No. 03-218

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General
BARBARA L. HERWIG
CHARLES W. SCARBOROUGH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Child Online Protection Act violates the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioner is John Ashcroft, Attorney General of the United States. 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, Internet Content Coalition, OBGYN.net, Philadelphia Gay News, Planetout Corporation, Powell's Bookstore, Riotgrrl, Salon Internet, Inc., and West Stock, Inc.

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The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-66a) is reported at 322 F.3d 240. An earlier opinion of the court of appeals (App., *infra*, 67a-105a) is reported at 217 F.3d 162. The opinion of the district court (App., *infra*, 106a-166a) is reported at 31 F. Supp. 2d 473. The opinion of the district court granting a temporary restraining order (App., *infra*, 167a-180a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2003. A petition for rehearing was denied on May 13, 2003 (App., *infra*, 181a-182a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The pertinent provisions of the Child Online Protection Act are reprinted in an appendix to this petition. App., *infra*, 183a-191a.

STATEMENT

1. a. This case involves the scope of Congress's power to protect minors from the harmful effects of sexually explicit material on the Internet. Congress first sought to address that serious problem through the enactment of Section 502 of the Communications Decency Act of 1996 (CDA). See Pub. L. No. 104-104, Tit. V, 110 Stat. 133. The CDA prohibited the knowing transmission of "indecent" messages over the Internet to persons under the age of 18, 47 U.S.C. 223(b), as well as the display of "patently offensive" sexually explicit messages in a manner available to those under 18 years of age. 47 U.S.C. 223(d). The CDA provided a defense to prosecution to persons who had "taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" to covered communications. 47 U.S.C. 223(e)(5).

In *Reno* v. *ACLU*, 521 U.S. 844 (1997), the Court held that the CDA's regulation of "indecent" and "patently offensive" speech violated the First Amendment. The

Court reaffirmed that the government has a "'compelling interest in protecting the physical and psychological well-being of minors which extend[s] to shielding them from indecent messages that are not obscene by adult standards." *Id.* at 869. It concluded, however, that the government had failed to demonstrate that the CDA was the least restrictive alternative available to further that compelling interest. *Id.* at 879.

b. Congress reexamined the problem of children's access to sexually explicit material on the Internet in light of this Court's decision in *Reno* v. *ACLU*. See *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet*: *Hearing Before the Subcomm. on Telecomm., Trade and Consumer Prot. of the House Comm. on Commerce*, 105th Cong., 2d Sess. (1998); see S. Rep. No. 225, 105th Cong., 2d Sess. 8 (1998). Following legislative hearings, *ibid.*, Congress enacted, and the President signed into law, the Child Online Protection Act (COPA), Pub. L. No. 105-277, Div. C, Tit. XIV, §§ 1401-1406, 112 Stat. 2681-736 to 2681-741 (47 U.S.C. 231, 231 note).

COPA authorizes the imposition of criminal and civil penalties on any person who "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes 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). A person communicates "for commercial purposes" only if he "is engaged in the business of making such communications," 47 U.S.C. 231(e)(2)(A), and a person is engaged in the business of making such communications only if he "devotes time, attention, or labor" to making harmful-to-minors communications "as a regular course of [his] trade or business, with the objective of earning

a profit as a result of such activities." 47 U.S.C. 231(e)(2)(B).

COPA defines "material that is harmful to minors" as "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind" that is "obscene" or that

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. 231(e)(6).

COPA's definition of non-obscene material that is "harmful to minors" parallels the three-part "harmful to minors" standard this Court approved in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), except that it has been modified to take into account the greater flexibility permitted by *Miller* v. *California*, 413 U.S. 15 (1973). Compare 47 U.S.C. 231(e)(6), with *Ginsberg*, 390 U.S. at 632-633, and *Miller*, 413 U.S. at 24; see H.R. Rep. No. 775, 105th Cong., 2d Sess. 13, 27-28 (1998). COPA's definition also tracks the standard used in state laws that prohibit the public display of magazines or other materials that are harmful to minors and that require

that such materials be placed behind a blinder rack, in a sealed wrapper, or in an opaque cover. *Id.* at 13.

COPA provides "an affirmative defense to prosecution" if a person, "in good faith, has restricted access by minors to material that is harmful to minors." 47 U.S.C. 231(c)(1). A person qualifies for that affirmative defense by (A) "requiring use of a credit card, debit account, adult access code, or adult personal identification number," (B) "accepting a digital certificate that verifies age," or (C) taking "any other reasonable measures that are feasible under available technology." 47 U.S.C. 231(c)(1).

c. In crafting COPA, Congress sought to "address[] the specific concerns raised by" this Court when it invalidated the CDA. See H.R. Rep. No. 775, *supra*, at 12; see also S. Rep. No. 225, *supra*, at 2. First, the CDA applied to communications through e-mail, newsgroups, and chat rooms, and age screening was found not to be technologically feasible for those forms of communication. *Reno* v. *ACLU*, 521 U.S. at 851, 876-877. In contrast, COPA applies only to material posted on the World Wide Web, 47 U.S.C. 231(a)(1), where age screening is both technologically feasible and affordable. H.R. Rep. No. 775, *supra*, at 13-14.

Second, the CDA prohibited the display or transmittal of materials that were "indecent" or "patently offensive," without defining those terms, and the CDA did not indicate whether the "indecent" and "patently offensive" determinations "should be made with respect to minors or the population as a whole." *Reno* v. *ACLU*, 521 U.S. at 871 & n.37, 873, 877. COPA, by contrast, identifies the particular types of sexually explicit depictions, descriptions, or representations that may be considered patently offensive, and it is specifically

limited to material that is "patently offensive with respect to minors." 47 U.S.C. 231(e)(6)(B).

Third, because the CDA did not require that covered material appeal to the prurient interest or lack serious value for minors, it covered vast amounts of non-pornographic material having serious value. *Reno* v. *ACLU*, 521 U.S. at 873, 877-878. In contrast, COPA applies only to material that is designed to appeal to the prurient interest of minors and that, "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(A) and (C).

Fourth, the CDA applied to nonprofit entities and to individuals posting messages on their own computers. It therefore included categories of speakers who might not be able to afford the cost of age screening. *Reno* v. *ACLU*, 521 U.S. at 856, 865, 877. In contrast, COPA applies only to persons who seek to profit from placing harmful-to-minors material on the Web as a regular course of their business. 47 U.S.C. 231(a)(1) and (e)(2). Such persons, Congress determined, can afford the costs of compliance. H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 6.[1]

d. Congress enacted legislative findings that explain the basis for COPA. Congress found that the "widespread availability of the Internet" continues to "present[] opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control." 47 U.S.C. 231 note (Finding 1). Congress further determined that

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[1] COPA also reduces the age of minority from under age 18 to under age 17 and makes clear that parents do not violate the Act when they permit their minor children to use the family computer to view material covered by the Act. See 47 U.S.C. 231(e)(7); H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 6; *Reno* v. *ACLU*, 521 U.S. at 865-866, 878.

"the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest." 47 U.S.C. 231 note (Finding 2). Congress noted that "the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation." 47 U.S.C. 231 note (Finding 3). It found, however, that "such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web." *Ibid.* Congress concluded that "a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest." 47 U.S.C. 231 note (Finding 4).

2. Before COPA became effective, a number of entities and individuals who maintain or seek access to Web sites filed suit in the United States District Court for the Eastern District of Pennsylvania, seeking to invalidate COPA. Respondents alleged that COPA violates the First and Fifth Amendments to the Constitution, and they sought to enjoin its enforcement. App., *infra*, 114a-115a. The district court entered a temporary restraining order prohibiting the government from enforcing the Act. *Id.* at 178a-180a. The district court later entered a preliminary injunction preventing enforcement of the Act, reasoning that COPA likely violates the First Amendment. *Id.* at 164a-166a.

Many of the district court's findings support COPA's constitutionality. The district court found that pornographic material is widely available on the Web and that minors can readily obtain access to it. App., *infra*, 156a. The court also found that readily available adult identification systems enable Web publishers to pre-

vent minors from obtaining access to harmful materials while still offering such material to adults. The court found, for example, that Web publishers can place harmful material behind screens that allow access to the material only when the user provides a valid credit card number. *Id.* at 138a-140a. The court also noted that one company, Adult Check, provides (at no cost to the Web publisher) a script that can be placed anywhere the publisher wishes to prevent access by minors. *Id.* at 141a. An adult user who comes across such a screen may click on a link to the Adult Check site and immediately purchase an adult personal identification (adult ID), return to the original site, and use the ID to obtain access to the site. *Id.* at 141a-142a. The court cited testimony that approximately three million people possess a valid Adult Check ID, and 46,000 Web sites accept them. *Id.* at 142a. The court also found that Web businesses can segregate the harmful material from their sites behind age verification screens, leaving other material on the site to be viewed by all users. *Id.* at 138a, 143a.

Despite those findings, the district court determined that respondents were likely to show that COPA imposes an impermissible burden on speech that is protected for adults. App., *infra*, 156a. In support of that conclusion, the court found only that respondents were likely to establish at trial that the placement of adult screens in front of material that is harmful to minors "may deter" some users from seeking access to such materials and that the loss of users "may affect" some Web posters' economic ability to provide such communications. *Id.* at 155a.

The district court also concluded that the voluntary use of blocking software might be "at least as successful as COPA" in restricting minors' access to harmful

material without imposing the same burden on constitutionally protected speech. App., *infra*, 160a. The court acknowledged that software blocks access to some sites that contain no harmful material, and that it permits access to some sites that contain such material. *Id.* at 148a, 160a. The court also noted that "[i]t is possible that a computer-savvy minor with some patience would be able to defeat the blocking device," and that "a minor's access to the Web is not restricted if [that minor] accesses the Web from an unblocked computer." *Id.* at 148a. The court found it more significant, however, that software can block material on foreign Web sites and material outside the Web, and that some minors may be able to obtain access to credit cards and adult IDs. *Id.* at 148a, 159a.

The court of appeals affirmed on a different ground. App., *infra*, 67a-105a. It held that COPA's reliance on "community standards" to identify material that is harmful to minors renders COPA facially unconstitutional, because it effectively requires persons who display material on the Web to comply with the community standards of the least tolerant community. *Id.* at 69a.

3. This Court vacated and remanded for further proceedings. *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002). In a judgment supported by several opinions, the Court held that "COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." *Id.* at 585.

In a plurality opinion, Justice Thomas, joined by the Chief Justice and Justice Scalia, concluded that "[b]ecause Congress has narrowed the range of content restricted by COPA in a manner analogous to [the] definition of obscenity" set forth in *Miller* v. *California*,

413 U.S. 15 (1973), "any variance caused by the statute's reliance on community standards is not substantial enough to violate the First Amendment." 535 U.S. at 584-585.

Justice O'Connor concurred in part and concurred in the judgment. 535 U.S. at 586-589. She agreed with the plurality that "even under local community standards, the variation between the most and least restrictive communities is not so great with respect to the narrow category of speech covered by COPA as to, alone, render the statute substantially overbroad." *Id.* at 586. She nonetheless concluded that COPA should be interpreted to incorporate a "national standard." *Id.* at 587.

Justice Breyer also concurred in part and concurred in the judgment. 535 U.S. at 589-591. He concluded that Congress intended the term community standards to refer to a national standard, *id.* at 590, and that any regional variations in the application of that standard "are not, from the perspective of the First Amendment, problematic." *Id.* at 591.

Justice Kennedy, joined by Justice Souter and Justice Ginsburg, concurred in the judgment. 535 U.S. at 591-602. They concluded that it cannot be known "whether variation in community standards renders the Act substantially overbroad without first assessing the extent of the speech covered and the variations in community standards with respect to that speech." *Id.* at 597.[2]

4. On remand, the court of appeals once again affirmed the district court's grant of a preliminary injunc-

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[2] Justice Stevens dissented. 535 U.S. at 602-612. He concluded that COPA's use of community standards to identify material harmful to minors renders the statute facially unconstitutional. *Ibid.*

tion. App., *infra*, 1a-66a. Based on a series of considerations, the court held that COPA violates the First Amendment. *Id.* at 19a-49a.

The court first held that COPA's requirement that material be considered "as a whole" to determine whether it appeals to the prurient interest is not narrowly tailored to serve the government's compelling interest in protecting minors from the covered material. The court noted that, under this Court's obscenity decisions, the First Amendment requires material to be considered "in context" in deciding whether it appeals to the prurient interest. App., *infra*, 21a-22a. The court interpreted COPA to preclude such a contextual assessment. The court reasoned that, because COPA describes harmful material as "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind," 47 U.S.C. 231(e)(6), COPA's "as a whole" requirement actually "mandates evaluation of an exhibit on the Internet in isolation, rather than in context." App., *infra*, 22a.

The court next concluded that COPA's "serious value" prong lacks sufficient precision. The court reasoned that, because COPA defines "minor" as "any person under 17 years of age," 47 U.S.C. 231(e)(7), Web publishers cannot know which minors should be considered in deciding whether material has serious value for minors. App., *infra*, 24a. The court rejected the government's argument that the question under COPA is whether material has serious value for a legitimate minority of normal older adolescents. *Ibid.* The court acknowledged that, before COPA's enactment, state display laws with similar language had been construed to incorporate that standard or a similar one, *id.* at 25a-26a n.16, but it concluded that Congress did not intend to incorporate that standard into COPA. *Id.* at 25a-27a.

The court also concluded that even if COPA incorporates the normal older adolescent standard, it still would not be "tailored narrowly enough to satisfy the First Amendment's requirements." *Id.* at 28a.

The court of appeals also held that COPA's limitation to communications made "for commercial purposes," 47 U.S.C. 231(a)(1), does not sufficiently narrow COPA's reach. App., *infra*, 28a. The court criticized COPA's "commercial purposes" limitation on the ground that it includes businesses that post harmful-to-minors material, even if they do not post such material "as the principal part of their business," and even if they seek to derive profit from the material through the sale of "advertising space" on the Web site rather than through the sale of the material itself. *Id.* at 29a. The court rejected the government's reliance on COPA's definition of commercial purposes, which limits the reach of COPA to businesses that seek to profit from harmful-to-minors material "as a regular course" of their business. 47 U.S.C. 231(e)(2)(A) and (B). The court stated that the "regular course" requirement does not "place any limitations on the amount, or the proportion, of a Web publisher's posted content that constitutes [harmful] material." App., *infra*, 31a.

The court of appeals further held that while COPA affords an affirmative defense to businesses that use credit cards or adult IDs to prevent minors from obtaining access to harmful material, those methods of compliance unconstitutionally burden adult access to protected speech. App., *infra*, 32a-37a. The court reasoned that "COPA will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is

sensitive or controversial." *Id.* at 35a. The court also regarded COPA's affirmative defenses as deficient because, while they furnish protection against conviction, they "do not provide the Web publishers with assurances of freedom from prosecution." *Id.* at 36a-37a.

For the reasons given by the district court, the court of appeals held that filtering software "may be substantially less restrictive than COPA in achieving COPA's objective of preventing a minor's access to harmful material." App., *infra*, 47a. The court concluded that "[t]he existence of less restrictive alternatives renders COPA unconstitutional under strict scrutiny." *Id.* at 48a.

Relying on the same considerations that led it to conclude COPA is not narrowly tailored, the court of appeals held that COPA is substantially overbroad. App., *infra*, 49a-54a. The court further concluded that COPA's reliance on community standards "exacerbates" those "constitutional problems." *Id.* at 58a. Relying on the same considerations that led it to conclude that COPA's definition of "minors" is not narrowly tailored, the court invalidated that definition as unconstitutionally vague. *Id.* at 55a n.37.

Finally, the court concluded that it had no authority to attempt to sever COPA's asserted invalid applications from its valid applications. App., *infra*, 59a. The court therefore affirmed the district court's preliminary injunction against any enforcement of COPA. *Id.* at 60a.

REASONS FOR GRANTING THE PETITION

For the second time, the court of appeals has held that the Child Online Protection Act violates the First Amendment. The court's decision prevents the government from enforcing COPA against anyone under any

circumstances and leaves minors unprotected from the harmful effects of the enormous amount of pornography on the World Wide Web. The court's decision is also incorrect. COPA is narrowly tailored to further the government's compelling interest in shielding minors from the harmful effects of pornography on the Web and is neither substantially overbroad nor vague. In concluding otherwise, the court of appeals misinterpreted key terms in COPA and misapplied established First Amendment principles. Review by this Court is therefore warranted.

I. THE COURT OF APPEALS HAS INVALIDATED AN ACT OF CONGRESS

The court of appeals has again invalidated the Act of Congress that was carefully crafted to further the compelling interest in protecting minors from the harmful effects of pornography on the Web. Relying on general and tentative district court findings at the preliminary injunction stage, the court of appeals held without qualification that COPA's harmful-to-minors standard, its commercial purposes limitation, and its affirmative defenses "are not narrowly tailored to achieve the Government's compelling interest in protecting minors from harmful material and therefore fail the strict scrutiny test." App., *infra*, 19a. It held that "COPA does not employ the 'least restrictive means' to effect the Government's compelling interest in protecting minors." *Id.* at 38a. It held that "COPA is substantially overbroad." *Id.* at 49a. And it held that COPA's definition of minors is "impermissibly vague." *Id.* at 55a n.37.

Based on those holdings, the court enjoined the government from enforcing COPA in any respect, rendering that important Act of Congress a nullity and leaving minors without the protection against harmful online

pornography that Congress so carefully fashioned to correct the flaws this Court, in *Reno* v. *ACLU*, had identified in the Communications Decency Act. The court of appeals' invalidation of COPA once again clearly warrants this Court's review. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) (certiorari granted "to review the exercise of the grave power of annulling an Act of Congress").

II. THE COURT OF APPEALS ERRED IN HOLDING COPA UNCONSTITUTIONAL

The court of appeals erred in invalidating COPA. COPA requires Web businesses that make profit-motivated harmful-to-minors communications as a regular course of their business to place such material behind age verification screens. 47 U.S.C. 231(a)(1) and (c)(1). COPA is modeled on state laws that require local stores to place pornographic material that is harmful to minors behind blinder racks, in sealed wrappers, or in opaque covers. Courts of appeals and state courts have consistently upheld those 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.[3] COPA is constitutional for the same reason. Indeed, COPA's princi-

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[3] *Crawford* v. *Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117 (1997); *Davis-Kidd Booksellers, Inc.* v. *McWherter*, 866 S.W.2d 520 (Tenn. 1993); *American Booksellers* v. *Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *American Booksellers Ass'n* v. *Virginia*, 882 F.2d 125 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990); *Upper Midwest Booksellers Ass'n* v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co.* v. *Casado*, 721 F.2d 1281 (10th Cir. 1983).

pal 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 record in this case confirms that COPA is carefully tailored to avoid undue interference with valuable Web communications. Despite the numerous exhibits submitted by respondents and their amici in an effort to demonstrate that COPA has an unjustifiable scope, the court of appeals identified only three Web communications with serious value for adults that are even *arguably* covered by COPA. App., *infra*, 52a-54a & n.35. And, under the correct interpretation of COPA, those communications are plainly not covered by COPA. See pp. 28-29, *infra*.

The court of appeals nonetheless viewed COPA as having a series of fatal flaws. The court's objections are all without merit.

A. COPA Is Narrowly Tailored

1. The court of appeals held that COPA's harmful-to-minors definition is not narrowly tailored. App., *infra*, 20a-28a. But that harmful-to-minors definition narrowly confines COPA's application to material that, taken as a whole, is designed to appeal to the prurient interest of minors, is patently offensive with respect to minors, and, taken as a whole, lacks serious value for minors. 47 U.S.C. 231(e)(6). That definition substantially tracks the harmful-to-minors definition this Court upheld in *Ginsberg* v. *New York*, 390 U.S. 629, 646 (1968). It parallels the definition of harmful to minors in state display laws. *E.g. Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618, 621 (Va. 1988). And it is analogous to the definition of obscenity that this

Court upheld in *Miller* v. *California*, 413 U.S. 15, 24 (1973).

a. The court of appeals found two flaws in COPA's harmful-to-minors definition. First, despite COPA's directive to examine material "as a whole," 47 U.S.C. 231(e)(6), the court of appeals concluded that COPA requires particular Web postings to be evaluated "in isolation, rather than in context." App., *infra*, 22a. That interpretation of COPA is incorrect.

The term "as a whole" has its source in this Court's obscenity decisions, and, in that setting, it carries with it the complementary requirement that material be judged in context, rather than in isolation. See *Roth* v. *United States*, 354 U.S. 476, 490 (1957) (approving jury instructions stating: "The test in each case is the effect of the book, picture or publication considered as a whole. * * * The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion."); *Kois* v. *Wisconsin*, 408 U.S. 229, 231 (1972) (per curiam) (under *Roth*'s "as a whole" requirement, a reviewing court "must, of necessity, look at the context of the material, as well as its content"). The "in context" aspect of the "as a whole" inquiry reinforces the basic inquiry that a particular depiction or passage *not* be considered in isolation. For example, under *Roth*, a book must be judged as a whole, while passages in the book must be judged in the context of the book. In using the term "as a whole" in COPA, Congress incorporated that settled understanding. As this Court has explained, terms borrowed from other sources bring with them the "cluster of ideas" attached to the term. *Evans* v. *United States*, 504 U.S. 255, 259-260 & n.3 (1992).

In concluding otherwise, the court of appeals relied (App., *infra*, 25a) on COPA's description of harmful material as "*any* communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind." 47 U.S.C. 231(e)(6) (emphasis added). But considering a particular picture or communication "as a whole" is fully consistent with examining it in the context in which it is presented, rather than in isolation. Indeed, the harmful-to-minors laws on which COPA was modeled describe harmful material as "*any* description or representation" that is harmful to minors, *Ginsberg*, 390 U.S. at 646 (emphasis added); *American Booksellers*, 372 S.E. 2d at 621 (emphasis added), and one of the obscenity statutes examined in *Roth* referred to "*any* obscene or indecent writing, * * * picture or print," 354 U.S. at 479 n.2 (emphasis added). Just as particular pictures and descriptions were to be considered in context under those statutes, they are to be so considered under COPA.

At the very least, nothing in COPA precludes the Court from interpreting COPA to incorporate an "in context" requirement if that is necessary to sustain its constitutionality. The Court has not hesitated to interpret federal statutes to embody certain standards when necessary to preserve their constitutionality, even when the requirements were not set forth in statutory text. See *Hamling* v. *United States*, 418 U.S. 87, 114-115 (1974) (interpreting federal obscenity statute to incorporate *Miller*'s constitutional requirements, even though the statutory text did not incorporate those requirements); *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) (interpreting the federal child pornography statute's "knowing" requirement to apply to knowledge of the age of the performers and the sexually explicit nature of the material,

even though the knowledge requirement would not apply to those elements under a grammatical reading of the statute).

b. The court of appeals also condemned COPA's harmful-to-minors definition on the ground that Web publishers cannot know which minors should be considered in deciding whether material lacks "serious value" for minors. App., *infra*, 24a. That criticism is misguided. Material is not covered by COPA unless it lacks serious value for all protected age groups, including the oldest group. State display laws have repeatedly been interpreted to incorporate that older-minor standard. See *American Booksellers Ass'n*, 372 S.E.2d at 624 (material has serious value for minors if it has serious value for a "legitimate minority of older, normal adolescents"); *Davis-Kidd*, 866 S.W.2d at 533 (material has serious value for minors if it has serious value for "a reasonable seventeen year old minor"); *Webb*, 919 F.2d at 1504-1505 (same). Because Congress intended to use the "familiar" definition of "harmful to minors" as that standard had been applied in the context of state display laws "over the years," H.R. Rep. No. 775, *supra*, at 13 (citing cases), COPA should be construed to incorporate that interpretation of state display laws. *Evans*, 504 U.S. 259-260 & n.3. That construction is also supported by the principle that federal statutes should be interpreted to avoid constitutional questions, rather than to create them. *X-Citement Video, Inc.*, 513 U.S. at 78.

The court of appeals concluded that COPA cannot be construed to incorporate an older-minor standard because COPA defines minor as "any person under 17 years of age." 47 U.S.C. 231(e)(7). But the state display laws cited above all had similar definitions. *American Booksellers Ass'n*, 372 S.E.2d at 621; *Davis-Kidd*, 866

S.W.2d at 534; *Webb*, 919 F.2d at 1513. COPA's definition of minors therefore provides no basis for departing from the settled understanding that material lacks serious value "for minors" as a class only when it lacks serious value for all protected age groups, including the oldest protected group.

The court of appeals also stated that, even if COPA incorporates an older-minor standard, "the term 'minors' would not be tailored narrowly enough to satisfy strict scrutiny." App, *infra*, 27a. However, COPA's standard cannot be tailored further without eviscerating its protections for minors. Not surprisingly, the court of appeals expressly refused to "suggest how Congress could have tailored its statute" in any other way. *Ibid.*[4]

2. The court of appeals similarly erred in holding that COPA's "commercial purposes" limitation is not narrowly tailored. As the court recognized, under that provision, a business is not covered by COPA unless it seeks to profit from harmful-to-minors material "as a regular course" of its business. 47 U.S.C. 231(e)(2)(A) and (B). The court viewed that limitation as insufficient because Web businesses are covered even when they do not post harmful material as a "principal part" of their business, and even when they seek to profit through sales of "advertising space" rather than the sale of harmful material itself. App., *infra*, 29a. Congress did not act unconstitutionally in failing to tailor COPA in the ways proposed by the court of appeals.

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[4] The court of appeals also concluded that COPA's definition of "minor" is "impermissibly vague" because it forces Web publishers to "guess at the bottom end of the range of ages to which the statute applies." App, *infra*, 55a-56a n.37. Interpreting COPA to incorporate an older-minor standard eliminates that vagueness concern.

Had Congress limited COPA's scope to businesses that post harmful material as a principal part of their business, a significant loophole would have been created. Under that interpretation, Web businesses that expressly hold themselves out as purveyors of pornography and Web businesses that post a substantial amount of pornography on their Web sites would be exempt from the reach of the law, as long as harmful material was not the principal part of their business. COPA's commercial purposes definition closes that loophole and ensures that minors receive the protection they need. COPA's definition also avoids the enormous practical difficulty that would arise from any attempt to define and calculate whether a Web business has posted harmful material as a "principal part" of its business.

Congress's extension of COPA's obligations to businesses that seek to profit from harmful material by selling advertising space is also unproblematic. When such businesses post harmful material as a regular course of their business, they pose just as much of a threat to minors as businesses that post harmful material in order to sell it to consumers. And there is no evidence that businesses that post harmful material in order to sell advertising space are any less able to bear the costs of complying with COPA than businesses that seek to profit from selling harmful material directly.

3. The court of appeals further erred in holding that COPA's affirmative defenses are not narrowly tailored. COPA provides "an affirmative defense to prosecution" for businesses that restrict access by minors to harmful material by requiring use of a credit card or an adult ID. 47 U.S.C. 231(c)(1). That defense allows adults to obtain access to speech that they have a constitutional right to receive, while protecting minors from material that is harmful to them.

Relying on the district court's tentative and general findings, the court of appeals held that COPA's affirmative defenses are not narrowly tailored. The court of appeals reasoned that "COPA will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial." App., *infra*, 35a. The court of appeals' assertion that "COPA will likely deter many adults from accessing restricted content" does not precisely track the district court's findings. The district court found that respondents "are likely to convince the Court that implementing the affirmative defenses in COPA will cause most Web sites to lose *some* adult users to the portions of the sites that are behind screens." *Id.* at 34a (emphasis added). That finding does not provide a sufficient factual basis for the court of appeals' holding that COPA's affirmative defenses are not narrowly tailored.

Requiring an adult to present an adult ID or a valid credit card number in order to obtain access to harmful material is not an unreasonable burden. The number of people who use adult IDs and credit cards on the Web demonstrates as much. At the time of trial, approximately three million people possessed a valid Adult Check ID, App., *infra*, 142a, and many commercial Web sites, such as Amazon.com, require a credit card to make a purchase, *id.* at 136a. Moreover, COPA also requires Web businesses that establish screening mechanisms to maintain the confidentiality of information collected in that process. 47 U.S.C. 231(d)(1). A violation of that requirement is punishable by a fine of up to $10,000 and imprisonment for up to one year. 47 U.S.C. 501.

The court of appeals was apparently of the view that Congress may further its compelling interest in protecting minors from harmful material only if it can do so without imposing *any* burden on adults that might deter some adults from seeking access to the material. That conception of the First Amendment conflicts with *Ginsberg's* holding that States may prohibit the sale of harmful material to minors. 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.

The court of appeals' First Amendment theory also conflicts with the decisions upholding state display laws. See n.3, *supra.* 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. And stores displaying harmful-to-minors material may pass on to their customers the costs of establishing and maintaining a system that prevents minors from obtaining access to such material.

The court of appeals' First Amendment theory also conflicts with this Court's recent decision in *United States* v. *American Library Ass'n*, 123 S. Ct. 2297 (2003). In that case, the Court upheld the constitutionality of the Children's Internet Protection Act (CIPA), 114 Stat. 2763A-335, which conditions federal Internet assistance to public libraries on the libraries' use of filtering software that blocks access to obscenity, child pornography, and material that is harmful to minors. The Court rejected the district court's conclusion that CIPA violates the First Amendment because it requires adults to ask library personnel to unblock

certain Web sites and adults may be too embarrassed to make such a request. A plurality of the Court stated that "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment." *Id.* at 2307. Justices Kennedy and Breyer similarly concluded that placing a burden on adults to request access to blocked sites does not violate the First Amendment. *Id.* at 2309 (Kennedy, J., concurring in the judgment); *id.* at 2312 (Breyer, J., concurring in the judgment).

That analysis also has persuasive force here. In order to further its compelling interest in protecting minors from the harmful effects of pornography, Congress may impose conditions that result in a reasonable burden on adults who seek access to that material on the Web. Requiring adults seeking pornographic material to present a valid credit card or an adult ID (which maintains the user's anonymity to the Web site) is a reasonable burden in order to serve the compelling interest in protecting minors from pornography. The harmful-to-minors material covered by COPA is not constitutionally protected for minors, even though it may be for adults. Requiring a credit card or adult ID as a condition of access is a readily available and familiar mechanism for distinguishing the former from the latter.

Nor does it matter that a Web publisher's use of a screening device is an affirmative defense to prosecution, rather than an "assurance[] of freedom from prosecution." App., *infra*, 36a-37a. Only an irresponsible prosecutor would bring criminal charges when he knows that a person has a valid defense, and this Court presumes that federal prosecutors will "properly discharge[] their official duties." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States*

v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)). Moreover, persons who maintain Web sites are plainly in a position to know whether they have required credit cards or adult IDs as a gateway to the harmful material on their Web sites.

B. There Is No Alternative To COPA That Is Equally Effective

The court of appeals also erred in invalidating COPA on the ground that blocking software "may be at least as successful as COPA would be in restricting minors' access to harmful material online." App., *infra*, 40a-41a. As applied to commercial Web sites in the United States that display harmful material as a regular course of their businesses, COPA's screening requirement is far more effective. COPA *compels* persons who display material on the Web to take steps to prevent minors from obtaining access to material that is harmful to them. Under the court of appeals' alternative, no entity is required to install filtering software. Blocking software also has several additional built-in limitations. It blocks access to some sites that contain no harmful material, and it permits access to some sites that contain such material. App., *infra*, 148a, 160a. Minors with sufficient computer skills can defeat the blocking device. *Id.* at 148a. A minor's access is not restricted on a computer that lacks blocking software. *Ibid.* Software can be expensive for parents to purchase. H.R. Rep. No. 775, *supra*, at 19. And software must be updated periodically at an additional cost. *Id.* at 20.

Because of those deficiencies in blocking software, the court of appeals' reliance (*App.*, *infra*, 42a-43a) on *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), was misplaced. There, the less restrictive 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 eliminate *entirely* the problem of signal bleed *without affecting content on other channels*. The court of appeals' alternative does not share any of those features. In addition, in *Playboy*, the Court viewed the alternative it identified as sufficient in large part because the government had failed to demonstrate that signal bleed was a serious or pervasive problem. 529 U.S. at 819-821. In contrast, Congress enacted COPA because it determined that pornography is widely available on the Web and that minors can easily obtain access to it. 47 U.S.C. 231 note (Finding 1).

As the district court found, 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. App., *infra*, 39a. Congress reasonably concluded, however, that domestic commercial Web businesses display an enormous quantity of material that is harmful to minors. H.R. Rep. No. 775 , *supra*, at 7. Congress was entitled to address that serious problem caused by persons in this country, and to do so with the most effective means available. The district court also found that some minors may obtain access to credit cards and adult IDs, App., *infra*, 39a, but there is no evidence that a substantial number of minors possess such cards or that the ones who do are free to use them without adult supervision. Thus, while COPA's reliance on credit cards and adult IDs is not a perfect solution, it is far more effective with respect to domestic commercial Web sites than blocking software.

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).

COPA's screening requirement and the use of blocking software by parents are thus not mutually exclusive alternatives. Rather, Congress envisioned that they would work together to prevent minors from being exposed to harmful material. COPA's screening requirement applies where it is far more effective, and blocking software is available to limit the sources of harmful material that COPA's screening requirement cannot. In these circumstances, any debate about which is more effective operating alone is beside the point. The relevant question is whether Congress's entire scheme—which consists of COPA's screening requirement *and* the notification of customers of the availability of blocking software—is significantly more effective in preventing access to harmful material than blocking software alone. Because the two together are significantly more effective in protecting minors from harmful material than blocking software alone, the

court of appeals' blocking-only alternative is not nearly as effective as the scheme that Congress enacted.

C. COPA Is Not Substantially Overbroad

The court of appeals further erred in holding that COPA is substantially overbroad. In reaching that conclusion, the court relied on the same considerations that led it to conclude that COPA is not narrowly tailored. The court's flawed narrow-tailoring analysis therefore infected its overbreadth analysis as well.

The court's flawed narrow-tailoring analysis also tainted the court's conclusion that COPA's reliance on community standards "exacerbates" COPA's substantial overbreadth. App., *infra*, 58a. Because the features of COPA on which the court relied in its narrow-tailoring analysis are not "constitutional problems" to begin with, *ibid*, COPA's reliance on community standards cannot exacerbate any such problems. And, as this Court held in *Ashcroft* v. *ACLU*, 535 U.S. at 585, "COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment."

The court's overbreadth analysis is flawed for another reason. For a law to be unconstitutionally overbroad, its impermissible applications must be "'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia* v. *Hicks*, 123 S. Ct. 2191, 2197 (2003). Here, the court of appeals failed to establish that COPA's impermissible applications are substantial in an absolute sense, much less that they are substantial relative to COPA's many plainly legitimate applications.

Indeed, while respondents and their amici offered an enormous number of exhibits in an effort to show that

COPA has a substantial number of invalid applications, the court identified only three specific problematic applications of COPA. App., *infra*, 52a-54a & n.35. Moreover, in each case, the court concluded only that COPA *arguably* covers the material at issue, and that conclusion depended on the court's view that COPA requires each communication to be viewed in isolation. *Ibid.* The court acknowledged that COPA would not cover the material at issue when viewed in the context in which it was presented. *Ibid.* As discussed above, material is to be considered in context, rather than isolation, under COPA. Accordingly, COPA does not cover *any* of the communications discussed by the court of appeals.

The court of appeals therefore held COPA substantially overbroad without identifying a single real life example of an invalid application. This Court's overbreadth decisions plainly do not support such a holding.

III. THE QUESTION PRESENTED IS RIPE FOR REVIEW

No further proceedings in the lower courts are needed to clarify the question presented or to render that question suitable for resolution by this Court. The court of appeals invalidated COPA based on a series of legal rulings regarding the scope of COPA and interpretations of First Amendment doctrine on narrow tailoring, less restrictive alternatives, substantial overbreadth, and vagueness. No further proceedings in the district court are needed for this Court to resolve those legal issues.

Moreover, the government has been subject for some time to a nationwide preliminary injunction that prevents it from enforcing COPA against anyone. Given the nature of the court of appeals' decision affirming

that preliminary injunction, and the denial of en banc review, there is every reason to expect that further proceedings in the district court would simply result in a permanent injunction of a similarly wide scope on the same grounds, and an affirmance of that injunction by the court of appeals. The result would be needlessly to delay this Court's resolution of the important questions presented concerning Congress's ability to protect minors from sexually explicit materials on the Web, and to exacerbate the adverse consequences of the decision below.

In *Ashcroft* v. *ACLU*, this Court granted certiorari to review the court of appeals' holding at the preiminary injunction stage that COPA's reliance on community standards likely violates the First Amendment. 535 U.S. at 573. For similar reasons, immediate review is warranted here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General
BARBARA L. HERWIG
CHARLES W. SCARBOROUGH
Attorneys

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