No. 98-1682

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

PLAYBOY ENTERTAINMENT GROUP, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, Tit. V, 110 Stat. 136, requires that a cable television operator "providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming" either "fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber * * * does not receive it," or, alternatively, not provide that programming "during the hours of the day (as determined by the [Federal Communication] Commission) when a significant number of children are likely to view it."

The questions presented are:

1. Whether Section 505 violates the First Amendment.

2. Whether the three-judge district court was divested of jurisdiction to dispose of the government's post-judgment motions under Rules 59 and 60 of the Federal Rules of Civil Procedure by the government's filing of a notice of appeal while those motions were pending.

PARTIES TO THE PROCEEDINGS

Appellants are the United States of America, Janet Reno, Attorney General, the United States Department of Justice, and the Federal Communications Commission. Appellee is Playboy Entertainment Group, Inc. Spice Entertainment Companies, Inc. (formerly Graff Pay-Per-View), was a party below but, after failing to obtain a preliminary injunction, chose not to participate in litigation of the merits. Spice has since been purchased by Playboy.

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OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-39a) is reported at 30 F. Supp. 2d 702. The permanent injunction (J.S. App. 87a-88a) and the order denying the government's post-trial motions (J.S. App. 91a-92a) are unreported. The prior opinion of the district court denying a preliminary injunction (J.S. App. 40a-86a) is reported at 945 F. Supp. 772. The order of this Court affirming the denial of the preliminary injunction is reported at 520 U.S. 1141. The opinion of the district court granting a temporary restraining order (Mot. to Aff. App. 1a-17a) is reported at 918 F. Supp. 813.

JURISDICTION

The permanent injunction of the three-judge district court, dated December 29, 1998, was entered on December 30, 1998. The government filed a notice of appeal on January 19, 1999 (a Tuesday after a Monday holiday). On March 10,

1999, Justice Souter extended the time for filing a jurisdictional statement to and including April 19, 1999. On March 18, 1999, the district court entered an order dismissing the government's motions to alter or amend the judgment and to correct the judgment. On April 7, 1999, the government filed a second notice of appeal, from both the original injunction and the order dismissing the government's post-trial motions. This Court noted probable jurisdiction on June 21, 1999. The jurisdiction of this Court rests on Section 561(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 143, and 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." Sections 504, 505 and 561 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 136, 142, are reproduced at J.S. App. 96a-101a.

STATEMENT

This action arises out of Congress's efforts to address the problem of "signal bleed" of cable television channels that are devoted to sexually explicit, "adult" programming. Such signal bleed occurs when cable operators partially scramble or otherwise block the signal on sexually explicit channels, in an effort to deprive those who do not pay for such channels of a clear signal. Because the scrambling is only partial, however, intelligible video and audio signals remain, and are transmitted to all households on the cable system. As a result, children in all households on a given cable system—even those households that do not subscribe to appellee's programming services—may be able to view and hear the sexually explicit content on appellee's programming that is distributed by cable operators.

1. Approximately 62 million households nationwide receive cable television. J.S. App. 53a. Cable customers typically are offered a "basic" package of channels for a monthly fee, but they also may subscribe at an additional monthly fee to premium channels that provide sports programming, recently released movies, or adult, sexually explicit entertainment. *Id.* at 5a. Cable customers may also order premium programming on a pay-per-view basis, permitting the customer access to a particular movie, sporting event, or sexually explicit program for a specified additional fee. *Ibid.*

In an effort to provide that cable customers who have not paid for premium programming are not able to view it, most cable operators scramble the programming at their central transmission facility, using either "RF" or "baseband" technology. RF scrambling causes the picture to jump and roll on the television sets of customers who are not authorized to receive the premium channel, although the images on the screen can be discerned to varying degrees at varying times. The cable system provides customers who are authorized to receive premium channels with a set-top device, called a "converter," which is connected between the subscriber line and the television set to counteract the scrambling and permit clear reception of one or more premium channels. RF scrambling does not affect the audio portion of the signal, and, as a result, the scrambling does not prevent the audio portion from being heard clearly on all customers' television sets at all times. J.S. App. 7a.

Modern baseband scrambling, in contrast, renders the video portion of the signal unintelligible. As with RF scrambling, subscribers authorized to receive premium programming are given converters to permit clear reception. Some baseband scrambling systems also encrypt the audio portion of the signal, so that no intelligible audio is presented to customers who do not subscribe to the scrambled premium service. For the most part, however, cable operators use RF

scrambling or prior generations of baseband scrambling, which do not render the video completely unintelligible and do not scramble the audio at all. J.S. App. 7a-8a.

The limitations of these scrambling systems give rise to "signal bleed." In any system that carries premium programming, all customers of the system receive the scrambled signal on all televisions that are connected to the cable system. As a result, the cables in those systems that carry premium programming but do not conform to the scrambling and blocking requirements of Section 505 typically carry a partially scrambled video signal and a completely clear audio signal of the premium programming, including, when offered, sexually explicit programming. J.S. App. 9a.

2. Congress enacted the statutory provision at issue in this case, Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 136, to address the problem of signal bleed in the context of cable channels that are devoted to sexually explicit, "adult" programming. Congress was "aware that some cable systems [were] permitting 'adult' programs that [were] clearly unsuitable for children to be received in the home without sufficient scrambling." S. Rep. No. 367, 103d Cong., 2d Sess. 103 (1994). Senator Feinstein, one of the sponsors of Section 505, explained that "[p]arents * * * come home after work only to find their children * * * watching or listening to the adults-only channel, a channel that many parents did not even know existed." 141 Cong. Rec. S8167 (daily ed. June 12, 1995). As an example, she referred to the fact that a "partially scrambled pornography signal was broadcast only one channel away from a network broadcasting cartoons and was easily accessible for children to view." *Ibid.*

The record in this case reflects the very graphic audio and visual content of the sexually explicit programming services the availability of which to children was the subject of congressional concern. We have lodged with the Court copies

of three tapes, DXs 1, 2 and 44, that are in the record in this case[1] and that demonstrate the extent to which reasonably discernible images and sounds can be seen and heard on sexually explicit cable programming services operated by appellee and others, despite the scrambling that cable operators ordinarily undertake. In addition, we have lodged two other videotapes in the record, DXs 11 and 35, that show unscrambled programming on Playboy and Spice. These tapes were among those provided by appellee and Spice in response to a government request for copies of their programming on randomly selected dates.[2] Finally, some of the content of the programming on Playboy, Spice, and similar sexually explicit cable programming services is described at pages 5-10 of Defendants' Post-Trial Brief, which was filed in

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[1] At the trial in this case, the court reserved ruling on admissibility of evidence until after trial. Tr. 811-812. The parties then submitted letters to the court, dated March 25, 1998, attaching their respective lists of exhibits. The letters were docketed by the district court on April 17, 1998. Docket Entries 243, 244. The letters set forth the parties' agreement that the parties' exhibits may be admitted into evidence subject to objections as to relevancy, to be asserted, if at all, in connection with the parties' reply briefs, as Judge Farnan had indicated at the pretrial conference. No such objections were made in the parties' reply briefs in the district court.

[2] A useful summary of the nature of the programming at issue in this case was provided by the marketing vice-president of Spice, which operates several sexually explicit programming services similar to those operated by appellee Playboy. He testified (Nolfi Dep. 35) regarding a document that provides the "content guidelines" used for the Spice and Spice Hot networks. According to the document (DX Vol. 1, No. 73), the Spice network depicts such activities as "female masturbation/external," "girl/girl sex," "oral sex/cunnilingus," "explicit language," "wide shot penis/flaccid," and "wide shot vagina." *Id.* at TWC00132. According to the same document, programming on the even more explicit Spice Hot network depicts "female masturbation with penetration," "male masturbation," "medium shot penis/erect," "oral sex/fellatio," "vaginal penetration/objects," "vaginal penetration/penis," and "vaginal penetration/tongue." *Ibid.*

the district court; we have lodged copies of those pages from our post-trial brief with the Clerk of this Court. We have not reproduced descriptions of the programming and the language used in the programming in this brief, but we urge the Court to examine those lodgings, so that the Court may be familiar with the programming at issue in this case and with the problem of signal bleed.

Congress's concerns about such programming were triggered by complaints from across the country. For example, Mr. Anthony Snesko of Poway, California, had made 550 copies of a videotape showing the Spice Channel as it appeared on his television at 9 a.m. sometime in April or May, 1994, and had distributed a copy to every Member of the Senate and House of Representatives. DXs 1, 47.[3] In December 1995, a mother from Cape Coral, Florida, complained to her Representative that she had recently found her eight-year-old son, seven-year-old daughter, and a playmate watching Spice at 4 p.m., "transfixed" by scenes of "a naked man sodomizing a woman" and the "groans and epithets that go along." DX 55.[4] In 1993, Senator Biden urged the Federal Communications Commission to review a cable com-

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[3] The videotape shows a scene in which a man performs oral sex on a woman. The video images, while scrambled, are discernible. The entirely audible audio portion contains four-letter words and vulgar references to sexual organs. DX 1.

[4] The record contains other evidence of partially scrambled transmissions by Playboy and Spice. For example, Defendants' Exhibit 4 contains partially scrambled scenes videotaped from the Playboy Channel in Orange, California. Harris Decl., DX Vol. 1, No. 49, at para. 5. The scenes depict "images of a nude woman caressing herself and then of two nude women in the water and in a boat, caressing each other." J.S. App. 52a. Defendants' Exhibit 5 is an audiotape of the Spice Channel in early 1994 in the Oxnard, California home of a non-Spice subscriber. Allen Decl., DX Vol. 1, No. 48, at para. 5. The tape contains "the sounds of what appear to be repeated sexual encounters accompanied by assorted orgiastic moans and groans." J.S. App. 52a-53a.

pany's compliance with federal law after large numbers of Delaware residents voiced objections about unwanted reception of Spice. DX 72. See also DXs 59, 61, 70 (constituent letters complaining about inadequately scrambled "sex channels" and their availability to children).

In her floor statement, Senator Feinstein acknowledged that an alternative approach would be for cable operators to provide complete blocking of audio and video signals free of charge at the request of a subscriber. 141 Cong. Rec. S8167 (daily ed. June 12, 1995) (statement of Sen. Feinstein).[5] But Senator Feinstein urged that a provision for blocking on demand would not "go[] far enough," because it would "put the burden of action on the subscriber * * * by requiring a subscriber to specifically request the blocking of indecent programming." *Ibid.*

3. Section 505 became law on February 8, 1996, when the President signed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Under Section 505, "[i]n providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor"—a term that includes a cable operator—"shall fully scramble or otherwise

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[5] Senator Feinstein noted that the cable industry association had adopted voluntary guidelines that called for cable operators to provide for free blocking upon request. 141 Cong. Rec. at S8167. At the time Senator Feinstein and Senator Lott proposed the provision ultimately enacted as Section 505, the Senate bill, as reported by the Committee on Commerce, Science and Transportation, already contained a requirement for blocking upon request of programming unsuitable for children. See S. 652, 104th Cong., 1st Sess. § 640 (1995), *reprinted in* S. Rep. No. 23, 104th Cong., 1st Sess. 122 (1995). That requirement was revised by the Conference Committee to apply to all programming, not merely programming unsuitable for children, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 192 (1996), and it was enacted in that form as Section 504 of the Telecommunications Act of 1996, 110 Stat. 136.

fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it." 110 Stat. 136 (47 U.S.C. 561(a) (Supp. III 1997)). Until the cable operator complies with these requirements, it "shall limit the access of children" to such programming "by not providing such programming during the hours of the day (as determined by the [Federal Communications] Commission) when a significant number of children are likely to view it." 110 Stat. 136 (47 U.S.C. 561(b) (Supp. III 1997)).

On March 5, 1996, the Federal Communications Commission issued an interim rule for implementation of Section 505. Order and Notice of Proposed Rulemaking, *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 11 F.C.C.R. 5386 (*Implementation of Section 505*). First, the Commission interpreted the term "sexually explicit adult programming," as used in Section 505, to be a category of "programming that is indecent," a phrase also used in the statute. *Implementation of Section 505*, paras. 6, 9. The Commission defined "indecent programming" on an interim basis to mean "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium," and proposed to adopt that definition on a permanent basis. *Id.* para. 9. As the Commission explained, that is essentially the same definition adopted by the Commission for purposes of regulating indecent broadcast programs. *Id.* paras. 6, 9.

The Commission also proposed, and provisionally adopted, a safe harbor, for purposes of Section 505's time-channeling alternative, of 10:00 p.m. to 6:00 a.m.. The Commission noted that those were the same safe-harbor hours that it had previously established, based on an extensive administrative record, in its rule governing indecent over-the-air broadcast television or radio programs, which had been sustained by

the District of Columbia Circuit, sitting en banc, in *Action for Children's Television* v. *FCC*, 58 F.3d 654 (1995), cert. denied, 516 U.S. 1043 (1996). *Implementation of Section 505*, paras. 5, 8; see 47 C.F.R. 73.3999. The rules implementing Section 505 became effective on May 18, 1997. *Implementation of Section 505 of the Telecommunications Act of 1996*, 12 F.C.C.R. 5212 (Apr. 17, 1997).

4. Appellee Playboy Entertainment Group provides "virtually 100% sexually explicit adult programming," J.S. App. 6a, for transmission by cable operators to premium subscribers who choose to order Playboy's programming. Playboy provides such programming via its Playboy Television and AdulTVision networks. *Id.* at 5a. On February 26, 1996, Playboy filed suit in the United States District Court for the District of Delaware seeking declaratory and injunctive relief against the operation of Section 505. The complaint alleged that Section 505 violates Playboy's rights under the First Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The district court consolidated the action with a similar action brought by Spice Entertainment Companies (formerly known as Graff Pay-Per-View), which operated channels similar to those operated by Playboy.[6] A three-judge court was convened pursuant to Section 561 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 142 (47 U.S.C. 223 note (Supp. III 1997)).

On November 8, 1996, the three-judge court issued a decision denying Playboy's motion for a preliminary injunction, stating that Playboy and Spice "ha[d] not persuaded us that

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[6] Playboy has recently purchased Spice, which did not participate in the proceedings after this Court affirmed the denial of a preliminary injunction, and it is no longer a party to this case. Chicago Tribune, Mar. 16, 1999, *available in* 1999 WL 2853823.

they are likely to prevail on the merits." J.S. App. 63a.[7] Reviewing Section 505 under "strict scrutiny or something very close to strict scrutiny" as a content-based restriction on speech, *id.* at 67a, the court held that Section 505 is carefully tailored to further the compelling interest in protecting children. The court explained that Section 505 "does not seek to ban sexually explicit programming, nor does it prohibit consenting adults from viewing erotic material on premium cable networks if they so desire." *Id.* at 78a. Instead, the court explained, Section 505 permits cable operators to provide sexually explicit programming to willing subscribers if the operators avail themselves of either of two alternative approaches to protecting nonsubscribers—full scrambling of audio and video, or time-channeling. *Id.* at 76a.

5. Playboy appealed the denial of its request for a preliminary injunction directly to this Court, which summarily affirmed. 520 U.S. 1141 (1997).

6. The case was tried before the district court on March 4-6, 1998. On December 28, 1998, the district court issued a decision holding that Section 505 is unconstitutional under the First Amendment.

The court held, as it had at the preliminary injunction stage, that "either strict scrutiny or something very close to strict scrutiny" should be applied. J.S. App. 23a. The court also held that Section 505 is constitutional only if the government proves that it "is a 'least restrictive alternative,' *i.e.*, that no less restrictive measures are available to achieve the same ends the government seeks to achieve." *Id.* at 26a.

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[7] Judge Farnan had entered a temporary restraining order on March 7, 1996, at the outset of the case, which remained in effect until this Court summarily affirmed the district court's denial of the motion for a preliminary injunction. *Playboy Entertainment Group, Inc.* v. *United States*, 918 F. Supp. 813 (D. Del. 1996) (*reprinted in* Mot. to Aff. App. 1a-17a); see J.S. App. 2a, 19a.

The court noted that the government asserted three compelling interests supporting Section 505: "the Government's interest in the well-being of the nation's youth—the need to protect children from exposure to patently offensive sex-related material"; "the Government's interest in supporting parental claims of authority in their own household—the need to protect parents' right to inculcate morals and beliefs [i]n their children"; and "the Government's interest in ensuring the individual's right to be left alone in the privacy of his or her home—the need to protect households from unwanted communications." J.S. App. 26a-27a. Although it expressed some doubt about the strength of the empirical evidence in the record regarding harm to minors, see *id.* at 30a, the court held that all three of those interests are present and, in sum, are compelling. *Id.* at 32a.

The court held, however, that Section 505 is not the least restrictive alternative that the government could have adopted to advance those interests. J.S. App. 35a. The court found that, under Section 505, cable operators "with incomplete scrambling technology" that could not completely eliminate signal bleed "chose time channeling because no other system-wide blocking technique is economically feasible." *Id.* at 33a n.23; see also *id.* at 16a-17a. The court found that such time-channeling restricts "a significant amount of speech," because "30-50% of all adult programming is viewed by households prior to 10 p.m.," before the safe-harbor period. *Id.* at 33a. In the court's view, Section 504, by contrast, is a content-neutral provision that permits subscribers voluntarily to request a free blocking device, thus avoiding the need for full scrambling or time channeling. *Id.* at 34a-35a.

The court acknowledged that an alternative must be not only less restrictive but also "a viable alternative." J.S. App. 35a. In this respect, the court noted that "parents usually become aware of the problem only after the child has been exposed to signal bleed, and then the damage has been

done," and that even if parents are aware of the problem, "the success of § 504 depends on parental awareness that they have the right to receive a lockbox free of charge." *Ibid.* The court was unable to find that the experience during the 14-month period in which Section 504 was in effect but Section 505 was enjoined was sufficient to alleviate the court's concerns regarding the adequacy of notice to customers under Section 504.[8] Specifically, notwithstanding the applicability of Section 504 during that time, cable operators still had distributed blocking devices on request to fewer than one-half of one percent of subscribers. The court stated, however, that the "minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem." *Id.* at 36a. In the court's view, then, either there has not been "adequate notice to subscribers," or "[p]arents may have little concern that the adult channels be blocked." *Ibid.*

To address the concern that inadequate notice rendered Section 504 insufficient to protect the interests involved, the court set forth what would constitute "adequate notice" under Section 504 in the future. First, the court explained, it should include a basic notice to subscribers that children may be viewing signal bleed from sexually explicit programming and that blocking devices are readily available free of charge. J.S. App. 36a-37a. Next, the court stated that such notice would have to be provided by "[a]ppropriate means," including "inserts in monthly billing statements," "on-air advertisement on channels other than the one broadcasting the sexually explicit programming," and "a special notice" when

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[8] That period began on March 9, 1996, when the Telecommunications Act went into effect, and ended on May 18, 1997, when Section 505 was implemented after the denial of a preliminary injunction was affirmed by this Court and the temporary restraining order was finally lifted. J.S. App. 19a; see note 7, *supra*.

a cable operator "change[s] the channel on which it broadcasts sexually explicit programming." *Id.* at 37a. The cable operator would have to provide the means whereby "a request for a free device to block the offending channel can be made by a telephone call" to the cable operator. *Ibid.* Finally, the notice should be given "on a regular basis, at reasonable intervals," and whenever a cable operator "change[s] the channel on which it broadcasts sexually explicit programming." *Ibid.*

Against this background, the court held that, as enhanced with what it deemed to be "adequate notice," Section 504 would be "a less restrictive alternative to § 505." J.S. App. 38a. Because neither party had proposed an enhanced Section 504 as an alternative to Section 505, neither party had addressed whether and to what extent such an enhanced Section 504 would serve the interests underlying Section 505 or would restrict speech less than Section 505. Nonetheless, the district court found that, "with adequate notice of the issue of signal bleed, parents can decide for themselves whether it is a problem," and "to any parent for whom signal bleed is a concern, § 504, along with 'adequate notice,' is an effective solution." *Id.* at 37a-38a. The court did not address how cable operators would respond to the enhancements it proposed for Section 504, or whether and how expenses incurred as a result of those enhancements would lead cable operators to restrict appellee's programming.

The district court recognized that it could not require all cable operators that transmit sexually explicit programming services to provide the type of "adequate notice" that the court had hypothesized, because as non-parties the operators were not subject to the court's jurisdiction. But the court pointed out that it did have jurisdiction over Playboy, and declared that it would require Playboy to include notice provisions in its contractual arrangements with cable operators. The district court then reiterated that unless adequate no-

tice is provided, Section 504 would not be an effective alternative to Section 505. J.S. App. 38a.

7. On December 29, 1998, the day after announcing its decision, the court issued an order permanently enjoining enforcement of Section 505. J.S. App. 87a-88a. The order did not contain any requirement that Playboy include "adequate notice" provisions in its contracts with cable operators. Nor did it limit the scope of the injunction to Playboy, which is the only programmer of sexually explicit broadcasting that remains a party to this lawsuit.

On January 12, 1999, the government filed a motion under Rule 59(e) of the Federal Rules of Civil Procedure seeking to alter or amend the judgment to limit the injunction to Playboy, and it filed a motion under Rule 60(a) seeking to correct the judgment by including the requirement discussed in the court's opinion—that Playboy ensure that its contracts require cable operators to provide "adequate notice" to cable customers. The government then filed a notice of direct appeal to this Court on January 19, 1999, 20 days after entry of the injunction, as provided in Section 561(b) of the Telecommunications Act of 1996 (110 Stat. 143). J.S. App. 89a-90a.

On March 18, 1999, the district court dismissed the government's two motions, stating that it "lack[ed] jurisdiction to adjudicate these motions due to subsequent filing of Defendants' notice of appeal to the United States Supreme Court." J.S. App. 91a-92a. On April 7, 1999, the government filed a second notice of appeal, addressed to both the original injunction and the March 18 order. *Id.* at 93a-95a. This Court noted probable jurisdiction on June 21, 1999.

SUMMARY OF ARGUMENT

This case involves the constitutionality of a law enacted by Congress to limit the ability of minors to obtain access to highly graphic, sexually explicit programming that intrudes, uninvited, into American homes through the signal bleed of

sexually explicit programming channels on cable television. It cannot be reasonably doubted that the interests served by the law—the protection of minors and of the privacy of the home—are compelling ones. Nor can it reasonably be doubted that in enacting Section 505, Congress carefully directed its aim at the programming by-product that creates the evil, leaving it entirely open to cable operators to broadcast sexually explicit materials to their subscribers at any time (so long as minors are not threatened by signal bleed of those materials) or during hours when children are unlikely to be in the audience (if signal bleed at other times would be unavoidable). Nonetheless, the district court held that Section 505 is unconstitutional, because the court believed that it could hypothesize an entirely untried version of another statute—a version not proposed or addressed as an alternative by any party to this case—that would in its view be less restrictive. The district court's conclusions are insupportable.

I. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), and a line of cases that have followed it, this Court has consistently recognized that, in undertaking First Amendment review of indecency on television and radio, a court must be cognizant of the uniquely pervasive and intrusive presence of those media in American homes and the unique accessibility of those media to children. Unlike in other First Amendment contexts, the cost of unduly limiting Congress's ability to act in this area is to disable society from serving critical interests in the protection of children and privacy; it would leave children exposed to graphic, sexually explicit audio and visual programming that our society has long viewed as entirely inappropriate for them. Accordingly, a court should be particularly careful in this context to accord deference to Congress's reasonable, predictive judgments that a particular, carefully tailored measure—such as Section 505—is the least restrictive alternative that would

achieve its ends. The district court entirely failed to accord such deference, and its judgment should be reversed for that reason.

In any event, even under the exceptionally stringent standard of review employed by the district court, Section 505 is constitutional. The district court based its decision entirely on the prediction that its hypothetical, enhanced version of Section 504 would prove to be a less restrictive alternative to Section 505. The enhanced Section 504, however, would neither be an effective alternative nor would it be less restrictive than Section 505. That is particularly true with respect to the application of Section 505 to the increasing number of cable systems that have the digital or other capacity to provide complete blocking; applying Section 505 to them is constitutional because it imposes no burden at all on speech. But it is also true with respect to the application of Section 505 to the larger number of cable systems without digital or other means to accomplish easy and inexpensive blocking.

The enhanced Section 504 would not be an effective alternative because it would not serve the compelling interests underlying Section 505. As the district court recognized, those interests include, *inter alia*, society's interest in protecting children from sexually explicit materials, separate and apart from its interest in helping parents to exercise their parental authority. But the district court entirely failed to assess whether its enhanced Section 504 would serve that fundamental interest. Even an enhanced version of Section 504 would succeed in blocking signal bleed only if parents affirmatively decided to avail themselves of the means offered to them to do so. Inevitably some parents—probably a great many parents—will fail to take advantage of those means, out of inertia, indifference, or distraction. Under an enhanced version of Section 504, children of those parents, and friends of those children, would thus

remain exposed to sexually explicit signal bleed, and society's independent interest in protecting children would not be served. Under Section 505, by contrast, such children would remain protected, unless and until their parents exercised their choice to subscribe to a sexually explicit programming service.

The district court's hypothetical, enhanced Section 504 would also lead to at least the same limitation on the availability of appellee's programming as Section 505. The district court itself never analyzed whether cable operators would respond to its enhanced Section 504 in the same way that they responded to Section 505. But the court did find that, if an extremely modest number of households (less than 3% to 6%) sought blocking of a channel under Section 504, the cost of providing that blocking would lead cable providers to drop that programming altogether or time-channel it (if some kind of time-channeling option were offered). In fact, if the enhanced Section 504 hypothesized by the district court actually provided clear notice of the problem of signal bleed on sexually explicit channels and easy availability of blocking devices, it would certainly lead to a significant increase in the number of subscribers requesting such devices. Accordingly, it would lead cable operators to drop or time-channel appellees' programming—precisely the same result that the district court believed would follow from the application of Section 505.

II. The district court also erred in holding that our filing of a notice of appeal to this Court divested the district court of jurisdiction to rule on our motions to alter or amend, and to correct, the judgment. Because this Court's Rules leave uncertain the question whether such motions toll the time for appealing, a prudent litigant in a case in which direct appeal to this Court is authorized must file a notice of appeal even if the litigant believes that it has meritorious grounds to seek postjudgment relief from the district court. There is

no reason why such a notice of appeal should divest the district court of jurisdiction to rule on the motions for post-judgment relief. That is particularly true prior to the time when the case is docketed in this Court, because there is no possibility that the district court and this Court would both be taking action on the same case before that time. On the contrary, permitting the district court to rule on such motions before docketing in this Court would potentially clarify the issues on appeal or even make the further prosecution of the appeal in this Court unnecessary.

ARGUMENT

I. THE MEASURES REQUIRED BY SECTION 505 OF THE TELECOMMUNICATIONS ACT OF 1996 TO PROTECT CHILDREN AND THE PRIVACY OF THE HOME AGAINST SEXUALLY EXPLICIT PROGRAMMING ON CABLE TELEVISION ARE CONSISTENT WITH THE FIRST AMENDMENT

A. First Amendment Scrutiny Of The Regulation Of Sexually Explicit Material On Cable Television Must Be Conducted With Sensitivity To Society's Distinct Interests In Protecting Children And In Protecting Against Unwanted Intrusions Into The Privacy Of The Home

1. When reviewing government regulation of the content of constitutionally protected speech, this Court generally has held that such regulation is permissible only if it is narrowly tailored to serve a compelling interest. *Burson* v. *Freeman*, 504 U.S. 191, 198-199 (1992). The Court has also recognized, however, that "context is all-important," *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 750 (1978), when conducting judicial review of the regulation of indecency on broadcast media. In particular, the Court held in *Pacifica* that "special treatment of indecent broadcasting" is "amply justif[ied]," and it upheld a time-channeling regulation of indecency on

broadcast radio that prohibited the broadcast of such material during hours when children were likely to be in the audience. *Id.* at 750. The Court explained that among the justifications for such "special treatment" are the facts that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans"; indecency on television or radio "confronts the citizen * * * in the privacy of the home"; "the broadcast audience is constantly tuning in and out, [and] prior warnings cannot completely protect the listener or viewer from unexpected program content"; and "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 748-749. In light of those unique features, the Court held that a regulation that entirely prohibited indecent speech during much of the broadcast day was constitutional, even though a similar content-based restriction of non-obscene speech would surely be unconstitutional in many other contexts. See *id.* at 750-751.[9]

The Court has consistently adhered to the principles of *Pacifica*. For example, in *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115, 127 (1989), the Court noted that the "special treatment of indecent broadcasting" upheld in *Pacifica* was justified because the regulation at issue there "did not involve a total ban on broadcasting indecent material," but instead "sought to channel it to times of day when children most likely would not be exposed to it." *Ibid.* In addition, the Court pointed out that *Pacifica* "relied on the 'unique' attributes of broadcasting, noting that broadcasting is 'uniquely pervasive,' can intrude on the privacy of the home without prior warning as to program content, and is

[9] See also 438 U.S. at 750-751 (Powell, J., concurring in part and concurring in the judgment) ("The result turns * * * on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes.").

'uniquely accessible to children, even those too young to read.'" *Ibid.* (quoting *Pacifica*, 438 U.S. at 733). More recently, in *Reno* v. *American Civil Liberties Union (ACLU)*, 521 U.S. 844 (1997), the Court held that "the most stringent review" applies to regulation of indecency on the Internet, but it reaffirmed that "special treatment of indecent broadcasting" by means of non-criminal regulation is appropriate, *id.* at 867, essentially for the reasons given above, see *id.* at 866-868.

2. The same "all-important" context that guided the Court's review of regulation of over-the-air broadcast indecency in *Pacifica* is present when the government regulates transmission of similar programming on cable television, especially when the regulation offers the same time-channeling option as in *Pacifica*. In *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, 518 U.S. 727 (1996), the Court considered a challenge to several statutory provisions that addressed indecency on cable television. None of the opinions in *Denver Area* suggested that regulation of indecency on cable television should be analyzed under standards that differ in any way from the standards governing regulation of indecency on over-the-air broadcast television and radio.

In a portion of the opinion authored by Justice Breyer that was identified as the opinion of the Court, he stated that, in order to resolve the issues in *Denver Area*, it was not necessary to "determine whether, or the extent to which, *Pacifica* does, or does not, impose some lesser standard of review where indecent speech is at issue." 518 U.S. at 755.[10]

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[10] In his separate opinion, Justice Kennedy, joined by Justice Ginsburg, stated that he joined that portion of the opinion "insofar as it applies strict scrutiny." See 518 U.S. at 812 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part); see also *id.* at 803-805 (noting that "*Pacifica* conducted a context-specific analysis of the

But however the nature of the scrutiny under *Pacifica* is described, elsewhere in his opinion, in which he spoke for a plurality of the Court, Justice Breyer relied heavily on *Pacifica* to uphold one of the cable television regulations at issue there, *id.* at 744-748. Moreover, the plurality distinguished *Sable*, in which the Court held unconstitutional a ban on indecent telephone messages, on the ground that *Sable*, unlike *Denver Area*, involved "a communications medium, telephone service, that was significantly less likely to expose children to the banned material, was less intrusive, and allowed for significantly more control over what comes into the home than either broadcasting or the cable transmission system before us." *Id.* at 748. The plurality concluded that, with respect to the way in which "parents and children view television programming, and how pervasive and intrusive that programming is[,] * * * cable and broadcast television differ little, if at all." *Ibid.*

The separate opinion of Justice Kennedy in *Denver Area* also noted the significance of context in reviewing regulation of indecency on television and radio. Relying on *Pacifica*, Justice Kennedy stated that cable television channels are "uniquely accessible to children" and that the "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue." 518 U.S. at 804 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *Cohen* v. *California*, 403 U.S. 15, 21 (1971)). In Justice Kennedy's view, those unique features of television program-

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FCC's restriction of indecent programming during daytime hours," and rejecting "a blanket rule of lesser protection for indecent speech").

ming raise "concerns [that] are weighty and will be relevant to whether the law passes strict scrutiny." *Ibid.*[11]

3. There are factors present in this case that make it even clearer than in *Pacifica* that some degree of governmental flexibility in regulation is warranted. First, the regulation in *Pacifica* was aimed directly at a purposeful communication between the broadcaster and willing listeners, and it rested on the ground that the material broadcast was indecent and should not be available to children. By contrast, Section 505 is aimed not at the intended communication—the communication between those who produce sexually explicit cable programs and those who subscribe to them—but at a byproduct of that communication (signal bleed) that can be harmful to children.[12] Cf. *Schneider* v. *State*, 308 U.S. 147, 162 (1939). Insofar as the sexually explicit programmer can communicate with its audience without creating that byproduct—as is the case on cable systems with digital or other equipment that completely blocks the programming to nonsubscribers (see page 40,

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[11] In his opinion concurring in the judgment in part and dissenting in part in *Denver Area*, Justice Thomas noted that the Court's "precedents establish that government may support parental authority to direct the moral upbringing of their children by imposing a blocking requirement as a default position." 518 U.S. at 832. Under that principle, Section 505 is constitutional.

[12] As the district court noted at the preliminary injunction stage of this case, the aim of the statute is also one of the differences between Section 505 and one of the provisions held unconstitutional in *Denver Area*. As the district court explained, "Section 505 differs * * * from the statute at issue in *Denver Consortium* and from most statutes that are directed at speech or at the regulation of speech in that the target of § 505 is not the speech itself, *i.e.*, sexually explicit adult programming. The target is signal bleed, a secondary effect of the transmission of that speech." J.S. App. 69a. See also *ibid.* ("[S]ignal bleed is intruding into the homes of television viewers who have chosen *not* to receive the underlying sexually explicit programming.").

infra), Section 505 imposes no cognizable restriction on speech at all. But insofar as the intended communication creates signal bleed as a byproduct—a byproduct in which appellee has not asserted any independent First Amendment interest, see J.S. App. 42a (noting that appellee did not "contend that signal bleed itself is protected speech")—Section 505 requires that it be blocked or time-channeled to hours when children are not likely to be in the viewing audience.[13] Because Section 505 is thus aimed not at expressive speech within its intended sphere, but at a byproduct of that speech that creates a risk to children, the interests served by Section 505 outweigh any countervailing First Amendment interests even more than they did in *Pacifica*.[14]

Additionally, the burden on speech imposed by Section 505 is much less than that imposed by the regulation in *Pacifica*, thus providing further support for the need for some regulatory flexibility. Unlike in *Pacifica*, where time-

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[13] Thus, the effect of Section 505 is carefully targeted at parties (programmers of sexually explicit material and non-subscribers) who have no interest in communicating with each other.

[14] *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), is not to the contrary. In that case, the Court held unconstitutional an ordinance forbidding drive-in theaters from showing movies containing nudity visible from a public street. In addressing the claim that the ordinance was constitutional as an attempt to protect minors, the Court held that the ordinance was overbroad because it "is not directed against sexually explicit nudity, nor is it otherwise limited." *Id.* at 213. Section 505, by contrast, is directed solely at sexually explicit programs broadcast on sexually explicit programming services. Moreover, unlike the ordinance in *Erznoznik*, Section 505 is directed at an instance "when the speaker intrudes on the privacy of the home," *id.* at 209—a context in which the Court in *Erznoznik* acknowledged the government's authority to act. *Ibid.* Cf. *People* v. *Starview Drive-In Theatre, Inc.*, 427 N.E.2d 201, 211-212 (Ill. App. Ct. 1981) (holding constitutional an ordinance forbidding drive-in theaters from showing sexually explicit material visible from the street or a private residence), appeal dismissed, 457 U.S. 1113 (1982).

channeling to the safe-harbor hours was the only way in which the regulated communication could be made, Section 505 permits transmission of sexually explicit material at any time of the day or night on the increasing number of cable systems that can completely block the signal, by digital or other means, to nonsubscribers. In addition, the burden imposed on speech by Section 505, even on those cable systems that time-channel appellee's programming, is not great. The district court found that one half or more of appellee's viewers watch during the safe-harbor hours anyway, and their viewing therefore would not be affected by time-channeling.[15] Moreover, the great majority of appellee's subscribers consist of those who watch on a pay-per-view basis,[16] and its average pay-per-view subscriber purchases appellee's programming five times per year, Tr. 90-91, and watches, on average, only one hour each time, DX Vol. 2, No. 78, at 7. And even those subscribers may make use of the videocassette recorders now located in most American homes to tape programming during the safe-harbor hours and watch it whenever they wish.[17] Both this Court and the

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[15] The district court found that "30 to 50% of all adult programming is viewed by households prior to 10 p.m." J.S. App. 18a. That means that 50-70% of adult programming is viewed after 10:00 p.m., during the safe-harbor hours.

[16] The district court found that "revenues from pay-per-view programming constitute the vast majority of Playboy's revenue." J.S. App. 16a n.13. The court found that "[t]he number of subscribers watching Playboy Television in a year is between 800,000 and 1.7 million." *Id.* at 18a n.16. The far smaller number of average monthly subscribers can be found in an exhibit that was filed under seal to preserve appellee's confidential business information, DX Vol. 11, No. 134, at PBD005 (Average Monthly Subs 1Q 97).

[17] The FCC has estimated that, as of June 1998, 88% of all households with televisions own at least one VCR. *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 F.C.C.R. 24284, para. 106 (1998) (*Fifth Annual Report*).

lower courts have recognized that some restriction on the communications activities of adults may be constitutional if necessary to serve the compelling interest in protecting minors.[18]

Finally, the risks to children posed by appellee's programming are substantially greater than those present in *Pacifica*. Unlike the one-time broadcast of inappropriate language—with no accompanying visual representation—at issue in *Pacifica*, this case involves channels that carry "virtually 100% sexually explicit adult programming." J.S. App. 6a, 42a, 47a. As described above and in our lodgings (see pages 4-6, *supra*), the programming at issue here consists largely of frequent, close-up, and graphic scenes of sexual intercourse and related sex acts. The result, due to signal bleed, is "an unbroken continuum of sexually explicit sounds and images, delivered without invitation to [children's] home[s]." *Id.* at 73a n.26. Indeed, the sound tracks from appellee's programming alone are much coarser and far more offensive than the broadcast that was at issue in *Pacifica*.

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[18] See *Denver Area*, 518 U.S. at 741 (plurality opinion) ("This Court * * * has consistently held that government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech."); *Sable Communications*, 492 U.S. at 128 (suggesting that restrictions on dial-a-porn to ensure use only by adults may be constitutional); *Action for Children's Television*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (sustaining statutory provision and FCC regulation prohibiting broadcasting of indecent material between 6:00 a.m. and 10:00 p.m.); *Crawford* v. *Lungren*, 96 F.3d 380, 387-389 (9th Cir. 1996) (ordinance banning sale of materials harmful to minors in unattended news racks held constitutional), cert. denied, 520 U.S. 1117 (1997); *American Booksellers* v. *Webb*, 919 F.2d 1493, 1501 (11th Cir. 1990) (statute banning display of materials harmful to minors in portions of stores in which minors are permitted held constitutional); *Upper Midwest Booksellers Ass'n* v. *City of Minneapolis*, 780 F.2d 1389, 1394-1395 (8th Cir. 1985) (same); *M.S. News Co.* v. *Casado*, 721 F.2d 1281, 1288-1289 (10th Cir. 1983) (same).

See page 6 and note 4, *supra*. Children generally watch more television than do their parents, see *Denver Area*, 518 U.S. at 744-745; they often do so when their parents are not present, and they are thus likely to be subject to signal bleed before their parents even know about it.[19] Accordingly, the risks to children posed by signal bleed—and the corresponding risks to society that would result from eliminating the most effective means to deal with the problem—are highly relevant to the First Amendment analysis.

4. a. Regardless of how the standard of review is characterized, each Member of the Court in *Denver Area* recognized—as did the Court in *Pacifica*—that the government is entitled to some flexibility in regulating indecency on cable television. That conclusion is correct. In many other contexts, the government's burden to justify regulation that has effects on protected speech is particularly heavy, because the potential cost of curtailing government regulation is presumed to be less than the potential cost of curtailing speech. Here, however, for the reasons given above, the cost of unduly limiting society's ability to impose the marginal limitation on speech that results from Section 505 would be extraordinarily high. Indeed, in light of such potential costs, it is not surprising that the Court has hesitated to apply a rigid analysis to regulation of indecency on television and radio.

In the present case, it would be appropriate to recognize the needed flexibility to accommodate society's interests in the context of indecent programming on broadcast and cable systems, regardless of the level of scrutiny applied, by giving effect to the long-accepted principle "that courts must accord substantial deference to the predictive judgments of Con-

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[19] There was substantial evidence at trial that parents do not become aware of signal bleed until after their children have encountered it. See, *e.g.*, Cavalier Dep. 10-16, 17; DX Vol. 1, No. 45, paras. 4-6 (Mahlo Decl.); Omlin Dep. 16; Ciciora Dep. 45. See also J.S. App. 35a.

gress." *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 665 (1994) (plurality opinion); see also *Turner Broadcasting Sys., Inc.* v. *FCC*, 520 U.S. 180, 196 (1997) (plurality opinion); *Action for Children's Television*, 58 F.3d at 667. In particular, Congress's judgment that a particular means (such as Section 505) of addressing the problem of indecency on television or radio is necessary is entitled to substantial deference. Of course, Congress's determination that a particular measure is necessary must reflect a reasonable choice among the available alternatives, and judicial scrutiny is appropriate "to assure that * * * Congress has drawn reasonable inferences based on substantial evidence." *Turner Broadcasting*, 512 U.S. at 666. Moreover, the measure chosen must directly aim at the problem of the availability of indecency to minors on television or radio. But mere speculation that some other, untested (and, in this case, ill-defined) measure would also accomplish the desired end is insufficient to upset Congress's judgment. The need to respect Congress's predictive judgments in this context is particularly clear, because, as we explain below (see pages 35-40, *infra*), the question whether Section 505 is less restrictive than other alternatives depends in part on predictions about the effects of Section 505 and other hypothetical measures on choices made by cable-operator third parties. [20]

If these principles are heeded, the district court's judgment must be reversed. The district court held Section 505 unconstitutional solely on the ground that, as compared with an enhanced version of Section 504 that it hypothesized, Sec-

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[20] Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)) (standing does not lie where claimed injury is the result of "the independent action of some third party not before the Court"); *id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.").

tion 505 was not the least restrictive measure that could have been enacted to achieve Congress's compelling interests. As we demonstrate below, even under the most stringent scrutiny employed by this Court, that conclusion was mistaken, because the hypothesized alternative would not fully serve the compelling interests advanced by Section 505 (see pages 29-35, *infra*), and would not in any event turn out to be less restrictive of speech (see pages 35-40, *infra*). Even if there were some doubt on those points, however, there can be no doubt that Congress's determination that Section 505 was necessary to achieve its ends—and that no other likely measure could accomplish its goals without imposing at least as great a burden on speech—was at least a reasonable one. Taking into account the "all-important context" in which Section 505 operates, that should be sufficient to establish that Section 505 is constitutional.

b. Far from giving careful consideration to the context in which Section 505 operates, as required by *Pacifica* and the subsequent decisions of this Court discussed above, the district court gave it no weight at all. The district court did acknowledge at one point that "the context of [Section 505's] content-based restriction must * * * be considered," because "[c]able television is a means of communication that is both pervasive and to which children are easily exposed." J.S. App. 26a. But the court proceeded to attach essentially no significance to that "context" in holding that "[t]he Government must prove that * * * no less restrictive measures are available to achieve the same ends the government seeks to achieve." *Ibid.* The court applied its "least restrictive alternative" test in a particularly rigorous manner, holding that Section 505 is unconstitutional solely because the court could imagine an alternative, entirely hypothetical scheme whose practicality, cost, and legality have never been tested. See *id.* at 35a-39a.

Indeed, the district court held its enhanced version of Section 504 to be a less restrictive alternative to Section 505 despite the fact that there had been no opportunity for litigation regarding its adequacy or consequences. Appellee had relied on Section 504 as enacted—without all of the district court's enhancements—as a less restrictive alternative, see J.S. App. 19a, and the government therefore had litigated that issue, not the adequacy of the district court's hypothetical version of the statute.[21] Apparently, the district court believed that regulations like Section 505 are so disfavored that the court's ability to hypothesize an entirely untried and unscrutinized alternative was sufficient to establish that Section 505 is unconstitutional. The district court's methodology was inconsistent with this Court's emphasis on the care with which review must proceed in this context, so as not unduly to impair society's ability to serve the compelling interests at stake.

B. Even If Strict Scrutiny Applies, The Hypothetical Version Of Section 504 Posited By The District Court Is Not An Adequate And Less Restrictive Alternative

Even under the exceptionally strict standard of review it employed in this case, the district court erred in concluding that its enhanced version of Section 504 would be sufficient to promote the interests underlying Section 505 and that it would be less restrictive than Section 505.

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[21] The district court agreed with the government that "[i]f 'adequate notice' is not provided, § 504 will no longer be a viable alternative to § 505." J.S. App. 38a. See also *id.* at 19a ("[I]f the § 504 blocking option is not being promoted, it cannot become a meaningful alternative to the provisions of § 505."); *id.* at 20a ("If * * * § 504 is to be an effective alternative to § 505, adequate notice of the availability of the no-cost blocking devices is critical.").

1. *The enhanced Section 504 would not be a suitable alternative to Section 505 because it does not fully serve the compelling interests underlying Section 505*

In order to qualify as a "less restrictive alternative," a measure must be not only less restrictive; it must also be "as effective" as the regulation being challenged. *Reno* v. *ACLU*, 521 U.S. at 874. See also *Sable Communications* v. *FCC*, 492 U.S. at 130-131 (narrow tailoring requirement not met when the record suggests a less restrictive and possibly "extremely effective" alternative); *Dial Info. Serv. Corp.* v. *Thornburgh*, 938 F.2d 1535, 1541, 1542 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992). The district court's enhanced version of Section 504 would not be a satisfactory alternative to Section 505, because it would not be as effective in protecting the compelling interests that the district court itself recognized supported Section 505.

The district court identified three interests that support Section 505:

> 1) the Government's interest in the well-being of the nation's youth—the need to protect children from exposure to patently offensive sex-related material; 2) the Government's interest in supporting parental claims of authority in their own household—the need to protect parents' right to inculcate morals and beliefs [i]n their children; and 3) the Government's interest in ensuring the individual's right to be left alone in the privacy of his or her home—the need to protect households from unwanted communications.

J.S. App. 26a-27a. See *id.* at 32a (concluding, after discussing each of the above interests, "that § 505 addresses three interests which in sum can be labeled 'compelling' ").[22]

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[22] Although the district court ultimately accepted that sufficient evidence had been introduced to establish each of the interests, it noted that it was "troubled by the absence of evidence of harm presented both before Congress and before [the court] that the viewing of signal bleed of sexually explicit programming causes harm to children." J.S. App. 30a. The district court's concern was misplaced. The government need not introduce empirical evidence in each case that minors are harmed by exposure to indecent, sexually explicit material. Concerns about minors' exposure to such material are based on commonly held moral views about the upbringing of children, not only on empirical, scientific evidence. This Court has repeatedly held, over a period of many years and without referring to specific sociological or psychological data demonstrating harm, that society has a compelling interest in protecting children from exposure to indecent, sexually explicit materials. See, *e.g.*, *Reno* v. *ACLU*, 521 U.S. at 869 (" '[T]here is a compelling interest in protecting the physical and psychological well-being of minors' which extend[s] to shielding them from indecent messages that are not obscene by adult standards.") (quoting *Sable Communications*, 492 U.S. at 126); *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 683-684 (1986); *New York* v. *Ferber*, 458 U.S. 747, 756-757 (1982); *Ginsberg* v. *New York*, 390 U.S. 629, 640-643 (1968). In the *Denver Area* case, the Court's unanimity on this point was particularly striking. See 518 U.S. at 743 (plurality opinion) ("[T]he provision before us comes accompanied with an extremely important justification, one that this Court has often found compelling—the need to protect children from exposure to patently offensive sex-related material."); *id.* at 779 (O'Connor, J., concurring in part and dissenting in part) (The regulations at issue "serve an important governmental interest: the well-established compelling interest of protecting children from exposure to indecent material."); *id.* at 806 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Congress does have * * * a compelling interest in protecting children from indecent speech."); *id.* at 832 (Thomas, J., concurring in the judgment in part and dissenting in part) ("Congress has a 'compelling interest in protecting the physical and psychological well-being of minors' and * * * its interest 'extends to shielding minors from the influence of [indecent speech] that is not obscene by adult standards.'").

This Court has carefully distinguished between the first and second of those interests in the past, referring in *Reno* v. *ACLU* both to "the State's *independent* interest in the well-being of its youth," and to "the principle that 'the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." 521 U.S. at 865 (emphasis added) (quoting *Ginsberg* v. *New York*, 390 U.S. at 639). Our society has long recognized the authority of parents to decide how to raise their children. See *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944). But it has also long recognized that society itself has an interest in the upbringing of youth, especially when parents, as a result of inertia or indifference or the competing claims of other responsibilities, fail to exercise their own authority. See *id.* at 166-170. See also *Action for Children's Television*, 58 F.3d at 661-663.

In determining whether its hypothetical, enhanced version of Section 504 would provide a less restrictive alternative to Section 505, the district court entirely ignored society's independent interest in seeing to it that children are not exposed to sexually explicit materials. The district court stated:

> [W]ith adequate notice of the issue of signal bleed, parents can decide for themselves whether it is a problem. Thus to any parent for whom signal bleed is a concern, § 504, along with 'adequate notice,' is an effective solution. In reality, § 504 would appear to be as effective as § 505 for those concerned about signal bleed, while clearly less restrictive of First Amendment rights.

J.S. App. 37a-38a. It seems highly unlikely that the district court was correct in its apparent belief that its enhanced version of Section 504 would be sufficient to inform all parents of the problem of signal bleed and to permit them to eliminate it easily and effectively. But even if it were, such a

measure would serve only two of the interests the district court identified—the interests in "protect[ing] parents' right to inculcate morals and beliefs [i]n their children" and "ensuring the individual's right to be left alone in the privacy of his or her home." *Id.* at 26a. Thus, under such an enhanced version of Section 504, parents who had strong feelings about the matter could see to it that their children did not view signal bleed—at least in their own homes.

The district court's enhanced version of Section 504 would not, however, serve society's independent interest in protecting minors from exposure to indecent, sexually explicit materials, and the district court's reasoning takes no account of that interest. Even an enhanced version of Section 504 would succeed in blocking signal bleed only if, and after, parents affirmatively decided to avail themselves of the means offered them to do so. There would certainly be parents—perhaps a large number of parents—who out of inertia, indifference, or distraction, simply would take no action to block signal bleed, even if fully informed of the problem and even if offered a relatively easy solution.[23] There also are

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[23] Studies have confirmed that sales of a good or service will be higher if consumers are required to take action to refuse it than if a mere failure to act is deemed to be a refusal of the good or service. For example, telephone companies offering an "optional maintenance plan" for wires inside the subscriber's residence achieved a median subscription rate of 44% among 50 positive option offers (the subscriber must affirmatively request the plan) and a median rate of 80.5% among 22 unilateral negative option offers. See Dennis D. Lamont, *Negative Option Offers in Consumer Service Contracts: A Principled Reconciliation of Commerce & Consumer Protection*, 42 UCLA L. Rev. 1315, 1330-1331 (1995). Similarly, Canadian cable programmers have reported that such "negative option" offers for new channels resulted in 60%-70% subscription rates, far higher than the 25% rates resulting from standard (positive option) marketing methods. *Id.* at 1331-1332. See also *In re Columbia Broad. Sys., Inc.*, 72 F.T.C. 27, 337-338 (1967) (FTC action against record club) ("In practice, the Club's officials anticipate in advance that approximately 35% of the

children who would view signal bleed at the homes of friends whose parents, due to the same factors, do not act under an enhanced Section 504 to block signal bleed. See J.S. App. 52a, 80a. Society has an interest independent of the choices made (or not made) by parents in seeing to it that children are not exposed to sexually explicit materials. Section 505 would protect that interest, by ensuring that children are not exposed to signal bleed as a result of inertia, indifference, or distraction; Section 504, by contrast, would not protect that interest, since children would be exposed to signal bleed of sexually explicit materials whenever parents failed, for whatever reason, to take the affirmative steps necessary to obtain blocking.

We are not referring here to that presumably very small number of children whose parents positively want their children to be exposed to sexually explicit programming. Even if we assume, *arguendo*, that the interests of those parents should prevail over the interests of society in protecting children from indecent material (but see *Prince*, 321 U.S. at 166-170; cf. *Reno* v. *ACLU*, 521 U.S. at 878 (reserving that question in the context of the Internet)), such parents' interests would be protected equally well either by Section 505 or by a hypothetical enhanced Section 504, for under either

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members of its largest ('popular') division will not return the card and hence will receive and accept the record selected for them by the Club.").

Indeed, precisely because negative option sales give an unfair advantage to the provider of a good or service, Congress has expressly prohibited cable operators from using negative option billing. See 47 U.S.C. 543(f) ("A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name," and the subscriber's "failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment."); 47 C.F.R. 76.981 (FCC regulation prohibiting negative option billing). See also 16 C.F.R. 425.1 (FTC regulation regarding negative option plans).

they would obtain access to sexually explicit channels by subscribing to them.[24] The children of parents who fail to act as a result of inertia, indifference, or distraction, however, would be protected only by Section 505. The district court gave no weight whatsoever to society's independent interest in protecting those children when it ruled that a hypothetical enhanced version of Section 504 would be an adequate alternative to Section 505.

2. *The enhanced Section 504 is not less restrictive than Section 505 because it is reasonably likely to lead to at least the same effect on the availability of appellee's programming as Section 505*

The court's analysis of the restrictions imposed by Section 505 was based on its finding that "time channeling has proven to be the method of compliance of choice among" cable operators because "no other system-wide blocking technique is economically feasible." J.S. App. 33a & n.23. See also *id.* at 16a-17a.[25] In other words, with respect to cable

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[24] We leave out of the analysis altogether those parents or other individuals who do not want to subscribe to Playboy's programming but who want signal bleed because they would like to receive Playboy's sexually explicit programming without paying for it. Such individuals have no cognizable interest in receiving signal bleed from a channel to which they do not subscribe.

[25] Appellee has periodically argued that there are various other alternative methods to protect children against signal bleed from sexually explicit programming services, such as set-top convertors and so-called child lock-out devices on some modern television sets. See Mot. to Aff. 4-5. The district court, however, relied only on the enhanced Section 504, rather than any of those methods, as a less restrictive alternative to Section 505. Extensive evidence at trial demonstrated that those alternative methods are ineffective, difficult for parents to operate, and easy for children to circumvent. See Defs. Post-Trial Reply 15-18. The district court's reliance on its enhanced Section 504 as the alternative suggests that it found that evidence concerning the deficiencies of other proffered alternatives highly probative. As appellee concedes, the "V-chips" now included in

systems that do not yet employ digital or other means of transmission that eliminate signal bleed, "the distribution of lockboxes to a sufficient number of customers to effectively control the problem of signal bleed is not economically feasible." *Id.* at 21a. In turn, the court reasoned, the adoption of such time-channeling by cable operators "amounts to the removal of all sexually explicit programming at issue during two thirds of the broadcast day from all households on a cable system." *Id.* at 33a. Time-channeling thus "diminishes Playboy's opportunities to convey, and the opportunity of Playboy's viewers to receive, protected speech." *Ibid.*

Based on the court's own factual findings, there is no basis for concluding that an application of the court's hypothetical, enhanced version of Section 504 would not have at least the same effects; that is so because cable operators under an enhanced Section 504 could be expected either to drop appellee's programming altogether or to transmit appellee's programming only during the safe-harbor hours (that is, if time-channeling was also an option in a hypothetical, enhanced Section 504). Indeed, the same economic factors that now lead to time-channeling under Section 505 would lead to dropping of appellee's sexually explicit programming services altogether (or perhaps, if the option were offered, time-channeling) under Section 504.

The district court itself noted the testimony in the record that the cost of distributing lockboxes to 3% of a cable system's customers would equal all of the revenue the operator derived from its sexually explicit channels. J.S. App. 21a-22a. The court added that, if a cable operator were willing to

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most new television sets "do not address the issue of signal bleed," Mot. to Aff. 5 n.4, because the imperfect scrambling that creates the problem of signal bleed distorts or obliterates the program classification (ratings) codes that the V-chip must interpret in order to block the programming. DX Vol. 10, No. 82, paras. 9-15.

amortize the cost of the lockboxes over five years, the number of lockboxes that could be distributed would rise only to 6% of the subscriber base. *Id.* at 22a. In actuality, cable operators could be expected to drop (or time-channel) sexually explicit channels long before the number of subscribers who requested lockboxes reached the 3% to 6% range. As the district court found, "[e]conomic theory would suggest that profit-maximizing cable operators would cease carriage of adult channels" before exhausting *all* revenues from such channels; rather, they would take action when the "costs rose to such a point that the profit from adult channels was less than the profit from channels unlikely to require blocking." *Ibid.* Therefore, a relatively minor boost in the number of subscribers seeking lockboxes would be sufficient to lead to dropping Playboy's programming altogether under an enhanced Section 504 (or time-channeling, if such an option were included in an enhanced Section 504 as a means of compliance)—and a consequent effect on the availability of appellee's sexually explicit programming at least as great as that the district court found to occur under Section 505.

A significant increase in the number of subscribers seeking lockboxes would inescapably follow if a truly effective notice requirement were added to Section 504. The district court itself found that the actual Section 504—without enhanced notice and without easy availability of blocking devices—had led to less than 0.5% of households requesting blocking. J.S. App. 20a & n.19. The court intended to design its enhanced version of Section 504 specifically in order to provide each subscriber with genuine, easily understandable notice of the problem of signal bleed and a quick and easy means to stop it through ready availability—via "a telephone call," *id.* at 37a—of blocking devices. See *id.* at 36a-37a.[26]

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[26] Whether a scheme of adequate notice and easy availability of blocking devices could be devised that did not result in exorbitant costs,

Moreover, such notice would have to be repeated on a regular basis (though the district court did not specify how often) on non-sexually explicit channels, and special notice would have to be given whenever a cable operator changed the channel on which a sexually explicit programming service was carried. *Id.* at 37a. If a genuinely effective system of notice and easily available blocking were instituted and proved to be as effective as the district court evidently anticipated, the number of subscribers requesting blocking could be expected to exceed the minimal number necessary to render carriage of the sexually explicit channels uneconomical. That is especially so in light of the fact that the various forms of notice contemplated by the district court, including regular notice on the cable operators' other channels, would themselves impose burdens, in the form of financial costs and interference with editorial discretion, on cable operators.[27]

Indeed, the district court's enhanced version of Section 504 could well result in a *greater* limitation on the availability

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insuperable enforcement difficulties, or distinct legal problems is open to substantial doubt. For example, the evidence at trial showed that, even where parents have notice of the problem of signal bleed, parents attempting to remedy the problem have sometimes had to make repeated phone calls to their cable operators—and even to local government supervising authorities—before they could obtain blocking of the signal bleed. See J.S. App. 21a (citing evidence). In light of the built-in financial incentive that cable operators have to discourage blocking (since blocking costs them money), it should not be surprising that this kind of problem has arisen.

[27] At least one of the notice mechanisms identified by the district court—advertising on non-sexually explicit channels the problem of signal bleed of sexually explicit programming and the availability of Section 504 blocking—could easily have the anomalous effect of informing children of the availability of signal bleed and encouraging them to watch it in those homes in which parents do not happen to request the Section 504 blocking solution.

of appellee's programming than does Section 505. Section 504, as enacted by Congress, does not include a safe-harbor provision like Section 505. Accordingly, if Section 504 were enhanced—as the district court envisioned—by adding requirements for notice to subscribers of the problem of signal bleed and the easy availability of blocking devices, the increased costs that cable operators would have to incur in affording notice and furnishing blocking devices might well make it uneconomical for them to carry appellee's programming at all. That would amount to a greater limitation on the availability of appellee's speech than the time-channeling that can be expected to result from Section 505. That consequence would be even more likely to result if Section 504 were altered to provide not only for the district court's enhancements, but also for a safe-harbor like that in Section 505. At least some subscribers, given effective notice of the problem, would likely seek lockboxes even if their cable operators limited the availability of appellee's programming to the safe-harbor hours. To avoid the costs of supplying those lockboxes, many cable operators would, once again, simply choose to drop appellee's programming altogether.

Although the district court made the key factual findings regarding the economic impact of subscriber requests for lockboxes on which our argument here relies, see J.S. App. 21a-22a, the court simply overlooked those findings when it analyzed the relative effects on the availability of appellee's programming resulting from Section 505 and alternatives. To be sure, the district court noted that "Section 504 * * * is less restrictive of the First Amendment rights of Playboy and its subscribers" than Section 505 because it operates on a voluntary basis and permits cable operators to broadcast appellee's programming 24 hours per day. *Id.* at 34a. But that finding concerns the actual Section 504, as enacted by Congress and containing no notice provisions—a statute that the district court itself viewed as an inadequate alternative

to Section 505. See J.S. App. 38a. Perhaps because no party had suggested that an enhanced Section 504 would be a less restrictive alternative and the parties' argument was therefore not directed to that point, the district court never analyzed whether the enhanced version of Section 504 that it had hypothesized would result in the same limitation on the availability of appellee's programming as Section 505. Had it done so, its own factual findings would have led to the conclusion that Section 504 would be at least as restrictive as Section 505. At the very least, the proposition that a fully effective notice requirement of the sort the district court posited would *not* result in at least the same restriction on speech as Section 505 has not been demonstrated with the clarity necessary to invalidate an Act of Congress on least-restrictive-alternative grounds.

C. At The Very Least, Section 505 Is Constitutional As Applied To The Transmission Of Sexually Explicit Programming By Operators That Have The Technology To Eliminate Signal Bleed

Finally, it is significant that Section 505 imposes a minimal burden on speech of those cable systems that have the ready capability to use digital or other modern technologies that completely eliminate signal bleed when transmitting sexually explicit programming services. The district court noted that an increasing number of cable systems use such technology. J.S. App. 9a, 18a n.17. Indeed, there was evidence in this case that all of the cable systems that transmit AdulT-Vision, a sexually explicit programming service operated by Playboy, have the capacity for complete encryption of programming so that nonsubscribers will not have any access to it. DX Vol. 8, No. 237, at PEIOOO159A. With respect to systems that already employ such digital or other means of transmission that eliminate signal bleed, Section 505 requires only that the cable operators—whose systems sometimes include both analog and digital components—use

the technology that they already have in place to ensure that there is no signal bleed of sexually explicit programming services. It therefore imposes no burden on speech with respect to those systems, and it should be held constitutional at least in application to them.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT IT WAS DIVESTED OF JURISDICTION TO DECIDE POST-TRIAL MOTIONS WHEN THE GOVERNMENT FILED A NOTICE OF APPEAL OF THE PERMANENT INJUNCTION

The district court's dismissal of the government's post-trial motions was mistaken. The first notice of appeal, filed on January 19, 1999, within the 20-day period prescribed by Section 561(b) of the Act but after the post-trial motions were filed seven days earlier, did not deprive the district court of jurisdiction to consider the government's motions relating to the terms of the judgment.

A. In an appeal to a court of appeals, the filing of a timely motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) or the filing (not more than ten days after entry of judgment) of a motion for relief under Federal Rule of Civil Procedure 60(a) tolls the time within which the notice of appeal must be filed. Fed. R. App. P. 4(a)(4)(A)(iv) and (vi). A notice of appeal filed before disposition of such a motion becomes effective only when the order disposing of the last such motion is entered. Fed. R. App. P. 4(a)(4)(B)(i). The reason for this rule is that when such a motion is filed, "the case lacks finality." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2821, at 220 (2d ed. 1995).

This Court's rule governing certiorari, Sup. Ct. R. 13.3, is similar to Rule 4(a)(4) of the Federal Rules of Appellate Procedure in that it provides for tolling of the time for filing a certiorari petition while a petition for rehearing is pending in

the court of appeals. The Court's rules governing appeals, however, do not address the consequences of filing a Rule 59(e) or Rule 60(a) motion in the district court. The time limits for filing a notice of appeal in such a case are "not free from doubt * * * because Rule 18.1 does not contain the statement, in former appeal Rule 11.3 (and in current certiorari Rule 13.3), that 'if a petition for rehearing is timely filed by any party in the case, the time for filing the notice of appeal for all parties * * * runs from the date of the denial of rehearing or the entry of a subsequent judgment.'" Robert L. Stern et al., *Supreme Court Practice* § 7.2(c), at 388 (7th ed. 1993). See also *ibid.* (noting that it is "most unlikely" that this Court meant to abandon that rule *sub silentio*). Through caution in this uncertain area of the law, we filed a notice of appeal within 20 days of entry of the injunction.[28]

B. Our filing of the first notice of appeal while the two post-trial motions were pending before the district court did not deprive the district court of jurisdiction to consider those motions. To begin with, Rule 60(a) itself permits a district court to correct clerical mistakes in a judgment while an ap-

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[28] In *FCC* v. *League of Women Voters*, 468 U.S. 364, 373 n.10 (1984), the Court held that under former Supreme Court Rule 11.3, a direct appeal taken during the pendency of a Rule 59 motion was permissible since the motion did not seek alteration of the rights adjudicated in the original judgment. See *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212 (1952) ("The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality."). In this case, the post-trial motions arguably did not seek to alter the rights adjudicated. The Rule 59(e) motion here asked the district court to limit the injunction to Playboy and thus would not have affected Playboy's rights. The Rule 60(a) motion asked the district court to include in its injunction what the court in its underlying decision announced it was requiring—that Playboy must ensure in its contractual arrangements that cable operators provide "adequate notice" of the availability of free lockboxes.

peal is pending: "During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court." On March 18, 1999, when the district court dismissed the Rule 60(a) motion for lack of jurisdiction, this appeal had not yet been docketed in this Court. Accordingly, the district court had jurisdiction to correct the mistake "just as if the case were still pending in the district court." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2856, at 251 (2d ed. 1995).[29]

The filing of the notice of appeal also did not divest the district court of jurisdiction to rule on the Rule 59(e) motion that was already pending when the notice of appeal was filed. This Court's Rule 18.1, which governs the commencement of appeals to this Court, is comparable to Rule 4 of the Federal Rules of Appellate Procedure as it existed before the 1979 amendments. Interpreting the pre-1979 Rule 4, this Court concluded in *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58-59 (1982) (per curiam), that while a district court lacked jurisdiction to entertain a Rule 59(e) motion after a notice of appeal had been filed, "if the timing was reversed—if the notice of appeal was filed after the motion to vacate, alter, or amend the judgment— * * * the district court retained jurisdiction to decide the motion, but the notice of appeal was nonetheless considered adequate for purposes of beginning the appeal process." The reason this "theoretical inconsistency" was permitted under the pre-1979 rule was that there was little danger that a court of appeals and a district court would be acting simultaneously on the same judgment, since a district court at that time did not

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[29] Even if the case had already been docketed in this Court by March 18, Rule 60(a) itself would have permitted the district court to adjudicate the motion "with leave of [this] Court."

automatically notify the court of appeals that a notice of appeal had been filed. *Id.* at 59.[30]

A direct appeal to this Court under Rule 18.1 functions similarly. After the notice of appeal is filed, the appellant is given 60 days within which to file its jurisdictional statement. Until the matter is docketed in this Court, there is no chance that the district court would be acting on a judgment at the same time as this Court. Because the jurisdictional statement in this case had not been filed at the time the district court dismissed the Rule 59(e) motion, that dismissal was improper and should be reversed.[31] A litigant who wants to file a post-judgment motion should not have to risk forfeiting the right to appeal in order to do so.

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[30] As the Court explained in *Griggs*, the 1979 amendments to Rule 4 altered the situation by making it clear that the court of appeals had no jurisdiction so long as a motion to vacate, alter, or amend the judgment was pending in the district court. 459 U.S. at 59-60. This in turn created a trap for the would-be appellant who failed to file a second notice of appeal after the disposition of the post-trial motion. Accordingly, Rule 4 was modified again in 1993 to provide that a notice of appeal filed after judgment but before the disposition of a post-trial motion "becomes effective to appeal a judgment or order * * * when the order disposing of the last such remaining motion is entered." Fed. R. App. P. 4(a)(4)(B)(i).

[31] Alternatively, if the filing of the Rule 59(e) motion tolled the time to file the first notice of appeal under both Section 561(b) of the Telecommunications Act of 1996 (110 Stat. 143) and 28 U.S.C. 1253, and if it is concluded that the Rule 59 motion "actually seeks an 'alteration of the rights adjudicated' in the court's first judgment," *FCC* v. *League of Women Voters*, 468 U.S. 364, 373 n.10 (1984) (quoting *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942)), then the first notice of appeal may have been ineffective, at least insofar as the government sought to challenge the injunction as a final judgment. An ineffective notice of appeal would not divest the district court of jurisdiction. In that event, it should be noted that the second notice of appeal would remain sufficient to bring this case properly before this Court.

CONCLUSION

The judgment of the district court (and, if necessary, the March 18, 1999, order of the district court) should be reversed.

Respectfully submitted.

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