

SUPREME COURT OF THE UNITED STATES

ASHCROFT, ATTORNEY GENERAL v. AMERICAN CIVIL LIBERTIES UNION et al.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 00—1293. Argued November 28, 2001—Decided May 13, 2002

In *Reno v. American Civil Liberties Union*, 521 U.S. 844, this Court found that the Communications Decency Act of 1996 (CDA)—Congress’ first attempt to protect children from exposure to pornographic material on the Internet—ran afoul of the First Amendment in its regulation of indecent transmissions and the display of patently offensive material. That conclusion was based, in part, on the crucial consideration that the CDA’s breadth was wholly unprecedented. After the Court’s decision in *Reno*, Congress attempted to address this concern in the Child Online Protection Act (COPA). Unlike the CDA, COPA applies only to material displayed on the World Wide Web, covers only communications made for commercial purposes, and restricts only “material that is harmful to minors,” 47 U.S.C. § 231(a)(1). In defining “material that is harmful to minors,” COPA draws on the three-part obscenity test set forth in *Miller v. California*, 413 U.S. 15, see §231(e)(6), and thus requires jurors to apply “contemporary community standards” in assessing material, see §231(e)(6)(A). Respondents—who post or have members that post sexually oriented material on the Web—filed a facial challenge before COPA went into effect, claiming, *inter alia*, that the statute violated adults’ First Amendment rights because it effectively banned constitutionally protected speech, was not the least restrictive means of accomplishing a compelling governmental purpose, and was substantially overbroad. The District Court issued a preliminary injunction barring the enforcement of COPA because it concluded that the statute was unlikely to survive strict scrutiny. The Third Circuit affirmed but based its decision on a ground not relied upon by the District Court: that COPA’s use of “contemporary community standards,” §231(e)(6)(A), to identify material that is harmful to minors rendered the statute substantially overbroad.

Held: COPA’s reliance on “community standards” to identify what material “is harmful to minors” does not by itself render the statute substantially overbroad for First Amendment purposes. The Court, however, expresses no view as to whether COPA suffers from substantial overbreadth for reasons other than its use of community standards, whether the statute is unconstitutionally vague, or whether the statute survives strict scrutiny. Prudence dictates allowing the Third Circuit to first examine these difficult issues. Because petitioner did not ask to have the preliminary injunction vacated, and because this Court could not do so without addressing matters the Third Circuit has yet to consider, the Government remains enjoined from enforcing COPA absent further action by the lower courts. P. 22.

217 F.3d 162, vacated and remanded.

Thomas, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, in which Rehnquist, C. J., and O'Connor, Scalia, and Breyer, JJ., joined, an opinion with respect to Part III—B, in which Rehnquist, C. J., and O'Connor and Scalia, JJ., joined, and an opinion with respect to Parts III—A, III—C, and III—D, in which Rehnquist, C. J., and Scalia, J., joined. O'Connor, J., and Breyer, J., filed opinions concurring in part and concurring in the judgment. Kennedy, J., filed an opinion concurring in the judgment, in which Souter and Ginsburg, JJ., joined. Stevens, J., filed a dissenting opinion.

Opinion of the Court

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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[May 13, 2002]

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This case presents the narrow question whether the Child Online Protection Act's (COPA or Act) use of "community standards" to identify "material that is harmful to minors" violates the First Amendment. We hold that this aspect of COPA does not render the statute facially unconstitutional.

I

"The Internet ... offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3) (1994 ed., Supp. V). While "surfing" the World Wide Web, the primary method of remote information retrieval on the Internet today,¹ see App. in No. 99—

1324 (CA3), p. 180 (hereinafter App.), individuals can access material about topics ranging from aardvarks to Zoroastrianism. One can use the Web to read thousands of newspapers published around the globe, purchase tickets for a matinee at the neighborhood movie theater, or follow the progress of any Major League Baseball team on a pitch-by-pitch basis.

The Web also contains a wide array of sexually explicit material, including hardcore pornography. See, e.g., *American Civil Liberties Union v. Reno*, 31 F. Supp. 2d 473, 484 (ED Pa. 1999). In 1998, for instance, there were approximately 28,000 adult sites promoting pornography on the Web. See H. R. Rep. No. 105—775, p. 7 (1998). Because “[n]avigating the Web is relatively straightforward,” *Reno v. American Civil Liberties Union*, 521 U.S. 844, 852 (1997), and access to the Internet is widely available in homes, schools, and libraries across the country,² see App. 177—178, children may discover this pornographic material either by deliberately accessing pornographic Web sites or by stumbling upon them. See 31 F. Supp. 2d, at 476 (“A child with minimal knowledge of a computer, the ability to operate a browser, and the skill to type a few simple words may be able to access sexual images and content over the World Wide Web”).

Congress first attempted to protect children from exposure to pornographic material on the Internet by enacting the Communications Decency Act of 1996 (CDA), 110 Stat. 133. The CDA prohibited the knowing transmission over the Internet of obscene or indecent messages to any recipient under 18 years of age. See 47 U.S.C. § 223(a). It also forbade any individual from knowingly sending over or displaying on the Internet certain “patently offensive” material in a manner available to persons under 18 years of age. See §223(d). The prohibition specifically extended to “any comment, request, suggestion, proposal, image, or other communication that, in context, depict[ed] or describ[ed], in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.” §223(d)(1).

The CDA provided two affirmative defenses to those prosecuted under the statute. The first protected individuals who took “good faith, reasonable, effective, and appropriate actions” to restrict minors from accessing obscene, indecent, and patently offensive material over the Internet. See §223(e)(5)(A). The second shielded those who restricted minors from accessing such material “by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.” §223(e)(5)(B).

Notwithstanding these affirmative defenses, in *Reno v. American Civil Liberties Union*, we held that the CDA’s regulation of indecent transmissions, see §223(a), and the display of patently offensive material, see §223(d), ran afoul of the First Amendment. We concluded that “the CDA lack[ed] the precision that the First Amendment requires when a statute regulates the content of speech” because, “[i]n order to deny minors access to potentially harmful speech, the CDA effectively suppress[ed] a large amount of speech that adults ha[d] a constitutional right to receive and to address to one another.” 521 U.S., at 874.

Our holding was based on three crucial considerations. First, “existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults.” *Id.*, at 876.

Second, “[t]he breadth of the CDA’s coverage [was] wholly unprecedented.” *Id.*, at 877. “Its open-ended prohibitions embrace[d],” not only commercial speech or commercial entities, but also “all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors.” *Ibid.* In addition, because the CDA did not define the terms “indecent” and “patently offensive,” the statute “cover[ed] large amounts of nonpornographic material with serious educational or other value.” *Ibid.* As a result, regulated subject matter under the CDA extended to “discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library.” *Id.*, at 878. Third, we found that neither affirmative defense set forth in the CDA “constitute[d] the sort of ‘narrow tailoring’ that [would] save an otherwise patently invalid unconstitutional provision.” *Id.*, at 882. Consequently, only the CDA’s ban on the knowing transmission of obscene messages survived scrutiny because obscene speech enjoys no First Amendment protection. See *id.*, at 883.

After our decision in *Reno v. American Civil Liberties Union*, Congress explored other avenues for restricting minors’ access to pornographic material on the Internet. In particular, Congress passed and the President signed into law the Child Online Protection Act, 112 Stat. 2681—736 (codified in 47 U.S.C. § 231 (1994 ed., Supp. V)). COPA prohibits any person from “knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors.” 47 U.S.C. § 231(a)(1).

Apparently responding to our objections to the breadth of the CDA’s coverage, Congress limited the scope of COPA’s coverage in at least three ways. First, while the CDA applied to communications over the Internet as a whole, including, for example, e-mail messages, COPA applies only to material displayed on the World Wide Web. Second, unlike the CDA, COPA covers only communications made “for commercial purposes.”³ *Ibid.* And third, while the CDA prohibited “indecent” and “patently offensive” communications, COPA restricts only the narrower category of “material that is harmful to minors.” *Ibid.*

Drawing on the three-part test for obscenity set forth in *Miller v. California*, 413 U.S. 15 (1973), COPA defines “material that is harmful to minors” as

“any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

“(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

“(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal

or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

“(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.” 47 U.S.C. § 231(e)(6).

Like the CDA, COPA also provides affirmative defenses to those subject to prosecution under the statute. An individual may qualify for a defense if he, “in good faith, has restricted access by minors to material that is harmful to minors—(A) by requiring the use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology.” §231(c)(1). Persons violating COPA are subject to both civil and criminal sanctions. A civil penalty of up to \$50,000 may be imposed for each violation of the statute. Criminal penalties consist of up to six months in prison and/or a maximum fine of \$50,000. An additional fine of \$50,000 may be imposed for any intentional violation of the statute. §231(a).

One month before COPA was scheduled to go into effect, respondents filed a lawsuit challenging the constitutionality of the statute in the United States District Court for the Eastern District of Pennsylvania. Respondents are a diverse group of organizations,⁴ most of which maintain their own Web sites. While the vast majority of content on their Web sites is available for free, respondents all derive income from their sites. Some, for example, sell advertising that is displayed on their Web sites, while others either sell goods directly over their sites or charge artists for the privilege of posting material. 31 F. Supp. 2d, at 487. All respondents either post or have members that post sexually oriented material on the Web. *Id.*, at 480. Respondents’ Web sites contain “resources on obstetrics, gynecology, and sexual health; visual art and poetry; resources designed for gays and lesbians; information about books and stock photographic images offered for sale; and online magazines.” *Id.*, at 484.

In their complaint, respondents alleged that, although they believed that the material on their Web sites was valuable for adults, they feared that they would be prosecuted under COPA because some of that material “could be construed as ‘harmful to minors’ in some communities.” App. 63. Respondents’ facial challenge claimed, *inter alia*, that COPA violated adults’ rights under the First and Fifth Amendments because it (1) “create[d] an effective ban on constitutionally protected speech by and to adults”; (2) “[was] not the least restrictive means of accomplishing any compelling governmental purpose”; and (3) “[was] substantially overbroad.”⁵ *Id.*, at 100–101.

The District Court granted respondents’ motion for a preliminary injunction, barring the Government from enforcing the Act until the merits of respondents’ claims could be adjudicated. 31 F. Supp. 2d, at 499. Focusing on respondents’ claim that COPA abridged the free speech rights of adults, the District Court concluded that respondents had established a likelihood of success on the merits. *Id.*, at 498. The District Court reasoned that because COPA constitutes content-based regulation of sexual expression protected by the First Amendment, the statute, under this Court’s precedents, was “presumptively invalid” and “subject to strict scrutiny.” *Id.*, at 493. The District Court then held that respondents were likely to establish at trial that COPA could not withstand such scrutiny

because, among other reasons, it was not apparent that COPA was the least restrictive means of preventing minors from accessing “harmful to minors” material. *Id.*, at 497.

The Attorney General of the United States appealed the District Court’s ruling. *American Civil Liberties Union v. Reno*, 217 F.3d 162 (CA3 2000). The United States Court of Appeals for the Third Circuit affirmed. Rather than reviewing the District Court’s “holding that COPA was not likely to succeed in surviving strict scrutiny analysis,” the Court of Appeals based its decision entirely on a ground that was not relied upon below and that was “virtually ignored by the parties and the amicus in their respective briefs.” *Id.*, at 173—174. The Court of Appeals concluded that COPA’s use of “contemporary community standards” to identify material that is harmful to minors rendered the statute substantially overbroad. Because “Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users,” the Court of Appeals reasoned that COPA would require “any material that might be deemed harmful by the most puritan of communities in any state” to be placed behind an age or credit card verification system. *Id.*, at 175. Hypothesizing that this step would require Web publishers to shield “vast amounts of material,” *ibid.*, the Court of Appeals was “persuaded that this aspect of COPA, without reference to its other provisions, must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute.” *Id.*, at 174.

We granted the Attorney General’s petition for certiorari, 532 U.S. 1037 (2001), to review the Court of Appeals’ determination that COPA likely violates the First Amendment because it relies, in part, on community standards to identify material that is harmful to minors, and now vacate the Court of Appeals’ judgment.

II

The First Amendment states that “Congress shall make no law ... abridging the freedom of speech.” This provision embodies “[o]ur profound national commitment to the free exchange of ideas.” *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989). “[A]s a general matter, ‘the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’ ” *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). However, this principle, like other First Amendment principles, is not absolute. Cf. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

Obscene speech, for example, has long been held to fall outside the purview of the First Amendment. See, e.g., *Roth v. United States*, 354 U.S. 476, 484—485 (1957). But this Court struggled in the past to define obscenity in a manner that did not impose an impermissible burden on protected speech. See *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part) (referring to the “intractable obscenity problem”); see also *Miller v. California*, 413 U.S., at 20—23 (reviewing “the somewhat tortured history of th[is] Court’s obscenity decisions”). The difficulty resulted from the belief that “in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression.” *Id.*, at 22—23.

Ending over a decade of turmoil, this Court in *Miller* set forth the governing three-part test for assessing whether material is obscene and thus unprotected by the First Amendment: “(a) [W]hether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Id.*, at 24 (internal citations omitted; emphasis added).

Miller adopted the use of “community standards” from *Roth*, which repudiated an earlier approach for assessing objectionable material. Beginning in the 19th century, English courts and some American courts allowed material to be evaluated from the perspective of particularly sensitive persons. See, e.g., *Queen v. Hicklin* [1868] L. R. 3 Q. B. 360; see also *Roth*, 354 U.S., at 488–489, and n. 25 (listing relevant cases). But in *Roth*, this Court held that this sensitive person standard was “unconstitutionally restrictive of the freedoms of speech and press” and approved a standard requiring that material be judged from the perspective of “the average person, applying contemporary community standards.” *Id.*, at 489. The Court preserved the use of community standards in formulating the *Miller* test, explaining that they furnish a valuable First Amendment safeguard: “[T]he primary concern ... is to be certain that ... [material] will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one.” *Miller*, 413 U.S., at 33 (internal quotation marks omitted); see also *Hamling v. United States*, 418 U.S. 87, 107 (1974) (emphasizing that the principal purpose of the community standards criterion “is to assure that the material is judged neither on the basis of each juror’s personal opinion, nor by its effect on a particularly sensitive or insensitive person or group”).

III

The Court of Appeals, however, concluded that this Court’s prior community standards jurisprudence “has no applicability to the Internet and the Web” because “Web publishers are currently without the ability to control the geographic scope of the recipients of their communications.” 217 F.3d, at 180. We therefore must decide whether this technological limitation renders COPA’s reliance on community standards constitutionally infirm.⁶

A

In addressing this question, the parties first dispute the nature of the community standards that jurors will be instructed to apply when assessing, in prosecutions under COPA, whether works appeal to the prurient interest of minors and are patently offensive with respect to minors.⁷ Respondents contend that jurors will evaluate material using “local community standards,” Brief for Respondents 40, while petitioner maintains that jurors will not consider the community standards of any particular geographic area, but rather will be “instructed to consider the standards of the adult community as a whole, without geographic specification.” Brief for Petitioner 38.

In the context of this case, which involves a facial challenge to a statute that has never been enforced, we do not think it prudent to engage in speculation as to whether certain hypothetical jury instructions would or would not be consistent with COPA, and deciding this case does not require us to do so. It is sufficient to note that community standards need not be defined by reference to a precise geographic area. See *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) (“A State may choose to define an obscenity offense in terms of ‘contemporary community standards’ as defined in *Miller* without further specification ... or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*”). Absent geographic specification, a juror applying community standards will inevitably draw upon personal “knowledge of the community or vicinage from which he comes.” *Hamling*, *supra*, at 105. Petitioner concedes the latter point, see Reply Brief for Petitioner 3–4, and admits that, even if jurors were instructed under COPA to apply the standards of the adult population as a whole, the variance in community standards across the country could still cause juries in different locations to reach inconsistent conclusions as to whether a particular work is “harmful to minors.” Brief for Petitioner 39.

B

Because juries would apply different standards across the country, and Web publishers currently lack the ability to limit access to their sites on a geographic basis, the Court of Appeals feared that COPA’s “community standards” component would effectively force all speakers on the Web to abide by the “most puritan” community’s standards. 217 F.3d, at 175. And such a requirement, the Court of Appeals concluded, “imposes an overreaching burden and restriction on constitutionally protected speech.” *Id.*, at 177.

In evaluating the constitutionality of the CDA, this Court expressed a similar concern over that statute’s use of community standards to identify patently offensive material on the Internet. We noted that “the ‘community standards’ criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.” *Reno*, 521 U.S., at 877–878. The Court of Appeals below relied heavily on this observation, stating that it was “not persuaded that the Supreme Court’s concern with respect to the ‘community standards’ criterion has been sufficiently remedied by Congress in COPA.” 217 F.3d, at 174.

The CDA’s use of community standards to identify patently offensive material, however, was particularly problematic in light of that statute’s unprecedented breadth and vagueness. The statute covered communications depicting or describing “sexual or excretory activities or organs” that were “patently offensive as measured by contemporary community standards”—a standard somewhat similar to the second prong of *Miller*’s three-prong test. But the CDA did not include any limiting terms resembling *Miller*’s additional two prongs. See *Reno*, 521 U.S., at 873. It neither contained any requirement that restricted material appeal to the prurient interest nor excluded from the scope of its coverage works with serious literary, artistic, political, or scientific value. *Ibid.* The tremendous breadth of the CDA magnified the impact caused by differences in community standards across the country, restricting Web publishers from openly

displaying a significant amount of material that would have constituted protected speech in some communities across the country but run afoul of community standards in others.

COPA, by contrast, does not appear to suffer from the same flaw because it applies to significantly less material than did the CDA and defines the harmful-to-minors material restricted by the statute in a manner parallel to the Miller definition of obscenity. See *supra*, at 5—6, 10. To fall within the scope of COPA, works must not only “depic[t], describ[e], or represen[t], in a manner patently offensive with respect to minors,” particular sexual acts or parts of the anatomy,⁸ they must also be designed to appeal to the prurient interest of minors and “taken as a whole, lac[k] serious literary, artistic, political, or scientific value for minors.” 47 U.S.C. § 231(e)(6).

These additional two restrictions substantially limit the amount of material covered by the statute. Material appeals to the prurient interest, for instance, only if it is in some sense erotic. Cf. *Erznoznik v. Jacksonville*, 422 U.S. 205, 213, and n. 10 (1975).⁹ Of even more significance, however, is COPA’s exclusion of material with serious value for minors. See 47 U.S.C. § 231(e)(6)(C). In *Reno*, we emphasized that the serious value “requirement is particularly important because, unlike the ‘patently offensive’ and ‘prurient interest’ criteria, it is not judged by contemporary community standards.” 521 U.S., at 873 (citing *Pope v. Illinois*, 481 U.S. 497, 500 (1987)). This is because “the value of [a] work [does not] vary from community to community based on the degree of local acceptance it has won.” *Id.*, at 500. Rather, the relevant question is “whether a reasonable person would find ... value in the material, taken as a whole.” *Id.*, at 501. Thus, the serious value requirement “allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value.” *Reno, supra*, at 873 (emphasis added), a safeguard nowhere present in the CDA.¹⁰

C

When the scope of an obscenity statute’s coverage is sufficiently narrowed by a “serious value” prong and a “prurient interest” prong, we have held that requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment. In *Hamling v. United States*, 418 U.S. 87 (1974), this Court considered the constitutionality of applying community standards to the determination of whether material is obscene under 18 U.S.C. § 1461 the federal statute prohibiting the mailing of obscene material. Although this statute does not define obscenity, the petitioners in *Hamling* were tried and convicted under the definition of obscenity set forth in *Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Mass.*, 383 U.S. 413 (1966), which included both a “prurient interest” requirement and a requirement that prohibited material be “ ‘utterly without redeeming social value.’ ” *Hamling, supra*, at 99 (quoting *Memoirs, supra*, at 418).

Like respondents here, the dissenting opinion in *Hamling* argued that it was unconstitutional for a federal statute to rely on community standards to regulate speech. Justice Brennan maintained that “[n]ational distributors choosing to send their products in interstate travels [would] be forced to cope with the community standards of every hamlet into which their goods [might] wander.” 418 U.S., at 144. As a result, he claimed

that the inevitable result of this situation would be “debilitating self-censorship that abridges the First Amendment rights of the people.” *Ibid.*

This Court, however, rejected Justice Brennan’s argument that the federal mail statute unconstitutionally compelled speakers choosing to distribute materials on a national basis to tailor their messages to the least tolerant community: “The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional.” *Id.*, at 106.

Fifteen years later, Hamling’s holding was reaffirmed in *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989). *Sable* addressed the constitutionality of 47 U.S.C. § 223(b) (1982 ed., Supp. V), a statutory provision prohibiting the use of telephones to make obscene or indecent communications for commercial purposes. The petitioner in that case, a “dial-a-porn” operator, challenged, in part, that portion of the statute banning obscene phone messages. Like respondents here, the “dial-a-porn” operator argued that reliance on community standards to identify obscene material impermissibly compelled “message senders ... to tailor all their messages to the least tolerant community.” 492 U.S., at 124. Relying on *Hamling*, however, this Court once again rebuffed this attack on the use of community standards in a federal statute of national scope: “There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. If *Sable*’s audience is comprised of different communities with different local standards, *Sable* ultimately bears the burden of complying with the prohibition on obscene messages.” 492 U.S., at 125—126 (emphasis added).

The Court of Appeals below concluded that *Hamling* and *Sable* “are easily distinguished from the present case” because in both of those cases “the defendants had the ability to control the distribution of controversial material with respect to the geographic communities into which they released it” whereas “Web publishers have no such comparable control.” 217 F.3d, at 175—176. In neither *Hamling* nor *Sable*, however, was the speaker’s ability to target the release of material into particular geographic areas integral to the legal analysis. In *Hamling*, the ability to limit the distribution of material to targeted communities was not mentioned, let alone relied upon,¹² and in *Sable*, a dial-a-porn operator’s ability to screen incoming calls from particular areas was referenced only as a supplemental point, see 492 U.S., at 125.¹³ In the latter case, this Court made no effort to evaluate how burdensome it would have been for dial-a-porn operators to tailor their messages to callers from thousands of different communities across the Nation, instead concluding that the burden of complying with the statute rested with those companies. See *id.*, at 126.

While Justice Kennedy and Justice Stevens question the applicability of this Court’s community standards jurisprudence to the Internet, we do not believe that the medium’s “unique characteristics” justify adopting a different approach than that set forth in *Hamling* and *Sable*. See *post*, at 4—5 (Kennedy, J., concurring in judgment). If a publisher chooses to send its material into a particular community, this Court’s jurisprudence teaches that it is the publisher’s responsibility to abide by that community’s standards. The publisher’s burden does not change simply because it decides to distribute its

material to every community in the Nation. See *Sable*, supra, at 125—126. Nor does it change because the publisher may wish to speak only to those in a “community where avant garde culture is the norm,” post, at 6 (Kennedy, J., concurring in judgment), but nonetheless utilizes a medium that transmits its speech from coast to coast. If a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities.¹⁴

Respondents offer no other grounds upon which to distinguish this case from *Hamling* and *Sable*. While those cases involved obscenity rather than material that is harmful to minors, we have no reason to believe that the practical effect of varying community standards under COPA, given the statute’s definition of “material that is harmful to minors,” is significantly greater than the practical effect of varying community standards under federal obscenity statutes. It is noteworthy, for example, that respondents fail to point out even a single exhibit in the record as to which coverage under COPA would depend upon which community in the country evaluated the material. As a result, if we were to hold COPA unconstitutional because of its use of community standards, federal obscenity statutes would likely also be unconstitutional as applied to the Web,¹⁵ a result in substantial tension with our prior suggestion that the application of the CDA to obscene speech was constitutional. See *Reno*, 521 U.S., at 877, n. 44, 882—883.

D

Respondents argue that COPA is “unconstitutionally overbroad” because it will require Web publishers to shield some material behind age verification screens that could be displayed openly in many communities across the Nation if Web speakers were able to limit access to their sites on a geographic basis. Brief for Respondents 33—34. “[T]o prevail in a facial challenge,” however, “it is not enough for a plaintiff to show ‘some’ overbreadth.” *Reno*, supra, at 896 (O’Connor, J., concurring in judgment in part and dissenting in part). Rather, “the overbreadth of a statute must not only be real, but substantial as well.” *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). At this stage of the litigation, respondents have failed to satisfy this burden, at least solely as a result of COPA’s reliance on community standards.¹⁶ Because Congress has narrowed the range of content restricted by COPA in a manner analogous to Miller’s definition of obscenity, we conclude, consistent with our holdings in *Hamling* and *Sable*,

that any variance caused by the statute’s reliance on community standards is not substantial enough to violate the First Amendment.

IV

The scope of our decision today is quite limited. We hold only 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. We do not express any view as to whether COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the District Court correctly concluded that the statute likely will not survive strict scrutiny analysis once

adjudication of the case is completed below. While respondents urge us to resolve these questions at this time, prudence dictates allowing the Court of Appeals to first examine these difficult issues.

Petitioner does not ask us to vacate the preliminary injunction entered by the District Court, and in any event, we could not do so without addressing matters yet to be considered by the Court of Appeals. As a result, the Government remains enjoined from enforcing COPA absent further action by the Court of Appeals or the District Court.

For the foregoing reasons, we vacate the judgment of the Court of Appeals and remand the case for further proceedings.

It is so ordered.

Notes

1. For a thorough explanation of the history, structure, and operation of the Internet and World Wide Web, see *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849—853 (1997).
2. When this litigation commenced in 1998, “[a]pproximately 70.2 million people of all ages use[d] the Internet in the United States.” App. 171. It is now estimated that 115.2 million Americans use the Internet at least once a month and 176.5 million Americans have Internet access either at home or at work. See *More Americans Online*, *New York Times*, Nov. 19, 2001, p. C7.
3. The statute provides that “[a] person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.” 47 U.S.C. § 231(e)(2)(A) (1994 ed., Supp. V). COPA then defines the term “engaged in the business” to mean a person: “who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person’s trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person’s sole or principal business or source of income).” §231(e)(2)(B).
4. Respondents include the American Civil Liberties Union, Androgony Books, Inc., d/b/a A Different Light Bookstores, the American Booksellers Foundation for Free Expression, Artnet Worldwide Corporation, BlackStripe, Addazi Inc. d/b/a Condomania, the Electronic Frontier Foundation, the Electronic Privacy Information Center, Free Speech Media, OBGYN.net, Philadelphia Gay News, PlanetOut Corporation, Powell’s Bookstore, Riotgrll, Salon Internet, Inc., and West Stock, Inc., now known as ImageState North America, Inc.
5. In three other claims, which are not relevant to resolving the dispute at hand, respondents alleged that COPA infringed the free speech rights of older minors, violated

the right to “communicate and access information anonymously,” and was “unconstitutionally vague.” App. 101—102.

6. While petitioner contends that a speaker on the Web possesses the ability to communicate only with individuals located in targeted geographic communities, Brief for Petitioner 29, n. 3, he stipulated below that “[o]nce a provider posts its content on the Internet and chooses to make it available to all, it generally cannot prevent that content from entering any geographic community.” App. 187. The District Court adopted this stipulation as a finding of fact, see *American Civil Liberties Union v. Reno*, 31 F. Supp. 2d 473, 484 (ED Pa. 1999), and petitioner points to no evidence in the record suggesting that this finding is clearly erroneous.

7. Although the phrase “contemporary community standards” appears only in the “prurient interest” prong of the Miller test, see *Miller v. California*, 413 U.S. 15, 24 (1973), this Court has indicated that the “patently offensive” prong of the test is also a question of fact to be decided by a jury applying contemporary community standards. See, e.g., *Pope v. Illinois*, 481 U.S. 497, 500 (1987). The parties here therefore agree that even though “contemporary community standards” are similarly mentioned only in the “prurient interest” prong of COPA’s harmful-to-minors definition, see 47 U.S.C. § 231(e)(6)(A), jurors will apply “contemporary community standards” as well in evaluating whether material is “patently offensive with respect to minors,” §231(e)(6)(B).

8. While the CDA allowed juries to find material to be patently offensive so long as it depicted or described “sexual or excretory activities or organs,” COPA specifically delineates the sexual activities and anatomical features, the depictions of which may be found to be patently offensive: “an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast.” 47 U.S.C. § 231(e)(6)(B).

9. Justice Stevens argues that the “prurient interest” prong does not “substantially narrow the category of images covered” by COPA because “[a]rguably every depiction of nudity—partial or full—is in some sense erotic with respect to minors,” post, at 6—7 (dissenting opinion) (emphasis in original). We do not agree. For example, we have great difficulty understanding how pictures of a war victim’s wounded nude body could reasonably be described under the vast majority of circumstances as erotic, especially when evaluated from the perspective of minors. See *Webster’s Ninth New Collegiate Dictionary* 422 (1991) (defining erotic as “of, devoted to, or tending to arouse sexual love or desire”).

10. Justice Stevens contends that COPA’s serious value prong only marginally limits the sweep of the statute because it does not protect all material with serious value but just those works with serious value for minors. See post, at 7. His dissenting opinion, however, does not refer to any evidence supporting this counterintuitive assertion, and there is certainly none in the record suggesting that COPA restricts about the same amount of material as did the CDA. Moreover, Justice Stevens does not dispute that COPA’s “serious value” prong serves the important purpose of allowing appellate courts to set “as a matter of law, a national floor for socially redeeming value.” *Reno*, 521 U.S., at 873.

11. Although nowhere mentioned in the relevant statutory text, this Court has held that the Miller test defines regulated speech for purposes of federal obscenity statutes such as 47 U.S.C. § 223(b) (1994 ed.). See, e.g., *Smith v. United States*, 431 U.S. 291, 299 (1977).

12. This fact was perhaps omitted because under the federal statute at issue in *Hamling v. United States*, 418 U.S. 87 (1974), a defendant could be prosecuted in any district through which obscene mail passed while it was on route to its destination, see *id.*, at 143–144 (Brennan, J., dissenting), and a postal customer obviously lacked the ability to control the path his letter traveled as it made its way to its intended recipient.

13. Justice Stevens’ contention that this Court “upheld the application of community standards to a nationwide medium” in *Sable* due to the fact that “[it] was at least possible” for dial-a-porn operators to tailor their messages to particular communities is inaccurate. See *post*, at 4 (dissenting opinion). This Court’s conclusion clearly did not hinge either on the fact that dial-a-porn operators could prevent callers in particular communities from accessing their messages or on an assessment of how burdensome it would have been for dial-a-porn operators to take that step. Rather, these companies were required to abide by the standards of various communities for the sole reason that they transmitted their material into those communities. See *Sable*, 492 U.S., at 126 (“If *Sable*’s audience is comprised of different communities with different local standards, *Sable* ultimately bears the burden of complying with the prohibition on obscene messages”).

14. In addition, COPA does not, as Justice Kennedy suggests, “foreclose an entire medium of expression.” *Post*, at 6 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994)). While Justice Kennedy and Justice Stevens repeatedly imply that COPA banishes from the Web material deemed harmful to minors by reference to community standards, see, e.g., *post*, at 6 (opinion concurring in judgment); *post*, at 7, 11 (dissenting opinion), the statute does no such thing. It only requires that such material be placed behind adult identification screens.

15. Obscene material, for instance, explicitly falls within the coverage of COPA. See 47 U.S.C. § 231(e)(6) (1994 ed., Supp. V).

16. Justice Stevens’ conclusion to the contrary is based on little more than “speculation.” See, e.g., *post*, at 8 (Kennedy, J., concurring in judgment). The only objective evidence cited in the dissenting opinion for the proposition that COPA “will restrict a substantial amount of protected speech that would not be considered harmful to minors in many communities” are various anecdotes compiled in an amici brief. See *post*, at 10 (citing Brief for Volunteer Lawyers for the Arts et al. as Amici Curiae 4–10). Justice Stevens, however, is not even willing to represent that these anecdotes relate to material restricted under COPA, see *post*, at 10, and we understand his reluctance for the vast majority of the works cited in that brief, if not all of them, are likely unaffected by the statute. See Brief for Volunteer Lawyer for the Arts et al. as Amici Curiae 4–10 (describing, among other incidents, controversies in various communities regarding Maya Angelou’s *I Know Why The Caged Bird Sings*, Judy Blume’s *Are You There God? It’s Me,*

Margaret, Aldous Huxley's *Brave New World*, J.D. Salinger's *Catcher in the Rye*, 1993 Academy Award Best Picture nominee *The Piano*, the American Broadcasting Corporation television network's *NYPD Blue*, and songs of the "popular folk-rock duo" the Indigo Girls). These anecdotes are therefore of questionable relevance to the matter at hand and certainly do not constitute a sufficient basis for invalidating a federal statute. Moreover, we do not agree with Justice Kennedy's suggestion that it is necessary for the Court of Appeals to revisit this question upon remand. See post, at 8—9. The lack of evidence in the record relevant to the question presented does not indicate that "we should vacate for further consideration." Post, at 9. Rather, it indicates that respondents, by offering little more than "speculation," have failed to meet their burden of demonstrating in this facial challenge that COPA's reliance on community standards renders the statute substantially overbroad.