No. 96-511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF PLAYBOY ENTERPRISES, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE[1]

Playboy Enterprises, Inc. ("PEI") is a Delaware corporation with its main offices in Chicago, Illinois. Among other commercial endeavors, PEI publishes *Playboy* magazine and *Playboy* newsstand special issues. In August 1994, *Playboy*

[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court.

became the first national magazine to publish on the World Wide Web.[2]

Playboy magazine is an award-winning publication, containing fiction; interviews with noted figures in politics, sports, government, entertainment, business and the arts; artwork by noted artists; and pictorials of beautiful women. *Playboy* is the number one men's magazine in the world, outselling rival publications in the United States such as *GQ* and *Esquire* by more than four to one. In 1993-95, for example, *Playboy*'s circulation exceeded those of major magazines such as *Newsweek*, *Smithsonian*, *Sports Illustrated*, *U.S. News and World Report*, *GQ*, *Esquire*, and *Rolling Stone* combined.[3]

Playboy averages 199 pages per month. About 29 pages, or roughly 15 percent, typically contain photographs of nude or partially clothed women. Most of *Playboy*'s pages contain articles and other material directed at men's interests such as current affairs, health, and sports. Approximately 25 percent of *Playboy* magazine is devoted to items of general interest, approximately 18 percent to culture or the humanities, 16 percent to amusements (including personalities or issues related to the screen, theater, television, or radio), nine percent to national and international affairs, seven percent to fiction, seven percent to apparel and grooming, six percent to sports and recreation, and the balance to home furnishings, food, health, and business.

Playboy is well known for its publication of fine fiction. The list of authors who have contributed fiction and other articles to *Playboy* includes Margaret Atwood, Gabriel Garcia Marquez, Doris Lessing, David Mamet, Erica Jong, William F. Buckley, Jr., John LeCarre, Saul Bellow, Isaac Asimov, Justice William O. Douglas, Graham Greene, Norman Mailer, T. Coraghessan Boyle, and John Steinbeck. *Playboy* is also well known for its publication of in-depth interviews with figures from the worlds of politics, sports,

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[2] The Playboy website is located at http://www.playboy.com.

[3] *Playboy*'s guaranteed U.S. rate base is 3,150,000 copies sold. With 15 international editions, *Playboy*'s *worldwide* monthly readership is estimated at 15 million.

government, entertainment, business, and the arts. The list of *Playboy*'s interview subjects includes Jimmy Carter, Martin Luther King, Jr., Lech Walesa, Barbara Streisand, Yasser Arafat, the Reverend Jesse Jackson, James Carville, Andrew Young, Billie Jean King, Michael Jordan, Candice Bergen, and Whoopi Goldberg.

Playboy's textual content has won many awards for excellence. For example, *Playboy* has been awarded the distinguished National Magazine Award "for excellence in fiction," which is granted to one magazine each year by the American Society of Magazine Editors in conjunction with the Columbia University School of Journalism, as well as the National Conference of Christians and Jews Certificate of Recognition. In addition, the artwork published in *Playboy* has received hundreds of design awards, including 194 awards from The Society of Publication Designers, 19 Gold Medals from The Society of Illustrators, and 23 Silver Medals from the Art Directors Club of New York/The One Show. *Playboy* has published the work of such artists as Andy Warhol, Keith Haring, and LeRoy Neiman.

PEI's website reflects the same editorial philosophy and content as *Playboy* magazine. By late 1996, the website encompassed more than 700 pages, providing visitors with excerpts from current and historic issues of *Playboy* magazine, plus schedules for Playboy Television. The Playboy website is supported by advertising revenues. In addition, Playboy offers an online version of the Playboy catalog, which offers branded merchandise for purchase.

During its 43-year history, Playboy has always supported an individual's right to choose what to read or to view. Accordingly, with respect to its website, Playboy strongly supports the various private-sector initiatives that employ Internet screening technologies to enable people, particularly parents, to block information or images that they deem unsuitable for their particular households. Accordingly, the Playboy website is registered with RSACi, and access can be blocked from any household that employs screening software.[4]

[4] The Recreational Software Advisory Council developed a rating system for the Internet that permits individuals to tailor their

Playboy magazine, special issues, its videos, and its website are fully protected by the United States Constitution. In over forty years of publishing, *Playboy* has never been judged "obscene," "pornographic," or "harmful to minors" in any federal, state or local jurisdiction. The Attorney General's Commission on Pornography ("Meese Commission") found that the type of images that appear in *Playboy* are not a threat to "individuals, families, or society," and pointed out that "[t]he true pornography industry is quite simply different from and separate from the industry that publishes 'men's' magazines."[5] The Commission acknowledged that "[f]ederal courts have found serious value contained in *Playboy* magazine,"[6] and characterized "[a]ttempted and unsuccessful actions * * * against *Playboy* magazine in Atlanta and several other places" as "mistakes."[7]

Despite these facts, PEI's website is threatened by the Communications Decency Act ("CDA"). Not only did the CDA's congressional sponsors make clear that they intended to catch *Playboy* in their net,[8] such a broad intention has been

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content preferences for newsgroups, FTP sites and the World Wide Web. Parents can set various tolerance levels (on a 1 to 4 scale) in the categories of violence, language, nudity and sex. The software is PICS compatible and can be set to block unrated sites.

[5] *See* Final Report, The Attorney General's Commission on Pornography 284, 348 (1986) [hereinafter "Meese Commission Report"]. The Commission reported that "excessively broad terms like 'pornography' or 'sexually explicit materials' are just too encompassing to reflect the results of our inquiry," *id*. at 320, and noted that "we could envision aesthetically-posed, air brushed photographs of beautiful men or women in a provocative context. The provocation derives from the power of sex to attract the attentions and stir the passions of all of us. Such materials may have, in most uses, little negative effect on individuals, families, or society." *Id*. at 348.

[6] *Id*. at 1289 (citing *Penthouse Int'l* v. *McAuliffe*, 610 F.2d 1353 (5th Cir.), *cert. dismissed*, 447 U.S. 931 (1980)).

[7] *Id*. at 271.

[8] 141 Cong. Rec. S8330 (daily ed. June 14, 1995) (statement of Sen. Exon) ("I am not talking *just* about *Playboy* and *Penthouse* magazines. By comparison, those magazines pale in offensiveness

understood and applied by the Act's enforcers[9] and is currently being defended by the Solicitor General.[10] Just last week, a Senate sponsor of the CDA told Congress that the law was necessary to proscribe a broad range of speech, including "glimpses of * * * Playmates" on the Playboy website.[11] Consequently, PEI has a vital stake in the outcome of this case.

SUMMARY OF ARGUMENT

The First Amendment is predicated on the principle that the essential remedy to "bad" speech is not censorship, but more speech. In its defense of the CDA, however, the government asserts that control over the Internet is needed because "millions of people disseminate information * * * without the intervention of editors, network censors, or market disincentives." Appellants' Br. at 32. As Judge Dalzell correctly wrote in the decision below, "[t]his argument is profoundly repugnant to First Amendment principles." App. 142a.

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with the other things that are readily available." (emphasis added)).

[9] The court below ordered the government to cease any "review" or "investigation" of images purportedly taken from a CompuServe database that it characterized as "analogous to *Playboy* or *Penthouse* centerfolds." *ACLU* v. *Reno*, 24 Media L. Rep. (BNA) 1795 (E.D. Pa. May 15, 1996). The government took the position at that time that "a *Playboy* centerfold appeals to the prurient interest," *id*. at 1797, and that the materials it presented at trial in the Schmidt notebook (which at Tab 42 included images taken from the April 1996 issue of *Playboy* magazine) were "indecent" within the CDA's terms, *id*. at 1797 n.2.

[10] *See* Appellants' Br. at 20 (images in "soft-porn" magazines "almost always would be covered"); *id*. at 33 (Schmidt notebook "graphically illustrates the dimensions of the problem"); *id*. at 43 (CDA indecency restrictions are "similar to the R-rating for movies").

[11] 143 Cong. Rec. S1355, S1356 (daily ed. Feb. 13, 1997) (statement of Sen. Coats). This assertion appears to conflict with the definition of "indecency" advocated by congressional amici. *See infra* pp. 22, 26.

Recognizing that Internet communication is precisely the kind of speech that the First Amendment was intended to protect, the court below correctly held that it should receive the same degree of protection under First Amendment as other forms of core speech. Ever since the printing press was invented, new communications technologies have been viewed as a threat to society and to those in power. As a result, innovation always has invited censorship. The Framers, however, recognized that the political debate made possible by new forms of speech could play an essential role in protecting liberty against governmental intrusion. Therefore, in order to prevent this type of repression from recurring in the future, the Framers decided to protect all new forms of communication by enshrining the freedom of speech and of the press in the First Amendment, thus denying the government the power to censor any and all new types of speech. Although this Court has in the past applied differing levels of protection to various media based upon their particular characteristics, it has over time recognized that the basic principles of the First Amendment should be the rule, regardless of the technical details of the various media. The lessons from this long period of experimentation should be applied here.

Additionally, this Court should affirm the decision below because the indecency standard is vague and antithetical to First Amendment values. Contrary to the government's assertion that the CDA respects literary works of "serious merit," the indecency standard imposes a legal regime identical to the one that was applied in the United States decades ago, when vital literary works were routinely suppressed, but was eventually and rightfully rejected. The indecency standard effectively reprises the worst portions of the old, discredited obscenity standard: unlike the current test for obscenity, indecency does not respect the rights of the average community member, pays no attention to literary works "as a whole," and provides no analytical framework to consider serious merit. For that reason, experience with the indecency standard demonstrates that it intrudes too deeply into First Amendment values to be sustained.

ARGUMENT

I. COMPUTER COMMUNICATION IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

The court below concluded that the CDA must be subjected to First Amendment strict scrutiny. App. 67a-68a (Sloviter, C.J.). The government and its amici, however, urge this Court to adopt a far lower level of constitutional protection for speech transmitted via computers. *See, e.g.*, Appellants' Br. at 36-37 (CDA should be considered "cyberzoning").

This Court need not and should not fashion new First Amendment standards to govern new forms of communication. Indeed, to do so would be quite ironic: it was the Framers' appreciation for the democratizing power of new forms of communication that led them to protect freedom of the press in the first place. In contrast to European governments, which began to censor speech because the printing press enabled citizens to express their (often anti-establishment) political views in powerful and far-reaching ways, the Framers recognized that new forms of speech could create a highly active and uninhibited communications environment in which political expression could thrive. Thus protecting emerging forms of speech constituted a vital means of preventing the federal government from infringing upon individual liberty.[12]

The Framers' desire to protect emerging forms of communication notwithstanding, the sad reality is that new communications technologies often are born in captivity. Supported by Justice Jackson's observation that each communications medium "is a law unto itself," *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring), the rhetoric of this Court's First Amendment precedents has suggested that "the

[12] *See* Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 Comm/Ent 247, 264-265 (1994); M. Ethan Katsh, *The First Amendment and Technological Change: The New Media Have a Message*, 57 Geo. Wash. L. Rev. 1459, 1467-72 (1989).

Constitution had to be reinvented with the birth of each new technology."[13]

A closer inspection of the substance of this Court's previous encounters with new technologies, however, reveals that the *Kovacs* "law-unto-itself" dicta has been more rhetoric than reality. By and large, this Court has tended to apply the same First Amendment standards that govern the traditional press to almost every new medium it encountered. And even in those cases where this Court at first declined to extend full First Amendment protection to a new form of communication, full protection was eventually extended as society gained more experience with it.

The paradigm case in this regard is film. "The first motion pictures appeared in the late nineteenth century, and soon thereafter came the first incidents of censorship."[14] Yet when this Court considered the constitutional status of this new medium for the first time, it held that motion pictures were not speech and thus were not protected by the First Amendment. *Mutual Film Corp.* v. *Industrial Comm'n*, 236 U.S. 230, 244 (1915). It took almost four decades to reconsider this decision. But after cinema had become an established and accepted part of society, this Court began to extend to film the same degree of First Amendment protection accorded the traditional press. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502-503 & n.13 (1952); *see also United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). Although the Court acknowledged that "[e]ach method [of communication] tends to present its own particular problems," the Court firmly concluded that notwithstanding these differences "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by

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[13] Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, Keynote Address at the First Conference on Computers, Freedom & Privacy (Mar. 26, 1991).

[14] Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary. L. Rev. 741, 761 (1992).

this Court, make freedom of expression the rule." *Joseph Burstyn, Inc.*, 343 U.S. at 503.[15]

As new media become more commonplace, this Court generally concludes that the "basic principles" underlying the First Amendment overshadow the "peculiar problems" that led initially to differential treatment. The main exception to this rule is broadcasting. In broadcasting, this Court determined that the inherent scarcity of transmission frequencies, *see Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 388-390 (1969), and the unique pervasiveness and accessibility of broadcasting, *see FCC* v. *Pacifica Found.*, 438 U.S. 726, 748-750 (1978), justified the imposition of significantly greater restrictions on broadcast speech than would be permitted on other media. *Cf. Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989) (rejecting imposition of indecency restrictions on telephony similar to those upheld in *Pacifica*); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974) (rejecting imposition on newspapers of right of response similar to that upheld in *Red Lion*).

This Court's experience with creating a separate First Amendment standard for broadcasting, however, has not been a happy one. As this Court has openly acknowledged, both courts and commentators have challenged the scarcity rationale since its inception. *See Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 638 & n.5 (1994). Moreover, when faced with the full implications of Justice Jackson's approach in *Kovacs*, this Court appeared to shy away from creating new First Amendment standards for each new form of communication out of whole cloth and instead attempted to resolve cases through the use of competing analogies that weighed whether the new technology bore greater similarities with broadcasting or print. *See, e.g.*, *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983); *Sable Communications*, 492 U.S. at 127-128; *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring). As the analytical bases for *Red Lion* and

[15] *See also Freedman* v. *Maryland*, 380 U.S. 51, 58-61 (1965); *New York* v. *Ferber*, 458 U.S. 747, 771 (1982) (describing film as one of the "traditional forms of expression such as books" that must be protected as "pure speech").

Pacifica grew less defensible, attempts to decide cases by analogizing to them grew increasingly strained and arbitrary.

Finally, in *Turner Broadcasting*, this Court flatly disavowed the principle that a medium's distinct characteristics necessarily requires creating a new First Amendment *standard* under which restrictions on speech transmitted through that medium would be evaluated. As the Court concluded:

> [W]hatever relevance these physical characteristics may have in the evaluation of particular cable regulations, they do not require the alteration of settled principles of our First Amendment jurisprudence.

512 U.S. at 639. In so holding, this Court returned to the original logic of *Joseph Burstyn, Inc.* by recognizing that although a medium's particular attributes might play an important role in the analysis of a particular problem (*e.g.*, what less restrictive measures might exist), those attributes should not change the fundamental First Amendment standards that would be applied.

Development of the Internet, "the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen," App. 141a, only confirms the wisdom of *Turner Broadcasting*. Transmission-based rationales such as scarcity, questionable from the beginning, have become increasingly meaningless. Print is now available via telephone, broadcast, cable, microwave transmission, and computer-based communication. Voice, once primarily carried through telephony, and moving images, once only conveyed via broadcast, are now available through virtually the all of the above-mentioned means as well. *See* Ithiel de Sola Pool, *Technologies of Freedom* 23 (1983).

Furthermore, the viability of distinctions based on the type of speech conveyed has also deteriorated as multimedia capabilities have grown increasingly sophisticated. It appears, for instance, that the only proper answer to the question whether the speech available on the Internet is more like the speech provided in print, mail, telephony, broadcasting, or cable is "all of the above." As the analytical coherence

underlying these analogies has degenerated, their application has become increasingly unprincipled.

Recent technological developments have revealed a more fundamental flaw in acknowledging the possibility that different First Amendment standards may apply to different types of media. Although the incremental, case-by-case approach traditionally followed by this Court has proven adequate to deal with the rate of past technological change, the rapid increase in the rate of progress will soon outstrip the judiciary's ability to keep up, if it has not done so already. Moreover, uncertainty about the standard that will be applied to future communications technologies will undoubtedly deter persons wishing to speak through those technologies from doing so until this Court has the opportunity to resolve the issue. As Justice Thomas so eloquently observed, the possibility that an emerging technology such as cable might be evaluated under a lower First Amendment standard "placed cable in a doctrinal wasteland in which regulators and cable operators alike could not be sure whether cable was entitled to the substantial First Amendment protections afforded the print media or was subject to the more onerous obligations shouldered by the broadcast media." *Denver Area Educ. Telecomms. Consortium* v. *FCC*, 116 S. Ct. 2374, 2420 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part).

And even after this Court has established the standard that will govern a particular medium, the danger remains that technological changes will undermine the basis for the particular standard chosen long before this Court has the opportunity to revisit it. The gap that has developed between doctrine and reality will only expand further as the pace of technological change accelerates.[16]

To whatever extent this Court has not expressly rearticulated the basic principle of *Joseph Burstyn, Inc.* and *Turner Broadcasting* in subsequent cases, it at least has *applied* searching First Amendment scrutiny. Although the reasoning

[16] Pool, *supra*, at 7; Rodney Smolla, *Free Speech in an Open Society* 321 (1992); Laurence H. Tribe, *American Constitutional Law* § 12-25, at 1007 (2d ed. 1986); Katsh, 57 Geo. Wash. L. Rev. at 1493.

of the plurality opinion in *Denver* once again opened the possibility that a different First Amendment standard might apply to cable, 116 S. Ct. at 2384-85 (plurality opinion), the plurality nonetheless applied a standard very close to the strict scrutiny called for by traditional First Amendment doctrine, *id.* at 2385, 2391 (plurality opinion), and a majority of the Justices of this Court endorsed the application of established First Amendment principles to cable television, *id.* at 2404 (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2419 (Thomas, J., joined by Rehnquist, C.J., & Scalia, J., concurring in the judgment in part and dissenting in part).

What the *Denver* plurality did not appreciate fully is that failing to make clear that emerging media are governed by traditional First Amendment principles ultimately does more harm than declaring so. Although rapid changes in the technological, industrial, and regulatory environments made the plurality understandably reluctant to pronounce a categorical standard, these concerns underscore the importance of establishing that all emerging media will be evaluated under the same principles that govern traditional media. Unless this Court definitively reaffirms that there is only one First Amendment that is applicable to all forms of speech, it will be called upon repeatedly—and more frequently—to develop a "new" First Amendment standard with the emergence of each new medium. Speakers using new communications technology will face great uncertainty about the nature and extent of their rights and will be forced to await a decision of this Court before they are able to determine the degree of protection their speech will receive. A Court seeking to "do no harm" should not permit such a result. *See id.* at 2403 (Souter, J., concurring).

II. THE CDA UNCONSTITUTIONALLY ABRIDGES PROTECTED SPEECH AND THE INDECENCY STANDARD IS COMPLETELY VAGUE.

It is a well-established proposition that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications*, 492 U.S. at 126. But absent a clear understanding of the term "indecency," or of the doctrine that permits regulation of

speech deemed by a designated decisionmaker to be "patently offensive," it is not entirely clear that such speech is protected in fact, or that constitutional protections for indecency exceed those extended to obscenity. Such questions are of critical importance to implementing the CDA, for unless the answers are clear, or even reasonably clear, to those who engage in online speech, it will be impossible to tell what speech must be screened from minors upon risk of criminal prosecution.

This is not simply a question of whether the indecency standard is impermissibly vague. Both as conceived and as historically applied, it is. There is also a more fundamental question whether the indecency standard incorporates any kind of intelligible "test" that limits the breadth of the concept or restricts the discretion of prosecutors. Our history teaches that such unbridled regulation intrudes deeply into the area of protected speech.[17]

A. The Indecency Standard Is the Reincarnation of the *Hicklin* Rule in American Law.

1. The Lack of a Constitutionally Sound Test for Obscenity and Indecency Historically Led to the Routine Suppression of Serious Literary Works.

Despite the fact that obscene speech is unprotected by the First Amendment, this Court has long held that such communications may be penalized only if all three parts of the relevant test are met: (1) the average person, applying contemporary community standards, must find that the work, taken as a whole, appeals to the prurient interest in sex; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically described by state law; and (3) the work, "taken as a whole, lacks serious literary, artistic,

[17] Because the indecency standard is constitutionally infirm, the government's suggestion that the CDA can be reformed or narrowed is erroneous. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216-217 (1975). This Court could decide that the CDA can be applied constitutionally only to obscene speech, *Hamling* v. *United States*, 418 U.S. 87 (1974), but doing so would create a needless redundancy. *See, e.g.*, 18 U.S.C. § 1465. Accordingly, the CDA should be invalidated as a whole.

political, or scientific value." *Miller* v. *California*, 413 U.S. 15, 24 (1973); *see also Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Massachusetts*, 383 U.S. 413, 418 (1966).[18] Even when the government asserts a need to protect minors from exposure to sexually oriented materials under a "variable obscenity" standard, the First Amendment prescribes strict limits based on the *Miller* test.[19]

The law was not always such. Before the courts rigorously applied First Amendment principles to obscenity laws, the relevant legal standard was drawn from an English case, *Regina* v. *Hicklin*, which held that the test for obscenity turned on whether the material tended to corrupt the morals of a young or immature person.[20] Under that standard, literature was judged obscene based upon a review only of brief excerpts of a publication and not the work as a whole.[21] Consequently, the intended audience of a book was unimportant if a young and inexperienced person might be exposed to

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[18] In addition to substantive requirements, this Court also has imposed strict due process guidelines on obscenity enforcement so as not to chill the exercise of protected speech. *See, e.g.*, *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 316-317 (1980); *Freedman*, 380 U.S. at 57-58.

[19] Well established First Amendment doctrine requires that material regulated under the "harmful to minors" standard must be "virtually obscene" before the government may adopt limited restrictions. *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 394 (1988); *accord American Booksellers* v. *Webb*, 919 F.2d 1493, 1504-05 (11th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991); *American Booksellers Ass'n* v. *McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981) (statute prohibiting sale or display to minors of material containing nude figures held overbroad); *American Booksellers Ass'n* v. *Superior Ct.*, 181 Cal. Rptr. 33 (Ct. App. 1982) (photographs with a primary purpose of causing sexual arousal held not to be harmful to minors). Moreover, government must employ the least restrictive means of serving its interest.

[20] *Regina* v. *Hicklin*, 3 L.R.-Q.B. 360 (1868). The test focused not on the "average person in the community," but on "those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *See* Meese Commission Report, *supra*, at 1246-47.

[21] Frederick F. Schauer, *The Law of Obscenity* 23 (1976).

the supposedly corrupting influence. Additionally, it was immaterial whether the book possessed literary merit. Indeed, some found that literary merit compounded the crime, by "enhancing a book's capacity to deprave and corrupt."[22]

Not surprisingly, under this test for obscenity, "[t]he first half of the 20th century [was] marked by heated litigation over books which are now generally regarded as classics."[23] Using the *Hicklin* rule, American courts held obscene such works as Theodore Dreiser's *An American Tragedy*,[24] D.H. Lawrence's *Lady Chatterley's Lover*,[25] Erskine Caldwell's *God's Little Acre*,[26] Radclyffe Hall's *The Well of Loneliness*,[27] Arthur Schnitzler's *Casanova's Homecoming*,[28] Henry Miller's *Topic of Cancer* and *Tropic of Capricorn*,[29] and James Joyce's *Ulysses*.[30]

In many cases, merely the threat of prosecution was sufficient to stop publication. By this method, publishers were persuaded to withdraw from circulation and destroy all outstanding copies of *Women in Love*, by D.H. Lawrence, *The Genius*, by Theodore Dreiser, and *Memoirs of Hecate*

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[22] Edward de Grazia, *Girls Lean Back Everywhere* 12 (1992).

[23] Schauer, *supra*, at 23-24.

[24] *Commonwealth* v. *Friede*, 171 N.E. 472 (Mass. 1930).

[25] *People* v. *Dial Press*, 48 N.Y.S.2d 480 (Magis. Ct. 1944).

[26] *Attorney Gen.* v. *Book Named "God's Little Acre"*, 93 N.E.2d 819 (Mass. 1950).

[27] *People* v. *Friede*, 233 N.Y.S. 565 (Magis. Ct. 1929).

[28] *People* v. *Seltzer*, 203 N.Y.S. 809 (Sup. Ct. 1924).

[29] *United States* v. *Two Obscene Books*, 99 F. Supp. 760 (N.D. Cal. 1951), *aff'd sub nom. Besig* v. *United States*, 208 F.2d 142 (9th Cir. 1953).

[30] Not only was a small literary magazine convicted of obscenity for publishing *Ulysses* in installments, but the U.S. Post Office seized and burned all of the issues of the magazine. No American publisher considered printing *Ulysses* for the next eleven years. *See* de Grazia, *supra*, at 9-13, 16-17.

County, by Edmund Wilson.[31] Other literary greats that were attacked included Nathaniel Hawthorne, Walt Whitman, Ernest Hemmingway, Sinclair Lewis, Leo Tolstoy, Honore de Balzac, and George Bernard Shaw.[32]

Because of the adverse effect on important literary works, American courts began to question the *Hicklin* rule. As early as 1913, Judge Learned Hand asked whether "we are even today so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library," but nevertheless applied what he described as the "mid-Victorian morals" of *Hicklin* because it had been accepted by federal courts as the prevailing standard. *United States* v. *Kennerley*, 209 F. 119, 120-121 (S.D.N.Y. 1913). A significant break with *Hicklin* came in *United States* v. *One Book Entitled Ulysses*, 72 F.2d 705, 707-708 (2d Cir. 1934), where the Second Circuit declined to find the book *Ulysses* obscene when "taken as a whole" and after assessing its effect on the average member of the community. Other courts began to follow suit.[33] Despite this emerging trend, however, many publishers continued to shy away from books considered to be risky. For example, *Lady Chatterley's Lover*, written in 1928, was not published in its unexpurgated form in America until 1959.[34] *Tropic of Cancer*, written in 1934, was unpublished in the United States for 26 years.[35]

Finally, in 1957, this Court expressly abandoned the *Hicklin* rule and held that the First Amendment requires that works must be judged as a whole in their entire context, considering their effect on the average member of the community—not the most vulnerable. Moreover, a work could

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[31] *Id.* at 72-73, 710.

[32] Blanchard, 33 Wm. & Mary L. Rev. at 746, 758, 771.

[33] *E.g.*, *United States* v. *Levine*, 83 F.2d 156 (2d Cir. 1936); *ACLU* v. *City of Chicago*, 121 N.E.2d 585 (Ill. 1954), *appeal dismissed*, 348 U.S. 979 (1955); *People* v. *Viking Press, Inc.*, 264 N.Y.S. 534 (Magis. Ct. 1933).

[34] de Grazia, *supra*, at 94; *see Grove Press, Inc.* v. *Christenberry*, 276 F.2d 433 (2d Cir. 1960).

[35] de Grazia, *supra*, at 55, 370.

not be considered obscene if it possessed serious value. *Roth* v. *United States*, 354 U.S. 476, 489-490 (1957). That same year, this Court struck down a Michigan law that prohibited books containing "immoral, lewd [and] lascivious language * * * tending to the corruption of the morals of youth" because it "reduce[d] the adult population * * * to reading only what is fit for children." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

As modified subsequently in *Memoirs* and *Miller*, this Court's categorical rejection of the *Hicklin* rule made clear that the detailed analytical framework of a three-part test is essential to preserve First Amendment values and to separate protected from unprotected speech. Departure from that standard—as has occurred with the indecency standard—sacrifices important First Amendment values.

2. The Indecency Standard Is the Functional Equivalent of *Hicklin*.

The government defends the constitutional sufficiency of the indecency standard by stating that "[t]he CDA's definition of patently offensive materials is similar to the second element" of the *Miller* test for obscenity. Appellants' Br. at 48. The standard is consistent with the First Amendment, the government maintains, because "[m]aterial having scientific, educational, or news value *almost always* falls outside the CDA's coverage." *Id*. at 50 (emphasis added). This invitation to rely on the government's sense of restraint in applying a standardless test was too much for the court below to accept. As Judge Sloviter pointed out, this position "would require a broad trust indeed from a generation of judges not far removed from the attacks on James Joyce's *Ulysses* as obscene." App. 82a.

Indeed, the indecency standard articulated in *FCC* v. *Pacifica Foundation*, *supra*, and applied by the FCC in subsequent cases betrays this trust, and restores a level of government control over speech that existed before *Roth* and *Butler*. Just as under *Hicklin*, the indecency standard applies to selected passages, not to works as a whole; it is based not on the average person in a community, but upon children; and literary or artistic merit does not bar liability. In short, the three-part test that courts developed to ensure the appli-

cation of First Amendment restraints on obscenity laws is precisely what the indecency standard lacks. Additionally, the CDA includes criminal penalties, creating a more serious constitutional problem than the administrative sanction at issue in *Pacifica*. *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

Although the government maintains that the relative "value" of speech is subsumed within the determination of "patent offensiveness," Appellants' Br. at 49-50, the FCC has held that the merit of a work is simply "one of many variables that make up a work's 'context.'"[36] Judge Patricia Wald has noted that "'[i]ndecency' is not confined merely to material that borders on obscenity—'obscenity lite.'" *Alliance for Community Media* v. *FCC*, 56 F.3d 105, 130 (D.C. Cir.) (in banc) (Wald, J., dissenting), *rev'd in part and aff'd in part sub nom. Denver Area Educ. Telecomms. Consortium* v. *FCC*, 116 S. Ct. 2473 (1996). Rather, the standard casts a larger net encompassing other, less offensive protected speech regardless of its merit. Thus, in many instances, "the programming's very merit will be inseparable from its seminal 'offensiveness.'" *Id*. The Commission has acknowledged that, because serious merit does not save material from an indecency finding, there is a "broad range of sexually-oriented material that has been or could be considered indecent" that does "not [include] obscene speech."[37]

Moreover, in applying the indecency standard, the FCC has expressly rejected claims that it must consider the suspect material as a whole,[38] and has penalized broadcasts where

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[36] *Infinity Broadcasting Corp.*, 3 FCC Rcd. 930, 932 (1987), *aff'd in part and rev'd in part on other grounds sub nom. Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*").

[37] *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. 5297, 5300 (1990), *rev'd on other grounds sub nom. Action for Children's Television* v. *FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992).

[38] *Illinois Citizens Comm. for Broad.* v. *FCC*, 515 F.2d 397, 406 (D.C. Cir. 1974); *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 998, 1004 (1993) ("We do not agree that any determination of indecency [on the cable medium] is required to take into account

less than five percent of a program was devoted to sexually-oriented material. The Commission concluded that it could impose a fine "[w]hether or not the context of the entire [program] dwelt on sexual themes." *WIOD(AM)*, 6 FCC Rcd. 3704, 3705 (1989). Finally, like the discredited *Hicklin* rule, the focus of indecency regulation is the effect of sexually-oriented material on a vulnerable population—children—and not average members of a community. *Pacifica*, 438 U.S. at 749-750. The net effect is to cancel the decades of constitutional evolution that made possible the protection of meritorious speech.

B. The Indecency Standard Is Unconstitutionally Vague.

The First Amendment requires that restrictions on speech be well-defined and unambiguous. Laws that inhibit free speech are subject to the most stringent standards of precision.[39] Vague laws attempting to regulate or suppress non-obscene speech have been repeatedly struck down,[40] even

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the work as a whole."). *Contra Erznoznik*, 422 U.S. at 211-212 n.7 ("Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as part of the whole work.").

[39] *Village of Hoffman Estates*, 455 U.S. at 499; *Cramp* v. *Board of Pub. Instruction*, 368 U.S. 278, 287 (1961); *see Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976) ("general test of vagueness applies with particular force in review of laws dealing with speech"); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975) (condemning denial of access to a municipal theater where "the exercise of such authority was not bounded by precise and clear standards"); *Smith* v. *Goguen*, 415 U.S. 566, 574-575 (1974); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972) (vague laws fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"); *Gentile* v. *State Bar*, 501 U.S. 1030, 1051 (1991).

[40] *E.g.*, *Winters* v. *New York*, 333 U.S. 507, 518 (1948) (statutory standard interpreted by state court to be "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes"); *Joseph Burstyn, Inc.*, *supra* ("sacrilegious" as a licensing standard); *Gelling* v. *Texas*, 343 U.S. 960 (1952) (mem.) ("prejudicial to the best interests of the people of said City"); *Superior Films, Inc.* v. *Department of*

when enacted to protect minors. In *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 678 (1968), this Court invalidated an ordinance requiring film classification and prohibiting attendance by youths under 16 at films classified "not suitable for young persons." *Interstate Circuit* established the principle that "the permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." *Id.* at 689.[41]

Vague laws impermissibly restrict speech in a variety of ways. First, without clear guidelines, those subject to a restriction cannot understand what is forbidden and what is not.[42] Second, a vague standard impermissibly chills speech, causing speakers to "steer far wider of the unlawful zone"[43] and to restrict their expression "to that which is unquestionably safe."[44] Third, restrictions on speech that lack clear limits give government officials far too much discretion to curb disfavored expression.[45] At bottom, the threat of

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Educ., 346 U.S. 587 (1954) (mem.) ("moral, educational, or amusing and harmless"); *Holmby Prods., Inc.* v. *Vaughn*, 350 U.S. 870 (1955) (mem.) ("cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals").

[41] *See also Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 59 (1963) (condemning a commission that was charged with reviewing material "manifestly tending to the corruption of the youth"); *Rushia* v. *Town of Ashburnham*, 582 F. Supp. 900, 905 (D. Mass. 1983) ("The fact that a regulation is adopted for the purpose of protecting children does not cure vagueness.").

[42] *See*, *e.g.*, *Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983); *Grayned*, 408 U.S. at 108-109; *Gentile*, 501 U.S. at 1048 (regulation of speech is unconstitutional when those subject to it can do no more than "guess at its contours").

[43] *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958); *Bella Lewitzky Dance Found.* v. *Frohnmayer*, 754 F. Supp. 774, 783 (C.D. Cal. 1991).

[44] *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964); *see also Cramp*, *supra*.

[45] *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 133 (1992); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988); *City of Houston* v. *Hill*, 482 U.S. 451, 468-469

prosecution grounded on vague standards constitutes a prior restraint.[46]

Contrary to the government's position in this case, *Denver* did not finally settle the vagueness question with respect to the CDA. The issue of the indecency standard's inherent vagueness has never been definitively resolved.[47] This Court's finding in *Denver* was focused on "a very particular context—congressional *permission* for cable operators to regulate programming that, but for a previous Act of Congress, would have had no path of access to cable channels free of an operator's control." 116 S. Ct. at 2386 (plurality opinion) (emphasis in original). The decision was predicated upon a "complex balance of interests," *id*. at 2387, that included the "First Amendment interests of cable operators and other [non-leased access] programmers," *id*. at 2386. Within the permissive framework of the very different law at issue in *Denver*, this Court assumed that cable operators

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n.18 (1987); *Kolender*, 461 U.S. at 358, 360; *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940).

[46] *Bantam Books*, 372 U.S. at 70; *Vance*, 445 U.S. at 316; *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 225-226 (1990) ("a scheme that places 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint'") (quoting *City of Lakewood*, 486 U.S. at 757).

[47] The discussion of vagueness in *Pacifica* was not endorsed by a majority of this Court. *Pacifica*, 438 U.S. at 743 (plurality opinion); *see id.* at 755-756 (Powell, J., concurring) ("The Court today reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion."). Subsequent decisions have simply relied on *Pacifica* and thus have done nothing to clarify the indecency standard or resolve the vagueness issue. *E.g.*, *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("*ACT I*"); *Carlin Communications, Inc.* v. *FCC*, 837 F.2d 546, 559 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988) ("*Carlin III*"); *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) ("*ACT II*"), *cert. denied*, 503 U.S. 913 (1992); *Information Providers' Coalition for Defense of First Amendment* v. *FCC*, 928 F.2d 866, 874-875 (9th Cir. 1991); *Alliance for Community Media*, 56 F.3d at 129; *Action for Children's Television* v. *FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) ("*ACT III*"), *cert. denied*, 116 S.Ct. 701 (1996).

would be prevented from applying an overly broad or vague standard because the law requires the screening of programs "only pursuant to a 'written and published policy.'" *Id.* at 2390 (plurality opinion) (citation omitted). No comparable constraint limits the CDA or the indecency concept.[48]

1. The Government and Supporting Amici Demonstrate the CDA's Vagueness.

The briefs filed by the government and supporting Amici are Exhibit A for the proposition that the indecency standard is unconstitutionally vague. Any person who might have been tempted to suggest that he or she understood the indecency concept when the CDA was passed would be at a total loss upon reviewing its defense before this Court. The five briefs filed with this Court in support of the CDA articulate at least five different views as to the meaning of indecency and the permissible scope of governmental authority for its regulation.

Whereas the Solicitor General takes the position that indecent speech may be regulated as if it were a "secondary effect," and the CDA's restrictions may be characterized as content-neutral "cyberzoning" regulations, Appellants' Br. at 36-37, the congressional amici claim that the standard for "online indecency" is far more speech protective than even the "harmful to minors" standard, Br. of Members of Congress ("Cong. Br.") at 8. The congressional brief asserts that the standard for online speech is "more permissive than broadcast indecency," and does not restrict anything one may display on one's jacket in public,[49] a public billboard,[50] at

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[48] In a February 1994 settlement agreement in an indecency case the FCC agreed to publish guidelines as to the meaning of the term "indecency" within 9 months. *Evergreen Media Corp.* v. *FCC*, Civil No. 92 C 5600 (N.D. Ill. Feb. 22, 1994). This clarification of the Commission's indecency standard has not been produced.

[49] *E.g.*, *Cohen* v. *California*, 403 U.S. 15 (1971) ("Fuck the Draft"); *cf. Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974); *Gooding* v. *Wilson*, 405 U.S. 518 (1972).

[50] *Cf. Erznoznik*, *supra* (films containing nudity).

school,[51] or on cable television,[52] *id*. at 6 & n.4, while Morality in Media advocates an "indecency for all" standard that would limit the level of discourse to that permitted in a school assembly,[53] Morality in Media Br. at 6-7, 13-16. The Family Life Project cites the George Carlin monologue made famous in *Pacifica* as the operational definition of indecency, a concept it maintains extends to any speech that does not conform "with accepted standards of morality." Fam. Life Proj. Br. at 27 (quoting *Pacifica*, 438 U.S. at 740). Enough is Enough equates "indecency" with "pornography" without elaborating on the legal standard, except to suggest that it is broad enough to criminalize "airbrushed sexual images of women." Enough is Enough Br. at 8 n.8, 11-12 n.16.

Nothing in these briefs remotely resembles a standard that an individual could use to ensure compliance with the law. Instead, law enforcement authorities and individuals are admonished to judge speech by employing a "host of variables" in which merit is not dispositive. *E.g.*, Cong. Br. at 9 n.10, 13; Appellants' Br. at 49-50. Congressional amici propose a new standard labeled "online indecency" and list at least eight variables to consider. Cong. Br. at 14. How this standard might actually be applied is anyone's guess.

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[51] *Papish* v. *Board of Curators*, 410 U.S. 667 (1973) (per curiam) (indecency sanction reversed for dissemination of campus newspaper, available to high school seniors, that depicted policemen raping Statue of Liberty and Goddess of Justice with caption "M----- F----- Acquitted").

[52] *Denver*, 116 S. Ct. at 2390 (non-obscene images of "oral sex, bestiality, and rape"); *Community Television, Inc.* v. *Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd sub nom. Jones* v. *Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem.*, 480 U.S. 926 (1987) (uncut R-rated movies); *cf.* Appellants' Br. at 43 (material "similar to the R-rating for movies" should be screened from minors).

[53] *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675 (1986) (penalizing student speech that included double entendre).

2. Experience with Indecency Enforcement Demonstrates the Standard's Vagueness and Overbreadth.

Apart from those cases that have commented on the generic language of the indecency test,[54] there is no body of case law interpreting the standard, since no broadcaster has "held out long enough" through the administrative process to have a particular enforcement order tested in court.[55] The CDA's supporters cannot even agree on the relevance of existing FCC indecency regulations to the current proceeding.[56] Nevertheless, the court below found that FCC administrative decisions at least "provide a kind of surrogate insight" into the scope of the standard. App. 119a.

Comparing the FCC's indecency orders to similar judicial decisions (in which more rigorous First Amendment tests apply) provides a benchmark by which to assess the government's claim that the indecency standard does not suppress speech "with serious redeeming value." Appellants' Br. at 50. For example, this Court found that the R-rated film *Carnal Knowledge* "could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way." *Jenkins* v. *Georgia*, 418 U.S. 153, 161 (1974). The film is about friends who are "preoccupied with their sex lives" and it includes scenes in which "sexual conduct including 'ultimate sex acts' is to be understood to be taking place" as well as "occasional scenes of nudity." *Id*. at 158, 161. This Court made clear, however, that "nudity alone is not enough to make material legally obscene under the *Miller* standards." *Id*. at 161.

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[54] *See supra* note 47.

[55] *Action for Children's Television* v. *FCC*, 59 F.3d 1249, 1254 (D.C. Cir. 1995) ("*ACT IV*"), *cert. dismissed*, 116 S. Ct. 773 (1996); *see also id*. at 1264 (Tatel, J., dissenting) ("of the thirty-six FCC indecency forfeiture orders issued since 1987, not one has been reviewed by a court").

[56] *Compare* Appellants' Br. at 50 (citing FCC cases) *with* Cong. Br. at 7 (the indecency restriction of the CDA "differs markedly from broadcasting law").

Pacifica, however, is an entirely different matter. In the FCC's only substantive ruling on a theatrical film, it concluded that the R-rated film *Private Lessons* was indecent.[57] As the Commission explained in a press statement, *Private Lessons* "included nudity and scenes depicting sexual matters which were dealt with in a pandering and titillating manner." It added that the 15-year-old protagonist's pursuit of sex, "together with the inclusion of explicit nudity, would have commanded the attention of children." Although the FCC tended to describe the subject matter of *Private Lessons* in more pejorative terms than did this Court in discussing *Carnal Knowledge*, an independent review of the two films found their respective depictions of sexual matters and nudity to be virtually identical.[58]

Although the movies might be distinguished based on their "quality," it is by no means certain how this concept might be applied as a matter of law. In any event, such questions appear to have made little difference to the FCC, judging by its investigation for indecency of the BBC-produced, Peabody Award-winning mini-series, *The Singing Detective*. The critically-acclaimed program was aired by various public television stations between 1988 and 1990, and a year-long FCC investigation ensued after the program appeared on a KQED-TV in San Francisco in 1990. The Commission's review did not consider the full seven hours of the program, but instead focused on several short scenes that included nudity and one scene in which a child witnessed a sexual encounter. The FCC never formally resolved the complaint, and simply let the matter fade away after putting the TV

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[57] *See* FCC News Release, "KZKC(TV), Kansas City, MO, Apparently Liable for $2,000 Fine for Indecent Broadcast" (June 23, 1988). The Commission stayed the proceeding shortly thereafter due to judicial review of its indecency policy, and no substantive decision ever issued. *See Kansas City Television, Ltd.*, 4 FCC Rcd. 7653 (1988); *see also* Appellants' Br. at 43 (a tagging system "similar to the R-rating for movies" could be used to identify online indecency).

[58] *See* Craig Hosoda, *The Bare Facts Video Guide* 647, 817 (1995). In *Jenkins*, this Court consulted film reviews in order to obtain more information about the film under review. 418 U.S. at 158-159.

station through the trouble of defending its actions. The episode demonstrates that, just as under the *Hicklin* rule, a successful prosecution is not needed in order to suppress speech.[59]

Despite this Court's repeated findings that nudity *per se* is not patently offensive, even as to minors,[60] it is clear that the FCC, Congress, and the Department of Justice believe otherwise. The FCC, for example, has asserted that "the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. § 1464."[61] Similarly, in the Telecommunications Act of 1996, Congress specifically added "nudity" to the list of proscribable "indecent" programming on public and leased access channels.[62] Although congressional amici now disclaim any intent to impose a similar interpretation under the CDA on the theory that "online

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[59] *See* Robert Corn-Revere, *New Age Comstockery*, 4 CommLaw Conspectus 173, 181-182 (1996); *see also Pacifica*, 438 U.S. at 741 n.16 (even if *Lady Chatterley's Lover*, when taken as a whole, is not obscene, "the utterance of such words or the depiction of such sexual activity on radio or TV would raise * * * public interest and section 1464 questions") (quoting *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2307 (1960)). *But cf. Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U.S. 684, 688-689 (1959) (invalidating, on First Amendment grounds, licensing restriction directed at film *Lady Chatterley's Lover* because it "portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of [the] citizenry"). The FCC has been reluctant to get into questions of literary merit, and, despite the existence of supporting judicial precedent, declined to issue a declaratory ruling that a reading from *Ulysses* is not indecent. *See William J. Byrnes, Esq.*, 63 Rad. Reg. 2d (P&F) 216 (Mass Media Bureau 1987).

[60] *Erznoznik*, 422 U.S. at 213; *Jenkins*, 418 U.S. at 161; *Kois* v. *Wisconsin*, 408 U.S. 229 (1972); *Manuel Enters., Inc.* v. *Day*, 370 U.S. 478 (1962).

[61] *En Banc Programming Inquiry*, 44 F.C.C. at 2307; *Pacifica*, 438 U.S. at 741 n.16.

[62] *See* Telecommunications Act of 1996, § 506, 47 U.S.C. § 531; *see also* 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms) (listing as examples of "indecency" scenes of "men and women stripping completely nude").

indecency" is "more permissive than broadcast indecency," Cong. Br. at 6, the Department of Justice and the Solicitor General are operating under a quite different assumption. *See supra* notes 9, 56; *see also ACLU* v. *Reno*, 24 Media L. Rep. (BNA) 1797 (E.D. Pa. May 15, 1996) clarifying TRO to block enforcement of CDA against "centerfold" type images).

Perhaps most threatening is the application of the indecency standard to news programming. The FCC has expressly declined to hold that "if a work has merit it is *per se* not indecent," and that material may be found indecent for broadcast even where the information is presented "in the news" and is presented "in a serious, newsworthy manner."[63] The government suggests nevertheless that material with "serious redeeming value" is not affected by this approach, and that programming with news value "almost always falls outside the CDA's coverage." Appellants' Br. at 50. To support this claim, the government cites an FCC dismissal of an indecency complaint against an NPR newscast in which a "reputed Mafia figure used an expletive repeatedly in conversation." Appellants' Br. at 50 (citing *Letter to Mr. Peter Branton*, 6 FCC Rcd. 610 (1991), *petition for rev. dismissed*, 993 F.2d 906 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1610 (1994)). While there is no question about the correctness of the decision in that case, the example raises more questions than it answers about how the government might apply the "host of variables" that separate innocence from criminality.

As a guideline to help determine "patent offensiveness," the government suggests that speakers should consider context (the kind of program on which speech appears) and degree (not "an occasional expletive"). Appellants' Br. at 49 (quoting *Denver*, 116 S. Ct. at 2390 (plurality opinion)). However, the "occasional expletive" rule did not prevent the FCC from imposing a fine on a radio station whose employees read a portion of a *Playboy* magazine interview on the air in which Jessica Hahn described being raped by Reverend Jim Bakker. *Letter to Merrill Hansen*, *supra*. The Commission agreed that "the newsworthy nature of broadcast mate-

[63] *Letter to Merrill Hansen*, 6 FCC Rcd. 3689, 3689 (1990) (citation omitted); *see also KLOL(FM)*, 8 FCC Rcd. 3228 (1993); *WVIC-FM*, 6 FCC Rcd. 7484 (1991).

rial" was a "relevant contextual consideration[]," but it nevertheless concluded, without discussion, that the presentation was "pandering." *Id.*[64] On the other hand, the Commission exonerated the NPR broadcast in *Branton* despite the fact that, as former FCC Commissioner Ervin S. Duggan wrote in dissent, it transmitted "in the course of a few seconds ten repetitions of the dirtiest of 'the seven dirty words.'"[65] The Commissioner concluded that "such deliberate and repeated use, in my judgment, however noble the intent of the broadcaster, seems to me to fit the definition of pandering: catering to low tastes." *Id.*

Given the government's ability to ignore or manipulate its own "factors" to determine patent offensiveness, these cases demonstrate that "indecency" is the very paradigm of a vague and arbitrary test. Commissioner Duggan, for example, suggested that his fellow Commissioners may have been persuaded not to issue a sanction in *Branton* "because the broadcast in question was by National Public Radio." *Id.*[66] Such an ability to assist favored speakers and penalize disfavored ones is the principal vice for which the vagueness doctrine was created, *Kolender*, 461 U.S. at 360, and it is particularly threatening to publishers such as Playboy, which, the Meese Commission acknowledged, has been the target of government "mistakes," *see supra* p. 4.

The lack of any principled basis for applying the "host of variables" subsumed within the concept of indecency also means that there is no way to predict the outcome of the next case, except to conclude that "merit" is not dispositive. If

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[64] Judge Patricia Wald has questioned the FCC's characterization of this case. *ACT III*, 58 F.3d at 685 (Wald, J., dissenting). She concluded that "this one case exemplifies so well * * * that enforcement of [the FCC's] indecency regulation involves both government- and self-censorship of much material * * * *"

[65] *Branton*, 6 FCC Rcd. at 611 (Duggan, Comm'r, dissenting). He described the word in question as "the one expletive that has traditionally been considered the most objectionable, the most forbidden, and the most patently offensive to civilized and cultivated people: the famous F-word." *Id.*

[66] It is conceivable that similar considerations persuaded the FCC to "misplace" the complaint involving *The Singing Detective*.

Commissioner Duggan had been a federal judge charged with enforcing the CDA, it is quite likely that NPR would have been found criminally liable for transmitting an indecent newscast. It is sobering to realize in this regard, that in *Gillett Communications* v. *Becker*, 807 F. Supp. 757 (N.D. Ga. 1992), *appeal dismissed mem.*, 5 F.3d 1500 (11th Cir. 1993), a federal district court held that the videotape *Abortion in America: The Real Story*, transmitted as part of a political advertisement by a bona fide candidate for public office, was indecent. As the late Justice William O. Douglas warned, "[h]ighly subjective inquiries such as this do not lend themselves to a workable or predictable rule of law, nor should they be the basis of fines or imprisonment." *Kois*, 408 U.S. at 232 (Douglas, J., concurring). Failure to heed this warning provides a vehicle "for the suppression of any unpopular tract." *Id*. at 233.

All of our experience with the indecency standard belies the government's claim that the CDA does not threaten speech with serious merit. It cannot be reconciled with the demands of the First Amendment. Accordingly, this Court should uphold the decision below that the indecency standard is constitutionally infirm.

CONCLUSION

For the foregoing reasons, and for those set forth in the appellees' briefs, the judgment below should be affirmed.

Respectfully submitted,

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