UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION, et al.,	:	
Plaintiffs,	:	
v.	:	Civ. Act. No. 98-CV-5591
JANET RENO, in her official capacity as ATTORNEY GENERAL OF THE UNITED STATES,	:	
Defendant.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs respectfully submit this Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction.

PRELIMINARY STATEMENT

This case challenges provisions of the Child Online Protection Act ("COPA"), 47 U.S.C. § 231, which is Congress' second attempt to impose severe criminal sanctions on the display of constitutionally protected, non-obscene materials on the Internet. The full text of the COPA is included as Attachment A hereto. The first attempt, the Communications Decency Act ("CDA"), was soundly rejected by all nine justices of the Supreme Court in *Reno v. American Civ. Liberties Union* ("*ACLU I*"), 521 U.S. 844, 117 S. Ct. 2329 (1997), *aff'g* 949 F. Supp. 824, 831 (E.D. Pa. 1996). Recognizing that the Internet had become a powerful "new marketplace of ideas" and "vast democratic fora" that was "dramatically expanding" in the *absence* of government

regulation, the Court imposed the highest level of constitutional scrutiny on content-based infringements of Internet speech. *ACLU I*, 117 S. Ct. at 2343, 2344, 2351.

Before the COPA was enacted, defendant wrote a seven-page letter to Congress outlining "serious concerns" about the bill, and warning that it "would likely be challenged on constitutional grounds." Defendant first warned that the bill "could require an undesirable diversion of critical investigative and prosecutorial resources" currently invested by the Department of Justice in combating child pornography and obscenity. Letter Dated October 5, 1998 from the Department of Justice to the Honorable Thomas Bliley, Chairman of the House Committee on Commerce (the "DOJ Letter") at 2, included as Attachment B hereto. Even if the COPA were enforced, defendant noted that the law might not have a "material effect in limiting minors' access to harmful materials." Id. at 3. Defendant then outlined "numerous ambiguities concerning the scope" of COPA's coverage that would render the legislation "problematic for purposes of the First Amendment." *Id.* at 4-6 (citing *ACLU I*, 117 S. Ct. at 2344). Congress passed the COPA despite defendant's warnings, and despite the Supreme Court's strong precedent against content-based Internet regulations in *ACLU I*. This case is the resulting constitutional challenge that defendant predicted.

For many of the reasons outlined in defendant's own letter to Congress, plaintiffs seek to have the COPA declared unconstitutional both on its face and as applied to them, and to enjoin defendant from enforcing it. As the following memorandum discusses in detail, the COPA's constitutional flaws are ultimately identical to the flaws that led the Supreme Court to strike down the CDA. Though the COPA, like the CDA, purports to restrict the availability of materials to minors, the effect of the law is to restrict

adults from communicating and receiving expression that is clearly protected by the First Amendment.

Plaintiffs represent a broad range of individuals and entities who use the World Wide Web (the "Web") to provide free information on a variety of subjects, including sexually oriented issues that they fear could be construed as "harmful to minors." They range from long-established booksellers and large media companies to newer online magazines, and they provide general interest news as well as special interest content such as fine art, safer sex materials, and gay and lesbian resources. Because the COPA provides no way for speakers to prevent their communications from reaching minors without also denying adults access to them, the COPA directly threatens plaintiffs, their members, and millions of other speakers with severe criminal and civil sanctions for communicating protected expression on the Web. The COPA also violates the rights of millions of Web users to access and read constitutionally protected speech.

In the face of her own warning that the COPA raises serious constitutional questions, defendant is hard-pressed to argue that at least preliminary relief should not be granted to plaintiffs. For the reasons discussed below, and because "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship," ACLU I, 117 S. Ct. at 2351, plaintiffs ask this Court to issue a temporary restraining order and preliminary injunction against enforcement of the COPA.

STATEMENT OF FACTS

A. Plaintiffs and Their Speech

Plaintiffs include seventeen organizations who sue on their own behalf, on behalf of their members, and on behalf of hundreds of thousands of people who read their online communications.[1] Plaintiffs do not speak with a single voice or on a single issue, but all engage in speech that some communities may consider to be "harmful to minors" under the COPA, and that plaintiffs believe is constitutionally protected for adults and older minors. Plaintiffs communicate through written text, graphic and artistic images, and video and audio recordings, all of which are explicitly covered by the COPA. *See* 47 U.S.C. § 231(e)(6). Some of the plaintiffs also host web-based discussion groups and chat rooms, which allow readers to converse on particular subjects. *See* Speyer Decl. (OBGYN.net) at pp. 8-10; Talbot Testimony (Salon Magazine).

Like the vast majority of speakers on the Web, plaintiffs provide their information for free to users. *See* Hoffman Decl. at pp. 13-14. Nevertheless, all of the plaintiffs are engaged in speech "for commercial purposes" as defined in the COPA because they all communicate with the objective of making a profit. *See* 47 U.S.C. § 231(3)(2)(B); *see also* Johnson Decl. (ArtNet.com) at pp. 8-9; Glickman Decl. (Condomania) at p. 8; Talbot Testimony (Salon Magazine); Laurila Testimony (A Different Light).

More specifically, plaintiffs include the following:

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[1] Citations throughout the brief are to the declarations filed in support of Plaintiffs' Motion for a Temporary Restraining Order, and to the anticipated testimony of live witnesses at the TRO hearing. As contemplated by the Court's schedule for the case, Plaintiffs will submit additional declarations, and expert and other live testimony, in support of the later hearing on Plaintiffs' Motion for a Preliminary Injunction.

- **American Civil Liberties Union (ACLU)** is a nationwide, nonpartisan organization of nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. The ACLU has many members who fear prosecution under the COPA, including the author Patricia Nell Warren, the poet Lawrence Ferlinghetti, and ACLU President Nadine Strossen.

- **A Different Light Bookstores** operates bookstores in three major cities, and maintains a comprehensive Web site with information about books and music of interest to the gay and lesbian community.

- **American Booksellers Foundation for Free Expression (AFBBE)** has over 300 member bookstores, over 75 of which use the Web to communicate information to readers and potential book purchasers about books on a wide range of subjects, including subjects covered by the COPA.

- **ArtNet Worldwide Corporation (ArtNet.com)** is the leading online service for the art world. It provides, among other resources, reviews of artworks, information about museums, galleries, and exhibitions, and reproductions of works by certain artists or works exhibited at certain galleries.

- **BlackStripe** is a Web-based resource for gay and lesbian individuals of African descent.

- **Condomania** is the nation's first condom store and is a leading online seller of condoms and distributor of safer-sex related materials.

- **Electronic Frontier Foundation (EFF)** is a nationwide, nonprofit organization committed to defending civil liberties in the world of computer communications. EFF has members who fear prosecution under the COPA, including Rufus Griscom, publisher of the online magazine "Nerve," and Open Enterprises, which maintains the "Good Vibrations" site on the Web.

- **Electronic Privacy Information Center (EPIC)** is a nonprofit research organization that uses the Web to collect and distribute information concerning civil liberties and privacy issues arising in the new communications media.

- **Free Speech Media, LLC** promotes extensive independent audio and video content on the Web.

- **Internet Content Coalition (ICC)** is a nonprofit professional association that includes many well-known and high-profile providers of original content for the Web, including The New York Times, Time, Inc., Sony Online, MSNBC, CNET, and ZDNet.

- **OBGYN.net** is a comprehensive international online resource center for professionals in obstetrics and gynecology, the medical industry, and the women they serve.

- **Philadelphia Gay News** has been the leading print newspaper for the gay and lesbian community of Philadelphia for twenty-two years, and now also publishes on the Web.

- **Powell's Bookstore** operates several bookstores, the largest of which is in Portland, Oregon, and maintains a comprehensive Web site with information on over one million books.

- **Riotgrrl** is a popular "Webzine" that advocates positive empowerment and support for women.

- **Salon Internet, Inc. (Salon Magazine)** is a leading online magazine featuring articles on current events, the arts, politics, the media, and relationships, as well as regular columns by well-known writers.

- **West Stock, Inc.** maintains a Web site that displays and sells licenses for stock photographs.

B. The Challenged Statute

The COPA, to be codified at 47 U.S.C. § 231, was signed into law on October 21, 1998 as part of the Omnibus Appropriations Act. Unless enjoined, the COPA will become effective on Friday, November 20, 1998, thirty days after the date of enactment. The COPA imposes criminal and civil penalties on persons who

> knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, make[] any communication for commercial purposes that is

> available to any minor and that includes any material that is harmful to minors . . . .

47 U.S.C. § 231(a)(1).

The penalties under the COPA are severe. Persons who violate § 231(a)(1) "shall be fined not more than $50,000, imprisoned not more than 6 months, or both." 47 U.S.C. § 231(a)(1). The COPA imposes additional penalties as follows:

> (2) INTENTIONAL VIOLATIONS -- In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (3) CIVIL PENALTY -- In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation."

47 U.S.C. § 231(a)(2)-(3). Together, these penalties impose potential fines of $150,000 *per day* on speakers who violate the COPA, even if their Web site contains only one image that is harmful to minors.

The COPA's definition of material that is "harmful to minors" explicitly includes written material and recordings in addition to pictures. It reads:

> The term 'material that is harmful to minors' means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene[2] or that -- (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals

[2] Plaintiffs do not challenge the portion of the COPA that prohibits "obscene" communications.

> or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6). Significantly, the COPA does not define the relevant "community" for purposes of determining what is "harmful to minors" in the global medium of cyberspace.

The COPA defines "minor" as "any person under 17 years of age." 47 U.S.C. § 231(e)(7). It makes no distinction between material that may be "harmful" to very young minors and material that may be "harmful" to older minors.

The COPA defines the phrase "by means of the World Wide Web" to mean "by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol." 47 U.S.C. § 231(e)(1).

The COPA defines "commercial purposes" as being "engaged in the business of making such communications." 47 U.S.C. § 231(e)(2)(A). The COPA then defines "engaged in the business" as meaning

> that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, 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 (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

47 U.S.C. § 231(e)(2)(B).

Section 231(b) of the COPA attempts to exempt certain persons from liability. It states:

> For purposes of subsection (a), a person shall not be considered to make any communication for commercial purposes to the extent that such person is -- (1) a telecommunications carrier engaged in the provision of a telecommunications service; (2) a person engaged in the business of providing an Internet access service; (3) a person engaged in the business of providing an Internet information location tool; or (4) similarly engaged in the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication made by another person, without selection or alteration of the content of the communication, except that such person's deletion of a particular communication or material made by another person in a manner consistent with subsection (c) or section 230 shall not constitute such selection or alteration of the content of the communication.

"Internet," "Internet Access Service," and "Internet Information Location Tool" are defined elsewhere in the COPA. *See* 47 U.S.C. § 231(e)(3)-(5).

Section 231(c)(1) of the COPA provides an affirmative defense to prosecution if the defendant:

> in good faith, has restricted access by minors to material that is harmful to minors --
>
> (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
>
> (B) by accepting a digital certificate that verifies age; or
>
> (C) by any other reasonable measures that are feasible under available technology.

47 U.S.C. § 231(c)(1).

Section 231(d) of the COPA forbids the disclosure of "any information collected for the purposes of restricting access to such communications" to minors without prior consent. 47 U.S.C. § 231(d)(1)(A). However, there is no penalty for

violation of this provision, and the COPA provides immunity to content providers for any actions taken to comply with the COPA. *See* 47 U.S.C. § 231(c)(2).

C. The World Wide Web[3]

1. The Nature of the Online Medium

The Internet is a decentralized, global medium of communications that links people, institutions, corporations and governments around the world. *ACLU I*, 949 F. Supp. at 831. It is a giant computer network that interconnects innumerable smaller groups of linked computer networks and individual computers. *ACLU I*, 117 S. Ct. at 2334. While estimates are difficult due to the Internet's constant and rapid growth, it is currently believed to connect more than 159 countries and over 100 million users. *ACLU I*, 929 F. Supp. at 831. The amount of traffic on the Internet is doubling approximately every 100 days.

Because the Internet merely links together numerous individual computers and computer networks, no single entity or group of entities controls the material made available on the Internet or limits the ability of others to access such materials. *ACLU I*, 117 S. Ct. at 2336. Rather, the range of digital information available to Internet users is individually created, maintained, controlled and located on millions of separate individual computers around the world.

The Internet presents extremely low entry barriers to anyone who wishes to provide or distribute information or gain access to it. Unlike television, cable, radio,

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[3] The facts in this section are largely taken from *ACLU I*; similar facts regarding the Internet were recently found in *ACLU v. Johnson*, 4 F. Supp. 2d 1029, 1031 (D.N.M. 1998); and also in *American Library Ass'n v. Pataki*, 969 F. Supp. 160, 164 (S.D.N.Y. 1997) Plaintiffs have proposed a Stipulation of Facts based on this Court's findings of fact in *ACLU I*, 929 F. Supp. at 830-49. Defendants have not yet responded. These facts will also be supported by declarations and live testimony, including expert testimony, at the TRO and preliminary injunction hearings.

newspapers, magazines or books, the Internet provides the average citizen or small business with an affordable means for communicating with, accessing and posting content to a worldwide audience.

The Web is currently the most popular way to provide and retrieve information on the Internet. Anyone with access to the Internet and proper software can post content on the Web, which may contain many different types of digital information -- text, images, sound, and even video. The Web comprises millions of separate but interconnected "Web sites," which in turn may have hundreds of separate "Web pages" that display content provided by particular persons or organizations. Any Internet user anywhere in the world with the proper software can create her own Web page, view Web pages posted by others, and then read text, look at images and video, and listen to sounds posted at these sites.

To gain access to the information available on the Web, a person uses a Web "browser" -- software such as Netscape Navigator, Mosaic, or Internet Explorer -- to display, print and download documents that use hypertext transfer protocol ("http"), the standard Web formatting language. Each document on the Web has an address that allows users to find and retrieve it. Most Web documents also contain "links." These are short sections of text or image that refer and link to another document. Through the use of these links from one computer to another and from one document to another, the Web for the first time unifies the diverse and voluminous information made available by millions of users on the Internet into a single body of knowledge that can easily be searched and accessed.

A number of search engines and directories -- such as Yahoo, Infoseek, and Lycos -- are available free of charge to help users navigate the Web. Once a user has accessed the search service, she simply types a word or string of words as a search request and the search service provides a list of sites that match the search string.

2. How Individuals Access the Web

Individuals have several easy means of gaining access to the Web. Internet service providers ("ISPs") offer their subscribers modem access to computers or networks linked directly to the Internet. Most ISPs charge a modest monthly fee, but some provide free or very low-cost access. *ACLU I*, 929 F. Supp. at 832-33. National "commercial online services," such as America Online and the Microsoft Network, serve as ISPs and also provide subscribers with additional services, including access to extensive content within their own proprietary networks. In addition, many educational institutions, libraries, businesses, and individual communities maintain computer networks linked directly to the Internet and thus the Web, and provide account numbers and passwords enabling users to gain access to the network. *ACLU I*, 117 S. Ct. at 2334.

Most users of the Internet are provided with a username, password and e-mail address that allow them to log on to the Internet and to communicate with other users. Many usernames are pseudonyms or pen names that provide users with a distinct online identity and help to preserve anonymity and privacy. The username and e-mail address are the only indicators of the user's identity; that is, persons communicating with the user will know them only by their username and e-mail address (unless the user reveals other information about herself through her communications).

3. Ways of Communicating and Exchanging Information Over the Web

The Web also allows individuals to communicate in discussion groups and chat rooms and by e-mail using hypertext transfer protocol. *See* Hoffman Decl. at pp. 18-19. Many Web sites use software applications, sometimes called "middleware," to provide users of their sites with access to discussion groups and chat rooms.

Discussion groups allow users of computer networks to post messages onto a public computerized bulletin board and to read and respond to messages posted by others in the discussion group. *ACLU I*, 117 S. Ct. at 2335. Discussion groups have been organized to cover virtually every topic imaginable. *Id*. Chat rooms allow a user to engage in simultaneous conversations with another user or group of users by typing messages and reading the messages typed by others participating in the "chat."

For example, plaintiff OBGYN.net sponsors discussion groups and chats that allow doctors to discuss women's health with their colleagues, and allow women to submit questions to be answered by medical professionals. These various discussion forums generate over one and a half million messages monthly, all of which are archived and can be searched and browsed by later users. *See* Speyer Decl. (OBGYN.net) at pp. 8-10 & Exhs. 5-7. Plaintiff Salon Magazine also sponsors and archives discussions on a wide range of current subjects; one recent topic was entitled "Can boys find the right spot?", which discussed whether men needed guidance to provide sexual pleasure to their partners. *See* Talbot Testimony (Salon Magazine), Exh. 27.

Online discussion groups and chat rooms create an entirely new global public forum where individuals can associate and communicate with others who have

common interests, obtain instant answers to research questions, and engage in discussion or debate on every imaginable topic. *ACLU I*, 929 F. Supp. at 835.

Finally, it is possible to set up an account for electronic mail, commonly referred to as "e-mail," using the Web. Several commercial Web sites such as Yahoo and Hotmail will provide free e-mail accounts to individuals. These accounts allow individuals to use the Web to create, send, and receive e-mails with other individuals. Such accounts allow individuals who do not possess their own computer or Internet access account to establish a permanent e-mail address and to correspond with other individuals by using the Web at public libraries and other public Internet access sites. *See* Hoffman Decl. at p. 18.

As can be seen from the various ways that individuals can exchange information and communicate via this technology, the Web is "interactive" in ways that distinguish it from traditional media. For instance, users are not passive receivers of information as with traditional broadcast media; rather, users can easily respond to the material they receive or view online. In addition, Web users must actively seek out with specificity the information they wish to retrieve and the kinds of communications in which they wish to engage. For example, to gain access to material on the Web, a user must know and type the address of a relevant site or find the site by typing a relevant search string into a search engine. For this reason, as this Court found in *ACLU I* based on the testimony of the government's witness, the "odds are slim" that a user would enter a sexually explicit site by accident. 929 F. Supp. at 844-45, ¶ 88; Hoffman Decl. at p. 17.

4. The Value and Breadth of Speech "For Commercial Purposes" On the Web

The overwhelming majority of information on the Web is provided to users for free, regardless of its source. *See* Hoffman Decl. at pp. 13-14. Nevertheless, under new business models made possible by the unique qualities of the Web, the Web provides tremendous opportunities for individual entrepreneurs, start-up companies, and home-based businesses, as well as businesses that also exist in the offline world. *See* Glickman Decl. (Condomania) at pp. 2-3; Johnson Decl. (ArtNet.com) at pp. 3-4; Speyer Decl. (OBGYN.net) at pp. 3-4. The breadth of the plaintiffs' speech is indicative of the wide range of individuals and companies communicating on the Web for commercial purposes. *See* Hoffman Decl. at pp. 13-17. Although it is not possible to know the exact number of sites that are run by profit-making enterprises, the percentage of such cites has increased over time. *See* Hoffman Decl. at 13. The number of such sites is now more that 400,000 and may well be over one million.

These businesses make a profit (or attempt to make a profit) in several ways. Just like many traditional print newspapers, bookstores, and magazine publishers, many Web publishers generate revenue through advertising. *See* Talbot Testimony (Salon Magazine). In addition, content providers such as online booksellers, music stores, and providers of art services allow potential customers to browse their content for free -- similar to browsing in an actual book store or art gallery. *See* Johnson Decl. (ArtNet.com) at p. 6; Finan Decl. (ABFFE) at p. 9; Laurila Testimony (A Different Light). Finally, some online content providers make a profit by charging their content contributors, although users may access the content for free. *See* Johnson Decl.

(ArtNet.com) at pp. 8-9. Thus, the COPA impacts a wide range of providers of free content, ranging from fine art to popular magazines to news and issue-oriented expression.

The value of these sites for users extends much further than a commercial exchange. Readers use these sites to obtain news, medical information, and literature that may not be available at their local bookstore, library, or art gallery. *See, e.g.*, Speyer Decl. (OBGYN.net) at p. 14; Johnson Decl. (ArtNet.com) at p. 4-5; Finan Decl. (ABFFE) at p. 9; Laurila Testimony (A Different Light). "It is estimated that there are over 320 million pages of content on the World Wide Web sites representing . . . a 'searchable 15-billion word encyclopedia.'" Hoffman Decl. at p. 14 (quoting Lee Giles & Steve Lawrence, "Searching the World Wide Web," *Science*, April 3, 1998, at pp. 98-100). The ease of access on the Web, and the fact that the information is free, draws millions of users to the Web sites of plaintiffs and other speakers covered by the COPA. *See* Talbot Testimony (Salon Magazine). The Web thus serves simultaneously as the world's largest library, news source, and shopping catalog.

5. The Inability of Speakers to Prevent Their Speech from Reaching Minors

The COPA applies to all communications on the Web that are "available to any minor." 47 U.S.C. § 231(a)(1). Because all content on the Web is "available to" both adults and minors, the COPA on its face applies to communications between adults. Given the technology of the Web, there are no reasonable means for speakers to make their speech "available" only to adults. *See* Steinhardt Decl. at pp. 6-9; Laurila Testimony (A Different Light); Talbot Testimony (Salon Magazine); Finan Decl. (ABFFE) at pp. 8-10; Warren Decl. (ACLU Member) at ¶¶ 19-31. From the perspective of speakers, the

information that they make available on the public spaces of the Web must be made available either to all users of the Web, including users who may be minors, or not at all.

The COPA attempts to provide affirmative defenses to criminal liability, none of which are available to plaintiffs and other providers of free content on the Web. *See* Steinhardt Decl. at pp. 6-9; Laurila Testimony (A Different Light); Talbot Testimony (Salon Magazine); Johnson Decl. (ArtNet.com) at pp. 18-20; Finan Decl. (ABFFE) at pp. 8-10; Glickman Decl. (Condomania) at pp. 14-17; Speyer Decl. (OBGYN.net) at pp. 15-18; Warren Decl. (ACLU Member) at ¶¶ 19-31; *see also* discussion *infra* at Section A.3.[4] Section 231(c)(1)(A) provides an affirmative defense if the defendant restricts access by "requiring use of a credit card, debit account, adult access code, or adult personal identification number." 47 U.S.C. § 231(c)(1). This defense is effectively unavailable to providers of free content because financial institutions charge to verify a credit card. The cost of credit card verification imposes insurmountable economic burdens on speakers and other content providers who want to provide their speech for free. *See* Steinhardt Decl. at pp. 6-8 ("News Media estimates setting up [a credit card age verification system] would cost somewhere between $20,000 and $30,000 per Web site . . . . For a large site with 100,000 individual users each month, the cost for credit card verification could be as high as $200,000 per month."); Johnson Decl. (ArtNet.com at pp. 18-19; Warren Decl. (ACLU Member) at ¶¶ 25-28; Speyer Decl. (OBGYN.net) at pp. 16-17. Plaintiffs and the vast majority of other speakers affected by the COPA could

[4] Plaintiffs expect to introduce additional expert testimony at the preliminary injunction hearing regarding the inability of speakers to avail themselves of the defenses. Similar testimony was taken in *ACLU I*, 929 F. Supp. at 845-48; *Shea v. Reno*, 930 F. Supp. 916, 941 (S.D.N.Y. 1996) (another case striking down the CDA), *aff'd*, 117 S. Ct. 2501 (1997); *ACLU v. Johnson*, 4 F. Supp. at 1031-33; and *ALA v. Pataki*, 969 F. Supp. at 167, 181.

not afford to pay these fees themselves. Talbot Testimony (Salon Magazine); Laurila Testimony (A Different Light). If speakers absorbed the costs themselves, rather than passing them on to users, some speakers with controversial information would risk economic sabotage because users who disapproved of their speech could simply access their site again and again in order to drive up the cost for the speakers. Warren Decl. (ACLU Member) at ¶ 27. If plaintiffs tried to pass the cost along to users, they believe most users would simply refrain from accessing their speech at all. Talbot Testimony (Salon Magazine). *See also* discussion *infra* at Section A.3.

Validation by a debit card under § 231(c)(1)(A) would also require a financial transaction and therefore is also unavailable to content providers who provider their speech for free. Similarly, requiring speakers to set up an adult identification system under § 231(c)(1)(A), or a system to accept "digital certificates" under § 231(c)(1)(B), before they can provide free content is technologically and economically infeasible for the vast majority of content providers covered by the COPA. Glickman Decl. (Condomania) at p.16 ("It is my understanding that digital certificate technology is not currently in widespread use, and will not become universally adopted for a considerable time if ever. Given the limited use of digital certificates, Condomania would not survive if it was required that users present a digital certificate before accessing our site."); Steinhardt Decl. at pp. 8-9 ("Digital certificate technology is not established enough to be deployed for widespread age verification."); *see also* discussion *infra* at Section A.3.b.

Finally, § 231(c)(1)(C) of the COPA provides an affirmative defense if the defendant takes "other reasonable measures that are feasible under available

technology" to restrict access by minors. As discussed above, there are no other "reasonable measures" that allow content providers to limit their speech to adults. Because none of the defenses are available, plaintiffs and other speakers have no way to comply with the COPA and are left with two equally untenable alternatives: (i) risk prosecution and civil penalties under the COPA, or (ii) attempt to engage in self-censorship and thereby deny adults and older minors access to constitutionally protected material.

6. The Impact of the COPA on Internet Users

Even if age or credit card verification were feasible, such a requirement would fundamentally alter the nature and values of the new computer communication medium, which is characterized by spontaneous, instantaneous, albeit often unpredictable, communication by hundreds of thousands of individual speakers around the globe, and which provides an affordable and often seamless means of accessing an enormous and diverse body of information, ideas and viewpoints.

The COPA would thus prevent or deter hundreds of thousands of readers from accessing protected speech even if it were feasible for speakers to set up a system to verify age. Any age verification requirement would inevitably prevent readers who lack the necessary identification from accessing speech that would otherwise be available to them. Many adults do not have a credit card. Age verification would have an especially detrimental effect on foreign users, who are less likely than U.S.-based adults to have a credit card or other identification. *See* Speyer Decl. (OBGYN.net) at p. 18; *see also* discussion *infra* at Section A.3.d.

In addition, many users will not want to provide personal information to obtain speech for free. Talbot Testimony (Salon Magazine). Users may not want to disclose information as valuable as a credit card number unless they are actually making a purchase. In addition, the COPA's registration requirements would prevent users from accessing information anonymously, and would thus deter many users from accessing sensitive or controversial speech covered by the COPA. *See* Warren Decl. (ACLU member) at ¶ 20; Speyer Decl. (OBGYN.net) at p. 13; Glickman Decl. (Condomania) at p. 17 ("Having to register would discourage those who are already shy about safer sex information from having access to any information at all."). Requiring adults to identify themselves before they can access speech defined as "harmful to minors" will also stigmatize that speech and thus deter access to protected speech. *See* Talbot Testimony (Salon Magazine). Finally, when faced with the choice between reading material that does not require any identification and providing a credit card or identification to access speech covered the COPA, many users will simply not bother to obtain or provide the necessary identification, and will instead decline to access the covered speech at all. *See* Talbot Testimony (Salon Magazine).

7. User-Based Filtering Programs and Other Available Alternatives

Because of the global nature of the Internet, defendants cannot demonstrate that the COPA would likely reduce the availability of sexual content on the Web to minors in the United States. At least 40% of the content provided on the Web originates abroad. All of the content on the Web is equally available to all Web users worldwide and may be accessed as easily as content that originates locally. *ACLU I*, 929 F. Supp. at 882. Because it is not technologically possible to prevent content posted

abroad from being available to Web users in the United States, the COPA will not accomplish its purported purpose of keeping sexually oriented content from minors in the United States. Similarly, the COPA does not apply to nonprofit, noncommercial speakers. Thus, speech identical to that on plaintiffs' Web sites can be legally made available to minors from any of the vast number of noncommercial Web sites both in the United States and abroad.

Conversely, there are many alternative means that are more effective at assisting parents in limiting a minor's access to certain material if desired. *ACLU I*, 117 S. Ct. at 2337, and 929 F. Supp. at 838-42, ¶7. Commercial online services like America Online and Prodigy provide features to prevent children from accessing chat rooms and to block access to Web sites and newsgroups based on keywords, subject matter, or specific newsgroups. *ACLU I*, 117 S. Ct. at 2336. These services also offer screening software that blocks messages containing certain words, and tracking and monitoring software to determine which resources a particular online user (*e.g.*, a child) has accessed. They also offer children-only discussion groups that are closely monitored by adults. *ACLU I*, 929 F. Supp. at 839, ¶ 54.

Online users can also purchase special software applications, known as user-based blocking programs. These applications allow users to block access to certain resources, to prevent children from giving personal information to strangers by e-mail or in chat rooms, and to keep a log of all online activity that occurs on the home computer.

ARGUMENT

Plaintiffs more than satisfy the requirements for preliminary injunctive relief. In order for this Court to grant a Temporary Restraining Order and Preliminary Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, plaintiffs must establish: (a) that they are likely to prevail on the merits; (b) that they will suffer irreparable harm if injunctive relief is not granted; (c) that potential harm to the defendants from issuance of a preliminary injunction does not outweigh possible harm to the plaintiffs if such relief is denied; and (d) that the granting of injunctive relief would not be against the public interest. *See In re Arthur Treacher's Franchise Litig.*, 689 F.2d 1137, 1143 (3d Cir. 1982); *Constructors Ass'n of W. Pa. v. Kreps*, 573 F.2d 811, 814-15 (3d Cir. 1978).

A. Plaintiffs Have a Substantial Likelihood of Success on the Merits

1. The COPA's Defects Are Identical to the Defects Which the Supreme Court Found Constitutionally Fatal in the Communications Decency Act.

The COPA's ultimate constitutional flaws are identical to the flaws that led a three-judge court in this district to strike down the Communications Decency Act (the "CDA"), and the Supreme Court to affirm the district court's decision, in *ACLU I*. Defendant herself recognized and discussed the similarities in the two laws in stating that the COPA "would likely be challenged on constitutional grounds, since it would be a content-based restriction applicable to 'the vast democratic form of the Internet,' a 'new marketplace of ideas' that has enjoyed a 'dramatic expansion' in the absence of significant content-based regulation. *ACLU I*, 117 S. Ct. 2329, 2343, 2351 (1997)." DOJ Letter at 3. While there are slight differences between the two laws, these differences are

insignificant when compared to the fundamental and fatal constitutional defect of both laws: "In order to deny minors access to potentially harmful speech" -- the COPA, like the CDA -- "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *ACLU I*, 117 S. Ct. at 2346. In passing both the CDA and the COPA, Congress made it a *crime* for *adults* to communicate and receive expression that is clearly protected by the Constitution.

Both acts are criminal statutes, which pose a very strong risk that they "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *ACLU I*, 117 S. Ct. at 2344. Both apply to material that is clearly constitutionally protected for adults.[5] Both effectively ban protected speech to adults because the defenses in both laws "d[o] not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults."[6] *Id*. at 2347; *see also ALA v. Pataki*, 969 F. Supp. at 166 (finding that age verification defenses provided no way to comply with state online harmful-to-minors statute); *ACLU v. Johnson*, 4 F. Supp. 2d at 1032 (same). In addition, because both laws rely on "community standards," both allow "any communication

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[5] *See ACLU*, 117 S. Ct. at 2346 (quoting *Sable*, 492 U.S. 115, 126 ("Sexual expression which is . . . not obscene is protected by the First Amendment"); *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."); *Fabulous Assocs. v. Pennsylvania Public Utility Comm'n*, 693 F. Supp. 332, 335 (E.D. Pa. 1988) ("[I]t is not enough that the variable standard may be constitutional as applied to minors, since it is being applied as a restriction on adults' access to protected speech."), *aff'd*, 896 F.2d 780 (3d Cir. 1990); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988).

[6] Two of the three defenses in the COPA are word-for-word identical to defenses found to be unavailable to content providers in *ACLU I*. The third defense is similarly unavailable to speakers.

available to a nation-wide audience [to] be judged by the standards of the community most likely to be offended by the message." *Id.* at 2347.

There are only two differences between the COPA and the CDA. As discussed more fully in the sections that follow, neither distinction overcomes the presumption that such content-based bans on protected speech violate the First Amendment. *See ACLU I*, 117 S. Ct. at 2351; *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). First, the category of non-obscene speech prohibited by the COPA -- material that is "harmful to minors" -- is arguably narrower than the category criminalized by the CDA -- material that is "indecent" or "patently offensive".[7] That distinction, however, is irrelevant to the First Amendment claims in this case because both "indecent" material and material that is "harmful to minors" are unquestionably protected for adults. *Fabulous Assocs.*, 896 F.2d at 788; *ACLU v. Johnson*, 4 F. Supp. 2d 1029 (D.N.M. 1998) (striking down online "harmful to minors" law as a violation of the First Amendment rights of adults); *ALA v. Pataki*, 969 F. Supp. 160 (striking down online "harmful to minors" law because it burdened adult speech rights in violation of the Commerce Clause). Because there is no way to verify age on the Internet, the two laws both effectively ban speech that is constitutionally protected between adults. Even under the guise of protecting children, the government may not justify the complete suppression of constitutionally protected speech because to do so would "burn the house to roast the pig." *ACLU I*, 117 S. Ct. at

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[7] The "harmful to minors" standard in the COPA attempts to track the standard applied in *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274 (1968) (upholding variable obscenity test for direct sale of material deemed "harmful to minors"), as modified by the Supreme Court's most recent definition of obscenity in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973). *Cf. American Booksellers Ass'n v. Webb* , 919 F.2d 1493, 1501 (11th Cir. 1990) (noting that *Ginsberg* did not address the "difficulties which arise when the government's protection of minors burdens (even indirectly) adults' access to material protected as to them"), *cert. denied*, 500 U.S. 942 (1992).

2350 (citing *Sable*, 492 U.S. at 127); *see also Butler v. Michigan*, 352 U.S. 380, 383 (1957).

Second, the COPA purports to restrict only speech provided on the Web "for commercial purposes," whereas the CDA applied to speakers regardless of intent.[8] In fact, however, the term "commercial purposes" is a misnomer because the COPA explicitly bans a wide range of protected expression that is provided *for free* on the Internet by individuals and organizations. The COPA does not address the commercial *sale* of content; in fact, providers who sell their content are provided with an explicit defense when the buyer pays by credit or debit card.[9] 47 U.S.C. § 231(c). Rather, the COPA targets all other communications made "publicly accessible" on the Web "for commercial purposes," defined very broadly as being "engaged in the business of making such communications." The COPA's definition of a person "engaged in the business" explicitly states that "it is not necessary that the person make a profit" nor that the making of the communications be the person's "principal business" in order to justify prosecution. 47 U.S.C. § 231 (e)(2)(B). Many Web publishers, like traditional newspapers and magazines, make a profit through advertising. Talbot Testimony (Salon Magazine). In addition, content providers such as online booksellers, music stores, and art vendors allow

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[8] The COPA applies to communications over the Web, whereas the CDA applied to communications over the Internet. Many of the interactive features that previously took place using non-Web protocols, such as discussion forums and chat rooms, now also occur over the Web. *See* Hoffman Decl. at pp. 18-19. Thus, the types of communication covered by the COPA include the same variety that were covered by the CDA when that law was challenged.

[9] Defendant will likely argue that the intent of the law to cover only commercial "pornography." Since most commercial "pornography" sites require a sale by credit card before they provide access to the material, there is in fact very little commercial pornography that could even arguably be impacted by the COPA. Thus, Defendant cannot meet its burden of proving that the law is an effective means of addressing its asserted interest. *See* discussion *infra* at Section A.4.

potential customers to browse their content for free -- similar to browsing in an actual book store or art gallery. Johnson Decl. (ArtNet.com). at p. 6; Glickman Decl. (Condomania) at p. 3; Laurila Testimony (A Different Light). Finally, some online content providers make a profit by charging their content contributors, although users may access the content for free. *See* Johnson Decl. (ArtNet.com) at pp. 8-9. Thus, the COPA, like the CDA, impacts a wide range of providers of free content, from fine art to popular magazines to news and issue-oriented expression. Just as the CDA suppressed a "large amount of speech" that adults have a constitutional right to receive, *ACLU I*, 117 S. Ct. at 2346, the COPA impacts millions of readers who will be prevented from accessing protected speech if the COPA is not enjoined.

2. The COPA Effectively Bans Constitutionally Protected Speech, and Therefore Cannot Survive Strict Scrutiny

As a content-based regulation of protected speech, the COPA is presumptively invalid. *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). Content-based regulations of speech will be upheld only when they are justified by compelling governmental interests and are "narrowly tailored" to effectuate those interests. *See Sable*, 492 U.S. at 126 (applying strict scrutiny to invalidate indecency ban on telephone communications, and holding that the government may effectuate even a compelling interest only "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms"); *Fabulous Assocs.*, 896 F.2d at 788 (applying strict scrutiny to strike down "harmful to minors" restrictions in telephone communications because of unconstitutional burden on adult rights). In concluding that strict scrutiny applies to content-based bans on Internet speech, the

Supreme Court stated that there was "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *ACLU I*, 117 S. Ct. at 2344; *see also id.* at 2346 ("Th[e] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").[10]

In *Sable*, the Court struck down a total ban on the commercial sale of indecency over the telephone because it had the "effect of limiting the content of adult [communications] to that which is suitable for children." *Sable*, 492 U.S. at 131; *see also Denver Area Educ. Telecomms. Consortium v. FCC*, 116 S. Ct. 2374, 2393 (1996). Indeed, because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," the Supreme Court has *never* upheld a criminal ban on non-obscene communications between adults. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (striking down a ban on mail advertisements for contraceptives); *Butler v. Michigan*, 352 U.S. 380, 381 (1957) (striking down a ban on material "manifestly tending to the corruption of the morals of youth").

The COPA is also unconstitutionally overbroad. Under the substantial overbreadth doctrine, a law must be struck down as facially invalid if it would "'penalize a substantial amount of speech that is constitutionally protected' . . . even if some

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[10] There is no question that strict scrutiny is the appropriate test in this instance even though the COPA purports to apply to speech "for commercial purposes." First, as discussed above, the law on its face applies to much more than speech that proposes a commercial exchange; it applies to all speech on the Web that is provided for free by organizations engaged in business. Second, laws that prevent or burden adults from accessing protected speech have been subject to strict scrutiny even when the speech involves a commercial transaction. *Sable*, 492 U.S. 115; *Fabulous Associates*, 896 F.2d 780; *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) (political advertising is not "commercial" speech and it is immaterial that the newspaper was paid for publishing it).

applications would be 'constitutionally unobjectionable.'" *ACLU I*, 929 F. Supp. at 867 (Dalzell, J.) (quoting *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 129-30 (1992)). Because the COPA provides no way for speakers to prevent their communications from reaching minors without also denying adults access to the material, the COPA "sweeps too broadly." *Forsyth County*, 505 U.S. at 130. Thus, like the CDA, the "breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA." *ACLU I*, 117 S. Ct. at 2348. Defendant cannot meet this burden.

Material that is "harmful to minors" is by definition material that some communities believe is inappropriate for minors although it is constitutionally protected for adults. The category was created to apply to speech that was non-obscene, and therefore constitutionally protected for adults, but that could be prohibited for direct sale to minors. *See Ginsberg v. New York*, 390 U.S. 629 (1968).[11]

The COPA's prohibition on material that is "harmful to minors" applies to any "communication, picture, image, graphic image file, article, recording, writing, or other matter," and thus directly applies to *written* material with no images, and to video and audio *recordings*, that meet the "harmful to minors" standard. 47 U.S.C. § 231(e)(6). The definition of "harmful to minors" has three parts, all of which require the speaker to take into account the impact of the speech on minors, *not* on adults. That is, material is "harmful to minors" if it 1) "*with respect to minors*, is designed to appeal to . . . the

[11] In contrast to *Ginsberg*, which restricted only the direct sale to minors of material that is "harmful to minors," the COPA on its face applies to all communications to adults that are also "available" to minors.

prurient interest;" 2) is "patently offensive *with respect to minors;*" and 3) "lack[s] serious . . . value *for minors*." 47 U.S.C. § 231(e)(6) (emphasis added).

There is a large category of material that is not "patently offensive" for adults to communicate and receive, and that has value when communicated to adults, but that many communities may believe is offensive and lacks value for communication to minors. That is the category of speech that is the gist of the "harmful to minors" standard. Because the standard does not distinguish between material that lacks value for a sixteen-year-old and material that lacks value for a younger child, speakers are at risk if they communicate material that could be considered harmful to an eight-year-old.[12] By using the "harmful to minors" standard, and by prohibiting all communications that are generally "available" to minors (as opposed to provided directly to them), the COPA on its face criminalizes a wide range of material that is constitutionally protected for adults.

While defendant will almost certainly argue that the law should be rewritten to apply only to the sale of "pornography," the COPA's plain language encompasses information provided for free that involves a much broader range of sexually oriented issues. As the Supreme Court made clear when rejecting the government's argument for a narrowing construction in *ACLU I*, a court "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." 117 S. Ct. at 2350 (quoting *Virginia v. American Booksellers Association*, 484 U.S. 383, 397 (1988)).[13]

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12 *See* discussion *infra* at Section A.6, citing DOJ Letter.

13 The Court articulated this principle as long ago as *United States v. Reese*, 92 U.S. 214, 221 (1875), when it said: "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government."

Similarly, in *Blount v. Rizzi*, 400 U.S. 410, 419 (1971), the Supreme Court refused to salvage a federal obscenity law by adopting a narrowing construction because it was "for Congress, not this Court, to rewrite the statute."[14] Ultimately, no suggested re-writing could resolve the COPA's unconstitutional burden on materials that are clearly protected for adults. Because the law on its face criminalizes speech that is "harmful to minors," and the affirmative defenses are unavailable to the vast majority of speakers covered by the COPA, the law violates the First Amendment rights of adults and must be struck down.

3. The COPA's Defenses Are Unavailable to the Vast Majority of Speakers on the Web Affected by the COPA

Standing alone, the COPA clearly fails strict scrutiny and is unconstitutionally overbroad. The COPA applies to any communication that is "available to any minor." 47 U.S.C. § 231(a)(1). Because the vast majority of speech on the Web is available to minors as well as adults, the COPA on its face applies to adult communications. *ACLU I*, 117 S. Ct. at 2347. "[E]xisting technology [does] not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults." *Id.*; *see also Pataki*, 969 F. Supp. at 166; *Johnson*, 4 F. Supp. 2d at 1032. Thus, every time a speaker communicates speech that may be "harmful to minors" on the Web, she risks prosecution under the COPA for making a communication "available to any minor."

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[14] Of course, Defendant has not yet articulated precisely which words in the COPA it would ask the Court to re-write in order to narrow the COPA's facial coverage. Just as in *ACLU I*, 117 S. Ct. at 2350-51, Plaintiffs believe that Defendant will be unable to articulate a definition of the COPA's coverage that does not conflict with the COPA's specific language. For example, Defendant cannot argue that the COPA only applies to "pornographic" images because the COPA specifically applies to written material. Similarly, Defendant cannot argue that the COPA only applies to businesses whose principal business is communicating "pornography" because the COPA specifically states that "it is not necessary that the . . . communications be the person's sole or principal business or source of income." 47 U.S.C. § 231(e)(2)(B).

The defenses do nothing to narrow the facial unconstitutionality of the COPA. As an initial matter, the affirmative defenses do not even protect an individual speaker from prosecution, as distinct from ultimate criminal liability. An online speaker may invoke the defenses only after a prosecutor has initiated criminal or civil proceedings against her, and only as an attempt to prove that she did not violate the law's direct prohibition on communicating material "available to any minor." *See ACLU I*, 929 F. Supp. at 857; *Shea*, 930 F. Supp. at 944. Because the defenses "in no way shield[] a content provider from prosecution," they are unlikely to eliminate the severe chilling effect of the COPA. *Shea*, 930 F. Supp. at 944. As the discussion below will illustrate, the defenses are technologically and economically unavailable to the vast majority of speakers on the Web covered by the COPA.

a. Credit Card Verification Is Unavailable to Speakers Who Provide Their Material for Free

Section 231(c) provides an affirmative defense to a defendant who "in good faith, has restricted access by minors to material that is harmful to minors -- (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number." This defense is identical to a defense found to be unavailable to content providers at risk under the CDA. *See ACLU I*, 117 S. Ct. at 2339 n.26 & 2347.

There is no technology available that would enable credit card verification by speakers on the Web who publish through commercial online services such as America Online and Prodigy Internet, which collectively have over 18 million subscribers. *ACLU I*,

929 F. Supp. at 845-46, ¶ 96; *Johnson*, 4 F. Supp. 2d at 1032.[15] Thus, this large category of people would simply have to refrain from engaging in constitutionally protected speech. For these speakers, § 231(c)1(A) is no defense at all. *See ACLU I*, 117 S. Ct. at 2349-50 and 929 F. Supp. at 854 (Sloviter, C.J.).

While credit card verification is not technologically impossible for speakers on the Web who do not use the commercial online services, it is still effectively unavailable for the vast number of these speakers on the Web -- including all of the plaintiffs -- who do not charge, and do not wish to charge, for their speech. *Credit card companies will not verify credit cards for free. ACLU I*, 117 S. Ct. at 2337 ("Credit card verification is only feasible, however, . . . in connection with a commercial transaction in which the card is used . . . ."); Steinhardt Decl. at pp. 6-7; Warren Decl. (ACLU Member) at ¶ 25.

The economic burdens alone of credit card verification when providing access to speech for free are insurmountable for plaintiffs and other speakers affected by the COPA. *See* Warren Decl. (ACLU Member) at ¶¶ 25-28; Johnson Decl. (ArtNet.com) at pp. 17-19; Speyer Decl. (OBGYN.net) at pp. 15-18; Finan Decl. (ABFFE) at pp. 8, 10; Talbot Testimony (Salon Magazine); Laurila Testimony (A Different Light). The burdens are multifaceted. First, plaintiffs who currently make no sales on their site, such as Salon Magazine, would have to purchase special software applications and secure servers. *See, e.g.*, Talbot Testimony (Salon Magazine). Second, all plaintiffs would either have to begin charging for their speech to cover the cost of verification, or they would have to cover the cost themselves. The fee per transaction would be anywhere between $0.20 and $2.00.

[15] Plaintiffs anticipate introducing testimony at the preliminary injunction hearing to show that this fact, as found in prior cases, is true today.

Steinhardt Decl. at p. 7; Warren Decl. (ACLU Member) at ¶ 25. To require users to pay the fee would be the equivalent of requiring bookstores to charge people before they could enter the store to browse through a single book, and would have a devastating impact on plaintiffs' businesses, because most users would be unwilling to pay for the information. *See* Warren Decl. (ACLU Member) at ¶ 26 ("I do not believe anyone wanting to visit the Wildcat Press web site would pay the fee themselves, any more than people would be willing to pay a fee to enter a bookstore."); Steinhardt Decl. at p.8; Talbot Testimony (Salon Magazine). Given the size of their audiences, which range up to the hundreds of thousands, plaintiffs could not afford to cover the cost of the verification. *See* Speyer Decl. (OBGYN.net) at p. 4 (over 100,000 visitors monthly); Johnson Decl. (ArtNet.com) at p. 3 (over 50,000 visitors weekly); Glickman Decl. (Condomania) at p. 15 (3,000 visitors daily); Talbot Testimony (Salon Magazine). Even if they could afford such costs, such a system would put controversial speakers at risk of economic sabotage. Since there would be no cost to the user if the speaker paid for verification, people offended by a speakers' message could force the speaker out of business by accessing their site over and over again to purposefully drive up verification costs. Warren Decl. (ACLU member) at ¶ 27.

In addition, to require speakers to charge for their speech in order to verify age, or to shoulder the cost themselves, would completely negate the value of the Web for speakers as well as readers. It would turn an otherwise inexpensive resource for communicating with a broad audience into an unaffordable one for many content providers. The economic burden would force some of the plaintiffs to close their Web sites. Laurila Testimony (A Different Light). Plaintiffs' only other option would be to

steer clear of communicating speech that is "harmful to minors" even to adults, an effect that is in clear violation of *ACLU I*, *Butler*, and *Sable*.

Economic burdens on the exercise of protected speech are routinely struck down by the courts. Thus, in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975), the Supreme Court found an unconstitutional deterrent effect on free speech where, to avoid prosecution, theater owners were required either to "restrict their movie offerings or [to] construct adequate protective fencing which may be extremely expensive or even physically impracticable." *Id.* at 217. The COPA's ongoing economic burden would be far greater than the one-time fencing costs invalidated in *Erznoznik*. In *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 115 (1991), the Court stated that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech," because such a regulation "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 115 (1991); *see also Meyer v. Grant*, 486 U.S. 414, 424 (1988). Because many of the plaintiffs would be forced to self-censor rather than shoulder the economic burdens of the COPA's requirements, there is no question that the COPA would drive protected speech on explicit sexual issues, ranging from the Starr Report to gay and lesbian fiction to fine art, out of the Web marketplace. *See, e.g.*, Talbot Testimony (Salon Magazine); Laurila Testimony (A Different Light); Johnson Decl. (ArtNet.com) at pp. 18-20 ("Because we currently have over 1.7 million items in our art database, the cost of manually segregating the visual images alone would be staggering."); Glickman Decl. (Condomania) at pp. 14-17; Speyer Decl. (OBGYN.net) at pp. 15-18 ("Because of the volume of news articles, links, questions and answers that

are added to the site daily and the small size of our staff there is no way that we could segregate all material every day and continue to provide all of the services that we do today.").

b. The Remaining Defenses Are Also Unavailable to the Vast Majority of Speakers Affected by the COPA

To establish any other system of verifying age by "debit account, adult access code, or adult personal identification," would also be insurmountable for many speakers affected by the COPA. *See* Steinhardt Decl. at p. 8 ("EFF and ACLU members with commercial Web sites fear that large percentages of their users would avoid their sites if the users were required to get adult identification numbers because (1) it would seem that they were associated with pornography and (2) it would mean that they would have to pay to get access to our members' sites to subsidize the adult identification procedure."); Talbot Testimony (Salon Magazine); Warren Decl. (ACLU Member) at ¶ 29 ("The cost and added personnel resources required to process pre-registration information for hundreds of potential online users, and to maintain a database of information in case of criminal investigation would not be economically feasible for Wildcat Press."). As Supreme Court found in *ACLU I*, the cost of creating and maintaining an age verification system "would be prohibitive even for a commercial entity such as HotWired, the online version of Wired magazine." 929 F. Supp. at 847, ¶ 105. Likewise, the district court in *ACLU I* found that "[t]here is concern by commercial content providers that age verification requirements would decrease advertising and revenue because advertisers depend on a demonstration that the sites are widely available and frequently visited." 117

S. Ct. at 2337 n.23 (citing 929 F. Supp. at 847, ¶ 106).[16] Similarly, an affirmative defense for restricting access "by accepting a digital certificate that verifies age," 47 U.S.C. § 231(c)(1)(B), is technologically and economically infeasible to the vast majority of speakers affected by the COPA. Steinhardt Decl. at pp. 8-9 ("Digital certificate technology is not established enough to be deployed for widespread age verification.").

c. Age Verification Would Greatly Burden Internet Readers As Well As Speakers

The COPA's mandatory age verification requirements would impose extreme burdens on adults who want to access protected speech covered by the COPA, and would effectively deny readers access to important information that would otherwise be available for free. *See ACLU I*, 117 S. Ct. at 2346; *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("The State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.")

First, as discussed above, the vast majority of speakers are unable to implement the COPA's age verification requirements, and therefore will be forced to remove risky materials from their Web sites altogether. *See generally* Talbot Testimony (Salon Magazine); Glickman Decl. (Condomania) at p.17; Finan Decl. (ABFFE) at p.11. The obvious impact would be to deprive literally millions of readers of speech that was previously available to them for free. *See* Talbot Testimony (Salon Magazine).

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[16] While there are some third party age verification services associated with the commercial pornography industry, the reliability of such services has not been established. *See ACLU I*, 117 S. Ct. at 2337 and 929 F. Supp. at 846-47. In addition, many plaintiffs and other speakers, as well as users of their sites, may not wish to associate or affiliate with commercial pornography sites.

Second, even if speakers could somehow shoulder the economic burden of credit card verification, which they cannot, such verification would still "completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material." *See ACLU I*, 117 S. Ct. at 2337 (quoting *ACLU I*, 929 F. Supp. at 846, ¶ 102)); *see also* Glickman Decl. (Condomania) at p. 17; Talbot Testimony (Salon Magazine); Laurila Testimony (A Different Light). Foreign users, who comprise a significant part of plaintiffs' audiences, would be especially burdened because they are less likely to have a credit card, and less likely to have any other access in their communities to the type of materials communicated by the plaintiffs. *See* Speyer Decl. (OBGYN.net) at p. 18.

Third, the COPA's age verification requirements, even if feasible for speakers, would require readers to "register" in order to gain access to constitutionally protected speech. As the Supreme Court found in striking down the CDA, "[t]here is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password." *ACLU I*, 117 S. Ct. at 2337 n.23 (citing *ACLU I*, 929 F. Supp. at 847, ¶ 106). Similarly, in *Denver Area*, the Court struck down a statutory requirement that viewers provide written notice to cable operators if they want access to certain sexually oriented programs because the requirement "restrict[s] viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the . . . channel."[17] *Denver Area*, 116 S. Ct. at 2391. To require speakers on the

[17] The COPA's "privacy protection" requirements do nothing to resolve the deterrent effect of mandatory age verification on users, because users must still disclose the personal information and then rely on third parties to comply. 47 U.S.C. § 231(d). The requirements provide no

Web, under threat of criminal sanctions, to register their users by credit card or adult identification is a more onerous burden than the scheme found unconstitutional in *Denver Area*. The Third Circuit has also held that requiring adults to apply for access codes imposes an unconstitutional burden on speech. In *Fabulous Associates*, the court struck down a requirement that adults apply for access codes before they could access paid telephone messages that were "harmful to minors." 896 F. 2d at 787 (holding that the access code requirement "imposes a burden on the exercise of the callers' First Amendment rights and chills the message services' protected speech.").

The COPA's requirements further infringe on the First Amendment right to communicate anonymously. As the Supreme Court stated in *McIntyre v. Ohio Elections Comm'n*, anonymity "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation -- and their ideas from suppression -- at the hand of an intolerant society." 115 S. Ct. 1511, 1524 (1995) (striking down Ohio statute prohibiting anonymous distribution of campaign literature); *see also Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (finding unconstitutional a requirement that recipients of communist literature notify the post office that they wish to receive it); *Talley v. California*, 362 U.S. 60, 64-65 (1960) (declaring unconstitutional a California ordinance that prohibited the distribution of anonymous handbills); *ACLU of Georgia v. Miller*, 977 F. Supp. 1228 (N.D. Ga. 1997) (striking down Georgia statute that would have made it crime for Internet users to "falsely identify" themselves online). Some of the plaintiffs communicate sensitive and personal information

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recourse at all to users for violations by content providers; in fact, the COPA explicitly grants immunity to content providers for any action taken to comply with the COPA. *See* 47 U.S.C. § 231(c)(2).

involving gay and lesbian issues, safer sex, and medical health, and they believe many users would be deterred from accessing their resources if they could not do so anonymously. *See* Laurila Testimony (A Different Light); Warren Decl. (ACLU Member) ¶ 20 ("I believe that anonymous access to quality information about these controversial issues facing youth is crucial in a society which is often hostile to such material, otherwise many users will forgo access to our web site rather than identify themselves."); Speyer Decl. (OBGYN.net) at p.12; Glickman Decl. (Condomania) at p.17.

d. There Are No Other "Reasonable Measures" Available for Speakers to Restrict Access by Minors Without Also Restricting Access to Adults

Finally, § 231(c)(1)(C) provides an affirmative defense to a defendant who takes "any other reasonable measures that are feasible under available technology" to restrict access by minors. This defense is almost identical to a defense found to afford no additional protection to plaintiffs in *ACLU I*.[18] It similarly fails to provide protection to speakers in this case, as there are no other "reasonable measures" plaintiffs and other speakers could take to restrict access to minors without also restricting access to adults. Thus, they must "choose between silence and the risk of prosecution." *ACLU I*, 929 F. Supp. at 849.

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[18] Section 223(e)(5)(A) stated that a defendant had a defense if he "ha[d] taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors . . . which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology." *See ACLU I*, 117 S. Ct. 2329.

4. The COPA Is An Ineffective Method For Achieving the Government's Interest, and Less Restrictive, More Effective, Alternatives Are Available to Parents

The COPA also fails the strict constitutional scrutiny required of content-based bans on speech because it is a strikingly ineffective method for addressing the government's asserted interest. Under strict (and even intermediate) scrutiny, a law "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). The government bears the burden of showing that its scheme will in fact alleviate the alleged "harms in a direct and material way." *Turner Broad. System, Inc. v. FCC*, 512 U.S. 622, 624, 114 S. Ct. 2445, 2470 (1994). Here, the defendants cannot meet this burden. As Justice Scalia wrote in his concurrence in *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989), "a law cannot be regarded as . . . justifying a restriction upon truthful speech, when it leaves appreciable damage to [the government's] supposedly vital interest unprohibited." *Id.* at 541-42 (Scalia, J., concurring).

If the government's interest is in preventing minors from accessing "pornographic" images (which, although difficult to define, is far from coextensive with the much broader category of material explicitly covered by the COPA), such speech is already illegal under existing law if it is either obscene or child pornographic. *See, e.g.*, 18 U.S.C. § 522 (importation of obscenity); 18 U.S.C. §§ 1460 et seq. (obscenity); 18 U.S.C. §§ 2251 et seq. (child pornography); DOJ Letter at 2-3. The vast majority of the remaining category of "pornography" is not provided for free, but rather is only provided after a fee is paid; thus, its purveyors are protected under the COPA because they already require a credit card. *See ACLU I*, 117 S. Ct. at 2341 n.4 ("[I]ronically, th[e] [credit card]

defense may significantly protect commercial purveyors of obscenity while providing little (or no) benefit for transmitters of indecent messages that have significant social or artistic value."). The COPA also excludes from coverage any "pornography" that is communicated by noncommercial entities.[19] Finally, many minors have credit cards, and so the COPA will not prevent them "from posing as adults" to gain access to "harmful" material. 117 S. Ct. at 2349.

In addition, because of the nature of the online medium, the COPA will be ineffective at ridding online networks of "harmful" material. The Internet is a global medium, and material posted on a computer overseas is just as available as information posted next door. Thus, the COPA will not prevent minors from gaining access to the large percentage of material that originates abroad. *See ACLU I*, 929 F. Supp. at 848, ¶ 117, 882-83 (Dalzell, J.) (finding that "a large percentage, perhaps 40% or more, of content on the Internet originates abroad"); *see also Pataki*, 969 F. Supp. at 178.

In sum, the only "pornography" that the COPA could possibly prevent minors from accessing is material that: 1) is not already illegal under obscenity and child pornography laws, (*see* DOJ Letter at 203); 2) does not require payment; 3) is not communicated by amateurs with no profit motive; and 4) is not provided by content providers overseas. Thus, the government cannot meet its burden of establishing a "compelling interest" because the COPA clearly fails to alleviate the alleged "harms in a direct and material way," *Turner Broad.*, 114 S. Ct. at 2470, and leaves "appreciable

[19] This is also a sign of the COPA's underinclusiveness. Under the COPA, the same communication can be legal or criminal depending on whether it is communicated by a commercial or noncommercial entity. For example, Congress could not be held liable for posting the text of the Starr Report on its Web site, but Salon Magazine or The New York Times may be at risk.

damage to [the] supposedly vital interest unprohibited." *Florida Star*, 491 U.S. at 541-42. As defendant herself wrote before the law passed,

> Such a diversion [of law enforcement resources] would be particularly ill-advised in light of the uncertainty concerning whether the COPA would have a material effect in limiting minors' access to harmful materials. There are thousands of newsgroups and Internet relay chat channels on which anyone can access pornography; and children would still be able to obtain ready access to pornography from a myriad of overseas web sites. The COPA apparently would not attempt to address those sources of Internet pornography . . . . The practical or legal difficulty in addressing these considerable alternative sources from which children can obtain pornography raises questions about the efficacy of the COPA and the availability of expending scarce resources on its enforcement.

DOJ Letter at 3.

Moreover, the COPA is not the least restrictive means of achieving the government's asserted interest. *See Sable*, 492 U.S. at 126 ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). There are many alternative means that are more effective at assisting parents in limiting a minor's access to certain material if desired. *See ACLU I*, 929 F. Supp. at 839-42, ¶¶ 49-73; *Shea*, 930 F. Supp. at 931-32. Commercial online services like America Online and Prodigy provide features to prevent children from accessing chat rooms and to block access to Web sites and discussion groups based on keywords, subject matter, or specific discussion groups. In addition, there are a growing number of family-friendly Internet Service Providers that provide pre-filtered access as a value-added service. In addition to blocking pornography, these sites offer options to filter violence, drugs and hate speech.

Finally, online users can purchase special software applications, known as user-based blocking programs. These applications allow users to block access to certain resources, to prevent children from giving personal information to strangers by e-mail or in chat rooms, and to keep a log of all online activity that occurs on the home computer. User-based blocking programs are not perfect, both because they fail to screen all inappropriate material and because they block valuable Web sites. However, a voluntary decision by concerned parents to use these products for their children constitutes a far less restrictive alternative than the COPA's imposition of criminal penalties for protected speech among adults. Congress itself recognized the usefulness of these programs through another provision enacted along with the COPA, and not being challenged here, that requires Internet service providers to "notify [all new customers] that parental control protections (such as computer hardware, software or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors." 47 U.S.C. § 230(d).

Unlike the COPA, user-based solutions provide a way for concerned parents to prevent sexually oriented material from reaching minors: (1) from foreign sites; (2) from amateur or non-commercial commercial sites; and (3) from sites that require a credit card for payment. The use of such software is also notably less restrictive than the COPA's criminal ban. *See ACLU I*, 117 S. Ct. at 2348; *Denver Area*, 116 S. Ct. at 2393 (informational requirements and user-based blocking are more narrowly tailored than speaker-based schemes as a means of limiting minors' access to indecent material). Of course, the government can also address its interest by vigorously enforcing other criminal statutes. *See, e.g.*, DOJ Letter at 2.

Congress itself recognized that it did not adequately research other alternatives before passing the COPA. Another provision passed alongside the COPA calls for the establishment of a Commission to "conduct a study to identify technological or other methods that . . . will help reduce access by minors to material that is harmful to minors on the Internet." H.R. 11242, 105th Cong. § 1406(c) (1998) (uncodified). If Congress had properly researched this issue *before* passing the COPA, it would have realized that there are other less restrictive alternatives than the criminal and severe civil penalties imposed by the COPA. *See* DOJ Letter at 4 ("Congress should wait until the Commission has completed its study and made its legislative recommendations before determining whether a *criminal* enactment would be necessary . . . .") (emphasis added).

5. The COPA Is Substantially Overbroad Because It Criminalizes Speech That Is Constitutionally Protected for Older Minors

In addition to banning constitutionally protected speech among adults, the COPA is unconstitutionally overbroad because it proscribes speech that is constitutionally protected for minors, especially older minors. Although plaintiffs fear that their speech will be found by some communities to be "harmful to minors," especially to younger minors, many of them believe that their speech is valuable to older minors. *See* Warren Decl. (ACLU Member) at ¶¶ 15-16 (information for gay and lesbian youth) ; Johnson Decl. (ArtNet.com) at p. 5 (fine art); Glickman Decl. (Condomania) at pp. 6-7 (safer sex materials); Speyer Decl. (OBGYN.net) at pp. 12-13 (women's health); Laurila Testimony (A Different Light) (gay and lesbian resources). The Supreme Court has ruled in many contexts that the First Amendment protects minors as well as adults, and that minors have the constitutional right to speak and to receive the information and ideas necessary for

their intellectual development and their participation as citizens in a democracy,[20] including information about reproduction and sexuality. *Carey v. Population Servs., Int'l*, 431 U.S. 678, 693 (1977). With only narrow exceptions, it is unconstitutional for the government to restrict minors' participation in the marketplace of ideas.

6. The COPA is Unconstitutionally Vague

As defendant herself recognized, the COPA "contains numerous ambiguities concerning the scope of its coverage." DOJ Letter at 4 (discussing ten separate ambiguities that are "among the more confusing or troubling"). Like the CDA, the vagueness of the COPA "is a matter of special concern for two reasons." *ACLU I*, 117 S. Ct. at 2344. First, the COPA is a content-based regulation of speech, which "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Id.* Second, the COPA is a criminal statute. In addition "to the opprobrium and stigma of a criminal conviction," *see id.*, the COPA threatens violators with criminal penalties including imprisonment up to six months, criminal and civil penalties up to $150,000 a day, or both. 47 U.S.C. § 231(a)(1)-(3). Thus, "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *ACLU I*, 117 S. Ct. at 2345; *see also Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1977) ("[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes") (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)); *Smith v. California*, 361 U.S. 147, 151 (1959)).

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[20] *See, e.g., Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982); *Erznoznik v. City of Jacksonville*, 422 U.S. at 213-14; *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503 (1969); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

Specifically, the COPA fails to define the relevant community that will set the standard for what is "harmful to minors" on the global Internet. *See* Finan Decl. (ABFFE) at p. 5; Glickman Decl. (Condomania) at p. 14 ("We understand the applicable community standards in Los Angeles and New York, where we operate stores, but we do not know the community standards of each community that can access Condomania Online, and it would be impossible for us to keep track of them all."); Johnson Decl. (ArtNet.com) at p. 17 ("We do not know . . . whether the 'community' referred to in the Act is the local art community, the worldwide art community, the local community of each Web user, or the worldwide community of Web users."); Speyer Decl. (OBGYN.net) at p. 18. Is the relevant community the local community viewing the speech, or the community of adults participating in the online medium? If it is the local community, how can a speaker who runs a web site in Philadelphia predict what prosecutors and juries in Topeka, Kansas might deem "harmful to minors"? *See ACLU I*, 929 F. Supp. at 862-63 (Buckwalter, J.) (holding that the CDA is unconstitutionally vague because it failed to define the relevant "community standard" for determining "indecency"); DOJ Letter at 6. Similarly, the phrase "considered as a whole," in the serious value prong of the COPA's definition of "harmful to minors," is hopelessly vague when applied to online communications. For example, how should a speaker on the Web define the relevant "work as a whole" when trying to determine the legality of a Web site comprised of thousands of linked documents, images, and texts, simultaneously presented through the ad hoc linking feature of the Web? *See id.* at 871 n.11 (Dalzell, J.). Plaintiff Salon Magazine provides the entire text of the Starr Report on its web site. The index to the report is a series of "links" which allow the reader to jump to a particular subsection of the

report. Does the COPA require Salon Magazine to block access to the entire Starr Report, or only to the subsections containing material "harmful to minors?" Talbot Testimony (Salon Magazine), Exh. 31. The COPA provides no clear answers to these questions which, if answered incorrectly, could send the speaker to jail.

In addition, while the COPA imposes severe additional penalties for "intentional" versus "knowing" violations, it fails to define the distinction between the two requisite levels of knowledge for prosecution. *See* 47 U.S.C. § 231(a)(1)-(2). As defendant herself has noted, "It is unclear what difference is intended in separately prohibiting 'knowing' violations . . . and 'intentional' violations . . . ; and there is no indication why the two distinct penalty provisions are necessary or desirable." DOJ Letter at 4-5. Since all of plaintiffs' Web communications are available to adults and minors equally, they do not understand how an "intentional" violation differs from a "knowing" violation. Do plaintiffs open themselves up to selective prosecution under the "intentional" provisions of the COPA if they actively promote their materials to minors? For example, would Patricia Nell Warren face prosecution for intentionally violating the COPA because she provides information about sexuality to minors? *See* Warren Decl. (ACLU Member) at ¶¶ 13-14. Does an e-mail message to members of a mailing list affirmatively inviting readers to link direct to a plaintiffs' web site transform a "knowing" violation into an "intentional" one? *See* Talbot Testimony (Salon Magazine). In the absence of any clear definition, plaintiffs and other speakers cannot know how to conform their speech to avoid prosecution.

Finally, the COPA fails to define the relevant age of the minor for purposes of determining whether specific material is "harmful to minors." As defendant herself

noted in her letter to Congress, one of the "numerous ambiguities concerning the scope of [the COPA's] coverage" was whether the COPA prohibited material that lacks value "for all minors, for some minors, or for the 'average' or 'reasonable' 16-year-old." *See* DOJ Letter at 4. Can a speaker be prosecuted if her material is considered "patently offensive" and "lacking" in value to an eight-year old, even though the material may not be "harmful" to a sixteen-year-old? *See* Talbot Testimony (Salon Magazine); Speyer Decl. (OBGYN.net) at p.18. The threat of criminal prosecution and severe civil sanctions for communicating material that violates a community's sense of what young children should see, and the wide discretion afforded to enforcers in deciding what to prosecute, will lead plaintiffs and other speakers to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (citations omitted).

B. Plaintiffs Have Standing to Challenge the Law On Its Face Under Well-Recognized Rules Of Law

As supported by the declarations and live testimony submitted by the plaintiffs, and the discussion above, plaintiffs clearly have standing to bring a facial challenge to the COPA because it threatens them and other speakers with criminal prosecution or forced self-censorship.[21] The COPA specifically proscribes "any material that is harmful to minors" that is communicated on the Web "for commercial purposes." Each of the plaintiffs communicates speech that they fear could be construed as "harmful

[21] The severe civil penalties magnify the fear of exposure because enforcers need only prove that it is "more likely than not" that a speaker violated the COPA to impose a $50,000 per day fine.

to minors."[22] Therefore, "the law is aimed directly at plaintiffs, who, if there interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution." *Virginia v. American Booksellers Ass'n*, 484 U.S. at 392. Indeed, the position of plaintiffs in this action is very similar to that of the plaintiffs found to have standing in *Virginia v. American Booksellers Ass'n*; the plaintiffs in that case were mainstream booksellers who feared that their communications would violate a state "harmful to juveniles" law. *See id.*

Plaintiffs also have standing to challenge the law on its face because of the chilling effect the COPA will have on constitutionally protected speech if it is allowed to go into effect. The Supreme Court has held that self-censorship caused by fear of prosecution can establish the requisite injury for standing purposes:

> We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.

Virginia v. American Booksellers Ass'n, 484 U.S. at 393; *see also ACLU I*, 929 F. Supp. at 872 (". . . plaintiffs' fear of prosecution under the Act is legitimate, even though they are not the pornographers Congress had in mind when it passed the Act."). Standing rules are relaxed in facial challenges to laws that infringe the First Amendment because of the risk that "'the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Maryland v. J.H. Munson Co.*,

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[22] *See generally ACLU I*, 929 F. Supp. at 870-72, and *id.* at 871 (in discussing plaintiffs' fear of prosecution, court notes that "the definition of indecency, like the definition of obscenity, is not a

467 U.S. 947, 956-957 (1984) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). The harm caused by chilling public speech is amplified in the context of the Web, where millions of speakers and readers communicate. For these reasons, at least at this stage of the case, the Court need not reach the question of whether each of the plaintiffs independently has standing to challenge the COPA on its face and as applied to them. The Court need only determine that at least one plaintiff is likely to succeed on the merits of their facial challenge to the COPA. Plaintiffs believe that a more thorough briefing of this issue would benefit the Court if and when defendant files a motion to dismiss.

C. Plaintiffs Clearly Satisfy the Other Requirements for Preliminary Injunctive Relief

1. Plaintiffs Will Suffer Irreparable Harm If Preliminary Relief Is Not Granted

If the COPA is not enjoined, plaintiffs and other speakers will be forced to remove speech from their Web sites that is clearly protected by the First Amendment for adults, thus preventing millions of Internet users from obtaining access to protected speech. *See, e.g.*, Warren Decl. (ACLU Member) at p.17; Glickman Decl. (Condomania) at p.17. The threat of prosecution, and the burdens of age verification on users, will inevitably cause a chilling effect on the communication and receipt of protected speech. As the Supreme Court has stated, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. 347, 373 (1976); *Fabulous Assocs.*, 896 F.2d at 785-87 (enjoining statutory requirement of access codes for telephone messages that are "harmful to minors" because it created chilling effect on protected speech for adults); *Time Warner Cable v. City of*

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rigid formula. Rather, it carries a large degree of autonomy to individual communities to set the

New York, 943 F. Supp. 1357, 1399 (S.D.N.Y. 1996) (city's action had direct chilling effect on plaintiff's First Amendment rights, causing irreparable injury). Plaintiffs who choose not to self-censor will face the risk of criminal prosecution and penalties of up to $150,000 per day for communicating speech that adults have the right to access. *See ACLU I*, 929 F. Supp. at 851 ("Subjecting speakers to criminal penalties for speech that is constitutionally protected in itself raises the specter of irreparable harm").

2. The Possible Harm to Plaintiffs Far Outweighs Any Potential Harm to Defendant, and Injunctive Relief Is In the Best Interest of the Public

Defendant herself warned Congress that the public would be harmed if the COPA was allowed to take effect. In identifying "serious concerns" about the bill, defendant noted that the COPA "could require an undesirable diversion of critical investigative and prosecutorial resources that the Department [of Justice] currently invests in combating traffickers in hard-core child pornography, in thwarting child predators, and in prosecuting large-scale and multidistrict commercial distributors of obscene materials." DOJ Letter at 2. Defendant further wrote, "We do not believe it would be wise to divert the resources that are used for important initiatives . . . to prosecutions of the kind contemplated under the COPA." *Id*. at 3.

Without explaining her change of heart, defendant may now assert that the law must be allowed to take effect to further its interest in suppressing "pornographic" images. But the vast majority of such speech is exempt from the COPA because its purveyors already require payment by credit card before providing access to the material. Given the COPA's ineffective and far from narrowly tailored means of addressing defendant's purported interest, and the availability of numerous less burdensome methods

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bounds for decency for themselves").

available for protecting those minors, preliminary relief will not harm defendant or the public.

In contrast, the harm to the plaintiffs, their members, and millions of other members of the public who are speakers and readers on the World Wide Web, is of constitutional dimension if the COPA is not enjoined. Plaintiffs and other speakers face suppression of a wide range constitutionally protected speech about sexually oriented issues including gay and lesbian resources, safer sex, national sex scandals, and fine art. Speakers will either have to self-censor their communications or face criminal prosecution if the COPA is not enjoined. Readers will either be denied access to such speech entirely, or be required to provide personal identification and payment to obtain speech that they could otherwise retrieve anonymously for free. As the *ACLU I* court observed, "[n]o string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech." *ACLU I*, 929 F. Supp. at 851 (Sloviter, C.J.); *see also Turner Broad.*, 512 U.S. 622, 114 S. Ct. at 2458.

CONCLUSION

For the reasons stated above, plaintiffs respectfully request that the Court grant plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction to bar enforcement of 47 U.S.C. § 231.

Respectfully submitted,

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