

No. 99 – 1324

In the United States Court of Appeals
for the Third Circuit

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
PLAINTIFFS-APPELLEES,

v.

**JOHN ASHCROFT, in his official capacity as
ATTORNEY GENERAL OF THE UNITED STATES,**

DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE*,

**Senator John S. McCain,
Representative Michael G. Oxley, Representative James C. Greenwood,
Representative Thomas J. Bliley, Jr. (ret.),**

**ON REMAND,
IN SUPPORT OF APPELLANT, HON. JOHN ASHCROFT,
ATTORNEY GENERAL OF THE UNITED STATES, AND REVERSAL**

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STATEMENT OF
CONSENT TO FILE BRIEF OF *AMICI CURIAE*,
ADMISSION OF COUNSEL,
BRIEF COMPLIANCE,
AND
CORPORATE DISCLOSURE OF COUNSEL

Consent of the parties was obtained for the filing of this BRIEF and copies of the written consents on behalf of the Plaintiffs-Appellees and Defendant-Appellant are attached hereto following Service and the originals filed with the Clerk.

Counsel for *amici curiae*, Bruce A. Taylor and James J. West, are members of the bar of this United States Court of Appeals for the Third Circuit.

This brief complies with FRAP Rules 29 and 30. It is less than 7000 words (6974) and printed in 14 point Times New Roman proportional font.

Amici curiae are not corporate entities for which a corporate disclosure statement would apply. Counsel for *amici*, Bruce A. Taylor and Carol A. Clancy, are, respectively, the President and Chief Counsel and the Senior Counsel of the National Law Center for Children and Families, Inc. (“NLC”), a non-profit educational organization, incorporated in Virginia and recognized under IRS Code § 501©(3), which provides assistance and advice to law enforcement, public officials, legislators, and the public on issues of obscenity, sexual exploitation of children, materials harmful to minors, indecency, and related First Amendment issues. NLC is not a publicly held corporation and is not a parent, subsidiary, or affiliate of any other corporation or non-profit organization.

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I. ISSUES ON REMAND

With respect to the issues raised by this appeal, *Amici* hereby reassert and incorporate by reference the points previously made to this Court in their BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE*, No. 99-1324, filed herein on or about October 18, 1999, as well as those points raised before the Supreme Court of the United States in their *Amici Curiae* Brief filed in support of Petitioner on writ of *certiorari* to the United States Court of Appeals for the Third Circuit (No.00-1293), a copy of which is attached hereto as Appendix B.

The remand order from this Court directs the parties to “rebrief and update all arguments and issues” for consideration in light of the Supreme Court’s decision in *Ashcroft v. ACLU*, No. 00-1293, and to address the following cases “for whatever impact, if any, those decisions may have on the instant matter”.

1. Significance of *Ashcroft v. ACLU*¹.

Ashcroft held that COPA’s reliance on “contemporary community standards” to identify “material that is harmful to minors” does not render the law substantially overbroad for purposes of the First Amendment.²

¹ ___ U.S. ___, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002), 2002 WL 970708.

² *Ashcroft v. ACLU*, *supra*, Slip Op. at 38, Part IV.

The entire matter was remanded to this Court of Appeals for further consideration as to the proper interpretation and construction of the definition of what is “harmful to minors” in 47 U.S.C. § 231(e)(6)³, as well as the propriety of the issuance of the preliminary injunction and the other issues of standing, overbreadth (on other grounds), vagueness, and whether COPA meets the level of judicial scrutiny appropriate in this case.⁴

Amici submit that the District Court abused its discretion in issuing the preliminary injunction. COPA is capable of being judicially construed in a constitutional fashion, consistent with the text of the Act, its legislative history, and applicable case law. Patterned after the requirements of *Ginsberg v. New York*⁵ and subsequent applicable case law, the *Millerized-Ginsberg* definition for what is “obscene for minors” in COPA is neither overbroad nor vague, and on motion for preliminary injunction upon a facial challenge, COPA should be upheld by the federal courts. With respect to Plaintiffs’ “as applied” challenge, injunctive relief was improper. COPA cannot reasonably be construed to apply to Plaintiffs, who for this reason lack sufficient “injury-in-fact”, required by

³ See operative provisions of COPA reproduced in Appendix A hereto.

⁴ *Ashcroft v. ACLU*, *supra*, Slip Op. at 38-39, Part IV.

⁵ 390 U.S. 629 (1968), as operative terms were modified by *Miller v. California*, 413 U.S. 15, 24-25 (1973), *Smith v. United States*, 431 U.S. 291, 300-02, 309 (1977), and *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987).

Article III of the Constitution, to establish their standing to challenge COPA. Because COPA regulates, as a neutral category, commercial speech activities and does not discriminate on the basis of any speaker's viewpoint, COPA is subject to intermediate scrutiny under the *Central Hudson*⁶ test for commercial speech, and not strict scrutiny. However, under either "intermediate" or "strict" scrutiny, COPA is constitutional, because the Act affects only unprotected speech for minors and there is no viable alternative that is "as effective"⁷ in achieving the substantial governmental interests⁸ involved.

2. Significance of *Ashcroft v. Free Speech Coalition*⁹.

Free Speech Coalition involved a facial challenge to provisions of the Child Pornography Protection Act of 1996 (CPPA), which Congress passed to prohibit computerized child pornography that "is or appears to be" of a minor. Congressional intent and *amici* argued that CPPA applied only to computer generated images that were so realistic looking that they appeared to be real pictures of real children being sexually abused. However, in striking the challenged provisions, the Court instead assumed that (1) CPPA could apply to

⁶ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561-66 (1980). *See also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001).

⁷ *See* discussion in Part VI, *infra*.

⁸ *See infra*, Part V, for discussion of many governmental interests involved.

⁹ 535 U.S. ___, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), 2002 WL 552476.

obvious fakes, such as paintings or movies that might imply (but not graphically depict) that underage characters were having sex off-camera, and (2) there was no technology yet available that was capable of producing realistic “counterfeit” visual depictions of children engaged in sexual conduct. The Court held that the challenged provisions of CPPA did not constitute a valid child pornography law formulated under *New York v. Ferber*,¹⁰ because *Ferber* only applied to visual depictions that involve “actual” children. The Court also found that CPPA “cannot be read to prohibit obscenity, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity.”¹¹

Free Speech Coalition does not affect COPA’s validity. In the instant case, COPA can be construed in a constitutional manner as a statute adopting the “variable obscenity” approach approved in *Ginsberg*.¹² COPA draws on the three-part obscenity for minors test modified by *Miller-Smith-Pope*¹³, further modified to conform to the characteristics of a recipient audience comprised of

¹⁰ 458 U.S. 747 (1982).

¹¹ *Ashcroft v. Free Speech Coalition*, *supra*, Slip Op. at 10-11. This deficiency is not present in COPA, because it adopts the “variable obscenity” test for “obscene for minors”.

¹² 390 U.S. at 636, n. 4.

¹³ *supra*, cited in footnote 5 above.

minors.¹⁴ This type of statute derives from and should, therefore, be construed *in pari materia* with the relevant obscenity law. The subject matter of COPA (pornography that is obscene as to minors) is not protected by the First Amendment when disseminated to minors,¹⁵ and may, in dissemination by commercial vendors using the Internet, be “quarantined” from minors by requiring said vendors to take reasonable steps to channel such material to an adult audience.

Free Speech Coalition examined and reasserts support for the application of laws that in their formulation rely upon the *Miller* obscenity standard. To this extent, *Free Speech Coalition* supports upholding COPA as a valid law, because COPA is closely related to and relies upon these obscenity law principles. COPA regulates the commercial dissemination only of pornographic material that is either obscene, even for adults, or “obscene for minors”, even if not for adults, and adopts the accepted *Millerized-Ginsberg* standard (mentioned with approval in *Free Speech Coalition*), modified to conform to the characteristics of a recipient audience comprised of minors (an approach supported by *Mishkin*

¹⁴ See *Ashcroft v. ACLU*, Slip Op. at 11-12. See also *Com. v. Am. Booksellers Ass’n*, 372 S.E.2d 618 (Va. 1988), followed, *Am. Booksellers Ass’n v. Com. of Va.*, 882 F.2d 125 (4th Cir. 1989); *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. den., 520 U.S. 1117 (1997). See also our original *amicus* brief to this Court at 11-12 and our Supreme Court *amicus* brief at 9-12.

¹⁵ *Ginsberg v. New York*, *supra*.

v. New York, 383 U.S. 502, 508-09 (1966), *Ginsberg v. New York*, 390 U.S. 629 (1968), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213, n. 10 (1975).

In light of *Free Speech Coalition*, COPA is narrowly tailored and is neither unconstitutionally overbroad nor vague.

3. Significance of *American Library Association v. United States*¹⁶.

American Library Association involves a pending challenge to the constitutionality of the Children’s Internet Protection Act (CIPA), which mandates the use of filters in connection with a federally-funded Internet development program. The reach of that law is limited, applying only to schools and libraries that participate in the funding program.

Regardless of its outcome, the CIPA case should have no negative effect on COPA. In light of the limited application of CIPA, together with the substantial governmental interests addressed by COPA, use of criminal prohibitions deemed by Congress to be necessary¹⁷ in order to regulate

¹⁶ 201 F.Supp.2d 401 (E.D. Pa. 2002), 2002 WL 1126046.

¹⁷ *See United States v. Orito*, 413 U.S. 139, at 144 (1973): “The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. ... 'It is sufficient to reiterate the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature.' ...” [Citations omitted.]

mechanisms involving Interstate Commerce and federal communication, would remain within the range of constitutionally permissible legislative options.

To the extent *American Library Association* expressed doubt for the effectiveness of filters or restrains the implementation and use of Internet filters by libraries, it would support upholding COPA (even under a “strict scrutiny standard”) as the only “effective” way to protect children from exposure on the Web to commercial pornography that is “obscene for minors”.

II. PLAINTIFFS HAVE FAILED TO PLEAD AND PROVE, OR OTHERWISE ESTABLISH, A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS.

COPA does not ban dissemination of speech to adults, but is narrowly tailored to quarantine children from exposure on the World Wide Web to commercial pornography that is obscene as to minors.

COPA does not even apply to Plaintiffs, based on the facts of this record. However, COPA can and should be constitutionally applied to commercial vendors of pornography, who voluntarily choose to use the World Wide Web to regularly sell that described matter. Under the Commerce Clause, the World Wide Web, as a facility of Interstate Commerce and a communications carrier, is subject to the plenary control of Congress.

(A) COPA is not “substantially overbroad.”

For First Amendment overbreadth, a plaintiff may assert rights of third parties *only* where a statute is *substantially* overbroad. *Broadrick v. Oklahoma*, 413 U.S. 601, 611-14 (1973). This is an intentionally heavy burden to establish. Plaintiffs must plead and prove the substantial overbreadth of the statute, as a whole. *See Broadrick, id., and New York v. Ferber*, 458 U.S. at 769-74.¹⁸ *See also Watson v. Buck*, 313 U.S. 387, 400-03 (1941),¹⁹ and *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 485 (1989).

Overbreadth analysis is “strong medicine,” which on a facial challenge may be invoked to strike an entire statute only when the overbreadth of the statute is not only “real, but substantial as well, judged in relation to the statute’s

¹⁸ *See Ferber*, 458 U.S. at 769, n. 24, and 772, n. 27. In *Ferber*, the Court abandoned a “speech-conduct” analysis and imposed *Broadrick’s* “substantiality” requirement on all First Amendment overbreadth challenges, holding that even where pure speech is involved, explaining at 458 U.S., 772: “The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.”

¹⁹ Noting: “The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. ... To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights.” In order for federal court to strike a state statute, it must be “flagrantly and patently violative of express constitutional prohibitions in

plainly legitimate sweep,” *Broadrick*, 413 U. S. at 615, and when the statute is not susceptible to limitation or partial invalidation. *Id.* at 613; *Board of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

The duty of federal courts to authoritatively construe federal statutes so as to save them was stated clearly in *Ferber*, 458 U. S. at 769, n. 24:

When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to a limiting construction.

The scope of COPA was carefully limited and avoids the overbreadth found in the challenged provisions of a predecessor statute, the Communications Decency Act (CDA), examined in *Reno v. ACLU*.²⁰ As the Supreme Court discussed it in the instant case above:

First, while the CDA applied to communications over the Internet as a whole, including, for example, e-mail messages, COPA applies only to material displayed on the World Wide Web. Second, unlike the CDA, COPA covers only communications made “for commercial purposes.” [footnote omitted] *Ibid.* And third, while the CDA prohibited “indecent” and “patently offensive” communications, COPA restricts only the narrower category of “material that is harmful to minors.” *Ibid.*²¹

every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.”

²⁰ 521 U.S. 844 (1997) (holding that the Internet is like a “print” medium, upholding CDA’s obscenity provisions, but striking other provisions that were interpreted to define “indecent” using “broadcast medium” standards).

²¹ *Ashcroft v. ACLU*, *supra*, Slip Op. at 10-11.

(B) COPA does not apply to Plaintiffs.

The text of the operative provisions of COPA clearly demonstrates that COPA does not regulate Web sites that merely contain material that is sexual in nature. COPA narrowly and specifically applies channeling obligations only on commercial Web sites that regularly engage in the business of selling, and then knowingly make available to minors, that type of pornography that meets the *Millerized-Ginsberg* definition in Section 231(e)(6) that is obscene or obscene for minors. As such, this two part burden of proof on the Government, like that under 18 U.S.C. § 1466,²² would require a federal jury and the federal courts to find that an offender of COPA regularly sold pornography that was obscene or obscene for minors and then made available specific pornographic material that is obscene for minors under the definition of what is “harmful to minors”. None of the Plaintiffs have pleaded or proven, or claimed or argued, that any of them has ever sold or engaged in the business of profiting from pornography meeting the proper test for obscenity or obscenity for minors. The Government has not claimed, and explicitly rejected any claim, that Plaintiffs have any such obscenity or have in any way come under the reach of COPA. Finally, the District Court did not find any of Plaintiffs’ materials to be pornographic, much

²² Congress intended COPA’s 47 U.S.C. § 231(e)(2) to parallel 18 U.S.C. § 1466, as stated in S. Rep. No. 105-225, at 11, and H.R. Rep. No. 105-775, at 27.

less even arguably within the proper scope of the statutory tests for obscenity or obscenity for minors, or that any Plaintiff has ever caused himself or itself to come within the intended and legitimate reach of the Act. Therefore, the record is devoid of any factual basis for a case or controversy as to the validity of COPA as to these Plaintiffs and there is no standing shown for any Plaintiff.

By specific statutory definition, COPA does not apply to materials that have serious literary, artistic, political, or scientific value for minors, and therefore COPA must not be construed to apply to serious or controversial treatments of sex, such as serious sex education, AIDS or STD information, disease prevention, sexual politics, news accounts of sexual offenses or legal issues, and political or social treatments of sexual issues. Properly construed, COPA cannot reach any such protected speech and Web sites displaying such materials have no duties under the Act.

COPA requires that an offender know the character of the matter and then knowingly make, for commercial purposes, a communication comprised of specific, statutorily defined material. Offenders must be “engaged in the business” of trying to profit from such pornographic communications “as a regular course of such person’s trade or business” under § 231(e)(2). COPA does not apply to private, governmental, news, non-profit, or other sites that do

not regularly market such statutorily defined material. Properly construed, even secondary transmissions (“hot links” to offending sites), standing alone, would not violate COPA, even if “commercial.” *See* House REPORT at 25²³.

There has been no showing of “irreparable harm” or even “risk” of irreparable harm.²⁴ “Self-censorship” does not constitute irreparable harm.²⁵ For this reason, the conclusion of the District Court, repeated by this Court in its original opinion,²⁶ that “plaintiffs could reasonably fear prosecution because their Web sites contained material ‘that is sexual in nature’” is clear error.²⁷

²³ House Commerce Committee Report to accompany COPA, H.R. Rep. No. 105-775 (1998).

²⁴ “Risk of harm” is insufficient for a harsh remedy of preliminary injunction. *See Hohe v. Casey*, 868 F.2d 69, 72 (3rd Cir. 1989): “[E]stablishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a ‘clear showing of immediate irreparable injury.’”

²⁵ *See Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989): “But deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and our cases have long recognized the practical reality that ‘any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.’ ... The mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedents.”[Citations omitted.]

²⁶ *See* 217 F.3d 162, 171.

²⁷ COPA only applies to subject matter meeting the 3-pronged *Millerized-Ginsberg* test, as adapted by Congress to the commercial Web-based pornography trade. Not only must the pornography depict a sexual act, contact, or lewd genital or breast exhibition, it must be obscene or obscene for minors in that it: (1) as a whole, appeals to prurient interest with respect to minors, and (2) with respect to what is offensive for minors, be patently offensive in the manner in which it represents the specific sexual conduct, and (3) lack serious literary,

(C) Plaintiffs’ allegation that COPA is invalid on its face for violating the First Amendment rights of minors is patently false.

*Ginsberg v. New York*²⁸ definitively held that *Ginsberg*-type statutes do not “invade the area of freedom of expression constitutionally secured to minors” and are not to be regarded as “involving an invasion of such minors’ constitutionally protected freedoms.” COPA “simply adjusts the definition of obscenity ‘to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests’ of such minors.” *Id.* Just as consenting adults have no constitutional right to obtain obscenity²⁹ or child pornography,³⁰ minors have no constitutional right to pornography that is legally “harmful to minors”. Criminal penalties may be used to assure that “for-profit”

artistic, political, or scientific value for minors. The first two prongs, under *Miller-Smith* and Congressional intent, are to be judged by the average adult, applying contemporary standards of the American adult community as a whole with respect to what is obscene for minors, and the third prong, under *Pope*, is judged by a “reasonable person” making a universal judgment of value for the age group of probable recipient minors to which the pornography was knowingly made available by a commercial Web site that regularly sells obscenity or variable obscenity. See H.R. Rep. No. 105-775, at 28; original Congressional *amicus* brief to this Court at 9-16; and Congressional *amicus* brief to Supreme Court at 4-12.

²⁸ 390 U.S. 629, 637-38.

²⁹ See *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973), *United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123 (1973); *United States v. Orito*, 413 U.S. 139 (1973); *United States v. Reidel*, 402 U.S. 351 (1971); *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971); *Roth v. United States*, 354 U.S. 476, 485 (1957), as reaffirmed by *Miller*, 413 U.S. at 23.

³⁰ See *Ferber, supra*, and *Osborne v. Ohio*, 495 U.S. 103 (1989).

vendors take reasonable steps to channel their commercial dissemination of pornography to their adult customers.

(D) Plaintiffs’ allegation that COPA is vague under the First and Fifth Amendments is false and unsupported by the record.

The Supreme Court has said “an enactment is void for vagueness if its prohibitions are not clearly defined.”³¹ COPA only prohibits distribution to minors of subject matter that meets the legal definition of what is obscene for adults or obscene for minors, a defined category of pornography under the Act and Congressional intent.

In addressing the problem of children’s access to “teasers, free sexually explicit images and animated graphic images files designed to entice a user to pay a fee to browse the whole” of pornography sites,³² COPA adopts the specific requirements of the *Millerized-Ginsberg* test and is supported by *Paris, 12 200-Ft. Reels, Orito, Reidel, Thirty-seven Photographs*, and *Roth, supra*, as well as *Miller, Smith, and Pope, supra*, and the legislative intent of Congress.

The Congressional REPORTS that accompanied COPA state the legislative basis and intent of the Act. *See* S. Rep. No. 105-225 and H.R. Rep. No. 105-775. COPA was drafted to conform to the special demands of the medium of the Web and to the traffic in “commercial pornography” (as repeatedly stated in the

³¹ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Senate Report). It differs from “geographic” or “non-specific” approaches to “community standards” that have been approved for judging adult obscenity under other print medium obscenity cases. COPA created an “age” standard, in which what is obscene for the respective under-17 audience; *i.e.*, the age group of the probable recipient minors, is measured by the views of the American adult community as a whole. *See* House REPORT at 28:

The Committee recognizes that the applicability of community standards in the context of the Web is controversial, but understands it as an “adult” standard, rather than a “geographic” standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors.

As stated in both the Senate and House Reports, Congress explicitly drafted COPA to be a narrow, specific statute that would not reach protected speech. The decision to adopt a “non-geographic”, “age-based”, “adult” community standard for judging how to measure the prurience and offensiveness prongs of COPA was proper for the legislative branch. *See Jenkins v. Georgia*, 418 U.S. 87, 157 (1974) (upholding “non-specific” community standard instructions for obscenity). *Jenkins*, at 157, held that courts and juries need not apply any hypothetical “geographic” standards whatsoever, stating: “We also agree with . . . instructions directing jurors to apply ‘community standards’

³² *ACLU v. Reno*, 31 F.Supp.2d 473, 478 (E.D. Pa. 1999).

without specifying what ‘community.’” Congress had the power to narrow COPA to suit the context of the Web by adopting generic “non-geographical” “adult” standards and this Court should so construe the statute so as to be fully constitutional as to those pornographers within its plainly legitimate reach.

This Court has a duty to authoritatively interpret COPA in such a way so as to protect the legitimate rights of those, such as Plaintiffs, to whom it *cannot* be applied, while at the same time upholding COPA as to all those to whom it is fairly applicable.³³

III. COPA IS AND CAN BE NARROWLY LIMITED AND REGULATES ONLY COMMERCIAL ACTIVITIES. IT SHOULD, THEREFORE, BE SUBJECT TO INTERMEDIATE SCRUTINY UNDER THE *CENTRAL HUDSON* TEST FOR COMMERCIAL SPEECH.

COPA as a narrow statute, applies (1) only to pornography displayed on the World Wide Web and (2) only to communications made for commercial profit. COPA “channels” (but does not “ban”) commercial material (as opposed to expressive speech) to an adult audience, and is based upon a number of legitimate governmental goals.³⁴ COPA should be subject to “intermediate

³³ As was done by the Court in *Commonwealth of Virginia v. American Booksellers Ass’n*, 372 S.E.2d 618 (Va. 1988), clarifying and limiting scope of “harmful to minors” law on certified questions from the U.S. Supreme Court in *Virginia v. American Booksellers Ass’n*, 848 U.S. 383 (1988).

³⁴ *See, infra*, at 23.

scrutiny,” under the *Central Hudson* test³⁵ for commercial speech, and not “strict scrutiny.” COPA is “viewpoint neutral,” regulating dissemination of specifically defined subject matter, regardless of the identity or perceived viewpoint of the speaker, and thus, does not present the danger of “viewpoint discrimination” that might require strict scrutiny.³⁶

Although COPA is a “content-based” regulation, such conclusion does not require a greater level of scrutiny than the standard *Central Hudson* analysis, since COPA defines a category of unprotected materials:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must [1] concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly

³⁵ In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561-66 (1980), the Supreme Court summarized the four-part analysis used to determine the constitutionality of governmental restrictions on commercial speech.

³⁶ See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 538, 554-55 (2001) (applying *Central Hudson* test to public advertising regulations). COPA regulates the placement of a commercial product for reasons unrelated to the communication of ideas. See *United States v. O’Brien*, 391 U.S. 367 (1968); *Erie v. Pap’s A.M.*, 529 U.S. 277, 289-96 (2000); *Texas v. Johnson*, 491 U.S. 397, 403 (1989). The electronic blinders are only to shield its view from minor children under 17. The regulatory obligations leave many adequate and readily available “alternative avenues of communication” in and out of this medium. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986).

advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.³⁷

COPA is not more extensive than necessary to serve and directly advance the many substantial governmental interests involved and may be subject to intermediate scrutiny.

IV. THE FEDERAL COURTS HAVE A CONSTITUTIONAL DUTY TO AUTHORITATIVELY CONSTRUE FEDERAL LEGISLATION IN A CONSTITUTIONAL FASHION SO AS TO UPHOLD IT.

It is the constitutional duty of this Court to construe COPA so as to be constitutional and, thus, uphold the Act, since the statute is specifically subject to such narrowing construction and such interpretation was explicitly intended by Congress, as discussed in the Senate and House Reports, *supra*. As stated in *12 200-Ft. Reels, supra*, 413 U.S. at 130, n. 7:

We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where “a serious doubt of constitutionality is raised” and “a construction of the statute is fairly possible by which the question may be avoided.” *United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971) (opinion of White, J.), quoting from *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

Many States have harmful to minors laws that regulate the dissemination of pornography to adults and away from minors.³⁸ COPA takes its approach

³⁷ *Lorillard Tobacco, supra*.

from such “variable obscenity” laws, such as “public display,” “news rack,” and “dial-a-porn” laws that were narrowly interpreted and then upheld in the Federal Courts.³⁹

This Court now has the mandate and the opportunity to correct a grievous error in this case, both for the United States, our children and families, and for Plaintiffs (whether they know it or not). This Court should authoritatively construe the statute so as to be constitutional and then uphold it with an order remanding to the District Court to issue a declaratory judgment in that regard that narrowly interprets and clarifies COPA as applicable to commercial pornography vendors on the Web and not applicable to Plaintiffs (who would

³⁸ See concurring and dissenting opinion of Justice O’Connor in *Reno v. ACLU*, 521 U.S. 844 (1997), at 887, footnote 1 (listing States that deny minors access to “adult” porn/sex establishments) and footnote 2 (listing States denying minors access to pornographic materials deemed “Harmful to Minors”).

³⁹ See *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997) (upholding California Penal Code § 313.1(c)(2), a criminal newsrack law); *Upper Midwest Booksellers Ass’n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985) (rejecting facial challenge and upholding harmful to minors ordinance); *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990) (upholding Georgia harmful to minors statute prohibiting display in places accessible to minors); and *Commonwealth of Virginia v. American Booksellers Ass’n*, 372 S.E.2d 618 (Va. 1988) (clarifying and limiting scope of Virginia’s display law upon Supreme Court’s certified questions), *followed*, *Am. Booksellers Ass’n v. Com. of Va.*, 882 F.2d 125 (4th Cir. 1989) (upholding law, as construed). See, also, *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 128 (1989) (Court statement favoring FCC regulations providing defenses for commercial dial-a-porn providers. These defenses were included in COPA, § 231(c); see Senate Report at 5, House Report at 14).

then be permanently protected without regard to whatever lawful application is ever made use of COPA to commercial porn-Websites to which it could apply). This Court could thus correct the manifest error committed below.

Your *amici* respectfully submit that, instead of effectuating the intent of Congress, the trial court below improperly widened the “possibly invalid” reach of COPA in order to issue the preliminary injunction, and improperly gave COPA an arbitrary and expansive construction, in violation of clearly binding precedents regarding statutory construction. In direct contravention to the mandate of *Ferber, supra*, 458 U.S. at 769, n. 24, the District Court interpreted COPA to reach potentially protected speech and, thus, made it unconstitutionally overbroad, rather than narrowly and authoritatively construing the Act within constitutional parameters under controlling precedent for “variable obscenity” and eliminating both potential overbreadth and any arguable vagueness. This Court of Appeals, in light of the remand Order of the Supreme Court above, has a duty to and should correct this error and authoritatively construe COPA as constitutionally appropriate and proper under the governing principles.

V. ON THIS RECORD, MOVANT PLAINTIFFS HAVE FAILED TO PLEAD AND PROVE THAT THEY WOULD BE IRREPARABLY HARMED BY DENIAL OF THE RELIEF.

There is a complete absence of any evidence that Plaintiffs will suffer the type of irreparable injury needed to invoke the extraordinary remedy of injunction. On the record before this Court, there is no evidence that Plaintiffs:

(1) “as a regular course of such person’s trade or business, with the objective of earning a profit as a result of such activities”, disseminate communications that are designed to appeal to or pander to the prurient interests of minors; or

(2) “as a regular course of such person’s trade or business, with the objective of earning a profit as a result of such activities,” Plaintiffs depict, describe, or represent “actual or simulated sexual acts or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast;” or

(3) “as a regular course of such person’s trade or business, with the objective of earning a profit as a result of such activities”, taken as a whole, Plaintiffs disseminate material that “lacks serious literary, artistic, political, or scientific value for minors.”

Because Plaintiffs: (1) have failed to establish that COPA is “substantially overbroad,” and (2) cannot show that COPA applies to them,

Plaintiffs lack the requisite standing to request and receive injunctive relief under Article III of the Constitution. Plaintiffs have suffered no “injury-in-fact.” Facts supporting Article III jurisdiction must “appea[r] affirmatively from the record.” *See FW/PBS v. Dallas*, 493 U.S. 215, 230 (1990). Plaintiffs’ unsubstantiated “fear” is too speculative to invoke the jurisdiction of an Article III court, as is any interference with an Internet “flow” experience or a general interest in stopping enforcement of laws affecting online pornography, even if genuinely held. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997): “An interest shared generally with the public at large in the proper application of the Constitution and laws will not do. *See Defenders of Wildlife*, 504 U.S. at 573-76, 112 S.Ct. at 2143-54.” As stated in *Valley Forge College v. Americans United*, 454 U.S. 464, 471 (1982):

The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process. The judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts.

Plaintiffs lack the requisite “direct stake in the outcome”.⁴⁰ This lawsuit has not been brought by commercial pornographers (to whom the statute may apply—and constitutionally so, if the Act were evaluated as if it was). Instead,

Plaintiffs are entities (based upon the record) expressing non-pornographic sexual content that has not been alleged or found or accused of being obscene for minors - “harmful to minors” or otherwise falling within COPA’s proper scope or legitimate reach.

VI. THE GRANTING OF INJUNCTIVE RELIEF RESULTED IN GREATER HARM TO THE NONMOVING PARTY AND RESULTS IN NO BENEFIT TO PLAINTIFFS.

The “public good” is not served by enjoining a federal statute that is capable of constitutional application. The preliminary injunction, issued wrongly, thwarts the legislative authority of Congress to protect children and the manner in which carriers of communication are used to transact business affecting Interstate Commerce. The District Court’s balancing of interests and “potential harm” to parties, 31 F.Supp.2d at 497-98, was in error.

The preliminary injunction wrongfully thwarts implementation of the following governmental interests that COPA directly and materially advances:

(a) The goal of protecting children from exposure to patently offensive sex related material is an interest held to be “compelling”.⁴¹

⁴⁰ See *Valley Forge College, supra* at 473.

⁴¹ See *Denver Area Educational Tele-Communications Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996); *Sable Communications of California v. FCC*, 492 U.S. at 126; *Ginsberg v. New York*, 390 U.S. at 639-40; *New York v. Ferber*, 458 U.S. at 756-57.

(b) The goal of *preventing* minors from gaining access to pornographic materials that are “harmful” because they are obscene as to minors.⁴²

(c) The goal of preventing children from gaining access to illegal pornography, such as obscenity or child pornography.⁴³

(d) The goal of aiding and supporting parents and guardians of children in the discharge of their primary responsibility for their children’s well-being.⁴⁴

(e) The goal of effectively stopping adults from using channels of Interstate Commerce and communications to disseminate to minors material that is unprotected and obscene for minors.⁴⁵

(f) The goal of aiding and supporting federal and state criminal and civil laws designed to deter and punish trafficking in obscenity, child pornography, stalking, and harassment by means of computer.

(g) The goal of preserving the “right of the Nation and the States to maintain a decent society” (referring to those values that historically have been

⁴² *Ginsberg*, 390 U.S. at 639-40.

⁴³ *Reno v. ACLU*, 521 U.S. 844 (1997).

⁴⁴ *Ginsberg*, *supra*.

⁴⁵ *Ginsberg*, *supra*; *Ferber*, 458 U.S. at 756-57; *Reno v. ACLU*, *supra* at 886, *et seq.* (opinion by O'Connor, J., joined by Rehnquist, C.J., concurring and dissenting).

regarded under the law as necessary for the maintenance of our democratic society) as has been discussed and explained in Supreme Court case law.⁴⁶

(h) The goals of regulating Interstate Commerce, and implementing Federal Communication Policy, by conserving, properly allocating, and expediting management of federal channels of communication.⁴⁷

VII. THE GRANTING OF PRELIMINARY RELIEF IS HARMFUL AND CONTRARY TO THE PUBLIC INTEREST.

The preliminary injunction is contrary to the public interest. Without evidentiary support, it restrains a valid Act of Congress and inequitably permits the legitimate target of COPA (*i.e.* commercial pornographers) to continue to disseminate to minors material that is “harmful” because it is obscene as to minors. This raises serious social⁴⁸ and law enforcement concerns.

⁴⁶ See *Paris Adult Theatre, supra*, 413 U.S. at 59-60, quoting Chief Justice Earl Warren in *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964)(dissenting opinion), that there is a “right of the Nation and of the States to maintain a decent society....”

⁴⁷ Under the Constitution, Congress holds plenary power over Interstate Commerce and federal channels of communication. By enacting COPA, Congress decided, as a matter of social policy, that the burden of protecting children online should be shared by the pornographers who cause the problem and profit from the Internet, and that protecting children online cannot and should not rest solely on parents. See Senate Report at 3; House Report at 10-12.

⁴⁸ The injunction herein permits commercial pornographers to continue exposing their wares to children, with the attendant harm that flows therefrom. Such harm is well known and long recognized, as the Court noted in *Ginsberg*, 390 U.S. at 642-43, n. 10 (quoting Dr. Gaylin of Columbia University

In connection with the volume of sexual predators and sexually explicit pornographic materials available on the Internet,⁴⁹ there are many situations where offering children access to such commercial materials may result in abusive and potentially dangerous situations.⁵⁰ There are a number of physical, medical, and mental risks for children who are exposed to such material.⁵¹

Psychoanalytic Clinic). As long as the injunction remains in place, children are being enticed by commercial pornography, with tragic and disturbing results.

⁴⁹ As the number of Internet users expands (*see Ashcroft v. ACLU*, Slip Op. at 5-6, n.2), the number of children exposed to harm continues to grow unabated.

⁵⁰ *See, for example*, the following reports: David Burt, *Dangerous Access, 2000 Ed: Uncovering Internet Porn in America's Libraries* < <http://www.copacommission.org/papers> >; *Operations Committee Report On Internet Use Policy to Full Board Of Greenville County Library* (Adopted by Full Board July 17, 2000) at < <http://www.copacommission.org/papers> >; National Center for Missing & Exploited Children, *Online Victimization: A Report on the Nation's Youth* < <http://www.missingkids.com> > at < <http://www.missingkids.org/download/nc62.pdf> >.

⁵¹ *See, for example*, the 1986 FINAL REPORT, at 299, 1034-35, of the Attorney General's Commission on Pornography, which consciously decided to include within its report the effects of *non-obscene* pornographic materials. *See also* Dr. Victor Cline: "Pornography's Effects on Adults and Children" and "Treatment and Healing of Sexual and Pornographic Addictions" at < <http://www.moralityinmedia.org> >. *See also* DIANA E.H. RUSSELL, PH.D., *Pornography As A Cause of Rape*, in *AGAINST PORNOGRAPHY: THE EVIDENCE OF HARM* (Berkeley: Russell Publications, 1994) at < http://www.mills.edu/ACAD_INFO/EMERITUS/RUSSELL/emeritus_russell.excerpttoc.html >. *See also* "Help for Porn Victims and Addicts, Selected Resources," at < <http://www.obscenitycrimes.org/helpvictims.cfm> >.

ViiI. THERE IS NO “SIMILARLY EFFECTIVE ALTERNATIVE” THAT WILL ACHIEVE THE LEGITIMATE PURPOSE THAT THE STATUTE WAS ENACTED TO SERVE. EVEN UNDER A STRICT SCRUTINY STANDARD, COPA IS FACIALLY CONSTITUTIONAL.

The record makes clear that there is no “similarly effective alternative” to COPA, a measure deemed necessary by Congress and narrowly tailored to achieve what are compelling and substantial governmental interests. Therefore, COPA is constitutional even under a strict scrutiny standard.

The issuance of the injunction herein should have been supported by findings that “adequate alternatives” exist, where there are none in fact—on the record or on the Web. In the words of Justice Breyer:⁵²

“[T]he Court reduces Congress’ protective power to the vanishing point. That is not what the First Amendment demands.”

There is no indication that anything short of criminal penalties (such as COPA) will be effective in deterring notorious, unprotected commercial practices.⁵³

COPA represents the legitimate and authoritative judgment of Congress that the power of additional criminal laws at the federal level is necessary.

⁵² See opinion of Breyer, J., joined by Rehnquist, C.J., O'Connor, J., and Scalia J., in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). Legislatures maintain the power to protect children by restricting access to, but not banning, certain material. *Id.* The difference between “imposing a burden” and “enacting a ban” is central. *Id.*

⁵³ For discussions of open dissemination of “free porn teasers,” see: < <http://www.ProtectKids.com> >, < <http://www.ftc.gov> >, and < <http://www.oii.org> >.

COPA's use of criminal penalties and fines would be highly effective in: (1) protecting children against repeated harmful exposure to pornographic imagery, and (2) preserving the integrity of federal channels of Interstate Commerce and communication. Unscrupulous business behavior can most effectively be controlled by the deterrent value provided by consistent, aggressive application of criminal sanctions. COPA vindicates the interest that society has in deterring and punishing anti-social commercial behaviors that harm children and which negatively affect communications channels and Interstate Commerce.

IX. CONCLUSION

By enacting COPA, Congress has determined that commercial vendors of pornography, who choose to disseminate their commercial product using the World Wide Web, must do so in a manner that does not contravene important governmental interests involved. COPA does not "ban" material—it "channels" a commercial product to the appropriate commercial audience (*i.e.* adults). Nothing in the Constitution forbids such commercial regulation. Commercial vendors can and should be *required* to take reasonable steps to refrain from using federal channels of communication in such a way so as to knowingly expose minors to material that is legally "harmful to minors" because it is obscene for minors.

The injunction in this case has unjustly frustrated the legitimate application of COPA to address a serious social problem. Plaintiffs have failed to establish their right to the injunction they secured, and the Federal Rules and applicable principles of equity warrant the dissolution of the preliminary injunction in this case *based on this record*. The Senate and House Reports correctly identified and addressed a critical problem for children and COPA is critically needed to meet this compelling governmental interest. This Court should properly construe the statute and vacate the injunction as having been wrongfully issued. In addition, because Plaintiffs have not established that they will suffer the requisite Article III “injury-in-fact,” all claims beyond declaratory relief should be dismissed for lack of standing and lack of case or controversy.

Respectfully submitted,

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CERTIFICATE OF SERVICE and FILING

Two copies of this BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE*, ON REMAND, IN SUPPORT OF DEFENDANT-APPELLANT were mailed to the following counsel on July 31, 2002, and two additional copies were served on counsel for the parties by shipment on July 31, 2002, for overnight delivery by UPS to counsel on the morning of August 1, 2002, and the original and ten copies were shipped by UPS for delivery to the Clerk of the Court of Appeals for the Third Circuit to be filed with the Court on August 1, 2002:

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COPA
Child Online Protection Act
of 1998

Title 47, United States Code

Section 231. **RESTRICTION OF ACCESS BY MINORS TO MATERIALS
COMMERCIALY DISTRIBUTED BY MEANS OF WORLD
WIDE WEB THAT ARE HARMFUL TO MINORS.**

(a) **REQUIREMENT TO RESTRICT ACCESS.—**

 (1) **PROHIBITED CONDUCT.** —Whoever 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 shall be fined not more than \$50,000, imprisoned not more than 6 months, or both.

* * *

(c) **AFFIRMATIVE DEFENSE.—**

 (1) **DEFENSE.**—It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—

 (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

 (B) by accepting a digital certificate that verifies age; or

 (C) by any other reasonable measures that are feasible under available technology.

* * *

(e) DEFINITIONS.—For purposes of this subsection, the following definitions shall apply:

* * *

(2) COMMERCIAL PURPOSES; ENGAGED IN THE BUSINESS.—

(A) COMMERCIAL PURPOSES.—A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

(B) ENGAGED IN THE BUSINESS.—The term 'engaged in the business' means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

* * *

(6) MATERIAL THAT IS HARMFUL TO MINORS.--The term `material that is harmful to minors' means 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.

(7) MINOR.—The term `minor' means any person under 17 years of age.