ACTION FOR CHILDREN'S TELEVISION V. FCC (ACT III), 58 F.3d 654 (D.C. Cir. 1995)(en banc):

BUCKLEY, *Circuit Judge:* We are asked to determine the constitutionality of section 16(a) of the Public Telecommunications Act of 1992, which seeks to shield minors from indecent radio and television programs by restricting the hours within which they may be broadcast. Section 16(a) provides that, with one exception, indecent materials may only be broadcast between the hours of midnight and 6:00 a.m. The exception permits public radio and television stations that go off the air at or before midnight to broadcast such materials after 10:00 p.m.

We find that the Government has a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts. We are also satisfied that, standing alone, the "channeling" of indecent broadcasts to the hours between midnight and 6:00 a.m. would not unduly burden the First Amendment. Because the distinction drawn by Congress between the two categories of broadcasters bears no apparent relationship to the compelling Government interests that section 16(a) is intended to serve, however, we find the more restrictive limitation unconstitutional. Accordingly, we grant the petitions for review and remand the cases to the Federal Communications Commission with instructions to revise its regulations to permit the broadcasting of indecent material between the hours of 10:00 p.m. and 6:00 a.m.

[T]he Commission argues that the Government's interests extend beyond facilitating parental supervision to include protecting children from exposure to indecent broadcasts and safeguarding the home from unwanted intrusion by such broadcasts. The Commission asserts that restricting indecent broadcasts to the hours between midnight and 6:00 a.m. is narrowly tailored to achieve these compelling governmental interests. It defends the exception allowing public stations that go off the air at or before midnight to broadcast such materials after 10:00 p.m. on the basis that these stations would otherwise have no opportunity to air indecent programs.

[The D.C. Circuit rejected petitioners' argument that the term indecency was unconstitutionally vague pointing out that "the Supreme Court's decision in *Pacifica* dispelled any vagueness concerns attending the [Commission's] definition."]

Despite the increasing availability of other means of receiving television, such as cable . . . there can be no doubt that the traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment.

Unlike cable subscribers, who are offered such options as "pay-per-view" channels, broadcast audiences have no choice but to "subscribe" to the entire output of traditional broadcasters. Thus they are confronted without warning with offensive material. This is "manifestly different from a situation" where a recipient "seeks and is willing to pay for the communication...." *Sable*; *see also Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985) (distinguishing *Pacifica* from cases in which cable subscriber affirmatively elects to have specific cable service come into home).

In light of these differences, radio and television broadcasts may properly be subject to different--and often more restrictive--regulation than is permissible for other media under the First Amendment. While we apply strict scrutiny to regulations of this kind regardless of the medium affected by them, our assessment of whether section 16(a) survives that scrutiny must necessarily take into account the unique context of the broadcast medium. . . .

Petitioners do not contest that the Government has a compelling interest in supporting parental supervision of what children see and hear on the public airwaves. . . . Although petitioners disagree, we believe the Government's own interest in the well-being of minors provides an independent justification for the regulation of broadcast indecency. The Supreme Court has described that interest as follows:

> It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.

New York v. Ferber, 458 U.S. 747, 756-57 (1982) (internal quotation marks and citations omitted).

[W]hile conceding that the Government has an interest in the well-being of children, petitioners argue that because "no causal nexus has been established between broadcast indecency and any physical or psychological harm to minors," that interest is "too insubstantial to justify suppressing indecent material at times when parents are available to supervise their children." That statement begs two questions: The first is how effective parental supervision can actually be expected to be even when parent and child are under the same roof; the second, whether the Government's interest in the well-being of our youth is limited to protecting them from clinically measurable injury.

As Action for Children's Television argued in an earlier FCC proceeding, "parents, no matter how attentive, sincere or knowledgeable, are not in a position to really exercise effective control" over what their children see on television. This observation finds confirmation from a recent poll conducted by Fairbank, Maslin, Maullin & Associates on behalf of Children Now. The survey found that 54 percent of the 750 children questioned had a television set in their own rooms and that 55 percent of them usually watched television alone or with friends, but not with their families. Sixty-six percent of them lived in a household with three or more television sets. Studies described by the FCC in its 1989 Notice of Inquiry suggest that parents are able to exercise even less effective supervision over the radio programs to which their children listen. According to these studies, each American household had, on average, over five radios, and up to 80 percent of children had radios in their own bedrooms, depending on the locality studied, two-thirds of all children ages 6 to 12 owned their own radios, more than half of whom owned headphone radios.

[Moreover,] the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech. In *Ginsberg*, the Court considered a New York State statute forbidding the sale to minors under the age of 17 of literature displaying nudity even where such literature was "not obscene for adults...." The Court observed that while it was "very doubtful" that the legislative finding that such literature impaired "the ethical and moral development of our youth" was based on "accepted scientific fact," a causal link between them "had not been disproved either." The Court then stated that it "did not demand of legislatures scientifically certain criteria of legislation. We therefore cannot say that [the statute] ... has no rational relation to the objective of safeguarding such minors from harm."

[F]inally, we think it significant that the Supreme Court has recognized that the Government's interest in protecting children extends beyond shielding them from physical and psychological harm. The statute that the Court found constitutional in *Ginsberg* sought to protect children from exposure to materials that would "impair[] [their] *ethical and moral* development." Furthermore, although the Court doubted that this legislative finding "expressed an accepted scientific fact," it concluded that the legislature could properly support the judgment of “parents and others, teachers for example, who have [the] primary responsibility for children's well-being ... [by] ... assessing sex-related material harmful to minors according to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.”

Congress does not need the testimony of psychiatrists and social scientists

in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material just this side of legal obscenity. The Supreme Court has reminded us that society has an interest not only in the health of its youth, but also in its quality.

We are not unaware that the vast majority of States impose restrictions on the access of minors to material that is not obscene by adult standards. In light of Supreme Court precedent and the social consensus reflected in state laws, we conclude that the Government has an independent and compelling interest in preventing minors from being exposed to indecent broadcasts.

Petitioners argue, nevertheless, that the Government's interest in supporting parental supervision of children and its independent interest in shielding them from the influence of indecent broadcasts are in irreconcilable conflict. The basic premise of this argument appears to be that the latter interest potentially undermines the objective of facilitating parental supervision for those parents who wish their children to see or hear indecent material.

[P]arents who wish to expose their children to the most graphic depictions of sexual acts will have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment, and the rental or purchase of readily available audio and video cassettes. Thus the goal of supporting "parents' claim to authority in their own household to direct the rearing of their children," is fully consistent with the Government's own interest in shielding minors from being exposed to indecent speech by persons other than a parent. Society "may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat." *Pacifica,* 438 U.S. at 758 (Powell, J., concurring in part and concurring in the judgment).

The Government's dual interests in assisting parents and protecting minors necessarily extends beyond merely channeling broadcast indecency to those hours when parents can be at home to supervise what their children see and hear. It is fanciful to believe that the vast majority of parents who wish to shield their children from indecent material can effectively do so without meaningful restrictions on the airing of broadcast indecency. . . .

Petitioners argue that section 16(a) is not narrowly drawn to further the Government's interest in protecting children from broadcast indecency for two reasons: First, they assert that the class to be protected should be limited to children under the age of 12; and second, they contend that the "safe harbor" is not narrowly tailored because it fails to take proper account of the First Amendment rights of adults and because of the chilling effect of the 6:00 a.m. to midnight ban on the programs aired during the evening "prime time" hours.

[T]he FCC defined "children" to include "children ages 17 and under." 5 F.C.C.R. at 5301. The agency offered three reasons in support of its definition: Other federal statutes designed to protect children from indecent speech use the same standard (citing 47 U.S.C.A. § 223(b)(3) (Supp. II 1990) (forbidding indecent telephone communications to persons under 18)); most States have laws penalizing persons who disseminate sexually explicit materials to children ages 17 and under; and several Supreme Court decisions have sustained the constitutionality of statutes protecting children ages 17 and under (citing *Sable, Ginsberg,* and *Bethel School District*).

We find these reasons persuasive and note, as the Commission did in the *1993 Report and Order* promulgating regulations pursuant to section 16(a), that the sponsor of that section, Senator Byrd, made specific reference to the FCC's finding that "there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of the day or night." 138 Cong. Rec. S7308 (1992) (statement of Sen. Byrd). In light of Supreme Court precedent and the broad national consensus that children under the age of 18 need to be protected from exposure to sexually explicit materials, the Commission was fully justified in concluding that the Government interest extends to minors of all ages.

[S]ection 16(a)'s midnight to 6:00 a.m. safe harbor safe harbor provisions are narrowly tailored . . . [therefore] the principles we bring to bear in our analysis of the midnight to 6:00 a.m. safe harbor apply with equal force to the more lenient one that the Commission must adopt as a result of today's opinion. Although fewer children will be protected by the expanded safe harbor, that fact will not affect its constitutionality. If the 6:00 a.m. to midnight ban on indecent programming is permissible to protect minors who listen to the radio or view television as late as midnight, the reduction of the ban by two hours will remain narrowly tailored to serve this more modest goal. . . .

The data on broadcasting that the FCC has collected reveal that large numbers of children view television or listen to the radio from the early morning until late in the evening, that those numbers decline rapidly as midnight approaches, and that a substantial portion of the adult audience is tuned into television or radio broadcasts after midnight. We find this information sufficient to support the safe harbor parameters that Congress has drawn.

[T]he remaining question . . . is whether Congress . . . and the Commission . . . have taken into account the First Amendment rights of the very large numbers of adults who wish to view or listen to indecent broadcasts. We believe they have. The data indicate that significant numbers of adults view or listen to programs broadcast after midnight. Based on information provided by

Nielsen indicating that television sets in 23 percent of American homes are in use at 1:00 a.m., the Commission calculated that between 21 and 53 million viewers were watching television at that time. Comments submitted to the FCC by petitioners indicate that approximately 11.7 million adults listen to the radio between 10:00 p.m. and 11:00 p.m., while 7.4 million do so between midnight and 1:00 a.m. With an estimated 181 million adult listeners, this would indicate that approximately 6 percent of adults listen to the radio between 10:00 p.m. and 11:00 p.m. while 4 percent of them do so between midnight and 1:00 a.m.

While the numbers of adults watching television and listening to radio after midnight are admittedly small, they are not insignificant. Furthermore, . . . adults have alternative means of satisfying their interest in indecent material at other hours in ways that pose no risk to minors. We therefore believe that a midnight to 6:00 a.m. safe harbor takes adequate account of adults' First Amendment rights.

Petitioners argue, nevertheless, that delaying the safe harbor until midnight will have a chilling effect on the airing of programs during the evening "prime time" hours that are of special interest to adults. They cite, as examples, news and documentary programs and dramas that deal with such sensitive contemporary problems as sexual harassment and the AIDS epidemic and assert that a broadcaster might choose to refrain from presenting relevant material rather than risk the consequences of being charged with airing broadcast indecency. Whatever chilling effects may be said to inhere in the regulation of indecent speech, these have existed ever since the Supreme Court first upheld the FCC's enforcement of section 1464 of the Radio Act. The enactment of section 16(a) does not add to such anxieties; to the contrary, the purpose of channeling . . . is to provide a period in which radio and television stations may let down their hair without worrying whether they have stepped over any line other than that which separates protected speech from obscenity. Thus, section 16(a) has ameliorated rather than aggravated whatever chilling effect may be inherent in section 1464.

Petitioners also argue that section 16(a)'s midnight to 6:00 a.m. channeling provision is not narrowly tailored because, for example, Congress has failed to take into consideration the fact that it bans indecent broadcasts during school hours when children are presumably subject to strict adult supervision, thereby depriving adults from listening to such broadcasts during daytime hours when the risk of harm to minors is slight. The Government's concerns, of course, extend to children who are too young to attend school. But more to the point, even if such fine tuning were feasible, we do not believe that the First Amendment requires that degree of precision.

In this case, determining the parameters of a safe harbor involves a

balancing of irreconcilable interests. It is, of course, the ultimate prerogative of the judiciary to determine whether an act of Congress is consistent with the Constitution. Nevertheless, we believe that deciding where along the bell curves of declining adult and child audiences it is most reasonable to permit indecent broadcasts is the kind of judgment that is better left to Congress, so long as there is evidence to support the legislative judgment. Extending the safe harbor for broadcast indecency to an earlier hour involves "a difference only in degree, not a less restrictive alternative in kind." It follows, then, that in a case of this kind, which involves restrictions in degree, there may be a range of safe harbors, each of which will satisfy the "narrowly tailored" requirement of the First Amendment. We are dealing with questions of judgment; and here, we defer to Congress's determination of where to draw the line . . .

Section 16(a) permits public stations that sign off the air at or before midnight to broadcast indecent material after 10:00 p.m. . . . Congress has provided no explanation for the special treatment accorded these stations other than . . ."to accommodate public television and radio stations that go off the air at or before 12 midnight." . . . Congress has made no suggestion that minors are less likely to be corrupted by sexually explicit material that is broadcast by a public as opposed to a commercial station . . . Whatever Congress's reasons for creating it, the preferential safe harbor has the effect of undermining both the argument for prohibiting the broadcasting of indecent speech before that hour . . . Congress has failed to explain what, if any, relationship the disparate treatment accorded certain public stations bears to the compelling Government interest--or to any other legislative value--that Congress sought to advance when it enacted section 16(a). . . . Here, Congress and the Commission have backed away from the consequences of their own reasoning, leaving us with no choice but to hold that the section is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight. . . . Accordingly, we remand this case to the Federal Communications Commission with instructions to limit its ban on the broadcasting of indecent programs to the period from 6:00 a.m. to 10:00 p.m.

EDWARDS, Chief Judge, dissenting:

I do not comprehend how the two governmental interests [that the majority finds compelling] can stand *together*. [A] law that effectively *bans* all indecent programming--as does the statute at issue in this case--does not facilitate parental supervision. In my view, my right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned from my ... television. Congress cannot take away my right to decide what my children watch, absent

some showing that my children are in fact at risk of harm from exposure to indecent programming."

Furthermore, the two interests--facilitating parental supervision and protecting children from indecent material--fare no better if considered alone. [T]he simple truth is that "there is not one iota of evidence in the record ... to support the claim that exposure to indecency is harmful--indeed, the nature of the alleged "harm' is never explained." There *is* significant evidence suggesting a causal connection between viewing *violence* on television and antisocial violent behavior; [2] but, as was conceded by Government counsel at oral argument in this case, the FCC has pointed to no such evidence addressing the effects of *indecent* programming. With respect to the interest in facilitating parental supervision, the statute is not tailored to aid parents' control over what their children watch and hear; it does not, for example, "segregate" indecent programming on special channels, . . .[3] nor does it promote a blocking device which individuals control. Rather, section 16(a) involves a *total ban* of disfavored programming during hours when adult viewers are most likely to be in the audience.

Because the statutory ban imposed by section 16(a) is not the least restrictive means to further compelling state interests, the majority decision must rest primarily on a perceived distinction between the First Amendment rights of *broadcast media* and *cable (and all other non-broadcast) media.* The majority appears to recognize that section 16(a) could not withstand constitutional scrutiny if applied against *cable* television operators; nonetheless, the majority finds this irrelevant because it believes that "there can be no doubt that the traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment." This is the heart of the case, plain and simple.

Respectfully, I find the majority's position flawed. First, because I believe it is no longer responsible for courts to provide lesser First Amendment protection to broadcasting based on its alleged "unique attributes," I would scrutinize section 16(a) in the same manner that courts scrutinize speech restrictions of cable media.

Second, I find it incomprehensible that the majority can so easily reject the "public broadcaster exception" to section 16(a), and yet be blind to the utterly irrational distinction that Congress has created between *broadcast* and *cable* operators. No one disputes that cable exhibits more and worse indecency than does broadcast. And cable television is certainly pervasive in our country. Today, a majority of television households have cable, [4] and over the last two decades, the percentage of television households with cable has increased every year. [5] However, the Government does not even attempt to regulate cable with the same heavy regulatory hand it applies to the broadcast media. There is no ban between

6 a.m. and midnight imposed on cable. Rather, the Government relies on viewer subscription and individual discretion instead of regulating commercial cable. Viewers may receive commercial cable, with all of its indecent material, to be seen by adults and children at any time, subject only to the viewing discretion of the cable subscriber. "Furthermore, many subscribers purchase cable service to get improved [broadcast] television reception, and a number of basic cable subscriptions are packaged to include channels that offer some indecent programming; so these subscribers will get indecent programming whether they want it or not." In other words, the Government assumes that this scheme, which relies on personal subscription and individual discretion, fosters parental choice and protects children without unduly infringing on the free speech rights of cable operators and the adult audience.

If exposure to "indecency" really is harmful to children, then one wonders how to explain congressional schemes that impose iron-clad bans of indecency on *broadcasters,* while simultaneously allowing a virtual free hand for the real culprits--*cable operators.* And the greatest irony of all is that the majority holds that section 16(a) is constitutional in part because, in allowing parents to subscribe to cable television as they see fit, Congress has facilitated parental supervision of children. In other words, Congress may ban indecency on broadcast television because parents can easily purchase all the smut they please on cable! I find this rationale perplexing. . . .

Because no reasonable basis can be found to distinguish broadcast from cable in terms of the First Amendment protection the two media should receive, I would review section 16(a) and the *Enforcement Order* under the stricter level of scrutiny courts apply to content-based regulations of cable. This means "the most exacting scrutiny" should be applied "to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." . . . In this case, the majority views the broadcast media as disfavored in the application of First Amendment rights, relying principally on *Pacifica;* however, my colleagues nonetheless agree that section 16(a) reflects a content-based regulation that is subject to exacting scrutiny. Indeed, even the FCC viewed the case in this way. In my view, there is no way that section 16(a) can survive exacting scrutiny. . . .

The majority finds that a 6 a.m. to midnight ban is the least restrictive means to further compelling interests and then goes on to find that a 6 a.m. to 10 p.m. ban is *also* the least restrictive means. While a 6 a.m. to 10 p.m. ban is certainly less speech restrictive than a 6 a.m. to midnight ban, it seems absurd to suggest that they are both *the least restrictive means.* As the majority itself notes, "the preferential safe harbor has the effect of undermining ... the constitutional viability of the more restrictive safe harbor that appears to have been Congress's

principal objective in enacting section 16(a)." [relocated footnote]

Although unlikely, it is conceivable that . . . a ban on indecent programming could be the least restrictive means of facilitating parental control. For example, the Government might show that significant numbers of unsupervised children were watching or listening to programs containing indecency during the hours of the ban, that parents wished to limit what their children saw or heard, and that other means of controlling such exposure was considered and found to be ineffective. In this case, the Government offers no data on actual parental supervision, parental preferences, or on the effectiveness of parental supervision at different hours of the day and night. The Commission presents no program-specific data of what children watch, despite the existence of this data. . . . Without this kind of data, the Commission's decision to ban indecent broadcasting during the extensive period here in question is not narrowly tailored to serve the asserted interest of facilitating parental supervision.

[A]t oral argument, counsel for the FCC assured the court that blocking technology, in which a chip placed in television sets prevents certain shows from being transmitted, is available. This device actually facilitates parental supervision in allowing parents to choose what programs or stations to block; and it is undoubtedly less speech-restrictive since parents assume control. [T]he Commission [has also] presented another alternative, a segregate-and-scramble scheme of indecent programming on cable's leased access channels. Again, while this may not be the best means, surely "exacting scrutiny" requires some consideration of alternatives before finding that the means chosen is the least restrictive available. The Commission's *Enforcement Order* shows no consideration of alternatives when they clearly exist. Therefore, the Commission's ban on indecent broadcast cannot be seen as the least restrictive means to facilitate parental control.

In summary, the Government's ban on indecent speech is not the least restrictive means available to further the Commission's primary compelling interest of facilitating parental supervision of their children's exposure to indecent programming. The Commission has failed to show that its secondary interest, protecting children from exposure to indecent broadcast, is compelling when it conflicts with the rights of parents to rear their children in the way they see fit and when it is advanced with no evidence of harm. In applying the same level of scrutiny to regulations of broadcast as we do to regulations of cable and other media, it seems clear that section 16(a) and the *Enforcement Order* violate the First Amendment.

[Judge Wald, joined by Judges Rogers and Tatel, also dissented.]