

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.¹¹ 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.

¹¹ 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 inciting¹² violence.

¹² 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-

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

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

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

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-*

¹³ 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.

Respectfully submitted,

Christopher Naoum
Future of Music Coalition
1615 L Street, N.W.
Suite 520
Washington, D.C. 20036
(202) 822-2051

Andrew Jay Schwartzman *
Matthew F. Wood
Media Access Project
1625 K Street, N.W.
Suite 1000
Washington, D.C. 20006
(202) 232-4300

Counsel for Amici Curiae

**Counsel of Record*

September 17, 2010