

BREYER, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 03–218

JOHN D. ASHCROFT, ATTORNEY GENERAL,
PETITIONER *v.* AMERICAN CIVIL
LIBERTIES UNION ET AL.

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

[June 29, 2004]

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

The Child Online Protection Act (Act), 47 U. S. C. §231, seeks to protect children from exposure to commercial pornography placed on the Internet. It does so by requiring commercial providers to place pornographic material behind Internet “screens” readily accessible to adults who produce age verification. The Court recognizes that we should “proceed . . . with care before invalidating the Act,” while pointing out that the “imperative of according respect to the Congress . . . does not permit us to depart from well-established First Amendment principles.” *Ante*, at 1. I agree with these generalities. Like the Court, I would subject the Act to “the most exacting scrutiny,” *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 642 (1994), requiring the Government to show that any restriction of nonobscene expression is “narrowly drawn” to further a “compelling interest” and that the restriction amounts to the “least restrictive means” available to further that interest, *Sable Communications of Cal., Inc. v. FCC*, 492 U. S. 115, 126 (1989). See also *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U. S. 727, 755–756 (1996).

Nonetheless, my examination of (1) the burdens the Act

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imposes on protected expression, (2) the Act's ability to further a compelling interest, and (3) the proposed "less restrictive alternatives" convinces me that the Court is wrong. I cannot accept its conclusion that Congress could have accomplished its statutory objective—protecting children from commercial pornography on the Internet—in other, less restrictive ways.

I

Although the Court rests its conclusion upon the existence of less restrictive alternatives, I must first examine the burdens that the Act imposes upon protected speech. That is because the term "less restrictive alternative" is a comparative term. An "alternative" is "less restrictive" only if it will work less First Amendment harm than the statute itself, while at the same time similarly furthering the "compelling" interest that prompted Congress to enact the statute. Unlike the majority, I do not see how it is possible to make this comparative determination without examining both the extent to which the Act regulates protected expression and the nature of the burdens it imposes on that expression. That examination suggests that the Act, properly interpreted, imposes a burden on protected speech that is no more than modest.

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.

Material is legally obscene if

- "(a) . . . 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ;
- (b) . . . the work depicts or describes, in a patently of-

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fensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U. S. 15, 24 (1973).

The present statute defines the material that it regulates as material that meets all of the following criteria:

“(A) the average person, applying contemporary community standards, would find, taking the material as a whole *and with respect to minors*, [that the material] is designed to appeal to, or is designed to pander to, the prurient interest;

“(B) [the material] 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) [the material] taken as a whole, lacks serious literary, artistic, political, or scientific value *for minors*.” 47 U. S. C. §231(e)(6) (emphasis added).

Both definitions 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, 213 (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

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sold solely as a claimed instrument of the sexual stimulation it would bring”). That is why this Court, in *Miller*, 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. See S. Rep. No. 105–225, p. 3 (1998) (hereinafter S. Rep.) (“The bill seeks to restrict access to commercial pornography on the Web by requiring those engaged in the business of the commercial distribution of material that is harmful to minors to take certain prescribed steps to restrict access to such material by

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minors . . .”); H. R. Rep. No. 105–775, pp. 5, 14 (1998) (hereinafter H. R. Rep.) (explaining that the bill is aimed at the sale of pornographic materials and provides a defense for the “commercial purveyors of pornography” that the bill seeks to regulate).

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.” See G. Dillard, *Shame on Me*, Lodging 609–612; *Reno v. American Civil Liberties Union*, 521 U. S. 844, 871 (1997); Brief for Respondents 29 (citing Lodging 732–736); Brief for American Society of Journalists and Authors et al. as *Amici Curiae* 8, and n. 7 (referring to a guide on the medical advice site www.afraidtoask.com); 322 F. 3d 240, 268 (CA3 2003) (citing Safer Sex Institute, safersex.org/condoms/how.to.use); Complaint ¶1, Lodging 40–41 (“a Mapplethorpe photograph,” referring to the work of controversial artist Robert Mapplethorpe); *Id.*, at 667–669 (Pl. Exh. 80, PlanetOut Youth Message Boards (Internet discussion board for gay teens)); declaration of Adam K.

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Glickman, president and CEO, Addazi, Inc. d/b/a Condo-mania, Supp. Lodging of Petitioner 4–10 (describing how Web site has been used for health education); declaration of Roberta Spyer, president and publisher, OBGYN.net, *id.*, at 15–16 (describing Web site as resource for obstetrics, gynecology, and women’s health issues); Brief for Volunteer Lawyers for the Arts et al. as *Amici Curiae* 15 (listing works of literature removed from some schools); Complaint ¶1, Lodging 40–41.

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.

I have found nothing elsewhere in the statute’s language that broadens its scope. Other qualifying phrases, such as “taking the material as a whole,” §§231(e)(6)(A), (C), and “for commercial purposes,” §231(a)(1), limit the statute’s scope still more, requiring, for example, that individual images be considered in context. See *Roth v. United States*, 354 U. S. 476, 490 (1957). In sum, the Act’s definitions limit the statute’s scope to commercial pornography. It affects unprotected obscene material. Given the inevitable uncertainty about how to characterize close-to-obscene material, it could apply to (or chill the production of) a limited class of borderline material that courts might ultimately find is protected. But the examples I have just given fall outside that class.

B

The Act does not censor the material it covers. Rather, it requires providers of the “harmful to minors” material to restrict minors’ access to it by verifying age. They can do so by inserting screens that verify age using a credit card,

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adult personal identification number, or other similar technology. See §231(c)(1). In this way, the Act requires creation of an internet screen that minors, but not adults, will find difficult to bypass.

I recognize that the screening requirement imposes some burden on adults who seek access to the regulated material, as well as on its providers. The cost is, in part, monetary. The parties agreed that a Web site could store card numbers or passwords at between 15 and 20 cents per number. *American Civil Liberties Union v. Reno*, 31 F. Supp. 2d 473, 488–489, ¶¶45–47 (ED Pa. 1999). And verification services provide free verification to Web site operators, while charging users less than \$20 per year. *Id.*, at 489–490, ¶¶48–53. According to the trade association for the commercial pornographers who are the statute’s target, use of such verification procedures is “standard practice” in their online operations. See S. Rep., at 7; Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearing on H. R. 3783 et al. before the House Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce, 105th Cong., 2d Sess., 46, 48 (1998) (prepared statement of Jeffrey J. Douglas, Executive Director and Chairman, Free Speech Coalition (calling the proposed child-protecting mechanisms “effective and appropriate”)).

In addition to the monetary cost, and despite strict requirements that identifying information be kept confidential, see 47 U. S. C. §§231(d)(1), 501, the identification requirements inherent in age-screening may lead some users to fear embarrassment. See 31 F. Supp. 2d, at 495. Both monetary costs and potential embarrassment can deter potential viewers and, in that sense, the statute’s requirements may restrict access to a site. But this Court has held that in the context of congressional efforts to protect children, restrictions of this kind do not automati-

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cally violate the Constitution. And the Court has approved their use. See, e.g., *United States v. American Library Assn., Inc.*, 539 U.S. 194, 209 (2003) (plurality opinion) (“[T]he Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment”). Cf. *Reno*, 521 U.S., at 890 (O’CONNOR, J., concurring in judgment in part and dissenting in part) (calling the age-verification requirement similar to “a bouncer [who] checks a person’s driver’s license before admitting him to a nightclub”).

In sum, the Act at most imposes a modest additional burden on adult access to legally obscene material, perhaps imposing a similar burden on access to some protected borderline obscene material as well.

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.” See *Denver Area Ed. Telecommunications Consortium, Inc.*, 518 U.S., at 743 (opinion of BREYER, J.) (interest in protecting minors is “compelling”); *Sable Communications*, 492 U.S., at 126 (same); *Ginsberg v. New York*, 390 U.S. 629, 639–640 (1968). 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*, at 8–12. 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

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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. Given the existence of filtering software, does the problem Congress identified remain significant? Does the Act help to address it? These are questions about the relation of the Act to the compelling interest. Does the Act, compared to the status quo, significantly advance the ball? (An affirmative answer to these questions will not justify “[a]ny restriction on speech,” as the Court claims, *ante*, at 8, for a final answer in respect to constitutionality must take account of burdens and alternatives as well.)

The answers to these intermediate questions are clear: Filtering software, as presently available, does not solve the “child protection” problem. It suffers from four serious inadequacies that prompted Congress to pass legislation instead of relying on its voluntary use. First, its filtering is faulty, allowing some pornographic material to pass through without hindrance. Just last year, in *American Library Assn.*, JUSTICE STEVENS described “fundamental defects in the filtering software that is now available or

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that will be available in the foreseeable future.” 539 U. S., at 221 (dissenting opinion). He pointed to the problem of underblocking: “Because the software relies on key words or phrases to block undesirable sites, it does not have the capacity to exclude a precisely defined category of images.” *Ibid.* That is to say, in the absence of words, the software alone cannot distinguish between the most obscene pictorial image and the Venus de Milo. No Member of this Court disagreed.

Second, filtering software costs money. Not every family has the \$40 or so necessary to install it. See 31 F. Supp. 2d, at 492, ¶65. By way of contrast, age screening costs less. See *supra*, at 7 (citing costs of up to 20 cents per password or \$20 per user for an identification number).

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. See *United States v. Playboy Entertainment Group, Inc.*, 529 U. S. 803, 842 (2000) (BREYER, J., dissenting).

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. As JUSTICE STEVENS pointed out, “the software’s reliance on words to identify undesirable sites necessarily results in the blocking of thousands of pages that contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies’ category definitions, such as pornography or sex.” *American Library*

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Assn., *supra*, at 222 (internal quotation marks and citations omitted). Indeed, the American Civil Liberties Union (ACLU), one of the respondents here, told Congress that filtering software “block[s] out valuable and protected information, such as information about the Quaker religion, and web sites including those of the American Association of University Women, the AIDS Quilt, the Town Hall Political Site (run by the Family Resource Center, Christian Coalition and other conservative groups).” Hearing on Internet Indecency before the Senate Committee on Commerce, Science, and Transportation, 105th Cong., 2d Sess., 64 (1998). The software “is simply incapable of discerning between constitutionally protected and unprotected speech.” *Id.*, at 65. It “inappropriately blocks valuable, protected speech, and does not effectively block the sites [it is] intended to block.” *Id.*, at 66 (citing reports documenting overblocking).

Nothing in the District Court record suggests the contrary. No respondent has offered to produce evidence at trial to the contrary. No party has suggested, for example, that technology allowing filters to interpret and discern among images has suddenly become, or is about to become, widely available. Indeed, the Court concedes that “[f]iltering software, of course, is not a perfect solution to the problem.” *Ante*, at 10.

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.

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The Court's response—that 40% of all pornographic material may be of foreign origin—is beside the point. *Ante*, at 9 (citing the District Court's findings). Even assuming (I believe unrealistically) that *all* foreign originators will refuse to use screening, the Act would make a difference in respect to 60% of the Internet's commercial pornography. I cannot call that difference insignificant.

The upshot is that Congress could reasonably conclude that, despite the current availability of filtering software, a child protection problem exists. It also could conclude that a precisely targeted regulatory statute, adding an age-verification requirement for a narrow range of material, would more effectively shield children from commercial pornography.

Is this justification sufficient? The lower courts thought not. But that is because those courts interpreted the Act as imposing far more than a modest burden. They assumed an interpretation of the statute in which it reached far beyond legally obscene and borderline-obscene material, affecting material that, given the interpretation set forth above, would fall well outside the Act's scope. But we must interpret the Act to save it, not to destroy it. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937). So interpreted, see *supra*, at 3–6, the Act imposes a far lesser burden on access to protected material. Given the modest nature of that burden and the likelihood that the Act will significantly further Congress' compelling objective, the Act may well satisfy the First Amendment's stringent tests. Cf. *Sable Communications*, 492 U. S., at 130. Indeed, it does satisfy the First Amendment unless, of course, there is a genuine alternative, “less restrictive” way similarly to further that objective.

III

I turn, then, to the actual “less restrictive alternatives” that the Court proposes. The Court proposes two real

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alternatives, *i.e.*, two potentially less restrictive ways in which Congress might alter the status quo in order to achieve its “compelling” objective.

First, the Government might “act to encourage” the use of blocking and filtering software. *Ante*, at 11. The problem is that any argument that rests upon this alternative proves too much. If one imagines enough government resources devoted to the problem and perhaps additional scientific advances, then, of course, the use of software might become as effective and less restrictive. Obviously, the Government could give all parents, schools, and Internet cafes free computers with filtering programs already installed, hire federal employees to train parents and teachers on their use, and devote millions of dollars to the development of better software. The result might be an alternative that is extremely effective.

But the Constitution does not, because it cannot, require the Government to disprove the existence of magic solutions, *i.e.*, solutions that, put in general terms, will solve any problem less restrictively but with equal effectiveness. Otherwise, “the undoubted ability of lawyers and judges,” who are not constrained by the budgetary worries and other practical parameters within which Congress must operate, “to imagine *some* kind of slightly less drastic or restrictive an approach would make it impossible to write laws that deal with the harm that called the statute into being.” *Playboy Entertainment Group*, 529 U.S., at 841 (BREYER, J., dissenting). As Justice Blackmun recognized, a “judge would be unimaginative indeed if he could not come up with something a little less ‘drastic’ or a little less ‘restrictive’ in almost any situation, and thereby enable himself to vote to strike legislation down.” *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188–189 (1979) (concurring opinion). Perhaps that is why no party has argued seriously that additional expenditure of government funds to encourage the use of screening is a “less

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restrictive alternative.”

Second, the majority suggests decriminalizing the statute, noting the “chilling effect” of criminalizing a category of speech. *Ante*, at 9. To remove a major sanction, however, would make the statute less effective, virtually by definition.

IV

My conclusion is that the Act, as properly interpreted, risks imposition of minor burdens on some protected material—burdens that adults wishing to view the material may overcome at modest cost. At the same time, it significantly helps to achieve a compelling congressional goal, protecting children from exposure to commercial pornography. There is no serious, practically available “less restrictive” way similarly to further this compelling interest. Hence the Act is constitutional.

V

The Court’s holding raises two more general questions. First, what has happened to the “constructive discourse between our courts and our legislatures” that “is an integral and admirable part of the constitutional design”? *Blakely v. Washington*, *ante*, at 1 (KENNEDY, J., dissenting). After eight years of legislative effort, two statutes, and three Supreme Court cases the Court sends this case back to the District Court for further proceedings. What proceedings? I have found no offer by either party to present more relevant evidence. What remains to be litigated? I know the Court says that the parties may “introduce further evidence” as to the “relative restrictiveness and effectiveness of alternatives to the statute.” *Ante*, at 14–15. But I do not understand what that new evidence might consist of.

Moreover, Congress passed the current statute “[i]n response to the Court’s decision in *Reno*” striking down an

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earlier statutory effort to deal with the same problem. *Ante*, at 3. Congress read *Reno* with care. It dedicated itself to the task of drafting a statute that would meet each and every criticism of the predecessor statute that this Court set forth in *Reno*. It incorporated language from the Court's precedents, particularly the *Miller* standard, virtually verbatim. Compare 413 U. S., at 24, with §231(e)(6). And it created what it believed was a statute that would protect children from exposure to obscene professional pornography without obstructing adult access to material that the First Amendment protects. See H. R. Rep., at 5 (explaining that the bill was "carefully drafted to respond to the Supreme Court's decision in *Reno*"); S. Rep., at 2 (same). What else was Congress supposed to do?

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*, 383 U. S., at 476 (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*, at 2 (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.

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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.” *NLRB*, 301 U. S., at 30. Accord, *McConnell v. Federal Election Comm’n*, 540 U. S. __, __ (2003) (slip op., at 72) (where a saving construction of the statute’s language “‘is fairly possible,’” we must adopt it (quoting *Crowell v. Benson*, 285 U. S. 22, 62 (1932))). And in the process, we would permit Congress to achieve its basic child-protecting objectives.

Second, will the majority’s holding in practice mean greater or lesser protection for expression? I do not find the answer to this question obvious. The Court’s decision removes an important weapon from the prosecutorial arsenal. That weapon would have given the Government a choice—a choice other than “ban totally or do nothing at all.” 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

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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.