

ADDITIONAL DEVELOPMENTS— CONSTITUTIONAL LAW

NITKE V. GONZALES

2005 U.S. Dist. LEXIS 15364 (S.D.N.Y. July 25, 2005)

A New York federal court ruled on the constitutionality of the Communications Decency Act (CDA).

Barbara Nitke, a photographer and faculty member at the School of Visual Arts in New York City, joined by the National Coalition for Sexual Freedom, and the National Coalition for Sexual Freedom Foundation, challenged the constitutionality of the CDA. Much of Nitke's artwork, some of which was posted on her website, focused on sexually explicit, sadomasochistic behavior. The CDA prohibits the use of telecommunications devices to transmit "any comment, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age." Although the indecency provisions of the CDA were struck down in *Reno v. ACLU*, 521 U.S. 844 (1997), Nitke contended that the community standards test for obscenity could not be fairly administered when the speech at issue was published on the internet since the speaker faced prosecution in the most conservative communities.

The district court held that plaintiffs had failed to establish the CDA was overbroad. The plaintiffs had standing because they had produced evidence indicating they had been deterred in exercising their free-speech rights. However, they failed to produce sufficient evidence regarding the total amount of speech that is affected by the CDA, or the amount of speech that was protected in at least one community but not in others, or the extent of variation in community standards. Such evidence, according to the court, was needed to demonstrate that the overbreadth of the CDA's obscenity provisions were substantial and thus violated the First Amendment. The court therefore upheld the constitutionality of the CDA's obscenity provisions.

In February of 2006, the Supreme Court summarily affirmed the District Court's decision.