

HIGH COURT STRIKES DOWN CHILD ONLINE PROTECTION ACT ON FIRST AMENDMENT GROUNDS BUT COULD BE UPHeld AFTER FINAL HEARING



The United States Supreme Court today decided one of the last controversial cases left this term: [*Ashcroft v. ACLU*, Case # 03-218](#), involving the issue of online age verification. In a stunning victory for Free Speech advocates, the High Court, in a 5/4 decision, upheld the preliminary injunction against the law that was entered by the Third Circuit Court of Appeal.

The Court found several potential problems with enforcement of COPA. First, the government is required to use the least restrictive means in regulating speech-related activities. Filters are less restrictive than age verification requirements. Moreover, filters may be more effective, since COPA does nothing to block adult content coming from overseas. The Court recognized that 40% of 'harmful' materials originate from overseas, and will thus not be impacted by enforcement of COPA. While the Court did not require filters, it strongly suggested that they may be a better alternative. The Court also noted that minors can readily circumvent credit card-based age verification requirements by gaining access to credit card numbers themselves. The Government will now need to address the question, at trial, of why filters are not a less restrictive alternative than age verification. The Court also expressed concern over the significant chilling effect that COPA had on free expression. Given the harsh penalties imposed for violating the law, the Court determined that upholding the injunction against enforcement served the interests of freedom of speech.

Another point identified by the court is the rapidly-changing nature of Internet technology. Much has changed online since the law was first enacted 5 years ago. Allowing the parties to brief the impacts of new Internet technologies at the trial court made more sense than making a decision on a record that was 5 years old, which is a lifetime in Internet time. Also important to the Court's decision is the fact that Congress has passed two laws since COPA was enacted: The Truth in Domain Names Act, and the statute creating a Dot Kids Domain. These alternative means of protecting children from inappropriate online speech may have changed the legal and constitutional landscape, which is something the lower courts had not considered yet. This case is destined to come back to the Supreme Court, after a final decision has been rendered by the trial court. Since the opinion was a 5/4 decision, one change in the makeup of the court could result in a dramatically different result next time.

The most troubling part of the Opinion is the suggestion that in the interim, while the courts are continuing to evaluate COPA, the Government can enforce obscenity laws already on the books. That suggestion is consistent with Justice O'Connor's comments during Oral Argument, where she questioned why the Justice Department is not prosecuting the many adult websites that appear to be in violation of the obscenity laws. This suggestion has added more fuel for the fire in the anticipated crackdown on adult websites using federal obscenity laws. For now, anyway, adult webmasters have one less law to worry about, since the Court maintained the injunction against COPA which has been in place since its adoption. This is not the end of the story, however, since the case will now go back to the District Court in Pennsylvania which will conduct a trial on whether COPA meets constitutional muster. We could be in for another several years of hearings, rulings and appeals, while the courts sort this mess out.

This author has always recommended that adult websites comply with COPA, regardless of the legal rulings, however. The government often likes to mix the issues of children and adult materials, when prosecuting obscenity offenses. Obscenity cases are harder to defend if the materials are being made available to children. When the issues involve adult materials created by adults, for adults, the First Amendment arguments tend to work better. However, when the Government can throw in the issue of access by children, juries tend to turn against the webmaster. Therefore, all free sites, and free tours, should contain some form of age verification.

The historical difficulty with online age verification has been the inability to see the customer, and visually evaluate their age, unlike the retail sales of adult materials at an adult video store. Most webmasters want to comply with the law, and keep erotic materials away from minors, but many sites offer free materials, or do not require that credit cards be presented before gaining access to sexually explicit content. That concern motivated this author to create the [Birth Date Verifier™](#), a patent-pending age verification device that does not rely on credit cards or password identification for age verification. The idea is simple: the user completes an [online form](#), under the penalties of perjury, using the E-Sign ("Electronic Signatures") Act. By electronically signing the document under oath, the user submits the equivalent of an electronic affidavit, swearing to his/her date of birth. The device then checks that date of birth against the current date on the server, to determine whether the user seeking access to the age restricted materials is actually over the age of eighteen, on that date. If so, the user is permitted entrance; if not, the user is sent elsewhere. Any minor attempting to gain access to adult materials, through this system, would be committing a federal felony by doing so.

Today marks a great victory for Free Speech online. However, webmasters should not lose sight of the fact that protecting minors from accessing adult materials is in the best interests of both children, and themselves.

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