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Hughes Hubbard Helps Defend Freedom of Expression

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Hughes Hubbard played a role in the U.S. Supreme Court's long-awaited June 27 decision in Brown v. Entertainment Merchants Association. The Court struck down as unconstitutional California's statute prohibiting the sale of violent video games to minors. The Court's 7-2 judgment was a resounding victory for proponents of free speech. Read the Court's slip opinionhere.

Hughes Hubbard filed an amicus brief on behalf of the Entertainment Consumers Association ("ECA"), a nonprofit organization that advocates for the rights of consumers of interactive electronic entertainment. The brief was also filed on behalf of other consumer advocacy organizations. Bill Stein, Dan Weiner and Danny Doeschner drafted the brief, with assistance from Benjamin Thompson and Katherine McHugh. Professor Jonathan Askin and his students from the Brooklyn Law Incubator & Policy Clinic at Brooklyn Law School made valuable contributions to the brief. The ECA thanked Hughes Hubbard and others who contributed to the victory on its Web site.

Justice Antonin Scalia's majority opinion (joined, in an unusual lineup, by Justices Kennedy, Ginsburg, Sotomayor and Kagan) held unequivocally that "[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection." The Court acknowledged that many may consider certain video games to be crude, extremely violent, and even "disgusting" and observed that "[r]eading Dante is unquestionably more cultured and intellectually edifying than playing Mortal Kombat. But these cultural and intellectual differences are not constitutional ones."

The Court rejected the notion that depiction of violence is a category of expression subject to restrictive, content-based regulation. (The statute was modeled on the Court's Miller obscenity test.) The Court emphasized that "new categories of unprotected speech may not be added to the list by a legislature that concludes that certain speech is too harmful to be tolerated."

The Court also turned aside as "unprecedented and mistaken" California's argument that content-based regulation is constitutionally permissible for speech directed at children (when the regulation would be impermissible if directed at adults). The Court did not accept the argument that the interactive nature of video games makes them qualitatively different from other forms of expression, and thus subject to greater regulation.

Video games are expressive speech subject to full First Amendment protection; the California statute seeks to impose content-based regulation on that speech. The law, therefore, could survive only if it passed the Court's "strict scrutiny" standard. The Court in Brown held that the video game law did not meet that standard because California had not demonstrated that the statute served a compelling interest. There was no credible evidence that video games cause children to be violent. The Court also found that the statute was not narrowly tailored to address the purported harm by the least restrictive means available (example: the video game industry's highly effective voluntary rating system and policies deterring merchants from selling mature games to minors).

The Brown decision is the latest in a series of expansive First Amendment decisions by the Roberts Court. The case is a sweeping affirmation of the "absolutist" approach to freedom of expression that leaves government little room to regulate the content of expressive media.