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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN ASHCROFT, ATTORNEY GENERAL :

Petitioner :

v. : No. 00-1293

AMERICAN CIVIL LIBERTIES UNION, :

ET AL. :

- - - - - X

Washington, D.C.

Wednesday, November 28, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

THEODORE B. OLSON, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

ANN E. BEESON, ESQ., New York, New York; on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 00-1293, John Ashcroft v. The American Civil
5 Liberties Union.

6 Mr. Olson.

7 ORAL ARGUMENT OF THEODORE B. OLSON

8 ON BEHALF OF THE PETITIONER

9 GENERAL OLSON: Mr. Chief Justice, and may it
10 please the Court:

11 All three branches of our National Government
12 have repeatedly determined that pornography causes
13 substantial, incalculable damage to our children, that
14 assisting parents in protecting children from that damage
15 is a compelling national interest, and that pornography is
16 widely available and readily accessible to our children on
17 the Internet.

18 The Child Online Protection Act is Congress'
19 response to that urgent national problem. It was drafted
20 after testimony, hearings, and findings in direct response
21 to explicit and detailed guidance in this Court's 1993
22 Reno v. ACLU decision explaining how to solve the problem
23 of Internet pornography in a constitutional manner.

24 COPA directly responds to several of the Court's
25 explicit suggestions in its 1997 Reno v. ACLU decision.

1 In the first place, Congress gave explicit, substantive
2 meaning to the terms, harmful to minor, utilizing
3 standards developed over several decades by this Court
4 describing what would be prohibited in the terms used by
5 this Court in the context of minors. I will not get into
6 the specifics of that, because those are before the Court,
7 and the Court is quite familiar with them.

8 The Court also added, however, in response to
9 this Court's explicit suggestion, the third prong of the
10 so-called Ginsberg-Miller test, that the material taken as
11 a whole would have to lack serious literary, artistic,
12 political, or scientific value for minors, an objective
13 standard developed by this Court to protect the producers
14 of communications. Congress limited the statute to
15 commercial pornographers at this Court's suggestion, those
16 whose trade or business, in an effort to produce profits,
17 are engaged regularly in the production of explicit sexual
18 material for profit.

19 QUESTION: In your view, is the provision that
20 it has to be objectionable to minors, is that a national
21 standard?

22 GENERAL OLSON: Well, as -- the reference to
23 community standards in the statute is in the first and
24 second and prongs of a three-part test. This Court has
25 introduced that community standard provision to protect

1 the communicator from individualized determinations by
2 jurors, and from particularly sensitive, or particularly
3 insensitive communities.

4 The Court has explained again and again that it
5 is an average standard. It is an adult approach to what
6 might be prohibited from the standpoint of damage to
7 minors. The Court has repeatedly said that it might be --
8 it doesn't refer to any specific geographic limitation.
9 In fact, in the Hamling case and in the Jenkins case
10 decided by this Court several years ago, the Court made it
11 clear that the community standards prong does not have to
12 apply to any specific community.

13 QUESTION: But Mr. Olson, isn't the problem with
14 that argument that the definition also refers to the
15 average person, so it's working average in by a separate
16 provision. If that is where the average comes in, then
17 doesn't the reference to community have to mean something
18 geographical if it's going to mean anything at all?

19 GENERAL OLSON: Well, this Court has repeatedly
20 said -- for example, in the Hamling case the Court was
21 looking at a geographic standard that covered the entire
22 State of California. The Court said in Hamling and
23 Jenkins that the standard doesn't have to have any
24 specific geographic limitation.

25 QUESTION: But did it -- did that -- and I just

1 don't remember this. Were we dealing there with a statute
2 that separately referred to kind of an average person
3 standard? Because the problem that I have here is, if you
4 say, well, it's -- what it's trying to get at is a norm,
5 it's already built the norm in on a different textual
6 basis, and therefore if it's already built that into the
7 definition, and it then additionally speaks of community
8 standard, then that's where I have the problem, so in the
9 case that you refer to, was the definition the same? Did
10 it have the two prongs?

11 GENERAL OLSON: Well, yes, because the Court was
12 in that case applying the two -- the other two prongs that
13 this Court --

14 QUESTION: No, no, but I mean, did it have the
15 average person provision in the definition?

16 GENERAL OLSON: It wasn't in the definition in
17 the statute itself. It was what this Court read into --

18 QUESTION: Okay. Well, now we've got it in the
19 statute itself, so in effect I guess you're saying the
20 reference to community standard, or the reference to
21 average, one or the other, is essentially redundant in the
22 definition.

23 GENERAL OLSON: Well, it may be, but what the
24 Congress was attempting to do was to develop and put into
25 the statute the protections which this Court over the

1 years have said are very important to protect the
2 communicator.

3 QUESTION: You're saying it's a belt and
4 suspenders definition.

5 GENERAL OLSON: Well, what this Court has
6 decided is that something to prevent jurors from
7 deciding -- imposing their own individual standards, or
8 imposing the least sensitive standards of the community,
9 or the most sensitive standards of the community.

10 QUESTION: General Olson, there's one thing that
11 you -- some new thing comes up in your brief. We go from
12 Miller, where there was a geographical base, and I know
13 you said that the Internet is not geographical base, but
14 you use a term that, what is harmful to minors is
15 reasonably constant across the United States. Now, is
16 that reasonably constant something looser than, say, the
17 serious value as a limitation on what would qualify as
18 harmful to minors?

19 GENERAL OLSON: Well, there is two parts to
20 that. The serious value standard is an objective standard
21 that this Court and other courts are entitled to examine
22 closely, and have examined closely to make sure that there
23 aren't any aberrational prosecutions or limits imposed.

24 With respect to the community standards, what
25 the Congress was attempting to do was to make sure that

1 people didn't impose individual limitations with respect
2 to how they were judging the material with respect to the
3 other two prongs of the statute. I hope I have answered
4 your question, but --

5 QUESTION: Well, the words that I used, they
6 invoke Miller, so it sounds like Congress didn't write any
7 word formula that was any different, but you say
8 something -- it's not --

9 GENERAL OLSON: That was a finding, so to speak,
10 by the House committee that there is not with respect --
11 years have changed since the Miller and the Hamling case.
12 We're now in an era of national television, national
13 media -- some of those standards were articulated at a
14 time when the community of the United States was much more
15 isolated and insular in various different parts. We are
16 now talking about a national media, national television,
17 national communication, the Internet reaching millions and
18 millions of households.

19 What Congress felt, that there would not be
20 substantial variation between what the average adult would
21 feel would be harmful to minors under the very specific,
22 itemized, detailed standards, prong 1, prong 2, and then
23 with the value-added prong 3 --

24 QUESTION: What was the basis for thinking that
25 the harmful to minors would be reasonably constant to a

1 greater extent than what is obscene?

2 GENERAL OLSON: Well, the House report that
3 specifically talked about that did not explain. I should
4 hasten to -- did not explain what the individual elected
5 Members of Congress were thinking when they came to those
6 conclusions. I think it's a reasonable thing to conclude,
7 is that Members of Congress are reflecting the judgments
8 that they develop as a result of running for office and
9 being in a national legislature.

10 That's exactly what we expect Congress to do,
11 and what Congress did in this case was apply those
12 standards, and those instincts, and those judgments in a
13 way in which it was in every conscientious way attempting
14 to comply with the instruction that came from this Court
15 in *Reno v. ACLU* as to how to do it.

16 QUESTION: Well, I think it's a difficult
17 question. I don't know what the rule ought to be, but if
18 you have a trial in State A, say a western State,
19 California, can you bring in an expert from New York and
20 from five other States, experts to tell the jury what the
21 community standard is there, or does the trial judge rule
22 that irrelevant?

23 GENERAL OLSON: Well, the courts have permitted
24 expert testimony with respect to that, but there's a great
25 deal of supervision that the trial courts and the

1 appellate courts impose with respect to that to make sure
2 that these definitions are being applied in a
3 nonaberrational --

4 QUESTION: In your view, how does it work? I
5 have a California jury. Is it proper, or is it necessary
6 for that jury to consider what the standards are in other
7 parts of the country before it returns its verdict?

8 GENERAL OLSON: I would submit, Justice Kennedy,
9 that yes, that would be possible. The Hamling instruction
10 I think is instructive. The Hamling instruction was the
11 standards generally held throughout this country
12 concerning sex, and matters pertaining to sex, the average
13 conscience of the time, the present critical point in the
14 compromise between candor and shame at which the community
15 may have arrived at here and now.

16 In other words, that standard -- and the
17 defendant in that case argued to this Court that that is a
18 national standard which this Court in Miller said was not
19 required as a matter of the First Amendment.

20 Interestingly, in Hamling, the defendants in
21 that case argued just as the plaintiffs in this case do,
22 that a national standard is both required and would be
23 prohibited. In other words, they want to have it both
24 ways.

25 QUESTION: They want to have it neither way.

1 GENERAL OLSON: They want to have it neither
2 way. Either way, it would be unconstitutional, and this
3 Court has specifically addressed that by saying that it --
4 that jurors are allowed to draw from their experience,
5 which necessarily comes from the community in which they
6 reside, but that Congress felt in this case that there
7 would be relatively constant standards throughout the
8 country. This is a facial challenge.

9 QUESTION: Well, when you say relative --

10 GENERAL OLSON: There's no evidence --

11 QUESTION: You say relatively. I'd like you to
12 be specific. That is, would it satisfy you if this Court
13 said, when it says the words, average person applying
14 contemporary community standards, we instruct the jury
15 that the word community means the United States taken as a
16 whole?

17 GENERAL OLSON: I think that this Court has said
18 that that is not a requirement of the First Amendment, but
19 from the --

20 QUESTION: I know. I'm not saying it's a
21 requirement --

22 GENERAL OLSON: Yes, sir.

23 QUESTION: -- of the First Amendment. Suppose,
24 having read the legislative history, I came to the
25 conclusion that that, in light of all the constitutional

1 difficulties, is just what Congress had in mind, and
2 therefore I wrote in the opinion, community means the
3 entire audience at which this is aimed, likely the entire
4 United States.

5 GENERAL OLSON: I --

6 QUESTION: Now, if those words were in the
7 opinion, would you consider that you had won this case?

8 GENERAL OLSON: I think I would, Justice Breyer,
9 and I think --

10 QUESTION: So that satisfies you.

11 GENERAL OLSON: And I think that would be a --
12 the statute is readily -- to use the words of this Court,
13 the statute is readily susceptible to the narrowing
14 construction, if that's how you would regard that, or a
15 leveling construction. I --

16 QUESTION: Now, would you tell me what the
17 difference is between the construction that Justice Breyer
18 has suggested and the result of your argument that the
19 third prong, the value prong, is in fact an objective
20 prong and hence a national -- I assume it's a national
21 standard. It's an objective prong, and therefore that in
22 effect eliminates -- as I understand your argument, the
23 application of that prong eliminates a lot of the
24 idiosyncrasy that might conceivably come in under a strict
25 geographic standard.

1 Is there a difference between the construction
2 Justice Breyer is suggesting and the result that we would
3 get if we accepted your argument about the effect of the
4 third prong?

5 GENERAL OLSON: I don't think so. I think that
6 what Justice Breyer is suggesting is a jury instruction or
7 a judicial construction which would apply to prongs 1 and
8 2, and that what you're saying is absolutely correct also,
9 we submit, that that is precisely what this Court has said
10 that third prong is there for. I should --

11 QUESTION: Oh, I wasn't necessarily saying it.
12 I was saying that I think you're saying it.

13 GENERAL OLSON: Well then, I agree with your
14 construction of what I'm saying.

15 QUESTION: Of you, okay.

16 (Laughter.)

17 GENERAL OLSON: I think it's a very important
18 point to make, that the Court has said that that is
19 another way in which we protect the speaker from
20 aberrational, highly --

21 QUESTION: Well, but aren't you then saying to
22 us that Congress, when it used the word community, really
23 meant to say national?

24 QUESTION: Yes.

25 QUESTION: Yes.

1 GENERAL OLSON: Well, I suspect, Justice
2 Stevens, that the people who assisted the Members of
3 Congress in drafting the statute read this Court's
4 decisions, as there's every indication in the two
5 committee reports and in the hearings that were taken,
6 that the Court was attempting in every way to live up to
7 the standards of this Court. This Court was saying that
8 the First Amendment does not require a national standard
9 with respect to community standards, but this Court has
10 not been entirely --

11 QUESTION: I think you're answering my question
12 by saying yes.

13 GENERAL OLSON: Well, what I think -- no, I
14 don't necessarily think that the Court -- that the
15 Congress was intending to impose a national standard,
16 because this Court had said that it wasn't required under
17 the First Amendment, and that the community standards did
18 not have to be judged by any particular geographical area.

19 QUESTION: I'm not trying to find out what the
20 Constitution requires or what our cases might have
21 required. I'm just asking you what you think the word
22 community means, as used in this section of the statute.

23 GENERAL OLSON: Well, I think what Congress was
24 attempting to do was come as close as possible to adopting
25 what this Court had said in the context of obscenity.

1 Now, I should hasten to say that to the extent
2 that the Third Circuit felt that the community standards
3 makes it unconstitutional in the context of the Internet,
4 that -- those community standards are -- this statute
5 prohibits obscene material on the Internet, too, and
6 community standards don't work for material which is
7 harmful to minors. They don't work probably for
8 obscenity, either.

9 QUESTION: I don't know where we are here --

10 QUESTION: Do you think it's possible for a
11 North Carolina jury to sit in judgment of a particular
12 pornographic transmission and decide whether this would
13 offend the standards of Las Vegas and New York City? I
14 mean, doesn't any jury necessarily apply the standards of
15 its own community? Aren't we really talking about an
16 imaginary distinction here?

17 GENERAL OLSON: Well, yes, Justice --

18 QUESTION: Let's assume that you instruct the
19 jury, jury, you must apply a national standard. What does
20 someone who's been raised his whole life in North Carolina
21 know about Las Vegas?

22 GENERAL OLSON: Well, I would submit that the
23 judge would instruct the jury, and the judge examining the
24 decision of the jury afterwards in appellate courts would
25 do exactly what this Court has said.

1 As long as the juror is attempting to apply his
2 judgment or her judgment with respect to adult
3 perceptions, based upon all the input that the juror may
4 have with respect to what is generally harmful to
5 minors -- the dilemma that this has caused, causes here,
6 both for Congress and here in this Court, is that we want
7 on the one hand to make sure that idiosyncratic judgments
8 are not being imposed on the transmitter of information.
9 On the other hand, we don't want such wide variations that
10 there would be difference in community --

11 QUESTION: I suppose a defendant could call an
12 expert witness in the case in North Carolina and say that
13 in New York this is fine. I don't know how much attention
14 a North Carolina jury would pay to that.

15 GENERAL OLSON: I think the defendants can put
16 on expert testimony with respect to what general standards
17 are, to use the phrase in Hamling, country-wide. Now, I
18 should say --

19 QUESTION: But then the trial judge must
20 instruct the jury, ladies and gentlemen of the jury, this
21 is a national standard, and that's consistent with what
22 Justice Breyer suggested to you, that we might consider in
23 putting in the opinion, so it's a national standard.

24 GENERAL OLSON: I'm not objecting to that. If
25 that is the readily accessible --

1 QUESTION: I think we're asking what the
2 Court -- which the Congress wanted. Now, I can sympathize
3 with the Congress when they're not exactly clear on what
4 this Court's decisions mean, but we need to know how it
5 ought to apply to this case in the context of the
6 Internet. The Internet would be very different than a
7 local bookstore.

8 GENERAL OLSON: I think that is a reasonable
9 solution to the problem, and is consistent with what
10 Congress was saying.

11 Congress was also aware that this Court has said
12 over and over again that the same material may be judged
13 differently by different juries from place to place, and
14 that that is not a constitutional impediment. This Court
15 has also said --

16 QUESTION: General Olson, in this context, if
17 you could -- I didn't get a clear answer to my question.
18 Maybe I'll put it this way. Is there greater judicial
19 control, either by the trial judge or the appellate judge,
20 with respect to the serious value standard than there is
21 with respect to the national standard for community --

22 GENERAL OLSON: Yes. That's what this Court has
23 said again and again, and we of course accept that, and
24 that is -- Congress accepted that as well.

25 QUESTION: And is your point, then, we first

1 take out that category. If it's serious value, it's out.

2 GENERAL OLSON: Yes.

3 QUESTION: And it's only when it doesn't have
4 serious value, then you get into the question of
5 national --

6 GENERAL OLSON: Yes, that's right, but remember
7 that -- it seems important to emphasize that these
8 definitions are highly specific with respect to the
9 material which is prohibited. It's not just saying to
10 jurors -- the obscenity statute doesn't have any of these
11 limitations in it.

12 18 U.S.C. 466 just talks in very, very general
13 terms, so what Congress was trying to do here is be much
14 more specific than the obscenity statute, which this Court
15 has accepted for 30 or 40 years by importing these kinds
16 of definitions into it. What Congress felt it was doing
17 responsively was not only defining what was prohibited
18 very specifically, but then incorporating those specific
19 standards, just as you suggest, Justice Ginsburg.

20 The other thing that this Court has said is that
21 those who are choosing a medium to make available to
22 children material which is harmful to children, over which
23 the person who is disseminating that information, those
24 who wantonly decide to pollute the stream from which we
25 all drink have a responsibility to take the minimal steps

1 necessary to reduce the harm that's being caused by
2 putting that material into the stream.

3 What we have as a result of this are substantive
4 standards that Congress developed based upon the teachings
5 of this Court with respect to obscenity, applying those
6 standards to minors, as this Court suggested is
7 appropriate and a part of a compelling national interest
8 in the Ginsberg case, the Ferber case, and Sable case, and
9 other cases where the Court has suggested that something
10 has to be done, and is entirely appropriate to be done
11 with respect to minors.

12 And then the third thing that Congress did was
13 adopt a solution to the problem which is consistent with
14 what 48 or so States have in these blinder laws, magazine
15 racks displays, the books, materials that this Court
16 considered in the American Booksellers case with respect
17 to what would be permissible to prevent children from
18 seeing damaging materials in bookstores.

19 Now, that is -- so what we have as a result of
20 COPA, Congress listening to this Court, lowering the age
21 to 16 and under, making it apply to commercial speech and
22 noncommercial speech, returning parental control, adopting
23 a device that this Court has considered in the Sable case
24 and considered in this case. The language of this Court's
25 decision in *Reno v. ACLU* said that the age verification

1 system is technologically and economically feasible, is
2 already in use, and would provide a defense to those
3 commercial purveyors of pornography, so Congress listened
4 to that, adopted that system, put into place for the
5 Internet the same standard that already exists in the 48-
6 State blinder laws with respect to access of minors to
7 these materials, so --

8 QUESTION: Did Congress take account in any of
9 this -- I mean, one objection that's raised is, it's all
10 futile, because you're just giving competitors from
11 abroad -- they will come in and fill the gap if U.S.
12 providers are not available. You're not going to be
13 saving children. You'll just be getting it from outside
14 the U.S.

15 GENERAL OLSON: Well, the Congress did
16 explicitly consider that. COPA applied to material in
17 interstate or foreign commerce. The Government will
18 prosecute where it can material that comes in from abroad
19 where it's capable of doing it, but Congress also
20 recognized that it would not -- was not going to allow the
21 perfect to be the enemy of the good. It was going to deal
22 with those problems, or those portions of the problem that
23 it could address.

24 Now, we understand and we have acknowledged that
25 it may well be that there are circumstances under which

1 these limitations can be avoided. There may be certain
2 foreign purveyors that Government are not able to track
3 down or obtain jurisdiction over, but what Congress was
4 trying to do is deal with as much of the problem as it
5 could in as constitutional a manner as possible.

6 QUESTION: And maybe Congress wouldn't mind even
7 if the child pornography industry flourished, at least
8 drive it overseas. That wouldn't exactly be a bad result,
9 would it --

10 GENERAL OLSON: Well --

11 QUESTION: -- in Congress' mind?

12 GENERAL OLSON: Well, I think -- and the Court
13 considered a case earlier this year of the damage that
14 that industry does, earlier this term. Yes, there's two
15 parts to that, Justice Scalia, the damage of the industry,
16 the domestic industry itself is incalculable, but the
17 damage to the recipient, to the children, are also
18 incalculable, so that might address part of the problem,
19 but Congress in this --

20 QUESTION: But here, at least from the exhibits
21 that you gave us, it doesn't seem that this material --
22 there are no virtual children, no real children. This is
23 adult stuff, at least.

24 GENERAL OLSON: Yes. We're not talking about
25 that aspect of the issue that you're considering in that

1 other case, but what I was simply trying to address is
2 Justice Scalia's question, that this is a major problem.
3 We understand from the legislative history that explicit,
4 adult material, not just on the Internet, is an \$8 billion
5 industry. According to what Congress decided in this
6 case, there are 28,000 sexually explicit commercial
7 pornography sites on the Internet.

8 This is readily accessible to children. It is
9 almost -- anyone with any experience with the Internet
10 will tell you that children can find it readily, and find
11 it as long as they can type and read they will find it,
12 and will find it by accident, and once they find it by
13 accident -- the House committee points out that if you
14 type in the words, White House, www.whitehouse.com, you
15 will find offensive, explicit pornography, and it's very
16 hard to get rid of.

17 QUESTION: And much of it you say -- if I
18 understand you correctly, you -- this law doesn't touch --
19 I mean, I was impressed at that set of exhibits. You
20 singled out three that you said would not be excluded as a
21 matter of law.

22 GENERAL OLSON: Possibly.

23 QUESTION: Oh. So you're saying maybe the
24 others --

25 GENERAL OLSON: Well, one of the ones that we

1 were concerned about is a series of very explicit
2 pictures, and I think the Court knows which ones I'm
3 talking about. We -- I went and did some additional
4 research on that. That is -- that are photographs of an
5 art exhibit, and one art gallery that was several years
6 ago that is a small portion of a large compilation.
7 Justice Ginsburg, I think that -- I don't know how that
8 would come out when all of the evidence came in with
9 respect to that.

10 Those photographs were pulled out of context and
11 put in the exhibits. That's why this material has to be
12 looked at as a whole, under these specific standards.

13 I'd like to reserve the remaining part of my
14 time for rebuttal, except to say that this is a facial
15 challenge, and we are dealing with the possibility of
16 striking down or not allowing the enforcement of a statute
17 which we -- this Court and Congress and the executive
18 branch is a necessary, narrowly tailored, carefully
19 crafted solution to a desperate problem.

20 QUESTION: Thank you, General Olson.

21 Ms. Beeson, we'll hear from you.

22 ORAL ARGUMENT OF ANN E. BEESON

23 ON BEHALF OF THE RESPONDENTS

24 MS. BEESON: Mr. Chief Justice, and may it
25 please the Court:

1 COPA, just like the Communications Decency Act,
2 makes it a crime to communicate protected speech to adults
3 on the World Wide Web. The Government, as Justice
4 Ginsburg just noted, has now conceded that COPA applies to
5 much more than commercial pornographers. They say in
6 their reply brief that under COPA they can prosecute a
7 popular online magazine, Salon Magazine, one of our
8 clients, and the leading fine art vendor on the web for
9 providing a few items that are deemed harmful to minors on
10 their web site.

11 The affirmative defenses in COPA --

12 QUESTION: Excuse me. If they're providing
13 those items, and if those items are pornographic, then
14 they are commercially in the pornography business. What
15 difference does it make that they do other business as
16 well?

17 MS. BEESON: Justice --

18 QUESTION: I don't see why Salon or any other
19 commercial operator should be immune by saying, well, you
20 know, all of my business isn't pornography, just a little
21 bit.

22 MS. BEESON: Justice Scalia, whether or not we
23 talk about them as commercial pornographers, the fact is,
24 the speech they communicate, which even the Government I
25 don't think would label them commercial pornographers in

1 the sense that we imagine, first of all, two of the three
2 exhibits are not pictures at all. They're written text.
3 They're stories, and the point is that all of this speech,
4 by definition, all of the speech targeted by this law is
5 by definition protected for adults.

6 This statute would make it a crime for speakers
7 to make that information available, and the defenses
8 simply do not solve the problems. They're the same two
9 defenses that were in the first statute. There's no
10 change at all, credit cards or adult access codes.

11 QUESTION: Can you think of an example of
12 something that would have serious literary, artistic,
13 political, or scientific value for an adult, but it would
14 not have it for a 17-year-old?

15 MS. BEESON: Yes, Your Honor. I think that --

16 QUESTION: You can?

17 MS. BEESON: I think that all --

18 QUESTION: I've had trouble.

19 QUESTION: 16-year-old.

20 MS. BEESON: I think that all of our client's
21 exhibits are precisely that sort of material, and that, of
22 course --

23 QUESTION: You think -- I looked at some of the
24 exhibits, and I think 17-year-olds are pretty
25 sophisticated, and I don't understand why they wouldn't

1 have, Salon Magazine, the same kind of value for a 17-
2 year-old that they have for a 21-year-old.

3 MS. BEESON: Your Honor, the --

4 QUESTION: It's 16, actually, isn't it? We're
5 talking about 16 years old.

6 MS. BEESON: Yes, I think it is 16, in fact.

7 QUESTION: All right, 16 -- 16.

8 MS. BEESON: There are --

9 QUESTION: There are even quite mature 16-year-
10 olds who know about --

11 (Laughter.)

12 MS. BEESON: There are many communities in this
13 country --

14 QUESTION: That's, I think, the question in the
15 case, correct. You're saying in some communities --
16 sorry, I didn't --

17 MS. BEESON: I'm saying -- perhaps in even most
18 communities that believe that providing any information
19 about experiencing sexual pleasure, about sex toys, to
20 teenagers, is sinful and is definitely harmful, and --

21 QUESTION: That's probably so, but I mean, what
22 Justice Breyer is addressing and what I was concerned with
23 with Mr. Olson was his argument that the third prong, the
24 value prong, in effect, sort of sands off the rough edges,
25 and it gets the -- in practical terms it gets the

1 community peculiarity out of it, and is that -- obviously
2 you don't agree with it. Why is he wrong in that?

3 MS. BEESON: Your Honor, first of all, I think
4 because all of the millions of speakers, including our
5 clients on the web, they are the ones that have to
6 understand this law, and as Mitch Pepper, who runs a
7 Sexual Health Network which provides specific information
8 about how to experience sexual pleasure to disabled
9 persons, testified, I think very strongly, based on my
10 interpretation of the words in this statute, even with the
11 serious value prong, that value prong is value for minors,
12 and he has to believe, as he testified, that discussion of
13 masturbation, oral sex, anal sex, descriptive positioning,
14 all of that can be construed as pandering to the prurient
15 interest of minors.

16 Those are the -- these are the speakers who are
17 going to be subjected to criminal prosecution under this
18 law, and let me clear, our clients don't ever want to come
19 before a jury. That's the problem, of course. They --

20 QUESTION: Oh, but the particular issue is
21 really not the third prong. That's not before us, I take
22 it. The issue before us is the question of community
23 standards, and so does it satisfy you if the Court were to
24 say -- or, say I wrote an opinion. I'm just thinking of
25 myself -- write an opinion that says, the word community

1 standards does not mean individual localities. It does
2 mean the Nation.

3 MS. BEESON: Absolutely not, Your Honor, for two
4 reasons which I want to explain. First of all, under
5 either standard this statute is unconstitutional, and that
6 is clear, and that is because of the very strong deterrent
7 effect it has on adult speech. Through all of these
8 speakers who are targeted under this law, they really have
9 only two choices, and just to give one example --

10 QUESTION: That was true in Hamling, too. There
11 was considerable deterrence, just because you didn't
12 know -- if you sent stuff Nation-wide, you didn't know
13 where you might be prosecuted.

14 MS. BEESON: Mr. Chief Justice, there's a very
15 real distinction here, and that is that Hamling was about
16 the obscenity standard and this is about the harmful-to-
17 minors standard, and my point is that --

18 QUESTION: Just a minute. Will you explain why
19 you think that's a distinction?

20 MS. BEESON: Because by definition all of the
21 material targeted by the statute is protected speech for
22 adults. Adults have the right to access it, even though
23 children don't. In the obscenity context, obviously, even
24 adults don't have the right to access the material.

25 QUESTION: No, that's true, but you run --

1 people in Hamling ran the same risk. They may have
2 thought their stuff would not be found to be subject to
3 the community standard, but a jury might find otherwise,
4 so that's just what you're complaining about.

5 MS. BEESON: Well, the range of speech, however,
6 of course, protected speech that is limited by the -- by
7 any harmful-to-minors display statute. It's just by
8 definition greater, again because the entire category of
9 speech is protected for adults. It's not like you're just
10 arguing about the margin of what is obscene for everyone.

11 QUESTION: Well, in obscenity cases, whether it
12 was obscenity or not depended upon the community
13 standards, so you were really taking your chance when you
14 published something nationally you were subject to the
15 least -- highest common denominator of obscenity. Why
16 should it be any different for pornography than it is with
17 obscenity? It seems to me that Hamling and the other
18 cases establish that it is no violation of the First
19 Amendment to subject a publisher to differing standards
20 throughout the country. If we did it for obscenity, I
21 don't know why we cannot do it for pornography.

22 MS. BEESON: Again, most importantly, Your
23 Honor, under any standard -- under any standard, COPA is
24 unconstitutional --

25 QUESTION: Okay --

1 MS. BEESON: -- because it would deter such a
2 great amount of adults from accessing --

3 QUESTION: But going back to Justice Breyer's
4 question, if we construed the statute the way he has
5 suggested, isn't it clear that we would have to vacate the
6 judgment in this case and send it back? We're not here to
7 make a final judgment on the statute. We're reviewing the
8 injunction, and if we construed it his way, we would have
9 to vacate, wouldn't we?

10 MS. BEESON: Your Honor, I don't believe so,
11 because we have a very strong record here, which again the
12 Third Circuit explicitly affirmed the findings of fact by
13 the district court that show that adults are going to be
14 deterred by this law, and that is because what the law
15 requires is that you put screens in front of all of the
16 material that again is protected to adults, and by
17 definition, if you're Different Light Bookstore, which is
18 one of our clients --

19 QUESTION: But that's not a community standards
20 problem.

21 MS. BEESON: It's a -- Your Honor, it's a
22 burden-on-speech problem.

23 QUESTION: Yes, but I --

24 QUESTION: It may be a burden on speech, but
25 look at the question we took.

1 QUESTION: I'm trying to get you to ask --
2 answer one specific question, and I'll try once more, all
3 right.

4 The question in front of us, presented is
5 whether the court of appeals properly barred enforcement
6 on First Amendment grounds because the statute relies on
7 community standards to identify material that is harmful
8 to minors. That's the question before us. You have 17
9 reasons why this statute is unconstitutional. I'd like
10 you, for the purpose of this question, to forget about
11 those 17 reasons. I want to know if, in respect to this
12 one reason, that the community standards -- that's what's
13 in the question -- if we were to say the word community
14 means national, then would you concede -- would you say
15 you've won, or you've lost, or --

16 MS. BEESON: Yes.

17 QUESTION: That -- how does that affect the
18 case, to answer that question nationally?

19 MS. BEESON: Yes, and our answer is that even
20 under a national standard this law clearly violates the
21 First Amendment.

22 QUESTION: I know that, but is the right thing
23 to do, then, for us to say, court of appeals, you were
24 wrong about the meaning of the word, community standards.
25 It is a national standard. There may be other things

1 wrong with this statute, in which case, go and consider
2 them, but this isn't one of them.

3 MS. BEESON: Your Honor, we -- again, if that
4 were the course that you decided to take, we do not think
5 that the appropriate thing would be to vacate the
6 injunction, but whether to leave the injunction in place,
7 and then --

8 QUESTION: Not vacating the injunction, vacate
9 the order of the court of appeals and say, you consider
10 these other points.

11 MS. BEESON: Again, Your Honor, I don't think
12 that that would be a helpful or useful exercise in this
13 case, because of both the strong facts we're working on
14 and also just to talk about the problem of the national
15 standard which, of course, was referred to when Mr. Olson
16 was speaking.

17 You know, as the Court said in Miller, a
18 national standard would be an exercise in futility. Will
19 jurors have to decide base on their own sense of community
20 standards whether or not something is patently offensive
21 and prurient?

22 QUESTION: But why is it okay for obscenity but
23 not okay here for -- not for -- I'm putting it too
24 favorably. It isn't okay for obscenity. It is okay for
25 taking your chance on whether what you publish is obscene.

1 MS. BEESON: And the --

2 QUESTION: But it's not okay for taking your
3 chance on whether what you publish is pornographic and
4 harmful to minors. Why should there be any difference
5 between the two?

6 MS. BEESON: Well, for one reason of course, one
7 of the crucial distinctions here is the nature of the
8 Internet, and that is one of the arguments that the Third
9 Circuit discussed. It is very distinct from handling in
10 Sable in the sense that this is not a situation where
11 people who put their speech up on the web have any way of
12 limiting their speech to only certain communities.

13 QUESTION: But you're only talking about
14 commercial speech, something that people are going to have
15 to pay to see.

16 MS. BEESON: Justice O'Connor, the Congress very
17 explicitly wrote the definition of commercial speech in
18 this statute so broadly that it applies to much more than
19 people who primarily communicate what is termed commercial
20 pornography.

21 That was the point before. They explicitly said
22 that anyone who includes any material that is harmful to
23 minors is covered by the law, and again, according to the
24 concession in the Government's reply brief, if you're
25 artnet.com, one of the leading fine art vendors, and you

1 have a series of Andre Serano photographs on your site,
2 you can be prosecuted, and also, of course, this is not
3 material that is for sale.

4 There is no requirement that you're actually
5 selling the material. It's only that you intend to make a
6 profit. As the district court found, the vast majority of
7 content on the web is available for free to users.

8 QUESTION: Well, Hamling didn't rely at all, the
9 opinion in Hamling, on the fact that the people could
10 choose where to circulate. I mean, they in effect said,
11 you do it at your own risk.

12 MS. BEESON: Your Honor, I think that's a very
13 different conclusion to reach when you're talking about an
14 environment in which you can control where you send the
15 material. If you're a regular magazine distributor, you
16 know where you're sending your magazines. On the web --

17 QUESTION: Do you mean --

18 MS. BEESON: -- if you want to communicate
19 locally, you can't.

20 QUESTION: You mean, we would have to make this
21 exception even for obscenity, even for out-and-out stuff
22 that's so far beyond that it's not even just pornography.
23 You would say we could not allow community standards to be
24 applied --

25 MS. BEESON: Your Honor --

1 QUESTION: -- on the web, for obscenity.

2 MS. BEESON: We think that that is a very
3 different question, and that is not a necessary conclusion
4 for the reason that I said before and that is because, by
5 definition, a national standard for what is displayed as
6 harmful to minors on the web would impact far more
7 protected speech than a national standard for obscenity,
8 which is by definition unprotected for adults as well as
9 minors, and to put it another way, no adult has the right
10 to materials that are obscene in even the most tolerant
11 community.

12 QUESTION: It seems --

13 MS. BEESON: All adults have the right to
14 materials.

15 QUESTION: -- the issue is how
16 unconstitutionally unfair it is to the publisher,
17 regardless of how many publishers are covered. You're
18 saying it's okay to do this for obscenity but somehow not
19 for pornography. It seems to me if subjecting you to a
20 risk Nation-wide is an unconstitutional thing, you're
21 going to go to jail just the same, whether you're going to
22 jail for pornography or obscenity.

23 MS. BEESON: We are saying --

24 QUESTION: If we cannot use community standards
25 for this, I don't see why we can use it for obscenity.

1 MS. BEESON: We, of course, don't think you need
2 to even reach that question, but to the extent that you
3 do, again, I think that it is quite a different question
4 because of the amount of protected speech that is
5 impacted. It's just not -- it is not so clear that
6 under -- with obscenity a national standard would be
7 nearly as problematic as it would when you're talking
8 about making available materials which are clearly, by
9 definition, protected for adults to receive.

10 What COPA does is to prevent speakers from doing
11 that, and requires them to make this unwelcome choice,
12 which is, you either set up costly screens that the record
13 shows are going to drive away your users, or you self-
14 censor, and if you're a Different Light Bookstore, or you
15 are the Sexual Health Network, or you're the artnet, a
16 fine art vendor, it's only rational, and of course they
17 testified to this, you are going to self-censure, because
18 that was the only option that will ensure that you're not
19 prosecuted.

20 QUESTION: But what about the Government's
21 position that of all the exhibits that are at least in the
22 record presented to us, there's only three that they say,
23 even as a matter of law, might be subject to prosecution,
24 so they're giving you a clean bill of health on all these
25 others, and they say it's really a very narrow category,

1 not the broad category that you're describing.

2 MS. BEESON: Justice Ginsburg, in fact that
3 concession in the reply brief makes us more nervous than
4 ever, and that is because the Government has changed their
5 mind. They very clearly argued at the district court that
6 our clients, none of our clients even had standing to
7 raise the constitutionality of this action because they
8 were so clearly protected.

9 Now, suddenly, here we are before the Supreme
10 Court, and they say, oh, no, we changed our minds, some of
11 them can be prosecuted. That very much implies that they
12 could change their mind again in the future --

13 QUESTION: Ms. Beeson --

14 MS. BEESON: -- and in fact the speech is
15 indistinguishable from many other exhibits that are in the
16 joint appendix before you.

17 QUESTION: Ms. Beeson, let's talk about artnet.
18 Do you really think that when artnet puts out the Andre
19 Serano photographs, do you think it expects to avoid being
20 held under this statute because of 6(a), that it would
21 hope that the average person applying contemporary
22 community standards would find this material as a whole
23 not designed to appeal to or pander to the prurient
24 interest, or do you rather think that artnet's protection
25 would surely be sought under (c), namely, that the

1 material taken as a whole possesses serious literary,
2 artistic, political, or scientific value? Isn't that
3 their real protection?

4 MS. BEESON: Your Honor, they really do not
5 believe it is their protection, and that again is because
6 it says, serious value for minors, and that, of course, is
7 one of the primary distinctions between this category and
8 obscenity. There are many people who would think that the
9 fine art --

10 QUESTION: The national standard -- I guess I
11 have to go back to that, but I didn't get an answer.
12 Right now, your clients could worry that they would be
13 prosecuted under the Miller standard, and the only
14 difference is minors, and so I find it very hard to think
15 of an artistic work that one would say has serious value
16 to a 21-year-old but not to a 16-year-old. That, to me,
17 seems impossible.

18 Now, you give me an example of such a thing.

19 MS. BEESON: Well, Your Honor, the Government
20 itself is saying that art --

21 QUESTION: That's their opinion. I'm asking for
22 your opinion.

23 MS. BEESON: I'm sorry, Your Honor, but they're
24 the ones that are going to prosecute my clients.

25 QUESTION: That may be, but the very fact that

1 your clients could be prosecuted does not mean they win
2 this case, because after all, they might be prosecuted
3 under Miller, too, and everyone agrees that that's the
4 law, so I'm asking you for your opinion, if you can find
5 an example of a work of art that would have serious value
6 for a 21-year-old but not for a minor, and I'm telling you
7 I can't think of one, and the reason that I ask you is,
8 I'd like you to try to think of one.

9 MS. BEESON: Your Honor, with respect, we
10 believe that all of the exhibits that we have put in, the
11 artistic ones and the literary works, the column, the nude
12 artworks by several clients, all of these could be
13 targeted under the statute, and again, what the effect,
14 the First Amendment effect of the statute is whether or
15 not our clients legitimately feel like they have to self-
16 censure under this law as compared to the obscenity law.

17 They don't believe that their works are obscene.
18 They know that some communities will find them harmful to
19 minors, and for that reason what they are going to do is,
20 they're going to self-censure, and what it's going to
21 effectively do is have COPA driving a certain category of
22 speech protected for adults from the marketplace of ideas
23 that is the web.

24 QUESTION: Are you saying that you have to give
25 some effect to Congress' words? It didn't say serious

1 value, period. It said, to minors, and that's different
2 from serious value that we're accustomed to dealing with
3 in the obscenity area, so for the Court to say, well,
4 Congress just used those words, they didn't mean anything.
5 That's I suppose what you're saying is of concern.

6 MS. BEESON: Yes, Your Honor, and the history of
7 the harmful-to-minors definition, that is one of the
8 primary points. The point is that even though people
9 might think that artistic words that are explicit, and you
10 know, references to homosexuality that are explicit, have
11 value for adults, many, if not most communities find that
12 that same material does not have value for minors.

13 And again, to address your question, too,
14 Justice Breyer, about the 16-year-old or the 17-year-old,
15 there is nothing in this statute that defines minor as the
16 16-year-old. The Government has been, again, pushing an
17 interpretation of that statute.

18 QUESTION: But I thought you might -- I mean, I
19 thought that the word, for example, for minors comes out
20 of cases that permit the Government to require certain
21 magazines to be placed in certain places in the
22 bookstores, or in the retail shops, with brown covers, so
23 perhaps there's some experience, since we have worked with
24 the words, for minors, of something that has to be done
25 under that law, but doesn't fall within Miller.

1 I mean, I just wanted to get your views on it.

2 MS. BEESON: Yes, absolutely. I think there
3 haven't been that many cases on the books because, again,
4 those statutes are much easier to comply with, and that's
5 what the courts have found, but even in those cases the
6 court has looked very carefully at whether or not there
7 was a significant deterrence effect on adults, and in the
8 blinder rack cases, none of which dealt with the unique
9 nature of the online medium, in which, as our records
10 showed, up to 75 percent of users would be deterred from
11 accessing speech that had a screen in front of it. Now,
12 that is the finding of the district court.

13 The blinder rack cases didn't deal with that
14 kind of situation. None of them would require adults to
15 disclose their identity, or to register before obtaining
16 the access to protected speech, and there is certainly no
17 record of the strong deterrence, and importantly, in those
18 cases there was no record of an equally effective
19 alternative, and that is something that I really think we
20 need to get to, because here the district court
21 specifically found that there was an alternative that was
22 equally effective, and that is the use of blocking
23 software, user-based blocking programs, and in fact --

24 QUESTION: But you're saying that it -- you're
25 saying, which was an issue last time around, it's up to

1 the parent, Government can do nothing. The blocking, I
2 take it, is something that the parent would buy and
3 install. The question is whether Government can do
4 anything, and I think your answer is no.

5 MS. BEESON: Your Honor, we believe that
6 Congress did two things already that we're not challenging
7 here. First of all, it established a study commission to
8 look into other options for protecting children, and after
9 the statute was enacted, that same study commission,
10 Congress -- and so I don't think, with respect to Mr.
11 Olson, that he's correct that all three branches of
12 Government are on the same wavelength here. I think that
13 we have some difference, and that is, Congress' own
14 commission has now concluded also, which is equal to the
15 district court's findings, that user-based blocking
16 software is actually more effective than credit card and
17 adult access code screening.

18 Just to remind the Court also that the Court
19 specifically found that the Government didn't prove the
20 last time around, in *Reno v. ACLU*, that those screening
21 techniques, credit card and adult access codes, will
22 actually prevent minors from accessing the content. The
23 same is true here. There's no evidence that those are
24 actually effective, whereas the district court
25 specifically found user-based alternatives are effective,

1 and then Congress' own commission concluded the same
2 thing.

3 QUESTION: Well, of course, all this goes to
4 these other aspects of the statute. As I understand where
5 we are in the argument, the court of appeals decided for
6 reasons that I think we cannot criticize on this record
7 that it's going to sustain this injunction based on the
8 community standards problem, and we're asking you, if the
9 community standard is national, doesn't that solve that
10 problem, and I'm coming away from this argument with the
11 impression that you're saying, well, I'm not going to
12 bother to help you on that, because there are so many
13 other things in the statute I want to talk about.

14 MS. BEESON: Yes, I'm sorry.

15 QUESTION: But that doesn't help me answer this
16 question.

17 MS. BEESON: Right, and I don't mean to leave
18 that impression. I -- what I'm saying clearly is that we
19 believe that even if you were to read a national standard,
20 it would be unconstitutional, because the real effect
21 would be precisely the same as the local community
22 standards interpretation is, and that is, the least
23 tolerant community would get to set the standards for
24 everyone on the web, since web speakers have no way to
25 determine where their audience is.

1 QUESTION: But is it not true that --

2 QUESTION: Then you're saying that a national
3 standard can't be enforced with any jury.

4 MS. BEESON: I don't think that it can, because
5 again jurors are going to have to enforce that. You're
6 going to have to have still a jury decide what is patently
7 offensive and prurient, and I think they're going to do
8 that naturally based on where they're physically located,
9 in their own community.

10 QUESTION: Then you're -- and I don't mean this
11 dismissively, but I think we have to accept this. You're
12 saying there in fact is no way to regulate this.

13 MS. BEESON: Your Honor, I'm saying that there
14 isn't any way to make it a crime to display material
15 harmful to minors on the web.

16 QUESTION: Yes.

17 MS. BEESON: That is our position, and again,
18 that we believe is very consistent with many other
19 statutes that have recently been struck down by the Court.
20 Just last term in the Playboy case, in, you know,
21 obviously the Reno v. ACLU case, the Denver Area case, I
22 mean, in the last 20 years I count at least six statutes,
23 some of which weren't even criminal statutes like this
24 one, which I think has an even stronger potential for
25 chilling speech, that were struck down because of the

1 burden on adult speech.

2 QUESTION: No, but I'm not -- again, I'm not
3 asking you the global question.

4 MS. BEESON: I understand.

5 QUESTION: I'm just asking you the question that
6 goes to the specific issue that we took for review, and
7 that is the legitimacy of basing an injunction, or
8 sustaining the district court's injunction on the
9 community standards portion of the statute, and my
10 question to you is simply, I take it you're saying that
11 there is no way to write a standard into the statute, call
12 it community, call it national, call it some third thing
13 that you dream up, that will ever suffice
14 constitutionally.

15 Forgetting the rest of the statute, forgetting
16 the rest of the problem, just on the touchstone of the
17 standard, there's no way to do it, and I think your answer
18 is no, there is no way to do it.

19 MS. BEESON: There is no way to do it, and
20 again, I do want to be clear that I think that we can
21 divorce the rest of the language of the statute, even
22 aside from the deterrence issues, and what I mean by that
23 is, because the statute was written so broadly as to cover
24 anybody who had even just one image, for example, because
25 the statute was written to include not just images but

1 text, I think, you know, I think those problems still
2 remain even just looking at the textual language, even if
3 you're focusing just on the community standard versus the
4 national standard, and that's another reason why we don't
5 think that fixing that problem is enough to save the
6 statute.

7 QUESTION: May I ask another sort of general
8 question? Do you think there's any way in which Congress
9 can deal with the problem of what they call teasers, which
10 everyone would agree would violate the standard here, and
11 would also not have serious artistic value?

12 MS. BEESON: Your Honor, one way they could do
13 that, of course, is through more vigorous prosecution of
14 obscenity and child pornography, which again --

15 QUESTION: No, no, I'm assuming nonobscene --

16 MS. BEESON: Nonobscene.

17 QUESTION: -- but clearly pornographic teasers.

18 MS. BEESON: Well, I mean, I of course don't
19 want to be the one to rewrite the statute, but I do think,
20 as I suggested before, that if they --

21 QUESTION: But I'm asking if it's your position
22 that that's beyond the power of Congress to control.

23 MS. BEESON: I think that a statute that did
24 just apply, for example, to web sites who were actually
25 selling things already -- this one isn't limited to

1 that -- and secondly, web sites who the predominant
2 portion of their site was actually harmful to minors.
3 That would certainly be closer to just addressing teasers
4 than this statute is.

5 QUESTION: You still haven't answered my
6 question. My question is whether it's beyond the power of
7 Congress to control the teaser problem.

8 MS. BEESON: Justice Stevens, my answer is that
9 I think if they wrote a statute -- are you asking me
10 whether I think that statute would be unconstitutional
11 also, because of course, I have to argue yes, it would be,
12 but it would certainly be -- you don't have to believe me
13 on that.

14 (Laughter.)

15 MS. BEESON: Obviously, and you know, just to be
16 clear --

17 QUESTION: Just on this one, right?

18 MS. BEESON: -- that would be -- that's what I
19 mean. That's a very different statute than this one. It
20 would be one narrowly tailored to the --

21 QUESTION: No, but one of the things we have to
22 be concerned with is, there is a genuine problem that
23 Congress is trying to address, and if your position is you
24 just forget about it, that you've got to live with the
25 problem, that's quite a different position than if you

1 think, well, there's a less restrictive alternative that
2 would accomplish what the Congress is trying to do, and
3 you're suggesting to me there isn't a less restrictive
4 alternative.

5 MS. BEESON: Well, the less restrictive
6 alternative for actually protecting children is the user-
7 based mechanisms, and that again, the -- Congress itself
8 found to be actually more effective at protecting
9 children.

10 Just to refer to the exhibits that were put in
11 by the Government, every single one of those sites that
12 address the teaser problem, all of those were blocked by
13 all of the major --

14 QUESTION: What would Congress do, pass a law
15 requiring parents at their own expense to impose user-
16 based screening?

17 MS. BEESON: Your Honor, we certainly believe
18 that the Federal Government could --

19 QUESTION: I mean, that's not a solution. That
20 is not a solution within the power of Congress.

21 MS. BEESON: No, and we don't think it needs to
22 be, because we think, of course, the ultimate decision
23 ought to be resting on parents, where it always has, to
24 make a decision as to whether they --

25 QUESTION: You're saying, in answer to Justice

1 Stevens, in your capacity as a lawyer, that whatever
2 statute Congress came up with, you would believe in that
3 capacity was unconstitutional. You're not prepared to say
4 that there's any statute that is constitutional. I'm
5 asking about what you think, not what I think.

6 MS. BEESON: We are not prepared to say that any
7 statute which significantly burdens adult speech is
8 constitutional, and I think that is very consistent with
9 the opinions of this Court, as in the Playboy case and the
10 Denver Area case.

11 In sum, I just want to say that the web provides
12 access, as we all know, to more speech by more speakers
13 than any other communications medium in history. COPA
14 threatens to transform this dynamic medium into one that
15 is fit only for children. We believe the preliminary
16 injunction should be affirmed.

17 QUESTION: Let me ask you a modification to my
18 question. Do you think it would be within the power of
19 Congress to require everyone who is in this area of
20 speech, which is protected as to adults but maybe not as
21 to minors, to put a XX on their material that goes onto
22 the web site so that the software could pick up that XX
23 more effectively?

24 MS. BEESON: Your Honor, the problem with that
25 would be, of course, without some kind of mechanism that

1 then allowed parents to --

2 QUESTION: No, that's right, but then that would
3 simplify the problem of buying -- of setting up software
4 that could screen out this stuff.

5 MS. BEESON: I think that it might have some
6 compelled speech concerns, especially, again, where you're
7 talking about a medium where you have these individuals --
8 just because it's commercial businesses doesn't mean
9 there's a big -- you know, a lot of employees to make
10 these determinations. We have clients who are single
11 individuals who are working out of their home. I think
12 they're just not going to be able to do that. What
13 they're much more likely to do instead is to self-censor,
14 so I'm not sure that that would be a solution.

15 We believe that a much better solution -- and
16 Congress agreed with us. The Justice Department itself
17 wrote a letter to Congress before this law was passed
18 saying that they think that upholding this statute would
19 divert valuable resources away from the more important
20 issues of prosecuting the child pornographers.

21 QUESTION: Ms. Beeson, last time we had a
22 colloquy with the Government on this subject, and they
23 were candid to say, we're not trying simply to maximize
24 parents' choices. We think Government, qua Government has
25 a concern for the children, so even if you have parents

1 who don't care at all what their kids see, the Government
2 has an interest in seeing that children -- and your point
3 about the effectiveness of a blocking device doesn't go to
4 that at all. The Government's saying, we have an
5 independent interest, and we can do something.

6 MS. BEESON: Yes, I do believe that that issue
7 came up in the Playboy case last term, and the Court, you
8 know, did rule that again voluntary -- we can't assume,
9 especially without a record to the contrary, that parents
10 are going to fail to act.

11 QUESTION: Thank you, Ms. Beeson.

12 MS. BEESON: Thank you.

13 QUESTION: Mr. Olson, you have 4 minutes
14 remaining.

15 REBUTTAL ARGUMENT OF THEODORE B. OLSON

16 ON BEHALF OF THE PETITIONER

17 GENERAL OLSON: Thank you, Mr. Chief Justice.

18 Justice Ginsburg, this Court has specifically
19 said and held in the Ginsberg case that the Government
20 does have a responsibility, and this Court has repeatedly
21 said there's a compelling national interest in addressing
22 that responsibility. It is not just helping the parents.
23 It's an independent, as this Court put it in the Ginsberg
24 case, independent responsibility to do something to
25 prevent damage, which everybody agrees is damage to

1 children.

2 What we're hearing from the plaintiffs in this
3 case is the same sky is falling defense that everything
4 possible is going to be precluded and taken away from
5 adults, and that some of the same parties were making in
6 the American Booksellers case, and this Court sent that
7 back to Virginia and asked the Virginia court to examine
8 whether all of these publications and materials were going
9 to be covered by the statute, and it turned out that none
10 of them were, and then the case wended its way back to the
11 Fourth Circuit, and it resolved itself in these statutes
12 that were used, that Congress uses as an analogy, the
13 blinder statute.

14 Now, what our opponents say now is that this
15 blinder statute applied to the Internet is somehow
16 intrusive, expensive, intolerable, burdensome. But when
17 you go into a bookstore to look behind the rack, you have
18 to do that in person. Sometimes, if it's a 7-11 or one of
19 these convenience stores, it may be on a camera.

20 In the Internet, you have to identify yourself
21 with a credit card, which many people do anyway. These
22 screens already exist, as Justice Stevens' questions focus
23 on. It is the teasers that are in front of the screen
24 that Congress was attempting to get at, so in many cases
25 these screens already exist. There's a privacy provision

1 built into the statute that prevents the adult
2 identification services from sharing the information as to
3 the identity of the person using it.

4 I would submit, or the Government would submit
5 it's quite obvious that this is less intrusive. As this
6 Court said in Reno v. ACLU, the system already exists, and
7 it's already in use, so what -- and the definitions -- oh,
8 and the other point that several of the questions have
9 focused on is if community standards are not permissible
10 on the Internet, which is what I understand our opponent's
11 position to be, those go out the window with respect to
12 obscenity, because those are the same standards that this
13 Court developed.

14 Now, what will happen then, as a result of
15 affirming the Third Circuit's decision, is that all of the
16 obscene material which is now behind the screen will be in
17 front of the screen, and all these children will now not
18 just be seeing the teasers, but the effect of the Third
19 Circuit decision is that they will be seeing everything
20 that anybody, any of the commercial pornographers want to
21 put on the Internet.

22 Now, the definition of commercial, that is the
23 same definition. Congress understands what those words
24 mean. It made it clear that it was talking about people
25 that are in the business of making a profit as a regular

1 trade or business in dealing with the provision of
2 material which is sexually explicit, and damaging to
3 minors.

4 It's a definition that already exists, that this
5 Court is quite familiar with. It's in 18 U.S.C. 1466, the
6 obscenity statute. The same definition of commercial is
7 in that statute that Congress adopted for this statute.

8 Finally, with respect to the national standards
9 point, I don't think Congress intended to adopt a national
10 standard. I think what they were trying to do is develop
11 a standard based upon what this Court said in Hamling, and
12 specifically in Jenkins, which was decided the same day as
13 Hamling. The jury instructions need not specify what
14 community, and so forth. I won't repeat the whole
15 definition there, that the definition of community
16 standards does not have to be geographically limited.

17 Congress suggested that there wasn't going to be
18 much variation. They didn't -- Congress didn't feel that
19 there would be much variation anyway, and this Court has
20 said there can be some variations from place to place and
21 time to time --

22 CHIEF JUSTICE REHNQUIST: Thank you, General
23 Olson.

24 GENERAL OLSON: -- and if you're in that
25 business you're taking your chances.

1 CHIEF JUSTICE REHNQUIST: The case is submitted.
2 (Whereupon, at 11:02 a.m., the case in the
3 above-entitled matter was submitted.)
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