

No. 99-1324

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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AMERICAN CIVIL LIBERTIES UNION, *et al.*,  
Plaintiffs-Appellees,

v.

JOHN ASHCROFT, in his official capacity as  
Attorney General of the United States,  
Defendant-Appellant.

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BRIEF AMICI CURIAE OF THE CENTER FOR DEMOCRACY &  
TECHNOLOGY, THE AMERICAN ASSOCIATION OF LAW  
LIBRARIES, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS,  
THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.,  
THE COMIC BOOK LEGAL DEFENSE FUND, THE COMPUTER &  
COMMUNICATIONS INDUSTRY ASSOCIATION, THE FREEDOM TO  
READ FOUNDATION, THE INFORMATION TECHNOLOGY  
ASSOCIATION OF AMERICA, THE NATIONAL ASSOCIATION OF  
RECORDING MERCHANTISERS, PEOPLE FOR THE AMERICAN WAY  
FOUNDATION, THE PUBLISHERS MARKETING ASSOCIATION, AND  
THE SOCIETY FOR PROFESSIONAL JOURNALISTS  
IN SUPPORT OF APPELLEES AND AFFIRMANCE

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AMERICAN CIVIL LIBERTIES UNION, ANDROGYNY BOOKS, INC.  
d/b/a/ A DIFFERENT LIGHT BOOKSTORES, AMERICAN  
BOOKSELLERS FOUNDATION FOR FREE EXPRESSION,  
ARTNET WORLDWIDE CORP., BACKSTRIPE, 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., WEST STOCK, INC.

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## **STATEMENT OF CONSENT TO FILE BRIEF *AMICI CURIAE***

All parties to this appeal have consented to the filing of this brief *amici curiae*, and counsel for *amici* have submitted proof of such consent to the Clerk of the Court.

## **CORPORATE DISCLOSURE STATEMENT**

Counsel for *amici curiae* certify that (1) none of *amici* have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in any *amici*.

## **CERTIFICATION OF BAR MEMBERSHIP**

Counsel for *amici curiae*, John B. Morris, Jr., is a member of the Bar of this United States Court of Appeals for the Third Circuit.

## **CERTIFICATION OF COMPLIANCE WITH WORD LIMITATION**

This brief complies with the 7,000 word limit on *amicus* briefs set by the Federal Rules of Appellate Procedure and the Local Appellate Rules of this Court. As measured by Microsoft Word 2000, and excluding tables of contents and cases, and certificates of counsel, this brief contains 6,857 words and is printed in 14 point Times New Roman proportional font.

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**INTEREST OF AMICI**

This brief *amici curiae* is submitted on behalf of a broad spectrum of  
Internet industry associations, content industry associations, library and  
academic associations, and public interest groups – described individually at

the conclusion of this brief – that share a deep commitment to ensuring that the Internet achieves its full promise as a revolutionary medium of communications suitable for both children and adults. Collectively, *amici* represent five broad and important categories of entities and individuals:

- ♦ over 500 corporate leaders in the Internet industry, including the leading hardware, software, service, and content providers in the United States;
- ♦ the publishers of the vast majority of commercial books in the United States, as well as the leading publishers of a wide range of alternative forms of content;
- ♦ thousands of libraries and librarians across the U.S., whose patrons desire access to the widest possible range of informative materials;
- ♦ over 9,000 journalists and newspaper editors, who are increasingly utilizing the Internet for distribution of their work; and
- ♦ public interest organizations reflecting parental and community concerns that potentially well-intentioned, but nonetheless broadly censorious, government regulation of the Internet not smother this medium in its infancy.

*Amici* share a common interest in the robust evolution of the Internet, and a common concern about the threat to that evolution posed by ill-considered, ineffective, and unconstitutional governmental regulation of the Internet.

## PRELIMINARY STATEMENT

The U.S. Supreme Court's opinion remanding this case held that the inclusion of "community standards" in the harmful-to-minors definition of the Child Online Protection Act, 47 U.S.C. § 231 ("COPA"), did not in and of itself render COPA unconstitutional, as this Court had held. That issue clearly warrants further consideration -- but not in this case. The district court found that COPA would fail strict scrutiny because it is ineffective, it burdens protected expression, and it is not the least restrictive means to further the Government's interest. These constitutional infirmities, which this Court alluded to but did not reach,<sup>1</sup> compel affirmance of the district court's injunction without the need to address the complex question whether community standards can be applied constitutionally to the World Wide Web.

In their brief submitted to the Court in 1999, *amici* explained why COPA fails to remedy the constitutional defects identified by the Supreme Court in the Communications Decency Act.<sup>2</sup> Those arguments remain valid,

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<sup>1</sup> See *American Civil Liberties Union v. Reno*, 217 F.3d 162, 174 n.19 (3d Cir. 2000).

<sup>2</sup> See Brief *Amici Curiae* of the Association of American Publishers, Inc., *et al.* (filed Sept. 1, 1999).

and *amici* hereby incorporate by reference the points and arguments advanced in that *amicus* brief. Specifically, *amici* believe that COPA poses a significant threat to their exercise of their First Amendment rights because:

- ♦ COPA is unconstitutionally overbroad, notwithstanding its limitation to World Wide Web material that is harmful to minors;
- ♦ COPA's vague "commercial purposes" requirement does not cure its unconstitutional reach; and
- ♦ COPA's affirmative defenses impose unconstitutional burdens on both speakers and listeners.

In this brief, *amici* focus on the impact on the issues before the Court of new information that was not presented to the Court during the prior proceedings. Specifically, *amici* discuss an authoritative and comprehensive report issued May 2002 by the National Academy of Sciences entitled "Youth, Pornography, and the Internet." Commissioned by an Act of Congress, the report provides an extensive analysis of the relative effectiveness of different methods – including legislation like COPA – in protecting children on the Internet from content deemed inappropriate. Also relevant is the October 2000 Final Report of the COPA Commission – created by the Child Online Protection Act itself – which arrived at many of the same conclusions later reached by the National Academy of Science study. In addition to these two reports, this brief also discusses the significance of the

U.S. Supreme Court's most recent decision addressing the availability of less restrictive means to protect children from sexual content, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000). That decision was issued one month before this Court's prior decision in this case and thus has not yet been fully briefed to this Court.

### **BACKGROUND ON THE REPORT OF THE NATIONAL ACADEMY OF SCIENCES**

In November 1998, Congress instructed the National Academy of Sciences to undertake a study of "computer-based technologies and other approaches to the problem of the availability of pornographic material to children on the Internet." Pub. L. No. 105-314, Title IX, § 901, 112 Stat. 2991 (1998). More than two years in the making, the National Academy released its study in May 2002. *See* Nat'l Research Council of the Nat'l Academy of Sciences, "Youth, Pornography, and the Internet" (2002).<sup>3</sup>

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<sup>3</sup> Attached hereto is an appendix containing the Executive Summary and the final concluding chapter of the report, and *amici* would be pleased to arrange for the National Academy of Sciences to provide the Court with full copies of the entire report. The full report is also available online in HTML format at [http://books.nap.edu/html/youth\\_internet/](http://books.nap.edu/html/youth_internet/) and in PDF format at <http://books.nap.edu/books/0309082749/html/index.html>.

The committee that prepared the report, chaired by former U.S.

Attorney General Richard Thornburgh,

was composed of a diverse group of people including individuals with expertise in constitutional law, law enforcement, libraries and library science, information retrieval and representation, developmental and social psychology, Internet and other information technologies, ethics, and education.

*Nat'l Acad. of Sciences*, at viii – x. Among the committee members were

University of Chicago Provost and law professor Geoffrey Stone and National

Center for Missing and Exploited Children Chief Operating Officer John

Rabun. Over the course of its two years of study and analysis, the committee

received extensive expert testimony, and conducted numerous meetings,

plenary sessions, workshops, and site visits. *See id.* at x – xi & appendix A.

The full final report is more than 400 pages long. This Court can and should

take judicial notice of the National Academy of Sciences report,<sup>4</sup> as it is an

official government document prepared at the instruction of Congress.<sup>5</sup>

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<sup>4</sup> *See, e.g., Tempel v. United States*, 248 U.S. 121, 130 (1918) (taking judicial notice of government reports); *Dispatch, Inc. v. City of Erie*, 364 F.2d 539, 541 (3d Cir. 1966) (taking judicial notice of government agency report).

<sup>5</sup> Likewise, the Court can take judicial notice of the report of the COPA Commission, which was created by Congress at the same time it enacted COPA. *See* 47 U.S.C. § 231, note. The "Final Report of the COPA

(footnote continued)

## SUMMARY OF ARGUMENT

The Supreme Court's remand of this case for further consideration was based only on its holding that COPA's use of "community standards" to define material that is harmful to minors does not *alone* render the statute unconstitutional. *Ashcroft v. American Civil Liberties Union*, 122 S. Ct. 1700, 1703 (2002). However, as the district court correctly found, COPA fails constitutional muster on several other grounds: (1) COPA would not materially further the Government's interest in protecting children from sexually explicit content on the Internet; (2) COPA would deprive adults of speech that is constitutionally protected as to them; (3) COPA's affirmative defenses would impermissibly burden protected speech; and (4) there are alternative actions the Government could take that would be less restrictive and more effective than COPA.

The district court's conclusions are buttressed by the findings of a two-year long study conducted at the behest of Congress by the National Research

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Commission," released on October 20, 2000, is available online in HTML format at <http://www.copacommission.org/report/> and in PDF format at <http://www.copacommission.org/report/COPAreport.pdf>.

Council of the National Academy of Sciences. The report, entitled “Youth, Pornography & the Internet,” provides a comprehensive look at strategies – including COPA – to protect children online, and it concludes that COPA will have little positive impact on the problem.

Although the Government’s interest in protecting children from harmful content on the Internet is well accepted, COPA fails to survive strict scrutiny in at least two respects. First, the Government has failed to meet its burden of demonstrating that COPA would materially advance the Government’s interest. The vast proliferation of overseas commercial sites offering sexually explicit material that are beyond the reach of U.S. law renders COPA ineffectual in protecting minors from exposure to sexually explicit content on the Internet. Even if COPA were to place all U.S.-based adult content sites beyond the reach of minors, hundreds of thousands of similar offshore sites outside of the jurisdiction of U.S. courts would remain accessible to children.

The *de minimis* benefits that might be gained by enforcement of COPA are not sufficient to justify the serious restriction on protected speech the statute would impose. Not only do the provisions of COPA inhibit speech, but the statute’s affirmative defenses would also discourage users from attempting to access Internet content that is protected by the First Amendment

as to them. Out-of-pocket costs of acquiring and implementing technologies necessary to comply with the requirements of the affirmative defenses (where such technologies exist) would impose significant direct and indirect costs on speakers providing that content and would reduce the amount of constitutionally protected speech available on the Internet.

Second, the availability of less restrictive alternative government actions more effective at furthering the Government's interest in protecting children precludes a finding that COPA is constitutional. In this regard, the National Academy of Sciences report identifies and describes in detail a number of governmental actions that the committee believed would be more effective than COPA in protecting children online. The study's proposals mirror the government actions held by the Supreme Court to be less restrictive means in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812, 816 (2000).

Because COPA (1) is ineffective, (2) significantly burdens protected speech, and (3) is not the least restrictive means to further the asserted governmental interest, it cannot withstand constitutional scrutiny.

## ARGUMENT

The question in this case is not whether there is reason to protect children from certain material on the Internet, but rather whether COPA is an effective and constitutional means to provide such protection. As with the earlier Communications Decency Act – struck down by the Supreme Court in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) – COPA fails to further the governmental interest of protecting children, unconstitutionally burdens protected speech on the Internet, and is not the constitutionally-required least restrictive means to advance the governmental interest. This Court therefore should affirm the district court's injunction against the enforcement of COPA.

### **I. COPA WOULD NOT FURTHER THE GOVERNMENTAL INTEREST IN PROTECTING CHILDREN, AND WOULD UNCONSTITUTIONALLY IMPAIR PROTECTED SPEECH ON THE INTERNET.**

As a content-based regulation of speech, COPA is subject to strict scrutiny and is presumptively invalid. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-83 (1992). In order to rebut the presumption of invalidity, the Government must show that COPA advances a compelling government interest and is the least restrictive means of doing so. *See Sable*

*Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1989).

The first of these showings requires the Government to prove that COPA is *effective* in advancing the asserted governmental interest. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557, 564 (1980). As explained in Section A below, the Government completely fails in this regard.

Moreover, in addition to failing to further the governmental interest, in protecting minors from inappropriate sexual material on the Internet, COPA would impose significant burdens on protected speech on the Internet, burdens that would reduce the amount of protected speech available to adults. It is well accepted that a regulation furthering a compelling state interest with regard to one group of individuals cannot do so at the expense of the First Amendment rights of another group of individuals. *See Reno v. ACLU*, 521 U.S. at 874-75. In this case, the burdens on speech created by COPA would more than outweigh any theoretical benefit afforded by the law.

**A. COPA Would Be Ineffective.**

The U.S. Supreme Court has made clear that a restriction on speech "must directly advance the state interest involved; the regulation may not be

sustained *if it provides only ineffective or remote support* for the government's purpose." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. at 564 (emphasis added). In this case, as the National Academy of Sciences report confirms, COPA will have virtually *no impact* on furthering the expressed governmental interest in protecting children from sexual content on the Internet.

The district court found that minors could access sexual content on foreign web sites, and that this was one of the "problems [COPA] has with efficaciously meeting its goal." *American Civil Liberties Union v. Reno*, 31 F. Supp. 2d 473, 496 (E.D. Pa. 1999). The National Academy report confirms this conclusion.

The National Academy determined that approximately three-quarters of the commercial sites offering sexually explicit material are located outside the United States. *See Nat'l Acad. of Sciences*, at 4. Globally, there are at least *three hundred thousand* non-U.S. sexual web sites, *id.*, and this figure likely does not include a huge number of sexual sites that do not seek direct payments from users.

This enormous number of sexually explicit sites outside of the United States means that COPA will be ineffectual in protecting minors from sexual content on the Internet. Simply put, even if COPA somehow made all U.S.-

based sites completely inaccessible to minors, minors would still have *hundreds of thousands* of sexual sites available to them.

The National Academy report speaks bluntly about the significance of the overseas sexual content in terms of the likely effectiveness of COPA in furthering the governmental interest:

For jurisdictional reasons, federal legislation cannot readily govern Web sites outside the United States, even though they are accessible within the United States. Because a substantial percentage of sexually explicit Web sites exist outside the United States, *even the strict enforcement of COPA will likely have only a marginal effect on the availability of such material on the Internet in the United States*. Thus, even if the Supreme Court upholds COPA, COPA is not a panacea, illustrating the real limitations of policy and legal approaches to this issue. The committee also notes that, even if COPA is constitutional, this does not necessarily mean it is good public policy. The concerns raised against COPA could at least arguably lead to the conclusion that it is insufficiently effective to justify its costs, whether or not it is consistent with the First Amendment.

*Nat'l Acad. of Sciences*, at 207 (emphasis added).<sup>6</sup> Elsewhere, the report identifies a closely related reason why COPA would be ineffective:

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<sup>6</sup> The Congressionally-created COPA Commission also recognized that overseas content limits the effectiveness of any one nation's laws. *See COPA Commission, Final Report of the COPA Commission*, Oct. 20, 2000, at 13 ("Material published on the Internet may originate anywhere, presenting challenges to the application of the law of any single jurisdiction.").

For a great deal of inappropriate sexually explicit material (specifically, material accessible through Web sites), a reduction of the number of Web sites containing such material, in and of itself, *is not likely to reduce the exposure of children to such material*. The reason is that a primary method for obtaining access to such material is through search engines, and the likelihood that a search will find some inappropriate material for a given set of search parameters is essentially independent of the number of Web pages represented in that search.

*Id.* at 360 (emphasis added). In other words, *even if all U.S.-based sites were completely disabled, minors would still be able to locate, and then access, the hundreds of thousands of sexual sites overseas.*

Neither *amici* nor the members of the National Academy of Sciences committee believe that the ineffectiveness of laws like COPA means that one should throw up one's hands and do nothing to protect minors from exposure to sexually explicit material on the Internet. Rather, *amici* fully endorse the conclusion of the National Academy committee that *education* of America's children, parents, educators, and administrators is key to providing effective protection of children on the Internet.<sup>7</sup> As the report explains:

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<sup>7</sup> The COPA Commission reached the same conclusion – that *public education* was the most important step that government could take to protect children on the Internet. *See COPA Commission*, at 40.

While both technology and public policy have important roles to play, social and educational strategies to develop in minors an ethic of responsible choice and the skills to effectuate these choices and to cope with exposure are foundational to protecting children from negative effects that may result from exposure to inappropriate material or experiences on the Internet.

*Id.* at 12. Notwithstanding the importance of protecting children on the Internet, the National Academy report makes clear that COPA would not be effective in furthering that goal. The ineffectiveness of COPA, when combined with the significant burdens it would impose on constitutionally protected speech and the less restrictive governmental actions discussed below, should lead this Court to affirm the district court's injunction against enforcement of COPA.

**B. The Burdens Caused by COPA Are Not Avoided by its Affirmative Defenses and Would Reduce Protected Speech on the Internet.**

The Government claims that COPA imposes no significant burdens upon protected speech because the affirmative defenses outlined by the statute would enable protected speech to occur without fear of sanction. This contention, however, ignores both the factual findings of the district court and the practical realities of the Internet today. Both the experience of *amici* and the research of the National Academy of Sciences committee confirm the

serious problems that the district court identified with COPA's affirmative defenses, as discussed below.

First, the use of a "digital certificate that verifies age," 47 U.S.C. § 231(c)(1)(B), is an illusory defense. As the district court found, "there is no certificate authority that will issue a digital certificate that verifies a user's age." *ACLU v. Reno*, 31 F. Supp. 2d at 487. More generally, there is no effective, efficient and broadly available technology that can determine and verify the age of a user on the Internet. As the National Academy report explains:

Making some material available to adults but not to children requires that providers have a reasonably reliable way of differentiating between them. In the physical world, such differentiation can often be accomplished with reasonable ease (e.g., by checking a driver's license or other identification). But in the Internet context, rules based on age differentiation are highly problematic and technically difficult to enforce.

*Nat'l Acad. of Sciences*, at 360. Specifically, "[i]n an online environment, age verification is much more difficult because a pervasive nationally available infrastructure for this purpose is not available." *Id.* at 63. Although such an infrastructure might, in theory, be built, it does not exist today. Moreover, such an infrastructure would be costly and still would not avoid the chilling effect such systems inevitably cause. As the National Academy report noted, "[t]he underlying technology to support widespread, high-confidence age

verification does exist, but its implementation could be very expensive, and its use would raise a myriad of important privacy concerns." *Id.* at 349.

Second, the use of COPA's affirmative defenses would alienate many users and reduce the amount of protected speech conveyed over the Internet. As the district court observed in its findings of fact – and both parties' expert witnesses agreed – a registration system would deter a substantial number of users from visiting web sites offering material that is constitutionally protected as to those users. *See ACLU v. Reno*, 31 F. Supp. 2d at 487, 491. Web site access conditioned on the use of age verification schemes poses substantial privacy burdens, which in turn deter users. As the National Academy report explains:

Because users are reluctant to provide [personal] information and are discouraged from accessing sites that require such disclosures, the imposition of age verification requirements may chill or inhibit adults from accessing non-obscene Web sites, both because they might not wish to give personal information and because they may not be able to prove their age.

*Nat'l Acad. of Sciences*, at 209 n.4. Unlike in the physical world, users of the Internet have little assurance that personal information they release for purposes of age verification will be kept private:

[Age verification systems] may entail a loss of privacy for the adult user, both perceived and real. In a face-to-face transaction with a clerk checking a driver's license, there may be some embarrassment, but as a general rule, the clerk

does not make a record of the license and does not record the titles of the material being purchased or rented. As importantly, the user can see that the clerk is not doing so. When an online [age verification system] is used, the reasonable assumption would be that records are being kept (whether or not they are in practice), and so the user has a plausible reason to be concerned that his name is associated with certain types of material.

The privacy problem is exacerbated by how some [age verification systems] work. . . . [The system creates] a complete record of all of the adult sites visited using its age credential.

*Id.* at 344. Unavoidably, then, the very use of the "adult web site" age verification system creates a significant disincentive for users to receive controversial speech over the Internet.

Third, the significant costs imposed by the age verifications systems will translate into a reduction of speakers and speech on the Internet. As the district court found, COPA would impose on speakers both the out-of-pocket cost of acquiring and using various technologies needed to comply with the law, as well as the even more significant economic harm that would result from loss of traffic to the site. *ACLU v. Reno*, 31 F. Supp. 2d at 491, 492. The National Academy report likewise recognizes that web sites would suffer both the direct financial costs of COPA compliance as well as the loss of traffic. *See Nat'l Acad. of Sciences*, at 209 n.4, 344. These economic costs are all the more real in the context of today's Internet economic realities. Gone are the

days when new web sites could be created without close regard to the concrete costs of and obstacles to attracting and maintaining traffic. In light of today's economic realities, the added direct and indirect costs imposed by COPA is even more likely to reduce the number of speakers willing to host controversial content on the Internet. The result will be a significant decrease in the availability of protected speech.

In *Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission*, 896 F.2d 780 (3d Cir. 1990), this Court confronted a statutory scheme directly analogous to COPA's affirmative defenses. In that case, the Court declared unconstitutional a law requiring adults to obtain access codes or other identification numbers in order to place a call to an adult telephone message service. As the Court explained,

the First Amendment protects against government inhibition as well as prohibition. An identification requirement exerts an inhibitory effect, and such deterrence raises First Amendment issues comparable to those raised by direct state-imposed burdens or restrictions. . . . [It is enough to invalidate a law where it is shown that] access codes will chill the exercise of some users' right to hear protected communications.

*Id.* at 785-86 (citations omitted). COPA would create in this case the exact same "inhibitory effect" that was declared unconstitutional in *Fabulous Associates*.

With respect to the direct and indirect economic costs COPA would impose on speakers providing constitutionally protected speech, it bears emphasizing that the imposition of "a financial burden on speakers because of the content of their speech" raises serious constitutional concerns. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991).

Because of its harmful impact on both speakers and listeners, COPA's affirmative defenses aggravate, instead of cure, its unconstitutional impact.

## **II. THERE ARE ALTERNATIVE GOVERNMENTAL ACTIONS THAT WOULD BE LESS RESTRICTIVE AND MORE EFFECTIVE THAN COPA.**

In addition to supporting the district court's conclusions regarding the ineffectiveness of COPA and the burdens it imposes on protected speech, the report of the National Academy of Sciences also supports the lower court's conclusion that there are a variety of less restrictive alternatives that would, in fact, be more effective than COPA in furthering the governmental interest in protecting children from harmful-to-minors material on the Internet.

As a preliminary matter, however, *amici* address a question raised in this Court's prior opinion in this case. In note 16 of its opinion, the Court expressed doubt that voluntary actions by a minor's parents could constitute a

less restrictive alternative, for purposes of strict scrutiny analysis, although the Court also noted that the Supreme Court had recently ruled that they could, in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). *See American Civil Liberties Union v. Reno*, 217 F.3d at 171 n.16. *Playboy* holds that governmental efforts to promote voluntary efforts by parents to protect their children from sexual content are a less restrictive alternative to blocking mandated by statute. *See Playboy*, 529 U.S. at 827. In *Playboy*, the Court held that a statute that required cable companies to scramble sexually explicit programming was unconstitutional in light of the less restrictive alternative of governmental promotion of voluntary blocking of the signal upon requests of parents. *Id.* at 822. As the Court observed, "targeted blocking [initiated by parents] enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id.* at 815.

This Court thus should not be deterred from finding that a less restrictive alternative exists merely because it may involve efforts of non-governmental actors. As the Supreme Court held in *Playboy*:

[I]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.

*Id.* at 824. *See also Reno v. ACLU*, 521 U.S. at 877 (noting significance of “user based” alternatives to governmental action).

It is the Government's burden to show that such a plausible less restrictive alternative would not be effective. *See id.* at 816. Both the Final Report of the COPA Commission, and the National Academy of Sciences report, cast serious doubt on the Government's ability to meet that burden. The COPA Commission analyzed the effectiveness and the speech-restrictiveness of both user-side filtering and blocking technologies and the affirmative defenses set out in the COPA law. The results indicate that filtering and blocking technologies are *more* effective for protecting children, and *less* restrictive of First Amendment values, than the credit card and age verification systems identified in COPA. *See COPA Commission*, at 8, 21, 25, 27.

Similarly, the National Academy of Sciences report identifies a number of governmental actions that the committee concluded would be more effective than COPA at furthering the governmental interest in protecting children on the Internet, while at the same time less burdensome on speech. The report specifically discusses the possibility that "the Supreme Court [might] invalidate[] COPA because age verification procedures in the context of the Internet are too burdensome on the First Amendment rights of adults,"

and the committee proceeds to present "several legal and regulatory approaches that might be available even if the Supreme Court invalidates COPA." *Nat'l Acad. of Sciences*, at 207.<sup>8</sup> The proposals advanced in the report are *precisely* the type of governmental actions that the Supreme Court found to be a less restrictive alternative in *Playboy*. As the report notes, "public policy can go far beyond the creation of statutory punishment for violating some approved canon of behavior." *Id.* at 8.

The following summarizes some, but not all, of the wide array of alternative public policy recommendations of the National Academy committee:<sup>9</sup>

- Concrete governmental efforts to promote Internet media

literacy and educational strategies would yield superior results without

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<sup>8</sup> *Amici* take no position on the constitutionality of each of the possible governmental actions identified in the National Academy report. Some would clearly be constitutional, while the constitutionality of others would depend – as is common in this area of the law – on the details of drafting and implementation.

<sup>9</sup> Again, the COPA Commission also identified a wide range of governmental actions that it believed would significantly contribute to the protection of children on the Internet. Significantly, the passage and enforcement of laws like COPA was *not* included in the Commission's recommendations. Many of the Commission's recommendations are similar to those later made by the National Academy committee. *See COPA Commission*, at 39-46.

any significant burden on protected speech. Specifically, the report suggests government funding for the development of model curricula, support of professional development for teachers, support for outreach programs such as grants to non-profit and community organizations, and development of Internet educational material, including public service announcements and Internet programming akin to that offered on PBS. *See Nat'l Acad. of Sciences*, at 384-85.

- Government support for industry self-regulation would provide significant protection to children without imposing unconstitutional constraints on First Amendment freedoms. Financial or legal incentives, as well as government coordination and facilitation of private efforts to self-police, could prove effective in addressing the problem. *See id.* at 385. For instance, financial or legal incentives might be used to bolster ISPs' creation of child-safe portals. *See id.* at 385. Likewise, government incentives might encourage commercial sources of sexually explicit images to contractually require affiliates posting their content to put that content behind an Internet equivalent of "plain brown wrappers." *See id.* at 216.

- Government support of parents' voluntary efforts to employ technological solutions would provide an effective alternative to

COPA. While recognizing that filtering technology is far from perfect, the National Academy committee concludes that filters (which may be installed directly on a computer by end-users or available as a feature offered by an ISP) can have "significant utility in denying access to content that may be regarded as inappropriate." *Id.* at 303.<sup>10</sup>

*Amici* believe that under the Supreme Court's analysis in *Playboy* case, the district court's finding that less restrictive alternatives exist should be upheld. In addition to the lower court's conclusions, the National Academy of Sciences report articulates a host of additional alternative governmental actions, all of which would qualify as less restrictive alternatives under *Playboy*. In light of these alternatives, COPA clearly fails strict scrutiny.

## CONCLUSION

The report of the National Academy of Sciences provides extensive support for the findings and conclusions of the district court. The report

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<sup>10</sup> *Amici* would *not* support government-mandated use of technological filtering tools for blocking content, a practice that has been held to be unconstitutional by a three-judge district court in this Circuit. *See American Library Assoc. v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

demonstrates that COPA not only would not be effective, but that it also creates significant burdens on constitutionally protected speech on the Internet – burdens that will certainly translate into a significant reduction of the amount of protected speech offered and received on the Internet. Accordingly, this Court should find COPA to be unconstitutional and should affirm the injunction entered by the district court.

### **IDENTITY OF THE AMICI**

**The Center for Democracy and Technology** ("CDT") is a non-profit public interest and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT's staff have conducted extensive policy research, published academic papers and analyses, and testified before Congress on the impact of Internet content regulations and the availability of alternative methods for protecting individuals online, including user empowerment tools and technologies.

**The American Association of Law Libraries** ("AALL") is a nonprofit educational organization with over 5000 members who respond to the legal information needs of legislators, judges, and other public officials at all levels

of government, corporations and small businesses, law professors and students, attorneys, and members of the general public.

**The Association of American Publishers, Inc.** ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. AAP members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish most of the general, educational, and religious books produced in the United States. For AAP's members, the Internet creates a new "electronic" marketplace in which both product and mode of delivery are assuming different forms. Increasingly competing for the consumer dollar with traditional paper versions of all manner of literature are works of similar content online. AAP's members are eager participants in this exciting new marketplace.

**The American Society of Newspaper Editors** ("ASNE") is a nationwide, professional organization of more than 850 members who hold positions as directing editors of daily newspapers throughout the United States and Canada. Founded more than seventy-five years ago to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American

people, ASNE is committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of this country with complete and accurate reports.

**The Comic Book Legal Defense Fund ("CBLDF")** is an organization dedicated to defending the First Amendment rights of the American comic book industry. CBLDF represents artists, publishers, and distributors, as well as the broader community of specialty retailers and readers. Largely because comics are a graphic-based art form, the comic industry was quick to embrace the Internet, not only as a means to advertise and distribute its product, but also as a new environment in which to create comics. Today, the largest individual retailers of comic books in the United States are Internet-based and online commerce in comics is steadily increasing. Past experience has shown that comics are particularly vulnerable to misapplication of "harmful-to-minors" standards as they are commonly perceived as an inherently juvenile art form. In reality, however, many comics are read by and geared to an adult audience. The CBLDF, therefore, fears that COPA would have a chilling effect on its many members who continue to explore and evolve the comic book art form.

**The Computer & Communications Industry Association ("CCIA")** is an international, nonprofit association of computer and communications

firms. Small, medium and large in size, CCIA's members include equipment manufacturers, software developers, telecommunications and online service providers, re-sellers, systems integrators, third-party vendors and other related business ventures. CCIA's mission is to further its members' business interests by promoting open, barrier-free competition in the offering of computer and communications products and services worldwide.

**The Freedom to Read Foundation ("FTRF")** is an organization established in 1969 by the American Library Association to promote and defend First Amendment rights, support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and help shape legal precedent for the freedom to read on behalf of all citizens. The FTRF and its library members serve both as access and content providers on the Internet. Many member libraries post a diverse array of content on their Web sites, as well as sponsor chat groups. In view of past attempts by some persons to ban literature and reference items from library collections, many of the FTRF's members fear prosecution under COPA should they post materials on the Internet that might be deemed "harmful to minors" in some community. FTRF is thus concerned that the library patrons served by FTRF's members will be denied access to constitutionally protected materials.

**The Information Technology Association of America ("ITAA")**

provides global public policy, business networking, and national leadership to promote the continued rapid growth of the information technology ("IT") industry. ITAA consists of over 500 direct corporate members throughout the United States. ITAA members range from the smallest IT start-ups to industry leaders in the Internet, software, IT services, digital content, systems integration, telecommunications, and enterprise solution fields.

**The National Association of Recording Merchandisers ("NARM")** is

an international trade association whose more than 1000 members include entertainment retailers, wholesalers, distributors and manufacturers, many of whom conduct business over the Internet. Some of NARM's members are online music retailers who market their recordings by permitting Internet users to download music samples before making a purchase with their credit cards. Permitting users to sample music before identifying themselves is an important feature of this marketing strategy. NARM members are concerned that they may be exposed to criminal liability under COPA simply for misjudging what may be deemed "harmful to minors" under an ambiguous standard.

**The People For the American Way Foundation ("People For")** is a

nonpartisan, education-oriented citizens organization with more than 300,000

members. Established in 1980 to promote and protect civil and constitutional rights, including First Amendment freedoms, People For and its diverse members are vitally interested in the preservation of free expression over the Internet. Many of People For's members engage in expression and receive information over the Internet, and have specific and personal interests in promoting and receiving uncensored information online.

**The Publishers Marketing Association** ("PMA") is a trade association representing more than 3,000 publishers across the United States and Canada. Many of PMA's members are small, independent publishers who publish a variety of works, including many concerning controversial topics or involving experimental approaches to writing, which more mainstream publishers have not acquired. A number of PMA members have developed Web sites that offer book samples, chat rooms, and other fora for the discussion of their publications. The Internet is an essential tool for marketing and disseminating the unique voices represented by PMA's members, and often is a significant source of their publishing income. The imposition of criminal sanctions for communications containing materials deemed "harmful to minors" is a real and tangible threat to these independent publishers, who provide a rich alternative to mainstream publishing houses. The PMA believes that the use of credit card and other user-identification systems defeat

the purpose of this democratic medium by discouraging the informal perusal of works otherwise not accessible to the majority of Internet users.

**The Society of Professional Journalists** ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Respectfully submitted,

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# APPENDIX