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

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 03-218

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

Respondents contend that review is unwarranted in this case because the court of appeals correctly held that the Child Online Protection Act (COPA) violates the First Amendment. That contention is wrong. In enacting COPA, Congress directly addressed each of the concerns that this Court identified in *Reno* v. *ACLU*, 521 U.S. 844 (1997), in holding that the Communications Decency Act of 1996 (CDA) was not narrowly tailored to further the government's compelling interests. Thus, COPA applies only to material posted on the World Wide Web. It covers only the limited number of Web communications that appeal to the prurient interest of minors, are patently offensive with respect to minors, and lack serious value for minors. It lowers the age of minority to under age 17 rather than age 18. And it applies only to those who are engaged in the business of making harmful-to-minors Web communications.

As such, COPA is narrowly tailored to further the government's compelling interest in protecting minors from the harmful effects of pornography on the Web.

Moreover, a final decision holding an Act of Congress unconstitutional should be made only by this Court. Whether minors will be afforded the protection Congress determined to be essential in COPA should not be left to the judgment of a single federal court of appeals. Indeed, this is the second time that the court of appeals has invalidated COPA. This Court reversed the court of appeals' first decision, *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002), and that court's decision invalidating COPA for a second time is equally flawed. Review by this Court is therefore warranted.

A. Respondents Have Not Shown That COPA Has An Unjustifiably Wide Scope

Respondents argue that COPA covers a wide range of speech that has serious value for adults. Br. in Opp. 12-15. Respondents have failed to make that showing. From their numerous exhibits, respondents have been able to identify only five Web communications that have serious value for adults that respondents nonetheless assert are covered by COPA. Moreover, those examples are premised on respondents' erroneous view that COPA requires material to be viewed in isolation, rather than in context. See pp. 3-4, *infra*. Respondents do not assert that any of their examples would be harmful to minors when viewed in context.

Respondents also assert that COPA has an unjustifiably wide scope because it covers persons who merely host communications in chat rooms and bulletin boards. Br. in Opp. 13, 20. In fact, such persons are excluded from COPA's coverage. COPA does not apply to persons who are "engaged in the * * * hosting * * * of a communication made by another person, without selection or alteration of the content of the communication." 47 U.S.C. 231(b)(4). Because

those who merely "host" chat rooms and bulletin boards do not "select[]" or "alter[]" the content of communications, they are excluded from COPA's coverage.

B. COPA Requires Material To Be Judged In Context

Respondents assert that COPA impermissibly requires an individual picture or writing to be viewed "in isolation" in deciding whether it is harmful to minors. Br. in Opp. 17. But COPA directs that pictures and writings must be examined "as a whole," 47 U.S.C. 231(e)(6), and, under this Court's decisions, that concept carries with it a requirement that material must be viewed in context, rather than in isolation. See *Roth* v. *United States*, 354 U.S. 476, 490 (1957); *Kois* v. *Wisconsin*, 408 U.S. 229, 231 (1972) (per curiam). At the very least, nothing in COPA precludes the Court from interpreting COPA in that way. See *Hamling* v. *United States*, 418 U.S. 87, 114-115 (1974) (interpreting federal obscenity statute to incorporate *Miller*'s elaborate constitutional requirements, even though the statutory text did not incorporate those requirements).

Respondents express confusion on whether the relevant context includes a single image on a Web page, a single Web page, or an entire Web site. Br. in Opp. 17-18. Under this Court's decisions, individual pictures or articles in a magazine are generally examined in the context of the entire magazine. *Manual Enters., Inc.* v. *Day*, 370 U.S. 478, 489 (1962); see *Ginzburg* v. *United States*, 383 U.S. 463, 466 n.5 (1966). Similarly, under COPA, individual pictures or articles on a Web site should generally be examined in the context of the entire Web site. Thus, if an explicit work of art appears on a Web site devoted to serious art, the explicit work of art should be evaluated in the context of the entire Web site.

That does not mean that a pornographer may escape his COPA obligations by joining a series of pornographic pictures together with a series of quotations from the Bible in a single Web site. Just as obscenity law does not countenance "a sham attempt to insulate obscene material with non-obscene material," *Penthouse Int'l, Ltd.* v. *McAuliffe*, 610 F.2d 1353, 1368 (5th Cir.), cert. dismissed, 447 U.S. 931 (1980), COPA does not permit a sham attempt to insulate harmful material with non-harmful material.

C. COPA Incorporates An Older Minor Standard

Respondents argue that COPA is overbroad because it includes material that has "serious value" for older minors. Br. in Opp. 17. In drafting COPA, however, Congress intended to incorporate the standards from state display laws, H.R. Rep. No. 775, 105th Cong., 2d Sess. 13 (1998), and those laws have been interpreted to exclude material that has serious value for the oldest group of minors. See *American Booksellers* v. *Webb*, 919 F.2d 1493, 1504-1505 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *Davis-Kidd Booksellers, Inc.* v. *McWherter*, 866 S.W.2d 520, 533 (Tenn. 1993); *Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618, 624 (Va. 1988); Pet. 19. Accordingly, if material has serious value for reasonable 16-year-olds, it is not covered by COPA.

Respondents contend that an older minor standard is inconsistent with Congress's intent to protect younger minors from harmful material. Br. in Opp. 17. There is, however, no inconsistency. Just as state display laws protect younger minors from the harmful effects of pornographic magazines that lack serious value for older minors, COPA protects younger minors from the wide range of pornographic material on the Web that lacks serious value for older minors. In that way, COPA shields *all* minors from the most harmful material on the Web without interfering with

the interest of older minors—or adults—in obtaining access to material that has value for older minors.

Respondents argue that COPA is overbroad even if it incorporates an older-minor standard because it still would restrict access by adults to material that is harmful to minors yet not obscene. Br. in Opp. 17. But COPA cannot possibly be tailored further without eliminating its protection for minors altogether. Not surprisingly, respondents make no effort to identify any serious value standard that would be more narrowly tailored yet still serve Congress's interest in protecting minors from material that is harmful to them.

D. The Commercial Purposes Limitation Is Narrowly Tailored

Respondents err in contending that COPA's "commercial purposes" requirement does not limit its reach. Br. in Opp. 16-17. By its terms, COPA does not apply unless a person is "engaged in the business" of distributing harmful-to-minors material. 47 U.S.C. 231(e)(2)(A). Persons who do not seek to profit from harmful-to-minors material are not covered by COPA. 47 U.S.C. 231(e)(2)(B). Even persons who seek to profit from harmful material are not covered unless they seek to do so as "a regular course" of their business. *Ibid.* COPA's commercial purposes requirement therefore places a significant limitation on the reach of the Act. Indeed, in invalidating the CDA, this Court in *Reno* v. *ACLU* emphasized that the CDA was not limited to commercial pornography. 521 U.S. at 856, 865, 877. COPA directly responds to that concern.

Respondents argue that COPA is overbroad because it applies to businesses that do not post harmful material as a principal part of their business as well as businesses that seek to profit through sales of advertising space rather than the sale of harmful material itself. Br. in Opp. 16-17. Had

Congress limited COPA in the manner suggested by respondents, however, it would have created an enormous loophole. Under respondents' approach, Web businesses that market themselves as pornography vendors would be exempt, as long as they carefully limit the amount of harmful material on their Web sites to just under the amount necessary to make it the principal part of their business. Similarly, Web businesses that post nothing but pornographic pictures and advertising on their sites would be exempt as long as they seek to profit from advertising revenue rather than through sale of the pictures. Congress was not required to so seriously compromise its goal of protecting minors from harmful material.

Respondents err in asserting that a person would be liable under COPA if he posted just one Serrano photograph on the Artnet Web site or just one "Sexpert Opinion" column on the Salon Web site. Br. in Opp. 17. Taking COPA's "in context" requirement into account, neither would be harmful to minors. In any event, a person who makes a single harmful posting would not be "engaged in the business" of making harmful communications as a "regular course" of his business. 47 U.S.C. 231(e)(2)(A) and (B).

E. The Affirmative Defenses Are Narrowly Tailored

Respondents contend that COPA's credit card and Adult ID defenses are not narrowly tailored because they do not provide an assurance against prosecution. Br. in Opp. 19. In the present context, however, there is no constitutional difference between an assurance against prosecution and an affirmative defense. Federal prosecutors who know that a person has a valid defense will not bring criminal charges, see *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996), and persons who use Adult IDs or credit cards as screening devices will have no difficulty establishing that fact. Persons

who comply with COPA's Adult ID and credit card defenses therefore have no legitimate reason to fear prosecution.

Respondents assert that COPA's affirmative defenses are insufficient because adults will be deterred from seeking access to harmful material if they must use a credit card or Adult ID. Br. in Opp. 21. At the time of trial, however, approximately three million people possessed a valid Adult Check ID, Pet. App. 142a, and many commercial businesses required credit cards to make a purchase, *id.* at 136a. COPA also requires that businesses establish screening mechanisms that maintain the confidentiality of information collected in that process. 47 U.S.C. 231(d)(1). Thus, COPA furthers the government's compelling interest in protecting minors from harmful material without unduly burdening adult access to such material.

In that respect, as in others, COPA resembles the state display laws on which it was modeled. The courts have consistently upheld such laws even though they place a burden on adult access to harmful material. See Pet. 15 n.3. Respondents seek to distinguish state display statutes on the ground that they do not impose precisely the same burden on adult access to harmful material as COPA. Br. in Opp. 24. But state display laws undeniably impose a burden on adult access to harmful material. Some adults will avoid blinder racks for fear of public embarrassment; others will not purchase magazines in sealed wrappers because they cannot examine their contents first. And stores displaying harmful-to-minors material may pass on to their customers the costs of establishing and maintaining a blinder-rack system. Just as those burdens are reasonable in light of the compelling interest in protecting minors from harmful material, requiring adults to use Adult IDs or credit cards to obtain access to harmful material on the Web is reasonable in light of that same compelling interest.

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

Finally, respondents argue that filtering software is more effective than COPA in serving Congress's compelling interest in shielding minors from harmful material. Br. in Opp. 25-28. As applied to commercial Web sites in the United States, however, COPA's screening requirement is far more effective than filtering software. COPA compels such entities to take steps to prevent minors from obtaining access to material that is harmful to them. Under respondents' alternative, no entity is required to install filtering software. Minors with sufficient computer skills can defeat blocking software. Pet. App. 148a. A minor's access is not restricted on a computer that lacks blocking software. *Ibid.* Software can be expensive for parents to purchase and update. H.R. Rep. No. 775, *supra*, at 19-20. And filtering software blocks access to some sites that contain no harmful material and permits access to some sites that contain such material. Pet. App. 148a, 160a.

Respondents err in relying on *United States* v. *American Library Ass'n*, 123 S. Ct. 2297, 2307 (2003), as support for blocking software alone as a sufficient alternative. Br. in Opp. 26. There, the Court upheld the Children's Internet Protection Act (CIPA), which conditions federal Internet assistance to public libraries on the libraries' use of filtering software that blocks access to obscentity, child pornography, and material that is harmful to minors. Nothing in the Court's decision suggests that filtering software would be as effective as COPA in protecting minors from the effects of commercial pornography on the Web.

There are also several critical differences between the use of filtering software under CIPA and respondents' proposed filtering alternative that make respondents' alternative far less effective. CIPA *requires* public libraries that receive federal Internet assistance to install filtering software.

Respondents' alternative does not require anyone to install such software. CIPA allows public libraries to use their expertise to address the inherent under- and over-inclusion of software. Respondents' alternative would require parents who lack such expertise to assume that role. CIPA imposes the financial cost of maintaining a filtering system on public libraries that receive federal assistance. Respondents would place the financial burden of purchasing and updating filtering software on parents. The filtering software scheme under CIPA therefore does not remotely resemble respondents' filtering scheme.

Respondents assert that COPA is ineffective because, unlike filtering software, it does not apply to non-Web protocols on the Internet. Br. in Opp. 25-26. But domestic commercial Web businesses display an enormous quantity of material that is harmful to minors, H.R. Rep. No. 775, *supra*, at 7, and Congress was entitled to address *that* serious problem with the most effective means available. Congress also did not ignore the dangers posed by non-Web sources of harmful material. 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), which addresses, at least to some extent, those other sources of pornography.

Thus, under COPA, COPA's screening requirement and the use of blocking software by parents work together to prevent minors from being exposed to harmful material. That scheme is significantly more effective in protecting minors from harmful material than respondents' alternative of relying solely on the availability of blocking software.

* * * * *

For the foregoing reasons as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

SEPTEMBER 2003