No. 05-526

In the Supreme Court of the United States

BARBARA NITKE, ET AL., APPELLANTS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

BARBARA L. HERWIG
CHARLES W. SCARBOROUGH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Communications Decency Act of 1996 (CDA) prohibits the knowing transmission "by means of a telecommunications device" of any "communication which is obscene * * *, knowing that the recipient of the communication is under 18 years of age." 47 U.S.C. 223(a)(1)(B). The questions presented are

1. Whether the CDA's reliance on community standards to determine what is obscene renders the statute substantially overbroad.

2. Whether the CDA's restriction on obscene communications is unconstitutionally vague.

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Pursuant to Rule 18.6 of the Rules of this Court, the Solicitor General, on behalf of the Attorney General of the United States and the United States, respectfully moves that the judgment of the district court be affirmed.

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 3a-28a) is not yet reported. A prior opinion of the three-judge court is reported at 253 F. Supp. 2d 587.

JURISDICTION

The judgment of the district court was entered on July 25, 2005. The notice of appeal (J.S. App. 1a-2a) was filed on August 26, 2005. The jurisdictional statement was filed on October 24, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. In the Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, § 502, 110 Stat. 133, Congress prohibited the use of telecommunications devices to transmit any material "which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age." 47 U.S.C. 223(a)(1)(B). The CDA also prohibited the display, in a manner available to minors, of material that is "patently offensive as measured by contemporary community standards." 47 U.S.C. 223(d)(1). The CDA provided a defense to prosecution to persons who conditioned access to covered material on proof of adult status, or who limited minors' access through other reasonable and effective means. 47 U.S.C. 223(e)(5).

In *Reno* v. *ACLU*, 521 U.S. 844 (1997), the Court held that the CDA's regulation of "indecent" and "patently offensive" speech violated the First Amendment. The Court emphasized that "[t]he general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value." *Id.* at 877. For that reason, the Court held that the government had "an especially heavy burden" to explain why less restrictive alternatives would not be as effective as the CDA. *Id.* at 879. The Court further held that the government failed to satisfy that burden. *Ibid.* Applying severability analysis, the Court left intact the CDA's prohibition on "obscene" communications, explaining that obscene speech "can be banned totally because it enjoys no First Amendment protection." *Id.* at 883.

2. Barbara Nitke is an art photographer who specializes in photographs depicting adults engaged in alterna-

tive sexual practices. J.S. App. 5a. The National Coalition for Sexual Freedom (NCSF) is a non-profit organization, some of whose members operate Web sites that contain sexually explicit content. *Id.* at 6a. In December 2001, Nitke and NCSF (appellants) filed suit in federal district court against the Attorney General of the United States, alleging that the CDA's prohibition against the transmission of obscene communications is facially overbroad and unconstitutionally vague. *Id.* at 4a, 6a-7a. In particular, appellants alleged that because the CDA relies on community standards to determine what is obscene, it reaches material that is constitutionally protected in some communities but not others. *Id.* at 16a-17a. Pursuant to Section 561(a) of the CDA, 110 Stat. 142, a three-judge court was convened to hear the suit. J.S. App. 4a.

3. The district court held that Nitke has standing to raise an overbreadth challenge to the CDA's prohibition against dissemination of obscene communications because she has been deterred from posting certain sexually explicit images, including depictions of sexual practices that were not "mainstream" or would otherwise have controversial sexual content. J.S. App. 21a, 25a-26a. Similarly, the court held that NCSF has standing to raise an overbreadth challenge because one of its members has been deterred from posting sexually explicit content based on an well-grounded fear of prosecution. *Id.* at 22a, 26a-27a.

On the merits, the court did not read this Court's prior decisions in *Hamling* v. *United States*, 418 U.S. 87 (1974), *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989), or *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002), to foreclose an overbreadth challenge to the CDA's reliance on community standards to determine whether ma-

terial is obscene. See 253 F. Supp.2d 587, 603-605 (S.D.N.Y. 2003). According to the court, the opinions of five Justices in *Ashcroft* v. *ACLU* indicated that it is possible to raise an overbreadth challenge to the regulation of obscenity on the internet based on the statute's reliance on community standards. *Id.* at 604-605.

After a trial, the district court rejected appellants' overbreadth challenge for failure of proof. The court held that plaintiffs in an overbreadth challenge bear the burden of establishing that a statute is substantially overbroad, and that appellants had failed to make that showing. J.S. App. 18a-19a, 23a-25a, 27a-28a. In particular, the court explained that appellants had failed to present sufficient evidence on (1) "the total amount of speech that is implicated by the CDA" (2) "the amount of protected speech—lacking in serious value, but potentially not patently offensive or appealing to the prurient interest in all communities—that is inhibited by the [CDA]," and (3) "whether 'the variation in community standards is substantial enough that the potential for inconsistent determinations of obscenity is greater than that faced by purveyors of traditional pornography, who can control the dissemination of their materials.'" *Id.* at 27a. Because of those deficiencies in appellants' evidence, the court concluded, appellants had not "established their claim that the overbreadth of the CDA, if any, is substantial and that the CDA therefore violates the First Amendment." *Ibid* (emphasis omitted).

Relying on this Court's decision in *Miller* v. *California*, 413 U.S. 15 (1973), the district court also rejected appellants' vagueness claim. The court reasoned that *Miller* established that the lack of precision in the three-part *Miller* definition of obscenity is insufficient to ren-

der it unconstitutionally vague. *Nitke*, 253 F. Supp. 2d at 608.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Appellants contend that the CDA's reliance on community standards to determine what is obscene renders the CDA's restriction on obscene communications unconstitutionally overbroad. They also contend that the CDA's restriction on obscene communications is unconstitutionally vague. Both contentions are foreclosed by prior decisions of this Court. Moreover, even if appellants' overbreadth challenge were not foreclosed by prior decisions of this Court, appellants failed to make the factual showing necessary to sustain an overbreadth challenge. Because appellants' appeal does not present any substantial constitutional question, the Court should summarily affirm.

A. Appellants' Overbreadth Claim Does Not Raise A Substantial Question

1. In *Miller* v. *California*, 413 U.S. 15, 24 (1973), the Court held that material is obscene and outside the protection of the First Amendment when (1) "'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest," (2) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," and (3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." That three-part test is intended to "isolate 'hard core' pornography from expression protected by the First Amendment." *Id.* at 29. The *Miller* test not only incorporates "community standards" into the determination whether material appeals to the prurient interest. *Id.* at 30. It also incorporates

"community standards" into the determination whether material is patently offensive. *Ibid.* This Court has interpreted federal statutes that prohibit the distribution of "obscene" materials to incorporate the three-part *Miller* test. *Hamling* v. *United States*, 418 U.S. 87, 106 (1974); *United States* v. *12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 129-130 (1973). Accordingly, as appellants concede (J.S. 7-8), the CDA's restriction on the dissemination of "obscene" material on the internet similarly incorporates the three-part *Miller* test, including its reliance on community standards to determine what appeals to the prurient interest and what is patently offensive.[1]

Appellants contend (J.S. 16-23) that the CDA's reliance on community standards renders its restriction on "obscene" communications fatally overbroad. Far from treating community standards as constitutionally suspect, however, this Court has always viewed community standards as an indispensable First Amendment safeguard in the regulation of obscenity. Early lower court obscenity cases had permitted obscenity to be judged by its effect upon "particularly susceptible persons." *Roth* v. *United States*, 354 U.S. 476, 489 (1957). In *Roth*, the Court rejected that standard as inconsistent with the First Amendment, and approved application of community standards as a safeguard against the censoring of works that legitimately address sexual issues. *Id.* at 488-489. In *Miller*, the Court emphasized the crucial role of community standards, explaining that they en-

[1] Indeed, the peculiar burden of appellants' challenge is that they really take issue, not with Congress' decision to restrict the transmission of obscene materials on the internet, but with this Court's decisions which place a substantial judicial gloss (in the form of the *Miller* test) on the undoubted ability of legislatures to restrict obscenity.

sure that material "will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person." 413 U.S. at 33. And in *Hamling*, 418 U.S. at 107, the Court reiterated that the application of community standards "assure[s] that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group."

Appellants contend (J.S. 17) that what the Court has regarded as a virtue is a vice because it means that a person who distributes material on the internet must conform to the community standards of the most restrictive community. *Miller*, however, expressly upheld the constitutionality of applying community standards rather than uniform national standards in determining whether material appeals to the prurient interest and is patently offensive. 413 U.S. at 30-34. And, as this Court's decisions in *Hamling* and *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989), establish, the inevitable consequence of that approval is that a person who chooses to conduct a nationwide business or to operate a business on a nationwide medium must observe community standards throughout the nation.

Hamling involved a criminal prosecution under 18 U.S.C. 1461 for mailing obscene material. The Court upheld the constitutionality of applying community standards rather than uniform national standards to determine the issue of obscenity under that statute. 418 U.S. at 106-107. In dissent, Justice Brennan took the position that application of community standards under the mail statute violated the First Amendment. In his view, "[n]ational distributors choosing to send their products in interstate travels will be forced to cope with the community standards of every hamlet into which their goods

may wander," and that rather than "risking the expense and difficulty of defending against prosecution in any of several remote communities," national distributors will "retreat to debilitating self-censorship." *Id.* at 144. The Court rejected Justice Brennan's argument that exposing a national distributor to potentially varying community standards imposed an impermissible burden on protected speech. *Id.* at 106. The Court stated that "[t]he fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit [their] materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." *Ibid.*

Similarly, in *Sable*, 492 U.S. at 124-126, the Court upheld the constitutionality of the prohibition in 47 U.S.C. 223(b) against obscene telephone messages. The Court rejected Sable's argument that the statute violated the First Amendment because it effectively "compel[led]" those who operate dial-a-porn businesses "to tailor all their messages to the least tolerant community." 492 U.S. at 124. The Court read *Hamling* to foreclose the argument that the need to comply with potentially varying community standards renders a federal statute unconstitutional. *Id.* at 125. The Court explained that "[t]here is no constitutional barrier * * * to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages." *Id.* at 125-126. Thus, the CDA's reliance on community stan-

dards to determine what is obscene raises no substantial constitutional question.

In arguing otherwise, appellants rely (J.S. 12-13, 17-18) on the Court's decisions in *Reno* v. *ACLU*, 521 U.S. 844 (1997), and *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002). Neither of those decisions, however, involved a challenge to a restriction on *obscenity*. And, in any event, both decisions confirm that the use of community standards to determine what is *obscene* does not raise any substantial First Amendment question.

In *Reno* v. *ACLU*, the Court reviewed the constitutionality of the CDA's restrictions on "indecent" and "patently offensive" materials, not its restrictions on "obscene" material. Those restrictions encompassed a large amount of material not encompassed by the three-part *Miller* standard. Of particular importance, because the CDA did not have any requirement that the material lack serious literary, artistic, political or scientific value, 521 U.S. at 865, 873, the CDA's restrictions on "indecent" and "patently offensive" communications covered a wide range of material that had serious value for adults. It was only because the "general, undefined terms" of the CDA reached a large amount of material that had serious value for adults that the Court viewed the statute's use of community standards as a matter of First Amendment concern. *Id.* at 877-878. The Court specifically explained that the use of community standards in that context meant that discussions about prison rape, safe sex practices, and artistic images that include nude subjects would be judged by the community most likely to be offended. *Id.* at 878. As a result of the serious value prong of the three-part *Miller* test, however, none of that material is covered by the CDA's restriction on obscene communications. Moreover, the

serious-value prong is not judged by community standards, and therefore "allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value." *Id.* at 873.

Indeed, while the Court in *Reno* v. *ACLU* held that the CDA's restriction on indecent communications was unconstitutional, it severed that restriction and left intact the CDA's restriction on obscene communications. 521 U.S. at 883. In severing the statute in that way, the Court reaffirmed that "obscene speech * * * can be totally banned because it enjoys no First Amendment protection." *Ibid.*

Appellants' reliance on *Ashcroft* v. *ACLU* is similarly misplaced. In that case, the Court squarely held that the Child Online Protection Act's (COPA) "reliance on community standards to identify 'material that is harmful to minors' *does not* by itself render the statute substantially overbroad for purposes of the First Amendment." 535 U.S. at 585 (emphasis added and deleted). That holding applies *a fortiori* here, because the CDA's restriction on obscene material is narrower than COPA's restriction on material that is harmful to minors. In particular, while COPA encompasses material that is constitutionally protected for adults, but harmful to minors, the CDA's restriction on obscene communications applies to material "that enjoys no First Amendment protection." *Reno* v. *ACLU*, 521 U.S. at 883. Thus, this Court's cases foreclose appellants' claim that the CDA's restriction on obscenity is overbroad because it incorporates community standards. Appellants identify no case that remotely supports a contrary conclusion.

2. Even if the Court's cases left open the possibility of a facial challenge to the CDA's restriction on obscene

communications based on its incorporation of community standards, that would not assist appellants. Appellants' theory of overbreadth is that the CDA covers material that is obscene in some communities, but not in others. J.S. 10-11. Even if such variation could form the basis for an overbreadth challenge, appellants would be required to show that the CDA encompasses a substantial amount of material that is obscene is some communities, but not others, when compared to the amount of material that would be obscene in all communities. See *Virginia* v. *Hicks*, 539 U.S. 113, 123-124 (2003) (overbreadth must be substantial in relation to a statute's legitimate scope). And because the serious value prong of the analysis is not dependent on community standards, but instead allows courts to establish, as a matter of law, a national floor for what has redeeming value, *Reno* v. *ACLU*, 521 U.S. at 873, appellants would have to make that showing with respect to material that lacks serious value.

Appellants failed to make that showing. As the district court explained, appellants failed to present sufficient evidence on (1) "the total amount of speech that is implicated by the CDA," or (2) "the amount of * * * speech—lacking in serious value, but potentially not patently offensive or appealing to the prurient interest in all communities—that is inhibited by the [CDA]." J.S. App. 27a.

Appellants argue that the district court "created an impossibly onerous standard for proving overbreadth," J.S. 16, and required impossible "empirical assessments" of variations among communities regarding obscenity, J.S. 21-22. Neither charge has merit. The district court simply required some evidence from which the court could conclude that, when compared to what

appellants concede to be the legitimate reach of the statute, the statute reaches a substantial amount of speech that would be found to be obscene in some communities, but not others. J.S. App. 27a. If an overbreadth claim could be made in this context at all, the Court's cases would require a plaintiff to establish at least that much. *Hicks*, 539 U.S. at 123-124; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973).

Appellants complain (J.S. 16) that it is too difficult to produce that evidence. But a plaintiff making a substantial overbreadth claim is not relieved of his burden to prove that a statute is substantially overbroad simply because it is difficult to make such a showing. Facial invalidation of a statute is "strong medicine," *Broadrick*, 413 U.S. at 613, and imposes substantial "social costs." *Hicks*, 539 U.S. at 119. That is why the Court requires a plaintiff to bear the heavy burden of demonstrating substantial overbreadth before a statute is facially invalidated. *Id.* at 118-120.

The evidence on which appellants rely in seeking to establish their claim of substantial overbreadth demonstrates just how insubstantial their claim is. Appellants assert (J.S. 18) that they satisfied their burden of showing substantial overbreadth by introducing evidence of "well over 1,000 works—photographs, novels, short stories, drawings, poems"—that "were neither prurient nor offensive in the community in which the creator resided." Appellants offered no evidence, however, that any of those works would not be protected under the serious value prong of the *Miller* test. Nor did they offer evidence that any community would find that such material appeals to the prurient interest and that it is patently offensive. Absent such evidence, appellants

cannot show that the statute would even reach any of the material they identified.

Appellants also rely (J.S. 20) on the district court's determination that Nitke has standing because she legitimately feared that a prosecutor might decide to prosecute if she displayed certain material. But the standing inquiry is entirely different from the inquiry into substantial overbreadth. To establish substantial overbreadth, a plaintiff must show not only that a federal prosecutor might decide to prosecute, but that the statute actually reaches the material at issue. *City of Houston* v. *Hill*, 482 U.S. 451, 459 (1987) (a statute "that make[s] *unlawful* a substantial amount of constitutionally protected conduct may be held facially invalid" (emphasis added)); *Grayned* v. *City of Rockford*, 408 U.S. 104, 114 (1972) (a statute may be overbroad "if in its reach it *prohibits* constitutionally protected conduct" (emphasis added)). Appellants failed to show that the statute reaches any of the material that Nitke wished to disseminate, but did not, let alone that the statute would reach the material in some communities, but not others.

Finally, appellants rely (J.S. 21) on evidence from their expert that more federal and state prosecutions are brought in some States than in others. Differing enforcement priorities among prosecutors, however, do not establish that a community has different standards for determining what is obscene. Indeed, as the district court noted, appellants' expert acknowledged that he was unable to determine standards for obscenity in any given region. J.S. App. 24a. Moreover, whatever the relevance of appellants' evidence relating to the inclinations of prosecutors, that evidence simply does not show that juries in different communities would reach different conclusions about any specific material that lacks

serious value, much less that any variance with respect to such material would be substantial in comparison to the amount of such material that would be found to be obscene in every community. Thus, even assuming arguendo that the Court's decisions leave room for an overbreadth challenge to the CDA's reliance on community standards to determine what is obscene, appellants failed to produce evidence that would support such a challenge.

B. Appellants' Vagueness Challenge Is Insubstantial

Appellants also contend (J.S. 24-29) that the CDA's restriction on obscene communications is unconstitutionally vague. This Court's decision in *Miller*, however, forecloses that contention. In that case, the Court held that the three-part test provides "fair notice" that dissemination of "hard core sexual conduct * * * may bring prosecution," and that such notice is sufficient to satisfy constitutional standards. 413 U.S. at 27 (internal quotation marks omitted). The Court acknowledged that the three-part test is not precise. But it reaffirmed that "lack of precision is not itself [constitutionally] offensive." *Id.* at 27 n.10. The Court explained that if the inability to articulate precise standards for regulation of obscenity were a fatal constitutional flaw, "then 'hard core' pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike." *Id.* at 28. Because the CDA incorporates *Miller*'s three-part test, it satisfies constitutional standards for fair notice and is not unconstitutionally vague.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
BARBARA L. HERWIG
CHARLES W. SCARBOROUGH
Attorneys

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