

No. 07-2539

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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 BOOKSTORES; AMERICAN  
BOOKSELLERS FOUNDATION FOR FREE EXPRESSION;  
ADDAZI, INC., d/b/a CONDOMANIA; ELECTRONIC FRONTIER  
FOUNDATION; ELECTRONIC PRIVACY INFORMATION  
CENTER; FREE SPEECH MEDIA; PHILADELPHIA GAY NEWS;  
POWELL'S BOOKSTORES; SALON MEDIA GROUP, INC.;  
PLANETOUT, INC.; HEATHER CORINNA [REDACTED];  
NERVE.COM, INC.; AARON PECKHAM, d/b/a URBAN  
DICTIONARY; PUBLIC COMMUNICATORS, INC.;  
DAN SAVAGE; SEXUAL HEALTH NETWORK,

Plaintiffs-Appellees,

v.

ALBERTO R. GONZALES, in his 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 APPELLEES

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## CORPORATE DISCLOSURE STATEMENT

In accordance with FRAP 26.1 and LAR 26.1 Plaintiffs make the following disclosures:

The following plaintiffs do not have parent companies, nor do any publicly held companies own ten percent or more of their stock: American Civil Liberties Union, Aaron Peckham d/b/a Urban Dictionary, Public Communicators, Inc., Free Speech Media, Sexual Health Network, Salon Media Group, Inc., Powell's Bookstore, Philadelphia Gay News, Nerve.com Inc., Electronic Privacy Information Center, Electronic Frontier Foundation, Addazi, Inc., d/b/a Condomania, American Booksellers Foundation for Free Expression.

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## STATEMENT OF THE ISSUE

Whether the district court correctly held that the Child Online Protection Act, 47 U.S.C. § 231, violates the First Amendment by suppressing a large amount of speech on the World Wide Web that adults are entitled to communicate and receive.

## STATEMENT OF THE CASE

### I. PROCEDURAL HISTORY.

The Child Online Protection Act (“COPA”), 47 U.S.C. § 231, was signed into law on October 21, 1998. COPA imposes severe criminal and civil sanctions on persons who “by means of the World Wide Web, make[] 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)-(3). On February 1, 1999, the district court preliminarily enjoined enforcement of COPA on the ground that COPA violates the First Amendment. *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999) (“*ACLU I*”).

On the initial appeal of the district court’s decision, this Court upheld the district court’s ruling on the single ground that COPA’s reliance on a “community standards” test rendered the statute unconstitutional. *ACLU v. Reno*, 217 F.3d 162, 166 (3d Cir. 2000) (“*ACLU I*”).

The Supreme Court vacated and remanded. The Court narrowly held “that COPA’s reliance on community standards to identify ‘material that is harmful to minors’ does not *by itself* render the statute substantially overbroad for purposes of the First Amendment.” *Ashcroft v. ACLU*, 535 U.S. 564, 585 (2002) (“ACLU I”) (emphasis in original). The Court remanded the case to this Court for consideration of the other issues ruled on by the district court, but did not lift the injunction preventing the government from enforcing COPA. *Id.* at 585-86.

On remand, this Court reaffirmed its conclusion that COPA was unconstitutional. *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003) (“ACLU II”). In its primary holding, the Court ruled that COPA failed strict scrutiny because it would deprive adults of material they are constitutionally entitled to receive. *Id.* at 253. Reviewing the plain language of the statute, this Court concluded that COPA “endangers a wide range of communications, exhibits, and speakers whose messages do not comport with the type of harmful materials legitimately targeted.” *Id.* The Court rejected the government’s plea to rewrite the statute to narrow its application, and concluded that COPA’s affirmative defenses did nothing to ameliorate the statute’s burden on speech protected for adults. *Id.* at 260-61. The Court further held that other alternatives, including Internet filtering software, were

“substantially less restrictive than COPA in achieving COPA’s objective of preventing a minor’s access to harmful materials.” *Id.* at 265.

The Supreme Court affirmed. *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (“*ACLU II*”). The Court first noted that both parties agreed that (1) “the statute was likely to burden some speech that is protected for adults,” and (2) Plaintiffs “had standing to challenge the statute.” *Id.* at 665. The Court held that it was the government’s burden to show that the “proposed less restrictive alternatives are less effective than COPA.” *Id.* at 667. In measuring the effectiveness of alternatives, the Court explained that:

[T]he test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress’ legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

*Id.* at 666. The Court then held that “[b]locking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children’s access to materials harmful to them.” *Id.* at 666-67. Because of the passage of time, the Court remanded the case to the district court for a trial on the merits to determine if the evidence still supported its conclusion about COPA’s unconstitutionality. *Id.* at 670-73.

The trial in the district court lasted more than four weeks. The district court heard the testimony of 38 witnesses, including twelve experts, and 172 exhibits were admitted. The district court again held that the statute was unconstitutional. *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007) (“ACLU III”). In support of its conclusion, the district court made over 180 specific factual findings. The Court summarized its legal conclusion as follows:

COPA facially violates the First and Fifth Amendment rights of the Plaintiffs because: (1) at least some of the Plaintiffs have standing; (2) COPA is not narrowly tailored to Congress’ compelling interest; (3) Defendant has failed to meet his burden of showing that COPA is the least restrictive, most effective alternative in achieving the compelling interest; and (4) COPA is impermissibly vague and overbroad.

*Id.* at 777-78.

## **II. THE STATUTE.**

The district court accurately summarized the principal provisions of the statute. *Id.* at 779-80. COPA provides civil and criminal penalties for anyone who engages in any speech that is “harmful to minors” on the World Wide Web if that speech is “available to any minor.” 47 U.S.C. § 231(a)(2),(3). “Harmful to minors” is defined as speech that is “patently offensive” to minors, “prurient” to minors, and lacks certain “value” for

minors. 47 U.S.C. § 231(e)(6). The statute applies to any speaker on the Web who has “the objective of earning a profit.” 47 U.S.C. § 231(e)(2)(b).

Speakers may not be held liable if they “in good faith, ha[ve] restricted access by minors to material that is harmful to minors” by use of a credit card or personal identification screen, a digital certificate, or “any other reasonable measures that are feasible under available technology.” 47 U.S.C. § 231(c)(1).

## STATEMENT OF FACTS

### I. A GREAT DEAL OF SPEECH IS AT RISK UNDER COPA.

The district court found that “there are numerous examples of material on the plaintiffs’ Web pages that contain an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast which might be considered harmful to minors.” *ACLU III*, 478 F. Supp. 2d at 786. The court made additional findings for three of the six named Plaintiffs who provided live testimony: the three Web sites operated by Plaintiff Heather Corinna, as well as the sites of the online magazines Nerve and Salon. *Id.* at 787-788. The court identified specific Web pages displayed by each of these Plaintiffs and held that those pages represented content that could be found to violate the language of COPA. *Id.* at 808. Those findings are amply

supported by the Record. 11/2/06, at 81-82, 87-89, 95 (Corinna); PX 42, at 0003-0028; 10/23/06, at 68-70, 73-74, 77, 79 (Griscom); 10/23/06, at 141,144-148, 152 (Walsh); PX 39, at 1-5, 61-78, 94-111, 119-135.

The testimony and exhibits from the three other testifying Plaintiffs – Sexual Health Network, Condomania, and Urban Dictionary – also support the district court’s conclusion. 10/30/06, at 184, 205-211, 213-215 (Tepper); PX 37, at 1-17, 73-74, 76-87, 89-99; 10/30/06, at 130-131 (Glickman); PX 40; 10/31/06, at 26-28 (Peckham).

The district court also heard testimony from four non-plaintiff witnesses who likewise provided examples of additional types of speech on the Web that will be at risk under COPA. 11/2/06, at 134, 143-150 (Snellen); PX 49; 10/26/06, at 183, 203-204, 208-209 (A. Smith); PX 50; PX 51; PX 83; 10/31/06, at 96-108 (Lewis); PX 52; 11/1/06, at 28-55 (DeGenevieve); PX 53. The evidence made clear that their speech is merely representative of innumerable similar Web sites that would likely be covered by COPA. 11/2/06, at 159 (Snellen); 10/26/06, at 191-194 (A. Smith); 10/31/06, at 89 (Lewis); 11/1/06, at 58 (DeGenevieve).

Defendant’s own evidence also showed that there is a great deal of speech that is at risk under COPA. Defendant’s experts found that approximately one percent of the Web contains “sexually explicit” speech.

478 F. Supp. 2d at 788-89. In conducting their analysis, Defendant's experts created a category of "other" for Web pages that "some people would probably characterize as adult entertainment," but others would not. 11/7/06, at 219-220 (Mewett). This large number of Web pages categorized as "other" provides rough evidence that for all of those sites that are correctly categorized as sexually explicit, an additional 50 percent would likely be reasonably chilled because they fall into this gray area. 11/7/06, at 220-221 (Mewett). According to Defendant's expert, that would amount to between 137 to 350 million Web pages. 478 F. Supp. 2d at 788-89.

Plaintiffs, the other speech witnesses, and untold numbers of similar Web speakers reasonably fear prosecution under COPA for their speech. There was extensive testimony that speech exactly like (or even less explicit than) the witnesses' speech has widely been considered patently offensive and lacking value for minors. 10/30/06, at 22 (Reichman); PX 22; 11/1/06, at 18-22 (DeGenevieve); 10/31/06, at 78-79 (Peckham). Professor Henry Reichman, one of the nation's leading experts on censorship, testified that there have been numerous prosecutions for speech similar to that of the Plaintiffs, and numerous efforts around the country to censor similar speech in books, in libraries, and on TV and radio. 10/30/06, at 11-15, 47 (Reichman); PX 22, 23. Indeed, many of the witnesses have received

complaints that their speech is inappropriate for minors. 10/23/06, at 156-157 (Walsh); 10/30/06, at 132-133 (Glickman); 11/2/06, at 151-154 (Snellen). Several have been expressly censored in the name of protecting children. For example, musician Ms. Smith was prohibited from performing her song "Lick-It" in a public place because of concerns that it would be heard by minors. 10/26/06, at 190-202 (A. Smith). Finally, at least one Web page from each Plaintiff is blocked by at least two of the major Internet content filtering companies, which categorize Web sites parents are likely to find inappropriate for minors. DX 85; 11/7/06, at 131-133 (Mewett); Joint Ex. 1, ¶32, 85.

**II. COPA FAILS TO PROTECT MINORS BECAUSE IT DOES NOT REACH A SIGNIFICANT AMOUNT OF INTERNET SPEECH.**

**A. Overseas Speech.**

Relying on the testimony of experts for both Plaintiffs and Defendant, the district court found that "a substantial number (approximately 50 percent) of sexually explicit websites are foreign in origin." 478 F. Supp. 2d at 789. The district court also found that a Congressionally-commissioned report by the National Research Council "noted that some estimates place as much as 75 percent of adult membership Web sites overseas." *Id.* The district court found that such Web sites have been migrating overseas over

the past five years, and that the percentage of overseas sexually explicit sites has therefore been increasing. *Id.*

The district court's findings were amply supported by the Record. 10/26/06, at 88-89, 99-100, 107-109, 112 (Zook); PX 29, at 0007-0008, 0012, 0014-0018; PX 54, at 0101; DX 62, ¶ 10.<sup>1</sup>

**B. Non-Web Based Internet Speech.**

COPA applies only to files “accessible over the Web via HTTP or a successor protocol.” 47 U.S.C. § 231(e)(1). As a result, the district court held that COPA does not apply to “other forms of communication and data transfer over the Internet including email, newsgroups, message boards, peer-to-peer and other file sharing networks, chat, instant messaging, VoIP, and FTP.” *ACLU III*, 478 F. Supp. 2d at 798. This holding was based on the language of the statute, but it was also amply supported by the undisputed testimony establishing that many forms of Internet communication are accessible via a computer protocol that is not “HTTP or a successor protocol,” such as email, instant messaging and chat, newsgroups, peer-to-peer file-sharing, and VoIP (telephone communication

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<sup>1</sup> Without explicitly asserting that the district court's findings regarding overseas speech are clearly erroneous, Defendant challenges these findings. Def. Br. at 53-54. The sole, selective evidence Defendant cites are an exhibit that the district court explicitly found to be methodologically flawed, 478 F. Supp. 2d at 789 (discussing DX 65), and an article by Plaintiffs' expert that was old and superseded by more recent studies by experts for both parties. *Id.*

over the Internet). 10/24/06, at 207-208, 217-218, 226-227, 234-235 (Felten); PX 13, at 10-13; Joint Ex. 1, ¶119. Perhaps most significantly given the explosive growth of Internet video through popular sites such as Youtube.com, COPA does not cover streaming audio or video. 10/24/06, at 239, 241 (Felten).

There was undisputed testimony that sexually explicit speech can and is distributed through all of these other popular forms of Internet speech. 10/25/06, at 203-205, 210-215 (Russo); PX 27, at 0026, 0028; 11/1/06, at 236-237 (Murphy).

Even individuals operating Web sites currently covered by COPA could easily evade COPA, and thereby immunize themselves from criminal prosecution under COPA, by displaying their speech through FTP (“File Transfer Protocol”), a non-HTTP protocol that is often used for downloading information on the Internet. 10/25/06, at 5-7 (Felten); Joint Ex. 1, ¶110; PX 19. Sexually explicit text and pictures can be displayed on the Web using FTP. 10/25/06, at 17, 65 (Felten).

### **C. Non-Commercial Speech.**

COPA does not reach non-commercial speech. Joint Ex. 1, ¶119. Sexually explicit material is available from many non-commercial sources on the Web. PX 54, at 0387.

### III. OTHER METHODS ARE MORE EFFECTIVE THAN COPA.

#### A. Filtering Software.

Defendant asserts that the district court “assume[d] the best about filtering” and “speculated at length.” Def. Br. at 20, 23. The district court did no such thing. Instead, it made over 50 specific factual findings concerning filters, each of which was fully supported by the evidence.

*ACLU III*, 478 F. Supp. 2d at 789-797.<sup>2</sup>

Internet content filters are “computer applications which, *inter alia*, attempt to block certain categories of material from view . . . including sexually explicit material.” *Id.* at 789. Filters can be configured “in a variety of different ways according to, *inter alia*, the values of the parents using them and the age and maturity of their children.” *Id.* at 790-91.

Filters can also be used in other ways, such as to restrict the time of day a child uses a computer or to monitor the sites a child visits. *Id.* at 792.

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<sup>2</sup> Defendant asserts that the district court “ignored substantial evidence” concerning filters. Def. Br. at 24. The section of the brief discussing the evidence provides evidentiary citations for exactly eighteen facts. Def. Br. at 46-52. Many of those citations support claims with which the court and Plaintiffs do not disagree. The district court made specific findings on many of those issues, just one that Defendant dislikes. Compare Def. Br. at 51 (children can circumvent filters), with 478 F. Supp. 2d at 795 (“It is difficult for children to circumvent filters”). For example, Defendant’s expert did testify that he found Web sites giving instructions on methods to circumvent filters. Def. Br. at 51. He did not testify that any of those instructions worked. Five separate witnesses testified that filters could not easily be circumvented, and the court made factual findings based on that testimony. 478 F. Supp. 2d at 795; *see* 10/24/06, at 86-87 (Cranor); 10/25/06, at 36-40 (Felten); 11/1/06, 216-217 (Murphy); 10/31/06, at 215 (Whittle); 11/2/06, at 244 (Allan).

Filters can block speech from overseas Web sites, as well as domestic sites, and from non-commercial sites, as well as commercial sites. *Id.* at 791-92. Filters can also block speech on every Internet application, including those not reached by COPA, such as email or streaming video. *Id.* at 791.

The district court explicitly found that filters “are widely available and easy to obtain.” *Id.* at 793; *see* 10/24/06, at 8-9 (Cranor). Many filters are free, and the new Microsoft operating software comes with filtering software pre-installed on computers. *Id.* The court also found that filtering programs are “fairly easy to install, configure, and use.” *Id.*; *see* 10/24/06, at 19, 21-39, 57, 68 (Cranor); PX 3; PX 6; PX 54; PX 85, at 4; PX 86.

Based on the evidence, the district court found that filtering products “are now more effective than ever before.” 478 F. Supp. 2d at 794. The court specifically evaluated a number of studies from Plaintiffs and Defendant and found that all of the studies agreed that filters “generally block about 95% of sexually explicit material.” *Id.* at 795-97. As the court noted, even the “vast majority” of the filters tested by Defendant in his study “blocked at least 95%” of the sexually explicit pages. *Id.* at 796.

The effectiveness of filters was demonstrated not just by these studies, but by the experiences of those who actually use them. Defendant uses

filters on Department of Justice computers. Those responsible for evaluating these filters have concluded that they are effective in preventing access to sexually explicit material. Joint Ex. 1, ¶¶114-116, 124. Three school librarians testified that their schools have utilized filters for years and that, as a result, they knew of no instances of students accessing sexually explicit speech from a school computer. 11/1/06, at 91-93 (Kirk); 11/1/06, at 175-177 (Taylor); 11/2/06, at 23 (Smathers). In addition, a study done for AOL found that 85 percent of parents are highly satisfied with their AOL Parental Controls products, and that 87 percent of the parents found them easy to use. 10/24/06, at 83, 129-130 (Cranor); PX 85, at 0004; *see also* 11/1/06, at 222-223, 229-230 (Murphy).

There was also testimony regarding overblocking by filters.

Defendant conceded that there were no reports of problems with overblocking on its own computers using filters. Joint Ex. 1, ¶¶114-16, 124. The librarians who use filters also reported no significant problems with overblocking. 11/1/06, at 91-93 (Kirk); 11/1/06, at 175-177 (Taylor); 11/2/06, at 23-24 (Smathers).<sup>3</sup>

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<sup>3</sup> Defendant suggests that filters overblock based on statistics from his experts' filtering study. Def. Br. at 48-51. The district court explicitly rejected those statistics: "I do not find Mewett's overblocking rates to be reliable because he sometimes concluded that a filter had overblocked even when the filter was performing exactly as intended." 478 F. Supp. 2d at 797.

Even when overblocking occurs, the court found that “a parent may add the Web sites that were erroneously listed . . . so that those Web sites are not blocked again.” 478 F. Supp. 2d at 794. Defendant’s only real response to this finding is to argue that “requiring parents to add individual web sites to a filter . . . is itself burdensome.” Def. Br. at 50. Defendant provides no citation to support this claim, and it is contradicted by several of the district court’s explicit findings, which are based on the evidence in the Record. 478 F. Supp. 2d at 793 (studies and tests show filters are “easy to install, configure and use and require only minimal effort by the end user to configure and update”).

**B. Other Alternatives.**

Because the district court concluded that Defendant had not met his burden of showing that filters were less effective than COPA, *id.* at 814, the district court did not have to reach the considerable and largely undisputed testimony that there are many additional effective alternatives that are less restrictive of speech. For example, Defendant could enforce existing laws, such as obscenity laws. *See infra* at 54-55 . Defendant could also enact a variety of narrower, more targeted statutes. *See infra* at 53-54. Defendant could encourage and fund educational efforts to help protect children on the Internet. *See infra* at 55-56. Finally, Defendant could also encourage and

fund the use of the numerous non-technological parental control tools available for parents. *See infra* at 57-58.

The expert testimony and numerous independent reports presented at trial establish that alternatives such as these would be effective in protecting minors. 10/24/06, at 94-95, 99 (Cranor); 11/1/06, at 71-72 (Kirk); 11/1/06, at 164-167 (Taylor); PX 6, at 18; PX 11, at 5, 20-24, Appendix III; PX 54 at 0255-58. The government presented no evidence at trial that any of these other alternatives would not be as effective as COPA.

#### **IV. THE AFFIRMATIVE DEFENSES DO NOT CURE COPA'S DEFICIENCIES.**

##### **A. The Defenses Do Not Work.**

COPA provides an affirmative defense to Web site owners who "in good faith" restrict access by minors to material that is harmful by: (1) "requiring the use of a credit card, debit account, adult access code, or adult personal identification number"; (2) "accepting a digital certificate that verifies age"; or (3) "by any other reasonable measures that are feasible under available technology." 47 U.S.C. § 231(c). Both parties agreed, and the district court found, that (2) and (3) were not viable. 478 F. Supp. 2d at 803; PX 163, at 0001-0002.

The district court found that the other defense – requiring credit cards or data verification – was "effectively unavailable" to Web site operators

because these mechanisms “do not in fact verify age.” 478 F. Supp. 2d at 800, 811-12. Specifically, with respect to credit cards and debit cards (“payment cards”), the court found that payment card association rules expressly state that the cards are not an effective method of verifying age and prohibit Web sites from using the cards to verify age. *Id.* at 801. In addition, the associations advise consumers not to offer the cards as a proxy for age. *Id.* The court also found that a significant number of minors have access to such cards, often without the knowledge or consent of their parents. *Id.* These findings are overwhelmingly supported by the Record. 10/25/07 at 72-73, 120, 124, 144, 157-160, 164-167 (Russo); 10/31/07 at 164-166, 174-175, 178-181, 185-187 (Cadwell); 10/30/07 at 52-53, 100-103, 107-108 (Glickman); 10/31/07 at 240, 251 (Peirez); 11/1/07 at 104-106, 111-113 (Thaler); 11/6/07 at 70, 75-77, 85-86, 96-97, 114, 133-134, 144-145 (Mann); 11/06/07 at 237-238 (Rinchiuso); 11/7/07 at 4-9, 13-19, 21-23, 26-27, 46-47 (Bergman); 11/14/07 at 179-183, 186-197, 201-202, 213-214 (Clark); PX 6, at 25; PX 17, at 0002, 0007; PX 25, at 0003, 0023-0025; PX 34, at 0003-0008; PX 54, at 0088, 0091, 0093, 0371, 0375-0377; PX 93, at 0010; PX 106, at 0004; PX 139 at 0003-0004; PX 141; PX 148, at 0002, 0004.

The district court similarly found that “there are no DVS [data verification] products that actually verify age” and, thus, that DVS products “are not effective age verification services.” 478 F. Supp. 2d at 812. The district court found that DVS products “merely verify the data entered by an Internet user” and “cannot determine whether the person entering information . . . is the person to whom the information pertains.” *Id.* at 802. The court also found that the minimum information required by a DVS company – first name, last name, street address, and zip code – “can easily be circumvented by children.” *Id.* Accordingly, the court concluded that using a DVS product to verify age is “unreliable” because “neither the DVS nor the Web page operator can know whether an adult or a child provided the information.” *Id.* at 803.<sup>4</sup> These findings are amply supported by the Record. 10/25/07, at 95-98, 172-176, 181-183, 196-197 (Russo); 10/31/07, at 127-128, 138-139, 143-145 (Meiser); 11/9/07, at 143-144, 160-161, 164-

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<sup>4</sup> The court also found that DVS services are not effective because they are less likely to verify the data from individuals overseas, recent immigrants, visa holders, non-citizens, young adults between the ages of seventeen and twenty-one, individuals residing in states from which the DVS companies do not have access to Department of Motor vehicle records, or individuals recently married, divorced or with a recent name change. 478 F. Supp. 2d at 803. These findings are amply supported by the Record. 10/25/07, at 177-181 (Russo); 10/31/07, at 122-123, 134-136, 140, 142, 155-156 (Meiser); 11/9/07, at 166-167, 237-239, 252-260 (Dancu); PX 25, at 0031-0032; PX 54, at 0370, 0372, 0376; PX 76; PX 79, at 0001, 0004.

166, 244-246, 249-252, 260-261 (Dancu); PX 25, at 0025-0033; PX 54, at 0092-0093, 0367; PX 76; PX 79, at 0004-0005.

**B. The Affirmative Defenses Create An Impermissible Economic Burden.**

Providing content for free is essential to Plaintiffs and other commercial Web site operators that fall within COPA's boundaries.

10/31/07, at 24, 55-56 (Peckham); 11/2/07, at 104 (Corinna); 10/23/07, at 84-85 (Griscom).

The district court found that the affirmative defenses "place substantial economic burdens on the exercise of protected speech." *ACLU III*, 478 F. Supp. 2d at 813. Specifically, the court found that "there are fees associated with all of the affirmative defenses and verification services identified in COPA, as well as all other services that claim to provide age verification." *Id.* at 803-04. In addition, financial institutions will not verify a payment card in the absence of a financial transaction, making payment card verification "practically unfeasible" for Web sites that distribute content for free. *Id.* These findings are amply supported by the Record. 10/25/07, at 162-166 (Russo); 10/31/07, at 183-184 (Cadwell); 10/31/07, at 246-247 (Peirez); 11/1/07, at 116-119 (Thaler); 11/6/07, at 242 (Rinchiuso); 11/7/07, at 25, 27-31 (Bergman); 11/14/07, at 214-218, 239-240 (Clark); PX 6, at 25; PX 25, at 0024; PX 34, at 0010; PX 54, at 0373; PX 106, at 0005, 0015.

The court similarly found that “[i]t is not economically feasible” for many Web sites to use a DVS because the DVS companies charge a fee for every verification transaction, as well as fees for the application, set-up and integration. 478 F. Supp. 2d at 804-05. In fact, the evidence shows that verifications cost a minimum of 37 cents per transaction and can cost as much as 97 cents per transaction. *Id.* The application, set-up and integration fees range from \$195 to \$495. *Id.* These findings are amply supported by the Record. 10/25/07, at 186, 192-193, 195 (Russo); 10/31/07, at 146-147 (Meiser); 11/9/07, at 221-222, 232, 239-240, 246 (Dancu); PX 25, at 0026-0028, 0030, 0033.

**C. The Affirmative Defenses Impermissibly Chill Protected Speech.**

The district court also found that “the utilization of those devices [verification screens] to trigger COPA’s affirmative defenses will deter listeners, many of whom will be unwilling to reveal personal and financial information in order to access content, and thus, will chill speech.” 478 F. Supp. 2d at 812. The resulting decline in Web traffic will deprive Web site owners of the possibility of reaching the very audiences with whom they are trying to speak, and will likely cause many sites to censor their speech to

avoid having to implement age verification screens. *Id.* at 805-806.<sup>5</sup> These findings of user and speaker deterrence are amply supported by the Record. 10/23/07, at 159, 161-166, 168-173 (Walsh); 10/23/07, at 66, 84-90 (Griscom); 10/25/07, at 146-148 (Russo); 10/30/07, at 178, 190-194, 212, 236-239, 241-242 (Tepper); 10/30/07, at 134-136 (Glickman); 10/31/07, at 47-48, 51-53 (Peckham); 11/2/07, at 103-104 (Corinna); 11/15/07, at 116-117, 172-173 (S. Smith); PX 6, at 25; PX 54, at 0235, 0372-0373.

### **SUMMARY OF ARGUMENT**

The Supreme Court remanded this case for further factfinding. Defendant nevertheless ignores almost all of the evidence that was presented at trial and never once asserts that the district court committed “clear error” in its evaluation of the evidence. Instead, Defendant simply repeats its earlier rejected legal arguments in an attempt to narrow the scope of COPA to avoid its clear constitutional defects, and claims that the district court – and, implicitly, this Court and the Supreme Court – reached the wrong conclusions. Because the overwhelming evidence in the Record amply supports the district court’s holding that COPA is unconstitutional, this Court should again affirm the injunction against enforcement of COPA.

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<sup>5</sup> Payment card verification systems would prevent all adults who do not have payment cards from accessing constitutionally protected speech. 11/6/07, at 151-152 (Mann); PX 25, at 0024; PX 34, at 0011.

First, the evidence makes clear that COPA impermissibly deprives adults of a substantial amount of constitutionally protected speech. Because of the way the Web works, COPA requires Web speakers to restrict access by both minors *and adults* to any speech that may be considered “harmful to minors” to avoid the risk of criminal prosecution and civil penalties. The Supreme Court has repeatedly made clear that such restrictions are not permitted by the First Amendment, even in the name of protecting children.

Second, the evidence demonstrates that COPA is a content-based restriction that cannot withstand strict scrutiny. COPA is not narrowly tailored because it is both overinclusive – it covers a significant amount of speech that is protected for adults – and underinclusive – it fails to protect children from much speech on the Internet that would likely be considered harmful. COPA’s affirmative defenses to prosecution do not cure these problems. Indeed, because they would impose a financial burden on Web sites covered by COPA and deter a significant number of Internet users from accessing those Web sites, the affirmative defenses exacerbate COPA’s unconstitutionality.

COPA also fails strict scrutiny because the government has failed to meet its burden of demonstrating that there are no less restrictive, available alternatives than COPA’s severe criminal and civil penalties to accomplish

the government's interest in protecting children on the Internet. In fact, the evidence establishes that filtering products and several other non-technological alternatives are both less restrictive and more effective than COPA.

Finally, the evidence presented at trial again demonstrates that COPA is unconstitutionally vague and overbroad.

### STANDARD OF REVIEW

The district court's legal conclusions are reviewed *de novo*, and its findings of fact are reviewed for clear error. *Sheet Metal Workers, Local 19 v. 2300 Group, Inc.*, 949 F.2d 1274, 1278 (3d Cir. 1991).<sup>6</sup>

### ARGUMENT

#### I. COPA IMPERMISSIBLY DEPRIVES ADULTS OF A SUBSTANTIAL AMOUNT OF CONSTITUTIONALLY PROTECTED SPEECH.

Once a speaker posts content on the Web, it is available to all other Web users worldwide. *Reno v. ACLU*, 521 U.S. 844, 853 (1997). Unlike face-to-face communications, it is not technologically possible for a speaker

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<sup>6</sup> Defendant wrongly suggests that the Court has a duty in this case to conduct an "enhanced examination of the entire record." Def. Br. at 25. Although the Supreme Court has held that an independent review of the facts is appropriate where necessary to assure that free speech rights have not been unduly abridged, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11 (1984), that rule does not afford "special protection for the government's claim that it has been wrongly prevented from restricting speech." *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1229 (7th Cir. 1985).

to know the age of a user who is accessing his or her communications on the Web. PX 25, at 0030-0031; PX 54, at 0088, 0091-0092; 10/25/06, at 124, 143-144, 157-159, 164-167 (Russo); *see also Reno*, 521 U.S. at 876. To avoid the risk of criminal prosecution and civil penalties, therefore, COPA requires Web speakers to restrict access by both minors *and adults* to any speech that may be considered “harmful to minors.”

COPA criminalizes a category of speech – “harmful to minors” material – that is constitutionally protected for adults. The Supreme Court has repeatedly held that “the governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults.” *Reno*, 521 U.S. at 875 (citations omitted); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002) (“[S]peech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.”). Applying this long established First Amendment analysis, the Court has invalidated the two most recent attempts by Congress (other than COPA) to criminalize non-obscene, sexually-explicit speech. *Reno*, 521 U.S. at 875 (striking down the Communications Decency Act); *Free Speech Coalition*, 535 U.S. at 252 (invalidating ban on “virtual” child pornography). Like those statutes, COPA impermissibly “proscribes a significant universe of speech that is

neither obscene . . . nor child pornography.” *Free Speech Coalition*, 535 U.S. at 240; *see also Reno*, 521 U.S. at 874. The result is that, like those other statutes, COPA is unconstitutional.

Indeed, because “[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox,” the Supreme Court has *never* upheld a criminal prohibition on non-obscene communications between adults. *Reno*, 521 U.S. at 875 (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74-75 (1983) (internal quotation marks omitted)); *see also Sable Communications of California v. FCC*, 492 U.S. 115, 131 (1989) (invalidating a conviction for distribution of indecent publications); *Bolger*, 463 U.S. at 74 (striking down a ban on mail advertisements for contraceptives); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975) (striking down a statute criminalizing the showing of certain movie content at drive-in theaters); *Butler v. State of Michigan*, 352 U.S. 380, 383 (1957) (invalidating a conviction for distribution of indecent publications). The Court has uniformly rejected such attempts to “burn the house to roast the pig.” *Butler*, 352 U.S. at 383.<sup>7</sup>

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<sup>7</sup> *Cf. Ginsberg v. State of New York*, 390 U.S. 629, 634-35 (1968) (upholding restriction on the direct commercial sale to minors of material deemed “harmful to minors” because it “does not bar the appellant from stocking the magazines and selling them” to adults); *American Booksellers v. Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990) (noting that “*Ginsberg* did not address the difficulties which arise when the government’s protection of minors burdens (even indirectly) adults’ access to material protected as to them”).

The Court has similarly rejected even non-criminal speech regulations that attempt to “reduc[e] the adult population . . . to . . . only what is fit for children.” *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996) (citations omitted) (invalidating law requiring cable television operators to segregate and block “patently offensive” content on certain channels); *see also U.S. v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (invalidating law requiring cable television operators to scramble channels); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 563 (2001) (invalidating tobacco advertising restrictions aimed at preventing children from viewing such advertising). Because COPA would have this precise effect, the district court’s decision to invalidate COPA was correct.

## **II. COPA IS A CONTENT-BASED REGULATION THAT CANNOT WITHSTAND STRICT SCRUTINY.**

COPA regulates speech on the basis of its content. Content-based regulations of protected speech are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992). Such a law will be upheld only if the government meets its burden of demonstrating both a compelling governmental interest and that the law is “narrowly tailored” to effectuate that interest. *Reno*, 521 U.S. at 874. In addition, the “burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to

serve.” *Id.*

**A. COPA Is Overinclusive Because It Criminalizes A Vast Quantity Of Protected Speech.**

COPA’s prohibition on the online display of “harmful to minors” material criminalizes vast quantities of protected speech. The speech of Plaintiffs and Plaintiffs’ witnesses provides a forceful illustration of the breadth and quantity of the speech that would be criminalized or deterred were COPA to take effect. *See supra* at 5-8. Given all of the evidence in the Record, the district court was correct to conclude that COPA is overinclusive and that a substantial amount of valuable, constitutionally protected speech is at risk under COPA. *ACLU III*, 478 F. Supp. 2d at 810.

Defendant seeks to limit COPA by offering a number of wishful interpretations of COPA’s plain language. None of Defendant’s narrowing interpretations withstands scrutiny.

**1. COPA Is Not Limited To “Commercial Pornography,” And The “Commercial Purposes” Provision Does Not Significantly Limit COPA’s Reach.**

Defendant claims that COPA covers only “commercial pornographers,” even though that term does not appear in the statute. Def. Br. at 32. This Court has already rejected that argument. *ACLU II*, 322 F.3d at 256. The district court similarly rejected that argument during the

preliminary injunction proceedings on the ground that, “There is nothing in the text of COPA . . . that limits its applicability to so-called commercial pornographers only.” *ACLU I*, 31 F. Supp. 2d at 480. Defendant merely repeats its prior arguments that the plain language of COPA should be ignored. The district court was correct to reject this argument again. *ACLU III*, 478 F. Supp. 2d at 808.

Defendant also argues that the “commercial purposes” language of COPA limits the reach of the statute to those who seek to profit by “regularly” posting harmful to minors material on the Web. Def. Br. at 31-32. This argument similarly ignores the plain language of the statute. COPA applies to *any* speaker who knowingly makes any communication for “commercial purposes . . . that includes *any* material that is harmful to minors.” 47 U.S.C. § 231(e)(2)(B) (emphasis added). In addition, COPA specifically allows prosecutors to seek criminal sanctions against speakers who offer any material that is harmful to minors, even if it is not the “sole or principal” part of their business. 47 U.S.C. § 231(e)(2)(B). In any event, if Defendant believes “regularly” means frequently, Plaintiffs and many other Web sites “regularly” provide harmful to minors communications, because they frequently make such communications on the Web. 10/23/06, at 124, 200 (Walsh); 10/30/06, at 187 (Tepper); 11/2/06, at 83-84 (Corinna).

**2. COPA Is Not Limited To Content That Is Harmful To “Older” Minors.**

Defendant also attempts to narrow the reach of COPA by revising it to apply only to material that is harmful to “older” minors, even though – once again – that term does not appear in the statute. Def. Br. at 34. The district court rejected this attempted rewriting of the statute, consistent with this Court’s prior ruling. *ACLU III*, 478 F. Supp. 2d at 817-18 (citing this Court’s decision, 322 F.3d at 253 (such an interpretation would be “in complete disregard” of the express terms of COPA)).

In addition to the reasons detailed in the district court’s and this Court’s decisions, Defendant’s proposed narrowing construction makes no sense because it would leave younger minors – i.e. all minors from birth to age 15 – unprotected from material that is harmful to them, but not to a 16 year-old, thus undercutting the government’s asserted interest in protecting all minors.<sup>8</sup> Moreover, if COPA were so limited, it would literally reach no speech not already covered by federal obscenity statutes. Defendant has admitted that there is no speech that is “harmful” to a 16-year old, but not to a 17 year-old. PX 166; PX 167. Defendant has thus admitted that he can

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<sup>8</sup> It is for this reason that, although Defendant cites to decisions in which a few courts have applied narrowing constructions to similar language, to do so here would be to violate, rather than vindicate, congressional intent. Moreover, as this Court previously noted, the cases cited by Defendant are inapposite. *ACLU II*, 322 F.3d at 254 n. 16.

identify no speech that is “harmful to minors” (i.e., to 16 year-olds) that is not also obscene (i.e., harmful to 17 year-olds), and already covered by obscenity statutes.

**3. COPA Is Not Limited Solely To Web Sites Whose Entire Content Is Harmful to Minors.**

This Court has also already rejected Defendant’s argument that COPA is narrow in scope because its “as a whole” language necessitates an evaluation of material in the context of an entire Web site, not just the specific Web page containing the harmful to minors material. *ACLU II*, 322 F.3d at 252.

Defendant’s interpretation ignores how individual users experience the Web. The building blocks of the Web are specific Web pages, not entire Web sites. Joint Ex. 1, at ¶¶79-84; 10/25/06, at 33-36 (Felten); 11/8/06, at 164 (Stark); 11/7/06, at 206-207 (Mewett). Indeed, because of the widespread use of search engines, most Web users look only at the specific page on a Web site that they have been directed to, not the rest of the Web site. 10/25/06, at 32 (Felten).

Defendant’s brief and its own witnesses undermine its argument. In attempting to minimize the burden of COPA’s affirmative defenses, Defendant asserts that the statute requires age verification screens to be placed only on the specific Web pages that contain harmful to minors

material, not before the entire Web site. Def. Br. at 41. Likewise, in their attempt to quantify the amount of sexually explicit material on the Web, Defendant's experts focused on Web pages, not sites. 11/7/06, at 206-207 (Mewett).

**B. COPA Is Underinclusive Because It Does Not Protect Minors From A Vast Quantity of Harmful To Minors Speech.**

Under strict scrutiny, a law "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. 557, 564 (1980). Defendant bears the burden of showing that the statute will in fact alleviate the alleged harms "in a direct and material way." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 624 (1994).

Because Defendant did not come close to meeting this burden, the district court correctly held COPA to be unconstitutional because of its underinclusivity. *ACLU III*, 478 F. Supp. 2d at 810.

**1. COPA Does Not Apply To The Significant Amount Of Material That Originates Overseas.**

A significant amount – at least 50 percent – of sexually explicit content is provided by foreign Web sites. 10/26/06, at 111-112 (Zook); PX 54, at 0101. That percentage is growing. 10/26/06, at 107-109, 112 (Zook); PX 29, at 0013-19. COPA is substantially underinclusive because it leaves

this enormous quantity of speech that is available to children in the United States completely unregulated. *ACLU III*, 478 F. Supp. 2d at 810.

Confronted with this evidence, Defendant for the first time argues that COPA covers all speech on the Web, including communications made by individuals outside the United States, even if those speakers have never entered the United States and their speech is permissible in their own countries. Def. Br. at 53. The district court properly rejected this untenable argument. *ACLU III*, 478 F. Supp. 2d at 810-11.

The Supreme Court has already stated that COPA's prohibitions do not extend to overseas speech. *ACLU II*, 542 U.S. at 667 ("COPA does not prevent minors from having access to [] foreign harmful materials"). Indeed, Defendant himself previously agreed that COPA does not apply overseas. PX 55, at 0002 (stating that if COPA were to take effect, "children would still be able to obtain ready access to pornography from a myriad of overseas Web sites").

This conclusion is mandated by the caselaw. The Supreme Court has established a presumption that "Congress ordinarily intends its statutes to have domestic, not extraterritorial, application." *Small v. United States*, 544 U.S. 385, 388-89 (2005). A statute is presumed to have only domestic effect, thus, in the absence of express language to the contrary. *Foley Bros.*,

*Inc. v. Filardo*, 336 U.S. 281, 285 (1949); *see also Microsoft Corp. v. AT&T Corp.*, 127 S.Ct. 1746, 1758 (2007) (characterizing this principle as “[t]he presumption that United States law . . . does not rule the world”).

No language in COPA gives any indication of a congressional intent to extend its coverage beyond the United States. As the district court recognized, it is well settled that the phrase “in interstate or foreign commerce” is insufficient to overcome the presumption against extraterritorial application. *ACLU III*, 478 F. Supp. 2d at 810-11 (“such language is legally insufficient”) (quoting *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 250-51 (1991) (“the Supreme Court has ‘repeatedly held that even statutes that contain broad language in their definitions of ‘commerce’ that expressly refer to ‘foreign commerce’ do not apply abroad”))).

The district court correctly noted that “the legislative history of COPA . . . shows that Congress intended for the statute to have only domestic application.” *ACLU III*, 478 F. Supp. 2d at 811. Indeed, the House Report clearly identifies COPA as a domestic legislative solution, targeting harmful material originating in the United States. H.R. Rep. No. 105-775, at \*20.

The cases cited by Defendant, *United States v. Harvey*, 2 F.3d 1318 (3d Cir. 1993), and *United States v. Thomas*, 893 F.2d 1066 (9th Cir. 1990),

do not support the government's position. In those cases, the courts merely held that due to the nature of the crime prohibited by the statute – child pornography – Congress intended to cover all such acts by United States citizens, even acts occurring overseas. *Harvey*, 2 F.3d at 1327; *Thomas*, 893 F.2d at 1068. As just discussed, that was not Congress' intent here, and there is, thus, no basis for overcoming the presumption against extraterritorial application that applies to COPA.<sup>9</sup>

Even if the statute covered overseas Web sites, the district court correctly concluded that enforcement issues would preclude COPA from being enforced against those sites. *ACLU III*, 478 F. Supp. 2d at 811. Defendant contends that enforcement could be achieved “indirectly through contractual requirements with credit card companies.” Def. Br. at 54.<sup>10</sup> The Record supports the opposite conclusion. In fact, although Defendant's

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<sup>9</sup> Those cases also focused solely on the conduct of U.S. citizens overseas, not on whether a United States statute could be applied to the overseas conduct of foreign citizens. The implications for extraterritorial application of COPA that Defendant endorses are far broader, reaching actions of foreign citizens on foreign soil, and thereby implicating thorny issues of international law. *See Microsoft*, 127 S.Ct. at 1758 (“Foreign conduct is [generally] the domain of foreign law.”) (citations omitted).

<sup>10</sup> Defendant also contends that COPA could be enforced against the domestic “hosts” for some of the overseas sites. Def. Br. at 54. Internet “hosts” are expressly exempted from COPA's coverage. 47 U.S.C. 231(b)(4).

expert speculated that the credit card companies theoretically could enforce COPA overseas, he testified that no credit card company ever represented to him that it would enforce COPA, and he ultimately agreed that it was unlikely that they would do so. 11/14/06, at 224-225, 228-29 (Clark). That skepticism was shared by Plaintiffs' expert and the district court. 11/6/06, at 154-157 (Mann); *ACLU III*, 478 F. Supp. 2d at 785. Moreover, credit card companies cannot enforce compliance with COPA by Web sites that do not have credit card agreements with them, even in the remote chance they wanted to do so. 11/6/06, at 156-158 (Mann); 11/14/06, at 229 (Clark); PX 34, at 0010. That is important because many Web sites with potentially harmful to minors content have no relationship with credit card companies. 10/30/06, at 235 (Tepper); 10/31/06, at 111 -112 (Lewis); 11/1/06, at 62-63 (DeGenevieve).

**2. COPA Does Not Apply To The Significant Amount Of Harmful To Minors Speech Made On The Non-Web Parts Of The Internet.**

COPA is dramatically underinclusive for a second reason: it does not apply to many of the high-traffic means of Internet communication through which sexually-explicit material is readily available, such as email, chat, instant messaging, peer-to-peer file sharing, streaming audio and video, Voice over IP, and television over the Internet. *See supra* at 9-10. An

extremely large quantity of speech occurs on these non-Web parts of the Internet, 10/24/06, at 209, 218-219, 228-229 (Felten); PX 27, at 0024; PX 54, at 0098, including a significant amount of sexually explicit material. 10/25/06, at 100-101, 103-104, 210-215 (Russo); 11/1/06, at 236-237 (Murphy); PX 27, at 0026-28.

Although the district court did not need to address the ramifications of COPA's failure to regulate these other forms of Internet speech, *ACLU III*, 478 F. Supp. 2d at 811, COPA's failure to do so renders the statute wholly ineffective at accomplishing Congress's stated goal of protecting children on the Internet.<sup>11</sup> That is especially true given the ease with which information currently communicated on the Web via HTTP could be communicated using other protocols that COPA does not cover. *See supra* at 10,

### **3. COPA Does Not Apply To Non-Commercial Speech.**

COPA is also underinclusive because it does not apply to Web sites that are "non-commercial" under the statute. It is undisputed that sexually explicit speech occurs on such sites. PX 54, at 0387.

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<sup>11</sup> Defendant attempts to avoid the underinclusivity problem by asserting that incremental restrictions are permissible. Def. Br. at 30 n.7. The Supreme Court has expressly rejected incremental regulation as a permissible reason for underinclusive content-based speech regulations. *See Erznoznik*, 422 U.S. at 215.

**C. The Affirmative Defenses Do Not Cure COPA's Constitutional Defects.**

The district court held that COPA's affirmative defenses "do not aid in narrowly tailoring COPA to Congress' compelling interest," and that they "raise unique First Amendment issues" of their own. *ACLU III*, 478 F. Supp. 2d at 813. The district court's holding is amply supported by both law and fact.

**1. The Use Of Payment Cards Or Data Verification Services Will Not Prevent Minors From Accessing Harmful To Minors Material.**

After careful consideration of all the evidence, the district court held that requiring use of a payment card to verify age would not work because they "do not in fact verify age." 478 F. Supp. 2d at 811. That conclusion was consistent with the evidence. *See supra* at 15-16 (detailing evidence in Record).

Unable to counter this overwhelming evidence that payment cards are not a proxy for age, Defendant merely alleges that minors "simply have access to cards supervised by adults." Def. Br. at 37. The district court held, however, that even if parental supervision of payment card use exists, it does not serve to prevent access to harmful material by minors because parents "may not be able to identify transactions on sexually explicit Web sites because the adult nature of such transactions is often not readily

identifiable.” 478 F. Supp. 2d at 802. In addition, even those parents reviewing such statements cannot prevent unauthorized access that occurs prior to the statements’ issuance. *Id.*

At trial, Defendant also argued that the use of data verification services (“DVS”) could be a defense. The district court carefully reviewed the evidence regarding the availability and feasibility of DVS products and held that DVS companies “are not effective age verification services.” *Id.* at 812. Defendant criticizes this finding by accusing the district court of “ignoring” testimony by one DVS company claiming that they “successfully verify the age of online consumers well over 90 percent of the time.” Def. Br. at 38. The district court found this testimony unpersuasive in light of the overwhelming evidence to the contrary. For example, Defendant does not contest the district court’s finding that: (1) DVS products do not “actually verify age but merely verify data, sometimes with as little as a name and address,” 478 F. Supp. 2d at 812; (2) such basic information is readily accessible to all minors, making the process easily susceptible to circumvention, *id.* at 802; and (3) there is no way for either the DVS company or the Web site to know if the individual inputting the information for verification is the individual to whom the information pertains. *Id.* at 802-03. Accordingly, the district court’s finding that “DVS products are not

effective age verification services” is wholly in line with the evidence.

10/25/06, at 97-98, 182-183 (Russo); 10/31/06, at 127-128, 138-139, 143-145 (Meiser); 11/9/06, at 244-246, 260-261 (Dancu); PX 25, at 0030-33; PX 54, at 0092-93; PX 79, at 4-5.

## **2. The Affirmative Defenses Unconstitutionally Chill Protected Speech.**

COPA’s affirmative defenses have the additional problem of placing unconstitutional burdens on those who wish to engage in protected speech. Although Defendant complains that the district court “overstated” and “greatly exaggerate[d]” the burdens inherent in the affirmative defenses, Def. Br. at 22-23, the court’s holdings are amply supported by law and fact. *See supra* at 18-20 (discussing the evidence).

The Supreme Court has held that a statute is “presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.” *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 115 (1991). In addition, a statute that has the effect of inhibiting speech violates the First Amendment. *See, e.g., Fabulous Assoc., Inc. v. Pennsylvania Public Utility Comm’n*, 896 F.2d 780, 785-789 (3d Cir. 1990) (holding that the “First Amendment is not available ‘merely to those who can pay their own way’”). COPA is guilty both of impermissibly imposing a financial

burden on speech and deterring speech. *ACLU III*, 478 F. Supp. 2d at 813 (“[T]he affirmative defenses place substantial economic burdens on the exercise of protected speech because all of them involve significant cost and the loss of Web site visitors, especially to those Plaintiffs who provide their content for free.”).

In addition to the concrete financial costs utilizing the affirmative defenses would impose, *see supra* at 18-19, the district court specifically found that requiring a Web user to provide credit card or other personal information just to browse a Web page “will deter most users from ever accessing those pages.” 478 F. Supp. 2d at 805. The evidence at trial specifically showed that both privacy concerns and security concerns will prevent many users from providing personal information to access a Web page. *Id.* at 805-807; *see* 11/15/06, at 116-29 (S. Smith); 10/23/06, at 171-72 (Walsh); 10/30/06, at 177-78, 238-39 (Tepper). That is especially the case when people wish to access sexually explicit material. *Id.* at 805-806.<sup>12</sup>

COPA’s criminal penalties would have a strong chilling effect even on those speakers who may have the ability and resources to implement a

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<sup>12</sup> Defendant’s only response to the overwhelming evidence cited by the district court is to accuse the district court of ignoring the testimony of one of its witnesses, Dr. Smith. Def. Br. at 46-47. Quite apart from ignoring Dr. Smith, the Court found his testimony on this subject completely “unreliable,” because it was contradicted by “many other studies,” including two of his own, and wholly without factual support. 478 F. Supp. 2d at 807.

defense despite the corresponding cost and drop in Web traffic. Section 231(c) is an affirmative defense only, and “in no way shields a content provider from prosecution.” *Shea v. Reno*, 930 F. Supp. 916, 944 (S.D.N.Y. 1996), *aff’d*, 521 U.S. 1113 (1997). Faced with the risk of imprisonment, speakers are likely to “steer far wide[] of the unlawful zone.” *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Indeed, history has illustrated that “[w]here a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial.” *ACLU II*, 542 U.S. at 670-671.

Defendant relies upon *Pitt News v. Fisher*, 215 F.3d 354 (3d Cir. 2000) for the true, but irrelevant, proposition that the First Amendment does not guarantee a right to a certain level of profitability. Def. Br. at 42. The issue here is not profitability, but that COPA imposes a burden on communicating a particular kind of protected speech. Economic burdens on the exercise of protected speech because of “the content of their speech” violate the First Amendment. *See, e.g., Simon & Schuster*, 502 U.S. at 115; *Erznoznik*, 422 U.S. at 217 (invalidating statute requiring drive-in theater owners to restrict their movie offerings or construct expensive protective fencing to avoid prosecution). Indeed, a later decision in the *Pitt News* case – ignored by Defendant – makes clear that such economic burdens are

unconstitutional. *Pitt News v. Pappert*, 379 F.3d 96, 109 (3d Cir. 2004) (statute unconstitutional because, in part, “it unjustifiably imposes a financial burden”).

Despite the government’s assertions, Def. Br. at 22, 28, COPA’s burden on speech is far greater than that imposed by “blinder rack” statutes. *Reno*, 521 U.S. at 877. As this Court previously held, a blinder rack statute “does not create the same deterrent effect on adults as would COPA’s credit card or adult verification screens.” *ACLU II*, 322 F.3d at 259. First, unlike COPA, blinder racks do not require adults to pay for speech that would otherwise be accessible for free. Second, blinder racks do not require adults to relinquish their anonymity in order to access protected speech.<sup>13</sup> Third, blinder racks do not create a potentially permanent electronic record that an individual has accessed restricted and stigmatized materials. Fourth, the number of speakers and the sheer quantity of speech threatened by COPA far exceeds that affected by any single state law. For these reasons and others, federal courts around the country have now invalidated nine state Internet laws modeled on COPA principally because they unconstitutionally

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<sup>13</sup> See, e.g., *M.S. News Co. v. Casado*, 721 F.2d 1281, 1288-89 (10th Cir. 1983) (requiring that harmful to minors materials be kept behind blinder racks that cover the lower two-thirds of the material, but that allow adults to browse the materials freely).

deter adults from accessing protected speech.<sup>14</sup>

**D. Defendant Failed To Prove That There Are No Less Restrictive Alternatives To COPA.**

“A statute that ‘effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.’”

*ACLU II*, 542 U.S. at 665 (quoting *Reno*, 521 U.S. at 874). The Supreme Court made clear that “the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.” *Id.* Defendant’s burden is “not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective.” *Id.* at 669 (citing *Reno*, 521 U.S. at 874). Defendant has failed to meet this burden.

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<sup>14</sup> See *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999), *aff’d*, 238 F.3d 420 (6<sup>th</sup> Cir. 2000); *ACLU v. Johnson*, 4 F. Supp. 2d 1029 (D.N.M. 1998), *aff’d*, 194 F. 3d 1149 (10<sup>th</sup> Cir. 1999); *American Libraries Ass’n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4<sup>th</sup> Cir. 2004); *American Booksellers Found. for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002); *The King’s English v. Shurtleff*, No. 2:05CV00485 DB (Utah Dist. Aug. 25, 2006) (order granting preliminary injunction); *ACLU v. Goddard*, No. Civ. 00-505 TUC ACM (D. Ariz. June 14, 2002) (order granting permanent injunction); *Southeast Booksellers Ass’n v. McMaster*, 282 F. Supp. 2d 389 (D.S.C. 2003); *American Booksellers Foundation for Free Expression v. Strickland*, 2007 WL 2783678 (S.D. Ohio 2007).

**1. Filtering Software Is A Less Restrictive And More Effective Alternative Than COPA.**

Based on the preliminary injunction record in this case, the Supreme Court held that “[b]locking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children’s access to materials harmful to them.” *ACLU II*, 542 U.S. at 666-67. This Court reached a similar conclusion. *ACLU II*, 322 F.3d at 265. The evidence presented at trial on remand only strengthens these findings. *ACLU III*, 478 F. Supp. 2d at 789-97. Based on the detailed evidence in the Record, the district court came to the only conclusion the evidence permits: filtering software is as effective, and, in fact, more effective, than COPA in protecting children from harmful to minors material. *Id.* at 814-15.

Defendant largely ignores all of this evidence. Instead, Defendant contends that the district court applied a “flawed analytical framework” in assessing whether filters are a less restrictive alternative and that filters cannot be considered a less restrictive alternative because they are part of the “status quo.” Def. Br. at 43-44. That exact argument was expressly rejected by the Supreme Court in this very case. *ACLU II*, 542 U.S. at 666.

Specifically, the Court held that:

The purpose of the [less restrictive alternatives] test is to ensure that

the speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

*Id.* The Supreme Court previously held to the same effect in *Playboy Entertainment Group*, 529 U.S. at 824.

Thus, contrary to Defendant's assertion, the Supreme Court did not instruct the district court to compare "the status quo of private filter use, plus any actions the government could take to increase filter use" with "the status quo of private filter use, plus the protections of COPA." Def. Br. at 44. The Court made clear that the government has the burden of demonstrating that none of the proposed alternatives, such as filtering, are as effective as COPA *itself*, not COPA *plus* all other already existing alternatives. *ACLU II*, 542 U.S. at 669. In fact, the Court specifically instructed the parties to update the factual record regarding, *inter alia*, the "effectiveness of filtering software" so that the district court could determine whether "filters are less effective than COPA." *ACLU II*, 542 U.S. at 670-72. Given this unambiguous language from the Supreme Court, it is clear that the district court utilized the proper analysis in reaching its conclusion that the government failed to demonstrate that there are no less restrictive

alternatives to COPA.

The undisputed evidence presented at trial establishes that filters are more effective than COPA. Filters can be used to block speech that originates from overseas or from the United States, speech that is distributed on non-commercial or commercial sites, and speech that is available on the Web or on the popular non-Web-based parts of the Internet such as email, instant messaging, chat, newsgroups, peer-to-peer file sharing, and streaming video. 10/24/06, at 6-7 (Cranor); 10/31/06, at 200-213, 216, 220-221 (Whittle); 11/2/06, at 240-243 (Allan); 11/1/06, at 210-213, 217-221 (Murphy); PX 6; PX 11; PX 54; PX 86. Given the vast quantity of speech that COPA does not cover, but that filters do cover, these facts alone are sufficient to render filters more effective than COPA. *ACLU II*, 542 U.S. at 667-668 (“COPA does not prevent minors from having access to those foreign harmful materials. That alone makes it possible that filtering software might be more effective in serving Congress’ goal . . . Finally, filters also may be more effective because they can be applied to all forms of Internet communication, including e-mail, not just communications available via the World Wide Web.”).

Filters also provide a far more flexible solution than COPA, as parents can tailor these tools to their own values and needs, and to the age and

maturity of their children – another significant advantage over COPA, which imposes some undefined and undetermined “community standard” on all adults, regardless of what their own personal values are and how mature their children are. 10/24/06, at 26-27, 37, 73-74 (Cranor); PX 86, at 0008-0009; 11/2/06, at 205-207 (Allan); 10/31/06, at 200, 203-212 (Whittle); 11/1/06, at 210-213, 219-221 (Murphy).

Unlike COPA, filtering products also provide parents with a number of valuable tools that enable parents to do more than simply block access to sexually explicit Web pages. Many filters include monitoring and reporting features that provide parents with the ability to monitor and supervise their children’s online activity, including from remote locations when they are not physically present with a child. 10/23/06, at 234, 249-251 (Cranor); 10/24/06, at 28-29 (Cranor); PX 86, at 0010-0013, 32; 10/31/06, at 210-212 (Whittle); 11/1/06, at 218-220 (Murphy). Filtering programs also offer parents the ability to restrict the times of day or days of the week that a child can use the Internet, making it possible for parents to make sure that their children only access the Internet when an adult is home to supervise. 10/24/06, at 5-6 (Cranor); 10/31/06, at 210-212 (Whittle); 11/1/06, at 218-220 (Murphy); PX 86, at 0010. Finally, many of the products can be set up to prevent children from inadvertently or intentionally sending out personal

information, such as a home address or telephone number, and to block children from receiving any downloads, attachments, or file transfers. 10/24/06, at 7-8 (Cranor); 11/2/06, at 236-240 (Allan); 11/6/06, at 5-8 (Allan); 10/31/06, at 201-209, 212-213, 219-221 (Whittle); 11/1/06, at 217-221, 235-239 (Murphy); PX 54, at 0300, 0304, 0319. These additional features provide valuable tools for parents and further demonstrate that filters, not COPA, will provide parents with a broader range of effective tools. 10/24/06, at 73-74 (Cranor); PX 6, at 34.<sup>15</sup>

Although filters are not perfect in that they are prone to some underblocking and overblocking, the evidence demonstrates that filters block the vast majority of the material on the Web that is sexually explicit. 10/24/06, at 49-50, 55 (Cranor); 11/6/06, at 14-18 (Allan); 10/31/06, at 216 (Whittle); PX 3, at 0001-0005, 0044; PX 6, at 19-22; PX 11, at 0005-0006, Appendix III; PX 85, at 0004. Filters work especially well at blocking the most popular Web sites and the Web sites that are most likely to be accessed by a minor. 10/23/06, 236-237 (Cranor); 11/1/06, at 194-196, 221-222

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<sup>15</sup> Defendant claims that the district court "ignored" evidence that filters are not able to block sexually explicit material accessed on mobile devices. Def. Br. at 51 n.13. That assertion is false. The evidence establishes that filters can work on mobile devices, that several companies currently have filters for use on mobile devices, and that the largest U.S. mobile carriers were actively soliciting bids for filters. 10/25/06, at 19-20, 24-25 (Felten); 11/2/06, at 33, 37, 56-57, 60-61 (Sena); PX 13, at 22-23; PX 70; 11/1/06, at 204-205, 233-234 (Murphy); 11/6/06, at 9-10, 223 (Allan). The district court made specific factual findings based on this evidence. *ACLU III*, 478 F. Supp. 2d at 792.

(Murphy); PX 2. Indeed, the undisputed evidence presented by Plaintiffs regarding real-world use and experiences with filtering products confirms that filters are an effective tool to restrict access to inappropriate content. 10/24/06, at 83, 129-130 (Cranor); 11/1/06, at 222-223 (Murphy); PX 85, at 0004; Joint Ex. 1, ¶¶ 114-16, 124; 11/1/06, at 91-93 (Kirk); 11/1/06, at 175-177 (Taylor); 11/2/06, at 23 (Smathers).

Defendant's conclusory claim that all of this evidence is based on "unsupported opinions" is without support. Def. Br. at 52. Numerous studies confirm the effectiveness of filters. 10/24/06, at 55-58 (Cranor); PX 2; PX 3, at 1, 44, 45; 11/6/06, at 17-18 (Allan). Defendant's own filtering study confirms that there are many filtering products that are "quite effective and accurate at blocking sexually explicit material, especially the most popular Web content, and that many of the products have less than a 10 percent underblocking rate regarding such content." *ACLU III*, 478 F. Supp. 2d at 797; *see also* 10/24/06, at 78, 81 (Cranor). Indeed, according to Defendant's study, the AOL filter blocked 98.7 percent of the sexually explicit Web pages that were returned in response to the most popular search terms. *Id.* at 796.

The effectiveness of filters has been further confirmed by the findings of the two separate Congressionally-commissioned reports. The COPA

Commission concluded that many filters can be “highly effective” and that “voluntary approaches provide powerful technologies for families,” especially when they are coupled with information to make these technologies and tools understandable for parents. PX 6, at 19, 21, 39; 10/24/06, at 71-74 (Cranor). Because the COPA Commission “unambiguously found that filters are more effective than age-verification requirements,” the Supreme Court concluded that “not only has the Government failed to carry its burden of showing the District Court that the proposed alternative is less effective, but also a Government Commission appointed to consider the question has concluded just the opposite.” *ACLU II*, 542 U.S. at 668. The NRC report similarly concluded that “filters can be highly effective in reducing the exposure of minors to inappropriate content if the inability to access large amounts of appropriate material is acceptable.” PX 54, at 0040, 0331; 10/24/06, at 75-76 (Cranor).

It is not surprising that filters are even more effective today than they have ever been before. As the district court noted, *ACLU III*, 478 F. Supp. 2d at 794, as with all software products, the filtering companies have addressed problems with earlier versions of the products and introduced new and improved versions, with more options and features. 10/24/06, at 81-82 (Cranor); 11/1/06, at 194-196, 221-222 (Murphy). Perhaps most

importantly, whereas many filters once only relied on blacklists or whitelists to block content, many of today's products utilize blacklists, whitelists, and real-time, dynamic filtering in combination with each other, providing a multi-layered filtering approach to ensure that even more content can be blocked. 10/23/06, at 245-247 (Cranor); 10/24/06, at 81-82 (Cranor); 10/31/06, at 201 (Whittle); 11/1/06, at 221-222 (Murphy). In addition, the increased sophistication of search engines has greatly increased the ability of filtering companies to locate and block material that is most likely to be encountered by children. 10/25/06, at 32 (Felten); 11/1/06, at 194-196, 221-222 (Murphy); PX 2.

Defendant argues that filters are not an effective alternative because some parents do not use filters. That some parents choose not to use filters does not mean that filters are not an effective alternative. *Playboy Entertainment Group*, 529 U.S. at 824 (that parents may not utilize an existing technological mechanism to prevent children from viewing certain material does not mean that the technological mechanism is not an effective alternative); *see also ACLU II*, 542 U.S. at 670 ("COPA presumes that parents lack the ability, not the will, to monitor what their children see.").

In support of this argument, Defendant cites to a study stating that 54 percent of parents were using filters. Defendant leaves out the additional

fact that this figure represents a 65 percent increase from a prior study done four years earlier, indicating that significantly more families are using filtering products now. 10/24/06, at 88, 90 (Cranor). Other studies have revealed that the number one reason why parents do not use filters is that they think they are unnecessary because they trust their children and do not see a need to block any content. 10/24/06, at 90-91, 133-134 (Cranor); 10/31/06, at 219 (Whittle); PX 85, at 0049 (60 percent did not use filters because they trust their children, 53 percent did not use filters because they checked up on their children's activities in other ways, and 40 percent did not use filters because the computer was in a public place in the home).<sup>16</sup>

That filters may overblock similarly does not mean that filters are not an effective alternative. One of the principal benefits of filters is that they provide parents with flexibility to make them more or less restrictive, depending on the parent's values and needs. If a parent wants to restrict as much harmful speech as possible, he or she can adjust the filters

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<sup>16</sup> Defendant repeatedly cites this same AOL study for the proposition that "parents elected not to use filters (or discontinued them) primarily because they believed filters were too restrictive." Def. Br. at 48, 50. As the statistics cited above indicate, parents elected not to use filters primarily because they trust their children, not because the filters were too restrictive. The statistic cited by Defendant actually comes from a small subset (22 percent) of this subset of parents not using AOL's filters, namely, those who had previously used the products, but were no longer doing so, and who listed multiple reasons for their decision. PX 85, at 0004. Although 72 percent of this small subset said they stopped using them because they were concerned about overblocking, 53 percent said they did so because their children had gotten older, and 27 percent said it was because their computer was in a public place. PX 85, at 0051.

accordingly. A parent who wants to minimize the amount of overblocking can similarly adjust the filter in the other direction. In any event, as the district court correctly concluded, that filters may overblock is not nearly as important as filters' underblocking rates, which address how effective filters would be in preventing children from accessing harmful to minors speech on the Internet. *ACLU III*, 478 F. Supp. 2d at 794.

Defendant claims that overblocking by filters makes them more restrictive than COPA. Def. Br. at 49. That argument is frivolous and should summarily be rejected. The Supreme Court has expressly concluded that “[f]ilters are less restrictive than COPA,” explaining that a broad criminal statute like COPA is far more restrictive and chilling than filters which permit adults to decide if they want to use them and, if so, how stringent they want them to be. *ACLU II*, 542 U.S. at 667. The evidence at trial confirms that, unlike COPA, filters do not subject speakers to significant prison sentences or civil fines, and filters are customizable and can be adjusted (or turned off) to meet the desires and values of every adult. *ACLU III*, 478 F. Supp. 2d at 813.

**2. Narrower Statutes Provide Less Restrictive Alternatives to COPA.**

Congress could adopt a variety of narrower restrictions on speech that would effectively advance the government's interests without imposing all

of the severe and broad criminal penalties and burdens of COPA. First, Congress could enact a statute restricting “only pictures, images, or graphic image files, which are typically employed by adult entertainment Web sites as ‘teasers.’” *ACLU I*, 31 F. Supp. 2d at 497.

Second, Congress could enact a statute similar to COPA that imposes only civil penalties, rather than COPA’s draconian use of criminal penalties for the distribution of protected speech. *Id.* at 497.

Third, Congress could enact a statute requiring the Department of Justice or another agency to compile a list of Web sites that it determines contain harmful to minors material. Such a statute would provide filtering companies with the ability accurately to block all speech that the government believes is harmful to minors. The filtering companies have indicated their receptiveness to such a list. 11/2/06, at 235-236 (Allan); 11/1/06, at 234-235 (Murphy).

Finally, Congress could enact a statute requiring a federal agency to make a list of available filtering products, to conduct testing of them, and to publish and publicize the results. Such a statute would provide parents with the information and resources necessary to make informed and educated decisions about which filtering products, if any, are best for them to use. The COPA Commission report specifically recommended this approach. PX

6, at 41.

The government failed to present any evidence demonstrating that these narrower statutes would be less effective than COPA.

**3. Enforcement Of Existing Laws Is A Less Restrictive, Equally Effective Alternative To COPA.**

Federal law prohibits obscene speech on the Web. *ACLU III*, 478 F. Supp. 2d at 799. If the government's interest is to protect minors, then presumably obscene speech, which is harmful to both adults and minors, would be the government's highest priority. Nevertheless, as the district court found, the government has largely refused to prosecute obscenity. *Id.* ("There have been fewer than 10 prosecutions for obscenity . . . since 2005."). Both the COPA Commission and NRC reports found that more vigorous prosecution of obscenity laws would help protect minors on the Internet. PX 6, at 39, 43; PX 54, at 0241.

Similarly, the government could be, but is not, vigorously enforcing the Misleading Domain Name statute, 18 U.S.C. § 2252B, which prohibits the use of misleading domain names by Web sites and prevents Web sites from disguising pornographic Web sites in a way likely to cause uninterested persons to visit them. Once again, the COPA Commission and NRC reports made such a recommendation. PX 6, at 46; PX 54, at 0136-0139.

Defendant presented no evidence that increased enforcement of these,

and other, existing laws would not be as effective as COPA.

**4. Encouraging And Funding Education Efforts Is Another Less Restrictive, Equally Effective Alternative To COPA.**

Educating children about how to use the Internet safely is another effective method of helping to ensure their protection and safety online. 10/24/06, at 93-94 (Cranor); 11/1/06, at 167, 169 (Taylor); 11/1/06, at 79-83, 85 (Kirk); 11/2/06, at 14-15 (Smathers); PX 6, at 18; PX 11, at 0022; PX 54, at 0253-0260, 0270-0273, 0284-0285, 0411-0413. Similarly, educating parents and teachers of minor children how to use the Internet safely and to be aware of children's Internet usage, is an effective method of ensuring the safety of minors online. 10/24/06, at 93-94 (Cranor); 11/1/06, at 167-168 (Taylor); 11/1/06, at 71 (Kirk); 11/2/06, at 5-6 (Smathers). The COPA Commission report specifically found that family education programs are an essential part of an overall solution to protecting children online, and that education programs can be highly effective in giving caregivers needed information about online risks and protection methods. PX 6, at 18.

Congress could encourage additional educational efforts through pilot programs, public relations efforts and funding. 10/24/06, at 99 (Cranor); PX 6, at 40-42; PX 54, at 0261, 0272, 0282-85, 0411-0413. Indeed, the COPA Commission recommended that the government, in combination with private

industry, should undertake a major education campaign to promote public awareness of the various parental control tools. 10/24/06, at 95-96 (Cranor); PX 6, at 18, 40.

Defendant did not introduce any evidence at trial establishing that increased educational efforts or funding would not address the government's interest as effectively as COPA.

**5. Numerous Additional Non-Technological Parental Control Tools Exist That Are A Less Restrictive And Equally Effective Alternative To COPA.**

There are a variety of available non-technological parental control tools that can be valuable and effective measures in helping parents control their children's Internet activities. 10/24/06, at 92 (Cranor); PX 6, at 33; PX 11, at 0020-24; PX 54, at 0246-0285. These tools include placing the computer in a family room where its use can be observed, establishing ground rules for use of the Internet, actively monitoring the child's time on the computer, supervising and tracking the Web sites to which the child goes, and following "best practices" models for use of the Internet by children. 10/24/06, at 92-93 (Cranor); PX 6, at 0036; PX 11, at 0022-23; PX 54, at 0255-0258. The uncontroverted evidence establishes that these non-technological parental control tools are very helpful tools for parents, especially when used in combination with technological tools like filters.

10/24/06, at 94-95, 99 (Cranor); PX 6, at 18; PX 54, at 0246-0285, 0287.

Indeed, a report from the Department of Commerce to Congress specifically found that the use of Internet safety policies, incorporating both technological and non-technological tools, can be effective at protecting children online, and that people who had implemented such safety policies had expressed a great deal of satisfaction with their effectiveness. 10/24/06, at 96-97 (Cranor); PX 11, at 5, 20-24.

Congress could encourage the use of these non-technological parental control tools through pilot programs, public relations efforts, and funding. 10/24/06, at 99 (Cranor); PX 6, at 40-42; PX 54, at 0261, 0272, 0282-0285.

Defendant again failed to introduce any evidence at trial establishing that the encouragement and increased use of these non-technological parental control tools would not effectively address the government's interest.

### **III. COPA IS UNCONSTITUTIONALLY VAGUE.**

In addition to its other deficiencies, COPA is unconstitutionally vague, as this Court has already ruled. *ACLU II*, 322 F.3d at 251, 268 n. 37. Indeed, Defendant previously admitted that COPA "contains numerous ambiguities concerning the scope of its coverage." PX 55, at 0004-0006

(discussing ten separate ambiguities that are “among the more confusing or troubling”).

COPA’s vagueness “is a matter of special concern for two reasons.” *Reno*, 521 U.S. at 871. First, COPA is a content-based regulation of speech, which “raises special First Amendment concerns because of its obvious chilling effect on free speech.” *Id.* at 871-72. Second, COPA is a criminal statute. In addition “to the opprobrium and stigma of a criminal conviction,” *id.* at 872, COPA threatens violators with criminal penalties including imprisonment up to six months, criminal and civil penalties up to \$150,000 a day, or both. 47 U.S.C. § 231(a)(1)-(3). Thus, “[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.” *Reno*, 521 U.S. at 872.

There can be little doubt about the vagueness of COPA. For the reasons discussed in the district court’s opinion and this Court’s prior decision, the statute’s language regarding “commercial purposes,” “as a whole,” and “intentional” and “knowing” is inherently vague. *ACLU III*, 478 F. Supp. 2d at 816-819. COPA’s definition of “harmful to minors” is also hopelessly uncertain. The vagueness of this phrase is perhaps best exemplified by the fact that Defendant has not been able clearly to define or consistently to determine what speech is covered by COPA. In fact,

Defendant's briefs in this litigation have been completely inconsistent and unclear on this point. *See* Def's Motion to Dismiss (E.D. Pa.), Dec. 29, 1998 at 30, n.16 (only one Plaintiff had speech that provided even a credible threat of prosecution); Def's Proposed Findings of Fact and Conclusions of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction (E.D. Pa.), Jan. 14, 1999, at 6, ¶28, at 31, ¶20 ("The materials identified by plaintiffs are not covered by COPA."); Petitioner's Brief (U.S. Supreme Court, No. 00-1293), July 2001, at 37 ("some" of Plaintiffs' Web pages (different from the single Web site identified in the Motion to Dismiss) would be "harmful to minors"); Reply Br. for Pet'r (U.S. Supreme Court, No. 00-1293), Oct. 2001, at 9 (three of Plaintiffs' exhibits "would likely not be excluded from [COPA's] coverage as a matter of law"); Reply Br. for Pet'r (U.S. Supreme Court, No. 03-218), Feb. 2004, at 5-6 (admitting that Defendant changed its mind); Defendant's Motion to Dismiss (E.D. Pa.), Aug. 25, 2006, at 6-44 (none of the Plaintiffs have standing because none engage in speech that could be considered harmful to minors); Def. Br. at 29 n. 5 (some unidentified number of Plaintiffs may engage in speech that is harmful to minors).

Beyond these inconsistent statements, there was further evidence at trial of Defendant's inability to define the scope of speech covered by

COPA. Defendant admitted that other than the express words of the statute, Defendant has no policies, guidelines, criteria, or rationales for interpreting what speech is harmful to minors, but not obscene. PX 166, 167. When Defendant tried to apply COPA to specific pages, his responses were so irrational as to constitute an admission that he cannot define COPA. For example, according to Defendant, a photograph of topless women exposing their breasts on Penthouse.com's Web page is harmful to minors.

According to Defendant, however, a photograph of topless women exposing their breasts on Playboy.com's Web page is not harmful to minors. To further confuse matters, according to Defendant, an even more innocuous photograph of a woman exposing her breasts on another site, where the nipples were covered by superimposed "stars," is harmful to minors. PX 166; PX 167; PX 165. If Defendant – the very person responsible for deciding whom to prosecute – cannot coherently or consistently state what speech is covered by COPA, it is clear that ordinary Web speakers will hardly have the clarity required for COPA to pass constitutional muster.

The vagueness of COPA was confirmed by the testimony of Plaintiffs and the other Web speakers who all testified that they did not know what speech they would have to censor to comply with COPA. 10/23/06, at 56-58 (Griscom); 10/23/06, at 135-137 (Walsh); 10/30/06, at 130 (Glickman);

10/30/06, at 195-197 (Tepper); 10/31/06, at 27 (Peckham); 10/31/06, at 95-96 (Lewis); 11/2/06, at 75-76 (Corinna).

#### **IV. COPA IS UNCONSTITUTIONALLY OVERBROAD.**

As discussed earlier, COPA cannot withstand strict scrutiny, in part, because of its overinclusiveness. *See supra* at 25-30. For the very same reasons, COPA is also unconstitutional under the related overbreadth doctrine.

“The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.” *Free Speech Coalition*, 535 U.S. at 237; *see also Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Because, as detailed earlier, COPA “effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another,” *Reno*, 521 U.S. at 874, the district court correctly held that COPA is unconstitutionally overbroad. *ACLU III*, 478 F. Supp. 2d at 819-820.

## CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

October 22, 2007

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Aden Fine", is written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation in F.R.A.P. 32(a)(7)(B). The brief contains 13,987 words, as determined by Microsoft Office Word 2003.

DATED: October 22, 2007

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Aden Fine

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify pursuant to LAR 46.1(e) that I am a member of the  
bar of this court.

DATED: October 22, 2007

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Aden Fine

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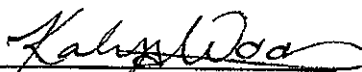
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CERTIFICATE OF VIRUS SCAN

I hereby certify that the foregoing brief has been scanned for viruses  
and that no virus has been detected.

DATED: October 22, 2007

  
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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2007, I filed and served the foregoing BRIEF FOR THE APPELLEE with the Court by hand delivery as well as electronic mail and served upon the following counsel by FedEx next day delivery and electronic mail:

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