No. 07-2539

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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 Rearick; 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.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

Brief of *Amici Curiae* American Society of Newspaper Editors; Association of American Publishers, Inc.; Center for Democracy & Technology; Comic Book Legal Defense Fund; Computer & Communications Industry Association; Freedom To Read Foundation; Information Technology Association of America; Internet Alliance; Media Access Project; National Association of Recording Merchandisers; National Cable Television Association; Net Coalition; Newspaper Association of America; Online Publishers Association; People for the American Way Foundation; PMA, The Independent Book Publishers Association; Society of Professional Journalists; and United States Internet Service Provider Association in Support of *Appellees*

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United States Internet Service Provider Association ("USISPA") is a non-profit trade association. USISPA is not a publicly-held corporation, does not have a parent corporation, and no publicly-held corporation owns 10 percent or more of its stock.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

This *amici curiae* brief is submitted on behalf of a broad spectrum of Internet and content industry associations, journalism and library associations, and public interest groups – described individually in the Appendix of this brief – that are deeply committed to ensuring that the Internet achieves its full promise as a revolutionary communications medium suitable for both children and adults.[1]

Collectively, *amici* represent:

- Corporate leaders in the Internet industry, including the leading hardware, software, service, and content providers in the United States;
- Publishers of commercial books in the United States, as well as the leading publishers, distributors and retailers of a wide range of other forms of content;
- Libraries and librarians across the United States whose patrons desire access to the widest possible range of informative materials both online and offline;
- Newspapers, newspaper editors and journalists, who are increasingly utilizing the Internet for research and distribution of their work; and
- Public interest organizations that work to promote a free and open Internet, which is essential to upholding First Amendment rights, including the right to freedom of expression and the right to receive or impart information regardless of the mode of communication.

Amici share a common interest in the robust evolution of the Internet and a common concern about the threat to that evolution posed by ill-considered,

[1] All parties have consented to the filing of this brief.

ineffective, and unconstitutional governmental regulation of the Internet. *Amici* and their members (hereinafter collectively "*amici*") are deeply concerned about Congress' attempt to censor what this Court has recognized to be a "dynamic, multifaceted category of communication" – the Internet – by transforming it into a "child-proof" medium whose "level of discourse" would be reduced to that "suitable for a sandbox." *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 74 (1983). *See also Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 252 (2002) ("speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it"). The First Amendment does not allow such sanitizing of public discourse, however well intentioned.

None of the *amici* are engaged in the business of "commercial pornography," yet content-providing *amici* nevertheless are concerned that the speech with sexual content that they produce, distribute, use as teaching aids, and otherwise provide access to via the World Wide Web stands at risk of challenge under the Child Online Protection Act (codified at 47 U.S.C. § 231 (Supp. V. 1999)) ("COPA"), while service-providing *amici* fear that their ability to provide online forums for and access services to lawful speech will be restricted by COPA. This fear is hardly unfounded, as COPA applies on its face to any Web site that, in the regular course of business, communicates *any* material that is harmful to minors – whether or not it constitutes commercial pornography. 47 U.S.C.

§§ 231(a)(1)-(3), § 231(e)(2)(B). *See ACLU v. Reno*, 31 F. Supp. 2d 473, 480 (E.D. Pa. 1999) (COPA "imposes liability on a speaker who knowingly makes any communication for commercial purposes 'that includes any material that is harmful to minors'"). Thus, the government's contention that COPA is limited to "commercial pornographers," Brief for Appellant ("DOJ Br.") at 21, finds no support in the statute and affords no protection to *amici*'s constituents. As this Court previously observed, "COPA's reach [is] beyond those enterprises that sell services or goods to consumers" and extends to "those persons who sell advertising space on their otherwise non-commercial web sites." *Ashcroft v. ACLU*, 322 F.3d 240, 256 (3d Cir. 2003).

A prosecutor could well rely on COPA in attempting to suppress mainstream Web sites, such as the following:

- An online bookstore's or book publisher's Web site that contains quotations from books in its catalogue, including from textbooks about human sexuality;
- An online library's Web site that allows users to "checkout" and read books about human sexuality;
- A recording retailer's Web site that includes clips of songs or videos containing sexually-oriented material;
- A medical Web site that carries and is supported by advertisements and that provides "safe sex" information;
- A Web site for fans of a musician or author that offers a message board or chat room where mature language has been used;

- An online dictionary that includes definitions of various sexual practices;
- Search engines that provide hyperlinks to Web sites that include information about safe sex practices, sexual education, and other sexual content; and
- A newspaper's Web site that provides hyperlinks to Web sites that include sexual health content to illustrate a story.

As these examples suggest, Congress' attempt in COPA to remedy the fundamental defects in the Communications Decency Act (Pub. L. No. 104-104, § 502) is unavailing. Despite attempts to circumscribe the scope of the restriction, COPA still impermissibly burdens constitutionally protected speech because it is not narrowly tailored to advance a compelling government interest, as strict scrutiny requires. COPA's attempt to protect minors would have the effect of depriving adults of speech that is constitutionally protected as to *them*.

As discussed below, and as correctly found by the District Court, COPA fails strict scrutiny because:

- There are less restrictive alternatives that are more effective than COPA at protecting minors from inappropriate content;
- COPA is ineffective as it does not, and probably could not effectively, apply to overseas content; and
- COPA is overbroad in that it applies to Web sites that include any commercial activity, such as advertising, which sites of many not-for-profit entities do.

ARGUMENT

I. USER-EMPOWERMENT TOOLS – INCLUDING BOTH TECHNOLOGICAL TOOLS AND PARENTAL OR OTHER CAREGIVER ACTIONS – OFFER A RANGE OF LESS RESTRICTIVE ALTERNATIVES TO COPA AND ARE MORE EFFECTIVE THAN GOVERNMENT RESTRICTIONS ON CONTENT.

Since COPA imposes content-based restrictions on communications that are constitutionally protected for those 18 years old and older, strict scrutiny applies. *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Reno v. ACLU*, 521 U.S. 844 (1997). Thus, to comport with the Constitution, COPA must constitute the least restrictive means of furthering the compelling governmental interest of protecting minors from exposure to sexually explicit content. *Ashcroft v. ACLU,* 322 F.3d 240, 252 (3d Cir. 2003). The District Court found as a factual and legal matter that filtering and other technological "user empowerment" tools are a less restrictive (and more effective) alternative to the direct government regulation and censorship of content on the Internet imposed by COPA. *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 813-14 (E.D. Pa. 2007) (Conclusions of Law 26 & 27). Such tools, as the District Court found, enable parents to protect their children as they see fit. Even during the period since the trial in the fall of 2006, parental empowerment tools have continued to improve and become more accessible, and they are rapidly becoming ubiquitous across a broad range of technologies.

These tools are far more specific and more successful than COPA at fulfilling the government's legitimate interest, which is to help protect children from inappropriate online content[2] while at the same time minimizing the impact on adults' ability to access protected speech. The experts agree that the best and most effective way to protect children from online pornography and other inappropriate sexual content is through education, coupled with the use of technological user empowerment tools. It is not a legitimate governmental interest to attempt to override parental decision-making and authority. The government must defer to and support these less restrictive alternatives rather than continuing to try to impose a one-size-fits-all and ultimately ineffective statutory solution on parents, and on lawful Internet content and service providers.

A. Effective User Empowerment Tools are Becoming Ubiquitous Across Technologies and are a Clearly Less Restrictive Means.

In the four years since this Court last considered this case, in the three years since the Supreme Court's most recent opinion in this case, and even in the one

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[2] *Amici* recognize that the COPA statute is primarily aimed at protecting children from unwanted content online, and does not directly address separate concerns about child predators. *Amici* note, however, that many of the user empowerment tools also help to protect children from predators, by preventing (for example) children from transmitting their home address or telephone number.

year since the District Court received evidence in this case, filtering software and other user empowerment tools have become more sophisticated and even more ubiquitous. Parents have gained access to a large menu of technological empowerment tools thanks to further developments in blocking, filtering, and monitoring software. In addition, as parents become increasingly familiar with the Internet, they have, increasingly, implemented household policies for their children's media usage. These alternatives are undeniably less restrictive and more effective than COPA in furthering the goal of protecting children from viewing unwanted content online. For that reason, the Court should uphold the District Court's finding that COPA is unconstitutional.

Further, since the Supreme Court's remand in 2004, technological user empowerment tools have become ubiquitous across technology platforms. For example, as mobile and wireless technologies enable more types of devices to connect to the Internet, industry has kept pace by meeting the demand for parental controls in such devices. As documented in a new and comprehensive survey of user empowerment tools, technological advances in controlling access to sexually explicit content have kept up with the development of new technologies and services, both on and off the Web (in stark contrast to legislative approaches that often lag behind the curve). *See* Adam Thierer, Parental Controls and Online Child Protection: A Survey of Tools and Methods, at 100 (Progress & Freedom

Foundation 2007) (hereafter "2007 Parental Controls").[3] Technological controls implemented by parents to keep their children from being exposed to inappropriate material online work more effectively than COPA, without restricting constitutionally protected speech, as COPA does.

As the trial court found, filtering software now can block up to 95 percent of sexually explicit Web content. *ACLU v. Gonzales*, 478 F. Supp. 2d at 795-96 (Findings of Fact 110-113). The software also has progressed to the point where it has become easier for parents to install and configure, thereby empowering even parents who are not "tech savvy" to protect their children from inappropriate content. In 2005, Consumer Reports gave nine of the 11 filtering software applications it tested an "ease-of-use rating" of either "Very Good" or "Excellent" after an extensive and independent study.[4] In short, the Internet and online publishing industries have responded to concerns about protecting children from inappropriate online content by improving their products.

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[3] Thierer's survey of user empowerment tools has been published online at http://www.pff.org/parentalcontrols/ (last visited Oct. 26, 2007). *See also* http://www.getnetwise.org (indexing vast array of user empowerment products available to protect kids online) (last visited Oct. 26, 2007).

[4] *See* ConsumerReports.org, "Filtering software: Better, but still fallible" (June 2005), available at http://www.consumerreports.org/cro/electronics-computers/resource-center/internet-filtering-software-605/overview/index.htm (last visited Oct. 26, 2007).

Blocking and filtering technologies permit parents to control their children's Internet usage at all levels. Internet service providers commonly include automatically updated parental control tools as part of their customer package, either free or for a small additional charge. 2007 Parental Controls at 64. Popular search engines Google and Yahoo! have a "SafeSearch" feature that permits users to filter out unwanted Web content. *Id.* at 69. Parental controls are available at the operating system level as well. For example, Apple's OS X Tiger operating system lets parents control some of their children's online activities, while Apple's Safari provides additional control at the Web browser level, allowing parents to establish a "whitelist" of sites their children may visit and blocking all other sites. *Id.* at 66. Microsoft's new Vista version of the Windows operating system also gives parents a robust suite of family safety tools. *Id.* at 65-66. Parents can adjust the software's settings as their children get older and more content becomes appropriate for them to view, or they can create different user accounts at the operating system level, again with customized settings, if they have children of different ages. *Id.* After installing blocks and filters, parents also can utilize monitoring software that forwards children's email, logs their chat sessions, and records what Web sites they visit, so that parents can take the extra step in making sure their children's Web activities are safe. *Id.* at 62.

Parental controls are also available for devices other than home computers. Parents now can buy wireless handsets designed for younger children, allowing parents to control the content their children can access on cell phones. *See* 2007 Parental Controls at 55-56. AT&T offers a content filter for the entire mobile Web that parents can set on their children's cell phones.[5] The wireless industry more broadly has worked proactively to help parents: the industry's trade association announced guidelines in 2005 for self-regulation under which wireless carriers have pledged not to make adult-oriented content available until they have implemented parental controls for wireless devices.[6] In short, as the Internet and online content become accessible from a greater number of platforms, industry is acting either preemptively or in quick response to new technological innovations, moving far more efficiently in this regard than legislation ever could.

The critical point is that highly effective technological tools are fast becoming readily available to aid parents in controlling what Internet content their children can access, using both traditional computers and newer devices. A recent

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[5] *See* AT&T, Parental Control Public Service Campaign, available at http://www.wireless.att.com/learn/articles-resources/parental-controls.jsp (last visited Oct. 26, 2007). *See also* the "Point Smart, Click Safe" campaign developed by the cable industry, available at http://www.pointsmartclicksafe.org/flash.html (last visited Oct. 29. 2007).

[6] *See* CTIA.org, Content Guidelines, available at http://www.ctia.org/advocacy/policy_topics/topic.cfm/TID/36 (last visited Oct. 26, 2007).

survey from the Pew Internet & American Life Project indicates that a majority of American parents have filtering software on the computer their children use at home. *See* Amanda Lenhart & Mary Madden, "Teens, Privacy and Online Social Networks," at v (Pew Internet & American Life Project 2007) [hereafter "2007 Pew Survey"].[7]

Importantly, technological user empowerment tools have the significant advantage of blocking and filtering Web content from *anywhere* in the world, while COPA applies only to content originating in the United States (as discussed in more detail in Section III below). *ACLU v. Gonzales*, 478 F. Supp. 2d at 810-11 (Conclusions of Law 10-15). Blocking and filtering software's universal applicability, coupled with its high accuracy rates, makes it far more effective than COPA in achieving Congress' compelling interest in shielding children from inappropriate Web content. At the same time, use of such software by parents and caregivers limits the restriction on constitutionally protected speech by allowing them to target with greater precision content to which they do not wish their children to have access. And critically, by placing the power of content blocking and filtering in parents' hands, technological access control tools block content at the household level, not at the source, leaving Web content creators free to speak

[7] The Pew study is available at http://www.pewinternet.org/pdfs/PIP_Teens_Privacy_SNS_Report_Final.pdf (last visited Oct. 26, 2007).

as they choose and willing adult listeners free to seek out that content. *See U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. at 817 ("The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control."). By contrast, COPA is both more restrictive of protected speech and less effective at achieving the governmental interest than technological user empowerment tools. The Court should therefore affirm the District Court's finding that COPA fails strict scrutiny and should uphold the injunction.

B. Parental Guidance and Actions That Do Not Involve Technological Tools Also Play a Critical Role in Protecting Children From Inappropriate Online Content and Are Also Less Restrictive Alternatives to COPA.

In its brief, the Department of Justice repeatedly emphasizes that not all parents use filtering or other technological tools, and it concludes from this that such technological tools are not effective. *See, e.g.,* DOJ Br. at 46. But this argument ignores the critical fact that, in addition to the technological user empowerment tools a majority of American parents employ to safeguard their children, most parents apply other techniques to guide what their children see and do online.[8]

[8] It also ignores the fact that, as recognized by the Supreme Court in the *Playboy* case, the fact that a parent does not block adult content does not necessarily mean that the parent does not know how to do so. It may represent a conscious choice. *U.S. v. Playboy Entm't Group*, 529 U.S. at 824.

By setting house rules for Internet usage, monitoring that usage, placing computers in kitchens and other family rooms, talking with their children about Web behavior, and educating their children to make their own informed choices, most parents take an active role in their children's Internet experience. According to Pew's recent study, at least 85 percent of American parents use technological user empowerment tools, non-technological approaches, or some combination the two. *See* 2007 Pew Study at vi. This combination of user empowerment tools and parental actions allows parents to implement the values they hold and to tailor their policies to their different children's ages and levels of maturity, in contrast with COPA's "one-size-fits-all" approach, which unduly restricts protected speech and, under which, apparently, the Department of Justice believes that *all* parents must adopt DOJ's conception of how best to raise a child.

Parents not only have the ability to monitor children's Internet usage through both technological and non-technical means, recent studies have shown that most also take a strong interest in doing so. The vast majority of parents have instituted house rules regarding children's Internet usage. Eighty-five percent of parents of teenagers say they have rules about what Web sites their children may or may not visit. *Id.* To ensure their children are following the rules, 76 percent of parents report checking what Web sites their children have visited, including 65 percent of parents of teenagers. *Id.*; Victoria Rideout, "Parents, Children, and Media: A

Kaiser Family Foundation Survey," at 11 (The Henry J. Kaiser Family Foundation 2007) (hereafter "2007 Kaiser Survey"). Parents also use other monitoring strategies, including placing the Internet-connected home computer in an open family area such as the kitchen or forbidding a child to close the door to the room when surfing the Internet. 2007 Kaiser Survey at 11. The percentage of parents of teenagers with such an "open area" policy increased from 70 percent in 2000 to 74 percent in 2006. *See* 2007 Pew Survey at vi.

Families may agree on these rules informally or by signing a "family contract" with which both children and parents agree to abide. Samples of such contracts are easily available at online resource sites such as GetNetWise.org.[9] With these household rules and practices in place, 92 percent of parents say they know "some" or "a lot" about their children's online activities. 2007 Kaiser Survey at 10. In many cases, frank family discussions can help parents trust their kids and worry less about their online activities. *Id.* at 7. In many families, household rules and discussion are sufficient, and parents therefore can protect their children as they see fit even if they do not take advantage of the range of technological tools available to them. *See* 2007 Parental Controls at 17. And family contracts can extend past the front door, such that children agree to abide by

[9] "Make an Internet Use Agreement with Your Child," available at http://kids.getnetwise.org/tools/toolscontracts/ (last visited August 9, 2007).

the same rules when accessing the Web at a friend's house, school, or the library as they would if they were at home. By talking with their children and educating them about the dangers of the Internet and what is and is not appropriate for them to view, parents equip them to make intelligent choices when surfing the Web, no matter where they are.

These non-technological parental controls are less restrictive than COPA and target inappropriate content more effectively. They allow parents to decide what content is appropriate for their children in accordance with their own values. Parents can make clear, for example, that while a pornographic Web site is inappropriate for a child to access, a Web site about medical topics that relate to sex is permitted. Just as they can customize filters for each child, parents can change their house rules as a child ages and different Web content becomes age-appropriate. *See* 2007 Parental Controls at 18-19. COPA lacks this flexibility and specificity, as it does not differentiate among "an infant, a five-year old, or a person just shy of age seventeen." *Id.* (quoting *ACLU v. Ashcroft*, 322 F.3d at 253-54).

Furthermore, house Internet usage rules and other techniques are effective against unwanted foreign and domestic content alike, whereas COPA reaches only the latter. Finally, such an approach acknowledges the First Amendment right of adults in the household to receive, and entities such as *amici* to communicate to

adults, constitutionally protected material that may be inappropriate for minors. Non-technological user empowerment techniques are in wide use and have a global reach without burdening speakers. Independently and together with technological user empowerment tools, they are a more effective and less restrictive alternative to COPA as a way of protecting children from inappropriate online content.

C. The Legitimate Governmental Interest Is in Protecting Children, Not in Blocking Access to Lawful Speech, and the Authoritative Study to Date Makes Clear that the Most Effective Way to Protect Kids Online Is Through Education, Not Regulation.

Congress does not have any legitimate interest in obstructing access to lawful, constitutionally protected speech on the Internet. Instead, the appropriate governmental interest is to promote the protection of children from inappropriate content online, and the most authoritative and comprehensive study of how best to do so was commissioned by Congress in 1998 and published by the National Academy of Sciences in 2002. The most critical conclusion of that study is that the best way to protect kids is through education, not through regulation of content.

In November 1998, Congress instructed the National Academy of Sciences to undertake a study of "computer-based technologies and other approaches to the problem of the availability of pornographic material to children on the Internet." Pub. L. No. 105-314, Title IX, § 901, 112 Stat. 2991 (1998). More than two years in the making, the National Research Council ("NRC") of the National Academy

of Sciences released its study in May 2002. *See* Nat'l Research Council, "Youth, Pornography, and the Internet" (2002) [hereafter "NRC Study"].[10]

The committee that prepared the report, chaired by former U.S. Attorney General Richard Thornburgh, "was composed of a diverse group of people including individuals with expertise in constitutional law, law enforcement, libraries and library science, information retrieval and representation, developmental and social psychology, Internet and other information technologies, ethics, and education." NRC Study at viii-x. Over the course of its two years of study and analysis, the committee received extensive expert testimony and conducted numerous meetings, plenary sessions, workshops, and site visits. *See id.* at x – xi & App. A.

The NRC committee specifically considered the likely effectiveness of COPA and concluded that, in light of the vast amount of overseas content, "even the strict enforcement of COPA will likely have only a marginal effect on the availability of such material on the Internet in the United States." *Id.* at 207. The Study explained:

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[10] The report is available online at http://books.nap.edu/html/youth_internet/ (last visited Oct. 26, 2007) and at http://books.nap.edu/books/0309082749/html/index.html (last visited Oct. 26, 2007). The full report was entered into evidence at trial, and relied upon by the District Court. *See, e.g., ACLU v. Gonzales*, 478 F. Supp. 2d at 796 (Findings of Fact 114-16). This Court can, in any event, take judicial notice of the Congressionally-commissioned report. Fed. R. Evid. 201.

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

Id. at 360 (emphasis added). In other words, even if access to all U.S.-based Web sites were somehow completely blocked through vigorous enforcement of COPA – something the District Count doubted would happen, *see ACLU v. Gonzales*, 478 F. Supp. 2d at 798-99 (Findings of Fact 131) – minors still would be able to locate, and then access, the hundreds of thousands of sexually explicit Web sites originating abroad.

In contrast with the ineffectiveness of COPA, the NRC Study concluded that user empowerment tools such as filtering can have "significant utility in denying access to content that may be regarded as inappropriate." NRC Study at 303. The Study concluded, however, that education was the most important tool to protect kids in the online environment:

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

Id. at 12 (emphasis added). The Congressionally-chartered COPA Commission – created by Congress at the same time it enacted COPA, *see* 47 U.S.C. § 231, note – reached the same conclusion: education is the most important approach to protecting children from inappropriate online content.[11]

The NRC Study specifically discussed a range of governmental actions that could be undertaken, noting that "public policy can go far beyond the creation of statutory punishment for violating some approved canon of behavior." NRC Study at 8. The Study proposed a variety of alternative public policy approaches, including (i) actions to promote Internet media literacy and other educational strategies, *see id.* at 384-85, and (ii) actions to promote the use of filtering tools by parents, *see id.* at 303. Among the concrete governmental efforts to promote education, the NRC Study specifically identified government funding for the development of model curricula, support of professional development for teachers, support for outreach programs such as grants to non-profit and community organizations, and development of Internet educational material, including public service announcements and Internet programming akin to that offered on PBS. *See id.* at 384-85.

[11] *See* "Final Report of the COPA Commission" at 40 (Oct. 20, 2000), available at http://www.copacommission.org/report/ (last visited Oct. 26, 2007).

As the NRC Study concluded, education is the key to protecting children online, and there is a range of concrete actions that Congress could undertake to promote such education. All of these steps are less restrictive alternatives to COPA, and all would be far more effective than COPA in protecting children from inappropriate online content.

D. State Governments Are Taking Steps to Promote Online Safety Education, and Congress Is Already Considering Taking Such Steps.

The Commonwealth of Virginia has made extensive efforts to promote online safety education for school children, and by doing so it has provided a clear picture of less restrictive alternatives that Congress could undertake to promote the protection of children online. In 2006, for example, the Virginia Legislature required by statute that Internet safety education must be taught in the Virginia schools, *see* Va. Code Ann. § 22.1-70.2(A)(v) (2006), and the Office of Educational Technology of the Virginia Department of Education published "Guidelines and Resources for Internet Safety in Schools," including a detailed curriculum guide to incorporating Internet safety instruction into the educational program of Virginia schools.[12] This can serve as a model for other states.

[12] The Virginia Department of Education's Internet Safety resources are available at http://www.pen.k12.va.us/VDOE/Technology/OET/internet-safety-guidelines.shtml (last visited Oct. 26, 2007).

Simply by providing funding or incentives for all states to emulate the approach to safety taken by Virginia, Congress could do far more to promote children's safety online than COPA has done or ever will do, without any significant impact on protected speech. These concrete steps that Congress could take would be less restrictive of lawful speech and more effective than COPA in protecting children from inappropriate content.

Importantly, it appears that some in Congress have finally taken the National Research Council's recommendations to heart and are proposing federal legislation to promote child safety education. For example, section 106 of Senate Bill 1965, the "Protecting Children in the 21st Century Act," would require that all schools that received federal funds to support computer activities must include Internet safety education in their educational programs.[13] In the House of Representatives, Section 3 of H.R. 3461, the "Safeguarding America's Families by Enhancing and Reorganizing New and Efficient Technologies Act of 2007," would require that the Federal Trade Commission undertake an extensive nationwide program to "increase public awareness and provide education regarding Internet safety."[14]

These bills in Congress, and a broad range of other educational proposals (including following the lead of the Virginia Department of Education), are all less

[13] *See* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.1965:.

[14] *See* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.3461:.

restrictive and more effective means of promoting online child safety and, as such, require this Court to uphold the permanent injunction against COPA.

II. COPA IS NOT LIMITED TO A WHOLLY UNDEFINED CATEGORY OF "COMMERCIAL PORNOGRAPHERS."

In its brief, the government argues that COPA only applies to "commercial pornographers" and that the Court should thus not be concerned that it would reach mainstream content providers. *See, e.g.,* DOJ Br. at 21. But the terms "commercial pornographers" and "pornography" are found nowhere in COPA; the terms COPA does use are "harmful to minors" and "commercial purposes." Nor are the terms "commercial pornographers" or "pornography" defined by the government in its brief or by prior case law. The Court instead must evaluate the statutory language, which reaches any material that the most conservative community in America would consider to be "harmful" to minors and therefore sweeps far more broadly than the governments suggests in contending that it is limited to "commercial pornographers."

In numerous cases, material published or produced by mainstream entities has been claimed to be "harmful to minors", such as Alex Comfort's *Joy of Sex*, Cormac McCarthy's *Child of God*,[15] and Judy Blume's *Forever*. This material is

[15] Doug Myers and Kyle Peveto, "Teacher Could Face Charges Over Book," *Abilene (TX) Online Reporter-News* (Oct. 16, 2007), available at

not "commercial pornography;" nor are the creators of this material pornographers. Rather than asking Congress to attempt to draft a statute that expressly applies only to "commercial pornographers" (whatever that may actually mean), the government asks this Court to perform radical and transformational surgery on COPA.

Moreover, as the District Court found, *see ACLU v. Gonzales*, 478 F. Supp. 2d at 808 (Conclusions of Law 4), and this Court previously has noted, *Ashcroft v. ACLU*, 322 F.3d at 256, the statutory language is *not* limited to "for profit" entities. For example, it would reach safe-sex Web sites that receive revenue by carrying advertisements. The government acknowledges that COPA would apply to advertising-supported Web sites. *See, e.g.,* DOJ Br. at 33. Indeed, the purpose of allowing advertisements on a site typically is to profit from them (whether or not the entity operating the site is "for profit" or "not for profit"). Therefore, the government's insistence that COPA only applies to "commercial" entities is erroneous.

The government also suggests that "engaged in the business" should refer to situations where "a person's primary purpose for engaging in the activity must be for income or profit." DOJ Br. at 32. But COPA specifically provides that the

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http://reporternews.com/news/2007/oct/16/teacher-could-face-charges-over-book/ (last visited October 26, 2007).

"making or offering to make such communications [need not] be the person's sole or principal business or source of income." 47 U.S.C. § 231(e)(2)(B).

III. BECAUSE COPA DOES NOT APPLY TO OVERSEAS WEB SITES, IT WOULD BE INEFFECTIVE IN PROTECTING CHILDREN FROM INAPPROPRIATE ONLINE CONTENT.

Key findings of the District Court are that COPA has no extraterritorial application, *ACLU v. Gonzales*, 478 F. Supp. 2d at 810 (Conclusions of Law 10), and that even if it did apply extraterritorially it would be highly ineffective, burdensome, and impractical in responding to overseas sexually oriented content if it did apply, *id.* at 811 (Conclusions of Law 15). In its brief to this Court, however, the government contends that the lower court "erred in concluding that COPA is applicable solely to web sites within the United States." DOJ Brief at 53. But this argument is directly contradicted by the legislative history of COPA, and this Court cannot and should not read extraterritorial reach into COPA absent a clear indication of congressional intent that it be so applied. Moreover, finding of extraterritorial reach would exacerbate the problems for U.S. content providers who would face the efforts of *other* countries to criminalize content that is both legal in the United States and hosted in the United States but accessible abroad.

A. As Both Rules of Statutory Construction and the Legislative History Make Clear, COPA Does Not Apply to Overseas Content.

It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[16] While Congress knows how to draft a criminal statute to reach conduct overseas,[17] it did not do so in COPA. Nevertheless, the government essentially argues that the Court should read an extraterritoriality provision into COPA. The District Court rejected this invitation to rewrite COPA, and the legislative history makes clear that COPA was *not* intended or expected to reach content overseas. *ACLU v. Gonzales*, 478 F. Supp. 2d at 798 (Finding of Fact 130).

In the primary legislative report prepared in connection with COPA, House of Representatives Report No. 105-775 (Oct. 5, 1998), the Commerce Committee of the House specifically discussed overseas pornography and made clear that COPA imposed only "domestic restrictions in the United States." H.R. Rep. No. 105-775 at 20 (1998). The Committee did *not* propose extraterritorial action and

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[16] *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

[17] *See, e.g.*, 18 U.S.C. § 3271(a) ("Whoever, while employed by or accompanying the Federal Government outside the United States, engages in conduct outside the United States that would constitute an offense under [the relevant sections] of this title if the conduct had been engaged in within the United States … shall be punished as provided for that offense.").

instead referred the question of international content to the COPA Commission for study:

> To the extent that an international problem exists, the Committee has requested that the Commission on Online Child Protection study the matter and report back to Congress.

Id. Moreover, in explaining the reasons for rejecting a particular possible extraterritorial action, the Committee noted that such action would "have international consequences and the United States should not act without reaching broad industry and international consensus." *Id.* at 18. It is thus clear that COPA was not intended to reach overseas content.[18] *See ACLU v. Gonzales*, 478 F. Supp. 2d at 799 (Finding of Fact 131) (citing a Department of Justice letter to the House Commerce Committee, which stated that "children would still be able to obtain ready access to pornography from a myriad of overseas web sites. The COPA

[18] Moreover, it is highly improbable that a foreign government such as Denmark or Sweden would cooperate with a United States attempt to press criminal charges under COPA against overseas content that is *completely legal* in its country of origin. It is well known that American sensibilities about sexual content are far stricter than in many other countries, and indeed, the European Commission itself prepared and released on the Internet a promotional video of sex scenes from European films, as part of an effort to promote the European film industry as better than the American film industry. *See* Caitlin Roman, "Sex Scenes in EUTube Clip Stir Controversy," *Associated Press* (July 3, 2007), available at http://abcnews.go.com/Technology/wireStory?id=3342250 (last visited Oct. 26, 2007). The "controversy" in Europe generated by the video clip was not that the content was illegal or inappropriate, but that the video was "tacky" and a waste of money.

apparently would not attempt to address those sources of Internet pornography….").

Thus, as the lower court found, filtering software (which can be 95 percent effective) is far more effective than COPA (which fails even to reach more than half of sexual content on the Internet).

B. A Judicial Extension of COPA to Reach Overseas Content Would Exacerbate Problems for U.S. Publishers of Content that is Legal in the U.S. But Arguably Illegal in Other Countries.

With its First Amendment and generally "hands-off" approach to governmental regulation of the Internet, the United States has set a standard of protecting Internet speech. Many countries have looked to the United States for policy-setting in this area.[19] However if this Court were to extend COPA beyond U.S. borders, it would be more difficult for our government and our courts to oppose the application (or attempted application) of foreign censorship laws to U.S. speakers. In the face of the United States attempting to control and censor content originating from foreign countries, other countries' governments are unlikely to be persuaded to abandon enforcement of their own speech regulations

[19] *Amici* note that overbroad content regulation by the United States would undermine the credibility U.S. efforts to promote Internet free speech in other nations.

against U.S. citizens (regardless of whether the speech is legal in the United States).

Foreign censorship of content that is lawful in the United States is common.[20] China, for example, outlaws discussion of the Falun Gong religion.[21] Countries across Europe criminalize hate speech regarding racial, ethnic, and religious groups.[22] Nazi books and memorabilia and neo-Nazi speech, writing, and demonstrations are banned, as is denying the occurrence of the Holocaust, the Armenian genocide in Turkey, and other instances of genocide.[23] In addition to anti-hate-speech legislation passed by individual nations, the European Union passed a joint action directing member states to criminalize certain types of speech,

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[20] *See generally*, Open Net Initiative's research on global Internet filtering, available at http://opennet.net/research (last visited Oct. 25, 2007).

[21] *See* Open Net Initiative's research on Internet filtering by the Chinese government, available at http://opennet.net/research/profiles/china (last visited Oct. 25, 2007).

[22] *See, e.g.,* Public Order Act, 1986, c. 64 (Eng.) (outlawing "incitement to racial hatred"); Racial and Religious Hatred Act, 2006, c. 1 (Eng.) (enforcement pending) (amending 1986 Act to include "religious hatred").

[23] *See, e.g.,* Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBI No. 1/1930, as last amended by BGBI. No. 148/1992 (Austria); Law of Mar. 23, 1995, Moniteur Belge, Mar. 30, 1995, p. 7996 (Belgium); Law No. 90-615 of July 13, 1990, J.O., July 14, 1990 p. 8333 (France); Einundzwanzigstes Strafrechtsänderungsgesetz [Twenty-First Law Modifying the Criminal Law], June 15, 1985 BGBI, 1 at 965 (codified at Strafgesetzbuch [StGB] [Penal Code], § 130, ch. 3) (Germany); Strafgesetzbuch [StGB] [Criminal Code] Dec. 21, 1937, 54 AS at 757 (1938), as amended by Gesetz, June 18, 1993, AS 2887 (1994), art. 261bis (Switzerland); Denial of Holocaust (Prohibition) Law, 1986, S.H. 196 (Israel).

press, and association that involve "discrimination, violence, or racial, ethnic or religious hatred."[24]

U.S. courts already have been asked to consider First Amendment issues raised by foreign court judgments against American defendants who had done nothing wrong under U.S. law based on Web content hosted in the United States that violated foreign law. In two such cases, the district courts held that foreign judgments could not be enforced on the ground that the content at issue was protected by the First Amendment (although in both cases, the district court decision was overturned on other grounds). *See S.A. Pierre Balmain v. Viewfinder Inc.*, 489 F.3d 474 (2nd Cir. 2007) (setting forth analysis for determination of whether First Amendment protection is violated by enforcement of foreign judgment); *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (blocking enforcement of a foreign judgment relating to Nazi material), *rev'd on other grounds*, 433 F.3d 1199 (9th Cir.) (en banc), *cert. denied*, 126 S. Ct. 2332 (2006).

That the First Amendment should protect U.S. Internet speakers from such foreign judgments does not eliminate the enormous harm that would be caused by a U.S.-imposed precedent that one country can censor the Internet content hosted in other countries. As one example, an American who is the subject of such a

[24] *See* Council Joint Action 96/443, Title I § A, 1996 O.J. (L 185) 5-7 (EU).

foreign judgment or criminal conviction cannot travel outside the U.S. without significant risk (even if attempts to enforce such a judgment in the U.S. were blocked by the First Amendment).

In light of the clear legislative history and the significant policy implications that would arise from a decision that U.S. laws can censor foreign content – risks that Congress appeared to appreciate in passing COPA in 1998 – this Court should reject the government's invitation to read an extraterritorial reach into COPA.

CONCLUSION

As the National Research Counsel determined in 2002, and as the District Court exhaustively documented earlier this year, COPA creates significant burdens on constitutionally protected speech on the Internet while being less effective than a broad range of less restrictive alternatives, including both technological user empowerment tools and parental guidance. The Supreme Court remanded this case to the District Court "to update and supplement the factual record to reflect current technological realities." *Ashcroft v. ACLU*, 542 U.S. 656, 672 (2004). The District Court, after extensive hearings, did so and found that, if anything, COPA is further from being the least restrictive means than it was in 1999 or in 2004. Accordingly, this Court should find COPA to be unconstitutional and should affirm the decision below.

Respectfully Submitted,

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Dated: October 29, 2007

APPENDIX: THE *AMICI*

American Society of Newspaper Editors ("ASNE") is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society include assisting journalists and providing unfettered and effective press in the service of the American people.

Association of American Publishers, Inc. ("AAP") is the national association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Center for Democracy & Technology ("CDT") is a non-profit public interest and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy and individual liberty. CDT has litigated or otherwise participated in a broad range of Internet free speech cases.

Comic Book Legal Defense Fund ("CBLDF") is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, which has it principal place of business in New York, New York, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located throughout the country and the world.

Computer & Communications Industry Association ("CCIA") is a trade association dedicated to open markets, open systems and open networks. CCIA members participate in many sectors of the computer, information, and communications technology industries, and range in size from small entrepreneurial firms to the largest in the industry. CCIA's members collectively employ nearly one million people and generate annual revenues exceeding $200 billion.

Freedom to Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

Information Technology Association of America ("ITAA") provides global public policy, business networking, and national leadership to promote the continued rapid growth of the IT industry. ITAA consists of over 300 corporate members throughout the U.S. The Association plays the leading role in issues of IT industry concern including information security, taxes and finance policy, digital intellectual property protection, telecommunications competition, workforce and education, immigration, online privacy and consumer protection, government IT procurement, human resources and e-commerce policy. ITAA members range from the smallest IT start-ups to industry leaders in the Internet, software, IT services, digital content, systems integration, telecommunications, and enterprise solution fields.

Internet Alliance ("IA") is a non-profit membership organization of companies for whom the Internet is central to their commercial enterprise. The IA operates exclusively in the 50 United States to promote consumer confidence and trust in the Internet, fostering its full potential as the premier marketing medium of the 21st century. Among the companies represented by IA are e-mail service providers, Internet service providers, marketers, and cable companies.

Media Access Project ("MAP") is a non-profit public interest telecommunications law firm founded in 1972. It represents the public's First Amendment right to have affordable access to a vibrant marketplace of issues and ideas via telecommunications services and the electronic mass media.

National Association of Recording Merchandisers ("NARM"), established in 1958, is a non-profit trade association that advances the promotion, marketing, distribution, and sale of music by providing its members with a forum for diverse meeting and networking opportunities, information, and education to support their businesses, as well as advocating for their common interests. NARM's membership includes retailers, wholesalers, distributors, record labels, multimedia suppliers, entertainment service providers, and suppliers of related products and services, as well as individual professionals and educators in the music business

field. NARM's retail members operate 7,000 storefronts that account for almost 85 percent of the music sold in the U.S. market. NARM's members are concerned that they may be exposed to criminal liability under COPA simply for misjudging what may be deemed "harmful to minors" under an ambiguous standard.

National Cable Television Association ("NCTA") is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving 90 percent of the nation's cable television customers as well as more than 200 cable program networks. NCTA also represents equipment suppliers and others interested in or affiliated with the cable television industry.

Net Coalition serves as the public policy voice for some of the world's largest and most innovative Internet companies on key public policy matters affecting the online world. Its members are providers of search technology, hosting services, ISPs, and Web portal services.

Newspaper Association of America ("NAA") is a non-profit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Most NAA members are daily newspapers, accounting for nearly 90 percent of the U.S. daily circulation. Many NAA members provide vital news and information through multiple channels, including the Internet. One of NAA's missions is to advance public policies that are intrinsic to the role of the press in a free and democratic society, including protecting the free flow of information whether in print or online.

Online Publishers Association ("OPA") is an industry trade organization founded in June 2001, whose mission is to advance the interests of high-quality online publishers before the advertising community, the press, the government and the public. OPA membership consists of 40 of the Internet's leading content brands who maintain the highest standards in Internet publishing with respect to editorial quality and integrity, credibility and accountability.

People for the American Way Foundation ("PFAWF") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, PFAWF now has more than 1,000,000 members and activists nationwide. PFAWF has represented parties and filed

amicus curiae briefs in important cases before the Supreme Court and lower federal courts defending First Amendment freedoms, including, in particular, cases concerning regulation of Internet content for minors such as *Reno v. ACLU,* 521 U.S. 844 (1997) (in which this Court struck down COPA's predecessor, the "Communications Decency Act"). In addition, PFAWF has researched and published national reports on attempts to ban or restrict books and other materials in public schools that demonstrated tremendous differences between and within states as to what materials are considered appropriate for minors. PFAWF believes that COPA would impose a national, lowest common denominator standard that would restrict and chill the communication and receipt of valuable expression throughout the United States by adults, as well as minors, in violation of fundamental First Amendment freedoms.

PMA, the Independent Book Publishers Association ("PMA") is a nonprofit trade association representing more than 3,700 publishers across the United States and Canada. PMA members publish and distribute mainstream books on a variety of topics including marriage, sex education, family and relationships, self help, art photography, glamour photography, photo techniques, as well as erotic fiction and romance novels.

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

United States Internet Service Provider Association ("USISPA") is a national trade association that represents the common policy and legal concerns of the major Internet service providers (ISPs), portal companies and network providers. Its members include AOL, AT&T, BellSouth, EarthLink, Microsoft, SAVVIS, United Online, Verizon, and Yahoo!.

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify counsel for *amici* John B. Morris, Jr., is a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

/s/ John B. Morris, Jr.

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John B. Morris, Jr.

October 29, 2007

CERTIFICATE OF WORD COUNT

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief contains 6942 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ John B. Morris, Jr.

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John B. Morris, Jr.

October 29, 2007

CERTIFICATE OF IDENTICAL BRIEFS AND VIRUS SCAN

I hereby certify that the text of *amici*'s E-Brief in PDF form and the paper copies are identical. I further certify that the E-Brief was scanned for viruses using the Kapersky Lab Anti-Virus File Scanner, available at http://www.kaspersky.com/scanforvirus, and that no viruses were detected.

/s/ John B. Morris, Jr.

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John B. Morris, Jr.

October 29, 2007

CERTIFICATE OF SERVICE

I hereby certify that on **October 29, 2007**, ten copies of the foregoing *amicus* brief were filed with the Clerk of the Court by overnight delivery service for next-day delivery, an electronic copy was e-mailed to the Clerk's Office at electronic_briefs@ca3.uscourts.gov and to each of the listed addressees below, and two copies were delivered by hand delivery or shipped by commercial carrier for next-day delivery upon the following:

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