Department of Justice Brief

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No. 96-511

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS
v.
AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

1. Whether the federal criminal prohibition against the use of a "telecommunications device" to "knowingly * * * make[], create[], or solicit[], and * * * initiate[] the transmission of" any material "which is * * * indecent, knowing that the recipient of the communication is under 18 years of age," 47 U.S.C. 223(a)(1)(B), is unconstitutional on its face.

2. Whether the federal criminal prohibition against "knowingly" using an "interactive computer service" to send to "a specific person or persons under 18 years of age," any material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. 223(d)(1)(A), is unconstitutional on its face.

3. Whether the federal criminal prohibition against "knowingly" using an "interactive computer service" to "display in a manner available to a person under 18 years of age," any material "that, in context, depicts or describes, in terms patently

offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. 223(d)(1)(B), is unconstitutional on its face.

4. Whether the federal criminal provisions that forbid a person from knowingly permitting the use of a telecommunications device under such person's control to be used to violate any of the three preceding prohibitions, 47 U.S.C. 223(a)(2) and (d)(2), are unconstitutional on their face.

PARTIES TO THE PROCEEDINGS

Appellants are Janet Reno, the Attorney General of the United States, and the United States Department of Justice. Appellees are the American Civil Liberties Union, Human Rights Watch, Electronic Privacy Information Center, Electronic Frontier Foundation, Journalism Education Association, Computer Professionals for Social Responsibility, National Writers Union, Clarinet Communications Corp., Institute for Global Communications, Stop Prisoner Rape, AIDS Education Global Information System, Bibliobytes, Queer Resources Directory, Critical Path AIDS Project, Inc., Wildcat Press, Inc., Declan McCullagh d/b/a Justice on Campus, Brock Meeks d/b/a Cyberwire Dispatch, John Troyer d/b/a The Safer Sex Page, Jonathan Wallace d/b/a The Ethical Spectacle, Planned Parenthood Federation of America, Inc., American Library Association, Inc., America Online, Inc., American Booksellers Association, Inc., American Booksellers Foundation for Free Expression, American Society of Newpaper Editors, Apple Computer, Inc., Association of American Publishers, Inc., Association of Publishers, Editors and Writers, Citizens Internet Empowerment Coalition, Commercial Internet Exchange Association, CompuServe Incorporated, Families Against Internet Censorship, Freedom to Read Foundation, Inc., Health Sciences Libraries Consortium, Hotwired Ventures LLC, Interactive Digital Software Association, Interactive Services Association, Magazine Publishers of America, Microsoft Corporation, The Microsoft Network, L.L.C., National Press Photographers Association, Netcom On-line Communications Services, Inc.,

Newspaper Association of America, Opnet, Inc., Prodigy Services Company, Society of Professional Journalists, and Wired Ventures, Ltd.

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OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-147a) is reported at 929 F. Supp. 824.

JURISDICTION

The judgment of the district court was entered on June 11, 1996. A notice of appeal was filed on July 1, 1996. J.S. App. 162a-164a. On August 19, 1996, Justice Souter extended the time for filing a jurisdictional statement to and including September 29, 1996; the jurisdictional statement was filed on September 30, 1996 (a Monday). This Court noted probable jurisdiction on December 6, 1996. The jurisdiction of this Court rests on Section 561(b) of the Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, 110 Stat. 143, and 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides that "Congress shall make no law * * * abridging the freedom of speech." The Fifth Amendment provides that no person shall be deprived of * * * liberty * * * without due process of law." Section 502 of the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133, appears in the appendix to the jurisdictional statement. J.S. App. 165a-172a.

STATEMENT

This case involves a constitutional challenge to provisions of the Communications Decency Act of 1996 (CDA) that forbid the use of "telecommunications device[s]" and "interactive computer service[s]" to disseminate "indecent" or "patently offensive" sexually explicit material to children under 18 years of age. Pub. L. No. 104-104, _ 502, 110 Stat. 133 (1996) (to be codified at 47 U.S.C. 223(a)(1)(B), (a)(2), and (d)).[1] Those prohibitions apply to the dissemination of material on the system of interlinked computers known as the Internet. Appellees, organizations and individuals who use the Internet, filed suit in the United States District Court for the Eastern District of Pennsylvania, alleging that the CDA's restrictions on the dissemination of sexually explicit material violate the First and Fifth Amendments of the Constitution. A three-judge district court held the CDA's restrictions unconstitutional on their face and issued a preliminary injunction against their enforcement. All three judges concluded that the restrictions violate the First Amendment right of adults to disseminate sexually explicit material to other adults. Two of the three judges concluded that the CDA's restrictions are also unconstitutionally vague.

1. The Internet is generally regarded as having originated from experimental efforts of the Department of Defense to link defense-related computer systems so that research and communication could continue even if portions of the network were damaged. J.S. App. 14a. Similar networks were subsequently developed to link universities, research facilities, businesses, and individuals around the world. Id. at 16a. All of those networks were ultimately linked to one another, and became a global network known as the Internet. Ibid.

Individuals obtain access to the Internet in two basic ways: Some use a personal computer with a modem to connect over a telephone line to a computer network that is linked to the Internet; others use a computer that is directly connected to a network linked to the Internet. J.S. App. 16a-17a. Many entities offer modem or direct connections to the Internet. For example, national on-line commercial services, such as America Online, and commercial "Internet service providers" charge subscribers a monthly or hourly fee for access to the Internet through their own

computer networks. Id. at 19a. Educational institutions often provide Internet access to students, faculty and researchers through computers located on campus. Id. at 17a. Some businesses provide such access to their employees through their office computers. Id. at 17a-18a. As many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999. Id. at 13a.

There are many ways for people to communicate on the Internet, either to one or several specific individuals or more broadly. One way is through electronic mail (e-mail). Using e-mail, an individual can send an electronic message to one or more specific persons. J.S. App. 21a. People can also use automatic mailing list services (mail exploders) to send messages that are automatically distributed via e-mail to those who have subscribed to the mailing list. Id. at 22a. Information can also be exchanged through newsgroups. Id. at 22a-23a. Like mail exploders, newsgroups involve discussions on specific topics. Those who use newsgroups, however, do not have to subscribe in advance; instead, messages are temporarily stored on the system, and users can obtain access to them until they are purged. Id. at 23a. Persons can also use the Internet to communicate in "real time." Programs such as "talk" permit one-to-one communication; programs such as "Internet Relay Chat" permit communication among several persons. Id. at 24a.

Another way to use the Internet is to search for and retrieve information that is stored on remote computers. J.S. App. 25a. The most well-known method of doing that is by exploring the "World Wide Web." Id. at 25a-26a. The Web utilizes a formatting language known as hypertext markup language (HTML). Software programs known as "Web browsers" can display HTML documents containing text, images, and sound. Ibid. HTML also permits documents to include "links" to other Internet documents, so that with a click of a computer "mouse," a person can move from one document to another even if the documents are stored on computers in different parts of the world. Ibid. Many organizations have "home pages" on the Web that store information about the organization and its activities and that provide links to other Web sites containing related information. Id. at 27a. For example, the Department of Justice maintains a home page on the Web at http://www.usdoj.gov. By typing that Internet address into a Web browser, a user could reach a computer containing information about the activities and operations of the Department of Justice.

"[S]earch engines" allow persons to search for information on a particular topic by typing "key words." J.S. App. 30a. For example, "a Web user looking for the text of Supreme Court opinions would type the words 'Supreme Court' into a search engine, and then be presented with a list of World Wide Web sites that contain Supreme Court information." Ibid. The user could thereafter "brows[e] through the information on each site, until the desired material is found." Ibid.

There is a wide range of information available through the Internet. Commercial enterprises maintain Web sites to inform potential customers about their goods and services and to solicit purchases. J.S. App. 43a. Nonprofit organizations make information available on topics of interest to them. Id. at 44a. Some libraries have placed their card catalogs online. Id. at 42a. Chat rooms and newsgroups provide forums for the discussion of

different topics, from Formula 1 racing cars to the Oklahoma City bombing. Id. at 42a-43a, 47a-48a. Information that is available on the Internet "is as diverse as human thought." Id. at 43a. Sexually explicit material also exists on the Internet, extending "from the modestly titillating to the hardest-core." Id. at 47. "Purveyors of such material take advantage of the same ease of access available to all users of the Internet." Ibid.

2. When it enacted the CDA, Congress found that the Internet and other interactive computer services "represent an extraordinary advance in the availability of educational and informational resources," 47 U.S.C. 230(a)(1), as well as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues of intellectual activity," 47 U.S.C. 230(a)(3). At the same time, Congress recognized that "some of the information traveling over the Internet is tasteless, offensive, and downright spine-tingling." 141 Cong. Rec. S8345 (daily ed. June 14, 1995) (remarks of Sen. Biden). Congress was concerned that, without "some basic rules of the road," the availability and easy accessibility of sexually explicit materials through the Internet would harm children. 141 Cong. Rec. S8087 (daily ed. June 9, 1995) (remarks of Sen. Exon). See 141 Cong. Rec. S8473 (daily ed. June 15, 1995) (remarks of Sen. Robb). As Senator Exon stated, "[t]he computer is a wonderful device for arranging, storing, and making it relatively easy for anyone to call up information or pictures on any subject they want. That is part of the beauty of the Internet system." 141 Cong. Rec. S8089 (daily ed. June 9, 1995). That same technology, however, allows sexually explicit materials, including "the worst, most vile, [and] most perverse pornography," to be "only a few click-click-clicks away from any child." Id. at S8088. See also 141 Cong. Rec. H8293 (daily ed. Aug. 2, 1995) (remarks of Rep. Hyde). Congress sought to ensure that the "brave new world" of interactive computer services would not be "hostile to the innocence of our children." Id. at S8333-S8334 (remarks of Sen. Coats).

Congress learned that commercial pornographers had seized upon the Internet as a profitable source of business. It found that commercial pornographers put "the best and most enticing pictures of whatever they want to sell" on the Internet as "teasers," and those pictures may be viewed "without charge" by "very young children" and "anyone else who wants to see them." 141 Cong. Rec. S8090 (daily ed. June 9, 1995) (remarks of Sen. Exon). Congress found that the only barriers between children and such material were "perfunctory onscreen warnings which inform minors they are on their honor not to look at this," which is "like taking a porn shop and putting it in the bedroom of your children and then saying 'Do not look.'" 141 Cong. Rec. S8332-S8333 (daily ed. June 14, 1995) (remarks of Sen. Coats).

Congress also found that pornography on the Internet was particularly accessible to children, because children have become "the computer experts in our Nation's families." 141 Cong. Rec. S8332 (daily ed. June 14, 1995) (remarks of Sen. Coats); see also id. at S8344 (remarks of Sen. Exon). As one of the CDA's most vocal legislative opponents stated, even "[v]ery young children are so adept with computers that they can sit at a keypad in front of a computer screen at home or at school and connect to the outside world through the Internet or some other on-line service." Id. at S8341 (remarks of Sen. Leahy). One study presented to Congress

estimated that "[o]f the 6.8 million homes with on-line accounts currently available, 35 percent have children under the age of 18." Id. at S8333-S8334 (remarks of Sen. Coats).

Congress also learned that the easy accessibility of pornographic material on the Internet was deterring its use by parents who did not wish to risk exposing their children to such material. 141 Cong. Rec. S8339 (daily ed. June 14, 1995) (remarks of Sen. Exon). Congress determined that a legislative response was necessary to ensure that the Internet would be a "family friendly resource" (142 Cong. Rec. S718 (daily ed. Feb. 1, 1996) (remarks of Sen. Exon)) that would be "more frequently used" (141 Cong. Rec. S8339 (daily ed. June 14, 1995) (remarks of Sen. Exon)). Congress wanted to make the Internet "even bigger, and * * * even better, * * * but not for raunchy pornography that would turn most people off." Id. at S8339-S8340.

Over a period of approximately one and one-half years, Congress considered a variety of ways to address the problem of children's access to sexually explicit material on the Internet. In the summer of 1994, Senator Exon proposed an extension of the existing prohibition against "indecent" telephone communications to reach "indecent" communications through "telecommunications device[s]." See 140 Cong. Rec. S9745 (daily ed. July 26, 1994). The Senate Commerce Committee issued a report on that proposal, see S. Rep. No. 367, 103d Cong., 2d Sess. 17, 102 (1994), but Congress did not otherwise act upon it. The following February, Senator Exon reintroduced his proposed legislation as The "Communications Decency Act of 1995" (S. 314, 104th Cong., 1st Sess. (1995), see 141 Cong. Rec. S1920 (daily ed. Feb. 1, 1995)), and he later refined the proposal with two amendments (141 Cong. Rec. S8120 (daily ed. June 9, 1995); 141 Cong. Rec. S8328 (daily ed. June 14, 1995)).

Others in the Senate proposed addressing the problem in different ways, such as by revising existing prohibitions on indecent broadcasting to include the transmission of indecent material using computers, see 141 Cong. Rec. S7922-S7923 (daily ed. June 7, 1995) (remarks of Sen. Grassley), by requiring tagging of indecent computer text or graphics, see 141 Cong. Rec. S8368 (daily ed. June 14, 1995) (remarks of Sen. Inouye), or by soliciting a report from the Attorney General on steps that could be taken to prevent unwanted indecency, see id. at S8327-S8328 (remarks of Sen. Leahy). In June 1995, the Senate adopted the Exon proposal. 141 Cong. Rec. S8480 (daily ed. June 15, 1995).

In October 1995, the House adopted a somewhat different approach, approving a prohibition against the "communicat[ion] by computer" of "patently offensive" sexually explicit material. 141 Cong. Rec. H9999 (daily ed. Oct. 12, 1995). A conference between the House and Senate reconciled the two approaches, see S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 187-188 (1996), and in February 1996, the CDA was ultimately enacted in its current form. That legislation was the product of considerable debate in both houses (see e.g., 141 Cong. Rec. S8087-S8091 (daily ed. June 9, 1995); 141 Cong. Rec. S8327-S8347 (daily ed. June 14, 1995); 141 Cong. Rec. H8468-H8472 (daily ed. Aug. 4, 1995); 142 Cong. Rec. S694-S695, S706, S707, S714-S715, S717-S718, H1165-H1166 (daily ed. Feb. 1, 1996)); hearings before the Senate Judiciary Committee (see Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action, Hearing Before

the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. 1 (1995) (Cyberporn Hearing)); and negotiations among conference participants (see 142 Cong. Rec. H1166 (daily ed. Feb. 1, 1996) (remarks of Rep. Berman)).

3. The CDA contains three primary restrictions on the dissemination of sexually explicit material to children. The first (the transmission provision), imposes criminal penalties on "[w]hoever * * * by means of a telecommunications device knowingly * * * (i) makes, creates, or solicits, and (ii) initiates the transmission of, any * * * communication which is * * * indecent, knowing that the recipient of the communication is under 18 years of age." 47 U.S.C. 223(a)(1)(B). The second (the specific child provision) imposes criminal penalties on any person who uses an "interactive computer service" to "send to a specific person or persons under 18 years of age * * * any * * * communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 47 U.S.C. 223(d)(1)(A). The third (the display provision) imposes criminal penalties on persons who use an interactive computer service to "display" patently offensive sexual material "in a manner available to a person under 18 years of age." 47 U.S.C. 223(d)(1)(B).[2] Because a "telecommunications device" includes a modem (J.S. App. 6a-7a n.5), and an "interactive computer service" includes a "service or system that provides access to the Internet" (47 U.S.C. 230(e)(2); 47 U.S.C. 223(h)(2)), all of the CDA's basic prohibitions apply to the dissemination of information over the Internet.[3] Although the transmission provision prohibits "indecent" communications, whereas the specific child and display provisions prohibit "patently offensive" sexually explicit communications, Congress intended for those two formulations to be used interchangeably. S. Conf. Rep. No. 230, supra, at 188. In other words, indecent is shorthand for patently offensive sexually explicit communications, and the latter is the definition of the former. J.S. App. 110a.

The CDA establishes a "defense to * * * prosecution" for a person who "has restricted access to such [indecent] communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number," 47 U.S.C. 223(e)(5)(B). A defense to prosecution is also available to those who have "taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" to their indecent communications. 47 U.S.C. 223(e)(5)(A).

4. The day the President signed the CDA into law, appellee American Civil Liberties Union (ACLU), joined by other organizations and individuals, filed suit in the United States District Court for the Eastern District of Pennsylvania against the Attorney General and the Department of Justice to challenge the constitutionality of the CDA's restrictions on indecent and patently offensive communications. J.S. App. 3a. The ACLU appellees alleged that the CDA's restrictions are facially unconstitutional under the First Amendment and the Due Process Clause of the Fifth Amendment. Id. at 2a. The district court issued a temporary restraining order (TRO) against enforcement of the Act's restrictions on "indecent" communications, but rejected appellees' request for a TRO against enforcement of the restrictions on "patently offensive" communications. Id. at 153a-

161a. Appellee American Library Association, the major online service providers (including America Online, Inc., CompuServe, and Prodigy), and various other organizations subsequently filed their own facial constitutional challenge to the same provisions. Id. at 4a-5a & n.3.

The two suits were consolidated, and pursuant to Section 561(a) of the CDA, 110 Stat. 142, were heard by a three-judge court. After a hearing, the court granted appellees' motion for a preliminary injunction. J.S. App. 1a-149a. For reasons stated in three separate opinions, the court concluded that appellees had demonstrated "a reasonable probability of eventual success in the litigation" by demonstrating that the CDA's restrictions on indecent communications are "unconstitutional on their face." Id. at 62a.

a. All three members of the court concluded that the statutory restrictions on indecent communications violate the First Amendment rights of adults to disseminate sexually explicit material to other adults. In her lead opinion, Judge Sloviter reasoned that the CDA's restrictions were "subject to strict scrutiny" and could be upheld only if they were "narrowly tailored" to effectuate a "compelling government interest." J.S. App. 67a. Judge Sloviter found that "there is certainly a compelling government interest to shield a substantial number of minors from some of the online material that motivated Congress to enact the CDA." Id. at 72a-73a. She concluded, however, that the CDA's restrictions are not narrowly tailored to vindicate that interest.

Judge Sloviter premised that conclusion on a determination that "it is either technologically impossible or economically prohibitive" for "many" Internet users to limit their communications to adults. J.S. App. 73a-74a. In particular, she found that "no technology exists which allows those posting on the category of newsgroups, mail exploders or chat rooms to screen for age, id. at 74a, and that while "efforts at age verification are technically feasible" on the World Wide Web, "as a practical matter, non-commercial organizations and even many commercial organizations using the Web would find it prohibitively expensive and burdensome to engage in * * * age verification," ibid. Judge Sloviter therefore concluded that, for many Internet users, the CDA operates as a "complete ban" on adult-to-adult communication of indecent material, ibid., and she viewed such a ban as unconstitutional under this Court's decision in Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989). J.S. App. 74a. Judge Buckwalter concurred in that portion of Judge Sloviter's opinion. Id. at 84a.

Judge Dalzell also concluded that the CDA's indecency restrictions violate the First Amendment, but under a different analysis. He reasoned that, because "the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country -- and indeed the world -- has yet seen," J.S. App. 141a, Congress "may not regulate indecency on the Internet at all," id. at 131a.

b. Judge Buckwalter and Judge Sloviter further concluded that the CDA's restrictions are unconstitutionally vague. As an initial matter, both judges assumed that the "indecent" communications restricted by Section 223(a) are the same as the "patently offensive" communications restricted by Section 223(d) -- both refer to material "that, in context, depicts or describes, in terms

patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. 223(d)(1)(B). J.S. App. 64a-65a, 92a-93a. Judge Buckwalter viewed that definition as unconstitutionally vague because it does not expressly restrict the communications that it prohibits to those that are indecent for "the medium of cyberspace" (id. at 95a), and because it does not expressly state whether the relevant community standard is a uniform national standard or a local standard that varies depending upon where children receive the information (id. at 96a-97a). Judge Sloviter agreed that the terms "'indecent' and 'patently offensive' are inherently vague." Id. at 80a.

Like the other two judges, Judge Dalzell determined that the "indecent" and "patently offensive" communications restricted by the CDA are governed by the same definition -- speech that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." J.S. App. 110a. He concluded, however, that the terms as so defined are not unconstitutionally vague. He reasoned that the definition "contains a subset of the elements of obscenity" set forth in Miller v. California, 413 U.S. 15 (1973), that this Court has upheld the Miller standard against vagueness challenges, and that "the omission of parts of that test does not warrant a contrary conclusion." J.S. App. 111a-112a.

c. Based on its conclusion that the CDA's restrictions on indecent communications are facially unconstitutional, the three-judge court entered a preliminary injunction preventing the Attorney General from "enforcing, prosecuting, investigating or reviewing any matter premised upon" the restrictions on the transmission or display of indecent material. J.S. App. 148a-149a.[4]

SUMMARY OF ARGUMENT

I. Parents and their children have a First Amendment right to receive information and acquire knowledge, Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923), and the Internet has unmatched potential to facilitate that interest. Much of the Internet's potential as an educational and informational resource will be wasted, however, if people are unwilling to avail themselves of its benefits because they do not want their children harmed by exposure to patently offensive sexually explicit material. The government therefore not only has an especially strong interest in protecting children from patently offensive material on the Internet, it has an equally compelling interest in furthering the First Amendment interest of all Americans to use what has become an unparalleled educational resource. The Communications Decency Act of 1996 constitutionally advances those interests.

A. The transmission and specific child provisions prohibit the sending of indecent material to children with knowledge that the recipient is under 18. Those provisions are essentially no different from the prohibition on the sale of indecent material to minors upheld in Ginsberg v. New York, 390 U.S. 629 (1968). Like that prohibition, the transmission and specific child provisions directly prevent the dissemination of indecent material to children without prohibiting adult access to that material. Because there is no First Amendment right to disseminate indecent material to children, the transmission and specific child provisions must be upheld.

B. The display provision is also constitutional. When read

together with the defenses to prosecution, the display provision permits persons to post indecent material on the Internet so long as they condition access on the use of credit cards or other adult identification devices, or otherwise employ reasonable, effective, and appropriate measures to ensure that their materials are not available to minors. That approach is constitutional under FCC v. Pacifica Foundation, 438 U.S. 726, 749 (1978). Just as it was constitutional for the FCC to channel indecent broadcasts to times of the day when children most likely would not be exposed to them, so Congress could channel indecent communications to places on the Internet where children are unlikely to obtain them. Indeed, there is a stronger justification for the display provision than there was for the restriction approved in Pacifica. The indecency problem on the Internet is much more pronounced than it is on broadcast stations. And unless steps are taken to restrict the availability of such material to children, many parents may be deterred from bringing the Internet into their homes at all.

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) and Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). also support the constitutionality of the display provision. In effect, the display provision operates as an adult "cyberzoning" restriction, very much like the adult theater zoning ordinances upheld in Renton and Young. Just as the cities of Detroit and Renton could direct adult theaters away from residential neighborhoods, so Congress could direct purveyors of indecent material away from areas of cyberspace that are easily accessible to children.

C. The display provision does not impose a flat ban on indecent communication. Current technology affords significant opportunities for adults to communicate and receive indecent material over the Internet and through other channels. For example, those who post indecent material on Web sites for commercial purposes can ensure that only adults have access to their material by requiring a credit card number or an adult ID. Similarly, operators of noncommercial Web sites can use adult verification services for that purpose. There are also ways to communicate through other Internet applications that would not expose children to indecency. And, as technology evolves, the opportunities for adult-to-adult communication of indecent material will expand even further. The district court's decision, which was premised on its characterization of the display provision as a flat ban on indecent communications, is therefore incorrect.

D. There is no less burdensome way to vindicate the government's vital interests that would work equally well. Congress reasonably determined that commercial software that attempts to screen out indecent information only partially addresses the problem. Such software cannot identify all existing sexually explicit sites; it cannot keep pace with the rapid emergence of numerous new sexually explicit sites; it places the entire burden on parents; and it is owned by only a small fraction of Americans.

In the short run, the CDA may impose some burdens and costs on adult-to-adult communication of indecent material. Congress constitutionally decided, however, that it is better to place some burdens and costs on those who disseminate patently offensive material through use of a new and rapidly changing technology than it is to leave children unprotected.

II. The district court erred in finding the CDA's restrictions unconstitutionally vague. The restrictions apply only to material that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 47 U.S.C. 223(d)(1). That formulation gives fair warning concerning the great bulk of what is and is not covered.

The CDA's definition of indecency is similar to one of the elements that this Court used to define obscenity in Miller v. California, 413 U.S. 15 (1973), and to one of the elements that New York used to define material harmful to minors in Ginsberg. And it is almost identical to the definition of indecency upheld against a vagueness challenge in Denver Area Educational Telecommunications Consortium v. FCC, 116 S. Ct. 2374 (1996). Those decisions strongly support the conclusion that the CDA's definition of indecency is not unconstitutionally vague.

The historical meaning of the CDA's indecency definition and the CDA's legislative history indicate that the kind of graphic pictures that appear in soft-porn and hard-core porn magazines almost always would be covered, while material having scientific, educational, or news value almost always would not be covered. There may be borderline cases in which it is difficult to determine on which side of the line particular material falls. But that does not show that the CDA's definition of indecency is unconstitutionally vague.

III. Even if the display provision were unconstitutional in some of its applications, the district court erred in enjoining enforcement of all three provisions in their entirety. The CDA is governed by a severability clause that makes clear that any invalid provision is severable from the rest. The severability clause also makes clear that if application of particular provisions is invalid in some respects, the CDA should otherwise remain intact.

Under the severability clause, any infirmity in the display provision could not affect the transmission and specific child provisions. Moreover, even assuming the display provision were invalid in some of its applications, the district court had no justification for invalidating the display provision in other respects -- e.g., as applied to material displayed for commercial purposes. The constitutionality of that application is not open to serious question.

Because the CDA's restrictions are all facially constitutional, and because any infirmity in those provisions could not justify the district court's sweeping injunction, the district court's judgment should be reversed.

ARGUMENT

I. THE CDA'S INDECENCY RESTRICTIONS CONSTITUTIONALLY ADVANCE THE GOVERNMENT'S INTERESTS IN PROTECTING CHILDREN AND IN ENSURING THAT PERSONS ARE NOT DETERRED FROM USING THE INTERNET AND OTHER INTERACTIVE COMPUTER SERVICES

Congress enacted the Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, 110 Stat. 133, to protect children from exposure to sexually explicit material that is now widely disseminated on the Internet. Equally significant, Congress sought to make the Internet a resource that all Americans could use without fear that their children would be exposed to the harmful effects of indecent material. The CDA's restrictions on indecent communications constitutionally advance those interests. They

prohibit persons from transmitting indecent material to children, while affording significant opportunities for adults to disseminate indecent material to other adults. Applying the principles that this Court has developed in other contexts, the CDA's restrictions are therefore facially constitutional.

A. This Court Has Developed Several Principles For Evaluating The Constitutionality of Restrictions On Indecent Communications In Various Contexts

This Court has not previously addressed the standards for judging the constitutionality of government restrictions on the communication of indecent material over the Internet or other interactive computer services. This Court has, however, developed principles for assessing restrictions on the dissemination of indecent material in other contexts. Those principles should guide the Court's analysis in this case as well. After identifying the basic principles in this part of the brief, we shall explain in the succeeding parts why the CDA provisions that the district court enjoined are constitutional under those principles.

1. First, because children generally do not possess the same capacity as adults to make informed choices about whether to view indecent material, and because such speech may have deep and harmful effects on children that cannot readily be undone, there is no First Amendment right to distribute indecent material to children. Thus, government regulation that prohibits the dissemination of indecent material to children, while not prohibiting dissemination to adults, is fully consistent with the First Amendment.

Ginsberg v. New York, 390 U.S. 629 (1968), establishes that principle. There, the Court rejected a First Amendment challenge to the constitutionality of a criminal statute that punished the sale to minors of sexually explicit magazines that were "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." Id. at 633. In sustaining that statute, the Court found it sufficient that the State could rationally conclude that exposure to such material was harmful to minors. Id. at 641. As this Court has subsequently explained, Ginsberg holds that bookstores and movie theaters "may be prohibited from making indecent material available to children." FCC v. Pacifica Foundation, 438 U.S. 726, 749 (1978); id. at 758 (Powell, J., concurring in part and concurring in the judgment). Such entities may withhold indecent material from children, but still sell it to adults. Ibid.

2. Second, when the dissemination of indecency to adults poses a substantial risk that children will be exposed to the material, government may channel the indecent communications so as to minimize the risk of children being exposed. Pacifica best illustrates that principle. There, the Court upheld an FCC decision holding that a radio station could be sanctioned for an afternoon broadcast of a comedy routine containing a stream of sexually explicit words. The Court explained that "broadcast media have established a uniquely pervasive presence in the lives of all Americans," 438 U.S. at 748; that "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home," ibid.; that "prior warnings cannot completely protect the listener or viewer from unexpected program content," ibid.; that "broadcasting is uniquely accessible to children," id. at 749; that the FCC had not

"intended to place an absolute prohibition on the broadcast of [indecent] language, but rather sought to channel it to times of day when children most likely would not be exposed to it," id. at 732-733; and that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words," id. at 750 & n.28.

Similarly, in Denver Area Educational Telecommunications Consortium v. FCC, 116 S. Ct. 2374 (1996), the Court upheld a provision permitting cable system operators to prohibit patently offensive programming over leased access channels. A plurality of the Court did so on the authority of Pacifica, reasoning that cable television poses the same serious and pervasive risk of exposing children to indecent material as broadcast stations. Id. at 2386-2388.

3. Third, government may adopt reasonable zoning schemes to address the secondary effects of sexually explicit communications. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) and Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), establish that point. In City of Renton, the Court upheld a zoning ordinance that prohibited theaters that show sexually explicit adult movies from locating within 1000 feet of any residential zone, single or multiple family dwelling, church, park, or school. 475 U.S. at 44-45. In Young, the Court upheld a zoning ordinance that prohibited movie theaters that show sexually explicit movies from locating within 1000 feet of any similar establishment or within 500 feet of a residential area. 427 U.S. at 52. A majority of the Court agreed on a rationale for those decisions in City of Renton. The Court explained that zoning restrictions on businesses that purvey sexually explicit material are constitutional when they are aimed at the secondary effects of such businesses (such as crime, loss of retail trade, reductions in property values, and reduced quality of urban life), and when they allow for reasonable alternative avenues of communication. 475 U.S. at 47-50. The latter inquiry, moreover, focuses on whether the regulation leaves open alternative locations as a legal matter, not whether sites are currently on the market or are commercially viable. Id. at 53-54.

4. Fourth, government generally may not adopt an outright ban on the dissemination of indecent material to adults. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989), illustrates that principle. In that case, the Court held unconstitutional a legal prohibition against any dissemination of indecent telephone messages for commercial purposes (dial-a-porn). Although the Court acknowledged that the government had a "compelling interest" in protecting children from dial-a-porn, id. at 126, it rejected the government's argument that a flat ban on such messages was appropriate to vindicate that interest. The Court explained that "the government may not 'reduce the adult population . . . to . . . only what is fit for children.'" Id. at 127-128. The Court also emphasized that the FCC had "determined that its credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors," ibid., and that there was no evidence to suggest that reliance on such measures would not protect all but "the most enterprising and disobedient young people," id. at 130. Because there was an alternative to a flat ban that would have effectively vindicated the government's interest in protecting children, Sable does not resolve whether an

outright prohibition is permissible when there is no reasonably effective alternative.

5. Finally, when government restrictions substantially burden or deter adult access to indecent communications, and a significantly less burdensome alternative will satisfy the government's interests equally well, the government must choose the less burdensome alternative. Denver Area illuminates that principle. There, the Court held unconstitutional a provision that required cable operators to segregate and block patently offensive sex-related material appearing on leased channels, to unblock the channel within 30 days of a subscriber's written request, and to reblock within 30 days of such a request. 116 S. Ct. at 2390-2391. In invalidating that provision, the Court emphasized its "obvious restrictive effects": the significant delays required subscribers to engage in considerable advance planning; the written notice requirement could deter subscribers who feared release of their identities; and the additional costs and burdens could encourage cable operators to ban programs they might otherwise be inclined to show. Id. at 2391. The Court also stressed that Congress had recently adopted an alternative approach for unleased cable channels that was "significantly less restrictive," and the record did not explain how Congress could conclude that its more recent approach would be effective for unleased channels but ineffective for leased channels. Id. at 2392.

6. Applying the principles discussed above, the CDA's transmission and specific child provisions are constitutional under the Ginsberg principle. The display provision is constitutional under both the Pacifica and Renton principles. None of the CDA's restrictions operates as a flat ban, and there is no equally effective way to serve the government's vital interests. The CDA's restrictions therefore do not violate the principles of Sable or Denver Area.[5]

B. The Transmission And Specific Child Provisions Are Facially Constitutional

1. The transmission provision forbids any person from using a "telecommunications device" to "knowingly * * * make[], create[], or solicit[], and * * * initiate[] the transmission of" any "communication which is * * * indecent, knowing that the recipient of the communication is under 18 years of age." 47 U.S.C. 223(a)(1)(B) (emphasis added). By its terms, that prohibition applies only in situations in which a person transmits indecent material to another person, knowing that person is under 18. For example, if an adult learned that one of the participants in a chat room was under 18, and then sent a private indecent communication to that individual by e-mail, the transmission provision would be violated.

As that example illustrates, to comply with the transmission provision, persons need not refrain from communicating indecent material to adults; they need only refrain from disseminating such materials to persons they know to be under 18. The transmission provision is therefore precisely tailored to meet the government's interest in shielding children from indecent material. At the same time, the provision does not prohibit communications between adults.

The transmission provision is essentially no different from the prohibition on the sale of indecent material to minors upheld in Ginsberg. Like that prohibition, the transmission provision

directly prevents the dissemination of indecent material to children without restricting adult access to that material. The district court therefore erred in enjoining its enforcement.

2. The same is true of the specific child provision, which prohibits persons from "knowingly * * * us[ing] an interactive computer service to send" patently offensive sexually explicit material "to a specific person or persons under 18 years of age." 47 U.S.C. 223(d)(1)(A). Like the transmission provision, the specific child provision applies only to situations in which a person sends indecent material to someone he knows to be under 18. Because the provision is aimed at messages knowingly directed to minors, it does not prohibit adult-to-adult communications, and the district court erred in enjoining its enforcement.[6]

3. In their responses to our jurisdictional statement, appellees did not contend that the transmission and specific child provisions are facially unconstitutional if construed as we have suggested. Appellees instead contended that those provisions should be construed far more expansively to reach any communication "that might be seen by any minor." ACLU Mot. to Aff. 26. That interpretation, however, reads the "knowledge" requirement out of the transmission provision and the "knowledge" and "specific" requirements out of the specific child provision. Because appellees' interpretation cannot be squared with the text of the provisions, it must be rejected.

Nor do those provisions penalize the sending of an indecent message to a place in cyberspace where minors would have the ability to obtain it (ACLU Mot. to Aff. 26-27). That conduct is addressed by the display provision, which prohibits the use of a computer "to display in a manner available" to children sexually explicit material. 47 U.S.C. 223(d)(1)(B). The transmission and specific child provisions have a narrower scope. Their terms require that the person initiating the indecent communication must know that a specific recipient of his message is under 18.

Appellees contend (ACLU Mot. to Aff. 26) that the knowledge requirement in the specific child provision requires only knowledge that a computer is being used, not knowledge that the specific child receiving the message is under 18 years of age. Under basic principles of statutory construction, however, the knowledge requirement applies to both elements of the offense. The specific child provision applies to:

> (d) Whoever --
>
> (1) in interstate or foreign communications knowingly --
>
> (A) uses an interactive computer service to send to a specific person or persons under 18 years of age,
>
> * * *
>
> * * * * *
>
> any * * * communication, that, in context, depicts or describes in terms patently offensive * * * sexual or excretory activities or organs.

Because the use-of-computer requirement and the under-18 requirement appear in the same clause, and because the knowledge requirement introduces that clause, it is perfectly natural to read the knowledge requirement as applying to both elements. Moreover, any ambiguity must be resolved by resort to the "presumption" that "a scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct." United States v. X-Citement Video, Inc., 115 S. Ct. 464, 467-469, 472

(1994).

The transmission and specific child provisions therefore should be construed in the manner we have suggested. As so construed, they raise no serious constitutional question.

C. The Display Provision Is Facially Constitutional

The display provision prohibits the use of an interactive computer service to "display" indecent material "in a manner available" to those under 18. 47 U.S.C. 223(d)(1)(B). Because information posted in public portions of the Internet, such as the World Wide Web, newsgroups, or chat rooms, may be automatically "available" to children as well as adults, the display provision has the potential to affect adult-to-adult communication. A person has a "defense to a prosecution," however, if he restricts access to indecent materials "by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number," 47 U.S.C. 223(e)(5)(B), or otherwise takes, "in good faith, reasonable, effective, and appropriate actions * * * to restrict or prevent access to minors," 47 U.S.C. 223(e)(5)(A). When read together with the statutory defenses, the display provision therefore permits persons to post indecent material on the Internet so long as they condition access on the use of credit cards or other adult identification devices, or otherwise employ "reasonable, effective, and appropriate" measures to ensure that their materials are not available to minors. In that way, Congress sought to keep sexually explicit materials on the Internet away from children, while providing significant opportunities for adults who are so inclined to receive such materials.

1. a. The approach Congress enacted is constitutional under Pacifica. Like broadcast stations, the Internet is establishing an increasingly "pervasive presence" in the lives of Americans. 438 U.S. at 748. As many as 40 million people in the world use the Internet today, and that figure is expected to grow to 200 million by 1999. J.S. App. 13a. And while precise figures are not available, the district court found that approximately 60% of the host computers linked to the Internet are located in the United States. Ibid. Like indecency presented on broadcast stations, indecent material presented over the Internet "confronts the citizen * * * in the privacy of the home." 438 U.S. at 748. Like broadcast stations, the Internet "is uniquely accessible to children." Id. at 749. Indeed, as Congress recognized, children have become "the computer experts in our Nation's families." 141 Cong. Rec. S8332 (daily ed. June 14, 1995) (remarks of Sen. Coats). As was true in Pacifica, Congress has not attempted to forbid all indecent communications. Just as the FCC sought to channel indecent broadcasts "to times of the day when children most likely would not be exposed to it," 438 U.S. at 732-733, so Congress has sought in the CDA to channel indecent communications to places on the Internet where children are unlikely to obtain it. And, as was the case in Pacifica, adults who have a desire for indecent material may obtain access to such material in other ways. Id. at 750 & n.28. In addition to attending live theater and nightclubs, adults interested in indecent material can purchase tapes, compact discs, books, magazines, videotapes, and CD Roms.

Moreover, in important ways, there is a stronger justification for the restriction at issue here than there was for the one approved in Pacifica. Because millions of people disseminate information on the Internet without the intervention of editors,

network censors, or market disincentives, the indecency problem on the Internet is much more pronounced than it is on broadcast stations. The record in this case demonstrates the seriousness of the problem. It shows that sexually explicit material, "from the modestly titillating to the hardest-core," J.S. App. 47a, is widely available on the Internet, and that computer-literate children can easily find and retrieve it. The government's expert, Howard A. Schmidt, the director of the Air Force's computer crimes investigations office, testified at length concerning the ease with which sexually explicit materials can be retrieved through the Internet and other interactive computer services. See Schmidt Decl. __ 7-10, 13-32, 36-37, 38-39. Search terms such as "xxx," id. __ 7-10, "xxx sex," __ 19-23, "adult porn," id. _ 37, and "porn pictures," id. _ 38, retrieved long lists of sites containing sexually explicit pictures. Each retrieved site contained links to other equally explicit sites, and access to those sites could be obtained simply by clicking with a computer mouse on the highlighted portion identifying the linked site. See, e.g., Schmidt Decl. __ 10, 21(a), 35, 40. Sexually explicit material can also be accidentally retrieved by search terms that have no necessary sexual connotation, such as "Jasmine, "Sleeping Beauty," and "Little Women." Id. __ 33-35; DX 13A; 3/22/96 Tr. 26:14-29:21, 35:1-37:18. Schmidt's declaration is accompanied in the record by a notebook which contained printouts of each screen that he described in his declaration. That notebook graphically illustrates the dimensions of the problem.

The widespread availability of sexually explicit material on the Internet and other interactive computer services has a significance beyond the direct risk posed by such material to the psychological well-being of children.[7] Unless steps are taken to restrict the availability of such material to children, parents and schools may be deterred from permitting children to use interactive computer services. Indeed, many parents may be deterred from bringing the Internet into their homes at all.

The "American people have always regarded education and acquisition of knowledge as matters of supreme importance." Meyer v. Nebraska, 262 U.S. 390, 400 (1923). That fundamental value reflects "[b]oth the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child." Plyler v. Doe, 457 U.S. 202, 221 (1982). As a result, parents and their children have a profound interest, protected by the First Amendment, in receiving information and acquiring knowledge. See Kleindienst v. Mandel, 408 U.S. 753, 763 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); Meyer, 262 U.S. at 399-401. The Internet has unmatched potential to facilitate that interest.

Much of the Internet's potential as an educational and informational resource will be lost, however, if substantial numbers of people are unwilling to avail themselves of its benefits because they do not want their children exposed to patently offensive material.[8] The result will be to exclude those children from an equal opportunity to participate in the promise of our new technological age. The government therefore not only has a compelling interest in protecting children from patently offensive material on the Internet, it also has a compelling interest in protecting the First Amendment interests of all Americans in using what has become an unparalleled educational resource. Under

Pacifica, the display provision is a constitutional way to further those goals.

b. The district court concluded that Pacifica was inapposite, because the danger of inadvertent exposure is not as pronounced on the Internet as it is on broadcast stations. J.S. App. 67a-68a. Pacifica, however, depended not on that one factor alone, but on the overall seriousness and pervasiveness of the problem, and the ineffectiveness of parental supervision as the solution. Far more serious than the risk of inadvertent exposure is that indecent material has the characteristics of an attractive "nuisance," 438 U.S. at 750, which young children are likely to affirmatively seek out. Because there is a much larger quantity of indecent material on the Internet than on broadcast stations, and because it is even more difficult to monitor what a child views on the Internet than it is to monitor what he or she watches and hears on broadcast stations, the overall problem of childrens' unsupervised exposure to sexually explicit material is much more serious on the Internet. The district court's effort to distinguish Pacifica is therefore unpersuasive.

Appellees have suggested (ALA Resp. 11 n.8) that the scarcity of broadcast spectrums justified the result in Pacifica. In applying the Pacifica rationale to cable television, however, the plurality in Denver Area squarely rejected that characterization of Pacifica. The Denver Area plurality explained that Pacifica rests on the effect of indecent programming on children, not on program scarcity. 116 S. Ct. at 2388. Pacifica is therefore directly applicable in the present context and fully supports the constitutionality of the CDA's display provision.

2. This Court's zoning decisions also support the constitutionality of the display provision. In effect, the display provision operates as an adult "cyberzoning" restriction, very much like the adult theater zoning ordinances upheld in Renton and Young. Just as the cities of Detroit and Renton could constitutionally require adult theaters to locate outside of residential neighborhoods, see 475 U.S. at 46; 427 U.S. at 52, so Congress could permissibly instruct providers of indecent material on the Internet to remove the material "from areas of cyberspace that are easily accessible to children" and to place them in adult cyberspace zones instead. 141 Cong. Rec. S8333 (daily ed. June 14, 1995) (remarks of Sen. Coats).

The zoning restrictions upheld in Renton and Young were aimed at the secondary effects of indecent communications, and that is also true here. The government's interest in ensuring that parents are not deterred from allowing their children to use the Internet is directly analogous to the concerns about crime, reduced property value, and the quality of urban life that animated the cities in Renton and Young. In channeling indecent materials to adult areas of cyberspace, the display provision seeks to ensure that the Internet will not become a wasteland visited by a small segment of the population, but will instead thrive and flourish as a gathering place for all Americans. And here, as in Renton and Young, the government's goal is "not to suppress the expression of unpopular views." Renton, 475 U.S. at 48.

The effect of patently offensive sexually explicit materials on children is also properly viewed as a secondary effect. It is true that the harm to children is the consequence of the indecent material and therefore could in a sense be viewed as a primary

rather than a secondary effect. Because there is no First Amendment right to disseminate indecent material to children, however, the harmful effect of such materials on children is better understood as a secondary effect of constitutionally protected adult-to-adult communication. Put differently, the government's interest in protecting children from patently offensive sexually explicit depictions and descriptions is as legitimate and unrelated to the suppression of constitutionally protected expression as the government's interests in reducing crime, maintaining property values, and preserving the quality of urban life. Thus, as long as a government zoning scheme is justified by the effects of indecent communications on children rather than adults, and leaves open reasonable opportunities for adult-to-adult communication, it is constitutionally permissible. That is the situation here.

D. The Display Provision Does Not Operate As A Flat Ban

The district court concluded that the display provision operates as a flat ban on indecent speech, in violation of the general principle identified in Sable. See J.S. App. 73a-74a (Sloviter, J.), 84a (Buckwalter, J.). That conclusion was premised on a determination that the statutory defenses are not available as a practical matter to most providers of material over the Internet and that such providers would therefore have to eliminate indecent speech entirely from their communications in order to comply with the display provision. The record demonstrates, however, that the CDA's display provision (in conjunction with the statutory defenses) leaves open significant opportunities for adult-to-adult communication. That provision therefore cannot reasonably be viewed as a flat ban.

1. a. First, it is clear that those who post patently offensive sexually explicit material on their Web sites for commercial purposes can take advantage of the statutory defenses. The district court below specifically found that current technology permits the operator of a Web site to screen those who seek access to the site by requesting a credit card number or adult ID. J.S. App. 51a. Moreover, the record in this case demonstrates that many commercial sites that display sexually explicit content already use credit card and other adult verification devices to screen for age. Id. at 135a (Dalzell, J.); see also Shea v. Reno, 930 F. Supp. 916, 943 (S.D.N.Y. 1996) (noting that "[m]any commercial content providers charge a fee to permit a user to gain access to sexually explicit content, thus necessitating credit card verification in any event"); Schmidt Decl. __ 12, 22; Schmidt Exhs. 3, 22, 29, 31 (examples of Web sites that provide access to sexually explicit material only upon the presentation or use of a valid credit card or a valid account with "First Virtual," a company that provides Internet users with a personal identification number once they provide valid credit card information). It is therefore beyond dispute that commercial providers have the ability to post indecent information on the Internet and limit access to that material to adults.[9]

Even though many commercial providers already require a credit card or adult ID for purchase of their material, the CDA nonetheless serves an important function. As Congress was aware, commercial providers often post free "teasers" on their Web sites, "not unlike coming attractions [at] the movies," to promote their products. 141 Cong. Rec. S8090 (daily ed. June 9, 1995) (remarks of Sen. Exon). "[T]hey * * * take the best and most enticing

pictures of whatever they want to sell that particular day or that particular week and enter it * * * on the Internet," ibid., in order to entice consumers to purchase other similar material. If the CDA's display provision were upheld, commercial pornographers would quickly end that practice.

There is nothing constitutionally suspect about requiring commercial Web site operators who profit from indecent material, but do not currently use credit cards or adult IDs as screening devices, to shoulder the modest burdens associated with their use. Nor does the First Amendment even arguably preclude government from requiring commercial providers who profit from credit card sales to use those same cards to ensure that only adults obtain access to their sites. The constitutionality of applying the CDA's display provision to commercial providers is therefore not open to serious question. Shea, 930 F. Supp. at 942-943 (the credit card and adult ID safe harbor "serves as an adequate defense for at least certain commercial providers of Web content -- specifically, those who primarily make Web content available for 'purchase' or, put another way, those who charge Web users to gain access to, and view, their content"). At the very least, the district court erred in entering a preliminary injunction barring enforcement of the CDA's provisions against commercial providers, because they have not and cannot make the requisite showing of a likelihood of success on the merits of their constitutional claim. See Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 316-317 (1985).

b. Operators of commercial and noncommercial Web sites can also take advantage of the statutory defenses by using "adult verification services," such as AdultCheck. See J.S. App. 55a-56a. Such services, which maintain their own Web sites, charge persons a nominal yearly fee (such as $9.95) to obtain an adult identification number that can be used to gain access to Web sites registered with the service. When a user goes to a registered site, he enters his adult ID number. If the number is valid, the user is automatically admitted to the site; if the number is invalid, entry to the site is denied. See generally Schmidt Decl. _ 11; Schmidt Exh. 6 (describing "AdultCheck" service); Schmidt Exh. 8 (describing "Validate" service). Verification services ordinarily do not charge the operator of a Web site a fee; on the contrary, they are often willing to pay the Web site operator to refer customers to their service, and will help the operator set up the means for password entry and verification. See generally Schmidt Decl. _ 11; Schmidt Exhs. 6, 8; see also Shea, 930 F. Supp. at 934.

The district court discounted the significance of adult verification services because the government's evidence as to their operation was derived primarily from publicly available promotional materials. J.S. App. 55a. But it is undisputed that such services are currently being used by purveyors of sexually explicit material on the Internet, see Schmidt Decl. _ 11; Schmidt Exh. 6, at 3-4 (listing sites using AdultCheck), and appellees offered no evidence that the services do not or could not work as advertised.

Appellees have also contended that adult ID services are not an available option for noncommercial Web sites because such services are currently used exclusively by commercial pornographers with whom appellees would prefer not to be associated. ALA Resp. 17. If appellees were to begin to use such existing adult verification services, however, such services would no longer be

tainted by an exclusive association with commercial pornographers. In any event, appellees are free to pool their resources to establish their own adult ID service or to hire another entity to provide such a service for them. The adult ID defense is therefore available to non-commercial Web site operators, and the display provision is constitutional as applied to them.

c. Those seeking to use other forms of communication over the Internet can also take advantage of the statutory defenses. For example, persons can post messages in a freestanding mailing list, newsgroup, or chat room directing participants to a Web site that is screened for age to view a particular patently offensive message. Anyone visiting the site who wished to respond in the same patently offensive fashion could do so by e-mail. Mail exploder and chat room users who want to disseminate patently offensive material can start a closed mailing list or chat room that has rules limiting participation to adults; newsgroup users who wish to exchange patently offensive material could also set up their own list of servers and screen for age. See Shea, 930 F. Supp. at 947-948. Other options may soon be available. For example, since the record was compiled at the preliminary injunction stage of the case, it has become clear that chat rooms, newsgroups, and mailing lists can be established on a Web site, where those who wish to post patently offensive material can avail themselves of the very same screening technologies that apply to the Web.[10]

d. While the display provision already affords numerous opportunities for adult-to-adult communication of indecency, the rapid development of technology on the Internet is certain to facilitate even more. For example, the technology already exists for "tagging" patently offensive communications in all major Internet applications. See Olsen Decl. __ 43-111, 134. One way for such a system to operate would be for there to be a consensus on a tag (an identifying code) that indicates that material is being marked for compliance with the CDA's indecency restrictions (similar to the R-rating for movies). Shea, 930 F. Supp. at 932-933. Web browsers could then be programmed to recognize and automatically block material that has been tagged, leaving parents and other adults the option to unblock it by means of a device that did not permit ready access by children. In light of the rapid development and innovative capabilities of Internet industry participants, there is every reason to expect that effective tagging and blocking or other technological solutions will be created if the CDA's indecency restrictions are upheld. In the meantime, Congress permissibly decided that it is better to place some burdens and costs on those who disseminate patently offensive material through use of a new and rapidly changing technology than it is to leave children unprotected.

2. Appellees attempt to defend the district court's conclusion that the display provision operates as a flat ban by characterizing it as a finding of fact. ACLU Mot. to Aff. 18-20. The district court's flat ban determination, however, is based on two serious legal errors. First, in deciding whether a particular defense was effectively unavailable, the district court did not limit its consideration to technical feasibility. It also assessed whether a particular method of compliance would impose costs or burdens. J.S. App. 74a. Such costs and burdens are not irrelevant to the question whether the display provision is constitutional.

As previously discussed, where significant costs and burdens are shown and a significantly less burdensome alternative will vindicate the government's interests equally well, the government must choose the less burdensome alternative. Denver Area, 116 S. Ct. at 2390-2392. The existence of burdens and costs associated with adult-to-adult communication, however, does not transform a restriction on the place and manner in which speech may be communicated into a flat ban of the kind condemned in Sable. Cf. Renton, 475 U.S. at 53-54 (increased costs and burdens associated with locating in an adult zone do not convert zoning restriction into a flat ban); Sable, 492 U.S. at 125 (constitutional to require message provider "to incur some costs in developing and implementing a system for screening the locale of incoming calls"). The district court erred as a matter of law in believing that it did.

Second, the district court assumed that the display provision should be viewed as a flat ban unless most speakers are able to communicate indecent speech over every possible Internet application. The proper inquiry, however, should be whether, on the whole, that provision leaves open reasonable opportunities to disseminate indecent material. Cf. Renton, 475 U.S. at 54 (zoning ordinance must provide reasonable opportunity for adult theaters to operate within the city). Nothing in this Court's First Amendment jurisprudence suggests that a restriction on communicating indecency over a medium should be viewed as a flat ban unless most people are able to use every possible method of communicating through that medium. Because the display provision leaves open reasonable opportunities for the transmission and receipt of indecent material over the Internet and other interactive computer services (not to mention avenues of communication outside of those new technologies), it is not properly viewed as a flat ban.

E. There Are No Alternatives That Would Be Equally Effective In Advancing The Government's Interests

The only remaining question is whether there is any alternative way to satisfy the government's interests that would be significantly less burdensome but would work equally well. Appellees suggest (ALA Resp. 22-23) that commercial software that attempts to screen out indecent information is such an alternative. While Congress recognized that such software could provide "part of the [a]nswer" to the problem of indecency on the Internet, it reasonably determined that it could not provide "the whole answer." 142 Cong. Rec. S706 (daily ed. Feb. 1, 1996) (remarks of Sen. Grassley). Screening software is only partially effective in screening indecent material, and Congress further determined that it would not be fair for parents to have "the sole responsibility to spend their hard-earned money to ensure that cyberporn does not flood into their homes through their personal computers." Cyberporn Hearing at 2 (Sen. Grassley).

One difficulty is that screening software must be programmed to recognize each of the thousands of sites that may contain indecent material, and "new sites are constantly coming online." J.S. App. 38a. Because indecent material can appear in numerous verbal forms, there can be no guarantee that any particular software program will screen all indecent sites simply by searching for particular words or phrases. It is for that reason that software producers employ persons to search the Internet for indecent sites, see ibid., and charge subscribers significant fees

for regular supplements to their lists of blocked sites, id. at 39a, 41a. Moreover, screening software is unable to "screen for sexually explicit images unaccompanied by suggestive text unless those who configure the software are aware of the particular site." Id. at 42a. As a result, "even where a parent has properly installed screening software and the software is operational * * * it is possible to retrieve some sexually explicit material." Shea, 930 F. Supp. at 932. Perhaps for that reason, parental control software is used by only a very small percentage of households that have access to the Internet. For example, as of the time of the Shea decision, approximately 450 individual households subscribed to SurfWatch, one of the leading commercial screeners of indecency. Ibid. Thus, despite the district court's prediction that parental control software might eventually be a reasonably effective method of screening indecent communication, J.S. App. 42a, the district court did not find that such software is currently effective in serving the government's compelling interests, and it did not rely on the availability of parental control software as a basis for its ruling that the CDA's prohibitions are facially unconstitutional.

Appellees offer two additional alternatives that are even less effective in serving the government's compelling interests. First, appellees propose (ALA Resp. 23) that parents use a screening mechanism that screens out all Internet speech that has not been affirmatively identified as appropriate for children by a particular rating service. Because only a very small fraction of Internet sites have been rated by any service, however, that option would force parents to limit dramatically the amount of information to which their children would have access. Appellees' other alternative is still more draconian -- parents could "deny their children the opportunity to participate in the medium." Ibid. Far from being less restrictive, the two additional alternatives proposed by appellees would seriously undermine the government's ability to further the substantial First Amendment interests of all parents and children in using what has become an unparalleled tool for communicating and retrieving information.

II. THE CDA'S INDECENCY RESTRICTIONS ARE NOT UNCONSTITUTIONALLY VAGUE

The CDA's indecency restrictions encompass the dissemination of information that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 47 U.S.C. 223(d). That formulation is not unconstitutionally vague.

In Miller v. California, 413 U.S. 15, 24 (1973), this Court defined what States could regulate as obscenity -- namely material that (1) "appeals to the prurient interest," (2) "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and (3) "lacks serious literary, artistic, political, or scientific value." The CDA's definition of patently offensive materials is similar to the second element in that definition. Because Miller held that the standard it imposed is not unconstitutionally vague and that States could criminally prosecute persons for violations of that standard, id. at 27 & n.10, Miller provides powerful support for the conclusion that the CDA's definition of patently offensive materials is not unconstitutionally vague. Ginsberg reinforces that conclusion. There, the Court rejected a vagueness challenge to a criminal prohibition on the sale of obscene pictures to minors that included

as one element that the material be "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." 390 U.S. at 632-633, 643.

Similarly, in Denver Area, a four-person plurality of the Court expressly rejected a vagueness challenge to a provision giving cable operators a right to prohibit programming on leased channels "that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 116 S. Ct. at 2381, 2389-2390. Three other Justices voted to uphold the constitutionality of that provision, thereby implicitly rejecting the vagueness challenge. Id. at 2419 (opinion of Thomas, J., concurring in part and dissenting in part). Because the CDA's definition of indecency is almost identical to the definition upheld against a vagueness challenge in Denver Area, that decision also provides support for the conclusion that the CDA's restrictions are not unconstitutionally vague.

The Denver Area plurality's discussion of the issue demonstrates why the CDA's definition of indecency is not unconstitutionally vague. The plurality explained that the provision giving cable operators a right to bar patently offensive communications aims at "pictures of oral sex, bestiality, and rape * * * and not at scientific or educational programs (at least unless done with a highly unusual lack of concern for viewer reaction)." 116 S. Ct. at 2389-2390. The plurality also noted that "what is 'patently offensive' depends on context (the kind of program on which it appears)" and "degree (not `an occasional expletive')." Id. at 2390.

The legislative history to the CDA shows that Congress intended to confine the CDA's restrictions on indecency in a similar way. The Conference Report states that the determination whether material is patently offensive "cannot be made without a consideration of the context of the description or depiction at issue," and that "[m]aterial with serious redeeming value" that "is quite obviously intended to edify and educate, not to offend," is not patently offensive. S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 189. The Conference Report also explains that Congress intended to codify the FCC's definition of indecency that was approved in Pacifica. Id. at 188. In enforcing broadcast indecency rules, the FCC has declined to take enforcement action against a televised program that included candid discussions of teenage sexuality and that used sex organ models to simulate the use of various birth control devices. The Commission explained that "the material presented was clinical or instructional in nature and not presented in a pandering, titillating or vulgar manner." In re King Broadcasting Co., 5 F.C.C. Rcd. 2971 (1990). The FCC has also dismissed a citizen's complaint concerning a radio news story that had broadcasted a recording in which a reputed Mafia figure used an expletive repeatedly in conversation. Letter to Mr. Peter Branton, 6 F.C.C. Rcd. 610 (1991), petition for review dismissed, 993 F.2d 906 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 1610 (1994).

Thus, material having scientific, educational, or news value almost always falls outside the CDA's coverage. On the other hand, the kind of sexually explicit pictures that appear in the Schmidt notebook in this case will almost always be covered. Admittedly,

there may be borderline cases "in which it is difficult to determine the side of the line on which a particular fact situation falls." United States v. Petrillo, 332 U.S. 1, 7 (1947). But that is not a "sufficient reason to hold * * * language too ambiguous to define a criminal offense." Ibid.

The Constitution requires government to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Perfect clarity, however, is neither possible nor constitutionally required. Id. at 110; Kolender v. Lawson, 461 U.S. 352, 361 (1983). In light of their history, the terms "patently offensive" and "sexual or excretory activities or organs" give fair warning concerning what types of depictions and communications are and are not prohibited by the CDA. If the legislature is to be permitted to protect children by regulating the dissemination of patently offensive communications, no greater precision can be expected or required.

III. THE PRELIMINARY INJUNCTION ENTERED BY THE DISTRICT COURT WAS IN ANY EVENT FAR TOO BROAD IN SCOPE

Finally, even if the display provision were unconstitutional in some of its applications, the district court erred in enjoining enforcement of all three provisions at issue in their entirety. The CDA's indecency restrictions were each enacted as amendments to the Communications Act of 1934. Communications Decency Act of 1996, Pub. L. No. 104-104, _ 502, 110 Stat. 133. They are therefore governed by the severability clause contained in that Act, which provides that "[i]f any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby." 47 U.S.C. 608. See Leavitt v. Jane L., 116 S. Ct. 2068, 2070 (1996) (relying on severability clause in the underlying Act to which the challenged provisions were added). As this Court has noted, Section 608 "indicate[s] in the strongest possible language that any invalid provision [is] severable from the rest of the Act." Pacifica, 438 U.S. at 739 n.13. As a result, any infirmity in the display prohibition would not affect the transmission and specific person provisions. Indeed, quite apart from the severability provision, in light of Congress's basic objective of protecting children, it simply is not possible that Congress would have preferred no provisions at all to the two provisions standing by themselves. Cf. Denver Area, 116 S. Ct. at 2397.

Section 608 is significant in another respect. Under that clause, any determination that the display provision is invalid as applied to particular persons or specific circumstances shall not affect its application "to other persons or circumstances." 47 U.S.C. 608; see Wyoming v. Oklahoma, 502 U.S. 437, 460-461 & n.14 (1992). To take the clearest example, even assuming that the display provision would have some invalid applications, there would be no basis for invalidating the provision as applied to commercial Web sites. See also Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503-504 (1985) (unless there are "countervailing considerations," a statute should "be declared invalid to the extent it reaches too far, but otherwise left intact"); compare United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1019 & n.26 (1995) (refusing to preserve certain applications after finding an act of Congress unconstitutionally overbroad,

because Congress had sent conflicting signals as to where the new line should be drawn, each of the new lines would raise independent constitutional concerns, and there was no severability clause).

Contrary to appellees' understanding (ALA Resp. 16; ACLU Mot. to Aff. 24-25), our argument on this point is not that the district court should have construed the CDA's display provision to reach only commercial providers; nor do we argue that the district court should have rewritten the statutory prohibition. Instead, consistent with the statutory command in the applicable severability clause, the district court was required to limit it preliminary injunctive relief to those applications for which it found that appellees had made the requisite showing of probable unconstitutionality, and to leave intact the rest.

Despite its apparent agreement that the display provision could be applied constitutionally to commercial providers, the district court refused to leave that part of the prohibition intact, on the ground that Congress made a conscious decision to impose the CDA's restrictions on commercial and noncommercial providers alike. J.S. App. 75a-76a; see S. Conf. Rep. No. 230, supra, at 191. But that does not provide any basis for ignoring the express terms of the severability clause. Moreover, Congress included noncommercial providers of patently offensive material because it found "that there is a great deal of [such] material on the Internet available to anyone free of charge." 141 Cong. Rec. S8089 (daily ed. June 9, 1995) (remarks of Sen. Exon). That concern does not suggest that Congress would have wanted commercial purveyors of indecency to proceed with impunity if a court were to hold that regulation of some noncommercial providers lay beyond its powers. In fact, the supporters of the CDA repeatedly emphasized that the Act would govern the activities of "entrepreneurs who are seeking money, cash money-making opportunities." Id. at S8090 (daily ed. June 9, 1995) (remarks of Sen. Exon); 141 Cong. Rec. 8340 (daily ed. June 14, 1995) ("the moneymakers on pornography"); id. at S8333 (remarks of Sen. Coats) (those "in the business of providing [patently offensive] material"). That history leaves little doubt that if the display provision cannot be given effect in all of its applications at the present time, Congress at least would have wanted the restrictions to apply to the display of indecent material "for commercial purposes," see 47 U.S.C. 223(b) (prohibiting indecent telephone communications "for commercial purposes").

As we have explained in Points I and II of the brief, however, the CDA provisions that appellees challenge are constitutional on their face in the context of all significant categories of communication functions now undertaken on the Internet. The three-judge district court therefore erred in entering a preliminary injunction barring enforcement of those provisions in any respect, especially in this action brought pursuant to a statutory provision that provides for expedited review only of a challenge to the constitutionality of a provision of the CDA "on its face." Pub. L. No. 104-104, _ 561(a), 110 Stat. 143.

CONCLUSION

The judgment of the three-judge district court should be reversed.

Respectfully submitted.

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1. Unless otherwise noted, references to the CDA are to its provisions as they will be codified in the United States Code.

2. Congress also added supplemental restrictions (the control provisions) that prohibit persons from "knowingly permit[ting] any telecommunications facility under [their] control to be used for" for any activity that violates the three primary restrictions. 47 U.S.C. 223(a)(2) and (d)(2).

3. The prohibitions addressed to interactive computer services apply to services, other than the Internet, such as bulletin boards. 47 U.S.C. 230(e); see United States v. Thomas, 74 F.3d 701 (6th Cir.) (discussing bulletin boards), cert. denied, 117 S. Ct. 74 (1996).

4. After the decision in this case, a three-judge court in the Southern District of New York issued its own preliminary injunction against enforcement of the CDA's restrictions on patently offensive communications. Shea v. Reno, 930 F. Supp. 916 (1996). The Shea court rejected the district court's conclusion in this case that the CDA's restrictions are unconstitutionally vague, but agreed with its conclusion that they are unconstitutional under Sable. The Attorney General's appeal of that preliminary injunction is also pending before this Court. Reno v. Shea, No. 96-595 (juris

5. The supplemental control provisions, 47 U.S.C. 223(a)(2) and (d)(2), are constitutional for the same reasons that the provisions they supplement are constitutional. We therefore do not discuss them further.

6. Although there is overlap between the transmission and specific child provisions (both cover the use of computers to send indecent material when the computers are linked by modems), there are also some differences in coverage. The transmission provision prohibits the use of a telephone or fax machine to transmit indecent material, while the specific child provision does not. The latter provision prohibits the use of interactive computers that are directly linked to other computers to disseminate indecent material, while the former does not.

7. The harm to children is exacerbated where access to indecent material by children is readily permitted, because of the implied societal approval of the material that accompanies such a regime. See Ginsberg, 390 U.S. at 642-643 n.10.

8. Cyberporn Hearing at 7 (Sen. Grassley) ("Congress must give America's parents a new comfort level in public and commercial computer networks if these are to be transformed from the private preserve of a special class of computer hackers into a widely used communications medium. This necessary transformation will never happen if parents abandon the Internet and computer communications technology remains threatening.").

9. Commercial providers of indecent information on multi-user computer servers that are not connected to the Internet -- such as electronic bulletin boards -- can also screen for age, since passwords are ordinarily required to gain access to such a service, and proof of age (or a valid credit card number) can be requested before a password is conferred upon a user. Schmidt Decl. _ 37(a); Schmidt Exh. 40, at 2 (bulletin board conditioning access on provision of copy of driver's license or birth certificate). See also United States v. Thomas, 74 F.3d 701, 705 (6th Cir.) (describing operation of sexually explicit electronic bulletin board that limited access to members who had provided names, ages, addresses, phone numbers, and signatures), cert. denied, 117 S. Ct. 74 (1996).

10. E.g., http://www.thepalace.com (chat service); http://www.alamak.com/chat/index.html (creation of chat room through use of a of credit card); http://www.lyris.com. (software to create discussions and announcement lists).