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 KENNEDY delivered the opinion of the Court.

This case presents a challenge to §505 of the Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 136, 47 U. S. C. §561 (1994 ed., Supp. III). Section 505 requires 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. 47 U. S. C. §561(a) (1994 ed., Supp. III); 47 CFR §76.227 (1999). Even before enactment of the statute, signal scrambling was already in use. Cable operators used scrambling in the regular course of business, so that only paying customers had access to certain programs. Scrambling could be imprecise, however; and either or both audio and visual portions of the scrambled programs might be heard or seen, a phenomenon known as "signal bleed." The purpose of §505 is to shield children from hearing or seeing images resulting from signal bleed.

To comply with the statute, the majority of cable opera-

tors adopted the second, or "time channeling," approach. The effect of the widespread adoption of time channeling was to eliminate altogether the transmission of the targeted programming outside the safe harbor period in affected cable service areas. In other words, for two-thirds of the day no household in those service areas could receive the programming, whether or not the household or the viewer wanted to do so.

Appellee Playboy Entertainment Group, Inc., challenged the statute as unnecessarily restrictive content-based legislation violative of the First Amendment. After a trial, a three-judge District Court concluded that a regime in which viewers could order signal blocking on a household-by-household basis presented an effective, less restrictive alternative to §505. 30 F. Supp. 2d 702, 719 (Del. 1998). Finding no error in this conclusion, we affirm.

I

Playboy Entertainment Group owns and prepares programs for adult television networks, including Playboy Television and Spice. Playboy transmits its programming to cable television operators, who retransmit it to their subscribers, either through monthly subscriptions to premium channels or on a so-called "pay-per-view" basis. Cable operators transmit Playboy's signal, like other premium channel signals, in scrambled form. The operators then provide paying subscribers with an "addressable converter," a box placed on the home television set. The converter permits the viewer to see and hear the descrambled signal. It is conceded that almost all of Playboy's programming consists of sexually explicit material as defined by the statute.

The statute was enacted because not all scrambling technology is perfect. Analog cable television systems may use either "RF" or "baseband" scrambling systems, which may not prevent signal bleed, so discernible pictures may

appear from time to time on the scrambled screen. Furthermore, the listener might hear the audio portion of the program.

These imperfections are not inevitable. The problem is that at present it appears not to be economical to convert simpler RF or baseband scrambling systems to alternative scrambling technologies on a systemwide scale. Digital technology may one day provide another solution, as it presents no bleed problem at all. Indeed, digital systems are projected to become the technology of choice, which would eliminate the signal bleed problem. Digital technology is not yet in widespread use, however. With imperfect scrambling, viewers who have not paid to receive Playboy's channels may happen across discernible images of a sexually explicit nature. How many viewers, how discernible the scene or sound, and how often this may occur are at issue in this case.

Section 505 was enacted to address the signal bleed phenomenon. As noted, the statute and its implementing regulations require cable operators either to scramble a sexually explicit channel in full or to limit the channel's programming to the hours between 10 p.m. and 6 a.m. 47 U. S. C. §561 (1994 ed., Supp. III); 47 CFR §76.227 (1999). Section 505 was added by floor amendment, without significant debate, to the Telecommunications Act of 1996 (Act), a major legislative effort designed "to reduce regulation and encourage 'the rapid deployment of new telecommunications technologies.'" *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 857 (1997) (quoting 110 Stat. 56). "The Act includes seven Titles, six of which are the product of extensive committee hearings and the subject of discussion in Reports prepared by Committees of the Senate and the House of Representatives." *Reno, supra*, at 858. Section 505 is found in Title V of the Act, which is itself known as the Communications Decency Act of 1996 (CDA). 110 Stat. 133. Section 505 was to become effective on March 9, 1996,

30 days after the Act was signed by the President. Note following 47 U. S. C. §561 (1994 ed., Supp. III).

On March 7, 1996, Playboy obtained a temporary restraining order (TRO) enjoining the enforcement of §505. 918 F. Supp. 813 (Del.), and brought this suit in a three-judge District Court pursuant to §561 of the Act, 110 Stat. 142, note following 47 U. S. C. §223 (1994 ed., Supp. III). Playboy sought a declaration that §505 violates the Constitution and an injunction prohibiting the law's enforcement. The District Court denied Playboy a preliminary injunction, 945 F. Supp. 772 (Del. 1996), and we summarily affirmed, 520 U. S. 1141 (1997). The TRO was lifted, and the Federal Communications Commission announced it would begin enforcing §505 on May 18, 1997. *In re Implementation of Section 505 of the Telecommunications Act of 1996*, 12 FCC Rcd. 5212, 5214 (1997).

When the statute became operative, most cable operators had "no practical choice but to curtail [the targeted] programming during the [regulated] sixteen hours or risk the penalties imposed . . . if any audio or video signal bleed occur[red] during [those] times." 30 F. Supp. 2d, at 711. The majority of operators– "in one survey, 69%"– complied with §505 by time channeling the targeted programmers. *Ibid.* Since "30 to 50% of all adult programming is viewed by households prior to 10 p.m.," the result was a significant restriction of communication, with a corresponding reduction in Playboy's revenues. *Ibid.*

In March 1998, the District Court held a full trial and concluded that §505 violates the First Amendment. 30 F. Supp. 2d, at 702. The District Court observed that §505 imposed a content-based restriction on speech. *Id.*, at 714–715. It agreed that the interests the statute advanced were compelling but concluded the Government might further those interests in less restrictive ways. *Id.*, at 717–720. One plausible, less restrictive alternative could be found in another section of the Act: §504, which

requires a cable operator, "[u]pon request by a cable service subscriber . . . without charge, [to] fully scramble or otherwise fully block" any channel the subscriber does not wish to receive. 110 Stat. 136, 47 U. S. C. §560 (1994 ed., Supp. III). As long as subscribers knew about this opportunity, the court reasoned, §504 would provide as much protection against unwanted programming as would §505. 30 F. Supp. 2d, at 718–720. At the same time, §504 was content neutral and would be less restrictive of Playboy's First Amendment rights. *Ibid.*

The court described what "adequate notice" would include, suggesting

> "[operators] should communicate to their subscribers the information that certain channels broadcast sexually-oriented programming; that signal bleed . . . may appear; that children may view signal bleed without their parents' knowledge or permission; that channel blocking devices . . . are available free of charge . . . ; and that a request for a free device . . . can be made by a telephone call to the [operator]." *Id.*, at 719.

The means of providing this notice could include

> "inserts in monthly billing statements, barker channels (preview channels of programming coming up on Pay-Per-View), and on-air advertisement on channels other than the one broadcasting the sexually explicit programming." *Ibid.*

The court added that this notice could be "conveyed on a regular basis, at reasonable intervals," and could include notice of changes in channel alignments. *Ibid.*

The District Court concluded that §504 so supplemented would be an effective, less restrictive alternative to §505, and consequently declared §505 unconstitutional and enjoined its enforcement. *Id.*, at 719–720. The court also required Playboy to insist on these notice provisions in its

contracts with cable operators. *Ibid.*

The United States filed a direct appeal in this Court pursuant to §561. The District Court thereafter dismissed for lack of jurisdiction two post-trial motions filed by the Government. App. to Juris. Statement 91a–92a. We noted probable jurisdiction, 527 U. S. 1021 (1999), and now affirm.

II

Two essential points should be understood concerning the speech at issue here. First, we shall assume that many adults themselves would find the material highly offensive; and when we consider the further circumstance that the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it. Second, all parties bring the case to us on the premise that Playboy's programming has First Amendment protection. As this case has been litigated, it is not alleged to be obscene; adults have a constitutional right to view it; the Government disclaims any interest in preventing children from seeing or hearing it with the consent of their parents; and Playboy has concomitant rights under the First Amendment to transmit it. These points are undisputed.

The speech in question is defined by its content; and the statute which seeks to restrict it is content based. Section 505 applies only to channels primarily dedicated to "sexually explicit adult programming or other programming that is indecent." The statute is unconcerned with signal bleed from any other channels. See 945 F. Supp., at 785 ("[Section 505] does not apply when signal bleed occurs on other premium channel networks, like HBO or the Disney Channel"). The overriding justification for the regulation is concern for the effect of the subject matter on young viewers. Section 505 is not "justified without reference to the content of the regulated speech.'" *Ward* v. *Rock*

Against Racism, 491 U. S. 781, 791 (1989) (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984) (emphasis deleted)). It "focuses *only* on the content of the speech and the direct impact that speech has on its listeners." *Boos* v. *Barry*, 485 U. S. 312, 321 (1988) (opinion of O'CONNOR, J.). This is the essence of content-based regulation.

Not only does §505 single out particular programming content for regulation, it also singles out particular programmers. 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." 47 U. S. C. §561(a) (1994 ed., Supp. III). One sponsor of the measure even identified appellee by name. See 141 Cong. Rec. 15587 (1995) (statement of Sen. Feinstein) (noting the statute would apply to channels "such as the Playboy and Spice channels"). Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles. Section 505 limited Playboy's market as a penalty for its programming choice, though other channels capable of transmitting like material are altogether exempt.

The effect of the federal statute on the protected speech is now apparent. It is evident that the only reasonable way for a substantial number of cable operators to comply with the letter of §505 is to time channel, which silences the protected speech for two-thirds of the day in every home in a cable service area, regardless of the presence or likely presence of children or of the wishes of the viewers. According to the District Court, "30 to 50% of all adult programming is viewed by households prior to 10 p.m.," when the safe-harbor period begins. 30 F. Supp. 2d, at 711. To prohibit this much speech is a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment

protection. It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.

Since §505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny. *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989). If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. *Ibid.* If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. *Reno*, 521 U. S., at 874 ("[The CDA's Internet indecency provisions'] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"); *Sable Communications*, *supra*, at 126 ("The 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"). To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit.

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." *Cohen* v. *California*, 403 U. S. 15, 21 (1971); accord, *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 210–211 (1975). 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. See *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 744 (1996) (plurality opinion); *id.*, at 804–805 (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part); *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978). 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.

In *Sable Communications*, for instance, the feasibility of a technological approach to controlling minors' access to "dial-a-porn" messages required invalidation of a complete statutory ban on the medium. 492 U. S., at 130–131. And, while mentioned only in passing, the mere possibility that user-based Internet screening software would "'soon be widely available'" was relevant to our rejection of an overbroad restriction of indecent cyberspeech. *Reno, supra*, at 876–877. Compare *Rowan* v. *Post Office Dept.*, 397 U. S. 728, 729–730 (1970) (upholding statute "whereby any householder may insulate himself from advertisements that offer for sale 'matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative'" (quoting then 39 U. S. C. §4009(a) (1964 ed., Supp. IV))), with *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 75 (1983) (rejecting blanket ban on the mailing of unsolicited contraceptive advertise-

ments). Compare also *Ginsberg* v. *New York*, 390 U. S. 629, 631 (1968) (upholding state statute barring the sale to minors of material defined as "obscene on the basis of its appeal to them"), with *Butler* v. *Michigan*, 352 U. S. 380, 381 (1957) (rejecting blanket ban of material "'tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth'" (quoting then Mich. Penal Code §343)). Each of these cases arose in a different context– *Sable Communications* and *Reno*, for instance, also note the affirmative steps necessary to obtain access to indecent material via the media at issue– but they provide necessary instruction for complying with accepted First Amendment principles.

Our zoning cases, on the other hand, are irrelevant to the question here. *Post*, at 4 (BREYER, J., dissenting) (citing *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), and *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976)). We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech. *Reno, supra*, at 867–868; *Boos*, 485 U. S., at 320–321. The statute now before us burdens speech because of its content; it must receive strict scrutiny.

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. The option to block reduces the likelihood, so concerning to the Court in *Pacifica, supra*, at 744, 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 speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt. Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests. This is not to say that the absence of an effective blocking mechanism will in all cases suffice to support a law restricting the speech in question; but if a less restrictive means is available for the Government to achieve its goals, the Government must use it.

III

The District Court concluded that a less restrictive alternative is available: §504, with adequate publicity. 30 F. Supp. 2d, at 719–720. No one disputes that §504, which requires cable operators to block undesired channels at individual households upon request, is narrowly tailored to the Government's goal of supporting parents who want those channels blocked. The question is whether §504 can be effective.

When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals. The Government has not met that burden here. In support of its position, the Government cites empirical evidence showing that §504, as promulgated and implemented before trial, generated few requests for household-by-household blocking. Between March 1996 and May 1997, while the Government was enjoined from enforcing §505, §504 remained in operation. A survey of cable operators determined that fewer than 0.5% of cable subscribers requested full blocking during that time. *Id.*, at 712. The uncomfortable fact is that §504 was the sole blocking regulation in effect for over a year; and the public greeted it with a collective yawn.

The District Court was correct to direct its attention to the import of this tepid response. Placing the burden of proof upon the Government, the District Court examined whether §504 was capable of serving as an effective, less restrictive means of reaching the Government's goals. *Id.*, at 715, 718–719. It concluded that §504, if publicized in an adequate manner, could be. *Id.*, at 719–720.

The District Court employed the proper approach. When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. *Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173, 183 (1999) ("[T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction"); *Reno*, 521 U. S., at 879 ("The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . ."); *Edenfield* v. *Fane*, 507 U. S. 761, 770–771 (1993) ("[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"); *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 480 (1989) ("[T]he State bears the burden of justifying its restrictions . . ."); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 509 (1969) ("In order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"). When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. "Content-based regulations are presumptively invalid," *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992), and the Government bears the burden to rebut that presump-

tion.

This is for good reason. "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958). Error in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.

When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as good as any other, and that in art and literature objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable. Quite the opposite is true. The Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of view. The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.

It is rare that a regulation restricting speech because of its content will ever be permissible. Indeed, were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personali-

ties or to silence dissenting ideas. 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. *Id.*, at 526.

With this burden in mind, the District Court explored three explanations for the lack of individual blocking requests. 30 F. Supp. 2d, at 719. First, individual blocking might not be an effective alternative, due to technological or other limitations. Second, although an adequately advertised blocking provision might have been effective, §504 as written did not require sufficient notice to make it so. Third, the actual signal bleed problem might be far less of a concern than the Government at first had supposed. *Ibid.*

To sustain its statute, the Government was required to show that the first was the right answer. According to the District Court, however, the first and third possibilities were "equally consistent" with the record before it. *Ibid.* As for the second, the record was "not clear" as to whether enough notice had been issued to give §504 a fighting chance. *Ibid.* The case, then, was at best a draw. Unless the District Court's findings are clearly erroneous, the tie goes to free expression.

The District Court began with the problem of signal bleed itself, concluding "the Government has not convinced us that [signal bleed] is a pervasive problem." *Id.*, at 708–709, 718. The District Court's thorough discussion exposes a central weakness in the Government's proof: There is little hard evidence of how widespread or how serious the problem of signal bleed is. Indeed, there is no proof as to how likely any child is to view a discernible explicit image, and no proof of the duration of the bleed or the quality of the pictures or sound. To say that millions of children are subject to a risk of viewing signal bleed is one thing; to avoid articulating the true nature and extent of the risk is quite another. Under §505, sanctionable

signal bleed can include instances as fleeting as an image appearing on a screen for just a few seconds. The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this. Although the parties have taken the additional step of lodging with the Court an assortment of videotapes, some of which show quite explicit bleeding and some of which show television static or snow, there is no attempt at explanation or context; there is no discussion, for instance, of the extent to which any particular tape is representative of what appears on screens nationwide.

The Government relied at trial on anecdotal evidence to support its regulation, which the District Court summarized as follows:

> "The Government presented evidence of two city councillors, eighteen individuals, one United States Senator, and the officials of one city who complained either to their [cable operator], to their local Congressman, or to the FCC about viewing signal bleed on television. In each instance, the local [cable operator] offered to, or did in fact, rectify the situation for free (with the exception of 1 individual), with varying degrees of rapidity. Included in the complaints was the additional concern that other parents might not be aware that their children are exposed to this problem. In addition, the Government presented evidence of a child exposed to signal bleed at a friend's house. Cindy Omlin set the lockout feature on her remote control to prevent her child from tuning to adult channels, but her eleven year old son was nevertheless exposed to signal bleed when he attended a slumber party at a friend's house.
>
> "The Government has presented evidence of only a handful of isolated incidents over the 16 years since 1982 when Playboy started broadcasting. The Gov-

> ernment has not presented any survey-type evidence on the magnitude of the 'problem.'" *Id.*, at 709 (footnote and record citations omitted).

Spurred by the District Court's express request for more specific evidence of the problem, see 945 F. Supp., at 779, n. 16, the Government also presented an expert's spreadsheet estimate that 39 million homes with 29.5 million children had the potential to be exposed to signal bleed, 30 F. Supp. 2d, at 708–709. The Government made no attempt to confirm the accuracy of its estimate through surveys or other field tests, however. Accordingly, the District Court discounted the figures and made this finding: "[T]he Government presented no evidence on the number of households actually exposed to signal bleed and thus has not quantified the actual extent of the problem of signal bleed." *Id.*, at 709. The finding is not clearly erroneous; indeed it is all but required.

Once §505 went into effect, of course, a significant percentage of cable operators felt it necessary to time channel their sexually explicit programmers. *Id.*, at 711, and n. 14. This is an indication that scrambling technology is not yet perfected. That is not to say, however, that scrambling is completely ineffective. Different cable systems use different scrambling systems, which vary in their dependability. "The severity of the problem varies from time to time and place to place, depending on the weather, the quality of the equipment, its installation, and maintenance." *Id.*, at 708. At even the good end of the spectrum a system might bleed to an extent sufficient to trigger the time-channeling requirement for a cautious cable operator. (The statute requires the signal to be "*fully* block[ed]." 47 U. S. C. §561(a) (1994 ed., Supp. III) (emphasis added).) A rational cable operator, faced with the possibility of sanctions for intermittent bleeding, could well choose to time channel even if the bleeding is too momentary to pose

any concern to most households. To affirm that the Government failed to prove the existence of a problem, while at the same time observing that the statute imposes a severe burden on speech, is consistent with the analysis our cases require. Here, there is no probative evidence in the record which differentiates among the extent of bleed at individual households and no evidence which otherwise quantifies the signal bleed problem.

In addition, market-based solutions such as programmable televisions, VCR's, and mapping systems (which display a blue screen when tuned to a scrambled signal) may eliminate signal bleed at the consumer end of the cable. 30 F. Supp. 2d, at 708. Playboy made the point at trial that the Government's estimate failed to account for these factors. *Id.*, at 708–709. Without some sort of field survey, it is impossible to know how widespread the problem in fact is, and the only indicator in the record is a handful of complaints. Cf. *Turner Broadcasting System, Inc.* v. *FCC*, 520 U. S. 180, 187 (1997) (reviewing "'a record of tens of thousands of pages' of evidence" developed through "three years of pre-enactment hearings, . . . as well as additional expert submissions, sworn declarations and testimony, and industry documents" in support of complex must-carry provisions). If the number of children transfixed by even flickering pornographic television images in fact reached into the millions we, like the District Court, would have expected to be directed to more than a handful of complaints.

No support for the restriction can be found in the near barren legislative record relevant to this provision. Section 505 was added to the Act by floor amendment, accompanied by only brief statements, and without committee hearing or debate. See 141 Cong. Rec. 15586–15589 (1995). One of the measure's sponsors did indicate she considered time channeling to be superior to voluntary blocking, which "put[s] the burden of action on the sub-

scriber, not the cable company." *Id.*, at 15587 (statement of Sen. Feinstein). This sole conclusory statement, however, tells little about the relative efficacy of voluntary blocking versus time channeling, other than offering the unhelpful, self-evident generality that voluntary measures require voluntary action. The Court has declined to rely on similar evidence before. See *Sable Communications*, 492 U. S., at 129–130 ("[A]side from conclusory statements during the debates by proponents of the bill, . . . the congressional record presented to us contains no evidence as to *how* effective or ineffective the . . . regulations were or might prove to be" (footnote omitted)); *Reno*, 521 U. S., at 858, and n. 24, 875–876, n. 41 (same). This is not to suggest that a 10,000 page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and supposition. The question is whether an actual problem has been proven in this case. We agree that the Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban.

Nor did the District Court err in its second conclusion. The Government also failed to prove §504 with adequate notice would be an ineffective alternative to §505. Once again, the District Court invited the Government to produce its proof. See 945 F. Supp., at 781 ("If the §504 blocking option is not being promoted, it cannot become a meaningful alternative to the provisions of §505. At the time of the permanent injunction hearing, further evidence of the actual and predicted impact and efficacy of §504 would be helpful to us"). Once again, the Government fell short. See 30 F. Supp. 2d, at 719 ("[The Government's argument that §504 is ineffective] is premised on adequate notice to subscribers. It is not clear, however, from the record that notices of the provisions of §504 have been adequate"). There is no evidence that a well-

promoted voluntary blocking provision would not be capable at least of informing parents about signal bleed (if they are not yet aware of it) and about their rights to have the bleed blocked (if they consider it a problem and have not yet controlled it themselves).

The Government finds at least two problems with the conclusion of the three-judge District Court. First, the Government takes issue with the District Court's reliance, without proof, on a "hypothetical, enhanced version of Section 504." Brief for United States et al. 32. It was not the District Court's obligation, however, to predict the extent to which an improved notice scheme would improve §504. 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. Indeed, to the extent the District Court erred, it was only in attempting to implement the less restrictive alternative through judicial decree by requiring Playboy to provide for expanded notice in its cable service contracts. The appropriate remedy was not to repair the statute, it was to enjoin the speech restriction. Given the existence of a less restrictive means, if the Legislature wished to improve its statute, perhaps in the process giving careful consideration to other alternatives, it then could do so.

The Government also contends a publicized §504 will be just as restrictive as §505, on the theory that the cost of installing blocking devices will outstrip the revenues from distributing Playboy's programming and lead to its cancellation. See 30 F. Supp. 2d, at 713. This conclusion rests on the assumption that a sufficient percentage of households, informed of the potential for signal bleed, would consider it enough of a problem to order blocking devices– an assumption for which there is no support in the record. *Id.*, at 719. It should be noted, furthermore, that Playboy is willing to incur the costs of an effective §504. One might infer that Playboy believes an advertised

§504 will be ineffective for its object, or one might infer the company believes the signal bleed problem is not widespread. In the absence of proof, it is not for the Court to assume the former.

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. If unresponsive operators are a concern, moreover, a notice statute could give cable operators ample incentive, through fines or other penalties for noncompliance, to respond to blocking requests in prompt and efficient fashion.

Having adduced no evidence in the District Court showing that an adequately advertised §504 would not be effective to aid desirous parents in keeping signal bleed out of their own households, the Government can now cite nothing in the record to support the point. The Government instead takes quite a different approach. After only an offhand suggestion that the success of a well-communicated §504 is "highly unlikely," the Government sets the point aside, arguing instead that society's independent interests will be unserved if parents fail to act on that information. Brief for United States et al. 32–33 ("[U]nder . . . an enhanced version of Section 504, parents who had strong feelings about the matter could see to it that their children did not view signal bleed– at least in their own homes"); *id.*, at 33 ("Even an enhanced version of Section 504 would succeed in blocking signal bleed only if, and after, parents affirmatively decided to avail themselves of the means offered them to do so. There would certainly be parents– perhaps a large number of parents– who out of inertia, indifference, or distraction, simply would take no action to block signal bleed, even if fully informed of the problem and even if offered a rela-

tively easy solution"); Reply Brief for United States et al. 12 ([Society's] interest would of course be served in instances . . . in which parents request blocking under an enhanced Section 504. But in cases in which parents fail to make use of an enhanced Section 504 procedure out of distraction, inertia, or indifference, Section 505 would be the only means to protect society's independent interest").

Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech. The Government's argument stems from the idea that parents do not know their children are viewing the material on a scale or frequency to cause concern, or if so, that parents do not want to take affirmative steps to block it and their decisions are to be superseded. The assumptions have not been established; and in any event the assumptions apply only in a regime where the option of blocking has not been explained. The whole point of a publicized §504 would be to advise parents that indecent material may be shown and to afford them an opportunity to block it at all times, even when they are not at home and even after 10 p.m. Time channeling does not offer this assistance. The regulatory alternative of a publicized §504, which has the real possibility of promoting more open disclosure and the choice of an effective blocking system, would provide parents the information needed to engage in active supervision. The Government has not shown that this alternative, a regime of added communication and support, would be insufficient to secure its objective, or that any overriding harm justifies its intervention.

There can be little doubt, of course, that under a voluntary blocking regime, even with adequate notice, some children will be exposed to signal bleed; and we need not discount the possibility that a graphic image could have a negative impact on a young child. It must be remembered,

however, that children will be exposed to signal bleed under time channeling as well. Time channeling, unlike blocking, does not eliminate signal bleed around the clock. Just as adolescents may be unsupervised outside of their own households, it is hardly unknown for them to be unsupervised in front of the television set after 10 p.m. The record is silent as to the comparative effectiveness of the two alternatives.

* * *

Basic speech principles are at stake in this case. When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression. We cannot be influenced, moreover, by the perception that the regulation in question is not a major one because the speech is not very important. The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly. It follows that all content-based restrictions on speech must give us more than a moment's pause. If television broadcasts can expose children to the real risk of harmful exposure to indecent materials, even in their own home and without parental consent, there is a problem the Government can address. It must do so, however, in a way consistent with First Amendment principles. Here the Government has not met the burden the First Amendment imposes.

The Government has failed to show that §505 is the least restrictive means for addressing a real problem; and the District Court did not err in holding the statute violative of the First Amendment. In light of our ruling, it is unnecessary to address the second question presented: whether the District Court was divested of jurisdiction to consider the Government's postjudgment motions after the

Government filed a notice of appeal in this Court. The judgment of the District Court is affirmed.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

Section 505 of the Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 136, 47 U. S. C. §561 (1994 ed., Supp. III), provides in relevant part:

> "(a) Requirement
>
> "In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.
>
> "(b) Implementation
>
> "Until a multichannel video programming distributor complies with the requirement set forth in subsection (a) of this section, the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.
>
> "(c) 'Scramble' defined
>
> "As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner."

Section 504 of the Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 136, 47 U. S. C. §560 (1994 ed., Supp. III), provides in relevant part:

> "(a) Subscriber request
>
> "Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of

each channel carrying such programming so that one not a subscriber does not receive it.

"(b) 'Scramble' defined

"As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner."