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"The right to receive information and ideas, regardless of their social worth is fundamental to our free society."¹

"[C]riminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."²

I. INTRODUCTION

The idea that there is "freedom of speech" traditionally has been somewhat disingenuous, criticized as a freedom that applied only to those with the ability to afford the required printing equipment.³ With the advent of the Internet, however, many who previously would not have been able financially to support a means to disseminate their ideas could do so with minimal expense, fostering "the marketplace of ideas."⁴ However, this newfound freedom also provides "a potentially harmful media for children."⁵ Various commercial Internet sites contain graphics that many people would classify as pornographic.⁶ Many of these sites offer "teasers," free sexually explicit material that is intended to entice a person to pay for the opportunity to see more. While this marketing technique is designed to attract paying adults, the free teasers are also available to children. "A child with minimal knowledge of a computer, the ability to operate a browser, and the skill to type a few simple words may be able to access sexual images and content over the World Wide Web."⁷ In fact:

[T]welve percent of websites are pornographic in nature, twenty-five percent of all Internet search engine requests are for pornography, the average child first views Internet pornography at age eleven, and eighty percent of fifteen-to-seventeen-year-olds have experienced multiple hard-core online pornography exposures. Approximately 11 million minors visit pornographic websites each week.⁸

4. Id.
5. Id.
6. It is important to note that there is no legal significance to the word pornography, and that the word itself can carry negative connotations. Material of this nature is legally defined as obscene, non-obscene, or harmful when applied to minors. See infra text accompanying notes 24–42. Further, as a law professor of mine once pointed out to me (and I paraphrase), "If you like it, it's adult erotica. If you don't like it, it's pornography." I use the term "pornography" here only to help illustrate the type of speech at issue—non-obscene, First Amendment protected sex speech—and pass no judgment on the propriety of such speech.
In an effort to reduce minors' access to sexually explicit material on the Internet, Congress, in 1998, passed the Child Online Protection Act ("COPA"). The Act sought to compel providers of commercial internet pornography to establish a barrier—an "adult verification screen"—that would require anyone intending to access such a site to first prove himself an adult.9

Civil liberty groups, including the American Civil Liberties Union ("ACLU"), and Internet content providers believed COPA was unconstitutional and filed for a preliminary injunction on October 22, 1998, against the government to prevent the enforcement of the Act.10 The district court held COPA to a strict scrutiny analysis,11 found that it failed such an analysis,12 and granted the preliminary injunction. On appeal, the Third Circuit Court of Appeals reviewed under an abuse of discretion standard and affirmed the district court.13 The case was then appealed to the United States Supreme Court. After determining that the government had "failed ... to rebut the plaintiff's contention that there are plausible less restrictive alternatives to the statute,"14 chiefly filtering software,15 and taking into consideration several "practical reasons,"16 the Supreme Court held that the district court did not abuse its discretion in granting the injunction. Further, without declaring with finality whether COPA is unconstitutional, the

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11. There are several levels of scrutiny that courts will apply to a regulation of speech, depending on what type of regulation is at issue. "The most exacting scrutiny test [strict scrutiny] is applied to regulations that suppress, disadvantage, or impose different burdens upon speech on the basis of its content ... ." 16A AM. JUR. 2D Constitutional Law § 460 (2005) (emphasis added). However, "regulations that are unrelated to content are subject to an intermediate level of scrutiny reflecting the less substantial risk of excising ideas or viewpoints from public dialogue." Id. (emphasis added). In other words, a "content-based" regulation will receive strict scrutiny, while a "content-neutral" regulation will receive intermediate scrutiny.
12. COPA was found to be a content-based regulation and, as such, was subject to strict scrutiny. Reno, 31 F. Supp. 2d at 492. As Justice Breyer later explained, subjecting the statute to strict scrutiny would "require the Government to show that any restriction of nonobscene expression is 'narrowly drawn' to further a 'compelling interest' and that the restriction amounts to the 'least restrictive means' available to further that interest." Ashcroft, 542 U.S. at 677 (Breyer, J., dissenting). See infra text accompanying notes 64–66.
15. Id. at 666–67.
16. Id. at 670–71. The Court listed three practical reasons why the preliminary injunction should be upheld: (i) "the potential harms from reversing the injunction outweigh those of leaving it in place by mistake;" (ii) "there are substantial factual disputes remaining in the case;" and (iii) "the factual record does not reflect current technological reality." Id.
Supreme Court stated that “COPA should be enjoined because the statute likely violates the First Amendment.”\textsuperscript{17} The case was then remanded to the district court to adjudicate the constitutionality of COPA on its merits.

The Court was to decide solely on the issue of the injunction and was not adjudicating the case on its merits.\textsuperscript{18} However, in its majority opinion, the Court directly stated that COPA was “likely” unconstitutional, which illustrates how the Court will probably rule when it has to decide the constitutionality of COPA on its merits. It is this language that compels analysis.

This Note will begin, in Part II, with an examination of the circumstances leading to the Supreme Court’s decision, discussing both the case history of sex speech as well as the legislative backdrop to the creation of COPA. Next, section III.A will demonstrate how the majority opinion of the Supreme Court narrowed the protected class originally intended by Congress. Section III.B will explain how the majority opinion’s arguments touting filtering software as a more effective and less restrictive means fail when applied to the intended broader class. Section III.C will argue that these findings are directly related to the Supreme Court’s implicit reliance on \textit{Ginsberg v. New York};\textsuperscript{19} that the Supreme Court should abandon \textit{Ginsberg}, which al-

\begin{enumerate}
\item \textit{Id.} at 660. This was a five to four decision. Justice Scalia filed his own dissenting opinion, in which he stated that the First Amendment does not protect the speech in question and that the statute should not be subjected to strict scrutiny. \textit{Id.} (Scalia, J., dissenting). Justice Breyer wrote a lengthy dissent, with which Chief Justice Rehnquist and Justice O'Connor joined. \textit{Id.} at 676 (Breyer, J., dissenting). Justice Breyer accepted the majority position that COPA should be subjected to strict scrutiny. However, after examination of the actual burdens placed on the protected speech, the compelling interest furthered by COPA, and the less restrictive means suggested by the majority, Justice Breyer refused to accept the majority conclusion that “Congress could have accomplished its statutory objective—protecting children from commercial pornography on the Internet—in other, less restrictive ways.” \textit{Id.} at 677.
\item \textit{Id.} at 664–65 (majority opinion).
\item 390 U.S. 629 (1968). The district court cited to, among other cases, \textit{Ginsberg} to support the contention that: “It is clear that Congress has a compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards.” Am. Civil Liberties Union v. Reno, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999). Similarly, the Third Circuit cited to \textit{Ginsberg} to support the statement that: “The Supreme Court has held that ‘there is a compelling interest in protecting the physical and psychological well-being of minors.’” Am. Civil Liberties Union v. Ashcroft, 322 F.3d 240, 251 (3d Cir. 2003) (citing \textit{Ginsberg}, 390 U.S. at 638 (“The well-being of its children is of course a subject within the State's constitutional power to regulate . . . at least if it was rational for the legislature to find that the minors’ exposure to such material might be harmful.”)). While the Supreme Court majority opinion never cites to \textit{Ginsberg}, the dissent does: “To be sure, our cases have recognized a compelling interest in protecting minors from exposure to sexually explicit materials.” \textit{Ashcroft}, 542 U.S. at 675 (Breyer, J., dissenting) (citing \textit{Ginsberg}, 390 U.S. 629). The majority's reli-
allows a rational relation test to validate the first prong of a strict scrutiny analysis; and that the Supreme Court should oblige empirical evidence relating to the need for such legislation (i.e., relating to the compelling interest) from Congress. Only then will the (un)constitutionality of such an act be arguable. While in sections III.A and III.B I disagree with the Court's finding of a more effective, less restrictive means, the concluding argument of this Note is that if empirical evidence of the harm caused to minor children by sex speech were presented to the Court (via legislative findings), then the Court would be better suited to discuss the existence of a compelling interest and the constitutionality of a proposed remedy.

II. HISTORY AND JURISPRUDENCE—THE SEX SPEECH BACKDROP

Before any attempt is made to discuss the main arguments presented in this Note, it is imperative to understand the legislative and judicial backdrop from which these arguments were formed. I will therefore present, in section II.A, a general case history and show how the Supreme Court distinguishes between sex speech that is protected by the First Amendment (i.e., non-obscene speech), and that which is not protected by the First Amendment (i.e., that which is obscene). In section II.B I will discuss how the Supreme Court treats regulations that attempt to prevent minors from coming into contact with sex speech that, although protected by the First Amendment, is seen as harmful to their development and well-being. In section II.C I will discuss the Communications Decency Act ("CDA"), the first attempt by Congress to regulate non-obscene sex speech on the Internet. Finally, in sections II.D and II.E, I will give a detailed description of the regulation at issue in this Note, COPA, and the Supreme Court's opinion that ultimately ruled that Act "likely" unconstitutional.

A. General History—Roth, Paris Adult Theater I, and Miller

Sex speech, and its interaction with the First Amendment, has an interesting jurisprudence. In modern times, the debate between what constitutes First Amendment protected sex speech and what is unprotected obscenity evolved in three main cases, all of which will be discussed in this section.
The first case of particular importance is *Roth v. United States*.22 There, the Court stated that "the unconditional phrasing of the First Amendment was not intended to protect every utterance."23 But, the Court continued:

[S]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. . . . It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.24

The Court in *Roth* then defined that which appeals to a prurient interest as that which is "a shameful or morbid interest in nudity, sex, or excretion."25 Sex speech, which does not appeal to the "prurient interest," is protected under the First Amendment; obscenity, which does appeal to the "prurient interest," is not.26 This distinction became known as the *Roth* standard.

The next major case was *Paris Adult Theatre I v. Slaton*,27 which concerned a consenting adult's right to view what he chooses. Because the case involved a consenting adult audience, concern was raised about the constitutionality of the *Roth* standard. The opinion, written by Chief Justice Burger, stated:

In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. Rights and interests "other than those of the advocates are involved." These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.28

The Court in *Paris Adult Theater I* reaffirmed the *Roth* obscenity standard, and emphasized that the standard did not violate the First Amendment.

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24. *Id.* at 487–88 (footnotes omitted).
25. *Id.* at 487 n.20.
26. Protection under this standard depends on "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489.
27. 413 U.S. 49 (1973).
28. *Id.* at 57 (citation omitted); see also *U.S. Constitution*, supra note 22 ("Chief Justice Burger for the Court observed that the States have wider interests than protecting juveniles and unwilling adults from exposure to pornography; legitimate state interests, effectuated through the exercise of the police power, exist in protecting and improving the quality of life and the total community environment, in improving the tone of commerce in the cities, and in protecting public safety.").
or Fourteenth Amendments, even in the context of consenting adults.29

While the Roth standard confirmed that some utterances were outside of the First Amendment circle, that standard remained somewhat vague and, as such, was seen by the Court as too broad.30 The Supreme Court, in Miller v. California,31 sought to clear up some of the ambiguity and attempted to give a clearer and narrower standard of what was not protected under the First Amendment by adding several requirements to the Roth standard:

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.32

The Miller majority developed what has become known as the Miller standard, the test used to determine what is obscene today.

B. As to Minors—Ginsberg v. New York

Five years before the Supreme Court decided Miller, it was asked to review the ability of a state legislature to regulate non-obscene (First Amendment protected) sex speech that was available to minors. In that case, Ginsberg v. New York,33 the Supreme Court upheld the constitutionality of a New York statute that prohibited “the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults.”34

The Ginsberg Court, before upholding the constitutionality of the statute, stated “the State has an interest ‘to protect the welfare of children’ and to see that they are ‘safeguarded from abuses’ which might prevent their ‘growth into free and independent well-developed men

29. Paris Adult Theater I, 413 U.S. at 57.
32. Id. at 24 (citation omitted). The Court alluded to the idea that while the analysis of what appeals to the prurient interest and is patently offensive “are essentially questions of fact” that can be judged under the local community standards, id. at 30; see also, e.g., Hamling v. United States, 418 U.S. 87, 104 (1974) (“A juror is entitled to draw on his knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination . . . .”), the third prong of the test should be determined under a reasonable person standard, see, e.g., Pope v. Illinois, 481 U.S. 497, 500–01 (1987) (stating that the test concerns “whether a reasonable person would find [literary, artistic, political, or scientific] value in the material, taken as a whole”) (emphasis added); see also U.S. Constitution, supra note 22.
33. 390 U.S. 629 (1968).
34. Id. at 631.
and citizens.'" Therefore, the "only question" the Supreme Court saw as needing an answer was whether the state legislature could "rationally conclude" that contact with the material regulated by the statute could cause such a developmental hindrance.

The Court conceded that "the growing consensus of commentators is that . . . 'these studies all agree that a causal link has not been demonstrated,'" but then went on to say that these studies all "equally agree[ ] that a causal link has not been disproved either." The Court subsequently cited a then recently conducted study and quoted an "unofficial poll" of psychiatrists:

Psychiatrists made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement.

The Court concluded its analysis by saying the statute could not be found to have "no rational relation to the objective of safeguarding such minors from harm." The Court did not require the legislature to prove or provide any evidence that harm was actually caused by the sex speech, but rather yielded to the state legislature's ability to "rationally" conclude that such harm could be caused.

C. Communications Decency Act

In 1996, with the increased use of the Internet, Congress, to alleviate what it saw as a forum that would potentially harm the develop-

35. Id. at 640-41.  
36. Id. at 641.  
37. Id.  
38. Id. at 642.  
39. Id. at 642-43 n.10 (quoting Willard M. Gaylin, The Prickly Problems of Pornography, 77 YALE L.J. 579, 594 (1968)).  
40. Id. at 643 (emphasis added). The Court in Ginsberg noted that the New York Legislature condemned the speech by saying such speech is "a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state." Id. at 641. However, the Court then said "[i]t is very doubtful that this finding expresses an accepted scientific fact." Id. (emphasis added).  
41. See Andrew Koppelman, Does Obscenity Cause Moral Harm?, 105 COLUM. L. REV. 1635, 1654 (2005) ("The Court observed that most parents did not want their children to see these publications, and the legislature could appropriately wish to help those parents . . . . But the Court also cited the state's 'independent interest in the well-being of its youth.' It did not specify just what harm the state was preventing, and the most articulate source it quoted emphasized a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive.").
ment and well being of children, passed the CDA. The CDA, in part, stated:

Whoever . . . (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, is obscene or child pornography, regardless of whether the user of such service placed the call or initiated the communication . . . shall be fined under Title 18 or imprisoned not more than two years, or both.

The CDA, however, provided a defense to prosecution, which could be asserted by anyone who "has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."

The ACLU challenged the CDA's constitutionality, and in Reno v. American Civil Liberties Union the Supreme Court struck down the CDA because it violated the First Amendment. There were four reasons why the Court found the CDA unconstitutional. First, "[u]nder the CDA . . . neither the parents' consent—nor even their participation—in the communication would avoid the application of the statute." Second, the CDA made no distinctions between commercial and non-commercial providers. Third, the Court found that the "CDA fails to provide us with any definition of the term 'indecent' . . . and, importantly, omits any requirement that the 'patently offensive' material . . . lack serious literary, artistic, political, or scientific value." Finally, the Court pointed to the definition of minor, holding that the CDA applied to children under eighteen years old, which "includes an additional year of those nearest majority." Because of these problems, the CDA was found to place "an unacceptably heavy burden on protected speech," and therefore was not narrowly tailored to serve the compelling governmental interest. Congress went back to the drawing boards and, after it corrected the constitutional problems found in the CDA, passed COPA.

D. Child Online Protection Act

COPA seemingly fixed what the Court saw as constitutional problems with the CDA. Congress composed COPA to allow for paren-

43. Id. § 223(d).
44. Id. § 223(e)(5)(B).
46. Id. at 865.
47. Id.
48. Id.
49. Id. at 866.
50. Id. at 882.
tal discretion, to apply only to commercial providers, to include a requirement that the patently offensive material lack "serious literary, artistic, political, or scientific value," and redefined minor to individuals under seventeen years of age.

COPA seeks to establish a barrier, an adult-verification screen, whereby an Internet user who wishes to access free sexually explicit material must first identify himself as an adult. COPA applies to "any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." Violation of COPA is punishable by a fine "not more than $50,000 [and imprisonment] not more than six months, or both." Further, for intentional violations of COPA, an additional criminal fine can be assessed up to $50,000 for each violation as well as a civil fine of up to $50,000 for each violation.

COPA, however, creates an affirmative defense whereby the content provider can avoid prosecution "by requiring use of a credit card, debit account, adult access code, ... adult personal identification number; ... digital certificate that verifies age; or ... any other reasonable measures that are feasible under available technology." Along with this affirmative defense, COPA provides that "[n]o cause of action may be brought in any court ... against any person ... [who] has taken in good faith to implement a defense authorized under" COPA. Finally, COPA takes into account privacy concerns with a provision that states the person operating such an Internet site "shall not disclose

52. See id.
53. Id. § 231(e)(6)(C).
54. See id. § 231(e)(7).
55. Id. § 231(a)(1). COPA defines minor as "any person under 17 years of age." Id. § 231(e)(7). COPA defines harmful material as

any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pande to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act...; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. § 231(e)(6)(A)–(C). COPA defines commercial purposes as "engaged in ... business," which COPA defines as operating "with the objective of earning a profit as a result of such activities." Id. § 231(e)(2)(A)–(B).
56. Id. § 231(a)(1).
57. Id. § 231(a)(2)–(3). An offense is defined as each day the site stands contrary to COPA. Id.
58. Id. § 231(c)(1)(A)–(C).
59. Id. § 231(c)(2).
any information collected for the purposes of restricting access to such communications to individuals seventeen years of age or older.”

E. Ashcroft v. American Civil Liberties Union

On October 22, 1998, the ACLU, others concerned with civil liberties, and Internet content providers filed a lawsuit in the United States District Court of the Eastern District of Pennsylvania which challenged COPA on First and Fifth Amendment grounds, and sought an injunction to prevent enforcement of COPA.

Before any analysis of specific facts, the district court established the level of scrutiny to be used. The district court found the COPA regulation was a “content-based regulation,” and as such “COPA is presumptively invalid and is subject to strict scrutiny.” That is to say, “the content of such protected speech may be regulated in order to promote a compelling governmental interest ‘if [the government] chooses the least restrictive means to further the articulated interest.’” This is a three-step analysis. First, a court has to verify the compelling governmental interest. Second, a court has to make certain the provisions of the regulation are narrowly tailored to achieve that compelling interest. Finally, a court must make certain that the regulation is the least restrictive means to accomplish that end.

The district court confirmed “it is clear that Congress has a compelling interest in the protection of minors.” Further, the court ruled that there was no broader congressional intent other than “to require the commercial pornographer to put sexually explicit messages ‘behind the counter’ on the Web, similar to existing requirements in some states that such material to be held behind the counter or sold in a paper wrapper in a physical store.” However, the court questioned the scope of COPA, saying that the Act could have been made less restrictive “if the prohibited forms of content had included, for instance, only pictures, images, or graphic image files, which are typically employed by adult entertainment Web sites as ‘teasers’ . . . [or] . . . without the imposition of possibly excessive and serious criminal penalties.” Moreover, after examining several factors that “reduce the benefit that will be realized by the implementation of

60. Id. § 231(d)(1)(A).
62. Id. at 492. For a description of content-based versus content-neutral regulations, see supra notes 11–12.
64. Id. (quoting Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n, 492 U.S. 115, 126 (1989)).
65. See id. at 493–96.
66. Id. at 495.
67. Id. at 495–96.
68. Id. at 497.
COPA," the court concluded that the availability of other technology such as filtering software presented a likely more effective and less restrictive means to accomplish the governmental goal. The court concluded there was a likelihood of success on the merits and granted the motion for the preliminary injunction.

On appeal, the Third Circuit upheld the district court's finding. However, this court did not base its determination on the district court's analysis. Instead, it based its finding "on COPA's reliance on 'contemporary community standards' in the context of the electronic medium of the Web to identify material that is harmful to minors." Finding that prior community standards jurisprudence "has no applicability to the Internet and the Web [because] Web publishers are currently without the ability to control the geographic scope of the recipients of their communications," the court concluded that due to the community standards language "COPA . . . is more likely than not to be found unconstitutional as overbroad on the merits."

The Supreme Court reversed the Third Circuit on the point of the community standards language, holding "that COPA's 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." The Supreme Court emphasized the narrowness of its decision, and made no determination as to whether: (i) COPA would not pass a strict scrutiny analysis; (ii) COPA was too vague; or (iii) COPA was overly broad for other reasons. Although the respondents asked the Supreme Court to immediately resolve those issues, the Supreme Court remanded the case back to the Third Circuit to investigate those three issues first.

Upon remand, the Third Circuit again affirmed the district court's decision and upheld the injunction. This time, following the district court's framework, the Third Circuit turned to the question of whether

69. Id. The factors considered by the court were the ability to access foreign web sites, obscene non-commercial sites, and minors who legitimately have a credit card and who might therefore be able to circumvent the COPA barrier. Id.
70. The court briefly analyzed the technology before making this conclusion, but stated that "the final determination must await trial on the merits." Id.
71. Id. at 498. The court also had to determine that the plaintiffs would suffer irreparable harm, and then balance that harm against the interest of the government. The court found that there would be irreparable harm to the plaintiffs, and that their harm "outweigh[ed] any purported interest of the [government]." Id.
73. Id. Consequently, the Third Circuit did not here address the district court's analysis concerning the strict scrutiny test. Id. at 173–74.
74. Id. at 180.
75. Id. at 181.
77. Id. at 585–86.
COPA could withstand strict scrutiny. It agreed with the district
court that the Act passed the first prong, finding a compelling govern-
mental interest. However, the Third Circuit determined that COPA
failed both the second (narrowly tailored) and third (least restric-
tive) prongs of the strict scrutiny test.

The government again appealed to the Supreme Court. To rebut
the respondent's claim that the use of filtering software is as effective
as COPA, the government argued that filters have to be purchased. The Court touched "the argument that filtering software is not an
available alternative because Congress may not require it to be used." The Court, however, quickly dismissed this notion, stating
that the "argument carries little weight, because Congress undoubt-

is a compelling interest in protecting the physical and psychological well-being of
minors. The parties agree that the Government's stated interest in protecting
minors from harmful material online is compelling." (citations omitted)).

79. The Third Circuit listed several provisions of COPA it deemed were not narrowly
tailored to achieve the compelling interest. Those were:

[T]he definition of "material that is harmful to minors," which includes
the concept of taking "as a whole" material designed to appeal to the
"prurient interest" of minors; and material which (when judged as a
whole) lacks "serious literary" or other "value" for minors; ... the defini-
tion of "commercial purposes," which limits the reach of the statute to
persons "engaged in the business" (broadly defined) of making communi-
cations of material that is harmful to minors; and ... the "affirmative
defenses" available to publishers, which require the technological screen-
ing of users for the purpose of age verification.

Id. There is a lengthy discussion articulating why the Third Circuit felt that
these provisions were not narrowly tailored. See id. at 251-61. However, in the
subsequent Supreme Court decision, the Supreme Court affirmed only the dis-

tRICT court's decision for reasons relied upon by the district court, namely the
availability of a more efficient and less restrictive means, and did not consider
the validity of these constitutionally tougher arguments. The Supreme Court
also avoided commenting on tough constitutional issues brought up by the Third
Circuit concerning the over breadth of the statutory language. Ashcroft v. Am.

80. Subjecting COPA to the third part of the strict scrutiny test, the Third Circuit
examined whether COPA was the least restrictive means available to accomplish
the perceived compelling interest. Similar to the district court, the Third Circuit
relied to a great extent on the existence of filtering software. The government
had the burden of showing that filtering software was not as effective as COPA,
and made three arguments to that end:

(1) [F]iltering software is voluntary—it transfers the burden of protect-
ing children from the source of the harmful material ... to the potential
victims and their parents; (2) filtering software is often both over- and
underinclusive of targeted material; and (3) it is more effective to screen
material "prior to it being sent or posted to minors" on the Internet.

Ashcroft, 322 F.3d at 282. The Third Circuit rejected these three arguments and,
relying on the existence of filtering software, again affirmed the district court's
decision to issue the injunction. Id. at 265.

81. Ashcroft, 542 U.S. at 669.

82. Id.
edly may act to encourage the use of filters." To reinforce this statement, the Supreme Court relied heavily on United States v. Playboy Entertainment Group. Citing that case, the Court determined that "[a] court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act."

The Supreme Court, while it seemingly assumed a compelling interest existed, did not address the arguments raised by the Third Circuit concerning the second part of the strict scrutiny analysis. Instead, similar to the district court, it moved directly to the third prong, and focused on the existence of filtering software to determine if there was a less restrictive means to COPA that was at least as effective to accomplish the compelling interest.

The Court examined several factors before determining that COPA was found to be more restrictive than filtering software. First, the Court looked at the nature of filtering software, and concluded that filtering software was necessarily less restrictive as it "impose[s] selective restrictions on speech at the receiving end, not universal restrictions at the source." Those who wish to do so can screen the specific material they do not want instead of forcing everything to be screened. For example, adults can turn off the screen if they do not want it, or even not install one if they do not have children. Second, the Court addressed privacy concerns, pointing out that filters would afford access to explicit material without having a person identify himself or provide a credit card number. Finally, and most convincingly for the Court, COPA was found to be more restrictive in that it provides for criminal penalties for dissemination of speech that is protected by the First Amendment. The Court found that "[a]bove all, promoting the use of filters does not condemn as criminal any category of speech."

The Court then examined the effectiveness of filtering software compared to COPA, pointing to a study conducted by a congressional commission specifically created to compare filtering software and age-verification screens. That commission found that filters have an effectiveness rating of 7.4, versus adult verification screens which have an effectiveness rating of 5.9. In part, this discrepancy is due to the fact that forty percent of the explicit material on the Internet comes

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83. Id.
85. Ashcroft, 542 U.S. at 669 (quoting Playboy, 529 U.S. at 824).
86. Id. at 667.
87. Id.
88. Id.
89. Id.
90. Id. at 668. A higher rating means that method is more effective than a method with a lower number.
from overseas\textsuperscript{91} sites. Filters would be more effective for these sites because overseas sites would not be required to provide adult-verification screens. The Court also noted "that filters can be applied to all forms of Internet communication, including e-mail" and non-commercial Internet sites, not just the commercial Internet sites to which COPA only applies.\textsuperscript{92} The Court finally noted that verification systems are open to circumvention by some minors who have their own credit or debit card.\textsuperscript{93}

Finding that filtering software presents a less restrictive, more effective means to accomplish the compelling governmental interest, the majority concluded that the district court did not abuse its discretion, found that COPA was "likely" unconstitutional, and upheld the injunction.

III. ANALYSIS

COPA was written to apply to commercial website operators who make certain sexually explicit material "available to any minor."\textsuperscript{94} Congress, when enacting COPA, accompanied the Act with several congressional findings. The first such finding stated that "the widespread availability of the Internet presents opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control."\textsuperscript{95} However, in the second congressional finding, Congress asserted that "the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest."\textsuperscript{96} The Supreme Court, in its majority opinion, seemingly implied that COPA did advance a bona fide compelling interest, but never stated exactly what that compelling interest was. Instead, the Court apparently interpreted the first of the findings as the congressional "goal"\textsuperscript{97} of COPA, and construed Congress's language to mean that "COPA presumes that parents lack the ability, not the will, to monitor what their children see."\textsuperscript{98} This interpretation gave way to the main thrust of the majority's finding that the availability of filtering software imparts a less restrictive means necessary to accomplish the objective of the statute. Therefore, when subjecting the statute to strict scrutiny, the Court concluded that COPA would "likely" be un-

\begin{itemize}
  \item \textsuperscript{91} Id. at 667.
  \item \textsuperscript{92} Id. at 668.
  \item \textsuperscript{93} Id.
  \item \textsuperscript{96} Id. § 1402(2).
  \item \textsuperscript{97} Ashcroft, 542 U.S. at 669.
  \item \textsuperscript{98} Id. at 670.
\end{itemize}
constitutional and upheld the injunction. However, the Court was wrong in using such a narrow construction of those to be protected; COPA was not meant to protect only those minors whose parents have the knowledge, wherewithal, and presence to install filtering software but rather was meant to protect any minor. Instead of focusing on the introductory finding, the Court should have focused on the language of the actual statute and the genuine definition of the compelling interest Congress gives in the second congressional findings note.

Filtering software does not accomplish the compelling interest as effectively as COPA when a broader reading of those intended to be protected by the statute is used. Therefore, since the Supreme Court narrowed the actual governmental compelling interest by narrowing the protected class, the arguments presented in the majority opinion concerning an available more effective, less restrictive means fail.

The Supreme Court’s majority finding is directly related to its struggle to define what the actual compelling interest advanced by COPA is. This struggle stems from the continued refusal to require empirical evidence and proof of the harm caused by sex speech on minor children (the scheme that was first advanced in Ginsberg). Only when the Supreme Court abandons the sentiment advanced by Ginsberg and requires that empirical evidence be provided will the Court be able to determine the existence of a compelling interest and the constitutionality of any regulation designed to prevent that harm.

A. That’s Not What We Meant

The district court stated there is a compelling governmental interest advanced by COPA: “It is clear that Congress has a compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards.”99 Taking these words at face value, it appears that the compelling interest is very broad; the term “minor” is not modified or restricted in any manner, and the protection of every minor is the compelling interest.

The Third Circuit defined the compelling interest similarly to the district court. It stated that “protecting the physical and psychological well-being of minors”100 and “protecting minors from harmful material online”101 are compelling interests. Again, through this manner of defining the compelling interest the court did not modify “minor” in any way; protecting all minors is the governmental compelling interest. Indeed, the Third Circuit even refused to interpret COPA as meaning anything but every person under seventeen, arguing that

101. Id.
[because the plain meaning of the statute's text is evident, we de-
cline to rewrite Congress's definition of 'minor']."  

However, nowhere in the majority opinion of the Supreme Court
does the Court directly state "_ is the compelling interest advanced
by COPA." This detail notwithstanding, the fact that the dissenting
opinion stated that no one denies that the governmental interest of
protecting minors from exposure to commercial pornography "is com-
pelling," combined with the structure of the majority's argument
(moving to the third prong of the strict scrutiny analysis), clearly sup-
ports the inference that the majority assumed the existence of a com-
pelling governmental interest. But what is the compelling
interest?

Congress drafted COPA to specifically state that the prohibited
custom applies to commercial material made "available to any mi-
nor" and defined minor as "any person under seventeen years of age." The statute contains no language that should qualify the
word "any." Additionally, Congress, when enacting COPA, accom-
panied the Act with several congressional findings. While the first
such finding stated that "the widespread availability of the Internet
presents opportunities for minors to access materials through the
World Wide Web in a manner that can frustrate parental supervision
or control," the second finding asserted that "the protection of the
physical and psychological well-being of minors by shielding them
from materials that are harmful to them is a compelling governmental
interest." When defining the compelling interest, Congress articu-

102. Id. at 254. The Third Circuit, using this broad definition, suggested the term
minor is too broad. The court argued, for example, that material could be educa-
tional for a sixteen year old but offensive to a ten year old. Therefore, the court
concluded that the term minor, since it included everyone under the age of seven-
teen, was too vague. Id. at 268. It would, the court argued, require a Web pub-
lisher to post material according to the youngest child that might be viewing the
site. "COPA's definition of 'minor' includes all children under the age of seven-
teen . . . . We cannot say whether such a minor would be five years of age, three
years, or even two months. . . . The chilling effect caused by this vagueness of-
fends the Constitution." Id. at 269 n.37.
103. Ashcroft, 542 U.S. at 683 (Breyer, J., dissenting).
104. See id. at 666 (majority opinion) ("The purpose of the test is to ensure that speech
is restricted no further than necessary to achieve the goal.") (emphasis added).
106. Id. § 231(e)(7).
107. It is important to note that COPA does not restrict a parent from accessing this
commercial material and then transmitting it to her child. Indeed, when that
happens, it is a parent originally accessing the material, and the subsequent de-

delivery to the child is no longer commercial and therefore COPA has absolutely no
applicability.
109. Id. § 1402(2) (emphasis added).
lated nothing—in either the language of the statute or the findings—that narrows the protected class from "any" minor.

However, a narrowing of the class to be protected from harmful commercial material is precisely what occurred in the Supreme Court majority opinion. The Court over-emphasized the first finding, and concluded that "COPA presumes that parents lack the ability,110 not the will,111 to monitor what their children see."112 While it is arguable that the Court's suggested alternative, filtering software, is not as effective even in instances when parents do "lack the ability [but] not the will,"113 the Court was wrong in using such an ambiguous construction of those to be protected—COPA was certainly meant to also protect children whose parents have the ability but lack the will. For instance, a parent could lack the will because the parent has not given any thought to the topic—the parent is indifferent.114 In this case, under the Court's opinion, the child of such a parent was not thought by Congress to be protected. However, given Congress's stated intent, this conclusion seems contrary to COPA's objective. Further, under the Court's analysis, Congress did not intend COPA to protect those children whose parents lack both the ability and the will. Again, this seems contrary to COPA's drafted applicability.

Effectively, the Court presumed COPA was an act established only to aid parents as a tool to safeguard what their children see (leaving it to parents to safeguard their children), not an act to protect children directly. In other words, the Supreme Court's decision stands for the notion that only those children with parents who otherwise would actively take part in what their children see, because they have both the ability and the will (therby installing filtering software) were to be protected by COPA.

But Congress did not draft COPA to apply to only those minors whose parents' control is frustrated, and there is no reason for the

110. The Court never defines "ability," but presumably the Court means a parent with ability is a parent with sufficient knowledge, money, and presence.
111. The Court never defines "will," but presumably the Court means a parent with will is a parent who wants to actively participate in the rearing of her child.
113. It seems that what the Court really means when suggesting the use of filtering software is that only those children of parents with both the ability and the will (those who can and want to install filtering software) are protected.
114. I do not mean parents who want their children to see the sex speech. If a parent actively decides her child can view something, that parent, under COPA, would be allowed to do so. See supra note 107. COPA does not completely circumvent parental responsibility over what the parent deems appropriate; the government is not raising the child. Rather, COPA ensures that a parent has at least had the opportunity to screen certain material that according to the parent's discretion is not appropriate for her particular child. In other words, COPA forces active participation of the parent, with (in cases where the parent will not participate) a default rule of not allowing the child to view the sex speech.
Court to have interpreted the congressional intent as such. The aim of COPA should not be limited by (i) a parent's apathy toward sexually explicit material on the Internet, or (ii) a parent's inability to buy or install the software. COPA has a much broader governmental interest in mind. While it indeed does help some parents safeguard their children, COPA was sanctioned in part to help in the protection of a minor's well-being by shielding such a minor from harmful material. The plain meaning of the words in COPA, specifically the word any, should be given effect. As such, COPA should have been interpreted to apply to every minor and the Supreme Court, in interpreting COPA otherwise, narrowed the class intended to be protected by COPA.

B. Do We Pass Now?

1. More Effective?

The analysis now, in light of a correct "broadened" compelling interest, turns to the effectiveness of filtering software. The Court made much of the fact that a special congressional commission found that filters have an effectiveness rating of 7.4, versus the verification screens COPA employs, which have an effectiveness rating of 5.9. One of the reasons for this is that an estimated forty percent of all explicit material comes from sites operated outside the country—material against which COPA would not protect. Also, COPA does not apply to non-commercial sites or other electronic forms, such as e-mail. Finally, COPA would not prevent minors who have their own credit or debit card from being able to circumvent the adult verification screens. For these reasons, when viewed in light of a compelling interest that assumes the use of such filtering software, it is possible to find that filtering software is likely to be more effective.

115. Ashcroft, 542 U.S. at 668.
116. Id. at 667. Justice Breyer, in his dissent, notes that while it is true forty percent of sexually explicit material comes from overseas, a sixty percent reduction of such material available to children is not a difference that we can label as "insignificant." Id. at 687 (Breyer, J., dissenting).
117. Id. at 668 (majority opinion). Indeed, the fact that the CDA did not apply to only commercial website operators was a main factor in the Supreme Court's finding it unconstitutional. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 865 (1997).
118. Ashcroft, 542 U.S. at 667. Justice Breyer, in his dissent, notes that while COPA is not perfect, "the presence of filtering software is not an alternative legislative approach to the problem of protecting children from exposure to commercial pornography. Rather, it is part of the status quo, i.e., the backdrop against which Congress enacted the present statute." Id. at 684 (Breyer, J., dissenting) (emphasis added).
119. Justice Breyer, in his dissent, offers answers to these concerns. See supra notes 116, 118. However, the intent of this section is not to suggest that filters are less effective when actual use of a filter is compared to COPA; rather, the intent is to demonstrate that the absence of filters is a concern, especially if the protection of every minor is the governmental interest.
However, to "[i]mpose selective restrictions on speech at the receiving end, not universal restrictions at the source"\textsuperscript{120} is clearly less effective when the compelling interest is to protect every minor, and not just those minors whose parents have installed filtering software.\textsuperscript{121}

A parent's ability to monitor with filtering software only exists at one receiving end, namely that family's household computer. A child can therefore circumvent filtering software by simply going to a different computer, for example to the computer of a friend who has less precautionary parents. Filtering software only restricts one machine, but does not restrict a minor. A restriction at the source, however, restricts all minors, and makes it impossible for a minor to circumvent a machine with filtering software.\textsuperscript{122}

Filters are not mandatory, and they will filter nothing if they are never installed. The Court touches the argument that "filtering software is not an available alternative because Congress may not require it to be used."\textsuperscript{123} The Court, however, quickly dismissed this notion, stating the "argument carries little weight, because Congress undoubtedly may act to encourage the use of filters."\textsuperscript{124} Reaching every parent to encourage them to buy, install, and learn how to use filtering software, and to have them actually do so, is a daunting task, even for the United States Congress.

Assuming, however, that every parent can be encouraged by Congress, a parent might not have the means to purchase or the knowledge to use the software. COPA's restriction at the source allows even the children of these parents to be protected, where filtering software unmistakably does not. Filtering software will not protect children whose parents cannot, either from a lack of money\textsuperscript{125} or a lack of knowledge, install filtering software, and is therefore less effective than COPA.

\begin{itemize}
  \item \textsuperscript{120} Ashcroft, 542 U.S. at 657.
  \item \textsuperscript{121} Further, it is important to note COPA provides that "any other reasonable measures that are feasible under available technology" can be employed to ascertain the age of the user. 47 U.S.C. § 231(d)(1)(A) (2000), validity called into doubt by Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656 (2004). COPA changes with technology as less restrictive means become available.
  \item \textsuperscript{122} See also Ashcroft, 542 U.S. at 685 (Breyer, J., dissenting) ("[F]iltering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision. As to millions of American families, that is not a reasonable possibility. More than 28 million school age children have both parents or their sole parent in the work force [and] at least 5 million children are left alone at home without supervision each week.").
  \item \textsuperscript{123} Id. at 669 (majority opinion).
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} Justice Breyer saw the monetary cost as a serious inadequacy of filtering software, commenting that "[n]ot every family has the $40 or so necessary to install it." Id. at 685 (Breyer, J., dissenting).
\end{itemize}
Moreover, congressional encouragement realistically will not lead all parents to install filtering software, especially those parents who are indifferent to the matter. Therefore, in the absence of filtering software, some children will be left exposed to explicit material on the Internet. However, under COPA, when the interest advanced by the Act is the protection of every child and not just those whose parents actively participate, a parent's indifference would not hamper the objective of protecting minors from the harms of pornography. Filtering software will not protect children whose parents will not install filtering software, and is therefore less effective than COPA.

Further, Congressional encouragement might not reach every parent. Without such encouragement, parents might not take steps to monitor their child. These parents might not even be aware that any problem exists. Again, the absence of filtering software prevents the compelling interest advanced by COPA from being realized.

In arguing that Congress could encourage the use of filtering software, the Court relied heavily on United States v. Playboy Entertainment Group, saying that case was "the closest precedent on the general point . . ." That case involved a statute provision that was a response to "signal bleed[ing]," times when the technology used to scramble adult cable programming fails for a brief period and allows for audio or visual elements of the program to be viewed. The provision required certain named cable operators to either scramble the programs in full (facing large penalties if there were any signal bleed) or only air such erotic programs between 10:00 p.m. and 6:00 a.m. The Court considered an alternative to the provision—Congressional encouragement of a full-block request, which, when requested by the cable subscriber, would completely block the programming with no problems of signal bleeding. The Court concluded that such an alternative was as effective and less restrictive, stating that "a court should not presume parents, given full information, will fail to act."

However, while the Court in Playboy recognized that the material did have First Amendment protection, it is important to note that the Court started its analysis by saying "[when] the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it." Further, the Court stated that broadcast media, like cable television (and arguably the Internet), "presents unique problems . . .

128. Playboy, 529 U.S. at 806.
129. Id. at 808.
130. Id. at 824.
131. Id. at 811.
which may justify restrictions that would be unacceptable in other contexts"132 and that "[n]o one suggests the Government must be indifferent to unwanted, indecent speech that comes into the home without parental consent."133 The Court ultimately struck down the ban in Playboy because the government was unable to disprove that "its interest is not sufficiently compelling to justify this widespread restriction on speech."134

Because of what the Court said, it becomes important to point out some major distinctions between the signal bleed provision in Playboy and COPA. Presumably, if there is a sufficiently compelling interest, then there is a justification for the restriction of speech, even in contexts when it might not otherwise be appropriate.135 The Court in Playboy saw as the central weakness the government's inability to present "hard evidence of how serious the problem of signal bleed is . . . [and] no proof as to how likely any child is to view a discernible explicit image . . . ."136 Conversely, the availability of sexually explicit material on the Internet is not contested, as "[a] child, with minimal knowledge of a computer, the ability to operate a browser, and the skill to type a few simple words may be able to access sexual images and content over the World Wide Web."137 Second, the regulation in Playboy applied specifically to named providers.138 Consequently, a provider named by the Playboy Act would be restrained, while any other provider who made available exactly the same material but was not specifically named would not be restricted. COPA, on the other hand, applies universally to all commercial Internet content providers. No provider is specifically singled out; instead, all providers are treated equally. Finally, the less restrictive means necessitated no money from parents, and required no specialized technological knowledge. Rather, the parent, once informed of the availability of the full-block option, merely had to make a phone call to make the request. Filtering software is different. It requires an outlay of about forty dollars.139 It requires specialized knowledge for operation. (Indeed, in an era where children are technologically leaps and bounds ahead of their parents, it might be the child teaching the parent how to use the filtering software!) While a phone call is fairly comfortable, the cost and knowledge required to use the technology might frustrate a parent's desire to actually use the technology. It then becomes, not a pa-

132. Id. at 813.
133. Id. at 814.
134. Id. at 825 (emphasis added).
135. See supra text accompanying notes 132–33.
136. Playboy, 529 U.S. at 819 (emphasis added).
138. Playboy, 529 U.S. at 813.
2. Less Restrictive?

While not flowing directly from a broadened compelling interest, it is nevertheless worthwhile to briefly address the arguments the Supreme Court used to contend that filtering software is less restrictive than COPA. First, the Court concluded that filtering software was less restrictive because it imposed limited restrictions at the user end, not a blanket restriction at the source. However, as Justice Breyer points out in the dissent, filtering is imperfect, “allowing some pornographic material to pass through without hindrance” and blocking other sexually related but non-pornographic material. This is because filtering software only searches for key phrases to block certain material, so it does not discriminate between materials that might contain educational, scientific, or social value. “[T]he software alone cannot distinguish between the most obscene pictorial image and the Venus de Milo.” Age-verification screens, on the other hand, target a specific type of speech that has been defined as harmful to minors, a definition that takes into account educational, scientific, or social value. It is much more accurate, regulates only that material Congress wants to regulate, does not restrict that which Congress does not wish to restrict, and, consequently is an arguably less restrictive alternative to filtering software.

Second, the Court raised privacy concerns, stating that while non-use of filters is anonymous, use of age-verification screens would require a person to identify himself. However, Congress took this concern into account when COPA was drafted and imparted certain privacy safeguards into COPA. The identity of the user is protected by section (d)(1) of COPA, which provides that any person collecting information required by COPA “shall not disclose any information . . . without the prior written consent” of the user concerned. Further, sensitive information such as a credit card number is protected by section (d)(2), which provides that any person collecting the information required by COPA “shall take such actions as are necessary to prevent unauthorized access to such information.”

140. See supra notes 86–89 and accompanying text.
141. Ashcroft, 542 U.S. at 685 (Breyer, J., dissenting).
142. Id.
144. Id. § 231(d)(1)(B); see also Ashcroft, 542 U.S. at 683 (Breyer, J., dissenting) (speaking about possible fear of embarrassment, Justice Breyer stated that “this Court has held that in the context of congressional efforts to protect children, restrictions of this kind do not automatically violate the Constitution”).
Finally, the Court expressed concern that COPA utilizes criminal penalties for violation of its provisions. However, it is important to note that most states already have statutes that provide for criminal punishments for selling sexually explicit material to minors. In Colorado, for example, distribution of pornographic material to a minor is a class 2 misdemeanor.\textsuperscript{145} In Arizona, violation of a similar statute is a class 4 felony.\textsuperscript{146} But the criminal punishment is not dealt in owning, buying, selling, or viewing non-obscene, sexually explicit material. Such a category of speech is not in any way condemned as criminal. To violate the statutes, one must allow a \textit{minor} to \textit{come into possession} of that material.\textsuperscript{147}

It is not the \textit{speech} that is condemned as criminal, but the \textit{dissemination} of that speech to a distinct, specific, and well-defined audience. Moreover, almost every state has already condemned such distribution as criminal,\textsuperscript{148} most using similar definitions to identify the objectionable material which, deliberately, is the same definition employed by COPA.\textsuperscript{149} COPA does not make something new unlawful. If done only on a state level, the commercial distribution of material that is harmful to minors is illegal. The argument that "above all, promoting the use of filters does not condemn as criminal any category of speech"\textsuperscript{150} seems to fall apart.

\section*{C. A "Compelling" Compelling Interest?}

The validity of the compelling governmental interest did not receive much attention from any of the courts. The district court briefly stated "[i]t is clear that Congress has a compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards."\textsuperscript{151} The Third Circuit agreed, merely saying "there is a compelling interest in protecting the physical and

\begin{itemize}
\item \textsuperscript{145} \textit{Colo. Rev. Stat.} § 18-7-501 (2005).
\item \textsuperscript{146} \textit{Ariz. Rev. Stat.} § 13-3506 (2005).
\item \textsuperscript{147} \textit{See id.} § 13-3506; \textit{Colo. Rev. Stat.} § 18-7-502; \textit{see also} Reno v. Am. Civil Liberties Union, 521 U.S. 844, 890 (describing the age-verification requirement as similar to a bouncer [who] checks a person's driver's license before admitting him to a nightclub).
\item \textsuperscript{148} \textit{See, e.g., supra} notes 145–46 and accompanying text.
\item \textsuperscript{149} 47 U.S.C. § 231(e)(2). Note that many of these definitions stem from the current obscenity analysis, given in \textit{Miller}:
[Whether] the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
\item \textsuperscript{150} \textit{Ashcroft} v. Am. Civil Liberties Union, 542 U.S. 658, 667 (2004).
\item \textsuperscript{151} \textit{Am. Civil Liberties Union v. Reno}, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999).
\end{itemize}
psychological well-being of minors." The Supreme Court, although never declaring explicitly what it saw the compelling interest to be, did conduct a less restrictive analysis, presumably with preventing children from viewing material that is harmful to them as a bona fide compelling interest.

While both the district and appellate courts only acknowledged the existence of the first prong, and the Supreme Court majority did not even clearly state anything concerning this prong, the first prong is an important part of the analysis. To be sure, given the nature of the legislation—a content-based restriction on constitutionally protected speech—a court should presume that the "governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." That is why the first step of the strict scrutiny analysis exists; there must be a compelling state interest before any content-based restriction can be found constitutionally valid.

Assuming the Supreme Court believes there is a compelling governmental interest, and that interest is safeguarding minors from the harms of pornography, it does not require the legislature to provide any sort of empirical evidence of that harm. Rather, with Ginsberg, the Court can allow the legislature to rely on its own rational intuition. In other words, there is no need for a legislature to present any empirical or scientific facts to support its proposed legislation.

Using a rational relation test to validate the existence of the first prong of a strict scrutiny analysis is troublesome for at least two reasons. First, use of the rational relation test is troublesome because it does not force Congress to clearly define what it sees as a problem (compelling interest), leaving both Congress, as well as the courts, with a certain degree of uncertainty with which to deal. This uncertainty could lead a legislature to not fully understand the problem it is trying to solve, thereby creating a remedy that does not fully or effectively address the perceived reason for the remedy. Further, this uncertainty could lead a court to draw incorrect inferences about the legislation, similar to the one I have suggested the Court drew about COPA.

However, providing empirical evidence would help Congress clarify its own findings. "A requirement that legislators provide empirical
support for their legislation can... help legislators focus on whether there truly is a nexus between the end pursued and the means employed." 156 Further, empirical evidence would guide the courts, helping "judges [to] decide which arguments in the child-protection censorship debate are more compelling." 157 Empirical evidence would not only help both Congress and the courts understand their own analyses, but would also help them better understand each other. Clarifying and supporting the legislation would, in other words, help facilitate the discussion about the legislation.158

Second, use of a rational relation test to support a strict scrutiny analysis causes some constitutionality concerns. As one commentator has noted, there "are many areas of constitutional jurisprudence in which the Court forgoes its power to review laws and instead defers to the political branches... [applying] a 'rational relationship' test that is really no test at all but rather a statement of judicial restraint."159 While this outlook alone is somewhat troubling (especially in the context of speech restrictions, where unpopular speech can be subject to government censorship), it is exacerbated by a possible lack of congressional self-restraint. Take, for example, the sentiment of United States Representative Jerrold Nadler, senior member of the House Judiciary Committee, speaking to the suggestion that Congress refrain from attempting to extend its Commerce Clause powers:

But, [...] as I understand the argument, the argument is we shouldn’t pass this because it is extending the Commerce Clause into local affairs, extending congressional powers into local affairs... but the fact is we are not extending anything. The courts will tell us exactly what our authority is and whatever it is, it is, and that is how far it will go.161

While Representative Nadler was speaking about the Commerce Clause, and not about First Amendment issues, the attitude is clear—members of Congress do not always submit their proposed legislation

157. Id. at 592.
159. Garfield, supra note 156, at 577–78 (citing JOHN MONAHAN & LAURA WALKER, SOCIAL SCIENCE IN LAW 10 (5th ed. 2002) ("[T]he rational relationship test... still limits all legislation, but since 1937 its application has been tantamount to finding legislation constitutional; the court has found virtually any proposed reason sufficient to sustain a statute"); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 8.2.3, at 604 (2d ed. 2002)).
to the exacting constitutional scrutiny that perhaps they should, and rather rely on the courts to limit their legislation. If Congress is not analyzing the legislation for constitutional violations, and the Court in turn is deferring to Congress, who is protecting free speech interests?

However, if the Court were to require Congress to provide empirical evidence to validate its own legislation, perhaps Congress would take a more comprehensive look at the problems it is seeking to rectify, especially any constitutional ramifications. Further, the Court could review the empirical evidence, providing “an effective means of weeding out some of the more egregious forms of censorship.”

“[L]egislators might think twice before enacting child-protection censorship laws when there is no empirical evidence to support their actions.”

It is important to remember that the speech in question is not obscenity, which “is not protected expression and may be suppressed without a showing of the circumstances which lie behind the phrase clear and present danger in its application to protected speech.” Rather, the speech in question has already been determined to fall within the First Amendment circle—it is protected speech—at least as far as adults are concerned. As such, it does not make any sense to say, on one hand, that “we require the strictest scrutiny” when talking about a content-based regulation on First Amendment protected speech, and then on the other to use Ginsberg and say that “we do not require empirical evidence from our legislatures—we will uphold the compelling interest if the legislature can rationally conclude harm stems from the speech.” “Rationally” and “strictest” are not synonymous, and should not be treated as such.

162. See Bradley P. Jacob, Free Exercise in the “Lobbying Nineties,” 84 Neb. L. Rev. 795, 826 n.131 (2006) (“Not only among political scientists, law professors, and advocates, but also within Congress itself, it is very hard to get past the idea that Congress should just take action on any issue that interests it and wait for the Supreme Court to tell it that it has stepped over its boundaries.”).

163. See Garfield, supra note 156, at 592-93 (“A requirement that legislators provide empirical support for their legislation can slow down the legislative process and help legislators focus on whether there truly is a nexus between the end pursued and the means employed.”).

164. Id. (noting that it would be difficult “to find empirical support for the proposition that Harry Potter books are harmful to children,” thereby allowing a court to easily “dismiss a law banning” those books).

165. Id.


167. The Ginsberg Court admitted that “the reading of pornography [was] unlikely to be per se harmful.” Id. at 642 n.10. Further, the Ginsberg Court acknowledged that the “studies all agree that a causal link [between the viewing of pornography and harm] has not been demonstrated.” Id. at 642. If this type of speech is not per se harmful, and there is not even a causal link between viewing pornography and harm required, how can the pledge of the “strictest scrutiny” be upheld? It is
Due to the infancy of the sex speech jurisprudence, the *Ginsberg* standard may have been sensible at the time *Ginsberg* was decided. The *Roth* decision was only a decade old, and *Miller* had not even hit the Supreme Court. The sex speech jurisprudence was not very well developed, and (some might argue), it was prudent to rule on the side of caution. The *Ginsberg* decision allowed state regulation of sex speech to pass constitutional muster without forcing the state to spend a lot of time proving the harm.\(^1\) However, much has happened since the 1960s, including the development of technology that allows for dissemination of speech in a manner that was previously unavailable and unimaginable. Therefore, it is becoming increasingly more important (but with greater occasion) to specifically define the "harm" caused if we are to debate the existence of a problem and the effectiveness of a remedy.\(^1\)\(^6\)\(^9\)

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\(^1\) No answer that "a causal link has not been disproved." *Id.* The fact that certain speech is controversial (or against societal norms) does not give a legislature an automatic right to regulate it. This is the basic guarantee of the First Amendment—that unpopular speech will not be allowed to be suppressed by the majority and that a free discourse of ideas will be allowed.

\(^1\)\(^6\) I do not believe that making the first prong of the strict scrutiny test harder (by requiring empirical evidence) will ultimately make passage of this type of legislation more difficult. In fact, I believe that quite the opposite will be true, and that the requirement of empirical evidence will only increase the time it takes to draft the legislation. But by setting a higher bar for the first prong, the courts will be somewhat pigeonholed into how to frame the issues for the other two prongs. In other words, clarifying and supporting the legislation will only help the eventual passage of the legislation.

\(^1\)\(^6\)\(^9\) This assertion is not completely without support. There have been several instances when the Court has used or required empirical evidence. See Garfield, *supra* note 156, at 589–90 (citing several cases where the Court has used or required empirical evidence, including *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), *Bartnicki v. Vopper*, 532 U.S. 514 (2001), *Lochner v. New York*, 198 U.S. 45 (1905), and *Brown v. Board of Education*, 347 U.S. 483 (1954)); see also *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1997). At issue in *Turner* was the Cable Television Consumer Protection and Competition Act of 1992, in which Congress passed a "must carry" provision that required "cable operators to carry the signals of a specified number of local broadcast television stations." *Id.* at 630. That act was designed with "the intention of preserving free broadcast television, [ ] promoting widespread dissemination of information, and [ ] promoting fair competition." *Id.* at 624. After the Court determined that the provision would be subject to *intermediate* scrutiny, it made the following comment about the lack of empirical evidence:

But even if one accepts [the given statistical evidence] as evidence that a large number of broadcast stations would be dropped or repositioned in the absence of must-carry, the Government must further demonstrate that broadcasters so affected would suffer financial difficulties as a result. Without a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence to establish that the dropped or repositioned broadcasters would be at serious risk of financial difficulty, we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions made by these appel-
I do not mean to suggest that providing empirical evidence will be easy. As one commentator has noted, "judges are not trained as social scientists and therefore venture beyond their expertise when they evaluate empirical data. . . . It is also true that the legislative process is not ideally suited for developing a coherent evidentiary record in support of legislation." These are both valid concerns, and any judge examining empirical evidence should do so knowing the limitations and drawbacks of empirical evidence. What I am suggesting, however, is that requiring a legislature to provide empirical evidence is a big step in the right direction. Unless the legislature is required to provide empirical evidence, a real discourse about the propriety of the legislation will likely not occur.

IV. CONCLUSION

What this case represents is the all too familiar First Amendment argument between the lesser of two evils—privacy, coupled with free speech of unpopular ideas, versus societal expectations. But the Supreme Court is not in a position to legislate this type of thing, nor are they willing to put themselves into the debate. Rather, they continue to ignore the important issues which require serious analysis. In the past, "community standards" have been a saving grace—the idea that there are so many differing opinions about pornography, depending on where those who are forming that opinion exist, that the Supreme Court cannot come down and make a blanket rule that applies to everyone. But in the past decade, technological advances have opened a Pandora's Box of issues that need to be addressed.

Ultimately, the underlying issue of whether such legislation is warranted can only be resolved with empirical studies determining the actual necessity of such legislation. The Supreme Court must abandon the sentiment expressed in Ginsberg that (when ruling about speech that falls within the First Amendment circle), empirical evidence is not necessary and a compelling interest can be upheld with a mere rational relation to the facts. Unfortunately, at present the Supreme Court will not require such evidence, nor are they willing to
engage in any debate on the topic, leaving the rest of us with a discussion that cannot be argued. In my opinion, the Court needs to take the opportunity that the COPA legislation is providing to seriously analyze, and retool if necessary, current First Amendment issues as they relate to sex speech, minors, and obscenity.

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