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# Tagging: A Proposed Framework for Constitutional Regulation of Sexually Explicit Material Available Via the World Wide Web

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## I. INTRODUCTION

The Supreme Court has recently indicated that the Child Online Protection Act (COPA) violates the First Amendment right to free speech.<sup>1</sup> COPA was designed by Congress to withstand First Amendment scrutiny after the Supreme Court invalidated Congress' initial attempt to protect minors from sexually explicit material on the Internet, the Communications Decency Act (CDA). The invalidation of COPA would mark Congress' second failure in as many attempts to draft legislation that protects minors from exposure to sexually explicit material available on the Internet via a content-based prohibition on speech. The Court's recent jurisprudence concerning the government's authority to regulate speech on the Internet begs an answer to the question posed by Justice Breyer in his dissent to the Court's opinion finding that COPA is a likely violation of the First Amendment: "If [COPA] does not pass the Court's 'less restrictive alternative' test, what does?"<sup>2</sup>

The answer to Justice Breyer's question is relatively simple: A statute that

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<sup>1</sup> Ashcroft v. A.C.L.U., 542 U.S. 656 (2004).

<sup>2</sup> A.C.L.U., 542 U.S. at 717 (Breyer, J., dissenting).

identifies sexually explicit material on the World Wide Web and empowers parents to effectively and constitutionally control their children's access to such material is less restrictive than a statute that attempts to prohibit such expression. The Supreme Court has indicated that it is open to limited regulation of speech on the Internet when the government can prove that such regulation is the least restrictive method of empowering parents to decide what their children view over the Internet, a goal that, at the very minimum, is a legitimate government interest.<sup>3</sup> The Court's recent decision on COPA has also specifically left the door open for further attempts at Internet regulation stating that, "it is important to note that this opinion does not hold that Congress is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials."<sup>4</sup>

In order to be successful in achieving its goal, Congress must adopt the "tagging" suggestion first advanced by the Court in its analysis of the CDA.<sup>5</sup> Tagging legislation would add a new identification label for sexually explicit material to the language used to develop Web pages. The legislation would also have to mandate the use of that label, allowing parents to easily identify and control their children's access to sexually explicit material. A congressionally mandated tag, perhaps called <adult>, could be implemented in a very short period of time at very little cost to software developers and Web content producers and no cost to the end user. By passing a tagging law, Congress sidesteps many of the constitutional questions raised by a broad prohibition on speech and tailors a solution that is even less restrictive than software filters employed by the end user.

Of course, tagging certain types of speech based upon the content of that speech raises difficult questions of its own, including the technical issues involved in implementing and enforcing such a system and the constitutionality of speech compelled by the federal government. However, given the difficulty Congress has experienced attempting to enact a content-based prohibition it appears that the constitutional issues raised by tagging technology are less compelling and easier to overcome than those raised by censoring and criminalizing speech.

## II. PRIOR HISTORY

### A. The Communications Decency Act of 1996

In 1997, the Supreme Court in *Reno v. ACLU (Reno I)* held that the Communications Decency Act of 1996 was unconstitutional.<sup>6</sup> The CDA was the first attempt by Congress to protect minors on the Internet from material available over the Internet that was "indecent" or "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."<sup>7</sup>

The CDA was challenged as unconstitutional on the same day it was signed into

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<sup>3</sup> See *Reno v. A.C.L.U.*, 521 U.S. 844 at 877-79 (1997).

<sup>4</sup> *A.C.L.U.*, 542 U.S. at 705.

<sup>5</sup> *Reno*, 521 U.S. at 879.

<sup>6</sup> *Reno*, 521 U.S. 844.

<sup>7</sup> 47 U.S.C.A. § 223(d) (Supp. 1997). Found unconstitutional in *Reno v. A.C.L.U.*, 521 U.S. 844 (1997).

law, February 8, 1996.<sup>8</sup> Forty-seven plaintiffs, including the American Civil Liberties Union, filed a consolidated civil action in the Eastern District of Pennsylvania against Janet Reno, then Attorney General of the United States, alleging before a three-judge panel that the CDA “effectively ban[ned] a substantial category of protected speech from most parts of the Internet.”<sup>9</sup>

The District Court examined the constitutionality of the two CDA provisions challenged by the plaintiffs: Sections 223(a) and 223(d). Section 223(a)—referred to as the “indecent” provision by the District Court—stated in relevant part:

(a) Whoever —

(1) in interstate or foreign communications

....

(B) by means of a telecommunications device knowingly

(i) makes, creates, or solicits, and

(ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

....

(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.<sup>10</sup>

Section 223(d)—referred to as the “patently offensive” provision by the District Court—stated in relevant part:

(d) Whoever—

(1) in interstate or foreign communications knowingly—

(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, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the use of such service placed the call or initiated the communication; or

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<sup>8</sup> A.C.L.U. v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996).

<sup>9</sup> *Id.* at 854.

<sup>10</sup> 47 U.S.C. §223(a) (Supp. 1997).

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity. shall be fined under Title 18, or imprisoned not more than two years, or both.<sup>11</sup>

In order to provide a factual basis for its analysis of the legal issues, the District Court made detailed findings of fact that described the function and the scope of the Internet, the CDA, the sexually explicit content available via the Internet, and the difficulty of implementing any type of age verification system to shield specific users from specific Internet communications.<sup>12</sup> The District Court also found that a variety of software "filters"<sup>13</sup> existed that would "enable parents and other adults to limit the Internet access of children," thereby preventing those children from viewing some of the sexually explicit content available.<sup>14</sup>

Based upon those findings of fact, the District Court held that, "[t]he CDA is patently a government-imposed content-based restriction on speech, and the speech at issue, whether denominated 'indecent' or 'patently offensive,' is entitled to constitutional protection. As such, the regulation is subject to strict scrutiny and will only be upheld if it is justified by a compelling government interest and if it is narrowly tailored to effectuate that interest."<sup>15</sup>

The government conceded that it had the burden of proof "to show both a compelling interest and that the statute regulates least restrictively,"<sup>16</sup> and asserted that, "shielding minors from access to indecent materials,"<sup>17</sup> was a compelling interest that justified the speech restrictions imposed by the CDA. To support that assertion, the government cited one case where the Supreme Court had found constitutional a regulation prohibiting people from "knowingly promoting sexual performances by children under 16 and distributing materials depicting such performances," and two cases upholding a federal ban on pornographic phone messages.<sup>18</sup> The District Court distinguished all three cases on the ground that neither "dial-a-porn" services nor live child sex shows contained *any* message of "valuable literary, artistic or educational information of value to older minors as well as adults." The District Court held that unlike the cases cited by the government, at least some of the material "subject to coverage under the 'indecent' and 'patently offensive' provisions of the CDA *may contain* literary artistic or educational

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<sup>11</sup> 47 U.S.C. §223(d) (Supp. 1997).

<sup>12</sup> A.C.L.U. v. Reno, 929 F. Supp., at 830-49.

<sup>13</sup> A software filter allows computer users to block access to specific websites on the basis of content. Many software companies offered filters in 1996 and the market has grown in the past eight years. *Id.* at 839-42;

<sup>14</sup> A.C.L.U. v. Reno, 929 F. Supp., at 839 (Findings 49-73).

<sup>15</sup> *Id.* at 851 (quoting *Elrod v. Burns*, 427 U.S. 347 at 363, "The benefit gained [by a content-based restriction] must outweigh the loss of constitutionally protected rights.").

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 852.

*information of value* to older minors as well as adults.”<sup>19</sup> The District Court construed the challenged provisions to include speech that is “non-pornographic, albeit sexually explicit,” because the government’s failure to define the terms “indecent,” and “patently offensive,” significantly broadened the scope of speech prohibited by the CDA.<sup>20</sup> The District Court held that the government’s interest was not as compelling as it could have been if the CDA had been limited to proscribing only pornographic speech without redeeming value.<sup>21</sup> However, the District Court stopped short of holding that the government had no compelling interest in shielding minors. Instead, the District Court acknowledged that the government had a compelling interest to shield, “a substantial number of minors from some of the online material that motivated Congress to enact the CDA.”<sup>22</sup>

The District Court then examined the reach of the CDA and held that even if the government’s interest in shielding minors from online indecency was compelling, the breadth of the CDA would suppress far too much protected speech to constitutionally achieve that interest.<sup>23</sup> The District Court found that content providers on the Internet were not able to, “determine the identity and age of every user accessing their material,”<sup>24</sup> and implementation of the age verification requirement was, “technologically impossible or economically prohibitive,” for many Internet content providers, “without seriously impeding their posting of online material which adults have a constitutional right to access.”<sup>25</sup> The only way speakers without the means to employ age verification would have been certain of avoiding prosecution under CDA would have been to reduce all their Internet communications to a level “appropriate for children,” or choose not to speak at all.<sup>26</sup> The Hobson’s choice forced on speakers by the CDA created an unconstitutional chilling effect on protected speech.

The District Court also held that without definitions or additional statutory language clarifying the scope of the challenged provisions, the CDA was both unconstitutionally vague and overbroad.<sup>27</sup> Congress neither included language in the CDA that would have limited the scope of material covered by the statute nor confined the CDA to material that “has a prurient interest or appeal.”<sup>28</sup> The CDA also did not include an exception for material with serious literary, artistic, or educational value.<sup>29</sup>

Although the three-judge panel differed somewhat in their legal analysis, all agreed that the challenged provisions likely violated the constitution and granted

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<sup>19</sup> *Id.* (emphasis added).

<sup>20</sup> A.C.L.U. v. Reno, 929 F. Supp. at 852.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> A.C.L.U. v. Reno, 929 F. Supp. at 855.

<sup>24</sup> *Id.* at 852.

<sup>25</sup> *Id.* at 854.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 855, 856.

<sup>28</sup> A.C.L.U. v. Reno, 929 F. Supp. at 855.

<sup>29</sup> *Id.*

plaintiffs' motions for injunctive relief.<sup>30</sup> The government appealed directly to the Supreme Court under the special review provision of the CDA and was granted *certiorari*.

In *Reno v. ACLU*,<sup>31</sup> a seven-member majority of the Supreme Court affirmed the decision of the District Court and permanently enjoined the government from enforcing the "patently offensive" and "indecent" provisions of the CDA. The majority agreed that the ambiguous language of the CDA encompassed such a broad range of possible speech that the statute would silence much protected speech if enforced to its full extent.<sup>32</sup> However, unlike the District Court, the Supreme Court declined to determine if the CDA was unconstitutionally vague. Instead, *Reno* discussed the vagueness of the CDA only "because of its relevance to the First Amendment overbreadth inquiry." Justice Stevens, writing for the majority, held that the CDA was unconstitutional because "it was not narrowly tailored" and "less restrictive alternatives were available."<sup>33</sup>

The *Reno* majority, like the District Court, appeared to apply strict scrutiny analysis to the CDA. Strict scrutiny requires the government to demonstrate that the CDA is necessary to achieve a compelling state interest. After review of the cases cited by the government in support of a more deferential level of review, the *Reno* majority stated that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]."<sup>34</sup>

However, while *Reno* agreed with the government that there was a state interest in "protecting the physical and psychological well-being of minors which extend[s] to shielding them from indecent messages that are not obscene by adult standards,"<sup>35</sup> the Supreme Court, like the District Court, went to great pains to avoid labeling that interest as "compelling" in the context of the Internet.<sup>36</sup> After calling the interest a "legitimate purpose,"<sup>37</sup> and then a "governmental interest,"<sup>38</sup> and finally disposing entirely with modifiers and using only "purpose,"<sup>39</sup> *Reno* ultimately aligned itself with the District Court and stated, "It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute."<sup>40</sup>

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<sup>30</sup> *Id.* at 883.

<sup>31</sup> *Reno*, 521 U.S. 844.

<sup>32</sup> *Id.* at 882.

<sup>33</sup> *Ashcroft*, 542 U.S. at 698.

<sup>34</sup> *Reno*, 521 U.S. at 870.

<sup>35</sup> *Id.* at 869, (quoting *Sable Communications of Cal. Inc., v. FCC*, 492 U.S. 115, 126 (1989)).

<sup>36</sup> *See Reno*, 521 U.S. at 878 ("It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute.")

<sup>37</sup> *Id.* at 874 ("[The CDA's] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the *legitimate purpose* that the statute was enacted to serve.") (emphasis added).

<sup>38</sup> *Id.* at 875. ("It is true that we have repeatedly recognized the *governmental interest* in protecting children from harmful materials.") (emphasis added).

<sup>39</sup> *Id.* at 875-76 ("[The inquiry must] make sure that Congress has designed its statute to accomplish *its purpose* without imposing an unnecessarily great restriction on speech.") (internal citations omitted) (emphasis added).

<sup>40</sup> *Id.* at 878.

*Reno*'s constitutional assessment focused on the tremendous breadth of the CDA and the available, less burdensome, alternatives. According to *Reno*, the CDA's

burden on protected speech . . . could be avoided by a more carefully drafted statute. We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if *less restrictive alternatives* would be *at least as effective* in achieving the legitimate purpose the statute was enacted to serve.<sup>41</sup>

According to the Court, “[t]he breadth of the CDA’s coverage [was] wholly unprecedented.”<sup>42</sup> The CDA was not limited to commercial speech or commercial entities.<sup>43</sup> The CDA contained general, undefined terms such as “indecent” and “patently offensive” which “cover[ed] large amounts of non-pornographic material with serious educational or other value.”<sup>44</sup> Finally, the court found that “community standards” language found in 223(d)(1)(B) conflicted with the borderless character of the Internet. Since most Internet content is available anywhere there is a computer, section 223(d)(1)(B), “as applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message.”<sup>45</sup> Under the “community standards” provision of the CDA:

[A] parent allowing her 17-year-old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term. Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community, found the material “indecent” or “patently offensive,” if the college town’s community thought otherwise.<sup>46</sup>

The government also failed to demonstrate that the criminal penalties imposed by the CDA constituted the least restrictive method of protecting children from indecent images on the Internet.<sup>47</sup> *Reno* noted four major less restrictive alternatives to CDA:

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<sup>41</sup> *Id.* at 874 (emphasis added).

<sup>42</sup> *Reno*, 521 U.S. at 877.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Reno*, 521 U.S. at 877-78.

<sup>46</sup> *Id.* at 878.

<sup>47</sup> *Id.* at 879.

first, the CDA failed to include a statutory provision that would allow for parental choice in determining what to show and hide from children; second, the CDA made no exceptions for messages with artistic or educational value; third, the CDA did not attempt to limit its regulation to a single portion of the Internet—such as commercial Web sites—while applying less restrictive regulation to other areas of the Internet, such as e-mail and chat-rooms;<sup>48</sup> fourth, the CDA blanket prohibition on speech was more restrictive than a requirement “that indecent material be ‘tagged’ in a way that facilitates parental control of material coming into [parents] homes.”<sup>49</sup>

#### B. Children’s Internet Protection Act

The Children’s Internet Protection Act provides that a library may not “receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them.”<sup>50</sup> In *U.S. v. American Library Association, Inc.*, the Eastern District of Pennsylvania held, “that a library’s use of a technology protection measure required by CIPA is not narrowly tailored to the government’s legitimate interest in preventing the dissemination of visual depictions that are obscene, child pornography, or in the case of minors, harmful to minors.”<sup>51</sup> The government was enjoined from enforcing CIPA because CIPA was “facially invalid on the ground that [it] induce[ed] public libraries to violate patrons’ First Amendment rights.”<sup>52</sup>

The District Court reasoned that because CIPA involved a constitutional challenge to a condition placed on federal funding by Congress that the constitutional analysis of CIPA should be based upon Congress’ spending power. The District Court held that:

[T]he spending power may not be used to *induce the States to engage in activities that would themselves be unconstitutional*. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress’ broad spending power.<sup>53</sup>

Plaintiffs argued that CIPA violated Congress’ spending power because the statute, “condition[ed] public libraries’ receipt of federal funds on the use of software filters, CIPA will induce public libraries to violate the First Amendment rights of Internet content-providers to disseminate constitutionally protected speech to library patrons via the Internet.”<sup>54</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> Reno, 521 U.S. at 879.

<sup>50</sup> *U.S. v. Am. Library Ass’n*, 539 U.S. 194, 199 (2003).

<sup>51</sup> *Am. Library Ass’n v. U.S.*, 201 F. Supp. 2d 401, 478 (E.D. Pa. 2002).

<sup>52</sup> *U.S. v. Am. Library Ass’n*, 539 U.S. at 199.

<sup>53</sup> *Am. Library Ass’n*, 201 F. Supp. 2d at 450 (citing *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (internal citations omitted) (emphasis added)).

<sup>54</sup> *Id.* at 450-51.

In order to determine if CIPA was a legitimate exercise of the spending power, the District Court had to first determine if CIPA induced public libraries to violate the First Amendment. To begin its First Amendment analysis, the District Court determined that, “when the government provides Internet access in a public library, it has created a designated public forum.”<sup>55</sup> The designated public forum finding required the District Court to analyze CIPA under strict scrutiny because, “content-based restrictions on speech [such as those in CIPA] in a designated public forum are most clearly subject to strict scrutiny when the government opens a forum for virtually unrestricted use by the general public for speech on a virtually unrestricted range of topics, while selectively excluding particular speech whose content it disfavors.”<sup>56</sup>

Although the District Court agreed with the government’s assertion that libraries have broad discretion in making content-based decisions about which print materials to acquire, the District Court distinguished the individual content-based decisions a library makes when adding a particular title to its collection from the blanket prohibition required by CIPA:

When a public library chooses to carry books on a selected topic, e.g. chemistry, it does not open its print collection to any member of the public who wishes to write about chemistry. Rather, out of the myriad of books that have ever been written on chemistry, each book on chemistry that the library carries has been reviewed and selected because the person reviewing the book, in the exercise of his or her professional judgment, has deemed its content to be particularly valuable. *In contrast, when a public library provides Internet access, even filtered Internet access, it has created a forum open to any member of the public who writes about chemistry on the Internet, regardless of how unscientific the author’s methods or of how patently false the author’s conclusions are, regardless of the author’s reputation or grammar, and regardless of the reviews of the scientific community.*<sup>57</sup>

According to the District Court’s analysis, “the more narrow the range of speech that the government chooses to subsidize (whether directly, through government grants or other funding, or indirectly, through the creation of a public forum) the more deference the First Amendment accords the government in drawing content-based distinctions,” but the, “more broadly the government facilitates private speech . . . the less deference the First Amendment accords to the government’s content-based restrictions on the speech that it facilitates.”<sup>58</sup> The discretion granted to the government in the narrow subsidies allows the government to make quality-based decisions in specific categories such as government-funded, art museums. For

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<sup>55</sup> *Id.* at 457.

<sup>56</sup> *Id.* at 460.

<sup>57</sup> *Id.* at 464 (emphasis added).

<sup>58</sup> Am. Library Ass’n, 201 F. Supp. 2d at 459, 460.

example, the Constitution allows the government to make content-based decisions on what works of art are to be displayed in the National Gallery. Without deference, the National Gallery would be required to display the works of all artists, regardless of quality or value, on a “first come, first serve” basis.<sup>59</sup> Like the art museum, the content-based decisions concerning the printed works within a library are afforded discretion. However, the District Court held that content-based exclusions within federally subsidized broad public forums, such as publicly-funded Internet access in libraries, must meet the requirements of strict scrutiny:

While the First Amendment permits the government to exercise editorial discretion in singling out particularly favored speech for subsidization or inclusion in a state-created forum, *we believe that where the state provides access to a vast democratic forum [such as the Internet], open to any member of the public to speak on subjects “as diverse as human thought,” and then selectively excludes from the forum certain speech on the basis of its content, such exclusions are subject to strict scrutiny.* These exclusions risk fundamentally distorting the unique marketplace of ideas that public libraries create when they open their collections, via the Internet, to the speech of millions of individuals around the world on a virtually limitless number of subjects.<sup>60</sup>

Applying strict scrutiny to the facts, the District Court concluded that CIPA induced public libraries to violate the First Amendment “because of the inherent limitations in filtering technology, public libraries can never comply with CIPA without blocking access to a substantial amount of speech that is . . . constitutionally protected.”<sup>61</sup>

The Supreme Court reversed the District Court in *U.S. v. American Library Association, Inc.*, and held that, “[b]ecause public libraries’ use of Internet filtering software does not violate their patron’s First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress’ spending power.”<sup>62</sup> The Supreme Court rejected the legal findings of the District

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<sup>59</sup> *See Id.* at 459 n.22.

<sup>60</sup> *Id.* at 464, 465 (quoting *Reno v. A.C.L.U.*, 521 U.S. at 868-70 (internal citations omitted) (emphasis added)).

<sup>61</sup> *Id.* at 453, 477 (“every technology protection measure used by the government’s library witnesses or analyzed by the government’s expert witnesses blocks access to a substantial amount of speech that is constitutionally protected with respect to both adults and minors. In light of the credited testimony of Dr. Nunberg, and the inherent tradeoff between overblocking and underblocking, together with the government’s failure to offer evidence of any technology protection measure that avoids overblocking, we conclude that any technology protection measure that blocks a sufficient amount of speech to comply with CIPA’s requirement that it “protect[ ] against access through such computers to visual depictions that are—(I) obscene; (II) child pornography; or (III) harmful to minors” will necessarily block substantial amounts of speech that does not fall within these categories. CIPA § 1712 (codified at 20 U.S.C. § 9134(f)(1)(A)). Hence, any public library’s use of a software filter required by CIPA will fail to be narrowly tailored to the government’s compelling interest in preventing the dissemination, through Internet terminals in public libraries, of visual depictions that are obscene, child pornography, or harmful to minors.”).

<sup>62</sup> *Am. Library Ass’n*, 539 U.S. at 214.

Court and held that the collection decisions forced on libraries by CIPA were no different from the traditional content-based decisions that libraries often made concerning their printed collections.<sup>63</sup>

In a judgment joined by Justices O'Connor, Scalia, and Thomas, Chief Justice Rehnquist wrote:

The public forum principles on which the District Court relied are out of place in this context of this case. *Internet access in public libraries is neither a traditional nor a designated public forum.*

....

[A public library] does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves[.]

....

[A public library] provides Internet access, not to encourage a diversity of view from private speakers, but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing material of *requisite and appropriate quality*.<sup>64</sup>

Because the plurality found that Internet access in public libraries did not constitute a public forum, the plurality determined that heightened judicial scrutiny was “incompatible with the discretion that public libraries must have to fulfill their traditional missions.”<sup>65</sup> The government did not have to show that CIPA was the least restrictive method of protecting children from sexually explicit online content because, “[the Court] requires the government to employ the least restrictive means only if the forum is a public one and strict scrutiny applies . . . such is not the case here.”<sup>66</sup>

The plurality saw no constitutional distinction between a library’s decision to obey a law requiring it to block online pornography and a library’s voluntary decision to block print-based pornography.<sup>67</sup> According to the plurality, it would make little sense to treat “libraries’ judgments to block online pornography,” any differently from libraries judgments to block print pornography, since both decisions, in the plurality’s opinion, were made for the same reason.<sup>68</sup>

Over-blocking, the tendency of filtering software to “erroneously block access to constitutionally protected speech,”<sup>69</sup> which troubled the District Court enough to invalidate CIPA, apparently did not concern the plurality. Although the District Court found that, “unblocking may take days, and may be unavailable, especially in

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<sup>63</sup> *Id.* at 207, 208.

<sup>64</sup> *Id.* at 205, 206 (emphasis added).

<sup>65</sup> *Id.* at 205.

<sup>66</sup> *Id.* at 207 n.3.

<sup>67</sup> *See id.* at 208.

<sup>68</sup> Am. Library Ass’n, 539 U.S. at 208.

<sup>69</sup> *Id.*

branch libraries,”<sup>70</sup> the plurality rejected any possibility that over-blocking would violate the First Amendment, “[a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled.”<sup>71</sup>

The plurality found that because CIPA did not induce violation of any First Amendment rights, the conditions imposed by CIPA on the federal funding of libraries was a permissible exercise of Congress’ spending power. The plurality also noted that “the Government was not denying a benefit to anyone, but was instead simply insisting that public funds be spent for the purposes for which they were authorized.”<sup>72</sup> Nor did the plurality find that CIPA penalized libraries that refused to install filter software. Libraries that wished to offer unfiltered Internet access remained free to do so, as long as those libraries did not accept federal funding.<sup>73</sup> “A legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.”<sup>74</sup>

Although CIPA represents a small victory for government and the advocates of Internet regulation, it fails to provide a relevant framework for future legislation that is larger in scope. Congress’ options to regulate indecent speech on the Internet under the spending power cannot extend beyond Internet access points that are federally-funded. Libraries, schools, and federal prisons may fit under the spending power’s protective sphere, but that coverage falls far short of creating a constitutional justification for effective regulation of indecency on the World Wide Web as a whole.

### C. The Child Online Protection Act

COPA is Congress’ most recent attempt at making the “Internet safe for minors by criminalizing certain Internet speech.”<sup>75</sup> Congress specifically stated that the goal of COPA “was to prevent the widespread availability of the Internet from providing opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control.”<sup>76</sup>

COPA, if enforced, would make it a crime to publish any speech to the World Wide Web that is “harmful to minors” and posted for “commercial purposes.” COPA defines the terms “harmful to minor,” “minor,” and “commercial purposes” as follows:

47 U.S.C. § 231(e)(6) Material that is harmful to minors.

The term “material that is harmful to minors” means any communication, picture, image, graphic image file, article,

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<sup>70</sup> Am. Library Ass’n, 201 F. Supp. 2d at 411.

<sup>71</sup> Am. Library Ass’n, 539 U.S. at 209.

<sup>72</sup> *Id.* at 211 (quoting *Rust v. Sullivan*, 500 U.S. 173, 196 (1991)).

<sup>73</sup> *See id.* at 212.

<sup>74</sup> *Id.* (quoting *Rust*, 500 U.S. at 193).

<sup>75</sup> A.C.L.U., 542 U.S. at 698.

<sup>76</sup> Pub. L. No. 105-277 § 1402, 112 Stat. 2681-736 (1998).

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 , of is designed to pander to the prurient interest;*

(B) *depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and*

(C) *taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.*

47 U.S.C. § 231(e)(7) Minor. The term “minor” means any person under 17 years of age.

47 U.S.C. § 231(e)(2) Commercial purposes; engaged in the business.

(A) Commercial purposes. A person shall be considered to make a communication for commercial purposed only if such person is engaged in the business of making such communications.

(B) Engaged in the business. The term “engaged in the business” means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person’s trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person’s sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web., communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowing solicits such material to be posted on the World Wide Web.<sup>77</sup>

The “harmful to minors” definition is comprised of a three-prong test and each prong must be violated in order for the speaker to be prosecuted under COPA. First, the speech must appeal or pander to the prurient interest applying *contemporary community standards* with respect to *minors*. Second, the speech must depict, describe, or represent, in a *manner patently offensive with respect to minors* a sexual act. Finally, the speech must lack serious value *for minors*.

COPA was challenged in the Third Circuit by the ACLU on the grounds that like

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<sup>77</sup> 47 U.S.C. § 231 (1998) (emphasis added).

the CDA, COPA suppressed, “a wide range of speech on the World Wide Web that adults are entitled to communicate and receive.”<sup>78</sup> The District Court applied strict scrutiny analysis because the Third Circuit found that COPA, like the unconstitutional CDA, was a “content-based restriction on speech.”<sup>79</sup>

Initially, the Third Circuit held that COPA was a likely violation of the First Amendment on the sole ground that the “community standards” basis of the first prong of the harmful to minors test would compel all Web publishers to “abide by the standards of the community most likely to be offended by the message, even if the same material would not have been deemed harmful to minors in all other communities.”<sup>80</sup> Borrowing an argument raised by the Supreme Court in *Reno*, the Third Circuit reasoned that because the Internet lacks the geographic borders of a traditional real-world community, the “community standards” language in COPA would compel each Internet speaker to abide by the moral standards of the most puritanical communities in order to avoid prosecution.<sup>81</sup> As a result, the Third Circuit held that COPA’s overbreadth problems, resulting from the problematic “community standards” language, could not be remedied judicially and affirmed the preliminary injunction entered against the government by the Eastern District of Pennsylvania.

The Supreme Court in *Ashcroft v. ACLU (Ashcroft I)* vacated the judgment of the Third Circuit and remanded for further proceedings on the narrow ground 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.”<sup>82</sup> The majority did not articulate any basis for this holding. However, a minority opinion written by Justice Thomas and joined by the Chief Justice and Justice Scalia, simply stated that, “it is sufficient to note that community standards need not be defined by reference to a precise geographic area”<sup>83</sup> in order to be applicable to an obscenity or prurient appeal inquiry. In a separate section of Justice Thomas’ opinion joined by Justices O’Connor, Scalia, and the Chief Justice, the Court indicated that COPA did not appear to suffer from the “unprecedented breadth and vagueness” of the CDA<sup>84</sup> because COPA restricted its prohibition to materials that “appealed to the prurient interest of minors,” and COPA contained an exemption for works with “serious literary, artistic, political or scientific value for minors.”<sup>85</sup>

The majority opinion in *Ashcroft I* offered no opinion as to whether “COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the District Court correctly concluded that the statute likely will not survive strict scrutiny analysis once adjudication of the case is

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<sup>78</sup> Brief of Plaintiffs-Appellees at 1, *A.C.L.U. v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003) (No. 99-1324).

<sup>79</sup> *A.C.L.U. v. Reno*, 217 F.3d 162 at 173 (3d Cir. 2000).

<sup>80</sup> *Id.* at 177 (quoting *Reno v. A.C.L.U.*, 521 U.S. at 877-78).

<sup>81</sup> *Id.* at 175.

<sup>82</sup> *A.C.L.U.*, 535 U.S. at 586.

<sup>83</sup> *Id.* at 576.

<sup>84</sup> *Id.* at 577-78.

<sup>85</sup> *Id.*

completed.”<sup>86</sup> The majority also refused to vacate the preliminary injunction without first allowing the Court of Appeals to perform a complete analysis of COPA’s constitutionality.<sup>87</sup>

On remand and under instruction to consider aspects of the case beyond its initial overbreadth analysis, the Third Circuit published a careful, step-by-step constitutional analysis that “touched all the bases.”<sup>88</sup> First, the Third Circuit considered if COPA would withstand strict scrutiny.<sup>89</sup> Citing *Ginsberg*, the Third Circuit found that government’s stated interest in “protecting minors from harmful material online is compelling,”<sup>90</sup> but that COPA was neither narrowly tailored to meet that interest nor was it the least restrictive means of achieving the goal of protecting children from sexually explicit content on the Internet.<sup>91</sup> The Third Circuit then substantially expanded and re-examined its initial overbreadth and vagueness analysis and concluded that COPA was unconstitutionally overbroad.<sup>92</sup>

The Supreme Court revisited COPA in *ACLU v. Ashcroft (Ashcroft II)*.<sup>93</sup> The second time, the majority was persuaded by the expanded analysis performed by the Third Circuit that COPA was a likely violation of the First Amendment and re-affirmed the preliminary injunction.<sup>94</sup> Although COPA awaits trial for the final determination of its constitutionality, the government will find it almost impossible to demonstrate that COPA is less restrictive than the alternatives proposed by the plaintiffs and the Court. The least restrictive means analysis will be the most critical element in the government’s defense of COPA since *Ashcroft II* explicitly stated, “Filters are less restrictive than COPA.”<sup>95</sup>

COPA contains parental control language because of the Supreme Court’s strong suggestion in *Reno* that the Constitution requires that parents, not the government, have the primary responsibility of deciding what is and is not appropriate for their children. Congress explicitly stated the primacy of parental control over a child’s access to the Internet in a congressional finding:

The Congress finds that —

(1) *While custody, care, and nurture of the child resides first with the parent, the widespread availability of the Internet present opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control;*

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<sup>86</sup> *Id.* at 585-86.

<sup>87</sup> *Id.* at 586.

<sup>88</sup> *A.C.L.U. v. Ashcroft*, 322 F.3d at 240, 251 (3d Cir. 2003).

<sup>89</sup> *Id.* at 251-66.

<sup>90</sup> *Id.* (quoting *Ginsberg v. State of NY*, 390 U.S. 629, 639-40 (1968)).

<sup>91</sup> *Id.* at 251, 260.

<sup>92</sup> *Id.* at 266-71.

<sup>93</sup> *A.C.L.U. v. Ashcroft*, 542 U.S. 656 (2004).

<sup>94</sup> *Id.* at 705.

<sup>95</sup> *Id.* at 701.

(2) the protection of the physical and psychological well-being of minors by shielding them from material that are harmful to them is a compelling governmental interest;

(3) to date, while the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation, such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web;

(4) *a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest.*<sup>96</sup>

The majority in *Ashcroft II* agreed with the government that shielding minors from harmful material on the World Wide Web was a government interest and acknowledged that “COPA presumes that parents lack the ability, not the will, to monitor what their children see.”<sup>97</sup> However, the majority disagreed with the government that COPA was the least restrictive means of achieving that goal. The majority stated that, “by enacting programs to promote use of filtering software, Congress could give parents that ability [to protect their children on the Web] without subjecting protected speech to severe penalties.”<sup>98</sup> According to the majority in *Ashcroft II*, filters

impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. *Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished.*<sup>99</sup>

The majority concluded its less restrictive analysis by holding that, “regardless of how broadly or narrowly the definitions in COPA are construed,” the benefits of a filtering scheme remain less restrictive than the solution proposed by COPA.<sup>100</sup>

The majority in *Ashcroft II* was also not persuaded that the problems associated with filters caused filtering systems to be less effective than COPA in achieving Congress’ stated goal of empowering parents to control what their children

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<sup>96</sup> Pub. L. No. 105-277 § 1402, 112 Stat. 2681-736 (1998) (emphasis added).

<sup>97</sup> *Ashcroft v. A.C.L.U.*, 542 U.S. at 703.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 702 (emphasis added).

<sup>100</sup> *Id.*

encounter on the Web.<sup>101</sup> The majority held that the government's burden in justifying COPA is "not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective."<sup>102</sup> Although the majority agreed with the government that filtering software has limitations and those limitations could cause the filter to either fail to block content that is harmful to minors or inadvertently filter out protected speech, the majority was not convinced those limitations proved that filters were less effective than COPA.<sup>103</sup>

Justice Stevens, joined by Justice Ginsberg, concurred with the judgment of the majority but reiterated his minority viewpoint from *Ashcroft I* that the initial community standards analysis performed by the Third Circuit was correct and that COPA's use of "contemporary community standards to identify materials that are harmful to minors was a serious, and likely fatal, defect."<sup>104</sup> Justice Stevens agreed with the less-restrictive means analysis applied by the majority but wrote to underscore his, "growing sense of unease when the interest in protecting children from prurient materials is invoked as a justification for using criminal regulation of speech as a substitute for, or a simple backup to, adult oversight of children's viewing habits . . . . [T]he possibility that Congress might have *accomplished the goal of protecting children from harmful materials by other, less drastic means is a matter to be considered with special care.*"<sup>105</sup>

Justice Breyer, joined by Justice O'Connor and the Chief Justice, dissented, expressly stating that the government has a compelling interest in "protecting children from commercial pornography on the Internet,"<sup>106</sup> and that no less restrictive alternatives were available.<sup>107</sup> The dissent also argued that COPA should be construed narrowly by the Court, reading the statute to exclude most protected speech while allowing Congress "to achieve its basic child-protecting objectives."<sup>108</sup> Justice Breyer also expressed his distaste for the majority's application of the less restrictive alternatives test. According to Justice Breyer, "If this statute does not pass the Court's "less restrictive alternative" test, what does? If nothing does, then the Court should say so clearly."<sup>109</sup>

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<sup>101</sup> *Id.* at 703.

<sup>102</sup> *Ashcroft v. A.C.L.U.*, 542 U.S. at 703 (quoting *Reno*, 521 U.S. at 874).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 705 (Stevens, J., concurring).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 708 (Breyer, J., dissenting).

<sup>107</sup> *Id.* at 715 ("My conclusion is that the Act, as properly interpreted, risks imposition of minor burdens on some protected material -- burdens that adults wishing to view the material may overcome at modest cost. At the same time, it significantly helps to achieve a compelling congressional goal, protecting children from exposure to commercial pornography. *There is no serious, practically available "less restrictive" way similarly to further this compelling interest.* Hence the Act is constitutional.") (Breyer, J., dissenting) (emphasis added).

<sup>108</sup> *Id.* at 716 (Breyer, J., dissenting).

<sup>109</sup> *Id.*

### III. THE TAGGING PROPOSAL

A possible answer to the question posed by Justice Breyer is this comment's proposed Adult Meta-Tag Act (AMTA). The AMTA would require the creation of a new identification label (a meta-tag) for use on the World Wide Web that would allow parents to easily identify and control their children's access to sexually explicit material. The AMTA would not be a content-based restriction on speech and would pose a minimal burden to both speakers and listeners on the Internet. The AMTA, or any other tagging legislation, would require clear definitions of what content is required to carry the identification label in order to avoid the community standards criticisms of Justice Stevens. Tagging legislation would also have to address the concerns of Justice Ginsburg by creating a tool that encourages adult supervision of what children view on the Internet without resorting to criminalizing protected speech. Finally, since the AMTA would not restrict any speech available via the Internet, the "tagging" of sexually explicit material would be a less restrictive alternative to either COPA or the CDA while offering ubiquity and ease of use that filtering cannot. The AMTA is exactly the combination of legislation and technology Justice Breyer was referring to when he noted in his dissent that COPA would pass his First Amendment analysis, "unless, of course, there is a genuine alternative, 'less restrictive' way similarly to further [the government's] objective."<sup>110</sup>

#### A. An Introduction to Meta-Tags and HTML

Tagging would be less restrictive than any type of content based prohibition because it would not proscribe any type of Internet speech and would not require Web content producers to make value judgments on what content may or may not be legal. A new HTML tag identifying sexually explicit content would be even less restrictive than a regulatory vacuum that depends on adult users to voluntarily purchase, install and maintain content filter software. Unlike a separate filter application, a tag identifying sexually explicit content could be incorporated directly into the structure of HTML. The adoption of this new HTML meta-tag would allow any adult Web user to enable or disable access to Websites containing the sexually explicit tag with the click of a mouse from within her browser software. Unlike filters, the new tag would never inadvertently filter out constitutionally protected content, nor could it inadvertently display properly labeled sexually explicit content.

In order to understand the tagging concept, it is important to have some basic background into how the Web works and how Web pages are displayed on any given computer. First, unlike a newspaper or a magazine, Web pages do not consist of mere words and images. In order to display properly (or, in fact, to display at all), a Web page must be properly formatted in Hypertext Mark-Up Language (HTML).<sup>111</sup> HTML is the computer language used by Web designers and Web browsers to encode and decode Web pages. HTML is composed of hundreds of "tags" or labels that tell the Web browser (or any other software application that is able to display Web-based content) how to display a Web page. Of course, today things have grown

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<sup>110</sup> *Id.* at 715 (Breyer, J., dissenting).

<sup>111</sup> *See generally* The World Wide Web Consortium, <http://www.w3.org> (for a history of HTML and an overview of how the World Wide Web works) (last visited April 22, 2005).

more complicated as HTML has either given way to or incorporated other languages for use on the Web.<sup>112</sup> However, for purposes of understanding tagging, only a basic introduction to HTML is required.

HTML contains the directions that a Web browser or any other Web enabled software application requires in order to properly display a Web page. Because the point of the World Wide Web is to allow computers and browsers of different types to access the same information in the same way, when a Web page is designed to display red text on a blue background, the author does not actually use a blue background nor does she type with red text. Instead, the author prefaces her text with an HTML command or ‘tag’ that informs the Web browser decoding and displaying the page that the following text should be red and the area behind the text should be blue.

In addition to the regular HTML tags that contain Web content (i.e. the text, images, recordings, etc. that make up the visible portion of the document) and specify how that content is to be displayed, HTML also employs meta-tags, which describe information about the document itself. Meta-tags are generally used when the author wants to include information within a Web document but does not necessarily want or need that information to be displayed in the browser. Meta-tags often identify the author of the Web page and may even contain contact information for that person but that information is not displayed on the Website as viewed by the browser. Unless the reader chooses to look directly at the ‘source’ HTML, the browser will acknowledge the information in the meta-tag but does not display it, unless required to do so by another HTML command.

HTML is also capable of incorporating new tags much the same way a spoken language is capable of incorporating new words. Just as new phrases such as “Bling-Bling” can be introduced into American English (assuming that both the speaker and the listener are aware that “Bling-Bling” refers to flashy, usually gold and diamond encrusted pieces of jewelry) new tags can similarly be introduced into HTML as long as the Webpage author and the Web browser both know and understand the definition of the new tag.

#### B. The Elements of a Constitutional Tagging Scheme

COPA and the CDA notwithstanding, Congress has demonstrated that it is capable of drafting workable, constitutional legislation to regulate the Internet. Drifting quietly in the wake of COPA’s failure, two federal Internet statutes have successfully limited the availability of sexually explicit material to minors over the Internet. 47 U.S.C. §941, also known as the “dot kids”<sup>113</sup> statute, created a new domain name limited to content appropriate for children 12 and under. 18 U.S.C. §2252(B) is an act that prevents Web publishers from using misleading domain names on the Internet, such as whitehouse.com, to lure unsuspecting minors and

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<sup>112</sup> XHTML (Extensible HyperText Markup Language), XML (Extensible Markup Language), SGML (Standard Generalized Markup Language) to name a few.

<sup>113</sup> 47 U.S.C. § 941 (2004).

adults to Websites that feature sexually explicit material.<sup>114</sup> As described in Part I, Congress was also successful with the Child Internet Protection Act because CIPA was narrowly tailored to regulate only those Internet access points that were directly subsidized by the federal government.<sup>115</sup>

In order to create a constitutional regulatory tagging scheme, Congress must draft legislation that reflects the lessons learned from both its success and its failures. Tagging must give parents an effective tool to protect their children from sexually explicit content on the Internet while not infringing upon the free speech rights of those who use the Internet to communicate.

Some of the current filtering and blocking applications available to Web users are based in part on meta-tag technology. The Platform of Internet Content (PICS) and the more recent Resource Description Framework (RDF) are two attempts by the World Wide Web Consortium (W3), the organization responsible for HTML and many other Web based standards, to create a framework for a common voluntary rating and filtering system on the Internet. However, voluntary ratings system on the Web have failed to gain the wide acceptance accorded to the other voluntary systems such as the Motion Picture Association of America's (MPAA) ratings system or the television ratings system used with the V-chip technology.

Previous attempts at a Web ratings system have failed for two reasons: One, current voluntary ratings systems on the Web are too complicated, attempting to address everything from violence and foul language to hard-core pornography; two, there has been no incentive to adopt the system. In contrast, a new <adult> meta-tag would be simple. Use of the <adult> meta-tag would be required for only a single category, sexually explicit content. Child pornography and obscenity are, of course, already illegal and controlling foul language and violent imagery on the Web most likely falls outside of what the Court would consider a "compelling" government interest. Also, to act as an incentive, legislation mandating creation and use of the <adult> tag would have to contain safe harbor provisions that insulate those who employ the tag from criminal and civil liability when children encounter properly tagged sexually explicit content.

My proposal for an effective, constitutional tool to enable parents to protect their children from sexually explicit material is as follows:

#### The Adult Meta-Tag Act

(a) Requirement to properly label any sexually explicit material available via the World Wide Web.

(1) Within 12 months of the passage of this legislation all Web pages, transmitted in interstate commerce or beyond by means of the World Wide Web for commercial purposes and containing any sexually explicit material shall be properly labeled with the <adult> meta-tag.

(2) Within 12 months of the passage of this legislation any software application or package capable of rendering HTML and

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<sup>114</sup> 18 U.S.C. § 2252 (2004).

<sup>115</sup> 20 U.S.C. §9134(f)(1)(a) (2003).

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is distributed in or enables interstate commerce must be <adult> compliant.

(3) Any internet content creator or Website hosting service that—

(A) knowingly creates a Web page containing sexually explicit content for commercial purposes without including a properly employed <adult> meta-tag; or

(B) knowingly hosts an unlabeled or improperly labeled Web page or Website that contains sexually explicit material, shall be punished under subsection (c) of this section.

(b) Inapplicability of common carriers.

(c) Penalties

(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), or (3) of subsection (a) shall be fined not more than \$50,000, imprisoned not more than 30 days or both. For the purposes of this paragraph each non-compliant Web page shall constitute a separate violation.

(d) Affirmative defense. It is an affirmative defense to a charge of violating subsection (a) that the defendant—

(1) Web hosting service required in the terms of service agreement that all Web pages with content that is sexually explicit and intended for commercial purposes be properly labeled with the <adult> meta-tag; or

(2) did not allow any access to the unlabeled or improperly labeled Web pages via the World Wide Web; or

(3) was unaware that the Web page was in violation of this section and promptly and in good faith properly labeled or removed any web-pages upon notification that such Web pages were posted in violation of this legislation.

(e) Safe Harbor. Any internet content creator, Website hosting service, or software publisher that properly implements or employs the <adult> meta-tag in good faith shall be not be subject to criminal penalties or civil liability when—

(1) minors have accessed <adult> Websites via an internet browser or software application capable of rendering HTML produced and distributed prior to the date when this legislation became effective; or

(2) a software failure or malfunction allows a minor to access a properly labeled <adult> Website, if that failure or malfunction is corrected by the manufacturer of the software within a reasonable period of time after the manufacturer becomes aware of the malfunction; or

(3) minors were able to view properly labeled Web pages because <adult> filtering had been disabled by an adult guardian, family member, or authorized user.

(f) Definitions

As used in this part, the term:

(1) “Web page” means any document that is available via the World Wide Web. In general, documents formatted in HTML (or any successor Web languages) and accessible via Hyper Text Transfer Protocol (or any successor Web protocols). “Web page” does not include or refer to each single element within a “Web page.” Flash animations, image files (GIF, TIFF, RAW and JPEG images), streaming or downloadable media files, or other individual elements do not constitute a “Web page” when they serve as elements of a larger “webpage” that is properly labeled. If any of the above elements appear in isolation and meet the requirements of (a)(1), then they constitute a “Web page” and require an `<adult>` meta-tag.

(2) “`<adult>` compliant” means that the browser or software application able to display “Web pages” fully supports and properly recognizes the `<adult>` meta-tag and provides a mechanism to allow an authorized user to enable and disable the display of `<adult>` tagged content.

(3) An “authorized user” is any adult who owns the computer or has been authorized by the owner to operate that computer.

(4) “Internet Content Creator” means any person or entity that creates a “Web page” for display on the internet and actually allows internet access to that “web page.”

(5) “Website hosting service” means any person or entity that provides storage space for a “Web page” and allows persons other than the author of that “Web page” to view the page via the internet.

(6) “Commercial Purposes” means any person who makes a communication, or offers to make a communication, by means of the World Wide Web, that included any material that is sexually explicit, devotes time, attention, or labor to such activities, as a regular course of such person’s trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person’s sole or principal business or source of income).<sup>116</sup>

(7) “Sexually Explicit” means—

(A) any image or visual representation of unclothed human genitalia or unclothed female nipples that when viewed in context with the other representations available on that Web page lacks serious literary, artistic, political, or scientific value; or

(B) a description or representation of any kind that depicts, describes, or represents, an actual or simulated act of masturbation, sexual intercourse, or physical contact in an act of apparent sexual

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<sup>116</sup> 47 U.S.C. §231(e)(2).

stimulation or gratification with a person's clothed or unclothed genitals, pubic area, buttocks or breasts, that when viewed in context with the other representations available on that Web page lacks serious literary, artistic, political, or scientific value.

(8) "Minor" means any person under 17 years of age.

In order to be both an effective tool and withstand a constitutional challenge, the AMTA differs from the CDA and COPA in seven major ways. First, the AMTA is not a content-based prohibition on speech. Second, the AMTA is narrowly tailored to regulate only commercial speech available on the World Wide Web rather than attempting to regulate all Internet based speech. Third, the AMTA is designed to offer parents a tool to control their child's exposure to material on the Web rather than attempting to replace parental oversight with government prohibitions. Fourth, the AMTA does not burden Internet content providers with an age-verification requirement or require content providers to make judgments about what content is harmful to minors and what content is safe for minors. Fifth, the AMTA specifically excludes from its definition of sexually explicit any material that has serious literary, artistic, political, or scientific value—restrictions on material with value will remain within the sole purview of the parents. Sixth, the AMTA replaces the "community standards" language employed in COPA with clear definitions of what constitutes material that requires an <adult> meta-tag, thereby avoiding ambiguity and preventing the most puritanical communities from using the AMTA as a weapon against communities with broader standards. Finally, the AMTA is arguably less restrictive than any of the available substitute technologies, including filters, because it requires no investment from the parents and does not prevent any speaker from communicating over the Internet.

Unlike COPA, Web publishers should embrace AMTA's regulations because responsibility is shifted from the publisher to the parent and AMTA offers incentives to adopt the tagging scheme in addition to penalties for non-compliance. AMTA contains a safe harbor provision that insulates anyone who employs the <adult> tag from criminal penalties or civil liability when children have inadvertently been exposed to properly tagged content. AMTA does not "chill" protected speech because publishers who employ the tag are under no threat of prosecution. Uncertainty is eliminated because the cautious content producer or Web publisher could choose to err on the side of safety, tagging borderline content to benefit from the protection that the tag offers without having to self-censor or fear criminal prosecution. Under the AMTA, criminal prosecution would be a last resort and limited only to those who refuse to employ the <adult> meta-tag on Web pages containing sexually explicit content in clear violation of the definitions provided in the statute.

Although the AMTA is not a content-based prohibition and should be subject to a lesser form of scrutiny should it be challenged on constitutional grounds, it is designed to withstand the same level of scrutiny applied to COPA and the CDA. *Ashcroft II* noted that filtering is less restrictive than COPA.<sup>117</sup> However, the

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<sup>117</sup> *Ashcroft v. A.C.L.U.*, 542 U.S. at 695.

majority in *Ashcroft II* also noted that, “this opinion does not hold that Congress is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials.”<sup>118</sup> The logical implication of these two somewhat contradictory comments is that some regulation of speech on the Internet, for the purpose of protecting minors, is constitutional. Therefore, the government probably does not have to show that COPA (or the AMTA) would be less restrictive than a purely voluntary user-based filtering scheme—since that would amount to a regulatory vacuum, and the Court has already expressly indicated that some regulation is constitutionally acceptable. However, at trial the District Court is still likely to find that COPA is not the least restrictive alternative due to the availability of tagging and perhaps even some type of mandatory filtering scheme.

Although the AMTA is not less restrictive than a total lack of regulation, tagging would be less restrictive than any type of mandatory filtering scheme since tagging would not suffer from the problems of over-blocking and under-blocking that afflict current filtering systems. Both *Reno* and *Ashcroft II* expressed concern that filtering programs would occasionally keep minors from viewing protected speech or accidentally allow minors to encounter prohibited speech. Under the AMTA, because the protection is automatic when the <adult> tag has been enabled by a parent or authorized adult, minors would never be inadvertently prohibited from viewing speech nor would minors be accidentally exposed to sexually explicit material governed by U.S. law.

Tagging would place very little burden on the end user because, unlike filtering, tagging would be free and would require no training to use. The lower courts have noted that because filters must be purchased, they are unavailable to those without financial means. Filters also require some knowledge to operate, either the user must enter blocked sites or keywords into a master list to activate the filter or the user must link to the filter manufacturer’s Website in order to download a current list of prohibited Websites. Tagging would eliminate both problems because the system would be integrated into all Web-enabled software and Websites would be self-identified.

Even after the tagging concept is shown to be the least restrictive method, legislation requiring mandatory <adult> meta-tags must avoid the vagueness and overbreadth issues that plagued the CDA and COPA in order to survive. The AMTA employs explicit, narrow definitions of all terms in order to avoid invalidation on vagueness or overbreadth analysis. First, unlike COPA, the definition of material requiring the <adult> tag is narrowly tailored to include only those sexually explicit materials that lack redeeming value. AMTA abandons the three part test COPA borrowed from *Ginsberg* to identify “harmful material.”<sup>119</sup> Under the COPA test, “any communication, picture, image file, article, recording, writing, or other matter of any kind,” that is designed to appeal to the prurient interest of a minor, is patently offensive and lacks serious value for minors is harmful. The Third Circuit found that COPA’s definition of “harmful material,”<sup>120</sup> could rob images of their contextual

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<sup>118</sup> *Id.* at 705.

<sup>119</sup> A.C.L.U., 322 F.3d at 252.

<sup>120</sup> *Id.* at 252 (quoting 47 U.S.C. §231(e)(6) “any communication, picture, image file, article, recording, writing or other matter of any kind”) (emphasis added).

framework, because COPA's "harmful material" definition includes "any communication" that satisfies the three prong test. The Third Circuit construed "taken as a whole" to mean that "each individual communication, picture, image, exhibit, etc. be deemed "a whole" by itself in determining whether it appeals to the prurient interests of minors."<sup>121</sup> Under this construction, COPA violated the First Amendment because "one sexual image, which COPA may proscribe as harmful material, might not be deemed to appeal to the prurient interest of minors if it were to viewed in the context of an entire collection of Renaissance artwork . . . as a result, individual communications that may be an integral part of an entirely non-prurient presentation may be held to violate COPA." The AMTA avoids this problem by limiting its label requirement to "Web pages" and clearly defining that term to exclude individual animations, image files, streaming or downloadable media files, or other elements of a Web page unless those elements appeared in isolation on a single page.

AMTA also does not require the publisher to distinguish between material that is appropriate for a first grade student and a high school senior. The Third Circuit was uncomfortable with COPA's failure to distinguish between different age groups in its definition of minor,<sup>122</sup> because COPA the term "minor applies in a literal sense to an infant, a five-year old, of a person just shy of age seventeen,"<sup>123</sup> and is not "tailored narrowly enough to satisfy the First Amendment's requirements."<sup>124</sup> The Third Circuit felt that a definition of "minor" that included all children under seventeen years of age made it very difficult for Web publishers to "decide what minor could be exposed to its publication, so that a publisher could predict, and guard against, potential liability."<sup>125</sup> AMTA only requires that publishers tag material that fits the definition in the statute, beyond that it is the parents, not the publishers, who decide what is and is not appropriate for their children.

The AMTA would be limited to commercial communications available via the World Wide Web. The Supreme Court has repeatedly held that "the Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression,"<sup>126</sup> and has articulated a four-part test to determine the constitutionality of regulations on commercial speech. First, the speech must concern lawful activity and not be misleading.<sup>127</sup> Second, the government interest must be substantial.<sup>128</sup> Third, the regulation must "directly advance the governmental interest asserted."<sup>129</sup> Fourth, the regulation must not be "more extensive than is necessary to serve that interest."<sup>130</sup> Although most sexually explicit content available

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 253, 254

<sup>123</sup> A.C.L.U., 322 F.3d at 254.

<sup>124</sup> *Id.* at 255.

<sup>125</sup> *Id.*

<sup>126</sup> *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 563 (1980). *See also* *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

<sup>127</sup> *Central Hudson*, 447 U.S. at 565.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

via the Web would qualify for first amendment protection under the first prong of this test, the AMTA, as proposed, would survive commercial speech regulation scrutiny. The Court has already recognized the government's interest in protecting children, and the AMTA directly advances that interest. As for the final prong, it places a slighter burden on the government than traditional overbreadth analysis or the less restrictive alternative analysis in the context of the recent Internet regulation cases.

E-mail, chat rooms, instant messaging systems, peer to peer file sharing networks and any other Internet forum that does not employ the Hyper Text Transfer Protocol would not be affected by the AMTA. This would eliminate any concern that consenting adults involved in private communications over the Internet could be prosecuted under the AMTA while still ensuring that all Web based pornography (the vast majority of sexually explicit material via the Internet) could be hidden from children via simple parental action.

#### IV. CONCLUSION

To be sure, a federal statute requiring the creation of an <adult> meta-tag and also requiring its use is not a panacea. Implementation of any mandated tagging scheme could raise questions about the constitutionality of mandatory labeling and would most likely have little direct effect on non-U.S. based sources of Web pornography. However, those potential difficulties are more easily overcome than the freighting concept of a law that criminalizes protected speech under the guise of protecting America's youth.

The Web industry is also taking steps to protect children from sexually explicit materials available on the Web. The Internet Corporation for Assigned Names and Numbers (ICANN), the private agency responsible for the regulation of top-level domain names, has recently announced plans to adopt a top level dot-xxx suffix dedicated to sexually explicit Websites. Dot-xxx addresses may be available for purchase as early as fall of 2005.<sup>131</sup> Although dot-xxx may make it marginally easier for parents to protect their children from sexually explicit material on the Web, adoption of dot-xxx by Web publishers is completely voluntary. Unlike a federally mandated tagging scheme, dot-xxx can neither insure that all sexually explicit content is properly labeled, nor can dot-xxx offer the statutory protection from liability that a federal statute could be drafted to provide. Free Speech Coalition, the adult industry's largest trade organization, has traditionally resisted adoption of a dot-xxx suffix and since use of the new dot-xxx domain will be voluntary, there is no indication that dot-xxx will be an effective tool that parents can use to keep sexually explicit materials away from their children.<sup>132</sup>

Clearly, self-regulation by those who produce sexually explicit Web content is the solution most in harmony with the First Amendment. However, if history is any indication, it is apparent that increasing federal regulation of the Internet is

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<sup>131</sup> *Stage Set for ".xxx" Internet Addresses*, CNN.com, June 2, 2005, <http://www.cnn.com/2005/TECH/internet/06/01/internet.porn.ap>.

<sup>132</sup> Joanna Glasner, *Sites Reconsider X-rated Domain*, WIRED, Aug. 25 2003, <http://www.wired.com/news/culture/0,1284,60145,00.html>.

inevitable. The longer the passage of such legislation takes, the more likely that extremely restrictive means of regulation will be considered constitutional by the Supreme Court. The time is ripe for those on both sides of the issue to pass reasonable, effective child-protection legislation that also respects the First Amendment.