UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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BARBARA NITKE, THE NATIONAL COALITION FOR SEXUAL FREEDOM, and THE NATIONAL COALITION FOR SEXUAL FREEDOM FOUNDATION,

Plaintiffs,

-against-

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA

Defendants.

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BRIEF *AMICUS CURIAE* IN OPPOSITION TO

GOVERNMENT'S MOTION TO DISMISS THE COMPLAINT

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TABLE OF CONTENTS

PRELIMINARY STATEMENT

Each medium of expression has its own distinctive features, and First Amendment law evolves by appreciating, not ignoring, those real-world differences. In bygone days, courts only grudgingly recognized the right to speak in new media. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (movies protected by First Amendment) (overruling *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915)). We have learned from those mistakes; today, courts are quicker to recognize that new media are important to public discourse. Unsurprisingly, then, the Internet, which includes modes of communication as different as e-mail and the World Wide Web ("Web"), is a fully protected medium of speech. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

It is not enough, however, merely to recognize that a new medium is as deserving of protection as an old medium. Doctrines designed for old media must not be mechanically applied to new media. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). Courts must instead look to the values that underlie the black-letter rules.

This case presents an opportunity to do just that -- to recognize that protecting speech on the Internet requires the reconsideration of nearly 30 years of obscenity law developed for media quite unlike the Internet. Indeed, the Supreme Court five years ago noted that the "community standards" element of obscenity doctrine does not fit comfortably with the Internet. *Reno*, 521 U.S. at 877-878.

The problem is simply stated. Under current law, the legal question of whether speech is obscene is determined by reference to local community standards. Federal venue rules permit an obscenity prosecution to be brought where the speech originated or where it was received. Internet speech, however, is received in every community of our nation. As a result, "the 'community standards' criterion as applied to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." Ibid (footnote omitted).

That insight lies at the heart of this case. The community standards doctrine exists largely in order to preserve diversity and localism in the marketplace of ideas. Diversity and

localism, in turn, are valued as a means of preserving different communities' tolerance of and taste for sexually explicit material. The doctrine seeks to accommodate the interests of all communities, not only the least tolerant.

Amicus Electronic Frontier Foundation ("EFF") does not argue that obscenity cannot be regulated on the Internet. But any such regulation must be consistent with First Amendment first principles. Today, EFF urges this Court to accept the Supreme Court's insight in *Reno*, reinforced by the positions of six Supreme Court justices in *Ashcroft v. ACLU*, 535 U.S. ___, 2002 WL 970708 (2002)[1] -- that the present law of community standards permits censorship of the Internet under the standards of the least tolerant community, negating the values that the doctrine was intended to protect -- and to take the next step: to require that Congress specify how community standards are to be applied to the Internet.

ARGUMENT

The Government argues that the mere non-uniformity of community standards does not itself render facially unconstitutional the obscenity provisions of the Communications Decency Act, 47 U.S.C. §223(a)(1)(B) ("CDA"). But the Government's mantra misses the point. Amicus EFF does not argue that that mere non-uniformity renders the CDA unconstitional.

EFF argues first that any construction of the CDA must be consistent with the underlying principles of the community standards doctrine. The Government appears untroubled by the fact that its position would leave no breathing space for Internet speech that is not obscene in most communities. But if the federal statutory scheme for Internet speech effectively enshrines the obscenity standards of the least tolerant community, destroying diversity and localism, then the statutory scheme is substantially overbroad and violates the First Amendment.

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[1]As discussed in more detail below, only the three justices who joined the plurality opinion in *Ashcroft* support the Government's position that the community standards doctrine can or should be applied to Internet speech without considering the "least tolerant community" problem. Each of the other six justices, some more strongly than others, expressed concern "that the use of local community standards will cause problems for regulation of obscenity on the Internet." 2002 WL 970708 at *12 (O'Connor, J., concurring in part and in the judgment).

EFF argues second that the CDA as construed by the Government is so incoherent and unprincipled as to be unconstitutionally vague. The basic point of the community standards doctrine is that speech obscene in one community will not be obscene in another. Where such speech is not obscene (and not otherwise unlawful), it is protected speech. But the combination of federal venue law and the community standards doctrine gives law enforcement and triers of fact unguided discretion over the choice of community and makes it impossible for Internet speakers to have fair notice of the community whose standard will be applied to their speech.

Crucially, the CDA is a criminal statute. As the courts have long recognized, "[t]he objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. 415, 432-433 (1963) (footnote and citation omitted).

I. OBSCENITY MUST BE DETERMINED BY REFERENCE TO "COMMUNITY STANDARDS" IN ORDER TO PREVENT NATIONAL DIVERSITY FROM BEING "STRANGLED BY THE ABSOLUTISM OF IMPOSED UNIFORMITY."

Under *Miller v. California*, 413 U.S. 15, 37 (1973), "obscenity is to be determined by applying 'contemporary community standards,' not 'national standards.'" While free speech law typically focuses on the interests of speaker, receiver, and public at large, the community standards doctrine takes account of local communities as well. The use of community standards safeguards First Amendment values by assuring that allegedly obscene 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. *Hamling v. United States*, 418 U. S. 87, 107 (1974); see *Cohen v. California*, 403 U.S. 15, 24-25 (1971) (merely protecting listeners from offense at message is not legitimate government interest). More generally, a non-national standard serves three basic vaues: diversity; localism; and practicality.

A. Diversity

Under *Miller*'s community standards approach, what is obscene in one community is not necessarily obscene in another. *Hamling*, 418 U.S. at 107; *Hoover v. Byrd*, 801 F.2d 740, 742 (5th Cir. 1986) (doctrine's point is to "permit different levels of obscenity regulation in such diverse communities as [rural] Kerrville and [metropolitan] Houston, Texas."); *United States v. Peraino*, 645 F.2d 548, 551 n.1 (6th Cir. 1981) ("material may be proscribed in one community but not in another").

As explained in *Miller*, "[i]t 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. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." 413 U.S. at 32-33 (citations and footnote omitted); see *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (First Amendment assumes "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

B. Localism and the locus of harm

The flip side of diversity is localism, in two senses. First, obscenity law tends to serve local interests. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973) (listing four state interests in regulating distribution of obscenity: (1) exposure of children and unconsenting adults; (2) "the quality of public life and the community environment"; (3) the "tone of commerce in the great city centers"; and (4) "possibly, the public safety itself.") (footnote omitted).

The existence and substantiality of each of these state interests has a significant local component tied to the "publicness" and "commerciality" of dissemination, which includes the way that consumers physically obtain sexually explicit materials. E.g., *Miller*, 413 U.S. at 27 ("public and commercial activities"); *Paris Adult Theatre I*, 413 U.S. at 57 ("commercialized obscenity"); id. at 68-69 ("Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public"); id. at 69 ("public exhibition

of obscene material, or commerce in such material"). A "brick-and-mortar" adult bookstore necessarily creates local physical effects like pedestrian traffic; a "dial-a-porn" center need not.[2]

Second, by allowing obscenity standards to be tailored to the norms of both more and less tolerant communities, the community standards doctrine ensures that local interests are assessed according to local values. *Hamling*, 418 U.S. at 107 (obscenity regulation involves "task of reconciling conflicting rights of the diverse communities within our society and of individuals.") (quotation marks and citation omitted); compare, e.g.,*United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132, 137 (2d Cir. 1983) (materials "not patently offensive" in view of New York City norms) with *United States v. Langford*, 688 F.2d 1088, 1096 (7th Cir. 1982) (community standards "allow[] the residents of a community to decide for themselves what will or will not be considered obscene in their local community").

In short, the community standards doctrine preserves the ability of local communities to assess the effects of obscenity on community life. A uniform national obscenity standard does not.

C. Practical applicability

In *Miller*, the Supreme Court also emphasized the role of the jury, which has traditionally spoken for the community.[3] But "there is no provable 'national standard'" and "it would be unreasonable to expect local courts to divine one" given the Court's own inability to do so. 413 U.S. at 32 (citation omitted). National standards are "hypothetical and unascertainable." Id. at 31. Even smaller geographical areas create problems. *Peraino*, 645 F.2d at 553 ("serious doubt . . . that a jury of one district could properly determine the standards of another community solely on the basis of expert testimony.").

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[2]These interests are like those protected by the "secondary effects" doctrine, which seeks to address local harms like crime and decline in property values near "adult" establishments. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986).

[3]"The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law." *Miller*, 413 U.S. at 30.

II. THE COMBINATION OF THE CDA AND COMMUNITY STANDARDS LAW IS UNCONSTITUTIONAL BECAUSE THE OBSCENITY OF INTERNET SPEECH WILL BE DETERMINED BY THE STANDARDS OF THE LEAST TOLERANT COMMUNITY.

The fundamental problem in this case is that the Government's construction of the CDA uses "community standards" to undermine their very basis. The Government argues that this is constitutionally permissible under *Hamling* and *Sable Communications v. FCC*, 492 U.S. 115 (1989). These cases, however, are the past, not the future, of community standards. Past obscenity prosecutions have been about books, magazines, and movies -- things that exist or are displayed in discrete physical locations. Internet dissemination is quite different.

A. Regulation of Internet obscenity must consider the Internet's special characteristics as a medium of expression.

The Government argues that Congress may constitutionally regulate obscenity in any medium. But each medium of expression "must be assessed for First Amendment purposes by standards suited to it." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Sable*, 492 U.S. at 127-128 (distinguishing broadcast from telephony).

The Internet differs significantly from earlier media. The Framers could not have imagined the Internet, but they would certainly have celebrated its ability to enable individual citizens to speak with each other and to publish to the nation at little cost and without regard to distance. *Reno*, 521 U.S. at 868-870 (distinguishing Internet from broadcast and according Internet unqualified protection as a medium).

Furthermore, although obscenity is considered "unprotected," it is "not entirely invisible" to the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992); *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973) (allegedly obscene speech entitled to "presumptive protection" by First Amendment); *Freedman v. Maryland*, 380 U.S. 51 (1965) (allegedly obscene movies procedurally protected against potential administrative censorship).

Given that the "legal" obscenity of speech varies between communities, and that Internet speech reaches every community, the Government's construction of the CDA means that speech protected in some or many communities cannot be published on the Internet without risk of

prosecution. Because "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression," *Miller*, 413 U.S. at 22-23, the Government's position is constitutionally irresponsible.

1. Internet content cannot be prevented from entering any community.

In *Reno*, the Supreme Court recognized that "[o]nce a provider posts its content on the Internet, it cannot prevent that content from entering any community." 521 U.S. at 853 (quotation marks and citation omitted).

> "Thus, for example, when the UCR/California Museum of Photography posts to its Web site nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore, and New York City, but also in Cincinnati, Mobile, or Beijing -- wherever Internet users live."

Id. at 853-854 (quotation marks and citation omitted); *Ashcroft*, 2002 WL 970708 at *7 n.6 (no basis for upsetting lower court's finding 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.").

2. Physical location cannot be determined over the Internet.

Conversely, Internet users "have no way of knowing the location of the recipient of his or her communication." *American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 167 (S.D.N.Y.1997) ("in online communications . . . the user has no way to determine with certainty that any particular person has accessed the user's speech."); id. at 165 ("The username and e-mail address are the only indicators of a user's identity; generally speaking, neither datum . . . discloses a party's . . . geographic location"); *ACLU v. Reno*, 31 F.Supp.2d 473, 495 (E.D. Pa. 1999) ("plaintiffs have presented evidence that the nature of the Web and the Internet is such that Web site operators and content providers cannot know who is accessing their sites, or from where, . . . unless they take affirmative steps to gather information from the user and the user is willing to

give them truthful responses"), aff'd, *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000), vacated and remanded, *Ashcroft v. ACLU*, supra.

3. Internet publication has a less "public" character than "brick-and-mortar" dissemination.

Third, Internet publication is unlike the more public modes of dissemination addressed in the past. In *Miller*, the defendant's conduct was characterized as "a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials." 413 U.S. at 18 (mass mailing of unsolicited advertising brochures resulted in restaurant manager's unwanted exposure to allegedly obscene matter). States may legitimately prohibit dissemination or exhibition of obscenity "when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." Id. at 19 (footnote and citations omitted). Similarly, a theater's right to exhibit an explicit movie is weaker than an individual's right at home to play an explicit movie. *Paris Adult Theatre I*, 413 U.S. at 65.

So-called Internet "voyeur residences" exemplify the differences between physical and virtual space. See *Voyeur Dorm, L.C. v. City of Tampa*, 265 F.3d 1232, 1236-1237 (11th Cir. 2001), *cert. denied*, ___ U.S. ___, 152 L.Ed.2d 115 (2002) (declining to apply local zoning ordinance governing adult entertainment establishments to premises where for a monthly fee Internet users can watch women in their homes because "the public offering occurs over the Internet in 'virtual space'"); Francesca Ortiz, *Zoning the Voyeur Dorm: Regulating Home-Based Voyeur Web Sites Through Land Use Laws*, 34 U.C. DAVIS L. REV. 929, 949 (2001) ("There is no evidence that the activities that occur within a voyeur residence would result in increased criminal or drug-related activity, prostitution, or the spread of AIDS or other disease.").

Such differences do not mean that a locality has no interest in regulating obscenity, of course. See *Langford*, 688 F.2d at 1095-1096 (sending jurisdictions have an interest in ensuring that they "not become the platform and a staging center for the sale and/or the distribution for

sale of obscene materials"). But it is illogical to presume that the locality's interest is the same across different modes of dissemination.

4. The CDA will unduly burden non-commercial speakers.

Finally, the Internet was lauded by the Supreme Court partly because it is a cheap, accessible medium of speech suited for those who cannot afford to own broadcast stations or newspapers. *Reno*, 521 U.S. at 870 ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."). Indeed, the Internet makes it easier for non-commercial groups to reach the public. Id. at 853 fn. 9 ("Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal 'home pages,' the equivalent of individualized newsletters about that person or organization, which are available to everyone on the Web.") (citation omitted).

By the same token, however, many of these speakers will be more sensitive to legal or financial burdens. Id. at 857 ("Using credit card possession as a surrogate for proof of age would impose costs on non-commercial Web sites that would require many of them to shut down."); id. at 856-857 ("an adult password requirement would impose significant burdens on noncommercial sites, both because they would discourage users from accessing their sites and because the cost of creating and maintaining such screening systems would be 'beyond their reach.'"); id. at 857 fn. 23 ("some, if not almost all, non-commercial organizations. . . regard charging listeners to access their speech as contrary to their goals of making their materials available to a wide audience free of charge") (citation omitted).

B. As construed by the Government, the CDA stands *Miller* on its head and is therefore unconstitutionally overbroad.

Given these facts about the Internet, the simplest issue in this case is the conflict between the Government's construction of the CDA and the First Amendment principles that the community standards doctrine was intended to serve. The Government argues that the fact that

"distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." *Hamling*, 418 U.S. at 106; *Sable*, 492 U.S. at 125-126.

The Government misses the point. Its position would allow obscenity determinations to be made by the least tolerant community, destroying the very point of the community standards doctrine. This position was deemed constitutionally problematic in *Reno* and by six Supreme Court justices in *Ashcroft*.

1. The Government's position destroys the very point of the community standards doctrine.

The fundamental basis of the community standards doctrine is the idea that each community should decide for itself the meaning of "obscenity," furthering the twin values of diversity and localism. The Government's construction of the CDA harms these values because the standards of the least tolerant community will be used to censor the Internet. Suppose that plaintiff Nitke's speech is not obscene and otherwise lawful in all but a few communities. It would not be difficult for federal prosecutors to identify those communities and bring a CDA action in one of them. Because Nitke can neither prevent her work from being available in those communities nor identify persons as being from those communities, the obvious result is that Nitke could not safely publish her work on the Internet at all. Only speech obscene in no community could be safely published.

When added to the fact that the CDA applies to both commercial and non-commercial speakers, the CDA is substantially overbroad because it would punish or "chill" a substantial amount of protected speech. See *Smith v. California*, 361 U.S. 147, 152 (1959) (Government may not restrict dissemination of speech that is not obscene or otherwise unlawful).

2. The Government's reliance on *Sable* and *Hamling* is untenable.

The Government's only response is to argue that Congress may regulate obscenity without regard to the medium being regulated and that it is constitutionally unproblematic to

impose these burdens on Internet speech and speakers. If these burdens make it impossible for artists like plaintiff Nitke to publish on the Internet, the Government says, they should find some other medium of expression.

The Government's reliance on *Sable* and *Hamling* is misplaced. These and other cases found that *Miller*'s principles could survive in different technological contexts. But none of these earlier contexts is comparable to the Internet; for each, the publisher could, with varying degrees of difficulty, reasonably tailor her publication to geographically disparate standards. Because this is not possible for Internet publication, the simplistic approach urged by the Government would suppress too much speech. Indeed, six Supreme Court justices do not regard *Sable* and *Hamling* as controlling authority in the Internet context, precisely for this reason.

It is hornbook First Amendment law that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion*, 395 U.S. at 386 (broadcasting). Broadcast differs from print because of "spectrum scarcity." Compare *FCC v. League of Women Voters*, 468 U.S. 364, 376 (1984), with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-258 (1974); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 638-39 (1993) ("The broadcast cases are inapposite . . . because cable television does not suffer from the inherent limitations that characterize the broadcast medium"); *Dial Information Services Corp. v. Thornburgh*, 938 F.2d 1535, 1540 (2d Cir. 1991) (in the dial-a-porn context, "appropriate" to use "contemporary community standards for the telephone medium.") (citation omitted), cert. denied sub nom., *Dial Information Services Corp. v. Barr*, 502 U.S. 1072 (1992)[4]

The opinions in *Ashcroft* only reinforce the point that *Sable* and *Hamling* do not control this case. There, the Supreme Court held that the use of community standards to decide whether material is harmful to minors "does not *by itself*" render the Child Online Protection Act

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[4]The Internet is a fully protected medium of expression. It has not been extensively regulated, does not suffer from spectrum scarcity or present "captive audience" or "invasiveness" problems. *Reno*, 521 U.S. at 868-869; id. at 870 ("no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium").

("COPA") substantially overbroad. *Ashcroft*, 2002 WL 970708 at *12 (emphasis in original). In so doing, however, six justices rejected the Government's key argument here.

Justice O'Connor stated that *Ashcroft* "still leaves open the possibility that the use of local community standards will cause problems for regulation of obscenity on the Internet, for adults as well as children, in future cases." Ibid (O'Connor, J., concurring in part and in the judgment). "[G]iven Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech, as we did in *Hamling* and *Sable*, may be entirely too much to ask, and would potentially suppress an inordinate amount of expression." Ibid.[5]

Justice Breyer similarly noted that reading COPA "as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the Nation. The technical difficulties associated with efforts to confine Internet material to particular geographic areas make the problem particularly serious." Id. at *14 (Breyer, J., concurring in part and in the judgment). Directly rejecting the Government's position here, he noted that "these special difficulties also potentially weaken the authority of prior cases in which they were not present." Ibid (citing *Sable* and *Hamling*).

Justices Kennedy, Souter and Ginsburg also agreed that it was a real concern that "COPA in effect subjects every Internet speaker to the standards of the most puritanical community in the United States." Id. at 16 (Kennedy, J., concurring in the judgment). In their view, *Sable* and *Hamling* "are of limited utility" in analyzing Internet speech regulation. Id. at *17. Instead, "when Congress purports to abridge the freedom of a new medium, we must be particularly attentive to its distinct attributes" because "[t]he economics and the technology of each medium affect both the burden of a speech restriction and the Government's interest in maintaining it."

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[5]She noted first that "individual litigants may still dispute that the standards of a community more restrictive than theirs should apply to them" in an as-applied challenge. She added that "in future facial challenges to regulation of obscenity on the Internet, litigants may make a more convincing case for substantial overbreadth." Ibid (observing that "[w]here adult speech is concerned," there may be more disagreement "about what is patently offensive or appeals to the prurient interest").

Ibid (citation omitted). They also recognized that *Sable* and *Hamling* involved media that lend themselves to "geographic restriction," unlike Internet communication. Ibid; id. at *18 ("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").[6]

Finally, Justice Stevens also rejected *Sable* and *Hamling*. The Internet is "a medium in which speech cannot be segregated to avoid communities where it is likely to be considered harmful to minors." Id. at *23 (Stevens, J., dissenting). *Sable*'s "conclusion that it was permissible for the speaker to bear the ultimate burden of compliance assumed that such compliance was at least possible without requiring the speaker to choose another medium or to limit its speech to what all would find acceptable." Id. at *24 (internal citation omitted). But "a law that criminalizes a particular communication in just a handful of destinations effectively prohibits transmission of that message to all of the 176.5 million Americans that have access to the Internet." Ibid (citation omitted). "In light of this fundamental difference in technologies, the rules applicable to the mass mailing of an obscene montage or to obscene dial-a-porn should not be used to judge the legality of messages on the World Wide Web." Ibid (footnote omitted).

In short, six sitting Supreme Court justices have clearly stated that *Sable* and *Hamling* have little or no value in assessing the constitutionality of Internet obscenity regulation.

C. By not specifying any methodology for deciding which community's standards governs, the CDA is unconstitutionally vague.

Where First Amendment rights are at stake, the vagueness doctrine requires greater specificity than in other contexts. *Button*, 371 U.S. at 432-433; id. at 438 ("Broad prophylactic rules in the area of free expression are suspect"); *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

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[6]These justices also answered the Government's argument that speakers may simply choose another medium. Id. at *17 ("it is no answer to say that the speaker should 'take the simple step of utilizing a [different] medium.' because 'laws that foreclose an entire medium of expression . . . . can suppress too much speech'"), citing *City of Ladue v. Gilleo,* 512 U.S. 43, 55 (1994); see *Schneider v. State of N.J. (Town of Irvington)*, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place").

Whether or not such laws violate the Fifth Amendment, they may still lack the precision that the First Amendment requires. *Reno*, 521 U.S. at 870-871.

The Government seems to believe that the CDA's only vagueness defect is that Internet speakers may be subjected to varying community standards. The constitutional problem here, however, is more serious: the combination of the CDA, federal venue rules, and the community standards doctrine neither limits the discretion of prosecutors and triers of fact over, nor gives speakers fair notice of, which community's standards will be applied to Internet speech and what those standards might be. This vagueness exacerbates the CDA's overbreadth.

Simply put, no rational or logical set of rules constrains the choice of community. At one level, the Internet speaker is faced by the multiplicity of communities in our nation. But the uncertainty does not end there, because triers of fact in any particular locality have great discretion over the scope of the "community" whose standards they use.

As a result, the CDA is not "a precise statute evincing a legislative judgment that certain specific conduct be . . . proscribed . . .[,] assur[ing] that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation." *Grayned v. City of Rockford*, 408 U.S. 104, 109 n. 5 (1972) (citation and quotation omitted). Instead, Congress has "impermissibly delegate[d] basic policy matters . . . for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Id. at 108-09.

1. Federal venue law gives prosecutors enormous discretion to decide where they will try an Internet obscenity case.

Although usually framed in terms of fair notice, "the more important aspect of [vagueness] 'is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (citation omitted).

Under federal law, "venue for federal obscenity prosecutions lies 'in any district from, through, or into which' the allegedly obscene material moves." *Peraino*, 645 F.2d at 551 (citing 18 U.S.C. Sec. 3237); *United States v. Bagnell*, 679 F.2d 826, 830 (11th Cir. 1982), *cert. denied*,

460 U.S. 1047 (1983) ("no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent"); *Hamling*, 418 U.S. at 106-107 (constitutionally permissible to subject defendant to different community standards throughout various federal judicial districts into which defendant issued obscene material).

In the postal or mailing context, prosecutors typically select either the "sending" community or the "receiving" community. *Bagnell*, 679 F.2d at 832 (receiving community); *United States v. Slepicoff*, 524 F.2d 1244, 1249 (5th Cir. 1975) (receiving community), *cert. denied*, 425 U.S. 998 (1976); *Langford*, 688 F.2d at 1095-96 (sending community).

Obviously, the choice of prosecuting community (e.g., rural Tennessee versus San Francisco) is significant. Courts have therefore expressed concern for speakers' uncertainty. The Eighth Circuit reserved judgment on cases in which material passes through a district en route to another destination partly because of due process principles. *United States v. McManus*, 535 F.2d 460, 463-64 (8th Cir. 1976), *cert denied*, 429 U.S. 1052 (1977); *Cinema Associates, Ltd. v. City of Oakwood*, 417 F.Supp. 146, 150 n. 5 (S.D. Ohio 1976) ("It had been an original intent of this opinion to determine numerically the number of jurisdictions in this nation that could assert 'community' in attacking sexually explicit material. When the number of villages, cities, counties, states, federal districts, and 'passage through' situations are added together, the number becomes undeterminable. It can only, however, number in the thousands.").

As the court in *Cinema Associates* put it: "This nightmare of possible prosecutions affects not only the pornographer whose obscenity lacks First Amendment protection, it affects also the legitimate artist, author, painter, sculptor, producer and distributor whose creative effort in the first instance does possess such protection." Id. at 150.

Obviously, matters are far worse in the Internet context, because every community is a "receiving" community. Because geography is an almost meaningless concept on the Internet, a Web publisher is subject to prosecution in every community in the United States. When plaintiff Nitke publishes on her Web page, her work reaches every geographical community in the nation.

Yet she can neither tailor her message to particular communities nor block its availability on a community-by-community basis.

2. Triers of fact possess enormous discretion over the scope of the community whose standards will be used to determine obscenity.

Compounding the problem is the CDA's lack of guidance to courts and juries as to which and what community's standards are applicable. This, too, is a classic concern of vagueness law. *Smith*, 415 U.S. at 575 ("such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections"); see *City of Lakewood v. Plain Dealer, Inc*., 486 U.S. 750, 758 (1988) (standards "add[] an element of certainty fatal to self-censorship"; without standards, "the use of shifting or illegitimate criteria [is] far too easy").

First, even when a prosecution is brought in one community, the court may decide that the proper standard is that of another. *McManus*, 535 F.2d at 462 (discussing *United States v. Elkins*, 396 F.Supp. 314, 318 (C.D.Cal. 1975) (in prosecution brought in Iowa but transferred to California, involving material mailed from California to Iowa, district court ruled that case was governed by Iowa community standards and dismissed indictment because California jury could not determine Iowa standards).[7]

But no rule of law governs this choice. Under *Hamling*, the First Amendment "[does] not require as a constitutional matter the substitution of some smaller geographic area" into the formula of community standards. 418 U.S. at 104; *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) ("A State may . . . define an obscenity offense in terms of 'contemporary community standards' . . . without further specification"); *Schedule No. 2102*, 709 F.2d at 136 ("trier of fact is at liberty to identify and apply community standards as he sees them, unchecked by any definition of the relevant community (except that it may not extend to the entire nation) or by any more precise benchmarks"). Compare *Bagnell*, 679 F.2d at 832 (receiving district "suffers the brunt of the harms . . . and is most in need of protecting itself by the application of its community standards")

[7]Such venue transfers are disfavored. *Bagnell*, 679 F.2d at 832 ("[c]ourts should thus exercise restraint in granting Rule 21(b) motions in obscenity prosecutions"); *United States v. Feig*, 1992 WL 170893 (W.D.N.Y. July 9, 1992).

with *Langford*, 688 F.2d at 1089 (sending jurisdictions have an interest in ensuring that they "not become the platform and a staging center for the sale and/or the distribution for sale of obscene materials").

Second, even for a given judicial district, courts may use more specific community standards. As the Second Circuit noted, it makes little sense to treat the Southern District of New York, which covers the "rural areas of Rockland and Dutchess Counties together with the urban sections of Manhattan and the Bronx," as a community with a meaningful obscenity standard. *United States v. Various Articles of Obscene Merchandise, Schedule No. 1303*, 562 F.2d 185, 191 (2d Cir. 1977); *Hoover*, 801 F.2d at 742 (community standards may vary from city to city); *Schedule No. 2102*, 709 F.2d at 137 (although venue was proper anywhere in Southern District of New York, district court could use community standards of New York City).

Indeed, one Internet obscenity case involving an Air Force officer noted that "an Air Force community standard was most likely the appropriate community." *United States v. Maxwell*, 45 M.J. 406, 426 (A.F.C.C.A. 1996). To the extent that an Air Force community standard would be inappropriate for a prosecution under the U.S. Code, the proper community "may be the entire community of subscribers to the AOL service or the members of AOL who use a specific bulletin board." Ibid ("such a community standard may be just as functional as application of a service-wide standard because of the identifiable, yet expansive and more uniform, nature of a technologically connected community"); see *Dial Information*, 938 F.2d at 1540 (measuring patent offensiveness for indecency "by contemporary community standards for the telephone medium").

Third, juries are arbitrarily free to choose from the communities to which they belong which or what community standard to use. A juror is expected to draw upon personal "knowledge of the community or vicinage from which he comes." *Hamling,* 418 U.S. at 105.

This arbitrary freedom is not a constitutional virtue for juries who value the rule of law, as poignantly illustrated by *Keaton v. Stanforth*, 117 F.3d 1420 (6th Cir. 1997) (mem.), *unpublished opinion available at* 1997 WL 369447. In response to the district court's instruction

that the jury take account of "community standards," the jury asked the judge, "What is the definition of community as it is used in the law? Does it mean in the country, in the state, the county or city?" Id. at *2. The trial court said that "it could not provide further instruction as to the meaning of 'community.'" Ibid.

As a result, neither the CDA nor the Supreme Court's obscenity jurisprudence specifies any principled methodology for deciding which community's standards governs the obscenity determination. Instead, the CDA permits arbitrary choice among many possible communities. Geographically speaking, there is an initial choice between the sending community and the receiving community. For Internet speech, the receiving community can be any community. Therefore, prosecutors can choose the receiving community that has the most restrictive standards in the nation. But once a particular community is chosen, the trier of fact can arbitrarily select a larger or smaller community. *Dial Information* shows that courts can choose communities on a medium-specific basis. 938 F.2d at 1540 ("telephone medium"). *Maxwell* shows that courts can also choose a non-geographical Internet or "virtual" community (America On-Line users or even AOL users of a specific bulletin board) or a community based on affiliation (members of the Air Force). 45 M.J. at 426.

3. An Internet speaker lacks "fair notice" under the CDA.

The Supreme Court has opined that *Miller*'s "specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." 413 U.S. at 27. That may be true for public or commercial dealers who use media that lend themselves to geographic restriction, but it is not true for the Internet.

There are two distinct fair notice problems here. First, fair notice is a prerequisite for proper assertion of jurisdiction. Under current Internet jurisdiction law, "passive" contacts with another jurisdiction, e.g., via a Web site that "does little more than make information available to those who are interested in it," are insufficient to establish personal jurisdiction in the receiving jurisdiction. *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997); see *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997) (declining

jurisdiction in New York for creation of website providing information on Missouri club absent allegations that defendant conducted any business in New York); *GTE New Media Servs. v. BellSouth Corp*., 199 F.3d 1343 (D.C. Cir. 2000) (mere accessibility of website in forum insufficient to create personal jurisdiction where alleged facts did not support inference of tortious activities directed at forum); *Cybersell, Inc. v. Cybersell, Inc*., 130 F.3d 414 (9th Cir. 1999) (Internet advertising alone insufficient to subject advertiser to jurisdiction); *Mink v. AAAA Dev. LLC*, 190 F.3d 333 (5th Cir. 1999) (website with product information and contact information insufficient to give rise to personal jurisdiction).[8]

Second, even given a specific geographical starting point, a speaker cannot rationally gauge the scope or extent of a community for community standards purposes. A community can be as large as the state of California, as in *Miller*, as small as a city, or somewhere in between. Thus, a publisher who knows that her work will be received in New York City cannot know whether the relevant community standard is that of New York, the Southern District of New York, "rural areas of Rockland and Dutchess Counties," "the urban sections of Manhattan and the Bronx," or some other geographical construct. See *Schedule No. 1303*, 562 F.2d at 191.

As the preceding examples show, the "fair notice" problem for Internet speakers is not a minor quibble over exactly what "obscene" means. The common metaphor of a certain "core" surrounded by a blurry, uncertain penumbra does not fit here because the "core" meaning of obscenity varies between individual communities. This problem always exists under the

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[8]Commercial sites may give rise to jurisdiction if the commercial activity goes beyond mere advertising. *Inset Sys. v. Instructions Set, Inc*., 937 F.Supp. 161 (D.Conn. 1996) (posting of toll-free number held to be solicitation of business sufficient to justify personal jurisdiction); but see *Mink*, 190 F.3d at 337 (declining jurisdiction based on the posting of a toll-free telephone number); *Hockerson-Halberstadt Inc. v. Costco Wholesale Corp*., No. 91-1720, 2000 U.S. Dist. LEXIS 8290 (E.D.La. June 2, 2000) (Internet sales made to forum residents through website, which amounted to less than .0000008 percent of its total sales and were unrelated to underlying patent infringement litigation, did not comprise systematic and continuous contacts necessary to submit Costco to personal jurisdiction in Louisiana when Costco never operated any warehouses in Louisiana, had no bank accounts, property, offices, agents, or employees there, and was not registered to do business in Louisiana).

community standards doctrine, but its significance is mitigated by the historical ability of speakers to restrict their speech geographically. Internet speakers cannot.

As a result, the CDA as construed by the Government is a statute that specifies no standard at all. *City of Chicago v. Morales*, 522 U.S. 41, 57 (1999) ("the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of 'loitering,' but rather about what loitering is covered by the ordinance and what is not") (plurality op.), *Shuttlesworth v. Birmingham*, 382 U.S. 87, 90 (1965) (ordinance if "[l]iterally read" said "that a person may stand on a public sidewalk . . . only at the whim of any police officer . . . . The constitutional vice of so broad a provision needs no demonstration"). Under the Government's approach, the CDA is therefore vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. Cincinnati*, 402 U. S. 611, 614 (1971).

4. Scienter

Courts sometimes find that scienter can cure vagueness, and scienter is necessary "to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." *Mishkin v New York*, 383 U.S. 502, 511 (1966); *Smith v. California*, 361 U.S. 147 (1959).

The CDA provides that one must "knowingly" engage in prohibited conduct. It is a fair question, however, what "knowingly" means here. Generally, "the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *United States v. X-Citement Video*, 513 U.S. 64, 72 (1994). Under the federal child pornography laws, "the age of the performers is the critical element separating legal innocence from wrongful conduct" because "nonobscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment." Id. at 72-73.

Here, a critical element separating legal innocence from wrongful conduct is the community whose standard will be used to determine obscenity. When a speaker publishes her art, her conduct may be "otherwise innocent" in one community but "wrongful" in another.

Therefore, under *X-Citement Video*, a publisher must be shown to have knowledge as to which community. See *Peraino*, 645 F.2d at 552 (Government must prove some level of knowledge as to communities to which material is to be distributed.); id. at 552 n. 2 (person could not be convicted as conspirator without proof that "a purpose of the conspiracy, at the time the conspirator was a member, involved a community, the standards of which were violated by the film"). This requirement does not entail knowledge of the community's standard, but of the identity of the community.

Obscenity statutes that require that the defendant knowingly transport materials in interstate commerce thus may not apply to Internet distributors. *United States v. Thomas*, 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996), implies that information submitted by a postal inspector, which involved submitting a signed form including his age, address, and telephone number, taken together with telephone conversations, constituted knowledge sufficient both for venue and for the offense.

The Supreme Court in *X-Citement Video* noted that "a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts." 513 U.S. at 78 (citation omitted). An obscenity statute completely bereft of a scienter requirement as to the community whose standards will be used raises the same doubts.

D. That obscenity is unprotected speech does not eliminate the problem of chilling effects.

The Government praises the deterrent effect of the CDA's overbreadth and vagueness. But the CDA is aimed directly at speech, and deterrence in this context creates chilling effects that will inevitably lead speakers like plaintiff Nitke to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

For instance, the suggestion that plaintiff Nitke or others may survive an obscenity prosecution by demonstrating that their speech is of serious value ignores the First Amendment principle that the very possibility or fact of prosecution chills speech. *Dombrowski v. Pfister*,

380 U.S. 479, 487 (1965) ("[t]he chilling effect upon the exercise of First Amendment rights may result from the fact of prosecution, unaffected by the prospects of success or failure"). The Supreme Court's words in *Speiser* are especially appropriate here:

> "where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding - inherent in all litigation - will create the danger that the legitimate utterance will be penalized. . . . This is especially to be feared when the complexity of the proofs and the generality of the standards applied provide but shifting sands on which the litigant must maintain his position."

Speiser, 357 U.S. at 526 (internal citation omitted). Internet speakers do not face a single line separating the obscene from non-obscene; they face thousands if not more. Moreover, when an Internet speaker is prosecuted, she may face a jury that, as in *Keaton*, can arbitrarily choose to use the standards of any community it wishes.

CONCLUSION

The fundamental problem here is that "[i]n its original form, the community standard provided a shield for communications that are offensive only to the least tolerant members of society. . . . In the context of the Internet, however, community standards become a sword, rather than a shield." *Ashcroft*, 2002 WL 970708 at *22 (Stevens, J., dissenting). Congress, however, did not address this problem in the CDA, and the Government has offered no saving construction in this case.

EFF believes that it would be inappropriate for the Court to attempt to save this statute. See *Reno*, 521 U.S. at 884-885 (refusing to "rewrite" indecency provisions of the CDA "to conform it to constitutional requirements." (citation and footnote omitted). The number of commentators who have addressed the problem[9] suggests that, in the first instance, this is a matter for Congress.

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[9]E.g., Gyong Ho Kim and Anna R. Paddon, *Cybercommunity Versus Geographical Community Standard For Online Pornography: A Technological Hierarchy In Judging Cyberspace Obscenity*, 26 RUTGERS COMPUTER & TECH. L.J. 65 (1999); Erik Swenson, *Redefining Community Standards in Light of Geographic Limitlessness of the Internet: A Critique of United States v. Thomas*, 82 MINN. L. REV. 855 (1998); Donald Stepka, *Obscenity On-Line: A Transnational Approach to Computer Transfers of Potentially Obscene Material,* 82 CORNELL

For these reasons, the Court should reject the Government's motion to dismiss and grant plaintiffs' cross-motion for a preliminary injunction.

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L. REV. 905 (1997); Patrick Egan, *Virtual Community Standards: Should Obscenity Law Recognize the Contemporary Community of Cyberspace?*, 30 SUFFOLK U. L. REV. 117 (1996); Timothy Bass, *Obscenity in Cyberspace: Some Reasons for Retaining the Local Community Standard*, 1996 U. CHI. LEGAL F. 471, 484-85 (1996); Randolph Stuart Sergent, *The "Hamlet" Fallacy: Computer Networks and the Geographic Roots of Obscenity Regulation*, 23 HASTINGS CONST. L.Q. 671 (1996).