Justices Give Reprieve to an Internet Pornography Statute

By LINDA GREENHOUSE

WASHINGTON, May 13 — The latest effort by Congress to shield children from pornography on the Internet barely survived an initial Supreme Court test today in a fractured decision suggesting that the court may ultimately find the law unconstitutional.

In the meantime, the court continued in effect a Federal District Court order that has blocked enforcement of the law, the Child Online Protection Act, since February 1999. The statute, which imposes prison sentences and fines of up to $100,000 for placing material that is "harmful to minors" on a Web site available to those under the age of 17, was passed in 1998 and has never taken effect.

In the decision reviewed today, the federal appeals court in Philadelphia had blocked the law on the ground that its identification of harmful material by reference to "contemporary community standards" — a phrase Congress borrowed from the Supreme Court's test for obscenity — violated the First Amendment when applied to the worldwide community of the Internet.

Using a community rather than a national standard gave "the most puritan of communities" an effective veto power over content on the Internet, the United States Court of Appeals for the Third Circuit said. The appeals court said this was such an obvious flaw that it was unnecessary to examine the rest of the law.

The justices today vacated that ruling, using four rationales expressed in four opinions, making the decision as messy a product as the court has brought forth in several years.

Among the eight justices who supported the outcome — Justice John Paul Stevens voted to uphold the Third Circuit — the only common ground was that the appeals court's analysis was incomplete and that the case needed to be sent back for further consideration.

It is therefore inevitable that the case will return to the Supreme Court. Parsing the separate opinions, it is evident that most justices — all nine of whom voted in 1997 to invalidate this law's predecessor, the Communications Decency Act — are at least to some degree skeptical of the law's constitutionality.

Only Justice Clarence Thomas and the two others who signed the central part of his opinion, Justice Antonin Scalia and Chief Justice William H. Rehnquist, found that the appeals court was simply wrong and that a community standard as applied to the Internet was constitutionally adequate. Yet though he spoke for only a minority of the court, and evidently failed to retain a majority after receiving the assignment last November to write the decision, Justice Thomas was unaccountably listed as author of the court's "judgment."

Closer to the court's center of gravity in the case, Ashcroft v. American Civil Liberties Union, No. 00-1293, was another three-justice opinion, written by Anthony M. Kennedy and joined by David H. Souter and Ruth Bader Ginsburg.

"There is a very real likelihood that the Child Online Protection Act is overbroad and cannot survive" a First Amendment challenge, Justice Kennedy said. But he said the court itself should not come to that conclusion in the absence of a "comprehensive analysis" by the court of appeals. For that reason, he agreed with the Thomas three that the case needed to be sent back.

But the two trios of justices agreed on little else. Justice Kennedy said the Third Circuit had approached the case in the wrong order, skipping over an analysis of what the law actually regulates to focus solely on the community standards issue.

He indicated special concern with the part of the "harmful to minors" definition that requires consideration of the material "as a whole."

"It is essential to answer the vexing question of what it means to evaluate Internet material 'as a whole' when everything on the Web is connected to everything else," Justice Kennedy said.

Two other justices, Sandra Day O'Connor and Stephen G. Breyer, each said that a national rather than a community standard should apply. Their reasons differed somewhat. Justice Breyer cited legislative history that he said indicated that Congress intended to apply a national standard. Construing the statute this way "avoids the need to examine the serious First Amendment problem that would otherwise exist," he said.

Justice O'Connor's separate opinion treated adoption of a national standard as constitutionally required. She called it "necessary in my view for any reasonable regulation of Internet obscenity."

It is far from certain that a majority of the court would eventually coalesce around adopting a national standard of what is harmful to minors. Justice Kennedy said that even with such a standard, "the actual standard applied is bound to vary by community nevertheless" and to impose "a particular burden on Internet speech."

So however that particular question is resolved, the court is likely to have to address the deeper First Amendment issues that Justice Kennedy identified.

The ultimate question for the court is whether this law shares the fatal flaw of the Communications Decency Act: that in endeavoring to protect children, it risks suppressing too much expression that is suitable and constitutionally protected for adults.

The Child Online Protection Act was challenged in Federal District Court in Philadelphia by the A.C.L.U. on behalf of a coalition of organizations that offer sexually explicit content, some of it educational or literary, on their Web sites. Ann E. Beeson, who argued the case as litigation director of the Technology and Liberty Program of the civil liberties union, said today that she was "quite confident" that the law would ultimately be invalidated.

Both the Justice Department, which defended the law, and Representative Michael G. Oxley, the Ohio Republican who sponsored it, portrayed the decision as favorable.

Among the law's defenders, the most realistic statement came from Jay Sekulow, chief counsel of the American Center for Law and Justice, which is affiliated with the Rev. Pat Robertson. The decision made clear that "there are still many constitutional hurdles ahead in the battle to protect children from online pornography," he said.

In another First Amendment decision today, the court held by a vote of 5 to 4 that the United States Court of Appeals for the Ninth Circuit should not have invalidated a Los Angeles zoning ordinance that prohibits two adult businesses, typically a bookstore and a video arcade, from being in the same building.

The appeals court, based in San Francisco, had awarded summary judgment to the challenges to the law, evidently the only one in the country that specifically the sharing of a building by two adult businesses, on the ground that Los Angeles had not provided evidence to show that the provision would reduce crime.

But the evidence in a 1977 police department study of the "secondary effects" of adult businesses on their neighborhoods was sufficient to withstand summary judgment and require a full trial, Justice O'Connor said in an opinion joined by Chief Justice Rehnquist and Justices Scalia and Thomas. Justice Kennedy joined only in the judgment.

In a dissenting opinion, Justice Souter said the city's study was inadequate because it examined only the impact of a concentration of separate businesses and offered no evidence that the common practice of combining a bookstore and video arcade caused any more undesirable effects than these businesses operating separately. Justices Stevens, Ginsburg and Breyer joined the dissent. The case was Los Angeles v. Alameda Books Inc., No. 00-799.

Rights Panel Plans Fight

By LYNETTE CLEMETSON

WASHINGTON, May 13 — The United States Commission on Civil Rights announced today that it planned to ask the Supreme Court to overturn a court decision seating a Bush administration appointee on the panel.

In a letter to the Justice Department, the commission's chairwoman, Mary Frances Berry, said that the commission would not try to block seating the appointee, Peter N. Kirsanow, while its application to the Supreme Court was pending and that Mr. Kirsanow would be recognized as a commissioner at the meeting scheduled for Friday.

The United States Court of Appeals for the District of Columbia on Wednesday reversed a lower court ruling that prevented the seating of Mr. Kirsanow of Cleveland, a labor lawyer who is chairman of the right-leaning Center for New Black Leadership.

The dispute has been building since December, when the White House named Mr. Kirsanow to succeed Victoria Wilson. President Bill Clinton picked Ms. Wilson in January 2000 to succeed Judge A. Leon Higginbotham Jr., who died in 1998. The White House contends that Ms. Wilson's term expired on Nov. 29, when Judge Higginbotham's term would have ended. Ms. Berry says Ms. Wilson was named to a six-year term.

Mr. Kirsanow said he intended to appear on Friday.

"I'm looking forward to the meeting," he said, "so we can start to address the substantive issues."