



**“The U.S. Supreme Court’s Support of the First Amendment,
Creative Expression, and Video Games – New Opportunities and Challenges”
Mike Gallagher, President and CEO, Entertainment Software Association
The Media Institute Communications Forum
September 20, 2011
Washington, DC**

Good afternoon everyone. Thanks very much, Patrick, for that great introduction, and thanks to the Media Institute for inviting me to today’s Communications Forum luncheon.

For those of you unfamiliar with the Entertainment Software Association, we are the trade association that serves the business and public affairs needs of companies that publish computer and video games for game consoles, personal computers and the Internet. Our members include virtually all of the leading entertainment software companies, from Sony, Nintendo and Microsoft to Disney, Electronic Arts and Ubisoft.

We represent our members on a variety of issues, from First Amendment protections to piracy and intellectual property, and work to foster economic conditions that support our robust and growing industry. We also organize and manage E3, the premier global video game trade show.

Today, I would like to talk to you about the U.S. Supreme Court’s recent landmark video game decision, and what that means for us not only in legal terms but for the recognition of what we do and how we do it.

By affirming that our products have the same Constitutional rights as books, movies and other entertainment forms, we now hope policymakers and opinion leaders will pay more attention to matters outside the legal system; to recognize that we have become much more than an entertainment medium, although that will always be the core of our business.

In fact, we are a vibrant contributor to economic growth, the education of our children and young adults, the training of America’s workforce, and even the health of our people.

We have firmly established ourselves as one of the most successful and innovative industries in the nation and we are proud of our many accomplishments. These developments get a lot less attention than an oral argument before the Supreme Court—especially one held on election day. Yet they are extremely important to the future of our industry and our nation’s economy.

I will share some reflections on those broader themes in a moment, but would first like to focus on our industry’s day in court.

As many of you know, ESA recently faced a historic challenge to the constitutional rights of video game developers and publishers – a challenge that officially began six years ago when the state of California enacted legislation regulating the sale of video games.

When the Supreme Court first agreed to hear the suit, we were very hopeful that the Court would affirm what we have always known – that video games are fully protected free speech under our Constitution, just like other expressive works. That is, in fact, exactly what they did.

In Justice Scalia's majority opinion, the Court forcefully declared, and I quote, that "Video games qualify for First Amendment protection. Like protected books, plays and movies, they communicate ideas through familiar literary devices and features distinctive to the medium. And 'the basic principles of freedom of speech...do not vary with a new and different communication medium.'"

The Court also said California did not meet the test of "strict scrutiny," as is required of any attempt to restrict free speech. As you may know, this test requires that a law furthers a compelling government interest, and that the proposed remedy is narrowly tailored to be the least restrictive means of achieving that interest. The Court said California's law failed on both counts.

For one, the Court stated California failed to present compelling evidence proving a causal link between playing violent video games and real-life violence. Let me read from the Court's decision, "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...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.'"

We have been saying that as an industry for years—it packs a real punch when it comes from the Supreme Court.

Secondly, the Court ruled that California's law was not a narrowly tailored solution. The state's proposed restrictions failed to meet the alleged substantial need of parents who wish to restrict their children's access to violent video games. The video-game industry's voluntary rating system already accomplishes that.

This ruling is not just a victory for the ESA, or for the video game industry. It is a victory for artists and publishers across this nation, including the more than 180 groups and individuals who filed amicus briefs with the Court on our behalf, many of which are represented in this ballroom today.

The Media Institute played a key role in amplifying our voice and ensuring the Court fully considered the far-reaching potential consequences of California's law for creative expression across many industries and art forms. We deeply appreciate The Media Institute's filing of an amicus brief -- along with The Thomas Jefferson Center for the Protection of Free Expression -- in support of our position.

The Media Institute's backing was critical, as was that of our other supporters, including 82 leading and well-respected social scientists, researchers, and medical professionals; Attorneys general from 10 states; and the Motion Picture Association of America, the National Association of Broadcasters, the Recording Industry Association of America, the Consumer Electronics Association, the Association of American Publishers and a number of news organizations that stressed to the Court their concerns about both the obvious and unintended consequences of this law.

The Court's ruling provides a strong defense against future attempts to restrict content that is fully protected speech under our Constitution. It is an important step away from the "slippery slope" down which our society may have fallen had the Court upheld California's law.

Had the Court ruled differently, lawmakers would have received the authority to distinguish between —acceptable and —unacceptable levels of violence in media. It is hardly beyond imagining that legislators would have attempted to apply those vague standards to other entertainment media and art forms. This could have put in danger a number of notable pieces of literature, classic films and award-winning songs that contain graphic depictions of violence. This includes titles like Mario Puzo's "The Godfather," Richard Brooks' "In Cold Blood," and Johnny Cash's "Folsom Prison Blues."

Despite their critical acclaim, logic suggests that even these well-regarded works would have faced increased scrutiny or been the subject of future controversies over content had the Court allowed California's video game law to stand. How can you restrict violence in one genre, but not in others; or to say a video game is worthy of restriction but a movie or book of the exact same title should be exempt?

The Court's decision not only places video games where they belong, alongside other protected forms of speech, but also guards against future regulation of some of our culture's most treasured works.

We believe in a better balance, one that has the benefit of being Constitutional.

We remain focused on working with parents, retailers and policymakers to chart a path forward that enables parents to control the games their children play while preserving developers' creative freedoms.

The ESA's past research shows that parents in particular strongly value their right to exercise control over media consumed in their homes. Sixty percent of parents agree that it is not the role of government to regulate game sales in purported attempts to protect children from exposure to violent video game content.

A major reason the Court rejected the California statute was our commitment to providing parents with numerous tools and policies to help them make educated choices about the games their youngsters play.

This includes the Entertainment Software Rating Board rating system, which assigns age ratings for video games and provides detailed content descriptors explaining why a game received a particular rating. Parents and opinion leaders continually recognize the ESRB as the best entertainment rating system in the country, including the Federal Trade Commission.

Parental controls that limit a child's access to games based on their ESRB rating are also available on all new video game consoles. According to a 2011 study conducted by Ipsos, 75 percent of parents believe parental controls are useful.

We also successfully partnered with organizations including the national Parent Teacher Association, Web Wise Kids and professional sports teams such as the Chicago Blackhawks and New Orleans Saints to raise awareness of these resources, as well as important tips for staying safe while playing games online.

Yet, we can always do more to enhance understanding and increase the use of these highly effective tools. We are reaching out to elected officials and other interested parties, inviting them to join with us, as many have already, in advancing these efforts.

The Court's ruling also presents a tremendous opportunity to be more fully recognized for helping Americans lead happier, healthier and more productive lives. We believe this transformative moment for interactive entertainment will lead to greater discussion and understanding of what video games have to offer, and the many ways in which they positively impact our daily lives.

Video games are everywhere and played by virtually everyone. According to Ipsos' research, 72 percent of American households play computer or video games. Forty-two percent of these players are women, and 29 percent are over the age of 50.

Yet perhaps more notably, today's games have a real and positive impact on how we live our daily lives. Video games can strengthen our education system, increase our chances for workplace success, improve the delivery of health care, help tackle important social issues and inspire artistic expression.

The body of research demonstrating that video games have real potential as next-generation learning tools continues to grow.

Arizona State University professor Dr. James Paul Gee concluded in his book, *What Video Games Have to Teach Us About Learning and Literacy*, that video games' intermixing of instruction and demonstration provides a more effective learning technique than the style currently found in most classrooms.

Games can be particularly useful in enhancing student interest and comprehension in science, technology, engineering and math topics. As part of the White House-led *Educate to Innovate* campaign, the ESA worked with several organizations to host the National STEM Video Game Challenge, which sought to motivate interest in STEM topics by tapping into students' natural passion for playing video games.

Recent studies by the Joan Ganz Cooney Center at Sesame Workshop and I.T.I.F. underscore the value of those efforts.

The educational benefits of video games are also extending into higher education. 343 American colleges, universities and technical schools will offer programs and courses in video game design, development and programming during the 2011-12 academic year. The 301 undergraduate programs and 42 graduate programs are offered at institutions of higher learning in 45 states.

In an effort to support this growing trend our philanthropic arm, the ESA Foundation, operates a grant program for organizations around the U.S. that utilize technology, including video games, to educate America's youth and young adults.

A variety of companies also incorporate games into their employee recruitment and training programs.

According to a 2008 survey conducted by KRC Research, more than 75 percent of businesses and non-profits said they already offer video game-based training and planned to expand their usage, and nearly 80 percent of organizations not utilizing games as training tools said they were likely to do so by 2013.

Medical professionals use games, game technologies and virtual worlds to help diagnose patients, enhance treatments and train tomorrow's health care providers. One such example can be found in the medical journal *Archives of Surgery*, which reported surgeons who played video games at least three hours a week in their past were 27 percent faster and performed simulated laparoscopic surgeries with 37 percent fewer than non-players. So we all know the key question we should be asking our surgeons down the road.

HopeLab, a nonprofit group that aims to improve the quality of life for kids with chronic illness, created a game called *Re-Mission*, which has helped young cancer patients stick to their treatments more effectively and enhanced their understanding of their disease.

Games also help to communicate ideas around important social and political issues.

In July, American Public Media, in cooperation with the Woodrow Wilson International Center for Scholars, released *Budget Hero 2.0*, which challenges players to try their hand at balancing our country's complex budget.

Video games also continue to gain appreciation as works of art, as their stunning graphics and captivating soundtracks attract the art community's attention.

The National Endowment for the Arts recently replaced its "Arts on Radio and Television" grant category with an expanded "Arts in Media category" that makes digital games, among other interactive and mobile technologies, eligible to receive funding.

And closer to home, the Smithsonian Institution will showcase the incredible artistry within games in the American Art Museum's "The Art of Video Games" exhibit. The exhibit opens in March 2012, and seeks to showcase the evolution of games as an artistic medium.

These evolving applications of games and game technologies help stimulate demand for the kinds of innovative products we develop, beyond an already-strong consumer demand. We constantly strive to reach consumers in new and interesting ways, and the innovation of our developers and publishers produces an impressive array of games to choose from in different formats and across all platforms.

This diversity of game content drives strong sales year after year. In 2010, video game sales generated \$25.1 billion in revenue in the U.S. Sales of game software and content, including digital formats, accounted for approximately \$16 billion of this total.

We also have a strong history and a very real present of blockbuster sales. *Halo: Reach*, Microsoft's latest title in the *Halo* game series, generated \$200 million in sales on its release day alone, and was among the top three highest-selling video games of 2010. Rockstar Games' *Grand Theft Auto IV* generated \$310 million in sales on its release day in 2008, and approximately \$500 million in its first week on the market.

No doubt, as many of you know, Activision Blizzard's *Call of Duty* series is also a gamer favorite. Game sales of last year's *Call of Duty: Black Ops* surpassed \$1 billion in less than a month. The number of consumers who played this game in the first two months of its release could fill the world's 83 largest stadiums, every day.

We are also exploring new paths for reaching consumers where they are – on their mobile phones and handheld devices. Of the top 10 paid apps available through Apple's App Store,

seven are games. Market research firm Interpret reported just last week that 8 million iPad owners in the U.S. use their device for game play. With 55 percent of Americans playing games on the go, leaders like Electronic Arts, Namco Bandai America and Konami Digital Entertainment are increasingly creating compelling digital games and mobile applications.

These companies also reach millions of gamers on social networking sites. Last month, Electronic Arts launched *The Sims Social* on Facebook. The game debuted with nearly 5 million active users, and just surpassed *FarmVille* as the second most popular game on Facebook.

It is also interesting to note who is playing these games in such record numbers. Today, the average computer and video game player is 37 years old and, on average, they have been playing for 13 years. 29 percent of gamers are over the age of 50 and more adult women play than teenage boys. In fact, among game buyers, women make almost half of all purchases.

Our innovations also drive trends in how consumers access and enjoy other forms of entertainment media. Recent market analysis from BMO Capital Markets found a 36 percent increase in the number of installed HD video game consoles in the past year alone. Not only do these consoles provide gamers with a high quality game play experience, they are the entertainment hub in homes across our country, enabling families to watch movies and TV shows when combined with services such as Hulu and Netflix. In fact, the Nielsen Company reported this summer that half of Netflix users connect to its streaming service through video game consoles. Yet that is only half the picture. HD games drive demand for other economic sectors, including broadband adoption, HD televisions, and HDMI cables.

These accomplishments are just the beginning. As policymakers, educators, health care providers, nonprofit organizations and business leaders experience the benefits of games and game technology in non-entertainment sectors, the perception of video games shifts, leading in turn to increased interest in developing new and innovative applications for interactive entertainment software.

At the same time, the ingenuity and enthusiasm of our developers and publishers guarantees that we will see an ever-expanding selection of exciting game content and achieve revolutionary advances in game technology.

I strongly believe that, by affirming games' parity with other acclaimed forms of expressive works, the Supreme Court's decision will promote further exploration and expansion of these trends.

This freedom is critical to fostering innovations that can advance our country. And, it is crucial that none of us take it for granted, and essential that we continue working together to preserve this right.

We as storytellers, innovators, creators, entertainers, and content providers, must seize the opportunity presented by the Court to capitalize on our creative abilities in ways that strengthen our society. Together, we can shape our country's future. As for me, I cannot wait to see what comes next.