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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, ET AL., Appellants v. PLAYBOY ENTERTAINMENT GROUP, INC.

CASE NO: 98-1682

PLACE: Washington, D.C.

DATE: Tuesday, November 30, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, ET AL., :

Appellants :

v. : No. 98-1682

PLAYBOY ENTERTAINMENT GROUP, :

INC. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, November 30, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

JAMES A. FELDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Appellants.

ROBERT CORN-REVERE, ESQ., Washington, D.C.; on behalf of the Appellee.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 98-1682, the United States v. Playboy Entertainment Group.

Mr. Feldman.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE APPELLANTS

MR. FELDMAN: Mr. Chief Justice, and may it please the Court:

This case concerns Congress' attempt to address the problem of graphic sexually explicit adult programming that is available on cable televisions -- on cable television to minors with merely the flip of a dial. It's available to children even though their parents have not subscribed to the cable channels carrying the programming and therefore have every reason to believe that they're not receiving that programming on their televisions.

The phenomenon is known as signal bleed, and it occurs when a cable operator scrambles partially the video portion of a premium channel like that operated by appellee, but -- and -- but meanwhile the soundtrack from that channel and other portions of the video programming are allowed to get through, even to non-subscribers.

As a result, children with access to cable

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television gain access intentionally or accidentally to what the district court termed the virtually 100 percent sexually explicit programming.

QUESTION: Mr. Feldman, is there evidence in the record of actual signal bleed as opposed to the potential for it? I mean, what -- what does the record show?

MR. FELDMAN: There's very substantial evidence of that. In the first place -- and I think the easiest way to approach that is the district court found that on most cable television systems -- and there's some variation, to be sure, but on most cable television systems, the audio portion of programming on channels like those that Playboy or Spice or Spice Hot operates -- the audio portion goes through unhindered. So, that -- that's there and that's a finding of the district court.

QUESTION: While I have you interrupted, what level of scrutiny do you think our precedents dictate -- govern our analysis here in light of the fact that we've said that cable television and the Internet are entitled to strict scrutiny?

MR. FELDMAN: The Court has never said that with respect to the question of indecency on cable television, and in fact, the Court has specifically declined to decide that question in the past on a number -- several occasions.

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In our view, the right answer, for the reasons given in our brief, is not quite strict scrutiny; that is, there should be a showing of a compelling interest because it is a content-based regulation.

But some deference should be given in light of the factors that the Court has noted in Pacifica and later cases, the pervasiveness into the -- in the home, the harm to children. Some deference should be given to Congress' choice among alternatives of -- of how to deal with the problem. And especially that's true where what the -- the alternative that Congress has chosen is time-channeling as one option, which permits the cable operator to show the -- show the material from 10:00 p.m. to 6:00 a.m. unhindered and with no restrictions. That is the -- that's the solution that the Court approved in Pacifica, and it's a reasonable accommodation of the competing interests. It keeps --

QUESTION: Mr. Feldman, do -- do I have to -- do I have to assume, for purposes of this case, that what is at issue here is just what you call indecency and not obscenity? I mean, I've read some of the footnotes in -- in your brief that describe -- describe these matters. My law clerks have looked at the videos that were lodged, and I wouldn't even read the descriptions in -- in public. It seems to me obscenity.

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MR. FELDMAN: I think that for purposes of this case you have to assume that it's indecency.

QUESTION: Why do I have to assume that?

MR. FELDMAN: Well, because -- I suppose because that's -- that's what -- insofar as -- insofar as there's obscenity that's being broadcast on cable television, it's already independently unlawful under the statute.

QUESTION: Well, you -- you can have -- you can have more than one means of -- of preventing that evil, it seems to me. There's no factual finding of the court below that this was not obscenity, is there? And even if there were, I just can't -- can't imagine that what you describe in your brief doesn't qualify as obscenity.

QUESTION: The Government didn't charge that it was obscene.

MR. FELDMAN: Yes. I mean, it wasn't really a -- it wasn't a subject of proof at trial. One reason is that the obscenity issue turns on contemporary community standards in different communities across the country. It also -- and a number of other factors as well.

QUESTION: I don't care what community you're in. The things described here and lodged with the Court strike me as obscene.

MR. FELDMAN: Well --

QUESTION: On that score, Mr. Feldman, you -- in

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your brief you urge particularly that we look at exhibits 1, 2, and 44.

MR. FELDMAN: Um-hmm.

QUESTION: Are those typical or are those the worst cases?

MR. FELDMAN: Those are -- I can't -- I can't answer that question because I can't say which they are. They are examples of what happens when signal bleed occurs, and this goes back to Justice O'Connor's question a little bit.

QUESTION: Yes, but for example, one of them, 2, is not as graphic as 1.

MR. FELDMAN: Right. It definitely varies. It varies from time to time and from place to place. At the times when those tapes were made, there's no reason not to think that the exact same material is being pumped down to all of the other subscribers on those particular cable television --

QUESTION: Yes. I -- I can imagine a cable channel advertising itself as we -- you know, we transmit indecent programming. That's going to get a lot of viewers I suppose as opposed to, quote, sexually explicit programming.

I had thought that the answer to my question you were going to give was that this is a facial challenge and

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that even if these particular productions are obscene and if this whole channel can be characterized as obscene, you -- you have to consider the application of this statute to other channels that -- that qualify as, quote, sexually explicit channels that are not obscene.

MR. FELDMAN: I -- I would -- I would agree with that.

QUESTION: That -- that would be a good answer if there existed any such channels. Are you sure that there exist any such channels? In a facial challenge, do we have to imagine factual situations that we know do not exist out in the real world?

MR. FELDMAN: Well, I -- I guess the -- the -- I don't think there's a record made as to whether there are other channels that broadcast materials that -- that wouldn't be obscene under -- well, let me put it this way.

QUESTION: What does the statute cover in -- in its terms? What -- what channels are -- are subject to this -- this law?

MR. FELDMAN: I think it's channels primarily devoted to sexually explicit programming.

QUESTION: Right. Now, do you think there are out there in the real world channels primarily devoted to sexually explicit program that do not -- do not contain obscene transmission in large part?

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MR. FELDMAN: Well, I don't know based on this record whether there are or not. But I do think that it -- it is jumping to a conclusion that all of --

QUESTION: I have a -- I have a very deep suspicion what the answer is.

MR. FELDMAN: Well, I -- I don't know -- I don't know what the answer is. But I do know that based -- that based on the record that -- the question of whether something is obscene, as I said before, depends on the local -- on contemporary community standards of specific communities. That wasn't an issue that was litigated in this case, and there aren't any findings in this case about it. And I'm not sure --

QUESTION: Maybe it should have been.

MR. FELDMAN: I beg your pardon?

QUESTION: Maybe it should have been. Maybe we cannot answer the -- the facial challenge question without inquiries into those questions, including inquiries into -- into whether there are any, quote, sexually explicit channels that do not regularly contain material that is obscene by anybody's community standards.

MR. FELDMAN: Well, I think it's exceptionally difficult to litigate an issue such as whether material is obscene that's broadcast on a nationwide channel because there are standards that differ from State to State and

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the case law and the results --

QUESTION: Mr. Feldman, wouldn't that be the -- wouldn't that be the prosecutor's choice? I mean, a court -- could a court say, if the Government chooses not to characterize something as obscene, I don't care what the prosecutor or the Government's attorney chooses to bring to this court, I'm going to make the case and insist that the Government makes the case that it's obscene? I -- I didn't know that a court had that authority.

MR. FELDMAN: No. I don't think it does.

QUESTION: May I ask this, Mr. Feldman? If Justice Scalia is right, that all this stuff is obscene, you didn't really need the statute, did you?

MR. FELDMAN: If it were all obscene, then -- then --

QUESTION: The statute is a nullity. It's just superfluous.

MR. FELDMAN: The statute wouldn't -- wouldn't have been necessary --

QUESTION: Can you tell me --

MR. FELDMAN: But I -- I do think that -- well, I'd just go back to what I said --

QUESTION: You'd prosecute each one of these movies one by one. Is -- is that right? And that's -- that's how you would protect the little children.

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MR. FELDMAN: Well, that's not -- that's not historically what has been done. What happened is that there were -- and this goes back to the exhibits that Justice Ginsburg was talking about, is that -- that this material was coming down the line on cable channels to parents into homes who had specifically chosen not to subscribe to it and only found out after their children had viewed it that they were seeing it. And the audio portions of the programming, as I mentioned, are exactly the same kinds of audio material that was at issue in -- in Pacifica, which only involved the radio, and in Sable -- in Sable -- the Sable case, which involved the dial-a-porn regulation of telephone lines.

QUESTION: Mr. Feldman, I -- I'm sure everybody would agree that this happens in some instances. Does the record, however, give us any basis for determining the extent to which it is happening, i.e., the extent to which in non-subscriber homes the bleed is being observed by the children -- by children? I'm sure there are some. Everybody agrees --

MR. FELDMAN: How -- how often the children are actually tuning in to it?

QUESTION: How much -- how much of it is being --

MR. FELDMAN: I don't think there's any way to

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know how much the children are actually tuning in to it. There was -- the evidence that the district court cites is that it's available in 39 million homes with 29 million children. Now, how often the children actually watch it or listen to it I don't know.

QUESTION: Does that include the -- the homes of the parents that subscribe to these channels?

MR. FELDMAN: I don't think it does. That was the figure that the district court used. And if you -- the number of parents who actually subscribed to this is rather low. The district court found that between 800,000 and 1.6 million people subscribe to the Playboy channel in a year.

QUESTION: I -- I think the figures you cite show there there's a substantial problem.

Can you tell me what is the standard for how widespread the bleed must be? I think it's widespread here based on what you said. What is the legal standard? If this happened in 1 community to 10 homes, would it justify the statute --

MR. FELDMAN: I think it has to -- it has to be a -- it has to be a significant problem. In the Pacifica case --

QUESTION: Significant problem nationwide?

MR. FELDMAN: Well, I guess I -- I would want to

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know whether what you're talking about is the availability of it in 1 -- or 10 homes or the number of children that are actually watching --

QUESTION: I think it's fairly much of an academic point based on your figures, but I just wanted to know what the -- what the standard was to the extent of the evil.

MR. FELDMAN: I think that the -- the only -- well, the reason I can't answer that is I think the question and the question on which the district court decided -- well, the key question here is to compare the extent to which there's a burden of speech that's imposed by section 505 with the evil that it's addressing. And so, you have to look at kind of both sides of the equation. The evil that -- that it's addressing is what I've addressed -- talked about so far, and that includes the audio signal bleed that is very widespread at least and video signal bleed that varies from time to time and place to place but that was the cause of a lot of complaints and clearly does happen, as shown by the tapes --

QUESTION: Well, certainly in our kiddie pornography cases, Ferber against New York, we did not require any very comprehensive showing of how many children were engaged in it. A few was too many.

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MR. FELDMAN: That's correct, and if you look at the Pacifica case, there was one complaint by -- from one parent that triggered the Pacifica litigation, and there was no showing in that record that there was more than one child who listened to it.

It's the -- the problem here is the risk that -- is that the availability of this material in people's homes who have not subscribed to it and don't even think that they're getting it. What Congress did to --

QUESTION: What material? I mean, all we know, if you're going to defend this statute facially without -- without making a determination that all of these channels, as far as we know, are -- are carrying obscenity, they can just be dirty words. Right? They can just be, you know, blue language.

MR. FELDMAN: They -- they -- well, I suppose they could be --

QUESTION: You -- you want us to decide this case on the basis of -- really what Congress was after was channels that use some -- some naughty words that shouldn't be used, indecency and not -- not obscenity.

MR. FELDMAN: No. I -- I don't think so. I think that the -- what was -- the facts that were underlying Congress' action are the facts that were found by the district court, and they are that there are

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channels that broadcast virtually 100 percent sexually explicit content and that that content is continuously broadcast.

QUESTION: That's not what Congress addressed in -- in using the word indecency, which is -- which is defined very broadly. It covers many other things.

MR. FELDMAN: Right, that's true. But -- that's true.

QUESTION: For purposes of the facial challenge, we have to assume the existence of -- of a person who uses the most innocuous of -- of those programmings.

MR. FELDMAN: I don't -- I -- I don't -- I don't think that that's correct. I think that you can look at the -- at the -- I don't think appellee would have standing to challenge the statute based on someone else who used the most innocuous of the material that would fall within this.

But in any event, this is the same material --

QUESTION: I thought that's -- I thought that's what a facial challenge was, that if -- if you could show that this would be unconstitutional as to anybody, you can -- you can plead that person's defense. Isn't --

QUESTION: Is -- is this -- I read this provision. It says in providing sexually explicit adult programming. That's one. Or two, other programming that

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is indecent. I thought this case involved one not two. Am I right?

MR. FELDMAN: It involves -- well, the FCC took that -- that definition and said that one is a subset of two, and it defined them both in the same way that -- the same definition that it has used in the regulation of dial-a-porn on -- on telephone lines which has been upheld now in the lower court.

QUESTION: It may be a subset.

MR. FELDMAN: It's a subset.

QUESTION: Is it still that we're dealing with one?

MR. FELDMAN: I -- I don't think that there's any determination of which we're dealing with. We're dealing with material that is -- that is indecent as defined by the FCC with a definition that is used and has been used for the past 20 years to control indecency on broadcast television.

QUESTION: And so for purposes of the facial challenge, we must assume anybody --

MR. FELDMAN: Right.

QUESTION: -- who does anything which is indecent.

MR. FELDMAN: You know, I -- maybe you can assume that. Maybe you can assume that.

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QUESTION: We must --

MR. FELDMAN: It has to be a channel -- it only applies to channels that are primarily devoted to -- to that kind of programming.

QUESTION: Well, to indecent programming.

MR. FELDMAN: Right. That's correct. It applies only to channels that are primarily devoted. So, that's a -- if a channel broadcast 24 hours a day the kinds of words that were at issue in Pacifica, then that would be covered by the -- that would surely be covered by the statute.

QUESTION: We have to deposit in our minds a dirty word channel. Right?

MR. FELDMAN: No, but I don't think so. I think you can deposit the whole range of different kinds of --

QUESTION: Well, if -- if the -- if the sentence actually is broken down, in providing sexually explicit adult programming or other programming that is indecent. I'm not so sure that someone who is providing sexually explicit programming can challenge it on the basis of -- of the other part of the sentence.

MR. FELDMAN: Well --

QUESTION: There's no reason why you should try to resolve all these nuances.

MR. FELDMAN: Well, I probably prefer not to.

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The FCC gave a definition -- gave a definition which is as a whole, if you take both halves, it refers to the -- it refers to any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium, which is the same definition that governs indecency on broadcast television. It's the same definition that governs indecency on dial-a-porn. It has done that for the last 10 years or more, 20 years on broadcast television, since the time of Pacifica. And if there's something wrong with the statute that regulates that material, then all of that regulation would have to fall.

QUESTION: Mr. Feldman, can I ask you one question about Pacifica? Because you've mentioned it so often. Do the findings describe the aural content, the sound content, as opposed to what you see because of the bleed? I didn't -- I missed that part of it when I --

MR. FELDMAN: They don't -- they don't specifically describe it.

QUESTION: They don't tell us what -- what words are heard over the -- this --

MR. FELDMAN: No, they don't. I -- it has never been disputed, and if you look at --

QUESTION: But that's a big part of your

argument. It's not even mentioned by the district court.

MR. FELDMAN: Well, you know, I would prefer if the district court had, but the tapes are in the record. It's certainly never been disputed. If you look at Playboy's own programming content guidelines or those of Spice, they say we use strong language. Strong language is something that we use.

QUESTION: Well, you see an awful lot of strong language on -- on WGN or whatever the best channels are. I'm very often shocked at what I see on television. And I just wonder --

MR. FELDMAN: I think you might be --

QUESTION: -- if strong language is enough.

MR. FELDMAN: Well, if -- if -- again, the -- the record is full of tapes of -- for instance, there were tapes of material that was broadcast on -- on Spice and on Playboy on certain, specific, randomly selected days.

QUESTION: So, we should have to make our own findings about what the aural content is by ourselves looking at these tapes.

MR. FELDMAN: It's --

QUESTION: I'm not particularly anxious to do that.

MR. FELDMAN: Right. Well -- well, the -- the Court -- the only other choice I think would be to remand

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it if -- to the district court for it. But I will say that I don't think it's disputed among the parties that the sound tracks on these tapes are the same kinds of sound tracks that were -- it's the same kind of indecent audio material that was at issue in the dial-a-porn cases and at issue in Pacifica.

QUESTION: Mr. Feldman --

QUESTION: Well, much of the language in Pacifica you can hear on television any night of the week on any channel.

MR. FELDMAN: It's actually much -- it's the same -- some of it is the same language. Actually it's repeated in terms that are much courser and that are in the context of people actually engaging in the activities that are described.

QUESTION: But what of the argument that unlike Pacifica where there was no opportunity for the parent who just switched on the signal to control it? Here the answer, in the next part of the statute that was persuasive to the district court, any parent who wants to stop this can for the -- not even the price of a telephone call, a free telephone call.

MR. FELDMAN: Right. And there's -- I think there are two problems as -- as we've -- as we've discussed in our briefs. There are two problems with the

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district court -- two reasons why the district court was just wrong about that.

The first is it's not just a question of each individual parent being able to decide for his or her own children. There's a social interest in the upbringing of children, society's interest, that this Court has repeatedly recognized.

Now, acting on that interest, Congress has decided that this material is harmful for children and shouldn't be shown to children unless the parents consent and that parental consent cannot be inferred simply from a parent's failure to act under a provision like 504. Now, that's very common in our society that --

QUESTION: The idea that the Government is a kind of a super parent.

Would you take the same view if Congress did the same thing with respect to violence on television? I was struck looking at some of the European Union countries. They put violence first on what the children can't see and then pornography comes after that.

MR. FELDMAN: There are some analogies to the situation to -- to a law like that about violence. I mean, one difference is that this Court has repeatedly recognized that this material is harmful to children and that our society has an interest in seeing to it that

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children don't get it.

But I -- I think it's important that what Congress decided is not that children can't get this. What Congress decided is that it's harmful to children and they shouldn't get it unless their parents consent. And it's not uncommon in our society that children don't get things unless their parents consent, and ordinarily that requires affirmative consent by the parent, not really the parent's failure to act. And it's particularly --

QUESTION: Well, why -- why should it, though? I mean, if -- if the -- if the public interest, as you describe, yields to a parent's decision to subscribe to the channel so that the children can see it -- presumably can see it unscrambled, why doesn't the public interest also yield when a parent, in effect, says I don't care whether my kids get to see this or not?

MR. FELDMAN: It's -- I think it's more complex than just to say a parent who says it. There are certainly parents who will say that. But they've said that after subscribing to the cable channel and making an affirmative decision that I don't want these channels. I know I can pay more for them and get them. I don't want them. And therefore, they have every reason to think -- and these are the complaints and the record show this -- these parents have every reason to think that they're not

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getting this material.

QUESTION: Yes, but on the district court's --

MR. FELDMAN: And they find their children --

QUESTION: But the district court's proposal is that the parents will be advised in -- in connection with, I guess it's section 504, that in fact this kind of bleed goes on and in fact they -- they can block it absolutely --

MR. FELDMAN: Right.

QUESTION: -- if they want to call for a blocking device. So that on the district court's analysis, the -- let's say the -- the totally ignorant, indifferent parent is -- is going to be, for practical purposes, eliminated, and on that assumption, why doesn't the public interest yield to the parents' decision in the face of that choice just as the -- just as the -- as the public responsibility somehow yields to the parents' affirmative choice to subscribe?

MR. FELDMAN: Well, I think that actually gets to the other half of the argument, and it's the -- the reason why Congress acted is because a scheme like the district court envisioned can't work and it can't work for three reasons.

The first reason is the kind of notice that would have to be given would have to be -- it's very

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doubtful that really effective notice that permits a genuinely informed and effective choice to be made would be even plausible to be given --

QUESTION: I don't understand.

MR. FELDMAN: Well, let me explain why. For two reasons. One reason is you're operating against -- in a situation where the cable operator has a financial incentive not to give the notice both because giving the notice is expensive. If the parent chooses to elect blocking, that's a further cost.

QUESTION: The Government presumably can tell them to give the notice and tell them what notice to give.

MR. FELDMAN: It has to be -- right.

Secondly, you're operating against a system where the parent already thinks that he's not getting it and it requires an exceptional amount of notice and effective notice in order to take a parent who thinks he's not getting it and convince him that he is getting it, and therefore he has to act once again and do something.

QUESTION: I just don't understand that. If the cable operator provides a notice saying you are getting this. If your children turn into channel X, they're going to get certain -- a certain signal bleed. Why is that difficult to convey to parents?

MR. FELDMAN: Well, I think you have to sketch

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out exactly what would be said and how it could be said in such a way to counteract the two things I just mentioned.

But then you get to the next problem which is that itself is going to be expensive. If it has to be done on bill inserts, on advertisements on other channels, on all the means that the district court said, and they would have to be specified very, very particularly.

QUESTION: Well, but the broadcasters accept that.

QUESTION: Yes. I would accept your argument there perhaps if -- if the channel here weren't quite willing to -- to do what the district court had in mind.

MR. FELDMAN: I'm not sure that -- that the channel here is or the other channels are willing to do it. They -- they --

QUESTION: They're certainly willing for purposes of this case.

MR. FELDMAN: Well, because they -- it hasn't been spelled out for them exactly what kind of a notice is required and what would -- what effective --

QUESTION: Well, but we're talking now about the -- about the expense and -- and the effect of the expense. And I presume they can calculate the -- the expense and they've calculated it and they don't think that that is tantamount to equal or -- or more severe regulation.

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MR. FELDMAN: I -- I would suggest that they've calculated something different which is that the minimum amount that they could do that was consistent with the vague guidelines that the district court gave would be something that they could do that wouldn't have much effect on that.

QUESTION: Well, let's -- let's assume they've made their mistake. Why isn't that their problem?

MR. FELDMAN: Well, I think --

QUESTION: In other words, why -- why -- if they've made a mistake in calculation, why should we decide this case on the basis of saving them from that mistake?

MR. FELDMAN: Well, because I don't really -- I guess I don't really think they've made the calculation. That's not a position that they took at trial in this case in front of the district court. Let's have a lot of notice.

QUESTION: Well, let -- let's assume --

MR. FELDMAN: We'll explain to you what we'll do. And I just don't think that it's fair to say that they now have a choice of either having this statute struck down and therefore it being open season or saying, yes, we'll abide by some kind of vague notice -- notice if anybody can ever figure out what it would be.

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QUESTION: Well, for purposes of developing the -- let's just assume that in the district court, they said, we're not concerned about the cost. We'll -- we'll take the risk that we're going to get cancellations because local channels are going to find that this is too -- we'll take that risk. We don't care. Could the Government come forward -- come back and say, oh, well, this might be more expensive than you think? That -- that sounds like an odd argument to me.

MR. FELDMAN: Well, I think it's not an -- I guess I don't think it's an odd argument to make when it's in the context of -- of a case where they're trying to get out from under a statute and where they're not genuinely faced with a particular regulatory program. In fact, I -- I would guess that if Congress really enacted a statute that detailed in the precise terms that would be necessary how -- what kind of a notice would be given and how that would work, and once they saw that, first of all, it would be very expensive for cable operators to provide the notice, and secondly, it would lead to an enormous number of people who, if they really knew about the problem and haven't subscribed to this have -- have no reason to want it, they would just say, no, I don't want it --

QUESTION: Well, but your guessing and -- and the burden is on -- is on you to sustain the legislation.

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MR. FELDMAN: Right, and I -- I think -- you know, I think that that partly goes back to Congress having looked at the situation and said there are so many reasons why a system like section 504 can't work, starting with the fact that these are parents who have already decided they don't want these channels, and only then they find that they're getting them anyway.

QUESTION: Well, even as to that, I think it may be a cost consideration. You get the cheapest channel and then you hope to get the sports on the bleed, you know?

(Laughter.)

MR. FELDMAN: For some it may be.

Let me just -- let me just also say that the district court's own findings are that -- with a very, very small number of people requested blocking under section 504 or under a section like 504 -- under the factual findings of the district court, it would be uneconomical for cable operators to carry appellee's programming, and they would drop it altogether, which would be a restriction on speech greater than that that results from 505. That operates from the same effect of market forces that 505 operates. If more people subscribed to -- to appellee's programming, then the market -- market would mean that it would be -- that it would be -- that maybe stations wouldn't have to move to

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time-channeling or they might be able -- well, it would mean that they would mean that they would got out and get the equipment that was necessary to block it and provide it 24 hours a day.

QUESTION: Mr. Feldman, you spoke of what Congress had contemplated. Am I right that in fact the provision in question here was -- was offered as an amendment on which there was never a hearing?

MR. FELDMAN: That's correct. But it was amendment to the same bill that contained section 504, and what we do know about it, it was specifically addressed to the fact that there was this 504 alternative out there, and Senator Feinstein specifically said, we should put the burden not on the parent, having already not subscribed to these channels to now say again, I don't want them, but to put it on the cable company to say, if you want to transmit these -- this material, people should affirmatively request it.

You know, I'd add that under the district court's findings, it would take a -- an extremely small number of parents to request blocking to make the whole scheme uneconomical, something like 1 or 2 percent. The district court found 3 percent would -- to 6 percent would completely exhaust all the revenues that the cable operators get from appellee's programming.

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QUESTION: Well, I suppose if that happened and then they started complaining, the answer would be, you asked for it, you got it.

MR. FELDMAN: Well, that might be the answer, but I think they would be in here with the same kind of argument they're making now, which is this is -- this is -- this violates the First Amendment because it's content-based, which it would be --

QUESTION: You'd have a different argument from the one you're making now.

MR. FELDMAN: Well, they would be saying this is content-based, which it would be, and it violates the First Amendment because it's leading these cable operators to completely drop our programming. Actually section 505, when Congress adopted the time-channeling option, it's the same option that's been used in broadcast television. That was a reasonable choice, and in fact it was the only effective way of achieving the compelling interests at stake.

If I could reserve the balance of my time.

QUESTION: Very well, Mr. Feldman.

Mr. Corn-Revere, we'll hear from you.

ORAL ARGUMENT OF ROBERT CORN-REVERE

ON BEHALF OF THE APPELLEE

MR. CORN-REVERE: Mr. Chief Justice, and may it

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please the Court:

This is a case of regulatory overkill. Section 505 of the Telecommunications Act violates the First Amendment because, as the district court found, the law significantly restricts Playboy's opportunities to convey and the opportunity of Playboy's viewers to receive protected speech.

The Government here is asking for greater flexibility to regulate which is really nothing more than a euphemism for expanding governmental authority over protecting -- protected speech.

QUESTION: Did the district court find that this was protected speech?

MR. CORN-REVERE: Yes, it did.

QUESTION: I don't -- I didn't discover that in -- in the findings of fact by the district court.

MR. CORN-REVERE: Well, I don't know you'd find that in -- in the findings of fact other than in the conclusions of law that indecency is protected by the First Amendment.

QUESTION: Where did it find that what is involved here is only indecency and not pornography?

MR. CORN-REVERE: There wasn't a specific finding on whether or not we are dealing with obscenity here, but perhaps the confusion that arises from that

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point comes with the emphasis the Government has placed on certain exhibits that give an atypical view of -- of really what's out there. They lodged with this Court a number of videotapes that they hand-selected and found from the most explicit examples they could find out there.

In particular, they focused on a -- a service called Spice Hot which only came into existence after section 505 was adopted. At the time in the record it was available in only 20 cable systems and there's no indication of whether or not it was subject to signal bleed on any of them.

They also focused on a service called AdulTVision which the record reflected doesn't even have signal bleed. It's available only on totally encrypted systems.

QUESTION: Well, what -- this applies only to channels that are exclusively devoted to sexually explicit programming. What --

MR. CORN-REVERE: That's not quite correct. The actual language, Justice Scalia, in section 505 is that it applies to channels that are primarily dedicated to sexually oriented programming.

QUESTION: Okay, primarily dedicated to sexually oriented programming.

Are -- are there, to you -- your knowledge -- I

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have no problem with -- with saying that since the Government didn't raise the obscenity point, it cannot come down on this particular cable operator for obscenity. But I am troubled by the fact that simply by choosing not to raise the obscenity point, the Government allows a facial challenge to eliminate this entire statute as applied to all -- all channels that -- that are devoted to primarily to, quote, sexually oriented programming.

Do you know whether there are channels devoted primarily to sexually oriented programming that do not contain material of this sort that's described in the Government's brief?

MR. CORN-REVERE: I would -- I would describe Playboy Television as one of those channels. It is primarily dedicated to sexually oriented programming, but we have disagreed from the beginning that it's necessarily dedicated to indecency or much less obscenity. And as a result, we had a running argument with the Government over the nature of the indecency standard and how it applies to these channels because it requires certain determinations that are difficult to make and certainly have not been made and not been clarified by the Government on this record.

QUESTION: Do you -- was this case presented just as a facial challenge?

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MR. CORN-REVERE: Yes, it was, and as a result, on the face of the statute, it applies in a much more broad way, not to anything approaching obscenity, but to channels that are primarily dedicated to sexually oriented --

QUESTION: If there exist any such channels. And I -- I'm not prepared to -- to believe that there are. And that seems to me a matter that -- for purposes of a facial challenge, it seems to me we don't imagine things that don't exist.

MR. CORN-REVERE: And I don't --

QUESTION: And -- and unless there are some findings that, indeed, there are channels that -- that just engage in -- in innocuous indecency, I -- I'm not prepared to say the whole statute is bad.

MR. CORN-REVERE: Well, and that was actually the underlying premise of the district court's decision. And in fact, it looked at a number of specific examples of Playboy programming that we had submitted to the FCC asking for a ruling of whether or not it was indecent. Our argument was that Playboy Television is analogous to Playboy Magazine and includes a number of features, including what you would expect, nude models and so on, and as well as other features that are difficult to -- to characterize even as indecent. And out of that broad

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editorial content, we --

QUESTION: There's some of that, but is -- is there nothing beyond that?

MR. CORN-REVERE: Well, yes, there is. But we -- we have argued that because of the statutory vagueness, that it's impossible to distinguish what might be prohibited from what might otherwise be wrapped up in the requirements of section 505, and none of that approaches what I think this Court's rulings have said about obscenity, much less indecency.

QUESTION: May I -- may I ask for a clarification on what the overall statutory and regulatory scheme entails? Is there any prohibition currently on showing indecent speech on the ordinary cable channels that are not -- that don't require subscription during certain hours?

MR. CORN-REVERE: I'm not aware of a specific statute that touches on basic cable channels.

QUESTION: Or regulations?

So, it -- is it entirely open, as far as you know, for ordinary cable channels to carry indecent speech in the early evening hours today?

MR. CORN-REVERE: The tradition is -- is that they do not, although again I don't know of a regulation that touches on that, except for the regulation that this

-- this Court addressed in the Denver Area case which dealt with leased access channels which are not subscription channels. They're presented as basic channels. And the Government's argument in that case is that leased access channels presented indecency and therefore needed to be regulated.

This Court's decision in the Denver Area case is quite pertinent to this case because it recognized a governmental interest, but yet found that the regulations imposed would restrict more speech than necessary and adopted instead the analysis that the Government should have focused on less restrictive means. That is --

QUESTION: Isn't that what the case is about, the less -- I mean, can I get over the first problems by simply assuming -- is this a fair assumption? This deal -- this case deals with channels that are primarily oriented to sexually -- to sexually oriented programming, that that means in this context channels that have sexually explicit adult programming, and that in this context that means that programming which is, among other things -- depicts sexual or excretory activities in a patently offensive manner?

Now, you -- you -- if I'm right, this is not concerning seven words on some other channel. This is a channel dedicated to explicit adult programming where that

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means patently offensive depiction of sexual activity. Right?

Now, you may have all the standing to raise anybody who fits that description, but is it fair to say you do not attack the statute, and I don't have to consider the statute, insofar as it is applied beyond that?

MR. CORN-REVERE: Well, in fact, we do argue that the statute applies to any channel that is primarily dedicated to sexually oriented programming, whatever channels those may be.

QUESTION: And that must be adult explicit material, and as far as I know, there is no channel that wouldn't fit within the definition as I described it, though you could argue about whether or not it is patently offensive. But I have to assume for this case that it is, I take it.

MR. CORN-REVERE: Well, one of the interesting things about this case is that we did ask the Government for an ability to try and distinguish between that which is sexually --

QUESTION: I know, but I'm trying to think of what I have to decide selfishly on this appeal.

(Laughter.)

QUESTION: That is, in -- in this case can I --

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can I make the assumptions that I made and say, okay, now we're going to go on to the basic issue, which I thought was the basic issue, which is the question of whether or not this means is an appropriate means under the First Amendment?

MR. CORN-REVERE: Yes, and that was the heart of the district court decision.

QUESTION: Mr. Corn-Revere, on page 42a of the appendix where the court is giving its opinion in this case, it says, plaintiffs conceded that their programming is essentially 100 percent sexually oriented in contrast to the other entertainment channels that display only occasional or sporadically -- sporadic sexually explicit scenes or programs. That tends to, I think, answer Justice --

And it also suggests that this was not a -- a facial challenge. I mean, if -- if it was a facial challenge, I wonder why the court is saying that these particular plaintiffs -- what they've done.

MR. CORN-REVERE: Well, we acknowledged before the district court that Playboy is primarily dedicated to sexually oriented programming, but disagreed on whether or not we crossed the line into indecency in many cases.

And that is part of the difficulty with this statute. While it applies to networks in general that are

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sexually oriented, the safe harbor prohibitions and the actual restrictions of section 505 are supposed to target only that which is indecent or that which is sexually explicit adult programming. The difficulty is the statute doesn't provide the analytic tools necessary for dividing one from the other, and we think that the network does carry programming that should be able to be presented in the non-safe harbor hours that once again the Government has not been able to define for us.

As a matter of fact, the Government's definition of the case, as a facial matter of the indecency standard and has litigated in this case, is that there is no distinction between hard-core pornography, as Justice Scalia was mentioning earlier, and safe sex information if it's presented on Playboy Television. And as a result, the overbreadth and the restrictiveness of section 505 is exacerbated.

And in fact, for that reason too, the issue of least restrictive means becomes paramount. As the district court found, section 504 would appear to be as effective as section 505 for those concerned about signal bleed while clearly less restrictive of First Amendment rights.

QUESTION: Can we talk about the Government's arguments with reference to 504? I -- I have some

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trouble, as indicated by questions from me and Justice Souter, with the Government saying, oh, this is going to be too expensive for you and the broadcaster seemed to accept it.

The other point, though, it seems to me the Government makes is -- is troublesome for you, and that is that many parents are just not going to know about this, they're not going to do anything about it.

MR. CORN-REVERE: Well, Justice Kennedy, that's why we would agree --

QUESTION: And -- and I'd like to talk about that a little, and you -- and perhaps you should tell me if you think that's something that I can just assume or if I need findings of fact on that. I mean, I think I pretty well know that it's a fact, but maybe you think that's out of the ability of the judges to know.

MR. CORN-REVERE: No. I think findings of fact would be required to determine that section 504 was ineffective because it's the Government's burden of proof to demonstrate that they have adopted the least restrictive means.

And with respect to the Government's argument that it is simply too expensive, I would suggest that the record is clear --

QUESTION: You -- you think we can't know that

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there are -- are parents who are so busy working and making a living that they don't have adequate time to supervise their children, they don't care about this sort of thing? And the Government is very concerned about it.

MR. CORN-REVERE: Well --

QUESTION: Can't I make that assumption? Don't I know that?

MR. CORN-REVERE: I think when it comes to making a decision that's going to restrict a significant amount of speech that is protected by the Constitution, that something more would be required than simply an assumption.

And in fact, this is the very argument that the Government presented in the Denver Area case involving indecency on leased access channels, in fact, in almost the same language that they've presented here. If you look at pages 36 to 37 of the Government's brief to this Court in Denver Area, which unfortunately I guess you wouldn't have today, the Government claimed, just as it does here that innumerable parents, through absence, distraction, indifference, inertia, insufficient information, would fail to take advantage of subscriber initiated measures to protect children from viewing indecent programming. It's almost identical to the --

QUESTION: Well, tell me whether you think the

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Government -- the Congress could prohibit broadcasting on ordinary channels patently offensive sexual material during early evening hours. Can it do that --

MR. CORN-REVERE: I think it would require --

QUESTION: -- without violating the First Amendment in order to protect children?

MR. CORN-REVERE: I -- I think that would require an analysis of whether or not less restrictive measures than a ban would also touch on that problem. And that also is the distinction that we've drawn between this Court's holding in Pacifica which applied to broadcasting and this case where there are less restrictive measures.

And with respect to the possibility that some parents may not be fully attentive, as Justice Kennedy's question got to, I think the Court's analysis in Denver Area speaks to that issue.

QUESTION: What do you say to the argument that's made here that on the assumption that there are indifferent parents, the district court was really being utopian in thinking that on -- on the section 504 modification it proposed, that effective notice could be given to parents that would get their attention and explain to them that bleed was possible and make it clear to them that they really did have an option to -- to block it entirely? The Government, in effect, is saying that

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the district court came up with a scheme that in the real world wouldn't work. Now, that's -- that's quite apart from its -- its concern about the cost to you. What is your response to the utopianism argument?

MR. CORN-REVERE: Well, my response, Justice Souter, is that we at least ought to try that first before we decide that we're going to restrict a significant amount of protected speech.

QUESTION: Well, don't we want to know more than -- that the fact that we might try it? I mean, shouldn't -- when -- when we -- when we say that this is bad because there is a less restrictive alternative, I mean, I think we've -- we've got to make the assumption or -- or draw the conclusion that the less restrictive alternative is a real alternative. And -- and that's why I'm interested in this utopianism argument. Do you think -- do you think it's non-utopian? May we conclude that, in fact, this argument on the Government's part is -- is unsound?

MR. CORN-REVERE: Well, I think it's no more utopian than this Court was being in Denver Area where it listed other alternative measures that would have been less restrictive, including a possible coding requirement or blocking available by a phone call, which is what we have with section 504.

QUESTION: But I don't think we're really

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getting to the -- what I intend to be the heart of the question. Do you believe that you can give effective notice or that the -- the cable operators can give effective notice if they are required to do -- to do so under -- under a 504 scheme, as -- as envisioned by the district court?

MR. CORN-REVERE: Well, yes, I do. I think the notice could be effective, and -- and we detail the number of measures that Playboy was prepared to do and the National Cable Television Association --

QUESTION: What would such a notice consist of? If you were writing the notice, what would it say?

MR. CORN-REVERE: It can take various forms and, in fact, has in practice. It can be a video announcement that is made on various channels on the cable system. It could be written notice that is sent separately from bills. It could be a written notice --

QUESTION: And what would -- let's assume it were a written notice that went with the bills. What would it say?

MR. CORN-REVERE: It would say that there is a phenomenon known as signal bleed, that -- that many households may find offensive that may contain sexually explicit or sexually oriented programming and that you have a right to block it. In fact, there are examples in

the record of a number of cable operators who sent such notices and had visual information on it to get the attention of the subscriber to provide that notice.

QUESTION: Now, of course, your -- your argument in -- in your brief to the effect that it would not be disastrously expensive is that there would not be that much response to it, not that many people would want to block. And I suppose the Government might say in response to that, well, that simply shows that the -- the notice in fact is not effective because if it were effective, more people would want to block. How would we resolve that -- that conundrum?

MR. CORN-REVERE: The inference that the Government makes that that demonstrates the ineffectiveness of notice provision simply underscores the Government's failure to demonstrate the pervasiveness and difficulty of solving signal bleed.

QUESTION: So, you're saying it's a burden of proof issue.

MR. CORN-REVERE: Well, it's partly a burden of proof issue, and that's how the district court viewed it when they suggested that if there is a low rate of lockbox distribution, that that is as indicative of the fact that the Government never demonstrated the pervasiveness of the issue in the first place.

It's also important to note that section 505 is not the only means out there -- and nor is section 504 -- for dealing with the phenomenon of signal bleed in those places where it occurs, as the Government conceded it very significantly from time to time and place to place. And the market has provided a number of mechanisms to allow individuals to deal with signal bleed even without respect to Government regulations.

For example, 80 percent of the televisions on the market on this record have channel locking features that will also block signal bleed. The same is true of VCR's on the market and -- and cable television set-top boxes. There are a number of ways that you can deal --

QUESTION: When you say on the market, you mean for sale?

MR. CORN-REVERE: That's right.

QUESTION: Rather than what's actually out there in the homes.

MR. CORN-REVERE: Well, I -- I can't tell you, based on the record, how many televisions are currently in homes that have channel locking features, but we do know that 80 percent of those on the market have them and that approximately 20 to 30 million televisions are sold every year.

QUESTION: The Government's figures as to the

number of houses in which presumably signal bleed occurs and the number of children in those houses -- should we assume that the figure of the number of children did not reflect anything one way or the other about the availability of these other blocking devices that you're -- you're considering?

MR. CORN-REVERE: That's right, and that's one --

QUESTION: So, that's -- that's the maximum possible figure.

MR. CORN-REVERE: The maximum possible without respect to these other measures that others might use.

QUESTION: May I ask you a factual question? I'm not -- does the record tell us -- I understand that this bleed is not always the same. Some bleed you can hardly see anything and some bleed you can really -- it's just as though you're watching the original version. Does the record tell us how -- what proportion is is what and how pervasive the -- the really clear reception is when there's a bleed?

MR. CORN-REVERE: No, it doesn't, and that's one of the curious things about the record because that's one of the issues that the district court asked the Government to demonstrate more fully at the permanent injunction stage.

QUESTION: Well, there were lots of tapes put in.

MR. CORN-REVERE: There were a number of tapes. Most of the tapes that the Government submitted were in the clear and weren't examples of scrambled imagery.

QUESTION: I asked about 1, 2, and 44 because those are graphic, particularly 1 and 44.

MR. CORN-REVERE: Let me address those.

QUESTION: Before you get off that question, I -- is the thesis that little kids aren't going to watch this unless it's really good reception?

(Laughter.)

MR. CORN-REVERE: I think given the range of other media that are available --

QUESTION: I don't see how it makes very much difference how clear the picture coming through is. You really think that's crucial?

MR. CORN-REVERE: I think --

QUESTION: Well, it seems to me if you can't understand what's going on because the thing is so clouded, it's not all that dangerous.

(Laughter.)

QUESTION: Well, they -- they mean by bleed more than -- more than that -- that you see something that's not visible, don't they?

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MR. CORN-REVERE: Well, not -- not if you look at the Government's tapes, particularly tape number 2 which -- which Justice Ginsburg alluded to.

QUESTION: You don't see much of anything.

MR. CORN-REVERE: Tape number 2 was actually a compilation tape made by a Department of Justice attorney. It was edited down from a 4-hour tape. If you look at tape number 2, you'll see every now and then 2 or 3 seconds of an image you can see, and if you add it all up, 82 percent of that image is completely blocked. You see nothing. If you look at the 4-hour tape, rather than the Government's greatest hits tape --

(Laughter.)

MR. CORN-REVERE: -- you get something like 93 percent of the programming is completely blocked. It does vary from time to time and place to place, but the Government never even attempted to demonstrate the phenomenon of --

QUESTION: Are you talking about video rather than audio?

MR. CORN-REVERE: Yes, primarily. But the audio transmission varies as well. Tape number 44, which Justice Ginsburg also alluded to, the audio tends to come in and out, just as in the other examples the video may.

The phenomenon of signal bleed varies

significantly from time to time and place to place based on a range of different factors, including the equipment used, its installation, its maintenance, and even factors such as the weather. And as a result of that, a blanket, across-the-board approach is strikingly inappropriate and, for that reason, is overly broad, rather than a tailored solution such as section 504 --

QUESTION: The basic difference between the broad and the tailored is not broad versus tailored. It's opt in versus opt out, and this is different from Denver because Denver was taking a lot of programs on a lot of different channels and forcing them to segregate. Here we're dealing with material that is segregated. So, as I see it, it's the narrow question: opt in versus opt out. And I'd appreciate your answer if that's right, really to go back to Justice Kennedy's question and focus explicitly.

Unlike the world where I grew up, I think many, many thousands of children come home after school and there's no one there and parents don't want to say I'll call up the program and do something because that means they lose an afternoon at work while -- while they're home while somebody comes out to the house, if they've understood it, and then he didn't show up on time. I mean, we've all lived through having to stay home all day

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because the repairman didn't come, and he still doesn't come.

So, they're saying that world is the world we live in. I don't think we have to have proof of that. And in that world opt in versus opt out makes an enormous difference. And you say you're going to segregate. Fine. Segregate, segregate. Just don't give it to people who don't want it. That's all.

MR. CORN-REVERE: That's --

QUESTION: And -- and don't force them to opt in -- rather opt out, or we get into the repairman problem, plus the fact we don't know, plus the fact my kid is at somebody else's house, and I trust my neighbors, but they're not so activist as me. All right?

I mean, that's what I want you -- that seems to me to be the pressure for saying it makes a big difference opt in versus opt out, and I'd like to get your response.

MR. CORN-REVERE: Notwithstanding those practical difficulties, every one of the examples that the Government was able to provide -- and it really was only a few anecdotal examples -- where signal bleed occurred, the individuals were able to get blocking from the cable operator upon request. And that was a factual finding of the district court.

And while I recognize the difficulties of opting

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in, this is different from the Denver Area case in this respect, in that if you decide to make a single phone call, you have blocked the channel that you're concerned about. Whereas, in Denver Area, as Justice Thomas pointed out in his separate opinion in Denver Area, the difficulty on leased access indecency is that you had no central editor and you didn't know when an indecent program may appear. Here the voluntary solution of making that call is a lot more effective because you have to just deal with that --

QUESTION: Well, in addition to making the call, does something have to be done to the television set?

MR. CORN-REVERE: Well, it would depend on the method that the cable operator uses to address the issue.

QUESTION: But in many cases it would require someone to come and do something to the television set.

MR. CORN-REVERE: We disagree that it would necessarily require a service call since someone is calling in to ask for a trap that can be attached to the television set. And in fact, the Government presented evidence at the preliminary injunction stage that traps could be installed very easily by the cable subscriber. You wouldn't have to --

QUESTION: What does Playboy do if somebody calls up and says, I want -- I'm getting this on channel

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2, you know, the educational channel? I don't want it. Okay, it's bleeding. What does Playboy do? Do they send somebody to the house or do they not?

MR. CORN-REVERE: Just as a point of clarification, it's not Playboy that responds to those calls.

QUESTION: No. All right, whatever.

MR. CORN-REVERE: And -- and also signal bleed doesn't intrude on other channels. It would occur only on the channel on which Playboy was designated.

QUESTION: You're clients. Let's say -- you have clients, I take it. They're involved in the signal bleed. I call up tomorrow and say it's bleeding. What do they do? Do they send somebody to the house or do they not?

MR. CORN-REVERE: The normal practice has been to do that.

QUESTION: To send someone to the house.

MR. CORN-REVERE: That's right. But that is not necessarily what would need to be required. As the court found below, if there were a lot more requests for traps, then the cable operators would be free to look for the more economical way to do that. And once again, it was the Government's witness that demonstrated that the traps could be installed by the subscriber.

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QUESTION: Is -- is it the case that if more than 3 percent wanted to do it, then it wouldn't be economical at all and you'd prefer this system?

MR. CORN-REVERE: Well, we disagree with -- with the Government's figures on that.

QUESTION: All right. What percent would it be in your view?

MR. CORN-REVERE: Well, based on the figures that we presented in our reply brief at the post-trial stage, we suggest that the breakeven point would be closer to 80 percent. But nothing approaches that in -- in this case because of the phenomenon of signal bleed being more sporadic than the Government suggests.

QUESTION: That's a pretty big spread. Couldn't you --

MR. CORN-REVERE: That is a --

QUESTION: -- get closer than that? I mean --

MR. CORN-REVERE: That -- that's a very big spread because the Government overestimated the cost of the traps by three times. They estimated the cost of having a service call, which added 80 percent to the cost, and when you add up all those differences, there is a significantly wide spread.

But even if you accepted the Government's figure, which is 6 percent, not 3 percent -- they tried to

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split the difference -- then you're talking about installing something like 3.72 million traps, which based on this record, is utterly implausible. In the 16 years that Playboy Television has -- has been on the air, the FCC has received 33,000 complaints about cable in general, and of those, only 72 related to indecent programming. And the Government doesn't know how many relate to signal bleed.

QUESTION: That was not a litigated issue, how much it would cost.

MR. CORN-REVERE: It was litigated.

QUESTION: It was litigated?

MR. CORN-REVERE: Yes, it was.

QUESTION: I thought you were telling us that you have a -- you and the Government are wide apart in how much it would cost.

MR. CORN-REVERE: We could never reach agreement on that point, but the figures are in the record --

QUESTION: Where is the finding of fact that you're talking about? What number is it?

MR. CORN-REVERE: The finding of fact by the district court was 6 percent, but that was expressly based on the assumption that you would require a service call and then didn't discuss the remaining factors that were addressed in the briefs. And based on that 6 percent,

once again that would amount to something like 3.72 million traps.

QUESTION: Well, when you say the assumption that there would have to be a service call, was the district court making a finding that there would have to be a service call?

MR. CORN-REVERE: I don't know if you'd call it a finding. It seemed more offhand than that. But the Government did -- I mean, the -- the district court did make that assumption despite the evidence that was presented below even by the Government that that wouldn't be required.

Ultimately to resolve the Court -- this case in the Government's favor, they're really asking this Court to make a number of changes, significant changes in -- in First Amendment doctrine.

First, they're asking this Court to apply the Pacifica precedent specifically to cable television, which this Court, at least in the past, has declined to do.

And secondly, they're asking for the authority to restrict the speech available in all households in a cable community even though they acknowledge that parents are fully able to block the offensive speech in a particular household.

And third, they're -- they're asking to

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significantly limit the doctrine of least restrictive means as it applies in First Amendment cases. There's really nothing in this Court's prior decisions -- and as the district court found -- that would justify significant changes in the law.

This is particularly true with respect to the notion of individual user empowerment and as we look at newer technologies. If the Government were correct that the complete ability of a household to stop offensive speech coming into the home is ineffective and is not sufficient to forestall the need for Government regulation, then it would open a wide avenue for the regulation not just of cable television, but of other new technologies that do empower individuals to take steps on their own either through market-based measures or through other less restrictive regulatory measures to address those issues. And for that reason, it would be a significant change in the law.

If there are no further questions, I'll --

QUESTION: Thank you, Mr. Corn-Revere.

Mr. Feldman, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE APPELLANTS

MR. FELDMAN: Thank you.

I just -- I wanted to point -- direct the

Court's attention -- the factual findings -- the facts on the issues that Mr. Corn-Revere were talking -- was talking about -- there was disagreement between the Government and Playboy on them, and the district court found in our favor. The 3 percent and 6 percent figures are what the district court -- this is on page 22a of the JS appendix. The district court found that those are the figures, depending on how long you allow the cable operator to recover its cost. Those are the figures that would totally exhaust the revenues, that if 3 to 6 percent of the subscribers requested blocking, the revenues that the cable operator got from Playboy.

The district court then found that, in fact, cable operators would drop Playboy before it exhausted all the revenues, but when it just was no longer making enough profit. That's on 22a.

The district court also in footnote 21 on that same page said, Playboy's contention that negative traps can be mailed to subscribers, thereby obviating the need for installation labor costs and lowering the cost of mechanism -- per mechanism, is unavailing. That sounds to me like a finding of fact that the district court thought that Playboy was wrong on that.

I'd just like to conclude by saying that Congress adopted here a time-channeling alternative that

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permits -- permits the material to be shown from 10:00 p.m. to 6:00 a.m. when most of the audience for the material is there. The people who -- people have -- given the virtually universal presence of video cassette recorders in homes, people who want to watch it at other times can watch it. But it imposes the least risk to children.

That was a -- more than a reasonable -- that was the only effective solution to the problem that Congress saw. And there -- Playboy hasn't suggested any reason why Congress' determination that that test, 10:00 p.m. to 6:00 a.m. safe harbor which governs the same kind of problem on broadcast television, shouldn't be equally applicable and equally effective here.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Feldman.

The case is submitted.

(Whereupon, at 11:05 a.m., the case in the above-entitled matter was submitted.)

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CASE NO: 98-1682

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BY: Fiona M. May
(REPORTER)