SUPREME COURT OF THE UNITED STATES

No. 91–1526

FERRIS J. ALEXANDER, SR., PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 28, 1993]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

After a full criminal trial, petitioner Ferris J. Alexander, owner of more than a dozen stores and theaters dealing in sexually explicit materials, was convicted on, *inter alia*, 17 obscenity counts and 3 counts of violating the Racketeer Influenced and Corrupt Organizations Act (RICO). The obscenity convictions, based on the jury's findings that four magazines and three videotapes sold at several of petitioner's stores were obscene, served as the predicates for his three RICO convictions. In addition to imposing a prison term and fine, the District Court ordered petitioner to forfeit, pursuant to 18 U. S. C. §1963 (1988 ed. and Supp. III), certain assets that were directly related to his racketeering activity as punishment for his RICO violations. Petitioner argues that this forfeiture violated the First and Eighth Amendments to the Constitution. We reject petitioner's claims under the First Amendment but remand for reconsideration of his Eighth Amendment challenge.

Petitioner was in the so-called "adult entertainment" business for more than 30 years, selling pornographic magazines and sexual paraphernalia, showing sexually explicit movies, and eventually selling and renting videotapes of a similar nature. He received shipments of these materials at

a warehouse in Minneapolis, Minnesota, where they were wrapped in plastic, priced, and boxed. He then sold his products through some 13 retail stores in several different Minnesota cities, generating millions of dollars in annual revenues. In 1989, federal authorities filed a 41-count indictment against petitioner and others, alleging, *inter alia*, operation of a racketeering enterprise in violation of RICO. The indictment charged 34 obscenity counts and 3 RICO counts, the racketeering counts being predicated on the obscenity charges. The indictment also charged numerous counts of tax evasion and related offenses that are not relevant to the questions before us.

Following a 4-month jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of 17 substantive obscenity offenses: 12 counts of transporting obscene material in interstate commerce for the purpose of sale or distribution, in violation of 18 U. S. C. §1465; and 5 counts of engaging in the business of selling obscene material, in violation of 18 U. S. C. §1466 (1988 ed. and Supp. III). He also was convicted of 3 RICO offenses which were predicated on the obscenity convictions: one count of receiving and using income derived from a pattern of racketeering activity, in violation of 18 U. S. C. §1962(a); one count of conducting a RICO enterprise, in violation of §1962(c); and one count of conspiring to conduct a RICO enterprise, in violation of §1962(d). As a basis for the obscenity and RICO convictions, the jury determined that four magazines and three videotapes were obscene. Multiple copies of these magazines and videos, which graphically depicted a variety of "hard core" sexual acts, were distributed throughout petitioner's adult entertainment empire.

Petitioner was sentenced to a total of six years in prison, fined $100,000, and ordered to pay the cost of prosecution, incarceration, and supervised release. In addition to these punishments, the District Court reconvened the same jury and conducted a forfeiture proceeding pursuant to §1963(a)(2). At this proceeding, the Government sought forfeiture of the businesses and real estate that represented petitioner's interest in the racketeering enterprise, §1963(a)(2)(A), the property that afforded petitioner influence over that enterprise, §1963(a)(2)(D), and the assets and proceeds petitioner had obtained from his racketeering offenses, §§1963(a)(1), (3). The jury found that petitioner had an interest in 10 pieces of commercial real estate and 31 current or former businesses, all of which had been used to conduct his racketeering enterprise. Sitting without the jury, the

District Court then found that petitioner had acquired a variety of assets as a result of his racketeering activities. The court ultimately ordered petitioner to forfeit his wholesale and retail businesses (including all the assets of those businesses) and almost $9 million in moneys acquired through racketeering activity.[1]

The Court of Appeals affirmed the District Court's forfeiture order. *Alexander* v. *Thornburgh*, 943 F. 2d 825 (CA8 1991). It rejected petitioner's argument that the application of RICO's forfeiture provisions constituted a prior restraint on speech and hence violated the First Amendment. Recognizing the well-established distinction between prior restraints and subsequent criminal punishments, the Court of Appeals found that the forfeiture here was "a criminal penalty imposed following a conviction for conducting an enterprise engaged in racketeering activities," and not a prior restraint on speech. *Id.*, at 834. The court also rejected petitioner's claim that RICO's forfeiture provisions are constitutionally overbroad, pointing out that the forfeiture order was properly limited to assets linked to petitioner's past racketeering offenses. *Id.*, at 835. Lastly, the Court of Appeals concluded that the forfeiture order does not violate the Eighth Amendment's prohibition against "cruel and unusual punishments" and "excessive fines." In so ruling, however, the court did not consider whether the forfeiture in this case was grossly disproportionate or excessive, believing that the Eighth Amendment "`does not require a proportionality review of any sentence less than life

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[1]Not wishing to go into the business of selling pornographic materials—regardless of whether they were legally obscene—the Government decided that it would be better to destroy the forfeited expressive materials than sell them to members of the public. See Brief for United States 26–27, n. 11.

imprisonment without the possibility of parole.'" *Id.*, at 836 (quoting *United States* v. *Pryba*, 900 F. 2d 748, 757 (CA4), cert. denied, 498 U. S. 924 (1990)). We granted certiorari, 505 U. S. —— (1992).

Petitioner first contends that the forfeiture in this case, which effectively shut down his adult entertainment business, constituted an unconstitutional prior restraint on speech, rather than a permissible criminal punishment. According to petitioner, forfeiture of expressive materials and the assets of businesses engaged in expressive activity, when predicated solely upon previous obscenity violations, operates as a prior restraint because it prohibits future presumptively protected expression in retaliation for prior unprotected speech. Practically speaking, petitioner argues, the effect of the RICO forfeiture order here was no different from the injunction prohibiting the publication of expressive material found to be a prior restraint in *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931). As petitioner puts it, see Brief for Petitioner 25, the forfeiture order imposed a complete *ban* on his future expression because of previous unprotected speech. We disagree. By lumping the forfeiture imposed in this case after a full criminal trial with an injunction enjoining future speech, petitioner stretches the term "prior restraint" well beyond the limits established by our cases. To accept petitioner's argument would virtually obliterate the distinction, solidly grounded in our cases, between prior restraints and subsequent punishments.

The term prior restraint is used "to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." M. Nimmer, Nimmer on Freedom of Speech §4.03, p. 4–14 (1984) (emphasis added). Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior

restraints. See *id.*, §4.03, at 4–16. This understanding of what constitutes a prior restraint is borne out by our cases, even those on which petitioner relies. In *Near* v. *Minnesota ex rel. Olson*, *supra*, we invalidated a court order that perpetually enjoined the named party, who had published a newspaper containing articles found to violate a state nuisance statute, from producing any future "malicious, scandalous and defamatory" publication. *Near*, therefore, involved a true restraint on future speech—a permanent injunction. So, too, did *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971), and *Vance* v. *Universal Amusement Co.*, 445 U. S. 308 (1980) *(per curiam)*, two other cases cited by petitioner. In *Keefe*, we vacated an order "*enjoining* petitioners from distributing leaflets anywhere in the town of Westchester, Illinois." 402 U. S., at 415 (emphasis added). And in *Vance*, we struck down a Texas statute that authorized courts, upon a showing that obscene films had been shown in the past, to issue an injunction of indefinite duration prohibiting the future exhibition of films that have not yet been found to be obscene. 445 U. S., at 311. See also *New York Times Co.* v. *United States*, 403 U. S. 713, 714 (1971) *(per curiam)* (Government sought to enjoin publication of the Pentagon Papers).

By contrast, the RICO forfeiture order in this case does not *forbid* petitioner from engaging in any expressive activities in the future, nor does it require him to obtain prior approval for any expressive activities. It only deprives him of specific assets that were found to be related to his previous racketeering violations. Assuming, of course, that he has sufficient untainted assets to open new stores, restock his inventory, and hire staff, petitioner can go back into the adult entertainment business tomorrow, and sell as many sexually explicit magazines and videotapes as he likes, without any risk of being held in contempt for violating a court order. Unlike the injunctions in

Near, *Keefe*, and *Vance*, the forfeiture order in this case imposes no legal impediment to—no prior restraint on—petitioner's ability to engage in any expressive activity he chooses. He is perfectly free to open an adult bookstore or otherwise engage in the production and distribution of erotic materials; he just cannot finance these enterprises with assets derived from his prior racketeering offenses.

The constitutional infirmity in nearly all of our prior restraint cases involving obscene material, including those on which petitioner and the dissent rely, see *post*, at 12, 18–19, was that Government had seized or otherwise restrained materials suspected of being obscene without a prior judicial determination that they were in fact so. See, *e.g.*, *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *A Quantity of Copies of Books* v. *Kansas*, 378 U. S. 205 (1964); *Roaden* v. *Kentucky*, 413 U. S. 496 (1973); *Vance*, *supra*. In this case, however, the assets in question were not ordered forfeited because they were believed to be obscene, but because they were directly related to petitioner's past racketeering violations. The RICO forfeiture statute calls for the forfeiture of assets because of the financial role they play in the operation of the racketeering enterprise. The statute is oblivious to the expressive or nonexpressive nature of the assets forfeited; books, sports cars, narcotics, and cash are all forfeitable alike under RICO. Indeed, a contrary scheme would be disastrous from a policy standpoint, enabling racketeers to evade forfeiture by investing the proceeds of their crimes in businesses engaging in expressive activity.

Nor were the assets in question ordered forfeited without according petitioner the requisite procedural safeguards, another recurring theme in our prior restraint cases. Contrasting this case with *Fort Wayne Books, Inc.* v. *Indiana*, 489 U. S. 46 (1989), aptly illustrates this point. In *Fort Wayne Books*, we

rejected on constitutional grounds the pretrial seizure of certain expressive material that was based upon a finding of "no more than *probable cause to believe* that a RICO violation had occurred." *Id.*, at 66 (emphasis in original). In so holding, we emphasized that there had been no prior judicial "determination that the seized items were `obscene' or that a RICO violation *ha[d] occurred*." *Ibid.* (emphasis in original). "[M]ere probable cause to believe a legal violation ha[d] transpired," we said, "is not adequate to remove books or films from circulation." *Ibid.* Here, by contrast, the seizure was not premature, because the Government established beyond a reasonable doubt the basis for the forfeiture. Petitioner had a full criminal trial on the merits of the obscenity and RICO charges during which the Government proved that four magazines and three videotapes were obscene and that the other forfeited assets were directly linked to petitioner's commission of racketeering offenses.

Petitioner's claim that the RICO forfeiture statute operated as an unconstitutional prior restraint in this case is also inconsistent with our decision in *Arcara* v. *Cloud Books, Inc.*, 478 U. S. 697 (1986). In that case, we sustained a court order, issued under a general nuisance statute, that closed down an adult bookstore that was being used as a place of prostitution and lewdness. In rejecting out-of-hand a claim that the closure order amounted to an improper prior restraint on speech, we stated:

> "The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution

> of particular materials is prohibited—indeed, the imposition of the closure order has nothing to do with any expressive conduct at all." *Id.,* at 705–706, n. 2.

This reasoning applies with equal force to this case, and thus confirms that the RICO forfeiture order was not a prior restraint on speech, but a punishment for past criminal conduct. Petitioner attempts to distinguish *Arcara* on the ground that obscenity, unlike prostitution or lewdness, has "`a significant expressive element.'" Brief for Petitioner 16 (quoting *Arcara, supra*, at 706). But that distinction has no bearing on the question whether the forfeiture order in this case was an impermissible prior restraint.

Finally, petitioner's proposed definition of the term "prior restraint" would undermine the time-honored distinction between barring speech in the future and penalizing past speech. The doctrine of prior restraint originated in the common law of England, where prior restraints of the press were not permitted, but punishment after publication was. This very limited application of the principle of freedom of speech was held inconsistent with our First Amendment as long ago as *Grosjean* v. *American Press Co.*, 297 U. S. 233, 246 (1936). While we may have given a broader definition to the term "prior restraint" than was given to it in English common law,[2] our decisions have steadfastly

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[2]The doctrine of prior restraint has its roots in the 16th- and 17th-century English system of censorship. Under that system, all printing presses and printers were licensed by the government, and nothing could lawfully be published without the prior approval of a government or church censor. See generally T. Emerson, System of Freedom of Expression 504 (1970). Beginning with *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931), we expanded this doctrine to include not only licensing schemes

preserved the distinction between prior restraints and subsequent punishments. Though petitioner tries to dismiss this distinction as "neither meaningful nor useful," Brief for Petitioner 29, we think it is critical to our First Amendment jurisprudence. Because we have interpreted the First Amendment as providing greater protection from prior restraints than from subsequent punishments, see *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 558–559 (1975), it is important for us to delineate with some precision the defining characteristics of a prior restraint. To hold that the forfeiture order in this case constituted a prior restraint would have the exact opposite effect: it would blur the line separating prior restraints from subsequent punishments to such a degree that it would be impossible to determine with any certainty whether a particular measure is a prior restraint or not.

In sum, we think that fidelity to our cases requires us to analyze the forfeiture here not as a prior restraint, but under normal First Amendment standards. So analyzing it, we find that petitioner's claim falls well short of the mark. He does not challenge either his 6-year jail sentence or his $100,000 fine as violative of the First Amendment. The first inquiry that comes to mind, then, is why, if

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requiring speech to be submitted to an administrative censor for prepublication review, but also injunctions against future speech issued by judges. See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 389–390 (1973) ("[T]he protection against prior restraint at common law barred only a system of administrative censorship. . . . [T]he Court boldly stepped beyond this narrow doctrine in *Near*"). Quite obviously, however, we have never before countenanced the essentially limitless expansion of the term that petitioner proposes.

incarceration for six years and a fine of $100,000 are permissible forms of punishment under the RICO statute, the challenged forfeiture of certain assets directly related to petitioner's racketeering activity is not. Our cases support the instinct from which this question arises; they establish quite clearly that the First Amendment does not prohibit either stringent criminal sanctions for obscenity offenses or forfeiture of expressive materials as punishment for criminal conduct.

We have in the past rejected First Amendment challenges to statutes that impose severe prison sentences and fines as punishment for obscenity offenses. See, *e.g.*, *Ginzburg* v. *United States*, 383 U. S. 463, 464–465, n. 2 (1966); *Smith* v. *United States*, 431 U. S. 291, 296, n. 3 (1977); *Fort Wayne Books*, 489 U. S., at 59, n. 8. Petitioner does not question the holding of those cases; he instead argues that RICO's forfeiture provisions are constitutionally overbroad, because they are not limited solely to obscene materials and the proceeds from the sale of such materials. Petitioner acknowledges that this is an unprecedented use of the overbreadth principle. See Brief for Petitioner 36. The "overbreadth" doctrine, which is a departure from traditional rules of standing, permits a defendant to make a facial challenge to an overly broad statute restricting speech, even if he himself has engaged in speech that could be regulated under a more narrowly drawn statute. See, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–613 (1973); *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 798–801 (1984). But the RICO statute does not criminalize constitutionally protected speech and therefore is materially different from the statutes at issue in our overbreadth cases. Cf., *e.g.*, *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 574–575 (1987).

Petitioner's real complaint is not that the RICO

statute is overbroad, but that applying RICO's forfeiture provisions to businesses dealing in expressive materials may have an improper "chilling" effect on free expression by deterring others from engaging in protected speech. No doubt the monetarily large forfeiture in this case may induce cautious booksellers to practice self-censorship and remove marginally protected materials from their shelves out of fear that those materials could be found obscene and thus subject them to forfeiture. But the defendant in *Fort Wayne Books* made a similar argument, which was rejected by the Court in this language:

> ``[D]eterence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized the practical reality that `any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.''' 489 U. S., at 60 (quoting *Smith* v. *California*, 361 U. S. 147, 154–155 (1959)).

Fort Wayne Books is dispositive of any chilling argument here, since the threat of forfeiture has no more of a chilling effect on free expression than the threat of a prison term or a large fine. Each racketeering charge exposes a defendant to a maximum penalty of 20 years' imprisonment and a fine of up to $250,000. 18 U. S. C. §1963(a) (1988 ed. and Supp. III). Needless to say, the prospect of such a lengthy prison sentence would have a far more powerful deterrent effect on protected speech than the prospect of any sort of forfeiture. Cf. *Blanton* v. *North Las Vegas*, 489 U. S. 538, 542 (1989) (loss of liberty is a more severe form of punishment than any monetary sanction). Similarly, a fine of several hundred thousand dollars would certainly be just as fatal to most businesses—and, as such, would result in the same degree of self-censorship—as a

forfeiture of assets. Yet these penalties are clearly constitutional under *Fort Wayne Books*.

We also have rejected a First Amendment challenge to a court order closing down an entire business that was engaged in expressive activity as punishment for criminal conduct. See *Arcara*, 478 U. S., at 707. Once again, petitioner does not question the holding of that case; in fact, he concedes that expressive businesses and assets can be forfeited under RICO as punishment for, say, narcotic offenses. See Brief for Petitioner 11 ("forfeiture of a media business purchased by a drug cartel would be constitutionally permissible"). Petitioner instead insists that the result here should be different because the RICO predicate acts were obscenity offenses. In *Arcara*, we held that criminal and civil sanctions having some incidental effect on First Amendment activities are subject to First Amendment scrutiny "only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in [*United States* v.] *O'Brien*, [391 U. S. 367 (1968)] or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in *Minneapolis Star* [*& Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575 (1983)]." 478 U. S., at 706–707 (footnote omitted). Applying that standard, we held that prostitution and lewdness, the criminal conduct at issue in *Arcara*, involve neither situation, and thus concluded that the First Amendment was not implicated by the enforcement of a general health regulation resulting in the closure of an adult bookstore. *Id.*, at 707. Under our analysis in *Arcara*, the forfeiture in this case cannot be said to offend the First Amendment. To be sure, the conduct that "drew the legal remedy" here—racketeering committed through obscenity violations—may be "expressive," see *R. A. V.* v. *St. Paul*, 505 U. S. ——, —— (1992), but our cases clearly hold that "obscenity" can be

regulated or actually proscribed consistent with the First Amendment, see, *e.g.*, *Roth* v. *United States*, 354 U. S. 476, 485 (1957); *Miller* v. *California*, 413 U. S. 15, 23 (1973).

Confronted with our decisions in *Fort Wayne Books* and *Arcara*—neither of which he challenges—petitioner's position boils down to this: stiff criminal penalties for obscenity offenses are consistent with the First Amendment; so is the forfeiture of expressive materials as punishment for criminal conduct; but the combination of the two somehow results in a violation of the First Amendment. We reject this counter-intuitive conclusion, which in effect would say that the whole is greater than the sum of the parts.

Petitioner also argues that the forfeiture order in this case—considered atop his 6-year prison term and $100,000 fine—is disproportionate to the gravity of his offenses and therefore violates the Eighth Amendment, either as a "cruel and unusual punishment" or as an "excessive fine."[3] Brief for Petitioner 40. The Court of Appeals, though, failed to distinguish between these two components of petitioner's Eighth Amendment challenge. Instead, the court lumped the two together, disposing of them both with the general statement that the Eighth Amendment does not require any proportionality review of a sentence less than life imprisonment without the possibility of parole. 943 F. 2d, at 836. But that statement has relevance only to the Eighth Amendment's prohibition against cruel and unusual punishments. Unlike the Cruel and Unusual

[3]This sense of disproportionality animates much of petitioner's First Amendment arguments as well. Questions of proportionality, however, should be dealt with directly and forthrightly under the Eighth Amendment, and not be allowed to influence *sub silentio* courts' First Amendment analysis.

Punishments Clause, which is concerned with matters such as the duration or conditions of confinement, "[t]he Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin* v. *United States*, —— U. S. ——, —— (1993) (slip op., at 6–7) (emphasis and internal quotation marks omitted); accord, *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 265 (1989) ("[A]t the time of the drafting and ratification of the [Eighth] Amendment, the word `fine' was understood to mean a payment to a sovereign as punishment for some offense"); *id.*, at 265, n. 6. The *in personam* criminal forfeiture at issue here is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional "fine." Accord *Austin*, *supra*.[4] Accordingly, the forfeiture in this case should be analyzed under the Excessive Fines Clause.

Petitioner contends that forfeiture of his entire business was an "excessive" penalty for the Government to exact "[o]n the basis of a few materials the jury ultimately decided were obscene." Brief for Petitioner 40. It is somewhat misleading, we think, to characterize the racketeering crimes for which petitioner was convicted as involving just a few materials ultimately found to be obscene. Petitioner was convicted of creating and managing what the District Court described as "an enormous racketeering enterprise." App. to Pet. for Cert. 160. It is in the light of the extensive criminal activities which petitioner apparently conducted through this racketeering enterprise over a substantial period of time that the question of whether or not the forfeiture

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[4]Unlike *Austin*, this case involves *in personam* criminal forfeiture not *in rem* civil forfeiture, so there was no threshold question concerning the applicability of the Eighth Amendment.

was "excessive" must be considered. We think it preferable that this question be addressed by the Court of Appeals in the first instance.

For these reasons, we hold that RICO's forfeiture provisions, as applied in this case, did not violate the First Amendment, but that the Court of Appeals should have considered whether they resulted in an "excessive" penalty within the meaning of the Eighth Amendment's Excessive Fines Clause. Accordingly, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.