

No. 08-1448

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IN THE  
**Supreme Court of the United States**

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ARNOLD SCHWARZENEGGER, Governor of the  
State of California, and EDMUND G. BROWN JR.,  
Attorney General of the State of California,

*Petitioners,*

v.

ENTERTAINMENT MERCHANTS ASSOCIATION  
and ENTERTAINMENT SOFTWARE ASSOCIATION,

*Respondents.*

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**On Writ of Certiorari to the United States Court  
of Appeals for the Ninth Circuit**

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**BRIEF FOR THE FUTURE OF MUSIC COALITION,  
NATIONAL ASSOCIATION OF MEDIA ARTS AND  
CULTURE, AND FRACTURED ATLAS AS AMICI  
CURIAE IN SUPPORT OF RESPONDENTS**

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## STATEMENT OF INTEREST<sup>1</sup>

The Future of Music Coalition (“FMC”), National Association of Media Arts and Culture (“NAMAC”), and Fractured Atlas (collectively, the “Arts and Music *Amici*”) respectfully submit this brief as *amici curiae* in support of respondents Entertainment Merchants Association and Entertainment Software Association.

FMC is a national nonprofit organization that works to ensure a diverse musical culture in which artists flourish and receive fair compensation for their work, and in which fans can find the music they want. Founded in June 2000 by musicians, artist advocates, technologists, and legal experts, FMC works to ensure that musicians have a voice in the issues that affect their livelihood. FMC’s work is rooted in the real-world experiences and ambitions of working musicians, whose perspectives are often overlooked in policy debates. FMC seeks to educate the media, policymakers and the public about issues at the intersection of music, technology, policy, and law, while bringing together diverse voices in an effort to identify creative solutions to challenges in this space. FMC also aims to document historic trends in the music industry, while highlighting innovative and potentially rewarding business

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made such a monetary contribution. This brief is filed with the consent of all the parties, pursuant to consents recorded in the docket as received from petitioners on May 10, 2010, and from respondents on May 27, 2010.

models that will empower artists and establish a healthier music ecosystem.

NAMAC was founded in 1980 by an eclectic group of media arts organization leaders who realized they could strengthen their social and cultural impact by working as a united force. Their idea was as bold as it was simple: to create a national organization that would provide support services to its institutional members, and advocate for the field as a whole. Since its founding, NAMAC has worked to raise the profile and influence of the media arts on behalf of its growing and changing membership. NAMAC members include community-based media production centers and facilities, university-based programs, museums, media presenters and exhibitors, film festivals, distributors, film archives, youth media programs, community access television, digital arts and online groups, and policy-related centers. Combined, these organizations serve approximately 400,000 artists and other media professionals nationwide.

Founded in 1998, Fractured Atlas is a non-profit organization that serves a national community of artists and arts organizations. Its programs and services facilitate the creation of art by offering vital support to the artists who produce it. Fractured Atlas is an arts industry leader in the use of technology to address challenges facing the arts community, share information and resources, and empower arts organizations with practical tools for managing their operations. The organization helps artists and arts organizations function more effectively as businesses by providing access to funding, healthcare, education and more, and works with talented but underrepre-

sented voices in the arts to foster a dynamic and diverse cultural landscape.

Proper resolution of this case is a matter of concern to the Arts and Music *Amici* and their members. As explained herein, the positions advocated by the petitioners conflict irreconcilably with the First Amendment. Implementation of the challenged statute, and acceptance of its purported rationales, would contradict this Court's decisions regarding the protections that the First Amendment provides for fully protected forms of expression, including but not limited to video, audio, graphic, and literary works of art. Under a proper reading of the First Amendment and prior cases, the Court should affirm the decision of the Ninth Circuit, and should reject petitioners' invitation to create new categories of unprotected artistic expression and, thereafter, to permit the prohibition of the distribution of such expressive works to minors.

### STATEMENT

The parties have set forth the procedural history and facts of the case in their submissions to the Court. Arts and Music *Amici* offer this Statement to provide details regarding the increasingly electronic and decentralized distribution and sale today of music and other forms of creative expression. Because of these relatively new and increasingly prevalent models for distributing protected speech, unconstitutionally vague laws such as the challenged statute here, California Civil Code Sections 1746 – 1746.5, would have especially chilling effects on the creation and exhibition of protected works distributed and sold in the current marketplace for artistic works of all varieties.

Each of the groups joining in the submission of this *amicus* brief work with a large number of partners in the creative cultural community, including individual musicians, arts organizations, venues and tech industry innovators. All of these partners, collaborators and allies are at the forefront of creating and delivering speech and content across multiple platforms. Inhibiting the creative environment in which this expression is facilitated, through the application of vague and unprecedented penalties for a newly unprotected category of materials (*i.e.*, violence that would be considered obscene as to minors), would interfere directly with artistic freedoms for all manner of creators.

Over the past two decades, government policymakers have frequently relaxed the media ownership rules for radio and television, which has led to a breathtaking amount of consolidation of both ownership and access to audiences for both of these media platforms. This has made it enormously difficult for the majority of creators to reach audiences through these media. By contrast, technological innovations inspired by the Internet have transformed how creators and content producers exercise their right to speech and facilitate the transmission of cultural and artistic material for both commercial and non-commercial purposes.

Historically, the cultural and music sectors have operated at a considerable disadvantage due to the inequities of a physical marketplace structured on a hierarchical system of gatekeepers. Traditional broadcast media such as commercial terrestrial radio and television have been notoriously reluctant to air potentially challenging content, due in large part to a

relaxed regulatory environment that allowed for widespread consolidation among broadcast station owners and the subsequent loss of local programming autonomy.

Individual artists have long been dependent on intermediaries such as record labels, book publishers, motion picture studios and television networks to reach their audiences. This has come at a high price to artists. In exchange for taking the risk of investing in new and unknown artists, these aggregators have extracted a very substantial proportion of the revenues those artists help generate.<sup>2</sup> Thus, even successful musicians have historically received little revenue from sound recordings, and “performance remains the means by which most musicians are compensated for their talents.” Troutt, *I Own Therefore I am: Copyright, Personality, and Soul Music in the Digital Commons*, Rutgers School of Law-Newark, Research Papers Series Paper No: 049, at 2, accessed at <http://ssrn.com/abstract=1462344> (2009) (footnote omitted).<sup>3</sup>

Technology has begun to transform how artists interact with their audiences. A widely held thesis, articulated in Chris Anderson’s best-selling book,

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<sup>2</sup> While this statement focuses on musicians, similar circumstances apply to artists working in film and video.

<sup>3</sup> See, e.g., *Music on the Internet: Is There an Upside to Downloading?*, Hearing Before the S. Comm. on the Judiciary, 106th Cong. (2000) (“My performing work is how I make my living. Even though I’ve recorded over twenty-five records, I cannot support my family on record royalties alone.”) (Testimony of Roger McGuinn, founder of The Byrds).

THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE (Random House Business Books, 2006) is that

with decreased barriers to entry on the Internet, consumers would have access to more music than ever before. The traditional structure—in which commercial success is enjoyed by only a small number of hits (making up the “head”) while a large number of obscure independent songs are unable to achieve success due to record label market control (the “tail”)—would be turned on its head, so to speak.

\* \* \*

Based on his research, Anderson surmises that the concept of hit songs will give way to the new “micro-hit” market, in which music fans adopt a more diverse music appetite.

Day, *In Defense of Copyright: Creativity, Record Labels, and the Future of Music*, accessed at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1609689](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1609689), at 20-22 (citing Anderson, *supra*, at 33-34 and 50-52) (footnotes omitted).

While few predict the demise of traditional distribution channels, it is increasingly possible for artists to establish direct relationships with their fans.

Internet tools have made it possible for [musical] artists who are completely outside of the traditional label system to make money from music. Fifteen years

ago, if you didn't have a label and a management team, you were lucky to get a couple hundred bucks for a gig, where you could sell a few demo tapes or self-produced CD's (which cost hundreds or thousands of dollars to produce). Promotion involved stapling fliers to light poles and sending post-cards through the mail—expensive, time-consuming, and not very effective.

Today, you can create, distribute and promote your music to many more people for much less money—plus set up tours, sell merchandise, and find partners—all without leaving your computer.

Rosoff, *Does the Internet Help Aspiring Rock Stars*, [http://news.cnet.com/8301-13526\\_3-10439710-27.html](http://news.cnet.com/8301-13526_3-10439710-27.html) (Jan. 22, 2010). Alternative financing models, in which established artists typically retain greater proportions of literary rights, are emerging.<sup>4</sup> Emerging artists are finding ways to obtain startup money directly from their fans.<sup>5</sup> New distribution channels

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<sup>4</sup> See, e.g., Bintliff, *Investment Fund Backs Singer's Album*, <http://www.ft.com/cms/s/0/9a4102b8-2bb2-11df-a5c7-00144feabdc0.html> (Mar. 10, 2010) (“Ms. Church said: ‘[The deal] provides me with a financial commitment equivalent to that of a major record company but with a much greater degree of control and ownership over my career.’”).

<sup>5</sup> Websites like [sellaband.com](http://sellaband.com), [pledgemusic.com](http://pledgemusic.com), and [kickstarter.com](http://kickstarter.com) solicit funding in small amounts from large numbers of fans. Pledged investments or donations are payable only if a threshold amount is reached. Donors typically receive premiums such as signed CDs if the project goes forward.

such as CDBaby afford artists a distribution channel even when only a few units are likely to be sold.<sup>6</sup> Social media sites such as MySpace and Facebook allow artists to communicate with their fans in real time.

A consequence of these changing distribution models, in which a large and increasing number of working artists function independently of traditional intermediaries, is that these creators do not have assistance in addressing legal issues that may arise. Thus, even more than videogame writers and publishers, musicians and visual artists lack the capacity to undertake the complicated analysis that would be required by provisions such as California Civil Code Sections 1746 – 1746.5. Moreover, however difficult it may be to apply the vague and amorphous standards here at issue to video games, it would be at least as challenging to apply any similar standards to music lyrics and videos, which often deal with far more symbolic and abstract themes.

These changing technologies have unleashed a new golden age of expression. More individuals than at any time in history have the ability to speak without the structural barriers that have to a large degree limited the scope of expression, creative and otherwise. Such exchanges often occur directly between speakers, which means that any attempt to curb this

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<sup>6</sup> CDBaby operates on a consignment basis, and never refuses an account because it is too small. According to its website, as of December 2009, more than 275,000 artists had sold music through CDBaby; it has sold more than 5 million CDs with a retail value in excess of 100 million dollars. *About Us*, <http://www.cdbaby.com/about>. The company also helps distribute digital downloads.

dynamic via arbitrary and vague content-based standards would be injurious to free expression.

If the voices of America's creators were to be thus foreclosed from full participation in the national discourse, there would be a tremendous loss to communities across the country. The Arts and Music *Amici* firmly believe that the full cultural potential of artists and content producers may likewise be stymied if the exchange of art, ideas and information on technological platforms such as the Internet were restricted by laws such as the challenged statute here.

Were the vague statute adopted by the State of California to become a normative standard, that result would have a tremendous chilling effect on free expression within the cultural community. The net effect of such restrictive pressures is incalculable. Creators would be forced to speculate about how far their creativity and expression may extend before triggering a punitive response based on a vague and indecipherable statute, and may limit their expression accordingly. The burden of this loss would ultimately be shouldered by a public unknowingly deprived of access to a broad assortment of expression from a diverse array of speakers.

Artists are also consumers of television, radio, live performances, and Internet content, albeit with a heightened interest in observing and building upon the work of other creators in their industry. Be they painters, writers, playwrights, or television creators, artists do not work in isolation, but rather within the context of each other's works. Creators often build upon or distinguish their work from that of their peers. Thus, a critical aspect of the creative process

is to have access to diverse and wide ranging work, which enables and fosters further creative expression. This access to original, wide-ranging creative work is what requires the strongest First Amendment protections.

The groups represented in this brief understand that the California statute applies at this time only to video games, and not to artists and musicians working in other media. Yet Arts and Music *Amici* recognize, as the Court must as well, that there is a thin line indeed between video games and other media content. For example, the music industry has struggled with issues regarding the labeling of musical content based on definitions of the suitability of its lyrics. Were the California statute upheld, it is possible to envision a scenario in which certain live performances by musicians, dance, or theatre organizations are unduly restricted.

If upheld, the California statute (or similar laws) could lead to a landscape in which 50 different states apply statutes defining “violent” speech in 50 different ways. Any legislative solution to harmonize standards may result in an extremely broad new category of restricted speech. More pressing is the concern that the adoption of state statutes governing depictions and descriptions of violence could create a slippery slope in which, for example, a local theatre company might halt production of a play for fear of exceeding limits on the “distribution” of certain imagery and language to minors.

While the subjectivity of the definition of violent video games in the California statute is certainly an issue that could produce artistic self-censorship, the lack of specificity regarding the method and means of

content distribution is also of tremendous concern for creators and producers of all stripes. Presently, the most attractive new market for artists and content providers is the digital realm. A statute pinned to distribution of physical copies of a work, and which does not acknowledge or account for the inherent differences between such physical distribution and online distribution across all market platforms, could quash the distribution opportunities for and even chill the production of original creative works, stifling innovative online business models in the process. If such a statute imposes penalties on brick and mortar distributors, would the same penalties apply to online creators and distributors for products not amenable to any physical labeling? The answer to that question is unclear.

The musicians and independent music labels, filmmakers, writers, and arts and service organizations that make up today's creative community all depend on the Internet to conduct business and contribute to the rich tapestry that is American arts and culture. Since its inception, the Internet has represented a powerful tool for the exchange of information and ideas, and in recent years, its structures have contributed greatly to the emergence of novel platforms for the dissemination of creative content. As the digital marketplace matures, it is essential not to prevent growth through restrictive legislation and vague restrictions on speech.

## SUMMARY OF ARGUMENT

The video games much discussed by Petitioners and their *amici*,<sup>7</sup> and briefly described in the decision below,<sup>8</sup> are not on trial in this case. Some such games undoubtedly do contain violent imagery and content. They may be objectionable to not a few members of society, and may be deemed unsuitable for minors by such minors' parents. Whether these "violent video games" (in the parlance of the invalidated California statute) are in fact objectionable is not at issue here.

Rather, the question before the Court is whether a state may enact a clearly and concededly content-based restriction on protected speech, attempting to ameliorate the presumptively invalid nature of such a restriction through the use of two disparate and ultimately ineffective tactics for overcoming that presumption. Petitioners first claim that a different standard of review should apply to laws prohibiting the distribution of such expression to minors. If that argument prevails—and it did not in the decision below—petitioners still must rely on terms borrowed from cases regarding the regulation of sexually explicit materials to craft a new regime for the regulation of putatively violent materials. In sum, they must resort to language heretofore undefined in the context of descriptions and depictions of violence

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<sup>7</sup> See Pet. Br. at 3-4; see, e.g., Br. for *Amici Curiae* Louisiana, Connecticut, Florida, Hawaii, Illinois, Maryland, Michigan, Minnesota, Mississippi, Texas, and Virginia at 1-2.

<sup>8</sup> *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 955 (9th Cir. 2009).

in order to narrow the statute and overcome the inherently vague nature of its basic proscriptions.

The state's content-based restriction here created an entirely new and unprecedented category of unprotected expression. It limited the sale and distribution to minors of expression purportedly fitting within an irremediably vague and ill-defined category of "violent video games," and required distributors of such material to adhere to a labeling requirement expressly tied to the distribution of physical copies of affected works.

The respondents have discussed at length the first element above: the contention that a different standard of review should apply for distribution of such materials to minors. Other *amici* supporting respondents likely will answer petitioners' contentions on this point as well. The Ninth Circuit correctly declined to adopt the lesser standard promoted by petitioners, and its decision should be affirmed on the ground that the challenged statute is a content-based restriction that fails both prongs of the strict scrutiny test.

Having found that the statute violated the First Amendment on that basis, the Ninth Circuit did not reach the question of the statute's precision, or lack thereof. In the event that this Court does have occasion to consider whether the statute is impermissibly vague, however, the statute fails that test as well. The vagueness inquiry is distinct from, yet related to, the strict scrutiny analysis. Whether or not the limiting language imported wholesale into the statute from laws prohibiting the distribution of obscenity would be considered vague in the context of sexually explicit materials, these limitations are

impermissibly vague in the context of heretofore protected speech such as “violent video games” and likewise would be vague with respect to other forms of artistic expression depicting or describing violence. The basic proscriptions in the statute are unclear, and the limitations intended to narrow them fail to do so sufficiently.

As a result, in today’s marketplace for distribution of ideas described above, *see supra* at 3-11, a vague law such as the statute at issue here would chill a wide range of artistic, political, and commercial expression fully protected by the First Amendment.

## ARGUMENT

### I. THE STATUTE IS IMPERMISSIBLY VAGUE, AND WOULD CREATE A NEW CATEGORY OF UNPROTECTED SPEECH.

#### A. Vague Laws Prohibiting Expressive Conduct Violate the First Amendment.

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also United States v. Williams*, 553 U.S. 286, 304 (2008) (“Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause....”). The Court in *Grayned* explained that

where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone...

than if the boundaries of the forbidden areas were clearly marked.

*Grayned*, 408 U.S. at 109 (internal quotation marks omitted; alterations in original).<sup>9</sup>

In the context of laws pertaining to curtailment of expression, vague prohibitions are problematic for at least two other reasons as well: they do not “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,” and thus “may trap the innocent by not providing fair warning”; and they “impermissibly delegate[ ] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Id.* at 108-109.

In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Court invalidated provisions of the Communications Decency Act (“CDA”)<sup>10</sup> ostensibly designed to prohibit the transmission of not only obscene but also indecent material to minors. Without reaching Fifth Amendment vagueness issues presented by the statute and discussed in the decision under review in that case, *see id.* at 864, the

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<sup>9</sup> The *Grayned* Court cited and quoted at length from several earlier cases for these basic propositions of law, including *Interstate Circuit v. Dallas*, 390 U.S. 676, 684 (1968); *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961); *Smith v. California*, 361 U.S. 147, 150-152 (1959); *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Winters v. New York*, 333 U.S. 507 (1948); and *Stromberg v. California*, 283 U.S. 359, 369 (1931).

<sup>10</sup> 47 U.S.C. § 223(a) (1994 ed., Supp. II).

*Reno* Court nonetheless found that “the many ambiguities concerning the scope of [the CDA’s] coverage render it problematic for purposes of the First Amendment.” *Id.* at 870. Echoing *Grayned*, the Court in *Reno* once again noted that the vagueness of any content-based regulation of speech “raises special First Amendment concerns because of its obvious chilling effect on free speech.” *Id.* at 871-872; see also *NAACP v. Button*, 371 U.S. 415, 432-433 (1963) (noting in the context of a criminal statute that “[t]he objectionable quality of vagueness...does not depend upon absence of fair notice...or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application”).

Because First Amendment freedoms “are delicate and vulnerable, as well as supremely precious in our society” and “[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions,” the Court has determined that these freedoms “need breathing space to survive” and, therefore, that “government may regulate in the area only with narrow specificity.” *NAACP*, 371 U.S. at 433 (internal citations omitted). As explained in greater detail hereafter, the California statute invalidated by the court below does not possess the requisite specificity, and therefore must be deemed invalid for vagueness if this Court reaches that issue. The *Williams* decision indicated that “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” 553 U.S. at 304 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)). Nevertheless, as *Williams* makes clear, “[w]hat renders a statute vague is not

the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.” *Williams*, 553 U.S. at 306.

That is precisely the problem with the challenged statute here. No court has determined the facts that might place certain games within the category of materials for which the invalidated law prohibits distribution to minors. Petitioners themselves have been unwilling or unable to determine whether particular video games described and included in the record below are in fact “violent video games” under the statute.<sup>11</sup> The statute is void for vagueness because of the undefined terms used to describe material deemed unsuitable for minors, and because of the ill-defined limiting factors approved in cases dealing with sexually explicit materials but inaptly borrowed now for violent imagery.

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<sup>11</sup> Despite petitioners’ repeated incantation of the violent imagery and plotlines in some video games, respondents noted in their brief in opposition to the petition for *certiorari* that “the record does not contain even a single game that Petitioners can claim would be covered by the statute.” Resp. Br. in Opposition at 18; *see also id.* at 18 n.4 (“Respondents placed six video games containing depictions of violence into the record, but Petitioners have refused to say whether they would be covered by the Act. The State’s hesitancy on this score points to the Act’s vagueness.”).

**B. The Court’s Decisions Have Confined Obscenity to Sexually Explicit Materials, and Petitioners’ Invitation to Expand That Category Would Result in Vague Prohibitions.**

Arts and Music *Amici* do not undertake discussion in depth of the strict scrutiny analysis that the Ninth Circuit utilized to invalidate the challenged statute, nor that court’s rejection of the petitioners’ argument for use of the “variable obscenity” standard adopted in *Ginsberg v. New York*, 390 U.S. 629 (1968). Nevertheless, Arts and Music *Amici* do note that the Ninth Circuit’s analysis regarding the limits of the obscenity doctrine were correct, because the limits articulated in the Court’s obscenity jurisprudence and recounted by the Ninth Circuit are relevant to the vagueness analysis.

As the decision on review here explained at length, “[t]he Supreme Court has carefully limited obscenity to sexual content. Although the Court has wrestled with the precise formulation of the legal test by which it classifies obscene material, it has consistently addressed obscenity with reference to sex-based material.” *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d at 959 (citing *Roth v. United States*, 354 U.S. 476, 487 (1957) (“Obscene material is material which deals with sex in a manner appealing to prurient interest); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966)). The Ninth Circuit decision also looked to *Miller v. California*, 413 U.S. 15, 24, (1973), which postdated *Ginsberg* and definitively confined the permissible scope of the obscenity doctrine to sexually explicit materials. *See id.* at 23-24 (“We acknowledge [ ] the inherent dangers of undertaking to regulate any form of

expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct.”) (internal citation omitted).

Petitioners claim that *Winters v. New York*, 333 U.S. 507 (1948), preserves states’ ability to limit minors’ access to “offensively violent material.” Pet. Br. at 42 & n.6. Conceding that the *Winters* Court struck down the law challenged in that decision on vagueness grounds, petitioners nonetheless maintain that the statute’s objective of preventing the distribution of violent materials to minors did not trouble the Court. *See id.* Whether the Court was troubled by such legislative motives in 1948, however, some twenty-five years later it clearly confined the permissible scope of obscenity regulations to sexually explicit materials.

The *Winters* Court concluded by indicating in *dicta*: “To say that a state may not punish by such a vague statute carries no implication that it may not punish circulation of objectionable printed matter, ***assuming that it is not protected by the principles of the First Amendment***, by the use of apt words to describe the prohibited publications.” *Winters*, 333 U.S. at 520 (emphasis added). Of course, a state may adopt any content-based restriction that it likes for objectionable materials, provided that such presumptively invalid restrictions pass strict scrutiny. However, *Miller* and *Winters* taken together demonstrate that the “variable obscenity” test petitioners would apply here has not been made applicable by the Court to depictions of violence. *Winters* stands for the proposition that definitive

statutes may prohibit the distribution of materials not protected by the First Amendment, and *Miller* does not include violent content within the scope of such unprotected materials.

Thus, in *Miller*, the Court adopted the now-familiar three-pronged test for obscenity, noting that statutes prohibiting such unprotected material “must be ***specifically defined*** by the applicable state law,” *id.* at 24 (emphasis added), and that materials must be limited to works which “appeal to the prurient interest in sex, [ ] portray sexual conduct in a patently offensive way, and...do not have serious literary, artistic, political, or scientific value.” *Id.* Arts and Music *Amici* support but do not discuss in detail the Ninth Circuit’s holdings with respect to *Ginsberg* and *Miller*. Yet, without regard to the standard of scrutiny this Court adopts, wholesale importation of the *Miller* test into a statute purporting to regulate materials depicting violence rather than sex does not suffice to define with requisite specificity the prohibitions that California intended to enforce under the invalidated law. *See infra* Part II.A.

### **C. Vague Content Restrictions Cannot Withstand Review Merely Because Speech Is Objectionable, or Because It Is Made Unlawful In Some Way by the Challenged Statute Itself.**

As the Court has long recognized, even disfavored or objectionable speech—and, perhaps, especially such disfavored forms of expression—need and must receive the protections afforded by the First Amendment. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 310-311 (1940). Moreover, laws intended to prohibit or restrict speech that some or even most

members of society would find objectionable must be “narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.” *See id.* at 311.

Petitioners note in their merits brief here that “[o]ffers to engage in illegal behavior are...unprotected since ‘offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection.’” Pet. Br. at 33 (quoting *Williams*, 553 U.S. at 298). While this may be so, petitioners cannot by way of circular reasoning determine that the distribution of violent video games to minors is unlawful activity—hence, unprotected by the First Amendment—just because the challenged statute itself makes such distribution unlawful. *Williams* dealt with offers to distribute child pornography depicting actual children, with the Court there holding that “offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment.” *See id.* As explained in Part I.B *supra*, this Court has not deemed unlawful (or otherwise placed outside of the protections of the First Amendment) expression concerning but not inciting<sup>12</sup> violence.

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<sup>12</sup> The decision below indicated that petitioners have abandoned their claim that the state relies on a “compelling interest” in “preventing violent, aggressive, and antisocial behavior” to support this content-based restriction. *Video Software Dealers Ass’n*, 556 F.3d at 961. That decision also explained in a footnote the confusion and disagreement between the parties during the case as to the application of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See Video Software Dealers Ass’n*, 556 F.3d at 961 n.15. Because the state apparently no longer relies on the suggestion that minors’ exposure to “violent video games” would cause such minors to engage in violent and

Likewise, earlier this year the Court reaffirmed the limited number of classes of speech that go unprotected by the First Amendment, declining to add something as likely objectionable as depictions of animal cruelty to that list. *See United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010) (“As the Government notes, the prohibition of animal cruelty itself has a long history in American law,... But we are unaware of any similar tradition excluding **depictions** of animal cruelty from ‘the freedom of speech’ codified in the First Amendment[.]”) (emphasis in original). As the Court there explained, its decisions in this area “cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment” merely because such speech depicts an unlawful activity. *Id.* at 1586. The *Stevens* Court thereafter invalidated the statute at issue in that case as overbroad, in violation of the First Amendment. *See id.* at 1592.

The Ninth Circuit therefore correctly declined to create a new category of unprotected speech in the case below. Any result to the contrary in the instant case would strike an improper balance with regard to the delicate, vulnerable, and precious free expression that the First Amendment guards. The threat of wholly new sanctions for presently protected descriptions and depictions of violence would deprive a wide range of creative works distributed in today’s market of the “breathing space” that the creators and distributors of these works need. Such sanctions, if upheld for the first time for putatively violent mate-

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lawless behavior, petitioners citation to laws restricting incitement are of no weight. *See Pet. Br.* at 14.

rial rather than sexually explicit material, would open the door to content-based regulation of heretofore protected material, and to a range of vague statutes purporting to limit access to “obscene” violence in forms of artistic expression other than video games.

## **II. THE STATUTE’S DEFINITIONS COMPOUND RATHER THAN CURE ITS VAGUE PROSCRIPTIONS.**

### **A. Other Courts Have Found Similar Statutes Restricting Depictions of Violence to be Vague, Even When Such Laws Import *Miller* Test Provisions.**

Although the Ninth Circuit did not reach the question of the statute’s vagueness, having affirmed invalidation of the content-based restriction on other grounds, courts that have considered similarly worded statutes have found them to be impermissibly vague in the context of depictions and descriptions of violence.

For example, the California statute restricts the distribution to minors of “violent video games” that allow game players to commit violence against “an image of a human being,” provided that such games (i) taken as a whole “appeal[ ] to a deviant or morbid interest of minors,” (ii) are “patently offensive to prevailing standards in the community as to what is suitable for minors,” and (iii) “as a whole, [ ] lack serious literary, artistic, political, or scientific value

for minors” because of the violence depicted. See Cal. Civ. Code § 1746(d)(1)(A).<sup>13</sup>

When considering similar language in other states’ statutes that likewise attempted to prohibit in some fashion the distribution of violent video games, reviewing courts have uniformly found limitations akin to those adopted by the California legislature to be impermissibly vague in the context of violent content. See, e.g., *Entertainment Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1077 (N.D. Ill. 2005) (finding that prohibition of games depicting violence against humans was vague in the context of a fanciful medium that often depicts non-human and superhuman characters); see also *Entertainment Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 656 (E.D. Mich. 2006); *Entertainment Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 836 (M.D. La. 2006). Perhaps especially in video games, but in any form of art depicting characters that are non-human, superhuman, and everything in between, a statute that restricts the distribution of materials showing violence against an image of a human being would be vague and difficult to administer even for courts, let alone for individual creators and artists attempting to discern in advance if their fantastical or symbolic narratives might fall within the strictures of such laws.

Likewise, the limiting factors that California borrowed from *Miller* and its progeny have little if any discernible meaning in the context of violent rather than sexually explicit materials. Thus, in *Video Soft-*

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<sup>13</sup> Petitioners have conceded that the definition adopted in Cal. Civ. Code § 1746(d)(1)(B) is unconstitutional. See *Video Software Dealers Ass’n*, 556 F.3d at 954 n.5.

*ware Dealers Ass'n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992), the Eighth Circuit affirmed the invalidation of a Missouri statute found to be “unconstitutionally vague.” The *Webster* decision explained first that a state’s “assertion that the statute aims to protect minors does not change the vagueness analysis.” *Id.* at 690 (citing *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968)). The Eighth Circuit then went on to refute Missouri’s claim that adopting the *Miller* test and merely substituting the word “violence” for the term “sexual conduct” could rescue the statute, with the court noting that phrases such as “morbid interests in violence” were elusive and vague at best in this context. *See id.* at 690; *see also Granholm*, 426 F. Supp. 2d at 655-56; *Foti*, 451 F. Supp. 2d at 835.

The Communications Decency Act provisions at issue in *Reno* concerned sexually explicit materials rather than depictions of violence, but the Court found that statute to be impermissibly vague because it failed to define proscribed material specifically. *See Reno*, 521 U.S. at 873. Moreover, the Court noted that the *Miller* test criteria concerning prurient interests and patently offensive material are inherently subjective and fact-based determinations, whereas the serious literary, artistic, political, or scientific value determination at least sets “a national floor for socially redeeming value.” Whatever the merit of these criteria in the context of obscenity cases dealing with sexually explicit material, the subjective nature of the first two prongs and the untested nature of the redeeming value test in statutes about violent material make all three components of the *Miller* test hopelessly vague for creators of content who would have “no reasonable

opportunity to know what is prohibited.” *See Grayned*, 408 U.S. at 109.

**B. Artists Today Are as Likely as Not To Serve as Distributors, and Are Ill-Positioned to Parse Language That Perplexes Even Appellate Advocates and Judges.**

Such vague prohibitions on distribution are especially problematic in light of the manner in which artists now distribute their work online, often bypassing retailers, studios, and other gatekeepers and making materials available directly to fans and consumers. Artists can more or less instantaneously create and distribute their works today, but vague statutes such as the invalidated California prohibition at issue here would chill expressive activity and curtail lawful speech. Laws prohibiting the distribution to minors of violent video games, if upheld, would lead inexorably to the enactment of new statutes prohibiting violent depictions or descriptions in other artistic media.

Independent artists now work quite often without the need, desire, or ability to consult with record labels, film studios, or publishing houses that might provide agents and lawyers devoted to the study of such proscriptions.

**CONCLUSION**

For the foregoing reasons, the Court should affirm the decision below.

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