No. 09-35153

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

POWELL'S BOOKS, INC., et. al.
Appellant,

v.

JOHN KROGER, Attorney General of the State of Oregon, et. al.
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
(Hon. Michael W. Mosman)

Case No. CV 08-501-MO

AMICUS CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

IN SUPPORT OF APPELLANTS REQUEST FOR REVERSAL

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This brief is filed with the consent of the parties pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

POWELL'S BOOKS, INC., et. al.
Appellant,

v.

JOHN KROGER, ATTORNEY GENERAL OF THE
STATE OF OREGON, et. al.
Appellees.

Pursuant to 9th Cir. R. 26.1, The Thomas Jefferson Center for the Protection of Free Expression makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?
No

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

/s/ John Joshua Wheeler
Signature of Counsel

July 28, 2009
(Date)

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CONSENT TO FILE AS *AMICUS CURIAE*

This brief is filed with the consent of the parties pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

INTEREST OF *AMICUS CURIAE*

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

STATEMENT OF THE CASE

The Statement of the Case set forth in the Brief of Appellants is hereby incorporated into this brief.

SUMMARY OF ARGUMENT

This appeal presents an extremely important question about the scope of state government power to limit the distribution to minors of materials that are otherwise entitled to First Amendment protection. Although the Supreme Court and this Court have recognized that such limitations are constitutionally acceptable under certain specific circumstances (*Ginsberg v. New York*, 390

U.S. 629 (1968), *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009)), carefully prescribed conditions must be met as a prelude to the exercise of such power. The judgment challenged in the current appeal clearly fails to meet those conditions and for that reason should be reversed.

The court below candidly acknowledged that the challenged statutes do "not conform to the *Miller/Ginsberg* formulation" in certain important respects, since it does not explicitly require prurience and of a lack of serious literary, artistic, political, or scientific value. *Powell's Books, Inc. v. Myers*, 599 F. Supp. 2d 1226, 1240, 1244 (D. Or. 2008). Yet that court sustained both provisions against substantial First Amendment challenge. *Id.* at 1231. Thus a central premise of the District Court's ruling was that laws which bar the dissemination of sexually explicit material to minors need not conform to those strictures. The court below accepted alternative grounds for validation of such regulations, despite the clarity and consistency of the standards set forth by the Supreme Court over four decades ago in *Ginsberg* and applied without exception since that time to government efforts to broaden restrictions on disseminating salacious material to minors. This Court recently recognized in *Video Software Dealers Association* that First Amendment freedoms do not

yield to circumvention merely by making an analogy between protected speech and obscenity.

In addition, reversal of the judgment below is warranted because challenges to the breadth and lack of precision in key language of the Oregon statute were rejected on grounds that are less than dispositive. The District Court recognized certain doubts that a distributor of clearly protected material might validly entertain under this statutory language, but concluded, inter alia, that the affirmative defenses would exempt or absolve "most of these [protected] materials." *Powell's Books*, 599 F. Supp. 2d at 1243. The court below also appreciated certain difficulties a bookseller might experience in reconciling statutory language with relevant aspects of the legislative history, but concluded that a conscientious and properly counseled distributor should be able to divine the proper meaning of the challenged provisions. *Id.* at 1249-50. However, the legal conclusion that the court below reached differs markedly from that which its analysis should have yielded consistent with First Amendment values and interests.

Finally, *amicus* would note that a reversal in this case would surely not leave Oregon or any other state powerless to protect its youth from materials of the type that may constitutionally be withheld from minors. Scrupulous

adherence to *Ginsberg* and relevant decisions of this Court afford ample protection to those vital government interests. Thus *amicus* strongly urges a reversal of the District Court ruling.

I. THE SUPREME COURT'S *GINSBERG* RULING PROVIDES AN EXCLUSIVE AND WELL-MARKED PATH TO STATE LIMITATION OF DISSEMINATION TO MINORS.

It is a hallmark of First Amendment law that expression is presumptively protected unless it falls within one of several carefully prescribed exceptions. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246 (2002). Although the U.S. Supreme Court recognized that "obscene" expression was such an exception as early as 1942 (*Chaplinsky v. New Hampshire*, 315 U.S. 568, __ (1942)), it was not until 1957 that the Court first addressed what actually constitutes obscenity. *Roth v. United States*, 354 U.S. 476 (1957). In the years following *Roth*, the high Court continued to define the obscenity exception until 1973 when it settled on the formulation that is followed by courts today. In deciding whether a work is obscene, the triers of fact must consider: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual

conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973) (internal citations omitted). The following year, the Court made clear that sexually explicit material does not lose its protected status unless it meets the *Miller* standards for obscenity. *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974).

Prior to its decision in *Miller*, the Supreme Court held that in limiting distribution to minors of obscene material, a state may consider the age of the material's potential viewer or reader in determining if the material is obscene. *Ginsberg v. New York*, 390 U.S. 629 (1968). This holding was unaltered by *Miller* and today the *Miller/Ginsberg* holdings are key to assessing the constitutionality of any governmental effort to restrict or prohibit distribution of obscene materials to minors.

While *Ginsberg* did further restrict the First Amendment rights of those who publish and distribute expressive material, that ruling was strikingly and specifically limited in scope. Rather than establish another separate and distinct exception to First Amendment protection, the Court allowed the regulation of the materials in question because they conformed to the standards of a previously defined exception--obscenity--as specifically applied to minors.

Ginsberg, 390 U.S. at 636 (stating that "the concept of obscenity or of unprotected matter may vary according to the group . . . from whom [the matter] is quarantined").

That the Supreme Court intended *Ginsberg* to be applied narrowly is evidenced by *Ginsberg*'s less celebrated companion case decided the same day, *Interstate Circuit, Inc., v. City of Dallas*, 390 U.S. 676 (1968). In *Interstate*, the Court struck down for lack of precision and excessive breadth a city ordinance comparable to that at issue in *Ginsberg*. In doing so, the Court emphasized the need for clarity and precision in any state laws that might take advantage of *Ginsberg*'s invitation to expand regulation of otherwise protected materials to protect young readers. *Interstate*, 390 U.S. at 689. The majority noted, "The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." *Id.* at 689. With this caveat, *Interstate* effectively placed a limit on *Ginsberg* similar to *Jenkins*'s limitation on *Miller*, i.e., only by strictly complying with *Ginsberg* may materials that are not obscene for adults be deemed obscene for minors.

Later Supreme Court rulings have reinforced the limits of *Ginsberg* as a source of regulatory power to protect young readers. In seeking to sustain the

"indecency" ban imposed on Internet speech by the Communications Decency Act, for example, the Government urged on the Court an analogy to *Ginsberg*. *Reno v. ACLU*, 521 U.S. 844, 864 (1997). The Justices flatly rejected the proffered analogy. *Id.* at 865. Justice Stevens, writing for the majority, noted several deficiencies, chiefly the failure to incorporate *Miller*-compatible obscenity standards; omitting such standards clearly deprived such legislation of any claim to *Ginsberg*-based deference. *Id.*

Similarly, in 2002 the high Court struck down the Child Pornography Prevention Act's ban on virtual child pornography – and in the process rejected another attempt to invoke the age-based obscenity exception for a purpose beyond its proper scope. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Recognizing the primacy of First Amendment protection for speech outside the defined exceptions, Justice Kennedy, writing for the majority, cautioned that any effort to regulate allegedly obscene material without satisfying the *Miller* standards must fail. *Id.* at 246. Since the CPPA contained none of those strictures, it was constitutionally deficient. *Id.*

In rejecting an analogy between violent video games and obscene material, this Court wisely noted that the Supreme Court's initial view of *Ginsberg* reflected "an intent to place a substantive limitation on its holding."

Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 960 (9th Cir. 2009). As discussed above, earlier rulings such as *Reno v. ACLU* and *Free Speech Coalition* serve to reinforce that sparing construction. Thus it would be hard to avoid the conclusion that any attempt to invoke the *Miller/Ginsberg* doctrine requires precise concordance.

Indeed, the District Court properly recognized that "in combination with . . . *Ginsberg*, defining obscenity as to minors, *Miller* is the definitive test for obscenity as to minors." *Powell's Books v. Myers*, 599 F. Supp. 2d 1226, 1239 (D. Or. 2008). The lower court even conceded on two occasions that "if the [challenged] Statutes were required to meet the precise terms of the *Miller/Ginsberg* test they would certainly fail" and that "Section 054 does not conform to the *Miller/Ginsberg* formulation." *Id.* at 1239, 1244. Yet, despite such recognition that the challenged statutes failed to meet the *Miller/Ginsberg* desiderata, the District Court deviated from precedent, identifying the task before it as to "apply a more functional test." *Powell's Books*, 599 F. Supp. 2d at 1240. "A statute that functionally distinguishes between obscene and non-obscene speech, as defined by *Miller/Ginsberg*, would survive a claim of unconstitutionality, even if it does not contain the familiar three-part test." *Id.* at 1239.

The District Court based this claim in part on the Supreme Court's statement that "it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts." *Id.*; *Miller*, 413 U.S. at 25. However, only by taking this statement out of context could it be interpreted to apply to all three of the *Miller* prongs. In fact, the statement was made in the context of *Miller*'s second prong, namely "whether the word depicts or describes . . . sexual conduct specifically defined by the applicable state law." *Id.* at 24.

That the statement on deferring to the state's legislative efforts was meant to apply only to *Miller*'s second prong is also evidenced by the fact that immediately following the statement, the *Miller* opinion "give[s] a few plain examples of what a state could define for regulation under part (b) of the standard announced in this opinion." *Id*. No such guidance is offered in discussing *Miller*'s first and third prongs, thereby implying that there was no need for either further guidance or redefining of those prongs by the lower courts.

The court below thus seems to have assumed within the *Miller/Ginsberg* doctrine a breadth or flexibility that might invite validation either of attempted regulation of sexually explicit expression so similar to obscenity that it can be

brought within the same exception to the First Amendment, or of a distinct and separate, but arguably analogous, type of speech regulation. Neither approach seems defensible, or consistent with the Supreme Court's view, or with the most recent ruling of this Court.

Extending *Miller/Ginsberg* to bar distribution to minors of material that is merely sexually explicit without meeting the legal standards for obscenity as to minors should be no more permissible than the state's attempt to hinder general distribution or screening of films that are not obscene for adults, as in *Jenkins*. Since its inception, *Ginsberg* has been recognized as defining a narrow and specific qualification to the First Amendment rights of those who produce and distribute publications that contain salacious material. If government were able to extend this qualification either by creating a new exempted category of expression, or by stretching the current exemption for obscenity (and especially that which covers obscenity in relation to minors), the basic First Amendment safeguards established in the *Miller/Ginsberg* holdings would be at grave risk.

This concern is particularly fitting with respect to the challenged Oregon statutes, which fail both strictly and functionally to conform to the *Miller/Ginsberg* standards for determining obscenity. As the Supreme Court stated in *Erznozik v. Jacksonville*, "Speech that is neither obscene as to youths

nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S. 205, 213-214 (1975). This underscores the importance that a statute conform not only to part of *Miller* standards—for example, that the material in question "is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors"—but that it conform to all components of the *Miller/Ginsberg* test. *Ginsberg*, 390 U.S. at 633.

II. THE CHALLENGED OREGON STATUTES FAIL TO CONFORM TO THE THREE PRONGS OF THE *MILLER/GINSBERG* TEST.

While the statutes contain some language similar to *Miller* standards, they notably lack a requirement that the material, taken as a whole, appeal to the prurient interest of minors—the first prong of the *Miller/Ginsberg* test. O.R.S. §§ 167.051, 167.054, 167.057 (2008). *See Ginsberg*, 390 U.S. at 633; *Miller*, 413 U.S. at 24.This Court has clarified that "[t]he 'prurient interest' portion of the obscenity test is not satisfied if the jury merely finds that the materials would arouse normal sexual responses." *Ripplinger v. Collins*, 868 F2d. 1043, 1054. *See also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491. However, the Oregon statutes apply to materials which would "arouse normal

sexual responses" because their terms contain no requirement that the materials go beyond that in creating a "shameful or morbid interest" in sex. To find sufficient a mere requirement that the materials may arouse a minor implies that sexual excitement in minors is always unhealthy, shameful, or lascivious. Since the works as a whole must, under *Miller*, be judged according to contemporary community standards, and since community standards are ever-changing and vary by location, it would be problematic to set in stone a standard by which it is always unacceptable for material to arouse minors. This is particularly true of older teenagers, who may legally (and with acceptance of the community) view scenes with sexually explicit content in films rated R. For this reason, the requirement that materials have the purpose of "titillating" a minor is not legally adequate. Material that merely titillates does not conform to *Miller* standards of obscenity, nor *Miller/Ginsberg* standards of obscenity for minors, and thus is protected under the First Amendment.

The statutes also fail adequately to protect materials that contain serious literary, artistic, or political value for a minor --the third prong of the *Miller/Ginsberg* test. *See Ginsberg*, 390 U.S. 629 at 633; *Miller*, 413 U.S. at 24. While an exception exists for material in which "the sexually explicit portions . . . form merely an incidental part" of the work and "serve some purpose other

than titillation," there remains a category of materials which may be intended to titillate but which also contain serious value. Or. Rev. Stat. §§ 167.054, 167.057.

The *Miller/Ginsberg* standard requires that the work be judged as a whole, when determining whether it has serious literary, artistic, political, or scientific value. *See Miller*, 413 U.S. at 24. The statutes in question exempt only works in which the sexually explicit portions themselves serve a purpose other than titillation. They do not exempt works in which the sexually explicit portions are primarily intended to titillate, while the rest of the work serves a different purpose. These differences between the Oregon statutes and the *Miller/Ginsberg* standards render the challenged statute over inclusive in that it fails to provide an exception for materials which would be protected under *Miller* standards even though they may serve to titillate a minor.

Because the Oregon statutes lack these key *Miller/Ginsberg* elements, they do not, as the lower court asserted, "functionally distinguish[] between obscene and non-obscene speech." *Powell's Books*, 599 F. Supp. 2d at 1239.

III. THIS COURT HAS CHOSEN NOT TO CREATE A DISTINCT AND SEPARATE, BUT ANALOGOUS TYPE OF SPEECH REGULATION FOR NON-OBSCENE MATERIALS.

Attempts to apply the structure of obscenity doctrine analogously to non-obscenity settings have fared no better than seeking to prohibit sexually explicit material beyond what is covered by *Miller/Ginsberg* standards. Courts have very recently and forcefully rejected such attempts in the context of violent video games. Defenders of state laws and local ordinances that regulate violent video games have consistently (and unsuccessfully) sought to invoke *Ginsberg*. The premise of this effort has been that the protective rationale which proved compelling to the Supreme Court in 1968 should be equally available in addressing a new and different threat posed by violent video games to the welfare of minors. In writing for the Seventh Circuit, Judge Posner firmly rejected that proffered analogy in striking down a city's video arcade ordinance. *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001). While comparable concerns underlay both regulatory systems, the Seventh Circuit nonetheless held that manifest differences between obscenity and violence deprived the claimed analogy of a constitutionally valid premise. *Id.* *Ginsberg* clearly did not apply directly to regulation of violent video games, and different concerns precluded any attempt to invoke it by analogy. *Id.* at 579.

Several other federal circuits have reached precisely the same conclusion, declining to expand *Ginsberg* to the arguably analogous but elusive area of violent video games. *See, e.g.*, *Interactive Digital Software Ass'n v. St. Louis,* 329 F.3d 954 (8th Cir. 2003); *Video Software Ass'n v. Maleng,* 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

That issue came very recently before this Court, which in late February of this year reached precisely the same conclusion. *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009). Despite the appeal of governmental interests invoked in support of regulating minors' access to violent video games, this Court shared the Seventh Circuit's view of the primacy of expressive activities, and in the process rejected once again an attempt to extend *Ginsberg* beyond its carefully defined scope. Recognizing that issue to be "one of first impression in this circuit," this Court concluded that *Ginsberg's* focus on obscenity sharply limited any efforts at analogous application, however appealing might be the case for such an extension. *Id.* at 958, 959-60. "*Ginsberg* is specifically rooted in the Court's First Amendment jurisprudence," cautioned the *Video Software* opinion, "which relates to non-protected sex-based expression." *Id.* at 959. That section of the opinion concluded with a caution that is especially apposite here: "Finally, we note that

the *Ginsberg* Court suggested its intent to place a substantive limit on its holding." 556 F.3d at 960.While the precise issue presented by this appeal differs from that involved in the violent video game cases, the guiding principles are the same; speech is protected by the First Amendment unless it falls under a defined category of unprotected speech.

IV. THE DISTRICT COURT'S RULING SUSTAINED STATUTORY LANGUAGE WHOSE BREADTH AND LACK OF PRECISION SEVERELY CHILL FREE EXPRESSION.

Quite clearly much of the material that the appellants propose to distribute to minors enjoys First Amendment protection. In disposing of the plaintiffs' claims of "substantial overbreadth" – illustrated by the plausible example of a bookseller's possibly unlawful sale of material that otherwise would be protected even for minors – the District Court rejected such a hypothetical because it showed a "strained quality," not based on "fairly quotidian assumptions." 599 F. Supp. 2d at 1247. Such a rejection seems the more surprising, given the court's early acceptance of the case as one that posed a facial challenge, reflecting the wide variety of potentially covered material. Furthermore, in addition to allowing prosecution for distribution of materials which are constitutionally protected, the statutes are written such that they fail

to give adequate notice to potential violators, and thus chill the exercise of free expression.

One statute creates the offense of "luring a minor," a term defined in ways that would leave doubts in the minds even of seasoned First Amendment attorneys, let alone booksellers and other distributors. The District Court's response to claims of vagueness and overbreadth relied heavily on several affirmative defenses, the precise scope and import of which themselves lack perfect clarity. *Id.* at 1241. For example, one defense found in a related statute exempts "representation, description or account of sexual conduct that forms merely an incidental part of an otherwise non-offending whole and serves some purpose other than titillation." *Id.* This defense would not provide a stable safe harbor for those who disseminate protected speech, as such defenses require an amount of speculation as to the purpose of an entire work that does not lend itself to being relied on for protecting acceptable speech.

Much as with regard to the deficiency in the statute's basic coverage, which was discussed above, the District Court candidly acknowledged that a conscientious distributor might reasonably have doubts as to precisely what conduct was forbidden by the key provisions of the law and what activity could claim exemption under the affirmative defenses. After conceding that more

than superficial asymmetries exist between the textual provisions of the applicable statutes, the District Court felt compelled to probe legislative history – and in so doing could not avoid attributing to Oregon lawmakers a particular view of the State's constitution and an interpretive state court ruling. *Id.* at 1242.

When it came to the affirmative defenses, beyond ambiguities of the type noted above, the District Court could conclude only that, under those defenses and a related scienter requirement, "plaintiffs' furnishing of most of these [cited] materials would escape liability." *Id.* at 1243. Recalling the clearly protected nature of much of the proffered material in any other setting, such a qualification seems striking. When it came to the potential crime of "luring," the terrain was even murkier. O.R.S. § 167.057. In contrast to the state's asserted interpretation of the key "purpose" section, the court below candidly noted that "there is contrary evidence both in the legislative history and in the phrasing" of the subject provision; official law enforcement testimony before the key legislative committee exemplified such "contrary evidence." 599 F. Supp. 2d at 1245. Moreover, "if I were to adopt the State's interpretation . . . it would conflate two portions of the statute . . . [and would render the relevant section] superfluous, in violation of the Oregon rules of statutory construction."

Id. at 1245-46. Instead, the District Court ultimately embraced the dictionary definition of "purpose" – a solution which at least avoided the "conflation" problem but seemingly disregarded the position taken by responsible Oregon officials.

Finally, the District Court's concluding discussion of alleged vagueness candidly recognized that "determining the primary purpose of sexually explicit materials and of a defendant in furnishing such materials . . . may be difficult sometimes," and that "there may be situations in which it is difficult to determine the primary purpose of a material or of a person." *Id.* at 1249. Yet such difficulties posed no constitutional impediment here simply because that determination was "a simple question of fact" in which judges and juries daily engage; "[e]ither the primary purpose is sexual arousal or it is not." *Id.* In addition to this conclusion's disregard for the possibility that a work might have both a primary purpose of sexual arousal and serious literary, artistic, or political value; the judgment of the Court below strongly implied tolerance of language that fails to offer to persons engaged in sensitive expressive activity the degree of clarity and guidance that the First Amendment requires of government in regulating such activity.

By their overbreadth and vagueness, the challenged statutes both potentially reach a substantial amount of protected material and chill free expression. Thus, the statutes are presumptively invalid and must be subject to strict scrutiny. *See Ashcroft v. ACLU*, 535 U.S. 564, 572. Although the statutes may serve a compelling interest of protecting minors, their key provisions are not narrowly tailored to achieve that effect. A statute that conforms strictly to *Miller/Ginsberg* standards would be more narrowly tailored to achieve its goal, and thus might be constitutional. However, the challenged statutes do not pass strict scrutiny as they are written. The statutory language lacks the precision of the statute allowed by *Ginsberg*, affords law enforcement officers too much discretion and provides potential defendants not enough guidance, and is therefore unconstitutional.

V. INVALIDATING OREGON'S CHALLENGED MINOR-PROTECTIVE STATUTES WOULD NOT LEAVE THAT OR OTHER STATES POWERLESS TO PROTECT YOUNG READERS AND VIEWERS.

Though such a concluding comment may be unnecessary, *amicus curiae* wishes to acknowledge the vitality of a state's interest in protecting the welfare of its young people from genuinely harmful experiences. Since its *Ginsberg* decision forty-one years ago, the Supreme Court has recognized that material

which meets the rigorous standards for "obscenity" in regard to minors, applied in accordance with due process, may be the subject of criminal sanctions even though such material may not always be deemed obscene for adult viewers and readers. Virtually all states have taken full advantage of *Ginsberg*'s invitation to adopt such laws for the specific protection of their young people, and have regularly enforced and applied such laws within First Amendment constraints. *See* 33 A.L.R.6th 373 (2008). Oregon remains entirely free to follow that course, constrained only by First Amendment standards that have stood the test of more than four decades.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to reverse the judgment of the District Court and to remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(d) and 9th Circuit Rule 32-1, the attached *amicus* brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less (4,305).

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CERTIFICATE OF SERVICE

United States Court of Appeals Docket Number: No. 09-35153

I hereby certify that I electronically filed the foregoing *Amicus Curiae* Brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF systems on July 28, 2009.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated July 28, 2009.

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