



Office of the Attorney General
Washington, D. C. 20530

September 27, 2013

The Honorable John Boehner
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *Free Speech Coalition v. Holder*, No. 09-4607 (E.D. Pa.)

Dear Mr. Speaker:

I am writing to advise you that the Department of Justice has decided not to cross-appeal a decision of the United States District Court for the Eastern District of Pennsylvania holding that a regulation of the Department of Justice, 28 C.F.R. § 75.5(b), is unconstitutional as applied in one factual setting. The regulation in question is one of the regulations issued by the Department to implement the recordkeeping provisions of 18 U.S.C. 2257 and 2257A. The statute and regulations require producers of material depicting sexually explicit conduct to maintain records to ensure that the persons involved in the performance of such conduct are not minors. Producers are required under the statutes to make the records available for inspection by the government at reasonable times.

The plaintiffs in this case challenged various aspects of 18 U.S.C. 2257 and 2257A under the First and Fourth Amendments. After an eight-day trial, the district court rejected almost all of the plaintiffs' constitutional challenges. It held, however, that when age-verification records are maintained in a producer's private home, an inspection of those records would violate the Fourth Amendment if the producer were not given advance notice of the inspection by the government. The district court accordingly held that 28 C.F.R. 75.5(b), which provides that "[a]dvance notice of record inspections shall not be given," cannot constitutionally be applied to inspections of private residences. The district court did not grant plaintiffs' request for injunctive relief.

The Department has decided not to appeal the ruling that this regulation is unconstitutional as applied to inspections in private residences. The district court's as-applied ruling is narrow, and its practical consequences are extremely limited. The district court made clear that its ruling does not affect the facial constitutionality of Section 2257 and 2257A under the Fourth Amendment, but only invalidates a narrow aspect of the Department's implementing regulations as applied in a narrow factual context.

The statutory recordkeeping system remains undisturbed, and every producer subject to the statutes must create and maintain the age-verification records required by the statutes. Moreover, the district court's ruling does not prohibit inspections of records kept in private residences; it merely requires advance notice of such inspections. The district court concluded that advance notice of such inspections would not allow producers to fabricate records or

The Honorable John Boehner

Page 2

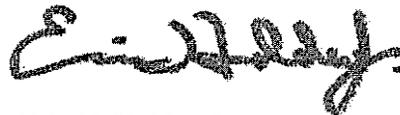
otherwise evade the statutory recordkeeping requirements. The court's opinion also notes that the Federal Bureau of Investigation has in the past provided advance notice to some producers, notwithstanding the regulation, without imperiling the goals of the statutory scheme.

The reasonableness of records inspections under the Fourth Amendment is highly fact-specific. The district court supported its Fourth Amendment ruling with facts developed at trial, including findings that conducting unannounced records inspections in private residences would impose significant burdens on producers, including possible interference with producers' privacy interests. Those factual findings would receive considerable deference on appeal. In these circumstances, the Department has determined that appeal is unwarranted.

On September 6, 2013, the plaintiff in this case filed a notice of appeal from the portion of the district court's decision that was adverse to them. The Department has filed a protective notice of cross-appeal, but plans to dismiss that cross-appeal in light of the determination conveyed in this letter.

Please let me know if I can be of any further assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric H. Holder, Jr.", written in a cursive style.

Eric H. Holder, Jr.
Attorney General