(Bench Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 96–511. Argued March 19, 1997—Decided June 26, 1997

Two provisions of the Communications Decency Act of 1996 (CDA or Act) seek to protect minors from harmful material on the Internet, an international network of interconnected computers that enables millions of people to communicate with one another in "cyberspace" and to access vast amounts of information from around the world. Title 47 U. S. C. A. §223(a)(1)(B)(ii) (Supp. 1997) criminalizes the "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age. Section 223(d) prohibits the "knowin[g]" sending or displaying to a person under 18 of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." Affirmative defenses are provided for those who take "good faith, . . . effective . . . actions" to restrict access by minors to the prohibited communications, §223(e)(5)(A), and those who restrict such access by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number, §223(e)(5)(B). A number of plaintiffs filed suit challenging the constitutionality of §§223(a)(1) and 223(d). After making extensive findings of fact, a three-judge District Court convened pursuant to the Act entered a preliminary injunction against enforcement of both challenged provisions. The court's judgment enjoins the Government from enforcing §223(a)(1)(B)'s prohibitions insofar as they relate to "indecent" communications, but expressly preserves the Government's right to investigate and prosecute the obscenity or child pornography activities prohibited therein. The injunction against enforcement of §223(d) is unqualified because that section contains no separate reference to obscenity or child pornography. The Government appealed to this Court under the Act's special review provisions, arguing that the District Court erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague.

Held: The CDA's "indecent transmission" and "patently offensive display" provisions abridge "the freedom of speech" protected by the First Amendment. Pp. 17–40.

(a) Although the CDA's vagueness is relevant to the First Amendment overbreadth inquiry, the judgment should be affirmed without reaching the Fifth Amendment issue. P. 17.

(b) A close look at the precedents relied on by the Government—*Ginsberg*

v. *New York*, 390 U. S. 629; *FCC* v. *Pacifica Foundation*, 438 U. S. 726; and *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41—raises, rather than relieves, doubts about the CDA's constitutionality. The CDA differs from the various laws and orders upheld in those cases in many ways, including that it does not allow parents to consent to their children's use of restricted materials; is not limited to commercial transactions; fails to provide any definition of "indecent" and omits any requirement that "patently offensive" material lack socially redeeming value; neither limits its broad categorical prohibitions to particular times nor bases them on an evaluation by an agency familiar with the medium's unique characteristics; is punitive; applies to a medium that, unlike radio, receives full First Amendment protection; and cannot be properly analyzed as a form of time, place, and manner regulation because it is a content-based blanket restriction on speech. These precedents, then, do not require the Court to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions. Pp. 17–21.

(c) The special factors recognized in some of the Court's cases as justifying regulation of the broadcast media—the history of extensive government regulation of broadcasting, see, *e.g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 399–400; the scarcity of available frequencies at its inception, see, *e.g.*, *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 637–638; and its "invasive" nature, see *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 128—are not present in cyberspace. Thus, these cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet. Pp. 22–24.

(d) Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for First Amendment purposes. For instance, its use of the undefined terms "indecent" and "patently offensive" will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean. The vagueness of such a content-based regulation, see, *e.g.*, *Gentile* v. *State Bar of Nev.*, 501 U. S. 1030, coupled with its increased deterrent effect as a criminal statute, see, *e.g.*, *Dombrowski* v. *Pfister*, 380 U. S. 479, raise special First Amendment concerns because of its obvious chilling effect on free speech. Contrary to the Government's argument, the CDA is not saved from vagueness by the fact that its "patently offensive" standard repeats the second part of the three-prong obscenity test set forth in *Miller* v. *California*, 413 U. S. 15, 24. The second *Miller* prong reduces the inherent vagueness of its own "patently offensive" term by requiring that the proscribed material be "specifically defined by the applicable state law." In addition, the CDA applies only to "sexual conduct," whereas, the CDA prohibition extends also to "excretory activities" and "organs" of both a sexual and excretory nature. Each of *Miller*'s other two prongs also critically limits the uncertain sweep of the obscenity definition. Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing alone, is not vague. The CDA's vagueness undermines the likelihood that it has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials. Pp. 24–28.

(e) The CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. Although the Government has an interest in protecting children from potentially harmful materials, see, *e.g.*, *Ginsberg*, 390 U. S., at 639, the CDA pursues that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive, see, *e.g.*, *Sable*, *supra*, at 126. Its breadth is wholly unprecedented. The CDA's burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the Act's legitimate purposes. See, *e.g.*, *Sable*, 492 U. S., at 126.

The Government has not proved otherwise. On the other hand, the District Court found that currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing material which the *parents* believe is inappropriate will soon be widely available. Moreover, the arguments in this Court referred to possible alternatives such as requiring that indecent material be "tagged" to facilitate parental control, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet differently than others. Particularly in the light of the absence of any detailed congressional findings, or even hearings addressing the CDA's special problems, the Court is persuaded that the CDA is not narrowly tailored. Pp. 28–33.

(f) The Government's three additional arguments for sustaining the CDA's affirmative prohibitions are rejected. First, the contention that the Act is constitutional because it leaves open ample "alternative channels" of communication is unpersuasive because the CDA regulates speech on the basis of its content, so that a "time, place, and manner" analysis is inapplicable. See, *e.g., Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 536. Second, the assertion that the CDA's "knowledge" and "specific person" requirements significantly restrict its permissible application to communications to persons the sender knows to be under 18 is untenable, given that most Internet forums are open to all comers and that even the strongest reading of the "specific person" requirement would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech. Finally, there is no textual support for the submission that material having scientific, educational, or other redeeming social value will necessarily fall outside the CDA's prohibitions. Pp. 33–35.

(g) The §223(e)(5) defenses do not constitute the sort of "narrow tailoring" that would save the CDA. The Government's argument that transmitters may take protective "good faith actio[n]" by "tagging" their indecent communications in a way that would indicate their contents, thus permitting recipients to block their reception with appropriate software, is illusory, given the requirement that such action be "effective": The proposed screening software does not currently exist, but, even if it did, there would be no way of knowing whether a potential recipient would actually block the encoded material. The Government also failed to prove that §223(b)(5)'s verification defense would significantly reduce the CDA's heavy burden on adult speech. Although such verification is actually being used by some commercial providers of sexually explicit material, the District Court's findings indicate that it is not economically feasible for most noncommercial speakers. Pp. 35–37.

(h) The Government's argument that this Court should preserve the CDA's constitutionality by honoring its severability clause, §608, and by construing nonseverable terms narrowly, is acceptable in only one respect. Because obscene speech may be banned totally, see *Miller, supra,* at 18, and §223(a)'s restriction of "obscene" material enjoys a textual manifestation separate from that for "indecent" material, the Court can sever the term "or indecent" from the statute, leaving the rest of §223(a) standing. Pp. 37–39.

(i) The Government's argument that its "significant" interest in fostering the Internet's growth provides an independent basis for upholding the CDA's constitutionality is singularly unpersuasive. The dramatic expansion of this new forum contradicts the factual basis underlying this contention: that the unregulated availability of "indecent" and "patently offensive" material is driving people away from the Internet. P. 40.

929 F. Supp. 824, affirmed.

STEVENS, J., delivered the opinion of the Court, in which SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., joined.