No. 98-1682

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

PLAYBOY ENTERTAINMENT GROUP, INC.

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

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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TABLE OF AUTHORITIES

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1. Appellee argues (Mot. to Aff. 11-14) that the district court correctly applied strict scrutiny in this case, notwithstanding that the Court in *Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727 (1996), expressly stated that it need not decide whether strict scrutiny applies to regulation of indecency on cable television. See *id.* at 755. Although separate opinions by Justices Kennedy, see *id.* at 803-804, and Thomas, see *id.* at 832, in *Denver Area* did apply strict scrutiny to the provisions in that case, each of those opinions reached conclusions that differ from one another and from the principal opinion. Accordingly, the fractured opinions in *Denver Area* cannot be said to have definitively resolved the question of the standard of review applicable to indecency on cable television. See J.S. 14-15.

Moreover, regardless of the level of scrutiny applied, this Court's decision in *Pacifica* at least made clear that certain unique features of the broadcast media—their "uniquely pervasive presence," the fact that they "confront[] the citizen * * * in the privacy of the home," the inefficacy of "prior warnings" to "protect the listener or viewer from unexpected program content," and their "unique[] accessib[ility] to children," 438 U.S. at 748-749—significantly

affect the analysis of restrictions on indecency in broadcasting. The plurality in *Denver Area* acknowledged the effect of those factors in the First Amendment analysis of indecency on cable television, see 518 U.S. at 744-748, and Justice Kennedy's opinion also acknowledged that those "concerns are weighty and will be relevant to whether the law passes strict scrutiny." *Id.* at 804. Nonetheless, as we explain in the jurisdictional statement (at 15-17), the district court's opinion in this case gave no weight to those concerns. Plenary review is thus warranted to correct the district court's departure from the analysis employed by this Court in *Pacifica*.

Appellee argues (Mot. to Aff. 13) that "the very outcome in *Denver* reveals the fundamental flaw in the government's reasoning," because the plurality in *Denver Area* "approved cable operators' ability to transmit (or not) totally unscrambled indecent programming on leased or public access channels at any time of the day or night." The basis for that holding, however, was that means other than the mandatory segregation and blocking provision at issue in that case were available to protect minors from indecency. See 518 U.S. at 756-759. Prominently featured among those alternative means was Section 505. See *id.* at 756. The Court's holding in *Denver Area*, therefore, rested on at least the possibility that Section 505 is constitutional; it could not establish, as appellee urges, that Section 505 violates the First Amendment.

2. Appellee argues (Mot. to Aff. 17) that, "[w]hether or not some of *Pacifica's* reasoning may apply to cable television as suggested by the *Denver* plurality, the time channeling requirement of Section 505 is far more restrictive of speech when applied to cable television networks than it is in the broadcasting context."[1] Appellee bases that assertion on

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[1] Appellee states that our claim that "the government's interest is stronger here than in the broadcasting context because *Pacifica* involved

the fact that "[w]ith respect to broadcasters, the safe harbor rules may require a station to reschedule a particular program to late night hours," while "the court below found that the * * * networks [affected by Section 505] had 'no practical choice' but to go dark for 16 hours per day." *Ibid.*

Initially, Section 505 would not result in the banning of appellee's networks 16 hours a day on all cable systems. As the district court made clear, an increasing number of cable operators use digital technology that easily eliminates signal bleed. See J.S. App. 6a-7a, 9a. Those operators may broadcast appellee's cable networks at whatever time of day or night they wish with no threat of signal bleed, and Section 505 is therefore not at all restrictive of speech with respect to their subscribers. See J.S. 17 n.5.

In any event, appellee's claim that Section 505 is more restrictive of speech because it would impose a greater decrease in programming than did the FCC rule at issue in *Pacifica* is without merit. The FCC rule upheld in *Pacifica* required time-channeling only of indecent material. If a radio station emulated appellee by broadcasting "virtually 100% sexually explicit adult programming," J.S. App. 6a, the FCC's rule would require it to limit its broadcasts to the 10 p.m.-to-6 a.m. safe harbor. In the same way, Section 505 requires time-channeling or blocking only of indecent material; cable operators may broadcast other material that appellee

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the one-time broadcast of inappropriate language compared to channels that carry virtually 100% sexually explicit adult programming is not correct, nor is it supported by the record below." Mot. to Aff. 12 (quoting J.S. 17) (internal quotation marks and citation omitted). The district court repeatedly stated that "[t]he programming on the Playboy network is virtually 100% sexually explicit adult programming." J.S. App. 5a-6a; see also *id.* at 42a, 47a. Indeed, the court distinguished appellee's broadcasting from that of other channels, which broadcast material "which contained some sexually explicit scenes but were not continuously sexually explicit." *Id.* at 6a. A child may therefore easily find sexually explicit material by tuning in to signal bleed from appellee's channels.

might choose to make available on its network at any time of the day or night, without scrambling. See Order and Notice of Proposed Rulemaking, *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 11 F.C.C.R. 5386, 5387, at ¶ 6 (1996). The fact that (for cable operators that do not already employ digital or other complete scrambling technology) time-channeling would limit appellee's programming for "16 hours per day" is the result of appellee's choice to broadcast only indecent material. That choice suggests that appellee's programming poses a particular threat to children; it does not suggest that Section 505 is "more restrictive of speech" than the rule at issue in *Pacifica*.[2]

3. Appellee argues (Mot. to Aff. 19) that Section 505 is unconstitutional because the government "did not show that the recited concerns are real, not conjectural." The district court, however, did not hold Section 505 unconstitutional because it does not address a real problem. To the contrary, the court ultimately found that "there is sufficient risk of harm to susceptible minors to warrant protection from sexu-

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[2] Appellee errs in stating that "[t]here is no dispute that Section 505 prevents the transmission of Appellee's programming during 'the hours when most viewers want to see such programming.'" Mot. to Aff. 15 (quoting J.S. 18 n.6); see also *id.* at 3, 27. The district court found that "30-50% of all adult programming is viewed by households prior to 10 p.m." J.S. App. 33a. It follows that 50-70% of such programming is viewed after 10 p.m. and would not therefore be affected by Section 505. The safe harbor provision of Section 505 *permits* the transmission of appellee's programming when most viewers want to see it, and it imposes only a minor restriction on the minority who want to view it at a different time. The cited portion of the jurisdictional statement makes that point. See J.S. 18 n.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."). Indeed, the fact that the safe-harbor hours are precisely the hours when adults usually want to view sexually explicit programming, coupled with the easy availability of VCR machines to tape such programming and play it at a time convenient to the viewer, emphasizes the relatively modest scope of the restriction imposed by Section 505.

ally explicit signal bleed." J.S. App. 30a. The sole basis for the district court's holding that Section 505 is unconstitutional was that, in the court's view, a less restrictive alternative is possible. The district court's finding that signal bleed is a real problem is well supported by the record,[3] and appellee's disagreement with the district court's conclusion on that point could not provide a basis for summary affirmance.

Appellee notes that the district court stated that "the Government has not convinced us that [signal bleed] is a pervasive problem." Mot. to Aff. 20 (quoting J.S. App. 36a). The very next sentence in the court's opinion, however, is that "[p]arents may have little concern that the adult channels be blocked." J.S. App. 36a. Read together, the two sentences make clear that the court believed that the government had not shown that parents (who are likely not to know of the problem) generally perceived that there is a substantial threat that their children would be exposed to signal bleed or that they should take affirmative steps to block it; the district court was not contradicting its earlier findings that audio signal bleed is common and video signal bleed is an ever-present danger on the majority of cable systems in operation today. Proof that the broadcast of indecent material occurred during a time of day when children were likely to be in the audience was sufficient in *Pacifica* to justify the FCC's time-channeling rule. Appellee's argument that the government had to establish not the number of

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[3] The district court found that most cable operators use a technology that leaves the audio portion of appellee's sexually explicit programming entirely audible and leaves portions of the video programming intelligible to varying degrees. J.S. App. 7a-8a. Indeed, the district court's finding that "the vast majority (in one survey, 69%) of cable operators have, in response to § 505, moved to time channeling," *id.* at 16a-17a, makes clear that the cable industry itself believes that signal bleed occurs with some regularity; otherwise, those systems would not have chosen to undergo the loss of revenue that results from limiting sexually explicit channels to the safe-harbor hours.

children potentially exposed to signal bleed from sexually explicit channels, but the number who actually listen to or watch such material, is inconsistent with *Pacifica*.

4. Appellee argues (Mot. to Aff. 22) that the government did not "demonstrate that imposing the 'safe harbor' under Section 505 'will in fact alleviate [the] harms [of signal bleed] in a direct and material way.'" In appellee's view, such proof is required by this Court's decision in *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994).

Initially, appellee's contention rests on the mistaken premise that federal regulation to protect children from indecency is permissible only on the same kind of empirical showing of harm as federal regulation of the speech of cable operators in *Turner* to promote the entirely different purpose of protecting a particular competitive structure in the broadcasting industry. But it has long been settled that there is a "'compelling interest in protecting * * * minors' which extend[s] to shielding them from indecent messages." *Reno* v. *ACLU*, 521 U.S. 844, 869 (1997). See J.S. 20 n.7. That interest is supported by deeply felt beliefs in our society about how children should be raised, as well as by the empirical, scientific evidence that led the district court to conclude that the risk to minors is real. See J.S. App. 30a.

Moreover, appellee apparently would demand direct, empirical evidence that children suffer harm from hearing the audio portions of appellee's sexually explicit programming in their entirety and viewing the partly (and at times completely) visible video portion. Children, however, are not experimental subjects whose environment can be manipulated with no regard for moral and social consequences. As the district court noted, acquiring evidence of the sort appellee demands would raise the "clear ethical questions surrounding clinical research of the effects of children viewing sexually explicit programming." J.S. App. 29a.

5. Contrary to appellee's suggestion (Mot. to Aff. 23-26), we do not argue that the district court erred in considering,

as part of the constitutional analysis, the possibility that other forms of regulation would be less speech-restrictive, even if those other forms of regulation have not been enacted into law. But even when strict scrutiny is applied, a party claiming that a particular regulation violates the First Amendment must do something more than dream up a theoretically possible alternative regulatory scheme; the alternative scheme must realistically promise to advance the legitimate purposes underlying the regulation, and it must be genuinely less restrictive of speech. The alternative on which the district court relied would do neither. See J.S. 17-25.

First, the district court's hypothetical Section 504, enhanced by complex requirements to ensure notice and easy and inexpensive access to lockboxes by parents who want them, would not be an alternative to Section 505, because it would not serve one of the purposes animating Section 505—society's interest in "protect[ing] children from exposure to patently offensive sex-related material." J.S. App. 26a. Appellee asserts (Mot. to Aff. 28) that the Court "addressed the identical question" in *Denver Area*.

Denver Area in fact suggests the inadequacy of appellee's argument. The Court noted that, among the remedies to the problem of "children with inattentive parents" is to take measures that may "impos[e] cost burdens upon system operators (who may spread them through subscription fees)," and, of particular significance, to "require[] lockbox defaults to be set to block certain channels (say, sex-dedicated channels)." 518 U.S. at 758-759. Although lockboxes (*i.e.*, set-top converters with channel lockout features, see J.S. App. 58a) offer no safeguard to children in households with cable-ready televisions that are not connected to set-top converters, see *ibid.*, the lockbox approach mentioned in *Denver Area* does operate like Section 505—rather than Section 504—in one important respect. Like Section 505, such a lockbox approach does not depend on parental awareness and initiative to offer children at least some level of protection.

By contrast, even the enhanced-notice version of Section 504 relied upon by the district court would have precisely the reverse effect; children would be exposed to sexually explicit material unless the parent took affirmative steps to avoid such exposure. None of the opinions in *Denver Area* stated that such an alternative would adequately protect children.

In any event, appellee does not dispute that the district court's conclusion that an enhanced-notice version of Section 504 would be an adequate alternative to Section 505 overlooked the independent societal interest in protecting children from sexually explicit materials. None of the opinions in *Denver Area* discussed whether that interest is sufficient to justify the kind of modest restriction on speech that Section 505 imposes.[4] Plenary review is warranted so that this Court may give full consideration to a key rationale underlying Congress's action.

Second, the district court's hypothetical, enhanced Section 504 would likely result in at least as great a restriction of appellee's programming as results from Section 505. The district court itself found that Section 504, without the district court's enhanced-notice provisions and in part without the provision for free access to blocking devices, see J.S. App. 20a & n.19, had led to approximately one-half of 1% of households requesting blocking. The enhanced-notice and other provisions the district court envisioned would surely result in at least a modest increase in the number of households requesting blocking devices. Even a modest increase would, according to the district court's findings, create at least the same incentives for cable operators to time-channel (or completely drop) appellee's network that Section 505 creates. The net result would be a regime in which the

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[4] Cf. 518 U.S. at 806 (opinion of Kennedy, J.) ("Congress does have * * * a compelling interest in protecting children from indecent speech. So long as society gives proper respect to parental choices, it may, under an appropriate standard, intervene to spare children exposure to material not suitable for minors.") (citations omitted).

restrictions on speech are at least as great as under Section 505.

The district court noted the testimony that the cost of distributing lockboxes to 3% of a cable system's customers would equal all of the revenue the operator derived from its sexually explicit channels. J.S. App. 21a-22a. The court added that, if a cable operator were willing to amortize the cost of the lockboxes over five years, the number of lockboxes that could be distributed would rise to 6% of the subscriber base. *Id.* at 22a. In actuality, cable operators could be expected to drop (or time-channel) sexually explicit channels long before the number of subscribers who requested lockboxes reached the 3-6% range. As the district court found, "[e]conomic theory would suggest that profit-maximizing cable operators would cease carriage of adult channels" before exhausting *all* revenues from such channels; rather, they would take action when the "costs rose to such a point that the profit from adult channels was less than the profit from channels unlikely to require blocking." *Ibid.* Therefore, a relatively minor boost in the number of subscribers seeking lockboxes—a boost that would be unavoidable under a version of Section 504 that mandated effective notice and easy availability of lockboxes—would be sufficient to lead to the same kinds of time-channeling under Section 504 as the district court found would occur under Section 505. Indeed, an enhanced Section 504 would likely result in more restrictions on speech, since at least some parents, given effective notice of the problem, may well seek lockboxes even if cable operators choose to time-channel their programming; to avoid the costs of supplying those lockboxes, cable operators might simply drop appellee's programming altogether. An enhanced Section 504 thus would not be less restrictive of speech than Section 505.

6. The district court's dismissal of our post-trial motions puts the government in an untenable position. See J.S. 25-29. The district court's opinion stated that it would

"require" appellee to take certain actions, J.S. App. 38a, but its injunction omitted any such requirement. Under the district court's ruling, however, we could obtain a resolution of the contradiction between the district court's opinion and its injunction only by delaying filing a notice of appeal until the district court acted on our post-trial motions, thereby risking that our notice of appeal would be deemed to have been jurisdictionally out of time.

Appellee argues that "[o]nly a handful of cases," Mot. to Aff. 30 n.31, may be affected by the legal issue presented. Those cases, however, frequently involve serious constitutional issues in which it is particularly important that orderly processes of litigation be available to the court and the parties, so that premature or unnecessary resolution of constitutional questions may be avoided and issues may be presented to this Court in a manner most suitable for this Court's resolution. Plenary review of the district court's jurisdictional ruling is warranted, so that parties in cases in which a direct appeal to this Court is available may both protect their rights to appeal and obtain postjudgment relief from the district court that could alter or clarify the issues on appeal in this Court—or even eliminate the need to take an appeal at all.

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For the foregoing reasons and those stated in the jurisdictional statement, the Court should note probable jurisdiction.

Respectfully submitted.

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