No. 98-1682

In the
Supreme Court of the United States
October Term, 1998

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

PLAYBOY ENTERTAINMENT GROUP, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

BRIEF OF FAMILY RESEARCH COUNCIL, MORALITY IN MEDIA, NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, NATIONAL COALITION FOR THE PROTECTION OF CHILDREN AND FAMILIES, AND CONCERNED WOMEN FOR AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Paul J. McGeady
Robin S. Whitehead
Co-Counsel
Morality in Media, Inc.
475 Riverside Drive
New York, NY 10115
(212)870-3232

Janet M. LaRue
Counsel of Record
Family Research Council
801 G. Street, N.W.
Washington, DC 20001
(202) 393-2100

Bruce Taylor
J. Robert Flores
Chadwicke L. Groover
Co-Counsel
National Law Center for Children and Families
3819 Plaza Drive
Fairfax, VA 22030
(703) 691-4626

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INTEREST OF *AMICI CURIAE*

The Family Research Council ("FRC"), Morality in Media, Inc. ("MIM"), National Law Center for Children and Families ("NLC"), Concerned Women for America ("CWA"), and National Coalition for the Protection of Children & Families ("NCPCF"), as *amici curiae*, file this brief in support of the Petitioner in this case, which is before this Honorable Court on the merits under the provisions of Rule 37.

The Family Research Council is a non-profit public policy organization dedicated to preserving the traditional family and to preserving and promoting traditional family values and the Judeo-Christian principles upon which it is built. Charles A. Donovan is Executive Vice President and acting C.E.O. and Janet M. LaRue, Esq., is Senior Director of Legal Studies.

FRC seeks to protect parents' interest in protecting their minor children from accessing pornography through all media, including the Internet and the government's compelling interest in assisting parents to do so. Our legal and public policy experts are continually sought out by federal and state legislators for assistance and advice on efforts to prevent children from accessing such material and the serious harms that befall children who do access such material.

FRC has filed *amicus curiae* briefs in this Court and in other federal and state courts involving First Amendment issues, including: *Alliance for Community Media, et al., v. FCC*, No. 95-227 (consolidated with *Denver Area Educ. Telcoms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (cable indecency); *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) *(Communications Decency Act, "CDA")*; *ACLU, et al., v. Reno*, No. 99—1324 (3rd Cir. 1999). FRC's Senior

Director of Legal Studies (Counsel of Record herein) has also filed briefs with this Court, *Knox v. U.S.*, (child pornography); *Crawford v. Lungren*, 520 U.S. 1117 (1997) (material harmful to minors); and in other federal and state courts involving First Amendment issues, *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996) (material harmful to minors); *State v. Stoneman*, 323 Ore. 536; 920 P.2d 535 (1996) (child pornography); and *People v. Wiener*, 29 Cal. App. 4th 1300; (1994) (obscenity).

Morality in Media has a special interest in this case because it was one of the organizations that assisted Congress in formulating this legislation and the Justice Department in preparing viewer testimony for the preliminary hearing and trial. The interest of this *amicus* sprang from its experience in responding to complaints of signal bleed by citizens in various states. MIM is a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and *Paris Adult Theatre I. v. Slaton*, 413 U.S. 49, 58 nn.7-8 (1973). More recently MIM has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491

(1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); and *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998).

National Law Center for Children and Families is a Virginia, non-profit corporation and educational organization specializing in supporting law enforcement through training, advice, legal research and briefs, and direct trial and appellate assistance to federal, state, and local prosecutors, police agencies, and legislators throughout the United States and in several foreign countries. The NLC focuses on constitutional, legislative, trial, law enforcement, and other legal issues related to obscenity, child pornography and sexual abuse, broadcast indecency, Internet and World Wide Web regulations and legal obligations, display and dissemination of materials harmful to minors, prostitution, public nuisances, indecent exposure, and the regulation, licensing, and zoning of sexually oriented businesses. NLC has filed numerous friend of the court briefs in this Court and in other federal and state cases involving First Amendment issues, including: *Alexander v. United States*, 509 U.S. 544 (1993) (RICO-obscenity, forfeiture); *Knox v. United States*, 510 U.S. 939 (1993), *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994), and *Knox v. United States*, 513 U.S. 1109 (1995) (child pornography); *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), and *Crawford v. Lungren*, 520 U.S. 1117 (1997) (adult token news racks for magazines harmful to minors); *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 519 U.S. 820 (1996) (computer BBS obscenity); *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998) (prison pornography regulations); *Free Speech Coalition v. Reno*, (N.D. Cal. 1997), unpublished, No. C97-028SC, 1997 WL 487758, and Ninth Circuit No. 97-16536 (argued Mar. 10, 1998) (computerized child pornography, 18 U.S.C. § 2252A); *ACLU v. Reno*, 929 F.Supp. 824 (E.D. Pa. 1996)

(Communications Decency Act, "CDA"); *City of National City v. Wiener*, 838 P.2d 223 (Cal. 1992) (sexually oriented business zoning); and *State v. Harrold*, 539 N.W.2d 299, (Neb. 1999) (obscene act on public access cable TV). NLC's Chief Counsel has also filed several briefs with this Court, including: *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (obscenity nuisance); *California v. Freeman*, 488 U.S. 1311 (1989) (prostitution in pornography production); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (RICO-obscenity); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (sexually oriented business regulation); *Reno v. ACLU*, 521 U.S. 844 (1997) (*Brief for Members of Congress* re: CDA), and presented oral argument to this Court in *Flynt v. Ohio*, 451 U.S. 619 (1981).

The National Coalition for the Protection of Children & Families hereby joins as an *amicus curiae* in this brief because it agrees with FRC, MIM, and the NLC that this Court should consider the arguments and submissions contained herein and it agrees that this brief raises important concerns for its members, for this Honorable Court, and for all Americans.

The NCPCF was founded in 1983. It assists concerned citizens and community leaders in efforts to significantly reduce sexual exploitation and violence by (a) increasing public awareness of the harm and availability of exploitative and abusive pornography, particularly in the lives of children; (b) supporting the enactment and enforcement, within the parameters of the Constitution, of limitations on pornography; and (c) offering assistance to people whose lives pornography has harmed.

NCPCF programs are carried out nationally and include resource development and distribution (including a wide range of research reports documenting the harms of

pornography); victim assistance (including seminars for the training of counselors, therapists, and church pastors who are directly involved with helping addicts, spouses of addicts, and victims and survivors of sex abuse); and assistance and training to law enforcement.

Concerned Women for America hereby joins as an *amicus curiae* in this brief because we agree with FRC, MIM, and the NLC that this Court should consider the arguments and submissions contained herein and it agrees that this brief raises important concerns for its members, for this Honorable Court, and for all Americans. CWA is a national, non-profit membership organization representing approximately 600,000 people.

The purpose of CWA is to preserve, protect, and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values. CWA is concerned about the increasing availability of pornography and the lack of enforcement of existing laws. CWA is concerned about the morally deteriorating condition of the entertainment industry in our country and the increasing emphasis on violent and sexually exploitative programs.

CWA works to reduce the alarming amount of violence which occurs in American families each year, particularly the high incidence of child, spouse, and elder abuse. Finally, CWA works to educate the public on laws restricting the use and sale of pornography and the need to reduce family violence, especially the sexual abuse of children.

Amici believe that the problem of uninvited sexually explicit or indecent material via signal "bleed" is egregious and violates the privacy rights of adults and children and is harmful to children. The Court's decision in this case will

have a lasting effect on the Government's ability to effectively address this invasive nuisance. *Amici* are filing this brief in support of the United States because we believe our brief contains relevant matter and alternative arguments that should be heard and may not be presented to the Court by the parties.

CONSENT TO FILE BRIEF

The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents are being filed concurrently with this brief.

SUMMARY OF ARGUMENT

Amici assert that Section 505 of the Telecommunications Act of 1996 (CDA), § 505, 110 Stat. 136 (47 U.S.C. 561 (Supp. III 1997)), is a regulation directed at signal bleed, a secondary effect of the transmission of sexually explicit or indecent "speech." *Amici* contend that it was error for the District Court to have ultimately determined Section 505 to be a content-based restriction on speech in light of their agreement with *amici* that the regulation at issue has a content-neutral objective. *Playboy Entertainment Group, Inc. v. United States, et al.*, 945 F.Supp. 772, 785 (D. Del. 1996) (denying preliminary injunction), *aff'd*, 117 S. Ct. 1309 (1997) ("*Playboy I*"). *But see Playboy Entertainment Group, Inc. v. United States, et al.*, 30 F.Supp.2d 702 (D. Del. 1998) (granting permanent injunction) ("*Playboy II*").

Amici provide several bases for this Court to uphold the constitutionality of Congress' ability to regulate such signal bleed through Section 505. Maintaining that signal bleed is not protected speech, *amici* argue that it should be prohibited under the nuisance doctrine. Alternatively, as a content-neutral regulation, it is proper to apply time, place, and manner analysis. Even assuming, arguendo, that Playboy's signal bleed is "speech" to which some minimal protection applies, at most, intermediate level of scrutiny applies. Further, *amici* submit that, under *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), when faced with a developing technology, strict scrutiny and least restrictive means are not always appropriate, as in this case.

If, however, this Court should find Section 505 to be a content-based regulation, requiring strict scrutiny analysis, *amici* would argue that it passes constitutional muster since it is narrowly drawn, provides the least restrictive, yet effective, means available to accomplish the Government's

compelling interests in protecting children and the privacy of the home from harmful, intrusive, explicit sexual performances of clearly pornographic character.

ARGUMENT

I. SIGNAL BLEED IS NUISANCE SPEECH WHICH IS WITHOUT FIRST AMENDMENT PROTECTION

In *Playboy Entertainment Group, Inc., et al., v. United States, et al.*, 945 F.Supp. 772, 774 (D. Del. 1996), *aff'd*, 117 S. Ct. 1309 (1997), the District Court, in denying Playboy's request for a preliminary injunction, stated: "Our analysis is narrowed by the fact that plaintiffs do not contend that signal bleed itself is protected speech." *Amici* agree. Section 505 regulates signal bleed, which all parties and the Court below agree is a content-neutral objective. *Playboy II*, 30 F.Supp.2d at 714.

This Court has stated that there are narrowly limited classes of speech which are not protected by the First Amendment. One such class is "nuisance speech." *Amici* contend that Playboy's signal bleed may be found to constitute a nuisance on several grounds: 1) the signal bleed invades privacy and the sanctity of the home; 2) is indecent; or 3) exposes children to material which is harmful. Thus, Playboy's signal bleed represents an even greater harm than signal bleed which is sexually explicit but not indecent.

This Court first alluded[1] to "nuisance speech" as a class of unprotected speech in *Chaplinsky v. New Hampshire*, 315 U.S. 558, 571-72 (1942), where the Court stated:

[1] *Amici* say "alluded" because the Court, while not specifically mentioning nuisance speech, twice cites the book, *Free Speech in the United States*, by Zechariah Chafee, Jr. (1941), which does so at pp. 149, 150:

> But the law also punishes a few classes of words like obscenity, profanity . . . because the very utterance of such words is considered to inflict a present injury upon listeners, readers . . . This is a very different matter from punishing words because they express ideas thought to cause future danger to the state. . . . [P]roperly limited they fall outside the protection of the free speech clauses. . . . [P]rofanity, indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young and the peace of mind of those who hear or see. . . . The man who swears in a street car is as much of a nuisance as the man who smokes there. [Emphasis added.]

> There are certain, well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

The "nuisance speech" doctrine was also at issue in *Kovacs v. Cooper*, 366 U.S. 77 (1949), where this Court upheld ordinances aimed at certain means of communication that intrude uninvited into the privacy of the home. The Court stated at 87, 89:

> In his home . . . he is practically helpless to escape the interference with his privacy by loud speakers. . . . That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call for

constitutional protection for what those charged with public welfare reasonably think is a nuisance.

Amici argue that "substantial privacy interests have been invaded in an intolerable manner", *Cohen v. California*, 403 U.S. 15, 21 (1971), and that it is patently demonstrative that explicitly sexual language and depictions that are uninvited, that invade the privacy of the home, and that are readily accessible to children, are an obvious example of nuisance speech.

In *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978), this Court recognized the applicability of the "nuisance speech" rationale to the broadcast media when it affirmed a FCC ruling which held that the monologue, "Filthy Words", as broadcast, was indecent and within the reach of 18 U.S.C. § 1464. This Court observed that the Commission's decision "rested entirely on a nuisance rationale under which context is all important" and compared the indecent broadcast to a "pig in a parlor instead of the barnyard." *Id.*

In the case currently before the Court, Playboy's pig has invaded the parlors of homes all across this country. Congress intended Section 505 to return the pig of "nuisance speech" to the barnyard, where only consenting adults may view and hear it. Therefore, *amici* contend that indecent sexual signal bleed which intrudes into the privacy of the home and is readily accessible to children amounts to "nuisance speech" which Congress can prohibit or regulate without having to confront the First Amendment.

II. SIGNAL BLEED IS NOT PROTECTED SPEECH; RATHER, IT IS AN ADVERSE SECONDARY EFFECT OF THE MANNER OF CABLE TRANSMISSION, AND SHOULD THEREFORE BE HELD TO A TIME, PLACE, AND MANNER STANDARD OF ANALYSIS

Amici contend that the District Court erred in holding the statute to be a content-based restriction on speech, in that it applies only to the transmission of sexually explicit adult programming or other programming that is indecent. *Amici* maintain that no evidence has been presented in this case supporting the contention that Section 505 is designed to promote some speech and not others. On the contrary, the language of the statute is clear, i.e., regardless of whether the sexually explicit material is medical, scientific, critically important, or mere entertainment in nature, the statute applies equally. The fact the statute reaches any and all types of sexually explicit material, regardless of its point of view or message, is critical. This point does not disappear merely because Playboy avoids addressing it. It is also important to note that Section 505 does not in any way seek to ban sexually explicit programming, nor does it prohibit consenting adults from viewing indecent material on premium cable channels they subscribe to.

Central to the determination of content-neutrality is your *amici*'s position that Section 505 is not aimed at the speech found on the Playboy Channel, nor does it attempt to regulate the kind of material that Playboy may broadcast on its channel. Instructive on this issue is *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), where a city ordinance regulating where adult films could be shown was at issue. In that case, this Court stated at 71-72:

> What is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content.

Similarly, Section 505 uses the nature of Playboy's programming to determine if its signal bleed fits within the scope of the statute, in order to scramble the signal bleed in homes that have not subscribed to this adult channel which is transmitting unwanted sexual images and sounds. Based on the fact Section 505 regulates signal bleed, not speech itself, this Court should apply a time, place, and manner standard of review, not strict scrutiny.

Having argued above that Section 505 is a content-neutral regulation, regulating only the manner in which speech is communicated, *amici* contend that the Court need determine only if the regulation is "designed to serve a substantial governmental interest and do[es] not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

Playboy's argument centers around the erroneous premise that, because Section 505 impacts their business of distributing sexually explicit material, it must be aimed at the product being offered by that business and is, therefore, an unconstitutional content-based regulation. *Amici* assert that, based on this Court's prior rulings in the area of zoning, Playboy's assertion has no merit. Most notably, in *Renton*, the Court found that regulations directed at "secondary effects" are proper even where they have an incidental impact on the communication of protected speech. *Renton*, at 47; *Young v. American Mini Theatres, Inc., supra; FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). *See also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (Justice Souter, concurring).

A. The Government's Interests are More Than Substantial, They are Compelling

As recognized by the District Court in *Playboy II*, 30 F.Supp.2d at 715, Congress asserted several substantial interests in regulating signal bleed:

> [T]he well-being of the nation's youth—the need to protect children from exposure to patently offensive sex-related material; . . . in supporting parental claims of authority in their own household—the need to protect parents' rights to inculcate morals and beliefs on their children; and . . . 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.

It is well established that Congress has not only a substantial interest, but a compelling interest, in the protection of children from sexually explicit material, especially in the context of a pervasive medium. *See Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996); *Ginsberg v. New York*, 390 U.S. 629, 640-41 (1968) ("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.'"). *See also Sable Communication of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("[T]here 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." Further, Justice Scalia, at 132, stated in his concurrence that "[T]he more pornographic [the material] embraced within the . . . category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation from minors.")

The *Ginsberg* Court, at 639, recognized another substantial governmental interest in supporting parental claims of authority in their own household, stating:

> The parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. . . . The legislature could properly conclude that parents . . . are entitled to the support of laws designed to aid in the discharge of that responsibility.

Amici further maintain that Congress is justified in regulating signal bleed based on the substantial governmental interest in ensuring an individual's right to be left alone in the privacy of his or her home. Section 505 regulates imperfect signal scrambling to homes of families who do not subscribe to sex-dedicated channels. These images enter as an offensive pollutant. *Playboy I*, 945 F.Supp. at 787. Millions of children now have access to indecent sounds of adult sexual activity, which was a concern raised in *Pacifica*, and also, with cable television, they see sexually explicit visual images of nude private parts and sex acts. As stated by this Court in *Pacifica*, 438 U.S. at 748:

> Patently offensive, indecent material presented over the airwaves confronts 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.

Based on the above substantial and compelling governmental interests, which courts have consistently held to justify regulations that protect children from explicit sexual material that is harmful as to them, *amici* would argue that parents are due government's support in shielding their children's eyes from the pruriently presented naked body parts that appear through the signal bleed of Playboy's cable

channel into homes that specifically refuse to subscribe to such "adult" programming.

B. Harms To Children From Exposure To Signal Bleed

Amici assert that viewing signal bleed of sexually explicit programming is harmful to children. As noted by the Court below, in *Playboy II*, 30 F.Supp.2d at 715: "The Supreme Court has not required empirical proof of harm to justify content-based restrictions on constitutionally protected speech where children are involved." As stated by the Court of Appeals in *Action for Children's Television v. FCC*, 58 F.3d 654, 661-62 (D.C. Cir. 1995) (*en banc*), Congress is not required to provide a "scientific demonstration of psychological harm . . . in order to establish the constitutionality of measures protecting minors from exposure to indecent speech."

Amici assert that one area of harm to children from viewing such explicit sexual activity is the manner in which children learn about sexuality, such that it glorifies the "free-sex" lifestyle. *See* U.S. Department of Justice, *Attorney General's Commission on Pornography, Final Report*, July 1986, at 339, 343-44. In addition to the harms to minors from viewing this material, *amici* also maintain there is harm from its mere availability to them. Indeed, the easy availability of sexually explicit material may well have the perverse effect of *encouraging* some children to access such material. *See Ginsberg*, 390 U.S. at 642 n. 10 ("To openly permit [reading of pornography] implies parental approval and even suggests seductive encouragement. . . . This apparent stamp of approval on sexually explicit material is detrimental to a child's own sexual development.")

C. Alternative Avenues are Available for Sexually Explicit Speech

The second part of a time, place, and manner standard of review requires there to be alternative avenues of communication available for the dissemination of the type of speech at issue. *Amici* argue that requiring programmers of sexually explicit material to completely scramble their signal does not prevent Playboy from broadcasting its sexually explicit programming to its consenting cable subscribers. Therefore, Section 505 leaves open alternative avenues for Playboy's sexually explicit communications. Since there are alternative avenues for Playboy's speech, and the Government's interests are clearly substantial, the signal-bleed regulation embodied in Section 505 should be held valid under the standard of analysis applied to content-neutral time, place, and manner regulations of the adverse secondary effects of cable transmission. This analysis would also satisfy an intermediate level of scrutiny to test any minimum expressive element of sexual signal bleed, even assuming such analysis were appropriate. *See Barnes v. Glen Theatre, Inc., supra.*

III. EVEN ASSUMING, ARGUENDO, THAT PLAYBOY'S SIGNAL BLEED IS "SPEECH" WORTHY OF SOME MINIMAL PROTECTION, THIS COURT SHOULD APPLY, AT MOST, AN INTERMEDIATE LEVEL OF SCRUTINY

This Court has established in its prior rulings, that speech which is patently offensive warrants less than full First Amendment protection. Beginning with *Pacifica, supra*, 438 U.S. at 743, where, as here, we have a mixed audience of adults and children, this Court stated, relative to indecent broadcasts:

> It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern. [Emphasis added.]

Further, as the Court stated in *Young v. American Mini Theatres, supra,* 427 U.S. at 61, 66:

> [T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance. . . . Even within the area of protected speech, a difference in content may require a different governmental response.

And again in *American Mini Theatres*, at 70:

> [E]ven though we recognize that 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 different, and lesser, magnitude than the interest in untrammeled political debate . . . few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities". . . . 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 from other motion pictures. [Emphasis added.]

In *New York v. Ferber*, 458 U.S. 747 (1982), the Court found that the New York child exploitation statute would have little impact on speech that had serious literary, artistic, political, or scientific value. Justice White, who delivered the opinion of the Court, wrote at 762, 763-64:

> The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*. We consider it unlikely that visual depictions of child performing sexual acts or lewdly exhibiting their genitals would often constitute an important necessary part of a literary performance or scientific or educational work. . . . [A] content-based classification has been accepted because . . . within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.

Concurring in judgment, Justice Stevens wrote at 777, 778:

> The two films respondent sold contained nothing more than lewd exhibition; there is no claim that the films included material having literary, artistic, scientific or educational value. . . . The question whether a specific act of communication is protected . . . always requires some consideration of both its content and context.

In *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), where less sexually explicit activities were at issue than those depicted on Playboy's cable channel, Chief Justice Rehnquist, writing the majority judgment and primary opinion for the Court, stated at 565:

> [Several of our cases contain] statements support[ing] the conclusion of the Court of Appeals that nude dancing of the kind performed here is expressive conduct within the outer perimeters of the First Amendment, though we view them as only marginally so.

Concurring in the judgment, Justice Souter wrote at 584-85:

> Given our recognition that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled debate" . . . I do not believe that a State is required affirmatively to litigate the issue repeatedly in every case. [quoting *American Mini Theatres*, 427 U.S. at 70.]

In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992), Justice Scalia, delivering the opinion of the Court, stated:

> From 1791 to the present . . . our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." [quoting *Chaplinsky*, 315 U.S. at 372.]

Amici maintain that the twin requirements of Section 505, that programming be indecent and be carried on a channel "primarily dedicated to sexually oriented programming," effectively guarantee that only a narrow

category of sexually explicit or indecent expression will be affected.[2]

Amici note that this Court in *Pacifica* distinguished broadcasting from other speech and that broadcasting "has received the most limited First Amendment protection." 438 U.S. at 748. This Court put forth two rationales in support of this lesser level of protection, stating, at 748-49:

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves 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 right of an intruder. . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected programming content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

[2] In this regard, Section 505(a) is similar to the Ensign Amendment, which bars use of U.S. Bureau of Prisons funds to pay for commercial material that is "sexually explicit or features nudity." [Emphasis added.] Bureau regulations define "features" to mean, in part: "the publication contains depictions of nudity or sexually explicit conduct on a routine or regular basis." In upholding the Ensign Amendment, the Court of Appeals for the D.C. Circuit in *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998), *cert. denied*, 119 S.Ct. 2392, wrote at 202:

> In any event, even under conventional overbreadth doctrine outside of prison, overbreadth claims by those on the margins of pornography have fared poorly. *See*, e.g., *Young v. American Mini Theatres*, 427 U.S. 50, 61 (1976) ("Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance").

Amici argue that the uninvited broadcast in *Pacifica* is analogous to Playboy's signal bleed in the present case, because Playboy's sexually explicit or indecent programming trespasses into the homes of non-consenting adults who receive cable television from cable companies that do not fully scramble their programming. These adults are faced with Playboy's forcing this type of unwanted speech upon them, which is a flagrant violation of the right to be left alone in the privacy of one's own home. Section 505's regulation of signal bleed does not prohibit Playboy from showing its sexually explicit or indecent programming, it merely prohibits them from showing it to those who do not wish to view it.

The second rationale given in *Pacifica* for treating broadcast indecency differently than other forms of speech is that "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749. Further, the Court found that "Pacifica's broadcast could have enlarged a child's vocabulary in an instant." *Id.* *Amici* assert that it takes little imagination to know of the lessons a child learns from watching the bleeding signals from the Playboy Channel. Such "Picasso porn" is surely not a proper art class. In fact, it has no class at all and is a particularly obnoxious marketing ploy that Section 505 rightfully prohibits being foisted on those who desire to protect themselves and their children from it.

Based on the above analysis, *amici* maintain that it would be inexplicable to give the signal bleed of Playboy's explicit sexual programming the full panoply of protection afforded political speech by holding Section 505 to a strict scrutiny and least restrictive means standard of review. To

do so would be a slap in the face of every decent parent's ability to protect his or her children from unwanted, sexually explicit or indecent material.

IV. WHEN CONFRONTED WITH "DEVELOPING TECHNOLOGIES", *DENVER AREA* INDICATES THAT STRICT SCRUTINY AND LEAST RESTRICTIVE MEANS MAY NOT ALWAYS BE THE PROPER STANDARD OF REVIEW

In *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), Justice Breyer, writing for the Court, relative to the level of scrutiny applicable to regulating leased access channels, stated at 740-43:

> Both categorical approaches suffer from the same flaws: They import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect. The history of the Court's First Amendment jurisprudence, however, is one of continual development, as the Constitution's general command that "Congress shall make no laws . . . abridging the freedom of speech and the press," has been applied to new circumstances requiring different adaptation of prior principles and precedents. The essence of that protection is that Congress may not regulate except in cases of extraordinary need with the exercise of care that we have not elsewhere required. At the same time, our cases have not left Congress or the States powerless to

> address the most serious problems. [Citing *Chaplinsky, American Mini Theatres,* and *Pacifica.*]
>
> Over the years this Court has restated and refined basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application...This tradition teaches that the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, but without imposing judicial formulas so rigid that they become a straightjacket that disables government from responding to serious problems. This Court in different contexts has consistently held that government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech. Justices Kennedy and Thomas would have us further declare which, among the many applications of the general approach that this court has developed over the years, we are applying here. But no definitive choice among the competing analogies (broadcast, common carrier, bookstores) allows us to declare a rigid single standard, good for now and for all future media and purposes. . . . Aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications...we believe it unwise to pick one analogy or one specific set of words now. . . . Rather than decide these issues, we can decide these cases more narrowly, by closely scrutinizing Section 10(a) to assure that it properly addresses an extremely important problem, without imposing in light of the relative interests, an unnecessarily great restriction on speech.
> [Emphasis added.]

Amici assert that, in the instant case as in *Denver Area*, Playboy's signal bleed is, at most, sexually explicit material on the periphery of the First Amendment, involving a developing technology, presenting extremely important governmental interests, and regulated by a viewpoint-neutral application. *Denver Area* instructs a balancing of competing interests and, on balance, *amici* maintain that Congress found that the interests in protecting children from exposure to sexually explicit or indecent programs, supporting parental claims of authority in their own household, and ensuring an individual's right to be left alone in the privacy of his or her home, far outweighs any inconvenience to content providers or adult users.

Amici also argue that "Signal Bleeders" must bear responsibility for invading the privacy of the home and exposing children and non-consenting adults to sexually explicit or indecent programming. Further, any expense commercial distributors must bear is part and parcel of the cost of doing business in their pursuit of profit. This is no different from the costs born by "adult" bookstore or video store operators who are required to shield the public, and children in particular, from exposure to their sexually explicit materials. There is no constitutional right to enjoy an idealized profit margin at the expense of public health and safety. *See Sable Communications of Cal. v. FCC*, 492 U.S. 115, 125 (1989). As *Renton* also teaches us, speakers may be faced with the cost of purchasing or leasing available "adult use" sites, but such regular cost of business is no barrier to regulation in the public interest. Quoting Justice Powell in *American Mini Theatres*, 427 U.S. at 78, the Court in *Renton*, 475 U.S. at 54, stated: "The inquiry for First Amendment purposes is not concerned with economic impact."

The District Court below, in granting Playboy's request for permanent injunctive relief, held Section 505

invalid, finding it not to be the "least restrictive means." 30 F.Supp.2d at 720. *Amici* contend that, under *Denver Area*, it is not necessary to apply the concept of "least restrictive means," but instead to recognize that Section 505 "properly addresses an extremely important problem, without imposing in light of the relative interests, an unnecessarily great restriction on speech."

Amici urge this Court to reject the District Court in applying rigid formulae, but, rather, to apply scrutiny only to the extent of determining that the law properly addresses an extremely important problem without imposing an unnecessarily great restriction on any protected speech. *Amici* maintain that the economic expense to Playboy in having it and its cable operator partners be responsible for scrambling the signal bleed of unwanted sexually explicit materials (which is, at most, on the borderline of protected speech) is not an unnecessarily great restriction on the Playboy Channel. Congress has addressed the extremely important problems of such activities being seen and heard by non-consenting adults and by children, against the will of their parents, who did not subscribe to such programming. These *amici* pray that the balance be weighed in favor of children and families and not in favor of the Signal Bleeders who profit from the titillating advertising effect of their bleeding signals.

Further, no adult subscriber is inconvenienced or affected by this law's provisions. If an adult subscribes, the adult gets Playboy. If an adult does not subscribe, he should not be heard to complain that he doesn't get free partial samples. However, even if an adult were inconvenienced by not having the free teasers of signal bleed images, both *Pacifica* and *Denver Area* would caution us that adults are not stopped from finding similar material elsewhere on videos, in theaters, or in "adult" porn shops. As this Court can take judicial notice, today such pornography-seeking

adults can find Playboy pictures and countless hard-core depictions through the Internet. With such availability, *amici* assert that Section 505 cannot be said to impose, in this manner, "a great restriction on speech" as indecent material is plentiful and readily available to adults elsewhere.

Amici would assert that, under *Renton*, there is an additional reason not to apply "strict scrutiny" and "least restrictive means" since we are similarly dealing with a law that regulates expression supposedly intended only for a consenting adult audience. Section 505 is concerned, not with the impact of speech on its intended audience, but rather with the "spill over effects" of the signal bleed on children and the quality of life of those who do not choose to be exposed to it. *Amici* note that, in this regard, *Renton* and the instant case are distinguishable from *Boos v. Barry*, where that law at issue in that case did "focus *only* on the content of the speech and the direct impact that speech has on its" audience. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

In *Connection Distributing Co., v. Reno*, 154 F.3d 281 (6th Cir. 1998), the Court of Appeals concluded that the labeling and record-keeping provisions of 18 U.S.C. § 2257, which apply only to those who produce sexually explicit visual depictions, were content neutral. That Amendment, wrote the Court of Appeals, "is not directed at the protected speech but rather unprotected conduct, namely child pornography." *Id.* at 290.

Similarly, Section 505 is not directed at the distribution of presumptively non-obscene speech to consenting adults, but rather at unprotected conduct, namely, the exhibition (either by mistake or as a marketing practice) of such material to children and to non-consenting adults in the privacy of their homes. *See People v. Starview Drive-In Theatre*, 427 N.E.2d 201 (Ill. App. 1981), *appeal dismissed*, 457 U.S. 1113 (1982), where the state Court of Appeals held

valid an ordinance requiring applicants for a license for outdoor movie theaters to agree to desist from exhibiting films containing any scene or scenes depicting acts of "sexually explicit nudity" if "viewable from any private residence." Likewise, signal bleed is indistinguishable from the sexually oriented business which pushes its explicit advertising under the front door of unsuspecting and unwilling homeowners. Just as that conduct is impermissible, signal bleed is also impermissible because of its invasive nature.

V. PLAYBOY'S PROGRAMMING IS NOT SPEECH AND AS SUCH THE COURT SHOULD NOT SUBJECT SECTION 505 TO STRICT SCRUTINY

Playboy makes the argument that, although Section 505 regulates only the signal bleed of its cable channel, the provision is unconstitutional because it adversely impacts on their speech. *Amici* contend that not only is signal bleed not speech, but that it is arguable whether, in fact, Playboy's programming is speech. It is often assumed, for purposes of analysis, that nude dancing in strip clubs and other similar activities are to be judged as if they had some minimal First Amendment protection, as discussed in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991). A court's assuming *arguendo* that certain conduct is speech, for the sake of eliminating claims of value, is different from finding that there is value as a matter of law. Thus, the application of a constitutional test does not compel the conclusion that, in fact, the speech at issue is valuable.

This Court in *Barnes* cited three cases where it had previously found some arguable element of expressive conduct that might be entitled to a level of First Amendment analysis. *Barnes* stated, at 565-66:

> Several of our cases contain language that nude dancing of the kind involved here is expressive conduct protected by the First Amendment. In *Doran v. Salem Inn, Inc.*, we said: "[A]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue*, that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." In *Schad v. Mount Ephraim*, we said that "[f]urthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation" (citations omitted). These statements support the conclusion of the Court of Appeals that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so. [Internal citations omitted.] [Emphasis added.]

Most public nudity, obviously, is not expressive speech protected by the First Amendment. This Court continued in *Barnes*, at 570, saying:

> It can be argued, of course, that almost limitless types of conduct—including appearing in the nude in public—are "expressive," and in one sense of the word this is true. People who go about in the nude in public may be expressing something about themselves by so doing. But the court rejected this expansive notion of "expressive conduct" in *O'Brien*, saying: "We cannot accept the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea." [Internal citation omitted.]

Further, in *Barnes* at 570, the Court also looked to *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), stating:

> "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment."

Amici contend that, if this Court is to ultimately determine that Section 505 impacts upon free speech, it must first make a finding that the signal bleed version of Playboy's cable channel is speech, that it is protected by the First Amendment, and to what degree that expressive conduct is protected by the First Amendment.

Assuming *arguendo* that Section 505's regulation of Playboy's signal bleed is a content-based restriction, impacting on protected speech, and warranting strict scrutiny analysis, *amici* maintain that Section 505 will still pass constitutional muster since Section 505 is narrowly drawn and is the least restrictive means available for addressing Congress's compelling interests in regulating the signal bleed of sexually explicit cable television channels.

VI. WERE THE COURT TO FIND THAT PLAYBOY'S PROGRAMMING CONSTITUTES SPEECH, *AMICI* CONTEND THAT SECTION 505 IS A NARROWLY DRAWN AND THE LEAST RESTRICTIVE, YET EFFECTIVE, MEANS OF ACCOMPLISHING CONGRESS' COMPELLING INTERESTS

In order for a law regulating speech to be valid under strict scrutiny standard of review, it must be narrowly drawn and utilize a least restrictive means of accomplishing the government's compelling interests. As noted above, this Court has repeatedly recognized government's compelling interest in protecting children from harmful material. See *Ginsberg v. New York*, 390 U.S. 629, 639-41 (1968) and *Sable v. FCC*, 492 U.S. 115, 126 (1989).

In *Dial Information Services v. Thornburgh*, 938 F.2d 1535, 1541 (2nd Cir. 1991), the Court of Appeals stated, "The government is empowered to 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." (quoting *Sable*, 492 U.S. at 126).

Since Section 505 does not "regulate the content" of "adult" cable programming, but merely regulates the signal bleed of such programming, your *amici* submit that the Government could not have chosen to regulate less of Playboy's content and instead has only regulated the signal bleed to the extent necessary to allow subscribers to obtain it and protect non-subscribers from it. As such, Section 505 is already less restrictive than the regulation of "content" which the Second Circuit in *Dial Information Services* said was permissible.

The District Court erred in determining Section 504 to be less restrictive and Section 505, therefore, not to be a least restrictive, yet effective, measure.

Playboy, in attempting to satisfy its burden of showing that there is a less restrictive, yet nearly as effective, means for accomplishing the Government's compelling interests, endorses Section 504 of the same Act as being "less" restrictive. *Amici* disagree that Section 504 should be

compared as a viable alternative to the problem addressed by Section 505. Section 504 is part of, but not all of, the regulations pertaining to signal bleed. Sections 504 and 505 work in tandem to protect household privacy and minors from indecent matter, but differ widely in effectiveness. Section 505 provides complete scrambling or time channeling, so that it does not reach non-subscribers or children, while Section 504 offers the right to request such protection on an affirmative, individual basis from the cable company.

Had Congress passed only Section 505 without the added protection of Section 504, cable customers who are not Playboy subscribers would be unable to avail themselves of complete protection from Playboy's signal bleed during the safe harbor hours had they desired such protection. Likewise, had Congress passed Section 504 without Section 505, cable customers unaware of the protections available through Section 504 would never be protected from Playboy's invasive signal bleed. Since cable programmers could choose to time-channel rather than completely scramble their sexually explicit signal bleed, Congress has, through Section 504, given customers control over what enters their homes by way of their television. *Amici* contend that, if this Court were to hold only Section 504 valid but not Section 505, this would not afford non-subscribing cable customers the complete protection envisioned by Congress.

Amici argue that, if a regulation is to be considered a truly "least restrictive means," that means must be a least restrictive, yet just as effective, measure that still accomplishes Government's compelling interests. It is true that Section 504 is "less" restrictive, to the extent it touches less speech, but only those children whose parents are cognizant of their rights under Section 504 will be protected. Though it may be less "restrictive" in this manner, it instead exposes countless children whose parents do not know of

Section 504 to the harms associated with partially scrambled signal bleed of sexual performances. Therefore, Section 504 does not accomplish the Government's interests in protecting children and the privacy of the home and the comparison should be rejected by this Court as a test of the least restrictive nature of Section 505.

VII. PLAYBOY'S ARGUMENT THAT THE SCRAMBLING PROVISION OF SECTION 505 IS NOT VIABLE AS TO THEM IS NOT PERSUASSIVE

The facts offered by Playboy relative to cable scrambling are inconsistent with the common knowledge of the American public. The American public knows that many cable operators can or do completely scramble the pay-per view and premium channels. As Justice Frankfurter stated, "[T]here comes a point where this Court should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52 (1949). *Amici* urge this Court to similarly take judicial notice of that which is common knowledge to the American public regarding scrambling. This is not a proper or complete record upon which this Court should be asked to strike down a federal statute. The evidence should be considered insufficient as a matter of law in this regard and this Court should remand with instructions for the court below to require the parties to provide a full picture of the technical abilities of cable programmers and cable operators to accomplish with Playboy that which they accomplish with the other premium channels available. *Amici* could not find a logical explanation in this record as to why the Playboy Channel cannot be completely scrambled when so many cable companies already completely scramble Playboy, other "adult" pay-per-view and porn channels, and all other non-adult programming that is not subscribed for, such as the movie and sports channels. These *amici* submit that this record defies logic and common experience and that

this Court should order the record clarified before further review.

Amici maintain that the District Court erred in not requiring the parties to present evidence which would establish an accurate, believable record for why Playboy can or cannot be completely scrambled like other cable programming, such as HBO, Showtime, Cinemax, ESPN2, etc. Therefore, this Court should remand this case and order such findings or have a Special Master appointed who can thoroughly investigate the facts in this area.

VIII. PLAYBOY'S ARGUMENT THAT IT IS TOO COSTLY FOR THEM TO COMPLY WITH SECTION 505 IS ALSO NOT PERSUASIVE

Playboy contends that the "economic impact of § 505 is significant." *Playboy II*, 30 F.Supp.2d at 711. *Amici* would contend that, not only are Playboy's economic claims not sufficiently proven on the record, but that such economic considerations are not germane to deciding the constitutionality of Section 505.

The District Court appeared to agree with your *amici* as to this issue, finding that although Section 505 may have some economic impact on Playboy, "the actual amount of Playboy's losses is of little relevance to our First Amendment analysis." *Playboy II* at 712. *See also Playboy I*, 945 F.Supp. at 783 n.20 (noting that while "Plaintiffs . . . claim that they will suffer economic loss," "[f]inancial loss is not . . . the type of irreparable injury that warrants the granting of injunctive relief"). Accordingly, Playboy's increased costs and decreased profits from time channeling do not provide a sufficient justification of their First Amendment challenge to Section 505. This Court in *Sable*, 492 U.S. at 128, found that the FCC's technical protections through "credit card, access

code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn message out of the reach of minors." (Emphasis added.) This Court has made clear that business costs incurred by providers of patently offensive sexual expression, in order for them to comply with the law, does not itself affect the constitutionality of a statute. *Sable* states, at 125:

> While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages.

Amici argue that Section 505 does not deny Playboy access to the adult cable market and that it in no affects the ability of consenting adults to view Playboy's sexually explicit programming. The fact that Playboy is faced with an additional cost of compliance with the regulation is the result of their insistence on an alleged right to take adult material out of an adult bookstore or from an adult section of a retail business (from which minors are excluded), and broadcast it into the homes of non-subscribing cable customers by way of signal bleed. Furthermore, if depriving Playboy of signal bleed would reduce their subscriptions, then the bleeding signal must have commercial value as a marketing ploy to tease adult customers or prime minors into wanting to be customers when they are old enough. If compliance were only a cost factor, and did not affect Playboy's subscription base, then such costs of doing business should not be an excuse to avoid available technology that scrambles the other premium channels. Cable programmers should not be imbued with a constitutional right to show floating private parts and sex acts to children and non-consenting adults as a cheaper means of teasing and reaching a targeted adult audience, if adults are their target audience.

Amici further note that Section 505 offers the alternative of "time channeling" for those cable programmers who truly cannot completely scramble their signal. This Court should not hold a law unconstitutional because those subject to the law will not make as great a profit selling their sexually explicit or indecent material as they would if there were no statute protecting children and the privacy of the home or even a much less restrictive measure to address part of the problem. (If every non-subscribing household with children took advantage of Section 504's individual block box solution, the costs to the cable operators would be so astronomically more than cable system or satellite level scrambling, though Playboy's costs no more, so the economic factor is that much more unreliable for resolving this controversy. This is another proof issue inadequately explored below.)

CONCLUSION

For all of the above, your *amici curiae* pray that this Honorable Court will reverse the judgment of the court below and declare that Section 505 of the Telecommunications Act does not violate the First Amendment.

Respectfully submitted,

Janet M. LaRue
Counsel of Record for *Amici Curiae*

J. Robert Flores
Bruce A. Taylor
Chadwicke L. Groover
Paul J. McGeady
Robin S. Whitehead
Co-counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

Three copies of the within Brief for *Amici Curiae* The Family Research Council, Morality in Media, Inc., National Law Center for Children and Families, Concerned Women for America, and National Coalition for the Protection of Children & Families, in Support of the Petitioner in this case were sent by First Class Postage Prepaid, on this 5th day of August, 1999 to:

Robert Corn-Revere, Esq.
Hogan & Hartson
555 13th Street N.W.
Washington, D.C. 20004
(202) 637-5600
Attorney for Respondent

Honorable Seth P. Waxman
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217
Attorney for Petitioner

By: _____
J. Robert Flores
Co-Counsel for *Amici Curiae*