radio and television broadcasts, because (1) "[t]he CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet," (2) the CDA imposes criminal penalties, and the Court has never decided whether indecent broadcasts "would justify a criminal prosecution," and (3) radio and television, unlike the Internet, have, "as a matter of history . . . 'received the most limited First Amendment protection,' . . . in large part because warnings could not adequately protect the listener from unexpected program content. . . . [On the Internet], the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material." [1375]

After the Supreme Court struck down the CDA, Congress enacted the Child Online Protection Act (COPA), which banned "material that is harmful to minors" on Web sites that have the objective of earning a profit.[1376] The Third Circuit upheld a preliminary injunction against enforcement of the statute on the ground that, "because the standard by which COPA gauges whether material is 'harmful to minors' is based on identifying 'contemporary community standards[,]' the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." [1377] This is because it results in communications available to a nationwide audience being judged by the standards of the community most likely to be offended. The Supreme Court vacated and remanded, holding "that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." [1378]

Upon remand, the Third Circuit again upheld the preliminary injunction, and the Supreme Court affirmed and remanded the case for trial. The Supreme Court found that the district court had not abused its discretion in granting the preliminary injunction, because the government had failed to show that proposed alternatives to COPA would not be as effective in accomplishing its goal. The primary alternative to COPA, the Court noted, is blocking and filtering software. Filters are less restrictive than COPA because "[t]hey impose selective restrictions on speech at the receiving end, not uni-

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[1375] 521 U.S. at 867.

[1376] "Harmful to minors" statutes ban the distribution of material to minors that is not necessarily obscene under the *Miller* test. In Ginsberg v. New York, 390 U.S. 629, 641 (1968), the Supreme Court, applying a rational basis standard, upheld New York's harmful-to-minors statute.

[1377] ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000).

[1378] Ashcroft v. ACLU, 535 U.S. 564, 585 (2002) (emphasis in original).