

No. 08-15964-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAUL F. LITTLE, aka MAX HARDCORE, aka MAX STEINER,
AND MAX WORLD ENTERTAINMENT, INC.,

Defendants-Appellants.

On Appeal From the United States District Court
For the Middle District of Florida, No. 07-00170 CR-T-24TBM

**BRIEF OF FOCUS ON THE FAMILY, AS *AMICUS CURIAE*,
SUPPORTING PLAINTIFF-APPELLEE
AND IN SUPPORT OF AFFIRMANCE**

Benjamin W. Bull, Esq.
Counsel of Record
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
Tel: (480) 444-0020
Fax: (480) 444-0028
Email: bbull@telladf.org

Patrick A. Trueman, Esq
ALLIANCE DEFENSE FUND
10350 Southam Lane
Oakton, VA 22124
Tel: (703) 938-1776
Fax: (703) 938-1770
Email: ptrueman@telladf.org

Attorneys for Amicus Curiae

USA v. Little, No. No. 08-15964-DD
CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1 the following individuals/entities have an interest in this litigation. None of the following individuals/entities is a corporation that issues shares to the public.

1. Focus on the Family, *Amicus Curiae*, in support of the Plaintiff-Appellee
2. Sheryl Loesch, Trial Attorney for Plaintiff
3. Robert O'Neill, Trial Attorney for Plaintiff
4. David Paul Rhodes, Trial Attorney for Plaintiff
5. Anita Cream, Trial Attorney for Plaintiff
6. Edward McAndrew, Trial and Appellate Attorney for Plaintiff
7. Jennifer Torrito Leonardo, Trial Attorney for Plaintiff
8. James Benjamin, Trial Attorney for Defendant Little
9. Jeffrey Douglas, Trial Attorney for Defendant Little
10. Daniel Aaronson, Trial Attorney for Defendant MaxWorld Entertainment
11. H. Louis Sirkin, Trial Attorney for Defendant MaxWorld Entertainment, Appellate Attorney for All Appellants
12. Jennifer Kinsley, Trial Attorney for Defendant MaxWorld Entertainment, Appellate Attorney for All Appellants

***USA v. Little*, No. No. 08-15964-DD
CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
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13. Judge Susan Bucklew

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

Focus on the Family is a non-profit religious corporation, headquartered in Colorado, committed to strengthening the family in the United States and abroad.

The founder of Focus on the Family, James C. Dobson, Ph.D., is a child psychologist who has written extensively on child rearing and family relations. Dr. Dobson hosts, and Focus on the Family distributes, a daily radio broadcast about family issues heard on more than 1,000 radio stations in the United States, reaching millions of listeners weekly. Focus on the Family also publishes and distributes *Focus on the Family* magazine and other literature.

Focus on the Family is concerned about the widespread distribution of illegal pornography and its profound negative effects on American society. Plaintiff-Appellee United States of America has given its consent to file this *amicus* brief. The Defendants-Appellants have refused to consent.

ISSUES PRESENTED

- I. Does *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003), render all obscenity laws unconstitutional?
- II. Do local community standards apply to the Internet?
- III. Is the "taken as a whole" standard in the first and second prongs of the obscenity test in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973), impossible or unworkable in the context of the Internet?
- IV. Was the prosecution required to play the DVDs in their entirety to the jury in open court?

SUMMARY OF ARGUMENT

Amicus Focus on the Family respectfully submits that the Defendants-Appellants were properly tried and convicted in the court below. *Amicus* has addressed just four issues that are before this Honorable Court to save the Court's time and to avoid duplication of argument with the United States. Nothing in the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003), implies that obscenity laws must fall, as argued by Appellants. The activities of Appellees for which they were convicted lie outside the scope of *Lawrence*. So too, nothing in the United States Supreme Court jurisprudence argues for the application of a national standard over a community standard in obscenity cases. *Amicus* also argues that the "taken as a whole" standard in the

first and second prongs of the obscenity test in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973), is proper in the context of Internet distribution of obscene material and, thus, the District Court did not err in ruling that the works to be “taken as a whole” were the five videos made available for download on the Appellants-Defendants’ website. Nor was the Court in error in allowing excerpts of charged DVDs to be shown in court rather than the entirety of each DVD.

ARGUMENT

I. THE SUPREME COURT’S DECISION IN *LAWRENCE V. TEXAS* DOES NOT APPLY TO FEDERAL OBSCENITY STATUTES

A. *Lawrence* Involved a Privacy Right Inapplicable to the Present Case.

Appellants argue that sections 1461, 1462, and 1465 of Title 18 of the United States Code are unconstitutional because the liberty interests the Court sought to protect in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003), have “expanded from marital bedroom [sic] to the public sphere of commercial interactions.” Appellants’ Brief (App. B.), at 8; 18 U.S.C. §§ 1461, 1462, 1465 (2008). As a result, “practically all choices made by consenting adults regarding their sexual practices are a matter of personal liberty beyond the reach of government.” App. B., at 12. This is a flawed understanding of *Lawrence*.

Lawrence did not create a “pre-existing, fundamental, substantive-due-process right to sexual privacy.” *Williams v. Morgan*, 478 F.3d 1316, 1319 (11th

Cir. 2007) (*Williams V*) (emphasis in original). Under the same rationale used by this Court in 2007, any rights that may have been created in *Lawrence* do not apply to this case.

In *Lawrence*, the Supreme Court protected the right to engage in a personal relationship involving sodomy, stating that

The statutes do seek to control a *personal relationship* that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, *the conduct can be but one element in a personal bond that is more enduring*. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Lawrence, 539 U.S. at 567, 123 S. Ct. at 2478 (emphasis added). The *Lawrence* Court explicitly eschewed the idea that the case involved public conduct, conduct in which an individual may be injured; and prostitution, strongly signaling its reasoning would not apply in those cases. *Id.* at 578, 123 S. Ct. at 2484. In all these respects, obscenity is distinct from the conduct in *Lawrence*.

First, as noted above, this Court has recognized that commercial activity is inherently public and not private. *Williams V*, 478 F.3d at 1322. In *Williams V*, this Court upheld a statutory prohibition on the distribution of any device designed or marketed to have a primary purpose of sexual stimulation, noting that “while the statute at issue in *Lawrence* criminalized *private* sexual conduct, the statute at issue

in this case forbids *public, commercial* activity.” *Id.* (emphasis in original).

Likewise, the conduct at issue here involved the distribution, marketing, and sale of sexually obscene material through a website accessible to anyone with an Internet connection by a distributor who shipped its material across the country using the United States Postal Service (USPS). App. B., at 2-3. The conduct was not an overt expression of an intimate relationship between two people in the privacy of a home: it was public, commercial, and intended to be accessible to anyone on the World Wide Web.

Neither did *Lawrence* address conduct that could “involve persons who might be injured.” *Lawrence*, 539 U.S. at 578. Pornography has been shown to contribute to violence in its viewers. A study of two Australian provinces found that liberalizing pornography laws in one province resulted in a 284% increase in rape; during the same time period, another province that did not liberalize its laws experienced only a 23% increase in rape. J. Court, *Sex and Violence: a Ripple Effect*, in *PORNOGRAPHY AND SEXUAL AGGRESSION* 143 (Neil Malamuth & Edward Donnerstein eds., 1984). Other studies also suggest that pornography viewing is linked to sexual aggression: three major meta-analyses published in the last 15 years demonstrate a “close relationship” between pornography and violence against women. Catherine A. Simmons et al., *Linking Male Use of the Sex Industry to Controlling Behaviors in Violent Relationships*, 14 *VIOLENCE AGAINST*

WOMEN 406, 407 (2008) (citing Mike Allen et al., *A Meta-Analysis Summarizing the Effects of Pornography: II. Aggression after Exposure*, 22 HUM. COMM'NS RES. 258 (1995)); Elizabeth Oddone-Paolucci et al., *A Meta-Analysis of the Published Research on the Effects of Pornography*, in CHANGING FAMILY AND CHILD DEVELOPMENT 48 (Claudio Violato et al. eds., 2000); and Neil M. Malamuth et al., *Pornography and Sexual Aggression: Are There Reliable Effects and Can We Understand Them?*, 11 ANN. REV. OF SEX RES. 26 (2000). This close connection between pornography and violence places Defendant Little's work outside of any *Lawrence* analysis because *Lawrence* was not meant to protect behavior that leads to violence.

Third, Appellant Little's conduct can be distinguished from *Lawrence* on the grounds that the latter did not protect conduct amounting to prostitution. Every state has enacted prostitution laws, 73 C.J.S., *Prostitution and Related Offenses* § 1 (2008), and any decision using *Lawrence* to protect obscenity would have broad ramifications on anti-prostitution laws throughout the country. One survey found that prostitution has been defined as "the performance of sexual intercourse for a fee, giving or receiving the body for sexual intercourse for hire . . . or engaging in sexual activity as a business." 63C AM. JUR. 2D *Prostitution* §1 (2008) (internal citations omitted). Some jurisdictions employ a broader definition encompassing payment by a third party for two individuals to engage in sexual activity. *Id.* at §

7. In this case, Little’s conduct is prostitution in either the narrow or broad sense. Little paid his sex partners for intercourse, which would be “prostitution” even in the strictest sense of the word. The commercial transaction between Little and consumers of his obscenity constitutes prostitution in the second sense of the word. In either case, such activity is outside the scope of *Lawrence*.

B. This Court Should Adhere to *Lawrence* Unless and Until the Supreme Court Overrules It.

The Supreme Court has repeatedly stated that lower courts should not overrule precedent by asserting that more recent cases have implicitly overruled prior cases; the decision is left to the Supreme Court and lower courts “should follow the case which directly controls.” *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 2017 (1997) (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22 (1989)). This Court has earnestly followed *Agostini*’s admonition. *United States v. Rodriguez*, 406 F.3d 1261, 1278 (11th Cir. 2005) (“We have been careful to heed the Supreme Court’s admonition about following its decisions until that Court explicitly overrules them.”); *Powell v. Barnett*, 541 F.3d 1298, 1302 (11th Cir. 2008) (“Until the Supreme Court tells us that the [] approach no longer applies where that Court applied it, we are inclined to continue using it.”).

Thus, it is not for this Court to overturn decades of precedent supporting restrictions on obscene speech. From the earliest modern free speech cases,

obscenity has been outside the realm of protected speech. *Miller*, 413 U.S. 15, 93 S. Ct. 2607; *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766 (1942). Even when possession of obscene speech was protected within the privacy of the home, *Stanley v. Georgia*, 394 U.S. 557, 568, 89 S. Ct. 1243, 1249 (1969), the Court quickly limited the holding and repeatedly upheld prosecutions for the transportation of obscene materials into the United States, *United States v. Thirty-seven Photographs*, 402 U.S. 363, 91 S. Ct. 1416 (1971), and across state lines, *United States v. Orito*, 413 U.S. 139, 93 S. Ct. 2674 (1973). *Orito*, for example, followed *Thirty-seven Photographs* and *United States v. Reidel*, 402 U.S. 351, 91 S. Ct. 1410 (1971), in explicitly rejecting the argument that a right to possess obscenity in the home implied a correlative right to receive, transport, and distribute obscenity. *Orito*, 413 U.S. at 141, 93 S. Ct. at 2677. These decisions speak directly to the issues in this case and these precedents must be followed until the Supreme Court overrules them. Notably, this was the exact approach taken by the Third Circuit in a recent obscenity case forwarding the same arguments. *United States v. Extreme Associates*, 431 F.3d 150, 155 (3rd Cir. 2005).

II. THE DISTRICT COURT WAS CORRECT TO APPLY LOCAL COMMUNITY STANDARDS TO THE EVALUATION OF THE OBSCENE MATERIALS

A. The Supreme Court Has Rejected a National Standard in Obscenity Prosecutions.

The Supreme Court firmly rejected a national standard for obscenity prosecutions in *Miller v. California*, calling such a standard “hypothetical and unascertainable” and “an exercise in futility” even if “the prerequisite consensus exists.” 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, 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.’”). The Court considered a national standard elusive because it held that obscenity is inherently a question of fact that properly belongs within the province of the jury. *Id.* (“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”). Jurors apply community standards to both the “patently offensive” and “prurient interest” prongs of the *Miller* test in determining whether material is obscene. As such, the *Miller* “community standards” test “take[s] on meaning only when . . . considered with reference to the underlying questions of fact that must be resolved in an obscenity case.” *Smith v. United States*, 431 U.S. 291, 300, 97 S. Ct. 1756, 1763 (1977).

Appellants urge that the medium of the Internet renders community standards so arcane that they are inapplicable. But with new advancements in

technological media, the Court has rejected a national standard, demonstrating the continued applicability of a community standard to evolving scenarios. For instance, in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 125-26, 109 S. Ct. 2829, 2836 (1989), the Court rejected a national standard because Sable was capable of tailoring his pornographic phone messages to the various communities he targeted, each of which might have a different conception of obscenity.

Almost a generation later in *Nitke v. Gonzales*, 413 F.Supp.2d 262 (S.D.N.Y. 2005), *aff'd*, 547 U.S. 1015, 126 S. Ct. 1566 (2006), the Court rejected a challenge to the Communications Decency Act of 1996 (CDA), holding that the act was not overbroad in its prohibition of the transmission of obscene communications aimed at minors via a telecommunications device. The district court found insufficient evidence to show that

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.

413 F.Supp.2d, at 272 (quoting *Nitke v. Ashcroft*, 253 F.Supp.2d 587, 606-07 (S.D.N.Y. 2003)).

Likewise, in *United States v. Thomas*, 74 F.3d 701, 711 (6th Cir. 1996), *cert. den.*, 519 U.S. 820, 117 S. Ct. 74 (1996), the Sixth Circuit declined to adopt a new definition of “community” for cyberspace instead of the federal judicial district of

the trial. Even if the allegedly obscene material would have been protected in the locale from which it was sent, it is “recognized that ‘venue for federal obscenity prosecutions lies “in any district from, through, or into which” the allegedly obscene material moves.’” *Thomas*, 74 F.3d at 711 (quoting *United States v. Peraino*, 645 F.2d 548, 552 (6th Cir. 1981)); see also *United States v. Sandy*, 605 F.2d 210, 217 (6th Cir. 1979).

Existing precedent makes clear that this Court must apply local community standards to new media. The Internet’s “unique characteristics [do not] justify adopting a different approach.” *Ashcroft v. ACLU (“COPA I”)*, 535 U.S. 564, 583, 122 S. Ct. 1700, 1712 (2002).

1. *The Supreme Court Has Not Endorsed the Third Circuit’s Opinion on Community Standards in Ashcroft v. ACLU.*

Appellants suggest that the Supreme Court tacitly condemned a community standard for the Internet when it affirmed the Third Circuit’s holding in *Ashcroft v. ACLU (“COPA II”)*, 542 U.S. 656, 124 S. Ct. 2783 (2004). Accordingly, appellants declare that the Third Circuit’s *COPA II* opinion is the “backdrop [within which] this Court must analyze the constitutional issues presented here.” App. B., at 21. But Appellants misconstrue the significance of the Third Circuit’s opinion. It is not controlling in this case because the Supreme Court never reached the issue of community standards. Justice Kennedy rested his majority opinion in

COPA II exclusively on the finding that COPA was not the least restrictive means available to protect minors from online pornography. *Id.* at 665-70, 124 S. Ct. at 2791-94. The Third Circuit’s *COPA II* opinion is not binding authority.

What is binding upon this Court is *COPA I*. In that case, the Third Circuit invalidated COPA as unconstitutionally overbroad solely because it employed a community standard to determine obscenity on the Internet. *COPA I*, at 572-73, 122 S. Ct. at 1706. Upon review, the Supreme Court reversed squarely on this issue. *Id.* at 586, 122 S. Ct. 1713-14. Appellants question the precedential value of the *COPA I* Court’s holding, labeling it a “highly-splintered opinion.” App. B., at 19. But *COPA I* is nonetheless the Supreme Court’s last word on community standards for the Internet. *COPA I*, 535 U.S. at 585, 122 S. Ct. at 1713.

2. *The Federal Obscenity Statutes Are Not Overbroad.*

It is also important to clarify the Third Circuit’s opinion in *COPA II* because Appellants draw unwarranted conclusions from it. Specifically, Appellants use the Third Circuit’s opinion to compare COPA directly with the federal obscenity statutes. Both present “identical overbreadth concerns,” they argue, because they both utilize community standards to define obscenity on the Internet. App. B., at 27. Appellants thus suggest that the Third Circuit found COPA overbroad chiefly because it utilized community standards.

In reality, the Third Circuit was careful to avoid placing major emphasis on community standards, having just been reversed by the Supreme Court on that very issue. Instead, the Third Circuit held that COPA's overbreadth was mainly due to its burdening of too much protected "adult speech." *ACLU v. Ashcroft*, 322 F.3d 240, 270 (3rd Cir. 2003). As the court noted,

[T]he expansive definitions of "material harmful to minors" and "for commercial purposes," as well as the burdensome affirmative defenses, likely render the statute substantially overbroad. . . . The "community standards" requirement, when viewed *in conjunction with* the other provisions of the statute . . . adds to the already wide range of speech swept in by COPA . . . [making] the limitations that COPA purports to place on its own reach . . . that much more ineffective.

Id.

This language confirms that COPA is readily distinguishable from the federal obscenity statutes as applied to this case. Specifically, 18 U.S.C. §§ 1461, 1462, & 1465 do not differentiate between minors and adults, and thus do not burden protected adult speech. Accordingly, they do not share the "identical" overbreadth problems of COPA.

In addition, courts limit the reach of the obscenity statutes depending on the type of case presented. Trial courts apply federal obscenity statutes to new media by adapting jury instructions to the context of the case. *Pinkus v. United States*, 436 U.S. 293, 300, 98 S. Ct. 1808, 1813 (1978); *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026 (1978). Appellate courts have independent authority to

review obscenity prosecutions to determine whether materials constitute “patently offensive hard core sexual conduct,” *Jenkins v. Georgia*, 418 U.S. 153, 164, 94 S. Ct. 2750, 2757 (1974) , or contain “redeeming social value.” *Pope v. Illinois*, 481 U.S. 497, 503, 107 S. Ct. 1918, 1922 (1987). Thus, there is effectively a First Amendment threshold of obscenity that exists irrespective of community standards.¹

3. *Community Standards Apply to Internet Obscenity Cases.*

Appellants allege that a community standard is unworkable in Internet obscenity cases and should be abandoned in favor of a national standard. For web businesses such as theirs, they claim, it is technologically “impossible” to know where their website is being viewed and thus they are unable to restrict its geographic reach. App. B., at 27. However, many Internet content providers now use geolocation technology to pinpoint the location of their users.² Major League Baseball’s Internet Arm and the Ultimate Black Jack Tour each currently use

¹ Patently offensive material usually includes prurient appeal as well. *See, e.g., Manual Enters., Inc. v. Day*, 370 U.S. 478, 486, 82 S. Ct. 1432, 1436 (1962).

² *See, e.g., Riva Richmond, We Know Where You Are*, WALL STREET JOURNAL, Sept. 29, 2008, available at <http://online.wsj.com/article/SB122227759888771725.html> (“companies are erecting virtual borders with geolocation software” that can “stop [web-users] from accessing an account or service.”); *See also, Maxmind’s IP Intelligence Solution*, <http://www.maxmind.com/app/ip-locate> (“When a person visits your website, GeoIP can determine which country, region, city, postal code, area code the visitor is coming from.”).

geolocation to avoid running afoul of state laws.³ Likewise, pornographers who wish to avoid prosecution can utilize available technology to restrict offerings in more “conservative” districts. Alternatively, they could distribute their materials through a different medium. *COPA I*, 535 U.S. at 583, 122 S. Ct. at 1712.

Moreover, pornography distributors who do nothing to restrict viewing of their products cannot credibly complain about being subject to community standards. By refusing to take any steps to restrict their materials, Appellants ensured their accessibility.⁴

Still, appellants argue that “a majority of Supreme Court justices to recently consider the issue have advanced a national community standard in Internet prosecutions.” App. Br. 28. However, only three Justices have endorsed a national standard.⁵ Justices Kennedy, Souter, and Ginsburg called for more extensive fact-finding on this issue in *COPA I*,⁶ and of these only Justice Ginsburg condemned community standards in *COPA II*. 542 U.S. at 673-76, 124 S. Ct. at 2795-97. Furthermore, Justices O’Connor and Breyer twice upheld COPA as constitutional.

³ See Richmond at fn. 2; See also, *Quova Powers WikiWatcher Suite of Wikipedia Monitoring Tools*, http://www.quova.com/page.php?id=33&news_id=190 (noting that the accuracy of Quova’s geolocation software is 96%).

⁴ See *Copa I*, 535 at 583, 122 S. Ct. at 1712: “The publisher’s burden does not change simply because it decides to distribute its material to every community in the Nation. Nor does it change because the publisher may wish to speak only to those in a ‘community where avant garde culture is the norm,’ but nonetheless utilizes a medium that transmits its speech from coast to coast.” (Internal citation omitted.)

⁵ The three justices are Justice O’Connor and Justice Stevens in *COPA I*, and Justice Ginsburg in *COPA II*. Justice Breyer grounded his *COPA I* concurrence in statutory construction.

⁶ 535 U.S. at 592-94, 122 S. Ct. at 1717-18.

Moreover, even the Third Circuit observed: “If the Supreme Court wants to treat all Internet obscenity cases as *sui generis* for the purposes of the federal obscenity law analysis, it has not yet said so.” *Extreme Associates Inc.*, 431 F.3d at 161.

Indeed, a majority of today’s Justices likely agree with the District Court in this case when it called an Internet standard “impossible to ascertain.” *United States v. Little*, 2008 WL 151875, at *2 (M.D. Fla. Jan. 16, 2008) (order denying motion to dismiss).

4. *The Jury Instruction Was Not Improper.*

Appellant argues that an Internet standard is necessary because community standards allow a “heckler’s veto” by the most prudish communities. *See App. B.*, at 28. However, the “average person” test guards against this danger because its “primary concern” is to avoid wholly subjective and personal opinions. *Pinkus*, 436 U.S. at 299-301, 98 S. Ct. at 1812-14; *Hamling v. United States*, 418 U.S. 87, 107, 94 S. Ct. 2887, 2902 (1974); *Miller*, 413 U.S. at 33-34, 93 S. Ct. at 2620. In particular, jurors are instructed to avoid focusing on the most susceptible or sensitive members in determining the standard of the community. *Pinkus*, 436 U.S. at 300, 98 S. Ct. at 1813. Thus, the *Pinkus* Court invalidated a jury instruction that included children as part of the relevant community because it feared their sensitivity would artificially lower the “average.” *Id.* at 297-98, 98 S. Ct. at 1812.

The “average person” is meant to be a generic synthesis of all the average qualities of people generally, much like the “reasonable person” of tort and criminal law. As a result, the average person standard provides jurors a measure of objectivity because they are instructed to avoid subjectivizing the obscenity test into how they would judge the material themselves. *Mishkin v. New York*, 383 U.S. 502, 508-10, 86 S. Ct. 958, 963-64 (1966). A juror is the judge and not the object of allegedly obscene matter. *United States v. Guglielmi*, 819 F.2d 451, 454-55 (4th Cir. 1987).

Alternatively, Appellant argues that because the Supreme Court has permitted geographically flexible community standards, the District Court should have expanded the relevant community even further in this case to the entirety of cyberspace. But the geographic flexibility of the *Miller* community standard does not lead inevitably to a national standard; on the contrary, it is precisely this flexibility that makes a national standard unnecessary. The Court has permitted the states to define the relevant community with geographic precision, as in *Miller*, but it has not required such precision. Instead, the Court has given states the latitude to define community standards that are broad enough to aid the jury, but not so broad as to be unworkable. *Jenkins*, 418 U.S. at 157, 94 S. Ct. at 2753. For instance, the *Hamling* Court held that evidence of standards outside the federal district of an

obscenity trial should be allowed if doing so would be helpful to the jury. 418 U.S. at 106, 94 S. Ct. at 2902.

According to *Hamling*, this flexibility aids jurors in judging obscenity because it allows them to “draw on knowledge of the views of the average person in the community or vicinage from which [they] come[] for making the required determination,” *id.*, at 104, 94 S. Ct. at 2901, such as their hometown or a tri-state region in which they work. In *United States v. Bagnell*, 679 F.2d 826, 836 (1982), *cert. den.*, 460 U.S. 1047 (1983), the Eleventh Circuit agreed, noting that this rule ensures “symmetry between the jury pool and the relevant community.”

By contrast, a “cyberspace standard” would be unworkable because it would require jurors to reconcile the views of billions of people worldwide. This intractable standard underscores the fact that the Internet is not a community of persons; rather, it is a technological medium. Just as there is no discernable “cell-phone community,” there is no ascertainable “Internet community.”

Appellants’ position would likely transform obscenity trials into battles of expert witnesses jockeying to articulate an Internet standard. Experts, not jurors, would thus largely decide what is obscene. The breadth of a global cyberspace standard would inevitably become so “tolerant” as to constitute no standard at all.

Therefore, the District Court was not in error in this case when it instructed the jury to consider community standards rather than an Internet standard.

5. *Jurors Consider a Broad Cross-Section of Views in Determining Community Standards.*

There is no evidence that juries across the United States vary wildly in applying the *Miller* test to hard-core pornography. Juries can and do take into account a broad cross-section of views because juries contain a random sample of persons representing various demographic characteristics and views. In addition, juries in “conservative” federal districts have found certain sexual materials are not obscene,⁷ while juries in “liberal” federal districts have found sexual materials are obscene.⁸

By arguing that the federal obscenity statutes are invalid, Appellants tolerate little to no variation in community standards. The Supreme Court has rejected this absolutist view of free speech, *Chaplinsky*, 315 U.S. at 571-72, 62 S. Ct. at 769, and *Amicus* urges this Court to do the same.

III. THE “TAKEN AS A WHOLE” STANDARD IS NOT IMPOSSIBLE TO APPLY IN THE CONTEXT OF THE INTERNET

For more than three decades the United States Supreme Court has held that federal obscenity prosecutions comply with the First Amendment as long as (1) the

⁷ See, e.g., Tim Wyatt, *Jurors say torture video is obscene*, DALLAS MORNING NEWS, Mar. 14, 2006, at 1B, available at http://www.dallasnews.com/s/dws/news/city/arlington/stories/DN-porntrial_14met.ART0.State.Edition2.e3d2d95.html (“But another movie, a much touted rape video . . . was not found to violate community standards.”).

⁸ See, e.g., Abbie Vansyckle, *Porn Trial More than a Simple Smut Case*, ST. PETERSBURG TIMES, Jun. 1, 2008, available at <http://www.tampabay.com/news/courts/criminal/article565978.ece> (“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.”).

average person, applying contemporary community standards, would find that the work, *taken as a whole*, appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct as defined by state law; and (3) the work, *taken as a whole*, lacks serious literary, artistic, political, or scientific value. *Miller*, 413 U.S. at 24, 93 S. Ct. at 2615 (emphasis added). Although courts have been applying the “taken as a whole” standard to various forms of media for more than three decades, Appellants urge that this Court abandon the Supreme Court’s framework. App. B., at 22. The District Court, however, rejected this argument and determined that the works to be taken “as a whole” were the five videos made available for download on the “Max Hardcore” website, rather than the website itself. *United States v. Little*, 2008 WL 151875, at *2. The District Court did not err in this holding.

A. The “Taken as a Whole” Standard is Not Impossible to Apply in the Context of the Internet.

The Supreme Court first directed that courts consider any material alleged to be obscene “as a whole” in *Roth*, 354 U.S. at 488-89, 77 S. Ct. at 1310-11, when it rejected the previously accepted position that a court could find obscenity on the basis of excerpts from longer works alone. The Court was concerned to distinguish between “ideas having even the slightest social importance,” which would receive the protections of the First Amendment, and obscenity, which the Court held was “utterly without redeeming social importance” and therefore not

entitled to First Amendment protections. *Id.* at 484, 77 S. Ct. at 1309. When the Supreme Court later replaced *Roth* with *Miller*, it left this admonition that courts consider works “as a whole” unchanged to ensure that valuable works would not lose their First Amendment protections on the basis of isolated excerpts. *See Miller*, 413 U.S. at 34-35, 93 S. Ct. at 2620-21.

In *Penthouse Intern., Ltd. v. McAuliffe*, 610 F.2d 1353, 1367-68 (5th Cir. 1980), the former Fifth Circuit discussed the application of the “taken as a whole” standard in a case involving several magazines that the government alleged to be obscene. The defendants argued that each magazine was the work to be taken as a whole, while the government argued that each magazine was not a single work, but rather was a “volume” that contained several “works.” Apparently because it was the first time the court was faced with the question post-*Miller*, the court identified the key issue as being “a determination of the meaning of ‘work, taken as a whole’ when applied to magazines.” *Id.*

The court ultimately agreed with the defendants, but *Penthouse* is instructive not only for its holding, but also for its methodology. *Penthouse* illustrates the fact that each obscenity prosecution must begin with a judicial determination of what constitutes “the work” before the jury can consider it “as a whole.” This determination necessarily involves some line-drawing, no matter how traditional the medium. In *Penthouse*, while the court did hold that “the work, taken as a

whole” included more than simply one article, it did not adopt what would have been a much more expansive interpretation of “the whole” by including, for example, all previous issues of the magazine. *See id.*

There is no reason why this same method of analysis could not be applied in the context of the Internet. In their brief, Appellants argue that it is impossible to consider any material on the Internet “as a whole” because the interconnectedness of webpages prevents judges or juries from examining every aspect of a website. App. B., at 22. But this argument already assumes that in every case involving material on the Internet the “work, taken as a whole” will consist of entire websites. The “taken as a whole” standard does not mean, as Appellants seem to suggest, that a jury must consider the allegedly obscene material in the broadest possible context. Instead, before a jury can consider the work “as a whole” the court must make a judgment as to what constitutes the proper scope of the work, a process that necessarily involves some line-drawing regardless of whether the material is presented on the Internet or in a more traditional form. *See Penthouse*, 610 F.2d at 1367 (“The crucial issue requires a determination of the meaning of ‘work, taken as a whole’ when applied to magazines.”).

Although courts may have to make explicit determinations more often about what constitutes “the whole” in Internet cases due to the novelty and variability of websites, courts will not be left without guidance because so many of the forms of

information available on the Internet can be analogized to more traditional media. In a simple case, for example, where allegedly obscene video or audio files are made available for download on a website, a court can simply analogize to the many cases holding that the individual audio or video files are to be considered the work to be “taken as a whole” without regard to the fact that these files were made available on the Internet rather than in some printed catalogue. *See Bagnell*, 679 F.2d at 835 (videos); *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 135-36 (11th Cir. 1992) (music); *see also United States v. Extreme Associates, Inc.*, No. 03-0203, 2009 WL 113767, at *2 (W.D. Pa Jan. 15, 2009) (holding that where a website made available for download free-standing, independent video files, the “whole” to be considered was each video file rather than the entire website). A more complicated determination may be required if it is the website itself that is alleged to be obscene, but even in this context there are any number of traditional print-media analogues available to courts.

Accepting Appellants’ position that the *Miller* test is impossible to apply in the context of the Internet would render any material presented on the Internet entirely immune from an obscenity prosecution. This would be a serious departure from the Supreme Court’s decades-old precedent upholding obscenity prosecutions, and a result the Court has itself sought to avoid in its recent cases addressing the constitutionality of laws regulating online speech.

For example, in striking down the CDA because of its overbreadth, the Supreme Court specifically left intact that portion of the CDA which prohibited the transmission of obscene speech over the Internet, making sure to note that its holding in that case did not affect its prior holdings allowing Congress the power to ban obscenity totally. *Reno v. ACLU*, 521 U.S. 844, 883, 117 S. Ct. 2329, 2350 (1997) (“Appellees do not challenge the application of the statute to obscene speech, which, they acknowledge can be banned totally because it enjoys no First Amendment protection.”). Later, in *COPA I*, the principal case relied upon by the Appellants, the Court rejected an argument suggesting that transmitting allegedly obscene material over the Internet made *Miller*’s “community standards” prong impossible to apply. The plurality opinion in that case noted that if it “were to hold [COPA] unconstitutional *because of* its use of community standards, federal obscenity statutes would likely also be unconstitutional as applied to the Web, a result in substantial tension with [its] prior suggestion that the application of the CDA to obscene speech was constitutional.” *COPA I*, 535 U.S. at 584, 122 S. Ct. at 1712-13 (plurality opinion) (emphasis in original).

Even if it is sometimes more difficult for courts to determine what is “the whole” in the context of the Internet, this increased difficulty does not justify the wholesale abandonment of the *Miller* test. As the Court noted in *Miller*, “[i]f the inability to define regulated materials with ultimate, god-like precision altogether

removes the power of the States or Congress to regulate, then ‘hard core’ pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike” *Miller*, 413 U.S. at 28, 93 S. Ct. at 2617.

B. The District Court Did Not Err in Holding That the Works to Be “Taken as a Whole” Were the Five Videos Made Available for Download on the “Max Hardcore” Website.

In this case, the allegedly obscene material consisted of five videos made available for download on the “Max Hardcore” website, rather than the website itself, so any issues of increased difficulty of defining what is “the whole” in the context of the Internet do not even arise. This Court has held that in determining whether videos are obscene, “the whole” can consist of the videos themselves. *See, e.g., Bagnell*, 679 F.2d at 835. In a recent case involving many issues presented here, the Western District of Pennsylvania held that where a website makes available for download several video files meant to stand alone, the videos themselves are “the whole” to be considered under the *Miller* test, rather than the website where they are made available. *See Extreme Associates*, 2009 WL 113767, at *2. Because the videos were presented as free-standing, independent works, the court held that they were each individual works to be “taken as a whole.” *Id.* at *2-3.

Here, as well, the District Court considered the Appellants’ argument that the work to be “taken as a whole” should be the entire “Max Hardcore” website,

but did not err in deciding that the videos made available for download on that website were capable of being considered “as a whole” themselves. *See United States v. Little*, 2008 WL 151875, at *4.

C. The District Court Was Correct in Holding That the “Taken as a Whole” Standard Did Not Require the Jury to View the Entirety of All Five Videos in Open Court.

Appellant contends that the Trial Court erred in denying his motion for judgment of acquittal because the Government did not publish the DVDs in their entirety, and the court allowed excerpts of the DVDs to be shown to the jury. App. B., at 30. An appellate court reviews denials of motions for judgment of acquittal *de novo* and views all evidence in the light most favorable to the Government and the verdict. *United States v. Acosta*, 421 F.3d 1195, 1197 (11th Cir. 2005). The reviewing court considers all the evidence to determine whether it was proper to find the defendant guilty beyond a reasonable doubt. *Id.* Further, when the defendant claims that the government failed to prove an element of the offense (here, the “taken as a whole” standard in *Miller*), the reviewing court considers it as a challenge to the sufficiency of the evidence. *Id.*; *United States v. Key*, 76 F.3d 350, 353 (11th Cir. 1996).

This case requires the Government to prove that obscene materials were mailed as alleged. The Government does not have a separate burden to prove the obscenity of the materials. Once the videos are admitted, they are the best

evidence of their own obscenity and speak for themselves. The prosecution may prove elements of the *Miller* test without any extrinsic evidence or testimony beyond the materials themselves. *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 56, 93 S. Ct. 2628, 2634-35 (1973). The jury is charged with the task of determining obscenity.

To determine a *prima facie* showing of obscenity, the Government need not show an entire video in open court. Rather, a court may decide that there is a *prima facie* showing based on a sufficient amount of evidence, similar to the standards of search warrants and grand jury proceedings. *See New York v. P.J. Video*, 475 U.S. 868, 106 S. Ct. 1610 (1986); *United States v. Entringer*, 532 F.2d 634, 636 (8th Cir. 1976).

So long as the material is available to jurors during their deliberation, allegedly obscene material need not be shown in open court in its entirety. *See Alexander v. United States*, 271 F.2d 140, 144-45 (8th Cir. 1959) (allowing jurors to read obscene books in the course of their deliberation rather than in open court). Such decisions are based upon the court's "discretionary choice." *United States v. West Coast News Co.*, 357 F.2d 855, 862 (6th Cir. 1966).

Appellants cite *United States v. Toushin*, 714 F.Supp. 1452, 1461 (M.D. Tenn. 1989), to support their notion that the DVDs must be seen in their entirety in open court. In *Toushin*, the court ordered *in camera* review of grand jury

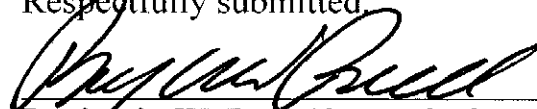
transcripts “to ensure that the [allegedly obscene] videos were evaluated in a manner consistent with *Miller*.” *Id.* The court’s review of such documents was meant “to establish that the prosecution did not mislead the grand jury members with selected excerpts of any of the indicted films” so as “to properly indict the defendants in compliance with the spirit of *Miller*.” *Id.* *Toushin* only emphasizes the need for discretionary choice mentioned in *West Coast News Co.* above.

There is no evidentiary or due process requirement to be served by showing the films in open court in their entirety. Criminal trials rely on juries to faithfully fulfill the oath, duty, and obligation to follow the instructions of law from the Court in reaching a verdict as to all the elements, including obscenity. To do otherwise is to belittle the role of the jury and to impugn individual jurors. The court must presume the jury will fulfill its mandate faithfully. Thus, the Government should be allowed to publish excerpts of the DVDs in open court and allow the jury to consider the entire works in its deliberations.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,



Benjamin W. Bull (*Counsel of Record*)

Patrick A. Trueman

ALLIANCE DEFENSE FUND

Attorneys for *Amicus Curiae*

Focus on the Family

CERTIFICATE OF COMPLIANCE WITH RULE 32

Counsel for *Amicus Curiae*, pursuant to Fed. R. App. P. 32(a)(7)(C), hereby certifies to the following:

- (1) That Brief of *Amicus Curiae* is proportionately spaced using Times New Roman typeface of 14-points.
- (2) The paper size, margin and line spacing contained within *Amicus Curiae*'s Brief are in compliance with Fed. R. App. P. 32(a).
- (3) The Brief for *Amicus Curiae*, excluding the cover page, table of contents, table of authorities, and certificate of compliance totals 6,842 words in compliance with Fed. R. App. P. 32(a)(7)(B).

Dated this 31st day of March 2009.


Benjamin W. Bull

CERTIFICATE OF SERVICE

I hereby certify that on March 31st, 2009, I have duly served the foregoing Brief of Focus on the Family, as *Amicus Curiae*, supporting Plaintiff-Appellee and in Support of Affirmance, by United States mail, first class postage, on each of the following:

H. Louis Sirkin
Jennifer M. Kinsley
Sirkin, Pinales & Schwartz, LLP
Suite 920- 105 West Fourth Street
Cincinnati, OH 45202

LisaMarie Freitas
Edward J. McAndrew
Jennifer Torrito Leonardo
1400 New York Ave., NW, Suite 600
Washington, DC 20005

Robert O'Neill
David Paul Rhodes
Anita M. Cream
United States Attorney's Office
400 N. Tampa Suite 3200
Tampa, FL 33602-4798

James S. Benjamin
Daniel R. Aaronson, P.A.
1 Financial Plz Ste 1615
Ft. Lauderdale, FL 33394-0026

Jeffery J. Douglas
1717 4th St. FL 3
Santa Monica, CA 90401-3319

Respectfully submitted, ↴

A handwritten signature in black ink, appearing to read "Benjamin W. Bull". The signature is written in a cursive style and is positioned above a horizontal line.

Benjamin W. Bull (*Counsel of Record*)

ALLIANCE DEFENSE FUND

Attorneys for *Amicus Curiae* ,

Focus on the Family

15100 North 90th Street

Scottsdale, AZ 85260

Tel: (480) 444-0020

Fax: (480) 444-0028

Bbull@telladf.org