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FIRST AMENDMENT

In This Section:

Last Term:

GOOD NEWS CLUB, et al., Petitioners
v.
MILFORD CENTRAL SCHOOL

No. 99-2036
Decided June 11, 2001

Classrooms Open to Faith Groups
High Court Rules That Christian Clubs Can Meet in School Buildings After Hours, Just Like Other Nonschool Groups

Christian Science Monitor

Tuesday, June 12, 2001

Warren Richey

An evangelical Christian group has a right to meet after hours in public-school classrooms despite the religious content of the group's meetings.

So says the US Supreme Court in an important church-state decision that may help pave the way for Bush administration plans to expand government partnerships with faith-based social-service groups.

In a 6-to-3 decision Monday, the high court ruled that if the Milford, N.Y., school board offers access to various groups holding after-school meetings, the board may not refuse the same access to the Good News Club, an evangelical group that targets grade-school kids, simply because the board has deemed it too religiously oriented.

The decision marks an important development in the court's evolution on church-state issues. It clarifies how government organizations must treat faith-based groups. Specifically, it demonstrates what it means for the government to be neutral toward such groups.

"When Milford denied the Good News Club access to the school's limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment," writes Justice Clarence Thomas for the majority.

The court ruled that the meetings after school amounted to a form of private speech that is protected by the First Amendment. The school board had argued in part that permitting the club to meet in school facilities would be an unconstitutional endorsement of religion by the school board.

But the court ruled that if the school maintained a policy granting private groups access to classrooms after school, then the school board cannot deny similar

access to one particular group because of its religious orientation.

"The court has had a remarkably consistent rule for 40 years on issues like this that private religious speech, even on public property, is protected," says Douglas Laycock, a University of Texas church-state scholar.

Critics see the decision as opening a door for the increased use of public facilities to advance religion. "The court didn't recognize how aggressive this evangelism is," says Barry Lynn, head of Americans United for the Separation of Church and State. "This is a back door to very aggressive proselytizing by these groups."

Right to exclude?

At issue in the case – Good News Club v. Milford Central School- was whether the school board could exclude the club from using a classroom for meetings immediately after school let out. Only students with written permission from their parents could participate in the meetings.

The school board denied access to the 25-member club, citing a state law and a school policy that prohibited the use of school facilities for religious worship. The board concluded that the club's activities were the equivalent of worship services.

The club sued the school board, claiming that it granted access to groups like the Boy Scouts, Girl Scouts, and 4-H Club that were involved in the moral development of young people. The club said it shared the same goal of moral development of youth, but approached that goal through religious means.

A federal district judge and a divided appeals court panel sided with the school board. The courts ruled that rather than merely approaching the subject of morality from a religious perspective, the group was engaged in actual worship.

In reversing the lower court decisions, the US Supreme Court said the school district had engaged in "impermissible viewpoint discrimination."

"We disagree that something that is quintessentially religious or decidedly religious in nature cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint," Justice Thomas writes.

Justice Thomas was joined in the majority by Chief Justice Willliam Rehnquist, and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Stephen Breyer.

The dissent

Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg dissented.

Justice Stevens, in a written dissent, draws a distinction between speech from a religious viewpoint and religious proselytizing. He compares it to a discussion of political issues used to recruit new members to a particular organization.

"If a school decides to authorize after-school discussions of current events in its classrooms, it may not exclude people from expressing their views simply because it dislikes their particular political opinions," he says. "But must it therefore allow organized political groups - for example, the Democratic Party, the Libertarian Party, or the Ku Klux Klan -

to hold meetings, the principal purpose of which is not to discuss the current-events topic ... but rather to recruit others to join their respective groups? I think not."

Justice Souter agreed in his own written dissent. "It is beyond question that Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion," he writes.

He says the majority ignored this reality and thus the decision must be viewed only in broad, generic terms. "Otherwise, this case would stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque."

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Last Term:

FEDERAL ELECTION COMMISSION, Petitioner
v.
COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE, Respondent

No. 00-191

Supreme Court of the United States

Decided June 25, 2001

Court Backs Limits on Campaign Spending
Justices Cite Need to Curb "Hard Money" Contributions

The Washington Post

Tuesday, June 26, 2001

Charles Lane

The Supreme Court yesterday upheld strict limits on how much political parties can spend in coordination with their congressional candidates, rejecting an argument that the restrictions violated the parties' free speech rights.

Although the 5 to 4 ruling did not involve "soft money" -- the unlimited donations to parties from wealthy individuals, corporations and labor unions -- both sides in that debate had watched it carefully for clues to how the high court might consider the constitutionality of prohibiting soft money.

The majority seemed sympathetic to arguments that large contributions to parties could influence candidates, and advocates of stricter campaign finance laws said they thought the court's approach would help them in any court challenge to the soft money ban pending in Congress.

Yesterday's case involved the way parties spend "hard money" -- funds that are raised from individuals and political action committees in limited amounts and that, unlike soft money, can be spent explicitly in support of candidates. Under the federal election law, each party can spend a set amount of "hard money" in coordination with its candidates, on top of what the candidates themselves spend.

Because the GOP's congressional campaign committees raise far more hard money than their Democratic ounterparts, Democrats feared a ruling permitting parties to pump unlimited sums into congressional races would leave them at a marked disadvantage.

Instead, the court upheld the spending limits. It said permitting parties to spend unlimited amounts in coordination with their candidates could give wealthy donors a loophole through which they could

evade contribution limits and exercise improper influence over candidates.

"Despite years of enforcement of the challenged limits," Justice David H. Souter wrote for the majority, "substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open."

Souter's opinion was joined by Justices Sandra Day O'Connor, Stephen G. Breyer, Ruth Bader Ginsburg and John Paul Stevens.

The case involved radio advertisements run by the Colorado Republican Party in advance of the 1986 Senate race criticizing Tim Wirth, then a congressman and the eventual Democratic nominee. Democrats complained that the ads amounted to contributions to Wirth's opponent and put the GOP over the party spending limit.

In a case that also went to the high court, the justices in 1996 said spending limits were unconstitutional when parties act independently of their candidates. It left open the question, decided yesterday, of whether the limits violate parties' free speech rights if the spending is done in coordination with candidates, the usual way parties operate.

Accusing the Colorado Republicans of "a refusal to see how the power of money actually works in the political structure," Souter brushed aside the party's contention that it could not possibly corrupt its own members.

Rejecting Colorado Republicans' contention that parties have an especially strong claim to freedom of association because of the role they play in organizing disparate political groups and uniting them behind candidates, the court said they should be treated no differently from political action committees or wealthy individuals when it comes to regulating contributions to individual candidates.

In dissent, Justice Clarence Thomas, joined by Chief Justice William H. Rehnquist and Justices Antonin Scalia and Anthony M. Kennedy, called the spending limits an attack on the parties' function in the American political system and an abridgement of their right to free political expression.

"I remain baffled that this Court has extended the most generous First Amendment safeguards to filing lawsuits, wearing profane jackets, and exhibiting drive-in movies with nudity, but has offered only tepid protection to the core speech and associational rights that our Founders sought to defend," Thomas wrote.

Backers of the soft money ban proposed by Sens. John McCain (R-Ariz.) and Russell Feingold (D-Wis.) said they were cheered by the ruling.

"Clearly, this decision demonstrates that McCain-Feingold restrictions on campaign contributions are constitutional," McCain said in a statement. As the House prepares to consider the legislation next month, he added, "Our opponents will have to find some other excuse not to enact laws to restore Americans' confidence in our political system."

McCain-Feingold has passed the Senate but opponents, led by Sen. Mitch McConnell (R-Ky.) and such groups as the National Right to Life Committee and

the American Civil Liberties Union, have pledged a court challenge if it becomes law.

Nevertheless, the tone and logic of the court's opinion yesterday implied the court might uphold a soft money ban. Yesterday, the court referred to the way in which donors "can use parties as conduits for contributions meant to place candidates under obligation."

Common Cause President Scott Harshbarger called the ruling "good news for the future of campaign finance reform efforts." He added, "The court today . . . has once again recognized that Congress can act -- consistent with the First Amendment -- to protect the integrity of our politics by regulating big money."

Craig Engle, a former general counsel of the National Republican Senatorial Committee, disagreed.

"Throughout the majority opinion, it is pretty clear that party committees cannot be treated differently than other political actors. . . ." he said. "McCain-Feingold says we are going to hold the party committees out for special treatment, that because of their unique position they will be prohibited from doing certain things that others may do. If the court won't give parties special permission, then it's unlikely the court will give parties special prohibitions."

One leading McCain-Feingold opponent said that, to the extent soft money finances activities that are not directly connected to particular candidates, such as get-out-the-vote drives, yesterday's ruling strengthens the case against an across-the board ban.

"The high court's opinion confirms that when parties act independently from candidates or pursue activities that are not contributions to candidates, they may not constitutionally be limited, much less subjected to an outright ban as in McCain-Feingold," said James Bopp Jr., general counsel of the James Madison Center for Free Speech.

The case is Federal Election Commission v. Colorado Republican Federal Campaign Committee, No. 00-191.

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Last Term:

LEGAL SERVICES CORPORATION, Petitioner
v.
Carmen VELAZQUEZ, et al.

United States
v.
Carmen Valazquez, et al.

Nos. 99-603 and 99-960

Supreme Court of the United States

Decided February 28, 2001

Tide Turning in LSC's Favor

Chicago Daily Law Bulletin

March 2, 2001

Patricia Manson

Proponents of the Legal Services Corp. scored two victories this week in their perennial battle for support for civil legal services to the poor.

One of those wins came when President Bush submitted a proposed budget calling for Congress to hold LSC's funding steady in the next fiscal year.

Another success was chalked up when a narrowly divided U.S. Supreme Court ruled that Congress trampled on constitutional rights by barring LSC-funded lawyers from challenging existing welfare laws on behalf of their clients.

But while hailing those victories, LSC proponents warned that there is still work ahead for the nation's largest funder of civil legal services to low- income people.

And they said the most immediate task is to seek Congress' support for funding -- a task that was given a boost Wednesday when Bush called for the LSC to receive $329 million in fiscal year 2002.

That is the amount the LSC received for the current year after the $330 million Congress appropriated was reduced by $726,000 under an across-the-board cut for 12 appropriations bills.

LSC proponents indicated they do not expect efforts to obtain funding for 2002 to meet with the kind of partisan opposition seen in the past when the agency was targeted for extinction by some conservative lawmakers.

L. Jonathan Ross, a Manchester, N.H., attorney who heads the American Bar

Association's Standing Committee on Legal Aid and Indigent Defendants, said he believes Bush's proposal to fund the LSC "represents the administration's statement that legal services to the poor in civil areas in this country is an important governmental function."

"I think it shows support for what the corporation has been doing and affirms that this is no longer a partisan but a bipartisan issue: to provide equal justice to citizens of the United States and others who need civil legal services and can't afford them," Ross said.

The executive director of the Legal Assistance Foundation of Metropolitan Chicago, Sheldon Roodman, said he also believes there is more support in Washington for the LSC than in the recent past.

Roodman said he expects Congress to hammer out any disputes over the LSC appropriation "in a spirit of good will, in contrast to years past when some congressmen ... tried to slash our funds by 50 percent."

Deborah H. Bornstein, president of the LAF Chicago board, said she too is pleased that "the budget isn't being attacked at this juncture."
"It's still below the level it was 15 years ago. But we need every penny, and we're glad there is some moderation being exercised by the current administration in declining to cut the funding," Bornstein said.

LSC funding typically is included in the appropriation bill for the Commerce, Justice and State departments. With the next fiscal year beginning Oct. 1, Congress has months to work out the details of that and other appropriation measures.

In the current fiscal year, LAF Chicago received about $6.4 million -- or more than 55 percent of its $11 million budget -- in LSC funds.

The remainder of the local group's funding comes from state and city governments and private donors and foundations. Contributions may be sent to LAF Chicago at 111 W. Jackson Blvd., Chicago, 60604.

Although efforts to eliminate the LSC failed, Congress for the past several years has battled over how much taxpayer money -- if any -- should go to the agency.

The LSC appropriation was slashed to $278 million in 1996, the year Republicans took control of Congress.

LSC came under attack in the following years for what lawmakers called a liberal agenda, and the LSC was subjected to such restrictions as a bar on bringing class actions against government entities or engaging in legislative advocacy.

Another restriction imposed on LSC-funded attorneys was a ban on challenging state or federal welfare reform statutes or regulations.
The prohibition was included in 1996 welfare overhaul that was championed by the Democratic Clinton administration and enacted by a Republican-led Congress.

But in a 5-4 decision Wednesday, the U.S. Supreme Court ruled that the prohibition represented an unconstitutional gag order that hampered lawyers in meeting their responsibilities to their clients. Legal Services Corp. v. Velazquez, No. 99-603; and U.S. v. Velazquez, No. 99-960.

"The Velazquez decision reinforces the notion that legal-assistance lawyers should

be able to represent our clients using all of the arguments and procedures available to lawyers in private practice," Roodman said.

Julie Clark, vice president for government relations of the Washington-based National Legal Aid and Defender Association, described the Supreme Court's ruling as "a very significant victory."

LSC proponents said they hoped Velazquez would prompt Congress to reconsider some of the other limits placed on attorneys receiving funds from the agency.

But some expressed doubts that Congress would reverse itself.

"I'm not sure under a Republican majority there would be much sympathy for lifting the restrictions," Clark said.
And Ross said Congress and the Supreme Court "are just two different forums" that approach the question of legal aid to the poor from a different perspective.

Even so, Ross said, the high court's ruling could offer guidance to legislators considering the LSC's role in the justice system.

"I hope that the congressional reaction is to carefully look at the majority opinion and not retrench from the advances that have been made in the service and the funding for the Legal Services Corp. over the last few years and the strong support that the Bush administration is giving to that concept," he said.

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Last Term:

Gloria BARTNICKI and Anthony F. Kane, Jr. Petitioners,
v.
Frederick W. VOPPER, et al.

United States, Petitioner
v.
Frederick W. Vopper, et al.

Nos. 99-1678 and 99-1728

Supreme Court of the United States

Decided May 21, 2001

We Could Be Heroes

The Village Voice

Tuesday, June 12, 2001

Cynthia Cotts

In a decision issued May 21, The Supreme Court elevated the First Amendment over privacy rights, by protecting a radio talk-show host who had broadcast an illegal tape. The decision, Bartnicki v. Vopper, seemed to give the press what it wanted: immunity to publish accurate, newsworthy information even when it came from a source who broke the law to get it.

But while the vote was 6-3, Justice John Paul Stevens's opinion was so murky that some experts say it's only a matter of time before the Supremes go the other way, giving privacy claims the power to censor the press. And if that happens, some fear the government will steal the rhetoric, making it a crime for the media to publish anything the feds choose to classify as a secret.

On the face of it Bartnicki is an important victory for the press. According to attorney Theodore J. Boutrous Jr., who filed an amicus brief on behalf of The Wall Street Journal, the decision gives journalists "a strong argument that if they have lawfully obtained information and it's truthful and of public concern, they cannot be punished."

Says Ken Paulson, executive director of the First Amendment Center, "There's nothing here that suggests that any news organization needs to do anything different." As before, the legality of publishing stolen goods is not automatically guaranteed, and journalists can still be punished if they break a law or encourage a source to do so.

But the Bartnicki decision leaves a lot of loopholes, and some describe it as equivocal. "It's a strange opinion," said one lawyer with a stake in the case. "It's kind of hiding the ball. I think they're concerned about the privacy interests, and they want to be able to limit or narrow this later on. That's why they don't show you all their cards." This source finds it conspicuous that Stevens did not state his standard for review, as is customary when crafting constitutional law. The source guesses that the omission was insisted on by Stephen Breyer and Sandra Day O'Connor, who voted with the majority but voiced reservations in a concurring opinion.

The facts of Bartnicki are not all that compelling. A few years ago, someone illegally taped a conversation between two representatives of a teachers' union in Pennsylvania. The union reps were negotiating with the local school board, and they'd hit a snag. One rep told the other that if the school board didn't come around, "We're gonna have to go to their homes ... to blow off their front porches." Before long, the tape was broadcast by talk-show host Frederick Vopper, who ended up getting sued.

What's the big deal if some union guy has a violent fantasy, someone else gets him on tape, and a third guy broadcasts it for town comment? In principle, this case is about leaks, those unexpected gifts that journalists depend on to help expose public and private corruption. The most notorious leak of all was the Pentagon Papers, a secret study of the Vietnam War that Daniel Ellsberg leaked to The New York Times. In 1971, the Supreme Court gave the Ames immunity to publish it, a decision journalists have relied on ever since when publishing info obtained by a third party illegally.

Under the U.S. legal system, some nobody can become a cause celebre for an entire class of potential defendants. That's why, on the way to Capitol Hill, Vopper attracted the support of The New York Times, The Washington Post, and the Journal, as well as magazines, TV networks, and wire services, all of whom joined amicus briefs on his behalf. The collective.wish was that upon reviewing Vopper s case, the Supremes would issue a broad rule, granting the press blanket immunity to publish anything as long as it's true and newsworthy-whether or not criminal behavior is involved.

Publishers aren't the only ones who think they deserve protection when their sources are thieves and eavesdroppers: In 1975, constitutional scholar Alexander Bickel argued that the press should not be held responsible for judging the morality of its sources. But that was post-Watergate, when Americans wanted a more transparent government and a more powerful press. At the same time, privacy was finding a niche in U.S. social policy, helping protect gay lifestyles and abortion rights. In the last 25 years, "the public has gradually turned its back on [the press] in favor of privacy," says Paulson. "We don't have the fever we had in the wake of Watergate."

And so, instead of seizing Bartnicki as a chance to be media heroes, the Supremes issued a series of conflicting messages: Stevens's majority opinion, the Breyer and O'Connor concurrence, and an ominous dissent signed by William Rehnquist, Antonin Scalia, and Clarence Thomas.

Experts suggest that Breyer and O'Connor didn't want to endorse a hard-and-fast rule because it might serve to justify using a high-tech bug to record someone's pillow talk. "Sooner or later there will be a case that shocks the

conscience," says Paulson, who offers the following hypothetical: In a political campaign, the upstart uses listening devices to pick up the incumbent's private conversations in his car or his bedroom, finds some newsworthy dirt, and sends the tape anonymously to the local newspaper. While it's arguable that the media could publish the content of that tape without fear of penalty, Paulson says that, post-Bartnicki, some news companies might get scared and decide that in all cases, "we won't take anything that's the fruit of the poisonous tree."

And if Breyer's Bartnicki concurrence doesn't have a chilling effect on the press, consider Rehnquist's dissent, which argues that the right to privacy should trump the First Amendment no matter what. Gregg Leslie, legal defense director for the Reporters Committee for Freedom of the Press, calls the dissent a Trojan horse, noting that if the dissenters had prevailed, giving individuals the power to suppress free speech, "it would open the floodgates for the government to justify its actions because it was trying to protect people's privacy." Under that rationale, privacy would be "not just a shield for individuals, but a sword the government can use to overcome someone's First Amendment rights."

Here's how that might pan out: Last fall, Congress approved a law that would have made it a felony for government officials to disclose any information that was deemed classified. The New York Times editorialized that such a bill could be used to "shield misconduct, block access to historical papers," and "deny Americans the chance to debate critical national issues." To his credit, Clinton vetoed the bill. But under Bush, one can imagine renewed support for keeping all government documents under wraps. If a test case makes it to the Supreme Court, Breyer and O'Connor might join the Bartnicki dissenters, resulting in a block of five justices who believe that privacy rights can overpower the press.

"The irony is that the right of privacy was supposed to protect an individual against the government," says Leslie. "It was never supposed to be something that gave the government more power."

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Last Term:

LORILLARD TOBACCO CO., et al. Petitioners
v.
Thomas F. REILLY

Altadis U.S.A. Inc., et al., Petitioners
v.
Thomas F. Reilly, et al.

Nos. 00-596 and 00-597

Supreme Court of the United States

Decided June 28, 2001

Court: State Can't Limit Tobacco Ads

The Associated Press

Thursday, June 28, 2001

Anne Gearan

State efforts to ban tobacco advertising near playgrounds and schools violate both federal law and free-speech rights, the Supreme Court ruled Thursday, concluding its 2000-2001 term with a victory for tobacco companies.

On the first and most practical point, the court ruled that states may not add their own advertising restrictions to the federal law that bans cigarette ads on TV and requires warning labels on packages.

That finding, by a vote of 5-4, would have been enough to defeat a proposed tobacco ad ban in Massachusetts.

But the court went on to rule that the state's plan would violate the First Amendment guarantee of free speech, because in the course of limiting children's exposure to tobacco ads, the state would prevent adults from seeing information about a product they have the legal right to buy.

The court focused first on the scope and wording of the 1969 national law passed by Congress to limit the way cigarettes are marketed and to increase public awareness of the dangers of tobacco.

The cigarette companies claimed that the national ad law trumped state efforts to pile on their own restrictions, and the Supreme Court agreed.

"From a policy perspective, it is understandable for the states to attempt to prevent minors from using tobacco products before they reach an age where they are capable of weighing for themselves the risks and potential benefits of tobacco use, and other adult activities,"

Justice Sandra Day O'Connor wrote for the court.

"Federal law, however, places limits on policy choices available to the states."

That reasoning apparently also invalidates similar local ad bans in New York City, Chicago and Baltimore, said Richard Daynard, president of the Tobacco Control Resource Center in Boston.

States would still be free to try other means to limit children's smoking, such as raising the legal age to buy tobacco, and increasing the price of cigarettes, Daynard said.

The Massachusetts regulations would have gone farther than the 1969 law, and farther than the 1998 settlement between tobacco companies and states that stopped billboard advertising and signs in places such as sports stadiums.

The plan has been on hold while the tobacco companies fought it in court.

Massachusetts Attorney General Tom Reilly said he will ask Congress to change the 1969 federal law.

"It's about time Congress stepped up and took on the tobacco companies," Reilly said.

Tobacco opponents also noted that the same court majority threw out a Clinton administration anti-smoking initiative last year, ruling that the government does not have the authority to regulate tobacco as an addictive drug.

The Campaign for Tobacco-free Kids said the Massachusetts plan was a commonsense attempt to keep tobacco away from those too young to buy it.

"No responsible corporate citizen would defend its right to market a deadly and addictive product near schools and playgrounds," said the group's president, Matthew L. Myers.

The court upheld one part of the Massachusetts plan. The state may ban self-service displays of cigarette cartons or other tobacco products in stores, and may require that the products be kept behind the counter or otherwise out of children's easy reach, the court ruled.

O'Connor also wrote that states and cities retain the right to apply various zoning restrictions to cigarettes, so long as tobacco is "on equal terms with other products."

Tobacco firms said Thursday the ruling was a relief but will not have much effect on the way they sell their products.

"We've already done a lot of things to change the way cigarettes are marketed or advertised," said William S. Ohlemeyer, vice president and general counsel of Philip Morris. "This decision (does not mean) an effort to advertise more broadly or aggressively than we do now."

Although large portions of Thursday's lengthy opinion were unanimous, the court divided 5-4 along ideological lines on the two most crucial points. The conservative-led voting bloc prevailed in both instances.

The case afforded the court an opportunity to grant "commercial speech" such as advertising the same free-speech rights as political or artistic expression.

But the court's overlapping statements on the First Amendment portion of the tobacco case are too tangled to be the broad new pronouncement on

commercial speech that Justice Clarence Thomas and conservatives outside the court had hoped.

"I have observed previously that there is no philosophical or historical basis for asserting that commercial speech is of lower value that noncommercial speech," Thomas wrote in a separate concurring opinion.

Justice John Paul Stevens, joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer and David Souter would have ordered a trial in lower court to settle the constitutionality of the proposed outdoor advertising ban.

The four dissenters would have upheld the constitutionality of ad restrictions inside convenience stores, gas stations and other places where people buy tobacco.

The cases are Lorillard Tobacco v. Reilly, 00-596, and Altadis U.S.A. v. Reilly, 00-597.

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00-795 Ashcroft v. Free Speech Coalition

Ruling Below (9th Cir., 198 F.3d 1083, 68 U.S.L.W. 1381, 66 Crim. L. Rep. 237, 28 Media L. Rep. 1225):

Child Pornography Prevention Act of 1996, which prohibits "visual depiction" that "appears to be" or "conveys the impression" of minor engaging in sexually explicit conduct, is content-based restriction on speech that is unsupported by any compelling governmental interest and thus violates First Amendment.

Question Presented: Is First Amendment violated by Child Pornography Prevention Act's prohibition of shipment, distribution, receipt, reproduction sale, or possession of any visual depiction that "appears to be [] of a minor engaging in sexually explicit conduct," 18 U.S.C. §§2252A and 2256(8)(B), and by act's prohibition of any visual depiction that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct," §§2252A and 2256(8)(D)?

FREE SPEECH COALITION, et al., Plaintiffs-Appellants

v.

Janet RENO, Attorney General, United States Department of Justice, Defendants-Appellees

United States Court of Appeals
for the Ninth Circuit

Decided March 10, 1998

MOLLOY, District Judge:

I.

The question presented in this case is whether Congress may constitutionally proscribe as child pornography computer images that do not involve the use of real children in their production or dissemination. We hold that the First Amendment prohibits Congress from enacting a statute that makes criminal the generation of images of fictitious children engaged in imaginary but explicit sexual conduct.

II.

In this case, the district court found that the Child Pornography Prevention Act of 1996 ("CPPA" or the "Act") was content-neutral, was not unconstitutionally vague or overbroad, and did not constitute an improper prior restraint of speech. The district court also found that the Child Pornography Prevention Act's affirmative defense did not impermissibly shift the burden of proof to a defendant by virtue of an unconstitutional presumption.

While we agree that the plaintiffs have standing to bring this case and that the Act is not an improper prior restraint of speech, the balance of the district court's

analysis does not comport with what we believe is required by the Constitution.

We find that the phrases "appears to be" a minor, and "convey[s] the impression" that the depiction portrays a minor, are vague and overbroad and thus do not meet the requirements of the First Amendment. Consequently we hold that while these two provisions of the Act do not pass constitutional muster, the balance of the Child Pornography Prevention Act is constitutional when the two phrases are stricken. Whether the statutory affirmative defense is constitutional is a question that we leave for resolution in a different case.

A.

The appellants consist of a group that refers to itself as "The Free Speech Coalition." The Free Speech Coalition is a trade association of businesses involved in the production and distribution of "adult-oriented materials." Bold Type, Inc. is a publisher of a book "dedicated to the education and expression of the ideals and philosophy associated with nudism;" Jim Gingerich is a New York artist whose paintings include large-scale nudes; and Ron Raffaelli is a professional photographer whose works include nude and erotic photographs.

* * *The district court determined the CPPA was constitutional and granted the government's motion for summary judgment. *See The Free Speech Coalition v Reno*, No. C 97-0281 VSC, 1997 WL 487758, at *7 (N.D.Cal. Aug.12, 1997).5 At the same time it denied Free Speech's cross motion for summary judgment. *See id.* After the district court's adverse ruling, Free Speech appealed.

In this appeal, Free Speech argues the district court was mistaken in its determination that the legislation is content neutral. They also argue that the district court was wrong to hold that the Act is not unconstitutionally vague. The argument is that where the statute fails to define "appears to be" and "conveys the impression," it is so vague a person of ordinary intelligence cannot understand what is prohibited. Free Speech also questions the district court's holding that the affirmative defense provided in the Act is constitutional. Finally, Free Speech appeals the lower court's determination that the Act does not impose a prior restraint on protected speech and that it does not create a permanent chill on protected expression.

B.

Child pornography is a social concern that has evaded repeated attempts to stamp it out. State legislatures and Congress have vigorously tried to investigate and enact laws to provide a basis to prosecute those persons involved in the creation, distribution, and possession of sexually explicit materials made by or through the exploitation of children. Our concern is with the most recent federal law enacted as part of the effort to rid society of the exploitation of children for sexual gratification, the Child Pornography Prevention Act of 1996.

* * *

6.

The Child Pornography Prevention Act of 1996 expanded the law to combat the use of computer technology to produce

5 The Opinion of the district court is not published in the Federal Supplement.

pornography containing images that look like children. The new law sought to stifle the use of technology for evil purposes. This of course was a marked change in the criminal regulatory scheme. Congress had always acted to prevent harm to real children. In the new law, Congress shifted the paradigm from the illegality of child pornography that involved the use of real children in its creation to forbid a "visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct." *See* 18 U.S.C.A. § 2256(8)(B) (West Supp.1999).

The premise behind the Child Pornography Prevention Act is the asserted impact of such images on the children who may view them. The law is also based on the notion that child pornography, real as well as virtual, increases the activities of child molesters and pedophiles.

7.

18 U.S.C. § 2256(8)6 defines child pornography as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct[.]"7 At issue in this appeal are the definitions contained in subsections (B) and (D) of § 2256(8). Section 2256(8)(B) bans sexually explicit depictions that appear to be minors. Section 2256(8)(D) bans visual depictions that are "advertised, promoted, presented, described or distributed in such a manner that conveys the impression" that they contain sexually explicit depictions of minors.

Because we hold the language at issue is unconstitutional, we do not consider the challenge to the affirmative defense in 18 U.S.C. § 2252A(c).8

* * *

1.

The district court held that the contested provisions of the Child Pornography Prevention Act are content-neutral regulations. * * *

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6 18 U.S.C. §2256(8) defines child pornography as: [A]ny visual depiction, including any photograph, film, picture, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
(B) bestiality;
(C) masturbation;
(D) sadistic or masochistic abuse; or
(E) lascivious exhibition of the genitals or pubic area of any person.
18 U.S.C.A. §2256(2) (West Supp. 1999).

7 "Sexually explicit conduct" means: actual or simulated—
(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
(B) bestiality
(C) masturbation;
(D) sadistic or masochistic abuse; or
(E) lascivious exhibition of the genitals or pubic area of any person.
18 U.S.C.A. §2256(2) (West Supp. 1999).

8 The CPPA, 18 U.S.C. §2252A(c), provides an affirmative defense for violations of the Act if:
(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct
(2) each such person was an adult at the time the material was produced; and
(3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

We do not agree. In *United States v Hilton*, 167 F.3d 61, 68-69 (1st Cir.1999), *cert. denied*, --- U.S. ----, 120 S.Ct. 115, 145 L.Ed.2d 98 (1999), the First Circuit found that the Act at issue was content-based because it expressly aims to curb a particular category of expression, child pornography, by singling out the type of expression based on its content and then banning it. The *Hilton* court's determination that blanket suppression of an entire type of speech is a content-discriminating act is a legal conclusion with which we agree. The child pornography law is at its essence founded upon content-based classification of speech.

The CPPA prohibits any sexually explicit depiction that "appears to be" of a minor or that is distributed or advertised in such a manner as to "convey the impression" that the depiction portrays a minor. Thus, the CPPA distinguishes favored from disfavored speech on the basis of the content of that speech. *See Crawford*, 96 F.3d at 384.

* * *

When a statute restricts speech by its content, it is presumptively unconstitutional. *See Crawford*, 96 F.3d at 385. As the First Circuit determined in *Hilton*:

> The CPPA fails both tests for substantive neutrality: it expressly aims to curb a particular category of expression (child pornography) by singling out that type of expression based on its content and banning it. Blanket suppression of an entire type of speech is by its very nature a content- discriminating act. Furthermore, Congress has not kept secret that one of its motivating reasons for enacting the CPPA was to counter the primary effect child pornography has on those who view it.

167 F.3d at 68-69 (footnote omitted). The CPPA is not a time, place, or manner regulation.

2.

Under the circumstances, if the CPPA is to survive the constitutional inquiry the government must establish a compelling interest that is served by the statute, and it must show that the CPPA is narrowly tailored to fulfill that interest. *See Crawford*, 96 F.3d at 385-86.

The district court found that even if no children are involved in the production of such materials the devastating secondary effect that sexually explicit materials involving the images of children have on society, and on the well being of children, merits the regulation of such images. * * We believe this legal determination is wrong.

There are three compelling interests put forward when instituting efforts to curb child pornography using images of actual children. The first interest is that child pornography requires the participation of actual children in sexually explicit situations to create the images. The second interest stems from the belief that dissemination of such pornographic images may encourage more sexual abuse of children because it whets the appetite of pedophiles. The third interest is that such images are morally and aesthetically repugnant.

* * *

The language of the statute questioned here can criminalize the use of fictional images that involve no human being, whether that fictional person is over the statutory age and looks younger, or indeed, a fictional person under the prohibited age. Images that are, or can be, entirely the product of the mind are criminalized. The CPPA's definition of child pornography extends to drawings or images that "appear" to be minors or visual depictions that "convey" the impression that a minor is engaging in sexually explicit conduct, whether an actual minor is involved or not. The constitutionality of this definition is not supported by existing case law.

* * *

By the same token, any victimization of children that may arise from pedophiles' sexual responses to pornography apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for CPPA's speech restrictions. This is so because to hold otherwise enables the criminalization of foul figments of creative technology that do not involve any human victim in their creation or in their presentation. *Cf. Jacobson v United States*, 503 U.S. 540, 548-49, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992) (invalidating a federal child pornography conviction and holding that even the compelling interest in protecting children from sexual exploitation does not justify modifications in otherwise applicable rules of criminal procedure); *United States v X-Citement Video, Inc.*, 513 U.S. 64, 78, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) (interpreting 18 U.S.C. § 2252 to require the prosecution to prove the defendant knew the material was produced with the use of a minor, in part because to find otherwise would be constitutionally problematic).

* * *

By criminalizing all visual depictions that "appear to be" or "convey the impression" of child pornography, even where no child is ever used or harmed in its production, Congress has outlawed the type of depictions explicitly protected by the Supreme Court's interpretation of the First Amendment. Because the 1996 Act attempts to criminalize disavowed impulses of the mind, manifested in illicit creative acts, we determine that censorship through the enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment.

Our determination is not to suggest that anyone condones the implicit or explicit harmful secondary effects of child pornography. Rather it is a determination to measure the statute by First Amendment standards articulated by the Supreme Court. To accept the secondary effects argument as the gauge against which the statute must be measured requires a remarkable shift in the First Amendment paradigm. Such a transformation, how speech impacts the listener or viewer, would turn First Amendment jurisprudence on its head.
In short, we find the articulated compelling state interest cannot justify the criminal proscription when no actual children are involved in the illicit images either by production or depiction. Because we find that Congress has not provided a compelling interest, we do not address the "narrow tailoring" requirement.

3.

The district court found the CPPA is not unconstitutionally vague as it gives sufficient guidance to a person of

reasonable intelligence as to what it prohibits. *See The Free Speech Coalition*, 1997 WL 487758, at *6. The *Hilton* court scrutinized the statute with a "skeptical eye" because the new law impinges on freedom of expression. *See* 167 F.3d at 75. In doing so, it concluded, as the district court did here, that the CPPA was not unconstitutionally vague. *See id.* at 76-77. In making its determination the First Circuit applied an objective standard to determine the meaning of the phrase, "appears to be a minor." *See id.* at 75.

* * *

The CPPA's criminalizing of material that "appears to be a minor" and "convey[s] the impression" that the material is a minor engaged in explicit sexual activity, is void for vagueness. It does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and it fails to provide explicit standards for those who must apply it, "with the attendant dangers of arbitrary and discriminatory application." *Grayned v City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

The two phrases in question are highly subjective. There is no explicit standard as to what the phrases mean. The phrases provide no measure to guide an ordinarily intelligent person about prohibited conduct and any such person could not be reasonably certain about whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution.

In the same light, the absence of definitions for these key phrases in the CPPA allows law enforcement officials to exercise their discretion, subjectively, about what "appears to be" or what "conveys the impression" of prohibited material. Thus, the vagueness of the statute's key phrases regarding computer images permits enforcement in an arbitrary and discriminatory fashion. * * *

4.

The district court held that the CPPA is not overbroad because it prohibits only those works necessary to prevent the secondary pernicious effects of child pornography from reaching minors. *See The Free Speech Coalition*, 1997 WL 487758, at *6. In addition, the First Circuit reasoned that "a few possibly impermissible applications of the Act does not warrant its condemnation[,]" and found that "[w]hatever overbreadth may exist at the edges are more appropriately cured through a more precise case-by-case evaluation of the facts in a given case." *Hilton*, 167 F.3d at 74. We do not agree.

Although overbreadth must "be 'substantial' before the statute involved will be invalidated on its face[,]" *Ferber*, 458 U.S. at 769, 102 S.Ct. 3348, such overbreadth is present here. On its face, the CPPA prohibits material that has been accorded First Amendment protection. That is, non- obscene sexual expression that does not involve actual children is protected expression under the First Amendment. *See id.* at 764-65, 102 S.Ct. 3348. This rule abides even when the subject matter is distasteful.

* * *

As explained, the CPPA is insufficiently related to the interest in prohibiting pornography actually involving minors to justify its infringement of protected speech. *See Village of Schaumburg v Citizens*

for a Better Env't, 444 U.S. 620, 637-39, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). * * The CPPA's inclusion of constitutionally protected activity as well as legitimately prohibited activity makes it overbroad. *See Broadrick v Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) * * *

5.

The district court found that because the CPPA does not require advance approval for production or distribution of adult pornography that does not use minors and does not effect a complete ban on constitutionally protected material, it does not constitute an improper prior restraint on speech. *See The Free Speech Coalition*, 1997 WL 487758, at *7. We agree.

* * *The CPPA only penalizes speech after it occurs. As such it is not a prior restraint of speech. *See id.* at 553-54, 113 S.Ct. 2766. The possibility of self-censorship and the contention that the CPPA has a chilling effect do not amount to a prior restraint. *See Fort Wayne Books, Inc. v Indiana*, 489 U.S. 46, 60, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989).

V.

We hold that the language of "appears to be a minor" set forth in 18 U.S.C. § 2256(8)(B) and the language "convey[s] the impression" set forth in 18 U.S.C. § 2256(8)(D) are unconstitutionally vague and overbroad. The statute is severable. *See* Pub.L. No. 104-208, 110 Stat. 3009, § 101 (1996). The law is enforceable, except for these amendments to 18 U.S.C. § 2256, § 4 of Senate Bill 1237, through the free standing savings provisions of § 9, codified at 18 U.S.C. § 2256(9). * * *

The judgment of the district court is AFFIRMED on the questions of standing and prior restraint. The judgment of the district court is REVERSED on the questions of the constitutionality of the statutory language "appears to be a minor" and "convey[s] the impression." The pending motion by Stop Prisoner Rape, to file an amicus brief in this case, is denied.

The case is remanded to the district court with instructions to enter judgment on behalf of the plaintiffs consistent with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

FERGUSON, Circuit Judge, Dissenting:

The majority holds that Congress cannot regulate virtual child pornography * * * because it does not require the use of actual children in its production. * * * Without the use of actual children, the majority believes that Congress is simply attempting to regulate "evil idea[s]." * * * I disagree. Congress has provided compelling evidence that virtual child pornography causes real harm to real children. As a result, virtual child pornography should join the ranks of real child pornography as a class of speech outside the protection of the First Amendment. In addition, I do not believe that the statutory terms "appears to be" or "conveys the impression" are substantially overbroad or void for vagueness. Accordingly, I would find the Child Pornography Prevention Act of 1996 ("CPPA") constitutional.

I.

For more than two decades, Congress has been trying to eliminate the scourge of child pornography. * * * Each time

Congress passes a law, child pornographers find a way around the law's prohibitions. *See* S.Rep. No. 104-358, at 26 (statement of Sen. Grassley). This cycle recently repeated itself and prompted Congress to enact the CPPA.

* * *

Despite these detailed legislative findings, the majority rules that Congress failed to articulate a "compelling state interest" to justify criminalizing virtual child pornography. * * * The majority argues that Congress cannot constitutionally regulate virtual child pornography because it does not depict "actual children." * * * Once "actual children" are eliminated from the equation, the majority believes that Congress is impermissibly trying to regulate "evil idea[s]." * * * I disagree for the following reasons.

First. The majority improperly suggests that preventing harm to depicted children is the only legitimate justification for banning child pornography. Although this was the Supreme Court's focus in *New York v Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), the Court has subsequently indicated a willingness to consider additional factors. *See Osborne v Ohio*, 495 U.S. 103, 110-11, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). In *Osborne*, the Supreme Court addressed the issue of whether Ohio could ban the possession of child pornography. *Id.* at 108, 110 S.Ct. 1691. In finding it could, the Court relied not only on the harm caused to the children who are used in its production (i.e., *Ferber*), but also on the harm that children suffer when child pornography is used to seduce or coerce them into sexual activity. *Id.* at 111, 110 S.Ct. 1691. Thus, in *Osborne*, the Court indicated that protecting children who are not actually pictured in the pornographic image is a legitimate and compelling state interest. *See Id. See also United States v Hilton*, 167 F.3d 61, 70 (1st Cir.) (recognizing the Supreme Court's "subtle, yet crucial, extension" of valid state interests to include protecting children not actually depicted), *cert. denied* --- U.S. ----, 120 S.Ct. 115, 145 L.Ed.2d 98 (1999).

Second. The majority ignores the fact that the Supreme Court has already endorsed many of the justifications Congress relied on when it passed the CPPA. As discussed above, the Court in *Osborne* recognized that states have a legitimate interest in preventing pedophiles from "us[ing] child pornography to seduce other children into sexual activity." *Osborne*, 495 U.S. at 111, 110 S.Ct. 1691. Relying on this justification, Congress enacted the CPPA after finding that "child pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." *Congressional Findings*, at 3. More importantly, Congress found that when child pornography is "used as a means of seducing or breaking down a child's inhibitions," the images are equally as effective regardless of whether they are real photographs or computer-generated pictures that are "virtually indistinguishable." *Congressional Findings*, at 8. * * *

The Supreme Court has also recognized that states have a legitimate interest in destroying the child pornography market. *Osborne*, 495 U.S. at 110. Similarly, in enacting the CPPA, Congress declared that the statute would

encourage people to destroy all forms of child pornography, thereby reducing the market for the material. *Congressional Findings* at 12. At the hearing before the Senate Judiciary Committee, witnesses testified that persons who trade and sell images that are indistinguishable from those of actual children engaged in sexual activity "keep the market for child pornography thriving." *Senate Hearing*, at 91 (testimony of Bruce Taylor). * * * This is because pictures that *look* like children engaging in sexual activities can be exchanged for pictures that *are* of actual children engaging in such activities. By limiting the production and distribution of images that appear to be of children having sex, the CPPA helps rid the market of all child pornography. * * *

Third. Even though Congress presented some new justifications that the Supreme Court has not specifically endorsed, the majority still had an obligation to consider them, especially if they advance the goal of protecting children. In both *Ferber* and *Osborne*, the Court stated that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' " *Osborne*, 495 U.S. at 109, 110 S.Ct. 1691, quoting *Ferber*, 458 U.S. at 756-57, 102 S.Ct. 3348. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Ferber*, 458 U.S. at 757, 102 S.Ct. 3348. Thus, the Court will generally "sustain[ ] legislation aimed at protecting the physical and emotional well- being of children even when the laws ... operate[ ] in sensitive areas." *Id.*

The lesson from *Ferber* and *Osborne* is that legislators should be given "greater leeway" when acting to protect the well-being of children. *See Id.* at 756, 102 S.Ct. 3348. The majority, however, ignores this principle and fails to consider any of the new justifications supporting the CPPA. * * *

Fourth. The majority ignores the fact that child pornography, real or virtual, has little or no social value. *See Ferber*, 458 U.S. at 762, 102 S.Ct. 3348 (stating that the value of child pornography is "exceedingly modest, if not de minimis"). It is well established that "[t]he protection given to speech and press was fashioned to assure unfettered interchange of ideas for bringing about the political and social changes desired by people." *Roth v United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). "All ideas having even the slightest redeeming social importance--unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion-- have ... full protection ..." *Id.* The First Amendment, however, does not protect certain limited categories of speech that are "utterly without redeeming social importance." *Id. See also R.A.V. v City of St. Paul*, 505 U.S. 377, 382-83, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (stating that "[f]rom 1791 to present ... our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas"). These categories include obscenity, *Roth*, 354 U.S. at 483, 77 S.Ct. 1304, libel, *Beauharnais v Illinois*, 343 U.S. 250, 266, 72 S.Ct. 725, 96 L.Ed. 919 (1952), and "fighting words." *Chaplinsky v New Hampshire*, 315 U.S. 568, 571-73, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). Child pornography is also one of these categories of speech. *Ferber*, 458 U.S. at 763-64, 102 S.Ct. 3348.

Why should virtual child pornography be treated differently than real child pornography? Is it more valued speech? I

do not think so. Both real and virtual child pornography contain visual depictions of children engaging in sexually explicit activity. The only difference is that real child pornography uses actual children in its production, whereas virtual child pornography does not. While this distinction is noteworthy, it does not somehow transform virtual child pornography into meaningful speech. Virtual child pornography, like its counterpart real child pornography, is of "slight social value" and constitutes "no essential part of the exposition of ideas." *See Chaplinsky*, 315 U.S. at 572, 62 S.Ct. 766. Therefore, the majority is wrong to accord virtual child pornography the full protection of the First Amendment.

Fifth. The majority improperly analyzes the CPPA under a strict scrutiny approach. * * *

* * *The majority should have weighed Congress' reasons for banning virtual child pornography against the limited value of such material. * * * If the majority had, it would have realized that Congress' interests in destroying the child pornography market and in preventing the seduction of minors outweigh virtual child pornography's exceedingly modest social value. Since the balance of competing interests tips in favor of the government, virtual child pornography should join the ranks of real child pornography as a class of speech outside the protection of the First Amendment.

II.

The analysis does not end with a finding that virtual child pornography is without First Amendment protection. Statutes can be found unconstitutional if they are worded so broadly that they "criminalize an intolerable range of constitutionally protected conduct." *Osborne*, 495 U.S. at 112, 110 S.Ct. 1691. This case focuses on the CPPA's new definition of child pornography which prohibits visual depictions that "appear[ ] to be," or are promoted or distributed "in such a manner that conveys the impression," that they are "of a minor engaging in sexually explicit conduct." 18 U.S.C.A. §§ 2256(8)(B), (D) (West Supp.1999). The majority holds that this language is overbroad because it bans "material that has been accorded First Amendment protection." Majority Op. at 1095-96. I disagree.

As a general rule, statutes should not be invalidated as overbroad unless the overbreadth is "substantial ... in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The Court has cautioned that the overbreadth doctrine is "strong medicine" that should be employed "sparingly and only as a last resort." *Id.* at 613, 93 S.Ct. 2908. Accordingly, a statute should not be invalidated as overbroad "when a limiting construction has been or could be placed on the challenged statute." *Id.*

* * *

From reading the legislative history, it becomes clear that the CPPA merely extends the existing prohibitions on "real" child pornography to a narrow class of computer-generated pictures easily mistaken for real photographs of real children. *See Congressional Findings*, at 13. Therefore, I agree with the United States Court of Appeals for the First Circuit which found that "drawings, cartoons, sculptures, and paintings depicting youthful persons in sexually explicit poses plainly lie beyond the Act." *Hilton*, 167 F.3d at 72. "By definition,

they would not be 'virtually indistinguishable' from an image of an actual minor." *Id.* "The CPPA therefore does not pose a threat to the vast majority of every day artistic expression, even to speech involving sexual themes." *Id.*

There has also been concern that the CPPA prohibits constitutionally protected photographic images of adults in sexually explicit poses. This contention, however, is also without merit. The CPPA explicitly states that "[i]t shall be an affirmative defense" to a charge of distributing, reproducing or selling child pornography that the pornography (1) "was produced using an actual person or persons," (2) each of whom "was an adult at the time the material was produced," and (3) "the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains visual depictions of a minor engaging in sexually explicit conduct." 18 U.S.C.A. § 2252A(c) (West Supp.1999). The CPPA thus shields from prosecution sexually explicit visual depictions so long as they are produced using actual adults and "the material has not been pandered as child pornography." S.Rep. No. 104-358, at 10, 21. Persons-- like the appellants in this case--who produce and distribute works depicting the sexual conduct of actual adults, and do not market the depictions as if they contain sexual images of children, are thus explicitly protected from culpability under the CPPA.

While there may be other potentially impermissible applications of the CPPA, I doubt that they would be "substantial ... in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615, 93 S.Ct. 2908. Rather than invalidate part of the statute based on possible problems that may never occur, it is best to deal with those situations on a case-by-cases basis. *See Ferber*, 458 U.S. at 781, 102 S.Ct. 3348 (Stevens, J., concurring) (noting that "[h]ypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors"). Accordingly, I would find that the CPPA is not substantially overbroad. *See Hilton*, 167 F.3d at 71-74 (finding that the CPPA is not unconstitutionally overbroad); *United States v Acheson*, 195 F.3d 645, 650-52 (11th Cir.1999) (same).

III.

I also disagree with the majority that the CPPA is unconstitutionally vague. It is well settled that a statute is not void for vagueness unless it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

Here, the key phrases of the CPPA are clearly defined. The CPPA applies to visual depictions of a minor engaging in sexually explicit conduct. A minor is defined as "any person under the age of eighteen years." 18 U.S.C.A. § 2256(1) (West Supp.1999). In addition, "sexually explicit conduct" is defined as actual or simulated "sexual intercourse ...; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area." 18 U.S.C.A. § 2256(2) (West Supp.1999). Given the detailed definition of sexually explicit activity, it is unlikely that a person of ordinary intelligence would be unable to determine what activities are prohibited.

The majority nevertheless finds fault with the CPPA because it believes that

the terms "appears to be" and "conveys the impression" are highly subjective and could be enforced "in an arbitrary and discriminatory fashion." * * * Once again, I disagree. With regard to the apparent age of the depicted individuals, the government can use the same type of objective evidence that it relied on before the CPPA went into effect. For example, in cases involving prepubescent individuals, the government can show the jury the pictures and the jury can determine for itself whether the virtual image "appears to be" of a minor. *See e.g. United States v Arvin*, 900 F.2d 1385, 1390 n. 4 (9th Cir.1990) (citing a jury instruction that requires the members of the jury to decide whether the prepubescent girls are "minors" based upon their own "observation of the pictures"), *cert. denied* 498 U.S. 1024, 111 S.Ct. 672, 112 L.Ed.2d 664 (1991). In cases in which the depicted children have reached puberty, the government can call expert witnesses to testify as to the physical development of the depicted person, and present testimony regarding the way the creator, distributor, or possessor labeled the disks, files, or videos. *See e.g. United States v Robinson*, 137 F.3d 652, 653 (1st Cir.1998) (noting that the pornographic photographs listed the ages of boys depicted). Based on these examples, I agree with the First Circuit which found that the standard for evaluating the key provisions of the CPPA "is an objective one." *Hilton*, 167 F.3d at 75. "A jury must decide, based on the totality of the circumstances, whether an unsuspecting viewer would consider the depiction to be an actual individual under the age of eighteen engaging in sexual activity." *Id.*

As an additional safeguard against arbitrary prosecutions, the government must satisfy the element of scienter before it can obtain a valid conviction under the CPPA. *See* 18 U.S.C.A. § 2252A (West Supp.1999). In any CPPA prosecution, the government must prove beyond a reasonable doubt that the individual "knowingly" produced, distributed, or possessed sexually explicit material and that the material depicts a person who appeared to the pornographer to be under the age of eighteen. *See Id. See also United States v X-Citement Video, Inc.*, 513 U.S. 64, 78, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994) (holding that the scienter requirement "extends to both the sexually explicit nature of the material and to the age of the performers"). "Thus, a defendant who honestly believes that the individual depicted in the image appears to be 18 years old or older (and is believed by a jury), or who can show that he knew the image was created by having a youthful-looking adult pose for it, must be acquitted, so long as the image was not presented or marketed as if it contained a real minor." *Hilton*, 167 F.3d at 75-76. Based on these safeguards, the majority's concerns about arbitrary and discriminatory prosecutions are misplaced. *See Id.* at 74-77 (finding that the CPPA is not unconstitutionally vague); *Acheson*, 195 F.3d at 652-53 (same).

IV.

In sum, the CPPA is not, as the majority claims, an attempt to regulate "evil idea[s]." Instead, the CPPA is an important tool in the fight against child sexual abuse. The CPPA's definition of child pornography provides adequate notice of the type of images that are prohibited and does not substantially encroach on protected expression. Accordingly, I would find the CPPA constitutional.

Justices to Tackle "Virtual" Child Porn

Los Angeles Times

Tuesday, January 23, 2001

David G. Savage

The Supreme Court, entering the new world of "virtual" pornography, agreed Monday to decide whether the government can make it a crime to have or sell computer-generated images of children having sex.

Congress has tried repeatedly to stamp out child pornography of all sorts. Five years ago, it expanded the definition of illegal activity to include a "visual depiction that appears to be a minor" engaged in sex acts or "conveys the impression" of even "simulated" sex involving children.

The new law specifically includes "computer-generated images" among the prohibited depictions.

Prosecutors said the change is needed because of advances in computer imaging. As the dinosaur movie "Jurassic Park" demonstrated, computers can create images that appear to be real. This kind of pornography can whet the appetite of pedophiles, prosecutors said, and therefore is dangerous even if no real children are involved.

But a coalition of photographers, movie makers and producers of "adult-oriented materials" challenged the new law as unconstitutional. The coalition said its terms are so broad and vaguely worded as to include depictions of young actresses who are not minors and who are not engaged in actual sex.

The federal appeals court in San Francisco agreed on a 2-1 vote. The 1st Amendment prohibits the government from making it a crime to generate "images of fictitious children engaged in imaginary but explicit sexual conduct," Judge Donald Molloy said.

He noted that the Supreme Court in the past has said that child pornography is not protected as free speech because it involves the sexual abuse of children. Although pornographic computer images are "unquestionably morally repugnant," the judge said, they cannot be turned into a crime "when no actual children are involved."

Government lawyers disagreed and urged the high court to revive the law against virtual porn. They said prosecutors would be hard pressed to win a conviction against a child pornographer if they must prove the illicit image is of an actual child. Moreover, they said, virtual porn "adds fuel to the underground child pornography industry."

On Monday, the justices said they would hear the case (Reno vs. Free Speech Coalition, 00-795). The argument will not be heard until fall and, by then, the case name will be changed to reflect the Bush administration's new attorney general.

In the meantime, prosecutors will be barred from bringing virtual-child pornography cases in California and the

eight other Western states within the jurisdiction of the U.S. 9th Circuit Court of Appeals.

Producing or selling child pornography is punishable by as much as 15 years in prison. Possession of such pornography can lead to as much as five years in prison.

Meanwhile, the court agreed to take up two regulatory cases that will help determine whether many consumers will ever have access to competitive local phone service and high-speed Internet access via cable television.

Congress encouraged deregulation and competition through the Telecommunications Act of 1996 but, so far, the measure has produced mostly litigation.

Local telephone companies are required to lease their lines to potential competitors, but it is not clear how much those competitors must pay.

The Federal Communications Commission set rates for leasing the lines, but a federal appeals court struck down part of the rate-making rules last year.

On Monday, the Supreme Court agreed to hear appeals from all of the parties to the dispute, but it put off the argument until fall (Verizon Communications vs. FCC, 00-511, and others).

The second case concerns how much cable TV firms must pay to use the utility poles that can carry their new Internet lines into homes.

In the past, those rates had been regulated, and Congress hoped the new law would encourage cable TV firms to provide Internet competition to local phone carriers.

But another federal appeals court said that the rates for cable companies' use of the utility poles no longer are regulated if they provide Internet service.

In the fall, the court will hear the appeals from the FCC and the cable industry in the case (National Cable TV Assn. vs. Gulf Power, 00-832)

In other actions, the court:

* Refused to hear pop singer Michael Bolton's appeal of a $ 5.4-million jury verdict over his 1991 hit "Love Is a Wonderful Thing" (Bolton vs. Three Boys Music Corp., 00-689). He was sued for illegal copying by the Isley Brothers, who recorded a song by the same name in 1964.

* Agreed to decide whether employee health-care plans that pay for an accident victim's medical claims can later recoup any money won by the victim in a lawsuit. Janette Knudson was left a quadriplegic after an auto accident, and her health plan paid $ 411,000 for her medical care. But when she won a substantial settlement from those responsible for the accident, her health plan sued to recover its payments (Great-West Life & Annuity Insurance Co. vs. Knudson, 99-1786).

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Justices to Weigh Issue of Child Pornography and Computer-Generated Images

The New York Times

Tuesday, January 23, 2001

Linda Greenhouse

While it has long been beyond debate that the government can make it a crime to possess or to distribute child pornography, a case the Supreme Court accepted today poses a new constitutional question for the computer age: whether the First Amendment permits criminalizing child pornography that depicts not actual children but computer-generated images that look like actual children.

A 1996 federal law, the Child Pornography Prevention Act, makes it a crime to distribute, receive, or possess an image that "appears to be of a minor engaging in sexually explicit conduct" or to describe such an image in a way that "conveys the impression" that it depicts an actual child.

Congress in passing the law and the Justice Department in defending it in courts around the country have argued that it provides an essential margin of safety for real children who are at risk of exploitation by the burgeoning and increasingly Internet-driven child pornography industry. The sophisticated computer-generated images help sustain the market and desensitize viewers, Congress concluded. The law also makes it a crime to present people who are actually over age 18 in ways that make viewers think they are looking at child pornography.

But in a First Amendment challenge brought by an adult entertainment trade association, a federal appeals court ruled in December 1999 that the phrases "appears to be" and "conveys the impression" were unconstitutionally vague.

The law set a "highly subjective" standard that left reasonable people uncertain of their potential criminal liability and gave too much discretion to law enforcement, a panel of the United States Court of Appeals for the Ninth Circuit held in a 2-to-1 opinion.

The appeals court, which sits in San Francisco, said the only governmental interest it would recognize was "the protection of the actual children used in the production of child pornography." There was no proof that real children would be victimized as the result of the existence and dissemination of fabricated images, the court said.

Three other federal appeals courts have upheld the law in the course of hearing appeals by people charged with violating it. By contrast, this case, Reno v. the Free Speech Coalition, No. 00-795, did not involve a criminal prosecution; the plaintiffs went to court seeking a declaration of unconstitutionality.

In its brief opposing Supreme Court review of its appeals court victory, the trade organization told the justices that its members "strongly oppose child pornography" but nonetheless were "threatened and injured" by the law because they "produce, distribute, and/or possess materials, including film, photographs, paintings and computerized images that could easily, although wrongly, be deemed to contain sexually explicit depictions of minors."

The Justice Department appeal, filed by the Clinton administration two months ago and certain to be carried forward by the new administration, told the justices that the Ninth Circuit's ruling would harm prosecution of actual child pornography because computer imaging technology has advanced to the point that it is very difficult for prosecutors to prove that a pornographic image was of a real child.

"The prohibitions at issue here ensure that people who disseminate or possess pornographic depictions of actual children will not escape punishment in those circumstances," the brief said.

The government said the Ninth Circuit's conclusion on vagueness was "seriously misguided" because the standard for enforcing the law was an objective one: "the relevant inquiry is whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity," the government told the court.

Furthermore, the government said, the law required any violation to be "knowing," a requirement that "further diminishes any vagueness concerns."

This case, as well as four others the justices granted today, will be argued in October, at the start of the court's next term. The argument calendar for the current term, which extends through the fourth week in April, is now fully booked.

There were also these other developments at the court today.

Gambling Tax

The justices accepted an appeal filed by two Indian tribes in Oklahoma and agreed to decide whether tribes must pay the federal gambling tax on their earnings from lottery-type games. The two tribes, the Chickasaw Nation and the Choctaw Nation of Oklahoma, both offer pull-tab games, a kind of instant-cash lottery similar to those run by many state governments.

State-conducted lotteries are exempt from the federal wagering tax, an excise tax of one-quarter of 1 percent on earnings from lotteries. The tax raises very little money for the federal treasury -- $13.8 million in 1999, compared with $21.2 billion from the federal excise tax on gasoline -- but has been a major irritant to Indian tribes.

At issue in the case, Chickasaw Nation v. United States, No. 00-507, is whether a separate federal law regulating Indian gambling places tribes on the same footing as states in extending to them the same tax exemption. The language of the Indian Gaming Regulatory Act is ambiguous on this point, and nearly simultaneous rulings of two federal appeals courts interpreted it in opposite ways.

In this case, the United States Court of Appeals for the 10th Circuit, in Denver,

found that the tribes were not exempt. The government did not oppose Supreme Court review, however, because it recently lost a similar case before the United States Court of Appeals for the Federal Circuit here and told the justices that the question needed to be resolved "to enable the United States to administer the tax laws consistently to all Indian gaming operators."

Pregnancy Discrimination

Without comment, the court turned down an appeal brought on behalf of hundreds of women who took maternity leave while working for AT&T and its subsidiaries before 1979, when federal law made it illegal for employers to discriminate on the basis of pregnancy.

The telephone companies, along with many other employers, did not count pregnancy leave for purposes of seniority, while giving full seniority credit to workers who took leaves for other temporary disabilities.

As a result, many female employees at what is now Ameritech, one of the companies formed as a result of the 1984 breakup of AT&T, did not have enough seniority to take advantage of a lucrative early retirement plan in 1994.

Because women in similar situations had brought lawsuits against other companies, Ameritech went to Federal District Court in Chicago in 1997 seeking a declaration that its use of its old seniority system to calculate eligibility for the new retirement benefits did not violate any of several federal laws dealing with pensions and sex discrimination. The women and their union, the Communications Workers of America, in turn sued Ameritech.

The company won in both the district court and the United States Court of Appeals for the Seventh Circuit, in Chicago, which held that the company had treated pregnancy leave in a way that was legal at the time and that was violating no law in using a calculation of accrued service that dated to those days.

In their appeal, Communications Workers of America v. Ameritech Benefit Plan, No. 00-864, the women said the court should resolve an issue that applied to a generation of female workers, with tens of thousands of women in the former Bell system alone facing reduced retirement benefits because of earlier pregnancy discrimination.

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00-1293 Ashcroft v. American Civil Liberties Union

Ruling Below (*American Civil Liberties Union v Reno*, 3d Cir., 217 F.3d 162, 69 U.S.L.W. 1044, 28 Media L. Rep. 1897, 21 Communications Reg. (P &F) 622)
Child Online Protections Act's ban on knowingly making communications in interstate or foreign commerce by means of World Wide Web "that is available to any minor and that includes any material that is harmful to minors," which is to be determined in part by whether average person "apply contemporary community standards" would find material designed to pander to minors' prurient interest, likely violates First Amendment.
Question Presented: Did court of appeals properly bar enforcement of Child Online Protection Act, 47 U.S.C. § 231, on First Amendment grounds because it relies on community standards to identify material that is harmful to minors?

AMERICAN CIVIL LIBERTIES UNION, et al., Appellees

v.

Janet RENO, Appellant

United States Court of Appeals
for the Third Circuit

Decided June 22, 2000

GARTH, Circuit Judge:

This appeal "presents a conflict between one of society's most cherished rights--freedom of expression--and one of the government's most profound obligations--the protection of minors." *American Booksellers v Webb*, 919 F.2d 1493, 1495 (11th Cir.1990). The government challenges the District Court's issuance of a preliminary injunction which prevents the enforcement of the Child Online Protection Act, Pub.L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231) ("COPA"), enacted in October of 1998. At issue is COPA's constitutionality, a statute designed to protect minors from "harmful material" measured by "contemporary community standards" knowingly posted on the World Wide Web ("Web") for commercial purposes. * * *

We will affirm the District Court's grant of a preliminary injunction because we are confident that the ACLU's attack on COPA's constitutionality is likely to succeed on the merits. Because material posted on the Web is accessible by all Internet users worldwide, and because current technology does not permit a Web publisher to restrict access to its site based on the geographic locale of each particular Internet user, COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability. Thus, because the standard by which COPA gauges whether material is "harmful to minors"

is based on identifying "contemporary community standards" the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech.

In affirming the District Court, we are forced to recognize that, at present, due to technological limitations, there may be no other means by which harmful material on the Web may be constitutionally restricted, although, in light of rapidly developing technological advances, what may now be impossible to regulate constitutionally may, in the not-too-distant future, become feasible.

I. *BACKGROUND*

COPA was enacted into law on October 21, 1998. Commercial Web publishers subject to the statute that distribute material that is harmful to minors are required under COPA to ensure that minors do not access the harmful material on their Web site. COPA is Congress's second attempt to regulate the dissemination to minors of indecent material on the Web/Internet. The Supreme Court had earlier, on First Amendment grounds, struck down Congress's first endeavor, the Communications Decency Act, ("CDA") which it passed as part of the Telecommunications Act of 1996. *See Reno v ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) ("*Reno II*").
* * *

* * *

B. *COPA*

COPA, the present statute, attempts to "address[ ] the specific concerns raised by the Supreme Court" in invalidating the CDA. H.R. REP. NO. 105-775 at 12 (1998); *See* S.R. REP. NO. 105-225, at 2 (1998). COPA prohibits an individual or entity from:

> knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, mak[ing] 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) (emphasis added). As part of its attempt to cure the constitutional defects found in the CDA, Congress sought to define most of COPA's key terms. COPA attempts, for example, to restrict its scope to material on the Web rather than on the Internet as a whole;9 to target only those Web communications made for "commercial purposes";10 and to limit its scope to

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9 COPA defines the clause "by means of the World Wide Web" as the "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).

10 COPA defines the clause "commercial purposes" as those individuals or entities that are "engaged in the business of making such communications." 47 U.S.C. § 231(e)(2)(A). In turn, COPA defines a person "engaged in the business" as one

> 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

only that material deemed "harmful to minors."

Under COPA, whether material published on the Web is "harmful to minors" is governed by a three-part test, *each* of which must be found before liability can attach: * * *

(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 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) (emphasis added). * * *

The parties conceded at oral argument that this "contemporary community standards" test applies to those communities within the United States, and not to foreign communities. Therefore, the more liberal community standards of Amsterdam or the more restrictive community standards of Tehran would not impact upon the analysis of whether material is "harmful to minors" under COPA.

COPA also provides Web publishers subject to the statute with affirmative defenses. If a Web publisher "has restricted access by minors to material that is harmful to minors" through the use of a "credit card, debit account, adult access code, or adult personal identification number ... a digital certificate that verifies age ... or by any other reasonable measures that are feasible under available technology," then no liability will attach to the Web publisher even if a minor should nevertheless gain access to restricted material under COPA. 47 U.S.C. § 231(c)(1). * * *COPA violators face both criminal (maximum fines of $50,000 and a maximum prison term of six months, or both) and civil (fines of up to $50,000 for each day of violation) penalties. * * *

* * *

II. *ANALYSIS*

In determining whether a preliminary injunction is warranted, we must consider:

(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

Allegheny Energy, Inc. v DQE, Inc., 171 F.3d 153, 158 (3d Cir.1999) (citing *ACLU v Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1477 n. 2 (3d Cir.1996) (en banc)). We review a district court's grant of a preliminary injunction according to a three-part standard. Legal conclusions are reviewed de novo, findings of fact are reviewed for clear

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). *Id.* § 231(e)(2)(B)

error, and the "ultimate decision to grant or deny the preliminary injunction" is reviewed for abuse of discretion. *See Maldonado v Houstoun*, 157 F.3d 179, 183 (3d Cir.1998), *cert. denied*, 526 U.S. 1130, 119 S.Ct. 1802, 143 L.Ed.2d 1007 (1999).

A. *Reasonable probability of success on the merits*

We begin our analysis by considering what, for this case, is the most significant prong of the preliminary injunction test--whether the ACLU met its burden of establishing a reasonable probability of succeeding on the merits in proving that COPA trenches upon the First Amendment to the United States Constitution. Initially, we note that the District Court correctly determined that as a content-based restriction on speech, COPA is "both presumptively invalid and subject to strict scrutiny analysis." *See Reno III*, 31 F.Supp.2d at 493. As in all areas of constitutional strict scrutiny jurisprudence, the government must establish that the challenged statute is narrowly tailored to meet a compelling state interest, and that it seeks to protect its interest in a manner that is the least restrictive of protected speech. *See, e.g., Schaumburg v Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980); *Sable Comm of Calif. v FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829 (1989). * * *

It is undisputed that the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards. *See Reno III*, 31 F.Supp.2d at 495 (citing *Sable*, 492 U.S. at 126, 109 S.Ct. 2829 (1989); *Ginsberg v New York*, 390 U.S. 629, 639-40, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968)). At issue is whether, in achieving this compelling objective, Congress has articulated a constitutionally permissible means to achieve its objective without curtailing the protected free speech rights of adults. *See Reno III*, 31 F.Supp.2d at 492 (citing *Sable*, 492 U.S. at 127, 109 S.Ct. 2829; *Butler v Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957)). As we have observed, the District Court found that it had not--holding that COPA was not likely to succeed in surviving strict scrutiny analysis.

We base our particular determination of COPA's likely unconstitutionality, however, on COPA's reliance on "contemporary community standards" in the context of the electronic medium of the Web to identify material that is harmful to minors. The overbreadth of COPA's definition of "harmful to minors" applying a "contemporary community standards" clause-- although virtually ignored by the parties and the amicus in their respective briefs but raised by us at oral argument--so concerns us that we are persuaded that this aspect of COPA, without reference to its other provisions, must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute. Hence we base our opinion entirely on the basis of the likely unconstitutionality of this clause, even though the District Court relied on numerous other grounds. * * *

* * *

* * *We are not persuaded that the Supreme Court's concern with respect to the "community standards" criterion has been sufficiently remedied by Congress in COPA.

* * *

Despite the government's assertion, "[e]ach medium of expression 'must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.' " *Reno III*, 31 F.Supp.2d at 495 (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975)). *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, at ----, 120 S.Ct. 1878, 1887, 146 L.Ed.2d 865 (2000). In considering "the unique factors that affect communication in the new and technology-laden medium of the Web," we are convinced that there are crucial differences between a "brick and mortar outlet" and the online Web that dramatically affect a First Amendment analysis. *Id.*

Unlike a "brick and mortar outlet" with a specific geographic locale, and unlike the voluntary physical mailing of material from one geographic location to another, as in Miller, the uncontroverted facts indicate that the Web is *not geographically constrained*. *See Reno III*, 31 F.Supp.2d at 482- 92; *American Libraries*, 969 F.Supp. at 169 ("geography, however, is a virtually meaningless construct on the Internet"). Indeed, and of extreme significance, is the fact, as found by the District Court, that Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users. As soon as information is published on a Web site, it is accessible to all other Web visitors. *See American Libraries*, 969 F.Supp. at 166; *Reno III*, 31 F.Supp.2d at 483. Current technology prevents Web publishers from circumventing particular jurisdictions or limiting their site's content "from entering any [specific] geographic community." *Reno III*, 31 F.Supp.2d at 484. This key difference necessarily affects our analysis in attempting to define what contemporary community standards should or could mean in a medium without geographic boundaries.

In expressing its concern over the wholly unprecedented broad coverage of the CDA's scope, the Supreme Court has already noted that because of the peculiar geography-free nature of cyberspace, a "community standards" test would essentially require every Web communication to abide by the most restrictive community's standards. *See Reno II*, 521 U.S. at 877-78, 117 S.Ct. 2329. Similarly, to avoid liability under COPA, affected Web publishers would either need to severely censor their publications or implement an age or credit card verification system whereby any material that might be deemed harmful by the most puritan of communities in any state is shielded behind such a verification system. Shielding such vast amounts of material behind verification systems would prevent access to protected material by any adult seventeen or over without the necessary age verification credentials. Moreover, it would completely bar access to those materials to all minors under seventeen--even if the material would not otherwise have been deemed "harmful" to them in their respective geographic communities.

* * *

Our concern with COPA's adoption of *Miller*'s "contemporary community standards" test by which to determine whether material is harmful to minors is with respect to its overbreadth in the context of the Web medium. Because no technology *currently* exists by which Web publishers may avoid liability, such publishers would necessarily be compelled to abide by the "standards of the community most likely to be

offended by the message" *Reno II*, 521 U.S. at 877-78, 117 S.Ct. 2329, even if the same material would not have been deemed harmful to minors in all other communities. Moreover, by restricting their publications to meet the more stringent standards of less liberal communities, adults whose constitutional rights permit them to view such materials would be unconstitutionally deprived of those rights. Thus, this result imposes an overreaching burden and restriction on constitutionally protected speech. * * *

We recognize that invalidating a statute because it is overbroad is "strong medicine." *Broadrick v Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). As such, before concluding that a statute is unconstitutionally overbroad, we seek to determine if the statute is " 'readily susceptible' to a narrowing construction that would make it constitutional ... [because courts] will not rewrite a ... law to conform it to constitutional requirements." *Virginia v American Booksellers'* Ass'n, 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (quoting *Erznoznik v City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975)). *See also Broadrick*, 413 U.S. at 613, 93 S.Ct. 2908; *Forsyth County v Nationalist Movement*, 505 U.S. 123, 130, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); *Shea*, 930 F.Supp. at 939.

Two possible ways to limit the interpretation of COPA are (a) assigning a narrow meaning to the language of the statute itself, or (b) deleting that portion of the statute that is unconstitutional, while preserving the remainder of the statute intact. *See e.g. Brockett v Spokane Arcades, Inc.*, 472 U.S. 491, 502, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985); *Shea*, 930 F.Supp. at 939. We therefore turn our attention to whether either limiting construction is feasible here.

The government, in attempting to make use of the first of these salvaging mechanisms, suggests that we should interpret narrowly the "contemporary community standards" language in COPA as an "adult" rather than as a "geographic" standard. The House Report itself suggests this construction to sidestep the potential constitutional problems raised by the Supreme Court in interpreting the CDA's use of a "community standards" phrase. * * *

* * *

Despite the government's effort to salvage this clause of COPA from unconstitutionality, we have before us no evidence to suggest that adults *everywhere* in America would share the same standards for determining what is harmful to minors. To the contrary, it is significant to us that throughout case law, community standards have always been interpreted as a geographic standard without uniformity. *See, e.g., American Libraries Ass'n v Pataki*, 969 F.Supp. 160, 182-83 (S.D.N.Y.1997) ("Courts have long recognized, however, that there is no single 'prevailing community standard' in the United States. Thus, even were all 50 states to enact laws that were verbatim copies of the New York [*obscenity*] Act, Internet users would still be subject to discordant responsibilities.").

* * *

With respect to the second salvaging mechanism, it is an " 'elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that

which is constitutional may stand while that which is unconstitutional will be rejected' " *Brockett v Spokane Arcades, Inc.*, 472 U.S. 491, 502, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985) (quoting *Allen v Louisiana*, 103 U.S. 80, 83-84, 26 L.Ed. 318 (1880)). As a result, if it is possible for a court to identify a particular part of the statute that is unconstitutional, and by striking *only* that *language* the court could leave the remainder of the statute intact and within the intent of Congress, courts should do so. *See Alaska Airlines, Inc. v Brock*, 480 U.S. 678, 684-85, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987).

Here, however, striking "contemporary community standards" from COPA is not likely to succeed in salvaging COPA's constitutionality as this standard is an integral part of the statute, permeating and influencing the whole of the statute. We see no means by which to excise those "unconstitutional" elements of the statute from those that are constitutional (assuming for the moment, without deciding, that the remaining clauses of COPA are held to be constitutional). This is particularly so in a preliminary injunction context when we are convinced that the very test or standard that COPA has established to determine what is harmful to minors is more likely than not to be held unconstitutional. *See Brockett*, 472 U.S. at 504-05, 105 S.Ct. 2794.

* * *As regulation under existing technology is unreasonable here, we conclude that with respect to this first prong of our preliminary injunction analysis, it is more likely than not that COPA will be found unconstitutional on the merits. * * *

* * *

B. *Irreparable Harm By Denial of Relief*

The second prong of our preliminary injunction analysis requires us to consider "whether the movant will be irreparably harmed by denial of the relief." *Allegheny Energy, Inc. v DQE, Inc.* 171 F.3d 153, 158 (3d Cir.1999). Generally, "[i]n a First Amendment challenge, a plaintiff who meets the first prong of the test for a preliminary injunction will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights." *Reno I*, 929 F.Supp. 824 at 866. This case is no exception.

If a preliminary injunction were not to issue, COPA-affected Web publishers would most assuredly suffer irreparable harm--the curtailment of their constitutionally protected right to free speech. As the Supreme Court has clearly stated, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). We, therefore, conclude that this element of our preliminary injunction analysis has been satisfied.

C. *Injury Outweighs Harm*

The third prong of our preliminary injunction analysis requires us to consider "whether granting preliminary relief will result in even greater harm to the nonmoving party." *Allegheny Inc. v DQE, Inc.*, 171 F.3d 153, 158 (3d Cir.1999). We are convinced that in balancing the parties' respective interests, COPA's threatened constraint on constitutionally protected free speech far outweighs the damage that would be imposed by our failure to affirm this preliminary injunction. We are also aware

that without a preliminary injunction, Web publishers subject to COPA would immediately be required to censor constitutionally protected speech for adults, or incur substantial financial costs to implement COPA's affirmative defenses. * * * Therefore, we affirm the District Court's holding that plaintiffs sufficiently met their burden in establishing this third prong of the preliminary injunction analysis.

D. *Public Interest*

As the fourth and final element of our preliminary injunction analysis, we consider "whether granting the preliminary relief will be in the public interest." *Allegheny Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir.1999). Curtailing constitutionally protected speech will not advance the public interest, and "neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *Reno I*, 929 F.Supp. at 866. Having met this final element of our preliminary injunction analysis, the District Court properly granted the ACLU's petition for a preliminary injunction.

III. *CONCLUSION*

Due to current technological limitations, COPA--Congress' laudatory attempt to achieve its compelling objective of protecting minors from harmful material on the World Wide Web--is more likely than not to be found unconstitutional as overbroad on the merits. * * * Because the ACLU has met its burden in establishing all four of the necessary elements to obtain a preliminary injunction, and the District Court properly exercised its discretion in issuing the preliminary injunction, we will affirm the District Court's order.

In so affirming, we approvingly reiterate the sentiments aptly noted by the District Court: "sometimes we must make decisions that we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." *Reno III*, 31 F.Supp.2d at 498. * * * We also express our confidence and firm conviction that developing technology will soon render the "community standards" challenge moot, thereby making congressional regulation to protect minors from harmful material on the Web constitutionally practicable. * * *

Therefore, we will affirm the District Court's order dated February 1, 1999, issuing a preliminary injunction.

High Court to Hear Internet Porn Case

Los Angeles Times

Tuesday, May 22, 2001

David G. Savage

The Supreme Court said Monday that it will consider reviving a disputed law that makes it a crime to put on the Internet sexually explicit material that can be viewed by minors.

The case once again pits the free-speech rights of adults against the government's interest in protecting children.

Four years ago, the justices struck down a broad federal law designed to protect children from computer pornography. That law, the Communications Decency Act, left the sponsors of adult-oriented Web sites--and even sponsors of art museum sites--nearly defenseless to a charge that they had exposed children to nude photographs or other inappropriate material.

Undaunted, Congress in 1998 passed a somewhat narrower law. It applies to sites on the World Wide Web that operate for "commercial purposes." And it says sponsors can protect themselves by requiring users to furnish a credit card number or an adult access code.

But lawyers for the American Civil Liberties Union challenged the new law, the Child Online Protection Act.

A federal judge in Philadelphia blocked the law from going into effect. Last year, the U.S. court of appeals affirmed that decision.

The lower court judges concluded the law was vague. It says Web sites may not post material that is "harmful to minors" based on "contemporary community standards." That approach would allow the most conservative community in America to set the standards, the judges said, because a Web site posted in San Francisco can be accessed in Provo, Utah.

They also said the requirement of using credit cards or access numbers would pose a burden. Many free sites also might be deemed "commercial" because they post ads. And some of these sites, such as bookstores, art galleries or AIDS support groups, might include material unsuitable for children.

"At present, due to technological limitations, there may be no means by which harmful material on the Web may be constitutionally restricted," wrote Judge Leonard Garth of the U.S. 3rd Circuit Court of Appeals. He mentioned, however, software that screens out content.

Justice Department lawyers appealed on behalf of Atty. Gen. John Ashcroft, arguing that the revised law is more narrow and focused, and should not be struck down just because it could cause problems for Web sites.

On Monday, the court said it will hear the case of Ashcroft vs. the ACLU, 00-1293, in the fall.

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Court to Review Online Porn Law

The Washington Post

Tuesday, May 22, 2001

Charles Lane

The Supreme Court agreed yesterday to decide whether the main federal law aimed at keeping children from viewing pornography on the Internet would violate the constitutional guarantee of free speech.

The Child Online Protection Act (COPA), passed by Congress and signed by President Bill Clinton in 1998, makes it a crime for commercial Web sites to present materials "harmful to minors," unless the companies try their best to keep children from gaining access.

But opponents say that technological methods for screening out children are costly and burdensome to adult users, and that the bill would unavoidably deter adults from using legitimate Web sites, such as those offering gynecological information.

"You can't force adults to reduce their language to speech that's fit only for children," said Ann Beeson, an attorney for the American Civil Liberties Union, which challenged the law in federal court.

The case is a replay of sorts for the Supreme Court, which struck down an earlier version of the law on free-speech grounds in a unanimous 1997 ruling.

COPA was Congress's effort to take the court's 1997 decision into account. Although the previous law sought to restrict all "indecent" material on the Web, COPA does not apply to chat rooms and e-mail, targeting only for-profit sites.

The Justice Department and advocates of the new law say that those changes should enable it to pass muster this time around -- in part because recent technological developments make it easier for Web sites to screen out children.

"COPA was meant to follow the road map the Supreme Court laid out," said Bob Flores, vice president and senior counsel of the National Law Center for Children and Families.

Lower federal courts have sided with the bill's opponents. In the decision that the justices agreed yesterday to review, a Philadelphia-based appeals court ruled last year that COPA's reliance on "community standards" to define what is harmful to minors was too broad.

Given the Internet's nationwide scope, the court ruled, it is impossible to tell what community's standards should take precedence.

The court will hear oral arguments in the case, Ashcroft v. ACLU, during the term that begins in October. A decision is likely before July 2002.

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Supreme Court Agrees to Hear Second Case on Internet Porn

The Washington Times

Tuesday, May 22, 2001

Frank J. Murray

Supreme Court justices yesterday agreed to referee a rematch of the battle over Internet sexual material that may be available to children, assuring a second appeal involving child-pornography issues on the fall docket.

The justices agreed to hear a case titled Attorney General John Ashcroft v. the American Civil Liberties Union, a closely watched battle over whether "community standards" may be applied to enforce the 1998 Child Online Protection Act.

In a second attempt to bar material "harmful to minors," that law was passed in the wake of a decision weakening the 1996 Communications Decency Act.

The ACLU pronounced itself ready yesterday for Round 2 of its fight to nullify such provisions, even as the American Center for Law and Justice seized "an important opportunity" and entered the case on behalf of members of Congress to support the law's original objectives.

"The First Amendment protects free speech but was never intended to permit the sale or distribution of porn to children on the Internet or anywhere else," said Jay Sekulow, the ACLJ's chief counsel.

In other actions yesterday, the court:

--Turned away without explanation a voters' challenge to changes in nine of Houston's 14 city council districts, some of which perpetuate minority dominance.

Justice Clarence Thomas dissented, saying the pending national reapportionment makes it imperative that the high court resolve whether its one-man, one-vote decisions relate to the total number of people in a district or to voting populations.

--Ended the long fight by some federal judges against deducting Social Security and Medicare taxes from their pay by ruling the broad Medicare tax must be paid while a retroactive Social Security tax unconstitutionally targeted federal judges, whose compensation cannot be reduced.

--Rejected an appeal by former Arkansas Judge David Hale, who said federal immunity should nullify his conviction and 21-day state sentence for lying to state regulators about the solvency of his insurance company.

Hale claimed he was prosecuted in retaliation for giving Whitewater-related testimony against President Clinton and Mr. Clinton's former business partners in connection with a $300,000 federally guaranteed loan that was not repaid.

Child pornography already was to be argued in the first day or two of the term that begins Oct. 1 in a case testing

whether laws against depicting real children in sexually exploitive material apply to "virtual children" created entirely by computers.

That case, Ashcroft v. Free Speech Coalition, has drawn many of the same outside interests as the appeal accepted yesterday.

The law under attack in the ACLU case requires commercial Web sites displaying explicit material to collect a credit card number or access code as proof of age, and it defines indecency more specifically. It carries criminal penalties of up to six months in jail or civil fines of up to $50,000.

"We're talking about material that would be harmful to minors. That is a test we have applied for years in the real world," said Robert Flores, vice president of the National Law Center for Children and Families.

"If you walk into a bookstore, the pornography is wrapped, or behind a blinder or will be in a place where it is difficult for young children to reach it," said Mr. Flores, whose group filed a brief supporting the law.

The ACLU's lead attorney in the case voiced confidence the court again will strike down virtually identical provisions that restrict the availability of material intended for adults simply because children may encounter objectionable pictures that are not legally obscene.

"We welcome the opportunity to demonstrate to the court that Congress has once again fundamentally misunderstood the nature of the Internet," said Ann Beeson, lead attorney in a case originally brought against the Clinton administration.

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00-1249 Thomas v. Chicago Park District

Ruling Below (7th cir., 227 F.3d 921):
Chicago Park District's permit procedure for group of 50 or more seeking to use park, which requires action on permit application within 28 days and decision by superintendent on appeal from denial of permit within 7 days, is too tight to permit evidentiary hearing with oral testimony, cross-examination, and other accouterments of trial, and given that applicants have recourse to judicial remedies in both state and federal courts, possible inadequacies of state judicial remedy (for which there is no deadline), which in any event are balanced by expedition of administrative procedure that barring oral testimony allows, are trivial; prior restraint cases such as *Freedman v Maryland*, 380 U.S. 51 (1965), which imposed deadline on judicial review of permit applications for sexually oriented businesses, involve censorship or quasi-censorship based on government's judgment about propriety of content or message of proposed expressive activity, and so do not extend to time, place, and manner licensing systems involving more general requirements of kind at issue here, which were not shown to have been applied to restrict expression of unpopular ideas; although park district might abuse its discretion to deny permit for various reasons such as misrepresentation in application, failure to tender fee, and applicant's having previously damaged park property, or to waive permit fee for events protected by First Amendment, elimination of that discretion would make regulation more restrictive than it is, and curtailing speech is odd way of protecting speech; accordingly, judgment for park district on facial challenge to permit procedure brought by plaintiffs seeking to use park for rallies in favor of repealing laws criminalizing sale of marijuana is affirmed.

Questions Presented: (1) Does immediate access to courts following denial of permit for core political speech in traditional public forum constitute prompt judicial review, as required by *Freedman v Maryland*, without regard to length of time allowed for judicial decisions? (2) Must ordinance require permit for core political speech in traditional public forum include each of procedural safeguards established in *Freedman v Maryland*, or is that cause only applicable to sexually explicit speech presented by adult entertainment businesses? (3) Is content-neutral ordinance that requires permit for core political speech in traditional public forum analyzed as prior restraint or under more deferential standard applicable to time, place, and manner regulations? (4) May plaintiff bring facial challenge to permit ordinance that restricts political. Speech in public forum without first having to prove that ordinance has been unconstitutionally applied to him because of government's hostility to plaintiff or his proposed speech? (5) Can ordinance requiring permit for core political speech in traditional public forum include unfettered discretion to issue or withhold permits?

Caren Crank THOMAS, et al, Plaintiffs-Appellants

v.

CHICAGO PARK DISTRICT, Defendant-Appellee

United States Court of Appeals
for the Seventh Circuit

Decided September 14, 2000

POSNER, Circuit Judge.

Among the regulations of the Chicago Park District governing the use of its parks is one requiring that a permit be obtained for an assembly, parade, demonstration, sporting event, or other use of the park by a group of 50 or more persons. Chi. Park Dist.Code ch. VII § C. The regulation spells out the criteria for the grant of such a permit, and the procedures for obtaining it and for challenging its denial, in considerable detail. The plaintiffs, who want to use the park for rallies in favor of repealing the laws criminalizing the sale of marijuana, claim that the regulation violates the free-speech clause of the First Amendment "on its face," that is, without regard to whether the regulation has been applied in such a way as to infringe the right of free speech. *Forsyth County v Nationalist Movement*, 505 U.S. 123, 129-30, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); *Lakewood v Plain Dealer Publishing Co*, 486 U.S. 750, 755-59, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988); *North Avenue Novelties, Inc. v City of Chicago*, 88 F.3d 441, 444 (7th Cir.1996). "Challenges to statutes as written, without inquiring into their application, are appropriate when details of implementation are inconsequential (usually because nothing could be done in the course of application to save the law) or when the laws are so overbroad that the risk of improper application leads persons to withdraw from the borderland. Fear of penalty, leading to a reduction in speech, supports the doctrine that a person whose speech lawfully could be regulated may challenge a statute achieving regulation in an improper way, or to an excessive extent." *Harp Advertising Illinois, Inc. v Village of Chicago Ridge*, 9 F.3d 1290, 1291-92 (7th Cir.1993). The plaintiffs claim that because a regulation that requires permission to hold a political rally in a "public forum" (as the Chicago Park District's parks are conceded to be) imposes a "prior restraint" on the exercise of free speech, it must, to pass constitutional muster, be free of any element of vagueness or uncertainty that might enable the regulation to be enforced in such a way as to deter or impede the exercise of this most celebrated of constitutional rights.

We do not find this a helpful formula. The historical referent of "prior restraints" is censorship, see 4 William Blackstone, *Commentaries on the Laws of England* 151-53 (1769), which the administration of a park system does not much resemble. The statement in the plaintiffs' brief that "denial of a permit to hold a rally is the ultimate censorship" is hollow rhetoric. It is a censor's business to make a judgment about the propriety of the content or message of the proposed expressive activity. Because he is in the business of suppressing such activity (friends of free speech are not drawn to a career in censorship), the danger of abuse is very great, especially when assessed in light of the dismal history of censorship. The regulation challenged here does not authorize any judgment about the content of any speeches or other expressive activity--their dangerousness, offensiveness, immorality, and so forth. It is not even clear that the regulation reduces the amount of speech. A park is a limited space, and to allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech. See *Cox v New Hampshire*, 312 U.S. 569, 574-76, 61 S.Ct. 762, 85 L.Ed. 1049 (1941); cf. *Beal v Stern*, 184 F.3d 117, 128-29 (2d Cir.1999). Just imagine two rallies held at the same time in the same park area using public- address systems that drowned out each other's speakers. Cf. *Ward v Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The heterogeneity of the practices that the "prior restraints" formula covers (with the present case compare *Freedman v Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), involving a

movie censorship board) is reason to doubt that it can provide much assistance to judges who have to decide a novel case.

The problem is general. General language, the language in which legal principles are couched, tends not to help much in the decision of cases in which weighty interests are on both sides of the balance that the court is asked to strike. Thus in this case there is, on the one hand, a danger in giving officials broad discretion over which political rallies shall be permitted to be conducted on public property, because they will be tempted to exercise that discretion in favor of their political friends and against their political enemies--and the advocates of legalizing the sale of marijuana and other controlled substances have very few political friends. But, on the other hand, a permit requirement is a sine qua non of managing a park system in a way that will preserve the value of the parks for the general public. Parks are primarily for recreation rather than for political and ideological agitation. They cannot be preserved in the primary use for which they are intended if any group can hold a rally of any size and length at any time with amplified sound of any volume. *Clark v Community for Creative Non-Violence*, 468 U.S. 288, 296, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). Indeed, as we noted earlier, without regulation even the agitators might not be able to get their message across.

The competing interests cannot be weighed in the abstract in other than the grossest sense, and so a "correct" balance cannot be struck. This must give pause to any court minded to strike down a permit regulation on its face and so without consideration of its application to a particular event for which a permit was denied. A challenge to the wording as distinct from the application of a regulation invites semantic nitpicking and judicial usurpation of the legislative drafting function in an effort to avert, without creating loopholes, dangers at best hypothetical and at worst chimerical. The problem is well illustrated by this case as we consider the plaintiffs' objections to the regulation, all of which the district court rejected en route to granting judgment for the park district after another panel of this court reversed the grant of a preliminary injunction. *MacDonald v Chicago Park District*, 132 F.3d 355 (7th Cir.1997).

The regulation authorizes the denial of a permit on a variety of grounds none of which has anything to do with the content of expressive activity. Chi. Park Dist.Code ch. VII § C5(e). One is that the applicant "has on prior occasions made material misrepresentations regarding the nature or scope of any event or activity previously permitted." The plaintiffs contend that the word "material" is excessively vague. The contention is frivolous. The word is one of the elemental legal terms, and is considered quite definite enough to form the keystone of criminal prohibitions against fraud. The residual vagueness that it shares with most words could be eliminated only by eliminating it from the regulation, but that would make the regulation more rather than less restrictive. The plaintiffs say that "misrepresentation" is vague too, and would prefer "falsehood." They have not suggested a substitute for "material" and so in effect they want us to rewrite the regulation so that it authorizes denying a permit to anyone who has told the park district a fib. All that their contention regarding the vagueness of "material misrepresentation" shows is the limits of language and so the inherent limitations of "facial" challenges.

They complain that the grounds for denial of a permit are permissive. The park district "may" deny a permit because of a misrepresentation, the failure to tender the fee, having damaged property of the park

district on a previous occasion, or other grounds listed in the regulation, but it is not required to; it can forgive. The plaintiffs argue that this power of mercy arms the park district to pick and choose among applicants on political grounds. It indeed creates such a danger; but if this discretionary feature of the regulation were excised, the regulation would be more restrictive than it is (just as it would be if "falsehood" were substituted for "material misrepresentation"). This is another example of how free speech is so often on both sides of the balance in cases of the regulation as distinct from the prohibition of speech, a consideration that should make courts hesitant to invalidate such regulations. An even clearer example is a provision of the ordinance waiving the required permit fee for events protected by the First Amendment. The plaintiffs complain that this is vague, but do not indicate how it could be made less vague yet encompass the myriad activities that the First Amendment has been held to protect. Curtailing speech is an odd way of protecting speech.

The regulation requires applicants for permits to obtain liability insurance in the amount of $1 million to indemnify the park district against liability arising from a rally that might degenerate into a riot. (That is the amount of the policy, not the premium, which for the type of event envisaged by the plaintiffs would not exceed $1,200.) The plaintiffs argue ingeniously that since violence to person or property incidental to a political rally is likely to arise from the unpopularity of the cause espoused by the rally's sponsors or speakers, the requirement of buying insurance amounts to a "heckler's veto," which the cases hold is not a proper basis for restricting free speech. *Forsyth County v Nationalist Movement, supra*, 505 U.S. at 134-35, 112 S.Ct. 2395; *Terminiello v Chicago*, 337 U.S. 1, 4-5, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); *Cox v Louisiana*, 379 U.S. 536, 551-52, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); *Chicago Acorn v Metropolitan Pier & Exposition Authority*, 150 F.3d 695, 701 (7th Cir.1998). But the amount of insurance required is not based on, or, so far as has been shown, influenced by, the nature of the event, and specifically by whether it involves controversial expressive activity likely to incite violence by onlookers or opponents. The required amount and the cost of the insurance depend only on the size of the event and the nature of the facilities involved in it (a bandstand, stage, tents, and so forth).

The park district requires that applications for permits be filed 30 days in advance--60 days if special facilities are to be involved, such as sound amplification, which unless limited can violate the city's noise ordinance. The plaintiffs argue that these periods are too long and inhibit rallies responding to fresh news and startling events. But since thousands of permit applications are filed with the park district every year, it would be burdensome to require the park to process the applications in a significantly shorter time. The park district's policy, moreover, is to allow "spontaneous" rallies in reaction to current events. The opportunities for abuse are manifest but are minimized by the fact that if there is abuse the victims can bring a judicial challenge to the permit regulation as applied to them.

The plaintiffs reserve their strongest objection for the regulation's failure to provide for searching judicial review of permit denials. They also complain about the absence of any deadline for the completion of such judicial review as the law affords them, not noticing the tension with their desire that the review be penetrating and meticulous--which takes time. In *Graff v City of Chicago*, 9 F.3d 1309 (7th Cir.1993) (en banc), the full court confronted the same issues of the adequacy and timing of judicial review in the context of an ordinance regulating newsstands on the city's sidewalks. The court was badly fractured, but counting

noses one discovers that a majority believed that the judicial review procedure was good enough for a regulation of expressive activity when the regulation is not a form of censorship, that is, does not require or permit the regulatory authority to evaluate the content or message of the activity regulated. *Id.* at 1324-25 (plurality opinion), 1330-33 (concurring opinion). This regulation does not.

Review of agency action in Illinois is governed by an administrative procedure act (similar to the federal act, *International College of Surgeons v City of Chicago*, 153 F.3d 356, 364 (7th Cir.1998))--but only if the statute creating the agency so provides. 735 ILCS 5/3-104. If it does not so provide, and it does not with respect to the park district's denial of permit applications, the agency's action is reviewable only by means of a proceeding for common law certiorari. But this turns out to be a distinction without a difference. The proceeding is instituted in the same state court that would review the action under the administrative procedure act, *Smith v Department of Public Aid*, 67 Ill.2d 529, 10 Ill.Dec. 520, 367 N.E.2d 1286, 1293 (1977), and although the standard of review is stated in different words from those used in that act, it amounts to the usual substantial-evidence review that is familiar from administrative law. The reviewing court does not take evidence but relies on the record compiled in the administrative proceeding and seeks only to determine whether the agency's legal conclusions are correct and the agency's factual conclusions supported by substantial evidence, e.g., *Norton v Nicholson*, 187 Ill.App.3d 1046, 135 Ill.Dec. 485, 543 N.E.2d 1053, 1059 (1989), or in other words not clearly erroneous. The review process is thus the same as under the state's administrative procedure act--as indeed the Supreme Court of Illinois stated in *Hannahan v Williams*, 174 Ill.2d 268, 220 Ill.Dec. 339, 673 N.E.2d 251, 253-54 (1996).

The plaintiffs argue that the park district should in every case in which it denies a permit be required to seek judicial review of its own action. The argument is based on a misreading of *Freedman v Maryland*, *supra*, 380 U.S. at 58-59, 85 S.Ct. 734, which holds only that the government may not regulate the content of speech without judicial authorization and so does not extend to time, place, and manner licensing systems. The Supreme Court made that clear in *FW/PBS, Inc. v City of Dallas*, 493 U.S. 215, 228- 230, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (plurality opinion), *id.* at 244, 110 S.Ct. 596 (concurring opinion), *id.* at 249, 110 S.Ct. 596 (concurring and dissenting opinion).

But their principal complaint about the judicial-review procedure we've outlined, other than the lack of a deadline for the court's decision, is that there is no provision for an oral hearing. An applicant denied a permit can appeal the denial to the park district's superintendent, and submit any documents he wants, and the district must give written reasons for its action. But all submissions are in writing and therefore, the plaintiffs argue, the record compiled before the park district is insufficient to enable meaningful judicial review of the superintendent's action. The argument is defeated by the plaintiffs' own emphasis on the importance of expedition. The regulation requires the park district to act on a permit application within 28 days and an appeal from the denial of such an application to be decided by the superintendent within 7 days. These deadlines are too tight to permit an evidentiary hearing with oral testimony, cross-examination, and the other accouterments of a trial. The plaintiffs have to choose between orality and expedition; they refuse to do so.

The entire emphasis on judicial review and evidentiary hearings is misplaced. If a person denied a permit for reasons that he believes violate the First Amendment is dissatisfied with a paper record reviewed in state court by means of common law certiorari, he has only to bring a suit in federal district court and if the matter is urgent to seek as these plaintiffs' predecessor (the deceased MacDonald) did a preliminary injunction. See *Patsy v Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982); *Van Harken v City of Chicago*, 103 F.3d 1346 (7th Cir.1997); *Harnetman v City of Chicago*, 776 F.2d 636 (7th Cir.1985). Given that the plaintiffs have two remedies, one in state court and the other in federal court, the possible inadequacies of the state remedy, inadequacies in any event balanced by the expedition that barring oral testimony permits, are trivial.

The plaintiffs fear that the required expedition at the administrative level will be undone by foot dragging at the state court level, since there is no deadline on when the state court must render its decision in a common law certiorari proceeding. It is of course unusual though not unknown to impose a time limit on judges, the fear being that it will both disrupt the orderly management of a judicial docket and conduce to hasty decision making. Since 42 U.S.C. § 1983, the statute under which federal constitutional claims are litigated in the federal courts, does not impose any requirement (with immaterial exceptions) of exhausting state judicial remedies, the victim of foot dragging in state court can always bring a parallel suit in federal court, complaining that the delay is denying him an adequate remedy for the violation of his constitutional rights.

Although a number of cases hold that judicial review of the denial of a permit must indeed be "deadlined," *Baby Tam & Co. v City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir.1998); *11126 Baltimore Blvd., Inc. v Prince George's County*, 58 F.3d 988, 998-1001 (4th Cir.1995) (en banc); *East Brooks Books, Inc. v City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.1995); *Redner v Dean*, 29 F.3d 1495, 1501-02 (11th Cir.1994); contra, *City News & Novelty, Inc. v City of Waukesha*, 231 Wis.2d 93, 604 N.W.2d 870, 881- 82 (1999), cert. granted, --- U.S. ----, 120 S.Ct. 2687, 147 L.Ed.2d 960 (2000); *TK's Video, Inc. v Denton County*, 24 F.3d 705, 707-09 (5th Cir.1994), they all involve special licensing regimes for sexually oriented businesses. They are based on Supreme Court cases involving censorship, such as the *Freedman* case cited earlier, or quasi-censorship, such as the ordinance at issue in *FW/PBS, Inc. v City of Dallas, supra*, which required the licensing of such businesses. The government's evident concern with the content of the "speech" disseminated by such businesses argues for greater judicial vigilance than in time, place, and manner cases, in which our rejection of deadlining in *Graff*, 9 F.3d at 1324-25, stands uncontradicted. Cf. *Jews for Jesus, Inc. v Massachusetts Bay Transportation Authority*, 984 F.2d 1319, 1327 (1st Cir.1993). Realism required recognition of the danger that state courts might drag their heels in deciding appeals by sexually oriented businesses from denials of licenses. The permit requirement at issue here is far more general and so far as appears the permits that are denied do not relate to controversial or unpopular expression. Especially in the absence of any showing, which has not been attempted, that the Chicago Park District is trying to restrict the expression of unpopular ideas or that the state courts are not acting with reasonable promptitude on appeals from permit denials, a more relaxed attitude toward the pace of judicial review is warranted than in the case of regulation targeted at unpopular expression. Cf. *Ward v Rock Against Racism, supra*, 491 U.S. at 795, 109 S.Ct. 2746; *Stokes v City of Madison*, 930 F.2d 1163, 1170 (7th

Cir.1991); *MacDonald v Safir*, 206 F.3d 183, 191 (2d Cir.2000).

AFFIRMED.

Top Court Takes Permit Case
City Parks Denied Bid to Rally for Drug Law Reform

Chicago Tribune

Wednesday, May 30, 2001

Glen Elsasser

The Supreme Court agreed Tuesday to decide whether the Chicago Park District's permit regulations violate the Constitution's free speech guarantees.

"This case is about the right of citizens to speak out publicly on issues of political importance," lawyers told the court on behalf of a group seeking reform of the nation's drug laws.

At issue is a September 2000 ruling by the 7th Circuit Court of Appeals upholding the Park District regulations on rallies in city parks that involve more than 50 persons.

The case arose in March 1997 when the Park District denied a permit requested by Robert MacDonald, the late activist seeking decriminalization of marijuana.

MacDonald wanted to hold a political rally in Grant Park on the subject of drug law reform.

According to the appeal, the Park District said it denied the application because MacDonald had failed to comply with the terms of two previous rally permits in 1996.

Denying any violations, MacDonald charged in a civil rights suit that the permit ordinance was an unlawful prior restraint of free speech.

Richard Wilson of Orlando, MacDonald's counsel, said Tuesday that his clients want the high court to impose a deadline on Park District decisions on permit applications.

Other issues to be decided, said Chicago lawyer Wayne Giampietro, are whether the Park District is required to have a court decide the propriety of permit denials and whether it bears the burden of proof.

In upholding the Park District ordinance, the federal appeals court in Chicago said, "A park is a limited space, and to allow unregulated access to all comers could reduce rather than enlarge the park's utility as a forum for speech."

While "advocates of legalizing the sale of marijuana and other controlled substances have few political friends," Judge Richard Posner wrote, the Park District regulation nevertheless authorizes the denial of a permit "on a variety of grounds none of which has anything to do with the content of expressive activity."

The outcome of the case is expected to affect another case concerning Chicago's ordinance regulating parades.

MacDonald challenged the regulation after the city twice denied his group, the Windy City Hemp Development Board, permits to march through the Loop and along Michigan Avenue.

Giampietro said he planned to file a Supreme Court appeal on the parade ordinance next week.

The court is expected to hear arguments and issue a decision during its new term, which begins in October.

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00-799 Los Angeles, Calif. v. Alameda Books, Inc.

Ruling Below (9th Cir., 222 F.3d 719, 28 Medial L. Rep. 2281):

City ordinances prohibiting operation of adult businesses that both sell adult products and contain facilities for viewing adult movies or videos, which were adopted entirely on basis of study of secondary impact of adult business concentrations that (i) treated bookstore/arcade combination as business whose secondary effects arise from proximity to other adult businesses and (ii) was not directed at determining impact of individual adult entertainment businesses, were not supported by reasonable belief that bookstore/arcade businesses produce harmful secondary effects and thus violate the First Amendment.

Question Presented: Is zoning ordinance that prohibits operation of more than one adult entertainment business at single location, including adult bookstore and adult arcade, invalid because city did not study negative effects of such combinations of adult businesses, but rather relied on judicially approved statutory precedent from other jurisdictions?

ALAMEDA BOOKS, INC., et al, Plaintiffs-Appellees

v.

CITY OF LOS ANGELES, Defendant-Appellant

United States Court of Appeals for the Ninth Circuit

Decided July 27, 2000

MICHAEL DALY HAWKINS, Circuit Judge:

We must determine whether the district court was correct in concluding as a matter of law that ordinances of the City of Los Angeles (the "City" or "Los Angeles") prohibiting the operation of adult businesses that both sell adult products and contain facilities for the viewing of adult movies or videos were inadequately supported by evidence of adverse impact so as to violate the First Amendment. We affirm.

I.

BACKGROUND

On July 28, 1978, the City enacted Ordinance No. 151,294, adding section 12.70 to the Los Angeles Municipal Code ("L.A.M.C."), which prohibits the "establishment, substantial enlargement or transfer of ownership or control" of an adult business establishment "within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park within the City of Los Angeles." L.A.M.C. § 12.70(C) (1977). The regulation was enacted after a comprehensive study, conducted in 1977 and assessing the impact of concentrations of adult businesses on surrounding areas, found a positive correlation between concentrations of adult businesses and increases in prostitution, robberies, assaults, and thefts. * * *

In 1983, the City amended section 12.70(C), with the passage of Ordinance No. 157,538 to prohibit so-called "multiple use" adult businesses. Section 12.70(C), as amended, additionally prohibits "the establishment or maintenance of more than one adult entertainment establishment in the same building, structure, or portion thereof...." L.A.M.C. § 12.70(C). The 1983 amendments also modified the existing definition of an "adult entertainment business" to specifically categorize *inter alia* an "adult bookstore" and an "adult arcade" as "separate adult entertainment businesses even if operated in conjunction with another adult entertainment business at the same establishment." L.A.M.C. § 12.70(B)(17).

Appellees, Alameda Books, Inc. ("Alameda") and Highland Books, Inc. ("Highland"), are two adult businesses operating within the city limits of Los Angeles. Neither is located within 1,000 feet of another adult business nor within 500 feet of any religious institution, public park, or school. Each business occupies less than 3,000 square feet. Both Alameda and Highland rent and sell sexually oriented products, including videotapes. Additionally, both businesses provide booths where patrons can view videotapes for a fee. The booths are of two types. In the Preview Booths customers can view videotapes that are for rent or sale within the store. The Multi-channel Viewing Booths allow customers to choose from dozens of pre-selected videotape selections.

The video booths and the retail sales and rental of tapes of both stores are located in the same commercial space within a single building. There are no distinctions, physical or otherwise, between the different operations within each of the stores. Each has only one entrance door, and one employee supervises the entire location. Additionally, the appellees are the sole owners of each of their stores, and revenue from the video booths and the sales and rentals is not distinguished in any way, other than for internal accounting purposes. Notwithstanding these facts, it is uncontested that both businesses have operations that fall within the definitions of "adult bookstore" and "adult arcade" under section 12.70(B)(17) of the L.A.M.C.

On March 15, 1995, a City building inspector found that Alameda was operating both an adult bookstore and an adult arcade in the same building and was therefore in violation of section 12.70(C). Alameda and Highland then joined as plaintiffs and sued for declaratory and injunctive relief under 42 U.S.C. § 1983 to prevent enforcement of the ordinance. Both the City and the appellees filed cross-motions for summary judgment.

The district court initially denied both motions on the First Amendment issues, concluding that there was a "genuine issue of fact as to whether plaintiffs' bookstore and arcade components were separate businesses, like those whose concentration was examined by the 1977 studies." Alameda and Highland then filed a motion for reconsideration of the First Amendment portion of the district court's order denying summary judgment. On June 2, 1998, the court vacated its prior order and granted summary judgment for Alameda and Highland and issued a permanent injunction enjoining the enforcement of the ordinance against the appellees. The City then appealed to this court. We have jurisdiction under 28 U.S.C. § 1291.

II.
STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *See, e.g., Robi v. Reed*, 173 F.3d 736, 739 (9th Cir.), *cert. denied*, --- U.S. ----, 120 S.Ct.

375, 145 L.Ed.2d 293 (1999). We must determine, viewing the evidence in the light most favorable to the appellants, whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *See, e.g., Berry v Valence Tech., Inc.*, 175 F.3d 699, 703 (9th Cir.), *cert. denied*, --- U.S. ----, 120 S.Ct. 528, 145 L.Ed.2d 409 (1999). We do not weigh the evidence or determine the truth of the matter; rather, we only decide whether there is a genuine issue of material fact for trial. *See Colacurcio v City of Kent*, 163 F.3d 545, 549 (9th Cir.1998).

The constitutionality of a regulation is a question of law that is reviewed *de novo*. *See Gonzalez v Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir.1999).

III.
ANALYSIS

A. *Renton* Analysis

Our inquiry, though not the result, is somewhat complicated by two varying formulations of the test governing our analysis. In *Tollis v San Bernardino County*, 827 F.2d 1329 (9th Cir.1987), we were presented with the opportunity to apply the then-recent decision of the Supreme Court in *City of Renton v Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), which analyzed the constitutionality of city zoning regulations that prohibited adult theaters from being located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. *Tollis* held that *Renton* had established a "three-step inquiry" to determine the constitutionality of such ordinances. *Tollis*, 827 F.2d at 1332. A reviewing court must inquire: (1) whether the ordinance is a time, place, manner regulation; (2) if so, whether it is content-neutral or content- based; and (3) if content-neutral, whether it is "designed to serve a substantial governmental interest and do[es] not unreasonably limit alternative avenues of communication." *Id.* (internal quotations omitted); *see also Renton*, 475 U.S. at 47, 106 S.Ct. 925.

More recently, we formulated this test in a slightly different and (we believe) more coherent manner. In *Colacurcio v City of Kent*, 163 F.3d 545 (9th Cir.1998), we looked to the Supreme Court's opinion in *Ward v Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), to determine the constitutionality of the city's ordinance requiring nude dancers to perform at least ten feet from patrons. * * * Citing to *Ward*, we held that "[m]unicipalities may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are: (1) content- neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information." *Colacurcio*, 163 F.3d at 551.

The differences between the *Tollis* and *Colacurcio* test are slight, yet obvious. *Colacurcio* eliminates *Tollis* 's first step--determining whether the ordinance is a time, place or manner regulation--and merely splits the two inquiries of *Tollis* 's third step--narrow tailoring to serve a significant government interest and ample alternative means of communication--into two separate steps. * * * Clearly, there is no substantive difference between *Tollis* and *Colacurcio*, and a given result under one necessarily dictates an identical outcome under the other. Moreover, the jurisprudence governing each test is fully applicable to both.

Colacurcio, however, better formulates the test. First, the third step of *Tollis* incorporates two distinct inquiries, which are more properly separated for both conceptual and practical reasons in *Colacurcio*

Additionally, *Tollis* needlessly establishes the time, place or manner inquiry as a distinct step. Time, place or manner is an objective description of a regulation (or one proffered by the enacting legislative body); it is not a talismanic incantation affording the ordinance a lesser degree of judicial scrutiny. To the contrary, the question the courts must ask is whether the time, place or manner regulation is content-neutral. The Supreme Court recognized as much in *Ward* when it excluded a time, place or manner analysis, which it had included in *Renton*, from its discussion. For the sake of clarity and consistency in future opinions, and because we believe the *Colacurcio* formulation is more aptly constructed, we will utilize it here.

As a preliminary matter, we note that section 12.70(C) comes under the general category of a time, place, or manner regulation. *Renton* held that zoning regulations governing adult businesses are generally considered time, place or manner regulations. *See Renton*, 475 U.S. at 46, 106 S.Ct. 925. Moreover, section 12.70(C) does not ban adult entertainment establishments altogether. *See Tollis*, 827 F.2d at 1332 (holding that ordinance before the court was "obviously" a time, place, or manner regulation "as it [did] not ban adult theaters altogether").

Under *Colacurcio* 's first step (i.e. *Tollis* 's second step), a regulation is content-neutral if the ordinance is "aimed to control secondary effects resulting from the protected expression rather than at inhibiting the protected expression itself." *Tollis*, 827 F.2d at 1332 (internal quotation omitted) (citing *Renton*, 475 U.S. at 48-49, 106 S.Ct. 925); *see also Renton*, 475 U.S. at 48, 106 S.Ct. 925 (regulation is content-neutral if it is "justified without reference to the content of the regulated speech"). * * * We need not decide whether the contested regulation is content- neutral, for even if it were, it fails to satisfy the second step in the *Colacurcio* analysis (i.e. the third step of *Tollis*). * * *

B. *Colacurcio* 's Second Step: Substantial Government Interest

The City has a "substantial government interest" in reducing crime in its neighborhoods. *See Young v. American Mini Theatres*, 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) ("[T]he city's interest in attempting to preserve the quality of urban life in one that must be accorded high respect."). At issue is whether the regulations are "designed to serve" this interest. We hold they are not.

The only evidence relied upon by Los Angeles to justify the 1983 amendments to section 12.70(C) is the 1977 study (the "Study"), which was used as the basis for the enactment of the original regulations. This is insufficient.

The Study looked at the concentration of four types of adult businesses: massage parlors, "bookstores/arcades," theaters, and adult motels. It assessed five areas where these businesses were concentrated and compared crime rates in these areas with rates in nearby "control" areas. Additionally, the Study measured changes in assessed land values from 1970 to 1976 in the study and control areas. As noted, the Study concluded that there was a positive correlation between concentrations of these adult businesses and increases in prostitution, robberies, assaults, and thefts.

The district court found that the Study addressed the secondary impact not of single adult business establishments, but of concentrations of separate, individual adult businesses, and that appellees' businesses are not separate in the sense that the businesses surveyed in the Study were separate establishments. As the Study was the only

evidence to justify the 1983 amendments, the district court held that summary judgment was appropriate because the City could not meet its burden to show that it "relied on evidence supporting a reasonable belief that combination businesses ... produced harmful secondary effects of the type asserted" in the 1977 Study. We agree.
* * *

The Study treated a bookstore/arcade combination as a single business or unit of adult entertainment whose secondary effects arise from its proximity to several other units of adult entertainment. It did not analyze an individual bookstore/arcade combination as a concentration of adult businesses.

Additionally, the Study was not directed at determining the impact of individual adult entertainment business units. Rather, its purpose was to ascertain the impact of a concentration of such business units in small geographic areas. Therefore, by categorizing certain businesses as "bookstore/arcades," the Study determined not what the impact of a "bookstore/arcade" was on the surrounding area, but the impact of a bookstore/arcade as an individual business entity that was part of a concentration consisting of multiple adult business establishments. As such, the Study did not identify any harmful secondary effects resulting from bookstore/arcade combinations as individual business units.

The City does not argue that the Study explicitly considered adult arcades and bookstores as separate business entities, an argument that would support its contention that a combination bookstore/arcade as an individual business entity is a "concentration" of adult businesses. Nor does it dispute that the concentration of adult businesses was the primary cause of the harmful secondary effects identified in the Study. Indeed, the pertinent findings of the Study focus solely on the concentration of separate adult business entities. Rather, the City asserts that the Study provides enough of a basis to allow it to constitutionally proscribe combination adult businesses under section 12.70(C) of L.A.M.C. The City's arguments fail.

In examining the City's regulation of adult businesses, we are mindful of numerous admonitions from the Supreme Court about the proper role of the judiciary in scrutinizing legislative judgments. In *American Mini Theatres,* the Supreme Court recognized that the courts are not to second-guess legislative solutions. In upholding the validity of a zoning regulation prohibiting adult entertainment establishments within 1,000 feet of one another, the Court stated: "It is not our function to appraise the wisdom of [the City Council's] decision.... Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." 427 U.S. at 71, 96 S.Ct. 2440; *see also Renton,* 475 U.S. at 52, 106 S.Ct. 925 (quoting *American Mini Theatres*); *United States v Albertini,* 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) (validity of a content-neutral time, place, or manner regulation does not "turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests"); *Jones Intercable, Inc. v City of Chula Vista,* 80 F.3d 320, 326 (9th Cir.1996) (courts "accord substantial deference to the predictive judgments" of legislative bodies when analyzing content-neutral regulations that burden speech) (quoting *Turner Broad. Sys., Inc. v FCC ("Turner I"),* 512 U.S. 622, 665, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)).

This deference to legislative decision making is not unbounded. In *Tollis,* we established a predicate evidentiary requirement that must be met before we will defer to the judgments

of legislative bodies enacting content-neutral time, place, or manner regulations that incidentally burden speech. *Tollis* considered an injunction against the enforcement of a county zoning ordinance prohibiting adult-oriented businesses from locating within 1,000 feet of various other establishments (e.g., schools, churches, etc.). The county had interpreted the ordinance such that a single showing of an adult movie would make a theater an "adult-oriented business" for the purposes of the ordinance. *See* 827 F.2d at 1331.

In affirming the injunction, we held that under *Renton*, the county "must show that in enacting the particular limitations ... *it relied* upon evidence permitting a reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects." *Id.* at 1333 (emphasis added). We then found that the county had presented no evidence that a single showing of an adult film would have any of the harmful secondary effects on the community that the county had identified as the basis for the regulation. *Id.*

Like the county in *Tollis*, Los Angeles has presented no evidence that a combination adult bookstore/arcade produces any of the harmful secondary effects identified in the Study. As the above discussion indicates, the evidence the City has "relied" upon--the 1977 Study--contains no findings that an individual combination bookstore/arcade produces any of the increased crime the Study found resulting from a concentration of adult businesses. Therefore, it is unreasonable for the City to infer that absent its regulations, a bookstore/arcade combination would have harmful secondary effects. *See also Acorn Invs., Inc. v. City of Seattle*, 887 F.2d 219, 222 (9th Cir.1989) (holding unconstitutional under *Renton* a city licensing fee for specific types of adult theaters because the City had "failed to prove" that these theaters were responsible for fostering the alleged secondary effects--criminal activity--that were given as justification for the licensing fee); *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 211, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (holding that in reviewing content-neutral regulations burdening speech under an intermediate scrutiny standard, the question for the courts "is whether the legislative conclusion was reasonable and supported by *substantial evidence in the record before [the legislative body]* ") (emphasis added).

The City argues that the original intent of section 12.70(C), adopted pursuant to the Study, included a ban on more than one adult business in a building. This argument is unpersuasive. Whether the prohibition against combination businesses was intended to be included in the original ordinance is largely immaterial to the question of whether the Study adequately justifies the current regulations.

Nor could Los Angeles have reasonably concluded that the expansion of an adult bookstore to include an adult arcade would increase the frequency and regularity of activity for the business and heighten the probability that such activity would produce the harmful secondary effects identified in the Study. Such reasoning would justify the prohibition of the simple expansion of a lone adult bookstore in order to accommodate a larger variety of adult products (which, ostensibly, would attract more patrons), and not for the purpose of installing an arcade. Such a prohibition, however, is clearly not supported by the Study.

The Supreme Court, as well as this circuit, have held that a legislative body may rely on studies, conducted by other cities and counties, linking a concentration of adult businesses to increased crime to justify its

own regulation of adult businesses. In *Renton*, the Court held that the city was entitled to rely on the experiences of ... other cities ... in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

475 U.S. at 51-52, 106 S.Ct. 925; *see also Colacurcio*, 163 F.3d at 551 ("In evaluating the secondary effects of adult entertainment, the city is also permitted to rely on experiences of other jurisdictions.").

Los Angeles relies on this ability to use foreign studies for the proposition that the 1983 amendments to section 12.70(C) are entitled to similar deference. If foreign studies can be used to justify the regulation of adult business, then surely, the City argues, its regulations, based upon its own study, are entitled to deference. Again, this argument misses the mark. That a legislative body may rely on foreign studies to establish its interest in a regulation does not relieve that entity from the obligation of demonstrating that the study must be " 'reasonably believed to be relevant to the problem that the city addresses.' " *Colacurcio*, 163 F.3d at 551 (quoting *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925). As shown, the Study fails this test. * * *

The City also points to decisions of our sister circuits in support of its argument that the Study provides the necessary evidentiary basis to satisfy *Renton* 's third prong. The cases cited, however, are either directly contrary to established Ninth Circuit precedent, or merely restate the requirement that a legislative body's reliance upon the evidence it cites must be reasonable. *See, e.g., Renton*, 475 U.S. at 51-52, 106 S.Ct. 925.

In *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir.1994), the Eighth Circuit upheld the constitutionality of an adult business zoning ordinance, as applied to adult bookstores, that prohibited on-premises viewing of adult movies or videotapes. The court noted that Rochester relied on foreign studies and held that under *Renton*,

> Rochester need not prove that [plaintiffs' business] would likely have the exact same adverse effects on its surroundings as the adult businesses studied by [other cities]. So long as Ordinance No. 2590 affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects, Rochester must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Id. at 1418 (internal quotation omitted). While this application of *Renton* may be somewhat more flexible than the standard we announced in *Tollis*, Los Angeles's regulations would still fail under the Eighth Circuit's analysis. The Los Angeles Study examined concentrations of multiple adult business establishments; it did not study the impact of individual establishments in any form, whether as solitary units or as part of the concentration of businesses. Under the Eighth Circuit's analysis, then, Los Angeles could not have reasonably believed, based on the Study, that an individual adult business could produce some of the secondary effects resulting from a concentration of businesses.

In *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3rd Cir.1993), the Third Circuit upheld a Delaware statute setting closing hours for adult businesses and prohibiting closed viewing booths. The court cited to *Renton* and held that the state "need only show that adult entertainment establishments as a class cause the unwanted

secondary effects the statute regulates." *Id.* at 138. This statement and the Third Circuit's citation to *Renton* pertain to whether the regulation is narrowly tailored, not whether the evidence produced can reasonably justify the regulation as serving a substantial government interest. Narrow tailoring of the Los Angeles ordinance is a question we need not address.

Moreover, if the Third Circuit's holding were applied to the issue before us, we would have to reject its analysis. Merely requiring that a legislative body show that adult establishments as a class cause the secondary effects the regulation is aimed at preventing could easily fall far short of our requirement in *Tollis* that a legislative body "must show that in enacting the particular limitations ... it *relied upon* evidence permitting the reasonable inference that, absent such limitations, the adult [businesses] would have harmful secondary effects." 827 F.2d at 1333 (emphasis added).

Finally, the City cites *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir.1979), a case in which the Fourth Circuit examined a state law almost identical to the Los Angeles ordinance. *Hart* held constitutional a North Carolina statute prohibiting two or more "adult establishments" from occupying a single building. Adult bookstores and adult arcades were defined as separate establishments under the statute.

The Fourth Circuit found that the statute, "on its face," was a "permissible regulation of the external costs of adult establishments that is unrelated to the overall suppression of any protected materials offered by them for public consumption." *Id.* at 829. In concluding that the statute served a substantial government interest, the court noted that no formal legislative history existed for the statute, but held that a legislative determination that the dispersal of the marketing activities of the businesses might ameliorate adverse secondary effects "cannot be thought unreasonable." *Id.* at 828.

Hart was decided before *Renton*; therefore, there may be some doubt that it would survive scrutiny under the current Supreme Court's precedent. We are sure, however, that the case would not pass muster under our decisions in *Tollis* and *Acorn*. In *Hart*, there was no evidence from foreign studies to support the statute. What evidence the court did cite as being produced by the state--a report on health conditions inside the video viewing booths that the bill's sponsor read to a legislative committee, *see id.* at 828 n. 9--would not meet *Tollis* 's reasonable inference requirement.

Prohibiting arcades and adult bookstores from being located in the same building would not prevent the type of unhealthy conditions in the booths that the Fourth Circuit cited as the only evidence produced by North Carolina to justify its statute. There is nothing in the case to indicate that the same type of behavior that occurs in viewing booths in combination bookstore/arcades would not occur in an establishment that only furnishes an arcade. Therefore, any inference that the statute could have an ameliorating impact on the identified harmful secondary effects would be unreasonable under both *Tollis* and *Acorn*.

The decision of the district court is AFFIRMED.

Court Reviews Adult Businesses Law

The Associated Press

Monday, March 5, 2001

Laurie Asseo

The Supreme Court agreed Monday to take on a free-speech case and clarify what evidence of harmful effects cities must have to justify regulating the location of adult bookstores and video arcades.

The court said it will hear Los Angeles' argument that it provided enough evidence to warrant upholding an ordinance that banned adult bookstores and video arcades from operating at the same location.

Two adult businesses won a lower court ruling that barred enforcement of the law.

"There is no evidence that a combination adult bookstore/arcade produces any of the harmful secondary effects" identified in a city study, the 9th U.S. Circuit Court of Appeals said last August.

Los Angeles enacted an ordinance in 1978 requiring adult establishments to be at least 1,000 feet away from other such businesses and 500 feet away from any school, religious institution or public park.

The ordinance was based on a 1977 study that said concentrating adult businesses in a particular area led to increased crime, lower property values and other negative effects.

The law was amended in 1983 to prohibit operating more than one type of adult business in the same building, even if they were part of the same establishment. Adult bookstores and video arcades were to be considered separate businesses.

That ordinance was challenged in federal court by Alameda Books and Highland Books, which each operated adult bookstores and adult video arcades in the same location.

A federal judge ruled for the two businesses in 1998, and the 9th Circuit court agreed. Los Angeles has a "substantial government interest" in reducing crime in its neighborhoods, but it did not provide enough evidence that the restriction would serve that goal, the appeals court said.

"There is nothing in the case to indicate that the same type of behavior that occurs in viewing booths in combination bookstore/arcades would not occur in an establishment that only furnishes an arcade," the court said.

In the appeal granted Supreme Court review Monday, the city's lawyers said a 1984 Supreme Court ruling "does not require a city council to independently investigate or corroborate each potential problem when it acts in furtherance of the public interest."

The bookstores' lawyers said a zoning law like the Los Angeles ordinance "would allow the absolute destruction of any adult bookstore business" by defining each type of product as a separate business that could not occur in the same store.

The case is Los Angeles v. Alameda Books,00-799.

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High Court to Wade Back into Secondary-Effects Debate

Freedomforum.org

Tuesday, March 6, 2001

Tony Mauro

It seemed like déjà vu yesterday, as the Supreme Court agreed to consider yet another adult-entertainment case that will give it the chance to elaborate on the "secondary-effects" doctrine, which allows government to regulate expression because of the impact it might have on the surrounding community.

Last year, the court determined in *City of Erie v. Pap's A.M.* that officials in the Pennsylvania town could ban nude dancing because it promoted alcohol abuse and domestic violence in the surrounding neighborhood.

Yesterday, the justices agreed to hear *Los Angeles v. Alameda Books*, a case testing a city ordinance prohibiting "multiple-use" adult establishments on the same premises.

As part of its effort to disperse adult businesses and prevent the development of red-light districts, the city of Los Angeles in 1978 required that these businesses locate at least 1,000 feet from each other. In 1983, the ordinance was refined to also prohibit more than one adult business from operating on the same premises.

To support the law, the city relied on a 1977 study that showed that the concentration of adult businesses increased prostitution and robberies in the surrounding community.

In 1995, the ordinance was invoked against Alameda Books and Highland Books, two companies that operated a combined adult bookstore and adult movie arcade that provided individual viewing booths for patrons. The companies challenged the ordinance as a violation of their First Amendment rights. A federal district court judge and a panel of the 9th U.S. Circuit Court of Appeals sided with the companies and struck down the multiple-use ordinance.

The appeals court ruling, which will be reviewed by the Supreme Court, asserted that the city did not provide enough evidence to justify the multiple-use ordinance. The 1977 study, the appeals panel said, "did not identify any harmful secondary effects resulting from bookstore/arcade combinations as individual business units ... Los Angeles has presented no evidence that a combination adult bookstore/arcade produces any of the harmful secondary effects identified in the study." In other words, the city had not shown that multiple adult uses on the same premises — the target of the ordinance — had any special secondary effects that warranted a separate ordinance banning them.

The city argues that the study was sufficient to justify the ordinance. But the appeals court, in effect, said that before a city can regulate adult businesses based on their secondary effects, it must provide fairly specific evidence that the ordinance is necessary to accomplish its goal.

"There is nothing in the case to indicate that the same type of behavior that occurs in viewing booths in combination bookstores/arcades would not occur in an establishment that only furnishes an arcade," the appeals panel said. "Therefore, any inference that the statute could have an ameliorating impact on the identified harmful secondary effects would be unreasonable."

The case could encourage the Supreme Court to elaborate on how much evidence of secondary effects a government needs — and how specific it must be — to justify severe restrictions on expression that is protected by the First Amendment. Free-speech advocates are concerned that allowing governments to use thin or tangential evidence to restrict adult businesses will make it easier for officials to stifle unpopular speech of all kinds. The bookstore owners also say that the Los Angeles ordinance could be misused to ban all adult establishments by defining each type of product as a separate business.

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