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

REPLY BRIEF FOR THE APPELLANTS

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REPLY BRIEF FOR THE APPELLANTS

In our opening brief, we explain that, although the district court's holding cannot be sustained under *any* standard of review, appropriate review under the First Amendment in this case should take into account this Court's precedents requiring special care before striking down an Act of Congress designed to protect children from sexually explicit material on television and radio and to protect the privacy of the home from the intrusion of sexually explicit programming. See *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748-749 (1978). This Court has repeatedly—and recently—referred to the pervasiveness of those media, their intrusiveness into the home, and their accessibility to children as the factors that justify regulation of indecency on television or radio. See *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115, 127 (1989); *Reno* v. *American Civil Liberties Union (ACLU)*, 521 U.S. 844, 866-868 (1997); see also *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 744-745, 748 (1996) (plurality opinion); *id.* at 776 (Souter, J., concurring) ("the characteristics of broadcast radio that rendered indecency particularly threatening in *Pacifica*, that is, its intrusion into the house and accessibility to children, are also present in the case of cable television").

Indeed, as we explain in our opening brief (at 22-26), there are additional factors present here that make it particularly important that Congress have the flexibility necessary to regulate graphic depictions of sexual activity on television, and that reinforce the constitutionality of Section 505. Those factors include that (a) Section 505 is aimed not at the intended communication between appellee and its subscribers, but at a byproduct of that communication (signal bleed) that is harmful to children (see Gov't Br. 22)[1]; (b) the burden on

[1] Appellee asserts (Br. 19-20) that this Court "has rejected similar efforts to mischaracterize direct restrictions on speech as regulations of 'secondary effects.'" But what this Court has held is that "[r]egulations

speech that results from Section 505 is at present modest and is decreasing over time as the advance to digital technology makes elimination of signal bleed easy and cost-free (see Gov't Br. 23-25); (c) the risks to children—even very young children—posed by signal bleed of appellee's consistent and very graphic sexually explicit programming are substantially greater than in *Pacifica* (see Gov't Br. 25-26; see also pp. 5-6, *infra*); and (d) Section 505 leaves open ample means (such as time-channeling and the use of VCRs by viewers, or digital transmission for those operators so equipped) for transmission of appellee's speech and therefore at worst addresses when—not whether—appellee's programming will be shown (see Gov't Br. 22-25; see also *Reno* v. *ACLU*, 521 U.S. at 867 (noting that the "order in *Pacifica* designate[d] when—rather than whether—it would be permissible to air such a program in that particular medium")). In light of the extraordinarily high costs of unduly limiting society's ability to protect children in this context, Congress's reasonable predictive judgments about the need for Section 505 and the inefficacy of alternative modes of protection should be accorded "substantial deference." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 665 (1994) (plurality opinion); see Gov't Br. 26-28. Section 505 therefore should be sustained by this Court.

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that focus on the direct impact of speech on its audience * * * are not the type of 'secondary effects'" that subject the restrictions to more relaxed scrutiny. *Boos* v. *Barry*, 485 U.S. 312, 321 (1988); see also *Reno* v. *ACLU*, 521 U.S. at 868. Section 505 does not "focus on the direct impact of speech on its audience," because it is not directed at the only communication for which appellee has ever claimed First Amendment protection—that between appellee and its subscribers. Instead, it is directed at a byproduct of that speech—the impact of signal bleed in homes that do not subscribe to appellee's services, do not want appellee's programming, and have no legal interest in obtaining it.

A. The Appropriate Standard Of Review Does Not Turn On Whether Television Programming Is Transmitted Through A Wire Or Over The Airwaves

Appellee argues that a different standard of review, less protective of children, applies to cable television than the one this Court has held applicable to broadcast television and radio. Appellee's arguments are illogical and inconsistent with this Court's precedents.

1. Appellee places its primary reliance on the assertion (Br. 16, 30-31, 35, 43, 45) that there are technical differences between cable television and broadcast television that make it appropriate to apply different standards of review to regulations of sexually explicit material on the two media. To all ordinary appearances, of course, the two means of transmitting television programming are indistinguishable; a child tuning in signal bleed on a television set would not likely know or care whether the programming had reached the home via a wire or via the air waves. See *Denver Area*, 518 U.S. at 744-745 (plurality opinion). Appellee argues, however, that there are technical means available to protect children against signal bleed from sexually explicit programming on cable television that would not be effective on broadcast television, and that the standard of review applicable to restrictions of sexually explicit material should therefore vary with the means (cable or airwaves) by which the signal is transmitted.

Appellee presented evidence in support of its contentions regarding alternative technical means of control to the district court. But the government introduced contrary evidence demonstrating that the alternative methods proposed by appellee are ineffective, difficult for parents to operate, and easy for children to circumvent. See Gov't Post-Trial Reply 15-18. The district court did not expressly resolve the resulting factual disputes, but the court's reliance on an enhanced Section 504 as a less restrictive alternative—rather than on those other technological alternatives—suggests

that the court found the government's evidence highly probative. In any event, this Court should not resolve such factual disputes in the first instance.[2]

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[2] An example of the problem presented by appellee's effort to have this Court resolve disputed factual issues is appellee's attempt (Br. 42 n.59) to rely on the V-chip as an alternative to Section 505, notwithstanding its concession in its motion to affirm (at 4-5) that the V-chip mechanism was not designed to address signal bleed. Appellee now relies on new V-chip regulations promulgated by the FCC after trial. See *In re Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings, Implementation of Sections 551(c), (d), and (e) of the Telecomms. Act of 1996*, 13 F.C.C.R. 11,248, para. 11 (1998) (*Implementation of Section 551*); 47 C.F.R. 15.120(e)(2). Appellee's theory is that V-chips will now be able to block unrated programming, and in doing so they will therefore block signal bleed from appellee's programming.

There are several problems with appellee's contention. First, the FCC did not discuss or mention signal bleed in its order, and it has never found that V-chips equipped with the ability to block unrated programming will in fact interpret signal bleed as unrated programming. Thus, it is not clear that the capacity to block unrated programs would do anything to block signal bleed. Second, the FCC regulations do not *require* V-chips to have the capability to block unrated programming; the FCC merely stated that "it is *permissible* to include features [in the V-chip] that allow the user to reprogram the receiver to block programs that are not rated." 47 C.F.R. 15.120(e)(2) (emphasis added). Third, the regulations provide that "[t]he default state of a [television] receiver (i.e., as provided to the consumer) should *not* block unrated programs." *Ibid.* (emphasis added). Thus, a parent who wants to block unrated programming must not only learn about the problem of signal bleed and the (hypothetical) ability of the V-chip to block it, but the parent must also learn how to "reprogram" the television to engage this feature. *Ibid.* Fourth, the FCC noted that the television rating system "will apply to all television programming *except for news, sports*, and [movies that incorporate the customary movie rating system]." *Implementation of Section 551*, para. 11 (emphasis added). Thus, a parent who purchases a television set that has the ability to block unrated programming and surmounts all of the other obstacles above will find out that enabling the ability of the V-chip to block unrated program will likely block all news and sports programming as well. Finally, because V-chips are only now being required to be included on new television sets with screen sizes larger than 13 inches, see 47 C.F.R. 15.120(b), and because existing television sets without V-chips will likely be in use for many

2. Appellee also appears to argue that Congress has less authority to protect minors from sexually explicit material on cable television than on broadcast television, because some cable channels (such as the ones carrying appellee's programming) broadcast an enormous amount of such material. According to appellee, whereas *Pacifica* "involved programming that represented 'a dramatic departure from traditional program content,'" sexually explicit content "has always been available on this medium." Br. 23. Appellee does not dispute the district court's findings that appellee has chosen "to broadcast only indecent material" (Br. 25), but it justifies that choice on the ground that "cable television networks generally are offered as niche services defined by subject matter" (Br. 26).

Appellee is correct that sexually explicit programming content is available on cable television. The district court made specific findings about the matter, noting that appellee's channels carry "virtually 100% sexually explicit adult programming." J.S. App. 6a, 42a, 47a.[3] Indeed, it is the availability of such material to nonsubscribers through signal bleed that Congress was attempting to stem in enacting Section 505. But appellee is incorrect to assume, counter-intuitively, that the more sexually explicit content a programmer chooses to provide, the less capability Congress has to protect minors from that content. To the contrary, as we pointed out in our opening brief (Gov't Br. 25-26), the "unbroken continuum of sexually explicit sounds and images, delivered without invitation to [children's] home[s]" on appellee's channels, J.S. App. 73a n.26, establishes that the

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years to come, the V-chip system could provide at best only a very long-term and partial solution to the problem of signal bleed.

[3] Appellee's complaints (*e.g.*, Br. 25, 29) that Section 505 would eliminate its broadcasting during two-thirds of the broadcast day on cable systems that are not digitally equipped also demonstrates the extent to which appellee is committed to broadcasting solely sexually explicit adult programming.

threat to minors is more serious in this case than in *Pacifica*, which involved a single broadcast of a satirical monologue. See also Gov't Br. 5-7 & nn. 2-4 (describing content of appellee's programming).

B. Vagueness Principles Furnish No Basis For Invalidating Section 505 Or Applying A More Stringent Standard Of Review

1. As it did before the district court, appellee argues extensively (Br. 26-30) that more stringent review should be applied to Section 505, because it is unconstitutionally vague and because, in any event, its asserted vagueness "precludes any attempt by [appellee] to minimize the censorial effect of time channeling." Br. 26. In response, the government argued in the district court that appellee's claim should be rejected because Section 505's application to the material that appellee in fact seeks to transmit on its networks is quite clear. See *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 58-59 (1976). The three-judge district court noted those contentions in an October 31, 1997, order, but it concluded at that time that certain "material questions of fact remain unresolved" that might have a bearing on the disposition of appellee's vagueness challenge. Mot. to Aff. App. 24a. The court noted, for example, that appellee's standing to challenge Section 505 on vagueness grounds would, in its view, require further information, including "Playboy's intentions, if any, to broadcast, outside the safe harbor hours, programming that is not sexually-oriented or that is materially different in sexual-explicitness to its current format *Id.* at 24a-25a. The court accordingly denied appellee's motion for partial summary judgment on vagueness, without prejudice to later renewal of the motion. *Id.* at 26a-27a. Although appellee renewed its vagueness claim after the trial in this case, the district court did not address that claim. This Court ought not resolve appellee's vagueness claim in the first instance, at least to the extent that resolution of that claim would turn on contested factual issues.

2. In any event, appellee's vagueness claim is wrong on its merits. The statute at issue in *Denver Area* relied on a formulation that, for practical purposes, is identical to the formulation in Section 505.[4] The plurality in *Denver Area* expressly held that the formulation was not "too vague," 518 U.S. at 750, and no Justice in *Denver Area* expressed any disagreement with that conclusion. Indeed, because Justice Thomas, joined by the Chief Justice and Justice Scalia, would have upheld the constitutionality of the entire statute in *Denver Area*, see *id.* at 812, they necessarily agreed with the plurality that it was not unconstitutionally vague. Like the provisions at issue in *Denver Area*, Section 505 is therefore "not impermissibly vague." *Id.* at 753.[5] See also *Dial Info.*

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[4] Compare *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 11 F.C.C.R. 5386, paras. 6, 9 (1996) (defining "indecent," as used in Section 505, as "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") with *Denver Area*, 518 U.S. at 736 (defining "sexually explicit" material, as used in the statute in that case, as "descriptions or depictions of 'sexual or excretory activities or organs in a patently offensive manner' as measured by the cable viewing community").

[5] Appellee argues (Br. 28-29) that a number of its actual or proposed programs are not indecent. To the extent the precise nature of individual programs is relevant to this Court's consideration of the case, we urge the Court to review the programs at issue and the discussion of them in our Post-Trial Brief (at 67-68). One program, for example, DX 36, includes a profile of a pornography star, with scenes of lesbian, oral, and group sex and a segment on a dial-a-porn company, including four of the seven "filthy words" at issue in *Pacifica*. Another, DX 40, includes the same dial-a-porn segment, along with scenes of sexual intercourse. Another submission, "Video Playmate Calendar," DX 39, is a series of twelve videos in which naked female models strut and move provocatively, or squirm on silken-sheeted beds, while caressing their breasts and genitals in implied self-arousal. And another program that purports to promote "safe sex" includes scenes in which a woman uses a zucchini to demonstrate how to put a condom on a man's penis with her tongue and in which, after a woman puts a condom on a man's erect penis, the couple engage in a series of sex acts.

Servs. Corp. v. *Thornburgh*, 938 F.2d 1535, 1540-1541 (2d Cir. 1991) (rejecting vagueness challenge to identical definition of "indecent," as used in dial-a-porn statute), cert. denied, 502 U.S. 1072 (1992); *Information Providers' Coalition for Defense of the First Amendment* v. *FCC*, 928 F.2d 866, 874-876 (9th Cir. 1991) (same); *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338-1339 (D.C. Cir. 1988) (broadcast regulation).

3. Without citing the discussion in *Denver Area*, appellee points out (Br. 26) that the Court in *Reno* v. *ACLU* found that the internet indecency statute in that case, which also used "indecency" formulations, had "ambiguities concerning the scope of its coverage that render it problematic for purposes of the First Amendment." 521 U.S. at 870. Even in that context, the Court in *Reno* did not hold that the term "indecency" was vague, see *id.* at 870, but rather decided the case on overbreadth grounds, see *id.* at 874. In any event, the Court in *Reno* did not overrule the holding that the "indecency" formulation in *Denver Area* was not unconstitutionally vague, but instead specifically explained why that holding was inapplicable in *Reno*. See *id.* at 872. Because the formulation of the vagueness standard under Section 505 and the context in which it is used are identical in relevant

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With respect to another of its programs, appellee errs in stating (Br. 28 n.36) that "the First Circuit [in *Brown* v. *Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 532 (1995), cert. denied, 516 U.S. 1159 (1996),] held that Playboy's program *Hot, Sexy and Safer* was appropriate for a mandatory middle school assembly." The First Circuit certainly did not hold that the program was "appropriate" for the ninth and tenth grade high school, see 68 F.3d at 541—not, as appellee states, "middle school"—students to whom it was shown. Instead, the First Circuit reached the quite different conclusion that plaintiffs had failed to demonstrate that the school officials had violated the Constitution or committed sexual harassment by showing the program to ninth and tenth graders. Of course, even if the First Circuit had believed that the program was "appropriate" for high school students, that would not establish that it is "appropriate" for the much younger children who have access to television sets and who could listen to it and view its signal bleed on appellee's networks.

respects to the statute at issue in *Denver Area*, the vagueness ruling in *Denver Area* is controlling here.

First, the ambiguities in the internet indecency statute in *Reno* arose in part because that statute contained two different and competing formulations of the statutory standard. See 521 U.S. at 870-871. Section 505, by contrast, uses a single formulation, which, as we note in our opening brief (at 8), has been carefully defined by the FCC. Indeed, the FCC's availability to define the statutory terms where necessary and definitively work out their meanings in future cases is itself a factor distinguishing this case from *Reno*. See *Dial Info. Servs.*, 938 F.2d at 1540-1541.

Second, in another passage not discussed by appellee, the Court in *Reno* explained that the internet indecency statute was a criminal statute, and therefore any potential vagueness "pose[d] greater First Amendment concerns than those implicated by the civil regulation reviewed in *Denver Area*." 521 U.S. at 872. Like the statute in *Denver Area* (and *Pacifica*)—and unlike the statute in *Reno*—Section 505 is a "civil regulation."

Finally, it is significant in this regard that Section 505 and the statutes at issue in *Denver Area* (and *Pacifica*) are directed at sophisticated commercial entities (like appellee) in the cable broadcasting and transmission businesses, whereas the internet indecency statute in *Reno* was "not limited to commercial speech or commercial entities," but "embrace[d] all nonprofit entities and individuals posting indecent messages or displaying them on their own computers," 521 U.S. at 877. Cf. Mot. to Aff. App. 24a (district court below, in discussing vagueness, notes that "because television broadcasting is a highly public forum, there is no risk that Section 505 would impose undue restrictions upon purely private

speech"). The vagueness holding in *Denver Area* is therefore controlling here.[6]

C. The District Court Erred In Holding That Its Enhanced Version Of Section 504 Is A Less Restrictive Alternative To Section 505

The district court held Section 505 unconstitutional on the ground that the enhanced version of Section 504 the court posited, if enacted by Congress, would be a less restrictive alternative to Section 505. J.S. App. 34a-39a. We argue in our opening brief that the district court's analysis and conclusion are defective, regardless of the standard of review to be applied. The alternative that the district court conceived —providing for notice to cable subscribers of the existence of signal bleed of sexually explicit programming and of a feasible means to eliminate it—would not be an adequate alternative to Section 505 because it would not serve all of the compelling interests served by Section 505 (see Gov't Br. 30-35), and it would not be less restrictive because it would lead to (at least) the same burdens on appellee's speech (see Gov't Br. 35-40).

We do not contend, as appellee suggests (Br. 40), "that a regulatory alternative must have been previously enacted and litigated in order to qualify as a less restrictive means." We do contend, however, that a court has an obligation to exercise considerable care before holding any Act of Congress unconstitutional, and the need for such care is especially important in a case like this. What is at stake here is society's interest in protecting children and in the sanctity and privacy of the home. An error in holding that a hypothetical and untried scheme is a less restrictive alternative can result

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[6] Appellee is correct (Br. 14 n.13) that a "willful" violation of the Communications Act is potentially punishable with a criminal penalty under 47 U.S.C. 501. But that did not convert the entire Communications Act into a criminal statute in *Denver Area* or *Pacifica*, and it does not do so here. Appellee is unable to point to a single criminal prosecution under that provision for violation of an indecency standard, and we are aware of none.

in leaving children unprotected from materials our society has found to be inappropriate for them and leaving individuals unable to protect the privacy of their homes from the intrusion of such materials. Especially when a proposed alternative (like the district court's enhanced Section 504) has never been used in fact and has never been subjected to the crucible of litigation, a court should exercise special caution before concluding that the ability to conceive of the alternative is sufficient to render an Act of Congress unconstitutional.

The district court exercised no such caution. It decided that the enhanced Section 504 would be a less restrictive alternative without affording the parties an opportunity to address the inadequacies of its suggested scheme and the speech-restrictive effects that scheme would have on appellee's programming. See Gov't Br. 28-29.[7] As a result, the court adopted, as a less restrictive alternative, an ill-defined enhanced Section 504 scheme that its own findings demonstrate would be inefficacious and speech-restrictive to at least the same degree as Section 505.

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[7] Appellee argues (Br. 45) that the question of the efficacy of an enhanced Section 504 was addressed during closing arguments. What was addressed by appellee's counsel (at closing argument, when it was too late to put on additional evidence) was the extent to which cable operators *currently* provide notice of the availability of blocking. See Closing Argument Tr. 47-51. Aside from that, there were only three stray, and similarly vague, references by appellee's counsel to notice. See *id.* at 48-49 ("it certainly would be within the realm of possibility to require more frequent notice or perhaps even more prominent notice of the ability to use those lockout features"); *id.* at 49 (similar), 130 (similar). We are unable to find any reference to enhanced notice requirements in government counsel's remarks at Closing Argument Tr. 104-110, which is also cited by appellee. In any event, the entire scheme conceived by the district court for enhanced notice and easy availability of blocking devices was not advocated by either party at trial, and it was not mentioned by the court at trial.

1. The Enhanced Section 504 Scheme Would Not Be An Efficacious Alternative To Section 505

As we explain in our opening brief (at 30-35), the district court's enhanced Section 504 would not be an efficacious alternative to Section 505 because it would not serve one of the key interests underlying Section 505—society's interest in seeing to it that children are not exposed to sexually explicit materials. That interest would of course be served in instances (which by appellee's account will be rare, see Br. 46 & n.64) in which parents request blocking under an enhanced Section 504. But in cases in which parents fail to make use of an enhanced Section 504 procedure out of distraction, inertia, or indifference, Section 505 would be the only means to protect society's independent interest.[8] Appellee's contention (Br. 43) that notice under an enhanced Section 504 would be so effective (despite the cable operator's built-in financial incentive to minimize notice and thereby minimize the costs of providing blocking) that such cases of parental distraction, inertia, or indifference will be rare is extraordinarily unlikely, and it runs directly contrary to common-sense—and scientifically based studies (see Gov't Br. 33 n.23)—about human behavior. Indeed, if appellee's prediction elsewhere (Br. 46) that very few households would request blocking under an enhanced Section 504 is correct, the only plausible explanation would be that most parents had failed to do so out of distraction, inertia, or indifference. The only other alternative—that most parents,

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[8] Appellee curiously criticizes Section 505 (Br. 44) as being ineffective because it permits transmission of sexually explicit programming during the safe-harbor hours. Since *Pacifica*, this Court has accepted that time-channeling to the late-night hours is an effective (albeit not perfectly effective) means to protect children from sexually explicit material on television and radio. Congress's decision to permit the safe harbor, moreover, demonstrates that Congress was not attempting to censor or suppress appellee's speech, but merely to protect children from its harmful effects. Appellee would surely not have been more satisfied with Section 505 had it contained no safe-harbor provision.

genuinely informed that their children could be exposed to sexually explicit programming via signal bleed, would prefer such exposure be available—is not plausible.

Appellee does not directly deny that there is a compelling societal interest in the upbringing and protection of children that is independent of the actions of particular parents. Appellee does assert (Br. 41), however, that this Court implicitly rejected the validity or substantiality of such an interest in *Denver Area* when it held Section 10(b) of the Cable Television Act of 1992 unconstitutional. Appellee's view is impossible to square with the consistent declarations of this Court—and of each Justice in the *Denver Area* case—that society does have such an interest and that it is compelling. See Gov't Br. 31 & n.22 (giving citations). In addition, as we note below (see p. 16, *infra*), one reason why the Court reached the conclusion it did in *Denver Area* was that it posited that one of the alternatives that would remain after Section 10(b) was struck down was Section 505. See 518 U.S. at 756. The Court's rejection of Section 10(b) was thus based in part on the assumption that Section 505 would continue to be available to protect society's independent interest in protecting children. *Denver Area* in no way suggests that that interest—and Congress's ability to legislate in support of that interest—could be disregarded.

2. The Enhanced Section 504 Would Not Be Less Restrictive Of Speech Than Section 505

We also explain in our opening brief (at 35-40) that the district court's enhanced Section 504 would not be less restrictive than Section 505, because, based on the district court's own findings, it would lead to the same (or more severe) limitations on the availability of appellee's programming. We need not repeat that explanation here, because appellee responds to it only by attacking the facts as found by the district court, contending that "the government *and the court below* vastly overstated the cost of compliance" with an enhanced Section 504. Appellee Br. 46 (emphasis

added). Appellee has entirely failed—indeed, has barely attempted—to carry its heavy burden of showing that the district court's factual determinations were clearly erroneous. This Court therefore should not further consider appellee's contentions on this point.[9]

Appellee also refers (Br. 39) to the district court's conclusion that Section 504 is not content-based, see J.S. App. 35a, and argues that Section 504 is therefore a less restrictive alternative to Section 505. Of course, the district court repeatedly explained that Section 504, without a requirement of enhanced notice and easy availability of blocking, would not be effective at all to solve the problem of signal bleed. See J.S. App. 20a ("If * * * § 504 is to be an effective alternative to § 505, adequate notice of the availability of the no-cost blocking devices is critical."); accord *id.* at 19a, 38a. Once the requirements of enhanced notice of signal bleed and easy availability of blocking are added to Section 504, however, it is no longer content-neutral, for those requirements

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[9] The district court found that cable operators would cease to earn a profit by carrying appellee's networks if 3%-6% of subscribers requested individual blocking of those networks. J.S. App. 22a. The district court also noted that cable operators would cease carrying appellee's networks long before they reached that no-profit point, since they would do so "if costs rose to such a point that the profit from adult channels was less than the profit from channels unlikely to require blocking." *Ibid.* See Gov't Br. 36-37. Thus, even appellee's initial calculation, based on the 6% figure (Br. 46 & n.64), far overstates the number of households whose requests for blocking under an enhanced Section 504 would be necessary to cause cable operators to time-channel (or cease carrying) appellee's programming. With respect to appellee's further contentions that the costs of providing blocking are very low, the district court rejected as "unavailing" and contrary to the expert testimony the very contentions advanced by appellee here (Br. 46-47)—that blocking devices "can be mailed to subscribers thereby obviating the need for installation labor costs and lowering the cost per mechanism to the cost of the product plus postage." J.S. App. 22a n.21. Our demonstration that an enhanced Section 504 would be (at least) as speech-restrictive as Section 505 rested on the district court's factual findings; appellee's argument to the contrary is based entirely on a rejection of those findings.

presumably would apply only to sexually explicit programming services like appellee's. Moreover, if those requirements were added to Section 504, appellee would no doubt argue (as it has with respect to Section 505) that they impose an impermissible economic burden on its speech and have other First Amendment defects as well.

D. Appellee's Other Arguments Should Be Rejected

Appellee advances a number of additional arguments—distinct from those relied upon by the district court—in support of its contention that Section 505 is unconstitutional. None of them are persuasive.

1. Appellee argues (Br. 20-21) that the First Amendment analysis here is governed not by *Pacifica*, but by *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1976), in which the Court held unconstitutional an ordinance forbidding drive-in theaters from showing movies containing nudity visible from a public street. As we explain in our opening brief (at 23 n.14), the Court in *Erznoznik* quite explicitly relied on the fact that the ordinance in that case "is not directed against sexually explicit nudity, nor is it otherwise limited," 422 U.S. at 213—unlike Section 505, which is directed *only* at sexually explicit programming. The fact that "a contemporaneous reference to *Erznoznik*" written by a "legal expert" (Appellee's Br. 21 n.22) described the ordinance (in contradiction of this Court's opinion) as directed only toward sexually explicit materials is obviously of no significance in construing this Court's holding. Nor does appellee offer any explanation of the other significant difference between this case and *Erznoznik* that reinforces the authority of Congress to enact Section 505: Section 505, unlike the drive-in movie regulation in *Erznoznik*, is directed at sexually explicit programming that intrudes, uninvited, into the privacy of the home.

2. Appellee argues (Br. 33-34) that this case is controlled by the Court's holding in *Denver Area* that Section 10(b) is unconstitutional. Section 10(b) provided that those who transmit indecent material on leased-access cable channels must

segregate such material on a separate channel and block that channel unless a subscriber specifically requests access to it in writing, a procedure that could result in a waiting period of up to 30 days to begin receiving service. The Court's holding regarding Section 10(b) is inapposite here, for four reasons.

First, the basis for the Court's holding regarding Section 10(b) was that alternative means were available to protect minors from indecency. See *Denver Area*, 518 U.S. at 756-759. Prominently featured among those alternative means was Section 505. See *id.* at 756. The Court's holding in *Denver Area*, therefore, rested on at least the possibility that Section 505 is constitutional; it therefore could not establish, as appellee argues, that Section 505 violates the First Amendment.

Second, Section 10(b)—unlike Section 505—did not allow for any "safe harbor" for transmitting indecent material at night. Accordingly, Section 10(b) imposed a far more stringent, and unnecessarily broad, restriction on speech than does Section 505.

Third, Section 10(b) in essence required that certain channels previously available to all viewers would thenceforth be available only by subscription. It thus directly interfered with the desired communication between cable operators and programmers, on the one hand, and their viewers, on the other. By contrast, Section 505 addresses the problem of signal bleed, which arises only with respect to channels that are already available only by subscription. And Section 505 permits the communication between appellee and its subscribers to continue without interference, so long as appellee does not thereby pose a threat to third parties (children viewing and listening to signal bleed, or adults seeking to preserve the privacy of their homes) with whom appellee has never asserted a First Amendment interest in communicating. See J.S. App. 42a ("[Appellee] do[es] not contend that signal bleed itself is protected speech.").

Finally, Section 10(b), unlike Section 505, required that subscribers must apply in writing to receive indecent programming on access channels and included several delays of up to 30 days that would further burden subscribers and programmers. The Court in *Denver Area* noted that those requirements would have "obvious restrictive effects," because they would put the indecent access programming out of the reach of occasional or casual viewers, and because the written notice requirement "will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel." 518 U.S. at 754. See also *id.* at 807 (Kennedy, J., concurring) (noting "constitutional infirmity of requiring persons to place themselves on a list to receive programming"). Section 505 imposes none of those burdens, and consequently is far less restrictive than Section 10(b) in this respect as well.

The plurality in *Denver Area* emphasized that its decision was highly context-specific. Because Section 505 differs so substantially from Section 10(b), the Court's specific holding in *Denver Area* that Section 10(b) is unconstitutional is not controlling here.

3. Appellee contends repeatedly that Section 505 is unconstitutional because "the government failed to demonstrate that signal bleed is a 'pervasive problem.'" Br. 31; see *id.* at 16, 30- 31, 35, 43, 45. Appellee's premise is mistaken. Congress's power to protect children from sexually explicit material on television is not limited to instances in which such material presents a "pervasive problem." In *Pacifica*, the Court held that the FCC could "proscribe this particular broadcast," 438 U.S. at 742, without requiring any showing that similar broadcasts pervaded the medium. Nor could such a showing have been made in that case. See *Reno*, 521 U.S. at 867 (program in *Pacifica* was "a dramatic departure from traditional program content"). Although it is no doubt true that Congress may not act to protect children from

sexually explicit programming with a measure like Section 505 unless there is a real problem being addressed, Congress need not wait until that problem pervades the entire medium before acting.

In any event, the problem of signal bleed is widespread. The district court found that most cable operators use a technology that leaves the audio portion of appellee's sexually explicit programming entirely audible. J.S. App. 7a-8a. Appellee cannot—and does not—deny that the audio portions of its programming are as sexually explicit as the video. In fact, in addition to the "assorted orgiastic moans and groans" to which the district court referred (and which are a staple of appellee's programming, *id.* at 52a-53a), the sound tracks of many of its programs not only make frequent use of the "seven dirty words" from *Pacifica*, but do so in the very coarse context of graphic depictions of individuals engaged in sexual intercourse and other explicit sexual acts, rather than in the relatively sanitized context of the satire/ social commentary before the Court in *Pacifica*.[10] Accordingly, the district court's finding that audio signal bleed is prevalent is sufficient to show that the problem Congress was addressing is very widespread.

With respect to the video portion of appellee's programming, too, the district court's findings establish that Congress was addressing a widespread problem. The record contains substantial anecdotal evidence of signal bleed in a wide variety of circumstances. See Gov't Br. 6-7.[11] Nothing

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[10] As a sample of the audio signal bleed that the district court found to commonly occur, we urge the Court to review the tapes that we have lodged with this court or any of the other tapes of appellee's programming that are a part of the record in this case. We have been informed that those tapes have been received by the Clerk of this Court, together with the other record materials.

[11] See also 141 Cong. Rec. 15,587 (1995) (Sen. Feinstein) (noting that "partially scrambled video pornography—replete with unscrambled and sexually explicit audio—was being automatically transmitted to more than 320,000 cable television subscribers" in San Diego, California, and the sig-

in the technology of cable television suggests that the magnitude of the problem is limited to the particular instances the evidence identified. In addition, the district court found that "the vast majority (in one survey, 69%) of cable operators have, in response to § 505, moved to time channeling." J.S. App. 16a-17a. That fact too makes clear that the cable industry itself believes that signal bleed occurs with some frequency. Otherwise, those systems would not have chosen to undergo the loss of revenue that results from limiting sexually explicit channels to the safe-harbor hours.[12]

Indeed, an examination of the operation of Section 505 reveals that it imposes a burden on speech that is well tailored to the scope of the problem of signal bleed on a given system. If signal bleed does not occur on a system, then Section 505 imposes no restriction on speech on that system at all. If signal bleed occurs sporadically, due to defects in "the quality of the [cable operator's] equipment, its installation, and maintenance," J.S. App. 9a, Section 505 requires only

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nal was transmitted "only one channel away from a network broadcasting cartoons and was easily accessible for children to view"); see also DX 1 (videotape lodged with Clerk of this Court). As the district court explained, the government's evidence showed that there was the potential for signal bleed in 39 million homes with more than 29 million children. J.S. App. 10a.

[12] We disagree with appellee's contention that the district court found that the government had failed to prove the pervasiveness of signal bleed. Appellee refers (Br. 16, 31, 35) to the district court's statement that "the Government has not convinced us that [signal bleed] is a pervasive problem." J.S. App. 36a. The very next sentence in the court's opinion, however, is that "[p]arents may have little concern that the adult channels be blocked." *Id.* at 36a. Read together, the two sentences indicate only that the court believed that the government had not convinced the court that parents (who are likely not to know of the problem) generally perceived that there is a substantial threat that their children would be exposed to signal bleed or that they should take affirmative steps to block it; the district court was not contradicting its earlier findings, discussed in text, that audio signal bleed is common and video signal bleed is an ever-present danger on the majority of cable systems in operation today.

that the cable operator correct the defects. But if signal bleed occurs with regularity, as the evidence suggests it does, then a cable operator may decide that the only effective solution is time-channeling. Regardless of how often signal bleed occurs on a given system, therefore, the burden imposed under Section 505 is closely commensurate with the scope of the problem.[13]

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For the foregoing reasons and those stated in our opening brief, the decision of the district court should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 1999

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[13] On the jurisdictional issue, appellee raises only one new point that we have not already answered in our opening brief (at 41-44). Appellee asserts (Br. 49) that an order granting appellants' Federal Rule of Civil Procedure 59(e) motion, which sought to confine the judgment to appellee Playboy (the only plaintiff remaining in the case), "would have essentially nullified Playboy's facial challenge to Section 505." That is incorrect. The legal basis for a particular plaintiff's challenge to a regulation or statute (*e.g.*, on-its-face as distinguished from as-applied) is distinct from the relief to which the plaintiff is entitled if that challenge is successful. Absent a special statutory review provision allowing a single party to obtain a judgment setting aside a regulation or restraining enforcement of a statute in its entirety (see, *e.g.*, *AT&T Corp.* v. *Iowa Utils. Bd.*, 119 S. Ct. 721, 728-729 (1999); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)), a plaintiff is entitled only to a judgment that declares the challenged provision unlawful or enjoins its enforcement or application as to that plaintiff. See, *e.g.*, *United States Dep't of Defense* v. *Meinhold*, 510 U.S. 939 (1993); *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891, 894 (1990). In that event, the collateral estoppel effect of the judgment is limited to the particular plaintiff before the court. See *United States* v. *Mendoza*, 464 U.S. 154 (1984). Of course, once this Court renders a decision concerning the validity of a regulation or statute, even in a case brought by a single party, the precedential effect of this Court's decision will bind the lower courts in cases brought by other plaintiffs, quite aside from principles of collateral estoppel.