

## IV. CONCLUSION

In *ACT I*, we held that the FCC had not adequately justified its administrative decision to impose a 6 a.m.-to-midnight ban on the broadcasting of "indecent" material. 852 F.2d 1332. Congress subsequently ordered a 24-hour ban on "indecent" material. In *ACT II*, we held the 24-hour ban unconstitutional and remanded the case to the FCC with the same directions as in *ACT I*, to redetermine the proper safe harbor after a full and fair hearing. *ACT II*, 932 F.2d at 1510. Once again Congress intervened, now enacting into law the original FCC-imposed 6 a.m.-to-midnight ban, in order (i) to protect the privacy of every American's home, (ii) to help parents supervise their children's listening and viewing, and (iii) independently to shield minors from "indecent" material. The government has not demonstrated to this court the compelling nature of any interest in suppressing constitutionally protected material in order to protect an abstract privacy of the home at the expense of First Amendment rights of its inhabitants. We do recognize, however, the compelling nature of the government's interest in helping parents supervise their children and in independently protecting the well-being of its youth. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince*, 321 U.S. at 168. Nevertheless, restrictions on First Amendment rights, even when imposed in the best interest of children, must still be narrowly tailored and no more burdensome than necessary to advance the protective goal. The boundaries of the 6 a.m.-to-midnight ban were arrived at solely on the basis of a judgment that fewer children are in the broadcast audience between the hours of midnight and 6 a.m. than at other times. That might even more assuredly have been said for a 1:00 a.m.-to-5:00 a.m. or 3:00 a.m.-to-4:00 a.m. safe harbor; no such one-dimensional analysis takes account of the First Amendment interests of older minors and adult viewers in receiving constitutionally protected material. Our system of government demands more precision when rights protected by the First Amendment are curtailed.

---

before midnight, any such special treatment in the future must be adequately explained.

We conclude that the government has not tailored its 6 a.m.-to-midnight ban on constitutionally protected speech narrowly so as to advance the asserted interests without unnecessary abridgment of First Amendment rights. Accordingly we vacate the FCC's 1993 Order, and hold section 16(a) of the Public Telecommunications Act of 1992 unconstitutional.

Once again the curtain falls and the FCC finds itself roughly in the same position that it occupied at the close of *ACT I*. The FCC's 1987 Reconsideration Order was neither vacated by this court in *ACT I*, nor retracted by the Commission. Thus, the Commission's declared intention to broaden enforcement of § 1464 beyond situations like the mid-day "Filthy Words" scenario approved by the Supreme Court in *Pacifica* still remains. See *Reconsideration Order*, 3 F.C.C.R. 930. We held in *ACT I* that this broader approach to enforcement of § 1464 required the Commission to "[d]etermin[e], after a full and fair hearing, . . . the times at which indecent material may be broadcast." *ACT I*, 852 F.2d at 1344. Relying on repeated congressional intervention, the subsequent record compiled by the FCC in the 1989-90 and 1992-93 rulemaking proceedings did not seek to address our concerns raised in *ACT I*. As in *ACT II*, however, we find the intervening statute unconstitutional. Therefore, should the Commission maintain its intention to broaden the enforcement of § 1464, we must, once again, direct the Commission to take its administrative task to "redetermin[e], after a full and fair hearing, . . . the times at which indecent material may be broadcast,' [and] to carefully review and address the specific concerns we raised in *ACT I*: among them, the appropriate definitions of 'children' and 'reasonable risk' [of exposure of children to indecent material] for channeling purposes, the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population, and the scope of the government's interest in regulating indecent broadcasts." *ACT II*, 932 F.2d at 1510 (citing *ACT I*, 852 F.2d at 1341-44).

*It is so ordered.*

EDWARDS, *Circuit Judge*, concurring specially in the reversal: I concur in the judgment to reverse, and I agree with much of what is said in the majority opinion. I write separately, however, to express my views on several matters that I find particularly troubling.

Initially, it is worth noting petitioners' renewed challenge to the constitutionality of the generic definition of indecency adopted by the Federal Communications Commission ("FCC" or "Commission"). This court twice has rejected unequivocally the contention that the definition is so vague as to violate the First Amendment. *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) ("*ACT II*"), *cert. denied*, 112 S. Ct. 1281 (1992); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) ("*ACT I*"). In *ACT I*, we read *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), implicitly to hold that the FCC's definition of indecency was not unconstitutionally vague, based on the fact that the Supreme Court both quoted elements of the definition with seeming approval and affirmed the Commission's sanction of a radio broadcast whose content ran afoul of the definition. 852 F.2d at 1338-39. Although in *ACT I* we invited correction from "Higher Authority" in the event we had misread *Pacifica*, no such correction has issued. Accordingly, we are precluded by our holdings in *ACT I* and *ACT II* from revisiting the question of vagueness.

This case requires us to address an issue not posed in *ACT I* or *ACT II*. Here, in addition to asserting an interest in facilitating parental supervision of their children, the Government further claims an "independent" interest in shielding children from exposure to indecent programming. In my view, these two interests, at least as the Government seems to define their scope, are irreconcilably in conflict. In *ACT I*, the Government made clear that its interest in facilitating parental supervision presupposed a significant measure of parental autonomy; that is, the FCC "[did] not propose to act *in loco parentis* to deny children's access [to indecent programming] *contrary to parents' wishes*." *ACT I*, 852 F.2d at 1343 (emphasis in original). Rather, the Government sought only to assist parents "to decide effectively what material of

this kind their children will see or hear.’” *Id.* at 1343–44 (quoting *In re Infinity Broadcasting Corp. of Pennsylvania*, 64 Rad.Reg.2d (P & F) 211, 215 para. 11 (1987)). Approving this interest, we directed the FCC to “determine what channeling rule will most effectively promote parental—as distinguished from government—control.” *Id.* at 1344.

In this case, however, the Government appears to take the position that its “independent” interest in protecting children’s well-being operates without regard either to parental wishes or to the availability of parental supervision.\* This being so, it is hard to comprehend how the Government’s “independent” interest does not render superfluous its supposed interest in facilitating parental supervision, even though the FCC explicitly reaffirms the latter. At oral argument, when pressed, the FCC’s counsel was unable to explain how these two interests mesh. The FCC’s failure to reconcile the interests on which it purports to rely is but one glaring example of the agency’s failure to justify the instant regulation.

I do not mean to say, however, that I doubt that the Government may have a compelling interest in the well-being of children or that there are many situations, in the First Amendment context and otherwise, in which that interest amply will support Government intervention of various sorts. For example, one sees daily illustrations of such intervention in the family divisions of state courts. In the family court context, however, Government regulation contrary to parental preferences and authority generally is a response to significant breakdowns within the family unit or to the complete

---

\* Indeed, the FCC concludes that “parents can effectively supervise their children only by co-viewing or co-listening, or, at a minimum, by remaining actively aware of what their children are watching and listening [to] at all times.” *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 8 F.C.C.R. 704, 710 ¶ 36 (1993) (“1993 Order”), reprinted in J.A. 79, 85. This high threshold virtually insures that the FCC can deem many parents incapable of supervising their children, thereby setting the stage for Government usurpation of the parental role.

*absence* of parental caretaking. Society protects children who are abused, neglected or abandoned, because the harm suffered is easily proven and no parent has a right to hurt a child in these ways. Indeed, such actions are contrary to the notion of "parenting," so they are not excused when a parent is the culprit.

The instant regulation, however, applies far more broadly and is not premised on such discernible harms. Rather, it seems to rest on vague notions that too many parents are either unavailable to supervise their children or inept at the task of parenting, at least insofar as the Government sees it. There are two problems with these views.

First, in effectively setting itself up as the final arbiter of what American children may see and hear, the Government tramples heedlessly on parents' rights to rear their children as they see fit and to inculcate in them moral values of the parents' choosing. See *Wisconsin v. Yoder*, 406 U.S. 205, 211 (1972) (exempting children of Amish faith from compulsory school attendance on grounds that secondary education teachings "are in marked variance with Amish values and the Amish way of life"); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (noting that "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of society" and of constitutional magnitude). This countervailing interest is not grounded solely in the First Amendment. As at least one scholar has persuasively posited, this parental interest also derives from our constitutional vision of liberty and the role of the individual in a true democracy. "Free people require 'private realms' in which they can develop differently. The child must not be the creature of the state, but must be 'conceived in liberty' and nurtured in contexts sheltered from homogenizing control." Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 299, 392-93 (1993) (footnote omitted).

Second, in acting to limit children's exposure to indecent material, the Government's stated purposes rest on inconsistent, confused and possibly false premises. Many persons in

society (and I am such a person) suppose that there must be ill effects from exposing children (especially young ones) to "indecent" material; but the truth of the matter is that we have yet to unearth those ill effects with any precision, and we have yet to understand whether the effects are measurably different when parents are available and willing to "supervise" their children. Indeed, "parental supervision" itself is a vague notion, for we surely cannot assume that all parents will act in some uniform way in "supervising" their children. When acting consciously, some parents might prohibit their children from any exposure to indecent material; some might modify a prohibition depending upon the nature of the material and the age of the child; still others might view or listen to indecent material with their children, either to criticize, endorse or remain neutral about what they see or hear (and these responses might vary depending upon the age of the child and family values). Thus, if facilitation of "parental supervision" is the principal interest to be served, then a good argument can be made that ensuring the availability of "blocking" devices—to *permit* parents to block their children from seeing and hearing indecent material in their absence—is the most that Government ought to do. For the interest of facilitating parental control assumes that parents are entitled to do as they prefer.

If, however, the interest to be served is the protection of children, without regard to their parents' preferences, then it seems to me that the issue is quite complicated. A principal problem is that we do not appear to know how the exposure to indecent (as opposed to violent) material affects children, either with respect to their senses of self-worth, their senses of respect for members of the opposite sex, or their behavior patterns as functioning members of society. Thus, to highlight the issue, suppose that we knew for sure that most parents would prefer to retain the right to decide whether and on what terms to allow their children to be exposed to indecent material: could Congress still ban the showing of indecent material? If so, on what terms? Would it be prompted by a "*moral judgment*" that indecent material is bad for all children of all ages? And, if so, how can that be

squared with the Supreme Court's rulings that distinguish between unprotected "obscene" and protected "indecent" materials, and suggest that the ages of minors must be considered in assessing the vulnerability of children? Or, rather, would it be premised on a purpose to *save children from harm*? If so, what is the nature of the harm, how does it manifest itself, and are children of all ages affected in the same way? Alternatively, would the action be designed to *protect society from harm* that can come from children who have been exposed to indecent material (or from adults who were exposed when they were minors)? If so, what is the nature of that harm and how pervasive is it?

In short, it seems to me that the strength of the Government's interest in shielding children from exposure to indecent programming is tied directly to the magnitude of the harms sought to be prevented. On the record before us, however, I have difficulty discerning precisely what those harms are. In the *1993 Order*, the FCC asserts only that "harm to children from exposure to [indecent] material may be presumed as a matter of law" and adverts to the existence of studies demonstrating certain undefined "negative effects of television on young viewers' sexual development and behavior." 8 F.C.C.R. at 706-07 ¶¶ 17-18. This does not provide a very secure basis on which to anchor significant First Amendment intrusions. The apparent lack of specific evidence of harms from indecent programming stands in direct contrast, for example, to the evidence of harm caused by violent programming—a genre that, as yet, has gone virtually unregulated. See generally Brandon S. Centerwall, *Television and Violence: The Scale of the Problem and Where To Go From Here*, 267 JAMA 3059 (1992) (recounting results of several studies demonstrating that prolonged childhood exposure to television violence correlates with increased levels of physical aggressiveness and violence).

In sum, on the record before us, it is quite clear that the Commission has failed in several significant respects to justify the broad restriction at hand. Thus, neither section 16(a) of the Telecommunications Act nor its implementing regulations can be upheld.

Finally, I wish to state my understanding of our ultimate resolution of this case. Although we find the 6 a.m.-to-midnight indecency ban unconstitutional, I do not understand the majority to hold the Commission obliged to continue with its efforts to regulate indecent programming. Six years and two statutory interventions after the Commission originally announced its intention to broaden enforcement of 18 U.S.C. § 1464, it is not for this court to assume that the FCC's regulatory agenda has remained static. Moreover, should the Commission choose to go forward, I do not believe it within our authority to order the agency to proceed in any specific administrative fashion, absent some statutory directive. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-44 (1978).

In *ACT I*, we ordered the Commission to hold hearings in order to resolve two pending enforcement actions. In this case, however, no enforcement actions are pending. Furthermore, we now readily acknowledge that repeated congressional intervention has prevented the Commission from carrying out its original intention of acting on its own to broaden enforcement of 18 U.S.C. § 1464. I discern no "constitutional constraints or extremely compelling circumstances" that would otherwise empower this court to cabin the Commission's lawful discretion or compel it to act other than as Congress requires. *Vermont Yankee*, 435 U.S. at 543. In other words, there is no legal requirement that the FCC pursue this matter further by "full and fair hearing." Under *Vermont Yankee*, the Commission is free to proceed by any lawful administrative means *it* deems appropriate.