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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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AMERICAN CIVIL LIBERTIES UNION; ANDROGYNY BOOKS, INC. d/b/a/ A  
DIFFERENT LIGHT BOOK STORES; AMERICAN BOOKSELLERS FOUNDATION FOR  
FREE EXPRESSION; ARTNET WORLDWIDE CORPORATION; BLACKSTRIPE;  
ADDAZI INC., d/b/a CONDOMANIA, ELECTRONIC FRONTIER FOUNDATION;  
ELECTRONIC PRIVACY INFORMATION CENTER; FREE SPEECH MEDIA;  
INTERNET CONTENT COALITION; OBGYN.NET; PHILADELPHIA GAY NEWS;  
PLANETOUT CORPORATION; POWELL'S BOOKSTORE; RIOTGRRL; SALON  
INTERNET, INC.; WEST STOCK, INC.,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

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

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BRIEF FOR THE APPELLANT ON REMAND

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 99-1324

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AMERICAN CIVIL LIBERTIES UNION; ANDROGYNY BOOKS, INC. d/b/a/ A  
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PLANETOUT CORPORATION; POWELL'S BOOKSTORE; RIOTGRRL; SALON  
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JOHN ASHCROFT, in his official capacity as ATTORNEY GENERAL  
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Defendant-Appellant.

---

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

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**BRIEF FOR THE APPELLANT ON REMAND**

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**STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331 and § 1361. The court's order granting plaintiffs' motion for a preliminary injunction was entered on the docket on February 1, 1999. The government's notice of appeal was filed on April 2, 1999 - within the sixty days permitted by Fed. R. Civ. P. 4(a)(1)(B). This Court has jurisdiction over the government's appeal pursuant to 28 U.S.C. § 1292(a)(1).

**STATEMENT OF THE ISSUE**

Whether Congress may require persons who make communications for commercial purposes on the World Wide Web containing material

that is "harmful to minors" to restrict children's access to such communications by requiring the use of "a credit card, debit account, adult access code, or adult personal identification number." 47 U.S.C. § 231(c)(1)(A). (31 F. Supp. 2d at 492-99 (District Court Opinion and Order)).

#### **STATEMENT OF RELATED CASES**

This Court's prior decision in this appeal, American Civil Liberties Union v. Reno, 217 F.3d 162 (3d Cir. 2000), was vacated and remanded for further proceedings on May 13, 2002. Ashcroft v. American Civil Liberties Union, 122 S. Ct. 1700 (2002). To counsel's knowledge, there are no other related cases or proceedings that are before any other court or agency, state or federal.

#### **STATEMENT OF THE CASE**

This case involves a facial challenge to the constitutionality of the Child Online Protection Act ("COPA"), Pub. L. No. 105-277, § 1403, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. § 231). COPA prohibits the commercial communication of "harmful to minors" material in a manner available to children on the World Wide Web unless specified measures, such as the use of a credit card or adult personal identification number, are taken to restrict children's access to such material. 47 U.S.C. §§ 231(a)(1), 231(c)(1)(A).

The American Civil Liberties Union ("ACLU"), joined by a number of organizations and individuals who post content on the Web, sued the Attorney General of the United States to enjoin COPA's enforcement on the grounds that the statute violated their

First Amendment right to freedom of expression and their Fifth Amendment right to due process. The district court (Reed, J.) issued a preliminary injunction against the statute's enforcement. ACLU v. Reno, 31 F. Supp. 2d 473, 498-99 (E.D. Pa. 1999). The court recognized that the government has a compelling interest in protecting children against exposure to sexually explicit harmful materials that may not be obscene as to adults, 31 F. Supp. 2d at 495, but concluded that COPA did not appear to be narrowly tailored to advance that interest. Id. at 496-97.

This Court affirmed on the ground that COPA's use of "community standards" to define material that is "harmful to minors" rendered the statute unconstitutionally overbroad. ACLU v. Reno, 217 F.3d 162, 173-74 (3d Cir 2000). The Supreme Court vacated and remanded, however, holding that COPA's use of community standards "does not render the statute facially unconstitutional.". Ashcroft v. ACLU, 122 S. Ct. 1700, 1703 (2002).

By letter dated June 24, 2002, this Court asked counsel to "rebrief and update all arguments and issues" in the case.

#### **STATEMENT OF FACTS**

**A. The Child Online Protection Act.** The Child Online Protection Act ("COPA") is the centerpiece of Congress's efforts to protect children from harmful sexual materials on the World Wide Web.

COPA authorizes the imposition of civil and criminal penalties on any person who "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the

World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. § 231(a)(1). By its terms, the statute covers only those knowing communications that are made (1) on the World Wide Web, (2) for commercial purposes, and that (3) contain material that is "harmful to minors." Ibid.

"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," 47 U.S.C. § 231(e)(2)(A), i.e., only if the person "devotes time, attention or labor" to making or offering to make such communications "as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities." 47 U.S.C. § 231(e)(2)(B). "[M]aterial that is harmful to minors" includes only "matter \* \* \* 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 a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6).

COPA establishes an "affirmative defense to prosecution" if a defendant "in good faith, has restricted access by minors" to harmful material by conditioning access on, among other things, the

"use of a credit card, debit account, adult access code, or adult personal identification number." 47 U.S.C. § 231(c)(1)(A).<sup>1</sup>

In passing COPA, Congress meant to "address the specific concerns raised by the Supreme Court" in invalidating its predecessor statute, the Communications Decency Act ("CDA"). H.R. Rep. No. 105-775, 105th Cong., 2d Sess. 12 (1998) (House Report); accord S. Rep. No. 105-225, 105th Cong., 2d Sess. 2 (1998) (Senate Report). See Reno v. ACLU, 521 U.S. 844 (1997). The CDA prohibited the knowing transmission of obscene or "indecent" messages over the Internet to persons under the age of 18, 47 U.S.C. § 223(c) (Supp. II 1996), as well as the sending or display of patently offensive sexually explicit messages in a manner available to those under 18 years of age. 47 U.S.C. § 223(d) (Supp. II 1996). Like COPA, the CDA also provided for an affirmative defense to prosecution if persons restricted access to a covered communication "by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." 47 U.S.C. § 223(e)(5) (Supp. II 1996).

In holding the CDA unconstitutional, the Supreme Court emphasized that the "breadth of the CDA's coverage" was "not

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<sup>1</sup> COPA's affirmative defense also permits persons "to accept[] a digital certificate that verifies age," or to use "any other reasonable measures that are feasible under existing technology." 47 U.S.C. § 231(c)(1)(B), (C). The district court found, however, that "as a technological matter, the only affirmative defenses presently available are the implementation of credit card or age verification systems because there is no currently functional digital certificate or other reasonable means to verify age." 217 F.3d at 170 (citing 31 F. Supp. 2d at 487).

limited to commercial speech or commercial entities," and that "[t]he general, undefined terms 'indecent' and 'patently offensive'" would "cover large amounts of non-pornographic material with serious educational or other value." Reno v. ACLU, 521 U.S. at 877. The CDA was unconstitutional, therefore, because it "place[d] an unacceptably heavy burden on protected speech." Id. at 882.

Congress passed COPA after re-examining the problem of children's access to harmful material online at length in the wake of the CDA's invalidation.<sup>2</sup> In legislative findings adopted with the statute, Congress determined that the "widespread availability of the Internet" continued to "present[] opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control." 47 U.S.C. § 231 note (Finding 1). Although Congress recognized that "the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors though parental control protections and self-regulation," it determined that "such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web." Id. (Finding 3). Congress ultimately concluded that "a prohibition on the

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<sup>2</sup> See Legislative Proposals to Protect Children From Inappropriate Materials on the Internet: Hearings on H.R. 3783, H.R. 774, H.R. 1180, H.R. 1964, H.R. 3177, and H.R. 3442 Before the Subcomm. on Telecomms., Trade and Consumer Protection of the House Comm. on Commerce, 105th Cong., 2d Sess. (1998); Internet Indecency: Hearings Before the Senate Comm. on Commerce, Science and Transp., 105th Cong., 2d Sess. (1998).

distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy" the "compelling government interest" in "protect[ing] the physical and psychological well-being of minors by shielding them from materials that are harmful to them." Id. (Findings 2, 3).

Unlike the CDA, COPA applies, not to all Internet communications, but only to communications made "by means of the World Wide Web." 47 U.S.C. § 231(a)(1).<sup>3</sup> COPA thus "does not apply to content distributed through other aspects of the Internet," including e-mail, listservs, USENET newsgroups, Internet relay chat, or real time remote utilization, such as telnet, or non-Web forms of remote information retrieval, such as file transfer protocol (ftp) or gopher, all of which would have been affected by the CDA. House Report, at 12. See Reno v. ACLU, 521 U.S. at 851-52.

The character of the material covered by COPA also differs substantially from that covered by the CDA. The CDA applied to Internet communications that contained "indecent" or "patently offensive" sexual material. 47 U.S.C. §§ 223(a)(1)(B), 223(d) (Supp. II 1996). By contrast, COPA applies to material that is "harmful to minors," 47 U.S.C. § 231(a)(1) - a standard that "has been tested and refined for thirty years to limit its reach to

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<sup>3</sup> The statute defines "by means of the World Wide Web" to mean "by placement of material in a computer server-based file archive, over the Internet, using hypertext transfer protocol or any successor protocol." 47 U.S.C. § 231(e)(1).

materials that are clearly pornographic and inappropriate for minor children of the age groups to which it is directed." House Report, at 13. Compare Reno v. ACLU, 521 U.S. at 865.

Equally important, COPA applies only to those Web communications that are made "for commercial purposes," 47 U.S.C. § 231(a)(1), i.e., only by those persons "engaged in the business" of making such communications. 47 U.S.C. § 231(e)(2). COPA thus does not apply, as did the CDA, to "non-commercial activities over the Web." House Report, at 13. Compare Reno v. ACLU, 521 U.S. at 877.<sup>4</sup>

**B. Prior Proceedings.** The President signed COPA into law on October 21, 1998. The following day, the ACLU, joined by a number of individuals and organizations that publish content on the World Wide Web, filed this suit in federal district court in Philadelphia, contending that the statute violated their First and Fifth Amendment rights. JA 48-52, 100-02 (Complaint).

1. After an evidentiary hearing, the district court entered a preliminary injunction against the statute's enforcement. ACLU v. Reno, 31 F. Supp. 2d 473, 498-99 (E.D. Pa. 1999).

The court agreed "that Congress has a compelling interest in

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<sup>4</sup> Congress further narrowed COPA by defining "minor" to mean "any person under 17 years of age," 47 U.S.C. § 231(e)(7), rather than under 18 years of age, as had been the case under the CDA. See Reno v. ACLU, 521 U.S. at 865-66. Congress also made clear that parents would not be liable under COPA for sharing sexually explicit information with their minor children. Compare Reno v. ACLU, 521 U.S. at 878. See House Report, at 15 (COPA "contains no restriction on the discretion of the parent to purchase material for their children who are under the age of 17"). Accord Senate Report, at 6.

the protection of minors, including shielding them from materials that are not obscene by adult standards." 31 F. Supp. 2d at 495. The court also acknowledged that "[m]any of the same characteristics which make cyberspace ideal for First Amendment expression — ease of participation and diversity of speakers — make it a potentially harmful media for children." Id. at 476.

The court assumed, however, that COPA applied to all speech that is "sexual in nature," id. at 480-81, and concluded that COPA imposed a burden on speech that was not narrowly tailored to advance the government's compelling interests. Id. at 496-97. In doing so, the court assumed that "most of the plaintiffs would be able to afford the cost of implementing and maintaining their sites if they add credit card or adult verification screens." Id. at 494-95. In the court's view, however, plaintiffs would be "likely to establish at trial that the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users from accessing such materials and that the loss of users of such material may affect the speakers' economic ability to provide such communications." Id. at 495. On the basis of the potential for an unspecified loss in such traffic, the court concluded that plaintiffs had "established a substantial likelihood that they will be able to show that COPA imposes a burden on speech that is protected for adults." Ibid.

The court also doubted that the government could "meet its burden to prove that COPA is the least restrictive means available to meet the goal of restricting the access of minors to [harmful]

material." Id. at 497. The court acknowledged that there was evidence that filtering and blocking technology was flawed, "in that it is possible that some appropriate sites for minors will be blocked while inappropriate sites may slip through the cracks." Ibid. The court also recognized that plaintiffs did "not argue that Congress should statutorily require the use of such techniques." Id. at 497 n.6. The court nonetheless stated that "blocking or filtering technology may be as least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators." Ibid.

Determining that plaintiffs faced irreparable injury because COPA deprived them of their First Amendment rights, and that "the public interest is not served by the enforcement of an unconstitutional law," ibid., the court issued a preliminary injunction enjoining the enforcement or prosecution of "matters premised on 47 U.S.C. § 231 \* \* \* at any time for any conduct that occurs while this Order is in effect." Id. at 499 (footnotes omitted).

2. This Court affirmed, but on other grounds. ACLU v. Reno, 217 F.3d 162, 174 n.19 (3d Cir. 2000). The Court praised "Congress' laudatory attempt to achieve its compelling objective of protecting minors from harmful material on the World Wide Web." Id. at 181. It nevertheless held that, because of COPA's "reliance on 'contemporary community standards' in the context of the electronic medium of the Web to identify material that is harmful

to minors," the statute was likely unconstitutional. Id. at 173. The Court stated that because "Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users," the statute would require them "either \* \* \* to severely censor their publications or implement an age or credit card verification system whereby any material that might be deemed harmful by the most puritan of communities in any state is shielded behind such a verification system." Id. at 175.

3. The Supreme Court vacated and remanded for further proceedings. Ashcroft v. ACLU, 122 S. Ct. 1700, 1714 (2002). In a judgment supported by several opinions, the Court held that COPA's "use of 'community standards' to identify 'material that is harmful to minors' \* \* \* does not render the statute facially unconstitutional." Id. at 1703.

Justice Thomas's plurality opinion<sup>5</sup> emphasized that "[w]hen the scope of an obscenity statute's coverage is sufficiently narrowed by a 'serious value' prong and a 'prurient interest' prong, we have held that requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment." 122 S. Ct. at 1710. "If a publisher chooses to send its material into a particular community," he stated, "it is the publisher's responsibility to abide by that community's standards," and "[t]he publisher's burden does not

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<sup>5</sup> Chief Justice Rehnquist and Justice Scalia joined Justice Thomas's opinion in full; Justices O'Connor and Breyer joined the opinion in part. See 122 S. Ct. at 1702-03.

change simply because it decides to distribute its material to every community in the Nation." Id. at 1712. Moreover, "[i]f a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities." Ibid. The plurality concluded that "[b]ecause Congress has narrowed the range of content restricted by COPA in a manner analogous to [the] definition of obscenity" set forth in Miller v. California, 413 U.S. 15 (1973), "any variance caused by the statute's reliance on community standards is not substantial enough to violate the First Amendment." Id. at 1713.

Justice O'Connor and Justice Breyer, concurring in part and concurring in the judgment in separate opinions, agreed that COPA's use of community standards did not render the statute facially overbroad, so long as "community" was interpreted to apply a national rather than a local standard. In Justice O'Connor's view, "adoption of a national standard is necessary \* \* \* for any reasonable regulation of Internet obscenity." 122 S. Ct. at 1714. In Justice Breyer's opinion, "Congress intended the statutory word 'community' to refer to the Nation's adult community as a whole, and not to geographically separate areas." Id. at 1715. Both Justices agreed that "[a]lthough jurors asked to evaluate the obscenity of speech based on a national standard will inevitably base their assessments to some extent on their experience of their local communities \* \* \* the lesser degree of variation that would

result is inherent in the jury system and does not necessarily pose a First Amendment problem." Id. at 1715 (O'Connor, J.); accord id. at 1716 (Breyer, J.) ("such variations are inherent in a system that draws jurors from a local geographic area and they are not, from the perspective of the First Amendment, problematic").

Justice Kennedy, joined by Justice Souter and Justice Ginsburg, concurred only in the judgment. Justice Kennedy found it unnecessary to "decide whether the statute invokes local or national community standards to conclude that vacatur and remand are in order." Id. at 1719. "We cannot know," he stated, "whether variation in community standards renders the Act substantially overbroad without first assessing the extent of the speech covered and the variations in community standards with respect to that speech." Id. at 1720. In this regard, Justice Kennedy wrote, it would be important to know "how limiting is the Act's limitation to 'communication for commercial purposes,'" id. at 1721, as well as "what it means to evaluate Internet material 'as a whole.'" Ibid. "[T]he question of venue" was "[a]nother issue worthy of mention." Id. at 1722. In the end, Justice Kennedy concluded that it would be inappropriate to determine that COPA is inconsistent with the First Amendment "with so many questions unanswered," and that instead "[t]he Court of Appeals should undertake a comprehensive analysis in the first instance." Id. at 1722.<sup>6</sup>

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<sup>6</sup> Justice Stevens dissented. He found COPA to be "a substantial improvement over" the CDA, and noted that "Congress has thoughtfully addressed several of the First Amendment problems" (continued...)

By letter dated June 24, 2002, this Court asked counsel to "rebrief and update all arguments and issues" in the case, "includ[ing], but not limited to, issues deemed relevant by reason of the Supreme Court's opinion."<sup>7</sup>

#### STANDARD OF REVIEW

As this Court explained in its prior opinion, it reviews the district court's grant of a preliminary injunction "according to a three-part standard." 217 F.3d at 172. "Legal conclusions are reviewed de novo, findings of fact are reviewed for clear error, and the "ultimate decision to grant or deny the preliminary injunction" is reviewed for abuse of discretion. *Ibid.* (citation omitted). "An abuse of discretion exists where the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to

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<sup>6</sup>(...continued)  
that had been identified in the litigation over that statute. *Id.* at 1723. He also emphasized that "hard-core pornography[,] \* \* \* obscene under any community's standard, does not belong on the Internet." Likewise, he stated, "[p]erhaps 'teasers' that serve no function except to invite viewers to examine hardcore materials, or the hidden terms written into a Web site's 'metatags' in order to dupe unwitting Web surfers into visiting pornographic sites, deserve the same fate." *Id.* at 1727. But he found that "regardless of how COPA's other provisions are construed, applying community standards to the Internet will restrict a substantial amount of protected speech that would not be considered harmful to minors in many communities." *Ibid.*

<sup>7</sup> The Court also called the parties' attention to "the recent opinion of the Supreme Court in Ashcroft v. The Free Speech Coalition, 122 S. Ct. 1389 (2002), and the decision of the three-judge panel of the district court in American Library Assoc. v. United States, [201 F. Supp. 2d 401] (E.D. Pa. 2002) for whatever impact, if any, those decisions may have on the instant matter."

fact." ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1476 (3d Cir. 1996) (en banc).

The findings in this case were, by the district court's own admission, "provisional." 31 F. Supp. 2d at 481 n.4. In any event, "the role of an appellate court, in a first amendment case, requires an enhanced examination of the entire record." Feldman v. Philadelphia Hous. Auth., 43 F.3d 823, 828 (3d Cir. 1994) (citation omitted).

### **SUMMARY OF ARGUMENT**

In remanding the government's appeal of the district court's preliminary injunction to this Court for renewed consideration, the Supreme Court made clear that the Child Online Protection Act's use of "community standards" to define material that is harmful to minors does not by itself render the statute unconstitutional. Ashcroft v. ACLU, 122 S. Ct. 1700, 1703 (2002). A fair examination of COPA's restricted scope, as well as its limited burdens, demonstrates that COPA is narrowly tailored to advance the government's compelling interest in protecting children from harmful material online. The district court therefore erred in enjoining its enforcement.

1. It is settled that the First Amendment permits government to regulate the content of speech so long as it does so in a manner that is narrowly tailored to advance a compelling government interest. The record shows that there is a vast range of highly graphic sexual material on the World Wide Web that is indisputably harmful to children. There is no question that the federal

government's interest in restricting children's access to such materials is compelling.

2. COPA is narrowly tailored to advance that interest. The statute's scope is confined, its burdens are limited, and there are no less restrictive alternatives.

a. COPA applies only to persons who knowingly make communications on the World Wide Web "for commercial purposes" that contain "material that is harmful to minors." 47 U.S.C. § 231(a)(1). Material is harmful to minors only if the average person, applying contemporary community standards, would find that the material, taken as a whole, is designed to appeal or pander to the "prurient interest" of minors, and then only if it depicts specified sexual activity in a "patently offensive" manner. 47 U.S.C. § 231(e)(6)(A), (B). Most importantly, however, material is harmful to minors under COPA only if, taken as a whole, and without reference to community standards, such material "lacks serious \* \* \* value for minors." 47 U.S.C. § 231(e)(6)(C).

Within these constraints, Congress is not prohibited from using community standards to help define harmful to minors material made available online. Enterprises seeking a wider market by employing a nationwide medium of communication may properly be held to the standards of each community into which they transmit their materials. See 122 S. Ct. at 1710-1713 (plurality opinion of Thomas, J.). In any event, if necessary to avoid an otherwise serious constitutional problem, this Court can read the statute to permit the use of a national standard. See id. at 1714-15

(O'Connor, J.); id. at 1715-16 (Breyer, J.).

b. Acting under the erroneous assumption that COPA applies to material that is merely "sexual in nature," 31 F. Supp. 2d at 480-81, the district court failed to require plaintiffs to show that any of the material they made available could actually be considered "harmful to minors." In addition, and as important, the district court failed to respect the statute's limitation to communications that are made "for commercial purposes." 47 U.S.C. § 231(a)(1). COPA makes clear that such communications can be made only by persons who are "engaged in the business" of making communications containing harmful to minors material, 47 U.S.C. § 231(e)(2)(A), that is, only if they "devote[] time, attention, or labor to such activities, as a regular course of [their] trade or business, with the objective of earning a profit," 47 U.S.C. § 231(e)(2)(B). COPA thus limits its focus to for-profit entities that are regularly engaged in the marketing of harmful to minors material.

c. COPA's restricted scope is mirrored by its limited burdens. COPA does not ban the commercial communication of harmful to minors material from the Web. Instead, it requires persons to take reasonable steps to ensure that such material is not made available to children online. Accordingly, the statute establishes an affirmative defense to prosecution for all persons who in good faith have restricted access to harmful to minors material "by requiring use of a credit card, debit account, adult access code, or adult personal identification number." 47 U.S.C.

§ 231(c)(1)(A).

As the district court found, there are a number of third-party vendors who will supply an adult PIN, at a reasonable cost to the consumer, and at a potential profit to Web sites. Indeed, the court was willing to assume that "most of the plaintiffs would be able to afford the cost of implementing and maintaining their sites if they add credit card or adult screens." 31 F. Supp. 2d at 495-95. It found that conclusion "not dispositive" because, the court opined, such screens might lead to an unspecified loss of viewer traffic to some sites. Id. at 495. There are good reasons to question the magnitude of any such traffic loss, but the critical point is that the First Amendment does not guarantee a publisher a profit. Economic loss, even if it leads to diminished operations, is not by itself a First Amendment harm. Pitt News v. Fisher, 215 F.3d 354, 366-67 (3d Cir. 2000), cert. denied, 531 U.S. 1113 (2001).

In the end, COPA does no more to restrict access to online materials than states have been doing for years by means of sale and display restrictions in traditional retail establishments. And as with such laws, the government is entitled to impose a narrowly tailored burden in order to advance its compelling interests in the protection of children.

3. There are also no less restrictive, equally effective, alternatives to COPA's screening requirements. Although the district court stated that "blocking or filtering technology may be at least as successful as COPA would be in restricting minors'

access to harmful materials online," 31 F. Supp. 2d at 497, the court did not suggest, and plaintiffs did not argue, that blocking and filtering software should be mandated. Id. at 497 n.6. As this Court recognized in its prior opinion (217 F.3d at 171 n.16), voluntary efforts by parents and others to screen harmful material - using filtering and blocking software that the district court found to be imperfect, id. at 497 - cannot be a less restrictive alternative to statutory requirements. While "[f]ilters may be very useful tools \* \* \* the law should impose duties on the source of the problem, not the victims." House Report, at 20.

In sum, because COPA is narrow in scope and limited in burden, and there are no less restrictive alternatives to its screening requirements that would as effectively protect children from harmful materials online, the statute does not violate the First Amendment. The district court's preliminary injunction should be reversed.

#### **ARGUMENT**

##### **THE DISTRICT COURT ERRED IN ENJOINING COPA'S ENFORCEMENT**

"[I]njunctive relief, particularly preliminary relief, is an 'extraordinary remedy . . . which should be granted only in limited circumstances.'" South Camden Citizens in Action v. New Jersey Dep't of Envl. Prot., 274 F.3d 771, 777 (3d Cir. 2001) (citation omitted), cert. denied, 122 S. Ct. 2621 (2002). Thus, a "preliminary injunction is warranted" only if "(1) \* \* \* the movant has shown a reasonable probability of success on the merits; (2) \* \* \* the movant will be irreparably harmed by denial of the relief; (3)

\* \* \* granting preliminary relief will [not] result in even greater harm to the nonmoving party; and (4) \* \* \* granting the preliminary relief will be in the public interest." 217 F.3d at 172. Preliminary injunctive relief is especially disfavored where the constitutionality of a legislative enactment is at issue. Church v. City of Huntsville, 30 F.3d 1332, 1342 (11th Cir. 1994); Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323 (1984) (Rehnquist, J., in chambers).

The district court's decision to grant a preliminary injunction rests at bottom on its determination that "the plaintiffs have established a substantial likelihood that they will be able to show that COPA imposes a burden on speech that is protected for adults," 31 F. Supp. 2d at 495, and that "it is not apparent \* \* \* that the defendant can meet its burden to prove that COPA is the least restrictive means available to achieve the goal of restricting the access of minors to [harmful] material." Id. at 497. The district court's analysis of the remaining preliminary injunction factors is entirely derivative of its holding on the merits. Accordingly, as this Court recognized in its earlier opinion, "for this case \* \* \* the most significant prong of the preliminary injunction test [is] whether the ACLU met its burden of establishing a reasonable probability of succeeding on the merits in proving that COPA trenches upon the First Amendment to the United States Constitution." 217 F.3d at 173.

Because, as we show below, plaintiffs have not carried their burden of demonstrating that COPA is unconstitutional, the

preliminary injunction cannot stand.

**A. COPA Is Narrowly Tailored To Advance The Government's Compelling Interest In Protecting Children From Harmful Materials On The World Wide Web.**

There is no dispute that COPA is a content-based regulation of speech. But it is settled that "[t]he Government may \* \* \* regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." Sable Communications of Calif., Inc. v. FCC, 492 U.S. 115, 126 (1989). Thus, as this Court recognized in its prior opinion, a federal statute imposing a "content-based restriction on speech" must be upheld under the First Amendment so long as "the challenged statute is narrowly tailored to meet a compelling state interest," and protects that interest "in a manner that is the least restrictive of protected speech." 217 F.3d at 173.

**1. The Government Has A Compelling Interest In Shielding Minors From Harmful Online Materials.**

"It is undisputed that the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards." 217 F.3d at 173. There is also no dispute that "[s]exually explicit material" – including text, pictures, audio and video, and extending "from the modestly titillating to the hardest core" – is "widely available" on the Internet and the World Wide Web. Reno v. ACLU, 521 U.S. at 853-54. Accord 31 F. Supp. 2d at 484. See also American Library Ass'n v. United States, 201 F. Supp. 2d 401, 419 (E.D. Pa. 2002)

(three-judge court), notice of appeal filed (June 20, 2002) ("There is a vast amount of sexually explicit material available via the Internet and the Web").

The growth in popularity of the Internet and the World Wide Web has fostered an enormous online pornography industry. As the House Commerce Committee noted in its 1998 Report, there were at that time "approximately 28,000 adult Web sites promoting pornography on the Internet," and those sites "generate[d] close to \$925 million in annual revenues." House Report, at 7 (citation omitted). As the Committee explained, commercial distributors of sexually explicit material "generally display many unrestricted and sexually explicit images" as a marketing tool "to advertise and entice the consumer into engaging in a commercial transaction." House Report, at 10. Accord Senate Report, at 1; 144 Cong. Rec. H9906 (daily ed. Oct. 7, 1998) (remarks of Rep. Tauzin); see also 31 F. Supp. 2d at 484. The result is that "minors can move from Web page to Web page, viewing and downloading [such] material without restriction." House Report, at 10. Accord Senate Report, at 1. Moreover, "[w]hile much of the sexually explicit material is accessed deliberately, minors often stumble upon it by mistake." House Report, at 10. Indeed, "[t]here are numerous hard-core pornography sites on the Internet using 'copycat URLs' to take advantage of innocent mistakes to bring traffic to their graphic sexual images." Ibid. Thus, "children searching the Internet for the official site of the White House can be confronted by hard-core pornography by mistyping 'www.whitehouse.com' rather than

'www.whitehouse.gov.'" Ibid. In addition, children who use Internet search engines to look up entirely innocent information can be confronted with sexually explicit material. Searches using the innocuous terms "toys, dollhouses, girls, boys, pets, teen, cheerleader, actress, gang, beanie babies, bambi and doggy" all will lead to harmful to minors material on the Web. Ibid. See also Senate Report, at 4 ("water baby" and "fiesta"). Even those legislators with concerns about COPA acknowledged that "there is content out on the Internet that is harmful to children and that they ought not to have access to such on-line fare from their computers." 144 Cong. Rec. H9906 (daily ed. Oct. 7, 1998) (remarks of Rep. Markey).

The district court readily acknowledged that because of the widespread existence of sexually explicit material on the Internet and the Web, cyberspace is a "potentially harmful media for children." 31 F. Supp. 2d at 476. The trial court explained that "[a] child with minimal knowledge of a computer, the ability to operate a browser, and the skill to type a few simple words may be able to access sexual images and content over the World Wide Web." Ibid. The court agreed that "typing the word 'dollhouse' or 'toys' into a typical Web search engine will produce a page of links, some of which connect to what would be considered by many to be pornographic Web sites." Ibid. The district court also noted that for-profit Web sites "offer 'teasers,' free sexually explicit images and graphic image files designed to entice a user to pay a

fee to browse the whole site." Ibid.<sup>8</sup>

**2. COPA Is Narrowly Tailored To Advance The Government's Compelling Interests.**

COPA seeks to address the undoubted problem of children's access to harmful to minors material online by achieving a "balance between preserving the First Amendment rights of adults and protecting children from harmful material on the World Wide Web." House Report, at 5. The statute is narrow in scope and its burdens are limited.

**a. COPA is narrow in scope.**

COPA applies only to persons who make communications on the World Wide Web that contain "material that is harmful to minors" and that are made "for commercial purposes." 47 U.S.C. § 231(a)(1).<sup>9</sup> These twin restrictions, which are central to the

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<sup>8</sup> The district court's findings were amply supported by the evidence. Government witness C. Damon Hecker, chief of the Computer Intrusion Squad of the Air Force's Office of Special Investigations, testified in detail regarding the contents of a CD-ROM exhibit containing the results of a search of sexually explicit material on the Web. Mr. Hecker testified that, using a number of readily available search engines, he was able in short order to obtain a substantial amount of sexually explicit material from commercial Web sites without disclosing his age. JA 524-59, 758-812. See also American Library Ass'n, 201 F. Supp. 2d at 419 ("a large number of sexually explicit sites may be accessed for free and without providing any registration information[;] \* \* \* some Web sites that contain sexually explicit content have innocuous domain names and therefore can be reached accidentally").

<sup>9</sup> COPA also applies only to those communications that are made "knowingly and with knowledge of the character of the material." 47 U.S.C. § 231(a)(1). The statute is additionally narrowed by its application to communications made available to persons under the age of 17, see 47 U.S.C. 231(e)(7), and by the fact that it does not prevent parents from sharing sexually explicit material with  
(continued...)

statute's scope, ensure that COPA's focus is restricted to material that is plainly inappropriate for minors and that its limited burdens are shouldered by certain kinds of for-profit enterprises.

**i. COPA is limited to "harmful to minors" material.**

Congress carefully limited COPA's reach to material that is "harmful to minors," 47 U.S.C. § 231(a)(1) - a term the statute defines to mean matter "that is obscene," or that meets each of the elements of a three-part definition of material that is "harmful to minors." 47 U.S.C. § 231(e)(6).

First, material that is "harmful to minors" must be material that "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." 47 U.S.C. § 231(e)(6)(A). Second, it must be material that "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 sex act, or a lewd exhibition of the genitals or post-pubescent female breast." 47 U.S.C. § 231(e)(6)(B). Third, the material must "taken as a whole, lack[] serious literary, artistic, political, or scientific value for minors." 47 U.S.C. § 231(e)(6)(C).<sup>10</sup>

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<sup>9</sup>(...continued)  
their children. House Report, at 15.

<sup>10</sup> In adopting this definition, Congress intended to conform to the harmful to minors formulation approved by the Supreme Court  
(continued...)

By employing the "harmful to minors" formulation, Congress made clear that it did not intend for COPA to extend to "entertainment, library, or news materials that merely contain nudity or sexual information, regardless of how controversial they may be for their political or sexual viewpoints." House Report, at 28. See also Senate Report, at 13 (the formulation "ensures that the [statute] may not be construed as to restrict access to public health information, art, literature, and political information"). Likewise, Congress made clear that material is not harmful to minors under COPA simply because the "political or sexual viewpoints" expressed may be "controversial." House Report, at 28.

The restrictions embodied in COPA's harmful to minors definition "substantially limit the amount of material covered by the statute." Ashcroft v. ACLU, 122 S. Ct. at 1710 (plurality opinion of Thomas, J.). By its terms, COPA applies not to all sexually-related material, but only to those sexual depictions that, with respect to minors, are designed to appeal or pander to the "prurient interest," 47 U.S.C. § 231(e)(6)(A), i.e., "a shameful or morbid interest in nudity [or] sex." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985). In addition, the material must, taken as a whole and with respect to minors, constitute a "patently offensive" depiction of a sexual act or a "lewd" exhibition of the genitals or female breast. 47 U.S.C. § 231(e)(6)(B).

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<sup>10</sup> (...continued)  
in Ginsberg v. New York, 390 U.S. 629 (1968), as modified by the refinement of the obscenity standard in Miller v. California, 413 U.S. 15 (1973), and later cases. See House Report, at 13, 27.

Mere nudity is thus not enough. Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 n.10 (1975). Instead, the material "must be, in some significant way, erotic." Ibid. (citation omitted). Accord Ashcroft v. ACLU, 122 S. Ct. at 1710 (plurality opinion of Thomas, J.). See United States v. Various Articles of Merchandise, Schedule No. 287, 230 F.3d 649, 654-58 (3d Cir. 2000) (nudist magazines not obscene).

Finally, and of crucial importance, COPA applies only to communications that contain material that "taken as a whole, lacks serious literary, artistic, political or scientific value for minors." 47 U.S.C. § 231(e)(6)(C). The test of value is an objective one. The inquiry is "whether a reasonable person would find \* \* \* value in the material," Pope v. Illinois, 481 U.S. 497, 501 (1987), and "the ideas a work represents need not obtain majority approval to merit protection." Id. at 500. Moreover, the material must be evaluated "as a whole," taking account of the context in which it is presented. Thus, in a narrative, "[t]he artistic merit of a work does not depend on the presence of a single explicit scene \* \* \* even though the scene in isolation might be offensive." Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1401 (2002). See Kois v. Wisconsin, 408 U.S. 229, 231-32 (1972) (per curiam). And the operative standard is whether the material has value for "a legitimate minority of normal, older adolescents"; if it does, it is considered to have value for the class of minors as a whole. American Booksellers v. Webb, 919 F.2d 1493, 1504-05 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991)

(citation omitted); American Booksellers Ass'n v. Virginia, 882 F.2d 125, 127 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990). See also Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 528 (Tenn. 1993). "[O]nly a minimal number of works will have serious value for reasonable adults but not for reasonable minors, including older minors." Webb, 919 F.2d at 1506.

Thus, in Commonwealth of Va. v. American Booksellers Ass'n, 372 S.E.2d 618, 624 (1988), the Virginia Supreme Court rejected the claim that 16 books, running the gamut from "classic literature to pot-boiler novels," fell within the ambit of a state statute regulating the display of material that is "harmful to juveniles." The court explained that although the works "vary widely in merit, none of them lacks 'serious literary, artistic, political or scientific value' for a legitimate minority of older, normal adolescents." Ibid. The court found the statute inapplicable to such works despite the fact they included books – such as "The Facts of Love" and "The New Our Bodies, Ourselves" – that discussed sexual matters. See id. at 622. See also American Booksellers v. Va., 882 F.2d at 127-28 (upholding same statute, as so construed, against constitutional challenge).

Disregarding the statute's language and legislative history, the district court denied the government's motion to dismiss on the grounds that plaintiffs had "articulated a credible threat of prosecution" because they published on their Web site, or posted on other sites, "some content \* \* \* that is sexual in nature." 31 F. Supp. 2d at 480-81 (emphasis added). The court nowhere analyzed

whether the sexual material posted by plaintiffs was patently offensive, or was designed to appeal to the prurient interest, or, most importantly, had serious value for minors. Compare United States v. Various Articles, 230 F.3d at 654-59. Instead, the court erroneously assumed that COPA applied to all sexual material on the Web regardless of its offensiveness, prurience, or value.

The district court's erroneous reading of COPA's scope was a critical error which greatly exaggerated the impact of the statute upon protected speech. As a result, the court never put plaintiffs to the burden of showing which, if any, of the materials that they make available are harmful to minors. And as even a brief examination shows, virtually all, if not all, of plaintiff's sample exhibits would be excluded as a matter of law by one or more of the three prongs of COPA's harmful to minors standard. See JA 601-757.

Had the district court properly analyzed the scope of the statute, and taken account of COPA's limitation to material that is "harmful to minors," its analysis would necessarily and "dramatically" have changed. Virginia v. American Booksellers Ass'n, 484 U.S. 383, 394 (1988). Instead, the court's erroneous view of the materials to which COPA applies greatly inflated the statute's supposed burden at the outset of its constitutional analysis - a mistake from which it never recovered.

Whether material is designed, with respect to minors, to appeal to the "prurient interest" under COPA must be evaluated according to "contemporary community standards." 47 U.S.C.

§ 231(e)(6)(A). The same is true in determining whether the material contains a "patently offensive" sexual depiction. Ashcroft v. ACLU, 122 S. Ct. at 1708 (opinion of Thomas, J.). See Pope v. Illinois, 481 U.S. 497, 500 (1987) (citing Smith v. United States, 431 U.S. 291, 300-01 (1977)).

Congress understood "that the applicability of community standards in the context of the Web is controversial," but it intended it to be "an 'adult' standard, rather than a 'geographic' standard." House Report, at 28. Congress' decision to employ community standards "without further specification" is unobjectionable. Jenkins v. Georgia, 418 U.S. 153, 157 (1974) (upholding lower court's "implicit approval of \* \* \* instructions directing jurors to apply 'community standards' without specifying what 'community.'" ). See also Ashcroft v. ACLU, 122 S. Ct. at 1708 (Thomas, J.).

A juror is necessarily permitted "to draw on his own knowledge of the average person in the community or vicinage from which he comes for making the required determination, just as he is required to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." Hamling v. United States, 418 U.S. 87, 104-05 (1974). But the possibility of variation in the standards that might be applied by local juries is insufficient, by itself, to render COPA facially unconstitutional. Ashcroft v. ACLU, 122 S. Ct. at 1703. For one thing, the substantive - and judicially enforceable - limits on the harmful to minors definition ensure that any such variation will be narrowly confined. Thus, as

we have shown, a case does not get to the jury under COPA unless the material at issue, taken as a whole, is designed to appeal to the prurient interest, *i.e.*, "is in some significant way, erotic," Erznoznik, 422 U.S. at 213 n.10 (citation omitted), and is "patently offensive," a determination over which juries also do not have "unbridled discretion." Jenkins, 418 U.S. at 160. See United States v. Various Articles, 230 F.3d at 654-58.

In addition, to be "harmful to minors," the material must "lack[] \* \* \* serious value for minors," 47 U.S.C. § 231(e)(6)(C), a criterion that is not judged according to community standards at all. Reno v. ACLU, 521 U.S. at 873; Pope v. Illinois, 481 U.S. at 500 ("the value of [a] work" does not "vary from community to community based on the degree of local acceptance it has won"). Instead, the question is "whether a reasonable person would find \* \* \* value in the material, taken as a whole." Id. at 501. The serious value prong is thus "particularly amenable to appellate review," Smith v. United States, 431 U.S. at 305, and "allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value." Reno v. ACLU, 521 U.S. at 873. See United States v. Various Articles, 230 F.3d at 653, 658.

Given the restrictions on the type of material that can qualify as harmful to minors, Congress understood that community standards would be "reasonably constant among adults in America with respect to what is suitable for children." House Report, at 28. In this regard, it is striking that throughout this liti-

gation, plaintiffs have not been able to identify "even a single exhibit in the record as to which coverage under COPA would depend upon which community in the country evaluated the material." Ashcroft v. ACLU, 122 S. Ct. at 1712 (Thomas, J.).

Even if the situs of the jury would matter in some cases, "[t]he mere fact that juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged." Miller, 413 U.S. at 26 n.9. The Supreme Court has made clear that "[t]he fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit [their] materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." Hamling, 418 U.S. at 106. Accord Sable, 492 U.S. at 125 ("[t]here is no constitutional barrier \* \* \* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others"). The principle is no different where the potential variation concerns the determination of material that is harmful to minors. Ashcroft v. ACLU, 122 S. Ct. at 1710-13 (Thomas, J.). This is especially true here, given that COPA applies only to entities that seek to employ a nationwide medium (and the advantages of a nationwide market) to make commercial communications - a particularly "hardy breed of expression." Central Hudson Gas & Elec. Corp. v. Pub.

Serv. Comm'n of N.Y., 447 U.S. 557, 564 n.6 (1980).<sup>11</sup>

Nonetheless, if despite COPA's narrow compass, the use of local community standards, in combination with the statute's other restrictions, rendered the statute constitutionally problematic, this Court would have the authority - indeed, the responsibility - to adopt any permissible reading of the community standards requirement that would avoid the constitutional difficulty. See, e.g., Immigration and Naturalization Serv. v. St. Cyr, 533 U.S. 289, 300 (2001); Stretton v. Disciplinary Board, 944 F.2d 137, 145 (3d Cir. 1991).

It is plainly possible to construe COPA's "community standards" to refer to the standards of "the Nation's adult community taken as a whole," and "not to geographically separate local areas." See Ashcroft v. ACLU, 122 S. Ct. at 1715 (Breyer, J., concurring); see also id. at 1714-15 (O'Connor, J., concurring). COPA does not define the term "community standards," and the legislative history's one-line reference to "an 'adult' \* \* \* rather than \* \* \* 'geographic' standard," House Report, at 28

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<sup>11</sup> COPA's legislative history emphasizes that by "engag[ing] in interstate commerce," the "person posting the material \* \* \* is subjecting himself to the jurisdiction of all communities." House Report at 28. It also recognizes (ibid.) that "there is no constitutional impediment to the government's power to prosecute pornography dealers in any district in which the material is sent." United States v. Thomas, 74 F.3d 701 (6th Cir.), cert. denied, 519 U.S. 820 (1996) (quoting United States v. Bagnell, 679 F.2d 826, 830 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983)). See 18 U.S.C. § 3237(a). "Indeed, prosecution in the district of receipt is eminently reasonable in view of the fact that it is the recipient community that suffers the deleterious effects of pornography distribution." Bagnell, 679 F.2d at 832.

- is subject to interpretation. While the term "community" often refers to smaller geographic units, there is nothing about the meaning of the word that prevents it from referring to the nation's adults as a group.

Miller v. California, 413 U.S. 15 (1973), is not to the contrary. Miller held that the First Amendment did not forbid the use of local community standards, but the decision "did not mandate their use." Jenkins, 418 U.S. at 157. Accord Smith v. United States, 431 U.S. 291, 304 n.11 (1977). To date, the Supreme Court has "express[ed] no view" on the question of whether Congress has the power to enact "federal legislation in such a way as to require reference to a national standard." Ibid. As Justice O'Connor observed, however, "[i]f the Miller Court believed generalizations about the standards of the people of California were possible \* \* \* it is difficult to believe that similar generalizations are not also possible for the Nation as a whole." 122 S. Ct at 1715.

This Court's prior opinion rejected an interpretation of COPA's community standard that would encompass adults in the United States, not because such a reading would conflict with the statute's text or its legislative history, but because the Court had "no evidence to suggest that adults everywhere in America would share the same standards for determining what is harmful to minors." 217 F.3d at 178. But it is not necessary to assume that all adults in the United States would share precisely the same views concerning prurience and patent offensiveness to conclude that instructions to apply a national standard would reduce any

remaining variation, particularly in light of the statute's substantive restrictions, to a level that is "not, from the perspective of the First Amendment, problematic." 122 S. Ct. at 1716 (Breyer, J., concurring). Accord id. at 1715 (O'Connor, J., concurring). Whether read as a national standard or a standard without geographic specification, COPA's use of the term "community standards" in defining material that is harmful to minors does not render the statute constitutionally infirm.

**ii. COPA is limited to communications made "for commercial purposes."**

COPA is restricted not only to material that is harmful to minors, but also to those communications that are made "for commercial purposes." 47 U.S.C. § 231(a)(1). The commercial purposes requirement further confines COPA's already limited scope.

COPA makes clear that for a communication to be "for commercial purposes," the person making the communication must be "engaged in the business" of making such communications. 47 U.S.C. § 231(e)(2)(A). The statute defines "engaged in the business" to mean "that the person who makes a communication, or offers to make a communication" on the Web containing harmful to minors material "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." 47 U.S.C. § 231(e)(2)(B).<sup>12</sup> The term "regular" means "usual; normal, [or]

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<sup>12</sup> The statute further specifies that "it is not necessary that the person make a profit or that the making or offering to make  
(continued...)

customary." The Random House Dictionary of the English Language 1624 (2d ed. 1987). Thus, COPA by its terms covers only those harmful to minors communications that are made by a person as a normal part of his or her for-profit business. If the posting of harmful to minors communications is not a usual part of a person's business, or if such communications are not made with the intention of earning a profit, the statute does not apply.

The term "engaged in the business" as used in COPA derived from 18 U.S.C. § 1466, which imposes criminal penalties on those "engaged in the business" of selling obscenity. See House Report, at 27; Senate Report, at 11. Under that limitation, "a legitimate bookseller, record or video dealer" who "might make an occasional transfer or sale of something not yet determined to be obscene," would "not be 'engaged in the business' unless a regular course of trade or business in obscene matter is shown." 134 Cong. Rec. E3750 (1988) (extended remarks of Rep. Hughes).

The same is true under COPA. Isolated examples of materials posted on a Web site, having only an insubstantial connection to the operator's regular for-profit business, are not covered by the statute. As a result, COPA's "engaged in the business" requirement ensures that the statute covers only those communications that have

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<sup>12</sup> (...continued)

such communications be the person's sole or principal business or source of income." Ibid. Moreover, a person may be engaged in the business of making Web communications including harmful to minors material "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." Ibid.

a substantial connection to the regular online marketing of material that is harmful to minors.<sup>13</sup> Again, the district court failed to put plaintiffs to their proof. It failed to recognize that even if materials are deemed "harmful to minors," they are covered by the statute only if they are made available in communications by those for-profit enterprises that are in the business of disseminating such materials.

**b. The burdens of complying with COPA's affirmative defense are reasonable.**

COPA's narrow scope is mirrored by its limited burdens. Rather than banning the distribution or display of harmful to minors material, the statute "simply requires the sellers of such material to recast their messages so that they are not readily available to children." House Report, at 6. See Ashcroft v. ACLU, 122 S. Ct. at 1712 n.15 (Thomas, J.). It does so by establishing an "affirmative defense to prosecution" for any defendant who, "in good faith, has restricted access by minors to material that is harmful to minors \* \* \* by requiring use of a credit card, debit account, adult access code, or adult personal identification number." 47 U.S.C. § 231(c)(1)(A).

As Congress found, "[c]redit card verification is commonly

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<sup>13</sup> COPA's application to a communication that "includes any material that is harmful to minors," 47 U.S.C. § 231(a)(1); see also 47 U.S.C. § 231(e)(2)(B), does not read the commercial purposes requirement out of the statute. Once it is determined that a person is "engaged in the business" of making harmful to minors communications on the Web, COPA covers any harmful to minors material that such a person might communicate for such purposes over the Web.

used today in both the dial-a-porn and Internet context and it should be easy to use and implement for commercial entities that sell pornography on the Web." House Report, at 26; Senate Report, at 7 (such "verification means are standard practice among commercial pornographers on the Web"). See Reno v. ACLU, 521 U.S. at 881. Even in those cases in which credit card verification is not feasible or economical, however, Web site operators can restrict access by requiring the use of an adult access code or personal identification number, a method that the district court understood to be both technically feasible and economically reasonable.

The district court found that "there are approximately twenty-five services on the Web which will provide adult access codes or personal identification numbers (PINs)." 31 F. Supp. 2d at 489. Typical among such services is "Adult Check," which provides Web site operators "with a script, free of charge, which can be placed at any point on the Web site where the content provider wishes to block access to minors." Ibid. As of January 1999, approximately 46,000 Web sites were using Adult Check and approximately three million Internet users had a valid Adult Check PIN. Id. at 490.<sup>14</sup>

Web site operators can actually profit from the use of an adult verification service. For example, Adult Check permits Web site operators to sign up for free and to "earn commissions of up to 50% to 60% of the fees generated by users who sign up with Adult Check to view content on the site." 31 F. Supp. 2d at 489. For

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<sup>14</sup> Adult Check's website currently states that 329,710 sites use its ID. <<http://www.adultcheck.com>> (visited July 22, 2002).

users, the cost to obtain an Adult Check identification number at the time of evidentiary hearing was \$16.95 a year, id. at 490, substantially less than the charge for a subscription to access the Internet though America Online or other Internet service providers, which even at that time could reach \$20 a month. JA 571A-571B.<sup>15</sup> Given these facts, the district court understandably "downplayed the cost (both in price and energy) that would be incurred by an individual seeking to access 'harmful to minors' material on the Web." 217 F.3d at 170.

In fact, the district court was willing to assume that "most of the plaintiffs would be able to afford the cost of implementing and maintaining their sites if they add credit card or adult verification screens." 31 F. Supp. 2d at 495.<sup>16</sup> The court nonetheless concluded that plaintiffs were likely to establish "that the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users from

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<sup>15</sup> The cost of an Adult Check ID is currently \$19.95 for a three-month period. See <<http://www.adultcheck.com>> (visited July 22, 2002). This is still considerably less than the standard fee for a one-month subscription to AOL, which is \$23.90. See <<http://www.aol.com>> (visited July 22, 2002).

<sup>16</sup> The court recognized that it might take some time and effort to segregate "harmful to minors" materials behind such screens, see id. at 490, but the court made no finding that this effort would be unduly burdensome. On the contrary, the court found that some of the plaintiffs already have contracts which prohibit their Web sites from "plac[ing] advertisements near particular content on the Web site" or from "post[ing] particular content that contains nudity or that is of a sexually explicit nature." Id. at 491. The court therefore found that "market forces may necessitate Web site operators and content providers who rely on advertising revenue to segregate content of a sexual nature regardless of COPA." Ibid.

accessing such materials." Id. at 495. Moreover, the court stated, "the loss of users of such material may affect the speakers' economic ability to provide such communications." Ibid. As a result, the district court found that plaintiffs were likely to convince it "that implementing the affirmative defenses in COPA will cause most Web sites to lose some adult users to the portions of the sites that are behind screens." 31 F. Supp. 2d at 492 (emphasis added).

The district court's conclusion was based entirely on the testimony of plaintiffs' witness Donna Hoffman. Ibid.; see also id. at 491. In Hoffman's view, a Web site's establishment of a credit card or adult verification screen would result in a "loss of traffic" to that site because the use of such screens would reduce both the user's anonymity and the user's "flow experience." Ibid.

There is good reason, however, to question whether COPA will result in significant traffic loss to commercial Web sites containing harmful to minors materials. As the district court found, "a credit card or adult verification screen can be placed at any point on a Web site: on the last page, or in front of an area of the site, or in select pages throughout the site, or at the beginning of the site on the home page." 31 F. Supp. 2d at 488. Accord id. at 489. Thus, any interruption to user "flow" can be limited to attempts to access "harmful to minors" material on the site. The district court also did not explain why the age verification screens required by COPA would produce interruptions in flow that are significantly more burdensome than those already

encountered by users of the World Wide Web. As Hoffman herself acknowledged, there are many non-COPA factors – including slow response times, broken links, and poor Web site design – that already inhibit a user's "flow" experience. JA 297-98. See 31 F. Supp. 2d at 487.

That concerns regarding the preservation of anonymity will result in significant traffic loss because of COPA is also highly questionable. There are many successful Web sites, such as that operated by online bookseller Amazon.com, that "require a credit card to make a purchase and have been successful in obtaining such information from users." 31 F. Supp. 2d at 487. See also JA 503-04. As important, Web sites that condition access on the presentation of an adult PIN do not require users to reveal any personal information to the Web site operator: users need only type in a valid adult PIN when they encounter an age verification screen. And COPA contains substantial privacy protections. Persons making covered communications are prohibited from disclosing "any information collected" for the purpose of restricting access to minors in accordance with the statute "without the prior written or electronic consent" of the individual concerned (if the individual is an adult), or of the individual's parent or guardian (if the individual is a minor). 47 U.S.C. § 231(d)(1)(A). Such persons must also "take such actions as are necessary to prevent unauthorized access to such information by a person other than the person making such communications and the recipient of such communication." Id. § 231(d)(1)(B).

In any event, the district court's speculation about the possibility of traffic loss for those Web sites that are forced to implement credit card or adult verification screens is insufficient to support its determination that COPA is likely unconstitutional. The First Amendment does not guarantee a certain level of traffic to a commercial Web site that regularly displays material that is harmful to minors. Indeed, this Court has recognized as much in closely analogous circumstances.

In Pitt News v. Fisher, 215 F.3d 354 (3d Cir. 2000), cert. denied, 531 U.S. 1113 (2001), this Court refused to enjoin the enforcement of a Pennsylvania statute prohibiting businesses from advertising alcoholic beverages in newspapers published "by, for, or in behalf of any educational institution." 215 F.3d at 357. The plaintiff, a student-run newspaper at the University of Pittsburgh, asserted that the loss of over \$17,000 in advertising stemming from the statute's enforcement had caused it "to shorten its newspaper, thereby losing space in which to print student articles and text," threatened its ability to purchase new equipment and make renovations to its facilities, and placed it "in a competitive disadvantage in the marketplace." 215 F.3d at 359.

This Court acknowledged that the enforcement of the state statute "had the effect of driving away certain closely regulated businesses who previously advertised in The Pitt News," but it held that this effect did "not in itself amount to a violation of The Pitt News' First Amendment rights." Id. at 366. "The fact that The Pitt News is a newspaper," the Court explained, "does not give it

a constitutional right to a certain level of profitability, or even to stay in business at all." Ibid. See also AMSAT Cable Ltd. v. Cablevision of Connecticut, 6 F.3d 867, 871 (2d Cir. 1993) (that a person "has a constitutional right to speak" does not mean that he has a right "to speak profitably"). "[A]lthough The Pitt News has no doubt felt an economic effect from the enforcement of [the statute]," the Court concluded, "this does not amount to a violation of its First Amendment rights." 215 F.3d at 367. "[H]arm to the ability to profit from publication is not a First Amendment harm." Id. at 367 n.13. Likewise, the district court's tentative finding that "most" Web sites would find that "some" adult users would be deterred from accessing their sites (or some portion thereof) by COPA's implementation, 31 F. Supp. 2d at 492, does not state a First Amendment claim, even if "the loss of users may affect the speakers' economic ability to provide such communications." Id. at 495.

The district court's findings also fall far short of a determination that commercial Web publishers will be denied a constitutionally reasonable opportunity to disseminate harmful to minors materials to adults. As Congress recognized, the burdens COPA imposes are no different in kind or degree from the sale and display requirements that many states impose on commercially available material deemed harmful to minors. In this regard, the effect of the statute is simply "to reorder the process in such a way as to require age verification before pornography is made available," and thereby to "requir[e] the commercial pornographer

to put sexually explicit images 'behind the counter.'" House Report at 15. See also Senate Report at 8. COPA thus does "no more than is required by most Circle K's or convenience stores." 144 Cong. Rec. H9910 (daily ed. Oct. 7, 1998) (Rep. Wilson).

State sale and display restrictions have been repeatedly upheld as constitutionally valid, even though they similarly impose constraints on adult access to harmful to minors material. For example, in Crawford v. Lungren, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117 (1997), the Ninth Circuit upheld a state law banning the sale of "harmful matter" in unsupervised sidewalk vending machines. The plaintiffs claimed that the statute would "likely make it commercially infeasible for the publishers [of such matter] to distribute their materials through vending machines, and the publishers have had great difficulty finding other outlets willing to distribute their materials." 96 F.3d at 383. The court nonetheless upheld the constitutionality of the statute, observing that "[t]he statute provides two defenses which allow for the retention of newsracks," and that while those defenses "may impose some economic burden, they do enable the publishers to continue distributing their publications on streets." Id. at 388.

Similarly, the Eleventh Circuit has upheld state display restrictions in American Booksellers v. Webb, 919 F.2d at 1498, despite the fact that the district court had found that the "in-store display of books" was "the cornerstone of the [bookselling] industry's marketing practices." The Tenth Circuit in M.S. News Co. v. Casado, 721 F.2d 1281, 1288 (10th Cir. 1983), likewise

upheld a blinder rack ordinance even though the court acknowledged that "compliance with the ordinance will to some degree restrict the viewing by adults of materials which are, as to adults, constitutionally protected." 721 F.2d at 1288. Because the restriction was "reasonable," however, the court concluded that it did "not offend the First Amendment." Ibid.<sup>17</sup>

In sum, COPA's scope is narrow and its burdens are limited. Whatever traffic loss commercial Web site operators engaged in the business of providing harmful to minors material may experience as a result of COPA's requirement that users identify themselves as adults – whether through an adult PIN obtained at a reasonable fee, possession of a valid credit card, or some other means – is no more burdensome than analogous identification and display requirements that have repeatedly been upheld in the world outside of

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<sup>17</sup> See Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389, 1399 (8th Cir. 1985) (upholding display ordinance even though it "limits to some extent the ability of adults to visit a bookstore or newsstand and browse through material that is obscene as to children but not as to adults"); Davis-Kidd, 866 S.W.2d at 526 (upholding display statute in face of testimony that "blinder racks, accompanied by reasonable steps to prevent perusal by children, would disrupt business practices"). See also Va. v. American Booksellers Ass'n, 372 S.E.2d at 625 (concluding that display statute "imposes a relatively light burden upon the bookseller, in contrast to the state's interest in protecting juveniles from materials harmful to them"); American Booksellers Ass'n v. Rendell, 481 A.2d 919, 941 (Pa. Super. 1984) (dismissing "any inhibitory effect on dissemination to adults" in light of "the state's legitimate interest in shielding children from these materials"). But see Tattered Cover, Inc. v. Tooley, 696 P.2d 780 (Colo. 1985).

cyberspace.<sup>18</sup>

**B. There Are No Less Restrictive Means of Effectively Protecting Children from Harmful Materials on the World Wide Web.**

COPA is not only narrowly tailored to advance the government's compelling interest in protecting children from harmful online material; it also furthers the government's interest "in a manner that is the least restrictive of protected speech." 217 F.3d at 173.

Before passing COPA, Congress considered a number of alternative means of protecting children from harmful to minors material on the World Wide Web. See House Report, at 16-20; Senate Report, at 4. Among them were market-based solutions, House

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<sup>18</sup> The district court briefly suggested that COPA "could have been \* \* \* more narrowly tailored \* \* \* if the prohibited forms of content had included, for instance, only pictures, images, or graphic image files." 31 F. Supp. 2d at 497. But limiting the statute's reach to pictures or images would simply serve to remove the statutory restriction on textual (or audio) material that the government otherwise has the power to regulate in order to protect minors. See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 749 (1978). The district court also remarked that "perhaps" Congress' goals "could be served without the imposition of possibly excessive and serious criminal penalties, including imprisonment and hefty fines." 31 F. Supp. 2d at 497. But it is plainly within the legislative power to impose criminal penalties to enforce narrowly tailored provisions deterring the dissemination of materials that are harmful to minors, as the cases which have upheld state display laws demonstrate. See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968) (rejecting challenge to N.Y. Penal Law § 484-h). Finally, the district court suggested that Congress could have made the statute less restrictive by "incorporat[ing] the substance of [COPA's] affirmative defenses into the elements of the crime," instead of "plac[ing] the burden of establishing an affirmative defense" on Web operators. 31 F. Supp. 2d at 497. But one obvious reason that age-screening is appropriately denominated an affirmative defense is that the Web operator is in the best position to set forth the steps taken to restrict the access of children to harmful to minors material on its site.

Report, at 16-17, zoning techniques, id. at 17-18, and blocking and filtering. Id. at 19-20. As the House Report explained, Congress determined that mandating the use of software that would block or filter access to harmful to minors material was "not the preferred solution" because of the risk "that protected, harmless, or innocent speech would be accidentally or inappropriately blocked," id. at 19, the concern that the expense of purchasing and updating such software programs might "discourage adults or schools from using them," id. at 19-20, and its belief that "the law should impose duties on the source of the problem, not the victims." Id. at 20.

Rather than adopting "techniques that rely on screening material after it has been posted on the Internet or retrieved by the end-user," the Committee found that it was "more effective to screen the material prior to it being sent or posted to minors, and that such a restriction imposes minimal burdens on adults." House Report, at 16. Congress ultimately determined that "a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest." 47 U.S.C. 231 note (Finding 4).

The district court nonetheless stated that "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators," and it found this to be "at least some evidence that COPA does not employ the least

restrictive means." 31 F. Supp. 2d at 497. The court's highly tentative observation is patently insufficient to override Congress's judgment or to support the conclusion that plaintiffs can demonstrate a likelihood of success on the merits of their constitutional claims.

The district court acknowledged that there was evidence "that blocking and filtering software is not perfect, in that it is possible that some appropriate sites for minors will be blocked while inappropriate sites may slip through the cracks." 31 F. Supp. 2d at 497. See also id. at 492. Moreover, the court found, a child may obtain unrestricted access to the Web if the child "accesses the Web from an unblocked computer," and the court recognized that it was "possible that a computer-savvy minor with some patience would be able to defeat the blocking device." Ibid.<sup>19</sup>

Most important, the district court also did not suggest -- and plaintiffs did not contend -- "that Congress should statutorily require" the use of blocking and filtering software to protect children from harmful to minors material on the Web. 31 F. Supp. 2d at 497. It can hardly be disputed, however, that if blocking and filtering software is not installed on a computer to which a

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<sup>19</sup> The limitations of the current generation of blocking software were also explored at length by the three-judge court in American Library Ass'n, 201 F. Supp. 2d at 427-50. The court concluded that "[a]lthough such programs are somewhat effective in blocking large quantities of pornography, they are blunt instruments that not only 'underblock,' i.e., fail to block access to substantial amounts of content that \* \* \* library boards wish to exclude, but also \* \* \* 'overblock,' i.e., block access to large quantities of material that library boards do not wish to exclude and that is constitutionally protected." Id. at 406.

minor has access, he or she will not be protected from harmful to minors material on the Web. This Court's prior opinion thus rightly "question[ed] the effectiveness of actions taken by a minor's parent to supervise or block harmful material by using filtering software," observing that "such actions do not constitute government action," and are not "a lesser restrictive means for the government to achieve its compelling interest." 217 F.3d at 171 n.16. See id. at 181 n.24 ("the parental hand should not be looked to as a substitute for a congressional mandate").<sup>20</sup>

In any event, COPA and the use of blocking software by parents are not mutually exclusive alternatives; indeed, Congress envisioned that COPA would operate against a backdrop of blocking and filtering software. Thus, Congress recognized that "blocking and filtering techniques may be effective for many parents, schools, and libraries." House Report, at 19. And it required - in another section of the same statute, see Pub. L. No. 105-277, § 1404(a)(3) - that interactive computer services notify their customers "that

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<sup>20</sup> United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000), is not to the contrary. In that case, the Supreme Court invalidated a provision requiring cable operators to "fully scramble or otherwise fully block" channels "primarily dedicated to sexually-explicit programming" because another section of the same statute required the operator to do so with regard to any of its channels upon its subscriber's request. Id. at 806, 809. Unlike this case, the less restrictive alternative in Playboy required the cable operator to block undesired channels upon request, and at no cost to the subscriber. Id. at 810. Moreover, the operator's action would entirely eliminate the problem without affecting content on other channels. By contrast, the use of filtering or blocking software necessarily runs the risk that "some appropriate sites for minors will be blocked while inappropriate sites may slip through the cracks." 31 F. Supp. 2d at 497.

parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors." 47 U.S.C. § 230(d). In the end, Congress's entire scheme - which envisions COPA and blocking software operating together - is plainly more effective in preventing access to harmful to minors material than the voluntary use of blocking software alone.<sup>21</sup>

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In sum, the district court refused to find COPA to be a narrowly tailored means of advancing the government's compelling interest in protecting children from harmful material on the World Wide Web only by interpreting the statute in a way that impermissibly and greatly exaggerates its impact on protected

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<sup>21</sup> As this Court observed, COPA does not prevent minors from "access[ing] material published by non-commercial Web publishers, and by foreign Web publishers," 217 F.3d at 177. Congress refrained from having COPA regulate non-commercial entities, however, because the Supreme Court made clear that the CDA's coverage of such entities materially contributed to the unacceptable breadth of that statute. Reno v. ACLU, 521 U.S. at 877. See House Report, at 13; Senate Report, at 11. Congress has nonetheless remained receptive to other "legislative proposals on how to address the difficult issue of restricting a minor's access to inappropriate material" on non-commercial sites. House Report at 13. And although COPA does not state whether it applies to foreign Web sites, there are practical (and possibly jurisdictional) obstacles to its enforcement overseas. The fact that a federal statute applies domestically, however, cannot render it fatally underinclusive - particularly where, as here, the statute's domestic application substantially advances the government's compelling interests. In the end, "[t]he requirement that the regulation alleviate the harm in a direct and material way is not a requirement that it redress the harm completely." Mariani v. United States, 212 F.3d 761, 774 (3d Cir. 2000) (en banc), cert. denied, 531 U.S. 1010 (2000).

speech. The district court's analysis of the plaintiffs' likelihood of success on the merits – the linchpin of its opinion – is thus fatally flawed.

As we have explained, COPA is narrow in scope and limited in burden, and there are no less restrictive alternatives that would as effectively achieve the government's compelling interests in protecting children from harmful material online. The preliminary injunction therefore should be vacated.

### **CONCLUSION**

For the foregoing reasons, the judgment of the district court should be reversed, its preliminary injunction vacated, and the case remanded for further proceedings.

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CERTIFICATION OF BAR MEMBERSHIP

Attorneys employed by the federal government are not required to be members of the Bar of this Court in order to represent the federal government in matters before this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that, excluding the table of contents, table of authorities, statutory addendum, and certificates of counsel, the foregoing brief contains a total of 13,661 words, as counted by Corel WordPerfect 9, the word processing system used to prepare the brief. The brief uses 12-point Courier, a monospaced type, with no more than 10.5 characters per inch.

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CERTIFICATE OF SERVICE

I hereby certify that on this \_\_\_ day of July 2002, I filed and served the foregoing Brief for the Appellant On Remand by causing copies to be delivered by FedEx overnight delivery to the Clerk of the Court and to:

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**STATUTORY ADDENDUM**