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 APPELLEE

Filed September 24, 1999

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Appellee Playboy Entertainment Group, Inc. ("PEGI") notes that it is a non-publicly traded corporation organized under the laws of Delaware and is a wholly-owned subsidiary of Playboy Enterprises International, Inc. ("PEII"), a non-publicly traded corporation organized under the laws of Delaware. PEII is a wholly-owned subsidiary of PEI Holdings, Inc. ("PEI Holdings"), a non-publicly traded corporation organized under the laws of Delaware. PEI Holdings is a wholly-owned subsidiary of Playboy Enterprises, Inc., a publicly traded corporation organized under the laws of Delaware.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

CASES (cont'd):

CASES (cont'd):

CASES (cont'd):

CONSTITUTION, STATUTES AND RULES:

CONSTITUTION, STATUTES AND RULES (cont'd):

LEGISLATIVE MATERIALS:

ADMINISTRATIVE PROCEEDINGS:

OTHER AUTHORITIES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1682

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 APPELLEE

Appellee Playboy Entertainment Group, Inc. ("Playboy") respectfully requests that this Court affirm the decision of the three-judge district court that Section 505 of the Telecommunications Act of 1996, 47 U.S.C. § 561 (Supp. III 1998) ("the Act"), violates the First Amendment to the United States Constitution. Playboy further asks that this Court affirm the district court's dismissal of Appellants' post-trial motions to modify the judgment.

STATEMENT

At issue here is Section 505 of the Telecommunications Act of 1996, a statute that forced Playboy Entertainment Group, Inc.'s cable television networks off of most cable systems except during a late night/early morning window of eight hours called the "safe harbor" period. Before Section 505 was implemented in May 1997, a growing number of the more than 500 cable systems that carried one or both of Playboy's networks did so on a 24-hour basis. Trial Tr. 22.[1] After implementation, approximately 70 percent of the systems surveyed by the government had reduced Playboy's networks to the so-called safe harbor hours, J.S. App. 16a-17a,[2] a time described by one court of appeals as "broadcasting Siberia," when most viewers are asleep.[3]

Adopted to address an episodic phenomenon known as "signal bleed," Section 505's broad restrictions on protected speech are excessive and its protections are redundant, as the court below found. Numerous non-regulatory options either prevent, or provide cable subscribers with the ability to block, signal bleed

[1]All exhibits and testimony referenced throughout this brief are more specifically identified in the attached Addendum. *See* Appellants' Br. 5 n.1.

[2]J.S. App. refers to the Appendix attached to the Jurisdictional Statement filed by the Appellants. M.A. App. refers to the Appendix attached to the Motion to Affirm filed by Playboy Entertainment Group, Inc. Although the Solicitor General sought and received Playboy's and the Court's permission to dispense with the preparation of a Joint Appendix, he lodged with the Clerk five videotapes that are part of the record in this case plus a six-page excerpt from Defendants' Post-Trial Brief to the district court. Letter from Seth Waxman to William K. Suter (August 27, 1999). However, the material lodged is neither fully representative of the record below, *see, e.g.*, note 16, *infra*, nor does it represent "generally known facts" that are appropriate for judicial notice. Robert L. Stern, Eugene Gressman, et al., SUPREME COURT PRACTICE 556 (7th ed. 1993) ("Stern & Gressman") (citation omitted).

[3]*Becker v. FCC*, 95 F.3d 75, 82, 84 (D.C. Cir. 1996) (time channeling relegates programming to "broadcasting Siberia," deprives speakers of their "preferred audience" and "inevitably interfere[s] with * * * freedom of expression"). The remaining cable systems were already in compliance without the need to make technical changes. Trial Tr. 37.

from any channel. In addition, less restrictive regulations, including Section 504 of the Telecommunications Act, provide effective alternative solutions for signal bleed. Without regard to such measures, Congress passed Section 505 as a floor amendment the same day that it was offered, without any debate or legislative findings. Purportedly enacted to protect children, Section 505 unnecessarily limits Playboy's right to speak to even the two-thirds of adult households that have no children under 18. J.S. App. 34a. Accordingly, the three-judge district court held correctly that Section 505 violates the First Amendment.

1. Since 1982, Playboy has provided cable operators with adult, sexually-oriented programming on premium networks. J.S. App. 5a, 12a.[4] Playboy Television is a video version of its namesake magazine. Its format features adult-oriented programming that includes films, short-form videos, live talk shows, and lifestyle programming such as book and movie reviews, news, and music videos. Pl. Ex. 1 at ¶ 10. Playboy Television also offers special-event programming such as Playboy's well-received, four-hour program on AIDS awareness and safe sexual practices done in connection with the World AIDS Day created by the World Health Organization. Trial Tr. 116-117. AdulTVision and Spice offer almost exclusively full-length movies. Pl. Ex. 1 at ¶ 13. Other premium cable networks such as Showtime, HBO, and Cinemax license many of the same programs that are shown on adult-oriented channels, either from Playboy or other independent producers. Pl. Exs. 5, 6; Prelim. Inj. Tr. at 13-14, 39-41.

Like the providers of other premium networks, Playboy fully scrambles the video and audio portions of its programs when it transmits them to cable operators. The operators must descramble

[4]When this litigation began, Playboy provided programming on two networks, Playboy Television and AdulTVision, the latter launched in 1994. Playboy recently acquired Spice Entertainment Companies, Inc. ("Spice") (formerly Graff Pay-Per-View, Inc.), which was a party below in a consolidated action through the preliminary injunction stage. The Spice Hot Network was not purchased by Playboy as part of the transaction. Califa Entertainment Group, Inc. purchased Spice Hot in a separate transaction with Spice.

these transmissions before rescrambling the signal to restrict access to only those customers who have paid for the service. Individual subscribers descramble the premium channel using a set-top box called an addressable converter. A phenomenon known as "signal bleed" may occur when discernible video and/or audio appears on cable customers' televisions although they have not purchased the premium channel or event. The court below described the nature and causes of signal bleed, and found that the "severity of the problem varies from time to time and place to place, depending on the weather, the quality of the equipment, its installation, and maintenance." J.S. App. 9a, 51a.

A variety of non-regulatory means are available to consumers to ensure they do not receive signal bleed. Record evidence demonstrates that cable television converters with "channel mapping" features do not permit signal bleed. J.S. App. 51a. Further, addressable converters typically have built in parental lock-out devices. Pl. Ex. 4. Such converters are routinely used by most multiple system operators ("MSOs"), including Time Warner, TCI, Jones Intercable, and Harron Communications. Pl. Exs. 4, 149, 194, 210. The government's technical expert agreed that many of the most popular configurations for wiring together televisions, VCRs, and cable converters can prevent signal bleed, and instructions for such configurations are provided in product manuals and industry publications.[5] In addition, the cable industry's leading trade association adopted a policy to resolve signal bleed problems upon request well before passage of the Act.[6]

[5]Jackson Dep. Tr. 135-137, 155-157. The cable industry provides guidance to consumers on such wiring configurations. *See* Defs. Ex. 83(d) *Connecting Cable Systems to Subscribers' TVs and VCRs – Guidelines for the Cable Industry* by the NCTA Engineering Committee Subcommittee on Consumer Interconnection.

[6]In February 1995, the National Cable Television Association adopted a policy that included voluntary blocking on request plus five other measures to facilitate parental control. Pl. Ex. 1 at ¶ 33; Pl. Ex. 35.

Finally, many televisions and VCRs already have built-in child-lock circuitry that allows parents or others to completely lock out the audio and video of any channel, thereby preventing signal bleed. In a recent survey, 80 percent of more than 100 models of televisions currently being sold by a major electronics store contained built-in child-lock circuitry, which has been available for at least the past several years. Pl. Ex. 62. During this period, more than 70 million new televisions were sold in the United States. Pl. Ex. 62(b).

2. As part of the Act, Congress adopted a number of measures designed to enable parents to protect children from "indecent" or other television programming considered to be objectionable. Section 504 requires cable operators, without an additional charge, to "fully scramble" or otherwise "fully block the audio and video programming" of any channel upon the request of a customer who does not subscribe to the channel. 47 U.S.C. § 560 (Supp. III 1998). Similarly, Section 551, the so-called V-chip provision, requires that new televisions include circuitry to enable parents to block video programs that contain "sexual, violent, or other indecent material about which parents should be informed before it is displayed to children." 47 U.S.C. § 303 note (Supp. III 1998).

Congress also enacted Section 505, the subject of this appeal, which requires that for any channel of service "primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it." 47 U.S.C. § 561(a). Any multichannel video programming distributor (referred to generally herein as a "cable operator") that could not meet the "block or scramble" requirements of Section 505(a) within 30 days after the Act was signed was required to cease all programming on the designated channels "during the hours of the day when a significant number of children are likely to view it." 47 U.S.C. § 561(b). The Federal Communications Commission subsequently decided that these blackout hours run from 6 a.m. to 10 p.m. *Implementation of Section 505 of the*

Telecomms. Act of 1996, 11 FCC Rcd. 5386, 5387 (1996) (*"Implementation of Section 505"*).

3. Playboy brought suit in the United States District Court for the District of Delaware seeking injunctive relief and a declaration that Section 505 is unconstitutional. Before Section 505 took effect, Playboy sought and received a temporary restraining order enjoining its implementation and enforcement. M.A. App. 18a-19a. But after a hearing on the motion for a preliminary injunction, the three-judge district court denied Playboy's motion for a preliminary injunction. J.S. App. 40a-86a. The district court said, "[a]t that time, it was not clear what any given MSO, with a system emitting signal bleed, would do when faced with complying with § 505." J.S. App. 16a. The court also noted its uncertainty about how many homes with the "potential" to receive signal bleed in fact receive it, and it asked for "more specific evidence" in subsequent proceedings on the actual extent of signal bleed as well as any evidence of its ill-effects on children. *Id.* at 61a, 72a & n.25, 79a-80a.

After this Court's decision in *Reno v. ACLU*, 521 U.S. 844 (1997), but before the hearing on the permanent injunction below, Playboy filed a motion for summary judgment on the question of statutory vagueness. Playboy argued that the vagueness of the indecency standard, coupled with a total absence of relevant FCC precedent, prevented it from providing alternative programming during non-safe harbor hours, thus making Section 505 both uncertain and overbroad. Appellants filed a cross-motion for summary judgment on the same issue. The district court denied both parties' motions, but noted the "fundamental uncertainty" about the definitions in the law and cited the lack of interpretive guidance from the FCC. M.A. App. 25a. Playboy subsequently filed a request for an expedited declaratory ruling with the FCC seeking clarification of Section 505's indecency standard and asking for an advisory opinion with respect to nine programs that, with one exception, Playboy Television had either aired, or

planned to transmit, on its network.[7] The FCC denied the request, M.A. App. 28a-29a, and provided no further guidance, except to argue at trial that all of the programs submitted to the FCC, including the safe sex documentaries, would be considered indecent if transmitted on Playboy Television. Defs. Post-Trial Br. at 67-69.

The vagueness of the statutory mandate thwarted Playboy's efforts to mitigate Section 505's censorial impact. Ever since Section 505 was adopted, Playboy repeatedly sought clarification from the government[8] and attempted to modify its programming schedule in order to minimize the law's restrictions and to preserve its access to adult subscribers.[9] Despite this and other ongoing attempts to understand the meaning and implications of the law, the FCC repeatedly rebuffed Playboy's efforts, applying its "generic" definition of indecency and asserting that no explanation of the terms was needed beyond their plain

---

[7]Pl. Ex. 118. The request included two safe sex documentaries produced for World AIDS Day (*Doin' it Right* and *Hot, Sexy and Safer*), two critically acclaimed theatrical films (*9-1/2 Weeks* and *The Unbearable Lightness of Being*), two magazine-style Playboy news programs (*360 - Sex in the USA* and *Playboy Late Night*), a recurring program that describes a current issue of *Playboy* magazine and events related to Playboy (*World of Playboy*), a recurring feature on Playboy centerfold models (*Video Playmate Calendar*), and an action-adventure film (*Rambo: First Blood, Part II*). A videotape of each of the programs was provided to the FCC and to the court below. Defs. Exs. 36-43.

[8]*See* Pl. Ex. 117 (Comments of Playboy Entertainment Group, Inc., *Implementation of Section 505 of the Telecomms. Act of 1996*, CS Dkt. No. 96-40 (Apr. 26, 1996)).

[9]Playboy explored "every option" to retain viewers in the wake of Section 505, Trial Tr. 284-285, including an attempt to selectively reprogram its feed for its largest markets to regain prime time carriage. *Id.* at 114-120, 328-329. Playboy adjusted its satellite feed, attempted to use a masking sound track, and explored additional ways to adjust its programming to comply with Section 505. *Id.* at 123-125 (investigating costs of purchasing or renting a new transponder), 125-129 (describing Playboy's audio-masking feed), 282-284 (exploring the use of digital satellite services such as DirecTV, PrimeStar, and EchoStar to offer different programming during non-safe harbor hours).

meanings.[10] As a result, no cable operators who reduced their hours of operation to comply with Section 505 transmitted any Playboy programming outside the safe harbor hours. Trial Tr. 122.

4. Following an evidentiary hearing on the request for a permanent injunction, the district court held that Section 505 is unconstitutional. J.S. App. 1a-39a. Although the court had been skeptical at the preliminary injunction stage of the potential losses that would be caused by Section 505, it found that the "restrictiveness of § 505 is now evident" given Playboy's experience following the law's implementation. J.S. App. 33a. It noted that neither Playboy nor the government could identify a single cable system that had adopted any approach other than time channeling, and concluded that cable operators had "no practical choice but to curtail such programming" for two-thirds of the broadcast day in all households, whether or not children were present. *Id.* at 16a-17a. It concluded that the time channeling requirement of Section 505 "diminishes Playboy's opportunities to convey, and the opportunity of Playboy's viewers to receive, protected speech." *Id.* at 33a-34a.

The district court also noted that the pervasiveness of signal bleed had not been established. Rather, the court held that the government presented "no evidence on the number of households actually exposed to signal bleed," and instead offered anecdotal evidence comprising "only a handful of isolated incidents over the 16 years since 1982 when Playboy started broadcasting." *Id.* at 11a-12a. It found that the lack of evidence provided by the government at trial "is reflected by the same dearth of evidence of harm within the legislative history of § 505." *Id.* at 29a. While the district court agreed that Section 505 was intended to address a compelling interest, it pointed out that the "mere articulation of a theoretical harm is not enough." *Id.* at 28a.

[10] *See* Pl. Ex. 27 at 14; *Implementation of Section 505*, 11 FCC Rcd. at 5387. The FCC defined "indecent" programming under Section 505 "the same as in other video programming contexts." 11 FCC Rcd. at 5387 & n.13.

Comparing Sections 504 and 505 as alternative ways to deal with signal bleed, the court concluded that "§ 504 is not restrictive of anyone's First Amendment rights and is clearly 'less restrictive'" than Section 505. J.S. App. 34a. Significantly, the court found that "two-thirds of all households in the United States have no children" but that Section 505 applies "irrespective of whether a household has children." *Id.* at 33a-34a. It also held that the content-neutrality of Section 504 made it less restrictive of First Amendment interests than Section 505. Although the Justice Department had submitted evidence that few subscribers had availed themselves of Section 504, the court noted that "the finding of minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem." *Id.* at 36a. "Indeed," the court concluded, "the Government has not convinced us that it is a pervasive problem."[11] Accordingly, the district court permanently enjoined the government from enforcing Section 505 by its Order dated December 29, 1999.

5. On January 12, 1999, the government filed motions pursuant to Rule 59(e) of the Federal Rules of Civil Procedure seeking to alter or amend the judgment to limit the injunction to Playboy, and Rule 60(a) seeking to correct the judgment by including the "adequate notice" requirement within the mandate. Appellants filed a notice of appeal from the district court's decision and injunction order one week later, on January 19, 1999, while the motions to alter and correct the judgment were still pending. The district court dismissed the Rule 59(e) and 60(a) motions on March 18, 1999, holding that it lacked jurisdiction to consider them. J.S. App. 91a-92a. Appellants filed a further notice of

[11] J.S. App. 36a. The court found that cable operators communicate the availability of channel blocking through a variety of means, including monthly billing inserts, special mailings, barker channels, and adult channel advertisements, *id.* at 20a, but said that it "is not clear" that such notices of the provisions of Section 504 have been adequate, *id.* at 36a. Accordingly, the court directed Playboy to ensure that cable operators provide their customers with "adequate notice" of Section 504. *Id.* at 38a.

appeal on April 7, 1999, seeking review of both the December 1998 and March 1999 Orders of the district court.

SUMMARY OF THE ARGUMENT

The district court correctly held that Section 505 violates the First Amendment because it significantly restricts protected speech without employing the least restrictive means of regulation and because the government failed to prove that its stated interests are real and not conjectural. Specifically, the district court found that:

- Section 505 imposes a content-based restriction on constitutionally protected speech that effectively imposes a ban on adult cable networks for two-thirds of the broadcast day in the vast majority of cable systems. J.S. App. 33a.
- Although the purpose of Section 505 is solely to protect children, the law significantly restricts speech in all U.S. households, including the two-thirds of all homes that do not have children under 18. J.S. App. 34a.
- The "problem" of signal bleed was never established in the legislative history, which the court below described as "an absolute void." M.A. App. 15a. Nor was the problem demonstrated after two years of litigation involving extensive expert testimony. J.S. App. 11a-12a.
- Less restrictive means are adequate to address the phenomenon of signal bleed. In particular, Section 504 of the Act, which enables any customer to obtain a blocking device for any network without charge, is a content-neutral solution that is tailored to the households that need it. J.S. App. 38a.

In the face of these findings, the government now asks this Court to reverse the decision below by making sweeping changes in its First Amendment jurisprudence to permit a greater "degree of flexibility in governmental regulation." Appellants' Br. 22. Specifically, Appellants ask this Court:

- To apply the standard for the regulation of "indecency" on free over-the-air broadcast television to cable television operators despite this Court's recent rejection of the government's effort to apply the broadcast standard to cable leased access channels.
- To approve regulations that would reduce the adult population to only what is fit for a child in most television households for most of the broadcast day in order to serve an "independent interest" in protecting children from indecency, even where parents are fully capable of doing so without restricting others' speech.
- To preclude reviewing courts from contemplating potentially less burdensome measures if such alternatives have not already been adopted and litigated, and to subject the government's "predictive judgments" under the least restrictive means test only to rational basis review.

None of the government's arguments for expanding its authority over protected speech has merit.

I. The significant restriction Section 505 imposes on Playboy's speech violates the well-established principle that a governmental interest in preventing access by children to sexually-oriented materials does not justify an unnecessarily broad suppression of speech addressed to adults. The government understands this fact, and even acknowledges that "a similar content-based restriction on non-obscene speech would surely be unconstitutional in many other contexts." Appellants' Br. 19. Yet it would have this Court approve a content-based restriction here by undermining established First Amendment law.

The government's primary argument is to ask this Court to extend the standard applicable to broadcast indecency to cable television. But this Court in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) ("*Denver*"), recently refused to do what the government now proposes, and for good reason. Appellants ignore the

historical differences in broadcast and cable regulation, the technical distinctions between the two media and the amplified censorial effect of time channeling in the cable television context. Such regulation has not previously been applied to cable programming, largely because cable allowed individual subscribers through existing technology to exert greater control over programming that comes into the home, where broadcasting did not. In addition, the restriction on speech imposed by time channeling is far greater for cable television because it restricts entire networks, as compared to that for broadcasting, where enforcement affects only the scheduling of a particular program. Because of the inherent vagueness of the indecency standard, aggravated by the particular mandate of Section 505 and the FCC's steadfast refusal to clarify the law, cable operators had no practical choice but to censor all of Playboy's programming during non-safe harbor hours. The government's attempt to extend *Pacifica* to newer media, if successful, would have wide-ranging chilling effects, and would undermine the logic of this Court's recent decision in *Reno v. ACLU*, 521 U.S. 844 (1997).

On the other hand, the district court's decision to strike down Section 505 is fully supported by this Court's decision in *Denver*, regardless of whether the level of review is characterized as strict or intermediate scrutiny. *Denver* upheld only a permissive regulation that expanded cable operators' editorial discretion, while striking down mandatory controls that impeded – but did not ban – adult access to "indecent" speech. The same reasoning compels the conclusion that Section 505 is unconstitutional. Moreover, the record below confirms the government's failure to demonstrate that the recited harms of signal bleed are real and not merely conjectural.

In addition, Section 505 is invalid because it does not provide the least restrictive means of addressing the government's concerns. Section 504 provides a content-neutral alternative that is tailored to those households that actually experience signal bleed, and that the government agrees is effective in stopping the phenomenon when used. Appellants' contentions that too many

parents are "distracted" to make Section 504 an adequate alternative, and that it is somehow inappropriate for a reviewing court to consider "hypothetical" alternative regulations, were considered and rejected by this Court in *Denver*. Moreover, the argument that it is acceptable to censor programming in all households in a community because some parents fail to use readily available measures to protect their children is antithetical to the rule that the government cannot reduce the adult population to viewing only what is fit for a child. The government's further claim that an "enhanced" Section 504 is equally as restrictive as Section 505 overlooks its failure to demonstrate the pervasiveness of signal bleed, and vastly overstates the cost of compliance with Section 504. Section 505 is inherently more restrictive in a constitutional sense because it is content-based and indiscriminately restricts speech in all households. In any event, the real question is not whether Section 504 may be more restrictive than Section 505; it is whether Section 504, standing alone, is more restrictive than Sections 504 and 505 together.

II. The district court correctly held that it lacked jurisdiction to consider the government's post-trial motions to modify the judgment because the filing of the notice of appeal terminated the lower court's jurisdiction. The government was not required to file its notice of appeal while its post-trial motions were pending, but its decision to do so carries jurisdictional consequences. Where, as here, the post-trial motions go to the heart of the constitutional controversy, it would be improper for the district court to retain jurisdiction after the appeal is noticed. The government's complaint about an ambiguity in this Court's appellate rules does not justify reversing the decision below, and would be more effectively addressed by asking this Court to modify its rules.

ARGUMENT

I. SECTION 505 VIOLATES THE FIRST AMENDMENT

A. As Playboy Predicted, Enforcement of Section 505 Significantly Restricted the Availability of Its Programming to Adult Viewers

Despite its initial uncertainty about the censorial impact of Section 505, after the trial on the merits the district court found that "[t]he restrictiveness of § 505 is now evident." J.S. App. 33a. As Playboy had predicted, "the practical impact of § 505 [was] to reduce the broadcast day for sexually explicit programming to an eight-hour safe harbor period of 10:00 p.m. to 6:00 a.m." J.S. App. at 17a & n.14. The evidence showed that the system-wide technical requirements of Section 505(a) were impractical.[12] Accordingly, the district court found that "most MSOs ha[d] no practical choice" but to time channel under Section 505(b) and thereby "curtail such programming during the other sixteen hours or risk the penalties imposed by the [law] if *any* audio or video signal bleed occurs during these times."[13]

As the district court found, these widespread cutbacks significantly "diminishe[d] Playboy's opportunities to convey, and the opportunity of Playboy's viewers to receive, protected speech" because time channeling results in "the removal of all sexually

[12]The district court found that such measures would have required operators to "overhaul[ ] the[ir] transmission[s] * * * such as through a systematic switch to digital transmission, or by providing channel-mapping converter boxes to all subscribers" to achieve "system-wide blocking." J.S. App. 33a n.23. Such solutions, which would cost in excess of $1 billion, are not economically feasible to implement Section 505. Pl. Ex. 60.

[13]J.S. App. 17a (emphasis added). Cable operators are extremely unlikely to take any chances with possible allegations of noncompliance since the Communications Act contains criminal penalties for willful violations. 47 U.S.C. § 501. Particularly relevant here, the Justice Department has in the past subjected a complaint about "incompletely scrambled indecent or obscene material" to criminal investigation by both the Criminal Division and the FBI. Pl. Ex. 245.

explicit programming at issue during two-thirds of the broadcast day from all households on a cable system." J.S. App. 33a. Before Section 505 was adopted, the buy rate for Playboy TV increased by an average of 40 percent in cable systems that expanded service from 10 to 24 hours per day. *See* Pl. Ex. 1 ¶ 26. The overall buy rate for Playboy, which had been growing during the 18 months before the law was adopted, significantly declined after Section 505 was implemented. Trial Tr. 26-28. Consistent with this experience, the court found the restriction imposed by the law was extensive since "30-50% of all adult programming is viewed by households prior to 10 p.m." J.S. App. 33a. The across-the-board cutbacks imposed by Section 505 are particularly excessive because they apply "irrespective of whether a household has children," and because the district court found that "two-thirds of all households in the United States have no children." *Id.* at 34a.

The government's current argument that the burden on speech "is not great," Appellants' Br. 24, is nothing more than an attempt to describe the video bookshelf as half full, rather than half empty. Its offhand defense that "one half or more of appellee's viewers watch during the safe harbor hours anyway" treats cavalierly the district court's finding that, as a general rule, up to 50 percent of Playboy's viewers are affected by time channeling, and ignores entirely the fact that, in some communities, the number exceeds 50 percent.[14] The government's attempt to minimize the impact by suggesting that the average pay-per-view customer purchases programming only five times per year fails to disclose that nearly 25 percent of all cable addressable households are purchasers of adult programming. Pl. Ex. 219. And its argument that subscribers may use their VCRs to tape programming and watch it "whenever they wish," Appellants' Br. 28, does not take into account the impulse nature of pay-per-view purchases or explain the actual

[14]When service hours for Spice were reduced to the safe harbor hours in San Diego, for example, the buy rate plummeted by almost two-thirds. Trial Tr. 42-44; *see also* Pl. Ex. 4 (Harron Communications estimated losses of from 50 to 56 percent due to time channeling).

loss of viewing opportunities that occurred during the enforcement of Section 505.[15] Based on this experience, Playboy estimated that it would lose approximately $25 million in revenues. Trial Tr. 174. This loss provides one quantitative measure of the lost First Amendment opportunities caused by Section 505.

These restrictions on speech are especially broad in relation to the problem the government is seeking to address. Television may be considered a "pervasive" medium, but the government never demonstrated that signal bleed is a pervasive problem. J.S. App. 36a. The extent to which any particular household may experience signal bleed varies significantly from one cable system to another, and even from household to household within a system. J.S. App. 9a, 51a. Yet the government failed either to quantify the extent of the problem or even to portray accurately its qualitative variations.[16] Even in cable systems that may be susceptible to signal bleed, the industry has responded with a variety of market-based non-regulatory solutions, including channel mapping converters, wiring configurations to prevent

[15]Nearly 90 percent of pay-per-view purchases of adult programming are made on impulse. Pl. Ex. 225; Trial Tr. 30. As a result, notwithstanding the existence of VCRs in most homes, Playboy's buy rate declined significantly when Section 505 was in effect.

[16]As the record demonstrates, not all signal bleed is created equal. The government's expert on the psychological impact of signal bleed agreed that any harmful effects from exposure would depend on the degree to which images and sounds were understandable. Benedek Dep. Tr. 201. Yet that expert based her entire assessment of the nature and impact of signal bleed on a single exhibit – Defendants' Exhibit 1 – handpicked by government lawyers and which lasted a total of 3 minutes, 44 seconds. Trial Tr. 551. However, when she was shown the other examples of signal bleed in the record – Defendants' Exhibits 3 and 4 – Dr. Benedek did not perceive any problems. After viewing Defendants' Exhibit 4, she testified that she could not tell whether it depicted sexual activity at all and there was no sound that a child could consider unpleasant. *Id.* at 555. Similarly, upon viewing Defendants' Exhibit 3, Dr. Benedek acknowledged that she could not discern what actions were taking place and that she had no idea how a child might interpret the signal. *Id.* She could detect no profanity on either tape. *Id.* at 556. Here, just as it did in the court below, the government sought to define the nature of signal bleed by lodging only Exhibit 1 with this Court, but not Exhibits 3 or 4.

signal bleed, and responsive industry policies. In addition, many televisions and VCRs already have built-in child-lock circuitry that, according to the government's own experts, allows parents or others to lock out the audio and video of any channel, thereby preventing signal bleed. Jackson Dep. Tr. 135-137, 155-157.

The government seeks to discount the impact of such technical measures, and asserts erroneously that the district court relied only on Section 504, "rather than any of those methods, as a less restrictive alternative to Section 505." Appellants' Br. 35 n.25. But such technical solutions are not "regulatory measures." Rather, the district court pointed out that the Appellants' failure to account for market-based solutions was "an underlying problem with the Government's analysis" and, as a result, "the Government presented no evidence on the number of households actually exposed to signal bleed and thus has not quantified the actual extent of the problem of signal bleed." J.S. App. 11a. Thus, after two years of litigation involving extensive discovery and two full hearings with extensive expert testimony, the district court concluded that "the Government has not convinced us that [signal bleed] is a pervasive problem." *Id.* at 36a.

Finally, to whatever extent signal bleed is a current problem, the government agrees that it will be eliminated by the transition to more technically sophisticated delivery systems, including digital transmission. Although the transition will not occur in time to prevent the significant First Amendment loss to Playboy and its subscribers as found by the district court, J.S. App. 18a & n.17, both sides agree that Section 505 eventually will be rendered entirely unnecessary by the unregulated evolution of the cable industry.[17] Nevertheless, Section 505 imposes a widespread restriction on speech to address a problem that is far from universal and that will vanish over time.

[17]Playboy agrees with the government that signal bleed does not occur in totally digital systems, but notes the district court's finding that a "considerable percentage of cable systems will remain 'analog only' over the next ten years." J.S. App. 18a n.17.

B. Section 505's Restrictions on Playboy's Programming Violate the First Amendment

The broad restrictions of Section 505 are plainly inconsistent with this Court's decisions that non-obscene sexual expression is protected by the First Amendment and the governmental interest in preventing access by children to such materials "does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno v. ACLU*, 521 U.S. at 874-875; *Denver*, 518 U.S. at 754-756. Although the government asserts that restricting communication between adults "may be constitutional if necessary to serve the compelling interest in protecting minors," Appellants' Br. 25, no precedents support the wholesale cutbacks associated with Section 505.

In the various contexts in which the government regulates access to sexually-oriented materials, courts have upheld only those laws that impose "a relatively light burden."[18] Thus, in a bookstore, the government may require posting and enforcing a store policy that keeps minors from openly reading adult materials, or keeping such materials on a shelf "within sight of the bookseller," *American Booksellers Ass'n*, 372 S.E.2d at 625, but is precluded from imposing more onerous business regulations, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990), such as limits on the amount of floor space that can be occupied by adult materials, *e.g.*, *U.S. Sound & Serv., Inc. v. Township of Brick*, 126 F.3d 555, 560 (3d Cir. 1997). Similarly, with adult telephone services, courts have upheld such measures as requiring adults to use a credit card to obtain access,[19] but have rejected regulations

[18] *Commonwealth v. American Booksellers Ass'n*, 372 S.E.2d 618, 625 (Va. 1988); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 388-389 (1988).

[19] *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129-130 (1989) (government must employ least restrictive means). Thus, where FCC rules block in advance access to a "dial-a-porn" service if it is billed by the telephone company, immediate access is permitted by credit card. *Information Providers' Coalition for Defense of First Amendment v. FCC*, 928 F.2d 866, 872 (9th Cir. 1991); *see also id.* at 878 ("[r]eceipt of uttered expression is provided immediately upon request"); *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535, 1543 (2d Cir. 1991) (rules impose "no restraint of any kind on adults who seek access").

that imposed more burdensome restrictions that would "act as a deterrent" to potential callers who might use the service "on impulse" or "infrequently."[20] And in the context presented here, cable television, this Court has upheld "permissive" regulations that expanded the editorial control of cable operators, *Denver*, 518 U.S. at 750 (plurality op.), but struck down mandatory controls that added "costs and burdens" for the operators, thus "prevent[ing] programmers from broadcasting to viewers who select programs day by day (or, through 'surfing,' minute by minute)," and restricting "viewers who would like occasionally to watch a few, but not many, of the programs on the 'patently offensive' channel." *Id.* at 754.

None of the cases support the type of broad restrictions on speech found to have resulted from Section 505. This is true despite the government's claim that Section 505 is not directed at "the speech itself," but at a "byproduct" or "secondary effect" of speech. Appellants' Br. 22-23. The district court fully considered this argument at each stage of the litigation below, and found that full First Amendment scrutiny applies to Section 505 because it targets channels solely on the basis of their content. J.S. App. 25a ("Signal bleed from the Disney Channel, for example, does not come within the purview of the statute.").[21]

[20] *Fabulous Assocs., Inc., v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 786-787 (3d Cir. 1990); *Carlin Communications, Inc. v. FCC*, 787 F.2d 846, 855-857 (2d Cir. 1986) ("*Carlin II*"); *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 121-122 (2d Cir. 1984) ("*Carlin I*") (dial-a-porn rules including "safe harbor" provision struck down).

[21] The government continues to rely on the district court's brief reference to "secondary effects" from the preliminary injunction decision, *see* Appellants' Br. 22-23, while ignoring entirely the Court's more complete discussion of the issue after all of the evidence was presented. J.S. App. 24a-25a. While the government understandably might prefer the outcome at the earlier stage of the proceedings where it prevailed, its persistence in relying on preliminary findings is at odds with its prior representation to this Court that further findings at the permanent injunction stage would enable the district court to better evaluate the merits of the

This Court repeatedly has rejected similar efforts to mischaracterize direct restrictions on speech as regulations of "secondary effects." *See Reno v. ACLU*, 521 U.S. at 867 (rejecting government characterization of speech regulations as "cyberzoning" subject to "secondary effects" analysis under *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49-50 (1986)); *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("Regulations that focus on the direct impact of speech on its audience * * * are not the type of 'secondary effects' we referred to in *Renton*."). It is settled law that the First Amendment prevents the government from restricting the circulation of speech simply because its "byproducts" can cause some type of "nuisance." *See, e.g.*, *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) (possibility of littering does not justify restriction on the distribution of handbills). This is particularly true where, as here, the intensity of the regulation is inextricably bound to speech content. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (government cannot impose variable financial burden on public demonstration based on evaluation of threatening content). For example, the government could not regulate sound levels at an outdoor concert based upon its distaste for a particular type of music. *Ward v. Rock Against Racism*, 491 U.S. 781, 791-793, 795 & n.5 (1989). Nor can it impose a content-based regulation of signal bleed and be immune from traditional First Amendment scrutiny.

This Court's decision in *Erznoznik v. City of Jacksonville* 422 U.S. 205 (1975) is directly on point. There, this Court struck down a local ordinance designed to protect children from "fleeting * * * glimpses of nudity" that could be seen from public streets when X-rated movies were shown at drive-in theaters. *Id.* at 214-215. Like Section 505, the ordinance at issue in *Erznoznik* targeted inadvertent viewing of bits and pieces of movies, and it subjected drive-in owners to essentially the same dilemma created

case. Mot. to Affirm at 12, 14-16, *Playboy Entertainment Group, Inc. v. United States*, No. 96-1034 (U.S. 1997).

for cable operators here: "they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable." *Id.* at 217. This Court held that the law imposed too great a burden under the First Amendment because it would "increase the cost of showing films containing nudity."[22] Such a burden, the Court concluded, is an unconstitutional "restraint on free expression" even if "it might not result in total suppression of these movies." *Id.* at 211 n.8; *see also Rabe v. Washington*, 405 U.S. 313, 314 (1972) (*per curiam*) (striking down ordinance restricting drive-in that presented films with "sexually frank scenes" that were clearly visible from private residences). Rather, the regulation was found to be excessive because it created a "deterrent effect" on speech. *Erznoznik*, 422 U.S. at 217.

In short, this Court has never upheld the types of broad restrictions on speech that are associated with Section 505. The government understands this fact, and even acknowledges that "a similar content-based restriction on non-obscene speech would surely be unconstitutional in many other contexts." Appellants' Br. 19. Accordingly, Appellants ask this Court to eviscerate the applicable level of First Amendment scrutiny in order to overturn the decision below. But as explained herein, it cannot justify such a sweeping change in the law.

[22] *Id.* at 211. The government does not dispute the relevance of *Erznoznik*, but attempts instead to distinguish the Jacksonville ordinance by claiming that it applied to a broader category of speech than does Section 505. But the claim that Section 505 "is directed solely at sexually explicit programs broadcast on sexually explicit programming services," Appellants' Br. 23 n.14, is undermined by the actual language of Section 505 ("channels primarily dedicated to sexually-oriented programming") as well as the imprecision and vagueness of the indecency standard. *See infra* pp. 26-30. Moreover, a contemporaneous reference to *Erznoznik* written by the Meese Commission's legal expert described the Jacksonville ordinance as a "requirement that drive-in theaters 'shield' passersby from adult or X-rated movies but not from others." *See* Frederick F. Schauer, THE LAW OF OBSCENITY 94-95 (BNA 1976).

1. *Pacifica* Does Not Provide the Appropriate Standard of Review

The heart of the government's argument is to ask this Court to do precisely what it refused to do in *Denver* — to extend the standard applicable to broadcast indecency to cable television. Although the *Denver* plurality compared broadcasting and cable television and found that both media are "pervasive," 518 U.S. at 744-745, it expressly declined the government's invitation to apply the holding from *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), to cable television.[23] Here, the government asks this Court to consider the "all-important context" and to apply *Pacifica* directly to cable, yet it utterly ignores the historical differences in broadcast and cable regulation, the technical distinctions between the two media, and the amplified censorial effect of time channeling in the cable context. As this Court explained in *Reno v. ACLU*, *Pacifica* involved a single order issued by the FCC which "had been regulating radio stations for decades," and "targeted a specific broadcast" that "represented a rather dramatic departure from traditional program content." 521 U.S. at 867. This case, however, arises in a very different context.

a. Contrary to the government's assertions, *Pacifica* is a most limited holding. This Court upheld only the government's ability to subject a particular broadcast to subsequent review, and emphatically declined to authorize the FCC "to edit proposed broadcasts in advance and to excise material considered

[23] *Denver*, 518 U.S. at 755 (plurality op.). The government's startling assertion that "[n]one of the opinions in *Denver Area* suggested that regulation of indecency on cable television should be analyzed under a standard that differs in any way from the standards governing regulation of indecency on over-the-air broadcast television and radio," Appellants' Br. 20, is contradicted on the same page of its own brief, *id.* at 20 n.10 (discussing Justice Kennedy's endorsement of strict scrutiny standard), and by the various *Denver* opinions, *e.g.*, 518 U.S. at 803-804 (Kennedy, J., concurring in part, dissenting in part) (concerns articulated in *Pacifica* "do not justify * * * a blanket rule of lesser protection for indecent speech"), 812-819 (Thomas, J., concurring in judgment in part and dissenting in part) (discussing application of full First Amendment protection to cable television).

inappropriate for the airwaves." 438 U.S. at 735-738. The ruling applied only to the "specific factual context" presented by the FCC's order – whether the Commission had the authority "to proscribe this particular broadcast," *id.* at 742 (internal quotation marks omitted), and this Court expressly limited its holding to approve only the "subsequent review" of the particular words at issue. *Id.* at 737.

Applying the *Pacifica* standard to cable television would drastically increase the level of government regulation of this medium, which has never previously been subject to the same degree of FCC control as broadcasting.[24] Whereas *Pacifica* involved programming that represented "a dramatic departure from traditional program content," applying broadcast-type indecency rules to cable television would extend regulation of programming to content that has always been available on this medium.[25] Traditional cable television fare is even more distinguishable from broadcast content because of the existence of government-mandated leased and public access channels, which may present indecent material to all cable subscribers on the basic

[24] *See, e.g.*, *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1116 (D. Utah 1985) (cable indecency law targeting premium movie services invalidated), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.*, 480 U.S. 926 (1987); *Cruz v. Ferre*, 755 F.2d 1415, 1419 n.4 (11th Cir. 1985) (same).

[25] Final Report, The Attorney General's Commission on Pornography 282 (1986) ("MEESE COMMISSION REPORT") (the increased sexual explicitness of cable television compared to broadcasting occurs in talk shows, call-in shows specializing in sexual advice, music videos featuring strong sexual or violent themes, cable channels that specialize in sexual fare, and more general purpose cable channels that offer uncut motion pictures that would not be shown on broadcast television). In one review of over 1,300 movies during a three year period, the FCC found that more than half of the films on general premium cable services received an MPAA R rating. *Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. 5297, 5308-5309 (1990). Although the R rating obviously is not a legal standard, the FCC has used it as a general rule of thumb. *See id.* ("adults can obtain indecent material through cable television" because "a significant number of R-rated movies are shown on cable").

service tier.[26] Consequently, *Pacifica*-style regulation is far more restrictive (and, as explained below, less effective) when applied to the cable television medium.[27]

In seeking to apply *Pacifica* wholesale to cable television, the government also ignores important technical distinctions between the broadcast and cable media. The broadcasting "safe harbor" rules historically were based on the fact that blocking technology did not exist for radio or for free television.[28] As the Solicitor General told this Court in *Denver*, Congress employed a safe harbor approach for broadcasting "because it is technologically impracticable (at least at present) to implement a central office 'blocking' scheme to screen indecent programming on existing television sets and radios." Brief of Fed. Resp'ts at 40 n.20, *Denver*. Accordingly, any First Amendment burdens resulting from the broadcasting safe harbor were more easily justified in that specific context because there was no other way to address the government's concern.[29]

---

[26]*Denver*, 518 U.S. at 752-753; *Loce v. Time Warner Entertainment*, 1999 WL 387150, at *8 (2d Cir. June 14, 1999); *Goldstein v. Manhattan Cable Television, Inc.*, 916 F. Supp. 262, 267 (S.D.N.Y. 1995).

[27]Because sexually-oriented material can and does appear on a broad range of cable networks, Section 505 also violates the Equal Protection Clause of the Fifth Amendment. *See Action for Children's Television v. FCC*, 58 F.3d 654, 668-669 (D.C. Cir. 1995) (en banc) (invalidating different safe harbor hours for public broadcasters), *cert. denied*, 516 U.S. 1043 (1996). Playboy raised this issue with the court below. *See* Pl. Post-Trial Br. at 74-77.

[28]*See Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. at 5309 (separating children from adults in the broadcast audience is an "impossibility"), *id.* at 5305 ("parents' control of children's television viewing * * * differs from parental control of cable viewing"), at 5308 ("[w]hile signal blocking and subcarrier use appear to be technologically feasible to prevent reception by individuals not wishing to receive certain signals, neither is available today" for broadcasting); *see Denver*, 518 U.S. at 775 (Souter, J., concurring) ("broadcasts [are] * * * difficult or impossible to control without immediate supervision").

[29]By increasing parental control over broadcasting, the V-chip requirements of the Telecommunications Act may now eliminate this rationale for applying time channeling restrictions on free over-the-air television.

With cable television, however, reviewing courts, including this Court, have noted that various technical options are available to permit control of cable programming into the home. *Denver*, 518 U.S. at 755-757 (discussing less restrictive technical alternatives, including the possibility of adding informational requirements); *Cruz*, 755 F.2d at 1420-21 (discussing lockboxes). Ironically, the government previously has taken the position that such technical options are less restrictive than time channeling. Brief of Fed. Resp'ts at 40-41, *Denver* (noting relative First Amendment burdens "[w]here technology permits a choice between mandatory time-of-day restrictions and a technique that permits 24-hour access").

b. Unlike the single enforcement order at issue in *Pacifica* that "targeted a specific broadcast," *Reno*, 521 U.S. at 867, Section 505 targets "channels" for wholesale service cutbacks. When safe harbor rules are applied to broadcasters, the affected station may comply by rescheduling a particular program to late night hours. But here, the district court found that the affected networks had "no practical choice" but to go dark for 16 hours per day. J.S. App. 17a. This is a fundamental breach of the basic principle that "'[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone * * *.'"[30] A blanket rule "chills potential speech before it happens" and imposes a far greater First Amendment burden than "an isolated disciplinary action." *United States v. National Treasury Employees Union*, 513 U.S. 454, 468 (1995).

The government asserts, however, that Section 505 requires time channeling or blocking "only of indecent material" and that the fact that Playboy's programming is restricted for two-thirds of the broadcast day "is the result of appellee's choice to broadcast only indecent material." Br. in Opp. to Mot. to Affirm at 3-4. This

---

[30]*Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 683 (1994) (O'Connor, J., concurring in part and dissenting in part) (citation omitted) ("*Turner I*"); *see Wilkinson*, 611 F. Supp. at 1110 (impact of indecency time channeling is far more burdensome for cable network than for broadcast station).

facile argument ignores the fact that, unlike broadcasting, cable television networks generally are offered as niche services defined by subject matter, and it highlights a fundamental flaw in Section 505 – the presumption it creates that all programming on a "sexually-oriented" channel is necessarily "indecent." As demonstrated throughout this litigation, this broad supposition, coupled with the lack of precision of the indecency standard, leads to the censorship of programming that clearly is not indecent, and precludes any attempt by Playboy to minimize the censorial effect of time channeling.

As Playboy demonstrated below,[31] the indecency standard used in Section 505 suffers from the same infirmities identified by this Court in *Reno v. ACLU*. In *Reno*, the identical indecency standard that is now employed in Section 505 was found to be seriously deficient due to "the absence of a definition of either [statutory] term," the lack of any requirement that the proscribed material be "specifically defined by the applicable * * * law" or that the material be without "serious literary, artistic, political, or scientific value."[32] This Court was troubled by the scope of the indecency restriction because it applied to "any of the seven 'dirty words' used in the *Pacifica* monologue" and could also extend to discussions about "safe sexual practices [and] artistic images that include nude subjects."[33]

[31] *See* Playboy's Mot. for Summ. J. on Vagueness at 4-19; Playboy's Post-Trial Br. at 34-52.

[32] 521 U.S. at 871-873 (internal quotation marks omitted). This Court pointed out that the term indecent "does not benefit from any textual embellishment at all," and the term patently offensive "is qualified only to the extent that it involves 'sexual or excretory activities or organs' taken 'in context' and 'measured by contemporary community standards.'" *Id.* at 871 & n.35 (citations omitted).

[33] 521 U.S. at 878. This Court also found that a speaker could not confidently assume "that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape would not violate the [law]." *Id.* at 871.

Section 505 has the same flaws, plus a few more. After briefing and argument on the vagueness issue, the district court below reserved judgment, but noted its particular concern "about the uncertainty which continues to surround the restrictions on programming on channels primarily dedicated to sexually-oriented programming during the non-safe harbor hours, presently the hours from 6:00 a.m. to 10:00 p.m." M.A. App. 24a. It also pointed to the "fundamental uncertainty surrounding the question of how a channel primarily dedicated to sexually-oriented programming during safe harbor hours would be classified if it opted to air an alternative type of programming during non-safe harbor hours." *Id.* at 25a. In particular, the district court asked whether there are "any FCC letter or advisory opinions that are available to assist this Court, the plaintiff, or other channels * * * in construing the permissible scope of regulation under Section 505." *Id.* at 25a n.6.

Notwithstanding the district court's concerns, the FCC rejected Playboy's efforts to get specific guidance on the meaning of the indecency standard in Section 505. It rejected Playboy's request for clarification, including a request for an expedited ruling to clarify the status of a safe sex documentary that premiered on World AIDS Day in December 1997.[34] In a one-page letter, issued long after World AIDS Day came and went, the Chief of the Cable Services Bureau wrote that "declaratory rulings related to programming issues must be dealt with cautiously" and "have the potential to be viewed as prior restraints." M.A. App. 28a-29a.

Notwithstanding the FCC's professed caution, the government in the court below did not hesitate to declare all of Playboy's

[34] Along with its request for a declaratory ruling on nine videos, Playboy sought an expedited ruling for the safe sex program *Doin' it Right* in the hope of transmitting it outside the safe harbor hours to make it available to as many cable subscribers as possible. When no ruling was forthcoming, however, the program aired after 10 p.m. Trial Tr. 117-118.

programming to be "indecent."[35] In particular, the government argued that AIDS awareness programs on Playboy TV should be restricted because they contained "crude and explicit language" and some "explicit" demonstrations. Defs. Post-Trial Br. at 68-69. It also argued that news magazine-type programs should be restricted because they generally are sexually-oriented, use some of George Carlin's "filthy words" in some segments, and include some segments with sexual activity. *Id.* at 67-68. And the government argued that nude images in the *Video Playmate Calendar* are indecent despite the absence of any sexual activity. *Id.* at 68.

In short, the government's actions in this case substantiate this Court's concerns that the indecency standard fails to account for the merit of a particular program and does not consider the work as a whole. In *Reno*, for example, this Court noted that a vague indecency standard threatened to restrict safer sex instructions "written in street language so that the teenage receiver can understand them," 521 U.S. at 870-871, 878, which is exactly what occurred here.[36] Similarly, the government's willingness to condemn news programs that included intermittent, fleeting images of sexual activity or profanity confirmed its failure to consider the work as a whole.[37] And its tendency to equate "nudity" with "indecency" undermines its argument that Section 505 is narrowly focused on "sexually explicit programs" and is

[35] *Amici* Family Research Council, et al., embrace the government's position and state that Section 505 should restrict Playboy's speech "regardless of whether the 'sexually explicit' material is medical, scientific, critically important, or mere entertainment in nature." Brief of *Amici* Family Research Council, et al., at 5.

[36] Contrary to the government's refusal to issue a declaratory ruling and its claims that Playboy's AIDS education programs should be considered indecent under Section 505, the First Circuit held that Playboy's program *Hot, Sexy and Safer* was appropriate for a mandatory middle school assembly because it was "intended to educate the students about the AIDS virus." *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 541 (1st Cir. 1995).

[37] *See, e.g.*, Defs. Ex. 41 *(World of Playboy*, in which only two of twelve news segments had any depictions of sexual activity).

contrary to well established law.[38] Finally, the government's discussion of the theatrical features contained in Playboy's declaratory ruling request underscores the concerns raised by the district court in *Reno* that the indecency standard restricts "a broad range of material" including "contemporary films" such as "*Leaving Las Vegas.*"[39]

Although the district court did not resolve the vagueness issue, J.S. App. 23a, 39a, it implicitly rejected the government's claim that "Playboy can offer non-indecent programs 'in the clear' whenever it wishes during the non-safe harbor period." Reply Br. in Support of Defs.' Mot. for Partial Summ. J. at 12. The court found that cable operators have "no practical choice" under Section 505 but to censor Playboy TV for two-thirds of the broadcast day, J.S. App. 17a, and that "the MSOs have unanimously chosen to stop *all* such programming on dedicated adult channels during the non-safe harbor hours." *Id.* at 33a n.23 (emphasis added). This finding undercuts the government's claim that time channeling is no more restrictive in this context than when it is applied to broadcast stations. And it also provides an

[38] *Erznoznik*, 422 U.S. at 213; *American Booksellers Ass'n*, 484 U.S. at 394; *see also ACLU v. Reno*, 24 Media L. Rep. (BNA) 1795, 1796-1797 & n.3 (E.D. Pa. May 15, 1996) (admonishing Justice Department for investigation of "centerfold-type images"). In contrast to the government's position here, the Department of Defense found that some of the same types of Playboy videos that were submitted to the FCC are not "sexually explicit" within the meaning of The Military Honor and Decency Act, 10 U.S.C. § 2489a (Supp. III 1998). It found that such videos as *Playboy 1995 Playmate Calendar* and various Playboy *Video Centerfolds* are not "sexually explicit." Twelve copies of the Pentagon's list of findings has been lodged with the Clerk of this Court.

[39] *ACLU v. Reno*, 929 F. Supp. 824, 855 (E.D. Pa. 1996) (Sloviter, J.). Although the government below argued that the theatrical releases included in Playboy's declaratory ruling request such as *9 1/2 Weeks* and the *Unbearable Lightness of Being* are not "typical or frequent fare" for Playboy, Defs. Post-Trial Br. at 68, such films have aired on Playboy TV and are sufficiently "typical" that Playboy uses *9 1/2 Weeks* as an example in its editorial guidelines. *See* Pl. Ex. 132. Of course, such programming can never become more typical or frequent under Section 505's vague standard.

independent basis for this Court to conclude that Section 505 is unconstitutional.[40]

c. The government's assertion that the context of Section 505 provides an even greater justification for "flexibility in regulation," Appellants' Br. 22, is wrong both factually and as a matter of law. The claim that Section 505 is less restrictive than time channeling under *Pacifica* because cable operators may transmit adult programming "at any time of the day or night" with adequate scrambling simply is incorrect. Appellants' Br. 23-24. Broadcasters have exactly the same "option" as cable operators. Under the FCC's indecency rules, broadcast stations may transmit indecent programming during non-safe harbor hours "on encrypted services, such as subscription television" ("STV").[41] However, STV is not an economically viable alternative means of complying with indecency rules, and it would be frivolous to suggest that any burdens on broadcast speech imposed by the rules could be avoided by switching to a subscription format.[42] Likewise, the district court found that the system-wide scrambling alternative provided by Section 505(a) was not viable, and that "[n]either Playboy nor the government could identify a single

[40]The question of Section 505's facial invalidity on grounds of overbreadth or vagueness is "fairly included" within the questions presented in this appeal. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 n.3 (1992); *see* Appellants' Br. at I. Moreover, this Court may uphold a judgment on any ground raised in the court below "whether or not that ground was relied upon, rejected, or even considered by the District Court or Court of Appeals." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

[41]*Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. at 5308. Contrary to the government's suggestion, in fact, Section 505 is more restrictive for cable operators with respect to scrambling because its requirements extend only to "multichannel video programming distributor[s]." 47 U.S.C. § 561(a). No comparable rule applies to STV.

[42]STV has been a marketplace failure. At its peak, around 1982, the service had about 1.4 million subscribers, and its numbers steeply declined thereafter. BROADCASTING & CABLE YEARBOOK 1998, at xxviii. The current BROADCASTING & CABLE YEARBOOK lists no subscription operations among U.S. television stations. *See id.* § B.

cable system that had adopted double scrambling to comply with § 505." J.S. App. 16a-17a, 33a n.23. It is therefore incorrect to suggest that the possibility of scrambling lightens the load of Section 505.[43]

Nor is there any basis in the record for the government's claim that the risks to children posed by signal bleed from Playboy's programming "are substantially greater than those present in *Pacifica*." Appellants' Br. 25. This argument, which depends on an overly generalized characterization of the programming at issue, overlooks the fact that the government failed to demonstrate that signal bleed is a "pervasive problem," J.S. App. 36a, either quantitatively or qualitatively. The district court noted the lack of evidence that "the effects of viewing signal bleed of sexually explicit television are the same as viewing sexually explicit television outright." J.S. App. 29a. In this regard, the FCC has suggested that concern over indecency is not present where the sexual import of material is "barely intelligible, much less inescapable to adults" so that those who randomly tune in would be unlikely to "continue listening" or unlikely to "discern the [material's] sexual meaning." *Sagittarius Broad. Corp.*, 7 FCC Rcd. 6873, 6874 (1992).

Even where signal bleed is more discernible, there is no record support for the government's assertion that the "sound tracks from appellee's programming alone are much coarser and far more offensive than the broadcast that was at issue in *Pacifica*." Appellants' Br. 30. With respect to the government's references to "assorted orgiastic moans and groans," Appellants' Br. 6 n.4, Judge Farnan described such audio signal bleed as "akin to the

[43]The fact that certain cable operators already comply with the technical requirements of Section 505(a) does nothing to reduce the regulatory burden of the law, because those operators did not upgrade their systems to comply with government mandates. However, the government's suggestion of a forced migration of Playboy programming to a digital tier by operators who have commenced some digital service, Appellants' Br. 40-41, would significantly restrict the number of subscribers who could receive service for a number of years. Trial Tr. 166-167.

utterances of actress Meg Ryan during her performance in the diner scene in the movie *When Harry Met Sally*," M.A. App. 17a n.11, and even the government's expert witness testified that such sounds were no more "offensive" or "harmful" than sounds routinely emitted from other channels.[44] Nor is there any evidence in the record that the sound tracks of films routinely shown on other premium networks (that are not subject to Section 505) are any less "coarse" or "offensive." *See* Pl. Ex. 18 at 2 (HBO film *Another 48 Hours* averages a profanity every 30 seconds).

Finally, it should be noted that granting the government's request to apply *Pacifica* here would violate the *Denver* plurality's decision to eschew adopting "a rigid single standard, good for now and for all future media and purposes." 518 U.S. at 742 (plurality op.). The government is using this case as a vehicle to obtain "greater flexibility" to regulate protected speech in the cable television medium, a request that has far-reaching implications as some courts have begun to define high-speed Internet access as a cable television service, regulated under the Cable Act. *See AT&T Corp. v. City of Portland*, 43 F. Supp.2d 1146 (D. Ore. 1999), *appeal pending*, No. 99-35609 (9th Cir.). As Justice Souter wrote in *Denver*, the media of communication are becoming "less categorical and more protean," and "as broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others." *Denver*, 518 U.S. at 776-777 (Souter, J., concurring). Here, the government's request that this Court expand *Pacifica*'s holding to newer media in circumstances far beyond its original context threatens to undermine the logic of *Reno v. ACLU*, 521 U.S. at 870 ("our cases provide no basis for

[44] The government's expert testified that any adverse effect of audio signal bleed is based on a child's exposure to an "unpleasant sound," not to anything related to sexuality. The sound could be an explosion, a gunshot, or a scream, and it would not matter what channel is on television. Trial Tr. 578-579.

qualifying the level of First Amendment scrutiny that should be applied to this medium"), and should be firmly rejected.

2. Section 505 is Unconstitutional Under the Level of Scrutiny This Court Applied in *Denver*

The district court correctly found Section 505 to be unconstitutional under the teachings of *Denver*, regardless of whether the First Amendment standard applied there is characterized as intermediate scrutiny or "strict scrutiny or something very close to strict scrutiny."[45] There simply is no basis for the government's complaint that the district court applied a "particularly rigorous" form of strict scrutiny. Appellants' Br. 28. Quite to the contrary, just as this Court held in *Denver*, Section 505 "fails to satisfy this Court's formulations of the First Amendment's 'strictest,' as well as its somewhat less 'strict,' requirements." *Denver*, 518 U.S. at 755; *id.* at 803-804 (Kennedy, J., concurring in part and dissenting in part).

a. Section 505 is plainly unconstitutional under *Denver*. Significantly, the only part of *Denver* to garner a solid majority was the section of the opinion invalidating Section 10(b) of the 1992 Cable Act, 518 U.S. at 753-760, a provision the government described below in this case as "remarkably similar to Section 505" and which was most often compared to Section 505 at the preliminary injunction stage.[46] Indeed, in its supplemental brief in *Denver*, the Solicitor General noted that Section 505 "has effects similar to Section 10(b) of the 1992 Cable Act." Supplemental Br. of Fed. Resp'ts at 3, *Denver*.

[45] J.S. App. 23a. While the *Denver* plurality may not have applied strict scrutiny explicitly, the result in that case was reached by "closely scrutinizing" the law "with the greatest care." 518 U.S. at 743 (Court must "closely scrutiniz[e]" the provisions of Section 10 to ensure that it does not impose "an unnecessarily great restriction on speech."); *id.* at 747 (plurality op.) ("Our basic disagreement with Justice Kennedy is narrow.").

[46] *See* Defs. Opp'n Br. to the Mot. for Prelim. Inj. at 2-3, 4, 14, 21, 23, 24, 25, 26, 33, 34, 37, 40, 41, 43, 54, 58, 63, 68, 71 (20 separate citations comparing Section 505 to Section 10(b)).

Moreover, the only regulation upheld in *Denver*, out of the three at issue, merely permitted cable operators to reject indecent programming on leased access channels. In sharp contrast to Section 505, Section 10(a) imposed no requirement at all on cable operators to restrict indecent programming,[47] and the vast majority of cable operators apparently adopted no such policy.[48] Instead, Section 10(a) *expanded* cable operators' editorial control over leased access channels because it empowered them for the first time to accept or reject indecent programs on those channels.[49] Moreover, unlike the governmental mandate imposed by Section 505, there is no possibility that the voluntary rules approved in *Denver* would be vague or overly broad, since cable operators themselves were given the authority to define what programming is "indecent." Such leased access requirements can only be enforced pursuant to a "written and published policy," *Denver*, 518 U.S. at 752 (plurality op.) (published policy requirement "protects against over broad application of its standards"), and must be applied consistently to "substantially similar programming," *id.* at 752-753; *see Loce*, 1999 WL

[47] *Denver*, 518 U.S. at 750 (plurality op.) (Court approved only *permissive* controls on indecent leased access programming), 768 (Stevens, J., concurring) ("The difference between § 10(a) and § 10(c) is the difference between a permit and a prohibition."), 779 (O'Connor, J., concurring in part and dissenting in part) (Sections 10(a) and 10(c) leave to the cable operator the decision whether or not to broadcast indecent programming), 823 (Thomas, J., concurring in part and dissenting in part) ("The permissive nature of §§ 10(a) and (c) is important in this regard. If Congress had forbidden cable operators to carry indecent programming on leased and public access channels, that law would have burdened the programmer's right * * * to compete for space on an operator's system.") (citation omitted).

[48] *See Cable Television Consumer Protection & Competition Act of 1992*, 62 Fed. Reg. 28371, 28371 (1997) (only about 100 cable systems per year expected to adopt a written policy limiting indecency); *Denver*, 518 U.S. at 745 (plurality op.) ("[t]he permissive nature of § 10(a) means that it likely restricts speech less than, not more than, the ban at issue in *Pacifica*").

[49] *Denver*, 518 U.S. at 743 (plurality op.) (provision involves a complex balance of First Amendment interests); *see also* Brief for Fed. Resp'ts at 25, *Denver* (the rules "limit programmers' expressive activity only insofar as – and to precisely the same extent as – they expand that of the operators").

387150, at *15 ("we see no indication that Congress meant to imply that a cable operator could reasonably believe any given program to be patently offensive solely because of its source"). Section 505's mandate is not remotely comparable to the sole provision upheld in *Denver*.

b. The district court's factual findings in this case amply reveal that the government failed to demonstrate "that the recited harms [to be addressed by Section 505] are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[50] After two years of litigation involving extensive discovery and two full hearings with extensive expert testimony, the district court concluded that "the Government has not convinced us that [signal bleed] is a pervasive problem." J.S. App. 36a.

The legislative history provides no support for the government's position. Section 505 was adopted as an eleventh hour amendment to a comprehensive telecommunications bill without discussion, supported only by the sponsors' unadorned assertion that "numerous" cable systems failed entirely to scramble their signals on adult channels. *See* 141 Cong. Rec. S8167 (daily ed. June 12, 1995). There were no hearings, debates, or congressional findings before Congress voted on the amendment. J.S. App. 54a. Moreover, no testimony or other evidence ever suggested that children would be harmed in any way by occasional or fleeting exposure to garbled cable signals. When the district court granted the temporary restraining order in this case, it noted that "the legislative record contains no findings as to how often this bleeding occurs, how many minors are exposed to the adult programming when the bleeding occurs or what effect such

[50] *Turner I*, 512 U.S. at 664; *see Denver*, 518 U.S. at 766 (plurality op.) ("[i]n the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, we cannot assume that the harm exists or that the regulation redresses it"); *Reno*, 521 U.S. at 858 n.24 (noting the lack of legislative investigation preceding passage of the Communications Decency Act).

exposure has on minors." M.A. App. 15a-16a (noting "an absolute void of legislative findings").

The district court challenged the government to provide "more specific evidence of the number of households with the potential for signal bleed" at the hearing on a permanent injunction, J.S. App. at 53a & n.16, but no such showing was made, *id.* at 36a. Although this Court has approved the use of judicial proceedings to supplement the abstract concerns of Congress where the legislative history lacks sufficient findings, *Turner I*, 512 U.S. at 664-668, and narrowly upheld the constitutionality of must carry regulations after a comprehensive record was compiled on remand, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-196 (1997) ("*Turner II*"), the differences between the *Turner* cases and this case are quite telling:

- Must carry rules were enacted only after years of detailed study, *Turner I*, 512 U.S. at 632; *Turner II*, 520 U.S. at 199 (Congress heard "years of testimony, and review[ed] volumes of documentary evidence and studies"), whereas Section 505 was adopted despite an "absolute void" of legislative findings.

- The FCC conducted a "contemporaneous study" of television stations that had been dropped from cable systems to support must carry rules, *Turner II*, 520 U.S. at 203, whereas here, there was no study of any kind, and the government could identify only 72 specific complaints "which the FCC believes are at least potentially related to indecent or sexually explicit cable programming" out of "33,000 informal written complaints about cable service generally."[51]

[51] Pl. Ex. 119. The 72 complaints did not all relate to "sexually-oriented" channels or to the issue of signal bleed, but to programming on networks as diverse as HBO, Cinemax, The Movie Channel, Showtime, MTV, E!, CNN, Bravo, The Disney Channel, Viewer's Choice, A&E and Nickelodeon. Pl. Ex. 43.

- In *Turner*, the legislative record in support of must carry rules was supplemented by an additional 18 months of factual development in the courts "yielding a record of tens of thousands of pages of evidence" that included congressional findings, expert submissions, sworn declarations, and industry documents. *Turner II*, 520 U.S. at 187 (internal quotation omitted). Here, however, after two years of litigation, the government presented "no evidence on the number of households actually exposed to signal bleed," and managed to compile anecdotal evidence comprising "only a handful of isolated incidents over the 16 years since 1982 when Playboy started broadcasting." J.S. App. 11a-12a.

Ultimately, the government's evidence in support of Section 505 amounted to accounts of two city councilors, 18 individuals, one United States Senator, and the officials of one city.[52] In *Denver*, this Court found similar evidence to be inadequate to support restrictions on indecent programming on public access channels. Although the record contained "anecdotal references to what seem isolated instances of potentially indecent programming," the plurality found that "these few examples do not necessarily indicate a nationwide pattern." *Denver*, 518 U.S. at 764 (plurality op.). The *Denver* plurality concluded that "the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end." *Id.* at 766. The same conclusion is warranted here, where the government failed to show that signal bleed is a pervasive problem. *See* Richard Posner, *Obsession*, NEW REPUBLIC, Oct. 18, 1993, at 34 ("in a nation of 260 million people, anecdotes [to establish problems of pornography] are a weak form of evidence"). In addition, the government failed to demonstrate that imposing the "safe harbor" under Section 505 "will in fact

[52] J.S. App. 11a. The paucity of examples is all the more impressive in light of the active participation of *Amici* in the drafting of this law, and in preparing viewer testimony for the preliminary hearing and trial. Br. of *Amici* Family Research Council, et al., at viii.

alleviate [the] harms [of signal bleed] in a direct and material way." *Turner I*, 512 U.S. at 664; *Denver*, 518 U.S. at 766 (plurality op.). *See infra* pp. 44-45.

c. As explained more fully in the next section, Section 505 is unconstitutional because it is not the least restrictive means of addressing the government's interest. Although this Court conducted the same analysis of less restrictive regulations in *Denver*, and reached the same conclusion with respect to Section 10(b), the government now asks it to defer to the predictive judgments of Congress about the necessity of Section 505. Appellants' Br. 26-28. But the government's argument assumes that Congress has made "a reasonable choice among the available alternatives," Appellants' Br. 27, and only pays lip service to the need for judicial scrutiny "to assure that * * * Congress has drawn reasonable inferences based on substantial evidence." *Turner I*, 512 U.S. at 666. Contrary to the government's plea for judicial leniency, the case for deference is not persuasive where, as here, there is an "absolute void" of legislative fact-finding or deliberation. M.A. App. 15a. In addition, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Sable*, 492 U.S. at 129 (citation omitted).

The rationale for deference is weakened still further where Congress repeatedly has reached an opposite conclusion from the one now urged by the government, and routinely relies on individual user empowerment to protect minors. [53] This Court

[53] In addition to Section 504, Congress adopted V-chip requirements in the 1996 Act upon the finding that parents will take an active role in supervising their children. Telecomms. Act of 1996 § 551(a)(7), reprinted at 47 U.S.C. § 303 note ("[p]arents express grave concern over violent and sexual video programming and strongly support technology that would give them greater control * * *."). Voluntary measures, according to Congress, such as "[p]roviding parents with timely information about the nature of upcoming video programming," provide a "nonintrusive and narrowly tailored means" of empowering parents. Telecomms. Act of 1996 § 551(a)(9), reprinted at 47 U.S.C. § 303 note; *see also* 47 U.S.C. § 544(d)(3) (notice requirement permits parents to block free access by non-subscribers to premium cable channels that provide films rated X, NC-17, or R).

has stressed that "we can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as *some indication* that more restrictive means are not 'essential' (or will not prove very helpful)." *Denver*, 518 U.S. at 758 (plurality op.) (emphasis in original) (citing *Boos* v. *Barry*, 485 U.S. at 329). Here, the only congressional actions that fairly can be described as "predictive judgments" about less restrictive means undermine, rather than support, the government's position.

C. The District Court Correctly Held That Section 505 Is Not the Least Restrictive Means of Addressing the Government's Interest

In holding that Section 505 is not the least restrictive means, the district court straightforwardly applied settled law. J.S. App. 32a-39a. Under traditional First Amendment analysis, the government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. at 799. The court below found that Section 505 required cable operators "to prevent [signal] bleed in all non-subscribing households, irrespective of whether a household has children," and that "two-thirds of all households in the United States have no children." J.S. App. 33a-34a. By contrast, the district court found that Section 504 is not content-based, *id.* at 35a, and that the existence of a content-neutral alternative "undercut[s] significantly" any defense of a content-based statute. *Id.* (quoting *Boos v. Barry*, 485 U.S. at 329). It concluded that "§ 504 would appear to be as effective as § 505 for those concerned about signal bleed, while clearly less restrictive of First Amendment rights."[54] The government's arguments that Section 504 is not an adequate alternative, and that

[54] J.S. App. 38a. To ensure that cable subscribers have adequate notice of their rights under Section 504, the district court directed Playboy to work with cable operators to provide such notice. Playboy has taken no position on the legality of such a command, and did not file a cross-appeal to this aspect of the decision below. In any event, Playboy's extensive arrangements to provide the contemplated notice are described in Playboy's Combined Opposition To Defendants' Post-Trial Motions at 10-11.

it is not less restrictive than Section 505 are unsupported and would require this Court to significantly alter its First Amendment jurisprudence.

1. The government's complaint about Section 504 with added notice requirements as being "hypothetical" or "uncertain" is most curious since courts routinely contemplate potential alternative measures. *See Reno,* 521 U.S. at 855; *Sable*, 492 U.S. at 130. Indeed, in *Denver*, this Court concluded that any perceived problems of voluntary blocking solutions could be cured by less burdensome means, and described a variety of "hypothetical" alternatives, including informational requirements, a simple coding system, or readily available blocking equipment accessible by telephone. 518 U.S. at 759. Here, it is the fact that Congress *could* have enacted an enhanced notice requirement for Section 504 – not that it did so – that undermines Section 505.[55]

Quite obviously, the least restrictive means analysis calls upon courts to anticipate measures Congress might employ to achieve its stated goals, and it does not require that such measures actually be adopted and proven effective. To assume, as does the government here, that a regulatory alternative must have been previously enacted and litigated in order to qualify as a less restrictive means would gut this First Amendment doctrine. Congress would be empowered to censor speech at will merely by refusing to enact less restrictive measures if the law were as the government suggests. And its theory also would reverse the burden of proof, which currently requires the government to demonstrate that its chosen method of regulation is the least restrictive alternative. *E.g.*, *Sable*, 492 U.S. at 129-130. The government cited no cases to support this novel interpretation, nor could it do so, for none exist.

---

[55]Because a reviewing court may postulate possible alternative regulations, the district court's directive that Playboy provide "effective notice" of Section 504 is not essential to the decision. It is sufficient that Congress might have adopted such a requirement.

The government's argument that inert, indifferent, or distracted parents doom any alternative regulation was specifically considered and rejected by a majority of this Court in *Denver*. There, citing the government's "independent interest" in protecting minors, Appellants asserted, just as they do here, that "innumerable parents," through "absence, distraction, indifference, inertia, or insufficient information" would fail to take advantage of "subscriber-initiated measures to protect children from viewing indecent programming."[56] Although the *Denver* majority "assume[d] the accuracy of this statement," noted the existence of "inattentive parents," and conceded that "[n]o provision * * * short of an absolute ban can offer certain protection against assault by a determined child," it did not find these factors to be sufficient grounds to justify more restrictive measures. 518 U.S. at 758-759. Instead, it described a number of possible alternative regulations that could be adopted to deal with "the Solicitor General's list of practical difficulties" including – as here – "informational requirements."[57] The *Denver* finding is highly significant to this case, since the "practical difficulties" of individualized blocking on leased access channels are even greater than for the channels targeted here.[58]

---

[56]Brief of Fed. Resp'ts at 36-37, *Denver*. The government argued that "[p]arents would have to discover that leased access channels convey indecent programming into their homes even though they never specifically ordered it; they would have to learn about – and focus on – their option to block such programming; and they would have to take the initiative to ensure that such programming is in fact blocked." *Id.*

[57]518 U.S. at 759. This Court also mentioned Section 505 as one potentially less restrictive alternative in *Denver* because it analyzed the Communications Act "as recently amended." 518 U.S. at 756. However, it emphasized that the constitutionality of Section 505 and the other provisions in the 1996 Act was not before it, and it was not deciding "whether the new provisions are themselves lawful." *Id.*

[58]In *Denver*, Justice Thomas pointed to the "distinguishing characteristic of leased access channels," which have no centralized editor and where indecent programming "is especially likely to be shown randomly or intermittently between non-indecent programs." 518 U.S. at 833-834 (internal quotations omitted). However, such concerns about the effectiveness of voluntary blocking

As this Court expressly recognized in *Denver*, the government's argument that programming in *all* homes in a community must be restricted because *some* will not use effective measures to control their own access represents a significant reordering of First Amendment doctrine. Such a striking reinterpretation of the law would not be limited to the context of signal bleed, or even to the cable television medium, but would extend to any setting where a less restrictive regulation depends on user empowerment and individual responsibility. To accept the government's position here would overturn the long-established principle that the state cannot reduce the adult population to only what is fit for a child. *Reno*, 521 U.S. at 875; *Denver*, 518 U.S. at 759; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74-75 (1983); *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

2. Contrary to the government's position in this case, Section 504 is not merely a less restrictive alternative, it is also an effective one. This alternative tailors the regulatory solution only to those homes that actually experience signal bleed, or that have not already blocked it using non-regulatory means, and it prevents signal bleed around the clock once deployed. There is no serious question in this case but that individualized blocking pursuant to Section 504 effectively prevents signal bleed when it is used. The district court found that installation of a blocking device under Section 504 effectively "eliminate[s] reception both of undesired channels and of undesired signal bleed." J.S. App. 10a. And the government acknowledges that "parents who had strong feelings about the matter could see to it that their children did not view signal bleed."[59]

do not apply where the objective is to block an entire channel, as is the case with Section 504.

[59] Appellants' Br. 33. The same is true of the V-chip, which depends on parental involvement. The government erroneously states that Playboy conceded that the V-chip will not prevent signal bleed. *Id.* at 35-36 n.25. Although Playboy acknowledged that the V-chip was not *designed* to stop signal bleed, Mot. to Affirm at 5 n.4, it nevertheless could be used for that purpose. The government correctly notes that signal bleed obliterates the transmission of

The government's only argument with regard to the effectiveness of Section 504 is its conjecture that "perhaps a large number of parents," Appellants' Br. 33, will be too lax to use the means that the government has made available. The suggestion that the relatively low rate of lockbox distribution shows the ineffectiveness of voluntary measures, *id.* at 37, overlooks the government's failure to prove the pervasiveness of signal bleed. Because Appellants could locate only a handful of anecdotal accounts of signal bleed in the 16 years Playboy Television has been on the air, the court below quite reasonably concluded that "minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem." J.S. App. 36a. The important point here is not how many lockboxes have been distributed, but that, in the very few cases in which the government was able to document a problem, Section 504 was effective in solving it. J.S. App. 12a ("[i]n each instance, the local MSO offered to, or did in fact, rectify the situation for free (with the exception of 1 individual), with varying degrees of rapidity").

In addition, the government's theory that parents are too unaware or unconcerned to make voluntary measures work cannot be reconciled with the marketplace response to the issue. The consumer electronics industry has developed and marketed cable television converter boxes, televisions and VCRs with built-in child-lock circuitry, and the vast majority of televisions now on the market incorporate such features. The cable television industry provides consumers with technical assistance to address issues such as signal bleed, and its principal trade association adopted a policy to provide blocking of signal bleed on request even before Section 504 was adopted. *See supra* pp. 4-5. Quite apart from the

program ratings, but it overlooks the fact that, under the FCC's technical rules that were adopted after the trial below, V-chips have been designed to enable parents to block unrated programming. *See Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings, Implementation of Sections 551(c), (d), and (e) of the Telecomms. Act of 1996*, 13 FCC Rcd. 11248, 11255 (1998); 47 C.F.R. § 15.120(e)(2).

less restrictive regulatory measures such as Section 504, none of the private sector responses would exist if consumers were as apathetic as the government now assumes.

To whatever extent voluntary blocking fails to provide a complete solution to the phenomenon of signal bleed, it is still more effective than time channeling by the government's own reckoning. First, the same factor that prompted the government in this case to describe time channeling as a modest restriction, Appellants' Br. 24 & n.17 — the widespread availability of VCR machines — undermines its assumptions as to the effectiveness of Section 505 to protect children. The FCC in the past rejected the use of a safe harbor as a sufficient alternative to protect children from indecent programming because of VCRs in children's rooms,[60] and the same logic applies here. Second, unlike Section 504, which completely blocks signal bleed, time channeling ceases at 10 p.m., and the district court pointed out that "a resourceful minor can still watch signal bleed after the safe-harbour hours."[61] Even if Section 504 did not provide an effective solution to signal bleed, Section 505 would be subject to a First Amendment challenge because it provides only limited or incremental support for the interest asserted. *Greater New Orleans Broad. Ass'n. Inc. v. United States*, ___ U.S. ___, 119 S. Ct. 1923, 1932-34 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996); *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984); *Bolger*, 463 U.S. at 73.

---

[60] *Implementation of Section 10 of the Cable Consumer Protection & Competition Act of 1992*, 8 FCC Rcd. 998, 1009 (1993) (expressly declining to adopt time channeling for leased access programming under the 1992 Cable Act); *Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. at 5306-07 (finding that time channeling is ineffective because of VCRs in children's rooms). As *Amici* noted, "indecent material is plentiful and readily available to adults everywhere." Brief of *Amici* Family Research Council, et al., at 19-20.

[61] J.S. App. 37a. For example, in one of the government's few examples, a child reportedly was exposed to unscrambled "pornography" (on an undisclosed channel) at a slumber party late at night, after the parents had gone to bed. Omlin Dep. Tr. 13-14, 18-20.

3. Finally, there is no substance to the government's speculative claim that an "enhanced" Section 504 is more restrictive than Section 505. The district court pointed out that Section 505 is more restrictive in the constitutional sense because it is content-based. J.S. App. 35a. Moreover, this Court in *Denver* noted that a provision that *allows* cable operators to drop indecent programming or even a rule that "create[s] a risk that a program will not appear" is "significantly less restrictive" than a mandatory restriction such as time channeling. 518 U.S. at 746-747 (plurality op.).

In any event, there is no support for the government's assertion that an "enhanced" Section 504 would render carriage of adult channels "uneconomical." Appellants' Br. 35-40. This argument is premised on a number of factual assumptions, none of which is borne out in the record. Even if this Court were to assume that existing notice to subscribers has been inadequate,[62] the government never demonstrated that signal bleed is such a pervasive problem that increased awareness would lead to a huge increase in demand for blocking devices or that the cost of blocking devices under Section 504 would be prohibitive.[63]

Whether or not notice was "adequate" in the past, adopting measures to increase public awareness of Section 504 would not

---

[62] Although for purposes of its current argument the government asserts that subscribers had not previously been informed about the availability of blocking devices, it stressed to the district court the comprehensive efforts undertaken by the NCTA, the major cable operators, and adult programmers to inform subscribers of the availability of blocking devices. Defs. Post-Trial Br. 40-42; Defs. Exs. 139, 140; Pl. Exs. 35, 147, 194, 196; *see* J.S. App. 20a. The district court never found that current efforts were inadequate, but only questioned their sufficiency due to the response rate. However, the absence of a finding on this point merely indicates that the government failed to meet its burden of proof. *Sable*, 492 U.S. at 129-131.

[63] The government asserts incorrectly that an enhanced Section 504 was not discussed below or that the district court never analyzed that point. Appellants' Br. 40. On the contrary, the issue was addressed specifically at oral argument by both Playboy and the government. Closing Argument Tr. 47-51, 104-110, 129-130.

lead to a significant increase in demand for blocking devices to the extent signal bleed is not a serious problem or if non-regulatory alternatives are sufficient to address it. As noted above, the district court found that "minimal lockbox distribution is equally consistent with an ineffective statute as it is with a societal response that signal bleed is not a pervasive problem," and that the government "has not convinced us that it is a pervasive problem." J.S. App. 36a. Accordingly, it is far from "inescapabl[e]," as the government now asserts, Appellants' Br. 37, that an enhanced Section 504 would lead to a huge increase in demand for blocking devices.

Even if there were a significant increase in demand for blocking devices, however, the government never demonstrated that Section 504 would lead to greater restrictions on adult channels. It strains credulity to assume that enhanced notice requirements would increase the number of complaints from the "handful of isolated incidents" in the record below, J.S. App. 11a-12a, to the millions that would be required to make adult channels uneconomical.[64] In addition, the government and the court below vastly overstated the cost of compliance. Where traps are placed on a subscriber's line to prevent unwanted signal bleed (as opposed to preventing theft of a premium service), a blocking device may be easily installed by a customer in the home without the need for a service call.[65]

The government's expert agreed that profit-maximizing cable operators would use the most economical means of compliance, Trial Tr. 705-707, and eliminating the cost of a service call alone

[64]Six percent of the 62 million cable television households in the United States – the number used in the government's "break-even" analysis – is equal to 3.72 million households.

[65]The government's expert demonstrated the ease with which positive traps can be installed by customers, and testified that such traps could be mailed to customers at minimal expense. Prelim. Inj. Tr. at 371-372. The government's expert also agreed that negative traps could be installed in the same manner by subscribers. Jackson Dep. Tr. 24-26.

reduces the cost of compliance with Section 504 by more that 80 percent. This single adjustment would change the government's "break-even" point from 6 percent to 24 percent, or approximately 15 million cable households. Not only did the government vastly overestimate compliance costs, but its break-even analysis also underestimated cable operators' revenues. Once this deeply flawed analysis is corrected with accurate buy rates for adult programming and adjusted to account for the life of the hardware, the true "break-even" point is 80 percent. *See* Pl. Post-Trial Reply Br. at 44-48; Closing Arguments Tr. at 51. Thus, even if the majority of cable subscribers asserted their rights under Section 504, it would not be remotely as restrictive as Section 505.

It is important to note, finally, that the government's economic argument is based on a false dichotomy. The issue is not whether Section 504 may be more restrictive than Section 505; it is whether Section 504, standing alone, is more restrictive than Sections 504 and 505 together. *See* Appellants' Br. 39 (even with safe harbor restrictions, subscribers will seek blocking devices under Section 504); Br. of *Amici* Family Research Council, et al., at 25 (Section 504 blocking is intended to be used in addition to Section 505 restrictions). As adopted by Congress, the Telecommunications Act includes both Section 504 and Section 505. It is illogical to suggest that Section 504, standing alone, is more restrictive than existing law.

II. THE DISTRICT COURT CORRECTLY DISMISSED THE GOVERNMENT'S POST-TRIAL MOTIONS

The district court properly dismissed the government's post-trial motions for lack of jurisdiction. J.S. App. 91a. Appellants' Rule 59(e) motion to alter or amend the judgment by limiting relief solely to Playboy, as well as its Rule 60(a) motion seeking to add the district court's "effective notice" language to the Order, violated the well-settled rule that "[t]he filing of a notice of appeal is an event of jurisdictional significance," and that a federal district court and a reviewing court "should not attempt to assert jurisdiction over a case simultaneously." *Griggs v. Provident*

Consumer Discount Co., 459 U.S. 56, 58 (1982). By noticing its appeal, the government deprived the district court of jurisdiction to consider its post-trial motions. *Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389, 390 n.2 (1982). As the leading Supreme Court procedure treatise makes clear "[a]n attempt by the district court to change the judgment after a notice of appeal from its ruling has been filed is ineffective." Stern & Gressman at 392.

The government's brief makes clear that its actual complaint is with this Court's rules, and not with the decision below. The controversy arises from a perceived ambiguity in Rule 18.1 that assertedly forced it to file its notice of appeal while the post-trial motions were pending in the district court or risk forfeiting its right to appeal. Appellants' Br. 42. However, it has been this Court's consistent practice since *Department of Banking v. Pink*, 317 U.S. 264 (1942) (*per curiam*) to toll the time for filing petitions for certiorari until after petitions for rehearing are denied. *See Missouri v. Jenkins*, 495 U.S. 33, 45-50 (1990). This also has been the practice for motions to reconsider judgments of federal district courts that are directly appealable to this Court. *Communist Party v. Whitcomb*, 414 U.S. 441, 444-446 (1974); *see also* Stern & Gressman, at 284-285. This Court generally avoids interpretations of procedural rules that would have the effect of cutting off the government's right to appeal. *E.g.*, *Jenkins*, 495 U.S. at 50; *Forman v. United States*, 361 U.S. 416, 426 (1960). Accordingly, the government's claim that it was compelled to file its notice of appeal in order to preserve its rights is not credible, and its professed concern over the wording of Rule 18.1 would be more sensibly resolved by appeal to this Court's ability to clarify its own rules.

Having decided to file its notice of appeal from the district court's ruling, however, the government cannot avoid the jurisdictional implications of its act. Appellants' post-trial motions sought to alter the substantive nature of the decision below, and not to correct "clerical mistakes" as the government characterizes them. As this Court established in *League of Women*

Voters, it may be appropriate to exercise simultaneous appellate jurisdiction while the lower court resolves a post-trial motion only where the post-trial motion is entirely collateral and "uniquely separable from the cause of action." 468 U.S. at 373-374 n.10 (citation omitted). There, the post-trial motion had no effect on "the prompt determination by the court of last resort of disputed questions of constitutionality of acts of the Congress." *Id.* (citation omitted). Here, however, the Telecommunications Act established an expedited appeal procedure for the very purpose of permitting this Court to rule on disputed questions of constitutionality. Telecomms. Act of 1996 § 561(b), reprinted at 47 U.S.C. § 223 note (Supp. III 1998). In this context, Appellants' Rule 59(e) motion to limit relief only to Playboy would have essentially nullified Playboy's facial challenge to Section 505. This Court rejected the government's identical modification request in *Reno v. ACLU*, concluding that "[w]e have no authority * * * to convert this litigation into an 'as-applied' challenge," 521 U.S. at 883, and it should do the same thing here. Thus, even if the district court had jurisdiction to consider the government's post-trial motions, it would have been compelled to reject them pursuant to *Reno*.[66]

The government's claim that the district court could have asserted jurisdiction over its post-trial motions because a direct appeal to this Court "functions similarly" to an appeal under Rule 4, Fed. R. App. P., as it existed before 1979, Appellants' Br. 43-44, is similarly unavailing. It simply is incorrect to suggest, as does the government here, that there is "no chance" that the district court would be acting on a post-trial motion at the same time as this Court because the appellant is allowed 60 days to file a jurisdictional statement. *Id.* at 44. Unlike the situation under the former Rule 4, the process for initiating appellate jurisdiction is

---

[66] Appellants' Rule 60(a) motion also would have materially altered the district court's judgment by including in the Order the instruction that Playboy ensure cable systems carrying its programming provide notice of Section 504 to their subscribers. As noted above, the proposed modification would have affected Playboy's substantive rights.

not entirely within the lower court's control. Under Rule 18.1 the appellant may file its jurisdictional statement before the 60-day deadline, or the district court could be delayed in issuing a decision that resolves the post-trial motion. In addition, it would vastly complicate an appellant's ability to prepare a jurisdictional statement that adequately identifies the substantial federal questions at issue if the judgment may be altered in the interim by the district court. The government's theory would cause great confusion over this Court's appellate jurisdiction, and it should be rejected.

CONCLUSION

For the foregoing reasons, Playboy respectfully urges this Court to affirm the decision below.

Respectfully submitted,

Of Counsel:
BURTON JOSEPH
JOSEPH, LICHTENSTEIN
& LEVINSON
134 LaSalle Street
Chicago, Illinois 60602
(312) 346-9270

ROBERT CORN-REVERE*
JEAN S. MOORE
RONALD J. WILTSIE, II
MARY ELLEN CALLAHAN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5640

*Counsel of Record

Counsel for Appellee