Volume 2, Chapter 10: Freedom of Speech and Press
Part I, Section XII. Indecent Speech
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Ashcroft v. ACLU
542 U.S. ___ (2004)

[Majoirty: Kennedy, Stevens, Souter, Thomas, and Ginsburg. Concurring: Stevens, joined by Ginsburg. Dissenting: Scalia; Bryer, joined by Rehnquist and O'Connor.]

JUSTICE KENNEDY delivered the opinion of the Court.

This case presents a challenge to a statute enacted by Congress to protect minors from exposure to sexually explicit materials on the Internet, the Child Online Protection Act (COPA), 47 U. S. C. §231. We must decide whether the Court of Appeals was correct to affirm a ruling by the District Court that enforcement of COPA should be enjoined because the statute likely violates the First Amendment....

Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid, *R. A. V. v. St. Paul*, 505 U. S. 377, 382 (1992), and that the Government bear the burden of showing their constitutionality. *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, 817 (2000). This is true even when Congress twice has attempted to find a constitutional means to restrict, and punish, the speech in question....

I-A. COPA is the second attempt by Congress to make the Internet safe for minors by criminalizing certain Internet speech. The first attempt was the Communications Decency Act of 1996, 47 U. S. C. §223. The Court held the CDA unconstitutional because it was not narrowly tailored to serve a compelling governmental interest and because less restrictive alternatives were available. *Reno v. American Civil Liberties Union*, 521 U. S. 844 (1997).

In response to the Court's decision in *Reno*, Congress passed COPA. COPA imposes criminal penalties of a $50,000 fine and six months in prison for the knowing posting, for "commercial purposes," of World Wide Web content that is "harmful to minors." §231(a)(1). Material that is "harmful to minors" is defined as:

> "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—"(A) the average person, applying contemporary community standards, would find, taking the material asa whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;"(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and"(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." §231(e)(6).

"Minors" are defined as "any person under 17 years of age." §231(e)(7). A person acts for "commercial purposes only if such person is engaged in the business of making such communications." "Engaged in the business," in turn,

> "means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income)." §231(e)(2)....

I-B. Respondents, Internet content providers and others concerned with protecting the freedom of speech, filed suit in the United States District Court for the Eastern District of Pennsylvania. They sought a preliminary injunction against enforcement of the statute. After considering testimony from witnesses presented by both respondents and the Government, the District Court issued an order granting the preliminary injunction. The court first noted that the statute would place a burden on some protected speech. *American Civil Liberties Union v. Reno*, 31 F. Supp. 2d 473 (1999). The court then concluded that respondents were likely to prevail on their argument that there were less restrictive alternatives to the statute....

II-A. "This Court, like other appellate courts, has always applied the abuse of discretion standard on the review of a preliminary injunction."...

The District Court, in deciding to grant the preliminary injunction, concentrated primarily on the argument that there are plausible, less restrictive alternatives to COPA. A statute that "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno*. When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute. Id.

In considering this question, a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal. The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

In deciding whether to grant a preliminary injunction stage, a district court must consider whether the plaintiffs have demonstrated that they are likely to prevail on the merits. See, e.g., *Doran v. Salem Inn, Inc.*, 422 U. S. 922 (1975). (The court also considers whether the plaintiff has shown irreparable injury, but the parties in this case do not contest the correctness of the District Court's conclusion that a likelihood of irreparable injury had been established. As the Government bears the burden of proof on the ultimate question of COPA's constitutionality, respondents must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than COPA. Applying that analysis, the District Court concluded that respondents were likely to prevail. That conclusion was not an abuse of discretion, because on this record there are a number of plausible, less restrictive alternatives to the statute.

The primary alternative considered by the District Court was blocking and filtering software. Blocking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them. The District Court, in granting the preliminary injunction, did so primarily because the plaintiffs had proposed that filters are a less restrictive alternative to COPA and the Government had not shown it would be likely to disprove the plaintiffs' contention at trial. Ibid.

Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished. All of these things are true, moreover, regardless of how broadly or narrowly the definitions in COPA are construed.

Filters also may well be more effective than COPA. First, a filter can prevent minors from seeing all pornography, not just pornography posted to the Web from America. The District Court noted in its factfindings that one witness estimated that 40% of harmful-to-minors content comes from overseas. COPA does not prevent minors from having access to those foreign harmful materials. That alone makes it possible that filtering software might be more effective in serving Congress' goals. Effectiveness is likely to diminish even further if COPA is upheld, because the providers of the materials that would be covered by the statute simply can move their operations overseas. It is not an answer to say that COPA reaches some amount of materials that are harmful to minors; the question is whether it would reach more of them than less restrictive alternatives. In addition, the District Court found that verification systems may be subject to evasion and circumvention, for example by minors who have their own credit cards. Finally, filters also may be more effective because they can be applied to all forms of Internet communication, including e-mail, not just communications available via the World Wide Web.

That filtering software may well be more effective than COPA is confirmed by the findings of the Commission on Child Online Protection, a blueribbon commission created by Congress in COPA itself. Congress directed the Commission to evaluate the relative merits of different means of restricting minors' ability to gain access to harmful materials on the Internet. Note following 47 U. S. C. §231. It unambiguously found that filters are more effective than age-verification requirements. See Commission on Child Online Protection (COPA), Report to Congress, at 19–21, 23–25, 27 (Oct. 20, 2000) (assigning a score for "Effectiveness" of 7.4 for server-based filters

and 6.5 for client-based filters, as compared to 5.9 for independent adult-id verification, and 5.5 for credit card verification). Thus, not only has the Government failed to carry its burden of showing the District Court that the proposed alternative is less effective, but also a Government Commission appointed to consider the question has concluded just the opposite. That finding supports our conclusion that the District Court did not abuse its discretion in enjoining the statute.

Filtering software, of course, is not a perfect solution to the problem of children gaining access to harmful-to-minors materials. It may block some materials that are not harmful to minors and fail to catch some that are. See 31 F. Supp. 2d, at 492. Whatever the deficiencies of filters, however, the Government failed to introduce specific evidence proving that existing technologies are less effective than the restrictions in COPA. The District Court made a specific factfinding that "[n]o evidence was presented to the Court as to the percentage of time that blocking and filtering technology is over- or underinclusive." Ibid. In the absence of a showing as to the relative effectiveness of COPA and the alternatives proposed by respondents, it was not an abuse of discretion for the District Court to grant the preliminary injunction. The Government's burden is not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective. *Reno*. It is not enough for the Government to show that COPA has some effect. Nor do respondents bear a burden to introduce, or offer to introduce, evidence that their proposed alternatives are more effective. The Government has the burden to show they are less so. The Government having failed to carry its burden, it was not an abuse of discretion for the District Court to grant the preliminary injunction....

The need for parental cooperation does not automatically disqualify a proposed less restrictive alternative. *Playboy Entertainment Group*. ("A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act"). In enacting COPA, Congress said its goal was to prevent the "widespread availability of the Internet" from providing "opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control." Congressional Findings, note following 47 U. S. C. §231. COPA presumes that parents lack the ability, not the will, to monitor what their children see. By enacting programs to promote use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties....

II-B. There are also important practical reasons to let the injunction stand pending a full trial on the merits. First, the potential harms from reversing the injunction outweigh those of leaving it in place by mistake. Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech. The harm done from letting the injunction stand pending a trial on the merits, in contrast, will not be extensive. No prosecutions have yet been undertaken under the law, so none will be disrupted if the injunction stands. Further, if the injunction is upheld, the Government in the interim can enforce obscenity laws already on the books....

Third, and on a related point, the factual record does not reflect current technological reality—a serious flaw in any case involving the Internet. The technology of the Internet evolves at a rapid pace. Yet the factfindings of the District Court were entered in February 1999, over five years ago....

On this record, the Government has not shown that the less restrictive alternatives proposed by respondents should be disregarded. Those alternatives, indeed, may be more effective than the provisions of COPA. The District Court did not abuse its discretion when it entered the preliminary injunction. The judgment of the Court of Appeals is affirmed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring.

...If a prurient appeal is offensive in a puritan village, it may be a crime to post it on the World Wide Web"). I continue to believe that the Government may not penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children's consumption, cf. *Reno v. American Civil Liberties Union*, 521 U. S. 844 (1997), and consider that principle a sufficient basis for deciding this case.

But COPA's use of community standards is not the statute's only constitutional defect. Today's decision points to another: that, as far as the record reveals, encouraging deployment of user-based controls, such as filtering software, would serve Congress' interest in protecting minors from sexually explicit Internet materials as well or better than attempting to regulate the vast content of the World Wide Web at its source, and at a far less significant cost to First Amendment values.

In registering my agreement with the Court's less-restrictive-means analysis, I wish to underscore just how

restrictive COPA is. COPA is a content-based restraint on the dissemination of constitutionally protected speech. It enforces its prohibitions by way of the criminal law, threatening noncompliant Web speakers with a fine of as much as $50,000, and a term of imprisonment as long as six months, for each offense. 47 U. S. C. §231(a). Speakers who "intentionally" violate COPA are punishable by a fine of up to $50,000 for each day of the violation. Ibid. And because implementation of the various adult-verification mechanisms described in the statute provides only an affirmative defense, §231(c)(1), even full compliance with COPA cannot guarantee freedom from prosecution. Speakers who dutifully place their content behind age screens may nevertheless find themselves in court, forced to prove the lawfulness of their speech on pain of criminal conviction. Cf. *Ashcroft v. Free Speech Coalition*, 535 U. S. 234 (2002).

Criminal prosecutions are, in my view, an inappropriate means to regulate the universe of materials classified as "obscene," since "the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct." *Smith v. United States*, 431 U. S. 291, 316 (1977) (STEVENS, J., dissenting)....

JUSTICE SCALIA, dissenting.

I agree with JUSTICE BREYER's conclusion that the Child Online Protection Act (COPA), 47 U. S. C. §231, is constitutional. Both the Court and JUSTICE BREYER err, however, in subjecting COPA to strict scrutiny. Nothing in the First Amendment entitles the type of material covered by COPA to that exacting standard of review. "We have recognized that commercial entities which engage in 'the sordid business of pandering' by 'deliberately emphasiz[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed,' engage in constitutionally unprotected behavior." *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803 (2000) (SCALIA, J., dissenting)....

JUSTICE BREYER, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting....

I-A. The Act's definitions limit the material it regulates to material that does not enjoy First Amendment protection, namely legally obscene material, and very little more. A comparison of this Court's definition of unprotected, "legally obscene," material with the Act's definitions makes this clear....

Both [the obscenity test for advits and the] definitions [in COPA] define the relevant material through use of the critical terms "prurient interest" and "lacks serious literary, artistic, political, or scientific value." Insofar as material appeals to, or panders to, "the prurient interest," it simply seeks a sexual response. Insofar as "patently offensive" material with "no serious value" simply seeks that response, it does not seek to educate, it does not seek to elucidate views about sex, it is not artistic, and it is not literary. Compare, e.g., *Erznoznik v. Jacksonville*, 422 U. S. 205 (1975) (invalidating an ordinance regulating nudity in films, where the ban was not confined to "sexually explicit nudity" or otherwise limited), with *Ginzburg v. United States*, 383 U. S. 463, 471 (1966) (finding unprotected material that was "created, represented, and sold solely as a claimed instrument of the sexual stimulation it would bring"). That is why this Court, in *Miller v. California*, 413 U.S. 15 (1973), held that the First Amendment did not protect material that fit its definition.

The only significant difference between the present statute and *Miller*'s definition consists of the addition of the words "with respect to minors," §231(e)(6)(A), and "for minors," §231(e)(6)(C). But the addition of these words to a definition that would otherwise cover only obscenity expands the statute's scope only slightly. That is because the material in question (while potentially harmful to young children) must, first, appeal to the "prurient interest" of, i.e., seek a sexual response from, some group of adolescents or postadolescents (since young children normally do not so respond). And material that appeals to the "prurient interest[s]" of some group of adolescents or postadolescents will almost inevitably appeal to the "prurient interest[s]" of some group of adults as well.

The "lack of serious value" requirement narrows the statute yet further—despite the presence of the qualification "for minors." That is because one cannot easily imagine material that has serious literary, artistic, political, or scientific value for a significant group of adults, but lacks such value for any significant group of minors. Thus, the statute, read literally, insofar as it extends beyond the legally obscene, could reach only borderline cases. And to take the words of the statute literally is consistent with Congress' avowed objective in enacting this law; namely, putting material produced by professional pornographers behind screens that will verify the age of the viewer....

These limitations on the statute's scope answer many of the concerns raised by those who attack its constitutionality. Respondents fear prosecution for the Internet posting of material that does not fall within the statute's ambit as limited by the "prurient interest" and "no serious value" requirements; for example: an essay about

a young man's experience with masturbation and sexual shame; "a serious discussion about birth control practices, homosexuality, . . . or the consequences of prison rape"; an account by a 15-year-old, written for therapeutic purposes, of being raped when she was 13; a guide to self-examination for testicular cancer; a graphic illustration of how to use a condom; or any of the other postings of modern literary or artistic works or discussions of sexual identity, homosexuality, sexually transmitted diseases, sex education, or safe sex, let alone Aldous Huxley's Brave New World, J. D. Salinger's Catcher in the Rye, or, as the complaint would have it, "Ken Starr's report on the Clinton-Lewinsky scandal."...

These materials are not both (1) "designed to appeal to, or . . . pander to, the prurient interest" of significant groups of minors and (2) lacking in "serious literary, artistic, political, or scientific value" for significant groups of minors. §§231(e)(6)(A), (C). Thus, they fall outside the statute's definition of the material that it restricts, a fact the Government acknowledged at oral argument. Tr. of Oral Arg. 50–51....

II. I turn next to the question of "compelling interest," that of protecting minors from exposure to commercial pornography. No one denies that such an interest is "compelling." Rather, the question here is whether the Act, given its restrictions on adult access, significantly advances that interest. In other words, is the game worth the candle?

The majority argues that it is not, because of the existence of "blocking and filtering software." Ante. The majority refers to the presence of that software as a "less restrictive alternative." But that is a misnomer—a misnomer that may lead the reader to believe that all we need do is look to see if the blocking and filtering software is less restrictive; and to believe that, because in one sense it is (one can turn off the software), that is the end of the constitutional matter.

But such reasoning has no place here. Conceptually speaking, the presence of filtering software is not an alternative legislative approach to the problem of protecting children from exposure to commercial pornography. Rather, it is part of the status quo, i.e., the backdrop against which Congress enacted the present statute. It is always true, by definition, that the status quo is less restrictive than a new regulatory law. It is always less restrictive to do nothing than to do something. But "doing nothing" does not address the problem Congress sought to address—namely that, despite the availability of filtering software, children were still being exposed to harmful material on the Internet.

Thus, the relevant constitutional question is not the question the Court asks: Would it be less restrictive to do nothing? Of course it would be. Rather, the relevant question posits a comparison of (a) a status quo that includes filtering software with (b) a change in that status quo that adds to it an age-verification screen requirement.

Second, filtering software costs money. Not every family has the $40 or so necessary to install it....

Third, filtering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision. As to millions of American families, that is not a reasonable possibility. More than 28 million school age children have both parents or their sole parent in the work force, at least 5 million children are left alone at home without supervision each week, and many of those children will spend afternoons and evenings with friends who may well have access to computers and more lenient parents....

Fourth, software blocking lacks precision, with the result that those who wish to use it to screen out pornography find that it blocks a great deal of material that is valuable....

In sum, a "filtering software status quo" means filtering that underblocks, imposes a cost upon each family that uses it, fails to screen outside the home, and lacks precision. Thus, Congress could reasonably conclude that a system that relies entirely upon the use of such software is not an effective system. And a law that adds to that system an age-verification screen requirement significantly increases the system's efficacy. That is to say, at a modest additional cost to those adults who wish to obtain access to a screened program, that law will bring about better, more precise blocking, both inside and outside the home....

V....I recognize that some Members of the Court, now or in the past, have taken the view that the First Amendment simply does not permit Congress to legislate in this area. See, e.g., *Ginzburg* (Black, J., dissenting) ("[T]he Federal Government is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind"). Others believe that the Amendment does not permit Congress to legislate in certain ways, e.g., through the imposition of criminal penalties for obscenity. See, e.g., ante (STEVENS, J., concurring). There are strong constitutional arguments favoring these views. But the Court itself does not adopt those views. Instead, it finds that the Government has not proved the nonexistence of "less restrictive alternatives." That finding, if appropriate here, is universally appropriate. And if universally appropriate, it denies to Congress, in practice, the legislative leeway that the Court's language seem to promise. If this statute does not pass the Court's

"less restrictive alternative" test, what does? If nothing does, then the Court should say so clearly.

As I have explained, I believe the First Amendment permits an alternative holding. We could construe the statute narrowly—as I have tried to do—removing nearly all protected material from its scope. By doing so, we could reconcile its language with the First Amendment's demands. We would "save" the statute, "not . . . destroy it." *McConnell v. Federal Election Comm'n*, 540 U. S. __ (2003) (where a saving construction of the statute's language " 'is fairly possible,' " we must adopt it). And in the process, we would permit Congress to achieve its basic child-protecting objectives....

The Act tells the Government that, instead of prosecuting bans on obscenity to the maximum extent possible (as respondents have urged as yet another "alternative"), it can insist that those who make available material that is obscene or close to obscene keep that material under wraps, making it readily available to adults who wish to see it, while restricting access to children. By providing this third option—a "middle way"—the Act avoids the need for potentially speech-suppressing prosecutions.

That matters in a world where the obscene and the nonobscene do not come tied neatly into separate, easily distinguishable, packages. In that real world, this middle way might well have furthered First Amendment interests by tempering the prosecutorial instinct in borderline cases. At least, Congress might have so believed. And this likelihood, from a First Amendment perspective, might ultimately have proved more protective of the rights of viewers to retain access to expression than the all-or-nothing choice available to prosecutors in the wake of the majority's opinion.

For these reasons, I dissent.