No. 03-218

In the

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

ALEXANDRA A.E. SHAPIRO
CHRISTOPHER R. HARRIS
MICHELE M. PYLE
NIA CROSS
LATHAM & WATKINS LLP
885 Third Avenue
New York, N.Y. 10022
Of Counsel to American Civil Liberties Foundation

ANN E. BEESON
Counsel of Record
CHRISTOPHER A. HANSEN
STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, N.Y. 10004

STEFAN PRESSER
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
125 South 9th Street, Suite 701
Philadelphia, P.A. 19107

DAVID L. SOBEL
ELECTRONIC PRIVACY INFORMATION CENTER
1718 Connecticut Ave. NW
Washington, D.C. 20009

LEE TIEN
ELECTRONIC FRONTIER
FOUNDATION
454 Shotwell Street
San Francisco, C.A. 94110
Counsel for Respondents

QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

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

CORPORATE DISCLOSURE STATEMENT

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

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

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

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

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

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

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

(7) Respondent Internet Content Coalition no longer exists.

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

(9) The following respondents do not have parent companies, nor do any publicly held companies own ten percent or more of their stock: Addazi Inc. d/b/a/ Condomania, American Booksellers Foundation for Free Expression, American Civil Liberties Union, Androgyny Books, Inc. d/b/a/ A Different Light Book Stores, Blackstripe, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, Powell's Bookstore, RiotGrrl, and Salon Media Group, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND OTHER AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 03-218

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, the respondents American Civil Liberties Union, *et al.*, hereby submit this brief in opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

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

A. The District Court's Decision and Factual Findings

On February 1, 1999, following an evidentiary hearing, the district court preliminarily enjoined enforcement of COPA, which imposes severe criminal and civil sanctions on persons who "by means of the World Wide Web, make [] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. § 231(a)(1)-(3). The district court's decision was supported by detailed findings of fact based on six days of testimony, numerous affidavits and extensive documentary evidence submitted by both sides. The findings describe the character and the dimensions of the Internet, the nature of the speech at risk under the law, the inability to verify the age of Internet users and the effect of the law on speakers and adult readers. The majority of factual findings and conclusions mirror those found in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), in which this Court struck down the very similar Communications Decency Act (the "CDA"), 47 U.S.C. § 223, holding that "it would be prohibitively expensive for . . . some commercial[] speakers who have Web sites to verify that their users are adults. These limitations must inevitably curtail a significant amount of adult communication on the Internet." *Id*. at 877 (citation omitted); *see also* Appendix to Petition for a Writ of Certiorari ("App.") 146a, 147a. Petitioner has not disputed the district court's findings either on appeal or in this petition, and some of those findings were derived from a joint stipulation submitted by the parties. *See* App. 121a-148a. Based on this record, the district court held that plaintiffs were likely to succeed on their claim that COPA violates the First Amendment, because "COPA imposes a burden on speech that is protected for adults," App. 156a, and because the government could not prove that COPA is the "least restrictive means available to achieve the goal of restricting

the access of minors to [harmful to minors] material," App. 159a.

1. Plaintiffs and Their Speech Affected By COPA

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

Plaintiffs and their users post, read and respond to sexually explicit content on the Web including visual art and poetry; information about obstetrics, gynecology, and sexual health; books and photographs; online magazines; and resources designed for gays and lesbians. *See* App. 129a, ¶21. Several plaintiffs host Web-based discussion groups and chat rooms that allow readers to converse on various subjects. *See* App. 129a, ¶22.

Like the vast majority of speakers on the Web, plaintiffs provide the great bulk of their online information for free. *See* App. 129a, ¶23. Like traditional newspapers and magazines, they earn advertising revenues by virtue of their speech. They are thus engaged in speech "for commercial purposes" within the meaning of COPA, because they communicate with the objective of making a profit. *See* App. 134a-134a, ¶33; 47 U.S.C. §231(e)(2)(B). Although certain plaintiffs are large, well-known Web publishers,

others are start-up operations run by single individuals. *See, e.g.*, Court of Appeals Joint Appendix ("J.A.") 139-40.[1]

2. The Impact Of COPA On Communication On The Web

The growth of commercial activity on the Web has been explosive. At the time of the district court's decision, approximately one third of the 3.5 million sites on the Web were commercial within the meaning of COPA in that their operators "intend to make a profit." App. 133a, ¶27. 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." App. 135a, ¶34. The "vast majority of information . . . on the Web . . . is provided to users for free." App. 129a, ¶23. It is generally not possible for a Web speaker to verify the age of a person accessing the speaker's content. *See* App. 128a, ¶18; 155a.

COPA provides three affirmative defenses to Web site operators who provide content deemed "harmful to minors": (1) requiring the use of a credit card, debit account, adult access code, or adult personal identification number; (2) accepting a digital certificate that verifies age; or (3) any other reasonable measures feasible under available technology. *See* App. 136a-137a, ¶37; 177a. The district court found, and petitioner does not dispute, that there is no "authority that will issue a digital certificate that verifies a user's age." App. 136a-137a, ¶37. Thus, the uncontested evidence showed that the only technologies currently available for compliance with COPA are online credit cards and adult access codes. Either option would require users to register and provide a credit card or other proof of identity

[1] Respondents cite to the Joint Appendix, which was originally filed in the petitioner's initial appeal to the Third Circuit, and incorporated into all subsequent appellate proceedings.

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

In addition, petitioner's own expert testified that "the only way to comply with COPA regarding potentially harmful-to-minors materials in chat rooms and bulletin boards is to require that a credit card screen or adult verification be placed before granting access to all users (adults and minors) to such fora." App. 145a, ¶58. Web-based interactive fora are inherently dynamic, and there is no way to prohibit access to some 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.* Plaintiffs testified that these interactive fora are essential in attracting users to their Web sites. *See* J.A. 221.

The district court also found that credit cards and adult access codes would deter adults from accessing other Web-based content and impermissibly burden their First Amendment rights. *See* App. 131a-133a, ¶¶25-26; 155a. Because almost all content on the Web is available without the need to register and provide personal information, Web users are reluctant to provide such information to Web sites. *See id.* 129a, ¶23; 135a, ¶35; 136a, ¶36. 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). Users "will only reveal credit card information at the time they want to purchase a product or service." App. 136a, ¶36. For this reason, Web sites that have required registration or payment before granting access "have not been successful." *Id.* Plaintiffs testified that any mandatory registration would drive away their users. *See* J.A. 330-31, 344, 367-68, 370. 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. App. 131a, ¶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 132a, ¶26.

In addition, to utilize COPA's credit card defense, a content provider "would need to undertake several steps," App. 138a, ¶41, with start-up costs ranging from "approximately $300 . . . to thousands of dollars. . . ." App. 138a, ¶42. The district court found that "it was not clear from the conflicting testimony" whether credit card verification services will authorize or verify a credit card number in the absence of a financial transaction. App. 139a, ¶45. Without such a service, a content provider would have to charge the user's credit card for accessing the content. *See* J.A. 126, 129. Even if this service were available, the credit card company would charge the content provider $0.15 to $0.25 per authorization. *See* App. 139a, ¶45. Such per-authorization fees would allow users hostile to certain content to drive up costs to the provider by repeatedly accessing restricted content. *See* J.A. 133.

Finally, COPA's credit card and adult access defenses would require speakers to redesign their Web sites in order to restrict only "harmful to minors" content. The district court found that this could be prohibitively expensive, and, in some cases, would require plaintiffs to shield even some materials not "harmful to minors" behind age verification screens. As the district court recognized, 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. *See* App. 137a, ¶39; App. 144a, ¶56. COPA would require some Web sites to reorganize and redesign literally millions of files. *See* J.A. 158-59. A content provider also would have to reorganize individual files and pages in order to restrict only content that could be "harmful to minors". *See* App. 143a, ¶54. In addition, even a single page of Web content could have some content that was prohibited under COPA and some that was not, making it difficult if not impossible to segregate such material. *See* App. 143a-144a, ¶55.

In sum, the district court concluded that "the implementation of credit cards or adult verification screens before gaining full access to material that is harmful to minors may deter users from accessing such materials and that the loss of users of such material may affect the speakers' economic ability to provide such communications." App. 155a.

3. *User-Based Filtering Programs*

In contrast to the burden imposed by COPA, user-based filtering software constitutes a less restrictive and more effective alternative. As the district court found, COPA does not even reach a substantial portion of material posted on the Web that may be "harmful to minors." COPA 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. *See* App. 159a. In addition, at the time of the district court's opinion, at least forty percent of Web content originated abroad, and minors could just as easily

access this material as they could the remaining sixty percent originating domestically. *See* App. 128a, ¶20.

In contrast, even the government's expert conceded that parents can use user-based blocking software to prevent access to these materials, in addition to blocking Web-based commercial materials. *See* App. 147a-148a, ¶65. To establish these controls, parents need only purchase software for their home computers or choose an Internet Service Provider or online service such as American Online that offers parental software controls. *Id.* 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. Thus, though not perfect, the district court found that user-based blocking software is at least equally effective and less restrictive than COPA's criminal penalties.

B. The Court of Appeals' Initial Opinion

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

C. This Court's Prior Ruling

This Court vacated and remanded the decision by the Court of Appeals finding COPA unconstitutional. Rejecting the Third Circuit's approach, the Court narrowly held "that

COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." *Ashcroft v. American Civil Liberties Union*, 122 S. Ct. at 1713 (emphasis in original). Significantly, however, the Court did not lift the injunction preventing the government from enforcing COPA absent further action. *Id.* at 1713-14. The Court then remanded the case for further proceedings on issues including "whether COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the district court correctly concluded that the statute likely will not survive strict scrutiny analysis…." *Id*. at 1713.

D. The Court of Appeals' Ruling on Remand

On remand, the Third Circuit reaffirmed its conclusion that COPA was unconstitutional. App. 18a. In its primary holding, the court ruled that COPA failed strict scrutiny because it would deprive adults of material they are constitutionally entitled to receive. App. 38a. The court also held that the statute was both overbroad and vague. App 49a-58a.

Reviewing the plain language of the statute, the court concluded that COPA "endangers a wide range of communications, exhibits, and speakers whose messages do not comport with the type of harmful materials legitimately targeted …." App. 23a. The court rejected the government's plea to re-write the statute to narrow its application, and found that COPA's affirmative defenses, identical to those previously rejected by this Court in *Reno v. ACLU*, did nothing to ameliorate the statute's burden on speech protected for adults. The court further held that other alternatives, including Internet filtering software, were "substantially less restrictive than COPA in achieving

COPA's objective of preventing a minor's access to harmful materials." App. 47a.

SUMMARY OF THE ARGUMENT

Petitioner seeks further review of the Child Online Protection Act (COPA), which makes it a crime to communicate material that is harmful to minors on the Web. There are, however, no new issues left in this case that merit review. The relevant facts are uncontested and the governing legal framework has been clearly set forth in this Court's prior decisions.

COPA was passed in 1998, when the Internet was still relatively new and less well understood. Like Congress' first attempt at legislation in this area, struck down by this Court in *Reno v. ACLU*, COPA relies exclusively on threatening Web speakers with severe criminal and civil penalties for communicating constitutionally protected speech. COPA was passed prior to any serious study of alternatives by Congress. Since then, two commissions have provided Congress with detailed reports that offer a number of ways to protect children from harm online without restricting adult speech rights. This Court has also recently upheld another federal statute that requires the use of one of those alternatives – user-based filtering software – in all public schools and libraries.

Given this altered landscape, there is no reason for further review of the lower court decision enjoining COPA. The decision below establishes no new principles, but merely applies this Court's well-established rule, specifically affirmed in the Internet context, that Congress may not enforce its interest in protecting minors by making it a crime to communicate constitutionally protected material to adults. In accordance with that rule, federal courts have now

unanimously struck down *seven* state statutes nearly identical to COPA.

Specifically, COPA threatens protected speech with criminal sanctions and suppresses a large amount of speech that adults have a constitutional right to communicate and receive on the Web. Petitioners argue that review is necessary because the lower court misinterpreted the breadth of the statute. But under any interpretation COPA clearly criminalizes speech that adults are constitutionally entitled to receive. The extensive record in this case, undisputed by the government, establishes that COPA reaches millions of content providers who have no effective way to prevent minors from obtaining their speech without also deterring and burdening access by adults. The two reports commissioned by Congress now confirm the district court's key findings in this case: credit cards and adult access codes are ineffective and deter adults from accessing protected speech, whereas filters are a more effective and less restrictive option for parents who wish to restrict their children's online viewing. Under this Court's clear precedents, COPA thus violates strict scrutiny and is overbroad.

For all of these reasons, the petition for certiorari should therefore be denied.

ARGUMENT

THIS CASE DOES NOT MERIT REVIEW BECAUSE THE DECISION BELOW APPLIES THIS COURT'S WELL-ESTABLISHED RULE THAT CONGRESS MAY NOT CRIMINALIZE SPEECH PROTECTED FOR ADULTS IN AN EFFORT TO PROTECT MINORS.

A. COPA Criminalizes A Wide Range Of Speech That Is Constitutionally Protected For Adults.

In its attempt to deny minors access to certain speech, COPA suppresses a broad array of speech that adults have a constitutional right to receive. *See* App. at 23a ("while COPA penalizes publishers for making available improper material for minors, at the same time it impermissibly burdens a wide range of speech and exhibits otherwise protected for adults"); *Reno v. ACLU*, 521 U.S. at 876-77. There is no way for a Web speaker to know the age of a user who is accessing her communications on the Web. 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's threat of jail time "may well cause speakers to remain silent rather than communicate even arguably unlawful words or ideas, and images." *Reno v. ACLU*, 521 U.S. at 874.

COPA criminalizes a category of speech that is unquestionably protected for adults. The record in this case is full of 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.).

See also App. at 52a-54a & n.35 (citing *amicus curiae* briefs).

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 Salon's frank discussions about whether "boys can find the right spot." *See* J.A. 359 (Reilly Testimony); J.A. 638-41 (Talbot PI Exhs.). Given the popularity of interactive messages and the more than one million commercial Web sites, the examples above are far from isolated. App. 133a, ¶27; *see also* App. at 52a-54a (citing AMICUS BRIEFS). While such content is appropriate for adults, such

unapologetically explicit speech finds itself well within COPA's reach.

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

Just in the last few years, this Court has struck down two federal statutes aimed at protecting minors because they "proscribe[d] a significant universe of speech that is neither obscene … nor child pornography." *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1396 (2002) (invalidating Congress' attempt to ban "virtual" child pornography); *Reno v. ACLU*, 521 U.S. 844 (1997) (invalidating statute that criminalized indecent communications on the Internet). While this 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." *Reno v. ACLU*, 521 U.S. at 875 (citations omitted); *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1402 (2002) ("speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.").

Indeed, because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," this Court has *never* upheld a

criminal prohibition on non-obscene communications between adults. *Reno v. ACLU*, 521 U.S. at 875 (quoting *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983) (internal quotations omitted)); s*ee also Sable Communications v. FCC*, 492 U.S. 115, 131 (1989) (invalidating statute that banned and criminalized the distribution of indecent speech); *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (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 the showing of certain movie content at drive-in theaters); *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957) (invalidating a conviction for distribution of indecent publications).

COPA was also correctly analyzed and enjoined under this Court's overbreadth cases, which hold that a statute 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). The Third Circuit held that COPA cannot stand because it "encroaches upon a significant amount of protected speech beyond that which the Government may target constitutionally in preventing children's exposure to material that is obscene for minors." App. at 51a; *see also Reno v. ACLU*, 521 U.S. at 874 (invalidating CDA because it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.") 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.

B. COPA Cannot Be Saved By Radical Surgery That Would Alter Its Plain Language

Petitioner urges review because the Third Circuit, in his view, has misinterpreted the breadth of the statute. As an initial matter, the correct interpretation of the statute poses no question for review because under *any* interpretation COPA unconstitutionally burdens speech clearly protected for adults. While narrower than the online indecency standard invalidated by this Court in *Reno v. ACLU*, speech that is harmful to minors is by definition non-obscene. This Court has struck down similar laws that restrict narrower but undisputedly protected categories of speech because of their burden on adult access. *See, e.g., Free Speech Coalition,* 122 S. Ct. at 1399; *United States v. Playboy*, 529 U.S. 803, 806 (2000).

Applying this Court's precedents, the lower court correctly declined to rewrite the statute to narrow its reach, and there is no need for this Court to grant review to perform the kind of radical surgery it has rejected in prior cases. *See Reno v. ACLU*, 521 U.S. at 884-85; *United States v. National Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995); *United States v. Reese*, 92 U.S. 214, 221 (1875).

First, petitioner has now largely conceded that COPA's application to Web sites operated for "commercial purposes" does nothing to limit its reach. COPA applies to speech that is provided *for free* on the Web by commercial businesses like Salon magazine and PlanetOut, and not just to speech that is for sale. Thus, petitioners agree that COPA extends "to businesses that seek to profit from harmful material by selling advertising space." Cert. Pet. at 21. Petitioner also concedes an intent to apply COPA's criminal sanctions to businesses that offer material that is harmful to minors, even if not a "principle part" of their businesses. *See*

Cert. Pet. at 21. Indeed, 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). The text of COPA also imposes liability on any speaker who knowingly makes any communication for commercial purposes "*that includes any material* that is harmful to minors." 47 U.S.C. 231(a); 47 U.S.C. 231(e)(2)(B). Thus, any harmful-to-minors material posted on a Web site – even just one Serrano photograph on the Web site of plaintiff ArtNet or one "Sexpert Opinion" column in Salon, J.A. at __ – would subject the speaker to COPA's criminal penalties.

Second, the Court of Appeals correctly rejected petitioner's plea to rewrite the statute to exclude all material with serious value for "normal, older adolescents." In passing COPA, Congress itself identified as objects of concern children who cannot be described as older adolescents. *See* App. 25a (quoting H.R. Rep. No. 105-775, at 9-10). Even if the statute were rewritten to exclude material with value for older minors, COPA remains defective under this Court's clear precedents because it still unconstitutionally restricts *adults* from viewing that category of material. *ACLU v. Reno*, 521 U.S. 844; *Free Speech Coalition*, 122 S. Ct. at 1396; *Sable*, 492 U.S. at 131; *Bolger*, 463 U.S. at 74; *Butler*, 352 U.S. at 383-84.

Third, the Court of Appeals rightly held that the statute is too broad because it requires "evaluation of an exhibit on the Internet in isolation, rather than in context." App. 22a. Petitioner criticizes that holding by referencing language in the statute that requires consideration of the material "as a whole," Cert. Pet. At 17, but never explains what that requirement means in the context of the seamless Web. That is, petitioner still has no answer to Justice Kennedy's question in his prior concurring opinion in this case: "It is unclear whether what is to be judged as a whole

is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites." 122 S. Ct. at 1717; *see also* App. 128a, ¶17 ("From a user's perspective, [the Web] may appear to be a single, integrated system."). In fact, petitioner has previously argued to this Court that some of the individual Web pages on respondents' enormous Web sites "plainly do test, and likely exceed, the legal limitations" of the harmful-to-minors test. *See* Gov. S. Ct. Br. at 37. The Third Circuit thus correctly concluded that this flaw, one of many, contributes to COPA's overbreadth.

C. COPA's Affirmative Defenses Do Not Save The Statute, Because They Will Prevent Or Deter Adult Web Users From Accessing A Wide Range Of Protected Speech.

COPA threatens any speaker on the Web who displays any material that is "harmful to minors" with severe criminal and civil sanctions. COPA provides only affirmative defenses for "good faith" efforts to restrict access by minors to material that is "harmful to minors," such as by requiring the use of a credit card or adult access code. *See* 47 U.S.C. § 231(c)(1)(A). Consistent with this Court's rejection of the same defenses in *Reno v. ACLU*, the district court found that either option would inevitably deter adults from accessing protected speech. In addition, as discussed below, last year Congress received two commissioned reports that confirm the findings of the district court. The first report was mandated through another provision enacted by Congress when it passed COPA.[2] *See* Commission on Child Online Protection, Final Report to Congress, Oct. 20, 2002 at

[2] The COPA 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.

http://www.copacommission.org/report (hereinafter "COPA Report"). The second report was conducted by the National Research Council, and is a comprehensive four-hundred-page study edited by former Attorney General Dick Thornburgh. *See* 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) at http://www.nap.edu (hereinafter "NRC Report").

1. COPA's Affirmative Defenses Do Not Protect Speakers From Prosecution for Communicating Protected Speech.

As an initial matter, the Third Circuit rightly noted that "the affirmative defenses do not provide the Web publishers with assurances of freedom from prosecution." App. at 36a-37a. COPA's criminal penalties will thus have a strong chilling effect even on those speakers who may be entitled to rely on an affirmative defense at trial. As this Court explained when striking down the Child Pornography Prevention Act ("CPPA"), "[t]he Government raises serious constitutional difficulties by seeking to impose on the 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 that would inhibit vast numbers of their adult users from accessing protected speech.

2. COPA Would Require Web-Based Interactive Chat Rooms To Restrict Speech Not Even Covered By The Statute.

COPA's affirmative defenses do nothing to alleviate the burden on protected speech in Web-based chat rooms and discussion groups. These interactive forums are vital contributors to the popularity of many commercial Web sites. J.A. 148-49, 358-59 (Talbot, Reilly Testimony). The hundreds of thousands of people who have communicated on respondents' sites alone represent only a miniscule portion of the discussions occurring at any moment on the Web. Yet COPA would require that users of any Web chat or discussion provide a credit card or adult access code before entering the discussion – even if the discussion ultimately contains no speech that is not harmful to minors. As the district court explained,

> 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.

See App. 156a. 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).

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

The district court also found that "the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter [adult] users from accessing such materials." App. 155a. 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, J.A. 392 (Farmer Testimony), which has millions of 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 Reno v. ACLU*, 521 U.S. at 881-82.. 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. *Reno v. ACLU*, 521 U.S. at 874-75.

COPA will deter most adults (even those with credit cards) from accessing restricted content, because Web users are simply unwilling to provide identifying information in order to gain access to content. To utilize either COPA's adult access code or credit card defense, Web 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). Respondents 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). These findings are consistent with the findings affirmed by this Court in striking down the Communications Decency Act, where evidence suggested "that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password." *Reno v. ACLU,* 521 U.S. at 857 n.23.

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 respondents' 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 COPA and NRC Reports support the lower courts' rulings. 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 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.

This Court has held in many prior cases that this form of inhibition renders a statute unconstitutional. *See Reno v. ACLU,* 521 U.S. at 857 n.23; *Denver Area Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 746 (1996) (holding that statute blocking certain cable channels and requiring users to request that those channels be unblocked unconstitutionally burdened subscribers access to information); *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").[3]

---

[3] Petitioners wrongly rely on this Court's decision in *United States v. American Library Association*, 123 S. Ct. 2297 (2003), to argue that COPA's deterrent effects do not render it unconstitutional. Unlike COPA, the statute upheld in that case did not threaten protected speech

4. COPA's Burdens Are Far Greater Than Those Imposed By State Harmful-to-Minors Display Laws.

Ignoring contrary case law from courts around the country, petitioner argues that this case merits review because the burdens COPA imposes are no different in kind or degree from display requirements that many states impose on material deemed harmful to minors. Cert. Pet. at 22-23. As the lower court held, COPA's burden on speech is far greater than in any of the cases cited by petitioner. App. 32a-38a. None of the blinder rack cases address the unique problems presented by regulation of harmful-to-minors material on the Internet. *Reno v. ACLU*, 521 US. at 889-91 ("the Court has previously only considered laws that operated in the physical world"). Federal courts 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.[4] In addition, unlike COPA, state blinder rack laws

---

with criminal sanctions, and was not subjected to strict scrutiny. In addition, the Court interpreted that statute to minimize any deterrent on adult access by allowing library patrons to gain unfettered access to all Internet speech without having to ask for specific access to potentially illegal content. Indeed, the case confirms that user-based filters are a less restrictive alternative to COPA. *See* discussion *infra* at 25-27.

[4] *See Cyberspace Communications v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001),; *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*, 167 F. Supp. 2d 878 (W.D. Va. 2001), certifying questions to 317 F.3d 413 (Virginia); *American Booksellers Found. for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002)*aff'd in part,* No. 02 Civ. 7785, 2003 WL 22016812 (2d Cir. Aug. 27, 2003) (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*, 232 F. Supp. 2d 932 (S.D. Ohio 2002) (granting temporary restraining order) (Ohio).

do not require adults to pay for speech that would otherwise have been accessible for free, or to relinquish their anonymity in order to access those materials. App. 38a.

D. COPA Is An Ineffective Means For Achieving The Government's Compelling Interest, and Less Restrictive Alternatives Are Available.

The lower court correctly concluded that COPA would be ineffective at protecting children from harmful materials, and that more effective alternatives are available to parents. App. 39a-47a. Since COPA was passed, the COPA and NRC Reports identified less restrictive alternatives consistent with the lower court's conclusions. Both independently identified a number of methods to reduce access by minors to sexually explicit material online, 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").

Like the lower court in this case, the COPA Report found that requiring age verification systems would not be "effective at blocking access to [non Web-based] chat, newsgroups, or instant messaging." COPA Report at 27; App. 145a, ¶ 58. 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); *see also Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring) ("a law cannot be regarded as . . . justifying a restriction upon truthful speech, when it leaves appreciable damage to [defendant's] supposedly vital interest unprohibited.").

Moreover, the lower court correctly held that COPA is not the least restrictive means of achieving defendant's asserted interest. *See* App. 47a-48a; *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 to 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").

Just last term, this Court upheld another federal law mandating that public libraries and schools require use of filters on all Internet access terminals. *U.S. v. American Library Assoc.*, 123 S. Ct. 2297, 2307 (2003). Petitioner vigorously and successfully defended that statute by arguing that filters were an effective means of protecting children online. Filters, while not perfect, are clearly a less restrictive alternative to COPA's criminal ban on protected speech by adults. Having mandated their use of public libraries and schools, petitioner can no longer argue that the same option is insufficient for use by parents who wish to restrict online

viewing in the home. *See Playboy*, 529 U.S. at 805 ("A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.")

In addition, the NRC Report highlights a number of other specific steps that the government can take to address the availability of sexually explicit material to minors online, including vigorous education and outreach to parents, teachers, librarians and other adults about Internet safety, and support for self-regulation by private parties. NRC Report at 8. This Court has repeatedly invalidated content-based burdens on adult speech when such less restrictive alternatives are available. *See Reno v. ACLU*, 521 U.S. at 879; *Denver Area*, 518 U.S. at 759-60 (informational requirements and user-based blocking are more narrowly tailored than speaker-based schemes as a means of limiting minors' access to indecent material on cable television); *Playboy,* 529 U.S. at 815 (finding that requiring cable operators upon request by a subscriber to scramble or block any unwanted channel was less restrictive alternative than forcing operations to scramble channels as a default).[5]

In Summary, the Third Circuit's decision fully comports with this Court's precedents and raises no unique question of constitutional law. The factual findings supporting the decision are consistent with two congressional reports, and a number of federal courts have now invalidated similar state statutes. Five years after COPA was passed and first enjoined, the government clearly has far more effective, less restrictive solutions to address its concerns. The Third Circuit correctly enjoined COPA's criminal sanctions on

---

[5] Of course, as Congress has now reiterated in its two reports, Petitioner 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.

protected speech for adults, and the decision does not merit this Court's review.

CONCLUSION

For all the reasons discussed above, the petition for certiorari should be denied.

Respectfully submitted,

Ann E. Beeson
Counsel of Record
Christopher A. Hansen
Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Stefan Presser
American Civil Liberties Union of Pennsylvania
125 South 9th Street, Suite 701
Philadelphia, PA 19107
(215) 592-1513 ext. 216

David L. Sobel
Electronic Privacy Information Center
1718 Connecticut Avenue NW
Washington, DC 20009
(202) 483-1140

Lee Tien
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110
(415) 436-9333

Attorneys for All Respondents

Alexandra A.E. Shapiro
Christopher R. Harris
Michele M. Pyle
Nia Cross
Latham & Watkins LLP
885 Third Avenue, Suite 1000
New York, NY 10022
(212) 906-1200

Of Counsel to American Civil Liberties Union Foundation on behalf of respondents American Civil Liberties Union, Androgyny Books, Inc. d/b/a A Different Light Bookstores, Artnet Worldwide Corporation, BlackStripe, Adazzi Inc. d/b/a Condomania, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, OBGYN.net, Philadelphia Gay News, PlanetOut Corporation, Powell's Bookstore, RiotGrrl, Salon Internet, Inc. and West Stock, Inc., now known as ImageState North America, Inc.