

ACLU's Motion to Affirm the Decision of ACLU v. Reno

Reno v. ACLU, Motion to Affirm

In the Supreme Court of the United States

October Term, 1995

Janet Reno, et al., Appellants

American Civil Liberties Union, et al., Appellees

On Appeal from the United States District

Court for the Eastern District of Pennsylvania

Motion to Affirm

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Should this Court summarily affirm the three-judge court's grant of a preliminary injunction against the criminal provisions of the Communications Decency Act on First Amendment grounds, based upon undisputed factual findings establishing that it is technologically and economically infeasible to comply with the Act's provisions, and that the Act would unconstitutionally and ineffectively ban a wide variety of protected speech in the democratic, noninvasive and global medium of cyberspace?

LIST OF PARTIES

Appellees agree with the List of Parties in the Jurisdictional Statement, with the addition of the parent corporation for plaintiff Institute for Global Communications, which is The Tides Center.

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Pursuant to Rule 18.6 of the Rules of the Supreme Court, appellees American Civil Liberties Union, et al., respectfully move for summary affirmance of the preliminary injunction order entered by the three-judge district court on June 12, 1996.

INTRODUCTION

The government appeals from a preliminary injunction barring the enforcement of the Communications Decency Act of 1996 (CDA), which is Congress' first attempt to regulate the content of communications in the democratizing, global medium of cyberspace.

International computer networks like the Internet represent a revolution in human communication that has been compared by some to the development of the printing press. The Internet allows millions of average citizens around the globe to communicate, publish, and exchange information on a vast array of subjects with a worldwide and virtually limitless audience. The Internet thus embodies the values that underlie the First Amendment by nurturing the robust exchange of ideas and equalizing the distribution of information.

The CDA would stifle this promising new medium. The CDA makes it a crime, punishable by up to two years in prison, for anyone to use online computer communications to transmit or "display in a manner

available to minors" any material that is "indecent" or "patently offensive." The three-judge district court correctly enjoined these provisions based on detailed factual findings that are not disputed on appeal and that will be described in more detail below. *ACLU v. Reno*, 929 F.Supp. 824 (E.D.Pa. 1996), reproduced as Appendix A of the government's Jurisdictional Statement. Four findings of the lower court, however, are worth particular emphasis.

First, the three-judge court found that the Internet is "the most participatory marketplace of mass speech that . . . the world has yet seen." J.S.App. 141a. The empowering and noninvasive nature of the Internet make it a very different medium than radio or television. Second, use of the Internet is growing exponentially and, in part because of that increased use, the technology that governs the Internet is continuously and rapidly evolving. Third, given the current state of technology, there is no way for the vast majority of Internet users to distinguish between adults and minors in their audience and, even in those parts of the Internet where it might be technologically possible, it is economically infeasible for many speakers, including the plaintiffs in this case. For these speakers, the only way to ensure that minors do not have access to speech that might later be deemed "indecent" by a criminal jury is to eliminate such speech from the Internet entirely. Fourth, less restrictive alternatives already exist that empower parents to make private decisions within the family about what materials their children should see. The CDA, conversely, is uniquely ill-suited to shield children from sexually explicit material on the Internet precisely because it is a global communications medium. The record reveals that at least 40% of the speech now on the Internet originates overseas and the general consensus is that this percentage is growing. That speech can be accessed as easily as speech that originates domestically but, as the lower court found, and the government concedes, that speech is beyond the reach of our domestic criminal law.

Based on these findings, the three-judge court reached the unanimous conclusion that the inevitable effect of the CDA would be to deprive adult Internet users of their right to send and receive constitutionally protected speech that deals with sexual issues. Because that result so clearly violates the First Amendment under this Court's well-established jurisprudence, the decision below can and should be summarily affirmed.

STATEMENT OF THE CASE

This case involves the government's attempt to regulate a new technology that will serve as the basis for global communication in the twenty-first century. Unfortunately, Congress held no hearings about the nature of the Internet before it enacted the CDA. The sad but predictable result is that Congress drafted a statute that is both ineffective and unconstitutional, as the lower court found after engaging in the detailed factual inquiry that Congress chose not to do.

A. The Statutory Framework

The criminal provisions challenged in this action are embodied in two sections of the CDA. Section 223(a)(1)(B) applies to "telecommunications devices," a term that is nowhere defined in the Act but that the parties have agreed includes a modem.

J.S.App. 6a-7a n.5. Under §223(a)(1)(B), anyone who transmits an "indecent" communication, "knowing that the recipient of the communication is under 18 years of age," now faces felony charges. The term "indecent" is also undefined in the statute.

Section 223(d)(1) applies to "interactive computer services," a phrase that is defined in the CDA. See 47 U.S.C. §230(e)(2). In contrast to the indecency provision, this section of the statute makes it a crime to "send" or "display in a manner available" to any person under eighteen any communication that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."

Throughout the district court proceedings, the government made very little effort to defend the constitutionality of these criminal provisions, standing alone. Instead, the government's constitutional defense primarily relied on the so-called "safe harbor" provisions set forth in §223(e)(5) of the Act. Section 223(e)(5)(A) creates an affirmative defense for anyone who "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to [prohibited] communications" Section 223(e)(5)(B) creates an affirmative defense for anyone who "has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." At trial, much of the evidence concerned the meaning, scope, and practical impact of these so-called defenses.

B. The Plaintiffs

The ACLU plaintiffs represent a wide variety of online users, content providers, and service providers. The subject matter of plaintiffs' speech ranges from human rights, censorship, and pornography, to the discussion of lesbian and gay issues, safer sex, and rape in prison. The ALA plaintiffs also include a wide variety of speakers, including the American Library Association, trade groups such as the American Publishers Association, and service providers such as America Online, Microsoft, Compuserve and Prodigy. None of the plaintiffs are pornographers, as that term is commonly understood, but all of them provide online speech that is sexually oriented or contains vulgar words.

J.S.App. 61a, 123. Many of the ACLU plaintiffs are individuals or nonprofit organizations with limited budgets; some rely heavily on volunteer labor. Many also believe that the information and ideas they convey online about sexual issues are valuable, not harmful, for older minors.

For example, plaintiff Critical Path AIDS Project, Inc. (Critical Path) maintains a web site that offers a wide variety of information about AIDS and safer sex. Kiyoshi Kuromiya, Director of Critical Path, testified:

Because most cases of AIDS are transmitted through sexual contact, the information must deal with descriptions of risky sexual activity.

In order to ensure that readers understand the materials, it often must be written using street or colloquial language rather than clinical language in order to be understood by most lay persons In my view, the information that Critical Path provides saves lives of both teenagers and adults and any attempt to censor or restrict the free flow of this life-saving information would be a critical public health mistake.

Plaintiff Wildcat Press, a publisher of gay and lesbian literature, publishes two electronic magazines on the World Wide Web that are written by and for gay and lesbian youth. Patricia Nell Warren testified that the YouthArts e-zines "provide a creative forum for many youth to discuss their coming out, their

experiences with gay life and their sense of their own identity Many of the contributors openly discuss sex and sexuality, often using slang common to their age group." Decl. of Patricia Nell Warren, at 9, 21, 23.

Plaintiff Stop Prisoner Rape (SPR), a nonprofit organization dedicated to combating the rape of prisoners and providing assistance to survivors, has a web site that contains a variety of textual and graphical documents concerning prisoner rape, including a number of testimonials and excerpts of letters from survivors of prisoner rape. Decl. of Stephen Donaldson. Plaintiff American Civil Liberties Union has a feature on its web site that allows users to access this Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), including the transcript of George Carlin's "seven dirty words" monologue that was deemed "indecent" for radio broadcast during daytime hours by the FCC.⁹ Other plaintiffs include Human Rights Watch, an international human rights monitoring

organization that uses the Internet to distribute reports and to communicate about human rights issues such as "torture, rape, mutilation, execution, and mass murder;" Justice on Campus, which provides an online information clearinghouse on free speech issues on college campuses; and John Troyer, who maintains The Safer Sex Page, a web site with information on safer sex that includes explicit language and pictures, and an online discussion forum in which users can comment on subjects such as condom brands, masturbation, and how to talk about safer sex with a partner.

The government has consistently refused to say that plaintiffs' speech is not covered by the CDA. As the lower court noted, "The Government has not by motion challenged the standing of any plaintiff in either case, and we harbor no doubts of our own on that point." J.S.App. 12a n.9; see also *id.* at 107a (Dalzell, J.).

Factual Findings By The Three-Judge District Court

The preliminary injunction proceedings included five days of testimony, documentary evidence, and detailed stipulations. The decision issued by the three-judge court contained over four hundred separate findings of fact that included information about the nature of communication and content in the cyberspace medium, the ability of users to restrict access to unwanted material, and the impracticality of the statutory defenses. Notably, 334 of the 409 separate fact-findings adopted by the trial court were derived from stipulations the parties filed with the court. J.S.App. 12a-30a, 1-43; App. 70-356. Thus, the majority of the facts necessary to the court's holding were not disputed by the government, and are not disputed on appeal. J.S.App. 11a-12a.

1. The Nature Of The Medium

The findings of fact established that the online medium is a "unique and wholly new medium of worldwide human communication." *Id.* at 46a, 81. The Internet is a giant, global communications network that connects innumerable smaller computer networks. *Id.* at 12a, 1. While difficult to estimate due to rapid growth, the Internet is believed to connect over 9,400,000 host computers worldwide and as many as 40 million people. *Id.* at 13a, 3. Indeed, only about 60% of the Internet's host computers are currently located in the United States. *Id.* Thus, the medium allows "literally tens of millions of people . . . to exchange information. These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of people interested in a particular subject, or to the

world as a whole." Id. at 13a-14a, 4.

The court also found that the evidence "showed significant differences between Internet communications and communications received by radio or television." Id. at 49a, 89. Communications on the Internet do not "'invade' an individual's home or appear on one's computer screen unbidden." Id. at 88. Rather, the receipt of information on the Internet "requires a series of affirmative steps more deliberate and directed than merely turning a dial." Id. at 89. The Internet is also distinct because it is "not exclusively, or even primarily, a means of commercial communication." Id. at 43a, 75. In addition, "[t]he start-up and operating costs entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication." Id. at 44a, 76.

There are a variety of ways in which users can communicate in cyberspace. See generally id. at 21a-25a, 22-32. Electronic mail, or e-mail, allows an online user to address and transmit a message to one or more people, "comparable in principle to sending a first class letter." Id. at 21a, 23. In addition, there are a wide variety of online discussion forums that allow groups of users to discuss and debate subjects of interest. The three most common methods for online discussion are mail exploders or "listservs," USENET newsgroups, and chat rooms. "Mail exploders," or "listservs," allow online users to subscribe to mailing lists that discuss particular subjects of interest. Subscribers send an e-mail message to the "list," and the "mail exploder" automatically and simultaneously sends the message to all of the other subscribers on the list; subscribers can reply to the message by sending a response to the list. Id. at 22a, 24.

The second type of forum for online discussion occurs on "USENET newsgroups . . . [which] are among the most popular and widespread applications of Internet services, and cover all imaginable topics of interest to users." Id. at 23a, 25. Unlike mail exploders, online users need not "subscribe" to newsgroups in advance in order to participate. Rather, the newsgroups are huge databases of messages arranged according to subject matter, and online users may access or send a message to any newsgroup at any time. Id. at 22a-23a, 25. There are newsgroups on more than 15,000 different subjects; "[c]ollectively, almost 100,000 new messages (or `articles') are posted to newsgroups each day." Id. at 24a, 26.

Third, chat rooms, or "Internet Relay Chats," allow "individuals on the Internet [to] . . . engage in an immediate dialog, in `real time,' with other people on the Internet . . . IRC is analogous to a telephone party line, using a computer and keyboard rather than a telephone." Id. at 27. There are thousands of different chat rooms available, "in which collectively tens of thousands of users are engaging in conversations on a huge range of subjects." Id.

Finally, one of the most well-known methods for communicating information online is the "World Wide Web," which allows users to publish documents, or "web pages," that can then be accessed by any other user in the world. See generally id. at 25a-32a, 33-48. Most web documents contain "links," which are "short sections of text or image which refer to another document." Id. at 27a, 36. When selected by the user, the "linked" document is automatically displayed, wherever in the world it is actually stored. Id. "These links from one computer to another, from one document to another across the Internet, are what unify the web into a single body of knowledge, and what makes the Web unique." Id. at 28a, 39. Ease of access, the court found, has been the key to the tremendous success of the Web.

In considering the diversity of communication and material available through the online medium, the

district court noted that "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought." *Id.* at 42a, 73.

The diversity of content is possible "because the Internet provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions." *Id.* at 44a, 76. The Internet is thus a "never-ending worldwide conversation," *id.* at 146a (Dalzell, J.), in which users "may speak or listen interchangeably." *Id.* at 46a, 79.

2. The Scope Of The CDA's Criminal Prohibitions

In addition to the information described in plaintiffs' declarations, the court found that a wide variety of other communications with sexual content, or containing vulgar words, would be potentially subject to the CDA. Indeed, the government did not dispute this point: although it attempted to paint the CDA's main target as "pornography," it acknowledged that artistic and political material with serious value could be prosecuted. The government's own witnesses testified that the magazine *Vanity Fair*, with a nude cover photo of the actress Demi Moore, would be potentially indecent in some communities, Schmidt testimony, Tr. Vol. IV, at 138-39, as would a political discussion that included the sentiment "Fuck the CDA," Olsen testimony, Tr. Vol. V, at 53-53. See also J.S.App. 99a (Buckwalter, J.); *id.* at 119a (Dalzell, J.). The court also found that library card catalogues, artworks such as Francesco Clemente's "Labyrinth," material from contemporary films such as *Leaving Las Vegas*, and reproductions of ancient Indian sculptures, are all within the CDA's broad proscriptions. See J.S.App. 42a-47a, 74-75, 78, 85; 71a, 76a-77a.

Conversely, while there was no dispute during the preliminary injunction proceedings that some sexually explicit material is available on the Internet, *id.* at 74a, 82-84, it is not "the primary type of content on this new medium." *Id.* at 83. While so-called search engines, used to help computer users find information on the web, "can accidentally retrieve material of a sexual nature through an imprecise search," the court found many factors that decreased the likelihood of such an "accident:" v A document's title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content. Even the Government's witness, Agent Howard Schmidt, Director of the Air Force Office of Special Investigations, testified that the "odds are slim" that a user would come across a sexually explicit site by accident. *Id.* at 88 (emphasis added).

3. The Impracticality Of The Statutory Defenses

After hearing extensive testimony on precisely this issue, the three-judge court found that it is currently impossible for most online speakers to determine who may ultimately read their messages, or to identify and screen out minors from the wide variety of forums over which they may communicate in cyberspace. See generally *id.* 49a-58a, 90-116. Thus, the court found that "[o]nce a provider posts content on the Internet, it is available to all other Internet users worldwide." *Id.* at 47a, 85.

Moreover, for the vast areas of cyberspace comprehended by e-mail, mail exploders, newsgroups, and chat rooms, "[t]here is no effective way to determine the identity or the age of a user who is accessing material." *Id.* at 49a, 90. The court found that verification of a credit card number over the Internet "is not now technically possible." *Id.* at 53a, 97. Off-line credit card verification, in addition to "significantly

delay[ing] the retrieval of information on the Internet," id. at 54a, 101, would impose a significant economic cost on noncommercial entities. For example, Critical Path testified that its web site has been accessed 3,300 times daily. The court concluded that "[i]f Critical Path must pay a fee every time a user initially enters its site, then, to provide free access to its non-commercial site, it would incur a monthly cost far beyond its modest resources." Id. at 100.

The court acknowledged that the government did offer "very limited evidence" regarding age verification systems on the World Wide Web that are used for accessing "commercial pornography sites"; however, that evidence "was not based on personal knowledge." Id. at 55a, 103. Moreover, the court found that the burdens imposed by such systems "make them effectively unavailable to a substantial number of Internet content providers." Id. at 56a, 107. In addition, free and anonymous access to speech on the Internet is often critical, so that requiring payment and proof of identity and age will deter substantial numbers of their audience, both adult and minor, from accessing important and even life-saving communications. Id. at 61a, 121. In sum, the court found that the "defenses" provided by the CDA under 47 U.S.C. §223(e)(5)(B) -- use of verified credit cards, adult access codes, and the like, to screen out minors -- "are effectively unavailable for non-commercial, not-for-profit entities." Id. at 122.

The court also found that there is no currently available technology to implement a possible "good faith" defense under §223(e)(5)(A) of the CDA through self-labeling or "tagging" of possibly "indecent" or "offensive" messages. It thus rejected the government's suggestions that a "consensus among speakers" might soon emerge "to use the same tag to label 'indecent' material," and that the industry might develop computer software "that recognizes the tags and takes appropriate action when it notes tagged speech." Id. at 57a-58a, 113-14. The court found these speculations concerning future technological developments insufficient to sustain a law that criminalizes speech today. Id. at 58a, 114.

Furthermore, the court found, the task of determining which material to tag indecent "would be extremely burdensome for organizations that provide large amounts of material." Id. at 57a, 110. For example, "[t]he Carnegie Library would be required to hire numerous additional employees to review its online files at an extremely high cost to its limited budget." Id. Similarly, "it would be impossible for . . . Critical Path to review all of its material because it has only one full and one part-time employee." Id. The inevitable result, as the court found, is that given the current state of technology, "[m]any speakers who display arguably indecent content on the Internet" -- including political and artistic discussion, and "information regarding protection from AIDS, birth control, or prison rape" -- would have to "choose between silence and the risk of prosecution" if the CDA were not preliminarily enjoined. Id. at 61a, 122-123.

4. The Availability Of Less Restrictive Alternatives That Empower Parents To Make Decisions For Their Own Families>

Finally, there is undisputed evidence in the trial record about the variety of voluntary measures available to restrict minors' access to online communications that their parents may consider unsuitable for them. Id. at 32a-42a, 49-73. User-based software that blocks content can be tailored to reflect the parents' values and the age and maturity of the child. As the court found, "[t]he market for this type of software is growing, and there is increasing competition among software providers to provide products." Id. at 35a, 54. In addition, "America Online, Microsoft Network, and Prodigy all offer parental control options free of charge to their members." Id. at 41a, 69.

D. The Decision Below

Following the court's findings of fact, all three judges agreed that, given the facts about the online medium, plaintiffs had established a likelihood of success on their claim that the challenged CDA provisions violate the First Amendment because they are substantially overbroad and insufficiently tailored to satisfy strict scrutiny.

Chief Judge Sloviter began her opinion by emphasizing that the CDA was not simply a regulatory scheme; instead, "we are dealing with criminal provisions, subjecting violators to substantial penalties." *Id.* at 64a. Rejecting the government's reliance on the statutory defenses to narrow the broad reach of the statute, she noted:

A wealth of persuasive evidence, referred to in detail in the Findings of Fact, proved that it is either technologically impossible or economically prohibitive for many of the plaintiffs to comply with the CDA without seriously impeding their posting of online material which adults have a constitutional right to access.

Id. at 73a (Sloviter, C.J.); *id.* at 84a (Buckwalter, J.); *id.* at 113a (Dalzell, J.).

Judge Dalzell also noted that "the Supreme Court's First Amendment jurisprudence compels us to consider the special qualities" of the cyberspace medium. *Id.* at 872. As Judge Dalzell explained:

I . . . have no doubt that a Newspaper Decency Act, passed because Congress discovered that young girls had read a front page article in the New York Times on female genital mutilation in Africa, would be unconstitutional Nor would a Novel Decency Act, adopted after legislators had seen too many pot-boilers in convenience store book racks, pass constitutional muster There is no question that a Village Green Decency Act, the fruit of a Senator's overhearing of a ribald conversation between two adolescent boys on a park bench, would be unconstitutional A Postal Decency Act, passed because of constituent complaints about unsolicited lingerie catalogues, would also be unconstitutional In these forms of communication, regulations on the basis of decency simply would not survive First Amendment scrutiny.

Id. at 144a. Judge Dalzell further observed that the Internet is an even more "speech-enhancing medium than print, the village green, or the mails." *Id.* Because the CDA "would necessarily reduce the speech available for adults on the medium," it is "constitutionally intolerable." *Id.*

ARGUMENT

The decision below is so clearly correct under well-established law that this Court need not engage in plenary review. All six federal judges that have reviewed the CDA have concluded that it is unconstitutional. The government itself has indicated that the CDA may be unconstitutional absent the statutory defenses. Indeed, the government has come close to conceding that CDA is at least in part unconstitutional even with the defenses.

Summary affirmance is particularly appropriate at this stage of the proceedings because the three-judge

court's conclusions were driven by extensive, detailed, and largely undisputed factual findings. These facts establish that there is currently no feasible way to identify and screen minors from access to most areas of the Internet. Consequently, the CDA presently operates as a total ban on "indecent" but constitutionally protected speech, a result clearly foreclosed by this Court's decisions in *Butler v. Michigan*, 352 U.S. 380 (1957), and *Sable Communications v. FCC*, 492 U.S. 115 (1989).

Plaintiffs acknowledge that this case is an important one. But summary disposition is appropriate, even in cases of high import, when the decision below is "so obviously correct as to warrant no further review." Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* at 401. In the present case, this Court's decisions in *Butler*, *Sable*, and *Denver Area Educational Area Television Consortium v. FCC (DAETC)*, 518 U.S. , 116 S.Ct. 2374 (1996), establish without question that a statute imposing what amounts to a criminal ban on a broad range of expression that is constitutionally protected for adults flatly violates the First Amendment.

Finally, summary affirmance is appropriate for prudential reasons. This is the first case presented to the Court that directly addresses the application of traditional free speech principles to the rapidly evolving medium of online communications. Only last Term In *DAETC*, Justice Souter cautiously observed that "[i]n my own ignorance I have to accept the real possibility that `if we had to decide today . . . just what the First Amendment should mean in cyberspace, we would get it fundamentally wrong.'" *Id.* at 2402, quoting Lessig, "The Path of Cyberlaw," 104 *Yale L.J.* 1743, 1745 (1995); see also 116 S.Ct. at 2403 (O'Connor, J., concurring in part and dissenting in part). Appellees respectfully submit that this Court does not "ha[ve] to decide" that issue today. Instead, it can and should focus on the factual record developed below and, based on that record, summarily affirm.

II. GIVEN THE THREE-JUDGE COURT'S EXTENSIVE, LARGELY UNDISPUTED FACTUAL FINDINGS REGARDING THE TECHNOLOGY AND ECONOMICS OF CYBERSPACE, THE DECISION BELOW IS PLAINLY CORRECT

Plaintiffs recognize that summary affirmance of a lower court order preliminarily enjoining a federal statute would be unusual. It is, nonetheless, fully warranted on this record. As the three-judge court found, because there is no way to shield minors alone from online "indecent" in the vast majority of contexts, the CDA amounts to a criminal ban on constitutionally protected communication among adults. This Court has frequently held that a statute that reduces adults to reading and seeing only what is fit for children cannot be sustained under the First Amendment.

Indeed, this Court has never upheld a criminal ban on indecent speech, even under the guise of protecting children. See *Butler*, 352 U.S. 380 (invalidating a conviction for distribution of indecent publications); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983)(striking down a ban on mail advertisements for contraceptives because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968)(invalidating ordinance banning sexually explicit motion pictures); *FCC v. Pacifica Foundation*, 438 U.S. at 750 (upholding noncriminal time-channeling rules against indecency in broadcast); *Sable Communications v. FCC*, 492 U.S. at 128 (striking down indecency ban in phone communications); *DAETC v. FCC*, 116 S.Ct. 2374 (striking down two of three indecency regulations for cable television, and upholding permissive regulation that allows, but does not require, broadcasters to ban indecency from leased access channels).

The government cannot persuasively challenge the lower court's findings, and has not attempted to do so. Nor has it asked this Court to reverse any of its well-established First Amendment rules. To the contrary, the government does not quarrel with the legal standard -- strict scrutiny -- used by lower court in this case. J.S. at 15; see also J.S. App. 67a. On this record, therefore, the government has failed to present the Court with any substantial constitutional issue to resolve.

Before the three-judge court, the government's effort to avoid the seemingly inescapable conclusion that the CDA is unconstitutional under *Butler* and its progeny rested entirely on its proposition that some of the CDA "safe harbor" defenses might work, at least some of the time, for some cyberspace speakers. The trial court finding that those defenses were not technologically or economically available for the vast majority of online content providers, including most of the plaintiffs, effectively disposes of that argument in this Court. See generally pp.12-14, *supra*. Specifically, the lower court found that §223(e)(5)(B)'s credit card and age verification defenses were effectively unavailable for the vast majority of communications and speakers in cyber-space. As to the "good faith" provision of §223(e)(5)(A), the lower court found that the government's proposal that "tagging" or self-rating might provide a defense is "purely hypothetical and offers no currently operative defense to Internet content providers." *Id.* at 79a (*Sloviter, J.*).

In addition to the findings establishing the technical infeasibility and economic burden of the defenses, many other factors supported the trial court's conclusion that the CDA is not the least restrictive means of accomplishing the government's asserted compelling interest in protecting the physical and psychological well-being of minors. First, the court held that the global nature of the medium made the CDA an imprecise and ineffective tool for achieving the government's purpose:

[T]he CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the CDA.

Id. at 882 (*Dalzell, J.*).

Second, in contrast to the facts establishing the ineffectiveness of the CDA, the preliminary injunction record is replete with evidence of alternative means of accomplishing the government's purpose more efficiently and less restrictively than through an outright criminal ban -- for example, through parental use of blocking software and the development of additional mechanisms for screening content on a voluntary basis. See generally pp.14, *supra*. In addition, "[t]he Government can continue to protect children from pornography on the Internet through vigorous enforcement of existing laws criminalizing obscenity and child pornography." J.S.App. 145a (*Dalzell, J.*).

Third, as Judge *Sloviter* noted, it is unclear on this record that the government has a compelling interest in blocking all minors' access to all online communications that would fit within the CDA's capacious "indecent" and "patent offensiveness" standards. *Id.* at 72a. Judge *Sloviter* thus questioned whether the government had met its burden of justifying restrictions so broad that it could well become criminal in many communities to permit older teenagers online access to the hit play "Angels in America," news

articles on female genital mutilation, or safer sex information. *Id.* at 70a. Under these facts, the CDA clearly fails strict scrutiny, which demands that "the benefit gained [by a content-based restriction] must outweigh the loss of constitutionally protected rights." *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

The Court's ruling last Term in *DAETC* fully supports this conclusion. No Justice in that case questioned the continued vitality of the principles set forth in *Butler* and *Sable*. To the contrary, the Court explicitly followed *Butler* and *Sable* in invalidating the only portion of the 1992 Cable Act which (like the CDA) mandated censorship: the requirement in §10(b) of the Act that "indecent" programming on leased access channels be scrambled until subscribers requested unscrambling. Even though the §10(b) restriction was far less draconian than the criminal penalties under the CDA, it was unconstitutional because the government had not met its burden of demonstrating that mandated scrambling was the least burdensome means available to accomplish its goal of protecting minors. 116 S.Ct. at 2390-2394 (plurality opinion); *id.* at 2396-97 (Kennedy & Ginsburg, JJ., concurring in part and dissenting in part). As Justice Breyer wrote for the plurality:

No provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child. We have not, however, generally allowed this fact alone to justify "reduc[ing] the adult population . . . to . . . only what is fit for children."

Id. at 2393, quoting *Sable*, 492 U.S. at 128; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. at 73, and *Butler*, 352 U.S. at 383.

In striking down the mandatory provision, the *DAETC* plurality considered the "benefits [the requirement] is likely to achieve," noting that "where, as here, the record before Congress . . . provides no convincing explanation, this Court has not been willing to stretch the limits of the plausible . . . in order to justify laws that impose significant restrictions upon speech." 116 S.Ct. at 2394. Because of the global nature of the online medium, the CDA is even less effective than the mandatory scrambling provisions of the Cable Act struck down by the Court in *DAETC*, thus warranting summary affirmance of the preliminary injunction in this case.

Of the other Cable Act provisions at issue in the *DAETC* case, the Court invalidated §10(c)(permitting cable operators to forbid indecency on public access channels), and upheld §10(a)(giving operators similar control over leased access programming). Both provisions were permissive; no government mandate -- much less a criminalization of protected speech -- was at issue. Even so, §10(c) failed to satisfy First Amendment standards.

The *DAETC* plurality also reaffirmed the principle that the particular qualities of the medium must be considered in determining the appropriate level of First Amendment protection. Justice Souter wrote, "Our indecency cases since *Pacifica* have likewise turned as much on the context or medium of the speech as on its content." *Id.* at 2401 n.2. In *Sable*, for example, the challenged ban on indecency was struck down in part because it "involved a communications medium, telephone service, that was significantly less likely to expose children to banned material, was less intrusive, and allowed for significantly more control over what comes in the home." See 116 S.Ct. at 2388 (Breyer, J.). Even in the cable television context, Justices Thomas, Rehnquist, and Scalia had no doubt in *DAETC* that "under our current jurisprudence, Congress could not impose a total ban on the transmission of indecent programming." *Id.* at 2423, citing *Sable*, 492 U.S. at 127. A fortiori, then, certainly the government

cannot justify a complete ban in the even less invasive, and more empowering, technology of the Internet. Yet that is exactly what Congress accomplished in the CDA -- a criminal ban on speech in the most democratizing and unintrusive medium that the world has yet created.

Thus, the application of clear legal principles to the factual findings regarding the online medium supports summary affirmance in this case.

II. NONE OF THE GOVERNMENT'S OTHER ARGUMENTS JUSTIFY NOTING PROBABLE JURISDICTION AT THIS STAGE OF THE PROCEEDINGS

In its jurisdictional statement, the government fails to raise any legitimate argument against summary affirmance. First, as discussed above, the government's argument that the overbreadth of the CDA is not "substantial," J.S. at 21-25, does not comport with the facts.

Second, to cure the obvious overbreadth of the CDA, the government suggests that the trial court should have upheld §223(d)'s display provision to the extent that it applies to "commercial Web sites." J.S. at 26. But the trial court in this case and in the Shea case correctly declined to perform such "radical surgery." Shea, 930 F.Supp. at 923. As Judge Sloviter wrote: "It is clear from the face of the CDA and from its legislative history that Congress did not intend to limit its application to commercial purveyors of pornography." J.S.App. 75a; see also H.R.Rep.No. 458, 104th Cong., 2d Sess. 113, 191 (1996). Among other things, Congress intentionally banned material under the CDA that lacks prurient appeal and that has serious value.

Thus, narrowing the CDA's application to "commercial web sites" would ban not only "commercial pornographers" from the Internet, but would criminalize "a broad range of material from contemporary films, plays and books showing or describing sexual activities . . . to controversial art and photographs." J.S.App. at 76a-77a. In addition, given the explicit application of the statute to libraries and educational institutions, the government's suggestion would require more than creative re-drafting. See §230(e)(2); §223(f)(a). The Shea court similarly declined the invitation "to usurp Congress' legislative functions" with an interpretation that "fl[ies] in the face of a clear congressional intent to apply the statute's proscriptions to commercial and non-commercial content providers alike." 930 F.Supp. at 949-50.

Third, the government creates a smokescreen to hide the overwhelming unconstitutionality of all of the CDA's provisions by attempting to distinguish §223(a)(1)(B) and §223 (d)(1)(A) from §223(d)(1)(B). J.S. at 20-21. For several reasons, the smokescreen should not divert the Court. Most significantly, the government did not present the argument below. See *Holly Farms Corp. v. NLRB*, 517 U.S. , 116 S.Ct. 1396, 1402 n.7 (1996)(declining to entertain argument that petitioners had failed to advance previously, because the Court "generally do[es] not address arguments that were not the basis for the decision below"), quoting *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. , 116 S.Ct. 873 n.5 (1996). Until it reached this Court, the government never suggested that any of the CDA's provisions would apply only to the direct and intentional communication of indecency to a specific person known to be a minor. To the contrary, both the government and the plaintiffs proceeded below on the assumption that each of the challenged provisions in the CDA applied to all online communications that might be seen by any minor. The government therefore relied on "safe harbor" defenses that the district court found to be constitutionally inadequate. The government's disappointment with those findings does not permit it to reinterpret the statute on appeal.

In any event, the government's effort to draw distinctions between the challenged provisions of the CDA is not supported by a fair reading of the statute when viewed as a whole. Section 223(a)(1)(B) and §223(d)(1)(A) suffer from the same Butler and Sable problems of overbreadth that are fatal to §223(d)(1)(B)'s "display" provision. Every online speaker in the publicly accessible areas of cyberspace (including the World Wide Web, newsgroups, mailing lists, and chat rooms) would have to reduce his or her speech to that which is suitable only for minors in order to avoid criminal penalties under any of the provisions. Specifically, §223(d)(1)(A) makes it a crime to "knowingly use[] an interactive computer service to send to a specific person or persons under 18 years of age" any material that is "patently offensive." It does not require that the defendant "know" that the recipient is a minor, but rather only requires that the defendant "knowingly use[] an interactive computer service." Thus, any use of an interactive computer service to communicate in the vast public areas of cyberspace could result in the sending of "patently offensive" material "to a specific person . . . under 18." Similarly, §223(a)(1)(B) makes it a crime to "make[], create[], or solicit[], and initiate[] the transmission of" any indecent material "knowing that the recipient of the communication is under 18 years of age." The user "knows" that minors have access to the vast public portions of cyberspace; thus, the user risks prosecution under §223(a)(1)(B) because simply by speaking in these spaces the user may have knowingly "initiat[ed] the transmission" of indecent material to a person under eighteen.

Moreover, Congress clearly applied the "safe harbor" defenses of §223(e)(5) to all three provisions of the CDA. If §223(a)(1)(B) and §223(d)(1)(A) were meant to apply only to persons who intentionally communicated indecent or patently offensive material to a particular person they knew to be a minor, it would be nonsensical for such defendants to assert §223(e)(5)(A)'s "good faith" defense, or §223(e)(5)(B)'s "verified credit card" defense, to avoid prosecution. Thus, contrary to the government's new interpretation in its Jurisdictional Statement, all three provisions of the CDA potentially affect communications between adults, and will have a serious chilling effect on online communication.

The fourth argument the government makes for plenary review is that the Court should take the case to consider whether the CDA is unconstitutionally vague. J.S.App. 86a-87a (Buckwalter, J.); *id.* at 80a (Sloviter, C.J.). But the Court may summarily affirm without reaching the vagueness issue. It was the CDA's overbreadth and its failure to meet strict scrutiny that was the dispositive issue both in this case and in *Shea*. In addition, as discussed above, given the new and evolving medium of cyberspace, it may be premature for the Court to rule on whether, in the context of the online medium, the "indecent" and "patently offensive" provisions provide adequate guidance for millions of speakers to avoid criminal prosecution.

Finally, the government argues that plenary review is appropriate because "[i]n light of the rapid development and innovative capabilities of all components of the Internet industry, there is every reason to expect that technological steps will occur swiftly if the CDA's indecency restrictions are upheld." But, as Judge Sloviter wrote, "I can imagine few arguments less likely to persuade a court to uphold a criminal statute than one that depends on future technology." J.S.App. 82a. In addition, the expansion of existing industry alternatives to empower parents to control Internet content -- rather than somehow legitimizing the CDA -- merely illustrates that less restrictive alternatives to the CDA's draconian ban are clearly available and, therefore, as the trial court correctly held, the CDA fails strict scrutiny.

CONCLUSION

For the reasons stated above, the ACLU appellees respectfully move for summary affirmance of the preliminary injunction entered by the three-judge district court.

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NOTES

1 The CDA was enacted as Title V of the Telecommunications Act of 1996, Pub.L.No. 104-104, §502, 110 Stat. 56, 133-35. The CDA will be codified at 47 U.S.C. §§223(a) to (h), and it is those cites that

appellees will use throughout this brief.

2 A separate challenge to §223(d), filed in the Southern District of New York, also resulted in a preliminary injunction from a three-judge court on July 29, 1996. *Shea v. Reno*, 930 F.Supp 916 (S.D.N.Y. 1996). The government has suggested that the *Shea* case be held pending the outcome of this case; ACLU appellees agree.

3 Section 223(a)(1)(B) also prohibits the transmission of "obscene" communications. That prohibition has not been challenged in this case.

4 Plaintiffs also challenged §§223(a)(2) and (d)(2), which make it a crime to "knowingly permit" use of a telecommunications facility for expression prohibited by §223(a)(1)(B) or 223(d)(1).

5 For a fuller description of the plaintiffs, see The Parties' Stipulations in Preparation for the Preliminary Injunction Hearing, at 70-356, adopted as findings of the trial court, J.S.App. 12a n.9. Those paragraphs are reproduced in the Appendix to this motion. See also J.S.App. at 42a-48, 74-78, 85.

6 See J.S.App. 44a, 76.

7 *Id.* at 71a (Sloviter, C.J.)("[P]laintiffs presented testimony that [their] material . . . may be critically important for certain older minors. For example, there was testimony that one quarter of all new HIV infections in the United States is estimated to occur in young people between the ages of 13 and 20, an estimate the government made no effort to rebut").

8 Decl. of Kiyoshi Kuromiya, at 3-5, 13, 15, 16. Direct testimony at trial was presented by declaration. J.S.App. 5a.

9 Decl. of Barry Steinhardt. The ACLU also hosts unmoderated online discussion groups, including a "free speech zone," that allow citizens to discuss and debate a variety of civil liberties issues.

10 App. at 6a, 89.

11 Although the judges jointly issued findings of fact and conclusions of law, and agreed that the CDA fails strict scrutiny and is unconstitutionally overbroad, each of the three judges issued a separate opinion. Judge Buckwalter and Judge Sloviter also held that the CDA was unconstitutionally vague; Judge Dalzell disagreed.

12 This Court has stated that "[a] summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment." *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983); see generally Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 215-221, §§4.28-4.29 (7th ed. 1993).

13 *Shea*, 930 F.Supp at 941 ("The Government concedes that §223(d), standing alone, is not constitutionally defensible").

14 See J.S. at 14, noting that §223(d)(1)(B) "raises more difficult questions," and arguing for a narrowing

construction "[e]ven if one or more of the CDA's restrictions were unconstitutional in some of their applications"

>15 Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1486, 47 U.S.C. §532.

16 Section 10(a) was upheld in large part because the First Amendment interests of cable operators were enhanced by returning to them some measure of editorial control over leased access channels. DAETC, 116 S.Ct. at 2385-87. In dissenting from the plurality's striking of §10(b) and §10(c), Justices Thomas, Rehnquist, and Scalia rejected a First Amendment jurisprudence that was less protective of the electronic than of the print media, agreed with Justices Kennedy and Ginsburg that strict scrutiny was appropriate, and only differed with the other Justices as to the relative strengths of the competing free speech interests asserted by cable programmers and cable operators. 116 S.Ct. at 2422, 2429. In the present case, it is difficult to draw lines between speakers and content providers, Internet Service Providers, and listeners on the Internet, since many users engage in several roles simultaneously. More importantly, the CDA does not enhance (or restore) anyone's free speech rights.

17 See generally pp.12-14, supra. See also the ALA Plaintiffs' Response to the Government's Jurisdictional Statement for a discussion of the government's misstatement of the factual record.

18 Nor, said Judge Sloviter, could the statute's overbreadth be cured by the government's suggestion that it probably would not prosecute "works of serious literary or artistic merit," for that would "require a broad trust indeed from a generation of judges not far removed from the attacks on James Joyce's Ulysses as obscene The bottom line is that the First Amendment should not be interpreted to require us to entrust the protection it affords to the judgment of prosecutors." *Id.* at 83a.

19 Section 223(e)(5) provides "a defense to a prosecution under subsection (a)(1)(B) or (d)" (emphasis added).

20 In addition, the problem of coercion and enticement of minors via computer, which would appear to be the rationale for any provision covering intentional communications to minors, was already covered elsewhere in the CDA, at §508, codified at 18 U.S.C. §2422(b). Plaintiffs do not challenge that provision.

21 The government's new argument also ignores the scope of the "indecent" and "patently offensive" prohibitions, which includes a vast amount of material that has social value -- indeed, that may be life-saving -- for older minors. See generally pp.4-7 & n.7, 10-12, supra, and Appendix.

22 See generally pp.4-7, supra. Contrary to the government's assertion, however, the vagueness holding of the lower court is not precluded by this Court's decisions in DAETC. Unlike the CDA, the statute at issue in that case did not impose criminal sanctions, involved an entirely different medium, and did not raise questions about the viability of applying local community standards in a global medium. As Judge Buckwalter pointed out, "In statutes that break into relatively new areas, such as this one, the need for definition of terms is greater, because even commonly understood terms may have different connotations or parameters in this new context." J.S.App. 101a.