advancing the Government’s interests.” Rather, “[n]arrow tailoring in this context requires . . . that the means chosen do not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’”¹⁸⁰ Under intermediate scrutiny, courts carefully balance the interests on both sides, and so the outcome depends largely on the facts presented.

Content-based restrictions are subject to “strict scrutiny.” Strict scrutiny requires the state to show that the regulation

is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an “actual problem” in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. “It is rare that a regulation restricting speech because of its content will ever be permissible.”¹⁸¹

b. California’s Arguments

California made three alternative arguments, depending upon the applicable standard of review. First, it argued for application of the *Ginsberg* standard.¹⁸² It reasoned that because extremely violent video games, like obscenity, were harmful to minors, the same interests present in *Ginsberg*—the need to protect minors from exposure to

Pacifica Found., 438 U.S. 726 (1978). But subsequently in *Turner*, the Court explained that the “less rigorous standard of . . . scrutiny” is only used for broadcasting or when reviewing the enforcement of a law of general applicability applied to the press. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 637–40 (1994).

176. *Turner*, 512 U.S. at 642.

177. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

178. *Id.*

179. *Id.* at 662 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

180. *Id.* (quoting *Ward*, 491 U.S. at 799).

181. *Brown v. Entm’t. Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (citations omitted).

182. This argument took up almost 35 out of 59 pages. Petitioners’ Brief, *supra* note 154, at 12–47.

harmful material and an independent interest in the well-being of youth—justified California’s restriction on the sale of offensively violent video games to minors.

In the alternative, California argued for intermediate scrutiny. Citing *Turner*, California argued the First Amendment does not demand proof of a direct causal link between exposure to violent video games and harm to minors when “the government defends a regulation on speech as a means of preventing anticipated harms.”¹⁸³ Rather, California argued, courts should uphold legislative predictive judgments where the legislature had “drawn reasonable inferences based on substantial evidence.”¹⁸⁴ To require a state show a direct causal link between playing violent video games and harm to minors “would presumably entail experimentation on minors” that would be both unethical and impractical.¹⁸⁵ Thus, it was enough that the studies considered by the Legislature demonstrated a connection between playing violent video games and increases in aggressive behavior by children.¹⁸⁶

Finally, California argued that even if strict scrutiny applied, the Act was the “least restrictive means” of serving the State’s interests.¹⁸⁷ The Ninth Circuit found that, assuming California had demonstrated a compelling state interest, it had failed to show that a less restrictive alternative, specifically an education campaign about the ESRB rating system directed at retailers and parents, would not achieve the state’s interests.¹⁸⁸ California argued the Ninth Circuit should have asked whether the “challenged regulation is the least restrictive means among available, *effective* alternatives.”¹⁸⁹ Because not all video games receive a rating from the ESRB, and the Federal Trade Commission found that a large percentage of children were able to purchase M-rated games without their parents, California argued the suggested alternative was not effective.¹⁹⁰

c. *EMA’s Arguments*

EMA argued that video games, including those depicting extreme violence, were fully protected by the First Amendment.¹⁹¹ It characterized California as contending “that depictions of violence either are

183. *Id.* at 48.

184. *Id.* (quoting *Turner*, 512 U.S. 622 (1994)).

185. *Id.* at 48–49.

186. *Id.* at 56.

187. *Id.* at 56–59.

188. *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 964–95 (9th Cir. 2009).

189. Petitioners’ Brief, *supra* note 154, at 58 (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

190. *Id.* at 57–58.

191. Brief of Respondents, *supra* note 146, at 17–23.

obscenity, or have historically been regulated as the equivalent of obscenity.”¹⁹² The first, EMA said, was wrong because obscenity was limited to works depicting sexual content.¹⁹³ The second was wrong because the United States had no tradition of regulating violent speech.¹⁹⁴ While acknowledging that “[i]n the 1880s some states did pass laws attempting to censor depictions of criminal behavior” it pointed out that “these laws, and later attempts to censor movies in the 20th century, were ultimately found to violate the First Amendment.”¹⁹⁵

EMA then characterized California as conceding it could not satisfy strict scrutiny and arguing instead that “some expression to minors, even if entirely non-sexual in content, is unprotected by the First Amendment.”¹⁹⁶ EMA called California’s argument “radical” and as “startling and dangerous” as that advanced by the Government in *Stevens*.¹⁹⁷

Finally, EMA argued that California could not meet strict scrutiny because it failed “to show an actual harm to minors that the Act materially addresses.”¹⁹⁸ It characterized California as seeking a deferential approach to legislators’ predictive judgments of harm because it was “[u]nable to defend the evidence on its merits.”¹⁹⁹ Moreover, California’s reliance on *Turner* was misplaced. The *Turner* majority afforded greater deference to the legislators because the Cable Act, unlike the California statute, was content-neutral.²⁰⁰

EMA also argued the Act failed to materially advance an actual harm because the State’s evidence showed that children could be harmed by exposure to violent media content including books and movies, but the Act only applied to some violent video games.²⁰¹ Finally, EMA argued the Act was not narrowly tailored because it could be used to censor a broad range of material and it drew “no distinctions between a 17-year-old and a preschooler.”²⁰²

192. *Id.* at 20 (citations omitted).

193. *Id.*

194. *Id.* at 21.

195. *Id.*

196. *Id.* at 22.

197. *Id.* at 23 (citing *United States v. Stevens*, 559 U.S. 460 (2010)). EMA also alleged California’s position had “almost no stopping point because so many expressive works contain violent depictions” that “someone could deem offensive for minors.” *Id.* at 24.

198. *Id.* at 47. The EMA found it “telling” that California had not even cited strict-scrutiny cases. *Id.* at 49.

199. *Id.*

200. *Id.* at 50.

201. *Id.* at 51.

202. *Id.* at 52.

3. *California's Risky Strategy*

In the Supreme Court, California abandoned the argument it made below that the Act survived strict scrutiny. Instead, it focused on convincing the Court to apply the *Ginsberg* standard. With the benefit of hindsight, this was a mistake. If California had been represented by a Supreme Court expert, it might have better appreciated the risks of pursuing this strategy.

This is not to say California had no reason to argue for the *Ginsberg* standard. It is a much easier standard to meet than strict scrutiny. Also, although the argument for applying the *Ginsberg* standard to violent content had been around for many years,²⁰³ every court since the district court in *Kendrick* had rejected its use.²⁰⁴ Unless the Supreme Court found that *Ginsberg* supplied the correct standard of review, no lower court would employ it.

Moreover, California's counsel may have interpreted some recent Supreme Court decisions as implying the Court would be receptive to affording differential treatment to minors. In 2005, the Court held in *Roper v. Simmons* that the Eighth and Fourteenth Amendments prohibited the execution of an individual who committed a capital crime under age eighteen.²⁰⁵ In 2010, the Court found the imposition of a life sentence with no possibility of parole on a juvenile who committed a non-capital offense also violated the Eighth Amendment.²⁰⁶ California argued these cases showed there were "physiological reasons why minors are not yet capable of exercising the full panoply of constitutional rights" and that minors were more susceptible to harmful effects.²⁰⁷

California also relied on the 2009 decision in *FCC v. Fox Television Stations, Inc.*²⁰⁸ There, the Federal Communications Commission (FCC) found the broadcast of "fleeting expletives" violated the law against indecent broadcasts, a law the FCC defended in the name of protecting children.²⁰⁹ On appeal, the Second Circuit found that the FCC's action likely violated the First Amendment, but reversed the FCC for being arbitrary and capricious in violation of the Administrative Procedure Act.²¹⁰ The FCC sought Supreme Court review. In the

203. Professor Saunders had argued that violence was comparable to obscenity and that the *Ginsberg* standard should apply to violent media as far back as 1994. Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107 (1994). See generally KEVIN W. SAUNDERS, *VIOLENCE AS OBSCENITY* (1996).

204. See *supra* text accompanying notes 79–80.

205. 543 U.S. 551 (2005).

206. *Graham v. Florida*, 560 U.S. 48 (2010).

207. Petitioners' Brief, *supra* note 154, at 25.

208. 556 U.S. 502 (2009) (*Fox I*).

209. *Id.* at 509–10.

210. *Id.* at 510–11.

Supreme Court, the networks argued the indecency prohibition was an unconstitutional content-based restriction on their speech and urged the Court to overturn the 1978 *Pacifica*²¹¹ decision, which held that prohibiting indecent broadcasts did not violate the First Amendment. The Supreme Court, however, declined to reach the First Amendment issues, and instead reversed the Second Circuit's finding that the FCC acted arbitrarily.²¹²

One reason the Second Circuit found the FCC's action arbitrary was that the FCC lacked evidence showing that fleeting expletives harmed children. The Supreme Court, in an opinion by Justice Scalia, held that no empirical data was required:

There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency. . . . Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate.²¹³

Justice Scalia added that if enforcement of the ban on indecent broadcasts “had to be supported by empirical data, the ban would effectively be a nullity.”²¹⁴ And even though the FCC “had adduced no quantifiable measure of the harm caused by the language in *Pacifica*,” the Court held that the “government’s interest in the ‘well-being of its youth’ . . . justified the regulation of otherwise protected expression.”²¹⁵

After the *Roper* and *Fox* decisions, however, the Supreme Court declined to use the *Ginsberg* standard in *Stevens*. As discussed above, *Stevens* found unconstitutional a federal ban on depictions of animal cruelty. It rejected the Government’s claim that such depictions, like obscenity, were categorically unprotected by the First Amendment.²¹⁶ The *Stevens* Court rejected as “startling and dangerous” the government’s contention that Congress had made a legislative judgment that depictions of animals being tortured were of such minimal redeeming social value that they were unworthy of First Amendment protec-

211. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

212. *Fox I*, 556 U.S. at 529. On remand, the Second Circuit found the FCC’s policy was unconstitutionally vague and had a chilling effect. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010). This time, the Supreme Court upheld the Second Circuit, but only on the ground that the FCC violated the networks’ due process rights by failing to give fair notice that a fleeting expletive could be actionably indecent. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012). Once again, the Court declined to address the First Amendment implications of the FCC’s indecency policy or revisit its *Pacifica* decision. *Id.*

213. *Fox I*, 556 U.S. at 519.

214. *Id.*

215. *Id.* at 519–20 (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978)).

216. *See supra* text accompanying notes 124–28.

tion.²¹⁷ The Court did, however, recognize the possibility that a category of speech might exist that had been unprotected historically but not yet been identified in case law.

California's response to *Stevens* was to try to make the case that offensively violent material was one such category.²¹⁸ To show that violent content had been unprotected historically, California claimed state laws "reflect a societal understanding that violent material can be just as harmful to the well-being of minors as sexually explicit material."²¹⁹ It cited several examples, including an 1889 Illinois statute making it a crime to distribute to minors publications principally devoted to "pictures and stories of deeds of bloodshed, lust or crime," and a 1956 Rhode Island statute prohibiting the sale to minors of "comic books devoted to crime, sex, horror, terror, brutality and violence."²²⁰ This strategy was unsuccessful because these examples actually reinforced the industry's claim that the State was simply overacting to a new form of media.

A Supreme Court expert would have advised California of the substantial risks in placing so much reliance on *Ginsberg*. The language from *Fox* case could hardly be read as a ringing endorsement of *Ginsberg*. *Fox* was a 5–4 decision with six separate opinions. Justice Thomas wrote a concurring opinion questioning the viability of the two precedents—*Red Lion* and *Pacifica*—supporting the FCC's claim of constitutional authority.²²¹ The four dissenting Justices thought the FCC had construed *Pacifica* too broadly.²²² Because the reasoning in *Pacifica* was based in part on *Ginsberg*, and five Justices in *Fox* were skeptical whether *Pacifica* remained good law (or if it did, whether it could be applied in any other circumstances), it seems likely those five Justices would be unwilling to extend *Ginsberg* to the different circumstances presented in the California video game case.

Moreover, after *Stevens*, it should have been obvious that California would be unlikely to convince the Court to use the *Ginsberg* standard. At the very least, a more experienced Supreme Court advocate would have tried to distinguish *Stevens* on the grounds that the statute prohibited the sale of the offending content to everyone, while the California statute applied only to minors.²²³

217. *United States v. Stevens*, 559 U.S. 460, 470 (2010).

218. Petitioners' Brief, *supra* note 154, at 13.

219. *Id.* at 34–36.

220. *Id.* at 34–35 (emphasis omitted).

221. *Fox I*, 556 U.S. 502, 530 (2009).

222. *Id.* at 539 (Stevens, J., dissenting); 544–46 (Ginsburg, J., dissenting); 546–67 (Breyer, J., dissenting).

223. Justice Alito distinguished the cases for this reasons and disagreed with the majority that *Stevens* was controlling. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 813–14 (2011) (Alito, J., concurring).

B. Alternative Arguments

In fact, California had other options it could have pursued. With expert counsel, California might have garnered the necessary five votes by arguing for a standard of review that, while not as deferential as *Ginsberg*, was easier to meet than strict scrutiny.

1. Facial Challenge

While California's Statement of Facts described the industry challenge as a facial one, its brief never argued that the posture of the case affected the standard of review. Instead, California's counsel tried to make this point for the first time at the end of his rebuttal at oral argument.²²⁴

Facial challenges are generally disfavored because they raise the risk of premature interpretation of a statute, run contrary to principles of judicial restraint, and frustrate the intent of the elected representatives.²²⁵ For this reason, it is usually more difficult to win a facial challenge than an applied challenge.

The *Stevens* case involved a facial challenge. The Court noted that to win a facial challenge, a party would have to meet the test in *Salerno*, "that no set of circumstances exists under which [the statute] would be valid,"²²⁶ or under *Glucksberg*, that the statute lacks any "plainly legitimate sweep."²²⁷ However, the Justices disagreed whether the same standards should apply in a facial challenge to a statute restricting speech. Without deciding exactly what standard applied, the *Stevens* Court recognized "a second type of facial challenge," whereby a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."²²⁸

California might have been more successful had it emphasized that this case involved a facial challenge. Justice Breyer would have upheld the statute in part because it was a facial challenge.²²⁹ Justice

224. Transcript of Oral Argument, *supra* note 166, at 59. Morazzini said "this is a facial challenge. This statute has not been applied has not been even construed by a state or federal court below, but—" At that point, the Chief Justice said "[t]hank you, counsel" and the argument was over.

225. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450–51 (2008).

226. *United States v. Stevens*, 559 U.S. 460, 472 (2010) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

227. *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 740 & n.7 (1997) (Stevens, J., concurring in judgment)).

228. *Id.* (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. at 449, n.6 (2008)). The *Stevens* Court concluded that the statute was so broad it would fail both on its face and as applied. *Id.* at 1590–91.

229. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 841 (citing *Stevens*, 130 S. Ct. 1577, 1587 (2010) (Breyer, J., dissenting)). Justice Breyer believed that the State could

Thomas thought the industry's challenge failed "[u]nder any of this Court's standards for a facial First Amendment challenge."²³⁰ At oral argument, the Chief Justice asked EMA counsel "whether you use the *Salerno* test or the *Glucksberg* test, if there is either one or any applications that would satisfy the Constitution, the facial challenge fails. Right?" He suggested that although a law prohibiting the sale of "a less violent game" to a 17-year-old might violate the First Amendment, "something like *Postal 2* sold to a 10-year-old might well . . . not."²³¹ Thus, had California stressed that facial challenges such as this one were disfavored, it would have had a better chance of getting the five votes it needed.

2. *Intermediate Scrutiny*

Another way to lower the level of scrutiny would have been to argue that the statute was content-neutral and therefore, subject only to intermediate scrutiny. But California never made this argument, nor did it ever challenge EMA's claim that the statute was content-based.

California could have argued the statute regulated conduct (that is, the sale to minors) and had only an incidental effect on speech. The statute was not intended to restrict access by minors based on the *ideas or messages* contained in video games. Indeed, as the EMA pointed out, video games utilize violence for a variety of reasons, mostly relating to the storyline. It was irrelevant under the California statute whether if, as EMA claimed, *Medal of Honor: Frontline* told a story about D-Day,²³² the Western-themed *Red Dead Redemption* portrayed "a violent, unvarnished cruel world of sexism and bigotry" that raised questions about ethics,²³³ or *Postal 2* was a satire designed to be "over the top."²³⁴ The only thing that mattered was whether the game met all three prongs of the statutory definition of a "violent video game."

At oral argument, the Chief Justice expressed skepticism about whether the statute was content-based. He asked Smith why they

legitimately apply its statute to "sales to minors under the age of 17 (the age cutoff used by the industry's own ratings system), of highly realistic violent video games, which a reasonable game maker would know meet the Act's criteria." *Id.*

230. *Id.* at 839.

231. Transcript of Oral Argument, *supra* note 166, at 40–41. Smith's response was first to quibble about whether those tests applied to facial challenges in the First Amendment context. Then he contended that even if the sale of some games could be constitutionally prohibited, the California law was too broad and there was no way that "anybody is going to be able to come back and draw a statute that gets to what they claim, because the English language is not susceptible of that level of precision." *Id.* at 41–43.

232. Brief of Respondents, *supra* note 146, at 2–3.

233. *Id.* at 4–5.

234. *Id.* at 34.

could not treat video games rated for adults like cigarettes—“on the top shelf out of reach of children.”²³⁵ Smith answered that “cigarettes are not speech,” to which the Chief Justice observed that cigarettes are harmful to children and some have concluded that the video games are likewise harmful to children.²³⁶

The incidental effects on speech, moreover, would be modest. The statute did not restrict the creation of violent games, limit their sale to adults, or prohibit anyone, including minors, from playing the games. As Justice Breyer put it, the only thing the statute “prevents is a child or adolescent from buying, without a parent’s assistance, a gruesomely violent video game of a kind that the industry *itself* tells us it wants to keep out of the hands of those under the age of 17.”²³⁷

Thus, California might have persuaded a majority that the statute was content-neutral and subject only to intermediate scrutiny, if it had made that argument.

3. *Whose First Amendment Rights?*

California could have—but did not—argue in the lower court that the only right at issue here was that of a minor to purchase violent video games without parental consent. One commenter has argued that “[a]ssuming *arguendo*, that there is a constitutional right to be free from parental control and that it is a right that could be pursued on *jus tertii* standing, the EMA still does not meet the requirements for *jus tertii* standing to assert this right on behalf of its child customers.”²³⁸ Although EMA could have asserted its own rights, it would not have met the criteria for asserting the rights of minors because it lacked a “close relationship” with children and its economic interests had nothing to do with children’s well-being.²³⁹

Framing the issue as whether video game companies had a First Amendment right to sell violent video games to minors without parental consent would have been consistent with the argument that the statute regulated conduct, not speech. It also would have made clear whose rights were actually at issue. Yet, California did not frame the case in this manner.

Presumably, California chose not to make this argument because it was so intent on persuading the Court to use the *Ginsberg* standard. The premise of *Ginsberg* is that “states may properly restrict minors’

235. Transcript of Oral Argument, *supra* note 166, at 51.

236. *Id.* at 52.

237. *Brown v. Entm’t. Merchs. Ass’n.*, 564 U.S. 786, 848–49 (2011) (citation omitted).

238. Margaret E. Jennings, *Blood, Brains, and Bludgeoning, But not Breasts: An Analysis and Critique of Brown v. Entertainment Merchants Association*, 32 *LOY. L.A. ENT. L. REV.* 87, 116–117 (2012).

239. *Id.* at 117–18. This Article concludes the *Brown* Court based its ruling on the First Amendment rights of a party not before it.

access to material that is fully protected as to adults.”²⁴⁰ California conceded that adults had a First Amendment right to purchase violent video games, but argued that minors’ First Amendment rights were less extensive than those of adults.²⁴¹

EMA responded by defending the First Amendment rights of minors. It argued that, as a general rule, minors enjoy the protection of the First Amendment and that government may not suppress speech solely to protect young people from ideas or images that a legislative body thinks are unsuitable for them.²⁴² It then argued that cases where the Court found that government could constitutionally prohibit public dissemination of protected materials to minors were limited to two specific settings: schools and broadcasting.²⁴³

Presumably because both sides characterized the case as about the First Amendment rights of minors, none of the Justices questioned whose rights were actually at stake.²⁴⁴ The majority found the California statute was “seriously overinclusive because it *abridges the First Amendment rights of young people* whose parents (and aunts and uncles) think violent video games are a harmless pastime.”²⁴⁵

4. *Strict Scrutiny*

Finally, California could have done a better job arguing the statute met the test for strict scrutiny. In the Ninth Circuit, California argued that if *Ginsberg* did not apply, the Act would survive strict scrutiny because it represented “the least restrictive means through which the State can effectively achieve its [compelling] goal [] of helping parents . . . protect [] [their children] from harm caused by playing offensively violent video games.”²⁴⁶ But, California took a different tack in its Petition for Certiorari where it argued the State should not be required to demonstrate that playing violent video games directly

240. Petitioners’ Brief, *supra* note 154, at 12. California devoted thirty-five pages to arguing the statute is constitutional under *Ginsberg* and only eleven to other arguments.

241. *Id.* at 28.

242. Brief of Respondents, *supra* note 146, at 25.

243. *Id.* at 25–27.

244. Indeed, Justice Thomas was the only one who even recognized that two different alleged rights were at issue. He believed the concept of free speech as originally understood did “not include a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians.” *Brown*, 564 U.S. at 821 (Thomas, J., dissenting). He explained that the colonialists held very different conceptions of parental authority and childhood than we have today. Parents had complete authority over their children and were expected to direct their development by, among other things, monitoring the books they read. *Id.* at 823–25.

245. *Id.* at 805 (majority opinion) (emphasis added); *see also id.* at 794–99 (discussing First Amendment rights of minors).

246. Petitioners’ Brief, *supra* note 154, at 41.

caused harm to minors.²⁴⁷ Instead, citing *Turner*, California argued the government need only show the legislature had “drawn reasonable inferences based on substantial evidence.”²⁴⁸

In opposing certiorari, EMA correctly pointed out that *Turner* required a lesser showing because the statute at issue was “content neutral” rather than “content based.”²⁴⁹ Expert Supreme Court counsel surely would have addressed EMA’s point in its merits brief. But California did not, and instead made essentially the same argument it made in its Petition for Certiorari.²⁵⁰ California could have argued that, even if strict scrutiny applied, it fully satisfied that test. This approach, however, would have required California to present evidence that the statute served a compelling government interest, something it did not even try to do in its Supreme Court brief.

In sum, it is fair to conclude that if California had been represented by a Supreme Court specialist, it might have been able to frame its arguments to attract five votes for overturning the Ninth Circuit.

C. Amicus Briefs

A voluminous literature demonstrates that amicus curiae briefs influence judicial behavior. They can influence, among other things, a party’s success, the number of separate opinions, and the content of the Court’s opinions.²⁵¹ As a result, parties, especially those with experienced attorneys who understand the value of amici, often solicit amici.²⁵²

The number of amicus briefs filed in recent years has increased steadily.²⁵³ On average, nine amicus briefs were filed in merits cases

247. Petition for Writ of Certiorari, *supra* note 115, at 12.

248. *Id.* at 5.

249. Brief in Opposition to Certiorari, *supra* note 122, at 32. In *Turner*, the majority found that the statute was content-neutral while the dissenters thought it was content-based. *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994).

250. Petitioners’ Brief, *supra* note 154, at 48 (citing *Turner*, 512 U.S. at 666).

251. Paul M. Collins Jr. et al., *Me Too? An Investigation of Repetition in U.S. Supreme Court Amicus Curiae Briefs*, 97 JUDICATURE 228 (2014); see also Paul M. Collins Jr. et al., *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 Law & Soc’y. Rev. 917 (2015) (examining the extent to which amicus briefs contribute to majority opinions). For a summary of studies on the impact of amicus briefs, see Claire B. Wofford, *Assessing the Anecdotes: Amicus Curiae, Legal Rules, and the U.S. Supreme Court*, 36 JUST. SYS. J. 274, 276 (2015).

252. MATTHEW M.C. ROBERTS, ORAL ARGUMENT AND AMICUS CURIAE 31 (2011). Lazarus explains that “amicus briefs, more than the mere self-interested *ipse dixit* of the petitioner, can demonstrate that the legal issue is important. Members of the elite Supreme Court Bar, accordingly, affirmatively recruit the filing of amicus especially at the certiorari stage.” Lazarus, *supra* note 27, at 1513.

253. Anthony J. Franze & R. Reeves Anderson, *Record Breaking Term for Amicus Curiae in Supreme Court Reflects New Norm*, NAT’L L.J.: SUP. CT. BRIEF (Aug. 19,

during the 2010 term.²⁵⁴ *Brown* came in well above the average for the term with thirty-one, of which only four supported California.

With so many briefs, not all will receive the same amount of attention. One study found that Supreme Court clerks gave the highest consideration to amicus briefs from the Solicitor General's office, followed by amicus briefs filed by states, other government entities, and public-interest groups.²⁵⁵ Among public-interest groups, the ACLU was most often mentioned.²⁵⁶ After the ACLU came professional associations, the NAACP, the AFL-CIO, and U.S. Chamber of Commerce.²⁵⁷

Clerks also reported they were more inclined to give careful consideration to an amicus brief filed by a prominent academic or established member of the Supreme Court bar, especially a former Solicitor General.²⁵⁸ Finally, "86% reported that an amicus brief filed [jointly] by ideologically opposed groups would be noteworthy."²⁵⁹

1. Briefs Supporting California

Leland Yee, the sponsor of the California statute, who had since been elected to the state senate, filed an amicus brief jointly with the California Chapter of the American Academy of Pediatrics and the California Psychological Association.²⁶⁰ This brief acknowledged that "[p]laying a lot of violent games is unlikely to turn a normal youth with zero, one or even two other risk factors into a killer. But . . . playing a lot of video games is likely to increase the frequency and the seriousness of his or her physical aggression, both in the short term and over time as the youth grows up."²⁶¹

2015), <http://www.nationallawjournal.com/supremecourtbrief/id=1202735095655/Record-Breaking-Term-for-Amicus-Curiae-in-Supreme-Court-Reflects-New-Norm>; Mark Walsh, *Frequent Filers: It Was Another Big Term for Amicus Curiae Briefs at the High Court*, 99 A.B.A. J. 16 (2013).

254. Franze & Anderson, *supra* note 253.

255. Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & Pol. 33, 46, 48–49 (2004).

256. *Id.* at 49.

257. *Id.* at 50. Clerks reported they were more likely to read briefs from these organizations because of their reputation for high quality. *Id.* at 46.

258. *Id.* at 52–55.

259. *Id.* at 63.

260. Yee's attorney, Steven F. Gruel, is a well-known former prosecutor and now criminal defense attorney in San Francisco. Gruel does not appear to have any prior Supreme Court experience. *Steven F. Gruel Attorney Profile*, SUPER LAWYERS, <http://profiles.superlawyers.com/california-northern/san-francisco/lawyer/steven-f-gruel/19416dc6-98da-426e-bd30-9e73c4281ebb.html> [https://perma.unl.edu/RXT4-Q4XP].

261. Brief of Amicus Curiae of California State Senator Leland Y. Yee et al., *supra* note 82, at 16.

This brief cited many studies linking the playing of violent video games with harm to minors. In particular, it emphasized that studies conducted since 2005 confirmed the findings relied upon by the California legislature.²⁶² For example, a meta-analysis conducted by leading U.S. and Japanese researchers in 2010 “concluded that the scientific debate should move beyond the simple question whether violent video game play is a causal risk factor for behavior because: ‘scientific literature has effectively and clearly shown the answer to be “yes.”’²⁶³

Appended to this brief was a “Statement on Video Game Violence” authored by thirteen scientists, scholars and researchers including Dr. Anderson, and endorsed by more than one hundred scholars, researchers and professionals. It stated in part:

Extensive research has been conducted over many years using all three major types of research designs (experimental, cross-sectional, and longitudinal). Numerous original empirical research studies have been conducted on children and adolescents. Overall, the research data conclude that exposure to violent video games causes an increase in the likelihood of aggressive behavior. The effects are both immediate and long term. . . . In addition to causing an increase in the likelihood of aggressive behavior, violent video games have also been found to increase aggressive thinking, aggressive feelings, physiological desensitization to violence, and to decrease pro-social behavior.²⁶⁴

Common Sense Media, a California-based advocacy group, also filed a supportive brief written by two law professors: Kevin Saunders of Michigan State University, who authored many articles arguing for the *Ginsberg* test to apply to violent media,²⁶⁵ and Theodore Shaw of Columbia, a well-known academic and former NAACP litigator.²⁶⁶ This brief argued that the First Amendment rights of children were limited with regard to violent video games because children’s minds were different from adults and more susceptible to harm.²⁶⁷ It also

262. *See id.* at 5 (referring to the brief’s meta-analysis of 130 studies regarding the effects of playing violent video games).

263. *Id.* at 25 (citing Craig Anderson et al., *Violent Video Game Effects on Aggression, Empathy, and Prosocial Behavior in Eastern and Western Countries: A Meta-Analytic Review*, 136 *PSYCHOLOGICAL BULL.* 151 (2010)).

264. *Id.* at 1a (appendix).

265. *See supra* note 203.

266. At that time, Shaw was a Professor of Law at Columbia and of counsel at Fulbright & Jaworski. *Theodore M. Shaw*, UNC SCH. OF LAW, <http://www.law.unc.edu/faculty/directory/shawtheodore/> [<https://perma.unl.edu/J2Y9-EX9J>]. Previously, Shaw worked for over twenty years for the NAACP Legal Defense and Educational Fund, where he was “instrumental in drafting the admissions policy that was upheld by the Supreme Court in its 2003 *Grutter v. Bollinger* decision.” He served as lead counsel for interveners in the companion case *Gratz v. Bollinger*. *Shaw Honored at SJI Dinner*, COLUM. L. SCH. MAG., Spring 2014, at 10. While Shaw has some Supreme Court experience, it is not clear whether he would meet Lazarus’s criteria for a Supreme Court expert.

267. Brief of Common Sense Media as Amici Curiae Supporting Petitioners at 3–10, *Brown*, 564 U.S. 786 (No. 08-1448).

argued that at the time of the framing of the Constitution and Bill of Rights, freedom of expression would not have been understood to include a right to expose children to harmful entertainment content.²⁶⁸

Louisiana, joined by ten other states, filed a brief supporting California. Analogizing the California law to state restrictions on minors regarding voting, marriage, contracts, and privacy, they concluded that “California’s law falls squarely within the limits on juvenile freedoms which this court has upheld.”²⁶⁹

The conservative Eagle Forum Education and Legal Defense Fund also filed a brief supporting California. It argued that playing video games is conduct, not speech, and that the statute should be subject only to rational-basis review.²⁷⁰

2. Briefs Supporting EMA

Some of the briefs supporting the EMA directly responded to amici supporting California. For example, Supreme Court specialist Patricia Millett,²⁷¹ filed a brief responding to the evidentiary claims of California and Senator Yee.²⁷² This brief was filed on behalf of “82 scholars with expertise in psychology, psychiatry, neuroscience, criminology, media studies, communication, and other fields” with “extensive experience with the research regarding the effects on individuals of media violence, including violence in video games.”²⁷³ This brief relied heavily on the publications of one of the listed scholars, Christopher J. Ferguson.²⁷⁴ It argued that the “problem confronting California and Senator Yee . . . is not the constitutional standard; it is simply their inability to meet that standard in this case because validated scientific studies prove the opposite, leaving no empirical foundation for the assertion that playing violent video games causes harm to minors.”²⁷⁵

268. *Id.* at 12–16.

269. Brief of Louisiana et al. as Amici Curiae Supporting Petitioners at 4, *Brown*, 564 U.S. 786 (No. 08-1448).

270. Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund in Support of Petitioners at 7, *Brown*, 564 U.S. 786 (No. 08-1448).

271. At the time, she had argued 32 cases in the Supreme Court. *Patricia A. Millett*, U.S. COURT OF APPEALS, <https://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Judges+-+PAM> [<https://perma.unl.edu/J3WH-U6BD>]. Ms. Millett currently serves as a judge on the D.C. Circuit. *Id.*

272. Brief of Social Scientists et al. as Amici Curiae Supporting Respondents, *Brown*, 564 U.S. 786 (No. 08-1448).

273. *Id.* at 1.

274. The brief cites eleven articles written or co-authored by Ferguson. *Id.* at iv–vi. See *supra* text accompanying note 15.

275. Brief of Social Scientists, *supra* note 272, at 35. A quantitative analysis of the publications by experts who signed on to Senator Lee’s amicus brief compared to those who signed on to the Millett brief found “an enormous disparity of *relevant* (i.e., violence and aggression in general, or media violence in particular) expertise

Nine states led by Rhode Island jointly filed an amicus brief “taking the unusual position of opposing a fellow state and arguing for restrictions on their authority.”²⁷⁶ While agreeing with California that states have broad authority to regulate conduct and to treat minors differently in many areas, the Rhode Island brief argued states may not restrict speech unless they can meet the test of strict scrutiny.²⁷⁷ It also argued the California law would “work against the goal of effective law enforcement” by diverting resources from other responsibilities and lending credence to criminal defenses seeking mitigation based on behaviors learned from playing video games.²⁷⁸

The United States Chamber of Commerce also filed a brief supporting the EMA. In recent years, the Chamber has been remarkably successful in influencing Supreme Court decisions by filing amicus briefs.²⁷⁹ In this case, the Chamber was represented by Supreme Court specialist Lisa Blatt.²⁸⁰

Organizations ranging from the ACLU to the Cato Institute also filed briefs supporting the EMA.²⁸¹ Some briefs were filed jointly on

between the experts supporting California and those supporting the violent video game merchants.” Deanna Pollard Sacks et al., *Do Violent Video Games Harm Children? Comparing the Scientific Amicus Curiae Experts in Brown v. Entertainment Merchants Association*, 106 NW. U. L. REV. COLLOQUY 1, at 10 (2011).

276. Greg Stohr, *Violent Video Game Limits Questioned at High Court*, BLOOMBERG (Nov. 2, 2010), <https://www.bloomberg.com/news/print/2010-11-02/california-sales-curb-on-violent-video-games-questioned-by-u-s-high-court.html> [<https://perma.unl.edu/2WDW-VPQW>]. According to supporters of the law, the video game industry conducted an intensive lobbying effort to get these states to file. *Id.*

277. Brief of Rhode Island et al. as Amici Curiae Supporting Respondents at 11, *Brown*, 564 U.S. 786 (No. 08-1448).

278. *Id.* at 3–4.

279. *See, e.g.*, David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce’s Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019 (2009); John Shiffman, *Chamber of Commerce Forms its Own Elite Law Team*, REUTERS (Dec. 8, 2014), <http://www.reuters.com/article/us-scotus-firms-chamber-idUSKBN0JM10Q20141208> [<https://perma.unl.edu/UY43-8B5B>] (“[P]erhaps no other national advocacy organization has so embraced the trend toward Supreme Court specialization as the chief American business lobby, the U.S. Chamber of Commerce.”); Lazarus, *supra* note 27, at 1505–06.

280. Lisa Blatt heads Arnold & Porter LLP’s Appellate and Supreme Court practice. At the time of publishing, she has argued thirty-five cases before the Supreme Court, and prevailed in thirty-two. *Lisa S. Blatt*, ARNOLD & PORTER LLP, <http://www.arnoldporter.com/en/people/b/blatt-lisa-s> [<https://perma.unl.edu/2QFY-CSER>].

281. The ACLU brief focused on the fact that the California statute did not expressly address online sales of violent video games to minors. It argued that if the law applied, it would “inevitably burden the First Amendment rights of adults as well as minors” because sellers have no effective means to determine the age of a purchaser. If the statute does not apply, then it would be completely ineffective.

behalf of ideologically opposed groups. William R. Stein,²⁸² for example, filed a brief on behalf of both the anti-regulatory Competitive Enterprise Institute and consumer groups, such as Consumer Federation of America, that traditionally favor regulation.²⁸³

All of the major trade associations supported the EMA, including the Motion Picture Association of America represented by Supreme Court expert Kannon K. Shanmugam,²⁸⁴ the National Cable and Telecommunications Association represented by Supreme Court specialist H. Bartow Farr III,²⁸⁵ and the National Association of Broadcasters represented by Supreme Court expert Robert A. Long Jr.²⁸⁶ In addition, Supreme Court expert and former Solicitor General Ted Olson filed a brief on behalf of Microsoft.

A group of prominent First Amendment scholars, including Professors David Cole, Kenneth Karst, Martin H. Redish, and William W. Van Alstyne, filed a joint brief co-authored by Eugene Volokh, a well-known professor at UCLA School of Law. This brief argued against using the *Ginsberg* standard because that case was premised on a broad and longstanding social consensus concerning the inappropriateness of sexual material for minors, while no comparable consensus existed regarding violent speech.

Brief of the American Civil Liberties Union et al. as Amici Curiae Supporting Respondents at 5–6, *Brown*, 564 U.S. 786 (No. 08-1448).

282. Stein is the head of Hughes Hubbard's Appellate Practice Group, and so would likely qualify as a Supreme Court expert. See *William R. Stein*, HUGHES HUBBARD & REED LLP, <http://www.hugheshubbard.com/william-r-stein/attorney.aspx> [<https://perma.unl.edu/V579-4F9U>]; *Appellate*, HUGHES HUBBARD & REED LLP, <https://www.hugheshubbard.com/experience-results/appellate> [<https://perma.unl.edu/Q5ZW-2G25>].

283. Brief for the Entertainment Consumers Association et al. in Support of Respondents, *Brown*, 564 U.S. 786 (No. 08-1448). Another amicus brief was filed by ideologically adverse organizations: the Progress & Freedom Foundation and the Electronic Frontier Foundation. See Brief of the Progress & Freedom Foundation and the Electronic Frontier Foundation as Amici Curiae in Support of Respondents, *Brown*, 564 U.S. 786 (No. 08-1448).

284. Shanmugam currently heads the Supreme Court practice at Williams and Connolly. At the time of publishing, he has had twenty oral arguments before the Supreme Court, worked in the Solicitor General's office, and clerked for Justice Scalia. *Kannon K. Shanmugam*, WILLIAMS & CONNOLLY LLP, <https://www.wc.com/kshanmugam> [<https://perma.unl.edu/53P6-7JF5>].

285. Farr has had 32 Supreme Court oral arguments, including *Turner*. *H. Bartow Farr*, BANCROFT PLLC, <http://www.bancroftpllc.com/who-we-are/h-bartow-farr/> [<https://perma.unl.edu/LK5G-NRA9>].

286. Robert A. Long Jr., an attorney at Covington and Burling, has argued before the Supreme Court eighteen times at the time of publishing. *Robert A. Long*, COVINGTON & BURLING, <https://www.cov.com/en/professionals/l/robert-long> [<https://perma.unl.edu/H92P-54YT>]. See also Janet Roberts et al., *supra* note 34, in *The Echo Chamber*, *supra* note 29.

3. *Influence of Amicus Briefs*

One way to assess the impact of amicus briefs is to see how often they were cited in opinions. In *Brown*, the Justices cited industry-side briefs more often than California-side briefs. And interestingly, Justices Scalia and Alito, who cited the fewest amicus briefs in the 2012 term,²⁸⁷ cited the most amicus briefs in *Brown*.

Justice Scalia cited the Cato Institute's brief three times, as well as the Comic Book Legal Defense Fund brief, to show that historically, new forms of entertainment thought to be harmful to children turned out to be benign.²⁸⁸ Justice Scalia also cited the Rhode Island brief to counter an argument made by Justice Breyer in dissent.²⁸⁹

Justice Alito cited several industry-side amicus briefs to criticize the majority opinion. For example, he chastised the majority for "not mention[ing] the fact that the industry adopted [the ratings] system in response to the threat of federal regulation . . . a threat that the Court's opinion may now be seen as largely eliminating."²⁹⁰ Justice Alito also challenged the Court's view that interactivity in video games was nothing new, citing RTNDA's brief to show that "[s]ome amici who support respondents foresee the day when 'virtual-reality shoot-'em-ups' will allow children to 'actually feel the splatting blood from the blown-off head' of a victim."²⁹¹ Finally, he observed that the "International Game Developers Association (IGDA)—a group that presumably understands the nature of video games and that supports respondents—tells us that video games are 'far more concretely interactive'" than literature.²⁹²

Only Justice Thomas cited amici in support of California. He cited Common Sense Media's brief to argue it was absurd to suggest the founding generation understood freedom of speech to include the right to speak to minors without going through their parents.²⁹³ He also cited the Brief for Louisiana et al., for examples of state support for parental authority.²⁹⁴

287. Walsh, *supra* note 253, at 17.

288. *Brown*, 564 U.S. at 797.

289. In taking issue with Justice Breyer's conclusion that the statute was necessary because twenty percent of minors were able to buy M-rated games, Justice Scalia referred to a study cited in the Rhode Island brief finding that a comparable percentage of minors were able to purchase alcohol. *Id.* at 803 n.9.

290. *Id.* at 815 (Alito, J., concurring) (citing Brief of Amicus Curiae Activision Blizzard, Inc. in Support of Respondents at 7–10, *Brown*, 564 U.S. 786 (No. 08-1448)).

291. *Id.* at 817 (citing Brief of the Reporters Committee for Freedom of the Press et al. as Amici Curiae Supporting Respondents at 29, *Brown*, 564 U.S. 786 (No. 08-1448) (internal quotation marks omitted)).

292. *Id.* at 819 (citing Brief of International Game Developers Association and Academy of Interactive Arts and Sciences as Amici Curiae Supporting Respondents at 3, *Brown*, 564 U.S. 786 (No. 08-1448)).

293. *Id.* at 822 (Thomas, J., dissenting).

294. *Id.* at 837.

In sum, it appears being represented by a Supreme Court expert gave EMA an advantage over California in terms of amicus briefs. EMA was able to solicit far more supporting briefs, including ones directly countering the amicus briefs supporting California. At least seven amicus briefs supporting the EMA bore the names of Supreme Court experts,²⁹⁵ while none supporting California did. The majority opinion cited three amicus briefs supporting EMA and none supporting California. And finally, the EMA had supporting briefs from both liberal and conservative organizations, including the influential ACLU, a factor that might have made it more comfortable for the three liberal Justices to join Justice Scalia's opinion.

D. Oral Argument

In addition to amicus briefs, another important factor in the outcome of a decision is the oral argument. Political scientists who study the Supreme Court have found that

oral arguments provide information that can reduce the Justices' uncertainty regarding aspects of a case. While the Justices generally come to these proceedings after reading the written briefs and the lower court record, they often still face some degree of uncertainty regarding what are generally complex legal and factual issues. The Justices, for example, need an understanding of the legal status quo, the policy choices available to them, the likely effect that different legal rulings will have on the litigants and other similarly situated parties, and the like.²⁹⁶

Moreover, oral argument is likely to have the most impact in very close cases.²⁹⁷

With the exception of Justice Thomas,²⁹⁸ most of the Justices that heard the *Brown* oral argument acknowledge the importance of oral argument. Chief Justice Roberts has written that "oral argument is terribly, terribly important."²⁹⁹ Because the voting conference is held soon after the oral argument, the discussion at the conference tends to focus on what took place at oral argument.³⁰⁰

295. Millett, Stein, Blatt, Shanmugam, Farr, Long, and Olsen.

296. Timothy R. Johnson et al., *Oral Advocacy Before the United States Supreme Court: Does it Affect the Justices' Decisions?* 85 WASH. U. L. REV. 457, 461–62 (2007). See also RYAN BLACK ET AL., ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE 5–6 (2012) (summarizing studies).

297. Michael Duvall, *When Is Oral Argument Important? A Judicial Clerk's View of the Debate*, 9 J. APP. PRAC. & PROCESS 121, 123 (2007).

298. Justice Thomas has been quoted as saying, "I don't see the need for all those questions. I think justices 99 percent of the time, have their minds made up when they go to the bench." LAWRENCE S. WRIGHTSMAN, ORAL ARGUMENTS BEFORE THE SUPREME COURT 25 (2008).

299. John G. Roberts Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. S. CT. HIST. 68, 69 (2005).

300. *Id.* at 70.

Justice Scalia, too, has observed that oral argument can make a difference in the outcome of a case:

Does oral argument change a well-prepared judge's mind? Rarely. What often happens, though, is that the judge is undecided at the time of oral argument (the case is a close one), and oral argument makes the difference. It makes the difference because it provides information and perspective that the briefs don't contain.³⁰¹

Justices Ginsburg, Kennedy, and Kagan have also recognized the importance of oral argument.³⁰²

1. *Role of Experience*

As a general rule, "attorneys with more prior litigating experience before the Court present better oral arguments."³⁰³ Other factors affecting the quality of oral argument include whether the attorney attended an elite law school, clerked on the Supreme Court, or is considered a "Washington, D.C. insider."³⁰⁴

Lazarus suggests that Supreme Court experts have an advantage at oral argument because they are more comfortable at the lectern.³⁰⁵ EMA counsel Smith appeared quite comfortable at the lectern. California counsel Morazzini did not seem particularly nervous, but nonetheless may have found the experience somewhat intimidating. After the oral argument, Morazzini told his law school magazine:

You cannot believe how close you are to the justices When you are making your argument, you are an arm's length away from the chief justice. If he wanted to, he could reach out and slap you. When the justices are talking, you're not hearing them through a speaker, you're hearing their words from their mouths . . . and they're staring at you.³⁰⁶

301. ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 139 (2008).

302. Justice Ginsburg has said, "I have seen few victories snatched at oral argument from a total defeat the judges had anticipated on the basis of the briefs. But I have seen several potential winners become losers in whole or in part because of the clarification elicited at oral argument." Wrightsman, *supra* note 298, at 40. Justice Kennedy's view is that oral "arguments can affect the outcome—not often, but often enough . . . a lawyer can change minds by framing a case or issue in ways the justices hadn't considered." Janet Roberts et al., *supra* note 34, in *The Echo Chamber*, *supra* note 29. Justice Kagan believes that oral argument is less important than the briefs, but it can make the difference between winning or losing in some cases. She uses oral arguments "both to find out things that I really want to know and also to suggest some things to my colleagues." HarvardLawSchool, *Back at Harvard Law, Justice Kagan Reflects*, YOUTUBE (Sept. 24, 2013), <https://www.youtube.com/watch?v=SLpKFac-OiE> [<https://perma.unl.edu/5CYU-PJ8K>] (view at approximately 19:35 and 22:55).

303. Timothy R. Johnson et al., *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99, 107 (2006).

304. *Id.* at 107–08.

305. Lazarus, *supra* note 27, at 1497.

306. Michael Heenan, *Face-to-Face with the Supreme Court Justices*, PACIFIC L., Summer 2011, at 7.

Another reason Supreme Court specialists have an advantage is that they are more likely to have done multiple moot courts before other Supreme Court advocates at their firm, or elsewhere.³⁰⁷ Lazarus notes that these practice sessions can have a considerable impact on the substance of the arguments presented.³⁰⁸ The EMA counsel participated in at least two moot courts. One was held at Georgetown Law's Supreme Court Institute.³⁰⁹ The other was before two former Solicitors General, Paul D. Clement and Theodore B. Olsen, along with Lee Levin, who has been called "the greatest First Amendment attorney in the United States."³¹⁰ This moot court alone cost \$23,979.³¹¹

It is unclear whether California's counsel participated in any moot courts.³¹² But even if he did, he was unlikely to be able to practice his argument and get feedback from Supreme Court experts as experienced and sophisticated as the ones available to Smith.

2. Quantitative Analysis

All Justices, except Justice Thomas, asked questions at the oral argument. A word count of the official transcript shows that Justice Breyer spoke most often (1191 words) and Justice Kennedy spoke least often (349 words).³¹³ The Justices frequently interrupted counsel to ask questions. Morazzini was interrupted about forty times and was allowed to finish his answer twenty-four times. Smith was interrupted about thirty times, and was allowed to finish twenty-nine answers, or five more than Morazzini.³¹⁴

Generally, the individual Justices addressed more words to counsel for the side they ultimately voted against. Justice Scalia, who voted in favor of EMA, spoke 710 words when Morazzini was up, but only 231 words when EMA's Smith took the lectern.³¹⁵ Similarly, Justice

307. Lazarus, *supra* note 27, at 1519.

308. *Id.*

309. Respondents' Motion for Attorneys' Fees and Expenses, *supra* note 57.

310. *Lee Levine*, LEVINE SULLIVAN KOCH & SCHULZ, LLP, http://www.lskslaw.com/attorneys/lee_levine.shtml [https://perma.unl.edu/RAM6-886B]. Sullivan had argued twice before the Supreme Court at the time of this publishing. *Id.*

311. This cost was included in EMA's motion for attorneys' fees and expenses totaling \$1,144,602. Respondents' Motion for Attorneys' Fees and Expenses, *supra* note 57.

312. The NAAG's Center for Supreme Court Advocacy provides opportunities for states attorneys to do moot courts. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, http://www.naag.org/naag/about_naag/center-supreme-court.php [https://perma.unl.edu/HVL3-KMVD].

313. The word count totals are reported in the Appendix.

314. Using the official transcript, a counsel's answer ending in a period was counted as completed, while one ending with a dash was counted as interrupted.

315. The Justices joining Scalia's opinion similarly directed more words to Morazzini than Smith.

Breyer, who voted in favor of California, spoke more words during Smith's argument (965) than during Morazzini's argument (226). The two concurring Justices, however, did not follow this pattern. Even though they voted in favor of the EMA, they spoke more words to the EMA counsel than to counsel for California.

The Justices spoke more words overall during Smith's argument (2824) than during Morazzini's (2565). Nonetheless, Smith managed to get in 725 more words than Morazzini in his opening argument and rebuttal combined. The fact Smith spoke more words, was interrupted less often, and answered more questions, may reflect his greater experience arguing before the Supreme Court.

3. *Qualitative Analysis*

Whether an oral argument is well done, however, is not simply a matter of counting words. To some extent, the answer depends on the "eyes of the beholder," as well as the advocate's goal.

Lyle Dennison, who frequently reports on oral arguments for *SCOTUSblog*, described the oral argument as swinging "between deep skepticism about state legislators' ability to define 'violence' without suppressing too much free expression, and an abiding feeling—a 'common sense' perception—that there *is* a social problem with children committing digital murder or maiming on their computer screens."³¹⁶ He reported that Morazzini "found himself up against a wall of First Amendment passion against the specific statute he was sent to defend."³¹⁷

[Morazzini] came under withering questioning about the young people it intended to protect. Justice Samuel A. Alito, Jr., for example, asked: "What age group are you talking about? If a video manufacturer has to decide under your statute where its game stands, what age of a child should the manufacturer have in mind? A 17-year-old? A 10-year-old?" Soon, Justice Ginsburg chimed in: "California doesn't make any distinctions between 17-year-olds and 4-year olds." Morazzini said it would be up to a jury to decide who the protected age group should be, but that response got him no traction.

.....

Morazzini's lowest moment, though, appeared to come with a comment by Justice Anthony M. Kennedy, whose vote[] the state almost surely would need to win the case. The state had argued, Kennedy noted, that the constitutional standards for obscenity could simply be applied to expressions of violence. The problem, the Justice went on, is that "for generations there has been a societal consensus about sexual material. . . . But you are asking us to go into an entirely new area where there is no consensus, no judicial opinions. And this indicates to me the statute might be vague, and I just thought you would like to know that reaction."³¹⁸

316. Lyle Dennison, *Argument Recap: "Common Sense" and Violence*, SCOTUSBLOG (Nov. 2, 2010, 12:44 PM), <http://www.scotusblog.com/2010/11/argument-recap-common-sense-and-violence/> [https://perma.unl.edu/E6PD-3UZM].

317. *Id.*

318. *Id.*

In contrast, the EMA counsel “clearly had a sympathetic Court awaiting his argument.”³¹⁹ Dennison describes Smith as “moving along well with his argument, buttressed by helpful comments and questions by Justice Scalia,” when he ran into questions about whether there was anything that government could do to shield children from extremely violent content.³²⁰ Dennison observed, “[i]f there was one strategic error” by EMA counsel, it was his “contending under questioning that there simply is no problem that legislatures need to try to solve nor is there any way constitutionally that they could craft a solution if they tried.”³²¹ Dennison concluded this “was Smith’s low point, but he made it without a hint of regret. It was apparently basic to his whole argument, but it appeared to have left an unsatisfied Court.”³²²

After attending the oral argument, reviewing the transcript, and listening to the recording, it is apparent that EMA’s counsel performed better than California’s counsel.

a. Morazzini’s Oral Argument

California’s counsel struggled to give crisp and clear answers to questions. The following exchange, which occurred early in the argument, provides an example:

MR. MORAZZINI: So this morning, California asks this Court to adopt a rule of law that permits States to restrict minors’ ability to purchase deviant, violent video games that the legislature has determined can be harmful to the development and the upbringing—

JUSTICE SCALIA: What’s a deviant—a deviant, violent video game? As opposed to what? A normal violent video game?

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.* Another blog noted that “[i]n response to pointed questioning, California’s Deputy State Attorney General struggled to explain which video games would be prohibited, why the law would be applied equally to 8 year olds and 17 year olds, and generally how to define violence. . . . The gaming industry’s attorney fared better in the argument, but was not immune from attack.” Rob Van Arnam, *The Terminator v. The Video Gaming Industry: Schwarzenegger v. Entertainment Merchants Association*, WILLIAMS MULLEN (Nov. 12, 2010), <http://www.williamsmullen.com/blog/terminator-v-video-gaming-industry-schwarzenegger-v-entertainment-merchants-association> [https://perma.unl.edu/EDL7-6WGY]. Consumer Electronics Daily reported that “both sides offered an upbeat take on what transpired in the courtroom, saying their attorneys effectively made their cases.” EMA President Bo Andersen thought that Smith’s oral argument “went very well.” Senator Yee also thought the argument went well for California, and that “at the very least what this court is willing to do is to provide us with a pathway as to how we can in fact have a law that would limit the sale of these ultra-violent video games to children and withstand the test of a First Amendment challenge.” Jeff Berman, *Hard to Gauge How Supreme Court Will Rule on Violent Game Battle*, CONSUMER ELECTRONICS DAILY (2010), 2010 WLNR 22176556.

MR. MORAZZINI: Yes, Your Honor. Deviant would be departing from established norms.

JUSTICE SCALIA: There are established norms of violence?

MR. MORAZZINI: Well, I think if we look back—

JUSTICE SCALIA: I mean, some of the Grimms' fairy tales are quite grim, to tell you the truth.

(Laughter.)

MR. MORAZZINI: Agreed, Your Honor. But the level of violence—

JUSTICE SCALIA: Are they okay? Are you going to ban them, too?

MR. MORAZZINI: Not at all, Your Honor.

JUSTICE GINSBURG: What's the difference? I mean, if you—if you are supposing a category of violent materials dangerous to children, then how do you cut it off at video games? What about films? What about comic books? Grimms' fairy tales? Why are video games special? Or does your principle extend to all deviant, violent materials in whatever form?

MR. MORAZZINI: No, Your Honor. That's why I believe California incorporated the three prongs of the Miller standard. So it's not just deviant violence. It's not just patently offensive violence. It's violence that meets all three of the terms set forth in—

CHIEF JUSTICE ROBERTS: I think that misses Justice Ginsburg's question, which was: Why just video games? Why not movies, for example, as well?³²³

At times, California counsel came across as not having a full grasp of the record. For example, when Justice Kagan asked if the State had studies showing that video games were more harmful to minors than movies, he replied:

MR. MORAZZINI: Well, in the record, Your Honor, I believe it's the Gentile and Gentile study regarding violent video games as exemplary teachers. The authors there note that video games are not only exemplary teachers of pro-social activities, but also exemplary teachers of aggression, which was the fundamental concern of the California Legislature in enacting this statute.

So, while the science is continually developing—indeed, it appears that studies are being released every month regarding—³²⁴

Later, Justice Sotomayor asked about “the Anderson study [which] says that the effect of violence is the same for a Bugs Bunny episode as it is for a violent video. So can the legislature now, because it has

323. Transcript of Oral Argument, *supra* note 166, at 4–5.

324. *Id.* at 6.

that study, say we can outlaw Bugs Bunny?”³²⁵ Morazzini answered no, but said nothing about the Anderson study.³²⁶

At another point, Justice Scalia asked whether there was any indication of an exception for violent speech when the First Amendment was adopted.³²⁷ Morazzini began talking about “historic statutes” enacted by states.³²⁸ Before he got very far, Justice Sotomayor wanted to know what was the “earliest statute and how much enforcement was entered?”³²⁹

MR. MORAZZINI: Your Honor, I don’t know the earliest statute off the top of my head. I believe they go back into the early 1900s, perhaps later. I apologize, but I don’t know that—³³⁰

An experienced Supreme Court advocate would have been better prepared to answer these questions.

A Supreme Court expert would also know that failure to raise an argument on appeal waives the argument. Yet the following dialog suggests Morazzini did not.

JUSTICE SOTOMAYOR: Justice Ginsburg talked about the labeling parts of this Act. The circuit court struck those portions of the Act. You have not challenged that ruling.

MR. MORAZZINI: Justice—

JUSTICE SOTOMAYOR: There are two sections to the Act.

MR. MORAZZINI: Sure.

JUSTICE SOTOMAYOR: One is a criminal act for selling to a minor, and the other is a requirement that you label in a certain way each video. The district court said both were—I think the circuit court said both were unconstitutional, correct?

MR. MORAZZINI: Yes, Justice Sotomayor. They found—

JUSTICE SOTOMAYOR: And your brief has not addressed the labeling requirements at all.

MR. MORAZZINI: Well, we didn’t, Your Honor, because one holding of the Ninth Circuit hinged upon the other. In striking down the body of California’s law, the restriction on the sale, the court found that since it’s not illegal to sell these games to 18-year-olds, that the governmental purpose served behind the label itself was—was in fact misleading. So under the Zauderer case law—I don’t have the case cite before me—but under Zauderer regarding lawyers’ advertising of—of services, it’s—the government can require a labeling, so long as it’s necessary to prevent misleading the consumer.

325. *Id.*

326. *Id.* at 7.

327. *Id.* at 16–17.

328. *Id.* at 17.

329. *Id.*

330. *Id.* at 17.

The Ninth Circuit found that because they struck down the body of our law, that the “18” label would be misleading. So that—

JUSTICE SOTOMAYOR: That’s an interesting concession on your part, that the labeling doesn’t have a need separate from the restriction on sale. I would have thought that if you wanted a lesser restriction, that you would have promoted labeling as a reasonable strict scrutiny restriction to permit the control of sale of these materials to minors, but you seem to have given up that argument altogether.

MR. MORAZZINI: Justice Sotomayor, I certainly did not attempt or intend to concede that the Ninth Circuit’s opinion was correct in any sense in this case.

JUSTICE SOTOMAYOR: Well, you have conceded it by not appealing it, but okay. We’re not—your case on labeling rises and falls on the sale to minors?

MR. MORAZZINI: At this point, I would agree, Your Honor.³³¹

Consequently, Morazzini spent a long time discussing an issue that was not actually part of the case.

Morazzini’s rebuttal was also weak. Instead of reminding the Court that if it accepted EMA’s argument, states would be unable to limit minors’ access to even the most extreme and disturbing video games, he used his four minutes to rebut minor points unlikely to affect the outcome of the case. For example, to counter Smith’s suggestion that because video games cost \$50–60, minors are unlikely buy video games without parental involvement, he stated that the law would also apply to rentals.³³²

b. Smith’s Oral Argument

In contrast, the EMA counsel clearly was familiar with the record and usually had his answers ready, as the next example illustrates. Justice Breyer asked why instead of making a new exception to the First Amendment for violence, the Court could not simply apply traditional First Amendment standards.

MR. SMITH: Your Honor, I think if you apply strict scrutiny here, they do not come close to the kind of showing that would be required under—under the First Amendment.

First of all, they have not shown any problem, let alone a compelling problem, requiring regulation here in a world where parents are fully empowered already to make these calls, where crime including violent crime, since the introduction of these games, has been plummeting in this country, down 50 percent since the day Doom first went on the market 15 years ago; in a world where parents are fully aware of what’s going on in their homes and aware of the ratings system and can use all the other tools that we have talked about—
333

331. *Id.* at 20–21.

332. *Id.* at 56–57.

333. *Id.* at 44.

This next exchange with Justice Alito illustrates Smith's ability to respond to a tough question and quickly get back to one of the central arguments in EMA's brief.

MR. SMITH: Your Honor, my main ground today is exactly that, that this Court said last year in *United States v. Stevens* it doesn't have a freewheeling authority to create new exceptions to the First Amendment after 200 years based on a cost-benefit analysis, and this is—this is a test of that. This is exactly what the State of California is asking you to do.

JUSTICE ALITO: But we have here a new—a new medium that cannot possibly have been envisioned at the time when the First Amendment was ratified. It is totally different from—it's one thing to read a description of—as one of these—one of these video games is promoted as saying, "What's black and white and red all over? Perhaps the answer could include disposing of your enemies in a meat grinder." Now, reading that is one thing. Seeing it as graphically portrayed [is another].

. . . .

So this presents a question that could not have been specifically contemplated at the time when the First Amendment was adopted. And to say, well, because nobody was—because descriptions in a book of violence were not considered a category of speech that was appropriate for limitation at the time when the First Amendment was violated is entirely artificial.

MR. SMITH: We do have a new medium here, Your Honor, but we have a history in this country of new mediums coming along and people vastly overreacting to them, thinking the sky is falling, our children are all going to be turned into criminals. It started with the crime novels of the late 19th century, which produced this raft of legislation which was never enforced. It started with comic books and movies in the 1950s. There were hearings across the street in the 1950s where social scientists came in and intoned to the Senate that half the juvenile delinquency in this country was being caused by reading comic books, and there was enormous pressure on the industry. They censored—they self-censored. We have television. We have rock lyrics. We have the Internet.³³⁴

But Smith did take a long time to finally answer another question from Justice Alito.

JUSTICE ALITO: Let me be clear about exactly what your argument is. Your argument is that there is nothing that a State can do to limit minors' access to the most violent, sadistic, graphic video game that can be developed. That's your argument?

MR. SMITH: My position is—

JUSTICE ALITO: Is it or isn't it?

MR. SMITH: My position is that strict scrutiny applies, and that given the facts in the record, given the fact that the— the problem is already well controlled, the parents are already empowered, and there are greatly less alternatives out there—

334. *Id.* at 37–38.

....

CHIEF JUSTICE ROBERTS: So, just to be clear, your answer to Justice Alito is, at this point, there is nothing the State can do?

MR. SMITH: Because there's no problem it needs to solve that would justify—

CHIEF JUSTICE ROBERTS: Could I—could I just have a simple answer?

MR. SMITH: The answer is yes, Your Honor.³³⁵

Smith surely knew the answer, but was probably trying to avoid explicitly acknowledging that deciding the case in favor of EMA would prevent states from taking any action to limit young people's access to violent video games.

V. DID ADVOCACY MATTER?

As shown above, counsel for the video game industry was a Supreme Court expert who wrote a much stronger brief on the merits, obtained far more amicus briefs in support, and fared better in oral argument than did counsel for California. Of course, it is impossible to know whether the result would have been different if California had been represented by a Supreme Court expert. But there are reasons to think it could have made a difference.

First, the odds favor petitioners in the Supreme Court. Because the Court has discretion over whether to hear a case, it is unlikely to grant certiorari unless at least four Justices think the lower court decided wrongly. During the 2010 term, the Court took more cases from the Ninth Circuit than any other Circuit, and it reversed in 73% of those cases.³³⁶ Thus, the odds in favor of California prevailing in reversing the Ninth Circuit were significant.

Second, a common reason for taking a case is to resolve a split among the Circuit Courts.³³⁷ Here, there was no circuit split to resolve. Indeed, as EMA's opposition pointed out, two other circuit courts and six district courts had addressed whether violent video games could be treated as obscenity for minors, and all concluded that the obscenity-for-minors exception to the First Amendment did not encompass violent expression.³³⁸ Because the Court rarely grants review of a lower court decision when it agrees with the outcome and

335. *Id.* at 48–49.

336. The reversal rate was slightly higher than the 70% reversal rate for all cases. SCOTUSBLOG, END-OF-TERM STATISTICAL ANALYSIS—OCTOBER TERM 2010, at 1 (2011), http://www.scotusblog.com/wp-content/uploads/2011/07/SB_Summary_Memo_OT10.pdf [<https://perma.unl.edu/F3T7-95G2>] [hereinafter OT 2010 SUMMARY].

337. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 189 (8th ed. 2008).

338. Brief in Opposition to Writ of Certiorari, *supra* note 122, at 12.

there is no circuit split, some thought that granting certiorari “signaled [the Court’s] willingness to chart a new course”³³⁹

Third, the line-up of the Justices in *Brown* was most unusual. Most non-unanimous decisions issued during the 2010 Term split along ideological lines. According to *SCOTUSblog*:

A sorted list of the Justices most frequently in the majority reveals a clear division by ideology. Justice Kennedy sits at the top of the list with 94% frequency in the majority, and the conservative Justices—the Chief Justice and Justices Thomas, Scalia, and Alito (in that order)—follow with 91%, 88%, 86%, and 86%. The liberal Justices round out the list with Justices Kagan, Sotomayor, Breyer, and Ginsburg joining the majority in 81%, 81%, 79[%], and 74% of cases, respectively.³⁴⁰

Thus, it is unusual for three liberal Justices to join in an opinion written by conservative Justice Scalia.³⁴¹

Fourth, Justice Alito’s concurring opinion criticized the majority’s approach in very strong language. Indeed, one commentator observed that “if not for their void for vagueness determination, Alito and Roberts may just as easily have joined the dissent.”³⁴² Justice Alito’s opinion rejected the majority’s legal and factual analysis. He disagreed that *Stevens* controlled this case, and distinguished it on several grounds.³⁴³ He accused the majority of distorting the effect of the California law, which he viewed as reinforcing “parental decisionmaking in exactly the same way as the New York statute upheld in *Ginsberg*. Under both laws, minors are prevented from purchasing certain materials; and under both laws, parents are free to supply their children with these items if that is their wish.”³⁴⁴

Justice Alito expressed the view that the Court should have proceeded with greater caution in “considering the application of unchanging constitutional principles to new and rapidly evolving technology”³⁴⁵ He thought the Court was “far too quick to dismiss the possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before” and to “dismiss

339. Bob Egelko, *Showdown Over Video Games*, S.F. CHRON, Nov. 2, 2010, at C1.

340. OT 2010 SUMMARY, *supra* note 336, at 6.

341. The liberal Justices Ginsberg, Sotomayor, and Kagan agreed in full with Justice Scalia in only 40%, 45%, and 49% of cases, respectively. In contrast, the more conservative Justices Roberts, Kennedy, Thomas, and Alito agreed in full with Justice Scalia in 72%, 64%, 65%, and 60% of cases. SCOTUSBLOG, STAT PACK FOR OCTOBER TERM 2010, at 19 (2011), http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf [<https://perma.unl.edu/NN2G-M4KX>].

342. Richard H.C. Clay, *Brown v. EMA: Too Good Bo be True for Video Games?*, Law 360 (Aug. 9, 2011), <http://www.law360.com/articles/261385/brown-v-ema-too-good-to-be-true-for-video-games> [<https://perma.unl.edu/3VNZ-5KR6>].

343. *Brown*, 564 U.S. at 813–15 (Alito, J., concurring).

344. *Id.* at 815.

345. *Id.* at 815, 806.

the judgment of legislators, who may be in a better position than we are to assess the implications of new technology.”³⁴⁶ He observed that millions of players spend hours in the realistic alternative worlds created by today’s advanced video games and that the amount of violence in some of those worlds was “astounding.”³⁴⁷

Victims by the dozens are killed with every imaginable implement, including machine guns, shotguns, clubs, hammers, axes, swords, and chainsaws. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools. Severed body parts and gobs of human remains are graphically shown. In some games, points are awarded based, not only on the number of victims killed, but on the killing technique employed.³⁴⁸

In the future, Justice Alito predicted, video games will be even more realistic; 3D video and sensory feedback will enable players to experience physical sensations such as blood splattering from a blown-off head.³⁴⁹ He concluded that if “the sophisticated games that are likely to be available in the near future are combined with the characteristics of the most violent games already marketed, the result will be games that allow troubled teens to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence.”³⁵⁰

Justice Alito also rejected the majority’s view that playing a violent video game was no different “from reading a description of violence in a work of literature.”³⁵¹ He contended that “[o]nly an extraordinarily imaginative reader who reads a description of a killing in a literary work will experience that event as vividly as he might if he played the role of the killer in a video game.”³⁵²

Finally, Justice Kagan has said in subsequent interviews that she was conflicted about *Brown* and might well have decided it differently. In an interview at Harvard Law, she described *Brown* as a “really

346. *Id.*

347. *Id.* at 818.

348. *Id.*

349. *Id.* at 806.

350. *Id.* at 819.

351. *Id.* at 806.

352. *Id.* He compared reading a passage in *Crime and Punishment* where the character kills someone with an axe to “a video-game player who creates an avatar that bears his own image; who sees a realistic image of the victim and the scene of the killing in high definition and in three dimensions; who is forced to decide whether or not to kill the victim and decides to do so; who then pretends to grasp an axe, to raise it above the head of the victim, and then to bring it down; who hears the thud of the axe hitting her head and her cry of pain; who sees her split skull and feels the sensation of blood on his face and hands.” He concludes that for “most people, the two experiences will not be the same.” *Id.* at 820 (citation omitted).

hard case, a super-hard case.”³⁵³ Later, at a forum at Princeton University, she described her decision-making process in *Brown* as “all over the map. . . . Every day I woke up and I thought I would do a different thing or I was in the wrong place.”³⁵⁴ She explained that she personally thought the law was “OK,” but she did not think there was sufficient evidence to satisfy strict scrutiny.³⁵⁵ Concerning her decision to join the majority in *Brown* she remarked: “That is the one case where I kind of think I just don’t know. I just don’t know if that’s right.”³⁵⁶

The Supreme Court’s high reversal rate of Ninth Circuit decisions, the lack of a circuit split, the unusual combinations of liberal and conservative Justices, the concurring Justices’ forceful rejection of the majority’s reasoning, and Justice Kagan’s doubts about how to decide this difficult case, all suggest that if California had done a better job of framing and arguing its case, it could have come out differently.

VI. CONCLUSION

The *Brown* case lends credence to the concerns of Lazarus and others that the increasing specialization of the Supreme Court bar advantages corporate interests. If California, like the video game industry, had been represented by a Supreme Court expert, it might have crafted arguments that could have garnered five votes. And even if having expert representation on both sides did not change the ultimate outcome, it could have resulted in a narrower decision—such as that written by Justice Alito—which would have given states the chance to try again to come up with a law that could be found constitutional.³⁵⁷

Cases in which only the industry side can afford to hire expert Supreme Court counsel seem fundamentally unfair. Most people would not consider a tennis match between someone who just started playing tennis and a tennis champion to be fair. Similarly, it is unrealistic to expect a Supreme Court newbie to do as well as a Supreme Court ex-

353. HarvardLawSchool, *Associate Justice Elena Kagan Speaks with Dean Martha Minow*, YOUTUBE (Sept. 14, 2015), <https://www.youtube.com/watch?v=FWJkCDJMGH4> [<https://perma.unl.edu/56PZ-KFZC>] (view at approximately 26:50).

354. Kyle Orland, *Supreme Court Justice Second-Guesses Decisive Vote in Gaming Free Speech Case*, ARS TECHNICA (Jan. 5, 2015, 4:10 PM), <http://arstechnica.com/gaming/2015/01/supreme-court-justice-second-guesses-decisive-vote-in-gaming-free-speech-case/> [<https://perma.unl.edu/E2XM-TPV5>].

355. *Id.*

356. *Id.*

357. Sometimes, the best result a Supreme Court specialist can hope to achieve is “a soft landing.” Lazarus, *supra* note 27, at 1541 (citation omitted). An example of a soft landing in *Brown* would be if the majority had struck down the statute solely on vagueness grounds, leaving the questions about constitutionality and causation for a later case.

pert. And it is unfair to have Supreme Court rulings turn on the fact that one party can afford to hire counsel with vastly more experience than the other party.

The stakes in Supreme Court cases can be very high. Here, the Supreme Court's decision has already had a significant impact: since *Brown*, no governmental body has passed legislation to limit minors' access to violent video games. The practical effect has been to severely limit the policy options available to address the significant problem of gun violence in the U.S., an area where there are not a lot of realistic policy options to begin with. And horrifying acts of violence continue unabated.

It is unknown whether a statute such as California's would help to reduce violence in the real world, and will remain unknown as long as such laws are not allowed to take effect. Because five Justices decided this case broadly on First Amendment grounds, states have nothing they can do to limit minors' exposure to extremely violent video games. Whether one agrees or disagrees with this result, it is important to have a fair process.

APPENDIX
Word Count of Oral Argument in *Brown*

Word Count of Oral Argument in *Brown*

| | | Word count of counsel | |
|-------|--|--|--|
| | Zackery P. Morazzini On behalf of Petitioners | Paul M. Smith On behalf of Respondents | |
| Total | 2334 | 3059 | |

| | | Word count of Justices | | | |
|-----------------------|------|-----------------------------|-------------------------|------------|-------------|
| | | In response to Morazzini | In response to Smith | Procedural | Total words |
| Justice Breyer | 226 | 965 | | | 1191 |
| Justice Scalia | 710 | 231 | | | 941 |
| Chief Justice Roberts | 23 | 744 | 42 | | 809 |
| Justice Sotomayor | 574 | 135 | | | 709 |
| Justice Alito | 130 | 394 | | | 524 |
| Justice Kagan | 350 | 142 | | | 492 |
| Justice Ginsburg | 287 | 129 | | | 416 |
| Justice Kennedy | 265 | 84 | | | 349 |
| Total | 2565 | 2824 | 42 | | 5431 |