No. 07-2539

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMERICAN CIVIL LIBERTIES UNION; ANDROGYNY BOOKS, INC., d/b/a A DIFFERENT LIGHT BOOKSTORES; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ADDAZI, INC., d/b/a CONDOMANIA; ELECTRONIC FRONTIER FOUNDATION; ELECTRONIC PRIVACY INFORMATION CENTER; FREE SPEECH MEDIA; PHILADELPHIA GAY NEWS; POWELL'S BOOKSTORE; SALON MEDIA GROUP, INC.; PLANETOUT, INC.; HEATHER CORINNA REARICK; NERVE.COM, INC.; AARON PECKHAM, d/b/a URBAN DICTIONARY; PUBLIC COMMUNICATORS, INC.; DAN SAVAGE; SEXUAL HEALTH NETWORK,
Plaintiffs-Appellees,

v.

ALBERTO GONZALES,
Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of Pennsylvania

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Defendant–Appellant
Urging Reversal

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 07-2539

American Civil Liberties Union, et al.

v.

Alberto Gonzales

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, The National Legal Foundation makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy

proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

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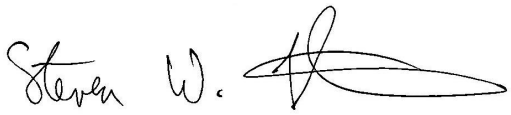

(Signature of Counsel or Party)

Dated: 9/26/07

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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is 501(c)(3) non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of its interests in protecting minors from pornography on the World Wide Web.

This Brief is filed pursuant to the consent of all parties.

SUMMARY OF THE ARGUMENT

This Brief makes one argument not made by the Attorney General and expands on two arguments made by him. First, *Amicus* argues that the District Court erred when it held the Child Online Protection Act (COPA) void for vagueness. Second, *Amicus* expands upon the Attorney General's Brief statement of the Standard of Review, explaining in more detail why this Court may independently examine the record below and the ramifications of such an examination. Third, *Amicus* expands upon a footnote in the Attorney General's Brief which noted the contradictions between the ACLU's position in this case (as seen in its argument to the court below) and the arguments it made before the Supreme Court in *United States v. American Library Association,* 539 U.S. 194 (2003).

First, the Brief demonstrates the error noted above concerning the District Court's void for vagueness analysis. Courts are supposed to examine the placement and purpose in the statutory scheme of critical words in interpreting statutes. However, the District Court did not engage in such an analysis of COPA. It simply stated that because Congress had used two different *scienter* terms, "knowingly" and "intentionally," and had not defined them, COPA is void for vagueness. However, Congress's intent can be found by looking at the placement and purpose of the *scienter* terms "knowingly" and "intentionally" in different sections. The Brief will demonstrate that Congress intended the "knowingly" *scienter* requirement to create a general intent crime and the "intentionally" *scienter* requirement to create a specific intent crime. Thus, the District Court erred in holding COPA void for vagueness.

Second, the Brief examines the standard of review for this case. As the Attorney General noted in his brief, (Appellant's Brief at 25), Federal Rule of Civil Procedure 52(a) controls this Court's review of factual findings. However, as the Attorney General also pointed out, (*id*.), "the role of an appellate court in a first amendment case requires an enhanced examination of the entire record." *Feldman v. Philadelphia Housing Auth.*, 43 F.3d 823, 828 (3d Cir. 1994). Because many of the Attorney General's arguments are based upon problems with the District Court's findings of facts and mixed questions of law and fact, this Brief explains

why those arguments are not foreclosed by the clearly erroneous standard. Using precedent from the United States Supreme Court and this Court, the Brief shows that "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984). Such an infection has occurred in this case and this Court is free to, and indeed has a responsibility to, perform an independent review of the record. Thus the Attorney General's fact-based arguments may properly be entertained by this Court.

Third, this Brief expands upon a footnote in the Attorney General's Brief which noted the contradictions between the ACLU's position in this case (as seen in its argument to the court below) and the arguments it made before the Supreme Court in *American Library Association*. There, the ACLU argued that Congress violated the First Amendment by inducing public libraries to install internet filters on their computers. The ACLU argued that filtration software violated the Constitution's free speech protections because, among other reasons, it overblocks websites. However, in this case, the ACLU has presented internet filtration software as a less restrictive means than Congress's chosen method. A review of the ACLU's brief to the Supreme Court demonstrates a clearly contradictory view

previously advanced by the ACLU, one which technological advances occurring during the past four years cannot account for.

ARGUMENT

I. COPA'S TWO *SCIENTER* REQUIREMENTS ARE NOT VOID FOR VAGUENESS BECAUSE THE MEANING OF EACH IS EASILY ASCERTAINABLE.

COPA provides for two different criminal penalties each with its own *scienter* requirement, one "knowingly" and the other "intentionally." 47 U.S.C. § 231(a) (1) & (2) (2006). Specifically, § 231(a) (1) states, "[w]hoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors" shall be subject to stated penalties. On the other hand, § 231(a) (2) states, "*[i]n 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." (emphasis added).

The District Court correctly found "that Congress intended the disparate use" of the *scienter* requirements. *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 816-17 (E.D. Penn. 2007). However, the District Court was incorrect in holding that "since neither term is defined, the difference in *scienter* standards creates

uncertainty in COPA's application and renders the terms vague." *ACLU*, 478 F. Supp. 2d at 817.

The Supreme Court has held "that the language of the statutes that Congress enacts provides 'the most reliable evidence of its intent.'" *Holloway v. United States*, 526 U.S. 1, 6 (1999) (quoting *United States* v. *Turkette,* 452 U.S. 576, 593 (1981)). The Court stated that it "begin[s] the task of statutory construction by focusing on the words that the drafters have chosen. In interpreting the statute at issue, 'we consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'" *Id.* (quoting *Bailey* v. *United States*, 516 U.S. 137, 145 (1995)). However, in coming to its conclusion that COPA was vague as to the *scienter* requirements, the District Court did nothing more than baldly assert that the lack of definitions render the terms vague. *ACLU*, 478 F. Supp. 2d at 816-817. Nevertheless, despite the District Court's assertion, the meaning of both words is readily ascertainable.

The first *scienter* requirement is "knowingly and with knowledge of the character of the material." 47 U.S.C. § 231(a)(1)(2006). This requirement has long been used in Congress's battle against obscenity and has presented no problem in being clearly understood. For example, in *Hamling v. United States*, 418 U.S. 87 (1974), the Supreme Court affirmed the conviction of the defendants for sending obscene materials through the United States mail. The *scienter*

requirement at issue there stated, "[w]hoever *knowingly* uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or *knowingly* causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or *knowingly* takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be" subject to the stated criminal penalties. 18 U.S.C. 1461 (2006).

The defendants argued that such a *scienter* requirement was constitutionally insufficient. In the context of rejecting this argument, the Court noted the common sense definition of knowledge and discussed an additional type of *scienter not* contained in the statute:

> [i]t is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. § 1461 nor by the Constitution.

Id. at 123-24. Crimes triggered by this type of *scienter* are typically described as general intent crimes since they requie proof only of "knowledge with respect to the *actus reus* of the crime . . . ." *Carter v. United States*, 530 U.S. 255, 268 (U.S. 2000).

In contrast, the second criminal penalty in COPA prohibits "*Intentional violations*. In addition to the penalties under paragraph (1), whoever *intentionally violates such paragraph*" shall be subject to additional penalties. 47 U.S.C. § 231(a)(2) (2006)(emphasis added). This penalty's "placement and purpose in the statutory scheme," *Holloway*, 526 U.S. at 6, gives it a clear meaning. Congress's placement of the additional penalty after the first one and its purpose in the statutory scheme evinces that the additional penalty is intended to be a specific intent crime.

In interpreting criminal statutes, "[c]ourts generally hold that a specific intent crime is one that requires a defendant to do more than knowingly act in violation of the law. *The defendant must also act with the purpose of violating the law.*" *United States v. Gonyea*, 140 F.3d 649, 653 (6th Cir. 1998) (citations omitted) (emphasis added). That is precisely what the placement and purpose in the statutory scheme in COPA indicate for the second penalty. Congress specifically conditioned the additional penalty upon an "intentional violation" of the statute.

Therefore, unlike the statute at issue in *Hamling*, in COPA, Congress would have expected a defendant to have "brushed up on the law" before he could have violated the *second* provision of COPA. Thus, the first provision creates a general

intent crime, while the second provision creates a specific intent crime. Neither *scienter* term is void for vagueness.

II. THIS COURT CAN REVIEW THE DISTRICT COURT'S FINDINGS OF FACT BECAUSE COURTS MUST ENGAGE IN AN INDEPENDENT REVIEW OF THE RECORD WHEN, AS HERE, ERRORS OF LAW HAVE INFECTED FACTUAL FINDINGS.

As the Attorney General noted in his statement of the Standard of Review, (Appellant's Brief at 25), Federal Rule of Civil Procedure 52(a) states that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." However, the Supreme Court has clearly stated that "an appellate court has an obligation to 'make an independent examination of the whole record' . . . ." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co*. v. *Sullivan*, 376 U.S. 254, 284-286 (1964)).[1] The Court specifically noted that Rule 52 cannot stand in the way of this examination. The Attorney General briefly noted the "independent review" standard, (Appellant's Brief at 25) but did explain its ramifications. Because many of the Attorney General's arguments are directed

[1] A portion of the *Bose* Court's decision was based on a disagreement among the Circuits regarding the applicability of Rule 52(a) to documentary evidence versus oral testimony. 466 U.S. at 500. The Federal Rules of Civil Procedure were amended the next year to clarify the issue. That issue is not relevant here, and *Bose* is routinely cited for the propositions under discussion here.

towards the District Court's findings of fact, it is important to understand why this Court can entertain those arguments. Under *Bose* and its progeny, this Court clearly can—indeed is obligated to—entertain them.

The *Bose* Court specifically opined that "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may *infect* a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Id.* at 501 (emphasis added). In fact, the Supreme Court, in holding that appellate courts should review the case record, went on to emphasize that "the rule of independent review assigns to judges a constitutional responsibility that *cannot* be delegated to the trier of fact." *Id.* (emphasis added).

This Court applied the *Bose* independent review standard to obscenity in *United States v. Various Articles of Merchandise*, 230 F.3d 649 (3d 2000). There, this Court properly emphasized that part of the purpose of an independent review in a First Amendment case is to "make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." Id at 652 (quoting *Bose*, 466 U.S. at 485) (internal citation omitted). However, that truth does not somehow trump the other side of the *Bose* concern: infected findings of fact must not escape appellate review. It's not either/or; it's both/and.

As the Attorney General noted—but without explicitly tying his point to the Standard of Review—

> The district court's holding that COPA is unconstitutional on its face rests on two fundamental errors which infected its entire analysis. *First*, at every turn, the court chose to construe the statute in a manner that exacerbates constitutional difficulties rather than minimizing them. Employing this approach—which is flatly at odds with established principles of statutory construction—the court exaggerated the breadth of COPA's coverage and thus magnified its burdens. *Second*, the court did not fairly assess the relative efficacy and burdens of COPA's age-verification requirements in comparison to filtering. While speculating at length regarding various ways in which COPA *might* be circumvented or *might* restrict more (or less) speech than necessary, the court ignored critical limitations in filtering technology, which demonstrate that it is not a less restrictive, equally effective, alternative to COPA. By viewing COPA so critically while assuming the best about filtering, the district court substituted its own judgment for that of Congress—effectively overruling Congress's reasonable conclusion "that, despite the current availability of filtering software, a child protection problem exists."

(Appellant's Brief at 20 (citation omitted)).

It is this infection that authorizes—indeed, obligates—this Court to undertake an independent review of the record. This "constitutional responsibility . . . *cannot* be delegated to the trier of fact." *Bose*, 466 U.S. at 501 (emphasis added).

III. THE ACLU's ARGUMENT IN THIS CASE IS INCONSISTENT WITH ITS ARGUMENT TO THE SUPREME COURT IN *UNITED STATES V. AMERICAN LIBRARY ASSOCIATION* REGARDING COMPUTER FILTRATION SOFTWARE.

As the Attorney General briefly noted in his brief, (Appellant's Brief at 46, n.10), the ACLU argued that filtering software would be a "less restrictive

alternative to COPA" at the trial court below. *ACLU*, 478 F. Supp. at 813. That argument, however, is not consistent with its argument in *United States v. American Library Association*, 539 U.S. 194, 198-99 (2003). There, the Supreme Court upheld the Children's Internet Protection Act, 20 U.S.C. § 9134 (2006) (CIPA), which required public libraries to install and maintain filtering software on their computers to protect children from being exposed to internet pornography as a condition of funding assistance.

In its Opening Brief for Appellees Multnomah County Public Library in *American Library Association*, the ACLU argued that CIPA's requirement for public libraries to use filtering software violated the Constitution. Brief of Appellees Multnomah County Public Library, *et al.* at *1, *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003) (No. 02-361), 2002 U.S. Briefs 361. The ACLU argued that "[t]here is no technology in existence, or likely to come into existence, that can 'protect against access' to the categories defined by the statute. All of the existing products use categories much less precisely defined, and much broader, than the statute." *Id.* at *7 (citations omitted). The ACLU stressed that "all of the available products substantially overblock . . . ." *Id.* at *8.

The ACLU then argued to the Supreme Court that the trial court correctly concluded that "no 'technology protection measure' that will do what CIPA requires without also blocking access to a vast amount of speech that is

constitutionally protected for both adults and minors."[2] *Id.* at 11 (citations omitted). The ACLU proceeded to describe six reasons technical reasons why filters overblock:

> *First*, categorizing the Web is an impossible task in part due to "the Internet's size, rate of growth, rate of change, and architecture." . . . *Second*, to review all of the dynamic content on the Web, blocking software companies have hired "between eight and a few dozen employees." Software companies must use a combination of automated search techniques and human review to categorize the vast content on the Web, both of which are subject to serious error. . . . *Third*, the products are unable to differentially block access to video files, audio files, chat rooms, or discussion groups. . . . *Fourth*, the products overblock because they primarily block at the level of the root domain rather than at the level of an individual Web page. . . . *Fifth*, the Internet's addressing system causes serious overblocking . . . . *Sixth*, overblocking is caused by so-called "loophole" sites.

Id. at *12-14 (emphasis added) (citations omitted).

The only one of these concerns that was addressed in any way by the District Court in the instant case was the second one. The District Court opined that "many of today's products utilize black lists, white lists, and real-time, dynamic filtering to catch any inappropriate sites that have not previously been classified by the product." *ACLU*, 478 F. Supp. 2d at 795. Thus, all of the ACLU's other concern

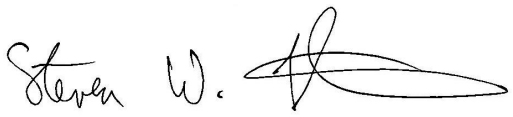
[2] The ACLU's overblocking concerns *based on the state of technology* will be no less true of COPA's restrictions's than of CIPA's. While CIPA may have implicated the minor/adult issue, either the technology can discriminate at the necessary level or it cannot.

about overblocking remain. Thus, as the Attorney General noted "[i]t is thus highly ironic that the ACLU now touts filtering as a less restrictive alternative to COPA." Appellant's Brief at 46, n.10

CONCLUSION

For the foregoing reasons, as well as other reasons stated in the Appellant's Brief, this Court should reverse the judgment of the United States District Court for the Eastern District of Pennsylvania.

Respectfully submitted this
26th day of September 2007.



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COMBINED CERTIFICATIONS

1. I hereby certify that I am admitted to practice law in the Third Circuit.

2. I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 3,042 words using Microsoft Word 2007 word count function.

3. I hereby certify that the electronic brief and the hard copies that have been filed are identical.

4. I hereby certify that the electronic brief has been scanned for viruses using PC Security Shield.

5. I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *American Civil Liberties Union, et al*. v. Gonzales, No. 07-2539, on all required parties by depositing the required number of paper copies in the United States mail, first class postage, prepaid on September 26, 2007, addressed as listed below. The required number of paper copies were filed in the same manner and the electronic version of the brief was e-mailed on the same date.

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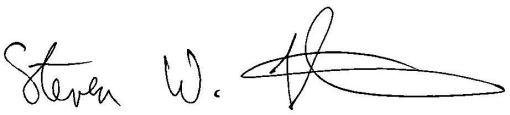

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