SUPREME COURT OF THE UNITED STATES

No. 98–1682

UNITED STATES, ET AL., APPELLANTS *v.* PLAYBOY ENTERTAINMENT GROUP, INC.

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

[May 22, 2000]

JUSTICE BREYER, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

This case involves the application, not the elucidation, of First Amendment principles. We apply established First Amendment law to a statute that focuses upon the broadcast of "sexually explicit adult programming" on AdulTVision, Adam & Eve, Spice, and Playboy cable channels. These channels are, as the statute requires, "primarily dedicated to sexually-oriented programming." Telecommunications Act of 1996, Pub. L. 104–104, §505(a), 110 Stat. 136, 47 U. S. C. §561(a) (1994 ed., Supp. III). Section 505 forbids cable operators from sending these adult channels into the homes of viewers who do not request them. In practice, it requires a significant number of cable operators either to upgrade their scrambling technology or to avoid broadcasting these channels during daylight and evening hours (6 a.m. to 10 p.m.). We must decide whether the First Amendment permits Congress to enact this statute.

The basic, applicable First Amendment principles are not at issue. The Court must examine the statute before us with great care to determine whether its speech-related

restrictions are justified by a "compelling interest," namely an interest in limiting children's access to sexually explicit material. In doing so, it recognizes that the legislature must respect adults' viewing freedom by "narrowly tailoring" the statute so that it restricts no more speech than necessary, and choosing instead any alternative that would further the compelling interest in a "less restrictive" but "at least as effective" way. See *ante*, at 8; *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 874 (1997).

Applying these principles, the majority invalidates §505 for two reasons. It finds that (1) the "Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban," *ante*, at 18, and (2) the "Government . . . failed to prove" the "ineffective[ness]" of an alternative, namely, notified viewers requesting that the broadcaster of sexually explicit material stop sending it, *ante*, at 18. In my view, the record supports neither reason.

I

At the outset, I would describe the statutory scheme somewhat differently than does the majority. I would emphasize three background points. First, the statutory scheme reflects more than a congressional effort to control incomplete scrambling. Previously, federal law had left cable operators free to decide whether, when, and how to transmit adult channels. Most channel operators on their own had decided not to send adult channels into a subscriber's home except on request. But the operators then implemented that decision with inexpensive technology. Through signal "bleeding," the scrambling technology (either inadvertently or by way of enticement) allowed non subscribers to see and hear what was going on. That is why Congress decided to act.

In 1995, Senator Dianne Feinstein, the present statute's legislative cosponsor, pointed out that "numerous cable

operators across the country are still automatically broadcasting sexually explicit programming into households across America, regardless of whether parents want this or subscribers want it." 141 Cong. Rec. 15588. She complained that the "industry has only taken baby steps to address this problem through voluntary policies that simply recommend action," *ibid.*, adding that the "problem is that there are no uniform laws or regulations that govern such sexually explicit adult programming on cable television," *id.*, at 15587. She consequently proposed, and Congress enacted, the present statute.

The statute is carefully tailored to respect viewer preferences. It regulates transmissions by creating two "default rules" applicable unless the subscriber decides otherwise. Section 504 requires a cable operator to "fully scramble" any channel (whether or not it broadcasts adult programming) *if* a subscriber asks *not* to receive it. Section 505 requires a cable operator to "fully scramble" every adult channel *unless* a subscriber asks to receive it. Taken together, the two provisions create a scheme that permits subscribers to choose to see what they want. But each law creates a different "default" assumption about silent subscribers. Section 504 assumes a silent subscriber wants to see the ordinary (non adult) channels that the cable operator includes in the paid-for bundle sent into the home. Section 505 assumes that a silent subscriber does not want to receive adult channels. Consequently, a subscriber wishing to view an adult channel must "opt in," and specifically request that channel. See §505. A subscriber wishing not to view any other channel (sent into the home) must "opt out." See §504.

The scheme addresses signal bleed but only indirectly. From the statute's perspective signal "bleeding"– *i.e.*, a failure to fully "rearrange the content of the signal . . . so that the programming cannot be viewed or heard in an understandable manner," §505(c),– amounts to transmis-

sion into a home. Hence "bleeding" violates the statute whenever a clear transmission of an unrequested adult channel would violate the statute.

Second, the majority's characterization of this statutory scheme as "prohibit[ing] . . . speech" is an exaggeration. *Ante*, at 7. Rather, the statute places a *burden* on adult channel speech by requiring the relevant cable operator either to use better scrambling technology, or, if that technology is too expensive, to broadcast only between 10 p.m. and 6 a.m. Laws that burden speech, say, by making speech less profitable, may create serious First Amendment issues, but they are not the equivalent of an absolute ban on speech itself. Cf. *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. ___ (2000). Thus, this Court has upheld laws that do not ban the access of adults to sexually explicit speech, but burden that access through geographical or temporal zoning. See, *e.g.*, *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986); *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976). This Court has also recognized that material the First Amendment guarantees adults the right to see may not be suitable for children. And it has consequently held that legislatures maintain a limited power to protect children by restricting access to, but not banning, adult material. Compare *Ginsberg* v. *New York*, 390 U. S. 629 (1968) (upholding ban on sale of pornographic magazines to minors), with *Butler* v. *Michigan*, 352 U. S. 380 (1957) (invalidating ban on all books unfit for minors); see also *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 737–753 (1996) (plurality opinion); *Pacifica Foundation*, *supra*, at 748–750; *Reno*, *supra*, at 887–889 (O'CONNOR, J., concurring in part and dissenting in part). The difference– between imposing a burden and enacting a ban– can matter even when strict First Amendment rules are at issue.

Third, this case concerns only the regulation of commer-

cial actors who broadcast "virtually 100% sexually explicit" material. 30 F. Supp. 2d 702, 707 (Del. 1998). The channels do not broadcast more than trivial amounts of more serious material such as birth control information, artistic images, or the visual equivalents of classical or serious literature. This case therefore does not present the kind of narrow tailoring concerns seen in other cases. See, *e.g.*, *Reno*, 521 U. S., at 877–879 ("The breadth of the [statutue's] coverage is wholly unprecedented. . . . [It] cover[s] large amounts of non pornographic material with serious educational or other value"); *Butler*, *supra*, at 381–384 (invalidating ban on books "'tending to the corruption of the morals of youth'").

With this background in mind, the reader will better understand my basic disagreement with each of the Court's two conclusions.

II

The majority first concludes that the Government failed to prove the seriousness of the problem– receipt of adult channels by children whose parents did not request their broadcast. *Ante,* at 14–17. This claim is flat-out wrong. For one thing, the parties concede that basic RF scrambling does not scramble the audio portion of the program. 30 F. Supp. 2d, at 707. For another, Playboy itself conducted a survey of cable operators who were asked: "Is your system in full compliance with Section 505 (no discernible audio or video bleed)?" To this question, 75% of cable operators answered "no." See Def. Exh. 254, 13 Record 2. Further, the Government's expert took the number of homes subscribing to Playboy or Spice, multiplied by the fraction of cable households with children and the average number of children per household, and found 29 million children are potentially exposed to audio and video bleed from adult programming. Def. Exh. 82, 10 Record 11–12. Even discounting by 25% for systems that

might be considered in full compliance, this left 22 million children in homes with faulty scrambling systems. See *id.*, at 12. And, of course, the record contains additional anecdotal evidence and the concerns expressed by elected officials, probative of a larger problem. See 30 F. Supp. 2d, at 709, and n. 10; see also 141 Cong. Rec. 15586 (1995).

I would add to this empirical evidence the majority's own statement that "*most* cable operators had 'no practical choice but to curtail'" adult programming by switching to nighttime only transmission of adult channels. *Ante*, at 4 (emphasis added) (quoting 30 F. Supp. 2d, at 711). *If signal bleed is not a significant empirical problem, then why, in light of the cost of its cure, must so many cable operators switch to night time hours?* There is no realistic answer to this question. I do not think it realistic to imagine that signal bleed occurs just enough to make cable operators skittish, without also significantly exposing children to these images. See *ante*, at 16–17.

If, as the majority suggests, the signal bleed problem is not significant, then there is also no significant burden on speech created by §505. The majority cannot have this evidence both ways. And if, given this logical difficulty and the quantity of empirical evidence, the majority still believes that the Government has not proved its case, then it imposes a burden upon the Government beyond that suggested in any other First Amendment case of which I am aware.

III

The majority's second claim—that the Government failed to demonstrate the absence of a "less restrictive alternative"—presents a closer question. The specific question is whether §504's "opt-out" amounts to a "less restrictive," but *similarly* practical and *effective*, way to accomplish §505's child-protecting objective. As *Reno* tells us, a "less restrictive alternative" must be "at least as

effective in achieving the legitimate purpose that the statute was enacted to serve." 521 U. S., at 874.

The words I have just emphasized, "similarly" and effective," are critical. In an appropriate case they ask a judge not to apply First Amendment rules mechanically, but to decide whether, in light of the benefits and potential alternatives, the statute works speech-related harm (here to adult speech) out of proportion to the benefits that the statute seeks to provide (here, child protection).

These words imply a degree of leeway, however small, for the legislature when it chooses among possible alternatives in light of predicted comparative effects. Without some such empirical leeway, the undoubted ability of lawyers and judges to imagine *some* kind of slightly less drastic or restrictive an approach would make it impossible to write laws that deal with the harm that called the statute into being. As Justice Blackmun pointed out, a "judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 188–189 (1979) (concurring opinion). Used without a sense of the practical choices that face legislatures, "the test merely announces an inevitable [negative] result, and the test is no test at all." *Id.*, at 188.

The majority, in describing First Amendment jurisprudence, scarcely mentions the words "at least as effective"—a rather surprising omission since they happen to be what this case is all about. But the majority does refer to *Reno*'s understanding of less restrictive alternatives, *ante*, at 8, and it addresses the Governments' effectiveness arguments, *ante*, at 18–22. I therefore assume it continues to recognize their role as part of the test that it enunciates.

I turn then to the major point of disagreement. Unlike the majority, I believe the record makes clear that §504's

opt-out is not a similarly effective alternative. Section 504 (opt-out) and §505 (opt-in) work differently in order to achieve very different legislative objectives. Section 504 gives parents the power to tell cable operators to keep any channel out of their home. Section 505 does more. Unless parents explicitly consent, it inhibits the transmission of adult cable channels to children whose parents may be unaware of what they are watching, whose parents cannot easily supervise television viewing habits, whose parents do not know of their §504 "opt-out" rights, or whose parents are simply unavailable at critical times. In this respect, §505 serves the same interests as the laws that deny children access to adult cabarets or X-rated movies. *E.g.*, Del. Code Ann., Tit. 11, §1365(i)(2) (1995); D. C. Code Ann. §22–2001(b)(1)(B) (1996). These laws, and §505, all act in the absence of direct parental supervision.

This legislative objective is perfectly legitimate. Where over 28 million school age children have both parents or their only parent in the work force, where at least 5 million children are left alone at home without supervision each week, and where children may spend afternoons and evenings watching television outside of the home with friends, §505 offers independent protection for a large number of families. See U. S. Dept. of Education, Office of Research and Improvement, Bringing Education into the After-School Hours 3 (summer 1999). I could not disagree more when the majority implies that the Government's independent interest in offering such protection– preventing, say, an 8-year-old child from watching virulent pornography without parental consent– might not be "compelling." *Ante,* at 19. No previous case in which the protection of children was at issue has suggested any such thing. Indeed, they all say precisely the opposite. See *Reno*, 521 U. S., at 865 (State has an "independent interest in the well-being of its youth"); *Denver Area*, 518 U. S., at 743; *New York* v. *Ferber*, 458 U. S. 747, 756–757 (1982);

Ginsberg, 390 U. S., at 640; *Prince* v. *Massachusetts*, 321 U. S. 158, 165 (1944). They make clear that Government has a compelling interest in helping parents by preventing minors from accessing sexually explicit materials in the absence of parental supervision. See *Ginsberg*, *supra*, at 640.

By definition, §504 does *nothing at all* to further the compelling interest I have just described. How then is it a similarly effective §505 alternative?

The record, moreover, sets forth empirical evidence showing that the two laws are not equivalent with respect to the Government's objectives. As the majority observes, during the 14 months the Government was enjoined from enforcing §505, "fewer than 0.5% of cable subscribers requested full blocking" under §504. *Ante*, at 11. The majority describes this public reaction as "a collective yawn," *ibid*., adding that the Government failed to prove that the "yawn" reflected anything other than the lack of a serious signal bleed problem or a lack of notice which better information about §504 might cure. The record excludes the first possibility– at least in respect to exposure, as discussed above. See *supra*, at 5–6. And I doubt that the public, though it may well consider the viewing habits of *adults* a matter of personal choice, would "yawn" when the exposure in question concerns young children, the absence of parental consent, and the sexually explicit material here at issue. See *ante*, at 3 (SCALIA, J., dissenting).

Neither is the record neutral in respect to the curative power of better notice. Section 504's opt-out right works only when parents (1) become aware of their §504 rights, (2) discover that their children are watching sexually-explicit signal "bleed," (3) reach their cable operator and ask that it block the sending of its signal to their home, (4) await installation of an individual blocking device, and, perhaps (5) (where the block fails or the channel number

changes) make a new request. Better notice of §504 rights does little to help parents discover their children's viewing habits (step two). And it does nothing at all in respect to steps three through five. Yet the record contains considerable evidence that those problems matter, *i.e.*, evidence of endlessly delayed phone call responses, faulty installations, blocking failures, and other mishaps, leaving those steps as significant §504 obstacles. See, *e.g.*, Deposition of J. Cavalier in Civ. Action No. 96–94, pp. 17–18 (D. Del., Dec. 5, 1997) ("It's like calling any utilities; you sit there, and you wait and wait on the phone . . . . [It took] [t]hree weeks, numerous phone calls. . . . [E]very time I call Cox Cable . . . I get different stories"); Telephonic Deposition of M. Bennett, at 10–11 (D. Del., Dec. 9, 1997) ("After two [failed installations,] no, I don't recall calling them again. I just said well, I guess this is something I'm going to have to live with").

Further, the District Court's actual plan for "better notice"– the only plan that makes concrete the majority's "better notice" requirement– is fraught with difficulties. The District Court ordered Playboy to insist that cable operators place notice of §504 "inserts in monthly billing statements, barker channels . . . and on-air advertising." 30 F. Supp. 2d, at 719. But how can one say that placing one more insert in a monthly billing statement stuffed with others, or calling additional attention to adult channels through a "notice" on "barker" channels, will make more than a small difference? More importantly, why would doing so not interfere to some extent with the cable operators' own freedom to decide what to broadcast? And how is the District Court to supervise the contracts with thousands of cable operators that are to embody this requirement?

Even if better notice did adequately inform viewers of their §504 rights, exercise of those rights by more than 6% of the subscriber base would itself raise Playboy's costs to

the point that Playboy would be forced off the air entirely, 30 F. Supp. 2d, at 713– a consequence that would not seem to further anyone's interest in free speech. The majority, resting on its own earlier conclusion that signal bleed is not widespread, denies any likelihood that more than 6% of viewers would need §504. But that earlier conclusion is unsound. See *supra*, at 5–6. The majority also relies on the fact that Playboy, presumably aware of its own economic interests, "is willing to incur the costs of an effective §504." *Ante*, at 19. Yet that denial, as the majority admits, may simply reflect Playboy's knowledge that §504, even with better notice, will not work. Section 504 is not a similarly effective alternative to §505 (in respect to the Government's interest in protecting children), unless more than a minimal number of viewers actually use it; yet the economic evidence shows that if more than 6% do so, Playboy's programming would be totally eliminated. The majority provides no answer to this argument in its opinion– and this evidence is sufficient in and of itself to dispose of this case.

Of course, it is logically *possible* that "better notice" will bring about near perfect parental knowledge (of what children watch and §504 opt-out rights), that cable operators will respond rapidly to blocking requests, and that still 94% of all informed parents will decided not to have adult channels blocked for free. But the *probability* that this remote *possibility* will occur is neither a "draw" nor a "tie." *Ante*, at 14. And that fact is sufficient for the Government to have met its burden of proof.

All these considerations show that §504's opt-out, even with the Court's plan for "better notice," is *not* similarly effective in achieving the legitimate goals that the statute was enacted to serve.

IV

Section 505 raises the cost of adult channel broadcast-

ing. In doing so, it restricts, but does not ban adult speech. Adults may continue to watch adult channels, though less conveniently, by watching at night, recording programs with a VCR, or by subscribing to digital cable with better blocking systems. Cf. *Renton*, 475 U. S. at 53–55 (upholding zoning rules that force potential adult theatre patrons to travel to less convenient locations). The Government's justification for imposing this restriction– limiting the access of children to channels that broadcast virtually 100% "sexually explicit" material– is "compelling." The record shows no similarly effective, less restrictive alternative. Consequently §505's restriction, viewed in light of the proposed alternative, is proportionate to need. That is to say, it restricts speech no more than necessary to further that compelling need. Taken together, these considerations lead to the conclusion that §505 is lawful.

I repeat that my disagreement with the majority lies in the fact that, in my view, the Government has satisfied its burden of proof. In particular, it has proved both the existence of a serious problem and the comparative ineffectiveness of §504 in resolving that problem. This disagreement is not about allocation of First Amendment burdens of proof, basic First Amendment principle nor the importance of that Amendment to our scheme of Government. See *ante*, at 22. First Amendment standards are rigorous. They safeguard speech. But they also permit Congress to enact a law that increases the costs associated with certain speech, where doing so serves a compelling interest that cannot be served through the adoption of a less restrictive, similarly effective alternative. Those standards at their strictest make it difficult for the Government to prevail. But they do not make it impossible for the Government to prevail.

The majority here, however, has applied those standards without making a realistic assessment of the alter-

natives. It thereby threatens to leave Congress without power to help the millions of parents who do not want to expose their children to commercial pornography– but will remain ill served by the Court's chosen remedy. Worse still, the logic of the majority's "505/504" comparison (but not its holding that the problem has not been established) would seem to apply whether "bleeding" or totally unscrambled transmission is at issue. If so, the public would have to depend solely upon the voluntary conduct of cable channel operators to avert considerably greater harm.

Case law does not mandate the Court's result. To the contrary, as I have pointed out, our prior cases recognize that, where the protection of children is at issue, the First Amendment poses a barrier that properly is high, but not insurmountable. It is difficult to reconcile today's decision with our foundational cases that have upheld similar laws, such as *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978), and *Ginsberg* v. *New York*, 390 U. S. 629 (1968). It is not difficult to distinguish our cases striking down such laws– either because they applied far more broadly than the narrow regulation of adult channels here, see, *e.g.*, *Reno* v. *American Civil Liberties Union*, 521 U. S. 844 (1997), imposed a total ban on a form of adult speech, see, *e.g.*, *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115 (1989); *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60 (1983), or because a less restrictive, similarly effective alternative was otherwise available, see, *e.g.*, *Denver Area*, 518 U. S., at 753–760.

Nor is it a satisfactory answer to say, as does JUSTICE THOMAS, that the Government remains free to prosecute under the obscenity laws. *Ante*, at 1. The obscenity exception permits censorship of communication even among *adults*. See, *e.g.*, *Miller* v. *California*, 413 U. S. 15 (1973). It must be kept narrow lest the Government improperly interfere with the communication choices that adults have freely made. To rely primarily upon law that bans

speech for adults is to overlook the special need to protect children.

Congress has taken seriously the importance of maintaining adult access to the sexually explicit channels here at issue. It has tailored the restrictions to minimize their impact upon adults while offering parents help in keeping unwanted transmissions from their children. By finding "adequate alternatives" where there are none, the Court reduces Congress' protective power to the vanishing point. That is not what the First Amendment demands.

I respectfully dissent.