No. 98-1682

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, et al.,
Appellants

v.

PLAYBOY ENTERTAINMENT GROUP, INC.,
Appellee

BRIEF OF THE MEDIA INSTITUTE, AS AMICUS CURIAE IN SUPPORT OF APPELLEE

Filed September 24, 1999

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BRIEF OF THE MEDIA INSTITUTE, AS AMICUS CURIAE IN SUPPORT OF APPELLEE

STATEMENT OF INTEREST[1]

The Media Institute (the "Institute") is an independent, nonprofit research foundation in Washington, D.C., specializing in issues of communications policy. The Institute advocates and promotes three principles: First Amendment freedoms for both new and traditional media; the maintenance and development of a dynamic communications industry based on competition rather than regulation; and excellence in journalism. The Institute has participated in regulatory proceedings and in select cases before federal courts of appeal and this Court. The Institute also conducts

[1] Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37. No party wrote any part of this brief or contributed to its financial support.

research projects and sponsors publications relating to the First Amendment and other issues of consequence to the communications media.

Amicus's interest in this case is based on our deep and abiding commitment to the values of free speech and free press that impels us to support full protection under the First Amendment for all print and electronic media. We believe that, in an age of technological convergence of the media, it is vital that inappropriate, unnecessary and out-of-date distinctions of constitutional significance no longer be drawn among the media. Rather, all media must enjoy equal protection from governmental content-based restrictions on freedom of expression, both to honor the majestic guarantee of the First Amendment and to enable the media to compete with one another on a level playing field in the twenty-first century.

To achieve these fundamental goals, *Amicus* believes it essential for the Court to strictly scrutinize all content-based restrictions on freedom of the press. In doing so, the Court, we submit, should hold the Government to an appropriately high burden of proof as to the compelling interests it asserts, the necessity and effectiveness of its regulatory measures, and the lack of a less speech-restrictive approach.

SUMMARY OF ARGUMENT

We are in a new era of technologically advanced electronic media that are rapidly becoming fully digital in format. This transformation of the electronic media allows easily available and highly effective user-based controls over virtually all content received in the home. There is, therefore, no persuasive reason for the Court to refrain from applying strict scrutiny to any content-based restrictions the Government seeks to impose on such media. Strict scrutiny is necessary to give continuing meaning to the fundamental precept that the First Amendment does not allow the Government to reduce the free-speech rights of adults to material fit only for children. *See Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 759 (1996); *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 128 (1989); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 73 (1983); *Butler v.*

Michigan, 352 U.S. 380, 383 (1957). Strict scrutiny for electronic media is equally necessary to foster full and equal competition among all media to serve the vital ends of informing, educating and entertaining the public.[2]

The Court might well resolve this case in appellee's favor on the narrow grounds adopted by the district court. See *Greater New Orleans Broad. Ass'n, Inc. v. United States*, ___ U.S. ___, ___, 119 S. Ct. 1923, 1930 (1999). Section 505 is impermissibly vague and very far from either the least speech-restrictive approach or even a narrowly tailored approach. But in affirming the judgment below, it is vital, we submit, for the Court to reaffirm the proposition that content-based restrictions on protected speech call for strict scrutiny. The Court must require the Government to demonstrate, not just assert, a truly compelling state interest that is addressed in what is plainly the least speech-restrictive manner.

The Court, in our view, should not follow the less protective and ambiguous approach of the plurality in *Denver Area* nor apply *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). *Pacifica's* sparse rationale does not withstand modern analysis. Moreover, *Pacifica* is badly out-of-date technologically and should no longer be followed. None of the factors here – the electronic media of (cable) television, the indecent or sexually oriented nature of the programming, or the need to protect the psychological well-being of children - provides any adequate justification for the Court to abandon strict scrutiny.

We recognize that the Government's asserted interest in protecting children is undoubtedly an important and compelling one. But the Court should go well beyond this generality and hold the Government to an appropriately high burden of proof of harm, proof of efficacy of its chosen remedial measures, and proof of no less speech restrictive alternatives. This is especially appropriate in the increasing number of cases such as this, involving politically

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[2] As this Court noted in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857 (1997), the Telecommunications Act of 1996, of which Section 505 here at issue was a part, was "an unusually important legislative enactment" whose "primary purpose was to reduce regulation and encourage 'the rapid deployment of new telecommunications technologies.'"

volatile legislation restricting free speech in the name of children, where Congress acts essentially without deliberation, and, in this particular case, where the potential for harm from signal bleed is truly minimal. Without such strict scrutiny, the asserted interests of children will be simply an unwarranted trump upon the vital First Amendment rights of all.

ARGUMENT

I. THE COURT SHOULD APPLY STRICT SCRUTINY TO SECTION 505.

A. Section 505 Unquestionably Is Content-Based Regulation Of Protected Speech Demanding Strict Scrutiny.

Section 505 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 136, regulates "signal bleed," the partial, scrambled audio and video reception of sexually explicit adult cable television programming in the homes of non-subscribers to that programming. It applies to vaguely defined "sexually explicit adult programming or other programming that is indecent," but only to such programming on a cable channel that is "primarily dedicated to sexually-oriented programming." *Id.* Thus Section 505 apparently, and irrationally, applies to Playboy Television but not, for example, to Home Box Office (HBO) even though both channels may show some of the same programming, *see Playboy Entertainment Group, Inc. v. United States*, 30 F. Supp. 2d 702, 707 (D. Del. 1998), and even though some programming on HBO - its provocative and highly popular series "Real Sex," for example - may be as sexually explicit as anything on Playboy.[3]

Section 505 requires a cable operator to fully block both the audio and video portions of such a channel for all non-subscribers to that channel so that no "understandable" portion bleeds through. As such total blocking currently is impractical, the statute and implementing regulations of the Federal Communications Commission ("FCC") allow a cable operator, instead, to time channel the affected programming to "safe harbor hours" when a

[3] *See* R. Thomas Umstead, *How Hot Is Hot?*, CABLEVISION, July 30, 1999, at 18.

significant number of children are not likely to view it. The effect of Section 505, therefore, is to limit Playboy Television to the "broadcasting Siberia," *Becker v. FCC*, 95 F.3d 75, 84 (D.C. Cir. 1996), of late night hours (here between 10:00 p.m. and 6:00 a.m.). *See Playboy Entertainment*, 30 F. Supp. 2d at 711. Thus Section 505 severely restricts Playboy's entire signal - all its programming, even that for subscribers - not just the scrambled signals in the homes of non-subscribers. As the district court found, the time-channeling that Section 505 requires as a practical matter "amounts to the removal of all sexually explicit programming at issue during two thirds of the broadcast day from all households on a cable system." *Id.* at 718.

There can be no question but that Section 505 is content-based regulation designed to suppress free speech that is disfavored by some but nonetheless fully protected under the First Amendment. The district court correctly ruled that Section 505 "is a content-based restriction on speech," *id.* at 714, that "restricts a significant amount of protected speech." *Id.* at 718. As such Section 505 must survive strict judicial scrutiny. The Government has the heavy burden of demonstrating, not just asserting, that Section 505 actually serves a compelling governmental interest that cannot adequately be met through less speech restrictive means. *See Sable Communications*, 492 U.S. at 126. This the Government has failed to do.

Playboy Television's programming, even if sexually explicit and even if "indecent" (whatever that overused and ill-defined term might mean in this context) is nonetheless fully protected expression. As this Court has recently reaffirmed, "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Reno v. American Civil Liberties Union*, 521 U.S. at 874, quoting *Sable Communications*, 492 U.S. at 126. The district court correctly observed that Playboy's programming cannot be considered marginal speech enjoying only diminished constitutional protection. 30 F. Supp. 2d at 714; *see also Denver*

Area, 518 U.S. at 804-05 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).[4]

Like the provisions at issue in *Denver Area*, Section 505 is a "content-based discrimination[] in the strong sense of suppressing a certain form of expression that the Government dislikes or otherwise wishes to exclude on account of its effects, and there is no justification for anything but strict scrutiny here." *Denver Area*, 518 U.S. at 802 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). In its modern era this Court has always applied the "most exacting scrutiny" to such regulations of speech. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). *See also Reno*, 521 U.S. at 868 (applying "the most stringent review"); *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) ("[c]ontent-based regulations are presumptively invalid"). There is no reason to depart from such analysis here.

B. Strict Scrutiny Is Particularly Appropriate And Necessary For Statutes Such As Section 505 Enacted Without Congressional Hearings, Legislative Findings Or Meaningful Debate.

The strictest judicial scrutiny of content-based statutes restricting free speech is especially appropriate and necessary when, as here, the political process arguably fails to protect against politically popular but ill-considered measures.

The district court tellingly recounted the legislative history of Section 505. The provision was offered by two Senators as a floor amendment to the 1996 Telecommunications Act after hearings and debate on the Act were concluded. There was no debate on the amendment and no hearings were held. Ninety-one Senators voted in favor and not one opposed the measure. *See* 30 F. Supp. 2d at 709-10. After all, what Senator wants to be portrayed as opposing an amendment, however unnecessary or constitutionally dubious, that its sponsors claim is necessary to protect children from sexually explicit television programming? If the choice is

[4] That portion of Justice Stevens's opinion in *Pacifica* where he suggested a lower level of constitutional protection for some patently offensive sexual language was joined by only two other Justices. *Id.* at 742-49. *Cf. id.* at 761-62 (Powell, Blackmun, J.J., concurring in part and concurring in the judgment).

presented as one between Playboy and children, Playboy (and the Constitution) are overwhelmingly likely to lose, even though there is no real danger to, or benefit for, children.

Section 505 is hardly alone in this regard. At least at the congressional level, children are becoming a universal First Amendment solvent immediately dissolving vital constitutional constraints on government interference with freedom of expression. The Internet provisions at issue in *Reno* were Senate floor amendments to the Communications Decency Act of 1996 (the "CDA," part of the 1996 Telecommunications Act) adopted without hearings or meaningful debate. *Reno*, 521 U.S. at 858 n.24, 875-76 n.41. The 1992 Cable Act indecency provisions at stake in *Denver Area* were "adopted in a series of floor amendments, without benefit of committee hearings or even substantial floor debate." *Alliance for Community Media v. FCC*, 56 F.3d 105, 141 (D.C. Cir. 1995) (Wald, J., dissenting). And in *Sable*, the Court noted that the dial-a-porn bill was introduced on the floor, without a committee report, supported only by conclusory statements and without considered judgment by members of Congress as to the necessity for its restrictions. 492 U.S. at 129-30. As the Court concluded in *Sable*, such scanty legislative records are due little deference from courts when First Amendment rights are at stake. *Id.*

Only the continued, most exacting scrutiny by this Court of measures such as Section 505 can keep the asserted but unproven interests of children from becoming a blank check on the First Amendment. As Justice Souter stated: Strict judicial scrutiny "keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." *Denver Area*, 518 U.S. at 774 (Souter, J., concurring). And Justice Kennedy reiterated this crucial observation by noting that "strict scrutiny at least confines the balancing process in a manner protective of speech" and against "the apparent exigencies of the day." *Id.* at 784-85 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

"[T]he mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry

into its validity." *Reno*, 521 U.S. at 875. *Amicus* of course realizes that Congress is not constitutionally required to make particularized findings in support of its legislation. But this Court has never simply deferred to legislative judgments in First Amendment cases. *Id.* at 875-76 (citing *Denver Area*, 518 U.S. at 741-42). *See also Turner Broad. Sys.*, 512 U.S. at 666; *Sable Communications*, 492 U.S. at 129; *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973). This Court should scrutinize with special care provisions such as Section 505, the products of superficial and politically charged legislative processes that trench so heavily on First Amendment rights. In short, strict scrutiny is the baseline rule for review of Section 505, *see Denver Area*, 518 U.S. at 800 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part), and there is no reason for the Court to depart from this approach here.

C. *Denver Area* Provides No Support For Any Standard Of Review Other Than Strict Scrutiny.

Amicus, candidly, is concerned that the Court not adopt what we respectfully urge is the misguided approach of the plurality in *Denver Area*. We support the result in *Denver Area* striking down the two mandatory cable provisions at issue there, based on the "close" or "heightened" scrutiny the plurality applied that might be termed "quasi" strict scrutiny. But we particularly see the plurality's apparent reliance on *Pacifica* as misplaced. Compare *Denver Area*, 518 U.S. at 744, 747-48 (plurality opinion) with *id.* at 755 (opinion of the Court). Moreover, we believe that the plurality's ambivalence in not making explicit the strict scrutiny that seems to be implicit in its opinion allows the Government to exploit the resulting confusion in its overreaching restrictions on free speech.

The plurality in *Denver Area* refers to "very serious practical problems," "extraordinary need," "the most serious problems," "close judicial scrutiny," "an extremely important problem," "unnecessarily great restriction on speech," "sufficiently tailored response," and the like. 518 U.S. at 740-43. But such language lacks the comparatively well-defined and well-developed

touchstones of true strict scrutiny, namely demonstration of a compelling governmental interest and employment of the least restrictive means of regulation. The issue is not, as the plurality seems to suggest, one of choosing among competing analogies – print, broadcasting, common carrier – for the best way to categorize cable for regulatory purposes. *See id.* at 741-42. Rather, *Amicus* urges that content-based regulation such as Section 505 demands strict judicial scrutiny **regardless** of the media being regulated. Especially as the electronic media converge technologically, there are no significant differences among them that would justify such different constitutional treatment. *See id.* at 776-77 (Souter, J., concurring).

The difficulty that the *Denver Area* plurality opinion engenders is that it seems to allow, at least in some cases, substituting *ad hoc* balancing for strict scrutiny of content-based restrictions on free speech. *See Denver Area* at 818 (Thomas, J., concurring in the judgment in part and dissenting in part). When this happens, it is all too easy for freedom of expression to be balanced away, particularly if the well-being of children is ostensibly at stake. As Justice Kennedy said of the plurality opinion, it is "adrift ... it applies no standard, and by this omission loses sight of existing First Amendment doctrine." *Id.* at 780-81 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). The crucial difference between the two approaches is perfectly captured by, on the one hand, Justice Souter's joining the plurality's exercise in balancing to adhere, in a period of media flux and consequent judicial uncertainty, to the maxim "[f]irst, do no harm," *id.* at 778 (Souter, J., concurring), and, on the other hand, Justice Kennedy's response that to do no harm the Court should apply strict scrutiny and "begin by allowing speech, not suppressing it." *Id.* at 787 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Communications technology is changing so rapidly, and the competitive structure of the media industry is so dynamic, that it is easy to appreciate Justice Souter's concern, three years ago in *Denver Area*, that courts "know too little to risk the finality of precision" when reviewing government media regulation. 518 U.S. at 778 (Souter, J., concurring). Nonetheless, as discussed in more

detail below (*see* Part I.D.4, *infra*), we do now know a good deal about the increased technical feasibility of parental control over children's access to undesirable material in electronic media. Indeed, we know enough that, in reviewing content-based regulations of speech such as the indecency provisions of Section 505 enacted in the name of protecting children, courts should have no hesitancy in holding Government to its high burden of proof of each of the elements required under strict scrutiny. This is the approach the Court has taken as to dial-a-porn in *Sable* and as to the Internet in *Reno*, and it is the approach the Court now should take as to the rest of the electronic media.[5]

D. *Pacifica* Is No Basis For Abandoning Strict Scrutiny Here.

Amicus believes that, as the dissent in *Pacifica* put it, the majority opinion there "unstitch[ed] the warp and woof of First Amendment law." 438 U.S. at 775 (Brennan, Marshall, J.J., dissenting). *See Action for Children's Television v. FCC*, 58 F.3d 654, 676 (D.C. Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1042 (1996) (Edwards, C.J., dissenting) (*Pacifica* now must be considered a "flawed decision ... [t]he critical underpinnings of the decision are no longer present."). Whatever the merits of the

[5] Lack of strict scrutiny easily allows glaring inconsistencies in the lower courts. In *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) *(en banc), cert. denied*, 516 U.S. 1042 (1996) ("*ACT*"), the court upheld relegating broadcast "indecency" to a mandatory, late-night safe harbor based on a vague definition of such indecency and without any evidence of harm to children. *Id.* at 671-72 (Edwards, C.J., dissenting) (noting that there is "not one iota of evidence in the record" as to the harmful effects on children from indecent broadcast programming). Yet, just a year later in *Becker v. FCC*, 95 F.3d 75 (D.C. Cir. 1996), the same court (in an opinion written by the author of the *ACT* majority) would not allow a broadcaster to channel to late-night hours campaign advertisements including graphic pictures of aborted fetuses that could be harmful to children. Here the court realized such content-based judgments are entirely subjective and based on "slippery standards," 95 F.3d at 81, and that such channeling would induce self-censorship and relegate affected programming to a "broadcasting Siberia" to the detriment of adult audiences. *Id.* at 83-84.

The Supreme Court's clear application of strict scrutiny to such issues should preclude such irreconcilable results that are particularly intolerable in the context of the First Amendment.

Pacifica decision when it was rendered in 1978, *Amicus* urges that it carries little weight today.

Pacifica was decided by a bare five-Justice majority with sparsely developed rationales and over sharp dissents.[6] *Pacifica* also was an exceedingly narrow decision that rightfully has had little material impact. Most importantly for present purposes, technological advances allowing much greater parental control over what children can see on television have rendered *Pacifica* woefully out of date. The *Denver Area* plurality's ambivalent treatment of *Pacifica*, compare 518 U.S. at 744-45, 747-48 (plurality opinion) with *id.* at 755 (opinion of the Court), now creates a substantial danger to First Amendment interests. Such an opinion inappropriately seems to endorse *Pacifica* for a general proposition of broad scope, allowing extensive restriction of protected free speech, well beyond any reasonable import of *Pacifica* itself. *Amicus* therefore urges the Court to clarify the point that *Pacifica* no longer can be relied on to sustain restrictions on indecency in electronic media and that, instead, regulations dealing with this issue must pass strict scrutiny.

1. The Rationales The Court Relied On In *Pacifica* Do Not Withstand Current Analysis.

Pacifica was a radio case, but the scarcity rationale for sustaining regulation of broadcasting that otherwise would violate the First Amendment was irrelevant to the indecency issue there. The Court therefore advanced two new rationales - the unique pervasiveness and intrusiveness of broadcasting and its unique accessability to children - sketched in one paragraph each with little explanation or analysis. *Pacifica*, 438 U.S. at 748-50. These factors, however, are no longer unique to broadcasting; they apply to all electronic media including cable, satellite and the Internet. Moreover, these somewhat amorphous factors by themselves have little distinguishing or explanatory power. A blaring boom box at a beach, for example, might be both pervasive and invasive

[6] One member of the FCC that decided *Pacifica* has confessed his "present embarrassment" at his "complicity" in that matter. Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 Duke L.J. 899, 948 n.182 (1998).

regardless of the station it is tuned to, but this is no basis for government content control. Television in the home may contain undesirable images some parents would prefer to keep from their children, but television viewing (whatever the source of the signal) is an open activity subject to direct parental control[7] or, now, to indirect control through technology (*see* Part I.D.4, *infra*).

The majority in *Pacifica* also stressed the intrusion of a media signal into the privacy of the home where an individual's right to be left alone is primary. 438 U.S. at 748. But the Court now should recognize, as the majority in *Pacifica* did not, that the interest in privacy and in controlling media content in one's home cuts both ways. Those interests for many may well include, first and foremost, the freedom from government interference with access to media content of one's choice in the privacy of one's home. It is in the home, after all, where parents' interest in controlling the raising of their children is greatest and entitled to the greatest freedom from interference from the state. *Hutchins v. District of Columbia*, ___ F.3d ___, 1999 WL 397429, at *7 (D.C. Cir. 1999) (*en banc*). And, while encountering unwanted and indecent or offensive material in the home may heighten the affront for some, such affront may be considerably less for many others.

That is, the momentary offense from something on a television screen that then can be immediately avoided may be far less for many people when occurring in the privacy of their homes as opposed to exposure to similar material in the presence of others, and in social settings where avoiding further exposure may be more difficult. Moreover, many adults who may be embarrassed and inhibited by having to access sexually oriented material openly - standing in line at an adult theater or renting an adult tape at a video store - may welcome the easy, relatively anonymous availability of such material in the privacy of their homes.[8] Unlike

[7] One of the many ironies in *Pacifica* is that the only listener to complain about the broadcast of the George Carlin monologue heard it while driving his car in the company of his son and, rather than exercising parental control and turning the dial, chose to listen for an extended period. 438 U.S. at 729-30.

[8] Ronald Dworkin makes a similar point in his well-known essay, "Do We Have a Right to Pornography?" in Ronald Dworkin, A MATTER OF PRINCIPLE, 355-56 (1985).

the one provision upheld in *Denver Area*, there is nothing permissive about Section 505; it is mandatory and results in late-night channeling of the affected programming. The Government makes the choice for all viewers rather than allowing individuals to choose for themselves in the privacy of their homes as the First Amendment requires. And, as the district court found, this governmentally imposed choice deprives adults who want Playboy Television and similar programming available in the privacy of their homes of their right to access it there during two-thirds of the broadcast day when 30-50% of adult programming is viewed. 30 F. Supp. 2d at 718.

Pacifica's unwarranted emphasis on media invasion of the home is highlighted by the strangeness of the result from several of the Court's opinions. If the sole complainant in *Pacifica* and his 15-year old son had driven by Erznoznik's outdoor movie theater, *see Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), or stopped in front of Paul Cohen crossing the street wearing his emblazoned jacket, *see Cohen v. California*, 403 U.S. 15 (1971), they would have had to accommodate themselves to the momentary offense. Adjusting the car radio when confronted with the Carlin monologue, however, somehow is not an adequate remedy. And, in the home, where individual control is far greater and the discomfort for some considerably less, a broad governmental prohibition requires everyone to conform to official taste.

The *Pacifica* factors of pervasiveness, accessability by children, and intrusion into the home all apply equally well to the Internet. The Court nonetheless applied strict scrutiny in *Reno* in striking down indecency provisions of the CDA. The Court now should apply the same analysis to all electronic media and no longer rely on *Pacifica*.

2. *Pacifica* Never Adequately Defined The "Indecency" That Can Be Regulated Nor The Class Of "Children" Who Supposedly Need Protection.

An additional weakness with *Pacifica* is that the Court never defined the concept of broadcast "indecency" that it allowed the Government to regulate. Indeed, this Court has never specifically

addressed whether the FCC's broad, generic definition of indecency is unconstitutionally vague. *See Alliance for Community Media*, 56 F.3d at 130 n.2 (Wald, J., dissenting) (citing *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988)). In *Reno*, however, the Court recognized the substantial danger to First Amendment interests from restrictions on "indecent" or "patently offensive" speech in electronic media that leave everyone guessing as to what such subjective terms might mean in practice. 512 U.S. at 877-78.[9] The chilling effect on free speech is "obvious." *Id.* at 871-72. And this problem is compounded by the lack of a clear, and strict, standard of review missing in the *Denver Area* plurality. As Justice Kennedy noted, the language of this combined approach "end[s] up being a legalistic cover for ad hoc balancing ... [that] will sow confusion ... [and produce an] unprotective outcome." *Denver Area,* 518 U.S. at 786-87 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

The majority in *Pacifica* also was unclear as to who are "children" that need governmental protection from "indecency." The district court here found that two-thirds of all households in the United States have no "children." 30 F. Supp. 2d at 718. Of the remaining one-third, the "children" undoubtedly range from infants to high school and college-age young adults. The Government cannot reasonably maintain that it can treat all these widely divergent individuals alike with respect to exposure to sexually related materials. *See Reno*, 521 U.S. at 878. *See* Part

[9] In its implementing regulations for Section 505, the FCC defined "indecent programming" as "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." Order and Notice of Proposed Rulemaking, *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 11 F.C.C.R. 5386, 5388, para. 9 (1996). This is essentially the same as the definition the Commission has adopted for regulating indecent broadcast programming, with "cable medium" replaced by "broadcast medium." But it is as meaningless to talk of community standards for nationwide media, see *Reno*, 521 U.S. at 877-78, as it is to try and qualify the definition medium by medium. In practice, as with Humpty Dumpty, such definitions mean whatever any Commission says they mean, and this is no way for the Government to operate under the First Amendment.

II.B.2 *infra*. Too facile reliance on *Pacifica*, however, allows the Government to avoid its appropriately difficult tasks of specifying exactly what speech it is restricting, with respect to exactly what audience, and exactly why. The strict scrutiny the Court should apply would require the Government to meet, if it can, the burdens the First Amendment requires before protected speech can be restricted.

3. With Its Many Deficiencies, *Pacifica* Had Little Legal Impact Before *Denver Area*, And The Court Should Not Now Resurrect This Troublesome And Out-Of-Date Decision.

Repeatedly in *Pacifica* itself the majority emphasized the narrowness of its decision confined to the very specific factual context presented there. 438 U.S. at 734-35, 738-39, 742, 744, 750. Immediately after the decision the FCC recognized that it had "no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast.... We intend strictly to observe the narrowness of the *Pacifica* holding." *WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 (1978) (mem. op. & ord.). *See also Pacifica Found.*, 95 F.C.C.2d 750, 759-61 (1983) (mem. op. & ord.). Thereafter, when citing *Pacifica* this Court took pains to stress its "emphatically narrow holding" in that case. *Sable Communications*, 492 U.S. at 127; *Reno*, 521 U.S. at 869-70. *See also Bolger*, 463 U.S. at 74. For many years *Pacifica* was taken to be about just a single radio program "as broadcast." 438 U.S. at 735, 742. The case was essentially *sui generis* dealing only with the "verbal shock treatment," *id.* at 757 (Powell, J., concurring), from the constant repetition of seven dirty words.[10]

[10] Another irony of *Pacifica* is that the repetition of offensive material that the Court there stressed is irrelevant for someone who takes momentary offense and turns off the program. Here, the relative constancy of sexually oriented programming on channels such as Playboy Television that Section 505 inartfully seeks to target is actually less reason to regulate such channels. As described below, such stations that are more likely to give offense to some people are easier to identify and then avoid or block through a variety of measures. See *Denver Area*, 518 U.S. at 833-34 (Thomas, J., concurring in the judgment in part and dissenting in part).

There is no reason for the Court now to extract some general principles from *Pacifica* and apply them broadly to newer forms of electronic media. This would be particularly inappropriate given the proliferation of new forms of electronic media allowing vastly increased control by users and viewers over the content they access. As the Court once noted in the context of broadcasting: "The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *Columbia Broad. Sys.*, 412 U.S. at 102. This is all the more true today of the entire electronic media industry. *Pacifica* is badly outmoded, and its dead hand should not be allowed to stifle freedom of expression for adults in a transformed, digital age of electronic communication.

4. *Pacifica* Is Technologically Out-of-Date And Should Not Be Followed.

In *Pacifica* the Court inappropriately dismissed a listener's ability to turn off the radio as a solution to the momentary offense from encountering undesirable material.[11] 438 U.S. at 748-49. Today, however, we have much greater viewer control over the signals that are received in the home, allowing consumers not just to turn off a signal but to screen and filter out in advance content that might be offensive or otherwise undesirable. The electronic age of communications, particularly as it rapidly is becoming digital, brings with it not only vastly increased power of consumers to access information of their choice but, similarly, the power to exclude that which they do not want. There is no reason to distinguish among cable, broadcast, satellite or the Internet in this regard, especially as they are converging technologically. In *Reno* the Court relied in part on user-based control of the technology to keep the Internet free of government restrictions. And not long ago the Court summarily affirmed a state court's

[11] The majority opinion analogized that it is no remedy for an assault to run away after the first blow, but this ignores the difference between speech and conduct and the constitutional protection for the former. In contrast, the remedy of avoiding further exposure to offensive speech was central to the Court's decisions in both *Erznozik*, 422 U.S. at 210-11, and *Cohen*, 403 U.S. at 21-22.

invalidation of cable indecency measures based on the degree of subscriber and parental control over cable television. *Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.), *aff'g Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). This approach of relying on user control that technology facilitates, rather than broad government fiat, should apply generally to electronic media.

As Playboy's brief undoubtedly will describe in more detail, there are a number of effective ways for parents or other adults to control the content of material they and their children are exposed to in their homes via the electronic media, particularly cable television at issue here. First and foremost, of course, parents can and should assure the well-being of their children by their presence and attention to their children and by the values they instill in their children. Parents have to prepare their children to deal with the world by themselves, and the Government should try to foster this most vital of parental roles, not supplant it. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). So, the only real issue concerns those circumstances when parents are unable to directly supervise their children. At these times parents effectively can use various technological means to facilitate raising their children as they individually see fit; there is no need for governmental mandate applying uniformly to all.

For the Internet, as the Court acknowledged in *Reno*, 521 U.S. at 876-77, parents can use ever more sophisticated and powerful software to filter the material their children can access. The V-chip and the quasi-voluntary ratings for broadcast programming provide the same sort of functionality for that media.[12] *See Denver Area*, 518 U.S. at 776-77 (Souter, J., concurring). Moreover, as the district court found, 30 F. Supp. 2d at 708, modern televisions and VCRs have lockout features whereby, using the remote control, parents can block all reception of an entire set of channels and keep their children from undoing this by maintaining custody of the remote control. This is similar to the programmable, complete block of "adult" channels that many hotel television systems now offer. In addition, for cable television the availability of lockboxes

[12] *Amicus* takes no position here on any constitutional issues that might arise from the V-chip system.

should dispose of any indecency issues. *See Denver Area*, 518 U.S. at 758-59. In particular, the content-neutral provision of Section 504 (47 U.S.C. § 560), requiring a cable operator, without charge, to fully block the audio and video programming on any channel a cable subscriber requests be so blocked, totally solves any problem of signal bleed. And this solution – a clear less restrictive alternative - operates at the appropriate, individually initiated level, not at the broad governmentally mandated level of Section 505. This approach thus reflects the soundest and most basic of First Amendment principles - that it is the speaker and the listener (or viewer), not the Government save in the most exigent circumstances, who should determine what messages are communicated, when and by what means.[13]

Aside from this modern, sophisticated technology there is another basic technology that perhaps has been lost in considerations of more exotic approaches. Any television or VCR easily could be equipped with a mechanical or electronic lock, controlled at the discretion of parents, that would prevent all use of the device except when the parents were willing to directly supervise their children's viewing. The technology clearly is available and economically feasible; indeed, it must be considerably easier and cheaper to implement than the V-chip. And, as with the V-chip circuitry, the FCC could mandate such locks on all receivers. But, unlike the ratings system the V-chip depends on, such locks *per se* raise no First Amendment issues at all. Such locks, like the other technological fixes described above, also would address the "latchkey kids" problem that worried the sponsors of Section 505. See 30 F. Supp. 2d at 709-10. There may be some mild inconvenience with such locks, but they could be

[13]The FCC has established a V-chip Task Force to ensure that system's effective implementation and is now widely disseminating information for parents on the various technologies available to them for control of electronic media content in their homes. See "Broadcast Television, Cable Television, Telephone & the Internet" on the FCC PARENTS' INFORMATION WEB PAGE at <www.fcc.gov/parents_information>. The FCC also has just enlisted Kermit the Frog to star in a public service announcement about the V-chip. See <www.fcc.gov/Speeches/Kennard/Statements/stwek956.html>. All this belies any Government claim that parents cannot be educated about their technological options and persuaded to use them if they wish.

made universally available at little cost to provide a complete solution without raising **any** constitutional issues. Such locks, alone, therefore have to be considered a less speech restrictive alternative precluding any more intrusive government regulation.

At a policy level, the basic locks serve another very salutary goal in fostering parental, not governmental, involvement and control. The Government should not be sanitizing television, eliminating what some deem offensive, so that parents and children can enjoy the latter's unsupervised access to an electronic babysitter. If parents do not wish to supervise their children, or employ one of the more sophisticated technologies to allow selective, unsupervised access, let them shut (and lock) the television. Perhaps if our children, who in their first eighteen years reportedly spend more time watching television than in school, begin to watch less and read more, we all may be far better off.

II. SECTION 505 CANNOT WITHSTAND EITHER STRICT SCRUTINY OR THE "HEIGHTENED" SCRUTINY OF THE *DENVER AREA* PLURALITY.

A. A Mere Generalized Interest In Protecting Children From Indecent Cable Programming Is Not Sufficient, By Itself, To Override The First Amendment Rights Of Adults.

Amicus certainly agrees that the Government has a "compelling interest" in protecting the physical and psychological well-being of children. *See Reno*, 521 U.S. at 869; *Denver Area*, 518 U.S. at 755. Indeed, it is impossible to challenge such a statement. That is the problem; it is so general a statement as to be trivially true, but it therefore lacks any analytical power. This interest also undoubtedly extends, in some circumstances, to protecting some children from exposure to some sexually explicit, even though not obscene, materials. *Reno*, 521 U.S. at 869-70. But as the Court noted in *Reno*, "that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Id.* at 875. In other words, although children are a particularly vulnerable group, hypothesized harm to children cannot immediately override all other interests. When First Amendment rights are at stake, it is too

abstract and too facile just to talk generally about protecting children as a compelling governmental interest.

A simple example makes an important point. Each year in this country a statistically certain, substantial number of children suffer death or debilitating brain damage in drowning accidents in residential swimming pools.[14] Unlike with the exposure of children to sexually explicit depictions on television, there is no uncertainty about the seriousness of the harm from these drownings or the likelihood of such harm's occurrence or magnitude. Moreover, home swimming pools are a luxury, not a necessity, and unlike freedom of expression they enjoy no constitutional protection. Yet we do not prohibit such pools and direct everyone to facilities at schools, community centers, or private clubs. Instead we allow backyard pools and rely on the proper supervision of children by responsible parents or other adults - assisted perhaps by technology in the form of pool fences or alarm devices - even though adults can be irresponsible, inattentive or absent, and even though children can evade parents' eyes or be exposed to danger at the homes of others.

Thus, the mere invocation of the need to protect children, however accurate, is not sufficient by itself to satisfy strict or "heightened" scrutiny designed to protect First Amendment rights. In *Turner Broad. Sys.*, for example, even when reviewing non-content-based regulation, the Court refused to accept that interests that are "important in the abstract" can in fact justify a particular regulatory burden. 512 U.S. at 664. Here, the Court should carefully analyze and evaluate the asserted governmental interests at stake and the reality and seriousness of the risk of harm, as well as the nature of that harm, and hold the government to an appropriately high burden of proof.[15] It is one thing not to require

[14] *See* Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, Drowning Fact Sheet at <www.cdc.gov/ncipc/duip/drown.htm> (reporting annual figures of about 500 drownings and 3,000 near-drownings in residential swimming pools among children younger than 5).

[15] Certainly the well-being of children is a general interest of the highest moment; but so is national security. Thus an admittedly imperfect analogy nonetheless makes an important point. When the President of the United States

definite scientific proof of harm to children from viewing sexually explicit programs, especially when the evidence comes from psychologists and other social scientists. But it is quite another matter, too inimical to free speech, to use the lack of scientific precision in this area as the basis for requiring little proof of harm beyond the bare assertion. *See Lamprecht v. FCC*, 958 F.2d 382, 393 (D.C. Cir. 1992) ("[a]ny 'predictive judgments' concerning group behavior and the differences in behavior among different groups must at the very least be sustained by meaningful evidence"). If the Government is correct in this case, for example, as to the substantial harm to children from signal bleed – and it is hard to imagine it is correct here – then it should be able to actually demonstrate such harm, perhaps with the sort of convincing clarity and certainty that this Court requires in other cases when free speech interests are at stake. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964) (requiring "convincing clarity" in proof of actual malice for defamation of a public official).[16]

If the Court does not insist on this sort of searching inquiry when harm to children is alleged to flow from their exposure to protected speech, children will become the universal First Amendment solvent referred to earlier. One court, for example, finding an

asserted an explicit and imminent threat to national security and to human life while the country was at war, this Court nonetheless refused to block the publication of stolen, classified government documents absent firm proof of actual danger, not just speculation and hypothesis. *New York Times Co. v. United States*, 403 U.S. 713 (1971). If the First Amendment mandates freedom of expression even in such exigent and compelling circumstances as presented by the Government in the Pentagon Papers case, certainly proliferating government attempts to restrict protected speech in the name of children should be strictly scrutinized and measured by a substantial burden of proof as well.

[16] Similarly, if the Government is correct as to the great danger to children lurking in signal bleed, why does it worry that "perhaps a large number of parents ... 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"? Gov't Brief at 33. The Government offers little by way of explanation for parents' strange indifference in the face of the grave danger it posits. The Government merely analogizes to alleged consumer reaction to negative option sales of goods or services that has no relation to parents' expected reactions when and if convinced of real danger to their children. *Id.* at n.23.

awkward lack of proof of harm to children from broadcast indecency, simply sidestepped the issue. The court just allowed Congress to "take note of the coarsening of impressionable minds" presumably caused by television indecency. *See Action for Children's Television*, 58 F.3d at 661-62. Such reliance on presumed congressional suppositions and intuitions not only is contrary to precedent, but it abdicates the courts' proper role in strictly reviewing content-based legislative infringements on protected speech, and soon would eviscerate the First Amendment.

Here, the Government is unable to show any substantial risk of significant harm to children from signal bleed. *See* 30 F. Supp. 2d at 710-11. The district court clearly was troubled by the "paucity" of evidence before both it and Congress. *Id.* at 716. Indeed, more generally, there is a notable lack of evidence of any harm to children from indecent television programming. *See Action for Children's Television*, 58 F.3d at 682 (Edwards, C.J., dissenting) ("There simply is no evidence that indecent broadcasts harm children."). Even when the Government is trying to validate restrictions on what this Court still considers to be somewhat lower value commercial speech, the Court consistently requires more than "mere speculation or conjecture"; rather, the Government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Greater New Orleans Broad. Ass'n*, ___ U.S. at ___, 119 S. Ct. at 1932, *quoting Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). The plurality in *Turner Broad. Sys.* applied the same stringency to non-content-based regulations of cable. 512 U.S. at 644 (opinion of Kennedy, J.). *A fortiori* the Government should be held to at least an equally high burden of proof when protected speech is threatened by hastily adopted legislation such as Section 505.

Some parents may wish to shield their children from exposure to sexually provocative television programming they find offensive. Such desire is understandable, legitimate and worthy of respect. And such parents are entitled to some level of technological assistance that does not infringe the First Amendment rights of others. But this parental desire cannot be equated with, or substituted for, actual, demonstrated harm to children. The district court's legal conclusion, 30 F. Supp. 2d at 716, despite the paucity

of evidence before it, that the Government has established a sufficient risk of harm to children from signal bleed, is wrong, and it is important that this Court correct that error.

B. The Only Valid Governmental Interest At Stake Is To Provide Parents Who Want It The Appropriate Level of Assistance They Already Enjoy In Shielding Their Children From Exposure To Sexually Provocative Television Programming.

The Government asserts three interests in this case that the district court labeled compelling "in sum." 30 F. Supp. 2d at 717. Considering the vital First Amendment interests at stake, this Court should be much more exacting in individually scrutinizing the several asserted interests none of which, alone or in combination in this case, can be deemed substantial, let alone compelling. The analytical approach is at least as important as the result.

1. There Is No Substantial, Let Alone Compelling, Interest In Protecting Adults Themselves.

First, there can be little if any governmental interest in using Section 505 to protect adults, even in the privacy of their homes, from exposure to sexually objectionable or otherwise offensive material, let alone from the scrambled images of signal bleed. Adults can avoid such exposure for themselves in the first instance through any of the available technological measures discussed earlier, including use of the off/on switch. In particular, any adult who chooses to subscribe to cable can invoke Section 504 to have any unwanted channel fully blocked. In contrast, the safe harbor provisions of Section 505 - actually a "ship's graveyard," *Action for Children's Television*, 58 F.3d at 685 (Wald, J., dissenting) - uniformly restricts adults who may highly value the easy and anonymous accessability of sexually explicit programming in the privacy of their homes.

Should total avoidance still somehow fail, adults once confronted can immediately turn away and change the channel. Adults' momentary discomfort from encountering offensive expression is a small price, among the many vicissitudes of life, that we pay for First Amendment freedoms. *See Erznoznik*, 422

U.S. at 210-11; *Cohen*, 403 U.S. at 21-22, 25. The largely incomprehensible nature of signal bleed makes this an especially trivial problem here. Any asserted governmental interest in protecting adults themselves can be readily and completely discounted.

2. There Is No Substantial or Compelling State Interest Here In Protecting Children Over And Above The Desires Of Parents.

The Government also asserts an interest in protecting children from exposure to patently offensive sex-related material, apparently regardless of, or even contrary to, the wishes of parents. This is untenable, especially given the amorphous, uncertain and unproven nature of the alleged harm to children, and the chilling vagueness of the concept of indecency. Moreover, the Government's position is inconsistent with the Government's asserted interest in supporting parents' authority and ability in inculcating morals and beliefs in their children as they see fit. As the district court recognized, this Court long has given substantial preference to parents, not the state, in the raising of children. 30 F. Supp. 2d at 717. *See Reno* at 865 ("parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society," *quoting Ginsberg v. New York*, 390 U.S. 629, 639 (1968)); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (upholding the fundamental "liberty of parents and guardians to direct the upbringing and education of children under their control"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition").

This parental interest is strongest within the home. *Hutchins v. District of Columbia*, ___ F.3d at ___, 1999 WL 397429, at *7. As Chief Judge Edwards noted in *Hutchins*, "when Government does

intervene in the rearing of children without regard to parents' preferences, 'it is usually in response to some significant breakdown within the family unit or in the complete absence of parental caretaking,' *Action for Children's Television v. FCC*, 58 F.3d 654, 679 (D.C. Cir. 1995) (Edwards, C.J., dissenting), or to enforce a norm that is critical to the health, safety, or welfare of minors." ___ F.3d at ___, 1999 WL 397429, at *16 (Edwards, C.J., concurring in part and concurring in the result). The Government can demonstrate no such general breakdown and has not demonstrated any such critical norm. So long as parents have available reasonable means to control television content accessed in their homes, as they so clearly already do, there is no need or basis for further, mandatory and uniform state intervention.

Intellectual and emotional development and maturity are highly individualistic and variable among children. Chronological age, the basis on which the state regulates, is a very poor measure of these crucial cognitive factors central to First Amendment theory and practice.[17] Parents, not the state, are in the best position to know their own children, assess their development on an individual basis, determine the values they wish to transmit to their children, and make appropriate decisions. As the dissent in *Pacifica* put it, only "acute ethnocentric myopia" can account for the Government not realizing that some parents see value in exposing, on an individual, considered basis, their children to material others find offensive and inappropriate. 438 U.S. at 775 (Brennan, Marshall, J.J., dissenting). Indeed, the Carlin monologue at issue in *Pacifica* was broadcast not for its comedic value but as part of the station's serious discussion of contemporary attitudes toward language, something many parents might well wish their children to hear. 438 U.S. at 730, 770, 775-76.

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[17] It is one thing for the state to regulate, say, a license to drive by chronological age as a general proxy for individual maturity and capacity to drive. It is quite another matter to regulate freedom of expression in this indiscriminate way, particularly when parents are available and able to make these formative decisions for their own families on an individual basis. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.").

There is no national consensus for the Government to enforce as to what is suitable for a broad, indiscriminate class of "children," any more than there is such consensus on what is one person's vulgarity or another's lyric. *See Cohen*, 403 U.S. at 25. The state has no "general power ... to standardize its children." *Yoder*, 406 U.S. at 232-33 (quoting *Pierce*, 268 U.S. at 535). Only a clear and convincing demonstration of harm, not present here, could begin to justify displacing individualized parental choice by uniform governmental fiat. Otherwise the Government's asserted independent interest in the well-being of children is irreconcilable with its primary interest in encouraging and providing support for parental supervision and authority. *Action for Children's Television*, 58 F.3d at 672 (Edwards, C.J., dissenting) ("the Government's asserted interests in facilitating parental supervision and protecting children from indecency are irreconcilably in conflict in this case").

3. The Only State Interest of Any Merit Here Is In Giving Parents Who Desire It The Appropriate Level of Assistance To Control Television Programming In Their Homes Consistent With The First Amendment Rights of Others. Parents Already Enjoy That Measure of Control Without Section 505.

When parents can directly supervise their children's use of television there is no reason for the Government to be involved in the choice of what they watch. No one would suggest that parents renting certain movies from a video store could be made to sign a pledge that they will not allow any child under eighteen to watch it. *See Ginsberg*, 390 U.S. at 639 ("the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children"). The only legitimate regulatory interest at stake here involves the ability of parents to control exposure of their **un**supervised children to patently offensive sexually explicit material (or, indeed, to other programming parents might find objectionable for a wide variety of idiosyncratic reasons). Some parents have a legitimate interest in preventing some of their children from exposure to some sexually explicit or otherwise objectionable material, under some circumstances, some of the time, and can legitimately expect some level of

technological assistance from the government in implementing those parental choices consistent with the First Amendment mandate of freedom of expression for adults. This is the interest that the Court should carefully scrutinize.

The Court has always insisted that parents have the "primary responsibility for children's well-being" and are "entitled to the support of laws designed to aid discharge of that responsibility." *Ginsberg*, 390 U.S. at 639. When the interest at stake and the limited role of Government are properly described, resolution of most cases of indecency on electronic media, especially the instant one, should be fairly straightforward, given the level of technological control readily available to parents. This remains true even though some concerned parents may closely supervise their children in their own homes but worry about what their children are exposed to in the homes of others. Children may be exposed outside their own homes to all sorts of books, magazines, language, behavior and the like that their own parents would find objectionable. Again, this is a matter for parents to deal with through the discriminating way they raise their own children; Government cannot sanitize the world for all children in the parochial, even if legitimate, interests of a few.

As the district court observed, the scope of the problem signal bleed presents - the potential for unsupervised exposure of children to signal bleed - is quite uncertain and probably minimal. 30 F. Supp. 2d at 708-09. Moreover, this uncertainty and the lack of proof of any real harm to children is reflected in the apparent lack of much parental concern. One lower federal court recently overcame the embarrassing lack of evidence of harm to children from broadcast indecency by simply asserting, without any basis, that there is a "broad national consensus that children under the age of 18 need to be protected from exposure to sexually explicit materials." *Action for Children's Television*, 58 F.3d at 664. But courts should not be able to substitute such overbroad and unwarranted assertions for the careful judicial scrutiny the First Amendment demands.

The potential for any harm here from signal bleed is truly minimal, certainly less serious than the problem of children somehow obtaining access to and watching a full-length, hard-core

pornographic film. While the Government highlights a few egregious examples, Gov't Brief at 5-6, it is almost comical to imagine young teenagers virtually going dizzy sitting in front of a scrambled TV picture for hours for a few fleeting glimpses of a partially unscrambled, discernible but still distorted, "indecent" video. This is not content likely to be encountered accidentally, *see Reno*, 521 U.S. at 854, but only by "a few of the most enterprising and disobedient young people." *Sable Communications*, 492 U.S. at 130. This Court has never required a foolproof method of erecting a perfect, hermetic seal over children. *Id.*; *Denver Area*, 518 U.S. at 759.

C. Section 505 Is Far From Being The Least Speech Restrictive Approach.

As *Amicus* has argued, the Court should apply strict scrutiny to Section 505, a content-based restriction on protected speech. Even under the "heightened" scrutiny approach of the *Denver Area* plurality or *Turner Broad. Sys.*, 512 U.S. at 641-42, however, Section 505 clearly violates the First Amendment as there are many considerably less speech restrictive approaches to the problem of signal bleed. Like the provisions of the CDA at issue in *Reno*, "[i]n order to deny minors access to potentially harmful speech, [Section 505] effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." 521 U.S. at 874.

First and foremost, parents can supervise their children and educate them to deal with sexually explicit programming. Moreover, as to indecent television programming generally, several approaches are available: a V-chip approach could be applied more broadly; parents can use remote controls to lock out specific parent-selected channels; televisions can be equipped with parent-controlled mechanical or electrical locks.

Specifically as to signal bleed, Section 504 is a complete content-neutral solution, one that Congress itself endorsed in a companion provision to the more drastic Section 505 challenged

here. The lock-out that Section 504 requires is free and available upon demand of any parent who wants it. The Court should not presume that any of these plausible alternatives, and particularly Section 504 that is specifically designed to address signal bleed, will fail to adequately protect the interests at stake. *See Denver Area*, 518 U.S. at 807 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part). Instead, the Government has the heavy burden to show that a plausible less restrictive alternative would not be sufficiently effective. *See Reno*, 521 U.S. at 877-79. This the Government has not and cannot do.

There are strong policy reasons to rely on the less restrictive approach of Section 504. Informed parents, not the Government, should control media content in the home. With Section 504 the initiative for such control comes, as it should, from the user - the viewer and consumer - not from the supplier of information and programming, and certainly not from the Government. This is the approach the Court appropriately relied on in *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), in upholding a statute allowing a householder, at his or her initiative and request, to control sexually provocative mailings to the home, and this is the approach the Court now should apply here.[18] This approach fosters parental involvement and individualized, discriminating selection of media programming on a home-by-home basis and properly rejects the broad censorial approach of government dictate. *See Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 73-74 (1983) (parental discretion, not a statutory ban, is the preferred method of dealing with unsolicited contraceptive advertising mailed to the home).

The Government, of course, can, as it already is doing,[19] inform and educate parents as to their many effective options to control

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[18]The majority in *Pacifica* cited *Rowan* in support of privacy in the home without adequately appreciating that *Rowan* depends on private, individual initiative and control and not intrusive and universal government mandate. 438 U.S. at 748.

[19]*See* footnote 13 *supra*.

the material that is received in their homes. Government can exhort parents to be involved and use these various options. It may even be appropriate to enhance the effectiveness of Section 504, as the district court did, by enlisting specific efforts by cable programmers and operators to adequately inform parents about signal bleed and the free availability of total blocking devices. 30 F. Supp. 2d at 719-20. *See also Denver Area*, 518 U.S. at 759 (favoring informational requirements and lockboxes over "segregate and block" mandates). But with the more than adequate less restrictive alternatives available for discretionary use by parents, such educational efforts form the limit of governmental intrusion that the First Amendment tolerates.

CONCLUSION

For the foregoing reasons, the Court should apply strict scrutiny to Section 505 and affirm the judgment below.

Respectfully submitted,

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