No. 03-218

# In The Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

*Petitioner*

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF OF *AMICI CURIAE* VOLUNTEER LAWYERS FOR THE ARTS AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF RESPONDENTS


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## QUESTION PRESENTED

Whether the Child Online Protection Act, 47 U.S.C. § 231, violates the First Amendment by criminalizing non-obscene speech on the World Wide Web on the basis of its content when the statutory prohibition is not sufficiently tailored to constitute the least restrictive means of achieving the government's interest.

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## INTEREST OF *AMICI CURIAE*[1]

*Amicus curiae* Volunteer Lawyers for the Arts ("VLA") is a not-for-profit organization that provides legal advice and assistance to low-income artists and non-profit artistic organizations. VLA's clients include the entire spectrum of New York's arts community, including visual arts, theatre, dance, writing, music, film, photography, graphic arts, performance art, multimedia, fashion design, and crafts. During the last fiscal year, VLA assisted more than 8,500 individual artists and arts organizations on more than 10,000 arts-related legal matters. The question of potential criminal liability for the content of art has arisen repeatedly as VLA provides its clients legal advice. The fear that legitimate artists may get caught in the capacious language of the Child Online Protection Act was confirmed by the United States' representation in an earlier phase of this litigation that photographs produced by noted artist Andres Serrano would be included within the meaning of "materials harmful to minors" and thus subject to criminal prosecution under COPA.

*Amicus curiae* People For the American Way Foundation ("People For") 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, People For now has more than 600,000 members and supporters nationwide. People For has for many years published reports documenting

[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of this Court along with this brief, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

tremendous differences in standards among communities regarding the appropriateness of particular materials for minors.

VLA and People For often file briefs in this Court to provide the views of artists and other persons concerned about limitations on First Amendment freedoms. VLA and People For filed a joint *amicus* brief in support of respondents when this Court last considered the validity of the preliminary injunction in this case in *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

## SUMMARY OF ARGUMENT

As written, and even with the interpretive glosses offered by the United States, the Child Online Protection Act ("COPA") is so inartfully drawn that it will inevitably force *amicus* VLA to advise certain of its artist clients to curtail their protected First Amendment speech on the World Wide Web in order to avoid the risk of arrest, prosecution, and possibly conviction under COPA.

A. COPA is not sufficiently tailored to target only the commercial pornographers that the government claims an interest in regulating. COPA's requirement that the material on the World Wide Web be "taken as a whole" in judging its literary, artistic, political, or scientific value for minors does not limit the breadth of the statute. The most natural reading of the statutory text is that each image must be considered alone, and not as part of the web page or web site on which it is posted. The United States appeared to have adopted that reading of the statute in an earlier phase of this litigation when it argued that COPA's criminal sanctions could apply to a web page in the record containing sexually explicit photographic images used in conjunction with an art review. So understood, COPA unconstitutionally denies a factfinder the opportunity to review the context surrounding the image in determining whether it has serious artistic or other value to minors.

The Executive Branch's subsequent, shifting efforts during the course of this litigation to give meaning to the phrase "taken as a whole" highlight the work left undone by Congress in applying that phrase, without elaboration or guidance, to the inherently fluid and non-linear World Wide Web. Persons on the Web have very little control over the context in which their pages (or images on those pages) are viewed. By use of links and bookmarks the public is generally free to go directly to a particular page. Search engines also allow a person to search for and view particular images or photographs on the Web by name, subject, or artist, bypassing the entire context of a web site and web page. The availability of interactive and multi-media presentations on the Web likewise raises novel issues in applying the "taken as a whole" provision. Therefore, the nature of the Web makes it impossible to rely on the unadorned "taken as a whole" approach that has been used to protect the First Amendment rights of artists and others who present graphic sexual content in physical stand-alone works such as books and movies.

COPA's reliance on "community standards" increases the statute's chill of constitutionally protected speech. The United States has maintained that it is free to initiate a COPA prosecution against a speaker anywhere in the United States. Yet no national consensus exists regarding what constitutes sexual material that is harmful to minors. To the contrary, as demonstrated in reports produced by *amicus* People For, this nation contains communities that hold sharply different standards regarding what materials are harmful to minors. Because present day technology does not permit a speaker using the Web to publish his works only to specific geographic locales, COPA's reliance on a "community standard" element to define proscribed material necessarily leads to the most puritanical view of what constitutes prohibited speech governing content for the entire nation.

Finally, the plain meaning of COPA's broad definition of "commercial purposes" extends far beyond pornography vendors – the government's purported target – to include many individual artists and not-for-profit organizations. Even accepting the government's awkward reading of the statute to require that a speaker "regularly" seek to profit from harmful material, the concept of "regularly" communicating is difficult to apply on the World Wide Web. For example, the 1997 art review containing photographs that the government once described as falling within the scope of COPA's proscription is still on the Web, and it thus could be argued that its publisher is "regularly" seeking to profit from that material by not removing it from the web site. The United States' proposed reading thus does not reduce the overbreadth of the statute.

B. COPA's affirmative defenses (*e.g.*, exempting speakers who require viewers to use credit or debit cards or adult access codes) are equally useless in ensuring the statute's constitutionality. Such affirmative defenses provide no practical option for smaller artists and not-for-profit groups that fall within COPA's scope. Implementing either form of screening is difficult, expensive, and may require major reorganization of a web site. Moreover, just implementing such screens will reduce traffic to a web site and thus curtail the adult audience for the art. Despite the unduly high burdens, the government has not shown that the defenses, in fact, further its interest in shielding minors from harmful material because, for example, some minors lawfully possess credit cards.

Making the use of credit and debit cards or adult access codes affirmative defenses in a criminal case also improperly shifts the burden of proof from the government to the artist. This Court has recently cautioned that the government may not satisfy First Amendment concerns by requiring a defendant to mount an affirmative defense in order to avoid conviction for speech. *See Virginia v. Black*, 123 S. Ct. 1536 (2003). The affirmative defenses provide no protection from arrest, indictment, and prosecution. An

arrest or the initiation of a criminal prosecution against an artist produces immediate harm and longlasting opprobrium that will not be cured even by a likely acquittal at trial.

Finally, COPA's affirmative defenses are underinclusive. COPA provides no relief for a web site that takes steps to ensure that readily available filtering software will block the web site or that uses warning labels on a site. The United States suggests that filtering software cannot be compared to the criminal prohibitions because obtaining filtering software imposes some burden on parents. But it is a burden that parents shoulder only if they elect to pay to have Internet service in their home and to allow their children unsupervised access to the World Wide Web. The United States fails to note, moreover, the less intrusive steps that Congress has taken to protect minors from harmful materials on the Internet, including encouraging the distribution of filtering software through tax incentives, prohibiting the use of misleading domain names to lure minors to pornographic sites, and creating a safe haven on the Web for parents who wish to allow their minors to be on that portion of the Web unsupervised. The United States has not shown that the broad reach of COPA's criminal sanctions is required to redress whatever lingering problem remains regarding minors having access to "harmful to minors" material.

## ARGUMENT

### COPA'S CONTENT-BASED CRIMINAL PROSCRIPTION IS NOT THE LEAST RESTRICTIVE MEANS OF ACHIEVING THE GOVERNMENT'S INTERESTS

The Child Online Protection Act ("COPA"), 47 U.S.C. § 231, like its predecessor the Communications Decency Act ("CDA"), which was found unconstitutional in *Reno v. ACLU*, 521 U.S. 844 (1997), criminalizes the communication of constitutionally protected non-obscene expression. As a content-based regulation of protected speech, the

United States must demonstrate that COPA is the least restrictive alternative available to achieve a compelling governmental interest. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). Instead, COPA unduly chills significant amounts of constitutionally protected speech by imposing a real threat of arrest and prosecution on artists, even those who could ultimately defend against such a charge at trial.

The World Wide Web is breaking down the barriers between artists and their public. For the first time, relatively unknown artists and small, not-for-profit organizations – historically lacking the means to attract a widespread audience for their endeavors – can instantly reach a worldwide public by placing a "site" on the World Wide Web or establishing "links" from other web sites to their own creative works. The consequence of this technological revolution has been an astounding explosion in both the diversity of artistic expression and the public's access to those creative labors.

Through the Web's unique ability to disseminate their works for both public appreciation and potential purchase, aspiring playwrights, novelists, filmmakers, poets, painters, sculptors, and musicians can sustain and support their artistic endeavors. The ultimate beneficiary of this technological revolution is the public. The convenience and economy of "virtual" visits to a web site maintained by an artist, author, musician, filmmaker, gallery, museum, or library mean that those who were once too poor, too busy, or too far away to view, read, or listen to artistic expression can now freely receive those works of art.

Artists sometimes deliberately provoke their audience, goading us to question ourselves and the world around us. Aristophanes did so in his *Lysistrata*, a bawdy plea for peace, and artists continue to do so today with deliberately disturbing, explicit, and provocative images. Such provocations are by no means unthinking; rather,

they are intended to prod the viewer and society to greater examination and analysis. Such useful provocations will not take place, however, if fear of the government censor comes between society and the best efforts of its artists. Meanwhile, other art, while not intended to provoke, may inadvertently offend the mores of certain communities. It is "well established" that the Constitution protects such speech from suppression even though "it concerns subjects offending our sensibilities." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).

*Amicus* VLA provides legal advice to artists, many of them of limited means and unknown in the general art world. Some of VLA's clients clearly address very controversial subject matter in their works: one client with a web site is the estate of a highly regarded photographer who often dealt with themes of being gay and Asian in Western culture; VLA also represents a number of rap, "hip-hop," and punk artists with sexually explicit music lyrics. Because their work often involves controversial subjects and themes, they have reason to be concerned that unduly broad content-based laws criminalizing speech may be used to target their art.

### A. COPA Is Not Sufficiently Tailored To Target Only The Commercial Pornographers That The Government Seeks To Regulate

The United States argues that COPA is directed primarily against commercial pornographers who "already put most of their material behind age verification screens," and that COPA's "principal effect is to require commercial pornographers to put their pornographic teasers behind those screens as well." Pet. Br. 27. Unfortunately, COPA was not narrowly written to apply only to such web sites. Instead, COPA applies to "*any* communication for commercial purposes" on the World Wide Web that includes any "picture, image, graphic image file, article, recording, writing, or other matter of any kind" that is deemed

"harmful to minors" as further defined by the statute. 47 U.S.C. § 231(a)(1), (e)(6) (emphasis added).

### 1. COPA's "taken as a whole" provision is not an adequate tailoring mechanism in light of the unique characteristics of the World Wide Web

In *Reno v. ACLU*, the Court held that one of the constitutional flaws of the CDA was that it failed to make clear to the public what types of material were proscribed and did not exempt material that adults were constitutionally entitled to receive and address to one another. *See* 521 U.S. at 872, 874. From the view of an attorney attempting to provide legal advice to an artist or other speaker, COPA provides no relief from the breadth and uncertainty of the CDA regarding what a speaker may make available on a web site without fear of prosecution.

a. COPA makes it criminal for a person to make available by means of the World Wide Web "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) (emphasis added). COPA provides that, in determining whether "material" is "harmful to minors," a factfinder must "tak[e] the material as a whole" and assess whether it is designed to appeal to the prurient interest, applying contemporary community standards, and whether it "lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. § 231(e)(6).

Because the statute describes the harmful-to-minors "material" as being "include[d]" in a prohibited communication, it is plain that Congress intended that such "material" be viewed as a sub-set of the entire communication. Thus, the most natural reading of the statute is that it is not the "communication" that must be "taken as a whole;" instead, it is only the individual "material." The statutory

text therefore indicates that a factfinder making a judgment about the literary, artistic, political, or scientific value of "material" should consider only the particular "picture, image, graphic image file, article, recording, writing, or other matter," 47 U.S.C. § 231(e)(6), as the "whole."

The United States' attempts to describe how the "whole" would be measured under COPA have not clarified matters. The United States appeared to have adopted the most natural reading of the statute, discussed above, in an earlier phase of this litigation. The government argued that COPA's criminal sanctions apply to a web page in the record displaying photographs from noted photographer Andres Serrano's "A History of Sex" series. Describing the web page as containing "photographs of abnormal sexual acts," the United States contended that a web page from an online magazine *Artnet* (available at www.artnet.com/magazine) "would likely not be excluded from [COPA's] coverage as a matter of law" when the page included some of Serrano's photographs from the series along side a review of those photographs. 00-1293 Pet. Rep. Br. 9 (discussing photographs reprinted at C.A. App. 710-713).

The photographs identified by the United States as "harmful to minors," and thus lacking "serious * * * artistic value for minors," 47 U.S.C. § 231(e)(6)(C), were commissioned by the Groninger Museum and have been displayed in museums and galleries in the United States and elsewhere. These photographs, arrayed alongside an art review on a web site devoted to art, involved serious artistic content for older minors when "taken as a whole" in light of both the web page and the web site. The United States, therefore, did not rely on that whole, but rather relied solely on the image in each photograph, individually

and apart from the remainder of the web page and site to make its judgment.[2]

So understood, COPA thus deprives a factfinder of an opportunity to review the context surrounding the posting of a photograph or other image in determining whether it has serious artistic or other value for minors. That raises the precise problems this Court found fatal in *Reno v. ACLU*, and again, more recently, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002), because it makes speech between adults subject to criminal sanctions simply because it contains sexual content.

b. Assuming the government is now correct that Congress intended more than the individual photograph, painting, or other image to be considered in assessing whether the material is "harmful to minors," *e.g.*, lacking in serious literary, artistic, political, or scientific value for minors, the United States does not satisfactorily explain how the statute gives sufficient notice to an attorney or artist as to how a "taken as a whole" approach is to be applied on the World Wide Web.

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[2] When the issue of this particular artwork was raised at oral argument before this Court in the earlier litigation phase, the Solicitor General stated that "additional research" had indicated that the photographs were "a small portion of a large compilation" of photographs shown together at an art gallery and that he did not "know how that would come out when all of the evidence came in with respect to that." 00-1293 Oral Arg. Tr. 23 (Nov. 28, 2001). The Solicitor General did not retreat from the government's more general contention that whether that web page violated COPA was an evidentiary issue, apparently for a jury to resolve after arrest and indictment. Moreover, to the extent the United States was suggesting that the context by which it is determined whether a communication on the World Wide Web is prohibited must include how the materials were previously displayed in the physical world, it has not subsequently renewed that contention.

On remand to the court of appeals after this Court's decision in *Ashcroft v. ACLU*, 535 U.S. 564 (2002), the United States asserted that the proper "whole" to consider is "often" the "accompanying material on the same Web page itself;" that one can also consider "Web pages through which the user is required to travel to reach the disputed image;" and that "in appropriate circumstances, context may even be provided by material contained on pages on the same Web site – although the other pages must, at a minimum, be 'rationally related' to the disputed image." Pet. C.A. Rep. Br. on Remand 6 & n.2. Focusing again on the web page containing Serrano's photographs, the United States reiterated on remand that those photographs are not, as a matter of law, within COPA's exception for materials having serious literary, artistic, political, or scientific value for minors, and insisted that it would "not be dispositive" that "a sexually explicit image appears as an illustration of a review essay on art." Pet. C.A. Rep. Br. on Remand 6.

Shifting positions again, in its briefs filed in this Court in the current appeal from that remand, the government now asserts (Pet. Br. 28) that the "whole" that must be assessed is "in general" "an entire Web site." The United States claims that, "if an explicit work of art appears on a Web site devoted to serious art, that explicit work of art should be evaluated in the context of the entire Web site." Pet. Br. 29; *see also* Pet. Rep. Br. in Support of Cert. 6 (a person who "posted just one Serrano photograph on the Artnet Web site" would *not* be liable under COPA because "[t]aking COPA's 'in context' requirement into account, [it] would [not] be harmful to minors."). That proposition wholly contradicts its earlier representations that the Serrano photographs are not, as a matter of law, excluded from COPA's criminal prohibition. *See* 00-1293 Pet. Rep. Br. 9; 00-1293 Oral Arg. Tr. 23 (Nov. 28, 2001).

c. All of the government's proposed glosses on the text of the statute are problematic because they fail to

address the unique characteristics of the World Wide Web. The inherently fluid nature of the Web makes it inappropriate to import wholesale the "taken as a whole" approach that has been applied to protect the First Amendment rights of artists and others who present graphic sexual content in physical stand-alone works such as books and movies.

First, the United States relies on a linear understanding of web pages and web sites, in which there is only one way to get to each page. But that is wholly foreign to the World Wide Web. Persons on the Web have very little control over the context in which their pages (or images on those pages) are viewed. By use of links and bookmarks, the public is generally free to by-pass the web site's introductory pages and go directly to a particular page. Indeed, the web pages of third persons linking to an artist's web page can present the artist's web page in a context that the artist does not control, may not intend, and even opposes. "[T]he use of links effectively excerpts that document by eliminating content unrelated to the link." *Reno v. ACLU*, 929 F. Supp. 824, 871 n.11 (E.D. Pa. 1996) (three-judge court) (opinion of Dalzell, J.), *aff'd*, 521 U.S. 844 (1997).

The same is true when a link to the web page is generated by a search engine that provides it as part of a list of purportedly related web pages. Search engines such as Google have features that allow a person to search for particular images or photographs on the World Wide Web by name, subject, or artist. By typing in the words "Andres Serrano" in a search engine that searches for images on the World Wide Web, a viewer is able to link directly to an image, and bypass the entire context of a web site and web page. Although the search engine would not be liable under COPA because it is expressly exempted from coverage, *see* 47 U.S.C. § 231(b)(3), (e)(5), the United States seems to suggest that anyone else linking to the image could be liable under COPA. *See* Pet. Br. 29; *see also* Pet. App. 130a (FF 24) (noting that one of the plaintiffs feared

prosecution for having links in articles on its site to other web sites on the World Wide Web).

This characteristic of the Web distinguishes it in relevant respects from the physical stand-alone works involved in earlier cases that have come before this Court. For example, although an author of a book cannot control whether people read only its erotic passages, at least there is a physical book that can be objectively said to constitute the "whole" communication of the author. That is simply not true of the World Wide Web. As the United States stipulated below, "the fact that each of [the computers storing information] is connected to the Internet through World Wide Web protocols allows all of the information to become part of a single body of knowledge." Pet. App. 126a (FF 12).

We do not suggest that it is impossible to devise a standard that relies on "context" in assessing the literary, artistic, political, or scientific value of materials on the World Wide Web. Congress simply did not address the unique characteristics of the World Wide Web when it enacted COPA. The Executive Branch's shifting attempts during the course of this litigation to give meaning to the phrase "taken as a whole" simply highlights the work left undone by Congress. It is not for the courts to rewrite the statute to resolve these difficult and novel issues. *See Reno v. ACLU*, 521 U.S. at 884-885.

Second, although the United States' brief is focused on photographs, the text of the statute is not limited to images alone, but applies to text, sounds, "or other matter of any kind." 47 U.S.C. § 231(e)(6). The World Wide Web's format, with its integration of text, "hypertext," graphics, and sound, has created a new art. Artists, experimenting with the possibilities, are creating poems, stories, and songs that fuse all these elements. Some artists have web pages where they allow the public to listen to samples of songs or even entire songs, and to read the lyrics at the same time.

A viewer's actions can affect, in unpredictable ways, the context provided by the web site. If the text of the lyrics to one song contains sexual content, should the question whether the text is "harmful to minors" be judged based on the text alone, or in combination with the sound and video clip that can (but need not) be activated at the same time? *Cf. Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir.) (lyrics and music of album must be considered together to determine whether album is obscene), *cert. denied*, 506 U.S. 1022 (1992). And should the lyrics be viewed along with other songs that were part of the music album when it was originally distributed in the physical form of a compact disc, but which are available only on separate pages of the web site or through links to another web site maintained by someone else? Congress provided no answers to such questions, and the government is silent on the matter. This uncertainty is precisely the situation prohibited under the First Amendment because such ambiguity has the real potential of unconstitutionally chilling substantial amounts of protected speech. *Cf. Reno v. ACLU*, 521 U.S. at 879 ("Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for First Amendment purposes.").

### 2. COPA's reliance on local community standards imposes an added chill in a medium in which a speaker cannot limit his speech to specific geographical areas

Even if the "taken as a whole" provision gave sufficient guidance to artists and other speakers on the World Wide Web, COPA still does not avoid unconstitutionally chilling substantial amounts of protected speech because it does not provide a speaker (or his lawyer) with a clear understanding of which "contemporary community standards," 47 U.S.C. § 231(e)(6)(A), will apply.

In *Reno v. ACLU*, the Court held that one of the flaws of the CDA was that it provided that any communication on the World Wide Web would "be judged by the standards of the community most likely to be offended by the message." 521 U.S. at 878. In *Ashcroft v. ACLU*, various members of the Court expressed different views regarding the appropriate community by which materials on the Web are to be judged under COPA. *See* 535 U.S. at 576-577 (plurality opinion of Thomas, J.) (standards of local community); *id*. at 587 (O'Connor, J., concurring) (standards of national community); *id*. at 590 (Breyer, J., concurring) (standards of national community); *id*. at 596 (Kennedy, J., concurring) (not addressing question); *id*. at 607 n.3 (Stevens, J., dissenting) (standards of local community). Such a divergence of reasonable interpretations, although not alone rendering COPA unconstitutional, raises serious risks for the creative community in determining whether to post works on the World Wide Web.

The beauty and power of the World Wide Web lies in the ability of a speaker to simultaneously address a global audience, and in the ability of a user to access communications from every corner of the nation. Yet no national consensus exists regarding what constitutes sexual material that is harmful to minors. To the contrary, as demonstrated in reports produced between 1985 and 1996 by *amicus* People For the American Way Foundation, this nation contains communities that enforce sharply different standards regarding what materials have sufficient literary, artistic, political, or scientific value for minors. For example, during the 1994-95 school year, Maya Angelou's autobiographical novel *I Know Why the Caged Bird Sings* was removed by a Texas school board from a ninth grade honors English class because of sexual content, while at the same time a Kansas school board approved its use for grades eight through twelve. Similarly, Aldous Huxley's *Brave New World* and J.D. Salinger's *Catcher in the Rye* have both been subject to removal from schools in some communities, but taught in others. Because present day technology does not permit a speaker using the World

Wide Web to publish his works only to specific geographic locales, *see* Pet. App. 128a (FF 18), reliance on a community standard element to define proscribed material would necessarily lead to the most puritanical view of what constitutes prohibited speech governing content for the entire nation.

Indeed, the United States has maintained that it is free to initiate a COPA prosecution against a speaker anywhere in the United States because a communication on the World Wide Web is available nationwide. *See* Pet. C.A. Br. on Remand 33 n.11. Thus, for example, a virtual art gallery or art magazine must consider whether it would face possible arrest, indictment, or prosecution based on the display of a photograph depicting nudity simply because a prosecutor may have probable cause to believe a conservative American town might view such a display of nudity to be "harmful to minors." *See Wisconsin v. Stankus*, No. 95-2159-CR, 1997 Wisc. App. LEXIS 138, at *2-3 (Wisc. App. Feb. 13, 1997) (photograph of a woman with a shirt open to the waist, displaying portion of breast but not displaying nipple, falls within state "harmful to minors" law).

One who places an artistic image or communication on the World Wide Web can have no way of knowing which zealous prosecutors will seek to apply their communities' standards to that work: rather than risk offending a very few, the artist, author, gallery, museum, or literary magazine facing the challenged criminal provisions of the COPA must forsake the opportunity to communicate with the very many.

### 3. COPA's "commercial purposes" provision does not sufficiently tailor the statute to commercial pornographers

In *Reno v. ACLU*, the Court held that one of the flaws of the CDA was that it failed to distinguish between those

"commercial" web sites that could afford to install technology to verify that their viewers are adults and other site operators. *See* 521 U.S. at 877, 881-882. The United States has argued that, by requiring that the communication be for "commercial purposes," Congress targets COPA at "a billion-dollar" commercial pornography industry "that makes staggering profits through the sale – day-in and day-out – of a wide variety of patently offensive prurient material with no claim at all to serious value for minors." Pet. C.A. Rep. Br. on Remand 3 n.1. Unfortunately, COPA's broad definition of "commercial purposes" extends far beyond the "commercial providers of sexually explicit material" referenced by the Court in *Reno v. ACLU*, 521 U.S. at 881, to include many web sites used by individual artists and not-for-profit organizations that cannot bear the costs of complying with COPA.

COPA's criminal sanctions apply to a person who "makes any communication for commercial purposes." 47 U.S.C. § 231(a)(1). By requiring an inquiry only into whether the "purpose" of the communication was "commercial" (*i.e.*, whether the communication was done with the objective of earning a profit as part of the person's trade or business, *see id*. § 231(e)(2)), the statute includes many artists within its scope. *Amicus* VLA's clients devote extensive time to their web pages, sometimes as a primary means of publishing their works. Many clients tend to be less well-known "starving artists" who do not have access to gallery representation, museum exhibitions, publishing companies, or recording contracts with record labels. In displaying their work on their web pages, one of their objectives is to make potential buyers aware of their work and to enhance their reputation and increase the price of their works. These artists clearly intend to earn a profit as a result of their activities on the World Wide Web and, therefore, have "commercial purposes."

The government attempts to avoid the overly-broad reach of the statute's plain language by urging (Pet. Br. 32-33) that the definition of "commercial purposes" requires a

determination that a speaker "regularly" makes communications that contain harmful-to-minors material with the objective of earning a profit. It is difficult to read COPA's definition of "commercial purposes" to impose the government's proposed "regularity" requirement.[3] But even accepting the government's reading of the statute to require that a speaker "regularly seek to profit from harmful material," Pet. Br. 32, the concept of "regularly" communicating is difficult to apply on the World Wide Web. A web page may remain unchanged on the World Wide Web, available to all, for a number of years. Or, even if superceded by more recent pages (as might occur in an on-line magazine), earlier "editions" of the page remain available on the web site. For example, the 1997 review of the Serrano photographs that the government once described as falling within the scope of COPA's proscription is still on the *Artnet* web site and it thus could be argued

[3] Congress specified in COPA that a person "shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications." 47 U.S.C. § 231(e)(2)(A). A person "who makes a communication * * * that includes any material that is harmful to minors" is "engaged in the business" if the person "devotes time, attention, or labor to *such activities*, as a regular course of such person's trade or business, with the objective of earning a profit as a result of *such activities*." *Id*. § 231(e)(2)(B) (emphases added). The most natural reading of the text would be that the phrase "such activities" refers back to the phrase "makes a communication * * * that includes any material that is harmful to minors."

Because the term "communication" means a web page or web site, the language of the statute treats as "commercial" any speaker that "devotes time, attention, or labor" to his web page or web site "as a regular course" of his business "with the objective of earning a profit" from the web page or web site, so long as the web page or web site "includes any material that is harmful to minors." There is no requirement that the harmful-to-minors material be a substantial part of the speaker's communication. Instead, the speaker's communication need only "include[ ] any" such materials. 47 U.S.C. § 231(e)(2)(B).

that *Artnet* is "regularly" seeking to profit from that material by not removing it from the web site. The United States' proposed reading thus does not reduce the breadth of the statute.

The United States now appears to suggest (Pet. Br. 34) that a party must add *new* harmful-to-minors materials on a regular basis in order to be regularly displaying such materials. It is not at all apparent how the statutory phrase "as a regular course of such person's trade or business" was intended by Congress to distinguish between a static web site that continues to communicate the same harmful-to-minor materials for a long period of time and an actively updated web site that replaces one set of harmful-to-minors materials with another.

The United States contends (Pet. Br. 33-34) that a more tailored definition of "commercial purposes," one that would include only those communications that include harmful-to-minors materials as a "principal part" of their business, would allow the government's true target – commercial pornographers – to take advantages of such "loopholes" and evade COPA's reach. In essence, the United States contends that the government needs a prophylactic criminal rule, one that sweeps in artists and other speakers, in order to address the problems caused by "pornography vendors." Pet. Br. 34. But "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone." *NAACP v. Button*, 371 U.S. 415, 438 (1963). This is particularly true in light of the less restrictive alternatives that are available for achieving the government's interests discussed below. *See* pp. 27-30, *infra*.

The cost for an individual artist of guessing wrongly about whether his web site will be viewed as a communication made for "commercial purposes" that includes "harmful to minors" material is high. Each violation can

lead to a six-month term of imprisonment and a $50,000 fine.[4] Even if these were viewed as slight penalties (and from the perspective of the individual they are not), the statute would still be unconstitutional because "even minor punishments can chill protected speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).

### B. COPA's Affirmative Defenses Do Not Mitigate Its Unconstitutional Chilling Effect

The United States suggests (Pet. 35, 38-39) that, by providing affirmative defenses to persons who have web sites and web pages if those persons require the use of a credit or debit card or "adult access code, or adult personal identification number" to access their material on the World Wide Web, 47 U.S.C. § 231(c)(1)(A), COPA protects an artist from regulation and prosecution.[5] But such affirmative defenses provide no practical option for many individual artists and not-for-profit groups that nonetheless fall within COPA's definition of "commercial" web sites. Moreover, the defenses provide protection only against ultimate conviction, and not against arrest, indictment, or prosecution. Because one distinctive feature of the artists and not-for-profit arts organizations who comprise *amicus* VLA's clients is their impecuniousness, the economic cost of compliance with the affirmative defenses and the chilling effect of an arrest or prosecution, loom large as VLA advises them with regard to compliance with COPA.

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[4] A $50,000 civil penalty may also be imposed for each day of violation, *see* 47 U.S.C. § 231(a)(3), a question submitted to a civil jury to be decided by the preponderance of the evidence, *see Tull v. United States*, 481 U.S. 412 (1987). And a $75,000 civil forfeiture may be imposed for each continuing violation, with no right to a jury trial. *See* 47 U.S.C. § 503(b)(2)(C).

[5] The parties agreed that the other affirmative defenses specified in Sections 231(c)(1)(B) and (C) are not currently available or technologically feasible. Pet. App. 137a (FF 37).

### 1. COPA's affirmative defenses impose substantial burdens on constitutionally protected speech that is not commercial pornography

COPA's affirmative defenses impose multiple burdens on artists and not-for-profit arts groups. First, it has been the experience of *amicus* VLA's artist clients that implementing either form of screening identified in the statute's affirmative defenses (*e.g.*, credit or debit cards or adult access codes) is difficult, expensive, and may require major reorganization of a site. *See* Commission on Child Online Protection, *Report to Congress* 25 (2000) ("COPA Report") ("it may be difficult or burdensome for small or non-commercial sites to implement card verification systems"); *id*. at 27 (age verification system "imposes high costs on content sources that must install systems and might pay to verify I.D.s.").

Second, as the district court found, implementing such screens will reduce all traffic to a web site, not just that of some minors, and thus will curtail the adult audience for the art. Pet. App. 147a (FF 63) ("implementing the affirmative defenses in COPA will cause most Web sites to lose some adult users to the portions of the sites that are behind screens"). Indeed, other than a few unusual counter-examples (such as the *Wall Street Journal*), the district court credited testimony that "users will only reveal credit card information at the time they want to purchase a product or service." Pet. App. 136a (FF 36). This is consistent with the experiences of VLA's clients. Even adults who are willing to register and give credit card information to large companies with sophisticated security and privacy protection devices are not willing to provide personal or financial information to an unknown artist. This is especially so if the demand comes before the viewer has seen the content of the site.

Despite the unduly high burdens, the government has not shown that the defenses, in fact, further its interest in shielding minors from harmful material. The district court

noted that the government had "presented no evidence" to contradict testimony introduced by respondents that "a minor may legitimately possess a valid credit or debit card." Pet. App. 140a (FF 48); *see also id*. at 159a; COPA Report, *supra*, at 25 ("some children have access to credit cards"); National Research Council, *Youth, Pornography and the Internet* 349 (Dick Thornburgh & Herbert S. Lin eds., 2002) ("as credit cards (and prepaid cards usable as credit cards) are increasingly marketed to adolescents as young as 13, such [adult verification technologies] will become less useful"). Thus, just as with the CDA, "the Government failed to adduce any evidence" credited by the district court "that these verification techniques actually preclude minors from posing as adults." *Reno v. ACLU*, 521 U.S. at 882.

### 2. COPA's affirmative defenses do not protect artists from the opprobrium associated with arrest, indictment, and prosecution

a. Apart from the technical and monetary limits that make reliance on the affirmative defenses unavailable to many artists and other speakers, imposing the credit and debit cards or adult access code as affirmative defenses in a criminal case also improperly shifts the burden of proof from the government to the artist.

COPA's prohibition on making a communication that is available to minors and that includes any material that is harmful to minors, standing alone, would be unconstitutional because it "has the invalid effect of limiting the content of adult [communications] to that which is suitable for children to hear." *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 131 (1989). That is because all web pages are "available" to all World Wide Web users and because there is no existing means of excluding all minors, thereby rendering all web sites always "available to any minor" as that term is used in the statute.

COPA attempts to avoid that problem by providing defendants with affirmative defenses if they use means of screening viewers that Congress thought would exclude many minors. But this Court has recently cautioned that the government may not satisfy First Amendment concerns by requiring a defendant to mount an affirmative defense in order to avoid conviction for speech. A statute is unconstitutional under the First Amendment if it permits the government "to arrest, prosecute, and convict a person" who has engaged in presumptively protected speech and who elects to "exercise [his] constitutional right not to put on a defense." *Virginia v. Black*, 123 S. Ct. 1536, 1550-1551 (2003) (opinion of O'Connor, J.); *see also Free Speech Coalition*, 535 U.S. at 255 (statute raises "serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful"). That describes COPA.

The United States provides no compelling reason for not imposing the burden on the government to show beyond a reasonable doubt that a web site has not engaged in efforts to exclude minors – instead of imposing the burden on speakers, as COPA does. It is plainly not unworkable to do so. To the contrary, in a simultaneously enacted provision that attempts to encourage web sites to require credit card or adult access code for harmful-to-minors materials by denying them the benefit of an exemption from state and local taxes when they do not do so, Congress did not make the screening a separate affirmative defense. *See* Internet Tax Freedom Act, Pub. L. No. 105-277, div. C, title XI, § 1101(e)(1), 112 Stat. 2681-719 (1998), *reprinted at* 47 U.S.C. § 151 note.

b. Even if an affirmative defense is available and is successfully invoked at trial, the availability of such a defense does not protect an artist from arrest, indictment, and prosecution. "Because [the affirmative defense] in no way shields a content provider from prosecution, it cannot be said that [it] eliminate[s] any chilling effect that the [criminal] provision otherwise would have." *Shea v. Reno*,

930 F. Supp. 916, 944 (S.D.N.Y. 1996) (three-judge court), *aff'd mem.*, 521 U.S. 1113 (1997).

An arrest or the initiation of a criminal prosecution against an artist immediately produces "a wrenching disruption of everyday life." *Young v. United States*, 481 U.S. 787, 814 (1987). Every arrest and prosecution "is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion*, 404 U.S. 307, 320 (1971). These burdens are felt with force by impecunious individuals such as *amicus* VLA's clients.

"An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a * * * conviction, that his conduct falls within the affirmative defense." *Free Speech Coalition*, 535 U.S. at 255. In obtaining an indictment and proceeding to trial, a federal prosecutor is not constitutionally required to investigate whether a person will be able to rely on COPA's affirmative defenses or report the findings of any such investigation to the grand jury or the court prior to trial. *See United States v. Williams*, 504 U.S. 36, 51-52 (1992) (prosecutor not required to bring exculpatory evidence to the attention of grand jury; "it is the grand jury's function not 'to enquire . . . upon what foundation [the charge may be] denied,' or otherwise to try the suspect's defenses, but only to examine 'upon what foundation [the charge] is made' by the prosecutor").

To the extent a judge is involved at all at these preliminary stages, the government must establish only probable cause that a crime has been committed and need not address affirmative defenses. *Cf. United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993) (when a judge assesses whether probable cause exists to believe that real property was used to facilitate a felony, "[t]he Government is not required to offer any evidence on

* * * potential defenses a claimant might have"). A court making a probable cause determination may rely on the prosecutor's descriptions of the "content and character" of materials and need not view them itself in determining whether there was a "fair probability" that the speech is illegal. *See New York v. P.J. Video, Inc.*, 475 U.S. 868, 874 n.5, 875-876 (1986). Indeed, under the United States' view, as expressed in argument in another case this Term, "[a]s long as there's probable cause to go forward, the prosecutor can go forward with the charges" even if the prosecutor "plainly on the face of it doesn't have enough evidence to convict." *Maryland v. Pringle*, No. 02-809 Oral Arg. Tr. 27 (Nov. 3, 2003). The prospect of what any of the nearly 100 United States Attorneys and approximately 5,000 Assistant United States Attorneys nationwide may find sufficient in order to arrest, indict, and prosecute an individual for a violation of COPA imposes an unconstitutional chill on speech.

As the United States notes (Pet. Br. 39), the Court has adopted a general presumption that federal prosecutors will act in good faith. But this Court has been unwilling to rely on presumptions of good faith on the part of government officials in determining whether a statutory scheme complies with the First Amendment. *See Reno v. ACLU*, 521 U.S. at 872 ("the 'risk of discriminatory enforcement' of vague regulations" through criminal sanctions poses special First Amendment concerns); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988) (rejecting request "to presume that the mayor will deny a permit application" only for valid reasons because the presumption that "the mayor will act in good faith" is "the very presumption that the [First Amendment] doctrine forbidding unbridled discretion disallows").

Nor can this Court consider COPA in isolation from its state and local counterparts. A number of States have enacted their own statutes governing material on the World Wide Web that are similar to COPA, and more would likely do so if this Court were to sustain COPA's

facial constitutionality. Thus, a speaker might be haled into court in a number of jurisdictions to answer for the same web page, subject to an array of harsh penalties.[6] This panoply of local legislation may unleash the uncabined discretion of an array of elected local prosecutors to initiate prosecutions against an artist even if they do not expect to prevail at trial. *Cf. Albright v. Oliver*, 510 U.S. 266 (1994) (splintered decision regarding what limits, if any, are imposed by Constitution on initiation of prosecution).

The human body, nudity, and sex have been, are, and understandably always will be, important components in all genres of artistic expression. Sexual symbols, in the form of phallic sculptures and female figures with overemphasized breasts and buttocks, abound in ancient as well as contemporary art as symbols of the fertility of the land and its people. Likewise, the human body has been a departure point for dance and visual art from the earliest times to the present day. Finally, discussions and depictions of nudity and sex are entangled in political and cultural disputes regarding gender, race, and homosexuality. The polarizing nature of such issues increases the risk that artists will become the targets of local prosecutions motivated by factors other than legitimate law enforcement interests.

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[6] *See*, *e.g.*, Mass. Gen. Laws ch. 272, § 28 (a felony punishable by up to five years in prison, a $10,000 fine, or both); S.C. Code Ann. § 16-15-385 (a felony punishable by up to five years in prison, a $5,000 fine, or both); N.Y. Penal Law §§ 235.21, 70.00, 80.00 (a felony punishable by up to four years in prison, a $5,000 fine, or both); Okl. St. tit. 21, §§ 1040.76, 1040.77 (a misdemeanor punishable by fines of up to $1,000 for each day the material is displayed or continues to be displayed). *But see* Pet. C.A. Rep. Br. on Remand 14 n.10 (federal government suggesting that state statutes may be barred under Dormant Commerce Clause analysis).

### 3. COPA's affirmative defenses do not shield artists who enable less restrictive alternatives that achieve the government's interest

a. COPA provides no relief for a web site that takes steps to ensure that readily available filtering software will block the web site. Record evidence demonstrated that, while "not perfect," widely available "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators." Pet. App. 160a. When filtering software is installed, a computer owner "can set such software to block categories of material, such as 'Pornography' or 'Violence'" and when a computer user "tries to view a site that falls within such a category, a screen appears indicating that the site is blocked." *United States v. American Library Ass'n*, 123 S. Ct. 2297, 2302 (2003) (plurality opinion). This Court recently credited Congress's conclusion that "filtering software that blocks access to pornographic Web sites could provide a reasonably effective way to prevent" minors from accessing pornography. *Ibid*. Indeed, use of filtering technology shields minors even from potentially harmful content on foreign-hosted Web sites, a laudable achievement that COPA cannot match. Pet. App. 160a; *see* COPA Report, *supra*, at 21 ("filtering can be effective in directly blocking access to global harmful to minors content on the Web, in newsgroups, in email and in chat rooms").

Thus, parents who have elected to have Internet service in their home have the ability currently to protect their children from potentially harmful content on the World Wide Web, just as they have the ability to control access to any other adult-oriented material that they may choose to bring into their homes. Moreover, other places children are likely to have access to a computer, such as schools and libraries, often are required to use filtering software. *See* 20 U.S.C. § 6777(a)(1) (schools receiving

federal assistance); 20 U.S.C. § 9134(f)(1) (libraries receiving federal assistance); 47 U.S.C. § 254(h)(6) (same); *American Library Ass'n*, *supra*, (upholding 20 U.S.C. § 9134(f)(1) and 47 U.S.C. § 254(h)(6) from facial First Amendment challenge).

The United States suggests (Pet. Br. 39) that filtering software cannot be compared to the criminal prohibitions of COPA because obtaining filtering software imposes some burden on parents. But it is a burden that parents shoulder only if they elect to pay to have Internet service in their home and to allow their children unsupervised access to the World Wide Web. *Cf. Playboy Entm't Group*, 529 U.S. at 824 ("It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time.").

The United States fails to note, moreover, the less intrusive steps that Congress has taken to ameliorate any burdens parents may bear. First, Congress has conditioned Internet provider's exemption from state and local taxes on their willingness to provide filtering software. *See* Internet Tax Freedom Act, Pub. L. No. 105-277, div. C, title XI, § 1101(f)(1), 112 Stat. 2681-719 (1998), *reprinted at* 47 U.S.C. § 151 note. A separate federal statute requires all providers to notify their customers of the availability of "parental control protections (such as computer hardware, software, or filtering services) * * * that may assist the customer in limiting access to material that is harmful to minors" and to "identify, or provide the customer with access to information identifying, current providers of such protections." 47 U.S.C. § 230(d); *see also* COPA Report, *supra*, at 17 ("Internet companies have made substantial efforts to make these online information resources available.").

b. Congress has taken additional steps to address the government's concerns (Pet. Br. 7-8, 20) that web site operators manipulate the World Wide Web so that minors are exposed to pornographic web sites even though minors do not intend to access such materials. *But see Reno v.*

*ACLU*, 521 U.S. at 869 (crediting district court's finding of fact that users "seldom encounter" sexually explicit material "'by accident'" and "'the odds are slim' that a user would come across a sexually explicit site by accident"). Congress has enacted a criminal prohibition tailored to that particular concern. *See* 18 U.S.C. § 2252B(b) ("Whoever knowingly uses a misleading domain name on the Internet with the intent to deceive a minor into viewing material that is harmful to minors on the Internet shall be fined under this title or imprisoned not more than 4 years, or both."). Federal agencies are also relying on existing enforcement authority to prevent unfair and deceptive practices that have the effect of luring minors to sexually explicit material on the World Wide Web. *See* Thornburgh & Lin, *supra*, at 80, 108-109 (describing enforcement efforts of Federal Trade Commission).[7]

In addition, Congress has required the creation of a new "domain," *i.e.*, a section of the World Wide Web, that consists entirely of material considered suitable for minors 13 years old and younger, now operating at www.kids.us. *See* 47 U.S.C. § 941; *see also* COPA Report, *supra*, at 30 ("This approach could be an accessible and generally effective way to protect children from harmful to minors content.").

Given the increased availability of filtering software, the criminal and civil sanctions for using misleading domain names, and the existence of a safe haven for parents who wish to allow their minors to be on the World

[7] COPA may, in fact, cause more inadvertent exposure to sexual content by failing to provide an affirmative defense for persons who attempt to prevent children from viewing material on their web page by use of warning labels. Indeed, COPA may discourage such efforts if, as the United States suggests (Pet. Br. 29), attempts to segregate materials that may be harmful to minors to a portion of a web site and to warn that they are "xxx pictures" (which could be even more easily filtered out), would be treated as evidence of pandering.

Wide Web, the United States has not shown that the overly broad reach of COPA's criminal sanctions is required to redress whatever lingering problem remains regarding access by minors to "harmful to minors" materials.

## CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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