No. 98-933

In the Supreme Court of the United States

OCTOBER TERM, 1998

APOLLOMEDIA CORPORATION, APPELLANT
v.

JANET RENO, ATTORNEY GENERAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether 47 U.S.C. 223(a)(1)(A) (Supp. II 1996)—which prohibits persons in interstate and foreign communications from initiating, by means of a "telecommunications device," the transmission of any communication that is "obscene, lewd, lascivious, filthy, or indecent" with the "intent to annoy, abuse, threaten, or harass another person"—is limited to communications that are obscene.

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OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-43a) is reported at 19 F. Supp. 2d 1081.

JURISDICTION

The district court's order was entered on the docket on September 24, 1998. The notice of appeal was filed on October 9, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.[1]

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[1] Section 1253 provides for a direct appeal to this Court from an order granting or denying an injunction in any case required by an Act of Congress to be decided by a district court of three judges. See J.S. 1. Section 561(a) of Pub. L. No. 104-104, 110 Stat. 142, requires that any civil action challenging the constitutionality, on its face, of any provision of the Communications Decency Act of

STATEMENT

1. From 1968 to 1996, federal law imposed criminal penalties on any person who

> in the District of Columbia or in interstate or foreign communication by means of telephone * * * makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent.

47 U.S.C. 223(a)(1)(A)(1994). Section 223(a)(2) imposed criminal penalties on anyone who "knowingly permits any telephone facility under his control to be used" for the above purposes.

In 1996, as part of the Telecommunications Act, Section 223(a) was amended to impose criminal penalties on any person who

> in interstate or foreign communications by means of a telecommunications device knowingly * * * makes, creates, or solicits, and * * * initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person.

47 U.S.C. 223(a)(1)(A) (Supp. II 1996). See Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, § 502, 110 Stat. 133. The amended Section 223(a)(2)

1996, shall be heard by a three-judge district court. See J.S. 1. Section 561(b), 110 Stat. 143, authorizes a direct appeal to this Court from judgments, decrees or orders holding unconstitutional all or part of the Communications Decency Act, and any amendment made by that Act. Because the district court's order upheld the constitutionality of 47 U.S.C. 223(a)(1)(A), Section 561(b) is inapplicable to this case.

imposes criminal penalties on anyone who "knowingly permits any telecommunications facility under his control" to be used for the above above purposes "with the intent that it be used for such activity." 47 U.S.C. 223(a)(2)(Supp. II 1996).

As relevant in this case, the 1996 Act made a number of changes in Section 223(a)(1)(A). It broadened the scope of liability from use of a "telephone" to use of a "telecommunications device"; it added the "knowingly" requirement; and it added "image or other communication" to the previous listing of "comment, request, suggestion or proposal." The 1996 Act also added the requirement that the communication had to be made "with intent to annoy, abuse, threaten, or harass any other person." 47 U.S.C. 223(a)(1)(C) (Supp. II 1996). The 1996 Act did not, however, change one important part of Section 223(a)(1)(A)—the basic characterization of the communication that is forbidden; the amended version, like the earlier version, imposes liability only if the transmitted item is "obscene, lewd, lascivious, filthy, or indecent." This case involves the meaning of those terms.

2. Appellant Apollomedia Corporation is a San Francisco-based company that maintains an Internet website—at "www.annoy.com"—intended to permit persons to communicate views to public figures using language that, appellant alleges, may be considered indecent in some communities. J.S. App. 4a-5a. One section of appellant's website, for example, is designed to permit persons to construct, from preselected options, anonymous e-mail messages to public figures named in articles by freelance authors taking provocative positions on various issues. *Id.* at 5a n.5. Another section permits persons to send "digital postcards" over the Internet by creating a postcard at a

specific location on the website and by e-mailing instructions to the intended recipient explaining how to retrieve the postcard. *Ibid.*

On January 30, 1997, appellant filed suit in federal district court seeking to enjoin the enforcement of 47 U.S.C. 223(a)(1)(A)(ii) and (2) on the ground that the provisions on their face violate appellant's First Amendment rights, as well as the First Amendment rights of visitors to its website, to make indecent communications with the intent to annoy their recipients. Pursuant to Section 561(a) of the CDA, 110 Stat. 142, a three-judge court was convened to hear the suit.

3. After briefing and argument, the court denied appellant's motion for a preliminary injunction and dismissed appellant's complaint. J.S. App. 1a-43a. Although the court held that appellant had standing to assert its claims, *id.* at 8a-13a, the court agreed with the government that 47 U.S.C. 223(a)(1)(A) proscribes only obscene speech, to which the protections of the First Amendment do not extend. J.S. App. 15a, 34a- 35a.[2]

Referring to the statutory specification of the prohibited communications ("obscene, lewd, lascivious, filthy, or indecent"), the court observed that, beginning with *Roth* v. *United States*, 354 U.S. 476 (1957), this Court had construed statutory words "nearly identical to those employed in § 223(a)(1)(A), to refer solely to 'obscenity.'" J.S. App. 18a. See *Roth*, 354 U.S. at 491 (construing 18 U.S.C. 1461's prohibition against the knowing use of the mails to transport any publication that is "obscene, lewd, lascivious, or filthy . . . or

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[2] Because the court recognized that liability under 47 U.S.C. 223(a)(2) "is only established by proving a violation of 47 U.S.C. § 223(a)(1)," it did not engage in a separate analysis of 47 U.S.C. 223(a)(2). J.S. App. 16a n.11.

* * * of an indecent character"); *Manual Enters., Inc.* v. *Day*, 370 U.S. 478, 482-483 (1962) (opinion of Harlan, J.) (any matter that is "obscene, lewd, lascivious, indecent, filthy or vile"); *Hamling* v. *United States*, 418 U.S. 87, 114 (1974) (same). See also *United States* v. *12 200-ft. Reels of Super 8 MM Film*, 413 U.S. 123, 130 n.7 (1973) ("obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral"). "These cases demonstrate," the court observed, "that, in the context of print media and film, the Supreme Court has read statutory 'strings of words' almost identical to that employed in § 223(a)(1)(A) to proscribe only material constituting obscenity." J.S. App. 21a.

The district court rejected appellant's reliance on two decisions of this Court which had held other federal statutes to reach speech that was indecent but not obscene—*FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (construing 18 U.S.C. 1464's prohibition against "obscene, indecent or profane" broadcasts), and *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989) (construing 47 U.S.C. 223(b)'s prohibition against "obscene or indecent" prerecorded telephone messages). As the court explained: "the 'string of words' employed in § 223(a)(1)(A) more closely resembles in both length and syntax the 'string of words' used in 18 U.S.C. § 1461, as interpreted in *Roth*, *Manual Enterprises*, and *Hamling*, than the words at issue in *Pacifica* and *Sable*." J.S. App. 23a. Moreover, the court stated, the *Roth* interpretation of Section 1461 to encompass only obscene speech "prevailed at the time that the predecessor statute to § 223(a)(1)(A), which employed the same 'string of words' as employed in § 223(a)(1)(A), was enacted." *Ibid.* Lastly, the court observed, the Federal Communications Commission (FCC) "has long interpreted § 1464 as encompassing more than the

obscene," *ibid.* (quoting *Pacifica*, 438 U.S. at 741), but "[t]here is no similar history of governmental regulation with respect to § 223(a)(1)(A)." *Ibid.*

The court found "no indication" that when Section 223(a)(1)(A) was first enacted in 1968, "the provision was intended to proscribe 'indecent' speech that is not 'obscene.'" J.S. App. 24a. In addition, the court observed, the legislative record of the CDA "does not state that Congress sought to change the nature of the speech proscribed by the provision" when it amended Section 223(a)(1)(A) in 1996. J.S. App. 25a. The court was aware that the conference report on the CDA discussed "Congress' intent to limit 'indecent' communications" in certain instances, but it noted that those discussions "are limited to those parts of the report which address the perceived need to protect minors from harmful communications," *id.* at 26a, and that the CDA contained separate provisions proscribing the transmission of "obscene or indecent" or "patently offensive" communications to persons under 18 years of age. *Id.* at 25a. See 47 U.S.C. 223(a)(1)(B) and (d)(1) (Supp. II 1996). The court also emphasized that while a few Senators opposed to the CDA stated that Section 223(a)(1)(A) "would proscribe merely 'indecent' communications made with an intent to annoy," there was no indication "that the CDA's sponsors, or the legislature generally, shared this view, nor does the conference report reflect such an intent on Congress' part." J.S. App. 28a.

The district court rejected appellant's contention that its interpretation would render Section 223(a)(1)(A) redundant of the federal obscenity prohibitions of 18 U.S.C. 1462 and 1465 that the CDA extended to Internet communications. J.S. App. 31a. The court observed that the use of a "telecommunications device"

to which Section 223(a)(1)(A) applies, "is not the equivalent of the use of an 'interactive computer service' under § 1462 and § 1465." J.S. App. 31a (citing 47 U.S.C. 223(h)(1)(B) (Supp. II 1996)). The court also rejected the contention that because obscene speech is unprotected by the Constitution, Section 223(a)(1)(A)'s requirement that prohibited communications be made with "intent to annoy" serves no purpose. The court explained that the intent requirement "clarifies Congress' intent that the statute proscribe only obscene communications between *non-consenting* adults." J.S. App. 34a.

In the end, taking into account the canon that "federal statutes are to be construed so as to avoid serious doubts as to their constitutionality," J.S. App. 34a, the court determined that it was "'fairly possible' to read § 223(a)1)(A) as applying only to 'obscene' communications," and that "[s]o construed, the provision would clearly survive constitutional challenge." J.S. App. 35a.

Judge Illston dissented. J.S. App. 35a-43a. She agreed that Congress could constitutionally prohibit the transmission of obscene communications over the Internet, but disagreed that Section 223(a)(1)(A) should be read to cover only obscenity. J.S. App. 35a. Stating that "[t]he present debate over the language * * * seems academic," she would have declared the statute "as written" to be unconstitutional and severed "the terms other than 'obscene' * * * from it." *Id.* at 43a.

ARGUMENT

This appeal should be dismissed. Appellant could have had standing at the outset of this case only insofar as appellant had a well-founded fear of prosecution under Section 223(a)(1)(A) for transmitting indecent—

but not obscene—material by means of a telecommunications facility. In the unusual circumstances of this case, any such fear was redressed by the combination of the district court's judgment holding that appellant could not be prosecuted for transmitting indecent material under Section 223(a)(1)(A) and by the reiteration in this case of the consistent position taken by the Department of Justice that Section 223(a)(1)(A) does not to extend to indecent communications that are not obscene. These factors combined to eliminate any well-founded fear of prosecution appellant might once have had. Because standing must be demonstrated not merely at the outset of a case, but also at each successive stage of the case through appeal and final judgment, the fact that appellant no longer has any well-founded fear of prosecution eliminates its standing to appeal.

If the Court should conclude that appellant does have standing to appeal, the judgment of the court below should be summarily affirmed, because it is clearly correct. Section 223(a)(1)(A) prohibits the transmission of communications that are "obscene, lewd, lascivious, filthy, or indecent." This Court has long limited the reach of virtually identical language in other federal criminal statutes to obscene communication that is unprotected by the Constitution. Moreover, this Court's decisions reaching that result were relatively recent at the time Congress adopted the "obscene, lewd, lascivious, filthy, or indecent" formulation in 1968, thus lending special force to the presumption that Congress legislated with this Court's decisions regarding the meaning of those statutory terms in view. Although Congress changed several other terms in Section 223(a)(1)(A) in 1996, it left the "obscene, lewd, lascivious, filthy, or indecent" formulation untouched,

thus indicating that it intended no change in the settled meaning of that formulation. Indeed, nothing in the legislative history of either the 1968 enactment or the 1996 amendment suggests that Congress intended a broader meaning. And even if there were any significant doubt about the matter, it would be appropriately resolved by the well-settled canon of construction that federal statutes are to be read to avoid—rather than magnify—constitutional doubts.

There is, in short, no basis for either an exercise of appellate jurisdiction or plenary review by this Court. Appellant challenges the district court's holding that Section 223(a)(1)(A) applies only to obscene communications, arguing that it reaches as well indecent communications that are not obscene. But appellant does so only as a predicate for its further contention that Section 223(a)(1)(A), as so construed, is unconstitutional precisely because it then would extend beyond obscene communications. And as relief appellant seeks a remand of the case to the district court "for the entry of appropriate equitable relief prohibiting enforcement of the statute except as to obscene material" (J.S. 25)—which is, of course, the very scope the district court has already given to Section 223(a)(1)(A) as a *statutory* matter. Article III of the Constitution does not recognize a litigable stake in such an exercise. But if the Court should conclude otherwise, that stake is so attenuated—especially in view of the position of the Department of Justice, reiterated in this case, that it will not bring a prosecution under Section 223(a)(1)(A) unless the communication at issue was obscene—that there is no basis in equity for this Court to disturb the district court's denial of injunctive relief. Accordingly, if the Court were to conclude that appellant has standing to appeal, the lack of equity would supply an

independent ground—in addition to the correctness of the district court's construction of Section 223(a)(1)(A)—for the Court to summarily affirm the judgment below.

1. Article III of the Constitution limits the jurisdiction of the federal courts to "cases" and "controversies." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). One element of this "bedrock requirement," *ibid.*, is that a party that seeks judicial relief in the federal courts must demonstrate that it has standing to sue. *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997). Standing is an Article III requirement that "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997); see also *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974) ("The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.").

When a plaintiff seeks an injunction barring future prosecution under a law on the ground that it may be applied to him, the plaintiff "must demonstrate a realistic danger of sustaining a direct injury as the result of the statute's operation or enforcement." *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 298 (1979). See also *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983) (plaintiff must "show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical'"). That rule is applicable even to plaintiffs who assert that the injury they suffer is a chilling of their

First Amendment rights of free speech. Where a plaintiff "has alleged threats of prosecution that cannot be characterized as 'imaginary or speculative'" and his concern with arrest for his allegedly constitutionally protected conduct is not "chimerical," "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel*, 415 U.S. at 459. But "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Babbitt*, 442 U.S. at 298. "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird* v. *Tatum*, 408 U.S. 1, 13-14 (1972).

The injury that appellant sought to redress in this case is what the district court found to be its fear of prosecution under Section 223(a)(1)(A) for communications that are indecent, but not obscene. J.S. App. 8a-11a. That fear was at most marginally sufficient to support standing at the inception of this case, since appellant did not and could not allege that there had been any threat by anyone to prosecute it under Section 223(a)(1)(A) or, indeed, that anyone had in recent decades been threatened with prosecution under Section 223(a)(1)(A) for communications that were indecent, but not obscene.[3] But whatever fear of

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[3] We are aware of only one instance, 29 years ago, in which anyone was prosecuted under Section 223(a)(1)(A) for communications that may have been indecent, but not obscene. See *United States* v. *Darsey*, 431 F.2d 963 (5th Cir. 1970). In that case, it appears that the government in fact charged the defendant with obscene communications. See *id.* at 963 ("The first two counts charged the use of obscene language in interstate telephone

prosecution appellant might have had at the outset of the case became entirely remote, speculative, and conjectural after the district court's ruling. Accordingly, appellant had no standing to appeal that ruling.

a. First, the core of the district court's opinion in this case was its express holding that "the provisions [challenged by appellant] regulate only 'obscene' communications." J.S. App. 1a. That holding would have collateral estoppel effect against the government should it ever attempt to prosecute appellant for indecent communications under Section 223(a)(1)(A).[4] As this Court explained in *United States* v. *Stauffer Chemical Co.*, 464 U.S. 165, 169 (1984), a party may make defensive use of collateral estoppel against the government if "there was mutuality of parties," "the issue sought to be relitigated was identical to the issue already unsuccessfully litigated in [the earlier] court," and there has "been no change in controlling facts or legal principles since the [earlier] action." All of those conditions would appear to be satisfied here. Accordingly, the district court's holding that Section 223(a)(1)(A) applies only to obscene communications, and therefore does not apply to the conduct appellant alleged it engages in, would generally preclude the United States from prosecuting appellant for the conduct appellant alleged in this case. See also 464 U.S. at 170-171 (rejecting the government's argument that collateral estoppel does not apply to pure questions of

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calls."). Accordingly, the case is best explained as a possible misapplication of the obscenity standard, rather than as a prosecution under a theory that the communications were indecent, but not obscene.

[4] Collateral estoppel is available against the government in criminal cases. See *Dowling* v. *United States*, 493 U.S. 342, 347 (1990).

law, and noting that "the doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action"). That alone would eliminate any well-founded fear of prosecution that appellant might have, and it accordingly would eliminate appellant's standing to appeal.

To be sure, the Court in *Stauffer Chemical* left open the possibility that collateral estoppel might not be applicable against the government in one additional circumstance: if the legal issue already decided arose in new litigation between the government and the same private party in a circuit that had accepted the government's view of the governing law. See 464 U.S. at 174. That possibility, however, is extremely remote here. No court has ruled that Section 223(a)(1)(A), either before or after its amendment in 1996, applies to communications that are indecent, but not obscene. Accordingly, even if the government believed that Section 223(a)(1)(A) applied to non-obscene but indecent communications and wanted to prosecute appellant, but see pp. 14-16, *infra*, there is no court in the country in which the United States could, at this time, bring such a prosecution without being subject to collateral estoppel. Before appellant could be prosecuted under Section 223(a)(1)(A) for non-obscene, indecent communications, the United States would have to alter its official position and conclude that Section 223(a)(1)(A) applied to communications that are indecent, but not obscene; some other individual would have to be prosecuted under that theory, and the theory would have to be accepted on appeal by a court of appeals; venue for a prosecution of appellant would have to lie in that circuit; the question left open in *Stauffer Chemical* regarding whether collateral estop-

pel would apply in that situation to bar the government from prosecuting appellant in that same circuit would have to be decided in favor of the government; and the government would have to surmount any other due process objections that appellant may raise to such a prosecution, see p. 15, *infra*. The remote possibility that that series of events could occur surely does not constitute the sort of well-founded fear of prosecution necessary to support any continued standing by appellant to appeal this case.

b. Second, on February 19, 1998, during the course of the proceedings in the district court in this case, John C. Keeney, the then-Acting Assistant Attorney General for the Criminal Division, instructed all United States Attorneys of the position of the Department of Justice with respect to the scope of Section 223(a)(1)(A) after enactment of the CDA. He pointed out that prior to its amendment by the CDA, "the United States Attorneys Manual interpreted this provision as prohibiting obscene remarks," App., *infra*, 2a (quoting United States Dep't of Justice, *United States Attorney's Manual* 9-63.410 (1992)). He then stated that after its amendment, "[c]onsistent with the pre-CDA interpretation of this provision, * * * the provision * * * continued to be limited to *obscene* communications, albeit by telecommunications device." App., *infra*, 2a. The notification also instructed United States Attorneys that "[t]his interpretation of the statute *shall* govern the conduct of your office." App, *infra*, 3a (emphasis added). The notification was filed in the district court in this case. See Notice of Filing, Feb. 27, 1998.

In the light of that assurance of the government's position, repeated in the government's filings in this case both in the district court and in this Court,

appellant would have a substantial due process objection to any prosecution brought against it under Section 223(a)(1)(A) for communications that are indecent, but not obscene—at least unless and until the government gave formal notice of a change in its position and appellant had the opportunity either to challenge the government's new position or to conform its conduct to that changed position. Cf. *Raley* v. *Ohio*, 360 U.S. 423, 438 (1959) (referring to "convicting a citizen for exercising a privilege which the State clearly had told him was available" as "the most indefensible sort of entrapment"); *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973) ("[T]o the extent that the regulations deprived [defendant] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution."); see also *United States* v. *Laub*, 385 U.S. 475, 487 (1967) ("Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach."); *Cox* v. *Louisiana*, 379 U.S. 559, 571 (1965) (reversing convictions of the defendant for picketing "near" a courthouse, where "the highest police officials of the city, in the presence of the Sheriff and Mayor," advised the defendant "that a demonstration at the place it was held would not be one 'near' the courthouse within the terms of the statute").

Accordingly, even if the district court's order, with its collateral estoppel effect, were insufficient alone to remove any well-founded fear of prosecution that appellant might once have had, the addition of the repeated and official assurances of the Department of Justice that it construes Section 223(a)(1)(A) to apply only to

obscene communications would be sufficient to render any remaining fear of prosecution chimerical. As a result, although appellant did not obtain the injunction it sought from the district court, the net effect is that the only basis on which appellant had standing in this case—its allegedly well-founded fear of prosecution—has been entirely redressed. Its appeal therefore should be dismissed.

2. If this Court does not dismiss this appeal, it should summarily affirm the judgment below.

a. Section 223(a)(1)(A) prohibits a person from using a telecommunications device to transmit any communication "which is obscene, lewd, lascivious, filthy, or indecent," if he has the requisite "intent to annoy, abuse, threaten, or harass." 47 U.S.C. 223(a)(1)(A) (Supp. II 1996). While this Court has never interpreted the scope of the string of words used in Section 223(a)(1)(A), it has had occasion to examine virtually identical series of words in other federal criminal statutes. In each case, the Court has determined that the string is limited to speech that is obscene and does not apply to speech that is merely indecent.

Thus, in *Roth* v. *United States*, 354 U.S. 476, 485 (1957), this Court upheld the constitutionality of 18 U.S.C. 1461 on the ground that "obscenity is not within the area of constitutionally protected speech or press." As then at issue, Section 1461 imposed criminal penalties on anyone who mailed any "obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character." See 354 U.S. at 479 n.1. It was argued that the statute violated due process on the ground that the language was "not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere." *Id.* at 491. Rejecting that argument, this

Court held that the statute, "applied according to the proper standard for judging obscenity, [did] not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." *Id.* at 492. *Roth* thus "found, in effect, that in spite of the range of terms employed in the statute, 18 U.S.C. § 1461 only proscribes obscene speech." J.S. App. 18a-19a.

The Court returned to the subject five years later in *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 (1962), which overturned an administrative ruling under an amended version of 18 U.S.C. 1461 that prohibited the mailing of matter found to be "obscene, lewd, lascivious, indecent, filthy or vile." In announcing the judgment of the Court, Justice Harlan emphasized that even though the words of the statute "have different shades of meaning, the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex," 370 U.S. at 482-483, *i.e.*, "only indecent material which, as now expressed in *Roth* v. *United States*, * * * 'taken as a whole appeals to prurient interest.'" *Id.* at 484.

The Court adhered to this approach after it refined its test for obscenity in *Miller* v. *California*, 413 U.S. 15 (1973). In *United States* v. *12 200-Ft. Reels of Super 8MM Film*, 413 U.S. 123 (1973), and *United States* v. *Orito*, 413 U.S. 138 (1973), the Court rejected constitutional challenges to 19 U.S.C. 1305(a), which prohibited the importation of "obscene or immoral" material, and 18 U.S.C. 1462, which prohibited the shipment in interstate commerce of matter that is "obscene, lewd, lascivious, or filthy * * * or * * * of indecent character." In doing so, the Court emphasized that "[i]f and when * * * a 'serious doubt' is raised as to the vagueness of the words 'obscene,' lewd,'

'lascivious,' 'filthy,' 'indecent' or 'immoral' as used to describe regulated material in 19 U.S.C. § 1305(a) and 18 U.S.C. § 1462 * * * we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller* v. *California*." *12 200-Ft. Reels*, 413 U.S. at 130 n.7. The Court did just that in rejecting a vagueness challenge to 18 U.S.C. 1461 the next year in *Hamling* v. *United States*, 418 U.S. 87, 110-116 (1974), holding that the terms—"obscene, lewd, lascivious, indecent, filthy or vile"—are "limited to the sort of 'patently offensive representations or descriptions of that specific hard core sexual conduct given as examples in *Miller* v. *California*.'" 418 U.S. at 114 (quoting *12 200-Ft. Reels*, 413 U.S. at 130 n.7).

Thus, in decisions rendered both before and after 47 U.S.C. 223(a)(1)(A) was first enacted in 1968 to prohibit "obscene, lewd, lascivious, filthy, or indecent" telephone conversations, see Pub. L. No. 90-299, § 1, 82 Stat. 112, this Court had interpreted virtually identical terms in other federal criminal statutes to encompass only speech that is obscene and not indecent. Congress is presumed to be aware of such settled prior judicial interpretation, *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995); *Cannon* v. *University of Chicago*, 441 U.S. 677, 698 (1979), and where, as here, the legislature adopts a statutory formulation that has been given a specific meaning by this Court, it is reasonable to conclude that Congress intended the formulation to be construed in accordance with the prior judicial construction.

b. There is no indication in the legislative history of the 1968 enactment to suggest that Congress intended the provision's reach to extend to telephone calls

involving speech that is indecent without being obscene. The House Report described the purpose of the statute as prohibiting "obscene, abusive, or harassing telephone calls," [5] but nowhere suggested that the term "indecent" was to have independent significance. H.R. Rep. No. 1109, 90th Cong., 2d Sess. 2 (1968). The Federal Communications Commission, in its comments on the proposed enactment, similarly described its reach as limited to "obscene or harassing telephone calls." *Id.* at 7-8. And in the course of legislative consideration, the Department of Justice informed Congress that the statutory phrase would survive constitutional challenge, resting its opinion on the decision in *Roth* that obscenity falls outside the protections of the First Amendment. See *Abusive and Harassing Telephone Calls: Hearings on S. 2825 and S. 3072 Before the Subcomm. on Communications of the Sen. Comm. on Commerce*, 89th Cong., 2d Sess. 27 (1966) (Letter from Deputy Attorney General Ramsey Clark to Committee Chairman Magnuson).

c. Relying on *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), and *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989), appellant contends (J.S. 9) that the indecent materials covered by 47 U.S.C. 223(a)(1)(A)

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[5] Besides prohibiting telephone conversations that involved "obscene, lewd, lascivious, filthy, or indecent" language, the 1968 statute also prohibited persons from making anonymous telephone calls with the intent to "annoy, abuse, threaten, or harass any person at the called number," or causing the telephone of another "repeatedly or continuously to ring, with intent to harass any person at the called number," or make repeated telephone calls, "during which conversation ensues, solely to harass any person at the called number." Pub. L. No. 90-299, § 1, 82 Stat. 112. Those provisions remain in current law. See 47 U.S.C. 223(a)(1)(C), (D), and (E) (Supp. II 1996).

should be "recognized as distinct" from those that are obscene. But *Pacifica* and *Sable* interpreted different statutes employing different language, and they did so years after Section 223(a)(1)(A) was first enacted.

At issue in *Pacifica* was 18 U.S.C. 1464, which forbids the use of "any obscene, indecent or profane language" by means of radio communications. This Court treated the statute as regulating speech that is indecent without being obscene in light of the FCC's longstanding interpretation of the statute "as encompassing more than the obscene," 438 U.S. at 741, and taking into account Congress's broader powers to regulate broadcasting under the First Amendment. *Id.* at 741-742 & n.17. In *Sable*, there was even less doubt about Congress' intent: the statute at issue prohibited "obscene or indecent" commercial telephone communications, see 492 U.S. at 123 n.4, and had been modified during the litigation to "specifically place[] the ban on obscene commercial telephone messages in a subsection separate from the prohibition against indecent messages." *Id.* at 124 n.6. In addition, as the court below correctly noted (J.S. App. 23a), "the 'string of words' employed in § 223(a)(1)(A) more closely resembles in both length and syntax the 'string of words' used in 18 U.S.C. § 1461, as interpreted in *Roth*, *Manual Enterprises*, and *Hamling*, than the words at issue in *Pacifica* and *Sable*."[6]

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[6] Appellant also cites *Denver Area Educational Telecommunications Consortium* v. *FCC*, 518 U.S. 727 (1996), and *National Endowment for the Arts* v. *Finley*, 118 S. Ct. 2168 (1998) (see J.S. 9-11), but those decisions interpreted statutory language that bears even less resemblance to that employed in 47 U.S.C. 223(a)(1)(A). See *Denver Area*, 518 U.S. at 732-733 (reviewing constitutionality of federal statute governing the carriage of cable programming containing "patently offensive" depictions of "sexual

Appellant in addition contends that because Section 223(a)(1)(A) uses the disjunctive—"obscene, lewd, lascivious, filthy, or indecent"—the necessary implication is "that each has a separate meaning." J.S. 11 (quoting *Pacifica*, 438 U.S. at 739-40). But any such implication is rebutted by this Court's prior interpretation of the virtually identical string of words in *Roth*, *Manual Enterprises*, and *Hamling*, which recognized that, despite the "different shades of meaning" associated with the words used in the string, "the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex." *Manual Enters.*, 370 U.S. at 483 (Harlan, J.). This Court has often relied on the canon of statutory construction "noscitur a sociis"—"a word is known by the company it keeps"—in order "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995) (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). That canon is appropriately applied in this case to fix the meaning of the single word "indecent" in the longer statutory string. See, *e.g.*, *Flying Eagle Publications, Inc.* v. *United States*, 273 F.2d 799, 803 (1st Cir. 1960) (explaining that, in construing 18 U.S.C. 1461, "the words 'indecent, filthy or vile' as used in the statute are limited in their meaning by the preceding words 'obscene, lewd, lascivious'"); *United States* v. *Keller*,

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or excretory activities or organs"); *Finley*, 118 S. Ct. at 2173 (reviewing constitutionality of statute requiring the NEA to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" in establishing regulations concerning grant decisions).

259 F.2d 54, 57 (3d Cir. 1958) (applying doctrine to hold that, in construing 18 U.S.C. 1463, "language of an 'indecent' character must be equated with language of an 'obscene' character").

d. There is no basis for concluding that, in amending Section 223(a)(1)(A) in 1996 as part of the CDA, Congress intended to affect the interpretation of the statutory phrase it had adopted in 1968. The 1996 amendments left the string of words at issue—"obscene, lewd, lascivious, filthy, or indecent" —unchanged. Compare Pub. L. No. 90-299, § 1, 82 Stat. 112, with 47 U.S.C. 223(a)(1)(A) (Supp. II 1996). That alone suggests that Congress did not intend to modify the prior interpretation of that language. *Pierce* v. *Underwood*, 487 U.S. 552, 567 (1988).

The legislative record relating to the 1996 amendments also does not show that Congress intended to expand the scope of the statute beyond obscene speech. The Conference Report simply explains that the Senate bill, which was adopted with minor modifications, "updates section 223(a) * * * by using the term 'telecommunications service' as a replacement for or in addition to 'telephone' references in the present law," and that "[t]he term 'communication' is added to current law references to 'conversation.'" H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 187 (1996). The report also observes that the Senate bill added "[a]n intent requirement * * * [so] that liability is incurred for 'obscene, lewd, lascivious, filthy, or indecent' communications with the intent to 'annoy, abuse, threaten, or harass another person.'" *Ibid.* The legislation's sponsor similarly stated that the bill's intent was merely to "give law enforcement new tools to prosecute those who would use the computer to make the equivalent of obscene telephone calls, to prosecute

electronic stalkers who terrorize their victims." 141 Cong. Rec. S8330 (daily ed. June 14, 1995) (statement of Sen. Exon); see also *id.* at S8333 (statement of Sen. Coats) ("What we are doing here is not new, * * * We are taking the standards adopted by the Senate, by the Congress, signed into law, that apply to the use of these kinds of communications over the phone wires and applied it, now, over the computer wires.").

In contending that Congress in 1996 intended Section 223(a)(1)(A) to reach "far beyond obscenity" (J.S. 20), appellant takes out of context a statement in the Conference Report that "the conferees intend that the term indecency * * * has the same meaning as established in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), and *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989)." H.R. Conf. Rep. No. 458, *supra*, at 188. As the court below noted (J.S. App. 26a), that statement was made in the section of the report discussing the provisions of the CDA dealing with the transmission of "obscene or indecent" and "patently offensive" material to minors. See 47 U.S.C. 223(a)(1)(B) and (d) (Supp. II 1996). The portions of the report preceding the sentence quoted by appellant thus explain that "[n]ew subsection [47 U.S.C.] 223(d)(1) applies to content providers who send prohibited material *to a specific person or persons under 18 years of age* * * * [and] who post indecent material for online display *without taking precautions that shield that material from minors*." H.R. Conf. Rep. No. 458, *supra*, at 188 (emphasis added). Those portions also state that it was "[n]ew section 223(d)(1)," not section 223(a)(1)(A), that codified *Pacifica*'s indecency definition. *Ibid.* Similarly, the sentence following the one quoted by appellant emphasizes that *Pacifica* and *Sable* "establish the principle that the federal government has

a compelling interest *in shielding minors* from indecency." *Ibid.* (emphasis added).

Appellant points to several statements by opponents of the CDA during the Senate floor debate that Section 223(a)(1)(A) would reach speech that is indecent but not obscene. J.S. 20-22. But "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394- 395 (1951). Accordingly, this Court has "often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents," since "[i]n their zeal to defeat a bill, they understandably tend to overstate its reach." *NLRB* v. *Fruit & Vegetable Packers & Warehousemen Local 760*, 377 U.S. 58, 66 (1964). Accord *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 585 (1988). Appellant can point to no statement by any of the CDA's supporters that adopted the view of Section 223(a)(1)(A) espoused by its opponents, and "[t]here is no indication * * * that the CDA's sponsors, or the legislature generally, shared this view." J.S. App. 28a.

e. Appellant complains (J.S. 8-9, 13-14) that the district court's construction of 47 U.S.C. 223(a)(1)(A) gives the term "indecent" in that subsection a meaning different from that in 47 U.S.C. 223(a)(1)(B) (Supp. II 1996), which prohibits "obscene or indecent" communications to minors, see *Reno* v. *American Civil Liberties Union*, 521 U.S. 844 (1997), and 47 U.S.C. 223(b)(2), which prohibits indecent communications "by means of telephone * * * for commercial purposes." See *Sable*, 492 U.S. at 126. But "[i]t is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which

precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932). In this case, the term "indecent" as used in Section 223(a)(1)(A) has a history and context that is distinctly different from that of either of the other provisions in Section 223 upon which appellant relies, and there is no reason to presume that its construction should be modified to fit that of other provisions, with different histories and embodying different purposes, which were added later.

Appellant also claims that the district court's construction renders 47 U.S.C. 223(a)(1)(A) "redundant of other federal laws criminalizing the communication of obscenity by computer, like 18 U.S.C. § 1465." J.S. 15. But Section 1465, which prohibits the interstate transportation of obscene matter for distribution, applies to materials transmitted through the use of "an interactive computer service." 18 U.S.C. 1465 (Supp. II 1996). Section 223(a)(1)(A), by contrast, applies to obscene matter transmitted by use of a "telecommunications device." The two terms are not the same. An "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including * * * a service * * * that provides access to the Internet." 47 U.S.C. 230(e)(2) (Supp. II 1996). In contrast, as appellant acknowledges (J.S. 3 n.1), "'telecommunications devices' include telephones, computer modems and fax machines." See *American Civil Liberties Union* v. *Reno*, 929 F. Supp. 824, 828 n.5 (E.D. Pa. 1996), aff'd, 521 U.S. 844 (1997). See also 47 U.S.C. 223(h)(1)(B) (Supp. II 1996) (specifically providing that "[t]he use of the term 'telecommunications device' in this section

* * * does not include an interactive computer service"). To be sure, there is an area of overlap between the two provisions, but that is hardly unusual where federal legislation is concerned. See *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703 (1995); *Russello* v. *United States*, 464 U.S. 16, 24 n.2 (1983) (even if there are "factual situations to which [two] subsections apply," an overlapping interpretation is not foreclosed where the two subsections are "not wholly redundant").

Finally, appellant asserts that interpreting Section 223(a)(1)(A) as limited to obscene communications renders its "intent to annoy" requirement "surplusage," because "obscene communications can be proscribed regardless of such intent." J.S. 12. But Congress always remains free to legislate short of constitutional boundaries. In this case, the legislative history shows that Congress intended in part to "codify Court and FCC interpretations that [the statute] applies to communications between non-consenting parties." 141 Cong. Rec. S8091 (daily ed. June 9, 1995) (statement of Sen. Exon). See J.S. App. 33a-34a (discussing *United States* v. *Carlin Communications, Inc.*, 815 F.2d 1367, 1372 (10th Cir. 1987), and *Cohalan* v. *New York Tel. Co.*, 55 Rad. Reg. 2d (P & F) 1249 (FCC Mar. 7, 1984). There is nothing questionable about interpreting Section 223(a)(1)(A) to prohibit only those obscene communications that are made with an intent to annoy.

f. In the end, even if doubts regarding the meaning of 47 U.S.C. 223(a)(1)(A) were more substantial, there would be no basis for overturning the district court's interpretation. It is well settled that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500 (1979). See

generally *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440, 466 (1989); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). Accordingly, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

Appellant vigorously contends that if 47 U.S.C. 223(a)(1)(A) is construed to reach communications that are indecent and not obscene, even with the limitation that such communications must be made with the intent "to annoy, abuse, threaten, or harass another person," the statute is unconstitutional. J.S. 23-27. If appellant is correct, then the district court was under a duty in accordance with this Court's precedents to determine whether there remained an alternative construction of the statute by which the constitutional question could be avoided. In this case, given this Court's decisions construing virtually identical language, it is plainly possible to read Section 223(a)(1)(A) as applying only to obscene communications. Appellant makes no claim that, as so construed, the statute would be unconstitutional—indeed, appellant concedes that "obscene communications can be proscribed" by Congress. J.S. 12. It was thus entirely appropriate for the district court to interpret Section 223(a)(1)(A) to reach only those indecent communications that are also obscene.

CONCLUSION

The appeal should be dismissed. In the alternative, the judgment of the district court should be summarily affirmed.

Respectfully submitted.

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MARCH 1999

APPENDIX

[Department of Justice caption omitted]

February 19, 1998

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: /s/ JCK John C. Keeney
Acting Assistant Attorney General

SUBJECT: Instructions on Interpretation of 47 U.S.C. § 223(a)(1)(A), Part of the Communications Decency Act.

On February 8, 1996, the President signed the Telecommunications Act of 1996, which contained the Communications Decency Act ("CDA"). The CDA amended, inter alia, 47 U.S.C. § 223(a)(1)(A) to prohibit by means of a telecommunications device transmissions of obscene, lewd, lascivious, filthy, or indecent materials with the intent to annoy, abuse, threaten, or harass another person. See 47 U.S.C. §§ 223(a)(1)(A), as amended by Title V, Section 502 of the Telecommunications Act of 1996.

As originally enacted in 1968, 47 U.S.C. § 223(1(A) lacked an intent requirement and prohibited using a "telephone" "in the District of Columbia or in interstate or foreign communication" to "make[] any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent." The United States Attorneys Manual interpreted this provision as prohibiting "obscene remarks." See U.S. Attys. Man 9-63.410 (1992) (section 223(a) "makes it a federal offense for any person, by means of a telephone in the District of Columbia or in interstate or foreign communication, to * * * [m]ake any obscene remark[.]"). See also, U.S. Attys. Man. 9-75.093 (1998) and Criminal Resource Manual at 1979 (47 U.S.C. § 223(a)(1)(A) (obscene phone calls)).

A lawsuit was recently filed in which plaintiff challenged solely the CDA's prohibition on "indecent" communications intended to "annoy" another person as unconstitutionally vague and overbroad on its face and as applied. See Apollomedia Corp. v. Reno, No. 97-346 (N.D. Ca.). Consistent with the pre-CDA interpretation of this provision, the Department took the position in opposing plaintiff's motion for preliminary injunction that the provision at issue continued to be limited to obscene communications, albeit by telecommunications device. Oral argument on the still-pending motion was held on October 20, 1997.

This interpretation of the statute shall govern the conduct of your office. In addition, the Child Exploitation and Obscenity Section ("CEOS") of the Criminal Division continues to have supervisory responsibility over section 223. Thus, "[c]onsultation with the Section is required before any criminal prosecution may be instituted [there]under[.]" U.S. Attys. Man. 9-75.020 ("Authorization and General Prosecution Policies—Department Priorities").