OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET. AL., appellants v. AMERICAN CIVIL LIBERTIES UNION

CASE NO: No. 96-511

PLACE: Washington, D.C.

DATE: Wednesday, March 19, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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JANET RENO, ATTORNEY GENERAL :
OF THE UNITED STATES, ET AL., :
Appellants :
v. : No. 96-511
AMERICAN CIVIL LIBERTIES :
UNION, ET AL. :

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Washington, D.C.

Wednesday, March 19, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

SETH P. WAXMAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Appellants.

BRUCE J. ENNIS, ESQ., Washington, D.C.; on behalf of the Appellees.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 96-511, Janet Reno v. The American Civil Liberties Union.

Mr. Waxman and Mr. Ennis, I would like to tell both of you before you start your argument that each counsel will be allowed 35 minutes instead of the usual 30 in this case.

You may proceed.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE APPELLANTS

MR. WAXMAN: Thank you. Mr. Chief Justice and may it please the Court:

The Internet is a revolutionary advance in information technology. It also provides a revolutionary means for displaying patently offensive, sexually explicit material to children in the privacy of their homes.

With as many as 8,000 sexually explicit sites on the World Wide Web alone at the time of the hearing, and the number estimated to double every 9 months, the Internet threatens to render irrelevant all prior efforts to protect children from indecent material.

All of the laws regulating the display of indecent materials in theaters and book stores, on radio,

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TV, cable, and telephone, all of these approach insignificance when the Internet threatens to give every child with access to a connected computer a free pass into the equivalent of every adult bookstore and video store in the country.

Congress debated for a year-and-a-half before enacting the Communications Decency Act which, as we explain in our brief, contains three distinct provisions.

Let me go right to the broadest one, which prohibits the display of patently offensive material "in a manner available to a person under 18 years of age."

When read together with the statutory --

QUESTION: That is (d)(1)(A)?

MR. WAXMAN: That is (d)(1)B).

QUESTION: (d)(1)(B). Thank you.

MR. WAXMAN: When read together with the statutory defenses, this provision permits persons to post indecent material on the Internet so long as they take reasonably effective steps not to expose it to children.

The district court found that on the World Wide Web, where most of the material that concerned Congress is posted, it is technologically feasible for speakers to screen for age, and on commercial sites that is commonly done.

Even as to noncommercial sites, the evidence

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showed that the technology exists, and is operating, to provide adults with a verification code that allows them to access adult-only sites at no cost to those who post information on those sites.

QUESTION: Mr. Waxman, does that technology require use of something called CGI --

MR. WAXMAN: It does --

QUESTION: -- in order to screen it out, in effect? Is that the mechanism by which that can be done?

MR. WAXMAN: The -- Justice O'Connor, the mechanism by which a Web site can screen for age, or a particular page, or indecent material on a Web site could screen for age is, or at least at the time of the hearing was by the use of something called CGI script.

But the obtaining of an adult ID is something that the unrebutted evidence showed was a service that even at the time of the hearing, without the benefit of the Communications Decency Act in effect, an adult, somebody over 18 who wanted to view patently offensive material on a screen site could, for $5 a year, obtain an adult identification that would give that person access to any and all adult sites, and --

QUESTION: Of course, the problem is not at that end. It is at the other end. How can a person putting material out in the system assure that it's only going to

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be accessible by somebody with that code?

MR. WAXMAN: Exactly, and what the record -- what the district court found as fact was that on the World Wide Web it is technologically feasible and economically feasible, either by use of a credit card, which is more expensive, or by requiring the punching in of an adult ID code that is available from a third party for as little as $5 a year, to get access, but the technology on the World Wide Web exists to display this.

QUESTION: Well, how does that fit in with use of Web sites by noncommercial users, or just private individuals or libraries, or something of that kind?

MR. WAXMAN: Do you mean use, that is that they want to view material, or use that they want to post indecent material?

QUESTION: Both.

MR. WAXMAN: Okay.

QUESTION: I mean, the library wants to have material on its Web site which might be viewed as indecent, I guess. We're not talking about obscene material --

MR. WAXMAN: That's right.

QUESTION: -- are we?

MR. WAXMAN: That's right. Let --

QUESTION: We're talking about some other

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category of material.

MR. WAXMAN: Let me address the example of the library.

QUESTION: And while you're at it, I want you to tell me how -- what percentage of Web sites are incapable of using this CGI script, do you think?

MR. WAXMAN: Okay. Let me --

QUESTION: Not all of them can use it, and so I --

MR. WAXMAN: Well, let me answer your second question first and then go to your library example, but the testimony in the record before the district court was that on -- for certain third party access providers like America Online and CompuServe, which allow customers to create their own Web sites for free, they do not currently have CGI software, so for example I, I am a member of America Online. If I want to create my own Web page I have to go to somebody else.

There are hundreds, if not thousands of servers that you can go to to create a Web page. I would have to write my own Web page on something other than America Online, or of course America Online could simply adopt CGI script, which at the time of the hearing at least it had chosen not to do.

Now, as to the library, the Carnegie Library is

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an appellee in this case, and it is a very good example of what we think represents the overblown nature of the challenge to this act.

The library wants to do two things. It wants to put its card catalogue on line so that anybody anywhere in the country can see what it is that the Carnegie Library has, and it also wants to put on line journals and abstracts that it in turn receives on line in an electric form.

Now, the definition, the accepted definition of what is patently offensive, that is a term of art. It is very narrow, and it is exceedingly difficult to see how it would apply to more than a handful of cards in a card catalogue, but to the extent that it does, you can simply run it through some sort of word processor or computer program to screen -- it's only text, after all, on cards, and if you find a card that --

QUESTION: Mr. Waxman, may I ask you to go back to the first point that you were answering, because I'm puzzled. I thought the district court found as a fact -- and this is at 929 F.Supp. 846 to 847 -- found as a fact that noncommercial organizations particularly would find age verification prohibitively expensive and that indeed, in the Shea case, that same fact-finding was made.

MR. WAXMAN: That is correct, and we do not

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think that that finding, as we read it, Justice Ginsburg, is either clearly in error or in error at all.

What the court found, though, was that for noncommercial Web sites -- that is, people who aren't businesses that want to post speech on the World Wide Web -- it would be prohibitively expensive to create their own adult validation system. That is the finding that the court made on page 55a of the Joint Appendix. I do not have the F.2d site, but that was not the only -- or F.Supp. site. Sorry.

That was not the only other alternative. We put on -- in response to their claim that the Communications Decency Act acts as a ban, we put on evidence showing that even prior -- even before the CBA came into effect there were third party entities that on line would provide any adult with an adult number for a fee of between $5 and $9.95 a year, at no cost to the person who wants to create their own Web site and put indecent material on it, which would allow you to go to any of those Web sites, or any of those pages, punch in your number and get access to it, and there was -- that evidence is unrebutted on the record.

So while we don't challenge the court's findings that if people like you or I wanted to post our -- or nonprofit organizations wanted to create their own adult

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verification system it would be unduly expensive, we do challenge the adequacy of that finding to support the conclusion that this statute is unconstitutional on its face.

QUESTION: May I ask you just for a little more clarification about your specific example of the Carnegie --

MR. WAXMAN: Yes.

QUESTION: -- the library posting a card that they know would violate the statute if it is read by an -- 17-year-old. Now, what does this software do exactly, that you are describing? It identifies all the adult people who have access to adult material. That means that anybody who does not have that cannot see it?

MR. WAXMAN: What the -- Justice Stevens, what the -- if the library found that there were any library cards that contained material that could be deemed patently offensive, they would take the --

QUESTION: Let's assume they know something would be, so it --

MR. WAXMAN: Okay. Let's assume there's that. If they had that, what they would do is, with respect to those cards, or those journals that they know to be patently offensive, they would put them in a little section of their Web site in which to get access to it.

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If you want to see -- we have certain other cards --

QUESTION: So that everyone who does not have the adult identification equipment, whatever it is, those people just don't see it.

MR. WAXMAN: That's right.

QUESTION: So that in order to get access to that if you're a viewer, you have to do whatever's necessary to become an identified adult.

MR. WAXMAN: That's right. It's the exact analogy to what may very well happen to the Carnegie Library itself in Pittsburgh.

QUESTION: What if --

MR. WAXMAN: Pittsburgh may have an ordinance that requires that patently offensive material be kept --

QUESTION: What if an identified --

MR. WAXMAN: -- in a different room and supervised.

QUESTION: What if an identified adult wrote the library a letter and said, I have the adult stuff, but I have a 17-year-old son that I'm going to have watch this with me. What should they do?

MR. WAXMAN: Well, the act does not make illegal the provision to adults of this material. If a father or mother --

QUESTION: They would know there's a 17-year-

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old the audience.

MR. WAXMAN: If -- well, I think here it depends a little on the mode of communication. If I -- if you ask me to send you an indecent E-mail, and you tell me that your son is sitting right next to you and is going to read it --

QUESTION: No, but my motive is that I'm Anthony Comstock, and I don't want this stuff to go out, so I'm telling you I've got a 17-year-old son who's going to help me police the airwaves.

MR. WAXMAN: Then I -- then under the specific child and transmission provisions as well as the display provision, you could not send it, but there is nothing to -- there is nothing in this act that in any way gets in the way of adult-to-adult communication.

I may very well find that my 16-year-old son in my judgment, in my responsibilities rearing my child, should be able to see material that a jury would find patently offensive, and I can certainly do that.

QUESTION: You're saying that any adult has a heckler's veto on the whole operation by simply saying I'm going to let my child watch it?

MR. WAXMAN: Oh, no. No, no. Absolutely not.

QUESTION: Well --

MR. WAXMAN: The only thing that is prohibited

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under -- if I can separate out the provisions, under the two more specific provisions, what we call the transmission and specific child provision, they only apply to transmissions where you know that the recipient, or a recipient is a child. If you don't know that, actually know it, it doesn't apply.

Now, on the display provision --

QUESTION: It's more than knowing it, isn't it? You have to send it to a specific person under 18.

MR. WAXMAN: Yes. Knowing --

QUESTION: And it seems to me if you're sending it to the adult and he says, by the way, I'm going to have a child watching, you're not sending it to the child.

MR. WAXMAN: That is --

QUESTION: You're sending it to the adult.

MR. WAXMAN: That is absolutely right. Now, the -- what becomes more problematic is the display provision, because it is broader.

QUESTION: Yes. Those two other provisions, as you interpret knowing, are virtually worthless as I understand it. I mean, they're not going to accomplish much.

MR. WAXMAN: They are actually very, very important to us in terms of our prosecutions of sexual predators.

QUESTION: Which two provisions are you talking about?

MR. WAXMAN: This is -- I think it's (a)(1)(D), the --

QUESTION: Transmission --

MR. WAXMAN: -- transmission provision, and (d)(1)(A), the specific transmission, the specific child provision. They are really designed, Justice O'Connor, to get at the determined sexual predator.

QUESTION: Well, is it the case under those provisions that -- suppose a group of high school students decide to communicate across the Internet, and they want to tell each other about their sexual experiences, whether those are real or imagined. They're all -- every high school student who would do this is then guilty of a Federal crime, and subject to 2 years in prison?

MR. WAXMAN: If high school -- I mean, when you say they want to talk about their sexual experiences --

QUESTION: That's been known to happen in high school.

(Laughter.)

MR. WAXMAN: I'm shocked to learn that there is gambling in this establishment.

(Laughter.)

MR. WAXMAN: There is a big difference, Justice

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Breyer, between discussing sexual experiences and communications and speech that is patently offensive as that term of art has come to be understood.

QUESTION: Well, I mean, I even imagine high school students might read from, let's say, books or magazines that have what people might think of as patently offensive ways of describing those experiences. If you get seven high school students on a telephone call, I bet that same thing happens from time to time.

MR. WAXMAN: It may.

QUESTION: And so my concern is whether, analogizing this to the telephone, it would suddenly make large numbers of high school students across the country guilty of Federal crimes as they try to communicate to each other either singly or in groups. That's one concern I have.

MR. WAXMAN: If high school students, like anybody else, communicates what a jury would find and what this Court would establish, given its responsibility to create a constitutional floor to be patently offensive within the meaning of this statute, they would violate it, because the alternative --

QUESTION: There's no high school student exemption?

(Laughter.)

MR. WAXMAN: Justice Scalia, you may find it in the legislative history, but it is not apparent on the face of the statute.

(Laughter.)

QUESTION: Wouldn't there then be a --

MR. WAXMAN: My point, if I could just finish, Justice Breyer, there is something that is -- there is a deadly serious point here, and that is that when the alternative is that every child in this country who has access to a computer and can click a mouse has access in his or her own bedroom or home or library to Hustler Magazine and Penthouse Magazine, and the kind of indecent speech that people sitting in the anonymity of their own bedrooms anywhere in the world or anywhere in the country wants to make available to them, we think that this is a small price to pay, and Congress could legitimately say that this is a narrowly tailored alternative.

QUESTION: That's the --

QUESTION: I take it then that you would also defend the constitutionality of a statute which, tracking the words we have here, prohibited indecent conversations on a public street with minors present --

MR. WAXMAN: I think that --

QUESTION: -- or between minors.

MR. WAXMAN: Well, I think that a municipality

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certainly could. I think it is a harder case, but I think a municipality could make it a crime for an -- for two adults to engage in patently offensive, sexually explicit communications in the presence of a minor child.

QUESTION: Why is that a harder case? It seems to me easier. It's easier to verify.

MR. WAXMAN: Oh, it's a harder --

QUESTION: The presence of that minor.

MR. WAXMAN: It's a harder case because a public park is a -- it's a free space. It's an area where, unlike the Internet, speech is free, which --

QUESTION: You're asking us to say that the Internet is not a public forum.

MR. WAXMAN: The Internet is -- we don't think it is, but if it is, in any event it certainly is, like other public forums, subject to reasonable time, place, and manner restrictions.

QUESTION: A public forum is something created by the Government, isn't it?

MR. WAXMAN: Right. Right. We don't think it's a public forum, whereas a park would be, but let me -- if I can just --

QUESTION: Well, it's a pretty public place, though, because anyone with a computer can get on line --

MR. WAXMAN: Right, and -- yes, and that is

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one --

QUESTION: -- and convey information and images, so it is much like --

MR. WAXMAN: It's one of the --

QUESTION: -- a street corner or a park, in a sense.

MR. WAXMAN: It's one of the wonderful things about it, and if I can just finish answering Justice Kennedy's question, you know, if a theater company wanted to put on a production at the Sylvan Theater on the National Mall that contained material that was patently offensive -- I don't know what a current production would be, but assume that they did. It would not be at all unreasonable or unlawful for the Park Service to say, you have got to screen for age. You have got to require people to show adult ID. You have got to cover the --

QUESTION: But that's in the commercial context, and Justice Breyer's question and my following question pertained to people that don't have counsel, that aren't broadcasters or regular Net users which understand what the concepts of decency or indecency are in any institutional sense, and conversations between two minors, between a minor and an adult, between two adults on public streets and public places would all be prohibited, it seems to me, under your analysis in this case.

MR. WAXMAN: It's -- I think the analogy here really is to Renton and Young. This is really a zoning issue.

Let me give you an example. Let's assume on the Mall --

QUESTION: May I suggest -- before -- it seems to me that the case that Justice Kennedy poses is a more difficult case, but isn't the reason that -- I don't think people throughout the country are worried about their kids hanging around conversations going on on the public street.

Isn't the scope of the risk involved very much related to what the Government can do by way of avoiding that risk?

MR. WAXMAN: I don't think there's any question about it. I mean, what Congress was faced with, and what the record below shows, if you look at the testimony of Mr. Schmidt, our expert, and the exhibit that he produced of the sites that he visited on one visit, the problem is very, very serious.

But even looking to the National Mall example, Justice Kennedy, if a park policeman finds somebody sitting on one of the benches on the National Mall making a speech with a bull horn or speaking in such a loud voice that it can be heard by others, and using patently

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offensive language, I don't think there's anything constitutionally impermissible with saying, sir, if you want to do that, there's a specific place on the Mall for that, or for $3 you can buy a cone of silence, and we'll put you in this little cone and you can talk to yourself.

QUESTION: The point of my --

MR. WAXMAN: And that's what this is about.

QUESTION: Mr. Waxman, you know, there was once prevalent throughout this country a kind of ordinance that went like this. It made it a misdemeanor to use offensive language in the presence of women and children.

I was wondering while you were speaking whether you were saying the assumption that those laws are no longer tenable would flunk the First Amendment, that that's not a correct assumption.

MR. WAXMAN: Those laws, Justice Ginsburg, are distinguishable in two very fundamental ways, and it's critical, I think, to this case.

One, this Court has recognized that, as opposed to minors, there is a constitutional right to make indecent, patently offensive speech to adults, and insofar as this was trying to protect women from hearing such speech, that would be unconstitutional.

Secondly, the notion --

QUESTION: Well, let's take out women. Just

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children.

MR. WAXMAN: Okay. The notion in those laws -- this is my second point -- of what is offensive was I think subject to a very serious vagueness challenge.

What we have here is a definition of patently offensive material that is not vague, that has been held by this Court and the FCC and the lower courts not to be constitutionally vague, and we have set out at page 17 of our reply brief pretty much in haec verba what a jury would have to be instructed in determining whether something was patently offensive under their prevailing community standards.

And added onto that we also have now, in light of Miller, and Jenkins, and Hamling, and Ferber, this Court's unequivocal statement that in the area of patently offensive, where First -- where there is a First Amendment implication on where the floor is drawn, the Court will and must draw a constitutional floor below which juries and legislatures can't go, so we have a standard here that has been accepted, and can be refined by this or other courts.

QUESTION: Mr. Waxman, let me ask you another question more or less along the lines, I guess, of Justice Breyer's, who spoke of the high school students who might go to prison. If we combine the display section and the

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knowingly permit section, I take it that a parent who allowed his computer, the computer that the parent owned, to be used by his child in viewing offensive material, indecent material, the parent would also go to prison, I take it.

MR. WAXMAN: I don't see why that would -- maybe I'm missing something --

QUESTION: Well --

MR. WAXMAN: -- in the language, but it prohibits a transmission.

QUESTION: -- it's an offense to display the material, as I understand it under the display section, where minors will obtain it, and if a parent says I'm going to allow, knowingly allow my computer to be used by my child to observe these displays, isn't the parent therefore guilty of the knowing, under the knowingly permit section?

MR. WAXMAN: I don't think so. This is a statute that is self-consciously directed solely at the content provider, the person who is putting --

QUESTION: No, but this isn't a content provider.

MR. WAXMAN: -- information on the World Wide Web.

QUESTION: It's a person who knowingly permits a

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device under his control to be used in effect to accomplish or facilitate any of these other offenses, and one of the offenses is the display offenses, and if the parent says, my computer can be used, in effect, to complete this display offense, because I'm going to let my child view it --

MR. WAXMAN: I see your point. I --

QUESTION: -- why isn't a parent guilty?

MR. WAXMAN: Well, you're referring here -- I now understand. You're referring here to a separate -- a provision separate from the three provisions that are at issue in this case. That is, (c) -- I can't remember. In any event, the knowing permission provision. It's number --

QUESTION: (d)(2), and according to the three-judge district court --

MR. WAXMAN: Yes, (d)(2).

QUESTION: -- plaintiffs also challenged those provisions.

MR. WAXMAN: Well, we think -- we think that in order to -- if necessary to save the constitutionality of that provision, this Court certainly could exempt the provision of this material for parents. I mean, one of the major --

QUESTION: How -- you mean under the -- by

severance.

MR. WAXMAN: Well --

QUESTION: Under severability?

MR. WAXMAN: Well, you can call it a --

QUESTION: Wouldn't that be unconstitutional?

MR. WAXMAN: If you found it would be unconstitutional -- I can think of instances in which it might actually constitute child abuse, which this Court's --

QUESTION: I take it you agree that the parent would be guilty under that section.

MR. WAXMAN: I think it depends on the way you construe it. This Court has the power and the authority in dealing with a statute which is either arguably vague, or arguably overbroad, to construe it or to partially invalidate provisions or applications to save the constitutionality. That's --

QUESTION: How could I construe it more narrowly than my hypothesis?

MR. WAXMAN: You could --

QUESTION: What do you have in mind?

MR. WAXMAN: You could certainly construe it to exclude parents. You could certainly say --

QUESTION: That would just be grabbing a limitation out of thin air.

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MR. WAXMAN: It wouldn't any more be grabbing it out of --

QUESTION: Exclude parents --

MR. WAXMAN: Let me just say, it wouldn't, because there's a very clear record before Congress that what Congress was concerned about was not protecting children from their parents, but protecting children and their parents from the children getting access to material that the children --

QUESTION: I could view this but Justice Scalia couldn't.

MR. WAXMAN: No, I think Justice --

(Laughter.)

MR. WAXMAN: Justice Scalia could and would, because --

(Laughter.)

MR. WAXMAN: I didn't say will.

(Laughter.)

MR. WAXMAN: If you look at cases that this Court has decided with respect to overbreadth, this would be, I suppose, an overbreadth challenge that it includes parents, or doesn't exclude parents.

QUESTION: Well, I --

MR. WAXMAN: This Court would --

QUESTION: At this point it's an overbreadth --

I suppose it's an overbreadth challenge when you say well, it's interfering -- not as a matter of overbreadth. It's interfering with the relationship between parent and child.

MR. WAXMAN: Yes, and you could do exactly what you did, for example, in United States v. Grace, where there was a criminal prosecution for demonstrating on the sidewalk in front of the Supreme Court. The statute defined the Supreme Court grounds literally by metes and bounds.

QUESTION: Would I --

MR. WAXMAN: There was no exclusion for sidewalks.

QUESTION: Excuse me. Would I have to do that in order to save the statute?

MR. WAXMAN: I don't think so.

QUESTION: Why?

MR. WAXMAN: Well, I think -- because I think as a practical matter it is so clear that this does not cover what a parent shows a child in the absence of true abuse, which is separately actionable.

QUESTION: Well, but it's not clear that it doesn't cover the coffee shop owner who has a computer network, or a teacher, or a high school librarian who under her supervision, or his supervision allows this

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material to be accessed.

MR. WAXMAN: If you think that it is necessary to save the (d)(2) provision from an overbreadth challenge, you should construe it, you must construe it in a manner that saves it as to those applications.

QUESTION: Could we talk about the defense clauses for a moment?

MR. WAXMAN: Sure.

QUESTION: And does the Government accept that it is a defense under the act if a parent or any owner or user of a computer buys some of this software that is designed to screen out indecent speech?

MR. WAXMAN: Well, it -- would it be a defense to the prosecution of the person who provided the content on the Internet?

QUESTION: Yes. I mean, I would be charged presumably under the display provision as -- for putting on some kind of indecent speech under your theory.

Now, is it a defense that there are these programs and software to prevent the use of it?

MR. WAXMAN: It --

QUESTION: And how about the parent who lets the child use the machine --

MR. WAXMAN: Thank you, Justice O'Connor --

QUESTION: -- that buys the software to screen

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it out?

MR. WAXMAN: The district court -- the district court in this case did not find, and properly so, that the purported -- that this purported solution that the appellees have offered, these parental control software programs like SurfWatch, are an effective alternative.

It didn't find that, and the reason is that with hundreds of thousands of Web sites and tens of millions of pages that can be discretely accessed, and with the number of sites increasing so rapidly, and the ability to change the name of the site so easy, there is simply no way that companies like SurfWatch or parents can keep up with what can and can't be screened out, and even if they could, with computers in libraries and community centers and schools, it is not an effective alternative as matters currently stand. Now --

QUESTION: What about tagging, Mr. Waxman? Why wouldn't it be adequate to meet the problem that is concerned about for Congress to say, you'll have a complete defense so long as you tag it?

MR. WAXMAN: Well --

QUESTION: And we'll establish a system. XXX means that it contains the kind of material that would violate this act, and therefore so long as you put XXX on it, you'll be safe.

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MR. WAXMAN: In the -- Justice Scalia, in the absence of a regime in which there is a universal tag -- that is, everybody knows and everybody uses, and --

QUESTION: Congress could do that.

MR. WAXMAN: Okay, and software that is available on all machines that are sold as a default mode to screen under that tag --

QUESTION: But that would be pretty easy if they were tagged.

MR. WAXMAN: Congress -- that would essentially be the mandated V-chip option.

QUESTION: Right.

MR. WAXMAN: And it would be better than what we have now, but it would not be either more effective or less restrictive than the Communications Decency Act.

Unlike television, we're not talking about a handful of broadcasters here who have their own lawyers and their own advertisers and other restraints on speech, and we're also not talking -- we're talking about millions and millions and millions of people who are putting speech on, and that's where the burden has to be put, and on the other hand, we're also not talking about television sets.

QUESTION: But we are -- might be talking about telephones, which was the point of my example with the children. Can Congress suddenly decide that all private

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telephone conversations will be monitored to see if there is indecent material going across the telephone that children will knowingly pick up? That was my concern.

MR. WAXMAN: I think the answer is no.

QUESTION: If the answer is no, then how does this differ, because the Internet after all is, in addition to being a little bit like a common, is very much like a telephone?

MR. WAXMAN: The difference -- the regime you've hypothesized is one in which all telephone calls between all people in the United States would be monitored.

QUESTION: No, what you'd have is an analogous statute that applied to the telephone so that when the high school students get on the phone and talk about their experiences, suddenly that all becomes a crime, and it suddenly looks a little bit worse from a First Amendment point of view --

MR. WAXMAN: It does.

QUESTION: -- if what you're talking about is the telephone.

MR. WAXMAN: It does.

QUESTION: But the Internet is rather like the telephone.

MR. WAXMAN: I have to disagree with your last statement. It looks a little bit -- it looks a lot

different, because on the telephone you are not displaying graphic images. You are not talking about a medium which, once it's placed on a computer by anybody, anywhere, is available to everybody everywhere. You're talking about discrete communications --

QUESTION: The question here is overbreadth.

MR. WAXMAN: -- and it would be hard -- if I can just finish, it would be much harder for Congress to demonstrate and I don't think Congress believes that there's a compelling interest, because of those differences, in doing so.

You know, in the face of the problem, in the face of this serious problem, I need to focus just for a minute on what the district court did.

The district court threw up its hands and struck down a statute without attempting to narrow it, without attempting to make it more specific, and most significantly, without finding that any more narrowly tailored, constitutionally acceptable solution exists. That is error of law of the first order.

QUESTION: Mr. Waxman, the district court was concerned about legislating. You know, it would be one thing if you could just say, take out this sentence, or take out this section, but just the kind of thing you describe with respect to the parent, that's a lot. That

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kind of tinkering courts don't do.

MR. WAXMAN: Justice Ginsburg, all I can say is that -- I mean, I could rattle off the name of a dozen or two dozen cases in which this Court in either the overbreadth context of the vagueness context has done just that even without a severability clause, and when there is a severability clause that includes the language of applications as well as provisions, this Court has always heeded that.

In fact, in Wyoming v. Oklahoma where the request was that, okay, if it's invalid as to one particular company, just strike them out, what this Court said was, severability clauses may easily be written to provide that if application of a statute to some classes is found unconstitutional, severance of those classes permits application to the acceptable classes. Now --

QUESTION: It was my impression from Califano v. Westcott, which I think is the last time the Court dealt with that, and it dealt with it up front, that the point was made that you can lop of something, you can include or exclude, you can put a caret mark, but nothing fancier than that.

MR. WAXMAN: I -- our understanding of the cardinal rule, even in the absence of a severability clause, is the rule stated in Ferber, in which this Court

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said, when a Federal court dealing with a Federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems if the statute is subject to a limiting construction.

Even if the Federal statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should be stricken down -- should not be stricken down on its face. If it is severable only the unconstitutional portion should be invalidated, and here, where we have a severance clause that directs the Court to sever as to unconstitutional applications, we think that rule should apply, too.

May I reserve the balance of my time?

QUESTION: Yes, Mr. Waxman.

Mr. Ennis, we'll hear from you.

ORAL ARGUMENT OF BRUCE J. ENNIS

ON BEHALF OF APPELLEES

MR. ENNIS: Mr. Chief Justice, and may it please the Court:

There are four reasons why the preliminary injunction should be affirmed. The CDA bans speech. It will not be effective. There are less-restrictive alternatives that would be much more effective. And the combination of an imprecise standard, coupled with the threat of severe criminal sanctions, will chill much

speech that would not be indecent.

First, the District Court found as fact that the CDA completely bans a vast amount of speech, all of which is constitutionally protected for adults, from all of the unique means of communication in cyberspace except the World Wide Web, and effectively bans that speech from most of the Web as well. Virtually all speech that is displayed on the Internet in a manner that would be available to adults would also be available to minors.

QUESTION: Excuse me. You say it banned it from other applications but not from the Web. Is it your contention -- and there is much of this in the briefs -- that every -- every facet of -- of cyberspace must be open to this kind of communication? I mean what is wrong with saying, well, if you want to use cyberspace, you have to use the Web?

MR. ENNIS: Well, Justice --

QUESTION: You can't get into -- into some of the other --

MR. ENNIS: Justice Scalia, let me try to answer that question this way. There are 40 million speakers who use news groups, listservs and chat rooms. It is not technologically possible in those means of communication to screen for age. The Government's expert conceded that.

There are about 100,000 Web sites in all. And

most speakers cannot afford the $1,000 to $10,000 it costs to have their own Web site. Furthermore, there is a much --

QUESTION: But, look. Let's take printed communications. It is certainly lawful -- and we have upheld provisions that require pornographic materials to be kept away from minors and not to be sold in such a fashion that minors can obtain them. This effectively excludes the publishers of pornographic publications from vending their material on the streets in vending machines, where minors can get access to them. Do we say it's unconstitutional because they cannot use that manner of communication? I don't think so. We say tough luck, you have to sell it in stores.

MR. ENNIS: Your Honor, in Southeastern Promotions, in Schad, in Bolger, in case after case, the Court has held, both under intermediate scrutiny and under strict scrutiny -- particularly under strict scrutiny -- that the possibility of a functionally equivalent alternative does not save the Government. Here the alternative is not functionally equivalent. Let me say why.

In news groups, chat rooms and listservs, you are engaging in an interactive dialogue, a conversation, in which you speak and the listeners reply and you can

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reply to what they say. They can be outraged. They can be offended. They can have a good point to make.

A Web site is static. What the Government is saying is that the 40 million people who can speak in an interactive dialogue in the other modes of communication on the Internet should post a static message on their Web site. And maybe the people who are in the news group would come to see it, maybe not. But the speaker would not get any feedback. There would be no dialogue.

Second, there are only 100,000 Web sites. But most of those do not have the screening capability that is required to screen for age. Only those Web sites that have what is called CGI Script capability can screen for age. We know from the record that all of the 12 million subscribers to the Internet who gain access through America Online, Compuserve, Prodigy, Microsoft, the major online service providers, those service providers provide Web site to those 12 million subscribers, but not one of those Web sites can have the capacity to screen for age.

So, in effect, there is a minuscule portion of the population that -- for which it is technologically possible to screen for age.

QUESTION: Why are the others incapable of screening for age?

MR. ENNIS: Because the -- the unique ways that

cyberspace works, you have to be able to have a computer software program that has a form that can be filled in, you can interrogate the listener who is trying to have access to your speech, and then you can have other data processing to figure out whether the listener can have access or not.

That kind of software does not work, as the Government's expert conceded, on news groups, listservs, and chat rooms.

QUESTION: Is that still true? How long ago were all of these technological conclusions arrived at? There are some aspects of cyberspace that didn't even exist when -- when the hearing was held; is that right?

MR. ENNIS: Justice Scalia, it is still true. The Government, in a highly unusual -- for the Government -- has cited in its reply brief to the Washington Post and NewsWeek, to suggest that it is possible to screen news groups and chat rooms on Web sites today. The fact that the Government is forced to refer to extra-record material shows there is no evidence in this record that you can.

And in fact, the Government is wrong. It is not possible, using a Web browser, which can gain access to a news group, to screen for age, because news groups exist in cyberspace on perhaps 200,000 different news group servers. And it would be necessary for the separate

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owners and operators of each of those servers to screen for age. Otherwise, the speaker would not be protected.

QUESTION: Well, it could be done, then. It could be done. You're just saying it would defeat the purpose of some of these things.

MR. ENNIS: Your Honor, Chief Justice Rehnquist, it is technologically possible on some Web sites to screen for age. But the -- the District Court also found as a fact that even on that small subset of Web sites, the cost of screening would be economically prohibitive for all speakers.

QUESTION: What does it mean when they say "prohibitively expensive" or "economically prohibitive"?

MR. ENNIS: Let me try to --

QUESTION: Those are value-laden adverbs.

MR. ENNIS: Well, let -- let me try to explain, Chief Justice. The principal way to screen for age is through use of a credit card. If you are not a commercial speaker, most credit card companies will not verify the credit card at all, period, for any cost.

QUESTION: So if you're a commercial speaker, they will?

MR. ENNIS: They will verify if you're a commercial speaker.

QUESTION: And what -- what do you mean by a

"commercial speaker"?

MR. ENNIS: A speaker who is charging for access to his or her speech. And that is a very small subset of all Internet speakers. None of the enormous range of plaintiffs in this case is a commercial speaker.

QUESTION: Well, the credit card people will verify for the commercial speaker because he can pay for it or because --

MR. ENNIS: That's right.

QUESTION: In other words, they would verify for anyone who could pay for it?

MR. ENNIS: Well, there are two questions -- two points. Most credit card companies simply will not verify for any price for a noncommercial transaction. They are not set up to do that. A few credit card companies will, but the record evidence showed they charge a dollar per verification for a noncommercial verification.

Now, if you are a speaker who wants to make your speech available to 100,000 listeners, that means you, the speaker, would have to pay $100,000 for the privilege of speaking.

QUESTION: Well, what about the first radio people, you know, before the Federal Radio Act in 1927? I'm sure that imposed a lot of operating requirements on radio stations. And before that, they could just say,

well, we like it the way it is. The Government shouldn't have to tell us we've got to have all this equipment. But, nonetheless, the Government did tell them, and that's certainly been upheld.

MR. ENNIS: Chief Justice Rehnquist, there is an enormous difference between some burden, some cost -- which this Court has upheld in other contexts -- and a burden or cost that is economically prohibitive. Let me continue to answer your question by saying that, for example, there is evidence in this record that the Carnegie Library, which has been used as an example, in order to classify which of its speech is indecent and which is decent within the meaning of this law, that would require a human judgment and it would cost about $3 million to do that.

QUESTION: And that's prohibitively expensive for the Carnegie Library?

MR. ENNIS: Yes, it is, Your Honor. There is no dispute on that in the record.

QUESTION: Mr. Ennis --

QUESTION: Well, I suppose it depends on how -- I mean on whether -- what is prohibitively certainly depends to some extent upon the goal to be achieved. I mean we do stop individual citizens from running radio stations, because of all the regulations, say it's

prohibitively expensive, you can't run your own radio station. And we say, well, you know, that's tough luck. The goal to be achieved is everybody can't talk at once, so we have to limit the numbers and we have to have all of these technological requirements. It's going to cost you $3 million, and we say that's too bad.

Now, how valuable, how important is the goal to be achieved here? Is it equivalently important? Isn't that very much a policy judgment that Congress is able to arrive at?

MR. ENNIS: Let me answer that, Justice Scalia, first, by saying and emphasizing that we did not challenge this law insofar as it prohibits obscene speech, child pornography, solicitation of minors, harassment of minors. That kind of speech was not challenged and is not enjoined by the injunction below. We are only talking about a much different subset of speech that is called patently offensive or indecent speech.

I want to emphasize that that standard is broader than any standard this Court has ever upheld even with respect to sale or display directly to a minor, and is vastly broader than the standards applied in the 48 States which use a "harmful to minors" standard, which requires that the speech be not only patently offensive for minors, but also appeal to a prurient interest for

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minors and lack serious value for minors.

QUESTION: Mr. Ennis, there is one thing I don't want to lose before you go away from the prohibitively expensive point. Would you comment on Mr. Waxman's argument that those who transmit and display could do so subject to a requirement that access be conditioned on an adult identification number? Is that a response to the prohibitively expensive argument?

MR. ENNIS: Justice Souter, Mr. Waxman said there was unrebutted evidence below. If you'll look at the court's opinion, the court -- what the court said was the government presented virtually no evidence about these third-party verification bureaus. But what the evidence does show is those third-party systems do not work at all for listservs, news groups, chat rooms, all of the modes of communication in cyberspace except the World Wide Web.

So those third-party bureaus effectively shut down the 40 million speakers who use those other means of communication. They cannot be used in those other means of communication.

QUESTION: Would it be effective, in effect, in all Web transmissions and display?

MR. ENNIS: Not in all Web transmissions. It would only be effective in Web -- in a certain number of Web transmissions. But I -- I want to emphasize that one

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of the real democratizing and speech-enhancing attributes of the Internet is that average citizens can speak to the world for free. In order to own your own Web site, the Government conceded, it would cost a thousand dollars to $10,000 to set up your own Web site, and then maintenance costs.

So we're -- we're reducing the number of speakers dramatically.

QUESTION: Can you at some point -- Mr. Ennis, could you at some point, at your choice, address the question of severability? In particular, I'm thinking is it possible to narrow the statute perhaps far more extremely than the Government would like, but to commercial pornographers? Is there a way of reading it so it only applies to people who make significant amounts of money out of selling pornography across the Internet? Is there some such construction?

MR. ENNIS: Justice Breyer, the District Court did focus on that question. And it found that no such limiting construction was possible for many reasons. First, the Act, by its terms, applies to both commercial and noncommercial entities. The legislative history makes clear that Government intended to regulate both commercial and noncommercial entities.

It applies, by its terms, to the speech of

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libraries and educational institutions. None of whom, by the way, are regarded as pornographers in the common understanding of that term.

It -- it is simply not possible to construe the statute that way. And if you did, it would be a nonsensical construction. Because before this Act was passed, the commercial pornographers already charged with credit card for access to their speech. They don't make that speech available for free.

QUESTION: How about narrowing the definition of what's patently offensive?

MR. ENNIS: Well, Your Honor, again, you would have to do violence to the text of the Act and to the legislative history. Because Congress squarely --

QUESTION: The Act just isn't specific. It says "indecent speech." I don't know that it's all that clear from the --

MR. ENNIS: On the text of the Act, it's not, Justice O'Connor. But the conference report, at page 188 and 189, makes very clear that Congress expressly rejected the more narrow "harmful to minors" standard, which would require that the speech be not only patently offensive, but also appeal to prurience and lack serious value.

Second, the conference report makes clear that Congress intended to apply the Act under -- using the FCC

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broadcast standard for indecency that was at issue in the Pacifica case. As the FCC said in Pacifica and as this Court noted, under that standard, speech can be found indecent even if it is not prurient and even if it has serious value.

QUESTION: Well, we construed the term "patently offensive" in our Denver Area opinions last term.

MR. ENNIS: Chief Justice Rehnquist, I think that, with respect to the vagueness argument, the Denver Area case is dramatically different from this case. First, that case did not involve any criminal sanction whatsoever and did not even involve any direct prohibition on speakers. It simply -- the only provision that was upheld under a vagueness challenge simply permitted cable operators, who have their own first amendment rights, permitted them to exercise their own editorial judgment. And it even required that --

QUESTION: Well, you might say that the -- what the Court came up with in Denver maybe was too lenient for a criminal statute, but certainly the term was construed there.

MR. ENNIS: It was, Chief Justice Rehnquist, but it --

QUESTION: It was construed in a quite limited way, was it not?

MR. ENNIS: Let me answer it this way.

QUESTION: Was it construed, do you think, in a limited way?

MR. ENNIS: I don't think that the term was actually construed in any particularly limited way in Denver Area. I think the Court didn't need to. But --

QUESTION: I thought the Court adhered to Pacifica in -- in defining indecency.

MR. ENNIS: I think the Court did refer to Pacifica, Justice Ginsburg. Pacifica also, itself, stressed that that case did not involve any criminal sanctions at all. An administrative slap on the wrist was what was at issue. And the Court, three times, said -- it was emphasizing that the Court was not upholding a prohibition of even broadcast indecency if it was accompanied by a criminal prohibition. That's what this case does.

QUESTION: Mr. Ennis, you did say in -- in your opening that you were going to tell us about a less restrictive, more effective means. And I was intrigued by that, and I hope, before your time is up, you will be able to do that.

MR. ENNIS: Yes. I'd be very happy to turn to that.

The court below found as a fact, at pages 32a to

42a of the appendix to the jurisdictional statement, that there is a broad range of technologies and software programs that enable parents either completely to block all access to the Internet, if the parents are really concerned or, more selectively, to screen and filter access to the Internet if they want to allow their children to have access to certain parts of the Internet but not to others.

QUESTION: Those cost money, though, don't they?

MR. ENNIS: Chief Justice Rehnquist, the basic ones don't cost a thing. Everyone -- all of the 12 million Americans who subscribe to the Internet through the major online service providers get, at no additional cost, the parental control options that all of the major online service providers offer. Using those options, by clicking one box, you can completely prevent all access to the Internet, including to foreign speech on the Internet, which this law will not deter.

QUESTION: So, there will be no cost involved in any part of this alternative to the parents?

MR. ENNIS: Not if the listener uses those software programs. No cost at all. There are other software programs, some of which are available for free and some of which cost perhaps $30, which parents can use to filter content in different ways. The --

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QUESTION: Well, Mr. Ennis, the Government says that these programs aren't effective. And that's pretty much what the District Court concluded, too.

MR. ENNIS: Justice O'Connor, with respect, I don't think that's a fair characterization. If you look at page 42a of the joint appendix, the District Court summarized by saying that these were effective, and there was reason to believe they would soon be more widely available.

Even the Government, if you look at pages 13 and 9 of the Government's reply brief, the Government concedes, at page 13, that parents today, using these software controls, can effectively prevent their children from having access to any indecent speech, including indecent speech posted abroad. The Government's response to that, however, is to say, well, yes, if parents want to be really safe and secure, they can completely protect their children; but that might deprive the children of access to some parts of the Internet they should have access to.

QUESTION: Mr. Ennis --

MR. ENNIS: That's not a first amendment problem. That's a parental judgment issue.

QUESTION: Mr. Ennis, so much of your argument is based upon what is currently available. You know, I

throw away my computer every 5 years. I think most people do. This is an area where change is enormously rapid. Is it possible that this statute is unconstitutional today, or was unconstitutional 2 years ago when it was examined on the basis of a record done about 2 years ago, but will be constitutional next week?

MR. ENNIS: Not --

QUESTION: Or next year or in two years?

MR. ENNIS: Not as it is presently worded, Justice Scalia. Because the way it's worded now, it makes it a crime for a speaker to make available on the Internet speech that would be -- to display speech that would be available to a minor. And even if everybody agreed on a tagging system and even if everyone's computer had a browser that was set to read the tag, the speaker would have no assurance that those browsers were set in that way.

QUESTION: But it depends on the -- on the security of the safe harbor. And how secure the safe harbor is depends so much upon technology, I frankly think that this case depends upon who has the burden of proof. I have no way of understanding --

MR. ENNIS: Well, I'm glad you asked that question, Justice Scalia. Because --

QUESTION: -- what is going to be what. Now,

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who has it? This is a distinctive kind of first amendment statute. I don't know that we've ever adjudicated one like this, which -- which only prohibits speech which is prohibitable. There's no doubt that you can prevent people from saying these things to minors. And that's all that is prohibited. The argument is not, as it was in Pacifica, you've not only prohibited communications to minors, you've prohibited communications to adults during those viewing hours. That's not the case here.

The only thing prohibited is clearly constitutionally prohibitable. And your argument is, ah, but in prohibiting what is prohibitable, you've done it in such a fashion that you -- you needlessly, unnecessarily, effectively prohibit non-prohibitable speech -- that is, speech to adults. That's -- that's a new case for us.

And I wonder whether it isn't true that you have the burden of proof. So long as the statute only says we're prohibiting these communications to minors, it's your burden to show that, in doing so, you're going to affect adults.

MR. ENNIS: Justice Scalia, that was an issue below. The Government conceded the Government had the burden below. That was an issue in the Shea case. In Shea, at 930 F.Supp.923, the Government concedes that it bears the burden of proving that the display provision --

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QUESTION: Well, we don't -- we don't decide cases here on the basis of concessions, Mr. Ennis. I mean, that's an independent judgment that we make.

MR. ENNIS: That's correct, Chief Justice Rehnquist. I didn't mean to suggest you'd be bound by the Government's concession. I simply want to suggest that the Government has made that concession for very good reason. The Government is attempting to regulate speech that is constitutionally protected for adults and some of which is constitutionally protected for older minors. It bears the burden of justifying that regulation.

The Government conceded below and in the Shea case that the display provision, standing alone, is an unconstitutional ban on speech. And it said that provision is justified because of its argument that speakers could use the affirmative defenses to communicate indecent messages to adults, while shielding those same messages from minors. But the District Court below found as fact that that is not so. It is not technologically possible for the vast majority of Internet speakers to use those affirmative defenses. Therefore, this law is a ban on indecent speech in cyberspace.

Returning to the effectiveness point that Justice Ginsburg asked, it's critical to note here that the court below found as fact that about 40 percent or

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more of all speech on the Internet is posted abroad in foreign countries. And that at least 30 percent of all indecent speech in cyberspace is posted abroad in foreign countries. The Government's own expert acknowledged below that the CDA would have no impact on that foreign indecent speech, and that parents would have to rely on parental control technologies to shield their children from that foreign speech.

QUESTION: But if 70 percent is shielded and 30 percent isn't, what kind of an argument is that against the constitutionality of the statute?

MR. ENNIS: First, Chief Justice Rehnquist, I think it's more like 50/50 today.

QUESTION: Well, whatever the situation is.

MR. ENNIS: Well, here's why. It's -- suppose we were talking about an enormous adult bookstore. Everything in the store is indecent. And the Government says, children can come into this enormous adult bookstore and browse unsupervised, but we're going to remove half the books, half the videos. That would not, directly and materially, advance the Government's interest of protecting those children from access to indecent materials.

QUESTION: Well, it would certainly -- it would certainly go halfway.

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(Laughter.)

MR. ENNIS: Well, Your Honor --

QUESTION: What about 500 bookstores, 500 obscene bookstores, and the Government eliminates 250 of them; would that be no progress at all?

MR. ENNIS: If they're obscene, they can eliminate them all, Justice Scalia. We don't challenge that.

QUESTION: Never mind obscene -- pornographic --

MR. ENNIS: Pornographic --

QUESTION: -- succeeds in excluding children from 250 out of 500, that's no use?

MR. ENNIS: Justice Scalia, the way the Internet works, a child using a search engine can sit down at their typewriter and they type in, if they want to go somewhere -- and it's important to stress that in cyberspace, listeners must affirmatively choose where they want to go. The Government's expert testified that the odds are slim that a child would come across a sexually explicit site by accident. But if a child wants to go to an indecent site, the child sits down and types in something like "triple-X sex."

If that home computer is not using parental control software, that search engine will go out there in the world and list the triple-X sites that are available.

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All the triple-X sites that are foreign will be listed there. The kid then clicks the mouse, and they have access to all the indecent speech they could possibly want to see.

The Government's interest here was not limiting children to 50 four-letter words a day instead of 100. The Government's interest was protecting children from access to indecent speech at all.

QUESTION: Does this statute --

MR. ENNIS: And this Act would be completely ineffective in achieving that goal.

QUESTION: Does this statute, with respect to foreign speech, prohibit United States users to post information that goes abroad?

MR. ENNIS: It doesn't specifically address that question at all, Justice Kennedy. Which is a big problem. Because there was evidence in the record below that if this law were upheld, so that it completely suppressed all indecent speech by all domestic speakers, it would be very simple for commercial purveyors of sexually explicit speech to move all of their operations abroad.

And they don't even have to do that. Using a dedicated computer here, they can post the messages here. It goes to a foreign computer, an anonymous re-mailer, and that speech then comes back to this country. It seems, to

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all intents and purposes, it comes from a foreign country.

QUESTION: Why, just out of curiosity, is it not applicable to messages that emanate from abroad?

MR. ENNIS: It's not applicable, Your Honor, because, first of all, as a practical matter, the Government would not have personal jurisdiction over foreign speakers, and could not realistically expect --

QUESTION: Well, I mean if they came here. Suppose they came here, they have assets here, et cetera.

MR. ENNIS: Well, there may be one or two or 10 or 20 applications --

QUESTION: Is it totally practically or is there some legal reason?

MR. ENNIS: Well, there are also legal reasons, Your Honor. This Court has indicated -- and Justice Scalia's opinion for the -- that there are two canons of statutory construction that are relevant here. The first is -- the first canon is that you do not presume that a domestic law is intended to have extraterritorial effect.

Second, even if it is, you do not presume that it does apply extraterritorially if that would create a conflict with the laws of foreign countries. And the Government's own expert testified in this case that there are many foreign countries in which the law that's considered criminally indecent here would be perfectly

lawful. So there would be that --

QUESTION: So Congress could cure this constitutional defect as you see it simply by making it clear that the law applied everywhere?

MR. ENNIS: No, it wouldn't cure the second problem, Your Honor, because that would then be a conflict with the laws of those many foreign countries --

QUESTION: Well, but supposing the Congress said we don't care if there's a conflict?

MR. ENNIS: Well, Congress could violate that standard of statutory interpretation.

QUESTION: Well, when Congress expressly provides something, it's not violating a standard of statutory interpretation.

MR. ENNIS: Your Honor, I -- I agree that Congress could have drafted a much different statute than the one it drafted. It could have drafted a statute that did not apply at all to noncommercial speakers. It did not. It could have drafted a statute that only applied to visual images, not just four-letter words. It did not. It could have drafted a statute that was, in many respects, narrower than the statute at issue here. It could have limited it to prurient speech that lacked serious value.

QUESTION: But I'm talking about broader

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statute. A broader statute, in that respect, saying that it was all over the world that it applied, would cure this one constitutional defect that you're talking about.

MR. ENNIS: It would take care of that defect. But that's not the statute we have before us.

QUESTION: Well, I'm not sure. While I certainly agree that normally statutes are not interpreted to be extraterritorial, I don't know that we've ever had a case in which it has been asserted that the difference between the constitutionality and unconstitutionality of the statute is whether it is extraterritorial. I think if the only way to make it constitutional is to interpret it as being extraterritorial, I'm not sure that we wouldn't say, well --

MR. ENNIS: Justice Scalia, this is not that case.

QUESTION: I mean if that's your only argument, I'm saying --

MR. ENNIS: It's not -- it's not the only argument. It's not the only argument at all.

QUESTION: I think it's a pretty weak argument.

MR. ENNIS: But it's not the only argument at all, Justice Scalia. Our argument --

QUESTION: I thought you were making the point that it would be ineffective because --

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MR. ENNIS: That's correct.

QUESTION: -- but not unconstitutional.

MR. ENNIS: It would be ineffective for that reason.

QUESTION: But --

MR. ENNIS: But even if -- excuse me, Justice --

QUESTION: -- you did bring up an interesting point. Are there other nations that have regulated indecent speech in cyberspace?

MR. ENNIS: Not that I know of, Justice Ginsburg. There may be. But there are other nations that have attempted to regulate the content of speech in cyberspace. China attempts to regulate speech that's critical of the Chinese Government. It's not inconceivable that Iran might attempt to regulate speech that's critical of religious --

QUESTION: And might want to control the world with respect to that, to rule the world with respect to the kind of speech that that nation doesn't like?

MR. ENNIS: Well, Justice Ginsburg, I think -- in fact, the Chamber -- U.S. Chamber of Commerce filed an amicus brief in this case, criticizing this law for precisely that reason -- that this law sends precisely the wrong signal. That it is appropriate for governments, in their own interest, to ban whatever speech they want to

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ban from a global medium, which will cripple the competitiveness of U.S. business in competing in this increasingly important business --

QUESTION: I suppose we better let obscenity in, too, then?

MR. ENNIS: No --

QUESTION: That's just the point.

QUESTION: If that's a global principle --

MR. ENNIS: I don't think obscenity --

QUESTION: Right.

QUESTION: -- if we shouldn't ban stuff that we don't like, it would apply to obscenity.

MR. ENNIS: I don't think obscenity is considered appropriate or lawful speech in any country that I'm aware of.

QUESTION: Well, but I do think it's a weak argument to say that the United States, if it has a strong public policy, cannot lead the way, and maybe other nations would follow. I think your argument is -- is not your strongest argument.

MR. ENNIS: No, that's not our strongest argument. Our strongest argument, Justice Kennedy, is that this law will have the unconstitutional effect of banning indecent speech from adults in all of cyberspace. For 40 years, this Court has repeatedly and unanimously

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ruled that Government cannot constitutionally reduce the adult population to reading and viewing only what is appropriate for children. That is what this law does.

In Sable, this Court, in the telephone context, struck down a law that had precisely that effect. It banned telephone indecent speech. And that had the unlawful effect of banning that speech from adults, as well as from minors. This Court unanimously struck that down.

And to answer Justice Breyer's question about telephone, I do not believe it is a crime in this country today for private persons, including private teenagers, to communicate indecent speech by telephone. It would be a crime to communicate exactly the same speech under the CDA.

So, returning, the principal arguments we have is that this is a ban on adult speech. It is not going to be effective, for the reasons I've expressed, about all of the foreign indecent speech. And even if it were effective, there are less-restrictive alternatives that enable parents, completely, to decide what they think is appropriate for their 17-year-old, as opposed to their 16-year-old.

Under this law, there is no parental choice. The Government decides what's appropriate for all

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17-year-olds. A parent who disagrees with the Government cannot, through the Internet, gain access to speech, safer sex information, very similar to the information at issue in the Bolger case. That parent would have no opportunity, using the Internet, to make that speech available to the parent's 17-year-old child.

And even worse than the hypothetical you asked, Justice Souter, about the "knowingly permit" provision, under the plain language of this statute, it would be a crime, 2 years in jail, for a parent to send an indecent E-mail message to the parent's 17-year-old college freshman son or daughter. That's a direct transmission, not just a permitting the use. The parent would -- would be committing a criminal act to do that.

QUESTION: Mr. Ennis, do you think it would be constitutional to require all transmitters to tag their material?

MR. ENNIS: Well, I think it would raise significant compelled speech questions, Justice Stevens. Whether it be constitutional or not, I don't know. But even if that were required, that would not --

QUESTION: If it's not, then that's not a less-restrictive alternative?

MR. ENNIS: Well, it wouldn't be a less-restrictive alternative under the way this law is

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worded. Because this law makes it a crime to make speech available.

QUESTION: No, I'm assuming you just start from scratch, with a law that requires that as the principal means of screening.

MR. ENNIS: I think -- I think what would be constitutional is what this Court found would be constitutional in Denver Area. And that is encouraging, facilitating parents to use the parental control options that are readily available to them right now. If parents use the software tools they have, they can block or screen all indecent speech.

QUESTION: Nothing with any teeth in it?

MR. ENNIS: Well, you could --

QUESTION: They're not readily available without labelling. That's the problem.

MR. ENNIS: No, no --

QUESTION: Without tagging.

MR. ENNIS: That's wrong, Justice Scalia. Right now -- I'm a parent. I subscribe to one of the major online service providers. I clicked the kid's only box. And that means my child does not have any access to the Internet unless I'm there to supervise.

QUESTION: Does the Government have any interest in protecting children who do not have parents available

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in the home or do not have adequate parental supervision?

MR. ENNIS: Well, Justice Kennedy, we do not dispute that the Government has a legitimate interest in protecting some children from some forms of speech that could be found indecent. But the problem with this law is, in order to achieve that objective, it completely bans all of that speech from adults and also bans it from the substantial portion of minors who themselves have first amendment rights, under Bolger and Erznoznik, to have access to the banned speech.

QUESTION: Mr. Ennis, if I had to be present whenever my 16-year-old is on the Internet, I would know less about this case than I know today.

(Laughter.)

QUESTION: That is simply not a realistic possibility -- to tell every parent, if you're worried about it, just don't let your teenager use the Internet unless you're there.

MR. ENNIS: That's the point, Justice Scalia.

QUESTION: That's not reasonable.

MR. ENNIS: That's the point. The parental control devices that are available on the Internet are more effective than any control devices available for broadcast TV, cable or telephone, because the parents don't have to be there.

QUESTION: Thank you, Mr. Ennis.

MR. ENNIS: Thank you, Mr. Chief Justice.

QUESTION: Mr. Waxman, you have a minute remaining.

REBUTTAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF APPELLANTS

MR. WAXMAN: I have five points. I will try and make them very quickly.

The burden of proof -- this is an act of Congress that's being challenged on its face -- the burden of proof, under long precedent, is with the party challenging it. That's verified by Federal Rule of Evidence 301, and this Court's precedence in Walters and Hicks v. St. Mary's Honor Center.

With respect to the classification burden on the Carnegie Library, this Court's precedence in the obscenity context have indicated that there is no obligation for the Carnegie Library to read every one of its books in order to decide it has to be classified. In order to prove a criminal case, we have to prove that the defendant actually knew the content. So the Carnegie Library only has to do what it has to do under its local ordinance, which is take the indecent stuff and put it in a different room.

This is the electronic equivalent of that.

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QUESTION: But that's' not true under the display -- that's not true under the display provision here, is it?

MR. WAXMAN: It is true under the display provision. That is, if they find that they have certain --

QUESTION: I thought that was not a knowing offense?

MR. WAXMAN: Excuse me?

QUESTION: The display provision is not a knowing offense.

MR. WAXMAN: Well, you have to knowingly display it. And it, in the context -- if I may just finish this point -- it, in the context of this Court's decisions in the patently offensive prong of the obscenity context, has said that whatever the standard of proof, whatever the scienter is, you may not, as a constitutional matter, convict somebody unless you prove not that they knew that it was pornographic, but that --

CHIEF JUSTICE REHNQUIST: I think you've -- I think you've -- Mr. Waxman, I think you've answered the question.

MR. WAXMAN: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:18 a.m., the case in the

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above-entitled matter was submitted.)

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