Case Nos. 12-56067, 12-56068, 12-56077 (Consolidated)
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ESTATE OF ROBERT GRAHAM, et al.,
Plaintiff and Appellants,

v.

SOTHEBY'S, INC.,
Defendant and Appellee.

THE SAM FRANCIS FOUNDATION, et al.,
Plaintiffs and Appellants,

v.

CHRISTIE'S, INC.,
Defendant and Appellee.

THE SAM FRANCIS FOUNDATION, et al.,
Plaintiffs and Appellants,

v.

EBAY, INC.,
Defendant and Appellee.

Appeal from the United States District Court, Central District of California
Case Nos. CV 11-8604 JHN (FFMx), CV 11-8605 JHN (FFMx),
CV 11-8622 JHN (PLAx)

BRIEF OF *AMICI CURIAE* CALIFORNIA LAWYERS FOR THE ARTS, RICHARD MAYER, AND PETER ALEXANDER IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

KEKER & VAN NEST LLP
STEVEN A. HIRSCH - #171825
KATHERINE M. LOVETT - #276256
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

DAVIS COWELL & BOWE LLP
JOHN J. DAVIS, JR. - #65594
595 Market Street, Suite 1400
San Francisco, CA 94105
Telephone: (415) 597-7200
Facsimile: (415) 597-7201

Attorneys for *Amici Curiae*
California Lawyers for the Arts, Richard Mayer, and Peter Alexander

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record state that *amicus curiae* California Lawyers for the Arts is a non-profit corporation that does not have a parent corporation, and that no publicly held company owns stock in California Lawyers for the Arts.

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IDENTITY OF *AMICI CURIAE*, INTEREST IN THE CASE, AND AUTHORITY TO FILE THIS BRIEF

Amicus curiae California Lawyers for the Arts ("CLA") is a state-wide non-profit organization founded in 1974. CLA is dedicated to educating and empowering artists and entertainers of all disciplines and to supporting non-profit arts organizations by establishing a bridge between the legal and arts communities. Each year, CLA serves more than 11,000 individuals, arts businesses, and non-profit organizations by providing referrals to affordable and pro bono legal services, educational programs, alternative dispute-resolution services, youth development, and information resources. CLA's membership includes artists, attorneys, accountants, educators, and other supporters of the organization's goals.

This appeal affects CLA's artist members directly. The California Resale Royalty Act ("CRRA") grants visual artists a fairer share in the profits from their labor, fosters the creation of new art, and communicates to both established and upcoming visual artists that California values their work. CLA is uniquely suited to explain the benefits that the CRRA provides to visual artists across California. CLA's membership also includes art dealers who support the CRRA and take pride in paying resale royalties to artists.

CLA, formerly known as Bay Area Lawyers for the Arts ("BALA"), participated in the drafting of the CRRA and was a moving force in urging the California legislature to adopt the law. BALA also acted as *amicus curiae* in

support of the artist-intervenors in a prior case upholding the CRRA's constitutionality. *See Morseburg v. Baylon*, No. 77-2410, 1978 WL 980, at *2 n.* (C.D. Cal. Mar. 23, 1978), *aff'd*, 621 F.2d 972 (9th Cir. 1980).

Amici curiae Richard Mayer and Peter Alexander are artists whose works have been sold and resold for decades, but who have very rarely received resale royalties. They intervened in *Morseburg*, the first constitutional challenge to the CRRA. In that case, they successfully defended the Act in the district court and in this Court, and in opposing Mr. Morseburg's *certiorari* petition. Mr. Mayer and Mr. Alexander still see the Act as a vital cultural asset.

This brief is submitted with consent of all parties pursuant to Federal Rule of Appellate Procedure Rule 29(a). In accordance with Rule 29(c)(5), *amici curiae* state that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money intended to fund preparing or submitting this brief; and (3) no person other than CLA, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Facial challenges to a statute's constitutionality are disfavored. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008). The challenger bears the daunting burden of establishing that "***no set of circumstances exists*** under which the [challenged statutory provision] would be valid." *S.D. Myers, Inc. v. City & Cnty. of S.F.*, 253 F.3d 461, 467 (9th Cir. 2001) (emphasis added) (internal quotation marks omitted).

The challengers in the lead cases[1] are two wealthy and powerful international auction houses with a long history of cheating California's visual artists out of the royalty payments owed to them under the statute that they now attack—the California Resale Royalty Act ("CRRA"). The CRRA is a trailblazing statute that has been on the books for 36 years and that withstood an earlier constitutional test in this Court. In enacting the CRRA, California lawmakers sought to right an imbalance between the economic rights of visual artists and those of other artists; to foster a vibrant arts community in California; to set an example for the rest of the nation; and to bring California law into line with that of many other jurisdictions, including the European Union.

[1] In the companion case, *The Sam Francis Foundation v. eBay Inc.*, Case No. 2:11-cv-08622-JHN-PLA (N.D. Cal.), the challenger bills itself as "the world's largest online marketplace" with "more than 100 million active users globally" and a "staggering" impact on ecommerce, having sold $68.6 billion in goods in 2011, or "more than $2,100 every second." *See* http://www.ebayinc.com/who (last visited March 5, 2013).

When finally called to account by this lawsuit, the auction-house defendants made no pretense of assembling a factual record capable of demonstrating that there is "no set of circumstances" in which the CRRA is valid. Rather, they invited the district court to dismiss the case based on naked pleadings and manufactured hypotheticals—and, regrettably, the district court jumped at the chance to end the case at the earliest possible procedural juncture.

But it is reversible error to invalidate a statute under the dormant Commerce Clause without a solid factual basis. Here there were no facts at all on which to base the momentous decision to strike down an important legal reform that benefits artists—only a set of hypothetical facts lacking any anchor in the real world. The court paid no deference whatsoever to the state legislature's admirable and innovative effort to let visual artists share more fairly in the fruit of their own labor. The court's decision to strike down the CRRA based on pleadings and speculation was erroneous.

The CRRA provides a five-percent royalty to an artist on the resale price of her fine-art works that are resold within her lifetime. Cal. Civ. Code § 986(a). The royalty applies (subject to a few exceptions) when one of two triggering circumstances occurs: (1) the sale takes place in California; or (2) the seller of the work resides in California (hereinafter the "California-sellers provision"). *Id.*

The CRRA is a vital part of California's efforts to nurture its artistic community. When California adopted the CRRA in 1976, it exemplified the state's traditional role in our federal system as a laboratory for new legislative ideas. Resale-royalty laws are common abroad, in both civil- and common-law countries. Like the international royalty laws, the CRRA creates a financial incentive to produce new art, grants visual artists royalties similar to those received by writers and musicians, and ensures that successful artists receive fair compensation for their creative genius and hard work.

But the district court did not consider the benefits that California's unique experiment in the law has provided to California artists and residents. Instead, the district court held at the pleadings stage that the California-sellers provision of the CRRA facially violates the dormant Commerce Clause. That premature decision should be reversed for two reasons.

First, the district court failed to require the auction houses to meet their stringent burden of proof for mounting a facial challenge to a statute's constitutionality. This Court's precedents required the defendants to establish that the California-sellers provision is invalid under ***any*** circumstances. This they did not do. In fact, the California-sellers provision can be applied in many factual circumstances without violating the Constitution. The district court speculated impermissibly when it held that, under some conceivable set of circumstances, the

California-sellers provision could lead to regulation of a transaction "wholly outside" of California.

Second, the district court decided the case without a factual record, much less a record containing the facts necessary to resolve the Commerce Clause issues that the defendants raised. The district court therefore lacked sufficient information about the CRRA's actual benefits, burdens, and extraterritorial effects. Consequently, its premature judgment should be reversed and the case remanded for appropriate factual development.

Even if this Court holds that the California-sellers provision is constitutionally unsound, it should reverse the district court's judgment striking down the entire CRRA. The Supreme Court has held that a statute should not be entirely invalidated because of one unconstitutional provision, unless it is evident that the legislature would not have enacted law without the offending provision. Neither the CRRA's text nor its legislative history make it "evident" that the legislature saw the California-sellers provision as essential to the CRRA. The district court's unfounded decision to the contrary should be reversed.

II. ARGUMENT

A. Laws providing resale royalties for visual artists have been embraced internationally and provide a multitude of benefits to artists and to society.

A widespread consensus exists among America's closest international partners that a visual artist is entitled to share in the increased value of his work, even after the work's initial sale. The experience in these countries makes plain that an artists' royalty can provide significant benefits to visual artists and to society in general.

The first legislation providing a resale-royalty right to visual artists, often referred to as the *droit de suite*, originated in France in 1920,[2] with Belgium, Poland, Italy, and Germany following suit by 1965. Stephanie B. Turner, *The Artist's Resale Royalty Right: Overcoming the Information Problem*, 19 UCLA ENT. L. REV. 329, 335-36 (2012). From the 1960s onward, countries of staggering diversity—both legally and culturally—codified resale royalties for visual artists. Those countries included Algeria, Australia, Chile, Czechoslovakia, Guinea, Mali, and Turkey. *Id.* at 336-37; *see also* Shira Perlmutter, *Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report*, 16 COLUM.-VLA J.L. & ARTS 395, 395 (1991-1992) (noting that approximately 30 countries had enacted some

[2] According to the general manager of a French *droit de suite* collection agency, over $17 million in resale royalties was distributed to more than 1,700 artists in France in 1990. Jeffrey C. Wu, *Art Resale Rights and the Art Resale Market: A Follow-Up Study*, 46 J. COPYRIGHT SOC'Y U.S.A. 531, 539 (1998-1999).

form of resale royalty by 1992). Moreover, in 2001, the European Union issued a directive requiring that all EU member states implement a resale royalty. Following that directive, the United Kingdom, a common-law country, enacted resale-royalty legislation in 2006. Turner, *supra*, at 337-38.

There are three main benefits to the visual artists' resale-royalty laws in force around the world. *See id.* at 332-33; *see also* Katreina Eden, *Fine Artists' Resale Royalty Right Should Be Enacted in the United States*, 18 N.Y. INT'L L. REV. 121, 140-45 (2005).

First, giving artists a share of the increased value of their work gives them a financial incentive to create new art. The resale-royalty right "is a promise, equally available to all, of reward for future success" that can encourage young artists to continue producing new works despite economic hardship. Perlmutter, *supra*, at 416. The incentive effect can be immediate, as even a modest royalty can help pay for an artist's next work, which often requires expensive upfront investment in studio space, materials, or models. *Id*.

Second, such laws put visual artists on par with other artists, including writers and musicians, who traditionally benefit from copyright protection when reproductions of their works are sold. Visual artists produce art prized for its one-of-a-kind nature, making copies much less commercially valuable. Consequently, a work of fine art is exploited differently than a book, a play, or a musical

composition. Its value lies in the "uniqueness of the original physical embodiment, the painting or sculpture itself." Perlmutter, *supra*, at 400. Each transfer of fine art is therefore a new exploitation of the work that enables a new circle of users to enjoy the original work. *See* Michael B. Reddy, *The Droit de Suite: Why American Fine Artists Should Have the Right to a Resale Royalty*, 15 LOY. L.A. ENT. L.J. 509, 518 (1995). Resale-royalty laws are grounded in the sensible notion that visual artists should be given an incentive like that given to authors and musicians, by allowing visual artists to share in the popularity of their creations over time. *See* Perlmutter, *supra*, at 404.

Third, resale-royalty laws fairly compensate an artist for her creative genius and for the effort she has put into improving her reputation within the artistic community over the course of her career. Artists are ultimately responsible for their works' increased value. They should not be cut out of the enormous profits reaped by collectors and dealers. Art is more than a mere economic asset; it is also an embodiment of the artist's own vision and personality, gaining value, in part, because of its link to its creator. *See* Reddy, *supra*, at 513. Both the Berne Convention for the Protection of Literary and Artistic Works, to which the United States is a signatory, and the Visual Artists Rights Act, passed by Congress in 1990, recognize the artist's unique right to participate in the future use of his

creations.[3] *See id.* at 510-11. Resale-royalty laws likewise recognize that a visual artist has an important stake in the future sale of his work because of how closely the value of art is associated with the person who created it.

Given the many benefits and broad international consensus in favor of resale royalties for fine artists, the California legislature had good reason to think that a resale royalty would help nurture the state's artistic community.

B. The California Resale Royalty Act benefits artists and is a cutting-edge attempt to bring state law into line with international norms.

In light of the broad international support for resale-royalty legislation, the CRRA represents an innovative and commendable attempt by the California legislature to blaze a trail for other states, and perhaps for the federal government, in protecting visual artists' rights. The CRRA has been embraced by artists and enriches California's cultural life. The district court should not have leapt at the first opportunity to strike down California's effort to fill a glaring gap in the law. By taking the rare and disfavored step of facially invalidating a state law prior to any factual development, the district court failed to consider the full implications of defendants' constitutional challenge.

In passing the CRRA, the California legislature engaged "in the very type of innovative lawmaking that our federalist system is designed to encourage."

[3] The Berne Convention also includes an optional resale royalty for artists and other authors of original works of art and manuscripts. Perlmutter, *supra*, 395-96.

Morseburg, 1978 WL 980, at *3. Enactment of the CRRA was prompted, in part, by a 1973 incident in which a work by celebrated artist Robert Rauschenberg, originally purchased from the artist for $900, was resold at public auction for the then-astronomical sum of $85,000.[4] *See* Turner, *supra*, at 338. The seller of the painting retained all of the profits, deeply upsetting Rauschenberg, other artists, and their supporters. *Id.* The California legislature recognized that the Rauschenberg sale and others like it represented a failure to protect the rights of visual artists. In response, it passed the first American law to provide a royalty to visual artists upon resale of their work.[5]

The Supreme Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems" and has cautioned the federal courts to refrain from diminishing that experimental role "absent impelling reason to do so." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). The California legislature's efforts to craft an innovative solution to a pressing social issue therefore should be respected to the greatest extent possible.

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[4] In today's dollars, this sale was equivalent to reselling a work that was originally purchased for about $4,600 for approximately $440,000. *See* Bureau of Labor Statistics, CPI Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm (last visited February 26, 2013).

[5] Georgia and Puerto Rico have since passed laws that include more limited resale-royalty provisions. *See* Turner, *supra*, at 331 n.7.

Moreover, the CRRA is simply too important to artists and to the state of California to be tossed out without more deliberate and measured consideration. The CRRA's benefits to artists, both psychologically and economically, are clear. Studies and anecdotal evidence show that many California artists have received significant royalty payments. *See* Reddy, *supra*, at 524. Perhaps more important, the CRRA has "an expressive function, encouraging respect for artists in society." Turner, *supra*, at 362. In fact, many visual-artist members of CLA report that the law supplies an important incentive for them to continue their work. *See, e.g.*, Motion for Judicial Notice ("MJN"), Ex. A[6] (letter to Governor Brown from artist Leith Johnson explaining that the CRRA would allow her to work by providing her with the functional equivalent of work insurance).

In addition, the CRRA serves California's local interests. By expressing respect for artists and their craft, the law fosters a culturally-enriched community. *See* MJN, Ex. B (letter from California Arts Council to Governor Brown explaining that the CRRA will encourage such an environment); *see also Morseburg*, 1978 WL 980, at *3 ("An important index of the moral and cultural strength of a people is their official attitude towards, and nurturing of, a free and

[6] All of the exhibits cited herein are excerpts from a legislative history of the CRRA assembled by Legislative Research & Intent LLC and are judicially noticeable on appeal under Federal Rule of Evidence 201(d), as explained in the accompanying Motion for Judicial Notice.

vital community of artists."). The statute also encourages fine artists to live and work in artisan-friendly California and to do business with the state's residents, because those artists know that a royalty obligation arises when a resident decides to resell a painting or sculpture. *See* MJN, Ex. C (telegram to Governor Brown from Robert Rauschenberg stating that, in order to support the CRRA, he will channel as much of his business as possible through California); MJN, Ex. D (letter to Governor Brown from Artists for Economic Action stating that the CRRA makes it more attractive for artists to live and work in California).

Thus, the CRRA encourages the development of a robust local artistic community and an art-sales system that is fair for visual artists. Invalidating the law would harm artists throughout the state. The district court's hasty decision respecting the law's constitutionality—made before ***any*** discovery was taken in the case—did not manifest the proper level of deference to the state legislature's efforts to create a new solution to a complex legal problem.

C. The district court erred when it facially invalidated a valuable state statute without any factual development regarding the statute's benefits, burdens, or extraterritorial effects.

The district court's analysis of the constitutionality of the California-sellers provision opened with an acknowledgment that a court must presume that a legislative act is a constitutional exercise of legislative power "until the contrary is clearly established." *Estate of Graham v. Sotheby's Inc.*, 860 F. Supp. 2d 1117,

1120 (C.D. Cal. 2012) (quoting *Close v. Glenwood Cemetery*, 107 U.S. 466, 475 (1883)). Yet the district court failed to apply this presumption, instead relying on speculation alone to facially invalidate a state law that had been in force for over three decades. The district court's hasty decision to invalidate the California-sellers provision must be reversed for two independent reasons: (1) the district court applied the wrong burden of proof to defendants' facial challenge; and (2) none of the dormant Commerce Clause issues raised by defendants can be resolved without factual development that was impossible at the pleading stage.

1. The district court erred when it facially invalidated the CRRA without requiring defendants to meet the high burden of proof that applies in a facial challenge to a statute's constitutionality.

The district court's decision must be reversed because the court applied much too low a burden of proof to defendants' claim that the CRRA is facially invalid under the dormant Commerce Clause.

Facial challenges to a statute are "disfavored" because they "often rest on speculation," "run contrary to the fundamental principle of judicial restraint," and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange*, 552 U.S. at 450-51. This Court therefore requires litigants to meet a very high burden to prevail on a facial challenge: they "must establish that ***no set of circumstances exists*** under which the [California-

sellers provision] would be valid." *S.D. Myers, Inc.*, 253 F.3d at 467 (applying the standard articulated in *United States v. Salerno*, 481 U.S. 739, 745 (1987), to a dormant Commerce Clause challenge) (emphasis added) (internal quotation marks omitted); *see also United States v. Bynum*, 327 F.3d 986, 990 (9th Cir. 2003) (reaffirming that the *Salerno* standard is the correct test to apply to every facial challenge except some First Amendment and abortion cases).

Defendants could not and did not meet this high burden at the pleading stage.[7] Instead, the district court invalidated the CRRA's California-sellers provision because the court mistakenly concluded that the provision has the "practical effect" of directly controlling commerce "occurring wholly outside the boundaries" of California. *See Graham*, 860 F. Supp. 2d at 1125 (relying on *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)). That determination would have been proper only if defendants had met their burden of showing that the California-

[7] The district court also could not have held at the pleading stage that the California-sellers provision was invalid ***as applied*** to the facts of this case—because there were no facts. "When [courts] are confronted with an as-applied challenge, [they] examine the facts of the case before [them] ***exclusively***, and not any set of hypothetical facts under which the statute might be unconstitutional." *Hegwood v. City of Eau Claire*, 676 F.3d 600, 603 (7th Cir. 2012) (emphasis added). Here, there were no facts to examine "exclusively," and the entire constitutional inquiry rested on facts that were hypothetical, if not plain wrong. The district court had ***no*** information about real-life sales that Christie's and Sotheby's had arranged for California residents in the past. The court therefore had ***no*** factual basis to conclude that any of those sales took place "wholly outside" of California.

sellers provision has "the practical effect of directly regulating interstate commerce under ***all circumstances***." *S.D. Myers*, 253 F.3d at 469 (emphasis added). Defendants didn't do so. In fact, they did not present one iota of evidence that ***all*** sales of art owned by California residents take place "wholly outside" of California.

Instead, defendants asserted only that the California-sellers provision ***could***, under a constructed set of hypothetical circumstances, lead to California regulation of a wholly out-of-state transaction. But speculation is not enough to facially invalidate a statute under the dormant Commerce Clause, as this Court recently held in a "practical effect" challenge to Arizona's regulation of alcohol distribution. *See Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1232 (9th Cir. 2010). In that case, a Michigan winery, Black Star Farms, challenged the facial constitutionality of an Arizona law allowing any winery producing fewer than 20,000 gallons of wine a year to ship an unlimited amount of its wines directly to Arizona consumers, while larger wineries were prohibited from doing so. *Id.* at 1231-32. Black Star Farms argued that this provision would have the "practical effect" of favoring in-state wineries over out-of-state wineries. *Id.* at 1232.

But Black Star Farms presented no evidence that the facially neutral Arizona scheme ***actually*** was decreasing the out-of-state market share in Arizona wine sales. *Id.* at 1231-32. This Court noted that it "must be reluctant to invalidate a

state statutory scheme . . . simply because it ***might*** turn out down the road to be at odds with our constitutional provision against state laws that discriminate against Interstate Commerce." *Id.* at 1232 (emphasis in original). The Court rejected the winery's challenge, observing, "Black Star Farms asks us without substantial evidentiary support to speculate and to infer that this scheme necessarily has the effect it fears. This leap of faith we will not take." *Id.*

Defendants are asking the Court to take a similar leap in this case based on pure conjecture about the CRRA's effects; but, just as in *Black Star Farms*, defendants must "prove it, or lose it." *Id.*

Here, the district court's analysis hinged upon a hypothetical scenario, entirely untethered to the facts alleged in plaintiffs' complaint, to illustrate that it was ***conceivable*** that the California-sellers provision could affect a transaction "wholly outside" of California. *See Graham*, 860 F. Supp. 2d at 1124 ("The following example illustrates the CRRA's problematic reach: Assume [a set of made-up facts]."). The court thus drew legal conclusions on the basis of a judicially invented fact pattern—the very type of speculation that led the Supreme Court to conclude that facial challenges are "disfavored." *Wash. State Grange*, 552 U.S. at 450. The district court posited a situation in which a California resident places a painting by a New York artist for sale at a New York auction house, which then sells the painting to a New York resident. However, it is also

possible to construct any number of hypothetical fact patterns falling within the California-sellers provision that involve sales with stronger connections to California. For example, a California resident could sign an agency agreement with a New York auction house, containing a California choice-of-law provision, for the sale of her artwork while she is physically present in California. Or she could sell her painting via a New York auction house to a California-resident buyer and have the auction house deposit the sales proceeds in a California bank account. Just because the district court could imagine one scenario where a sale had a more distant connection to California does not mean that ***all*** California-seller sales would take place under similar circumstances—the test for facial invalidation.

Even if the district court could consider hypothetical facts on a facial challenge—which it can't—the district court's hypothetical was based on false premises. The district court concluded that its hypothetical sale to a New York buyer of a painting originally created by a New York artist would occur "wholly in New York" and "wholly outside California." *Graham*, 860 F. Supp. 2d at 1124. But the district court's conclusion does not follow from its hypothetical. "[U]nder general principles of agency law, an auctioneer acts as the agent of the consignor." *Mickle v. Christie's Inc.*, 207 F. Supp. 2d 237, 244 (S.D.N.Y. 2002) (citing a Christie's consignment agreement creating an agency relationship); *see also* Cal. Civ. Code § 1738.6 (stating that consignment creates an agency relationship in

California art sales). Accordingly, the auction house in the district court's hypothetical would be acting as an agent for a ***California*** seller who, by definition, has a significant relationship with the state of California. Moreover, the hypothetical contract between the New York auction house and the California resident seller could have been entered into in California or could contain a California choice-of-law provision, two contacts that would further ground the sale in California. As a result, the district court's hypothetical fails to describe a dormant Commerce Clause violation, even if such speculation were permissible.

Because the district court failed to hold defendants to the demanding burden of proof for facial invalidation, and because defendants did not satisfy that burden, the court's decision must be reversed.

2. The district court erred when it invalidated the CRRA without developing the factual record necessary to adjudicate defendants' dormant Commerce Clause claims.

The district court should have insisted on further factual development before ruling on the constitutionality of the California-sellers provision under the dormant Commerce Clause. Neither prong of the two-part dormant Commerce Clause test properly could be applied to the bare-bones facts contained in plaintiffs' and defendants' pleadings. And *amici* strongly believe that further factual development regarding the benefits, burdens, and extraterritorial effects of the

CRRA will demonstrate that the California-sellers provision does not violate the dormant Commerce Clause.

This Court applies a two-tiered test to resolve dormant Commerce Clause challenges to laws affecting interstate commerce. *See Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1177 (9th Cir. 2011). If a statute directly discriminates against interstate commerce, it is "virtually per se invalid." *Id.* (quoting *Barber v. Hawaii*, 42 F.3d 1185, 1194 (9th Cir. 1994)). Conversely, where the statute regulates evenhandedly, the Court applies the test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); the statute will be upheld unless the burden imposed on commerce is clearly excessive in relation to the statute's putative local benefits. *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 995 (9th Cir. 2002).

This is an intensely factual inquiry, requiring "specific details as to how the costs of the [statute] burden[] interstate commerce." *S.D. Myers*, 253 F.3d at 471. Here, the total lack of factual development precluded a full analysis of either part of this test. Factual development is required for at least two reasons.

First, factual development is necessary to determine whether the California-sellers provision directly discriminates against interstate commerce—the very premise of the district court's decision. As the Supreme Court has observed, "[t]he modern law of . . . the dormant Commerce Clause is driven by concern about

'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008). But the CRRA is not designed to favor in-state over out-of-state interests; in fact, it ***only*** burdens individuals with an in-state connection—namely, sellers of art who reside in California or who come to California to carry out a sale, and their contractual agents. Defendants nevertheless insist that the California-sellers provision is a direct discrimination against interstate commerce because it "has the undeniable effect of controlling commercial activity occurring wholly outside of the boundary of the State." *Healy*, 491 U.S. at 337.

Defendants fail to recognize that whether out-of-state art sales occur "wholly outside" the boundaries of California is a fact-specific issue that cannot be resolved simply by looking at the physical site of the auction or final sale. A number of factual circumstances influence the Court's determination of this question. For instance, the Tenth Circuit has observed that there is no extraterritorial-regulation problem when a state regulates a transaction that results in the transfer of bank funds into an account in that state, as may have occurred here. *See Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308 (10th Cir. 2008). And the Third Circuit has held that a state has an interest in regulating aspects of a transaction that occur within its boundaries when one of that state's citizens enters into a contract with a citizen of

a different state; such a contract does not occur "wholly outside" of the boundaries of either state. *A.S. Goldmen & Co. v. N.J. Bureau of Secs.*, 163 F.3d 780, 787 (3d Cir. 1999); *see also Life Partners, Inc. v. Miller*, 420 F. Supp. 2d 452, 464 (E.D. Va. 2006) (holding that, where one party to an out-of-state agreement signed the agreement in Virginia, significant parts of the transaction occurred in Virginia and Virginia's regulatory oversight was justified), *aff'd on other grounds*, 484 F.3d 284 (4th Cir. 2007).

The district court rushed to judgment without ***any*** factual basis on which to decide whether legally significant events take place in California before or after out-of-state art sales in general, or sales by Sotheby's and Christie's specifically. Since no discovery had occurred, the court could not review any agreements between California-resident sellers and auction houses to determine whether those agreements were entered into in California or elsewhere. The court similarly could not determine whether auction houses complete the sales process by depositing funds into California bank accounts. California's connection to these sales is thus far unknown. As a result, any determination that the California-sellers provision regulates transactions "wholly outside" of the state is speculative, premature, and runs "contrary to the fundamental principle of judicial restraint." *Wash. State Grange*, 552 U.S. at 450.

Second, factual development is necessary before the district court can hope to undertake the *Pike* balancing test. As earlier noted, when a statute only affects interstate commerce indirectly, *Pike* requires the court to balance the putative local benefits of that statute against its burden on interstate commerce. *See Conservation Force, Inc.*, 301 F.3d at 995. Here there was no opportunity for factual development regarding the CRRA's benefits, many of which were canvassed earlier in this brief. Organizations like CLA could be of service on remand by offering the perspectives of artists, art enthusiasts, and other community members about the CRRA's positive impact. Instead, because this case was resolved on the pleadings, interested parties had no opportunity to submit affidavits about (let alone testify about) the CRRA's contributions to California's artistic community. Factual development in this area would allow the district court to conduct the fact-sensitive *Pike* balancing test. It also would decrease the risk of "short circuit[ing] the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange*, 552 U.S. at 451.

Even more important, defendants' arguments that the CRRA imposes a real burden on interstate commerce are completely speculative at this early stage of litigation. Because plaintiffs have not yet obtained key documents regarding defendants' sales practices and histories, they have no way to refute defendants'

unsupported assertion that compliance with the CRRA is a substantial burden that is "clearly excessive" in relation to local benefits.

This Court requires litigants to provide "specific details as to how the costs of [a statute] burdened interstate commerce." *S.D. Myers*, 253 F.3d at 471. But defendants did not supply the district court with ***any*** specific details about the costs of complying with the CRRA. They have presented no evidence that their sales are hampered by the resale royalty's existence, or that paying the royalty presents a significant administrative burden. In fact, *amici* believe that discovery will reveal that auction houses routinely comply with resale-royalty laws in the thriving art markets of London and Paris. Such evidence would belie defendants' argument that complying with resale-royalty provisions is impossibly burdensome, and would demonstrate that these wealthy and sophisticated international auction houses can and will pay royalties for sales originating in California—as long as courts send them a clear message that they must.

Thus, there are just too many unsettled questions about the extraterritorial reach, local benefits, and actual burdens of the CRRA to invalidate the statute without any factual record. This Court should reverse the judgment and remand the case for discovery before any dormant Commerce Clause rulings are made.

D. At a minimum, this Court should reverse the district court's ruling that the rest of the CRRA is not severable.

Even if this Court holds that it was appropriate to strike down the CRRA's 36-year-old California-sellers provision as facially unconstitutional, the Court still should reverse the part of the district court's judgment holding that the rest of the CRRA is not severable.

The district court quoted the Supreme Court's caution that "a court should refrain from invalidating more of [a] statute than is necessary," but failed to apply that standard in practice. *See Graham*, 860 F. Supp. 2d at 1126 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)). The district court again relied solely on speculation to conclude that the California legislature would not have enacted the CRRA without the California-sellers provision.

That conclusion was wrong. The Supreme Court has held that federal courts must sustain statutes that are fully operable with their unconstitutional provisions excised, unless it is "***evident***" that the legislature would not have enacted the constitutional provisions independently. *Free Enter. Fund v. Pub. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161-62 (2010) (emphasis added). It is certainly not "evident" that the California legislature would have refused to pass the CRRA without a provision applying the royalty to out-of-state art sales by California residents.

Indeed, the California legislature intended the CRRA to be severable, and this Court should hold that it is. The CRRA includes a severability clause stating, "If any provision of this section or the application thereof to any person or circumstance is held invalid for any reason, such invalidity shall not affect any other provisions or applications of this section which can be effected, without the invalid provision or application, and to this end the provisions of this section are severable." Cal. Civ. Code § 986(e).

The severability of a state statute is a question of state law. *See Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). Under California law, the presence of a severability clause "establishes a presumption in favor of severance." *Cal. Redev. Ass'n v. Matosantos*, 267 P.3d 580, 607 (Cal. 2011). Besides the presence of a severability clause, California courts consider three criteria to determine severability: (1) grammatical separability (whether the invalid parts can be removed without affecting the coherence of the remaining words); (2) functional separability (whether the remainder of the statute is complete in itself); and (3) volitional separability (whether the legislature would have enacted the remainder if it had foreseen the statute's partial invalidation). *Id.* at 607-08.

The first two prongs of this test are easily satisfied here. If the California-sellers provision were excised from the CRRA, the provision covering in-state art sales would remain grammatically and functionally independent. *See Morseburg*,

1978 WL 980, at *4 ("The [CRRA] is, for a sale within the State of California, a valid enactment of the California Legislature which does not offend the provisions of the United States Constitution.").

The district court's analysis focused solely on volitional separability. "The issue, when assessing volitional separability, is not whether the legislative body would have preferred the whole to the part . . . . Instead, the issue is whether a legislative body, knowing that only part of its enactment would be valid, would have preferred that part to nothing . . . ." *Cal. Redev. Ass'n*, 267 P.3d at 609.

The district court erroneously relied on three pieces of "evidence" in deciding that the legislature would not have passed the CRRA absent the California-sellers provision: (1) speculation about the reasons why the legislature included the provision; (2) the history of the statutory text during the legislative process; and (3) a letter from the California Legislative Counsel describing his misgivings about the provision. *See Graham*, 860 F. Supp. 2d at 1125-26.

None of these data points, alone or collectively, supports the district court's conclusion that the CRRA is not severable.

First, the district court mistakenly relied on guesswork about the legislature's intent. The court stated, "As Defendants pointed out in oral argument, the reason for the legislature's decision [to include a California-seller provision] seems obvious: were the CRRA to apply *only* to sales occurring *in* California, the

art market would surely have fled the state to avoid paying the 5% royalty." *Id.* at 1126 (emphases in original). The court cited no evidence for that conclusion, other than defendants' speculation at oral argument.

In truth, it is not ***evident*** that the legislature added the California-sellers provision as some sort of protectionist measure or saw that provision as essential to the statute as a whole. Defendants have not cited a single document in the legislative history indicating that the legislature viewed the California-sellers provision as indispensable. In other words, defendants have not shown that the legislature would have preferred no resale royalty at all over a partial royalty. *See Cal. Redev. Ass'n*, 267 P.3d at 609. Given the presumption in favor of severance, the district court was not entitled to assume without evidence that legislators were primarily concerned about the art market fleeing California when they passed the CRRA.

Moreover, it is far from "obvious" that a law limited only to sales in California would drive the art market out of California. The empirical evidence for and against that notion was and still is hotly debated. It was by no means clear at the time of the CRRA's passage that the art market would be driven out of California by a more limited bill that applied only to in-state sales. *See* Perlmutter, *supra*, at 408 (noting that "there is statistical evidence from the European collecting societies indicating that art sales have not been diverted from countries

with a *droit de suite*."). In fact, as some of the evidence cited above in this brief demonstrates, many artists professed an ***increased*** eagerness to work and live in California and to sell their art to Californians after the CRRA's passage. *See* MJN, Ex. C; MJN, Ex. D.

Second, the district court read too much into the limited portion of legislative history that it did examine. The court noted that the original version of the CRRA only regulated sales that take place in California, and that an amended version of the bill was extended to cover sales when the buyer or seller resided in California. *See Graham*, 860 F. Supp. 2d at 1126. The court then observed that "all amended versions were consistent in one respect: they applied to sales taking place outside California so long as the seller resided in California." *Id.* The district court read far too much into this observation. "Unpassed bills, as evidenc[e] of legislative intent, have little value." *Dyna-Med, Inc. v. Fair Emp't & Hous. Comm'n*, 743 P.2d 1323, 1333 (Cal. 1987). The fact that the California-sellers provision was in most versions of the bill does not make it "evident" that the legislature would not have passed the bill without it.

Third, the district court misconstrued a letter from California's Legislative Counsel expressing concern about the CRRA's extraterritorial reach. The district court concluded that the legislature knew that the California-sellers provision

might be unconstitutional but deemed the provision essential. *Graham*, 860 F. Supp. 2d at 1126.

But the district court completely ignored the fact that the Legislative Counsel's letter ***also*** opined that the California-sellers provision was ***severable***. The Legislative Counsel explained that "the bill provides that if any provision or application of the bill is invalid, the remaining provisions or applications are severable . . . . Thus, in our opinion, the provisions . . . would be valid only as to sales which occur in California."[8]

In sum, the district court relied on a slanted view of the legislative history to jump to conclusions about the legislature's intent. *Amici* urge the Court—if it finds the California-sellers provision unconstitutional—to invoke the presumption against wholesale invalidation and to reverse the district court's decision striking down the entire CRRA.

III. CONCLUSION

The district court erred in granting defendants' motion to dismiss plaintiffs' claims on the ground that the CRRA is facially unconstitutional. Defendants failed to meet the exceptionally demanding burden of showing that the CRRA's California-sellers provision is invalid under any and all circumstances. And the district court erred in concluding that the CRRA was not severable.

[8] 4 EOR 603 (Legislative Counsel's letter to Governor Brown).

Accordingly, the Court should reverse the judgment and remand this case to the district court for further proceedings.

Dated: March 7, 2013

Respectfully submitted,

KEKER & VAN NEST LLP

s/Steven A. Hirsch
STEVEN A. HIRSCH
KATHERINE M. LOVETT

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1 because it is proportionally spaced, has a typeface of 14 points or more and contains 6,238 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: March 7, 2013

s/Steven A. Hirsch
STEVEN A. HIRSCH

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Steven A. Hirsch
STEVEN A. HIRSCH