No. 00-1293

IN THE
Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
Respondents.

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 Court of Appeals for the Third Circuit committed clear error in concluding that the district court did not abuse its discretion by granting a preliminary injunction that bars enforcement, pending discovery and trial, of the Child Online Protection Act (COPA), 47 U.S.C. § 231 *et seq*.

TABLE OF CONTENTS

TABLE OF CONTENTS — Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES — Continued

TABLE OF AUTHORITIES — Continued

TABLE OF AUTHORITIES — Continued

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae Volunteer Lawyers for the Arts ("VLA") is a not-for-profit organization that provides legal assistance to artists and non-profit artistic organizations. VLA and its clients believe that the First Amendment protections enjoyed by visual expression is as vital to the nation's ability to communicate on important issues as is verbal expression. VLA also believes that a reversal of the preliminary injunction entered below would chill its clients' ability to express themselves, to innovate, to exhibit their work, and to distribute their work on the Internet in a manner sufficient to provide a livelihood.

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 over 500,000 members and supporters nationwide. People For has represented parties and filed *amicus curiae* briefs in important cases before the Supreme Court and lower federal courts defending First Amendment freedoms, including, in particular, cases concerning the regulation of Internet content for minors such as *American Library Ass'n v. United States Dep't of Justice* (in which this Court struck down the prior federal "Communications Decency Act"). In addition, for many years People For researched and published national reports on attempts to ban

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[1] Written consent to the filing of this brief has been obtained from the parties and is lodged herewith. Counsel for a party did not author this brief in whole or in part. No person or entity other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

or restrict books and other materials in public schools which demonstrated tremendous differences between and within states as to the appropriateness of such materials for minors. People For believes that, because of the general inability to determine age or geography with respect to Internet communications, COPA would impose a national, lowest common denominator standard that would restrict and chill the communication and receipt of valuable expression relating to health, sex education, culture, and other matters throughout the United States by adults as well as minors in violation of fundamental First Amendment freedoms.

Amici therefore have a strong interest in providing the Court with information relevant to, and with analysis of, the crucial issue whether the preliminary injunction below was erroneously entered.

SUMMARY OF ARGUMENT

1. The narrow question before this Court is whether the Court of Appeals erred in its conclusion that the district court did not commit clear error in granting the injunction below. Far from committing clear error, the district court's decision is a prudent step preserving the *status quo ante* pending development of a full factual record. On the present record, the district court properly concluded that COPA's reliance on a mythical consensus community standard on the types of material that should be considered as harmful to minors renders COPA fatally overbroad. By incorporating a supposed national consensus view on what is harmful to minors, COPA threatens to "strangle[]" the existing diversity of views on which material is permissible "by the absolutism of imposed uniformity." *Miller v. California*, 413 U.S. 15, 33 (1973). In addition, if COPA is construed to refer to a national "adult" standard concerning material that should be restricted, this Court will necessarily be forced to act as the

final arbiter of the precise contours of that hypothetical national standard. This Court wisely rejected that role in *Miller* with respect to material that should be considered obscene, and should also reject that role with respect to discerning whether material is harmful to minors.

2. On the present state of the record, it appears that an Internet speaker cannot restrict access based on the geographic locations of the listener. But even if such geographic filtering were available, COPA could not pass Constitutional muster because COPA cannot be found to be the least restrictive method of protecting minors from potentially harmful content on the Internet. Using existing technology, parents can and should exercise discretion and control over their children's Internet use in a manner that does not restrict the material available to other children, other parents, or to adults in general.

FACTS

Our nation is composed of diverse communities that do not share a consensus view on the types of artistic or other materials that may be harmful to minors. For each area of artistic endeavor, a range of opinions can be found that undermine any notion of consensus on either the "prurient" or "offensive" nature of the expression itself, or whether, even if prurient or offensive, it might nevertheless have serious artistic value for minors. Indeed, adult opinion on what types of material (artistic and otherwise) may be harmful to minors is literally all over the map.

A. Community Standards Differ Widely In The Context Of Literature.

Between 1985 and 1996, People For the American Way[2] produced annual reports of its extensive investigation and research documenting hundreds of attempts to remove books or other materials from public school curriculum and libraries all across the country as inappropriate for minors. (*See, e.g.*, People For the American Way, *Attacks on the Freedom to Learn: 1995-96 Report* (1996) ("1996 Freedom to Learn Report")).[3] The reports did not include attempts by parents to prevent their children from reading any particular material, but rather attempts by individuals to ban or restrict what *all* minors would be able to read. These reports consistently demonstrate not only that particular books and materials were challenged in some communities as inappropriate for minors and not in others, but also that challenges to the exact same book or other material were upheld by school boards or adult review committees in some communities and struck down by similar groups in other communities.

For example, during the 1994-95 school year, a school board in Wimberley, Texas voted unanimously to remove award winning author Maya Angelou's autobiographical novel *I Know Why The Caged Bird Sings* from a ninth-grade honors English class because of sexually explicit content and references to rape and masturbation. The school board acted in part based on a survey by the superintendent of ninth-

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[2] This 501(c)(3) research and education-oriented organization is now called People For the American Way Foundation and is one of the *amicus* organizations represented in this brief.

[3] These extensively documented reports provide evidence of a consistent pattern for over a ten-year period of sharply differing community standards as to what books and materials are deemed appropriate by adults for minors under 17 years of age.

grade parents that indicated a majority favored removing this best-selling book. (*See* 1996 Freedom to Learn Report at 207). Conversely, in October, 1995, a public school review committee in Shawnee Mission, Kansas unanimously agreed that the very same book was "appropriate for student in-class instruction in grades eight through twelve," although a parent had objected that the book was "absolutely inappropriate for secondary level students" stating that it contained "pornographic and violent material . . . ." (*See* 1996 Freedom to Learn Report at 144).

Similarly, Judy Blume's books *Are You There God? It's Me, Margaret* and *Forever*, which contain frank discussions of adolescent sexuality and are explicitly aimed at a teenage audience, are featured on the American Library Association's list of The 100 Most Frequently Challenged Books of 1990-1999 (the "ALA List"). (*See* http://www.ala.org/alaorg/oif/top100.pdf). Nevertheless, *Are You There God? It's Me, Margaret* was also included on the New York Times list of Outstanding Books of the Year in 1970, the year it was first published, and in 1996, Ms. Blume received the Margaret A. Edwards Award for Lifetime Achievement from the American Library Association. Toni Morrison, winner of the Nobel Prize for Literature, authored three books that have been frequently challenged and in some cases restricted in various locations, at least in part for their sexual content. Yet all three of Ms. Morrison's banned books are *also* included in the California Department of Education's database of "Recommended Literature: Kindergarten Through Grade Twelve" (the "CDE Database").[4] (*See* http://www.cde.ca.gov/literaturelist/litsearch.asp). In fact, a total of 37 books have the ironic distinction of being featured on *both* the CDE

[4] *Beloved*, *Bluest Eye*, and *Song of Solomon*, all by Toni Morrison, are listed on both the ALA List and the CDE Database.

"recommended reading" database and the ALA "banned book" list.[5]

Aldous Huxley's *Brave New World* was removed from a high school library in Foley, Alabama after a parent complained about the book's references to orgies, self-flagellation and the book's contempt for religion, marriage and the family. *Brave New World* ranks fifth on the Modern Library "List of the Best English Language Novels of the Twentieth Century," as published by Random House (*see* http://www.randomhouse.com/modernlibrary/100best/novels.html), and also ranks 54th on the ALA List. J.D. Salinger's *Catcher in the Rye* is the tenth most banned book of the 1990s according to the ALA List, in part because of objections to the use of profanity in the book and its description of sexual situations. Yet *Catcher in the Rye* remains required reading for incoming juniors at Farmington High School in Farmington, Connecticut. (*See* http://www.farmington.lib.ct.us/fhs2001.htm).

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[5] The following books are featured on both the ALA List and CDE Database: M. Angelou, *I Know Why the Caged Bird Sings*; M. Twain, *The Adventures of Huckleberry Finn*; J. Steinbeck, *Of Mice and Men*; K. Paterson, *Bridge to Terabithia*; J.D. Salinger, *Catcher in the Rye*; L. Lowry, *The Giver*; C. Collier and J.L. Collier, *My Brother Sam is Dead*; B. Greene, *Summer of My German Soldier*; P.R. Naylor, *Achingly Alice*; A. Walker, *The Color Purple*; K. Paterson, *The Great Gilly Hopkins*; M. L'Engle, *A Wrinkle in Time*; L. Lowry, *Anastasia Krupnik*; J.C. George, *Julie of the Wolves*; M. Mathabane, *Kaffir Boy*; T. Morrison, *The Bluest Eye*; T. Morrison, *Beloved*; W.D. Myers, *Fallen Angels*; M. Atwood, *The Handmaid's Tale*; S.E. Hinton, *The Outsiders*; H. Lee, *To Kill a Mockingbird*; R. Cormier, *We All Fall Down*; D. Keyes, *Flowers for Algernon*; J.K. Rowling, *Harry Potter and the Sorcerer's Stone*, R. Dahl, *James and the Giant Peach*, S. Silverstein, *A Light in the Attic*, A. Huxley, *Brave New World*; J.L. Conly, *Crazy Lady*; L. Rodriguez, *Always Running*; K. Vonnegut, *Slaughterhouse Five*; W. Golding, *Lord of the Flies*; R. Wright, *Native Son*; M.D. Bauer, *On My Honor*; I. Allende, *House of the Spirits*; R.A. Anaya, *Bless Me, Ultima*; T. Morrison, *Song of Solomon*; S. King, *Christine*.

B. Community Standards Differ Widely In The Context Of Music.

A 1998 free high school concert tour by a popular folk-rock duo, the Indigo Girls, provides a good example. The Indigo Girls, who have performed together for over ten years, have sold more than seven million albums worldwide and have earned six "Grammy" nominations by the National Academy of Arts and Sciences, including winning the 1989 Grammy Award for Best Contemporary Folk Group. In 1998, the group had scheduled several free concerts at high schools across the southern United States to perform and share their knowledge about songwriting and the music industry. While they were welcomed without incident at many high schools during this tour, officials at two Tennessee high schools canceled the free concerts citing alleged profanity in one song. In Columbia, South Carolina, the principal at Irmo High School canceled the group's appearance after complaints by parents relating to the fact that the two singers are gay and pressure from the school board chair who claimed the group was promoting a homosexual agenda. (*See* People For the American Way Foundation, *Hostile Climate: Report on Anti-gay Activity* (1999), at 199-200, 202.)

C. Community Standards Differ Widely In The Context Of Film and Television.

Reactions to film and television fare no better. After the American Family Association ("AFA") launched a national campaign against the film *Showgirls* (1995) — a film released by Metro-Goldwyn-Mayer — claiming it was "pornographic," a theater company in Memphis, Tennessee removed the film from two of its theaters in another state. However, Circle 7, an independently owned and operated theater in Bennington, Vermont, screened the film notwithstanding the protests of the local chapter of the AFA.

The AFA launched a similar national campaign against *NYPD Blue*, a critically-acclaimed dramatic series aired on the American Broadcasting Corporation television network, also claiming that the series was pornographic. In response, 22 business owners in Jonesboro, Arkansas pulled their local advertisements scheduled to air during the program.

Similarly, school district officials in Coon Rapids, Minnesota prohibited students from watching in class *The Piano*, winner of the 1993 Academy of Motion Picture Arts & Sciences award for Best Picture, after a parent complained that the movie was inappropriate due to scenes of nudity and violence.

D. Community Standards Differ Widely In The Context Of Theater.

In the realm of live theater, members of the Christian Coalition in Clearwater, Florida circulated a petition condemning a theater for sponsoring Tony Kushner's *Angels in America*, the winner of seven Tony awards and the Pulitzer Prize, claiming that the play's "nudity, homosexual themes and sexual situations [were] inappropriate." Ruth Eckerd Hall, a non-profit arts organization, had announced its intended production in a brochure with a note stating that "*Angels in America* is serious adult theater with profanity, full nudity, gay themes and sexual situations. Not recommended for children." In December, 2000 in Jacksonville, Florida, the same play was physically torn out of dozens of textbooks at the Paxon School for Advanced Studies, after a student's parent complained about its descriptions of sex. The play was not used in any classes, but had been included in an anthology of plays distributed to students. (*See* Joe Humphrey, *School Excises Explicit Play From Textbooks*, The Florida Times-Union, Dec. 2, 2000, at A-1).

Similarly, in Mecklenburg, North Carolina, county commissioners voted to ban funding of art that shows "perverted forms of sexuality" or that "seek to undermine and deviate from the value and societal role of the traditional American family," in response to proposed productions of *Angels in America* and *Six Degrees of Separation*, by Tony Award-winner Tony Guare. The commissioners ultimately cut $2.5 million from the city's Arts and Science Council. (*See* People For the American Way Foundation, *Hostile Climate: Report on Anti-gay Activity* (1998), at 58).

E. Community Standards Differ Widely In The Context Of Fine Art.

In 1996, an assistant high school principal in New Castle, Delaware removed a student drawing entitled "Standing Nude Female" from an art exhibit in the school, claiming its depiction of nudity was inappropriate and potentially offensive The artist, Stephen Halko, drew the work during a ten-week figure-drawing course at the University of the Arts in Philadelphia. The drawing won a National Scholastic Award from the Delaware Department of Public Instruction, the Art Educators of Delaware, Inc., and Delaware State University, and was included in the exhibit on that basis.

A stage company administrator in Portland, Maine removed seven works that contained nudity from a lobby exhibit, claiming they were inappropriate and might offend visitors. The paintings, by artist Carlo Pittore, who had been invited to display his work in the lobby, depicted male and female nudes in various poses. The same paintings had been displayed in the past at other venues in the U.S. without controversy.

In sum, in a country as large and diverse as the United States, it is clear that no "reasonably constant" community standard exists among adults that governs questions of taste,

tolerance and artistic expression. American adults do not maintain any "reasonably constant" opinion of either the offensiveness or ultimate value of works that have achieved critical acclaim and wide popularity, let alone works at the fringes of artistic expression that are more explicitly intended to challenge, shock or criticize. As shown above, no consensus exists regarding a "narrow band" of sexual material that adults would agree is harmful to minors — instead, such material is the subject of wide-ranging and ongoing debate.

ARGUMENT

I. The Third Circuit's Decision Is Correct, Given The Present State Of The Record.

The government all but ignores the limited nature of appellate review of a trial court's decision to grant a preliminary injunction. It is nevertheless clear that the Third Circuit ruling must stand unless Petitioners can meet the high burden of showing that an "abuse of discretion" occurred in the "ultimate decision to grant … the preliminary injunction". *Maldonado v. Houstoun*, 157 F.3d 179, 183 (3d Cir. 1998), *cert. denied*, 526 U.S. 1130 (1999). Given the limited factual record below, and given the great deference wisely accorded to a district court's judgment regarding requests for preliminary injunctions, it is clear that no abuse of discretion occurred.

A. COPA's Attempt To Ignore Differing Community Standards To Define Proscribed Material Renders The Statute Fatally Overbroad.

In the first of COPA's three-element definition of material that is "harmful to minors," Congress explicitly calls upon *contemporary community standards* to define the type of protected expression that is subject to COPA's

restrictions. 47 U.S.C. § 231(e)(6) ("[T]he 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." (emphasis added)). The phrase "contemporary community standards" is, of course, well known to this Court, which struggled for many years to find an acceptable definition of obscene material before finally settling on a definition which rests on the application of the varied local standards and mores that exist in the multitude of communities around the nation. *See Miller v. California*, 413 U.S. 15 (1973).

In *Miller*, this Court flatly rejected the notion that obscenity could be defined by referring to a hypothetical national standard, holding instead that a jury must evaluate accused material against the contemporary standards of the community in which the offending conduct took place. *Id.* at 33-34. *Miller*'s holding was premised on the unassailable fact that the fifty states do not share any single prevailing community standard concerning material that is considered obscene. *Id.* at 32. Indeed, the varying nature of community standards was crucial to the Court's decision that "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Id.* at 32. The Court recognized the "danger to free expression" from "the use of 'national' standards" under which materials would be "unavailable where they are acceptable [in a community]." *Id.* at 32 n. 13. Since communities around the nation vary in their "tastes and attitudes" Congress could not "strangle[]" the existing diversity of views on which material is permissible "by the absolutism of imposed uniformity." *Id.* at 33.

As the Third Circuit recognized, communications via the Internet do not have a fixed, known geographic location. App. 24a; *See also American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997). Indeed, the beauty and power of the Internet lies in the ability of virtually any speaker to simultaneously address a global audience, and in the ability of a user to access communications from virtually any corner of the world. Thus, on the present state of the record, the Third Circuit's conclusion that no technology exists to geographically restrict Web site access is clearly correct. App. 29a.

Because present day technology does not permit an Internet speaker to exclude listeners from specific geographic locales, reliance on a community standard element to define proscribed content would necessarily lead to the most puritan view of what constitutes prohibited speech. In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court recognized the absurdity (and, more importantly, the unconstitutionality) of such an approach, noting that to apply a community standard test in cyberspace would require every Internet communication to abide by the standards of "the community most likely to be offended by the message." *Id.* at 877-78. Thus, for example, a virtual art gallery would have to wonder if it faces prosecution based on display of paintings depicting any nudity simply because a single conservative American town might view any display of nudity to be "lewd."[6] The Barnes & Noble Web site — www.bn.com — offers readers the opportunity to read excerpts or entire chapters from select books and plays prior to purchasing them (such as Maya Angelou's *I Know Why the Caged Bird Sings* and Aldous Huxley's *Brave New*

[6] *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 "harmful to minors" law).

World). As set out above, no consensus exists as to the prurient or offensive nature of these relatively mainstream works, and as a result, Web sites promoting their sale through this sort of sampling might reasonably fear prosecution under COPA because of offense taken by particular local communities.

The government contends that COPA's definition of material that is harmful to minors is nothing more than a faithful adoption of current First Amendment caselaw, and that the Internet is not entitled to any greater First Amendment solicitude than any other medium of communication. But the cases they cite to support this position are inapposite. For example, in *Hamling v. United States*, 418 U.S. 87, 105 (1974), this Court held that obscenity should not be judged based on a national standard but should instead rely on a juror's knowledge of the average person's views in his local community. Significantly, in *Hamling*, the defendants could have chosen not to mail unsolicited sexually explicit materials to some communities while continuing to mail them to others, effectively limiting their exposure to liability by avoiding those communities with particularly restrictive standards. Similarly, in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), the Court specifically recognized that the Sable telecommunications company was able to "tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve." This is precisely the type of geographic selectivity that is *not* available to an Internet speaker, as the decision below makes clear. App. 26a-27a.

Additionally, petitioner's argument, relying on *Hamling* and *Sable*, that it is acceptable to require a nationwide business to conform to community standards throughout the country as a cost of doing business is misplaced both factually and legally with respect to the Internet. First, the underlying premise that Internet speakers subject to COPA's

prohibitions intend or "choose" to conduct a nationwide business is simply wrong and is not supported by the current record. To the contrary, many small and local Internet operators who seek to make a profit communicate to a local clientele through their Web sites and, because of the nature of the Internet, simply cannot feasibly prevent their communications from reaching a national and international audience. This is true even where the operator sells nothing on-line, but merely provides information to local clients through the web and a forum for discussing products that are sold entirely at a local community store. Since a fully developed record would show that many Internet speakers do not conduct nationwide businesses (as was the case in *Sable* and *Hamling*), there is no basis for requiring local business owners to comply with widely divergent community standards throughout the country, particularly where they would have little or no knowledge of such standards. In addition, as discussed above, unlike sending mail to a zip code or a telephone message to an area code, it is not possible or feasible for the vast majority of Internet speakers to control where their speech can be received or to "tailor" their communications on a "selective basis." As a result, unlike the other federal statutes cited by the petitioner, COPA would impermissibly impose a national, lowest common denominator standard on a vast range of speakers, and on communication and content that would be deemed "acceptable" in many communities and were specifically protected under *Miller*.

B. COPA's Alleged Reliance On A Hypothetical National "Adult" Standard Is Equally Flawed.

1. Reliance on a national adult standard would require this Court to resume a role it rejected in *Miller*.

Congress recognized that application of "community standards" to the Internet was "controversial," and recommended that juries be instructed to refer to a hypothetical national "adult" standard rather than to any particular local geographic standard. H.R. Rep. No. 105-775 at 28 (1998). If COPA is construed to refer to a hypothetical, national "adult" standard, however, this Court will necessarily be placed in the position of being the final arbiter of the precise contours of that hypothetical national standard, a role it rejected in *Miller*.

In a line of decisions stretching from *Roth v. United States*, 354 U.S. 476 (1957), to *Miller v. California*, 413 U.S. 15 (1973), no definition of obscenity was able to capture a majority of this Court, and instead, the Court was forced to review obscenity cases on an *ad hoc* basis. Beginning with *Redrup v. New York*, 386 U.S. 767 (1967), the Court embarked on a policy of summary review and *per curiam* disposition of obscenity cases, disclosing nothing about its rationales or even about the nature of the materials reviewed. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 82 n. 8 (1973) (Brennan, J., dissenting). No fewer than thirty-one cases followed the *Redrup* approach[7], and, as a result, the

[7] Aside from the three cases reversed in *Redrup*, the 31 cases disposed in this fashion are: *Keney v. New York*, 388 U.S. 440 (1967); *Friedman v. New York*, 388 U.S. 441 (1967); *Ratner v. California*, 388 U.S. 442 (1967); *Cobert v. New York*, 388 U.S. 443 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Aday v. New York*, 388 U.S. 447 (1967); *Books, Inc. v. United States*, 388 U.S. 449 (1967); *A Quantity of Copies of Books v. Kansas*, 388 U.S. 452

lower courts (and, perhaps more importantly, all those who desired to communicate on matters that might be considered obscene) were deprived of any guidance as to material that could be constitutionally restricted. *See Paris Adult Theatre I*, 413 U.S. at 82.

Chief Justice Warren (joined by Justice Clark) and Justice Black (joined by Justice Douglas) warned that the Court was stepping beyond its proper role as an appellate court. Chief Justice Warren expressly advocated a deferential standard of appellate review in obscenity cases as the only reasonable way of preventing the Court from sitting as "the Super Censor of all the obscenity purveyed throughout the Nation." *Jacobellis v. Ohio*, 378 U.S. 184, 203 (1964) (Warren, C.J., dissenting).[8] In *Miller*, the Court eventually found that the "*Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us," 413 U.S. at 23 n.3, and expressly adopted a deferential standard based on local community views.[9] To

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(1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I.M. Amusement Corp. v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. Tennessee*, 389 U.S. 578 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Henry v. Louisiana*, 392 U.S. 655 (1968); *Cain v. Kentucky*, 397 U.S. 319 (1970); *Bloss v. Dykema*, 398 U.S. 278 (1970); *Walker v. Ohio*, 398 U.S. 434 (1970); *Hoyt v. Minnesota*, 399 U.S. 524 (1970); *Childs v. Oregon*, 401 U.S. 1006 (1971); *Bloss v. Michigan*, 402 U.S. 938 (1971); *Burgin v. South Carolina*, 404 U.S. 809 (1971); *Hartstein v. Missouri*, 404 U.S. 988 (1971); *Wiener v. California*, 404 U.S. 988 (1971).

[8] The Court "is about the most inappropriate Supreme Board of Censors that could be found". *Jacobellis*, 378 U.S. at 196 (Black, J., concurring).

[9] Contrary to the Government's contention, the Court did not stray from its rejection of a uniform, national standard in *Jenkins*. In *Jenkins*,

construe COPA to require reference to a hypothetical national adult standard would necessarily reinstate the confusion and uncertainty of the pre-*Miller* years, and would force this Court to resume the role of final arbiter of acceptable communications.

2. There is no consistent view among the nations' adults regarding which material is harmful to minors.

According to the government and its *amici*, we live in a nation where views are "reasonably constant among adults . . . with respect to what is suitable for minors." *See* Petitioner's Br. at 42-43 (citing H.R. Rep. No. 105-775, at 28 (1998)). This rosy view finds no support in the factual record below,[10] nor in readily accessible evidence drawn from previous court decisions and reported conflicts over various material deemed by some, but not by others, to be harmful to minors. *See, e.g.*, *Miller*, 413 U.S. at 30 ("[O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation."); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 182-83 (S.D.N.Y. 1997). Quite the contrary, the factual examples set forth above show that no agreement exists even as to relatively mainstream literature, music, film, television and

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this Court simply found that a jury could be instructed to apply "community standards without specifying what community". *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974). *Jenkins* essentially recognized, in conformity with *Miller*, that a juror may rely on her own community's standards to define what a reasonable person may find offensive and need not rely on an abstract community's standard that would be specified by the court. *Id.* *Jenkins* never stood for the proposition that a jury could be instructed to follow a national hypothetical standard.

[10] The Court of Appeals noted "we have before us *no evidence* to suggest that adults everywhere in America would share the same standards for determining what is harmful to minors." App. 31a.

theater, and that works ranging from the prime-time television drama *NYPD Blue* to the Pulitzer prize-winning play *Angels in America* have been challenged as offensive and unsuitable for minors in some communities, owing to their sexual content.

II. COPA Is Not The Least Restrictive Means Of Serving The Government's Expressed Purpose.

COPA, like CDA, criminalizes the communication of constitutionally protected non-obscene expression.[11] As a content-based regulation of protected speech, COPA is presumptively invalid, and is subject to the highest level of Constitutional scrutiny. COPA cannot be upheld unless the government can show that it is the least restrictive alternative available to achieve the compelling interest served by the statute. *See, e.g.*, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). While protecting minors from potentially harmful content on the Internet is a laudable goal, and is unquestionably a compelling governmental interest, COPA fails to achieve that goal in a narrowly tailored and constitutional manner, and, accordingly, it cannot stand.

The government argues that COPA "is directed primarily to commercial pornographers who already put most of their material behind age verification screens," and that "[t]he principal effect of the Act is to require those commercial pornographers to put their teasers behind age verification screens as well." Petitioner's Br. at 21. Unfortunately, COPA's reach is much broader, as noted by the district court. *ACLU v. Reno*, 31 F. Supp. 2d 473, 480 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000) ("There is nothing

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[11] "Sexual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

in the text of the COPA . . . that limits its applicability to so-called commercial pornographers.") Instead, COPA applies to "*any* communication for commercial purposes" on the Internet that includes "*any* material that is harmful to minors." 47 U.S.C. § 231(a)(1)-(3). Therefore, as set out above, COPA broadly reaches on-line art galleries specializing in nude or partially clothed portraiture or displaying noted photographer Andres Serrano's "A History of Sex" series, or even on-line bookstores excerpting John Cleland's *Fanny Hill*.[12] Indeed, the breadth of COPA's reach was acknowledged by the Department of Justice in its candid, pre-enactment assessment of the then draft COPA, which noted that the "harmful to minors" standard is "[a]mong the more confusing or troubling ambiguities" in the statute. October 5, 1998, Letter from Department of Justice Letter to Honorable Thomas Bliley, Chairman of House Committee on Commerce (Plaintiffs' Memorandum of Law in Support of Temporary Restraining Order, Ex. A at 4).

Most importantly, as the district court noted below, there is evidence in the record that widely available filtering and blocking technology is a less restrictive means of protecting minors from potentially harmful content on the Internet. (*See* App. 94a). Indeed, use of filtering and/or blocking technology would shield minors from potentially harmful content on foreign-hosted Web sites, a laudable achievement that COPA cannot match. Thus, parents have the current ability to protect their children from potentially harmful content on the Internet, just as they have the ability to control access to adult oriented material that they may choose to bring into their homes. As the Third Circuit noted in a closely analogous situation, "in this respect, the decision a

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[12] *See Bookcase, Inc. v. Broderick*, 18 N.Y.2d 71 (1966) (Fanny Hill constitutes material that is 'harmful to minors').

parent must make is comparable to whether to leave sexually explicit books on the shelf or subscribe to adult magazines. No constitutional principle is implicated. The responsibility for making such choices is where our society has traditionally placed it -- on the shoulders of the parent.[13] *Fabulous Associates, Inc. v. Pennsylvania Public Utility Comm'n*, 896 F.2d 780, 788 (3rd Cir. 1990) (striking down a statute that required adults to obtain an access code before listening to sexually explicit recorded telephone messages).

[13] The government, however, can and indeed has, played an important role in facilitating and promoting user and parental education and empowerment. For example, Congress has required Internet Service Providers to provide access to filtering services and could provide funding for education, development and dissemination of user-based methods and technology. (*See* 47 U.S.C. § 230 *et seq*.).

CONCLUSION

The district court did not abuse its discretion by entering a preliminary injunction below, and on the present record (which will necessarily be expanded and clarified after discovery and trial are completed), the government appears unlikely to meet its burden to show that COPA is sufficiently narrowly tailored to survive the strict scrutiny required of laws that burden protected expression.

Respectfully Submitted,

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