Protecting Minors from Sexually Explicit Materials on the Net: COPA Likely Violates the First Amendment According to the Supreme Court

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"Congress shall make no law . . . abridging the freedom of speech."[1]

I. INTRODUCTION

The United States is currently facing a difficult problem in cyberspace; we need to provide much-needed protection for children on the information superhighway,[2] while protecting First Amendment free speech rights. Congress's first attempt at this difficult balancing act was the 1996 Communications Decency Act (CDA),[3] which was struck down by the United States Supreme Court in 1997 in *Reno v. ACLU*.[4] In 1996, Congress also passed the Child Pornography Prevention Act (CPPA),[5] which expanded the existing ban on child pornography to computer-generated images appearing to be children engaged in sexually explicit conduct. The Supreme Court in 2002 in *Ashcroft v. Free Speech Coalition* also struck down provisions of the CPPA as overbroad and unconstitutional.[6] In 1998, in response to the Court's 1997 decision in *Reno v. ACLU*, Congress more carefully drafted the Child Online

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1. U.S. CONST. amend. I.
2. *See* 141 CONG. REC. 8088 (daily ed. June 9, 1995) (statement of Sen. Exon).
3. 47 U.S.C. § 223 (Supp. III 1997); *see infra* notes 16-18 and accompanying text.
4. 521 U.S. 844, 845 (1997); *see infra* notes 24-30 and accompanying text.
5. 18 U.S.C. § 2256 (Supp. III 1997); *see infra* notes 31-37 and accompanying text.
6. 535 U.S. 234, 259 (2002); *see infra* notes 44-50 and accompanying text.

Protection Act (COPA)[7] to restrict access to harmful materials by minors on the World Wide Web. In 2002, the Supreme Court upheld sections of COPA as not unconstitutionally broad in *Ashcroft v. ACLU*,[8] but in 2004, the Court in *Ashcroft v. ACLU*[9] held that COPA likely violates the First Amendment. According to the Court, there are less restrictive alternatives to COPA, such as Internet filters.[10] In fact, the Supreme Court in 2003 in *United States v. American Library Ass'n*[11] upheld the Children's Internet Protection Act (CIPA),[12] under which, to receive federal assistance, public libraries must install blocking software for images of obscenity, child pornography, and material harmful to minors.

This Article examines Congress's attempts to protect minors who use the Internet, the Court's responses, and proposed solutions to this important and perplexing problem.

II. THE CDA AND *RENO V. ACLU*

Congress passed the Communications Decency Act[13] as part of the Telecommunications Act of 1996.[14] The CDA was the first Congressional attempt to make the Internet safe for minors by levying criminal charges against offenders. Section (a) of the CDA stated that anyone who, by means of a telecommunications device, knowingly makes, creates, or solicits, and initiates the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, knowing that the recipient of the communication is under the age of eighteen is subject to criminal penalties of imprisonment of no more than two years, or a fine, or both.[15] Section (d) of the CDA criminalized knowingly using an interactive computer service to send to or display in a manner available to a person under eighteen years of age, any image or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.[16]

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7. 47 U.S.C. § 231 (2002); *see infra* notes 51-56 and accompanying text.
8. 535 U.S. 564, 587 (2002); *see infra* notes 64-68 and accompanying text.
9. 124 S. Ct. 2783, 2795 (2004); *see infra* notes 79-114 and accompanying text.
10. 124 S. Ct. at 2791-92.
11. 539 U.S. 194, 199 (2003); *see infra* notes 129-142 and accompanying text.
12. 20 U.S.C. § 9134 (2002); *see infra* notes 115-120 and accompanying text.
13. 47 U.S.C. § 223 (Supp. III 1997).
14. *Id.* § 151.
15. *Id.* § 223(a).
16. *Id.* § 223(d).

The CDA provided four defenses. There was no violation for access or connection of providers who also do not create content; for employers whose employee's conduct is outside the scope of employment; for those who make a good faith effort to restrict access to minors; or for those who have restricted access to minors by such means as a verified credit card, debit account, adult access code, or identification number.[17]

The CDA was immediately challenged, and a district court granted a partial temporary restraining order,[18] finding that the "indecent" term in section (a)[19] was unconstitutionally vague. A three judge panel was appointed.[20] With each writing a separate opinion, the members of the panel concluded that the plaintiffs had established a reasonable probability of eventual success in proving that both the CDA's portion of section (a) involving indecency and section (d) are unconstitutional.[21] A preliminary injunction was granted.[22]

The government appealed directly to the Supreme Court.[23] The Court held, in 1997 in *Reno v. ACLU*, applying strict scrutiny, that the CDA is unconstitutionally vague under the First Amendment concerning the "indecent" and "patently offensive" language, despite the important and legitimate goal of Congress to protect children from harmful materials.[24] The Court further stated that the government did not meet its burden in showing that there were less restrictive alternatives at least as effective in meeting the purpose of protecting minors from harmful materials on the Internet.[25] "The breadth of the CDA's coverage is wholly unprecedented," according to the Court.[26] The Court further held that the CDA's safe harbors do not save an otherwise unconstitutional act.[27] Severing the "indecent" language, while leaving the "obscene" provision,[28] the Court upheld the injunction against the CDA.[29] Justice

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17. *Id.* § 223(e).

18. ACLU v. Reno, 929 F. Supp. 824, 827 (E.D. Pa. 1996). The CDA was not contested on the obscenity or child pornography provisions. *Id.* at 829.

19. *See supra* note 16 and accompanying text.

20. *ACLU*, 929 F. Supp. at 827.

21. *Id.* at 849-65.

22. *Id.* at 849.

23. *Reno v. ACLU*, 519 U.S. 1025 (1996), noted that probable jurisdiction was under 47 U.S.C. § 561(b) (2001) and 28 U.S.C. § 1253 (2000).

24. Reno v. ACLU, 521 U.S. 844, 883-84 (1997).

25. *Id.* at 874-79.

26. *Id.* at 877.

27. *Id.* at 880-82.

28. *Id.* at 883; *see* 47 U.S.C. § 608 (2001) (allowing for separation of provisions).

29. *Reno*, 521 U.S. at 885.

O'Connor's concurrence suggested constitutional "adult zones" on the Internet, such as zoning laws which already exist.[30]

III. THE CPPA AND *ASHCROFT V. FREE SPEECH COALITION*

Congress also passed the Child Pornography Prevention Act in 1996. Finding that there is a compelling government interest for prohibiting both photography of actual children engaged in sexually explicit conduct and computer-generated images of children which are virtually indistinguishable from photos of actual children engaged in the same conduct,[31] Congress banned the latter as well under the CPPA.[32] The CPPA bans sexually explicit depictions, including any photograph, film, video or computer-generated picture, that appear to include minors,[33] and visual depictions that are advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that they contain sexually explicit depictions of minors.[34] Sexually explicit conduct is defined by the CPPA as actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area.[35] There is an affirmative defense if an actual adult was used in production, and the material was not promoted, described, or distributed in such a way to give the impression that it contained a visual depiction of a minor engaged in sexually explicit conduct.[36] A minor is defined as a person under eighteen years old.[37]

Plaintiffs, including The Free Speech Coalition, challenged the constitutionality of the CPPA. The district court granted the government summary judgment in *Free Speech Coalition v. Reno*, finding that the CPPA was not an improper prior restraint of speech, being content neutral and clearly advancing the important and compelling

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30. *Id.* at 886 (O'Connor, J., concurring); *see* Sue Ann Mota, *Neither Dead Nor Forgotten: The Past, Present, and Future of the Communications Decency Act in Light of Reno v. ACLU*, 4 COMPUTER L. REV. & TECH. J. 1 (Winter 1998).

31. S. REP. NO. 104-358, § 2 (1996). Congress also found that child pornography is often used to seduce children into sexual activity. Further, pedophiles are stimulated by child pornography, and the resulting harm to the children victimized is just as great whether visual depictions involving actual children or computer-generated children are viewed by the pedophile. *Id.*

32. 18 U.S.C. § 2256 (Supp. III 1997).

33. *Id.* § 2256(8).

34. *Id.* § 2256(8)(D).

35. *Id.* § 2256(2).

36. *Id.* § 2252A(c) (Supp. IV 1997).

37. *Id.* § 2256(1) (Supp. III 1997).

governmental interest of protecting children from the harm of child pornography.[38]

On appeal to the United States Court of Appeals for the Ninth Circuit in 1999, the majority held that the CPPA's language "appears to be" a minor and "conveys the impression" of sexually explicit depictions of a minor[39] is unconstitutionally vague and overbroad.[40] The district court also erred in finding a compelling state interest served by the CPPA, according to the majority, since no actual children are used in vesting virtual child pornography.[41]

The dissent would have found the CPPA constitutional.[42] Preventing harm to actual children in the filming of pornography is not the only legitimate compelling interest, and the terminology is not unconstitutionally vague, as key terms are clearly defined, according to the dissent.[43]

The Supreme Court in 2002 in *Ashcroft v. Free Speech Coalition* agreed with the majority in the Court of Appeals for the Ninth Circuit.[44] The majority of the Court found the CPPA's terms "appears to be" a minor and "conveys the impression" of being a minor to be overbroad and unconstitutional.[45] While recognizing that First Amendment protected free speech has limits, including obscenity, child pornography using actual children, defamation, and incitement, the Court did not expand the list to include virtual child pornography.[46]

Justice O'Connor concurred with the judgment, but dissented in part.[47] While she agreed that the "conveys the impression" language is overbroad, she would have taken a narrower approach of striking the "appears to be" language only as it applies to youthful-looking adult pornography.[48] Both Chief Justice Rehnquist and Justice Scalia dissented

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38. No. C 97-0281 SC, 1997 U.S. Dist. LEXIS 12212, at *13, *16, *22 (N.D. Cal. Aug. 12, 1997). The district court further held that the CPPA is neither overbroad nor unconstitutionally vague. *Id.* at *19-*21.

39. 18 U.S.C. § 2256(8)(B), (D).

40. Free Speech Coalition v. Reno, 198 F.3d 1083, 1086, 1097 (9th Cir. 1999).

41. *Id.* at 1091-92.

42. *Id.* at 1098 (Ferguson, J., dissenting).

43. *Id.* at 1099, 1103 (Ferguson, J., dissenting).

44. 535 U.S. 234, 258 (2002).

45. *Id.* at 257-58.

46. *Id.* at 240. *See generally* Sue Ann Mota, *The U.S. Supreme Court Addresses the Child Pornography Prevention Act and Child Online Protection Act in* Ashcroft v. Free Speech Coalition *and* Ashcroft v. American Civil Liberties Union, 55 FED. COMM. L. REV. 85, 92-93 (2002).

47. 535 U.S. at 267 (O'Connor, J., concurring in judgment and dissenting in part).

48. *Id.* at 261, 267 (O'Connor, J., concurring in judgment and dissenting in part).

and would have upheld the CPPA in its entirety.[49] Nevertheless, the Supreme Court struck down Congress's attempt to protect minors under the CPPA just as it did with the CDA.[50]

IV. COPA AND *ASHCROFT V. ACLU*

In response to the Court's decision in *Reno v. ACLU*,[51] Congress in 1998 passed the Child Online Protection Act.[52] COPA was drafted more narrowly, applying only to material on the World Wide Web, to communications for commercial purposes, and to material harmful to minors under seventeen.[53] Prohibited material harmful to minors is defined by COPA as any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is either obscene, or that the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, appeals or panders to the prurient interest, and, in a patently offensive manner with respect to minors, depicts a sexual act or contact or a lewd exhibition of the genitals, and taken as a whole lacks serious literary, artistic, political, or scientific value for minors.[54] Safe harbors are included, which allow a defense if one has restricted access by minors to material which is harmful to minors by either requiring a credit card, debit account, adult access code, or adult personal identification number or by accepting a digital certificate that verifies age, or by any other reasonable, feasible measures under available technology.[55] Criminal penalties for COPA violators without a defense could include a $50,000 fine and up to six months imprisonment.[56]

Plaintiffs, including the ACLU, filed suit before COPA went into effect. The district court granted a preliminary injunction, holding that it was not apparent on the record that COPA was the least restrictive means available to reach the compelling interest of restricting access by minors to harmful material.[57] Blocking or filtering software may be at least as effective to reach this interest as COPA, but without restricting adults'

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49. *Id.* at 267, 273 (Rehnquist, C.J., dissenting).

50. *See* at 258. *See generally* Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 331 (2003).

51. *See supra* notes 25-30 and accompanying text.

52. 47 U.S.C. § 231 (Supp. V 1999).

53. *Id.*

54. *Id.* § 231(e)(6).

55. *Id.* § 231(c)(1).

56. *Id.* § 231(a)(1).

57. ACLU v. Reno, 31 F. Supp. 2d 473, 497 (E.D. Pa. 1999).

constitutionally protected speech.[58] The district court did state that the court and many parents and grandparents would like to see the efforts of Congress to protect children from harmful materials on the Internet succeed and the will of the majority of U.S. citizens to be realized.[59]

The government appealed; the United States Court of Appeals for the Third Circuit in 2000 affirmed on different grounds.[60] The Third Circuit held that the "contemporary community standards" language was unconstitutionally overbroad,[61] and even striking this portion of the statute would not likely salvage COPA, because the standard was an integral part of the statute.[62] The Third Circuit called Congress's attempt "laudable," but more likely than not unconstitutionally overbroad.[63] Thus, the preliminary injunction stood. The government requested review by the Supreme Court; certiorari was granted.[64]

The Supreme Court addressed one issue in 2002: whether COPA's use of community standards to identify material harmful to minors violated the First Amendment.[65] The Court held that it did not.[66] The

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58. *Id.*

59. *Id.* at 498.

60. ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000).

61. *Id.*

62. *Id.* at 179.

63. *Id.* at 181. *See generally* Matthew K. Wegner, Note, *Teaching Old Dogs New Tricks: Why Traditional Free Speech Doctrine Supports Anti-Child-Pornography Regulations in Virtual Reality*, 85 MINN. L. REV. 2081, 2101 (2001); William D. Deane, Comment, *COPA and Community Standards on the Internet: Should the People of Maine and Mississippi Dictate the Obscenity Standard in Las Vegas and New York*?, 51 CATH. U.L. REV. 245, 248 (2001); Anthony Niccoli, *Least Restrictive Means: A Clear Path for User-Based Regulation of Minors' Access to Indecent Material on the Internet*, 27 J. LEGIS. 225, 232 (2001); Tim Specht, *Untangling the World Wide Web: Restricting Children's Access to Adult Materials While Preserving the Freedoms of Adults*, 21 N. ILL. U. L. REV. 411, 432 (2001); Shahara Stone, *Child Online Protection Act: The Problem of Contemporary Community Standards on the World Wide Web*, 9 MEDIA L. & POL'Y 1 (2001); Scott Winstead, *The Application of the "Contemporary Community Standard" to Internet Pornography: Some Thoughts and Suggestions*, 3 LOY. INTELL. PROP. & HIGH TECH. J. 28, 39 (2000).

64. Ashcroft v. ACLU, 532 U.S. 1037, 1037 (2001).

65. Ashcroft v. ACLU, 535 U.S. 585 (2002).

66. *Id. See generally* Kristin Ringeisen, *The Use of Community Standards by the Child Online Protection Act to Determine if Material Is Harmful to Minors Is Not Unconstitutional:* Ashcroft v. American Civil Liberties Union, 41 DUQL. REV. 449 (2003); Maybeth Eyrich, Ashcroft v. ACLU*: The Fate of the Child Online Protection Act*, 7 COMPUTER L. REV. & TECH. J. 331 (2003); Susannah J. Malen, *Protecting Children in the Digital Age: A Comparison of Constitutional Challenges to CIPA and COPA,* 26 COLUM.-VLA J.L. & ARTS 217 (2003), Ronald J. Krotoszynski, Jr., *Childproofing the Internet*, 41 BRANDEIS L.J. 447 (2003); Mitchell P. Goldstein, *Congress and the Courts Battle over the First Amendment: Can the Law Really Protect Children from Pornography on the Internet?*, 21 J. MARSHALL J. COMPUTER & INFO. L. 141 (2003); David E. Roberts, Note, *Top Level Domain Reorganization: A Constitutional Solution to Legislative Attempts at Internet Regulation*, 36 IND. L. REV. 883 (2003).

Court did not address other issues, and since the government did not request it, the Court did not lift the injunction.[67]

In a concurring opinion, Justice O'Connor agreed that even if obscenity is defined by community standards, that COPA is not overbroad; a national standard is not only constitutional, but also reasonable.[68] Justice Stevens dissented, stating that while COPA is a substantial improvement over the CDA, he would still affirm the decision of the Court of Appeals for the Third Circuit.[69]

On remand, the Third Circuit again affirmed the judgment of the district court in *ACLU v. Ashcroft*, after revisiting the constitutionality of COPA in light of the Court's concerns;[70] the issuance of the preliminary injunction was affirmed.[71] The Third Circuit conducted an independent analysis of the issues addressed by the district court in light of the Supreme Court's ruling, and again held that the district court did not abuse its discretion by granting the preliminary injunction.[72]

The Third Circuit further addressed whether COPA could withstand strict scrutiny. Despite finding that the government did have a compelling interest in protecting harmful material online,[73] the court was "hard-pressed" to hold that COPA was narrowly tailored to meet this purpose.[74] Further, the term "minors" was not tailored narrowly enough to satisfy strict scrutiny.[75] COPA's "commercial purposes" definition also imposed content restrictions on a number of commercial, nonobscene speakers in violation of the First Amendment.[76]

The Third Circuit further held that the affirmative defenses do not save the statute from sweeping too broadly because they place too high a burden on adults and web publishers to comply, thus driving protected speech from the internet in violation of the First Amendment.[77] COPA is thus vague and overbroad;[78] the preliminary injunction's issuance was

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67. 535 U.S. at 586.
68. *Id.* at 586, 589 (O'Connor, J., concurring).
69. *Id.* at 603, 612 (Stevens, J., dissenting).
70. 322 F.3d 240, 243 (3d Cir. 2003).
71. *Id.* at 271.
72. *Id.* at 251.
73. *Id.*
74. *Id.* at 253. According to the Court, the "taken as a whole" language failed to meet the strictures of the First Amendment. *Id.*
75. *Id.* at 255.
76. *Id.* at 256-57.
77. *Id.* at 267, 269-70.
78. *Id.* at 266. COPA's "material harm to minors" standard places at risk a large spectrum of protected speech. *Id.* at 266-67.

affirmed.[79] The government once again requested review by the Supreme Court; certiorari was once again granted.[80]

On June 29, 2004, the Supreme Court ruled 5-4 in *Ashcroft v. ACLU* to affirm the Third Circuit.[81] The Supreme Court agreed that the district court did not abuse its discretion in granting the preliminary injunction, but the Supreme Court's reasoning was based on a narrower, more specific rationale than the court of appeals.[82] The Court held that a lower court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives, rather than to start with the existing regulation, and then ask whether there is some additional way to achieve Congress's legitimate interest.[83]

Writing for the majority, Justice Kennedy, joined by Justices Stevens, Souter, Thomas, and Ginsburg, stated that blocking and filtering software is a less restrictive alternative to COPA, because selective restrictions on speech are placed by the receiver, instead of universal restrictions placed on the transmitter.[84] Filters, in addition to being a less restrictive alternative, may actually be a more effective alternative because they may prevent minors from seeing both domestic and foreign pornography.[85] The Court did indicate that filtering software is not perfect, as it does not block some material harmful to minors, while it does block other material that is not harmful.[86] Further, Congress may give incentives for the use of filters, such as the Children's Internet Prevention Act,[87] upheld by the Supreme Court in 2003 in *United States v. American Library Ass'n*,[88] which is discussed in the next Part.[89]

The injunction was upheld pending a full trial on the merits for several reasons. First, the potential harm of removing the injunction outweighs the benefit, because speakers might censor themselves rather than face prosecution with only affirmative defenses available for the

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79. *Id.* at 271.

80. Ashcroft v. ACLU, 124 S. Ct. 2783 (2004). Respondents argued unsuccessfully that the petition for certiorari should be denied because the decision below applied the court's well-established rule that Congress may not criminalize adult speech in an effort to protect minors. Brief for the Respondents at 25, Ashcroft v. ACLU, 124 S. Ct. 2783 (2004) (No. 03-218).

81. 124 S. Ct. 2783, 2795 (2004).

82. *Id.* at 2791.

83. *Id.* According to the Court, the purpose of the test is to ensure that speech is restricted no further than necessary. *Id.*

84. *Id.* at 2787-92.

85. *Id.* at 2792.

86. *Id.* at 2793.

87. 20 U.S.C. § 9134 (2003).

88. *See* 539 U.S. at 214.

89. *See infra* notes 129-142 and accompanying text.

speaker.[90] Second, there are substantial factual disputes remaining, such as the effectiveness of filtering software.[91] Third, since the technology grows at such a rapid pace, on remand the district court may be able to gather current facts concerning the technology in light of a changed legal landscape.[92] Since COPA's passage, Congress has also passed a prohibition on misleading Internet domain names[93] and a statement creating a ".kids" second-level Internet domain.[94] Finally, the majority of the Court noted that Congress may still pass further legislation to prevent minors from gaining access to harmful materials on the Internet.[95]

The Court thus affirmed and remanded the case.[96] Justice Stevens concurred, joined by Justice Ginsburg, to underscore the restrictive nature of COPA.[97] The concurrence preferred user-based controls,[98] and viewed criminal prosecutions as inappropriate to regulate obscene materials.[99]

Justice Breyer's dissent, joined by Chief Justice Rehnquist and Justice O'Connor, stated that they would have construed COPA narrowly, and found it constitutional.[100] Applying strict scrutiny, these dissenters examined the burdens on protected speech, the compelling interest of protecting minors from commercial pornography, the proposed less restrictive alternatives, and the dissenter's conviction that the majority was incorrect.[101]

Examining first the burden on speech, this dissent concluded that COPA, properly interpreted, only imposes a modest burden on protected speech.[102] COPA's definition of material that is harmful to minors differs

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90. *Ashcroft*, 124 S. Ct. at 2794. The government can prosecute under existing laws in the meantime. *Id.*

91. *Id.*

92. *Id.* at 2794-95.

93. 18 U.S.C.A. § 2252B (Supp. 2004).

94. 47 U.S.C.A. § 941 (Supp. 2004). *See generally* Maureen E. Browne, *Play It Again Uncle Sam: Another Attempt by Congress to Regulate Internet Content. How Will They Fare This Time?*, 12 COMMLAW CONSPECTUS 79, 81 (2004).

95. *Ashcroft*, 124 S. Ct. at 2795.

96. *Id.*

97. *Id.* at 2796 (Stevens, J., concurring).

98. *Id.* (Stevens, J., concurring).

99. *Id.* at 2796-97 (Stevens, J., concurring). *See generally* Robert K. Magovern, *The Expert Agency and the Public Interest: Why the Department of Justice Should Leave Online Obscenity to the FCC*, 11 COMMLAW CONSPECTUS 327, 347 (2003).

100. 124 S. Ct. at 2804-05 (Breyer, J., dissenting). COPA seeks to protect children from exposure to commercial pornography on the Internet by requiring commercial providers to place pornographic material behind screens, but the material is still readily available to adults who produce age verification. *Id.* at 2797 (Breyer, J., dissenting).

101. *Id.* at 2798 (Breyer, J., dissenting).

102. *Id.* (Breyer, J., dissenting).

significantly from "legally obscene" material only in the addition of the words "with respect to minors" and "for minors."[103] Further, COPA at most imposes a modest additional burden on adult access to legally obscene material and perhaps a similar burden on some protected borderline material.[104]

Concerning the compelling interest of protecting minors from commercial pornography, "[n]o one denies that such an interest is 'compelling.'"[105] The restriction satisfies the First Amendment unless there is a genuine less restrictive alternative way to further the objective.[106] The dissent stated that the issue was not whether the status quo—including filtering—is less restrictive than doing nothing, because it is always less restrictive to do nothing, but rather how COPA compares

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103. *Id.* at 2798-99 (Breyer, J., dissenting). Both definitions include precisely what materials are prohibited by using the terms "prurient interest" and "lacks serious literary artistic, political, or scientific value." *Id.* (Breyer, J., dissenting). According to this dissent, this should allay fears of the respondents and their amici who attack COPA's constitutionality. *Id.* at 2799 (Breyer, J., dissenting). Respondents' brief cited a few illustrative examples of materials threatened, including: a Web site with photos from the series "A History of Sex"; a Web site with a graphic account of a thirteen-year-old's date rape; a Web site with an article describing a gay authors' first experience with masturbation; a site with archives of an Internet radio show "Dr. Ruthless"; another site detailing the author's first experience with oral sex; and chat rooms and discussion boards on sexual topics. Brief for the Respondents at *29, Ashcroft v. ACLU No. 03-218, 2003 U.S. Briefs 218. The American Society of Journalists and Authors expressed concern that the "harmful to minors" language could encompass a broad range of sexual information, from basic education about procreation, to safe sex instruction, to health information about gynecological or urological issues. Brief of Amici Curiae American Society of Journalists and Authors in Support of Respondents at 8, Ashcroft v. ACLU, No. 03-218, 2003 U.S. Briefs 218. The Volunteer Lawyers for the Arts cites books such as *I Know Why the Caged Bird Sings*, *Brave New World*, and *Catcher in the Rye* have been removed from some schools, but not others. Brief of Amici Curiae Volunteer Lawyers for the Arts in Support of Respondents at 15, Ashcroft v. ACLU, No. 03-218, 2003 U.S. Briefs 218. Further, the Association of American Publishers, Inc., expressed concern that prosecutors could rely on COPA in an attempt to suppress mainstream Web sites such as an online bookstore's Web site that has quotes posted including quotes from textbooks on human sexuality, a publisher's Web site that has excerpts from graphic romance novels and photographs of male genital from a fine art photography book, and an online library which allows users to read books on human sexuality. Brief of Association of American Publishers, as Amici Curiae in Support of Respondents at 2, Ashcroft v. ACLU, No. 03-218, 2003 U.S. Briefs 218. The dissent's response is that such materials fall outside the statutes' definition of restricted material, since they're not designed to appeal or pander to the prurient interest of minors and lack serious literary, artistic, political, or scientific value. *Ashcroft*, 124 S. Ct. at 2800 (Breyer, J., dissenting).

104. *Ashcroft*, 124 S. Ct. at 2801 (Breyer, J., dissenting). COPA does not censor material; rather it imposes monetary cost and potential embarrassment. Stored numbers or passwords could cost between fifteen and twenty cents per number; verification services charge users less than $20 per year. According to the trade association for commercial pornographers, such verification is already an industry standard practice. *Id.* at 2800 (Breyer, J., dissenting).

105. *Id.* at 2801 (Breyer, J., dissenting).

106. *Id.* at 2803-04 (Breyer, J., dissenting).

to the status quo that includes filtering software.[107] Justice Breyer's dissent found four flaws with filters: they are faulty, thus allowing some pornographic material to remain accessible; they are more expensive than screening; they rely on parents' ability to enforce them at home and elsewhere; and they lack precision, thus blocking some valuable, nonpornographic material.[108] Thus, the justification is sufficient, and there is not a less restrictive alternative.[109] Decriminalizing the statute as the concurrence suggests[110] would make the statute less effective, according to the dissent.[111]

Justice Breyer's dissent concluded that COPA was carefully drafted to meet each and every criticism of the CDA in *Reno v. ACLU*.[112] It incorporated language from the Court's precedents virtually verbatim.[113] "What else was Congress supposed to do?"[114] According to the dissent, "[a]fter eight years of legislative effort, two statutes, and three Supreme Court cases . . . [w]hat remains to be litigated?"[115]

Justice Scalia's dissent agreed with Justice Breyer's conclusion that COPA is constitutional.[116] Justice Scalia, however, would not apply strict scrutiny.[117] Since the commercial pornography business could be banned entirely under the First Amendment, COPA's restrictions raise no constitutional concern.[118]

V. CIPA AND *UNITED STATES V. AMERICAN LIBRARY ASS'N*

The one statute upheld by the Supreme Court as not violating First Amendment rights of adults was the Children's Internet Protection Act (CIPA, also called the CHIP Act).[119] Signed into law in 2000, the CHIP Act provided that libraries that wished to receive two types of federal

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107. *Id.* at 2801-02 (Breyer, J., dissenting).
108. *Id.* at 2802-03 (Breyer, J., dissenting).
109. *Id.* at 2804 (Breyer, J., dissenting).
110. *See supra* note 98 and accompanying text.
111. *Ashcroft*, 124 S. Ct. at 2804 (Breyer, J., dissenting).
112. *Id.* at 2805 (Breyer, J., dissenting); *see supra* notes 52-56 and accompanying text.
113. *Id.*; *see supra* note 102 and accompanying text.
114. *Id.* (Breyer, J., dissenting).
115. *Id.* (Breyer, J., dissenting). The dissent also recognized that some members of the Court take or have taken the view that the First Amendment does not permit Congress to legislate in this area, and others, such as Justice Stevens, *see supra* note 98 and accompanying text, do not believe that the First Amendment allows Congress to impose criminal penalties for obscenity. The Court, however, did not adopt this view. *Ashcroft*, 124 S. Ct. at 2805 (Breyer, J., dissenting).
116. *Ashcroft*, 124 S. Ct. at 2797 (Scalia, J., dissenting).
117. *Id.* (Scalia, J., dissenting).
118. *Id.* (Scalia, J., dissenting).
119. 47 U.S.C.A. § 254(h) (Supp. 2004).

subsidies, grants under the Library Services and Technology Act,[120] or discounts for Internet access and support under the Telecommunications Act of 1996,[121] had to have in place certain Internet safety policies that protect both minors and adults from visual depictions which are obscene and involve child pornography, and for computers used by minors, visual depictions harmful to minors.[122] An administrator, supervisor, or authorized person may disable the technology protection measure, or filter, during use by an adult for bona fide research or other lawful purposes.[123]

CIPA was challenged by library associations, a group of libraries, library patrons, and Web site publishers who argued that CIPA was unconstitutional because it induced public libraries to violate their patrons' First Amendment rights and it required libraries to relinquish their own First Amendment rights to receive federal funds.[124] A three-judge court was convened, pursuant to CIPA.[125] An eight day trial was held.[126] The first question addressed by the court in its decision in 2002 was the level of scrutiny to be applied; the court agreed with the plaintiffs that strict scrutiny should be applied.[127] Under strict scrutiny, the filtering software is permissible only if it is narrowly tailored to further a compelling governmental interest, and there are not less restrictive alternatives that would serve that interest.[128] The court stated that the public library's use of software filtering is not narrowly tailored, and less restrictive alternatives exist.[129] Thus, the lower court held CIPA to be

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120. 20 U.S.C. § 9121 (2000). Under the Grants to States programs, funds are awarded to libraries to assist in accessing information through networks and pay costs associated with Internet accessible computers. *Id.*

121. 47 U.S.C.A. § 254. This is the Schools and Libraries Program, or E-rate, under which telecommunication carriers provide services to schools and libraries, for educational purposes, at a rate less than that charged to other parties. *Id.* § 254(h)(1)(B).

122. *Id.* § 254(h). The definition of "harmful to minors" includes any picture, image or other visual depiction which appeals to the prurient interest of minors, depicts material potently offensive to minors, and lacks serious literary, artistic, political, or scientific value to minors. *Id.* § 254(h)(7)(B). Minors are under age seventeen. *Id.*

123. *Id.* § 254(h)(5)(D).

124. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 407 (E.D. Pa. 2002).

125. *Id.*; *see* 47 U.S.C.A. § 254(h).

126. *Am. Library Ass'n*, 201 F. Supp. 2d at 408.

127. *Id.* at 409-10, 470.

128. *Id.* at 410. The court was sympathetic to the government, devoutly wishing that library patrons could share in the Internet while being insulated from depictions which are obscene or involve child pornography, or in the case of minors, harmful to them, but this outline is not available. *Id.*

129. *Id.* Libraries could enforce Internet use policies, and impose penalties on violators which could range from a warning to identifying law enforcement. *Id.* In addition libraries already regulate patrons' Internet use by such methods as offering training, separating patrons so

facially invalid and permanently enjoined its enforcement.[130] Further, the court found that Congress exceeded its authority under the Spending Clause because any public library complying with CIPA will violate the First Amendment.[131]

The Government appealed to the Supreme Court; probable jurisdiction was noted by the Court.[132] The issue on appeal was whether CIPA induces public libraries to violate the First Amendment,[133] thereby exceeding Congress's power under the Spending Clause.[134]

Writing for a plurality in *United States v. American Library Ass'n* in 2003, Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, and Thomas, concluded that since public libraries' use of filtering software does not violate patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution and is a valid exercise of Congress's spending power.[135] The decisions by most libraries to exclude

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they won't see what others are viewing, putting terminals in prominent and visible location, including observing what patrons are viewing and using a tap-on-the-shoulder policy.

130. *Id.* at 411. Examining the available filtering software, software can overblock or underblock, and one is exactly tailored to CIPA. These shortcomings will not be solved through a technical solution in the near future. *See generally* Felix Wu, United States v. American Library Association*: The Children's Internet Protection Act, Library Filtering, and Institutional Roles*, 19:1 BERKELEY TECH. L.J. 555, 560 (2004); Dawn C. Nunziato, *Toward a Constitutional Regulation of Minors' Access to Harmful Internet Speech*, 79 CHI-KENT L. REV. 121, 147 (2004); Michael D. Birnhack & Jacob H. Rowbottom, *Shielding Children: The European Way*, 79 CHI-KENT L. REV. 175, 216 (2004); Amitai Etzioni, *On Protecting Children from Speech*, 79 CHI-KENT L. REV. 3, 17 (2004); Kevin W. Saunders, *The Need for a Two (or More) Tiered First Amendment to Provide for the Protection of Children*, 79 CHI-KENT L. REV. 257, 259 (2004); Kiera Meehan, *Installation of Internet Filters in Public Libraries: Protection of Children and Staff vs. the First Amendment*, 12 B.U. PUB. INT. L.J. 483, 495 (2003); Namita E. Mani, *Judicial Scrutiny of Congressional Attempts to Protect Children from the Internet's Harms: Will Internet Filtering Technology Provide the Answer Congress Has Been Looking for?*, 9 B.U. J. SCI. & TECH. L. 201, 207 (2003); J. Adam Skaggs, Note, *Burning the Library to Roast the Pig? Online Pornography and Internet Filtering in the Free Public Library*, 68 BROOK. L. REV. 809, 842 (2003); Gregory K. Laughlin, *Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters to Control Access to Internet Pornography in Public Libraries*, 51 DRAKE L. REV. 213, 251-52 (2003); Kelly Rodden, Note, *The Children's Internet Protection Act in Public Schools: The Government Stepping on Parents' Toes?*, 71 FORDHAM L. REV. 2141, 2153 (2003); Mitchell P. Goldstein, *Congress and the Courts Battle over the First Amendment: Can the Law Really Protect Children from Pornography on the Internet?*, 21 MARSHALL J. COMPUTER INFO. L. 141, 188 (2003).

131. *Am. Library Ass'n*, 201 F. Supp. 2d at 453.

132. 537 U.S. 1017 (2002).

133. *See* U.S. CONST. amend. 1.

134. *Id.* art. 1, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.").

135. 539 U.S. 194, 214 (2003). Congress has wide latitude to attach conditions to the receipt of federal assistance, and public libraries have broad discretion in deciding what material to provide patrons. *Id.* at 203-04.

pornography are not subject to strict scrutiny, so the decision to filter online pornography should not be held to this higher standard either, according to the majority of the Court.[136] Assuming that public libraries have First Amendment rights, CIPA does not deny libraries the right to provide unfiltered access to patrons, rather it just does not subsidize this activity.[137] Thus, the district court's injunction was reversed.[138]

Justice Kennedy's concurrence stated that "there is little to this case,"[139] since a librarian will unblock filtered material at the request of an adult. Justice Kennedy further noted that there is a compelling governmental interest in protecting minors from material inappropriate for them at the library, and adult users have not been shown to be burdened in any significant way.[140]

Justice Breyer concurred, finding that COPA does not violate the First Amendment when the relatively small burden on library patrons is compared to COPA's legitimate objectives.[141] Justice Breyer, however, could have used a higher level of scrutiny than the "rational basis" that the majority used; Justice Breyer, however, would not have applied strict scrutiny.[142]

Justice Stevens dissented, and would have upheld the district court's injunction.[143] The Court should not allow federal funds to be used to enforce this broad restriction on First Amendment rights, according to this dissent.[144]

Justice Souter, joined by Justice Ginsburg, agreed with Justice Stevens's dissent, but would have gone even further; they argued that the use of Internet filters violates the First Amendment even if libraries took this action entirely on their own.[145]

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136. *Id.* at 208.

137. *Id.* at 212. Congress's decision does not infringe on a fundamental right when it merely decides not to subsidize such a right. *Id.*

138. *Id.* at 214.

139. *Id.* at 214-15 (Kennedy J., concurring).

140. *Id.* at 215 (Kennedy J., concurring).

141. *Id.* at 220 (Breyer, J., concurring). The objectives of restricting access to obscenity, child pornography, and material harmful to minors are legitimate and even compelling. *Id.* at 218 (Breyer, J., concurring).

142. *Id.* at 216 (Breyer, J., concurring).

143. *Id.* at 231 (Stevens, J., dissenting).

144. *Id.* at 230-31 (Stevens, J., dissenting).

145. *Id.* at 231 (Souter, J., dissenting).

VI. CONCLUSION

Congress has attempted to protect minors from harmful material on the Internet with the CDA in 1996[146] and COPA in 1998;[147] the Court struck these down in *Reno v. ACLU*[148] in 1997 and *Ashcroft v. ACLU*[149] in 2004. Congress passed the CPPA to prevent virtual child pornography, similar to child pornography using live children, in 1996;[150] the Court struck this claim in *Ashcroft v. Free Speech Coalition* in 2002.[151] CIPA, however, requiring libraries to filter out visual images and obscenity, child pornography, and material harmful to minors when used minors to receive federal funding[152] was upheld by the Court in 2003 in *Unites States v. American Library Ass'n*.[153]

Thus, according to the Court, library filters withstand First Amendment scrutiny, but the other acts do not, unless the district court upholds CIPA in *Ashcroft v. ACLU* on remand, considering current technology and facts still in dispute.[154] This author respectfully requests that the district court carefully consider the factual, legal, and technological issues on remand.

This author agrees with Justice Breyer's dissent in *Ashcroft v. ACLU*, that COPA was carefully drafted to meet each and every criticism of the CDA in *Reno v. ACLU*.[155] This author urges Congress to draft subsequent legislation, if necessary. The majority in *Ashcroft v. ACLU* actually suggested that Congress may pass further legislation to prevent minors from gaining access to harmful materials on the Internet.[156] Since *Ashcroft v. ACLU* was a 5-4 decision, perhaps a new statute could be drafted to pass constitutional scrutiny.

Simultaneously, there remains a business opportunity to continue to develop more effective Internet filters. Currently, there is a large market for such filters with both the public library and school market to receive federal funds,[157] as well as the private sector market. Obviously, the most

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146. *See supra* notes 16-18 and accompanying text.
147. *See supra* notes 5256 and accompanying text.
148. *See supra* notes 25-30 and accompanying text.
149. *See supra* notes 80-114 and accompanying text.
150. *See supra* notes 31-37 and accompanying text.
151. *See supra* notes 44-50 and accompanying text.
152. *See supra* notes 115-120 and accompanying text.
153. *See supra* notes 132-142 and accompanying text.
154. *See supra* notes 89-91 and accompanying text.
155. *See supra* notes 109-110 and accompanying text.
156. *See supra* note 94 and accompanying text.
157. *See supra* notes 115-120 and accompanying text.

effective filter which neither overblocks nor underblocks would have a competitive advantage in these markets.

Self-regulation by the pornography industries could also aid in the goal of keeping minors from harmful material. While participation is optional, self-regulation should be encouraged. Free teasers could be removed. Congress could establish a mandatory rating system. A ".porn" domain could be established similar to the new ".kids" domain.[158] Software filters could lock all unrated sites and porn sites.

This author respectfully requests that efforts continue on all fronts, technological and legal, to attempt to protect minors from harmful material on the Internet. While this author agrees that this responsibility lies first and foremost on parents, as Justice Breyer states in his dissent in *Ashcroft v. ACLU*, parents may lack the ability to enforce at home and elsewhere.[159] According to another author, we may have a near-moral responsibility to develop effective laws to protect minors from harmful material on the Web.[160]

158. *See supra* note 93 and accompanying text.

159. *See supra* note 107 and accompanying text. A six-month investigation of documents of public libraries obtained by a Freedom of Information Act request uncovered more than two thousand documented incidents of patrons, many of them children, accessing pornography, obscenity, and child pornography in public libraries. Many incidents witnessed by librarians were disturbing, such as adults instructing children on how to find pornography. United States v. Am. Library Ass'n, Inc., 123 S. Ct. 2297, 2302 (2003) (citing DAVID BURT, DANGEROUS ACCESS, 2000 EDITION: UNCOVERING INTERNET PORNOGRAPHY IN AMERICA'S LIBRARIES (2000)). This author attests to the difficulty of protecting her child from material harmful to minors; her fourth-grade son was exposed to a discussion of pornography in the lunchroom of a Christian elementary school, presumably a safe haven, by a nine-year-old girl.

160. David F. Norden, Note, *Filtering Out Protection: The Law, the Library, and Our Legacies*, 53 CASE W. RES. L. REV. 767, 814 (2003).