In the United States Court of Appeals
for the Sixth Circuit

No. 94-6648
No. 94-6649

ROBERT ALAN THOMAS
and
CARLEEN THOMAS,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE, THE NATIONAL WRITERS UNION, FEMINISTS FOR FREE EXPRESSION, AND THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Northern California and the ACLU of Tennessee are affiliates of the ACLU in those areas.

Throughout its 75 year history, the ACLU has been particularly concerned with any abridgement of the freedoms guaranteed by the First Amendment. The ACLU has, therefore, appeared before the Supreme Court and the Courts of Appeals in numerous cases involving the First Amendment, both as direct counsel and as amicus curiae. Because this case raises an important First Amendment issue of organizational concern to the ACLU, we respectfully submit this brief as amicus curiae for the Court's consideration.

The National Writers Union is the 4,000-strong labor union for freelance writers founded in 1983. Its members include investigative journalists, book authors, technical writers, political cartoonists, poets, textbook authors, and multimedia contributors. The First Amendment is of paramount interest to its members, many of whom use computer communications extensively in their work.

Feminists for Free Expression (FFE) is an organization of diverse feminist women who share a commitment both to gender equality and to preserving the individual's right and responsibility to read, view, and produce media materials of her

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or his choice, free from government intervention "for our own good." In support of those goals, FFE has become active in a variety of litigation, lobbying, and educational efforts to oppose censorial measures which, even if well-intended, are ultimately counterproductive to the goal of equality for women. In particular, FFE believes that obscenity laws, as applied to censor media materials solely on the basis of erotic content, are an anomalous holdover from Victorian times, are essentially inconsistent with

feminist values, and, indeed, have historically been used to silence women, from the prosecutions of birth control advocate Margaret Sanger to accusations of obscenity against performance artists like Holly Hughes and Karen Finley.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan institution in Charlottesville, Virginia, whose sole mission is the safeguarding of freedoms of expression defined in the First Amendment of the United States Constitution. The Center has pursued its mission in several ways, including testimony before legislative and administrative bodies, public statements, and involvement in litigation that may affect free expression. The Center has filed briefs amicus curiae in state and federal courts in a wide variety of cases, seeking recognition and affirmation of freedoms of speech and press.

INTRODUCTION

This is an obscenity case, but it is not just another obscenity case. This case represents one of the first, if not

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the first, applications of existing obscenity statutes to the novel context of computers. The exponential growth in computer technology, and international computer networks such as the Internet, is transforming the nature of communication. Computer networks have created vast new fora for the exchange of ideas. They have created new communities with new opportunities for people with similar interests to communicate with each other. Until now, computer networks have been faithful to the values that underlie the First Amendment. They have fostered, encouraged, and even nurtured the robust exchange of ideas.

In this case, the government seeks to use a criminal law never intended to apply to computer communications, to put a break on that development, to stifle the explosive creativity and breadth of expression occurring on computer networks. Where Congress has moved slowly and deliberately, acting only where the implications of action, and the need for action, are fully explored, the prosecutors seek to rush, stretching a federal obscenity law beyond its intended purpose and imposing the "local community standards" of a conservative jurisdiction to communications originated elsewhere and existing within that jurisdiction only in the privacy of the home. In seeking to impose censorship on computer networks like the Internet through the mechanism of a single case, the government risks not only the chilling of protected speech, but its direct suppression. By doing so in the context of a criminal prosecution, the government ignores the requirement that criminal statutes be clearly and

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narrowly defined, giving notice to those affected. In this area, where fundamental constitutional values are implicated, the courts must protect those values by rejecting the government's clumsy attempt to censor communications in cyberspace through application of an obscenity law and standards wholly inappropriate for this new medium.

STATEMENT OF THE CASE

Defendants-Appellants Robert Thomas and Carleen Thomas ("the Thomases") operate a computer bulletin board and related distribution business in Milpitas, California (near San Francisco) involving sexually explicit words and pictures. They were convicted of two groups of offenses in the United States District Court for the Western District of Tennessee. First, they were convicted of several violations of 18 U.S.C. Section 1462 as a result of mailing certain videotapes to a postal inspector in Tennessee. (TR 905). Amici take no position on the validity of the convictions on those counts, and this brief does not discuss the facts or law applicable to those convictions.

Second, they were convicted of several violations of 18 U.S.C. Section 1465 as a result of visual images posted onto their computer bulletin board in California that were obtained by a postal inspector in Tennessee. (TR 895-96). These convictions raise important questions concerning criminal statutes that were passed for one purpose and are now being stretched to achieve another purpose. They also raise important and largely novel

questions concerning the regulation of obscenity in the world of computer exchange of information, the so-called information superhighway or cyberspace. For the reasons stated below, amici respectfully urge the Court to reverse the convictions pursuant to 18 U.S.C. Section 1465.

A computer bulletin board like the Thomases' consists of information contained in one or more computers that can be accessed by another computer over telephone wires by means of a modem. (James McMahon at TR 256-57). Although, for reasons discussed below, the example is imperfect, for lawyers, the most well known services analogous to that of the Thomases are LEXIS or WESTLAW.

Like LEXIS or WESTLAW, the data in the Thomases' computer were not available to the general public. People who wanted access had to fill out an application and pay an access fee. (David Dirmeyer at TR 302). The application process served several purposes. It contributed to the profit of the business. It ensured that those seeking access understood the nature of the data on the computer. It was part of an attempt to ensure that minors were denied access to the computer. (Robert Thomas at TR

742). Only after an application was approved and the fee paid, were those seeking access given the codes needed to link their computers with that of the Thomases.

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Unlike LEXIS or WESTLAW, the data in the Thomases' computer consisted of sexually explicit words and pictures.<1> In the Thomases' case, the person seeking access called a phone number connected to the Thomases' computer. The caller was then able to see written descriptions of the images that had been loaded into the computer (just as the initial images on LEXIS and WESTLAW describe the libraries on those services). (David Dirmeyer at TR 303). If the caller had received the access codes as part of joining the bulletin board, he or she could then select the image desired and press the appropriate keys on his or her connected computer. The image was then downloaded from the Thomases' computer to the receiving computer.

That is, the image was converted into a series of digital 1's and 0's. (James McMahon at TR 256). From the moment this stream of 1's and 0's left the Thomases' computer and traveled along the phone lines, it was not in a format that anyone could read. Someone tapping into the phone line along the way, without knowing the appropriate software that had been used to convert the image into computer data, would find the material incomprehensible.<2> The receiving computer received those 1's

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1 Computer technology has reached the point where it is possible to enter pictures into a computer which, once entered, can be accessed by any person with the appropriate software. (James McMahon at TR 258, 273-75).

2 Thus, technologically, it is as though a book had been purchased in California and the buyer, while still in California, encoded the entire book, substituting letters (i.e. all E's are replaced by F's) to make the book incomprehensible. The buyer then took the encoded book to Memphis, decoding it in his home there. The software used by the Thomases to encode the images [continued next page]

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and 0's, and the appropriate software converted them back into pictures which could then be printed at the receiving end. (James McMahon at 259-60, 291).

Also unlike LEXIS or WESTLAW, the computer network run by the Thomases, like the vast majority of computer networks, allowed the members to communicate with each other. Thus, a member of the network could send messages from his or her computer to the Thomases, to another member of the board, or to all of the members of the board. (Robert Thomas at TR

747).

Like LEXIS and WESTLAW, this operation was entirely automated at the seller's end. Neither of the Thomases had to be on their computer, or even in their home, for someone seeking a picture to obtain access to it. (James McMahon at TR 294). After the pictures had been entered into the computer in California, no person in that state had to take any further action for the specific images to arrive in Tennessee. Thus, it is not technologically accurate to describe the Thomases as sending pictures to others. Instead, those seeking the pictures went to the computer where the images were loaded and pulled them out.

In the summer of 1993, a U.S. postal inspector in Memphis, Tennessee became aware of the bulletin board offered by the Thomases. (David Dirmeyer at TR 301). He first looked at the public portion of the board which generally described the information available. (David Dirmeyer at TR 303-312). He then

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2[continued] was GIF, a fairly common software used to translate pictures into computer data. (James McMahon at TR 273-75).

joined the bulletin board by filling out an application, using a fictitious name, and paying a fee. (David Dirmeyer at TR 312-318). Using his computer in Memphis, he then obtained the digital representations of several of the visual images in the Thomases' computer. (David Dirmeyer at TR 338). He used his computer software in Memphis to turn the digital entries into viewable images and to print them. It is those images that the prosecution asserted were legally obscene in Memphis and that resulted in the convictions pursuant to 18 U.S.C. Section 1465.

SUMMARY OF ARGUMENT

Three of the elements necessary for a violation of Section 1465, the statute under which the Thomases were convicted, were not present in this case. First, as the Tenth Circuit held in United States v. Carlin Communications, 815 F.2d 1367 (10th Cir. 1987) ("Carlin"), Section 1465 prohibits transportation of tangible objects, not intangible computer impulses. Second, the statute covers travel by private conveyances, not by phone lines. Finally, Section 1465 criminalizes the behavior of the person who transports the material. In this case, it was the postal inspector, and not the Thomases, who transported the material. The prosecution is thus not only attempting to use a statute that is on its face inapplicable to computer exchange of information; such exchange was not even contemplated when the statute was passed. It is up to Congress,

not this Court, to define the appropriate approach

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to the exchange of sexually explicit material by computer network.

Even if Section 1465 were deemed applicable to computer exchange, however, the district court erred when it instructed the jury on the definition of the "community standards" portion of the test created by Miller v. California, 413 U.S. 15 (1973), for defining obscenity. There was an insufficient nexus between actions taken by the Thomases and the geographic community in Memphis, Tennessee to justify Memphis or Tennessee as the relevant community. Computer technology has created new "communities" or groups of individuals who communicate among themselves, sharing thoughts, ideas, and values. These communities do not exist geographically, but they exist nonetheless. The district court should have instructed the jury to apply the standards of the community involved, that of the members of the Thomases' bulletin board.

In Stanley v. Georgia, 394 U.S. 557 (1969), the Supreme Court held that it was unconstitutional to punish someone for obscene material held in the privacy of his or her own home. Although in subsequent cases, the Court limited Stanley by allowing prosecution for transport of material, whether intended for the home or not, the computer technology at issue in this case undercuts the rationales of those cases and provides renewed vitality to the values that underlie Stanley. The Thomases did not transmit the material to Memphis. As the material traveled over the phone lines, it was an incomprehensible stream of 1's

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and 0's. It utilized software, and those who did not have the appropriate matching software could not read it. Except when sought by law enforcement, when the material arrived at its destination, it was almost always arriving in a person's home and, only when the recipient's computer software translated it back into images, could it be seen. In short, there is insufficient basis, beyond the values of privacy and home protected by Stanley, for finding any link between this material and Memphis, Tennessee. For this reason, the district court's instruction that the "community" was Memphis was error and the convictions should be reversed.

ARGUMENT

I. THE THOMASES DID NOT VIOLATE 18 U.S.C. SECTIONS 1465.

A. Criminal Laws Should be Strictly Construed, Especially Where First Amendment Values Are at Stake.

The Supreme Court has plainly stated that criminal statutes must not be stretched beyond their strict meaning:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court which is to define a crime and ordain its punishment.

Dowling v. United States, 473 U.S. 207, 213-14 (1985)(quoting former Chief Justice Marshall in United States v. Wiltberger, 5 Wheat. 76, 95 (1820)). See also United States v. LaMacchia, 871 F. Supp. 535 (Mass. 1995)(rejecting an attempt to use the

criminal wire fraud statute to punish an arguable violation of copyright laws in cyberspace); Liparota v. United States, 471 U.S. 419, 427 (1985)(noting "our longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'" (quoting Rewis v. United States, 401 U.S. 808 (1971)). These principles have particular force when the government attempts to criminalize behavior that, as a result of new technology, was not even contemplated when the original statute was passed.

These principles also have special force where First Amendment rights are at stake. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms"). In this case, the government's attempt to force "new wine . . . into an old bottle" does damage to those rights and should be rejected. United States v. LaMacchia, 871 F. Supp. at 536.

B. Because They Did Not Use a Private Conveyance to Transport a Tangible Object, the Thomases Did Not Violate the Statute.

18 U.S.C. Sections 1460 et. seq. define federal obscenity offenses. Sections 1461-1465 prohibit transportation of obscene material by mail (Sections 1461, 1463), by importation or transport via common carrier (Section 1462), by broadcast (Section 1464) and by private conveyance (Section 1465).<3> None of these statutes, including the one that the

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3 Section 1460 prohibits sale of obscene pictures on federal land.

government chose in this case, Section 1465, deals with computer communications, such as those involving the Thomases' bulletin board.

In United States v. Carlin Communications, 815 F.2d 1367 (10th Cir. 1987), the Tenth Circuit held that Section 1465 governed the physical transportation of tangible objects and was inapplicable to intangible communications over telephone wires. ". . . Section 1465 . . . is restricted in its terms to the transportation of tangible objects. Read as a whole, it is simply inapplicable to telephone messages." Id at 1371. The Circuit upheld dismissal of indictments charging a telephone service offering sexually explicit messages with violation of Section 1465. Although this case involves computer communications over phone lines, not recorded messages, application of the holding in Carlin to the facts of this case requires reversal of the convictions based on Section 1465.

The Circuit in Carlin based its holding on both the language and legislative history of Section 1465. Section 1465 makes it illegal to

"transport[] . . . an obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character . . ."

The Tenth Circuit emphasized the list of items and the phrase "or other article" in concluding that the list was intended to be and was a list of "material" or "tangible" objects. Carlin, 815 F.2d at 1371. That conclusion is correct.

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In this case, the material that traveled to Memphis consisted of the intangible 1's and 0's that constitute computer code. More specifically, the computer interprets pulses of electricity (1's) and the absence of such pulses (0's). Thus the material was just as intangible as the phone calls at issue in Carlin, which, depending on the phone lines used, consisted of either similar digital transmission or sound waves. The only relevant point at which the material in this case was tangible in any form was after the postal inspector used his computer software in Memphis to translate the computer impulses and then to order the image printed on the printer attached to his computer.

The government can be expected to argue that because the list in Section 1465 includes "images," it covers the material in this case. There is no reason to suppose that Congress used the word "images" to include non-tangible material. Indeed, its inclusion in a long list of tangible material suggests the contrary. Moreover, the matter in this

case that went from California to Memphis was not an "image." It was instead a series of 1's and 0's that could not become an "image" until it arrived at a computer in Memphis and was translated by the appropriate software. The material did ultimately become an image, but it was the postal inspector who made it so, not the Thomases.

The legislative history of Section 1465 strongly reinforces the conclusion of the Tenth Circuit that the statute does not cover computer exchange of information. Indeed, the Circuit found that "the legislative history ... makes clear the fact that Congress

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had no understanding or intent that these sections would reach telephone calls." 815 F.1d at 1371. The legislative history also establishes that the statute was intended to and does prohibit exchange of obscene matter only by means of private conveyance and not by phone lines or, indeed, other common carrier lines that might carry tangible things.

The statute dates back to 1955, at a time when computer exchange was unknown. Thus, at the time of passage, Congress could not have intended to cover computer exchange of data. Section 1465 was added in 1955 to a more general set of statutes governing transmission of obscene information.<4> Section 1461 governed "transportation of obscene matter by mail and section 1462 prohibit[ed] the use of common carriers for the transportation of that matter" but no statute governed "transportation by private conveyance." House Report 690, 84th Congress, June 1, 1955 at 2. Section 1465 was added to close "a serious loophole in the law which has permitted this ... to be distributed by private automobiles and by trucks. This could no

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4 At the same time that Section 1465 was added, Section 1461 was amended in response to a different problem. There had been doubt about whether the obscenity statutes covered obscene phonograph recordings as well as printed matter. The Supreme Court had decided that Section 1462 did cover sound recordings. United States v. Alpers, 338 U.S. 680 (1950). Congress determined that there should be no ambiguity about any of the obscenity statutes and therefore added additional descriptions to Section 1461 to make clear that it also prohibited phonograph recordings, as well as other obscene "article[s], matter[s], thing[s], device[s], or substance[s]." Senate Report No. 113, 84th Congress, reprinted in 1955 U.S. Code Congressional and Administrative News 2210. The list still described tangible things, not the intangible computer exchanges in this case.

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longer be done under this legislation." 101 Cong. Rec. at A4051 (Remarks

of Representative Keating, Tuesday, April 16, 1955). See also 101 Cong. Rec. at A4093 (Remarks of Representative Poff, June 8, 1955). The material contained in the Thomases' computer was not tangible material transported by private conveyance, and thus falls outside Section 1465.

Section 1465 was amended in 1988. The government can be expected to argue that the 1988 amendments expanded it to include computer exchanges over phone wires. The 1988 amendments, however, suggest exactly the opposite conclusion.

Efforts to amend the federal obscenity statutes began as early as 1985. At that time, Senator Trible introduced legislation "to address ... the use of computers ... to transmit prurient material." 131 Cong. Rec. at S8241-43 (June 17, 1985). He proposed legislation only after writing to the Attorney General of the United States to ask if existing law covered that situation. Id. at S8242. The Attorney General first suggested that it was possible that computer transmission might be illegal under 47 U.S.C. Section 223 and/or 18 U.S.C. Section 1462. Id. at S8243. He then suggested that Section 1465 would not prohibit the computer transmissions. Quoting the remarks of Representative Keating, the Attorney General said that "the legislative history suggests rather strongly that this statute was enacted to cover private carriage rather than use of a common carrier ... Therefore, if telephone companies are common carriers, it would appear that this section does not apply. Moreover, the section is limited to

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transportation for the purpose of sale or distribution." Id. at S8243.

When the amendments were adopted as part of the Child Pornography and Obscenity Enforcement Act of 1988, P.L. 100-690, Section 7501 et. seq., Congress did address the use of computers to exchange sexual subject matter, if the material involved children. Thus, Congress amended 18 U.S.C. Section 2251 to add to its child pornography ban "by any means including by computer." P.L. 100-690, Section 7511. No similar amendment was made to Section 1465. P.L. 100-690, Section 7521. In other words, Congress knew of the problem and knew the proper language to use to incorporate computer exchange into existing law, but chose to prohibit that exchange only for pornographic material involving children and not for obscene material transported by private conveyance, as proscribed by Section 1465.<5>

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5 In addition, Congress amended 47 U.S.C. Section 223, governing transmission of obscene material over phone lines. P.L. 100-690, Section 7524. Whether those amendments would make the actions in this case

illegal or not, and amici do not believe that they do, the Thomases were not charged with violation of Section 223.

Finally, Congress amended Section 1465 to add a prohibition against the "use of a facility or means of interstate commerce" to transport obscenity. Debate on that addition reveals that its purpose was to ease the burden of proof on the government so that it no longer had to prove the precise means of transport used. 134 Cong. Rec. S13328-29 (Sept. 26, 1988).

In the Senate, during debate, Senator Hatch quoted U.S. Attorneys as asserting that

> "the present requirement of specific proof that obscene material traveled in interstate commerce is a weakness in the law . . . . By using a variety of commercial carriers, transporting material by private conveyance . . . distributors are able to obstruct and in some cases prevent investigations and prosecutions."

Id. The Senator then described the added language: [continued next page]

In this case, the district court instructed the jury that a violation of 18 U.S.C. Section 1465 could be found if defendants used "any method of communication between different states." (TR 898). That instruction was incorrect. In fact, the statute does not cover "communication" of intangible matter by computer exchange over phone wires. The statute only covers transportation of tangible items by private conveyance. The "communication" in this case was not of that kind and was thus not prohibited by Section 1465.

C. Because They Did Not "Transport" Anything, the Thomases Did Not Violate the Statute.

Section 1465 makes it illegal to "transport" or "travel" or "use a facility or means of interstate commerce for the purpose of transporting" obscene material. The words used require that the seller of the material take some action to transport the material physically. The Thomases did place the images into their computer in California, allowed the postal inspector to join the bulletin board, and gave him the codes needed to access the computer. However, the Thomases took no additional action that could be described as "transport" of the images.

As explained above, the inspector was able to sign on to the bulletin board, select a photograph, pull it out of the Thomases'

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5 [continued] It would prohibit the use of a facility or means of commerce for obscenity trafficking. In other words, under the language of the provision, it would not be necessary for the Government to demonstrate that obscene material actually traveled interstate, but only that a facility or means of interstate commerce was used. Id.

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computer and bring it to Memphis, all without the Thomases being involved or even present. Thus, technologically, the process is not analogous to mail order where a seller receives a request and then takes the steps needed to transmit the order to a buyer by putting it in the mail or giving it to a company like Federal Express. The process instead more closely resembles a bookstore transaction, where the seller makes the pictures available, and a buyer can come to the store, purchase a copy of one or more of the pictures, and take them back home. In this case, the buyer traveled in cyberspace, not through airports. However, the process is analogous. To use the language of the statute, the person who was "transporting" or "traveling" was the postal inspector, not the Thomases. Thus, the Thomases did not violate the statute.<6>

The government may try to argue that this distinction (and the ones in the prior section), based on the nature of the medium involved in this case, are merely "nitpicking." However, such distinctions are crucially important in criminal law, and illustrate a more fundamental concern about the applicability of

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6 See TR 861. A similar argument might be made for the protection of pre-recorded audio messages accessible over phone lines (so-called dial-a-porn). A review of the briefs and opinions in the principal Supreme Court case involving that medium, Sable Communications v. FCC, 492 U.S. 115 (1989), suggests that this argument was not raised or addressed. Moreover, 47 U.S.C. Section 223, the relevant statute, is more broadly written than Section 1465. For example, Section 223 makes the actions illegal "regardless of whether the maker of such communication placed the call." In addition, Section 223 provides a defense for those who "restrict access to the prohibited communication" to adults, as the Thomases sought to do. 47 U.S.C. Section 223(b)(3).

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criminal laws to new contexts. Congress did not consider the problem of computer exchange of obscene photographs when it adopted Section 1465 because the technology did not then exist for such exchange. The 1988 amendments did not address computer exchange except with respect to child

pornography. See 18 U.S.C. Section 2251. Now that the technology is well developed, the question is whether the courts will take language clearly intended to cover a different situation, and "interpret" it beyond the plain language in order to justify applying it to a new technology, or whether the courts will wait for Congress to pass legislation that covers the new situation.<7>

The Supreme Court has been clear. Particularly in the context of criminal statutes impinging on First Amendment values, courts may not stretch to apply existing statutes to situations not covered by the language or contemplated by the drafters. See section I.A above. This court should follow those principles and hold that Section 1465 does not apply to the conduct in this case.<8>

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7 At this writing, Congress is considering legislation proposed by Senator Jim Exon (D-Neb.), that specifically addresses sexually explicit computer communications. See "Smut Ban Backed for Computer Net," New York Times, March 24, 1995, at A1.

8 It is not clear from the record available to amici whether defense counsel argued in the trial court that Section 1465 was not applicable to the Thomases' conduct. Even if he did not, however, this Court must consider the statute's applicability. Although certain errors can be waived if not presented to the trial court, if the behavior of the defendants as a matter of law was not criminal, the appellate court must reverse. E.g. Fed. R. Crim. Pro. 52(b); United States v. Olano, 507 U.S. __, 113 S. Ct. 1770, 123 L.Ed.2d 508 (1993).

II. EVEN IF SECTIONS 1465 APPLIED TO THIS CASE, THE DISTRICT COURT ERRED IN DEFINING THE "COMMUNITY" WHOSE STANDARDS DETERMINED WHETHER THE MATERIAL WAS "PATENTLY OFFENSIVE" AND APPEALED TO THE "PRURIENT INTEREST."

The current standards for obscenity law were established in Miller v. California, 413 U.S. 15 (1973). The Supreme Court created, in Miller, a three-part test for determining if material is legally obscene. Two parts of that test -- patent offensiveness and appeal to the "prurient interest" -- depend on "applying contemporary community standards." 413 U.S. at 33, quoting Mishkin v. New York, 383 U.S. 502, 508-09 (1966). In Miller, which involved promoting the sales of books by mailing advertising pamphlets, the Court held that it was not error for "community" to be defined in geographic terms to include an area less than the entire

country. Miller, 413 U.S. at 33-34.

In this case, the district court instructed the jury that in determining if the pictures appealed to the prurient interest and were patently offensive under contemporary community standards, the jury was to apply "contemporary community standards from the community from which you come." (TR 902). The district court relied on established law in the context of mail order and phone sex that permit prosecution under the community standards of the geographic community into which the communication arrives. United States v. Orito, 413 U.S. 139 (1973); Sable Communications v. FCC, 492 U.S. 115 (1989). The Thomases were convicted after the jury found the images obscene according to Memphis community standards.

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This case presents one of the first, if not the first, opportunities for an appellate court to apply existing obscenity laws to the novel context of computer networks. For that reason, even if the Court decides that Section 1465 applies, it should not simply apply existing concepts mechanically to this novel situation. Instead, the Court should examine the societal, individual, and constitutional interests and determine the most appropriate method by which alleged obscenity should be evaluated in this new context. In doing so, the court should conclude that the "community" in cyberspace communications is not geographic at all, but instead consists of those people who have joined together on the basis of common interest, not common location, to communicate via this bulletin board. Because the district court failed to apply this definition (and indeed explicitly rejected it, TR 726), it erred, and the convictions should be reversed.

The growth in computer technology, and computer networks, has been phenomenal. It has not been a local phenomenon, or even a national one, but is truly global. The largest computer information exchange system, the Internet, is a large network linking a number of smaller networks. The Internet links at least 159 countries, and "the majority of its users are not subject to United States Law." Lewis, Peter, "Computer Jokes and Threats Ignite Debate on Anonymity," New York Times, Dec. 31, 1994 at 29. There are now at least 20-30 million users worldwide. See "The Global Information Infrastructure: Agenda

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for Cooperation," (U.S. Information Infrastructure Taskforce, Feb. 15, 1995) at 5.

Because of the number of people involved, the individuals who use computer networks have created a variety of electronic "sites," variously

called bulletin boards (as with the Thomases) or newsgroups. These sites are not actual physical locations, but are places on the network where those with common interests and values can "meet" and exchange ideas and information. Thus, if there is a community of people interested in pre-Columbian art, or quantum mechanics, or virtually any other subject, a location will be developed for those people to share their interests. The relative anonymity of the communication has fostered a willingness in some contexts to share intimate confidences, confidences that many find difficult if not impossible to share face-to-face. Thus, many users of computer networks report a sense of sharing, a sense of community, with those they meet on the network, that is far greater than their connection to those who happen to live in their home town. Rheingold, Howard, The Virtual Community (Addison-Wesley, 1993); "The Global Information Infrastructure: Agenda for Cooperation," supra; Alburty, Stevan, "It's a Buyer's Marketplace," New York Times, March 20, 1995 at A17.<9>
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9 People join Internet "to be part of a community. They're not just viewers, they're visitors . . . . The most basic of all human desires turns out . . . to be part of a community . . . . Our progeny will consider it commonplace to hang out in cyberspace and meet new friends from around the globe."

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This community is a virtual community, not a geographic one. The virtual community does not invade the interests of the geographic communities in which its members reside. When a community forms that is interested in exchanging sexually explicit material on a computer network, none of the complications courts have associated with distribution of sexual material in geographic communities exist. Thus, for example, no commercial, retail outlets exist. There is no danger of having to avert one's eyes walking down the street, and no danger that illegal activities will surround the outlet. The material as it travels over phone lines is incomprehensible even if "overheard."

The computer communities are also international. Material is posted from Finland just as easily as from next door, and one can communicate with one's neighbor in Finland at least as easily as one's neighbor next door. Many bulletin boards or news groups are public in the sense that communications are posted and may be read by anyone. Thus, not only can a Memphis resident communicate privately with someone in Finland, he or she can often read messages sent by someone in Finland responding to a message sent by someone in Japan. Indeed, the technology is such that it is possible that a million people, in many locations, are simultaneously reading that communication.

The Thomases' bulletin board, though not connected to a larger network like Internet, was nevertheless a network, not just a system of two-way communications. Unlike mail order or dial-a-porn, the material was not transmitted in a one-way

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fashion from one specific person to another. Instead, a community was created consisting of a number of people, each of whom could communicate with one or all of the other members of the community at once. (TR 747). In this case, members of the Thomases' bulletin board could download photographs or words, or they could communicate with the Thomases, or they could communicate with another member of the bulletin board, or they could send a message to all of the other members of the bulletin board. Id. Thus, in contrast to mail order or dial-a-porn, the Thomases' bulletin board created a genuine, non-geographic community, or group of people with shared interests.

Unlike many parts of the Internet, the Thomases' board was not public. Thus, the only people who could communicate on it, or read communications on it, were those who had joined the board through the application process. It thus shared the qualities of community inherent in computer networks, without the danger that someone who did not share the community's interests would wander into the wrong neighborhood.

This concept of computer communities is particularly important to the amici in this case. Both the ACLU and the National Writers Union have online services for members and others who share their interests. The ACLU's computer "reading room" is designated as a "free speech zone" within a larger network whose corporate provider ordinarily censors "offensive" words. The Thomas Jefferson Center often communicates over computer network systems. Feminists for Free Expression also has

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an online service, and is especially concerned that censorship of sexual ideas and information in cyberspace not deprive women of the opportunity to form computer communities on topics including sexuality, reproduction, safe sex, and sexual harassment. Especially in a climate of backlash against feminism, use of obscenity laws to punish computer communications can only harm women and be used to silence controversial feminist speech.

Given the qualities of computer communities in general, and the Thomases' bulletin board at issue in this case, the rationale for using the geographic community of Memphis, Tennessee to decide the obscenity issue is weak at best. Even assuming the material involved was "patently offensive" and appealed to the "prurient interest" according to the standards of Memphis, there was nothing obscene in Tennessee until the postal inspector used his private computer to translate the electric stream and print out the material. The material, as it was traveling to

Tennessee consisted of electrical impulses, 1's and 0's, that were themselves not obscene. There was no retail outlet or "public depiction" of sexual acts. Miller, 413 U.S. at 32. As suggested above, the Thomases took no affirmative steps to get the material into Tennessee. The material was accessible only to the community of those who joined the board because they found the material of interest; thus the people of "Maine or Mississippi" (or Memphis) were not being unwillingly subjected to the moral standards of New York, Las Vegas, or cyberspace. Cf. Miller, 413 U.S. at 32. If the Thomases are to be prosecuted for obscenity,

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there is simply an insufficient connection between their conduct and Tennessee to justify use of Tennessee community standards.<10> Under these facts, to judge the Thomases now by the standards of Tennessee would be simply inequitable, and to permit prosecutions such as this would chill the free flow of computer conversations.<11>

In addition, application of the local, geographic community standard presents virtually insurmountable practical problems given the international nature of the more public computer networks, some of which also have areas set aside for sexually explicit communications. If a Memphis resident obtains access to the Internet from a service such as Prodigy or America Online, and then simply reads messages on a board sent by a resident of Finland to a resident of Japan and the latter's responses, is American law going to attempt to make the behavior of the service or of any of the three people involved illegal? To describe this scenario is to suggest its impossibility.<12> And beyond the

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10 The United States has relied upon the conservative standards of Memphis before to prosecute material available nationally. In 1976, the government prosecuted a number of people in Memphis who were involved in the movie Deep Throat. Quittner, Joshua, "Computers in the 90's," Newsday, August 16, 1994 at B27.

11 Whether prosecution would be permissible in California based on either the images contained in the computer, which had its own software that would translate the images, or based on the hard or printed copies of the images, is an issue this Court need not reach.

12 A somewhat similar argument has been made in challenging dial-a-porn prosecutions. In Sable, the Supreme Court rejected the argument that the technology makes it unfair to apply local standards. The Court simply assumed that blocking transmission [continued next page]

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practical, serious questions are raised by any attempt to require people

throughout the world to conform to the moral or aesthetic standards of conservative American localities.

Even more fundamentally, examination of the values that underlie obscenity prohibitions reveals a new balance of interests, requiring the new definition of community. The new technology should be measured against the interests of privacy and the home recognized by Stanley v. Georgia, 394 U.S. 557 (1969).

The Supreme Court has repeatedly said that obscenity is not protected speech. Miller v. California, 413 U.S. 15 (1973). However, in Stanley, the Court prohibited prosecution on obscenity charges for anyone possessing otherwise obscene material in the privacy of his or her own home. As the Court said, "[w]hatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." 394 U.S. at 565.

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12 [continued] to conservative localities was technically feasible, 492 U.S. at 125-26, and does not appear to have considered the problems of international communication. More importantly, phone communications are two-way, with prosecutors seeking only to punish the speakers. Computer networks, by contrast, place on the same "party line" many speakers and listeners.

The Court has so far refused to expand Stanley beyond the home.<13> However, when the rationales of Miller and Stanley (and subsequent cases) are applied to computer networks, the Stanley holding, and the privacy interests on which it is based, are more applicable than in the cases involving other methods of transmission or communication.

A vast amount of the material received via computer will be received directly into the home, in effect without having passed through any geographic space, at least in any tangible fashion. Thus, with the exception of government agents such as the postal inspector, it is likely that every person receiving information from the Thomases' bulletin board received it on his or her computer in his or her home.<14> And, as discussed, until it arrived in the home, it was not discernibly obscene in any way. It was merely a stream of coded electrical impulses. It could not be received at all until the person seeking it used a password to permit the initial access, and it could not be viewed

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13 Thus, it has held that someone may be prosecuted for obscenity for receiving the material in the mail, United States v. Reidel, 402 U.S. 351 (1971); by plane, United States v. Orito, 413 U.S. 139 (1973); or by phone, Sable Communications v. FCC, 492 U.S. 115 (1989).

14 It is possible that someone might try to access the bulletin board from office rather than home computers. Given the nature of the material involved here, that seems highly unlikely. Moreover, given the costs associated with computer communication, employers can be expected to take effective steps to prohibit purely private communications on office computers. (For example, many employers have blocked their phone lines, preventing their use to access dial-a-porn numbers.)

until the recipient used specific software in his or her computer to translate the file into an image.<15>

Thus, returning to the rationales for severely limiting Stanley, none of them supports punishment of the conduct in this case under Memphis community standards. Use of the initial code system would prevent access by unwilling recipients or by children in Memphis or indeed anywhere. Miller, 413 U.S. at 18-19.<16> In addition, parents can program their home computers to prevent their children from accessing the network. There is no retail outlet, the presence of which would lower the moral tone of Memphis or lead to the incidental, detrimental effects caused by such outlets. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59 (1973). There is no danger of the material accidentally being seen by those other than its recipients because even if such a person obtained access to the electrical stream, that stream, a meaningless set of 1's and 0's, would not and could not be itself obscene or offensive. United States v. Orito, 413 U.S. 139, 143-

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15 "I [went] searching for some of the pornography for which the Internet is notorious. Three entries looked especially mouthwatering. . . . I clicked on the second of these and waited . . . before my screen was filled with indecipherable symbols but no instructions for translating them into the promised color photographs." Steingarten, Jeffrey, "What's Cooking in Cyberspace," Vogue, March, 1995, 402, 465.

16 Cf. Rowan v. U.S. Post Office Dept., 397 U.S. 728 (1970) (emphasizing importance of homeowners' autonomy, not government control, in deciding what mail to receive); Michael I. Meyerson, "The Right to Speak, the Right to Hear, and the Right Not to Hear: The Technological Resolution to the

Cable/Pornography Debate," 21 U. Mich J.L. Ref. 137, 140, 146-47 (1988) (homeowners' privacy interests may outweigh interests in government control).

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44 (1973). Finally, there is no more likelihood that this material would escape the private home than the material in Stanley. In short, there is no community interest in Memphis to justify overriding the privacy interests protected by Stanley and imposing Memphis community standards on global communications.

The Supreme Court has frequently recognized that different media of communication call for different First Amendment analyses that are sensitive to the character and technology of the medium involved. FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952); compare, e.g. Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969) and Miami Herald v. Tornillo, 418 U.S. 241 (1974).<17> In this case, the "community standards" part of the Miller obscenity test must be adapted not only to the technology, but to the unique mix of free speech and privacy interests arising from computer communications. Thus, the Court ought to hold that geographic "communities" are not appropriate or even relevant. The appropriate "community" whose standards will be applied is the community of those who have access to a particular network or

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17 The idea that "community" need not always be defined as a local geographic area is not novel. In the context of broadcast radio and television, there is a national standard of "indecency." FCC v. Pacifica, 438 U.S. 726 (1978).

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bulletin board.<18> Because the district court instructed the jury to the contrary, the convictions should be overturned.

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18 This result would not eliminate the role of the jury in assessing the "prurient interest" and "patent offensiveness" prongs of Miller. It might require the jury, however, to review the standards set by the relevant computer community, either directly or through expert testimony.

If the Court were to adopt the standard that amici propose, it could mean that there would be a place in cyberspace where adult material would be essentially immune from prosecution. So long as the community, in advance, carefully defined the standards it would permit to include sexually explicit material, and so long as the community took effective

action to assure access only by consenting adults, then at least insofar as communications remained within the homes of community members, community standards could bar prosecution for obscenity. This result would be consistent with many of the critiques of obscenity law, particularly in terms of the vagueness and subjectivity of the "community standards" test. See, e.g. Smith v. United States, 431 U.S. 291, 313 (1977)(Stevens, J. dissenting)("The diversity within the Nation which makes a single standard of offensiveness impossible to identify is also present within each of the so-called local communities ... In my judgment, the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct."); Pope v. Illinois, 481 U.S. 497, 504 (1987)(Scalia, J. concurring); Lockhart, William, "Escape From The Chill of Uncertainty; Explicit Sex and the First Amendment," 9 Georgia L.Rev. 533 (Spring 1975).

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CONCLUSION

For all these reasons, amici respectfully ask the Court to reverse the convictions that were based on 18 U.S.C. Section 1465.

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April 12, 1995

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