

07-16620

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**VIDEO SOFTWARE DEALERS ASSOCIATION  
and ENTERTAINMENT SOFTWARE  
ASSOCIATION,**

**Plaintiffs-Appellees,**

v.

**ARNOLD SCHWARZENEGGER, in his official  
capacity as Governor of the State of California,  
et al.**

**Defendants-Appellants.**

On Appeal from the United States District Court  
For the Northern District of California  
No. C 05 4188 RMW  
The Honorable Ronald M. Whyte, District Judge

**MOTION OF AMERICAN BOOKSELLERS FOUNDATION FOR  
FREE EXPRESSION, ASSOCIATION OF AMERICAN  
PUBLISHERS, INC., COMIC BOOK LEGAL DEFENSE FUND,  
ENTERTAINMENT CONSUMERS ASSOCIATION, FREEDOM  
TO READ FOUNDATION, NATIONAL ASSOCIATION OF  
RECORDING MERCHANTISERS, AND RECORDING INDUSTRY  
ASSOCIATION OF AMERICA FOR LEAVE TO FILE *AMICUS  
CURIAE* BRIEF IN SUPPORT OF APPELLEES [AFFIRMANCE]**

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In accordance with Rule 29 of the Rules of Appellate Procedure, *amici* seek leave to file the accompanying *amicus curiae* brief in support of Appellees, urging that this Court affirm the decision of the court below that California's violent video game law, California Civil Code §§ 1746 - 1746.5 (2006), is unconstitutional. Appellants and Appellees do not oppose this motion.

*Amici's* members (hereinafter "*amici*") publish, produce, distribute, sell and are consumers of books, magazines, motion pictures, sound recordings, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific and entertaining. Materials published, distributed and sold by members of *amici* include depictions of violence. These range from popular motion pictures such as "No Country for Old Men" and "Sweeney Todd," nominated this year for various academy awards, "Flags of our Fathers," directed by Clint Eastwood and "Saving Private Ryan," "The Terminator" and "Rambo," starring well-known actors such as Tom Hanks, Arnold Schwarzenegger and Sylvester Stallone, to documentaries and books about wars and the Holocaust as well as to photographs in books, magazines and newspapers about recent terrorist attacks. *Amici* have a direct and significant interest in ensuring that the

protection of such expressive materials afforded by the First Amendment for decades is not eroded by the regulation the State seeks to impose in this matter.

If accepted by this Court, the State's argument that depictions of violent action can be regulated and censored would carve an enormous new exception into the First Amendment bedrock upon which *amici* depend for the creation and dissemination of a wide variety of constitutionally-protected material in all media. *Amici* thus submit the accompanying *amicus curiae* brief urging this Court to reject the State's effort to expand the body of law regarding "obscenity for minors" or "harmful to minors" speech on sexual matters to regulate material containing violent content. Based on the reasoning proposed by the State, were this Court to reverse the decision below and depart from precedent of the U.S. Supreme Court and Courts of Appeal across the nation, such materials could be subject to regulation based on their content, thus imposing a risk of liability on, and substantially chilling expressive activities of, *amici* or their members that heretofore have been protected by the First Amendment.

Many of the *amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws infringing on First

Amendment rights. *See, e.g., Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383 (1988); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992); *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) *aff'd*, 475 U.S. 1001 (1986); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *Village Books v. Bellingham*, No. C88-1470 (W.D. Wash. Feb. 9, 1989); *Am. Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993); *Leech v. Am. Booksellers Ass'n*, 582 S.W.2d 738 (Tenn. 1979). They also strongly believe it important to assert the values of the First Amendment in this case as *amici*.

*Amici* are familiar with the parties, the law and the important issues raised in this matter before the Court. They have reviewed the filings of Appellees and Appellants. For all of the foregoing reasons, *amici* respectfully request that the accompanying *amicus curiae* brief be accepted

and ordered filed in this matter.

Dated: February 12, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Bamberger', is written over a horizontal line.

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, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On **FEB 12 2008**

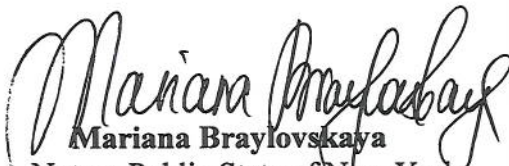
deponent served the within: **Motion**

upon:

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the address(es) designated by said attorney(s) for that purpose by depositing 1 true copy(ies) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Overnight Express Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Sworn to before me on **FEB 12 2008**



**Mariana Braylovskaya**  
Notary Public State of New York  
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