

No. 96-511

**In the  
Supreme Court of the United States**

October Term, 1996

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**Janet Reno, et. al.**, Appellants,

v.

**American Civil Liberties Union, et. al.**, Appellees.

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On Appeal from the United States District Court for the Eastern District of  
Pennsylvania

**Brief of Appellees**

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## INTRODUCTION

The government appeals from a preliminary injunction barring the enforcement of the Communications Decency Act of 1996 (CDA),<sup>1</sup> which imposes criminal penalties on constitutionally protected speech occurring on the Internet. The Internet has no parallel in the history of human communication. It provides millions of people around the globe with a low-cost method of conversing, publishing, and exchanging information on a vast array of subjects with a worldwide and virtually limitless audience.

It also provides a foundation for new forms of community -- communities based not on any accident of geographic proximity, but on bonds of common interest, belief, culture or temperament.

As Congress itself recognized, "[t]he Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."<sup>2</sup> The CDA jeopardizes each of these goals. Unless enjoined, it will reduce this "never-ending, worldwide

conversation" to a level deemed suitable for children. Appendix to the Jurisdictional Statement 146a (J.S. App.).

Specifically, the CDA makes it a crime, punishable by up to two years in prison, for anyone to use online computer communications to transmit or "display in a manner available to minors" any material that is "indecent" or "patently offensive." Because there is no way for the vast majority of Internet speakers to distinguish between adults and minors in their audience, the CDA is the most restrictive censorship scheme imposed on any medium. For that reason, among many others, the government has yet to convince even a single federal judge that the statute, as written, can be sustained.

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## STATEMENT OF THE CASE

This appeal arises from two consolidated cases challenging the constitutionality of the CDA. A three-judge district court heard five days of testimony on plaintiffs' motions for a preliminary injunction, including an online demonstration of all of the methods of communicating on the Internet.<sup>3</sup> The court also considered numerous affidavits and extensive documentary evidence submitted by both sides. The decision to grant a preliminary injunction was unanimous. All three judges agreed that the statute violated the First Amendment. Two members of the panel also concluded that the critical provisions of the CDA were unconstitutionally vague.<sup>4</sup>

The preliminary injunction decision in this case is supported by 409 separate factual findings. The overwhelming majority of the findings (334) were derived from a joint stipulation submitted by the parties.<sup>5</sup> Those findings, which are not disputed by the government, comprehensively describe the plaintiffs, their speech, the nature of the Internet as a communications medium, the inadequacy of the statutory defenses relied on so heavily by the government, the ineffectiveness of the CDA in accomplishing its asserted goals, and the availability of less restrictive alternatives that enable parents (rather than the government) to decide what material their children should see.

### A. The Statutory Framework

The criminal provisions challenged in this action are embodied in two sections of the CDA. Section 223(a)(1)(B) applies to "telecommunications device[s]." J.S. App. 6a-7a n.5. Under §223(a)(1)(B), it is a felony to transmit an "indecent" communication "knowing that the recipient of the communication is under 18 years of age." The term "indecent" is undefined in the statute.<sup>6</sup>

Section 223(d)(1) applies to "interactive computer services." It criminalizes communications to minors that, "in context, depict[] or describe[], in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."<sup>7</sup> Section 223(d)(1)(A) makes it a crime to "use[] an interactive computer service to send [such material] to a specific person or persons under 18 years of age."<sup>8</sup> Section 223(d)(1)(B) makes it a crime to "display [such material] in a manner available" to any person under eighteen.<sup>9</sup>

Until reaching this Court, the government made very little effort to distinguish among these provisions or to defend their constitutionality, standing alone. Rather, throughout the district court proceedings, the government's case primarily relied on the defenses set forth in §223(e)(5). Section 223(e)(5)(A) creates an affirmative defense for anyone who "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to [prohibited] communication[s] . . . ." Section 223(e)(5)(B) creates an affirmative defense for anyone who "has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."

### B. The Reach Of The CDA: Plaintiffs And Their Speech

The plaintiffs in these consolidated cases illustrate the spectrum of individuals and organizations who use online computer networks to communicate, send, display and access information, including information that could be considered "indecent" or "patently offensive."<sup>10</sup> Plaintiffs include nonprofit public interest organizations, such as the American Civil Liberties Union (ACLU), the American Library Association (ALA), Planned Parenthood Federation of America (PPFA), Human Rights Watch (HRW), the Electronic Privacy Information Center (EPIC), and the Electronic Frontier Foundation (EFF), as well as for-profit corporations such as Wildcat Press, BiblioBytes, and Prodigy.

Individual plaintiffs include Kiyoshi Kuromiya, who runs the Critical Path AIDS site on the World Wide Web, and Declan McCullagh, who alone operates the Justice On Campus Web site and a popular online discussion list on censorship issues. M.A. 23a-26a, ¶¶176-188; *id.* at 27a-28a, ¶¶194-97. Corporate speakers and trade groups include Microsoft, the American Booksellers Association, and the National Writers Union. Some plaintiffs provide material that is accessed by large numbers of people each day, M.A. 1a-5a, ¶¶170-84; *id.* at 23a-26a, ¶¶176-88, while others simply send an occasional e-mail to relatives or friends, *id.* at 14a, ¶131. Some plaintiffs also provide access to the Internet in addition to being speakers and users of online information. See *id.* at 16a-17a, ¶¶140-44; 23a-26a, ¶¶176-88.

The plaintiffs do not speak with a single voice or on a single issue. However, all plaintiffs engage in speech that may be regarded as "indecent" by some communities across this country, notwithstanding its social value.<sup>fn11</sup>

<sup>11</sup> As set forth in the record, that speech includes the following:

**Speech about AIDS, safer sex practices, and prisoner rape:** Plaintiffs include several individuals and organizations who engage in frank speech about sexual practices. Critical Path is typical. See *generally* J.A. 136-49. Both directly and through access to other sites, Critical Path provides an extensive online library concerning the transmission and treatment of AIDS.<sup>12</sup> The Critical Path Web site is accessed as often as 10,000 times per day by people all over the world. *Id.* at 138, ¶12. By definition, the information it provides deals with sexual activity, which is frequently described in colloquial terms that can be generally understood by its intended audience.

The importance of this information was summarized by Kiyoshi Kuromiya, who testified: "In my view, the information that Critical Path provides saves lives of both teenagers and adults and any attempt to censor or restrict the free flow of this life-saving information would be a critical public health mistake." Kuromiya Test. Decl. at 35, ¶13, ¶15, ¶16; see *also* M.A. 23a-36a, ¶¶176-188. Other plaintiffs also provide explicit information about safer sex. For example, the Safer Sex Web Page includes a photograph that illustrates the proper method of putting on a condom. See Pl.Exh. 50. They also host an online discussion group that allows individuals to discuss issues, such as how to talk about safer sex with a partner. See M.A. 29a-31a, ¶¶203-214; see *also id.* at 18a-21a, ¶¶155, 161; 32a-33a, ¶¶221-28.

Plaintiff Stop Prisoner Rape (SPR), a nonprofit organization dedicated to combatting the rape of prisoners and providing assistance to survivors, has a Web site that contains a variety of documents about prisoner rape that use raw, street language to discuss violence, sex and certain excretory functions used to humiliate victims. The site publishes testimonial letters from survivors that describe their brutal victimization and the psychological as well as physical devastation they experienced; these letters educate the public by conveying the horrible realities of prisoner rape in ways that statistics could never do. SPR also provides a forum for survivors to talk openly about their anger and fears, receive important survival tips, and dispel uneducated myths about the subject. See Donaldson Test. Decl.; M.A. 17a-19a, ¶¶145-154.

**Speech about gay and lesbian issues:** Plaintiffs also include individuals and organizations who engage in speech of particular interest to gay men and lesbians. For example, Wildcat Press, a publisher of gay and lesbian literature, sponsors two electronic magazines (e-zines) on the World Wide Web that are written by and for gay and lesbian youth. Patricia Nell Warren testified that the YouthArts e-zines "provide

a creative forum for many youth to discuss their coming out, their experiences with gay life and their sense of their own identity . . . Many of the contributors openly discuss sex and sexuality, often using slang common to their age group." Warren Test. Decl. at 9, ¶¶21, 23; see also M.A. 26a-27a, ¶¶189-193. See *id.* at 22a-23a, ¶¶168-175. Plaintiff National Writers Union hosts an online mailing list called "NWU-queer" for writers who are gay, lesbian, or bi-sexual. See *id.* at 14, ¶131.

**Speech about censorship and human rights:** Several of the plaintiffs engage in speech concerning censorship. For example, the ACLU posts online information that includes the text of the famous "Seven Dirty Words" comic monologue that was declared "indecent" in *FCC v. Pacifica*, 438 U.S. 726 (1978). In addition, the ACLU hosts online discussions on a variety of civil liberties topics, ranging from efforts to censor Howard Stern's best-selling book, "Private Parts," to a discussion of masturbation as part of a larger debate over the firing of former Surgeon General Jocelyn Elders. See M.A. 3a-4a, ¶¶78-80.

Human Rights Watch, a nongovernmental organization that monitors and promotes the observance of international human rights, posts some of its reports on their Internet site. Those reports can include graphic language about prostitution, rape, and torture involving sexual mutilation. See *id.* at 5a-6a, ¶¶85-92. Plaintiffs EPIC, EFF, Justice on Campus and Cyberwire Dispatch use the World Wide Web and online discussion groups to communicate about censorship; among other things, they often provide excerpts of censored material. See *id.* at 6a-10a, ¶¶1893-106; 27a-29a, ¶¶194-202.

**Controversial speech:** Plaintiffs also include authors, publishers, and teachers who use the Internet to write or provide access to fiction and nonfiction that often uses strong language and addresses controversial issues. These plaintiffs include the Ethical Spectacle, an online newsletter that has discussed Nazi experimentation and the morality of pornography; BiblioBytes, an online bookseller with over one thousand titles including romance novels, erotica, classics, and horror; ClariNet and Cyberwire Dispatch, who publish news articles that sometimes uses vulgar and graphic language; and the Journalism Education Association, a national organization of high school teachers that assists minors with online research on many subjects, including teenage sexuality, abortion, art and literature. See *id.* at 31a, ¶¶215-20; 15a-16a, ¶¶135-39; 21a-22a, ¶¶162-67; 28a-29a, ¶¶198-202; 10a-11a, ¶¶107-13.

Of course, the reach of the CDA extends far beyond the actual plaintiffs in this case. The government's own witnesses testified that the magazine *Vanity Fair*, with a nude cover photo of the actress Demi Moore, would be potentially indecent in some communities, J.A. 118-19, as would a political discussion that included the sentiment "Fuck the CDA," Olsen testimony, Tr. Vol. V, at 53-53. See also J.S. App. 99a (Buckwalter, J.); *id.* at 119a (Dalzell, J.). The trial court also found that artworks such as nudes by Edward Weston, material from contemporary films such as "Leaving Las Vegas," and reproductions of ancient Indian sculptures, are all within the CDA's broad proscriptions. See *id.* at 42a-47a, ¶¶74-75, 78, 85; 71a; 76a-77a.

### C. The Nature Of The Internet

The Internet is a "unique and wholly new medium of worldwide human communication." *Id.* at 46a, ¶81. Simply described, it is a giant, global communications network that connects innumerable smaller computer networks. *Id.* at 12a, ¶1. While difficult to estimate due to rapid growth, the Internet is believed to connect over 9,400,000 host computers worldwide and as many as 40 million people. *Id.* at 13a, ¶3. Only about 60% of the Internet's host computers are currently located in the United States, and the percentage of foreign sites is growing. *Id.* The medium allows "literally tens of millions of people . . . to exchange information. These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole." *Id.* at 13a-14a, ¶4. In the words of the trial court, "[i]t is no exaggeration to conclude that the content on the Internet is as diverse as human thought." *Id.* at 43a, ¶74. In addition to its vast online libraries, the Internet hosts conversations and even "'virtual communities' that simulate social interaction." *Id.*; see also Rheingold Test. Decl. at 2-3, ¶¶5-6 ("[V]irtual communities enable people to form associations that can enrich their lives and often carry over into face to face society").

As the trial court found, the evidence below "showed significant differences between Internet communications and communications received by radio or television." J.S. App. 49a, ¶89. Communications on the Internet do not "'invade' an individual's home or appear on one's computer screen unbidden." *Id.* at 49a, ¶88. Rather, the receipt of information on the Internet "requires a series of affirmative steps more deliberate and directed than merely turning a dial." *Id.* at ¶89. In addition, because the Internet is interactive, individuals can talk back, opposing speech they find disagreeable with more speech. The court also found that "[t]he start-up and operating costs entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication," permitting its use by individuals as well as large corporations. *Id.* at 44a, ¶76. The Internet is thus distinct because it is "not exclusively, or even primarily, a means of commercial communication." *Id.* at 43a, ¶75.

Search engines, which help computer users find information on the Internet, can on occasion "accidentally retrieve material of a sexual nature through an imprecise search." *Id.* at 49a, ¶88. However, the district court found many factors that decreased the likelihood of such an "accident":

A document's title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content. Even the Government's witness, Agent Howard Schmidt, Director of the Air Force Office of Special Investigations, testified that the "*odds are slim*" that a user would come across a sexually explicit site by accident.

*Id.* (emphasis added). <sup>13</sup>

#### **D. How Communication Takes Place On The Internet**

There are a variety of ways in which users can communicate in cyberspace. *See generally id.* at 21a-25a, ¶¶22-32. Electronic mail (e-mail) allows an online user to address and transmit a message to one or more people, "comparable in principle to sending a first class letter." *Id.* at 21a, ¶23. In addition, there are a wide variety of online discussion forums that allow groups of users to discuss and debate subjects of interest. The three most common methods for online discussion are mail exploders, USENET newsgroups, and chat rooms.

Mail exploders, also called listservs, allow online users to subscribe to automated mailing lists that discuss particular subjects of interest. Subscribers send an e-mail message to the "list," and the mail exploder automatically and simultaneously sends the message to all of the other subscribers on the list; subscribers can reply to the message by sending a response to the list. *Id.* at 22a, ¶24. Users of mailing lists can typically add or remove their names from the list automatically, with no direct human involvement. *Id.*

USENET newsgroups are huge databases of messages arranged according to subject matter, and online users may read or send a message to any newsgroup at any time without a prior "subscription." *Id.* at 22a-23a, ¶25. "USENET newsgroups . . . are among the most popular and widespread applications of Internet services, and cover all imaginable topics of interest to users." *Id.* There are newsgroups on more than 15,000 different subjects; "[c]ollectively, almost 100,000 new messages (or 'articles') are posted to newsgroups each day." *Id.* at 24a, ¶26.

In addition, chat rooms, or "Internet Relay Chats," allow "individuals on the Internet [to] . . . engage in an immediate dialog, in 'real time,' with other people on the Internet . . . IRC is analogous to a telephone party line, using a computer and keyboard rather than a telephone." *Id.* at 24a, ¶27. There are thousands of different chat rooms available, "in which collectively tens of thousands of users are engaging in conversations on a huge range of subjects." *Id.*

Finally, one of the most well-known methods for communicating information online is the "World Wide Web," which allows users to publish (or "post") documents, or "Web pages," that can then be accessed by any other user in the world. *See generally id.* at 25a-32a, ¶¶33-48. Most Web documents contain "links," which are "short sections of text or image which refer to another document." *Id.* at 27a, ¶36. When selected by the user, the "linked" document is automatically displayed, wherever in the world it is actually stored. *Id.* "These links from one computer to another, from one document to another across the Internet, are what unify the Web into a single body of knowledge, and what makes the Web unique." *Id.* at 28a, ¶39. Ease of access, the court found, has been the key to the tremendous success of the Web. *Id.* at 32a, ¶8.

### **E. The Inadequacy Of The Statutory Defenses**

Because the government essentially conceded that the CDA would be unconstitutional in the absence of the statutory defenses,<sup>14</sup> there was extensive evidence below on whether those defenses -- credit card verification, adult verification, or "good faith, reasonable, effective, and appropriate actions . . . to restrict or prevent access by minors to [prohibited] communications" -- were actually available to speakers on the Internet. It concluded they were not.

Thus, the district court found that *none* of the defenses were available *at all* to online speakers who communicate, debate and exchange information by e-mail, mail exploders, USENET newsgroups, and chat rooms. J.S. App. 49a, ¶90 ("There is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms"); *see also Shea*, 930 F.Supp. at 941 ("[A]s the government concedes, for the vast majority of applications and services available on the Internet, a user has no way of communicating . . . with certainty that the content will not reach a person under eighteen").

Specifically, the district court found that "[t]here is no reliable way in many instances for a sender to know if the e-mail recipient is an adult or a minor." J.S. App. 50a, ¶90. "The difficulty of e-mail age verification is compounded for mail exploders . . . which automatically send information to all e-mail addresses on a sender's list." *Id.* The government's expert agreed that no current technology could "give a speaker assurance that only adults" were subscribed to the list. *Id.*

Similarly, the defenses do not work for USENET newsgroups. *Id.* at 50a, ¶91. Newsgroups are "disseminated using ad hoc, peer to peer connections between approximately 200,000 computers . . . around the world," *id.* at 23a, ¶25, and the "dissemination of messages . . . is an automated process that does not require direct human intervention or review," *id.* at 23a-24a, ¶25. Likewise, speakers who communicate in real time through chat rooms "cannot ensure that all readers are adults." *Id.* at 50a, ¶90. Moreover, it is not technologically possible for speakers in e-mail, mail exploders, newsgroups, or chat rooms to "segregate" their speech in a way that wo