No. 03-218

**In the**
**Supreme Court of the United States**

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**JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,**

***Petitioner,***

**v.**

**AMERICAN CIVIL LIBERTIES UNION, ET AL.,**

***Respondents.***

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

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# BRIEF FOR THE RESPONDENTS

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## QUESTION PRESENTED

Whether the Court of Appeals correctly held that the criminal and civil provisions of the Child Online Protection Act, 47 U.S.C. § 231, violate the First Amendment by suppressing a large amount of speech on the World Wide Web that adults are entitled to communicate and receive.

## PARTIES TO THE PROCEEDING

The petitioner in this case is John Ashcroft, Attorney General of the United States. The respondents are: American Civil Liberties Union; Androgyny Books, Inc. d/b/a A Different Light Bookstores; American Booksellers Foundation For Free Expression; Artnet Worldwide Corporation; BlackStripe; Addazi Inc. d/b/a Condomania; Electronic Frontier Foundation; Electronic Privacy Information Center; Free Speech Media; OBGYN.net; Philadelphia Gay News; PlanetOut Corporation; Powell's Bookstore; Riotgrrl; Salon Internet Inc., now known as Salon Media Group, Inc.; and West Stock, Inc., now known as ImageState North America, Inc. The plaintiff Internet Content Coalition is no longer in existence.

## CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following disclosures:

(1) The parent corporation of respondent ArtNet Worldwide Corporation is ArtNet AG.

(2) Approximately 30% of the stock of respondent OBGYN.net is owned by MediOne, Inc., an affiliate of Medison Co., Ltd.

(3) The parent corporation of respondent Philadelphia Gay News is Masco Communications.

(4) PlanetOut Corporation now exists as part of PlanetOut Partners USA, Inc., which is a subsidiary of PlanetOut Partners, Inc. JP Morgan Partners and affiliated entities of JP Morgan Partners together hold more than 10% of the shares issued and outstanding of PlanetOut Partners, Inc. AOL Time Warner Inc., which had been listed as a major shareholder in prior stages of this litigation, does not hold more than 10% of the shares issued and outstanding of PlanetOut Corporation or PlanetOut Partners, Inc.

(5) The parent corporation of respondent West Stock, Inc., which has been renamed ImageState North America, Inc., is ImageState, PLC.

(6) Respondent Salon Internet Inc. is now known as Salon Media Group, Inc.

(7) Respondent Internet Content Coalition no longer exists.

(8) Respondent Riotgrrl hosts a Web site that is no longer operating.

(9) The following respondents do not have parent companies, nor do any publicly held companies own ten

percent or more of their stock: Addazi Inc. d/b/a/ Condomania, American Booksellers Foundation for Free Expression, American Civil Liberties Union, Androgyny Books, Inc. d/b/a/ A Different Light Book Stores, Blackstripe, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, Powell's Bookstore, RiotGrrl, and Salon Media Group, Inc.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**



**OTHER AUTHORITIES**

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# BRIEF FOR THE RESPONDENTS

## STATEMENT OF THE CASE

The Child Online Protection Act ("COPA"), 47 U.S.C. § 231 (1998), was signed into law on October 21, 1998. The following day, plaintiffs filed this suit in the United States District Court for the Eastern District of Pennsylvania, alleging that COPA violated the First Amendment to the Constitution. Plaintiffs sought an injunction to prevent COPA's enforcement.

### A. The District Court's Decision And Factual Findings

On February 1, 1999, following an evidentiary hearing, the district court preliminarily enjoined enforcement of COPA, which imposes severe criminal and civil sanctions on persons who "by means of the World Wide Web, make[] 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)-(3). The district court's decision was supported by detailed findings of fact based on six days of testimony, numerous affidavits and extensive documentary evidence submitted by both sides. The majority of factual findings and conclusions mirror those found in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), in which this Court struck down the very similar Communications Decency Act (the "CDA"), 47 U.S.C. § 223 (1996), because it would "inevitably curtail a significant amount of adult communication on the Internet." 521 U.S. at 877 (citation omitted). Petitioner has not disputed the district court's findings on appeal, and some of those findings were derived from a joint stipulation submitted by the parties. *See* Pet. App. 121a-148a. Based on this record, the district court held that plaintiffs were likely to succeed on their claim that COPA violates the First Amendment, because "COPA imposes a burden on speech that is protected for adults," *id.* at 156a, and because the government could not prove that COPA is the "least restrictive means available to achieve the goal of restricting the access of minors to [harmful to minors] material," *id.* at 159a.

### 1. Plaintiffs And Their Speech

Plaintiffs include a diverse range of individuals and organizations, ranging from "new media" online magazines to long-established booksellers. All plaintiffs use the World Wide Web (the "Web") to provide information on a variety of subjects, including sexually explicit issues that they fear could be construed as "harmful to minors." *See id.* at 129a-133a, ¶¶21, 24-26.

Plaintiffs and their users post, read and respond to sexually explicit content on the Web including books and photographs; online magazines; resources designed for gays and lesbians; and visual art and poetry. *See id.* at 129a, ¶21. The record contains extensive examples of plaintiffs' speech

at risk under COPA. *See generally* Court of Appeals Joint Appendix ("J.A.") 601-757; Suppl. Lodg. 1-78. (Pls. Exhs.).[1] For example, Plaintiff Salon Media Group, Inc. ("Salon"), is a leading general interest online magazine that publishes articles on current events, the arts, politics, the media, and sexuality. J.A. 139-40 (Talbot Testimony). Salon publishes a regular column entitled "Sexpert Opinion" by author and sex therapist Susie Bright, including sexually frank articles such as "Move over, Ken, it's 'Bend Over Boyfriend,'" which explores women's desire to penetrate their male partners, and "Beatings, eatings and other ass-candy," which recounts the author's experience at a sex club. J.A. 617-33 (Salon Exhs.). The Web site of RiotGrrl has comparably explicit material, including a woman's description of her ménage a trois fantasy, J.A. 737-39 (RiotGrrl Exhs.), and an essay titled "Blow Jobs: A Man Handler's Reverie," J.A. 749 (RiotGrrl Exhs.).

A Different Light Bookstore operates bookstores in California, and maintains a comprehensive Web site with information about books of interest to the gay and lesbian community. J.A. 106-07, 601-16 (Laurila Testimony, Pls. Exhs.). Among other content, A Different Light's Web site includes reviews of books about sadomasochism and fetishism such as "The Topping Book, or, Getting Good at Being Bad," "Whore Carnival," and "SM 101: A Realistic Introduction." J.A. 603-04 (A Different Light Exhs.). The site also includes excerpts from stories such as "Shame on Me," an autobiographical account of a young man's experience with masturbation and sexual shame. J.A. 609-12 (A Different Light Exhs.). The essay offers a critical assessment of sexual mores in today's society, with passages

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[1] Respondents cite to the Joint Appendix filed by the parties in petitioner's initial appeal to the Third Circuit, which has been incorporated into all subsequent appellate proceedings, and lodged with this Court.

like "[m]y dick's too big, my dick's too small, too hard, too cut, too uncut, my sperm doesn't come out straight enough or with enough force, my sperm tastes like coffee, ... my butt's too big, too scrawny, too hairy, too shiny, too closed, too open ...." J.A. 612 (A Different Light Exhs.). Likewise, Blackstripe, a Web-based resource for gay and lesbian individuals of African descent, has published on its Web site a powerful political essay about racism and sexuality entitled "How do you challenge the white cock you're sucking?" J.A. 753 (Blackstripe Exhs.).

Mitchell Tepper, a member of plaintiff ACLU, owns and operates the Sexual Heath Network Web site out of his home in Connecticut. The Sexual Health Network provides easy access to information about sexuality geared towards individuals with disabilities. Much of the Web site focuses on helping disabled persons experience sexual pleasure through the use of sex toys, and sexual surrogacy as a form of sexual therapy. Pet. App. 131a, ¶25; J.A. 670-88 (Sexual Health Network Exhs.).

Several plaintiffs host Web-based discussion groups and chat rooms that allow readers to engage in explicit conversations on various subjects. *See* Pet. App. 129a, ¶22. In addition to its news columns, Salon hosts a very popular set of discussion groups called "Table Talk," to which three thousand messages are posted each day, on topics such as "Can boys find the right spot?" J.A. 147-49 (Talbot Testimony). Salon archives its content, and its Web site contains tens of thousands of previously published pages. J.A. 145, 147 (Talbot Testimony). Likewise, the Sexual Health Network's Web site includes an interactive discussion area, including a forum called "Love Bites," where readers can ask experts frank questions about sexuality, and a bulletin board where users can post explicit comments about how to increase sexual pleasure. J.A. 672-85 (Sexual Health Network Exhs.). For example, in one exchange on the discussion board, posters shared suggestions about different

sexual positions that a large man and a petite woman could use to maximize their gratification. J.A. 683-85 (Sexual Health Network Exhs.).

The Web site of PlanetOut, an online community for gay, lesbian, bisexual and transgendered people, includes a bulletin board and chat rooms where users can discuss lesbian sexuality, and where teenagers who live in remote locations can discuss their sexual orientation. J.A. 661-69 (Pls. Exhs.). The site also allows users to post personal ads, including descriptions of their sexual interests and physical characteristics, and photographs of themselves in various states of dress and undress. J.A. 656-60 (Pls. Exhs.). The site is a valuable resource for "closeted" people who do not voluntarily disclose their sexual orientation due to fear of the reaction of others. Pet. App. 132a, ¶26.[2]

Plaintiffs, like the vast majority of speakers on the Web, provide the bulk of their online information for free.

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[2] Other plaintiffs include: Condomania, a leading online seller of condoms and distributor of materials about sexual pleasure and safety; ArtNet, a leading online vendor of fine art on the Web; Free Speech Media, which promotes extensive independent audio and video content on the Web; OBGYN.net, a comprehensive international online resource on obstetrics and gynecology; Powell's Bookstore, a large new and used bookstore with a Web site containing information on over one million books; Electronic Frontier Foundation; Electronic Privacy Information Center; RiotGrrl, a "Webzine" that advocates positive empowerment for women (the Web site is not currently operating); WestStock, now known as ImageState North America, Inc., an online seller of stock photographic images; BlackStripe, a Web-based resource for gay and lesbian individuals of African descent; American Booksellers Foundation for Free Expression, an organization that includes some on-line bookstores; and Philadelphia Gay News, which operates a Web site. *See* Pet. App. 130a at n.5; *see generally* J.A. 696-757 (Pls. Decl. Exhs.). One of the plaintiffs in the district court was the Internet Content Coalition, a non-profit professional association of well-known content providers including The New York Times, Reuter's, CBS News Media, CNET, and MSNBC. The Internet Content Coalition no longer exists, though its previous members are still in business.

*See id.* at 129a, ¶23. Like traditional newspapers and magazines, they earn advertising revenues by virtue of their speech. They are thus engaged in speech "for commercial purposes" within the meaning of COPA, because they communicate with the objective of making a profit. *See id.* at 134a-135a, ¶33; 47 U.S.C. §231(e)(2)(B). Although certain plaintiffs are large, well-known Web publishers, others are start-up operations run by single individuals. For plaintiffs such as these, a finding of liability under COPA could cause personal financial ruin in addition to jail time and a criminal record.

**2. The Challenged Statute**

COPA imposes severe criminal and civil penalties on persons who

> knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, make[] 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)-(3). COPA authorizes a criminal fine of up to $50,000 and six months imprisonment, and a civil fine of up to $50,000 for each violation of the statute. *Id.* Those found guilty of "intentionally" violating COPA are subject to a fine of up to $50,000 a day for every day that the violation exists. *Id.* § 231(a)(2).

COPA defines "commercial purposes" as being "engaged in the business of making such communications." 47 U.S.C. § 231(e)(2)(A). COPA then defines "engaged in the business" as meaning

> that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any

> material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income).

47 U.S.C. § 231(e)(2)(B).

Section 231(c)(1) of COPA provides an affirmative defense to prosecution if the defendant,

> in good faith, has restricted access by minors to material that is harmful to minors – (A) by 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); *see also id.* § 231(b).

### 3. The Deterrent Effect Of COPA's Defenses

The growth of commercial activity on the Web has been explosive.[3] At the time of the district court's decision, approximately one third of the 3.5 million sites on the Web were commercial within the meaning of COPA in that their operators "intend[ed] to make a profit." Pet. App. 133a, ¶27.

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[3] The number of commercial Web sites has risen dramatically since 1999. In January of 1999, there were 12,140,747 Web hosts using the domain name ".com", which is the top-level domain intended for commercial uses; in July of the same year, there were 18,773,097. By January of 2003 that number had risen to 40,555,072. *See* The Internet Software Consortium, Internet Domain Survey (visited Dec. 15, 2003) <http://www.isc.org/ds>.

A variety of business models operate on the Web. By far the most popular business model is the advertiser supported or sponsored model, "in which nothing is for sale, content is provided for free, and advertising on the site is the source of all revenue." *Id.* at 134a, ¶¶30, 31; J.A. 206 (Hoffman Testimony). The fee based or subscription model, in which users are charged a fee before accessing content, is the least popular. Pet. App. 134a, ¶31.

Most Web businesses do not make a profit. J.A. 214-15 (Hoffman Testimony). Web businesses are valued according to "the number of customers they believe the Web site is able to attract and retain over time, or 'traffic.'" Pet. App. 135a, ¶34; J.A. 216-20 (Hoffman Testimony). Traffic is "the most critical factor for determining success or potential for success on a Web site." Pet. App.135a, ¶ 34. Because "[t]he best way to stimulate user traffic on a Web site is to offer some content for free to users ... virtually all Web sites offer at least some free content." *Id.*

COPA provides three affirmative defenses to Web site operators who provide content deemed "harmful to minors": (1) requiring the use of a credit card, debit account, adult access code, or adult personal identification number; (2) accepting a digital certificate that verifies age; or (3) any other reasonable measures feasible under available technology. *See id.* at 136a-137a, ¶37; 177a. "Without these affirmative defenses, COPA on its face would prohibit speech which is protected as to adults." *Id.* at 171a.

With regard to these affirmative defenses, the district court found, and petitioner does not dispute, that there is no "authority that will issue a digital certificate that verifies a user's age." *Id.* at 136a-137a, ¶37. Thus, the uncontested evidence showed that the only technologies currently available for compliance with COPA are online credit cards and adult access codes. Either option would require users to register and provide a credit card or other proof of identity

before gaining access to restricted content. *Id.* at 131a-133a, ¶¶25-26; 155a.

Both defenses deter adults from accessing protected speech. *Id.* at 155a-156a. Because the "vast majority of information ... on the Web ... is provided to users for free," *id.* at 129a, ¶23, the district court found that COPA's registration requirements would deter most Web readers. *Id.* at 155a-156a. Peer-reviewed studies have shown that up to 75% of Web users are deterred by registration requirements; two-thirds of consumers would not even accept money in exchange for giving up personal information to Web sites. J.A. 227, 238 (Hoffman Testimony). Because of privacy concerns, users would simply forego accessing their material if forced to register or provide a credit card or adult access code. For this reason, the district court found that users "will only reveal credit card information at the time they want to purchase a product or service." Pet. App. 136a, ¶36.

Notably, although PlanetOut allows users to register voluntarily to receive free benefits, "less than 10% of the users to [the] site have registered." Pet. App. 132a, ¶26; *see also* J.A. 133-35, 138, 156 (Laurila Testimony). When one of PlanetOut's competitors required identification, the competitor suffered a loss of viewership, with membership stuck at 10,000 compared to the 350,000 PlanetOut members and two million PlanetOut readers. *Id.*; J.A. 355, 368-69 (Reilly Testimony); *see also* J.A. 144 (Talbot Testimony) (noting that when a competitor switched from free content to a fee-based model, its "circulation plummeted overnight from ... over 150,000 individual users each month to about 20 to 30,000").

In additional to the strong deterrent effect of credit card or age verification, the district court found that the defenses imposed numerous additional burdens on protected speech.

### 4. Additional Burdens Of COPA's Defenses

#### i. Web-Based Chat Rooms And Bulletin Boards

Many plaintiffs provide "interactive fora such as Web-based electronic mail (email), Web-based chat, and Web-based discussion groups." Pet. App. 129a, ¶ 22. The evidence showed that Web-based chat rooms and discussion groups are vitally important features that contribute to the popularity of many commercial Web sites. J.A. 148-49, 358-59 (Talbot, Reilly Testimony). They are some of the "vast democratic fora of the Internet," providing Web users with equal access and an equal voice. *Reno v. ACLU*, 521 U.S. at 868. Hundreds of thousands of people have communicated with each other on plaintiffs' sites alone, which represent only a miniscule portion of the discussions occurring at any given moment on the Web.

COPA would require that users of all interactive fora provide a credit card or adult access code before entering the discussion – *even discussions that contain a wide range of speech that is not harmful to minors.* Petitioner's own expert testified that "the only way to comply with COPA regarding potentially harmful to minors materials in chat rooms and bulletin boards is to require that a credit card screen or adult verification be placed before granting access to all users (adults and minors) to such fora, or to implement a full-time monitor on the site to read all content before it is posted." Pet. App. 145a, ¶58. The content in Web-based interactive fora is inherently dynamic, and there is no way to prohibit access to some materials while "still allow[ing] unblocked access to the remaining content for adults and minors, even if most of the content in the fora was not harmful to minors." *Id.*

### ii. Adult Access Codes

There are about twenty-five services on the Web that will provide adult access codes to Web users in order to access a variety of adult Web sites. Pet. App. 140a, ¶ 48; 142a, ¶52; J.A. 401 (Farmer Testimony). To obtain an adult access code, a user must provide identification information and pay a fee to the adult access service, normally by providing a credit card number online. Pet. App. 142a, ¶51. No standards govern the operation of these services, and content providers cannot ensure their security or reliability. J.A. 386-87 (Farmer Testimony). Plaintiffs testified that most users would forgo accessing restricted content rather than provide their name and credit card to a third party adult access service, especially to access free content. J.A. 330-31, 344, 367-68, 370 (Barr, Tepper, Reilly Testimony).

A content provider that contracts with an adult access service is provided a script that must be placed in front of every restricted page. Pet. App. 141a, ¶49. To avoid requiring users to re-enter their passwords repeatedly, the content provider would have to obtain and utilize additional software tools enabling it to place all restricted material in one directory behind the adult verification screen. J.A. 467-78 (Alsarraf Testimony). Without the use of these additional tools, any user could successfully "attempt[] an end-run around the screen" and go directly to a site that was meant to be restricted. Pet. App. 142a, ¶53.

### iii. Credit Card Verification

To use COPA's credit card defense, a content provider "would need to undertake several steps." *Id.* at 138a, ¶41. The steps would include "(1) setting up a merchant account, (2) retaining the services of an authorized Internet-based credit card clearinghouse, (3) inserting common gateway interface, or CGI, scripts into the Web site to process the user information, (4) possibly rearranging the content on the Web site, (5) storing credit card numbers or

passwords in a database, and (6) obtaining a secure server to transmit the credit card numbers." *Id.* The start-up costs would range from "$300 ... to thousands of dollars ...." *Id.* at 138a, ¶42.

A normal credit card transaction involves both an "authorize only" transaction, which determines whether the card is valid, and a "funds capture" transaction, which charges an amount to the user's credit card. *Id.* at 139a, ¶45. The government was unable to prove that credit card verification services would "authorize or verify a credit card number in the absence of a subsequent funds capture transaction." *Id.* Without such a service, a content provider would have to charge the user's credit card for accessing the content. J.A. 126, 129 (Laurila Testimony). Even if this service were available, the credit card company would charge the content provider $0.15 to $0.25 per authorization. Pet. App. 139a, ¶45. Such per-authorization fees would not only substantially increase the costs of engaging in protected speech but would also allow users hostile to certain content to drive up costs to the provider simply by repeatedly accessing restricted content. J.A. 133 (Laurila Testimony).

Finally, the court found that because some minors "may legitimately possess a valid credit or debit card," they would have access to restricted content despite credit card verification. Pet. App. 140a, ¶48.

**iv. Web Site Redesign**

COPA's credit card and adult access defenses would also require speakers to redesign their Web sites in order to restrict only "harmful to minors" content. The district court found that the technological requirements for implementing credit card or adult access code verification to comply with COPA could be substantial – depending on the amount of content on a Web site, the amount of content that may be harmful to minors, the degree to which a Web site is organized into files and directories, the degree to which

harmful to minors material is currently segregated into a particular file or directory, and the level of expertise of the Web site operator. *Id.* at 137a, ¶39; 144a, ¶56. COPA would require some Web sites to reorganize and redesign literally millions of files. J.A. 158-59 (Talbot Testimony).

A content provider would also have to reorganize individual files and pages in order to restrict only content that could be harmful to minors. Pet. App. 143a, ¶54. Even a single page of Web content could have some content prohibited under COPA and some that was not. "Text is more difficult to segregate than images, and thus if a written article contains only portions that are potentially harmful to minors, those portions cannot be hidden behind age verification screens without hiding the whole article or segregating those portions to another page." *Id.* at 143a, ¶55.

In sum, the district court concluded that "the implementation of credit cards or adult verification screens before gaining full access to 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 155a.

### 5. Less Restrictive Alternatives

The district court found that, in contrast to the severe and broad criminal penalties of COPA, Congress could have adopted a narrower restriction on speech that would advance the same purported interests. Given that petitioner has repeatedly claimed that Congress' goal was to prevent the free dissemination of "teaser" pictures, *see, e.g.*, Pet. Br. at 19, Congress could have restricted only pictures, images, or graphic text files "which are typically employed by adult entertainment Web sites as 'teasers.'" Pet. App. at 161a. The district court also noted that Congress could have resorted to civil penalties, rather than the draconian use of

criminal penalties for the distribution of protected speech. *Id.*

User-based filtering software constitutes another less restrictive alternative. At least forty percent of Web content originates abroad, and may be accessed by minors as easily as content that originates locally. *Id.* at 128a, ¶20. COPA cannot restrict this content, and also does not restrict the wide range of harmful to minors materials provided noncommercially on the Web, and through non-Web protocols on the Internet such as newsgroups and non-Web chat rooms. Conversely, as petitioner's expert conceded, parents can use user-based blocking software to prevent access to these materials, in addition to blocking Web-based commercial materials. *Id.* at 148a, ¶65. User-based blocking software can also block other categories of material that parents may deem inappropriate, such as violence or hate speech. J.A. 314 (Magid Testimony). To establish these controls, parents may either purchase software for their home computers or choose an Internet Service Provider or online service such as America Online that offers parental software controls. Pet. App. 148a, ¶65; J.A. 309 (Magid Testimony). These services also may provide tracking and monitoring software to determine which resources a child has accessed, and offer access to children-only discussion groups that are closely monitored by adults. J.A. 162-63 (TRO Memorandum Opinion).

For all of these reasons, the district court ruled in favor of plaintiffs and granted a preliminary injunction enjoining the government from enforcing COPA.

### B. Congressional Reports Supporting The District Court's Findings

Since the district court's decision, two separate reports commissioned by Congress have independently concurred with the district court's factual findings. Specifically, when Congress passed COPA, it also set up the

Commission for Online Child Protection to study methods of reducing access by minors to sexually explicit material.[4] The National Research Council (the "NRC") also studied ways to address material on the Internet that is inappropriate for children, publishing over 350 pages on the subject.[5] The COPA Report and the NRC Report both independently identified a number of alternatives for protecting children, and both concluded that applying criminal laws to protected speech on the Internet poses significant First Amendment problems, while failing to protect children effectively. *See* COPA Report at 9, 11, 13, 25, 39; NRC Report, Executive Summary at 11-13 (summarizing alternatives), Sec. 14.4.3 ("in an online environment in which it is very difficult to differentiate between adults and minors, it is not clear whether denying access based on age can be achieved in a way that does not unduly constrain the viewing rights of adults").

Like the district court, the COPA Report found that requiring age verification systems would not be "effective at blocking access to [non Web-based] chat, newsgroups, or instant messaging." COPA Report at 27. It also noted that where either age verification or credit cards are required, "[a]n adverse impact on First Amendment values arises from the costs imposed on content providers, and because requiring identification has a chilling effect on access." *Id.* at 26-27. The NRC Report found that "widespread [use of age verification technology] may compromise the privacy of

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[4] Commission on Child Online Protection, Final Report to Congress, Oct. 20, 2002 ("COPA Report"), at http://www.copacommission.org/report. This report essentially served as a substitute for thorough congressional findings. COPA was passed as a part of an omnibus appropriations bill, with no hearings in the Senate and only one hearing in the House.

[5] Committee to Study Tools and Strategies for Protecting Kids from Pornography, National Research Council, Youth, Pornography, and the Internet, Dick Thornburgh and Herbert S. Lin, eds., (2002) ("NRC Report"), at http://www.nap.edu/books/0309082749/html/.

adult viewing." NRC Report at 347, Section 13.3.7. When users are required to give personally identifying information to verify age, "the reasonable assumption would be that records are being kept (whether or not they are in practice), and so the user has a plausible reason to be concerned that his name is associated with certain types of material." *Id.* at 344, Sec. 13.3.5. This loss of privacy "may inhibit free flow of information and create a chilling effect on the freedom of adults who wish to access lawful though perhaps controversial material." *Id.* at 348, Section 13.3.7.

The COPA Report also concluded that COPA's protections were underinclusive, given the law's inability to reach inappropriate material originating from abroad. COPA Report at 11, 13, 25, 39. The NRC Report pointed out that the international nature of the Internet "pose[d] substantial difficulties" for those attempting to regulate content on the Web that is harmful to minors. NRC Report, Executive Summary at 12.

Both reports emphasized that there are numerous alternative means of restricting minors' access to certain materials, many of which would be more effective than COPA. The reports called for the government to vigorously enforce obscenity and child pornography laws. *See id.* at Section 14; *see also id.* at Section 9.1; COPA Report at 43. It suggested the government could also

> promote media literacy and Internet safety education (including development of model curricula, support of professional development for teachers on Internet safety and media literacy, and encouraging outreach to educate parents, teachers, librarians, and other adults about Internet safety issues); support development of and access to high-quality Internet material that is educational and attractive to children in an age-appropriate

manner; and support self-regulatory efforts by private parties.

NRC Report, Executive Summary at 8.

Like the district court, the reports also applauded the use of "voluntary methods and technologies to protect children," and noted that, "[c]oupled with information to make these methods understandable and useful, these voluntary approaches provide powerful technologies for families." COPA Report at 39; *see also id.* at 8, 21, 25, 27; NRC Report, Executive Summary at 10 ("filters can be highly effective in reducing the exposure of minors to inappropriate content if the inability to access large amounts of material is acceptable"); *see generally id.* at Section 2.

### C. The Court Of Appeals' Initial Opinion

On the initial appeal of the district court's decision, the Third Circuit upheld the district court's ruling that COPA violates the First Amendment, *see* Pet. App. 69a. The court held that "because the standard by which COPA gauges whether material is 'harmful to minors' is based on identifying 'contemporary community standards[,]' the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." *Id.* The court affirmed on this single ground, and did not reach the other grounds relied upon by the district court.

### D. This Court's Prior Ruling

This Court vacated and remanded the decision by the Court of Appeals finding COPA unconstitutional. Rejecting the Third Circuit's approach, the Court narrowly held "that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment," *Ashcroft v. American Civil Liberties Union*,

535 U.S. 564, 585 (2002) (emphasis in original). Significantly, however, the Court did not lift the injunction preventing the government from enforcing COPA absent further action. *Id.* at 586. The Court then remanded the case for further proceedings on issues including "whether COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the district court correctly concluded that the statute likely will not survive strict scrutiny analysis...." *Id.* at 585-86.

### E. The Court Of Appeals' Ruling On Remand

On remand, the Third Circuit reaffirmed its conclusion that COPA was unconstitutional. Pet. App. 18a. In its primary holding, the court ruled that COPA failed strict scrutiny because it would deprive adults of material they are constitutionally entitled to receive. *Id.* at 38a. Reviewing the plain language of the statute, the court concluded that COPA "endangers a wide range of communications, exhibits, and speakers whose messages do not comport with the type of harmful materials legitimately targeted ...." *Id.* at 23a. The court rejected the government's plea to re-write the statute to narrow its application, and found that COPA's affirmative defenses, did nothing to ameliorate the statute's burden on speech protected for adults. The court further held that other alternatives, including Internet filtering software, were "substantially less restrictive than COPA in achieving COPA's objective of preventing a minor's access to harmful materials." *Id.* at 47a.

## SUMMARY OF THE ARGUMENT

COPA was passed in 1998, when the Internet was still relatively new and less understood. Like Congress' first attempt at legislation in this area, struck down by this Court in *Reno v. ACLU*, COPA relies exclusively on threatening Web speakers with severe criminal and civil penalties for communicating protected speech. COPA's bludgeon suppresses an enormous amount of speech protected for

adults, and is unnecessary and ill-tailored to address the government's interest in protecting children from sexually explicit content.

Absent enforcement of COPA, a variety of existing laws and tools already offer significant protection for minors using the Internet. Significantly, the government has all but ceased using one of the most potent protections available, the federal obscenity law. The government's failure to protect minors from materials that are obscene even for adults seriously undermines its claimed need for a much broader law that burdens protected speech. In addition, three new federal laws protect minors by requiring the use of filtering software in schools and libraries throughout the country, educating parents about the availability of filters for use in the home, and creating a new .kids domain that provides a safe online environment for children. Since enactment of COPA, two reports commissioned by Congress offer a variety of additional suggestions for protecting minors *without* imposing criminal sanctions on adult speech. In contrast to the many other options now available, COPA offers only marginal support for the government's interest while imposing a censorship regime on the Web that is far more draconian than in any other medium.

The government has only two responses to COPA's presumptive unconstitutionality. While conceding that COPA burdens adult speech, the government argues that the statute targets only a narrow range of speech, and that its affirmative defenses reduce the burden on that speech. The uncontested trial record, largely ignored by the government, defeats both arguments. First, the record shows that even the government's untenable view of the statute would threaten a broad range of protected speech. Specifically, the government concedes that COPA targets not just speakers and businesses who *sell* their speech on the Web, but also the vast majority of speakers and businesses who provide their Web speech *for free*. Similarly, COPA threatens a

substantial amount of speech even if interpreted to exclude material with value for *older* minors, and to require an evaluation of material in the context of an entire Web site. Given the vast quantity and diversity of speech on the Web, even a narrow view of the statute targets a broad range of speech that by definition is not "obscene," and is therefore protected, for adults.

Second, COPA's affirmative defenses, identical to those found insufficient by this Court in *Reno v. ACLU*, burden millions of content providers who have no effective way to prevent minors from obtaining their speech without also deterring and burdening access by adults. The two reports commissioned by Congress now confirm the key findings of the trial court. COPA's defenses would force Web speakers to choose between risking criminal prosecution or implementing costly defenses that would inevitably deter their adult users. Even assuming that Web speakers would not self-censor to avoid the risk of jail time, the record shows that up to 75% of Web users would be deterred by either credit card or adult access screens. Furthermore, these screens must be placed at the entrance to Web-based chat rooms and discussion boards, which are vitally important features on many Web sites, thus restricting conversations not even targeted by the statute.

Under this Court's clear precedents, specifically affirmed in the Internet context, COPA thus violates strict scrutiny and is overbroad because it "effectively suppress[es] a large amount of speech that adults have a constitutional right to receive and to address to one another." *Reno v. ACLU*, 521 U.S. at 874. Especially with a broad range of more effective tools available, Congress may not enforce its interest in protecting minors by making it a crime to communicate constitutionally protected material to adults.

## ARGUMENT

### I. A VARIETY OF EXISTING LAWS AND VOLUNTARY PRACTICES OFFER SIGNIFICANT PROTECTION FOR MINORS WITHOUT IMPOSING COPA'S CRIMINAL PENALTIES ON PROTECTED SPEECH.

Today, *absent* enforcement of COPA, a variety of laws and voluntary practices are available to protect minors from sexually explicit content. Though the government claims that COPA is necessary to protect minors, it has not even used all of the tools currently available. Given the significant protections already in place, surveyed briefly below, COPA's criminal penalties clearly fail strict scrutiny.

First, and most fundamentally, federal law already makes it a crime to distribute material – in any form – that is obscene. Yet the government has prosecuted only a handful of obscenity cases in the last twenty-five years.[6] Nor did obscenity prosecutions increase when the Internet vastly expanded in the 1990s, despite Congress' repeated claims

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[6] U.S. Justice Department obscenity enforcement records from the past ten years, available from the Transactional Records Access Clearinghouse (TRAC) at http://trac.syr.edu, indicate there have been fewer than 15 obscenity prosecutions annually since 1997. *See also* "American Porn," PBS Frontline documentary, reporting that federal obscenity prosecutions essentially stopped in the 1990s, at http://www.pbs.org/wgbh/pages/frontline/shows/porn/prosecuting/. A number of the organizations that filed briefs in support of the government in this case have criticized this drop in obscenity prosecutions. The Family Research Council has said "FRC has been concerned that over the past three years of the Bush administration we have seen few if any obscenity prosecutions." *See* http://www.frc.org/get.cfm?i=WA03I87#-WA03I87. Morality in Media has stated that "[h]ad the obscenity laws been properly enforced," the percentage of children who have reported viewing pornography "would have been much, much smaller." *See* Matt Pyeatt, "Teen Internet Porn Study Stirs Debate," CSNNews.com, Dec. 12, 2001.

that online pornography was a problem. Because obscene material is not constitutionally protected for adults or minors, prosecuting obscenity raises none of the constitutional concerns that COPA does. Though the government claims that its interest in protecting minors from sexually explicit material is "compelling," it has failed to protect minors from materials that are obscene even for adults – a category significantly more explicit (and thus hypothetically more harmful) than the constitutionally protected materials that COPA seeks to criminalize. By contrast, the government has successfully prosecuted child pornography and solicitation of minors on the Internet and elsewhere.[7] These laws also already offer significant protection for minors.

Furthermore, three new federal laws now specifically protect minors from accessing inappropriate materials on the Internet. The first, the Children's Internet Protection Act, mandates the use of filtering software in all public schools and libraries that receive federal funds (the vast majority of all schools and libraries). That law was upheld by this Court last Term. *United States v. American Library Ass'n*, 123 S. Ct. 2297 (2003). The second, the Dot Kids Implementation and Efficiency Act of 2002, creates a special ".kids.us" domain on the Internet that "provides a safe online environment for children, and helps to prevent children from being exposed to harmful material on the Internet." 116 Stat. 2766. The third, passed along with COPA and not challenged here, requires all Internet Service Providers to inform parents of the availability of filtering software for use in the home. Since COPA was passed, two congressionally sponsored commissions have recommended numerous additional steps that the government, teachers, and parents can take to minimize exposure and reduce any harmful effects. *See* Statement of the Case, *supra* at Section B.

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[7] *See* Transactional Records Access Clearinghouse, at http://tracfed.syr.edu, reporting Justice Department data for prosecution under 18 U.S.C. § 2252 from the last ten years.

Finally, all of the harmful to minors materials that are *for sale* on the Internet are *already* behind credit card screens. In this sense the online medium, by virtue of its structure, offers more protection than is available in the majority of book stores and convenience stores around the country.

In summary, in today's world, a minor is already protected from accessing sexually explicit material online whenever: 1) the minor is accessing the Internet at school or in a public library; 2) the material is for sale; 3) the material is obscene or contains child pornography; or 4) the minor is accessing the Internet at home and the parents are using filtering software. The government's argument that an injunction against COPA will leave minors unprotected from sexually explicit material on the Internet ignores all of these existing protections.

It is against this backdrop that the government seeks to defend the constitutionality of COPA, which severely threatens the right of adults to access protected speech by making it a *crime* to display materials online that are harmful to minors. Far from bringing the Internet into conformity with rules in other media, COPA would in fact create a federal censorship regime that is more draconian than in any other medium. Never before has there been a federal criminal harmful to minors law in any medium – COPA is the first. There is no federal law that criminalizes even the direct sale to a minor, let alone the display, of books, magazines, newspapers, CDs, movies, videos, DVDs, or video games that are harmful to minors.

COPA would also impose federal rules that conflict with the decisions made by half of the states *not* to prohibit the display – rather than the direct sale – of harmful to minors materials. Even states that have offline harmful to minors display laws rarely enforce them. When they are enforced, the targeted content has varied widely and has

included content far less explicit than the plaintiffs' speech in this case.[8] This court has never upheld the constitutionality of state display laws,[9] and as the government concedes, some courts have recognized constitutional problems with their application even to offline media.

Though drastically impacting adult speech rights, this new federal criminal law would do little to advance the government's interest in protecting minors. COPA would do nothing to protect minors from harmful material delivered via e-mail, non-commercial Web sites, non-Web-based chat rooms or discussion boards, or from any Web site originating outside the United States. Any marginal benefit provided by COPA's criminal penalties simply cannot be justified under this Court's precedents, given COPA's heavy burden on adult communication and the numerous other effective tools for protecting minors.

## II. COPA MUST BE STRUCK DOWN IF IT FAILS STRICT SCRUTINY OR IS UNCONSTITUTIONALLY OVERBROAD.

Under COPA, it is a crime to make "any communication [on the Web] 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)-(3). Once a

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[8] *See, e.g., State v. Vachon*, 306 A.2d 781, 784 (N.H. 1973) (holding that the sale of a button with the slogan "Copulation Not Masturbation" was obscene as to minors under *Ginsberg*), *rev'd on other grounds*, 414 U.S. 478 (1974); *Wisconsin v. Stankus*, 1997 WL 58727 (Wis. App., Feb. 13, 1997) (upholding conviction for exposing a child to harmful material by displaying a photograph of "a woman with a shirt and jacket open to the waist, without exposing her nipples.").

[9] In *Virginia v. American Booksellers*, the Court said that a Virginia state harmful to minors display law could present "substantial constitutional questions" depending on its impact on adult speech. 484 U.S. 383, 394 (1988). On remand, the Fourth Circuit ultimately upheld the law only after it was narrowly construed by the Supreme Court of Virginia.

speaker posts content on the Web, it is available to all other Web users worldwide. J.A. 114, 145, 148; *see also Reno v. ACLU*, 521 U.S. at 853. Unlike face-to-face communications, it is not technologically possible for a speaker to know the age of a user who is accessing her communications on the Web. *See Reno v. ACLU*, 521 U.S. at 855, 876. Thus, in order to avoid the risk of criminal prosecution and civil penalties, COPA requires Web speakers to restrict access by both minors *and adults* to any speech that may be considered "harmful to minors."

COPA criminalizes a category of speech that is unquestionably constitutionally protected for adults. This Court has repeatedly held that "the governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno v. ACLU*, 521 U.S. at 875 (citations omitted); *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1402 (2002) ("speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it"); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

Applying this time-honored First Amendment analysis, the Court has invalidated two recent attempts by Congress to criminalize non-obscene sexually explicit speech. *Reno v. ACLU*, 521 U.S. at 875 (striking down the Communications Decency Act); *Free Speech Coalition*, 122 S. Ct. at 1402 (invalidating ban on "virtual" child pornography). Like those statutes, COPA "proscribes a significant universe of speech that is neither obscene ... nor child pornography." *Free Speech Coalition*, 122 S. Ct. at 1396; *see also Reno v. ACLU*, 521 U.S. at 874.

As a content-based regulation of protected speech, COPA is presumptively invalid. *R.A.V. v. City of St. Paul*,

505 U.S. 377, 391 (1992). Content-based regulations of speech will be upheld only if they are justified by a compelling governmental interest and are "narrowly tailored" to effectuate that interest. In concluding that strict scrutiny applies to content-based bans, this Court has held that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno v. ACLU*, 521 U.S. at 870; *see also id.* at 874 ("Th[e] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

Indeed, because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," the Court has *never* upheld a criminal prohibition on non-obscene communications between adults. *Id.* (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983) (internal quotation marks omitted)); *Sable Communications v. FCC*, 492 U.S. 115, 131 (1989) (invalidating indecency ban on telephone communications); *Bolger*, 463 U.S. at 74 (striking down a ban on mail advertisements for contraceptives); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975) (striking down a statute that criminalized showing of certain movie content at drive-in theaters); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (invalidating a conviction for distribution of indecent publications). This Court has uniformly rejected such attempts to "burn the house to roast the pig." *Butler*, 352 U.S. at 383.[10]

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[10] *Cf. Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding restriction on the direct commercial sale to minors of material deemed "harmful to minors" because it "does not bar the appellant from stocking the magazines and selling them" to adults); *American Booksellers v. Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990) (noting that "*Ginsberg* did not address the difficulties which arise when the government's protection of minors burdens (even indirectly) adults' access to material protected as to them").

This Court has also rejected even non-criminal speech regulations that attempt to "'reduc[e] the adult population ... to ... only what is fit for children.'" *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996) (invalidating law requiring cable television operators to segregate and block "patently offensive" content on certain channels); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2002) (invalidating law requiring cable television operators to scramble channels); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (invalidating tobacco advertising restrictions aimed at preventing children from viewing such advertising).

Analyzed under the related overbreadth doctrine, COPA is "unconstitutional on its face if it prohibits a substantial amount of protected expression." *Free Speech Coalition*, 122 S. Ct. at 1399; *see also Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Indeed, because COPA "impos[es] criminal penalties on protected speech," it is a "textbook example of why ... facial challenges [are permitted] to statutes that burden expression." *Free Speech Coalition*, 122 S. Ct. at 1398. COPA cannot stand if it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *Reno v. ACLU*, 521 U.S. at 874.

The government may overcome COPA's presumptive unconstitutionality only by proving that the statute is narrowly tailored to achieve its interest. Effectively conceding that COPA burdens speech for adults, the government has only two arguments: 1) COPA applies only to a narrow range of speech, and 2) COPA's affirmative defenses reduce the burden on adult speech. As discussed below and confirmed by the undisputed record, even the government's view of the statute threatens a broad range of protected speech, and the defenses will substantially chill adult speakers and deter Web users from communicating that speech.

## III. COPA SUPPRESSES A VAST AMOUNT OF "HARMFUL TO MINORS" MATERIALS THAT ADULTS ARE CONSTITUTIONALLY ENTITLED TO COMMUNICATE.

### A. Even The Government's Untenable View Of The Statute Threatens A Broad Range Of Protected Speech.

#### 1. The Quantity And Diversity Of Speech On The Web Is Enormous.

Throughout its brief, the government repeatedly suggests that COPA covers only "commercial pornography." The term "pornography" is mentioned nowhere in the statute, and has no legal meaning. The government's use of the term in no way cabins the reach of the statute, and is merely a prejudicial label for speech that by definition adults have the right to access. The relevant question is whether COPA's restriction of "harmful to minors" material burdens a substantial amount of speech on the Web.

As an initial matter, the sheer quantity of speech on the Web cannot be overestimated. As of 2002, there were over 40 million commercial Web sites, most of them originating in the United States. Unlike other mass media, which are dominated by a finite number of large and powerful businesses, small businesses have flourished on the Internet because it reaches mass audiences "and provides relatively unlimited, low-cost capacity for communication of all kinds." *Reno v. ACLU*, 521 U.S. at 870. Regardless of how narrowly one defines the speech that COPA regulates, it inevitably encompasses an enormous quantity of speakers and businesses.

The record in this case is full of examples that illustrate the breadth of sexually explicit speech on the Web. COPA threatens any business that offers "patently offensive" written or visual depictions of 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." 47 U.S.C. § 231(e)(6). The government's pretense that the appellate court discussed only a few examples of such speech ignores the extensive record. The following examples, in addition to those highlighted in the Statement of the Case, are illustrative:

- ArtNet's Web site displays photographs from Andres Serrano's series "A History of Sex." J.A. 710-13 (ArtNet Exhs.).
- ACLU member Patricia Nell Warren's Web site includes a graphic account of a fifteen-year-old who was date-raped when she was thirteen. J.A. 732-36 (Warren Exhs.).
- A Different Light's site contains an article describing a gay author's first experience of masturbation. J.A. 609-12 (Laurila Exhs.).
- PlanetOut offers archives of an Internet radio show called "Dr. Ruthless" that discusses topics such as anal sex and masturbation. J.A. 658-60 (Reilly Exhs.).
- RiotGrrl's articles include explicit descriptions of an author's first experience with oral sex. J.A. 745-48 (Douglas Exhs.).

*See generally* J.A. 601-757; Supp. Lodg. 1-78.

Web-based chat rooms and discussion boards involving sexual topics are also extremely popular and widespread on the Internet. PlanetOut alone has over forty chat rooms about gay sexuality and Salon's Table Talk has thousands of discussions about sexual pleasure. *See* J.A. 359-360 (Reilly Testimony); J.A. 147-149 (Talbot Testimony). Given the popularity of interactive messages and the millions of commercial Web sites, the examples above are far from isolated. Pet. App. 132a-134a, ¶27; *see also* Amicus Curiae Brief on Behalf of American Society of

Journalists & Authors, et al.; Amicus Curiae Brief on Behalf of Volunteer Lawyers for the Arts, et al. The Third Circuit thus properly held that COPA "encroaches upon a significant amount of protected speech ...." Pet. App. 51a. As discussed below, even the government's reading of the statute fails to significantly narrow the quantity of protected speech that COPA threatens.

### 2. COPA Threatens A Broad Range Of Web Businesses That Provide Their Information For Free.

The government argues that, unlike the CDA, COPA's impact on protected speech is negligible because it applies only to speakers who communicate "for commercial purposes" on the Web. But it concedes that COPA applies to much more than the direct sale of harmful to minors material on the Web. COPA threatens all of the speech that is provided *for free* on the Web by commercial businesses who seek to profit "through sales of 'advertising space'." Pet. Br. at 33.

COPA applies to *any* speaker who knowingly makes any communication "for commercial purposes ... that includes any material that is harmful to minors." "Commercial purposes" is further defined to mean that the speaker is "engaged in the business" of making prohibited communications when she "devotes time, attention, or labor to such activities, as a regular course of such person's trade of business, with the objective of earning a profit." 47 U.S.C. 231(e)(2)(A)-(B). COPA specifically allows prosecutors to seek criminal sanctions against businesses that offer material that is harmful to minors, even if it is not the "sole or principal part" of their business. 47 U.S.C. 231(c)(2)(B). The government nevertheless reads this language as protecting from prosecution businesses who only "occasionally" provide harmful material. But even that interpretation applies to a broad range of Web speakers.

In its brief, the government says that even a site that primarily offers medical information could be prosecuted if it "displays a bi-weekly column of sexually explicit pornography that is harmful to minors even when viewed in the context of a medical Web site." Pet. Br. at 37. A Web site seeking to comply with COPA would reasonably fear prosecution if it offers merely a single bi-weekly column that could be construed as harmful to minors. A number of the plaintiffs meet this definition.

For example, Salon Magazine devotes regular columns, features, and discussion boards to candid discussions about sex. *See* J.A. at 157 (Talbot Testimony) (a key editional mandate for salon.com is to promote honest conversations in an "adult and frank fashion about ... controversial subjects like sex and politics."). In addition, several plaintiffs host ongoing interactive chat discussions that customarily involve sexual content. Specifically, Salon provides a discussion group called Table Talk in which users exchange ideas that often are sexually explicit in nature. J.A. at 147 (Talbot Testimony). Similarly, PlanetOut's Web site always contains discussions devoted to sexuality. J.A. 359-61 (Reilly Testimony). In addition, all or nearly all plaintiffs provide archived material on their sites and thus "regularly" offer harmful to minors communications. For example, ArtNet.com archives all content and thus will always contain such material as Andres Serrano's "A History of Sex (The Kiss)," J.A. 713 (ArtNet Exhs.), and Ashley Bickerton's "Rosie and the General," J.A. 715 (ArtNet Exhs.).

### 3. COPA Threatens A Broad Range Of Speech On The Web That May Be Considered Harmful To Older Minors.

COPA's exclusion of material with "serious value to minors" also fails to save the statute, even under the government's reading. Because COPA protects only speech that jurors believe has serious value for minors, plaintiffs

legitimately fear prosecution for material that jurors may believe has no value for *minors* but clearly has value for *adults*. The government argues that the impact on adult speech is narrowed if COPA's "serious value" prong is interpreted to protect all material with value for "older minors." Pet. Br. at 29. Under that interpretation, though, COPA still reaches a broad range of speech that many – including petitioner himself – view as harmful even for older minors.

Congress' own recent report confirms that there is widespread disagreement about what content is inappropriate for older minors. The National Research Council found that "[a] great deal of sexually explicit material falls into the category over which consensus among diverse groups is not easily forthcoming." NRC Report, Section 7.3. In particular, the report confirms that

> Sex education is highly contentious, and some public schools avoid teaching anything about this topic because parents have such different perspectives on what information is appropriate to provide to young people. Some parents feel that providing young people with information on birth control is unacceptable because it conveys a permissive attitude about premarital sexual activity, and some believe that it increases the frequency of sexual activity in minors.

*Id.*[11] Petitioner Ashcroft himself has indicated that he is opposed to any sexual education for any minor other than the

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[11] Indeed, in 2001 Congress passed a statute providing funds only for abstinence-only education. The Act states that "none of the funds authorized under this chapter shall be used ... to provide sex education or HIV–prevention education in schools unless that instruction is age appropriate and includes the health benefits of abstinence." 20 U.S.C. § 7906 (2001).

promotion of abstinence.[12] Many of the organizations who filed amicus briefs in support of the government in this case have also taken strong positions against sex education beyond the promotion of abstinence.[13]

In addition, many plaintiffs and other Web speakers provide information on how to experience sexual pleasure, including discussions of masturbation and oral sex. J.A. at 343 (Tepper Testimony). For example, as Dr. Tepper of the Sexual Health Network testified, "Based on my interpretation of the words I read, and specifically, in respect to minors, I have to believe discussion of masturbation, oral sex, anal sex, descriptive positioning, all may be construed as 'pandering to the prurient interest of minors.'" *Id.* at 343 (Tepper Testimony). Many adults would surely find this content harmful to minors under COPA, even if they were willing to permit access to explicit instructions intended to protect teenagers from sexually transmitted diseases or unwanted pregnancies. *See also* Amicus Brief of American Society of Journalists and Authors, et al.

The National Research Council Report reached similar conclusions about material regarding sexual orientation:

> [Some] materials depict what it means to be lesbian or gay in sexual orientation; what for some people is a description of positive feelings about one's orientation is for others an endorsement of a perverse lifestyle. Having two same-sex people identified as a

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[12] Press Release, Planned Parenthood, *Appointment Watch*, at http://www.ppfa.org/About/PRESSRELEASES/_122100_attgenAsh.html (last visited Jan. 13, 2004) (Ashcroft voted to support "$75 million to be earmarked for abstinence only education" in 1996).

[13] *See* Focus on the Family, at http://www.family.org; Family Research Council, at http://www.frc.org (last visited Jan. 13, 2004).

> couple or depicting them as kissing is very offensive to some people.

*Id.* For example, as Senator, petitioner Ashcroft said "homosexuality is a sin."[14] Voting against the Employment Nondiscrimination Act, which would have prohibited discrimination based on sexual orientation, Ashcroft stated that the Act "contain[ed] seeds of real instability and inappropriate activity, which could grow way out of hand and send the wrong signals to young people."[15] Many of the organizations who filed amicus briefs in support of the government in this case have taken similar positions.[16]

Given these findings, even assuming material with serious value for *older* minors is protected, plaintiffs such as PlanetOut and A Different Light Bookstore fear prosecution for sexually explicit speech that actively promotes homosexual conduct. Web sites such as Mitch Tepper's Sexual Health Network and even OBGYN.net fear that they will be targeted by prosecutors who share Attorney General Ashcroft's view that all minors should be protected from frank sex education materials. Countless other Web sites offer similar content at risk under COPA.

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[14] Derrick Jackson, "Ashcroft's Backtrack on Gay Pride at Justice," Boston Globe, June 11, 2003, A23.

[15] Michelangelo Signorile, *John Ashcroft's Anti-Gay Crusade*, Gay.com, Jan. 16, 2001, available at http://www.signorile.com/articles/gcash.html (last visited Jan. 13, 2004) (Ashcroft also said "the Bible calls [homosexuality] a sin, and that's what defines sin for me").

[16] *See*, e.g., Family Research Council, at http://www.frc.org/get.cfm-?I=ISO2E3 (drawing multiple inferences between homosexuality and child abuse) (last visited Jan. 13, 2004); National Legal Foundation, at http://www.nlf.web-08.hosting.core.com/marriage%20petition.htm (last visited Jan. 13, 2004) (opposing gay marriage and organizing petition in response to decision by the Massachusetts Supreme Court); Focus on the Family, at http://www.family.org/-cforum/feature/a0027979.cfm (last visited Jan. 13, 2004) (opposing the "homosexual agenda").

It is also important to note that COPA's "serious value" prong does not provide protection for *all* material with "serious value" for minors, but rather protects only material that has "serious *literary, artistic, political, or scientific* value for minors." 47 U.S.C. § 231(e)(6). Unlike some state statutes, COPA does not protect material with "educational" value, providing additional cause for concern by sex education providers. In addition, the broad range of speakers who provide their content purely for its entertainment value can find no comfort at all in the serious value clause. *See* J.A. at 352-377 (Reilly Testimony); Supp. Lodg. 21-39 (Douglas Decl. & Exhs.); *see also* Amicus Brief of American Society of Journalists and Authors, et al.[17]

#### 4. COPA Threatens A Broad Range Of Speech That May Be Harmful To Minors Even When The Entire Web Site Is Evaluated "As A Whole."

COPA also requires that material be viewed "as a whole" in determining whether it is harmful to minors. This requirement also fails to narrow the broad range of protected speech impacted by COPA. For the first time in over five years of litigation, in response to a question from Justice Kennedy in this Court's prior opinion, the government has offered an interpretation of the "as a whole" requirement in the context of the Web. It argues that "[i]n general ... individual pictures or articles should be examined in the context of an entire Web site." Pet. Br. at 28. Leaving aside the numerous problems with that interpretation, *see* discussion *infra* at III. B., most of the plaintiffs – and thus countless similar speakers on the Web – have every reason to fear prosecution under even this narrow construction.

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[17] Further, a defendant would be liable under COPA's civil penalties if a jury found by a mere preponderance of the evidence that her speech lacked value for minors. 47 U.S.C. § 231(a)(3).

First, some plaintiffs' Web sites and a wide range of similar sites are entirely or substantially devoted to sexually explicit material that many consider harmful to minors. J.A. 341-343 (Tepper Testimony); J.A. 696-702 (Pls. Decl. Exhs). Second, the government is equivocal about its "entire Web site" rule, carefully stating that it is not a "universal rule for applying the 'in context' requirement." Pet. Br. at 28. The government's own examples show that it wants to preserve the option of prosecuting Web sites even if they display only small amounts of prohibited material. For example, the government suggests that even Web sites with a variety of content could be at risk if they "highlight" sexually explicit material. Pet. Br. at 29. Blackstripe and Salon have consistent articles, columns and features that are sexually explicit and are promoted or "highlighted" on their Web site. J.A. 753-757, J.A. 617-633 (Pls. Decl. Exhs).

In addition, referring specifically to the Web pages of Salon and ArtNet, petitioner himself previously argued to this Court that "[s]ome of respondents' exhibits ... plainly do test, and likely exceed, the legal limitations imposed by th[e] three prongs" of the harmful to minors test. *See* Pet. Br., No 00-1293, at 37 (filed July 2001). Although the "as a whole" analysis is clearly part of the "three prong[ed]" test, it would apparently fail to keep these plaintiffs out of jail despite the presence of a wide range of non-sexually explicit material on their Web sites. There is no meaningful distinction between these Web sites previously targeted by the government and those of other plaintiffs. If Salon's columns on anal penetration fall within the statute's ambit, A Different Light Bookstore's article describing a gay author's first experience of masturbation is also at risk. Similarly, if ArtNet's Andres Serrano photographs are at risk, other online museum sites with sexually explicit artwork should feel similarly threatened and may justifiably self-censor to avoid COPA's criminal penalties.

Finally, the government's interpretation would put smaller Web sites at risk, because they would have less content to insulate any offending material from prosecution under an "entire Web site" evaluation. For example, a Mapplethorpe photograph on the Web site of the Museum of Metropolitan Art might be safe, while the same photograph on the Web site of a small online gallery devoted to Mapplethorpe would be at risk. In summary, even the government's interpretation of "as a whole" threatens a wide range of Web sites.

### B. COPA's Plain Language Restricts An Even Greater Quantity Of Protected Expression.

As discussed above, even accepting the government's view of the statute, COPA is not narrowly tailored because it restricts a broad range of speech protected for adults. Without radical surgery to re-write the statute and narrow its reach, COPA would suppress even more protected speech. Because the government's proposals ultimately fail to save the statute and ignore COPA's plain language, this Court should reject them.

First, petitioner interprets COPA's serious value prong to apply only to material that lacks value for *older minors*. As the Third Circuit correctly held, this narrowing language is nowhere in the statute. Pet. App. 25a. In other statutes passed to protect younger minors from inappropriate material, Congress has specifically excluded older minors to protect their rights. *See* 116 Stat. 2766. Congress knew how to write "older" minors into COPA's serious value prong but chose not to. In addition, the government's narrowing construction clearly leaves younger minors – all minors from birth up to age 15 – unprotected from material that is harmful to them, thus undercutting the government's asserted interest in protecting all minors. Finally, more vigorous prosecution of the adult obscenity statute would be a far more narrowly tailored way to protect all minors from the most sexually

explicit speech than imposing criminal penalties on material protected for adults.

Second, the statute's plain language contradicts petitioner's view that the "commercial purposes" language can be narrowly construed to exclude sites that only "occasionally" publish harmful to minors material. As the Court of Appeals held, COPA applies "to Web publishers who have posted *any* material that is 'harmful to minors' ... even if a small part of his or her Web site displays such material." Pet. App. 29a. In fact, Congress specified *three times* that communications covered by COPA "include[] any material" that may be deemed harmful to minors. *See* 47 U.S.C. § 231(a)(1); § 231(e)(2)(B) (twice). Petitioner's interpretation would deny any meaning to that phrase. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) ("First, the Court will avoid a reading which renders some words altogether redundant.").

Third, it is not feasible to interpret COPA's "as a whole" language to require an evaluation of material "in the context of the entire Web site." Pet. Br. at 30. Though petitioner suggests that a Web site is no different than a magazine, many Web sites are much more akin to online libraries containing hundreds of magazines. Many sites archive all of their past content on a single Web site. In the physical world, an article is evaluated according to a single issue of a magazine. In the online world, is the government suggesting that an article must be evaluated according to every article ever published on the Web site? Such an interpretation could be practically impossible for the many sites with a great quantity of content.

In addition, almost all Web sites include links to content that resides on different computers throughout the world that are controlled by others. From the user's point of view, it is often difficult or impossible to tell which content resides on the host's Web site. *See* Pet. App. 128a, ¶17

("From a user's perspective, [the Web] may appear to be a single, integrated system."). The government has not clarified whether external links will be considered part of the "as a whole" evaluation, though it has ominously stated that "there may be other circumstances where the actions of the business displaying the communications has a distinct bearing on the context in which the material is displayed." Pet. Br. at 29. Thus, despite the government's half-hearted clarification, Web speakers will remain "unclear ... [about] what constitutes the denominator – that is, the material to be taken as a whole – in the context of the World Wide Web." 535 U.S. at 601 (Kennedy, J., concurring).

This Court has specifically rejected narrowing constructions in similar circumstances. As the Court explained in refusing to re-write the Communications Decency Act, courts should decline to "'draw one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn.'" *Reno v. ACLU*, 521 U.S. at 884 (quoting *United States v. National Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995)). Just as the CDA could not be fixed, COPA cannot be rewritten to "'conform it to constitutional requirements.'" *Reno v. ACLU*, 521 U.S. at 884-85 (quoting *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988)). To attempt such a major rewriting of the statute would clearly constitute a "'serious invasion of the legislative domain.'" *Reno v. ACLU*, 521 U.S. at 884 (quoting *United States v. National Treasury*, 513 U.S. 454, 479 n.26 (1995)).[18]

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[18] "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government." *United States v. Reese*, 92 U.S. 214, 221 (1875).

## IV. COPA'S AFFIRMATIVE DEFENSES DO NOT SAVE THE STATUTE, AND LESS RESTRICTIVE ALTERNATIVES ARE AVAILABLE TO PROTECT MINORS.

### A. COPA's Defenses Pose Tremendous Burdens On Online Speakers And Users That Will Suppress Protected Speech.

As the district court correctly held, "[a] statute which has the effect of deterring speech, even if not totally suppressing speech, is a restraint on free expression." Pet. App. 151a. COPA's defenses are identical to those found insufficient by this court in *Reno v. ACLU*. They impose tremendous burdens on both Web speakers and users that substantially suppress protected speech, and thus do not save the statute.

#### 1. COPA Would Require Web-Based Interactive Chat Rooms And Discussion Groups To Restrict Speech That Is Not Even Covered By The Statute.

The evidence showed that Web-based chat rooms and discussion groups are vitally important features that contribute to the popularity of many commercial Web sites. J.A. 148-49, 358-59 (Talbot, Rielly Testimony). They are some of the "vast democratic for[a] of the Internet," providing Web users with equal access and an equal voice. *Reno v. ACLU*, 521 U.S. at 868. Hundreds of thousands of people have communicated with each other on plaintiffs' sites alone, which represent only a miniscule portion of the discussions occurring at any given moment on the Web. Yet COPA would require that users of any interactive forum provide a credit card or adult access code before entering the discussion – even if the discussion contains a wide range of speech that is not harmful to minors. As the district court held,

> the uncontroverted evidence showed that there is no way to restrict the access of minors to harmful materials in chat rooms and discussion groups, which the plaintiffs assert draw traffic to their sites, without screening all users before accessing any content, even that which is not harmful to minors, or editing all content before it is posted to exclude material that is harmful to minors. This has the effect of burdening speech in these fora that is not covered by the statute.

Pet. App. 156a.

Content providers utilizing interactive fora routinely select the topics that will be discussed by users. *Id.* As a result, the district court found that these providers cannot utilize COPA's "hosting defense," which immunizes from prosecution only those who are "engaged in the transmission, storage, retrieval, hosting, formatting or translation (or any combination thereof) of a communication made by another person, *without selection or alteration of the content of the communication*." 47 U.S.C. § 231(b)(4) (emphasis added). COPA would thus curtail a vast number of online discussions on commercial Web sites, halting much of the "worldwide conversation" that is the Internet. *See American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996).

### 2. COPA Unconstitutionally Forces Web Speakers To Choose Between Severe Criminal Penalties And The Substantial Financial Burdens Imposed By The Defenses.

COPA threatens any speaker on the Web who displays any material that is "harmful to minors" with severe criminal and civil sanctions. Faced with the risk of jail time for what they say on the Web, speakers are certain to "steer

far wide[] of the unlawful zone." *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

As an initial matter, COPA's penalties will have a strong chilling effect even on those speakers who may be entitled to rely on an affirmative defense at trial. As this Court explained when striking down the Child Pornography Prevention Act ("CPPA"), "[t]he Government raises serious constitutional difficulties by seeking to impose on the petitioner the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense." 122 S. Ct. at 1404; *see also Shea v. Reno*, 930 F. Supp. 916, 944 (S.D.N.Y. 1996) (striking down the federal CDA, and noting that affirmative defenses "in no way shield[] a content provider from prosecution"), *aff'd*, 521 U.S. 1113 (1997).

Speakers who want to communicate to adults material that may be deemed harmful to minors are forced by COPA into the Hobson's choice of risking prosecution or implementing costly defenses. As the district court held, the result is certain to be widespread self-censorship. Since content providers know that most users will not register to gain access to restricted speech, "the loss of users of such material may affect the speakers' economic ability to provide such communications." Pet. App. 155a. Content providers depend on drawing a high level of traffic to their site to attract and retain advertisers and other investors. J.A. 144, 221 (Talbot, Hoffman Testimony). Many content providers would not bother to shoulder the burdens of setting up age verification systems that few if any users would utilize, and that would cause a drastic decrease in traffic. J.A. 331 (Barr Testimony). Instead, "content providers may feel an economic disincentive to engage in communications that are or may be considered to be harmful to minors and thus, may self-censor the content of their sites." Pet. App. 156a.

In addition, the evidence established that content providers who institute credit card verification would incur substantial start-up and per-transaction costs. J.A. 382-383 (Farmer Testimony). Content providers may have to charge the user's card to allow access to content, as petitioner was unable to prove that credit card companies will verify a credit card in the absence of a commercial transaction. J.A. 497 (Alsarraf Testimony). If a content provider used third-party adult verification through adult access codes, users would also be required to pay a fee to access material that speakers wish to make available for free, inevitably decreasing traffic to the site. J.A. 440 (Alsarraf Testimony).

In striking down the CDA in *Reno v. ACLU*, this Court held that the prohibitively high economic burden of age verification "must inevitably curtail a significant amount of adult communication on the Internet." 521 U.S. at 877. This Court has repeatedly held that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). The government's ability to use financial regulation to impose content-based burdens on speech "raises the specter that petitioner may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 116; *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975) (invalidating a statute requiring theater owners, to avoid prosecution, either to "restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable").

### 3. Any Mandatory Registration Will Unconstitutionally Prevent Or Deter Web Users From Accessing Protected Speech.

Even assuming Web speakers would not self-censor for fear of criminal penalties and would shoulder the high

financial burden of the defenses, COPA would deter a substantial number of adult Web users from accessing restricted speech. The district court found 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." Pet. App. 155a. Of course, for all adults who do not have credit cards, COPA operates as a complete ban. *See Reno v. ACLU*, 521 U.S. at 874-75.

COPA will deter most adults (even those with credit cards) from accessing restricted content because Web users are simply unwilling to provide identifying information in order to gain access to content. To utilize either COPA's adult access code or credit card defense, Web users would have to provide identifying information before accessing protected speech, perhaps to an untrusted third-party Web site. J.A. 379 (Farmer Testimony). Plaintiffs testified that their customers would simply forgo accessing their material entirely if forced to apply for an adult access code, provide a credit card number, or pay for content. J.A. 330-31, 344, 367-68, 370 (Barr, Rielly, Tepper Testimony). The record shows that up to 75% of Web users are deterred by registration requirements. J.A. 227, 238 (Hoffman Testimony). Another peer-reviewed study showed that two-thirds of consumers would not give up personal information to Web sites even in exchange for money. J.A. 227, 238 (Hoffman Testimony).

Web users who wish to access sensitive or controversial information are even less likely to register to receive it. For example, Dr. Tepper testified that persons who access the Sexual Health Network "have already been too embarrassed or ashamed to ask even their doctor. I think if they come across this barrier to access, that they are just not going to take the next step and put their name and credit card information in." J.A. 344 (Tepper Testimony). The use of credit card or adult access code verification may also require users to pay a fee, further increasing COPA's

deterrent effects. J.A. 396 (Farmer Testimony). The COPA and NRC Reports, both commissioned by Congress, also found that mandatory age verification would deter substantial numbers of adult users. *See* discussion *supra* at Statement of the Case, Section B.

Case law is clear that this form of inhibition on adult access to protected speech renders a statute unconstitutional.[19] *See Denver Area Telecommunications Consortium*, 518 U.S. at 746 (holding that statute blocking certain cable channels and requiring users to request that those channels be unblocked unconstitutionally burdened subscribers' access to information); *Reno v. ACLU*, 521 U.S. at 857 n.23; *Playboy*, 529 U.S. at 815 (finding that requiring cable operators upon request by a subscriber to scramble or block any unwanted channel was less restrictive alternative than forcing operators to scramble channels as a default); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (invalidating on First Amendment grounds a statute requiring that individuals request certain mail in writing, holding the statute would have "a deterrent effect"); *Martin v. City of Struthers*, 319 U.S. 141, 148 (1943) (holding that statute prohibiting door-to-door distribution of information violated First Amendment rights of "those desiring to receive it").

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[19] Petitioners wrongly rely on this Court's decision in *United States v. American Library Association*, 123 S. Ct. 2297 (2003), to argue that COPA's deterrent effects do not render it unconstitutional. Unlike COPA, the statute upheld in that case did not threaten protected speech with criminal sanctions, and was not subjected to strict scrutiny. In addition, the court interpreted that statute to minimize any deterrent on adult access by allowing library patrons to gain unfettered access to all Internet speech. Indeed, the case confirms that user-based filters are a less restrictive alternative to COPA.

### B. COPA's Burden On Speech Fails Strict Scrutiny and Is Overbroad.

As illustrated above, given the tremendous burden COPA imposes on the protected speech of adults, COPA is far from narrowly tailored and thus clearly fails strict constitutional scrutiny. Despite the government's assertions, contradicted by the trial record, COPA's burden on speech is far greater than that imposed by "blinder rack" statutes that some states have used to restrict harmful to minors materials in bookstores and vending machines. *See* Pet. Br. at 22.

None of the blinder rack statutes deal with the unique problems presented by regulation of harmful to minors materials on the Internet. *Reno v. ACLU*, 521 U.S. at 877. As the Third Circuit held, a blinder rack statute "does not create the same deterrent effect on adults as would COPA's credit card or adult verification screens." Pet. App. 38a. First, unlike COPA, blinder racks do not require adults to pay for speech that would otherwise be accessible *for free*. Second, blinder racks do not require adults to relinquish their anonymity in order to access protected speech.[20] Third, blinder racks do not create a potentially permanent electronic record that an individual has accessed restricted and stigmatized materials. Fourth, the number of individual speakers and the sheer quantity of speech threatened by COPA far exceeds that affected by any single state law. For these reasons and others, federal courts around the country have now struck down *seven* state harmful to minors display laws modeled on COPA and enacted to govern the Internet

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[20] *See, e.g., M.S. News Co. v. Casado*, 721 F.2d 1281, 1288-89 (10th Cir. 1983) (requiring that harmful to minors materials be kept behind blinder racks that cover the lower two-thirds of the material, but that allow adults to browse the materials freely); *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389, 1395 (8th Cir. 1985) (requiring opaque covers and sealing of harmful to minors materials); *Crawford v. Lungren*, 96 F.3d 380, 388 (9th Cir. 1996) (prohibiting sale in newsracks).

because they unconstitutionally deter adults from accessing protected speech.[21] The government conveniently ignores these cases in its brief.

Finally, the government's position on venue and community standards distinguishes COPA from state statutes and exacerbates COPA's overbreadth. The government has conceded that regardless of whether COPA is read to apply local or national community standards – a question ultimately left unanswered by this Court in its prior opinion – "the actual standard applied is bound to vary by community." 535 U.S. at 596 (Kennedy, J., concurring); Appellant's Brief on Remand, at 34-35. The government asserts that it could prosecute under COPA in any venue in which a Web site can be viewed. Appellant's Brief on Remand, at 33 n.11 (citing 18 U.S.C. § 3237(a)).

Given the variation in views between communities, "the choice of venue may be determinative of the choice of standard. The more venues the Government has to choose from, the more speech will be chilled by variation across communities." 535 U.S. at 602 (Kennedy, J., concurring). Self-censorship is the only option for Web speakers that want to assure themselves that they will not be prosecuted in the most conservative communities:

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[21] *See Cyberspace Communications v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999), *aff'd*, 238 F.3d 420 (6th Cir. 2000) (Michigan); *American Civil Liberties Union v. Johnson*, 4 F. Supp. 2d 1029 (D.N.M. 1998), *aff'd*, 194 F. 3d 1149 (10th Cir. 1999) (New Mexico); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (New York); *PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000) (Virginia); *American Booksellers Found. for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002) (Vermont); *American Civil Liberties Union v. Napolitano*, No. Civ. 00-505 TUC ACM (D. Ariz. June 14, 2002) (order granting permanent injunction) (Arizona); *Bookfriend v. Taft*, No. C3-02-210 (S.D. Ohio Aug. 2, 2002) (granting temporary restraining order) (Ohio); *see also Southeast Booksellers Ass'n v. McMaster*, 282 F. Supp. 2d 389 (D. S.C. 2003) (South Carolina).

> A Web publisher in a community where avant garde culture is the norm may have no desire to reach a national market; he may wish only to speak to his neighbors; nevertheless, if an eavesdropper in a more traditional, rural community chooses to listen in, there is nothing the publisher can do. As a practical matter, COPA makes the eavesdropper the arbiter of propriety on the Web.

*Id.* at 595-96 (Kennedy, J., concurring). Given the broad range of protected speech targeted by COPA, the government's ability to prosecute Web speakers in any venue clearly exacerbates the statute's overbreadth. COPA poses a very strong risk that most Web speakers will "remain silent rather than communicate even arguably unlawful words, ideas, and images." *Reno v. ACLU*, 521 U.S. at 872; *see also* Pet. App. 161a.

### C. COPA Is An Ineffective Method For Achieving The Government's Interest, And Less Restrictive, More Effective, Alternatives Are Available.

The lower courts correctly concluded that COPA would be ineffective at protecting children from harmful materials, and that more effective alternatives are available. Pet. App. 47a-48a, 159a-161a. Specifically, COPA is ineffective because "minors may be able to gain access to harmful to minors material on foreign Web sites, non-commercial sites, and online via protocols other than http." Pet. App. 159a, 45a. Under strict (and even intermediate) scrutiny, a law "may not be sustained if it provides only ineffective or remote support for [petitioner's] purpose." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). Petitioner bears the burden of showing that the scheme will in fact alleviate the alleged "harms in a direct and material way." *Turner Broadcasting.*

*Sys., Inc. v. FCC*, 512 U.S. 622, 624 (1994); *see also Florida Star v. B.J.F.* 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring) ("a law cannot be regarded as ... justifying a restriction upon truthful speech, when it leaves appreciable damage to [petitioner's] supposedly vital interest unprohibited."); *Sable*, 492 U.S. at 126 ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). Especially given the recent Congressional reports, it is clear that petitioner did not meet this burden.

The record shows, and both reports by Congress now confirm, that many alternative means are more effective at addressing minors' access to inappropriate material. *See* Statement of Case, *supra* at Sections A.5., B. These options include the use of filtering software, the promotion of Internet education and high-quality Internet material for children, and the vigorous enforcement of existing laws. All of these approaches are notably less restrictive than COPA's criminal ban. *See Reno v. ACLU*, 521 U.S. at 879; *Denver Area*, 518 U.S. at 759-60 (informational requirements and user-based blocking are more narrowly tailored than speaker-based schemes as a means of limiting minors' access to indecent material on cable television); *Playboy*, 529 U.S. at 815 (finding that requiring cable operators upon request by a subscriber to scramble or block any unwanted channel was less restrictive alternative than forcing operators to scramble channels as a default). Three new federal laws, in addition to the existing obscenity and child pornography laws, extend the range of available protections for minors. *See supra* at I. Given all of these options, there can be no doubt that COPA's criminal penalties fail strict scrutiny.

## CONCLUSION

For the reasons stated above, this Court should affirm the preliminary injunction against the Child Online Protection Act.

Respectfully submitted,

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