

## The Terminator Cometh

**Robert Corn-Revere**



In James Cameron's 1984 film "The Terminator," a killer cyborg from the future portrayed by now-California Governor Arnold Schwarzenegger is described by another character as a remorseless and unstoppable machine bent on destruction: "Listen, and understand. That terminator is out there. It can't be bargained with. It can't be reasoned with. It doesn't feel pity, or remorse, or fear. And it absolutely will not stop, ever."

Some may have felt a vague sense of irony when in May, his cyborg days evidently behind him, Governor Schwarzenegger announced the filing of a petition for *certiorari*, asking the U.S. Supreme Court to save a California law that sought to restrict access by minors to violent video games (including, presumably, games inspired by "The Terminator"). The U.S. Court of Appeals for the Ninth Circuit held in February that the law violated the First Amendment protection for freedom of expression.

The court found that the California law was unconstitutional because the state failed to show that violence-themed video games actually cause psychological or neurological harm, because the law was not narrowly tailored, and because the Constitution does not permit treating depictions of violence as if they are a form of obscenity. In seeking review, California is asking the Supreme Court to reverse 60 years of First Amendment jurisprudence and to hold that "excessively

violent" material — whatever that may be — "deserves no constitutional protection." It is also asking the Court to relieve government from actually having to demonstrate the purported harmfulness of speech it seeks to regulate, but instead to defer to "reasonable inferences" and "legislative judgments."

Beyond irony, California's announcement of a *cert* petition should have sparked a dizzying feeling of déjà vu as well. The court of appeals decision of which the state is seeking Supreme Court review is one of five such rulings from three different circuits, the Seventh, the Eighth, and the Ninth. Together with a number of district court opinions that have reached nearly identical conclusions on the law, the cases represent an unbroken string of defeats for nine state and local governments that sought to break new First Amendment ground by regulating imaginary violence.

Since the various jurisdictions have failed to marshal evidence or legal arguments sufficient to persuade the courts to uphold any of the video game laws, California is asking the Supreme Court to intervene in order to rewrite — and thereby dilute — basic First Amendment principles. Rather than seeking to show that the problem it seeks to address is significant enough, or that its legal arguments are compelling under traditional doctrine, the state is asking the Court simply to lower the bar so that protected speech may be regulated based on legislative whim.

It is not as if the circuit courts have failed to agree on applicable constitutional principles, which is a primary justification for Supreme Court review. Instead, California is seeking review because the district and circuit courts have been *unanimous* in striking down the various laws. Thus, like the Terminator, no matter how many times you kill it, the government drive that motivates these laws keeps on going and going until it achieves its programmed goal. If California is successful, it will open the door to regulate not just video games, but a wide

range of speech that is currently protected under the First Amendment.

So we've come full circle, haven't we? In 1984, Arnold Schwarzenegger established as an iconic character a relentless cyborg sent to the present from the future to terminate humankind's hope for survival.

In 2009, the killer cyborg turned governor has materialized in the present from the past in a plot to undermine the First Amendment. It is time for the Court to declare an end to the sequels and to pull the plug on this machine.

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July 2009

*Speaking Freely* opinion papers are published jointly by The Media Institute and The Thomas Jefferson Center for the Protection of Free Expression. These papers are intended to provide timely and thoughtful perspectives on First Amendment and communications policy issues by experts in constitutional law, media law, and communications policy. The views expressed in *Speaking Freely* papers are those of the authors and not necessarily those of The Thomas Jefferson Center or The Media Institute. These papers are also available on the websites of both organizations.



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