No. 98-1682

In the Supreme Court of the United States

OCTOBER TERM, 1998

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

JURISDICTIONAL STATEMENT

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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(e) and 60(a) 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 (App., *infra*, 1a-39a) is reported at 30 F. Supp. 2d 702. The permanent injunction (App., *infra*, 87a-88a) and the order denying the government's post-trial motions (App., *infra*, 91a-92a) are unreported. The opinion of the district court denying a preliminary injunction (App., *infra*, 40a-86a) is reported at 918 F. Supp. 772. The opinion of the district court granting a temporary restraining order is reported at 918 F. Supp. 813. The order of this Court affirming the denial of a preliminary injunction is reported at 520 U.S. 1141.

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. 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 App., *infra*, 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. Signal bleed is a phenomenon occurring in most cable television systems. It is associated with the practice of cable television operators of "scrambling" or otherwise blocking the signal for their "premium" channels (channels for which an additional charge is imposed) to ensure that cable customers who have not subscribed to those channels do not receive programming for which they have not paid. Signal bleed occurs when non-subscribers receive a signal that is only partially scrambled: the video signal can be discerned at random intervals, and the audio signal is often not scrambled at all.

1. Approximately 62 million households nationwide receive cable television. App., *infra*, 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 or sporting event for a specified additional fee. *Ibid.*

To ensure 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 at times be discerned. The cable system provides customers who are authorized to receive the premium channel 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 the channel. 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. App., *infra*, 7a.

Modern baseband scrambling, in contrast, renders the video portion of the signal unintelligible. As with RF scrambling, subscribers authorized to receive the 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. App., *infra*, 7a-8a.

The limitations of these scrambling systems give rise to the "signal bleed" problem. In any system where premium

programming is carried, all customers of the system receive the scrambled signal on all televisions hooked up to the customer's line. As a result, all customers who are non-subscribers to a premium service typically receive a partially scrambled video signal and a completely clear audio signal. App., *infra*, 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.*

Congress's concerns were triggered by complaints from across the country. For example, Mr. Anthony Snesko had made 550 copies of a videotape showing the Spice Channel as it appeared on his television in Poway, California, at 9:00 in the morning sometime in April or May, 1994, and had distributed a copy to every Member of the House and Senate. DX 1, 47.[1] In December 1995, a mother from Cape Coral,

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[1] The videotape shows a scene in which a man performs oral sex on a woman. The video images, while scrambled, are discernible. The entirely

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 4:00 in the afternoon, "transfixed" by scenes of "a naked man sodomizing a woman" together with the "groans and epithets that go along." DX 55. In 1993, Senator Biden urged the Federal Communications Commission to review a cable company's compliance with federal law after large numbers of Delaware residents voiced objections about unwanted reception of Spice. DX 72. See also DX 59, 61, 70 (constituent letters complaining about inadequately scrambled "sex channels" and their availability to children).

In her floor statement, Senator Feinstein acknowledged that it was also open to Congress to require cable operators to provide complete blocking of audio and video signals free of charge on *any* channel—not merely those showing sexually explicit programming—at the request of a subscriber. That is the approach Congress ultimately included in Section 504 of the Telecommunications Act of 1996, 110 Stat. 136. But Senator Feinstein explained that the proposal for blocking on demand did 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." 141 Cong. Rec. at S8167.

3. Section 505 became law on February 8, 1996, when the President signed the Telecommunications Act of 1996, 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 fully block the video and audio

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audible audio portion contains four-letter words and vulgar references to sexual organs. DX 1.

portion of such channel so that one not a subscriber to such channel or programming does not receive it." 110 Stat. 136 (codified at 47 U.S.C. 561 (Supp. II 1996)). Until the cable operator complies with those 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." *Ibid.*

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* ¶¶ 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.* ¶ 9. As the Commission explained, that is essentially the same definition adopted by the Commission for purposes of regulating indecent broadcast programs and telephone messages.

The Commission also proposed, and provisionally adopted, a safe harbor for purposes of Section 505's time-channeling requirement of 10 p.m. to 6 a.m., the same safe-harbor hours previously established for airing indecent broadcast television or radio programs. *Implementation of Section 505* ¶¶ 5, 8; see also 47 C.F.R. 73.3999. The final rules implementing Section 505 became effective on May 18, 1997. *In re 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," App., *infra*, 5a-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 violated 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.[2] A three-judge court was convened pursuant to Section 561 of the Telecommunications Act, 110 Stat. 142, 47 U.S.C. 223 note (Supp. II 1996).

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 they are likely to prevail on the merits." App., *infra*, 63a.[3] 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

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[2] It appears that Playboy has recently purchased Spice, which did not participate in the proceedings on remand from this Court and is no longer a party to this case. Chicago Tribune, Mar. 16, 1999, 1999 WL 2853823.

[3] Judge Farnan had entered a temporary restraining order on March 7, 1996, at the outset of this case, which remained in effect until this Court summarily affirmed the district court's denial of a preliminary injunction. 918 F. Supp. 813 (D. Del. 1996); see App., *infra*, 2a, 19a.

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 remedies to protect 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. App., *infra*, 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.

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 on 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." App., *infra*, 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. App., *infra*, 35a. The court noted that Section 505 requires complete scrambling of the video signal even to households without children, and the court concluded that Section 505's alternative of time channeling restricts "a significant amount of protected speech," because "30-50% of all adult programming is viewed by households prior to 10 p.m." *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." App., *infra*, 35a. In this respect, the court acknowledged that under Section 504 "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 (see note 3, *supra*) was sufficient to alleviate the court's concerns regarding the adequacy of notice to customers under Section 504. 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.[4] The court

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[4] This period began on March 9, 1996, when the Telecommunications Act went into effect, and ended on May 18, 1997, when Section 505 was

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.*

The court set forth in some detail what would constitute "adequate notice" under Section 504. 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. App., *infra*, 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 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.*

The court held that when enhanced with such "adequate notice," Section 504 would be "a less restrictive alternative to § 505." App., *infra*, 38a. The court explained 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

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implemented after the denial of a preliminary injunction was affirmed by this Court. App., *infra*, 19a.

'adequate notice,' is an effective solution." *Id.* at 37a-38a. The court recognized that it could not require cable operators to provide "adequate notice," 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 notice is provided, Section 504 would not be a viable alternative to Section 505. *Id.* at 38a.

7. On December 29, 1998, the day after announcing its decision, the court issued an order permanently enjoining enforcement of Section 505. App., *infra*, 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 mentioned 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 appeal on January 19, 1999, 20 days after entry of the injunction, as provided in Section 561(b), 110 Stat. 143, of the Act. App., *infra*, 89a-90a; see page 1, *supra*.

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." App., *infra*, 91a-92a. On April 7, 1999, the govern-

ment filed a second notice of appeal, addressed to both the original injunction and the March 18 order. *Id.* at 93a-95a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The three-judge district court has held Section 505 of the Telecommunications Act of 1996 unconstitutional and enjoined its application throughout the country. The court based that holding solely on its conclusion that a hypothetical statute similar to Section 504 of the Act, but with complex, enhanced notice requirements, would be a less restrictive alternative to Section 505. The court's analysis was deeply flawed, and its judgment invalidating an Act of Congress warrants plenary review by this Court.

First, the court applied the strictest form of scrutiny, ruling that Section 505 could survive only if it were less restrictive than any alternative, including the court's untried theoretical construct of a Section 504-type regulation enhanced by an extensive but imprecise notice requirement. In *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, 518 U.S. 727, 755 (1996), the plurality reserved the question whether strict scrutiny applies to regulation of indecency on cable television. The district court here decided that question and did so incorrectly, thus subjecting indecent programming distributed by cable to a different First Amendment standard than identical material broadcast through the air. Had it not done so, the court would have concluded that Section 505 is constitutional.

Second, the district court's ruling is illogical even on its own terms, because it has not been established that even the enhanced version of Section 504 that the court hypothesized would in practice be less restrictive than Section 505, and it would not in any event protect the compelling interests that the court itself recognized. Based on the court's own findings, if any significant number of subscribers opted to request blocking of signal bleed, economics would lead to the

means of compliance that the district court found to have resulted under Section 505—cable operators would time channel sexually explicit programming services or simply drop them altogether. In addition, in analyzing whether its hypothetical enhanced Section 504-type regulation would adequately serve the interests protected by Section 505, the court entirely ignored society's independent interest in protecting minors from exposure to explicit sexual material. Had the court taken that interest into account, it would have found any version of Section 504 to be an inadequate alternative.

A. 1. As a general matter, "[t]he government may * * * regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). This Court has never applied that "strict scrutiny" standard, however, to the regulation of indecency on radio or television. Instead, in *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 750 (1978), the Court stated that "special treatment of indecent broadcasting" is "amply justif[ied]" and upheld a time-channeling regulation of indecency on broadcast radio that would have been constitutionally infirm in many other contexts. See *ibid.* 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"; that indecency on television or radio "confronts the citizen * * * in the privacy of the home"; that "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content"; and that "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 748-749.

The Court has repeatedly reaffirmed the principles of *Pacifica*. For example, in *Sable*, the Court noted that *Pacifica*'s "special treatment of indecent broadcasting" is 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." 492 U.S. at 127. 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 'uniquely accessible to children, even those too young to read.'" *Ibid.* (quoting *Pacifica*, 438 U.S. at 733). More recently, in *Reno* v. *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, essentially for the reasons given above, *id.* at 866-868.

2. The Court has not yet definitively decided whether the more relaxed standard that applies to time-channeling regulation of indecency on broadcast radio and television also applies to regulation of indecency on cable television. In *Denver Area*, the plurality stated that it "need [not] determine whether, or the extent to which, *Pacifica* does, or does not, impose some lesser standard of review where indecent speech is at issue" in a challenge to regulations of cable television. 518 U.S. at 755. But the plurality in *Denver Area* also relied heavily on *Pacifica* to uphold one of the cable television regulations at issue there. *Id.* at 744-748. Moreover, it distinguished *Sable*, in which the Court held unconstitutional a ban on indecent telephone messages, on the ground that *Sable*, unlike *Denver Area*, involved "a total governmentally imposed ban on a category of communications, but also 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.*

As the plurality noted in *Denver Area*, the factors on which the Court based its decision to apply "special treatment" to time-channeling of indecent over-the-air radio and television programming apply with at least equal force to indecent cable television programming. See 518 U.S. at 744-745, 748. Children may just as easily obtain access to indecency broadcast on cable television as to similar materials on broadcast channels. Moreover, the regulation at issue in this case, like the regulation at issue in *Pacifica*, is not a criminal prohibition or an outright ban on indecent speech; it permits cable operators to "time channel" indecent material to the same late-night hours as in *Pacifica*, and it also permits operators to provide indecent material at any time, so long as they eliminate unwanted signal bleed. Finally, as in *Pacifica*, "warnings could not adequately protect the listener from unexpected [signal bleed]." *Reno*, 521 U.S. at 867.

3. The district court in this case gave no weight to the concerns on which the Court relied in sustaining special treatment of regulation of broadcast indecency in each of the above cases. The district court did note 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." App., *infra*, 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.* Indeed, the court applied its "least restrictive alternative" test in a particularly rigorous manner, holding that Section 505 was unconstitutional solely because the court could imagine an alternative, entirely hypothetical scheme whose practicality, cost, and legality have never been tested.

Whether a scheme of adequate notice could be devised without resulting in exorbitant costs or raising other legal problems is open to substantial doubt. In this regard, it is significant that the district court's scheme, though modeled on Section 504, would be far more complex and uncertain. It would involve requirements, enforceable only against Playboy that operators (who have a financial incentive to minimize subscriber requests for blocking devices) notify customers at regular (though unspecified) intervals, and via a variety of means, of the problem of signal bleed, the availability of blocking devices at no charge, and even the means—"a telephone call" to the cable operator, App., *infra*, 37a—by which a subscriber could obtain the devices. Indeed, the court held such a scheme to be a "viable" alternative to Section 505 notwithstanding the fact that there was literally *no* evidence in the record that such a scheme would work to provide genuinely adequate notice and a genuinely free choice. The only evidence that was in the record on this point surely did not support the viability of the court's scheme, for it consisted of the meager one-half of one percent rate of requests for blocking devices (albeit without the detailed notice and other requirements fashioned by the district court).

Pacifica upheld a time-channeling regulation of broadcast indecency that was more restrictive than the Section 505 scheme. It did not offer broadcasters the alternative of

blocking rather than time-channeling,[5] and it directly regulated a desired communication, rather than, as here, regulating a byproduct (signal bleed) of a communication between other parties in which the receiving nonsubscriber has no legitimate interest. Indeed, because the interest in protection of children in this case is greater than that in *Pacifica*, it would support stronger measures. Unlike the one-time broadcast of inappropriate language at issue in *Pacifica*, this case involves channels that carry "virtually 100% sexually explicit adult programming," App., *infra*, 42a, 47a, and which result, due to signal bleed, in "an unbroken continuum of sexually explicit sounds and images, delivered without invitation to [children's] home[s]." *Id.* at 73a. Had the district court taken *Pacifica* and its rationale into account, it would have upheld Section 505 because Section 505 imposes a very limited restriction on speech and is a very effective approach to the substantial evil it addresses. The court's application instead of a very rigorous, least-restrictive-alternative test is consistent only with a form of scrutiny far more demanding than that which this Court has applied to indecency on the broadcast media. Because indecency on cable television is constitutionally indistinguishable from indecency on those media, the district court's use of that standard of review was erroneous.

B. The district court also erred in concluding, even under the exceptionally strict standard of review it applied in this case, that Section 504 would be less restrictive than Section

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[5] Although the district court found that cable operators "with incomplete scrambling technology" choose time-channeling, App., *infra*, 33a n.23, an increasing number of cable systems use digital or other technologies that eliminate signal bleed entirely. See *id.* at 9a, 18a n.17. With respect to subscribers to sexually explicit programming services on such systems, Section 505 imposes no restriction on speech whatever. Quite aside from the arguments in text, the district court had no basis for enjoining the application of Section 505 to such systems.

505 or that Section 504 would be sufficient to promote the interests underlying Section 505.

1. 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," App., *infra*, 33a & n.23. See also *id.* at 16a-17a. In turn, the court reasoned, such time channeling "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.*[6]

Based on the court's own factual findings, it is highly likely that an application of the court's hypothetical, enhanced version of Section 504 would have at least the same effects. The court found that "the distribution of lockboxes to a sufficient number of customers to effectively control the problem of signal bleed is not economically feasible." App., *infra*, 21a. Specifically, the court found that, "[i]f one considers a five year revenue stream in the break-even analysis, the number of traps that could be distributed rises to 6.0 percent of the subscriber base." *Id.* at 22a. In other words, if six percent of a system's subscribers opted to block signal bleed under an enhanced version of Section 504, then the costs of supplying the traps would equal the operator's expected profit from carrying sexually explicit channels. Of

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[6] We do not dispute that time-channeling of indecent sexually explicit television programming to the hours when most viewers want to see such programming is a restriction on such programming. The district court, however, failed to take into account the rather modest scope of that restriction—especially in light of the easy availability of VCR machines to tape television programming and play it at a time that is convenient to the viewer. Cf. *Pacifica*, 438 U.S. at 750 & n.28.

course, cable operators could be expected to cease carrying sexually explicit channels long before they reached that break-even point. As the court found, "profit-maximizing cable operators would cease carriage of adult channels * * * 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.*

Those findings make clear that any scheme that resulted in requests for traps from even quite a small number of customers—fewer than six percent and perhaps as low as one to three percent—would make it uneconomical for cable operators to carry sexually explicit channels. The district court's enhanced version of Section 504 would, under its own rationale, be such a scheme. The district court designed its enhanced version of Section 504 to provide genuine, easily understandable notice to each subscriber of the problem of signal bleed and a quick and easy means to stop it. App., *infra*, 36a-37a. Moreover, such notice would have to be repeated on a regular basis (though the district court did not specify how often), 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 such a system of notice and easily available blocking were in fact put into effect, the number of subscribers requesting blocking could be expected to exceed the minimal number necessary to make carriage of the sexually explicit channels uneconomical.

The result is that even a much enhanced version of Section 504 would likely lead to at least the same restriction of speech as does Section 505. Indeed, because time-channeling is not a part of the enhanced Section 504 scheme as envisioned by the district court, operators would simply cease to offer Playboy's sexually explicit programming services. On the other hand, if time-channeling too were offered to cable operators as a part of the hypothetical enhanced

Section 504 package, then the operators would surely choose that option, for precisely the same economic reasons as they have chosen time channeling to comply with Section 505. Accordingly, the district court's enhanced version of Section 504 would be at least as restrictive of speech as Section 505, and it therefore is not a "less restrictive alternative." At the very least, the proposition that a fully effective notice requirement of the sort the district court posited would *not* result in time channeling to a comparable extent has not been demonstrated with the clarity necessary to invalidate an Act of Congress on least-restrictive-means grounds.

2. The district court's hypothetical, enhanced version of Section 504 would not in any event be a satisfactory alternative to Section 505, because it would not adequately protect the compelling interests that the district court itself recognized supported Section 505. Those interests are:

> 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.

App., *infra*, 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'").[7]

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[7] 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." App., *infra*, 30a.

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," as well as "the principle that 'the parents' claim to authority in their own household to direct the rearing of their chidren is basic in the structure of our society.'" 521 U.S. at 865 (emphasis added) (quoting *Gins-*

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 as well as 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*, 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, 640-642 (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) (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.").

berg v. *New York*, 390 U.S. 629, 639 (1968)). 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 been recognized that society itself has an interest in the upbringing of youth, especially where parents, as a result of inertia or indifference or the competing claims of other responsibilities, fail to exercise their own authority.

In determining whether its hypothetical, enhanced version of Section 504 would provide a less restrictive alternative to Section 505, the 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.

App., *infra*, 37a-38a. We assume for purposes of discussion here that the court was correct in concluding that its enhanced version of Section 504 would be sufficient to inform parents of the problem of signal bleed and to permit them to eliminate it easily and effectively. In that event, such a regulation would arguably serve two of the interests identified by the district court—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. Under such an enhanced version of Section 504, parents who had strong feelings about the matter could certainly 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 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.[8] There also are

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[8] 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 a refusal of the good or service. For example, telephone companies offering an "optional maintenance plan" for wires inside the subcriber'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. 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. See Dennis D. Lamont, *Negative Option Offers in Consumer Service Contracts: A Principled Reconciliation of Commerce and Consumer Protection*, 42 UCLA L. Rev. 1315, 1330-1332 (1995). See also *In re Columbia Broadcasting System, 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 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 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

children who would view signal bleed at the homes of friends whose parents do not act (for whatever reason) under an enhanced Section 504 to block signal bleed. See App., *infra*, 52a, 80a. Society has an interest independent of the choices made by parents in seeing to it that children are not exposed to sexually explicit materials. Section 505 protects that interest, by ensuring that children are not exposed to signal bleed as a result of inertia, indifference, or distraction; reliance on Section 504 alone, by contrast, would disserve that interest, since children would be exposed to signal bleed of sexually explicit materials if parents did not take affirmative steps to obtain blocking.

We are not referring here to that presumably very small number of children whose parents affirmatively want their children to have the opportunity to watch 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 (cf. *Reno* v. *ACLU*, 521 U.S. at 878 (reserving that question)), such parents' interests would be protected equally well either by Section 505 (under which they would obtain access to sexually explicit channels by subscribing to it[9]) or by a hypothetical enhanced Section 504 (under which they would automatically receive the signal bleed). The children of parents who fail to act as a result of inertia, indifference, or

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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).

[9] We leave out of the analysis altogether those parents or other individuals who want signal bleed because they would like to receive sexually explicit materials broadcast by Playboy but do not want to pay for it. Such individuals have no cognizable interest in receiving signal bleed of a channel to which they do not subscribe.

distraction, however, would be protected only by Section 505. The district court gave no weight whatsoever to society's interest in protecting those children when it ruled that a hypothetical enhanced version of Section 504 would be an adequate alternative to Section 505. Accordingly, the district court's conclusion that such a version of Section 504 would be a less restrictive alternative to Section 505 is mistaken, and its judgment that Section 505 is unconstitutional should be reversed for that reason as well.

C. The district court's dismissal of the government's post-trial motions also was mistaken. The first notice of appeal, filed within the 20-day period prescribed by Section 561(b) of the Act but after the post-trial motions were filed, was effective to challenge the court's final judgment (as it would not have been if Rule 4(a)(4) of the Federal Rules of Appellate Procedure applied), but it did not deprive the district court of jurisdiction to consider the government's motions relating to the terms of that judgment.

1. 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 10 days after entry of judgment) of a motion for relief under Federal Rule of Civil Procedure 60(b) 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) 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, but the Court's rule governing appeals (Sup. Ct. R. 18) does not address the

consequences of filing a Rule 59(e) or 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 13.4), 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*). Based on simple caution in this uncertain area of the law, we therefore decided to file a notice of appeal within 20 days of entry of the injunction.[10]

2. 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 appeal is pending: "During the pendency of an appeal, such

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[10] In *FCC* v. *League of Women Voters*, 468 U.S. 364, 373 n.10 (1984), the Court held that under former 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 lock-boxes.

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*, *supra*, § 2856, at 251.

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 1979. Interpreting the pre-1979 Rule 4, this Court explained 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 appeals 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 automatically notify the court of appeals that a notice of appeal had been filed. *Id.* at 59.[11]

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[11] 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

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.[12]

3. The question whether the government's notice of appeal divested the district court of jurisdiction is of substantial significance to the government and to other litigants in cases in which there is a right of direct appeal to this Court. The parties in such cases often must determine how to preserve both their right to appeal and their ability to seek postjudgment relief from the district court, which may alter the nature of the appeal to this Court or even render

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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 posttrial 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).

[12] 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 Act and 28 U.S.C. 1253, and if it is concluded that the Rule 59(e) motion "actually seeks an 'alteration of the rights adjudicated' in the court's first judgment," *FCC* v. *League of Women Voters*, 468 U.S. at 373 n.10 (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.

such an appeal unnecessary. Under the district court's ruling in this case, a litigant who wants to file a post-judgment motion may do so only at the risk of forfeiting the litigant's right to appeal. Plenary consideration of the district court's ruling by this Court would advance the interests of litigants, the district courts, and this Court in orderly litigation of cases involving direct appeals to this Court.

CONCLUSION

This Court should note probable jurisdiction.

Respectfully submitted.

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APRIL 1999

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

No. Civ.A. 96-94-JJF

PLAYBOY ENTERTAINMENT GROUP, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Dec. 28, 1998]

OPINION OF THE COURT

ROTH, Circuit Judge.

Plaintiff, Playboy Entertainment Group, Inc. ("Playboy") challenges the constitutionality of section 505 of the Communications Decency Act of 1996, 47 U.S.C. § 561 ("CDA") which regulates signal bleed, *i.e.*, the partial reception of sexually explicit adult cable television programming in the homes of non-subscribers to that programming. Playboy seeks a declaratory judgment that § 505 violates the First Amendment and the Equal Protection guarantee of the Fifth Amendment of the United States Constitution and also seeks injunctive relief, preventing the United States, the United States Department of Justice, Attorney General Janet Reno, and the Federal Communications Commission

(collectively "the Government") from enforcing Section 505.

I. Procedural Background

The procedural background of this lawsuit is described at length in our opinion denying the preliminary injunction. *See Playboy Entertainment Group, Inc. v. United States of America*, 945 F. Supp. 772 (D. Del. 1996), *aff'd mem.*, —- U.S. ——, 117 S. Ct. 1309, 137 L.Ed.2d 473 (1997) ("PI Opinion"). We will set out that background briefly here.

On February 26, 1996, Playboy filed an action challenging § 505 of the CDA. Playboy's action was consolidated with one brought by Graff Pay-Per-View ("Graff"), owner of two adult networks, Adam & Eve and Spice. Judge Dolores K. Sloviter of the United States Court of Appeals for the Third Circuit then granted the parties' request to appoint a three-judge district court pursuant to § 561(a) of the CDA.[1] She named to the panel Judge Joseph J. Farnan, Jr., of the U.S. District Court for the District of Delaware, Judge Jerome B. Simandle of the U.S. District Court for the District of New Jersey, and Judge Jane R. Roth of the U.S. Court of Appeals for the Third Circuit.

On March 7, 1996, Judge Farnan granted Playboy's motion for a temporary restraining order, enjoining enforcement of § 505 until the matter could be heard by the three judge panel. *Playboy Entertainment Group*,

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[1] Section 561(a) of the CDA provides that a three judge district court shall be convened to decide "any action challenging the constitutionality on its face, of this title or any amendment made to this title . . . pursuant to the provisions of section 2284 of title 28, United States Code."

Inc. v. United States of America, 918 F. Supp. 813 (D. Del. 1996) ("TRO Opinion").

After a hearing, the three judge panel on November 9, 1996, denied Playboy's application for a preliminary injunction and lifted the temporary restraining order. *See* PI Opinion, 945 F.Supp. at 792. After affirmance of that order by the Supreme Court, Graff withdrew from the litigation, but Playboy pressed on.

Playboy contends that § 505 infringes the free speech protections provided by the First Amendment of the U.S. Constitution. Additionally, Playboy asserts that the language of § 505 is unconstitutionally vague. Finally, Playboy claims that § 505 violates the Equal Protection guarantee of the Fifth Amendment of the U.S. Constitution by singling out Playboy as a network "primarily dedicated to sexually oriented programming," while not regulating signal bleed from other premium networks which transmit sexually oriented programs. The parties cross-moved for partial summary judgment on the vagueness issue; these motions were denied on October 31, 1997. A pretrial conference was held on February 19, 1998, and trial was held on March 4-6, 1998, and post-trial argument on May 28, 1998.

II. Findings of Fact

While many of the background facts, especially regarding the technology of cable transmission, are set out in our opinion denying the preliminary injunction, *see* PI Opinion, 945 F. Supp. at 776-782, some bear repeating.

1. Playboy challenges § 505 of the CDA, 47 U.S.C. § 561,[2] entitled "Scrambling of sexually explicit adult video service programming." This section requires a multisystem operator ("MSO")[3] either to fully scramble[4] or to time channel "sexually explicit adult programming or other programming that is indecent" on any of its channels that are "primarily dedicated to sexually-oriented programming." The purpose of this provision is to eliminate "signal bleed," which is the partial reception of video images and/or audio sounds on a

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[2] Section 505 of the CDA, 47 U.S.C. § 561 provides:

> (a) REQUIREMENT—In 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 shall fully scramble or otherwise 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.
>
> (b) IMPLEMENTATION—Until a multichannel video programming distributor complies with the requirement set forth in subsection (a) of this section, the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.
>
> (c) DEFINITION—As used in this section, the term "scramble" means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

[3] Section 505 applies to "multichannel video programming distributors," which are also known as "multisystem operators" or "MSOs." We will refer to them as MSOs.

[4] Scrambling means "rearrang[ing] the content of the signal . . . so that the programming cannot be viewed or heard in an understandable manner."

scrambled channel. The stated methods of eliminating signal bleed are either by blocking the transmission of the targeted programming or by limiting its transmission to the hours of the day when a significant number of children are not likely to view it ("safe harbour hours"). The FCC regulation implementing time channeling would limit adult programming to the period between 10:00 p.m. and 6:00 a.m. *In re Implementation of Section 505 of the Telecommunications Act of 1996*, CS Dkt. No. 96-40, FCC 96-84, Order & Notice of Proposed Rulemaking amending 47 C.F.R. § 76 ¶ 6.

2. MSOs provide cable subscribers with various packages of cable channels for which the subscribers pay a monthly fee. There is a "basic" package of local broadcast networks (*e.g.*, ABC, CBS, Fox, and NBC), leased and public access channels, and news, education, music, sports and shopping networks. MSOs also provide "premium" channels, for which they charge an additional fee. These premium channels include HBO, Cinemax, Showtime, and the adult entertainment channels. Premium programming may also be offered on a "pay-per-view" basis. The pay-per-view customer places an order with the cable operator for a specific program or a specific period of time. When a consumer places a pay-per-view order, the MSO unscrambles the signal for the viewing period and then rescrambles it by remote accessing a converter box in the subscriber's home.

3. Playboy and Graf provide MSOs with adult, sexually oriented video programming. The MSOs then transmit the programming to premium subscribers and pay-per-view purchasers. Playboy owns two adult-programming networks, Playboy Television and AdulTVision. The programming on the Playboy

network is virtually 100% sexually explicit adult programming. On a yearly basis, 3 million households subscribe to and/or receive pay-per-view sexually explicit adult programming through the Playboy or Graf channels.

4. Other non-adult premium networks have obtained licenses to exhibit particular Playboy films. In addition, non-adult premium and basic cable channels will at times transmit sexually explicit programs or programs which contain some sexually explicit scenes. At the PI hearing, we noted as an example that the number of sexually explicit programs available on non-adult channels on one Friday evening in Denver, Colorado, was one-sixteenth that shown on the adult channels. Moreover, unlike the adult channels, the sexually explicit programming on non-adult channels was mainly "R" rated movies which contained some sexually explicit scenes but were not continuously sexually explicit.

5. MSOs receive signals, mainly in analog form, from many sources, such as master antennas, satellites, and local television stations. The signals are received at the system transmitter or "head-end" where they are amplified and retransmitted by coaxial cable. Cable subscribers receive the channels directly by cable, if they own a cable-ready television, or by attaching the cable to a converter box if they own a non-cable-ready television.[5] A recent development in signal transmission is

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[5] A converter box permits an older model television set, which can receive only a finite number of VHF or UHF channels, to receive the larger number of channels transmitted by cable systems. Converter boxes are electronic channel selectors. They are connected both to the subscriber's TV set and to the MSO's cable line. When a subscriber chooses a cable channel to view, the box

the Head-End-in-the-Sky ("HITS"), an orbiting digital platform which takes network signals, like Playboy's, and bounces them from a satellite in digital form to a cable system's receive station. The cable system then pumps the digital signal down an analog cable television wire to a consumer's home where a set-top box converts the signal back to an analog one suitable for the standard contemporary television set. The box required to make this conversion is fairly expensive and there are fewer than 50,000 homes today with a digital box. An additional 3 million cable homes receive a direct digital signal.

6. Because of the additional cost of premium and pay-per-view programming, MSOs seek to secure these signals for subscribers only. To prevent a signal from reaching the home of a non-subscriber, MSOs "scramble" the signal in an analog system by using either "RF" or "baseband" technology. Generally, the scrambling affects only the video portion of the transmission.

7. Cable television technology has evolved over the last 20 years. A variety of scrambling technologies are used by MSOs when broadcasting in analog form.[6] Forms of scrambling are

a) "RF" or "baseband" scrambling. This is the method most MSOs use for a signal sent by coaxial cable from the MSO to cable subscribers. Generally, this type of scrambling affects only the video portion of the transmission. Some baseband systems, however, include audio encryption as well. Once the signal is

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"converts" the selected channel to a frequency that the subscriber's TV set can receive and display.

[6] This technology is not necessary when an MSO sends its signal in digital form.

scrambled, the MSO must then descramble it for subscribers.

b) Positive traps. These are devices that are installed at the MSO transmitter and jam the signal of the channel being secured. Nonsubscribers to that channel will receive only "snow" for video and a high-pitched beep for audio. Subscribers to the jammed channel receive a metal cylinder, the positive trap, which is attached to a cable-ready TV or to the set-top converter box in order to filter out the jamming signal.

c) Negative traps. In the case of negative trapping, the signal is transmitted in the clear, and the negative trap, installed on the cable wiring at the homes of the nonsubscribers, jams the signal. Negative traps cost between $12 and $15 per household.

d) Addressable converters. These are boxes which are attached to the television set. The MSO can remotely "address" an addressable converter by sending out an electrical impulse to descramble or rescramble a signal. Addressable converter technology is the only type that provides the necessary equipment for pay-per-view requests. A converter costs approximately $115 per television set.

8. Section 505 was enacted to remedy the problem of "signal bleed." Signal bleed occurs when a signal is not completely scrambled by the MSO's RF or baseband equipment, and the video and/or audio is wholly or partially discernible. While signal bleed is caused by inadequate RF or baseband technology, bleed does not occur when RF or baseband technology is used in conjunction with positive or negative traps ("double scrambling"). In addition, bleed does not occur in systems where TVs have converter boxes, addressable or

otherwise, with channel mapping.[7] However, bleed does occur when consumers do not have a converter box with channel mapping or when they have a cable-ready TV, obviating the need for a converter box. Bleed does not occur when MSOs broadcast their signal in digital, as opposed to analog form.

9. Signal bleed becomes a problem when a cable subscriber, who does not subscribe to a premium channel, tunes to that scrambled channel and receives a signal which may include all or portions of the video picture and/or audio signal. The cause of this phenomenon is known as random lockup. The severity of the problem varies from time to time and place to place, depending on the weather, the quality of the equipment, its installation, and maintenance. Because of the existence of this problem, a child may tune to a scrambled channel and receive discernible images even though the parent is a not a subscriber to the channel. This result is of particular concern where the programming is sexually explicit, intended for an adult-only audience.

10. In addition to § 505, there are a variety of technologies available to consumers to ensure that they do not receive signal bleed. Under § 504 of the CDA, 47 U.S.C. § 560,[8] an MSO, upon request of any cable

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[7] Channel mapping is a feature whereby when a consumer attempts to tune a scrambled channel, the converter box will not tune to that channel but will tune to another channel providing either a promotional message or a blue screen.

[8] (a) SUBSCRIBER REQUEST—Upon request by a cable service subscriber, a cable operator shall, *without charge*, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

service subscriber, must, free of charge, fully scramble or fully block both audio and video signals. This would eliminate reception both of undesired channels and of undesired signal bleed. In addition, modern TVs and VCRs have both lockout and V-chip features by which a consumer can program the TV or VCR to block reception either of an undesired channel or of offensive types of programming.

11. The pervasiveness of the signal bleed problem is a matter of dispute between the parties. At the preliminary injunction stage, we found that 40 million households in the United States have the potential for signal bleed but that the actual number of homes with signal bleed would be less, depending on whether the local MSO employed effective scrambling techniques and on how many of these households already subscribed to adult channels. PI Opinion, 945 F. Supp. at 779, ¶ 14. We invited the parties to present more specific evidence of this problem at the permanent injunction stage. The Government has now presented two types of evidence: a) a statistical analysis of the number of children *potentially* exposed to signal bleed, and b) anecdotal evidence of actual exposure.

a) Potential exposure—The Government presented expert witness testimony that 39 million homes with 29.5 million children have the potential to be exposed to signal bleed from sexually explicit programming on Playboy and Spice. *See* Defense Exhibit ("DX") 82, ¶ 25.[9] Playboy argues that this estimate is too high

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(Emphasis added).

[9] Dr. Charles Jackson, an expert on the cable television industry, took the number of subscribers to cable systems that carry Spice, 22.1 million, added the number of subscribers to cable systems that carry Playboy, 27.6 million, and subtracted the number

because it fails to subtract 1) those households that are subscribers of adult programming and therefore are not subject to unwanted bleed, 2) those households on cable systems that employ more advanced technologies that prevent signal bleed, and 3) those households that have TVs, converters, and/or VCRs with built-in child lock circuitry that can bypass the audio and video of any channel. While it is not clear to what degree the Government's estimate of potential exposure should be lowered, the nature of this dispute points to the underlying problem with the Government's analysis. The Government presented evidence of households with the "potential to be exposed"; the Government presented no evidence on the number of households actually exposed to signal bleed and thus has not quantified the actual extent of the problem of signal bleed.

b) Anecdotal evidence—The Government presented evidence of two city councillors, eighteen individuals, one United States Senator, and the officials of one city who complained either to their MSO, to their local Congressman, or to the FCC about viewing signal bleed

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of households on cable systems carrying both Playboy and Spice, 11.05 million, to conclude there are 38.65 million households with the potential to be exposed to signal bleed. Dr. Jackson used a Cable Advertising Bureau estimate of the number of cable households with children, 36.7%, and a Census estimate that the average household with children has slightly more than two children present (2.07). Multiplying the number of cable households by the number of cable households with children by the number of children in an average household yields the number of children in households with the potential to be exposed to signal bleed of sexually explicit television. He then concluded in these close to 39 million households with the potential to be exposed to signal bleed from both Playboy and Spice, there are roughly 29 million children (16.7 million at risk from Playboy). DX 82, ¶¶ 20-33.

on television. DX 45-59, 61-64, 66-68, 70.[10] In each instance, the local MSO offered to, or did in fact, rectify the situation for free (with the exception of 1 individual), with varying degrees of rapidity. Included in the complaints was the additional concern that other parents might not be aware that their children are exposed to this problem. In addition, the Government presented evidence of a child exposed to signal bleed at a friend's house. Cindy Omlin set the lockout feature on her remote control to prevent her child from tuning to adult channels, but her eleven year old son was nevertheless exposed to signal bleed when he attended a slumber party at a friend's house. Omlin Dep. at 8-19.

12. The Government has presented evidence of only a handful of isolated incidents over the 16 years since 1982 when Playboy started broadcasting. The Government has not presented any survey-type evidence on the magnitude of the "problem." Nor has the Government demonstrated that the theoretical calculation by

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[10] Beth Mahlo, Rock Island City Council, Rock Island, IL.; Anthony Snesko, Poway City Council, Poway, CA.; Frank Allen, Jr., Oxnard, CA.; Ann Harris, Orange, CA.; Chuck Davis, Orange, CA.; John Augustine, Laureldale, PA.; Ann Trine, State Center, IA.; Betty J. Lewis, Bossier City, LA.; M.V. Walters, San Antonio, TX., Hugh Cunningham, Professor Emeritus, University of Florida College of Journalism, Gainsville, FL.; Pat Faulkenberry, Columbus, GA.; Timothy Joyce, Yorktown, NY.; Louisa Lindell, Wilmington, DE. (son viewed signal bleed at friend's house); Phil Vonder Haar, Webster Groves, MO. (viewed signal bleed at daughter's in St. Louis); Cecilia Flake, Battle Creek, MI. (told would be charged $6.00 to have signal blocked); David DeBerry, Assistant City Attorney, Orange, CA., on behalf of the City of Orange; Carol Beecher, Monticello, IN.; Jeff Schiske; Joseph & Ann Marie Schewe, Latham, N.Y.; Lorraine Serzega, Phoenixville, PA; Christina Petsas, Martinez, CA.; Senator Joseph R. Biden, Jr., Wilmington, DE.

Dr. Jackson on potential for signal bleed is actual reality—that in fact x million children are exposed to signal bleed. *See* Post-trial Argument Tr. 57-62.

Legislative History of § 505

13. On June 12, 1995, after hearings and debate had been held regarding the 1996 Telecommunications Act, Senator Diane Feinstein of California and Senator Trent Lott of Mississippi offered Amendment 1269 which ultimately became Section 505 of the Act.

14. Senator Feinstein told members of the Senate that "[p]arents . . . come home after work only to find their children sitting in front of the television watching or listening to the adult's-only channel, a channel that many parents did not even know existed." Cong. Rec. S8167; *see* Playboy Exhibit ("PX") 20. She noted that guidelines which put the burden on the subscriber to request complete scrambling of adult channels were inadequate because often non-subscribers are unaware that indecent audio and/or video signals could be received. *Id.* The object of the amendment, she said, was to "protect [] children by prohibiting sexually explicit programming to those individuals who have not specifically requested such programming."

15. Senators Feinstein and Lott each spoke briefly about their proposed amendment. 141 Cong. Rec. S8166-S8169. Except for the statements of Senators Feinstein and Lott, there was no debate on the amendment and no hearings were held on it. The amendment passed easily in the Senate (91 votes in favor and none opposed) and became § 505 of the bill that emerged from the House/Senate conference.

Harm from Exposure to Signal Bleed of Sexually Explicit Programming

16. Playboy's expert witness, Dr. Richard Green, a psychiatrist specializing in the field of psychosexual development, testified that in his opinion there were no adverse effects demonstrated from exposure of children or adolescents to sexually-explicit video materials. Dr. Green did acknowledge on cross-examination that he had written a book entitled **Sex and the Life Cycle** in which he stated at page 26 that

> The overlap between many of the physical behaviors involved in typical sexual conduct and those involved with aggressive conduct renders the visual experiencing of adult sexuality by young children potentially confusing and hazardous.

17. The Government presented no evidence of a clinical nature showing any harm associated with signal bleed. The Government's expert witness, Dr. Elissa P. Benedek, a board-certified child psychiatrist, testified about the nature and duration of harm that minors might suffer by virtue of being exposed to sexually explicit programming. Dr. Benedek then hypothesized that viewing signal bleed of sexually explicit programming would have a similar effect, perhaps to a lesser degree, as watching sexually explicit programming. For this postulation, Dr. Benedek relied on clinical studies done in a related area: the effect on minors of television violence, as well as on anecdotal evidence—a few isolated incidents of exposure by minors to signal bleed and their reactions.[11]

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[11] When pressed at post-trial argument as to whether there was evidence, anecdotal or otherwise, of any child actually harmed by signal bleed, the Government could point to only one incident:

a) Nature of harm—Dr. Benedek suggested that most minors would suffer dysphoria which she explained as "kind of a catch word for unpleasant feelings [that] encompasses disgust, horror, general distaste, and just not feeling good about something." Trial Tr. 471:24-472:2. In the rare child, Dr. Benedek explained, dysphoria might be correlated with other symptoms such as bed wetting or school phobia. *Id.* at 476:21-77:9. Other children might exhibit modeling behavior: "children will imitate, model, attend to, incorporate, assimilate . . . materials they are exposed to." Trial Tr. at 487:18-20. Furthermore, viewing sexually explicit programming might affect a child's attitudes towards sex—"that sexually-explicit images can be confusing to children; that children although they should learn about adult sexuality, can acquire misperceptions about sexuality if they are exposed to explicit sexuality—especially out-of-context sexuality—in the wrong environment, and without sufficient preparation; [and] that as a result of viewing sexually explicit television, child's attitudes can change . . . ." *Def. Post-trial R.Br.* at 5. Of these harms associated with watching sexually-explicit programming, the only one that Dr. Benedek clearly linked to viewing signal bleed of sexually explicit programming was the modeling of unblocked audio. Trial Tr. at 487.

b) Duration of Harm—Dr. Benedek explained that in the vast majority of cases, the effects postulated above would be transient, or temporary. Trial Tr. 501:1-4 ("I

Cindy Omlin's testimony that her child viewed signal bleed at a friend's house on a Friday night, and on the ensuing Monday morning awoke with a bad stomach ache, saying he didn't want to go to school. Dr. Benedek described these symptoms as school phobia. Post-trial Argument Tr. at 84-86.

would say that in the vast majority of cases, the effects are not long-term effects."); Benedek Dep. Tr. 138:9-10 ("Transient is less than enduring, so it could be momentary.").[12]

The Technological and Economic Impact of § 505

18. At the time of the preliminary injunction hearing, it was not clear what any given MSO, with a system emitting signal bleed, would do when faced with complying with § 505. Each MSO would have the option of upgrading its technology from analog to digital transmission, of time channeling, or of distributing channel-mapping capable converters, lockboxes, or positive or negative traps to all their customers. Plaintiffs argued that MSOs would find time channeling the least costly choice, losing only 30% of their revenues, whereas losses would average 50% of revenues for the next best option, double scrambling, *i.e.*, scrambling via baseband or RF technology plus a positive trap.[13] As predicted, the vast majority (in one survey,

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[12] The weight we gave to Dr. Benedek's testimony was diminished by the fact that she has not written or researched in any directly relevant area. Moreover, she has reviewed no literature concerning the effects of television viewing upon children except for the few articles provided to her by counsel for the government. She has never previously testified as an expert involving the media in general or television's effects in particular. She has in the past been retained to testify as an expert but this has been on a spectrum of other issues arising in unrelated products liability and personal injury contexts.

[13] PX 152 at 2; PI Tr. 435-38 (Testimony of Defendant's expert Jonathan Kramer). Neither negative traps nor positive traps alone would be viable options because neither allow an MSO to broadcast any pay-per-view programming; revenues from pay-per-view programming constitute the vast majority of Playboy's revenue. PI Tr. 430-33. Alternatively, the cost of converting an analog-

69%) of cable operators have, in response to § 505, moved to time channeling. *See* DX 320;[14] Pl. Post-trial Br. at 54-55. Neither Playboy nor the Government could identify a single cable system that had adopted double scrambling to comply with § 505. In effect, the practical impact of § 505 has been to reduce the broadcast day for sexually explicit programming to an eight-hour safe harbor period of 10:00 p.m. to 6:00 a.m. This is because most MSOs have no practical choice but to curtail such programming during the other sixteen hours or risk the penalties imposed by the CDA if any audio or video signal bleed occurs during these times.

19. The effect on Playboy of cable systems moving to time-channeling is primarily economic. However, Playboy argues that the economic impact of § 505 is significant and serves as a quantitative measure of the lost First Amendment opportunities suffered by Playboy and its viewers. Time channeling, the removal of sexually explicit programming during two-thirds of the broadcast day, precludes all households from receiving

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based system to digital at this point in time would be in the billions of dollars with each household needing a digital converter. This too would not be a viable option as it would be cost-prohibitive. PI Tr. 423-28. Alternatively, the cost of supplying every cable subscriber with state of the art converters with channel-mapping would also be cost-prohibitive. PI Tr. 428-29; PI Opinion, 945 F.Supp. at 781, ¶ 24.

[14] Defense Exhibit 320 is a Government survey of MSOs taken after § 505 was implemented on May 18, 1997. This survey demonstrates 68% of MSOs surveyed who carry adult programming went to time channeling. PX 106. This includes 23 of 24 Jones Intercable systems and 36 of 38 TCI systems. While only 17 of 39 Comcast systems surveyed are time-channeling, PX 104, Comcast has a reputation for having better, more up-to-date technology than other MSOs

such programming during that time. Given that 30 to 50% of all adult programming is viewed by households prior to 10 p.m.,[15] the impact on Playboy and its viewers[16] is significant. Playboy estimates its losses at $25 million through 2007, or 15% of revenues. The Government estimates Playboy's losses through 2002 at $6 million.[17] The actual amount of Playboy's losses is of little relevance to our First Amendment analysis. Suffice it to say that Playboy will lose a significant amount of money as a result of cable operators' time channeling in order to comply with § 505.

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[15] PX 184 (Jones Intercable showing that 55% of Playboy's buys, and 50% of Adult Vision buys occurred during non-safe harbour hours); PX 192 (Spice estimates that 30-50% of its buys occur between 6 AM and 9 PM); Sealed PX 216 (Time Warner-Rochester, N.Y. instituted a voluntary rollback to safe harbor hours demonstrating a significant decline in adult programming purchases); *see also Pl. Post-trial Br.* at 57 & n. 108.

[16] The number of subscribers watching Playboy Television in a year is between 800,000 and 1.7 million.

[17] The primary disagreement over losses is differing time horizons which stems from an uncertainty over when digital technology will be commonplace, obviating the need for cable operators to time channel. The Government economics expert, Dr. Dertouzos does not include losses after 2002 because of his uncertainty as to the pervasiveness of digital technology thereafter, but he acknowledges that he has no expertise regarding the conversion of the cable industry from analog to digital. Trial Tr. 746:9-12. Furthermore, Playboy presented experts knowledgeable in the area of cable conversion; all concluded that a considerable percentage of cable systems will remain "analog only" over the next ten years. *Pl. Post-trial Br.* at 59 & n. 112. Clearly then, the measure of damages is at least somewhat greater than the Government estimate of $6 million.

Efficacy of Section 504

20. Section 504 of the CDA also requires MSOs to completely block upon request any programming that a cable systems customer desires, whether sexually explicit or otherwise. The MSO, not the subscriber, must bear the cost of providing the blocking mechanism. Playboy argues that § 504 presents a constitutionally "less restrictive alternative" to § 505 because it would achieve the same purpose: complete blocking for those who want it, with less restriction of Playboy's First Amendment rights. A key variable in the efficacy of § 504 is the type of notice that cable system customers receive about their rights under § 504. As we found at the preliminary injunction stage, "[i]f the § 504 blocking option is not being promoted, it cannot become a meaningful alternative to the provisions of § 505." PI Opinion, 945 F.Supp. at 781, ¶ 23. There, we invited the parties to present further evidence of "the actual and predicted impact and efficacy of § 504." *Id.*

21. The CDA, of which §§ 504 and 505 are a part, went into effect on March 9, 1996. The enforcement of § 505 was enjoined from March 6, 1996, three days prior to its implementation, until May 18, 1997. This stay provided a 14-month opportunity to observe the efficacy of § 504 without § 505.[18] In that 14 months, the number of lockboxes distributed was minimal. A Government survey determined that cable operators distributed § 504 lockboxes to block adult cable channels to

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[18] When § 504 and § 505 are both being enforced, with respect to regulating sexually explicit programming, § 504 does not relieve an MSO from complying with § 505. Complying with § 504, *i.e.*, providing free lockboxes, does not comply with § 505's more stringent requirements.

less than one-half of one percent (0.5%) of their subscribers. Tr. Trans. 655-59 (Dertouzos); DX 154, 145 (survey of 79 MSOs of roughly 6000 country-wide with 62 answering the question of how many adult- channel lockboxes they had distributed since the earliest known date?[19]). A May 1997 memorandum from Jones Intercable (a leading MSO) to its cable systems appears to confirm the Government survey results. DX 137.[20]

22. If, however, § 504 is to be an effective alternative to § 505, adequate notice of the availability of the no-cost blocking devices is critical. In order for Playboy to prevail on its claim that § 504 is a less restrictive alternative to § 505, Playboy must demonstrate that § 504 is efficacious. The type of notice given is crucial to the implementation of § 504. Parents must be aware that MSOs have the ability to, and are required to, block channels that parents find offensive. Parents must also be aware that the MSOs are required to do so free of charge. The Government notes that "cable operators communicate the availability of channel blocking devices to their subscribers through a variety of means such as monthly billing inserts, special mailings, barker channels, and adult-channel advertisements." *Gov't Post-trial Br.* at 41 referring to two sample inserts PX 194, 196.

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[19] The language "earliest known date" may slightly overestimate the utility of § 504 as a solution to the signal bleed problem because some of these lockboxes may have been distributed pursuant to 47 U.S.C. § 544(d)(2) (1984) which provided that cable operators shall provide lockboxes upon request of their subscribers, but they could charge subscribers for the blocking device.

[20] It states that "Jones cable companies have always complied with § 504" by providing equipment to "trap the audio and video signals on adult programming services," but only "a minimal number" of traps were requested. DX 137 at JIP000005.

23. Notwithstanding the adequacy of any notice given, the Government argues that § 504 is not a less restrictive alternative because it is not effective at controlling the problem of signal bleed; the mere fact that so few lockboxes were distributed suggests that voluntary requests for lockboxes will not solve the problem. Playboy provides an alternate explanation for the low number of boxes distributed—the lack of parents' concern. If parents don't think signal bleed is a problem, they won't request lockboxes, whether free or otherwise. The underlying premise of Playboy's argument is that parents are aware of the occasional signal-bleed situation and have decided that it is not a problem.

24. The Government enumerates other potential problems regarding § 504. The Government suggests that it may take weeks for cable operators to comply with a subscriber's request for a lockbox. Cavalier Dep. at 17-22, 27; Bennett Dep. at 9-10. The Government also contends that the device may fail. Henne Dep. at 9-10. In addition, after a subscriber has installed a blocking device, the cable operator may move the adult network to a different channel, rendering the block ineffective. Henne Dep. at 11-16.

25. Concerning the economic feasibility of § 504, the Government presented evidence that the distribution of lockboxes to a sufficient number of customers to effectively control the problem of signal bleed is not economically feasible. The Government's economics expert, Dr. Dertouzos studied the "break-even" point—the point at which the cost of distributing lockboxes would exhaust all of a cable system's adult channel revenues. He determined that even if a substantial number of parents requested lockboxes, it is "economically unfeasible to distribute more than a trivial number

of [lockboxes] to subscribers." Trial Tr. at 661-62. Using Playboy's buy rate for the first quarter of 1997 and the average retail price for Playboy programming during that period, the number of traps that could be distributed is 3.0 percent of the subscriber base. *Gov't Post-trial Br.* at 43.[21] If one considers a five year revenue stream in the break-even analysis, the number of traps that could be distributed rises to 6.0 percent of the subscriber base. *Id.* The finding that the cost of distribution of boxes is not feasible for a cable system is confirmed by the statement of Playboy's expert witness, John Mancell. Mancell attested that the cost of distributing negative traps to 56 percent of subscribers without addressable converters would exceed $434 million, PX 61, ¶¶ 8, 20, which is far above cable operators' revenues from adult-networks, estimated at $78 million. PX 60, ¶ 21. Economic theory would suggest that profit-maximizing cable operators would cease carriage of adult channels if the cost of distributing boxes exceeded the revenue generated by the adult channels, or even if costs rose to such a point that the profit from adult channels was less than the profit from channels unlikely to require blocking. Trial Tr. at 941.

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[21] These calculations are premised on a cost of $37 per blocking mechanism plus installation. Playboy's contention that negative traps 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, is unavailing. All experts agree that negative traps are installed on the cable pole or the cable itself outside the home, requiring installation. PX 65 (Ciciora PI Decl.), ¶ 19; DX 303 (Jackson PI Decl.), ¶ 35; Ciciora Dep. at 146:20-21 ("The presence of the negative trap is almost always outside on the pole").

III. Conclusions of Law

Playboy seeks a declaratory judgment that § 505 of the CDA is unconstitutional and an injunction against the Government from enforcing its provisions. Playboy challenges § 505 on the grounds that it is a content-based restriction on speech that must satisfy strict scrutiny under the First and Fifth Amendments, that the Government did not meet its burden of demonstrating that § 505 is necessary to serve a compelling governmental interest, and that § 505 does not employ the least restrictive means of addressing the issue of signal bleed. Playboy argues as well that § 505 violates the Equal Protection guarantee of the Fifth Amendment of the U.S. Constitution and contains unconstitutionally vague terminology. Because we find that § 505 is not the least restrictive means of addressing the issue of signal bleed, we hold that § 505 violates the First Amendment. For that reason, we do not reach Playboy's other arguments regarding equal protection and vagueness.

Standard of Review

Playboy claims that § 505 burdens its rights guaranteed under the First Amendment by inhibiting its freedom of speech. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Our first task is to determine the standard of review to which we will subject the statute at issue. At the preliminary injunction stage, we held that "§ 505 should be treated as a content-based restriction on speech" and that "we should apply either strict scrutiny or something very close to strict scrutiny when a content-based law, applicable in the cable television context, is challenged

on the grounds that it violates the First Amendment." PI Opinion, 945 F. Supp. at 784-85 & n. 24. We recognize in this regard that no majority of the Supreme Court has ever accepted the argument that sexually explicit, but not obscene, material receives less protection under the First Amendment than artistically, politically, or scientifically valued forms of speech. *See Denver Area Educ. Telecommunications Consortium v. FCC*, 518 U.S. 727, 116 S. Ct. 2374, 135 L.Ed.2d 888 (1996) (reaffirming the principle that sexual expression which is indecent but not obscene is protected by the First Amendment). Nothing presented at trial, and no jurisprudence subsequent to the Preliminary Injunction Opinion in 1996, has changed the analysis or outcome reached there. *See*, *e.g.*, *Reno v. A.C.L.U.*, 521 U.S. 844, 117 S. Ct. 2329, 2346, 138 L.Ed.2d 874 (1997) ("[s]exual expression which is indecent but not obscene is protected by the First Amendment").

The Government continues to argue that its constitutional burden is reduced by virtue of the fact that this legislation is content-neutral and attacks the "secondary effects" of exposure to sexually explicit material. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47, 106 S. Ct. 925, 89 L.Ed.2d 29 (1986) (holding that a zoning ordinance that prohibited motion picture theatres from locating within 1000 feet of certain residential zones was properly analyzed as a time, place and manner restriction, and thus subject to intermediate scrutiny). But it is clear that the *Renton* "secondary effects" analysis does not apply where regulation of adult movie theatres is based on "the content of the films being shown inside the theatres." *Boos v. Barry*, 485 U.S. 312, 319-21, 108 S. Ct. 1157, 99 L.Ed.2d 333 (1988) ("[I]f the ordinance [in *Renton*] was justified by

the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate."); *Reno v. A.C.L.U.*, 521 U.S. 844, 117 S. Ct. 2329, 2342, 138 L.Ed.2d 874 (rejecting the Government characterization of a regulation on Internet indecency as "cyberzoning" and thus subject to the *Renton* "secondary effects" time, place and manner analysis; rather holding that the purpose of the CDA is to protect children from the primary effects of "indecent" and "patently offensive speech and thus strict scrutiny is appropriate); *U.S. Sound & Service, Inc. v. Township of Brick*, 126 F.3d 555, 558-59 (3d Cir. 1997) ("If the government regulates non-obscene expression based on its sexually explicit content, the restrictions imposed pass constitutional muster only if they survive 'strict scrutiny'—that is, only if they serve a compelling state interest in a manner which imposes the least possible burden on expression."); *Phillips v. Borough of Keyport*, 107 F.3d 164, 172 (3d Cir.) (en banc), *cert. denied*, —- U.S. ——, 118 S. Ct. 336, 139 L.Ed.2d 261 (1997).

As in the preliminary injunction opinion, we continue to view § 505 as a content-based restriction on speech. *See* PI Opinion, 945 F. Supp. at 785. Although § 505 is aimed at preventing signal bleed, a content-neutral objective, the section applies only to signal bleed occurring during the transmission of "sexually explicit adult programming or other programming that is indecent." Signal bleed from the Disney Channel, for example, does not come within the purview of the statute. Congress's targeting of signal bleed of solely sexually explicit programming is a content-based restriction.

To be sure, the context of this content-based restriction must also be considered because speech does not occur in isolation. Cable television is a means of communication that is both pervasive and to which children are easily exposed. *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-50, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978) (radio broadcasting is pervasive and to which children are easily exposed); *Denver Consortium*, 518 U.S. at 744 (these two factors are as applicable to cable television as to broadcasting). Thus, this context cannot go unnoted.

In cases such as this, it is the Government's burden to demonstrate that its interests are compelling and that the means chosen "are carefully tailored to achieve those ends." *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L.Ed.2d 93 (1989). The Government must prove that § 505 is a "least restrictive alternative," *i.e.*, that no less restrictive measures are available to achieve the same ends the government seeks to achieve. *Denver Consortium*, 518 U.S. at 754-55, 116 S. Ct. 2374; *Sable*, 492 U.S. at 130-31, 109 S. Ct. 2829.

Compelling Government Interest

The Government asserts three interests that in its view justify § 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 on 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.

In its First Amendment jurisprudence, the Supreme Court has recognized the need to protect children from "exposure to patently offensive sex-related material." *Denver Consortium*, 518 U.S. at 743, 116 S. Ct. 2374. "The State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'" *Ginsberg v. New York*, 390 U.S. 629, 640-41, 88 S. Ct. 1274, 20 L.Ed.2d 195 (1968) (upholding a statute prohibiting the sale to minors of sexually explicit magazines); *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L.Ed. 645 (1944); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978) (Court relied on the Government's interest in the well-being of children in upholding the constitutionality of the FCC's decision to prohibit the radio broadcast of indecent language during the day). There is no doubt that the State has an interest in protecting children. The question remains, however, whether the "harm," from which the State seeks to protect children, is in fact a harm to children. In other words, does viewing signal bleed of sexually explicit programming constitute a harm to children. If it is a harm, there is no doubt the State has a compelling interest in regulating it.

The Supreme Court has not required empirical proof of harm to justify content-based restrictions on constitutionally protected speech when children are involved. *See Pacifica*, 98 S. Ct. at 3040 (rationale for upholding the constitutionality of the FCC's decision to prohibit the radio broadcast of indecent language during the day was that broadcast "could have enlarged a child's

vocabulary in an instant;" not requiring the Government to prove that the monologue at issue could cause a scientifically articulable harm); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L.Ed.2d 549 (1986) (empirical proof of harm not required for restriction of speech in school setting); *Action for Children's Television v. F.C.C.*, 58 F.3d 654, 661-62 (D.C. Cir. 1995) (en banc) ("the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech.").[22] However, some evidence of harm must be presented. The mere articulation of a theoretical harm is not enough. *See Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997) (striking down a law restricting the dissemination of "indecent crime materials to minors," explaining that although there was no dispute that protecting the psychological well-being of minors is a compelling interest, the Government could not enact an indecency regulation relying on "experience, knowledge and common sense," noting an absence of empirical proof that the law would serve the County's articulated interests). In

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[22] It must be noted that where "obscene" material is involved, as opposed to the sexually explicit but not obscene material at issue here, the standard of proof to which the Government is put is much lower. *See Ginsberg*, 390 U.S. at 641-42, 88 S. Ct. 1274 (because the material at issue was obscene, and therefore not protected speech, the State need only be rational in its conclusion of harm associated with the material); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-61, 93 S. Ct. 2628, 37 L.Ed.2d 446 (1973) (in the context of regulating obscene materials exhibited at "adult" theatres, rejecting the requirement of scientific data conclusively demonstrating the exposure to obscene material adversely affects people).

short, some evidence of harm short of definitive scientific proof must be presented. This case demonstrates a paucity of such evidence.

We have detailed the evidence of harm put forward by the Government. The Government presents no clinical evidence linking child viewing of pornography to psychological harms. Rather, the Government argues by analogy to clinical studies showing the effect of child viewing of televised violence as well as anecdotal evidence of the effects of sexually explicit television. The reference to televised violence research is weakened by the lack of evidence establishing the appropriateness of the analogy. Even if watching televised violence causes children to be violent, should the same hold true for televised sex? We cannot say that it would. The next weakly proven inference is that the effects of viewing signal bleed of sexually explicit television are the same as viewing sexually explicit television outright. This lack of evidence is reflected by the same dearth of evidence of harm within the legislative history of § 505. Moreover, there are clear ethical questions surrounding clinical research of the effects of children viewing sexually explicit programming.

The evidence presented on the type and duration of the harm is equally troubling. Dr. Benedek testified concerning transient dysphoria, modeling, and changed attitudes towards sexuality associated with susceptible children viewing explicit pornography. None of her views, however, are derived from observations of exposure to partially scrambled images and sounds of sexual activity. There is no evidence in this case that such scrambled, garbled, intermittent signal bleed has a harmful potential similar to explicit pornography.

Nevertheless, we are not prepared to say that there is no prospect of such harm.

We are troubled by the absence of evidence of harm presented both before Congress and before us that the viewing of signal bleed of sexually explicit programming causes harm to children and that the avoidance of this harm can be recognized as a compelling State interest. We recognize that the Supreme Court's jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required when sexually explicit programming and children are involved. *See Pacifica*, 98 S.Ct. at 3040. In conclusion, then, on the basis of the few scientific studies that have been done in related areas, keeping in mind Dr. Benedek's experience as a clinician and the anecdotal evidence she was exposed to in that capacity, and considering Dr. Green's comment on the hazards of children visually experiencing adult sex, we conclude that there is sufficient risk of harm to susceptible minors to warrant protection from sexually explicit signal bleed.

Turning then to the Government's next concern, concomitant with its interest in protecting children, it has an interest in protecting parent's authority to raise their children as they see fit. *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L.Ed. 1070 (liberty of parents to direct the upbringing and education of their children) (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L.Ed. 1042 (1923). A parent has a right to "inculcat[e] moral standards, religious beliefs, and elements of good citizenship." *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972); *Cf. Hodgson v. Minnesota*, 497 U.S. 417, 448-49, 110 S. Ct. 2926, 111 L.Ed.2d 344 (1990) (justifying waiting period before minor may exercise her fundamental right to an

abortion in part on the basis of parental interest in discussing implications of abortion decision, and providing guidance). On the basis of this interest, the Supreme Court has held that governmental restrictions of access by children to sexually explicit, but not obscene, material is justifiable. *See Ginsberg*, 390 U.S. at 639, 88 S.Ct. 1274 (upholding a restriction on sale of sexually explicit magazines to minors in part based on the recognition that "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"). In *Pacifica*, the Court recognized the parental interest in deciding whether their child would be allowed to hear an indecent radio broadcast; this interest helped "justify the special treatment of indecent broadcasting." 438 U.S. at 749-50, 98 S. Ct. 3026; *see also Action for Children's Television v. FCC*, 58 F.3d 654, 661 (D.C. Cir. 1995) ("the Government has a compelling interest in supporting parental supervision of what children see and hear on the public airways"). Section 505 addresses this compelling interest in that it ensures that parents can decide how best to teach their children about sex without the unwanted exposure to sexually explicit signal bleed. In short, § 505 ensures, for the most part that unwanted exposure does not occur.

The third interest of the Government is to protect the right of the individual to be left alone in the privacy of his or her home. *See Pacifica*, 438 U.S. at 749-50, 98 S. Ct. 3026 (relying on an individual's right to be left alone in his or her home to justify the content-based restriction of indecent radio broadcasting; "Patently offensive, indecent material presented over the airways confronts the citizen, not only in public but also in the privacy of the home, where the individual's right to be

left alone plainly outweighs the First Amendment rights of an intruder."); *Rowan v. Post Office Dept.*, 397 U.S. 728, 90 S. Ct. 1484, 25 L.Ed.2d 736 (1970) (upholding a statute allowing private individuals to direct the Postmaster General to cease mailing "erotically arousing or sexually provocative" materials to their homes, noting that Congress passed the statute in order to protect the privacy of homes from unsolicited sexual materials). Section 505 embraces the individual's right to be left alone in his home by restricting signal bleed to the safe harbour hours. Only individuals who subscribe to Playboy and who have therefore chosen to bring sexually explicit programming into their homes are exposed.

Least Restrictive Alternative Analysis

Recognizing that § 505 addresses three interests which in sum can be labeled "compelling," we must determine whether § 505 is narrowly tailored to serve that end and whether it is the least restrictive alternative. Playboy argues that § 504 is a less restrictive alternative than § 505, mandating that we grant Playboy's request for declaratory judgment and injunction against the enforcement of § 505. The basic difference between § 504 and § 505 is in determining who takes the initiative to remediate the signal bleed problem. Section 505 is an advance blocking of channels required of MSOs. Section 504 is a voluntary blocking of channels upon individual request. In either event, the MSO must pay the cost.

To be a "less restrictive alternative," § 504 must be both less restrictive in the sense that it inhibits protected speech to a lesser degree and it must be a viable alternative in that it allows the Government to achieve

the ends that are its compelling interest. We think it is clear that § 504 is in fact less restrictive.

The restrictiveness of § 505 is now evident. The solution Congress crafted in § 505 to control the problem of signal bleed gave MSOs two alternative methods of compliance: 1) complete scrambling, or 2) time-channeling the programming into safe-harbor hours. There is no doubt that time channeling has proven to be the method of compliance of choice among MSOs.[23] While the effect of time channeling on Playboy's profitability is perhaps not clear, time channeling certainly diminishes Playboy's opportunities to convey, and the opportunity of Playboy's viewers to receive, protected speech. Time channeling 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. Since 30-50% of all adult programming is viewed by households prior to 10 p.m. and since the restricted programming is protected speech, § 505 restricts a significant amount of protected speech. *See Reno v. A.C.L.U.*, 521 U.S. 844, 117 S. Ct. 2329, 2346, 138 L.Ed.2d 874 (1997) (Governmental interest in protecting children from indecent, but not obscene, materials does not justify an unnecessarily broad suppression of speech addressed to adults). Section 505 was designed to protect minors, but cable operators are

[23] As we found, MSOs with incomplete scrambling technology chose time channeling because no other system-wide blocking technique is economically feasible. Faced with the choice between overhauling the transmission to ensure complete scrambling, such as through a systemic switch to digital transmission, or by providing channel-mapping converter boxes to all subscribers, or by reducing such transmissions to safe-harbor hours, the MSOs have unanimously chosen to stop all such programming on dedicated adult channels during the non-safe harbor hours.

required to prevent bleed in all non-subscribing households, irrespective of whether a household has children. In fact, as we found, two-thirds of all households in the United States have no children.

The Government argues that the number of Playboy consumers is relatively small between 800,000 and 1.7 million, compared to the 16.7 million children potentially exposed to signal bleed. Moreover, as technology upgrades of equipment take place, more MSOs will be able to fully block signal bleed, rather than to time channel. The Government also argues that time channeling is a minor inconvenience, that the typical consumer can alter his or her viewing time to the safe harbour hours or can tape safe-harbour programming and play it back at his or her leisure. Therefore, the Government argues, the effects of time channeling are minimal. This misstates the issue. The question is not the significance of the totality of the effects of time channeling standing alone. It is instead the relative burden of one solution versus another. *See Fabulous Associates, Inc. v. Pennsylvania Public Utility Comm'n*, 896 F.2d 780, 787 n. 6 (3d Cir. 1990).

Section 504, by contrast to § 505, is less restrictive of the First Amendment rights of Playboy and its subscribers. Section 504 provides for voluntary blocking. Those consumers who request a blocking device will have one installed free of charge. However, for those who wish to receive Playboy programming, MSOs will be able to broadcast it 24 hours per day. In this way, neither Playboy nor its subscribers will suffer any First Amendment ill-effects. For that reason, § 504 is not restrictive of anyone's First Amendment rights and is clearly "less restrictive."

Furthermore, § 504 is a content-neutral regulation. It does not apply only to signal bleed of "sexually explicit adult programming or other programming that is indecent," as § 505 does. Rather, it applies to any signal bleed or to any programming that the requesting subscriber finds offensive. The fact that § 504 is content-neutral differentiates it from the content-based restrictions of § 505. *See Boos v. Barry*, 485 U.S. at 329, 108 S. Ct. 1157 (the existence of a content-neutral alternative "undercut[s] significantly" any defense of a content-based statute).

While § 504 is clearly less restrictive, it must also be a viable alternative. The Government argues that § 504 is not an effective alternative to § 505 because there are inherent limitations to parent-initiated blocking schemes which depend upon subscriber initiative and vigilance. *Dial Information Services v. Thornburgh*, 938 F.2d 1535, 1542 (2d Cir. 1991) (rejecting voluntary blocking in the dial-a-porn context). Logically, a parent must be aware of the problem of signal bleed, before he or she is likely to examine potential solutions such as a lockbox. The Government argues 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. Furthermore, once aware of the problem, the success of § 504 depends on parental awareness that they have the right to receive a lockbox free of charge from their local MSO. Indeed, it was this same concern with parental awareness of signal bleed and of § 504 that motivated our rejection of § 504 as a less restrictive alternative at the preliminary injunction stage of this litigation. *See* PI Opinion, 945 F. Supp. at 789. There, we explained that "we ha[d] no evidence . . . whether local cable operators or producers of sexually

explicit programming [were] advertising the free availability of the § 504 lockbox or other blocking devices upon demand," and that we had no evidence whether "parents [were] otherwise aware of the § 504 means of achieving complete blocking of undesired channels." *Id.* "Upon [that] record," we held that "the government ha[d not] demonstrated an expectation that § 504 [would] be a viable alternative." *Id.*

That record has now been supplemented with information during the 14 month period when § 504 was in effect and § 505 was not. In that time, MSOs distributed lockboxes to less than one half of one percent of their subscribers. The Government relies on this statistic to establish that § 504 is clearly ineffective. At most, it blocked 0.5% of signal bleed. The first problem with the Government's argument is that the finding of 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. Indeed, the Government has not convinced us that it is a pervasive problem. Parents may have little concern that the adult channels be blocked.

The second problem with the Government's argument that the 0.5% statistic proves that § 504 is ineffective is that the argument is premised on adequate notice to subscribers. It is not clear, however, from the record that notices of the provisions of § 504 have been adequate.

In the interest of ensuring that adequate notice be given in the future, we suggest that it be given along the following lines: MSOs should communicate to their subscribers the information that certain channels broadcast sexually-oriented programming; that signal bleed, *i.e.*, partially discernible video images and full

audio of those channels, may appear; that children may view signal bleed without their parents' knowledge or permission; that channel blocking devices that will block signal bleed are available free of charge from the subscriber's MSO; and that a request for a free device to block the offending channel can be made by a telephone call to the MSO.

The adequacy of the notice will also depend on the means by which it is made. Appropriate means would include inserts in monthly billing statements, barker channels (preview channels of programming coming up on Pay-Per-View), and on-air advertisement on channels other than the one broadcasting the sexually explicit programming. In addition, the notice should be conveyed on a regular basis, at reasonable intervals. Moreover, if an MSO were to change the channel on which it broadcasts sexually explicit programming, a special notice indicating this should be mailed to subscribers who have requested a lockbox.

The efficacy of § 504 with "adequate notice" must be compared to that of § 505. The time channeling requirement of § 505 ensures that during the hours when children are likely to be watching television, signal bleed cannot occur. We note, however, that a resourceful minor can still watch signal bleed after the safe-harbour hours. By contrast, § 504 depends on parental vigilance. *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73-74, 103 S. Ct. 2875, 77 L.Ed.2d 469 (1983) (parental discretion controlling access to unsolicited contraceptive advertisements in the home is the preferred method of dealing with such material). However, with 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.

We hold therefore that § 504 is a less restrictive alternative to § 505 as long as MSOs provide "adequate notice" to their subscribers. We do not have jurisdiction over the MSOs to require them to provide such notice. We do, however, have jurisdiction over Playboy. As a consequence, we will require Playboy in its contractual arrangements with MSOs to ensure that MSOs provide "adequate notice" of the availability of § 504 blocking devices. If "adequate notice" is not provided, § 504 will no longer be a viable alternative to § 505.

To be sure, MSOs retain the right not to broadcast sexually explicit programming, if, for example, it proves not to be economically feasible. Playboy, however, as well as other providers of sexually explicit programming, will have the incentive to ensure the economic feasibility of lockbox distribution by MSOs.

Under § 504, the Government is undoubtedly correct that some minors will find access to signal bleed from sexually explicit programming if they are determined to do so. As the Supreme Court explained in the context of dial-a-porn regulations, "[i]t may well be that there is no fail-safe method of guaranteeing that never will a minor be able to access the dial-a-porn system." *Sable Communications*, 492 U.S. at 130, 109 S. Ct. 2829. Nonetheless, the Court did not deem the desire to prevent "a few of the most enterprising and disobedient young people," from securing access to the pornography, to justify a statutory provision that had the

"invalid effect of limiting the content of adult telephone conversations to that which is suitable for children." *Id.* at 2839; *see Fabulous Associates*, 896 F.2d at 788. Similarly, § 504 with "adequate notice" is not a perfect solution; but neither is § 505. We have balanced the rights of Playboy and of its subscribers against the interest of the government in regulating sexually explicit programming. We find the balance struck by § 504 with "adequate notice" to be a less restrictive alternative to that provided by § 505. For this reason, we declare § 505 unconstitutional and enjoin its enforcement.[24]

[24] As we find § 505 unconstitutional on First Amendment grounds, we do not reach the merits of the other claims put forward by Playboy, that § 505 is unconstitutionally vague and that § 505 violates the Equal Protection guarantee of the Fifth Amendment.

APPENDIX B

UNITED STATES DISTRICT COURT
D. DELAWARE

Civil Action Nos. 96-94, 96-107-JJF

PLAYBOY ENTERTAINMENT GROUP, INC., AND GRAFF-PAY-PER-VIEW INC., PLAINTIFFS

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE JANET RENO, ATTORNEY GENERAL, AND THE FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

[Filed: Nov. 8, 1996]

OPINION

Before: ROTH[1], Circuit Judge, FARNAN[2] and SIMANDLE [3], District Judges.

ROTH, Circuit Judge:

The plaintiffs in this action, Playboy Entertainment Group, Inc. ("Playboy") and Graff Pay-Per-View ("Graff"), challenge the constitutionality of section 505

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[1] Judge Jane R. Roth, United States Circuit Court Judge for the Third Circuit.

[2] Judge Joseph J. Farnan, United States District Court Judge for the District of Delaware.

[3] Judge Jerome B. Simandle, United States District Court Judge for the District of New Jersey.

of the Communications Decency Act of 1996 ("the CDA" of "the Act"), which is Title V of the Telecommunications Act of 1996, Pub.L. No. 104- 104, 110 Stat. 56. Congress enacted section 505 in an effort to eliminate signal bleed, *i.e.*, the partial reception of sexually explicit adult cable television programming in the homes of non-subscribers to that programming.

Most cable television systems in the United States offer one or more optional premium channels dedicated to sexually oriented programming. However, of the 62 million households that subscribe to cable television, only about 3 million will purchase or subscribe to adult programming during the course of a year. Cable system operators attempt to block non-subscribers from receiving this programming by various scrambling techniques which we will explain in greater detail in our Findings of Fact. Signal bleed occurs when the scrambling process is not fully successful.

The stated purpose of section 505 is to protect children from signal bleed. Section 505(a) requires a cable television operator to completely scramble or block the video and audio portions of any cable channel that is primarily dedicated to sexually explicit programming. If a cable operator is unable to comply in full with section 505(a), then section 505(b) requires "time channeling", *i.e.*, that sexually explicit adult programming be transmitted only during those hours when children are not likely to view it. The Federal Communications Commission has determined these "safe harbor" hours to be from 10:00 p.m. to 6:00 a.m.

The principal issue facing us is whether government regulation of signal bleed from sexually explicit programming offends the free speech and equal protection rights of adult-programming networks and of their

subscriber audience. Our analysis is narrowed by the fact that plaintiffs do not contend that signal bleed itself is protected speech. Moreover, plaintiffs concede that their programming is essentially 100% sexually oriented, in contrast to other entertainment channels that display only occasional or sporadic sexually explicit scenes or programs. Nevertheless, because the regulatory scheme of section 505 impacts on the transmission of adult programming, which is entitled to First Amendment protection,[4] we will examine whether section 505 is a content-based restriction of speech, and, if so, whether it survives scrutiny by addressing a compelling interest and by being narrowly tailored for that end. We will also consider whether Congress has unconstitutionally singled out networks that are exclusively dedicated to sexually oriented programming, while not regulating signal bleed from other premium networks that at times will transmit sexually oriented programs or scenes. Finally, we will examine plaintiffs' claim that the language of section 505 is unconstitutionally vague.

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[4] We recognize at the outset that the programming on plaintiffs' sexually dedicated channels is indecent, meaning vulgar or offensively explicit sexual material not generally available for viewing by children, but that it is not obscene. Indecent speech is subject to constitutional protection because it is established that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836-37, 106 L.Ed.2d 93 (1989); *Fabulous Associates Inc. v. Pennsylvania Public Utility Comm'n*, 896 F.2d 780, 783 (3d Cir. 1990); *Action for Children's Television v. F.C.C.*, 58 F.3d 654, 659 (D.C. Cir. 1995) (en banc), *cert. denied*, —- U.S. ——, 116 S. Ct. 701, 133 L.Ed.2d 658 (1996); accord, *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), at 851 (Sloviter, J.), at 858 n.3 (Buckwalter, J.), and at 865-66 (Dalzell, J.).

I.

PROCEDURAL BACKGROUND

President Clinton signed the CDA into law on February 8, 1996. On February 26, Playboy filed this action in the United States District Court for the District of Delaware, seeking a declaratory judgment that § 505 violates the First Amendment and the Equal Protection Clause of the Fifth Amendment of the U.S. Constitution. In addition, Playboy sought injunctive relief that would prohibit enforcement of § 505 by the Government.[5] Graff subsequently filed an action seeking identical relief against the same defendants. On March 4, 1996, Judge Farnan granted Graff's motion to consolidate these actions pursuant to Federal Rule of Civil Procedure 42(a). That same day, Chief Judge Dolores K. Sloviter of the United States Court of Appeals for the Third Circuit granted the parties' request to appoint a three-judge district court pursuant to § 561(a) of the CDA. She named Judge Joseph P. Farnan of the U.S. District Court for the District of Delaware, Judge Jerome B. Simandle of the U.S. District Court for the District of New Jersey, and Judge Jane R. Roth of the U.S. Court of Appeals for the Third Circuit.[6]

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[5] The defendants in this action are the United States; the United States Department of Justice; Attorney General of the United States, Janet Reno; and the Federal Communications Commission ("the FCC"). To simplify matters, we will refer to these defendants jointly as "the Government."

[6] Section 561(a) of the CDA provides that a three judge district court shall be convened to decide "any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title . . . pursuant to the provisions of section 2284 of title 28, United States Code." Pub.L. No. 104-104, § 561(a), 110 Stat. 56, 142 (1996). Section 2284 requires that at least one of the judges appointed to serve on the three-judge panel be a circuit judge.

Because the CDA was to go into effect on March 9, 1996,[7] Playboy requested a temporary restraining order ("TRO") to enjoin implementation and enforcement of § 505 of the Act. On March 6, 1996, Judge Farnan heard oral argument on Playboy's TRO motion.[8] He granted Playboy's motion on March 7, 1996, temporarily enjoining enforcement of § 505 until the matter could be heard by the three judge panel appointed by Chief Judge Sloviter. *Playboy Entertainment Group, Inc. v. United States*, 918 F. Supp. 813 (D. Del. 1996).

In preparation for our consideration of the plaintiffs' Application for a Preliminary Injunction, the parties negotiated a mutually acceptable discovery and briefing schedule. Much of the factual and technical evidence was presented by affidavits and briefs submitted prior to the preliminary injunction hearing. We heard testimony on May 20 and May 21, 1996, and closing arguments were presented on May 22. We concluded that

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[7] Pursuant to § 505(b), section 505 was set to go into effect on March 9, 1996, thirty days after it was signed into law by the President. Pub.L. No. 104-104, § 505(b), 110 Stat. 56, 136 (1996).

[8] Section 2284(b)(3) delineates the preliminary matters that may be decided by a single judge from those matters that must be decided by three-judge district courts. That section provides:

> A single judge may . . . grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by
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> > the district court of three judges of an application for a preliminary injunction. A single judge shall not . . . hear and determine any application for a preliminary or permanent injunction. . . . Any action of a single judge may be reviewed by the full court at any time before final judgment.
>
> 28 U.S.C. § 2284.

we should delay our decision until after the Supreme Court's decision in *Alliance for Community Media v. F.C.C.*, 56 F.3d 105 (D.C. Cir. 1995). The Supreme Court published its decision on June 28, 1996, *sub nom.*, *Denver Area Educational Telecommunications Consortium v. F.C.C.*, —- U.S. ——, 116 S. Ct. 2374, 135 L.Ed.2d 888 (1996). The parties then submitted supplemental memoranda, as we had instructed, on the impact and applicability of the Supreme Court's decision.

II.

FINDINGS OF FACT

In order to understand fully the arguments made by the parties in this case, it is necessary to understand the technological workings of cable signals and transmission. During the preliminary injunction hearing, the court heard extensive and complex testimony regarding cable technology and the mechanisms available to comply with § 505. Pursuant to Federal Rule of Civil Procedure 52(a), we make the following findings of fact:

The Statute At Issue

1. Playboy and Graff challenge § 505 of the CDA, entitled "Scrambling of Sexually Explicit Adult Video Service Programming." This section requires a multisystem operator ("MSO")[9] to scramble "sexually explicit adult programming or other programming that is indecent" which is transmitted on a channel "primarily dedicated to sexually oriented programming." Section 505 requires that any such adult channel or network be

[9] Section 505 applies to "multichannel video programming distributors." These distributors are more simply known as "multisystem operators" or "MSOs" and we will refer to them in this manner.

fully scrambled. The purpose of this scrambling is to eliminate "signal bleed." "Signal bleed" is the partial reception of video images and/or audio sounds on a scrambled channel. If an MSO does not or cannot comply with § 505's blocking requirement, the MSO is prohibited from transmitting the adult programming during hours of the day when minors are most likely to view it.[10]

2. MSOs, such as Telecommunication, Inc. ("TCI") and Time Warner Cable, provide cable subscribers with various packages of cable channels for which subscribers pay a monthly fee. Some subscribers receive a "basic" package or "tier" of channels. A basic cable tier often includes local broadcast networks (like ABC,

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[10] Section 505 provides:

> (a) REQUIREMENT.–In 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 shall fully scramble or otherwise 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.
>
> (b) IMPLEMENTATION.–Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.
>
> (c) DEFINITION.–As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

Pub.L. No. 104-104, § 505, 110 Stat. 56, 136 (1996) (to be codified at 47 U.S.C. § 561).

CBS, and NBC), leased and public access channels, as well as networks devoted entirely to news, education, fine arts, music videos, sports, or shopping. MSOs also provide "premium" tiers, which offer, in addition to the basic tier channels, channels showing recently released movies (like HBO, Cinemax, and Showtime) and channels dedicated solely to adult entertainment. MSOs charge a monthly fee for a basic cable package and additional monthly fees for premium cable channels.

3. Premium programming is also offered by MSOs on a "pay-per-view" basis. A pay-per-view consumer places an order with a cable operator, requesting access to a particular movie or sporting event. A consumer may also purchase programming on a premium channel for a specified period of time. When a consumer places a pay-per-view order, the MSO at the beginning of the requested program unscrambles the signal by remote accessing of a converter/descrambler box in the subscriber's home. The MSO rescrambles the signal at the conclusion of the program. The fee charged for receiving a program on a pay-per-view basis is always in addition to monthly fees paid for a cable package.

4. Playboy and Graff provide MSOs with adult, sexually oriented video programming. The MSOs then transmit the plaintiffs' programming to premium subscribers and pay-per-view purchasers who request access to such programming. Playboy owns two adult-programming networks: Playboy Television and AdulT-Vision. Graff also owns two adult networks: Adam & Eve and Spice. The programming on the Playboy and Graff networks is virtually 100% sexually explicit adult programming. In marketing its programming, Playboy relies on both premium subscription and pay-per-view sales, while Graff relies almost entirely on pay-per-

view. On a yearly basis, 3 million households subscribe to and/or receive pay-per-view sexually explicit adult programming.

5. Other non-adult premium networks have obtained licenses to exhibit particular Playboy films. In addition, non-adult premium and basic cable channels will, among other programs, transmit sexually explicit programs or programs which contain some sexually explicit scenes. We received evidence of the frequency of sexually explicit programming on non-adult channels. It was demonstrated for example that the number of sexually explicit programs available on non-adult channels on the evening of Friday, May 17, 1996, in Denver, Colorado, was one sixteenth that shown on the plaintiffs' adult channels. Moreover, unlike the adult channels, the sexually explicit programs on non-adult channels were mainly "R" rated movies which contained some sexually e explicit scenes but were not continuously sexually explicit as was plaintiffs' programming.

6. MSOs receive signals from many sources, such as master antennas, satellites, and local television stations. The signals are received at the system transmitter or "headend" where they are amplified and retransmitted by coaxial cable. Cable subscribers receive the channels directly by cable, if they own a cable-ready television, or by attaching the cable to a converter box if they own a non-cable-ready television.[11]

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[11] A converter box sits on top of an older model television set which can receive only a finite number of VHF or UHF channels. The converter takes the cable signal and converts it to a channel which can be received by the subscriber's television set. When cable systems began to offer programming, other than local broadcast stations, on channels that television sets designed for broadcast reception were not capable of receiving, MSOs began to

7. Because the cost of premium and pay-per-view programming is in addition to the cost of basic programming, MSOs seek to secure premium network signals for subscribers only. To prevent a signal from reaching the home of a non-subscriber, MSOs "scramble" the signal by blocking a portion of it. Currently, most MSOs scramble premium channel signals using either "RF" or "baseband" technology. Generally, this scrambling affects only the video portion of the transmission.[12]

8. When a consumer decides to subscribe to a premium or pay-per-view channel, the MSO must descramble the channel for the new subscriber. This can be done either by installing a positive or negative trap in the coaxial cable leading to the new subscriber's home or by providing the new subscriber with an addressable converter. The trap or the addressable converter descrambles the signal so that the integrity of the image and/or the sound is restored in the set or sets attached

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distribute these converter boxes to their subscribers. Converter boxes are electronic channel selectors. They are connected both to the subscriber's TV set and to the MSO's cable line. When a subscriber chooses a cable channel to view, the box "converts" the selected channel to a frequency (typically broadcast television channel three or four) that the subscriber's TV set can receive and display.

In about 1980, TV set manufacturers began marketing "cable-ready" TV sets, units equipped with tuners capable of directly receiving cable programming transmitted on non-broadcast (cable only) frequencies. If a subscriber has a cable-ready TV set, and it is capable of tuning all the channels offered by the cable system, the subscriber's line can be connected directly to the TV set.

[12] Because RF affects only the picture portion of the television transmission, no audio scrambling occurs. Some baseband systems do include audio encryption so that no intelligible audio will be presented to the non-subscribing customers.

to the descrambled line. The MSO can remotely "address" an addressable converter by sending out an electrical impulse. Addressable converters make pay-per-view requests possible by enabling an MSO by remote direction to descramble and then rescramble the cable signals entering the subscriber's home.[13]

9. As mentioned above, one of the technologies used by MSOs to secure premium channels is "positive trapping." For positive trapping, the MSO installs at its transmitter headend an electronic box which jams the signal of the channel to be secured. Non-subscribers to that channel will receive only "snow" for video and a high-pitched beep for audio. Subscribers to the jammed channel receive a metal cylinder, the positive trap, which is attached to the cable- ready TV or to the set top converter box in order to filter out the jamming signal.

10. A premium channel's signal can also be secured by "negative trapping." Using this technology, the signal will be transmitted in the clear. A negative trap is installed at the homes of non-subscribers, jamming the signal there.

11. An MSO's choice between using positive or negative trapping will depend on whether the majority of subscribers to the overall cable service also wish to subscribe to a particular premium service. It is cost effective to use negative traps only when a large majority of the customers of a cable system subscribe to a particular premium channel.

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[13] The previously described converter box and the addressable converter/descrambler can be combined in one set top box.

12. The problem which § 505 was enacted to remedy is known as "signal bleed." Audio or video "bleed" occurs when a signal is not effectively scrambled by the MSO's RF or baseband equipment. Bleeding does not occur in TV sets with converter boxes that have a feature known as channel mapping.[14] Cable-ready television sets, however, do not include this mapping feature. When a consumer with a cable-ready TV tunes to a scrambled premium channel to which the consumer does not subscribe, the consumer receives the jammed signal which under some circumstances includes a video picture or portions of a picture because of a phenomenon called random lockup. The non-subscribing consumer will also receive a clear audio signal unless the MSO's scrambling system is one which scrambles the audio.[15] The severity of this signal bleeding problem varies from time to time and from place to place. The reason for these inconsistencies may be weather extremes, faulty or old equipment, or human error in installing, operating, and/or maintaining systems. Moreover, according to plaintiffs' expert, Dr. Walter Ciciora, the cable-ready TV's that pervade the market today have improved electronic circuitry which will make a discernible picture out of a partly-scrambled signal. This technology, developed over the past two decades, permits the child of a cable subscriber to tune the cable-ready TV to a premium or pay-per-view channel offered on the cable system and to receive discerni-

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[14] When a consumer with a converter box attempts to tune a scrambled channel, the converter box will not tune that channel but will tune to another channel, providing either a promotional message or a blue screen.

[15] A subscriber will of course receive the descrambled video and audio.

ble images even though the parent is a non- subscriber to that channel.

13. With this incidence of improved electronic technology and/or partially scrambled signals, a non-subscriber may see and hear portions of a channel or program to which he or she does not subscribe. This result is of particular concern when the programming is sexually explicit, intended for an adult-only audience. Families, who do not subscribe to adult entertainment channels, have found that sounds and images from these channels are at least partially discernible. The government presented anecdotal evidence of parents discovering that their children have been exposed to sights and sounds from sexually explicit programming only after the exposure had occurred. This evidence included affidavits from several parents testifying about the danger in their homes of signal bleed from adult programming networks. Other parents complained that, even though their own sets were attached to lockboxes that fully blocked indecent programs, their children were exposed to signal bleed from adult programming when they visited friends. Anecdotal evidence of signal bleed was also presented in letters which had been sent to various members of Congress and were made part of the record before this court. In addition, video tapes of sexually explicit signal bleed were admitted into evidence. For instance, Defendant's Exhibit No. 4 was taped from the Playboy Channel in Orange, California. Exhibit No. 4 shows partially scrambled images of a nude woman caressing herself and then of two nude women in the water and in a boat, caressing each other. Defendant's Exhibit No. 5 is an audio tape of the Spice Channel, made by a non-Spice subscriber from the audio bleed. It carries the sounds of

what appear to be repeated sexual encounters accompanied by assorted orgiastic moans and groans.

14. There are approximately 62 million households in the United States which receive cable television. Of these, 20 to 25 million have converter boxes to receive basic and/or premium cable service. These converter boxes will map out the scrambled channels and as a consequence these households will not receive "signal bleed." The other 40 million cable subscribers have the potential for a "bleed" problem. It is not clear how many of these 40 million cable homes with the potential for "signal bleed" will not in fact receive signal bleed either because the local MSO employs effective baseband or digital scrambling or because the household is already a subscriber to the adult channels.[16] No evidence was presented of any consumer desire to receive "signal bleed." Moreover, plaintiffs make no claim that "signal bleed" itself is constitutionally protected.

Legislative History of § 505

15. On June 12, 1995, after hearings and substantial debate had been held regarding the legislation that was to become the 1996 Telecommunications Act, Senator Diane Feinstein of California and Senator Trent Lott of Mississippi offered Amendment 1269 which ultimately became Section 505 of the Act. Their amendment proposed that MSOs, offering adult programming, should be required to completely scramble the audio and video

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[16] If at the trial on the permanent injunction more specific evidence of the number of households with the potential for signal bleed were to be presented, we would be in a better position to consider whether the standards for a permanent injunction have been met.

signals to prevent partial reception of those channels in the homes of nonsubscribers.

16. Senator Feinstein told members of the Senate that "[p]arents . . . come home after work only to find their children sitting in front of the television watching or listening to the adult's-only channel, a channel that many parents did not even know existed." Cong. Rec. S8167; *see* Playboy Ex. 20. She noted that guidelines which put the burden on the subscriber to request complete scrambling of adult channels were inadequate because often nonsubscribers are unaware that indecent audio and/or video signals can be received. *Id.* The object of the amendment, she said, was to "protect [ ] children by prohibiting sexually explicit programming to those individuals who have not specifically requested such programming."

17. Senators Feinstein and Lott each spoke briefly about their proposed amendment. 141 Cong. Rec. S8166-S8169. Accompanying the transcript of their statements before the Senate was a memorandum from the American Law Division ("ALD") of the Congressional Research Service. The memorandum analyzed the Feinstein-Lott amendment in light of First Amendment case law and concluded that some language contained in the provision might be unconstitutional and over broad. *Id.* at S8168. Except for the statements of Senators Feinstein and Lott, there was no debate on the amendment and no hearings were held on it. The amendment passed easily in the Senate (91 votes in favor; none opposed) and became § 505 of the bill that emerged from the conference which ironed out the differences between the House and Senate versions. On February 8, 1996, President Clinton signed the bill into law.

18. Section 505 does not eliminate adult programming. Instead, it offers MSOs either the option of fully scrambling the video and audio signals of adult programming or, if complete scrambling is not possible or is not the choice of the MSO, the option of transmitting adult programs only during the "safe harbor" hours. Specifically, pursuant to § 505(a) (47 U.S.C. § 561(a)), MSOs are required to "fully block the video and audio portion of [an adult entertainment] channel so that one not a subscriber to such channel or programming does not receive it." If an operator cannot fully block its adult channels, it must then, pursuant to § 505(a) (47 U.S.C. § 561(b)), discontinue programming "during the hours of the day . . . when a significant number of children are likely to view it." The FCC regulation implementing this alternative would limit adult programming to the eight hour period between 10:00 p.m. and 6:00 a.m. We will refer to the requirement found in subsection (a) as "complete scrambling," and the alternative offered by subsection (b), as "time channeling."

The Technological and Economic Impacts of § 505

19. There are MSOs that already meet the requirements of § 505. For example, Steven Saril, Senior Vice President of Sales and Marketing for Graff, testified that roughly half of the systems carrying Graff programming are in compliance with § 505.[17] For the MSOs that are not in compliance, several technologies may become available in the future that would allow an MSO to meet the requirements of § 505. Television

[17] Saril also testified that the Spice network might go out of business if the non-complying channels were required to time channel. The Graff "standard agreement," however, requires an MSO to carry Spice only during the hours of 9 p.m. to 3 a.m.–hours that are very close to the safe harbor time period.

manufacturers may soon be required by law to insert the so-called "v-chip," in all new televisions. Pub. L. No. 104-104, § 551, 110 Stat. at 139-41. The v-chip will allow parents to block types of programming which they find inappropriate for their children. The v-chip is currently being tested in Canadian markets. It is not clear, however, how long it will be before televisions with v-chips become widely available in the United States.

20. Digital cable technology is another future option that will permit MSOs to completely scramble signals to nonsubscribers as § 505 requires. Approximately 2 million American consumers presently receive digital television service. Digital signals will prevent all audio and video bleeding, but digital service will require conversion of the MSOs' headend equipment from analog to digital technology. As MSOs adopt digital service, they will probably use it first for premium channels, including adult programming.

21. Because the currently used "RF" and "base-band" technologies are not capable of fully scrambling both the audio and video signal at all times, many MSOs would be required, if § 505(a) was enforced today, to resort to other and/or additional scrambling techniques. If an MSO was not able or willing to initiate additional scrambling techniques, it would be required to time channel adult programming.

22. One device which has been available for several years and which succeeds in fully scrambling unwanted cable signals is the lockbox. Since the early 1980s, MSOs have been required by law to provide a lockbox to any customer upon request. Section 544(d) of the 1984 Cable Act requires that cable operators either sell or lease a blocking device to any subscriber who

requests that a channel be completely blocked. *See* 47 U.S.C. § 544(d)(2)(A). However, few households have obtained the lockboxes made available by this provision.

23. Section 504 of the CDA also requires MSOs to completely block *upon request* any programming that a cable customer finds personally offensive. This blocking requirement is not limited to the "sexually explicit adult video service programming" which is the target of § 505. Pub. L. No. 104-104, § 504, 110 Stat. 56, 136 (1996). Moreover, under § 504, the MSO, rather than the subscriber, is responsible for bearing the cost of providing the blocking mechanism.[18] Despite this economic burden, plaintiffs suggest that § 504 presents a constitutional, "less restrictive alternative" because it would require an MSO to provide complete blocking only upon request. Plaintiffs also assert that cable subscribers can be alerted through public relations efforts that blocking devices will be made available to them, free of charge, upon request. Methods of disseminating this information could include inserts in program guides and bills, informative screens shown on "barker channels", advertisements run on other channels, and special mailings. We have not, however, received evidence that MSOs are advising cable customers of the availability of the free channel blocks

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[18] Section 504(a) provides:

> (a) SUBSCRIBER REQUEST.–Upon request by a cable service subscriber, a cable operator shall, *without charge*, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

Pub. L. No. 104-104, § 504, 110 Stat. 56, 136 (1996) (emphasis added).

under § 504. Nor is there evidence that customers are responding to such notices, if given. Thus, we cannot effectively assess plaintiffs' claim that § 504 is likely to become a viable remedy for eliminating signal bleed. If the § 504 blocking option is not being promoted, it cannot become a meaningful alternative to the provisions of § 505. At the time of the permanent injunction hearing, further evidence of the actual and predicted impact and efficacy of § 504 would be helpful to us.

24. MSOs that adopted the lockbox remedy, in order to comply with § 505, would be required to provide *all* nonsubscribers with a lockbox programmed to block the audio and video signals of adult entertainment networks. A mapping converter with a lockbox feature allows parents to control when adult programming will be received and when it will be blocked. Most lockboxes currently available are capable of blocking only signals entering the television set to which the box is attached. In order to fully block access to sexually oriented programming at all times, each cable-connected TV set in the home would have to be connected to a lockbox. A single converter/lockbox costs approximately $115. If MSOs that offer adult programming were to distribute one converter/lockbox to every nonsubscribing household currently without one, the total cost would be prohibitive, probably in excess of one billion dollars.

25. In the alternative, MSOs could provide "negative traps" to nonsubscribers. A "negative trap" is installed on the cable wiring of non-subscribing households and scrambles a clear signal. Subscribers to adult channels receive the clear signal without the negative trap. Negative trapping costs between $12 and $15 per household. It is an economically feasible solution only

in areas, such as military bases, where a large majority of cable subscribers want to receive the adult channel.

26. Double scrambling with "positive trap" technology provides the most workable alternative or non-complying MSOs. To achieve double scrambling, RF or baseband scrambling is combined with a jamming signal at the headend. The headend jamming completely blocks video and audio so that no signal bleed occurs in the homes of non-subscribers. In order for a subscriber to view programming that has been double scrambled, the subscriber needs both a positive trap and an addressable converter. The positive trap filters out the interference from the jamming signal, and the addressable converter descrambles the RF or baseband scrambling. The addressable converter can be used to start up and end periods of premium service and also to permit pay-per-view reception. Positive trap technology would be economically advantageous in areas where nonsubscribers outnumber subscribers. If the positive trapping alternative were adopted by an MSO, positive traps would be delivered to or installed at all households subscribing to adult programming. The average cost of a positive trap is $7. A positive trap is easily installed by the subscriber or it can be installed by the MSO at a cost of approximately $35. The cost of the additional equipment necessary for jamming at the MSO's headend is estimated to be $750 to $1,000.

27. Positive trapping technology poses an additional problem for pay-per-view purchases. Customers either have to pick up a positive trap or order it in advance of viewing the desired program. This interferes with the spontaneous nature of what plaintiffs consider to be the

impulse purchasing of sexually explicit adult programming.

28. Professional installation of traps also raises privacy concerns. A subscriber, who enjoys adult entertainment at home, might be dissuaded from requesting a positive trap upon realizing that the MSO will learn his or her identity. The new subscriber will be identified as a consumer of sexually explicit material—although with sexually explicit premium and pay-per-view programming, the subscriber will also be identifiable through billing for the programming.

29. A few MSOs have already adopted "double scrambling" to resolve community opposition to sexually explicit programming and to the audio and/or video bleeding of signals from such programming. Plaintiffs contend that in these double-scrambling communities revenues from adult channels has fallen by fifty per cent. Plaintiffs are of the opinion that a significant factor causing this drop in revenue is the impulse nature of the purchase of adult programming.

30. Finally, an MSO has the option of complying with § 505 by "time channeling" as provided in subsection (b). If an MSO cannot or chooses not to completely scramble audio and/or video signals as required by § 505(a), it must restrict adult program to certain "safe harbor" hours. In preparation for implementing § 505, the FCC established a regulation that defines the safe harbor hours as the eight hour period between 10:00 p.m. and 6:00 a.m. *In re Implementation of Section 505 of the Telecommunications Act of 1996*, CS Dkt. No. 96-40, FCC 96-84, Order & Notice of Proposed Rulemaking amending 47 C.F.R. § 76 ¶ 6 (released March 5, 1996; intended to become effective March 9,

1996). If time channeling were adopted by an MSO, adult cable programming would not be available in the MSO's service area except during the safe harbor hours. Plaintiffs estimate that their revenues would fall approximately thirty per cent if time channeling were adopted.[19]

31. The MSOs that have taken a position on the method by which they would comply with § 505 have all announced that they would adopt time channeling.

III.

CONCLUSIONS OF LAW

A. The Preliminary Injunction Standard

Playboy and Graff have asked this court to exercise extraordinary judicial authority by striking down a law drafted and adopted by a co-equal branch of govern

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[19] We are skeptical of plaintiffs' estimate of revenue loss. It appears to be significantly overstated. Although Graff's Vice President, Steven Saril, stated that 30 percent of those who purchase his company's programming do so outside the safe harbor hours, many of these customers may not be affected by time channeling because half of the cable systems, carrying Graff channels, already comply with § 505(a). The customers of these MSOs will still be able to view Graff's channels outside the safe harbor period. Moreover, Saril admitted on cross-examination that 21% of the non-safe-harbor purchases occur at 9:00 or 9:30 p.m., and that a 10:00 p.m. starting time would cause no loss of revenue. He further admitted that people may rearrange their viewing schedule or use a VCR to tape adult programming during the safe harbor hours, again preserving Graff's revenues. Finally, plaintiffs acknowledge some remaining elasticity in the pricing of sexually explicit programming. Graff would be able raise its rates a certain extent without losing customers.

ment. The plaintiffs' request raises one of the judiciary's most "awesome responsibilit[ies] calling for the utmost circumspection in its exercise." *Heart of Atlanta Motel, Inc.* v. *United States*, 85 S. Ct. 1, 2, 13 L.Ed.2d 12 (1964). After thorough examination and discussion, we conclude that, at this preliminary injunction stage, we will not strike down § 505. As the case has presently been developed before us, the plaintiffs have not met the requirements for the issuing of a preliminary injunction. We will, therefore, deny their petition for preliminary relief.

The standard used to determine whether plaintiffs are entitled to a preliminary injunction is well established. In order to succeed, plaintiffs must demonstrate that they are likely to prevail on the merits and that they will suffer irreparable harm if they are not granted injunctive relief. We must also consider whether the potential harm to the defendant that will result from the issuing of a preliminary injunction outweighs the harm that may fall upon the plaintiffs if such relief is denied, and whether granting the requested injunctive relief is in the public interest. *American Civil Liberties Union* v. *Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996) (citing *Campbell Soup Co.* v. *ConAgra, Inc.*, 977 F.2d 86, 90-91 (3d Cir. 1992) and *Bradley* v. *Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1175 (3d Cir. 1990)); *see also Clean Ocean Action* v. *York*, 57 F.3d 328, 331 (3d Cir. 1995).

In a case such as this one, in which the alleged injury is a threat to First Amendment interests, the finding of irreparable injury is often tied to the likelihood of success on the merits. *American Civil Liberties Union*, 929 F. Supp. at 851 (citing *Elrod* v. *Burns*, 427 U.S. 347,

96 S. Ct. 2673, 49 L.Ed.2d 547 (1976)). The loss of First Amendment freedoms is unquestionably irreparable injury. *Elrod*, 427 U.S. at 373, 96 S. Ct. at 2689-90 (citing *New York Times Co.* v. *United States*, 403 U.S. 713, 91 S. Ct. 2140, 29 L.Ed.2d 822 (1971)). Conversely, however, if the only irreparable injury alleged is the loss of first amendment freedoms, the likelihood that plaintiffs will not succeed on the merits creates an equal likelihood that they will not suffer First Amendment injury.[20] Constitutional injury cannot occur if there is not a constitutional violation. We will, for this reason, turn our inquiry first to the issue of the plaintiffs' likelihood of success on the merits.

Plaintiffs challenge § 505 on grounds that it (1) infringes the free speech protections provided by the First Amendment of the U.S. Constitution, (2) violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, and (3) contains unconstitutionally vague terminology With regard to all three of these claims, we conclude that Playboy and Graff have failed to meet the preliminary injunction test. They have not persuaded us that they are likely to prevail on the merits if any of these three claims are

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[20] Plaintiffs also claim that they will suffer financial loss. Financial loss is not, however, the type of irreparable injury that warrants the granting of injunctive relief. *See, e.g., In re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1145 (3d Cir. 1982). To the extent that plaintiffs may suffer financial loss for which they will not be reimbursed, that economic burden is an element which we considered *infra* in the balancing of harms, particularly in our discussion of the benefit to the public of time channeling (per *F.C.C.* v. *Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978)) and its availability under § 505 as an alternative to complete scrambling.

ultimately litigated. Moreover, they have not demonstrated that the public interest is served by permitting signal bleed to invade nonsubscribers' homes, particularly in view of our interest in protecting children from a pervasive medium which transmits sexually explicit sounds and images and in view of the continuing availability under § 505 of sexually explicit adult programming during the safe harbor hours.[21]

B. First Amendment Jurisprudence

Playboy and Graff claim that § 505 burdens their rights guaranteed under the First Amendment by inhibiting their freedom of speech. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Supreme Court has been exacting in its protection of this First Amendment right. Moreover, as circumstances and technologies have changed, the Court has adapted free speech protection to meet these changes.

We postponed our decision here until the Supreme Court reached its decision in a case dealing with a similar field of developing technology—that of leased and public access cable channels. *See Denver Area*

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[21] In our discussion, we do not separate out the elements to consider with regard to the issuing of an injunction, *i.e.*, likelihood of success on the merits, irreparable harm, balancing of harms, and public interest. First, in this context of a claim of unconstitutional restriction of free speech, the harm and public interest elements are important factors in determining the likelihood of success on the merits. These factors will therefore be discussed in conjunction with the merits of the claims. Second, as we note above, our irreparable harm analysis is subsumed by our finding that plaintiffs are not likely to succeed on the merits.

Educational Telecommunications Consortium, Inc. v. *F.C.C.*, —- *U.S.* ——, 116 S. Ct. 2374, 135 L.Ed.2d 888 (1996) [hereinafter *Denver Consortium*]. In *Denver Consortium*, the plaintiffs challenged three sections of the Cable Television Consumer Protection and Competition Act of 1992, which placed restrictions upon indecent programming aired on leased and public access cable channels.[22] Pub. L. No. 102-385, 106 Stat. 1460,

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[22] The plaintiffs in *Denver Consortium* challenged Sections 10(a), 10(b), and 10(c) of the 1992 Cable Act. These provisions were to be applied to "leased access channels" and "public, educational, or governmental channels" ("PEG channels"). Section 10(a) "permit[s] a cable operator to enforce prospectively a written and published policy of prohibiting programming [on leased access channels] that the operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 1992 Cable Act, § 10(a)(2).

Section 10(b) requires that, if cable operators choose not to ban sexually explicit programming as permitted under § 10(a), when they broadcast such programming on leased access channels, they must completely segregate and block the signal carrying the indecent programming. 1992 Cable Act, § 10(b). According to regulations promulgated pursuant to § 10(b), leased access programmers must inform cable operators if their programming will be indecent, and cable operators must then place that programming on a single channel. 47 C.F.R. § 76.701(d) (1995). The signal of this single channel must be completely blocked by the cable operator, and unscrambled only upon the written request of an adult subscriber. *Id.* at § 76.701(b). Upon receiving a subscriber's request, the operator must provide access to the blocked channel within thirty days and, if that subscriber later asks that the channel be re-blocked, the operator must accommodate the subscribers request, again within 30 days. *Id.* at § 76.701(c).

Section 10(c) is similar to § 10(a) but applies only to PEG channels. It instructs the F.C.C. to enact regulations that would permit a cable operator "to prohibit the use, on [a cable system], of any channel capacity of any public, educational, or governmental

1486, § § 10(a), 10(b), and 10(c) (codified at 47 U.S.C. §§ 532(h), 532(j), and note following § 531) ("the 1992 Cable Act"). A majority of the Supreme Court agreed that § 10(b) of the 1992 Cable Act was unconstitutional, but the Court was unable to form a majority regarding the constitutionality of the remainder of the Act.[23]

Justice Breyer wrote for the Court regarding § 10(b), but thereafter he wrote for a plurality, which upheld § 10(a) and struck down § 10(c). One of the seemingly unresolved aspects of *Denver Consortium* is the standard of scrutiny we should apply in our analysis here. The plurality suggested that it was "unwise and unnecessary" to decide whether a lower standard of scrutiny, such as that applied in *F.C.C.* v. *Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978), should apply in the cable context. *Denver Consortium*, —- U.S. at ——, 116 S. Ct. at 2385. It was unnecessary to specify a specific standard because § 10(b) could not pass constitutional muster either under strict scrutiny or under a less rigorous standard. And, it was unwise to declare a "rigid single standard" for fear of dampening the rapid rate of development in the field of communications technologies.

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access facility for any programming which contains obscene material, sexually explicit, conduct, or material soliciting or promoting unlawful conduct." 1992 Cable Act, § 10(c).

[23] Unlike leased and public access channels, the Graff and Playboy networks are commercial premium channels. The segregation of adult programming and the scrambling of adult channel signals, which concerned the Court in *Denver Consortium*, is, in the context of adult channels, a commercial decision which MSOs have made in order to limit access to those viewers who pay to subscribe to the adult channels.

The other five members of the Court suggested that strict scrutiny remained the applicable standard where a law restricted speech on the basis of its content. Thus, these members of the Court would have required that the law be "narrowly tailored" to achieve a "compelling" government interest in order to survive constitutional review. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia believed that all three challenged provisions of the 1992 Cable Act were constitutional and that even § 10(b) would survive strict scrutiny. *See id.* at ——, —— - —— & ——, 116 S. Ct. at 2422, 2428-29 & 2432 (Thomas, J., concurring in part and dissenting in part). Justice Kennedy, joined by Justice Ginsburg, would have held to the contrary that strict scrutiny was fatal to the challenged provisions and all three should be struck down. *See id.* at —— - ——, —— - ——, & ——, 116 S. Ct. at 2405-07, 2416-17, & 2419 (Kennedy, J., concurring in part and dissenting in part). In the aftermath of the *Denver Consortium* decision, it is clear only that we should apply either strict scrutiny or something very close to strict scrutiny when a content-based law, applicable in the cable television context, is challenged on grounds that it violates the First Amendment.[24]

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[24] We recognize that several Supreme Court pluralities have suggested that sexually explicit material receives less protection under the First Amendment than, for example, artistically, politically, or scientifically valued forms of speech. For example, in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L.Ed.2d 310 (1976), a plurality of the Court explained:

> [E]ven though we recognize the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly

However, whatever the standard of scrutiny, as Justice Breyer stated for the Court in *Denver Consortium:* "The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required." *Id.* at ——, 116 S. Ct. at 2384.

The first step that the majority took in *Denver Consortium* was to scrutinize the statute to assure that it properly addressed "an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech." *Id.* at ——, 116 S. Ct. at 2385. The Court defined the problem as the protection of children from exposure to

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> different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment ["I disapprove of what you say, but I will defend to the death your right to say it."]. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theatres of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification. . . .

Id. at 70-71, 96 S. Ct. at 2452. This plurality also noted that "[e]ven within the area of protected speech, a difference in content may require a different governmental response." *Id.* at 66, 96 S. Ct. at 2450. The plurality opinion in *Pacifica Foundation* similarly suggested that a lower standard of scrutiny may be appropriately applied in certain contexts when the content of the regulated material is offensive, vulgar, or shocking. *See Pacifica Foundation*, 438 U.S. at 744-48, 98 S. Ct. at 3037-40.

patently offensive depictions of sex. *Id.* It was to address this same problem that Congress enacted § 505.

Section 505 differs, however, 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. Moreover, § 505 is directed at this secondary effect because signal bleed is intruding into the homes of television viewers who have chosen *not* to receive the underlying sexually explicit programming.

This focus of § 505 on a secondary effect of speech leads us to our next inquiry, whether § 505 is "content-based" or "content-neutral." *See City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47, 106 S. Ct. 925, 928-29, 89 L.Ed.2d 29 (1986). As we have noted, in *Denver Consortium* five justices agreed that a content-based strict scrutiny standard should apply. We conclude here, but not without considerable deliberation, that § 505 should be treated as a content-based restriction on speech. Even though § 505 is aimed at the content-neutral objective of preventing signal bleed, the section applies only when signal bleed occurs during the transmission of "sexually explicit adult programming or other programming that is indecent." It does not apply when signal bleed occurs on other premium channel networks, like HBO or the Disney Channel. Thus, Congress targeted signal bleed based on its sexually explicit content, rendering § 505 a "content-based" restriction. We will therefore apply content-based analysis.

We must, however, also consider content in context. We cannot ignore the fact that the households that receive signal bleed have not subscribed to the adult channel which transmits the unwanted images and sounds. Nor can we ignore the fact that cable television is a means of communication which is pervasive and to which children are easily exposed. The Supreme Court has recognized that cable television is as accessible to children as over-the-air broadcasting, if not more so. *See Denver Consortium*, —- U.S. at ——, 116 S. Ct. at 2386.

Moreover, the Supreme Court in its consideration of freedom of speech under the First Amendment has recognized the need to protect children from sexually explicit material, particularly in the context of a pervasive medium. *See Denver Consortium*, —- U.S. at ——, 116 S. Ct. at 2386 ("[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."); *Sable Communications of Cal., Inc.* v. *F.C.C.*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836, 106 L.Ed.2d 93 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards."); *New York* v. *Ferber*, 458 U.S. 747,756-57, 102 S. Ct. 3348, 3354-55, 73 L.Ed.2d 1113 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" (citation omitted)); *Fabulous Assocs. Inc.* v. *Pa. Pub. Util. Comm'n*, 896 F.2d 780, 787 (3d Cir. 1990) ("There is

little question that the interest of the state in shielding its youth from exposure to indecent materials is a compelling state interest.").

Nor are the courts alone in finding that children should be protected from exposure to sexually explicit materials. In 1986, the Attorney General's Commission on Pornography issued a final report that reached similar conclusions regarding the effects of "non-violent and non-degrading," sexually explicit materials on children. The Commission explained:

> Perhaps the most significant potential harm in this category exists with respect to children. We all agree that at least much, probably most, and maybe even all material in this category, regardless of whether it is harmful when used by adults only, is harmful when it falls into the hands of children. . . . We have no hesitancy in concluding that learning about sexuality from most of the material in this category is not the best way for children to learn about the subject. There are harms both to the children themselves and to notions of family control over a child's introduction to sexuality if children learn about sex from the kinds of sexually explicit materials that constitute the bulk of this category of materials.
>
> We have little doubt that much of this material does find its way into the hands of children, and to the extent that it does we all agree that it is harmful. We may disagree about the extent to which people should, as adults, be tolerated in engaging in sexual practices that differ from the norm, but we agree about the question of the desirability of exposing children to most of this material, and on

> that our unanimous agreement is that it is undesirable.

U.S. Dept. of Justice, *Attorney General's Commission on Pornography*, July 1986, at 343-44 (Def.'s Ex. 80).[25]

As a result, we conclude that § 505 clearly addresses a recognized "compelling interest," and it remains only for us to determine whether the provision is carefully tailored to serve that end. For the reasons that we now develop, and particularly on the basis of the Supreme Court's ruling in *F.C.C.* v. *Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L.Ed.2d 1073 (1978), we hold

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[25] In considering harm to children, we have not relied on the study conducted by Government's expert witness, Dr. Diana M. Elliott, Ph.D. *See* Diana M. Elliott, *Children's Exposure to Pornography: Prevalence and Impact* (Def.'s Ex. 79). We understand, as she testified, that it would be unethical to expose children to pornography in order to test their reactions to sexually explicit material, but, for a number of reasons, we have concerns regarding the reliability of her methods and conclusions. Her results strike us as anecdotal and possibly misleading. Because the parties stipulated prior to the preliminary injunction hearing that all evidence submitted would be admissible, we did not consider the admissibility of her study under the rules established in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993) and *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), *cert. denied*, —- U.S. ——, 115 S. Ct. 1253, 131 L.Ed.2d 134 (1995). Instead, the reliability concerns that the court had regarding Dr. Elliott's research were considered only in weighing the evidence. We ultimately decided that her research should not be given weight in coming to our present decision.

If plaintiffs plan to seek a hearing in order to request a permanent injunction before this panel, it would be helpful if the parties would provide the court with additional evidence demonstrating the effects of sexually explicit materials on children.

that Congress has adopted, at least in respect to § 505(b), a carefully tailored, and constitutional, solution.[26]

In *Denver Consortium*, a plurality of the Supreme Court acknowledged that case's similarity to *Pacifica Foundation*, noting that, like the broadcast system at issue in *Pacifica Foundation*, "[c]able television systems . . . 'have established a uniquely pervasive presence in the lives of all Americans.'" *Denver Consortium*, —- U.S. at ——, 116 S. Ct. at 2386 (quoting *Pacifica Foundation*, 438 U.S. at 748, 98 S. Ct. at 3039-40). It was largely the pervasive nature of broadcast media that motivated the Court in *Pacifica Foundation* to uphold governmental restrictions placed on radio broadcasts of indecent material.

We wholeheartedly agree with the plurality's finding in *Denver Consortium* that cable television is now "uniquely pervasive." *Id.* The plurality also noted that

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[26] The Supreme Court held in an earlier "secondary effects" decision, regarding the exposure of the unwilling viewer to nudity, that a city ordinance was invalid which barred the exhibition in drive-in theaters of motion pictures in which human male or female bare buttocks, human female bare breasts, or human bare pubic areas were shown if the motion picture was visible from any public street or public place. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). We find the present case distinguishable from *Erznoznik* in that it is not an occasional glimpse of a portion of nude anatomy which is visible in the signal bleed from adult channels, but instead it is an unbroken continuum of sexually explicit sounds and images, delivered without invitation to one's home rather than to passers-by on a public highway. We believe it is likely that if the Jacksonville ordinance at issue in *Erznoznik* had been directed solely at the display of 100% sexually explicit films which were visible from the public street and from private homes, the ordinance would have been held to be valid.

"[c]able television broadcasting . . . is as 'accessible to children' as over-the-air broadcasting if not more so." *Id.* Justice Souter further explained:

> [W]hile we have found cable television different from broadcast with respect to the factors justifying intrusive access requirements under the rule in *Red Lion* [*Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969)], *see Turner Broadcasting System, Inc.* v. *F.C.C.*, [512 U.S. 622, —— - ——, 114 S. Ct. 2445, 2456-57, 129 L.Ed.2d 497 (1994)] (finding that *Red Lion's* spectrum scarcity rationale had no application to cable), today's plurality opinion rightly observes that 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.

Id. —— U.S. at —— - ——, 116 S. Ct. at 2401-02 (Souter, J., concurring) (citation omitted).

There is no question that a commanding majority of households in this nation subscribe to cable programming. As a result of imperfect signal scrambling, millions of children then have potential access not only to indecent sounds, similar to those raising concern in *Pacifica Foundation*, but also to sexually explicit visual images. In the homes of families who do not subscribe to sex-dedicated networks, these images enter as an offensive pollutant. They invade the household and "confront[ ] the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica Foundation*, 438 U.S. at 748, 98 S. Ct. at 3040;

see also *Denver Consortium*, —- U.S. at ——, 116 S. Ct. at 2386 (plurality opinion).

In *Pacifica Foundation*, the Supreme Court found it undisputed that George Carlin's "Filthy Words" monologue was "vulgar," "offensive," and "shocking." 438 U.S. at 747, 98 S. Ct. at 3039. The Court noted that, in the right context, the speech deserved First Amendment protections, providing adult listeners with a right to find Carlin's observances funny and provocative, instead of vulgar and offensive. The Court therefore examined the context of the monologue, broadcast at 2 o'clock in the afternoon. It emphasized the ubiquitous nature of broadcast radio and recognized that airing Carlin's performance at the time "could have enlarged a child's vocabulary in an instant." *Id.* at 749, 98 S. Ct. at 3040.

Similarly, when cable signal bleed occurs, children may be exposed to the sights and sounds of sexually explicit films and other adult programming. Such programming has the potential to affect not only a child's vocabulary, but also his or her capacity for inappropriate conduct that is sexual in nature. We believe that the danger of prematurely exposing children to video and audio transmissions of graphic adult sexual behavior is even more troublesome than the exposure to offensive language that was at issue in *Pacifica Foundation.*

Indeed, the parties do not dispute that the government has a well-established compelling interest in protecting children from unsupervised exposure to sexually explicit material.

We then turn to the solution which Congress crafted in § 505. Congress provided MSOs with two alternative methods of compliance with the section: (1) complete scrambling, or (2) time-channeling the programming into safe-harbor hours. Playboy and Graff argue that very few MSOs will be financially able to comply with § 505 by distributing expensive equipment that will fully scramble the signals of sex-dedicated networks as required by subsection (a). Plaintiffs fear that MSOs will drop adult programming entirely, rather than invest in technologies which will be made obsolete by the v-chip or that MSOs will transmit plaintiffs' networks for an unprofitably short eight-hour period. Not only do the plaintiffs foresee lost profits, they present the possibility of bankruptcy caused by implementation of § 505.

There is undoubtedly a substantial expense involved in complying with subsection (a). However, while an economic burden may warrant consideration when weighing the relative harms imposed by a law, economics alone cannot dictate the result where constitutional rights are at issue. *See Young* v. *American Mini Theatres*, *Inc.*, 427 U.S. 50, 78, 96 S. Ct. 2440, 2456, 49 L.Ed.2d 310 (1976) (Powell concurring); *Mitchell* v. *Comm'n on Adult Entertainment Establishments*, 10 F.3d 123, 144 (3d Cir. 1993). [27] Moreover, § 505 does *not*

[27] While we are aware that *Young* and *Mitchell* are zoning cases, we consider that their holdings on economic impact are

require that MSOs shoulder potentially fatal economic burdens. If the economic hardship imposed by subsection (a) is too severe, an MSO is free to choose to comply with § 505 by time-channeling in accordance with subsection (b).

By including the time-channeling compliance option in § 505, Congress provided MSOs with decision-making flexibility and an economically less restrictive alternative. We thus find that the economic burden placed on MSOs by subsection (a) is not determinative of the result in light of the substantially less expensive option provided by time-channeling in subsection (b). It follows therefore that if the time-channeling alternative provides a constitutional means of compliance with § 505, then § 505 is constitutional.

Time-channeling was explicitly approved by the Supreme Court as a constitutional restriction on pervasive indecent speech in *Pacifica Foundation*. There, the Supreme Court found that one of the most troubling aspects of the Carlin broadcast was the early afternoon hour at which it was aired. Shown at that time, the broadcast was " 'like a pig in a parlor instead of the barnyard.'" *Pacifica Foundation*, 438 U.S. at 750, 98 S. Ct. at 3041 (quoting *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388, 47 S. Ct. 114, 118, 71 L.Ed. 303 (1926)). The F.C.C. opinion challenged by the Pacifica Foundation did not intend to ban future indecent broadcasts entirely but merely sought to channel them into a safe-harbor period during which significant numbers of children would not be listening. *Id.* 438 U.S. at

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relevant in that, as is the statute at issue in this case, the regulations there were directed at competing concerns of public welfare rather than at the speech itself.

732, 98 S. Ct. at 3031-32 (citing 59 F.C.C.2d 892 (1976)). The Supreme Court held that time-channeling was an appropriate response to the problem presented. It therefore approved the F.C.C. attempt to prevent the airing of offensive programming on a pervasive form of communication at a time of day when children were likely to be listening.

Because the Supreme Court endorsed a time-channeling solution in very similar circumstances in *Pacifica Foundation*, we believe that time-channeling also survives constitutional scrutiny here. It is important to our reasoning that § 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. It is clearly established that a complete ban on indecent speech will rarely (if ever) be tolerated. *See Denver Consortium*, —- U.S. at ——, 116 S. Ct. at 2387 (plurality opinion) (suggesting that § 10(a) passed constitutional muster in part because it gave a cable operator the flexibility to choose not to ban indecent broadcasts, but rather "to rearrange broadcast times, better to fit the desires of adult audiences while lessening the risks of harm to children); *id.* at ——, 116 S. Ct. at 2423 (Thomas, J., concurring in part and dissenting in part) ("Certainly, under our current jurisprudence, Congress could not impose a total ban on the transmission of indecent programming."); *Sable Communications*, 492 U.S. at 127, 109 S. Ct. at 2837 (holding total ban on indecent telephone communications to be unconstitutional and distinguishing the time-channeling remedy approved in *Pacifica Foundation* on grounds that it "did not involve a total ban on broadcasting indecent material."); *Young*, 427 U.S. at 70, 96 S. Ct. at 2452 (finding that the First Amendment

protects communication in the area of sexually oriented materials from total suppression). The time-channeling alternative in § 505 explicitly allows MSOs to continue transmitting sex-dedicated networks. Section 505 thus leaves the speaker and the listener with an opportunity to maintain sufficient adult communication, while respecting the privacy interests of those who might be offended or inappropriately exposed. We believe the law thus strikes a permissible balance of constitutional interests.

The plaintiffs contend, nevertheless, that § 504 is a less restrictive option which is available to provide protection from signal bleed. They urge, therefore, that we declare § 505 invalid. However, the cost to MSOs of creating an adequate shield from a widespread intrusion of signal bleed by supplying converter/ lockboxes to households that don't subscribe to adult channels, would be close to the expense of providing converter/ lockboxes to non-subscribing households under § 505(a). The main difference is that under § 504 the household has to request the box, while under § 505 the MSO must provide the box.[28] We have no evidence in the present

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[28] Plaintiffs also assert that Congress found, in § 551(a)(8) & (9) of the Act, that there is a compelling governmental interest in empowering parents to control the television viewing by their children, such as by providing parents with technological tools that allow them to easily block violent, sexual or other programming that they believe harmful to their children. Section 504 was one such mechanism, and the development of v-chip technology will be another. Congress recognized, as Senator Feinstein's remarks indicated, *supra*, that many parents are unaware of the problem of sexually explicit signal bleed and its accessibility to children of non-subscribers of sexually-dedicated channels. The parental control option is viewed as an adjunct of lesser efficacy because its

record that local cable operators or producers of sexually explicit programming are advertising the free availability of the § 504 lockbox or other blocking devices upon demand. Likewise, there is no evidence that parents are otherwise aware of the § 504 means of achieving complete blocking of undesired channels. Upon this record, the government has demonstrated an expectation that § 504 will not be a viable alternative.

Moreover, in view of the fact that children watch television in the homes of their friends as well as in their own homes, we do not find Congress to have been unreasonable in wishing to extend protection from signal bleed beyond a child's own home.

Furthermore, Congress enacted, as one of the regulatory options, time channeling, which the Supreme Court had in *Pacifica Foundation* held to be a constitutionally acceptable way of protecting children from a pervasive, sexually explicit medium. Therefore, even if § 505(a) does not pass constitutional analysis, § 505(b) does.

Given the content of adult programming and the pervasive nature of cable television, we find that § 505 is an acceptable governmental response intended to prevent exposure of minors to sexually explicit signal bleed. We therefore conclude that plaintiffs have failed to show that they are likely to succeed in their claim that the provision violates their First Amendment rights to freedom of speech.[29]

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exercise requires knowledge and the taking of affirmative steps such as requesting the blocking device from the MSO.

[29] We are mindful that the Supreme Court in *Denver Consortium* referred to the Telecommunications Act of 1996, including

C. Fourteenth Amendment Equal Protection Jurisprudence

Likewise, plaintiffs have not persuaded us that they can succeed on the merits of their claim that § 505 violates their rights guaranteed by the Equal Protection Clause. Playboy and Graff argue that other premium channel networks carry adult-oriented programming but that § 505 will not restrict the speech of these networks. They claim, for example, that HBO and Showtime present programming that is an equivalent to the sexually oriented programming shown on the Playboy networks and on Spice, and that this programming is shown at hours outside of the safe-harbor period. They assert that legislation directed at them, but not at these other premium networks, denies them equal protection of the laws. *See*, *e.g.*, *News America Pub., Inc.* v. *F.C.C.*, 844 F.2d 800, 813 (D.C. Cir. 1988) ("The safeguards of a pluralistic political system are often absent when the legislature zeroes in on a small class of citizens.") (citing *Railway Express Agency v. New York*, 336 U.S. 106, 69 S. Ct. 463, 93 L.Ed. 533 (1949)).

There is, however, a significant difference between plaintiffs' networks and the non-adult premium networks. The plaintiffs admit that *all* of the programming shown on their networks—in some cases, twenty-four hours per day—is "adult programming." Transcript of Preliminary Injunction Hearing 201-02 (D. Del. May 20, 1996) (testimony of Steven Saril,

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specifically § 505, as "significantly less restrictive" than § 10(b) of the 1992 Cable Act which they struck down. *See*, *e.g.*, —- U.S. at ——, 116 S. Ct. at 2392. However, since § 505 was not before the Court in *Denver Consortium*, this reference is dictum.

Senior Vice President of Sales and Marketing for Graff); *see* Deposition of Anthony J. Lynn, President of Playboy Entertainment Group, Inc. at 124-25 (Def.'s Ex. 72) (stating that sexually explicit programming aired on AdulTVision "is at risk of being defined as sexually explicit" under § 505); Plaintiff Graff Pay-Per-View Inc.'s Answers to Defendants' First Set of Interrogs. at 6 (Def.'s Ex. 43) (responding that 100% of Graff's programming contains material that is "sexually oriented"). On the premium channels, however, sexually explicit shows constitute only a fraction of the programming. For example, only one sixteenth of the programming on the non-adult cable channels on a Friday evening in Denver was sexually explicit. Moreover, many of the shows constituting that one-sixteenth were "R" rated movies with some sexually explicit scenes, rather than being 100% sexually explicit. Thus, it cannot be said that the non-adult channels, such as HBO and Showtime, are "primarily dedicated" to sexually explicit programming. Moreover, signal bleed from that one-sixteenth, if signal bleed occurred, would not continuously present sexually explicit scenes to the channel surfer.[30]

We find therefore that Congress was justified in initially addressing the problem of sexually explicit signal bleed by focusing on sex-dedicated networks. Section 505's "differential treatment" of plaintiffs' networks is justified by their "special characteristic" of providing nothing but sexually explicit programming

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[30] We note also that § 505 applies uniformly and without discrimination to all networks that are "*primarily* dedicated to sexually-oriented programming." Pub.L. No. 104-104, § 505, 106 Stat. at *136 (1996) (emphasis added). The law does not, for instance, favor Playboy over Graff.

intended for adult audiences. *See Turner Broadcasting*, 512 U.S. at ——, 114 S. Ct. at 2468. It is perfectly logical that Congress would begin its attempt to prevent minors from gaining access to programming intended solely for adults by focusing first on the networks that specialize in adult-only programming. "Congress need not deal with every problem at once," and Congress "must have a degree of leeway in tailoring means to ends." *Denver Consortium*, —- U.S. at ——, 116 S. Ct. at 2393 (majority opinion) (citing *cf. Semler v. Oregon Bd. Of Dental Examiners*, 294 U.S. 608, 610, 55 S. Ct. 570, 571, 79 L.Ed. 1086 (1935) and *Columbia Broadcasting Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 102-03, 93 S. Ct. 2080, 2086-87, 36 L.Ed.2d 772 (1973)); *see also Williamson* v. *Lee Optical of Okla.*, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L.Ed. 563 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 434, 113 S. Ct. 2696, 2707, 125 L.Ed.2d 345 (1993) (The Court does not "require that the Government make progress on every front before it can make progress on any front.").

We find that the means chosen by Congress to protect children and aid their parents was a permitted and measured response to a national problem. The cause of the problem was primarily traced to sex-dedicated networks and, understandably, Congress began its efforts to address the problem by focusing on those networks.[31] Congress thus made a logical

[31] Furthermore, this is not a case involving governmental discrimination against a suspect class, nor is there any evidence of arbitrary or invidious governmental conduct. *See, e.g., New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 592-93, 99 S. Ct.

distinction and tailored the law in an acceptable manner. As a result, plaintiffs' claim that § 505 will violate their right to equal protection of the laws is likely to fail.

D. Vagueness Jurisprudence

After the Supreme Court's decision in *Denver Consortium*, it is clear that plaintiffs' vagueness claim will also fail on the merits. Graff noted in its Memorandum of Law in support of its Motion for a Preliminary Injunction that "the Supreme Court has before it a similar vagueness challenge in the cable indecency case," citing *Denver Consortium*. At that time, argument had been heard by the Supreme Court in *Denver Consortium*, but the decision was pending. When the Supreme Court published its decision in that case, it flatly rejected the plaintiffs' argument that the provisions challenged were unconstitutionally vague. *Denver Consortium*, —- U.S. at —— - ——, 116 S. Ct. at 2389-90. The Court concluded that similar terms had been previously defined by courts and by the F.C.C. It also found the language of the statute "similar to language previously used by this Court for roughly similar purposes," referring to its decision in *Miller* v. *California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 2614-15, 37 L.Ed.2d 419 (1973), among others. *Id.* —- U.S. at ——,

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1355, 1369-70, 59 L.Ed.2d 587 (1979). Therefore, we apply rational basis review and ask whether the alleged classification is "rationally related" to a "legitimate" government interest. In our discussion of First Amendment jurisprudence, *supra*, we applied a much higher standard of scrutiny and concluded that § 505 is constitutional. We therefore hold that § 505 is not merely rationally related to a legitimate government interest, it is carefully tailored to an interest that is widely regarded as compelling.

116 S. Ct. at 2389. Thus, the use of accepted terms imbued the statute with meaning.

In recent decisions, other members of the federal judiciary have likewise found that the term "indecent" has, over time, been sufficiently defined. *See American Civil Liberties Union* v. *Reno*, 929 F. Supp. at 865, 868 (Dalzell, J., concurring); *Shea ex rel. American Reporter* v. *Reno*, 930 F. Supp. 916, 935-36 (S.D.N.Y., 1996). As pointed out recently by a three-judge panel in the United States District Court for the Southern District of New York, federal courts have approved the F.C.C.'s definition of "indecency" and have rejected vagueness challenges to that term in the context of broadcast media, commercial telephone communications, and cable programming. *See Shea*, 930 F. Supp. at 935-36. The court in *Shea* comprehensively reviewed the precedent in this area, and we find their research and their reasoning persuasive.

Therefore, we conclude that § 505 does not suffer from the "vice of vagueness." The plaintiffs clearly understood that the law applied to them, and in the wake of this litigation, it is clear that the F.C.C. would apply § 505 to MSOs that carry the plaintiffs' networks. Thus, the meaning and application of § 505 should be plain to MSOs as well. Playboy and Graff have little-to-no chance of succeeding on the merits of a vagueness claim.

VI. Conclusion

Plaintiffs have not satisfied the elements of the preliminary injunction test. We will therefore remove the temporary restraining order, which was previously

granted by this court, and we will deny plaintiffs request for preliminary injunctive relief.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-94-JJF

PLAYBOY ENTERTAINMENT GROUP, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Dec. 29, 1998

ORDER

This 29th day of December, 1998, the Court having reviewed the submissions of the parties in support of and in opposition to plaintiff Playboy Entertainment Group, Inc.'s action, challenging the constitutionality of Section 505 of the Telecommunications Act of 1996,

IT IS ORDERED that, for the reasons stated in the Opinion of this Court, issued on December 28, 1998, defendants, United States of America; United States Department of Justice; Janet Reno, Attorney General; and the Federal Communications Commission, are

permanently enjoined from enforcing Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1966).

/s/ JANE R. ROTH
JANE R. ROTH
United States Circuit Judge

/s/ JOSEPH J. FARNAN, JR.
JOSEPH J. FARNAN, JR.
United States District Judge

/s/ JEROME B. SIMANDLE
JEROME B. SIMANDLE
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-94 (JJF)

PLAYBOY ENTERTAINMENT GROUP, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, *ET AL.*, DEFENDANTS

Jan. 14, 1999
[Docketed Jan. 19, 1999]

NOTICE OF APPEAL

Please take notice that pursuant to section 561 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 142, codified at 47 U.S.C. § 223 note, and 28 U.S.C. § 1253, all defendants in this action, and specifically the United States of America; the United States Department of Justice; Janet Reno, Attorney General; and the Federal Communications Commission, hereby appeal to the United States Supreme Court from the Order entered on the docket on December 30, 1998, which was based upon the opinion issued on December 28, 1998.

Dated: January 19, 1999

Respectfully submitted,

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 96-94 (JJF)

PLAYBOY ENTERTAINMENT GROUP, INC., PLAINTIFF

v.

THE UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS

Mar. 18, 1999

ORDER

Upon consideration of Defendants' Motion to Alter or Amend Judgment and Defendants' Motion to Correct Judgment, its supporting brief, Plaintiff Playboy Entertainment Group, Inc.'s brief opposing these motions, and Defendants' Reply Brief; and

The court finding that this court lacks jurisdiction to adjudicate these motions due to subsequent filing of Defendants' notice of appeal to the United States Supreme Court;

IT IS this 18 day of March, 1999 hereby

ORDERED that Defendants' Motion to Alter or Amend Judgment and Defendants' Motion to Correct Judgment shall be, and they hereby are, DISMISSED.

/s/ JANE R. ROTH
JANE R. ROTH
United States Circuit Judge

/s/ JOSEPH J. FARNAN, JR.
JOSEPH J. FARNAN, JR.
U.S. Chief District Judge

/s/ JEROME B. SIMANDLE
JEROME B. SIMANDLE
U.S. District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

No. Civil Action 96-94 (JJF)

PLAYBOY ENTERTAINMENT GROUP, INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed: Apr. 7, 1999]

NOTICE OF APPEAL

Please take notice that pursuant to section 561 of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 142, codified at 47 U.S.C. § 223 note, and 28 U.S.C. § 1253, all defendants in this action, and specifically the United States of America; the United States Department of Justice; Janet Reno, Attorney General; and the Federal Communications Commission, hereby appeal to the United States Supreme Court from the Order dated March 18, 1999, filed on March 18, 1999, and entered on the docket on March 19, 1999; and from the Order

entered on the docket on December 30, 1998, which was based upon the opinion issued on December 28, 1998.

Respectfully submitted,

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APPENDIX G

1. Section 504 of the Telecommunications Act of 1996, codified at 47 U.S.C. 560 (Supp. II 1996), provides:

§ 560. Scrambling of cable channels for nonsubscribers

(a) Subscriber request

Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

(b) "Scramble" defined

As used in this section, the term "scramble" means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

2. Section 505 of the Telecommunications Act of 1996, codified at 47 U.S.C. 561 (Supp. II 1996), provides:

§ 561. Scrambling of sexually explicit adult video service programming

(a) Requirement

In 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 shall fully scramble or otherwise 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.

(b) Implementation

Until a multichannel video programming distributor complies with the requirement set forth in subsection (a) of this section, the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

(c) "Scramble" defined

As used in this section, the term "scramble" means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.

3. Rule 59 of the Federal Rule of Civil Procedure provides:

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

4. Rule 60 of the Federal Rule of Civil Procedure provides:

Rule 60. Relief From Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. 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.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief

from a judgment shall be by motion as prescribed in these rules or by an independent action.

5. Rule 4(a)(4) of the Federal Rule of Appellate Procedure in relevant part provides:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.—

(4)(A) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) to alter or amend the judgment under Rule 59;

(iv) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a

previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

6. Section 561 of title V of Pub. L. 104-104, codified at 47 U.S.C. 223 note, provides:

(a) THREE-JUDGE DISTRICT COURT HEARING.—Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title [see Short Title of 1996 Amendment note set out under section 609 of this title] or any amendment made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

(b) APPELLATE REVIEW.—Notwithstanding any other provisions of law, an interlocutory of final judgment, decree, or order of the court of 3 judges in an action under subsection (a) holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.