NO. 99-1324

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, ANDROGYNY BOOKS, INC. d/b/a A DIFFERENT LIGHT BOOKSTORES; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ARTNET WORLDWIDE CORPORATION; BLACKSTRIPE; ADDAZI INC. d/b/a CONDOMANIA, ELECTRONIC FRONTIER FOUNDATION; ELECTRONIC PRIVACY INFORMATION CENTER; FREE SPEECH MEDIA; IMAGESTATE NORTH AMERICA, INC.; OBGYN.NET; PHILADELPHIA GAY NEWS; PLANETOUT PARTNERS USA, INC.; POWELL'S BOOKSTORE; RIOTGRRL; SALON MEDIA GROUP,

Plaintiffs-Appellees,

v.

JOHN ASHCROFT, in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES,

Defendant-Appellant.

ON REMAND FROM THE UNITED STATES SUPREME COURT

BRIEF OF PLAINTIFFS-APPELLEES

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STATEMENT OF THE ISSUE

Whether a federal criminal law violates the First Amendment by suppressing a wide range of speech on the World Wide Web (the "Web") that adults are entitled to communicate and receive.

INTRODUCTION

This Court considers for a second time the constitutionality of the Child Online Protection Act ("COPA"), which imposes severe criminal and civil penalties on the display of constitutionally protected, non-obscene materials on the Internet. Last term the Supreme Court issued a "quite limited" decision in this case which left the lower court's injunction against COPA in place. *Ashcroft v. American Civil Liberties Union* ("*ACLU II*"), 122 S. Ct. 1700, 1713 (2002), *rev'g in part American Civil Liberties Union v. Reno*, 217 F. 3d 162 (3d Cir. 2002), *aff'g* 31. F. Supp. 2d 473 (E.D. Pa. 1999). The Court remanded to this Court for consideration of the "very real likelihood that [COPA] is overbroad." *Id.* 122 S. Ct. at 1716 (Kennedy, J., concurring). Though COPA purports to restrict only the availability of materials to minors, the district court correctly found that COPA would prohibit adults from communicating and receiving expression that the First Amendment clearly protects. Since this Court's prior ruling, Congress itself

has commissioned two reports that support the district court's holding.[1] Plaintiffs respectfully ask this Court to affirm the judgment of the district court granting a preliminary injunction against enforcement of COPA.

STATEMENT OF THE CASE

COPA was signed into law on October 21, 1998. The next day, plaintiffs filed this suit alleging that COPA violated the First and Fifth Amendments to the Constitution and seeking injunctive relief from its enforcement. The district court heard six days of testimony and a day of argument, and considered numerous affidavits and extensive documentary evidence submitted by both sides.[2] *ACLU II*, 31 F. Supp. 2d 473, 477, 485, ¶24 & n.5 (E.D. Pa. 1999). On February 1, 1999, the district court issued a preliminary injunction against enforcement of COPA, holding that plaintiffs were likely to succeed on their claim that COPA violates the First Amendment because it "imposes a burden on speech that is protected for adults," *id.* at 495, and because defendant could not prove that COPA is the "least restrictive means available to achieve the goal of restricting the access

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[1] Commission on Child Online Protection, Final Report to Congress, Oct. 20, 2002 ("COPA Report"), at http://www.copacommission.org/report; 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) ("NCR Report"), at http://www.nap.edu.

[2] The court heard a day of testimony on plaintiffs' motion for a temporary restraining order, which the court granted on November 19, 1998.

of minors to [harmful-to-minors] material," *id*. at 497.

The district court supported its holding with extensive findings of fact, some of which were derived from a joint stipulation submitted by the parties. *Id*. at 481-92. Those findings, which defendant has never seriously disputed, describe the nature of communication and commercial activity on the Web, plaintiffs and their speech, COPA's effect on Web traffic, the burden and costs of implementing COPA's affirmative defenses, and the availability of less restrictive alternatives that enable parents to decide what their children should see.

On June 22, 2000, this Court affirmed the district court's decision, finding an alternative basis for COPA's unconstitutionality. *See ACLU II*, 217 F.3d 162, 181 (3d Cir. 2000). This Court specifically affirmed the district court's findings of fact. *Id*. at 170. Because Web speakers are unable to verify the geographic location of readers, this Court held that COPA would subject all speech on the web to the most restrictive community standards. *Id*. at 173-80.

The Supreme Court vacated and remanded on the narrow holding "that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute overbroad for purposes of the First Amendment." *Ashcroft v. American Civil Liberties Union*, 122 S.

Ct. at 1713. Importantly, the Supreme Court did not lift the injunction preventing the government from enforcing COPA absent further action by this Court or the district court. *Id*. at 1713-14. The Supreme Court remanded to this Court 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 1713.

In its June 24, 2002 letter, this Court asked counsel to "rebrief and update all arguments and issues" in the case. The Court also asked the parties to explain the impact, if any, of *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002), and *American Library Association v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

STATEMENT OF FACTS

A. The Reach Of COPA: Plaintiffs And Their Speech

Plaintiffs represent a diverse group of individuals, entities, and organizations who range from cutting edge online magazines to long-established booksellers and large media. All plaintiffs use the Web to provide information on a variety of subjects, including sexually-oriented issues that they fear could be construed as "harmful to minors." *ACLU II*, 31 F. Supp. 2d at 484-85, ¶¶21, 24-26. Plaintiffs and their users post, read, and respond to

content including resources on visual art and poetry; resources designed for gays and lesbians; information about obstetrics, gynecology, and sexual health; information about books and photographs; and online magazines. *Id.* at 484, ¶21. Several plaintiffs host Web-based discussion groups and chat rooms that allow readers to converse on various subjects. *Id.* at 484, ¶22. Like the vast majority of speakers on the Web, plaintiffs provide virtually all of their online information for free. *Id.* at 484, ¶23. Nevertheless, all plaintiffs are engaged in speech "for commercial purposes" as defined in COPA because they all communicate with the objective of making a profit. *Id.* at 487, ¶33; 47 U.S.C. § 231(e)(2)(B).

Several plaintiffs provided live testimony during the hearings. Salon Internet, Inc., now known as Salon Media Group ("Salon"), is a leading general interest online magazine featuring articles on current events, the arts, politics, the media, and sexuality. Joint Appendix ("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,'" and "Beatings, eatings and other ass-candy." *See generally* J.A. 617-41 (Pls. PI Exhs.). Salon also 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 pages published over the last three years. J.A. 145, 147.

A Different Light Bookstore operates bookstores in two[3] major cities, 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. PI 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," and stories such as "Shame on Me," an autobiographical account of a young man's experience with masturbation. J.A. 106-07, 601-16.

Mitchell Tepper, a member of the ACLU, owns and operates the Sexual Health Network Web site out of his home in Connecticut. The Sexual Health Network provides easy access to information about sexuality geared toward individuals with disabilities. The site includes information on how disabled persons can experience sexual pleasure, including articles on erectile dysfunction, the use of sex toys, and sexual surrogacy as a form of sexual therapy. *ACLU II*, 31 F. Supp. 2d at 485, ¶25; J.A. 670-88 (Pls. PI Exhs.).

[3] A Different Light Bookstore has closed its New York bookstore.

The site also includes interactive components, such as a forum called "Love Bites" in which readers can ask experts questions about sexuality and a bulletin board where users can post comments. J.A. 672-85.

PlanetOut is a Web site that acts as an online community for gay, lesbian, bisexual and transgendered people. The site includes, among other things, 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. PI 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. PlanetOut also contains travel information, news, and entertainment listings of interest to the lesbian and gay community. J.A. 655-60 (Pls. PI 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. *ACLU II*, 31 F. Supp. 2d at 485, ¶26.[4]

[4] Other plaintiffs include Condomania, a leading online seller of condoms and distributor of safer-sex related materials; ArtNet, the 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 popular "Webzine" that advocates positive empowerment for women (the Web site is

B. 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 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

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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 ACLU II*, 31 F. Supp. 2d at 485 n.5; *see generally exhibits*, 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.

> 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* § 231(b).

C. The Statute And The Web

1. Breadth Of Speech "For Commercial Purposes" On The Web Available To Users For Free

The growth of commercial activity on the Web has been explosive.[5] *ACLU II*, 31 F. Supp. 2d at 486, ¶¶27-28. As of trial, approximately one third of the 3.5 million sites on the Web were commercial,

[5] The number of commercial Web sites has risen dramatically since 1999. In January of 1999, there were 12,140,747 Web hosts using the top-level 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 July of 2002 that number had risen 43,814,657. *See* The Internet Software Consortium, Internet Domain Survey (visited Aug. 15, 2002) <http://www.isc.org/ds>.

i.e., they "intend to make a profit." *Id.* at 486, ¶27. 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 486-87, ¶¶30, 31; J.A. 207 (Hoffman Testimony). The fee based or subscription model, in which users are charged a fee before accessing content, is the least popular. *ACLU II*, 31 F. Supp. 2d at 486, ¶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.'" *ACLU II*, 31 F. Supp. 2d at 487, ¶34; J.A. 216-20 (Hoffman Testimony). Traffic is "the most critical factor for determining success or potential for success on a Web site." *ACLU II*, 31 F. Supp. 2d at 487, ¶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.*

2. Impact Of Mandatory Registration On The Web

COPA provides three affirmative defenses: (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. The district court recognized that "[t]here is no certificate authority that will issue a digital certificate that verifies a user's age." *Id.* at 487, ¶37. Defendant put on no evidence of "other reasonable measures" available to restrict access to minors. *Id*. at 487-88, ¶37. Thus, the evidence showed that the only technology currently available for compliance with COPA is 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 488, ¶38.

"Without these affirmative defenses, COPA on its face would prohibit speech which is protected as to adults." *ACLU II*, No. Civ. A. 98-5591, 1998 WL 813423, at *3 (E.D. Pa. Nov. 23, 1998). Even with these defenses COPA would prevent or deter both adults and minors from accessing protected speech. *ACLU II*, 31 F. Supp. 2d at 495.

Because the "vast majority of information . . . on the Web . . . is provided to users for free," *id.* at 484, ¶23, the court found that COPA's registration requirements would deter most Web readers. *Id*. at 495. 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 provide a credit card or adult access code. Notably, although PlanetOut allows users to register voluntarily to receive free benefits, "less than 10% of the users to [the] site have registered." *ACLU II*, 31 F. Supp. 2d at 485-86, ¶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. *ACLU II*, 31 F. Supp. 2d at 485-86, ¶26*;* J.A. 355, 368-69 (Reilly Testimony).

David Talbot, CEO of Salon Magazine, testified about the impact mandatory registration would have on their business:

> One of our competitors, Slate Magazine, which is owned and operated by Microsoft, launched originally as a free site like Salon did, but about a year ago decided to go to a [subscription] model with disastrous results for their circulation. Their circulation plummeted overnight from . . . over 150,000 individual users each month to about 20 to 30,000 . . . . That wouldn't be enough circulation to sustain Salon's business because advertisers expect you to have a certain circulation level before they'll do business with you. And, that typically is at least over 100,000 per month.

J.A. 144.

Many of the plaintiffs' readers and other Web users are

particularly reluctant to identify themselves because the information they seek is intensely personal, sensitive, or controversial. Mr. Tepper of the Sexual Health Network, for example, testified that some of his readers would simply not go to his site if they had to identify themselves. *ACLU II*, 31 F. Supp. 2d at 485, ¶25. His site aims to provide information about sexuality to disabled persons who will only seek it anonymously. Similarly, many gay or lesbian people who are "closeted" rely on a Web site such as PlanetOut "because it allows closeted people access to this information while preserving their anonymity." *Id*. at 485-86, ¶26.

3. Additional Burdens Of Implementing COPA's Affirmative Defenses

a. Web-Based Chat Rooms And Bulletin Boards

Defendant's own expert agreed 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." *ACLU II*, 31 F. Supp. 2d at 491, ¶58. The content in Web-based interactive fora is inherently dynamic, and "there is no method by which the creators of those fora could block access by minors to harmful to minors materials and still allow 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.*

b. 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. *Id.* at 489-90, ¶¶48, 52; J.A. 401 (Farmer Testimony). No standards govern the operation of these services, and content providers cannot ensure their security or reliability. J.A. 386-87 (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. *ACLU II*, 31 F. Supp. 2d at 490, ¶51. Plaintiffs testified that their users would not choose to register for an adult access code, but would instead forgo accessing restricted 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. *ACLU II*, 31 F. Supp. 2d at 489, ¶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. *ACLU II*, 31 F. Supp. 2d at 490, ¶53.

c. Credit Card Verification

To use COPA's credit card defense, a content provider "would need to undertake several steps." *Id.* at 488, ¶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 488, ¶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 488, ¶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.* at 489, ¶45. 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. *ACLU II*, 31 F. Supp. 2d at 489, ¶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, because some minors "may legitimately possess a valid credit or debit card," they would have access to restricted content despite credit card verification. *ACLU II*, 31 F. Supp. 2d at 489, ¶48.

d. Burdens Of Web Redesign

COPA's credit card and adult access defenses would also require speakers to redesign their Web sites in order to restrict only their 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 488, ¶39, 490, ¶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. *ACLU II*, 31 F. Supp. 2d at 490, ¶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 490, ¶55.

4. 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 defendant has repeatedly claimed that Congress' goal was to prevent the free dissemination of "teaser" pictures, *see, e.g.*, Def. Br. at 22, 23-24, Congress could have restricted only pictures, images, or graphic text files "which are typically employed by adult entertainment Web sites as 'teasers.'" *ACLU II*, 31 F. Supp. 2d at 497. 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 484, ¶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 defendant'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 492, ¶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. *ACLU II*, 31 F. Supp. 2d at 492, ¶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).

Congress itself has identified a variety of alternatives to COPA since its passage. Congress' own COPA Commission concluded that user-based alternatives were more effective and less restrictive than COPA. COPA Report at 39. In addition, at Congress' request the National Research Council (the "NRC") recently issued a comprehensive study on protecting children on the Internet which concluded that technological, social and educational, and other policy options were effective alternatives to criminal penalties. *See* NRC Report, Executive Summary at 12.[6]

STANDARD OF REVIEW

The district court's issuance of a preliminary injunction against COPA should stand unless defendant can prove an "abuse of discretion." *Maldonado v. Houstoun*, 157 F. 3d 179, 183 (3d Cir. 1998), *cert. denied*, 526 U.S. 1130 (1999); *American Civil Liberties Union v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1476 (3d Cir. 1996) (*en banc*). Legal conclusions are reviewed *de novo*, and findings of fact are reviewed for clear error.[7]

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[6] Congress also passed another provision enacted along with COPA, and not challenged here, that requires Internet service providers to "notify [all new customers] that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors." 47 U.S.C. § 230(d).

[7] Defendant wrongly suggests that the Court has a duty in this case to conduct an "enhanced examination of the entire record." Def. Br. at 15. Although the Supreme Court has held that an independent review of the facts is appropriate

Maldonado, 157 F. 3d at 183.

SUMMARY OF ARGUMENT

The extensive trial record in this case clearly establishes that COPA fails strict scrutiny and is unconstitutionally overbroad because it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) ("*ACLU I*") (holding that "'[s]exual expression which is … not obscene is protected by the First Amendment'") (quoting *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989)). *See also ACLU II*, 217 F. 3d at 177; *ACLU II*, 31 F. Supp. 2d at 495; *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1396 (2002). There is no way to prevent minors from obtaining communications on the Web without also deterring and burdening access by adults. *See ACLU II*, 31 F. Supp. 2d at 495, 497; *ACLU I*, 521 U.S. at 876-77. The record is full of examples of the broad range of speech at risk under COPA's criminal penalties.

Defendant's only response to COPA's drastic impact on

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where necessary to assure that free speech rights have not been unduly abridged, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11 (1984), that rule does not afford "special protection for the government's claim that it has been wrongly prevented from restricting speech." *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1229 (7th Cir. 1985).

protected expression is to urge a radical re-writing of the statute. But given COPA's plain language, there is no way to construe the statute to apply only to commercial pornographers. Clearly, the "serious value to minors" clause would not protect the substantial amount of sexually explicit material on the Web that lacks value for minors but has value for adults. In addition, COPA obviously targets all web sites that includes *any* material that is harmful to minors, including the huge number of commercial Web sites that make their content available for free.

COPA's affirmative defenses – the same defenses available in *ACLU I* – do not cure the statute's constitutional deficiencies. The defenses would require all interactive speech on the Web, even speech that is not harmful to minors, to be placed behind verification screens. In addition, credit card and adult access codes would deter most adult users from accessing protected speech, because they eliminate privacy, stigmatize sensitive or controversial content and impose costs on content that would otherwise be available for free.

In contrast to COPA's repressive and ultimately ineffective penalties, Congress has now identified a variety of alternatives for shielding children from inappropriate material while preserving the free speech rights of adults. *See* FN1 *supra* at 2. The studies support the district court's ruling that

COPA is not narrowly tailored and cannot survive the strict constitutional scrutiny required of all content-based regulations of protected speech. For all of these reasons, the district court's issuance of a preliminary injunction against enforcement of COPA should be affirmed.

ARGUMENT

I. COPA SUPPRESSES A WIDE RANGE OF HARMFUL TO MINORS" MATERIALS, INCLUDING THOSE OF PLAINTIFFS, THAT ADULTS ARE CONSTITUTIONALLY ENTITLED TO COMMUNICATE.

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 speaker posts content on the Web, it is available to all other Web users worldwide. J.A. 114, 145, 148; *see also ACLU I*, 521 U.S. at 853. It is not technologically possible for a speaker to know the age of a user who is accessing her communications on the Web. *See ACLU II*, 31 F. Supp. 2d at 495; *see also ACLU I*, 521 U.S. at 855, 876. In order to avoid the risk of criminal prosecution and civil penalties, on its face COPA effectively requires Web speakers to deny both minors *and adults* access to any speech that may be considered "harmful to minors."

COPA criminalizes a category of speech that is unquestionably constitutionally protected for adults. Just this term, the Supreme Court struck

down another statute aimed at protecting minors because it "proscribe[d] a significant universe of speech that is neither obscene ... nor child pornography." *Free Speech Coalition*, 122 S. Ct. at 1396 (invalidating Congress' attempt to ban "virtual" child pornography); *see also ACLU I*, 521 U.S. at 874; *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.").

The record in this case is complete with examples that illustrate the breadth of protected speech that falls within COPA's ambit:

- ArtNet's Web site displays photographs from Andres Serrano's series "A History of Sex." J.A. 710-13 (ArtNet PI 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 PI Exhs.).
- A Different Light's site contains an article describing a gay author's first experience of masturbation. J.A. 609-12 (Laurila PI Exhs.).
- Salon publishes Susie Bright's columns describing her sexual experiences including anally penetrating her boyfriend and having sex outdoors. J.A. 617-26 (Talbot PI 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 PI Exhs.).

- RiotGrrl's articles include explicit descriptions of an author's first experience with oral sex. J.A. 745-48 (Douglas PI Exhs.).

- BlackStripe's Web site contains James Earl Hardy's article *Black-on-Black Love: It Ain't A 'Revolutionary Act,'* which opens by asking "How do you challenge the white cock you're sucking?" J.A. 753-57 (Tarver PI Exhs.).

As defendant admitted, popular Web-based chat rooms and discussion boards involving sexual topics are also covered. COPA would criminalize PlanetOut's forty chat rooms about gay sexuality and OBGYN.net's numerous daily postings about pregnancy and sexually transmitted diseases. *See* J.A. 359 (Reilly Testimony), 716 (OBGYN.net PI Exhs.). Given the popularity of interactive messages and the more than one million commercial Web sites, the examples above are far from isolated. *ACLU II*, 31 F. Supp. 2d at 486, ¶27; *see also* Amicus Curiae Brief on Behalf of American Society of Journalists & Authors, et al. While such content is appropriate for adults, such unapologetically explicit speech finds itself well within COPA's reach.

COPA's civil and criminal penalties are clearly unconstitutional. 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, the Supreme Court has held that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *ACLU I*, 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.").[8]

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). COPA cannot stand because it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *ACLU I*, 521 U.S. at 874. 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.

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[8] *See also Sable*, 492 U.S. at 126 (applying strict scrutiny to invalidate indecency ban on telephone communications, and holding that the government may effectuate even a compelling interest only "by narrowly drawn regulations designed to serve those interests without necessarily interfering with First Amendment freedoms"); *Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n*, 896 F. 2d 780, 788 (3d Cir. 1990) (applying strict scrutiny to strike down "harmful to minors" restrictions in telephone communications because of unconstitutional burden on adult rights).

The Supreme Court has repeatedly held "that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it." *Id*. at 1402. While the Court "ha[s] . . . recognized the governmental interest in protecting children from harmful materials . . . that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *ACLU I*, 521 U.S. at 875 (citations omitted). 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)); *see also Free Speech Coalition*, 122 S. Ct. at 1402-03 (striking down a ban on virtual child pornography where "t]he Government … ban[ned] speech fit for adults simple because it may fall into the hands of children.")*; Sable*, 492 U.S. at 131 (invalidating a conviction for distribution of indecent publications); *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).[9] The Supreme Court has uniformly rejected such attempts to "burn the house to roast the pig." *Butler*, 352 U.S. at 383.

The 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); *American Library Ass'n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002) (invalidating law requiring libraries that receive federal funds to mandate use of Internet filters for adults and minors).

II. COPA CANNOT BE SAVED BY RADICAL SURGERY THAT WOULD ALTER ITS PLAIN LANGUAGE

Defendant's only answer to COPA's clear impact on protected

[9] *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").

speech is to urge radical surgery to re-write the statute and narrow its reach. First, he argues that the statute covers only "commercial pornography." Second, he claims that COPA's exception for material with "serious value for minors" will prevent targeting of speech like the plaintiffs'. Third, he argues that the statute applies only to a narrow range of content providers "engaged in the business" of providing harmful-to-minors communications. These arguments ignore entirely the plain language of the statute. Indeed, defendant has been remarkably inconsistent in even identifying which limbs of the statute to amputate. This uncertainty only broadens the chilling effect COPA's penalties have on protected expression, and confirms the need to invalidate the statute altogether.

A. COPA Censors Much More Than The Sale Of Pornography

First, defendant claims COPA should be construed to restrict only "commercial pornography." But COPA covers "written" materials, not just images. Further, the statute covers these images even when such images are provided for free, not simply when they are offered for sale. *See* 47 U.S.C. § 231(e)(2)(B). Because plaintiffs' sexually explicit speech fits squarely within COPA's plain language, plaintiffs have every reason to believe they are at risk of criminal prosecution or civil penalties.

Thus, Dr. Mitchell Tepper testified at trial that COPA directly targets his Web site, the Sexual Health Network: "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.'" J.A. 343; *see also* examples *supra* at 6-7. The district court reviewed numerous other examples of plaintiffs' speech and correctly determined that plaintiffs had a reasonable fear of prosecution for communicating "harmful to minors" materials.[10] *See ACLU II*, 31 F. Supp. 2d at 480-81.

In fact, despite claims in the district court that plaintiffs lacked standing to bring this case because their speech was not at risk, *see ACLU II*, 31 F. Supp. 2d at 480-81, the government itself has now stated that it may prosecute at least some of the plaintiffs. Referring specifically to the Web pages of plaintiffs Salon Magazine, a mainstream online magazine, and

[10] Defendant claims that the district court "labored under the erroneous conclusion that the statute covered all materials that were 'sexual in nature,' rather than the narrow subset of materials that are 'harmful to minors' as defined by COPA." Def. Br. at 35-36. This argument is completely untenable given the opinion below, which clearly explained that "[t]he plaintiffs contend that such sexual material could be considered 'harmful to minors' by some communities. The plaintiffs offer an interpretation of the statute which is not unreasonable, and if their interpretation of COPA's definition of "harmful to minors" and its application to their content is correct, they could potentially face prosecution for that content on their Web sites." *ACLU II*, 31 F. Supp. 2d at 480-81 (citation omitted); *see also id.* at 479-80.

ArtNet, a fine art vendor on the Web, the government asserted in the Supreme 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* Gov. S. Ct. Br. at 37. Even under the broadest of definitions, these plaintiffs are far from "commercial pornographers." In addition, there is no meaningful distinction between the particular speech targeted by the government and the speech of other plaintiffs. For example, it is difficult to understand why the government asserts that Salon's Susie Bright columns on anal penetration fall within the statute's ambit, but A Different Light Bookstore's article describing a gay author's first experience of masturbation, and PlanetOut's archives of online radio shows discussing anal sex and masturbation, do not. 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.[11] *See, e.g.*, Amicus Brief of American Society of Journalists &

[11] Moreover, plaintiffs and other Internet speakers reasonably fear prosecution under COPA because state laws have been applied to less graphic speech than theirs. *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*, No. 95-2159-CR, 1997 Wisc. App. LEXIS 138, at *2-3 (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."); *American Libraries Ass'n v.*

Authors.

B. The Serious Value Prong Does Not Eliminate COPA's Impact on Protected Speech

Defendant also claims plaintiffs will be protected by the "serious value" prong of the harmful-to-minors definition, which applies a national standard. Def. Br. at 32. The problem with this contention is that COPA's "serious value" prong protects only material that has "serious literary, artistic, political, or scientific value *for minors*." 47 U.S.C. § 231(e)(6) (emphasis added). Because COPA protects only speech that jurors believe has value for minors, plaintiffs legitimately fear prosecution for material that may not be considered to have value for *minors* but clearly has value for *adults*. The government's own admission that the statute proscribes certain of plaintiffs' speech illustrates this crucial distinction between the harmful-to-minors standard and the adult obscenity standard. Although Andres Serrano photographs and magazine articles describing anal sex have some value for adults, and, accordingly, are not obscene, the government apparently believes this speech lacks value for minors under COPA. *See* J.A. 617- 621 (Pls. PI Exhs.). In addition, since *all* of the speech targeted by the government is

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Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) (plaintiffs communicating broad range of valuable speech had standing because of credible fear of prosecution under harmful-to-minors statute).

either "literary" or "artistic" (indeed, Salon Magazine is an award-winning publication), the "serious value" clause does nothing to curb COPA's broad chilling effect. Those 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 regarding PlanetOut); S.C. Supp. J.A. at 21-22 (Douglas Declaration) (stating that Riot Grrl is a "webzine," an online magazine of communication); *see also* Amicus Brief of American Society of Journalists and Authors. In addition, because COPA does not exclude material with "educational" value, many sex education providers will not qualify for the "serious value" exception. For example, Dr. Tepper noted that his Sexual Health Network is specifically designed to help people experience sexual pleasure. *See* J.A. at 337 (Tepper Testimony) (offering access to "sexuality related information, education and other resources" for people with chronic illnesses and disabilities). It is hard to see how this content could qualify for COPA's "scientific value" exception.

Congress' own recent report confirms that there is widespread disagreement about what content is inappropriate for 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.[12] The 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 couple or depicting them as kissing is very offensive to some people.

Id.[13] Given these findings, plaintiffs and similar speakers have every reason

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[12] 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. Defendant himself has indicated that he is opposed to any sexual education for minors other than the promotion of abstinence. Press Release, Planned Parenthood, *Appointment Watch*, at http://www.ppfa.org/About/PRESSRELEASES/122100 attgenAsh.html (last visited Aug. 13, 2002) (Ashcroft voted to support "$75 million to be earmarked for abstinence only education" in 1996).

[13] Likewise, defendant here has indicated that he considers homosexuality immoral and a bad influence on minors. Voting against the Employment

fear that that they may be prosecuted despite COPA's exception for material with "serious value for minors."[14]

A further problem with the serious value clause is that it fails to distinguish speech that lacks value for a six-year-old from speech that lacks value for a sixteen-year-old. Though the government continues to argue that the statute could be narrowly construed to censor only material that lacks value for older minors, Def. Br. at 27-28, apparently even this construction would fail to save Salon Magazine and ArtNet from potential jail time. Thus not only under the plain language of the statute but even under the government's proposed reading, COPA will prohibit teenagers as well as adults from accessing material that is protected as to them simply because it lacks value for younger children.

C. Under COPA's Plain Language, COPA

Nondiscrimination Act, 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." Michelangelo Signorile, *John Ashcroft's Anti-Gay Crusade,* Gay.com, Jan. 16, 2001, available at http://www.signorile.com/articles/gcash.html (Ashcroft also said "the Bible calls [homosexuality] a sin, and that's what defines sin for me"). Defendant has also described homosexuality as "the most repulsive desecration in the sexual order." *Is Ashcroft a Bigot*? at http://uspolitics.about.com/library/weekly/aa010401b.htm (last visted Aug. 13, 2002).

[14] Further, COPA imposes civil penalties where a majority of a jury finds, by a mere preponderance of the evidence, that speech lacks value for minors. 47 U.S.C. § 231(a)(3).

Applies To All Web Sites That Include Any Material That Is Harmful to Minors

Defendant also wrongly argues that the district court misconstrued COPA by "fail[ing] to recognize" COPA's commercial purposes requirement. Def. Br. at 37. Yet COPA is clearly not limited to the sale of harmful-to-minors material on the Web, but instead applies to speech like that of plaintiffs that is provided for free on the Web by commercial businesses.

The district court correctly interpreted the statute's "commercial purposes" language, holding that "the text of COPA imposes liability on a speaker who knowingly makes any communication for commercial purposes '*that includes any material* that is harmful to minors.'" *ACLU II*, 31 F. Supp. 2d at 480 (emphasis added); *see also* 47 U.S.C. § 231(a)(1); 47 U.S.C. § 231(e)(2)(B). A Web speaker is "engaged in the business" of making prohibited communications under COPA if she "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." 47 U.S.C. § 231(e)(2)(A)-(B). The statute specifically notes that speakers are subject to prosecution even if providing "harmful" materials is not their "sole or principal business or source of income." 47 U.S.C. § 231(e)(2)(B). 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).

Defendant's interpretation would deny any meaning to that phrase. It is a fundamental rule of statutory interpretation that courts should avoid an interpretation of a statute that renders certain words meaningless. 73 Am. Jur. 2d *Statutes* §151 ("[T]he legislative history of a statute may not compel a construction at variance with its plain words "); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) ("First, the Court will avoid a reading which renders some words altogether redundant.").

Based on COPA's own definitions, the district court correctly held that "[b]ecause COPA applies to communications which include, but are not necessarily wholly comprised of material that is harmful to minors, it logically follows that it would apply to any Web site that contains only some harmful to minors material." *ACLU II*, 31 F. Supp. 2d at 480. Thus, any harmful-to-minors material posted on a Web site—even a single book review of "The Topping Book, or, Getting Good at Being Bad" on the Web site of plaintiff A Different Light Bookstore, J.A. 603 (Laurila PI Exhs.), or one Serrano photograph on the Web site of plaintiff ArtNet, J.A. 713 (ArtNet PI Exhs.)—would subject the speaker to COPA's civil and criminal penalties.

Defendant also attempts to distract the Court from COPA's plain language by proposing a new definition of "regular course of business." Defendant has been inconsistent in its interpretation of "regular" or

"regularly." *Compare* Def. Br. at 36 (defining "regular" as "usual" or "normal") *with* Def. Brief in Support of Motion to Dismiss at 38 (COPA does not apply to "occasional" communications), 40 (COPA does not apply if person only "devote[s] some modicum of time" to prohibited communications) *and* TRO Transcript at 150:10-13 (arguing that Salon is not "engaged in the business" because only "a very small part" of its communications are harmful to minors). However, neither "usual" nor "normal" appears anywhere in the statute. In addition, defendant fails to clarify what he means by these terms. These substituted terms could indicate that, to be covered by COPA, (1) the speaker must consistently offer prohibited material over time or (2) a considerable percentage of the speaker's material must be "harmful to minors."[15] Either interpretation runs counter to COPA's plain language, which applies to any speaker that "*includes any material* that is harmful to minors." 47 U.S.C. § 231(a)(1); § 231(e)(2)(B) (emphasis added).

In any event, many speakers on the Web would risk prosecution under any of defendant's inconsistent interpretations of COPA. All plaintiffs would satisfy a "consistently offers" interpretation of "regular course of business." A number of plaintiffs host ongoing interactive chat discussions

[15]The statute by its terms rejects an interpretation of "regular" that means majority. 47 U.S.C. § 231(e)(2)(B).

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 chat rooms devoted to sexuality. J.A. 359-61 (Rielly Testimony). In addition, some plaintiffs regularly offer sexually explicit columns. 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, all or nearly all plaintiffs provide archived material on their sites and therefore "usually" 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, and Ashley Bickerton's "Rosie and the General," J.A. 715. Similarly, both Salon's and CNET's archives of news stories contain "The Starr Report," which is rife with sexually explicit language. *See* Pls. PI Exhs. 31, 43. Accordingly, even if the Court were to accept defendant's definition of "engaged in the business," all plaintiffs (and all sites that archive material) would risk prosecution under COPA.

D. This Court Should Reject the Government's Attempt to Re-Write the Statute

The district court correctly declined to perform any of the radical surgery suggested by the government. To remedy the breadth of COPA's coverage, this Court would have to change several actual words in the statute. To exclude the plaintiffs' speech and target only "commercial pornographers," it would have to strike out the application of the statute to "written" communications. It would have to re-write the "serious value to minors" prong to exclude all speech with "serious value to adults." Finally, it would have to strike out a phrase – "includes any material that is harmful to minors" – that appears three times in the statute. *See supra* at 35-39.

The Supreme 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.'" *ACLU I*, 521 U.S. at 884 (quoting *United States v. National Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995)). Just as CDA could not be fixed, COPA cannot be rewritten to "'conform it to constitutional requirements.'" *ACLU I*, 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.'" *ACLU I*, 521 U.S. at 884 (quoting *United States v. National Treasury*, 513 U.S. 454, 479 n.26 (1995)).[16]

III. EVEN ACCEPTING ALL OF THE GOVERNMENT'S RADICAL SURGERY, COPA WOULD STILL UNCONSTITUTIONALLY PROHIBIT PROTECTED EXPRESSION

Even if the Court could re-write the statute in every way suggested by the government above, the government's reading of the statute still unquestionably suppresses a broad range of speech protected for adults. Even under the government's reading of the statute, COPA would still apply to speech that under any definition is not "obscene," and is therefore protected, for adults. It would still apply to speech in Web-based chat rooms and discussion boards that is not even covered by the statute, because there is no way to segregate harmful-to-minors speech in these fora. *See infra* at 44-45. It would still apply not just to speech that is for sale on the Web, but to the vast majority of speech that is available on the Web for free.

In addition, the government has interpreted COPA to prohibit a

[16] "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).

single harmful-to-minors Web page on a Web site, despite COPA's requirement that speech should be considered "as a whole." 47 U.S.C. § 231(e)(6)(C). On the Web, speech by different content providers and on different computers around the world is seamlessly linked together. As Justice Kennedy noted in his concurrence, "It is unclear . . . what constitutes the denominator – that is, the material to be taken as a whole – in the context of the World Wide Web." 122 S. Ct. at 1721; *see also ACLU II*, 31 F. Supp. 2d at 484, ¶17 ("From a user's perspective, [the Web] may appear to be a single, integrated system."). The government apparently concluded that some plaintiffs are liable based on single pages viewed in isolation from their Web sites as a whole. *See* Gov. Br. at 17. For example, it referred to a single Serrano photograph, ignoring all of the non-explicit fine art available on the ArtNet web site. Given the government's position, it is difficult to imagine a construction of the "as a whole" requirement that would significantly limit the breadth of COPA's coverage.

Finally, the government's position on venue and community standards confirms 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 the Supreme Court in its recent opinion – "the actual standard applied is bound to vary by community."

122 S. Ct. at 1719 (Kennedy, J., concurring); Gov. S. Ct. Br. at 39. The government asserts that it could prosecute under COPA in any venue in which a Web site can be viewed. Def. Br. 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." 122 S. Ct. at 1722 (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:

> 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 1719 (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." *ACLU I*, 521 U.S. at 872; *see also ACLU II*, 31 F. Supp. 2d at 497.

IV. BECAUSE COPA SUPPRESSES PROTECTED EXPRESSION, THE DISTRICT COURT CORRECTLY ENJOINED ITS ENFORCEMENT

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." *ACLU II*, 31 F. Supp. 2d at 493 (citing *Fabulous, Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n*, 896 F. 2d 780, 785 (3d Cir. 1980)). Here the record clearly indicates that COPA so deters speech.

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. *ACLU I*, 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.

ACLU II, 31 F. Supp. 2d at 495 (citation omitted). COPA would thus halt the great majority of all online discussions on commercial Web sites, and the "worldwide conversation" that is the Internet would be greatly curtailed as a result. *See American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996).

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

The district court also correctly invalidated COPA because "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." *ACLU II*, 31 F. Supp. 2d at 495. The record showed that there is no technology available to enable credit card verification for speakers on the Web who publish through commercial online services such as America Online and Prodigy Internet, J.A. 392 (Farmer Testimony), which collectively have

over 18 million subscribers. *See generally* J.A. at 389-90 (Farmer Testimony) (discussing the absence of credit card verification generally on the web). For these speakers, the credit card defense is no defense at all. *See ACLU I*, 521 U.S. at 881-82; *ACLU v. Reno*, 929 F. Supp. at 856. In addition, COPA will prevent all adults who do not have credit cards from accessing harmful-to-minors materials on the Web. For these adults, COPA operates as a complete ban on their ability to access protected speech. *ACLU I*, 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 providers would have to require all of their users 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).[17]

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). Finally, the evidence showed that plaintiffs' users would be deterred by adult access code services that cater to the pornography industry, and would not want to affiliate with such services in order to gain access to plaintiffs' and similar "harmful to minors" materials. J.A. 156 (Talbot Testimony).

The findings of the COPA and NRC Reports, both commissioned by Congress, support those of the district court. The COPA Report found 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

[17] Without pointing to a single fact in the actual record, the government now "question[s] whether COPA will result in significant traffic loss." *See* Gov. Br. at 40.

providers, and because requiring identification has a chilling effect on access." COPA Report at 26-7. The National Research Council found that "widespread [use of age verification technology] may compromise the privacy of 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." NRC Report at 344, section 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." NRC Report at 348, section 13.3.7.

Thus, the court held that while the financial cost to content providers of implementing COPA's defenses contributes to COPA's burden on speech, a speaker's ability to afford the defenses is not the "dispositive" question under the First Amendment. *ACLU II*, 31 F. Supp. 2d at 494-95. Rather, as the district court correctly held, the "relevant inquiry is determining the burden imposed on the *protected speech* regulated by COPA, not the pressure placed on the *pocketbooks or bottom lines* of the plaintiffs." *Id*. at 495. The district court concluded that COPA failed strict scrutiny "not because of the risk of driving certain commercial Web sites out of business,

but [because of] the risk of driving this particular type of protected speech from the marketplace of ideas." *Id.*

Case law is clear that this form of inhibition renders a statute unconstitutional. *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); *ACLU I*, 521 U.S. at 857 n.23; *Playboy*, 529 U.S. at 924 (finding that requiring cable operators upon request by a subscriber to scramble or block any unwanted channel was less restrictive alternative than forcing operations 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"). Similarly, in *Fabulous*, this Court noted that "the First Amendment protects against governmental 'inhibition as well as prohibition.' An identification requirement exerts an inhibitory effect." 896 F.2d at 785 (citations omitted).

Likewise, a three-judge court in this Circuit recently struck down

the Children's Internet Protection Act ("CIPA"), a federal law that mandates the use of Internet filters in public libraries that receive federal funds. *American Library Ass'n v. U.S.*, 201 F. Supp. 2d 401 (E.D. Pa. 2002). The court held that the ability of patrons to ask for a particular web site to be unblocked did not save the statute. "[C]ontent-based restrictions that require recipients to identify themselves before being granted access to disfavored speech are subject to no less scrutiny than outright bans on access to such speech." *Id.* at 486. CIPA, like COPA, targets harmful-to-minors speech. The court found that "library patrons will be reluctant and hence unlikely to ask permission to access ... erroneously blocked Web sites containing information about sexually transmitted diseases, sexual identity, certain medical conditions, and a variety of other topics." *Id.*

Given the quantity and range of speech burdened by COPA, its registration requirements are clearly unconstitutional.

3. COPA Unconstitutionally Forces 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. 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 the Supreme

Court explained when striking down the Child Pornography Prevention Act ("CPPA"), "[t]he Government raises serious constitutional difficulties by seeking to impose on the defendant 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 harmful-to-minors materials to adults are forced by COPA into the Hobson's choice of risking prosecution or implementing costly defenses. As the district court held, the result instead is certain to be widespread self-censorship. Most significantly, 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." *ACLU II,* 31 F. Supp. 2d at 495. 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." *ACLU II*, 31 F. Supp. 2d at 495; *see supra* at 10-13.

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); *supra* at 15-16. Content providers may have to charge the user's card to allow access to content, as defendant 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); *supra* at 15-16. 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. J.A. 440 (Alsarraf Testimony).

The Supreme Court has routinely struck down economic burdens on the exercise of protected speech. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975), the Court invalidated 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." This Court similarly struck down a statute requiring adults to purchase extra equipment before they could access "harmful to minors" phone communications because "the First Amendment is not available 'merely to those who can pay their own way.'" *Fabulous*, 896 F.2d at 787 (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943)).

As the Supreme Court has held, "[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 defendant may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 116. In striking down the CDA in *ACLU I*, the Supreme 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. Similarly, COPA's unconstitutional financial burdens on speakers and users require affirmance of the district court's injunction against enforcement.

B. COPA's Burden On Speech Fails Strict Scrutiny

Defendant and *amici* do not argue that COPA imposes no burden

on speech. *See* Def. Br. at 44; Congressional *Amici* at 2. Rather, they argue that COPA's burdens are "reasonable." Of course, as defendant is aware, the relevant First Amendment test is not whether COPA is "reasonable" but rather whether defendant can overcome the presumption of unconstitutionality by proving that COPA is a narrowly tailored means of achieving a compelling government interest. As illustrated above, given the tremendous burdens COPA imposes on the protected speech of adults, COPA is far from narrowly tailored and thus clearly fails this strict constitutional scrutiny. Yet defendant asserts that "[i]n this case, the burdens the statute imposes are no different in kind or degree from the display requirements that many states impose on commercially available material deemed harmful to minors, which have been repeatedly upheld as valid, even though they similarly impose reasonable constraints on adult access to such material." Def. Br. at 42-43. COPA's burden on speech, however, is far greater than in any of the cases cited by defendant, *see* Def. Br. at 43, in which courts considered the constitutionality of statutes that limited the display of harmful-to-minors materials in bookstores and vending machines by requiring "blinder racks."

First, none of the blinder rack cases deal with the unique problems presented by regulation of harmful-to-minors materials on the Internet. *ACLU II*, 31 F. Supp. 2d at 493; *ACLU I*, 521 U.S. at 877. 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 because they unconstitutionally deter adults from accessing protected speech. *See Cyberspace Communications v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999), *aff'd*, 238 F.3d 420 (6th Cir. 2000) (Michigan); *ACLU 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).

Second, defendant ignores *Fabulous*, in which this Court struck down, as too burdensome on adult speech rights, a statute that required adult access codes in order to receive phone communications that were harmful to minors. *See supra* at 50.

Third, unlike COPA, none of the blinder rack statutes requires adults to pay for speech that would otherwise have been accessible for free,

and to relinquish their anonymity in order to access those materials.[18]

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

The district court correctly concluded that COPA would be ineffective at protecting children from harmful materials, and that more effective alternatives are available to parents. *ACLU II*, 31 F. Supp. 2d at 496-97. Since the district court's ruling, two separate reports commissed by Congress have independently concurred with the district court's conclusions. Specifically, when Congress passed COPA, it also set up the Commission on Online Child Protection to study methods of reducing access by minors to sexually explicit material.[19] Congress also commissioned the NRC in 1998 to study ways to address material on the Internet inappropriate for children; in May 2002, the NRC published a 388-page book with its findings. The COPA Report and the NRC Report both independently identified a number of

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[18] *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).

[19] This report essentially served as a substitute for thorough congressional findings. COPA was passed as part of an omnibus appropriations bill, with no hearings in the Senate and only one in the House.

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); Section 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").

As this Court previously affirmed, the district court found that COPA was 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." *ACLU II*, 31 F. Supp. 2d at 496; *see also* 217 F.3d at 177 n.21. The COPA Report similarly 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. The COPA Report also found that COPA's protections are underinclusive, given the law's inability to reach inappropriate material originating from abroad. *Id*. at 11, 13, 25, 39. In addition, the NRC Report noted that the international nature of the Internet "poses substantial difficulties," NRC Report at 12, which as the district court found "demonstrates the problems this statute has with

efficaciously meeting its goal." ACLU II, 31 F. Supp. 2d at 496; *see also ACLU I*, 929 F. Supp. at 848, ¶117, 882-83; *Pataki*, 969 F. Supp. at 178.

Under strict (and even intermediate) scrutiny, a law "may not be sustained if it provides only ineffective or remote support for [defendant's] purpose." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). Defendant bears the burden of showing that its 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). Especially given the recent Congressional reports, it is clear that the district court correctly found that defendant did not meet this burden. Justice Scalia wrote in *Florida Star v. B.J.F.* that "a law cannot be regarded as . . . justifying a restriction upon truthful speech, when it leaves appreciable damage to [defendant's] supposedly vital interest unprohibited." 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring).

Moreover, the district court correctly held that COPA is not the least restrictive means of achieving defendant's asserted interest. *See ACLU II*, 31 F. Supp. 2d at 496-97; *see also 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."). The record shows, and both reports by Congress now confirm, that many alternative means are more

effective at addressing minors' access to certain material. The COPA Report applauds the use of "voluntary methods and technologies to protect children," and notes 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 appropriate material is acceptable"); *see generally id*. at Section 2.

The NRC Report also highlights a number of other specific steps that the government can take to address the availability of sexually explicit material to minors online, including to:

> 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 education iddues); 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 at 8. The NRC Report also noted that "neither technology nor policy can provide a complete – or even a nearly complete – solution....

[S]ocial and educational strategies to develop in minors an ethic of responsible choice and the skills to effectuate these choices and to cope with exposure are foundational to protecting children from negative effects that may result from exposure to inappropriate material or experiences on the Internet." *Id*., Executive Summary, at 12; *see also id*. at Chapter 10. All of these approaches are notably less restrictive than COPA's criminal ban. *See ACLU I*, 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 operations to scramble channels as a default).

Of course, as Congress has now reiterated in its two reports, defendant can also address its interest by vigorously enforcing other criminal statutes, such as obscenity and child pornography laws. *See* NRC Report at Section 14; *see also id.* at Section 9.1; COPA Report at 43. [20]

[20] Even if there were not the many viable alternatives discussed above, this Court rightly held that "'[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained

from those limitations.'" 217 F.3d at 179 (quoting *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555 (2d Cir. 1988).

CONCLUSION

For the reasons stated above, plaintiffs respectfully request that this Court affirm the district court's decision granting a preliminary injunction against enforcement of 47 U.S.C. § 231.

Respectfully submitted,

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ATTORNEY CERTIFICATION

Pursuant to Fed. R. App. P. 46.1(e) and 3d Cir. LAR 28.3(d) the undersigned certifies that the following counsel whose names appear on the Brief of Plaintiffs-Appellees are members in good standing of the bar of this Court.

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), the undersigned certifies this brief complies with the type-volume limitations of FRAP 32(a)(7)(B).

1. EXCLUSIVE OF THE EXEMPTED PORTION IN FRAP 32(a)(7)(B), THE BRIEF CONTAINS 13,952 WORDS.

2. THE BRIEF HAS BEEN PREPARED IN PROPORTIONALLY SPACED TYPEFACE USING WORD 2000 IN TIMES NEW ROMAN 14 POINT FONT.

3. A COPY OF THE WORD OR LINE PRINTOUT IS ATTACHED.

4. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN FRAP 32(a)(7)(B), MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

_____
Christopher R. Harris

STATEMENT OF THE ISSUE

Whether a federal criminal law violates the First Amendment by suppressing a wide range of speech on the World Wide Web (the "Web") that adults are entitled to communicate and receive.

INTRODUCTION

This Court considers for a second time the constitutionality of the Child Online Protection Act ("COPA"), which imposes severe criminal and civil penalties on the display of constitutionally protected, non-obscene materials on the Internet. Last term the Supreme Court issued a "quite limited" decision in this case which left the lower court's injunction against COPA in place. *Ashcroft v. American Civil Liberties Union* ("*ACLU II*"), 122 S. Ct. 1700, 1713 (2002), *rev'g in part American Civil Liberties Union v. Reno*, 217 F. 3d 162 (3d Cir. 2002), *aff'g* 31. F. Supp. 2d 473 (E.D. Pa. 1999). The Court remanded to this Court for consideration of the "very real likelihood that [COPA] is overbroad." *Id.* 122 S. Ct. at 1716 (Kennedy, J., concurring). Though COPA purports to restrict only the availability of materials to minors, the district court correctly found that COPA would prohibit adults from communicating and receiving expression that the First Amendment clearly protects. Since this Court's prior ruling, Congress itself

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2002, I filed and served the Brief of Plaintiffs-Appellees On Remand by Express Mail overnight delivery to the Clerk of the Court and to:

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TABLE OF AUTHORITIES

CASES

STATUTES AND OTHER AUTHORITIES

CORPORATE DISCLOSURE STATEMENT

In accordance with FRAP 26.1 and LAR 26.1, plaintiffs make the following disclosures:

1) The parent corporation of plaintiff ArtNet Worldwide Corporation is ArtNet.com AG.

2) Plaintiff OBGYN.net is the brand name for a Delaware corporation named Medispecialty.com, Inc. Approximately 30% of the stock of Medispecialty.com, Inc. is owned by Medison Co., Ltd., which is currently operating under court receivership in the Republic of Korea.

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

4) Plaintiff PlanetOut Corporation now exists as part of PlanetOut Partners USA, Inc., 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.

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

6) Plaintiff Internet Content Coalition is no longer in existence.

7) Plaintiff Salon Internet, Inc. has been renamed Salon Media Group.

8) The following plaintiffs 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 Bookstores, Blackstripe, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, Powell's Bookstore, and RiotGrrl.