

No. 08-1448

IN THE
Supreme Court of the United States

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.

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

**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 INTEREST¹

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

¹ 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.