1997 WL 74391 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

JANET RENO, ATTORNEY GENERAL of the United States, et al., Appellants,
v.
AMERICAN CIVIL LIBERTIES UNION, et al., Appellees.

No. 96-511.
October Term, 1996
Feb. 20, 1997.

On Appeal From The United States District Court For The Eastern District Of Pennsylvania

BRIEF OF APOLLOMEDIA CORPORATION AND BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, AS AMICI CURIAE, IN SUPPORT OF AFFIRMANCE

WILLIAM BENNETT TURNER
ROGERS, JOSEPH, O'DONNELL
& QUINN
311 California Street, 10th Floor
San Francisco, California 94104
Telephone: (415) 956-2828
Facsimile: (415) 956-6457

***i** TABLE OF CONTENTS

***iii** TABLE OF AUTHORITIES

FEDERAL CASES

*1 INTEREST OF THE AMICI

Amicus ApolloMedia Corporation is a multimedia technology company located in San Francisco, California. Its business is entirely devoted to computer-mediated communications. It designs and constructs sites on the World Wide Web, and it implements Internet systems for the delivery and management of information. Amicus uses computers, modems and telephone lines to communicate its own "content" as well as the content published by its clients and by visitors to its web sites.

ApolloMedia's web sites and some of its clients' web sites often communicate strong positions using expression that may be considered "indecent" by some people in some communities. Its "annoy.com" web site (http:// www.annoy.com) enables visitors to construct and send provocative email messages to various public officials and public figures, transmitting views on controversial issues such as single sex marriage, censorship, health care and gays in the military. Amicus' online databases contain material of social or political value, some of which is sexually explicit or uses vulgar language. Among ApolloMedia's clients are the Service Members Legal Defense Network (assisting military service members who are investigated concerning alleged homosexuality or who oppose sexual harassment), and the Hawaii Equal Rights Marriage Project (attempting to secure the right to marriage for gay and lesbian couples).

ApolloMedia has filed an action in the Northern District of California (*ApolloMedia Corporation v. Reno*, No. C-97-0346 MMC), challenging the constitutionality of the provision of the Communications Decency Act ("CDA"), 47 U.S.C. § 223(a)(1)(A)(ii), that makes criminal any "indecent" computer communication "with intent to annoy." The Court's resolution of "indecent" speech issues in the instant case, under different CDA provisions (§§ 223(a)(1)(B)(ii) and (d)(1)(B)), may affect certain issues in ApolloMedia's action.

***2** Amicus Bay Area Lawyers for Individual Freedom (BALIF) is a minority bar association comprised of over 500 lesbian, gay and bisexual members of the Bay Area legal community. Founded in 1980, BALIF promotes the professional interests of its members and the legal interests of the gay, lesbian and bisexual community at large.

BALIF frequently appears as amicus curiae in cases in which it can provide perspective that will inform a court's decision on a matter of broad public importance. BALIF believes this to be such a case. The speech of BALIF's members, their clients and lesbian, gay and bisexual Californians in general is restricted by the CDA. They routinely use computer-mediated forms of communication. BALIF itself maintains a web site (http:// www.balif.org), with links to a variety of other sites and organizations of interest to BALIF members, including Gay.Net. Because the CDA targets sexual speech, and because BALIF is identified in part by its members' sexual orientation, the CDA's attempt to outlaw "indecent" speech threatens the full and frank discussion of matters of great concern to BALIF. Indeed, BALIF is aware that the very concept of homosexuality is considered "indecent" to some people in some communities, and the CDA therefore poses a particular threat to the speech of BALIF and the gay, lesbian and bisexual community it represents.

The parties have consented to the filing of this brief, and amici have lodged letters of consent with the Clerk.

SUMMARY OF ARGUMENT

1. The federal government's power to regulate interstate commerce does not confer on it a "compelling interest" in restricting the speech of ordinary citizens using computers. Any federal interest in policing sexual morality is attenuated. It is further attenuated, compared to its power over government licensed broadcasters, by the nature of the Internet medium, the most democratic ever ***3** invented. The CDA supplants the authority of parents and the states by banning speech that some parents affirmatively wish their children to have access to (e.g., information about avoiding sexually transmitted diseases) or are willing to trust their children with. Speech is made criminal and banned for everyone if it is deemed "patently offensive" for five-year olds. The government's alternative argument, that it has a compelling interest in making sure that people are not deterred from

using the Internet fails in light of the reality that the Internet is flourishing and Americans are flocking to it, and there is simply no need for coercive federal criminal intervention.

2. The CDA exempts intrastate communications. It is practically unenforceable against communications originating abroad, which are a substantial portion of sexually explicit communications. The CDA's formal and practical underinclusiveness means that it does not effectively prohibit many if not most "indecent" communications. Because the CDA's speech restrictions do not effectively serve the government's asserted purpose in shielding children from such communications, they violate the First Amendment.

3. Section 223(a)(1)(B)(ii) criminalizes "indecent" speech but does not define it. "Indecency" has no meaning sufficiently intelligible to make its prohibition criminally enforceable. The government's attempt to rescue the statute by relying on a committee report to supply the missing definition violates settled canons of statutory interpretation and due process requirements of fair notice. The prohibition is impermissibly vague for a criminal statute.

4. As construed by the government, the CDA uses only one part of the three-part test of *Miller v. California*, 413 U.S. 15, 24 (1973), to make criminal speech that is not legally obscene. This violates the First Amendment because it punishes speech with societal value and because, when the "patently offensive" prohibition is uncoupled from the prurient-appeal and no-societal value ***4** rules for obscene speech, the law is impermissibly vague. The wholly uncertain applicability of the CDA defenses actually compounds the vagueness of the statute. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991). In addition, using "community standards" to judge a non-geographic medium like the Internet means that speech offensive to the least tolerant community in the nation is banned from all communities. The subjective "patently offensive" standard, standing alone, invites both discriminatory enforcement and unseemly government surveillance of the online communications of ordinary innocent citizens.

ARGUMENT

The Court has never upheld a *criminal* statute outlawing either "indecent" or "patently offensive" speech that is not legally "obscene." [1] The provisions of the CDA at issue in this case punish pure speech as a felony.

***5** The CDA is not a "sensitive tool" for regulating unprotected speech. *See Speiser v. Randall*, 357 U.S. 513, 525 (1958). Instead, it is a clumsy and defective piece of legislation that builds a censorship edifice on the flimsiest of foundations: it prohibits unknowable kinds and quantities of speech ("indecent") not defined by the statute; the government's proposed definition of the forbidden speech, borrowed from a committee report, was in turn borrowed from the FCC's definition used to regulate government licensees in a very different medium (broadcast); and the FCC's definition in turn borrowed one part of the three-part test for "obscene" matter established by *Miller v. California*, 413 U.S. 15 (1973). At each step in the construction of this censorship structure, the CDA's unconstitutionality has been compounded.

I. THE FEDERAL GOVERNMENT'S POWER TO REGULATE INTERSTATE COMMERCE DOES NOT CONFER ON IT A "COMPELLING" INTEREST IN REGULATING "INDECENT" SPEECH BY ORDINARY CITIZENS USING COMPUTERS

The primary battleground on which this case has been fought is whether the CDA is "narrowly tailored." But the CDA's attempt at regulation of the speech of ordinary citizens requires a determination, first, whether the *federal* government has both the constitutional power and a compelling interest in regulating citizen speech (not the speech of federally-licensed broadcasters) using computers. The requisite power and interest cannot simply be assumed. *E.g.*, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1988) (burden on government); *id.* at 788-89 (asserted interests not "supported by record ***6** or legislative findings"). Only if, after consideration of all the relevant facts, the Court finds the federal interest to be "compelling" need it decide whether the CDA is "narrowly tailored" to serve the interest.

Congress has only the legislative powers enumerated in the Constitution. All other powers are reserved, under the Tenth Amendment, to the states and the people. The federal government needs to be reminded on occasion that it, unlike the states, has no general police power. In particular, "the domain of sexual morality is pre-eminently a matter of state concern." *Roth v. United States,* 354 U.S. 476, 502 (1957) (Harlan, J., dissenting in part). Interests protected by statutes on sexual morality are "primarily entrusted to the care, not of the federal government, but of the states. Congress has no substantive power over sexual morality." *Id.* at 504.

As the Court held in *Roth,* Congressional power to regulate obscene matter in the mails is based on its express power over the postal system under Article I, section 8, clause 7 of the Constitution. 354 U.S. at 492-93. Even this plenary power over the postal system does not justify Congressional attempts to restrict unpopular speech transmitted by mail. *E.g., Bolger v. Young's Drug Products Corp.,* 463 U.S. 60 (1983) (invalidating federal statute that prohibited unsolicited mail advertising of contraceptives); *Lamont v. Postmaster General,* 381 U.S. 301 (1965) (invalidating requirement that persons receiving "Communist propaganda" had to request delivery of such mail). Congress has no express power over other forms of communication, including the Internet, and therefore any regulatory power must be implied from its power over interstate commerce. *See* ***7** *National Broadcasting Co. v. United States,* 319 U.S. 190, 227 (1943) (Communications Act of 1934 provision a proper exercise of Congressional power over interstate commerce). [2]

The federal commerce power, however, is not unlimited. *United States v. Lopez,* 115 S. Ct. 1624 (1995). If under *Lopez* Congress lacks power under the Commerce Clause to protect children from the very serious problem of violence associated with guns in schools, it is hard to see why its interest in shielding them from private online speech should be considered "compelling." As Justice Harlan pointed out, "Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do." *Roth, supra,* 354 U.S. at 505. The "deadening uniformity" of national censorship is one of the dangers. *Id.*

The "attenuated" federal interest in regulating sexual morality is further attenuated by the nature of the online medium. As Justice Frankfurter pointed out in *NBC* with regard to the broadcast medium, "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to ***8** use it must be denied." 319 U.S. at 226; *accord, Red Lion,* 395 U.S. at 386-401. But the Internet *can* be used by all. "Unlike other modes of expression," there is no scarcity of frequencies or facilities that could justify government content regulation. Nor is it "intrusive" in the sense that an unwanted communication may enter the home unbidden and "confront" unsuspecting children. *Cf. FCC v. Pacifica Foundation,* 438 U.S. 726, 748 (1978). Nor is it a medium "uniquely accessible to children." *Id.* at 749. Receiving any computer-mediated communication requires both affirmative effort and significantly more sophistication than turning on a television set or picking up a telephone.

The government asserts that "the indecency problem" on the Internet is "much more pronounced than it is on broadcast stations." U.S. Br. at 29. According to the government, this is because the Internet operates "without the intervention of editors, network censors, or market disincentives." *Id.* In other words, according to the government, because ordinary citizens can communicate with each other directly, not as the passive recipients of programming directed at them by powerful corporations, the government is entitled to step in and make criminal the citizen speech that it disfavors. The perverse result is that the more democratic the medium-in the sense of being free of corporate "censors" and commercial "disincentives"-the greater the government's right to regulate the medium. If the First Amendment means anything, this argument must be rejected out of hand.

Finally, any federal interest is attenuated because the CDA officiously meddles in what is first and foremost the domain of parents, not government. It overrides parents' wishes and criminalizes speech that some parents affirmatively wish their children to have access to, e.g., information about how to avoid sexually transmitted diseases. ***9** It criminalizes speech that some parents are willing to trust their children with. It makes felonies speech that would be perfectly appropriate for 17-year old minors simply because it might be deemed "patently offensive" in some communities for *5-year old* children. (The CDA makes no distinction between older minors and toddlers, banning speech if it is "available" to *any* minor.) Further, the CDA ignores the

fact that parents may easily install software on their computers that prevents their children from gaining access to material that the parents do object to. *ACLU v. Reno,* 929 F. Supp. at 838-42. In short, the CDA supplants parental control with governmental control over the information that children have access to, and it supplants state authority with federal authority over sexual morality. It does so without hearings, findings or any evidence of *what* speech might cause *what* harm to *what* minors.

As Judge Dalzell noted, the asserted interest in protecting children "is as dangerous as it is compelling" because it has "no limiting principle." *ACLU v. Reno,* 929 F. Supp. at 882. It would, for example, authorize Congress to enact a "Newspaper Decency Act," *id.,* and, in the name of protecting children, to restrict wide varieties of speech disfavored by paternalistic legislators.

The Court should conclude that Congress does not in fact have a compelling interest in shielding all children, of whatever age and regardless of their parents' wishes, from sexual speech on the Internet. The Court's decision in *Ginsberg v. New York,* 390 U.S. 629 (1968), cannot carry the freight that the government attempts to load on it. The government contends, first, that what it calls the CDA's "specific child" and "transmission" provisions are "essentially no different" from the New York law in *Ginsberg.* U.S. Br. at 24. The Court in *Ginsberg* rejected the argument of a commercial seller of pornography that ***10** minors had the right to see the same materials available for sale to adults. 390 U.S. at 636-37. *Ginsberg* involved a *state* law enacted in the state's police power, not a federal commerce regulation. The Court specifically noted that the validity of the law rested on the state's power "to control the conduct of children" (*id.* at 638-39), a power that the federal government does not have. Justice Stewart, concurring, said that the law was valid on the same basis that the states may deny minors the right to marry or to vote. *Id.* at 649-50.

Furthermore, the state statute in *Ginsberg* embodied a legislative approach that Congress expressly and deliberately *rejected* in the CDA. The New York law precisely defined types of materials that were deemed by the state to be "harmful to minors." 390 U.S. at 645-47. For example, the state statute contained detailed definitions of "nudity, sexual conduct, sexual excitement, or sado-masochistic abuse," [3] which, when the material met the three-part test of *Miller* as obscene for minors, were deemed to be "harmful to minors." Congress, however, "considered, but rejected the so-called 'harmful to minors' standard. *See Ginsberg v. New York* ..." Conf. Report at 188, reprinted in 1996 U.S. Code Congressional Adm. News, at 202. Oddly, it is the very approach specifically rejected by Congress that is now relied upon by the government. [4]

***11** Finally, now that the case is in this Court, the government asserts-without any supporting evidence or congressional finding-a new "compelling interest in protecting the First Amendment interests of all Americans," not just children, in using the Internet. U.S. Br. At 31. The argument is that the Internet's potential "will be lost" if people are "unwilling to avail themselves of its benefits because they do not want their children exposed to patently offensive material." *Id.* at 30. There is, however, no evidence to support the suggestion that substantial numbers of people are foregoing the communicative benefits of the Internet for fear of exposing their children to "indecent" material. In fact, all the evidence shows that the Internet is flourishing and American participation in it is growing by leaps and bounds. Households, schools and businesses are flocking to it in ever increasing numbers. It "ain't broke" and does not need government "fixin' " to make it work for the people. [5] *If* any parents are sufficiently concerned that they might be "deterred" from using the Internet, they have it within their power-with no need for coercive government criminal intervention- ***12** to monitor their children's use and to install the readily available software that screens out undesired material.

Furthermore, recognizing a "compelling government interest" in making sure that a communications medium is "family friendly" (U.S. Br. at 7) has disturbing implications. Such an interest could as easily be asserted with regard to "indecent" speech in public parks or leaflets passed out on street corners. If the federal government were given free rein to ensure "family friendly" communications media, it could regulate depictions of violence, use of profanity and almost any other content disfavored by legislators. The simple truth is that criminalizing the speech of ordinary citizens in the name of making sure that all speech on a medium is acceptable to the majority-who may otherwise desert the medium-is inconsistent with the very purpose of the First Amendment.

II. BECAUSE THE CDA EXEMPTS INTRASTATE COMMUNICATIONS AND IS NOT PRACTICALLY ENFORCEABLE AGAINST COMMUNICATIONS ORIGINATING ABROAD, THE GOVERNMENT'S ASSERTED INTEREST IS NOT IN FACT SERVED BY ITS SPEECH RESTRICTIONS

Sections 223(a)(1) and (d)(1) of the CDA apply only to "interstate and foreign communications." These are defined terms in the Communications Act. 47 U.S.C. § 153(e) and (f). The definition of "interstate communication" is a common sense one, meaning a communication or transmission "from any State ... to any other State." *See Sprint Corp. v. Evans*, 846 F. Supp. 1497, 1500-01 (M.D.Ala.1994).

Because Congress elected in the CDA not to make criminal *intra* state computer communications, the Act exempts innumerable communications that may well ***13** include "indecent" or "patently offensive" material. For example, a "chat room" or email sexual proposition from a pedophile to a child in the same town is not covered by the Act. Nor are cross-town facsimile transmissions. Similarly, intrastate email among employees in a business, or students at a university, is not covered. Many other online communications of all kinds, so long as they do not cross state lines, are simply not covered.

In *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the Court invalidated a Florida law prohibiting disclosure of rape victims' names in "any instrument of mass communication." The Court held that the law's "facial under-inclusiveness" undermined the state's claim that it was in fact accomplishing its asserted purpose of protecting the victims' privacy. The law did not "prohibit the spread by other means of the identities of victims of sexual offenses," and did not cover communications by individuals (like the "backyard gossip") at all. 491 U.S. at 540. The Court held that "without more careful and inclusive precautions against alternative forms of dissemination, we cannot conclude that Florida's selective ban on publication by the mass media satisfactorily accomplishes its stated purpose." Justice Scalia stated the defect in the law concisely in his concurring opinion, in terms directly applicable here: the speech restriction is invalid "when it leaves appreciable damage to that supposedly vital interest unprohibited." 491 U.S. at 542.

Similarly, in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the Court invalidated a law that made it a crime for a newspaper (but not electronic media) to publish the names of juvenile offenders. The Court held that the law failed to "accomplish its stated purpose." 443 U.S. at 105. As now Chief Justice Rehnquist remarked, it is "difficult to take very seriously [the government's] asserted need to preserve the anonymity of its youthful ***14** offenders when it permits other, equally, if not more, effective means of mass communication to distribute this information without fear of punishment." *Id.* at 104-05 (Rehnquist, J., concurring); *accord*, *First National Bank of Boston v. Bellotti*, *supra*, 435 U.S. at 792-93 (statute invalid because "both underinclusive and overinclusive" in dealing with asserted interests).

In addition to exempting intrastate communications, the CDA is prevented from effectively serving the interest in protecting children by the fact that a "large percentage, perhaps 40% or more, of content on the Internet originates outside the United States." *ACLU v. Reno*, 929 F. Supp. at 848; *see Shea v. Reno*, 930 F. Supp. 916, 931 (S.D.N.Y.1996). Perhaps "thirty percent of the sexually explicit material currently available on the Internet originates in foreign countries." *Shea*, 930 F. Supp. at 931. "Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the CDA." *ACLU*, 929 F. Supp. at 882-83. Thus, for this reason alone, "the CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet." *Id.* at 882. The CDA "will not reach a significant percentage of the sexually explicit material currently available." *Shea*, 930 F. Supp. at 941.

(The extent to which the quixotic CDA is ineffective is emphasized by the twin realities that minors are in fact exposed to "indecent" speech in many more direct and pervasive ways than through computers, and shutting down even some of those ways through measures like a Newspaper Decency Act, a Novel Decency Act, a Village Green (or "Schoolyard," or "Lockerroom") Decency Act or a Postal Decency Act would be palpably unconstitutional. *See ACLU*, 929 F. Supp. at 882.)

***15** The Court frequently has invoked the principle that a speech restriction must be demonstrably *effective*. *E.g., 44 Liquormart, Inc. v. Rhode Island,* 116 S. Ct. 1495, 1509 (1996) (state failed to demonstrate that ban on liquor advertising actually reduced alcohol consumption); *Turner Broadcasting Sys. v. FCC,* 114 S. Ct. 2445, 2470 (1994) (government must meet burden of establishing that speech regulation "will in fact alleviate these harms in a direct and material way"); *Edenfield v. Fane,* 113 S. Ct. 1792, 1800 (1993) (even restriction on commercial speech requires such justification).

Because the CDA is facially underinclusive in that it does not reach intrastate communications, and because it cannot practically prevent foreign materials from reaching minors in this country, it does not effectively accomplish the government's asserted goal of shielding minors from "indecent" and "patently offensive" speech. Therefore, it is not effective in serving a compelling government interest, and for this reason violates the First Amendment.

III. SECTION 223(a)(1)(B)(ii)'s FAILURE TO DEFINE THE "INDECENT" SPEECH THAT IT MAKES CRIMINAL RENDERS IT UNCONSTITUTIONALLY VAGUE

Section 223(a)(1)(B)(ii) prohibits communicating any "indecent" speech (including mere words) to anyone under age 18. Here, the CDA overinclusively bans "indecent" speech by telephone, fax machine or email, to a 17-year-old if it would be "indecent" for a toddler, even outlawing communications that the parents of the minor recipient know of and permit (or, indeed, send).

The provision does not define "indecent." "Indecent" can mean many things to different people. For example, it ***16** might include depictions or descriptions of violence, profanity or blasphemy, all of which are considered "indecent" by some people. The word is defined in the dictionary as "1. offensive to good taste; unseemly. 2. offensive to public morals; immodest; indecent exposure-See Synonyms at improper." *American Heritage Dictionary of the English Language,* 668 (1st ed. 1969). The synonyms are "improper, unbecoming, unseemly, indelicate, indecent, indecorous." *Id.* at 662.

Amici have found only one legislative definition of "indecent" in the federal Codes. 18 U.S.C. § 1461, dealing with obscene materials in the mails, provides that: "The term indecent as used in this section includes matter of a character tending to incite arson, murder, or assassination." In *United States v. Smith,* 11 Fed. 663 (C.C.Ky.1882), in quashing an information under this statute, the court ruled that "indecent" means "immodest, impure," not "coarse, or unbecoming, or even profane."

Given these diverse definitions, "indecent" has no meaning sufficiently intelligible or coherent to make its prohibition criminally enforceable. The government, however, relying not on anything in the statute itself but on a conference report, says that "indecent" in subsection (a)(1)(B)(ii) (speech communicated to a minor via "telecommunications device") *means* "patently offensive" sexual speech as referred to in subsection (d)(1)(B) (speech "available" to a minor via an "interactive computer service"). The conference report states that "The conferees intend that the term indecency (and the rendition of the definition of that term in new section 502) has the same meaning as established in *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), and *Sable Communications of California v. FCC,* 492 U.S. 115 (1989)...." Conf. Report at 188, reprinted in 1996 U.S. Code Congressional & Administrative News, at 201.

***17** Even if the intent of the few "conferees" were relevant for the purpose of supplying a missing definition in a criminal statute, the report is inaccurate in stating that "indecency" is defined in section 502; it is not. In fact, the CDA does not even use the noun "indecency." Further, contrary to the conference report, "indecency" under the CDA cannot have the "same meaning" as in *Pacifica;* the FCC's definition that the Court upheld for administrative (not criminal) purposes referred to patently offensive language "as measured by contemporary community standards *for the broadcast medium ... at times of the day* when there is a reasonable risk that children may be in the audience." 438 U.S. at 732 (emphasis added). This cannot be applied to online communication, which is asynchronous.

The government's attempt to salvage subsection (a)'s criminalization of undefined "indecent" communications by reference to a different term in a different provision of the statute must be rejected. If Congress uses language in one section of a statute but omits it in another, it is presumed that Congress acted intentionally and intended different meanings. *Gozlon-Peretz v. United*

States, 498 U.S. 395, 404 (1991); *Russello v. United States,* 464 U.S. 16, 23 (1983). Further, to read "indecent" as redundant of "patently offensive" is to rob it of independent meaning in violation of the rule that a "statute must, if possible, be construed in such fashion that *every word* has some operative effect." *United States v. Nordic Village,* 503 U.S. 30, 36 (1992) (emphasis added); *Bowsher v. Merck & Co.,* 460 U.S. 824, 833 (1983).

More fundamentally, it is entirely inappropriate for the government to attempt to validate a criminal statute, which requires fair notice of precisely what is proscribed, by relying on a conference report. "Congress is elected to enact statutes rather than point to cases," and ***18** "unrestrained use of legislative history" by reference to committee reports is no substitute for valid legislation. *Blanchard v. Bergeron,* 489 U.S. 87, 89 (1989) (Scalia, J., concurring); *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 616, 619-22 (1991) (Scalia, J., concurring); *see generally,* Note, *Why Learned Hand Would Never Consult Legislative History Today,* 105 Harv. L. Rev. 1005 (1992). Reliance on a committee report citing a case to supply a statutory term crucial to its validity is particularly inappropriate. "As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist ..." *Blanchard v. Bergeron, supra,* 489 U.S. at 98 (Scalia, J., concurring).

Amici recognize that one judge in *ACLU v. Reno* and the court in *Shea v. Reno* accepted the government's argument that the conference report supplied the missing definition of "indecent," and that "indecent" means "patently offensive...." But neither gave any consideration to the rules of statutory construction cited above. More importantly, the authorities on which they relied involved only civil administrative uses of "indecent" as equivalent to "patently offensive"-FCC regulations and decisions, *Pacifica* and the television cases following *Pacifica.* Since *none* of those authorities involved *criminal* statutes, the Court should not sanction their incorporation to salvage a defective criminal law. *See generally Pope v. Illinois,* 481 U.S. 497, 507-19 (1987) (Stevens, J., dissenting). [6] The requisites for valid criminal statutes- ***19** adequate notice and precision to discourage arbitrary enforcement-rule out such legislation by indirection.

Because § 223(a)(1)(B)(ii) makes criminal a broad range of "indecent" speech, without defining the term, this provision of the CDA is void for vagueness. *See, e.g., Kolender v. Lawson,* 461 U.S. 352, 357, 359, n. 8 (1983); *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972); *Winters v. New York,* 333 U.S. 507, 515 (1948).

IV. THE COURT SHOULD REJECT ANY ATTEMPT TO BORROW ONE-THIRD OF THE *MILLER V. CALIFORNIA* TEST FOR THE PURPOSE OF CRIMINALIZING NON-OBSCENE SPEECH

Even if, contrary to amici's contention in point III, § 223(a)'s prohibition of "indecent" speech is read to mean "patently offensive" sexual speech as prohibited by § 223(d)(1)(B), the patently offensive proscription is itself unconstitutional. It bears emphasis again that the Court has never upheld a *criminal* statute outlawing "patently offensive" speech that is not legally "obscene" under the test of *Miller v. California,* 413 U.S. 15, 24 (1973).

The Court struggled in the 1950's and 1960's with whether "obscene" speech could be either meaningfully defined or punished criminally. *E.g., Roth v. United States,* 354 U.S. 476 (1957); *Jacobellis v. Ohio,* 378 U.S. 184, 191 (1964); *id.* at 197 (Stewart, J.: "I know it when I see it"). In *Miller* the Court attempted to resolve those questions by establishing a three-part test for obscenity regulation: (1) the "work" must appeal to the "prurient" interest; (2) its depictions of sexual acts must be "patently offensive" as judged by community standards; and (3) the work must lack "serious literary, artistic, political or scientific value." 413 U.S. at 24.

Several members of the Court have expressed their dissatisfaction with the *Miller* test even as to obscenity. ***20** *See, e.g., Pope v. Illinois,* 481 U.S. 497, 505-06 (1987) (Scalia, J.) (need for "reexamination" of *Miller,* since whether material has literary or artistic value is matter of taste and *"De gustibus non est disputandum"*); *id.* at 516 & n.ll (Stevens, J.) (criminal prosecution for obscenity involving consenting adults should not be permitted); *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 84 (1973)

(Brennan, J., dissenting); *cf. Alexander v. United States,* 509 U.S. 544, 573 (1993) (Kennedy, J., dissenting, with Blackmun, Stevens and Souter, JJ.) (obscenity "separated from protected expression only by a 'dim and uncertain line' "). [7]

Each of the three parts of the *Miller* test must be met to criminalize even obscene speech. *Cf. Pope v. Illinois,* 481 U.S 497 (1987) (societal value part not to be judged by community standards, which govern offensiveness and prurient parts); *id.* at 507-08 (Stevens, J., dissenting: "prosecutor must prove each of these three elements beyond a reasonable doubt"). If the CDA borrows only one-third of the *Miller* guidelines to outlaw "patently offensive" speech on the Internet, it violates the First Amendment because it criminally punishes valuable speech and because, when it is uncoupled from the prurient-appeal and no-societal-value rules for obscene speech, the subjective patently offensive "test" becomes impermissibly vague for use in a criminal statute. In addition, judging offensiveness by geographic "community standards" means that Internet speech is barred ***21** everywhere if it is "offensive" in the least tolerant community in the nation, thus denying the speech to the vast majority of Americans to whom it is not offensive.

A. Uncoupling "patently offensive" from the *Miller* obscenity test makes the law impermissibly overbroad, subjective and vague for criminal purposes

As construed by the government, the CDA borrows only the "patently offensive" part of the *Miller* test. It completely omits the other two parts: that the material's appeal be to the "prurient" interest and that the material not have "serious literary, artistic, political or scientific value." Accordingly, the CDA prohibits speech that, by definition, does *not* appeal to the prurient interest and that *does* have serious literary, artistic, political or scientific value. In other words, not only does the CDA criminalize a vast range of speech, but it forbids speech that may have important societal value. It is a "statute of unprecedented sweep," *Shea,* 930 F. Supp. at 922, the most sweeping restriction on the speech of ordinary citizens that Congress has ever attempted.

Examples of patently offensive sexual speech that are protected by the First Amendment can be found in the decisions of this Court. *See, e.g., Cohen v. California,* 403 U.S. 15 (1971), and *Hustler Magazine v. Falwell,* 485 U.S. 46 (1988). Cohen's "Fuck the Draft" jacket, worn to court in full view of all spectators, including children, was held to be protected even though highly "offensive" to most citizens. Hustler Magazine's mean-spirited accusation that Rev. Falwell had sex with his mother in an outhouse was deemed "patently offensive" by this Court. 485 U.S. at 50. Even though the parody was "gross and repugnant in the eyes of most" (*id.*), and found by a jury to be an "outrageous" and intentional infliction of emotional harm, it ***22** was held protected. Both examples obviously would be deemed "patently offensive" in some communities and, if the communications had been done by computer rather than in public or print, would be felonies under the CDA.

Bolger v. Young's Drug Products Corp., 463 U.S. 60 (1983), is another example of speech held protected by this Court but subject to criminal punishment under the CDA. *Bolger* invalidated a statute prohibiting unsolicited mail advertising of contraceptives. The advertising-"Plain Talk About Venereal Disease" and "Condoms and Human Sexuality" (463 U.S. at 62, n. 4)-might well have been considered "patently offensive" by some recipients, especially those with religious scruples about contraceptives. The Court rejected the government's argument that the statute was needed to keep unsolicited sexual material out of the hands of children. *Id.* at 73-74. But such material, if communicated via the Internet, likely would be a felony in some communities. [8]

Moreover, "patently offensive" is an inherently subjective standard. The speech must be offensive *to* someone. This loose and variable "standard" is wholly inappropriate for a criminal statute of general application enforceable throughout the nation. As Chief Justice Rehnquist wrote for the Court in *Hustler Magazine, supra,* " 'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." 485 U.S. at 55.

***23** Nor is the CDA's inherent subjectivity cured by the supposed statutory "defenses" set forth in 47 U.S.C. § 223(e)(5). The defenses are not in fact available to most speakers. *Shea,* 930 F. Supp. at 942-48; *ACLU,* 929 F. Supp. at 846, 849, 856,

859. Moreover, their wholly indeterminable applicability to a few speakers (who could theoretically-but not practicably-take some "good faith" step to screen the age of recipients) actually compounds the vagueness of the statute. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991) ("safe harbor" provision of disciplinary rule misled attorney into believing he had defense to vague rule).

The government's reliance on *Pacifica* is completely misplaced. The court below properly rejected the notion that *Pacifica*-involving administrative regulation of a government-licensed broadcaster in a medium that is "uniquely accessible" to children and can "confront" listeners without warning (438 U.S. at 748)-validates a *criminal* statute governing a completely different medium. *Pacifica* involved only a mild declaratory order (not even a reprimand). 438 U.S. at 730. Moreover, in sharp contrast to the initiation of criminal proceedings under the CDA by any of hundreds of federal prosecutors who wish to do so, the FCC stated in *Pacifica* that it would not impose even an administrative sanction "without warning." *Id.* at 743. [9]

The Court's discussion of "borderline" examples of cable television broadcasts in ***24** *Denver Area Educ. Telecommunications Consortium v. FCC*, 116 S. Ct. 2374, 2396-97 (1996), is instructive here. The Court invalidated a provision of the 1992 cable television act that merely *permitted* cable operators to refuse to carry "patently offensive" programming on public access channels. In doing so, the Court referred to certain "borderline examples as to which people's judgment may differ, perhaps acceptable in some communities but not others." The Court mentioned "depiction of a self-help gynecological examination," "nude scenes from a movie" and a "safe sex" program. 116 S. Ct. at 2396-97. The Court concluded that it was "difficult to see how such borderline examples could show a compelling need, nationally, to protect children from significantly harmful materials." Amici's point is that the CDA, worse than the much less restrictive provisions that the Court struck down in *Denver*, makes *criminal* the very kinds of "borderline examples" that the Court recognized might not be "acceptable in some communities." [10] The effect of the CDA is to ban even the "borderline" examples from *all* communities because they are unacceptable in some very intolerant ones, even though they are generally acceptable around the nation.

The government stretches too far when it invents the concept of "cyberzoning" and says the CDA operates like the adult theater ordinances in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). The CDA does not "channel" materials to "adult areas of cyberspace" (U.S. Br. at 32); it makes *criminal* speech that is protected among adults. Moreover, the CDA is not a time, place and manner regulation aimed at containing the "secondary effects" of speech. Unlike *City of Renton and Young*, where ***25** the cities sought to control crime and protect retail business and property values through geographic zoning of theaters, the CDA criminalizes speech because of its content. As the Court remarked in *City of Renton*, "[i]t is th[e] secondary effect which these zoning ordinances attempt to avoid, *not the dissemination of 'offensive' speech.*" 475 U.S. at 49, quoting *Young*, 427 U.S. at 71, n. 34 (emphasis added). Here, it is precisely the "offensive" speech that is prohibited.

B. Using geographic "community standards" for a non-geographic medium means that speech offensive in any community is banned from all communities

Miller 's definition of obscene speech that enjoys no First Amendment protection attempted to minimize subjectivity by requiring that offensiveness be judged by "community standards." These standards have come to be *geographic. Miller* itself said that it was permissible to use the State of California as the relevant "community." 413 U.S. at 30-31. Other courts have approved the use of "community standards" of a county (*e.g., United States v. Bagnell*, 679 F.2d 826, 836-37 (11th Cir.1982), *cert. denied*, 460 U.S. 1047 (1983)), and a federal district (*e.g., United States v. Thomas*, 74 F.3d 701, 710-11 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996)). But the Internet is a non-geographic medium, and online communications can and do circulate throughout the nation and the world, with the speaker commonly having no idea who might read his or her words or in what geographic community readers might live. [11] In other words, the assumption of *Miller* that ***26** "patent offensiveness" will be judged by the standards of a given geographic community, where the defendant intends to sell the offending film or book, simply does not work with the Internet. Applying geographic community standards to speech that is "available" everywhere reduces all speech to what is acceptable in the *least tolerant community* a prosecutor can find.

Amici recognize that *Sable Communications v. FCC*, 492 U.S. 115 (1989), rejected the argument of commercial "dial-a-porn" operators that they would be compelled to tailor their messages to the least tolerant community. 492 U.S. at 124. The argument was that *Miller* was violated because the telephone statute assertedly created an "impermissible *national* standard." The Court cited its cases upholding prohibitions against *mailing* or *broadcasting* obscene materials into certain communities. The Court said that a commercial telephone pornographer was "free to tailor its messages, on a selective basis, if it so chooses, *to the communities it chooses to serve*," and that there was no constitutional impediment to imposing the costs of "screening the locale of incoming calls" on the commercial operator. 492 U.S. at 125 (emphasis added). This reasoning cannot be applied here because the vast majority of Internet speakers (1) are not commercial enterprises, (2) do not "choose" to serve *any* geographic community, and (3) have no means of "screening" who might see their speech. As Judge Dalzell pointed out, "unlike other media, there is no technologically feasible way for an Internet speaker to limit the geographical ***27** scope of his speech (even if he wanted to), or to 'implement[ ] a system for screening the locale of incoming' requests." *ACLU*, 929 F. Supp. at 878, quoting *Sable*. [12]

Miller was decided on the assumption that the Court was dealing with relatively fixed "works," like movies, books and magazines, that the publisher intends to sell in a given geographic community. *Miller* was decided two decades before the Internet emerged. The Court plainly did not anticipate its application to *interactive* speech, the kinds of computer-mediated human conversations that the Internet medium makes possible and that know no geographic boundaries.

The Conference Report on the CDA states that a different section of the law, § 223(f)(2), which preempts inconsistent state and local regulations, is "intended to establish a uniform national standard of content regulation for a national, and indeed a global, medium ..." Conf. Report at 191, reprinted at 1996 U.S. Code Congressional & Administrative News, at 204. If this opaque reference was meant to establish "national" standards rather than local "community" standards for judging "patently offensive" speech, this is an odd and highly questionable legislative technique. *See* authorities cited in point III, *supra*. It also is contrary to *Miller* 's rejection of a ***28** national standard. 413 U.S. at 30 ("our Nation is simply too big and diverse for this Court reasonably to expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists").

When uncoupled from *Miller* 's context of "hardcore," prurient sexual "works" with no societal value, the "patently offensive" standard becomes an engine for the suppression of speech that prosecutors subjectively find objectionable. It cannot stand alone as the test for whether speech is criminal. Whatever its validity as part of the FCC's administrative regulation of commercial broadcasters who voluntarily seek government licenses and submit to such regulations, it cannot be used in a criminal statute applied to ordinary citizens who converse on the Internet. Its vagueness is compounded by "the government's inability to identify the relevant community by whose standards the material will be judged." *ACLU v. Reno*, 929 F. Supp. at 856 (Sloviter, J.); *id.* at 863 (Buckwalter, J.).

Nor is it irrelevant that enforcement of this criminal statute inevitably will involve widespread eavesdropping or other participation by government agents and vigilante groups in the online conversations of ordinary citizens. That is, unlike complaint-activated monitoring of public broadcasts by the FCC, enforcement of the CDA necessarily will involve reading, snooping on and recording the electronic communications of unsuspecting and wholly innocent citizens. For example, when a vigilante group tips law enforcement that a certain news group involves the "patently offensive" discussion of abortion, safe sex or erotic literature, Big Brother government will log on and listen to the conversation, recording at will. When a prosecutor thinks he or she can get a conviction in a particular community intolerant of such discussion, ***29** the conversation can be downloaded-with a mouse click-to that venue. Hundreds of persons' thoughts and ideas will become "evidence" in a criminal prosecution. This will happen even if the "patently offensive" material in fact has no impact whatever on the "community" whose standards will govern and would not even have been downloaded there except for the purpose of prosecution. [13] Thus, not only does the CDA's vagueness invite arbitrary and discriminatory enforcement (*see Grayned v. City of Rockford, supra*, 408 U.S. at 108-09), but the enforcement will include unseemly government surveillance of the private online conversations of ordinary innocent people.

In short, the CDA is not rescued by borrowing from *Pacifica* which in turn borrowed part of *Miller*. Unlike with broadcast, cable and telephone, where there is a long tradition of significant federal regulation, including the need to apply for government licenses to make commercial use of these media, there is no overriding federal interest in policing the content of citizen speech on the Internet. *See* point I, *supra*. The drafters of the CDA, in their haste to suppress images and words that *they* find offensive, blundered far beyond the scope of any legitimate federal interest. Until Congress specifies, in clear terms that give fair notice to speakers, what harm is ***30** caused to what minors by what speech, it cannot make "patently offensive" speech a *criminal* offense.

CONCLUSION

The judgment of the court below, finding the Communications Decency Act unconstitutional, should be affirmed.

Footnotes

1 *In Denver Area Educ. Telecommunications Consortium v. FCC,* 116 S. Ct. 2374 (1996), the Court considered a non-criminal provision of the 1992 cable television act that was entirely permissive, authorizing, but not requiring, cable operators to refuse to carry "patently offensive" sexual material. 116 S. Ct. at 2387. A plurality of the Court found that the provision was not vague. *Id.* at 2390. Not only did *Denver* involve a non-criminal statute, but the Court emphasized the special characteristics of the medium, noting that cable television is essentially the same as broadcast in being a "pervasive" presence, "uniquely accessible to children" and capable of confronting them "with little or no warning." Computer-mediated communication, for the many reasons set forth in the findings of fact below, *ACLU v. Reno,* 929 F. Supp. 824, 830-49 (E.D.Pa.1996), is very different from broadcast. One of those reasons-the ability of consumers to block communications that they do not want their children to see-was emphasized by the Court in *Denver* in striking down the provision of the 1992 cable act requiring *operators* to "scramble and block" sexual material. 116 S. Ct. at 2392-93. The provision invalidated by the Court is more closely analogous to the CDA provisions at issue in this case than the permissive provision upheld by the Court.

2 The provisions at issue in this case are not limited to commercial speakers. For example, they are far broader than the prohibition of obscenity on the telephone, where the statute, 47 U.S.C. § 223(b)(1), is limited to transmission of obscenity "for commercial purposes." *Sable Communications, Inc. v. FCC,* 492 U.S. 115 (1989). The Court has upheld non-criminal regulation of federally licensed commercial operators of broadcast and cable television outlets. *E.g., Red Lion v. FCC,* 395 U.S. 367 (1969); *Denver Area Educ. Telecommunications Consortium v. FCC,* 116 S. Ct. 2374 (1996). But the CDA reaches far beyond commercial uses to regulate the speech of ordinary citizens using computers.

3 Typical of the detail in the definitions was "nudity": the "showing of the human male or female genitals, pubic area or buttocks with less then a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state." 390 U.S. at 645.

4 Nor did *Ginsberg* approve the prohibition of "indecent" material. It was an obscenity case, in which satisfying all three parts of the "three-pronged test" (390 U.S. at 635) was required by the statute. The Court approved the statute's "variable obscenity" approach, so that the material could be deemed obscene if it had prurient appeal for persons under 17, if it was patently offensive with respect to what was suitable for minors and if it was "utterly" without redeeming social importance for minors. *Id.* at 632. In sharp contrast, the CDA makes speech criminal if it meets only *one* part of the three-part test for obscenity. *See* point IV, *infra.*

5 At a minimum, the government has not carried its burden of proof that substantial numbers of people in fact are afraid to use the Internet because they do not wish their children to see "indecent" material. *See Turner Broadcasting Sys. v. FCC,* 114 S. Ct. 2445, 2470 (1994) (government failed to prove that statute met actual need to preserve free broadcast).

6 Justice Stevens was the author of *Pacifica.* His opinion in *Pope* explains at length why *Pacifica*-type administrative or civil speech regulation is entirely inappropriate for *criminal* prohibitions.

7 *See also Smith v. United States,* 431 U.S. 291, 316 (1977) (Stevens, J., dissenting) ("line between communications which 'offend' and those which do not is too blurred to identify criminal conduct"); *accord, Board of Airport Commissioners v. Jews for Jesus,* 482 U.S. 569, 756 (1987) (O'Connor, J.: line too "murky"); *Alexander, supra* (line too uncertain for criminal forfeiture purposes); *Kolender v. Lawson,* 461 U.S. 352, 359, n. 8 (1983).

8 In another context, Senator Helms declared that written "safe sex" educational materials were "obscene." 133 Cong. Rec. § 14203 (daily ed. Oct. 14, 1987). If a prominent legislator believes that *Bolger*-type materials are "obscene," it is not farfetched to suggest that some prosecutors and juries will find them "patently offensive."

9 *See also, Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 55 (1973) (civil procedure for determining obscenity provides seller with "the best possible notice, prior to any criminal indictments").

10 A wide variety of similar examples of speech with societal value that the CDA makes criminal was identified below. *ACLU,* 829 F. Supp. at 852, 855, 871-72.

11 "An individual sending a message that will be retransmitted by a mail exploder program has no way of knowing the e-mail addresses of other subscribers." *Shea,* 930 F. Supp. at 927. "[O]ne who posts an article to a news group has no way of knowing who will choose to retrieve it." *Id* at 928; *ACLU,* 929 F. Supp. at 845, 854, 878.

12 In *United States v. Thomas,* 74 F.3d 701 (6th Cir.), *cert. denied,* 117 S. Ct. 74 (1996), the Sixth Circuit upheld an obscenity conviction involving pictures transmitted by computer from California to Memphis, Tennessee, rejecting the argument that it should "adopt a new definition of 'community' for use in obscenity prosecutions involving electronic bulletin boards." 74 F.3d at 711. The court found "no need" to reconsider this aspect of the *Miller* test because the defendants in *Thomas* in fact "knew" that they were sending the pictures to a specific recipient in Tennessee who had submitted an application and been issued a password before requesting that the particular pictures be sent to Tennessee. *Id.* at 72.

13 In *United States v. Thomas, supra,* the only person to download the defendant's electronic bulletin board's materials in Tennessee was the postal inspector who initiated the prosecution. 74 F.3d at 705. The defendants in that case knew that they were transmitting the material to Tennessee, because they required an application and password for any transmission. *Id.* at 705, 710, 711. But in most CDA cases, the unsuspecting speaker will have no idea where his or her communications are going, or to whom. See note 11, *supra.*

End of Document