Does the Child Online Protection Act Violate the First Amendment?

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FIRST AMENDMENT

Does the Child Online Protection Act
Violate the First Amendment?

by Susanna Frederick Fischer


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ISSUE
Does the Child Online Protection Act (COPA) violate the First Amendment to the United States Constitution?

FACTS
This is the second round of arguments before the Supreme Court, on a second attempt at federal legislation to protect children from sexually explicit material on the Internet that is not obscene by adult standards. An earlier effort to achieve the same goal, the Communications Decency Act (CDA), enacted as Title V of the Telecommunications Act of 1996, was struck down in 1997 by the United States Supreme Court on the basis that it violated the First Amendment. Reno v. ACLU, 521 U.S. 844 (1997).

Proponents of such federal legislation did not give up after Reno v. ACLU. On October 21, 1998, Congress enacted a second statute, COPA, which attempts to remedy the constitutional defects of the CDA. COPA prohibits "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. § 231(a)(1). Violations are subject to civil and criminal sanctions, including imprisonment up to six months, criminal fines up to $50,000, and civil penalties up to $50,000 per violation. 47 U.S.C. § 231(a)(1)-(3). Anyone who intentionally violates COPA may additionally be fined up to $50,000 per day that a violation exists. 47 U.S.C. § 231(a)(2).

COPA defines material that is "harmful to minors" as material that is "obscene" or that satisfies a three-part test, namely, material that:

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

(Continued on Page 290)
designated to panderm 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.

COPA contains a definition of "commercial purposes," namely:
"A person shall be considered to be engaged in the business of making or offering to make a communication for commercial purposes, namely:
| (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors. |

: designed to panderm 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.

COPA provides for an affirmative defense to prosecution when a defendant "in good faith, has restricted access by minors to material that is harmful to minors" by imposing a requirement to use a credit card, debit account, adult access code, or adult personal information number, by accepting a digital age verification certificate, or by taking "any other reasonable measures that are feasible under available technology." 47 U.S.C. § 231(c)(1).

On the day after COPA's enactment, the American Civil Liberties Union and other free speech advocates and online-content providers that post sexually explicit content on the Web (collectively, ACLU) filed suit in the United States District Court for the Eastern District of Pennsylvania, making a facial challenge to COPA's constitutionality and seeking to enjoin the government from enforcing it. After holding an extensive evidentiary hearing, the district court granted the plaintiffs' motion for a preliminary injunction on the basis that they were likely to succeed on the merits of their claim that COPA was unconstitutional. ACLU v. Reno, 31 F. Supp. 2d 497 (E.D. Pa. 1999).

The district court found that COPA is a content-based regulation of speech that was subject to strict scrutiny analysis. Although the government had "a compelling interest" in protecting minors from harmful materials that were not obscene by adult standards, it was not clear that the government would meet its burden at trial to show that COPA is "narrowly tailored to achieve its goal" and is "the least restrictive means" to do so. 31 F. Supp. 2d 495-97. The plaintiffs had established a likelihood of success on the merits on the basis that COPA would unduly burden speech that is constitutionally protected for adults. In particular, it was likely that by implementing age verification or credit card screens, COPA might deter adult users from accessing material that was harmful to minors, and might consequently chill publications by Web publishers who bore the costs of implementing age-verification technologies. The current technological impossibility of restricting minors from accessing chat rooms and discussion groups other than by requiring screening for all users would impose an undue burden on speech that was constitutionally protected for adults. Moreover, the government was not likely to satisfy its burden to prove that COPA is the least restrictive means to achieve its compelling interest. The district court found that the use of blocking and filtering technologies, though imperfect, would likely be "at least as successful as COPA" and would impose a lesser burden on constitutionally protected speech. ACLU v. Reno, 31 F. Supp. 2d 497.

The United States Court of Appeals for the Third Circuit affirmed the district court. ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000). This decision was entirely based on a new ground raised by the Third Circuit at oral argument, and did not reach any of the grounds relied on by the district court. Taking issue with COPA's "contemporary community standards" test, the Third Circuit found that this is unconstitutionally overbroad in the context of the World Wide Web. The Third Circuit reasoned that since Web publishers lacked the ability to control the geographic distribution of their publications, the "contemporary communi-
ty standards” criterion would result in every Web communication being required to comply with the most restrictive community’s standards.

The United States Supreme Court vacated the decision of the Third Circuit and remanded for further proceedings. *Ashcroft v. ACLU*, 535 U.S. 564 (2002). A majority of the Court held that COPA’s incorporation of community standards in its definition of “material that is harmful to minors” does not, by itself, cause the statute to be unconstitutionally overbroad. In so holding, the majority did not express a view as to whether COPA is unconstitutionally vague or likely to survive strict scrutiny analysis. The Court did not vacate the preliminary injunction granted by the district court, but remanded for consideration of the other issues.

On remand, the Third Circuit once again affirmed the district court’s grant of a preliminary injunction against enforcement of COPA. *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003). The Third Circuit agreed with the district court that COPA fails the strict scrutiny test. It held that although COPA addresses a compelling governmental interest in protecting minors from harmful material online, some of its provisions are not narrowly tailored to serve that compelling interest and do not provide the least restrictive means of furthering that interest.

The Third Circuit pointed out the following problems: (1) COPA’s definition of “material that is harmful to minors” is insufficiently narrowly tailored because its requirement that such material be treated “as a whole” would not permit the consideration of such material in context as the First Amendment requires. (2) COPA’s definition of “minor” does not make it clear to Web publishers which age of “minor” they should take into account in determining whether online material on their Web site would violate COPA. This is so even accepting the government’s proposed narrowing interpretation of the term “minor” to mean normal, older adolescents. That interpretation conflicts with the plain meaning of the statute. (3) COPA’s limitation to communications for “commercial purposes” is also insufficiently narrowly drawn, since it applies to a wider range of Web publishers than the commercial pornographers that were COPA’s real target. The Third Circuit did not accept the government’s proposed narrowing construction of this provision to cover only communications that have a substantial connection to the regular online marketing of material that is harmful to minors. Even though COPA’s definition of “engaged in the business” contains the phrase “regular course ... of trade or business,” this is not sufficient narrow tailoring because there could still be liability for communications that were a tiny fraction of a content provider’s business. (4) COPA’s affirmative defenses unconstitutionally burden adult access to constitutionally protected content. COPA’s screening requirements are likely to deter many adults from accessing restricted content due to privacy concerns. (5) COPA is not the least restrictive means to achieve its purpose since filtering or blocking software may be at least as effective in protecting children from harmful online material. Moreover, COPA is unconstitutionally overbroad. Although the “community standards” provision does not by itself render COPA overbroad, COPA is overbroad when the community standards provision is viewed together with COPA’s overly broad definitions of “material harmful to minors” and “for commercial purposes” as well as its overly burdensome affirmative defenses. The “radical surgery” that would be required to rewrite the statute to make it constitutional would be a “serious invasion of the legislative domain.” *ACLU v. Ashcroft*, 322 F.3d 271.

The government’s petition for rehearing was denied. On October 14, 2003, the Supreme Court granted the government’s petition for review of the Third Circuit’s decision. *Ashcroft v. ACLU*, 124 S.Ct. 399 (2003).

**CASE ANALYSIS**

The parties agree that COPA regulates speech based on its content, which is presumptively invalid under the First Amendment and subject to a strict scrutiny analysis. To survive constitutional scrutiny, COPA must be supported by a compelling government interest, and it also must be narrowly tailored and the least restrictive means of furthering that interest.

In the “real world” context of traditional media sold in physical space, many states have laws regulating the sale of materials that are harmful to minors although not obscene for adults. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Supreme Court upheld the constitutionality of a New York criminal statute that prohibited the sale to minors of magazines that were obscene as to minors, though not obscene for adults. Since *Ginsberg*, many states have enacted “blinder laws” that regulate not only the sale of materials that are harmful to minors but also the display of such materials to minors. A number of federal courts of appeals and state courts have ruled that such blinder laws are constitutional. See, e.g., *Crateford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117 (1997), *American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir. 1989), cert. denied, 494 U.S. 1056

(Continued on Page 292)
The problem of regulating materials disseminated in cyberspace that are "harmful to minors" arose in the mid-1990s after the Internet became a widely used communications medium in the United States. Congress first attempted to address this problem by enacting the CDA in 1996.

The CDA criminalized the "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age (the "indecent transmission provision") as well as the "knowing" sending or displaying to a person under 18 of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" (the "patently offensive display provision"). 47 U.S.C. §§ 223(a), 223(d) (1996). The CDA contained two affirmative defenses. One applied to defendants who took reasonable and effective actions to limit access by minors to prohibited material. 47 U.S.C. § 223(e)(5)(A) (1996). The second applied to defendants who restricted access to such material through the use of certain specified forms of age verification. 47 U.S.C. § 223(e)(5)(B) (1996).

Although, on a facial challenge to the CDA's constitutionality, the Court found in Reno v. ACLU, 521 U.S. 844, that the government had a compelling interest in protecting minors from indecent messages that would not be obscene for adults, it held that the "patently offensive display" and "indecent transmission" provisions of the CDA were vague and not narrowly tailored to further that interest. Nor had the government shown that the challenged provisions of the CDA were the least restrictive alternative available to further that compelling interest. Moreover, the Court found the CDA to be unconstitutionally overbroad because it applied to large amounts of non-pornographic material with serious educational or other value.

The Court found the CDA to be significantly broader than the "harmful to minors" statute found constitutional in Ginsberg because (1) the CDA was not limited to commercial transactions; (2) the CDA, unlike the Ginsberg statute, failed to contain any exception for parents who permitted their children to view the prohibited material; (3) the CDA's key terms, indecent and patently offensive, were undefined and also failed to exempt material that was of serious literary, artistic, political, or scientific value; (4) the CDA's definition of minors as those under 18 years of age would include many first-year college students, unlike the Ginsberg statute, which limited minors to those under 17.

The CDA's affirmative defenses did not amount to sufficiently narrow tailoring to save the CDA from unconstitutional overbreadth. According to the district court's findings of fact, existing technology could not be used by the senders of messages on the Internet to block minors' access to harmful materials while permitting adults to access these, nor could it be used to verify age in chat rooms, e-mail, "mail exploders," or news groups. Moreover, again relying on the district court's findings of fact, the Court noted that the adoption of age-verification technology was not economically feasible for most non-commercial Web sites and even some commercial Web sites. But parents could effectively and reasonably use user-based filtering and blocking systems to block their children from accessing harmful material online. In sum, the Court likened the CDA to "burning the house to roast the pig." Reno v. ACLU, 521 U.S. 882. The CDA's unconstitutional restrictions on speech "threaten to torch a large segment of the Internet community." Id.

The government now argues that COPA has remedied all of the constitutional defects of the CDA. The ACLU disagrees.

The government contends that COPA is narrowly tailored to further the compelling interest of protecting children from harmful material on the World Wide Web. In support of this contention, the government points out that COPA's scope is narrower than the CDA since COPA applies only to material on the World Wide Web, for which age screening is technologically feasible, and excludes e-mail, newsgroups, and chat rooms, for which age screening technology is not effective. The government also contends that the narrowing of COPA's scope to communications "for commercial purposes" rectifies the CDA's problem of an overly broad reach to entities and individuals who might not be able to afford age screening. The government argues that COPA should be interpreted narrowly to apply only to persons or entities that seek to profit from posting harmful materials online as a regular course of their business.

Moreover, according to the government, COPA resolves other constitutional defects from which the CDA suffered. By limiting its coverage only to material that appeals to the prurient interest of minors, is patently offensive with respect to minors, and lacks serious value for minors, COPA cures the CDA's overly broad application to material with serious value for minors. Unlike the
CDA, COPA contains a precise definition of what types of material may be considered patently offensive. Furthermore, COPA is modeled in all essential respects on state harmful-to-minors laws that have been found to be consistent with the First Amendment.

The government argues that the Third Circuit's holding that COPA is not narrowly tailored is erroneous in several respects. First, contrary to the holding of the Third Circuit, COPA's "as a whole" language does not require material to be viewed in isolation, but in the context, at minimum, of the entire Web site on which such material is posted. Secondly, the Third Circuit erred in finding that COPA's definition of minors does not make clear to Web businesses the age of minors that they must take into consideration. According to the government, in considering whether material lacks "serious ... value for minors" under COPA, the term "minors" should be interpreted consistently with the state "blinder laws" on which COPA is modeled. On this interpretation, the term means the oldest category of minors, that is, normal 16-year-olds. Third, the Third Circuit erred in ruling that COPA's commercial purposes definition is not narrowly tailored. COPA limits its scope to businesses that seek to profit from harmful material on a regular basis. The government urges the Court to reject the Third Circuit's suggestion that COPA should exclude businesses that seek to profit from harmful material through the sale of advertising space rather than the harmful material itself, and that it should also limit its scope to businesses that post harmful material as a principal part of their business. The government argues that to limit COPA in this way would unduly compromise its compelling interest in protecting children from harmful materials.

Fourth, the government contends that the Third Circuit erred in holding that COPA's affirmative defenses unconstitutionally burden adult access to harmful material when such material can be obtained through the use of an adult ID or credit card. According to the government, these modest screening requirements are reasonable and do not give rise to privacy concerns since COPA contains confidentiality requirements for which violations are subject to criminal penalties. Fifth, the Third Circuit erroneously held that filtering or blocking software might be a less restrictive means of achieving the government's goals. Finally, the Third Circuit erred in finding COPA substantially overbroad. It is not overbroad for the same reasons that it is narrowly tailored. The government contends that it follows that COPA's reliance on community standards cannot not exacerbate any problem of overbreadth, because there is no such problem.

The ACLU argues in response that COPA violates the First Amendment's strict scrutiny requirement, since the government has not met its burden to establish that COPA is narrowly tailored to address the government's interest in protecting children from harmful material. Nor has the government established that COPA is not unconstitutionally overbroad. According to the ACLU, COPA, like the CDA, "burns the house to roast the pig" by suppressing too much speech that is constitutionally protected for adults to send and receive.Respondent's Brief at 25-26, 30. The ACLU describes COPA as a "bludgeon" that targets not just businesses that sell content online but also online businesses that provide information without charge as long as they seek to profit by the sale of online advertising. Respondent's Brief at 18-19. Contrary to the government's argument, COPA's definition of "commercial purposes" is not narrowly tailored but applies to a broad range of speakers on the Web.

The ACLU contends that COPA is unconstitutionally overbroad even on the government's interpretation that it excludes material with value for older minors, excludes Web sites that only occasionally publish material that is harmful to minors, and requires material to be assessed as harmful to minors in the context of an entire whole site. Even accepting this narrowing construction (which the ACLU argues is a completely untenable interpretation), COPA places a broad range of online speech at risk of prosecution. Since COPA contains no exclusion for material with serious educational or entertainment value, it threatens online providers of sex education as well as content providers that post sexually explicit speech purely for entertainment.

Moreover, the ACLU argues that the government's proposed narrowing interpretation is untenable on COPA's plain meaning. The government's narrowing construction of COPA's definition of "minors" would leave younger minors totally unprotected and is thus inconsistent with the statute's purpose. The government's interpretation of COPA's "commercial purposes" language to exclude Web sites that only occasionally post material that is harmful to minors is inconsistent with the plain language elsewhere in the statute. Interpreting COPA to mean that allegedly harmful material must be evaluated in the context of an entire Web site is not feasible or practical, and does not take into account the problem of large Web sites with vast amounts of content or links on Web sites to content residing on different servers.

(Continued on Page 294)
COPA's affirmative defenses constitute undue burdens on content providers by requiring them to risk criminal prosecution or to implement costly technological screening that would deter adults from accessing constitutionally protected speech as a result of privacy concerns. Given that the burden of proof for COPA's affirmative defenses is on content providers, subjecting them to this Hobson's choice will have a chilling effect on constitutionally protected speech, especially when there is a risk of being prosecuted according to the standards of the most conservative community. Moreover, COPA's affirmative defenses will impose registration requirements on all users of interactive fora such as Web-based chat and discussion groups, even if most of the material on the discussion does not contain material that was harmful to minors.

The ACLU argues that COPA would be ineffective in accomplishing its goal and that there are other less restrictive means to accomplish it than a threat of criminal sanctions. COPA would be ineffective in protecting children from sexually explicit speech because it would not protect them from harmful material originating outside the United States, via protocols other than http, or on non-commercial websites. Other less-restrictive alternatives than COPA include the use of filtering software, more rigorously enforcing existing federal obscenity law, and enforcing three newer federal laws. These newer laws are: (1) the Children's Internet Protection Act, which requires the use of filtering software in libraries and schools receiving federal funds; (2) the Dot Kids Implementation and Efficiency Act of 2002, which protects children from harmful materials on the Internet by creating a special "kids.us" domain; and (3) an unchallenged part of COPA that requires Internet Service Providers to educate parents about the availability of home filtering technology. In support of its argument that there are other less-restrictive means to achieve COPA's goal, the ACLU also points out that credit card screens already screen harmful material that is on sale on the Internet.

The ACLU also argues that COPA would create a far more draconian censorship regime for the Internet than for other media. Many states do not have blinder statutes, and many others do not often or uniformly enforce them. Moreover, the Supreme Court has never upheld the constitutionality of state blinder laws. Further, the ACLU argues that blinder laws do not suffer from COPA's deterrent effect on constitutionally protected speech because blinder laws do not require adults to pay for speech they could otherwise get for free. Nor do blinder laws raise the privacy concerns posed by COPA's registration requirements. The ACLU also points out that federal courts have struck down seven "harmful to minors" statutes modeled on COPA. The ACLU also argues that the Supreme Court has never upheld a criminal ban on non-obscene communications between adults.

**SIGNIFICANCE**

The Supreme Court must now weigh-in for the second time in this more than 5-year-old court battle over whether COPA's drafters have rectified the constitutional defects of the CDA. In an effort to cure the CDA's lack of narrow tailoring, the drafters of COPA have more narrowly defined the speech that is being regulated and have also narrowed the speakers who are subject to regulation. However, COPA's drafters have not really changed the CDA's requirements for the technological screening mechanisms that speakers must implement to defend themselves against prosecution. Even though the Court is now considering the appropriateness of a preliminary injunction to restrain enforcement of COPA, its ruling may effectively and finally determine whether COPA is facially unconstitutional. The CDA's fate was determined at a similar procedural stage.

The Court's ruling is thus likely to have a significant impact on the long-running debate over how to protect children from sexually explicit materials on the Internet that do not qualify as obscene. Few would dispute that children can now easily access such materials on the Web, and concern over this is widespread. But there remains significant disagreement over who should bear the cost and burden of implementing screening, blocking and/or filtering technologies to restrict access by minors to harmful materials. If the government prevails and COPA is found constitutional, Web content providers will bear this burden, whereas a ruling striking down COPA would mean that this burden would rest on parents.

A parent's right to control what his or her child reads or views on the Internet is an aspect of a parent's more general right to bring up, educate, and direct that child, a right that the Court has protected from state interference under the Fourteenth Amendment. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Court has also characterized this parental right as a responsibility, holding that it can therefore be constitutionally permissible for lawmakers to supplement parental control over their children by enacting restrictions on children's access to harmful speech. See, e.g., *Ginsburg*, 390 U.S. 639 (stating that "[t]he legislature could properly conclude that..."
parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.

However, the Court has emphasized the importance of ensuring that parents retain the right to determine what material is appropriate for their children. In Reno v. ACLU, 521 U.S. 865, the Court struck down the CDA in part because “neither the parents' consent—nor even their participation—in the communication would avoid the application of the statute.” COPA's drafters sought to clarify that parents would not violate COPA if they permitted their minor children to use the family computer to view material covered by the Act. Although the ACLU does not object to COPA on the basis that it applies to a parent who consents to his or her child accessing sexually explicit material on the Internet, the Court's ruling is likely to be an important decision on the proper role of the government in supplementing parental responsibility for a child's upbringing and direction.

In determining the extent to which the government should step in to augment parental responsibility, the Court must consider the proper role of a significant non-legal source of regulation for cyberspace: technology in the form of hardware or software code. As Lawrence Lessig has famously stated in his groundbreaking book on cyberlaw, Code and Other Laws of Cyberspace (1999), “code is law.” (Code at 89). Both the government and the ACLU contend that technology has an important role in protecting children from harmful materials on the Internet. The government supports COPA's requirement that Web site owners to implement such technology places an unacceptable burden on speech that is constitutionally protected for adults, the ACLU contends that parental use of filtering or blocking technology is a less restrictive means of protecting children from such material. A ruling in this case is likely to be a significant statement on the proper balance between legal and technological regulation of cyberspace. The Court must assess this balance in an era of rapidly evolving technology. As the district court noted, both sides apparently concede that filtering, blocking, and screening technology is currently imperfect; the Court's upcoming ruling in this case will likely have an impact on the future market for and development of this kind of technology.

Many commentators view the balance between legal and technological regulation of the Internet to be a central problem that will affect its future. It has been the subject of a long-running debate between advocates of a cyberlibertarian approach to Internet regulation, who argue that regulation is best left to the market to develop appropriate technologies of regulation, and supporters of state regulation, who contend that a market left entirely to its own devices will fail and there is thus a need for state regulation. A ruling for the ACLU would be a victory for the cyberlibertarian approach to Internet regulation, whereas a ruling for the government would constitute a victory for proponents of greater government regulation of cyberspace.

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<table>
<thead>
<tr>
<th>Case Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska Department of Environmental Conservation v. Environmental Protection Agency et al.</td>
<td>23</td>
</tr>
<tr>
<td>Arizona v. Gant</td>
<td>52</td>
</tr>
<tr>
<td>Ashcroft v. American Civil Liberties Union et al.</td>
<td>289</td>
</tr>
<tr>
<td>Baldwin v. Reese</td>
<td>108</td>
</tr>
<tr>
<td>Banks v. Dretke</td>
<td>145</td>
</tr>
<tr>
<td>Barnhart v. Thomas</td>
<td>27</td>
</tr>
<tr>
<td>Beard v. Banks</td>
<td>257</td>
</tr>
<tr>
<td>BedRoc Limited et al. v. United States et al.</td>
<td>195</td>
</tr>
<tr>
<td>Castro v. United States</td>
<td>36</td>
</tr>
<tr>
<td>Commonwealth of Virginia v. State of Maryland</td>
<td>10</td>
</tr>
<tr>
<td>Crawford v. Washington</td>
<td>72</td>
</tr>
<tr>
<td>Doe et al. v. Chao</td>
<td>166</td>
</tr>
<tr>
<td>Dretke v. Haley</td>
<td>278</td>
</tr>
<tr>
<td>Engine Manufacturers Assn. et al. v. South Coast Air Quality Management District et al.</td>
<td>186</td>
</tr>
<tr>
<td>Fellers v. United States</td>
<td>136</td>
</tr>
<tr>
<td>Frew et al. v. Hawkins et al.</td>
<td>14</td>
</tr>
<tr>
<td>General Dynamics Land Systems, Inc. v. Cline et al.</td>
<td>68</td>
</tr>
<tr>
<td>Groh v. Ramírez et al.</td>
<td>94</td>
</tr>
<tr>
<td>Grupo Dataflux v. Atlas Global Group et al.</td>
<td>240</td>
</tr>
<tr>
<td>Hibbs v. Winn et al.</td>
<td>206</td>
</tr>
<tr>
<td>Household Credit Services, Inc. v. Pfennig</td>
<td>286</td>
</tr>
<tr>
<td>Illinois v. Lidster</td>
<td>77</td>
</tr>
<tr>
<td>Iowa v. Tovar</td>
<td>225</td>
</tr>
<tr>
<td>Jones et al. v. R.R. Donnelley &amp; Sons Co.</td>
<td>263</td>
</tr>
<tr>
<td>Kontrick v. Ryan</td>
<td>57</td>
</tr>
<tr>
<td>Lamie v. United States Trustee</td>
<td>80</td>
</tr>
<tr>
<td>Locke et al. v. Davey</td>
<td>130</td>
</tr>
<tr>
<td>Maryland v. Pringle</td>
<td>62</td>
</tr>
</tbody>
</table>

Missouri v. Seibert — 152

Muhammad v. Close — 141

Nixon et al. v. Missouri Municipal League et al. — 190

Office of Independent Counsel v. Favish et al. — 112

Olympic Airways v. Husain et al. — 85

Raytheon Co. v. Hernandez — 19

Republic of Austria et al. v. Altmann — 248

Sabri v. United States — 267

Scarborough v. Principi — 245

Securities and Exchange Commission v. Edwards — 90

South Florida Water Management District v. Miccosukee Tribe of Indians et al. — 201

Tennessee v. Lane et al. — 221

Tennessee Student Assistance Corp. v. Hood — 252

Till et ux. v. SCS Credit Corporation — 160

United States v. Banks — 42

United States v. Flores-Montano — 283

United States v. Galletti et al. — 180

United States v. Lara — 214

United States v. Patane — 125

United States Postal Service v. Flamingo Industries (U.S.A.) Ltd. et al. — 116

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP — 31

Vieth et al. v. Jubelirer et al. — 120

Yarborough v. Alvarado — 271

Yates et al. v. Hendon — 211
AGE DISCRIMINATION
General Dynamics Land Systems, Inc. v. Cline et al. — 68

ANTITRUST
United States Postal Service v. Flamingo Industries (U.S.A.) Ltd. et al. — 116
Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP — 31

AVIATION
Olympic Airways v. Husain et al. — 85

BANKRUPTCY
Kontrick v. Ryan — 57
Lamie v. United States Trustee — 80
Till et ux. v. SCS Credit Corporation — 160

BRIBERY
Sabri v. United States — 267

CIVIL RIGHTS
Jones et al. v. R.R. Donnelley & Sons Co. — 263

CLEAN AIR ACT
Engine Manufacturers Assn. et al. v. South Coast Air Quality Management District et al. — 186

CLEAN WATER ACT
South Florida Water Management District v. Miccosukee Tribe of Indians et al. — 201

CRIMINAL PROCEDURE
Baldwin v. Reese — 108
Castro v. United States — 36
Fellers v. United States — 136
Missouri v. Seibert — 152
United States v. Patane — 125

DEATH PENALTY
Banks v. Dretke — 145
Beard v. Banks — 257

DISABILITY RIGHTS
Raytheon Co. v. Hernandez — 19

ELEVENTH AMENDMENT
Frew et al. v. Hawkins et al. — 14

ENVIRONMENTAL LAW
Alaska Department of Environmental Conservation v. Environmental Protection Agency et al. — 23

EQUAL ACCESS TO JUSTICE ACT
Scarborough v. Principi — 245

ERISA
Yates et al. v. Hendon — 211

FEDERALISM
Nixon et al. v. Missouri Municipal League et al. — 190
Tennessee v. Lane et al. — 221

FEDERAL JURISDICTION
Grupo Dataflux v. Atlas Global Group et al. — 240
FIFTH AMENDMENT
Yarborough v. Alvarado — 271

FIRST AMENDMENT
Ashcroft v. American Civil Liberties Union et al. — 289
Locke et al. v. Davey — 130

FOURTH AMENDMENT
Arizona v. Gant — 52
Groh v. Ramirez et al. — 94
Illinois v. Lidster — 77
Maryland v. Pringle — 62
United States v. Banks — 42
United States v. Flores-Montano — 283

FREEDOM OF INFORMATION ACT
Office of Independent Counsel v. Favish et al. — 112

HABEAS CORPUS
Dretke v. Haley — 278

INDIAN RIGHTS
United States v. Lara — 214

INTERNATIONAL LAW
Republic of Austria et al. v. Altmann — 248

PRISONERS' RIGHTS
Muhammad v. Close — 141

PRIVACY ACT
Doe et al. v. Chao — 166

PUBLIC LAND USE
BedRoc Limited et al. v. United States et al. — 195

REDISTRICTING
Vieth et al. v. Jubelirer et al. — 120

SECURITIES LAW
Securities and Exchange Commission v. Edwards — 90

SIXTH AMENDMENT
Crawford v. Washington — 72
Iowa v. Tovar — 225

SOCIAL SECURITY
Barnhart v. Thomas — 27

SOVEREIGN IMMUNITY
Tennessee Student Assistance Corp. v. Hood — 252

TAXATION
Hibbs v. Winn et al. — 206
United States v. Gallelli et al. — 180

TRUTH IN LENDING ACT
Household Credit Services, Inc. v. Pfennig — 286

WATER RIGHTS
Commonwealth of Virginia v. State of Maryland — 10
Burdens/Standards of Proof — As a general matter, the party in a lawsuit asserting a claim or defense has the burden of presenting evidence that establishes the claim or defense. This is known as the burden of proof.

There are three burdens of proof. From the least to the most demanding, they are the preponderance-of-the-evidence burden of proof; the clear-and-convincing burden of proof; and the beyond-a-reasonable-doubt burden of proof. The first two burdens can apply in either criminal or civil cases, while the third applies only in criminal cases and then only to the prosecution.

There are no ready definitions for these burdens. There are, however, working definitions. Under the preponderance standard, the party with the burden of proof is required to come forward with credible evidence establishing that a claim or defense is more likely true than not. Under the clear-and-convincing standard, the party with the burden of proof is expected to present evidence establishing that the claim or defense is quite likely true. Under the beyond-a-reasonable doubt standard, the prosecution must present such evidence of the defendant's guilt that a reasonable person would not hesitate to find the defendant guilty. See Victor v. Nebraska, 114 S. Ct. 1239 (1994).

Class Action Lawsuit — As a general rule, a class action lawsuit is one in which one or several named individuals sue for themselves and others believed to have sustained injuries or losses similar to those sustained by the named plaintiffs, but who, at the time the case is filed, are unknown both as to their identities and their actual numbers. In order for a plaintiff’s lawsuit to be given class action status, the named plaintiff must show that (1) the class is so large as to make it impracticable to specify each and every plaintiff by name, (2) there exist questions of law or fact common to all members of the plaintiff class, (3) the claims of the named plaintiffs are representative of the claims of the unnamed plaintiffs, and (4) the named plaintiffs can fairly and adequately represent the interests of the entire plaintiff class. (Note: Less common is the class action lawsuit in which the class is composed of named and unnamed defendants or in which both the plaintiff's and the defendant's side of the case constitute a class.)

Collateral review (see also habeas corpus) — Collateral review is the criminal law's fail-safe mechanism. It is intended to ensure that a conviction and sentence satisfy the requirements imposed by law, constitutional and statutory. As its name suggests, collateral review looks at a convicted defendant's trial and in some cases the sentencing proceeding; it is not, however, a second trial. As a general rule, collateral review is limited to issues of law.

To be eligible for collateral review, the petitioning party must be in custody at the time the process begins. Typically but not necessarily, custody means imprisonment. For those convicted of state-law crimes, collateral review is available under state law and federal law, the latter in the form of a petition for a writ of habeas corpus. As a general rule, state-law petitioners must exhaust all avenues of collateral review under state law before filing a federal habeas corpus petition. For federal-law petitioners, federal habeas corpus review is available after certain post-conviction avenues such as a motion to vacate a conviction or sentence have been exhausted.

For both state-law and federal-law petitioners, federal habeas corpus review begins in a trial-level court but in the collateral-review context, the trial court functions as a reviewing court. However, if the federal habeas corpus petitioner is unsuccessful in habeas court, he or she is permitted, within limiting procedural rules, to seek further review of the habeas court's decision in the appropriate intermediate federal appeals court and if unsuccessful there, in the Supreme Court.

Damages — In law, damages means money given to a party whose legal interests have been injured. While there are several types of damages that can be given to an injured party, two of the most prominent types are compensatory damages and punitive damages.

An award of compensatory damages is a sum of money intended to make the injured party whole, insofar as this is possible. An award of punitive damages is intended to punish the wrongdoer in order to deter future wrongdoing. Usually, punitive damages go to the injured party and are over and above any award of compensatory damages. However, in some states, a portion of any punitive damages award goes to the state treasury.

Direct review — In American criminal law, a defendant is tried once, but the trial itself can be reviewed many times by many appellate courts. One channel of review is called direct review because it is initiated by a first appeal as a matter of statutory right. Direct review also is wide-ranging review because the convicted defendant is permitted to raise all procedurally proper issues regarding the trial court's disposition of his or her case — including issues of law, issues of fact, issues concerning the trial judge's use of discretion.

If the first appeal is resolved against the convicted defendant, appellate rules permit the defendant to seek discretionary review by still higher courts, generally by the highest court of the convicting state and then by the United States Supreme Court. (In federal criminal cases, the convicted defendant's initial appeal as a matter of right is to a circuit court of appeals and then as a matter of discretion to the Supreme Court.) If these courts decline to hear the defendant's case, hear the case but decide against the defendant, or if the
defendant defaults on his or her right to seek discretionary review, the direct review process ends and it is said that the defendant's conviction and sentence are final. At this point, the only avenue of relief from a conviction or sentence — retrial, resentencing, or outright release — is collateral review defined above.

**Discovery** — Discovery is a pretrial device in which each party to a lawsuit seeks information from the other party as well as from non-parties believed to have knowledge relevant to the issues in the case. The plaintiff seeks information through discovery to make his or her case; the defendant seeks information to support any defenses that may be available.

**Diversity** — This term is used whenever a federal court has jurisdiction over a case that does not involve a question of federal law. While there are several types of diversity jurisdiction, the most common type has two requirements: (1) the plaintiff and the defendant are residents of different states; (2) the dollar amount of the dispute between the parties is at least $75,000, exclusive of interest and costs.

**Habeas corpus** — Under the federal habeas corpus statute, 28 U.S.C. §2254 (1994), a person held in state/local custody who believes that his or her custody violates federal law — typically, the Constitution — may challenge that custody by filing a petition for a writ (i.e., an order) of habeas corpus in federal district court. If the petitioner wins, he or she must be released or retried, at the option of the prosecuting authority.

**In banc** — In banc (sometimes spelled en banc) literally means “full bench.” The term applies to those courts — typically, intermediate appellate courts — in which more than one judge, but less than all judges of the court, hears a case. As a general rule, when an appellate court sits in banc, all active judges sit. However, in the federal system, some circuit courts of appeals have so many active judges, e.g., the Ninth Circuit with 28 judges, that sitting literally in banc is not feasible. Thus, for those circuits with 15 or more active judges, the size of an in banc court is set by circuit rule. Currently, in banc courts in the Fourth, Fifth, Sixth, and Ninth Circuits are composed of fewer than the entire court, with the exact number varying by circuit according to circuit rule.

**Per curiam opinion** — This term literally means “the opinion of the court,” the Supreme Court or any appellate court. Because the opinion is the court’s opinion, there is no indication of which justice/judge wrote it.

**Plurality opinion** — This term denotes an opinion of the United States Supreme Court in which there is no majority opinion; that is, fewer than a bare majority of five justices were able to agree on the legal basis for the Court’s action in affirming, reversing, or vacating a lower court decision.

In some cases, the Court’s opinion can be a partial plurality opinion. A partial plurality opinion is one in which at least one part of the opinion represents the views of four or fewer Justices. For an example of a partial plurality opinion, see Hubbard v. United States, 115 S. Ct. 1754 (1995) (Parts IV and V. a plurality of three Justices; Parts I, II, III, and VI, a majority of six Justices).

**Preemption** — Under the Supremacy Clause, U.S. Const. art. VI, § 2, federal law — whether based on the Constitution, a statute, or a treaty — takes precedence over state or local law on the same matter. In other words, if federal law addresses a matter, either expressly or by implication, it trumps and renders unenforceable any state or local law on the matter.

**Qualified Immunity** — Qualified immunity is a defense that can be raised by a government employee whenever there is uncertainty about the lawfulness or unlawfulness of certain actions taken by the employee, actions claimed by the plaintiff to be unlawful. A government employee can avoid a trial under this defense if the employee can show that, at the time of the complained-of action, he or she could not have known that it violated the law.

**Strict scrutiny** — Strict scrutiny is a searching level of judicial review applied to governmental actions — federal, state, and local — challenged as unconstitutional. Strict scrutiny requires the governmental actor to show that it had a compelling reason to take the challenged action and that the action taken goes no further than necessary — is narrowly tailored — to advance the cited compelling reason.

**Summary judgment** — This is the name of a procedural device available to either party to a civil lawsuit that enables one or the other party to win without a trial. A party seeking summary judgment is entitled to a judgment in its favor if there is no genuine dispute about the pertinent facts, and, based on those undisputed facts, the law compels a judgment for the party who has asked for a favorable ruling.
COVERING THE COURT'S ENTIRE MARCH
CALENDAR OF CASES, INCLUDING ...

ELK GROVE UNIFIED SCHOOL DISTRICT V. NEWDOW ET AL.

Michael Newdow, the respondent in this case, is an atheist and the father of a minor child who attends a public elementary school in the Elk Grove District. He objects to his child hearing and observing the recitation of the Pledge of Allegiance.

In June 2002, a divided three-judge panel of the Ninth Circuit ruled that the phrase “under God” in the Pledge violates the Establishment Clause of the First Amendment. In February 2003, the panel issued an amended opinion that retreated slightly from its holding that the words “under God” in the Pledge are unconstitutional but reaffirmed that a public school district’s policy of requiring teachers to lead willing students in reciting the Pledge is unconstitutional.

HIBEL V. SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA ET AL.

The issue in this case arose when a police officer responding to a citizen’s call regarding a possible assault encountered a potential suspect who refused to identify himself.

The question pressed by the petitioner is whether the government can force an individual to identify himself if the police have legitimately detained him but lack probable cause to make an arrest. Specifically, the Court is being asked to decide whether a state law that requires detained individuals to identify themselves violates either the Fifth Amendment right against self-incrimination or the Fourth Amendment right to be free from unreasonable search and seizure.
<table>
<thead>
<tr>
<th>MONDAY</th>
<th>TUESDAY</th>
<th>WEDNESDAY</th>
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</thead>
<tbody>
<tr>
<td>MARCH 22</td>
<td>MARCH 23</td>
<td>MARCH 24</td>
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<tr>
<td>Hibel v. Sixth Judicial District Court of the State of Nevada et al.</td>
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<td></td>
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<th>MARCH 29</th>
<th>MARCH 30</th>
<th>MARCH 31</th>
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