SUPREME COURT OF THE UNITED STATES

No. 00–1293

JOHN ASHCROFT, ATTORNEY GENERAL, PETITIONER *v.* AMERICAN CIVIL LIBERTIES UNION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[May 13, 2002]

JUSTICE KENNEDY, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, concurring in the judgment.

I

If a law restricts substantially more speech than is justified, it may be subject to a facial challenge. *Broadrick* v. *Oklahoma,* 413 U. S. 601, 615 (1973). There is a very real likelihood that the Child Online Protection Act (COPA or Act) is overbroad and cannot survive such a challenge. Indeed, content-based regulations like this one are presumptively invalid abridgements of the freedom of speech. See *R. A. V.* v. *St. Paul,* 505 U. S. 377, 382 (1992). Yet COPA is a major federal statute, enacted in the wake of our previous determination that its predecessor violated the First Amendment. See *Reno* v. *American Civil Liberties Union,* 521 U. S. 844 (1997). Congress and the President were aware of our decision, and we should assume that in seeking to comply with it they have given careful consideration to the constitutionality of the new enactment. For these reasons, even if this facial challenge appears to have considerable merit, the Judiciary must proceed with caution and identify overbreadth with care before invalidating the Act.

In this case, the District Court issued a preliminary

injunction against enforcement of COPA, finding it too broad across several dimensions. The Court of Appeals affirmed, but on a different ground. COPA defines "material that is harmful to minors" by reference to "contemporary community standards," 47 U. S. C. §231(e)(6) (1994 ed., Supp. V); and on the theory that these vary from place to place, the Court of Appeals held that the definition dooms the statute "without reference to its other provisions." *American Civil Liberties Union* v. *Reno,* 217 F. 3d 162, 174 (CA3 2000). The Court of Appeals found it unnecessary to construe the rest of the Act or address the District Court's reasoning.

This single, broad proposition, stated and applied at such a high level of generality, cannot suffice to sustain the Court of Appeals' ruling. To observe only that community standards vary across the country is to ignore the antecedent question: community standards as to what? Whether the national variation in community standards produces overbreadth requiring invalidation of COPA, see *Broadrick*, *supra*, depends on the breadth of COPA's coverage and on what community standards are being invoked. Only by identifying the universe of speech burdened by COPA is it possible to discern whether national variation in community standards renders the speech restriction overbroad. In short, the ground on which the Court of Appeals relied cannot be separated from those that it overlooked.

The statute, for instance, applies only to "communication for commercial purposes." 47 U. S. C. §231(e)(2)(A). The Court of Appeals, however, did not consider the amount of commercial communication, the number of commercial speakers, or the character of commercial speech covered by the Act. Likewise, the statute's definition of "harmful to minors" requires material to be judged "as a whole." §231(e)(6)(C). The notion of judging work as a whole is familiar in other media, but more difficult to

define on the World Wide Web. It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites. Some examination of the group of covered speakers and the categories of covered speech is necessary in order to comprehend the extent of the alleged overbreadth.

The Court of Appeals found that COPA in effect subjects every Internet speaker to the standards of the most puritanical community in the United States. This concern is a real one, but it alone cannot suffice to invalidate COPA without careful examination of the speech and the speakers within the ambit of the Act. For this reason, I join the judgment of the Court vacating the opinion of the Court of Appeals and remanding for consideration of the statute as a whole. Unlike JUSTICE THOMAS, however, I would not assume that the Act is narrow enough to render the national variation in community standards unproblematic. Indeed, if the District Court correctly construed the statute across its other dimensions, then the variation in community standards might well justify enjoining enforcement of the Act. I would leave that question to the Court of Appeals in the first instance.

II

COPA provides a three-part conjunctive definition of "material that is harmful to minors." The first part of the definition is that "the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, [that it] is designed to appeal to, or is designed to pander to, the prurient interest." 47 U. S. C. §231(e)(6)(A). (The parties agree that the second part of the definition, §231(e)(6)(B), likewise invokes contemporary community standards, though only implicitly. See *ante,* at 11–12, n. 7.) The nub of the problem is, as the Court has said, that "the 'commu-

nity standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Reno*, 521 U. S., at 877–878. If material might be considered harmful to minors in any community in the United States, then the material is covered by COPA, at least when viewed in that place. This observation was the linchpin of the Court of Appeals' analysis, and we must now consider whether it alone suffices to support the holding below.

The quoted sentence from *Reno* was not casual dicta; rather, it was one rationale for the holding of the case. In *Reno*, the Court found "[t]he breadth of [COPA's predecessor] . . . wholly unprecedented," *id.*, at 877, in part because of variation in community standards. The Court also relied on that variation to assess the strength of the Government's interest, which it found "not equally strong throughout the coverage of this broad statute." *Id.*, at 878. The Court illustrated the point with an example: A parent who e-mailed birth control information to his 17-year-old child at college might violate the Act, "even though neither he, his child, nor anyone in their home community found the material 'indecent' or 'patently offensive,' if the college town's community thought otherwise." *Ibid.* Variation in community standards rendered the statute broader than the scope of the Government's own expressed compelling interest.

It is true, as JUSTICE THOMAS points out, *ante,* at 16–19, that requiring a speaker addressing a national audience to meet varying community standards does not always violate the First Amendment. See *Hamling* v. *United States,* 418 U. S. 87, 106 (1974) (obscene mailings); *Sable Communications of Cal., Inc.* v. *FCC,* 492 U. S. 115, 125–126 (1989) (obscene phone messages). These cases, however, are of limited utility in analyzing the one before us, because each mode of expression has its own unique charac-

teristics, and each "must be assessed for First Amendment purposes by standards suited to it." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546, 557 (1975). Indeed, when Congress purports to abridge the freedom of a new medium, we must be particularly attentive to its distinct attributes, for "differences in the characteristics of new media justify . . . differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 386 (1969). The economics and the technology of each medium affect both the burden of a speech restriction and the Government's interest in maintaining it.

In this case the District Court found as a fact that "[o]nce a provider posts its content on the Internet and chooses to make it available to all, it generally cannot prevent that content from entering any geographic community." *American Civil Liberties Union* v. *Reno,* 31 F. Supp. 2d 473, 484 (ED Pa. 1999). By contrast, in upholding a ban on obscene phone messages, we emphasized that the speaker could "hire operators to determine the source of the calls or engag[e] with the telephone company to arrange for the screening and blocking of out-of-area calls or fin[d] another means for providing messages compatible with community standards." *Sable, supra*, at 125. And if we did not make the same point in *Hamling*, that is likely because it is so obvious that mailing lends itself to geographic restriction. (The Court has had no occasion to consider whether venue would be proper in "every hamlet into which [obscene mailings] may wander," *Hamling*, *supra*, at 144 (dissenting opinion), for the petitioners in *Hamling* did not challenge the statute as overbroad on its face.) A publisher who uses the mails can choose the location of his audience.

The economics and technology of Internet communication differ in important ways from those of telephones and mail. Paradoxically, as the District Court found, it is easy

and cheap to reach a worldwide audience on the Internet, see 31 F. Supp. 2d, at 482, but expensive if not impossible to reach a geographic subset, *id*., at 484. A Web publisher in a community where avant garde culture is the norm may have no desire to reach a national market; he may wish only to speak to his neighbors; nevertheless, if an eavesdropper in a more traditional, rural community chooses to listen in, there is nothing the publisher can do. As a practical matter, COPA makes the eavesdropper the arbiter of propriety on the Web. And it is no answer to say that the speaker should "take the simple step of utilizing a [different] medium." *Ante*, at 19 (principal opinion of THOMAS, J.). "Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression . . . . [T]he danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech." *City of Ladue* v. *Gilleo,* 512 U. S. 43, 55 (1994).

JUSTICE BREYER would alleviate the problem of local variation in community standards by construing the statute to comprehend the "Nation's adult community taken as a whole," rather than the local community from which the jury is drawn. *Ante*, at 1 (opinion concurring in part and concurring in judgment); see also *ante*, at 1–4 (O'CONNOR, J., concurring in part and concurring in judgment). There is one statement in a House Committee Report to this effect, "reflecting," JUSTICE BREYER writes, "what apparently was a uniform view within Congress." *Ante*, at 2. The statement, perhaps, reflects the view of a majority of one House committee, but there is no reason to believe that it reflects the view of a majority of the House of Representatives, let alone the "uniform view within Congress." *Ibid*.

In any event, we need not decide whether the statute invokes local or national community standards to conclude that vacatur and remand are in order. If the statute does

incorporate some concept of national community standards, the actual standard applied is bound to vary by community nevertheless, as the Attorney General concedes. See *ante*, at 12 (principal opinion of THOMAS, J.); Brief for Petitioner 39.

For this reason the Court of Appeals was correct to focus on COPA's incorporation of varying community standards; and it may have been correct as well to conclude that in practical effect COPA imposes the most puritanical community standard on the entire country. We have observed that it is "neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Miller* v. *California,* 413 U. S. 15, 32 (1973). On the other hand, it is neither realistic nor beyond constitutional doubt for Congress, in effect, to impose the community standards of Maine or Mississippi on Las Vegas and New York. "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.*, at 33. In striking down COPA's predecessor, the *Reno* Court identified this precise problem, and if the *Hamling* and *Sable* Courts did not find the problem fatal, that is because those cases involved quite different media. The national variation in community standards constitutes a particular burden on Internet speech.

III

The question that remains is whether this observation "*by itself*" suffices to enjoin the Act. See *ante,* at 22. I agree with the Court that it does not. *Ibid*. We cannot know whether variation in community standards renders the Act substantially overbroad without first assessing the extent of the speech covered and the variations in community standards with respect to that speech.

First, the breadth of the Act itself will dictate the degree of overbreadth caused by varying community standards. Indeed, JUSTICE THOMAS sees this point and uses it in an attempt to distinguish the Communications Decency Act of 1996, which was at issue in *Reno*. See *ante,* at 13 ("The CDA's use of community standards to identify patently offensive material, however, was particularly problematic in light of that statute's unprecedented breadth and vagueness"); *ante*, at 14 ("The tremendous breadth of the CDA magnified the impact caused by differences in community standards across the country"). To explain the ways in which COPA is narrower than the CDA, JUSTICE THOMAS finds that he must construe sections of COPA elided by the Court of Appeals. Though I agree with the necessity for doing so, JUSTICE THOMAS' interpretation—undertaken without substantial arguments or briefing—is not altogether persuasive, and I would leave this task to the Court of Appeals in the first instance. As this case comes to us, once it is accepted that we cannot strike down the Act based merely on the phrase "contemporary community standards," we should go no further than to vacate and remand for a more comprehensive analysis of the Act.

Second, community standards may have different degrees of variation depending on the question posed to the community. Defining the scope of the Act, therefore, is not relevant merely to the absolute number of Web pages covered, as JUSTICE STEVENS suggests, *post,* at 8–9 (dissenting opinion); it is also relevant to the proportion of overbreadth, "judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U. S., at 615. Because this issue was "virtually ignored by the parties and the amicus" in the Court of Appeals, 217 F. 3d, at 173, we have no information on the question. Instead, speculation meets speculation. On the one hand, the Court of Appeals found "no evidence to suggest that adults *everywhere* in America would share the same standards for determining

what is harmful to minors." *Id.,* at 178. On the other hand, JUSTICE THOMAS finds "no reason to believe that the practical effect of varying community standards under COPA . . . is significantly greater than the practical effect of varying standards under federal obscenity statutes." *Ante,* at 20. When a key issue has "no evidence" on one side and "no reason to believe" the other, it is a good indication that we should vacate for further consideration.

The District Court attempted a comprehensive analysis of COPA and its various dimensions of potential overbreadth. The Court of Appeals, however, believed that its own analysis of "contemporary community standards" obviated all other concerns. It dismissed the District Court's analysis in a footnote:

> "[W]e do not find it necessary to address the District Court's analysis of the definition of 'commercial purposes'; whether the breadth of the forms of content covered by COPA could have been more narrowly tailored; whether the affirmative defenses impose too great a burden on Web publishers or whether those affirmative defenses should have been included as elements of the crime itself; whether COPA's inclusion of criminal as well as civil penalties was excessive; whether COPA is designed to include communications made in chat rooms, discussion groups and links to other Web sites; whether the government is entitled to so restrict communications when children will continue to be able to access foreign Web sites and other sources of material that is harmful to them; what taken 'as a whole' should mean in the context of the Web and the Internet; or whether the statute's failure to distinguish between material that is harmful to a six year old versus a sixteen year old is problematic." 217 F. 3d, at 174, n. 19.

As I have explained, however, any problem caused by

variation in community standards cannot be evaluated in a vacuum. In order to discern whether the variation creates substantial overbreadth, it is necessary to know what speech COPA regulates and what community standards it invokes.

It is crucial, for example, to know how limiting is the Act's limitation to "communication for commercial purposes." 47 U. S. C. §231(e)(2)(A). In *Reno*, we remarked that COPA's predecessor was so broad in part because it had no such limitation. 521 U. S., at 877. COPA, by contrast, covers a speaker only if:

> "the person who makes a communication or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income)." 47 U. S. C. §231(e)(2)(B).

So COPA is narrower across this dimension than its predecessor; but how much narrower is a matter of debate. In the District Court, the Attorney General contended that the Act applied only to professional panderers, but the court rejected that contention, finding "nothing in the text of the COPA . . . that limits its applicability to so-called commercial pornographers only." 31 F. Supp. 2d, at 480. Indeed, the plain text of the Act does not limit its scope to pornography that is offered for sale; it seems to apply even to speech provided for free, so long as the speaker merely hopes to profit as an indirect result. The statute might be susceptible of some limiting construction here, but again the Court of Appeals did not address itself to this question.

The answer affects the breadth of the Act and hence the significance of any variation in community standards.

Likewise, it is essential to answer the vexing question of what it means to evaluate Internet material "as a whole," 47 U. S. C. §§231(e)(6)(A), (C), when everything on the Web is connected to everything else. As a general matter, "[t]he artistic merit of a work does not depend on the presence of a single explicit scene. . . . [T]he First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive." *Ashcroft* v. *Free Speech Coalition*, *ante*, at __ (slip op., at 10). COPA appears to respect this principle by requiring that the material be judged "as a whole," both as to its prurient appeal, §231(e)(6)(A), and as to its social value, §231(e)(6)(C). It is unclear, however, what constitutes the denominator—that is, the material to be taken as a whole—in the context of the World Wide Web. See 31 F. Supp. 2d, at 483 ("Although information on the Web is contained in individual computers, the fact that each of these computers is connected to the Internet through World Wide Web protocols allows all of the information to become part of a single body of knowledge"); *id.*, at 484 ("From a user's perspective, [the World Wide Web] may appear to be a single, integrated system"). Several of the respondents operate extensive Web sites, some of which include only a small amount of material that might run afoul of the Act. The Attorney General contended that these respondents had nothing to fear from COPA, but the District Court disagreed, noting that the Act prohibits communication that "includes" any material harmful to minors. §231(a)(1). In the District Court's view, "it logically follows that [COPA] would apply to any Web site that contains only some harmful to minors material." 31 F. Supp. 2d, at 480. The denominator question is of cru-

cial significance to the coverage of the Act.

Another issue is worthy of mention, because it too may inform whether the variation in community standards renders the Act substantially overbroad. The parties and the Court of Appeals did not address the question of venue, though it would seem to be bound up with the issue of varying community standards. COPA does not address venue in explicit terms, so prosecution may be proper "in any district in which [an] offense was begun, continued, or completed." 18 U. S. C. §3237(a). The Act's prohibition includes an interstate commerce element, 47 U. S. C. §231(a)(1), and "[a]ny offense involving . . . interstate . . . commerce . . . may be inquired of and prosecuted in any district from, through, or into which such commerce . . . moves." 18 U. S. C. §3237(a). In the context of COPA, it seems likely that venue would be proper where the material originates or where it is viewed. Whether it may be said that a Web site moves "through" other venues in between is less certain. And since, as discussed above, juries will inevitably apply their own community standards, the choice of venue may be determinative of the choice of standard. The more venues the Government has to choose from, the more speech will be chilled by variation across communities.

IV

In summary, the breadth of the Act depends on the issues discussed above, and the significance of varying community standards depends, in turn, on the breadth of the Act. The Court of Appeals was correct to focus on the national variation in community standards, which can constitute a substantial burden on Internet communication; and its ultimate conclusion may prove correct. There may be grave doubts that COPA is consistent with the First Amendment; but we should not make that determination with so many questions unanswered. The Court of Appeals should undertake a comprehensive analysis in the first instance.