

Reno v. American Civil Liberties Union (1997)

521 U.S. 844

Congress enacted the Telecommunications Act of 1996 to encourage the rapid deployment of new telecommunications technologies. After committee hearings on the act, amendments were added in executive committee and on the floor of Congress with the purpose of protecting minors from harmful materials on the Internet. These amendments came to be known as the Communications Decency Act of 1996 (CDA). Section 223(a)(1) of the CDA criminalized the “knowing” transmission of “obscene or indecent” messages to any recipient under eighteen years of age. Section 223(d) prohibited the “knowing” sending or displaying to minors 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.” The CDA also established defenses against prosecution under the act for those who took “good faith, effective actions” to restrict access to minors and for those who restricted access by requiring designated forms of age proof, such as a verified credit card or an adult identification number. Immediately after enactment of the CDA, several plaintiffs filed suit, challenging Sections 223(a)(1) and 223(d) as violations of the First Amendment. A three-judge district court convened pursuant to the act entered a preliminary injunction against enforcement of both challenged provisions, and the government appealed this ruling to the Supreme Court under the act’s special review provisions.

Opinion of the Court: Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

Opinion concurring in the judgment in part and dissenting in part: O’Connor, Rehnquist.

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.

We begin with a summary of the undisputed facts. Sexually explicit material on the Internet includes text, pictures, and chat and “extends from the modestly titillating to the hardest core.” 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.” For that reason, the “odds are slim” that a user would enter a sexually explicit site by accident. 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.”

Systems have been developed to help parents control the material that may be available on a home computer with Internet access. “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.” 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.”

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.” 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.”

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 noncommercial 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.” 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.”

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.”

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.”

In arguing for reversal, the Government contends that the CDA is plainly constitutional under three of our prior decisions: (1) *Ginsberg v. New York* (1968); (2) *FCC v. Pacifica Foundation* (1978); and (3) *Renton v. Playtime Theatres, Inc.* (1986). A close look at these cases, however, raises—rather than relieves—doubts concerning the constitutionality of the CDA.

In *Ginsberg*, we upheld the constitutionality of a New York statute that prohibited selling to minors under 17 years of age material that was considered obscene as to them even if not obscene as to adults. In four important respects, the statute upheld in *Ginsberg* was narrower than the CDA. First, we noted in *Ginsberg* that “the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.” Under the CDA, by contrast, neither the parents’ consent—nor even their participation—in the communication would avoid the application of the statute. Second, the New York statute applied only to commercial transactions, whereas the CDA contains no such limitation. Third, the New York

statute cabined its definition of material that is harmful to minors with the requirement that it be “utterly without redeeming social importance for minors.” The CDA fails to provide us with any definition of the term “indecent” as used in 223(a)(1) and, importantly, omits any requirement that the “patently offensive” material covered by 223(d) lack serious literary, artistic, political, or scientific value. Fourth, the New York statute defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority.

In *Pacifica*, we upheld a declaratory order of the Federal Communications Commission, holding that the broadcast of a recording of a 12-minute monologue entitled “Filthy Words” that had previously been delivered to a live audience “could have been the subject of administrative sanctions.” There are significant differences between the order upheld in *Pacifica* and the CDA. First, the order in *Pacifica*, issued by an agency that had been regulating radio stations for decades, targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when—rather than whether—it would be permissible to air such a program in that particular medium. The CDA’s broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet.

Second, unlike the CDA, the Commission’s declaratory order was not punitive; we expressly refused to decide whether the indecent broadcast “would justify a criminal prosecution.” Finally, the Commission’s order applied to a medium which as a matter of history had “received the most limited First Amendment protection,” in large part because warnings could not adequately protect the listener from unexpected program content. The Internet, however, has no comparable history. Moreover, the District Court found that the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.

In *Renton*, we upheld a zoning ordinance that kept adult movie theaters out of residential neighborhoods. The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the “secondary effects”—such as crime and deteriorating property values—that these theaters fostered. According to the Government, the CDA is constitutional because it constitutes a sort of “cyberzoning” on the Internet. But the CDA applies broadly to the entire universe of cyberspace. And the purpose of the CDA is to protect children from the primary effects of “indecent” and “patently offensive” speech, rather than any “secondary” effect of such speech. These precedents, then, surely do not require us to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions.

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 purposes of the First Amendment. For instance, each of the two parts of the CDA uses a different linguistic form. The first uses the word “indecent,” while the second speaks of material that “in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.” Given the absence of a definition of either term, this difference in language will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean.

The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. Second, the CDA is a

criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.

The Government argues that the statute is no more vague than the obscenity standard this Court established in *Miller v. California* (1973). But that is not so. Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague. Each of *Miller*'s additional two prongs—(1) that, taken as a whole, the material appeal to the “prurient” interest, and (2) that it “lack serious literary, artistic, political, or scientific value”—critically limits the uncertain sweep of the obscenity definition. The second requirement is particularly important because, unlike the “patently offensive” and “prurient interest” criteria, it is not judged by contemporary community standards. This “societal value” requirement, absent in the CDA, allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value.

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. “Regardless of the strength of the government’s interest” in protecting children, “the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.”

In arguing that the CDA does not so diminish adult communication, the Government relies on the incorrect factual premise that prohibiting a transmission whenever it is known that one of its recipients is a minor would not interfere with adult-to-adult communication. The findings of the District Court make clear that this premise is untenable. Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be minor—and therefore that it would be a crime to send the group an indecent message—would surely burden communication among adults.

The District Court found that at the time of trial existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults. The Court found no effective way to determine the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms. As a practical matter, the Court also found that it would be prohibitively expensive for noncommercial—as well as some commercial—speakers who have Web sites to verify that their users are adults. These limitations must inevitably curtail a significant amount of adult communication on the Internet. By contrast, the District Court found that “despite its limitations, currently available *user-based* software suggests 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 widely available.”

The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings, addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all. We agree with the District Court’s conclusion that the CDA places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of “narrow tailoring” that will save an otherwise patently invalid unconstitutional provision. For the foregoing reasons, the judgment of the district court is affirmed.

JUSTICE O’CONNOR, with whom THE CHIEF JUSTICE joins, concurring in the judgment in part and dissenting in part.

I write separately to explain why I view the Communications Decency Act of 1996 (CDA) as little more than an attempt by Congress to create “adult zones” on the Internet. The creation of “adult zones” is by no means a novel concept. States have long denied minors access to certain establishments frequented by adults. The Court has previously sustained such zoning laws, but only if they respect the First Amendment rights of adults and minors. That is to say, a zoning law is valid if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material. As applied to the Internet as it exists in 1997, the “display” provision and some applications of the “indecent transmission” and “specific person” provisions fail to adhere to the first of these limiting principles by restricting adults’ access to protected materials in certain circumstances. Unlike the Court, however, I would invalidate the provisions only in those circumstances.

Our cases make clear that a “zoning” law is valid only if adults are still able to obtain the regulated speech. If the law does not unduly restrict adults’ access to constitutionally protected speech, however, it may be valid. In *Ginsberg v. New York* (1968), for example, the Court sustained a New York law that barred store owners from selling pornographic magazines to minors in part because adults could still buy those magazines. The Court in *Ginsberg* concluded that the New York law created a constitutionally adequate adult zone simply because, on its face, it denied access only to minors. The Court did not question—and therefore necessarily assumed—that an adult zone, once created, would succeed in preserving adults’ access while denying minors’ access to the regulated speech. Before today, there was no reason to question this assumption, for the Court has previously only considered laws that operated in the physical world, a world that with the twin characteristics of geography and identity enable the establishment’s proprietor to prevent children from entering the establishment, but to let adults inside.

The electronic world is fundamentally different. Since users can transmit and receive messages on the Internet without revealing anything about their identities or ages, it is not currently possible to exclude persons from accessing certain messages on the basis of their identity. Cyberspace differs from the physical world in another basic way: Cyberspace is malleable. Thus, it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and, consequently, more amenable to zoning laws. This transformation of cyberspace is already underway. Internet speakers (users

who post material on the Internet) have begun to zone cyberspace itself through the use of “gateway” technology. Such technology requires Internet users to enter information about themselves—perhaps an adult identification number or a credit card number—before they can access certain areas of cyberspace, much like a bouncer checks a person’s driver’s license before admitting him to a nightclub.

Despite this progress, the transformation of cyberspace is not complete. Although gateway technology has been available on the World Wide Web for some time now, it is not ubiquitous in cyberspace, and because without it “there is no means of age verification,” cyberspace still remains largely unzoned—and unzoneable. User based zoning is also in its infancy. Although the prospects for the eventual zoning of the Internet appear promising, I agree with the Court that we must evaluate the constitutionality of the CDA as it applies to the Internet as it exists today.

Given the present state of cyberspace, I agree with the Court that the “display” provision cannot pass muster. Until gateway technology is available throughout cyberspace, and it is not in 1997, a speaker cannot be reasonably assured that the speech he displays will reach only adults because it is impossible to confine speech to an “adult zone.” Thus, the only way for a speaker to avoid liability under the CDA is to refrain completely from using indecent speech. But this forced silence impinges on the First Amendment right of adults to make and obtain this speech and, for all intents and purposes, “reduce[s] the adult population [on the Internet] to reading only what is fit for children.” As a result, the “display” provision cannot withstand scrutiny.

The “indecent transmission” and “specific person” provisions present a closer issue, for they are not unconstitutional in all of their applications. Both provisions are constitutional as applied to a conversation involving only an adult and one or more minors, e.g., when an adult speaker sends an e-mail knowing the addressee is a minor, or when an adult and minor converse by themselves or with other minors in a chat room. In this context, these provisions are no different from the law we sustained in *Ginsberg*. The analogy to *Ginsberg* breaks down, however, when more than one adult is a party to the conversation. If a minor enters a chat room otherwise occupied by adults, the CDA effectively requires the adults in the room to stop using indecent speech. If they did not, they could be prosecuted under the “indecent transmission” and “specific person” provisions for any indecent statements they make to the group, since they would be transmitting an indecent message to specific persons, one of whom is a minor. The CDA is therefore akin to a law that makes it a crime for a bookstore owner to sell pornographic magazines to anyone once a minor enters his store. Even assuming such a law might be constitutional in the physical world as a reasonable alternative to excluding minors completely from the store, the absence of any means of excluding minors from chat rooms in cyberspace restricts the rights of adults to engage in indecent speech in those rooms.

There is no question that Congress intended to prohibit certain communications between one adult and one or more minors. There is also no question that Congress would have enacted a narrower version of these provisions had it known a broader version would be declared unconstitutional. I would therefore sustain the “indecent transmission” and “specific person” provisions to the extent they apply to the transmission of Internet communications where the party initiating the communication knows that all of the recipients are minors.

Whether the CDA substantially interferes with the First Amendment rights of minors, and thereby runs afoul of the second characteristic of valid zoning laws, presents a closer question. Because the CDA denies minors the right to obtain material that is “patently offensive”—even if

it has some redeeming value for minors and even if it does not appeal to their prurient interests—Congress’ rejection of the *Ginsberg* “harmful to minors” standard means that the CDA could ban some speech that is “indecent” (i.e., “patently offensive”) but that is not obscene as to minors. I do not deny this possibility, but to prevail in a facial challenge, it is not enough for a plaintiff to show “some” overbreadth. Our cases require a proof of “real” and “substantial” overbreadth, *Broadrick v. Oklahoma* (1973), and appellees have not carried their burden in this case. In my view, the universe of speech constitutionally protected as to minors but banned by the CDA—i.e., the universe of materials that is “patently offensive,” but which nonetheless has some redeeming value for minors or does not appeal to their prurient interest—is a very small one. Appellees cite no examples of speech falling within this universe and do not attempt to explain why that universe is substantial “in relation to the statute’s plainly legitimate sweep.” Accordingly, in my view, the CDA does not burden a substantial amount of minors’ constitutionally protected speech.

Thus, the constitutionality of the CDA as a zoning law hinges on the extent to which it substantially interferes with the First Amendment rights of adults. Because the rights of adults are infringed only by the “display” provision and by the “indecent transmission” and “specific person” provisions as applied to communications involving more than one adult, I would invalidate the CDA only to that extent. Insofar as the “indecent transmission” and “specific person” provisions prohibit the use of indecent speech in communications between an adult and one or more minors, however, they can and should be sustained. The Court reaches a contrary conclusion, and from that holding I respectfully dissent.