No. 07-2539

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMERICAN CIVIL LIBERTIES UNION; ANDROGYNY BOOKS, INC., d/b/a A DIFFERENT LIGHT BOOKSTORES; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ADDAZI, INC., d/b/a CONDOMANIA; ELECTRONIC FRONTIER FOUNDATION; ELECTRONIC PRIVACY INFORMATION CENTER; FREE SPEECH MEDIA; PHILADELPHIA GAY NEWS; POWELL'S BOOKSTORES; SALON MEDIA GROUP, INC.; PLANETOUT, INC.; HEATHER CORINNA [redacted] NERVE.COM, INC.; AARON PECKHAM, d/b/a URBAN DICTIONARY; PUBLIC COMMUNICATORS, INC.; DAN SAVAGE; SEXUAL HEALTH NETWORK,

Plaintiffs-Appellees,

v.

ALBERTO R. GONZALES, in his capacity as Attorney General of the United States,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE APPELLANT

PETER D. KEISLER
Assistant Attorney General

PATRICK L. MEEHAN
United States Attorney

SCOTT R. McINTOSH
(202) 514-4052
CHARLES W. SCARBOROUGH
(202) 514-1927
Attorneys, Appellate Staff
Civil Division, Room 7244
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

United States Constitution:

Statutes :

Legislative Materials:

Miscellaneous:

STATEMENT OF JURISDICTION

This is an action for declaratory and injunctive relief based on claims arising under the First and Fifth Amendments to the Constitution. Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. The court issued a final decision on March 22, 2007, which is published at 478 F. Supp. 2d 775. The government filed timely a notice of appeal on May 18, 2007. This Court has jurisdiction over that appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

The Child Online Protection Act requires persons "engaged in the business" of posting materials that are "harmful to minors" on the World Wide Web to take reasonable measures to restrict children's access to such materials, by requiring the use of a credit card or any other feasible measure to identify age. The question presented in this appeal is whether COPA facially violates the First Amendment.

STATEMENT OF RELATED CASES

This case has twice been before this Court on appeal from a preliminary injunction. See Ashcroft v. ACLU, 322 F.3d 240 (3d Cir. 2003); ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000). The Supreme Court has also issued two decisions in this case. See Ashcroft v. ACLU, 542 U.S. 656, 673 (2004); Ashcroft v. ACLU, 535 U.S. 564 (2002). To counsel's

knowledge, there are no other related cases or proceedings that are before any other court or agency, state or federal.

STATEMENT OF THE CASE

A. Regulatory Background.

The Child Online Protection Act ("COPA"), Pub. L. No. 105-277, § 1403, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. § 231), is the centerpiece of Congress's efforts to protect children from sexually explicit material on the Internet. COPA authorizes the imposition of civil and criminal penalties on any person who "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. § 231(a)(1). COPA thus focuses narrowly on communications that are made (1) on the World Wide Web, (2) for commercial purposes, (3) that contain material that is "harmful to minors," and (4) that the speaker knows are harmful to minors.

COPA does not censor communications that fall within the narrow scope of its coverage. Instead, the statute regulates the manner in which "harmful to minors" materials may be displayed on the Web, requiring reasonable measures to be taken to shield such materials from children.

Specifically, COPA provides an "affirmative defense" where a person "in good faith, has restricted access by minors" to harmful material by "(A) requiring use of a credit card, debit account, adult access code, or adult personal identification number, (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology." 47 U.S.C. § 231(c)(1).

COPA employs definitions of key terms taken directly from Supreme Court decisions and other well-established sources. Relying on concepts applied in Ginsberg v. New York, 390 U.S. 629 (1968), as refined in Miller v. California, 413 U.S. 15 (1973), the statute defines "material that is harmful to minors" to include "matter * * * that is obscene or that —

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6). A "minor" is defined as any person under the age of 17. Id. at § 231(e)(7).

COPA is also limited to communications made "for commercial purposes." The statute specifies that "[a] person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications," 47 U.S.C. § 231(e)(2)(A), i.e., only if the person "devotes time, attention or labor" to making or offering to make such communications "as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities." 47 U.S.C. § 231(e)(2)(B) (emphasis added).

In passing COPA, Congress addressed the specific constitutional concerns raised by the Supreme Court in Reno v. ACLU, 521 U.S. 844 (1997), where the Court invalidated the statute's predecessor, the Communications Decency Act (CDA). See H.R. Rep. No. 105-775, 105th Cong., 2d Sess. 12 (1998); accord S. Rep. No. 105-225, 105th Cong., 2d Sess. 2 (1998).

B. Prior Proceedings In This Case.

1. The day after President Clinton signed COPA into law, the ACLU and other plaintiffs filed suit, contending that the statute violates their First and Fifth Amendment rights. The district court (Reed, J.) entered a preliminary injunction prohibiting enforcement of COPA. ACLU v. Reno, 31

F. Supp. 2d 473, 498-99 (E.D. Pa. 1999). Holding that COPA imposes a burden on speech that is not narrowly tailored to advance the government's compelling interest, id. at 496-97, the court concluded "that the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users from accessing such materials and that the loss of users of such material may affect the speakers' economic ability to provide such communications." Id. at 495. The court also found that "blocking or filtering technology may be as least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators." Id. at 497.

This Court affirmed, but on other grounds. ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000). Praising "Congress' laudatory attempt to achieve its compelling objective of protecting minors from harmful material on the World Wide Web," id. at 181, this Court nonetheless held that COPA was likely invalid because of its "reliance on 'contemporary community standards' in the context of the electronic medium of the Web to identify material that is harmful to minors," id. at 173.

In Ashcroft v. ACLU, 535 U.S. 564 (2002), the Supreme Court vacated this Court's decision and remanded for further proceedings. The Court held that COPA's "use of 'community standards' to identify 'material that is harmful to minors' * * * does not render the statute facially unconstitutional." Id. at 566. "When the scope of an obscenity statute's coverage is sufficiently narrowed by a 'serious value' prong and a 'prurient interest' prong," the Court held that "requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment." Id. at 580.

2. On remand to the same panel (Nygaard, McKee, and Garth), this Court once again affirmed the preliminary injunction. ACLU v. Ashcroft, 322 F.3d 240 (3d Cir. 2003). The panel ruled that COPA is not narrowly tailored, in a variety of ways, to advance the government's compelling interest in protecting minors, id. at 251-66, and was for the same reasons unconstitutionally overbroad. Id. at 266-71.

First, the Court criticized COPA's definition of "material harmful to minors," reiterating its original conclusion that the use of "contemporary community standards," as applied to the Internet, "effectively limits the range of permissible material under the statute to that which is deemed

acceptable only by the most puritanical communities." Id. at 252. The panel found the resulting burden on speech for adults especially troublesome because it interpreted the definition to require the harmfulness and value of online material to be evaluated "in isolation, rather than in context," id. at 253 – despite COPA's instruction that material should be evaluated "as a whole." 47 U.S.C. § 231(e)(6)(A), (C).

Second, the Court held that the statute's "limitation of liability to persons making communications 'for commercial purposes' does not narrow the reach of COPA sufficiently." Id. at 256. Asserting that COPA subjects a Web publisher to liability "if even a small part of his or her Web site displays material 'harmful to minors,'" the panel concluded "that COPA is not narrowly tailored to proscribe commercial pornographers and their ilk, as the Government contends, but instead prohibits a wide range of protected expression." Id. at 257.

Third, the Court rejected the argument that COPA's affirmative defenses serve to narrow the statute's proscriptions. Id. at 257-61. The panel agreed with the district court's view "that COPA will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access

to content, especially where the information they wish to access is sensitive or controversial." Id. at 259.

Finally, the Court held that "COPA does not employ the 'least restrictive means' to effect the Government's compelling interest in protecting minors." Id. at 261. Citing the district court's finding that blocking and filtering software "may be substantially less restrictive than COPA in achieving COPA's objective of preventing a minor's access to harmful material," id. at 265, the Court held that COPA was unconstitutionally overbroad, id. at 266-70.

The Supreme Court affirmed, but did so on very narrow grounds. Ashcroft v. ACLU, 542 U.S. 656 (2004). The Court affirmed "for the reasons relied upon by the District Court," and emphasized that it was expressly not "consider[ing] the correctness of the other arguments relied on by the Court of Appeals." Id. at 665. Noting that the district court had "concentrated primarily on the argument that there are plausible, less restrictive alternatives to COPA," id. at 665, the Supreme Court held that the district court had not abused its discretion in concluding that the Government had failed to demonstrate that various alternatives –chiefly,

the use of blocking and filtering software – are less effective than COPA. Id. at 666.

Based on the preliminary injunction record, the Court found that "[f]ilters are less restrictive than COPA" because, among other things, "[t]hey impose selective restrictions on speech at the receiving end, not universal restrictions at the source," they allow adults without children to "gain access to speech they have a right to see without having to identify themselves or provide their credit card information," and they allow adults with children to "obtain access to the same speech on the same terms simply by turning off the filter on their home computers." Id. at 667. "All of these things are true," the Court held, "regardless of how broadly or narrowly the definitions in COPA are construed." Id.

The Court acknowledged that filtering software "is not a perfect solution to the problem of children gaining access to harmful-to-minors materials" because "[i]t may block some materials that are not harmful to minors and fail to catch some that are." Id. at 668. Nonetheless, the Court held that the government failed to carry its burden of showing that filtering is not a less restrictive than COPA. Id. at 669. In so holding, the Court specifically rejected "the argument that filtering software is not an available

alternative because Congress may not require it to be used." Id. "That argument carries little weight," the Court stated, "because Congress undoubtedly may act to encourage the use of filters," including "steps to promote their development by industry and their use by parents." Id.

The Court recognized that the preliminary injunction record "does not reflect current technological reality – a serious flaw in any case involving the Internet." Id. at 671. Accordingly, while affirming the injunction, the Court remanded to "allow the parties to update and supplement the record to reflect current technological realities." Id. at 671-72.

Justice Breyer (joined by Chief Justice Rehnquist and Justice O'Connor) dissented. Emphasizing that COPA is narrowly tailored to reach "legally obscene material, and very little more," id. at 678, that "the Act's definitions limit the statute's scope to commercial pornography," id. at 681, and that COPA "does not censor the material that it covers" but instead simply "requires creation of an internet screen that minors, but not adults, will find difficult to bypass," id. at 682, Justice Breyer concluded that "the Act at most imposes a modest additional burden on adult access to legally obscene material," id. at 683.

Justice Breyer also stressed that the voluntary use of blocking and filtering software could not properly be deemed a less restrictive alternative to COPA. Because "the presence of filtering software is not an alternative legislative approach to the problem of protecting children from commercial pornography," but instead "is part of the status quo," id. at 684 (emphasis in the original), Justice Breyer stated that the "relevant constitutional question" required "a comparison of (a) a status quo that includes filtering software with (b) a change in that status quo that adds to it an age-verification screen requirement." Id. Stated another way, the question is, "[g]iven the existence of filtering software, does the problem Congress identified remain significant?" Id.

Justice Breyer explained that "a 'filtering software status quo' means filtering that underblocks, imposes a cost upon each family that uses it, fails to screen outside the home, and lacks precision." Id. at 686. As a result, he summarized, "Congress could reasonably conclude that, despite the current availability of filtering software, a child protection problem exists," and "that a precisely targeted regulatory statute, adding an age-verification requirement for a narrow range of material, would more effectively shield children from commercial pornography." Id. at 687.

C. The District Court's 2007 Decision.

On remand from the Supreme Court, the district court held a three-week bench trial focused primarily on the availability and efficacy of user-end blocking and filtering technologies as a putatively "less restrictive alternative" to COPA. On March 22, 2007, the court again invalidated the statute on its face, ruling that (1) COPA is not narrowly tailored to serve Congress' compelling interest in protecting minors from sexually explicit materials on the Web, (2) COPA is not the least restrictive, most effective alternative to advance that interest, and (3) COPA is impermissibly vague and overbroad. 478 F. Supp. 2d at 777-78. As a result, the court permanently enjoined the government from enforcing COPA.

1. Before undertaking any legal analysis, the court made various factual findings. Id. at 789-794. Among other things, the court found that "filters are widely available and easy to obtain," that many Internet Service Providers (ISPs) offer filters for free, and that "non-ISP filtering products vary in cost, ranging from approximately $20 to $60." Id. at 793. The court also found that "[f]iltering programs are fairly easy to install, configure, and use and require only minimal effort by the end user to configure and update." Id. The court found "that filters generally block about 95% of

sexually explicit material," id. at 795, but it made no findings regarding the percentage of parents with minor children that actually use filters. Moreover, the court acknowledged evidence that the filters with the lowest rates of underblocking had significant rates of overblocking. Id. at 796-97 (noting that AOL filter blocked approximately 20% of non-sexually explicit Web pages). However, the court adopted plaintiffs' argument "that in determining whether filters are effective, the filter's underblocking rate is more important than its overblocking rate." Id. at 794.

The district court also made findings regarding the availability and efficacy of various affirmative defenses under COPA. Id. at 799-807. Specifically, the court found "that there is no evidence of age verification services or products available on the market to owners of Web sites that actually reliably establish or verify the age of Internet users." Id. at 800. For example, the court found that "traditional payment cards" (i.e., credit, debit and reloadable prepaid cards) cannot reliably be used to verify age because "a significant number of minors have access to them," id. at 801; that "data verification services" (i.e., companies that verify personal data entered by an Internet user and check it against public records) cannot reliably be used to verify age because they "can easily be circumvented by

children who generally know the first and last name, street address and zip codes of their parents or another adult," id. at 802; and that there are no "digital certificates" or "any other available or feasible options which would allow Web site owners to restrict access to certain material to minors, while continuing to provide it to adults," id. at 803.

Moreover, the court found that COPA's affirmative defenses would likely impose significant economic burdens upon Web publishers and result in a loss of web viewership. Id. at 803-07. The court found "that there are fees associated with all of the affirmative defenses and verification services identified in COPA, as well as other services that claim to provide age verification," and that the use of credit cards or age verification services would "therefore be practically unfeasible for all of the plaintiffs and most other Web site operators and content providers covered by COPA who distribute their content for free." Id. at 803-04. The court also found that "[r]equiring users to provide credit card or personal information before they can browse a Web page to determine what it offers will deter most users from ever accessing those pages, causing the traffic to Web sites such as the plaintiffs' to fall precipitously." Id. at 805.

2. In its conclusions of law, the district court held that (1) COPA is not narrowly tailored to serve Congress' compelling interest in protecting minors from harmful materials on the Web, id. at 810-13, (2) the government failed to show COPA is the least restrictive alternative for advancing that interest, id. at 813-16, and (3) COPA is both unconstitutionally vague and overbroad, id. at 816-20.[1]

a. In concluding that COPA is not narrowly tailored, the court held that the statute is both over- and underinclusive. The court held that COPA is "overinclusive" because it believed "the definitions of 'commercial purposes' and 'engaged in the business' apply to an inordinate amount of Internet speech and certainly cover more than just commercial pornographers," and because the statute "applies to speech that is obscene as to all minors from newborns to age sixteen, and not just to speech that is obscene as to older minors." Id. at 810.

[1] Before reaching these issues, the district court also held that at least three plaintiffs had standing to challenge COPA, id. at 807-09, and that the statute's constitutionality must be assessed under a strict scrutiny standard, id. at 809.

The court also stated that COPA is fatally "underinclusive" because it does not cover web sites outside the United States. Id. at 810-11.[2] Rejecting the government's argument that COPA applies to foreign web sites, the court concluded that COPA's legislative history "shows that Congress intended for the statute to have only domestic application." Id. at 811. The court also suggested that, even if COPA were applicable to foreign websites, its enforcement would likely be "burdensome and impractical due to the knotty questions of jurisdiction which arise in the Internet context." Id.

The court also held that COPA's affirmative defenses do not aid in narrowly tailoring the statute "because they are effectively unavailable." Id. at 811. Based on its finding that "[c]redit cards, debit accounts, adult access codes, and adult personal identification numbers do not in fact verify age," the court concluded that their use does not, as a general

[2] The court also noted that COPA applies solely to material accessible using HTTP or a successor protocol, but it did not hold the statute underinclusive in this regard, because the government's compelling interest "is quite narrow in that it seeks only to protect children from harmful materials on the Web." Id. at 811.

matter, constitute a "good faith" attempt to restrict access by minors within the meaning of Section 231(c)(1)(A) of COPA. Id. Instead, the court concluded, the affirmative defenses "raise their own First Amendment concerns," because the use of those defenses "will deter listeners" and will "place substantial economic burdens on the exercise of protected speech because all of them involve significant cost and the loss of Web site visitors, especially to those plaintiffs who provide their content for free." Id. at 812-13. Thus, rejecting the government's argument "that the defenses are not burdensome to commercial pornographers because they already accept credit cards to sell their content," the court reiterated its conclusion that "COPA does not apply merely to commercial pornographers but to a wide range of speakers on the Web." Id.

b. The district court next held that the government had not shown that COPA is the least restrictive alternative for advancing its compelling interest in protecting minors from harmful material on the Web. Id. at 813-16.

The court first rejected the argument that, because filters currently exist and can be used in conjunction with COPA, they are part of the "regulatory status quo" and cannot be viewed as a less restrictive

alternative to COPA. Id. at 814. The court emphasized that the government could take a variety of additional steps to promote and support the use of filters (e.g., by providing training and education regarding their use, performing studies about them, and subsidizing their purchase for low-income families). Id. Despite recognizing that encouraging greater use of filters is the relevant alternative, however, the court nevertheless proceeded to compare the efficacy of existing filters against the predicted efficacy of COPA's age-screening requirements. Employing this framework, the court concluded that the government "failed to show that filters are not at least as effective as COPA at protecting minors from harmful material on the Web." Id. at 814.

The court noted "that there is no showing of how effective COPA will be," but nonetheless concluded that COPA would not be very effective because it "will not reach a substantial amount of foreign source sexually explicit materials on the Web, which filters will reach," and because "its affirmative defenses including the age verification schemes are not effective." Id. In contrast, the court stated, "[a]lthough filters are not perfect and are prone to some over and under blocking, the evidence shows that they are at least as effective, and in fact are more effective than COPA in

furthering Congress' stated goal" because they "block sexually explicit foreign material on the Web, parents can customize filter settings depending on the ages of their children and what type of content they find objectionable, and filters are fairly easy to install and use." Id. at 815. The court concluded that even the government's study "shows that all but the worst performing filters are far more effective than COPA would be at protecting children from sexually explicit material on the Web." Id.

c. Finally, the district court declared that COPA is both unconstitutionally vague and overbroad, and therefore enjoined the government from enforcing the statute against anyone. 478 F. Supp. 2d at 816-20.[3] In finding COPA vague, the court outlined various provisions in the statute that it believed were insufficiently clear, including COPA's scienter requirements, its limitation to communications made for

[3] While recognizing that "facial challenges should be avoided," and emphasizing that its holding "is merely supplemental," the court declared that it was necessary to address these issues because they would be "very important to the facilitation of any subsequent legislation in this area." Id. at 816 n.10. However, the court expressly declined to reach the issue whether COPA's reliance on "community standards" renders it unconstitutional, because it recognized that "technology related to limiting access to Web sites based on the geographic location of the user has progressed." Id. at 820 n.13. The court also declined to address plaintiffs' claims that COPA interferes with the First Amendment rights of older minors or impairs the right to communicate anonymously. Id. at 821 n.14.

"commercial purposes," its "harmful to minors" definition, and its requirement that material be judged "as a whole." Id. at 816-18. Because COPA permits criminal penalties, the court concluded that the ambiguities it perceived in each of these areas impose an impermissible chilling effect on speech. Id. at 819.

In finding COPA overbroad, the court reiterated the same concerns that led it to conclude that the statute was not narrowly tailored. For example, the court asserted that the breadth and vagueness of the "commercial purposes" definition "would allow prosecutors to use COPA against not only Web publishers with commercial Web sites who seek profit as their primary objective but also those Web publishers who receive revenue through advertising or indirectly in some other manner." Id. at 819. Likewise, the court declared that COPA's "harmful to minors" definition sweeps up too much protected speech because a story that has serious value for a 16-year old could be viewed as appealing to the prurient interest of an 8-year old and might therefore be regulated under COPA. Id. The court concluded that it could not construe the statute narrowly to avoid these problems. Id. at 820.

SUMMARY OF ARGUMENT

In bookstores, movie theaters, and other "brick and mortar" establishments – indeed, everywhere but on the Internet – the display of sexually explicit material that falls within the well-established "harmful to minors" definition is regulated, and reasonable measures must be taken to prevent children from accessing such material. The Child Online Protection Act ("COPA") is an attempt by Congress to extend the same protections to children from harmful material on the World Wide Web that they enjoy in other fora. The statute reflects a conscientious effort by Congress to satisfy the concerns expressed by the Supreme Court in ACLU v. Reno while addressing the critical problem of children's exposure to sexually explicit material on the Web – a problem that has only grown since the statute's enactment in 1998, due to the increasing importance and accessibility of the Internet and the vast proliferation of sexually explicit material online.

COPA attempts to keep material that is "harmful to minors" from reaching children, who do not have a constitutional right to view it, while permitting access to the same material by adults, who do. The statute minimizes the burdens in differentiating between these two groups by

imposing age-verification requirements solely on persons who regularly and knowingly post such materials on the Web for profit. COPA thus places a modest burden on commercial Web publishers rather than relying exclusively on user-end controls such as filtering to screen such material, because Congress reasonably concluded that filtering provides only a partial solution to the problem of children's exposure to harmful materials online – due to inherent limitations in filtering technology and because filtering is entirely dependent upon voluntary implementation by parents.

The district court's holding that COPA is unconstitutional on its face rests on two fundamental errors which infected its entire analysis. First, at every turn, the court chose to construe the statute in a manner that exacerbates constitutional difficulties rather than minimizing them. Employing this approach – which is flatly at odds with established principles of statutory construction – the court exaggerated the breadth of COPA's coverage and thus magnified its burdens. Second, the court did not fairly assess the relative efficacy and burdens of COPA's age-verification requirements in comparison to filtering. While speculating at length regarding various ways in which COPA might be circumvented or might restrict more (or less) speech than necessary, the court ignored

critical limitations in filtering technology, which demonstrate that it is not a less restrictive, equally effective, alternative to COPA. By viewing COPA so critically while assuming the best about filtering, the district court substituted its own judgment for that of Congress – effectively overruling Congress's reasonable conclusion "that, despite the current availability of filtering software, a child protection problem exists." Ashcroft v. ACLU, 542 U.S. at 687 (Breyer, J., dissenting).

These two fundamental errors skewed the court's entire analysis, leading the court to incorrectly hold that: (A) COPA is not narrowly tailored to advance the government's compelling interest in protecting children from harmful material on the Web, (B) filtering is a "less restrictive alternative" to COPA, and (C) COPA is overbroad and vague on its face.

A. In concluding that COPA is not narrowly tailored to advance the government's interests, the district court did not identify any ways in which Congress could have crafted a more narrow statute while still providing reasonable protections for children. Indeed, in criticizing the statute's "underinclusivity" in certain respects (i.e., in its application solely to HTTP and successor protocols) the court actually underscored COPA's narrow tailoring.

More importantly, the court failed to give proper effect to COPA's limiting provisions in at least three important ways. First, the court largely ignored the statute's "commercial purposes" requirement, despite a ready textual basis (and clear support in the legislative history) for limiting its coverage to commercial pornographers. Second, the court refused to construe COPA's "harmful to minors" requirement in the same limited manner it has been interpreted in other cases – to require an assessment of "serious value" with regard to older minors – and thus exaggerated the volume of material falling within this definition. Third, the court erroneously discounted the limiting impact of COPA's affirmative defenses and overstated their burdens. When properly construed, COPA imposes only modest burdens on a very narrow category of speech, and it does so in the same manner as well-established state display and blinder rack laws, which have uniformly been upheld on First Amendment challenges.

B. The district court also erred in holding that filtering is a less restrictive alternative than COPA to advance the government's interest in protecting children from harmful materials on the Web. Under the Supreme Court's most recent decision, the relevant question is not whether filtering is more effective than COPA in isolation – since COPA clearly

contemplates, and indeed encourages, the voluntary use of filtering – but whether additional efforts by Congress to improve filtering and encourage its use are a less restrictive, equally effective, alternative to COPA. See Ashcroft v. ACLU, 542 U.S. at 669-70. Because the district court made no findings regarding the predicted efficacy of additional measures Congress could undertake to improve filters and promote their use, it had no basis for concluding that such hypothetical efforts would be less restrictive and equally effective in addressing the problem of children's exposure to harmful material online – a problem that still exists despite the current availability of filters which the district court found are cheap (or free) and very easy to install and update.

Moreover, even under its own framework (comparing the efficacy of filters to COPA's predicted efficacy), the court ignored fundamental limitations in filtering while greatly exaggerating difficulties with COPA. For example, the evidence showed that approximately one half of households with children and an Internet connection do not use any form of filtering, despite the ready availability and low cost of filtering software. The evidence also showed that filters miss significant amounts of sexually explicit material, and that those that are marginally better at blocking such

material do so only by "overblocking" as much as 20% of the entire Web – a staggering result demonstrating that at least some filtering products are far more restrictive than COPA. Although the district court discounted these overblocking rates, it is precisely because of overblocking problems that many parents choose to discontinue the use of filters.

In addition, although the court speculated at length about various ways in which COPA's screening requirements could be circumvented, it ignored identical evidence that children (who are usually more computer-savvy than their parents) can easily circumvent filtering software. Likewise, the court erroneously found that COPA does not apply to foreign web sites, while ignoring evidence that filters, which are dependent upon text-based analysis, have difficulties picking up sexually explicit phrases in other languages. In short, the court ignored substantial evidence demonstrating that filtering is an inadequate solution to the problem of children's exposure to harmful materials on the Internet.

C. Finally, the court erred in concluding that COPA is facially invalid on overbreadth and vagueness grounds. In order to prevail on an overbreadth challenge, plaintiffs bear the heavy burden of showing that COPA's overbreadth is substantial in relation to its "plainly legitimate

applications." Virginia v. Hicks, 539 U.S. 113, 119 (2003). But the district court made no findings – and plaintiffs offered no evidence – that the modest burdens COPA may impose on other for-profit Web sites are substantial in relation to the statute's plainly legitimate regulation of commercial pornographers. The court likewise erred in holding that COPA's reliance on traditional scienter requirements, and its use of well-established terms like "harmful to minors" (which have been refined and upheld in various Supreme Court decisions), render COPA unconstitutionally vague. Accordingly, because the court had no basis for invalidating COPA on its face, it plainly erred in issuing a permanent injunction prohibiting all enforcement of the statute rather than, at most, simply enjoining its application to the plaintiffs here.

STANDARD OF REVIEW

This Court reviews the constitutionality of a federal statute and related questions of statutory interpretation de novo. Abdul-Akbar v. McKelvie, 239 F.3d 307, 311 (3d Cir. 2001). Although purely factual findings by the district court are reviewed only for clear error, "the role of an appellate court in a first amendment case requires an enhanced examination of the entire record." Feldman v. Philadelphia Housing Auth., 43 F.3d 823, 828 (3d Cir. 1994).

ARGUMENT

COPA DOES NOT VIOLATE THE FIRST AMENDMENT.

It is undisputed "that the government has a compelling interest in protecting children from material that is harmful to them, even if it is not obscene by adult standards." ACLU v. Reno, 217 F.3d at 173. It is also udisputed that "[s]exually explicit material" – including text, pictures, audio and video, extending "from the modestly titillating to the hardest core" – is "widely available on the Internet and the World Wide Web." Reno v. ACLU, 521 U.S. at 853-54. The key issue in this case is whether COPA is narrowly tailored to advance the government's compelling interest in protecting children from harmful material on the Web and whether any less

restrictive, equally effective, alternative was (or is) available to Congress to address this "child protection problem." As explained below, the district court fundamentally erred in evaluating each of these issues, and thus erroneously concluded that COPA violates the First Amendment on its face.

A. COPA Is Narrowly Tailored To Advance The Government's Compelling Interest In Protecting Children From Harmful Materials On The Web.

Employing concepts from the Supreme Court's decisions in Ginsberg and Miller, COPA identifies a narrow category of speech that is "obscene as to minors" but protected for adults, and attempts to confine access to such material to those who have a constitutional right to it. COPA minimizes the burdens on adult access to such material by imposing age-verification requirements limited exclusively to those who regularly and knowingly post such materials on the Web for profit. The statute thus requires commercial pornographers and others who seek to profit from regularly posting "harmful to minors" material on the Web to take reasonable measures to verify age before making such material available, just as any retailer in a "brick and mortar" establishment is required to do.

COPA is narrowly tailored in several important respects. First, the statute applies solely to material that is "harmful to minors," – that is, material that (1) taken as a whole, is designed to pander to the "prurient interest," (2) depicts actual or simulated sexual acts in a manner that is "patently offensive with respect to minors," and (3) taken as a whole, "lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. § 231(e)(6). Thus, on its face, COPA applies "to material that does not enjoy First Amendment protection, namely legally obscene material, and very little more." Ashcroft v. ACLU, 542 U.S. at 678 (Breyer, J., dissenting).[4] See also H.R. Rep. No. 105-775, at 28.

COPA also applies only where the speaker "knowingly and with knowledge of the character of the material" makes a communication that is "harmful to minors." 47 U.S.C. § 231(a)(1). Even more importantly, COPA applies solely to a communication made for "commercial purposes," – that is, where the person making it is "engaged in the business" of making such communications, a term defined by whether a person "devotes time,

[4] It is important to recognize that the majority in Ashcroft did not reject Justice Breyer's assessment of COPA's narrow breadth. In affirming the preliminary injunction on other grounds, the majority expressly declined to consider whether COPA was narrowly tailored.

attention, or labor to such activities, as a regular course of such person's trade or business." 47 U.S.C. § 231(e)(2).

Moreover, COPA does not prohibit communications that fall within the narrow scope of its coverage; it simply regulates the manner in which such materials may be displayed on the Web. COPA provides that Web publishers must take reasonable steps to shield such materials from children, by requiring the use of credit cards, adult access codes, digital certificates that verify age, or any other feasible measures that verify age before allowing access to those materials. 47 U.S.C. § 231 (c)(1). Thus, COPA is similar to an electronic bouncer, requiring efforts to verify age in much the same way that many state laws require material that is "harmful to minors" to be physically segregated, placed behind blinder racks, or accessed only by a token or other device intended to verify adult access. See, e.g., Crawford v. Lundgren, 96 F.3d 380 (9th Cir. 1996) (upholding prohibition on sale of harmful material in unsupervised sidewalk vending machines); American Booksellers v. Webb, 919 F.2d 1493 (11th Cir. 1990) (upholding requirement that harmful material be placed behind blinder racks); Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1986) (upholding requirement that harmful material be

sealed in an opaque cover); M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983); Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520 (Tenn. 1983).

In holding COPA unconstitutional on its face, the district court exaggerated the breadth of the statute and thus overstated its burdens on protected speech in at least three distinct ways. First, the court largely ignored COPA's "commercial purposes" limitation, declaring that this provision "is nearly a nullity and, thus, no restriction at all," 478 F. Supp. 2d at 815 n.9, and improperly focused almost entirely on COPA's burdens with regard to web sites "who provide their content for free," id. at 813. Second, the court refused to construe COPA's "harmful to minors" provisions in the same narrow manner that identical language has been interpreted in Supreme Court and other decisions – to require an assessment of "serious value" with regard to an older minor. Id. at 817-18. Third, the court erroneously discounted the limiting impact of COPA's affirmative defenses because it believed that "they are effectively unavailable," id. at 811, and they impose undue burdens on speech, id. at 812-13.

Taken together, the court's erroneous construction of these provisions greatly exaggerates the reach and potential burdens of the

statute.[5] Moreover, the court's approach violates the well-established duty to construe statutes to save them rather than destroy them. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937); New York v. Ferber, 458 U.S. 747, 769 n.24 (1982). That duty is particularly strong where (as here) Congress conscientiously responded to concerns identified by the Supreme Court in prior decisions and endeavored to craft a statute narrowly-tailored to further the government's compelling interest in protecting minors from exposure to harmful materials on the Web. See Ashcroft v. ACLU, 542 U.S. at 690 (Breyer, J., dissenting) (noting that Congress "dedicated itself to the task of drafting a statute that would meet each and every criticism of the predecessor statute that this Court set forth in Reno").[6]

---

[5] The district court's flawed views regarding the breadth of materials covered by COPA also infected the court's analysis of plaintiffs' standing in this case. Properly construed, COPA does not apply to the vast majority (if not all) of the material posted on plaintiffs' web sites – because such material is either not "harmful to minors" or was not posted "for commercial purposes" within the meaning of the statute. Even assuming the district court did not clearly err in finding that at least a few of the plaintiffs demonstrated a well-founded fear of prosecution, however, it still erred in failing to recognize COPA's limited reach.

[6] Likewise, there is a heightened duty not invalidate Congressional efforts to address an acute national problem where, as here, state laws attempting to regulate the proliferation of "harmful to minors" material on the Internet have uniformly been invalidated on Commerce Clause

grounds. See, e.g., PSINet, Inc. v. Chapman, 362 F.2d 227 (4th Cir. 2004); American Booksellers Foundation v. Dean, 342 F.3d 96 (2d Cir. 2003).

The district court did not identify any way in which Congress could have drafted COPA more narrowly while still providing reasonable protections for children. Indeed, in finding COPA "underinclusive" in certain respects, the court underscored COPA's narrow tailoring. See 478 F. Supp. 2d at 815 (noting that COPA applies only to HTTP or successor protocols).[7] Although the court nonetheless concluded that COPA is not narrowly tailored to serve the government's compelling interest, it did so only by ignoring or misinterpreting various limiting provisions in the statute.

1. Communications Made For "Commercial Purposes"

As noted, COPA applies to "harmful to minors" communications only if they are made "for commercial purposes," 47 U.S.C. § 231(a)(1), and a

[7] Apparently recognizing that "underinclusivity" and narrow tailoring are two sides of the same coin, the court noted the "interesting conundrum for defendant where broadening COPA's reach would likely make it overbroad, but by narrowing its reach to HTTP or successor protocols, Congress has made COPA underinclusive and less effective than filters." Id. at 815. But the inevitable tension between narrowing a statute sufficiently to survive First Amendment scrutiny and legislating broadly enough to address the relevant problem cannot simply be dismissed as an "interesting conundrum." Nor could the court properly conclude that COPA is "underinclusive" because it does not apply outside the United States. As shown below, infra pp. 53-54, COPA does apply to foreign web sites (and can be enforced against them) and even if it did not, "reform may take one step at a time, addressing itself to the phase of the problem that seems most acute to the legislative mind." McConnell v. FEC, 540 U.S. 93, 207-08 (2003).

person communicates "for commercial purposes" only if that person is "engaged in the business" of making such communications, id. at § 231(e)(2)(A). In turn, a person will be deemed to be "engaged in the business" of making harmful to minors communications only where he "devotes time, attention, or labor to such activities, as a regular course of such person's trade or business." 47 U.S.C. § 231(e)(2)(B). Thus, COPA applies solely to persons who seek to profit from "regular[ly]" placing material that is "harmful to minors" on the Web.

The district court erred in holding that COPA's "commercial purposes" requirement "is nearly a nullity and, thus, no restriction at all." Id. at 815 n.9. As the legislative history of COPA makes clear, see H.R. Rep. No. 105-775, at 15 (1998), and the district court expressly found, "Congress intended COPA to apply only to commercial pornographers." 478 F. Supp. 2d at 816. Nonetheless, the court concluded that "COPA clearly covers far more speakers on the Web than those who might be defined as commercial pornographers." Id. at 808 n.5. But the court nowhere explained how the language of COPA compels that conclusion so clearly that an interpretation limiting COPA to commercial pornographers – the

result Congress plainly intended – is not proper. See Ferber, 458 U.S. at 769 n.24.

The Supreme Court has held that the term "engaged in a trade or business" generally refers to activities where a person's "primary purpose for engaging in the activity must be for income or profit." Commissioner v. Groetzinger, 480 U.S. 23, 35 (1987). Although COPA does not specify a volume or percentage of a web site operator's speech that must be "harmful to minors" in order to qualify as "regular," the definition plainly does not apply to occasional or sporadic "harmful to minors" postings on a web site operated for profit. See The Random House Dictionary of the English Language 1624 (2d ed. 1987) (defining "regular" as "usual, normal, [or] customary"). Applying these definitions, COPA covers only those harmful to minors communications that are made by a person as a normal part of his or her for-profit business. See 134 Cong. Rec. E3750 (1998) (an isolated or "occasional" transaction is not in the "regular" course of business).

In short, although COPA may indeed apply to a web site publisher who derives his profit solely from advertising revenue, it will do so only if that person regularly and knowingly posts "harmful to minors" materials

with the objective of earning a profit from them – thus making it fair to require that person to employ some reasonable age-verification measures as part of the cost of doing business.

Viewed in this light, the district court's assertion that COPA applies to "plaintiffs who provide their content for free," 478 F. Supp. 2d at 813, is inaccurate because it ignores the intent to profit from regularly posting "harmful to minors" materials that is necessary under the statute. A "for-profit" advertising-based web site would plainly not be liable for an occasional or sporadic posting deemed "harmful to minors," while a web site devoted to regularly posting sexually explicit "teasers" to direct traffic to a commercial pornography site would be liable.[8] In concluding that "the affirmative defenses place substantial economic burdens on the exercise of protected speech," id., the court thus ignored the way in which COPA focuses the costs of age-verification on those making a profit (or attempting to do so) from regularly posting "harmful to minors" material.

[8] The evidence at trial suggested that web sites using the "pure advertising model" are typically just "feeder" sites for subscription sites, serving as "teasers" for subscription-based sites and receiving profit from

those sites. 10/26/06, at 34-35 (Russo); 10/26/06, at 114-15 (Zook) .

2. "Harmful To Minors" Communications

The district court also misconstrued COPA's "harmful to minors" definition and thereby substantialy overstated the range of protected speech covered by the statute. Specifically, the court refused to read the "serious value" prong of that definition, 47 U.S.C. § 231(e)(6)(C), in accordance with COPA's legislative history and established precedent interpreting other "harmful to minors" laws: to exclude material that has value to "a legitimate minority of normal, older adolescents." See H.R. Rep. No. 105-775, at 13 (1998); American Booksellers v. Webb, 919 F.2d 1493, 1504-05 (11th Cir. 1990); American Booksellers Ass'n v. Virginia,

882 F.2d 125, 127 (4th Cir. 1989); Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 528 (Tenn. 1993).[9]

The court summarily rejected these precedents as "not binding on this Court," 478 F. Supp. 2d at 817 n.12, declaring that COPA's "harmful to minors" definition is problematic because it believed web publishers would not be able to tell whether their material will be judged according to the

[9] As explained in Section C, infra, the court also failed to recognize the limiting impact of COPA's provision requiring the prurience and value of material to be taken "as a whole." 478 F. Supp. 2d at 818. Rather than viewing this requirement as a virtue that prevents material from being examined in isolation and thus unfairly judged to be "harmful to minors" out of context, the court held that this definition was impermissibly vague because, in the context of Web-based communications, it is not clear "what needs to be examined in order to make an 'as a whole' evaluation." Id. Here again, the court failed to adopt a reasonable construction of the statutory language by construing it to require some examination of the context of the entire web site. See Knievel v. ESPN, 393 F.3d 1068, 1076-77 (9th Cir. 2005) (examining entire web site to determine whether material could be considered truthful or was obviously a joke).

sensibilities of a three-year old or a 16-year old. Id. at 817. In so doing, the district court violated its obligation to construed the statute to minimize constitutional problems in accord with other decisions upholding similar statutes.

Moreover, the court offered no plausible basis for distinguishing the Supreme Court's decision in Ginsberg v. New York, 390 U.S. 629 (1968), which upheld a state statute protecting minors under the age of 17 from harmful materials. Although the district court asserted that Internet transactions present unique difficulties that were not present in Ginsberg, because an "Internet merchant has no viable method of determining whether an individual is 6, 12, 17 or 51," 478 F. Supp. 2d at 818, the court did not explain how these difficulties render the exact same "harmful to minors" definition approved in Ginsberg unconstitutional in COPA. The determination whether specific material is "harmful to minors" – and whether age verification is thus required – depends upon a threshold evaluation of whether it appeals to the prurient interest or has serious value for older minors, not a determination regarding the age of a specific minor seeking to access that material. In short, the court erred in holding that considerations unique to the Internet render the same "harmful to minors"

definition approved in cases upholding state display laws unconstitutional as applied to the Web. See United States v. Extreme Assocs., Inc., 431 F.3d 150, 160-61 (3d Cir. 2005) (rejecting argument "that obscenity law does not apply to the Internet or even that a new analytical path is necessary in Internet cases").

3. Age Verification As A Defense To Liability

The district court also erred in wholly dismissing the limiting impact of COPA's affirmative defenses. Most significantly, the court held that the use of credit card screening does not constitute a "good faith" effort to restrict access by minors, and therefore is not a defense under COPA, "because a significant number of minors have access to payment cards." 478 F. Supp. 2d at 812.

That holding rests on a patent misreading of the statute. Although COPA permits the use of new technologies that constitute a "good faith" effort to screen for age, it also specifies several methods of age verification that are categorical defenses, including "use of a credit card, debit account, adult access code, or adult personal identification number." 47 U.S.C. § 231(c)(1). COPA's legislative history makes clear that Congress viewed credit card verification as a per se defense to liability, regardless of its

efficacy in particular cases or settings. See H.R. Rep. No. 105-775, at 26 ("Credit card verification is commonly used today in both the dial-a-porn and Internet context and it should be easy to use and implement for commercial entities that sell pornography on the Web.").

The possibility that some minors may have access to credit cards merely demonstrates that no system of age verification is foolproof. It does not call into question the availability of credit card screening as an affirmative defense that tailors COPA more narrowly. Put another way, the court's observation that some minors may have access to credit/debit cards is no different from the recognition that some minors may be able to gain access to cigarettes, liquor, or printed "harmful to minors" material by presenting fake identification in face-to-face transactions. Although the possibility for fraud may be greater on the Internet than in the "brick-and-mortar" world, this does not remove the availability of credit/debit card screening as an affirmative defense under COPA.

Moreover, in finding that minors have access to certain types of credit and debit cards, the court ignored testimony that minors do not have access to traditional payment cards under their own control but simply have access to cards supervised by adults. 11/14/06, at 92, 117-20 (Clark).

Given the ability of parents to monitor the activity on credit cards used by minors, the efficacy of credit cards as an age verification method is substantially greater than the court acknowledged. Likewise, the court ignored undisputed testimony that age verification services, such as IDology, successfully verify the age of online consumers well over 90 percent of the time. 11/9/06, at 224-26 (Dancu). In short, the court plainly erred in concluding that COPA's affirmative defenses are ineffective and compounded that error by concluding that the statute was therefore not narrowly tailored.

The court also held that these defenses do not aid in narrowly tailoring COPA because they impose undue burdens on Web publishers in two different ways: (1) the high costs of age verification through credit card companies or age verification services, and (2) the loss of traffic that would likely resulting from use of age verification mechanisms. 478 F. Supp. 2d at 812-13. Specifically, the court concluded that "the affirmative defenses place substantial economic burdens on the exercise of protected speech because all of them involve significant cost and the loss of Web site visitors, especially to those plaintiffs who provide their content for free." Id. at 813 (emphasis added). As explained above, however, the court's

evaluation of the burdens imposed by COPA was flawed because the court focused largely, if not exclusively, on Web publishers who provide their content for free. Id. (rejecting the argument "that the defenses are not burdensome to commercial pornographers because they already accept credit cards"). Whatever limited application COPA might have beyond its core regulation of commercial pornography, the court erred in evaluating the burdens the statute imposes based entirely on these marginal cases and ignoring the heartland of the statute's proscriptions, where the burdens are far less onerous.

The district court's estimate of the burdens COPA's affirmative defenses would likely impose on web site operators was necessarily speculative because the statute has been enjoined since its enactment. Nevertheless, even on these terms, the court's conclusion that COPA's affirmative defenses would disrupt web viewership is not supported by the evidence.

For example, the court found that "many Web users already refuse to register, provide credit card information, or provide real personal information to Web sites if they have any alternative." 478 F. Supp. 2d at 805 (emphasis added). But this finding ignores that COPA would create a

level playing field without any "alternative" means to access "harmful to minors" materials aside from those permitted under the statute. As the Supreme Court recently emphasized, the legislative scheme under review should itself be allowed to shape the playing field and encourage the development of measures to "accommodat[e] legislative demand." Gonzales v. Carhart, 127 S.Ct. 1610, 1634 (2007). In this respect, the district court also erred in ignoring testimony regarding promising new technologies (i.e., "digital wallet" capabilities) that are on the horizon, see 11/9/06, at 191-92, 204-07 (Dancu), whose development would undoubtedly be spurred if COPA were ever allowed to take effect.

In addition, the court ignored substantial evidence that consumers have become increasingly willing to provide personal and credit card information on the Internet, and that consumer demand for pornography has remained steady over time despite technological and regulatory changes. See, e.g., 11/15/06, at 186-88 (Smith). Although the court discounted the testimony of defendant's expert, Professor Smith, on the ground that he had previously published articles discussing concerns expressed by consumers about online shopping, 478 F. Supp. 2d at 807, Professor Smith explained that what consumers do is a better measure of

behavior than what consumers say, and that behavioral data indicates that consumers are more and more willing to provide personal information on the Internet. 11/5/06, at 186-88. The court thus had no sound basis for its conclusion that Internet users today will be drastically deterred by age verification mechanisms requiring the disclosure of some personal information.

The court also overstated the burdens of age verification screening in at least two additional ways. First, the court found that, under COPA, web site operators "would be forced to place a credit card or age verification screen on the initial home page of their Web sites and/or on each individual Web page." 478 F. Supp. 2d at 805. But COPA does not require verification screens to be placed on the home page of a web site; it simply requires the placement of a screen before harmful content. As a result, web sites can maintain a high level of traffic to their web sites without any interruption from age verification screens while selectively screening explicit content – a business model used effectively by the commercial pornography industry. 10/25/06, at 218 (Russo).

Second, the court vastly overstated the financial burdens of age verification services by ignoring the ability of passwords to obviate the need

for re-verification on the same web site or a group of affiliate web site. For example, the court found that, if a web site such as Urban Dictionary had used an age verification service such as IDology to verify the age of its approximately 40 million visitors between January and October of 2006 it "would have incurred costs from between $14,800,000 to $38,000,000." 478 F. Supp. 2d at 805. But this cost projection is grossly inflated because it clearly assumes that password protection (available through IDology) would be insufficient to avoid the need for re-verification for repeat visitors – an assumption directly at odds with the court's stated view that password protection would be fully adequate to ensure the efficacy of filtering.

In any event, the district court's speculation about the financial burdens and potential lost traffic from age-verification screening is insufficient to support a determination that COPA is unconstitutional. As the Supreme Court recognized in upholding a federal statute prohibiting obscene telephone messages, "there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages." Sable Communics. of Calif., Inc. v. FCC, 492 U.S. 115, 125 (1989). Indeed, as Justice Scalia emphasized in this very case, the business of commercial pornography "could, consistent with the

First Amendment, be banned entirely," and thus "COPA's lesser restrictions raise no constitutional concerns." Ashcroft, 542 U.S. at 676 (Scalia, J., dissenting).

Likewise, in Pitt News v. Fisher, 215 F.3d 354 (3d Cir. 2000), this Court confirmed that the First Amendment does not guarantee the right to a certain level of profitability from speech. In that case, this Court refused to enjoin a Pennsylvania statute prohibiting businesses from advertising alcoholic beverages in newspapers published "by, for, or in behalf of any educational institution." Id. at 357. The plaintiff, a student-run newspaper at the University of Pittsburgh, asserted that this statute had caused it to lose advertising revenue and caused it "to shorten its newspaper, thereby losing space in which to print student articles and text." Id. at 359. While recognizing that "The Pitt News has no doubt felt an economic effect from the enforcement of [the statute]," this Court held that "this does not amount to a violation of its First Amendment rights." Id. at 367.

In the end, the burdens COPA's affirmative defenses impose are no different in kind or degree from the burdens imposed by state laws regulating the sale and commercial display of "harmful to minors" materials. In this regard, the effect of the statute is simply to "requir[e] the

commercial pornographer to put sexually explicit images 'behind the counter.'" H.R. Rep. No. 105-775, at 15. COPA thus does "no more than is required by most Circle K's or convenience stores." 144 Cong. Rec. H9910 (daily ed. Oct. 7, 1998) (Rep. Wilson).

B. There Are No Less Restrictive, Equally Effective, Alternatives To COPA.

The district court also erred in holding that the government failed to demonstrate that COPA is the least restrictive alternative available to advance its compelling interest in protecting minors from harmful materials on the Web. As an initial matter, the court employed a flawed analytical framework for comparing COPA to filtering, and even within that framework, the court did not fairly assess either the efficacy or restrictiveness of COPA against filtering. Most notably, the court exaggerated what it perceived as flaws in COPA's efficacy and overstated the statute's burdens while ignoring conceptually identical problems with filtering. Thus, as explained below, the court erred in concluding that Congress was required to rely solely on the voluntary use of user-end controls such

as filtering despite evidence that filtering is not an adequate solution to the problem of children's exposure to harmful material on the Web.

1. In its most recent decision, the Supreme Court rejected the argument "that filtering software is not an available alternative because Congress may not require it to be used." Ashcroft v. ACLU, 542 U.S. at 669. "That argument carries little weight," the Court explained, "because Congress undoubtedly may act to encourage the use of filters." Id. Emphasizing that "COPA presumes that parents lack the ability, not the will, to monitor what their children see," the Court stated that, "[b]y enacting programs to promote use of filtering software, Congress could give that ability to parents without subjecting protected speech to severe penalties." Id. at 670. In so doing, the majority indicated that, on remand, the district court should compare: (1) the status quo of private filter use, plus any actions the government could take to increase filter use, and (2) the status quo of private filter use, plus the protections of COPA. Id. at 669-70.

The district court appeared to recognize that the proper comparison is between COPA on the one hand and measures Congress could take to promote or encourage additional filtering use on the other. The court identified several ways in which Congress could "promote and support" the

private use of filters. See 478 F. Supp. 2d at 814 (identifying options such as educating and training parents, subsidizing filtering, and encouraging or requiring ISPs to provide filters to subscribers). However, the court did not make any attempt to assess the efficacy of such hypothetical, additional efforts to encourage filtering use compared to the efficacy of the age-verification requirements in COPA. Instead, the court simply compared the efficacy of existing filters against the efficacy of COPA in isolation. The court thus failed to assess both the restrictiveness and the efficacy of any specific alternatives to COPA

The district court's analysis was fundamentally flawed. As the Supreme Court made clear in this case, "the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives." 542 U.S. at 666 (emphasis added). In short, an alternative must be both less restrictive than the one chosen by Congress and equally effective. Because the district court omitted any assessment of the likely efficacy of additional efforts to promote and encourage the voluntary use of filtering, the court could not properly conclude that such measures are constitutionally preferable to COPA.

In any event, it is difficult to imagine what additional steps Congress could have taken to produce materially greater use of filtering – short of mandating its use, which neither the district court nor plaintiffs have ever characterized as a "less restrictive" option.[10] COPA already requires ISPs to provide information to customers identifying and providing access to filtering. 47 U.S.C. § 230(d). Moreover, the evidence at trial suggests that additional efforts by Congress to promote greater voluntary filtering use would likely be ineffective – and would almost certainly be less effective than COPA's age-verification requirements. Most notably, the evidence showed that, whatever its merits, approximately half of all parents are not using filters. See DX 4, at 40-44 (surveys showing that, on average, only 40 percent of parents with children and an Internet connection use filters); 10/24/06, at 88 (Cranor) (claiming 54% usage of filters). And, given the court's own findings that filtering programs are readily available, fairly easy to install, and relatively inexpensive, 478 F. Supp. 2d at 793, there is little reason to believe that Congress could do more through legislative action to

[10] Indeed, in United States v. American Library Assn., Inc., 539 U.S. 194 (2003), the ACLU vigorously opposed a statute mandating the use of filters in the public schools and libraries, citing problems with filtering, including high rates of overblocking that effectively restricts speech on the Internet. It is thus highly ironic that the ACLU now touts filtering as a less

influence parental behavior and encourage greater filtering use. Thus, even if the district court had attempted to gauge the likely efficacy of additional efforts to promote filtering, its own findings strongly suggest that such efforts would not ever be as effective as COPA.

2. As noted, rather than undertaking a comparison between COPA and additional measures Congress could take to encourage greater use of filters (or develop better filters), the district court simply compared the efficacy and restrictiveness of existing filters to COPA. Beyond the basic analytical error in this approach, the court's assessment of filtering in comparison to COPA was flawed because the court ignored (or minimized) a variety of inherent problems with filtering while grossly exaggerating every conceivable problem with COPA.

a. The evidence at trial showed that "black lists" and "white lists" can never adequately filter objectionable material because the Web is growing too quickly, and that "dynamic" filtering – which checks inbound data against keywords and/or phrases – must therefore be used. 11/7/06, at 102–04 (Mewett). However, "dynamic" filtering is a highly imperfect way to classify material on web sites because it depends on text-based analysis of

---

restrictive alternative to COPA.

key words which can easily be circumvented by assigning non-descriptive names to sexually explicit images – a practice commonly employed by commercial pornographers. Id. at 145-46. Thus, as a result of its inability to classify images, dynamic filtering will always result in significant underblocking, overblocking, or both. 11/9/06, at 37-38, 81 (Neale).

The results of the government's surveys in this case confirmed that even the best-performing filters underblock a substantial amount of sexually explicit material and the worst-performing ones miss enormous volumes of that material. See DX 68 (AOL Mature Teen missed 8-9% of sexually explicit material in Google and MSN search indexes, while Norton Default missed 54-60%).[11] These surveys also demonstrated a direct correlation between underblocking and overblocking – that is, the less a filter underblocked the more it overblocked. Id. Thus, the best-performing filter tested (AOL) blocked sexually explicit material more successfully only by overblocking more than 20% of the entire Web. DX 68.

[11] Examples of sexually explicit materials that were missed by at least three of the filters are collected in DX 88. See 11/7/06, at 126-27.

As noted above, between 46 and 60% of all parents with children and an Internet connection do not use any filters. DX 4, at 40-44. The evidence showed that parents elected not to use filters (or discontinued them) primarily because they believed filters were too restrictive – i.e., they overblocked too much. See PX 85, at 5 (noting that 72% of parents who removed AOL's filtering software did so because they thought the product was too restrictive). This direct correlation between overblocking rates and parental decisions not to use filters is even more compelling evidence that additional efforts by the government to encourage greater use of filters would have very little impact and would, at a minimum, not be as effective as COPA. Moreover, as the National Research Council observed, although greater promotion of parental education and supervision may be useful, "the expectations for such education and socialization should not be unrealistic." PX 54, at 398. See also id. at 336-37 (noting limited efficacy of parental monitoring and that, "as with filtering, monitoring can be circumvented by a change of venue in which monitoring is not present").[12]

[12] The NRC report strongly suggests that requiring parents to shoulder the burdens of shielding their children from every possible source of adult content – rather than addressing the problem at its source through COPA – is unrealistic because "continual in-person supervision of a child's Internet usage by a parent is not likely to be achieved by many families."

The district court largely ignored this evidence demonstrating inherent limitations in filtering technology and the direct link between these problems and decisions by nearly one half of all parents with children not to use filters in their homes. Most notably, the court dismissed evidence about overblocking on the ground "that underblocking is the more important concern." 478 F. Supp. 2d at 794. The court thus wholly failed to appreciate the degree to which overblocking reduces the efficacy of filters by discouraging parents from actually using them.

Moreover, in discounting the significance of overblocking, the court also failed to consider the degree to which this inherent feature of filters makes them more restrictive and more burdensome than COPA in many respects. As noted, the evidence at trial showed that the filters most effective at blocking sexually explicit material did so only by overblocking as much as one-fifth of the entire Web. See DX 68 (noting that AOL Mature Teen filter overblocked 22-23% of non-sexually explicit Web pages). Indeed, many of plaintiffs' own web sites were blocked by various filters. See Joint Ex. 1, at ¶ 32; DX 83, at 27; 11/8/06, at 56-60 (Mewett). In light of

---

PX 54, at 254.

this evidence, the court plainly erred in categorically holding that filters are "less restrictive" than COPA.

The court dismissed concerns about overblocking on the ground that "a parent may add the Web sites that were erroneously overblocked to the filter's white list so that those Web sites are not blocked again." 478 F. Supp. 2d at 794. But this is no answer to the problem because adults may never know what sites are blocked, and requiring parents to add individual web sites to a filter's white list so they will not be blocked is obviously quite burdensome. Indeed, the evidence that 72% of parents who removed AOL's filters did so because they thought the product was too restrictive, PX 85, at 5, strongly suggests that parents do not share the district court's optimistic appraisal of these methods to avoid overblocking.

Likewise, the problem of overblocking cannot simply be dismissed on the ground that parents can easily turn filters off. This option plainly does not solve the problem of overblocking for minors themselves, and it assumes an unrealistic level of technological sophistication and diligence among parents. Moreover, even assuming parents can easily turn filters on and off, this same feature makes filters less effective because it underscores how easily they may be circumvented by children – especially

adolescents, who are often more sophisticated computer-users than their parents.

Although the district court speculated at length regarding ways in which older minors might be able to circumvent COPA's age verification requirements (e.g., by using an adult's credit card or personal information), see 478 F. Supp. 2d at 802, the court largely ignored similar ways minors can circumvent filters.[13] For example, the court ignored testimony from defendant's expert, Paul Mewett, that he was able to obtain instructions from the Web on how to disable or bypass at least some of the filters he tested even with those filters turned on. 11/7/06, at 152-53; DX 82, at 32-34. The court also ignored evidence that web proxy sites can be used to gain access to web sites that have been blocked, and that there are free

[13] By refusing to come to grips with the many ways in which filters may be circumvented while exaggerating similar issues with regard to COPA, the court again put a heavy and inappropriate thumb on the scale in favor of filtering. The court also ignored evidence that filters are ineffective in another important way: their inability to block sexually explicit material accessed on mobile devices such as cell phones. See 11/7/06, at 182-86

web sites instructing viewers on ways to circumvent filters. See DX 82, 89, 90; 11/7/06, at 157-58 (Mewett).

The court discounted this evidence based largely on its finding that "[i]t is difficult for children to circumvent filters because of the technical ability and expertise necessary to do so." 478 F. Supp. 2d at 795. But this finding (which is based solely on unsupported opinions from plaintiffs' witnesses) cannot be squared with the common sense recognition that minors (particularly teenagers) are often more sophisticated computer users than their parents. Moreover, even assuming some children lack the ability to bypass filters, it is naive to assume they lack the wherewithal to access passwords and other mechanisms the court identified as effective measures to prevent children from bypassing filters. Id. Indeed, that assumption is directly at odds with the court's assumptions regarding the likely resourcefulness of minors in circumventing COPA. See Id. at 802 (noting that children "generally know the first and last name, street address and zip codes of their parents or another adult"). In sum, the court plainly overstated the efficacy of filters and understated their restrictiveness.

(Mewett).

b. On the other hand, the court overstated the restrictiveness and burdens of COPA while understating the statute's likely efficacy. While acknowledging that "there is no showing of how effective COPA will be," the district court suggested that COPA would be ineffective for three principal reasons: (1) the statute "will not reach a substantial amount of foreign source sexually explicit material on the Web, which filters will reach," (2) COPA's "affirmative defenses including the age verification schemes are not effective," and (3) given the sparse enforcement of obscenity laws, "it is unlikely COPA will be widely enforced." 478 F. Supp. 2d at 814. As explained below, none of these findings can be sustained.

First, and most importantly, the court erred in concluding that COPA is applicable solely to web sites within the United States. See id. at 810-11 (finding COPA underinclusive because it cannot be enforced against foreign web sites). By its terms, COPA applies to all material "in interstate or foreign commerce," 47 U.S.C. § 231(a)(1), and the statute is replete with references to the Internet and the World Wide Web – terms that plainly have no geographic limitation. See 47 U.S.C. § 231(e)(3) (defining "Internet" as a "worldwide network of computer networks"). In similar circumstances, both this Court and others have construed anti-pornography statutes to apply to

conduct outside the United States where the goal is to "contain the evils caused on American soil by foreign as well as domestic suppliers" of pornography. United States v. Harvey, 2 F.3d 1318, 1327 (3d Cir. 1993). See also United States v. Thomas, 893 F.2d 1066 (9th Cir. 1990).

Moreover, the district court also erred in concluding that enforcement of COPA against foreign Web sites would be "burdensome and impractical." 478 F. Supp. 2d at 811. As an initial matter, the vast majority of ostensibly "foreign" web sites are in fact hosted on computer servers in the United States, which can provide the large amounts of bandwidth that such sites require. DX 65; DX 83, at 16-18; 10/26/06, at 117-19. COPA could be enforced against these domestically-based hosting services, 11/7/06, at 88, and, even as to those web sites that are not domestically hosted, COPA could be enforced indirectly through contractual requirements with credit card companies. 11/14/06, at 144-47. In short, because the court erred in concluding that COPA applies solely to domestic web sites and that the statute cannot be enforced against foreign web sites, the court had no basis for holding that filtering is more effective than COPA in this regard.[14] To the

[14] Even more clearly, the court had no basis for its entirely circular finding that COPA will be ineffective because "it is unlikely that COPA will be widely enforced." Id. at 814.

contrary, filtering may be less effective than COPA with regard to material from foreign web sites because filters are dependent upon text-based analysis which may not pick up sexually explicit phrases in other languages. 11/7/06, at 162-65.

Similarly, the district court's finding that COPA's age-verification requirements "are not effective" rests on a flawed understanding of those defenses. As explained in Section A (pp. 41-42), although some minors may have access to credit or debit cards, most have access solely to cards supervised by adults. 11/14/06, at 92, 117-20 (Clark). As a result, the efficacy of credit card screening is substantially greater than the court acknowledged. Likewise, the efficacy of age verification services is also quite high. See 11/9/06, at 224-26 (Idology verifies the age of online consumers well over 90 percent of the time). Thus, although the court questioned the efficacy of payment cards and age verification services, 478 F. Supp. 2d at 800-02, it could not properly characterize these defenses as "ineffective" simply because children might find ways to circumvent them.

In the end, the district court's holding that filtering is a less restrictive alternative to COPA rests on an essentially legislative judgment that Congress must rely solely upon the voluntary implementation of user-end

controls to address the critical problem of children's exposure to harmful materials on the Web. Given the evidence that filters provide no protection whatsoever from harmful materials for approximately half of all minors whose parents do not use them (and only limited protection for minors who can obtain unfiltered access to the Web elsewhere), however, Congress could (and did) reasonably conclude that filtering is an inadequate solution to this problem. Moreover, in light of the substantial overblocking inherent in any effective filtering (which discourages parents from using filters), attempts by the government to encourage greater filtering use would not only be ineffective but would have negative First Amendment consequences in their own right – resulting in even

greater overblocking of material that is plainly not "harmful to minors." As a result of these problems with filtering, Congress reasonably concluded that those who regularly and knowingly seek to profit from posting "harmful to minors" materials on the Web should shoulder some of the burden in protecting children from that material, and the district court had no basis for nullifying Congress's judgment that COPA – combined with the voluntary implementation of user-end filtering technology – is the least restrictive and most effective alternative available to advance the government's compelling interest in protecting minors from harmful materials on the Web.

C. COPA Is Neither Overbroad Nor Vague.

The district court did not merely hold that COPA imposes unconstitutional burdens on the plaintiffs in this case. The court also concluded that COPA is overbroad and vague, and permanently enjoined any enforcement of the statute on this basis.[15] The court thus held that

[15] Although the court characterized its overbreadth and vagueness holdings as "merely supplemental," 478 F. Supp. 2d at 816 n.10, the facial invalidation of COPA in these holdings provides the only basis for an injunction prohibiting all enforcement of the statute rather than merely enforcement against the plaintiffs.

COPA cannot constitutionally be applied even to require commercial pornographers to undertake reasonable measures to verify age before displaying sexually explicit images for profit on the Web.

The court erred in invalidating COPA as a facially overbroad violation of the First Amendment. As this Court and the Supreme Court have both cautioned, the facial invalidation of a statute on overbreadth grounds is "'strong medicine' to be used 'sparingly and only as a last resort.'" Conchatta, Inc. v. Miller, 458 F.3d 258, 263 (3d Cir. 2006) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)). In order to succeed on the merits of a facial challenge, it is not enough to show some overbreadth. Rather, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615. See also Osborne v. Ohio, 495 U.S. 103, 112 (1990). This is so because "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law." Virginia v. Hicks, 539 U.S. 113, 119 (2003).

Plaintiffs have not satisfied their heavy burden of demonstrating that COPA is substantially overbroad. Most importantly, plaintiffs have not demonstrated that COPA burdens a substantial amount of protected speech

in relation to its "plainly legitimate" regulation of sexually explicit materials posted on the Web by commercial pornographers. Indeed, it is only by advancing the most expansive construction of COPA that plaintiffs have identified any potentially problematic applications of the statute. But this approach – which also permeates the district court's analysis – violates the well-established principle that courts must construe statutes to avoid constitutional problems rather than to exacerbate them. See Ferber, 458 U.S. at 769 n.24.

As explained above, when properly construed, COPA poses only modest burdens on a very narrow range of protected speech. Moreover, the question whether compliance with COPA is too burdensome for any specific Web publisher can best be assessed in challenges to the statute as applied. See Carhart, 127 S. Ct. at 1639 (2007) ("As-applied challenges are the basic building blocks of constitutional adjudication."). Because there can be no serious doubt that COPA does not impose undue burdens on commercial pornographers (who already require credit cards or other forms of payment to access adult content) plaintiffs' speculation that COPA might be applied outside this heartland (to persons who post material on the Web for free) "is not sufficient to render [COPA] susceptible to an overbreadth

challenge." Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984). In short, whatever burdens COPA might impose on speech at the outer margins of the statute's coverage, plaintiffs offered no evidence – and the district court made no findings – that these burdens are substantial in relation to the statute's plainly legitimate regulation of commercial pornography.[16] Thus, the court erred in holding COPA overbroad.

Likewise, the district court erred in holding that COPA is unconstitutionally vague. The court criticized the statute's scienter requirements, its limitation to communications made "for commercial purposes," and its "harmful to minors" standard, including the requirement that material be judged "as a whole," asserting that these terms were unclear. 478 F. Supp. 2d at 816-18. As explained above, however, each of these requirements serves to limit the reach of the statute and, at a

[16] Whether or not COPA is strictly limited to commercial pornography, there can be no doubt that this is the heartland of the speech regulated by the statute and constitutes the vast majority of speech subject to the statute.

minimum, provides "fair notice as to what is permitted and what is prohibited." United States v. Tykarsky, 446 F.3d 458, 473 (3d Cir. 2006).

Contrary to the district court's views, COPA's scienter requirements do not render the statute impermissibly vague because such provisions generally "mitigate a law's vagueness." Village of Hoffman Estates, 455 U.S. at 499. See also Tykarsky, 446 F.3d at 473. Likewise, COPA's "harmful to minors" definition is derived directly from Supreme Court decisions upholding state laws employing that standard, and COPA's requirement that material be judged "as a whole" simply mirrors the contextual inquiry that is already necessary under the First Amendment. See Kois v. Wisconsin, 408 U.S. 229, 231 (1972) ("A reviewing court must, of necessity, look at the context of the material, as well as its content."). As a result, no sound basis exists for concluding that any of COPA's requirements renders the statute unconstitutionally vague.

Because both of the district court's bases for invalidating COPA on its face – overbreadth and vagueness – are flawed, this Court should, at a minimum, vacate the injunction prohibiting all enforcement of the statute.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the injunction prohibiting enforcement of COPA should be vacated.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

PATRICK L. MEEHAN
United States Attorney

SCOTT R. McINTOSH
(202) 514-4052
CHARLES W. SCARBOROUGH
(202) 514-1927
Attorneys, Appellate Staff
Civil Division, Room 7244
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

SEPTEMBER 2007

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B) of the Federal Rules of Civil Procedure. The brief contains 13,943 words, as determined by Corel WordPerfect 12.

_____

Charles W. Scarborough

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2007, I filed and served the foregoing BRIEF FOR THE APPELLANT by causing the required number of copies of the brief to filed with the Court by Federal Express next-day delivery and served upon the following counsel by first-class mail and electronic mail:

Christopher Hansen
Aden Fine
American Civil Liberties Union
125 Broad Street – 18th Floor
New York, NY 10004
(212) 549-2693
Christopher Harris
Seth Friedman
Latham & Watkins LLP
885 Third Avenue
New York, NY 10022
(212) 906-1800

_____

Charles W. Scarborough