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THE CONSTITUTIONAL CONSTRAINTS ON STATE REGULATIONS OF THE INTERNET: *ACLU V. JOHNSON*[1]

INTRODUCTION

What is the Internet? Who controls the World Wide Web? Where are the boundaries in Cyberspace? These are all questions without clear answers. The government has tried to come to terms with a phenomenon that is understood by few and utilized by many. Researchers and scholars alike have attempted to measure the impact of the Internet on society with varying degrees of success. The results of the many attempts to measure the Internet have been unclear simply because there is no accurate way to test the results. Yet, some statistics regarding the impact of the Internet are indeed impressive. For example, one survey estimated that U.S. consumers spent approximately $8.2 billion on online purchases during the 1998 holiday season.[2] The same survey estimated that there were 57,037,000 Internet users as of May 1998.[3] Without doubt this number will have significantly increased by the time this comment is published. The fact remains that the Internet is a medium of both commerce and communication with unknown potential and impact on human society. But with this unique growth comes unique challenges. Nowhere have these challenges been more controversial or more publicly debated than in the American judicial system. Within the last decade, American courts wrestled with the Internet on several occasions. The judicial inquiries primarily focused on the constraints the Constitution imposes on the Internet. These challenges primarily addressed two constitutional concerns: First Amendment guarantees of free speech and the Commerce Clause.

The United States Court of Appeals for the Tenth Circuit recently delivered an opinion on the issue of regulating the dissemination of information over the Internet. In *ACLU v. Johnson*,[4] the court considered the constitutional validity of a New Mexico statute.[5] This decision was one of first impression to the Tenth Circuit. The plaintiffs challenged the New Mexico statute on both First Amendment and Commerce Clause grounds.[6] The court reached its decision to invalidate the New Mexico

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1. 194 F.3d 1149 (10th Cir. 1999).

2. World Wide Web User Statistics, *available at* http://www.why-not.com/company/stats.htm (last visited March 1, 2000).

3. *Id.*

4. 194 F.3d 1149 (10th Cir. 1999).

5. N.M. STAT. ANN. § 30-37-3.2 (1999) (preliminarily enjoined from enforcement at ACLU v. Johnson, 194 F.3d 1149, 1164 (1999)).

6. 194 F.3d at 1152 (10th Cir. 1999).

statute by relying heavily upon a recent United States Supreme Court decision, *Reno v. ACLU.*[7] The primary challenge to the statute in *Johnson* alleged that the New Mexico statute placed an unconstitutional burden on the First Amendment's free speech guarantees.[8] The Tenth Circuit focused primarily on the First Amendment issue in invalidating the statute. Therefore, the primary concern of this comment is to examine the First Amendment implications of the *Johnson* decision by the Tenth Circuit.

Part I of this comment provides a brief historical context within which the Court recently decided *ACLU v. Johnson.*[9] Part II examines the ramifications of the decision with respect to First Amendment guarantees and future regulation of information distributed over the internet. Part III discusses the application of the Commerce Clause in the context of regulating information distributed over the internet. Finally, Part IV analyzes the future implications of *Johnson* and relevant United States Supreme Court decisions.

I. HISTORICAL BACKGROUND

The recent Tenth Circuit decision in *ACLU v. Johnson*[10] arose in the context of the explosive growth of the internet both as a means of communication and as an instrument of commerce. The phenomenal growth of the Internet attracted the attention of concerned state and federal legislators. Accordingly, the internet also produced constitutional challenges as a by-product of its unprecedented growth.[11] In reaching its decision in *Johnson*, the Tenth Circuit relied heavily upon the United States Supreme Court decision in *Reno v. ACLU* (hereinafter "*Reno II*").[12] This

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7. 521 U.S. 844 (1997).

8. 194 F.3d at 1153 (10th Cir. 1999).

9. 521 U.S. 844 (1997).

10. 194 F.3d 1149 (10th Cir. 1999).

11. *See* Reno v. ACLU (*"Reno I"*), 929 F. Supp. 824 (E.D. Pa. 1996)(preliminarily enjoining the enforcement of the Communications Decency Act (CDA), 47 U.S.C.A. § 223(a), (b)); Reno v. ACLU ("Reno II"), 521 U.S. 844, 885 (1997) (affirming the United States District Court for the Eastern District of Pennsylvania in granting a preliminary injunction against the enforcement of the Communications Decency Act (CDA), 47 U.S.C.A. § 223(a), (b) (1999)); ACLU v. Reno ("Reno III"), 31 F. Supp. 2d 473 (E.D. Pa. 1999) (affirming a preliminary injunction enjoining enforcement of the Child Online Protection Act (COPA) 47 U.S.C.A. § 231(1999)); ACLU v. Reno ("Reno IV"), 217 F.3d 162 (3d Cir. 2000)(affirming the District Court in *Reno III*);United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (U.S. 2000); PSINet, Inc. v. Chapman, 108 F. Supp. 2d 611 (W.D. Va. 2000) (granting a preliminary injunction against the enforcement of Va. Code Ann. § 18.2-391 (Mich. Supp. 1999) (amended 2000)); Cyberspace Comm., Inc. v. Engler, 55 F. Supp. 2d 737 (E.D. Mich. 1999) (granting preliminary injunction against the enforcement of Michigan law, Pub. Act No. 33 (1999), amending Mich. Comp. Laws § 722.671); Hatch v. Superior Ct., 94 Cal. Rptr. 2d 453 (Cal. App. 4th Dist. 2000) (upholding California law regulating the Internet as Constitutional as applied).

12. 521 U.S. 844 (1997).

case struck down a portion of a federal statute[13] that sought to regulate the dissemination of materials deemed harmful to minors over the Internet.[14] The Court held that the federal statute was unconstitutionally vague and overbroad and that the statute violated the First Amendment guarantee of freedom of speech.[15] Since *Reno II* played a prominent role in the Tenth Circuit's decision in *Johnson*, *Reno II* deserves closer examination.

The Telecommunications Act of 1996[16] promoted the primary Congressional goal to "reduce regulation and encourage the rapid deployment of new telecommunications technologies."[17] This Act contains seven titles, one of which (Title V) is known as the "Communications Decency Act of 1996" (hereinafter *CDA*).[18] On February 8, 1996, twenty plaintiffs filed suit in the United States District Court for the Eastern District of Pennsylvania against the Attorney General of the United States and the Department of Justice.[19] The plaintiffs included the American Civil Liberties Union (hereinafter *ACLU*), Human Rights Watch, Electronic Privacy Information Center and other such potentially effected parties.[20] These plaintiffs challenged the constitutionality of §§223(a)(1) and 233(d) of the CDA.[21] The District Court entered a temporary restraining order against the enforcement of §223(a)(1)(B)(ii).[22]

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13. The Court struck down a portion of the Communications Decency Act of 1996, located at 47 U.S.C. § 223(a) and 223(d). Section 223(a) stated in pertinent 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." Section 223(d) stated in pertinent 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 user of such service placed the call or initiated the communication, or (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."

14. *Reno*, 521 U.S. at 857.

15. *Id.*

16. PUB. L. 104-104, 110 STAT. 56.

17. *Reno*, 521 U.S. at 857 (citing the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. at 56).

18. *Id.*

19. *Id.* at 861.

20. *Id.*

21. *Id.*

22. *Id.*

Twenty-seven additional plaintiffs also challenging the provisions of the CDA subsequently filed a second suit.[23] The two suits were consolidated and evidentiary hearings were held before a three-judge panel.[24] Following these hearings, each judge issued a separate opinion, unanimously holding that the CDA was likely unconstitutional and granting an injunction against its enforcement.[25] The government appealed this decision directly to the United States Supreme Court by invoking §561 of the CDA.[26]

On appeal, the government argued that the District Court erred in finding that the CDA violated both the First and Fifth Amendment of the Constitution.[27] The Supreme Court affirmed the District Court's holding on First Amendment grounds without addressing the Fifth Amendment contentions.[28] The government relied upon *Ginsburg v. New York,*[29] *FCC v. Pacifica Foundation,*[30] and *Renton v. Playtime Theatres*[31] to argue that the challenged provisions of the CDA were constitutional.[32] The Supreme Court distinguished each of these decisions from the present scenario in *Reno II.*[33]

Ginsburg v. New York upheld the constitutionality of a New York statute that prohibited the selling of material that was considered obscene for minors to persons less than seventeen years of age.[34] The case involved the criminal prosecution of a storeowner who sold two "girlie" magazines to a sixteen-year-old boy.[35] The Supreme Court reasoned that obscene materials are not within the area of constitutionally protected speech.[36] However, under the Court's rationale, the "girlie" magazines involved in *Ginsburg* were not obscene for adults.[37] The statute in question did not restrain the defendant from selling such items to persons seventeen years or older.[38] The statute merely required that such material

23. *Id.*
24. *Id.*
25. *Id.* at 862-64. Chief Judge Sloviter concluded that the terms of the CDA were overbroad and could not reasonably be read narrowly. 929 F. Supp. at 853-55. Judge Buckwalter concluded that terms "indecent", "patently offensive", and "in context" in § 223(d)(1) were unconstitutionally vague. 929 F. Supp. at 863-65. Judge Dalzell concluded that the CDA would "abridge significant protected speech." 929 F. Supp. at 867-79.
26. *Id.* at 864.
27. *Id.*
28. *Id.*
29. 390 U.S. 629 (1968).
30. 438 U.S. 726 (1978).
31. 475 U.S. 41 (1986).
32. *Reno,* 521 U.S. at 864.
33. *Id.*
34. *Ginsburg,* 390 U.S. at 633.
35. *Id.* at 631.
36. *Id.* at 635 (citing Roth v. United States, 354 U.S. 476, 485 (1957).
37. *Id.* at 634 (citing Redrup v. State of New York, 386 U.S. 767 (1967).
38. *Id* at 634-35.

not be sold to persons under age seventeen.[39] The Court concluded that the state had an interest in protecting the well being of its children, that the materials in question could reasonably be held to impair the ethical and moral development of minors.[40] Ultimately, the Court held that the statute did not violate any constitutional guarantees.[41]

The *Reno II* Court found several significant facts that differentiated the instant situation from the facts found in *Ginsburg*. First, the *Ginsburg* statute did not prohibit the sale of "girlie" magazines to parents who wished to provide the magazines to their children.[42] However, under the CDA, neither parental consent nor parental participation would avoid the criminal sanctions.[43] Second, the *Ginsburg* statute applied exclusively to commercial transactions[44] while the CDA contained no limitations on the type of speech to which it applied.[45] Third, the *Ginsburg* statute defined materials that were harmful to minors as those "utterly without redeeming social importance for minors."[46] In *Reno II*, however, the CDA provided no such requirement.[47] Finally, the *Ginsburg* statute defined minors as under age seventeen while the CDA defined minors as those under age eighteen.[48] The *Reno II* Court felt that this additional year might be significant in regulating access to indecent materials.[49]

The government also relied upon *Federal Communications Commission v. Pacifica Foundation*[50] (hereinafter *Pacifica*) on appeal in *Reno II*. In *Pacifica*, the Court upheld a declaratory order of the Federal Communications Commission (hereinafter *FCC*), which concluded that an afternoon radio broadcast of a comedic monologue was indecent.[51] The *Pacifica* Court held that the ease of access by children to the broadcast "coupled with the concerns recognized in *Ginsburg* justified special treatment of indecent broadcasting."[52] The *Reno II* Court distinguished the *Pacifica* holding on several grounds. First, the FCC, an agency that regularly regulates radio transmissions, issued the order in *Pacifica*.[53] Further, the FCC regulation concerned a specific broadcast with respect to when, rather then whether, it would be permissible to broadcast such a

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39. *Id.*
40. *Id.* at 641-45.
41. *Id.*
42. *Reno*, 521 U.S. at 865 (citing *Ginsburg*, 390 U.S. at 639).
43. *Id.* at 865.
44. *Id.* (citing *Ginsburg*, 390 U.S. at 647).
45. *Id.*
46. *Id.* (citing *Ginsburg*, 390 U.S. at 646).
47. *Id.* (citing CDA § 223(a)(1); § 223(d)).
48. *Id.* at 865-66.
49. *Id.* at 866.
50. 438 U.S. 726 (1978).
51. *Reno*, 521 U.S. at 866 (citing *Pacifica*, 438 U.S. at 730).
52. *Id.* at 866-67 (citing *Pacifica*, 438 U.S. at 749-750).
53. *Id.* at 867.

program via radio transmission.[54] In contrast, the CDA prohibitions did not provide for particular times when the dissemination of indecent material would be accepted and the CDA prohibitions are not subject to any government agency control.[55] Second, the Commission's "order was not punitive," while the CDA is punitive in nature.[56] Finally, the Commission's order applied to radio broadcast, a medium of communication that historically limited First Amendment protections.[57] In contrast, the Internet has no such history of regulation.[58] Further, the *Reno II* Court noted that the risk of accidental encounter of indecent material by minors is much more remote on the internet in comparison to radio broadcast due to a series of affirmative steps that are required to access materials on the internet.[59] In light of these factual differences, the Court held that *Pacifica* was not directly applicable to the facts of *Reno II*.[60]

Finally, the government in *Reno II* relied on *Renton v. Playtime Theatres, Inc.*[61] to argue that the CDA was constitutionally sound.[62] The *Renton* Court upheld a zoning ordinance that prohibited adult theaters in residential neighborhoods.[63] The Court upheld this ordinance because its focus was not the offensive nature of the theaters themselves, but rather the "secondary effects" such as crime and deteriorating property values.[64] The *Reno II* Court held that the CDA was not a similar type of "time, place, and manner regulation" as was the ordinance in *Renton*.[65] Rather, the Court held that the CDA was a "content-based, blanket restriction on speech, and as such cannot be 'properly analyzed as a form of time, place, and manner regulation.'"[66] Therefore, the *Reno II* Court held that all three of the government's key precedents were inapposite to the facts before it on appeal.[67]

After reviewing the government's key cases, the *Reno II* Court considered the proper standard of scrutiny to apply in content-based regulation of the internet. The Court noted that "each medium of expression . . . may present its own problems."[68] Additionally, the Court agreed with the District Court's finding that "communications over the Internet do not

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* (citing *Pacifica*, 438 U.S. at 748).
58. *Id.*
59. *Id.*
60. *Id.* at 868.
61. 475 U.S. 41 (1986) (hereinafter *Renton*).
62. *Reno*, 521 U.S. at 864.
63. *Id.*
64. *Renton*, 475 U.S. at 49.
65. *Reno*, 521 U.S. at 868.
66. *Id.* (quoting *Renton*, 475 U.S. at 46).
67. *Id.*
68. *Id.* (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)).

'invade' an individual's home or appear on one's computer screen unbidden."[69] Thus, the Court recognized the unique characteristics of the internet as a medium of expression. This unique nature became the cornerstone of the Court's analysis and conclusion.

First, the Court considered the claim that the challenged provisions of the CDA were unconstitutionally vague and a violation of the First Amendment. Specifically, the Court addressed the statutory term "indecent"[70] and the statutory phrase "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[71] The Court reasoned that the lack of definition of these terms would "provoke uncertainty among speakers about how the two standards relate to each other . . . ."[72] The effect of the ambiguity and uncertainty surrounding these terms, in combination with the potential criminal consequences that would result from a violation, lead the Court to conclude that this ambiguous legislation was a content-based regulation that would have an "obvious chilling effect on free speech."[73] The government countered by arguing that the CDA was no more vague than the obscenity standard provided in *Miller v. California*.[74]

In *Miller v. California*,[75] the Court set forth a test for obscenity, which still controls today. The *Miller* test provides that:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[76]

The government asserted that because the CDA's term "patently offensive" is one part of the *Miller* test, the CDA could not be unconstitutional.[77] However, the Court found this argument unpersuasive because the *Miller* test contains a crucial requirement that the CDA did not require. The *Miller* test requires that the proscribed materials be "specifically defined by the applicable state law."[78] The Court reasoned that this requirement would reduce the vagueness found in the "patently offen-

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69. *Id.* at 869 (quoting *Reno I*, 929 F. Supp. at 844 (finding 88)).
70. *As used in* 47 U.S.C.A. § 223(a).
71. *As used in* 47 U.S.C.A. § 223(d).
72. *Id.* at 871.
73. *Id.* at 872.
74. *Reno*, 521 U.S. at 872 (citing *Miller*, 413 U.S. 15 (1973)).
75. 413 U.S. 15 (1973).
76. *Reno*, 521 U.S. at 872 (citing *Miller*, 413 U.S. at 24).
77. *Id.* at 873.
78. *Id.* (quoting *Miller*, 413 U.S. at 24).

sive" standard of the CDA.[79] Yet such a requirement is not contained in the text of the CDA.[80] Therefore, the Court found the CDA to be inherently vague while the *Miller* test provided adequate protections against vague definitions of proscribed speech in content-based regulations.[81]

The *Reno II* Court also briefly considered the other two prongs of the *Miller* test. The Court first addressed the requirement that the material lack "serious literary, artistic, political, or scientific value."[82] The Court noted that in prior applications of this prong of the *Miller* test, the requirement is "not judged by contemporary community standards."[83] Thus, this "societal value" requirement allows courts to set forth a national standard for a "socially redeeming value."[84] The *Reno II* Court took notice that the CDA could not simultaneously adhere to the *Miller* test requirement of applying the "community standards" test as a question of fact, left to a jury, and also provide a uniform national standard of content regulation.[85] As the Court noted in *Miller*, the determination of "what appeals to the 'prurient interest' or is 'patently offensive' are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation."[86] Yet, while the CDA was under Committee consideration in the Senate, the conference reports assert that the "CDA was intended 'to establish a uniform national standard of content regulation.'"[87] The *Reno II* Court concluded that the CDA clearly contrasted with the test set forth in *Miller*, and as a result, it "presents a greater threat of censoring speech that in fact, falls outside the statute's scope."[88] Thus, the CDA was held to be an over-inclusive restriction of speech based upon content.[89]

In construing the CDA as an over-inclusive, content-based restriction, the *Reno II* Court moved to consider the necessary standard of review arising from a challenge to the First Amendment.[90] Precedent clearly dictated the rule that in the consideration of free speech rights of adults, "sexual expression which is indecent but not obscene is protected

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79. *Id.*
80. *Id.*
81. *See Reno*, 521 U.S. at 874.
82. *Id.* at 873 (quoting *Miller*, 413 U.S. at 24).
83. *Id.* (quoting *Pope v. Illinois*, 481 U.S. 497, 500 (1987)).
84. *Id.*
85. *Id.* at 873, n.39.
86. *Id.* (quoting *Miller*, 413 U.S. 15, 30).
87. *Id.* at n. 39. (quoting S. Conf. Rep. No. 104-230, p. 189, 191 (1996), 142 Cong. Rec. H1145, H1165-H1166 (Feb. 1, 1996)).
88. *Id.* at 874.
89. *Id.*
90. *Id.* at 874-75.

by the First Amendment."[91] The government asserted that it held a legitimate state interest in protecting children from indecent material by the enactment of the CDA.[92] However, under a strict scrutiny test the Court noted that the "burden placed upon adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate state purpose that the statute was enacted to serve."[93] The Court did not explicitly consider whether or not the asserted governmental interest in protecting minor children was indeed a legitimate state interest; rather, it merely assumed that such an interest was legitimate and moved to consider the effects of the statute itself on adult speech.[94]

In evaluating the effects of the CDA, the Court acknowledged that despite its prior recognition of a governmental interest in protecting children from harmful materials,[95] such an interest "does not justify an unnecessarily broad suppression of speech addressed by adults . . . the Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'"[96] The mere fact that the stated purpose of the CDA was to protect children was not conclusive with respect to its Constitutional validity; rather, the Court recognized that its role in such situations was to "make sure that Congress has designed its statute to accomplish its purpose 'without imposing an unnecessarily great restriction on speech.'"[97] The Court agreed with the District Court's factual analysis, which suggested that the over-breath of the CDA would curtail the ability of adults to communicate over the internet.[98] The District Court noted that at the time of trial, no technology existed to provide an effective method for a sender of information to assure that only adults accessed that information.[99] Additionally, the requirement of such age verification systems would be "prohibitively expensive for non-commercial as well some commercial speakers" to implement and utilize.[100]

In the final weighing of the prohibitive effects of the CDA on adult speech against the state's interest in protecting children, the *Reno II* Court ultimately held the challenged terms of the CDA to be facially

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91. *Id.* at 874 (quoting *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

92. *Id.*

93. *Id.*

94. *See generally* Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427 (discussing the need for the Supreme Court to more fully consider the asserted government interests in cases involving the regulation of the content of speech, where the protection of children is the stated purpose of the law).

95. *Reno*, 521 U.S. at 875 (citing *Ginsburg*, 390 U.S. at 639; *Pacifica*, 438 U.S. at 749).

96. *Id.* (quoting *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996)).

97. *Id.* at 876 (quoting *Denver Area Ed.*, 518 U.S. at 741).

98. *Id.*

99. *Id.* at 876.

100. *Id.* at 877.

over-broad, imposing an undue restriction on the content of speech.[101] In the concluding words of the Court, "government regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interests in encouraging freedom of expression in a democratic society outweigh any theoretical but unproven benefit of censorship."[102]

Since the delivery of the *Reno II* decision, several other federal courts considered similar challenges to state statutes that had substantially similar language and goals.[103] The recent Tenth Circuit decision in *ACLU v. Johnson*[104] is one such case.

II. FIRST AMENDMENT GUARANTEES

A. *ACLU v. Johnson*

1. Facts

The plaintiffs in *ACLU v. Johnson*[105] consisted of a large group of individuals affected by a New Mexico statute[106] that sought to regulate the dissemination of information to minors over the internet. The plaintiffs included the ACLU, Feminist.com, Full Circle Books, OBGYN.net, Santa Fe Online and several others.[107] The defendants were Gary Johnson, the Governor of New Mexico, and Patricia A. Madrid, the Attorney General of New Mexico.[108]

The statute in question sought to criminalize the computerized dissemination of materials harmful to minors.[109] This statute stated in relevant part:

> Dissemination of material that is harmful to a minor by computer consists of the use of a computer communications system that allows the input, output, examination or transfer of computer data or computer programs from one computer to another, to knowingly and intentionally initiate or engage in communication with a person under eighteen years of age when such communication in whole or in part depicts actual or simulated nudity, sexual intercourse or any other

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101. *Id.*
102. *Id.* at 885.
103. *See* cases, *supra* note 11.
104. 194 F.3d 1149 (10th Cir. 1999).
105. *Id.*
106. N.M. STAT. ANN. § 30-37-3.2 (1999).
107. *ACLU*, 194 F.3d at 1149.
108. *Id.*
109. N.M. STAT. ANN. § 30-37-3.2 (1999).

> sexual conduct. Whoever commits dissemination of material that is harmful to a minor by computer is guilty of a misdemeanor.[110]

The plaintiffs based their initial challenge in the United States District Court for the District of New Mexico on the grounds that the criminal statute regulating the content of material on the Internet violated the First, Fifth, and Fourteenth Amendments as well as the Commerce Clause of the United States Constitution.[111] The plaintiffs sought a preliminary and permanent injunction against the enforcement of the statute in question.[112] The District Court addressed the preliminary issues of standing, the bar against such a suit provided in the Eleventh Amendment, and the necessity for the court to abstain from granting an injunction until the New Mexico Supreme Court had an opportunity to interpret the language of the statute.[113] The District Court held that the plaintiffs had proper standing to bring this suit, the Eleventh Amendment did not bar this suit, and the issue was ripe for judicial review. The District Court granted the plaintiffs' motion for a preliminary injunction, therein prohibiting enforcement of the statute.[114] The defendants appealed this decision.[115]

The decision by the Tenth Circuit considered the appeal brought by the defendants.[116] The defendants argued on appeal that the plaintiffs lacked standing to bring this suit; that the court erred in determining that the plaintiffs were likely to succeed on the merits of their challenge; that the court erroneously held that the plaintiffs would suffer irreparable harm unless the injunction was issued; and that the court reached various other erroneous legal conclusions.[117] The Tenth Circuit ultimately affirmed the District Court's decision to grant the preliminary injunction.[118]

2. Standing

The Court of Appeals first addressed the defendants' challenge to the plaintiffs' standing. The court noted that "standing is a threshold

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110. N.M. STAT. ANN. § 30-37-3.2 (A) (1999).

111. ACLU v. Johnson, 4 F. Supp. 2d 1024, 1026 (D.N.M. 1998). The First Amendment states in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ." The Fifth Amendment states in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." The Fourteenth Amendment, Section 1 states in relevant part: ". . . [N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ." Article II, Section 8, Paragraph 1,3 states in relevant part: "The Congress shall have Power . . . 3. To regulate Commerce with foreign Nations, and among the several States . . . ."

112. *Id.*

113. *ACLU*, 194 F.3d at 1153.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1153-54.

118. *Id.* at 1163.

issue,"[119] and in order to establish standing, the plaintiffs "must have suffered an 'injury in fact.'"[120] Thus, in order to demonstrate that they suffered an "injury in fact" the plaintiffs had to show "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."[121] The defendants argued that because the statute had not been enforced, the plaintiffs lacked standing.[122] In fact, the statute in question was not effective at the time the plaintiffs brought the suit.[123] Thus, the defendants argued that the plaintiffs had not suffered any "real and concrete threat of prosecution from law enforcement authorities."[124] The court disagreed.[125]

The Tenth Circuit's reasoning on this issue relied heavily upon *Lujan v. Defenders of Wildlife*.[126] In *Lujan*, the Court stated that "[n]o one should have to go through being arrested for a felony, publicly shamed, and pay for a defense only to have a court find that the newly enacted statute is unconstitutional. This can, and should, be determined before such injury occurs."[127] Additionally, the instant court reasoned that the issue in this case was ripe for review.[128] The court stated, "if a threatened injury is sufficiently 'imminent' to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied."[129] Further the court recognized that "customary ripeness analysis . . . is . . . relaxed somewhat . . . where a facial challenge implicating First Amendment values, is brought."[130] Thus, the court reasoned, "in that situation, 'reasonable predictability of enforcement or threats of enforcement, without more, have sometimes been enough to ripen a claim.'"[131] Accordingly, the Court affirmed the District Court's holding

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119. *Id.* at 1154 (citing Keys v. School Dist. No. 1, 119F.3d 1437, 1445 (10th Cir. 1997)).

120. *Id.* (citing Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1572 (10th Cir. 1995) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

121. *Id.* (quoting *Lujan*, 504 U.S. at 560).

122. *Id.*

123. N.M. STAT. ANN. § 30-37-3.2 (effective date July 1, 1998). The U.S. District Court for the District of New Mexico issued its decision granting plaintiffs' motion for a preliminary injunction against the enforcement of this statute on June 24, 1998. 4. F.Supp. 2d at 1024 (D.N.M. 1998). Thus, the injunction was granted prior to the date that the statute in question was to become effective.

124. *ACLU*, 194 F. 3d at 1154 (citing Defendants' brief at 43).

125. *Id.*

126. 504 U.S. 555 (1992).

127. *ACLU*, 194 F.3d at 1154 (citing *Lujan*, 504 U.S. at 564 n.2).

128. *Id.* at 1155.

129. *Id.* at 1155 (quoting Nat'l Treasury Employees Union v. United States, 101 F.3d 1423, 1428 (D.C. Cir. 1996)).

130. Id. (quoting New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir. 1995)).

131. *Id.* (citing *Gonzales*, 64 F.3d at 1499 (10th Cir. 1995) (quoting Martin Tractor Co. v. Federal Election Comm'n, 627 F.2d 375, 380 (D.C. Cir. 1980))).

that the plaintiffs had proper standing to bring this suit before the court.[132]

3. First Amendment

The District Court held that the New Mexico statute in question violated the First and Fourteenth Amendments "because it effectively bans speech that is constitutionally protected for adults;" it does not "directly and materially advance a compelling governmental interest;" it is not "the least restrictive means of serving its stated interest;" it "interferes with the rights of minors to access and view material that to them is protected by the First Amendment;" it is "substantially overbroad;" and it "prevents people from communicating and accessing information anonymously."[133] The defendants challenged these findings on appeal by arguing that the statute "can and must be read narrowly, and so narrowed, the statue is constitutional under the authority of *Ginsburg v. New York.*"[134] The court ultimately rejected the defendants' argument and affirmed the findings of the lower court on this issue.[135] In reaching its conclusion, the Tenth Circuit relied heavily upon the recent decision of *Reno v. ACLU (Reno II).*[136]

The United States Supreme Court stated that the government may "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[137] Further, the Court noted that "sexual expression which is indecent but is not obscene is protected by the First Amendment."[138] Thus, the Court held that although a "compelling" governmental interest existed in "protecting the physical and psychological well-being of minors;" nevertheless, the means chosen by the government must be "carefully tailored" to meet that end.[139] The Court applied this same standard of "strict scrutiny" to the content-based regulation found in *Reno v. ACLU (Reno II).*[140]

In *Reno II*, the Supreme Court held that portions of the Communications Decency Act (CDA)[141] violated the First Amendment.[142] The *Reno*

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132. *Id.*

133. *Id.* at 1156.

134. *ACLU*, 194 F.3d at 1156 (citing Ginsburg v. New York, 390 U.S. 629 (1968)).

135. *Id.*

136. 521 U.S. 844 (1997).

137. *Johnson*, 194 F. Supp. 2d at 1156 (quoting *Sable* Communications Inc. v. FCC, 492 U.S. 115, 126 (1989)). This is essentially a "strict scrutiny" test utilized where fundamental rights are implicated.

138. *Id.* (quoting *Sable Comm.*, 492 U.S. at 126 (1989)).

139. *Id.* (quoting *Sable Comm.*, 492 U.S. at 126 (1989)).

140. *Id.* (discussing *Reno v. ACLU*, 521 U.S. at 870). *See* discussion of *Reno II*, 521 U.S. 844 (1997), *infra* Part I.

141. 47 U.S.C. § 223(a)(1), (d) (2000).

142. *ACLU*, 194 F.3d at 1156.

II Court concluded that "given the size of the potential audience for most messages...the sender must be charged with knowing that one or more minors will likely view it."[143] Additionally, the Court viewed the potential costs to the many non-commercial users of the internet to verify the age of its viewers would be prohibitive of speech.[144] Thus, the Court held that the CDA placed too heavy a burden on the exercise of protected speech and therefore the challenged provisions were unconstitutionally vague and overbroad.[145]

The Tenth Circuit *Johnson* decision followed essentially the same rationale in determining that the New Mexico statute in question was also unconstitutionally vague and broad. In *Johnson*, the court noted that the similarity between the CDA discussed in *Reno II* and the New Mexico statute currently in question compelled the same result.[146] In *Johnson*, as in *Reno II*, the government argued that the statute in question could and should be construed narrowly.[147] The government in *Johnson* argued that the statute would only apply in situations where an adult sender of a message "knowingly and intentionally" sends a harmful message directly to a minor.[148] Therefore, the statute would not apply to chat rooms or other situations where both adults and children were involved simultaneously.[149] The government, like in *Reno II*, attempted to liken the scenario here to the one faced in *Ginsburg v. New York*.[150] Both the *Reno II* and *Johnson* courts determined the situation in *Ginsburg* to be factually different from the regulations presented in both cases.[151]

In *Ginsburg*, the Court addressed the sale of sexually explicit materials in a face-to-face situation.[152] In contrast, both the *Reno II* and *Johnson* situations involved the dissemination of sexually explicit materials over the Internet. The *Johnson* court agreed with the *Reno II* Court that the regulation of information being disseminated over the internet introduced new problems that more fully, and consequently unduly, restricted the freedom of speech and expression.[153] The *Johnson* court noted that the unique nature of the internet does not allow for accurate, in person age verification prior to the dissemination of sexually explicit materials.[154] Similarly, as noted by the Supreme Court in *Reno II*, the

143. *Reno II*, 521 U.S. at 876.
144. *Id.* at 876-77.
145. *Id.* at 885-86.
146. *Johnson*, 194 F.3d at 1158.
147. *Id.*
148. *Id.*
149. *Id.*
150. 390 U.S. 629 (1968).
151. *Johnson*, 194 F.3d at 1158. *See* discussion of *Ginsburg*, *infra* Part I.
152. *Id.*
153. *Id.*
154. *Id.*

Johnson court recognized that "[t]he Internet does not distinguish between minors and adults in their audience. To comply with the Act, a communicant must speak only in language suitable for children."[155] The chilling effect on the otherwise protected adult speech by both the CDA in *Reno II* and the New Mexico statute in *Johnson*, coupled with the inability of internet information providers to perform physical age verification, led the *Johnson* court to conclude that *Ginsburg* did not apply to content based restrictions of information disseminated via the internet.[156]

Finally, the government in *Johnson* argued that the defenses explicitly provided in the New Mexico statute in question allowed for a narrow reading, thereby saving an otherwise invalid unconstitutional provision.[157] The court disagreed.[158] The defense to which the government referred provided a "good faith" defense.[159] This "good faith" defense essentially allowed parties who disseminated harmful information over the internet to plead an affirmative defense that they took reasonable steps to restrict access to the information by minors.[160] In *Johnson*, the court concluded that these defenses did "not salvage an otherwise unconstitutionally broad statute."[161] This holding was similar to the Supreme Court decision with respect to comparable statutory defenses encountered in *Reno II*[162] and by the district court in *Cyberspace Communications, Inc.*[163] Thus, the statutory defenses for "good faith" efforts by

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155. *Id.* (citing Cyberspace Comm., Inc. v. Engler, 55 F. Supp. 2d 737, 747 (E.D. Mich. 1999)).

156. *Id.* at 1160.

157. *Id.*

158. *Id.*

159. *Id.* at 1152.

160. N.M. Stat. Ann. § 30-37-3.2(C) (1999). This portion of the statute stated in relevant part:

> (C) In a prosecution for dissemination of material that is harmful to a minor by computer, it is a defense that the defendant has: (1) in good faith taken reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to indecent materials on computer, including any method that is feasible with available technology; (2) restricted access to indecent materials by requiring the use of a verified credit card, debit account, adult access code or adult personal identification number; or (3) in good faith established a mechanism such as labeling, segregation or other means that enables the indecent material to be automatically blocked or screened by software or other capability reasonably available to persons who wish to effect such blocking or screening and the defendant has not otherwise solicited a minor not subject to such screening or blocking capabilities to access the indecent material or to circumvent the screening or blocking.

N.M. Stat. Ann. § 30-37-3.2(C).

161. *Johnson*, 194 F.3d. at 1160.

162. *Id.* (citing *Reno*, 521 U.S. at 882).

163. *Id.* (citing *Cyberspace Comm. Inc.*, 55 F. Supp. 2d at 751). In *Cyberspace Comm. Inc.*, the United States District Court for the Eastern District of Michigan, Southern Division, addressed a challenge to an amendment to a Michigan statute (Pub. Act No. 33 (1999), amending Mich. Comp. Laws § 722.671 et seq.). *Cyberspace Comm. Inc.*, 55 F. Supp.2d at 740. This amendment prohibited the use of computers or the Internet to disseminate sexually explicit materials to minors. *Id.* The plaintiffs sought a preliminary injunction against the enforcement of this amendment, arguing that it violated the First Amendment and the Commerce Clause of the U.S. Constitution. *Id.*

defendants have not been held to provide adequate protections against the otherwise unconstitutional restraint placed upon protected speech in any statutes attempting to regulate the dissemination of indecent materials to minors via the internet.

III. COMMERCE CLAUSE

The *Johnson* court next considered the effects of the New Mexico statute on the Commerce Clause.[164] The defendants argued that the New Mexico statute in question sought to regulate merely intrastate activities; and therefore, the statute did not violate the Dormant Commerce Clause of the Constitution.[165] Again, the court returned to the unique nature of the internet in its analysis. The court noted that the geographic limitations placed upon states' jurisdictional limits in the field of commercial regulation do not easily apply to commerce via the internet.[166] The court stated that given the lack of geographic limitations on the internet, it is impossible to regulate only those communications that occur within the geographic borders of a single state.[167] The statute "cannot effectively be limited to purely intrastate communications over the internet because no such communications exist."[168] As a result, any state statute, including the one in question in *Johnson*, regulates conduct outside the state; and therefore, violates the Commerce Clause limitations of the United States Constitution. Thus, the *Johnson* court held that the New Mexico statute "represents an attempt to regulate interstate conduct occurring outside New Mexico's borders, and is accordingly a per se violation of the Commerce Clause."[169]

Second, the *Johnson* court considered the burden placed upon interstate commerce in comparison to the local benefit.[170] The defendants argued that the state of New Mexico held a significant interest in protecting minors from sexually explicit materials.[171] The court noted that the local benefits to New Mexico were insubstantial.[172] If the court were to read the statute as the defendants proposed, then this statute would affect only one-on-one communications between a New Mexico sender

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The District Court held that the amendments, if enforced against the plaintiffs, would indeed violate the First and Fourteenth Amendments, and the Commerce Clause of the U.S. Constitution. *Id.* at 753. Thus, the court granted a preliminary injunction against the enforcement of the amendments against the plaintiffs. *Id.* at 754.

164. *Johnson*, 194 F.3d at 1160.

165. *Id.* at 1161.

166. *Id.*

167. *Johnson*, 194 F.3d at 1160. (citing Am. Libraries Ass'n v. Pataki, 969 F.Supp 160, 168-69 (S.D.N.Y. 1997)).

168. *Johnson*, 194 F.3d at 1160. (citing *Am. Libraries Ass'n*, 969 F.Supp at 171).

169. *Johnson*, 194 F.3d at 1160.

170. *Id.*

171. *Id.*

172. *Id.*

and a New Mexico recipient whom the sender knew to be a minor.[173] Additionally, given the fact that this statute could not affect materials sent from international sources, the court reasoned that this statute would "almost certainly fail to accomplish the government's interest in shielding children from pornography on the Internet."[174] Accordingly, the court held that these "limited local benefits '[are] an extreme burden on interstate commerce.' Thus, section 30-37-3.2(A) constitutes an invalid indirect regulation on interstate commerce."[175]

Finally, on the issue of Commerce Clause violation, the *Johnson* court considered the District Court's holding that the New Mexico statute unconstitutionally imposes inconsistent regulations on the internet.[176] The Court of Appeals agreed with the lower court's holding that the statute did indeed impose inconsistent regulation on the internet, and that "the Internet, like . . . rail and highway traffic . . . requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations."[177] Thus, the Court held that the statute violated the Commerce Clause limitations on state actions and was invalid.[178]

A. *Conclusion*

In sum, the Court of Appeals held the New Mexico statute in question was unconstitutional, invalid and unenforceable against the plaintiffs.[179] The Court noted that its discussion of the Commerce Clause challenges was unnecessary, but nonetheless instructive and important.[180] As a result of its holding, the Court of Appeals granted the plaintiffs' requested injunction prohibiting the enforcement of the New Mexico statute.[181]

1. Post-Johnson Decisions

Since the *Johnson* decision from the Tenth Circuit was issued on November 2, 1999, there have been some new developments in this area of Constitutional Law. On October 21, 1998, Congress enacted the Child Online Protection Act (COPA) into law.[182] COPA attempted to "'address[] the specific concerns raised by the Supreme Court' in invalidating the Communications Decency Act (CDA)."[183] The Supreme Court in

173. *Id.* at 1162.
174. *Id.*
175. *Id.* (quoting Am. Libraries Ass'n v. Pataki, 969 F.Supp. 160, 179 (S.D.N.Y. 1997)).
176. *Johnson*, 194 F.3d at 1162.
177. *Johnson*, 194 F.3d at 1162. (quoting *American Libraries Ass'n*, 969 F. Supp. at 182).
178. *Johnson*, 194 F.3d at 1163.
179. *Id.*
180. *Id.* at 1160.
181. *Id.* at 1164.
182. ACLU v. Reno (*Reno IV*), 217 F.3d 162, 166 (3d Cir. 2000).
183. *Id.* at 167 (quoting H.R. REP. NO. 105-775 at 12 (1998).

Reno II, discussed above, previously invalidated the CDA.[184] In comparison to the CDA, COPA specifically addressed the dissemination of material to minors over the internet by commercial persons and /or entities.[185] In enacting COPA, Congress attempted to cure some of the key defects of the CDA, as highlighted in *Reno II*. COPA sought to provide the explicit definitions of the statute's crucial terms.[186] Such explicitly defined terms had the intended effect of limiting the scope of affected materials to the World Wide Web and not the more general internet;[187] limiting the scope of application to solely "commercial purposes;"[188] and limiting the scope to only material deemed "harmful to minors."[189] The phrase "harmful to minors" was defined in the text of COPA and consequently raised some constitutional issues in the judicial considerations that followed the statute's enactment. Congress defined "harmful to minors" with a three-part analysis, which must be found before liability may attach under COPA.[190] The statute further defines a "minor" as a person under the age of seventeen.[191] Finally, COPA provided some affirmative defenses for commercial entities accused of violating the statute.[192] De-

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184. *See Reno II*, 521 U.S. at 885.

185. COPA, 47 U.S.C. § 231(a)(1)(1998): "Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both."

186. *See Reno IV*, 217 F.3d at 167 (discussing the text of COPA).

187. *Reno IV*, 217 F.3d at n.4 (quoting 47 U.S.C. § 231(e)(1)). "COPA defines the clause 'by means of the World Wide Web' as the 'placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol.'"

188. *Reno IV*, 217 F.3d at n.5 (quoting 47 U.S.C. § 2321(e)(2)(A)). "COPA defines the clause 'commercial purposes' as those individuals or entities that are 'engaged in the business of making such communications.'"

189. *Reno IV*, 217 F.3d at n.5 (quoting 47 U.S.C. § 231(e)(2)(B)). "COPA defines a person 'engaged in the business' as one 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 principle business or source of income)."

190. *Reno IV*, 217 F.3d at 168. The three-part test stated:

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to 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)(6).

191. 47 U.S.C. § 231(e)(7).

192. *Reno IV*, 217 F.3d at 168 (quoting 47 U.S.C. § 231(c)(1)). The affirmative defenses provided that if a commercial entity "restricted access by minors to material that is harmful to minors" through the use of a "credit card, debit account, adult access code, or adult personal

spite the attempts by Congress to conform COPA to meet the problems raised in *Reno II*, a suit was filed seeking a preliminary injunction against the enforcement of this second congressional attempt to regulate information disseminated over the internet.

On October 22, 1998 the plaintiffs[193] filed an action in the Federal District Court for the Eastern District of Pennsylvania seeking a preliminary injunction against the enforcement of COPA.[194] The plaintiffs claimed that COPA was invalid on its face and as applied to them under the First Amendment by burdening speech which is protected for adults; that it violated the First Amendment rights of minors; and that it is unconstitutionally vague under the First and Fifth Amendments.[195] The District Court held that the plaintiffs were likely to succeed on the merits of their Constitutional claims and granted their request for a preliminary injunction against the enforcement of COPA.[196] The government appealed this ruling to the United States Court of Appeals for the Third Circuit.[197]

The Third Circuit affirmed the District Court's granting of the preliminary injunction.[198] In reaching its conclusion, the Court of Appeals relied heavily upon the findings of fact made by the lower court and it reviewed the District Court's conclusions of law under a de novo standard.[199] The four elements necessary for a preliminary injunction to be warranted include: (1) the reasonable probability of success; (2) whether the movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.[200] Clearly, the first of these three elements attracted most of the court's attention in its decision.

First, the court noted that the District Court was correct in finding that since COPA was a content based restriction on speech, it was "presumptively invalid and subject to strict scrutiny analysis."[201] As a result of the necessary strict scrutiny analysis the government was required to

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identification number...a digital certificate that verifies age...or by any other reasonable measures that are feasible under available technology" then no liability will attach.

193. The list of plaintiffs is too lengthy for full presentation here; the plaintiffs were essentially those that filed suit in *Reno II*, which include the American Civil Liberties Union; Androgyny Books d/b/a A Different Light Bookstores; American Booksellers Foundation for Free Expression; and Artnet Worldwide Corp.

194. ACLU v. Reno *(Reno III)*, 31 F. Supp.2d 473, 476 (E.D. Pa. 1999). COPA was to become effective on November 29, 1998. *Id.*

195. *Reno III*, 31 F. Supp.2d at 477.

196. *Id.*

197. *Reno IV*, 217 F.3d at 165.

198. *Id.* at 181.

199. *Id.* at 172.

200. *Id.* (quoting Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999).

201. *Reno IV*, 217 F.3d at 173 (quoting *Reno III*, 31 F. Supp.2d at 493).

"establish that the challenged statute is narrowly tailored to meet a compelling state interest, and that it seeks to protect its interest in a manner that is the least restrictive of protected speech."[202] Further, the court noted that the Supreme Court has recognized each medium of expression may present unique justifications for government regulation.[203] Yet the Third Circuit differentiated the Internet from other forms of media that were historically subject to government regulations.[204] Unlike other regulated mediums, the Internet did not have a history of regulation nor did it have a limited number of frequencies.[205] Thus, the standard of review for content-based regulation of speech via the Internet presented the Court with a unique and continually developing area of Constitutional Law.

The intrinsic characteristics of the Internet presented the revised "contemporary community standards" test provided in COPA with some unique challenges. Congress attempted to revise the test from the CDA (overturned in *Reno II*) in COPA by adding that "the average person, applying contemporary community standards' would find the work taken as a whole, [to appeal] to the prurient interest.'"[206] It was this revised test that the court found to be in conflict with the inherent nature of the Internet. The court noted that the Internet is not geographically limited;[207] that information is instantaneously available on the Internet as soon as it is published;[208] and that current technology prevents Web publishers from circumventing particular jurisdictions or limiting their site's content "from entering any [specific] geographic community."[209] As a result of these unique characteristics of the Internet, the court concluded that COPA's adoption of the *Miller* "contemporary community standards" test would have an overbroad effect.[210] The court determined this overbroad effect would restrict the constitutionally protected speech of adults to the most stringent standards of the least liberal communities, therein depriving adults of free access to protected forms of speech.[211] Such a stringent limitation to the lowest common denominator has consistently

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202. *Reno IV*, 217 F.3d at 173 (citing Schaumbern v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980)). The Court noted that this approach was recently confirmed in United States v. Playboy Ent. Group, Inc., 529 U.S. 803, 2000 WL 646196 (U.S. 2000) (discussing the "bleeding" of cable transmissions and holding § 505 of the Telecommunications Act of 1996 unconstitutional as violative of the First Amendment).

203. *Reno IV*, 217 F.3d at n.18.

204. *Id.*

205. *Id.* (quoting *Reno II*, 521 U.S. 844, 868 (1997)).

206. *Reno IV*, 217 F.3d at 174.

207. *Id.* at 175 (quoting *Reno III*, 31 F. Supp. 2d at 482-92).

208. *Reno IV*, 217 F.3d at 175 (citing *American Libraries*, 969 F. Supp. at 166; *Reno III*, 31 F. Supp. 2d at 483).

209. *Id.* (quoting *Reno III*, 31 F. Supp. 2d at 484).

210. *Reno IV*, 217 F.3d at 177.

211. *Id.*

been held to be in violation of the First Amendment in all the preceding *Reno* decisions.

Finally, the court considered whether COPA was "readily susceptible" to a narrowing construction that would make it constitutional.[212] Courts generally recognized two methods of narrowing an otherwise unconstitutionally broad statute: (1) by "assigning a narrow meaning to the language of the statute or; (2) deleting that portion of the statute that is unconstitutional, while preserving the remainder of the statute intact."[213] The court attempted both approaches at the behest of the government. First, the court concluded that in previous applications of the *Miller* "contemporary community standards" test, it was applied on a geographic basis, and therefore could not be read narrowly to present an "adult" rather than a geographic standard in this instance.[214] Second, the court concluded that by striking the contemporary community standards test from COPA would have the effect of rendering the rest of the statute virtually meaningless.[215] The test was held to be an "integral part of the statute, permeating and influencing the whole of the statute" and thus, its removal would not salvage the constitutional remnants.[216] Therefore, the court concluded that COPA was not susceptible to a narrow reading and accordingly it was deemed likely that the plaintiffs would succeed on their constitutional challenge to COPA.[217]

The Third Circuit briefly addressed the remaining two prongs of the preliminary injunction test. First, the court noted that "in a First Amendment challenge, a plaintiff who meets the first prong of the test . . . will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights."[218] Therefore, the court concluded that the second prong was likely met in this situation.[219] Finally, in applying the balancing test required by the third prong, the court concluded that the threats of COPA on constraining constitutionally protected speech far outweighed the damage that would be caused by the denial of the requested injunction.[220] While the court concluded that the District Court properly granted the plaintiff's request for a preliminary injunction

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212. *Id.* (quoting Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988)).

213. *Reno IV*, 217 F.3d at 177 (citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985)).

214. *Reno IV*, 217 F.3d at 178. The Court noted that prior decisions have recognized that the nation is simply too large and too diverse for a common standard of "obscene" or "indecent" materials to be adequately defined at a national level. In fact, it was this rationale that lead the Court to develop the "contemporary community standard" in the *Miller* decision (which was based on geographic notions of "community"). *Id.* (discussing *Miller*, 413 U.S. at 30, 33).

215. *Reno IV*, 217 F.3d at 179.

216. *Id.*

217. *Id.*

218. *Id.* at 180 (quoting *Reno I*, 929 F. Supp. 824, 826).

219. *Reno IV*, 217 F.3d at 180.

220. *Id*

prohibiting the enforcement of COPA, this conclusion was not the end of the court's decision.

The final paragraph of the *Reno IV* decision provides some intriguing dicta concerning the future of this area of the law. The Court stated: "we . . . express our confidence and firm conviction that developing technology will soon render the 'community standards' challenge moot, thereby making congressional regulation to protect minors from harmful materials on the Web constitutionally practicable."[221] This statement, which has been reiterated by several of the *Reno* courts in a variety of ways, points to technology as the key solution to Congress' ability to regulate information sent to minors over the Internet. These technological advancements must be able to adequately protect children from material obscene to them, while not placing an undue burden on adult speech not encompassed by the obscenity standards for children in the relevant community. Beyond this, it is unclear what these advancements will entail or to what extent they will be required. In the final analysis, the four *Reno* decisions coupled with the *Johnson* decision blaze an ambiguous trail for both legislators and parents wishing to protect their children from the perceived dangers of the World Wide Web.

IV. ANALYSIS

The ramifications of the *Johnson* decision will be felt both inside of and outside of the Tenth Circuit. Internet business growth rates suggest that dissemination of information via the Internet is the way the world will operate in the 21st Century. As a result, regulation of how information is transmitted over the Internet is a crucial topic facing the legal profession today. Encompassed in any discussion of regulation of the Internet are two broad constitutional issues: First Amendment Rights of individuals and Commerce Clause limits on state powers. The Tenth Circuit decision in *Johnson* was one of first impression for the Circuit, but the decision also followed the Supreme Court's guidance in *Reno v. ACLU.* Additionally, other federal courts appear to be in general agreement with both *Reno* and *Johnson.*[222] The effect of the Tenth Circuit ruling in *Johnson* is twofold.

First, courts have clearly taken notice of the unusual nature of the Internet and have consistently pointed to several unique characteristics of the Internet that effectuate key differences from other mediums of expression. For example, in *Reno IV*, the Third Circuit reviewed the differences between broadcast media, such as television or radio, and the

221. *Id.* at 181.

222. *See generally* Cyberspace Comm. Inc. v. Engler, 55 F. Supp. 2d 737 (E.D. Mich. 1999); American Libraries Assoc. v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997); Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996).

Internet.[223] As a result of its non-geographic structure, the Internet is a unique target of government regulation.[224] The question of the Internet's international character has yet to be adequately addressed by the American courts. However, due to its inherently national character, courts appear to agree that there must be uniform regulation of the Internet, at the national, as opposed to the state level. The balance between regulating the Internet and the continued protection of constitutional rights is an omnipresent challenge to the Congress and the courts. The *Johnson* decision and other similar decisions addressed only the surface of potential conflicts between the regulation of the Internet and the protection of constitutional guarantees. Nevertheless, these preliminary decisions laid an important foundation upon which future courts will build a body of Internet regulation.

Second, the *Johnson* decision affects the balance of power between the states and the federal government. The age-old debate of states' rights versus national rights is inherent in the American system of Federalism. Nonetheless, the potential power that the Internet may soon wield in the stream of commerce and communication is a source of potential conflict between the states and the federal government. State legislatures will certainly want to gain a voice in the development of the Internet to bring the prosperity of the Internet within the state. However, as the courts have suggested, there is a need to regulate the Internet on a national level.

Regulation at the state level would compromise the success of the Internet. A lack of national uniformity in regulating the Internet would likely result in an inability of the Internet to offer the benefits of simultaneous, instantaneous communications and commerce as it currently aims to achieve. Regulation on a state-by-state basis would most likely create a patchwork regulatory system. Such a patchwork system would impede the ability of many Internet services to function in a profitable manner. For example, if New Mexico and Colorado both passed regulations on the dissemination of materials to minors via the Internet; but New Mexico banned all indecent material, while Colorado imposed a less restrictive regulation, how would a company wishing to do business via the Internet in both states act? The company would be forced either to make its entire Internet materials conform to the New Mexico statute, or to choose to avoid doing business in New Mexico altogether.

In contrast, if the Federal government enacted a single, uniform regulation such patchwork regulation would not be of concern to the business wishing to carry on business nationwide via the Internet. The business would be able to access consumers nation-wide without the risk of violating 50 different statutory schemes. Clearly such uniform regula-

223. *Reno IV*, 217 F.3d at 168-69.
224. *Id.* at 169.

tion would provide the greatest benefit to the continued growth of the Internet as a means of commercial activity in the United States.

The central issue remains to what extent does the holding in *Johnson* and other similar decisions have on the future of Internet regulations? The final answer remains to be determined. The only certainty in this field is that attempts to regulate the Internet will continue and the tension between government action and parental choice will likely devolve into a moot discussion when technology catches Constitutional theory. Parental control still remains the best and most likely source of protecting minors from indecent materials, however defined. Until such time as technology offers controls that conform to the constraints of the Constitution, parents must take the lead in assuring that the Internet is a safe place for children to roam.

CONCLUSION

The Internet is clearly a revolutionary new medium of expression. The opportunity for persons to exchange ideas worldwide with the instant click of a mouse is truly unique. The Internet provides for greater communication among people on an infinite range of subjects. This freedom of expression has never before been provided with such a powerful tool. Yet with this advantage comes concern, specifically related to minors accessing materials that are not appropriate for children. This concern has prompted government intervention and regulation. It is this regulation that strikes at the very core of what it means to be "American." The Constitution seeks to protect expression, not simply because it is a noble concept, but more precisely because it is the freedom of expression that drives democracy. Free expression among citizens is the most essential ingredient of a functional and successful democratic society. Thus, it is the opinion of this author that the courts have so far been correct in holding the governmental regulations invalid as violating the most basic principles of the Constitution. Further, it is clear that with the continued growth of technology, parents will be better equipped to prevent their children from accessing material that the parent deems harmful. Removing the power of a parent and placing it in the hands of government is at a minimum troublesome, and the worst, Orwellian. Clearly, the duty to regulate the dissemination of information to minors over the Internet must be left in the sovereign hand of parents, and the parents alone.

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