

No. 08-1448

---

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

---

ARNOLD SCHWARZENEGGER, Governor of the State  
of California, and EDMUND G. BROWN, 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 OF AMERICAN BOOKSELLERS FOUNDATION FOR  
FREE EXPRESSION, ASSOCIATION OF AMERICAN  
PUBLISHERS, FREEDOM TO READ FOUNDATION,  
NATIONAL ASSOCIATION OF RECORDING  
MERCHANTISERS, RECORDING INDUSTRY  
ASSOCIATION OF AMERICA, AMUSEMENT & MUSIC  
OPERATORS ASSOCIATION, ASSOCIATION OF  
NATIONAL ADVERTISERS, PEN CENTER USA, AND  
THE RECORDING ACADEMY  
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS**

---

MICHAEL A. BAMBERGER  
mbamberger@sonnenschein.com  
*Counsel of Record*  
RICHARD M. ZUCKERMAN  
Sonnenschein Nath & Rosenthal LLP  
1221 Ave. of the Americas  
New York, NY 10020-1089  
212-768-6700  
*Attorneys for Amici Curiae*

---

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICI</i> .....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT .....	6
<b>I. THERE ARE NO EXCEPTIONS TO FIRST AMENDMENT PROTECTION FOR DEPICTIONS OR DESCRIPTIONS OF VIOLENCE .....</b>	<b>6</b>
A. This Court’s Precedents Accord First Amendment Protection to Depictions and Descriptions of Violence.....	6
B. There Is No History of States Regulating First Amendment-Protected Material Based on Their Violent Content .....	10
C. Depictions and Descriptions of Violence Have Always Been Part of Our Civilization’s Art and Expressions .....	11
<b>II. THE EXCEPTIONS PROPOSED BY CALIFORNIA WOULD CREATE A VAST NEW AND UNWARRANTED INROAD ON FIRST AMENDMENT RIGHTS .....</b>	<b>16</b>
A. California’s Proposed Exceptions Are Content-Based, Subjective, and Antithetical to the First Amendment.....	16
B. California’s Proposed Exceptions Rely on an Extremely Broad and Unconstitutionally Vague Definition of Violence.....	23
CONCLUSION.....	27
APPENDIX A — <i>AMICI CURIAE</i> .....	A-1
APPENDIX B — BOOKS CHALLENGED, RESTRICTED	

OR REMOVED BASED ON VIOLENT CONTENT,  
1990-2009 .....B-1

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Adams v. Hinkle</i> , 322 P.2d 844 (Wash. 1958) .....	9
<i>American Amusement Machine Ass’n v. Kendrick</i> , 244 F.3d 572 (7th Cir. 2001).....	9
<i>American Booksellers Ass’n v. Hudnut</i> , 771 F.2d 323 (7th Cir. 1985).....	3, 7, 8
<i>Bookfriends, Inc. v. Taft</i> , 223 F. Supp. 2d 932 (S.D. Ohio 2002) .....	passim
<i>City of Dallas v. Stanglin</i> , 490 U.S. 19 (1989).....	18
<i>Davis-Kidd Booksellers, Inc. v. McWherter</i> , 866 S.W.2d 520 (Tenn. 1993) .....	3, 6, 11, 23
<i>Eclipse Enterprises, Inc. v. Gulotta</i> , 134 F.3d 63 (2d Cir. 1997) .....	9
<i>Entertainment Software Ass’n v. Swanson</i> , 519 F.3d 768 (8th Cir. 2008).....	8
<i>Ginsberg v. New York</i> , 390 U.S. 629 (1968).....	passim

<i>Hudnut v. American Booksellers Ass’n, Inc.</i> , 475 U.S. 1001 (1986).....	3, 7, 23
<i>Interactive Digital Software Ass’n v. St. Louis County</i> , 329 F.3d 954 (8th Cir. 2003).....	8
<i>Interstate Circuit, Inc. v. City of Dallas</i> , 366 F.2d 590 (1966), <i>vacated on other grounds</i> , 391 U.S. 53 (1968) .....	9
<i>Miller v. California</i> , 413 U.S. 15 (1973).....	5, 8, 25
<i>People v. Steiner</i> , No. 276821, 2008 WL 2437533 (Mich. Ct. App., June 17, 2008) .....	10
<i>People v. Winters</i> , 294 N.Y. 545 (1945) .....	7
<i>Police Comm. of Baltimore v. Siegel Enterprises, Inc.</i> , 162 A.2d 727 (Md. 1960).....	9
<i>Pope v. Illinois</i> , 481 U.S. 497 (1987).....	5, 25
<i>R.A. V. v. City of St. Paul</i> , 505 U.S. 377 (1992).....	8, 23
<i>Sovereign News Co. v. Falke</i> , 448 F. Supp. 306 (N.D. Ohio 1977), <i>remanded on other grounds sub nom. Sovereign News Co. v. Corrigan</i> , 610 F.2d 428 (6th Cir. 1979).....	9

<i>State v. Johnson</i> , 343 So. 2d 705 (La. 1977) .....	9
<i>Turner Broad. Sys., Inc. v. F.C.C.</i> , 512 U.S. 622, 640 (1994).....	18
<i>United States v. Comstock</i> , 130 S. Ct. 1949 (2010).....	18
<i>United States v. Playboy Entm't Group, Inc.</i> , 529 U.S. 803 (2000).....	23
<i>United States v. Stevens</i> , __ U.S. __, 130 S. Ct. 1577 (2010) .....	20, 21
<i>Video Software Dealers Ass'n v. Maleng</i> , 325 F. Supp. 2d 1180 (W.D. Wash. 2004) .....	9
<i>Video Software Dealers Ass'n. v. Webster</i> , 968 F.2d 684 (8th Cir. 1992).....	9
<i>Winters v. New York</i> , 333 U.S. 507 (1948).....	passim

## STATUTES

Cal. Civ. Code § 1746 .....	24
Mich. Con. Laws § 750.142 (2004).....	10
Ohio Rev. Code § 2905.34 .....	10
Ohio Rev. Code § 2907.01(E)(3) .....	3, 10
R.I. Gen. Laws § 11-31-10.....	11
Tenn. Code Ann. § 39-17-901.....	3, 10

## OTHER AUTHORITIES

- Aeschylus, “*Agamemnon*,” (Robert Fagles trans. Penguin Books 1966) ..... 13
- Michael Bamberger, *Reckless Legislation: How Lawmakers Ignore the Constitution* (Rutgers 2001)..... 17
- John M. Callahan, *The Ultimate in Theater Violence*, in *Violence in Drama* (James Rudman ed. 1991.) ..... 14
- Charles Champlin, *Critic at Large: Film Violence: Is It Time to Shoot the Messenger?*, Los Angeles Times, October 13, 1987 ..... 14
- David Denby, “*Does Homer Have Legs*,” The New Yorker, Sept. 6, 1993..... 13
- Doyle, *Banned Books: Challenging Our Freedom to Read* (American Library Association 2010) ..... 15
- Philip French, *Violence in the Cinema*, in *Violence in the Mass Media* (Otto N. Larsen ed. 1968) ..... 14
- Victor Godinez, *Video game review: “Halo: Reach”*, Dallas Morning News, September 13, 2010  
[http://www.dallasnews.com/sharedcontent/dws/ent/stories/DN-halo\\_0914gd.State.Edition1.515253d.html](http://www.dallasnews.com/sharedcontent/dws/ent/stories/DN-halo_0914gd.State.Edition1.515253d.html) ..... 19

Eric Gwinn, <i>Is 'Grand Theft Auto IV' the greatest writing of the century?</i> , Chi. Trib., January 25, 2009 <a href="http://articles.chicagotribune.com/2009-01-25/news/0901230326_1_grand-theft-auto-iv-gta-iv-rockstar-games">http://articles.chicagotribune.com/2009-01-25/news/0901230326_1_grand-theft-auto-iv-gta-iv-rockstar-games</a> .....	20
Homer, <i>The Iliad</i> , Book 13 (Robert Fagles trans., Viking Penguin 1990) .....	12
Andy Kaiser, <i>More original versions of classic fairy tales</i> (November 17, 2008) .....	16
Andy Kaiser, <i>Original versions of classic fairy tales</i> (October 27, 2008) .....	15
Lou Kesten, Review: <i>'Halo: Reach more fun with more than 1</i> , Wash. Post, September 13, 2010 .....	20
Gerald Levine, <i>Violence and Sensationalism in Elizabeth England</i> (N.Y.U. Doctorate Thesis, Gd. Schl. Arts & Sciences, June 1968) .....	13
Judith Levine, "Shooting the Messenger: Why Censorship Won't Stop Violence," <a href="http://www.mediacoalition.org/reports/stm_full.pdf">www.mediacoalition.org/reports/stm_full.pdf</a> .....	26
Murrell, "The Greater Cincinnati Committee on the Evaluation of Comic Books" .....	17

Seth Schiesel, *Grand Theft Auto: The Story Continues, as Gritty as Ever*, N.Y. Times, February 18, 2009  
[http://www.nytimes.com/2009/02/18/arts/television/18gta.html?\\_r=1&pagewanted=print](http://www.nytimes.com/2009/02/18/arts/television/18gta.html?_r=1&pagewanted=print)..... 20

“*Violence in the Media*,” 52 Record of Ass’n of Bar of City of New York 275 (1997) . 11, 13, 15

Wertham, “*Is TV Hardening Us to the War in Vietnam?*” in Larsen (ed.), *Violence and the Mass Media* (1968)..... 17

American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Freedom to Read Foundation, National Association of Recording Merchandisers, Recording Industry Association of America, Amusement & Music Operators Association, Association of National Advertisers, PEN Center USA, and The Recording Academy respectfully submit this *amicus* brief in support of Respondents.<sup>1</sup>

### INTEREST OF *AMICI*

*Amici's* members (“*amici*”) write, create, publish, produce, distribute, sell, advertise in, and manufacture books, magazines, videos, sound recordings, motion pictures, interactive games, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific, and entertaining.<sup>2</sup> Libraries and librarians represented by *amicus* Freedom to Read Foundation provide such materials to readers and viewers.

---

<sup>1</sup> 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 curiae*, their members, their counsel, or Media Coalition Inc. (a 37-year old trade association of which most of the *amici* are members) made a monetary contribution to its preparation or submission. Respondents are members of Media Coalition and pay general membership dues.

The parties’ written consents to the filing of this brief have been filed with the Clerk of the Court.

<sup>2</sup> A description of *amici* is attached as Appendix A.

*Amici* have a significant interest in preventing the imposition of unconstitutional governmental limitations on the content of their First Amendment-protected communicative materials, both textual and visual.

Many of the *amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws that infringe First Amendment rights. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *PSInet, Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001), *aff'd*, 362 F.3d 227 (4th Cir. 2004); *American Booksellers Found. v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002), *aff'd*, 342 F.3d 96 (2d Cir. 2003); *ACLU v. Johnson*, 4 F. Supp. 2d 1029 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999); *Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981 (S.D. Ind. 2008); *American Libraries Ass'n. v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993).

*Amici* have also filed *amicus* briefs in this Court to address First Amendment issues, including the impact of the regulation of speech on mainstream creators, producers, distributors, and retailers. *See, e.g., United States v. Stevens*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1577, 1585 (2010); *Beard v. Banks*, 542 U.S. 406 (2004); *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *City of Los Angeles v. Alameda Books, Inc.*, 536 U.S. 921 (2002); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000); *Denver Area Educ. Telecomms. Consortium v. F.C.C.*, 518 U.S. 727 (1996); *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994).

### SUMMARY OF ARGUMENT

Contrary to the contention of the State of California, this Court has consistently, and properly, declined to make exceptions to the protections of the First Amendment for visual depictions or textual descriptions of violence. In *Winters v. New York*, 333 U.S. 507 (1948), the Court struck down a New York statute criminalizing the distribution of printed material “devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime.” 333 U.S. at 508. More recently, in *Hudnut v. American Booksellers Ass’n, Inc.*, 475 U.S. 1001 (1986), the Court summarily affirmed the Seventh Circuit’s finding that an Indianapolis ordinance making unlawful the distribution of pictures or words depicting physical or psychological violence being imposed on women (which the ordinance had defined as “pornography”) was unconstitutional. 771 F.2d 323 (7th Cir. 1985).

Similarly, California’s contention that “many states have regulated violent material” (Pet. Br. at 34) is misleading. Many such laws “have lain dormant for decades.” *Winters v. New York*, 333 U.S. at 511. Other cited state laws have been found unconstitutional, repealed, or both. Thus, *e.g.*, Ohio Rev. Code § 2907.01(E)(3), which California asserts includes “extreme or bizarre violence, cruelty or brutality” in its definition of “harmful to juveniles” (Pet. Br. at 35) was amended in 2002 to delete that language after it was found unconstitutional in *Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932, 947 (S.D. Ohio 2002). The reference to “excess violence” in Tenn. Code Ann. § 39-17-901 (Pet. Br. at 35-36) was found unconstitutionally void for vagueness seventeen years ago in *Davis-Kidd Booksellers, Inc.*

*v. McWherter*, 866 S.W.2d 520 (Tenn. 1993).

According First Amendment protection to textual descriptions and visual depictions of violence recognizes the fact that such descriptions and depictions, both fictional and real, have always been a part of our civilization's art, history, and literature, both for children and for adults. Classic fairy tales such as Hansel and Gretel, Pinocchio, Little Red Riding Hood and Sleeping Beauty are replete with violence. The witch is burnt alive, the grandmother is devoured by the wolf, and Sleeping Beauty was not tired, she was poisoned. Even the popular *Punch & Judy* shows featured Punch, who "beats up a neighbor, throws his baby out, bludgeons his wife to death, kicks and kills a doctor, thrashes a beggar, knocks a policeman down, hangs a hangman and successfully wards off the devil."<sup>3</sup> Dorothy kills the Wicked Witch. In many instances, violent fairy tales were toned down by publishers and movie makers without government intervention. Older minors have long been exposed to graphic violence in classical works such as the *Iliad* and Shakespeare's plays, as well as in history and the news of the day.

All viewers of broadcast and cable news, including minors, have, in recent years, been exposed to violent images in greater measure than previously. An entire nation, including minors, watched the horror of 9/11, and continues to view images from the wars in Iraq and Afghanistan.

In short, the exposure of minors to visual depictions and textual descriptions of graphic

---

<sup>3</sup> Twitchell, *Preposterous Violence: Fables of Aggression in Modern Culture* 79 (Oxford 1989).

violence is nothing new.

California proposes two new and troublingly “flexible” exceptions to the First Amendment protection accorded to descriptions and depictions of violence: (1) that a state should be able to regulate any material that its legislature deems likely to harm the ethical or moral development of minors (Pet. Br. at 30); and (2) that, to “reinforce” parental authority, a state should be able to deny minors direct access to materials protected by the First Amendment, as long as parents can choose to provide such items to their minor children (Pet Br. at 38). Both proposed exceptions are content-based; both are subjective in application; both are potentially vast in scope; and both are antithetical to First Amendment values.

The task of defining violence is not simple. The statutes at issue in *Winter*, *Hudnut*, *Davis-Kidd* and *Bookfriends* each were held to be unconstitutionally vague. The California definition is similarly vague; it attempts to incorporate the *Miller/Ginsberg*<sup>4</sup> paradigm, but that test was never intended to cover violent content and is unsuitable to do so for many reasons, including that there is no common understanding as to what descriptions or depictions of violence have serious value for children of a given age or maturity. That issue must be determined based not on community standards but on “whether a reasonable person would find such value in the material taken as a whole.” *Pope v. Illinois*, 481 U.S. 497, 501 (1987).

---

<sup>4</sup> *Miller v. California*, 413 U.S. 15 (1973), *Ginsberg v. New York*, 390 U.S. 629 (1968).

Finally, through its emphasis on the attributes of video games, California appears to concede that the law would be unconstitutional if applied to other media. The First Amendment does not permit such distinctions.

The proposed new First Amendment exceptions would open a large hole in the First Amendment. They should be rejected, and the decision of the Ninth Circuit should be affirmed.

## ARGUMENT

### I. **THERE ARE NO EXCEPTIONS TO FIRST AMENDMENT PROTECTION FOR DEPICTIONS OR DESCRIPTIONS OF VIOLENCE**

California cites no case law—and there is none—permitting the regulation or prohibition of First Amendment materials based on their violent content.

#### A. **This Court’s Precedents Accord First Amendment Protection to Depictions and Descriptions of Violence**

This Court has directly dealt with this issue twice.

*Winters v. New York*, 333 U.S. 507 (1948), involved a conviction under a New York statute for possession with intent to sell a magazine “principally made up of criminal news, police reports, and accounts of criminal deeds, and pictures and stories of deeds of bloodshed, lust and crime,” namely “Headquarters Detective, True Cases from the Police Blotter, June 1940.” The New York Court of Appeals upheld the conviction, noting that:

The contents are nothing but stories and

pictures of criminal deeds of bloodshed and lust. \* \* \* The stories are embellished with pictures of fiendish and gruesome crimes, and are besprinkled with lurid photographs of victims and perpetrators.

*People v. Winters*, 294 N.Y. 545, 551 (1945). This Court reversed, noting that the statute “does not limit punishment to the indecent and obscene, as formerly understood,” and that the statute was unconstitutionally vague. 333 U.S. at 519.

*Hudnut v. American Booksellers*, 475 U.S. 1001 (1986), *summarily affirming* 771 F.2d 323 (7th Cir. 1985), struck down an Indianapolis ordinance making unlawful the distribution of “pornography.” Pornography was defined in an unusual way, namely material that contains the “graphic sexually explicit subordination of women, whether in pictures or in words, that also includes” one of six other factors.

In holding the Indianapolis statute unconstitutional, the Seventh Circuit directly addressed the possibility that the premise of the statute—that depiction of violence against women promoted such violence—was correct:

People often act in accordance with the images and patterns they find around them. \* \* \* Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. \* \* \*

Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech. Hitler's orations affected how

some Germans saw Jews. Communism is a world view, not simply a Manifesto by Marx and Engels or a set of speeches. \* \* \*

Many people believe that the existence of television, apart from the content of specific programs, leads to intellectual laziness, to a penchant for violence, to many other ills. The Alien and Sedition Acts passed during the administration of John Adams rested on a sincerely held belief that disrespect for the government leads to social collapse and revolution—a belief with support in the history of many nations. Most governments of the world act on this empirical regularity, suppressing critical speech. In the United States, however, the strength of the support for this belief is irrelevant. Seditious libel is protected speech unless the danger is not only grave but also imminent.

771 F.2d at 328-29.

And while this Court has often spelled out the few limited exceptions to some or all of the protection of the First Amendment, such as fighting words, obscenity, and defamation (*see e.g. R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992)), it has neither included depictions and descriptions of violence among them, nor included violence within the definition of obscenity. *Miller*, 413 U.S. at 24. Similarly, every state and lower federal court decision to date has found that depictions and descriptions of violence are protected.<sup>5</sup>

---

<sup>5</sup> *E.g. Entertainment Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008); *Interactive Digital Software (cont'd)*

California’s argument that *Ginsberg v. New York*, 390 U.S. 629 (1968), supports a violence exception ignores this Court’s explicit statement that its decision was limited to “sex material”:

We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State, *cf. In re Gault*, 387 U.S. 1, 13, 87 S. Ct. 1428, 18 L. Ed. 2d 527. It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York, insofar as § 484-h does so, to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see.

---

*Ass’n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997); *Interstate Circuit, Inc. v. City of Dallas*, 366 F.2d 590 (1966), *vacated on other grounds*, 391 U.S. 53 (1968); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004); *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684 (8th Cir. 1992); *Bookfriends v. Taft*, 223 F. Supp. 2d 932 (S.D. Ohio 2002); *Sovereign News Co. v. Falke*, 448 F. Supp. 306 (N.D. Ohio 1977), *remanded on other grounds sub nom. Sovereign News Co. v. Corrigan*, 610 F.2d 428 (6th Cir. 1979); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W. 2d 520 (Tenn. 1993); *State v. Johnson*, 343 So. 2d 705, 710 (La. 1977); *Police Comm. of Baltimore v. Siegel Enterprises, Inc.*, 162 A.2d 727 (Md. 1960); *Adams v. Hinkle*, 322 P.2d 844 (Wash. 1958).

390 U.S. at 636-37.

**B. There Is No History of States Regulating  
First Amendment-Protected Material Based  
on Their Violent Content**

California's contention that "many states have regulated violent material as well" (Pet. Br. at 34) is, at best, highly misleading. While some such laws may still be on the statute books, as this Court recognized (more than sixty years ago) in *Winters*, many of them "have lain dormant for decades." 333 U.S. at 511. For example, Mich. Con. Laws § 750.142 (2004) (Pet. Br. at 34) includes in a single statute prohibitions on providing "obscene" materials and on providing materials "devoted to the publication of criminal news, police reports, or criminal deeds." There are reported decisions of prosecutions for the former, *see, e.g., People v. Steiner*, No. 276821, 2008 WL 2437533 (Mich. Ct. App., June 17, 2008), but not for the latter.

In fact, a number of the laws cited by California either were repealed, held unconstitutional, or both.

Ohio Rev. Code § 2905.34 (1963 Supp.) (Pet. Br. at 34), which prohibited showing, to a minor, material "principally made up of criminal news, police reports, or accounts of criminal deeds...." was repealed in 1970. Ohio Rev. Code § 2907.01(E)(3) was amended in 2003 to delete the language California erroneously states is still in effect "even today" (Pet. Br. at 35) ("extreme or bizarre violence, cruelty or brutality") after that "harmful to minors" definition was found unconstitutional in *Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932, 947 (S.D. Ohio 2002).

The cited reference to "excess violence" in Tenn. Code Ann. § 39-17-901 (*see* Pet. Br. at 35), was found

unconstitutionally void for vagueness seventeen years ago in *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993).

The Rhode Island Legislature’s “declaration” of the “relationship between sex and violence” (*see* Pet. Br. at 35) is not embodied in any statute. The Rhode Island statute to which the quoted “declaration” relates is limited to “explicit representations of ‘sexual conduct’, ‘sexual excitement’, [and] ‘nudity’” which meet *Miller/Ginsberg* standards. R.I. Gen. Laws § 11-31-10.

### **C. Depictions and Descriptions of Violence Have Always Been Part of Our Civilization’s Art and Expressions**

The First Amendment protection accorded to depictions and descriptions of violence accords with these basic facts:

Violence, both fictional and real, has always caused uneasiness in civilized audiences. Yet, violence has always been an essential part of our civilization’s art and expression, just as violence has always been a part of the reality of human existence.

“Violence in the Media,” 52 Record of Ass’n of Bar of City of New York 275 (1997) (“*Violence in Media*”).

To be insulated from depictions and descriptions of violence, one would have to be insulated from the great works of religion, history, art, literature, and culture.

The Bible describes the jealous murder of

Abel whose blood cries out from the ground,<sup>6</sup> the destruction of the Egyptians in the Red Sea,<sup>7</sup> the direction of the Lord to destroy the Amalekites, “man and woman, infant and suckling” concluding with the hewing of the king, Agag, into pieces.<sup>8</sup> It recounts how a man chops his violated concubine “together with her bones, into twelve pieces.”<sup>9</sup> The Bible could be regarded as one of the most violent works of all time, expressing the darker side of human emotion as well as the positive. The *Iliad*, like all effective accounts of war, reeks with blood, death and mutilation. Homer describes how “Menelaus hacked Pisander between the eyes, the bridge of the nose, and bone cracked, blood sprayed and both eyes dropped at his feet to mix in the dust—he curled and crashed,” and how “Little Ajax ... lopped the head from the corpse’s limp neck and with one good heave sent it spinning into the milling fighters like a ball ... tumbling in the dust.”<sup>10</sup> Aeschylus in *Agamemnon* describes how Atreus made his brother Thyestes “a feast of his own children’s flesh. He cuts the extremities, feet and delicate hands into small pieces, scatters

---

<sup>6</sup> Genesis 4:8-12.

<sup>7</sup> Exodus 14:26-28.

<sup>8</sup> Samuel 15:33.

<sup>9</sup> Judges 19:29.

<sup>10</sup> Homer, *The Iliad*, Book 13, lines 708-711, and 241-245 (Robert Fagles trans., Viking Penguin 1990).

them over the dish and serves it ....”<sup>11</sup> Elizabethan playwrights dramatized street violence, social disorder, military conflict and “the most inhumane horrible mutilations of the body.”<sup>12</sup> Violence pervades much of Shakespeare’s work, *Macbeth* drips with blood, and Titus Andronicus was “one of the bloodiest plays” of a bloody period.<sup>13</sup>

Violence is a central subject of many great works of visual art, such as Hogarth’s *The Four Stages of Cruelty*, Delacroix’s *Medea*, Cezanne’s *The Rape*, and Picasso’s *Guernica*.<sup>14</sup> Violent depictions in many of these works are central to their meaning and impact. As one commentator states, “A great work of art is likely to be subversive of almost anyone’s peace.”<sup>15</sup>

*Violence in Media* at 275-76. Just as depictions and descriptions of violence have been part of literature and art which have attained great acclaim, they also have been an important part of popular culture.

---

<sup>11</sup> Aeschylus, “*Agamemnon*,” lines 1623-1627 (Robert Fagles trans. Penguin Books 1966).

<sup>12</sup> Gerald Levine, *Violence and Sensationalism in Elizabeth England* 146 (N.Y.U. Doctorate Thesis, Gd. Schl. Arts & Sciences, June 1968).

<sup>13</sup> Id.

<sup>14</sup> James B. Twitchell, *Preposterous Violence: Fables of Aggression in Modern Culture* (1989). See also John P. Sisk, *Our Savage Spectacles: New Performers in the Theater of Cruelty*, *Harper’s Magazine*, July 1985, at 64.

<sup>15</sup> David Denby, “*Does Homer Have Legs*,” *The New Yorker*, Sept. 6, 1993, at 68.

Soon after its inception in 1897, the Grand Guignol theater in Paris became internationally famous for its horror and comedy shows. Violent scenes included “a Frenchman’s hands being cut off at the wrists,” “the flesh being cut off a young girl,” and “a bottle of sulfuric acid being thrown in a character’s face.<sup>16</sup> What today would be called “violent children’s programming” existed well before the age of television and film. The Punch and Judy puppet show featured a main character, Punch, who “beats up a neighbor, throws his baby out, bludgeons his wife to death, kicks and kills a doctor, thrashes a beggar, and knocks a policeman down.”<sup>17</sup>

[C]inema has been filled with violence since its inception. In 1893, the Edison Company produced a film entitled “The Execution of Mary Queen of Scots,” a one-and-one-half minute film that depicts Mary being beheaded and her head rolling off.<sup>18</sup> Another early film, “The Great Train Robbery,” ends with a striking image of a six-shooter being aimed into the camera.<sup>19</sup>

---

<sup>16</sup> John M. Callahan, *The Ultimate in Theater Violence*, in *Violence in Drama*, 165, 170 (James Rudman ed. 1991.)

<sup>17</sup> *Twitchell*, supra n.9.

<sup>18</sup> Philip French, *Violence in the Cinema*, in *Violence in the Mass Media* 59 (Otto N. Larsen ed. 1968).

<sup>19</sup> Charles Champlin, Critic at Large: Film Violence: Is It Time to Shoot the Messenger? Los Angeles Times, October 13, 1987 at part 6, page 1.

*Violence in the Media* at 277.

Even works directed at children, such as classic fairy tales, are extremely violent. “Hansel and Gretel,” “Little Red Riding Hood,” “Snow White,” and “Sleeping Beauty” are replete with violence. The witch is burnt alive. The grandmother is devoured by the wolf. Sleeping Beauty was poisoned. In fact, the distribution of “Snow White” and a collection of Grimm’s fairy tales were restricted in schools in Arizona and Florida recently because of their violent content. Doyle, *Banned Books: Challenging Our Freedom to Read* 211 (American Library Association 2010).

And the fairy tales that were read to us, that we read to our children, and that we watch on television, on DVD, and in movie theaters have been substantially sanitized by the media without government intervention. Earlier versions were far more violent. Little Red Riding Hood and her grandmother are both eaten by the wolf; a passing hunter cuts the wolf open and both tumble out alive.<sup>20</sup> Sleeping Beauty is raped by the prince while sleeping and gives birth to twins.<sup>21</sup> And in “Snow White,” the Queen, having stranded Snow White in the cold, asks a hunter to kill her and bring back her heart, lungs and liver for the queen to cook and eat. In the end, after Snow White is poisoned by the Queen and recovers, the Queen is killed by being

---

<sup>20</sup> Andy Kaiser, *Original versions of classic fairy tales* (October 27, 2008), <http://www.dbskeptic.com/2008/10/27/original-versions-of-classic-fairy-tales> (accessed 9/16/10)

<sup>21</sup> *Id.*

forced to dance in red-hot metal shoes.<sup>22</sup>

Many popular children's cartoons are violent. Tom and Jerry spend short after short physically attacking each other. Superman and Spiderman deal violently with their foes. Yosemite Sam is a gunslinger with a "Hare Trigger" temper intent on killing Bugs Bunny. Slapstick films, from the Marx Brothers to the Three Stooges, highlight physical violence.

Video games may be new, but there is nothing new about the depiction and description of violence in works of literature and art for both adults and children.

## **II. THE EXCEPTIONS PROPOSED BY CALIFORNIA WOULD CREATE A VAST NEW AND UNWARRANTED INROAD ON FIRST AMENDMENT RIGHTS**

### **A. California's Proposed Exceptions Are Content-Based, Subjective, and Antithetical to the First Amendment**

In an attempt to circumvent existing First Amendment protection, California proposes to the Court two new "flexible" exceptions that would deprive depictions and descriptions of violence of the protection of the First Amendment. Both are content-based; both are subjective; both are potentially vast in scope; and both are antithetical to

---

<sup>22</sup> Andy Kaiser, *More original versions of classic fairy tales* (November 17, 2008), <http://www.dbskeptic.com/2008/11/17/more-original-versions-of-classic-fairy-tales> (accessed 9/16/10)

First Amendment values.

The first proposed exception would give a state the right to regulate anything that its legislature deems likely to harm the ethical or moral development of minors. (Pet. Br. at 30). The second proposed exception, intended to “reinforce” parental authority, would give a state the right to prevent minors from having direct access to any category of First Amendment-protected content, as long as parents could provide such materials to their minor children. (Pet. Br. at 38). California proposes that judicial review under either exception be limited to a highly deferential “rational basis” test.

As to the first exception, California posits that “a legislative body should be permitted to act cautiously in the interests of society if it rationally determines that offensively violent video games depicting brutal and sadistic acts committed by the game player are *likely* to harm the development of a child.” (Pet. Br. at 30) (emphasis added) Throughout the years, arguments have been made that comics, television shows, television news, serious literature and movies harm the development of children.<sup>23</sup> Under this proposed exception, a legislature could restrict children’s access to any of these media—without reference to the First Amendment—solely on a determination that the content of that medium

---

<sup>23</sup> See Michael Bamberger, *Reckless Legislation: How Lawmakers Ignore the Constitution* 35-37 (Rutgers 2001); Wertham, “Is TV Hardening Us to the War in Vietnam?” in Larsen (ed.), *Violence and the Mass Media* 50 (1968); Murrell, “The Greater Cincinnati Committee on the Evaluation of Comic Books” in Larsen, *supra*, at 182.

harms the ethical or moral development of children. For all practical purposes, this exception would deprive children of their First Amendment rights.

As to the second exception, California states that to support “parental rights over minors” it “may properly limit minors’ access to the offensive violence in certain video games so long as it is not irrational for the legislature to determine that the video games covered by the Act are harmful to minors. *Ginsberg*, 390 U.S. at 641.” (Pet. Br. at 41)<sup>24</sup> California thus suggests that so long as there is *some* basis for believing that harm may result, *i.e.*, that the legislature has not been arbitrary and capricious, access by minors can be prohibited.

While such a minimal standard has been applied in determining whether a statute is within the constitutional power of Congress or whether the Equal Protection Clause has been violated,<sup>25</sup> this “most relaxed and tolerant form of judicial scrutiny,” *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989), is inappropriate when fundamental First Amendment rights are at issue. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 640 (1994). California would, in effect, subject a content-based speech restriction to an even more deferential standard of review than

---

<sup>24</sup> While California cites *Ginsberg*, it is clear that the games are not “harmful to minors” (*i.e.*, obscene as to minors) under *Ginsberg* because *Ginsberg* applies only to “sex materials” and California’s statute applies to materials that contain depictions of violence, whether or not there is a sexual component.

<sup>25</sup> See, *e.g.*, *United States v. Comstock*, 130 S. Ct. 1949, 1956-1957 (2010)

this Court applies to content-neutral speech restrictions.

The fact that, under California's scheme, a minor may have access to First Amendment-protected video games with his or her parent's approval does not cure the violation of the First Amendment. Because of parental absence, parental disinterest, parental lack of involvement or an antagonistic relationship between parent and minor, a teenager may be deprived of his or her First Amendment right to a video game appropriate to him or her. More generally, all of a minor's First Amendment rights cannot be subordinated to a parent's right of approval.

California seeks to justify applying a "rational basis" test rather than strict or even intermediate scrutiny by denigrating the value of the speech embodied in video games. For example, California argues that video games as a category

add nothing to the free exchange of ideas for minors, do not represent a step to the truth, and any benefit to be derived . . . is clearly outweighed by the societal interest in order and morality.

(Pet. Br. at 40) To the contrary, video games, like books and music, are regularly reviewed by the mainstream press in terms that make it clear that they are considered to have serious literary and artistic value.<sup>26</sup> Moreover, the Court has repeatedly

---

<sup>26</sup> *See, e.g.*, Victor Godinez, *Video game review: "Halo: Reach"*, Dallas Morning News, September 13, 2010 ("But the team at Bungie took a literal suicide mission and crafted into a story of courage and determination"),  
*(cont'd)*

disavowed such a value-balancing approach to removing categories of speech from the protection of the First Amendment. In *Winters*, for example, the Court made clear that the level of First Amendment protection accorded to depictions of violence did not turn on literary merit

Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.

333 U.S. at 510. Last term, in *United States v. Stevens*, \_\_ U.S. \_\_, \_\_, 130 S. Ct. 1577 (2010), the Court stated:

---

[http://www.dallasnews.com/sharedcontent/dws/ent/stories/DN-halo\\_0914gd.State.Edition1.515253d.html](http://www.dallasnews.com/sharedcontent/dws/ent/stories/DN-halo_0914gd.State.Edition1.515253d.html)

Seth Schiesel, *Grand Theft Auto: The Story Continues, as Gritty as Ever*, N.Y. Times, February 18, 2009 (“the new episode conveys a humor, wit, intelligence and sense of cultural satire”), [http://www.nytimes.com/2009/02/18/arts/television/18gta.html?\\_r=1&pagewanted=print](http://www.nytimes.com/2009/02/18/arts/television/18gta.html?_r=1&pagewanted=print)

Lou Kesten, Review: ‘*Halo: Reach more fun with more than 1*, Wash. Post, September 13, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/13/AR2010091302410.html>

Eric Gwinn, *Is ‘Grand Theft Auto IV’ the greatest writing of the century?*, Chi. Trib., January 25, 2009 (“In GTA IV, the radio is speaking more to the player and not so much the avatar,’ says Miller, ‘and in San Andreas, you could hear the radio really speaking to the avatar, and that, I thought, was an incredible achievement.”) [http://articles.chicagotribune.com/2009-01-25/news/0901230326\\_1\\_grand-theft-auto-iv-gta-iv-rockstar-games](http://articles.chicagotribune.com/2009-01-25/news/0901230326_1_grand-theft-auto-iv-gta-iv-rockstar-games) (each site accessed 9/14/2010).

The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an *ad hoc* balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. \*  
\* \*

[In *Miller*, we did not] determine that serious value could be used as a general precondition to protecting other types of speech in the first place. Most of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation.

130 S. Ct. at 1585, 1591

Indeed, California goes so far as to argue that one of the beneficial aspects of its statute is that it *is* content-based, stating:

The Act also serves to eliminate the perceived societal approval of minors playing offensively violent video games—a distinct developmental harm recognized by this Court. In *Ginsberg*, the Court cited the Columbia University Psychoanalytic Clinic in reporting on the independent harm to developing egos when minors perceive a societal approval of viewing pornography: "Dr. Gaylin emphasizes that a child might not be as well prepared as an adult to make an intelligent choice \* \* \* The child is

protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved.”

(Pet. Br. at 40). California’s description of *Ginsberg* is inaccurate. The Court did not “recognize” any “distinct developmental harm.” Instead, in a footnote, the Court stated that:

[D]espite the vigor of the ongoing controversy whether obscene material will perceptibly create a danger of antisocial conduct, or will probably induce its recipients to such conduct, a medical practitioner recently *suggested* that the *possibility* of harmful effects to youth *cannot be dismissed as frivolous*.

390 U.S. at 642 n.10 (emphasis added). The quoted study attributed this possibility to the views of “some psychiatrists.” *Id.* The Court’s acknowledging that there has been a “*suggestion*” of the “*non-frivolous*” “*possibility*” of harm is hardly the equivalent of recognizing that “distinct developmental harm” is caused.

One of the lessons learned by children who are fortunate enough to grow up in a free society is that books, magazines, newspapers, movies, television programs, video games, and other forms of expression do not need “societal approval.” By contrast, children who grow up in repressive societies, in which only government-approved publications are permitted, well understand that the availability of such works connotes such approval. California’s effort to jettison the free-speech rights of minors by creating a new category of unprotected speech in a misguided effort to protect them cannot be squared with the First Amendment.

The statute at issue is clearly content-based; as such, it is presumptively invalid. *R.A.V. v. St. Paul*, at 391, and can be upheld only if it survives strict scrutiny. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (citing *Sable Comm'ns of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). Since the California statute cannot survive strict scrutiny, California proposes that this Court abandon its precedents in a way that would substantially weaken the traditional protection of the First Amendment. *Amici* urge the Court not to do so.

**B. California's Proposed Exceptions Rely on an Extremely Broad and Unconstitutionally Vague Definition of Violence**

In proposing these unwarranted exceptions to the First Amendment, California proffers a definition of violence of astonishing breadth and unconstitutional vagueness.

When they have attempted to ban depictions and descriptions of violence, legislatures have found that the extent of violence in our literature and art makes it extremely difficult to define violence. The statutory definitions of violence at issue in *Winter*, *Hudnut*, *Davis-Kidd* and *Bookfriends* all were held unconstitutional on a range of grounds, including vagueness.

California drafted two alternative definitions of violence, but has conceded that one of the definitions is unconstitutional, and it relies on the remaining definition:

“Violent video game” means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an

image of a human being, if those acts are depicted in the game in a manner that \* \* \* :

(A) Comes within all of the following descriptions:

(i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.

(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.

(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

Cal. Civ. Code § 1746.

This definition has two components.

The first component simply requires that the video game include one of the options of “killing” or “maiming” or “dismembering” or “sexually assaulting” an image of a human being. Thus, the video game equivalent of a “Cowboys and Indians” movie of the American Old West would meet the first component, if it allowed players to shoot guns or use bows and arrows to “kill” an “image of a human being.” So would a video game based on war (whether historical or fictional), or on “the battle between good and evil” personified in human form. The first component of the definition is thus of extraordinary breadth.

The second component—appeals to “deviant or morbid” interest, is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value”—is adapted from the *Miller/Ginsberg*

standards. But those standards—developed to address “sex materials”—do not work when applied to depictions or descriptions of violence.

California cannot show, and does not attempt to show, that there is a “prevailing standard” in the community as to what violent video games may be “suitable for minors.” To the contrary, by seeking to defend its law as supporting “parental choice,” California recognizes that adults disagree vehemently on what video games are “suitable for minors.” How, then, can California rely upon a statutory definition grounded in a non-existent community consensus on what is suitable?

Nor does the “lacking serious value” element of the *Miller/Ginsberg* paradigm work when used to evaluate violent video games under this statute. Serious value varies based on the age and maturity of the minor. There is no common understanding as to what descriptions or depictions of violence have serious value for children of a given age or maturity. Under *Miller*, serious value is not to be determined based on community standards but rather on “whether a reasonable person would find such value in the material taken as a whole.” *Pope v. Illinois*, 481 U.S. 497, 501 (1987). Evaluating whether a particular video game, which includes violence, would have value to minors would be wholly subjective.

Some schools and libraries have deemed books ranging from “Snow White” and “Complete Fairy Tales of the Brothers Grimm” to Ellen Alderman and Caroline Kennedy’s “In Our Defense: The Bill of Rights in Action” as lacking serious value for minors. Appendix B lists books challenged or restricted for minors based on violent content at schools and libraries over the last 20 years. If there can be no

consensus on the value of such works, then how can California presume that there is a “reasonable person” standard on what video games have “serious value” for minors?

California compounds the problem by emphasizing the attributes of video games, and thus appearing to argue that similar violent content in a different medium might not be subject to regulation. (*E.g.*, *Pet. Br.* at 6, 40). Thus, a “Cowboys and Indians” video game could be banned, but not a John Wayne movie. A “Grand Theft Auto” video game could be banned, but not a “Grand Theft Auto” movie. A video game based on World War II could be banned, but not “Saving Private Ryan”—which had more scenes of “serious violence” than any other mainstream movie that year (1998).<sup>27</sup> The First Amendment permits no such distinctions.

California also appears to suggest that the new technologies represented by video games require a reassessment of First Amendment principles. Technological change usually causes fear and uncertainty. In the twentieth and twenty-first centuries, technological change has repeatedly revolutionized entertainment media and communications, as well as the storage, retrieval, and distribution of information. Each of these technological advances—movies, television, the Internet, and now handheld, interactive electronic video games—has brought with it the fear that the

---

<sup>27</sup> Judith Levine, “Shooting the Messenger: Why Censorship Won’t Stop Violence,” p. 10, available at [www.mediacoalition.org/reports/stm\\_full.pdf](http://www.mediacoalition.org/reports/stm_full.pdf).

new technology would corrupt the young.<sup>28</sup> But there is no reason to permit fear of novel technologies to diminish fundamental constitutional rights such as the First Amendment

The proposed exceptions would open a large hole in the protection of the First Amendment. They should not be embraced by this Court.

### CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Dated: September 16, 2010

MICHAEL A. BAMBERGER  
mbamberger@sonnenschein.com  
*Counsel of Record*  
RICHARD M. ZUCKERMAN  
Sonnenschein Nath & Rosenthal LLP  
1221 Ave. of the Americas  
New York, NY 10020-1089  
212-768-6700

*Attorneys for Amici Curiae*

---

<sup>28</sup>See Bamberger, *supra*, at 35-38.

APPENDIX A

—  
*AMICI CURIAE*

The following *amici curiae* join this brief..

**American Booksellers Foundation for Free Expression** (“ABFFE”) was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

**Association of American Publishers, Inc.** (“AAP”) is the national association of the U.S. book publishing industry. AAP’s members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

**Freedom to Read Foundation** is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

**National Association of Recording Merchandisers** (NARM) is a not-for-profit trade association that since 1958 has served the music and entertainment content delivery community in a variety of areas including networking, advocacy, information, education and promotion. NARM's general members consist of music wholesalers and retailers, including brick-and-mortar, online and mobile music delivery companies. Its associate members consist of distributors, record labels, multimedia suppliers, technology companies, and suppliers of related products and services. Individual professionals and educators in the field of music are also members.

**Recording Industry Association of America** ("RIAA") is the trade organization that supports and promotes the creative and financial vitality of the major music companies. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. In support of this mission, RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conduct consumer, industry and technical research; and monitor and review state and federal laws, regulations and policies. RIAA also certifies Gold®, Platinum®, Multi-Platinum™ and Diamond sales awards as well as Los Premios De Oro y Platino™, an award celebrating Latin music sales.

**Amusement & Music Operators Association** ("AMOA") represents the owners, operators and distributors of coin-operated amusement machines, jukeboxes, video games, redemption equipment and similar devices in the out-of-home entertainment marketplace. The association was one of the lead plaintiffs in *AAMA v. Kendrick*, 244 F.3d 572 (7th

Cir. 2001), and maintains a substantial interest in the freedom of speech inherent in amusement devices and video games.

**Association of National Advertisers** (“ANA”), founded in 1910, leads the marketing community by providing its members with insights, collaboration, and advocacy. ANA’s membership includes 350+ companies with 9,000 brands that collectively spend over \$250 billion in marketing communications and advertising. The ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs, and advance, promote, and protect all advertisers and marketers.

**PEN Center USA** (PEN USA) is an organization of over 700 novelists, poets, essayists, translators, playwrights, screenwriters, teleplay writers, journalists, and editors. As part of International PEN, PEN USA is chartered to defend free and open communication within all nations and internationally.

**The Recording Academy** is an organization of musicians, producers, engineers and recording professionals that is dedicated to improving the cultural condition and quality of life for music and its makers. Internationally known for the GRAMMY® Awards—the preeminent peer-recognized award for musical excellence and the most credible brand in music—The Recording Academy is responsible for groundbreaking professional development, cultural enrichment, advocacy, education and human services programs. The Academy continues to focus on its mission of recognizing musical excellence, advocating for the well-being of music makers and ensuring music remains an indelible part of our culture.

APPENDIX B

—  
BOOKS CHALLENGED, RESTRICTED OR  
REMOVED BASED ON VIOLENT CONTENT,  
1990-2009

Compiled from Doyle, *Banned Books: Challenging Our Freedom to Read* (American Library Association 2010).

Adoff, Arnold, <i>Poetry of Black America</i>	Challenged at the Fort Walton Beach, FL, school libraries (1996)
Alderman, Ellen, and Kennedy, Caroline, <i>In Our Defense: The Bill of Rights Action</i>	Challenged in Wisconsin Rapids, WI, schools (1998)
Allende, Isabel, <i>The House of the Spirits</i>	Challenged in Paso Dobles, CA, high school (1994)
Anaya, Rudolfo A., <i>Bless Me, Ultima</i>	Challenged at Porterfield, CA, high schools (1992) and Round Rock, TX, high school (1996); removed from Laton, CA, Unified School (1992)

B-2

Angelou, Maya,  
*I Know Why the Caged  
Bird Sings*

Challenged and  
removed in various  
schools across the  
nation (1990 - 2009)

Atkins, Catherine,  
*Alt Ed*

Challenged in Lake  
Oswego, OR, Jr. High  
School (2007)

Baldwin, James,  
*Go Tell It on the  
Mountain*

Challenged in Hudson  
Falls, NY, schools  
(1994)

Bishop, Claire H.,  
*The Five Chinese  
Brothers*

Challenged at Colton,  
CA, elementary schools  
(1998) and Spokane,  
WA, school district  
(1994)

Block, Francesca Lia,  
*Baby Be-Bop*

Challenged in West  
Bend, WI, Community  
Memorial Library  
(2009)

Capote, Truman,  
*In Cold Blood: A True  
Account of a Multiple  
Murder and Its  
Consequences*

Banned but later  
reinstated in Savannah,  
GA, high school (2002)

Charyn, Jerome, <i>Billy Budd, KGB</i>	Challenged at Fairbanks, AK, Library (1992)
Cohen, Daniel, <i>The Headless Roommate and Other Tales of Terror</i>	Restricted from 4 <sup>th</sup> and 5 <sup>th</sup> graders in Tewksbury Twnshp., NJ (1993)
Cohen, Daniel, <i>Southern Fried Rat and Other Gruesome Tales</i>	Challenged in Waldorf, MD, middle school (1991)
Collier, James Lincoln, and Christopher Collier, <i>My Brother Sam Is Dead</i>	Challenged in schools in KS, CA, PA, CO, VA and IL (1993, 1994, 1996, 1998 and 2000)
Conroy, Pat, <i>Beach Music</i>	Suspended from Nitro, WV, high school honors and advanced placement courses (2007)
Conroy, Pat, <i>The Prince of Tides</i>	Suspended from Nitro, WV, high school honors and advanced placement courses (2007)

Cooke, John Peyton, <i>The Lake</i>	Challenged at the Multnomah County, OR, library (1991)
Cormier, Robert, <i>After the First Death</i>	Challenged in Manchester, CT, and Fauquier, VA, schools (2000)
Cormier, Robert, <i>Fade</i>	Challenged in Campbell County, WV, junior high schools (1990)
Cormier, Robert, <i>We All Fall Down</i>	Removed or restricted in school libraries in CA, FL and TX (1984, 2000)
Courtenay, Bryce, <i>The Power of One</i>	Challenged in Round Rock, TX, high school (1996)
de Jenkins, Lyll Becerra, <i>The Honorable Prison</i>	Challenged at Bainbridge Island, WA, middle school (1992)
Dorner, Marjorie, <i>Nightmare</i>	Removed from Winona, MN, middle school (1995)

Duncan, Lois, <i>Killing Mr. Griffin</i>	Removed in Bonsall, CA, middle school (1992) and challenged in PA schools (1995, 2000)
Ellison, Ralph, <i>Invisible Man</i>	Challenged in Yakima, WA, schools (1994)
Fuentes, Carlos, <i>The Death of Artemio Cruz</i>	Challenged in Yakima, WA, schools (1994)
Gardner, John C., <i>Grendel</i>	Challenged in GA, CO and OR (1993, 1997, 2008)
Gilstrap, John, <i>Nathan's Run</i>	Removed in Anneville- Cleona, PA, middle school (1998) and challenged in Everett, WA, School District
Golding, William, <i>Lord of the Flies</i>	Challenged in Bloomfield, NY, high school (2000)
Gordimer, Nadine, <i>July's People</i>	Challenged in Yakima, WA, schools (1994)

Grimm, Jacob, and  
Wilhelm K. Grimm,  
Translated by Jack  
Zipes,  
*The Complete Fairy  
Tales of the Brothers  
Grimm*

Challenged in Kyrene,  
AZ, elementary schools  
(1994)

Grimm, Jacob,  
*Snow White*

Restricted in Duval  
County, FL, public  
schools (1992)

Grisham, John,  
*The Client*

Challenged in  
Hillsborough, NJ, school  
(1996)

Hahn, Mary Downing,  
*The Dead Man in  
Indian Creek*

Challenged in Salem,  
OR, school (1994)

Haugaard, Erick C.,  
*The Samurai's Tale*

Challenged at Wilsona,  
CA, School District  
(1995)

Hegi, Ursula,  
*Stones from the River*

Banned but later  
reinstated in Savannah,  
GA, high school (2000)

Hinton, S.E, <i>Tex</i>	Challenged at Daytona Beach, FL, middle school
Hosseini, Khaled, <i>The Kite Runner</i>	Challenged in Morgantown, NC, schools (2008)
Kehret, Peg, <i>Abduction</i>	Challenged in Apple Valley, MN, middle school and elementary schools (2006)
Kesey, Ken, <i>Sometimes a Great Notion</i>	Challenged in Richland, WA, high school (1998)
King, Stephen, <i>Carrie</i>	Challenged in Boyertown, PA, junior high school
King, Stephen, <i>The Dark Half</i>	Challenged in Roseburg, OR, high school (1994)
King, Stephen, <i>Four Past Midnight</i>	Challenged in Sparta, IL, high school (1992)
King, Stephen, <i>Gerald's Game</i>	Removed from Lake City, FL, high school (1998)

King, Stephen, <i>It</i>	Restricted in Franklinville, NY, high school (1992)
King, Stephen, <i>The Shinning</i>	Removed from Livingston, MT, middle school (1990)
Kipling, Rudyard, <i>The Elephant's Child</i>	Challenged in Davenport, IA, schools (1993)
Korman, Gordon, <i>Jake Reinvented</i>	Challenged in Gilbert, AZ, high school (2007)
Letts, Billie, <i>Where the Heart Is</i>	Challenged in Natrona County, WY, schools (2002)
Lewis, C. S., <i>The Lion, the Witch and the Wardrobe</i>	Challenged in Howard County, MD, schools (1990)

Lipsyte, Robert, <i>One Fat Summer</i>	Challenged in Levittown, NY, middle school (1997)
Lowry, Lois, <i>The Giver</i>	Challenged in CA, MT and CA (1994, 1995, 2007)
Manson, Marilyn, <i>The Long Hard Road out of Hell</i>	Challenged in West Chicago, IL, Public Library (1998)
Martin, Michael, <i>Kurt Cobain</i>	Removed from Farmington, MN elementary and middle school libraries (2009)
McAlpine, Helen and William McAlpine, <i>Japanese Tales and Legends</i>	Challenged in Lake Los Angeles, CA, schools (1995)
McCammom, Robert, <i>Mystery Walk</i>	Challenged in Salem- Keizer, OR, schools (1992)
McCunn, Ruthanne Lum, <i>Thousand Pieces of Gold</i>	Challenged in Bainbridge, WA, middle school (1992)

Merriam, Eve, <i>Halloween ABC</i>	Challenged in Sandwich, MA, and Wellsville, NY (1995, 2000)
Momaday, N. Scott, <i>House Made of Dawn</i>	Challenged in Round Rock, TX, high school (1996)
Morrison, Toni, <i>Beloved</i>	Challenged in Round Rock, TX, high school (1996)
Myers, Walter Dean, <i>Fallen Angels</i>	Removed in Laton, CA, schools (1999); challenged in Lakewood, OR, high school (1997) and Fairfax County, VA, schools (2002)
Nelson, O. T., <i>The Girl Who Owned a City</i>	Challenged in Fort Fairfield, ME, schools (2000)
Nichols, John, <i>The Milagro Beanfield War</i>	Removed in Shawnee, OH, high school (1999)
O'Brien, Tim, <i>In the Lake of the Woods</i>	Challenged in Richland, WA, high school (1998)

Parks, Gordon,  
*The Learning Tree*

Challenged in  
Burnsville, MN, high  
school (1992)

Paterson, Katherine,  
*The Great Gilly  
Hopkins*

Challenged in Emporia,  
KS, elementary school  
(1993)

Pelzer, Dave,  
*A Child Called It*

Removed in Sussex, DE,  
middle school (2000)

Pike, Christopher,  
*Bury Me Deep*

Removed in Nampa, ID,  
middle school (2000)

Pike, Christopher,  
*Chain Letter 2*

Removed in Nampa, ID,  
middle school (2000)

Pike, Christopher,  
*Last Act*

Removed in Nampa, ID,  
middle school (2000)

Pike, Christopher,  
*The Listeners*

Removed in Nampa, ID,  
middle school (2000)

Pike, Christopher,  
*The Lost Mind*

Removed in Nampa, ID,  
middle school (2000)

Pike, Christopher,  
*The Midnight Club*

Removed in Nampa, ID,  
middle school (2000)

B-12

Pike, Christopher, <i>Remember Me 3</i>	Removed in Nampa, ID, middle school (2000)
Pike, Christopher, <i>The Star Group</i>	Removed in Nampa, ID, middle school (2000)
Pike, Christopher, <i>Witch</i>	Removed in Nampa, ID, middle school (2000)
Pipher, Mary, <i>Reviving Ophelia</i>	Challenged in Richland, WA, high school (1998)
Plath, Sylvia, <i>The Bell Jar</i>	Challenged in Richland, WA, high school (1998)
Prelutsky, Jack, <i>Nightmares: Poems to Trouble Your Sleep</i>	Removed from Berkeley County, SC, schools (1993) and Eau Claire, WI, elementary schools (1993)
Preston, Richard, <i>The Hot Zone</i>	Challenged in Richland, WA, high school (1998)
Reed, Rick, <i>Obsessed</i>	Removed from East Coweta County, GA, high school (1996)

Rodriguez, Luis J., <i>Always Running</i>	Removed from Santa Barbara schools (2004)
Schwartz, Alvin, <i>More Scary Stories to Tell in the Dark</i>	Challenged in Tracy, CA, schools (1995)
Schwartz, Alvin, <i>More Tales to Chill Your Bones</i>	Challenged in West Hartford, CT, elementary and middle schools (1992) and Kirkland, WA, schools (1992)
Schwartz, Alvin, <i>Scary Stories to Tell in the Dark</i>	Challenged in West Hartford, CT, elementary and middle schools (1992) and Kirkland, WA, schools (1992)
Silko, Leslie Marmom, <i>Ceremony</i>	Challenged in Round Rock, TX, high school (1996)
Smiley, Jane, <i>A Thousand Acres</i>	Challenged in Round Rock, TX, high school (1996)

Steig, William, <i>The Amazing Bone</i>	Challenged in Issaquah, WA, elementary school (1993)
Steinbeck, John, <i>Of Mice and Men</i>	Challenged in Tomah, WI, schools (1999)
Steinbeck, John, <i>The Red Pony</i>	Challenged in Attalla, AL, schools (1997)
Strasser, Todd, <i>Give a Boy a Gun</i>	Challenged in Bangor, PA, middle school (2007)
Toriyama, Akira, <i>Dragon Ball: The Monkey King</i>	Removed in Wicomico, MD, schools (2009)
Trueman, Terry, <i>Stuck in Neutral</i>	Challenged in Evansville, WI, high school (2003)
Ungerer, Tomi, <i>Beast of Monsieur Racine</i>	Challenged in AR (1989)
<i>Vasilissa the Beautiful: Russian Fairy Tales</i>	Challenged in Mena, AR, schools (1990)

Vonnegut, Kurt,  
*Slaughterhouse-Five*

Removed in Coventry,  
RI, high school (2000);  
challenged in Round  
Rock, TX, high school  
(1996)

Welch, James,  
*Fools Crow*

Challenged in Bozeman,  
MT, high school (2000)

Welch, James,  
*Winter in the Blood*

Challenged in Round  
Rock, TX, high school  
(1996)

Wright, Richard,  
*Native Son*

Removed in Fremont,  
CA, high school (1998);  
challenged in Yakima,  
WA, schools (1994) and  
High Point, NC, high  
school (1996)