

No. 96-100455

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1996

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JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES  
Petitioner

vs.

NAUGHTY NETSURFERS, INC.,  
Respondent.

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ON WRIT FOR CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

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BRIEF FOR PETITIONER

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Counsel for Petitioner

September 1996

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### QUESTIONS PRESENTED

1. Did the Court of Appeals for the Fourteenth Circuit err in holding that the Anti-Indecency and Effectiveness Standards for Cyberspace Communications Act of 1996 (ESC), which incorporates the definition of "indecent" already upheld by the judiciary as constitutional, is unconstitutionally vague?
  
2. Did the Court of Appeals for the Fourteenth Circuit err in holding that the Anti-Indecency and Effectiveness Standards for Cyberspace Communications Act of 1996 (ESC), which does not chill constitutionally protected freedoms and which meets the strict scrutiny standard of review, is unconstitutionally overbroad?

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## STATEMENT OF THE CASE

On June 5, 1996, John Doe, a minor of ten years of age, accessed photographs of nude men and women engaged in explicit sexual acts while researching the history of photography for a school project. Doe gained access to these pictures through NetView, a popular software package which enables users to access the Internet via a personal computer. By typing in the word "picture" as his search term, John was able to view three depictions of men and women in sexual acts on his screen; these were part of a sales pitch for a subscription to Naughty Netsurfers' website, and accordingly, there was no charge for John to see these pictures.

Naughty Netsurfers, Inc., a corporation which markets sites accessible via the World Wide Web containing sexually explicit material designed for adult entertainment, moved for a preliminary injunction against Janet Reno, Attorney General of the United States of America, challenging on constitutional grounds the Anti-Indecency and Effective Standards for Cyberspace Communications Act of 1996 (ESC), which comprises Title VI of the Telecommunications Act, Pub.L. No. 105-105, § 504, 110 Stat. 57, 134-136. The specific provisions challenged are to be codified at 47 U.S.C. §226(d) and (e). Naughty Netsurfers argued that ESC was unconstitutionally vague and overbroad, and thus it violated rights protected by the First Amendment and the Due Process Clause of the Fifth Amendment. The Government argued that ESC passes judicial scrutiny because it incorporates the definition of "indecenty" already accepted by the judiciary and because it addresses a

compelling interest by narrowly tailored means, without interfering with First Amendment freedoms.

The District Court denied Naughty Netsurfers' motion for a preliminary injunction, finding that (1) §226(d) was not unconstitutionally vague because the language of §226(d) essentially codifies the definition of "indecent" adopted by the FCC in the broadcast medium and upheld in 1978; (2) ESC was not unconstitutionally overbroad because under strict judicial scrutiny, §226(d) coupled with §226(e) was narrowly tailored to achieve a compelling interest, and (3) the ESC was not unconstitutional for lack of effectiveness.

On appeal, the case was affirmed as to the lower court's decision to use the strict standard of review to evaluate the First Amendment challenge, but was reversed as to the lower court's holding that the statute was not unconstitutionally vague or overbroad. The court held that the statute had failed to define adequately the term "indecent," leaving commercial content providers without guidance as to what material would be prohibited by the statute; the Court also held that subjecting commercial content providers to varying community standards rendered the statute unconstitutionally vague. The Court reversed the lower court's ruling that the statute was narrowly tailored, as well, finding that the means chosen in the statute to reduce exposure of children to indecency were not the least restrictive, and that the statute would chill constitutionally protected free speech. This court granted a petition for certiorari on September 16, 1996.



### SUMMARY OF THE ARGUMENT

The Court of Appeals erred in concluding that 47 U.S.C. §226 of the Anti-Indecency and Effective Standards for Cyberspace Communications Act of 1996 (ESC) is unconstitutionally vague. The language of §226(d) essentially incorporates the definition of "indecent" upheld as not vague by the Supreme Court in 1975 for the broadcast medium, and by subsequent courts since 1975 as applied to different mediums. The absence of a reference to a particular communications medium targeted by ESC does not render the statute unconstitutionally vague; there is no authority for the requirement of such a reference. Furthermore, subjecting Naughty Netsurfers to varying community standards of the jurisdictions into which they transmit their materials does not render the federal statute unconstitutional for vagueness; commercial content providers must bear the burden of complying with these community standards.

The Court of Appeals also erred in concluding that 47 U.S.C. §226 of the Anti-Indecency and Effective Standards for Cyberspace Communications Act of 1996 (ESC) is unconstitutionally overbroad. ESC does not chill constitutionally protected speech of Respondent or others not before the court. The affirmative defenses of §226(e)(5), which are technologically possible and economically feasible, lessen the chill of §226(d) to ensure that providers can protect themselves from prosecution without seriously impeding their ability to transmit protected communications to adults.

ESC meets the strict scrutiny standard of judicial review appropriate for content-based regulation of speech, and thus is not

unconstitutionally overbroad. Under this strict scrutiny review, the Government may regulate the content of constitutionally protected speech in order to promote a compelling interest only if the regulation it chooses is narrowly tailored to effectuate that interest. The Government clearly has a compelling interest in protecting minors from exposure to patently offensive material on the Internet. ESC is narrowly tailored to this interest of the government because §226(d), coupled with §226(e)'s affirmative defenses, is reasonably restricted to the evil it is said to combat, and because it preserves for adults the ability to engage in constitutionally protected communications.

#### ARGUMENT

**I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT 47 U.S.C. § 226 OF THE ANTI-INDECENCY AND EFFECTIVE STANDARDS FOR CYBERSPACE COMMUNICATIONS ACT OF 1996 (ESC) IS UNCONSTITUTIONALLY VAGUE.**

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). A statute which either "forbids or requires the doing of an act so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Const. Co., 269 U.S. 385, 391. The language of §226(d) essentially codifies the definition of "indecent" upheld as not vague by the Supreme Court in 1975 for the broadcast medium, and by subsequent courts since 1975 as applied to different mediums. Furthermore, subjecting Naughty Netsurfers to varying community standards of the jurisdictions into

which they transmit their materials does not render the federal statute unconstitutional for vagueness; the burden is on the commercial content provider to comply with these community standards. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 125-26 (1989).

A. THE LANGUAGE IN §226(d) INCORPORATES THE DEFINITION OF "INDECENCY" ALREADY ACCEPTED BY THE JUDICIARY AS CONSTITUTIONAL.

The FCC's definition of "indecent" in §226(d) ("patently offensive as measured by contemporary community standards") originated in the Supreme Court's obscenity case law. In Miller v. Cal., 413 U.S. 15, 24 (1973), a work was held to be legally obscene if it portrayed "sexual conduct in a *patently offensive* way." (emphasis added). Since Miller, the Supreme Court has consistently used the terms "indecent" and "patently offensive" interchangeably. See Action for Children's Television v. FCC, 852 F.2d 1332 (D.C.Cir. 1995); see FCC v. Pacifica Found., 438 U.S. 726 (1978). Thus, when the Court has held the words "patently offensive" to be not unconstitutionally vague, they are considering and ruling on a vagueness challenge to the term "indecent," as well.

In framing the definition of "indecent" in §226(d), it is apparent that the Commission simply turned to the broadcast industry to borrow a definition for indecent that had been upheld by the Supreme Court since it was first codified in 1975. Info. Providers Coalition v. FCC, 928 F.2d 866, 874 (9th Cir. 1991). In FCC v. Pacifica Found., 56 F.C.C.2d 94, 98 (1975), the FCC

determined that the language of a monologue entitled "Filthy words" was indecent as broadcast and thus prohibited by the statute that forbid the use of any obscene or indecent language over the radio. Although the Pacifica court never specifically addressed whether the FCC's definition was unconstitutionally vague, it did conclude that the monologue at issue was indecent within the section. Id. at 751. Hence, although Respondent argues that the Court has never considered a vagueness challenge to the term "indecent," the Pacifica opinion has been read to foreclose a vagueness challenge to the FCC's definition for indecency in the broadcast medium. Action for Children's Television v. FCC, 852 F.2d 1332, 1339-40 (D.C.Cir, 1988) ("In sum, if acceptance of the FCC's generic definition of "indecent" as capable of surviving a vagueness challenge is not implicit in Pacifica, we have misunderstood higher authority and welcome correction.").

Since Pacifica, Courts of Appeals and the Supreme Court have held that Pacifica's definition of "indecency" as applied to different mediums is not vague; borrowing an "indecency" definition from another medium does not make the definition vague per se. In Information Providers Coalition v. FCC, 928 F.2d 866, 875 (9th Cir. 1991) the court held "if the indecency definition passes the void for vagueness test for persons of ordinary intelligence who broadcast radio communication, it certainly must pass the same test for those who offer indecent communications over the telephone line." In that case, the FCC borrowed the definition used in Pacifica for broadcast medium for its definition of indecency for

the telephone medium; the court did not find that the statute was void for vagueness. See Denver Area Educ. Telecomm. Consortium v. FCC, 116 S.Ct. 2374 (1996) (the statutory definition of indecency for the cable medium held not to be vague); Dial Information Services v. Thornburgh, 938 F.2d 1535 (2nd Cir. 1991) (statute regulating indecent telephone message service held not unconstitutionally vague); Alliance for Community Media v. FCC, 56 F.3d 105 (D.C.Cir. 1995) (statute regulating cable television held not unconstitutionally vague). "The necessary implication of the courts action is that the term 'indecent' as interpreted by the commission is not per se void for vagueness." Info. Prov., at 874.

**B. ABSENCE OF REFERENCE TO PARTICULAR COMMUNICATIONS MEDIUM TARGETED BY ESC DOES NOT RENDER STATUTE UNCONSTITUTIONALLY VAGUE.**

The Appellate Court found that in previous cases, the FCC had defined indecent as patently offensive by reference to contemporary community standards for a *particular medium*; because §226(d) is not constrained to any specific medium, the court held it to be unconstitutionally vague. There is, however, no case law to support this rationale. No case affirmatively states the importance of a specific medium in the definition of 'indecent'. Accordingly, it is unclear how Pacifica and subsequent case law can be thought to require such a reference, or how the absence of such a reference can lead to a holding of unconstitutionally vague. See Denver Area Educ. Telecomm. Consortium v. FCC, 116 S.Ct. 2374, 2389-90 (1996) (holding by a plurality of the Court that statutory definition of 'indecent' for the cable medium is not

unconstitutionally vague, despite the lack of reference to the specific cable medium).

**C. COMMERCIAL CONTENT PROVIDERS BEAR THE BURDEN OF COMPLYING WITH COMMUNITY STANDARDS OF INDECENCY.**

Obscenity case law has held that application of a national standard of obscenity is not necessary; holding distributors of obscene materials subject to the varying community standards of obscenity of the jurisdictions into which they transmit materials does not render a statute unconstitutional. Hamling v. U.S., 418 U.S. 15 (1973). In Miller v. Cal., 413 U.S. 15 (1973), the Court found an obscenity statute not to be vague, despite the use of community standards. The Court held that there were no national standards of precisely what was 'patently offensive.' "[This is] essentially [a] question of fact. [sic] The adversary system, with lay jurors as the usual ultimate fact-finders in criminal prosecutions, has historically permitted triers of fact to draw on the *standards of their community*." Id. at 30 (emphasis added).

Because the definition of "indecency" that is used in §226(d) is based on obscenity jurisprudence, the same rationale relied on in Miller for the constitutionality of applying community standards of obscenity, as opposed to a national standard, is appropriate for the application of community standards of indecency in the Internet medium. This same rationale has been used in other indecency cases. In Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 125-26 (1989), the court found that although the statute prohibiting 'patently offensive' telephone messages to minors did not use a national standard of indecency, it was not

unconstitutionally vague. "There is no constitutional barrier under Miller to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages." Id. at 125-126.

Internet content providers like Naughty Netsurfers are no less capable than those subject to obscenity laws or subject to indecency restrictions in the telephone medium to acquire a familiarity with the relevant standards. Respondent has the same responsibility as the message provider in Sable: they must bear the burden of complying with community standards of indecency. The juror will be the final fact finder as to the "patent offensiveness" of material that is placed on the Internet, based on community standards, for it is the juror who truly knows what is patently offensive in his own community.

**II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT 47 U.S.C. §226 OF THE ANTI-INDECENCY AND EFFECTIVE STANDARDS FOR CYBERSPACE COMMUNICATIONS ACT OF 1996 (ESC) IS UNCONSTITUTIONALLY OVERBROAD**

An overbroad statute, one that is written too broadly or more broadly than necessary, is one whose purpose is to restrict activities that are not constitutionally protected, but, it is one which, in actuality, also restricts activities protected by the First Amendment. It is this flaw, that of prohibiting constitutionally protected activities, that is the basis for a violation under this doctrine. The doctrine of overbreadth

recognizes that an unconstitutional restriction of freedom of expression may deter parties not before the court from engaging in protected speech. Broadrick v. Okl., 413 US 601, 612-13 (1973). Because ESC does not chill constitutionally protected speech of Respondent or others not before the court, and because ESC is narrowly tailored to the compelling interest of the Government in protecting minors from indecent material on the Internet, ESC is not substantially overbroad.

**A. ESC DOES NOT CHILL THE CONSTITUTIONALLY PROTECTED SPEECH OF NAUGHTY NETSURFERS OR OTHERS NOT BEFORE THE COURT.**

However compelling the interest of the government is in protecting minors from viewing "patently offensive" material on the Internet, if the means it has chosen sweep more broadly than necessary and thereby chill the expression of adults, it has overstepped onto the rights protected by the First Amendment. Sable, 492 U.S. at 131. §226(d) prohibits any commercial content provider from knowingly sending a minor any communication that is patently offensive. Because content providers using most forms of Internet communication have no way of transmitting indecent content with certainty that it will not reach a minor, the only way for a content provider to comply with §226(d), standing alone, would be to refrain from transmitting any indecent content; the government concedes that §226(d) chills the constitutionally protected speech of commercial content providers on the Internet. However, §226(d) is not the sole section of ESC. "Invalidation of a statute on overbreadth grounds is 'strong medicine,' and is inappropriate



unless the overbreadth is substantial and no limiting construction could be placed upon the challenged statute." Broadrick v. Okla., 413 US 601, 613 (1973). The affirmative defenses of §226(e) place a limit on the statute, so that §226(e) coupled with §226(d) ensures that commercial content providers can protect themselves from prosecution without seriously impeding their ability to transmit constitutionally protected communications on the Internet to adults. Because the defenses in §226(e) are neither technologically impossible or economically prohibitive, §226(e) lessens the chill of §226(d), and accordingly, ESC does not chill protected speech of the First Amendment.

**1. IT IS TECHNOLOGICALLY FEASIBLE TO COMPLY WITH §226(e).**

Section 226(e)(5)(B) provides that it is a defense to a prosecution under §226(d) if a person has "restricted access to [covered] communications by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." This defense adequately ensures that minors will not gain access to patently offensive materials, while commercial speakers will still be able to transmit constitutionally protected communications to adults. In Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989), Congress held that an outright ban on indecent messages did not pass constitutional muster because it was not sufficiently narrow; at the same time, however the Court agreed that establishing credit card, access code and scrambling rules were a "satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of

minors," Id. at 128, and thus it was feasible as an age screening mechanism. The assumption in the Court in Sable was that all of these techniques were available only to those over 18, and therefore, served as a positive deterrent to access by minors, while still enabling adults to reach the material they had a constitutional right to. Because "these rules represent a feasible and effective way to serve the governments interest in protecting children," Id. at 128, without acting as an outright ban and prohibiting the provider from transmitting constitutionally protected materials to adults, the statute with such defenses did not unconstitutionally chill the expression of adults.

The assumption of the Sable Court is appropriate here for the Internet medium as well; there is little difference between the telephone medium and the Internet medium in regards to these techniques of deterring minors from accessing patently offensive materials. Thus, as in Sable, credit card, access code and scrambling rules are feasible and effective screening devices for the Internet medium, and this technology already exists in abundance.

§226(e)(5)(A), the "good-faith" defense, provides a safe harbor for commercial content providers, as well. Content providers who "in good faith" take "reasonably effective actions," including any steps "feasible under available technology," to prevent minors' access to patently offensive communications, have an affirmative defense. §226(e)(5)(A) also offers a defense that is technologically feasible, as well as one that ensures commercial

speakers can still provide constitutionally protected communications to adults.

The statute gives examples of such "reasonably effective" actions that would indemnify a provider under ESC. These include labeling sites indicating coverage under the ESC, coupled with the use of software configured to identify and block tagged material, and registering with the marketplace of software able to identify and to block covered materials. These are all technologically possible, proven by the fact that they are all on the market at present. There is a wide range of browser and blocking services already developed by commercial on-line services and software companies that are capable of detecting "tags." (R. at 10). These tags are labels attached to sites that identify whether the material is suitable for minors; the browser software is capable of detecting these tags and blocking the sites tagged. (R. at 10). A commercial content provider of indecent material can easily tag its site, and a minor trying to access such material would be blocked from doing so.

This process of tagging and blocking is not only technologically feasible, but it is "reasonably effective" as well. The findings of fact show that a minor would effectively be blocked from gaining patently offensive material with this technology. (R. at 11). Furthermore, although the number and location of Internet sites are constantly changing, the manufacturers of browser software offer regular subscription or update services to stay in tune with these changes. (R. at 11).

2. IT IS NOT ECONOMICALLY PROHIBITIVE FOR  
COMMERCIAL CONTENT PROVIDERS TO COMPLY WITH  
ESC.

As a practical matter, commercial organizations using the Internet would not find it prohibitively expensive or burdensome to engage in the methods of age verification proposed by the government, and thus §226(e)(5)(A) and (B) successfully lessen the chill of §226(d) on First Amendment rights. ESC is limited in scope to commercial providers; the plain language of the statute can only be read as aimed at commercial content providers. By definition, these are organizations which can and will pass on the cost of screening devices such as credit card verification, and browser and blocking services, to their consumers, like any other business cost. As the District Court stated, "in the marketplace for cybersmut, the principles of supply and demand would set prices just as they do in any other free market system." In fact, at present, 65% of the national market of browsing/blocking software is comprised of that which is used for screening indecent materials from minors. (R. at 10). This finding of fact is proof that the "reasonably effective actions" of §226(e)(5)(A) have already been determined to be economically feasible; supply and demand exists in a market already formed for these devices.

The fact that commercial content providers may have to enlist the cooperation of third parties to satisfy §226(e)(5)(A) does not make its' defenses ineffective or ESC chilling. The Court in Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 125-26 (1989), held that

"while Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages. Whether Sable chooses to hire operators to determine the source of the calls or engages with the telephone company to arrange for the screening and blocking of out-of-area calls or finds another means for providing messages compatible with community standards is a decision for the message provider to make."

Thus, the fact that a commercial content provider would have to enlist a third party software developer to tag and block indecent materials does not per se chill constitutionally protected speech. Naughty Netsurfers has the option, under §226(e)(5)(A), to engage with software companies like Microstroft or Genius to arrange for screening and blocking minors' access to indecent materials. The decision to use this method to meet community standards of indecency is up to the provider, and constitutionally protected speech is not chilled by giving them that option.

**B. UNDER THE STRICT SCRUTINY STANDARD OF REVIEW, THE GOVERNMENT HAS A COMPELLING INTEREST WHICH ESC IS NARROWLY TAILORED TO**

Sexual expression which is indecent but not obscene is protected by the First Amendment; the sale of indecent materials to adults can not be criminalized solely because they are indecent. The government may, however, regulate the content of such constitutionally protected speech in order to promote a compelling interest, but only if the regulation it chooses is narrowly tailored to effectuate that interest. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). Thus, under this "strict scrutiny" standard of review, appropriate for content-based

regulation of speech, the government may regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses a *reasonably restrictive means* to further the articulated interest. Butler v. Michigan, 352 U.S. 380 (1957). ESC is constitutional under strict scrutiny because the government has a compelling interest in protecting minors from exposure to patently offensive material, and Congress chose a reasonably restrictive means to further than interest when it enacted ESC. Because the statute meets this standard of review, it is not overbroad.

**1. PROTECTING MINORS FROM EXPOSURE TO PATENTLY OFFENSIVE MATERIAL IS A COMPELLING INTEREST.**

Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. Ginsberg v. NY, 390 U.S. 629, 636 (1968). In Ginsberg, the Court held that because of the "exigent interest in preventing distribution to children of objectionable material, the state can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults." Id. at 636. As recently as February of 1996, the Court has found that the interest of protecting children from exposure to patently offensive sex-related material is compelling. Denver Area Educ. Telecomm. Consortium, 116 S.Ct. 2374, 2387 (1996). Thus, it is clear that the government's interest here, namely that of protecting minors from viewing patently offensive material on the Internet, is a compelling one.

2.    ESC IS NARROWLY TAILORED TO THE COMPELLING  
INTEREST OF THE GOVERNMENT

ESC is narrowly tailored to the interest of the government in protecting minors from patently offensive material on the Internet because §226(d), coupled with §226(e)'s affirmative defenses, is reasonably restricted to the evil it is said to combat, and because it preserves for adults the ability to engage in constitutionally protected communications. "The benefit gained [by a content-based restriction] must outweigh the loss of constitutionally protected rights." Elrod v. Burns, 427 U.S. 347, 363 (1976) (plurality opinion).

In Butler v. Michigan, 352 U.S. 380 (1957), a Michigan statute which prohibited making available to the general public a book having a potentially deleterious influence on youth was held to be unconstitutional because it reduced the ability of the adult population to read that which it has a constitutional right to read. The State had argued that by quarantining the general reading public against "books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare." Id. at 383. The Court found, however, that the statute was not reasonably restricted to the evil with which it was said to deal. "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." Id. at 383. This case was insufficiently tailored because it denied constitutional rights to adults, which outweighed the interest of protecting minors.

In Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989), the statute did not pass the strict scrutiny standard of review because it was not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages. The court reasoned that the statute had the "invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear." Id. at 131. "Because the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny." Id. 131.

Unlike the statutes in Butler and Sable, ESC does not limit the content of adult Internet communications to that which is suitable only for children to see; ESC is reasonably restricted to the evil with which it is said to deal, that of protecting minors from viewing patently offensive material on the Internet. ESC is not a complete ban of indecent materials on the Internet. ESC merely places reasonable restrictions on the transmission of patently offensive materials. As stated in part II of this brief, §226(e)(5) contains two affirmative defenses that eliminate the possibility that the adult population will effectively be reduced to viewing only that which is fit for children, because they allow providers to continue transmitting with the knowledge that their compliance with §226(e) protects themselves from prosecution. Because ESC is limited to commercial content providers, and because the defenses afforded them are technologically feasible,



economically possible, and not burdensome, providers like Naughty Netsurfers are not *in effect* banned from transmitting indecent materials to adults by ESC. Therefore, ESC is reasonably restricted to the protection of children, and satisfies strict judicial scrutiny.

The benefit gained from this content-based restriction, namely protection minors from viewing indecent material on the Internet, far outweighs the loss of constitutionally protected rights, which are minimal to none. ESC will at most deter only the transmission on the Internet of "patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern." FCC v. Pacifica Found., 438 U.S. 726, 743 (1978).

#### CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court to reverse the ruling of the United States Court of Appeals for the Fourteenth Circuit as to the unconstitutionality of ESC based on vagueness and overbreadth.

Respectfully submitted,

Counsel for Petitioner  
