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ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: SABLE COMMUNICATIONS OF CALIFORNIA, INC., Appellant
V. FEDERAL COMMUNICATIONS, ET AL., and
FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Appellants V. SABLE COMMUNICATIONS OF CALIFORNIA,
INC.

CASE NO: 88-515 & 88-525

PLACE: WASHINGTON, D.C.

DATE: April 19, 1989

PAGES: 1 thru 56

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IN THE SUPREME COURT OF THE UNITED STATES

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SABLE COMMUNICATIONS OF :
CALIFORNIA, INC., :
Appellant :
v. : No. 88-515
FEDERAL COMMUNICATIONS :
COMMISSION, ET AL.; :
and :
FEDERAL COMMUNICATIONS :
COMMISSION, ET AL., :
Appellants :
v. : No. 88-525
SABLE COMMUNICATIONS OF :
CALIFORNIA, INC. :

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Washington, D. C.
Wednesday, April, 19, 1989
The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:01 o'clock a.m.

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APPEARANCES:

**RICHARD G. TARANTO, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.;**
**on behalf of the Appellees/Cross-Appellants,
Federal Communications Commission, et al.**

**LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on
behalf of the Appellant/Cross-Appellee, Sable
Communications.**

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1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 88-515, Sable Communications
5 of California v. FCC; and 88-525, Federal Communications
6 Commission v. Sable.

7 Mr. Taranto?

8 ORAL ARGUMENT OF RICHARD G. TARANTO
9 ON BEHALF OF THE APPELLEES/CROSS-APPELLANTS,
10 FEDERAL COMMUNICATIONS COMMISSION, ET AL.

11 MR. TARANTO: Mr. Chief Justice, and may it
12 please the Court:

13 These cases in involve facial challenges to
14 the constitutionality of Congress' 1988 legislation
15 aimed at commercial telephone pornography.

16 Section 223(b) of the Communications Act of
17 1934, as it was amended in 1988, prohibits any person
18 from making any obscene or indecent interstate telephone
19 communication for commercial purposes.

20 Sable challenged both the obscenity and
21 indecency prohibitions on their face.

22 The district court, on a motion for
23 preliminary injunction, held the obscenity prohibition
24 valid and the indecency prohibition invalid.

25 Our position is that both challenges should

1 have been rejected.

2 As to obscenity, which is not protected by the
3 First Amendment, the short answer to Sable's objections,
4 concerning how the statute is to be applied, is that
5 they are insufficient to support a facial challenge,
6 because the statute plainly is capable of constitutional
7 application.

8 As to indecency, the statute is justified by a
9 distinctive combination of factors similar to those
10 relied on in the broadcasting context in *Pacifica*: the
11 accessibility of the telephone medium to children, the
12 compelling governmental interest in preventing children,
13 especially younger children, from hearing patently
14 offensive sexual speech, especially in the privacy of
15 the home, the reasonable congressional judgment that no
16 lesser measure would reliably prevent children's access,
17 and the availability of alternative sources of such
18 speech for adults who wish to obtain it.

19 QUESTION: Mr. Taranto, do we know which is
20 which here, I mean, of -- of the calls that are really
21 the money-making part of this operation? Is it your
22 view that they come within the obscenity provision?

23 MR. TARANTO: We don't have any kind of
24 statistical breakdown of --

25 QUESTION: Well, how -- how would one judge?

1 I mean, let's say the -- the calls that consist of a
2 woman describing sexual activity, would you consider
3 that to be obscene, or just a good, healthy interest in
4 sex --

5 MR. TARANTO: Well, it -- it would depend on
6 exactly what was said. The indecency definition is
7 essentially one part of the three-part Miller definition
8 for obscenity. The material need not have prurient
9 appeal in the specific sense that's required for
10 obscenity. And it may well have some literary,
11 artistic, scientific, or political value --

12 QUESTION: Well, is --

13 MR. TARANTO: -- although this kind of
14 pornographic material, I think, probably hadn't --
15 certainly does not meet the last of those criteria. But
16 the prurient appeal definition that this Court
17 elaborated in *Brockett* against *Spokane*, we think,
18 narrows the range of even sexually explicit material
19 that is covered by obscenity.

20 So it is entirely possible that there is a
21 fair volume of indecent material that would not rise to
22 the level of obscenity because the prurient appeal
23 definition of *Brock* -- of *Brockett* might not be met.

24 But the short answer to your question about
25 the factual record is that we simply don't know of the

1 millions and the tens of millions of calls made each
2 year, what percentage of those would be obscene, what
3 percentage would be indecent, and what percentage would
4 be neither obscene nor indecent.

5 QUESTION: May I just be sure of one point?
6 Are either of these terms defined in the statute?

7 MR. TARANTO: No, not in the statute itself,
8 but --

9 QUESTION: How do we know what Congress meant
10 them to mean?

11 MR. TARANTO: Well, we think that the
12 legislative history makes it quite clear that Congress
13 was looking at both Miller and at Pacifica when it was
14 using those terms. There are various memoranda of law
15 in the Congressional Record. And I don't think it --

16 QUESTION: Is there anything in any of the
17 committee reports that describes this point?

18 MR. TARANTO: There are no committee reports
19 for this legislation.

20 QUESTION: How deeply into the legislative
21 history must we go to find this out? Memorandum of law
22 prepared by whom?

23 MR. TARANTO: It was prepared by, I think,
24 Citizens for Decency Through Law, and put into the
25 Congressional Record by the principal sponsors --

1 QUESTION: And we're presuming that the
2 Congress adopted the views of that particular group?

3 MR. TARANTO: Well, I think that is a fair
4 assumption in this case, because all of the sponsors of
5 the legislation repeatedly referred to both the
6 memorandum and to Pacifica and to Miller. There was, as
7 far as I'm aware, no dispute --

8 QUESTION: Referred -- referred in what kind
9 of context, in the debates on the floor, or in a hearing
10 --

11 MR. TARANTO: Yes, in the debates on the
12 floor. The bills that are -- that became this law did
13 not make it through committee. They were introduced as
14 amendments. They were introduced on the floor and voted
15 on, on the floor, in the House separately, and then as
16 an amendment to a larger education bill.

17 QUESTION: But it is --

18 MR. TARANTO: There was no disputing, within
19 Congress, what the definition of indecency was or
20 obscenity.

21 QUESTION: Or really no discussion, I suppose,
22 then. Or just a -- sort of an adoption of those. But
23 we do -- it is clear we must look to legislative history
24 to find out what these terms mean.

25 MR. TARANTO: Well, without legislative

1 history, it seems to me the fairest assumption, when
2 Congress used the term indecency, is to look to what
3 this Court had -- had said, and this Court's case on
4 indecency in *Pacifica*. And there, both the Commission
5 in that case and in numerous subsequent administrative
6 proceedings, has adhered to a standard definition of
7 patently offensive sexual speech.

8 I would like to explain the background of
9 section 223(b), because that background is important to
10 understanding both the aims of the statute and why the
11 statute is no broader than necessary to achieve those
12 aims.

13 The telephone pornography industry was born in
14 1983. As a result of newly available technology,
15 providers of pre-recorded, sexually-explicit messages,
16 like *Sable*, could disseminate those messages on special,
17 976 lines to thousands of callers simultaneously, and to
18 hundreds of thousands of callers a day.

19 The providers of this so-called dial-a-porn
20 use the telephone companies to do their billing. The
21 telephone company collects a special charge per minute
22 or per call and pays the provider a share.

23 The market for sexual telephone messages grew
24 rapidly. In 1984, 180 million calls were made to
25 dial-a-porn in New York alone. By 1988 the industry was

1 estimated to gross more than \$2 billion a year.

2 QUESTION: Mr. Taranto, under law, are the
3 telephone companies required to accept these people as
4 customers, or is it a voluntary contractual arrangement?

5 MR. TARANTO: It is my understanding that each
6 of the telephone companies is, as part of its
7 non-discrimination obligation, required to accept --
8 accept these. But I can't say with certainty whether
9 that's so in each state.

10 I know of no state which -- in which a
11 telephone company has refused to accept these, and has
12 been upheld in doing so.

13 From the beginning of this new industry it was
14 clear that children had ready access to dial-a-porn, and
15 that the messages contained a wide range of graphic
16 descriptions of sexual acts, many of those acts
17 involving minors.

18 In 1983 Congress enacted the first version of
19 section 223(b) to attack the problem. The statute
20 banned obscene and indecent commercial telephone
21 communications to minors. It directed the FCC to devise
22 regulations that would try to separate adults from
23 minors in the calling audience.

24 And it provided that compliance with such
25 regulations would be a defense under the statute. The

1 FCC then undertook a four-year effort to promulgate
2 regulations that would accommodate Congress' competing
3 goals, to try to prevent access by minors while not
4 unduly restricting adults' access to dial-a-porn.

5 The Commission first proposed a defense based
6 either on use of a credit card to pay for the call,
7 which was not feasible for pre-recorded telephone
8 messages, or on restriction of the messages to evening
9 and -- and night-time hours.

10 In the challenge brought by Sable's affiliate,
11 Carlin, the Second Circuit invalidated the time-of-day
12 restriction as essentially ineffective, noting how
13 little time it took for a minor to make a call, and the
14 availability of dial-a-porn by long-distance calls to
15 other time zones.

16 On remand the Commission added a second
17 defense based on the dial-a-porn providers requiring
18 callers to punch in an access code to hear the message.
19 Based on comments from Carlin and others, Carlin, in
20 fact, stated children intent on acquiring a code will
21 certainly be able to do so.

22 The Commission recognized the problem that
23 minors might obtain access codes. And the Commission,
24 therefore, required that access codes be made available
25 only through the mail and cancelled upon notification of

1 improper use.

2 In the same proceeding, the Commission also
3 rejected various kinds of blocking as technologically
4 infeasible, unduly expensive, over-inclusive in their
5 impact on non-sexual 976 telephone messages, and
6 ineffective in preventing minors' access.

7 After another court challenge by Sable's
8 affiliate and another remand from that challenge, the
9 Commission promulgated a third set of regulations,
10 adding a third defense based on the providers scrambling
11 of its messages.

12 Once scrambled, the message could be
13 de-scrambled by a simple \$15-\$20, pocketwatch-size
14 device held up to or attached to the earpiece on the
15 phone.

16 Again, based on comments submitted in the
17 administrative proceeding and reiterated by Sable in its
18 challenge in the Second Circuit, the Commission
19 recognized that minors might be able to obtain
20 de-scramblers, as it previously recognized with respect
21 to access codes.

22 In the end, though, the Commission came to
23 rest on the three defenses, requiring credit card
24 payment, access codes or scrambling, as the best
25 available implementation --

1 QUESTION: And, Mr. Taranto, didn't the FCC
2 conclude that the -- a scheme using access codes,
3 scrambling and credit card payment, was a feasible and
4 effective way to serve the states' compelling interest
5 in protecting children from exposure to these calls?

6 MR. TARANTO: Well, I think that -- that the
7 Commission was operating throughout that four-year
8 period not -- with -- a single-minded mandate to prevent
9 minors' access --

10 QUESTION: But didn't it reach that conclusion
11 that I stated, fairly?

12 MR. TARANTO: I'm -- I'm not sure exactly what
13 quote you're referring to.

14 QUESTION: That it was feasible and effective
15 using those things to meet the states' compelling
16 interest in protecting children.

17 MR. TARANTO: I believe that -- that the
18 Commission was stating a conclusion about the
19 effectiveness of reaching an inherently compromised
20 goal, a goal that said, keep children out, but make sure
21 adults can -- can continue to gain access to the
22 material. And I think all of its rulings in the first,
23 second and third reports, in order, need to be read with
24 that goal in mind.

25 The Commission was not looking for the single,

1 most effective method of keeping children -- but
2 preventing unsupervised access by children. It always
3 had in mind the competing congressional goal of ensuring
4 that adults could -- could continue to have access.

5 So it may well be that the Commission did, at
6 various points, state, at least with respect to credit
7 cards, although there it was talking only about live
8 calls, that that would be an effective way of preventing
9 children's access.

10 QUESTION: Well, I think that's a concern, if
11 the agency itself concluded that some more restrictive
12 means of controlling this is feasible and effective, I
13 wonder how the total ban survives our constitutional
14 test of least restrictive means.

15 MR. TARANTO: Again, I think -- I think that
16 the Commission was drawing a -- a conclusion about
17 effectiveness as to an inherently limited goal. And --
18 indeed, the Commission recognized that each of its three
19 proceedings, based on comments by Carlin and Sable and
20 the telephone companies, that there were significant
21 loopholes in each of the -- in each of the -- the
22 options. Credit cards, it --

23 QUESTION: Well -- well, you say inherently
24 limited goal. It's limited by the compelling interest
25 that the state itself hypothesizes at the outset.

1 MR. TARANTO: No, I think it was the -- the
2 goal was limited by the dual congressional command in
3 1983 to keep this -- this material available on the
4 phones to adults, but try to keep children from gaining
5 access.

6 As long as one had the first part of the
7 congressional command in place, it was never the
8 Commission's focus to look for effective technological
9 alternatives, only to get at the second goal. Because
10 Congress -- it understood Congress to say, don't do
11 anything unduly to restrict adults' access.

12 And I think it's in that -- against that
13 background that, really, all of the Commission's
14 conclusions need to be -- need to be understood.

15 QUESTION: Well, and I suppose it's more than
16 just a congressional concern. It may be founded,
17 indeed, on a constitutional requirement --

18 MR. TARANTO: The --

19 QUESTION: -- that adult access be considered.

20 MR. TARANTO: Yes, there is -- we have not
21 disputed, and Congress, itself, did not differ with the
22 conclusion that non-obscene speech is within the
23 protection of the First Amendment. And there is no
24 doubt that this ban has an impact on adults' access to --

25 QUESTION: So we do have to make the inquiry

1 about whether this is narrowly tailored and the least
2 restrictive method?

3 MR. TARANTO: Well, we have argued that --
4 that this statute does, in fact, meet that standard
5 under, at least, the plurality opinion in *Pacifica*, it
6 may well be that some laxer standard may be
7 appropriate. Now, we have not pressed that -- that
8 standard.

9 QUESTION: Well, but, *Pacifica* was certainly
10 not a case that can be read to authorize a blanket ban --

11 MR. TARANTO: No, *Pacifica* --

12 QUESTION: -- In a criminal context.

13 MR. TARANTO: *Pacifica* does not go that far.

14 QUESTION: No.

15 MR. TARANTO: *Pacifica* noted the limits on its
16 opinion. *Pacifica*, however, also did not say that --
17 say that it was going this far and no further. It said
18 that, given the distinctive problems concerning
19 broadcasting, the access of children, the pervasiveness
20 of it, the inability to separate adults from children
21 within the audience, that the particular measure before
22 it was justified.

23 What we are asking today is -- is to support
24 -- is -- is for this Court to uphold this telephone
25 indecency ban based on the same considerations that led

1 the Court in Pacifica to uphold what was concededly a
2 more limited measure in -- in -- in that case.

3 QUESTION: Well, just before -- before we
4 leave this and beginning with Justice O'Connor's initial
5 inquiry, can we interpret this record fairly as saying
6 that the administrative agency made a determination that
7 blocking and access codes were reasonably effective to
8 deter use by minors?

9 MR. TARANTO: I don't -- I don't mean to be --
10 to -- to evade that. It depends what one means by
11 reasonably effective. Again, the Commission, every time
12 it stated a conclusion about effectiveness, had in mind
13 effectiveness concerning a -- a dual goal: two pieces
14 of a congressional command that were --

15 QUESTION: Well, I'm talking about -- I'm
16 talking about the one goal of limiting access for
17 minors, as to indecent messages.

18 MR. TARANTO: No, I -- I don't think that the
19 Commission's conclusions, as a whole, can be taken to
20 establish the proposition that children would all but be
21 kept from -- from gaining unsupervised access.

22 QUESTION: You think they -- you think that --
23 that the Commission did, though, decide they had done as
24 well as they could?

25 MR. TARANTO: Yes. I think -- I think the

1 Commission did -- did do that.

2 QUESTION: And -- and even -- even if they --
3 even if they thought it was reasonably effective, as
4 Justice Kennedy says, Congress apparently disagreed with
5 them?

6 MR. TARANTO: Well, Congress -- I'm not sure
7 Congress disagreed with the --

8 QUESTION: I mean they would --

9 MR. TARANTO: -- Commission's conclusions. If
10 -- if you read the Commission's conclusion --

11 QUESTION: Yes, exactly.

12 MR. TARANTO: -- that way, then Congress did
13 disagree.

14 QUESTION: And if they said this -- and if
15 they said, well, this is as well as we can do --

16 MR. TARANTO: That's not good enough.

17 QUESTION: -- Congress said that wasn't good
18 enough.

19 MR. TARANTO: Yes, I think that -- that would
20 be one reading of the record.

21 QUESTION: Mr. Taranto, let's talk about if --
22 If the child protection portion of it is no good, do you
23 concede that the whole thing is bad, then?

24 MR. TARANTO: The -- the child protection
25 purpose?

1 QUESTION: Yes. Let's assume that that child
2 protection purpose is -- is not served, or could be
3 served in a different fashion.

4 MR. TARANTO: We -- we have not defended, and
5 Congress, I don't think even enacted the statute on any
6 ground except the prevention of unsupervised access --

7 QUESTION: And that's the only ground on which
8 we can uphold it?

9 QUESTION: Well, that -- that part of the
10 statute.

11 MR. TARANTO: The indecency part of the
12 statute, that's correct. Not the obscenity. The
13 obscenity part is different. But as to the indecency,
14 we have not suggested that that statute can be upheld on
15 --

16 QUESTION: Does the text of the statute say
17 that that's the only basis for -- for the indecency
18 portion?

19 MR. TARANTO: No, the text of the statute
20 doesn't -- doesn't contain a statement of purpose --

21 QUESTION: Indeed, what -- what affects me is
22 what you say about whether phone companies have to carry
23 this stuff. We're talking here about pornography that
24 is just short of obscenity.

25 And in the ordinary world, responsible

1 individuals can exercise judgment about whether they
2 want to lower the tone of society by making that
3 material available to adults or to children; the local
4 grocery store, even the local broadcaster, because they
5 are not common carriers. But here you're talking about
6 a government that imposes an obligation to carry this
7 stuff nationwide, and there is no individual that can
8 exercise the judgment to say this is not the kind of
9 thing that ought to be generally available in the
10 community --

11 MR. TARANTO: Well --

12 QUESTION: -- instead of just downing one
13 sector by zoning, or something of that sort.

14 Don't you think that makes it quite different
15 from -- from some other areas of -- of whether
16 pornography can generally be available?

17 MR. TARANTO: The -- the measure before this
18 Court doesn't impose that obligation. I understood your
19 question to -- to be whether this particular measure
20 could be justified, whatever other statutes are -- are
21 on the books, by --

22 QUESTION: This measure applies only to common
23 carriers, doesn't it?

24 MR. TARANTO: Well, this -- this measure
25 applies to the message providers themselves. This --

1 this statute doesn't speak directly to the -- the common
2 carriers.

3 QUESTION: Yes, but the message provider is
4 providing the message on common carrier facilities --

5 MR. TARANTO: That's right.

6 QUESTION: -- who must carry it. So that
7 there is nobody who has any say as to whether that goes
8 into every community in the country; indeed, into every
9 home in the country.

10 MR. TARANTO: Well, if -- if there is a
11 concern --

12 QUESTION: If they have a public service
13 obligation, the common carriers.

14 MR. TARANTO: Perhaps another statute could
15 relieve common carriers of that obligation. This
16 statute simply prohibits the message providers from
17 disseminating this -- this information.

18 And -- and we have not defended that statute
19 on the ground that adults -- that it -- that it's
20 justified as a means of somehow protecting adults.
21 Because adults do, after all, have the presumed capacity
22 to decide whether they want to pick up the phone and
23 call.

24 What's different about children is that
25 Congress can quite legitimately say, even a voluntary

1 call by a minor is not -- is not something that -- that
2 we want to turn a blind eye to.

3 QUESTION: Adults have the capacity to turn
4 off a television set, too, but most broadcasters and
5 most sponsors, who have the power to make the judgment
6 about whether they're going to carry pornography just
7 short of -- just short of obscenity won't do it.

8 So there is somebody other than the man who's
9 making money on it, who can control it. And you're
10 telling me this is a situation where, as far as you
11 know, there isn't anybody under current law.

12 MR. TARANTO: That -- that is true, as far as
13 I know under -- under current law. That, I think, is a
14 problem that, if I'm wrong about -- if I'm right about
15 what -- what current law is, could be -- might well be
16 addressable in -- in another statute.

17 QUESTION: May I ask to follow up on Justice
18 O'Connor's inquiry earlier about the -- the Commission's
19 conclusion about what could -- would reasonably prevent
20 access by minors?

21 I think when you -- in your phrasing of the
22 point, you said that there was no way that you could
23 reliably prevent access by minors. You used a little
24 different word. What -- what -- how many -- how many
25 minors are we concerned about, if just a handful get

1 access, is that enough to defend the statute, or do you
2 have to have a substantial segment? And when is a minor
3 a minor, at what age?

4 MR. TARANTO: Well, it would certainly be a
5 harder case if -- If the facts presented were a choice
6 between a ban that made sure no minors got access, and a
7 handful. I think we would then -- we then -- we would
8 then have questions like those that arise -- that arose
9 in time, place and manner cases, like Community for
10 Creative Non-Violence, where the question was, just how
11 far can the Park Service go in -- in, you know, in
12 keeping a park -- preserving a park for specified uses.

13 This record, I think, quite amply justifies
14 the conclusion that we don't have a choice between a
15 near-perfect and a perfect measure. The ability to gain
16 a credit card number, to gain an access code, to gain a
17 -- a de-scrambler --

18 QUESTION: And see, those abilities are
19 probably for the older minors. The very young minors
20 probably -- it would probably work quite well as to --
21 and I guess as they get closer to majority, they're also
22 more able to figure out ways to get access to this stuff.

23 So --

24 MR. TARANTO: I think that -- that is
25 certainly true, that -- that the older minors get, the

1 more resourceful they can get, the more freedom they
2 have, the more time they have unsupervised from their
3 parents. But --

4 QUESTION: What, for purposes of this -- this
5 -- what -- what do we mean by minor in your -- well,
6 what, did Congress identify the age that they were
7 talking about?

8 MR. TARANTO: No, because --

9 QUESTION: Was it under 21, or under 14, or
10 what?

11 MR. TARANTO: Well, in -- in the 1983 statute,
12 Congress did use the term minor, and I assume used in --
13 in the normal sense of 18 or under.

14 In the current statute there is no reference
15 to minors. The question is, we're talking about minors
16 because of the congressional concern. That concern
17 surely is of diminished force as -- as we are talking
18 about 17 -- 17-year-olds.

19 But children from 5, 6, 8, 10 --

20 QUESTION: But those children --

21 MR. TARANTO: -- have access to telephones and
22 know how to use --

23 QUESTION: Have access to telephones, but they
24 probably couldn't master these -- you know, they
25 couldn't evade the restrictions as easily, I wouldn't

1 think.

2 MR. TARANTO: Well, not -- not as easily. But
3 I think that -- that children of age 10 or 11, as indeed
4 the anecdotal evidence submitted to Congress and the
5 Commission show, have shown a very strong interest in
6 calling up these dial-a-porn services and getting a
7 three- or four-digit access code, or getting a credit
8 card number, or picking up a small de-scrambler that
9 just needs to be held up to the earpiece of a telephone,
10 is, we think, not a -- a very difficult measure for --
11 for children.

12 And, indeed, Sable and its affiliates have,
13 throughout the administrative proceedings, urged the
14 proposition that these measures are, in fact,
15 ineffective, that children would be able to -- to
16 circumvent -- easily circumvent all of these measures.

17 So we think that -- that it was well within
18 Congress' usual range of fact-finding discretion to
19 determine that the loopholes left by various
20 technological alternatives were very substantial
21 loopholes, and that we weren't just talking about a
22 handful of minors, monthly or annually, who would be
23 able to gain access, but a very significant number.

24 QUESTION: Is that number just based on
25 anecdotal evidence, or are there any studies in the

1 record to tell us --

2 MR. TARANTO: There are no -- there are no
3 studies. The -- one reason, I suspect, is that the most
4 obvious means of gaining statistical information would
5 be a survey, and, in part, because of embarrassment and
6 other factors, that might be very unreliable information.

7 There have, over the years, been hundreds and
8 hundreds of complaints made, informal and formal, to the
9 Commission, to state agencies, to members of Congress --

10 QUESTION: But those, I suppose, include
11 complaints by adults who wouldn't want the material
12 disseminated to adults either?

13 MR. TARANTO: No, I'm referring to --

14 QUESTION: Just children?

15 MR. TARANTO: -- adults complaining about
16 their children's access.

17 QUESTION: I see.

18 MR. TARANTO: Let me say one -- one quick word
19 about the obscenity portion of the case.

20 QUESTION: Including an amicus here, whose --
21 whose daughter was raped by a -- by a 12-year-old after
22 he --

23 MR. TARANTO: Yes.

24 QUESTION: -- had talked on the phone for
25 two-and-a-half hours to one of these.

1 MR. TARANTO: Yes. There are some extremely
2 lurid consequences of -- of this -- of this telephone
3 pornography.

4 Let me just say one word about the obscenity
5 challenge. We think it is a sufficient answer that this
6 is a facial challenge, and that Sable's objection to the
7 obscenity portion is not that obscenity is protected,
8 but that speech that is not obscene in Los Angeles might
9 be disseminated in some other community where it is
10 obscene.

11 It is a sufficient answer, I think, to that
12 challenge, just to note that the -- the statute is
13 clearly capable of constitutional application -- or
14 prosecution in Los Angeles, even under Sable's view of
15 -- of the statute, and that no other party is
16 differently situated. And so under Taxpayers For
17 Vincent and other cases, there is no third party
18 overbreadth claim here.

19 Any challenge that Sable has regarding its --
20 the obscenity portion should and must be raised only, in
21 an as-applied challenge.

22 I would like to reserve the balance of my time.

23 QUESTION: Very well, Mr. Taranto.

24 Mr. Tribe.

25 ORAL ARGUMENT OF LAURENCE H. TRIBE

1 ON BEHALF OF THE APPELLANT/CROSS-APPELLEE,
2 SABLE COMMUNICATIONS

3 MR. TRIBE: Mr. Chief Justice, and may it
4 please the Court:

5 Let me begin with the question that you, Mr.
6 Chief Justice, asked Mr. Taranto, and with Justice
7 Scalia's follow-up concern, because, until now, this
8 case has been litigated in terms of the interest of
9 children.

10 But I do understand the question, mightn't
11 Congress have had -- or mightn't this Court in hindsight
12 attribute to Congress, another legitimate purpose,
13 protecting common carriers from the distasteful
14 obligation of carrying messages that, in some cases, as
15 Justice Scalia suggests, are just short of obscene,
16 although in other cases, as with many of the portions of
17 the Carlin tape, are probably far short of obscene.

18 That interest is an important one, I think, to
19 examine, even if Congress didn't have it in mind, though
20 I wouldn't concede that it would be appropriate to
21 uphold the law on that basis.

22 The fact is that most courts have not treated
23 telephone companies in this context as common carriers.
24 Pacific Bell has debated whether it will carry these
25 messages; for the time being, it does. Mountain State

1 said no. And the Ninth Circuit, in an opinion by Judge
2 Sneed, in Carlin Communication against Mountain State,
3 said that when you have these messages that can reach
4 lots of people at once, the phone company doesn't have
5 to be treated as a common carrier. It declined to
6 construe state law as requiring that pornographic
7 messages, even lawful ones, be carried.

8 Southern Bell similarly refused, and the Fifth
9 Circuit said that it didn't have to carry them. And
10 both Circuits said there was no state action.

11 So the premise that Mr. Taranto has, that
12 perhaps Congress might be upheld on another ground, I
13 think just can't be sustained. So we do have to focus
14 on children --

15 QUESTION: Have there been decisions in other
16 Circuits that came out differently from either the Fifth
17 or the Ninth Circuit, Mr. Tribe?

18 MR. TRIBE: Mr. Chief Justice, I don't think
19 so. So far, every Circuit has said these are not common
20 carriers with this general obligation.

21 QUESTION: So --

22 QUESTION: Does your client take a position
23 that the telephone companies are common carriers that
24 must be required --

25 MR. TRIBE: I think --

1 QUESTION: -- to carry these messages?

2 MR. TRIBE: -- an affiliate of Sable has
3 argued for that position in other cases, but the client
4 I represent here does not take any position on that
5 matter in this case. I really don't have a view.

6 I do think that there is a powerful --

7 QUESTION: You have no view on whether the
8 telephone companies can refuse to carry these messages?

9 MR. TRIBE: Oh, I'm inclined to think that
10 they can refuse, unless there is some governmental
11 pressure upon them, in which case it's tantamount to a
12 governmental ban.

13 Indeed, Judge Sneed did take the position that
14 when they refuse under threat of prosecution, then the
15 First Amendment comes into play. And that, of course,
16 is the focus of our case today --

17 QUESTION: Well, but, are we talking the
18 long-lines companies or just the local companies?

19 MR. TRIBE: We're talking about the Baby Bells
20 and the other local companies. As to the long-line
21 companies, of course, if the locals refuse to carry,
22 there'd be nothing to connect.

23 QUESTION: Sure --

24 MR. TRIBE: But I suspect a similar
25 proposition would be advanced with respect to the

1 long-line companies.

2 QUESTION: But I -- we can say that it's not
3 settled, either from the standpoint of the policy of
4 your client, or by a definitive decision of this Court
5 that the carrier is not going to be told that it's
6 required to carry the messages?

7 MR. TRIBE: Not absolutely and authoritatively
8 settled, Justice Kennedy, but I think implausible to
9 sustain this law on that ground, first, because it's
10 likely they wouldn't be so required. Second, because
11 that wasn't one of Congress' reasons. Third, because
12 even if there is some such requirement, that requirement
13 is purely a product of state law.

14 And for this Court to uphold a law that
15 outright bans and criminalizes concededly protected
16 speech in order to hypothetically protect some possible
17 potential common carriers from a state law obligation,
18 seems something of a stretch.

19 The real issue here, I think, is children.
20 And whenever a category --

21 QUESTION: But -- but -- but before we leave
22 that --

23 MR. TRIBE: Yes.

24 QUESTION: Would it be constitutional for
25 Congress to pass a statute saying that common carriers

1 can refuse to carry any commercial message they choose?

2 MR. TRIBE: That's an intriguing question,
3 Justice Kennedy. I suppose, if there were something of
4 a monopoly, and the impact of that law was to prevent
5 certain persons from getting protected messages
6 somewhere, it would be a little like Marsh v. Alabama,
7 in which this Court held that a private company cannot,
8 in effect, be authorized by state law to block access of
9 a whole group of people to a protected message. But
10 that would be a difficult issue for another day, I think.

11 QUESTION: And -- and if -- if that statute is
12 -- is not constitutional, then we are right back to this
13 question, because the next question could be, would a
14 statute be permissible allowing the option to the
15 company to refuse indecent calls.

16 MR. TRIBE: In any event, that would surely be
17 a less restrictive alternative for Congress. But if
18 Congress were to say that a company may refuse to carry
19 certain kinds of messages, and in that way were to try
20 to relieve them of the burden, the adverse impact on
21 protected speech by message providers would be
22 considerably less. Because it would depend on a later
23 adjudication of whether that law was valid.

24 With respect to children, I think the
25 important and quite universally recognized point, and we

1 certainly have to concede it, is that when a category of
2 speech is protected for adults but might harm children,
3 there are not many ways that government can absolutely
4 rule out any possible child access.

5 There are three broad approaches government
6 can take. It can try to channel or zone the speech into
7 times and places where parents can supervise exposure.
8 This Court authorized, for example, banning the sale of
9 adult magazines, even not quite obscene ones, to minors
10 in Ginsberg, in Pacifica.

11 Although it certainly didn't authorize
12 outright criminalization, it said that one could take a
13 radio station's careless daytime broadcast of dirty
14 words into account in the licensing context. One could
15 rely, as this Court said, one had to, in Bolger, on
16 parents to intercept potentially indecent condom ads at
17 the mailbox. That's one approach.

18 Now, a second approach is to screen. That is,
19 one can require that the speech, which is unsuitable for
20 children, be coded or scrambled, or otherwise made
21 accessible only to people who have some special
22 information or device. And then one can make it illegal
23 for minors to obtain that device.

24 You could require lockboxes on cable t.v.,
25 and, of course, there is the FCC's 1987 approach.

1 Now, these two approaches aren't perfect.
2 Children are not chained to their parents. Parents may
3 be busy or distracted. Kids can go next door. All
4 locks and codes can be broken by someone enterprising
5 enough.

6 And so it's tempting sometimes to take the
7 next steps and to ban the speech outright by criminal
8 law so that not even willing adults can get it, which is
9 the approach of this -- of this statute.

10 QUESTION: Well, unless you want to say this
11 approach is -- is like the first approach, it -- it --
12 it says you can do it, but not in this place. That is,
13 not on these common carrier lines.

14 MR. TRIBE: Not on the telephone.

15 QUESTION: You can do it by cassettes, you can
16 do it by other modes, just not by telephone.

17 MR. TRIBE: I understand.

18 QUESTION: Why is that different, in kind,
19 from the first approach?

20 MR. TRIBE: I think the search for that kind
21 of limiting principle is important. Because, I think,
22 as your question recognizes, otherwise the government
23 could use a flat ban to reduce the messages reachable by
24 phone to those that are fit for children.

25 The same rationale, namely, some kid will get

1 through, could be used to eliminate the sale of
2 indecent, but not obscene, books, magazines, films,
3 videos, HBOs, and the like. Indeed, much of what is
4 here described as just short of obscene is not
5 distinguishable from a lot of what's in R-rated movies,
6 and lots of racy novels.

7 So it is important to ask whether there is
8 something distinctive about dialing a phone that would
9 justify this content-based law, which is certainly not
10 narrowly tailored. I mean, after all, most of what it
11 outlaws is an adult deliberately dialing a call, not
12 being harassed by anyone.

13 And so, let me -- let me turn to that.

14 QUESTION: How about the fact that it's in my
15 home, for one thing? I can keep my kids out of the
16 movie, but I can't keep them out of my home. And the
17 phone is right there whenever they want to use it.

18 MR. TRIBE: The phone is right in your home,
19 as is the mailbox. And if you don't want the kids, if
20 you don't want the kids, as I certainly wouldn't want
21 them, to dial these companies from my phone, I wouldn't
22 buy a de-scrambler.

23 And the FCC takes that into account when it
24 says we do want to empower parents in their homes to
25 disarm the telephone, make it not a -- a vehicle for

1 getting this kind of indecent speech.

2 But this is not a medium -- call it common
3 carrier or anything else -- that is somehow directed or
4 dedicated to minors as in a -- like a public school PA
5 system or an educational channel. And --

6 QUESTION: Mr. Tribe, what is a blocking
7 device?

8 MR. TRIBE: Well, there are three versions of
9 it. There is a central access blocking technique, which
10 uses the computers within the phone system, and which is
11 now becoming feasible just about every place. There is
12 a device that can be attached to the phone, in which the
13 default position is the message can get through, but
14 then if you block, the message can't. And there is a
15 de-scrambler, which is what the FCC in 1987 advocated as
16 the thing making it feasible --

17 QUESTION: Well, the FCC never relied on the
18 use of blocking devices?

19 MR. TRIBE: No. No, it did not. It relied
20 instead --

21 QUESTION: Has the technology changed since
22 then, so that that is now feasible?

23 MR. TRIBE: It seems to have advanced,
24 although the record in this case doesn't tell us. The
25 FCC did say last April in Carlin III that the

1 combination of access codes, required prepayment by
2 credit card and scrambled messages, so that the default
3 position is that the indecent message can't get through
4 unless the parent wants it to get through, that that
5 combination was, as you indicated, Justice O'Connor, a
6 reasonable, feasible and effective way. But --

7 QUESTION: Did -- does Sable agree with that
8 position?

9 MR. TRIBE: That it's reasonably feasible and
10 effective, absolutely.

11 QUESTION: And does it agree that that it's a
12 legitimate regulation?

13 MR. TRIBE: The decision in Carlin III raised
14 one question about that, that I think I ought, in
15 candor, to focus on. And that is, the Second Circuit in
16 Carlin III suggested that it is legitimate unless and
17 until even less restrictive alternatives become
18 available. And they were talking primarily about a beep
19 tone approach, under which the default position would be
20 that the message could get through unless the parent
21 installed, for \$5 or so, and that is now feasible I
22 understand, a beep tone device in the phone so that it
23 wouldn't get through.

24 But it seems to me that the combination -- I
25 don't want to be -- I don't think one should get

1 distracted with the technological wizardry of all this.
2 The fundamental proposition is that there is nothing
3 distinctive about phones. If anything, it cuts the
4 other way. It's much easier to police the phone, either
5 in your own house or in a neighbor's house, than it is
6 to police a kid looking in somebody else's closet for
7 old copies of Playboy or old centerfolds, or turning on
8 the HBO.

9 At least some parent is going to have a
10 monthly bill from Sable or Carlin -- actually, from the
11 phone company, indicating use of a service by Sable or
12 Carlin. So there is a policing mechanism.

13 Justice Scalia --

14 QUESTION: Well, I'm still not sure of the
15 answer. Does -- does Sable agree that some, or all of
16 these devices in combination, are legitimate?

17 MR. TRIBE: Yes. Certainly, as a less
18 restrictive alternative than a flat ban. It agrees that
19 they are legitimate unless and until a less restrictive
20 alternative, still, becomes available.

21 But certainly, their availability makes this
22 flat ban illegitimate.

23 Let me return to Justice Scalia's question
24 about the terrible -- the rape of that 12-year-old.
25 Some of the stuff, which is either obscene or not

1 obscene, in any medium, might be associated with
2 terrible, terrible tragedy.

3 That isn't, I think, denied. The question
4 really is can one, as a result, in dealing with
5 non-obscene material, which the government admits is
6 protected for adults, wipe it out from the whole medium
7 on the theory that it's somehow distinctive.

8 The fact is, if you can do it to the
9 telephone, you can do it to pictures of nudity or
10 violence that are not suitable for minors, that might
11 give them terrible ideas, but that are protected for
12 adults. They can be every bit as tempting and
13 corrupting for children, both in print and on film.

14 There are other suggestions the government
15 makes for somehow trying to limit the precedent that I
16 think it realizes could be terribly dangerous. They
17 suggest repeatedly in their brief that what's
18 distinctive about the phone in your home, to which you
19 referred, Justice Scalia, is that it is somehow immune
20 to control for age at the point of sale.

21 That is, unlike the neighborhood magazine
22 store or the neighborhood movie theater, where there is
23 somebody in the window and where, unless you're pretty
24 close to 18, you can't very well pass for 18, though you
25 can sneak in, the government says that there's no live

1 vendor at the telephone, and therefore no check at the
2 point of sale. And therefore, it's distinctive. And we
3 could, therefore, justify a sort of limited ruling
4 saying that on the telephone you can reduce adults to
5 what is suitable for minors.

6 I think that that's quite a canard. I mean,
7 the fact is that the FCC's safeguards, the combination
8 of requiring a credit card or an access code, or
9 scrambling the message, would interpose live vendors.
10 When you go to get the credit card or the access code or
11 the de-scrambler.

12 The picture of the world that is painted by
13 the government in its brief is that these children are
14 so enterprising they can steal their parents' credit
15 cards, they can sneak into someplace and buy this
16 de-scrambling device, but somehow, despite that, they're
17 not going to manage to see the same thing on adult -- in
18 adult magazines or somewhere else.

19 The fact is you have to buy an adult magazine
20 even to get the telephone number of one of these
21 companies. So the idea that the absence of a live
22 vendor is decisive, I think, is fallacious.

23 It's especially fallacious since the
24 government's own argument shows that the harm comes not
25 from the purchase, but from the peek. The harm is

1 exposure. It doesn't matter who bought it, if the child
2 goes across the street and looks at the centerfold at
3 the age of five or six, or reads some dirty jokes, that
4 can be disruptive of development in exactly the same way.

5 The Issue, therefore, has nothing to do with
6 the vendor, it has to do with the parent. And are we
7 going to have government, basically, displace parents,
8 because parents are not -- are not perfect?

9 QUESTION: But what about the impact on the
10 child? The printed word is -- is less -- less likely to
11 be attractive and harmful; pictures, more so; the live
12 human voice, it would seem to me, more so still. And
13 I'm sure, right around the corner with fiber optics is
14 -- is these services with video on telephone lines.

15 MR. TRIBE: But, Justice Scalia --

16 QUESTION: Is there no distinction that can be
17 based upon the degree of harm that -- that even letting
18 a few children slip under -- under the wire can cause?

19 MR. TRIBE: There are two points, Justice
20 Scalia. The first is that no system will prevent some
21 slippage under the wire unless we take the draconian
22 step of completely blanking out protected speech.

23 QUESTION: I agree with that. I think --

24 MR. TRIBE: The second proposition, however,
25 is that this is not a live voice. The government makes

1 a special point of saying that live, two-way
2 conversations have nothing to do with this case. This
3 is a recorded voice; it's an answering machine.

4 QUESTION: Well --

5 MR. TRIBE: And certainly a tape or a record
6 or a video --

7 QUESTION: I'll take that. That -- that's
8 still better than the printed word, I would think --

9 MR. TRIBE: Well --

10 QUESTION: -- as -- as far as its impact upon
11 the juvenile is concerned.

12 MR. TRIBE: But does it matter whether it
13 comes into your ear through the telephone or through the
14 air in front of you when you put it on a record player
15 or a tape recorder? Are we now going to say, as it
16 would follow from that question, I think, that if a
17 record or a tape contains suggestive or salacious
18 language, or is somehow erotic, though not obscene, it
19 certainly would be disruptive for a five-year-old or a
20 10-year-old to hear, that we can't sell it? Because if
21 you sell it down the street, some 15-year-old may buy
22 it, and the five-year-old may borrow it.

23 It seems to me that that is an illimitable
24 position, profoundly dangerous to the First Amendment.

25 I understand the temptation of it because the

1 stuff may not seem terribly edifying.

2 QUESTION: I take it then, it wouldn't make
3 any difference to your argument if the -- if the -- if
4 the Commission had found that there is just no
5 technologically feasible way of keeping this away from
6 children at all?

7 MR. TRIBE: Justice White, I think it would
8 depend, and in this I agree with Mr. Taranto, on what
9 was meant by no feasible way. That is, take
10 skywriting. They use an example --

11 QUESTION: Well, I -- I know, but my question
12 --

13 MR. TRIBE: Yeah.

14 QUESTION: -- let's just suppose that the
15 Commission had found that -- that there is just no way
16 of really keeping this away from -- it just won't be
17 just a few, but practically any child that wants to can
18 get to this.

19 MR. TRIBE: Yes --

20 QUESTION: I would think your argument would
21 still be the same.

22 MR. TRIBE: Well, I think the compelling
23 interest in protecting children leads, as Justice
24 O'Connor says, to a requirement of narrow tailoring.
25 And that leads to an inquiry of whether there really is

1 a less restrictive alternative.

2 And in the rare case where there is just no
3 way --

4 QUESTION: Well, so -- so if there weren't --
5 if there weren't a less restrictive alternative, you
6 would think the law would be all right?

7 MR. TRIBE: It might well be all right if
8 large numbers of children could, in any event, get a
9 hold of it. I was about to give the example of
10 skywriting. There are some things that, just by the
11 nature of it, when they're up there, everybody can
12 equally see them. And you can't filter out some people.

13 But it is simply fallacious to suggest, as the
14 government does, that we're dealing here with anything
15 remotely of that sort. That is, all of the evidence
16 about the hundreds of calls that came in, came from a
17 period when there were no FCC safeguards in place.

18 The primary quotation they rely on in their
19 brief is from Brent Ward, U.S. Attorney in Utah. And he
20 said that there were hundreds of calls from parents of
21 minors who complained to Carlin's New York City
22 telephone service. But those calls occurred without any
23 safeguards at all.

24 And if you ask what Brent Ward, their primary
25 witness on this subject, testified before Congress, he

1 said this, and we quote him at page 9 of our brief, "The
2 access code requirement," I'm quoting, "The access code
3 requirement and the screening option would dramatically
4 reduce the number of calls from minors, almost
5 eliminating them. It would be a very effective way to
6 do it." That's his language.

7 Now, the government says, but that's only
8 because they have a compromised goal. The compromise,
9 as Justice O'Connor suggests, is with the Constitution,
10 with the First Amendment. They say, if you really have
11 an unalloyed goal, then you can say that there is no
12 less restrictive alternative. But the alloy that they
13 would remove is the alloy of the First Amendment.

14 That is, quite clearly, if you give any weight
15 at all to the importance of not preventing adults from a
16 medium ultimately indistinguishable from others, from
17 having access to material that is protected as to them,
18 then this is an overly broad law.

19 QUESTION: So how do you decipher what
20 Congress did?

21 MR. TRIBE: Oh, I think in an election year,
22 in 1988, it's not too hard, Justice White, if you ask me
23 that question to decipher what Congress did almost --

24 QUESTION: I didn't say it was hard, I just
25 wanted to hear what you had to say about it.

1 (Laughter)

2 MR. TRIBE: I think this was -- I think this
3 was a politically popular measure to favor, politically
4 devastating to oppose, even though --

5 QUESTION: Well, that's fine. But what do you
6 think they -- what do you think they had in -- what do
7 you think they tried to do, to make it absolutely -- to
8 achieve the impossible goal of -- of ensuring that no
9 child ever --

10 MR. TRIBE: I think that what they --

11 QUESTION: They didn't care whether it was one
12 child or 1,000 who could -- is that it?

13 MR. TRIBE: They had no -- they were
14 frustrated, Justice White, because there was this long
15 colloquy between the relevant administrative agency, the
16 FCC, and the Second Circuit, lasting for about five
17 years, going back and forth.

18 And it was in early April of 1988 that the
19 Second Circuit finally came down in Carlin III and said,
20 you've -- you've done it; you've solved it. Within days
21 -- within days Congress voted this flat ban. The
22 hearings were held months before Carlin III came down.

23 So Congress probably thought, if you ask me to
24 speculate, that the Second Circuit was forever going to
25 frustrate the FCC and that it was just going to cut

1 through all of the red tape, and since it didn't value
2 this stuff much anyway, and since it thought, perhaps,
3 that it knew what it was outlawing, although, with
4 Justice Stevens, I'm not sure exactly what it was
5 outlawing, because these terms are not self-defining --

6 QUESTION: Well, did the -- did the --

7 MR. TRIBE: -- they just said, let's go.

8 QUESTION: Did they -- did they seek the views
9 of the Communications Commission with respect to this
10 particular piece of legislation? And what did they --

11 MR. TRIBE: Oh, yes. They were told by Diane
12 Killory --

13 QUESTION: What did they say? Did they --
14 they recommend that it be passed?

15 MR. TRIBE: They recommended that it was
16 probably unconstitutional.

17 QUESTION: Well -- well, they said --

18 MR. TRIBE: And that Congress not go that far.
19 President Reagan, when he signed it, said I'm
20 not so sure that it will pass muster, but I'm going to
21 sign it.

22 I do think, if you ask what they had --

23 QUESTION: What -- what was their view of the
24 -- when they presented their views, they said it might
25 be unconstitutional, but what about how -- how -- how --

1 how safe was -- did they say that -- that there is a --
2 there is a -- a reasonably effective way of doing this?

3 MR. TRIBE: Oh, yes. They concluded in their
4 third report in 1987 that there's a reasonably effective
5 way of doing it. And that report was before Congress
6 when it had this law. And the colloquy wasn't over
7 whether that would be reasonably effective --

8 QUESTION: And -- and did they testify before
9 the committee -- the committee -- the --

10 MR. TRIBE: I believe Diane Killory did, but
11 I'm sure Mr. Taranto will have that information.

12 QUESTION: And did they explain what they
13 thought reasonably effective was?

14 MR. TRIBE: Well, the -- they, I believe,
15 agreed with Brent Ward, that it would almost eliminate
16 calls from minors. And these are calls, I do want to
17 get back to the suggestion, Justice Scalia, that this is
18 just a teensy-weensy bit short of completely
19 unprotected. I don't think there's anything in the
20 record that -- that shows that.

21 After all, the -- the government says, in page
22 5 of its brief, that this criminalizes calls even when
23 the -- when the message is only suggestive, not sexually
24 explicit, even when there's no prurient appeal at all.

25 And in oral argument, they say that

1 represents, they think, a fair volume. Even when -- and
2 they -- to answer Justice Stevens, they go to the
3 Pacifica case to say, well, what does indecent mean? Of
4 course, Pacifica dealt with the Carlin, "seven dirty
5 words" monologue. That wasn't erotic in the slightest.
6 It was, perhaps, in terrible taste. It was more funny
7 than erotic. It might have been gross. But it had
8 nothing to do with heavy breathing. It had nothing to
9 do with anything porno -- pornographic in the usual
10 sense.

11 The government concedes that this ban applies
12 even if there maybe serious value. Indeed, as one of
13 the amicus briefs suggest, one of the commissioners of
14 the FCC wondered why Ulysses, sort of, ever made it,
15 because he doubted that it had serious value.

16 This law is about as broad as one can imagine.

17 QUESTION: Mr. Tribe, if you prevail in your
18 -- or Sable prevails, and the indecency portion of the
19 statute is struck down, do -- is -- does the FCC still
20 have authority to proceed the way it was proceeding up
21 through 1987?

22 MR. TRIBE: I believe, Mr. Chief Justice, that
23 the prior law would have to be re-enacted to give it
24 that authority, though they might --

25 QUESTION: Did Congress --

1 MR. TRIBE: -- find some more general statute.

2 QUESTION: Did Congress repeal the prior law
3 when it enacted the 1988 statute?

4 MR. TRIBE: I believe it replaced the prior
5 with the 1988 statute. But I'm sure that the prior law,
6 which was a little bit like the law of New York in
7 Ginsberg, it outlawed targeting minors, and it created a
8 safe harbor if the FCC's regulations were complied
9 with.

10 I have no doubt that they would re-enact that
11 in a minute.

12 QUESTION: Can I come back to your -- your
13 point about, you know, how much really important stuff
14 is covered by this? In the Second Circuit case, Carlin
15 won. The court -- the court observed that, rather
16 incredibly, 800,000 calls per day were made to
17 dial-a-porn, your client's service, colloquial --
18 colloquially called dial-a-porn, in May, in the one
19 month of May 1983.

20 MR. TRIBE: Uh-huh. It was quite a fad at
21 first.

22 QUESTION: And 180 million calls in the year
23 ending February 1984.

24 MR. TRIBE: Right.

25 QUESTION: Now I don't think they called up to

1 listen to the Carlin dialogue. I really don't. I don't
2 think that's where the money is. I don't think anybody
3 thinks that's where the money is.

4 MR. TRIBE: Actually, actually, the numbers
5 dropped off dramatically. And many people think that
6 jokes are the next thing, and that people got bored with
7 those kinds of calls. But the key point, really, is
8 that if it is protected, as the government concedes,
9 judging what its value might be, is a treacherous
10 enterprise under the First Amendment.

11 One man's trash may be another's solace.
12 These poor --

13 QUESTION: I never believed that at all.

14 MR. TRIBE: You never believed that?

15 QUESTION: I never believed it for a minute.

16 (Laughter)

17 MR. TRIBE: The lonely, bored person, afraid
18 of getting AIDS. I mean, the fact is, Justice Scalia,
19 I, at first, didn't take this as seriously as perhaps I
20 -- I should, but last year, the National Academy of
21 Science's Institute of Medicine reported that stifling
22 graphic sexual materials may now take a toll in human
23 lives in the current period.

24 The government addresses that. And they said,
25 well, we don't know if it's true. If it's protected by

1 the First Amendment, the default position, when in doubt
2 should be, don't suppress.

3 Let me, in the very brief time I have left --
4 yes, sir?

5 QUESTION: Are you going to argue the --

6 MR. TRIBE: Obscenity.

7 QUESTION: -- obscenity case?

8 MR. TRIBE: I was about to try to do that.

9 QUESTION: About to try to. All right.

10 MR. TRIBE: Right.

11 (Laughter)

12 MR. TRIBE: Of course, the Miller case, the
13 separate, entirely separable obscenity provision draws
14 on Miller, which involved a mass mailing thrust on
15 unwilling people. And some members of the Court would
16 really, I think, be understandably reluctant to uphold
17 an obscenity law where the interests of consenting
18 adults and children are otherwise taken care of.

19 But the key point about the obscenity
20 provision is that even if you would otherwise regard the
21 government's power of criminalization as broad enough to
22 encompass obscene transmission to a consenting adult,
23 the government has conceded that this law, because of
24 the discretion of the phone companies, they can invite
25 -- invite eavesdroppers from Salt Lake City on calls

1 meant only to Los Angeles. This law puts pressure on
2 the companies to leave on the cutting room floor
3 protected material -- protected in the community where
4 it is targeted, in order to avoid prosecution.

5 And their whole answer is, hey, you don't need
6 to challenge it now; wait till you're prosecuted. The
7 law is capable of valid application. That's a
8 completely non-responsive argument.

9 QUESTION: The Big Chill?

10 MR. TRIBE: It's the very Big Chill.

11 (Laughter)

12 MR. TRIBE: And it's not just an overbreadth
13 challenge, this is -- this operates like a prior
14 restraint; it really does. That is, what's left on the
15 cutting room floor -- because otherwise, someone will
16 involuntarily ship it to Salt Lake City -- will never
17 expose you to prosecution. And they have never
18 responded to that.

19 QUESTION: Is it correct Mr. -- is it correct,
20 Mr. Tribe, that your client has been able to reach
21 agreements now with Pacific Bell to offer purely local
22 service in the Los Angeles area?

23 MR. TRIBE: Ah, would that it were quite as
24 true as the government suggests at page 22 of its reply
25 brief. What is correct is that proposed tariffs are in

1 place with the California PUC. It's completely up to
2 Pacific Bell whether to live with them. And their
3 current proposal says, we might do it, but we will not
4 allow you to collect any revenue for these local calls.

5 Well, that's not exactly a settlement. That
6 is, they might allow carrying local calls, purely local,
7 which they would exclude from eavesdropping from across
8 the country, but not transmit any of the revenue
9 generated thereby to Sable.

10 QUESTION: Well, I guess your client could
11 also hire people to answer the phone calls and screen
12 them out from --

13 MR. TRIBE: It could use a completely live
14 method altogether --

15 QUESTION: Yes.

16 MR. TRIBE: -- but I suppose you could say of
17 records that people sell, they could also use live
18 singers. But this is a separate, distinctive channel of
19 communication. And the government's position, that they
20 can shrink it to what is fit for children, knows no
21 limiting principle whatever.

22 And whatever one might think of the great or
23 small value of this stuff, it seems to me that the First
24 Amendment is in the balance and that it ought to prevail.

25 Thank you.

1 QUESTION: Thank you, Mr. Tribe.

2 Mr. Taranto, do you have rebuttal?

3 REBUTTAL OF RICHARD G. TARANTO

4 MR. TARANTO: Just a couple of brief points
5 that I think focus on the heart of -- of our dispute.

6 First of all, it cannot be consistent with
7 what this Court held in Ginsberg and reiterated in
8 Pacifica, that the point of sale is simply irrelevant to
9 the inquiry.

10 If congressional and state legislative concern
11 ended with the proposition that minors can, through a
12 variety of means, pick up copies of Playboy Magazine in
13 their friends' houses, or what have you, then the whole
14 proposition and ruling of Ginsberg would be defeated.

15 The point of -- the significance of the point
16 of sale is that it represents, in most cases, a very
17 reliable opportunity to make sure that minors are
18 screened from the audience.

19 What is distinctive about the telephone
20 medium, as was distinctive about the broadcasting
21 medium, is that that is simply not possible.

22 One -- one additional point, and that is, we
23 think it is, at the very least, important in focusing,
24 then, on whether Congress did adopt the less restrictive
25 alternative, in addition to giving deference to

1 Congress' and the Commission's judgment about precisely
2 what kind of access children would have, to ensure that
3 -- that we don't -- that the Court does not strike down
4 a ban on the strength of a less restrictive alternative
5 that the Second Circuit found unconstitutional in Carlin
6 III, and that Sable, itself, would continue to challenge
7 as unconstitutional.

8 Thank you.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Taranto. The case is submitted.

11 (Whereupon, at 10:59 a.m., the case in the
12 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-515-SABLE COMMUNICATIONS OF CALIFORNIA, INC., Appellant V. FEDERAL COMMUNICATIONS COMMISSION, ET AL., and

No. 88-525 - FEDERAL COMMUNICATIONS COMMISSION, ET AL., Appellants V. SABLE COMMUNICATIONS OF CALIFORNIA, INC.

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