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Reflecting on the Virtual Child Porn Decision

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The 2002 Supreme Court term could well be most remembered for its abundance of First Amendment cases involving sexual expression.[1] The Court addressed cases involving pornography on the Internet,[2] zoning of adult businesses[3] and so-called virtual child pornography.[4]

Perhaps the most controversial decision of the three (particularly given its outcome) was *Ashcroft v. Free Speech Coalition,*[5] the so-called virtual child pornography case. The Court examined the constitutionality of two provisions of a federal law designed to keep pace with technology called the Child Pornography Prevention Act of 1996 (CPPA).[6] Six justices voted to strike down one provision of the law, while seven justices voted to strike down the other challenged provision.[7] As Joan Bertin wrote: "Curiously, the case that seemed most controversial yielded the most clarity and consensus."[8]

The Free Speech Coalition, an adult trade association, and others[9] made a facial challenge to the provisions. The statute defined child pornography as follows:

> [A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where —

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* David Hudson, Attorney, First Amendment Center, J.D. Vanderbilt (1994)

1. Joan E. Bertin, *Talking Dirty: First Amendment Cases to Defy Traditional Conservative and Liberal Labels: Those Dealing with Sexual Expression Are No Exception*, N.J. L.J. July 29, 2002; David L. Hudson Jr., *Prurient Protections, Prohibitions: This Term's Free-speech Cases Involve Sexually Oriented Expression*, 87 A.B.A. J. 32 (2001).
2. Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 567 (2002).
3. City of L.A. v. Alameda Books, 535 U.S. 425, 428 (2002).
4. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1396 (2002).
5. *Free Speech Coalition*, 122 S. Ct. at 1389.
6. 18 U.S.C. § 2256(8) (2000).
7. *Free Speech Coalition*, 122 S. Ct. at 1395.
8. Bertin, *supra* note 1, at 1.
9. *Free Speech Coalition*, 122 S. Ct. at 1398. The other plaintiffs included Bold Type, Inc., a publisher of nudist lifestyle books, Jim Gingerich, a painter of nudes, and Ron Raffaelli, a photographer of erotic images.

> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
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> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
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> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct;
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> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct. . . [10]

The plaintiffs challenged subsections (B) and (D). They argued that the "appears to be" and "conveys the impression" language in those sections would criminalize as child pornography material that did not involve the use of actual children.[11] They contended that the material would classify as "criminal contraband," mainstream movies like *Romeo and Juliet*, *The Blue Lagoon*, *Fast Times at Ridgemont High*, *The Exorcist*, *Pretty Baby*, and *Lolita*.[12]

The government countered with several arguments including: (1) computer child pornography is often used to seduce children;[13] (2) pedophiles use computer child porn to "whet their own sexual appetites;"[14] (3) if computer child porn is allowed, it will make it harder on the government to prove that images of child porn in a defendant's possession are images of actual children;[15] and (4) images of computer child porn "are often exchanged for pictures of real children engaged in such conduct," which "helps to sustain the market for the production of visual depictions that involve real children."[16]

In the Free Speech Coalition litigation, the lower courts were split. In 1997, a federal district court granted summary judgment to the government in an opinion with incredibly poor First Amendment analysis.[17] Amazingly, the judge classified the challenged provisions of the CPPA as content-neutral even though

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10. 18 U.S.C. § 2256(8) (2002).
11. *Free Speech Coalition*, 122 S. Ct. at 1395.
12. Brief for Respondents at 6, Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002).
13. Reply Brief for Petitioners at 4-6, Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002).
14. *Id.*
15. *Id.* at *5.
16. *Id.* at 6.
17. Free Speech Coalition v. Reno, Docket No. C97-0281, 1997 U.S. Dist. LEXIS 12212 at *23 (N.D. Cal. 1997).

they clearly restricted expression based on content.[18] The district judge misunderstood the application of the secondary effects doctrine, failing to grasp the Supreme Court's own limitation that a "listener's reaction to speech is not a valid secondary effect but a primary effect."[19]

A three-judge panel of the Ninth Circuit reversed 2-1 and sided with Free Speech Coalition.[20] The court held that the "First Amendment prohibits Congress from enacting a statute that makes criminal the generation of images of fictitious children engaged in imaginary but explicit sexual conduct."[21] According to the Ninth Circuit, the CPPA radically changed the definition of child pornography from material that harmed real children in its production to bad ideas.[22]

The Ninth Circuit relied on the 1982 U.S. Supreme Court case *New York v. Ferber*.[23] In *Ferber*, the U.S. Supreme Court said that the First Amendment did not protect child pornography because "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."[24]

Prior to the grant of certiorari in *Free Speech Coalition*, many had believed that the government would prevail, resulting in the CPPA being upheld.[25] Although the Ninth Circuit had ruled in favor of Free Speech Coalition, four other circuits had upheld the CPPA from constitutional attack.[26] Further, the Ninth Circuit for many years has had a higher rate of reversal than any other circuit court of appeals.

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18. *Id.* at *10. "The contested provisions of the CPPA are content-neutral regulations. They have clearly been passed to prevent the secondary effects of the child pornography industry, including the exploitation and degradation of children and the encouragement of pedophilia and molestation of children." *Id.* at *10-11

19. *See* David L. Hudson Jr., *Dangerous Ripple Effects of Free Speech Ruling*, NAT'L L.J., Dec. 22, 1997, at A18. For further analysis of Secondary Effects Doctrine see David L. Hudson, Jr., *The Secondary Effects Doctrine: The Evisceration of First Amendment Freedoms*, 37 WASHBURN L.J. 55 (1997).

20. Free Speech Coalition v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999).

21. *Id.* at 1086.

22. Miller v. California, 413 U.S. 15 (1973).

23. New York v. Ferber, 458 U.S. 747, 758 (1982).

24. *Id.*

25. *See* Hudson, *supra* note 1 (quoting First Amendment expert Kevin F. O'Neill: "If I were a betting man I would predict that the Court would side with the [law's defenders] even though this Court has been so protective of speech").

26. United States v. Fox, 248 F.3d 394, 397 (5th Cir. 2001); United States v. Mento, 231 F.3d 912, 915 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645, 648 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61, 65 (1st Cir. 1998).

THE COURT'S OPINION

On April 16, 2002, the Supreme Court issued a dramatic ruling that sided with the Free Speech Coalition. Justice Anthony Kennedy wrote the majority opinion. He noted that the "appears to be" and "conveys the impression" clauses could lead to the banning of material that is neither obscene under *Miller v. California*, nor child pornography under *Ferber*.[27]

The Court found persuasive the Free Speech Coalition's argument that the broad language of the provisions could apply to modern Oscar-nominated films such as *Traffic* and *American Beauty*.[28] The Court further found that under such an interpretation versions of *Romeo and Juliet* could also be prohibited.[29]

The court noted that the *Ferber* decision allowed the prohibition of child pornography because of the harm caused by the actual children used during the production of the material.[30] However, the CPPA also criminalized material that did not involve the use of actual children.[31]

The Court rejected the government's arguments for denying First Amendment protection to computer-generated child pornography that did not involve the abuse of children.[32] The government had argued that pedophiles would use the computer-generated porn to seduce children.[33] The *Free Speech Coalition* majority responded that "[t]here were many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they could be misused."[34]

The Supreme Court next addressed the argument that the material prohibited by the CPPA whetted the appetites of pedophiles. The Court found that there was not a sufficient reason to ban materials, simply because there existed a possibility that free speech might encourage unlawful acts.[35] The Court questioned the lack of evidence showing a connection between computer generated porn and actual child abuse, and found that "[t]he Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."[36] The Court also recognized that "[w]ithout a significantly stronger, more direct connection, the

27. *Free Speech Coalition*, 122 S. Ct. at 1396.
28. *Id.* at 1400.
29. *Id.*
30. *Id.* at 1401.
31. *Id.* at 1402.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 1403.
36. *Id.*

Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct."[37]

The Court dismissed the notions that virtual child porn images had to be eradicated in order to dry up the market for actual child porn. The Court also discussed the notion that virtual images led to an increase in illegal child porn. The Court responded, "The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice."[38]

The Court next turned to the government's third argument that the existence of computer-generated child porn made it hard for the government to prove that those who produced pornography used real children.[39] The government told the Court that it would make it quite hard to prosecute child porn cases when virtual child porn is identical to actual images of children.[40] Experts would have trouble testifying that certain images contained actual children.[41]

Justice Kennedy and the Court rejected this contention as contrary to established First Amendment law, stating that:

> The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.[42]

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37. *Id.*

38. *Id.* at 1404. The Court also noted that even if the government's market-based deterrence argument was valid, it would not support the statute because "there is underlying crime at all" in the case of virtual child porn. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 1404. Kennedy's opinion read like a paean to the First Amendment in places. Consider the following passages:

- The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it absent some showing of a direct connection between the speech and imminent illegal conduct. . . *Id.* at 1403.
- The prospect of crime, however, by itself does not justify laws suppressing protected speech. . . *Id.* at 1399.
- As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. . . . *Id.*
- First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought. . . . *Id.* at 1403.

Justice Clarence Thomas wrote a concurring opinion stressing that "technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children."[43] If the Government could show that defendants were successful in beating child porn charges by using the existence of computer-generated images to create reasonable doubt, then Thomas stated that he might have voted differently. But, he noted that the Government had not pointed to a single case in which a defendant had been acquitted based on such a defense.[44]

Justice O'Connor agreed that § 2256 (D) was unconstitutional and agreed that "the CPPA's ban on youthful-adult pornography is overbroad."[45] However, she voted to uphold the bulk of § 2256 (B), the section with the "appears to be a minor" language, by interpreting that provision to mean material that is "virtually indistinguishable" from actual children.[46] She concluded that materials that 'convey the impression' that they contain images of actual children should not be banned as Constitutionally obscene, but that she would ban pornographic depictions that actually 'appear to be' of minors, so long as the ban is not applied to youthful-looking adult pornography.[47]

Chief Justice William Rehnquist dissented, in an opinion joined by Justice Scalia,[48] and voted to uphold both provisions. Rehnquist also believed that the statute should be read so as to apply only to images that are "virtually indistinguishable" from that of minors.[49] He voted to uphold § 2256 (D) by interpreting the "conveys the impression" language as applying only to the "panderer."[50]

CONGRESSIONAL RESPONSE

Congress reacted with predictable outrage to the Court's decision, one congressman even saying that the Court had "sided

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- The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. . . . *Id.* at 1404.

43. *Id.* at 1406 (J. Thomas, concurring).

44. *Id.*

45. *Id.* at 1408 (J. O'Connor, concurring in part and dissenting in part).

46. *Id.* at 1409.

47. *Id.* at 1411.

48. *Id.* at 1412. Scalia joined Rehnquist's opinion except for a paragraph explaining the statute's legislative history. *Id.*

49. *Id.* at 1412, 1414. ("The CPPA is targeted to this aim by extending the definition of child pornographer to reach computer-generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct.")

50. *Id.* at 1413.

with pedophiles over children."[51] Attorney General John Ashcroft said the Court's decision will make the government's job in fighting child porn "immeasurably more difficult."[52]

Congress also responded with more than politically popular rhetoric.[53] U.S. Rep. Henry Brown, along with thirty-three co-sponsors, responded with a proposal to amend the Constitution to prohibit virtual child pornography.[54] They hastily introduced the Child Obscenity and Pornography Prevention Act of 2002 (COPPA).[55] The House passed the measure by a vote of 413-8. The bill had not cleared the Senate at the time of this article, but passage may soon be a foregone conclusion.

In its findings, the bill noted that the Ninth Circuit "has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in Free Speech Coalition."[56]

The bill deleted section 2256(D), the provision that seven Justices of the Court struck down. The bill, however, has been amended, and section 2256(D) now reads: "such visual depiction is a computer image or computer-generated image that is, or is indistinguishable . . . from, that of a minor engaging in sexually explicit conduct."[57]

The measure also seeks to get around the *Free Speech Coalition* decision by introducing a new section entitled "Prohibition of Obscenity Depicting Young Children."[58] This new section criminalizes the production and distribution of a "visual depiction that is, or is indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct."[59]

Perhaps the biggest change in the new bill is its focus on the word "indistinguishable." The bill defines the term as follows:

> [T]he term 'indistinguishable' used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons,

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51. Jessica Sabbath, *House panel alters 'virtual' child porn ban,* ATLANTA J. & CONST., June 30, 2002, at 10A.

52. Associated Press, *Feds Ease Rules on Child Porn Charges*, (April 17, 2002), *available at* http://courses.cs.vt.edu/~cs3604/lib/Freedom.of.Speech/Sup.Ct.COPA.html (last visited Nov. 15, 2002) .

53. *See supra* note 46.

54. H.J Res. 106, 107th Cong. (2002); *see also*, Lauren Markoe, *Some call for 'virtual' child porn amendment*, (July 21, 2002), *at* http://www.thestate.com/mld/state/news/politics/3705730.htm (last visited Nov. 15, 2002).

55. H.R. 4623, 107th Cong. (2002).

56. *Id.* at § 2(9).

57. *Id.* at § 3(a).

58. *Id.* at § 5.

59. *Id.*

sculptures, or paintings depicting minors or adults.[60]

Jeffrey Douglas, executive director of the Free Speech Coalition, says the measure is "a combination of being a poorly drafted bill and exceptionally difficult to parse out."[61]

He points out that the new version of the statute attempts to track the language in the Supreme Court's dissenting opinions, meanwhile ignoring the decision and reasoning set forth by the majority.[62] According to Douglas, the majority held that there can be no exception to the First Amendment right to free speech involving child pornography unless the image contains a depiction of an actual, identifiable child.[63]

Douglas' analysis seems particularly astute with respect to the fact that the new bill tracks the language of the dissenting opinion. Chief Justice Rehnquist's dissenting opinion and the partial dissenting opinion of Justice O'Connor both emphasized that the CPPA should be interpreted to apply to images that are "virtually indistinguishable" from images of actual children.[64]

WHAT THE CASE SAYS ABOUT PARTICULAR JUSTICES

The Court's opinion in *Free Speech Coalition* confirmed Justice Anthony Kennedy's stature as the Justice that is most protective of First Amendment rights in many cases.[65] Kennedy showed a willingness to take a case involving expression that many find repulsive, and write broad First Amendment principles that will apply far outside that context. For instance, his statement in *United States v. Playboy*—"The history of the law of free expression is one of vindication in cases involving speech that

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60. *Id.* at § 5(c)(4).

61. Telephone interview with Jeffrey Douglas, Executive Director, Free Speech Coalition (July 24, 2002).

62. *Id.*

63. *Id.*

64. *Free Speech Coalition*, 535 U.S. at 1404, 1409, 1411 (J., Rehnquist, dissenting). Consider the language from Chief Justice Rehnquist's dissent: "Other than computer generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct, the CPPA can be limited so as to not reach any material that was not already unprotected before the CPPA" and "[t]he CPPA is targeted to this aim by extending the definition of child pornography to reach computer generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct." *Id.* at 1411, 1414. O'Connor's partial dissent interpreted the CPPA to mean images "that are virtually indistinguishable from actual children." *Id.* at 1409 (J. O'Connor, dissenting in part).

65. *See* Eugene Volokh, *How the Justices Voted in Free Speech Cases*, 1994-2000, 48 UCLA L. REV. 1191, 1202 (2001) (ranking Justice Kennedy first as ruling for First Amendment claims nearly seventy-five percent of the time since 1994). An updated version of this article is available at http://www1.law.ucla.edu/~volokh/howvoted.htm. (last visited Nov. 15, 2002).

many citizens may find shabby, offensive, or even ugly"[66]—is an oft-cited phrase well on its way to becoming First Amendment lore. This language, coupled with his concurring opinion in *Republican Party v. White*,[67] a case concerning restrictions on judicial candidates' speech, confirm Justice Kennedy's strong belief in the need to carefully protect First Amendment freedoms.

The *Free Speech Coalition* opinion also showed that Justice Clarence Thomas can strike out on his own, writing his own concurring opinions in First Amendment cases — even cases involving sexual expression. Thomas surprised some with his vote in *Playboy* and his concurrence in *Free Speech Coalition* is quite similar. In fact, some commentators praise his concurring opinion in *Free Speech Coalition* as the most sensible because he recognized the danger of allowing defendants to escape prosecution by raising a computer generated images defense.[68]

Justice Stephen Breyer is slowly coming around now, in 2002, to the First Amendment side in many cases. Though overall his record in First Amendment cases is poor,[69] his joining of Kennedy's opinion in *Free Speech Coalition* and Stevens' dissent in *Alameda* show that perhaps he is becoming more sensitive to First Amendment interests.

THE LASTING SIGNIFICANCE OF THE OPINION

The Supreme Court showed that it could conduct an impressive First Amendment inquiry despite the heat of public criticism.[70] Some critics of the Court said the decision was symptomatic of a Court that has strayed far from the original high purposes of the First Amendment.[71] Robert Bork called the

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66. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 826 (2000).

67. Republican Party v. White, 122 S. Ct. 2528, 2544 (2002) (J. Kennedy, concurring).

68. Roger Parloff, *Stalled by Politics of Porn*, LEGAL TIMES, July 15, 2002, at 54. Parloff praised Thomas' concurring opinion as "sensible" for recognizing the possible need to reassess ruling if government compiles better factual record in the future. *Id.*

69. *See* Volokh, *supra* note 59 (ranking Justice Bryer the least likely of all Justices to rule in favor of First Amendment claims, and showing that on nearly forty percent of occasions since 1994 he has voted to rule against First Amendment protections).

70. *See* Bertin, *supra* note 1 (stating that "[f]ree Speech Coalition reveals the Court's willingness to undertake a principled analysis of highly volatile and politicized issues."); Lawrence G. Walters, *Adult Industry Update – May 2002*, *at* http://www.ainews.com/story/3375 (last visited Sept. 29, 2002) (stating that "despite the political heat that the Court knew that it would draw, the decision is cast in broad, eloquent terms, and constitutes a resounding victory for First Amendment principles.").

71. Robert Bork, *How did 'virtual porn' end up with constitutional protection?*, *at* http://www.indybay.org/news/2002/04/125147.php (last visited Sept. 29, 2002).

opinion "ludicrous."[72] Others said the case represented a classic First Amendment victory. Law professor Marci Hamilton says the case could actually contribute to the protection of children by allowing artists the freedom to depict the evils of child abuse.[73]

On balance, the opinion was analytically sound because of the sheer breadth of the challenged provisions. Criminalizing material as child porn when the material does not involve actual children and may even involve actors over the age of eighteen is bad law and bad policy. When the language of a statute could be used to criminally charge the producers of *Traffic*, *American Beauty* and *Romeo and Juliet*, the legislators had better go back to the drawing board to craft a more narrowly tailored measure.

Often, Congress acts too hastily in passing legislation in the technology arena. Recall the horrendously overbroad and vague provisions of the Communications Decency Act of 1996 struck down by the Court in *Reno v. American Civil Liberties Union.*[74] Congress quickly responded with the Child Online Protection Act (COPA). Perhaps we will see the same pattern with the CPPA and the COPA.

Whatever the future of COPA, *Free Speech Coalition* is already making its mark on First Amendment jurisprudence, as many other federal courts have already cited the case outside of the child pornography area. The Sixth Circuit cited the case for the principle that the mere tendency of speech to encourage unlawful acts was not a sufficient reason to ban the speech.[75] This principle has appeared in an action to dismiss a lawsuit against media companies blaming them for school shooting deaths.[76] A dissenting judge in the Nuremberg Files case cited the case repeatedly and even quoted the classic phrase: "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[77] A federal district court also cited the case in striking down a state's Internet indecency law.[78]

Perhaps the most important aspect of the opinion was that the Court stood firm and did not allow certain speech to be banned merely because it "might" have a bad effect on certain listeners or

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72. *See* George Gilder, *Slouching Still*, *in* AM. SPECTATOR, July/Aug. 2002 34 (interviewing Robert Bork about "pushy porn").

73. Marci Hamilton, *The Supreme Court Gets It Right in Ashcroft v. Free Speech Coalition: Why Allowing Speech Concerning Child Abuse Is More Likely to Remedy Abuse Than Perpetuate It*, (Apr. 25, 2002), *available at* http://writ.corporate.findlaw.com (last visited Nov. 23, 2002).

74. Reno v. ACLU, 521 U.S. 844 (1997).

75. *Id.*

76. James v. Meow Media, Inc., 300 F.3d 683, 698 (6th Cir. 2002).

77. Planned Parenthood v. Am. Coalition of Life Activists, 290 F.3d 1058, 1097-98 (9th Cir. 2002).

78. Am. Booksellers Found. v. Dean, 202 F.Supp. 2d 300, 317 (D. Vt. 2002).

recipients. The amicus brief of the Association of American Publishers and others[79] alerted the Court to this danger: "If non-obscene sexually explicit images, the creation of which did not involve actual children, can be banned based on their purported effect on certain viewers, then the government could, in theory, regulate any category of speech that could be asserted to have some undesirable effect on certain recipients."[80]

A decision adopting such reasoning would further empower legislators to make war upon popular culture. The producers of rap lyrics, violent video games, and graphic movies could be subject to criminal penalties.

The opinion primarily stands for the principle that speech cannot be outlawed unless the government can establish a factual record showing that the speech actually directly caused the harm. If the government could compile a factual record that clearly establishes that access to virtual child pornography leads to the harm of actual children, then the issue should be considered. But, the government in *Free Speech Coalition* failed to meet this burden. In the words of Justice Kennedy, "the [g]overnment has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse," and "[w]ithout a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct."[81]

The Supreme Court did not favor pedophiles over children, or give a "green light to pornographers."[82] Instead, the Court protected freedom of thought, freedom of speech, and the First Amendment.

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79. *See* Brief of Amici Curiae Ass'n of Am. Publishers, Inc. at 18; *Free Speech Coalition*, 535 U.S. at 1389.

80. *Id.*

81. *Free Speech Coalition*, 535 U.S. at 1403.

82. Jay Sekulow, *The Supreme Court Missed the Mark on Virtual Child Pornography*, ACLJ, *available at* http://www.aclj.org/resources/pornography/jay_virtual_porn.asp (last visited Nov. 15, 2002).