

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

**ASHCROFT, ATTORNEY GENERAL v. AMERICAN
CIVIL LIBERTIES UNION ET AL.****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT**

No. 03–218. Argued March 2, 2004—Decided June 29, 2004

To protect minors from exposure to sexually explicit materials on the Internet, Congress enacted the Child Online Protection Act (COPA), 47 U. S. C. §231, which, among other things, imposes a \$50,000 fine and 6 months in prison for the knowing posting, for “commercial purposes,” of World Wide Web content that is “harmful to minors,” but provides an affirmative defense to commercial Web speakers who restrict access to prohibited materials by “requiring use of a credit card” or “any other reasonable measures that are feasible under available technology,” §231(c)(1). COPA was enacted in response to *Reno v. American Civil Liberties Union*, 521 U. S. 844, in which this Court held that the Communications Decency Act of 1996, Congress’ first attempt to make the Internet safe for minors by criminalizing certain Internet speech, was unconstitutional because it was not narrowly tailored to serve a compelling governmental interest and because less restrictive alternatives were available. Respondents, Web speakers and others concerned with protecting the freedom of speech, filed suit for a preliminary injunction against COPA’s enforcement. After considering testimony presented by both respondents and the Government, the District Court granted the preliminary injunction, concluding that respondents were likely to prevail on their argument that there were less restrictive alternatives to COPA, particularly blocking or filtering technology. The Third Circuit affirmed on different grounds, but this Court reversed, *Ashcroft v. American Civil Liberties Union*, 535 U. S. 564. On remand, the Third Circuit again affirmed, concluding, *inter alia*, that COPA was not the least restrictive means available for the Government to serve the interest of preventing minors from using the Internet to gain access to harmful materials.

Syllabus

Held: The Third Circuit was correct to affirm the District Court’s ruling that enforcement of COPA should be enjoined because the statute likely violates the First Amendment. Pp. 6–15.

(a) The District Court did not abuse its discretion when it entered the preliminary injunction. The abuse-of-discretion standard applies on review of such an injunction. Because 28 U. S. C. §1254(1)’s grant of appellate jurisdiction does not give this Court license to depart from an established review standard, *Walters v. National Assn. of Radiation Survivors*, 473 U. S. 305, 336, the injunction must be upheld and the case remanded for trial on the merits if the underlying constitutional question is close. There is therefore no need to consider the broader constructions of the statute adopted by the Court of Appeals. The District Court concentrated primarily on the argument that there are plausible, less restrictive alternatives to COPA. See *Reno*, 521 U. S., at 874. When plaintiffs challenge a content-based speech restriction, the Government has the burden to prove that the proposed alternatives will not be as effective as the challenged statute. *Ibid.* The purpose of the test is to ensure that speech is restricted no further than is necessary to accomplish Congress’ goal. The District Court’s conclusion that respondents were likely to prevail was not an abuse of discretion, because, on the record, the Government has not met its burden. Most importantly, respondents propose that blocking and filtering software is a less restrictive alternative, and the Government had not shown it would be likely to disprove that contention at trial. Filters impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, childless adults 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. Promoting filter use does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished. Filters, moreover, may well be more effective than COPA. First, the record demonstrates that a filter can prevent minors from seeing all pornography, not just pornography posted to the Web from America. That COPA does not prevent minors from accessing foreign harmful materials alone makes it possible that filtering software might be more effective in serving Congress’ goals. COPA’s effectiveness is likely to diminish even further if it is upheld, because providers of the materials covered by the statute simply can move their operations overseas. In addition, the District Court found that verification systems may be subject to evasion and circumvention, *e.g.*, by minors who have their own credit cards. Finally, filters also may be more ef-

Syllabus

fective because they can be applied to all forms of Internet communication, including e-mail, not just the World Wide Web. Filtering's superiority to COPA is confirmed by the explicit findings of the Commission on Child Online Protection, which Congress created to evaluate the relative merits of different means of restricting minors' ability to gain access to harmful materials on the Internet. §231, note. Although filtering software is not a perfect solution because it may block some materials not harmful to minors and fail to catch some that are, the Government has not satisfied its burden to introduce specific evidence proving that filters are less effective. The argument that filtering software is not an available alternative because Congress may not require its use carries little weight, since Congress may act to encourage such use by giving strong incentives to schools and libraries, *United States v. American Library Assn., Inc.*, 539 U. S. 194, and by promoting the development of filters by industry and their use by parents. The closest precedent is *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, which, like this case, involved a content-based restriction designed to protect minors from viewing harmful materials. The Court there concluded that, absent a showing that a less restrictive technological alternative already available to parents would not be as effective as a blanket speech restriction, the more restrictive option preferred by Congress could not survive strict scrutiny. *Id.*, at 826. The reasoning of *Playboy Entertainment Group*, and the holdings and force of this Court's precedents, compel the Court to affirm the preliminary injunction here. To do otherwise would be to do less than the First Amendment commands. *Id.*, at 830. Pp. 6–12.

(b) Important practical reasons also support letting the injunction stand pending a full trial on the merits. First, the potential harms from reversal outweigh those of leaving the injunction in place by mistake. Extraordinary harm and a serious chill upon protected speech may result where, as here, a prosecution is a likely possibility but only an affirmative defense is available, so that speakers may self-censor rather than risk the perils of trial. Cf. *Playboy Entertainment Group, supra*, at 817. The harm done from letting the injunction stand pending a trial on the merits, in contrast, will not be extensive. Second, there are substantial factual disputes remaining in the case, including a serious gap in the evidence as to the filtering software's effectiveness. By allowing the preliminary injunction to stand and remanding for trial, the Court requires the Government to shoulder its full constitutional burden of proof respecting the less restrictive alternative argument, rather than excuse it from doing so. Third, the factual record does not reflect current technological reality—a serious flaw in any case involving the Internet, which evolves

Syllabus

at a rapid pace. It is reasonable to assume that technological developments important to the First Amendment analysis have occurred in the five years since the District Court made its factfindings. By affirming the preliminary injunction and remanding for trial, the Court allows the parties to update and supplement the factual record to reflect current technology. Remand will also permit the District Court to take account of a changed legal landscape: Since that court made its factfindings, Congress has passed at least two further statutes that might qualify as less restrictive alternatives to COPA—a prohibition on misleading domain names, and a statute creating a minors-safe “dot-Kids” domain. Pp. 12–15.

322 F. 3d 240, affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG, J., joined. SCALIA, J., filed a dissenting opinion. BREYER, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O’CONNOR, J., joined.