No. 98-1682

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, et al.,
Appellants

v.

PLAYBOY ENTERTAINMENT GROUP, INC.,
Appellee

AMICUS CURIAE BRIEF FOR NATIONAL CABLE TELEVISION ASSOCIATION IN SUPPORT OF APPELLEE

Filed September 24, 1999

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On Appeal from the United States District Court
for the District of Delaware

AMICUS CURIAE BRIEF FOR NATIONAL CABLE TELEVISION ASSOCIATION IN SUPPORT OF APPELLEE

INTEREST OF AMICUS

The National Cable Television Association ("NCTA") is the principal trade association representing the cable television industry in the United States. NCTA's members include cable operators that serve more than 90% of the nation's cable subscribers, as well as most of the non-broadcast program networks whose services are carried on cable systems. NCTA also represents a large number of suppliers of equipment to cable operators and program networks.

This case has important implications for the cable industry, especially insofar as the Government contends that restrictions on the carriage of "indecent" programming on cable television are subject to a more relaxed standard of review than the strict scrutiny that generally applies to content-based regulation of speech. The cable industry, like the three-judge district court, acknowledges this Court's determination that the unwanted intrusion of sexually explicit programming into homes in a manner that is likely to be viewed by children may, in some circumstances, warrant regulation. Even before Congress adopted the provisions of the Communications Decency Act of 1996 that are at issue in this case, the cable industry adopted voluntary guidelines designed to prevent any such undesired intrusions.

But the Court has never held that the Government may regulate indecent but non-obscene programming on cable television without meeting the tests of strict scrutiny. The Court has not heretofore given the Government leeway to regulate such content without requiring the Government to demonstrate both that the regulation advances a compelling interest and that it is narrowly tailored to be no more restrictive of protected speech than is necessary to serve that interest. The cable industry has an important interest in opposing the Government's notion that cable operators and program networks are subject to a lesser standard of First Amendment protection, at least with respect to indecent programming, than other speakers and media of communication.*

SUMMARY OF ARGUMENT

Differences among media may, indeed, justify differential regulation of indecent content on those media. One such difference is the use by broadcasters of scarce spectrum, which has been held by this Court to justify the regulation of broadcast content to a degree not permitted of any other media. The Court has squarely held that this unique rationale for regulation does not apply to cable television.

* The parties have consented to the filing of this brief.

As the Court's decisions regarding the regulation of indecent material over broadcast television, telephone wires and the Internet demonstrate, the differences that count, aside from spectrum scarcity, are those differences that affect whether a regulation is necessary to protect the Government's compelling interest in protecting children from the unwanted and unexpected intrusion of such material into homes. Unlike broadcasters, cable operators can limit accessibility to any channel of programming that they offer.

If a household chooses not to purchase cable service, it will receive no cable programming. If it chooses not to purchase an optional package of cable services, or an optional channel or pay-per-view offering, the operator will scramble or block reception of that programming. If parents want to block their children's access to one or more channels included in the packages that that they have purchased, operators will make available devices to do just that. And if, despite the operator's scrambling of unpurchased channels, a parent is concerned that the audio or video portions of those channels is partially viewable or audible, operators can fix that, too, by providing that parent with a device that fully blocks the signal.

All these capabilities make it possible to protect parents from the unexpected and unwanted exposure of their children to sexually-oriented programming and other programming that they may find unsuitable and inappropriate. And if they can provide such protection in a manner that is less restrictive than a statute or regulation that prohibits or restricts the provision of particular content, then the First Amendment requires that such a less restrictive means be chosen.

As the three-judge district court held, Section 505 of the Communications Decency Act of 1996 – which requires that cable operators either fully block channels primarily dedicated to sexually-oriented programming or carry such programming only during late-night hours – are more restrictive than necessary to prevent the unwanted intrusion of partially scrambled sexually-oriented channels in households that have not purchased them. The court

correctly found that as long as subscribers are aware that sexually-oriented programming is being provided on the system and is only partially scrambled, and as long as they are aware of their right to obtain full blocking devices free of charge pursuant to Section 504, the provisions of Section 504 fully achieve the objectives of Section 505, and do so in a manner less restrictive than Section 505.

ARGUMENT

I. STRICT SCRUTINY APPLIES TO CONTENT-BASED REGULATION OF CABLE TELEVISION PROGRAMMING.

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court held that it was constitutionally permissible for the FCC to prohibit *broadcasters* from transmitting certain material that was deemed offensive and inappropriate for children except during late evening hours. The Government now contends that *Pacifica* means that something short of the most exacting First Amendment scrutiny applies to the regulation of "indecent," non-obscene content on *cable television*. It argues that it is entitled to more "flexibility" and greater "deference" when it engages in such regulation than when it engages in other forms of content regulation. *See, e.g.*, Government Brief at 26.

To prevail in this case, the Government would certainly need such a relaxation of First Amendment standards. But there is no basis in *Pacifica*, in other decisions of this Court, or in the particular context of this case, for granting such extraordinary flexibility and deference. When the Government seeks to regulate the content of protected speech, this Court has generally insisted that it have a "compelling" or "extremely important" justification. *See, e.g., Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Denver Area Educational Telecommunications Consortium v. FCC*, 116 S. Ct. 2374, 2385 (1996). This standard was not loosened in *Pacifica*. The Government's interest in that case – enabling parents to prevent the unexpected and unwanted intrusion into their

homes of, and exposure of their children to, indecent, sexually-oriented material – has repeatedly been recognized by this Court to be a compelling interest.

Even in cases involving content-neutral regulation, the Court requires that the restriction on protected speech be "no greater than is essential to the furtherance of" the Government's asserted interest (which, in the case of content-neutral regulation need not be as "compelling"). *United States v. O'Brien*, 391 U.S. 367, 377 (1968). But it applies a still more stringent test to content-based regulation. To show that a content-based regulation is sufficiently narrowly tailored, the Government must generally show that the regulation is the least speech-restrictive means of advancing its compelling interest. *See, e.g., Boos v. Barry*, 485 U.S. 312, 329 (1998). And it is entitled to less flexibility and deference than in seeking to justify a content-neutral restriction, which must not be "substantially broader than necessary to achieve the government's interest," but "need not be the least restrictive or least intrusive means" of serving that interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989). *See also Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 671 n.2 (1994) ("*Turner I*") (Stevens, J., concurring in part and concurring in the judgment) ("the factual findings accompanying economic measures that . . . have only incidental effects on speech merit greater deference than those supporting content-based restrictions on speech").

The more stringent "least restrictive means" test that applies to content-based regulation is no less applicable in cases where the important interest at stake involves protecting children from inadvertent exposure to sexually explicit programming than in cases involving other compelling interests. Thus, Justice Kennedy has pointed out (in a case specifically involving the regulation of sexually-oriented programming on cable television), that, in contrast to the "intermediate" level of scrutiny that the Court applied in *Turner I*,

> [w]hen applying strict scrutiny, we will not assume plausible alternatives will fail to protect compelling interests; there must be some basis in the record, in legislative findings or otherwise, establishing the law as the least restrictive means. *Sable Communications*, *supra*, at 128-130. Cf. *Turner Broadcasting*, 512 U.S., at 664-668.

Denver Area Educational Telecommunications Consortium, *supra*, 116 S. Ct. at 2417 (Kennedy, J., concurring in part and dissenting in part).

Similarly, in *Sable Communications of California, Inc. v. FCC*, *supra*, the Court, in applying strict scrutiny to the FCC's regulations of indecent content provided over the telephone by so-called "dial-a-porn" services, refused to give any special deference to Congress's judgment that no less restrictive means of protecting minors from such content was available:

> To the extent that the federal parties suggest that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution. This is particularly true where the Legislature has concluded that its product does not violate the First Amendment. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."

492 U.S. at 129 (*quoting Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)).

Nor, in *Reno v. ACLU*, 512 U.S. 844, 117 S. Ct. 2329 (1997), did the Court relax the standards of strict scrutiny in reviewing the constitutionality of the provisions of the Communications Decency Act restricting indecent content on the Internet – provisions that, like Section 505, were aimed at

"protect[ing] children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech." 117 S. Ct. at 2342. To the contrary, the Court determined that "the most stringent" review was warranted. *Id.* at 2343.

As the Court indicated in *Pacifica*, some regulation of broadcast content that might not otherwise survive strict scrutiny has historically been permitted because of broadcasting's unique use of scarce spectrum. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969), the Court explained that if there was to be any broadcasting at all, "it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few." And since the Government was necessarily involved in selecting the few licensees, it could require a broadcaster "to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community, and which would otherwise, by necessity, be barred from the airwaves." *Id.* at 389.

The Court, in upholding the FCC's regulation of indecency in *Pacifica*, relied on the fact that, "of all forms of communications, it is broadcasting that has received the most limited First Amendment protection." 438 U.S. at 748. But the principal reason for this limited protection – the essential allocation of scarce spectrum by the Government – does not apply to cable television: "[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply in the context of cable regulation," *Turner I*, 512 U.S. at 637; and "application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation." *Id.* at 639. Thus, to the extent that *Pacifica* applied a "more relaxed standard of scrutiny" to broadcast indecency on *that* basis, no similar departure from strict scrutiny is warranted in reviewing the content-based regulation of cable programming at issue in this case.

The Court in *Pacifica* also pointed to several unique characteristics of broadcasting that justified the FCC's indecency regulations – in particular, the "uniquely pervasive presence" of the broadcast media, 438 U.S. at 748, and the fact that broadcasting is "uniquely accessible to children." *Id.* at 749. But these unique characteristics were relevant precisely insofar as they made the regulations at issue in that case the least restrictive means of achieving the Government's interests. The pervasive availability of over-the-air broadcasting justified a prohibition on indecent speech prior to late evening hours because it meant that there was no less restrictive way for parents to prevent such speech from intruding by surprise into the privacy of their homes (or, in that case, their cars). Where a technology used by *other* media permits *other* means of preventing such intrusions, prohibitions on indecent speech have not survived First Amendment scrutiny.

For example, although telephones are certainly ubiquitous in the nation's households, and computers are rapidly becoming a household utility, the Court rejected restrictions on indecent commercial telephone and Internet communications precisely because, in contrast to the context of *Pacifica*, it was possible to craft less restrictive ways to prevent the unexpected exposure of children to such communications. In *Sable*, the Court noted, first, that

> [p]lacing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.

492 U.S. at 128. The Court also found that "credit card, access code and scrambling rules" would be "a 'feasible and effective' way to serve the Government's compelling interest in protecting children." *Id.*

And in *Reno*, the Court first noted that, as in the case of dial-a-porn – and unlike the broadcast material at issue in *Pacifica* – indecency on the Internet was relatively unlikely to catch viewers by surprise:

> The District Court specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.' " 929 F. Supp., at 844 (finding 88). It also found that "[a]lmost all sexually explicit images are preceded by warnings as to the content," and cited testimony that "'odds are slim' that a user would come across a sexually explicit sight by accident." Ibid.

117 S. Ct. at 2343. Second, the Court agreed with the district court that "[d]espite its limitations, currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children will soon be widely available." (*quoting* district court) (emphasis added by this Court). In these circumstances, the Court held that the ban was unconstitutional, even though there was no way to protect every child in all circumstances from viewing indecent material on the Internet.

Wholly apart from the absence of any "spectrum scarcity" rationale for content-based regulation of cable, unique characteristics of cable television make it possible to prevent the unwanted and unexpected exposure of children to inappropriate material through means not available for broadcast transmissions. Most significantly, cable operators can, at a subscriber's request, block a particular channel from "intruding" into that subscriber's home. For this reason, it has long been established that the Government may not, on the basis of *Pacifica*, prohibit or restrict cable operators from providing sexually-oriented, non-obscene programming to subscribers who choose to purchase it. *See Cruz v. Ferre*,

755 F.2d 1415 (11th Cir. 1985); *Community Television, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

In the first instance, households can decide whether or not to subscribe to cable service at all – and a significant number still decide not to subscribe. While 97% of the nation's households have television sets and, therefore, have unrestricted access (whether wanted or unwanted) to all local broadcast programming, fewer than 70% subscribe to cable.[1]

Second, while households that subscribe to cable are required by law to purchase the "basic" tier that includes the local broadcast channels carried on the system,[2] they may choose whether or not to purchase any other tiers or à la carte or pay-per-view channels. Cable program networks are more likely than broadcast stations to limit their service to a particular type or category of programming (*e.g.*, news, sports, music videos, children's programming, adult-oriented programming, etc.), so subscribers can readily identify any channels likely to carry programming that they may find offensive. If they do not choose to purchase a service, the cable operator will use some method of blocking access to it. *See Cruz v. Ferre*, *supra*, 755 F.2d at 1420.

Third, if a household wants to purchase a tier of services but does not want to receive a particular channel on that tier, there are devices available to block reception of that channel, *see id.* – and cable operators are required by law to sell or lease such devices upon request by a subscriber. 47 U.S.C. § 544(d)(2).

Fourth, if a household has chosen *not* to purchase a particular tier or à la carte or pay-per-view channel but the cable operator's method of preventing access does not fully block the video or audio, there are devices available for fully blocking such channels – and cable operators are required by

[1] NCTA Cable Television Developments, Summer 1999, p. 1.

[2] *See* 47 U.S.C. § 543(b)(7).

law, in such circumstances, to provide such devices *at no charge*. 47 U.S.C. § 560 (also referred to as Section 504 of the Communications Decency Act of 1996).

Because of the availability of these blocking devices, cable programming is not as inherently pervasive as broadcast programming. And it is possible to prevent the unexpected intrusion of unwanted programming through means less restrictive than the time-channeling requirements that were imposed on broadcasters in *Pacifica*. In assessing whether a particular restriction of sexually-oriented content on cable is permissible under the First Amendment, the question is not whether such restrictions survive the more relaxed standard of scrutiny urged by the Government. It is whether, under the standards of strict scrutiny that the Court generally applies to non-obscene content, there is a less restrictive way to advance the Government's compelling interests. In this case, as the court below held, it *is* possible to prevent the intrusion of unwanted indecent programming through means substantially less restrictive than the requirements imposed by Section 505 of the Communications Decency Act of 1996, 47 U.S.C. § 561.

II. SECTION 505 IS NOT NARROWLY TAILORED TO ADVANCE A COMPELLING GOVERNMENT INTEREST.

Section 505 requires cable operators who carry channels primarily dedicated to sexually-oriented programming to fully scramble those channels so that neither the audio nor the video is receivable in a comprehensible manner by subscribers who choose not to purchase such services. Alternatively, operators may carry such channels only during hours when they are unlikely to be viewed by a significant number of children – which the FCC has determined to be the hours between 10 p.m. and 6 a.m.

No one disputes that this content-based regulation restricts protected speech. To the extent that full scrambling is not a readily available option for a significant number of cable operators, this content-based restriction clearly restricts the

protected speech of program networks primarily dedicated to sexually-oriented programming. And it restricts the protected speech of cable operators who would choose to provide such programming to subscribers before 10 p.m., but for whom system-wide implementation of full scrambling is not economically viable.

The court below held that any compelling interests of the Government that might be furthered by Section 505 can be advanced as well -- and in a less restrictive manner -- by the requirements of Section *504*, provided that cable subscribers have adequate notice that sexually-oriented channels are being carried in partially scrambled form on their system and that blocking devices are available at no charge pursuant to Section 504:

> [W]ith adequate notice of the issue of signal bleed, parents can decide for themselves whether it is a problem. Thus to any parent for whom signal bleed is a concern, § 504, along with "adequate notice," is an effective solution. In reality, § 504 would appear to be as effective as § 505 for those concerned about signal bleed, while clearly less restrictive of First Amendment rights.

J.S. App. 37a-38a.

The Government, in addition to maintaining that the court applied too stringent a standard of review, contends that Section 504 is *less effective* than Section 505 and that, in any event, Section 504 is *no less restrictive* than Section 505. Neither argument holds water.

A. Section 504 Is Fully Effective in Advancing the Interests Advanced by Section 505.

The Government does not strenuously argue that Section 504 (with adequate notice) is less effective than Section 505 in achieving two of the interests asserted by the Government and identified as "compelling" by the court below -- the

interests "in supporting parental claims of authority in their own household -- the need to protect parents' right to inculcate morals and beliefs [i]n their children" and "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."[3] But the Government contends that Section 504 would not serve a third interest, namely "society's independent interest in protecting minors from exposure to indecent, sexually explicit materials."[4]

Thus, the Government maintains that "[t]here would certainly be parents -- perhaps a large number of parents -- who out of inertia, indifference, or distraction, simply would take no action to block signal bleed, *even if fully informed of the problem and even if offered a relatively easy solution.*" In its view, the Government has a compelling interest in protecting children from partially scrambled programming that "society" deems harmful and offensive, even where their fully informed parents see no need to take an easy step to block such programming from their homes. In addition, the Government is worried about "children who would view signal bleed at the homes of friends whose parents, due to the

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[3] Although the Government thinks it "highly unlikely that the district court was correct in its apparent belief that its enhanced version of Section 504 would be sufficient to inform all parents of the problem of signal bleed and to permit them to eliminate it easily and effectively," the Government does not further argue the point. In any event, what matters is not whether the particular notice requirements proposed by the court would be sufficient to inform parents that sexually-oriented programming is being carried on the system, that the audio and/or video may not be fully scrambled, and that full blocking devices will be provided at no charge on request. What matters is that *some* form of notice surely *would* be reasonably sufficient to make subscribers aware of the problem and of the available remedy -- and requiring the provision of such notice would be a much less restrictive way to enable parents to ensure that sexually-oriented programming and any other programming that they may find offensive and harmful to their children is fully blocked from intruding into their homes.

[4] Government Brief at 38.

same factors, do not act under an enhanced Section 504 to block signal bleed."[5]

Whether the Government's paternalistic interest in substituting its judgment for the judgment of a child's fully informed parents provides a legitimate and compelling basis for content-based regulation is dubious at best. *See, e.g., Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. at 2416 (Kennedy, J., concurring in part and dissenting in part) ("*So long as society gives proper respect to parental choices*, it may, under an appropriate standard, intervene to spare children exposure to material not suitable for minors.") (emphasis added). Certainly, the scenarios suggested by the Government are a far cry from what was at issue in *Pacifica*, where parents who had a strong desire to prevent their children from being exposed to certain sexually-oriented content had no available way of blocking such content from the radio dials in their cars.

But the extent to which the Government has a compelling interest to protect children from speech to which their parents are indifferent need not be resolved in this case – because Section 505 itself does not appear to be aimed at, or at least cannot be justified by, that interest. Section 505 requires full scrambling, or time channeling, to ensure that children are not exposed to sexually-oriented channels, even in partially scrambled form, that their parents have not chosen to purchase. But Congress took no steps to prevent children from seeing or hearing such channels, wholly unscrambled, in households that have purchased them. If Congress, in enacting Section 505, had been concerned with protecting children from the informed judgments of their parents with respect to exposure to sexually-oriented channels – or from seeing or hearing such channels in the homes of friends whose parents have purchased the channels – it would have banned all such channels from daytime hours.

[5] *Id.* at 33.

Put another way, the Government cannot claim that a statutory restriction on speech is narrowly tailored to serve a particular compelling interest if the statute, in other respects, seems unconcerned with that interest. As Justice Kennedy has noted, "[p]artial service of a compelling interest is not narrow tailoring." *Denver Area Educational Telecommunications Consortium v. FCC, supra*, 116 S. Ct. at 2416 (Kennedy, J., concurring in part and dissenting in part) (*citing FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 396 (1984); *The Florida Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983)). The Government does not explain why full scrambling is necessary to serve a compelling interest in preventing children from seeing and hearing partially scrambled sexually-oriented programming that their parents have chosen not to buy, but no steps are necessary to prevent children from seeing and hearing fully unscrambled sexually-oriented programming that their parents or friends' parents have chosen to purchase – unless the only compelling interest at stake is the parents' interest in preventing the unwanted intrusion, via "signal bleed," of sexually-oriented programming into their homes.

Section 504, as the Government essentially concedes, effectively solves that problem, so long as parents can be expected to be aware of the problem and the availability of a free remedy. It may be that Congress enacted Section 505 in addition to Section 504 because it was concerned that parents could *not* always be expected to be aware of the problem and the remedy available under Section 504. But to the extent that this was a legitimate concern, the court below correctly recognized that Congress could have effectively addressed it by adding reasonable notice requirements to the less restrictive provisions of Section 504.

B. Adequate Notice and Availability of Free Blocking Devices Provide a Content-Neutral, Less Restrictive Alternative to Section 505.

The Government also argues that Section 504, augmented by whatever requirements are necessary to ensure that households are aware of "signal bleed" and the availability of a free remedy, would not necessarily be a *less restrictive* alternative to Section 505. The Government contends that once subscribers are made aware of the problem, so many of them will ask for free blocking devices that cable operators will choose not to carry potentially offensive channels – just as most have chosen not to carry sexually-oriented channels during daytime hours rather than fully scramble such channels for all subscribers as would be required by Section 505.

Even if this were to occur, Section 504 with adequate notice requirements would still be less restrictive of First Amendment rights, insofar as Section 504 gives subscribers the right to obtain full blocking of any partially scrambled channels that *they* – not the Government – deem offensive or unsuitable for children. Unlike Section 505, it "gives proper respect to parental choices." *See* discussion at p. 14, *infra.*

In any event, the notion that requiring cable operators to take reasonable steps to ensure that subscribers are aware of the problem of – and available remedies for – signal bleed *might* have the same (or even greater) restrictive effects on the carriage of sexually-oriented channels as Section 505 is purely speculative. It is based on two unsupported and less than obvious assumptions – first, that "[a] significant increase in the number of subscribers seeking lockboxes would inescapably follow if a truly effective notice requirement were added to Section 504;"[6] and, second, that "[i]f a genuinely effective system of notice and easily available blocking were instituted and proved to be as

[6] Government Brief at 37.

effective as the district court evidently anticipated, the number of subscribers requesting blocking could be expected to exceed the minimal number necessary to render carriage of the sexually explicit channels uneconomical."[7]

There is no evidence anywhere in the legislative or judicial record, much less in the Government's brief, indicating how many cable subscribers, if fully informed, would ask for full blocking devices. The Government simply assumes that a large number of subscribers would surely ask for blocking devices if only they were fully informed of the "signal bleed" problem. But it is quite plausible that many responsible parents, when alerted to the problem of signal bleed, will feel confident of their own ability to supervise and determine what their children do and do not watch, without the need for a blocking device. This is especially likely in light of the commitment of cable operators, pursuant to a resolution adopted by NCTA's Board of Directors almost five years ago, to "use reasonable efforts to position primarily sexually-oriented premium channels on channels well away from program networks which carry specific program blocks targeted at children." NCTA Resolution on Sexually-Oriented (Adult) Programming Services, adopted Feb. 9, 1995.[8]

[7] *Id.* at 38.

[8] The resolution also committed operators voluntarily to provide full blocking of any partially scrambled signal at no charge, upon any customer's request, even before Section 504 turned such a voluntary commitment into a legal obligation. In addition, the resolution embodied a commitment to accompany all print and video promotion of sexually-oriented channels with an advisory that the programming is targeted to an adult audience and that parental control options are available. It also reflects the industry's established practice of informing franchising officials, and other appropriate community leaders, that a primarily sexually-oriented premium channel is being carried and of making such officials and leaders aware of the steps being taken to enable only those expressly wishing to view such programming to do so. All of these steps reduce the likelihood of unexpected exposure of children to sexually-oriented channels, even apart from the requirements of Section 504.

Moreover, the Government has no basis for assuming that, if the number of subscribers who request blocking devices were to increase significantly, cable operators would simply drop offensive channels rather than find a more economical way to distribute such devices. The Government points to testimony in the record, cited by the court below, purportedly indicating that the cost of distributing lockboxes or traps to 3-6% of a system's customers would equal all the revenue the operator derived from carrying sexually explicit channels Government Brief at 36. But that testimony was clearly based on the assumption that operators would have to incur the costs of *installing* each trap, in addition to the costs of the traps themselves.

Thus, the court noted that "[t]hese calculations are premised on a cost of $37 per blocking mechanism plus installation." Appendix at 22a. But the cost of the trap alone is a small fraction of this amount – estimated by the Government's own witness as "about $4 to $10." Declaration of Charles Jackson, Plaintiff Ex. 257. The rest is attributable to the cost of sending a technician to the home to install the device.

Playboy argued below that "negative traps can be mailed to subscribers thereby obviating the need for installation costs and lowering the cost per mechanism to the cost of the product plus postage." *Id.* The court suggested that this would not be a viable alternative because "[a]ll experts agree that negative traps are installed on the cable pole or the cable itself outside the home, requiring installation." Most negative traps *are* installed by technicians outside subscribers' homes. But this is because most negative traps in use today are intended to prevent subscribers from receiving channels that they might like to watch but have not purchased. If the traps were installed in the home, subscribers could easily remove them and watch all the premium channels on their systems at no charge.

But this concern about signals being stolen in the home does not apply to subscribers who *ask* for a blocking device because they do *not* want particular channels to be viewable

in their homes. Cable operators need not be concerned that subscribers who request traps pursuant to Section 504 will remove the traps and watch channels that they have not purchased. Therefore, they could mail the devices to subscribers, or have subscribers pick them up at the cable system's offices. This would reduce the per-subscriber cost of complying with Section 504 to only about a small fraction of what the court below assumed – so that many more subscribers could request blocking before the costs exceeded the revenues from carrying a particular channel.

In sum, the district court has not, in this case, dreamed up a purely hypothetical more narrowly tailored alternative to Section 505. The court looked to Congress and found it had already enacted such an alternative in Section 504 (and could have adopted more formal notice requirement, which it itself applied). It found that as long as steps are taken to ensure that subscribers are informed that sexually-oriented channels are being carried on their systems and that full blocking is available on request pursuant to Section 504, any legitimate, compelling interests can effectively be advanced in a way that is less restrictive of protected speech.

That is the established test for reviewing content-based statutes such as Section 505, and the three-judge court correctly applied it. The Government asks for more "deference" and "flexibility" to regulate the content at issue in this case because it is unable to show that these findings or the application of the law are wrong. In fact, the court properly applied the standards of strict scrutiny to the circumstances of this case, and its decision should be affirmed.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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