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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the criminal 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 Book Stores; 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; Internet Content Coalition; 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.

CORPORATE DISCLOSURE STATEMENT

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

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

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

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

4) Approximately 17% of the total number of shares issued and outstanding, including warrants and options, of respondent PlanetOut Corporation is owned by AOL Time Warner Inc.

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

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

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

STATEMENT OF THE CASE

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

A. The District Court's Decision And Factual Findings

On February 1, 1999, following an evidentiary hearing, the district court preliminarily enjoined enforcement of COPA,

which imposes severe criminal and civil sanctions on persons who "by means of the World Wide Web, make [] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. § 231(a)(1)-(3). The district court's decision was supported by detailed findings of fact based on six days of testimony, numerous affidavits and extensive documentary evidence submitted by both sides. The findings describe the character and the dimensions of the Internet, the nature of the speech at risk under the law, the inability to verify the age and geographic location of Internet users and the effect of the law on speakers and adult readers. The majority of factual findings and conclusions mirror those found in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) ("*ACLU I*"), in which this Court struck down the very similar Communications Decency Act (the "CDA"), 47 U.S.C. § 223, and held that "it would be prohibitively expensive for . . . some commercial[] speakers who have Web sites to verify that their users are adults. These limitations must inevitably curtail a significant amount of adult communication on the Internet." *Id*. at 877 (citation omitted); *see also* Appendix to Petition for a Writ of Certiorari ("App.") 80a, 81a, 89a. Petitioner has not disputed the district court's findings either on appeal or in this petition, and some of those findings were derived from a joint stipulation submitted by the parties. *See* App. 55a-82a. Based on this record, the district court held that respondents were likely to succeed on their claim that COPA violates the First Amendment because "COPA imposes a burden on speech that is protected for adults," App. 90a, and because the government could not prove that COPA is the "least restrictive means available to achieve the goal of restricting the access of minors to [harmful to minors] material," App. 93a.

1. Respondents And Their Speech Affected By COPA

Respondents include a diverse range of individuals, entities, and organizations, ranging from "new media" online magazines to long-established booksellers and large media companies. All respondents use the World Wide Web (the "Web") to provide information on a variety of subjects, including sexually oriented issues that they fear could be construed as "harmful to minors." *See* App. 63a-67a, ¶¶ 21, 24-26.

Respondents and their users post, read and respond to content on the Web including visual art and poetry; information about obstetrics, gynecology, and sexual health; books and photographs; online magazines; and resources designed for gays and lesbians. *See* App. 63a, ¶ 21. For example, Dr. Mitchell Tepper operates the Sexual Health Network Web site, which provides easy access to information about sexuality geared toward individuals with disabilities, including advice on sexual surrogacy and how to experience sexual pleasure. *See* App. 65a, ¶ 25. Salon Magazine is a leading online magazine featuring articles on current events, the arts, politics and sexuality. Salon publishes a regular column entitled "Sexpert Opinion" by author and sex therapist Susie Bright. *See* Court of Appeals Joint Appendix ("J.A.") 139-40, 617-41. Several respondents host Web-based discussion groups and chat rooms that allow readers to converse on various subjects. *See* App. 63a, ¶ 22.

Like the vast majority of speakers on the Web, respondents provide virtually all of their online information for free. *See* App. 63a, ¶ 23. Like traditional newspapers and magazines, they earn advertising revenues by virtue of their speech. They are thus engaged in speech "for commercial purposes" within the meaning of COPA, because they communicate with the objective of making a profit. *See* App. 68a-69a, ¶ 33; 47 U.S.C. § 231(e)(2)(B). Although certain respondents are large,

well-known Web publishers, others are start-up operations run by single individuals. *See, e.g.*, App. 65a; J.A. 139-40.

2. The Impact Of COPA On Communication On The Web

Currently, approximately one third of the 3.5 million sites on the Web are commercial within the meaning of COPA in that their operators "intend to make a profit." App. 67a, ¶ 27. Because "[t]he best way to stimulate user traffic on a Web site is to offer some content for free to users . . . virtually all Web sites offer at least some free content." App. 69a, ¶ 34. The "vast majority of information . . . on the Web . . . is provided to users for free." App. 63a, ¶ 23. It is generally not possible for a Web speaker to verify the age or geographic location of a person accessing the speaker's content. *See* App. 62a, ¶ 18; App. 89a.

COPA provides three affirmative defenses to Web site operators who provide content deemed "harmful to minors": (1) requiring the use of a credit card, debit account, adult access code, or adult personal identification number; (2) accepting a digital certificate that verifies age; or (3) any other reasonable measures feasible under available technology. *See* App. 70a-71a, ¶ 37; App. 111a. The district court found, and petitioner does not dispute, that there is no "authority that will issue a digital certificate that verifies a user's age." App. 70a-71a, ¶ 37. Further, there are "no other reasonable measures" available to restrict access to minors. *Id*. Thus, the uncontested evidence showed that the only technologies currently available for compliance with COPA are online credit cards and adult access codes. Either option would require users to register and provide a credit card or other proof of identity before gaining access to restricted content. *Id*.

The essential problem with either option, as the district court found, is that requiring Web users to register or pay before accessing a site would deter adult users from accessing that site,

thus impermissibly burdening First Amendment rights. *See* App. 65a-67a, ¶¶ 25-26; 89a. Because almost all content on the Web is available without the need to register and provide personal information, Web users are reluctant to provide such information to Web sites. *See* App. 63a, ¶ 23; 69a, ¶ 35; 70a, ¶ 36. Users "will only reveal credit card information at the time they want to purchase a product or service." App. 70a, ¶ 36. For this reason, Web sites that have required registration or payment before granting access "have not been successful." *Id.*

Respondents testified that any mandatory registration would drive away their users. *See* J.A. 330-31, 344, 367-68, 370. 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.

In addition, to utilize COPA's credit card defense, a content provider "would need to undertake several steps," App. 72a, ¶ 41, with start-up costs ranging from "approximately $300 . . . to thousands of dollars. . . ." App. 72a, ¶ 42. The district court found that "it was not clear from the conflicting testimony" whether credit card verification services will authorize or verify a credit card number in the absence of a financial transaction. App. 73a, ¶ 45. Without such a service, a content provider would have to charge the user's credit card for accessing the content. *See* J.A. 126, 129. Even if this service were available, the credit card company would charge the content provider $0.15 to $0.25 per authorization. *See* App. 73a, ¶ 45. Such per-authorization fees would allow users hostile to certain content to drive up costs to the provider by repeatedly accessing restricted content. *See* J.A. 133.

Petitioner's own expert testified that "the only way to comply with COPA regarding potentially harmful to minors

materials in chat rooms and bulletin boards is to require that a credit card screen or adult verification be placed before granting access to all users (adults and minors) to such fora." App. 79a, ¶ 58. Web-based interactive fora are inherently dynamic, and there is no way to prohibit access to some materials "and still allow unblocked access to the remaining content for adults and minors, even if most of the content in the fora was not harmful to minors." *Id.* Respondents testified that these interactive fora are important in attracting users to their Web sites. *See* J.A. 221.

Finally, COPA's credit card and adult access defenses would require speakers to redesign their Web sites in order to restrict only "harmful to minors" content. The district court found that this could be prohibitively expensive, and, in some cases, would require respondents to shield even some materials not "harmful to minors" behind age verification screens. As the district court recognized, the technological requirements for implementing credit card or adult access code verification to comply with COPA could be substantial – depending on the amount of content on a Web site, the amount of content that may be "harmful to minors," the degree to which a Web site is organized into files and directories, the degree to which "harmful to minors" material is currently segregated into a particular file or directory and the level of expertise of the Web site operator. *See* App. 71a, ¶ 39; App. 78a, ¶ 56. COPA would require some Web sites to reorganize and redesign literally millions of files. *See* J.A. 158-59. A content provider also would have to reorganize individual files and pages in order to restrict only content that could be "harmful to minors". *See* App. 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* App. 77a-78a, ¶ 55.

In sum, the district court concluded that "the implementation of credit cards 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." App. 89a.

3. User-Based Filtering Programs

In contrast to the burden imposed by COPA, user-based filtering software constitutes a less restrictive and more effective alternative. As the district court found, COPA does not even reach a substantial portion of material posted on the Web that may be "harmful to minors." COPA does not restrict the wide range of "harmful to minors" materials provided noncommercially on the Web, and through non-Web protocols on the Internet such as newsgroups and non-Web chat rooms. *See* App. 93a. In addition, at least forty percent of Web content originates abroad, and this material may be accessed by minors as easily as content that originates locally. *See* App. 62a, ¶ 20. In contrast, even the government's expert conceded that user-based blocking software can block these materials, in addition to blocking Web-based commercial materials. *See* App. 81a-82a, ¶ 65. Thus, even recognizing the flaws of user-based blocking software, it is at least equally effective and less restrictive than COPA's criminal penalties.

B. The Court Of Appeals' Ruling

On appeal, the United States Court of Appeals for the Third Circuit upheld the district court's ruling that COPA violates the First Amendment, *see* App. 3a, and specifically accepted the district court's factual findings, *see* App. 12a.

The court of appeals affirmed on other grounds and did not reach issues addressed by the district court. *See* App. 21a, n.19. The court of appeals did not reject the district court's rationale, but rather held that "because the standard by which COPA gauges whether material is 'harmful to minors' is based on identifying 'contemporary community standards[,]' the inability of Web publishers to restrict access to their Web sites

based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." App. 3a.

SUMMARY OF THE ARGUMENT

Like the CDA, which this Court unanimously struck down in *ACLU I*, COPA threatens protected speech with criminal sanctions and effectively suppresses a large amount of speech that adults have a constitutional right to communicate and receive on the Web. 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 regulations, this Court has imposed the highest level of constitutional scrutiny on content-based infringements of Internet speech. *ACLU I*, 521 U.S. at 868, 870, 885. COPA, like the CDA, fails this scrutiny.

COPA's criminal penalties apply to millions of commercial content providers whose communications on the Web "include[] any material that is harmful to minors" – even a single description or image on a Web page. Respondents' threatened speech includes, for example, Andres Serrano photographs, sexually explicit poetry, interactive chats educating disabled persons on how to experience sexual pleasure, news stories about the Monica Lewinsky episode and an online radio show for gays and lesbians called "Dr. Ruthless." *See* J.A. 606-07, 634-37, 656, 672-79, 709-13. COPA violates the First Amendment because there is still no effective way to prevent minors from obtaining prohibited speech without also deterring and burdening access by adults. *See ACLU I*, 521 U.S. at 876-77; App. 89a, 95a. In addition, COPA would force online speakers to abide by the standards of the most conservative community for determining what is "harmful to minors." *See ACLU I*, 521 U.S. at 877-78; App. 29a. Because COPA suffers from the same fundamental defects

that led the Court to strike down the CDA, this case does not merit the Court's review.

REASONS FOR DENYING THE WRIT

I. BECAUSE COPA CONTAINS THE SAME DEFECTS AS THE CDA, WHICH THIS COURT HAS ALREADY FOUND UNCONSTITUTIONAL, THIS CASE DOES NOT MERIT REVIEW

A. COPA Contains The Same Defects That Caused This Court To Hold That The CDA Was Unconstitutional

COPA suffers from the very same fundamental defects that caused this Court to strike down the CDA as unconstitutional. 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" and are therefore unconstitutionally overbroad. *ACLU I*, 521 U.S. at 874. Petitioner has not identified a Circuit split or any other "compelling reason[]," Sup. Ct. R. 10, why this Court should revisit these same issues just four years later.

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; App. 95a. Both apply to speech that is constitutionally protected for adults. Both effectively prevent adults from accessing 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; App. 89a, 95a. In addition, because both laws impose "community standards" on a medium that knows no geographical boundaries, both laws allow "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; App. 29a.

This Court has repeatedly held that content-based regulations, such as the relevant provisions of the CDA and COPA, are subject to strict scrutiny and are presumptively unconstitutional. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 391 (1992). As the Court explained in *ACLU I*, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to this [Internet] medium." 521 U.S. at 870. Accordingly, such regulations must be justified by a compelling governmental interest and be narrowly tailored to effectuate that interest, *i.e.*, there must be no less restrictive alternative to achieve that compelling interest. *See id.* at 874 ("Th[e] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

In *ACLU I*, this Court applied strict scrutiny and held that the CDA was unconstitutional because it was not narrowly tailored and would suppress non-obscene speech that this Court has found constitutionally protected for adults. *See id.* ("[s]exual expression which is indecent but not obscene is protected by the First Amendment") (quoting *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989)). The Court emphasized, among other facts, the district court's findings that "at the time of trial existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults" and that "[a]s a practical matter . . . it would be prohibitively expensive for noncommercial—as well as some commercial—speakers who have Web sites to verify that their users are adults." *ACLU I*, 521 U.S. at 876-77.

COPA suffers from these same defects. There is still no way for a speaker to prevent minors from obtaining access to its Web communications without deterring adult users. *See* App. 89a-90a, 95a. Accordingly, both statutes effectively force speakers to withhold their speech from adults as well as minors.

COPA's affirmative defenses, which are nearly identical to defenses found insufficient in the CDA, do not solve this problem. The district court's undisputed findings establish that it is as true today as when this Court reviewed the CDA that there is no way to verify age in interactive fora without restricting access to all speech. *See infra* § II(A). It is still prohibitively expensive for respondents to use the only technologically feasible method for verifying age. *See infra* § II(B). Finally, COPA – like the CDA – improperly relies on "community standards" to define the ambit of its reach. *See ACLU I*, 521 U.S. at 877-78; *see also infra* § III.

COPA thus suffers from the same fundamental overbreadth that rendered the CDA invalid. By sweeping in material that is unquestionably protected for adults, COPA, like the CDA, impermissibly "'burn[s] the house to roast the pig.'" *ACLU I*, 521 U.S. at 882 (quoting *Sable*, 492 U.S. at 127).

B. None Of The Alleged Differences Between COPA And The CDA Raise Any Novel Issues Warranting This Court's Review

Petitioner's efforts to avoid the clear implications of this Court's decision in *ACLU I* by attempting to distinguish COPA from the CDA, *see* Petition for a Writ of Certiorari ("Pet.") 6-8, 15-18, are unavailing. None of the differences between the two statutes have any constitutional significance.

For example, petitioner stresses that COPA applies only to material communicated through the Web whereas the CDA applied to all forms of communication on the Internet. *See* Pet. 6. But there is no question that COPA (like the CDA) bans a staggering amount of constitutionally protected communications between adults. Furthermore, many interactive fora such as chat rooms and discussion groups have now become Web-based. *See* App. 59a, ¶ 9. COPA applies to these millions of communications, effectively banning protected

speech in them because there is no way to determine the age of users. *See* App. 79a, ¶ 58.[1]

Likewise, although COPA purportedly restricts only speech provided "for commercial purposes," *see* Pet. 7, it effectively covers any 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.[2] COPA's restrictions thus include speech that is clearly subject to the highest level of First Amendment protection, such as poems, artwork and articles in Web magazines. *See* App. 52a-53a. The fact that the speakers may ultimately profit from their communications is constitutionally irrelevant. Indeed, any theory that the level of constitutional protection afforded to speech depends upon whether the speaker has a "commercial

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[1] Although COPA, unlike the CDA, at least attempts to track 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), this flaw in the CDA was not the basis for the Court's holding in *ACLU I*; rather, the Court found the CDA unconstitutional because, like COPA, it censored communications protected by the Constitution for adults.

[2] COPA applies broadly on its face 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(e)(2)(B). The district court noted the broad scope of COPA, stating: "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,' and defines a speaker that is engaged in the business as one who makes a communication 'that *includes any material* that is harmful to minors . . . as a regular course of such person's trade or business (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income).'" App. 52a. (emphasis in original).

purpose" would reverse longstanding precedents protecting communications such as newspaper articles and literary works. *See New York Times v. Sullivan*, 376 U.S. 254 (1964).

II. EVEN IF THIS COURT HAD NOT ALREADY RULED THAT AN ESSENTIALLY IDENTI-CAL STATUTE IS UNCONSTITUTIONAL, REVIEW WOULD BE UNNECESSARY BECAUSE COPA IS CLEARLY OVERBROAD

A. The Inability To Verify Age On The Web Renders COPA Overbroad

Even if this Court had not already decided the constitutionality of a substantially identical statute, review would be unwarranted here because COPA's criminal penalties on protected speech are clearly unconstitutional under this Court's well-established precedent. *See, e.g., Sable*, 492 U.S. at 131 (invalidating a conviction for distribution of indecent publications); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (striking down a ban on mail advertisements for contraceptives); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975) (striking down a statute that criminalized showing of certain movie content at drive-in theaters); *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957) (invalidating a conviction for distribution of indecent publications).

As noted above, an inherent characteristic of the Web is that there is essentially no way to tell whether a Web user is a minor or an adult. Thus, it is not technologically possible for speakers on the Web to verify the age of a recipient who accesses their communications online. *See* App. 89a. There is no effective method for a sender to prevent minors from obtaining access to its communications on the Web without also deterring adults from accessing its communications. *See* App. 89a – 90a, 95a.

In addition, COPA requires Web-based interactive chat rooms and discussion groups to restrict speech that is not even covered by the statute. "[T]he uncontroverted evidence

showed that there is no way to restrict the access of minors to harmful materials in chat rooms and discussion groups…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." App. 90a (citation omitted).

COPA's threat of prosecution, and burden on protected speech, violate the First Amendment, and are far more onerous than many speech restrictions struck down by this Court. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (striking down law requiring cable operators to scramble sexually oriented programming); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (invalidating statute requiring cable operators to block certain cable channels).

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

COPA provides affirmative defenses for "good faith" efforts to restrict access by minors to material that is "harmful to minors," such as by requiring the use of a credit card or adult access code. *See* 47 U.S.C. § 231(c)(1)(A). However, as the district court noted, "the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter [adult] users from accessing such materials." App. 89a. If Web providers utilize either COPA's adult access code or credit card defenses, Web users would be required to provide identifying information, perhaps to an untrusted third-party Web site, before accessing protected speech. *See* J.A. 379. As a result, COPA will deter adults from accessing restricted content because Web users are simply unwilling to provide identifying information in order to gain access to content. *See* App. 89a-90a; J.A. 330-31, 344, 367-68, 370

(customers would simply forgo accessing respondents' material entirely if forced to apply for an adult access code, provide a credit card number, or pay for content).

For example, although PlanetOut allows users to register voluntarily to receive free benefits, "less than 10% of the users to [the] site have registered." App. 66a, ¶ 26. Tom Rielly of PlanetOut testified that "the traffic to a competitor's site which had placed its entire content behind a credit card wall and charged users $10 per month only grew to 10,000 total [members]." App. 66a, ¶ 26. By contrast, PlanetOut has 350,000 members and over two million total users have accessed the PlanetOut Web site. *See* J.A. 354-55, 368; *see also* J.A. 110-11, 134-35. David Talbot, CEO of Salon Magazine, testified that Salon Magazine does not charge for a subscription because "the people who use the Web are not inclined to pay for it." J.A. 144. Similarly, this Court found in examining the CDA that credit card and adult access code requirements would unconstitutionally inhibit adult Web browsers. *See ACLU I*, 521 U.S. at 857 n.23 ("There is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password.") (quoting district court).

Furthermore, COPA's threat of criminal penalties and economic disincentives will cause Web speakers to self-censor. Speakers who want to communicate "harmful to minors" materials to adults are forced by COPA into the Hobson's choice of risking prosecution or implementing costly defenses. As the district court held, the result is certain to be widespread self-censorship. *See* App. 90a ("[C]ontent providers may feel an economic disincentive to engage in communications that are or may be considered to be harmful to minors and thus, may self-censor the content of their sites."). This Court has routinely struck down 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).

Moreover, although the financial cost to content providers of implementing COPA's defenses contributes to COPA's burden on speech, 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 [respondents.]" App. 88a. By providing economic disincentives for Web speakers to engage in certain online communications, COPA will cause speakers to self-censor speech that is constitutionally protected. Similarly, in striking down the CDA, this Court noted that the prohibitively high economic burden of age verification "must inevitably curtail a significant amount of adult communication on the Internet." *ACLU I*, 521 U.S. at 877.

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

COPA also fails strict scrutiny because it will not even advance the government's asserted state interest. Under strict (and even intermediate) scrutiny, a law "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). COPA does not satisfy this test. Despite its prohibitions, it does not prevent minors from gaining access to "harmful to minors" material on foreign Web sites, on non-commercial sites, and via non-Web-based protocols. *See* App. 93a. This major flaw "demonstrates the problems this statute has with efficaciously meeting its goal." App. 93a. In fact, former Attorney General

Janet Reno herself recognized this flaw of COPA. In a letter sent to Congress before COPA passed, the Attorney General stated:

> Such a diversion [of law enforcement resources] would be particularly ill-advised in light of the uncertainty concerning whether the COPA would have a material effect in limiting minors' 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.

Furthermore, the district court held that there are less restrictive alternatives to COPA. *See* App. 93a-95a. For example, parental use of blocking software is both less restrictive and more effective than COPA. Such software blocks foreign sites and content on non-Web-based protocols, as well as material from amateur or non-commercial Web sites. *See* App. 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." 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 ACLU I*, 521 U.S. at 879.

Congress itself has recognized the usefulness of such 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 that may assist the customer in limiting access to material that is harmful to minors." 47 U.S.C. § 230(d). This Court, moreover, 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 a less restrictive alternative than forcing operators to scramble channels as a default)*; see also Denver Area*, 518 U.S. at 759-60 (informational requirements and user-based blocking are more narrowly tailored than speaker-based schemes as a means of limiting minors' access to indecent material on cable television).[3]

[3] *Playboy* resolves the Third Circuit's question regarding whether a parent's decision to use blocking software can constitute a less restrictive alternative. App. 15a n.16. It is also important to note that the Third Circuit *did not* reject, nor did the government challenge on appeal, the district court's factual finding that blocking software was more effective at achieving the government's interest.

III. REVIEW IS ALSO UNNECESSARY BECAUSE THE COURT OF APPEALS CORRECTLY HELD THAT COPA UNCON-STITUTIONALLY REQUIRES SPEAKERS ON THE WEB TO ABIDE BY THE STANDARDS OF THE MOST RESTRICTIVE COMMUNITY OR RISK CRIMINAL PROSECUTION

A. The Court Of Appeals' Reasoning Is Correct Under *Miller* And Its Progeny

Relying on the clear rulings of this Court, the court of appeals held that COPA is unconstitutionally overbroad because it subjects Web speakers across the nation to the most restrictive community's standards for what is "harmful to minors."[4] Just as the inability under COPA to verify age on the Web effectively criminalizes protected communication between 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, or the factual findings that inevitably led the court of appeals to conclude that COPA violates that doctrine. Because this Court recently reaffirmed that doctrine in *ACLU I*, and because COPA is clearly unconstitutional for the other reasons discussed above, there is no reason for the Court to review this case.

In *Miller v. California*, 413 U.S. 15 (1973), this Court articulated the community standards doctrine that has governed

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[4] Respondents alleged in their complaint that COPA is unconstitutionally vague because it fails to define the relevant community that would establish the standard for what is "harmful to minors" on the global Web. *See* Complaint ¶¶ 26, 83, 200. Thus, despite the government's assertion to the contrary, *see* Pet. 10, this argument was not raised for the first time by the court of appeals.

for almost 30 years.[5] In defining the constitutionally permissible scope of speech regulation, this Court specifically adopted a *local* community standards test, and rejected the imposition of a national standard.[6] "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.

The language of COPA is modeled on *Miller* and attempts to impose a local community standard; it criminalizes "prurient" material as judged by "the average person, applying contemporary community standards." *Id*. at 24 (citations omitted). But the nature of the Internet effectively transforms that standard into a de facto national standard based on the most conservative community. As the district court found, Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users. *See* App. 62a, ¶ 18. The government did not challenge this factual finding on appeal, *see* App. 12a; to the

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[5] The *Miller* test is "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24. Though *Miller* involved the standards for judging obscene material, the local community standards test has also been applied to "harmful to minors" material. *See, e.g*., *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988).

[6] The prior obscenity test set out in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Massachusetts*, 383 U.S. 413 (1966), had been interpreted to impose a national standard, which the Court in *Miller* specifically rejected in favor of requiring a local standard. *See Miller*, 413 U.S. at 30-31.

contrary, it stipulated to it at the preliminary injunction hearing. *See* Joint Stipulations for the Preliminary Injunction Hearing ¶ 41 ("Once 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."). In *ACLU I*, this Court affirmed precisely the same fact. 521 U.S. at 853 (quoting district court). Practically, then, "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).

Many other lower courts have also found that the Web is not geographically constrained. *See, e.g.*, *American Library Ass'n v. Pataki*, 969 F. Supp. 160, 166-67, 171 (S.D.N.Y. 1997); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Cyberspace Communications, Inc. v. Engler*, No. 99-2064, 2000 WL 1769592 (6th Cir. Nov. 15, 2000), *aff'g*, 55 F. Supp. 2d 737 (E.D. Mich. 1999); *PSINet v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000).

Given these undisputed facts, the court of appeals correctly ruled that COPA is overbroad 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 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.

App. 24a-25a. Because speakers would be forced to conform their speech to the standards of the most restrictive communities, COPA's use of community standards deprives adults and minors of speech that they have a constitutional right to access in their own communities. *See* App. 29a.

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, petitioner relies on a purported Congressional finding to argue that the "harmful to minors" standard is reasonably constant across the United States. *See* Pet. 20-21. 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." App. 31a. Indeed, the government put on no evidence at trial to suggest that standards were constant, and "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *see also Sable*, 492 U.S. at 129.[7]

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[7] The government also argues that the serious value prong (which is a national standard) creates a national floor, and that "a reviewing court may also enforce substantive limitations on what may be found to be 'patently offensive' with respect to minors." Pet. 22. 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.

This Court has already recognized the constitutional implications of the inability of online speakers to prevent their speech from entering a particular community. In *ACLU I*, the Court stated that "the 'community standards' criterion as applied to the Internet means that any communication available to a nation wide audience will be judged by the standards of the community most likely to be offended by the message." 521 U.S. at 877-78. Thus, in addition to being consistent with *Miller* and its progeny, the Third Circuit's ruling relies on this Court's reasoning in *ACLU I* and a growing body of jurisprudence that flows from it. *See Pataki, supra; Johnson, supra; Engler, supra; Chapman, supra*.

B. The Third Circuit's Reasoning Is Fully Consistent With *Hamling* And *Sable*

The government argues that subjecting the same speaker to varying standards is not unusual or unconstitutional, citing *Hamling v. United States*, 418 U.S. 87 (1974), and *Sable, supra*. *See* Pet. 12, 18, 19. As the court of appeals held, however, those cases are easily distinguishable from the present case. *See* App. 26a. *Sable* and *Hamling* involved the regulation of the actual sale of pornography by phone and through the mail, respectively. In both instances, the services were provided only to paid subscribers, and providers could simply refuse to send the material to subscribers living in more conservative geographic communities. Unlike Web speakers, then, the phone and mail providers in those cases could control the distribution of controversial material with respect to the geographic communities into which they released it. *See* App. 26a; *see also Sable*, 492 U.S. at 125-26; *Hamling*, 418 U.S. at 106. In addition, in contrast to the phone and mail services, the vast majority of speech affected by COPA is communicated free of charge on the Web, includes valuable information about sexual dysfunction, gay and lesbian resources, and art, and could be found "harmful" in some communities and valuable – even life saving – in others. *See* App. 63a, ¶¶ 21, 23.

This Court has recognized that each medium of expression is unique, and "must be assessed for First Amendment purposes by standards suited to it." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *see also Playboy*, 529 U.S. at 813. In contrast to speakers using other media, Web speakers cannot restrict access to their speech based on the geographic location of their users. *See* App. 26a. "'[A]n Internet user cannot foreclose access to . . . work from certain states or send differing versions of . . . communication[s] to different jurisdictions. . . . The Internet user has no ability to bypass any particular state.'" App. 26a-27a (citing *Pataki*, 969 F. Supp. at 183). Given the unique features of the Web, COPA forces Web speakers to either comply with the most stringent standard or "'[entirely] forego Internet communication of the message that might or might not subject [the publisher] to prosecution.'" App. 27a (citing *Pataki*, 969 F. Supp. at 183). The court of appeals thus correctly held that COPA's reliance on local community standards, while workable in other media, unconstitutionally restricts adults from communicating and accessing protected speech on the Web.

CONCLUSION

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

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