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BENCH MEMORANDUM

INTERNET DEFAMATION: JURISDICTION IN CYBERSPACE AND THE PUBLIC FIGURE DOCTRINE

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THE FOURTEENTH ANNUAL JOHN MARSHALL LAW SCHOOL
NATIONAL MOOT COURT COMPETITION IN INFORMATION
TECHNOLOGY AND PRIVACY LAW
No. 95-241
IN THE SUPREME COURT
OF THE
STATE OF MARSHALL

JENNIFER FETTY,	)
	)
Plaintiff,	)
	)
v.	)
	)
ROBERT JACOBS,	)
Defendant.	)

I. RECORD ON APPEAL

OPINION

WOBURT, B., PRESIDING JUSTICE

This is an interlocutory[1] appeal from orders of the Circuit Court of

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1. In Marshall, appeals may be immediately taken on certain issues in a case. Such review requires circuit and appellate court certification. Normally, certification is granted

Lakeview County denying defendant's motions to dismiss the plaintiff's defamation action. The claim was filed in that court on January 5, 1995. Defendant filed an appearance specifically to challenge jurisdiction. That motion was denied and he subsequently filed a motion to dismiss plaintiff's cause of action for insufficiency of the complaint. Circuit Judge Paul Hanson held that (1) the defendant was subject to personal jurisdiction in the State of Marshall under the Marshall long-arm statute; and (2) the plaintiff is not a public figure merely by virtue of communicating through the Internet.[2] The plaintiff's petition in the defamation action alleged the following facts relevant to this appeal:

Defendant, Robert Jacobs is a computer salesman who resides in Addison, Illinois. He is an active computer user who subscribes to an electronic communications service which provides access to the Internet.

Plaintiff, Jennifer Fetty is a cashier of a local convenience store who resides in Peoria, Illinois. She is a computer hobbyist who also has access to the Internet through an online service provider.

During the months of November and December, 1993, both Fetty and Jacobs were part of a discussion group conversing on CanWeChat, a Bulletin Board Service, ("BBS") hosted by a sysop in Chicago, Illinois. The topic of discussion was abortion. The plaintiff, defendant, and others participating in the CanWeChat discussion group expressed their views on the subject. Jacobs allegedly supported the legality of abortion and the rights of women to choose to terminate pregnancy in accord with the standards of *Roe v. Wade*,[3] while Fetty expressed firm opposition to abortion on both religious and moral grounds.

On December 4, 1993, Jacobs and Fetty were logged onto CanWeChat with others, and continued to debate the abortion issue. At one point in the discussion, Jacobs posted the following message: "As for Fetty's opinions on this matter, I'm not going to let some woman who prostitutes herself dictate my standards of conduct or morality." David Bornmann, a resident of Crossroads, in the State of Marshall, was part of the CanWeChat discussion group at that time. Bornmann replied to the Jacobs message quoted above, stating: "I object to mean-spirited and slanderous personal accusations, and if Robert Jacobs can't be civil I suggest that he leave this discussion."

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where the issues involve questions where there is substantial ground for differences of opinion and where the issues involve controlling questions of law. Moreover, Marshall courts seek to advance the termination of the litigation as quickly as possible. In the present case, both Judge Hanson of the circuit court, and this court, certified the issues of personal jurisdiction and defective pleadings for immediate review.

2. The Court takes notice that Internet is an international electronic network easily available to the public by linking computers and transmitting information.

3. 410 U.S. 113 (1973), *modified,* Planned Parenthood of S.E. Penn. v. Casey, 505 U.S. 833 (1992).

Fetty's complaint alleged that Jacobs, out of spite and ill will, published a defamatory statement about her in Marshall, and elsewhere, which was reasonably understood as defamatory and which caused her injury in Marshall, and elsewhere. Such allegations satisfy the common law elements required in order for Fetty to establish a prima facie case for defamation in Marshall. Fetty requested damages in the amount of five hundred thousand dollars ($500,000.00). The statute of limitations[4] for a cause of action for defamation in Marshall is two years from the date the violation occurred.

Jacobs' motion to dismiss the complaint for lack of personal jurisdiction was based on the ground that he was not a domiciliary of the State of Marshall, nor had he visited the state or conducted any business in Marshall. Other than the facts set forth herein, the complaint alleged no other basis for the presence of either party in the State of Marshall. In the lower court, Fetty successfully argued that Jacobs is subject to jurisdiction under Marshall's long-arm statute for two reasons. First, the tort was committed in the State of Marshall. Second, injury was caused to Fetty, also in the State of Marshall.

The Marshall long-arm statute reads as follows:

MARSHALL REVISED STATUTES

MARSHALL LONG-ARM STATUTE
Chapter 48

I. PERSONAL JURISDICTION BY ACTS OF A NON-DOMICILIARY.

A. Courts may exercise personal jurisdiction over non-domiciliaries, their administrators or executors, as to courses of action which arise from conduct enumerated in this section, who in person or through an agent:

1) conduct or transact business within the state of Marshall;
2) commit a tortious act within the state of Marshall; or
3) commit a tortious act outside the state of Marshall which causes injury to persons or property within the state of Marshall, if he or she
   (a) regularly conducts or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from services rendered or goods consumed or used in the state of Marshall, or
   (b) expects or should reasonably expect his or her conduct to have consequences in the state of Marshall and derives substantial revenue from interstate or international commerce.

4. The statute of limitations in Illinois, for a defamation action, is one year from the time the violation accrued. 735 ILCS 5/13-201 (1992).

The procedures that Fetty undertook for perfecting service on Jacobs pursuant to the statute were proper, but Jacobs argued that the few messages he posted from Addison, Illinois, on the BBS located in Chicago, Illinois, and merely viewed in Marshall, did not satisfy the minimum contacts requirements of the due process clause of the United States Constitution.

Additionally, Jacobs asserted that Fetty's complaint is fatally defective in that as a limited public figure, she fails to allege that he acted with "actual malice" in publishing the statement, as required by the *New York Times v. Sullivan*,[5] and *Gertz v. Robert Welch, Inc.*,[6] cases.

Judge Hanson, properly taking the foregoing facts as true, held that Jacobs was subject to personal jurisdiction in the State of Marshall under the Marshall long-arm statute. Regarding the claim of insufficiency of the complaint, Judge Hanson held that, as a matter of law, Fetty was not a public figure under constitutional standards merely by virtue of her participation in a discussion over the Internet, and no other basis was urged.

Jacobs filed a timely interlocutory appeal with this court, certified to us by the Circuit Court of Lakeview County. Because this case is before this court on motions to dismiss, we accept as true for the purposes of the motions, the facts as set forth herein and we review *de novo* the questions of law. Both issues here are matters of first impression in this court.

II. DISCUSSION

I. WHETHER THE MARSHALL LONG-ARM STATUTE, MRS CH. 48 § I, PROPERLY AND CONSTITUTIONALLY SUBJECTS THE DEFENDANT TO PERSONAL JURISDICTION IN THE STATE OF MARSHALL.

In the present case, Jacobs asserts that he has no physical connection with the State of Marshall. This Court, however, finds that he is subject to personal jurisdiction under the Marshall long-arm statute because of his participation on the BBS which, regardless of his physical presence in Illinois, gave him virtual and legal presence in the State of Marshall. Jacobs' allegedly defamatory statement on the CanWeChat BBS was published in Marshall and thus the alleged tort was committed here as required under the long-arm statute.

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5. 376 U.S. 254 (1964).

6. 418 U.S. 323 (1974), *cert. denied*, 459 U.S. 1226 (1983).

II. WHETHER THE PLAINTIFF CONSTITUTES A PUBLIC FIGURE MERELY BY VIRTUE OF HER ACTIONS ON THE INTERNET.

Fetty is not a public figure merely because of her participation in a discussion of a controversial issue which was widely published on the Internet. No other basis was alleged in the complaint or other pleadings to support that status, as described in the *New York Times* and *Gertz* cases. Therefore, plaintiff has no burden of proving that the defendant posted the defamatory matter with the constitutional requirement of "actual malice."

CONCLUSION

In light of the foregoing discussion, this court affirms the orders denying defendant's motions to dismiss on all counts.

AFFIRMED.

III. ISSUES PRESENTED

A. WHETHER THE MARSHALL LONG-ARM STATUTE, MRS CH. 48 § I, PROPERLY AND CONSTITUTIONALLY SUBJECTS THE DEFENDANT TO PERSONAL JURISDICTION IN THE STATE OF MARSHALL.

B. WHETHER THE PLAINTIFF IS A PUBLIC FIGURE, AS REQUIRED BY CONSTITUTIONAL STANDARDS, BECAUSE OF HER PARTICIPATION IN A DISCUSSION OF A CONTROVERSIAL ISSUE WIDELY PUBLISHED ON THE INTERNET.

IV. ANALYSIS

A. ISSUE ONE - PERSONAL JURISDICTION

1. *Legal History*

i. Personal Jurisdiction

A court must have jurisdiction over the parties before they are obligated to comply with the orders of the court.[7] The United States Supreme Court addressed this specific issue in *International Shoe Co. v. Washington*.[8] In *International Shoe*, the defendant was a shoe manufacturer, incorporated in Delaware, with its principal place of business in St. Louis, Missouri.[9] The defendant's salesmen, who were located in the forum state, Washington, solicited orders from prospective buyers in

7. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).
8. *Id.*
9. *Id.* at 313.

Washington and transmitted the orders to the St. Louis office to be filled and shipped back.[10] The Supreme Court found that the continuous and systematic business activities of the defendant in Washington, resulting in many interstate sales, justified the exercise of personal jurisdiction there.[11] Furthermore, the Court held that a state court's exercise of personal jurisdiction satisfies the due process clause if the defendant had "certain minimum contacts with . . . [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[12]

In *McGee v. International Life Insurance Co.*,[13] the Supreme Court held that states could exercise personal jurisdiction over defendants based on a single contract with a state resident, provided that the contract had a substantial connection with the state.[14] In *McGee*, the Court upheld jurisdiction where an insurance company's only physical contact with California consisted of mailings to insure a California resident, and the receipt of premium checks for a period of two years.[15] Jurisdiction in *McGee* was found in part because the defendant *initiated* the contact with the forum state.[16]

Contrary to these holdings, in *Hanson v. Denckla*,[17] the United States Supreme Court stated that a court could not exercise jurisdiction over a defendant where there was no "act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State thus invoking the benefits and protections of its laws."[18] In *Hanson*, a Delaware resident established a trust with a Delaware company which had no activities in Florida; later she moved to Florida. Upon her death in Florida, a controversy arose and the Delaware trust company was named as a party in a suit filed in Florida.[19] The Supreme Court found that the Delaware company did not have the sufficient minimum contacts to subject it to jurisdiction in Florida.[20]

Twenty years later, in *Kulko v. Superior Court*,[21] a defendant father, and a resident of New York, challenged California's exercise of jurisdic-

10. *Id.* at 314.

11. *Id.* at 320.

12. *International Shoe*, 326 U.S. at 316 (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

13. 355 U.S. 220 (1957).

14. *Id.* at 223.

15. *Id.*

16. *Id.* at 221-222.

17. 357 U.S. 235 (1958).

18. *Id.* at 253 (citing *International Shoe*, 326 U.S. at 319).

19. *Id.* at 240.

20. *Id.* at 251-254.

21. 436 U.S. 84 (1978), *reh'g denied*, 438 U.S. 908 (1978).

tion where he had no personal physical contact with the state.[22] The parties, who had been husband and wife, entered into a separation agreement, in New York, where they were originally residents.[23] Later, the wife obtained a divorce in Haiti, and thereafter moved to California, where she brought an action to modify the child custody decree of the New York court that had granted the defendant custody during the school year.[24] The United States Supreme Court stated that jurisdiction based on the effects within a state that result from activity outside the state is proper only if it was commercial activity which affected forum state residents, or if it was wrongful activity which caused injury within the state.[25] Defendant's mere act of sending his child to California from New York to live with the mother, provided no basis for personal jurisdiction over the father.

In *World-Wide Volkswagen Corp. v. Woodson*,[26] the defendant car dealership sold a car to the plaintiff in New York.[27] Later, while driving in Oklahoma, the plaintiff's were in an accident where their car caught fire and caused serious injuries.[28] The plaintiff sued the dealership in Oklahoma. The Court found that the defendant did not seek or serve the Oklahoma market and concluded that "those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction," did not exist.[29] The Court stated that the foreseeability of contact which is relevant is "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being hailed into court there," not the foreseeability that a product may find its way into the forum state.[30]

In *Keeton v. Hustler*,[31] a resident of New York sued Hustler magazine for libel in New Hampshire, where defendant regularly distributed its magazine.[32] The plaintiff had virtually no connection with the state of New Hampshire, and was not well known there; in fact, he picked that forum because of New Hampshire's six-year statute of limitations for defamation claims.[33] The Supreme Court upheld jurisdiction because of defendant's New Hampshire contacts.[34]

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22. *Id.* at 88.
23. *Id.* at 86-7.
24. *Id.* at 87-88.
25. *Id.* at 96.
26. 444 U.S. 286 (1980).
27. *Id.* at 288.
28. *Id.*
29. *Id.* at 295.
30. *Id.* at 297.
31. 465 U.S. 770 (1984).
32. *Id.* at 772.
33. *Id.* at 773.
34. *Id.* at 781.

In *Calder v. Jones*,[35] Shirley Jones brought an action in California for libel against the National Enquirer, a Florida corporation. The Supreme Court rejected the defendant's free-speech arguments and held that the First Amendment does not require a special jurisdictional standard for libel cases.[36] The Court decided that analysis of First Amendment considerations would "needlessly complicate" the already difficult and fact-specific minimum contacts inquiry.[37] The article was written in Florida from information received from California via the phone.[38] However, California was the state where the Enquirer had its largest circulation and the defendant's acts were expressly aimed at California, so the defendant's could "reasonably have anticipated being haled into court there."[39]

Finally, in *Burger King Corp. v. Rudzewicz*,[40] a Florida-based franchisor sued a Michigan individual in Florida for breach of contract after they entered into a franchise agreement through interstate communication. The Supreme Court found that the defendant was properly subject to the Florida long-arm statute.[41] The Court evaluated whether the defendant purposefully established minimum contacts in the forum state to decide whether the defendant could reasonably anticipate or foresee that any actions he may take in connection with the franchise could lead to litigation in Florida.[42] The Court found that the defendant "reached out beyond Michigan" and negotiated the purchase of a long-term franchise with a Florida corporation.[43] The contract documents emphasized that operations were conducted and supervised from Florida, all notices and payments were to be sent to Florida, the agreements were made in and enforced from Florida, and all decision making authority vested in the Florida headquarters.[44] Consequently, because modern commercial life allows for the conducting of business and communications across state lines, the fact that the defendant never entered the forum state did not defeat jurisdiction. As long as efforts are "purposefully directed" at the residents of another state, the absence of physical contacts will not defeat jurisdiction.[45]

35. 465 U.S. 783 (1984).
36. *Id.* at 790.
37. *Id.*
38. *Id.* at 785-86.
39. *Id.* at 789.
40. 471 U.S. 462 (1985).
41. *Id.* at 478.
42. *Id.* at 480.
43. *Id.*
44. *Burger King*, 471 U.S. at 479-481.
45. *Id.* at 476.

ii. General v. Specific Jurisdiction

When assessing how much contact a defendant must have with a forum for the valid exercise of jurisdiction, the Court has divided the exercise of jurisdiction into two categories. A distinction between general and specific jurisdiction was articulated by the United States Supreme Court in *Helicopteros Nacionales de Colombia S.A. v. Hall*.[46]

Helicopteros involved a wrongful death suit brought in Texas based on a helicopter crash in Peru.[47] The plaintiffs and decedents were not Texas residents and the defendant was a Colombian corporation.[48] The defendant's challenge to jurisdiction was rejected by the Supreme Court of Texas.[49] The Supreme Court reversed, finding that the defendant's connections with Texas were not sufficient to allow a Texas court to assert jurisdiction.[50] All parties conceded that the claims against the defendant, arising from the aircraft accident in Peru, did not arise out of the defendant's activities within Texas and therefore, the Court could not exercise specific jurisdiction.[51] The Court analyzed the defendant's overall business contacts and concluded that they could not establish general jurisdiction.[52] Though the defendant's contacts with Texas consisted of accepting checks drawn on a Texas bank in payment for services, conducting one negotiation in Texas for a helicopter lease, purchasing helicopters and equipment, and sending employees to Texas for training, did not constitute doing business in Texas sufficient for general jurisdiction.[53]

A forum has general jurisdiction over a party when the party has substantial connections to that forum.[54] General jurisdiction allows a state to exercise jurisdiction over a party for any claim, regardless of whether a particular claim is related to the party's contacts with the state.[55] On the contrary, specific jurisdiction is exercised when a claim arises out of a party's contacts with the state in regard to the defendant's contacts with that forum.[56]

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46. 466 U.S. 408, 414-15, 418 (1984).

47. *Id.* at 410, 412.

48. *Id.* at 408-13.

49. *Id.* at 412.

50. *Id.* at 416, 418-19.

51. *Helicopteros,* 466 U.S. at 415-16.

52. *Id.* at 416.

53. *Id.* at 416-18.

54. William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 614 (1993); *Helicopteros*, 466 U.S. at 414 n.9.

55. *Id.* at 614.

56. *Helicopteros*, 466 U.S. at 414 n. 8.

iii. Contacts/Fairness Two Part Test

The Contacts/Fairness test is often cited as deriving from the decisions in *International Shoe*,[57] *World-Wide Volkswagen*[58] and *Burger King*.[59] First, the forum state court must look at the extent of pre-litigation connections the defendant has with the forum state.[60] Second, the forum state court must evaluate the overall reasonableness or fairness of the exercise of jurisdiction over the defendant, in light of the contacts.[61] Foreseeability is also relevant in this analysis.[62] This test is extremely fact specific.[63]

The Supreme Court has provided five factors to consider when analyzing jurisdictional fairness: "(1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the several states' shared interest in furthering fundamental substantive social policies."[64]

iv. Long-Arm Statutes

After the Supreme Court's decision in *International Shoe*, state legislatures started to expand the scope of their courts' jurisdiction. Illinois was the first state which created a statute expanding personal jurisdiction as broadly as due process would allow.[65] Since then, all states have procured rules by which jurisdiction may be obtained over nonresident individuals and corporations.[66]

The main purpose of a long-arm statute is to gain jurisdiction over nonconsenting nonresidents who could not otherwise be sued in the forum state.[67] However, a significant question arises when considering who may use a long-arm statute as a plaintiff. "Most statutes do not in terms exclude the possibility of use by nonresidents or foreign corporations and, in the absence of limiting language, courts generally have per-

57. *See supra* notes 8-12 for a discussion of *International Shoe*.

58. *See supra* notes 26-30 and accompanying text for a discussion of *World-Wide Volkswagen*.

59. *See supra* notes 40-45 and accompanying text for a discussion of *Burger King*.

60. *See International Shoe*, 326 U.S. 310; *see also World-Wide Volkswagen*, 444 U.S. 286; *Burger King*, 471 U.S. 462.

61. *Id.*

62. *See World-Wide Volkswagen*, 444 U.S. 286; *see also Burger King*, 471 U.S. 462.

63. *See World-Wide Volkswagen*, 444 U.S. 286.

64. *Burger King*, 471 U.S. at 477.

65. 1 ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS, § 4.01 (1991); *see also* Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 537 (1963).

66. 1 Robert C. Casad, JURISDICTION IN CIVIL ACTIONS § 4.01 (1991).

67. *Id.* § 4.01[3][a].

mitted nonresidents to avail themselves of long-arm jurisdiction."[68] There are, however, some long-arm statutes which restrict use to state residents. Also, some statutes have provisions applicable only to resident plaintiffs.[69]

Many long-arm statutes, such as the Marshall statute, allow jurisdiction to be obtained over one who commits a tort within the state or causes tortious injury by an act or omission in the state.[70] As with any statutes there are interpretation problems. Within the realm of tort language in long-arm statutes, the statutes may apply to acts which take place within the state or acts taking place out of the state causing injury within the state. However, "[w]hen the defamatory statement and publication take place outside the forum state, long-arm jurisdiction may turn upon whether the particular long-arm statute applies only when the defendant's act occurs within the forum state, or whether it is sufficient if injury is sustained there."[71]

2. *Discussion*

For Marshall to exercise valid personal jurisdiction over Jacobs, Fetty must show that Jacobs has sufficient minimum contacts which make him amenable to jurisdiction under the Marshall long-arm statute and that the exercise of jurisdiction is consistent with the Due Process Clause of the Fourteenth Amendment. Moreover, Fetty must demonstrate that Jacobs purposely established minimum contacts with Marshall, availing himself of the protections and benefits of Marshall's laws and that the exercise of jurisdiction is fair and reasonable.

i. Jacobs' Minimum Contacts Argument

Jacobs will likely rely on the cases from jurisdictions which apply the view that sending defamation into a state after producing it somewhere else does not constitute the commission of a tortious act in the receiving state. He will likely stress that for minimum contacts analysis the tortious act occurs where the material is printed, not later published. In *Talbot v. Johnson Newspaper Corp.*,[72] the court found that personal jurisdiction could not be exercised over a California resident who wrote and mailed a defamatory letter in California to a recipient in New York, the forum state.[73] In *Talbot*, the defendant, a California resident, had

68. *Id.* § 4.01[3][b] (citing Schuehler v. Pait, 238 S.E.2d 65 (1977) and Edmonton World Hockey Enters., Ltd. v. Abrahams, 658 F. Supp. 604 (D. Minn. 1987)).

69. 1 CASAD, *supra* note 65, § 4.01[3][b].

70. *Id.* § 4.02[2].

71. *Id.* § 7.07[1][a].

72. 522 N.E.2d 1027 (N.Y. 1988).

73. *Id.* at 1028-29.

attended college in New York for four years, obtained a degree, and returned to California.[74] While at school she had witnessed objectionable conduct by a coach at the university.[75] Upon returning to California after graduation, she sent a defamatory letter about the coach to the university which forwarded it to a New York newspaper, in which it was published.[76] The New York court found the defendant did not engage in purposeful activities within New York that bore a substantial relationship to the publishing of the defamatory letter, and hence personal jurisdiction was not conferred under the New York long-arm statute.[77]

Similarly, in *Tavoulareas v. Comnas,*[78] the District of Columbia Court of Appeals found that the act involved in a defamatory phone call occurs in the state where the defendant makes the statement.[79] The court held that several allegedly defamatory phone calls made by a non-resident, received in the District, did not subject the defendant to personal jurisdiction in the District.[80] The court stated that mechanical reproduction of a defamatory statement on a telephone receiver in the District fails to give a non-resident defendant physical presence in the District.[81]

Likewise, in the present case, Jacobs may assert that he made the statement at issue in Illinois. The message was then reproduced on a computer screen in Marshall. He will argue that this should not constitute physical presence in Marshall for the purpose of defamation. Even if he is considered to have mailed the message to the State of Marshall, he will assert that he did not engage in purposeful activities with the state or within the state which bore a substantial relationship to the allegedly defamatory statement.

Courts decline to assert personal jurisdiction over non-resident defendants, even where the consequences of statements may be foreseeable, if the forum state resident initiates the call which brings a non-resident's defamatory statement into the forum state.[82] In *McDonald v. St. Joseph's Hospital*, two hospitals in Georgia called the plaintiff's former supervisor in Tennessee for references four times.[83] The Tennessee supervisor gave negative appraisals of the plaintiff, which allegedly

74. *Id.* at 1028.
75. *Id.*
76. *Id.*
77. *Talbot*, 522 N.E.2d at 1028-29.
78. 720 F.2d 192 (D.C. Cir. 1983).
79. *Id.* at 194.
80. *Id.*
81. *Id.*
82. McDonald v. St. Joseph's Hosp., 574 F. Supp. 123, 125-26 (N.D. Ga. 1983).
83. *Id.* at 124.

caused harm.[84] The court granted the supervisor's motion to dismiss for lack of personal jurisdiction holding that the phone calls were not initiated by the defendant and were isolated instances.[85] Consequently, the quality and nature of the defendant's contacts were not such that he purposely availed himself to Georgia law or could have reasonably foreseen being haled into Georgia court.[86]

Jacobs will argue that he did not establish minimum contacts with Marshall or purposely avail himself because his allegedly defamatory statement was made in Illinois and directed at an Illinois resident. In *Westhead v. Fagel*,[87] a California lawyer made allegedly defamatory statements during a California press conference concerning a California basketball coach.[88] A Pennsylvania newspaper later republished the statements.[89] The Pennsylvania court refused to assert personal jurisdiction, stating that the focal point of the harm and the statements was the state of California.[90] Similarly, in the present case, the focal point of Jacobs' alleged defamation is in the State of Illinois.

Additionally, in *Hardnett v. Duquesne University*,[91] a Maryland resident sued a Pennsylvania university for negligence concerning an injury sustained at a concert at the school.[92] The Maryland contacts, by the university, were: (1) sending promotional literature to the plaintiff in Maryland; (2) plaintiff's return of a completed application from Maryland; and (3) the university's letter of acceptance, received in Maryland.[93] The court found that general personal jurisdiction could not be exercised over the school because the contacts were not sufficient.[94] Moreover, specific jurisdiction was not satisfied because the plaintiff's claim did not arise out of the defendant's forum contacts.[95]

Furthermore, in *Pres-Kap v. System One, Direct Access, Inc.*,[96] the Florida Court of Appeals found that a travel agency in New York which entered into a lease agreement with a Florida based information provider could not be subject to jurisdiction in Florida.[97] The plaintiff was a Delaware corporation with its main billing and business office in Florida

84. *Id.*
85. *Id.*
86. *Id.* at 126.
87. 611 A.2d 758, 759 (Pa. Super. 1992).
88. *Id.* at 759.
89. *Id.* at 759.
90. *Id.* at 761.
91. 897 F. Supp. 920 (D. Md. 1995).
92. *Id.* at 921.
93. *Id.* at 923.
94. *Id.*
95. *Id.* at 923-24.
96. 636 So. 2d 1351 (Fla. Dist. Ct. App. 1994).
97. *Id.* at 1353.

and a branch business office in New York.[98] The parties negotiated and executed the contract in New York and the defendant called the plaintiff's New York office when there were problems.[99] The defendant's contacts with Florida were minimal; it made its lease payments and it accessed the plaintiff's database in Florida, though there was not a showing that the defendant was aware of the location of the computer database.[100] The court indicated that the proper forum for the case would be New York.[101]

In *Wheeler v. Teufel*,[102] the court held the Minnesota long-arm statute did not confer personal jurisdiction over an Arizona defendant who made defamatory phone calls from Arizona to persons within the forum state.[103] Minnesota's long-arm statute, however, separates the act from the injury and requires that both occur within the state in order to subject a defendant to personal jurisdiction.[104] The court said that the significant tortious act, uttering the words, was not done in Minnesota, but in Arizona.[105]

ii. Fetty's Minimum Contacts Argument

Fetty will attempt to demonstrate that through his continued use of the CanWeChat BBS Jacobs established substantial connections with Marshall. In *Condalary v. Campbell*,[106] Louisiana residents sued a New York resident and a Virginia resident for damages resulting from the purchase of dairy goats from Louisiana.[107] The parties had not united in Louisiana, but had communicated by phone and mail a number of times and formed a contractual agreement through those contacts.[108] The court found that specific jurisdiction was proper since there were sufficient minimum contacts which arose out of the transaction.[109] The court said that even a single act directed at the forum state is enough to confer jurisdiction if the act gives rise to the asserted claim.[110]

Fetty should assert that even one communication may subject a defendant to jurisdiction. In *Brown v. Flowers Indus.*,[111] the court allowed

98. *Id.* at 1351.
99. *Id.* at 1352.
100. *Id.* at 1353.
101. *Pres-Kap*, 636 So. 2d at 1353.
102. 443 N.W.2d 555 (Minn. Ct. App. 1989).
103. *Id.* at 557.
104. *Id.*
105. *Id.* at 556-57.
106. 1995 WL 555581 (E.D. La. 1995).
107. *Id.* at *1.
108. *Id.*
109. *Id.* at *3.
110. *Id.*
111. 688 F.2d 328 (5th Cir. 1982).

personal jurisdiction over nonresident defendants based solely on one tortious phone call made by defendants to the forum state.[112] An agent of the defendant corporations, who was an Indiana resident, called the United States Attorney in Mississippi, from Indiana, and made a defamatory statement about the plaintiff. Although none of the defendants were incorporated in Mississippi or had any other contacts in the state, the court stated that the number of contacts is not itself determinative, rather it is whether the nonresident defendant's contacts suggest that he purposefully availed himself to the benefits of the forum state.[113] The court emphasized that exercising personal jurisdiction over a nonresident defendant corporation is in Mississippi's interest because defendant's agent called the state and committed an intentional tort.[114] Furthermore, the court found that to require the plaintiff to litigate elsewhere would be a great inconvenience because the plaintiff lived in the forum state, as did one of the witnesses.[115]

Fetty should explain that even though Jacobs wrote the defamatory statement and placed it on the BBS while in Illinois, the statement ultimately harmed Fetty's reputation in Marshall. Additionally, since receipt of the defamatory message by a third party constitutes publication, a necessary element of the tort, a court could find that a defendant who mailed a defamatory statement into the forum state could be found to have committed a tortious act there.

In *Fallang v. Hickey*,[116] the Ohio court exercised personal jurisdiction over a nonresident defendant based on a defamatory letter he wrote and mailed to the forum state regarding the resident plaintiff.[117] Defendant Long, a resident of South Carolina, sent the defamatory letter to defendant Hickey, who resided in Ohio.[118] Hickey distributed Long's letter to others.[119] The plaintiff sued Hickey and Long in Ohio and the court held that Long's act constituted a substantial connection to Ohio because it involved a resident of Ohio and most of the witnesses resided in Ohio.[120]

Fetty can also rely on the "last event" test regarding jurisdiction under long-arm statutes. With the last event test, "the place of a wrong is where the last event takes place which is necessary to render the actor

112. *Id.* at 333-34.
113. *Id.* at 333.
114. *Id.* at 334.
115. *Id.*
116. 532 N.E.2d 117 (Ohio 1988).
117. *Id.* at 119.
118. *Id.* at 118.
119. *Id.*
120. *Id.*

liable."[121] In *Gray v. American Radiator & Standard Sanitary Corp.*, an Illinois resident sued an Ohio valve manufacturer for injuries he sustained when a hot water heater exploded in Illinois.[122] The defendant manufactured a valve in Ohio, then shipped it to Pennsylvania where it was then incorporated into the hot water heater and consequently sold to an Illinois consumer.[123] In finding jurisdiction, the Illinois court refused to separate the negligent act from the resulting injury and concluded that the tort occurred in Illinois.[124]

Additionally, courts have held that a non-resident television station is subject to jurisdiction under a long-arm statute when a defamatory telecast is received in the forum state which is also a part of the station's regular audience.[125] In *Casano v. WDSU-TV, Inc.*, the court held that Mississippi had personal jurisdiction over a defendant TV station located in Louisiana because the station broadcasted its programs in Mississippi, where the plaintiff lived.[126] The court found that although the defendant was incorporated in Louisiana, maintained no offices and paid no taxes in Mississippi, the defendant benefitted from Mississippi advertisers who pay to broadcast their goods and services on the defendant's station.[127]

Finally, at least one jurisdiction has found that electronic communications can establish minimum contacts. In *Plus System, Inc. v. New England Network, Inc.*,[128] a Colorado plaintiff brought a breach of contract action in Colorado against a Connecticut defendant.[129] The parties had an agreement where the defendant was to process electronic fund transfers by using a national network operated by Plus System through its central computer in Colorado.[130] The court found that the defendant purposely availed itself of the forum state's laws through regular computer communications which occurred by telephone to the central computer in Colorado.[131]

In July, 1995, the Minnesota Attorney General's Office released a memorandum asserting that Minnesota courts have jurisdiction over persons outside the state who transmit information via the Internet

121. Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 762-63 (Ill. 1961).

122. *Id.* at 762.

123. *Id.* at 764.

124. *Id.* at 763.

125. Casano v. WDSU-TV Inc., 313 F. Supp. 1130, 1138 (S.D. Miss. 1970), *aff'd*, 464 F.2d 3 (5th Cir. 1972).

126. *Id.* at 1138.

127. *Id.* at 1144.

128. 804 F. Supp. 111 (D. Colo. 1992).

129. *Id.* at 114.

130. *Id.* at 114-15.

131. *Id.* at 118-19.

knowing that such information will be disseminated within Minnesota.[132] The Attorney General's Office filed six lawsuits against promoters of scams and other illegal activities on the Internet, including gambling, credit repair, pyramid schemes and snake oil.[133] One suit, *Minnesota v. Granite Gate Resorts, Inc.*, is still pending.[134] The case alleges that a Las Vegas casino is planning to offer an illegal sports bookmaking service via the Internet which permits individuals to place bets using a credit card.[135] The casino challenges Minnesota's jurisdiction.[136]

Minnesota Statute Section 609.025 (1994), which is the Minnesota general criminal jurisdiction statute, reads as follows:

> A person may be convicted and sentenced under the law of this State if the person:
>
> (1) Commits an offense in whole or in part within this state; or
>
> (2) Being without the state, causes, aids or abets another to commit a crime within the state; or
>
> (3) Being without the state, intentionally causes a result within the state prohibited by the criminal laws of this state.
>
> It is not a defense that the defendant's conduct is also a criminal offense under the laws of another state or of the United States or of another country.

Minnesota courts have successfully used this statute to obtain jurisdiction over persons in varied circumstances. First, jurisdiction was found over a person on an Indian Reservation who shot someone across the boundary line in Minnesota.[137] Second, it was determined that Minnesota had jurisdiction over an Iowa resident who mailed unlicensed gambling equipment into the state.[138] Additionally, in the civil case *Minnesota v. Red Lake DFL Committee*,[139] the court determined that it had jurisdiction over an Indian tribe committee which purchased a space for political advertisement in a newspaper circulated in the state.[140] It seems that according to the Attorney General's Office, these principles extend to Internet activities. Consequently, those outside Minnesota who disseminate information in Minnesota via the Internet causing a

132. *States Get Entangled In The Web*, LEGAL TIMES, Jan. 22, 1996, at S35.

133. *Minnesota A.G. Files Legal Action Against Individuals Involved In Computer On-Line Scams*, PR NEWSWIRE, July 18, 1995.

134. *Id.*

135. *Id.*

136. *Id.*

137. Minnesota v. Rossbach, 288 N.W.2d 714 (Minn. 1980).

138. Minnesota v. Brown, 486 N.W.2d 816 (Minn. Ct. App. 1992).

139. 303 N.W.2d 54 (Minn. 1981).

140. *Id.*

result to occur in Minnesota have been subject to Minnesota criminal and civil laws.

3. *Whether the Exercise of Jurisdiction Over the Defendant is Fair and Reasonable in Light of the Due Process Clause.*

Jurisdictional fairness should be evaluated by analyzing the following factors: "(1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the several states' shared interest in furthering fundamental substantive social policies."[141]

i. Jacobs' Fairness Argument

First, Jacobs will discuss the burden of defending this suit in a forum in which he is not a resident. He should emphasize his lack of connection to the State of Marshall. He should also assert the travelling inconvenience, financial inconvenience and the inconvenience involved in needing a Marshall attorney to help with his defense.[142]

In *Madara v. Hall*,[143] the plaintiff, a California resident, sued for defamation in Florida, based on an interview printed in a California magazine, and distributed in Florida.[144] The interview took place by phone with defendant Hall in New York and the interviewer in California.[145] The Appellate Court found that Hall did not establish sufficient minimum contacts to anticipate being haled into a Florida court.[146] The court also found that because both parties would have to travel, and because few copies of the magazine were distributed there, Florida had little interest in this dispute between two non-residents.[147] Therefore, the court held that the exercise of jurisdiction in Florida would offend due process.[148]

Similarly, Jacobs should stress that the State of Marshall has no interest in adjudicating the dispute. Neither Fetty nor Jacobs is a resident of Marshall and neither party works in Marshall. Moreover, Jacobs'

141. *See Burger King*, 471 U.S. at 477.

142. *See* Hanson v. Denckla, 357 U.S. 235, 250-53 (1958) (holding Florida could not exercise jurisdiction over a Delaware trustee even though the trustee stood to gain or lose nothing and the burden was minimal).

143. 916 F.2d 1510 (11th Cir. 1990).

144. *Id.* at 1513.

145. *Id.*

146. *Id.* at 1517.

147. *Id.* at 1519.

148. *Madara*, 916 F.2d at 1519.

statement did not harm the state or any resident thereof; the state with a real interest is Illinois.

In *Shaffer v. Heitner*,[149] an Arizona shareholder of a Delaware corporation brought a shareholder's derivative action in Delaware against officers and directors of the corporation, who never set foot in Delaware.[150] The plaintiff also filed a motion for sequestration of the personal property in Delaware, of individual defendants, who were nonresidents of Delaware.[151] The property consisted of stocks, options, warrants and various corporate rights of the defendants.[152] The defendants issued a special appearance to quash service and vacate the order, asserting that the sequestration procedure did not accord them due process.[153] The Delaware courts exercised jurisdiction and the United States Supreme Court reversed.[154]

The Court stated that to assert jurisdiction based solely on the statutory presence of the defendant's personal property in the state violates the Due Process Clause.[155] Moreover, the defendants' corporate holdings did not provide sufficient contacts.[156] The defendants had nothing to do with Delaware and asserting jurisdiction in the state would be fundamentally unfair.[157]

In *Asahi Metal Indus. Co., Ltd. v. Superior Court*,[158] the Court held that in a defective product suit arising from a sale of the product in the forum state, the lower court improperly exercised long-arm jurisdiction over a foreign manufacturer.[159] Although the Justices disagreed on the sufficiency of contacts, the Court held 8-1 that California's jurisdiction over the Japanese defendant failed the fairness test.[160] Initially, the case involved a California plaintiff's product liability claim against a Taiwanese tire maker, who then interpleaded and brought an indemnity cross-claim against Asahi, the Japanese valve-maker.[161] When the plaintiff's claim settled, only the indemnity action remained.[162] In support of its fairness holding, the Court cited California's minimal interest in the case, the substantial burden of California litigation on Asahi, and

149. 433 U.S. 186 (1977).
150. *Id.*
151. *Id.* at 190.
152. *Id.* at 191.
153. *Id.* at 192-93.
154. *Shaffer*, 433 U.S. at 195.
155. *Id.* at 213.
156. *Id.*
157. *Id.* at 216.
158. 480 U.S. 102 (1987).
159. *Id.* at 108, 114-16.
160. *Id.* at 105.
161. *Id.* at 106.
162. *Id.*

the ready availability to the Taiwanese tire maker of alternative forums.[163]

ii. Fetty's Fairness Argument

Fetty must demonstrate that an exercise of jurisdiction by Marshall is fair and reasonable. However, one must remember that the exercise of jurisdiction rests more on the quantity and quality of contacts under the minimum contacts and purposeful availment factor. To begin, Fetty should contend that the burden on the defendant, of defending in Marshall, is minimal. She should stress the Supreme Court's decision in *Burger King*,[164] where a Michigan franchisee was found to be subject to jurisdiction in Florida, even though the burden of travel and expenses seemed great.[165] She should also assert that the defendant is not an alien so his burdens are much less severe than those sustained by someone that is sued in a different country.[166]

Next, Fetty should argue that the Supreme Court has supported a state's interest in providing a forum for an injured non-resident.[167] In *Keeton v. Hustler*, the Supreme Court found that New Hampshire had an interest in the claim of the non-resident who was defamed through distribution of a magazine in New Hampshire.[168] False statements harm both the subject and the recipient and states have an interest in deterring such conduct within the state's borders.[169] Additionally, in *Burger King*, the Court stated that where the nature or quality of a defendant's contact warrants, a single act can support jurisdiction when it is connected with the injury sued upon.[170]

Similarly, in the present case, although neither party was a forum resident, the Jacobs circulated his defamatory statement in Marshall and the Fetty suffered injury in Marshall. In *Computac, Inc. v. Dixie News Co.*,[171] the non-resident defendant contracted with the resident plaintiff for data processing services.[172] The data was transmitted between the parties by telephone or mail.[173] After processing was completed by the plaintiff, such data was relayed back to the defendant in

163. *Id.* at 114-15.
164. 471 U.S. 462 (1985).
165. *Id.* at 487-90 (Stevens, J., dissenting).
166. *See supra* notes 154-158 and accompanying text.
167. *See* Keeton v. Hustler, 465 U.S. 770, 776-77 (1984).
168. *Id.* at 772.
169. *Id.* at 776.
170. *Burger King*, 471 U.S. at 475 n. 18.
171. 469 A.2d 1345 (N.H. 1983).
172. *Id.* at 1346.
173. *Id.*

North Carolina, by telephone.[174] The parties entered two other related contracts, but the defendant had no other contacts with the forum state.[175]

The plaintiff brought suit for payment under the contract.[176] The Supreme Court of New Hampshire found that the weekly contact by telephone to New Hampshire and the delivery of information to New Hampshire satisfied the minimum contacts test.[177] The court also found that it was fair and reasonable to compel the defendant to defend the suit in New Hampshire.[178] Through the defendant's continued contact, the defendant could reasonably anticipate being haled into New Hampshire court and the connections created an interest in the forum.[179]

Finally, Fetty also has an interest in obtaining convenient and effective relief and the most efficient resolution of the case. She chose the State of Marshall as the forum, indicating that it was a convenient location. Effective relief could not be obtained in Illinois because the limitations period had already expired. Additionally, Fetty's witness is a resident of Marshall. Although a ready and convenient alternate forum may outweigh a state's exercise of jurisdiction Marshall is convenient and the state has an interest because the injury occurred in Marshall.

Consequently, Fetty will likely rely on the Supreme Court's holding in *Keeton* to support her choice of forums. In *Keeton*, the fairness issue was not clear because the plaintiff had no real connection with New Hampshire and was not well known there.[180] The plaintiff however, picked the forum because of New Hampshire's six-year statute of limitations for defamation claims.[181] The Court addressed the minimum contacts and fairness questions and held the defendant subject to jurisdiction.[182] Thus, the plaintiff's forum shopping did not preclude a finding of minimum contacts or personal jurisdiction when the defamation made its way into the forum state.

B. Defamation and the Public Figure Doctrine

1. *Background*

Defamation is commonly defined as a communication which tends to harm the reputation of another person, lowering him in the community's

174. *Id.*
175. *Id.*
176. *Computac*, 469 A.2d at 1346.
177. *Id.* at 1347.
178. *Id.* at 1347-48.
179. *Id.* at 1347.
180. *Keeton*, 465 U.S. at 773-74.
181. *Id.*
182. *Id.* at 781.

estimation or which deters third persons from dealing or associating with him.[183] Such a statement may be oral or written.[184] A prima facie case of defamation consists of: 1) defamatory words; 2) publication or communication of the words to a person other than the plaintiff; 3) falsity; 4) some degree of fault; and 5) resulting injury.[185]

Defamatory statements may be defamatory on their face or may need additional facts plead to demonstrate the defamatory nature of the statement.[186] The recipient of the defamatory statement must reasonably understand that the statement refers to the plaintiff.[187] However, without specifically referring to the plaintiff, a statement may still be actionable.[188]

Defamation embodied in physical form, such as written or printed words, constitutes libel.[189] Libel is either defamatory on its face or through the establishment of additional facts.[190] If a statement is libelous on its face no special damages must be proven.[191] If a statement is not libelous on its face but refers to "1) imputations of plaintiff engaging in criminal conduct or crimes of moral turpitude; 2) imputations that the plaintiff suffers from a loathsome disease; 3) imputations adversely reflecting on the plaintiff's professional or business activities; or 4) imputations that an unmarried woman is unchaste," injury to reputation is presumed.[192] In cases of slander or spoken defamation, injury to reputation is never presumed unless the statement involves one of the four categories above.[193] Special damages must be proved for all other cases of slander.[194]

Before 1964, plaintiffs were generally required only to show that a defendant's statement "subjected them to hatred, contempt, or ridicule."[195] However, in that year the Supreme Court decided in *New York Times v. Sullivan*[196] to impose First Amendment restrictions on defamation laws. In *New York Times* case, the New York Times had published

183. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

184. *Id.* § 568.

185. Frank C. Morris, Jr., *Privacy and Defamation in Employment*, C108 ALI-ABA 577, 609 (1995).

186. *Id.*

187. *Id.*

188. *Id.*

189. RESTATEMENT (SECOND) OF TORTS § 568.

190. Morris, *supra* note 185, at 610.

191. RESTATEMENT (SECOND) OF TORTS § 569.

192. Morris, *supra* note 185, at 610-11.

193. RESTATEMENT (SECOND) OF TORTS § 570.

194. Morris, *supra* note 185, at 611.

195. Eric Walker, *Defamation Law: Public Figures—Who Are They?*, 45 BAYLOR L. REV. 955, 956 (1993).

196. 376 U.S. 254 (1964).

an editorial advertisement which accused the Montgomery Police Department of engaging in racial harassment.[197] The police commissioner, Sullivan, sued and was awarded damages.[198] Although some of the accusations were false, reliable sources confirmed the story and the Times had no reason to doubt the story's validity.[199] The Supreme Court reversed the state court's decision, holding that defamatory statements concerning public officials require that the official show the defendant made the statement with "actual malice," in other words, with *knowledge that a statement is false or reckless disregard for the truth or falsity of the statement.*[200] The actual malice standard serves "the First Amendment's goal of promoting uninhibited, open, and robust debate on the activities of those holding the public's trust."[201]

The Court then extended the "actual malice" standard to *public figures* in *Curtis Publishing Co. v. Butts.*[202] The Saturday Evening Post published an article stating that the plaintiff, athletic director at the University of Georgia, and Bryant, the Alabama football coach, conspired to fix a game between their teams.[203] The story's source was a man claiming to have tapped into a phone conversation between the plaintiffs.[204] Stating that basing the story on one person's strange testimony violated basic journalistic standards, the Court upheld the finding of defamation.[205] The Supreme Court ruled that a public figure also had to prove a higher standard of fault.[206]

In *Gertz v. Robert Welch, Inc.*,[207] the Supreme Court defined a public figure.[208] *Gertz* involved an attorney who had been defamed by the John Birch Society.[209] The Court defined public figures as people who have "assumed roles of [special] prominence in the affairs of society."[210] The court distinguished between pervasive public figures and limited public figures.[211] The Court stated that some people achieve significant fame or notoriety for all purposes and in all contexts.[212] Others, however, be-

197. *Id.* at 256-58.
198. *Id.* at 254.
199. *Id.* at 256-62.
200. *Id.* at 279-80.
201. Walker, *supra* note 195, at 957.
202. 388 U.S. 130 (1967).
203. *Id.* at 135.
204. *Id.* at 136.
205. *Id.* at 135-38.
206. *Id.* at 155.
207. 418 U.S. 323 (1974).
208. *Id.*
209. *Id.* at 326-27.
210. *Id.* at 345.
211. *Id.*
212. *Gertz,* 418 U.S. at 345.

come limited public figures by voluntarily "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[213] Thus, limited public figures are public figures with respect to the range of specific matters for which they are prominent.

The Court presented two main considerations that led to the requirement for a higher standard of fault in the defamation of public figures. Most importantly, "public figures have voluntarily exposed themselves to increased risk of injury . . . . because they have thrust themselves to the forefront of particular public controversies . . . ."[214]

Additionally, the Court said: "The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie . . . public figures usually enjoy significantly greater access to the channels of effective communication . . . ."[215] The Court observed, "[t]hus, private individuals are not only more vulnerable to injury than . . . public figures; they are also more deserving of recovery."[216] It is important to note that the standard of fault for a private individual regarding a public issue can be mere negligence.

In *Gertz*, a police officer had been prosecuted criminally for shooting a young man.[217] The deceased's family had hired plaintiff to represent them in civil litigation against the officer.[218] The Court said:

> In this context it is plain that (plaintiff) was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution. . . . Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome.[219]

Since *Gertz*, few Supreme Court cases have addressed the issue of the plaintiff's private or public figure status.[220] Moreover, in those cases the Court found the plaintiff to be a private individual.[221] The cases also add very little to the public figure analysis established in previous cases.[222] However, the Court seems reluctant to declare public figure

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213. *Id.*
214. *Id.*
215. *Id.* at 344.
216. *Id.* at 345.
217. *Id.* at 325.
218. *Gertz,* 418 U.S. at 325.
219. *Id.* at 352.
220. *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976); *see also* Hutchinson v. Proxmire, 443 U.S. 111 (1979); Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).
221. *Id.*
222. *Id.*

status as a result of being involved in litigation.[223]

Time v. Firestone,[224] for example, involved a highly publicized and sensational divorce proceeding in which the wife even called press conferences to castigate her husband.[225] The wife was held to be a non-public figure.[226] Next, the Court concluded that a scientist who applied for government assistance for his research was not a public figure.[227] In *Hutchinson v. Proxmire*, Hutchinson sued a senator for allegedly defamatory statements made about his government-sponsored research.[228] The Court explained that Hutchinson did not voluntarily rise to the forefront of a controversy, but that he became a well-known figure because of the defendant's statements.[229] Consequently, the Court concluded that one who defames "cannot, by their own conduct, create their own defense by making the claimant a public figure."[230]

Finally, in *Wolston*, the plaintiff sued Reader's Digest for publishing a book which falsely listed him as a Soviet spy.[231] More than ten years before the book was published, Wolston was subpoenaed to testify before a grand jury concerning his aunt's and uncle's involvement in espionage.[232] For failing to appear he received a contempt conviction which received short-term media attention.[233] However, at the time of the alleged defamation, he had dropped out of the public eye and had returned to a wholly private life.[234] The Court concluded that Wolston was not a public figure, in spite of the media attention he had once received.[235] First, the Court held that Wolston's refusal to appear in court was not the type of voluntary activity which establishes public figure status, even though such an action is likely to invite media attention.[236] Second, the Court concluded that engaging in criminal conduct, or being prosecuted for a crime, does not establish public figure status.[237] It is clear that the determination of such status is a question for the court.

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223. *Id.*
224. 424 U.S. 448 (1976).
225. *Id.* at 485 (Marshall, J., dissenting).
226. *Id.* at 455.
227. *Hutchinson*, 443 U.S. at 134-36.
228. *Id.* at 114.
229. *Id.* at 135.
230. *Id.*
231. *Wolston*, 443 U.S. at 159-60.
232. *Id.* at 162.
233. *Id.*
234. *Id.* at 163.
235. *Id.* at 161.
236. *Wolston*, 443 U.S. at 166-67.
237. *Id.* at 168.

2. *Public Figure Analysis*

The Supreme Court established that the actual malice requirement governs cases involving public figures, not private individuals. To determine whether someone constitutes a limited purpose public figure for a defamation action many courts evaluate the factors as dictated in *Waldbaum v. Fairchild Publications, Inc.*[238] In *Waldbaum*, the plaintiff, who had been a supermarket industry executive, sued the publisher of a trade journal article which discussed his termination from a company.[239] The article stated that his company had been "losing money the last year and retrenching."[240] The court found that the plaintiff was very active spokesman in the industry and was a "mover and shaper of many of the cooperative's controversial actions."[241] He thrust himself into debate over issues relating to the supermarket industry in attempt to influence the policies of the supermarket industry.

The court held that the *Waldbaum* plaintiff was a public figure and articulated some guidelines for determining public figure status: (1) consider the scope of the public's interest by isolating the public controversy; (2) examine the plaintiff's role in the controversy and evaluate whether the individual has voluntarily risen to the forefront of particular public controversies which expose him or her to criticism; and (3) examine whether the defamatory statement is "germane to the plaintiff's participation in the controversy."[242] Additionally, courts analyze the extent of the plaintiff's access to channels of media communication, as discussed in *Gertz*.[243]

3. *Discussion*

i. Jacobs' Public Figure Argument

Jacobs will likely contend that Fetty satisfies all factors of the public figure test. First, he should demonstrate that the public has a significant interest in the topic of abortion and that Fetty played a crucial role in one such discussion, thrusting herself into the controversy. For example, in *Maxwell v. Henry*,[244] an abortion protester filed actions, including a defamation claim, against various parties concerning his arrest, incarceration and media reports of the incident.[245] The plaintiff was arrested on a public street, in the vicinity of an abortion clinic and he engaged in

238. 627 F.2d 1287 (D.C. Cir. 1980).
239. *Id.* at 1290.
240. *Id.*
241. *Id.* at 1300.
242. *Id.* at 1296-98.
243. *Waldbaum*, 627 F.2d at 1294-95.
244. 815 F. Supp. 213 (1993).
245. *Id.* at 215.

an altercation with the police.[246] The court found that the broadcast by the television station concerned a public controversy and that the plaintiff was a limited public figure.[247] Consequently, the court dismissed the action because the plaintiff failed to establish "actual malice" against the television station.[248]

Similarly, in *Wright v. Haas*,[249] plaintiff, a member of a civic organization, wrote a "letter to the editor" which was published in the paper.[250] The defendant wrote a response, also published, criticizing the plaintiff and his organization.[251] In the plaintiff's defamation action, the Oklahoma Supreme Court held that the plaintiff was a limited public figure because he (1) wrote a previous letter to the editor seeking to engage attention of the public, (2) made issue of his organization's composition, and (3) made himself an issue through labeling himself as a radical.[252]

Next, Jacobs should argue that his statement is not germane to the plaintiff's role in the controversy. He should argue that his statement was no more than "rhetorical hyperbole, a lusty and imaginative expression of the contempt" he felt toward Fetty's views about abortion.[253] In *Letter Carriers v. Austin*, a postal union engaged locally in an effort to organize the minority of letter carriers who had not yet selected the union as their bargaining representative.[254] The union listed the names of non-members in its monthly newsletter under the heading "List of Scabs."[255] The newsletter defined a scab as a "two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue."[256] A scab is "a traitor to his God, his country, his family and his class."[257] Several of the people named filed defamation actions against the union and received jury awards which were upheld by the Supreme Court of Virginia.[258] However, the United States Supreme Court reversed and stated that words such as "traitor" were "obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization."[259]

246. *Id.*
247. *Id.* at 215.
248. *Id.*
249. 586 P.2d 1093 (Okla. 1978).
250. *Id.* at 1095.
251. *Id.*
252. *Id.* at 1096.
253. Letter Carriers v. Austin, 418 U.S. 264, 286 (1974).
254. *Id.* at 267.
255. *Id.*
256. *Id.* at 267-68.
257. *Id.*
258. *Letter Carriers*, 418 U.S. at 269-70.
259. *Id.* at 284.

Finally, Jacobs should emphasize that Fetty has full access to the media through the Internet. Jacobs should rely on *Reuber v. Food Chem. News, Inc.*,[260] and *Colson v. Stieg*.[261] In *Reuber*, a scientist employed by the National Cancer Institute, received a reprimand letter from his supervisor, Michael Hanna, which was eventually leaked to the press.[262] In his defamation action, the plaintiff had recovered, but the judgment was overturned because he was held to be a public figure.[263] The court focused on the plaintiff's access to the precise "fora where [his] reputation was presumably tarnished and where it could be redeemed," specifically scientific and public health sources of communication.[264] The sources included journals in which he had frequently published and the food-chemical industry newsletter in which the alleged libel was published.[265]

Similarly, in *Colson v. Stieg*, the Illinois Supreme Court held that John Calvin Colson, a university professor, had sufficient media access when an allegedly defamatory statement was made by Lewis Steig, Colson's boss, only to a university faculty committee.[266] The court focused on the audience and the extent of the publication.[267] The court did not address public figure analysis because the statement was a matter which received first amendment privilege protection.[268] Nonetheless, the plaintiff was still required to prove "actual malice" to recover.[269] The court found that if the statement had been communicated to the general public the plaintiff may not have had sufficient access to "channels of communication to overcome or offset the damaging effect of defendant's statement."[270] This conclusion followed from the fact that, in such a situation, those who heard the statement would have "no other means of acquiring knowledge" about the plaintiff.[271]

In the present case, the other members of the bulletin board are the only people to which the defamatory statement had been published. Thus, Fetty had sufficient access to the exact "fora where [her] reputation was presumably tarnished and where it could be redeemed."[272] Moreover, relatively few people received the communication; the state-

260. 925 F.2d 703 (4th Cir. 1991) (en banc), *cert. denied*, 501 U.S. 1212 (1991).
261. 433 N.E.2d 246 (Ill. 1982).
262. *Reuber*, 925 F.2d at 707.
263. *Id.* at 708.
264. *Id.*
265. *Id.*
266. *Colson*, 433 N.E.2d at 249-50.
267. *Id.*
268. *Id.* at 249.
269. *Id.* at 249-51.
270. *Id.* at 250.
271. *Colson*, 433 N.E.2d at 249.
272. *Reuber*, 925 F.2d at 708.

ment was not published to the general public. Therefore, Fetty could have refuted the statements and cured any damage to her reputation through her access to the exact media in which she was allegedly defamed.

ii. Fetty's Public Figure Argument

Fetty will want to assert that although the public has an interest in the topic of abortion, the public does not have an interest in the particular discussion taking place on the CanWeChat BBS. A public controversy is "more than a general public concern, more than a newsworthy issue, more than a cause celebre."[273] According to the Supreme Court, "[a] public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way."[274]

In *Firestone*, most of the parties' divorce dispute occurred in a public courtroom.[275] Press conferences were even held regarding the dispute.[276] However, the Supreme Court found that the public nature of the private dispute between the parties did not elevate the dispute to the level of a public controversy.[277]

Similarly, in the present case, the dispute, although centered in the public topic of abortion, was a private dispute between two people with differing opinions. Newsworthy issues of general public concern are not normally public controversies for purposes of the public figure doctrine.[278] However, BBS's and Internet news groups consist mainly of discussions about these types of issues.[279] Consequently, depending on the nature of the BBS and a member's influence,[280] members of most boards seem unlikely to face the challenge of proving actual malice in a

273. Thomas D. Brooks, *Catching Jellyfish in the Internet: The Public Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461, 483-84 (1995) (citing *Hutchinson*, 443 U.S. at 135; *Wolston*, 443 U.S. at 167; and *Firestone*, 424 U.S. at 454).

274. *Id.* at 484.

275. *Firestone,* 424 U.S. at 449-452.

276. *Id.* at 454 n.3.

277. *Id.* at 454.

278. Brooks, *supra* note 273, at 485.

279. *Id.*

280. The same statement may or may not implicate the public figure doctrine depending on the members of the BBS and the type of BBS. For instance, if a statement is made maligning fortune 500 companies and politicians which endorse a trade agreement the public figure doctrine would be applicable because the plaintiff would be a major player with influence on government policy. However, if the individual allegedly defamed is an average citizen on a board consisting of average citizens the doctrine does not seem to be implicated. *See* Brooks, *supra* note 273, at 486.

defamation case.[281]

Next, Fetty will want to assert that her role in any discussion which took place on the BBS was not at the forefront of the controversy. Courts examine the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation," to determine an individual's public figure status.[282] In other words, one's whose involvement is insubstantial to the controversy and its resolution does not assume the role required for public figure status. Here, Fetty could not realistically have expected that through her conduct on the BBS that she would have an impact which effected the issue of abortion in such a way to make her a limited public figure. She was not in a position of power or influence; she merely voiced her opinion concerning the abortion topic, even though she spoke in a public forum.

Similarly, in *Fleming v. Moore*,[283] the Virginia Supreme Court found that a man who spoke twice at a planning commission meeting had insufficient influence over the others at the meeting and the commission to be a public figure for all purposes.[284] At the planning commission meetings, the plaintiff expressed his concern that a housing project to be constructed by the defendant would create a pollution hazard.[285] The plaintiff never gave interviews or spoke in another public forum.[286] The defendant then published advertisements in which he depicted the plaintiff as a racist.[287] The court found that the plaintiff did not occupy a position of power or influence, therefore he was not a public figure for all purposes; nor was he a limited public figure since he did not organize opposition to the project and he voiced his own interest.[288]

Likewise, in *Hutchinson v. Proxmire*,[289] a researcher sued a senator for defamation.[290] The Court noted that the plaintiff had not voluntarily risen to the forefront of a controversy, but that he became a well-known figure *because of the defendant's statements.*[291] The Court said that one who defames cannot, by his or her own conduct, make the victim a public figure and use it for his or her defense.[292]

Finally, Fetty should argue that access to the Internet and the CanWeChat BBS do not provide someone media access as intended by

281. *Id.* at 485.
282. *Wolston*, 443 U.S. at 167.
283. 275 S.E.2d 632 (Va. 1981).
284. *Id.* at 637.
285. *Id.* at 634.
286. *Id.*
287. *Id.* at 634.
288. *Id.* at 637.
289. 443 U.S. 111 (1979).
290. *Id.* at 114.
291. *Id.* at 135.
292. *Id.*

the Supreme Court. Otherwise, anyone gaining access to the Internet would constitute a public figure. Fetty should distinguish her case from cases such as *Waldbaum v. Fairchild Publications, Inc.*,[293] *Nadel v. Regents of the Univ. of California*[294] and *Wright v. Haas*.[295] In *Waldbaum*, the plaintiff was a very active spokesman in a particular industry, and he shaped many controversial actions by thrusting himself into debate over issues in an attempt to influence the policies of the industry.[296] In *Wright*, the plaintiff wrote a letter addressed to the editor of a newspaper seeking to engage the attention of the public in order to influence public issues, defend his organization, make an issue of its composition, make himself an issue through his own labeling of himself as a radical, and addressing other issues including a city attorney's opposition to organization and rehiring practices of the city council.[297]

In *Nadel*, protesters opposed the construction of volley ball courts in a University park.[298] The protesters passed out fliers warning of violent consequences.[299] Ultimately there were incidents of vandalism and damage to the courts, confrontations and rioting.[300] *The plaintiffs were active and vocal members of the protesting group who spoke at meetings, wrote letters to the paper, the University and the city and spoke to reporters.*[301] During a suit in which the plaintiffs were named for damages and injunctive relief, the defendants wrote articles allegedly defaming the plaintiffs.[302] The court found that the plaintiffs became limited purpose public figures by thrusting themselves into the forefront of the controversy and by inviting publicity, speaking at city council meetings and speaking to news media.[303]

Fetty should also point out that in *Firestone*,[304] where the divorce proceeding occurred in a public courtroom and the parties held press conferences the plaintiff was not considered a public figure.[305] Certainly, in our scenario Fetty does not have sufficient access to traditional media to rebut any defamation to which she falls victim.

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293. *See supra* notes 228-243 and accompanying text for a discussion of *Waldbaum v. Fairchild Publications, Inc.*

294. 28 Cal. Rptr.2d 188 (Cal. Ct. App. 1994).

295. *See supra* notes 241-44 and accompanying text for a discussion of *Wright*.

296. *Waldbaum*, 627 F.2d at 1299-1300.

297. *Wright*, 586 P.2d at 1096.

298. *Nadel*, 34 Cal. Rptr.2d at 190.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 191.

303. *Nadel*, 34 Cal. Rptr.2d at 198-99.

304. *See supra* notes 220-224 and accompanying text for a discussion of *Firestone*.

305. *Firestone*, 424 U.S. at 455.

BRIEF FOR THE PETITIONER

No. 95-1481

IN THE SUPREME COURT
OF THE
STATE OF MARSHALL

JENNIFER FETTY,
Respondent,

v.

ROBERT JACOBS,
Petitioner.

ON APPEAL FROM THE APPELLATE COURT
OF THE STATE OF MARSHALL

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

I. WHETHER THE MARSHALL LONG-ARM STATUTE, CH. 48 § I, WAS CONSTITUTIONALLY APPLIED TO ACQUIRE PERSONAL JURISDICTION OVER PETITIONER.

II. WHETHER RESPONDENT IS A PUBLIC FIGURE BY VIRTUE OF HER PARTICIPATION IN A CONTROVERSIAL DEBATE WIDELY PUBLISHED ON THE INTERNET.

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The order of the Circuit Court of Lakeview County denying Petitioner's motion to dismiss is unreported and summarized in the Record on Appeal. (R. 1-5.) The opinion of the Court of Appeals of the State of Marshall affirming the circuit court's decision is contained in the Record on Appeal. (R. 1-6.)

STATEMENT OF JURISDICTION

A formal statement of jurisdiction is omitted pursuant to § 1020(2) of the Rules for the Fourteenth Annual John Marshall Law School Competition in Information Technology and Privacy Law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the following constitutional and statutory provisions relevant to the determination of this case are set forth in Appendix A: U.S. CONST. amend. I; U.S. CONST. amend. XIV, § 1; and Ch. 48 MRS § I.

STATEMENT OF THE CASE

A. SUMMARY OF THE FACTS

On December 4, 1993, Respondent Jennifer Fetty and Petitioner Robert Jacobs, both residents of Illinois, were engaged in a computer generated discussion group called CanWeChat. (R. 2.) The CanWeChat discussion group is a computer bulletin board system hosted on an Internet server located in Chicago, Illinois. (R. 2.) Through the use of a computer and a modem, subscribers of online service providers have the ability to log on to thousands of bulletin board systems. Upon log in, the users electronically communicate over telephone lines with others who have access to the same bulletin boards.

The topic of the December 4, 1993 discussion was abortion. (R. 2.) During the discussion, the litigants, as well as other subscribers, hotly debated the controversial issue. (R. 2.) Not surprisingly, the discussion took on a caustic tenor. Respondent alleges that Petitioner posted a message stating "[a]s for Fetty's opinions on this matter, I'm not going to let some woman who prostitutes herself dictate my standards of conduct or morality." (R. 2-3.) David Bornmann, who was part of the CanWeChat discussion group, viewed this message in Marshall and expressed dissatisfaction with Petitioner's posting. (R. 3.) On January 5, 1995, over a year later, Respondent filed a defamation suit in the Marshall Circuit Court of Lakeview County against Petitioner Mr. Jacobs. (R. 1.) In her suit, Respondent alleged that the tort occurred in the State of Marshall. (R. 1.)

B. Summary of the Proceedings

On January 5, 1995, after the statute of limitations for defamation had tolled in the state of Illinois, Respondent filed a complaint in the State of Marshall. (R. 1, 3.) In her complaint she alleged that Petitioner, "out of spite and ill will, published a defamatory statement about her in Marshall, and elsewhere, which was reasonably understood as defamatory and which caused her injury in Marshall, and elsewhere." (R. 3.) Respondent thus decided to pursue her cause of action in Marshall despite the fact that neither party, nor the bulletin board, had any relation whatsoever with that state. (R. 2-3.)

Petitioner filed motions to dismiss the complaint for lack of personal jurisdiction and for failure to specifically allege that Petitioner acted with actual malice. (R. 1, 3-4.) Circuit Court Judge Hanson denied Petitioner's motions, stating that Marshall could properly assert jurisdiction on the basis of Marshall's long-arm statute. (R. 1.) Judge Hanson also ruled that Respondent was not a public figure "by virtue of communicating through the Internet." (R. 1.) Petitioner filed an interlocutory appeal, which in the state of Marshall may immediately be taken on certain issues of a case. (R. 1, 5.) Because of the substantial ground for differences of opinion and the controlling issue of law, Judge Hanson certified the issues of personal jurisdiction and defective pleadings for immediate review. (R. 1.)

Reviewing the questions of law *de novo*, the Court of Appeals of the State of Marshall affirmed the circuit court's order denying Petitioner's motion to dismiss. (R. 6.) On June 22, 1995, the Supreme Court of the State of Marshall granted Petitioner leave to appeal the orders and certified the issues of personal jurisdiction and defective pleadings for review. (R. 1, 7.) Both are issues of first impression in the State of Marshall. (R. 5.)

SUMMARY OF ARGUMENT

I. Forcing Petitioner, as a private citizen, to litigate in the State of Marshall violates the Due Process Clause of the Fourteenth Amendment. The Marshall Court of Appeals, in finding jurisdiction predicated on Marshall's long-arm statute, erred in not undertaking a proper fundamental fairness analysis as required by the Supreme Court of the United States. Fundamental fairness requires an inquiry into whether there are substantial contacts with the forum state that would establish a defendant's reasonable anticipation of litigation in that state. Petitioner has had no personal or business contacts with Marshall, receives no economic benefit from his Internet involvement, nor has he availed himself of the benefits and protections of Marshall laws. Further, Marshall has no unique interest in the litigation between Petitioner and Respondent. Finally, subjecting Petitioner to litigation in the state would be overly burdensome.

Jurisdiction is also improper if the defendant cannot foresee a risk of injury in the forum. Because Petitioner could not foresee a risk of injury based on his Internet communication, compelling him to defend a lawsuit there would thus be fundamentally unfair and violative of the Due Process Clause.

Moreover, public policy prohibits the expansion of jurisdictional boundaries to allow any computer communication, in and of itself, to potentially result in distant and unexpected litigation. This is especially true when the litigants and the computer database itself have no connection with the forum state. Additionally, due process affords protection to individuals like Petitioner from defending against forum-shopping plaintiffs who seek redress in a distant forum either to exact revenge or to preserve actions which are time-barred in other forums. Because defending in the State of Marshall does not pass scrutiny under a fundamental fairness analysis, Petitioner's motion to dismiss for lack of jurisdiction should be granted.

II. The First Amendment offers special protections for the free dissemination of ideas, particularly when their content address important social and political issues. One such protection is the public figure doctrine which requires that those who voluntarily participate in a public controversy, and have a means for rebutting attacks against them, must prove actual malice when suing for defamation.

The Marshall Court of Appeals erred in failing to determine that Respondent is a public figure required to allege actual malice. Her status as a public figure is supported by the public nature of the abortion issue, the volitional extent to which she participated in the Internet debate, and the means of effective rebuttal to which she had access. By willingly participating in a debate about abortion, one of the most contro-

versial topics of our time, Respondent exposed herself to the harsh criticisms and confrontations that accompany such a dispute. Far from being a private chat among acquaintances, the abortion debate Respondent joined was conducted on a computer bulletin board on the Internet, a forum accessible by millions. Her participation in a public debate about an issue which has substantial ramifications for society at large warrants the application of the public figure doctrine. Because Respondent failed to allege actual malice in her defamation claim, Petitioner's motion to dismiss for insufficiency of Respondent's complaint should have been granted.

ARGUMENT

I. THE COURT OF APPEALS OF THE STATE OF MARSHALL ERRED IN RULING THAT PETITIONER WAS SUBJECT TO *IN PERSONAM* JURISDICTION IN THE STATE OF MARSHALL BECAUSE SUCH A FINDING IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The appellate court erred in ruling that Petitioner was subject to *in personam* jurisdiction in Marshall. The decision of the lower court offends the Due Process Clause of the Fourteenth Amendment because Marshall's exercise of jurisdiction over Petitioner does not comport with "traditional notions of fair play and substantial justice." *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). Petitioner's mere participation on the CanWeChat computer bulletin board did not give him "virtual and legal presence in the State of Marshall." (R. 6.) Furthermore, the "defendant's allegedly defamatory statement on the CanWeChat BBS" that appeared in Marshall, (R. 6.), cannot be the basis for jurisdiction without more substantial contacts with the state. The lower court should therefore be reversed and Petitioner's motion for dismissal granted.

A. Subjecting Petitioner to Jurisdiction in Marshall is Improper Under a Fundamental Fairness Analysis.

The lower court should have concluded that jurisdiction over Petitioner was fundamentally unfair. In finding minimum contacts pursuant to Ch. 48 MRS § I(A)(2), the court neglected its duty to consider a proper fundamental fairness analysis. To assert authority over a nonresident defendant, a court must not only address the state's long-arm statute, but must also balance additional factors that ensure that the court's assertion of jurisdiction is fair. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *see also Burger King v. Rudzewicz*, 471 U.S. 462 (1985). The court of appeals erroneously concluded that personal jurisdiction over Petitioner was predicated on a tortious act being committed in Marshall. (R. 6.) Even if Petitioner's statement over the Internet

amounted to actionable defamation, jurisdiction in Marshall violates Supreme Court standards of "fundamental fairness."

Fundamental fairness is contingent on whether a litigant "purposefully availed himself" of the benefits and protections of the forum state so that he might "reasonably foresee" litigating in that state. *International Shoe*, 326 U.S. at 319. "Reasonable foreseeability" should additionally be analyzed in light of how substantial the litigant's contacts are with the forum state. *See McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). A court must also inquire into factors including whether a state has a unique and vested interest in adjudicating a particular dispute and whether litigation in a particular forum would be overly burdensome for the defendant. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984).

When applying the criteria of a proper fundamental fairness analysis to Petitioner's situation, it is unreasonable to conclude that his one posted message in Marshall via the Internet was sufficient to make jurisdiction in Marshall comport with Due Process principles. Petitioner availed himself of no benefits or protections of Marshall, and had only minor contact with the state. Not only does Petitioner have no reasonable expectation of litigation there, Marshall has no unique interest in adjudicating the case at bar. Consequently, the exercise of personal jurisdiction in the present case is inappropriate, and the lower court should therefore be reversed.

1. *Petitioner did not purposefully avail himself of any benefits and protections of Marshall, thus litigation in the state was not reasonably foreseeable.*

Petitioner had no contacts with the state of Marshall that could be construed as purposefully availing himself of the benefits and protections of the state. In *International Shoe*, the Supreme Court held that minimum contacts with a state must be determined by the relationship between the defendant and the forum state. 326 U.S. at 316. This evaluation must be made in light of "traditional notions of fair play and substantial justice." *Id.* The Court established that fairness emanates from purposeful activities directed at a forum state that result in gaining the benefit and protection of a forum state's laws. *Id.* at 319. These, in turn, trigger a reasonable expectation that litigation may ensue in that state. *Id. See also Hanson v. Denckla*, 357 U.S. 235 (1958), *reh'g denied*, 358 U.S. 858 (1958). In *Burger King v. Rudzewicz*, the Supreme Court emphasized that the "purposeful availment" requirement ensured that a defendant would "not be hailed into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts." 471 U.S. at 475.

Petitioner's contacts with Marshall are no more than random, fortuitous, and attenuated. They do not meet the "purposeful availment" standard that would give rise to a reasonable expectation of litigation. Petitioner is not engaged in any business that affords him any protection of the laws of Marshall, (R. 3.), nor does he have any continuous contacts with the state except for the "few messages" posted on the CanWeChat bulletin board. (R. 4.) Although commentary posted on a computer bulletin board has the potential of being read nationally or even internationally, there was no purposeful directing of Petitioner's comment to the State of Marshall, and certainly no economic benefit derived from the posting of the message. David Bornmann's receipt and acknowledgment of Petitioner's comment was a random occurrence that does not meet the "purposeful availment" standard set out by either *International Shoe* or *Burger King*. As a consequence, Petitioner could not have reasonably anticipated litigating in that state.

Petitioner's contention that he has been unfairly expected to litigate in an inappropriate forum is supported by the holding of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). In *World-Wide Volkswagen*, a New York couple purchased a car from a New York dealership. *Id.* at 288. While driving to Arizona, the couple was in an accident in the state of Oklahoma. *Id.* The couple filed suit in an Oklahoma court against the manufacturer, the importer, as well as the regional and local automobile dealerships from New York. *Id.* In finding Oklahoma retained no jurisdiction over the regional and local dealers, the Court noted that the New York defendants sold cars in a three state area that did not include Oklahoma. *Id.* at 298. Because no legal or economic benefit was derived from Oklahoma, the Court found no purposeful availment that would cause the dealers to reasonably anticipate litigating in the distant forum. *World-Wide Volkswagen,* 444 U.S. at 299. Personal jurisdiction was found inappropriate and violative of Due Process. *Id.* This despite the fact that one could reasonably foresee that a New York car sold in New York could wind up in Oklahoma and conceivably cause harm. *Id.*

Similarly, while Petitioner could have foreseen that his message would be read in forums other than his own, his conduct was not the type of "purposeful availment" contemplated by *World-Wide Volkswagen*. Petitioner, like the New York retailers in *World-Wide Volkswagen*, has availed himself of no benefits or protections of Marshall. He has no continuous contacts with the state nor has he derived any economic benefit from the state. (R. 3.)

Various courts have denied jurisdiction where there are a lack of business contacts or other continuous and systematic contact with the forum state. For instance, in *Johnson v. Sel-Mor Dist.*, the court found no purposeful availment of a sales company that had only "sporadic" contact with the forum state, even though the effect of alleged defamation

occurred within the forum. 430 N.W.2d 495, 498 (Minn. Ct. App. 1988). In *Johnson*, a sales manager allegedly made misrepresentations about an employee which prevented him from finding future employment. *Id.* at 496. Although the alleged defamation had its effect in the forum state, the defendant's other sporadic contacts did not amount to the kind of purposeful availment that would lead him to reasonably anticipate litigation in the forum state. *Id.* at 498. In the instant case, Petitioner's only conceivable contact with the forum state was an allegedly defamatory comment read over the Internet by Mr. Bornmann. Because his comment was read in Marshall, it might be said to have an "effect" in Marshall. Nevertheless, like *Johnson*, a comment having an "effect" in the forum state does not establish continuous and systematic contacts required for the type of purposeful availment necessary to confer jurisdiction.

The court in *Norris v. Oklahoma City University*, similarly assessed the need for substantial business contacts to satisfy the "purposeful availment" test. 1993 WL 313122 (N.D. Cal. Aug. 3, 1993). In *Norris*, the court held that the defendant law school did not "purposefully avail" itself to the benefits and protections of California so that long-arm jurisdiction would attach. *Id.* at *1. The plaintiff in *Norris* claimed that the defendant school had purposely directed activities at California because it sent her law school transcripts containing allegedly defamatory statements to that forum. *Id.* at *2. The court reasoned that there was no purposeful availment by the Oklahoma school because sending transcripts into a state was not an activity expressly directed at the forum. *Id.* Likewise, Petitioner's single contact with Marshall can hardly be viewed as being expressly directed at Marshall. The comment was sent to Chicago, Illinois. Without some other purposeful activities directed at the forum state, jurisdiction clearly would not comport with fundamental fairness.

Finally, in *Pilipauskas v. Yakel*, an Illinois resident brought a claim for injuries allegedly sustained while vacationing in a Michigan lodge. 629 N.E.2d 733 (Ill. App. Ct. 1994). In finding that Illinois retained no jurisdiction over the defendant lodge, the court concluded that the defendant did not purposefully avail itself of the benefits and protections of the state of Illinois. *Id.* at 741. The court found this even though the defendants made approximately 100 phone calls annually into the forum state and purposely marketed in the state of Illinois. *Id.* The court noted that these efforts at bringing Illinois residents to Michigan did not amount to purposeful availment that would give defendants a fair warning they would be sued in the state of Illinois. *Id.*

The object of this litigation—Petitioner's single computer contact through a telephone line—is far short of the continuous systematic contacts contemplated as necessary by *Johnson* and *Norris*. Moreover, it is

far less than the hundreds of calls made and purposeful marketing strategy properly found insufficient in *Pilipauskas*. A significant business relationship is an important consideration in assessing the "purposeful availment" component of the fundamental fairness analysis. Petitioner had absolutely no economic contacts with the State of Marshall, (R. 3.), that could be interpreted as availing himself of any protections or benefits of the state. Since his contacts with Marshall, economic or otherwise, fall far short of what other courts have considered sufficient to constitute purposeful availment, jurisdiction in Marshall is inappropriate.

Due Process shields defendants from having to litigate in forums where it would be fundamentally unfair to do so. Potential defendants should be able to reasonably anticipate or predict where they might be subject to suit. *See* Harold S. Lewis, *The Forum State Interest Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769, 803 (1982). Without any purposeful and continuous contact with Marshall, Petitioner could not have reasonably anticipated litigation in that state. Compelling Petitioner to defend in Marshall is violative of Due Process.

2. *Petitioner's communications did not amount to substantial contact with Marshall.*

Telephone connections in and of themselves are not an adequate basis for long-arm jurisdiction. *See Margoles v. Johns*, 483 F.2d 1212 (D.C. Cir. 1973). In *Margoles*, a Washington D.C. plaintiff sued a Wisconsin defendant for defamatory statements made over the telephone to his office staff. *Id.* at 1213. The court held that the defendant, by virtue of telephone calls into the forum state, could not have projected her presence into the forum state for purposes of that state's assertion of personal jurisdiction. *Id.* at 1217. The court stated, "[u]nless we wish to delve into a magical mystery tour of 'projecting presences,' we must find that no jurisdiction can be afforded." *Id.* at 1218.

Petitioner is similarly situated to the defendant in *Margoles*, if, for no other reason, because the Internet system is transmitted over telephone lines. Comparable to the *Margoles* defendant, he has absolutely no ties, other than the telephone line, with the forum state. (R. 3.) In fact, Petitioner, unlike the *Margoles* defendant, did not even direct his communication into the forum state and had little control over where it would be published. The CanWeChat bulletin board is hosted by a sysop in Chicago, Illinois, (R. 2.), and is accessed in Illinois by participants using their computers to dial into that state.

Petitioner directed his communication to Illinois and it was only by virtue of David Bornmann's dialing the same bulletin board that he was able to read the message while in Marshall. No contact, telephone or

otherwise, was directed at Marshall. This makes Marshall an even less anticipated forum for litigation. To assert that Petitioner projected himself into Marshall because a Marshall resident dialed a computer terminal in Illinois would indeed be delving into a "magical mystery tour of projecting presences." *Margoles*, 483 F.2d at 1218.

Defamation suits in general require substantial contacts before a forum state may assert jurisdiction. In *Keeton v. Hustler Magazine, Inc.*, the Court held that the publisher of a defamatory article may be subject to long-arm jurisdiction when there is a substantial circulation of the article in the forum state. 465 U.S. 770 (1984). In *Keeton*, the plaintiff was a resident of New York who claimed that she was libeled by photographs and comments that appeared in the publication. *Id.* at 772. The plaintiff sued several Ohio corporations and a California resident involved in publishing the materials. *Id.* The suit was originally brought in Ohio, but the statute of limitations had tolled. *Id.* at n.1. The plaintiff then brought the suit in New Hampshire, the only state in which the statute of limitations had not expired. *Id.* The Supreme Court found that the magazine's national notoriety and circulation constituted substantial contacts that were sufficient to confer jurisdiction on the forum state. *Keeton,* 465 U.S. at 773-74.

Similarly, in *Calder v. Jones*, the Court held that personal jurisdiction over the writers and editors of a defamatory article was proper when the focal point of, and the resulting harm from, the allegedly libelous article was purposefully directed at the forum state. 465 U.S. 783 (1984). In *Calder*, the defendants were both Florida residents whose place of business was also Florida. *Id.* at 785. They wrote a defamatory article that impugned the professionalism of a prominent entertainer whose television career was centered in California. *Id.* at 783. In finding California an appropriate forum, the Court determined that substantial contacts were established by the intent to harm within the forum state in addition to the large circulation of the article in California. *Id.* at 788-89. Given these circumstances, the Court theorized that the writers had every reason to expect they would have to litigate in California. *Id.* at 790.

Petitioner's contacts with Marshall are not substantial enough to confer jurisdiction in the state. Unlike the defendants in *Keeton* and *Calder*, Petitioner had no circulation of an alleged defamatory statement, much less the mass circulation in those cases. It is even unclear whether anyone but David Bornmann read Petitioner's comment. Not even Respondent took the opportunity to respond to Petitioner's comment. (R. 3.) Moreover, the statement, "I'm not going to let some woman who prostitutes herself dictate my standards of conduct or morality," (R. 3.), is hardly the type of purposeful, impugning attack contemplated by either *Keeton* or *Calder*. Rather, it was a spontaneous comment made in the

midst of a heated debate. Petitioner may have been making reference to a prior comment of Respondent's or presenting his opinion about an incongruity in Respondent's stance on the abortion issue. Petitioner's one ambiguous comment is markedly different than the defamation alleged and mass circulated in *Keeton* and *Calder*.

It is also noteworthy that it is only Respondent's neglect in filing a timely suit that has brought this issue before the Marshall courts. Petitioner, Respondent, and the bulletin board itself are all domiciled in Illinois. (R. 2.) Had the suit been filed in Illinois, there would have been no question that the state retained jurisdiction. However, because the statute of limitations has expired in Illinois, (R. 3.), Respondent chose Marshall where the statute had not tolled. This is blatant forum-shopping which has been condemned as an abuse of our judicial system. "[S]tate courts [must] . . . resist such blatant attempts at shopping for the favorable law of a forum that has no connection with the controversy other than a . . . defendant do[ing] unrelated business there." Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 970 (1983). Although the Court in *Keeton* allowed jurisdiction even though the plaintiff engaged in forum-shopping, *Keeton* is distinguishable because of the defendant's substantial contacts with the forum state. These contacts do not exist in the case at bar. Respondent's efforts at forum-shopping should be regarded as unfairly attempting to compel Petitioner's appearance in an inconvenient and inappropriate forum.

3. *Respondent's defamation action is not sufficiently related to Marshall.*

The State of Marshall has very little interest, if any, in litigating the dispute between Petitioner and Respondent. In *Curtis Publishing Co. v. Birdsong*, the court expressed concern about extending the authority of its courts over situations not sufficiently related to the forum state. 360 F.2d 344 (5th Cir. 1966). The defendant in *Birdsong* published an allegedly libelous article in the State of Alabama. *Id.* at 345. The writer of the article was a New York resident and the article was edited in New York City. *Id.* at 346. The content of the article concerned the state of Mississippi and all of the plaintiffs were Mississippi residents. The only contact with the forum state of Alabama was that the publishing company did business there. *Id.* at 345.

In finding that the exercise of personal jurisdiction would violate Due Process, the *Birdsong* court reasoned that there must be a rational nexus between the fundamental events giving rise to the cause of action and the forum state. *Id.* at 346. The events must give the forum state sufficient interest in the litigation before it may constitutionally compel litigants to defend in that forum. *Birdsong,* 360 F.2d. at 346-47. The

court commented that the only interest that the forum state had was an interest held by forty-nine other states: to protect its citizens against reading libels distributed in its state. *Id.* at 347. The Due Process Clause was found to prohibit such extensions of local power because a state could otherwise extend its authority beyond its boundaries to matters not sufficiently related to that state. *Id.* at 348. This extension would reduce the separate entity of the state to a mere fiction. *Id.*

Like *Birdsong*, the only contact that Marshall has with the present case is that the alleged defamatory statement was published there. The only interest that the State of Marshall may have had, similar to *Birdsong*, was to protect its citizens against reading libels distributed in its state, and that interest in the litigation was held by forty-nine other states as well. To that end, the exercise of personal jurisdiction over Petitioner for contacts that were not purposefully directed at the forum state would lead the court to extend its authority beyond state lines. This extension of authority violates due process.

4. *Litigating in Marshall would be overly burdensome for Petitioner.*

Petitioner would be unfairly burdened by litigation in Marshall. A court must consider the burden placed on the defendant before finding jurisdiction appropriate. *See Kulko v. Superior Court*, 436 U.S. 84 (1978); *see also Asahi Metal Industries v. Superior Court*, 480 U.S. 102 (1987). In *Kulko* a nonresident father was subjected to jurisdiction for modification of a child support agreement. 436 U.S. at 84. The father's only contact with the forum state was the purchase of an airline ticket, done outside the state, for his daughter residing within the state. *Id.* at 87. The mother asserted that he committed "a purposeful act outside the state that caused an effect within the state," thereby conferring jurisdiction on the forum. *Id.* The Court, however, held that the exercise of *in personam* jurisdiction over the nonresident father would violate the Due Process Clause of the Fourteenth Amendment. *Id.* at 85. The Court determined that "fairness to the defendant [is] an essential criterion in all cases," and that "[no] reasonable parent would expect . . . the substantial burden and personal strain of litigating a child support suit 3000 miles away." *Id.* at 92.

Although the Court in *Kulko* made reference to traversing 3000 miles, the focal point of the Court was not primarily the distance but the hardship upon the defendant of litigating in a forum where he lacked substantial contacts. Petitioner's only contact with the State of Marshall has been well-documented as the fortuitous occurrence of a third party's participation on a computer bulletin board based in Petitioner's home state. In *Kulko*, at least one of the litigants resided in the forum state. Here, neither do. This, in addition to the absence of any other substan-

tial contact, would result in an undue burden even if Marshall is directly adjacent to Illinois. Although Petitioner's undue burden in and of itself would be insufficient to preclude jurisdiction, when balanced within the whole of the fundamental fairness analysis, the scales weigh in favor of denying jurisdiction in Marshall. Accordingly, Petitioner's motion to dismiss should have been granted.

B. Petitioner Could Not Be Subject To Jurisdiction In Marshall As The Risk Of Injury Was Not Foreseeable.

Where contacts with a particular state are *de minimis*, jurisdiction is improper if a defendant could not have foreseen that a plaintiff would have been injured in the forum. *See* David I. Levine, *Jurisdiction in Distant Forums: Preliminary Procedural Protection for the Press from Jurisdiction in Distant Forums*, 1984 Ariz. St. L.J. 459, 477 (1984). The issue of foreseeability was examined in *Church of Scientology v. Adams*, in which a California church brought a libel action in that state against the publisher of a St. Louis newspaper. 584 F.2d 893 (9th Cir. 1978). The suit was based upon an article written, *inter alia*, about a Missouri church of the same denomination. *Id.* The court determined it was not reasonably foreseeable that any risk of injury would occur from circulation in California and, as a consequence, jurisdiction was inappropriate. *Id.* at 898. The court found that California readers were not a principle or even secondary target of the articles, nor was the plaintiff mentioned in any of the publications. *Id.*

Without it being reasonably foreseeable that any risk of injury would occur in a forum, commentators have argued that jurisdiction should not be conferred on the state. Willis L. M. Reese & Nina M. Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 Iowa L. Rev. 249, 263-64 (1959). This is exactly the case with Petitioner. Although Petitioner could have foreseen his message being read both nationally and internationally, there was no specific targeting of Marshall. Thus there could have been no reasonably foreseeable risk of injury in that state.

Although individuals have been subjected to *in personam* jurisdiction for writing letters and sending them into the forum state, the "foreseeability of harm" analysis has been predicated on the purposeful nature of sending letters into the forum. Catherine J. Wiss, *Personal Jurisdiction Over Non-Resident Publishers and Authors: What Contacts are Needed After Keeton v. Hustler and Calder v. Jones*, 34 Cath. U. L. Rev. 1125, 1149 (1985). For example, in *St. Clair v. Righter*, jurisdiction was conferred over defendants who mailed letters containing allegedly defamatory statements regarding the president of a corporation. 250 F. Supp. 148 (W.D. Va. 1966). The court found the defendants' act of mail-

ing letters into the forum state to be a "voluntary action . . . which was calculated to have an effect in the forum state." *Id.* at 154. Petitioner, on the other hand, has exhibited no such purpose. In fact, he purposely directed his comments only to Chicago, Illinois, where the bulletin board was hosted.

Moreover, commentators have acknowledged the sensitive and emotional nature of the abortion controversy, the vigorous opposing views, and the deep and seemingly absolute convictions that the subject inspires. Caryl Wolfson Leightman, Robak v. United States: *A Precedent-Setting Damage Formula for Wrongful Birth*, 58 CHI.-KENT L. REV. 725, 733 n.47 (1982). The subject is predisposed to inflammatory comment as it is "perhaps the most emotional and divisive controversy of this century." Anne D. Lederman, *A Womb of My Own: A Moral Evolution of Ohio's Treatment of Pregnant Patients with Living Wills*, 45 CASE W. RES. L. REV. 351, 360 (1994). The nature of the Internet debate which provoked Petitioner's comment made it even less foreseeable that Petitioner could envision the emotionally charged exchange causing harm in a distant forum. Consequently, the State of Marshall erroneously asserted jurisdiction.

C. PUBLIC POLICY DICTATES THAT TECHNOLOGICAL ADVANCEMENTS DO NOT JUSTIFY LIMITLESS JURISDICTIONAL BOUNDARIES.

Computer bulletin board participants, like Petitioner, should not be subject to long-arm jurisdiction simply because technology enables messages to be posted in distant locations. Modern technology raises important concerns regarding the exercise of personal jurisdiction and courts have addressed these issues when making jurisdictional determinations. In *T.J. Raney & Sons, Inc. v. Sec. Sav. & Loan Ass'n*, the court affirmed that the use of banking facilities, as well as the use of mail and telephone facilities, absent other contacts, did not meet the "minimum contacts" standard and could not be used to exercise personal jurisdiction. 749 F.2d 523 (8th Cir. 1984). Similarly, the court in *Resolution Trust Corp. v. First of American Bank*, held that Due Process prevented the exercise of personal jurisdiction over a bank that received two Automated Clearing House transactions initiated by another bank. 796 F. Supp. 1333 (C.D. Cal. 1992). The court stated that "such technology which makes banking services more accessible to customers does not commit the bank to national jurisdiction without some other affirmative act." *Id.* at 1336. The court was not willing to accept such an expansive result.

In a similar line of reasoning, the Florida District Court of Appeal held that an Internet connection did not satisfy jurisdictional requirements. *Pres-Kap, Inc. v. System One Direct Access, Inc.*, 636 So. 2d 1351

(Fla. Dist. Ct. App. 1994). The plaintiff was a Delaware corporation that owned and operated a computerized airline reservation service. *Id.* at 1351. The computer database, as well as the plaintiff's billing and main business office, was located in Florida. *Id.* The plaintiff had a New York office as well. *Id.* For a monthly fee, the plaintiff provided access to its computer base through telephone lines to book reservations essential to a travel agency's operation. *Id.* at 1351-52. The defendant, a New York travel agency with its sole place of business in New York, leased computer terminals from the plaintiff and mailed the monthly fee to the plaintiff's office in Florida. *Pres-Kap,* 636 So. 2d at 1352. The court held that the Internet connection did not meet the minimum contacts test, and further stated that conferring jurisdiction on individual users would be "wildly beyond the reasonable expectations of such computer-information users, and, accordingly, the results offend the traditional notions of fair play and substantial justice." *Id.* at 1353.

Commentators have almost uniformly determined that the average individual computer user should not be subject to *in personam* jurisdiction merely through use of a bulletin board. *See, e.g.*, Michael J. Santisi, Pres-Kap, Inc. v. System One, Direct Access, Inc.*: Extending the Reach of the Long-Arm Statute Through the Internet?*, 13 J. MARSHALL J. COMPUTER & INFO. L. 433, 450 (1995). Subjecting individual citizens to jurisdiction is unreasonable because individuals are substantially less prepared to deal with distant litigation than commercial entities. *Id.*

The court in *Pres-Kap* recognized this difference between a business user and an individual using services provided by the Internet. The court stated, "[l]awyers, journalists, teachers, physicians, courts, universities, and business people throughout the country daily conduct various types of computer-assisted research over telephone lines linked to supplier databases located in other states." 636 So. 2d at 1353.

It is unthinkable that a lawyer using Lexis in a distant state would be compelled to defend a suit in Ohio or in the forum of Lexis's choosing. In fact, even when a court has conferred personal jurisdiction over a particular defendant by virtue of computer communications, it was done only when there was purposeful availment and more substantial economic contacts. *See Plus System, Inc. v. New England Network, Inc.*, 804 F. Supp. 111 (D. Colo. 1992). The court in *Plus System* refused to disregard existing jurisdictional framework when confronted by cases involving technological complexities. *Id.* at 117-21. Personal jurisdiction must still be predicated upon the overriding principle of fairness. *Id.* at 117.

Petitioner in no way "projected" himself into Marshall any more so than an individual using Lexis projects himself into Dayton, Ohio. Moreover, Petitioner had no economic contacts with the forum state as were found necessary in *Plus System.* Without these contacts, fundamental

fairness requires the lower court be reversed and Petitioner's motion to dismiss be granted.

Technology is playing a vital role not only in our daily lives, but also in courts of law. Jurisdictional issues once thought inconceivable are now regularly confronted by courts. Burgeoning technology has the potential of creating numerous jurisdictional horrors. Automated bank tellers, home shopping capabilities, and fax machines all have the capacity to project an "electronically achieved presence" anywhere in the world. Individual users of such technology cannot reasonably be expected to litigate in a seemingly infinite number of possible forums. This is particularly true when the users have no notion of where their communications may travel. The Supreme Court of Marshall can readily avoid these dilemmas and decide this matter consistent with the traditional notions of fair play and essential fairness upon which *in personam* jurisdiction is predicated. As Chief Justice Stone commented in *International Shoe*, without continuous and systematic activities, "presence [of the defendant] . . . or even his conduct of single or isolated items of activities in a state . . . are not enough to subject [him] to suit." 326 U.S. at 317. Requiring one to "defend the suit away from his home or other jurisdiction where it carries on more substantial activity has been thought to lay too great and unreasonable burden [on the defendant] to comport with due process." *Id.* This concept must be applied despite developments in technology and, as a consequence, jurisdiction over Petitioner should be found violative of due process. The lower court should therefore be reversed and Petitioner's motion to dismiss granted.

II. THE COURT OF APPEALS OF THE STATE OF MARSHALL ERRED IN NOT DISMISSING RESPONDENT'S CLAIM BECAUSE SHE IS A PUBLIC FIGURE WHO FAILED TO ALLEGE ACTUAL MALICE.

The appellate court erred in denying Petitioner's motion to dismiss because Respondent is a public figure required by the First Amendment to allege and prove actual malice to sustain a defamation action. Respondent became a public figure by virtue of her willful participation in a debate about abortion on the Internet. Abortion, one of the most divisive issues currently facing the nation, is a public controversy. The nature and extent of Respondent's participation in the debate indicates that she invited attention and comment by thrusting herself to the forefront of that controversy. It is the duty of this court to apply traditional First Amendment protections in favor of free debate on public controversies. A review of the instant case indicates that the actual malice standard governing defamation actions by public figures is applicable to Respondent's

action against Petitioner. Therefore the decision of the lower court should be reversed and Petitioner's motion to dismiss Respondent's complaint should be granted.

The First Amendment precludes public officials from recovering damages in a defamation action absent an allegation and clear and convincing proof "that the statement was made with 'actual malice,' that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974); *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). This standard also applies to public figures. *Gertz*, 418 U.S. at 323, 345; *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 134 (1967). Public figures include those individuals who thrust themselves to the forefront of a particular public controversy, thereby inviting attention and comment. *Gertz*, 418 U.S. at 345.

The reason for imposing a higher burden of proof on public figures like Respondent, as opposed to purely private individuals, is clear. It is to ensure "that debate on public issues [is] uninhibited, robust, and wide-open." *New York Times*, 376 U.S. at 270. Even before the Court's landmark ruling in *New York Times*, this nation has regarded the unfettered exchange of ideas as inextricably linked with the very foundations of democracy. These sentiments are evident in early decisions of the Supreme Court. In *Thornhill v. Alabama*, the Court stated that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." 310 U.S. 88, 102 (1940). The Court has likewise instructed that "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

If we are to enjoy uninhibited and robust debate about public controversies such as abortion, as well as the free dissemination of truth and opinion, society must afford a certain amount of "strategic protection" to statements which might otherwise be defamatory. *Gertz*, 418 U.S. at 342; *New York Times*, 376 U.S. at 272. The actual malice standard permits such protection by affording a constitutional "breathing space" to allegedly defamatory statements made about public figures. *Gertz*, 418 U.S. at 342. It guards against the chilling of free expression through sanction and self-censorship, consequences brought on by defamation litigation. *Id.*

The exchange between Petitioner and Respondent over the Internet is precisely the kind of speech that the First Amendment is designed to protect. The Internet, often referred to as the "world-wide web," is the largest electronic communication service in the world. Mark A. Kassel & Joanne Kane Kassel, *Don't Get Caught in the Net: An Intellectual Prop-*

erty Practitioner's Guide to Using the Internet, 13 J. MARSHALL J. COMPUTER & INFO. L. 373, 373 (1995). Because the Internet is a medium of speech, Petitioner, who also participated in the abortion debate, is entitled to traditional First Amendment protections. Accordingly, Respondent must allege actual malice in her defamation action against Petitioner.

A. THE LOWER COURT ERRED IN DETERMINING THAT RESPONDENT WAS NOT A PUBLIC FIGURE FOR PURPOSES OF HER DEFAMATION ACTION.

The public or private status of a defamation plaintiff is critical in a court's determination of the weight to be allocated between the competing interests of the state in protecting an individual's reputation on one hand, and free speech on the other. *Gertz*, 418 U.S. at 344. When someone becomes a public figure, imposing the actual malice standard is warranted because they, unlike private individuals, have greater access to the media to correct misstatements about them. *Id.* Conversely, private individuals are generally not privy to those means of redress. *Id.* Furthermore, public figures, unlike private persons, accept and run the risk that others, in analyzing and commenting on public controversies, "will focus on them and, perhaps, cast them in an unfavorable light." *Id.* at 345. Respondent's involvement in a public controversy via the Internet transformed her from a private individual to a public figure. Her online participation in the CanWeChat discussion group made the state's interest in protecting uninhibited, robust, and wide-open public debate more compelling than any interest the state may have in guarding her reputation.

The *Gertz* Court defined alternate theories by which an individual may become a public figure:

> [I]t may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. *More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.*

Gertz, 418 U.S. at 345 (emphasis added). There are then, two distinct categories of public figures; individuals of such pervasive notoriety that they are public figures for all purposes, and individuals like Respondent who are drawn into or who voluntarily inject themselves into a specific public controversy. The latter is commonly referred to as a "limited purpose public figure." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d

1287, 1292 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980) (finding CEO in the supermarket industry a "limited purpose public figure").

This court is vested with the authority to determine whether Respondent is a public figure as a matter of law. *See Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966). In deciding whether a defamation plaintiff is a public figure, courts should engage in a fact-sensitive examination concerning the character of the controversy and "the nature and extent of [Respondent's] participation in the particular controversy that gave rise to the alleged defamation." *Gertz*, 418 U.S. at 343-44.

The first consideration, which calls upon the court to determine the character of the controversy, turns upon (1) whether the controversy preexisted the alleged defamation, and (2) whether the outcome of the controversy effects those not directly participating in it in some appreciable way. *See Waldbaum*, 627 F.2d at 1292-96, *noted with approval in Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 246 n.3 (1986). If the answer to both inquiries is affirmative, the issue is a public controversy.

The second consideration, the nature and extent of the plaintiff's role in the controversy, focuses upon the voluntariness of the plaintiff's involvement, and should include notice of whether the plaintiff had access to channels of effective communication. *See Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *see also Foretich v. Capital Cities/ABC*, 37 F.3d 1541 (4th Cir. 1994). The more voluntary the plaintiff's participation in the public controversy, and the more accessible the means to effective communication, the more likely the plaintiff is a limited purpose public figure as a matter of law. Applying these criteria to the instant case can only lead to the conclusion that Respondent is a voluntary, limited purpose public figure as a matter of law.

During its brief consideration of the issue, the Marshall Court of Appeals neglected its duty to undergo a fact-sensitive analysis about the particular controversy in which Respondent engaged. An examination of the nature and extent of her role in that controversy is also notably absent from the appellate court's opinion. This violates the direction of the Supreme Court in *Gertz* and its progeny. The lower court ignored this direction and summarily dismissed, without elaboration, the contention that one may become a public figure "merely because of her participation in a discussion of a controversial issue widely published on the Internet." (R. 6.) In its scant treatment of the issue, the court failed to recognize that electronic communication services have become an easily accessible forum for public debate. Any individual with a computer and modem may participate in public controversies to such an extent so as to acquire the status of a limited purpose public figure.

Commentators reflecting on the application of the First Amendment to electronic communication services have recognized their role in the

free marketplace of ideas. *See* Anne Wells Branscomb, *Emerging Media Technology and The First Amendment: Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L.J. 1639, 1668 (1995) (quoting Mike Godwin, Legal Counsel for the Electronic Frontier Foundation, "The world of the networks is a true democracy, your influence is measured not by wealth or position, but by how well you write and reason.") A proper analysis of the instant case indicates that Respondent, like many others, chose the Internet as the medium for injecting her ideas into a public controversy. The nature and extent of her participation in that controversy was such that she became a limited purpose public figure.

1. *A debate about abortion on the Internet constitutes a public controversy.*

Respondent's online participation in the CanWeChat abortion debate was a public rather than private concern. "If [an] issue was being debated publicly [prior to the alleged defamation], and if it [has] foreseeable and substantial ramifications for nonparticipants, it [is] a public controversy." *Waldbaum*, 627 F.2d at 1296.

Little reflection is required to arrive at the conclusion that the abortion debate pre-existed Petitioner's participation in the CanWeChat discussion group in November and December, 1993. (R. 2.) In 1973, the Supreme Court recognized a woman's right to choose an abortion before fetal viability. *Roe v. Wade*, 410 U.S. 113 (1973), *modified sub nom,* 505 U.S. 833 (1992) Since then, a heated debate has raged across the nation, dividing people according to their legal, moral, and political convictions. The abortion debate also has foreseeable and substantial ramifications for nonparticipants. Doctors have been murdered for their willingness to perform the procedure. Stephen Braun, *Abortion's Wary Line of Defense*, L.A. TIMES, Aug. 11, 1994, at A1. Women seeking access to family planning clinics are harassed or denied access by abortion protestors. Laura Griffin, *Violence in the Name of God*, ST. PETERSBURG TIMES, Oct. 23, 1994, at 1A. Police forces are overburdened with monitoring pro-choice and pro-life demonstrations. *Id.* Clearly, the abortion controversy effects those not directly involved in the debate in an appreciable way. Abortion, perhaps more than any other issue, is a public controversy.

In light of other issues courts have recognized as public controversies, reasonable minds would conclude that the abortion debate is even more worthy of the title. Consumer, health, and environmental issues are commonly found to be public controversies. *See, e.g.*, *Bose Corp. v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984). For instance, an ongoing debate about the carcinogenic effect

of pesticides is a public controversy. *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 709 (4th Cir. 1991). A utility company's refusal to allow public access to its cooling lake for recreational purposes has been recognized as a public controversy. *Knudsen v. Kansas Gas & Electric Co.*, 807 P.2d 71 (Kan. 1991). A community's concerns about the rates of a municipally owned utility may also constitute a public controversy. *Wright v. Haas*, 586 P.2d 1093 (Okla. 1978).

Even seemingly private family matters can become public controversies if they heighten social awareness. In *Foretich v. Capital Cities/ABC, Inc.*, the court, in determining whether the plaintiffs were limited purpose public figures, concluded that a highly publicized child custody battle was a public controversy. 37 F.3d 1541 (4th Cir. 1994). In *Foretich*, the grandparents of a child at the center of the custody litigation filed a defamation action against ABC for a docudrama in which they were referred to as "abusers." *Id.* at 1541-43. The court explained that the custody dispute was not merely a personal matter which captured the voyeuristic attention of the public. *Id.* Rather, it was a public controversy which raised social awareness about child abuse allegations and the negative ramifications of lengthy custody disputes. *Id. Cf. Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (finding publicized divorce of socially prominent couple not the sort of "public controversy" to which *Gertz* applies). The plaintiffs were ultimately held to be private figures notwithstanding the controversy because their public statements were not voluntary but made in defense of accusations that they had abused their grandchild. *Foretich*, 37 F.3d at 1543.

That the abortion debate is a public controversy is uncontested and no reasonable court would find otherwise. The appellate court conceded as much by stating Respondent was involved "in a discussion of a controversial issue widely published on the Internet." (R. 6.) Indeed, Petitioner and Respondent were engaged in a debate of far greater magnitude than the quality of consumer goods or the rate of local utilities. Like the issues addressed in *Foretich*, the abortion debate on CanWeChat heightened social awareness as to the complexities of the issue. The discussion was representative of the colliding legal and moral positions on abortion prevalent in the general public. The messages posted by the parties also demonstrate the passion with which individuals respond when challenged as to the propriety of their view. Distinguished from the plaintiffs in *Foretich*, Respondent did not make her statement in self-defense of any accusation of illegal activity.

Abortion, an intrinsically private decision about procreation, has generated a public controversy of enormous proportions. Respondent debated this topic undoubtedly aware of its magnitude. The special protections for speech relating to public issues stem from the belief that the First Amendment was intended to allow the free exchange of ideas to

bring about desired political and social changes. *Roth v. United States*, 354 U.S. 476, 484 (1957); *see also Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949). Those seeking to influence opinions on abortion via the Internet have the ability to bring about political or social change through peaceful means. The debate in which Petitioner was engaged and his statements therein should be granted First Amendment protection, lest censorship of discussion about volatile public issues result in the eventual violent outburst of otherwise suppressed opinions.

2. *Respondent voluntarily thrust herself into the abortion controversy and, by virtue of her participation in the debate on the Internet, had access to effective means of rebuttal.*

The lower court erred in not conducting a thorough analysis of Respondent's role in the abortion controversy. Such an inquiry is required when determining the public or private status of a defamation plaintiff. *See Clark v. American Broadcasting Co., Inc.*, 684 F.2d 1208, 1218 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, §§ 12-13 (2d ed. 1988). In considering the plaintiff's role in a public controversy, the court should examine the voluntariness of the plaintiff's presence in the controversy, and take notice of whether the plaintiff had available a means of rebuttal that reduces the need for litigation. *Hutchinson v. Proxmire*, 433 U.S. 111, 135-136; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

When individuals voluntarily assume a role in a public controversy, they, by their own will, expose themselves to increased risk of injury from defamatory falsehood. *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164 (1979). They accept and run the risk that others, in analyzing and commenting on public controversies, "will focus on them and, perhaps, cast them in an unfavorable light." *Gertz*, 418 U.S. at 344-45. When a plaintiff has ready access to a means of effective communication, courts prefer rebuttal of defamatory speech over a resort to litigation. *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 708 (4th Cir. 1991) *citing Gertz*, 418 U.S. at 344). An application of these considerations to the instant case indicates that Respondent willingly joined a debate about a controversial issue, thereby running the risk that others would defame her. The Record also demonstrates that Respondent, by virtue of her participation in the online discussion, literally had the instrument of rebuttal at her fingertips. Her decision to file suit, rather than challenge Petitioner's speech, is particularly inappropriate given her voluntary participation in a debate likely to evoke heated, confrontational comments.

Persons like Respondent who choose to write about public controversies become limited public figures, that is, public figures with respect to

the issues they write about. For instance, a free-lance journalist who wrote a critical article about a utility company was determined to be a limited purpose public figure. *Knudsen v. Kansas Gas & Electric Co.*, 807 P.2d 71, 78 (Kan. 1991). In reaching its decision, the court explained that as a free-lance writer, the plaintiff was free to choose any topic to write about. *Id.* In choosing to write an article about the utility company, the plaintiff voluntarily injected himself into a public controversy, thereby inviting attention and comment. *Id.* at 78. Notably, the defendants' allegedly defamatory statements went beyond criticizing the plaintiff's article and attacked the plaintiff personally, by saying he was "will[ing] . . . to print untrue information and to distort it to make an adversarial position." *Id.* at 74. Even so, the court stated that "[plaintiff] is in no position to complain just because [defendant's] opinion, comments, or criticisms are adverse to his article." *Id.* at 78. Interestingly, the court went on to state that, even had the plaintiff retained his status as a "private individual," he was required to prove actual malice because his article addressed an issue of public concern. *Knudsen,* 807 P.2d at 79 *citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

Like the plaintiff in *Knudsen*, Respondent voluntarily injected herself into the abortion debate and, having done as much, is in no position to complain simply because Petitioner's message was critical of her. The *Knudsen* opinion also demonstrates that, because Respondent's comment about abortion addressed a matter of public rather than private concern, she may be required to allege actual malice on that basis alone.

The Supreme Court of Oklahoma followed a rationale similar to *Knudsen* in finding that a defamation plaintiff became a limited purpose public figure because he wrote a letter to the editor of a local newspaper. *Wright v. Haas,* 586 P.2d 1093, 1093 (Okla. 1978). The plaintiff's letter addressed a controversy surrounding increasing rates of a municipally owned utility and criticized the former city attorney. *Id.* at 1094. The former city attorney responded in kind, referring to the plaintiff as a radical who "participat[ed] in activities . . . which, but for the protection of highway patrol troopers and the national guard, would have resulted in the fire-bombing of at least one book store and the armory." *Id.* In finding that the plaintiff voluntarily injected himself into the vortex of a public controversy, the court explained that the plaintiff's letter to the editor "sought to engage the public's attention to influence public issues." *Id.* at 1096. In reaching its decision that the plaintiff was a limited public figure, the court found significant that both parties wrote and had published letters to the editor, thereby establishing a likelihood of rebuttal. *Id.*

By posting the message voicing her "firm opposition to abortion on religious and moral grounds," (R. 2.) Respondent likewise voluntarily in-

jected herself into the vortex of a public controversy. Her message was essentially an electronic editorial by which she engaged the participants' attention in an attempt to influence the debate. As a voluntary participant in the online debate, Respondent, like the plaintiff in *Wright*, ran the risk that others commenting on the issue might cast her in an unfavorable light.

Debates are inherently confrontational, calling upon their participants to denigrate others' arguments to fortify their own. When there exists a likelihood of rebuttal between a defamation plaintiff and defendant, the court is more likely to conclude that the plaintiff is a public figure for the limited range of issues in which he has involved himself. *Wright*, 586 P.2d at 1096. Although a medium of effective communication was readily accessible to Respondent, she neither requested a retraction nor responded to Petitioner's statement, opting instead to take the disfavored action of filing suit.

When people have an effective means of disseminating information and rehabilitating their reputation at their disposal, filing a defamation claim is an inappropriate course of action. *Reuber*, 925 F.2d at 708 (citing *Hutchinson*, 443 U.S. at 135); *see also Colson v. Stieg*, 433 N.E.2d 246 (Ill. 1982). In *Reuber*, a scientist who was allegedly defamed by his employer was found to be a limited public figure. 925 F.2d at 704. The plaintiff had published articles in the same scientific newsletter in which his employers tarnished his reputation. *Id.* In arriving at the conclusion that the plaintiff was a public figure, the court relied on his significant access to channels of communication, both before and during the publication of the allegedly defamatory statements. *Id.* at 708. Because he had ample opportunity to redeem his reputation through the same medium in which he was allegedly defamed, the court disapproved of the plaintiff's choice to file suit. *Id.*

Like the plaintiffs in *Wright* and *Reuber*, Respondent had access to the same medium of communication by which she claims she was defamed. Commentators have suggested that when defamation plaintiffs subscribe to the same computer bulletin board in which they are defamed, they have sufficient access to redeem their reputations. *See* Thomas D. Brooks, *Catching Jellyfish in the Internet: The Public Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461 (1995). There is no evidence to indicate Respondent terminated her connection to the Internet at anytime after Petitioner's allegedly defamatory message was posted. The unique structure of computer bulletin boards allows users to immediately post a rebuttal, bypassing traditional obstacles like editors of print media. *Id.* at 467. Any alleged injury to Respondent's reputation could have been cured by her own initiative in the very same forum where she was alleg-

edly defamed. Opting to commence legal action against Petitioner was therefore inappropriate.

B. The Lower Court Erred in Not Finding That Respondent is Required to Allege Actual Malice.

Respondent is a public figure as a matter of law with respect to her participation in the abortion debate on the Internet. The *New York Times* and *Gertz* rule of law requires such plaintiffs to plead and prove actual malice to maintain a defamation action. Respondent is precluded from proceeding with her defamation claim because she failed to allege actual malice in her complaint against Petitioner.

By allowing Respondent's complaint to proceed absent an allegation of actual malice, the lower court has chilled the free exchange of ideas on the issue of abortion, a matter of significant public importance. When reviewing defamation cases, an appellate court has an obligation to make an independent examination of the record as a whole to ensure that the final judgment does not infringe upon constitutionally protected speech. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). It is, therefore, within this court's discretion to apply the actual malice standard, even if it does not find that Respondent is a public figure as a matter of law, on the single basis that the speech between Petitioner and Respondent involved a matter of public concern. *Knudsen*, 807 P.2d at 79 (interpreting *Greenmoss*, 472 U.S. at 749 (plurality)); *see also* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo. Wash. L. Rev. 1 (1990). In the interest of protecting uninhibited, robust and wide-open debate on public issues, this court should impose the actual malice standard on Respondent due to her public figure status or, in the alternative, because she engaged in debate about a matter of public concern.

The record demonstrates that Respondent was required to plead with the burden of pleading actual malice. Because Respondent failed to do so, Petitioner's motion to dismiss for insufficiency of the complaint should have been granted. Therefore, the decision of the Circuit Court of Appeals should be reversed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this court reverse the appellate court's decision and grant Petitioner's Motions to Dismiss.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

UNITED STATES CONSTITUTION, amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, amend. XIV, § 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MARSHALL REVISED STATUTES, MARSHALL LONG-ARM STATUTE, Chapter 48.

I. Personal Jurisdiction by Acts of a Non-Domiciliary.

A. Courts may exercise personal jurisdiction over non-domiciliaries, their administrators or executors, as to courses of action which arise from conduct enumerated in this section, who in person or through an agent:

1) conduct or transact business within the state of Marshall;
2) commit a tortious act within the state of Marshall; or
3) commit a tortious act outside the state of Marshall which causes injury to persons or property within the state of Marshall, if he or she

(a) regularly conducts or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from services rendered or goods consumed or used in the state of Marshall, or

(b) expects or should reasonably expect his or her conduct to have consequences in the state of Marshall and derives substantial revenue from the interstate or international commerce.

BRIEF FOR THE RESPONDENT

No. 95-1481

IN THE SUPREME COURT
OF THE
STATE OF MARSHALL

JENNIFER FETTY,
Respondent,

v.

ROBERT JACOBS,
Petitioner.

ON APPEAL FROM THE APPELLATE COURT
OF THE STATE OF MARSHALL

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

I. WHETHER THE MARSHALL COURT MAY PROPERLY AND CONSTITUTIONALLY EXERCISE JURISDICTION UNDER THE MARSHALL LONG-ARM STATUTE TO REDRESS INJURIES THAT WERE THE FORESEEABLE RESULT OF DEFAMATORY REMARKS PURPOSEFULLY DIRECTED TOWARD THE CITIZENS OF MARSHALL.

II. WHETHER JENNIFER FETTY IS A LIMITED-PURPOSE PUBLIC FIGURE, AS REQUIRED BY CONSTITUTIONAL STANDARDS,

BASED SOLELY ON HER PARTICIPATION IN THE CANWECHAT DISCUSSION GROUP ON THE INTERNET WHEN:

1. SHE WAS NOT INVOLVED IN A PUBLIC CONTROVERSY;
2. SHE DID NOT ASSUME A POSITION OF PROMINENCE IN A PUBLIC CONTROVERSY SUCH THAT SHE COULD INFLUENCE ITS RESOLUTION; AND
3. SHE DID NOT HAVE SUFFICIENT ACCESS TO A PUBLIC MEDIA SOURCE THROUGH WHICH SHE COULD ADEQUATELY RESPOND TO THE DEFAMATORY STATEMENTS.

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OPINIONS BELOW

The order of the Lakeview County Circuit Court that denied Petitioner's motion to dismiss is unreported. The opinion of the Court of Appeals of the State of Marshall that affirmed the circuit court's order is also unreported.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The statutory provisions relevant to the determination of this case include the following: Marshall Revised Statutes, Chapter 48, Section I, paragraph A and the Due Process Clause, U.S. Const. amend. XIV. The pertinent text of the Marshall statute is set out in the Appendix. The Due Process Clause of the United States Constitution is set out in the Appendix.

STATEMENT OF THE CASE

A. SUMMARY OF THE FACTS

Respondent Jennifer Fetty resides in Peoria, Illinois, where she works as a convenience store cashier. (R. at 2.) She enjoys computer use as a hobby and has access to the Internet[1] through an on-line service provider. (R. at 2.) Ms. Fetty's use of the Internet resulted in her introduction to Petitioner Jacobs.

Jacobs is an active computer user who resides in Addison, Illinois. He works as a computer salesman, a position requiring a developed understanding of computer systems. (R. at 2.) As part of his computer use, he subscribes to a computer service which provides access to the Internet. (R. at 2.)

The paths of Jennifer Fetty and Jacobs first crossed in November of 1993 through their mutual participation in the CanWeChat[2] discussion group, a bulletin board system on the Internet. (R. at 2.) Both parties continued to participate in this group throughout November and continuing into December. (R. at 2.) The discussions focused on the participants' views regarding abortion. (R. at 2.) Jennifer Fetty and Jacobs expressed contrasting views on the abortion issue. (R. at 2.)

On December 4, 1993, Jennifer Fetty, Jacobs and the other members of the discussion group were on-line discussing their views on abortion. (R. at 2.) Jacobs attempted to discredit Ms. Fetty, with regard to her views on abortion, by accusing her of prostituting herself. (R. at 2-3.) Jacobs transmitted his defamatory message to Marshall where it was received by another participant, David Bornmann. (*See* R. at 3.) David Bornmann was outraged by Jacobs' "mean-spirited and slanderous personal accusations," and further suggested that if Jacobs could not be civil, he should leave the discussion. (R. at 3.)

B. SUMMARY OF THE PROCEEDINGS

Jennifer Fetty brought a defamation action against Jacobs in Marshall. (R. at 3.) The suit resulted from the defamatory statement that was received and read by a resident of Marshall. (R. at 3.) Jacobs filed a motion to dismiss the complaint claiming that the State of Marshall lacked personal jurisdiction. (R. at 3.) His motion was based on his assertion that he was not a domiciliary of the State of Marshall and that he

1. The Internet, the world's largest computer network, has been described as a "vast international network of networks that enables computers of all kinds to share services and communicate directly, as if they were part of one giant, seamless, global computing machine." Philip Elmer-Dewitt, *Battle for the Soul of the Internet*, TIME, July 25, 1994, at 50.

2. CanWeChat is operated by a system operator ("sysop") in Chicago, Illinois. (R. at 2.)

had neither visited nor conducted business in the state. (R. at 3.) Jacobs also argued that the messages he posted in Illinois, which were subsequently received and read in Marshall, did not constitute minimum contacts as required by the Due Process clause of the United States Constitution. (R. at 3.) Jacobs additionally asserted that Jennifer Fetty was a limited-purpose public figure. (R. at 4.) Consequently, Jacobs attacked the sufficiency of the complaint for failure to allege that Jacobs acted with actual malice. (R. at 4.)

The trial court held that Jacobs was subject to personal jurisdiction in the State of Marshall under the Marshall long-arm statute. (R. at 5.) As to Jacobs claim that Jennifer Fetty's complaint was insufficient, the trial judge ruled that, as a matter of law, Jennifer Fetty was not a public figure. (R. at 5.) The court did not address Jacobs' Due Process challenge.

Jacobs filed a timely appeal of the judge's order to the Marshall Court of Appeals. (R. at 5.) The court reviewed the matters of law *de novo* and affirmed the orders of the circuit court. (R. at 5-6.) The court of appeals held that Jacobs' participation in the bulletin board system established virtual legal presence in Marshall, thereby subjecting him to personal jurisdiction in Marshall. (R. at 6.) The court also held that Jennifer Fetty was not a public figure, and therefore, did not bear the burden of proving actual malice. (R. at 5-6.) This Court granted leave to appeal on June 22, 1995.

SUMMARY OF THE ARGUMENT

I. Jurisdiction is the basis for a court's authority to require a defendant to answer a lawsuit and to enforce a judgment against him. The Marshall long-arm statute allows courts to assert jurisdiction over nonresident defendants who commit tortious acts within the state. In a libel action, a tort occurs in every state in which the defamatory material is circulated. Jacobs' transmission of defamatory material to a resident of Marshall falls within this provision.

Jacobs' lack of physical contacts with Marshall is not a bar to jurisdiction. Jacobs' use of the CanWeChat bulletin board system established virtual and legal presence in Marshall, thereby allowing the courts to exercise specific jurisdiction. Specific jurisdiction in this case is founded on three traditional doctrines. First, Jacobs purposefully availed himself of the privilege of communicating with residents of Marshall. Second, Jacobs' communications injured Jennifer Fetty in Marshall. Marshall, therefore, may also exercise jurisdiction under the effects test. Finally, Jacobs' intentional placement of his defamatory remarks in an established distribution system, the Internet, provides the Marshall courts with jurisdiction under the stream of commerce theory. Jacobs could

foresee that he would be subject to jurisdiction in Marshall on the basis of these three theories, and thus, the Due Process Clause does not prevent jurisdiction in this case. This court therefore, should affirm the decisions of the lower courts and provide Jennifer Fetty relief for her injuries.

II. The United States Supreme Court has recognized a conflict between defamation law and First Amendment freedoms. Public officials and public figures, therefore, must prove that a defamatory statement was made with actual malice in order to recover. In this regard, the Court has provided a three prong test to assist courts in deciding whether a plaintiff is a public figure.

Jennifer Fetty's participation in a group discussion on the Internet does not classify her as a limited-purpose public figure under this three part test. First, this case does not involve a public controversy. While the issue of abortion was the underlying topic of discussion for the CanWeChat discussion group, the controversy was actually the personal views of the participants in the group. The personal views of the participants is not an issue which could have substantial ramifications on the general public. However, even if this Court decides that this case does involve a public controversy, Jennifer Fetty did not "thrust" herself to the forefront a public controversy with a reasonable expectation that she could influence the resolution of the issue. Furthermore, Jennifer Fetty did not have sufficient access to the media in order for her to adequately rebut Jacobs' defamatory message. As a convenience store cashier, Ms. Fetty is not in a position to attract members of the press to her rebuttal. Additionally, she had no adequate means to respond to Jacobs' defamatory statements because the statements could conceivably have been disseminated to persons outside the CanWeChat discussion group. Because Jennifer Fetty does not meet the three requirements of a limited-purpose public figure, this Court should affirm the decisions of the lower courts and provide Jennifer Fetty the opportunity to continue her suit against Jacobs for her injuries without proving actual malice.

PROLOGUE

Personal jurisdiction and public figure status in the context of defamation actions are issues that have been addressed by courts on many occasions. The facts of this case, however, are unique in that the dispute between the parties arises out of their use of an Internet bulletin board service. (R. at 2.) Accordingly, the issues in this case can only be effectively resolved if all parties involved have a basic understanding of the Internet and computer bulletin board services.

The Internet originated as a United States Defense Department project approximately 25 years ago. Thomas D. Brooks, Note, *Catching Jel-*

lyfish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards, 21 RUTGERS COMPUTER & TECH. L.J. 461, 469 (1995). It is the largest computer network in the world and currently links together large commercial computer-communications services, universities, and government and corporate networks. Philip Elmer-Dewitt, *Battle for the Soul of the Internet*, TIME, July 25, 1994, at 50. Although the Internet originated in the United States, it presently allows communications on an international scale and is available to virtually anyone with a computer. *See id.* This global communication system "reaches nearly 25 million computer users . . . and is doubling every year." *Id.*

Computer bulletin boards are two-way communication services that can be accessed through the Internet. Robert Charles, *Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?*, 2 J. L. & TECH. 121, 124 (1987). Bulletin board subscribers can "communicate inexpensively and instantaneously with a number of other personal computer owners or users." *Id.* To date, approximately 100,000 bulletin boards exist worldwide, about 2,500 of which are available to Internet users. Brooks, 21 RUTGERS COMPUTER & TECH. L.J. at 468. Bulletin boards dedicated to a single discussion topic are now common features on the Internet. *Id.* The CanWeChat discussion group, dedicated to societal views on abortion, is one example of a bulletin board with a specific topic. (R. at 2.)

The Internet and bulletin board services such as CanWeChat are unique because the participants are potential producers and consumers of information. Mike Godwin, *The First Amendment in Cyberspace*, 4 TEMP. POL. & CIV. RTS. L. REV. 1, 4 (1994). "Since the information can flow in any direction, it is a many-to-many medium." *Id.* This case is a prime example of how the Internet and computer bulletin boards are playing an increasingly important role in the communications world and, perhaps as importantly, the American legal system.

I. THE MARSHALL COURT MAY CONSTITUTIONALLY EXERCISE JURISDICTION UNDER THE MARSHALL LONG-ARM STATUTE TO REDRESS INJURIES THAT WERE THE FORESEEABLE RESULT OF DEFAMATORY REMARKS PURPOSEFULLY DIRECTED TOWARD THE CITIZENS OF MARSHALL

This case raises an issue regarding the propriety of broadening the permissible scope of *in personam* jurisdiction ("personal jurisdiction") to properly accommodate advances in communications and the increased mobilization of society. The need to expand jurisdiction was first recognized almost four decades ago by the United States Supreme Court. *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-23 (1957).

This need for expansion resulted from commercial activity that affected multiple states. *Id.* The advent of the computer has made both commercial and multi-state communications commonplace.

"Unlike communication by mail or telephone, messages sent through computers are available to the recipient and anyone else who may be watching." *California Software Inc. v. Reliability Research, Inc.*, 631 F. Supp. 1356, 1363 (C.D. Cal. 1986). Computers allow individuals to interact simultaneously with individuals in several states. Modern technology's revolution of communications has made it imperative for courts to "broaden correspondingly the permissible scope of jurisdiction exercisable by the courts." *Id.*

Despite the evolution of traditional jurisdiction principles, a valid exercise of jurisdiction still requires compliance with both the state's long-arm statute and the Due Process Clause of the Constitution. Thus, the first issue before this court is whether the Marshall long-arm statute confers personal jurisdiction over Jacobs.

Jacobs' initial objection to the jurisdiction of the Marshall court is that he has never conducted business in Marshall. (R. at 3.) The Marshall long-arm statute, however, provides several different and independent types of conduct that subject a nonresident to jurisdiction in Marshall. Jacobs' contention only applies to section I A (1) of the Marshall statute. Both lower courts, however, premised jurisdiction on section I A (2) of the statute—the commission of tortious acts within the state. (R. at 1.)

A. JACOBS COMMITTED A TORT WITHIN THE STATE OF MARSHALL WHEN HE TRANSMITTED HIS DEFAMATORY REMARKS TO MARSHALL.

Chapter 48, Section I, paragraph A, subparagraph 2 of the Marshall Revised Statute provides in pertinent part: "Courts may exercise personal jurisdiction over non-domiciliaries . . . as to courses of action which arise from conduct enumerated in this section, who . . . commit a tortious act within the state of Marshall . . . ." (R. at 4.) The court's interpretation of this provision must necessarily begin with an assessment of where the tortious activity is committed in a defamation action.

A general principle of tort law holds that defamation occurs wherever the offending material is circulated. RESTATEMENT (SECOND) OF TORTS § 577A cmt. a (1977). This principle stems from recognition that publication or communication is a necessary component of defamation. *Laxalt v. McClatchy*, 622 F. Supp. 737, 742 (D. Nev. 1985). Defamation, by definition, involves injuries sustained as the result of third parties reading the false statements. *Id.* Consequently, courts that have consid-

ered where the tort of defamation occurs have focused almost exclusively on the location at which the defamed party suffers injury.

In the leading case on defamation, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), the United States Supreme Court held that jurisdiction over a nonresident defendant was proper in any forum in which the impact of the defamatory remarks was felt. Libelous actions cause two types of injuries. First, false statements harm the defamed person. *Keeton*, 465 U.S. at 777. "The reputation of the libel victim may suffer harm even in a state in which he has hitherto been anonymous. The communication of the libel may create a negative reputation among the residents of a jurisdiction where the plaintiff's previous reputation was, however small, at least unblemished." *Id.* The recipients of the defamatory statements are also injured. *Id.* The state's interest in discouraging the deception of its citizens allows the state courts to exercise jurisdiction over the author of the libelous statements. Employing both the interest of the defamed party and the interest of the recipients of the defamatory message, the Supreme Court held that jurisdiction over a nonresident defendant in a defamation action brought by another nonresident was proper. *Keeton*, 465 U.S. at 781.

Courts that have been called upon to interpret state long-arm statutes have overwhelmingly adopted the *Keeton* Court's holding and applied it to permit jurisdiction over nonresident defendants in defamation actions. Several decisions have involved the interpretation of provisions analogous to the Marshall long-arm statute. A fundamental principle of statutory construction dictates that statutes containing similar language and sharing a common purpose should be similarly interpreted. *Northcross v. Board of Education*, 412 U.S. 427, 428 (1973). Marshall's long-arm statute, therefore, should be construed accordingly.

The Illinois long-arm statute provides courts the power to exercise jurisdiction over nonresidents who "[commit] a tortious act within the state. . . ." ILL. ANN. STAT. ch. 735 ¶ 5/2-209 (Smith-Hurd 1993). This provision permits Illinois courts to exercise jurisdiction for a single tortious act committed in Illinois even if most of the defendant's activities occur elsewhere. *Rose v. Franchetti*, 713 F. Supp. 1203, 1209 (N.D. Ill. 1989), *aff'd*, 979 F.2d 81 (7th Cir. 1992). "The general rule is that where tortious acts are committed over the telephone, the situs of the tort is the place where the phone call is received." *Id.* Thus, as long as the fraudulent statement is received in Illinois, the tort occurred in Illinois for purposes of the Illinois long-arm statute. *Id.*

The Illinois long-arm statute was revisited by the Northern District of Illinois in *Wysnoski v. Millet*, 759 F. Supp. 439, 442 (N.D. Ill. 1991). The plaintiff in *Wysnoski* brought an action for a misrepresentation by telecommunication that originated in Texas and was received in Illinois. *Id.* at 441. The relevant inquiry for jurisdictional purposes is not where

the information originates. *Id.* at 442. Rather, the focus is on where the information is received. *Id.* The *Wysnoski* court concluded that the Illinois statute would permit the court to exercise jurisdiction if the defendant intended to communicate his message to Illinois. *Id.* "It is 'well established Illinois law . . . that use of the mails and telephone subjected [the defendant] to jurisdiction.'" *Id. quoting FMC Corp. v. Varonos*, 892 F.2d 1308, 1313 (7th Cir. 1990).

Analogous provisions of the Florida and Nevada long-arm statutes, providing jurisdiction over nonresident defendants for the commission of tortious acts within the state, have been applied to allow jurisdiction in defamation actions in which the articles originated outside the forum state. *See* FLA. STAT. ANN. § 48.193(1)(b) (West. 1994); NEV. REV. STAT. § 14.065 (1985). Under the Nevada statute, the defendants in a libel action were held to have committed a tort in Nevada since the defendants had some responsibility for the publication of the defamatory remarks in Nevada. *Laxalt*, 622 F. Supp. at 742.[3] Similarly, a tort was committed in Florida when defamatory remarks made during a telephone interview between parties in New York and California were published in a magazine circulated in Florida. *Madara v. Hall*, 916 F.2d 1510 (11th Cir. 1990).

Jacobs' statements were circulated in Marshall. Jennifer Fetty suffered injury in Marshall when the circulated material was read by David Bornmann, a Marshall resident. Under general tort principles, as well as the application of similar long-arm provisions, Jacobs' transmission of the libelous material to a Marshall resident constituted the commission of a tortious act in Marshall. Jurisdiction, is therefore, proper under the Marshall long-arm statute.

Additional support for this conclusion is provided by the liberal interpretations traditionally given to long-arm statues. "Most long-arm statutes are drafted to permit the maximum possible exercise of jurisdiction consistent with the Due Process requirement . . . ." Conrad M. Shemadine, et al., *Motions to Dismiss and Demurrers in Defamation Actions*, 338 PLI/Pat 493, 493 (1992). This Court should apply a nonrestrictive application of the Marshall statute, thereby encompassing Jacobs' actions and allowing Marshall courts to provide relief to victims of libelous communications.

B. SPECIFIC JURISDICTION OVER JACOBS IN MARSHALL DOES NOT IMPLICATE DUE PROCESS CONCERNS.

Jacobs' second objection to the Marshall court's exercise of jurisdiction is that the complaint's failure to assert the presence of either party

3. The Nevada statue has been amended to provide for jurisdiction in a civil action on any basis not inconsistent with the Constitution. NEV. REV. STAT. § 14.065 (1991).

in the State of Marshall rendered jurisdiction improper. (R. at 3.) Jacobs' argument is based on the mechanical and archaic physical presence rule of *Pennoyer v. Neff*, 95 U.S. 714 (1877). Physical presence in the forum state, however, is not a prerequisite to jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). Advances in communications and the increased mobilization of society long ago obviated the need for physical presence within the forum state. *Id.* The new "constitutional touchstone" of jurisdiction involves "the relationship among the defendant, the forum state, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

1. *Jacobs has minimum contacts with the State of Marshall*

In order for a state to exercise personal jurisdiction over a nonresident defendant, due process requires that the defendant have minimum contacts with the forum state such that jurisdiction would not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Jurisdiction was upheld in *International Shoe* because the contacts of the corporation gave rise to the cause of action.[4] The Court concluded that when the activities of a nonresident result in potential legal obligations in the forum, "so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the [defendant] to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." *Id.* at 391. The Court has refined this holding in later decisions to provide guidance for determining whether contacts of the defendant satisfy the standard.

i. Jurisdiction was established by Jacobs' purposeful interactions with a Marshall resident

The most significant qualification imposed by the Court is that the defendant's contacts with the forum state must be purposeful. *Hanson v. Denckla*, 357 U.S. 235 (1958). Chief Justice Warren, writing for the majority, conditioned jurisdiction on "some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

4. Specific jurisdiction, like that exercised by the Court in *International Shoe*, involves a situation in which the cause of action "arises out of or relates" to the defendant's contacts with the forum. *Burger King*, 471 U.S. at 472. Specific jurisdiction contrasts with general jurisdiction in which the defendant's contacts have no necessary relationship to the cause of action. Id. at 473 n.15. General jurisdiction relies on the defendant's "continuous and systematic" activities with the forum state. Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558, 1563 n.10 (Fed. Cir. 1994), *cert. dismissed*, __ U.S. __, 115 S. Ct. 18 (1994). Jennifer Fetty is not contending that Jacobs is subject to the general jurisdiction of the court.

Id. at 253. Jurisdiction is proper so long as the defendant's actions are "purposefully directed toward the residents of the [forum] state." *Burger King*, 471 U.S. at 476.

The publication of a defamatory letter in Rhode Island was held to have constituted a purposefully initiated contact in *Froess v. Bulman*, 610 F. Supp. 332, 337 (D.R.I. 1984), *aff'd*, 767 F.2d 905 (1st Cir. 1985). By sending defamatory material to the forum state, the defendant purposefully availed himself of the opportunity of conducting an activity in the state. *Id.* Requiring the author of defamatory remarks to defend a suit resulting from the defamatory statements in the forum in which the injury is said to have occurred is fair. *Id.*

The purposeful availment requirement will not be met if the defendant's only contacts with the forum state were the result of the unilateral activity of a third person. In *Hanson*, jurisdiction was denied because the only contact the administrator of a will had with Florida was that the decedent had moved to Florida after the will was drawn and the administrator mailed her a letter there. *Hanson*, 357 U.S. 235. Similarly, a defendant New York automobile dealer was not subject to jurisdiction in Oklahoma when the only contact with the forum state was the plaintiff's act of driving the car through the state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

The Court's message in *Hanson* and *World-Wide Volkswagen* is clear: jurisdiction is proper if a defendant, rather than a third party, purposefully directs its activities at the forum state. Thus, in *Edwards v. Associated Press*, 512 F.2d 258 (5th Cir. 1975), jurisdiction over a news agency that defamed the plaintiff in Mississippi was proper even though the agency broadcast the defamatory message by sending it electronically from Louisiana. The agency's purposeful transmission of the message into Mississippi justified jurisdiction under the purposeful availment analysis. *Id.* at 268.

Jacobs, like the agency in *Edwards*, had complete control over the activities at issue in this case. Jacobs wrote and transmitted the false statements about Jennifer Fetty. He participated in the discussion group and had been interacting with the other group members throughout November and December. Jacobs wrote and dispersed his defamatory remarks with the intent that every person who accessed the bulletin board system would read his message. Jacobs' actions constitute purposeful availment.

ii. The tortious effects in Marshall resulting from Jacobs' conduct established jurisdiction

A nonresident defendant may be held to have established minimum contacts with the forum state based on activities conducted outside the

state that have an effect in the state. The United States Supreme Court first applied the effects test to a defamation action in *Calder v. Jones*, 465 U.S. 783 (1984). *Calder* involved an action brought by a California resident in response to an article written and edited in Florida by Florida residents. *Id.* at 784-85. The California Court of Appeals upheld jurisdiction in California on the theory that the defendant intended to, and did, cause injury in California. *Id.* at 787. In the words of the court of appeals, "[t]he fact that the actions causing effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects." *Id.* Justice Rehnquist, writing for the majority of the Supreme Court, expressly approved of the court of appeals' use of the effects test. *Id.* at 787 n.6. The effect of the libelous statements in California provided a sufficient basis for jurisdiction in California. *Id.* at 789.

The focus under the effects test is the "act of intentionally direct[ing] an alleged libel at a resident of the forum." *Id.* (quotation omitted). A defendant's physical contacts with the forum state are irrelevant under the effects test. *Laxalt*, 622 F. Supp. at 743-44. Jurisdiction is proper over a defendant who acts in an intentional manner so as to cause a tortious effect in the forum state. *Id.* at 744. Thus, a New York corporation, by sending defamatory letters to its New Hampshire customers, was held to have purposefully directed its activities at New Hampshire, thereby establishing minimum contacts with New Hampshire on the basis of its out-of-state conduct. *Lex Computer & Management Corp. v. Eslinger & Pelton*, 676 F. Supp. 399, 404 (D.N.H. 1987).

The location of the highest volume of circulation is also irrelevant under the effects test. *Id.* A single letter sent into the forum state is sufficient to assert limited jurisdiction over the sender. *Burt v. Board of Regents of University of Nebraska*, 757 F.2d 242, 244-45 (10th Cir.), *cert. granted* 474 U.S. 1004 (1985), *vacated as moot*, 475 U.S. 1063 (1986). "[I]f a libel party occurs on a bulletin board covering many states, the plaintiff can sue in any state in which she can prove that someone received the defamatory message." John C. Faucher, *Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases*, 26 U.C. DAVIS L. REV. 1045, 1049 (1993).

In the present action, Jacobs prepared a defamatory article and transmitted it to the other members of the discussion group, including at least one Marshall resident. (R. at 3.) A tortious effect occurred in Marshall when Mr. Bornmann received and read Jacobs' defamatory remarks. A defendant's act of preparing a libelous statement and directing the statement into the forum state satisfies the effects test. *Laxalt*, 622 F. Supp. at 744. Jacobs' actions, therefore, subject him to jurisdiction under the effects test. Furthermore, Jacobs' selection of an established

distribution channel as his transmission medium subjects him to jurisdiction under the stream of commerce theory.

iii. Jurisdiction is proper as a consequence of Jacobs' decision to transmit his comments on a nationwide communication system

The stream of commerce theory evolved out of the foreseeability inquiry associated with due process. In *World-Wide Volkswagen*, the Supreme Court recognized that the foreseeability that is critical to the due process analysis is that the defendant's conduct is such that the defendant should reasonably anticipate being haled into court there. *World-Wide Volkswagen*, 444 U.S. at 297. The foreseeability inquiry ensures that potential defendants can structure their conduct with some assurance as to where they may be subjected to liability. *Id.* The requisite level of foreseeability is present, and consequently due process is not violated, if the defendant "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." *Id.* at 298.

The stream of commerce theory has been the source of confusion since the Court's decision in *Asahi Metal Industries Co. v. Superior Court*, 490 U.S. 102 (1987). Four Justices of the Court, in an opinion authored by Justice O'Connor, concluded that minimum contacts required more than the mere placement of a product into the stream of commerce. *Id.* at 112. Such an act, even if done with an awareness that the stream will sweep the product into the forum, is insufficient. *Id.* Conversely, Justice Brennan, writing on behalf of four members of the Court, concluded that "jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause." *Id.* at 117 (Brennan, J., concurring). A showing of additional conduct is not required. *Id.* (Brennan, J., concurring).[5]

The Supreme Court has not addressed the stream of commerce theory since its decision in *Asahi*. The Federal Circuit, however, appears to favor Justice Brennan's position for application in high technology cases. In *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir.), *cert. dismissed*, __ U.S. __, 115 S.Ct. 18 (1994), the plaintiff brought a patent infringement action in Virginia alleging that the defendants purposefully shipped infringing products into Virginia through the use of an established distribution channel. *Id.* at 1565. The cause of action for patent infringement arose from these actions. *Id.* "No more is usually required to establish specific jurisdiction." *Id.*

The *Beverly Hills* court distinguished *World-Wide Volkswagen*, in which the contacts with the forum state resulted from the unilateral acts of a third party. *Id.* The contacts in *Beverly Hills* were the result of the

5. Justice Stevens did not join in either opinion.

defendant's own actions. *Id.* Jurisdiction over a nonresident defendant is proper if the defendant purposefully places the article in an established distribution channel. *Id.*

Although the stream of commerce theory was originally applied to the distribution of physical objects, the theory applies with equal force to the transmission of data through the Internet. "[Jurisdiction under the stream of commerce theory] rests on the reasonable inference that the sale of a large number of devices to a firm with a nationwide distribution network will generally result in the sale—or at least the use—of one of those devices in the [forum state]." *Ensign-Bickford Co. v. ICI Explosives USA Inc.*, 817 F. Supp. 1018, 1028 (D. Conn. 1993). The Internet is also a nationwide distribution network. Users of the Internet can foresee that their messages may reach at least one resident of each state.

Jurisdiction over a defendant is proper if the defendant knew, or should have known, that the chosen distribution channel was broad enough to include any state. *Violet v. Picillo*, 613 F. Supp. 1563, 1578 n.15 (D.R.I. 1985). The Internet is an extensive communication system that connects the entire country. Jurisdiction is proper because Jacobs should have known that the Internet was broad enough to reach residents of Marshall.

The First Circuit recognized the applicability of the stream of commerce theory to defamation actions in *Hugel v. McNell*, 886 F.2d 1, 4 (1st Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990). The First Circuit recognized that the focus behind the stream of commerce theory is whether the nonresident defendant's acts establish a substantial connection with the forum state. *Id.* Defamation is an intentional tort. *Id.* A defendant's intent for an article to be published and disseminated nationwide, thereby causing damage to a plaintiff's reputation in the forum state, subjects the defendant to jurisdiction in the forum state. *Id.* at 5. Similarly, Jacobs' intent to injure Jennifer Fetty's reputation among the members of the discussion group, including a Marshall resident, provides the Marshall courts with jurisdiction to redress the injuries resulting from the defamatory remarks. A reasonable user of an extensive distribution network that reaches the forum state "has to expect to be hailed into the courts of that state, however distant, to answer for any liability based at least in part on that [distribution]." *North Am. Philips Corp. v. Am. Vending Sales, Inc.*, 35 F.3d 1576, 1580 (Fed. Cir. 1994).

2. *Jurisdiction over Jacobs in Marshall does not offend traditional notions of fair play and substantial justice*

Although a finding of minimum contacts establishes a presumption of reasonableness, the court still must decide whether the "fair play and substantial justice" factors would render jurisdiction unreasonable. Les-

lie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441, 444-45 (1991). In *Asahi Metal Indus. Co. v. Superior Court*, Justice O'Connor, in a part of the opinion joined by seven other members of the Court, stated that "the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors." *Asahi*, 480 U.S. at 113. These factors are "the burden on the defendant, the interests of the forum state, and the interest of the plaintiff in obtaining relief." *Id.*[6] Based on these factors, the Court denied jurisdiction over Asahi, a Japanese corporation, in California, not because the company lacked minimum contacts with the state, but because the totality of the circumstances would not comport with fairness and justice. *Id.*

This analysis again reveals that jurisdiction over Jacobs in Marshall is proper. The interest of the forum state in this litigation is extremely high. The record reveals that Jacobs deliberately sent defamatory remarks about Jennifer Fetty to David Bornmann. (R. at 2-3.) Jennifer Fetty suffered an injury in Marshall as a result of this exchange. "[I]t is beyond dispute that [Marshall] has a significant interest in redressing injuries that actually occur within the State." *Keeton*, 465 U.S. at 776. The state's interest extends to libel actions brought by nonresidents. *Id.*

Marshall also has a strong interest in protecting its residents from the deception resulting from false accusations. *Id.* Marshall's interest is best served by allowing the state to enforce its libel laws against both residents and nonresidents.

Jennifer Fetty also has an interest in seeking redress for her injuries. A plaintiff's interest in obtaining relief is generally served by allowing the suit to remain in the forum of choice if the record indicates that the suit could not be maintained over the defendant in any other forum. *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 529 (4th Cir. 1987). The statue of limitations in Illinois, the residence of both parties, has run. Consequently, a decision by this court finding jurisdiction unreasonable would deny relief.

Similar considerations were probably influential in the Court's determination that jurisdiction was not unreasonable in New Hampshire over an Ohio publishing corporation with its principal place of business in California in *Keeton*, 465 U.S. 770. The *Keeton* Court recognized that most injuries in a libel action will occur outside the forum state unless

6. This language was similar to that which had previously appeared in *World-Wide Volkswagen* that listed the factors to be weighed as "the burden on the defendant, . . . the forum State's interest in adjudicating the dispute, [and] the plaintiff's interest in obtaining convenient and effective relief . . . ." *World-Wide Volkswagen*, 444 U.S. at 292 (citations omitted).

the action is brought in the plaintiff's domicile. *Id.* at 780. Nonetheless, this result does not justify restricting libel actions to the plaintiff's home forum. "The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has certain minimum contacts." *Id. quoting International Shoe*, 326 U.S. at 316).

Releasing a defendant from jurisdiction in any forum other than the place of origination would have the net effect of treating defamation actions as if they never occurred. Most users of the Internet are individuals without extensive resources. The Internet's ability to connect users in multiple states makes it highly probable that a user on the East Coast will injure a party on the West coast. So long as the potential defendant knew he would not be traveling to the forum state within the limitation period, he would be free from liability. Limiting jurisdiction would allow users to defame with immunity. "A defendant effectively becomes judgment proof when individuals with small claims cannot afford the cost of bringing an action in an inconvenient forum." Abramson, 18 HASTINGS CONST. L.Q. at 457. "Defamed persons have rights too." *Buckley v. New York Post Corp.*, 373 F.2d 175, 180 (2nd Cir. 1967). Courts should not treat the circulation of a libelous publication outside the state of initial publication as if it never occurred. *Id.*

Finally, litigating in Marshall places no unjust burden on Jacobs. Once minimum contacts are established, "the interest of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the . . . defendant." *Asahi*, 480 U.S. at 114. A finding that a defendant has satisfied the purposeful availment requirement may be an implicit statement that the defendant's election to engage in the conduct which led to the filing of the lawsuit reduces any burden incurred by the defendant. *Morris v. SSE, Inc.*, 843 F.2d 489, 495 (11th Cir. 1988). Similarly, a nonresident defendant's deliberate conduct that has a foreseeable effect on the plaintiff in the forum may affect the court's assessment of the burden of litigating in the forum. Abramson, 18 HASTINGS CONST. L.Q. at 451.

It is highly possible that it is more convenient for Jacobs to litigate in a forum other than Marshall. Nonetheless, Jacobs' failure to structure his conduct to avoid litigation in Marshall subjects him to jurisdiction in Marshall. *See Violet*, 613 F. Supp. at 1578.

"Looking back over the long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." *McGee*, 355 U.S. at 222. "There has been a movement away from the bias favoring the defendant in matters of personal jurisdiction toward permitting the plaintiff to insist that the defendant come to him when there is a sufficient basis for doing so." *Buckley*, 373 F.2d at 181. Jurisdiction in this case is in keeping with this trend. It is within the bounds of due process be-

cause Jacobs' contacts with Mr. Bornmann, a resident of Marshall, gave rise to the cause of action and jurisdiction is both fair and reasonable.

II. THE MARSHALL COURT OF APPEALS CORRECTLY HELD THAT JENNIFER FETTY IS NOT A PUBLIC FIGURE BECAUSE SHE DID NOT VOLUNTARILY THRUST OR INJECT HERSELF INTO A PUBLIC CONTROVERSY, IN AN ATTEMPT TO INFLUENCE THE OUTCOME, SHE DID NOT HAVE SUFFICIENT ACCESS TO THE MEDIA, AND BECAUSE PUBLIC POLICY FAVORS SUCH A DECISION

This case additionally raises an issue of constitutional dimensions regarding whether Jennifer Fetty is a limited-purpose public figure merely because she participated in a discussion group on the Internet. If she is a limited-purpose public figure, she must prove that Jacobs acted with actual malice, and it will be more difficult for her to recover. However, if she is not a limited-purpose public figure, Jennifer Fetty can maintain her action against Jacobs and recover for her injuries. Jacobs maintains that Jennifer Fetty is a limited-purpose public figure merely by virtue of her participation in the CanWeChat discussion group on the Internet. (R. at 4.) The determination of whether Jennifer Fetty is a public or private figure is ultimately one of law. *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 708 (4th Cir.), *cert. denied*, 501 U.S. 1212 (1991). Therefore, review is *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988). Additionally, when determining if a plaintiff is a public figure, courts must "look through the eyes of a reasonable person at the facts taken as a whole." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir.) *cert. denied* 449 U.S. 898 (1980). This determination of public or private figures status is necessary because of the differing standards of culpability for recovering compensatory damages. *Id.* In a defamation action, public figures must prove "actual malice" to recover compensatory damages. *Id.* Private individuals, on the other hand, are not confronted with this heightened burden. *Id.* Therefore, upholding the decision that Jennifer Fetty is a private individual, and not a limited-purpose public figure, permits her to recover and justice to be served.

A. JENNIFER FETTY IS NOT A PUBLIC FIGURE ACCORDING TO THE CRITERIA SET OUT BY THE SUPREME COURT IN *GERTZ V. ROBERT WELCH, INC.*

The First Amendment has long protected the rights of individuals to freely speak their minds. *See* U.S. CONST. amend. I. Defamation law, on the other hand, provides compensation for those who have suffered damage to their reputation by someone who is abusing his right to free

speech. Laura L. Saadeh, Note, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.: *The Supreme Court Further Muddies the Defamation Waters*, 20 LOY. L.A. L. REV. 209, 209 (1986). "When the threat of having to pay that compensation hinders free speech, the two areas of law collide." *Id.*

American defamation law evolved from the English common law of defamation. Jamie D. Batterman, Comment, *The First Amendment Protection of the Freedoms of Speech and the Press and its Effect on the Law of Defamation as Seen Through the Eyes of Brennan: His Impact and Its Future*, 13 WHITTIER L. REV. 233, 236 (1992). Prior to 1964, defamation law was grounded exclusively in state common law and was a strict liability offense that could only be defended on the basis that a defamatory statement was true or that the defendant was entitled to a privilege. Thomas D. Brooks, Note, *Catching Jellyfish in the Internet: Public Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461, 470-72 (1995).

In 1964, the United States Supreme Court drastically altered defamation law when it recognized the conflict between defamation law and First Amendment rights in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The Court in *New York Times* held that a plaintiff in a defamation action who was a "public official" must prove that a defamatory statement against her was made with actual malice before she could recover. *Id.* at 279-80.[7]

Three years after deciding *New York Times*, the Supreme Court made it more difficult to sue for defamation by extending the actual malice requirement to "public figures" in addition to "public officials." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967). The Court appeared to be expanding the actual malice requirement again in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), when a plurality held that even private persons would have to meet the actual malice requirement if the discussion or defamatory statement concerns a matter of public interest. *Id.* at 43-44.

In 1974, a majority of the Supreme Court rejected the *Rosenbloom* holding in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Court in *Gertz* focused on the status of defamation plaintiffs in holding that private individuals are more vulnerable to injury than public figures, and thus, the state has a greater interest in protecting them. *Id.* at 343-44. The Court made it clear that in defamation actions, it is imperative to determine whether the plaintiff is a public figure or a private individual. *Id.* at 343-46. In adopting this test, the *Gertz* Court established two

7. The Court defined "actual malice" to be "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280.

types of public figures—general public figures and limited-purpose public figures. *See id.* at 345.

General public figures are those individuals who are public figures for all purposes. *Waldbaum*, 627 F.2d at 1294. They are those individuals who have achieved celebrity status or whose name is a household word. *Id.* at 1292. General public figures include persons such as Ralph Nader, Jimmy Carter, and Jerry Falwell. Erik Walker, Comment, *Defamation Law: Public Figures—Who Are They?*, 45 BAYLOR L. REV. 955, 960 (1993). It is important to note, however, that an individual should only be deemed to be a general public figure after a clear showing of "general fame or notoriety in the community, and pervasive involvement in the affairs of society . . . ." *Waldbaum*, 627 F.2d at 1294 *quoting Gertz*, 418 U.S. at 352. In this case, there has been no showing that Jennifer Fetty, a convenience store cashier, (R. at 2.) meets these criteria. Accordingly, she is not a public figure for all purposes, and the issue becomes whether she is a limited-purpose public figure.

A limited-purpose public figure is an individual who has "thrust [herself] to the forefront of [a] particular public controvers[y] in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345. The *Gertz* Court set forth a three-prong test for determining whether a plaintiff is a limited-purpose public figure. *Id.* at 345, 351. First, there must be a public controversy. *Id.* at 351. Second, the plaintiff must have thrust herself to the forefront of the public controversy to influence its ultimate resolution. *Id.* at 345. Finally, the plaintiff must have greater access to channels of communication than private individuals usually enjoy. *Id.* at 344. Applying the *Gertz* test to Jennifer Fetty's case makes it clear that she is not a limited-purpose public figure.

1. *Jennifer Fetty was not involved in a public controversy*

The first factor in the test for determining if a person is a limited-purpose public figure is whether she was involved in a public controversy. *Gertz*, 418 U.S. at 351. This factor requires a court to distinguish between a matter of public interest and something that is truly a public controversy. *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976). While the Supreme Court has never specifically defined "public controversy," several cases shed some light on this issue. The United States Supreme Court has stated that newsworthiness alone is not enough. *Waldbaum*, 627 F.2d at 1296. Instead, a public controversy is a dispute that receives public attention because of the ramifications it will have on even those who do not directly participate in it. *Id.*

Admittedly, abortion is a public controversy. However, the controversy in this case is Jennifer Fetty's views on abortion, and not the issue of abortion itself. The court in *Waldbaum* astutely noted that the true

controversy in a discussion or debate may not always be the underlying topic of public interest. *See id.* at 1296 n.23. Debates are often sparked over the strategies of lawyers involved in specific trials. *Id.* However, the controversy is not the matter being litigated but rather the specific strategies of the attorneys. *See id.* The example given by the court in *Waldbaum* is analogous to the facts in this case.

Jennifer Fetty was involved in a discussion that revolved around the participants' views on abortion. (R. at 2.) Each of the participants expressed his or her personal views on the subject. (R. at 2.) While the issue of abortion was the topic of the group's discussion, (R. at 2), the controversy surrounded the differing views of each participant. This is made clear by Jacobs' defamatory statement that, "[a]s for Jennifer Fetty's opinions on this matter, I'm not going to let some woman who prostitutes herself dictate my standards of conduct or morality." (R. at 2-3.) Because the controversy revolved around the views of the participants, it was not a "public controversy" which "affect[ed] the general public or some segment of it in an appreciable way." *Waldbaum*, 627 F.2d at 1296. Therefore, the public controversy requirement of the *Gertz* test is not satisfied in this case. If, however, this Court determines that the controversy in this case is abortion, and thus a public controversy, Jennifer Fetty still prevails because she had no control over the outcome of the controversy and she did not have sufficient access to the media to adequately rebut Jacobs' defamatory statement.

2. *Jennifer Fetty did not voluntarily inject herself into a controversy in an effort to influence its resolution*

The second factor used to determine whether Jennifer Fetty is a limited-purpose public figure is whether she "thrust [herself] to the forefront of [a] particular public controvers[y] in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345. Plaintiffs who are limited-purpose public figures through participation in controversies invite attention and comment. *Id.* A good example of a limited-purpose public figure can be found in *Waldbaum*. The plaintiff in *Waldbaum*, was the president and CEO of the second-largest food cooperative in the nation and played an active role in setting policies and standards within the supermarket industry. *Waldbaum*, 627 F.2d at 1290. He was an activist in the supermarket industry and a "mover and shaper of many of the cooperative's controversial actions." *Id.* at 1300. The court found that Waldbaum was a limited-purpose public figure because he thrust himself into the debate over issues relating to the cooperative in an attempt to influence the policies of the supermarket industry. *Id.*

In *Underwager v. Salter*, 22 F.3d 730 (7th Cir.) *cert. denied*, ___ U.S. ___, 115 S.Ct. 351 (1994), the limited-purpose public figure status was

also imposed on the authors of a book on sexual abuse of children. *Id.* at 731. The defendant reviewed the book and stated that it misrepresented studies and ignored evidence contradicting the book's thesis. *Id.* at 732. The Seventh Circuit found that the plaintiffs were limited-purpose public figures despite the fact that ordinary persons could not identify the plaintiffs. *Id.* at 734. The court stated that the plaintiffs were well known in the medical, legal, and scientific fields regarding child sexual abuse. *Id.* This recognition was sufficient to cause them to be limited-purpose public figures. *Id.*

Jennifer Fetty is hardly in a position analogous to the plaintiffs in *Waldbaum* and *Underwager*. She was not publicly active in rallies or debates on the issue of abortion other than her discussions on the CanWeChat bulletin board system. Contrary to the plaintiff in *Waldbaum*, it would be difficult to consider Jennifer Fetty to be a "mover and shaper" of anything relating to the broad issue of abortion. Furthermore, she is not well known among the individuals who have the power to affect the outcome of the abortion issue.

Since the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), the issue of abortion has been a hotly debated issue. The topic has been openly and widely discussed in a wide range of forums throughout the nation. While the issue is one that commands a great deal of public interest, controversy, and attention, there are relatively few individuals who possess the power to influence policies regarding abortion rights. Those persons who possess this ability include President Clinton, First Lady Hillary Rodham Clinton, members of the United States Congress, and Supreme Court Justices. While Jennifer Fetty may have been in a position to influence the opinions of those participating on CanWeChat, this limited opportunity to persuade does not allow her to be classified with these individuals when one considers her inability to impact the issue of abortion.

To be a limited-purpose public figure, Jennifer Fetty must "have been purposely trying to influence the outcome" or have "realistically . . . expected, because of [her] position in the controversy, to have an impact on its resolution." *Waldbaum*, 627 F.2d at 1297 (*citing* Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons*, 49 S. CAL. L. REV. 1131, 1210-11 (1976)). Jennifer Fetty simply does not fit this description. She is a cashier at a local convenience store in Peoria, Illinois, (R. at 2), who does not occupy a prominent position with regard to the abortion issue. She had no reasonable expectation of affecting the resolution of this issue. Additionally, there is no indication that she took part in any activities or debates relating to the issue of abortion other than her participation in the CanWeChat discussions on the bulletin board system. While she voluntarily entered the on-line discussion and may have been in a position

to influence the opinions of the members of the group, she lacked the ability to influence public or national policy on the issue of abortion.

Therefore, she did not voluntarily thrust herself into the forefront of a public controversy.

3. *Jennifer Fetty does not have sufficient access to the media*

The third factor in determining Jennifer Fetty's improbable status as a limited-purpose public figure is whether she had sufficient access to the media. *See Gertz*, 418 U.S. at 344. Because "public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements[,]" private individuals are more vulnerable to defamation and the state has a greater interest in protecting them. *Id.*

One idea behind making it easier for private individuals to sue for defamation is that public individuals can hold press conferences and rebut negative comments. Mike Godwin, *The First Amendment in Cyberspace*, 4 TEMP. POL. & CIV. RTS. L. REV. 1, 7 (1994). On the other hand, if a private individual were to hold a press conference, reporters simply would not attend. *Id.* When *Gertz* was decided in 1974, the media admittedly encompassed more than just the written press. It also included radio and television news and information sources. As times have changed and technology has advanced, however, the term "media" has become more amorphous and undoubtedly more difficult to define. With the advent of computers, and ultimately Internet bulletin board services such as CanWeChat, it has become necessary to determine whether the Internet can be considered a viable media source by which defamation victims such as Jennifer Fetty can adequately rebut their accusers.

Much like the term "public controversy," the United States Supreme Court has never defined "media" for purposes of the *Gertz* test. Brooks, 21 RUTGERS COMPUTER & TECH. L.J. at 478. In fact, one scholar has likened the "media" concept to that of pornography: "[T]he justices know it when they see it." *Id.* Accordingly, this Court is faced with the daunting task of determining whether Jennifer Fetty has sufficient access to the media based solely on her status as an Internet user.

The determination of whether Jennifer Fetty had sufficient access to the media requires this Court to focus on her situation before Jacobs placed his defamatory statement on the CanWeChat bulletin board. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135-36 (1979). In *Hutchinson*, the plaintiff had access to the media, but only after the defamatory statements were made. *Id.* This type of media access is inadequate because "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.*

To date, no published opinion has addressed the issue of whether the Internet is considered an adequate media source for purposes of rebutting defamatory statements. One court, however, has discussed whether the Internet is a media source in general. This discussion reviewed the Texas Disciplinary Rules of Professional Conduct regarding attorney advertising. *Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328, 1333 (E.D. Tex. 1995). Lonnie Morrison, the president-elect of the State Bar of Texas at the time, testified that the drafters of the rule allowing lawyers to advertise in the public media "never considered the potentiality that the. . . rules might be applied to [Internet] communications." *Id.* at 1369-70. Regardless, the court determined that advertising on the Internet was the equivalent of advertising in the public media. *Id.* Indeed, it is hard to imagine that the Internet would not be considered a form of media. In defamation cases, however, the media source must provide the target of a defamatory statement with adequate opportunity to rebut the statement. *See Gertz*, 418 U.S. at 344. The question then becomes one of whether the Internet, as a public media source, allows Jennifer Fetty the opportunity to adequately rebut the message posted by Jacobs on the CanWeChat bulletin board service.

There are commentators who believe that Internet users can rebut defamatory statements posted on the Internet because they have access to the same medium upon which they were defamed. *See* Godwin, 4 TEMP. POL. & CIV. RTS. L. REV. 1, at 7-8; Brooks, 21 RUTGERS COMPUTER & TECH. L.J. at 480-83. The Fourth Circuit, for example, held that the plaintiff had sufficient access to the media for purposes of responding to a reprimand letter leaked to the media because he had access to the precise "fora where [his] reputation was presumably tarnished and where it could be redeemed." *Reuber*, 925 F.2d at 708; *see also Colson v. Stieg*, 433 N.E.2d 246, 249 (Ill. 1982).

Although Jennifer Fetty has access to the Internet and the CanWeChat bulletin board service, she may not have access to the precise fora where she was defamed because she has no idea who received the defamatory statement posted by Jacobs. For instance, the Internet provides users with the capability to download and print any message posted on a bulletin board service. Terri A. Cutrera, *Computer Networks, Libel and the First Amendment*, 11 COMPUTER/L.J. 555, 562 (1992). Accordingly, a defamatory statement that is printed off the bulletin board system could be widely disseminated by a sender or user who receives the message. Jacobs, or anyone logged on to CanWeChat on December 4, 1993, could conceivably print and circulate to the public at large Jacobs' message regarding Jennifer Fetty's views on abortion. Assuming that to be the case, it becomes apparent that Jennifer Fetty could not possibly respond to Jacobs' statement because the Internet does not guarantee

her a pervasive media source capable of adequately rebutting Jacobs' defamatory statement.

B. Public Policy Favors A Finding That Jennifer Fetty Is Not A Limited-Purpose Public Figure Based Solely On Her Participation In The Internet Discussion Group, CanWeChat

If, as Jacobs asserts, Jennifer Fetty is a limited-purpose public figure based solely on her participation in the CanWeChat discussion group on the Internet, then everyone who accesses and uses the Internet is a public figure. *See* David Gordon, *Taking the First Amendment on the Road: A Rationale for Broad Protection for Freedom of Expression on the Information Superhighway*, 3 CommLaw Conspectus 135, 142 (1995). Common sense, however, dictates that a computer user who is defamed on a discussion group bulletin board is a private person. *See* Terri A. Cutrera, *Computer Networks, Libel and the First Amendment*, 11 Computer/L. J. 555, 570 (1992).

The danger in extending the public figure doctrine to Internet users is that it opens the door for unlimited and illogical application of the doctrine. For example, an analogy can easily be drawn between the use of a discussion group bulletin board service and a conference telephone call. If the facts and parties in this case were identical except that the conversations took place on a conference call, the court would have difficulty justifying a distinction between Jennifer Fetty's status as a public figure on the Internet and her status as a private figure when using the telephone. The consequences of extending public figure status to Internet users could have far-reaching and undesirable effects. Conceivably, a student discussing abortion with several friends at school could be classified as a public figure. Although this determination seems illogical, the rational progression of a decision by this Court, that Jennifer Fetty is a public figure based on her use of the Internet, could lead to such a result.

Characterization of Jennifer Fetty as a limited-purpose public figure, based solely on her use of the Internet, would effectively render the distinction between public and private figures in defamation actions meaningless. Erasing the line between public and private figures would destroy the balance between free speech and the protection of one's reputation. This imbalance would undermine the *New York Times* decision, wherein the Court determined that First Amendment principles impact defamation law. *New York Times*, 376 U.S. at 379-80. Furthermore, the Supreme Court has not found a defamation plaintiff to be a limited-purpose public figure under any circumstances. *See, e.g.*, *Gertz*, 418 U.S. at 326, 351-52 (holding that a lawyer accused of being a communist conspir-

ator for suing a police officer for wrongful-death was not a public figure); *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 161-67 (1979)(holding that the plaintiff, who had been held in contempt for 16 years for refusing to appear before a grand jury regarding Soviet espionage investigations, was not a public figure); *Hutchinson*, 443 U.S. at 134-37 (holding that a professor, who had been berated in the public media by a United States senator, was not a public figure); *Time*, 424 U.S. at 454-55 (holding that a wealthy party in a divorce, who held press conferences regarding the case, was not a public figure).

Public figures are those individuals who "hold themselves up to public scrutiny, while private people do not." Cutrera, 11 COMPUTER/L. J. at 570. Jennifer Fetty, by participating in the CanWeChat discussion group on the Internet, did not hold herself out to be ridiculed by Jacobs or the public at large. Furthermore, she did not thrust herself to the forefront of a public controversy merely by espousing her views on abortion. The classification of Jennifer Fetty as a limited-purpose public figure based solely on her participation and use of the Internet runs contrary to public policy.

CONCLUSION

For the reasons stated, the decisions of the trial court and the Marshall Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

MARSHALL REVISED STATUTES

Marshall Long-Arm Statute

Chapter 48

I. Personal Jurisdiction by Acts of a Non-Domiciliary.

A. Courts may exercise personal jurisdiction over non-domiciliaries, their administrators or executors, as to courses of action which arise from conduct enumerated in this section, who in person or through an agent:

1) conduct or transact business within the state of Marshall;
2) commit a tortious act within the state of Marshall; or
3) commit a tortious act outside the state of Marshall which causes injury to persons or property within the state of Marshall, if he or she
   (a) regularly conducts or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from services rendered or goods consumed or used in the state of Marshall, or
   (b) expects or should reasonably expect his or her conduct to have consequences in the state of Marshall and derives substantial revenue from interstate or international commerce.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

U.S. CONST. amend. XIV, section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.