No. 98-1682

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,

Appellants,

—v.—

PLAYBOY ENTERTAINMENT GROUP, INC.,

Appellee.

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

BRIEF *AMICI CURIAE* OF SEXUALITY SCHOLARS, RESEARCHERS, EDUCATORS, AND THERAPISTS IN SUPPORT OF APPELLEE

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INTEREST OF *AMICI CURIAE* [1]

The ***amici curiae*** are scholars, researchers, educators, and therapists in the field of human sexuality, most of whom hold faculty appointments at major academic institutions. All are members of, and most have been elected officers in, one or more of the major professional associations: the International Academy of Sex Research, the Society for the Scientific Study of Sexuality, the Society for Sex Therapy and Research, and the American Association of Sex Educators, Counselors, and Therapists. Most teach topics pertaining to human sexuality on college or medical school campuses. All have lengthy publication records in the major academic journals of human sexuality research.[2]

Amici submit this brief in the hope that it may assist the Court in determining whether the government in this case met its burden of establishing a compelling interest in shielding minors from garbled, intermittent, "sexually explicit" or "indecent" cable television signals (so-called signal bleed). Despite what it candidly described as "a paucity" of evidence of psychological harm to minors from

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed pursuant to Rule 37.3 of the Rules of this Court. No part of this brief was written or financed by any party other than the ***amici***, and the National Coalition Against Censorship (NCAC), a nonprofit organization. The positions advocated by NCAC in this brief do not necessarily reflect the positions of its participating organizations.

[2] See the individual biographies in the Appendix.

exposure to signal bleed, the district court concluded that the government's burden had been met. In reaching that conclusion, the court erroneously relied upon questionable and controversial moral assumptions, and failed to consider possible harms from restricting access to sexual information and materials.

STATEMENT OF THE CASE

Section 505 of the Telecommunications Act of 1996 (the signal bleed provision) requires cable operators either to scramble fully or relegate to late-night hours any "sexually explicit adult programming or other programming that is indecent" on any channel "primarily dedicated to sexually oriented programming," unless, of course, a household has subscribed to the channel. Playboy Entertainment Group and Graff Pay-Per-View challenged the constitutionality of §505 and sought preliminary relief.

In November 1996, the district court denied their motion for a preliminary injunction. It rejected, as "anecdotal and possibly misleading," the testimony of the government's expert witness, Dr. Diana Elliott, to the effect that signal bleed from sexually explicit programming was actually harmful to minors. It also questioned the reliability of Dr. Elliott's methods. Nevertheless, the court relied upon statements in *Sable Communications v. FCC,* 492 U.S. 115 (1989), and *Denver Area Educ. Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), to rule that the government was likely to meet its burden of showing a compelling need to shield minors from signal bleed. In part

because of the weakness of Dr. Elliott's testimony, the court invited "additional evidence demonstrating the effects of sexually explicit materials on children" in the event that the plaintiffs sought a permanent injunction. *Playboy Entertainment Group v. United States*, J.S. App. 72a n.25, 945 F. Supp. 772, 786 & n. 25 (D.Del. 1996), aff'd mem., 520 U.S. 1141 (1997).

Three experts testified at the permanent injunction hearing: Richard Green and William Simon for the plaintiff,[3] and Elissa Benedek for the government. Both Dr. Green and Professor Simon testified that there is no empirical evidence of psychological harm to minors from exposure to sexually explicit videos, no less to signal bleed, and Dr. Benedek did not dispute the point. Tr. at 365-67 (testimony of Richard Green); 539-47 (testimony of Elissa Benedek); 876-77 (testimony of William Simon). See *Playboy Entertainment Group v. United States*, J.S. App. 14a, 30 F. Supp. 2d 702, 710 (D. Del. 1998). Dr. Benedek acknowledged that in her 30 years of psychiatric practice, nobody had come to her with a complaint about either scrambled or unscrambled sexual images. Tr. at 524.

Dr. Green testified that none of the available literature – including comparisons of the amount of erotica available in different countries, studies of sex offenders, laboratory experiments on pornography and violence, clinical experience worldwide, and research on people who as children had witnessed the "primal scene" – supports the

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[3] Graff had withdrawn from the case. See *Playboy Entertainment Group v. U.S.*, J.S. App. 3a, 30 F. Supp. 702, 705 (D.Del. 1998).

notion that exposure to sexual explicitness is psychologically harmful to youth. In 25 years of clinical practice – much of it with children and adolescents – he had not encountered psychological problems stemming from pornography. "It's reductionist and simplistic," Dr. Green said, "to expect that a single variable is going to somehow, in a direct line, lead to some kind of adverse outcome. That's not the way human development evolves." Tr. at 361, 365-67, 397.[4]

Despite this absence of empirical or clinical evidence showing "any harm associated with signal bleed," Dr. Benedek in her testimony "hypothesized" that viewing intermittent sounds or images from sexually explicit programming could lead to "dysphoria" ("'a kind of catch word for unpleasant feelings'"), bad attitudes, and possible imitative behavior. She explained that "in the vast majority of cases," these postulated effects "would be transient, or temporary." To support her hypothesis, she relied upon materials sent to her by the government's attorneys regarding the effects of television violence, or television more generally, and anecdotes regarding allegedly "traumatic play" in one instance, and children's use of vulgar language in another, reportedly after exposure to sexual content on television. Dr. Benedek offered no evidence – anecdotal, clinical, or empirical – regarding psychological

[4] Dr. Green also acknowledged that he had written some 24 years earlier that young children's "visual experiencing of adult sexuality" could be "potentially confusing and hazardous," but he testified that studies since then involving adults who as children had witnessed the "primal scene" indicated no adverse effect. Tr. at 418-20.

harm from signal bleed,[5] and acknowledged that she was not an expert on the effects of erotica, pornography, or television. Tr. at 445-81; *Playboy*, J.S. App. 14a-16a, 30 F. Supp.2d at 710-11.

The three-judge court was no more impressed with Dr. Benedek's testimony than it had been with Dr. Elliott's at the preliminary injunction stage. It noted that the government had presented "no clinical evidence linking child viewing of pornography to psychological harms," but instead had argued, inappropriately, by analogy to studies on TV violence. J.S. App. 29a, 30 F. Supp. 2d at 716.[6] "The next weakly proven inference," said the court, was that "the effects of viewing signal bleed of sexually explicit television are the same as viewing sexually explicit television outright." *Id.* Dr. Benedek's evidence "on the type and duration of the harm" was "equally troubling." She

> 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

[5] The district court noted that the government could actually point to "only one such incident," involving a stomach ache. J.S. App. 14a-15a n.11, 30 F. Supp. 2d at 710 n.11.

[6] Although not an issue in this case, it should be noted that the psychological and social science literature regarding the effects of television violence on young people is more ambiguous and contested than is frequently assumed.

no evidence in this case that such scrambled, garbled, intermittent signal bleed has a harmful potential similar to explicit pornography.

Id.[7] In short, the court said, "[w]e 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." J.S. App. 30a, 30 F. Supp.2d at 716.

The three-judge court nevertheless ruled that the government had met its burden of showing a compelling interest in shielding minors from signal bleed. It did so based largely on isolated statements by this Court regarding minors' exposure to "sexually explicit" or "indecent" speech. Thus, it said, only "some evidence of harm short of definitive scientific proof must be presented," a burden it later characterized as "some minimal amount of evidence." Even though this case demonstrated "a paucity of such evidence," the court said, "we are not prepared to say that there is no prospect of such harm." J.S. App. 29a-30a, 30 F. Supp. 2d at 716. Therefore, it reasoned, the government had met its burden – because it accepted the hypothetical possibility of harm, in the absence of actual evidence.[8] It

[7] Because the district court did not find evidence of "harmful potential" even from "explicit pornography," this last statement presumably referred to Dr. Benedek's views.

[8] The court also found compelling the government's interests in protecting "parents' authority to raise their children as they see fit" and (continued...)

went on, however, to hold §505 unconstitutional on the ground that an alternative means of shielding minors, less restrictive of First Amendment rights than §505, was available. J.S. App. 32a-39a, 30 F. Supp.2d at 717-20. This appeal by the government followed.

SUMMARY OF ARGUMENT

Under the First Amendment strict scrutiny applicable to §505, the government has the burden of showing that the law is necessary to achieve a compelling state interest. The district court's determination that the government met this burden was unjustified because it was based on dubious and inadequate evidence, as the court frankly acknowledged. In the event, therefore, that this Court disagrees with the district court's less-restrictive-alternative analysis, it should affirm the judgment of unconstitutionality on the ground that no compelling governmental interest was shown in shielding minors from "sexually explicit" or "indecent" signal bleed.[9]

To reach its compelling interest determination, the

[8](...continued)
"the right of the individual to be left alone in the privacy of his or her home." J.S. App.30a-31a, 30 F.Supp.2d at 716-17. Although *amici* do not address these rulings, we question whether the admittedly important rights to privacy and parental autonomy imply a governmental power to advance them by means of censorship laws.

[9] Even if this Court were to apply a less stringent standard of First Amendment scrutiny, the government's proof was insufficient to establish harm to minors from signal bleed.

district court bolstered the "paucity" of record evidence by citing four Supreme Court decisions involving minors' access to sexual speech. J.S. App. 27a-28a, 30 F. Supp. 2d at 715-16. But none of these cases applied the strict scrutiny/compelling interest test, or even contemplated the claim that fleeting sounds or images from indecent signal bleed could be harmful to youth. Particularly in light of this Court's recognition in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), that the term "indecent" (or its FCC definition, "patently offensive") has no readily discernible meaning, and can include non-prurient expression with serious literary or educational value, it cannot simply be assumed that minors are harmed by exposure to the sounds or garbled images of signal bleed.

The district court evidently recognized the need for expert evidence on the question of harm; but having invited such evidence, it then made a mockery of the strict scrutiny test. As the court acknowledged, the government presented not just a "paucity" of evidence but *no* evidence that signal bleed causes psychological harm. The government's failure of proof was not surprising, for most scholars in the field of sexuality agree that there is no basis to believe sexually explicit words or images, especially of the sort contained in signal bleed, in and of themselves cause psychological harm to the great majority of young people. Indeed, the district court ignored unusually strong evidence of the complete absence of empirical support for the government's claims.

Given the absence of evidence of harm from signal bleed, courts should not rely upon social conventions or moral value judgments in deciding whether the compelling

state interest test has been met. Our society embraces many differing, and hotly contested, moral and pedagogical attitudes toward minors and sexual speech. In the face of these many different attitudes and philosophies, the First Amendment does not permit Congress or the courts to impose one moral viewpoint about child-rearing, adolescence, and sexual ideas.

ARGUMENT

I THERE IS NO CONSTITUTIONAL BASIS FOR A PRESUMPTION THAT MINORS ARE HARMED BY SIGNAL BLEED FROM "SEXUALLY EXPLICIT ADULT PROGRAMMING OR OTHER PROGRAMMING THAT IS INDECENT"

The district court was correct to ask for evidence on the question of harm to minors from "sexually explicit" or "otherwise indecent" signal bleed. Having sought and heard such evidence, however, it was not free to ignore it by reducing the government's burden of proof to a nullity, or to rely on statements by justices of this Court in other contexts to conclude that the government could meet its burden of proof under the compelling state interest test merely by alleging, not proving, hypothetical harm. Should this Court disagree with the district court's "less restrictive alternative" analysis, therefore, it should still affirm the judgment of unconstitutionality because the government did not establish a compelling need to shield minors from signal bleed.

The district court relied upon statements in four Supreme Court cases for the proposition that minors are harmed by "'exposure to patently offensive sex-related material,'" and its consequent conclusion that only "some minimal amount of evidence" is needed to establish a compelling interest in protecting minors from signal bleed. J.S. App. 30a, 30 F. Supp.2d at 715-16, quoting *Denver Area*, 518 U.S. at 743.[10] None of the cited cases, however, dealt with the compelling state interest test, where the government bears a heavy burden of justification and precision is required in the scope and wording of a censorship law. The situation here is not, therefore, comparable to *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986), where a public school administration, in the interests of pedagogy, disciplined a student for speech thought to be inappropriate at a school assembly. There is at bottom no constitutional justification for presuming psychological harm to minors from "sexually explicit" or "indecent" speech, no less from signal bleed. When the presumption of harm to minors serves to infringe the First Amendment rights of adults, as it does here, the constitutional issues become even more compelling. *Cf. Reno v. ACLU*, 521 U.S. 844.

Obscenity law in both England and the United States was initially premised on the notion that the most vulnerable or impressionable members of society – primarily minors –

[10] The four cases were *Denver Area, supra*; *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); and *Ginsberg v. New York*, 390 U.S. 629 (1968). The court also cited *Prince v. Massachusetts*, 321 U.S. 158 (1944), not a case involving free speech or "indecency."

must be shielded from material that might "deprave or corrupt" them. *Regina v. Hicklin*, L.R., 3 Q.B. 360 (1868); *Rosen v. United States*, 161 U.S. 30 (1896); *United States v. Bennett*, 24 F. Cas. 1093 (Circ. Ct. S.D.N.Y. 1879). The U.S. Court of Appeals for the Second Circuit rejected this overly censorious standard in the 1930s, see *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930); *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934); and this Court followed suit in 1957 with its decisions in *Butler v. Michigan*, 352 U.S. 380, and *Roth v. United States*, 354 U.S. 476, rejecting vulnerable youth as the benchmark for corruptibility, and ruling that the First Amendment does not permit government to reduce the adult population to reading or viewing "only what is fit for children." *Butler*, 352 U.S. at 383. In order to shield minors, however, this Court eleven years later established the "variable obscenity" test in *Ginsberg v. New York*, 390 U.S. 629 (1968).

Ginsberg upheld a statute that prohibited the sale to persons under age 17 of material that lacked any redeeming value for minors, appealed to their prurient interest, and described sexuality in terms deemed patently offensive for that age group. The statute thus incorporated a variation on this Court's three-part definition of obscenity – expression that is not protected by the First Amendment. Because the material at issue in *Ginsberg* was constitutionally unprotected as to minors, and the statute did not infringe the rights of adults, no First Amendment problem was involved, and the strict scrutiny standard accordingly did not apply. Instead, the Court had only to find it was "not irrational" for the New York legislature to believe the speech in question – so-called "girlie magazines" – might impair "the

ethical and moral development of our youth." 390 U.S. at 639-41.[11] It was in this "rational basis" context *only* that *Ginsberg* noted the government's interest in shielding minors from speech that is "not obscene by adult standards." *Sable Communications*, 492 U.S. at 126.

Ginsberg thus did not involve any issue of compelling governmental interest, or suggest that a generalized, empirically unsupported legislative pronouncement regarding "the ethical and moral development of our youth" would suffice to justify the suppression or burdensome regulation of constitutionally protected speech. Equally important, the speech involved in *Ginsberg*, because it was obscene for minors by definition, did not have any redeeming value for them.[12] Where Congress chooses a standard of "indecency" or "sexual explicitness," by contrast, much more careful analysis of the harm-to-minors question is necessary because the speech at issue *is* constitutionally protected and

[11] The court noted that it was "very doubtful that this finding expresses an accepted scientific fact." *Id.*

[12] The obscenity definition at the time of *Ginsberg* incorporated the "utterly without redeeming social value" test derived from *Roth v. U.S., supra,* and *Memoirs of a Woman of Pleasure v. Massachusetts*, 383 U.S. 413 (1966). Five years after *Ginsberg*, the test changed to one of "serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973). Courts since *Miller* in "variable obscenity" or "harm-to-minors" cases have assumed that the looser *Miller* standard would now govern. *American Booksellers Ass'n v. Webb*, 919 F.2d 1493, 1496, 1503 & n.18 (11th Cir. 1990); *American Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127 n.2 (4th Cir. 1989).

may have serious value.[13]

A departure from this important rule distinguishing "variable obscenity" from constitutionally protected speech was suggested, perhaps inadvertently, 21 years after *Ginsberg* in *Sable Communications*. *Sable* invalidated a law restricting "indecent" telephone messages, but in the process noted that government does have a "compelling interest" in shielding minors "from the influence of literature that is not obscene by adult standards." 492 U.S. at 126, citing *Ginsberg* and *New York v. Ferber*, 458 U.S. 747 (1982).[14] A casual reference later in the *Sable* opinon, without explanation, seemed to equate the *Ginsberg* variable obscenity concept with the much broader standard of constitutionally protected, potentially valuable and non-prurient indecency. 492 U.S. at 130.

Sable's *dicta* was repeated in this Court's plurality opinion in *Denver*; but again, without consideration of the vast difference between indecent speech, and material that is obscene for minors because it lacks serious value for them; or between the government's minimal burden in a rational

[13] There was no such analysis in *FCC v. Pacifica*, nor did the Court there articulate any constitutional standard of review. Instead, the 5-4 majority seemed to assume a deferential standard based on the FCC's historic regulation of broadcast content. The Court has noted that *Pacifica* is a narrow holding, essentially limited to its facts. *Sable Communications*, 492 U.S. at 128.

[14] *Ferber* involved an entirely different issue – not minors' access to sexual *images or ideas*, but the physical exploitation of minors in sexual *acts*.

basis case and its immensely heavier one in a case involving constitutionally protected expression. That consideration did finally occur two years ago in *Reno v. ACLU*. Although repeating language from *Denver* and *Sable* concerning government's "generally ... compelling interest in protecting minors from 'indecent' and 'patently offensive' speech," 521 U.S. at 863 n.30, the *Reno* decision devoted substantially more attention to the vagueness and overbreadth of the indecency standard, and the many contexts in which it would suppress speech that was not only unharmful but positively helpful to youth: safer sex information, discussions of birth control, homosexuality, or prison rape, "artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library." *Id.* at 878.

Although "sexually explicit" or "indecent" cable programming may not have the range of the Internet speech at issue in *Reno*, the constitutional analysis is the same. For Congress in §505 deliberately selected the same broad, vague standard when it targeted "sexually explicit" or "indecent" programming, a standard that by definition includes non-prurient, constitutionally protected expression with serious value.[15] At the very least, then, the courts must focus on the actual harm, if any, shown to be caused by the range of speech that Congress actually chose to suppress.

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[15] Programs with likely artistic or educational value on the Playboy channel have included safer sex instructions, a documentary produced for World AIDS Day, two magazine-style news programs, and the films *9½ Weeks* and *The Unbearable Lightness of Being*. See Pl. Motion to Affirm at 8; Def. Post-Trial Br. at 67-69.

II THE GOVERNMENT FAILED TO SHOW A COMPELLING NEED TO BAR MINORS FROM EXPOSURE TO SIGNAL BLEED

The government manifestly failed to meet its burden of demonstrating a compelling need to shield minors from signal bleed. As the district court acknowledged, there was *no evidence* of harm from signal bleed presented either to Congress or the court. By allowing the government to prevail on this issue in the absence of evidence simply because "we are not prepared to say that there is no prospect" of psychological harm, the district court turned the strict scrutiny standard upside down – it essentially created a presumption of harm in the absence of evidence, and imposed on the plaintiff the near-impossible burden of proving a negative.

As all three experts in this case agreed, there is no empirical evidence that exposure of minors to sexually explicit speech is in itself psychologically harmful. Not only is there a dearth of statistical data, but even clinical and anecdotal reports are limited. Dr. Benedek's opinions about "dysphoria" were both empirically and clinically unsupported, and in any event she acknowledged that such hypothesized effects would be transient, far from universal, and unpredictable for any particular child. The testimony of Dr. Green and Dr. Simon, by contrast – both, unlike Dr. Benedek, experts who have written extensively on pornography, sexuality, and media effects – was consistent with the widely agreed-upon view within the profession that

no harmful effects have been demonstrated.[16] As the Surgeon General's Workshop on Pornography and Public Health noted in 1986, many psychologists believe young children are unaffected by pornography because they lack "the cognitive or emotional capacities needed to comprehend it." Edward Mulvey & Jeffrey Haugaard, *Surgeon General's Workshop on Pornography and Public Health* 61 (U.S. Dep't of Health & Human Services, June 22-24, 1986).[17]

Dr. Benedek's speculations regarding behavioral "modeling" effects were likewise unpersuasive. As the district court noted, they were based upon an analogy to media violence studies with which she had only superficial familiarity and which, in any event, are not applicable to sexual speech or signal bleed. The weight of psychological evidence, in fact, indicates that sexual offending is related not to youthful exposure to sexually explicit material but to its opposite: youthful repression, conflict, and guilt. See Judith Becker & Robert M. Stein, "Is Sexual Erotica Associated with Sexual Deviance in Adolescent Males?" 14

[16] Indeed, Dr. Benedek's testimony relied upon analogies and suppositions substantially more attenuated than those rejected by courts in garden variety tort cases. See, e.g., *General Electric Co. v. Joiner*, 522 U.S. –, 118 S.Ct. 512 (1997); *Daubert v. Merrell Dow, Inc.*, 509 U.S. 579 (1993).

[17] Even as to the effects of pornography on young adults, leading researchers have criticized the misuse of their data by those desiring to suppress sexually explicit speech. See Daniel Linz, Steven Penrod, and Edward Donnerstein, "The Attorney General's Commission on Pornography: The Gaps Between 'Findings' and Facts," 4 *American Bar Edtn. Research J.* 713 (1987).

Int'l J. Law & Psychiatry 85 (1991); Milton Diamond & Ayako Uchiyama, "Pornography, Rape, and Sex Crimes in Japan," 22 *Int'l J. Law and Psychiatry* 1, 15-19 (1999) (citing additional sources); P.H. Gebhard *et al.*, *Sex Offenders* (New York: Harper & Row, 1965); William Thompson, *Soft Core: Moral Crusades Against Pornography in Britain and America* 133 (London: Cassell, 1994) (collecting sources); Ira L. Reiss & Harriet M. Reiss, *Solving America's Sexual Crisis*, chs. 3 & 6 (Amherst, NY: Prometheus Books, 1997). As these studies suggest, punitive upbringing, repressed sexuality, and individual histories of physical and sexual abuse tend to be the primary determinants of sex offending.[18]

[18] There are virtually no empirical studies of possible behavioral effects on minors from sexually explicit material – and certainly none on signal bleed. A variety of studies have attempted to gauge the effects of media offerings that address sexuality or sex roles in less explicit terms, but even here, it has not been possible to establish a causative connection to youngsters' sexual behavior. For example, an experiment in 1980 asked 75 adolescent girls, half of them pregnant, about their television viewing habits. The pregnant ones, overall, watched more TV soap operas and were somewhat less likely to think that their favorite soap opera characters would use contraceptives, but, as the authors acknowledged, it is "difficult to know if television portrayals are encouraging adolescents to be unrealistic about sexual relationships [that is, not using contraceptives], or if unrealistic adolescents identify with the glamorized TV portrayals." See Charles Corder-Bolz, "Television and Adolescents' Sexual Behavior," 3 *Sex Education Coalition News* 3, 5 (Jan. 1981); see also Victor Strasburger, *Adolescents and the Media - Medical and Psychological Impact* (Thousand Oaks: Sage Pubs., 1995); Jane D. Brown and Susan F. Newcomer, "Television Viewing and Adolescents' Sexual Behavior," 21(12) *Journal of Homosexuality* 77 (1991); American Academy of Pediatrics, "Children,

(continued...)

The district court also noted Dr. Benedek's concern that "viewing sexually explicit programming might affect a child's attitudes toward sex" – an argument heavily relied upon by the government. J.S. App. 15a, 30 F. Supp. at 710, citing Def. Post-Trial R. Br. at 5. But here, both the government and its witness merged psychological issues with moral and ideological ones. As the government explained, the "harm" posited here is to "socially appropriate standards," and to "the promotion of 'healthy relationships ... where there is mutual caring, understanding, empathy, concern, civility, lack of callousness.'" Def. Post-Trial Br. at 29, citing Tr. at 461-62. These are indeed worthy goals, and society undoubtedly has a legitimate interest in teaching minors healthy sexual attitudes, but that interest should not be confused with evaluations of psychological harm. Nor is there evidence that sexual attitudes will be improved by blocking signal bleed.

Efforts to use science to "validate a social preference" can distort both science and public policy. Stephen Jay Gould, *The Mismeasure of Man* 22-23 (New York: W.W. Norton, 1981). As Gould observes, the risk of distortion is greatest when "topics are invested with enormous social importance but blessed with very little reliable information." *Id.* at 22. Attitudes about mental health have been particularly vulnerable to the influence of social convention. For example, in the 1940s and '50s,

> medical experts cautioned against thwarting what a group of male doctors told *Life* magazine was a healthy woman's "primitive biological urge toward reproduction, homemaking and nurturing. ..."
>
> Like those who argued against educating the Negro lest it confuse him as to his proper place – fomenting restlessness and menacing the social order – the critics of women's education couched their warnings in benevolent terms. "To urge upon her a profession in the man's world can adversely affect a girl," wrote a Yale psychologist, advising against the admission of women to the college. "She wants to be free of guilt and conflict about being a fulfilled woman."

Miriam Horn, *Rebels in White Gloves – Coming of Age with Hillary's Class - Wellesley '69* 7-8 (New York: Random House, 1999).

In sum, the factual record in this case was wholly insufficient to establish harm to minors, and the district court improperly relied upon speculation and social convention in its place. As the Second Circuit ruled in an analogous case involving allegations of harm from minors' exposure to "heinous crime" trading cards, "the conclusory and contradictory testimony of [the government's] experts" was legally insufficient; a law restricting speech cannot properly be based on "speculation or surmise." *Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997). The Second Circuit observed that this Court has required "substantial supporting evidence in order for a regulation that threatens speech to be upheld":

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[18](...continued)
Adolescents, and Television," 96(4) *Pediatrics* 786 (Oct. 1995).

> "When the Government defends a regulation on speech as a means to ... prevent anticipated harms, it must do more than simply posit the existence of the disease to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."

Id., quoting *Turner Broadcasting System v. FCC*, 512 U.S. 622, 664 (1994).[19]

III IN THE ABSENCE OF EVIDENCE OF PSYCHOLOGICAL HARM, SOCIAL TABOOS AND MORAL VALUE JUDGMENTS THAT ARE HIGHLY CONTESTED IN OUR DIVERSE SOCIETY CANNOT JUSTIFY CENSORSHIP

In the absence of any demonstration of psychological harm, the district court fell back on suggestions in *Denver, Pacifica, Bethel,* and *Ginsberg* that moral or social conventions are sufficient justification for laws restricting access to sexually explicit or indecent speech. Likewise, the government, essentially acknowledging that its expert's hypothesized harm was inadequate, argues that no evidence is necessary; "commonly held moral views about the upbringing of children" should suffice to establish a

[19] The comments of the Court regarding legislative fact-finding in *Turner Broadcasting System v. FCC* ("*Turner II*"), 520 U.S. 180 (1997), are inapplicable here because, as the lower court observed, Congress held no hearings and made no findings of fact about the issue of harm to minors from exposure to signal bleed.

compelling interest in blocking minors' possible viewing of signal bleed. Br. of Appellants at 35 n. 21. The *amici curiae* Family Research Council *et al.* make the point in equally viewpoint-discriminatory terms: government has a compelling interest, they say, in suppressing minors' access to speech that "glorifies the 'free-sex' lifestyle," and in teaching youngsters that sexually explicit material is taboo. Br. of Family Research Council *et al.* at 9, quoting U.S. Dep't of Justice, *Attorney General's Commission on Pornography, Final Report* 339, 343-44 (July 1986).

This Court has long condemned such explicitly viewpoint-discriminatory justifications for censoring speech. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992); *Kingsley Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684, 689 (1959); see also *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir.), aff'd mem., 475 U.S. 1001 (1985). Moreover, the government does not specify how it arrived at its conclusion about "commonly held moral views" in the first place. If anything, the record in this case suggests that, at least with respect to signal bleed, the great majority of parents do not view it as a major problem. The government's dismissal of such parents as merely inert, indifferent, or distracted, Br. at 33, has no factual basis. It seems not to have occurred to the government that many parents, while not favoring a diet of erotica for their youngsters or actively foisting it upon them, nevertheless do not believe serious psychological damage will result if they come upon it by accident. Indeed, they may feel that more harm would result from a highly negative adult reaction.

The government's generalized concerns with moral values and social taboos may have sufficed in *Ginsberg* to satisfy the rational basis test, or in *Bethel* in the particular pedagogical context of a public school assembly; but they are not sufficient to establish a compelling or even substantial government interest in the censorship of fleeting sounds or images of constitutionally protected speech about sex that may be non-prurient and have substantial value. In a society that embraces a wide range of views and attitudes about sexuality, and in which explicit details of the sexual activities of the President of the United States are the subject of impeachment proceedings in the Senate, the courts are hardly in a position to stake out one moral viewpoint that suppresses anything deemed indecent or sexually explicit in the interest of delivering a message of disapproval to minors. In the absence of actual evidence of psychological harm, it is for parents, schools, churches, and other community institutions to inculcate standards of civility and sexual behavior in our youth through education and example, rather than censorship and taboo.

CONCLUSION

The judgment should be affirmed on the ground that the government did not establish that §505 serves a compelling state interest.

Respectfully submitted,

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