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Nos. 95-124 and 95-227

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In the Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ALLIANCE FOR COMMUNITY MEDIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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

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QUESTIONS PRESENTED

Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1486, authorizes operators of cable television systems to prohibit indecent programming on channels set aside for lease by unaffiliated third parties (leased access channels), as well as channels reserved for public, educational or governmental (PEG) use. In addition, with respect to the leased access channels, if a cable operator chooses not to prohibit indecent programming on those channels, the operator must place such programming on a separate channel and block access to that channel until the cable subscriber requests access in writing. The questions presented are:

1. Whether Congress violates the First Amendment by permitting—but not requiring or encouraging—cable operators to prohibit indecent programming on their leased access or PEG channels.

2. Whether Congress violates the First Amendment by requiring cable operators who choose not to ban indecent programming on their leased access channels to segregate and block such programming, permitting access only upon a subscriber's written request.

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OPINIONS BELOW

The opinion of the court of appeals *in banc* (Pet. App. 2a-88a)[1] is reported at 56 F.3d 105. The opinion of the panel (Pet. App. 90a-125a) is reported at 10 F.3d 812. The Federal Communications Commission's First Report and Order (Pet. App. 128a-177a) is reported at

[1] References to "Pet. App." are to the Appendix to the Petition in No. 95-124.

8 FCC Rcd 998, and its Second Report and Order (Pet. App. 178a-202a) is reported at 8 FCC Rcd 2638.

JURISDICTION

The judgment of the court of appeals *in banc* was entered on June 6, 1995. The petitions for a writ of certiorari were filed on July 21, 1995, and August 9, 1995, respectively, and were granted on November 13, 1995 (116 S. Ct. 471). The jurisdiction of this Court rests on 28 U.S.C. 1254(1). See 28 U.S.C. 2350(a).

STATEMENT

1. Federal law requires operators of cable television systems with more than 36 channels to set aside a certain number of channels for commercial lease by unaffiliated third parties (leased access channels), see 47 U.S.C. 532(b) (1988 & Supp. V 1993), and permits local franchise authorities to require operators to set aside certain channels for "public, educational, or governmental [PEG] use." 47 U.S.C. 531 (1988).

When Congress first enacted those provisions in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984 Cable Act), it forbade cable operators from exercising editorial control over their PEG and leased access channels, see 47 U.S.C. 531(e), 532(c)(2) (1988), and provided that cable operators "shall not incur any * * * liability" under federal, state, and local obscenity laws for programs carried on such channels, 47 U.S.C. 558 (1988). As one method of addressing the problem of indecent cable programming, however, the 1984 Act required cable operators to "s[ell] or lease" lockboxes to subscribers who request them. 47 U.S.C. 544(d)(2) (1988). A lockbox is a device "by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." 47 U.S.C. 544(d)(2)(A) (1988).

Congress revisited the question of indecent cable programming, particularly on leased access and PEG channels, as part of its comprehensive overhaul of cable television regulation in the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act). "The problem," Congress was informed, "is that cable companies are required by law to carry, on leased access channels, any and every program that comes along," including programs that include a wide variety of highly indecent material. 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms) (describing leased access program in New York that "depicts men and women stripping completely nude," another featuring people performing oral sex, and a channel with advertisements promoting "incest, bestiality, [and] even rape"). See also *id.* at S648 (statement of Sen. Thurmond) (noting leased access channel with "numerous sex shows and X-rated previews of hard-core homosexual films" as well as channels with advertisements for phone lines letting listeners eavesdrop on acts of incest). Members of Congress were concerned that "early and sustained exposure" to such material can cause "significant physical, psychological, and social damage to a child." *Id.* at S649 (statement of Sen. Coats).

To protect against the harm to children and to return a measure of control to cable operators on leased access channels, Congress adopted Section 10(a) of the 1992 Cable Act, 106 Stat. 1486, which permits cable operators to enforce "a written and published policy of prohibiting programming 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) (Supp. V 1993). The provision's sponsor, Senator Helms, emphasized that by giving "the cable operator the right to reject such material," Section 10(a) "doe[s] not require

the cable operators to do anything." 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992).

Congress also adopted a provision requiring the Commission to promulgate regulations to limit the access of children to indecent programming on leased access channels. Section 10(b) of the 1992 Cable Act, 106 Stat. 1486, requires cable operators who permit the carriage of indecent programming on leased access channels to place the programming on a separate channel and to block a subscriber's access to that channel until the subscriber requests in writing that the channel be unblocked. See 47 U.S.C. 532(j) (Supp. V 1993). As Congress was informed, the segregation and blocking requirement was "precisely the same method" that it had used and the courts had approved to block access to indecent telephone messages (so-called "dial-a-porn"). 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms). See *Dial Information Servs. Corp.* v. *Thornburgh*, 938 F.2d 1535, 1543 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992); *Information Providers' Coalition* v. *FCC*, 928 F.2d 866, 878 (9th Cir. 1991).

Moreover, the problem of indecent programming, Congress found, was not limited to leased access channels. PEG channels were also being used, for example, "to basically solicit prostitution through easily discernible shams such as escort services, fantasy parties, where live participants, through two-way conversation through the telephone, are soliciting illegal activities." 138 Cong. Rec. S649 (daily ed. Jan. 30, 1992) (statement of Sen. Fowler). See also *id.* at S650 (statement of Sen. Wirth) (agreeing that public access "has * * * been abused"). Congress therefore adopted Section 10(c) of the 1992 Cable Act, 106 Stat. 1486, which requires the Commission to enable cable operators to prohibit the use of PEG channels "for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." 47 U.S.C. 531 note (Supp. V 1993). In this way, Congress permitted cable operators to "police their own systems, which they cannot

do now." 138 Cong. Rec. S650 (daily ed. Jan. 30, 1992) (statement of Sen. Wirth). The PEG provision differs from the leased access provision, however, in that it contains no requirement that operators segregate and block any indecent programming that they choose to carry.

Finally, Congress eliminated the immunity of cable operators for carrying obscene programming on their access channels, by specifying that operators would be free from liability for programming on leased access and PEG channels "unless the program involves obscene material." 1992 Cable Act, § 10(d), 106 Stat. 1486, 47 U.S.C. 558 (Supp. V 1993). The provision's sponsor explained that "it was never the intent of the Congress * * * to provide a safe harbor for obscenity." 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992) (statement of Sen. Helms).

2. The Commission adopted final regulations implementing the statutory provisions governing leased access channels in its *First Report and Order*, 8 FCC Rcd 998 (Pet. App. 128a-177a). In doing so, the Commission rejected constitutional challenges to Section 10(a)'s authorization to cable operators to prohibit indecent programming on leased access channels. Pet. App. 140a. The Commission also made clear that, consistent with the definition contained in Section 10(a) of the statute (itself based on the Commission's long-standing formulation), indecent programming subject to blocking consists of "programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." 47 C.F.R. 76.701(g); Pet. App. 148a-149a.

The Commission issued regulations concerning the carriage of indecent programming on PEG channels in its *Second Report and Order*, 8 FCC Rcd 2638 (Pet. App. 178a-202a). The agency again rejected the contention that, by permitting operators to choose to prohibit certain programming on PEG channels, the statute violated

the First Amendment. Pet. App. 181a-183a. The Commission also construed the statute's coverage of programming containing "sexually explicit conduct" to mean that the programming must be "indecent." *Id.* at 186a-187a. The Commission found such a construction to be reasonable, "given the purposes underlying section 10 as a whole and its legislative history, namely, reducing the exposure of viewers, especially children, to 'indecent' programming on cable access channels." *Id.* at 187a.

3. Petitioners, a number of cable programmers and organizations of listeners and viewers, filed petitions for review of the Commission's orders in the court of appeals, contending that Section 10 and its implementing regulations violate their rights to free speech under the First Amendment.

a. After staying the regulations pending review, a panel of the court invalidated Sections 10(a) and 10(c). Pet. App. 111a. The panel held that, because those provisions permitted cable operators to ban indecent leased access and PEG programming, the operators' decisions to do so should be attributed to the federal government as "state action." *Id.* at 108a. The panel remanded the issue of the constitutionality of Section 10(b)'s segregation and blocking scheme for leased access channels to the Commission for further consideration in light of its invalidation of Sections 10(a) and 10(c). *Id.* at 122a-125a.

b. The court of appeals subsequently vacated the panel opinion, reheard the case *in banc*, and issued a judgment upholding Section 10 and the regulations. Pet. App. 2a-89a. The full court held that the decisions by cable operators to prohibit indecent leased access or PEG programming are not "state action" to which the First Amendment applies. *Id.* at 31a. The court emphasized that the statute does not "command" cable operators to prohibit indecent programming. *Id.* at 12a. Instead, the court explained, the statute "gives them a choice" (*id.* at 18a); operators "may carry indecent programs on their access channels, or they may not" (*id.* at 12a).

As the court explained, that is the same choice that operators have with respect to all other cable channels on their systems. *Id.* at 14a.

The court also concluded that the statute does not provide such "significant encouragement" to the decision by any cable operator to ban indecent access programming that "state action must be found." Pet. App. 19a. As the court recognized, " '[m]ere approval of or acquiescence in the initiatives of a private party' * * * cannot 'justify holding the State responsible for those initiatives.' " *Id.* at 22a (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982)). The court also found that it would be inappropriate to assume that the costs associated with Section 10(b)'s segregation and blocking scheme would cause cable operators to ban indecency from their leased access channels. Pet. App. 23a-25a. As the court explained, "[n]othing in section 10 specifies that [such costs] * * * must be borne by cable operators," and the FCC "has determined to take up this and related issues in its cable rate regulation proceeding upon the final resolution of this litigation." *Id.* at 24a.

In addition, the court determined, any effect that Section 10(d)'s removal of immunity for the carriage of obscene programming would have on an operator's programming decision would not support attribution of the operator's decision to ban indecent programming to the government. Pet. App. 26a-27a. The court observed that because obscene cable programming is constitutionally unprotected, Congress has the power to ban such programming altogether. The court noted that "Section 10(d) thus imposes on cable operators the same liability for obscene access programming that operators long have had with respect to other programming on channels they control." *Id.* at 27a. If "a cable operator takes this into account in deciding which programs to carry—on any channel," that fact could not "convert its refusal to carry indecent programming into state action." *Ibid.*

The court determined, moreover, that leased access and PEG channels are not "public forums" for First Amendment purposes, since they are neither owned by the government, Pet. App. 29a, nor "so dedicated to the public that the First Amendment confers a right on the users to be free from any control by the owner of the cable system," *id.* at 31a. The court found that the 1992 Cable Act's leased access and PEG obligations are akin to common carrier requirements, which have never been thought to transform a private entity's decisions into those of the government. *Ibid.*

The court held that Section 10(b)'s segregation and blocking scheme constitutes state action, but is the least restrictive means of accommodating "two competing interests: the interest in limiting children's exposure to indecency and the interest of adults in having access to such material." Pet. App. 33a. The voluntary use of lockboxes would not be an effective alternative, the court determined, since it would present cable viewers with "two, equally unacceptable options." *Id.* at 35a. Because such channels are controlled by no single editor, viewers either would have to "continually activate and deactivate" the lockboxes, "inevitably risking a slip up or a lapse that would expose their children to indecency," or they would have to "install lockboxes permanently, thereby giving up leased access programming altogether." *Ibid.*

The court rejected petitioners' arguments that Section 10 unconstitutionally discriminates against leased access programming because it does not impose a similar segregation and blocking scheme on PEG or commercial cable channels. The court explained that leased access channels are unlike commercial channels, not only because no single editor is responsible for what is shown on leased access channels, but because indecency on other channels is generally shown only upon request and for a premium payment. Pet. App. 40a-41a. The court acknowledged that PEG channels "are comparable" to leased access channels in this respect, but found that PEG

channels "did not pose dangers on the order of magnitude of those identified on leased access channels." *Id.* at 40a.

Finally, the court concluded, the statute's indecency standard is not impermissibly vague, noting that the standard tracks the Commission's generic definition of indecency, which this Court reviewed and upheld in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). Pet. App. 42a-43a.[2]

SUMMARY OF ARGUMENT

I. Cable operators "own the physical cable network and transmit the cable signal to the viewer." *Turner Broadcasting Sys., Inc.* v. *FCC*, 114 S. Ct. 2445, 2452 (1994). By virtue of its ownership interest, a cable operator ordinarily exerts editorial control over the programming provided on its system; it chooses which programs it will transmit, and which it will not. See *id.* at 2456; *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 707 (1979).

In requiring that certain channels be set aside for leased access programming and permitting cable operators and local franchise authorities to agree to reserve other channels for PEG programming, Congress generally withdrew the operators' editorial control over those portions of their systems. See 47 U.S.C. 531(e), 532(c)(2) (1988). By doing so, however, Congress removed the ability of operators to determine whether or not to carry indecent programming on their systems. Sections 10(a) and 10(c) of the 1992 Cable Act simply restore that abil-

[2] Only Judges Wald and Tatel dissented in full from the *in banc* decision. Pet. App. 44a-76a. Judge Edwards stated that in his view Sections 10(a) and 10(b), read in tandem, impose an unconstitutional burden on speech, but he sided with the majority as to Section 10(c), concluding that the provision "merely returns some editorial control to cable operators," which is "not the least bit objectionable." *Id.* at 78a. Judge Rogers agreed with the dissenters only with regard to Section 10(b); after severing that provision, she would have upheld the rest of the statute. *Id.* at 88a.

ity by permitting operators, if they so choose, to prohibit indecent programming on their leased access and PEG channels.

Sections 10(a) and 10(c) do not provide governmental encouragement to cable operators not to broadcast indecent programming, let alone so significantly encourage them not to do so that the operators' decisions should be attributed to the government. Sections 10(a) and 10(c) leave the decision whether or not to carry indecent access programming entirely up to each cable operator; the statute neither requires operators to ban such programming nor provides them with significant incentives to do so. The fact that Sections 10(a) and 10(c), like many other federal statutes, preempt state laws to the contrary does not require attribution of the cable operators' decision to the government under the state action doctrine. Nor are private cable operators bound by the public forum doctrine to carry whatever programming is submitted to them for dissemination on access channels.

Although the programming decisions of private cable operators are not properly attributed to the government, Congress's enactment of a law giving them that choice must be consistent with the First Amendment. That law, however, does not restrict the right of the public to engage in free expression. Instead, it permits private cable operators to exercise their own expressive rights by refusing to serve as disseminators of indecent programming. The government's allowance of that freedom of private choice, in the context of indecent speech, is both reasonable and viewpoint-neutral. Accordingly, Sections 10(a) and 10(c) are consistent with the First Amendment.

II. The 1992 Cable Act also requires, through Section 10(b), that cable operators who carry indecent programming on leased access channels must segregate and block such programming on a separate channel, with access available upon a subscriber's written request. 47 U.S.C. 532(j) (Supp. V 1993). Section 10(b) constitutes state action.

The First Amendment does not require that regulations of indecency on television be subject to the strictest standard of review. Like radio broadcasting, which this Court addressed in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), television is a uniquely pervasive presence in American homes, and its offerings are uniquely accessible to children. Therefore, the conclusion in *Pacifica* that a more flexible standard of review applies to regulation of indecency broadcast over the radio is equally appropriate to regulation of indecency on cable television.

In any event, Section 10(b) would satisfy even strict scrutiny, because it constitutes the least restrictive means of realizing the federal government's "compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). As Congress was informed, programming carried on access channels included footage of sexual intercourse, advertisements for dial-a-porn services, "escort" solicitations, and other sexually graphic material. See, *e.g.*, 138 Cong. Rec. S646-S648 (daily ed. Jan. 30, 1992). Under the 1984 Cable Act, children had unimpeded access to such programming unless and until their parents discovered that their family televisions harbored indecent images that they never ordered, spent the time and money to buy a "lockbox" from their cable operators, and accurately installed and programmed the lockbox to screen what their children could view. Recognizing that inertia or lack of knowledge would keep many parents from taking those steps, Congress found that a segregation and blocking requirement was as a practical matter necessary to limit the access of children to indecent programming.

III. Finally, Congress's limitation of segregation and blocking to leased access channels does not render Section 10(b) impermissibly underinclusive. As the court of appeals determined, Congress reasonably found that the problem of indecency was more severe on leased access than on other channels. Nor is Section 10 unconstitutionally vague because it applies to "programming

that describes or depicts sexual or excretory activities or organs in a patently offensive manner." 47 C.F.R. 76.701(g). As this Court implicitly determined in *Pacifica,* that formulation, as it has been applied by the Commission, is not "so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Action for Children's Television* v. *FCC,* 852 F.2d 1332, 1338-1339 (D.C. Cir. 1988) (internal quotation marks omitted).

ARGUMENT

I. SECTIONS 10(a) AND 10(c) OF THE 1992 CABLE ACT, WHICH PERMIT CABLE OPERATORS TO PROHIBIT INDECENT PROGRAMMING ON LEASED ACCESS AND PEG CHANNELS, DO NOT VIOLATE THE FIRST AMENDMENT

In seeking to invalidate Sections 10(a) and 10(c), petitioners make two distinct arguments. First, they argue (DAETC Br. i (Questions Presented), 14-15 & n.17, Alliance Br. 29) that those provisions are unconstitutional because private cable operators will "censor" the speech of access programmers. Although they claim otherwise (see DAETC Br. 19, Alliance Br. 22), that argument amounts to a mistaken claim that private cable operators are state actors when they make individual programming decisions. The action of private operators in choosing whether to prohibit indecent programming on access channels on their own systems is not properly attributable to the federal government.

Second, petitioners argue (DAETC Br. 19-21; Alliance Br. 20-22) that, because they are challenging a statute enacted by Congress, state action must be present. The enactment and governmental implementation of the statute are undoubtedly state action. Such action is not, however, "censorship." Instead, it is a grant of permission to private actors to make a choice regarding whether to transmit indecent material over their cable channels. Be-

cause the First Amendment allows the government to grant such permission, the statute is constitutional.

A. The 1992 Cable Act Does Not So Significantly Encourage Cable Operators To Prohibit Indecent Programming On Access Channels That Their Decision To Do So Should Be Attributed To The Government

By its terms, Section 10(a) of the 1992 Cable Act "permit[s]" cable operators to enforce a written and published policy of prohibiting indecent programming on leased access channels. 47 U.S.C. 532(h) (Supp. V 1993). It does not require them to do so. Section 10(c) of the 1992 Cable Act similarly requires the Commission to "enable" cable operators to prohibit the use of PEG channels for indecent programming, but it does not mandate that cable operators forbid such programming. See 47 U.S.C. 531 note (Supp. V 1993). Thus, as the court of appeals recognized, "[r]ather than coerce cable operators, section 10 gives them a choice." Pet. App. 18a. "Cable operators may carry indecent programs on their access channels, or they may not." *Id.* at 12a.

A governmental entity "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 546 (1987) (quoting *Blum*, 457 U.S. at 1004). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient." *Blum*, 457 U.S. at 1004. Accord *San Francisco Arts & Athletics*, 483 U.S. at 547. Because nothing in Section 10 compels cable operators to prohibit indecent programming on leased access or PEG channels or significantly encourages operators to do so, their private choice is not attributable to the government.

1. Petitioners contend that the statute significantly encourages operators to ban indecent access programming

because Members of Congress, such as Senator Helms, voiced their expectation that the statute would "put an end to the kind of things going on in New York and elsewhere" on access channels. 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992); see Alliance Br. 28-29. As the court of appeals recognized (Pet. App. 21a-22a), the fact that individual Members of Congress may have expressed hope that operators would prohibit indecent programming on their access channels is of little relevance. Such statements impose no legal duty on cable operators, and may not even come to their attention. The question, instead, is whether *the statute* coerces or otherwise significantly encourages operators to prohibit such programming. See *Blum,* 457 U.S. at 1004-1005. If it does not, decisions by cable operators to prohibit indecent programming cannot be attributed to the government, whatever the statements of individual legislators.

In any event, Senator Helms' statement was made not with regard to Section 10(a) or Section 10(c), but with regard to Section 10(*d*), which removed cable operators' immunity for obscene programming, and was meant to emphasize that federal law would no longer provide a "safe harbor for obscenity" on access channels. 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992). The statement has no relevance whatever to Senator Helms' separate discussion of Section 10(a), which, he emphasized, "does not require cable operators to do anything." *Id.* at S646.[3] Other supporters of Sections 10(a) and 10(c) also understood and confirmed the limited effect of those provisions. For example, Senator Thurmond observed that Section 10(a) "gives cable operators the right to reject sexually explicit programming on leased * * * access

[3] Senator Helms underscored the voluntariness of the cable operator's decision in a colloquy with Senator Inouye, the Democratic manager of the bill. Senator Inouye asked: "The action proposed in your amendment is not mandatory, is it?" 138 Cong. Rec. S649 (daily ed. Jan. 30, 1992). To which Senator Helms responded: "That is correct." *Ibid.*

channels," but that operators could "choose to accept such programming." *Id.* at S648. Senator Fowler, who introduced Section 10(c) on the Senate floor, explained that Section 10(c) "would *empower* cable operators to prohibit sexually explicit conduct * * * carried through the so-called public access channels." *Id.* at S649 (emphasis added). And Senator Wirth similarly emphasized that Section 10(c) would "give a very clear signal to the cable companies that, in fact, they can police their own systems, which they cannot do now." *Id.* at S650. Those statements by the principal supporters of Sections 10(a) and 10(c) reflect an intent to leave it entirely up to cable operators to decide whether or not to ban indecent access programming.

2. The Alliance petitioners contend (Br. 29-30) that the 1992 Cable Act encourages cable operators to prohibit indecent programming on their leased access and PEG channels, focusing on Section 10(d)'s removal of operators' immunity for the carriage of access programming that "involves obscene material." 47 U.S.C. 558 (Supp. V 1993). It is well settled, however, that the government may prohibit obscene speech, since such speech falls outside the First Amendment.[4] See, *e.g.*, *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 124 (1989). The fact that cable operators are now subject to such prohibitions with respect to their access channels—as they previously were with respect to all other channels they operate—does not provide a special incentive to operators to ban indecent programming that is not obscene.

Alliance nonetheless maintains (Br. 30) that, in order to avoid liability for carrying obscene speech, cable operators are likely to "take the safe route and simply ban all materials that access programmers cannot affirmatively certify to be decent." But "[s]ome self-censorship is an

[4] The FCC has made clear that the statutory phrase removes operator immunity only for material that "is unprotected by the first amendment." Pet. App. 152a n.40.

inevitable result of all obscenity laws." *Carlin Communications, Inc.* v. *Mountain States Tel. & Tel. Co.,* 827 F.2d 1291, 1297 n.6 (9th Cir. 1987), cert. denied, 485 U.S. 1029 (1988). See *Fort Wayne Books, Inc.* v. *Indiana,* 489 U.S. 46, 60 (1989). Private parties make private decisions against a backdrop of criminal laws and obscenity statutes every day. As the court of appeals recognized (Pet. App. 27a), the fact that they take such laws into account does not transform their decisions into those of the government. *Carlin,* 827 F.2d at 1297 n.6.

3. Alliance also alleges (Br. 29) that cable operators have an incentive under the statute to ban rather than block indecent access programming because "blocked channels are technically cumbersome and financially burdensome."

As the court of appeals recognized, a blocked channel is not "technically * * * cumbersome" to establish; "[e]very cable system that has premium or pay-per-view channels already is constantly blocking and unblocking them and thus has the technical capability to perform this task." Pet. App. 24a, 25a. For those systems that do not have such channels, the Commission's rules permit the operator to achieve the same result by installing lockboxes that exclude the blocked channel, while retaining the key or numeric code until the customer requests unblocking. *Id.* at 25a (citing *id.* at 162a n.46).[5] In any event, even if there were some cable systems for which the blocking requirement posed technical difficulties, that fact cannot assist petitioners in this facial, pre-enforcement challenge to the statute as a whole. See *Reno* v. *Flores,* 113 S. Ct. 1439, 1446 (1993).

Any financial burdens relating to the establishment of a separate blocked channel are irrelevant to petitioners'

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[5] Operators also are not required to block a separate channel for the entire day if only a few hours are needed to carry indecent programming. Under the Commission's rules, the channel designated for the carriage of indecent leased access programming need "be blocked only during those time periods that indecent leased access programming is being shown." Pet. App. 163a.

facial challenge to Section 10's constitutionality. As the court of appeals recognized, the statute does not require that costs associated with segregation and blocking of indecent programming on leased access channels be borne by the cable operator, and the Commission has yet to consider the matter. Pet. App. 24a, 146a n.29.

The record also suggests that carrying indecent programming provides cable operators with financial benefits that offset whatever burden might be involved in implementing Section 10(b)'s blocking requirements. Indecent programming is often highly popular, as petitioners are aware. See Alliance Br. 43 n.33 (noting that by mid-1992, the Playboy Channel had generated more than $50 million" in revenues for cable operators). Indeed, Time Warner—a large cable operator that "owns and operates cable systems in approximately 1,000 franchise areas throughout the United States," J.A. 251—successfully suggested to the Commission that a cable operator should be allowed "to provide an additional blocked leased access channel for indecent programming if the first channel becomes full." See Pet. App. 163a; J.A. 255-256. See also J.A. 251-252 (noting that leased access channel in New York City is "usually fully booked with sexually explicit programming" every day "from 10:00 p.m. to 4:30 a.m." and that "the demand for additional time remains high").

Nor is there reason to believe that cable operators' "general hostility" towards access programmers (see Alliance Br. 29) will lead operators to ban indecent programming on their access channels. An operator's decision to prohibit indecent programming on access channels does not generally lessen its obligation to provide such channels; it simply changes the mix of its access programming. Thus, the fact that operators may be generally reluctant to provide access capacity does not suggest that, once obligated to provide a set number of access channels, see 47 U.S.C. 532(b) (1988 & Supp. V 1993), they will be more or less likely to permit indecent access programming.

4. a. Relying on *Railway Employes' Dep't* v. *Hanson,* 351 U.S. 225 (1956), petitioners contend (Alliance Br. 24-27; DAETC Br. 23-24) that the actions of the cable operators in deciding whether to ban indecent programming from their access channels should be attributed to the federal government because Section 10(a) and 10(c) preempt contrary state law.

Hanson involved a provision of the Railway Labor Act authorizing interstate railroads to enter into union shop agreements "[n]otwithstanding any * * * law * * * of any State." 45 U.S.C. 152, Eleventh.[6] Appellees, non-union employees of a railroad that had entered into a union shop agreement, sought to enjoin the application and enforcement of the agreement under state law. *Hanson,* 351 U.S. at 228. The Supreme Court of Nebraska held that the union shop agreement violated the First and Fifth Amendments, and that therefore Nebraska law, which prohibited the agreement, was controlling. *Id.* at 230. On appeal, this Court concluded that the federal statute constituted state action to which the First and Fifth Amendments applied. *Id.* at 232.

Hanson provides no support to petitioners' argument here. First, the preemptive effects of Sections 10(a) and 10(c) are not appropriately resolved in this facial challenge to Section 10. To prevail, petitioners "must establish that no set of circumstances exists under which the [statute] would be valid." *Reno* v. *Flores,* 113 S. Ct. at 1446. Yet petitioners do not—and could not—assert that every cable operator is required by state or local law or by a franchise agreement to permit indecency on access channels. Alliance cites (Br. 26 n.18) only two jurisdictions (New York and the Virgin Islands) that divest cable operators of editorial control over their leased and public access channels as a matter of local law. And

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[6] A union shop agreement provides that "an employee must become a member of the union within a specified period of time after hire, and must as a member pay whatever union dues and fees are uniformly required." *Abood* v. *Detroit Bd. of Educ.,* 431 U.S. 209, 217 n.10 (1977).