

APPEAL NO. 07-10528 AND 07-10534

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

JEFFREY A. KILBRIDE and JAMES ROBERT SCHAFFER

Defendants-Appellants.

Appeal from the United States District Court
for the District of Arizona

Honorable David G. Campbell, Presiding

Criminal Case Nos. CR-05-00870-DGC-2 and CR-05-00870-003-PHX-DGC

BRIEF *AMICI CURIAE* OF ALLIANCE DEFENSE FUND AND MORALITY IN MEDIA

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1(a), Alliance Defense Fund is a non-profit corporation organized under the laws of the State of Arizona. Alliance Defense Fund does not have a parent corporation and is not publicly held.

Morality in Media is a non-profit corporation organized under the laws of the State of New York. Morality in Media does not have a parent corporation and is not publicly held.

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AMICI STATEMENT OF INTEREST

ALLIANCE DEFENSE FUND (“ADF”) is a not-for-profit public interest organization that litigates and provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties, sanctity of life, and family values. ADF and its allied organizations represent hundreds of thousands of Americans who object to the eroding standards of decency in our society. Its allies include more than 1,200 lawyers and numerous public interest law firms. ADF has advocated for the rights of Americans to maintain standards of decency and exercise their religious beliefs in hundreds of significant cases throughout the United States, having been directly or indirectly involved in at least 500 such cases and legal matters, including cases before the Supreme Court of United States such as *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), *Mitchell v. Helms*, 530 U.S. 793 (2000), *Troxel v. Granville*, 530 U.S. 57 (2000), *Agostini v. Felton*, 521 U.S. 203 (1997), *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

Morality in Media, Inc (“MIM”) has an interest in this case as a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and

upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by the Supreme Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 notes 7 and 8 (1973). MIM focuses on legal and law enforcement issues related to obscenity, child pornography, the broadcasting and other mass communication of indecent material, and the display and dissemination to minors of materials which are harmful to minors.

INTRODUCTION

Appellants argue to this honorable Court that the court below should have instructed the jury to apply a so-called “national standard” when considering community standards for the first and second prongs of the three-prong test for obscenity established in *Miller v. California*, 413 U.S. 15 (1973). Yet there would have been no precedent for doing so and the Supreme Court of the United States in several cases has indicated that a national standard is inappropriate.

I. USE OF A NATIONAL STANDARD FOR OBSCENITY CRIMES WOULD BE AN EXERCISE IN FUTILITY

The United States has firmly rejected the use of a national standard in obscenity cases. It has done so with clarity in its landmark obscenity case, *e.g.* *Miller v. California*, and in cases following. Indeed, in *Miller*, 413 U.S. at 30, the Court proclaimed that it would be futile to use a national community standard:

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the “prurient interest” or is “patently offensive.” These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether “the average person, applying contemporary community standards” would consider certain materials “prurient,” it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate fact finders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their

community...To require a State to structure obscenity proceedings around evidence of a *national* “community standard” would be an exercise in futility. (Emphasis added.)

Miller at 413 U.S. at 32-33, also specifically rejected the notion that the

Constitution requires national uniformity:

It is neither realistic *nor constitutionally sound* to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City...People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in *Mishkin v. New York*, 383 U.S. 502 (1966) at 508-509, the primary concern with requiring a jury to apply the standard of “the average person, applying contemporary community standards” is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person -- or indeed a totally insensitive one. (Emphasis added.)

A year after *Miller*, in *Hamling v. United States*, 418 U.S. 87 at 104-05

(1974), the Court once again rejected the argument that a national standard was

appropriate in federal obscenity prosecutions and also clarified that the standard to

be used was not necessarily a “precise” smaller geographic area:

Miller rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene, describing such standards as “hypothetical and unascertainable”...But in so doing the Court did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of “the average person, applying contemporary community standards.”...Our holding in *Miller* that California could constitutionally proscribe obscenity in terms of a

“statewide” standard did not mean that any such precise geographic area is required as a matter of constitutional law.

In *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974), the Court again stated that a trial court is not required to specify what community standards apply:

We also agree with the Supreme Court of Georgia’s implicit approval of the trial court’s instructions directing jurors to apply “community standards” without specifying what “community,”...A State may choose to define an obscenity offense in terms of “contemporary community standards” as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*.

Miller and *Hamling* also reaffirmed the right of jurors in criminal cases to make decisions based on their knowledge of community standards:¹

The adversary system, with lay jurors as the usual ultimate fact finders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community.... *Miller*, 413 U.S. at 30.

¹ *Amici* note that in making indecency determinations under 18 U.S.C. § 1464, the Federal Communications Commission (FCC) utilizes “contemporary community standards *for the broadcast medium*.” (Emphasis added.) FCC Commissioners, however, can be expected to have a sense of what is acceptable in a nationwide medium (*see, e.g.*, www.fcc.gov (biographical information for Commissioners)); Commissioners also participate in open meetings around the nation (*see* www.fcc.gov (Commission Meetings)); and the FCC receives many complaints each year relating to indecency, obscenity and profanity (*see* Indecency Complaints and NALs: 1993-2006, <http://www.fcc.gov/eb/oip/ComplStatChart.pdf>.) In *Infinity Broadcasting Corporation of Pennsylvania (Reconsideration)*, 3 *FCC Rcd* 930, 933 (1987), the FCC stated: “In making the required determination of indecency, Commissioners *draw on their knowledge* of the views of the average viewer or listener, as well as *their general expertise* in broadcast matters. The determination reached is thus not one based on a local standard, but one based on a broader standard for broadcasting generally.” (Emphases supplied.)

Our analysis in *Miller* of the difficulty in formulating uniform national standards of obscenity, and our emphasis on the ability of the juror to ascertain the sense of the “average person, applying contemporary community standards” without the benefit of expert evidence, clearly indicates that 18 U. S. C. § 1461 is not to be interpreted as requiring proof of the uniform national standards. *Hamling*, 418 U.S. at 105.

The result of the *Miller* cases, therefore, *as a matter of constitutional law* and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion “the average person, applying contemporary community standards” would reach in a given case. *Id.* at 105 (Emphasis added.)

Were jurors to be questioned during voir dire about their knowledge of national community standards,² potential jurors who were not well educated or well traveled could be excluded from the jury.³ Such hypothetical concepts are also outside the scope of the jury’s common knowledge and could infringe on the jury’s ability to use its collective knowledge to apply contemporary community standards.

² See, e.g., *Smith v. United States*, 431 U.S. 291, 308 (1977),

³ According to survey commissioned by Morality in Media and conducted by Harris Interactive in July 2006, seventy-three percent of adult Americans did not consider it morally acceptable to view pornographic videos and websites, but the percentages varied based on education levels and total annual household income. Eighty-one percent of adults with a high school education or less did not consider it morally acceptable, versus sixty-six percent for those with at least some college education or higher. Seventy-nine percent of adults whose total annual household income was less than \$60,000 did not consider it acceptable, versus fifty-nine percent for those whose annual household income exceeded \$60,000. See <http://www.obscenitycrimes.org/news/survey072006.cfm>.

In a case involving use of telephones to distribute pornography, *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 125-26 (1989), the Supreme Court again held national standards of obscenity are not required:

As we have said before the fact that “distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity”...

Furthermore, *Sable* is free to tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve. While *Sable* may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages. Whether *Sable* chooses to hire operators to determine the source of the calls or engages with the telephone company to arrange for the screening and blocking of out-of-area calls or finds another means for providing messages compatible with community standards is a decision for the message provider to make. There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. If *Sable*'s audience is comprised of different communities with different local standards, *Sable* ultimately bears the burden of complying with the prohibition on obscene messages. (Citation omitted.)

In *Reno v. ACLU*, 521 U.S. 844, 877-878 (1997), the Supreme Court invalidated a provision of the Communications Decency Act of 1996 (CDA) that prohibited distribution of “indecent” content on the Internet, observing at one point, “Moreover, the ‘community standards’ criterion as applied to the Internet

means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message.”

But as Justice Thomas observed in *Ashcroft v. ACLU*, 535 U.S. 564, 577-579 (2002) (plurality opinion):⁴

The CDAs use of community standards to identify patently offensive material...was particularly problematic in light of that statute’s unprecedented breadth and vagueness. The statute covered communications depicting or describing ‘sexual or excretory activities or organs’ that were ‘patently offensive as measured by contemporary community standards’ – a standard somewhat similar to the second prong of *Miller’s* three-prong test. But the CDA did not include any limiting terms resembling *Miller’s* additional two prongs. See *Reno*, 521 U.S. at 873. It neither contained any requirement that restricted material appeal to the prurient interest nor excluded from...its coverage works with serious literary, artistic, political, or scientific value. *Ibid.*

....

In *Reno*, we emphasized that the serious value “requirement is particularly important because, unlike the ‘patently offensive’ and ‘prurient interest’ criteria, it is not judged by contemporary community standards”...This is because “the value of [a] work [does not] vary from community to community based on the degree of local acceptance it has won.” *Id.*, at 500. Rather, the relevant question is “whether a reasonable person would find . . . value in the material, taken as a whole.” *Id.*, at 501. Thus, the serious value requirement “allows appellate courts to impose some limitations and regularity on the definition by setting, *as a matter of law*, a national floor for socially redeeming value.” *Reno*, supra, at 873 (emphasis added), a safeguard not present in the CDA.

In *Nitke v. Gonzalez*, 413 F.Supp. 2d 262 (S.D.N.Y. 2005), *aff’d*, 545 U.S.

1015 (2006), plaintiffs challenged another provision of the CDA that prohibits by

⁴ In *Ashcroft v. ACLU*, the Supreme Court held that the Child Online Protection Act’s “reliance on community standards to identify ‘material that is harmful to minors’ does not by itself render the statute substantially overbroad for purposes of the First Amendment.” 535 U.S. at 586 (plurality opinion).

means of a telecommunications device the transmission of any communication which is “obscene,” knowing that the recipient of the communication is under 18 years of age. Plaintiffs asserted that the CDA provision was overbroad inasmuch as it prohibited a substantial amount of speech that was protected, based on local standards prevailing in one or more other communities. In rejecting the plaintiffs’ overbreadth challenge, a three-judge panel concluded that the plaintiffs presented insufficient evidence to support findings regarding, among other things, whether “the variation in community standards is substantial enough that the potential for inconsistent determinations of obscenity is greater than that faced by purveyors of traditional pornography, who can control the dissemination of their materials.” *Id.* at 272.

In *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. den.*, 519 U.S. 820 (1996), the Sixth Circuit also rejected defendants’ argument that computer technology required a definition of community for cyberspace rather than the geographic locale of the federal judicial district of the criminal trial:

The computer-generated images...were electronically transferred from Defendants’ home in California to the Western District of Tennessee. Accordingly, the community standards of that judicial district were properly applied in this case...It is well established that “venue for federal obscenity prosecutions lies ‘in any district from, through, or into which’ the allegedly obscene material moves, according to 18 U.S.C. § 3237. This may result in prosecutions of persons in a community to which they have sent materials which is obscene under that community’s standards though the community from which it is sent would tolerate the same material.”

Id. at 711.

In conclusion, it clearly would have been inappropriate for the court below to instruct the jury to apply a national standard for community standards.

II. IN DETERMINING COMMUNITY STANDARDS, JURIES MUST CONSIDER A BROAD CROSS-SECTION OF VIEWS

While it has been assumed that there are differences among the Federal districts when it comes to “contemporary community standards,” there is no evidence showing that juries in various districts have arrived at markedly different decisions when applying the obscenity test to hardcore pornography.

The reality is that there is not a district anywhere in the nation that does not include a mixture of citizens when it comes to age, education, gender, income, race, religion, and political or moral views. Therefore, even in a supposedly more “conservative” community like Dallas, jurors must take into consideration the views of the many citizens who hold more “moderate” or “liberal” views. And, in a supposedly more “liberal” community like New York City, jurors must take into account the views of the many citizens who are religious or who emigrated from countries with traditional cultures, or who view pornography as degrading to women, or who are concerned about the impact of pornography on children.

The United States as a whole is also becoming more and more diverse,⁵ and juries in federal districts considered more “conservative”⁶ can determine that sexual materials are not obscene,⁷ while juries in federal districts that are considered more “liberal”⁸ can determine that sexual materials are obscene.⁹ Furthermore, if the concern is that citizens in more

⁵ See, e.g., Charise Jones & Paul Overberg, “Demographic landscape shifts across the United States,” *USA TODAY*, Aug. 7, 2008; Pete Letheby, “In the Midwest, Bring on the Immigrants,” *Denver Post*, Aug. 19, 2007; Emma Johnson, “Shelving Diversity,” *Journal of Property Management*, January 2007 (“Many great American cities are known for their ethnic shopping districts...But as the US’ population becomes more ethnically diverse, the ethnic shopping experience is changing throughout the country.”); Haya El Nassar, “Sunbelt, suburbs get more diverse,” *USA TODAY*, Mar. 7, 2006; William H. Frey, “Diversity Spreads Out: Metropolitan Shifts in Hispanic, Asian, and Black Populations Since 2000,” The Brookings Institution, March 2006; Susan Sachs, “The changing face of America: The biggest boom in immigration in a century is transforming the way the nation looks, feels and sounds,” *N.Y. Times*, Sep. 3, 2001.

⁶ See, e.g., “More about the war against porn,” Jan. 28, 2006 <http://blenderartists.org/forum/archive/index.php/t-58665.html>. (“Texas has become a favorite venue for judge-shopping federal anti-porn prosecutors. Defense attorneys preparing for pending cases expect Dallas to be the venue of choice for feds keen to fatten their conviction record by doing legal battle in one of the most socially conservative areas in the nation.”).

⁷ See, e.g., Tim Wyatt, “Jurors say torture video is obscene,” *Dallas Morning News*, Mar. 14, 2006 (“But another movie, a much touted rape video...was not found to violate community standards.”).

⁸ See, e.g., Abbie Vansickle, “Trial More Than About Smut,” *St. Petersburg Times*, Jun. 1, 2008 (“In terms of finding a conservative community sympathetic to prosecutors, Tampa, a city that’s home to the Mons Venus strip club and hosts porn movie awards, isn’t an obvious choice.”).

⁹ Kevin Graham, “Jurors Judge Movies Obscene,” *St. Petersburg Times*, Jun. 6, 2008 (“As they heard the word ‘guilty’ read 20 times...Little and his team of attorneys...bowed their heads and remained motionless...In closing arguments, the

liberal communities will be unable to access some types of hardcore pornography on the Internet because distributors fear prosecution in more conservative communities, requiring “national standards” will not completely solve the problem because national standards will presumably still be higher than those in more liberal communities.¹⁰

III. ALLOWING COMMUNITIES TO HAVE A VOICE DOES NOT INTERFERE WITH FIRST AMENDMENT RIGHTS

In discussing the permissible scope of obscenity laws, the Supreme Court in *Miller* stated that an obscenity offense must be limited to works which “taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” 413 U.S. at 24. This is the core of the obscenity test, and as the Court observed in *Smith v. United States*, 431 U.S. 291 at 300-01 (1977):

The phrasing of the *Miller* test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case... The test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve.

defense asked jurors to consider the nearly five-dozen adult oriented businesses in the bay area and infer what that suggested about the local community standards.”).

¹⁰ See, e.g., *In the Matter of Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705, April 29, 1987 (radio licensee argued that Howard Stern show is acceptable under “local community standards” and that the FCC should not have applied “community standards for the broadcast medium”).

The *Miller* opinion indicates that patent offensiveness is to be treated in the same way. The fact that the jury must measure patent offensiveness against contemporary community standards does not mean, however, that juror discretion in this area is to go unchecked...The kinds of conduct that a jury would be permitted to label as “patently offensive” in a Section 1461 prosecution are the “hard core” types of conduct suggested by the examples given in *Miller*...

In *Jenkins v. Georgia*, 418 U.S. at 160-61, the Court also stated:

Even though questions of appeal to the “prurient interest” or of patent offensiveness are “essentially questions of fact,” it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is “patently offensive.” Not only did we there say that “the First Amendment values applicable to the States...are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary”...but we made it plain that under that holding “no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct...” Our own viewing of the film satisfies us that “Carnal Knowledge” could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way... Appellant’s showing of the film “Carnal Knowledge” is simply not the “public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain” which we said was punishable in *Miller*.

In *Pope v. Illinois*, 481 U.S. 497 (1987), the Supreme Court also held that juries should not be instructed to apply “community standards” when determining whether a work lacks serious literary, artistic, political or scientific value.

Irrespective of “contemporary community standards,” therefore, to be obscene, sexual materials must depict or describe “hard-core sexual conduct” and must, when taken as a whole, lack serious literary, artistic, political, or scientific

value. As for prurient appeal, it is difficult to imagine what purpose or effect, other than prurient appeal, a depiction or description of “hard-core” sexual conduct, which is lacking in serious First Amendment value, would have. As Justice Harlan observed in *Manual Enterprises Inc. v. Day*, 370 U.S. 478, 486 (1962) (plurality opinion), “that which is patently offensive will also usually carry the requisite ‘prurient interest’ appeal.”¹¹

Furthermore, the Supreme Court has recognized that the appellate courts have the authority and duty to make determinations as to what is or is not obscene;¹² and since the Supreme Court has the final say, there must be a First Amendment threshold of obscenity¹³ that must be met irrespective of community

¹¹ When the “patently offensive” test was articulated in *Manual Enterprises*, 370 U.S. at 482, the obscenity test encompassed both soft- and hard-core pornography. Today, the obscenity test reaches only “‘hard-core’ sexual conduct” (*Miller*, 413 U.S. at 27), which is even more likely to appeal to the prurient interest.

¹² See, e.g., *Smith v. United States*, 431 U.S. at 300-301; *Jenkins*, 418 U.S. at 160-161; *Kois v. Wisconsin*, 408 U.S. 229, 232 (1972); *Jacobellis v. State of Ohio*, 378 U.S. 184, 187-190 (1964); *Roth v. United States*, 354 U.S. at 497-498 (Harlan, J., concurring and dissenting).

¹³ See, e.g., *Reno v. ACLU*, 521 U.S. at 873 (“The second requirement is particularly important because, unlike the ‘patently offensive’ and ‘prurient interest’ criteria, it is not judged by contemporary community standards... This ‘societal value’ requirement, absent in the CDA, allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value.”); *Miller v. California*, 413 U.S. at 34-35 (“The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value... ‘The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,’ *Roth v. United States*, at 484

standards.¹⁴ If that threshold is met, the possibility that people in one community cannot access materials because those materials may be subject to prosecution in another community does not interfere with substantive First Amendment rights.¹⁵ That some communities may *permit* some hardcore pornography does not mean that such material is or should be *protected* everywhere. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942), the Supreme Court stated:

[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances...There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem...These include the lewd and obscene...It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Amici would also point out that there is little if any content distributed on the Internet that cannot also be distributed in tangible form (*e.g.*, on DVDs),¹⁶ thus

(emphasis added)...But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.”)

¹⁴ Supreme Court Justices cannot be expected to know what the contemporary community standards are in each Federal district.

¹⁵ *Miller*, 413 U.S. at 30 (“Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community...”)

¹⁶ *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726, 750, n.28 (1978)(“The Commission’s action does not by any means reduce adults to hearing only what is fit for children...Adults who feel the need may purchase tapes and records...”.)

enabling website pornographers to send more extreme pornographic materials only to districts where U.S. Attorneys refuse to enforce the federal obscenity laws.¹⁷

IV. PERSONS WHO KNOWINGLY OR RECKLESSLY PROMOTE PORNOGRAPHY IN A STATE SHOULD NOT BE HEARD TO COMPLAIN ABOUT BEING CONVICTED OF OBSCENITY ON SOMETHING OTHER THAN A NATIONAL STANDARD

A primary argument offered for requiring use of “national” community standards when determining whether content disseminated on the Internet is obscene is that disseminators supposedly cannot determine the location of persons who download content from their websites. It is no longer true, however, if it ever was, that Internet content providers and marketers cannot determine the geographic location of visitors to their websites¹⁸ or limit marketing to specific states or areas

¹⁷ *Amici* would contend that there is no federal district in the United States where juries would not convict in obscenity cases if given the opportunity to do so. According to a survey commissioned by Morality in Media and conducted by Harris Interactive in July 2006, almost three in four (73%) adult Americans said that viewing pornographic websites and videos is morally unacceptable. According to a survey commissioned by Morality in Media and conducted by Harris Interactive in November 2005, more than three out of four (77%) adult Americans supported the Justice Department’s new effort to enforce federal obscenity laws. See <http://www.obscenitycrimes.org/supcrackdown.cfm>.

¹⁸ See, e.g., Louella Fernandez, “Geography Lessons for Online Retailers,” *Silicon.com*, Jan. 9, 2008 (“Geolocation has essentially dispelled the myth of the borderless internet...The technology determines the geographic location and network connection data for each IP address accessing a website... Knowing where and how web visitors are accessing the internet is fundamental to preventing online fraud and complying with regulations.”) (published at: <http://networks.silicon.com/webwatch/0,39024667,39169604,00.htm>); see also, www.ip2location.com (“Do you want to know where your Internet visitors are coming from?...which state?...which city?...which zip code?”).

within those states. To avoid prosecution, therefore, disseminators could limit offerings in more “conservative” districts to less extreme forms of pornography.

Furthermore, if a distributor does *nothing* to restrict access from particular districts or intentionally or recklessly solicits business in those districts (as Defendants did by means of porn spam), that distributor should not be heard to complain about being subject to something other than a national standard.¹⁹

In *United States v. Thomas*, 74 F.3d 701, 711 (1996), *cert. den.*, 519 U.S. 820 (1996), the defendants also argued that computer technology (from a decade ago, that is no longer true today) required a definition of community for cyberspace rather than the geographic locale of the federal judicial district of the criminal trial. Otherwise, they argued:

[T]here will be an impermissible chill on protected speech because BBS operators cannot select who gets the materials they make available on their bulletin boards. Therefore, they contend, BBS operators like Defendants will be forced to censor their materials so as not to run afoul of the standards of the community with the most restrictive standards.

The Sixth Circuit responded:

¹⁹ Appellants’ Brief states at page 35 that “Mass email communications are likewise dissimilar to mail or phone. Mailings involve a geographic address and phone calls involve an area code. In contrast, emails customarily are directed to a recipients email ‘address’ which does not have a geographic component...” Many businesses, however, enable purchasers or renters of email lists to target states, cities or zip codes. *See*, for example, the websites www.specificmedia.com (“target your ads based on...state...postal code”); and www.listguy.com (“Consumer Email list – geographically targeted...by City...by Zip...by Region”).

Defendants' First Amendment issue, however, is not implicated by the facts of this case. This is not a situation where the bulletin board operator had no knowledge or control over the jurisdictions where materials were distributed for downloading or printing...If Defendants did not wish to subject themselves to liability in jurisdictions with less tolerant standards for determining obscenity, they could have refused to give passwords to members in those districts, thus precluding the risk of liability.

Id.

In the case at bar, if Defendants did not wish to subject themselves, in whole or part, to contemporary community standards in the District of Arizona, they should not have sent hardcore pornography into Arizona homes.

V. THE JURY INSTRUCTION WAS NOT IMPROPER AND THE APPELLANTS WERE NOT PREJUDICED

Appellants state in their Brief (at page 24):

Community standard instructions have always defined communities as geographical, although not always in precise boundaries. The instruction given in this case is a clear and fundamentally flawed departure from this well-established rule.

When the Supreme Court in *Roth v. United States*, 354 U.S. 476 (1957) adopted a new standard of obscenity (“whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest”), however, it did not define “community” in geographical terms. Rather, the *Roth* Court said (at 488-489):

The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible

persons. *Regina v. Hicklin*...Some American courts adopted this standard...but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest...The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.

In *Hamling*, 418 U.S. at 104-107, the Court specifically rejected the argument that a geographic area was constitutionally required:

Miller rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene, describing such standards as “hypothetical and unascertainable”...But in so doing the Court did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of “the average person, applying contemporary community standards.”...

Our holding in *Miller* that California could constitutionally proscribe obscenity in terms of a “statewide” standard did not mean that any such precise geographic area is required as a matter of constitutional law.

Appellants also state in their Brief (at page 27) that the District Court’s jury instruction was erroneous because it permitted the jury to “consider evidence of standards existing in *places* outside the district.” (Italics supplied by *Amici*.) But as Justice O’Connor observed in *Ashcroft v. ACLU*:²⁰

In holding that a State may define the obscenity standard by stating the *Miller* standard without further specification, 418 U.S. at 157, *Jenkins* left

²⁰ 535 U.S. at 589 (O’Connor, J., concurring).

open the possibility that jurors would apply any number of standards, including a national standard, in evaluating material's obscenity.

Appellants also state in their Brief (at page 31): "This instruction creates an impermissible hybrid between a local and national community standard." But *Hamling* authorized a "hybrid," when it stated:

But this is not to say that a district court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide. (418 U.S. at 106)

Furthermore, by instructing the jury that "community standards are set by what is in fact accepted by the community as a whole, that is to say by society at large or people in general" and that the jury may consider evidence of standards "in places outside" the district, the district court alleviated concerns about a more conservative community having a heckler's veto affecting the rest of the Nation. Even were the Supreme Court to determine that the appropriate standard is a national standard, Appellants were not materially prejudiced by the instruction.

In *Hamling*, 418 U.S. at 107, the Court stated that while the jury instruction given by the District Court included "occasional references to the community standards of the nation as a whole" and thus "delineated a wider geographical area than would be warranted," whether petitioners "were materially prejudiced by those references is a different question." The Court went on to hold "that reversal is required only where there is a probability that the excision of the references to

the ‘nation as a whole’ in the instruction dealing with community standards would have materially affected the deliberations of the jury.” *Id.* at 108.

In the case at bar, not only did the Defendants send unsolicited porn spam into countless homes, they sent porn spam that included hardcore depictions of sexual conduct embedded in the spam, some of which were viewed by children. According to a Harris Poll conducted in May 2003, 93% of online users found spam “Somewhat/Very annoying,” and 79% said they favored making spamming illegal. In particular, according to the survey, 86% of online users said that spam emails “selling pornography” annoyed them “a lot.”²¹

Furthermore, had children been included in the community, as they could have been, it is highly unlikely that any jury in the United States would have determined that the content at issue was acceptable under community standards. Generally speaking, in determining community standards, a jury is not to consider children within the community. *Pinkus v. United States*, 436 U.S. 293 (1978). In *Pinkus*, however, there was “no evidence that children were the intended recipients of the materials at issue here, or that petitioner had reason to know children were

²¹ Humphrey Taylor, *Majority in Favor of Making Mass-Spamming Illegal Rises to 79% of Those Online*, HarrisInteractive, July 16, 2003, available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=387.

likely to receive the materials.” *Id.* at 298. With porn spam, children are “likely to receive the material;”²² and in the case at bar children did receive the material.²³

²² See, e.g., “ObscenityCrimes.org...site marks first anniversary,” Morality in Media Release, Jun. 24, 2003, <http://www.moralityinmedia.org/obscenityEnforcement/ObscCrimes1stAnniv.htm>. (“During April and May 2003, 9 out of 10 reports (90.4%) submitted to ObscenityCrimes.org indicated that the reports were the result of ‘porn spam.’ Almost 4 out of 10 (37.1%) of the porn spam-related reports indicated that children were (or easily could have been) exposed to the spam.”).

²³ Grant Gross, “Two convicted for porn spam operation,” *IDG News Service*, Jun. 26, 2007 (“Eight U.S. residents...traveled from Massachusetts, Texas, Iowa, and California to testify in the trial and to describe how their families, including some children, received the spam.”).

CONCLUSION

The Court below did not commit error in not instructing the jury to apply a national standard when considering community standards for the first and second prongs of *Miller*.

Dated: November 25, 2008

Respectfully submitted,



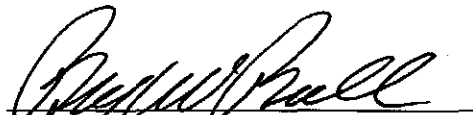
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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

Dated: November 25, 2008


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I hereby certify that two copies of the foregoing Brief Amici Curiae were
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