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Space, the Final Frontier—Expanding FCC Regulation of Indecent Content onto Direct Broadcast Satellite

John C. Quale* & Malcolm J. Tuesley**

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I. INTRODUCTION

Dating back to the Radio Act of 1927, Congress has prohibited the presentation of indecent programming by over-the-air broadcasters. While Federal Communications Commission (“FCC” or “Commission”) enforcement of its indecency prohibition has been generally infrequent and low-key, the climate changed dramatically in 2004, when there was an explosion of viewer and listener complaints against radio and television stations and a concomitant increase in FCC enforcement action.

Nearly three decades ago, the Supreme Court, recognizing that indecent speech is entitled to First Amendment protection, nonetheless upheld over First Amendment challenges the Commission's authority to regulate indecent programming on over-the-air broadcast stations. According to the Court, the “uniquely pervasive presence” of the broadcast medium in American life and the fact that broadcasting is “uniquely accessible to children” warrant limitation of the First Amendment rights of broadcasters.¹

The vast majority of viewers today receive video programming from multichannel video programming providers—mostly cable television or direct broadcast satellite (“DBS”)—rather than directly over-the-air from broadcast stations. While the FCC has not hesitated to sanction broadcasters for what it deems to be indecent content, it consistently has found that it lacks the authority to regulate indecency on subscription services like cable television. Citizens groups and some in Congress now seek to extend indecency restrictions to DBS services under existing law or through the enactment of new legislation. It is true that DBS, because of its use of radio spectrum to deliver programming to consumers, does share some similarities with broadcasting.² Although the Supreme Court has not

1. *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978).

2. While cable operators use spectrum (both satellite and terrestrial) to receive programming from distributors, they do not use radio spectrum in delivering content to subscribers.

considered the issue, we believe that the nature of the DBS service more closely resembles cable television than broadcasting. Assuming that the FCC has statutory authority to regulate indecency on DBS (which is itself doubtful), Supreme Court precedent regarding the regulation of content on cable and the Internet strongly suggests that any restriction on DBS indecency would contravene the First Amendment.

II. CONTENT REGULATION AND CALLS FOR EXPANSION

A. Pressure to Extend Broadcast Indecency Regulation to Cable and DBS

The Janet Jackson “wardrobe malfunction” in early 2004 ignited a crusade against broadcast indecency by various citizens’ groups, such as the Parents Television Council (“PTC”).³ After successfully inciting greater FCC enforcement action against broadcasters (primarily by inundating the agency with form complaints), these groups took aim at the cable and DBS industries. On February 1, 2005, the PTC launched a campaign to call attention to indecent content on basic cable at a press conference on Capitol Hill.⁴

Lawmakers in both the House and Senate have also called for a crack down on cable and satellite indecency, while urging these multichannel video program distributors (“MVPDs”) to provide consumers with better programming options. At one point, Senator Ted Stevens, then-Chairman of the Senate Committee on Commerce, Science, and Transportation, and others voiced strong support for regulating indecency on cable and DBS.⁵ However, using the threat of legislation, Senator Stevens began to favor industry action such as the creation of “family tiers” that would exclude more objectionable programming channels.⁶ In addition, Senators Rockefeller and Hutchison introduced S. 616, the “Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005.” S. 616 not

3. During a halftime performance at the 2004 Super Bowl broadcast on the CBS television network, Justin Timberlake removed part of Janet Jackson's costume, revealing for an instant her breast. The incident was dubbed a “wardrobe malfunction,” and the FCC imposed a \$550,000 fine on CBS. See *In re Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVII Halftime Show*, Forfeiture Order, 21 FCC Rcd 2760 (2006), *affirmed on recon.*, 21 FCC Rcd 6653 (2006), *appeal pending*, CBS Corp. v. Federal Communications Commission, No. 06-3575 (3d Cir. 2006).

4. Press Release, Parents Television Council, New PTC Study Finds MTV Blatantly Selling Smut to Children (Feb. 1, 2005), *available at* <http://www.parentstv.org/PTC/publications/release/2005/0201.asp>.

5. Ted Hearn, *Stevens Adds Cable to Indecency Jihad*, MULTICHANNEL NEWS, Mar. 7, 2005, at 1, 32.

6. Amol Sharma, *Focusing On A Fresh Start*, CONG. Q. WKLY., Jan. 2, 2006, at 55.

only sought to expand current broadcast indecency penalties, but also to apply them to cable and DBS providers. The bill also would have regulated “excessively violent” video programming and supplanted the current, voluntary indecency rating system.⁷ More recently, legislation was introduced in the House that would require cable and DBS operators to accept broadcast indecency standards or, in the alternative, enhance access to family-friendly programming with expanded family tiers or by offering subscribers the ability to select individual channels.⁸

Suggesting that the Commission will take its lead from Congress, Chairman Martin, in his first speech as Chairman, said that “the Commission is a creature of Congress, and it’s Congress that ends up trying to determine whether or not the rules on indecency should be applied to cable.”⁹ While it appears that any new indecency laws will come from Congress rather than the FCC, Chairman Martin nevertheless has publicly pushed for cable and DBS to agree voluntarily to address the problem.¹⁰ At a forum on decency held by the Senate Commerce Committee in November of 2005, the Chairman testified that he has “urged the industry to voluntarily” offer family-friendly programming packages or to accept indecency restrictions on their basic tier of programming.¹¹

While appearing before Congress in April of 2005, Chairman Martin was asked what he thought about the regulation of indecency on satellite radio, and he said, “whenever you talk about applying any kind of indecency to a subscription service, it raises constitutional concerns.”¹² Commissioner Adelstein has also expressed similar concern about extending indecency regulation to satellite services:

Right now everybody is concerned about indecency But if a person can find less restrictive means to prevent exposure then the govt. can’t impose restrictions on free speech [I]t’s very difficult

7. Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005, S. 616, 109th Cong. (2005).

8. See Kara Rowland, *Bill Seeks to Give Viewers an Option; No Charge for Blocked Channels*, WASH. TIMES, June 15, 2007.

9. Kevin J. Martin, Chairman, Fed. Comm’ns Comm’n, Remarks at National Cable and Telecommunications Association Convention: Conversation with Fox News Channel Journalist Stuart Varney (Apr. 5, 2005), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-258104A1.pdf.

10. *Open Forum on Decency: Hearing Before the Comm. on Commerce, Science and Transp.*, 109th Cong. 9-12 (Nov. 29, 2005) (transcript available at <http://www.commerce.senate.gov/pdf/decency2.pdf>).

11. *Id.*

12. Drew Clark, *FCC Chief Will Press Firms To Act On Indecency Controls*, CONGRESSDAILYAM, Apr. 27, 2005, http://nationaljournal.com/cgi-bin/iffetch4?ENG+CONGRESS_-NJMAG+7-cd0097+1191062-REVERSE+0+0+43700+F+3+3+1+fcc+AND+PD%2f04%2f26%2f2005%2d%3e04%2f28%2f2005.

to move in that direction We run into major constitutional issues.¹³

In an apparent attempt to stave off the new push for cable content regulation, the National Cable & Telecommunications Association (“NCTA”) launched a comprehensive \$250 million campaign “to help families manage their home TV viewing and protect children from programming their parents may find inappropriate for them.”¹⁴ Not surprisingly, the PTC immediately attacked the campaign and cited a previous study it conducted alleging that the current ratings system is deficient.¹⁵ The cable industry claims that these attacks are unfounded because of plans to improve the ratings system by implementing a number of enhancements.

The TV ratings icon that is displayed on the upper left portion of the TV screen for the first 15 seconds of rated programs will be enlarged by 70 percent so it is more visible to the viewer.

Coming out of every commercial break, cable networks will begin inserting a TV ratings icon on the screen to alert viewers of the TV rating throughout the program.¹⁶

In addition, “[c]able networks will provide on their websites [sic] information about the TV ratings system including program ratings in their online TV schedules and descriptions of the ratings system, and the V-chip.”¹⁷

More targeted blocking based on ratings is possible because of the congressionally mandated V-Chip. As part of the deployment of the V-Chip, in 1997, the Commission approved voluntary guidelines submitted by the entertainment industry to rate programming that contains sexual, violent, or indecent material and implemented a system to facilitate the transmission of the ratings in such a way that enables parents and other

13. *FCC Wants DBS and Satellite Radio to Compete with Terrestrials, Others*, COMMC’N DAILY, June 2, 2005 (copy of electronic article on file with author).

14. Press Release, Nat’l Cable & Telecomms. Ass’n, U.S. Cable Industry Launches “Take Control. It’s Easy” Campaign to Help Parents Manage Their Family’s TV Viewing (Apr. 27, 2005), available at <http://www.ncta.com/ContentView.aspx?hiddenavlink=true&type=reltyp1&contentId=369>.

15. Press Release, Parents Television Council, PTC Calls NCTA’s Announcement a \$250 Million Sham (Apr. 27, 2005), available at <http://www.parentstv.org/ptc/publications/release/2005/0427.asp>.

16. Press Release, Nat’l Cable & Telecomms. Ass’n, Fact Sheet: Cable’s Commitment to Help Parents Control Their Family TV Viewing (Apr. 27, 2005), available at http://www.ncta.com/pdf_files/Fact-Sheet-on-Cables-Pledge_PDF_4-27-05.pdf.

17. *Id.*

consumers to block the display of programming they determine is inappropriate for them or their children.¹⁸

DBS similarly provides a full range of robust parental content controls. In addition to passing through the V-Chip ratings, DIRECTV provides every customer with a free “Parental Controls” feature, which enables parents to restrict access at designated times to certain programming and to specific channels they consider inappropriate for family members.¹⁹ DISH offers a similar service with parental control features.²⁰ These systems supplement the ability of cable and satellite to block completely any specific channel.

Actual use of these systems, however, is another matter. “[O]nly 15 percent of parents use the V-chip that’s built into new TV sets . . . [a] Pew study found. Half of parents don’t know they even have a V-chip.”²¹ It remains to be seen if the recent push to promote the availability of these systems will increase their usage. In any event, the ratings system and other technologies that assist parents in regulating what their children watch on television will play an important role in determining what, if any, government regulation of content on MVPDs is constitutionally permissible.

B. Current Content Regulation

Federal criminal law prohibits the utterance of “any obscene,

18. See *In re Violent Television Programming and Its Impact on Children, Notice of Inquiry*, 19 F.C.C.R. 14394, 14394 n.2 (2004) [hereinafter *Violent Television Programming Notice*].

The ratings system, also known as the TV Parental Guidelines, was established by the National Association of Broadcasters, the National Cable Television Association, and the Motion Picture Association of America. These ratings are displayed on the television screen for the first 15 seconds of rated programming and, in conjunction with the V-Chip, permit parents to block programming with a certain rating from coming into their home. The TV ratings system has been in place since 1997. It was designed to give parents more information about the content and age-appropriateness of TV shows.

NBC, V-Chip/TV Ratings, <http://www.nbc.com/nbc/footer/v-chip/tvratings.shtml> (last visited September 24, 2007). A program can be rated TV-Y (All Children); TV-Y7 (Directed to Older Children); TV-Y7-FV (Directed to Older Children-Fantasy Violence); TV-G (General Audience); TV-PG (Parental Guidance Suggested); TV-14 (Parents Strongly Cautioned); or TV-MA (Mature Audience Only). *Id.*

19. See DIRECTV, Parental Controls, <http://www.directv.com/DTVAPP/global/content/Page.jsp?assetId=900007> (last visited Oct. 16, 2007).

20. See Dish Network, Parental Controls, http://www.dishnetworkproducts.com/products/parental_controls.php (last visited Oct. 16, 2007).

21. Marilyn Rauber, *Shielding Young Eyes from Sex, Violence*, RICH. TIMES DISPATCH, May 1, 2005, at A-1.

indecent, or profane language by means of radio communication.”²² Congress, moreover, has given the Commission the authority to impose administrative sanctions for violations of the criminal statute. Section 503 of the Communications Act of 1934 (“Act”) states, in pertinent part, that any person who “willfully or repeatedly fail[s] to comply” with any rule, regulation, or order issued by the Commission, or who violates 18 U.S.C. § 1464, “shall be liable to the United States for a forfeiture penalty.”²³ As used in § 503 of the Act, the term “willful” means that the “violator knew it was taking the action in question, irrespective of any intent to violate the Commission’s rules.”²⁴ The Commission’s rule implementing this statute states: “No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.”²⁵ Indecency is defined as the broadcast of patently offensive material that depicts or describes sexual or excretory organs or activities.²⁶ Patent offensiveness is “measured by contemporary community standards for the broadcast medium.”²⁷ In implementing 18 U.S.C. § 1464, the Commission did not purport to regulate indecent programming on cable or DBS.²⁸

A separate statutory provision governs the presentation of obscene, but not indecent or profane, material on cable television and subscription services on television. 18 U.S.C. § 1468 makes it a crime to “knowingly

22. 18 U.S.C. § 1464 (2000). Violators are subject to fines and imprisonment of up to two years. *Id.* Although § 1464 is a criminal law, the Commission has authority to impose civil penalties for the broadcast of indecent material without regard to the criminal nature of the statute. *See In re Indus. Guidance On the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, Policy Statement*, 16 F.C.C.R. 7999, n.2 (2001) [hereinafter *Indecency Policy Statement*].

23. 47 U.S.C. § 503(b)(1)(B), (D) (2000).

24. *In re Telemundo of Puerto Rico License Corp., Notice of Apparent Liability for Forfeiture*, 16 F.C.C.R. 7157, 7160 (2001).

25. 47 C.F.R. § 73.3999(b) (2006). Indecent content, in contrast to obscene content, is entitled to some First Amendment protection. The D.C. Circuit Court of Appeals has held, however, that restricting the broadcast of indecent programming to the 10 p.m. to 6 a.m. safe harbor period is a properly tailored means of furthering the government’s compelling interest in the welfare of children. *Indecency Policy Statement, supra* note 20 at para. 5 (citing *Action for Children’s Television v. FCC*, 58 F.3d 654, 669-70 (D.C. Cir. 1995)). A broadcast licensee is prohibited from airing obscene material at any time of day. *Indecency Policy Statement, supra* note 20, at para. 3. Obscene material is defined by a three-part test: (1) an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973).

26. *See Indecency Policy Statement, supra* note 20, para. 4.

27. *Id.* at para. 8.

28. *See* 47 C.F.R. § 73.3999 (2006). *But cf.* 47 U.S.C. § 532(h) (2000) (permitting cable operators to prohibit indecent material on leased access channels).

utter[] obscene language or distribute[] any obscene matter by means of cable television or subscription services on television.”²⁹ Similarly, 47 U.S.C. § 559 makes it a crime to “transmit[] over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States.”³⁰ States are also free to regulate obscenity on cable or subscription services on television: § 1468 provides that no federal law “is intended to interfere with or preempt the power of the States . . . to regulate the uttering of language that is obscene or otherwise unprotected by the Constitution.”³¹

C. *The Commission’s Longstanding Refusal to Extend Its Indecency Regulations to Subscription Media*

Arguably, § 1464’s prohibition on the transmission of indecent material by means of radio communication could extend to DBS and satellite radio, or even cable, to the extent that it uses radio spectrum to receive programming services, which it then delivers to subscribers through cable headends. However, the Commission consistently has declined invitations to regulate indecency on subscription services.³² Most recently, the Commission denied a late-filed petition to deny the AT&T/Comcast transfer application, which, among other things, alleged that AT&T had distributed obscene material over one of its cable systems.³³ Citing its 1988

29. 18 U.S.C. § 1468(a) (2000).

30. 47 U.S.C. § 559 (2000). Section 1468 was enacted because it was “unclear under what circumstances, if any, the federal government could enforce Section 639 [of 47 U.S.C. § 559] . . .” H.R. Doc. No. 100-129, at 93 (1987).

31. 18 U.S.C. § 1468(c).

32. *See, e.g., In re Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp. to AT&T Comcast Corp., Memorandum Opinion and Order*, 17 F.C.C.R. 23246, para. 213 (2002) [hereinafter *AT&T/Comcast Transfer Application*]; *Violent Television Programming Notice*, *supra* note 16, at para. 21. (“Indecency regulation is only applied to broadcast services,” not cable); *In re Litigation Recovery Trust, Memorandum Opinion and Order*, 17 F.C.C.R. 21852, para. 8 (2002) [hereinafter *Litigation Recovery Trust*]; *Indecency Policy Statement*, *supra* note 20, para. 4 (citing *Reno v. ACLU*, 521 U.S. 844, 868 (1997), and noting that the Supreme Court has “recognized the ‘special justifications for regulating the broadcast media that are not applicable to other speakers.’”); *In re Applications of Harriscope of Chicago, Inc., Memorandum Opinion and Order*, 3 F.C.C.R. 757, para. 5 n.2 (1988) [hereinafter *Harriscope Order*]. *See also In re Various Complaints Regarding CNN’s Airing of the 2004 Democratic National Convention, Memorandum Opinion and Order*, 20 F.C.C.R. 6070 (2005) [hereinafter *CNN Order*] (issued by the Chief of the Enforcement Bureau); *In re Various Complaints Against the Cable/Satellite Television Program “Nip/Tuck”, Memorandum Opinion and Order*, 20 F.C.C.R. 4255 (2005) [hereinafter *Nip/Tuck Order*] (issued by the Chief of the Enforcement Bureau); Letter from W. Kenneth Ferree, Chief, Media Bureau, to Saul Levine, Mt. Wilson FM Broadcasters, Inc., *Published Letter*, 19 F.C.C.R. 24069 (2004) [hereinafter *Ferree Letter*].

33. AT&T/Comcast Transfer Application, *supra* note 32, at para. 209.

decision in *Harriscope* and its 2001 *Indecency Policy Statement*, the Commission concluded that “[t]o the extent that the petition describes programming that might be considered indecent, we note that the services provided by AT&T are not broadcast services, but subscription-based services, which do not call into play the issue of indecency.”³⁴

The *Harriscope* decision cited by the Commission addressed a challenge in a comparative renewal proceeding to *Harriscope*’s use of its license to provide late-night adult films as part of its over-the-air subscription television (“STV”) service.³⁵ To receive the STV service, “viewers were required to make an affirmative decision to purchase the programming in question and had to obtain a special decoding device to unscramble the STV signal.”³⁶ In confirming that the case did not raise the issue of indecency, the Commission stated that, “[c]onsistent with existing case law, the Commission does not impose regulations regarding indecency on services lacking the indiscriminate access to children that characterizes broadcasting.”³⁷ The existing case law to which the Commission referred consisted of two circuit court decisions that struck down local regulations designed to restrict cable indecency. While these judicial decisions did not address specifically the scope of § 1464, they made clear that the regulation of indecency on any medium that lacks indiscriminate access to children (e.g., a subscription service) is constitutionally suspect.³⁸

34. *Id.* at para. 213 (citing *Harriscope Order*, *supra* note 32, at para. 5 n.2).

35. See *Harriscope Order*, *supra* note 32, at paras. 3-5.

36. *Id.* at para. 5. The subscription television format has been defunct for many years. *In re Application of Harriscope of Chicago, Inc.*, *Memorandum Opinion and Order*, 8 F.C.C.R. 2753, para. 20 (1993).

37. *Harriscope Order*, *supra* note 32, at para. 5 n.2 (citing *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (explaining that the “subscription nature of cable television and other technical capabilities of cable to restrict children’s access to indecent cable programming forecloses [a] municipality’s ability to impose additional regulations on cable indecency”)); *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff’d*, 480 U.S. 926 (1987).

38. In *Cruz v. Ferre*, the Eleventh Circuit Court of Appeals held that a Miami ordinance that prohibited a cable television system from knowingly distributing indecent material was unconstitutional overbroad and failed adequately to protect the Due Process rights of violators. 755 F.2d at 1416. The court concluded that the judicial cornerstone of the broadcast indecency regime, the Supreme Court’s decision in *FCC v. Pacifica Foundation*, (discussed below), was inapplicable to the cable regulation at issue. *Cruz*, 755 F.2d at 1421; *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). According to the Eleventh Circuit, “[t]he [High] Court’s concern with the pervasiveness of the broadcast media can best be seen in its description of broadcast material as an ‘intruder’ into the privacy of the home. [Cable], however, does not ‘intrude’ into the home.” *Cruz*, 755 F.2d at 1420. “Probably the more important justification recognized in *Pacifica* for the FCC’s authority to regulate the broadcasting of indecent materials was the accessibility of broadcasting to children.” *Id.* at 1420 (citing *Pacifica*, 438 U.S. at 750). “This interest, however, is significantly weaker in the context of cable television because parental manageability of cable television greatly exceeds the ability to manage the broadcast media.” *Id.* The Tenth Circuit’s decision in *Jones v. Wilkinson* was a *per curiam* opinion which affirmed the lower court’s decision that

Moreover, the Commission has not read the public interest obligations of satellite licensees to be so broad as to permit regulation of indecent programming. In October of 2002, the Commission denied a request by Litigation Recovery Trust for a declaratory ruling that Comsat had violated the public interest standards of the Communications Satellite Act by transmitting obscene and indecent films via satellite to hotels through its subsidiaries SpectraVision and On Command.³⁹ The Commission noted that the services provided by Comsat were not broadcast services and were provided on a closed circuit basis within the confines of particular hotels. Citing *Harrisclope* and the *Broadcast Indecency Policy Statement*, the Commission concluded that “[s]uch subscription-based services do not call into play the issue of indecency.”⁴⁰ The Commission also refused to consider unadjudicated allegations that the material was obscene. “The Commission has not previously interpreted the public interest standard to proscribe the transmission of ‘adult’ programming that was not otherwise unlawful pursuant to statute or regulation, and we decline to do so here.”⁴¹

Even Commissioner Copps, who concurred in the outcome but dissented in part, recognized that “the [satellite] services at issue are not broadcast services subject to the language of the indecency statutes.”⁴² But unlike the majority, he wanted to make clear that these satellite services are provided “by the holder of FCC licenses, who, like all licensees, is subject to the general obligation to serve the public interest.”⁴³ Commissioner Copps “could not support a decision that might preclude the Commission from [regulating satellite services] in the future, should circumstances warrant such an outcome.”⁴⁴

In short, the Commission has ruled repeatedly that subscription services, like DBS, are not subject to indecency regulation because they are not indiscriminately accessible by children. In doing so, the Commission has expressly relied upon Supreme Court precedent singling out only

a Utah law banning indecent material on cable was preempted by federal law. 800 F.2d at 990-91. The lower court noted that the “practical and critical distinction between *Pacifica* and the present case is apparent: cable television is not an uninvited intruder.” *Comty. Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1113 (D. Utah 1985). The court also cited *Cruz v. Ferre* and its conclusion that parents can significantly control their children’s access to cable. *Id.* at 1116.

39. Litigation Recovery Trust, *supra* note 32, at para. 1. Section 401 of the Communications Satellite Act, 47 U.S.C. § 741, made COMSAT “fully subject to the provisions of title II [Common Carriers] and title III [Provisions Relating to Radio] of [the Communications] Act.” 47 U.S.C. § 741 (2000).

40. Litigation Recovery Trust, *supra* note 32, at para. 8.

41. *Id.* at para. 9.

42. *Id.* at 21860 (Copps, Comm’r, dissenting in part).

43. *Id.*

44. *Id.*

broadcasting for reduced protection under the First Amendment.⁴⁵ As discussed below, nothing in more recent Supreme Court precedent suggests that the Commission may now constitutionally change course and regulate indecent content on DBS.

III. POSSIBLE STATUTORY BASIS FOR FCC REGULATION OF INDECENCY ON DBS

A. *Regulation of DBS and Cable Under § 1464 of the Criminal Code or Section 1 of the Communications Act*

Quite apart from the constitutional infirmities, the Commission would be on shaky statutory footing if it attempted to regulate indecent content on DBS. As noted above, § 1464 applies to transmission of obscene, indecent, or profane material by means of radio communications and is not limited to broadcasting. The statutory scheme suggests, however, that Congress did not intend to regulate indecency on subscription services using radio communications. In particular, Congress enacted § 1468 in 1988, which prohibits only obscenity on subscription services on television.⁴⁶ It would have made little sense for Congress to enact § 1468 if such services were already covered by the much broader language of § 1464 (“obscene, indecent, or profane” programming), which dates back to the Radio Act of 1927.⁴⁷ Accordingly, the most reasonable interpretation of § 1464 is that it applies only to broadcasting.⁴⁸

45. See, e.g., Indecency Policy Statement, *supra* note 22.

46. When § 1468 was enacted in 1988, moreover, the only “subscription services on television” were offered by terrestrial over-the-air broadcasters. See 73 C.F.R. § 73.641 *et seq.* The first DBS operators did not begin service to subscribers until 1994. See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Report, 19 F.C.C.R. 1606, para. 16 (2004). Section 1468 was added shortly after the FCC’s decision in *Harriscope*.

47. See *Gagliardo v. United States*, 366 F.2d 720, 723 (1966) (“The original prohibition against ‘obscene, indecent, or profane’ language was enacted as section 29 of the Radio Act of 1927, c. 169, 44 Stat. 1172.”). Moreover, the heading of § 1464 is “[b]roadcasting obscene language,” 18 U.S.C. § 1464 (2000) (emphasis added), while § 1468 is entitled “[d]istributing obscene material by cable or subscription television.” 18 U.S.C. § 1468 (2000). Accepted rules of statutory construction, however, permit reliance on the heading of a provision only if the language of the law itself is ambiguous. See *Carter v. United States*, 530 U.S. 255, 267 (2000) (“The title of a statute ‘[is] of use only when [it] sheds light on some ambiguous word or phrase’ in the statute itself.” (quoting *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998))). The term “radio communication” in § 1464, while not defined, does not appear to be particularly ambiguous. Thus, a court could be expected to turn to the Communications Act and Title 47 for guidance, which contain a very broad definition of “radio communication.” “The term ‘radio communication’ or ‘communication by radio’ means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and

The Commission alternatively might seek to justify regulation of indecency under Section 1 of the Communications Act, which gives the Commission authority to regulate “interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nationwide, and world-wide wire and radio communication service.”⁴⁹ In addition, § 303(r) of the Act states that “the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter.”⁵⁰ The Commission’s efforts to adopt rules under its general authority to regulate communications, however, increasingly have met judicial resistance, particularly where the “regulations . . . significantly implicate program content.”⁵¹ Thus in *Motion Picture Association of America v. Federal Communications Commission* (“MPAA”), the Court of Appeals for the District of Columbia Circuit struck down FCC regulations that required television broadcasters to deliver programming with video description to enhance service to the visually impaired.⁵² The court rejected the FCC’s reliance on Section 1: it “has not been construed to allow the FCC to regulate programming content . . . because such regulations invariably raise First Amendment issues.”⁵³ As discussed in detail below, there is no question that indecent programming is entitled to First Amendment protection, although broadcasting has received a lesser degree of protection than other media. Yet under *MPAA*, the Commission may not regulate the content of even broadcast programming under the auspices of Section 1.⁵⁴

services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.” 47 U.S.C. § 153 (33) (2000).

48. The Department of Justice has brought criminal indecency charges under § 1464 against citizen’s band radio operators. See *United States v. Simpson*, 561 F.2d 53 (1977); *Gagliardo*, 366 F.2d at 720. Like broadcasting, CB radio, although defined as a two-way private communication service in 46 C.F.R. § 95.401(a) (2006), is transmitted without encryption and is accessible by children. The Commission’s rules, moreover, expressly prohibit indecent communication on CB radio. See 47 C.F.R. § 95.413(a)(2) (2006).

49. 47 U.S.C. § 151 (2000).

50. 47 U.S.C. § 303(r) (2000).

51. See, e.g., *Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 799 (D.C. Cir. 2002).

52. See *id.* at 798; see also *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005) (holding that Title I of the Communications Act did not authorize the FCC to regulate receiver apparatus after a transmission was complete, thus there was no statutory foundation for the Commission’s broadcast flag rules, and the FCC acted outside the scope of its delegated authority).

53. *Motion Picture Ass’n of Am.*, 309 F.3d at 805 (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 651 (1994)).

54. *Id.*

B. Regulation of Indecent Content on DBS in the Licensing Context

Finally, as Commissioner Copps suggested in his opinion in *Litigation Recovery Trust*, the Commission could seek to regulate indecency on DBS through its licensing process.⁵⁵ Pursuant to § 309(a) of the Communications Act, the Commission shall consider “whether the public interest, convenience, and necessity will be served” by its grant or renewal of a license.⁵⁶ In order to deny an application in the DBS service, however, the Commission would have to depart from its holdings in *AT&T/Comcast* and *Harrisclope*, both licensing proceedings, that it does not consider indecency allegations with respect to subscription services.

Even assuming that the FCC has the statutory authority to regulate indecent programming on DBS, it must supply a reasoned analysis in the event it chooses to jettison the extensive precedent against regulating indecent content on subscription services.⁵⁷ It is difficult to discern what, if any, logic would support a departure by the Commission from its indecency enforcement policy at this point in time. The Commission in *Harrisclope* recognized that it was constrained by judicial interpretation of the First Amendment,⁵⁸ and the justifications that warranted excluding subscription services from the FCC’s enforcement authority are only stronger today. As the FCC has stated repeatedly, subscription satellite services do not enter the home uninvited. Furthermore, since the FCC’s decision in *Harrisclope*, technology has enhanced the ability of parents to restrict children’s access to indecent content. In short, the FCC would be hard-pressed to offer up a rational explanation for a departure from its prior conclusion that the First Amendment limits its authority to regulate indecent content on subscription services.

55. The Commission has the authority to set broad policies either by adjudication or through a rulemaking proceeding. *See Cent. Tex. Tel. Co-op, Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005) (“Agencies often have a choice of proceeding by adjudication rather than rulemaking Orders handed down in adjudications may establish broad legal principles.”).

56. 47 U.S.C. § 309(a) (2000).

57. *See AT&T Corp. v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001) (“The FCC ‘cannot silently depart from previous policies or ignore precedent’ as it has done here.”) (citation omitted); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”).

58. *Harrisclope Order*, *supra* note 32, at para. 5 n.2 (noting that the FCC must act in accordance with existing case law).

IV. APPELLATE REVIEW OF BROADCAST INDECENCY REGULATION AND ITS IMPLICATIONS FOR DBS AND CABLE

The underpinnings of broadcast indecency regulation date back nearly three decades to the decision by a divided Supreme Court in *FCC v. Pacifica Foundation*.⁵⁹ The Court upheld the Commission's determination that George Carlin's "Filthy Words" monologue was indecent as broadcast.⁶⁰ The Court's opinion, though, was "an emphatically narrow holding"⁶¹ based on the "uniquely pervasive presence"⁶² of the broadcast medium in the lives of all Americans and the fact that broadcasting is "uniquely accessible to children"⁶³—justifications that have been undermined by the subsequent three decades of technological and marketplace changes. In 1978, the Court was also concerned that while "[o]ther forms of offensive expression may be withheld from the young without restricting the expression at its source,"⁶⁴ broadcasting could not be so limited.

The federal courts last considered the FCC's indecency standard for broadcasting a decade ago. In *Action for Children's Television v. FCC* ("ACT III"), the D.C. Circuit upheld the broadcast indecency standard while recognizing that "[s]exual expression which is indecent but not obscene is protected by the First Amendment."⁶⁵ The court purportedly applied strict scrutiny to the regulation, as it concluded it must "regardless of the medium."⁶⁶ Under the "strict scrutiny" standard, "[t]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."⁶⁷ The court went on to state, however, that its "assessment of whether [the law] survives that scrutiny must necessarily take into account the unique context of the broadcast medium."⁶⁸ After accepting the *Pacifica* rationale for limiting the First Amendment protections of broadcasters, the court concluded that channeling indecent broadcasts to the late-evening and early-morning hours was permissible.⁶⁹

59. *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978).

60. *Id.*

61. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989).

62. *Pacifica*, 438 U.S. at 748.

63. *Id.* at 749.

64. *Id.*

65. *Action for Children's Television v. FCC*, 58 F.3d 654, 657 (D.C. Cir. 1995) (quoting *Sable*, 492 U.S. at 126).

66. *Id.* at 660.

67. *Id.* at 659 (citing *Sable*, 492 U.S. at 126).

68. *Id.* at 660.

69. *Id.* at 656.

Even twelve years ago, though, Chief Judge Edwards contended that the *Pacifica* analysis was no longer tenable. In a vigorous dissent in *ACT III*, he noted that “[t]here is not one iota of evidence in the record . . . to support the claim that exposure to indecency is harmful.”⁷⁰ Moreover, he said that the law effectively “involves a *total ban* of disfavored programming during hours when adult viewers are most likely to be in the audience.”⁷¹ He added that because the ban “is not the least restrictive means to further compelling state interests, the majority decision must rest primarily on a perceived distinction between the First Amendment rights of *broadcast media* and *cable (and all other non-broadcast) media*.”⁷² But “it is no longer responsible for courts to provide lesser First Amendment protection to broadcasting” based on “alleged ‘unique attributes’.”⁷³ Moreover, he called it “incomprehensible” that the majority could be “blind to the utterly irrational distinction that Congress has created between *broadcast* and *cable* operators.”⁷⁴ Chief Judge Edwards rejected the notion that the two media have any distinguishing characteristics.

A recent decision by the United States Court of Appeals for the Second Circuit—*Fox Television Stations, Inc. v. FCC*—failed to reach constitutional challenges to the FCC’s broadcast indecency regime but rather was decided on narrower administrative law principles.⁷⁵ The *Fox* court held that the FCC’s enforcement of a newly announced policy of sanctioning the isolated or fleeting use of expletives was arbitrary and capricious under the Administrative Procedure Act and remanded the case back to the Commission.⁷⁶ Moreover, having discussed at length at oral argument the constitutional challenges to the FCC’s indecency regulations, the court provided an analysis (which it expressly acknowledged was dicta) that questioned whether the FCC’s indecency test could survive First Amendment scrutiny notwithstanding *Pacifica*.⁷⁷ The court concluded that, in light of more recent Supreme Court decisions, it likely could not.⁷⁸ In particular, the court observed that if the High Court’s decision in *United*

70. *Id.* at 671 (Edwards, C.J., dissenting) (citing *Alliance for Cmty Media v. FCC*, 56 F.3d 105, 145 (D.C. Cir. 1995) (Edwards, C.J., dissenting)).

71. *Id.* (emphasis in original).

72. *Id.* (emphasis in original).

73. *Id.*

74. *Id.* (emphasis in original).

75. *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2007) [hereinafter *Fox*].

76. *Id.* at 446.

77. *Id.* at 462.

78. *Id.* at 466. The Solicitor General, on behalf of the FCC and the United States, filed a petition for writ of certiorari in the case, creating an opportunity for Supreme Court review of the FCC’s current indecency regime. *See Federal Communications Commission v. Fox Television Stations, Inc., Petition for a Writ of Certiorari*, Supreme Court No. 07-582 (filed Nov. 1, 2007).

States v. Playboy Entertainment Group, discussed *infra*, “is any guide, technological advances may obviate the constitutional legitimacy of the FCC’s robust [indecent] oversight.”⁷⁹

V. SUPREME COURT DECISIONS ADDRESSING REGULATION OF CONTENT ON CABLE AND THE INTERNET AND THEIR APPLICABILITY TO DBS

A. *Turner Broadcasting Systems v. FCC*

As the first in a series of cases that addressed the First Amendment rights of cable television operators, the Supreme Court held in *Turner Broadcasting Systems v. FCC* (“*Turner I*”) that, unlike broadcasting, cable television is entitled to full First Amendment protection.⁸⁰ The Court was considering a constitutional challenge brought by cable operators to the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”). Eight Justices agreed that the justification for its “distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium.”⁸¹ Cable, they concluded, may soon have no practical limitation on the number of speakers who may use the medium, “[n]or is there any danger of physical interference between two cable speakers attempting to share the same channel.”⁸² “In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.”⁸³ Five Justices, though, found the must-carry regulations content-neutral and, therefore, subject to an intermediate level of scrutiny.⁸⁴ As a result, the statute was upheld.

79. Fox, 489 F.3d at 466.

80. *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994) [hereinafter *Turner I*].

81. *Id.* at 637.

82. *Id.* at 639.

83. *Id.* (citing *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 74 (1983)) (“Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication.”). In *Red Lion*, the Court concluded that “[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.” *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969).

84. See *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (The Court will uphold a content-neutral regulation of speech “if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if

B. Denver Area Educational Telecommunications Consortium, Inc. v. FCC

Two years later, in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, the Court appeared to retreat from the *Turner I* analysis and its strong support for unlimited First Amendment protections for the cable medium.⁸⁵ Three provisions of the 1992 Cable Act were before the Court. Section 10(a), which permits cable operators to prohibit indecent material on leased access channels, was upheld in a plurality opinion.⁸⁶ A nearly identical provision in § 10(c), which enabled cable operators to prohibit indecent material on public access channels, and § 10(b), which required the segregation and blocking of certain “patently offensive” programming channels unless a viewer requested access, were found by the Court to violate the Constitution.⁸⁷

1. Section 10(a)

A Plurality Opinion: As part of the review of § 10(a), Justice Breyer’s plurality opinion (joined by Justices Stevens, O’Connor and Souter) concluded:

The Court’s distinction in *Turner*, . . . between cable and broadcast television, relied on the inapplicability of the spectrum scarcity problem to cable. While that distinction was relevant in *Turner* to the justification for structural regulations at issue there (the ‘must carry’ rules), it has little to do with a case that involves the effects of television viewing on children.⁸⁸

Citing *Pacifica*, the plurality also noted that cable television “is as ‘accessible to children’ as over-the-air broadcasting, if not more so. . . . [Cable has] ‘established a uniquely pervasive presence in the lives of all Americans,’” and can “‘confron[t] the citizen’ in the ‘privacy of the home,’ with little or no prior warning.”⁸⁹

The plurality also refused to be bound by prior First Amendment standards of review. “[N]o definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes.”⁹⁰ Moreover, the Justices were clear that they had no interest in preventing government from responding to serious problems. “This Court, in different contexts, has

the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”).

85. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 748 (1996).

86. *Id.*

87. *Id.*

88. *Id.* at 748 (citations omitted).

89. *Id.* at 744-45 (citation omitted).

90. *Id.* at 741-42.

consistently held that government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech.”⁹¹ The plurality concluded that § 10(a) was justified by the compelling need to protect children from exposure to sex-related material.⁹² “[T]he problem Congress addressed here is remarkably similar to the problem addressed by the FCC in *Pacifica*, and the balance Congress struck is commensurate with the balance we approved there.”⁹³ Applying the newly articulated standard, the plurality opinion concluded “that § 10(a) is a sufficiently tailored response to an extraordinarily important problem.”⁹⁴ The Court then addressed a vagueness challenge and found “that the statute is not impermissibly vague.”⁹⁵

Concurring in the Outcome: Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, provided the necessary votes to uphold the § 10(a) grant of authority to cable operators to prohibit indecency on leased access channels as constitutional, but they did not endorse Justice Breyer’s embrace of *Pacifica* in the context of cable. Justice Thomas thought that the permissive nature of the regulation was enough to save it. “[Congress] merely restore[d] part of the editorial discretion an operator would have absent Government regulation”⁹⁶ He then chastised the Court for not articulating “how, and to what extent, the First Amendment protects cable operators, programmers, and viewers from state and federal regulation.”⁹⁷

In the process of deciding not to decide on a governing standard, Justice Breyer purports to discover in our cases an expansive, general principal permitting government to ‘directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech.’ This heretofore unknown standard is facially subjective and openly invites balancing of asserted speech interests to a degree not ordinarily permitted.⁹⁸

The Dissent: Justice Kennedy (joined by Justice Ginsburg) concluded that § 10(a) was unconstitutional. He too was troubled by the failure of the plurality to apply an established standard of review. “The opinion treats

91. *Id.* at 741.

92. *Id.* at 743 (citing *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982)).

93. *Id.* at 744.

94. *Id.* at 743.

95. *Id.* at 753.

96. *Id.* at 823 (Thomas, J., concurring).

97. *Id.* at 812.

98. *Id.* at 818 (referring to majority opinion).

concepts such as public forum, broadcaster, and common carrier as mere labels rather than as categories with settled legal significance; it applies no standard, and by this omission loses sight of existing First Amendment doctrine.”⁹⁹ Justice Kennedy concluded that “the proper standard for reviewing §§ 10(a) and (c) is strict scrutiny.”¹⁰⁰ He felt that:

Sections 10(a) and (c) present a classic case of discrimination against speech based on its content. There are legitimate reasons why the Government might wish to regulate or even restrict the speech at issue here, but §§ 10(a) and (c) are not drawn to address those reasons with the precision the First Amendment requires.¹⁰¹

2. Section 10(b)

An Opinion of the Court: Section 10(b) required cable operators to segregate “patently offensive” leased-access programming on a single channel and block the channel unless a subscriber requested access. Six Justices (Breyer, Stevens, O’Connor, Kennedy, Souter, and Ginsburg) voted to strike down the provision as unconstitutional. Justice Breyer, delivering the opinion of the Court, appeared to apply strict scrutiny to the regulation.¹⁰²

[O]nce one examines this governmental restriction, it becomes apparent that, not only is it not a ‘least restrictive alternative’ and is not ‘narrowly tailored’ to meet its legitimate objective, it also seems considerably ‘more extensive than necessary.’ That is to say, it fails to satisfy this Court’s formulations of the First Amendment’s ‘strictest,’ as well as its somewhat less ‘strict,’ requirements.¹⁰³

While recognizing “that protection of children is a ‘compelling interest,’”¹⁰⁴ the Court felt that provisions of the Telecommunications Act of 1996 (“1996 Act”) like the V-Chip and § 505, which required “cable operators to ‘scramble or . . . block’ such [indecent] programming on any (unleased) channel ‘*primarily dedicated*’ to sexually-oriented

99. *Id.* at 780-81 (Kennedy, J., dissenting).

100. *Id.* at 805.

101. *Id.* at 807.

102. The Court refused to articulate a standard. The government had argued that “the First Amendment, as applied in *Pacifica*, ‘does not require that regulations of indecency on television be subject to the strictest’ First Amendment ‘standard of review.’” *Id.* at 755 (citation omitted). The Court declined to respond to the argument: “[We need not] determine whether, or the extent to which, *Pacifica* does, or does not, impose some lesser standard of review where indecent speech is at issue.” *Id.* (citation omitted).

103. *Id.* (citation omitted).

104. *Id.*

programming,” were “significantly less restrictive than the provision here at issue.”¹⁰⁵

The Dissent: Justice Thomas, again joined by Chief Justice Rehnquist and Justice Scalia, found that § 10(b) “clearly implicates petitioners’ free speech rights Consequently, § 10(b) must be subjected to strict scrutiny and can be upheld only if it furthers a compelling governmental interest by the least restrictive means available.”¹⁰⁶ Because the provision is narrowly tailored to achieve a well-established compelling interest (protecting children), Justice Thomas thought that the provision should be upheld. He was not convinced that blocking and lockboxes “effectively support[ed] parents’ authority to direct the moral upbringing of their children.”¹⁰⁷

3. Section 10(c)

A Plurality Opinion: Section 10(c) permitted cable operators to prohibit indecent material on public access channels. Justice Breyer was only able to marshal two other justices, Stevens and Souter, for his opinion as to why § 10(c) violates the First Amendment. Again, without specifying a level of scrutiny, the Justices concluded “that the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end.”¹⁰⁸ Based on a review of the legislative history of the statute and the record before the court, the Justices found that the programming control systems then in place for public access channels would normally avoid any child-related problems with offending programming.¹⁰⁹ “In the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, we cannot assume that the harm exists or that the regulation redresses it.”¹¹⁰

Justice Kennedy, joined by Justice Ginsburg, concurred in the judgment that the provision was invalid but for different reasons. Justice Kennedy was of the opinion that public access channels met the definition of a public forum,¹¹¹ and, as such, should be subjected to strict scrutiny.¹¹²

105. *Id.* at 756 (citation omitted). Section 505 was later held unconstitutional in *United States v. Playboy Entm’t Group*, 529 U.S. 803 (2000), which is discussed in greater detail below.

106. *Id.* at 832 (Thomas, J., concurring).

107. *Id.* at 833.

108. *Id.* at 766.

109. *Id.* at 763-64.

110. *Id.* (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664-65 (1994)).

111. *Id.* at 791 (Kennedy, J., concurring).

112. *Id.* at 805.

Section 10(c) could not survive constitutional muster because it was not narrowly tailored to protect children from indecent programming.¹¹³

C. *United States v. Playboy Entertainment Group*

The Supreme Court again considered content-based regulation of cable television in *United States v. Playboy Entertainment Group*. In another narrow five to four decision, the Court made clear, as it had not done in *Denver Area Education Telecommunications Consortium, Inc. v. FCC*, that strict scrutiny applies to content-based restrictions of cable television.¹¹⁴ The Court was considering Playboy's challenge to § 505 of the 1996 Act, which required "cable television operators who provide channels 'primarily dedicated to sexually-oriented programming' either to 'fully scramble or otherwise fully block' those channels or to limit their transmission to hours when children are unlikely to be viewing, set by administrative regulation as the time between 10 p.m. and 6 a.m."¹¹⁵

The Opinion of the Court: Justice Kennedy, joined by Justices Stevens, Souter, Thomas, and Ginsburg, seemed particularly troubled by the fact that § 505 not only targeted specific content but also targeted specific speakers. "The speech in question was not thought by Congress to be so harmful that all channels were subject to restriction. Instead, the statutory disability applies only to channels 'primarily dedicated to sexually-oriented programming.'"¹¹⁶ This focus on particular speakers was of great concern to the Court because "[l]aws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles."¹¹⁷

The Court then made clear that "[s]ince § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny."¹¹⁸ As a result, the standard of review was relatively straight forward. "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."¹¹⁹ Ordinarily, shielding the sensibilities of listeners does not qualify as a compelling governmental interest.

113. *Id.* at 806. The Chief Justice and Justices O'Connor, Scalia, and Thomas all voted to uphold § 10(c).

114. *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000).

115. *Id.* at 806 (citing 47 U.S.C. § 561(a) (1994); 47 C.F.R. § 76.227 (1999)).

116. *Id.* at 812 (citing 47 U.S.C. § 561(a) (1994)).

117. *Id.*

118. *Id.* at 813 (citing *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

119. *Id.* at 813 (citing *Reno v. ACLU*, 521 U.S. 844, 847 (1997) ("[The CDA's Internet indecency provisions'] burden on adult speech is unacceptable if less restrictive alternatives

Our precedents teach these principles. Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities 'simply by averting [our] eyes.'¹²⁰

But cable and broadcasting present special problems:

Here, of course, we consider images transmitted to some homes where they are not wanted and where parents often are not present to give immediate guidance. Cable television, like broadcast media, presents unique problems, which inform our assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts.¹²¹

Despite finding parallels between broadcasting and cable, the Court concluded that strict scrutiny applies.

No one suggests the Government must be indifferent to unwanted, indecent speech that comes into the home without parental consent. The speech here, all agree, is protected speech; and the question is what standard the Government must meet in order to restrict it. As we consider a content-based regulation, the answer should be clear: The standard is strict scrutiny. This case involves speech alone; and even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.¹²²

While the Court addressed the similar and "unique problems" of cable and broadcasting, it nonetheless made clear that content-based cable regulation, unlike broadcast, would be subjected to full strict scrutiny.

In fact, it was not the similarity of the two media but rather their differences that dictated the outcome. "There is, moreover, a key difference between cable television and the broadcasting media, which is the point on which this case turns: Cable systems have the capacity to block unwanted channels on a household-by-household basis."¹²³ The availability of a less restrictive alternative enabled the Court to distinguish *Pacifica*.

The option to block reduces the likelihood, so concerning to the Court in *Pacifica*, that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem. The corollary, of course, is that targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the

would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.").

120. *Id.* at 813 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971); *accord* *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11 (1975)).

121. *Id.*

122. *Id.* at 814.

123. *Id.* at 815.

speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt.¹²⁴

Targeted blocking (contained in § 504 of the 1996 Act) was less restrictive than the banning contemplated by § 505, and, therefore, § 505 could not be sustained.

The burden of persuasion is clearly on the government.¹²⁵ “It was for the Government, presented with a plausible, less restrictive alternative, to prove the alternative to be ineffective, and § 505 to be the least restrictive available means.”¹²⁶ In the end, the government failed to prove that the targeted blocking of § 504 would be an ineffective alternative to the complete ban contained in § 505.¹²⁷ “It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.”¹²⁸

The majority also concluded that the government “failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban.”¹²⁹ The government had failed to present any evidence about the extent of the signal bleed problem.¹³⁰ “The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this.”¹³¹

Concurring: Justice Thomas concurred in the outcome by noting that the government should have defended the statute on the basis that at least some of the speech was obscene and, hence, entitled to no First Amendment protection. The “Government, having declined to defend the statute as a regulation of obscenity, now asks us to dilute our stringent First Amendment standards to uphold § 505 as a proper regulation of protected (rather than unprotected) speech. I am unwilling to corrupt the First Amendment to reach this result.”¹³² Likewise, Justice Scalia, who also joined Justice Breyer’s dissent, wrote separately to express his “view that §

124. *Id.*

125. *Id.* at 818 (“When First Amendment compliance is the point to be proved, the risk of nonpersuasion—operative in all trials—must rest with the Government, not with the citizen.”).

126. *Id.* at 823.

127. *Id.*

128. *Id.* at 824.

129. *Id.* at 823.

130. *Id.* at 821.

131. *Id.* at 819.

132. *Id.* at 830 (Thomas, J., concurring) (citation omitted).

505 can be upheld in simpler fashion: by finding that it regulates the business of obscenity.”¹³³

The Dissent: Justice Breyer, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, dissented. Justice Breyer appeared to accept the application of strict scrutiny:

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.¹³⁴

Justice Breyer disagreed with the majority’s conclusion that the government failed to establish a pervasive nationwide problem and that it failed to prove the ineffectiveness of blocking technology.¹³⁵ He was not convinced that the blocking scheme contemplated by § 504 amounted to a “‘less restrictive,’ but *similarly* practical and *effective*, way to accomplish § 505’s child-protecting objective.”¹³⁶ Justice Breyer then offered further elaboration:

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).¹³⁷

Section 504 was simply not an adequate alternative in the eyes of the dissent.

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.¹³⁸

These steps, among other things, meant, in his judgment, that the § 504 blocking scheme was not an effective alternative to § 505.¹³⁹

133. *Id.* at 831 (Scalia, J., dissenting).

134. *Id.* at 836 (Breyer, J., dissenting) (referencing majority opinion).

135. *Id.* at 839-840 (Breyer, J., dissenting).

136. *Id.* at 840 (Breyer, J., dissenting) (quoting the majority).

137. *Id.* at 841.

138. *Id.* at 843.

139. *Id.* at 845.

D. The Internet Cases: Reno v. ACLU and Ashcroft v. ACLU

The Supreme Court's response to congressional attempts to regulate Internet speech also provides additional insight into how it would consider attempts to extend the broadcast indecency regime to satellite and cable. In 1997, Justice Stevens, in an opinion joined by six additional Justices (Justices Scalia, Souter, Kennedy, Thomas, Ginsburg, and Breyer), found provisions of the Communications Decency Act of 1996 ("CDA") unconstitutional.¹⁴⁰ The provisions of the CDA before the Court in *Reno v. ACLU* sought "to protect minors from 'indecent' and 'patently offensive' communications on the Internet" by prohibiting or otherwise limiting children's access to such content.¹⁴¹ The indecency definition in that case was virtually identical to the Commission's broadcast indecency definition. The Court concluded that the indecency restriction was unconstitutionally vague and overbroad.¹⁴²

With respect to the vagueness challenge, the Court was troubled by the statute's lack of precision. In one section, the CDA referred to "indecent" material, while in another section it spoke "of material that 'in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.'"¹⁴³ Since neither term ("indecent" or "patently offensive") was defined, the Court concluded that "this difference in language will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean."¹⁴⁴ Furthermore, "[t]his uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials."¹⁴⁵ Because of the "vague contours of the coverage of the statute . . . [the Court had] further reason for insisting that the statute not be overly broad."¹⁴⁶

As it examined the breadth of the statute, the Court again noted that the First Amendment protects indecent sexual expression so long as it is not obscene.¹⁴⁷ "It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But

140. *Reno v. ACLU*, 521 U.S. 844 (1997).

141. *Id.* at 849.

142. *Id.* at 875.

143. *Id.* at 871 (quoting 47 U.S.C. § 223(d) (1994)).

144. *Id.*

145. *Id.*

146. *Id.* at 874.

147. *Id.* at 874-75 (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989); see also *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.")).

that interest does not justify an unnecessarily broad suppression of speech addressed to adults.”¹⁴⁸ Because of the breadth of the content-based restrictions contained in the CDA, the government was faced with the heavy burden of explaining why a less restrictive alternative would not be as effective—a burden it was unable to satisfy.¹⁴⁹ “Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.”¹⁵⁰ The Court rejected restricting the protections for cyber speech in a fashion similar to broadcasting.

The special factors recognized in some of the Court’s cases as justifying regulation of the broadcast media—the history of extensive government regulation of broadcasting, the scarcity of available frequencies at its inception, and its ‘invasive’ nature—are not present in cyberspace. Thus, these cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet.¹⁵¹

In June of 2004, the Court again considered the constitutionality of a congressional attempt to regulate Internet speech, this time with the Child Online Protection Act (“COPA”)—a congressional rework of the CDA in light of *Reno*. In *Ashcroft v. ACLU*, another closely divided Court (five to four) affirmed a lower court’s injunction which prohibited enforcement of the Act.¹⁵² Justice Kennedy (joined by Justices Stevens, Souter, Thomas, and Ginsburg) concluded that the government had not shown that blocking and filtering were less effective than COPA’s prohibition on the “knowing posting, for ‘commercial purposes,’ of World Wide Web content that is ‘harmful to minors.’”¹⁵³

The closest precedent on the general point is our decision in *Playboy Entertainment Group*. *Playboy Entertainment Group*, like this case, involved a content-based restriction designed to protect minors from viewing harmful materials. The choice was between a blanket speech restriction and a more specific technological solution that was available to parents who chose to implement it. Absent a showing that the proposed less restrictive alternative would not be as effective, we concluded, the more restrictive option preferred by Congress could not survive strict scrutiny. In the instant case, too, the Government has

148. *Id.* at 875 (citation omitted) (citing *Ginsberg v. N.Y.*, 390 U.S. 629, 639 (1968); *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978)).

149. *Id.* at 879.

150. *Id.*

151. *Id.* at 845 (citations omitted).

152. *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

153. *Id.* at 661 (citing Child Online Protection Act (COPA), 47 U.S.C. § 231(a)(1) (1998)).

failed to show, at this point, that the proposed less restrictive alternative will be less effective. The reasoning of *Playboy Entertainment Group* and the holdings and force of our precedents require us to affirm the preliminary injunction. To do otherwise would be to do less than the First Amendment commands.¹⁵⁴

Justice Breyer dissented, joined by Chief Justice Rehnquist and Justice O'Connor. He felt that "[f]iltering software, as presently available, does not solve the 'child protection' problem."¹⁵⁵ He identified four "serious inadequacies"¹⁵⁶

First, its filtering is faulty, allowing some pornographic material to pass through without hindrance Second, filtering software costs money. Not every family has the \$40 or so necessary to install it Third, filtering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision Fourth, software blocking lacks precision, with the result that those who wish to use it to screen out pornography find that it blocks a great deal of material that is valuable."¹⁵⁷

He concluded, "[t]here is no serious, practically available 'less restrictive' way similarly to further this compelling interest [protecting children from the exposure to commercial pornography]. Hence the Act is constitutional."¹⁵⁸ Justice Scalia also dissented but would not have subjected the statute to strict scrutiny since the statute covered commercial pornography, a category of speech that, according to him, is constitutionally unprotected.¹⁵⁹ Nevertheless, the Court again, by the narrowest of margins (a vote of five to four), found that Congress had overstepped its authority in attempting to protect children from harmful materials.

VI. THE FIRST AMENDMENT RIGHTS OF DBS PROVIDERS

The High Court has yet to consider whether DBS is entitled to the same First Amendment protection as cable television. In view of the Court's analysis in *Turner I*, which, as discussed above, rejected the application of *Red Lion's* spectrum scarcity rationale to the regulation of cable, we see no basis for differing treatment of DBS and cable under the First Amendment. Given that DBS offers a very robust platform, we believe that the Court is very likely to accord equal First Amendment rights to DBS and cable television.

154. *Id.* at 670 (citations omitted).

155. *Id.* at 684 (Breyer, J., dissenting).

156. *Id.*

157. *Id.* at 685.

158. *Id.* at 689.

159. *Id.* at 676 (Scalia, J., dissenting).

At least two lower federal courts, however, have considered the First Amendment rights of DBS. The U.S. Court of Appeals for the District of Columbia Circuit concluded that DBS, like over-the-air broadcasting, is constrained by the limited availability of spectrum and should be afforded lesser First Amendment protections. In *Time Warner v. FCC*, the D.C. Circuit in 1996 upheld, over a First Amendment challenge, a law that required DBS providers to set aside a percentage of their channel capacity for noncommercial, educational, and informational programming.¹⁶⁰ The court decided that “the same relaxed standard of scrutiny that the court has applied to traditional broadcast media” should be applied to the DBS set-aside provision at issue.¹⁶¹

In contrast, the Fourth Circuit, citing *Turner I*, five years later concluded that “both satellite carriers and cable operators engage in speech protected by the First Amendment when they exercise editorial discretion over the menu of channels they offer to their subscribers.”¹⁶² Finding that the carry-one, carry-all rule under attack by DBS carriers was a content-neutral restriction, the Fourth Circuit, like the Court in *Turner I*, applied intermediate First Amendment scrutiny under *United States v. O'Brien* and upheld the provision as a reasonable restriction on speech.¹⁶³

Since *Pacifica*, neither the Commission nor the courts have sought to justify regulation of indecent content on broadcasting on the basis of spectrum scarcity. As Justice Brennan noted in *Pacifica*, “[t]he opinions of my Brothers Powell and Stevens rightly refrain from relying on the notion of ‘spectrum scarcity’ to support their result. As Chief Judge Bazelon noted below, ‘although scarcity has justified *increasing* the diversity of speakers and speech, it has never been held to justify censorship.’”¹⁶⁴ Since its 1987 decision to abolish the fairness doctrine, the Commission has not defended content (as opposed to structural) regulation on the basis of spectrum scarcity.¹⁶⁵ As discussed above, the FCC, moreover, has declined to

160. See *Time Warner Entm't Co. v. FCC*, 93 F.3d 957 (1996).

161. *Id.* at 975.

162. *Satellite Broad. & Commc'ns Ass'n of Am. v. FCC*, 275 F.3d 337, 352-53 (4th Cir. 2001) (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636-37 (1994)).

163. *Id.* at 366. See also *supra* text accompanying note 78. “Carry-one, carry-all” refers to the obligation of a DBS operator who voluntarily decides to carry one local station in a market under the statutory copyright license to carry, subject to certain limitations, all the requesting stations in that market. See *Satellite Broad. and Commc'ns Ass'n v. FCC*, 275 F.3d 337, 349 (2001).

164. *FCC v. Pacifica Found.*, 438 U.S. 726, 770, n.4 (1978) (Brennan, J., dissenting) (quoting *Pacifica Found. v. FCC*, 556 F.2d 9, 29 (D.C. Cir. 1977) (emphasis in original)).

165. See *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert denied*, 493 U.S. 1019 (1990); see also John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed*, FCC MEDIA BUREAU STAFF RESEARCH PAPER, (FCC, D.C.), Mar. 2005, at 28 (“[T]he Commission's authority in this

regulate subscription services (e.g., DBS, satellite radio, and subscription television), despite their use of spectrum, because they are not as accessible to children as broadcasting.

Likewise, in *Denver Area*, discussed above, the plurality opinion noted that, though spectrum scarcity continued to justify the “structural regulations at issue [in *Turner I*] (the ‘must carry’ rules), it has little to do with a case that involves the effects of television viewing on children. Those effects are the result of how parents and children view television programming, and how pervasive and intrusive that programming is.”¹⁶⁶ In according full First Amendment rights four years later in *Playboy* and mandating strict scrutiny of content regulation of cable, moreover, the Court compared cable to broadcasting and found that broadcasting presents “unique problems” that may provide a basis for restrictions that would be intolerable in another context.¹⁶⁷ “No one suggests the Government must be indifferent to unwanted, indecent speech that comes into the home without parental consent.”¹⁶⁸ While the Court found “a key difference” between cable and broadcasting, it was not spectrum scarcity, but rather the ability of subscribers to block unwanted channels.¹⁶⁹ Because DBS has even more effective parental controls than were available to subscribers in 2000 when the Court decided *Playboy*, we believe that the Court is likely to treat regulation of content on DBS no less favorably than cable under the First Amendment. Cable and DBS should both be afforded full First Amendment protections.

VII. CONCLUSION

As the debate over television decency intensifies, and many push to extend current broadcast indecency regulation to DBS and other platforms, Congress and regulators should recognize the likely constitutional infirmities associated with such an approach. While the Supreme Court has yet to consider whether DBS is entitled to the same First Amendment protection as cable television, in view of the Court’s analysis in *Turner I*, we see no basis for differing treatment. There, the Court eschewed its “distinct approach to broadcast regulation” and afforded full constitutional protection to cable based upon its conclusion that there was no practical

area [(indecency)] is not expressly premised on The Scarcity Rationale.”); see also Angie A. Welborn & Henry Cohen, Regulation of Broadcast Indecency: Background and Legal Analysis 25 (Mar. 30, 2005) (Congressional Research Service, Order No. RL32222), available at <http://fpc.state.gov/documents/organization/44236.pdf>.

166. *Denver Area Educ. Telecomm’s. Consortium, Inc. v. FCC*, 518 U.S. 727, 748 (1996).

167. *United States v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000).

168. *Id.* at 814.

169. *Id.* at 815.

limitation on the number of speakers who may use the cable medium.¹⁷⁰ Given that DBS offers a very robust platform, we believe that the Court is likely to accord DBS the same First Amendment rights as cable television.

With DBS and cable subjected to full First Amendment protection, any attempt to regulate indecency on either platform would surely run afoul of the Constitution. The Supreme Court has been strongly skeptical of content-based regulation of cable, and it would be very difficult for the Court to depart from its holdings in *Playboy* (strict scrutiny applies to cable television) and *Reno* (indecency standard is both inherently vague and overbroad). Given the availability of an effective and less restrictive alternative to content regulation (i.e., parental content controls), we believe that the Court, consistent with *Playboy*, would strike down any regulation of indecency on DBS or cable.

170. *Turner I*, 512 U.S. at 637.