No. 08-565

In the Supreme Court of the United States

MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GREGORY G. GARRE
Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
WILLIAM M. JAY
Assistant to the Solicitor General
SCOTT R. MCINTOSH
CHARLES W. SCARBOROUGH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Child Online Protection Act violates the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioner is Michael B. Mukasey, Attorney General of the United States. Respondents are American Civil Liberties Union, Androgyny Books, Inc. d/b/a A Different Light BookStores, American Booksellers Foundation for Free Expression, Artnet Worldwide Corporation, Blackstripe, Addazi Inc. d/b/a Condomania, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, OBGYN.net, Philadelphia Gay News, PlanetOut Corporation, Powell's Bookstore, Riotgrrl, Salon Media Group, Inc. (f/k/a Salon Internet Inc.), and ImageState North America, Inc. (f/k/a West Stock, Inc.). The Internet Content Coalition was formerly a party but no longer exists.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 08-565

MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-52a) is reported at 534 F.3d 181. An earlier opinion of the court of appeals (App. 150a-212a) is reported at 322 F.3d 240, and another earlier opinion is reported at 217 F.2d 162. The opinion of the district court (App. 55a-149a) is reported at 478 F. Supp. 2d 775. An earlier opinion of the district court is reported at 31 F. Supp. 2d 473.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2008. A petition for rehearing was denied on September 16, 2008 (App. 53a-54a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The pertinent statutory provisions are reprinted in an appendix to this petition. App. 213a-220a.

STATEMENT

1. a. This case involves the scope of Congress's power to protect minors from the harmful effects of sexually explicit material on the Internet. Congress first sought to address that serious problem through the enactment of Section 502 of the Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, Tit. V, 110 Stat. 133. The CDA prohibited the knowing transmission of "indecent" messages over the Internet to persons under the age of 18, 47 U.S.C. 223(a)(1)(B) (2000), as well as the display of "patently offensive" sexually explicit messages in a manner available to those under 18 years of age, 47 U.S.C. 223(d) (2000). The CDA provided a defense to prosecution to persons who had taken steps to restrict access by minors to covered communications. 47 U.S.C. 223(e)(5).

In *Reno* v. *ACLU*, 521 U.S. 844 (1997), the Court held that the CDA's regulation of "indecent" and "patently offensive" speech violated the First Amendment. The Court reaffirmed that the government has a "'compel-

ling interest in protecting the physical and psychological well-being of minors' which extend[s] to shielding them from indecent messages that are not obscene by adult standards." *Id.* at 869 (quoting *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989)); see *id.* at 875. It concluded, however, that the government had failed to demonstrate that the CDA was the least restrictive alternative available to further that compelling interest. *Id.* at 874-879.

b. Congress responded to this Court's decision by reexamining the problem of children's access to sexually explicit material on the Internet. See *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet*: *Hearing Before the Subcomm. on Telecomms., Trade & Consumer Prot. of the House Comm. on Commerce*, 105th Cong., 2d Sess. (1998); see S. Rep. No. 225, 105th Cong., 2d Sess. 8 (1998). Following legislative hearings, *ibid.*, Congress enacted, and the President signed into law, the Child Online Protection Act (COPA), Pub. L. No. 105-277, Div. C, Tit. XIV, 112 Stat. 2681-736 (47 U.S.C. 231 & note).

COPA authorizes the imposition of criminal and civil penalties on any person who "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. 231(a)(1). A person communicates "for commercial purposes" only if he "is engaged in the business of making such communications," 47 U.S.C. 231(e)(2)(A), and a person is engaged in the business of making such communications only if he "devotes time, attention, or labor" to making harmful-to-minors communications "as a regular course of

[his] trade or business, with the objective of earning a profit as a result of such activities." 47 U.S.C. 231(e)(2)(B).

COPA defines "material that is harmful to minors" as "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind" that is "obscene" or that

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. 231(e)(6).

COPA's definition of non-obscene material that is "harmful to minors" parallels the three-part "harmful to minors" standard this Court approved in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), except that it has been modified to take into account the greater flexibility permitted by *Miller* v. *California*, 413 U.S. 15 (1973). Compare 47 U.S.C. 231(e)(6), with *Ginsberg*, 390 U.S. at 632-633, and *Miller*, 413 U.S. at 24; see H.R. Rep. No. 775, 105th Cong., 2d Sess. 13, 27-28 (1998). COPA's definition also tracks the standard used in state laws that prohibit the public display of magazines or other materials that are harmful to minors and that require that such

materials be placed behind a blinder rack, in a sealed wrapper, or in an opaque cover. *Id*. at 13.

COPA provides "an affirmative defense to prosecution" if a person, "in good faith, has restricted access by minors to material that is harmful to minors." 47 U.S.C. 231(c)(1). A person qualifies for that affirmative defense by (A) "requiring use of a credit card, debit account, adult access code, or adult personal identification number," (B) "accepting a digital certificate that verifies age," or (C) taking "any other reasonable measures that are feasible under available technology." *Ibid*.

c. In crafting COPA, Congress sought to "address[] the specific concerns raised by" this Court when it invalidated the CDA. H.R. Rep. No. 775, *supra*, at 12; accord S. Rep. No. 225, *supra*, at 2. First, the CDA applied to communications in e-mail, newsgroups, and chat rooms, and age screening was found not to be technologically feasible for those forms of communication. *Reno* v. *ACLU*, 521 U.S. at 851, 876-877. In contrast, COPA applies only to material posted on the World Wide Web, 47 U.S.C. 231(a)(1), where age screening is both technologically feasible and affordable. H.R. Rep. No. 775, *supra*, at 13-14.

Second, the CDA prohibited the display or transmittal of materials that were "indecent" or "patently offensive," without defining those terms, and the CDA did not indicate whether the "indecent" and "patently offensive" determinations "should be made with respect to minors or the population as a whole." *Reno* v. *ACLU*, 521 U.S. at 871 & n.37, 873, 877. COPA, by contrast, identifies the particular types of sexually explicit depictions, descriptions, or representations that may be considered patently offensive, and it is specifically limited to mate-

rial that is "patently offensive with respect to minors." 47 U.S.C. 231(e)(6)(B).

Third, because the CDA did not require that covered material appeal to the prurient interest or lack serious value for minors, it covered vast amounts of non-pornographic material having serious value. *Reno* v. *ACLU*, 521 U.S. at 873, 877-878. In contrast, COPA applies only to material that is designed to appeal to the prurient interest of minors and that, "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(A) and (C).

Fourth, the CDA applied to nonprofit entities and to individuals posting messages on their own computers. It therefore included categories of speakers who might not be able to afford the cost of age screening. *Reno* v. *ACLU*, 521 U.S. at 856, 865, 877. In contrast, COPA applies only to persons who seek to profit from placing harmful-to-minors material on the Web as a regular course of their business. 47 U.S.C. 231(a)(1) and (e)(2). Such persons, Congress determined, can afford the costs of compliance. H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 7.[1]

d. Congress enacted legislative findings that explain the basis for COPA. Congress found that the "widespread availability of the Internet" continues to "present[] opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control." 47 U.S.C. 231 note (Finding 1). Congress further determined that

[1] COPA also reduces the age of minority from under age 18 to under age 17, and parents do not violate COPA when they permit their minor children to use the family computer to view material covered by the statute. See 47 U.S.C. 231(e)(7); H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 6; *Reno* v. *ACLU*, 521 U.S. at 865-866, 878.

"the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest." 47 U.S.C. 231 note (Finding 2). Congress noted that "the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation." 47 U.S.C. 231 note (Finding 3). It found, however, that "such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web." *Ibid.* Congress concluded that "a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest." 47 U.S.C. 231 note (Finding 4).

2. Before COPA became effective, a number of entities and individuals who maintain or seek access to Web sites filed suit in the United States District Court for the Eastern District of Pennsylvania, seeking to invalidate COPA. Respondents alleged that COPA violates the First and Fifth Amendments to the Constitution, and they sought to enjoin its enforcement. *ACLU* v. *Reno*, 31 F. Supp. 2d 473, 477 (E.D. Pa. 1999). The district court entered a preliminary injunction against COPA's enforcement. *Id.* at 481-499.

The district court found that pornographic material is widely available for free on the Web, where minors can readily obtain access to it. 31 F. Supp. 2d at 484. The court also found that, even in 1999, adult identification systems were readily available and could enable Web publishers to prevent minors from obtaining access to harmful materials while still offering such material to adults. The court found, for example, that Web publish-

ers could place harmful material behind screens that allow access to the material only when the user provides a valid adult access code or a credit card number. *Id.* at 489-491. The court also found that, for a small annual fee, adults could obtain adult access codes to verify their age to Internet merchants using such a screen. *Ibid.*

Despite those findings, the district court determined that respondents were likely to show that COPA imposes an impermissible burden on speech that is protected for adults. 31 F. Supp. 2d at 495. The district court concluded that COPA might not be the "least restrictive means" of effecting Congress's compelling interest in protecting children from harmful speech, because the voluntary use of blocking software might be "at least as successful as COPA" in restricting minors' access to such material without imposing the same burden on constitutionally protected speech. *Id.* at 497. The court acknowledged that filter software blocks access to some sites that contain no harmful material, and that it permits access to some sites that contain such material. *Id.* at 492, 497. The court also noted that "[i]t is possible that a computer-savvy minor with some patience would be able to defeat the blocking device," and that "a minor's access to the Web is not restricted if [that minor] accesses the Web from an unblocked computer." *Id.* at 492. The court found it more significant, however, that software can block material on foreign Web sites and material on the Internet beyond the Web, and that some minors may be able to obtain access to credit cards and adult access codes. *Id.* at 492, 496-497.

The court of appeals affirmed on a different ground. *ACLU* v. *Reno*, 217 F.3d 162 (3d Cir. 2000). It held that COPA's reliance on "community standards" to identify material that is harmful to minors renders COPA fa-

cially unconstitutional, because it effectively requires persons who display material on the Web to comply with the community standards of the least tolerant community. *Id.* at 177.

3. This Court vacated and remanded for further proceedings. *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002). In a judgment supported by several opinions, the Court 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." *Id.* at 585 (plurality opinion). Accord *id.* at 586-589 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 589-591 (Breyer, J., concurring in part and concurring in the judgment) (concluding that any regional variations in the application of a national "community standard" "are not, from the perspective of the First Amendment, problematic"); see also *id.* at 597 (Kennedy, J., concurring in the judgment) ("[W]hether variation in community standards renders the Act substantially overbroad [cannot be determined] without first assessing the extent of the speech covered and the variations in community standards with respect to that speech.").

4. On remand, the court of appeals once again affirmed the district court's grant of a preliminary injunction. App. 150a-212a. Based on a series of considerations, the court held that COPA violates the First Amendment.

a. The court first held that COPA's requirement that material be considered "as a whole" to determine whether it appeals to the prurient interest is not narrowly tailored to serve the government's compelling interest in protecting minors from the covered material. The court noted that, under this Court's obscenity decisions,

the First Amendment requires material to be considered "in context" in deciding whether it appeals to the prurient interest. App. 168a-171a. The court interpreted COPA to preclude such a contextual assessment. The court reasoned that, because COPA describes harmful material as "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind," 47 U.S.C. 231(e)(6), COPA's "as a whole" requirement actually "mandates evaluation of an exhibit on the Internet in isolation, rather than in context." App. 170a.

b. The court next concluded that COPA's "serious value" prong lacks sufficient precision. The court reasoned that, because COPA defines "minor" as "any person under 17 years of age," 47 U.S.C. 231(e)(7), Web publishers cannot know which minors should be considered in deciding whether material has serious value for minors. App. 172a. The court rejected the government's argument that the question under COPA is whether material has serious value for a legitimate minority of normal older adolescents. App. 171a-172a. The court acknowledged that, before COPA's enactment, state display laws with similar language had been construed to incorporate that standard or a similar one, App. 173a & n.16, but it concluded that Congress did not intend to incorporate that standard into COPA. App. 173a. The court also concluded that even if COPA incorporates the normal older adolescent standard, it still would not be "tailored narrowly enough to satisfy the First Amendment's requirements." App. 173a-176a.

c. The court of appeals also held that COPA's limitation to communications made "for commercial purposes," 47 U.S.C. 231(a)(1), does not sufficiently narrow COPA's reach. App. 176a-179a. The court criticized

COPA's "commercial purposes" limitation on the ground that it includes businesses that post harmful-to-minors material, even if they do not post such material "as the principal part of their business," and even if they seek to derive profit from the material through the sale of "advertising space" on the Web site rather than through the sale of the material itself. App. 176a-177a. The court rejected the government's reliance on COPA's definition of commercial purposes, which limits the reach of COPA to businesses that seek to profit from harmful-to-minors material "as a regular course" of their business. 47 U.S.C. 231(e)(2)(A) and (B). The court stated that the "regular course" requirement does not "place any limitations on the amount, or the proportion, of a Web publisher's posted content that constitutes [harmful] material." App. 178a.

d. The court of appeals further held that although COPA affords an affirmative defense to businesses that use credit cards, adult access codes, or other means to prevent minors from obtaining access to harmful material, those methods of compliance unconstitutionally burden adult access to protected speech. App. 179a-185a. The court reasoned that "COPA will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial." App. 182a. The court also regarded COPA's affirmative defense as deficient because, while it furnishes protection against conviction, it "do[es] not provide the Web publishers with assurances of freedom from prosecution." App. 184a.

e. Next, the court of appeals held that filtering software "may be substantially less restrictive than COPA

in achieving COPA's objective of preventing a minor's access to harmful material." App. 193a; see App. 186a-195a. The court noted that the evidence before the district court had not conclusively established the extent to which filters are over- or underinclusive, and agreed with the district court that filters "*could* be at least as effective as COPA." App. 191a (emphasis added). The court concluded that "[t]he existence of less restrictive alternatives renders COPA unconstitutional under strict scrutiny." App. 195a.

f. Relying on the same considerations that led it to conclude COPA is not narrowly tailored, the court of appeals held that COPA is substantially overbroad. See App. 196a-206a. The court further concluded that COPA's reliance on community standards "exacerbates" those "constitutional problems." App. 204a. In a footnote, relying on the same considerations that led it to conclude that COPA's definition of "minors" is not narrowly tailored, the court held that definition unconstitutionally vague as well. App. 201a n.37.

5. By a vote of 5 to 4, this Court affirmed the preliminary injunction on "narrower, more specific grounds than the rationale the Court of Appeals adopted," and remanded the case for proceedings on the merits. *Ashcroft* v. *ACLU*, 542 U.S. 656, 665, 672-673 (2004). The Court expressly "decline[d] to consider the correctness of the other arguments relied on by the Court of Appeals." *Id.* at 665.

The Court decided that the district court had not abused its discretion by granting interim relief "[o]n this record." 542 U.S. at 666, 672-673. The Court focused exclusively on whether the preliminary-injunction record established that COPA was the least restrictive means of achieving Congress's purpose of protecting

children, or whether Congress might be able to achieve the same goal just as effectively by encouraging parents to use filtering software to regulate their children's Internet activity. *Id.* at 666, 669. In this respect, the Court found "a serious gap in the evidence as to the effectiveness of filtering software" as an alternative to COPA. *Id.* at 671; see *id.* at 668-669. The Court also noted that the limited record assembled in the district court was already five years old, "a serious flaw in any case involving the Internet." *Id.* at 671. In the absence of an adequate record, the Court stated, it would not "assume, without proof, that filters are less effective than COPA." *Ibid.* Rather, it left that factual question for evidentiary development in the district court. *Id.* at 671-673. The Court stressed, however, that it "d[id] not foreclose" the government from establishing that there is no equally effective, less restrictive alternative to COPA. *Id.* at 673.

6. After a bench trial, the district court permanently enjoined the Attorney General from enforcing COPA in any respect. App. 55a-149a. The court concluded that filters are a less restrictive alternative; that COPA is otherwise not narrowly tailored to the promotion of Congress's compelling interest; and that COPA is vague and overbroad.

a. The district court concluded that filter software would be both less restrictive and more effective than COPA. App. 79a-96a. The court determined that filters were readily available, easy to use, and able to block a very large fraction of the indecent Internet content that is harmful to minors. App. 86a-91a, 93a-96a. The court acknowledged that filters do make errors both in blocking and in failing to block. But it concluded that filters would be more effective than COPA in protecting chil-

dren who use the Internet. App. 134a. The court did not address the extent to which filters, despite their purported effectiveness and ease of use, are not currently being used by parents with Internet connections. See App. 86a-87a.

b. The court concluded that COPA is not narrowly tailored because it is both overinclusive and underinclusive. The court examined the definitions of "commercial purposes" and "minor" and found them too broad, causing the court to conclude that COPA prohibits too large a set of protected speech. App. 123a-124a. For instance, the court held that Web sites supported by advertising should not fall into the same definition of "commercial purposes" as sites engaged in the full-time commercial sale of pornography. App. 120a-121a. At the same time, the court concluded that COPA was underinclusive because it does not block foreign Web sites. App. 124a-127a.

The district court also found COPA's affirmative defense problematic. Although the court recognized that existing services provide age verification for Internet users, the court concluded that the affirmative defense was nonetheless "effectively unavailable" because those services are not foolproof and therefore do not provide perfect verification of Internet users' age. App. 106a-110a, 127a-128a. And the district court reiterated the court of appeals' earlier conclusion that the affirmative defense would burden speech, because a requirement to verify one's age (and possibly one's identity) before obtaining access to Internet content harmful to minors would deter potential readers from seeking access to content protected in that fashion. App. 128a-129a.

c. The district court also concluded that COPA is facially overbroad and vague, although it acknowledged

that its holding on those points was "merely supplemental." App. 136a n.10. The court concluded that a number of COPA's terms were ambiguous, such as the distinct scienter standards "knowingly" and "intentionally." App. 137a-138a. The court also concluded that the statute left ambiguous the degree to which a content provider must be "commercial" to qualify for coverage under COPA. App. 139a-140a. And the court reiterated the court of appeals' discussion of the term "minor" as creating an ambiguity. App. 139a-140a. The district court further held that those ambiguities could not be resolved (or COPA saved) by a narrowing construction. See App. 144a. For similar reasons, the district court concluded that COPA penalizes too much speech and is therefore fatally overbroad. See App. 143a-145a.

7. The court of appeals again affirmed. App. 1a-52a.

a. The court relied principally on the law-of-the-case doctrine. In the court's view, the panel that had ruled on the preliminary-injunction appeal had already resolved a number of the contested legal issues, and the court declined to re-examine any of those issues. App. 9a-15a.

Accordingly, the court of appeals relied on the preliminary-injunction panel's opinion to hold that COPA is not narrowly tailored, because it is overinclusive, App. 22a-23a; that the burden imposed by COPA's affirmative defense is categorically different from the burden imposed by blinder racks that screen adult magazines, App. 31a-32a; and that COPA is vague and overbroad, App. 47a-48a, 51a.

b. The court agreed with the district court that the affirmative defense under COPA is "'effectively unavailable,'" and thus does not make the statute any more narrowly tailored, because the means specified in the

statute "do not actually verify age." App. 29a (quoting App. 128a). And the court further concluded that, if employed, the affirmative defense would create an unconstitutional burden on Web publishers, because implementing the affirmative defense would have "high costs" and would result in "[t]he loss of traffic," because requiring age verification will deter users from visiting these Web sites. App. 30a-31a.

c. The court of appeals also agreed with the district court "that filters and the Government's promotion of filters are more effective than COPA," and that the First Amendment therefore required Congress to rely on that means of protecting children. App. 42a. The court relied principally on the notion that filters, and only filters, can block harmful content originating outside the United States. Although the United States contended that COPA regulates that content as well, the court of appeals read this Court's previous opinion to reach the "express conclusion" that COPA does not apply to foreign Web sites. App. 43a.

As for the evidence that approximately half of all parents do not use filters, the court of appeals dismissed that fact as irrelevant. Although the court "recognize[d] that some of those parents may be indifferent to what their children see," it speculated that others "trust that their children will voluntarily avoid harmful material on the Internet." App. 44a. The court therefore concluded that even though filters do not protect a substantial fraction of children, that "does not mean that filters are not an effective alternative to COPA." *Ibid.*

d. Although the court of appeals concluded that it was bound by the law of the case to hold that COPA is void for vagueness, based on a footnote in its prior opinion construing the term "minor," App. 47a-48a, the court

also agreed with the district court's identification of other terms as unconstitutionally vague. See App. 48a-49a; p. 15, *supra*. Accordingly, the court held that "COPA's use of the phrases and terms 'communication for commercial purposes,' 'as a whole,' 'intentional,' and 'knowing' renders it vague, for the reasons the District Court stated in its opinion." App. 48a-49a.

8. The court of appeals denied the government's petition for rehearing en banc. App. 53a-54a.

REASONS FOR GRANTING THE PETITION

The court of appeals has again held that the Child Online Protection Act violates the First Amendment, and this Court should again review that holding. If allowed to stand, the court's decision would permanently prevent the government from enforcing COPA, and it would leave millions of children unprotected from the harmful effects of the enormous amount of pornography on the World Wide Web. The court's decision is also incorrect. COPA is the most effective means of advancing Congress's compelling interest in shielding children from the harmful effects of commercially marketed pornography on the Web. The statutory protections and affirmative defense that Congress crafted in response to this Court's decision in *Reno* v. *ACLU*, *supra*, are narrowly tailored to further that compelling interest. And COPA is neither substantially overbroad nor vague. In concluding otherwise, the court of appeals misinterpreted key terms in COPA and misapplied established First Amendment principles. Review by this Court is therefore warranted.

I. THE COURT OF APPEALS' INVALIDATION OF AN ACT OF CONGRESS WARRANTS REVIEW BY THIS COURT

The court of appeals has again invalidated the Act of Congress that was carefully crafted to further the compelling interest in protecting children from the harmful effects of pornography on the Web. Relying on the legal conclusions of a previous panel—conclusions that this Court declined to endorse when it previously reviewed this case—the court of appeals held that despite Congress's considered effort to draft a statute consistent with *Reno* v. *ACLU, supra,* COPA nonetheless suffers from the same failings as the earlier CDA. The court therefore affirmed a nationwide injunction that bars the Attorney General "from enforcing or prosecuting matters [under COPA] at any time for any conduct." App. 148a.

The court of appeals' decision renders an important Act of Congress a nullity and leaves children without enforceable protection against harmful online pornography. The court of appeals' reinstatement of its decision invalidating COPA clearly warrants this Court's review, just as the previous flawed decision did, especially now that the court of appeals has affirmed a final judgment that permanently enjoins the enforcement of COPA.

II. THE COURT OF APPEALS ERRED IN HOLDING COPA UNCONSTITUTIONAL

The court of appeals erred in invalidating COPA. COPA requires Web businesses that make harmful-to-minors communications as a regular course of their business to place such material behind age verification screens. 47 U.S.C. 231(a)(1) and (c)(1). COPA is modeled on state laws that require local stores to place pornographic material that is harmful to minors behind

blinder racks, in sealed wrappers, or in opaque covers. The courts have consistently upheld those display laws as a valid way to further the government's compelling interest in protecting minors from harmful material, without imposing an unreasonable burden on adults who seek access to such material.[2] COPA is constitutional for the same reason. Indeed, one of COPA's principal effects is merely to require commercial pornographers who already place much of their material behind screens to place their pornographic "teasers" behind those screens as well.

In nonetheless holding COPA unconstitutional, the court of appeals reiterated the constitutional objections set out in its previous opinion, which this Court declined to reach the last time the case was before the Court, and also concluded that COPA was less effective than filters. The court of appeals' analysis continues to lack merit.

This Court's previous decision principally focused on whether legislation promoting the use of filtering software would be an equally effective way of achieving the same goal. The evidence submitted below—much of it uncontroverted—demonstrates that it would not. Although filters are certainly one useful tool in shielding minors from harmful online content, they cannot do the job standing alone. Even after years of development that have made filters readily available, approximately

---

[2] *Crawford* v. *Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117 (1997); *Davis-Kidd Booksellers, Inc.* v. *McWherter*, 866 S.W.2d 520 (Tenn. 1993); *American Booksellers* v. *Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *American Booksellers Ass'n* v. *Virginia*, 882 F.2d 125 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990); *Upper Midwest Booksellers Ass'n* v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co.* v. *Casado*, 721 F.2d 1281 (10th Cir. 1983).

half of all households with children and Internet access do not use them. The use of filters is manifestly less effective—and indeed, has no effect at all—in protecting the millions of children in those households from the concededly harmful materials to which COPA is addressed. Congress could properly conclude that those children deserve effective protection too, and that the compelling interest in protecting them is in no way negated by the fact that *other* children are protected by filters on the computers *they* use. Congress therefore reasonably determined that a meaningful response to that acknowledged problem—and accomplishment of the compelling governmental purpose of protecting children from material that is harmful to them—requires age verification by the content provider, not just voluntary implementation of filters by the Internet user. For the millions of children the Third Circuit's decision leaves unprotected, filters alone are not an alternative at all, much less a more effective one.

A. COPA Is Narrowly Tailored

1. The court of appeals adhered to the prior panel's holding that COPA is not narrowly tailored because its prohibition on communications that are made for commercial purposes and harmful to minors is overinclusive. App. 22a-23a; see App. 18a-19a, 171a-179a. But the statute narrowly confines its application to material that is knowingly posted to the Web as a regular part of a profit-seeking business, a definition that cures a deficiency this Court identified in the CDA. *Reno* v. *ACLU*, 521 U.S. 844, 877 (1997). And the definition of communications harmful to minors substantially tracks the definition this Court upheld in *Ginsberg* v. *New York*, 390 U.S. 629, 646 (1968). It parallels the definition of harm-

ful to minors in state display laws. *E.g., Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618, 621 (Va. 1988). And it is analogous to the definition of obscenity that this Court upheld in *Miller* v. *California*, 413 U.S. 15, 24 (1973).

a. The court of appeals erroneously relied on two features of COPA that had incorrectly been perceived by the preliminary-injunction panel as unconstitutional defects. First, the court of appeals held that COPA's "commercial purposes" limitation is not narrowly tailored. As the court acknowledged, under that provision, a business is not covered by COPA unless it seeks to profit from harmful-to-minors material "as a regular course" of its business. 47 U.S.C. 231(e)(2)(A) and (B). But the court viewed that limitation as insufficient because Web businesses are covered even when they do not post harmful material as "the principal part" of their business, and even when they seek to profit through the sale of "advertising space" rather than the sale of harmful material itself. App. 176a, 177a.

Congress did not act unconstitutionally in declining to limit COPA in the ways proposed by the court of appeals. COPA does not cover occasional or sporadic postings, because they are not part of the "regular course" of business. But there is no basis for requiring Congress to target profit-making harmful speech only when it is "the principal part" of a particular Web site. Speech harmful to minors remains harmful even when it amounts to "only" 49% of the hosting Web site's content. And imposing a "principal part" requirement—notwithstanding the difficulty of breaking down a Web site's content into precise fractions—would create a significant loophole into which commercial purveyors of pornography could readily seek to fit. COPA's commercial-

purposes definition keeps that loophole closed and ensures that minors receive the protection they need.

Congress's extension of COPA's obligations to businesses that seek to profit from harmful material by selling advertising space is also unproblematic. Businesses that seek to profit from harmful material presumptively have the resources to bear the modest cost of compliance with COPA, whether their profits come from a business model using subscription content or one using advertising. When such businesses post harmful material as a regular course of their business, the material poses just as great a threat to minors as when it is posted for sale.

b. The court of appeals also incorrectly adhered to the preliminary-injunction panel's holding that COPA is not narrowly tailored because it provides that speech is harmful to minors only if it "lacks serious * * * value for minors." The court of appeals thought that this provision would sweep in all content that meets the other two prongs of the harmful-to-minors definition if that content lacks serious value for *any* minor under age 17, from an infant to a teenager. App. 172-173a. That holding is misguided. Material does not "lack[] serious * * * value for minors" unless it lacks such value for *all* groups of minors, including the oldest group.[3]

The court of appeals thought that this construction is textually impossible—even if it is necessary to save the statute—because "minor" is defined to include "any person under 17 years of age." 47 U.S.C. 231(e)(7). The

[3] The court of appeals appeared also to believe that the assessment of "serious * * * value" depends on the identity of the minor reading the specified material and therefore makes compliance too difficult for content providers. See App. 172a. That reading is incorrect; the material's value is assessed objectively, with respect to *minors*.

court was wrong, for two reasons. First, the operative provision considers whether material has value "for minors"—*i.e.*, for "any person[s]" under age 17, which would include those persons who constitute a legitimate minority of normal older adolescents. Second, Congress consciously used language that, in state laws regulating the display of content that is harmful to minors, has repeatedly been interpreted to incorporate the older-minor standard even when the definition of "minor" is at least as broad as COPA's. See *American Booksellers Ass'n*, 372 S.E.2d at 621, 624 (material has serious value for minors if it has serious value for a "legitimate minority of normal, older adolescents"); *Davis-Kidd*, 866 S.W.2d at 533, 534 (material has serious value for minors if it has serious value for "a reasonable seventeen year old minor"); *Webb*, 919 F.2d at 1504-1505, 1513 (same); see also H.R. Rep. No. 775, *supra*, at 13 (Congress intended to use the "familiar" definition as construed "over the years"). Because the older-minor interpretation is supported by the statutory text and context, the court of appeals erred in rejecting a construction that could avoid the constitutional difficulty the court perceived. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

The court of appeals also stated that, even if COPA incorporates an older-minor standard, "the term 'minors' would not be tailored narrowly enough to satisfy strict scrutiny" because "too much uncertitude" would still remain. App. 175a. However, COPA's standard cannot be tailored further without eviscerating its protections for minors. Indeed, not surprisingly, the court of appeals expressly refused to "suggest how Congress

could have tailored its statute" in any more narrow way. *Ibid.*[4]

2. The court of appeals further erred in holding that COPA's affirmative defense does not aid in tailoring the statute narrowly. COPA provides "an affirmative defense to prosecution" for businesses that act in good faith to restrict access by minors to harmful material, such as by requiring an adult identification to obtain access. 47 U.S.C. 231(c)(1). The court of appeals held that that defense is "'effectively unavailable'" because, in the court's view, the methods that COPA contemplates as acceptable "do not actually verify age" with sufficient accuracy. App. 29a (quoting App. 128a). And the court simultaneously held that because content providers will conform to the requirements of the defense, too much Web content will be placed under access restrictions. App. 30a-31a. Neither holding is correct.

a. No system of age verification is foolproof, and the affirmative defense Congress crafted does not require such a foolproof system. Rather, the plain terms of the statute make clear that a content provider can obtain full immunity by using credit cards or other age-verification systems in good faith to control access to harmful content. The district court and the court of appeals thought that those systems "do not actually verify age," App. 29a, because some children might impersonate adults to get an online adult access code or gain access to their parents' credit cards, App. 26a-27a. But that conclusion—which was the sole basis the courts below

[4] The court of appeals also concluded that COPA's definition of "minor" is "impermissibly vague" because it forces Web publishers to "guess at the bottom end of the range of ages to which the statute applies." App. 201a n.37; see App. 48a. Interpreting COPA to incorporate an older-minor standard eliminates that vagueness concern.

gave for concluding that the affirmative defense is "effectively unavailable," App. 29a—is entirely beside the point. The statute confers immunity on anyone who, in good faith, restricts access (*inter alia*) "by requiring use of a credit card, debit account, adult access code, or adult personal identification number." 47 U.S.C. 231(c)(1)(A). There is no requirement that any of those specified mechanisms in turn be shown in court to provide any particular degree of assurance of the user's age. Congress made a *categorical* judgment that the good-faith use of any one of those mechanisms satisfies COPA. And even if the statute could also be read in the way the court of appeals thought, the court gave no basis for refusing to apply the narrower construction, which would contribute to COPA's narrow tailoring.

b. The court of appeals concluded that the affirmative defense is itself problematic because, if a Web site conforms to the defense's standards, the provider will incur "high costs" and the users will be deterred by privacy concerns from seeking to gain access to the site. App. 31a. The court further rejected the government's argument that the burdens entailed are no different than those created by "blinder racks" used to prevent children from viewing adult magazines. The court instead held itself bound by the preliminary-injunction panel's ruling on this point, which had concluded that COPA places a greater burden on users' anonymity and imposes higher costs. App. 31a-32a.

Requiring an adult to present an adult access code, a valid credit card number, or similar proof of age to obtain access to harmful material is not an unreasonable burden, and indeed use of a credit card or other identifier is a common feature of doing business on the Internet. The court of appeals incorrectly concluded that

Congress's compelling interest in protecting minors from harmful material cannot justify those modest burdens without having an impermissible deterrent effect. But in upholding measures designed to protect children from harmful material, this Court and other courts have necessarily contemplated that those restrictions could be enforced by verifying customers' age and ensuring that they cannot obtain access to the harmful material without such verification. See note 2, *supra*; cf. *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 125 (1989) ("[T]here is no constitutional impediment to enacting a law which may impose [compliance] costs on a medium electing to provide [dial-a-porn] messages [that are lawful for some recipients but unlawful for others]."). Thus, for instance, a merchant may be required to keep adult magazines in a plastic wrapper or behind a counter off-limits to minors. A would-be reader may be required to verify his age by showing an identification card that also displays his name, and a reader or purchaser would in any event be visible to the seller and perhaps to other customers. Any resulting inconvenience or embarrassment is not a constitutionally significant burden. Cf. *United States* v. *American Library Ass'n*, 539 U.S. 194, 209 (2003) (plurality opinion); *id.* at 214-215 (Kennedy, J., concurring in the judgment); *id.* at 219 (Breyer, J., concurring in the judgment). Moreover, Internet users may be able to verify their age and gain access in private without communicating with a live human being at all—if anything, a *lesser* burden on privacy.[5]

---

[5] As for the court of appeals' concern that electronic age verification risks "creat[ing] a potentially permanent electronic record" that the customer accessed indecent content, App. 32a, COPA addresses that concern with an express privacy guarantee, backed up with criminal penalties. 47 U.S.C. 231(d)(1); see 47 U.S.C. 501.

B. There Is No Alternative To COPA That Is Equally Effective

This Court remanded the case to permit the development of a full and updated record on the question whether Congress might have been able to find an equally effective, less restrictive alternative to COPA by promoting parents' use of blocking software. *Ashcroft* v. *ACLU*, 542 U.S. 656, 668-669, 670-673 (2004). The evidence adduced shows that blocking software has limitations that make it both less effective and less comprehensive. As no party disputes, blocking software is optional, and many parents do not use it. Furthermore, despite advances, the software still blocks some sites that do not contain harmful-to-minors material and misses some sites that do. For that reason and others, parents likely will *continue* not to use it, despite any encouragement from Congress. And relying solely on blocking software, while placing none of the responsibility on the operators of pornography-purveying Web sites, would mean that whenever a child can obtain unrestricted access to a Web browser—by gaining access to a computer without filtering software or by circumventing the software in place—the entire universe of harmful speech on the Web would be open to him. As applied to commercial Web sites in the United States that display harmful material as a regular course of their businesses, COPA's screening requirement is far more effective in protecting all children.

The court of appeals, like the district court, reached the contrary conclusion by conducting a flawed analysis. First, the relevant comparison is between COPA and measures to encourage the use of filters, not between COPA and a hypothetical world in which all parents and others install filters and ensure their use on all comput-

ers to which a child has access. See *Ashcroft* v. *ACLU*, 542 U.S. at 669, 670. The evidence submitted at trial showed that approximately half of all parents with Internet access do not use filters and that government action, such as publishing reviews of the quality of competing filter products, would not increase their use. *E.g.*, C.A. App. 159-160, 439, 537-544. But the district court made no findings at all on the extent of filter use or whether *any* action by Congress could increase filter use. And even if there were some marginal increase in the use of filters as a result of encouragement by Congress, there still would be vast numbers of children left unprotected.

To the extent the court of appeals thought the proper comparison of effective alternatives was simply between COPA and filtering software, it misread this Court's opinion. As this Court repeatedly emphasized, it was considering a record that it acknowledged was limited, and it was reviewing the issuance of an injunction on these grounds for abuse of discretion. See *Ashcroft* v. *ACLU*, 542 U.S. at 660, 664-665, 666, 668-669, 670, 671, 673. Now that the fully developed record has shown the extent to which filtering software does not protect children, especially the millions of children who have access to computers without filters, the court of appeals erred in rigidly examining only the efficacy of filtering software.

Second, because of this incorrect focus, the courts below gave inadequate treatment to problems with filters that, the government's evidence showed, prevent them from being widely used and trusted. Although the district court acknowledged that filters "are prone to some over and under blocking," App. 134a, it declined to address the extent of overblocking, *i.e.*, the problem that

filters will block legitimate sites. App. 90a. Nor did it address the government's evidence that frustration with overblocking causes parents to remove filters. See C.A. App. 1561. The court also asserted that filters are "difficult for children to circumvent" by technical means (such as proxy servers). App. 92a. That conclusion is dubious in itself. See *ACLU* v. *Reno*, 31 F. Supp. 2d at 492 ("It is possible that a computer-savvy minor with some patience would be able to defeat the blocking device."). But even if it were not, it does not address an equally significant problem with relying on parents' voluntary implementation of filters: children may simply be able to obtain their parents' passwords. These inherent limitations on filters' effectiveness are a necessary part of any comparison between COPA and increased use of filters, but neither the district court nor the court of appeals addressed them.

Instead, the court of appeals speculated (unsupported by any factual findings) that parents do not use filters "because they trust their children" to "voluntarily avoid harmful material on the Internet." App. 44a. The court's speculation essentially treats Congress's concededly compelling interest in affirmatively protecting children from harmful material on the Internet as no interest at all.

Third, the court of appeals relied in part on a misreading of this Court's previous opinion. The court concluded that COPA does not reach foreign Web sites and that, as a result, any filtering software that *does* block some foreign Web sites must be "more effective in advancing Congress's interest." App. 43a. The government had explained that COPA *does* apply to foreign Web sites and, indeed, that as a practical matter many "foreign" pornographic sites are hosted on computer

servers in the United States. Gov't C.A. Br. 53-54; see also 47 U.S.C. 231(a)(1) (application to material in "foreign commerce"). The court of appeals, however, asserted that this Court "already ha[d] rejected [this] construction of the statute." App. 43a. But in suggesting that "COPA does not prevent minors from having access to * * * foreign harmful materials," this Court was not definitively construing the statute; rather, it was noting for future factual development the "*possib[ility]* that filtering software *might* be more effective" than COPA. 542 U.S. at 667 (emphases added). In fact, respondents had contended in this Court only that COPA "*cannot* restrict this content," presumably for practical reasons. Resp. Br. at 14, *Ashcroft* v. *ACLU*, *supra* (No. 03-218). And although the government acknowledged that "enforcement of COPA against foreign sites may involve practical difficulties," it did not suggest that the statute *barred* such enforcement efforts. U.S. Reply Br. at 16, *Ashcroft* v. *ACLU*, *supra* (No. 03-218).

Thus, the plain terms of COPA apply to foreign commerce. In any event, the unrebutted evidence demonstrates that a large proportion of the harmful pornographic content on the Web either originates from or is hosted on servers in the United States. *E.g.*, C.A. App. 772, 867-869. That sort of evidence was precisely what this Court contemplated that the government would amass on remand, and the court of appeals erred in regarding the issue as foreclosed by the very opinion in which this Court ordered the remand.

C. COPA Is Not Substantially Overbroad Or Vague

The court of appeals further erred in holding that COPA is substantially overbroad and vague on its face, with the result that it cannot be applied even to commer-

cial pornographers whose activities are unquestionably within the scope of constitutional regulation. In reaching that conclusion, the court relied on the same considerations that led it to conclude that COPA is not narrowly tailored. The court's flawed narrow-tailoring analysis therefore infected its overbreadth analysis as well.

1. The preliminary-injunction panel thought that COPA covers significantly more speech than necessary to achieve Congress's purpose, and accordingly found the statute overbroad. The court of appeals then adhered to that ruling in affirming the final judgment on overbreadth grounds. See App. 50a-51a. But the court of appeals' overbreadth holding overlapped substantially with its narrow-tailoring analysis, which as set forth above was erroneous. Indeed, the court's rejection of narrowing constructions was essential to its overbreadth holding. See App. 51a. For instance, as an essential part of its analysis, the court read COPA's requirement to consider material "as a whole" as an instruction *not* to consider the context in which a particular image or communication appears on the Web. App. 50a, 170a-172a; see also App. 17a-18a (alluding to, but not relying on, that interpretation of "as a whole" in discussing narrow tailoring). But in fact, "as a whole" is most naturally read (and certainly can permissibly be construed) to *include* consideration of context, which the court of appeals effectively acknowledged would resolve the objection it raised. App. 198a; see U.S. Br. at 26-29, *Ashcroft* v. *ACLU*, *supra* (No. 03-218).

That sensible construction of "as a whole" also refutes all three of the court of appeals' attempts to identify examples of protected speech that would unnecessarily be affected by COPA. See App. 198a-200a. Thus, neither in its preliminary-injunction opinion nor in the

instant opinion did the court of appeals identify *any* protected speech that would be unnecessarily affected by COPA, properly construed. There certainly has been no showing that COPA is *substantially* overbroad, "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008).

2. The court of appeals also held that COPA is vague in four respects: the set of minors that the statute's definition of "harm to minors" incorporates; the meaning of the scienter standards "knowingly" and "intentionally"; the scope of a "communication for commercial purposes"; and the application in the Internet context of the concept of evaluating a work "as a whole." App. 48a. The court gave no reasoning; it relied on a footnote in the preliminary-injunction panel's opinion, App. 201a n.37, or on the district court's analysis, App. 137a-142a. The court's cursory but sweeping vagueness holding was likewise in error. Here, too, the court found facial invalidity only by refusing to consider constitutional-avoidance constructions. For instance, the court thought that the word "minor" was impermissibly vague because Congress must have meant to cover children only beginning at some indeterminate age, rather than all children under 17. But as discussed above, the legitimate-value prong of the "harmful to minors" definition is properly construed in this context to refer to older minors, a much narrower and more discrete category. See pp. 22-24, *supra*.

Because the same errors that undermined the court's narrow-tailoring analysis are present in its vagueness ruling, that additional ground for invalidating the statute fails as well.

* * * * *

The upshot is that the court of appeals has permanently enjoined an important Act of Congress, enacted to protect the well-being of the Nation's youth, based on a misinterpretation of the statute's terms, of this Court's precedents, and of the record in this case. While it is unfortunate that this case necessitates review in this Court again, the court of appeals' decision permanently enjoining COPA calls out just as strongly—if not more so—for this Court's review than did the court of appeals' decisions preliminarily enjoining that statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
WILLIAM M. JAY
Assistant to the Solicitor General
SCOTT R. MCINTOSH
CHARLES W. SCARBOROUGH
Attorneys

OCTOBER 2008