Supreme Court Decision in Reno v ACLU, et al

June 26, 1997

SUPREME COURT OF THE UNITED STATES

Syllabus

RENO, ATTORNEY GENERAL OF THE UNITED STATES, et al. *v.* AMERICAN CIVIL LIBERTIES UNION et al.

appeal from the united states district court for the eastern district of pennsylvania

No. 96-511. Argued March 19, 1997-Decided June 26, 1997

Two provisions of the Communications Decency Act of 1996 (CDA or Act) seek to protect minors from harmful material on the Internet, an international network of interconnected computers that enables millions of people to communicate with one another in "cyberspace" and to access vast amounts of information from around the world. Title 47 U. S. C. A. §223(a)(1)(B)(ii) (Supp. 1997) criminalizes the "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age. Section 223(d) prohibits the "knowin[g]" sending or displaying to a person under 18 of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." Affirmative defenses are provided for those who take "good faith, . . . effective . . . actions" to restrict access by minors to the prohibited communications, §223(e)(5)(A), and those who restrict such access by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number, §223(e)(5)(B). A number of plaintiffs filed suit challenging the constitutionality of §§223(a)(1) and 223(d). After making extensive findings of fact, a three-judge District Court convened pursuant to the Act entered a preliminary injunction against enforcement of both challenged provisions. The court's judgment enjoins the Government from enforcing §223(a)(1)(B)'s prohibitions insofar as they relate to "indecent" communications, but expressly preserves the Government's right to investigate and prosecute the obscenity or child pornography activities prohibited therein. The injunction against enforcement of §223(d) is unqualified because that section contains no separate reference to obscenity or child pornography. The Government appealed to this Court under the Act's special review provisions, arguing that the District Court erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague.

Held: The CDA's "indecent transmission" and "patently offensive display" provisions abridge "the freedom of speech" protected by the First Amendment. Pp. 17-40.

(a) Although the CDA's vagueness is relevant to the First Amendment overbreadth inquiry, the judgment should be affirmed without reaching the Fifth Amendment issue. P. 17.

(b) A close look at the precedents relied on by the Government-*Ginsberg* v. *New York,* 390 U. S. 629; *FCC* v. *Pacifica Foundation,* 438 U. S. 726; and *Renton* v. *Playtime Theatres, Inc.,* 475 U. S. 41-raises, rather than relieves, doubts about the CDA's constitutionality. The CDA differs from the various laws

and orders upheld in those cases in many ways, including that it does not allow parents to consent to their children's use of restricted materials; is not limited to commercial transactions; fails to provide any definition of "indecent" and omits any requirement that "patently offensive" material lack socially redeeming value; neither limits its broad categorical prohibitions to particular times nor bases them on an evaluation by an agency familiar with the medium's unique characteristics; is punitive; applies to a medium that, unlike radio, receives full First Amendment protection; and cannot be properly analyzed as a form of time, place, and manner regulation because it is a content-based blanket restriction on speech. These precedents, then, do not require the Court to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions. Pp. 17-21.

(c) The special factors recognized in some of the Court's cases as justifying regulation of the broadcast media-the history of extensive government regulation of broadcasting, see, *e.g., Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 399-400; the scarcity of available frequencies at its inception, see, *e.g., Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622, 637-638; and its "invasive" nature, see *Sable Communications of Cal., Inc.* v. *FCC,* 492 U. S. 115, 128-are not present in cyberspace. Thus, these cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet. Pp. 22-24.

(d) Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for First Amendment purposes. For instance, its use of the undefined terms "indecent" and "patently offensive" will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean. The vagueness of such a content-based regulation, see, *e.g., Gentile* v. *State Bar of Nev.,* 501 U. S. 1030, coupled with its increased deterrent effect as a criminal statute, see, *e.g., Dombrowski* v. *Pfister,* 380 U. S. 479, raise special First Amendment concerns because of its obvious chilling effect on free speech. Contrary to the Government's argument, the CDA is not saved from vagueness by the fact that its "patently offensive" standard repeats the second part of the three-prong obscenity test set forth in *Miller* v. *California,* 413 U. S. 15, 24. The second *Miller* prong reduces the inherent vagueness of its own "patently offensive" term by requiring that the proscribed material be "specifically defined by the applicable state law." In addition, the CDA applies only to "sexual conduct," whereas, the CDA prohibition extends also to "excretory activities" and "organs" of both a sexual and excretory nature. Each of *Miller*'s other two prongs also critically limits the uncertain sweep of the obscenity definition. Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing alone, is not vague. The CDA's vagueness undermines the likelihood that it has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials. Pp. 24-28.

(e) The CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. Although the Government has an interest in protecting children from potentially harmful materials, see, *e.g., Ginsberg,* 390 U. S., at 639, the CDA pursues that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive, see, *e.g., Sable, supra,* at 126. Its breadth is wholly unprecedented. The CDA's burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the Act's legitimate purposes. See, *e.g., Sable,* 492 U. S., at 126. The Government has not proved otherwise. On the other hand, the District Court found that currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing material which the *parents* believe is inappropriate will soon be widely available. Moreover, the arguments in this Court referred to possible alternatives such as requiring that indecent material be "tagged" to facilitate parental control, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet differently than others. Particularly in the light of the absence of any detailed congressional findings, or even hearings addressing the CDA's special problems, the Court is persuaded that the CDA is not narrowly tailored. Pp. 28-33.

(f) The Government's three additional arguments for sustaining the CDA's affirmative prohibitions are rejected. First, the contention that the Act is constitutional because it leaves open ample "alternative channels" of communication is unpersuasive because the CDA regulates speech on the basis of its content, so that a "time, place, and manner" analysis is inapplicable. See, *e.g., Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.,* 447 U. S. 530, 536. Second, the assertion that the CDA's "knowledge" and "specific person" requirements significantly restrict its permissible application to communications to persons the sender knows to be under 18 is untenable, given that most Internet forums are open to all comers and that even the strongest reading of the "specific person" requirement would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of

indecent speech. Finally, there is no textual support for the submission that material having scientific, educational, or other redeeming social value will necessarily fall outside the CDA's prohibitions. Pp. 33-35.

(g) The §223(e)(5) defenses do not constitute the sort of "narrow tailoring" that would save the CDA. The Government's argument that transmitters may take protective "good faith actio[n]" by "tagging" their indecent communications in a way that would indicate their contents, thus permitting recipients to block their reception with appropriate software, is illusory, given the requirement that such action be "effective": The proposed screening software does not currently exist, but, even if it did, there would be no way of knowing whether a potential recipient would actually block the encoded material. The Government also failed to prove that §223(b)(5)'s verification defense would significantly reduce the CDA's heavy burden on adult speech. Although such verification is actually being used by some commercial providers of sexually explicit material, the District Court's findings indicate that it is not economically feasible for most noncommercial speakers. Pp. 35-37.

(h) The Government's argument that this Court should preserve the CDA's constitutionality by honoring its severability clause, §608, and by construing nonseverable terms narrowly, is acceptable in only one respect. Because obscene speech may be banned totally, see *Miller, supra,* at 18, and §223(a)'s restriction of "obscene" material enjoys a textual manifestation separate from that for "indecent" material, the Court can sever the term "or indecent" from the statute, leaving the rest of §223(a) standing. Pp. 37-39.

(i) The Government's argument that its "significant" interest in fostering the Internet's growth provides an independent basis for upholding the CDA's constitutionality is singularly unpersuasive. The dramatic expansion of this new forum contradicts the factual basis underlying this contention: that the unregulated availability of "indecent" and "patently offensive" material is driving people away from the Internet. P. 40.

929 F. Supp. 824, affirmed.

Stevens, J., delivered the opinion of the Court, in which Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Rehnquist, C. J., joined.

SUPREME COURT OF THE UNITED STATES

No. 96-511

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, et al., APPELLANTS *v.* AMERICAN CIVIL LIBERTIES UNION et al.

on appeal from the united states district court for the eastern district of pennsylvania

[June 26, 1997]

Justice Stevens delivered the opinion of the Court.

At issue is the constitutionality of two statutory provisions enacted to protect minors from "indecent" and "patently offensive" communications on the Internet. Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, we agree with the three-judge District Court that the statute abridges "the freedom of speech" protected by the First Amendment.(1)

The District Court made extensive findings of fact, most of which were based on a detailed stipulation prepared by the parties. See 929 F. Supp. 824, 830-849 (ED Pa. 1996).(2) The findings describe the character and the dimensions of the Internet, the availability of

sexually explicit material in that medium, and the problems confronting age verification for recipients of Internet communications. Because those findings provide the underpinnings for the legal issues, we begin with a summary of the undisputed facts.

The Internet

The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called "ARPANET,"(3) which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is "a unique and wholly new medium of worldwide human communication."(4)

The Internet has experienced "extraordinary growth."(5) The number of "host" computers-those that store information and relay communications-increased from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999.

Individuals can obtain access to the Internet from many different sources, generally hosts themselves or entities with a host affiliation. Most colleges and universities provide access for their students and faculty; many corporations provide their employees with access through an office network; many communities and local libraries provide free access; and an increasing number of storefront "computer coffee shops" provide access for a small hourly fee. Several major national "online services" such as America Online, CompuServe, the Microsoft Network, and Prodigy offer access to their own extensive proprietary networks as well as a link to the much larger resources of the Internet. These commercial online services had almost 12 million individual subscribers at the time of trial.

Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant to this case are electronic mail ("e-mail"), automatic mailing list services ("mail exploders," sometimes referred to as "listservs"), "newsgroups," "chat rooms," and the "World Wide Web." All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium-known to its users as "cyberspace"-located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.

E-mail enables an individual to send an electronic message-generally akin to a note or letter-to another individual or to a group of addressees. The message is generally stored electronically, sometimes waiting for the recipient to check her "mailbox" and sometimes making its receipt known through some type of prompt. A mail exploder is a sort of e-mail group. Subscribers can send messages to a common e-mail address, which then forwards the message to the group's other subscribers. Newsgroups also serve groups of regular participants, but these postings may be read by others as well. There are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls. About 100,000 new messages are posted every day. In most newsgroups, postings are automatically purged at regular intervals. In addition to posting a message that can be read later, two or more individuals wishing to communicate more immediately can enter a chat room to engage in real-time dialogue-in other words, by typing messages to one another that appear almost immediately on the others' computer screens. The District Court found that at any given time "tens of thousands of users are engaging in conversations on a huge range of subjects."(6) It is "no exaggeration to conclude that the content on the Internet is as diverse as human thought."(7)

The best known category of communication over the Internet is the World Wide Web, which allows

users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. Some of these documents are simply files containing information. However, more elaborate documents, commonly known as Web "pages," are also prevalent. Each has its own address-"rather like a telephone number."(8) Web pages frequently contain information and sometimes allow the viewer to communicate with the page's (or "site's") author. They generally also contain "links" to other documents created by that site's author or to other (generally) related sites. Typically, the links are either blue or underlined text-sometimes images.

Navigating the Web is relatively straightforward. A user may either type the address of a known page or enter one or more keywords into a commercial "search engine" in an effort to locate sites on a subject of interest. A particular Web page may contain the information sought by the "surfer," or, through its links, it may be an avenue to other documents located anywhere on the Internet. Users generally explore a given Web page, or move to another, by clicking a computer "mouse" on one of the page's icons or links. Access to most Web pages is freely available, but some allow access only to those who have purchased the right from a commercial provider. The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.

From the publishers' point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals.(9) Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. "No single organi zation controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web."(10)

Sexually Explicit Material

Sexually explicit material on the Internet includes text, pictures, and chat and "extends from the modestly titillating to the hardest-core."(11) These files are created, named, and posted in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of an imprecise search. "Once a provider posts its content on the Internet, it cannot prevent that content from entering any community."(12) Thus, for example, "when the UCR/California Museum of Photography posts to its Web site nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore, and New York City, but also in Cincinnati, Mobile, or Beijing-wherever Internet users live. Similarly, the safer sex instructions that Critical Path posts to its Web site, written in street language so that the teenage receiver can understand them, are available not just in Philadelphia, but also in Provo and Prague."(13)

Some of the communications over the Internet that originate in foreign countries are also sexually explicit.(14)

Though such material is widely available, users seldom encounter such content accidentally. "A document's title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content."(15) For that reason, the "odds are slim" that a user would enter a sexually explicit site by accident.(16) Unlike communications received by radio or television, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."(17)

Systems have been developed to help parents control the material that may be available on a home computer with Internet access. A system may either limit a computer's access to an approved list of sources that have been identified as containing no adult material, it may block designated inappropriate sites, or it may attempt to block messages containing identifiable objectionable features. "Although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images."(18) Nevertheless, the evidence indicates that "a reasonably effective method by which parents can prevent their children

from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be available."(19)

Age Verification

The problem of age verification differs for different uses of the Internet. The District Court categorically determined that there "is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms."(20) The Government offered no evidence that there was a reliable way to screen recipients and participants in such fora for age. Moreover, even if it were technologically feasible to block minors' access to newsgroups and chat rooms containing discussions of art, politics or other subjects that potentially elicit "indecent" or "patently offensive" contributions, it would not be possible to block their access to that material and "still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent."(21)

Technology exists by which an operator of a Web site may condition access on the verification of requested information such as a credit card number or an adult password. Credit card verification is only feasible, however, either in connection with a commercial transaction in which the card is used, or by payment to a verification agency. Using credit card possession as a surrogate for proof of age would impose costs on non-commercial Web sites that would require many of them to shut down. For that reason, at the time of the trial, credit card verification was "effectively unavailable to a substantial number of Internet content providers." *Id.,* at 846 (finding 102). Moreover, the imposition of such a requirement "would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material."(22)

Commercial pornographic sites that charge their users for access have assigned them passwords as a method of age verification. The record does not contain any evidence concerning the reliability of these technologies. Even if passwords are effective for commercial purveyors of indecent material, the District Court found that an adult password requirement would impose significant burdens on noncommercial sites, both because they would discourage users from accessing their sites and because the cost of creating and maintaining such screening systems would be "beyond their reach."(23)

In sum, the District Court found:

> "Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers." *Ibid.* (finding 107).

II

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, was an unusually important legislative enactment. As stated on the first of its 103 pages, its primary purpose was to reduce regulation and encourage "the rapid deployment of new telecommunications technologies." The major components of the statute have nothing to do with the Internet; they were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting. The Act includes seven Titles, six of which are the product of extensive committee hearings and the subject of discussion in Reports prepared by Committees of the Senate and the House of Representatives. By contrast, Title V-known as the "Communications Decency Act of 1996" (CDA)-contains provisions that were either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation. An amendment offered in the Senate was the source of the two statutory provisions challenged in this case.(24) They are informally described as the "indecent transmission" provision and the "patently offensive display" provision.(25)

The first, 47 U. S. C. A. §223(a) (Supp. 1997), prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. It provides in pertinent part:

> "(a) Whoever-
>
> "(1) in interstate or foreign communications-

. . . . .

"(B) by means of a telecommunications device knowingly-

"(i) makes, creates, or solicits, and

"(ii) initiates the transmission of,

"any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; . . . . .

"(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,

"shall be fined under Title 18, or imprisoned not more than two years, or both."

The second provision, §223(d), prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. It provides:

"(d) Whoever-

"(1) in interstate or foreign communications knowingly-

"(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

"(B) uses any interactive computer service to display in a manner available to a person under 18 years of age,

"any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communicatio

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