OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL., Petitioners v. FEDERAL COMMUNICATIONS COMMISSION, ET AL. and ALLIANCE FOR COMMUNITY MEDIA, ET AL., Petitioners v. FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CASE NO: No. 95-124 & No. 95-227

PLACE: Washington, D.C.

DATE: Wednesday, February 21, 1996

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IN THE SUPREME COURT OF THE UNITED STATES

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DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL., Petitioners : v. : No. 95-124

FEDERAL COMMUNICATIONS COMMISSION, ET AL. and ALLIANCE FOR COMMUNITY MEDIA, ET AL., Petitioners : v. : No. 95-227

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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Washington, D.C.

Wednesday, February 21, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:14 a.m.

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APPEARANCES:

I. MICHAEL GREENBERGER, ESQ., Washington, D.C.; on behalf of the Petitioners.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 95-124, Denver Area Educational Telecommunications Consortium v. FCC, and Number 95-227, Alliance for Community Media v. FCC.

Mr. Greenberger.

ORAL ARGUMENT OF I. MICHAEL GREENBERGER

ON BEHALF OF THE PETITIONERS

MR. GREENBERGER: Mr. Chief Justice, and may it please the Court:

This case presents a question of constitutional analysis of section 10 of the 1992 Cable Act, which in turn amended provisions of the Federal Cable Act of 1984 that dealt with public and leased access channels on cable systems.

It is important to note that public and leased access channels are not a creation of the Federal Government. As this Court noted in the Turner Broadcasting case just 18 months ago, cable companies owe their very existence to municipalities giving them by contract the rights of way in their community to lay and string their cable. That's encompassed in a franchising agreement.

As part of that franchising agreement, that

contract between the municipal government and the cable company, it had become a practice in the sixties, seventies, and eighties for municipalities, without any inspiration from the Federal Government or requirement by the Federal Government, to insist as a condition of allowing entrance of the cable companies and allowing them to speak in the very first instance, that they set aside channels for the public, and those channels were supposed to be used and are used on a first come, first served, nondiscriminatory basis, free of editorial control and, in fact, in the usual case --

QUESTION: May I ask you on that one point, is it clear that those channels are offered pursuant to this section within the meaning of the statute we're looking at, when the locality imposes those conditions?

MR. GREENBERGER: In other words, does section 10 apply to these channels?

QUESTION: Well, it's the part of subsection (h) that precedes section 10 which was in the statute all along. It says, any cable service offered pursuant to this section. Does what you described fit within that language? I want to be sure.

MR. GREENBERGER: Yes. It is definitely -- I think there's no dispute between the parties that public and leased access channels are covered by --

QUESTION: Even if these restrictions you describe were imposed by the locality rather than the Federal Government?

MR. GREENBERGER: Yes.

QUESTION: Okay.

MR. GREENBERGER: As well as insisting upon leased public access channels, as we noted in our reply brief, by 1982 over 350 jurisdictions, municipalities, had insisted that leased channels be set aside. Those are channels which can be used by people who are interested in doing commercial television and can't get their programming on a regular cable channel.

In 1984 --

QUESTION: You say this came, too, at the instance of municipalities --

MR. GREENBERGER: Yes.

QUESTION: -- rather than the National Government?

MR. GREENBERGER: That's correct. There was a general feeling and a fear on the part of municipalities when they opened their city for the laying and stringing of cable that they were allowing a kind of monopoly, or at least a bottleneck, into their community with regard to the speech over the cable system, and they wanted to let people unaffiliated with the cable company -- that is, the

public in general and people who wanted to use leased access -- to come on and be able to use that free of editorial control by the cable operator.

In fact, with regard to public access, most nonprofit public access corporations are appointed by the municipal government itself. They're the ones who are responsible for it.

In 1984, when Congress first got involved in regulating cable, they looked at this process, made extensive studies, had findings in the legislation that this was a good thing, they sanctioned -- they did not require, but they sanctioned the practice of municipalities having pubic access channels, and they did require that they be free from editorial control, but that was already a condition in the franchising agreements themselves.

QUESTION: Well, what do you mean when you say they sanctioned it?

MR. GREENBERGER: They said that communities may have public access programming. They did not say, we require it. They did not say you have to have it. They didn't say how you had to have it.

QUESTION: They just kind of ratified what was in --

MR. GREENBERGER: They ratified what the cities

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had already done.

QUESTION: Are you making this point in order to lead up to your State action argument? Is that what you're laying the groundwork for?

MR. GREENBERGER: Yes, I am leading up to that point, because --

QUESTION: Because it seems to me there might be State action even if the Government had enacted this statute in the very first instance.

MR. GREENBERGER: I agree with you, Justice Kennedy, and I will address that point, but the one thing I want to make clear is that in banc court of appeals and the Solicitor General's brief refuses to acknowledge what is clear from the record and nobody disputes, is the prior history of there being no editorial control by cable companies over public and leased access. The cities didn't want it. They wanted their citizens to be able to get on free of editorial control.

QUESTION: Well, but you refer to the in banc court. Only -- there were four dissenting judges below, and only two of them agreed with the proposition that there was State action, so two of the dissenting judges thought there was no State action either.

MR. GREENBERGER: Right, and the fundamental mistake I think that the nine judges made who didn't agree

with us below is they refused to recognize -- the in banc said the 1984 act took away editorial control in the first instance, it was required by the Federal Government, and all the 1992 act did was restore editorial control.

The only persons who challenged that were the two dissenting judges who dissented across the board.

Now, our position is the 1992 act, which is a floor amendment without hearings, without studies, without reports, without House consideration, and handled in a matter of minutes on the floor --

QUESTION: What does that have to do with anything?

QUESTION: Yes.

QUESTION: Does that have to do with the constitutionality of it?

MR. GREENBERGER: It certainly --

QUESTION: I thought Congress, so long as it passes the words by majority vote, the words can come from nowhere as far as we're concerned.

MR. GREENBERGER: Justice Scalia, when Congress acts against the prohibition of the First Amendment that Congress shall make no law, if it's a content-based discrimination, which we argue this is, there must be a compelling interest and the least restrictive means.

QUESTION: I understand all that.

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MR. GREENBERGER: Now, this Court said in Sable, and the plurality repeated again in Turner, that it's not an agency proceeding but there must be some record somewhere, either in the legislative history or in the bill itself -- Congress often makes findings in bills as they did in the '84 act -- that there is a compelling interest --

QUESTION: You mean, you're saying that the bill itself has to make a finding that there's a compelling interest?

MR. GREENBERGER: What I'm saying --

QUESTION: I don't think we've ever held that.

MR. GREENBERGER: Mr. Chief Justice, I think that this Court has been flexible and said both in Sable, which is the majority opinion of this Court, and in the plurality in Turner, that Congress can do this any way it wants, but when it treads on the rights of the First Amendment it has an obligation to let this Court know some way whether there's a compelling interest and whether the least restrictive means --

QUESTION: Well, it may have to make factual findings, but you can make factual findings in a bill that originates on the floor. Your suggestion in response to Justice Scalia that there's something wrong with a bill that originates on the floor --

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MR. GREENBERGER: No.

QUESTION: -- I don't think has any foundation in our cases.

MR. GREENBERGER: Thank you, Mr. Chief Justice, I didn't understand that was the -- I agree with you completely that the findings can be in the bill on the floor and, of course, in this legislation, there were no such findings.

QUESTION: Wait, I'm -- the findings have to be in the bill, you say.

MR. GREENBERGER: They can be anywhere. In --

QUESTION: In the floor debate?

MR. GREENBERGER: In Sable -- I know that you had a separate opinion in Sable, Justice Scalia, but in Sable eight justices of this Court said somewhere in the floor debate, in the hearings, in the bill, somewhere, this Court has to be told that Congress has a compelling interest.

QUESTION: Congress only speaks through its statutes. It doesn't speak through the statement of one Senator in a floor debate.

MR. GREENBERGER: That is --

QUESTION: That's so silly. But I don't want to waste your --

MR. GREENBERGER: If that's the prevailing view,

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Justice Scalia, that it can only --

QUESTION: It seems to me that a bill that comes to the floor, which has so clearly a compelling interest that it is immediately adopted by acclamation, you're telling me that bill is weaker than one which is debated on the floor.

MR. GREENBERGER: The minority is protected not by acclamation votes but by an explanation that there's a compelling interest, and this Court has insisted that the Congress, when it act pursuant to the First Amendment, if it has a content-based statute, which this statute is, that it outline -- not posit a disease, as Justice Kennedy said in the Turner Broadcasting case, they have to show that there's real harm, and they have to show, if it's content-based discrimination, that the least restrictive means are used.

In this case, section 10(a) and 10(c) provide the cable operator, the very persons that the municipalities didn't want to get involved in this situation, that they have the discretion to ban, to impose a total ban on --

QUESTION: How would Congress go about, in your view, showing that it was using the least restrictive means? Would a boiler plate recital somewhere that we find this to be a least restrictive means, would that aid

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the adjudication of the case?

MR. GREENBERGER: Mr. Chief Justice, in the Sable case, Justice White said that they could go about it in any way they want to, but they have to --

QUESTION: Go about what? Are you saying that the Congress has to make a finding that what it's doing is the least restrictive way?

MR. GREENBERGER: It doesn't have to make a finding, but it somehow has to allow this Court, when it makes a review, and this Court has frequently said it has independent judgment over what Congress does, not de novo review in this area, but an independent judgment.

It has to tell this Court why they're making a law that's abridging freedom of speech, and if it's content-based discrimination, what they have to tell this Court is that there's a real harm, a compelling interest, and that the least restrictive means are being used, and Sable so holds.

QUESTION: You're telling me that Sable holds that Congress has to find that what it's doing is "the least restrictive means"?

MR. GREENBERGER: I -- Sable does, and Sable follows many precedents, Mr. Chief Justice. Sable says there must be a record, and --

QUESTION: Well, to say there must be a record

from which this Court could make that determination is quite different from saying that Congress has to make the determination.

MR. GREENBERGER: No, it's -- the cases make it very clear that it's Congress that's abridging the speech, and Congress must make the record --

QUESTION: Well, but --

MR. GREENBERGER: -- and this Court reviews the record.

QUESTION: Including, in your view, a finding that what we are doing is the least restrictive means?

MR. GREENBERGER: I --

QUESTION: I don't recall any case in which I've seen, in the 20 years I've been on the bench, that I've read a record where Congress has said we find what we're doing is the least restrictive means.

MR. GREENBERGER: Your Honor, they may not have to say it with those exact words.

QUESTION: Well, what -- then what are we coming to?

MR. GREENBERGER: But they have to say -- for example, in Sable, which dealt with dial-a-porn, which is, we believe, basically a much more serious indecent problem than we're dealing with here, but in Sable the Court said there they had an existing means to regulate the

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problem -- credit cards, access codes -- and Justice White, speaking for substantial members of this Court, said that in order to put a total ban in effect, which is what Sable did, Congress must somewhere explain to this Court in a meaningful way why the existing regulation is no longer the least restrictive means.

QUESTION: The trouble that I'm having with this, and you may come to this later, in which case at some point -- I just -- is, it seems -- I'm having -- I find this very difficult, this case, in part because it seems to me there are First Amendment rights on both sides.

It isn't just that there's a First Amendment right of a person who wants to originate a program of a certain kind and those who want to perhaps see this particular program. There's also a First Amendment right as an editor of a person who provides transmission.

If this were the New York Times or ABC, or NBC News, et cetera, would you feel the same way? Wouldn't it be obvious?

MR. GREENBERGER: No, I don't feel the same way, and I will give you three reasons I believe that the First Amendment rights here of the so-called cable companies are at least accommodated, if they exist at all. In the first --

QUESTION: Do they -- how -- that's important, because it's a question of what framework we think about --

MR. GREENBERGER: As I mentioned originally, and as this Court recognized in Turner, to be able to speak in the first instance, cable companies had to come to municipalities and say, we want to get on your property, we want to lay and string cable, before they had any rights to speak.

And the municipalities universally -- and Congress recognized this in 1984 -- universally said, fine, but you've got to set aside space for us, public, unaffected -- it's just like a subdivision. You've got to set aside parks for the public. They said, you've got to set aside some of your channels.

QUESTION: Now, why -- look, I'm not certain that this is a correct way to view it, but they are people who provide to other people lots of messages, and they have to, of course, use a cable, and NBC has to use a piece of property where they broadcast through the air. The air was controlled by the public, the spectrum was controlled by the public, so is the cable place controlled by the public.

I'm not saying it's determinative. I'm simply saying, don't we have an instance, and why not, where

there are First Amendment rights versus First Amendment rights --

MR. GREENBERGER: Well, the First Amendment rights --

QUESTION: -- not First Amendment rights against something else.

MR. GREENBERGER: I'm sorry, Justice Breyer.

QUESTION: Yes.

MR. GREENBERGER: The First Amendment rights are being dealt with in a completely different case that's like the must-carry case that this Court handled in Turner.

So far, the United States Government has taken the position that if the cable operators have any rights with regard to public access and leased access, the discrimination against them is content neutral because there's no content involved, it's first-come, first-served, and the district court has so held.

The United States, when it gets up here, has to tell you that it is arguing these cable operators don't have the rights on leased access.

In the Turner case, we had a much harder question. In the Turner case it was, does NBC have a First Amendment right to be carried, and the Congress said in that case, and made a record, a detailed record, well,

the local NBC station does, because we want to have local content.

Now, most of this Court said that was content-neutral. Some of this Court said it was content-specific because it required a local nature.

In this case, all the municipalities said was, first-come, first-served, we don't care what you say, and cable operator, stay out of their way.

So if they have First Amendment rights, if they didn't surrender it upon entering into the cable business by getting the municipality to let them come on the property, those rights have been fully accommodated. The United States is so arguing, Judge Jackson so held in the Daniels case, that case is on appeal, and TWE, Time Warner case in the D.C. Circuit --

QUESTION: Mr. Greenberger, do I misunderstand the D.C. Circuit's in banc decisions on this point? As I read them, I thought that the conflict lay in the area of the or block question.

That is, it seemed to me that every one of the judges accepted that if all you had was cable operator, you can ban, they all would have found the scheme constitutional.

MR. GREENBERGER: With regard to the leased access, the cable company either must ban, which is a

total ban for adults and children --

QUESTION: But I'm asking you to forget the either.

MR. GREENBERGER: All right.

QUESTION: Just suppose they had had (a) and (c) and no (b).

MR. GREENBERGER: If it's -- we think there are three things the in banc court did not deal with when it decided this decision, three decisions of this Court, the Turner case, the Sable case, and the Skinner case. The Turner case --

QUESTION: But am I right in thinking that there was not a one of them that said, if all you had was (a) and (c), it would be unconstitutional?

MR. GREENBERGER: Judge Wald and Judge Tatel did agree that (a) and (c) were unconstitutional in and of themselves, and Judge Edwards and Judge Rogers said that (a) and (b) were unconstitutional because they work together, must block or -- must ban or block.

But leave (b) to the side. Let's talk about (a) and (c). (a) and (c) set up content discrimination. Everybody who wants to speak can get onto public access or leased access if they pay a fee except those people who have to identify themselves as speaking "indecently" as that is broadly defined in these definitions.

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So you have people who have a right to get on, most people, but if you self-label yourself indecent, if you self-censor, you can't get on. In our view --

QUESTION: Mr. Greenberger, how does the 1996 act affect this situation? It applies some blocking requirement now on nonaccess channels, right, under the new law?

MR. GREENBERGER: You can -- well, that goes to our least restrictive means argument, but for nonaccess channels what they've said, is if you've got indecent stuff and you don't want it in, call up the cable operator and tell them to scramble it. Cable operator, you've got to scramble it.

Here they say, for public and leased access, what we're going to do is allow, against the municipalities' wishes -- and by the way, there are no municipalities involved in this case, saying they're coming apart because of the problems in public and leased access, but against the municipalities' wishes they say, you can totally ban, for adults, too. If under (a) you totally ban leased access, adults don't see it, at all.

In Pacifica, at least, the very definition of indecency said, when there's a risk that children may be watching.

QUESTION: But just explain to me what change

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the new law makes now that applies across the board to all kinds --

MR. GREENBERGER: Well, with regard to public and leased access specifically, it did not affect these regulations but did give the cable operator the independent power to ban editorially for obscenity, nudity, or indecency, which would not be affected by this case.

With regard to all other channels on the cable, it gave in sections 504 and 505 a right to the parent or the cable subscriber to call in and ask that the cable be blocked from its home.

Now, it's -- I will tell you, Justice O'Connor, I don't pretend to be an expert. There's confusion in that statute about whether you can only block things you don't subscribe to, or whether you block things that you subscribe to and become a nonsubscriber, but there is a way of dealing with that in the new law.

With regard to broadcast channels, they have the V chip. They have -- the broadcast channels have a year to come up with a voluntary rating system, and Congress has required that every television set has to be built so that it can pick up the microelectronic wave and block something that's indecent or violent.

So when we say -- here we're talking about the

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potential of a total ban by cable companies who Congress in findings in 1984 said they don't like public access because it takes away their valuable channel space and they frankly just don't like these people in jeans and earrings walking around telling big-time cable operators what they're going to put on these channels. Congress made that finding, not in those words, to be sure, but they certainly made that clear.

And basically, with regard to State action, our view is this Court has made it clear when a law imposes burdens on speech based on content, it is subject not only to First Amendment scrutiny but to the most exacting scrutiny. This law poses burdens on the public, who are allowed by municipalities to come onto the thing if they self-identify themselves as being indecent. That's --

QUESTION: Mr. Greenberger, in judging the burden, may I ask you just to advert to (a) and (c) for a moment. Am I correct that with the exception of what I will generally just call indecency there is still a Federal statutory ban on any editorial control by the cable operators?

MR. GREENBERGER: Except that this was created an exception to the editorial ban in fact, de facto exception. They could for indecency, and in fact in the new law it does make it clear -- not that I think it

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really had to, but it does make it clear that the editors can ban for obscenity, indecency, and now nudity.

QUESTION: Okay. So we're faced with a statutory regime in which it's not the case that the statute is blank and suddenly Congress says, by the way, you can censor for indecency. What we've got is a scheme in which Congress has said, you may not censor, you may not exercise any editorial control, but you may exercise it for indecency.

MR. GREENBERGER: That's exactly right.

Now, one other thing that's important, the cable operators came to the FCC and said, wait a minute, our franchise agreements won't let us do this. Now, these agreements are off of 30 years in the making.

The community said, don't editorialize, and the cable operators said, well, in (a) and (c) you gave us discretion, but if we're bound by the contracts we can't use our discretion, and the FCC construed the statute and said that Congress intended to preempt not only future franchising agreements, but franchising agreements that were already in existence, and in 1984, Congress was so worried about the expectations in the contracts between municipalities and the cable companies, they said, you can preempt, but you can't preempt existing contracts. That's section 557 of the Cable Act.

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All of a sudden, out of the clear blue, all of these expectations pushed to the side, based on a supposed harm, a posited harm but not a proven harm, and certainly not based on the least restrictive means.

We can offer many suggestions of less restrictive means. Have the parent call the cable company and block the channel.

QUESTION: But Mr. Greenberger, isn't all precedent relevant to the issue of harm, so that really your concentration should be on the means used to check that harm? Pacifica, the ACT cases in the D.C. Circuit --

MR. GREENBERGER: Right.

QUESTION: -- I'm thinking it was pretty well accepted that there is harm to children.

MR. GREENBERGER: It's accepted, and we don't dispute that. In fact, we support it. Our one argument, it isn't proven here, and with regard to least restrictive means, it's not proven that this is the least restrictive means.

QUESTION: Well, but your argument on least restrictive means I think leaves out one ingredient of the Government's argument, and the Government's argument is the argument from inertia.

It may very well be that I would agree with you on least restrictive means if I made the assumption that

the parents were sitting there and making decisions as to whether they really want the kids to see it or whether they don't. What's the response to inertia?

MR. GREENBERGER: That's a very good question, Justice Souter.

Congress made findings in 1984 that lock boxes were fine. The FCC in implementing them said lock boxes are fine.

Congress has made no findings here. They didn't even mention lock boxes, that parents are inert or don't use lock boxes and, in fact, the D.C. Circuit uses not the least restrictive means test but the most effective means test, because they thought, without any guidance from Congress, that yes, some parents may be inert, but there's no finding to that effect at all.

QUESTION: We're back to whether there have to be findings again.

MR. GREENBERGER: Justice Scalia, I use the word --

QUESTION: We're back to whether there have to be findings or simply evidence from which this Court could make a reasonable conclusion.

MR. GREENBERGER: I stand corrected. That's exactly the proper way to put it. Substantial evidence from which this Court can make a decision.

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QUESTION: Is it illegitimate --

MR. GREENBERGER: I agree with you, Justice Scalia.

QUESTION: I'm sorry.

Is it illegitimate for us to draw our own conclusions about the probability of parental inertia?

MR. GREENBERGER: In the Sable case, Justice White made it clear this Court cannot make de novo judgments. The first judgments has to be made by Congress. You can review the judgment, you can review it independently, but this Court is not free to see if something is done --

QUESTION: But it has to be a finding. I thought you just said there didn't have to be a congressional finding.

MR. GREENBERGER: Substantial evidence.

QUESTION: You keep going back and forth on that.

MR. GREENBERGER: Substantial evidence.

QUESTION: So Congress doesn't have to make the judgment. We can make the judgment.

MR. GREENBERGER: No, no, no, that's wrong, Justice Scalia.

QUESTION: Congress does have to make the judgment.

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MR. GREENBERGER: Congress has to make -- provide substantial evidence in the first instance. You get to review it, decide whether it's satisfactory enough to meet the least restrictive means test. You can't make, I can't make, cable companies can't make the judgment of when the first --

QUESTION: Let me interrupt you. Supposing Congress, not in a formal finding but committee reports and lots of testimony, everybody says, well, we're pretty sure that a lot of parents are guilty of inertia. They don't pay enough attention to this problem, as they should. All that was perfectly clear that that's what Congress thought. Would the outcome of the case be different?

MR. GREENBERGER: The outcome of the case would be much more difficult. It might very well be different, because then they might say we have a compelling reason, parents aren't watching their children, now we've got to step in, this is the least restrictive means.

QUESTION: You don't think that's something we could take judicial notice of?

MR. GREENBERGER: Your Honor, my reading of the Sable case and the term plurality make it absolutely clear that Justice White said you can't take judicial notice.

QUESTION: Well --

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QUESTION: What if the question were whether violent crime is a problem in the United States, and there had been no finding by Congress. We could not take judicial notice of that?

MR. GREENBERGER: You could, Your Honor, but here the question is --

QUESTION: But -- well, if we can take judicial notice of a fact like that, surely we can take judicial notice of other facts, too, so long as they meet the standard for judicial notice.

MR. GREENBERGER: You can take -- my question is, can you take judicial notice that public and leased access channels throughout the country are purveying indecency, and indecency is coming from those channels? You would need expertise and help on that, I do believe.

QUESTION: Well, but then your position is that in some cases the Court cannot possibly make its own finding but in others it can.

MR. GREENBERGER: Your Honor, my view is that --

QUESTION: Is that right? Am I --

MR. GREENBERGER: In others it can when it's so obvious as to be unarguable. That there's violence in the United States, in my view, in that situation Congress would have made that clear.

QUESTION: But I -- we don't have to find -- maybe I misunderstood you. We don't have to find that these channels are purveying indecency. What we have to be satisfied about are facts that would go to the constitutionality of the application of the statute if there is an opportunity to apply it.

All we have to conclude about indecency is that if there is such a thing being purveyed, the statute would work in one way or it would work in another way.

MR. GREENBERGER: I think you do have to look those findings over if you're applying the least restrictive means test.

QUESTION: Well, are you claiming that the statute is going to be -- maybe you are claiming that the statute is going to be applied on a pretextual basis, not because necessarily there's indecency, but that this is going to be a pretext to keep the people in the jeans and the earrings from broadcasting, period.

MR. GREENBERGER: Right. We argue --

QUESTION: I mean, is that the argument you're --

MR. GREENBERGER: No, it's not the view.

QUESTION: Okay.

MR. GREENBERGER: The definition of indecency, which is another argument here, is so broad it's way

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beyond the definition used in Pacifica, that the public has to decide what the cable companies --

QUESTION: I grant you that, but that is, too, a separate argument, isn't it?

MR. GREENBERGER: Yes, it is, so a lot is swept into this point, but our basic view is that no matter what happens a content-based distinction has been made here.

All decent speech, or whatever Congress thinks is decent, automatically has a right to get on. If it's indecent, it has to jump through hoops and is subject to a total ban, not just for children, but for adults. There's no time channeling here.

QUESTION: Okay, but you -- I suppose you win, accepting your premises, if we assume there is one instance of indecency somewhere on some channel across the United States.

MR. GREENBERGER: Again, the Sable case made it absolutely clear that you don't have to prove that the world is perfect. What you have to prove is that there's a real problem -- and you don't have to prove that the restriction is perfect. There may be people get around it -- that it's the least restrictive means.

Congress is required to go through that analysis by substantial evidence, or whatever --

QUESTION: Okay.

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MR. GREENBERGER: -- and this Court has to see whether they've done it.

QUESTION: May I ask you just a different question? I guess it's the one that follows the Chief Justice's question of a moment ago. He spoke of our taking judicial notice of our problem of violent crime.

I'm going to make a suggestion which may have no application. I don't know.

What if there were on the record study after study after study by supposedly disinterested academics to the effect that (a) there's indecency coming over these channels, and (b) America's parents are inert. Let's assume the studies show that 52 percent of American parents suffer from total inertia on the subject.

(Laughter.)

QUESTION: Congress didn't happen to allude to them in the legislative history. Could we take those studies into consideration?

MR. GREENBERGER: You can take those studies into account, but the fact is that even if that were true, total banning is not the least restrictive means. We know that from section 10(b), which has blocking, and parents can ask to see the stuff.

QUESTION: Thank you, Mr. Greenberger.

Mr. Lawrence -- or Mr. Wallace, we'll hear from

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you.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE RESPONDENTS

MR. WALLACE: Thank you, Mr. Chief Justice, and may it please the Court:

The whole point of this Court's remand in Turner Broadcasting was based on its holding that cable operators do have First Amendment rights and further findings were needed to see whether the must-carry provisions at issue in that case were a valid restriction on those First Amendment rights.

Indeed, point 2 of the Court's opinion in Turner Broadcasting starts with the following sentence: there can be no disagreement on an initial premise cable programmers and cable operators engage in and transmit speech and they are entitled to the protection of the speech and press provisions of the First Amendment, so Justice Breyer's question is very much in point here.

Access programmers are a special category of cable programmers first provided for by Congress in the 1984 act. Of course, some access programming had originated theretofore. The leased access programming, the commercial access programming, was far less common, and that is the kind that Congress required cable operators to set aside channels to accommodate.

The public access programs, the so-called PEG access programming, public, educational, and governmental, was already quite common and Congress merely authorized franchising authorities to continue that at their discretion.

But what Congress did do that was new was to make access programmers a special category by providing that the operators, the cable operators would have no editorial control, no editorial discretion with respect to programming on those channels. They do have that kind of discretion with respect to other cable channels.

QUESTION: Well, do we have any cable operators and programmers here arguing that their First Amendment rights are being protected by this legislation?

MR. WALLACE: Time Warner in an amicus filing in our support is an example of that. There are a great many briefs before the Court.

QUESTION: Of course, it's kind of a curious arrangement, because I guess on a nonaccess channel of a cable operator the cable operator can charge a premium for channels that have indecent material on them, and many do, don't they? They charge more.

MR. WALLACE: That is correct.

QUESTION: They earn more money for it.

MR. WALLACE: That is correct.

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QUESTION: So there would be a real incentive for them, then, to think that this is a dandy scheme because they can keep it off the nonaccess channels and make more money by selling their own.

MR. WALLACE: The leased access channels are one which the cable operators also collect a fee from the users of, and that fee can be adjusted based on how many viewers are attracted, what kind of commercial rates the programmer may be able to charge, et cetera.

QUESTION: And those channels are blocked, I take it, unless you pay the fee.

MR. WALLACE: That is --

QUESTION: That's how the cable owner makes his profit on it.

MR. WALLACE: That is --

QUESTION: He blocks them unless you take the affirmative action of paying a fee, and asking for them to come into your home.

MR. WALLACE: That is correct, and fee disputes can be taken to the Commission on that. Now --

QUESTION: To pay the fee you've got to give your name, right?

MR. WALLACE: To the cable operator.

QUESTION: Is that -- and that's correct, if --

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MR. WALLACE: As far as I'm aware.

QUESTION: I mean, there's no way to put a penny in a box or something, is what I'm saying.

MR. WALLACE: I'm not talking about viewers, I'm talking about the programmers who lease the access.

QUESTION: I'm sorry, I misunderstood.

MR. WALLACE: The lease is a fee-paying arrangement.

QUESTION: Mr. Wallace, I understand your point about the cable operators up to a point, and it's this, if the statute were simply, you can ban it if you want to, that's your judgment, but the argument, as I take it, on the other side is, it isn't pre-choice for the operator. By putting this, or block into, you're pushing the choice. Government is steering the choice in favor of ban rather than to make available.

MR. WALLACE: Precisely so, Justice Ginsburg, and I -- what I want to try to clarify in leading up to addressing that is what we see as the scope of governmental action involved here that is subject to the restrictions of the First Amendment, that does have to comply with the First Amendment, and what is in our view not governmental action.

Sections 10(a) and 10(c) of the 1992 act readjust the distribution of editorial discretion between

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the operators and the programmers with respect to indecent programming. To that extent, an act of Congress does constitute governmental action, and has to be consistent with the First Amendment.

But as the court of appeals recognized in its analysis of the case, any such adjustment by Congress between these two protected groups is what could be described as a move in a zero sum game for First Amendment purposes, because any conferral of discretion on one correspondingly diminishes the discretion that the other one would have over programming. There's still the same total amount of programming available to the viewing public. It's just a question of who's exercising the discretion.

So we have suggested that if that -- the adjustment is made, regardless of whether the 1984 act came first or the 1982 act came first, if that adjustment is made in a reasonable manner that is viewpoint neutral, then it should be upheld, because Congress is not trying to influence what people can hear by dictating views that will be made available. It's leaving it up to actors in the private sector.

QUESTION: Why isn't Congress influencing it, because if Congress did nothing, there would be complete freedom to -- for either party to censor or not, as he

sees fit. By acting, Congress says, you either editorialize, or you block. That has an effect.

MR. WALLACE: Well, it is leaving it solely to the option of the operators whether -- we're talking about 10(a) and (c) now, not the blocking provision of 10(b), which of course is governmental action. It's required by the statute.

QUESTION: Yes, but you can't, I suppose, assess -- certainly your opponent's position is that you can't assess the significance of (a) without noticing what's going to happen in the default situation provided by (b).

MR. WALLACE: Well, there --

QUESTION: So there is a tendency to require censorship, editorialization, however you want to characterize it, that is positive.

QUESTION: And that has to be, isn't it so, Mr. Wallace, because otherwise Congress would have been acting for no purpose at all.

Wasn't it Congress' purpose to diminish, to restrict, to regulate what's called indecent programming, and your characterization of it seems to indicate that Congress acted for no purpose whatsoever.

MR. WALLACE: Well, I would have to differ with that in -- but it will take a moment to explain it.

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What Congress thought was in the public interest, at least judging by the provisions it enacted, is that because of a consideration this Court recognized in Turner Broadcasting, it's to the advantage of the public to have a multiplicity of sources available to provide programming and therefore the access programming itself, which has to be from unaffiliated sources, that the cable operator is required to carry, is something that serves the public interest.

But Congress was also concerned that an operator, a cable operator who is providing these services should not be required against its will to become a purveyor of indecent programming over its system. It is the one with the direct contact with the consuming public, and providing the service and selling the service, and so Congress thought that the operator should have that option.

And our view is that the First Amendment does not require Congress to sacrifice one of those aspects of the public interest to the other, that it can allow this kind of programming to be available on access channels but at the operator's discretion in order to serve both aspects of what Congress reasonably concluded is in the public interest.

QUESTION: So is it one of the justifications

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for the bill that is under the law as enacted, it is easier for the subscribers, the viewers, to hold people to account for what they say, whereas without the act it's not very clear to whom we can object? Is that part of --

MR. WALLACE: Particularly on the access channels, which are typically not channels where any one programmer is on the whole time, but they're made available in blocks of time that people can afford to buy.

QUESTION: Was this argument made in the briefs? Maybe it was, and I just -- this idea of accountability, that the act makes it more clear who is accountable for producing and broadcasting this stuff?

MR. WALLACE: Well, I would have to say the argument is more implicit than explicit --

QUESTION: That's what I thought.

MR. WALLACE: -- when you articulate it that way.

(Laughter.)

MR. WALLACE: But I think that it is inherent in our pointing out that Congress had a strong interest in allowing the operators the discretion to decide whether they wanted to transmit programming of that nature while still otherwise requiring that they transmit access programming from unaffiliated sources without exercising editorial control, because there are special problems

connected with indecency.

But I've been trying to lay the groundwork, then, to get to the question that Justice Ginsburg put to me, which is really the argument that was before the court of appeals. I mean, what I've said so far is consistent with the court of appeals' analysis, but the court of appeals didn't have to address any First Amendment intention based upon just the redistribution of authority itself, and that's why the court of --

QUESTION: But isn't it -- the most vulnerable part of your case is the or block option, because the argument is made, I think loud and clear, that the Government isn't being a neutral arbiter.

It is making it tough to give the customer the choice, because it says, if you do, you have to first block, and then you have to turn on, instead of saying, make it available, if the customer doesn't want it, the customer will tell you.

MR. WALLACE: Well, that goes to the 10(b) segregation and blocking requirement, which we have argued is not subject to the strictest scrutiny, but it can pass muster under the strictest scrutiny test because of what Justice Souter quite aptly called the inertia problem.

In Ginsberg, this Court --

QUESTION: But Mr. Wallace, before we get into

that, isolating it is not what I'm asking you about.

You said the ban choice restores choice to the cable operator. The suggestion is that it doesn't restore choice, that it is forcing a particular choice, that it's pushing in one direction, so that (a) and (b) have to come together. They can't be disassociated.

MR. WALLACE: Well, that gets us back to the State action question in the attack on the conferral of discretion on the operator in 10(a) and 10(c).

QUESTION: It's not the question I meant to address, Mr. Wallace, because I'm powerfully confused by talking about State action when you're dealing with a statute, and a statute that concerns speech, so that statute is subject to First Amendment controls --

MR. WALLACE: The -- well, I --

QUESTION: -- and I don't know how State action got into this.

MR. WALLACE: I have explained that of course the readjustment of discretion itself is governmental action that is subject to First Amendment restrictions, but what the argument below was on 10(a) and 10(c) is that while, on the face of it, the operator would be the one deciding whether or not to carry the indecent programming, that could have been the way the 1984 act was written in the first place.

It isn't the change in the act that is so crucial here to their argument. What they are arguing is that that choice is one where other provisions of the statute and the statutory scheme so weigh on the choice, the Government's thumb is so heavily on the scales encouraging the operator not to carry it, that the private choice has to be attributed to the Government, and is part of what is implicit in the enactment.

The mere fact that Congress has exercised its commerce power and made rules to govern the relations between private parties that preempt any State law to the contrary is not something unique to this statute. It's true of any exercise of the Congress' power.

QUESTION: I would like to understand what your position is on the pushing the cable operator to make one choice, that is to ban, and also putting the subscriber, the customer, in the uncomfortable position of having to list yourself as someone who wants to subscribe to indecent programming.

MR. WALLACE: Well, that is something that is not a disclosure to the Government, but something that --

QUESTION: Would the answer be different if it were a disclosure to the Government?

MR. WALLACE: Well, it would be a closer analogy to Lamont v. The Postmaster General, it would be more of a

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problem of possible stigma, but this is something that the cable operator is required to keep confidential. It's just a way of ordering services that are offered, and those services have been ordered by large numbers of dial-a-porn customers in New York City, for example, as we've pointed out, and as the Second Circuit found in its Dial decision on that, Dial Information Services.

The arguments that are made seem to us not to satisfy the test that this Court has laid down. What -- the starting premise on this kind of inquiry about whether a private action can be attributed to the Government is that you can't just start off saying that the Government is required to prohibit, is required by the First Amendment to prohibit a private person such as the operator from refusing to carry it, because that would really be an indirect way of saying that private conduct is itself subject to the First Amendment if the First Amendment requires certain action on the part of the cable operator.

So what the Court has said is that the Government can normally be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement that the choice must in the law be deemed that of the Government rather than the private actor.

QUESTION: Well, that's precisely the argument here, and there is some indication that when you look at the whole scheme that's what's happening, that the thumb has been put on -- the Government's thumb has been put on the scale to eliminate --

MR. WALLACE: Well --

QUESTION: -- a certain type of protected speech.

QUESTION: And it would seem to me that you might be better advised to spend your time defending the scheme rather than saying that it's not State action, Mr. --

MR. WALLACE: Well, when we look at what -- at the elements of what are said to be the Government's thumb on the scales, they seem to us not to be substantial enough to meet this Court's test.

It's true that Members of Congress expressed the hope on the floor that this might be the result, but that did not impose any legal obligation or material inducement to the operators, nor would it necessarily even come to their attention.

QUESTION: Well, but aren't there three elements that have got to be weighed here? Number 1, you've got a general statutory scheme that says no editorializing, and then the Government says, but it's okay in cases of

indecency. There's kind of a wink there.

Number 2, the Government says, if you don't exercise editorial control you've got to find out what is indecent, and you've got to block it out.

And number 3, the Government says, if anybody wants it unblocked, they've got to make an affirmative act to that effect and sort of put their name on file with the cable operator.

MR. WALLACE: The --

QUESTION: There are three sources of burden. How do we weight that?

MR. WALLACE: The obligation is on the programmer rather than the operator to notify the programmer -- to notify the operator. The programmer has to notify the operator

QUESTION: Right.

MR. WALLACE: -- that it's going to be broadcasting anything indecent, so there's no burden placed on the operator. It can rely on certifications from the programmer and any sanctions would fall on the programmer. There's no burden on the operator to --

QUESTION: But the operator does have the burden of the choice of saying okay, once I find that this is going to be coming over my cables, I've either -- I either have got to say, you can't do it, or I've got to

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block it.

MR. WALLACE: That -- segregate and block it. For large systems that ordinarily scramble programming, this is not a substantial impediment. They have the technology to do that as they do with their pay-per-view or premium pay channels.

For smaller systems, in the rulemaking the Commission said that they can use a lock box system that is centrally controlled, so that there has to be a written request, unlock the box, the code, and it's the operator who will do the unlocking.

QUESTION: Mr. Wallace, can I just ask one question? I understand generally how it works when most of the channel is a certain kind of programming, but supposing you have a channel that normally is athletics, or something very normal, but they occasionally put on a medical program or some unusual program that would fall within the statutory definitions.

How does it work as a practical matter that -- how do they block that and give the people in the audience a choice of whether to see it or not?

MR. WALLACE: Well --

QUESTION: Under the statute.

MR. WALLACE: I don't think a medical program --

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QUESTION: Well, some, you know --

MR. WALLACE: -- has been anything ever found indecent by the Commission.

QUESTION: Well, but there are certain kinds of programs that would have a public value that would nevertheless fall within the definition of indecency, wouldn't you agree with that?

MR. WALLACE: It depends on --

QUESTION: It isn't exactly indecency, it's got different words in the statute to describe the kind of program.

MR. WALLACE: It depends on what --

QUESTION: Live births, for example, might be covered.

MR. WALLACE: -- is meant by a public value. A live birth might very well not be indecent. The examples that we give in footnote 25 at the end of our brief, which I invite the court to look into, are examples of very graphic sexual activities that the Commission has found to be indecent.

QUESTION: No, I understand, but I'm asking you about the program that's on the borderline. It might be a movie with certain scenes in it, or it might be -- but not one that you just say, obviously this should not be seen by children. They're sort of borderline things, and being

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cautious the operator would probably say, pursuant to our policy, we'll treat this as indecent.

Having done so, how can -- how does it work that the -- that that one program, which is different than the normal run of programs on that channel, becomes available to the public or gives the public a choice between either getting it or not getting it? How does it work as a practical matter?

MR. WALLACE: Well --

QUESTION: Or are you saying that category doesn't exist?

MR. WALLACE: Well, in the first place, it's up to the programmer to notify the operator that a program --

QUESTION: Right --

MR. WALLACE: That it's indecent.

QUESTION: -- and he notifies that a program that's going to be shown at 7:00 to 9:00 tomorrow night is arguably indecent. What happens after that?

MR. WALLACE: The operator, if the operator is not showing indecent programming, if it has exercised that choice, then that program won't be shown. If it's doing the segregation and blocking --

QUESTION: Right.

MR. WALLACE: -- it would normally be put into that.

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I mean, the operator is usually not going to be in a position to view the program in advance and to make a judgment about it. When there are disputes, there are a number of remedial provisions.

QUESTION: But if the decision is made to block the particular program, how does the audience get the opportunity to make a choice to have it unblocked?

MR. WALLACE: Well, that --

QUESTION: How much notice, and what's -- how does it work in the individual case? I really don't understand.

MR. WALLACE: Well, a subscriber can notify the operator in writing that it wants access to the indecent programming, and will be given access.

QUESTION: And that's on a different --

QUESTION: How much notice does he get? It shows up in the weekly TV guide, or whatever it is, we're going to show a certain movie, and they want to see it. How do they -- everybody has to expect

MR. WALLACE: They would have had a blanket -- a notice on a blanket basis that indecent programming on the segregated channels would be made available to that subscriber, and they will get it the way they would get HBO if they're paying the fee for HBO, and the channel would be available to them.

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QUESTION: In respect to that, I've one question on this. Let me assume that (a) and (c), suppose for the sake of argument I agree with you on that, just for the sake of argument, that they're treating -- they're giving the channels, the cable operator the same kind of discretion in respect to this patently offensive material as NBC, ABC, or newspapers normally have, all right. That would take care of (a) and (c). That's your assumption.

Now, let's look at (b). In respect to (b), I take it the status quo is that a person has a locked box, and he can turn off any indecent program that any cable operator sends, but if the cable operator doesn't originate that program but it comes over a leased channel, then the lock box is irrelevant. It's not a question of consumer choice. Rather, there it's automatically blocked, and to get that you have to write 30 days in advance.

All right. Now, I want to know what sense of any sort that makes. I mean, if, in fact, you are justifying, because there are First Amendment interests on both sides, a rational basis test, how could it be rational, or anything a little beyond rational, if you're a little tougher, to say that 62 channels for their indecent material, it's of course a system where the person at home turns a key to block it, but for the eight

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channels that are leased, in fact to get that the person at home has to write and give his name 30 days in advance?

Now, I just don't understand. That was Judge Edwards' point, I think --

MR. WALLACE: Right --

QUESTION: -- and I just don't understand the rationality of that.

MR. WALLACE: In the first place, the status quo is not that most consumers have a lock box.

QUESTION: No, no, but --

MR. WALLACE: It's that they can get a lock box if they know of the existence of it and know that there's reason to have one because indecent programming may be coming in which they may not even be aware of.

QUESTION: -- lock box?

MR. WALLACE: If you ask for it, and most consumers do not have a lock box.

The problem that the sponsors of this legislation found was over the access channels, where programming is very unpredictable because you've got different programmers on each hour or half-hour. You never know what will be coming over the access channels, and that's where most of the unwanted, uninvited indecency would crop up that there was concern about protecting children from. You're not going to see it over NBC or PBS

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and so on.

QUESTION: Mr. Wallace, what's an example of an access channel in this region?

MR. WALLACE: I don't know of an example in this region. What -- well, of course, the PEG channels are things like the Montgomery County, or one of the university channels that use them for educational programs, and they have been much less of a problem of indecency taking viewers by surprise and suddenly cropping up.

The commercial access channel that's recounted in the record in some detail is Channel 35, the Time Warner channel in New York City, which has practically nonstop indecent programming on it put on by a variety of programmers who come on a first-come, first-served basis.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wallace.

The case is submitted.

(Whereupon, at 11:14 a.m., the case in the above-entitled matter was submitted.)

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DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL., Petitioners v. FEDERAL COMMUNICATIONS COMMISSION, ET AL. and ALLIANCE FOR COMMUNITY MEDIA, ET AL., Petitioners v. FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CASE NO: *95-124 & 95-227*

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)