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.[2] 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).[3]

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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[2] While this statement focuses on musicians, similar circumstances apply to artists working in film and video.

[3] *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.
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> * * *
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> 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, 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 postcards 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 (Jan. 22, 2010). Alternative financing models, in which established artists typically retain greater proportions of literary rights, are emerging.[4] Emerging artists are finding ways to obtain startup money directly from their fans.[5] New distribution channels

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[4] *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.'").

[5] Websites like sellaband.com, pledgemusic.com, and 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.[6] 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

[6] 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*,[7] and briefly described in the decision below,[8] 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

[7] *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.

[8] *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).[9]

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")[10] 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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[9] 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).

[10] 47 U.S.C. § 223(a) (1994 ed., Supp. II).