No. 00-1293

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

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

The petitioner in this case is John Ashcroft, Attorney General of the United States. The respondents are American Civil Liberties Union; Androgyny Books, Inc. d/b/a A Different Light Bookstores; American Booksellers Foundation For Free Expression; Artnet Worldwide Corporation; BlackStripe; Addazi Inc. d/b/a Condomania; Electronic Frontier Foundation; Electronic Privacy Information Center; Free Speech Media; OBGYN.net; Philadelphia Gay News; PlanetOut Corporation; Powell's Bookstore; Riotgrrl; Salon Internet, Inc.; 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 refer to the Corporate Disclosure Statement in respondents' Brief in Opposition to Certiorari, with the following amendments:

1) Respondent Internet Content Coalition is no longer in existence.

2) PlanetOut Corporation now has a parent corporation, 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. does not hold more than 10% of the shares issued and outstanding of PlanetOut Corporation or PlanetOut Partners, Inc.

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STATEMENT OF THE CASE

A. Introductory Statement And Proceedings Below

This case concerns the Child Online Protection Act ("COPA"), 47 U.S.C. § 231(1998), Congress' second attempt to impose severe criminal and civil sanctions on the display of protected, non-obscene speech on the Internet. COPA targets speech on the World Wide Web (the "Web") that is harmful to minors according to "contemporary community standards." The first attempt to restrict protected speech on the Internet was declared unconstitutional by all nine justices of this Court in *Reno v. ACLU*, 521 U.S. 844 (1997) ("*ACLU I*") (affirming preliminary injunction against the Communications Decency Act (the "CDA") 47 U.S.C. §223 (1996)). Recognizing that the Internet is a powerful "new marketplace of ideas" and "vast democratic for[um]" that is "dramatic[ally] expand[ing]" in the *absence* of government regulation, the Court imposed the highest level of constitutional scrutiny on content-based infringements of Internet speech. *ACLU I*, 521 U.S. at 870, 885.

Plaintiffs filed this challenge to the constitutionality of COPA in 1998. Joint Appendix ("J.A.") 103. Based on live testimony, sworn declarations, and numerous exhibits, the district court first granted a temporary restraining order against COPA on November 20, 1998, which was extended on consent. Pet. App. 42a-43a, 112a-114a. Plaintiffs then moved for a preliminary injunction. The district court heard five days of live testimony from 10 witnesses and admitted approximately 18 sworn declarations and over 400 exhibits. *Id.* 43a, 64a n.5. The parties also stipulated to twenty facts. *Id.* 55a-62a, ¶¶ 0-19. One of those stipulations agreed that "[o]nce a provider posts its content on the Internet and chooses to make it available to all, it generally cannot

prevent that content from entering any geographic community." *Id.* 62a, ¶ 18. As documented below, much of the actual record directly contradicts the limited legislative findings relied on by Congress and petitioner.

After hearing "extensive" evidence, *id.* 12a, the district court granted a preliminary injunction, finding that plaintiffs were likely to succeed on the merits of their claim that COPA violated the First Amendment. *Id.* 98a. The court found that the government had not met its burden of establishing that COPA was narrowly tailored. *Id*

online magazines." *Id.* 63a, ¶ 21. Though they provide virtually all of their online information for free, they all communicate with the objective of making a profit. *Id.* 63a, ¶ 23, 68a-69a, ¶ 33. They sue on their own behalf and on behalf of their readers.

Plaintiffs include Web sites maintained by individuals. For instance, Mitchell Tepper of the Sexual Health Network runs his Web site out of his home. *Id.* 65a, ¶ 25. "The mission of his Web site is to provide easy access to information about sexuality geared toward individuals with disabilities." *Id.* The site "is almost exclusively sexual in nature and … contains, for example, information on sexual surrogacy as a form of sexual therapy and advice on how a large man and a small woman should position themselves comfortably for intercourse." *Id.* The Sexual Health Network also has an interactive component through which readers c

Exhs.). Salon archives its content, and its Web site contains tens of thousands of pages published over the last three years. J.A. 145 (Talbot Testimony).

Plaintiff 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 post personal ads, including descriptions of their sexual interests and physical characteristics, and where teenagers who live in remote locations can discuss their sexual orientation. Pet. App. ¶ 66a, ¶ 26; J.A. 652-53, 661-69 (PlanetOut 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. Pet. App. 66a, ¶ 26.[1]

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[1] 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; WestStock, 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 bookstores on the Web; and Philadelphia Gay News, which operates a Web site. *See ACLU v. Reno* ("*ACLU II*"), Pet. App. 64a n.5; *see generally* J.A. 601-757, Supplemental Lodging ("S.L.") 65-78 (Plaintiffs' PI Exhibits); J.A. 106-159, 325-79, S.L. 1-

Plaintiffs all engage in some speech that is sexual in nature and constitutionally protected for adults. Pet. App. 52a. The government has never asserted that any are "commercial pornographers." Although the government argued below that none engaged in speech that was "harmful to minors," Pet. App. 51a, the government now asserts that at least some are engaged in illegal speech. Brief for the Petitioners ("Gov. Br.") at 37. Thus, the government now concedes that the law criminalizes speech by people other than "commercial pornographers."

C. The Challenged Statute

COPA imposes severe criminal and civil penalties[2] 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

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[2] Violation of COPA subjects speakers to up to six months imprisonment and / or $50,000 in fines, plus additional fines for each intentional violation. 47 U.S.C. § 231(a).

regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or

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* Pet. App. 46a, 70a-71a, ¶ 37. The district court found, and the government does not dispute, that there is no "authority that will issue a digital certificate that verifies a user's age." *Id.* 70a-71a, ¶ 37. Further, there are "no other reasonable measures" available to restrict access to minors. *Id.* Thus, the only technologies currently available for compliance with COPA are 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.*

"Without these affirmative defenses, COPA on its face would prohibit speech which is protected as to adults." *Id.* 105a. As the district court found and the court of appeals affirmed, given the nature of the Web, even with these defenses COPA would prevent or deter both adults and minors from accessing protected speech. *Id.* 89a-90a.

Expert testimony established that approximately one third of the 3.5 million sites on the Web are commercial, i.e., they "intend to make a profit." *Id.* 67a, ¶ 27. 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 sites is the source of all revenue." *Id.* 68a, ¶¶ 30, 31; J.A. 207 (Hoffman Testimony). Fee-based models are the least popular. *Id.* 68a, ¶ 31. 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.'" *Id.* 69a, ¶ 34; *see also* J.A. 216-20 (Hoffman Testimony). Traffic is "the most critical factor for determining success or potential for success on a Web site." Pet. App. 69a, ¶ 34. "The best way to stimulate user traffic

on a Web site is to offer some content for free to users . . . . [V]irtually all Web sites offer at least some free content." *Id.*

Because the "vast majority of information . . . on the Web . . . is provided to users for free," *id.* 63a, ¶ 23, the court found that COPA's registration requirements would deter most Web readers. *Id*

comply with COPA, plaintiffs would have to place *all* interactive speech behind credit card or age verification screens even if the speech is not harmful to minors. *Id.* 79a, ¶ 58, 90a. "Because of the dynamic nature of the content of such interactive fora, 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.* 79a, ¶ 58. The government's implication that COPA does not apply to interactive speech, *see* Gov. Br. at 9-10, 25-26, is thus contradicted by the record. In addition, a single Web page may have some content prohibited under COPA and some that is not. "Text is more difficult to segregate than images," and so COPA would also force Web speakers to block entire Web pages, even if much of the page's text is not harmful to minors. Pet. App. 77a-78a, ¶ 55.

E. Additional Burdens Of Utilizing Credit Cards Or Adult Access Codes

In addition to the strong deterrent effect of COPA's screening requirements, the district court identified several other burdens that COPA's defenses would impose on Web speech. Not all Web sites even have the ability to set up

77a-79a, ¶¶ 54-58. For speakers with large Web sites, faced with jail time for their mistakes, this process could be quite difficult. *Id.* 71a, ¶ 39, 78a, ¶ 56.

Second, speakers would have to pay start-up costs ranging from "$300 . . . to thousands of dollars." *Id.* 72a, ¶ 42. The government was unable to prove that credit card verification services "will authorize or verify a credit card number in the absence of a . . . [financial] transaction." *Id.* 73a, ¶ 45. Without such a service, Web speakers would also have to pay per-transaction costs every time a user accessed restricted content. These fees would allow users hostile to certain content to drive up costs to the speaker by repeatedly accessing it. J.A. 133 (Laurila Testimony).

Utilizing the adult access code defense would impose additional burdens. There are dozens of adult access code services, which cater to the commercial pornography industry, and each one of which requires users to pay a separate fee. J.A. 348 (Tepper Testimony), 402-03 (Farmer Testimony). Users could thus be required to pay multiple fees in order to access all of the content they wish to see. In addition, adult access codes are issued only after a person submits a variety of authoritative identifying information and, usually, submits a credit card. Pet. App. 76a, ¶ 51; J.A. 439 (Alsarraf Testimony). Plaintiffs testified, without contradiction, that their users would not want to be associated with the "adult" access code industry, and would instead forego accessing the plaintiffs' content. J.A. 330-31, 347-52, 367-68, 370 (Barr, Tepper, Reilly Testimony). For example, persons seeking access to the mainstream CNET news site, or a disabled person wanting accurate information about sexual functioning from the Sexual Health Network, would not want to provide personal information to verification services associated with the pornography industry. J.A. 330-31 (Barr Testimony); J.A. 344, 349 (Tepper Testimony).

In summary, the record contradicts the government's assertion, Gov. Br. at 9, that credit cards and adult access codes are technologically and economically feasible. The district court concluded that using a credit card or adult verification screen would "deter users from accessing such materials and … the loss of users of such material may affect the speakers' economic ability to provide such communications." Pet. App. 89a. Especially when faced with the risk of imprisonment, many speakers would self-censor rather than set up age verification systems that their readers would not use. *Id.* 90a.

F. Alternatives To COPA

COPA does not restrict the wide range of harmful-to-minors materials provided non-commercially on the Web, and through non-Web protocols on the Internet such as newsgroups and non-Web chat rooms. *Id.* 93a. The law would also fail to protect minors from the forty percent of Web content that originates abroad. *Id.* 62a, ¶ 20, 93a. Conversely, as the government's expert conceded, user-based blocking software can effectively block these materials, in addition to blocking Web-based commercial materials. *Id.* 81a-82a, ¶ 65. User-based blocking software can also block other content that parents may deem inappropriate, such as violence or hate speech. J.A. 314 (Magid Testimony). To establish these controls, parents may either purchase software for their home computers or choose an Internet service provider or online service such as America Online that offers parental software controls. Pet. App. 81a-82a, ¶ 65; J.A. 309 (Magid Testimony). Available tracking and monitoring software can also determine which resources a child has accessed, and offer access to children-

only discussion groups that are closely monitored by adults. J.A. 317-18 (Magid Testimony).[3]

SUMMARY OF THE ARGUMENT

Because the extensive trial record in this case overwhelmingly supports the preliminary injunction against COPA, the government ignores it. Remarkably, the government brief cites almost exclusively to legislative findings, many of which are directly contradicted by the record. *See* Stmt. of the Case, *supra* at 7, 10-12. The Constitution, of course, requires the government to prove that COPA survives strict scrutiny by convincing a court with "actual facts" legitimized by the safeguards of the judicial process. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). In particular, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Id.* "Were it otherwise, the scope of freedom of speech . . . would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Id.* at 844; *see also Sable Communications, Inc. v. FCC*, 492 U.S. 115, 129 (1989); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 822 (2000).

The record establishes that COPA violates the central principal of *ACLU I*, in which this Court struck down the CDA. Both statutes, in their attempt to deny minors access to certain speech, "effectively suppress[] 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; *see also* Pet. App. 29a, 90a. The CDA made it a crime to communicate material that was "indecent" or "patently offensive" on the Internet. 47 U.S.C. § 223(a), (d)(1). COPA makes it a crime to communicate material on the Web for

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3 *See also* Amicus Curiae Brief on Behalf of the Computer & Communications Industry Association, et al.

commercial purposes that includes any material that is "harmful to minors." 47 U.S.C. § 231(a)(1).

Both the CDA and COPA are criminal statutes, which pose a very strong risk that they "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *ACLU I*, 521 U.S. at 872; Pet. App. 95a. Both apply to speech that is constitutionally protected for adults. Both effectively prevent adults from receiving speech because there is no way to prevent minors from obtaining communications on the Web without also deterring and burdening access by adults. *See ACLU I*, 521 U.S. at 876-77; Pet. App. 89a-90a, 95a. Both statutes contain nearly identical affirmative defenses that protect only speakers that can prove they restrict prohibited content by requiring a credit card or adult access code; trial courts in both cases found that these defenses do not cure the statutes' censorship of protected speech. *See ACLU I*, 521 U.S. at 881-82; *see also* Pet. App. 90a.

In addition, as the court of appeals correctly held, COPA—like the CDA—imposes "community standards" on a medium that knows no geographical boundaries, and thus allows "any communication available to a nationwide audience [to] be judged by the standards of the community most likely to be offended by the message." *ACLU I*, 521 U.S. at 877-78; Pet. App. 27a, 29a.

Contrary to the government's argument, none of the differences between the two statutes are constitutionally significant. For example, the government stresses that COPA applies only to material communicated through the Web whereas the CDA applied to all forms of communication on the Internet. *See* Gov. Br. at 8-9. Yet the record shows that the volume and breadth of protected speech targeted by COPA—like the CDA—is staggering. *See* Stmt. of the Case, *supra* at 2-5, 8; Section I(A), *infra*.

Furthermore, the district court specifically found that COPA applies to millions of Web-based interactive messages. Because there is no way to screen individual messages in these fora, COPA would require age-screening for *all* of their millions of communications *regardless of whether they contain material prohibited by the statute*. *See* Pet. App. 79a, ¶58.

Likewise, although COPA purportedly restricts only speech provided "for commercial purposes," *see* Gov. Br. at 10, it applies to all speech provided for free on the Web by a commercial entity, not merely speech that proposes a commercial transaction. COPA sweeps in any individual or organization communicating with the objective of making a profit, whether by promoting and selling products over the Web or by selling space to advertisers or members. *See* Pet. App. 52a-53a, 63a-67a, ¶¶ 21-26. The government also makes much of the fact that COPA, unlike the CDA, tracks the "harmful to minors" standard this Court approved in *Miller v. California*, 413 U.S. 15 (1973), and *Ginsberg v. New York*, 390 U.S. 629 (1968). By definition, though, that standard is unconstitutional if applied to censor adult communications. *See, e.g.*, *Fabulous Assocs. v. Pennsylvania Pub. Util. Comm'n*, 693 F. Supp. 332, 335 (E.D. Pa. 1988) ("[I]t is not enough that the variable standard may be constitutional as applied to minors, since it is being applied as a restriction on adults' access to protected speech."), *aff'd*, 896 F.2d 780 (3d Cir. 1990).

Given the close parallels between the CDA and COPA as established by the record, the government itself concedes that COPA would prevent adults from receiving protected speech. *See* Gov. Br. at 39-42. Ultimately, its only argument is that because COPA is not *quite* as censorious as the CDA, it should be upheld. A law banning books does not become constitutional because it is re-written to remove only every *other* book on the shelves. Content-based bans

are "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and the government has the burden to prove that such laws are narrowly tailored to serve a compelling interest. *ACLU I*, 521 U.S. at 870, 874. As the record establishes, the government did not meet that burden in this case. Thus, the holdings of both the district court and the court of appeals are correct under *ACLU I*, and this Court should likewise affirm the preliminary injunction against COPA's criminal and civil penalties on protected speech.[4]

ARGUMENT

I. COPA IS CLEARLY OVERBROAD AND FAILS STRICT SCRUTINY

A. COPA Suppresses A Wide Range Of Speech Protected For Adults

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* Pet. App. 89a; *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 requires Web speakers to deny both minors and adults access to any speech that may be considered "harmful to minors." In striking down the CDA's prohibitions on transmitting indecency to minors by

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[4] The district court's issuance of a preliminary injunction against COPA should stand unless respondents can prove an "abuse of discretion." *Walters v. National Ass'n of Radiation*

means of the Internet, this Court held that while "we have repeatedly recognized the governmental interest in protecting children from harmful materials . . . that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Id.* at 875. COPA is similarly invalid because it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *Id.* at 874.

Even if this Court had not already decided the constitutionality of a substantially identical statute, COPA's civil and criminal penalties would be clearly unconstitutional under this Court's well-established precedents. In its attempt to deny minors access to certain speech, COPA criminalizes the communication of expression that is clearly protected by the Constitution for adults. The government may not justify the suppression of constitutionally-protected speech under the guise of protecting children. 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.* at 875 (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983) (internal quotation marks omitted)); *see also 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).[5] The Court has uniformly rejected such

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[5] *Cf. Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding restriction on the direct commercial sale to minors of material

attempts to "burn the house to roast the pig." *Butler*, 352 U.S. at 383.

This Court has also recently 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 Playboy*, 529 U.S. at 813 (invalidating law requiring cable television operators to scramble channels); *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2426 (2001) (invalidating tobacco advertising restrictions aimed at preventing children from viewing such advertising).

Just as in prior cases, the category of speech that COPA prohibits includes a wide range of speech that is unquestionably constitutionally protected for adults. *See ACLU I*, 521 U.S. at 874 ("'[s]exual expression which is . . . not obscene is protected by the First Amendment'") (quoting *Sable*, 492 U.S. at 126); *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 is full of examples that illustrate the breadth of the protected speech that COPA targets:

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deemed "harmful to minors" because it "does not bar the appellant from stocking the magazines and selling them" to

- ArtNet's Web site displays photographs from

> do you challenge the white cock you're sucking?" J.A. 753-57 (Tarver PI Exhs.).

Popular 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. Pet. App. 67a, ¶ 27. *See also* Amicus Curiae Brief on Behalf of American Society of Journalists & Authors, et al. While such content is appropriate for adults, there is no doubt that some communities would find it "harmful to minors."

The government contends that COPA is "directed primarily to commercial pornographers" and that its "principal effect . . . is to require those commercial pornographers to put their teasers behind age verification screens." Gov. Br. at 18. But the government itself argues that some of the plaintiffs' exhibits are illegal under COPA, *see* Gov. Br. at 37, even though none of the plaintiffs in this case are commercial pornographers or have "teasers." In fact, as the district court held, "[t]here is nothing in the text of COPA ... that limits its applicability to so-called commercial pornographers only." Pet. App. 52a. COPA also expressly covers "writing[s]," "recording[s]," and "article[s]," not just commercial pornographic images. 47 U.S.C. § 231(e)(6).

Although COPA is limited to communications made "for commercial purposes," on its face COPA applies to *any* Web site that, in the regular course of business, communicates any speech that includes any material that is harmful to minors. 47 U.S.C. § 231(a)(1); 47 U.S.C.

§ 231(e)(2)(B). The speaker is "engaged in the business" of making prohibited communications 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).

Instead of limiting its reach to commercial pornographers, COPA broadly applies to all speech on the Web—even speech provided for free—if the speaker is engaging in some business through which she merely hopes to make a profit through advertising or other means. Plaintiff BlackStripe, for example, provides Web users with a free Web-based forum to obtain and discuss information pertaining to same-gender-loving individuals of African descent, and is funded, in part, by selling space on the Web site to advertisers. *See* J.A. 75-76; *see also* J.A. 753-57 (BlackStripe PI Exhs.). Similarly, plaintiff OBGYN.net provides its medical-related content free to Web users and is funded through advertising and sponsorship. *See* J.A. 88, 716-27 (OBGYN.net PI Exhs.).

As the district court noted and the Third Circuit affirmed, "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.'" Pet. App. 52a (emphasis added). 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). 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." Pet. App. 52a (emphasis added). 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. COPA effectively criminalizes all Web sites that contain even a single example of content that may be harmful to minors, and the government's interpretation of the statute as applying only to commercial pornographers would deny any meaning to the statute's explicit wording.[6]

B. COPA's Affirmative Defenses Do Not Save The Statute, Because They Would Prevent Or Deter Adult Web Users From Accessing Protected Speech

Essentially conceding that COPA would be clearly unconstitutional without its affirmative defenses, the government argues that those defenses save the statute. The government ignores both the clear findings of the district court and this Court's holding in *ACLU I* that identical affirmative defenses were not sufficient to save an otherwise unconstitutional act. *See ACLU I*, 521 U.S. at 881-82; Pet. App. 89a-90a.

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6 COPA's definition of "harmful to minors" also requires material to be judged "as a whole." 47 U.S.C. § 231(e)(6)(C). It is unclear how to apply this standard to the Web, where speech by different content providers and on different computers around the world is seamlessly linked together. The government apparently concluded that some plaintiffs are liable based on single pages viewed in isolation from the Web sites as a whole. *See* Gov. Br. at 17.

The only way for a speaker who displays "harmful to minors" materials to avoid conviction under COPA is to invoke one of the Act's "affirmative defenses."[7] *See* 47 U.S.C. § 231(c)(1)(A). COPA provides three affirmative defenses to Web speakers 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* Pet. App. 70a-71a, ¶ 37.

The district court found, and the government does not dispute, that there is no "authority that will issue a digital certificate that verifies a user's age." *Id.* Further, there are "no other reasonable measures" available to restrict access to minors. *Id.* Thus, the uncontested evidence shows that the only technologies currently available for compliance with COPA are credit cards and adult access codes—precisely the same technologies considered by this Court in *ACLU I* and rejected as insufficient to save the statute.[8] Recognizing the weakness of the credit card

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7 COPA's criminal penalties would have a strong chilling effect even on those speakers who may have the ability to implement a defense. The defenses are affirmative defenses only, and "in no way shield[] a content provider from prosecution." *Shea v. Reno*, 930 F. Supp. 916, 944 (S.D.N.Y. 1996), *aff'd*, 521 U.S. 1113 (1997).

8 *Compare* 47 U.S.C. ¶ 231(c) ("It is an affirmative defense to prosecution under this section that 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;") *with ACLU I*, 521 U.S. at 861 (quoting CDA) ("It is a defense to prosecution under . . . this section that a person -- . . . (B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."). The only other affirmative

defense, the government has now essentially abandoned its prior reliance on it. In its brief to this Court, it relies almost entirely on the adult access code defense. That defense, however, suffers from the same defects as the credit card defense.

The evidence clearly establishes that either defense would require users to register and provide a credit card or other proof of identity before gaining access to restricted content. These defenses burden free speech, for at least five reasons discussed below:

- they deny access to all adults without credit cards;
- they require all interactive speech on the Web to be placed behind verification screens, even speech that is not "harmful to minors";
- they deter adults from accessing protected speech because they impose costs on content that would be free, eliminate privacy, and stigmatize content;
- they allow hostile users to drive up costs to speakers; and
- they impose financial burdens on speakers that will cause them to self-censor rather than incur those burdens.

First, credit card verification would categorically prevent all adults without credit cards from accessing protected speech. 47 U.S.C. ¶ 231(c)(1)(A); *see also ACLU I*, 521 U.S. at 856 (citing district court's finding that a credit card requirement "'would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material'"). Adult access services

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defense in the CDA was a good faith, reasonable action defense similar to the third defense in COPA.

generally require payment by credit card as well. *See* Pet. App. 76a, ¶ 51; J.A. 401 (Farmer Testimony).

Second, the mandatory use of credit cards or adult access codes would burden interactive speech on the Web that is not even targeted by the statute. The government'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." Pet. App. 79a, ¶ 58. Web-based interactive fora are inherently dynamic; for instance, PlanetOut's gay and lesbian users post messages that often include sexual content, and talk on Salon's discussion boards ranges daily from the racy to the mundane. Pet. App. 66a, ¶ 26; J.A. 361 (Talbot Testimony); *see also* Stmt. of the Case *supra* at 3-4. Yet COPA would impose screening requirements on *all* content in these interactive fora. As the district court found:

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

Pet. App. 90a (citation omitted and emphasis added). Plaintiffs' expert testified that these interactive fora are vital in attracting users to their Web sites. *See* J.A. 221 (Hoffman Testimony).

Third, as the district court found, "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." Pet. App. 89a. *See also* Pet. App. 65a-67a, ¶¶ 25-26, 89a; *ACLU I*, 521 U.S. at

an adult access code, provide a credit card number, or pay for content). 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). In *Denver Area*, this Court struck down a similar identification requirement because it would "further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel." 518 U.S. at 754.

The mandatory use of credit cards or adult access codes may also impose inhibiting financial costs on users. Contrary to its assertion, the government did not prove that credit card verification was feasible. Indeed, 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. Pet. App. 73a, ¶ 45. Without such a service, a Web speaker would have to charge the user's credit card for accessing the content. *See* J.A. 126, 129 (Laurila Testimony). In the context of the Web where the vast majority of speech is provided for free, *ACLU I*, 521 U.S. at 852; *see also* J.A. 220, any financial burden on users would further deter them from accessing protected speech. Pet. App. 66a, ¶ 26. *See also* Stmt. of the Case, *supra* at 8; J.A. 133-135, 138 (Laurila Testimony), 156 (Talbot Testimony).

Fourth, the use of a credit card may also require the Web speaker to pay a per-user fee. Thus, even if credit card companies agree to verify credit cards without charging the user a fee, the credit card company would charge the Web speaker $0.15 to $0.25 per authorization. *See* Pet. App. 73a, ¶ 45. Such per-authorization fees would allow users

offended by certain content to drive up costs to the Web speaker by repeatedly accessing restricted content. *See* J.A. 133 (Laurila Testimony).

Fifth, although the district court correctly held that 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," Pet. App. 88a, the court found that COPA's economic pressures would burden speech. 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 either defense 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* Pet. App. 71a, ¶ 39, 78a, ¶ 56. COPA would require some Web sites to reorganize and redesign literally thousands of files. *See* J.A. 158-59 (Talbot Testimony). 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* Pet. App. 77a, ¶ 54. In addition, even a single page of Web content could have some content prohibited under COPA and some that was not, making it difficult if not impossible to segregate such content. *See Id.* 77a-78a, ¶ 55. Moreover, content providers using COPA's credit card defense "would need to undertake several steps," *Id.* 72a, ¶ 41, with start-up costs ranging from

"approximately $300 . . . to thousands of dollars. . . ." *Id.* 72a, ¶ 42.

Web speakers are faced with two strong incentives to self-censor: financial burdens and the risk of criminal penalties. Because registration requirements would deter readers and thereby decrease advertising revenue, many Web sites would choose to self-censor rather than attempt to implement a burdensome registration scheme. J.A. 256 (Hoffman Testimony). As David Talbot, CEO of Salon Magazine, explained,

> 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 (Talbot Testimony). *See also* J.A. 330-31 (Barr Testimony) (CNET would choose to self-censor rather than impose registration scheme); J.A. 225-27 (Hoffman Testimony) (study found consumers will not register at Web sites); J.A. 343-44 (Tepper Testimony) (Sexual Health Network believes its traffic will stop and its Web site will cease to have value if barriers to access are put in place).

Similarly, in striking down the CDA this Court found that "[t]here is concern by commercial content providers that age verification requirements would decrease

advertising and revenue because advertisers depend on a demonstration that the sites are widely available and frequently visited." *ACLU I*, 521 U.S. at 857 n.23. The district court here thus correctly concluded that "the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users from accessing such materials and that the loss of users of such material may affect the speakers' economic ability to provide such communications." Pet. App. 89a.

This Court has routinely struck down such economic burdens on the exercise of protected speech. *See, e.g., Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."); *Erznoznik*, 422 U.S. at 217 (invalidating a statute that in effect required drive-in theater owners wishing to avoid prosecution either to restrict their movie offerings or construct expensive protective fencing).

Relying heavily on the adult access code defense, the government's brief overlooks all the evidence in the record that adult access codes burden speech. Adult access codes impose the burdens discussed above, and indeed are more likely to deter users in some circumstances. For example, users are reluctant to use adult access codes because they are associated with the pornography industry. Plaintiffs testified that their users would forego accessing their content rather than apply for adult access codes. J.A. 137-38 (Laurila Testimony); *see also* Stmt. of the Case, *supra* at 10-11; *Denver Area,* 518 U.S. at 754 (discussing fear of social stigma if persons are required to affirmatively request "patently offensive" materials). Adult access codes also impose monthly or yearly fees upon all users, even those who want to view only one Web site on one occasion. *See* Pet. App. 76a, ¶¶ 51-53*; see also Denver Area*, 518 U.S. at 754 (noting

restrictive effect of requirement that would not allow a user to select one "patently offensive" program to view).

C. COPA Is Not Narrowly Tailored To Advance The Government's Asserted Interest

COPA also fails strict scrutiny because it would not even advance the government's asserted interest. Even if the government has a compelling interest in protecting some minors from material that may be harmful, which it did not prove,[9] COPA is far from narrowly tailored to achieve that goal.[10]

In contrast, the district court identified effective and less restrictive alternatives to COPA's criminal penalties. *See* Pet. App. 93a-95a. The government's expert conceded that, unlike COPA, parental use of blocking software can prevent access to foreign sites, content on non-Web-based protocols, and material from non-commercial Web sites. *See* Pet. App. 81a-82a, ¶ 65, 94a. As the district court held, "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators." Pet. App. 94a. Although user-based blocking programs are not perfect, both because they fail to screen some inappropriate material and because they block some valuable Web sites, a voluntary decision by concerned parents to use these products for their children constitutes a far less restrictive alternative than COPA's imposition of criminal penalties for protected speech among adults. *See* Pet. App. 94a-95a; *see also ACLU I*, 521 U.S. at 879.

Congress itself has recognized the usefulness of user-based blocking software through 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

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> access to harmful materials. There are thousands of newsgroups and Internet relay chat channels on which anyone can access pornography; and children would still be able to obtain ready access to pornography from a myriad of overseas web sites.

Letter Dated October 5, 1998 from Department of Justice to Honorable Thomas Bliley, Chairman of House Committee on Commerce (Pls. Mem. of Law in Support of TRO, Ex. A) at 3.

that may assist the customer in limiting access to material that is harmful to minors." 47 U.S.C. § 230(d). Congress also established a Commission on Online Child Protection, when it enacted COPA, to study methods of reducing minors' access to harmful materials. 112 Stat. 2681-736. That Commission ultimately concluded that user-based alternatives were more effective and less restrictive than COPA. Comm. on Child Protection Report to Congress (Oct. 20, 2000), *available at* http://www.copacommission.org/report/COPAreport.pdf.

The government wrongly argues that the court of appeals' holding is flawed because it did not rely on the less restrictive alternatives to COPA identified by the district court. *See, e.g.*, Gov. Br. at 12-13. First, the court of appeals clearly affirmed the findings of the district court regarding the availability and effectiveness of user-based blocking software.[12] *See* Pet. App. 11a-13a. Second, though the court of appeals opined in dicta that voluntary alternatives could not constitute less restrictive alternatives because they were not government action, the court of appeals itself acknowledged that this Court had ruled to the contrary. *See* Pet. App. 15a n.16 (citing *Playboy*).

This Court has specifically relied on the ability of parents to block objectionable content as "less restrictive than [government] banning." *Playboy*, 529 U.S. at 815 (finding that requiring cable operators upon request by a subscriber to scramble or block any unwanted channel was

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12 The district court had also noted that the government could draft a narrower statute. *See* Pet. App. 94a-95a. Even if there were no less restrictive alternatives, though, it is clear that the government "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." *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir. 1988).

a less restrictive alternative than forcing operators to scramble channels as a default); *see also ACLU I*

aimed at minors into one that censors adults, the inability to verify the geographic location of Web users transforms COPA's "community standards" requirement into a national mandate of the most restrictive community's standards. The government does not attempt to challenge the long-standing doctrine prohibiting a national standard,[14] or the factual findings that inevitably led the court of appeals to conclude that COPA violates that doctrine. Rather, the government tries to limit the unconstitutional impact of community standards on the Web by relying on facts contradicted by the actual record and on a myopic view of the relevant case law. A brief historical review of the standard should inform the Court's analysis.

The "community standards" doctrine was first applied to state obscenity laws. In *Roth v. United States*, 354 U.S. 476, 489 (1957), this Court defined the obscenity test as whether "the average person, applying contemporary community standards, [finds that] the dominant theme of the material taken as a whole appeals to prurient interest." Following *Roth*, the justices disagreed about whether "community standards" should be local or national. *See A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Massachusetts*, 383 U.S. 413 (1966); *Jacobellis v. Ohio*, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting). The Court resolved the debate in *Miller v. California*, 413 U.S. 15 (1973), and articulated the local community standards doctrine that

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14 The broadcast medium is the *only* medium in which this Court has upheld a national standard for "patently offensive" content, defined by a federal administrative agency. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978). Here, COPA requires juries around the country, not a single federal agency, to determine what is "patently offensive." This Court specifically rejected the government's attempt to treat the Internet like broadcast. *ACLU I*, 521 U.S. at 866-67.

has governed for almost 30 years. *See id.* at 30-31.[15] In defining the permissible scope of speech regulation, this Court specifically adopted a *local* community standards test, noting that a national standard would not be "constitutionally sound." *Id.* at 32. "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 33. "[O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation." *Id.* at 30.

Shortly before *Miller*, this Court issued its only opinion to date regarding the constitutionality of a state statute that made it a crime to sell material directly to minors that was obscene as to minors, but not as to adults. *Ginsberg v. New York*, 390 U.S. 629 (1968). In lower court cases following *Ginsberg*, such statutes became known as variable obscenity or harmful-to-minors statutes. After the Court's articulation of the new obscenity test in *Miller*, state harmful-to-minors statutes were amended or interpreted to apply a local community standards test. *See, e.g.*, *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988).

B. The Facts Establish That COPA Unconstitutionally Imposes The Most Restri

The language denoting local community standards in COPA is modeled on *Ginsberg* and *Miller*. COPA criminalizes "prurient" material as judged by "the average person, applying *contemporary community standards*." *Miller*, 413 U.S. at 24 (citations omitted) (emphasis added). The impact of this standard on the Web is fundamentally different than its impact on other media. The government itself *stipulated* at the preliminary injunction hearing that "[o]nce a provider posts its content on the Internet and chooses to make it available to all, it generally cannot prevent that content from entering any geographic community." *See* J.A. 187, ¶ 41 (Joint Stipulations for the Preliminary Hearing); Pet. App. 62a, ¶ 18. The government saw no reason to re-litigate this quintessential feature of the Internet, which was clearly established in *ACLU I*, 521 U.S. at 853 (quoting district court). Unsurprisingly, it chose not to challenge the finding on appeal. Pet. App. 12a. Especially on appeal from a preliminary injunction, the government cannot now try to negate its stipulation and the district court findings by relying on unsupported facts not in the record. *See* Gov. Br. at 29 n.3.[16]

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16 The government cites two articles and the decision of a French trial court, *see* Gov. Br. at 29 n.3, but ignores all of the American courts that, after evidentiary hearings, have specifically found that online speakers cannot determine the geographic location of their readers. *See infra* at 39. In addition, the experts on which the French court relied have largely repudiated that court's conclusion. *See* Complaint For Declaratory Relief, *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Anti-Sémitisme* (N.D. Cal. Dec. 21, 2000) *available at* http://www.cdt.org/speech/international/0011221yahoo complaint.pdf, ¶¶ 22-24, 26-28, 31. Finally, the French court relied, in part, on the fact that most French Internet users have e-mail addresses that contain the designation ".fr," indicating that their account is based in France. *See* Interim Court Order, *La Ligue Contre Le Racisme Et L'Anti-Sémitisme v. Yahoo! Inc.* (T.G.I. Paris

Because Web speakers are without any means to limit access to their sites based on the geographic location of particular users, they must conform to the standards of the most conservative community or risk criminal prosecution when their speech is accessed in those communities. Plaintiffs testified that they had no way to prevent their material, which they believe is valuable, from reaching communities that might find it harmful to minors. *See, e.g.*, J.A. 110 (Laurila Testimony) ("we have no knowledge of who you are or where you're coming from or anything else"). In addition, the district court found that the burdens of segregating Web content could be substantial. Pet. App. 71a, ¶ 39, 78a, ¶ 56. If speakers were required to create and segregate different versions of content in order to conform to the varying standards of a multitude of communities throughout the United States, these burdens would increase exponentially. *See* Stmt. of the Case, *supra* at 10-11.

Based on the government's own stipulation and the testimony at the hearing, the Third Circuit thus correctly held that COPA must be enjoined because speakers could be jailed for providing content that is constitutionally protected in many communities:

> [T]o avoid liability under COPA, affected Web publishers would either need to severely censor their publications or implement an age or credit card verification system whereby any material that might be deemed harmful by the most puritan of communities in any state is shielded behind such a verification system. Shielding such vast amounts of material behind

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Nov. 20, 2000) English translation *available at* http://www.istf.org/archive/yahoo_france.html. No similar designation is given to distinguish users from specific U.S. states.

> verification systems would prevent access to protected material by any adult seventeen or over without the necessary age verification credentials. Moreover, it would completely bar access to those materials to all minors under seventeen—even if the material would not otherwise have been deemed "harmful" to them in their respective geographic communities.

Pet. App. 24a-25a; *see also id.* 29a.

The Third Circuit relied directly on *ACLU I*, in which this Court also found that Web speakers are unable to prevent their speech from reaching a particular geographic community. 521 U.S. at 853. Practically, "when the UCR/California Museum of Photography posts to its Web site nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore, and New York City, but also in Cincinnati, Mobile, or Beijing." *Id.* at 854 (quoting district court). The Court recognized in *ACLU I* that the CDA's use of community standards contributed to the statute's overbreadth, stating that "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Id.* at 877-78.

about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document

C. The Government Presented No Evidence That Community Standards Are "Reasonably Constant" Across America, And Such An Interpretation Would Not Save The Statute

Even Congress realized that "the applicability of community standards in the context of the Web is controversial." H.R. Rep. No. 105-775, at 27 (1998). In an attempt to sidestep this defect, the government relies on a purported Congressional finding to argue that the "harmful to minors" standard is "reasonably constant" across the United States.[17] *See* Gov. Br. at 36-38. But no semantic trick

communities. Thus, the preliminary injunction must be affirmed because COPA burdens a significant amount of protected speech even if standards are assumed to be "reasonably constant." But as the court of appeals correctly noted, "we have before us no evidence to suggest that adults *everywhere* in America would share the same standards for determining what is harmful to minors." Pet. App. 31a. Indeed, the government put on *no* evidence at trial to suggest that standards were constant.[18]

The record and the government's own position in this case illustrate that COPA would subject plaintiffs and other speakers to widely different community standards across the country. The government itself has been inconsistent in its interpretation of what speech meets the standard. The government explicitly assured the district court on at least two separate occasions that plaintiffs' materials are not harmful to minors.[19] However, despite these assertions, the government now suggests 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. Br. at 37. In contrast, Members of Congress who sponsored COPA have filed an amicus brief asserting that *all* of the plaintiffs' speech is

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18 The government also argues that the serious value prong (which is a national standard) creates a national floor, Gov. Br. at 34-35, and that "the legal limitations on what can be found to satisfy the first two prongs of the harmful-to-minors standard can be enforced by a reviewing court," Gov. Br. at 36. But these arguments applied in *Miller* and its progeny as well, and the Court nonetheless held that a nationwide standard for all three prongs would be defective.

19 *See* Closing Statement of Senior Trial Counsel Karen Stewart, January 26, 1999 at 253 ("plaintiffs' materials are not harmful to minors"); Testimony of Trial Attorney Rupa Bhattacharyya, January 27, 1999 at 39 ("defendant feels that the plaintiffs' materials are not harmful to minors").

protected. Brief of Amici Curiae Members of Congress, Senator John S. McCain et al. at 19. It is difficult to imagine how community standards can be "reasonably constant" across America when they are not even constant between the sponsors of COPA and the small group of lawyers defending it.

The plaintiffs also testified that while they believe their speech is valuable, some communities might find it harmful to minors. For example, Ernest Johnson of Artnet.com testified that Jock Sturges photographs were available on his site, but that Sturges photographs had been targeted as obscene in Alabama and Tennessee. S.L. 14 (Johnson Decl.). Tom Reilly of PlanetOut testified that in his experience small town community standards regarding discussions of sexual orientation were different than the standards of his lesbian and gay readers. J.A. 356-58 (Reilly Testimony).

Other indicators make it clear that communities disagree about what material is appropriate for minors -- just as they did when this Court first adopted local community standards in *Miller*. First, the state harmful-to-minors laws themselves--on which COPA was modeled--are not uniform in what material they proscribe. Some prohibit mere nudity if it is "patently offensive," while others prohibit only specifically defined sexual content. *Compare* D.C. Code Ann. § 22-2201(b) (WESTLAW 2000); Idaho Code §§ 18-1514, 1515 (WESTLAW 2000), *with* La. Rev. Stat. § 14:91.11. (WESTLAW 2000). Some prohibit mere display of harmful materials, while others prohibit only the direct sale of materials to others. *Compare* Ala. Code § 13A-12-200.5(2)(a) (WESTLAW 2001) *with* N.Y. Penal Law § 235.21.1 (McKinney 1999). At least one state has recently upheld a conviction for exposing a child to a photograph of "a woman with shirt and jacket open to the waist, without exposing her nipples," *State v. Stankus*, No. 95-2159-CR, 1997

WL 58727, at *1 (Wisc. App. Feb. 13, 1997); other states only prohibit fully-exposed breasts, S.C. Code Ann. §

0312302. Moreover, each year the American Library Association documents community-based attempts to ban books such as *The Catcher in the Rye*, by J.D. Salinger, and the *Harry Potter* books, by J.K. Rowling--books that are considered mainstream and required reading in other communities. *See The 100 Most Frequently Challenged Books of 1990-1999*, *available at* http://www.ala.org/bbooks/top100bannedbooks1999.html. All of these attempts, whether or not they rely on legal prohibitions, are based on presumed harm to minors. Thus, they all illustrate that attitudes about what is appropriate or harmful for minors

service restrictions. The number and range of providers is astronomically greater, and includes valuable information about sexual dysfunction, gay and lesbian resources, and art that may nevertheless be harmful to minors in some communities. *See* Pet. App. 52a-53a, 63a, ¶

subject [the publisher] to prosecution.'" Pet. App. 27a (citing *Pataki*, 969 F. Supp. at 183) (alterations in original).

Clearly unable to meet its actual burden of proving that COPA meets the strictest constitutional scrutiny, the government warns that affirming the Third Circuit's reasoning would render state harmful-to-minors laws "largely meaningless." *See* Gov. Br. at 25. But the government distorts the current state of the law. According to the Government's own tally, only half of the states even have harmful-to-minors laws that prohibit the display—rather than the direct sale—of such materials to minors. *See* Gov. Br., App. II. This Court has never upheld the constitutionality of these laws,[22] and some courts have recognized constitutional problems with their application even to the print medium.[23] To the extent these laws are valid in the print medium, COPA does nothing to prevent their application. In addition, any interest that Alabama, for example, has in its harmful-to-minors display law does not justify imposing COPA's prohibitions on each of the majority of states that has specifically rejected even a print display statute. Indeed, because of the unique qualities of the online medium, courts have uniformly rejected the application of state harmful-to-minors statutes to the Internet; the government conveniently ignores these cases.[24]

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22 The closest the Court came to deciding the constitutionality of such a statute was *Virginia v. American Booksellers*, in which it stated that the law could present "substantial constitutional questions" depending on its impact

See Cyberspace Communications v. Engler, No. 9902064, 2000 WL 1769592 (6th Cir. Nov. 15, 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999);

CONCLUSION

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