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. :

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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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C O N T E N T S

P R O C E E D I N G S

(10:01 a.m.)

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

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

years have said are very important to protect the communicator.

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

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

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

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

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

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

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

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

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

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

greater extent than what is obscene?

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

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

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

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

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

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

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

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

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

QUESTION: They want to have it neither way.

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

QUESTION: Well, when you say relative --

GENERAL OLSON: There's no evidence --

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

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

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

GENERAL OLSON: Yes, sir.

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

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

GENERAL OLSON: I --

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

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

QUESTION: So that satisfies you.

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

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

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

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

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

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

QUESTION: Of you, okay.

(Laughter.)

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

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

QUESTION: Yes.

QUESTION: Yes.

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

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

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

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

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

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

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

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

GENERAL OLSON: Well, yes, Justice --

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: And is your point, then, we first

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

GENERAL OLSON: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GENERAL OLSON: Well --

QUESTION: -- in Congress' mind?

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

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

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

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

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

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

GENERAL OLSON: Possibly.

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

GENERAL OLSON: Well, one of the ones that we

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

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

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

QUESTION: Thank you, General Olson.

Ms. Beeson, we'll hear from you.

ORAL ARGUMENT OF ANN E. BEESON

ON BEHALF OF THE RESPONDENTS

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

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

The affirmative defenses in COPA --

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

MS. BEESON: Justice --

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

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

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

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

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

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

QUESTION: You can?

MS. BEESON: I think that all --

QUESTION: I've had trouble.

QUESTION: 16-year-old.

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

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

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

MS. BEESON: Your Honor, the --

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

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

QUESTION: All right, 16 -- 16.

MS. BEESON: There are --

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Okay --

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

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

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

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

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

QUESTION: Yes, but I --

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

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

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

MS. BEESON: Yes.

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

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

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

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

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

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

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

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

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

MS. BEESON: And the --

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

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

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

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

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

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

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

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

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

QUESTION: Do you mean --

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

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

MS. BEESON: Your Honor --

QUESTION: -- on the web, for obscenity.

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

QUESTION: It seems --

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

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

MS. BEESON: We are saying --

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

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

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

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

not the broad category that you're describing.

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

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

QUESTION: Ms. Beeson --

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

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

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

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

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

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

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

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

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

QUESTION: That may be, but the very fact that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and then Congress' own commission concluded the same thing.

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

MS. BEESON: Yes, I'm sorry.

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

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

QUESTION: But is it not true that --

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

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

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

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

QUESTION: Yes.

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

burden on adult speech.

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

MS. BEESON: I understand.

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

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

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

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

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

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

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

MS. BEESON: Nonobscene.

QUESTION: -- but clearly pornographic teasers.

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

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

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

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

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

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

(Laughter.)

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

QUESTION: Just on this one, right?

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

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

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

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

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

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

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

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

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

QUESTION: You're saying, in answer to Justice

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

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

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

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

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

then allowed parents to --

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

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

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

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

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

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

QUESTION: Thank you, Ms. Beeson.

MS. BEESON: Thank you.

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

REBUTTAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONER

GENERAL OLSON: Thank you, Mr. Chief Justice.

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

children.

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE REHNQUIST: Thank you, General Olson.

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

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)