1995 WL 763733 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, et ano., Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, et ano., Respondents.
ALLIANCE FOR COMMUNITY MEDIA, et al., Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, et ano., Respondents.

Nos. 95-124, 95-227.
October Term, 1995.
December 27, 1995.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, FREEDOM TO READ FOUNDATION, INTERACTIVE DIGITAL SOFTWARE ASSOCIATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, MAGAZINE PUBLISHERS OF AMERICA, INC., MOTION PICTURE ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF COLLEGE STORES, INC., NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., PUBLISHERS MARKETING ASSOCIATION, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., AND VIDEO SOFTWARE DEALERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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West Headnotes (3)

Constitutional Law Cable and Satellite Television Systems; Community Antenna Systems

Constitutional Law Cable Television; Community Antenna and Satellite Systems

Telecommunications Validity

Telecommunications Indecent, Obscene or Violent Programs

Do provisions of Cable Television Consumer Protection and Competition Act, which allows cable system operators to prohibit patently offensive or indecent programming transmitted over leased access channels, and regulations implementing provision, constitute “state action” for purposes of First Amendment? U.S.C.A. Const.Amend. 1; Communications Act of 1934, § 612(h), as amended, 42 U.S.C.A. § 532(h).

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Constitutional Law Cable Television; Community Antenna and Satellite Systems

Telecommunications Validity

Telecommunications Indecent, Obscene or Violent Programs

Should provision of Cable Television Consumer Protection and Competition Act, which allows cable system operators to prohibit patently offensive or indecent programming transmitted over leased access channels, and regulations implementing that provision be subject to constitutional scrutiny if legislative and regulatory provision authorizes or directs standard and substance of private actions impacting constitutionally protected rights? U.S.C.A. Const.Amend. 1; Communications Act of 1934, § 612(h), as amended, 47 U.S.C.A. § 552(h).

Constitutional Law Particular Issues and Applications in General

Should content-based restrictions on, or impediments to access to, constitutionally protected materials be validated on basis that material will ultimately be available? U.S.C.A. Const.Amend. 1.

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*1 STATEMENT

The American Booksellers Foundation for Free Expression, Council for Periodical Distributors Associations, Freedom to Read Foundation, Interactive Digital Software Association, International Periodical Distributors Association, Magazine Publishers of America, Inc., Motion Picture Association of America, National Association of College Stores, Inc., National Association of Recording Merchandisers, Periodical and Book Association of America, Inc., Publishers Marketing Association, Recording Industry Association of America, Inc., and Video Software Dealers Association submit this joint amicus brief urging reversal of the decision below. [1] This brief is submitted upon the written consents of counsel to both petitioners and respondents, which are submitted herewith.

INTEREST OF THE AMICI

Amici's members (hereinafter "amici") publish, produce, distribute and sell books, magazines, videos, sound recordings, motion pictures, interactive games and printed materials of all types, including those that are scholarly, literary, artistic, scientific and entertaining. Libraries and librarians represented by the Freedom to Read Foundation provide such materials to readers and viewers. Amici, mainstream providers of speech in a variety of forums and media, are concerned by the holding of the Court below. In a world with rapidly developing and integrating media technology, governmentally imposed standards of speech in one medium automatically impact every other medium. Amici submit this brief to highlight the very real danger of allowing the government to enact a legislative scheme targeting currently unpopular speech and to avoid constitutional scrutiny simply by cloaking the scheme in "permissive" language. When the government creates a detailed scheme to restrict ***2** disfavored but constitutionally-protected speech, it violates the rights not only of the restricted creators and distributors, but also of mainstream consumers who depend upon a wide variety of materials and who would rather discriminate in their consumption themselves than allow the government to dictate those choices. [2]

The regulatory scheme at issue in this proceeding could potentially be applied to ban or severely restrict access to a variety of educational programming, such as programs related to sex education, AIDS education or abortion, or programs devoted to reading from the great books, based on the content of those materials. The regulations compel a cable operator to ban or severely restrict the viewing of any program "that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 47 U.S.C. § 532(h)(2). Almost any description of a sexually oriented nature could, therefore, be banned or segregated under this definition. Programming that merely serves to educate the public on matters connected to sexuality might be banned, not because it is obscene, but because a cable operator is fearful that it might be offensive to some of its customers. For example, a cable operator might ban or segregate

all programming that "describes" the availability of birth control or abortion to young people. In the end, the restrictions on speech imposed by the regulatory scheme will eliminate or chill important speech on matters of public concern.

In the past amici have brought numerous actions in both federal and state courts, to assert the unconstitutionality of invalid laws. See, e.g., Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383 (1988); ***3** American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd 475 U.S. 1001 (1986); Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992); Village Books v. Bellingham, C88-1470 (W.D. Wash. Feb. 9, 1989); American Booksellers Ass'n, Inc. v. McAuliffe, 533 F. Supp. 50 (N.D. Ga. 1981); Davis-Kidd Booksellers Inc. v. McWherter, 866 S.W.2d 520 (Tenn. 1993); Leech v. American Booksellers Ass'n, Inc., 582 S.W.2d 738 (Tenn. 1979).

Amici believe that the definition of "state action" applied by the court below is incorrect and, if sustained, would permit legislatures to enact cleverly drafted statutes which could erode the scope of presently accepted First Amendment rights. Similarly, the assumption by the majority below that governmentally-imposed impediments to access to constitutionally-protected materials do not run afoul of the First Amendment as long as such materials are eventually available to persons desiring them also is incorrect and also endangers First Amendment rights.

The resolution of these issues will determine the scope of legislation affecting the First Amendment rights of amici in the future.

SUMMARY OF ARGUMENT

The majority of the District of Columbia Court of Appeals, sitting in banc, held that the challenged provisions of the Cable Television Consumer Protection and Competition Act, a federal statute, did not, for the most part, constitute "state action" and, to the extent that they did constitute state action, did not violate the First Amendment because the provisions were not an unconstitutional restriction on First Amendment rights. In reaching its decision, the Court of Appeals misapplied the relevant precedents of this Court and, in so doing, jeopardized the First Amendment rights of the amici. ***4** By holding that the facially permissive nature of the challenged provisions removes them from the category of state action, the Court below avoided the task of analyzing whether the provisions represented a prohibited infringement of First Amendment rights. Such a cursory dismissal of constitutional scrutiny would allow a state or the federal government to pass legislation affecting almost any area of First Amendment rights but to avoid judicial review by structuring it to appear optional. The legislature must not be permitted to authorize or direct private action affecting First Amendment rights in such a manner, and thereby bring in through the back door what it is not permitted to bring in through the front. [3]

The federal statutes and regulations challenged in this Court obviously constitute state action since they are statutes and regulations passed by and enforced by the United States government. The inquiry does not end because petitioners passed the state action threshold. In this case, the actions that would be taken by the cable operators restricting access to constitutionally-protected materials under the challenged statute are subject to constitutional scrutiny since they are causally related to the challenged state action, having been authorized or directed by it. The statute targets and regulates a special category of speech; therefore, strict scrutiny must be applied. Finally, since content-based restrictions on, or impediments to, access to constitutionally protected materials cannot be validated ***5** on the basis that the material will be ultimately available, the decision of the court below must be reversed. [4]

ARGUMENT

I. THE FEDERAL STATUTE AND REGULATIONS CHALLENGED IN THIS ACTION OBVIOUSLY CONSTITUTE STATE ACTION.

Since the First Amendment addresses only governmentally created restrictions, petitioners' success in this action depends upon a threshold determination that the above provisions constitute state action; only then need the Court subject those provisions to constitutional scrutiny. See, e.g., Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982).

Petitioners in this case challenge as violative of the First Amendment a governmental scheme under the Cable Television Consumer Protection and Competition Act ("Cable Television Act"), Pub.L. No. 102-385, 106 Stat. 1460, 1486 (to be codified at 47 U.S.C. §§ 531, 532(h), 532(j) and 558), and the regulations issued thereunder, 47 C.F.R. §§ 76.701, 76.702. The statutory and regulatory scheme as to leased access channels includes two elements of content-based restriction in an "either-or" scenario:
1. Elimination of all descriptions or depictions of sexually related material deemed patently offensive by the cable operator; or

2. Segregation of such material to one or more designated "indecent" channels after 30 days prior written request by the proposed viewer.

***6** There is no alternative of non-action or free distribution of constitutionally-protected materials. A cable operator must either ban or block the material, despite the fact that it is by definition constitutionally-protected.

The section 10 provisions and accompanying FCC regulations are a blatant government attempt to chill, if not eliminate, a constitutionally-protected category of speech. The government dictates a set of options detrimental to a single category of protected speech, defines the contours of the targeted speech, requires certification of that speech by programmers and then regulates disputes arising from that certification process.[5] Moreover, the cable operator must carry such programs if they are not banned or segregated as patently offensive descriptions of sexuality. The government thus compels the cable operator to air such programs or ban them based on government-mandated restrictions. The airing of programs on cable is thus directly regulated and mandated by the government.

This case is a direct challenge of a Congressional statute and its implementing regulations themselves, rather than of actions taken by a private party and then attributed to the State.[6] Thus it stands in marked contrast to the precedents upon which this Court's state action doctrine has been built. In their attack on section 10 of the Cable Television Act, petitioners have not challenged a cable operator's decision to ban "indecent" programming under one of section 10's provisions; rather they have challenged the action of Congress in passing those provisions, and the actions of the FCC in implementing them. As Professor Tribe has aptly remarked, "[i]f litigants challenge ***7** a federal or state statute ... in a case where the validity of the statute is necessarily implicated, state action is obvious, and no formal inquiry into the matter is needed." Laurence H. Tribe, American Constitutional Law § 18-1 at 1688 (2d ed. 1988).[7] Cf. The First Amendment to the U.S. Constitution ("Congress shall make no law ....") (emphasis added).

The majority below missed this crucial distinction when it preliminarily queried whether the actions of cable operators under section 10 "may be attributed to the government."[8] The majority was thus able to rely, in support of its position, on an inapposite line of cases in which this Court denied governmental constitutional responsibility for decisions made by private actors. In Blum v. Yaretsky, for example,[9] a group of Medicaid patients who had been discharged or transferred from their nursing homes challenged decisions by the nursing homes to discharge or transfer them without notice or the opportunity for a hearing. They brought the action against state officials responsible for administering the State Medicaid programs, arguing state action on the grounds that the State had "affirmatively command[ed]" the summary discharge or transfer of Medicaid patients who were thought to be inappropriately placed in their nursing facilities.[10] In finding that there had been no state action, the Court focused on the fact that the nursing home patients had not challenged "particular state regulations or procedures,"[11] highlighting both that there was no direct challenge of regulations themselves and that the patients could ***8** point to no regulation which directed the basis of the doctors' decisions to transfer.

Similarly, in Jackson v. Metropolitan Edison Co., [12] and in Rendell-Baker v. Kohn, [13] both cited by the majority in support of its finding that sections 10(a) and 10(c) do not constitute state action, [14] the parties bringing suit did not challenge State statutes or regulations, but rather private actions which were not related to any relevant regulations.

In Jackson v. Metropolitan Edison Co., the Court found no state action when a customer brought suit against a privately owned utility company for terminating her electrical services. The Court there determined that the procedure for termination of electrical services was not a practice addressed by state regulation, but was merely approved by the state utility commission as part of its regulatory duties. 419 U.S. at 357.

In Rendell-Baker v. Kohn, the Court found no state action where a group of teachers sued the school for violation of their constitutional rights in connection with their discharges, reasoning that "the decisions to discharge the petitioners were not compelled or even influenced by any state regulation." 457 U.S. at 841. There again, the teachers did not challenge any specific state regulations, and, indeed, the Court noted that the state showed relatively little interest in regulating personnel decisions. Ibid.

In all of those cases, to the extent that the Court found no state action, it did so on the basis of avoiding "imposing on the ***9** State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." [15] There is no occasion for such an inquiry when, as here, Congressional action is at stake. [16]

II. IF THE LEGISLATIVE AND REGULATORY PROVISION AUTHORIZES OR DIRECTS THE STANDARD AND SUBSTANCE OF PRIVATE ACTIONS IMPACTING CONSTITUTIONALLY PROTECTED RIGHTS, IT IS NECESSARILY SUBJECT TO CONSTITUTIONAL SCRUTINY.

Having determined that, by challenging the statute and regulations themselves, petitioners have passed the state action threshold does not end the inquiry, however. In order to invoke constitutional scrutiny, the private party's actions which restrictconstitutionally-protected materials must be authorized or directed by the challenged state action. Had the utility customer in Jackson challenged a statute regulating the utility, or had the teachers in Rendell-Baker challenged statutes regulating their school, even though the statutes would meet the test of constituting "state action," the parties were not able to point to specific ***10** regulations having a causal relationship to the decisions to shut off the electricity or to discharge the teachers. [17]

Under this standard, even the relevant Medicaid provisions in Blum are not causally connected to the doctors' decisions to transfer or discharge patients. The provisions in question did require doctors to assess the medical needs of each Medicaid recipient and to place the patient in the appropriate facility, with a resulting adjustment of Medicaid reimbursement. However, as the Court argued in reaching its decision, the decisions of the doctors depended upon independent medical judgments "made by private parties according to professional standards that are not established by the State." 457 U.S. at 1008.

***11** In contrast, sections 10(a), 10(b) and 10(c) of the Cable Television Act define a specific procedure for a specific category of speech. The provisions mandate that indecent speech on leased access cable television be either banned or segregated and blocked, with access curtailed for up to 30 days, and authorize the banning of such speech, and only such speech, on public access cable television. The standard for judging whether the speech qualifies as indecent is established by statute and FCC regulations. The statutory scheme at issue here directly and substantively authorizes or directs the decisions of cable operators in determining their treatment of indecent speech. [18]

The majority opinion below suggests however that there is no First Amendment issue since 10(a) and 10(c) are not mandatory. This fails to see the forest for the trees. A hypothetical may be helpful. Let us assume that Congress passes a law containing a provision which authorizes bookstores to ban all books critical of the government, and the provision contains a definition of

that category of books. If the bookstore owner chooses not to ban the books, another provision requires the bookstore owner to place them in a special room presided over by a guard to whom a special identification card must be presented upon entrance. It takes thirty days to obtain the card, and the statute provides that bookstores cannot release the names of the cardholders.

Such a statute would clearly be unconstitutional. However, if one adopts the majority's analysis, upon ***12** constitutional challenge of the statute itself, the majority below would isolate the first provision, characterizing it as permissive in nature, would find no state action, and thereby avoid constitutional scrutiny. The majority would then argue that as long as a reader could ultimately buy the book and the seller ultimately sell it under the second provision, there is no infringement upon the First Amendment rights of either seller or buyer. [19] Under the majority's analysis, similarly "permissive" legislation allowing the banning of any constitutionally protected speech in any medium -- broadcasting, books, movies, the Internet -- could be passed with impunity and avoid analysis for constitutional infirmities.

The analysis which we believe appropriate and consonant with this Court's precedents would reach a contrary result. The challenge of the statute itself would satisfy the state action requirement for both provisions. Next, the legislation would be analyzed for its impact on the decisions of the bookstore owner. The provisions, taken together, would reveal a statutory scheme which requires a specific procedure (banning, or segregating and blocking) to be applied to a specific category of books (those critical of the government), with the government providing the standard definition for that categorization. The hypothetical legislation would be subjected to strict scrutiny; the challenged provisions of the Cable Television Act are similarly subject to strict scrutiny.

***13 III. CONTENT-BASED RESTRICTIONS ON, OR IMPEDIMENTS TO ACCESS TO, CONSTITUTIONALLY-PROTECTED MATERIALS CANNOT BE VALIDATED ON THE BASIS THAT THE MATERIAL WILL BE ULTIMATELY AVAILABLE.**

Having met the two-pronged test described above, the challenged statute and regulations, which "suppress, disadvantage or impose differential burdens upon speech because of its content," must be subject to strict scrutiny. Turner Broadcasting Sys., Inc. v. F.C.C., 114 S. Ct. 2445, 2459 (1994).

The application of strict scrutiny to the challenged statute and regulations involves numerous issues. One is of particular concern to amici and will be discussed here.

Under strict scrutiny, the government may regulate the content of constitutionally protected speech only if 1) the regulation promotes a compelling interest and 2) the government chooses the least restrictive means to further the articulated interest. Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126 (1989).

In order to satisfy the second prong, the Court must focus on the access of the receiver to the protected speech. The least restrictive means test is consistent with a long line of cases in which the Supreme Court has zealously defended the recipient's "right to receive information and ideas." [20]

Clearly, the banning of constitutionally-protected speech altogether under sections 10(a) and 10(c), if those provisions stood alone, would fail the least restrictive means test. The Court below was able to avoid that conclusion by finding no state action for those two provisions, but did engage in such analysis solely as regarded section 10(b).

***14** However, both 10(a) and 10(b) address treatment of "indecent" programming on leased access channels and must therefore be viewed together. The statutory scheme challenged in this action includes two elements of content-based restriction in an "either-or" scenario:
1. Elimination of all descriptions or depictions of sexually related material deemed patently offensive by the cable operator; or

2. Segregation of such material to one or more designated “indecent” channels after 30 days prior written request by the proposed viewer.

The analysis of the majority in the Court of Appeals finds these alternatives constitutional only by ignoring a long-standing precedent of this Court which prohibits the imposition of impediments to speech with the rationale that the speech is available ultimately. [21]

The majority's position that section 10(b) provides the least restrictive means of regulating “indecent” programming is based upon a factual finding that the current voluntary blocking system is ineffectual. That finding, however, ignores the onerous nature of the challenged scheme's 30-day wait for the segregated programming. Requiring up to a 30 days wait to obtain any programming labelled as “indecent” creates a substantial impediment that cannot be characterized as “least restrictive.” The numerous viewers who wish selectively to view the category of programming regulated by the scheme at issue here will normally not have more than a week or two of notice as to upcoming programming. The concept that a thirty-day wait following a required affirmative request by a reader, viewer or listener is constitutionally acceptable would, if applied to books, periodicals, videos and recording, preclude persons ***15** from seeing many of the educational and cultural offerings associated with the amici which would fall under the government's broad “indecency” definition.

The majority stated that

> the difference between the two systems amounts to this: under the 1984 Act, their material does not get into the home if the subscriber locked it out; under the 1992 Act, their material does not get into the home unless the subscriber invites it in.

56 F.3d at 126. The majority then analogizes the blocking and segregation of the current statutory scheme with the blocking and segregation associated with pay-per-view programs. Thus, the majority states that “there is little difference between section 10's treatment of indecent leased access programming and the 1992 Act's handling pay-per-view programming.” Id. The majority's opinion ignores a critical distinction between the current regulatory scheme and both the 1984 Act and pay-per-view programming: the 30-day waiting period for access to programming creates an unreasonable and serious impediment to access of programming. Pay-per-view programming may be accessed immediately with a single phone call. The lockbox feature of the 1984 Act permitted viewers to directly and immediately control their programming availability. By contrast, the current regulatory scheme imposes severe constraints on the availability of constitutionally-protected programming. The Court has held that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” Elrod v. Burns, 427 U.S. 347, 373 (1976). Where alternatives such as lockboxes are available, it is apparent that a scheme that requires an advance 30-day request for programming is not the least restrictive alternative.

The majority's offhand minimization of the 30-day waiting period ignores the Court's prior rejection, in cases ***16** involving zoning restrictions and delays in the receipt of mail, of the same argument that the restriction or delay is permissible since persons ultimately have access to the protected speech. [22] In general terms, the majority is arguing that ultimate access to “indecent” programming is sufficient and does not impose a meaningful restriction. As this Court found in Lamont v. Postmaster General of United States, 381 U.S. 301 (1965), “the ‘uninhibited, robust and wide-open’ debate and discussion that are contemplated by the First Amendment” is inconsistent with a requirement that unpopular speech can be delayed and subject to a requirement that the prospective recipient must affirmatively request it. (381 U.S. at 307) [23]

The unconstitutional inhibitions on First Amendment rights caused by such a provision are not caused solely by the fact that such a requirement is addressed to a content-specific class of speech tainted by being so designated by the government. Amici know well from their own businesses the importance of browsing and impulse purchasing of core First Amendment items such as books, magazines, recordings, videos and motion pictures. [24] Further, amici also know that state and local governments,

frustrated in their efforts to prohibit the distribution of unpopular constitutionally-protected materials, may seek to reach the same goal by imposing one or more impediments ***17** between the provider and the consumer of First Amendment protected materials. The Court should guard against such attempts.

CONCLUSION

One of the glories of the First Amendment is that it permits a broad and diverse distribution of expressive material, whether popular or not. The broad range of media, the multiplicity of distribution outlets--large and small, expensive or not, local or national--and the diversity of the forms which the expression take create this panoply. The application of the principles of what is state action and what level of regulation of First Amendment material is permissible as decided by this Court in this case will not be limited to the newer technologies and media that are before the Court in this case. They will apply to the more traditional forms and media of expression as well.

Amici urge the Court to reaffirm its precedents and reverse the decision of the court below, finding that the federal statute and regulations at issue in this case constitute state action, and that the scheme created by the statute and regulations violates the First Amendment to the U.S. Constitution.

APPENDIX A: THE AMICI

The American Booksellers Foundation for Free Expression (ABFFE) was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Council for Periodical Distributors Associations is the national trade association for approximately 330 independent local wholesale distributors who distribute over 90% of all magazines in every state of the United States, as well as comic books, paperback books and newspapers.

The Freedom To Read Foundation (FTR) is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The Interactive Digital Software Association is a trade association whose members represent the leading publishers of interactive entertainment software.

The International Periodical Distributors Association (IPDA) is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Magazine Publishers of America (MPA) is a trade association for the consumer magazine industry. MPA was organized in 1919 and has a membership of approximately 200 publishers, representing almost 800 general interest consumer magazines, ranging from journals of literature to special interest publications to multi-million circulation publications.

The Motion Picture Association of America is a not-for-profit corporation founded in 1922 for the purpose of promoting the interest of the motion picture industry in the United States and helping the industry maintain high standards and public goodwill.

The National Association of College Stores, Inc. is a trade association comprised of approximately 3,000 college stores located throughout the United States.

The National Association of Recording Merchandisers is an international trade association whose more than 1,000 members represent recorded entertainment retailing, wholesaling, distributing and manufacturing.

The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who rely on newsstand sales and who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada.

The Publishers Marketing Association ("PMA") is a nonprofit trade association representing more than 2,000 publishers across the United States and Canada. The PMA represents predominantly nonfiction publishers and assists members in their marketing efforts to the trade.

The Recording Industry Association of America, Inc. ("RIAA") is a trade association whose member companies produce, manufacture and distribute over 90% of the sound recordings sold in the United States. The RIAA is committed to protecting the free expression rights of its member companies.

The Video Software Dealers Association (VSDA) is the trade association for the home video entertainment industry. It represents more than 3,500 member-companies in North America and 22 countries worldwide, including small, independently owned video retailers as well as large video chains. It also includes the home video divisions of all the major and independent motion picture studios, and the other associated businesses that comprise the home video industry.

Footnotes

1 A description of the amici is attached as Appendix A.

2 The Court has assiduously protected the "right to receive information and ideas." See, e.g., Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976).

3 Indeed, passage of section 10 is a prime example of tailoring of statutory language to circumvent constitutional problems. (Senator Helms: "Under my amendment, cable operators have the right to reject such filthy programming .... [T]here is no constitutional problem with this amendment because this is not governmental action. It is an action taken by a private party." 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992)

4 The amici are in agreement with the legal and policy arguments set forth by the Association of American Publishers in its amicus brief and write separately here to highlight additional legal and policy arguments of special concern to amici.

5 Pub. L. No. 102-385, § 10, 106 Stat. 1460, 1486 (codified at 47 U.S.C. §§ 531, 532(h), 532(j) and 558; 47 C.F.R. §§ 76.701, 76.702.

6 Amici do not challenge, and in fact strongly support, the right of creators, distributors and retailers of First Amendment-protected materials to select what they create, distribute or sell, free of governmental restrictions.

7 In the dissent below, Judge Wald also protested that "it strikes me as a wholly untenable proposition that a statute duly enacted by the Congress of the United States could be anything other than state action." Alliance for Community Media v. F.C.C., 56 F.3d 105, 132, fn. 4 (D.C. Cir. 1995) (Wald, J., dissenting).

8 56 F.3d at 113.

9 457 U.S. 991 (1982).

10 457 U.S. at 1005.

11 457 U.S. at 1003.

12 419 U.S. 345 (1974).

13 457 U.S. 830 (1982).

14 Since the majority reached petitioners' First Amendment arguments regarding section 10(b), apparently they found state action in so far as that provision standing alone was concerned.

15 Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982).

16 Even if the Court were to analyze the state action issue as though this action were a challenge to the actions of the cable operators themselves (which it is not), there would be ample ground for finding state action according to the above precedents. If a cable operator were to ban or block programming as a result of section 10, it would be basing its decision directly on a statute which

targets a specific category of speech for special unfavorable treatment and for which the standard for that decision, the definition of indecency, is established by the state.

In Blum, the Court based its decision on the fact that the regulations at issue set no standard for its discharge or transfer decisions ("those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." Blum, 457 U.S. at 1008. In Jackson and Rendell-Baker, the Court argued that the government could not be implicated where there was no state regulation specifically addressing the actions taken by the private parties. Jackson, 419 U.S. at 357, Rendell-Baker, 457 U.S. at 841.

In passing section 10 of the Cable Television Act, the government, by providing for special and unfavorable treatment for programming that describes or depicts sexually oriented material and establishing the definition of such material, has implicated itself in that private action. Under this analysis, any private decision authorized by a statute which targets a specific category of speech for specific restrictive treatment should constitute state action and, as it is content-based, should be subjected to strict scrutiny.

17 The same reasoning explains the decision in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), where a black guest of a patron of a private club who was refused service sued for injunctive relief, citing state liquor board licensing provisions as the basis for his state action theory. Had the guest challenged the licensing provisions directly, he still would have failed the second test, as the plaintiff could not point to any provision having a causal relationship to the club's decision to deny him service.

18 We have analyzed 10(a) and 10(b) together as a compulsory provision regarding indecent programming on leased access channels. The provisions' mandatory nature make it an easier case. However, the courts should subject any targeting of a specific category of speech for unfavorable treatment to strict scrutiny. While some permissive statutes may then pass constitutional scrutiny by the very fact that they are permissive and not compulsory in nature, the historical background of cable television regulation and the other parts of the present regulatory scheme dictate otherwise as to § 10(c).

19 See point III below.

20 See fn. 2, supra.

21 The clearest example of the majority's "ultimate access" approach is its approach to 10(b)'s 30-day waiting requirement.

22 See, e.g., Schneider v. State, 308 U.S. 147 (1939); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Lamont v. Postmaster General of United States, 381 U.S. 301 (1965).

23 This would not be validated as a time, place and manner restriction since, as such, it would have to be "justified without reference to the content of the regulated speech." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

24 See, e.g., American Booksellers Ass'n v. Webb, 643 F. Supp. 1546, 1549 (N.D. Va. 1986); American Booksellers Ass'n v. Strobel, 617 F. Supp. 699, 702 (D.C. Va. 1985).

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