SUPREME COURT OF THE UNITED STATES

No. 03–218

JOHN D. 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

[June 29, 2004]

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring.

When it first reviewed the constitutionality of the Child Online Protection Act (COPA), the Court of Appeals held that the statute's use of "contemporary community standards" to identify materials that are "harmful to minors" was a serious, and likely fatal, defect. *American Civil Liberties Union* v. *Reno*, 217 F. 3d 162 (CA3 2000). I have already explained at some length why I agree with that holding. See *Ashcroft* v. *American Civil Liberties Union,* 535 U. S. 564, 603 (2002) (dissenting opinion) ("In the context of the Internet, . . . community standards become a sword, rather than a shield. If a prurient appeal is offensive in a puritan village, it may be a crime to post it on the World Wide Web"). I continue to believe that the Government may not penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children's consumption, cf. *Reno* v. *American Civil Liberties Union,* 521 U. S. 844, 878 (1997), and consider that principle a sufficient basis for deciding this case.

But COPA's use of community standards is not the statute's only constitutional defect. Today's decision points to another: that, as far as the record reveals, en-

couraging deployment of user-based controls, such as filtering software, would serve Congress' interest in protecting minors from sexually explicit Internet materials as well or better than attempting to regulate the vast content of the World Wide Web at its source, and at a far less significant cost to First Amendment values.

In registering my agreement with the Court's less-restrictive-means analysis, I wish to underscore just how restrictive COPA is. COPA is a content-based restraint on the dissemination of constitutionally protected speech. It enforces its prohibitions by way of the criminal law, threatening noncompliant Web speakers with a fine of as much as $50,000, and a term of imprisonment as long as six months, for each offense. 47 U. S. C. §231(a). Speakers who "intentionally" violate COPA are punishable by a fine of up to $50,000 for each day of the violation. *Ibid.* And because implementation of the various adult-verification mechanisms described in the statute provides only an affirmative defense, §231(c)(1), even full compliance with COPA cannot guarantee freedom from prosecution. Speakers who dutifully place their content behind age screens may nevertheless find themselves in court, forced to prove the lawfulness of their speech on pain of criminal conviction. Cf. *Ashcroft* v. *Free Speech Coalition,* 535 U. S. 234, 255 (2002).

Criminal prosecutions are, in my view, an inappropriate means to regulate the universe of materials classified as "obscene," since "the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct." *Smith* v. *United States,* 431 U. S. 291, 316 (1977) (STEVENS, J., dissenting). See also *Marks* v. *United States,* 430 U. S. 188, 198 (1977) (STEVENS, J., concurring in part and dissenting in part). COPA's creation of a new category of criminally punishable speech that is "harmful to minors" only compounds the problem. It may be, as JUSTICE BREYER contends, that the statute's

coverage extends "only slightly" beyond the legally obscene, and therefore intrudes little into the realm of protected expression. *Post,* at 4 (dissenting opinion). But even with JUSTICE BREYER's guidance, I find it impossible to identify just how far past the already ill-defined territory of "obscenity" he thinks the statute extends. Attaching criminal sanctions to a mistaken judgment about the contours of the novel and nebulous category of "harmful to minors" speech clearly imposes a heavy burden on the exercise of First Amendment freedoms.

COPA's criminal penalties are, moreover, strong medicine for the ill that the statute seeks to remedy. To be sure, our cases have recognized a compelling interest in protecting minors from exposure to sexually explicit materials. See, *e.g., Ginsberg* v. *New York,* 390 U. S. 629, 640 (1968). As a parent, grandparent, and great-grandparent, I endorse that goal without reservation. As a judge, however, I must confess to a growing sense of unease when the interest in protecting children from prurient materials is invoked as a justification for using criminal regulation of speech as a substitute for, or a simple backup to, adult oversight of children's viewing habits.

In view of the gravity of the burdens COPA imposes on Web speech, the possibility that Congress might have accomplished the goal of protecting children from harmful materials by other, less drastic means is a matter to be considered with special care. With that observation, I join the opinion of the Court.