



U.S. Department of Justice

Office of the Solicitor General

Solicitor General

Washington, D.C. 20530

March 10, 2021

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Re: *Free Speech Coalition v. Attorney General*, 974 F.3d 408 (3d Cir. 2020)
(Nos. 18-3188 & 18-3189), rehearing denied (Oct. 27, 2020)

Dear Madam Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you that the Department of Justice has decided not to seek Supreme Court review of the above-referenced decision of the United States Court of Appeals for the Third Circuit. A copy of the decision is attached.

As described in two prior letters involving other aspects of this long-running litigation (sent on September 27, 2013, and October 24, 2016, respectively), this case concerns the constitutionality of the age-verification and recordkeeping requirements of 18 U.S.C. 2257 and 2257A, and Department of Justice regulations implementing those statutes. Sections 2257 and 2257A require certain producers of material depicting sexually explicit conduct to collect and maintain records of the identity and age of each performer in such materials, to ensure that the performers are not minors. Each copy of covered material must display a statement describing where the age records are kept.

As relevant here, the plaintiffs in this case challenged various aspects of Sections 2257 and 2257A and the implementing regulations under the First Amendment. In an earlier phase of the litigation (described in the 2016 letter mentioned above), the court of appeals ruled that the statutes are content-based speech regulations subject to strict scrutiny under *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). In the current decision, the court of appeals rejected the plaintiffs' claim that the statutes are facially unconstitutional. The court, however, affirmed the district court's determination that the statutes may not constitutionally be applied to the small number of plaintiffs in this case who produce sexually explicit images for art, education, or other purposes not typically considered to be part of the pornography industry. The court of appeals vacated an injunction that had prohibited enforcement of the statutes against all persons, and remanded for the district court to enter relief limited to the named plaintiffs against whom the court of appeals concluded that the provisions could not be constitutionally enforced.

The Third Circuit's decision is largely favorable to the government, and to the extent that it is adverse, its practical consequences are extremely limited. The court of appeals' rejection of the plaintiffs' facial constitutional challenge means that the statutes remain in force in almost all

settings and protect minors from sexual exploitation in the vast majority of the statutes' applications, including in the adult-entertainment industry. The court of appeals' limited as-applied holding prevents the government from enforcing the statutes only against the small group of individuals in this case. Notably, these plaintiffs—who are artists, educators, a journalist, and one corporate producer of sex-education materials—are not producers whose works significantly implicate the statutes' core concern: preventing the sexual exploitation of minors in the production of pornography. Rather, the evidence at trial showed that the plaintiffs are “not what may be considered ordinary pornographers,” in part because they do not predominantly depict young-looking people in their explicit images. 974 F.3d at 431 (citation omitted). By contrast, for the commercial pornography industry, where the government's interest in protecting minors is broadly implicated and compelling, the court of appeals' decision provides no impediment to enforcement of the statutes.

In these circumstances, I have determined not to seek Supreme Court review. Under the Supreme Court's present order providing 150 days to file a petition for a writ of certiorari, such a petition would be due on March 26, 2021. Please let me know if I can be of any further assistance in this matter.

Sincerely,

A handwritten signature in black ink that reads "Elizabeth B. Prelogar". The signature is written in a cursive, flowing style.

Elizabeth B. Prelogar
Acting Solicitor General

Enclosure