No. 98-1682

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL.,

Appellants

v.

PLAYBOY ENTERTAINMENT GROUP, INC.,

Appellee

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

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., COMIC BOOK LEGAL DEFENSE FUND, FREEDOM TO READ FOUNDATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, MOTION PICTURE ASSOCIATION OF AMERICA, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC., NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., PUBLISHERS MARKETING ASSOCIATION, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., AND VIDEO SOFTWARE DEALERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLEE

STATEMENT

American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation ("FTRF"), International Periodical Distributors Association, Motion Picture Association of America, Inc., National Association of College Stores, Inc., National Association of Recording Merchandisers, Periodical and Book Association of America, Inc., Publishers Marketing Association, Recording Industry Association of America, Inc., and Video Software Dealers Association submit this joint amicus brief in support of appellee urging that this Court

affirm the decision below.[1] This brief is submitted upon written consents of counsel to appellant and appellee, which are submitted herewith.

INTEREST OF *AMICI*

Amici's members (hereinafter "*amici*") publish, produce, distribute, sell and are consumers of books, magazines, videos, sound recordings, motion pictures, interactive games and printed materials of all types, including those that are scholarly, literary, artistic, scientific and entertaining. Libraries and librarians represented by FTRF provide such materials to readers and viewers. *Amici*, who include mainstream providers of speech in a variety of forums and media, are concerned that the restrictions imposed by Section 505 of the Telecommunications Act of 1996 (the "Act") on "sexually-oriented programming" will have the inevitable effect of suppressing altogether the transmission of such programming on certain cable channels, notwithstanding the ready availability of less restrictive, non-governmentally imposed means of protecting minors from the harms purported to flow from such programming.

Section 505 provides that so-called "indecent" programming on a cable television channel "primarily dedicated to sexually-oriented programming" must be fully scrambled or blocked so that a non-subscriber does not receive any portion of the video or audio (so-called "signal bleed"). Until such blocking or scrambling is achieved, all such programming must be during late night hours (10 p.m. to 6 a.m.).

The court below permanently enjoined the enforcement of Section 505 as unconstitutional under the First Amendment because it did not constitute the least restrictive alternative for dealing with the problem of signal bleed. The government appealed, contending that the statute was constitutional.

In the current environment of rapidly developing and integrating media technology, the once discrete worlds of print and

[1] A description of the *amici* is attached as Appendix A.

electronic media are discrete no longer. *Amici* once devoted exclusively to the publication of books and magazines are now or soon will be making some of those same materials available on-line via telephone lines linked to personal computers and via coaxial cables connected to television sets. Indeed, the expansion of appellee Playboy Entertainment Group, Inc. ("Playboy") from print into cable television exemplifies the exciting fluidity with which content-providers are approaching the expanding potential of the new media to reach wider audiences. Thus, the constitutional issues presented by Section 505 of the Act directly affect all media.

Amici submit this brief to highlight the very real danger of allowing the government to enact legislation targeting currently unpopular speech. When the government restricts politically disfavored but constitutionally protected speech -- the very kind of speech at issue here -- it violates the rights not only of the restricted creators and distributors, but also of mainstream consumers who depend upon a wide variety of materials and who would rather discriminate in their consumption themselves than allow the government to dictate those choices.[2]

In the past, many of the *amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws infringing on the First Amendment. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992); *Village Books v. Bellingham*, No. C88-1470 (W.D. Wash. Feb. 9, 1989); *American Booksellers Ass'n, Inc. v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d

[2] The Court has assiduously protected the "right to receive information and ideas." *See, e.g., Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976); *Consolidated Edison Co. v. Public Serv. Comm'n.*, 447 U.S. 530, 541 (1980); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557 (1980).

520 (Tenn. 1993); *Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738 (Tenn. 1979).

Section 505 of the Act continues a disturbing trend by Congress of regulating so-called "indecent" but non-obscene speech.[3] This trend, if unimpeded, will substantially erode the ability of *amici* to publish, distribute and otherwise disseminate mainstream materials with significant literary, artistic, political and scientific value. Despite the Supreme Court's clear refusal to expand the regulation of indecent speech beyond the broadcast medium,[4] Congress has begun wielding a hatchet where the constitution mandates a scalpel. In this case, the government attempts to regulate "indecent" audio and visual signal bleed from scrambled programming on cable channels "primarily dedicated to sexually-oriented programming." While this regulatory scheme is limited in scope, *amici* are concerned that, if upheld here, this vague and unconstitutional censorial standard could be applied to the speech that they present.

SUMMARY OF ARGUMENT

"Indecency" is an inappropriate and constitutionally incorrect standard. In *F.C.C. v. Pacifica*, 438 U.S. 726 (1978), the Supreme Court carved out only a narrow exception to the prohibition against content-based regulation of constitutionally protected speech, recognizing the great danger in limiting non-obscene speech with societal value. However, Congress has now begun legislating concerning indecency in a multitude of media within the telecommunications industry. Such congressional activism in the regulation of speech is doubly alarming when the

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[3] *See, e.g.*, Cable Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, Section 10 (regulating indecent speech in public and leased access cable television), 47 U.S.C. §§ 531, 532(h), 532(j), 558 (1999); Communications Decency Act of The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Sections 502, 230 (regulating indecent communications on the Internet), 47 U.S.C. §§ 223, 230 (1999).

[4] *Reno v. ACLU*, 521 U.S. 844, 867-70 (1997); *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115 (1989).

category of regulated speech includes material of educational and other serious value.

Instead of employing the adequate protection to minors afforded by the obscenity standards, Congress borrows the mantle of the state's right to safeguard children and misapplies it in a rush to suppress so-called "indecent" speech. *Ginsberg v. New York*, 390 U.S. 629 (1968), sanctioned state involvement in monitoring children's exposure to certain types of speech to the extent it aided parental authority, as long as it remains available to adults. When courts have permitted regulation of indecent speech, they have done so only where it was clear that parents had no means to do so themselves. Section 505 supplants parental authority by imposing automatic scrambling despite the ready availability of parental control through the use of lockboxes. Congress has also, through the enactment of Section 505, violated the limitations on regulation of indecent speech as enunciated in *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115 (1989). Congress no longer feels the need to justify its encroachment on the rights of adult receivers of speech with legislative findings describing the needs and comparative effectiveness of its regulation. Such findings are essential to the judiciary's ability meaningfully to assess the magnitude of the state's interest and the appropriateness of the means of regulation. Such findings are lacking in this instance. Further, in supplanting parental opportunities for control, Congress is usurping their role as protector of minors and ignoring its mandate to regulate constitutionally protected speech only when there are no means available that are less restrictive of First Amendment rights. The Act is also unconstitutional because it employs the unconstitutionally vague standard "indecent" in describing the speech to be regulated.

Finally, the Act rests upon the assumption that the First Amendment protection of identical material varies depending on who the speaker is, even if the nature of the speech is the same.

This is a dangerous notion that violates the Equal Protection Guarantee of the Fifth Amendment.[5]

ARGUMENT

I

THE USE OF AN INDECENCY STANDARD IS INAPPROPRIATE AND UNCONSTITUTIONAL. IT GOES BEYOND *MILLER/GINSBERG* AND IS VAGUE

Section 505 of the Act is yet another attempt to legislate application of the vague, amorphous "indecency" standard to "protect" minors under the age of 18. This Court, recognizing the First Amendment implications of such "protection," created in *Ginsberg v. New York*, 390 U.S. 629 (1968), as modified in *Miller v. California*, 413 U.S. 15 (1973), a three-part test for determining whether material which is First Amendment protected as to adults is unprotected as to minors. That test requires that material, in order to be constitutionally unprotected as to a minor, taken as a whole, must

(i) predominantly appeal to the prurient, shameful or morbid interest of minors;

(ii) be patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(iii) lack literary, artistic, political or scientific value.

[5] Because the three-judge district court found Section 505 unconstitutional on First Amendment grounds, it did not "reach the merits of the other claims put forward by Playboy, that § 505 is unconstitutionally vague and that § 505 violates the Equal Protection guarantee of the Fifth Amendment." *Playboy Entertainment Group, Inc. v. United States of America, et al.*, 30 F. Supp. 2d 702, 720, n. 24 (D. Del. 1998). This Court, of course, is free to reach those merits left unexamined by the court below.

Material under the *Miller/Ginsberg* test can be barred from distribution to minors, so long as such prohibition does not unduly infringe on adult access; it is obscene as to minors and is not constitutionally protected as to them. Material which *is* protected under *Miller/Ginsberg* has First Amendment protection, whether the recipient be adult or child. Most importantly, under the third prong of the test, material having serious value remains constitutionally protected as to minors, irrespective of its sexually explicit content.

Following the suggestion of the Supreme Court in *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988), many states have held that when material is restricted from access by all minors as a class, in order to fall within the restricted class, material must be obscene to the most mature group of 17-year-olds.[6] *Virginia v. American Booksellers*, 372 S.E.2d 618 (Va. 1989); *American Booksellers v. Virginia*, 882 F.2d 125 (4th Cir. 1989); *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991); *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520 (Tenn. 1993).

Section 505 does not apply the accepted *Miller/Ginsberg* obscenity standard. Rather, it applies an "indecency" standard. While indecency is not defined in the statute, the Federal Communications Commission (the "FCC"), by rule making, has defined indecency as the description or depiction of "sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable or other MVPD medium." 11 F.C.C. Rcd. 5386, at 4-5 (March 5, 1996); 12 F.C.C. Rcd. 5212 (April 17, 1996). The FCC's interpretation of the word "indecent" does not bring the Act within the *Miller/Ginsberg* standards and it does not cure the Act's vagueness problems for the reasons that follow.

[6] Until the Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681, 47 U.S.C. § 231 (1999) ("COPA"), no federal statute used the *Miller/Ginsberg* standard. The interplay between COPA and *Virginia v. American Booksellers* has not been determined.

It is important to delineate a number of crucial differences between the obscenity standard and indecency, even as thus defined:

(a) "Indecent" material is protected by the First Amendment as to minors. Obscene material under the *Miller/Ginsberg* definition is not.

(b) "Indecent" material includes material which has serious literary, artistic, political or scientific value to minors. Obscene material under the *Miller/Ginsberg* formula does not.

(c) "Indecency" and "patently offensive" are terms which are unconstitutionally vague. While the *Miller/Ginsberg* test is at times difficult to apply, it has developed meaning over the years and, most importantly, the safety net of serious value protects against the subjective aspect of its first two prongs.

While this Court permitted indecency to be channeled into delineated time slots in *F.C.C. v. Pacifica*, 438 U.S. 726 (1978), this Court has since that decision regularly and repeatedly stressed the fact that the ruling is narrow, applied to broadcast only and governed by the facts of that case. *See, e.g., Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 127-28 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). In *Denver Area Educ. Telecommunications Consortium v. F.C.C.*, 518 U.S. 727, 751 (1996), four justices appeared to accept Justice Breyer's conclusion that indecency may not be vague, although the concept "depends on context . . ., degree . . ., and the time of broadcast." However, the subsequent decision of this Court in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), made it clear that indecency is not a constitutionally appropriate standard outside the factual context of the *Pacifica* case.

In *Reno v. ACLU*, this Court distinguished the facts of *Pacifica* from the Communications Decency Act of 1996

(the "CDA") (which was, like Section 505, part of The Telecommunications Act of 1996) as follows:

> As with the New York statute at issue in *Ginsberg*, there are significant differences between the order upheld in *Pacifica* and the CDA. First, the order in *Pacifica*, issued by an agency that had been regulating radio stations for decades, targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when -- rather than whether -- it would be permissible to air such a program in that particular medium. The CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet. Second, unlike the CDA, the Commission's declaratory order was not punitive; we expressly refused to decide whether the indecent broadcast "would justify a criminal prosecution." *Id.*, at 750. Finally, the Commission's order applied to a medium which as a matter of history had "received the most limited First Amendment protection," *id.* at 748, in large part because warnings could not adequately protect the listener from unexpected program content. The Internet, however, has no comparable history. Moreover the District Court found that the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.
>
> * *
>
> When *Pacifica* was decided, given that radio stations were allowed to operate only pursuant to federal license, and that Congress had enacted legislation prohibiting licensees from broadcasting indecent speech, there was a risk that members of

> the radio audience might infer some sort of official or societal approval of whatever was heard over the radio, *see* 556 F.2d at 37, n.18. No such risk attends messages received through the Internet, which is not supervised by any federal agency.
>
> * *
>
> Finally, unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity.

521 U.S. at 867-70. These distinctions apply equally here. Cable, unlike radio, and just like the Internet discussed in *Reno*, is a form of communication which a citizen must affirmatively seek out and buy; the risk of encountering indecent material by accident is remote; there is little risk that members of the cable audience might infer some sort of official or societal approval of whatever was seen over the cable airwaves; and, finally, cable can hardly be considered a "scarce" expressive commodity. The context in which indecency was permitted to be regulated in *Pacifica*, therefore, is inapplicable to this action.

Applying the *Miller/Ginsberg* obscenity standard to cable transmissions would raise other constitutional requirements. Such a statute would have to be, under *Virginia v. American Booksellers* and its progeny, very narrow. *American Booksellers*, 484 U.S. at 383. The material restricted would have to be obscene to the most mature group of 17-year-olds. Further, the statute could only impose criminal liability on a provider if it comes to the provider's attention that a juvenile is seeking to view such obscene material and the provider fails to attempt to stop such viewing. *Id.*

The statutory term "indecent" also is subjective and vague. What is indecent to one is not necessarily indecent to another. Even if one accepts the gloss that the FCC adds by its regulations, the term "patently offensive" is equally subjective and vague. It is this sort of vagueness in a statute affecting First Amendment freedoms that the Court has said cannot be tolerated:

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. (footnote and citation omitted). These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. (citations omitted). *Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.* (emphasis added)

NAACP v. Button, 371 U.S. 415, 432-33 (1963). *See also Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

Any extension of the indecency standard beyond over-the-air broadcasting concerns *amici*. It is particularly alarming to *amici* that the Federal Government would attempt to impose on an important and promising medium -- namely, cable television -- speech restrictions that greatly exceed in scope the extremely limited regulation of sex-related speech previously condoned by the Supreme Court. As noted, the manner of delivery of information to the American public is evolving at a rapid pace. The one-time universe comprising the arguably discrete worlds of "print" and "broadcast" is no longer. The worlds of print, broadcast, cable and, most recently, on-line and CD-ROM delivery are increasingly converging. *Amici's* members are committed to adapting to provide the same rich diversity of works to the consuming public by whatever avenues technology, and the demands of consumers, dictate. But regulatory approaches such as those here under examination, which treat new media more as speech threats than as speech opportunities, jeopardize the fulfillment of these First Amendment objectives. Such regulation disregards the precise evil the Supreme Court addressed in *Butler v. Michigan*, 352 U.S. 380 (1957), by reducing the cable

viewing options during most of the day and evening to what is suitable for children.

Nor are *amici* assuaged by the fact that Section 505 is apparently limited to indecent material on cable channels primarily dedicated to sexually explicit material. If the utterly vague and undefined indecency standard may constitutionally be applied to the minimal leakage from such scrambled channels, there is no reason why it could not constitutionally be applied to non-obscene material of serious literary, artistic, educational, political, scientific or entertainment value, deemed to be indecent by some, whether on cable or any other of the various media which *amici* use. Such an inroad on the First Amendment rights of both adults and minors is intolerable.

II

SECTION 505 VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE FIFTH AMENDMENT BECAUSE IT SELECTIVELY EXEMPTS NON-ADULT CABLE STATIONS FROM ITS SCRAMBLING AND TIME CHANNELING REQUIREMENTS

Section 505, without any ambiguity whatsoever, specifically applies only to those distributors who provide "sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming." 47 U.S.C. § 561(a) (1999). Excluded are those distributors who, although they may provide sexually explicit or "indecent" material, do so on cable channels that are *not* "primarily" dedicated to sexually-oriented programming. Sexually explicit and "indecent" programming can be seen on cable program services such as Home Box Office ("HBO") and Showtime, and similar fare can be purchased on pay-per-view channels which are not "primarily" dedicated to the kind of constitutionally protected material which Congress sought to regulate via Section 505. In fact, Playboy licenses some of its fare

to such channels.[7] And yet, these entities need not "fully scramble or otherwise fully block the video and audio portion of [the offending] channel" or comply with subsection (b) of the statute "by not providing such programming during the hours of the day . . . when a significant number of children are likely to view it." 47 U.S.C. § 561(a), (b) (1999). Because this statutory scheme discriminates against those channels which are primarily dedicated to sexually-oriented programming on the basis of the content of their speech (*i.e.*, indecent, but not obscene programming), it runs afoul of the Equal Protection Guarantee of the Fifth Amendment and hence is invalid.

A. Equal Protection Jurisprudence And The First Amendment Prohibit A Government From Creating Arbitrary Classifications Among Media Entities

The Fifth Amendment of the United State Constitution provides in relevant part that "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V. This Court has consistently held that the protections afforded by the Equal Protection Clause of the Fourteenth Amendment vis-à-vis state action (*i.e.*, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"), are also available with respect to actions by the Federal Government. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Equal Protection Clause, in turn, requires that classification in laws, at a minimum, meet a standard of rationality and, in cases involving important rights such as the First Amendment, meet a standard of strict scrutiny. *Attorney General of New York. v. Soto-Lopez*, 476 U.S. 898, 904 (1986) ("Whenever a state law infringes a constitutionally protected right, we undertake intensified equal protection scrutiny of that law."). *See also Bery v. City of New York*, 7 F.3d 689, 699 (2d Cir. 1996)

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[7] Playboy Trial Exhibit No. 5, submitted to the court below in connection with Playboy's application for a preliminary injunction, consisted of a list of films licensed by Playboy to HBO including, but not limited to, films such as *Fanny Hill, Married People, Single Sex 2* and *Sorceress.*

(Equal Protection Clause of the Fourteenth Amendment is violated where city cannot articulate a compelling need for requiring a general vendor's license for visual art while written material may be sold and distributed without a license), *cert. denied*, 520 U.S. 1251 (1997).

This Court has therefore noted that the concerns of both the First Amendment and the Equal Protection Clause are at play when a government attempts -- as does the Federal Government with Section 505 -- to selectively tax, or selectively place a financial burden upon, one media class but not another. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 n.3 (1987) (noting that a First Amendment challenge to a discriminatory tax on the press is "obviously intertwined with interests arising under the Equal Protection Clause") (citing *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 94-95 (1972)). And, in this context, the Court has held that "differential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233, 250-51 (1936) (a license tax for publications of more than 20,000 is a violation of the First Amendment). *See also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (tax exemption based on content of publication violates the First Amendment).

This Court's analysis of discriminatory treatment of the press in the context of selective taxation is equally applicable to, and should be extended to cover, the situation presented by Section 505; namely, an attempt by the government to single out one type of presenter of constitutionally protected speech while allowing other presenters of the same or similar speech to proceed without any such restrictions. The application of First Amendment/Equal Protection Guarantee jurisprudence is appropriate for two reasons. First, the situations are analogous – in each case the government has selected one group of media entities for discriminatory treatment in an area of speech protected by the First Amendment; thus, the regulation can only survive if the government can persuade the Court that there is a compelling interest in doing so. There is no compelling reason – let alone any rational reason – for forcing Playboy to eliminate 100% of its signal bleed in order to protect the nation's children (or forcing it into time channeling if it cannot), while, at the same time, permitting others similarly situated to proceed without such a requirement. Second, *amici* have a legitimate concern that, if permitted in this context, the government may extend its attempts to selectively burden providers of disfavored material.

B. There Is Neither A Compelling Nor A Rational Reason For Singling Out Adult-Only Cable Stations For Section 505 Treatment

In *Boothby v. City of Westbrook*, 23 A.2d 316, 319 (Me. 1941), the Maine Supreme Court articulated a useful summary regarding a government's power to constitutionally regulate similarly situated citizens:

> A regulatory ordinance passed [by a city] pursuant to a general legislative grant of power must be reasonable and not arbitrary and operate uniformly on all persons carrying on the same business under the same conditions.

Similarly, following the lead of this Court, federal courts have noted that the discriminatory application of rules designed to regulate the content of constitutionally protected speech is, absent a compelling government interest, constitutionally invalid. In *Action for Children's Television v. F.C.C.*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996), for example, the United States Court of Appeals for the District of Columbia Circuit generally approved the adoption of a safe harbor approach to regulate free, over-the-air broadcasting. But it nevertheless struck down the discriminatory application of the indecency rules, whereby the law permitted certain public broadcasters to begin transmitting indecent programming at 10:00 p.m., instead of midnight, as was the rule for all other licensees. The court found that such a "selective exemption" or "preferential safe harbor" for

certain stations as opposed to others "undermin[ed] both the argument for prohibiting the broadcasting of indecent speech before that hour and the constitutional viability of the more restrictive safe harbor." *Id.* at 668. The court found that such "disparate treatment" left it "no choice but to hold that the section is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight" because "Congress . . . fail[ed] to explain how this disparate treatment advanced its goal of protecting young minds from the corrupting influences of indecent speech[.]" *Id.* at 668-69. There is a similar infirmity to Section 505 – if the evil to be eradicated is the momentary unscrambled image and sound of indecent sexual behavior, then applying the absolute scrambling mandate to one provider but not to others undermines the very argument for mandating absolute scrambling in the first place. Furthermore, this discrimination cannot be justified under the guise of addressing a problem "one step at a time" because, although this Court has upheld some targeted classifications on the theory that the legislature may adopt incremental solutions, *see, e.g.*, *Williamson v. Lee Optical of Okl.*, 348 U.S. 483, 488-89 (1955), there is no presumption of validity where a classification turns on the content of speech.[8]

C. The Act's Discriminatory Treatment Of Similarly Situated Providers Of Constitutionally Protected Speech Concerns *Amici* Beyond The Facts Of This Case

Amici do not suggest that Section 505 would be constitutional even if it applied to *all* distributors of "sexually explicit adult programming or other programming that is indecent." 47 U.S.C. § 561(a) (1999). To the contrary – for the reasons set forth above (and for the reasons articulated by Playboy and adopted by the court below), Section 505, even if it were of general applicability, would violate the First Amendment because

[8] *Carey v. Brown*, 447 U.S. 455, 461-62 (1980); *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

it uses the unconstitutional indecency standard and because it does not employ the least restrictive means of addressing the problem of signal bleed. However, it is still the case that the statute blatantly discriminates against one class of constitutionally protected speakers as opposed to other similarly situated speakers. The fact that the statute does not operate with an even hand is evidence in and of itself that it is not constitutional. *See Church of the Lukumi Babalu Ave. v. City of Hialeah*, 508 U.S. 520 (1993) (city ordinance prohibiting the ritual slaughter of animals by a specific group violates the First Amendment because, among other reasons, it does not apply to other slaughterers of animals).

Furthermore, if permitted in this limited context, the discriminatory concept underlying Section 505 of the Act could be applied to providers of other types of constitutionally protected speech such as *amici*. If the Court were to conclude that Section 505 is not violative of the Equal Protection Guarantee of the Fifth Amendment, there would be nothing amiss in forcing one specific, perhaps unpopular, provider of speech to take special precautions and shoulder special financial burdens to "protect youth," while not imposing similar burdens on other providers of the same or similar speech. All members of *amici*, and therefore by extension the reading public, would be at risk.

* * *

"Nowhere are the protections of the Equal Protection Clause more critical than when legislation singles out one or a few for uniquely disfavored treatment." *News America Pub., Inc. v. F.C.C.*, 844 F.2d 800, 813 (D.C. Cir. 1988). Because Section 505 selectively burdens one provider of constitutionally protected speech while other providers of the same or similar speech are unburdened, and does so on the basis of a characterization of the overall content of that provider's speech and without any rational or compelling reason for doing so, it is violative of the Fifth Amendment's Equal Protection Guarantee and hence is constitutionally invalid.

CONCLUSION

For the reasons set forth above, as well as the reasons set forth in the decision below, the judgment below should be affirmed and Section 505 of the Act declared unconstitutional.

Dated: September 24, 1999

Respectfully submitted,

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APPENDIX A: THE *AMICI*

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Association of American Publishers, Inc. ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately 200 members include most of the major commercial book publishers in the United States. AAP members publish most of the general, educational, and religious books produced in the United States.

The Comic Book Legal Defense Fund ("CBLDF") is an organization dedicated to defending the First Amendment rights of the American comic book industry. CBLDF represents artists, publishers and distributors, as well as the broader community of specialty retailers and readers.

The Freedom To Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

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