

STATEMENT OF AUTHORITY/CONSENT TO FILE BRIEF AMICI CURIAE

Consent of the parties was obtained for the filing of this brief amici curiae in support of Plaintiffs-Appellees. Copies of the written consents on behalf of Plaintiffs-Appellees and Defendant-Appellant are attached hereto and the originals filed with the Clerk of this Court.

CERTIFICATION OF BAR MEMBERSHIP

Counsel for amici curiae, R. Bruce Rich and Elizabeth S. Weiswasser, are members of the bar of this Court of Appeals for the Third Circuit.

CERTIFICATION OF COMPLIANCE

This brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 8768 words in text and footnotes, as counted by Microsoft Word 8.0, the word processing system used to prepare this brief. Absent the description of the nineteen amici contained at the conclusion of this brief, this brief is 6979 words in text and footnotes. Due to the foregoing, amici file herewith a motion for leave to file an overlength brief amici curiae. This brief is printed in 12-point Courier New font, which is no more than 10.5 characters per inch.

CORPORATE DISCLOSURE STATEMENTS

Amici curiae The Association of American Publishers, Inc.; The American Society of Newspaper Editors; BiblioBytes, Inc.; The Center for Democracy and Technology; The Comic Book Legal Defense Fund; The Commercial Internet Exchange Association; The Computer & Communications Industry Association; The Freedom to Read Foundation; Magazine Publishers of America, Inc.; The National Association of College Stores; The National Association of Recording Merchandisers; Newspaper Association of America; People for the American Way Foundation; The Periodical and Book Association of America, Inc.; The Publishers Marketing Association; The Recording Industry Association of America; and The Society for Professional Journalists are not corporate entities for which a corporate disclosure statement would apply (i.e., such entities do not have any parent corporations and or any publicly held company that owns ten percent or more of any stock, see FRAP 26.1).

Amicus curiae The Internet Alliance is a subsidiary of The Direct Marketing Association.

Amicus curiae PSINet Inc. ("PSINet") discloses that IXC Internet Services Inc., a subsidiary of IXC Communications Inc., owns more than fifteen percent of the issued and outstanding shares of PSINet, and that Janus Capital

Corporation owns 10.9 percent of such shares.

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THE AMICI

This brief amici curiae is submitted on behalf of a spectrum of businesses, trade associations and public interest organizations, listed in the margin

¹ and more fully described at the conclusion of this brief, that share a deep commitment to ensuring that the Internet achieves its full promise as a revolutionary medium of communication suitable for both children and adults. Amici variously constitute and represent:

authors, publishers, editors and distributors of textual, audio and audio-visual material ranging from books, magazines, newspapers, newsletters and comic books through sound recordings and video games;

educators and librarians whose students and patrons desire access to the widest possible range of informative material;

Internet and online service providers through which the public obtains access to the Internet and the ability to navigate through it;

software developers and technology concerns who, responding to the market's demands, have been developing ever-more-effective means for parents to protect impressionable minors from exposure to age-inappropriate materials; and

public interest organizations reflecting parental and community concerns that potentially well-intentioned, but nonetheless broadly censorious, government regulation of the Internet not smother this medium in its infancy.

¹ The Association of American Publishers, Inc.; The American Society of Newspaper Editors; BiblioBytes, Inc.; The Center for Democracy and Technology; The Comic Book Legal Defense Fund; The Commercial Internet Exchange Association; The Computer & Communications Industry Association; The Freedom to Read Foundation; The Internet Alliance; Magazine Publishers of America, Inc.; The National Association of College Stores; Newspaper Association of America; The National Association of Recording Merchandisers; People for the American Way Foundation; The Periodical and Book Association of America, Inc.; PSINet Inc.; The Publishers Marketing Association; The Recording Industry Association of America; and The Society for Professional Journalists.

INTEREST OF THE AMICI

For the second time in three years, the Congress has enacted legislation which threatens to turn what the United States Supreme Court has recognized to be a “dynamic, multifaceted category of communication” -- the Internet -- into a child-proof medium whose “level of discourse” would be reduced to that “suitable for a sand box.” This the First Amendment to the Constitution does not allow.

Congress’ first effort at regulating speech on the Internet took the form of the Communications Decency Act of 1996 (“CDA”). That legislation criminalized speech over the Internet which was “patently offensive” or “indecent” for minors. In the ensuing legal challenge to the CDA, in which many of amici served as plaintiffs, first a three-judge panel of the Eastern District of Pennsylvania (including Chief Judge Sloviter of this Court), and then the United States Supreme Court, found the CDA to be facially unconstitutional. ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), aff’d, 521 U.S. 844 (1997) (“CDA”). Its vice, these courts reasoned, lay not in its interest in protecting minors, but in its inevitable consequence: “In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have the constitutional right to receive and to address to one another,” thereby impermissibly “reduc[ing] the adult population . . . to . . . only what is fit for children.” CDA, 521 U.S. at 874-75 (quoting Denver Area Educational Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 759 (1996)).

The Supreme Court held that the burden imposed by the CDA on adult speech was unacceptable because the technological means proposed by the CDA for screening unsuitable materials from minors while at the same time not unduly burdening adult speech were, in combination, ineffective and unproven. (These proposed screening mechanisms were presented in the CDA as affirmative

defenses to a prosecution.) At the same time, the Court found that a less restrictive means of accomplishing the statute's objectives -- user-driven technology which empowers parents with the ability to regulate their children's access to material they believe is inappropriate for their children to receive over the Internet would soon be widely available.

Central to the Court's ruling were the unique attributes of the Internet, which make it fundamentally different from any medium preceding it -- its ability to support a spontaneous and cost-free "never-ending worldwide conversation," in which each participant, irrespective of his or her means, has a voice. See CDA, 929 F. Supp. at 865 n.9, 882-83. The Supreme Court in CDA contrasted the Internet to the broadcast medium, insofar as "the 'odds are slim' that [an Internet] user would enter a sexually-explicit site by accident." See CDA, 521 U.S. at 854.

This lawsuit results from Congress' latest effort to enact "minors access" legislation as applied to the Internet. The Child Online Protection Act ("COPA") suffers the same crippling constitutional flaws that condemned the CDA insofar as it:

targets a potentially broad category of speech that is entirely lawful as to adults, but is "harmful to minors";

criminalizes the offer of such speech by a potentially large number of Internet speakers, unless it is rendered inaccessible to minors;

presupposes that credit card and age-verification techniques adopted by Congress as affirmative defenses impose no burden on speech, when, in fact, they will discourage readers of controversial or potentially controversial material and burden many would-be speakers; and

disregards the steadily-developing state of user-empowerment technology as the preferred, less restrictive and more effective alternative to overbroad government regulation.

For these reasons, among others, Judge Reed of the United States District Court for the Eastern

District of Pennsylvania, following a five-day evidentiary hearing, entered a preliminary injunction against the enforcement of COPA. ACLU v. Reno, 31 F. Supp.2d 473 (E.D.Pa. 1999) (“COPA”).

On appeal, as below, the government attempts to mitigate COPA’s infringement on speech freedoms by asserting that COPA, by confining its criminal penalties to “harmful to minors” speech engaged in by entities “for commercial purposes,” will deter only speech engaged in by “commercial pornographers.” Significantly, none of amici’s constituents are engaged in the business of commercial pornography, yet amici appear here because they are deeply concerned that the speech they produce, distribute, use as teaching aids, and otherwise provide access to, stands at risk by the passage of COPA.

As we discuss in Point I.C.1. below, COPA’s formulation of a “harmful to minors” standard raises many more questions as to its potential application than it answers. Moreover, in drawing its commercial/non-commercial distinction, COPA misapprehends the Courts’ findings in the CDA litigation, which expressed concern over the censorious impact of federal minors access legislation on all manner of Internet speech, wherever originated, and whether profit-motivated or not. The fundamental constitutional flaw of the CDA arose from the fact that there is no practicable means by which the vast majority of those who provide content over the Internet — whether profit-motivated or otherwise -- can screen out minors from accessing that content, while not unduly burdening adults’ access to their speech.

The Government’s position here -- that the infirmities of the age-verification techniques which were exposed in the CDA litigation do not exist in the context of “communications made for commercial purposes” -- is fundamentally mistaken. Neither the record in CDA, nor that before the

district court here, nor amici's own knowledge and experience, support such a premise.

Amici thus draw no comfort from the purported narrowing of COPA as targeting only “commercial pornographers.” Faced with potential criminal penalties for guessing wrong as to what a local federal prosecutor might believe is “harmful to minors” in a given community,² and faced with impracticable affirmative defenses to such prosecution in the form of age-verification techniques that misapprehend both the state of technology and the realities of Internet commerce, amici's constituents engaged in providing speech fora for adults will be faced with the constitutionally-impermissible dilemma of risking prosecution or engaging in self-censorship.

Under such a regime, frank and provocative discussions, whether generated by “affairs of state,” public health issues such as AIDS and abortion, readings from and critiques of classical and modern fiction, reviews of sound recordings and motion pictures, reader, viewer and listener reactions to literary, music, and television fare dealing in some manner with the topic of sex or sexual relationships, to name a few, may well fall in the category of speech that is viewed as too risky and thus be forsaken for other, “safer” speech. The necessary effect of COPA will thus be to force speakers to “steer far wider of the unlawful zone.” Speiser v. Randall, 357 U.S. 513, 526 (1958).

Rather than being so threatened, the enterprises represented by, and whose Internet speech is facilitated and encouraged by, amici, are constitutionally entitled to participate fully in the growth and development of the Internet. Indeed, amici every day work in myriad ways to fulfill the CDA courts' vision of the Internet, continually searching for means of responding to the public interest

² COPA provides criminal penalties of up to six months imprisonment, as well as civil penalties of up to \$150,000 for each day of violation. See 47 U.S.C. § 231(a).

in all manner of information and entertainment, while preserving the wondrously spontaneous and interactive quality of this medium. Through their World Wide Web sites, the varied communications entities whose speech interests are fostered by amici, are affording the American public access to more information and entertainment, faster and more cheaply than ever before. The functions of publishers' catalogs, magazine and newspaper kiosks, book and record stores, indeed, entire libraries, are captured in the Web site offerings of amici's constituents. And this is just the beginning.

In addition, amici in the Internet/online service provider industry have built dynamic, two-way communications networks that permit users to send and receive information of their choice, thereby enhancing the uniquely user-controlled and interactive quality of this medium. They are investing in ever-faster networks and are expanding the array of rich multimedia applications available to consumers.

COPA threatens to impede this exploration by adopting "rules of the road" that invite the cleansing from central Internet speech sites of speech for "commercial purposes" that is arguably not suitable for minors, all in derogation of the First Amendment. That a particular speaker may publish for "commercial purposes" does not diminish his or its First Amendment freedom. This nation's free-speech tradition is fulfilled no less robustly by the Philadelphia Inquirer than a not-for-profit newspaper or newsletter; no less by Time Warner's Cable News Network than C-SPAN; no less by Barnes & Noble than a public library. The CDA litigation reaffirmed that the ability of the Internet to achieve its potential as a speech medium is dependent upon the diversity of the speech it protects and fosters. Because COPA threatens a substantial contraction of such speech, this Court should strike down COPA as unconstitutional on its face.

ARGUMENT

I. COPA IS FACIALLY INVALID

A. The Constitutional Framework

Certain fundamental First Amendment principles should guide the Court's consideration of the constitutionality of COPA. First, there is no dispute that Congress, in enacting COPA, expressly restricted the distribution of a category of speech, defined by its content, that is constitutionally protected for adults. Such a content-based regulation of protected speech is presumptively invalid, subject to the strictest, "most exacting" scrutiny, and cannot be upheld absent a showing by the government that the statute will, in fact, directly and materially advance a compelling government interest and is narrowly tailored to effectuate that interest in the least speech-restrictive manner. See, e.g., CDA, 521 U.S. at 856, 871-72. Indeed, as a content-based restriction providing for criminal penalties, COPA is particularly suspect under the First Amendment. Id. at 871-72 ("The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.").

It does not matter that the interest asserted to justify COPA is protection of minors, or that at least some minors have no constitutional right to receive the expression at issue. The Supreme Court has long recognized that the government cannot, in the interest of protecting minors from speech deemed harmful to them, restrict adults' access to non-obscene speech, and thereby reduce the level of adult discourse to that appropriate for children. CDA, 521 U.S. at 874-75; Butler v. Michigan, 352 U.S. 380, 383 (1957) ("[s]urely [to do so] is to burn the house to roast the pig"); see also Sable Communs. of Cal., Inc. v. FCC, 492 U.S. 115, 126, 131 (1989); Bolger v. Young Drug Prods. Corp.,

463 U.S. 60, 74-75 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.").

Moreover, the fact that a speaker may operate for profit, or make a profit from the sale of speech, in no way limits the First Amendment protection to which the speaker or the speech is entitled. As the Supreme Court made clear in Burstyn v. Wilson, "[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." 343 U.S. 495, 501 (1952); see also Smith v. California, 361 U.S. 147, 150 (1959) ("It is of course no matter that the dissemination [of speech] takes place under commercial auspices.").

B. The Internet As A Unique Forum For Communication.

The constitutionality of COPA must be scrutinized in the context of the speech medium which it purports to regulate: the Internet. In CDA, the Supreme Court described the speech outlets of the Internet as "vast democratic fora" and a "new marketplace of ideas, which "provides relatively unlimited, low-cost capacity for communication of all kinds," the growth of which "has been and continues to be phenomenal." 521 U.S. at 870, 886. The Supreme Court recognized that it is the very breadth and variety of speech over the Internet, whatever its source and regardless of its method of transmission, that gives the Internet its unique attributes and extraordinary communicative power:

This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could

from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought."

521 U.S. at 870. As explained by the district court in CDA:

[I]f the goal of our First Amendment jurisprudence is the individual dignity and choice that arises from putting the decision as to what views shall be voiced largely into the hands of each of us, then we should be especially vigilant in preventing content-based regulation of a medium that every minute allows individual citizens actually to make those decisions. Any content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig.

929 F. Supp. at 881-82 (Dalzell, J.) (citations and internal quotations omitted).

The very force of this new medium compelled the Supreme Court to conclude in CDA that speech restrictions engrafted upon the Internet must be subjected to the highest level of First Amendment scrutiny. 521 U.S. at 870.

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C. COPA, No Differently Than CDA, Is Void on Its Face.

On this appeal, the government focuses on the two substantive differences between COPA and the CDA (as well as

³ The government agency charged with overseeing federal communications policy has itself noted that "[l]imited government intervention is a major reason why the Internet has grown so rapidly in the United States." See FCC Digital Tornado Report at (i) (March 1997).

on the affirmative defenses, discussed infra): (1) the standard for determining speech covered by COPA (COPA is directed to speech "harmful to minors," while the CDA was directed to "indecent" and "patently offensive" speech); and (2) the Internet speakers and fora at which the law is directed (the CDA applied to all manner of Internet speech, wherever originating, while COPA is limited to speech for "commercial purposes" communicated on the World Wide Web). Contrary to the government's arguments, these distinctions cannot salvage COPA.

1. COPA's "Harmful To Minors" Standard.

In CDA, the Supreme Court held that the CDA was an unconstitutional restraint on speech because it had the impermissible effect of suppressing speech which adults have the constitutional right to receive and transmit to one another. That holding would apply equally to the present statute, which, no differently than the CDA, purports to restrict the offer of, and adult access to, constitutionally protected speech, when there are far more effective and less restrictive ways to protect children. Thus viewed, the change from the CDA's "indecent/patently offensive" standard to COPA's "harmful to minors" standard is immaterial from a First Amendment standpoint. To the extent imposition of the

"harmful-to-minors" standard on Web sites will, as with the CDA, have the effect of restricting the offer of, and adult access to, constitutionally-protected speech, such regulation is unconstitutional. As the record in this case, and the ensuing discussion in Point II demonstrates, COPA will have just such an unconstitutional effect.

The government asserts that "the character of the material covered by COPA is significantly different than that covered by the CDA," Gov. Br. at 10, and that the "harmful to minors" standard is so narrow in scope as to be inapplicable to plaintiffs (and, we would assume by extrapolation, to speech of the type in which amici's constituents engage). The government thus contends that the district court "vastly overstates [the] impact" of the statute because "COPA's reach is . . . limited to materials that are clearly pornographic." Gov. Br. at 16, 24-25. In so arguing, the government asserts that the meaning of COPA's "harmful to minors" is clear and unambiguous and covers only such speech as is lacking in value to "a legitimate minority of normal, older adolescents." Id. at 32.

These assertions are directly at odds with the Department of Justice's pre-enactment, candid appraisal of the "harmful to minors" standard as "[a]mong the more confusing or

troubling ambiguities" in the statute. October 5, 1998,
Letter from Department of Justice Letter to Honorable Thomas
Bliley, Chairman of House Committee on Commerce ("DOJ Ltr.")
4. Amici agree with the government's pre-litigation
appraisal. The "harmful to minors" standard, on its face, is
neither clear nor limited. For example, in applying the
"contemporary community standards" requirement of COPA, is the
relevant community the worldwide community of Internet users,
the local community in which the user resides, or some other
community? Further, does the statutory language "as a whole"
refer to the single Web page on which the "harmful"
communication appears or to the Web site as a whole? Does it
also include linked Web sites? To what age(s) of minors is
the statute directed? On this latter issue, prior to
enactment of COPA, the Department of Justice itself queried
whether material covered by COPA includes that which lacks
serious value "for all minors, for some minors, or for the
'average' or 'reasonable' 16-year-old minor?" See DOJ Ltr. 6.

That the Department of Justice itself could, in so
short a space of time, so radically alter its interpretation
of the law serves to underscore amici's concern that, in the
hands of the nearly one hundred United States Attorneys across

the nation, this law can mean anything to anyone at any given time. As Chief Judge Sloviter made clear in CDA, "the First Amendment should not be interpreted to entrust the protection it affords to the judgment of prosecutors. Prosecutors come and go. Even federal judges are limited to life tenure. The First Amendment remains to give protection to future generations as well." 929 F.Supp. at 857.⁴

In any event, even under the government's present position on this matter the law cannot withstand strict scrutiny standards. First, by definition, the law is restricting a category of information, however large it may be, that is constitutionally protected as to adults. As discussed in Point II below, there simply is no reasonable means for Internet providers of such information, whether through Web sites, chat rooms, or other Internet vehicles, to limit or prevent access by minors while at the same time maintaining the free flow of such information to adults. Amici thus submit that even under the government's new interpretation of COPA's "harmful to minors" standard, the contours of the law would entail a significant risk of prosecution for mainstream Internet speakers and users.

The government's present interpretation would, moreover, undermine Congress' asserted "compelling interest" for enacting COPA. If, as the government would now claim, COPA would protect only the oldest minors and only a small quantity of material, then where is the "compelling

⁴ The government's present interpretation of the "harmful-to-minors" standard also is inconsistent with the legislative history of COPA, which is barren of any similarly narrow view by the Congress of the intended scope of the legislation and indeed notes a far broader application of the law: the "harmful to minors standard reaches material that is inappropriate for minor children of the age groups to which it is directed." See H.R. Rep. No. 105-775, at 28 (1998).

interest” underlying the legislation? In this case, the law could not be shown to “alleviate” the “recited harms” presented by Congress in a “material” way. See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (emphasis added); see also Bolger, 463 U.S. at 73 (invalidating law prohibiting unsolicited mailings of contraceptive ads; “[the] marginal degree of protection [afforded by the law] is achieved by purging all mailboxes of unsolicited material that is entirely suitable for adults”).

It would seem to amici that the government cannot have it both ways, namely, argue that it has a “compelling interest” to protect minors’ sensibilities, but then seek to define away the affected category of minors with which Congress clearly was concerned. In addition, as recognized by the Supreme Court in CDA, the current availability of user empowerment technology, which enables parents to determine for themselves the content on the Internet to which their children should have access, provides a far less restrictive and far more effective alternative for addressing Congress’ purported interest in protecting children from age-inappropriate material on the Internet, including “commercial pornography.” See CDA, 521 U.S. at 846, 876.⁵

From amici’s perspective, the many ambiguities of the harmful-to-minors standard as embodied in the statute, hence its uncertain scope of application, leave amici’s constituents in the untenable posture of choosing between gambling on offering speech which a local federal prosecutor may believe is “harmful to minors,” thereby subjecting themselves to potential criminal and civil penalties, or engaging in self-censorship to avoid that risk. Amici fervently believe that the First Amendment protects Internet speakers from that untenable choice.

⁵ Industry has made significant efforts in this area. In particular we would like to direct the Court’s attention to a collection of available user-empowerment tools located online at <http://www.getnetwise.org>.

2. [The “Commercial Purposes” Requirement.](#)

No different from its change in the standard for covered speech, Congress’ narrowing of the CDA to apply only to “communication[s] for commercial purposes” “by means of the World Wide Web” does not alter COPA’s constitutional infirmity. As earlier discussed, Congress may no more regulate constitutionally-protected speech flowing to, from, and through Web sites operated “for commercial purposes” than it can those operated for non-commercial purposes, chat rooms, or the like.

The Supreme Court brought this point home with force in CDA, making clear that the First Amendment virtues inhering in the Internet are found in all manner of speech and speakers, as well as fora within it, including the Web:

The Web is [] comparable, from the readers’ viewpoint, to both a vast library including millions of readily available and indexed publications, and a sprawling mall offering goods and services. From the publishers’ point of view, [the Web] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can “publish” information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals.

CDA, 521 U.S. at 853. Hence, the Congress’ distinction between commercially-motivated and not-for-profit speakers in the medium of cyberspace is irrelevant from a constitutional perspective and cannot, as a matter of law, save COPA from facial invalidity where, as here, it operates to restrict adult access to constitutionally-protected speech.

As with the “harmful to minors” standard, the government asserts that the “commercial purposes” requirement of COPA is so narrow in scope as to be inapplicable to plaintiffs (and, once

again by extension, likely to amici as well). Focusing on the statutory definition of “engaged in the business,” the government asserts that COPA is limited in its coverage to such entities as “regularly” disseminate communications which are harmful to minors. The government thus asserts that COPA’s proscriptions extend no further than commercial pornographers. See Gov. Br. 36-38.

The government’s claim that the meaning of COPA’s “commercial purposes” requirement is clear and unambiguous finds no support in the statutory language itself. For example, what is the meaning of “regularly” versus “principally,” and how does the latter differ from the former? Further, the statutory language is unclear as to whether a covered entity is one which regularly transmits communications which are harmful to minors, or simply one which regularly transmits communications over the Web. Indeed, the government’s present characterization of this statutory language is again inconsistent with the Department of Justice’s pre-enactment appraisal of it as one of the more “confusing or troubling ambiguities” in the statute. See DOJ Ltr. 3-4; see also COPA, 31 F.Supp.2d at 480 (“There is nothing in the text of the COPA . . . that limits its applicability to so-called commercial pornographers.”).

In any event, the government’s present position on this matter proves too much from a constitutional perspective. Were the government correct in its statutory interpretation that COPA’s scope is limited to commercial pornographers, the statute itself would become wholly unnecessary. As noted by the Supreme Court in CDA, and as recognized by the Congress in the legislative history to COPA (and indeed by the government in its defense of COPA here), commercial sellers of pornography over the Internet already require customers to use credit cards and/or take other steps to verify their adult status. See H.R. Rep. No. 105-775, at 15 (1998) (“the age verification procedures

prescribed under the bill represent standard procedures for conducting commercial activity on pornographic Web sites); CDA, 521 U.S. at 882 n.47 (“[I]ronically, the [affirmative] defense [of adult verification] may significantly protect commercial purveyors of obscene postings while providing little (or no) benefit for transmitters of [constitutionally protected speech].”); CDA, 929 F. Supp. at 879 (“Perversely, commercial pornographers would remain relatively unaffected by the [CDA] since we learned that most of them already use credit card or adult verification anyway.”), aff’d, 521 U.S. 844.

Thus, if, as the government asserts, COPA applies only to commercial pornographers, whose practices already ensure them a defense to prosecution, there is lacking any compelling interest on the part of the government in enacting this law. If, on the contrary, the law potentially sweeps more broadly, it will ensnare precisely those enterprises least equipped to fend off its criminal and civil penalties.

D. Judicial Interpretations of State Harmful-To-Minors Laws Cannot Salvage COPA’s Constitutionality.

The government asserts that the restrictions contained in COPA “are not materially different than the restrictions on the display of harmful to minors materials that have been upheld in prior cases involving the world outside of cyberspace.” Gov. Br. at 28; see also id. at 18. As the Supreme Court already has made clear, the government is wrong. Unlike in a physical store or location, an Internet content provider or user has no reasonable means for controlling or preventing minors from gaining access to material made available to the public through Web sites, including those featuring newsgroups, chat rooms or other interactive features. See CDA, 521 U.S. at

877. Each of the cases cited by the government concerns the fundamentally distinct circumstance of physical space, rather than cyberspace, and generally involves restrictions aimed at preventing minors' involuntary exposure to age-inappropriate material in public environments. See, e.g., Crawford v. Lungren, 96 F.3d 380 (9th Cir. 1996) (statute prohibiting sale or display in unsupervised sidewalk vending machine located in a public place); Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1986) (requiring display of harmful-to-minors material in sealed wrapper).

For similar reasons, compliance with COPA (by implementing one or more of the affirmative defenses, discussed infra) entails a significantly greater burden on adult speech than compliance with various of the statutes at issue in the cited cases. See, e.g., Commonwealth v. American Booksellers Ass'n., Inc., 236 Va. 168, 179, 372 S.E.2d 618, 625 (1988) (display statute "imposes a relatively light burden upon the bookseller" because statute not violated if "shelf containing restricted books was located within sight of the bookseller" and "an employee could readily intervene" if minor observed attempting to peruse covered books).

Finally, to the extent that the government is asserting that there exists a national, uniform interpretation

of harmful-to-minors statutes, it is mistaken. See, e.g., Illinois Pattern Jury Instructions (Criminal) § 9.31A (1992) ("You should consider whether the predominant appeal of the material is to a prurient interest by judging it with reference to average children of the same general age of the child to whom such material allegedly was offered, distributed, sent or exhibited").

II.COPA'S AFFIRMATIVE DEFENSES IMPOSE CONSTITUTIONALLY UNACCEPTABLE BURDENS ON SPEECH.

The government argues that COPA does not seriously limit the distribution of protected speech because the affirmative defenses allow distribution of such speech under certain defined circumstances. The government thus asserts that the district court "completely misunderstood the burden of complying with COPA's affirmative defenses." Gov. Br. at 38. As we show, the government's assertion is simply wrong. While COPA does not impose a flat ban on "harmful-to-minors" expression on the Internet, it does substantially burden the distribution and receipt of that category of protected speech.

As an initial matter, the affirmative defenses provided by COPA are essentially identical to those contained in the CDA, which were found by the Supreme Court to be

insufficient to save the statute from facial invalidity:

We agree with the District Court's conclusion that the CDA places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of "narrow tailoring" that will save an otherwise patently invalid unconstitutional provision. In Sable [citation omitted] we remarked that the speech restriction at issue there amounted to "'burn[ing] the house to roast the pig.'" The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community.

CDA, 521 U.S. at 882.

Although the government here contends that the Supreme Court drew a sharp distinction between the feasibility of the affirmative defenses for commercial versus non-commercial entities, the Supreme Court in fact acknowledged the impracticability of such defenses for many commercial Web sites, particularly in view of the prevalence of Web sites that provide content free of charge:

There 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. . . . Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password

verification systems make them effectively unavailable to a substantial number of Internet content providers.

CDA, 521 U.S. at 857; see also COPA, 31 F.Supp.2d at 495 (finding that "implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users from accessing such material and [] the loss of users to such material may affect the speakers' economic ability to provide such communications").

Amici can attest (and the record before the District Court affirms) that these realities have not changed. Requiring credit card or age-verification screening for access to all potentially "harmful-to-minors" material on covered Web sites would severely burden expression for two basic reasons.

A. The Burden on Users

First, would-be recipients of information will be deterred by pre-access screening requirements. Judge Reed found that "consumers on the Web do not like the invasion of privacy from entering personal information" and that "COPA would have a negative effect on users because it will reduce anonymity to obtain the speech and reduce the flow experience of the user, resulting in a loss of traffic to Web sites." COPA, 31 F.Supp.2d at 477, 491. This is consistent with the experience of many amici and the Internet industry in general

that many Web users will leave a site if required to register.

Responding to this concern, the commercial entities that comprise many of amici's constituents have in recent years enhanced and refined their models for doing business on the Web, and the model that is becoming prevalent is the advertiser-supported site that can be accessed by users free of charge. COPA, 31 F.Supp.2d at 486 ("the most popular business model [on the Web] is the advertiser supported or sponsored model, which is illustrated by the variety of online magazines which operate on the Web"). While most sites devoted exclusively to "pornography" do require credit cards or adult verification, advertiser-supported sites are an important part of the array of options available for those seeking a more diverse array of content.

Were advertiser-supported Web sites to employ the adult verification schemes required by COPA, they would likely alienate many users. By effectively forcing users of the Web to register with the sites they choose to access, implementation of the affirmative defenses will require individuals to disclose personal information (e.g., name, address, social security number, credit card) to a third party prior to being afforded access to constitutionally-protected

speech. Reliance on such systems will create records of individuals' First Amendment activities -- records that will be available for use and misuse regardless of statutory provisions seeking to protect them.

Conditioning adults' access to constitutionally-protected speech on the disclosure of one's identity raises troubling First Amendment and privacy issues. The defenses pose a Faustian choice to individuals seeking access to information -- protect privacy and forgo access to information, or exercise First Amendment freedoms and forgo privacy. See CDA, 929 F. Supp. at 847 ("adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password"), aff'd, 521 U.S. 844.

As this Court concluded in holding unconstitutional a law requiring adults to obtain access codes or other identification numbers in order to place a call to a telephone message service:

[T]he First Amendment protects against government inhibition as well as prohibition. An identification requirement exerts an inhibitory effect, and such deterrence raises First Amendment issues comparable to those raised by direct state-imposed burdens or restrictions. . . . [It is enough to invalidate a law where it is shown that] access codes will chill the

exercise of some users' right to hear protected communications.

Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n, 896 F.2d 780, 785-86 (3d Cir. 1990) (citations omitted).⁶

Finally, in addition to the burden on individual privacy, such a requirement impermissibly prejudices users of the Web who lack credit cards. See CDA, 929 F. Supp. at 846 ("Imposition of a credit card requirement would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material."), aff'd, 521 U.S. 844.

B. The Burden on Speakers

The burden is equally severe if viewed from the perspective of the operators of Web sites. As an initial matter, the affirmative defenses provide little comfort in that they do not immunize speakers from criminal prosecution under the Act, but only provide affirmative defenses -- on which the speaker will bear the burden of proof -- to be asserted following prosecution. As such, they are unlikely to curb the Act's severe chilling effect. As the Supreme Court reasoned in Speiser v. Randall, 357 U.S. 513 (1958), in holding unconstitutional an analogous procedure which placed an affirmative burden on the speaker of proving that its speech was "legitimate": "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct . . . can only result in a deterrence of speech which the Constitution makes free." Speiser, 357 U.S. at 526.

⁶ See also Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 754 (1996) ("[W]ritten notice requirement[s] will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel."); Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n, 693 F. Supp. 332, 338 (E.D. Pa. 1988) (Access codes impose a self-identification process, which carries with it "the societal opprobrium associated with dial-a-porn messages and the probable undesirability of having one's name and address at the disposal of message providers and other third parties."), aff'd, 896 F.2d 780 (3d Cir. 1990).

And as Chief Judge Sloviter explained in CDA:

[I]t is difficult to characterize a criminal statute that hovers over each content provider, like the proverbial sword of Damocles, as a narrow tailoring. Criminal prosecution, which carries with it the risk of public obloquy as well as the expense of court preparation and attorneys' fees, could itself cause incalculable harm. No provider, whether an individual, non-profit corporation, or even large publicly held corporation, is likely to willingly subject itself to prosecution for a miscalculation of the prevalent community standards or for an error in judgment as to what is indecent. A successful defense to a criminal prosecution would be small solace indeed.

CDA, 929 F. Supp. at 855-56, aff'd, 521 U.S. 844; see also COPA, 31 F. Supp.2d at 497

(preliminary injunction based in part on COPA's "imposition of possibly excessive and serious criminal penalties" and placement of "the burden of establishing an affirmative defense [on the speaker]").

Moreover, compliance with the affirmative defenses will result in the stigmatization of speech by forcing Web sites to create "adults only" zones, which are widely associated with pornographic materials. See H.R. Rep. No. 105-775, at 26 (1998) ("Credit card verification is commonly used today in both the dial-a-porn and Internet context and it should be easy to use and implement for commercial entities that sell pornography on the Web."). Indeed, as the government's own expert makes clear, the Adult Check system advocated by the government is used in connection with "adult entertainment sites." See J.A. at 480.

The affirmative defenses thus essentially require Internet purveyors of speech for "commercial purposes" whose sites contain some degree of sexually-frank content to create "adults-only" zones, thereby stigmatizing the speech by equating it with pornography. See Shea v. Reno, 930 F. Supp. 916, 943 (S.D.N.Y. 1996) (finding it burdensome for commercial and non-commercial

content providers of non-pornographic content, as well as users wishing to access such material, to associate with adult verification services, which are identified with pornographic materials and users of same), aff'd, 521 U.S. 1113 (1997). In this regard, COPA's affirmative defenses would impose an onerous and ongoing burden on amici to redesign Web sites in order to segregate "harmful to minors" content. See DOJ Ltr. at 3 (recognition of constitutional problems in applying a harmful-to-minors standard to the Internet in view of inherent difficulty in segregating "adult speech" in context of "the dynamic, interactive nature" of this medium).

Finally, Web sites, particularly many created and maintained by amici, are increasingly employing interactive technology, which permits visitors to communicate with one another in discussion groups and chat rooms, as well as by electronic mail. To the extent that the law applies to these features of Web sites, it causes additional burdens. While the employment of interactive technology greatly enhances the First Amendment value of the Internet by permitting listeners seamlessly to transform into speakers and speakers into listeners, implementation of one or more of the verification schemes envisioned by the Government will bring such technological strides to a halt.

For one, employment of verification schemes in interactive environments such as chat rooms will destroy the promise of such media of communication by fundamentally interfering with the spontaneity and flow of dialogue that occurs within them. Further, those who sponsor such fora on their Web sites (as do many of the entities represented by amici), faced with the costly and difficult prospect of monitoring the speech occurring on them and the concomitant risk of prosecution under the Act for allowing ill-defined "harmful to minors" speech to transpire, will necessarily think twice about offering such fora. See COPA, 31 F.Supp.2d at 495 ("there is no way to restrict the access of minors

to harmful material in chat rooms and discussion groups . . . without screening all users before accessing any content, even that which is not harmful to minors, or editing all content before it is posted to exclude material that is harmful to minors”).

These profound shortcomings of COPA’s affirmative defenses leave amici’s speech sponsors, representative of many other Internet speakers, with two equally untenable alternatives: (1) offer speech that is unquestionably constitutionally protected as to adults but which may be construed as “harmful to minors,” and thereby risk criminal prosecution and civil penalties under the COPA; or (2) suppress such speech by self-censorship, thereby denying adults access to constitutionally-protected material. Requiring amici’s constituents to face this dilemma is antithetical to fundamental First Amendment principles.

CONCLUSION

For the foregoing reasons, amici respectfully submit that COPA is an unconstitutional restraint on free speech and that the district court’s entry of a preliminary injunction should thus be affirmed.

DESCRIPTION OF THE AMICI

The Association of American Publishers, Inc. (“AAP”) is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately 200 members include most of the major commercial book publishers in the United States. AAP members publish most of the general, educational, and religious books produced in the United States. For AAP’s members, the Internet creates a new “electronic” marketplace in which both product and mode of delivery are assuming different forms. Increasingly competing for the consumer dollar with traditional paper versions of all manner of literature are works of similar content online. AAP’s members are eager participants in this exciting new marketplace.

The American Society of Newspaper Editors (“ASNE”) is a nationwide, professional organization of more than 850 members who hold positions as directing editors of daily newspapers throughout the United States and Canada. Founded more than seventy-five years ago to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people, ASNE is committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of this country with complete and accurate reports.

BiblioBytes, Inc. publishes a variety of electronic books on the Internet and provides them to the public free of charge, relying on financial support from advertisers who buy space on its Web site. As a previous plaintiff in ACLU v. Reno, BiblioBytes has a strong interest in this case and in protecting its ability to freely publish material on the Internet.

The Center for Democracy and Technology (“CDT”) is a non-profit public interest

and Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT's staff have conducted extensive policy research, published academic papers and analyses, and testified before Congress on the impact of Internet content regulations and the availability of alternative methods for protecting individuals online, including user empowerment tools and technologies.

The Comic Book Legal Defense Fund ("CBLDF") is an organization dedicated to defending the First Amendment rights of the American comic book industry. CBLDF represents artists, publishers, and distributors, as well as the broader community of specialty retailers and readers. Largely because comics are a graphic-based art form, the comic industry was quick to embrace the Internet, not only as a means to advertise and distribute its product, but as a new environment in which to create comics. Today, the largest individual retailers of comic books in the United States are Internet-based and online commerce in comics is steadily increasing. Past experience has shown that comics are particularly vulnerable to misapplication of "harmful-to-minors" standards as they are commonly perceived as an inherently juvenile art form. In reality, however, many comics are read by and geared to an adult audience. The CBLDF, therefore, fears that COPA would have a chilling effect on its many members who continue to explore and evolve the comic book art form.

The Commercial Internet Exchange Association ("CIX") is a trade association of public data Internet service providers ("ISPs") which promotes and encourages the development of the Internet industry in both national and international markets. The oldest association of ISPs, CIX's members run more than 130 networks throughout the world. Its members include: @Home, AT&T, AGIS, Epoch, e.spire, Exodus, GTE Internetworking, MCI, WorldCom, MediaOne, PSINet, Sprint,

Time Warner Fibrcom, and Verio.

The Computer & Communications Industry Association (“CCIA”) is an international trade association whose members include major, midsize, and small independent software providers, computer equipment manufacturers, telecommunications and online service providers, resellers and systems integrators. CCIA’s members collectively generate approximately \$250 billion in revenue annually and have approximately one million employees. For twenty-six years, CCIA has advocated open, barrier-free competition in the computer and communications industry.

The Freedom to Read Foundation (“FTRF”) is an organization established in 1969 by the American Library Association to promote and defend First Amendment rights, support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and help shape legal precedent for the freedom to read on behalf of all citizens. The FTRF and its library members serve both as access and content providers on the Internet. Many member libraries post a diverse array of content on their Web sites, as well as sponsor chat groups. In view of past attempts by some persons to ban literature and reference items from library collections, many of the FTRF's members fear prosecution under COPA should they post materials on the Internet that might be deemed "harmful to minors" in some community. FTRF is thus concerned that the library patrons served by FTRF’s members will be denied access to constitutionally-protected materials.

Internet Alliance (“IA”), Internet Alliance, the leading trade association for the consumer-focused Internet online industry, currently has approximately 76 members who represent more than eighty-five percent of the commercial Internet online consumer access marketplace in the United States. Protection of First Amendment rights on the Internet is critical to furthering IA's mission

of building the consumer confidence and trust necessary to develop the Internet into a global mass market medium.

Magazine Publishers of America (“MPA”) is a national trade association including in its present membership more than 200 publishers of approximately 1,200 consumer interest magazines sold at newsstands and by subscription. MPA member publications provide broad coverage of domestic and international news, literature, religion, law, politics, science, agriculture, business and industry, and many other interests, avocations and pastimes of the American people. MPA members actively publish a substantial volume of content on the Internet and utilize the Internet in a variety of ways, including solicitation via Web sites of subscriptions for their publications, marketing of print and online publications to advertisers and agencies, promoting events, and sharing information with other publishers. Some MPA members publish electronic versions or excerpts from their magazines that might in some communities be deemed “harmful to minors.” MPA believes that credit card verification and adult identification systems would be economically burdensome and technologically infeasible for its members, and would, in the end, repel rather than attract visitors to its members’ Web sites.

The National Association of College Stores (“NACS”) is a trade association composed of approximately 3,000 college stores located throughout the United States. NACS fears that certain materials that might be considered “harmful to minors” by a local federal prosecutor might be posted or sold over the Internet by a college store or professor in the context of online classes, or even by an entity linked to a college or college store Internet site. NACS’s members will thus be required to restrict the teaching and other college-related activities promoted through this medium.

The National Association of Recording Merchandisers (“NARM”) is an

international trade association whose more than 1000 members include entertainment retailers, wholesalers, distributors and manufacturers, many of whom conduct business over the Internet. Some of NARM's members are online music retailers who market their recordings by permitting Internet users to download music samples before making a purchase with their credit cards. Permitting users to sample music before identifying themselves is an important feature of this marketing strategy. NARM members are concerned that they may be exposed to criminal liability under COPA simply for misjudging what may be deemed "harmful to minors" under an ambiguous standard.

Newspaper Association of America ("NAA") represents the interests of more than 2,000 newspapers in the U.S. and Canada. Most NAA members are daily newspapers, accounting for eighty-seven percent of the U.S. daily circulation. Many of these newspapers are currently on the Internet. A strong advocate of the press' First Amendment rights, NAA is particularly concerned with protecting the free flow of information over the Internet.

People For the American Way Foundation ("People For") is a nonpartisan, education-oriented citizens organization with more than 300,000 members. Established in 1980 to promote and protect civil and constitutional rights, including First Amendment freedoms, People For and its diverse members are vitally interested in the preservation of free expression over the Internet. Many of People For's members engage in expression and receive information over the Internet, and have specific and personal interests in promoting and receiving uncensored information online.

The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who distribute their wares through independent national distributors, wholesalers, and retailers, many of whom conduct business over the Internet.

PSINet Inc., founded in 1989, is a global Internet data communications carrier focused on the business marketplace. PSINet operates around the world serving primary markets in 90 of the 100 largest metropolitan statistical areas in the U.S. and in 16 of the 20 largest global telecommunications markets. PSINet serves more than 73,400 business accounts including telecommunications carriers and other Internet service providers and together, with our small office/home office and consumer customers, provides service to more than 1,041,000 customers.

The Publishers Marketing Association (“PMA”) is a trade association representing more than 3,000 publishers across the United States and Canada. Many of PMA’s members are small, independent publishers who publish a variety of works, including many concerning controversial topics or involving experimental approaches to writing, which more mainstream publishers have not acquired. A number of PMA members have developed Web sites which offer book samples, chat rooms, and other fora for the discussion of their publications. The Internet is an essential tool for marketing and disseminating the unique voices represented by PMA’s members, and often is a significant source of their publishing income. The imposition of criminal sanctions for communications containing materials deemed “harmful to minors” is a real and tangible threat to these independent publishers, who provide a rich alternative to mainstream publishing houses. The PMA believes that the use of credit card and other user-identification systems defeat the purpose of this democratic medium by discouraging the informal perusal of works otherwise not accessible to the majority of Internet users.

The Recording Industry Association of America (“RIAA”), a national trade association whose member companies produce, manufacture, and distribute more than ninety percent of the sound recordings sold in the United States, is committed to protecting its members’ free

expression rights across all communications media, including the Internet.

The Society of Professional Journalists (“SPJ”) is a voluntary non-profit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully, and in the public interest. SPJ strongly advocates the protection and preservation of First Amendments rights across all mediums, including the Internet.

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Respectfully submitted,

By:

R. Bruce Rich
Elizabeth S. Weiswasser
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8000

Attorneys for Amici Curiae
The Association of American Publishers, Inc.; The
American Society of Newspaper Editors;
BiblioBytes, Inc.; The Center for Democracy and
Technology; The Comic Book Legal Defense
Fund; The Commercial Internet Exchange
Association; The Computer & Communications
Industry Association; The Freedom to Read
Foundation; The Internet Alliance; Magazine
Publishers of America, Inc.; The National
Association of College Stores; The National
Association of Recording Merchandisers;
Newspaper Association of America; People for the
American Way Foundation; The Periodical and
Book Association of America, Inc.; PSINet Inc.;
The Publishers Marketing Association; The
Recording Industry Association of America; and
The Society for Professional Journalists

OF COUNSEL:

Michael A. Bamberger
Sonnenschein Nath
& Rosenthal

Richard M. Schmidt, Jr.
Kevin M. Goldberg
Cohn & Marks
THE AMERICAN SOCIETY
OF NEWSPAPER EDITORS

Jerry Berman
Alan B. Davidson
James X. Dempsey
Deirdre K. Mulligan
Elizabeth D. Kessler
THE CENTER FOR DEMOCRACY
AND TECHNOLOGY

Burt Joseph
Barys Joseph and Lichtenstein
THE COMIC BOOK
LEGAL DEFENSE FUND

Ronald L. Plessner
James J. Halpert
Piper & Marbury LLP
THE COMMERCIAL
INTERNET EXCHANGE ASSOCIATION
AND PSINET INC.

Ed Black
Jason Mahler
THE COMPUTER AND
COMMUNICATIONS INDUSTRY
ASSOCIATION

Howard Liberman
Arter & Hadden
THE INTERNET ALLIANCE

Anne R. Noble
MAGAZINE PUBLISHERS
OF AMERICA, INC.

Marc L. Fleischaker
Arent Fox Kintner Plotkin & Kahn PLLC
THE NATIONAL ASSOCIATION OF
COLLEGE STORES

David S. J. Brown
René P. Milam
THE NEWSPAPER ASSOCIATION OF
AMERICA

Elliot M. Minberg
Lawrence S. Ottinger
PEOPLE FOR THE AMERICAN WAY
FOUNDATION

Lloyd J. Jassin
Law Office of Lloyd J. Jassin
THE PUBLISHERS MARKETING
ASSOCIATION

Stephen Marks
THE RECORDING INDUSTRY
ASSOCIATION OF AMERICA

Bruce W. Sanford
Robert D. Lystad
Bruce D. Brown
Baker & Hostetler LLP

THE SOCIETY OF PROFESSIONAL
JOURNALISTS

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