SUPREME COURT OF THE UNITED STATES

No. 02–361

UNITED STATES, ET AL., APPELLANTS *v.* AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[June 23, 2003]

JUSTICE BREYER, concurring in the judgment.

The Children's Internet Protection Act (Act) sets conditions for the receipt of certain Government subsidies by public libraries. Those conditions require the libraries to install on their Internet-accessible computers technology, say, filtering software, that will help prevent computer users from gaining Internet access to child pornography, obscenity, or material comparably harmful to minors. 20 U. S. C. §§9134(f)(1)(A)(i) and (B)(i); 47 U. S. C. §§254(h)(6)(B)(i) and (C)(i). The technology, in its current form, does not function perfectly, for to some extent it also screens out constitutionally protected materials that fall outside the scope of the statute (*i.e.,* "overblocks") and fails to prevent access to some materials that the statute deems harmful (*i.e.,* "underblocks"). See 201 F. Supp. 2d 401, 448–449 (ED Pa. 2002); *ante,* at 11–12 (plurality opinion). In determining whether the statute's conditions consequently violate the First Amendment, the plurality first finds the "public forum" doctrine inapplicable, *ante,* at 8–11, and then holds that the statutory provisions are constitutional. I agree with both determinations. But I reach the plurality's ultimate conclusion in a different way.

In ascertaining whether the statutory provisions are constitutional, I would apply a form of heightened scrutiny, examining the statutory requirements in question

with special care. The Act directly restricts the public's receipt of information. See *Stanley* v. *Georgia,* 394 U. S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas"); *Reno* v. *American Civil Liberties Union,* 521 U. S. 844, 874 (1997). And it does so through limitations imposed by outside bodies (here Congress) upon two critically important sources of information—the Internet as accessed via public libraries. See *ante,* at 2, 6 (plurality opinion); *post,* at 6–7 (STEVENS, J., dissenting); *Board of Ed., Island Trees Union Free School Dist. No. 26* v. *Pico,* 457 U. S. 853, 915 (1982) (REHNQUIST, J., dissenting) (describing public libraries as places "designed for freewheeling inquiry"). See also *Reno, supra,* at 853, 868 (describing the Internet as a "vast democratic" medium and the World Wide Web, in part, as "comparable, from the readers' viewpoint, to . . . a vast library"); *Ashcroft* v. *American Civil Liberties Union,* 535 U. S. 564, 566 (2002). For that reason, we should not examine the statute's constitutionality as if it raised no special First Amendment concern—as if, like tax or economic regulation, the First Amendment demanded only a "rational basis" for imposing a restriction. Nor should we accept the Government's suggestion that a presumption in favor of the statute's constitutionality applies. See, *e.g.,* 201 F. Supp. 2d, at 409; Brief for United States 21–24.

At the same time, in my view, the First Amendment does not here demand application of the most limiting constitutional approach—that of "strict scrutiny." The statutory restriction in question is, in essence, a kind of "selection" restriction (a kind of editing). It affects the kinds and amount of materials that the library can present to its patrons. See *ante,* at 6–7, 10–11 (plurality opinion). And libraries often properly engage in the selection of materials, either as a matter of necessity (*i.e.,* due to the scarcity of resources) or by design (*i.e.,* in accordance with collection development policies). See, *e.g.,* 201 F. Supp. 2d,

at 408–409, 421, 462; *ante,* at 6–7, 11 (plurality opinion). To apply "strict scrutiny" to the "selection" of a library's collection (whether carried out by public libraries themselves or by other community bodies with a traditional legal right to engage in that function) would unreasonably interfere with the discretion necessary to create, maintain, or select a library's "collection" (broadly defined to include all the information the library makes available). Cf. *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241, 256–258 (1974) (protecting newspaper's exercise of editorial control and judgment). That is to say, "strict scrutiny" implies too limiting and rigid a test for me to believe that the First Amendment requires it in this context.

Instead, I would examine the constitutionality of the Act's restrictions here as the Court has examined speech-related restrictions in other contexts where circumstances call for heightened, but not "strict," scrutiny—where, for example, complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests. Typically the key question in such instances is one of proper fit. See, *e.g., Board of Trustees of State Univ. of N. Y.* v. *Fox,* 492 U. S. 469 (1989); *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC,* 518 U. S. 727, 740–747 (1996) (plurality opinion); *Turner Broadcasting System, Inc.* v. *FCC,* 520 U. S. 180, 227 (1997) (BREYER, J., concurring in part); *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 389–390 (1969).

In such cases the Court has asked whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives. It has considered the legitimacy of the statute's objective, the extent to which the statute will tend to achieve that objective, whether there are other, less restrictive ways of achieving that objective, and ultimately whether the statute works speech-related harm that, in relation to that

objective, is out of proportion. In *Fox, supra,* at 480, for example, the Court stated:

> "What our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but, as we have put it in the other contexts . . ., a means narrowly tailored to achieve the desired objective." (Internal quotation marks and citations omitted.)

Cf., *e.g., Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.,* 447 U. S. 557, 564 (1980); *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968); *Clark* v. *Community for Creative Non-Violence,* 468 U. S. 288, 293 (1984). This approach does not substitute a form of "balancing" for less flexible, though more speech-protective, forms of "strict scrutiny." Rather, it *supplements* the latter with an approach that is more flexible but nonetheless provides the legislature with less than ordinary leeway in light of the fact that constitutionally protected expression is at issue. Cf. *Fox, supra,* at 480–481; *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748, 769–773 (1976).

The Act's restrictions satisfy these constitutional demands. The Act seeks to restrict access to obscenity, child pornography, and, in respect to access by minors, material that is comparably harmful. These objectives are "legitimate," and indeed often "compelling." See, *e.g., Miller* v. *California,* 413 U. S. 15, 18 (1973) (interest in prohibiting access to obscene material is "legitimate"); *Reno, supra,* at 869–870 (interest in "shielding" minors from exposure to indecent material is "'compelling'"); *New York* v. *Ferber,* 458 U. S. 747, 756–757 (1982) (same). As the District

Court found, software filters "provide a relatively cheap and effective" means of furthering these goals. 201 F. Supp. 2d, at 448. Due to present technological limitations, however, the software filters both "overblock," screening out some perfectly legitimate material, and "underblock," allowing some obscene material to escape detection by the filter. *Id.,* at 448–449. See *ante,* at 11–12 (plurality opinion). But no one has presented any clearly superior or better fitting alternatives. See *ante,* at 10, n. 3 (plurality opinion).

At the same time, the Act contains an important exception that limits the speech-related harm that "overblocking" might cause. As the plurality points out, the Act allows libraries to permit any adult patron access to an "overblocked" Web site; the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, "Please disable the entire filter." See *ante,* at 12; 20 U. S. C. §9134(f)(3) (permitting library officials to "disable a technology protection measure . . . to enable access for bona fide research or other lawful purposes"); 47 U. S. C. §254(h)(6)(D) (same).

The Act does impose upon the patron the burden of making this request. But it is difficult to see how that burden (or any delay associated with compliance) could prove more onerous than traditional library practices associated with segregating library materials in, say, closed stacks, or with interlibrary lending practices that require patrons to make requests that are not anonymous and to wait while the librarian obtains the desired materials from elsewhere. Perhaps local library rules or practices could further restrict the ability of patrons to obtain "overblocked" Internet material. See, *e.g., In re Federal-State Joint Board on Universal Service: Children's Internet Protection Act*, 16 FCC Rcd. 8182, 8183, ¶2, 8204, ¶53 (2001) (leaving determinations regarding the appropriateness of compliant Internet safety policies and their dis-

abling to local communities). But we are not now considering any such local practices. We here consider only a facial challenge to the Act itself.

Given the comparatively small burden that the Act imposes upon the library patron seeking legitimate Internet materials, I cannot say that any speech-related harm that the Act may cause is disproportionate when considered in relation to the Act's legitimate objectives. I therefore agree with the plurality that the statute does not violate the First Amendment, and I concur in the judgment.