SUPREME COURT OF THE UNITED STATES

No. 98–1682

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

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

[May 22, 2000]

JUSTICE SCALIA, dissenting.

I agree with the principal dissent in this case that §505 of the Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 136, 47 U. S. C. §561 (1994 ed., Supp III), is supported by a compelling state interest and is narrowly tailored. I write separately to express my view that §505 can be upheld in simpler fashion: by finding that it regulates the business of obscenity.

To be sure, §505 and the Federal Communications Commission's implementing regulation, see 47 CFR §76.227 (1999), purport to capture programming that is indecent rather than merely that which is obscene. And I will assume for purposes of this discussion (though it is a highly fanciful assumption) that none of the transmissions at issue independently crosses the boundary we have established for obscenity, see *Miller* v. *California,* 413 U. S. 15, 24 (1973), so that the individual programs themselves would enjoy First Amendment protection. In my view, however, that assumption does not put an end to the inquiry.

We have recognized that commercial entities which engage in "the sordid business of pandering" by "deliberately emphasiz[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed," engage in constitutionally unprotected

behavior. *Ginzburg* v. *United States,* 383 U. S. 463, 467, 472 (1966); see also *FW/PBS, Inc.* v. *Dallas,* 493 U. S. 215, 257–258 (1990) (SCALIA, J., concurring in part and dissenting in part); *Pinkus* v. *United States,* 436 U. S. 293, 303–304 (1978); *Splawn* v. *California,* 431 U. S. 595, 597–599 (1977); *Hamling* v. *United States,* 418 U. S. 87, 130 (1974). Cf. *Jacobellis* v. *Ohio,* 378 U. S. 184, 201 (1964) (Warren, C. J., dissenting) ("In my opinion, the use to which various materials are put– not just the words and pictures themselves– must be considered in determining whether or not the materials are obscene"). This is so whether or not the products in which the business traffics independently meet the high hurdle we have established for delineating the obscene, viz., that they contain no "serious literary, artistic, political, or scientific value." *Miller, supra,* at 24. See *Ginzburg,* 383 U. S., at 471. We are more permissive of government regulation in these circumstances because it is clear from the context in which exchanges between such businesses and their customers occur that neither the merchant nor the buyer is interested in the work's literary, artistic, political, or scientific value. "The deliberate representation of petitioner's publications as erotically arousing . . . stimulate[s] the reader to accept them as prurient; he looks for titillation, not for saving intellectual content." *Id.*, at 470. Thus, a business that "(1) offer[s] . . . hardcore sexual material, (2) as a constant and intentional objective of [its] business, [and] (3) seek[s] to promote it as such" finds no sanctuary in the First Amendment. *FW/PBS, supra,* at 261 (SCALIA J., concurring in part and dissenting in part).

Section 505 regulates just this sort of business. Its coverage is limited to programming that "describes or depicts sexual or excretory activities or organs *in a patently offensive manner* as measured by contemporary community standards [for cable television]." 47 CFR §76.227(d) (1999) (emphasis added). It furthermore ap-

plies only to those channels that are "*primarily dedicated* to sexually-oriented programming."[1] §505(a) (emphasis added). It is conceivable, I suppose, that a channel which is primarily dedicated to sex might not *hold itself forth* as primarily dedicated to sex– in which case its productions which contain "serious literary, artistic, political, or scientific value" (if any) would be as entitled to First Amendment protection as the statuary rooms of the National Gallery. But in the competitive world of cable programming, the possibility that a channel devoted to sex would not advertise itself as such is sufficiently remote, and the number of such channels sufficiently small (if not indeed nonexistent), as not to render the provision substantially overbroad.[2]

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[1] Congress's attempt to limit the reach of §505 is therefore, contrary to the Court's contention, see *ante*, at 7, a virtue rather than a vice.

[2] JUSTICE STEVENS misapprehends in several respects the nature of the test I would apply. First, he mistakenly believes that the nature of the advertising controls the obscenity analysis, regardless of the nature of the material being advertised. I entirely agree with him that "advertising a bareheaded dancer as 'topless' might be deceptive, but it would not make her performance obscene." *Ante*, at 1 (concurring opinion). I believe, however, that *if* the material is "patently offensive" *and* it is being advertised as such, we have little reason to think it is being proffered for its socially redeeming value.

JUSTICE STEVENS' second misapprehension flows from the first: He sees the test I would apply as incompatible with the Court's commercial-speech jurisprudence. See *ante*, at 1–2 (concurring opinion); see also *Splawn* v. *California,* 431 U. S. 595, 603, n. 2 (1977) (STEVENS, J., dissenting) ("*Ginzburg* cannot survive [*Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748 (1976)]"). There is no such conflict. Although the *Ginzburg* test, like most obscenity tests, has ordinarily been applied in a commercial context (most purveyors of obscenity are in the business for the money), its logic is not restricted to that context. The test applies equally to the improbable case in which a collector of indecent materials wishes to give them away, and takes out a classified ad in the local newspaper touting their salacious appeal. Commercial motive or not, the "'[c]ircumstances of . . . dissemination are

Playboy itself illustrates the type of business §505 is designed to reach. Playboy provides, through its networks– Playboy Television, AdulTVision, Adam & Eve, and Spice– "virtually 100% sexually explicit adult programming." 30 F. Supp. 2d 702, 707 (Del. 1998). For example, on its Spice network, Playboy describes its own programming as depicting such activities as "female masturbation/external," "girl/girl sex," and "oral sex/cunnilingus." 1 Record, Exh. 73, p. TWC00132. As one would expect, given this content, Playboy advertises accordingly, with calls to "Enjoy the sexiest, hottest adult movies in the privacy of your own home." 6 *id.*, Exh. 136, p. 2P009732. An example of the promotion for a particular movie is as follows: "Little miss country girls are aching for a quick roll in the hay! Watch southern hospitality pull out all the stops as these ravin' nymphos tear down the barn and light up the big country sky." 7 *id.*, Exh. 226, p. 2P009187. One may doubt whether– or marvel that– this sort of embarrassingly juvenile promotion really attracts what Playboy assures us is an "adult" audience. But it is certainly marketing sex.[3]

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relevant to determining whether [the] social importance claimed for [the] material [is] . . . pretense or reality.' " *Splawn*, *supra*, at 598 (quoting jury instruction approved). Perhaps this is why the Court in *Splawn* did not accept JUSTICE STEVENS' claim of incompatibility.

[3] Both the Court, see *ante*, at 6, and JUSTICE THOMAS, see *ante*, at 2 (concurring opinion), find great importance in the fact that "this case has been litigated on the assumption that the programming at issue is not obscene, but merely indecent," see *ibid.* (emphasis deleted). But as I noted in *FW/PBS, Inc.* v. *Dallas,* 493 U. S. 215, 262–263 (1990) (opinion concurring in part and dissenting in part), we have not allowed the parties' litigating positions to place limits upon our development of obscenity law. See, *e.g.*, *Miller* v. *California,* 413 U. S. 15, 24–25 (1973) (abandoning "utterly without redeeming social value" test *sua sponte*); *Ginzburg* v. *United States,* 383 U. S. 463 (1966) (adopting pandering theory unargued by the Government); *Mishkin* v. *New York,* 383 U. S. 502 (1966) (upholding convictions on theory that obscenity could be defined by

Thus, while I agree with JUSTICE BREYER's child-protection analysis, it leaves me with the same feeling of true-but-inadequate as the conclusion that Al Capone did not accurately report his income. It is not only children who can be protected from occasional uninvited exposure to what appellee calls "adult-oriented programming"; we can all be. Section 505 covers only businesses that engage in the "commercial exploitation of erotica solely for the sake of their prurient appeal," *Ginzburg*, *supra*, at 466– which, as Playboy's own advertisements make plain, is what "adult" programming is all about. In most contexts, contemporary American society has chosen to permit such commercial exploitation. That may be a wise democratic choice, if only because of the difficulty in many contexts (though not this one) of identifying the panderer to sex. It is, however, not a course compelled by the Constitution. Since the Government is entirely free to *block* these transmissions, it may certainly take the less drastic step of dictating how, and during what times, they may occur.

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looking to the intent of the disseminator, despite respondent's express disavowal of that theory). As for JUSTICE THOMAS's concern that there has been no factual finding of obscenity in this case, see *ante*, at 2 (concurring opinion): This is not an as-applied challenge, in which the issue is whether a particular course of conduct constitutes obscenity; it is a facial challenge, in which the issue is whether the terms of this statute address obscenity. That is not for the factfinder below, but for this Court.