No. 05-1555

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

EXTREME ASSOCIATES, INC.,
ROBERT ZICARI, a/k/a Rob Black,
and JANET ROMANO, a/k/a Lizzie Borden,

Appellees.

Appeal from the Dismissal Entered by the United States District Court for the Western District of Pennsylvania (Lancaster, J.) at Criminal No. 03-203

MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE* AND FILE AN *AMICUS* BRIEF ON BEHALF OF BARBARA NITKE AND THE NATIONAL COALITION FOR SEXUAL FREEDOM IN SUPPORT OF APPELLEES AND AFFIRMANCE OF THE DISTRICT COURT

In accordance with Federal Rule of Civil Procedure 29(b), Barbara Nitke (hereinafter "Nitke") and The National Coalition for Sexual Freedom (hereinafter

"NCSF") hereby move before this Court for Leave to appear as *Amici Curiae* and for leave to file the attached brief in support of Appellees and affirmance of the District Court's dismissal of the Government's indictment.

Rule 29(b) lays out the requirements a moving party must meet before a motion for Leave to Appear as *Amicus Curiae* is granted. A moving party must "state: (1) the movant's interest; and (2) the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case." *Id.* Nitke and NCSF's interests and reasons are set forth in the attached brief and Statement of the Interests of the *Amici Curiae.* Furthermore, this Court has a long history of liberally granting proposed *Amicus Curiae* parties' petitions to be heard by this Court. *See Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128 (3d Cir. 2002) ("I think that our court would be well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted."). Finally, the Government's attorney, Christine A. Sanner has represented that the Government has no opposition to this Motion.

WHEREFORE, upon a showing that Nitke and NCSF have a legitimate interest and the attached brief is desirable and relevant, Nitke and NCSF pray that its Motion for Leave to Appear as *Amici Curiae* and file the attached brief is GRANTED.

Dated: May 12, 2005

Respectfully Submitted,

John F. Wirenius
Thomas G. Rozinski
Alan R. Levy
Attorneys for proposed *Amici Curiae*, Barbara Nitke and The National Coalition for Sexual Freedom

By: /S/ John F. Wirenius
John F. Wirenius,
Counsel for proposed *Amici Curiae*

Law Offices of John F. Wirenius,
52 Broadway, 9th Floor
New York, New York 10004
(212) 533-6300 x 138

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John F. Wirenius
Thomas G. Rozinski
Alan R. Levy
Attorneys for proposed *Amici Curiae*, Barbara Nitke and The National Coalition for Sexual Freedom

Law Offices of John F. Wirenius,
52 Broadway, 9th Floor
New York, New York 10004
(212) 533-6300 x 138

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PRELIMINARY STATEMENT

Barbara Nitke ("Nitke") and the National Coalition for Sexual Freedom ("NCSF") (collectively, the "Amici") respectfully submit this brief *amicus curiae* in support of Defendants-Appellees Extreme Associates, Inc., Robert Zicari (a/k/a "Rob Black") and Janet Romano (a/k/a "Lizzie Borden") (collectively, "Defendants") and affirmance of the District Court. Defendants have been charged with nine counts of violating the federal obscenity statutes by disseminating obscene materials via the Internet and the United States mails, and one count of conspiracy from the same conduct as that underlaying the main charges. *See United States v. Extreme Associates, Inc.*, 352 F. Supp. 2d 578, 580 (W.D. Pa. 2005). On January 20, 2005, the District Court (Lancaster, J.) dismissed the indictment *in toto*. *See Id.* at 595-596. The United States (the "Government") timely filed its Notice of Appeal.

Amici fully join in the arguments advanced in support of the judgment below. Additionally, Amici suggest for this Court's consideration further grounds in support of affirming the District Court's decision to dismiss the indictment, which this Court is free to rely upon even though not relied upon by the District Court. *See, e.g., Kabakjian v. United States*, 267 F.3d 208 (3d Cir. 2001); *In re Mushroom Transp. Co.*, 382 F.3d 325, 344 (3d Cir. 2004). Two such grounds are submitted for the Court's consideration: *First*, the rulings in *Lawrence v. Texas*,

539 U.S. 558 (2003) and *Stanley v. Georgia*, 394 U.S. 557 (1969), as relied upon by the District Court, undermine the constitutional underpinnings of employing a majoritarian definition of "offensiveness" in regulating even low-value speech, such as obscenity. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Saxe v. State College Area School Dist.*, 240 F.3d 200 (3d Cir. 2001). *Second*, the counts of the indictment charging the Defendants with disseminating obscene materials via the Internet independently violate the First Amendment by permitting the Government to apply the most restrictive community standard in the Nation to the Internet as a whole.

Several of the statutes under which the Defendants were charged were amended by the Communications Decency Act of 1996, Title V of the Telecommunications Act of 1996, Act of Feb. 8, 1996, Pub. L. No. 104-104, Title V, Subtitle C §561, 110 Stat. 56 (the "CDA"). The CDA proscribes dissemination of obscene materials via the Internet by amending sections of the federal criminal code relating to obscenity to extend their reach to include dissemination by means of "interactive computer service" [§507(a) (amending 18 U.S.C. §1462, "Importation or Transportation"); §507(b) (amending 18 U.S.C. §1465 (Transportation for Purposes of Sale and Distribution)].

By allowing the location from which any visitors, including Government agents, can download materials to serve as a venue for prosecution, the obscenity

statutes unconstitutionally apply in a mechanistic, cookie-cutter way obscenity precedents arising in physically-sited media, well situated for a geographic community analysis, to a medium which is equally sited in and accessible from every jurisdiction, whether metropolis or hamlet. Absent the harms which the geographic interpretation of "local community standards" was created to address, the CDA transforms the local community standards from a preserver of diversity views to a destroyer of that diversity. This result has been aptly characterized by the Supreme Court as creating a content-based restriction of speech of unprecedented breadth. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 877-878 (1997); *see also Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002).

INTERESTS OF THE AMICI CURIAE

Amicus Curiae Barbara Nitke is a photographer and a member of the faculty of the School of Visual Arts in New York City. Her photographs depict adults engaged in a variety of sexual practices, including sadomasochism and fetishism. A selection of these photographs can be viewed on her website, www.barbaranitke.com. *See Nitke v. Ashcroft*, 253 F. Supp. 2d 587, 593 (S.D.N.Y. 2003). *Amicus Curiae* National Coalition for Sexual Freedom ("NCSF") is a not-for-profit corporation that acts as a national advocacy group on behalf of individuals who practice "alternative sexual expression," such as consensual dominance and submission. The members of NCSF maintain websites that contain erotic material. *Id.*

Amici have an interest in this case because the content of their websites places them at risk of prosecution under the Communications Decency Act, codified at 47 U.S.C. § 223(a)(1)(B), which prohibits obscene transmissions to minors by means of a telecommunications device, including the internet. *Nitke*, 253 F. Supp. 2d at 594. They challenged the constitutionality of this statute in a trial that took place in October 2004, and the decision of the three-judge panel of the Southern District of New York is pending. The statutes under which the instant Defendants are charged, 18 U.S.C. §§ 1461-62, 1465, are among those challenged in that action, and may be read to prohibit the transmission of materials that A*mici*

currently place on their websites or distribute over the Internet. Should the decision of the District Court for the Western District of Pennsylvania be reversed, A*mici* may face a risk of prosecution under these provisions. Furthermore, the decision of the court below casts further doubt on the constitutionality of the Communications Decency Act, since the basis for that court's decision would apply to all statutes regulating the dissemination of material deemed to be obscene. *See United States v. Extreme Associates, Inc.*, 352 F. Supp. 2d 578, 586-87 (W.D. Pa. 2005).

ARGUMENT

POINT I

The Obscenity Doctrine Impermissibly Targets Speech Which Challenges Majority Viewpoints

Obscenity is subject to criminal prosecution as one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942); Wirenius, John F., *First Amendment, First Principles: Verbal Acts and Freedom of Speech* at 73, 90-95 (2d ed. 2004). As the *Chaplinsky* Court set forth, "[t]hese include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words–those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.*[1] The reason undergirding the prohibition is that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* In reaffirming *Chaplinsky's* application to obscenity, the Court in *Roth v. United States*, 354 U.S. 476, 485

[1] The same year that the Court decided *Chaplinsky*, it added one more category of regulabe low-value speech: commercial speech. *Valentine v. Chestensen*, 316 U.S. 52 (1942).

(1957), concluded: "We hold that obscenity is not within the area of constitutionally protected speech or press."[2]

However, in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992), the Supreme Court scotched the notion that First Amendment principles have no applicability to obscenity because of the Court's past statements that "low value speech" is "not within the area of constitutionally protected speech" or simply that the "protection of the First Amendment does not extend to them":

> What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)--not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

505 U.S. at 383-384. (emphasis in original).

The Court in *R.A.V.* made clear that the First Amendment does not permit "censoring a particular literary theme." *Id*. at 384 (*discussing and quoting New York v. Ferber*, 458 U.S. 747, 763 (1982). In *R.A.V.*, the Court equated the

[2] In articulating the current definition of obscenity, in *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court did not provide any further basis for the regulation of obscenity, but merely reasserted the holdings of *Roth* and *Chaplinsky*. 413 U.S. at 20-21 (*quoting Roth and Chaplinsky*).

categories of lower value speech with sound trucks, broadcasting speech in residential neighborhoods, which has long been upheld as constitutional, and noting "as with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility -- or favoritism -- towards the underlying message expressed." *Id*. at 386.

In *Saxe v. State College Area School Dist.*, 240 F.3d 200 (3d Cir. 2001), this Court applied the principles of *R.A.V.* to a restriction on harassing speech (predicated on sexual orientation), and found that the lodestone of First Amendment jurisprudence applied: "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of content." 240 F.3d at 207 (*quoting R.A.V.*, 505 U.S. at 392). In short, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *Saxe*, 240 F.3d at 209 (*quoting Texas v. Johnson*, 491 U.S. 397, 413 (1989)). This is true even for so-called "lesser value" speech.

Despite this proscription, the Government advances as a primary interest in regulating obscenity "the right of the Nation and of the States to maintain a decent society." (Government Br. at 36, *quoting Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973). As subsequent decisions to *Miller* and *Paris* have shown, the

Government violates the strictures of the First Amendment when it regulates low-value speech for the paternalistic purpose of protecting the audience from speech which depicts conduct the Government seeks to cast as "immoral". *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512 (1996) (*overruling Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986)). As the Court held in *44 Liquormart*, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." 517 U.S. at 503.

The *Posadas* Court had accepted the argument that the police power of the Government to ban an activity outright–in that case, casino gambling–allowed it to ban truthful, nonmisleading advertisement, lesser value speech, directed at Puerto Rico residents. The Court in *44 Liquormart* found that holding to be at odds with the First Amendment:

> The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.

517 U.S. at 512; *see also Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 193-194 (1999) (noting continued disapproval of rationale of

Posadas; "for the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct").

In the instant case, by contrast, the Government cannot ban the *activity* depicted by the Defendants, namely, consensual sex between adults. *Lawrence v. Texas*, 539 U.S. at 578-579 (homosexual sodomy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (heterosexual sex between unmarried adults). The Government nonetheless paradoxically asserts a right to ban *speech* concerning those same activities, despite the existence of the First Amendment's prohibition of regulating such speech. Even prior to *Lawrence,* the courts of this Circuit have noted that governmental regulation of speech premised on "public morality" is at best "problematic." *See, e.g., Marilyn Manson, Inc., v. New Jersey Sports and Exposition Authority*, 971 F. Supp. 875, 887 (D.N.J. 1997). As the line of cases from *R.A.V.* and *44 Liquormart* to *Lawrence* make clear, the Government's primary asserted interest in regulating obscenity is simply no longer legitimate. [3]

[3] The other interests asserted by the Government–protection of children, and of adults unwilling to themselves be exposed to "obscene" materials does not support a blanket ban; as the Supreme Court held in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 814 (2000), "[T]he objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *See also, Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251-252 (2002).

The governmental interest in regulating obscenity that was justified in the *Chaplinsky-Roth-Miller* line of cases is no longer a valid constitutional justification. This has happened to other *Chaplinsky* categories as well; several are now afforded either full protection, or considerably more protection than their original characterization would have warranted. *See, e.g., Johnson v. Campbell*, 332 F.3d 199, 212-213 (3rd Cir. 2003) (use of profanity not constitutionally regulable); *Cohen v. California*, 403 U.S. 15 (1971) (eliminating category of "profane" speech); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (expanding protections afforded allegedly libelous speech); *Central Hudson Gas & Elec. Co. v. Pub. Serv.Comm.*, 447 U.S. 557 (1980) (overruling *Valentine, supra*; expanding protection afforded commercial speech). In each instance, as the unfolding jurisprudence of the First Amendment recognized that the label of "low value" speech was based on a distrust of the marketplace of ideas, the Supreme Court has replaced censorship with constitutionally protected status.

The decision in *Lawrence*, read in light of the overruling of *Posadas*, also makes clear that the present definition of obscenity impermissibly "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *R.A.V.*, 505 U.S. at 387 (*quoting Simon & Schuster v. Crime Victims Bd. of New York*, 502 U.S. 105, 116 (1991); *see also, Legal Services Corp. v. Velasquez*, 531 U.S. 533, 548-549 (2001) ("[w]here private speech is involved,

even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest"). Under *Miller v. California*, the

> basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

413 U.S. 24 (internal quotation marks and citations omitted).

Moreover, subsequent decisions have made clear that, in the context of traditional so-called "bricks-and-mortar media," courts are to apply local community standards that are geographical in nature. *Ashcroft v. American Civil Liberties Union*, 535 U.S. at 576-577 & n. 7 (Thomas, J. for plurality), *citing Pope v. Illinois*, 481 U.S. 497, 500 (1987). Accordingly, *both* the appeal to prurient interest prong *and* the patently offensive prong of the definition are "question[s] of fact to be decided by a jury applying contemporary community standards." *Id.; Nitke*, 253 F. Supp. 2d at 600-601.

By asking the finder of fact to apply community standards of what is offensive, however, the crime of obscenity penalizes speakers that challenge majoritarian norms and mores of sexual behavior. As the courts have long held, speakers that are "controversial" or "divisive" are engaging in quintessential First

Amendment speech, and the hostile reaction of a community cannot be the basis for regulating their speech. *See Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District*, 386 F.3d 514, 527-528 (3rd Cir. 2004); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-135 (1992).

Just as the harassment policy involved in *Saxe* imposed an improper culture of "political correctness" upon dissidents whose beliefs were judged "offensive" by the vast majority of citizens, so to do the obscenity statutes impose a majoritarian code of reticence upon lifestyle dissidents whose expression, like that of Amici and of the Defendants may be deemed transgressive of notions of "decency." *See Saxe*, 240 F.3d at 206 ("when anti-discrimination laws are 'applied to ... harassment claims founded solely on verbal insults, pictorial or literary matter, the statutes impose content-based, viewpoint-discriminatory restrictions on speech'") (*quoting DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-597 (5th Cir. 1995) (editing marks omitted)).

Indeed, obscenity law has been applied in just such a way as to penalize with especial harshness the speech of those whose sexual tastes are not mainstream. As a matter of law, Congress has specifically targeted for more severe censure speech on sado-masochistic themes (like that of the Defendants and of *Amici*). The Federal Sentencing Guidelines establishing a penalty enhancement applicable to

"importing, mailing or transporting obscene matter," stating "[i]f the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase four levels." 18 U.S.C.S Appx. §2G3.1(b)(2)(2004). As the base level for the crime is level 10, (*id.* at 2G3.1(a)) and the enhancement for distribution to a minor is 5 levels (*id.* at 2G3.1(b)(C), the governmental disapproval of the subject matter of the depictions created by the Defendants, as well as by *Amici* is so severe that its dissemination to an adult is deemed less heinous than disseminating more mainstream obscene materials to a minor. *Id.*

Because such communitarian moral disapproval targeting non-traditional sexuality cannot, in the wake of *Lawrence*, *R.A.V.* and *44 Liquormart*, provide a legitimate basis for regulation of speech, this Court should uphold the District Court's finding that the federal obscenity statutes cannot be enforced as presently enacted.

POINT II

Allowing Defendants To Be Prosecuted In A Location Where Their Materials Were Downloaded Would Unconstitutionally Restrict Speech Throughout The United States

Counts five through ten of the indictment charge the Defendants with distributing obscene video clips over the Internet in violation of 18 U.S.C. § 1465. Government's Br. at 7. The basis for the prosecution was that Postal Inspectors in Western Pennsylvania purchased a membership to www.extremeassociates.com, and downloaded and viewed several of the available video clips. *Id.* at 6-7. The determination as to whether these video clips is obscene is made by applying the community standards of the area in which the prosecution took place. *See Miller v. California*, 413 U.S. 15, 24 (1973). However, if the Government is allowed to prosecute the Defendants under § 1465, this would open to the door to prosecutions in any area of the country where their video clips might be downloaded from the Internet. Defendants could only avoid the possibility of criminal prosecution by limiting the material on their websites to that which would be acceptable to the most conservative community standards in the country. This would effectively create a definition of obscenity that would unconstitutionally "restrict[] substantially more speech than is justified." *Ashcroft v. American Civil*

Liberties Union, 535 U.S. 564, 591 (Kennedy, J., concurring, citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

In arguing that obscene material lacks First Amendment protection, (Government Br. at 27), the Government neglects that material that may be obscene in one community is not necessarily obscene in others, where it is entitled to the protection of the First Amendment. More specifically, if material that would be considered obscene in Western Pennsylvania and is not obscene in New York, then New York viewers are constitutionally entitled to view that material. As the Supreme Court held in *Miller*, "[p]eople in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." 413 U.S. at 33; *Ashcroft*, 535 U.S. at 597 (Kennedy, J., concurring). The Government's argument ignores the presumption that speech allegedly obscene in any one community is nonetheless protected speech elsewhere, *see Miller*, 413 U.S. at 34, and yields the conclusion that because material may be found obscene in one community, it may be banned from the Internet *in toto*. The interpretation of § 1465 offered by the Government would turn *Miller* from a shield defending more conservative communities against obscenity into a sword denying access to viewers in more permissive communities.

This view neglects the fundamental distinction between media capable of being targeted to specific communities and the Internet, where distribution cannot

be so limited. Statutes criminalizing obscenity on the Internet are more analogous in their effect to the unconstitutional state statute at issue in *Smith v. California*, 361 U.S. 147, 152 (1959), which penalized booksellers who possessed books that contained obscene matter even if they had no knowledge of the contents. The Court held that if this statute were enforced,

> the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. . . The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.

Id. at 153-54. The statute under which the Government seeks to prosecute Defendants for distribution of video clips on the Internet, 18 U.S.C. § 1465, is like the statute found unconstitutional in *Smith*. Where a statute restricts a substantial amount of protected speech in the process of prohibiting unprotected speech, it is overbroad, and hence unconstitutional. *See Nitke*, 253 F. Supp. 2d at 604, *following Smith*, 361 U.S. at 153-54.

Last year, in *Ashcroft v. American Civil Liberties Union*, 124 S. Ct. 2783 (2004), the Supreme Court addressed the chilling effect caused by the fear of being prosecuted anywhere in the country for material placed on the Internet. In

continuing the injunction affirmed by this Court against enforcement of the Child Online Protection Act, 47 U.S. § 231, the Court noted, "Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech." *Ashcroft,* 124 S. Ct. at 2793. That chill will become real if this Court reverses the decision below because there is currently no effective way for a website operator to geographically limit who may visit the website. As this Court held in that case, "Web publishers are currently without the ability to control the geographic scope of the recipients of their communications." *American Civil Liberties Union v. Reno,* 217 F.3d 162, 180 (3d Cir. 2000) *reversed and remanded sub nom. American Civil Liberties Union v. Ashcroft,* 535 U.S. 564. There is no factual information in the district court's opinion that would allow this Court to make a contrary factual finding.

Furthermore, Amici are aware of no decisions holding that website operators currently have the technological means to prevent viewers in certain areas from gaining access over the Internet. Consequently, adopting the Government's interpretation of § 1465 allows the most conservative community to impose its standards on speech across the country, effectively censoring speech that is constitutionally protected in more permissive communities.

CONCLUSION

For the reasons expressed in this brief, the judgment below should be affirmed.

Dated: May 12, 2005

Respectfully Submitted,

John F. Wirenius
Thomas G. Rozinski
Alan R. Levy
Attorneys for proposed Amici Curiae, Barbara Nitke and The National Coalition for Sexual Freedom

/S/ John F. Wirenius
By: John F. Wirenius,
Counsel for proposed Amici Curiae

CERTIFICATION OF BAR MEMBERSHIP

I certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

/S/ John F. Wirenius
John F. Wirenius

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume volume limitation of Fed.R.App.P. 32(a)(7)(B) because the brief contains 3,772 words, excluding the sections of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word in Times New Roman 14 font.

3. The text of the electronic version of this brief is identical to the paper version.

4. A virus check was performed on both this e-mail and brief using McAfee Virus Scan.

/S/ John F. Wirenius
John F. Wirenius

CERTIFICATE OF SERVICE

I hereby certify that pursuant to LAR 31.0, ten (10) true and correct copies of this brief were filed with the clerk and two (2) copies were served by mail to the following:

Christine A. Sanner, Esq.
Assistant U.S. Attorney
Office of the United States Attorney
700 Grant Street
Suite 400
Pittsburgh, PA 15219

Jennifer M. Kinsley, Esq.
H. Lewis Sirkin, Esq.
Sirkin, Pinales, Schwartz
105 West Fourth Street
Suite 920
Cincinnati, OH 45202

/S/ John F. Wirenius
John F. Wirenius