No. 00-1293

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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The Child Online Protection Act (COPA), 47 U.S.C. 231(a)(1) and (c)(1) (Supp. V 1999), requires Web businesses that regularly make profit-motivated harmful-to-minors communications to place such material behind age verification screens. COPA parallels state display laws that require local stores to place pornographic material that is harmful to minors behind blinder racks, in sealed wrappers, in opaque covers, or behind the counter. Courts of appeals and state courts have consistently upheld state display laws on the ground that they further the government's compelling interest in shielding minors from material that would impair their psychological and moral development, without imposing an unreasonable burden on adults who seek access to such material. COPA is constitutional for the same reason. Indeed, COPA's principal effect is merely to require commercial pornographers who already place much of their material behind age verification screens to place their pornographic teasers behind those screens as well.

The court of appeals' judgment invalidating COPA rests entirely on its determination that COPA's reliance on "community standards" violates the First Amendment. In fact,

however, COPA's reliance on the standards of the adult community as a whole serves as a valuable First Amendment safeguard: It helps to ensure that jurors will assess material based on the judgment of an average person, rather than on the personal reactions of an individual juror or a particularly sensitive person.

Respondents nonetheless argue (Br. 33-47) that COPA's reliance on community standards violates the First Amendment. They also argue (Br. 15-33) that COPA fails strict scrutiny. Both contentions are without merit.

I. COPA'S RELIANCE ON COMMUNITY STANDARDS DOES NOT VIOLATE THE FIRST AMENDMENT

A. COPA Constitutionally Adopts The Standards Of The Adult Community With Respect To What Is Harmful To Minors

Respondents contend (Br. 36-39) that because Web content cannot be limited to particular geographic areas, COPA effectively requires Web businesses to comply with the standards of the country's least tolerant locality. As a result, respondents argue, COPA requires Web businesses to place behind age verification screens material that is not harmful to minors in many communities. In fact, Web content can be limited to particular geographic areas, albeit at some cost.[1]

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[1] Web businesses can limit their material to particular geographic areas by limiting access to members and mailing membership cards to specific geographic areas. A new technology also permits a Web business to identify a Web visitor's geographic identity. Gov't Br. 29 n.3. Contrary to respondents' contention (Br. 36), the government did not stipulate otherwise. The government stipulated only 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." 1 C.A. App. 187 (emphasis added). Through the methods discussed above, a Web business can "choose" not to "make" its content "available to all." Respondents correctly point out that those methods for

Even accepting, arguendo, respondent's factual premise, COPA's reliance on community standards is constitutional.

1. Contrary to respondents' assertion (see *e.g.*, Br. 35, 40), COPA does not call for the application of "local community standards." Nor does COPA require the trier of fact to ascertain and apply the standards of the State in which a particular locality is situated. Cf. *Miller* v. *California*, 413 U.S. 15 (1973) (upholding California law providing for statewide standards). Instead, COPA requires jurors to assess material based on the community standards of the adult population as a whole with respect to what is harmful to minors, without a particular geographic specification. H. R. Rep. No. 775, 105th Cong., 2d Sess. (H. Rep. 775) 28 (1998). Under that approach, "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." *Hamling* v. *United States*, 418 U.S. 87, 104-105 (1974). A juror is not directed, however, to apply the standards of any "precise geographic area." *Id.* at 105.

Thus, under COPA, "community standards" is intended to refer not to the standards of a particular locality, but rather to emphasize that whether material appeals to the prurient interest and is patently offensive with respect to minors is to be judged from the perspective of adults in society at large, rather than particularly sensitive (or insensitive) adults. In *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974), the Court held that such an instruction complies with the First Amendment. The Court explained that "[a] State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller*, without further specification, as was done here, or it may choose to define the standards in

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geographic screening are not in the record, but they do not dispute their availability.

more precise geographic terms, as was done by California in *Miller*." *Ibid.* Because the application of COPA does not turn on local standards, there is no basis for holding COPA unconstitutional on its face because of a supposed variation in local standards.

2. Even though COPA does not adopt or focus the jury on the standards of a particular locality, it remains possible that different juries might reach different conclusions and that the situs of the jury (like other variables) could contribute to that result. But "[t]he mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged." *Miller*, 413 U.S. at 26 n.9.

There are, moreover, additional reasons in the present context to reject respondents' challenge based on speculation about the possibility of variation in local standards. First, Congress determined when it enacted COPA that community standards concerning what is "prurient" and "patently offensive" with respect to minors are likely to be "reasonably constant" throughout the United States. H. Rep. 775, at 25. See pp. 7-9, *infra* (discussing that determination in greater detail). Second, juries should be instructed to take into account the fact that the Web is a nationwide medium (see Gov't Br. 39), which should guard against the possibility that a particular jury might take too parochial a view of what is harmful to minors.

Respondents contend (Br. 40 n.17) that COPA's adoption of a standard drawn from the adult community as a whole without geographic specification—when coupled with an instruction that the jury take into account that the Web is a nationwide medium—in effect creates a "national standard," which respondents assert is prohibited by *Miller*. See Br. 34-35. That contention is erroneous for two reasons. First the *Miller* Court held that "[n]othing in the First Amendment *requires* that a jury must consider hypothetical and unascertainable 'national standards' when attempting to deter-

mine whether certain materials are obscene as a matter of fact." Br. 31-32 (emphasis added). *Miller* did not hold that the use of national standards would *violate* the First Amendment. See *Hamling*, 418 U.S. at 107-110 (affirming conviction based on jury determination applying national standard); *Smith* v. *United States*, 431 U.S. 291, 304 n.11 (1977) (reserving question whether Congress may mandate a national standard).

Second, COPA calls for the application of community standards without geographic specification, local *or* national. COPA therefore does not require a jury to evaluate material based on "hypothetical and unascertainable 'national standards.'" *Miller*, 413 U.S. at 31. The suggested jury instruction concerning the nature of the Web is not to the contrary; it simply instructs the jury, when evaluating material under the standards of the adult community with respect to what is harmful to minors, to take into account that the particular *medium* on which the material is displayed is national in scope.

3. To the extent that the situs of the jury might have some residual effect on the outcome in particular cases, that possibility does not render COPA facially unconstitutional. Web businesses that regularly display harmful material for profit take advantage of a nationwide market for their material. It is reasonable to require such businesses to make sure that their business activities do not harm minors in the areas of the country from which they seek to profit. Web businesses can easily satisfy that requirement by placing all harmful material behind an age verification screen.

COPA's regulation of obscenity on the Web illustrates the flaw in respondents' First Amendment theory. A Web business that makes harmful material available nationwide can reasonably be expected to consider the consequences of its action. A Web business may not justify displaying material that is obscene in one area of the country simply on the ground that it would not be found obscene in another. See

Reno v. *ACLU*, 521 U.S. 844, 883 (1997) (preserving application of the Communications Decency Act to obscene material on the Internet). Similarly, Web businesses do not have a First Amendment right to harm minors in some parts of the country simply because they are (by hypothesis) not harming minors in other parts.

This Court's decisions support the constitutionality of applying community standards to the Web. In *Hamling*, 418 U.S. at 106, the Court held that "[t]he fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit [their] materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." Likewise, in *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115, 125-126 (1989), the Court held that "[t]here is no constitutional barrier * * * to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others."

Respondents contend (Br. 44) that *Hamling* and *Sable* are distinguishable because "the phone and mail providers in those cases could control the distribution of controversial material in particular geographic communities." But Web businesses can also control the distribution of their material. See note 1, *supra*. More fundamentally, the holdings in *Hamling* and *Sable* did not depend on that factor. *Hamling* did not mention geographic control as an element in its analysis. Although *Sable* noted that Sable could control geographic distribution of its message at some cost, it held that, regardless of that factor, "Sable ultimately bears the burden of complying with the prohibition on obscene messages." 492 U.S. at 126. Respondents' effort to distinguish *Hamling* and *Sable* on factual grounds ignores the controlling legal analysis in those decisions. In any event, COPA does not call for the application of "local" standards as a legal matter, and there is no reason to anticipate significant geographic varia-

tion in the application of COPA as a practical matter. See pp., 7-9, *infra*.

Acceptance of respondents' view that community standards are unconstitutional as applied to the Web would also have an extraordinary consequence. As the court of appeals acknowledged, if Congress may not apply community standards to the Web, "there may be no other means by which harmful material on the Web may be constitutionally restricted." Pet. App. 3a. Thus, under respondent's First Amendment theory, even though Congress has a compelling interest in preventing harmful material from reaching minors, it may be powerless to adopt any effective measure to serve that compelling interest. We are not aware of any decision of this Court that has invalidated an Act of Congress that serves a compelling interest when there has been no effective alternative for furthering that interest.

B. Community Standards Concerning What Is Harmful To Minors Are Reasonably Constant Across The United States

Respondents contend (Br. 40-44) that there is no evidence supporting Congress's determination that the standards of the adult community concerning what is harmful to minors are reasonably constant in the country. Congress, however, reached a common-sense conclusion based on the kind of material that is subject to the requirements of the Act and the understanding of the American people possessed by its Members elected by the American people. Congress aimed COPA primarily at the conduct of commercial pornographers that display pornographic teasers to entice viewers to purchase other material on the site. H. Rep. 775, at 7, 10. Congress had ample reason to conclude that such material would be regarded as harmful to minors throughout the country. The government exhibits that are lodged with the Court (2 C.A. App. 758-812) vividly illustrate the nature of that material. Congress did not need to conduct empirical

studies in order to conclude that adults throughout the country would view such material as prurient and patently offensive with respect to minors. Respondents do not suggest that there are places in the country where a different conclusion would be reached.

Respondents instead argue (Br. 43-44) that communities have different attitudes about whether sex education, information on homosexuality, and books such as *The Catcher in the Rye* are suitable for minors. Communities may well differ on those issues. But COPA does not permit such differences to affect coverage under the statute. A crucial feature of COPA that respondents fail to address is that it expressly excludes from coverage material that, "taken as a whole," has "serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(C) (Supp. V 1999). Under COPA, the question whether material has serious value does not depend on community standards. *Reno* v. *ACLU*, 521 U.S. at 873; *Pope* v. *Illinois*, 481 U.S. 497, 500 (1987). Instead, the resolution of that issue depends on whether the material has serious value for a "legitimate minority" of older minors. *Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618, 624 (Va. 1988). For more than a decade, courts have enforced that legal limitation to exclude from state display laws books on sex education and controversial works such as *The Catcher in the Rye*. *Ibid.* (*The Facts Of Love* and *The New Our Bodies Ourselves* not covered by state display law despite graphic drawings of human anatomy and explicit yet informative discussions of sexual acts). Such material is similarly excluded as a matter of law from COPA. Thus, respondents' surveys do not undermine Congress's judgment that, with respect to the material to which COPA is addressed, community standards are "reasonably constant."

Respondents' reliance (Br. 42-43) on differences in state harmful-to-minors laws is also unpersuasive. As respondents note (Br. 42), some States prohibit only distribution of

material that is harmful to minors, while many others prohibit public display of such material as well. But that simply reflects a difference in enforcement strategies; it does not reflect any significant underlying difference in the category of material that communities throughout the country regard as prurient and patently offensive with respect to minors.

Respondents also note (Br. 42) that some States prohibit nudity that is patently offensive, while others prohibit specifically defined sexual content. Those definitions, however, may simply amount to different ways of describing the same basic content. In any event, as this Court has explained, the definitions of covered material in state law prohibitions are not necessarily embodiments of community standards; often they reflect only a State's enforcement priorities. *Smith*, 431 U.S. at 302-303, 306. The state law differences identified by respondents therefore do not affect the validity of Congress's judgment that community standards are reasonably constant throughout the Nation concerning what is prurient and patently offensive with respect to minors.

A review of respondents' sample exhibits (Br. 18-19) provides further support for Congress's judgment. Most of those exhibits are excluded from coverage as a matter of law by one or more of the three prongs of the harmful-to-minors standard. One of those exhibits contains photographs of abnormal sexual acts, 2 C.A. App. 710-713, and two others contain titillating and graphic first-person accounts of sexual experiences. *Id.* at 617-620, 745-748. If regularly displayed on the Web for profit, those exhibits would likely not be excluded from coverage as a matter of law. But there is no reason to believe that those exhibits would be viewed as appealing to prurient interest and patently offensive with respect to minors in some communities but not in others. Indeed, respondents' brief does not identify a single exhibit as to which coverage under COPA would depend on which community in the country evaluated the material.

II. RESPONDENTS' STRICT SCRUTINY ARGUMENTS ARE NOT RIPE FOR REVIEW

Respondents also contend (Br. 15-33) that COPA fails strict scrutiny. That issue is not ripe for review. The court of appeals based its judgment invalidating COPA entirely on its view that COPA's reliance on community standards violates the First Amendment. Pet. App. 21a. That court did not address whether COPA otherwise satisfies strict scrutiny. *Id.* at 21a n.19. The government's certiorari petition in this case similarly raised only the question whether COPA's reliance on community standards violates the First Amendment. Pet. I.

Unlike the court of appeals, the district court did address whether COPA satisfies strict scrutiny. But because proceedings in the district court were directed to respondents' request for a preliminary injunction, the court did so in a preliminary way. The district court characterized its findings as "provisional," Pet. App. 55a n.4, and it expressed its conclusions in tentative and highly qualified terms, *id.* at 53a (respondents' interpretation of COPA's coverage "is not unreasonable"); *id.* at 89a (adult verification screens "*may* deter users from accessing such materials" and "the loss of users of such material *may* affect the speakers' economic ability to provide such communications") (emphasis added); *id.* at 94a (blocking software "*may* be at least as successful as COPA would be in restricting minors' access to harmful material online") (emphasis added).

Because the court of appeals did not address whether COPA satisfies strict scrutiny, and the district court did so only in a preliminary way, that issue is not ripe for resolution by this Court. This Court should therefore reverse the court of appeals' judgment holding that COPA's reliance on community standards violates the First Amendment and remand for further proceedings on whether COPA satisfies strict scrutiny.

III. COPA SATISFIES STRICT SCRUTINY

Should the Court choose to address the issue, it should hold that COPA satisfies strict scrutiny. A law satisfies strict scrutiny if it is "narrowly tailored to promote a compelling Government interest." *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). COPA satisfies both prongs of that inquiry. This Court has repeatedly held that the government has a compelling interest in shielding minors from sexually explicit material that is harmful to them, even if it is not obscene by adult standards. *Reno* v. *ACLU*, 521 U.S. at 869; *Sable*, 492 U.S. at 126; *Ginsberg* v. *New York*, 390 U.S. 629, 639-640 (1968). Unlike the CDA invalidated in *Reno* v. *ACLU*, COPA is narrowly tailored to achieve that objective. See pp. 18-20, *infra* (discussing how COPA cures the specific problems with narrow tailoring that required invalidation of the CDA).

Respondents nevertheless argue that COPA is not narrowly tailored to achieve the government's compelling interest in protecting minors from material that is harmful to them. That argument is unpersuasive.[2]

A. COPA Applies To A Limited Category Of Material

Respondents first contend (Br. 13-14, 17-21) that "the volume and breadth of protected speech targeted by COPA—like the CDA—is staggering." In order to support that contention, respondents follow "the current fashion in First Amendment litigation." *Regan* v. *Time, Inc.*, 468 U.S. 641, 693 (1984) (opinion of Stevens, J., concurring in the

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[2] Although respondents do not dispute that the government has a compelling interest in protecting minors from the material covered by COPA, they assert (Br. 30) that the government did not "prove" that such material harms minors. This Court has repeatedly recognized, however, that exposure to such material harms the psychological and moral development of minors, *Reno* v. *ACLU*, 521 U.S. at 869; *Sable*, 492 U.S. at 126; *Ginsberg*, 390 U.S. at 639-640, and the record before Congress contains ample evidence confirming that conclusion. See H. Rep. 775, at 11. Further proof is not required.

judgment in part and dissenting in part). Instead of urging the Court to construe COPA narrowly in order to avoid serious constitutional questions, they urge the Court "to adopt the most confusing and constitutionally questionable interpretation of the statute that it could." *Ibid.* Indeed, respondents ignore key statutory language that sharply limits the scope of COPA's coverage, and thereby eliminates the very concerns respondents raise.

Respondents argue (Br. 18) that COPA covers material that conveys information about birth control, sexually transmitted diseases, sexual health, date rape, and homosexuality. Such material, however, has serious value for a legitimate minority of older minors. It is therefore excluded from COPA's coverage as a matter of law. See p. 8, *supra*. In arguing that COPA targets such material, respondents pointedly fail to discuss the serious value prong of the statute. See 47 U.S.C. 231(e)(6)(C) (Supp. V 1999).

Respondents similarly err in asserting (Br. 19) that COPA applies to the millions of communications in chat rooms and on bulletin boards on the Web. In fact, COPA applies only to those who regularly "make[]" harmful communications "for commercial purposes," 47 U.S.C. 231(a)(1) (Supp. V 1999), and a person "shall not be considered to make any communication for commercial purposes to the extent that such person is * * * engaged in the * * * hosting * * * of a communication made by another person, without selection or alteration of the content of the communication." 47 U.S.C. 231(b)(4) (Supp. V 1999). Those who merely "host" chat rooms and bulletin boards and do not "select" or "alter" the content of communications are therefore excluded from COPA's coverage. The persons who actually make harmful communications in chat rooms also are not covered, except in the unusual circumstance where they do so "for commercial purposes."

Equally without merit is respondents' contention (Br. 21) that a Web business is liable under COPA if it makes a single

harmful communication. COPA's obligations apply only to a person who makes harmful communications in the "*regular* course of such person's trade or business." 47 U.S.C. 231(e)(2)(B) (Supp. V 1999) (emphasis added). COPA therefore does not apply to those who make an isolated harmful communication.

Once COPA's textual limitations are taken into account, it is evident that the statute applies primarily to commercial pornographers, just as Congress intended. If COPA applies to a staggering amount of protected speech, it is only because there is a staggering amount of commercial pornography on the Web.

B. COPA Places A Modest Burden On Adult Access To Speech

Respondents also contend (Br. 15-16) that COPA requires Web sites to "deny" adults access to speech they have a constitutional right to receive. COPA, however, contains no such requirement. Instead, it simply requires Web sites that regularly display harmful material for profit to place that material behind an age verification screen. 47 U.S.C. 231(c)(1) (Supp. V 1999).

Respondents argue (Br. 21-30) that adult verification requirements impose unacceptable burdens on adult access to protected speech. That argument fails to take into account the modest burdens associated with Adult IDs. At the time of trial, one adult identification service—Adult Check—would set up an age verification service at no cost to the Web site, and adults could purchase an Adult ID for $16.95 per year. Pet. App. 75a-76a.

Respondents argue (Br. 24-26) that Adult IDs impose an unacceptable burden because adults must give identifying information to a third party in order to obtain them, deterring some adults who want to maintain their privacy. They also express concerns (Br. 26) about the costs of Adult IDs. Respondents vastly overstate the significance of those bur-

dens. At the time of trial, approximately three million people had a valid Adult Check ID. Pet. App. 76a. In light of the substantial and apparently growing use of Adult IDs, the reluctance of "some" to obtain them, *id* at 81a, does not render COPA unconstitutional.

Respondents' other objections to Adult IDs are even less persuasive. For example, respondents claim (Br. 23-24) that an Adult ID requirement would deny access to all adults without credit cards. The district court specifically found, however, that individuals who do not have credit cards can easily obtain an Adult ID by mailing a check and a copy of a driver's licence or passport to an adult verification service. Pet. App. 76a.[3]

Respondents contend (Br. 26-27) that users "offended by certain content" can "drive up" a Web site's costs "by repeatedly accessing restricted content." To the extent that problem is anything other than theoretical, however, it exists only when a Web site requires a viewer to use a credit card number to obtain access to screened content. Pet. App. 73a-74a. A Web site that requires a viewer to gain access with an Adult ID could not experience that problem because repeated use of an Adult ID does not impose costs on a Web operator. *Ibid.*

Respondents also claim (Br. 27) that the district court found that the costs of redesigning a Web site and segregating harmful from non-harmful content could be "prohibi-

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[3] Respondents are incorrect in asserting (Br. 24) that, in order to host chat rooms, Web sites would have to place both harmful and non-harmful material behind an age verification screen. It is true that there is no way to prevent minors from obtaining access to harmful content in a chat room without also placing non-harmful content in that chat room behind an age verification screen. Pet. App. 90a. But COPA does not require Web sites that host chat rooms to place either harmful or non-harmful content behind an age verification screen. As already discussed, (see p. 12, *supra*), COPA excludes from coverage those who merely host chat rooms. See 47 U.S.C. 231(a)(1) (Supp. V 1999).

tively expensive." The court made no such finding. Instead, the court found only that the extent of such costs would depend on a number of factors, Pet. App. 78a, that the cost of segregating new content was likely to be less expensive than the start-up costs, *ibid.*, and that Web sites that rely on advertising revenues may already have to segregate sexual content in order to meet the requirements of certain advertisers, *id.* at 57a. The court noted as well that respondents' expert did not view out-of-pocket costs as the real economic burden on content providers, *id.* at 80a, and that the government's financial planning expert concluded that compliance with COPA would not impose unreasonable out-of-pocket costs. *Id.* at 80a-81a.

COPA's adult screening requirement therefore effectively meets Congress's dual objectives: It prevents minors from obtaining access to harmful material without unduly burdening adult access to such material. Respondents apparently believe, however, that Congress may further its compelling interest in protecting minors from harmful material only if it can do so without imposing *any* burden, however modest, on adult access to speech. If that conception of the First Amendment were accurate, this Court could not have upheld the prohibition on sale of harmful material to minors at issue in *Ginsberg*. In order to enforce prohibitions on sale of harmful material to minors, local stores may ask some customers for a driver's license as proof of age. Under respondents' theory, that would impose an impermissible burden on adults who do not want to give out identifying information to a third party.

Respondents' First Amendment theory would also invalidate state display laws. Those laws impose some burden on adults who seek access to material that is harmful to minors. Some adults may steer clear of blinder racks for fear of public embarrassment; others may be disinclined to purchase magazines in sealed wrappers because they cannot peruse them first. Stores displaying harmful-to-minors material

had to incur the start-up costs of segregating such material, and they continue to incur the ongoing costs of segregating new material. And to the extent these costs are passed on to adult customers, the display laws impose a financial burden on those customers as well.

Respondents do not deny that their First Amendment theory would invalidate state display laws. Instead, they point out (Br. 46) that this Court has never upheld the constitutionality of display laws, and that some courts have expressed the view that they raise serious constitutional questions. Courts of appeals and state courts of highest resort, however, have consistently upheld state display laws on the ground that such laws further the government's compelling interest in protecting minors from harmful material without imposing an undue burden on adult access to protected speech. Gov't Br. 24-25, 42-43 & n.5 (collecting cases). COPA is constitutional for the same reason.[4]

C. No Alternative To COPA Would Be As Effective

Respondents contend (Br. 30-33) that COPA's screening requirement is not narrowly tailored because the use of blocking software by parents is less restrictive and at least as effective. As applied to commercial Web sites in the United States that regularly display harmful material, however, COPA's screening requirement is far more effective. COPA *compels* Web publishers to take steps to prevent minors from obtaining access to material that is harmful to them. Under respondents' alternative, no entity is required to install filtering software. Blocking software also has several additional built-in limitations. It both blocks certain material that is not harmful to minors and fails to screen out certain material that is harmful to minors. Pet. App. 94a. It can be defeated by a computer-savvy minor. *Id.* at 82a. It

[4] Respondents rely (Br. 16-17) on several cases holding that the government may not limit adults to material that is suitable for minors. Because COPA does not have that effect, those cases are inapposite.

can be expensive for parents to purchase. H. Rep. No. 775, at 19. And it must be updated periodically at an additional cost. *Id.* at 20. COPA's screening requirement does not suffer from those built-in deficiencies.[5]

As respondents note (Br. 30), COPA's screening requirement will not protect minors from all sources of harmful material. It does not apply to non-Web protocols on the Internet and non-commercial Web sites, and its application to foreign Web sites is problematic. Congress reasonably concluded, however, that domestic commercial Web businesses display an enormous quantity of material that is harmful to minors. H. Rep. No. 775, at 7. Congress was entitled to address that serious problem with the most effective means available.

Congress also did not ignore the dangers posed by other sources of harmful material. As to those sources, it concluded that blocking software constitutes the most practical solution currently available. The reason is that non-Web protocols lack the technology for age screening; enforcement of a screening requirement against foreign Web sites would create serious enforcement difficulties; and *Reno* v. *ACLU*, 521 U.S. at 876-877 raised questions about the constitutionality of imposing compliance costs on non-commercial Web sites. In contrast, despite its limitations, blocking software can be used to address each of those sources of harmful material to some extent. For that reason, in a separate provision in COPA, Congress directed Internet service providers to notify customers of the availability of blocking software. 47 U.S.C. 230(d) (Supp. V 1999); see also H. Rep. No.

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[5] Respondents' reliance (Br. 32-33) on *Playboy* is misplaced. There, the alternative identified by the Court *required* cable operators to block undesired channels upon the request of the subscriber, *at no cost* to the subscriber. 529 U.S. at 803-804. Moreover, once the operator blocked the channel, it would *entirely* eliminate the problem of signal bleed *without affecting content on other channels*. Respondents' alternative does not share any of the those features.

775, at 19 (noting that blocking software may be effective for many parents).

COPA's screening requirement and the use of blocking software by parents are thus not mutually exclusive alternatives. Both can work together to prevent minors from being exposed to harmful material, and Congress envisioned that they would. COPA's screening requirement applies where it is far more effective, and blocking software is available to address the sources of harmful material that COPA's screening requirement cannot. In those circumstances, any debate about which is more effective operating alone is beside the point. The relevant question is whether Congress's entire scheme—which envisions COPA's screening requirement and blocking software operating together—is significantly more effective in preventing access to harmful material than the use of blocking software alone. Because the two together are significantly more effective in protecting minors from harmful material than blocking software alone, respondents' blocking-only alternative is not nearly as effective as the scheme that Congress enacted.[6]

D. COPA Cures The Flaws In The CDA

Finally, respondents argue (Br. 12-15) that there is no relevant distinction between COPA and the CDA. But Congress carefully considered the concerns about narrow tailoring that this Court identified in *Reno* v. *ACLU* and successfully addressed them.

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[6] The district court's tentative and highly qualified conclusion that blocking software "may be at least as successful as COPA would be in restricting minors' access to harmful material" (Pet. App. 94a) addresses the wrong question. The critical points are that COPA's screening requirement is far more effective where it applies, and that, as applied to all sources of harmful content on the Internet, COPA's screening requirement and blocking software are together far more effective than blocking software operating alone. At the very least, "substantial evidence" supports Congress's determination on that issue. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195-196 (1997).

First, the CDA applied to non-Web Internet communications where age screening was not feasible. *Reno* v. *ACLU*, 521 U.S. at 851, 876-877. In contrast, COPA applies only to Web communications, 47 U.S.C. 231(a)(1) (Supp. V 1999), where age screening is feasible. H. Rep. No. 775, at 13-14. Second, the CDA applied to communications made for non-commercial purposes and therefore included large categories of speakers who could not easily afford the costs of age screening. 521 U.S. at 856, 877. In contrast, COPA applies only to Web businesses that regularly make harmful communications on the Web for profit, 47 U.S.C. 231(a)(1) and 231(e)(2)(B) (Supp. V 1999)—a group that can readily afford the costs of compliance. H. Rep. No. 775, at 13-15.

Third, because the CDA applied to materials that were "indecent" or "patently offensive," without defining either term and without making clear whether the "indecent" and "patently offensive" determinations should be made with respect to adults or minors, it raised serious vagueness concerns. *Reno* v. *ACLU*, 521 U.S. at 870-874, 877. In contrast, COPA identifies the particular sexual activities and anatomical features depiction of which may be found to be "patently offensive," and makes clear that the determination whether material containing such depictions is "patently offensive" shall be made "with respect to minors." 47 U.S.C. 231(a)(1) and (e)(6)(B) (Supp. V 1999). Fourth, because the CDA did not require that the covered material "appeal to the prurient interest" or lack "serious educational or other value," it covered vast amounts of non-pornographic materials having serious value. 521 U.S. at 873, 877-878. In contrast, COPA contains all three prongs of the *Ginsberg* test, and therefore applies to the kind of pornographic material that has been behind blinder racks and in sealed wrappers for more than a decade.

Fifth, the CDA made it unlawful for parents to permit their children to use the family computer to view covered material. *Reno* v. *ACLU*, 521 U.S. at 865, 878. In contrast,

COPA contains no such intrusion on the parent-child relationship. H. Rep. 775, at 15. Sixth, the CDA defined a minor as any person under 18 years of age, thereby including some persons in their first year of college. 521 U.S. at 865-866, 878. In contrast, COPA defines "minor" as "any person under 17 years of age," 47 U.S.C. 231(e)(7) (Supp. V 1999), thereby allowing more mature minors to have access to the material at issue.

Respondents argue (Br. 13) that none of those differences is "constitutionally significant." That argument ignores this Court's decision in *Reno* v. *ACLU*. In explaining why the CDA failed strict scrutiny, the Court relied upon each of the factors noted above. 521 U.S. at 865-866, 870-874, 877-879. Congress responded directly to the Court's decision in *Reno* v. *ACLU* by tailoring COPA in a manner that addresses the very concerns that the Court identified.

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For the foregoing reasons, as well as those stated in the government's opening brief, the court of appeals' judgment should be reversed, and the case should be remanded to that court for further proceedings.

Respectfully submitted.

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