SUPREME COURT OF THE UNITED STATES

No. 03–218

JOHN D. ASHCROFT, ATTORNEY GENERAL, PETITIONER *v.* AMERICAN CIVIL LIBERTIES UNION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 29, 2004]

JUSTICE SCALIA, dissenting.

I agree with JUSTICE BREYER's conclusion that the Child Online Protection Act (COPA), 47 U. S. C. §231, is constitutional. See *post*, at 14 (dissenting opinion). Both the Court and JUSTICE BREYER err, however, in subjecting COPA to strict scrutiny. Nothing in the First Amendment entitles the type of material covered by COPA to that exacting standard of review. "We have recognized that commercial entities which engage in 'the sordid business of pandering' by 'deliberately emphasiz[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed,' engage in constitutionally unprotected behavior." *United States* v. *Playboy Entertainment Group, Inc.,* 529 U. S. 803, 831 (2000) (SCALIA, J., dissenting) (quoting *Ginzburg* v. *United States,* 383 U. S. 463, 467, 472 (1966)). See also *Los Angeles* v. *Alameda Books, Inc.,* 535 U. S. 425, 443–444 (2002) (SCALIA, J., concurring); *FW/PBS, Inc.* v. *Dallas,* 493 U. S. 215, 256–261 (1990) (SCALIA, J., concurring in part and dissenting in part).

There is no doubt that the commercial pornography covered by COPA fits this description. The statute applies only to a person who, "as a regular course of such person's trade or business, with the objective of earning a profit,"

47 U. S. C. §231(e)(2)(B), and "with knowledge of the character of the material," §231(a)(1), communicates material that depicts certain specified sexual acts and that "is designed to appeal to, or is designed to pander to, the prurient interest," §231(e)(6)(A). Since this business could, consistent with the First Amendment, be banned entirely, COPA's lesser restrictions raise no constitutional concern.