

Justices dissenting: Scalia, Thomas, Roberts, C.J., Alito

165. Act of September 30, 1996 (Pub. L. No. 104–208, § 121, 110 Stat. 3009–26, 18 U.S.C. §§ 2252, 2256)

Two sections of the Child Pornography Prevention Act of 1996 that extend the federal prohibition against child pornography to sexually explicit images that appear to depict minors but that were produced without using any real child violate the First Amendment. These provisions cover any visual image that “appears to be” of a minor engaging in sexually explicit conduct, and any image promoted or presented in a way that “conveys the impression” that it depicts a minor engaging in sexually explicit conduct. The rationale for excepting child pornography from First Amendment coverage is to protect children who are abused and exploited in the production process, yet the Act’s prohibitions extend to “virtual” pornography that does not involve a child in the production process.

*Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer

Justice concurring specially: Thomas

Justices dissenting: Chief Justice Rehnquist, Scalia

166. Act of November 21, 1997 (Pub. L. 105–115, § 127, 111 Stat. 2328, 21 U.S.C. § 353a)

Section 127 of the Food and Drug Administration Modernization Act of 1997, which adds section 503A of the Federal Food, Drug, and Cosmetic Act to exempt “compounded drugs” from the regular FDA approval process if providers comply with several restrictions, including that they refrain from advertising or promoting the compounded drugs, violates the First Amendment. The advertising restriction does not meet the *Central Hudson* test for acceptable governmental regulation of commercial speech. The government failed to demonstrate that the advertising restriction is “not more extensive than is necessary” to serve its interest in preventing the drug compounding exemption from becoming a loophole by which large-scale drug manufacturing can avoid the FDA drug approval process. There are several non-speech means by which the government might achieve its objective.

*Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

Justices concurring: O’Connor, Scalia, Kennedy, Souter, Breyer

Justices dissenting: Breyer, Stevens, Ginsburg, Rehnquist, C.J.

167. Act of December 9, 1999 (Pub. L. 106–152, § 1(a), 113 Stat. 1732, 18 U.S.C. § 48)

Federal law which criminalized the commercial creation, sale, or possession of depictions of animal cruelty struck down. Despite an exemption for depictions with “serious religious, political, scientific, edu-