

## High Court Strikes Down Child Pornography Prevention Act

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### *Ashcroft v. Free Speech Coalition*

On April 16, 2002, the Supreme Court issued a decision in *Ashcroft v. Free Speech Coalition*, involving challenges to the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256 (CPPA). The Act expands existing child pornography laws to prohibit not only depictions of actual children engaged in sexually explicit activity, but also “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture” that “is or appears to be, of a minor engaging in sexually explicit conduct.” *Id.* § 2256(8)(B). The Act also criminalizes sexually explicit images that are “advertised, promoted, presented, described or distributed in such a manner that conveys the impression” that “a minor engaging in sexually explicit conduct” is depicted. *Id.* § 2256(8)(D).

The Court struck down each provision in an opinion written by Justice Kennedy and joined by Justices Stevens, Souter, Ginsburg, and Breyer. Turning first to § 2256(8)(B), the Court noted that the Act cannot be sustained by reference to obscenity law because it expressly reaches beyond speech that is obscene. Indeed, the Court found, the plain language of the statute would reach psychology manuals, movies depicting the horrors of sexual abuse, and even mainstream movies such as *Traffic* and *American Beauty*.

Nor could the statute be upheld on the basis that it bans speech that is akin to “real” child pornography. Although such speech can be constitutionally barred without reference to its offensiveness or literary merit, the Court explained, that is only because real chil-

dren are harmed in the production of such material, and the continued distribution of such material causes continued harm to the abused children’s well-being. The speech banned by the CPPA, in contrast, does not involve real children. Thus, it imposes no such harm and cannot be banned pursuant to the rationale adopted by the Court in *New York v. Ferber*, 458 U.S. 747 (1982).

The Court similarly dismissed the government’s assertions that the CPPA is constitutional because it is narrowly tailored to further a compelling governmental interest. Although the government asserted that pedophiles may use virtual child pornography to seduce children, the Court reasoned that many innocent items, including candy and cartoons, can also be used in such a manner, but cannot be banned for that reason. Nor could the ban be sustained on the ground that it “whets the appetite” of pedophiles. Although the government may target unlawful conduct (in this case, the sexual abuse of children), it may not target speech on the ground that it encourages such unlawful conduct. “The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”

The government had also attempted to justify the CPPA’s ban on the ground that virtual images promote trafficking in real child pornography. The Court rejected this argument as “implausible,” noting that “[i]f virtual images were identical to illegal child pornography, the illegal images would be driven from the market” because “[f]ew pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.”

Finally, the Court dismissed the assertion that the ban is necessary to secure prosecutions of those producing real child pornography. Criminal defendants might assert that images they possessed were of “virtual” children, the government argued, rendering prosecutors unable to successfully convict even

those who possess real child pornography. That argument, the Court held, is essentially “that protected speech may be banned as a means to ban unprotected speech.” This analysis, however, “turns the First Amendment upside down.” Indeed, the Constitution may require that some unprotected speech go unpunished in order to ensure that protected speech is not chilled. The affirmative defenses provided in the statute do not cure this fundamental flaw; not only are “serious constitutional difficulties” raised by imposing on defendants the burden of proving their speech was lawful, but the affirmative defenses in this statute do not provide a complete defense in any event.

The Court next turned to § 2256(8)(D), the Act’s “pandering” prohibition. Under this provision, a targeted work must be sexually explicit but need not contain sexual scenes involving even virtual minors to be banned. Instead, the work must merely be promoted as if such scenes would be found in the relevant material. A person possessing a movie could thus be prosecuted if the movie was marketed in a manner that suggested that sexual activity involving minors was depicted, even if that person knew the material contained no real child pornography but was merely mislabeled. Concluding that the government did “not offer a serious defense of this provision,” the Court invalidated it as well.

Justice Thomas wrote separately, concurring in the judgment but asserting that if technology evolves to the point where, in fact, the government is unable to prosecute real child pornography, it should be possible to draft a narrow law addressing that problem that would survive constitutional challenge. Justice O’Connor also wrote separately, concurring in that part of the judgment striking down the prohibition on pornography that “appears to” involve minors but that, in fact, involves youthful looking adults. Chief Justice Rehnquist and Justice Scalia would

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have imposed a limiting construction on the statute and upheld it in its entirety.

### ***Thompson v. Western States Medical Center***

A divided Court held in *Thompson v. Western States Medical Center* that certain FDA restrictions on advertising violated the First Amendment. The case involved a challenge to statutory provisions that used advertising as a trigger for requiring FDA new-drug approval of compounded drugs—drugs that are mixed by pharmacists by prescription from doctors to respond to particular patient needs, such as allergies. If pharmacies advertised the compounded drug product, they would be required to get FDA approval for the compounded drugs; without the advertising, the compounded drugs were exempt.

Applying the *Central Hudson* commercial speech test, Justice O'Connor's opinion for the Court accepted as important the government's interests in (1) preserving the effectiveness and integrity of the FDA's new drug approval process, and (2) continuing the limited but useful practice of compounding. The Court concluded that, given these interests, the government needed to draw a line between small-scale compounding and large-scale drug manufacturing. Without discussing the government's argument that the balancing of those two interests was a separate important government interest, the Court looked to the final prong of the test, and held that the regulation was more extensive than necessary to serve those interests.

The Court then posited several nonspeech-related means of drawing a line between compounding and large-scale manufacturing: the government could ban the use of commercial scale manufacturing or testing equipment for compounding drug products; the government could limit the amount of compounded drugs that a pharmacy may sell out of state or in general; or it could prohibit pharmacists from compounding more drugs than they have prescriptions for. Noting that Congress appeared to not even have considered other options, and that the government had not demonstrated that the ban on advertising was necessary, the Court affirmed

that the advertising ban was unconstitutional. Moreover, as to the fear that advertising compounded drugs causes people to obtain drugs that do not promote their health, the Court held that the fear of bad decision making based on truthful information was not an interest that would justify the ban.

Justice Breyer, joined by three other Justices, dissented on the ground that the majority had failed to recognize that the line the government must draw was not only between compounding and large-scale manufacturing, but also between sales of compounded drugs to those who clearly need them and sales of compounded drugs to those for whom the drugs are a convenience rather than a necessity. Focusing on the fact that the regulations allow pharmacies to advertise the fact that they compound but not the compounded products themselves, the dissent argued that the specific regulation on advertising was not more extensive than necessary because the government feared the safety consequences of compound drug prescriptions initiated by pharmacist-to-patient advertising.

### **Court Grants Cert. in *Eldred v. Ashcroft***

Surprising many Court watchers, the Supreme Court granted certiorari in *Eldred v. Ashcroft*. The case involves a challenge to the Sony Bono Copyright Term Extension Act (CTEA). The CTEA amends provisions of the Copyright Act of 1976 to extend the terms of all copyrights by twenty years for works already created as well as those yet to be created. Eldred (who distributes public domain works on the Internet) and others interested in distributing works in the public domain challenged the copyright extension on constitutional grounds, alleging that the law exceeded Congress's power under the Copyright Clause and that the law violated the First Amendment. The district court rejected the challenges. A divided D.C. Circuit panel affirmed. Drawing on the Supreme Court's decision in *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539 (1985), Judge Douglas Ginsburg's majority opinion held that the copyright laws themselves adequately accommodated First

Amendment interests through the idea/expression dichotomy and the fair use doctrine, and that copyright laws are categorically immune from direct challenges under the First Amendment.

The majority also rejected the claim that Congress had exceeded its Copyright Clause powers. Eldred had argued that the CTEA violated two requirements of the clause: that copyrights be restricted to original works and that they be for limited durations. The CTEA violated the originality requirement by definition, Eldred contended, because it extended the copyright term for previously created works. The court, however, concluded that the originality requirement is satisfied so long as the work was original at its creation, and that this requirement imposes no additional limit on the power of Congress to provide for renewals or extensions of copyright terms. Eldred similarly focused his "limited Times" argument on the fact that the CTEA extended the terms of existing works, contending that the extension could not fulfill the clause's express purpose of promoting "the Progress of Science and useful Arts" with respect to such works because they had already been brought into existence without the extended period of protection. Rejecting this argument, the court held that the "promote Progress" language in the clause's preamble does not impose any substantive limitations on Congress's power.

Judge Sentelle took vigorous exception to this latter conclusion in his dissent. Purporting to go back to "first principles" (and drawing by analogy on *United States v. Lopez*), Judge Sentelle contended that the grant of power in the Copyright Clause was limited in scope, as was the Commerce power at issue in *Lopez*. According to Judge Sentelle, the Copyright Clause's requirement that Congress use the Copyright power to "promote Progress" necessarily precluded extending the copyright of existing works because such an extension cannot by definition provide any incentives to create the works.

Briefing will occur over the summer, with oral argument scheduled for next Term. 