1976 WL 194412 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Jerry Lee SMITH, Petitioner,
v.
UNITED STATES OF AMERICA, Respondent.

No. 75-1439.
October Term, 1976.
September 8, 1976.

Brief on Behalf of Association of American Publishers, Inc., American Booksellers Association, Inc., Council for Periodical Distributors Associations, International Periodical Distributors Association, Inc., Motion Picture Association of America, Inc. and Periodical and Book Association of America, Inc., as Amici Curiae, in Support of the Petitioner

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***1 Statement**

The Association of American Publishers, Inc., the American Booksellers Association, Inc., the Council for Periodical Distributors Associations, the International Periodical Distributors Association, Inc., the Motion Picture ***2** Association of America, Inc. and the Periodical and Book Association of America, Inc. (collectively referred to as *amici*) submit this joint brief, *amici curiae*, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of the petitioner, Jerry Lee Smith. This joint brief is submitted upon the written consent of both parties. [1]

The *Amici*

The Association of American Publishers, Inc. (AAP) is a trade association organized under the laws of the State of New York. It is the major national association of publishers of general books, textbooks and educational materials in the United States. Its approximately two hundred and ninety members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish in the aggregate the vast majority of all general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities throughout the United States.

The American Booksellers Association, Inc. (ABA) is a trade association organized under the laws of the State of New York. It is the major national association of booksellers throughout the United States. ABA's approximately ***3** five thousand members consist of chain operations, private bookstores, department store book departments and university bookstores.

The Council for Periodical Distributors Associations is an Illinois not-for-profit corporation. It is the national trade association for over five hundred independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state in the United States.

The International Periodical Distributors Association, Inc. is a trade association organized under the laws of the State of New York. It is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Motion Picture Association of America, Inc. is a trade association whose membership comprises companies which are among the largest producers and/or distributors of motion pictures in the United States.

The Periodical and Book Association of America, Inc. is a New York not-for-profit association of publishers of magazines and paperback books who share a common interest in the sale of their products through independent wholesaler distribution channels throughout the United States.

***4 Interests of the Amici**

This case involves a federal criminal prosecution for the mailing of allegedly obscene materials in violation of 18 U.S.C. §1461 (1970). The allegedly illegal acts transpired entirely within a single state (Iowa) whose state law - which preempts local option - presently permits dissemination of such materials to consenting adults. [2] Petitioner was nonetheless convicted in a federal court on the theory that the federal jury could, if it so chose, apply its own view of the applicable community standard, even if that view resulted in a verdict that would not have been permitted under Iowa's preemptive statute. Important and unresolved issues are therefore raised concerning the respective federal and state law enforcement roles in such circumstances under *Miller v. California*, 413 U.S. 15 (1973), and its progeny. [3]

Amici's members publish, produce, distribute and sell books, magazines, motion pictures and other related materials which are distributed and sold within each of the fifty states. Yet, it is the rare book, periodical or film that does not also move through the mails or touch upon interstate ***5** or foreign commerce. *Amici* thus have a very substantial interest in the relation between federal and state obscenity laws and the standards that may be applied to materials over which the federal government and the states may have concurrent jurisdiction. [4]

Amici's concern over government suppression of sexually-frank expression is neither recent nor casual. Their members too often find themselves faced with federal, state or local censorship which, *amici* believe, exceeds the constitutional limits of governmental action and abridges the freedom of speech and of the press. Even when *amici's* members have not been subjected to coercive legal action, the ever-changing and often inscrutable standards for determining the parameters of First Amendment protection in this area have subjected them to the more subtle pressures that lead to self-censorship - a result equally inimical to free expression.

Consequently, *amici* bring to this case a profound and also very practical belief in the need carefully to preserve First Amendment values. It is from this perspective that *amici* have concluded - and have so indicated to this Court in previous *amicus* submissionsithat - the *Miller* line of cases fails to strike a proper balance between free expression ***6** and efforts to regulate or suppress sexually-oriented materials. [5]

However, it is unnecessary here to reargue the minimum constitutional standards governing censorship of sexually-explicit materials that this Court established in *Miller.* For it is within those standards that *amici* urge reversal of the judgment of the courts below.

Thus, *amici* respectfully submit, the judgment below runs squarely against both the letter and spirit of the ***7** *Miller* line of cases; affirmance would constitute an unjustifiable - and unnecessary - disavowal of the federalist principles therein enunciated (Point I). Moreover, affirmance would negate the considered legislative judgment of Iowa as well as a substantial and growing

number of other states that have found it appropriate to provide a greater standard of protection to sexually-explicit expression than this Court has so far held to be constitutionally required (Point II).

ARGUMENT

I

Federal nullification of Iowa's permissive legislative action is inconsistent with the federalist principles enunciated in *Miller v. California* and *Hamling v. United States* and is not justified by any congressional assertion of interest in controlling the standards of obscenity.

Amici respectfully suggest that it would be paradoxical indeed, in light of this Court's recent rulings, for the Court here to affirm the judgment below. Such a ruling would permit federal prosecutors and federal juries to circumvent - in affect to "nullify" - permissive state laws by applying potentially more restrictive (albeit undefined) federal standards of obscenity. This result would represent a disavowal of the federalist principles enunciated by the Court in *Miller, Hamling* and their companion cases. [6] Since Iowa's laws are well within the constitutional standards established by this Court in *Miller* and since, moreover, Iowa's legislation does not conflict with any expressed ***8** congressional interest in controlling the standards of obscenity, such a disavowal is totally unwarranted and inappropriate.

A. Federal nullification is inconsistent with the local standards approach of *Miller* and its progeny.

It has long been recognized that the federal legislative interest in the suppression or regulation of obscenity is a limited one. Mr. Justice Harlan, in discussing the proper interpretation of §1461, noted in *Roth v. United States,* 354 U.S. 476 (1957), that: "[T]he interests which obscenity statutes purportedly protect are primarily entrusted to the care, not of the Federal Government, but of the States. Congress has no substantive power over sexual morality. Such powers as the Federal Government has in this field are but incidental to its other powers, here the postal power, and are not of the same nature as those possessed by the States, which bear more direct responsibility for the protection of the local moral fabric." (concurring and dissenting opinion) *Id.* at 504. [7]

For similar reasons, in *Miller v. United States,* 413 U.S. 15 (1973), this Court declined to deprive the states of their traditional power to regulate obscenity, stating:
"Nor should we remedy 'tension between states and federal courts' by arbitrarily depriving the States ***9** of a power [to regulate obscenity] reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day." *Id.* at 32.

Consistent with this viewpoint, in *Hamling v. United States,* 418 U.S. 87 (1974), this Court engrafted *Miller's* standards onto the provisions of 18 U.S.C. §1461. Once again, the holding of *Hamling* - that state or local standards will be used to define the contours of federal law - necessarily suggests that this Court considered federal statutory interests to he confined to protecting whatever the standards of the state or local community might be. [8]

Miller and its progeny consistently reiterate what the Court has considered to be the important *state* interests involved in the regulation of obscenity. These are said to include the traditional local police power over community environment, local commerce and public safety, *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 57-58 (1973), and the historic local power generally to deal with obscenity, *Miller v. California, supra,* 413 U.S. at 29. On the other hand, the Court's failure to advert to any similar *federal* interests strongly suggests the impropriety of any effort to override state legislation, at least within minimum constitutional constraints, by the imposition of inconsistent federal *statutory* standards.

***10** Finally, it is noteworthy that *Miller* opted for local rather than national standards in part to avoid precisely the result obtained in the courts below. This Court there declined to adopt a rule which, it believed, would prevent a community from enacting a more permissive test than the hypothetical national standard, noting: [9]

"The use of 'national' standards … necessarily implies that materials found tolerable in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable." 413 U.S. at 32 n.13.

In light of the foregoing, at least where solely *intrastate* acts are involved and where no out-of-state interests are implicated, to permit federal nullification of the permissive policy expressed by the legislature of the State of Iowa would represent an unwarranted usurpation of decisionmaking which *Miller* and *Hamling* suggest is best left, within permissible constitutional limits, to the states themselves. [10]

***11** In sum, *amici* respectfully submit that by failing to give heed to the legislative judgment of the State of Iowa here, the courts below have ignored the unmistakable import of this Court's recent rulings. The decisions below have improperly nullified what must be considered under *Miller* to be a valid exercise of state power and should therefore be reversed.

B. Congress has asserted no independent federal interest in controlling the standards of obscenity.

The Court's emphasis in *Miller* and *Hamling* upon the importance of state and local interests in the control of obscenity is reinforced by the historic absence of any congressional assertion of an independent federal legislative interest in controlling the standards of obscenity to be applied to federal prosecutions. [11]

In enacting the federal obscenity laws, Congress provided neither a definition of obscenity nor an indication of how the constitutionally-required determination of "offense" to the contemporary community should be made. The pertinent federal laws - which have not been substantially ***12** revised since they were first introduced in the nineteenth century - assert no clear and manifest federal interests, but are merely the federal statutory embodiments of the minimum constitutional standards defined by this Court. Such vitality as they retain exists only by virtue of constant reinterpretation by this Court, most recently in *United States v. 12 200-Ft. Reels of Film,* 413 U.S. 123 (1973); *United States v. Orito,* 413 U.S. 139 (1973); and *Hamling v. United States,* 418 U.S. 87 (1974).

In short, there is presented here neither a manifest congressional intention to occupy the field nor any implicit conflict between federal and state statutory interests which would justify nullifying - in effect "preempting" - the permissive Iowa legislative action. *See Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 141-42 (1963); *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). *Cf. Goldstein v. California,* 412 U.S. 546 (1973).

II

A separate standard for federal prosecutions would be destructive of important State legislative initiatives.

Miller v. California, 413 U.S. 15 (1973), mandated state initiatives - either legislative or judicial - to bring state obscenity laws into conformity with the minimum constitutional standards there defined. *Id.* at 24 and n.6. In so ruling, the Court did not preclude states from exceeding these minimum constitutional requirements by narrowing the scope of permissible censorship or, for that matter, eliminating all controls ou obscenity.

***13** Thus, in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973), decided on the same day as *Miller*, the Court stated, per Chief Justice Burger:

"[T]he States, of course, may follow … a 'laissez faire' policy and drop all controls on commercialized obscenity, if that is what they prefer.…" *Id.* at 64. [12]

Indeed, as earlier noted, this Court's view that the states should be free to adopt more liberal standards was one reason cited in *Miller* for the rejection of a national standard of obscenity. [13]

As detailed below, a significant number of states have found it appropriate as a matter of *legislative* choice to provide in various ways a greater standard of protection for sexually-explicit expression than this Court has so far held is *constitutionally* required.

Thus, while no state has eliminated all restrictions on the commercial sale or dissemination of sexually-explicit ***14** materials, several states - including Iowa - have enacted reforms that either eliminate censorship of materials for consenting adults or otherwise go beyond *Miller's* imprecise constitutional standards to assure greater clarity and provide procedural safeguards in the application of state obscenity laws.

Amici favor such legislative initiatives. In varying degrees these reforms hold out the promise of ameliorating the vagueness, overbreadth and inconsistency *amici* believe inhere in the *Miller* standards.

There follows below an illustrative listing of some of the more significant policies which have been adopted among the several states as part of their determination to provide greater protection to sexually-oriented expression. [14]

1. Nonprohibition of obscenity for willing adults [15]

At present, some *eight* states have opted, as a matter of legislative preference, generally to adhere to the view that ***15** no outright prohibition upon the dissemination of sexually-explicit materials to consenting adults need be adopted. [16] In so doing they have, in effect, chosen to approach the obscenity problem in the manner advocated, since *Miller*, by Mr. Justice Brennan:

"that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 113 (1973) (Brennan, J. dissenting - joined by Justices Marshall and Stewart).

Those states which have opted not to suppress the availability of such materials to consenting adults are:
Alaska, *Alaska Stat.* §§11.40.160-11.40.180 (Cum. Supp. 1974). [17]

Colorado, *Colo. Rev. Stat. Ann.* §§18-7-101-18-7-106; 18-7-401 and 402; 31-15-401 (1976). [18]

Iowa, *Iowa Code Ann.* §§725.1 *et seq.* (Cum. Supp. 1975). [19]

Montana, *Mont. Rev. Codes Ann.* §94-8-110 (Spec. Crim. Code Supp. 1976). [20]

***16** New Mexico, *N.M. Stat. Ann.* §§40-50-1-40-50-8 (Supp. 1975).
South Dakota, *S.D. Compiled Laws Ann.* §§22-24-28 *et seq.* (Supp. 1976).

Vermont, *Vt. Stat. Ann.* tit. 13, §§2801-2807 (Supp. 1975).

West Virginia, *W. Va. Code Ann.* §§61-8A-1-61-8A-7 (Cum. Supp. 1975).

2. Statewide standards

In *Jenkins v. Georgia*, 418 U.S. 153 (1974), this Court held that a state may, consistently with *Miller*, define the geographic community standard applicable to state obscenity cases. *Id.* at 157. *Seventeen* states have accordingly adopted *statewide* standards which may lessen the inconsistency and confusion inevitable in the application of literally thousands of potentially divergent local standards. Ten states have so acted by legislation and seven by judicial decision.

(i) Legislation:

Arizona, *Ariz. Rev. Stat. Ann.* §13-531.01 (Cum. Supp. 1975).
Connecticut, *Conn. Gen. Stat. Ann.* §53(a)-193(a) (Supp. 1976).

Massachusetts, *Mass. Ann. Laws* ch. 272, §31 (Cum. Supp. 1975).

North Carolina, *N.C. Gen. Stat.* §14-190.1(b) (2) (Cum. Supp. 1975).

North Dakota, *N.D. Cnt. Code* §12.1-27.1-.01 (4) (1976).

Oregon, *Ore. Rev. Stat.* §167.087(2)(b) (1975).

South Dakota, *S.D. Compiled Laws Ann.* §22-24-27(1) (Supp. 1976).

Tennessee, *Tenn. Code Ann.* §39-3010(G)(1974).

***17** Vermont, *Vt. Stat. Ann.* tit. 13, §2801(6)(B)(Cum. Supp. 1975).

West Virginia, *W. Va. Code Ann.* §61-8A-1(7) (Cum. Supp. 1975).

(ii) Judicial Decision:

Alabama, *Pierce v. State*, 292 Ala. 473, 296 S.2d 218 (1974).
Georgia, *Slaton v. Paris Adult Theatre I*, 231 Geo. 312, 201 S.E. 2d 456 (1973).

Illinois, *State v. Ridens*, 59 Ill. 2d 362, 321 N.E. 2d 264 (1974).

New York, *Heller v. State*, 33 N.Y. 2d 314, 307 N.E. 2d 805 (1973).

Oklahoma, *McCrary v. State*, 533 P.2d 629 (1974).

Wisconsin, *Court v. State*, 63 Wisc. 2d 570, 217 N.W. 2d 676 (1974).

Washington, *J.R. Distributors, Inc. v. State*, 82 Wash. 2d 584, 512 P.2d 1049 (1973).

3. State preemption of local standards

Like the adoption of statewide standards, a state's decision to preempt concurrent local authority to legislate in the obscenity field also tends to ameliorate inconsistency by assuring statewide uniformity as to both regulatory schemes and standards.

Nine states have, to a greater or lesser degree, preempted local power over obscenity. [21] Those states are:

Colorado, *Colo. Rev. Stat. Ann.* §18-7-101 (1976) [22]

***18** Idaho, *Idaho Code* §18-4113 (Cum. Supp. 1975).
Indiana, *Ind. Code* §§35-30-10.1-8 and 35-30-11.1-7 (*Ind. Ann. Stat.* §§10-2818 and 10-837, Burns, 1975).

Iowa, *Iowa Code Ann.* §725.9 (Cum. Supp. 1975).

Nebraska, *Neb. Rev. Stat.* §28-926.33 (Cum. Supp. 1974).

New Mexico, *N. M. Stat. Ann.* §40-50-1 (Supp. 1975). [23]

North Dakota, *N. D. Cnt. Code* §12.1-27.1-12 (1976).
Oregon, *Ore. Rev. Stat.* §167.100 (1975).

Vermont, *Vt. Stat. Ann.* tit. 13, §2808 (Cum. Supp. 1975). [24]

4. Procedural safeguards

In an effort to avoid the inevitable uncertainty implicit in subjective judgments as to whether particular materials are obscene or not - and the consequent "chill" of protected expression - a total of *sixteen* states presently adopt one or another of several similar procedural safeguards for civil determination of the obscenity *vel non* of materials prior to the invocation of criminal sanctions. [25]

***19** This Court has recognized the efficacy of such prior civil proceedings, stating:

> "*[S]uch a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments,* as to whether the materials are unprotected by the First Amendment and subject to state regulation." *Paris Adult Theatre I v. Slaton supra,* 413 U.S. at 55 (majority opinion of Burger, C.J.) (emphasis added). *Cf. McKinney v. Alabama,* - U.S. - , 96 S. Ct. 1189 (1976).

Seven states now require institution of "*mandatory*" prior civil or mandatory *in rem* proceedings and a finding of obscenity before a criminal action can be instituted. [26]

Arkansas, *Ark. Stat. Ann.* §§41-3563-41-3576 (1976). [27]

Louisiana, *La. Rev. Stat. Ann.* §14:106 (F)(1) (1974). [28]

Massachusetts, *Mass. Ann. Laws* ch. 272, §28C (Cum. Supp. 1975). [29]

North Carolina, *N. C. Gen Stat.* §14-190.2 (Cum. Supp. 1975).
North Dakota, *N. D. Cnt. Code* §§12.1-27.1-05-12.1-27.1-08 (1976).

***20** Vermont, *Vt. Stat. Ann.* tit. 13, §2809 (Cum. Supp. 1975). [30]

Wisconsin, *Wis. Stat. Ann.* §944.25(2)-(7) (Supp. 1975). [31]

Nine additional states have a variety of provisions generally creating procedures whereby the obscenity *vel non* of materials may be determined outside of criminal proceedings in a "*non-mandatory*" civil or *in rem* proceeding: [32]

Alabama, *Ala. Code* tit. 14, §374 (Supp. 1973). [33]

Iowa, *Iowa Code Ann.* §725.4 (Supp. 1976).
Nebraska, *Neb. Rev. Stat.* §28-926.20 (Cum. Supp. 1974).

Nevada, *Nev. Rev. Stat.* §201.250 (4) (1973).

Ohio, *Ohio Rev. Code Ann.* §2903.15; §2907.36 (1974).

Oklahoma, *Okla. Stat. Ann.* tit. 21, §1040.14-16 (Cum. Supp. 1976). [34]

Rhode. Island, *R.I. Gen. Laws Ann.* §§11.31.1-(1)-(12) (1970).
Virginia, *Va. Ann.* §18.2-384 (1975). [35]

***21** Washington, *Wash. Rev. Code Ann.* §9.68.060 (Supp. 1975). [36]

These many salutary legislative initiatives would be for naught if, as the courts below have apparently concluded, they could be circumvented by federal prosecution of activities now permitted within those states. Certainly, the intractable problems which this Court well knows inhere in any program of censorship should not be allowed to be exacerbated by a system that, on the one hand, encourages the local determination of standards of regulation but that, on the other hand, gives the federal prosecutor and, ultimately, the federal juror a mandate to nullify those standards.

Conclusion

The exercise of federal power in this case to create a standard of obscenity separate from, and more restrictive than, applicable state standards inevitably operates to supplant the judgment of the people of Iowa and the considered actions of their state legislators. *Amici* respectfully urge the Court to reverse the decision below, rejecting such federal nullification and according the states sufficient leeway to decide for themselves, within proper constitutional constraints, the extent to which regulation of sexually-oriented materials is in the interests of their citizens and whether they shall adopt standards and procedural safeguards ***22** that exceed the minimum protections found to be constitutionally required in *Miller v. California.*

Footnotes

1 The originals of respondent's written consent, by the Solicitor General of the United States, and of petitioner's consent, by Kirkland & Ellis, Esqs., to the several *amici* are being filed herewith.

2 *See generally, Iowa Code Ann.* §§725.1 *et seq.* (Cum. Supp. 1975). In a recent general criminal code revision, the Iowa legislature readopted certain limited restrictions on dissemination to adults. But these amendments, which carry misdemeanor penalties only, are not effective until January 1, 1978. Iowa Senate File 85, §2804.

3 *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973); *Kaplan v. California,* 413 U.S. 115 (1973); *United States v. 22 200-Ft. Reels of Film,* 413 U.S. 123 (1973); *United States v. Orito,* 413 U.S. 139 (1973); *Hamling v. United States,* 418 U.S. 87 (1974); *Jenkins v. Georgia,* 418 U.S. 153 (1974).

4 The potential concurrent federal jurisdiction established by Congress is far-reaching. In addition to use of the mails, 18 U.S.C. §1461 - the statutory provision here in issue - federal jurisdiction extends to use of express companies and common-carriers, 18 U.S.C. §1462, interstate or foreign transportation by any other means, 18 U.S.C. §1465, and importation, 19 U.S.C. §1305(a). *See United States v. Orito,* 413 U.S. 139 (1973); *United States v. Sherpix, Inc.,* 512 F.2d 1361 (D.C. Cir. 1975); *United States v. 12 200-Ft. Reels of Film,* 413 U.S. 123 (1973).

5 The grounds for *amici's* disagreement with *Miller* have previously been expounded by most of them at length. *See, e.g.*, Brief of Association of American Publishers, Inc., *Amicus Curiae*, and Brief on Behalf of the Council for Periodical Distributors Associations, the International Periodical Distributors Association, Inc., and the Periodical and Book Association of America, Inc., *Amicus Curiae*, in *Jenkins v. Georgia*, No. 73-557 (October Term, 1973); Motion and Brief of Association of American Publishers, Inc., Council for Periodical Distributors Associations, International Periodical Distributors Association, Inc., Periodical and Book Association of America, Inc., American Booksellers Association, Inc., and National Association of College Stores, Inc., *Amicus Curiae*, in Support of the Petition for Rehearing in *Kaplan v. California.*, No. 71-1422 (October Term, 1971).

Those briefs noted, *inter alia*, that although *Miller* holds that censorship must be limited to patently offensive "hard core pornography." the test it establishes - perhaps inevitably - has failed to achieve this limited goal. Many works traditionally afforded First Amendment protection have been prosecuted, have been threatened with prosecution, or have otherwise fallen prey to the chilling effects of *Miller's* vague standards and overbroad application. Equally unfortunately, the Court's sanction of even this limited form of censorship has deeply influenced the public's willingness to accept censorship of all controversial expression even when obscenity is not at issue. Finally, in a field where uniform constitutional principles should be paramount, *Miller's* reliance on "local standards" fosters inconsistency, insularity and prejudice, making it increasingly difficult to disseminate books, magazines and films intended for a nationwide audience without steering far clear of the hazy line between protected speech and obscenity. Indeed, the rulings by the courts below in the instant case demonstrate graphically *Miller's* potential for confusion and lack of predictability.

6 *Miller v. California,* 413 U.S. 15 (1973); *Hamling v. United States,* 418 U.S. 87 (1974). *See also* cases cited in n.3, *supra.*

7 Mr. Justice Harlan apparently drew from this analysis the further conclusion - one which has never been adopted by the Court - that the *constitutional* constraints applicable to the states through the Due Process Clause of the Fourteenth Amendment might be of a different and less restrictive nature than those applicable to the federal government under the First Amendment. *Amici's* position here that federal prosecutors ought not be permitted to override permissive state legislation should not be viewed as indicating assent to such a proposition.

8 It is worth noting that *Hamling* involved application of §1461 to *interstate* dissemination, as the allegedly obscene materials there at issue were sent to "postal patrons *in various parts of the country.*" 418 U.S. at 94 (emphasis added). The instant case, involving solely *intrastate* acts, is therefore an even clearer case for declining to preempt local or state standards by imposing an inconsistent federal standard.

9 *Sec* Point II, *infra.* It should be noted that *amici* continue to believe for the reasons stated in n.5, *supra*, among others, that it would be preferable - when vital constitutional rights are involved - to apply uniform nationwide standards rather than local standards.

10 It is undisputed that this case involves solely *intrastate* transactions. Although the question of *interstate* transactions is therefore not squarely presented and, consequently, the Court need not here decide the issue, *amici* believe that the arguments made in this brief would be generally applicable as well to interstate dissemination. *Amici* recognize that an additional question potentially raised in the case of interstate dissemination is that of the choice of law to be applied in the determination of obscenity. On that issue two recent cases suggest, in general accord with the principles advocated here, that the appropriate local standard should not be circumvented solely because of the fortuity of federal venue. *United States v. Various Articles of Obscene Merchandise,* Schedule No. 1303, 75 Civ. 4691 (S.D.N.Y. August 25, 1976) (Frankel. D.J.); *United States v. Elkins,* 396 F. Supp. 314 (C.D. Cal. 1975). *See also* Schauer, *Obscenity and Conflict of Laws,* 77 W. VA. L. Rev. 377 (1975).

11 *Amici* express no opinion concerning - nor need the Court here decide - the precise reach of federal power to preempt state obscenity law by a "clear and manifest" intention to occupy the field. *Cf. National League of Cities v. Usery,* - U.S. - , 96 S. Ct. 2465 (1976). It is only suggested that absent such an intent, the state and local values that have been previously viewed by this Court as paramount in the obscenity field ought to be honored, subject to constitutional limits. However, respect for permissive state legislative action in these circumstances should not be read as in any way suggesting that *amici* now believe either that *Miller* was correctly decided or that a uniform federal constitutional standard - or for that matter a preemptive federal statutory standard more deferential to First Amendment principles - ought not be adopted.

12 In support of this proposition the Court referred to Mr. Justice White's observation, speaking for the Court in *United States v. Reidel,* 402 U.S. 351 (1971):

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential. *This may prove to be the desirable and eventual legislative course. But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances.*" *Id.* at 357 (emphasis added).

13 *See* Point I, *supra,* at 10.

14 The data in the following sections was prepared in cooperation with the Media Coalition, Inc., an organization that concerns itself with the impact of obscenity legislation on the exercise of First Amendment freedoms, and whose affiliated groups are all involved with book, magazine and film production and distribution. *Amici* are all members of the Media Coalition.
The data set forth represent, to the best of *amici's* knowledge, an accurate portrayal of the state of legislative developments in the obscenity field in the areas discussed. However, because these developments are diffuse and often poorly or slowly reported, it is possible that slight inaccuracies may inadvertently be reflected in this summary.

15 *Amici* have not attempted in this subsection to catalogue the various regulatory measures passed by a number of states to protect unconsenting adults from offensive "display" or "thrusting" of sexually-explicit materials.

16 Of these, four states had adopted such provisions before *Miller* was decided (Alaska, Montana, New Mexico and Vermont); the other four have adopted them since *Miller*.

17 The only extant Alaska obscenity provisions regulate the distribution, exhibition or sale of "objectionable" *comic books* to any "person," *id.* §11.40.160, although it would seem evident that the central targets of the prohibition are materials likely to be distributed to minors.

18 In Colorado the adult exemption does not apply to "sadomasochistic" materials. *Id.* §18-7-104.

19 *But see n. 2, supra,* for certain recent, restrictive modifications of Iowa law, effective January 1, 1978.

20 In Montana the adult exemption does not apply to "pandering." *Id.* §94-8-110(1)(f).

21 Of these, three preempted local power prior to *Miller* (Idaho, Oregon and New Mexico); the remaining opted for state preemption after *Miller*.

22 Colorado's obscenity law preempts local standards concerning minors, sadomasochistic material, public display and the "printed word." *Id.* Colorado does, however, provide that localities may adopt obscenity provisions applicable to adults so long as they are not inconsistent with the state's ininors law.

23 New Mexico's obscenity law applies only to dissemination to minors. Its preemption clause is likewise limited to local provisions concerning minors.

24 Vermont's obscenity law applies only to dissemination to minors. Its preemption clause is likewise limited to local provisions concerning minors.

25 Still other safeguards are provided in those states that have incorporated somewhat more narrowly-defined standards for obscenity than the "examples" and "basic guidelines" suggested in *Miller v. California, supra,* 413 U.S. at 24-25. For example, Connecticut has retained the "utterly without redeeming social value" test. *Conn. Gen. Stat. Ann.* §53a-193(a) (Supp. 1976). *See Roth v. United States,* 354 U.S. 476 (1957); *Memoirs v. Massachusetts,* 383 U.S. 413 (1966). Indiana and North Carolina have exempted "simulated" sex acts from the reach of their obscenity laws. *Ind. Code* §35-30-10.1-1(d) (1975); *N.C. Gen. Stat.* §14-190.1(c)(1) (Cum. Supp. 1975). A number of other states have attempted to devise clearer and more specific definitions of "simulated" sex acts. *See, e.g., Mass. Ann. Laws* ch. 272, §31 (Cum. Supp. 1975).

26 Of these, three adopted such mandatory procedural safeguards before *Miller* (Arkansas, Massachusetts and Wisconsin); the other four have adopted them since *Miller*. An eighth state, Mississippi, also enacted such mandatory safeguards. *See Miss. Code Ann.*

§§91-31-5 *et seq.* (1972). However, the constitutionality of Mississippi's entire obscenity statute has been placed into doubt by a recent decision of that state's highest court, holding one section of the law - pertaining to moving pictures - unconstitutional. *See ABC Interstate Theatres, Inc. v. Mississippi,* No. 48,583 (Supreme Court of Mississippi January 1976).

27 Arkansas' prior *in rem* proceedings apply onIy to "mailable matter." *Id.* §41-3566.

28 In Louisiana, the prior determination is not required as to certain "close-up depiction[s] of human genital organs so as to give the appearance of the consummation of ultimate sexual acts …." *Id.*

29 Massachusetts' prior *in rem* proceeding applies only to "books." *Id.*

30 Vermont's prior proceeding is mandatory only for "written matter in a book or other publication." Vermont also provides for a non-mandatory prior civil proceeding in other cases. *Id.* §2810.

31 The Wisconsin proceeding is applicable only to matter disseminated to minors.

32 Of these nine, eight adopted such non-mandatory prior civil proceedings before *Miller.* Only Iowa has adopted them since *Miller.* However, both Nebraska and Virginia readopted their non-mandatory procedures since *Miller.*

33 Alabama's proceeding applies only to "mailable matter."

34 The Oklahoma provision applies only to "mailable matter."

35 The Virginia proceeding is available only with regard to "books."

36 The Washington proceeding applies only to "erotic materials" for minors.

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