

How the Supreme Court Justices Voted on Prior Internet Pornography Cases

Justice Stevens delivered the opinion of the Court in *Reno I*, stating that the CDA was unconstitutional.¹ Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer all joined in the opinion. The majority stated that the CDA's provisions regarding indecent transmissions and patently offensive displays, because of their vagueness, abridged the First Amendment because, along with the CDA's criminal penalties, created a chilling effect on speech.² Justices O'Connor and Rehnquist concurred in part and dissented in part.³ The two Justices agreed that the CDA infringed upon the rights of adults communicating with other adults, but found the CDA's provisions constitutional insofar as they regulated indecent speech between adults and children.⁴

In *Ashcroft I*, Justice Thomas delivered the opinion of the Court, and Justices Rehnquist, O'Connor, Scalia, and Breyer joined.⁵ The majority held that COPA should be remanded to the Third Circuit for further review because COPA's use of community standards to identify material that is harmful to minors did not, by itself, render the statute unconstitutional.⁶ Justice O'Connor filed a separate concurring opinion in which she asserted that it would be both constitutional and desirable to adopt a national standard for regulating Internet obscenity.⁷ Justice Breyer filed a concurring opinion and stated that COPA's legislative history indicated that Congress intended the statutory word "community" to refer to the Nation's adult community taken as a whole.⁸ Justice Kennedy also wrote a concurring opinion, in which Justices Souter and Ginsburg joined.⁹ They stated that it would only be possible to determine whether or not community standards were unconstitutional only after identifying what speech COPA actually burdened.¹⁰ Justice Stevens, the lone dissenter, asserted that the use of community standards on a unique medium such as the Internet was unconstitutional because it denied to some sections of the country access to material based on the preferences of other sections of the country.¹¹

Justice Kennedy delivered the opinion of the Court in *Ashcroft III*.¹² Joined by Justices Stevens, Souter, Thomas, and Ginsburg, Kennedy asserted that because COPA was more restrictive than Internet filters, it was unconstitutional.¹³ The court found that filtering software was a less restrictive alternative to COPA because it imposed selective restrictions on the receiving end of speech rather than blanket restrictions at the source of speech.¹⁴ Also, the Court found that filters were capable of blocking more pornography than COPA.¹⁵ Also, the Court asserted that COPA would unnecessarily chill speech.¹⁶ Justice Stevens, in a concurring opinion in which Justice Ginsburg joined, repeated his argument from *Ashcroft I*.¹⁷ Also, Stevens objected to the use of criminal prosecutions as an inappropriate means to regulate obscenity.¹⁸ Justice Scalia dissented, asserting that because COPA covered commercial pornography, that a strict scrutiny analysis of the statute was incorrect.¹⁹ Scalia asserted that commercial pornography could be banned entirely in a manner consistent with the First Amendment, and, because of this, COPA's lesser restrictions raised no constitutional concerns.²⁰ Justices Breyer, Rehnquist, and O'Connor dissented as well, stating that filtering software was not a less restrictive alternative to COPA because it suffered from four serious inadequacies (underblocking, prohibitive cost, lack of parental authority to decide where children access the Internet, and overblocking).²¹

In *American Library Association*, Chief Justice Rehnquist delivered the Judgment of the Court and an opinion in which Justices O'Connor, Scalia, and Thomas joined.²²

These Justices asserted that, because public libraries' use of filtering software does not violate patrons' First Amendment rights, CIPA could not induce libraries to violate the First Amendment.²³ Further, the plurality opinion asserted that libraries' decisions to block Internet pornography were no different than libraries' decisions to exclude pornography from their printed collections.²⁴ Finally, because adult patrons had the ability to disable the filters, concerns regarding overblocking were misplaced.²⁵ Justice Kennedy filed a concurring opinion, in which he stated that because of the substantial governmental interest in protecting young library patrons from inappropriate material was legitimate, and because no significant burden on adult speech existed, the statute was not unconstitutional on its face.²⁶ Justice Kennedy further asserted that if it could be demonstrated in specific instances that adult speech were overly burdened, however, then a legitimate constitutional question would arise.²⁷ Justice Breyer also filed a concurring opinion.²⁸ He stated that the Court should employ a test that requires more than a rational basis (because of the First Amendment concerns), but less than strict scrutiny.²⁹ Heightened scrutiny would inquire whether the regulation is a proper fit for the problem to be resolved.³⁰ According to Justice Breyer, CIPA's objectives were legitimate, and no clearly superior or better fitting alternative to filters had been presented.³¹ Justice Stevens dissented, stating that CIPA acted as a "blunt nationwide restraint" on adult access to "an enormous amount of valuable information."³² Local decision makers, he asserted, should be allowed to tailor their policies to local concerns.³³ Also, CIPA would severely underblock inappropriate content and overblock legitimate content.³⁴ Finally, Justice Souter wrote a dissenting opinion in which Justice Ginsburg joined.³⁵ They asserted, contrary to the plurality, that CIPA "mandate[d] action by recipient libraries that would violate the First Amendment's guarantee of free speech if the libraries took that action entirely on their own."³⁶ Because of this, CIPA was unconstitutional.

Footnotes:

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1. *See Reno v. ACLU*, 521 U.S. 844, 848 (1997).
2. *See id.* at 871-872.
3. *See id.* at 886.
4. *See id.* at 897.
5. *See Ashcroft v. ACLU*, 535 U.S. 564, 566 (2002).
6. *See id.* at 585-86.
7. *See id.* at 589.
8. *See id.*
9. *See id.* at 591.
10. *See id.* at 601-02.
11. *See id.* at 605-606.
12. *See Ashcroft v. ACLU*, 542 U.S. 656, 659 (2004).
13. *See id.* at 666-67.
14. *See id.* at 667.
15. *See id.*
16. *See id.*
17. *See id.* at 673-74.
18. *See id.* at 674-75.
19. *See id.* at 676.
20. *Id.*
21. *See id.* at 676-80.

22. *See* U.S. v. American Library Ass'n, Inc., 539 U.S. 194, 198 (2003).
23. *See id.* at 205-06.
24. *See id.* at 204-05.
25. *See id.* at 209.
26. *See id.* at 215.
27. *See id.* at 214-15.
28. *See id.* at 215.
29. *See id.* at 216.
30. *See id.* at 216-17.
31. *See id.* at 218-219.
32. *Id.* at 220.
33. *See id.* at 223.
34. *See id.* at 228.
35. *See id.* at 231.
36. *Id.*