Testimony of

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(Titles used for identification purposes only)

On behalf of the

AD HOC MEDIA COALITION

Before the Senate Committee on Commerce, Science and Transportation

"Impact of Media Violence on Children"

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## TABLE OF CONTENTS



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My research and teaching focus primarily on the United States Constitution, including the First Amendment. I am the author of *American Constitutional Law*, which has been cited in more than 60 Supreme Court cases, and of numerous law review articles and books on constitutional analysis. I have also briefed and argued a number of cases before the Supreme Court on First Amendment issues, among others. In connection with this testimony, I have been retained – through the auspices of Akin Gump Strauss Hauer & Feld LLP, for which I serve as a consultant – by a coalition of affected media-related entities listed in the Appendix. However, the conclusions that I have reached, and that I express in this testimony, are my own and not those of Harvard Law School, Harvard University, or the individual members of the coalition. My conclusions are limited to the federal constitutional validity of various proposed regulations.

Chairman Inouye, Vice Chairman Stevens, and distinguished members of the Committee: Thank you for inviting me to testify about the constitutionality of the legislative proposals made by the Federal Communications Commission (FCC) in its recent report on television violence.

That Report concludes that there is evidence – which the Report concedes to be mixed and uncertain – that certain depictions of violence on television correlate with harmful effects on children, including short-term aggressive behavior and feelings of distress, and that the existing V-chip regime, based on the industry's voluntary ratings system, has been insufficiently effective at keeping violent content from children. On that basis, the Report recommends three legislative responses: time channeling, which would ban some content during certain hours; a mandatory, government-run ratings program to replace the current voluntary system; and mandatory unbundling, or à la carte cable/satellite programming, to require cable and satellite providers to give consumers a choice of opting in or out of channels or bundles of channels.

However, as Commissioner Adelstein forthrightly acknowledges in his separate statement, "the Report diminishes the extent to which courts have either expressed serious skepticism or invalidated efforts to regulate violent content." FCC Report at 32. In my view, the First Amendment renders invalid and would be invoked by the Supreme Court to strike down legislation adopting any or all of the FCC's proposals. In raising these First Amendment concerns, I certainly do not mean to deny that parents have legitimate interests in what their children see on television. I am not only a father but a grandfather, and I believe that not everything on television is appropriate for young children to view – as the broadcasters and cablecasters acknowledge, both in their public statements and in their voluntary ratings.

I also do not mean to suggest that Congress is helpless to assist parents in this area. But the fundamental error of the FCC Report lies in its belief that the most appropriate response to concerns about television programs containing violent scenes or elements is more intrusive *governmental* control over the free flow of speech, rather than more narrowly tailored and far less restrictive alternatives to facilitate greater *parental* control. Such use of centralized government regulation is antithetical to the letter and spirit of the Constitution.

At the outset, I would like to emphasize that violent television programming is speech protected by the First Amendment – a point that the FCC Report concedes. At the most fundamental level, any attempt to regulate such protected speech will fail because it will be impossible to define "impermissible" depictions of violence on television according to the strict constitutional requirements that govern laws regulating speech. The first two FCC proposals rely on their face upon an explicit distinction between allowable and forbidden violent content. And even the third FCC proposal – mandatory unbundling – either expressly invokes or is concededly driven by concerns with the violent content that the first two proposals would overtly address. But such a distinction is necessarily ambiguous to the point of being unconstitutionally vague. To the extent that the First Amendment allows regulation of speech, it requires an extremely clear line between the permitted and the forbidden. In a great understatement, the FCC Report itself notes that drawing such a distinction in a constitutionally permissible manner would be "challenging," FCC Report at 18, and so the FCC declines to try to come up with such a definition itself, leaving the task to Congress. But in my view, any attempt to come up with a constitutionally acceptable definition of "impermissible" television violence is more than challenging – it is hopeless. The adoption of a line as amorphous as would inevitably result from such an attempt would chill protected speech, as broadcasters, cable/satellite operators, and

artists react in altogether predictable ways to uncertainty over whether they will face punishment – and, if so, how severely they would be penalized. Moreover, this vague prohibition would give regulators and prosecutors too much discretion to shape the content of free expression.

Any serious attempt to regulate violence on television would also be unconstitutional because the very effort on government's part to regulate televised violence is an attempt by government to dictate the right way to think and feel about violence. But the First Amendment prohibits the government from forcing people to adopt a particular position on any subject of debate, whether the topic is global warming, immigration, or violence. And even if one believes that the First Amendment allows legislatures to limit the availability of violent content for the sake of young children – a conclusion that I believe is inconsistent with constitutional principle and Supreme Court precedent, which recognizes that children enjoy First Amendment protections as well – it is undeniable that the First Amendment fully protects the rights of adults and older children to view televised violence, and the concomitant rights of broadcasters, cable/satellite operators, and artists to formulate and express that content. Whatever Congress's power to protect children, it cannot regulate speech in a way that infringes on these fundamental rights. What is more, any law regulating violence would fail to achieve the purposes that would motivate its enactment, and any such statute would be unconstitutional on those grounds alone.

The FCC Report suggests that none of these concerns applies because the government can regulate depictions of violence in the same way that it can regulate indecency, and others have suggested analogizing regulations of televised violence to obscenity laws. But depictions of violence cannot properly be equated or analogized to indecency or obscenity.

Finally, the FCC Report downplays and in some respects simply ignores a large and ever-growing number of less restrictive means by which parents can regulate the exposure of their

young children to televised violence. Changes in technology have made it increasingly easy for parents who wish to do so to block content from their children, household by household, program by program, child by child. Indeed, technological advances allow parents to regulate television content in any fashion that they desire – beyond narrow concerns with violence, sex, or other substantively identified facets of the content to which their children are exposed. The First Amendment forbids more intrusive, centralized, one-size-fits-all regulations when such less restrictive, more individualized, and more narrowly tailored means are available.

## I. THE FIRST AMENDMENT PROTECTS DEPICTIONS OF VIOLENCE ON SUCH MEDIA AS TELEVISION.

The FCC Report concedes that the First Amendment protects depictions of violence, but the scope and rationale of this protection nevertheless deserve emphasis here. In *Winters v. New York*, 333 U.S. 507 (1948), the Supreme Court considered the constitutionality of a state law criminalizing the sale of magazines that displayed "stories of bloodshed, lust or crime." *Id.* at 511. New York argued that the First Amendment did not cover these magazines because they were merely entertainment and because they were "sanguinary or salacious publications." *Id.* at 510. The Court rejected these arguments, holding that "[w]hat is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Id.* The lower federal courts have properly recognized that the rule announced in *Winters* applies to depictions of violence in other media as well. *See, e.g.*, *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 960 (8th Cir. 2003) ("*IDSA*") (applying First Amendment to violent video games); *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 579-80 (7th Cir. 2001) (applying First Amendment to violent video games); *Eclipse Enterprises, Inc. v.*

*Gulotta*, 134 F.3d 63, 64 (2d Cir. 1997) (applying First Amendment to trading cards depicting violent crimes); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 691 (8th Cir. 1992) (applying First Amendment to videos depicting violence); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) (noting that depictions of violence on television are covered by the First Amendment). Of course, "programs broadcast by . . . television . . . [also] fall within the First Amendment guarantee." *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981).

Thus, violent television content – whether it educates or merely entertains – is protected by the First Amendment. This conclusion properly recognizes that depictions of violence have always been an integral part of expressive speech. From Greek mythology to the stories in the Bible, from Grimm's Fairy Tales to innumerable great plays, novels, and movies, depictions of violence have long played a role in the stories, fables, and narratives that illustrate and inform our notions of crime and punishment, evil and justice, right and wrong. The use of violence in television programming is no different. Depictions of violence and its effects and consequences can contribute powerfully to a show's portrayal of our often violent world or its equally violent history, and the use of violence – however disquieting – adds emphasis that is nearly impossible to achieve otherwise. For example, news programs reporting on a war could not be as truthful, nor achieve the same impact, if they shied away from violence, and a Holocaust documentary that unflinchingly portrays the atrocities of that era is both more honest and more effective than a documentary on the same subject that avoids any such video or pictorial depictions. These are contexts in which excising elements of violence would lie by omission.

The important role of depictions of violence holds for fictional programming as well. Many of our most popular and critically acclaimed television shows are indelibly associated with depictions of violence. "The Untouchables," "Dragnet," "Hawaii Five-O," "Columbo,"

"Rockford Files," "Murder, She Wrote," "Hill Street Blues," "Law and Order," "CSI" – these and scores of other police and detective series would be severely weakened, artistically and dramatically, if they could not depict with some degree of verisimilitude the commission and consequences of violent crimes and the physical conduct sometimes necessary on the part of law enforcement to bring wrongdoers to justice. Similarly, shows about espionage (*e.g.*, "I Spy," "Mission Impossible," "24"), war (*e.g.*, "Combat," "Twelve O'Clock High"), science fiction and the supernatural (*e.g.*, "Star Trek," "X-Files," "Lost"), and doctors (*e.g.*, "MASH," "ER," "Grey's Anatomy") would be greatly diminished in their power and their story-telling if they could not contain some scenes of violence or its effects, as well as scenes showing surgical and other medical procedures.

My point here is not that violence is necessary for television programs to express any "message," or that it is impossible for these shows or others to continue in *some* form without portraying violence. Rather, my point is that all of these programs and many others would be drastically different – and considerably less valuable as speech – if they were forbidden to portray physical violence and its consequences in the way that they do. Whether fictional or nonfictional, journalistic or artistic, depictions of violence in television programming are entitled to the powerful protection of the First Amendment.

## II. THE FCC'S PROPOSALS RELY UPON A CONSTITUTIONALLY UNACCEPTABLE CONCEPTION OF "IMPERMISSIBLE" DEPICTIONS OF VIOLENCE.

The FCC Report does not, of course, recommend that *all* violence on television be regulated. Rather, it recommends regulating only those depictions of violence that the FCC views as somehow crossing the line from "permissibly violent" to "impermissibly violent."

All of the FCC's proposals necessarily rely, either on their face or in their justification, on this distinction between permissible and impermissible depictions of violence. Time channeling would segregate impermissibly violent television programming into late-night time slots, while allowing permissibly violent programming to be aired at all hours. A mandatory ratings system would impose one rating on shows with permissible violence and another, presumably more severe, rating on shows with impermissible violence. Many unbundling proposals require cable/satellite providers to separate channels with permissible violence from channels with impermissible violence. And even unbundling proposals that are drafted without any mention of violent content are transparently driven by the same concerns.

Although the distinction between permissible and impermissible views of violence thus lies at the heart of all of the FCC's proposals, the Report provides little meaningful guidance on the content of this distinction or on how to translate it into operative language. The FCC's silence is telling. It is not difficult to see why any attempt to distinguish between permissible and impermissible displays of violence – using words and concepts like "excessive," "gratuitous," and so on – could not pass muster under First Amendment scrutiny.

### A. One cannot define a meaningfully distinguishable subcategory of objectionable television violence in a way that is not unconstitutionally vague.

The FCC Report proposes that Congress regulate "excessively violent programming that is harmful to children" on television. The heart of any such law will be its definition of "excessively violent," but any meaningful definition of "excessive violence" – that is, any definition that prohibits a significant amount of the violent content that the FCC is concerned about – will be unacceptably vague because it will be impossible at the end of the day to tell what the definition regulates and what it does not. And the FCC Report – despite concluding

that it would be "possible" to develop an "appropriate" definition – fails entirely to explain what that definition should be or why it would pass constitutional muster.

The Due Process Clause requires any law, whatever its context, to be specific about what it prohibits: "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Two principal concerns have driven this prohibition on vague laws, even when the First Amendment is not at stake. First, it is fundamentally unfair to punish a person for conduct he could not have known was prohibited: "Vague laws may trap the innocent by not providing fair warning." *Grayned*, 408 U.S. at 108. Second, it is the lawmaker's responsibility to decide what will be punished, but a vague law in effect "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Id.* at 108-09.

Laws regulating speech are held to even "stricter standards" and must be particularly clear: "[A] man may the less be required to act at his peril" when a statute may have a "potentially inhibiting effect on speech," because "the free dissemination of ideas may be the loser." *Smith v. California*, 361 U.S. 147, 151 (1959); *see also Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 288 (1961). It is a speaker's right to speak freely when what he wants to say does not violate any law, but vague laws "inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked," thus chilling constitutionally protected speech. *Grayned*, 408 U.S. at 109.

The prohibition on vagueness becomes no less stringent simply because "a particular regulation of expression . . . was adopted for the salutary purpose of protecting children," as the

Supreme Court held in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968). There, the Court invalidated a statute that permitted a movie review board to censor films that the board deemed "unsuitable" for consumption by children if, among other things, they described or portrayed "brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency." The Court found the phrase "likely to incite" insufficiently determinate, in effect granting the board a "roving commission" to censor any films of which it disapproved. *Id.* at 688. For the same reason, the Second Circuit recently noted that the FCC's efforts to protect children from "indecent" language, fleetingly uttered, was likely unconstitutional because the FCC's vague definition of indecency "permits the FCC to sanction speech based on its subjective view of the merit of that speech" and thus gives "too much discretion to government officials." *Fox Television Stations, Inc. v. FCC*, --- F.3d ---, No. 06-1760, slip op. at 34 (2d Cir. June 4, 2007). Even though the statute in *Interstate Circuit* and the regulation in *Fox* both sought to protect children, the grants of censorship authority were void for vagueness under the same rule that would have applied had the statute sought only to protect adults.

Despite these settled principles, the FCC surmises that it would be possible to establish a definition of "excessive violence" that would somehow satisfy the Constitution. As a concrete example, the FCC suggests that Congress could prohibit "depictions of physical force against an animate being that, in context, are patently offensive." FCC Report at 20. The FCC also notes – without explaining whether it believes they would be constitutional – several definitions of prohibited violence proposed by commentators, among them depictions of "outrageously offensive or outrageously disgusting violence"; of "severed or mutilated human bodies or body parts, in terms patently offensive as measured by contemporary community standards for the

broadcast medium"; and of "intense, rough or injurious use of physical force or treatment either recklessly or with an apparent intent to harm."

None of these proposed definitions is specific enough to give broadcasters, cable/satellite operators, or regulators any real sense of what is prohibited, much less the precise guidance that the Constitution demands. Phrases like "outrageously offensive," "patently offensive," "intense," or "rough" are "classic terms of degree" – they measure a *quality* of speech rather than delineating a firm and discrete *category* of speech. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1049-49 (1991). As a result, they do not offer sufficient guidance because a person of "ordinary intelligence" would have to guess at whether a particular program violates the rule. *See Grayned*, 408 U.S. at 108.

The impenetrable darkness into which such definitions would plunge writers, producers, broadcasters, cable/satellite operators, and other creators and distributors of content is easily illustrated by reference to a recent report on television violence by a group that strongly backs government regulation of television violence.[*] Among the examples of television programming that the group deems objectionable, and which it presumably would want to subject to government regulation and fines:

- A little girl pulls another girl's hair on an episode of "America's Funniest Home Videos";
- A "dead and bloodied body" is shown on an autopsy table in an episode of "Medical Investigation";
- A witness describes an alleged rape (never shown) on "Law and Order";

[*] Parents Television Council, *Dying to Entertain: Violence on Prime Time Broadcast Television 1998 to 2006* (January 2007), *available at* http://www.parentstv.org/PTC/publications/reports/violencestudy/DyingtoEntertain.pdf.

- Two bloody murders are described, but not shown, and the bloody crime scene (without bodies) is depicted, on "Criminal Minds";
- On "CSI Miami," a man falls into the water and is surrounded by sharks. His actual death is not shown, but "[b]lood fills the water and one of the man's shoes is shown falling to the bottom of the ocean floor."

In any of these cases, how is a government regulator to decide whether the violence is "gratuitous," "excessive," and/or "patently offensive," as the group listing these examples evidently believes? Any such inquiry would be unavoidably, and almost entirely, subjective, leaving a creator or distributor of content no choice but to steer far clear of anything that might be deemed objectionable by the most sensitive viewer.

The same concerns have driven the Court to strike down other statutes for vagueness. In the most directly applicable case, *Winters v. New York*, the Court paid special attention to the way in which efforts to prevent regulations of violent materials from being fatally overbroad operated to render such regulations unacceptably vague. Thus, in striking down a prohibition on violent printed materials that were "so massed as to become vehicles for inciting violent and depraved crimes against the person," the Court in *Winters* noted that the novelty of this legislative phrase showed "the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications." 333 U.S. at 519.

Similarly, in *Reno v. ACLU*, 521 U.S. 844 (1997), the Supreme Court found impermissibly vague a federal statute – the Communications Decency Act (CDA) – that banned the online distribution of "indecent" material that, "in context, depict[ed] or describ[ed], in terms patently offensive as measured by contemporary community standards, sexual or excretory

activities or organs." 47 U.S.C. § 223(d)(1) (1994 ed., Supp. II). The Court concluded that this standard "lacks the precision that the First Amendment requires when a statute regulates the content of speech." 521 U.S. at 873. It found deeply troubling "the vagueness inherent in the open-ended term 'patently offensive'"; such vagueness, the Court said, "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Id*.

The phrases suggested by the FCC to delimit a class of impermissibly violent content – "outrageously offensive," "rough," "intense," and the like – are no more definite than other statutory phrases deemed unconstitutionally vague by the Supreme Court, from "patently offensive" and "so massed as to become vehicles for inciting" in *Reno v. ACLU* and *Winters,* respectively, to such phrases as "moral and proper" and "prejudicial to the best interests of the people." *See Interstate Circuit*, 390 U.S. at 682 (listing impermissibly vague phrases). Because these phrases have no historically or legally established meaning, they provide little guidance for those subject to punitive measures for failing to comply with the statute's imprecise commands.

The vague definitions of impermissible violence proposed by the FCC also pose another danger: the delegation of essentially boundless, subjective discretion to the FCC. Language like "patently offensive," when divorced from the historical and legal contexts to which it has traditionally been attached, has such a "standardless sweep" that it would impermissibly allow the FCC's individual enforcement agents "to pursue their personal predilections." *Smith*, 415 U.S. at 575. Indeed, vague standards could empower the FCC to crack down on certain programs because of political pressure, or based on individual commissioners' aesthetic or moral judgments about particular shows or particular scenes. As with a statute prohibiting "opprobrious words or abusive language," such as the one the Supreme Court invalidated in *Gooding v. Wilson*, 405 U.S. 518 (1972), any attempt to regulate violence will be too "easily

susceptible to improper application." *Id.* at 528; *see also Forsythe County v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of expression.").

The FCC's conclusion that a definition of impermissible violence can avoid vagueness problems is unconvincing because it makes no real effort to grapple with the Supreme Court's First Amendment vagueness precedents. Ignoring every other case, the Report does cite glancingly to a single Supreme Court opinion to suggest that a sufficiently clear definition of violence could be developed. That decision, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), does not support the FCC's conclusion. In *Pacifica*, the Supreme Court upheld a sanction on a radio station for broadcasting "indecent" content despite an arguably vague definition of "indecent." But the underpinnings of *Pacifica* have since been eroded, and, in any case, are not transferable to the context of television violence.

First, as the Supreme Court recognized at the time, 438 U.S. at 750, and has subsequently reaffirmed, *Pacifica* stands for "an emphatically narrow holding." *Sable Communication, Inc. v. FCC*, 492 U.S. 115, 127 (1989). That holding was limited to its facts – a particular comic monologue, broadcast on the radio, which was pervaded by words with explicit sexual meanings. Indeed, the *Pacifica* Court had no occasion to consider – and did not consider – whether any particular definition of "indecency" was constitutional, because the respondent had conceded that the programming was "patently offensive." 438 U.S. at 739; *id.* at 742 (declining to decide whether the Commission's general definition of "indecency" was constitutional and stressing that its review was limited to the particular broadcast before it).

Second, the FCC Report ignores the Supreme Court's much more recent decision in *Reno v. ACLU*, mentioned above, which found impermissibly vague the CDA's ban on the distribution of "indecent" material on the Internet even though the CDA's definition of prohibited material was essentially identical to the FCC's broadcast indecency standard. Just this month, the U.S. Court of Appeals for the Second Circuit said that, in light of the *Reno v. ACLU* decision, "we are skeptical that the FCC's identically worded indecency test could nevertheless provide the requisite clarity to withstand constitutional scrutiny." *Fox*, *supra*, slip op. at 31. Indeed, the Second Circuit continued, "we are sympathetic to the … contention that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague." *Id.* at 32.

Finally, even if *Pacifica* could be read as allowing a particular use of a vague definition of "indecency," its reasoning could not be extended to definitions of "excessive violence" that use the adjective "indecent" or that are modeled on existing definitions of "indecent." Like obscenity law, indecency regulation is a constitutional anomaly with a distinct historical provenance that taps into traditional concerns with personal modesty and the propriety of open expressions of sexuality – concerns that find no analogue in depictions of violence. *Cf. Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality opinion) (citing common law prohibitions on public indecency that predated the First Amendment by more than a century to uphold a prohibition on public nudity). The legal and historical distinctions between "indecency" and "violence" lay at the heart of the *Winters* Court's recognition that the treatment of "indecent" material could not be invoked to sustain a similarly worded definition of impermissible violence, which the Court held "ha[d] no technical or common law meaning." 333 U.S. at 518, 519.

The conclusion that any meaningful attempt to regulate violence on television would fail on vagueness grounds does not rest on mere conjecture about how the lower courts would apply the Supreme Court's precedents. To the contrary, the lower federal courts have consistently struck down prohibitions of displays of violence on vagueness grounds. When Louisiana attempted to regulate any video game that "appeal[ed] to the minor's morbid interest in violence," a federal court held that the language the statute used was too vague because video game makers would be "forced to guess at the meaning and scope of the Statute." *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 836 (M.D. La. 2006). In *Entertainment Software Association v. Blagojevich*, 404 F. Supp. 2d 1051, 1077 (N.D. Ill. 2005), *affirmed*, 469 F.3d 641 (8th Cir. 2006), a federal district court struck down that state's violent video game law on the ground that the statute's definition of impermissible violence – such as depictions of humans inflicting "serious physical harm" on other humans – was too vague. *Id.* at 1077. Similar statutes have been struck down in Michigan (*Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006)), Washington (*Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D.Wash. 2004)), and Minnesota (*Entertainment Software Association v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn 2006)), and have been enjoined in Oklahoma (*Entertainment Software Association v. Henry*, 2006 WL 2927884 (W.D. Oklahoma, 2006)), and California (*Video Software Dealers Association v. Schwarzenegger*, 401 F.Supp. 2d 1034 (N.D. Cal. 2005)).

### B. Any plausible definition of impermissible television violence will unconstitutionally discriminate based on the viewpoint expressed.

Much of the drive to regulate televised violence responds less to violence as such than to what a particular depiction appears to *say* about the use of violence – whether it appears to

glamorize or condemn such use, whether it seems to approve or disapprove of some form or degree of violent behavior in a given context, and what attitude about or perspective on violence viewers might be expected to take away from the experience. It is hardly a coincidence, therefore, that definitions of "impermissible" depictions of violence often reveal explicit viewpoint discrimination of a sort that flies in the face of core First Amendment precepts: for example, the FCC Report suggests that a definition of violence might helpfully include factors such as whether violence is "glamorize[d]" or "trivialize[d]," "whether [the violence] is morally defensible or unjustified," and "whether the violence is explicitly rewarded or goes unpunished." FCC Report at 20 & 8 n.34 (citing factors identified in violence study).

But any law, regulation, or enforcement practice that explicitly or implicitly restricted "excessively violent" programming in this way, or in any way that considered the purpose or message behind the use of violence, would necessarily be subject to – and would almost certainly fail – the strictest First Amendment scrutiny, as landmark decisions such as *RAV v. City of St. Paul*, 505 U.S. 377 (1992), make clear. At issue in that case was a local ordinance criminalizing "fighting words" that attacked the intended victim's "race, color, creed, religion or gender." *Id.* at 391. The Court acknowledged that "fighting words," like obscenity (but *unlike* depictions of violence), generally receive the lowest level of First Amendment protection. It nevertheless concluded that this ordinance violated the First Amendment because it engaged in *unconstitutional viewpoint discrimination*: it prohibited racist, sexist, and anti-religious "fighting words," but not similar speech "*in favor* of racial, color, etc., tolerance and equality." *Id.* "The government may not regulate [speech] based on hostility – or favoritism – towards the underlying message expressed," even if that speech as a general matter receives less First Amendment protection. *Id.* at 386; *see also Kingsley-International Pictures Corp. v. Regents of*

*the University of the State of N.Y.*, 360 U.S. 684 (1959) (striking down state law proscribing the display of any film depicting adultery as desirable).

The same rationale would apply to prohibit any law defining "impermissibly violent" programming as programming that expressed or implied approval or tolerance of violence; that left audiences with the sense that violence could be engaged in without anyone getting badly hurt; or that instilled undue fear at the thought of being violently attacked. Presumably, under such a law, equally intense, graphic, and even vicious portrayals of violence would be permitted, so long as they expressed the view that violence was generally improper, typically injurious and painful to perpetrator and victim alike, but not so rampant as to be a reason for nightmarish fear. Similarly, neither a federal statute nor an enforcement action by the FCC could constitutionally punish violence employed for a bad or evil purpose – as by a criminal – while leaving unpunished violence employed for a good or just purpose – as by a police officer or a superhero. To treat a scene showing a criminal shooting a fleeing victim in the leg differently from a scene depicting a policeman shooting a fleeing suspect in the leg would be to engage in precisely this kind of forbidden discrimination on the basis of viewpoint. And if a law drew a distinction between, for example, real violence during an actual boxing match (which it permitted), and fake violence during a simulated fight in a television show (which it forbade), it would also enforce a particular view about when violence is appropriate. Such discrimination among viewpoints triggers the strictest possible scrutiny, and under *RAV* it would almost certainly fail that test.

### C. Any plausible definition of impermissible television violence will be unconstitutionally overbroad.

An intrinsic problem with defining impermissible violence is that any such definition that manages to sweep in *enough* violent content to accomplish Congress's goals will at the same

time sweep in far *more* speech than may permissibly be suppressed. Whatever interests Congress may assert to regulate televised violence, they do not justify prohibiting adults (or, for that matter, older children) from seeing the violent but protected depictions that the FCC hopes to prevent young children from seeing.

Even a statute enacted with the best of intentions, and even one undoubtedly effective in achieving its objectives, is "unconstitutional on its face if it prohibits a substantial amount of protected expression." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). "[W]hen legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities,[†] Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms. The Constitution and the basic position of First Amendment rights in our democratic fabric demand nothing less." *United States v. Robel*, 389 U.S. 258, 267 (1967).

It has long been settled that the First Amendment prohibits limiting permissible expression to speech that would be suitable for the very young. In the landmark case of *Butler v. Michigan*, 352 U.S. 380 (1957), the Supreme Court considered the constitutionality of a Michigan statute that criminalized distribution of books that contained language "tending to the corruption of the morals of youth." The State of Michigan argued that, "by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare." *Id.* at 383. The Court emphatically rejected this argument, famously observing: "Surely, this is to burn the house to roast the pig. . . . The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." *Id.*

[†] In that case, the burden was "bar[ring] employment . . . for association which may not be proscribed consistently with First Amendment rights." 389 U.S. at 266.

Similarly, in *Ashcroft*, the Supreme Court struck down a statute that would have banned the display of "'any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture,' that 'is, or appears to be, of a minor engaging in sexually explicit conduct.'" 535 U.S. at 241. This statute was aimed at protecting minors, both from abuse in the making of such depictions and, like the regulations here contemplated by the FCC, from the effects that the dissemination of those depictions could have on them. The Court recognized that protecting children was vitally important, but observed that the statute prohibited vast quantities of speech that adults had a right to hear, such as several films that either won or were nominated for Academy Awards. The Court held that "[t]he Government cannot ban speech fit for adults simply because it may fall into the hands of children." *Id.* at 252; *see also Reno v. ACLU*, 521 U.S. at 877 (striking down ban on indecent material on the Internet because "[t]he general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value"*); Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 79 (1983) (Rehnquist, J., concurring) (noting that ban on mailing contraception information, ostensibly to protect children, is "broader than is necessary because it completely bans from the mail unsolicited materials that are suitable for adults").

Many of the proposed regulations of television violence share the same constitutional defect: out of concern for protecting young children, they would prevent adults and older children from viewing programs that they are constitutionally entitled to see. Indeed, as noted above, some of the leading advocates for centralized regulation of television violence have raised objections to an astonishingly broad range of content – extending well beyond actual depictions of even arguably objectionable violence – that they believe should be kept off television (at least before 10 p.m.), including televised descriptions of violent behavior (such as the testimony of a

victim at a rape trial), mere intimations that violence has occurred (such as blood on the floor), and even depictions of medical procedures.[‡] Whatever the merits of restricting the availability of such content to young children, no similar argument can possibly justify keeping this content away from adults and older children, as the FCC's proposals threaten to do.[§] Congress may not prescribe a regulation of violent speech that limits "the level of discourse reaching [people's homes] . . . to that which would be suitable for a sandbox." *Bolger*, 463 U.S. at 74.

### D. Any plausible regulation of supposedly unacceptable television violence will contain too many internal inconsistencies to meet First Amendment standards.

The FCC has identified several interests that are arguably served by centrally regulating televised violence, including:

- enabling parents to protect their children from material that the parents believe will make their children too insensitive to the evils of hurting others,
- enabling parents to protect their children from material that the parents believe will make their children too fearful of being violently injured or killed, and
- protecting children from material their parents would not want them to see but are unable to keep from their children despite that wish.

However legitimate or even compelling these interests might be, they are at war with one another to such a degree that they will ironically render any statute that was closely tailored to serve any one of those interests self-defeating with respect to others, leaving it unconstitutionally *ill-fitting* under the First Amendment. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994).

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[‡] *See* Parents Television Council, *Dying to Entertain*, *supra*.

[§] According to Nielsen, 84.2% of American television homes contain no children under six, 73.9% of American television homes contain no children under twelve, and 64.2% of American television homes contain no children under eighteen. Nielsen Television Index, 2007-2008 Universe Estimates.

The ostensible interest in protecting children from frightening material, for example, would suggest that any depiction of violence should be cartoonish and sanitized, as in the madcap violence of the Roadrunner cartoons or the Three Stooges or the stylized heroics of the old Batman series; but this would undercut the asserted interests in making children understand the real-life consequences of violence and in avoiding material that proponents of regulation fear children might imitate. Further, if some obviously protected categories of violent depictions, such as those in news or sports, were exempted in order to save regulation of television violence from unimaginable overbreadth, the result would be to prevent Congress's goals from being meaningfully served: children who would imitate the physical brawling on a detective drama would be no less likely to imitate the hard-hitting tackles on televised football games, assuming the risk of imitative behavior to be as the proponents suggest it is. And if the fictional bloodletting on "The Shield" scares young children, then surely the very real violence that children might see while watching news about the war in Iraq would be no less frightening. The First Amendment forbids speech regulation that selectively targets some speech while exempting other speech that is likely to have similar effects. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487-89 (1995); *City of Cincinnati v. Discovery Networks, Inc.*, 507 U.S. 410, 427 (1993); *Edenfield v. Fane*, 507 U.S. 761, 773 (1993); *Fox*, *supra*, slip op. at 24 (noting that ability of children to hear fleeting expletives in contexts expressly permitted by the FCC such as news programs and a movie like "Saving Private Ryan" undermined the FCC's rationale that hearing such fleeting expletives was inherently damaging to children).

## III. EVEN IGNORING THESE CORE DEFINITIONAL DEFECTS, THE FCC'S PROPOSALS CANNOT BE RECONCILED WITH THE FIRST AMENDMENT.

As a result of these characteristics, all of the options presented in the report clearly flunk even the "intermediate" scrutiny test that governs content-neutral regulations of speech.[**] But the FCC's proposed regulations of television violence suffer from constitutional infirmities beyond the definitional flaws I have already described. Because each of the proposals imposes content-based restrictions on protected speech, all are subject to strict scrutiny under the First Amendment. And all three proposals fail such strict scrutiny.

### A. Strict scrutiny applies to the FCC's specific proposals to regulate violent television programming.

Government regulation of expression based on its content is generally subject to strict scrutiny, the most exacting First Amendment standard of review. *RAV v. City of St. Paul*, 505 U.S. 377, 382 (1992). Such regulations are "presumptively invalid," *id.* at 382, and are void unless "narrowly tailored to promote a compelling government interest" in the strong sense that, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature *must use the alternative*." *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (emphasis added).

The FCC Report acknowledges that strict scrutiny normally applies to any regulation of expressive content. FCC Report at 11. We will shortly see specifically why each of the FCC's proposals would burden free speech in a way that triggers strict scrutiny. Before that analysis, however, I turn to three arguments that the FCC Report makes for its view that strict scrutiny is, as a general matter, inapplicable to almost any child-protective regulation of "violent content" on

[**] Even content-neutral restrictions on speech as such are constitutionally required to be narrowly tailored to serve the government's significant interests. *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). And "[a] statute is narrowly tailored [only] if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy," *Frisby v. Schultz*, 487 U.S. 474, 485 (1988), not if it is "substantially broader than necessary to achieve the government's interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

television. First, the FCC argues that strict scrutiny would not apply because "violence" (or some subset thereof) is analogous to "indecency" and "obscenity," regulation of which it contends is subject to a lower level of scrutiny. FCC Report at 12. Second, the FCC suggests that strict scrutiny may not apply when a legislature limits expression to protect children. FCC Report at 12. Finally, the FCC argues that strict scrutiny "does not apply to the regulation of broadcast speech." FCC Report at 11. None of these claims has merit.

**1. Any analogy between "violence" and "indecency" or "obscenity" cannot support evaluating the FCC's proposals under anything less than strict scrutiny.**

Although acknowledging that depictions of violence generally are subject to strict scrutiny, the FCC Report contends that a subset of violent depictions – such as "excessively violent programming" – could be regulated under a lower standard of scrutiny because it is analogous to "indecency" or "obscenity."

First, the FCC Report argues that depictions of violence may be deemed "excessive" if they are "patently offensive" in the same way that indecent programming is. So defined, the Report contends, "excessively violent programming, like indecent programming, occupies a relatively low position in the hierarchy of First Amendment values because it is of 'slight social value as a step to truth.'" FCC Report at 12. But even assuming that "excessively violent" programming could be analogized to "indecent" programming, the FCC's argument would rest on a fundamentally flawed premise: namely, that regulations of "indecent" programming can be evaluated under a standard more forgiving than strict scrutiny. The FCC's sole support for this premise is *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), in which a three-justice plurality of the Supreme Court appeared to apply a standard other than strict scrutiny to the FCC's sanction

of an indecent radio broadcast. But *Pacifica* is no longer good law on this point, and the FCC inexplicably ignores the Supreme Court's subsequent pronouncements about the level of scrutiny that applies to regulation of indecent content. For example, in *Sable Communications v. FCC*, 492 U.S. 115 (1989), the Supreme Court unanimously applied strict scrutiny to evaluate the constitutionality of a prohibition on indecent dial-a-porn messages. *Id.* at 126. And in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), the Supreme Court unanimously applied strict scrutiny to evaluate the constitutionality of a time channeling requirement for cable television operators who primarily carried "sexually-oriented programming." *Id.* at 813; *see also id.* at 831 (Scalia, J., dissenting) (applying strict scrutiny but finding that the test was satisfied); *id.* at 836 (Breyer, J., dissenting) (same). Thus, the FCC's analogy between violent and indecent programming does not justify the application of a lower standard of scrutiny.

Second, the FCC Report seems to suggest that a lower standard of scrutiny applies to regulations of violent television because depictions of violence are directly analogous to obscenity. FCC Report at 11 n.56. The Supreme Court has recognized obscenity as one of the "few limited areas" of essentially "unprotected" speech in which it "has permitted restrictions upon the content of speech" without requiring application of strict scrutiny. *RAV*, 505 U.S. at 382-83. But any superficial similarity between obscenity and "excessive" violence does not lessen the First Amendment protection to which restrictions of violent television programming are subject.

As an initial matter, the violent character of something depicted on television, no matter how extreme, does not in itself render the depiction "obscene," as that term has long been understood in the First Amendment context, because the Supreme Court has clearly "confine[d]

the permissible scope of . . . regulation [of obscenity] to works which depict or describe sexual conduct." *Miller v. California*, 413 U.S. 15, 24 (1973); *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n.10 (1975) ("[T]o be obscene 'such expression must be, in some significant way, erotic.'") (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971)); *Roth v. United States*, 354 U.S. 476, 487 (1957) ("Obscene material is material which deals with sex in a manner appealing to prurient interest.").

Nor is the notion that certain depictions of violence may in some unspecified sense be *like* obscenity sufficient to justify applying a lower standard of review to television violence. Testing that proposition, certain opponents of violent programming have suggested adapting the definition of obscenity from *Miller v. California* to cover television violence, so that programming would be deemed "excessively violent" if, *e.g.*,

> (1) Taken as a whole and applying contemporary community standards, the average person would find that it has a tendency to cater or appeal to morbid interests in violence . . . ; and
> (2) It depicts violence in a way which is patently offensive to the average person applying contemporary adult community standards . . . ; and
> (3) Taken as a whole, it lacks serious literary, artistic, political, or scientific value . . . .

*Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 687 (8th Cir. 1992). In my view, the Supreme Court would have to apply strict scrutiny to regulations based upon any such "definition by substitution." To be sure, the definition is "derived" from obscenity in the mechanical sense that it simply substitutes the word "violence" for the word "sex." But one could as easily replace "sex" in the *Miller* definition with such words as "suffering," "tragedy," "death," "disability" – or, for that matter, "genius," "comedy," or even "life." Analytically, each resulting derivative of the *Miller* test would be every bit as close an analogue to obscenity as is the suggested definition of "excessive violence," but these simple substitutions could not for that

reason alone delineate categories of speech that enjoy reduced First Amendment protection. The government could not, for example, obtain less stringent First Amendment review by regulating speech that "appeals to morbid interests in comedy" or that "depicts genius in a way which is patently offensive to the average person."

This definition-by-substitution approach is also inconsistent with the First Amendment. The Supreme Court has adopted an extremely strict and carefully "limited categorical approach" to defining the classes of less-protected speech. *RAV*, 505 U.S. at 383. "The Supreme Court historically has confined the categories of unprotected speech to defamation, fighting words, direct incitement of lawless action, and obscenity," *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 66 (2d Cir. 1997), and it has refused to create or "find" additional categories that receive something less than strict scrutiny. The lower courts, accordingly, have uniformly applied First Amendment strict scrutiny to laws defining impermissible depictions of violence based upon *Miller*'s definition of obscenity. *See, e.g.*, *Eclipse*, 134 F.3d at 64 ("patently offensive" content lacking "serious literary, artistic, political and scientific value"); *Webster*, 968 F.2d at 684 ("patently offensive" content lacking "serious literary, artistic, political and scientific value").

This carefully limited approach reflects the well-founded fear that a looser view of these less-protected categories – one fastening on such *adjectives* as "morbid," "patently offensive," and absence of "serious . . . value," and ignoring the operative *nouns* of "defamation," "fighting words," "incitement," and "obscenity" – could sharply and unjustifiably delimit the scope of free speech. Opponents of television violence seek to analogize certain "excessive" depictions of violence to obscenity in part because they believe that such violence is no less psychologically harmful than obscenity, especially to young children. But such generic and decontextualized reasoning potentially opens the door to regulations of many other types of speech that people

may think is psychologically harmful, from caricature, to blasphemy, to flag burning, *Texas v. Johnson*, 491 U.S. 397 (1989), to rude political speech, *Cohen v. California*, 403 U.S. 15 (1971) ("F--- the Draft"), to disrespectful remarks about parents and other authority figures, *Watts v. United States*, 394 U.S. 705, 706 (1969) (per curiam) ("If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."). These examples of fully protected speech, like certain instances of "excessive" violence, may bear some superficial similarities to obscenity: they may disgust certain people, violate some community standards of propriety, and appeal to what some people deem base, immoral, or unseemly instincts. But if the First Amendment is to remain a robust protection of free speech – and if obscenity, incitement, and the like are to remain the exceptions, rather than the norm – these arguable similarities cannot justify lowering the level of First Amendment protection enjoyed by such expression.

Finally, it might be argued that watching violent, terrifying, or other extreme events can excite some people physically in a way that resembles reflexive reactions to sexual material. But that proves far too much. Athletic contests, religious rituals, political rallies, and certain kinds of music are all famously capable of exciting passionate and even physically aggressive visceral responses – including responses that many might deem negative or even patently offensive. Freedom of speech would be in grave jeopardy if the presence of a subliminal or physiological component in a communication's range of psychological effects could strip it of constitutionally protected status.

**2. Strict scrutiny applies to regulations intended to protect minors.**

The FCC Report suggests that a lower standard of review applies to regulations of speech that are motivated by an attempt to protect children. FCC Report at 3. This argument relies upon *Ginsberg v. New York*, 390 U.S. 629 (1968), in which the Supreme Court upheld a state law

prohibiting the sale of sexually indecent (but not obscene) materials to minors. But *Ginsberg* does not stand for the general rule that something less than strict scrutiny applies to laws seeking to protect minors by replacing parental control of the influences to which growing children are subject with central governmental control of those influences.[††] Rather, *Ginsberg*'s holding rested on a notion of "variable obscenity" that allowed the definition of obscenity to be adjusted for different target audiences, so that material merely indecent for adults could be deemed obscene for minors. 390 U.S. at 638; *cf. Ginzburg*, 383 U.S. at 472-73 (noting that material can be obscene when marketed to certain audiences but non-obscene otherwise). As explained above, however, the logic that relativized the definition of obscene material in terms of the audience to which such material is directed has no logical analogue in the realm of violent but non-obscene depictions.

Apart from the illogic of extrapolating notions of "variable obscenity" to the realm of violent depictions, the idea that children's special malleability counts *in favor* of government control turns the First Amendment on its head. The Supreme Court has recognized the powerful and (as some people believe) detrimental influence that the government can exert on young minds with such control, in several decisions denying the government the power to shape the education of children as it saw fit. For example, in *Wisconsin v. Yoder*, 406 U.S. 205, 211 (1972), the Court held that the state could not compel Amish adolescents to attend public *or* private schools because the Amish faith of their parents taught that immersion in a school's regimen together with non-Amish of similar age would expose the Amish adolescents to values "in marked variance with Amish values and the Amish way of life." Similarly, in *Meyer v.*

[††] On the contrary, as we will see shortly, the Court has generally applied strict scrutiny to laws that might interfere with the ability of parents themselves "to make decisions concerning the care, custody, and control of their [own] children." *Troxel v. Granville,* 530 U.S. 57, 66 (2000).

*Nebraska*, 262 U.S. 390, 402 (1923), the Court struck down a law prohibiting parents from engaging educators to teach foreign languages to their children, comparing that law unfavorably to the Spartan practice of housing young boys in military barracks "[i]n order to submerge the individual and develop ideal citizens." Centralized control over the materials available to children may well flout not only the wishes of those children but also of their parents, who may have very different ideas about the kinds and levels of violence that are appropriate for their children to view. Indeed, some children and parents may be convinced that it is valuable to allow their children to observe the very depictions of violence from which other parents might wish to protect theirs, believing that "[t]o shield children right up to the age of 18 from exposure to [such] violent descriptions and images would . . . [be] deforming; it would leave them unequipped to deal with the world as we know it." *Kendrick*, 244 F.3d at 577.

Finally, just as children have a First Amendment right to *see* violent television programming that government, but not their parents, wish them not to see, so broadcasters, cable/satellite operators, artists, and other content providers have a right to *furnish* that programming. "[T]he government cannot silence protected speech by wrapping itself in the cloak of parental authority." *IDSA*, 329 F.3d at 960.

I do not mean to suggest that parents have no legitimate concerns about allowing their children to see violence on television. My point is simply that centralized government regulation of television content is not the constitutionally appropriate way to respond to such concerns. Under the First Amendment, regulation of this sort does not receive a free pass simply because it is motivated by, concerned with, or addressed to children. Rather, any such regulation must be evaluated under the same standard that applies to *all* restrictions on speech: strict scrutiny.

**3. Strict scrutiny applies to regulations of broadcast television content.**

The FCC Report contends that strict scrutiny would be inapplicable to regulation of the "violent content" of broadcast television programming. FCC Report at 11. To support that proposition, the FCC cites two justifications: (i) broadcasting's supposed "uniquely pervasive presence in the lives of all Americans," and (ii) broadcasting's supposed "accessibility to children, coupled with the government's interests in the well-being of children and in supporting parental supervision of children." FCC Report at 11 (internal quotations omitted). For these reasons, the FCC argues, broadcasting traditionally has been afforded a lower level of First Amendment protection than other means of communication (such as cable), purportedly giving the government greater leeway to impose content-based regulations. FCC Report at 11.

Unfortunately, the FCC is caught in a time warp. The justifications for allowing government regulation of content on broadcast television date back several decades to the Supreme Court's decisions in *Red Lion v. FCC*, 395 U.S. 367 (1969), and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In *Red Lion*, the Court observed that "if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves." 395 U.S. at 389. "Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.* at 390. In *Pacifica*, the Court upheld an after-the-fact fine for the airing of "seven dirty words" in the course of a comedy monologue broadcast over the radio. In that case, the Court took note of the listener's privacy interests in controlling what he hears in his own home or car and concluded that, "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content" on broadcast radio. 438 U.S. at 748.

In my view, however, broadcast television can no longer be considered the unloved stepchild of the First Amendment – to the extent that its subordinate status was ever justified to begin with. This is true for two reasons. First, technological advances have made broadcast television more similar to other media such as cable, content-based regulation of which is indisputably subject to strict scrutiny. *See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U. S. 94, 102 (1973) ("[T]he broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."). Second, to the degree that broadcast television retains features distinct from other television media, these distinctions cannot justify the *kinds* of content-based regulation of speech that the FCC Report proposes. *Cf. Turner Broadcasting Sys., Inc. v. FCC,* 512 U.S. 622, 639 (1994) ("[W]hatever relevance these physical characteristics may have in the evaluation of particular cable regulations, they do not require the alteration of settled principles of our First Amendment jurisprudence.").

The Supreme Court's post-*Red Lion* case law on this subject, while paying lip service to the anomalous place of broadcast in First Amendment jurisprudence, has increasingly recognized that broadcast media have grown ever more similar to other media, such as cable, that enjoy undiluted First Amendment protection. The Supreme Court first began to dismantle the foundations of broadcast media's subordinate First Amendment status as early as 1984, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), which struck down an act of Congress forbidding federally funded, noncommercial broadcast stations from engaging in editorializing. The Court assumed that, under *Red Lion*, the unique features of broadcast media "required some adjustment in First Amendment analysis." *Id.* at 377. But in invalidating the federal statute, the Court applied a standard strikingly similar to the normal strict scrutiny test that applies to most

regulations of speech: it held that Congress's restriction of federally funded broadcast media must be "narrowly tailored to further a substantial governmental interest," *id.* at 380, and that Congress could not burden free speech when its "interest[s] can be fully satisfied by less restrictive means that are readily available," *id.* at 395.

The next significant erosion in the subordinate status of broadcast media occurred when the Supreme Court seriously examined the First Amendment implications of cable television in *Denver Area Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996). A four-justice plurality noted that "cable and broadcast television differ little, if at all," *id.* at 748, because "cable television . . . is as accessible to children as over-the-air broadcasting, if not more so," and because, like broadcast television, "[c]able television systems . . . have established a uniquely pervasive presence in the lives of all Americans," *id*. at 744-45. (The U.S. court of Appeals for the Second Circuit recently reached the same conclusion, noting that "it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children." *Fox*, *supra*, slip op. at 36.) Of course, these two factors had been cited by *Pacifica* to justify the Court's application of a lower standard of review to regulations of broadcast media. Nevertheless, when the Court again considered the constitutionality of cable regulations in *Playboy*, it did not hold that cable media enjoyed less First Amendment protection even though, like broadcasting, it had become pervasive nationally and accessible to children. 529 U.S. at 813-14, 826-27. Rather, the Court insisted that strict scrutiny must apply to content-based restriction of expression on cable television, thus implicitly calling into question the continued validity of *Pacifica*'s rationales for subordinating broadcast media under the First Amendment.

This growing doctrinal merger between broadcast and non-broadcast media in First Amendment jurisprudence properly recognizes the outdated nature of the technological

assumptions that initially undergirded the "broadcast exception." For instance, the *Pacifica* Court found that broadcast radio was "uniquely accessible to children" in an era where voluntary blocking technologies such as the V-chip did not exist; hence, in *Playboy*, the Supreme Court applied strict scrutiny to regulations of cable television largely in reliance on the "key difference" that only "[c]able systems had the capacity to block unwanted channels on a household-by-household basis." 529 U.S. at 815. Today, however, this distinction has dissipated, as more households access broadcast channels through their cable or satellite systems, and as more technology becomes available to block programs on broadcast as well as non-broadcast television, as the FCC Report implicitly acknowledges. *See Fox*, *supra*, slip op. at 38 ("If the *Playboy* decision is any guide, technological advances [such as the V-chip] may obviate the constitutional legitimacy of the FCC's robust oversight.").

Another technological justification noted above for applying a lower level of scrutiny to broadcast regulations has been spectrum scarcity. *See Red Lion v. FCC,* 395 U.S. 367 (1969); *Turner,* 512 U.S. at 637 (referring to "the unique physical limitations of the broadcast medium"). The limited number of frequencies available for over-the-air broadcasts has traditionally been cited as a basis for government regulation of broadcasting to prevent signal interference (when two broadcasters use the same frequency) and to ensure a sufficiently broad range of voices on the airwaves. *Id.* at 638.

But technological changes have greatly eroded this argument as well. Broadcasters can now use ever narrower bands of the spectrum, vastly increasing the number of channels that can be transmitted over the air without signal interference. Moreover, the expansion and increasing availability of alternative forms of communication, such as cable and the Internet, have vitiated any asserted government need to regulate the content of broadcasting to promote a diversity of

communications. *Cf. League of Women Voters,* 468 U.S. at 376 (twenty years ago, acknowledging "[c]ritics [who] charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete"). As formerly distinct media converge, any basis for distinguishing among television, newspapers, and the Internet dissolves: any of us can read the *Wall Street Journal* in paper or on the Internet, and those who miss episodes of *Ugly Betty* or *Grey's Anatomy* can watch the shows in their entirety through ABC's website. *See Fox*, *supra*, slip op. at 38 ("The proliferation of satellite and cable television channels – not to mention internet-based video outlets – has begun to erode the 'uniqueness' of broadcast media.").

Moreover, assertions about spectrum scarcity beg the question as to whether any *particular* content-based regulation can be justified. Even at the time, the Court's scarcity rationale in *Red Lion* at most was held to justify regulation to "increas[e] the diversity of speakers and speech"; it never "justif[ied] censorship" of the type being proposed by the FCC with regard to violent television programming. *See Pacifica*, 438 U.S. at 770 n.4 (Brennan, J., dissenting); *see also League of Women Voters*, 468 U.S. at 379 (characterizing *Red Lion* as allowing the government to advance its interest "in ensuring balanced presentations of views in this limited medium and yet pos[ing] no threat that a broadcaster would be denied permission to carry a particular program or to publish his own views"). Indeed, the majority in *Pacifica* did not rely at all on notions of spectrum scarcity. Whatever the validity of the technological distinctions historically drawn between broadcast and non-broadcast media, the FCC cannot cite these distinctions to support the kinds of content-based, speech-limiting regulations that it proposes as a response to television violence.

The Supreme Court's post-*Red Lion* and *Pacifica* case law thus reflect its awareness that the historically anomalous First Amendment treatment of broadcast media has become ever less justified over time, evaporating any basis for withholding strict scrutiny from content regulation of broadcast television programming.

### B. Under strict scrutiny, the FCC's proposals share a common flaw: they are not the least restrictive means to satisfy the government's interests.

The government is strictly limited in the tools with which it may regulate speech. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975). Assuming that the goal of limiting children's access to violent television programming is a compelling interest, regulation of speech to achieve that goal is "unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno v. ACLU*, 521 U.S. at 874; *see also Sable Commc'ns*, 492 U.S. at 126 ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."). The "least restrictive means" test "is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997).

Here, a large number of less restrictive alternatives exist to control the availability of violent television programming to children. Crucially, all of these alternatives avoid the problems posed by the FCC's proposals by empowering parents rather than government to control what children see, thus fitting far more comfortably within the framework that the First Amendment establishes as the baseline for reconciling a system of free expression with the threats that some forms of speech might pose to some children. The FCC criticizes only a small

subset of these alternatives, but its criticisms – aside from being too narrowly focused – are both legally immaterial and factually inaccurate.

**1. Many less restrictive alternatives exist to respond to violent television programming.**

The FCC Report surveys only a small fraction of the options available, limiting its discussion of current technologies to the V-Chip and cable operator-provided parental controls, coupled with voluntary ratings systems. But the FCC substantially underreports the extent to which existing technologies can give effect to the government's goal of limiting the exposure of children to television programming that their parents deem unacceptably violent. Parents have access to a wide range of tools – shortchanged or ignored by the FCC Report – with which they can limit their children's exposure to such programming should they wish to do so. As Commissioner McDowell notes in his separate statement, "Never have parents been more empowered to choose what their children should and should not watch." FCC Report at 37.

First, V-Chips are available in all but the smallest TVs (that is, all TVs bigger than a piece of legal paper or a laptop computer) manufactured since 2000.[‡‡] The upcoming transition

[‡‡] As the FCC acknowledged in its report, under a 1996 amendment to Title III of the Communications Act, all televisions sets manufactured in the United States or shipped in interstate commerce with a screen larger than 13 inches must be equipped with a "V-Chip" that can be programmed to block programming that parents do not want their children to view. Even if it is correct that only half of televisions in use are equipped with V-chips, *see* FCC Report at 13, that is irrelevant in light of the fact that 100% of new televisions available for purchase are equipped with V-chips. And while it is up to individual parents to decide whether to use it, information on using the V-chip is readily available. The FCC itself has posted a website that gives detailed instruction to parents on how to use the V-Chip, and industry and private groups have provided similar information via websites and tutorials. *See* Adam Thierer, *The Right Way to Regulate Violent TV* at 8, Progress and Freedom Foundation (May 10, 2007); *see also* http://www.controlyourtv.org (industry-sponsored site explaining controls available, and offering information on how to use them).

to digital television, scheduled to take place shortly after the next presidential election, will make V-chip technology universal.[§§]

Second, V-chip-like devices are also available on nearly all cable and satellite services, allowing parents to block either entire channels or just those shows that the parents believe include unacceptably violent (or otherwise objectionable) content.[***] Furthermore, on-screen guides are standard features of most cable and satellite services, and almost all cable and satellite providers allow viewers to establish special menus tailored to their own preferences so as to block channels they do not want their children to watch. Two examples are Locks & Limits on DirecTV and Adult Guard on Dish Network, which Commissioner Adelstein mentioned in his statement accompanying the FCC Report. These parental controls are readily available to the 87.7 percent of American households that currently subscribe to cable or satellite services.[†††]

Third, parents can choose to subscribe to family-friendly cable and satellite options, such as Comcast's Children and Family channels, Dish Network's Family Pak, and DirecTV's Family Choice Plan, which enable individual households to limit their children to child-friendly content.

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[§§] The Deficit Reduction Act of 2005 requires that analog television broadcasting cease on February 17, 2009. *See* Pub. L. No. 109-171 (Feb. 8, 2006), § 3002(b). After that, consumers will need to obtain a digital receiver or a set-top converter (both of which will include a V-chip), or receive television from cable or satellite systems that enable parents to block programming using the same ratings system.

[***] Although digital cable and satellite control boxes are more advanced, both analog and digital cable and satellite boxes allow parents to block individual channels and lock them with passwords. *The Right Way to Regulate Violent TV* at 9-10. Cable subscribers without set-top boxes also can request that cable providers block channels from coming into their homes. *Id.* at 9. *See also* 47 U.S.C. 544(d)(2) (providing that "[i]n order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber"). Since March 2004, cable companies providing services to 90 percent of cable subscribers voluntarily committed to providing blocking service for free. *See* http://i.ncta.com/ncta_com/PDFs/ControlyourTV/Take%20Control%20FAQS%204-27-05.pdf.

[†††] Nielsen Television Index, May 2007.

Fourth, parents can use time-shifting technologies (such as VCRs and DVRs) to record certain programs they deem appropriate for their children, and allow their children to watch only pre-recorded programming.

Fifth, parents can employ a number of after-market solutions to limit the channels their children watch and the time of day their children are allowed to watch television, such as the TV Channel Blocker or various timers that allow televisions to work only at certain times.[‡‡‡]

Sixth, parents can watch television with their children and/or establish and enforce rules about what children can watch and when they can watch it. Many resources, such as the Pause, Parent, and Play Project,[§§§] provide resources enabling parents to involve themselves directly in the programming that their children see.

There are also a number of ratings systems that parents can access to guide their choices in using all of the above tools. In addition to the industry's voluntary ratings program, many independent groups provide ratings guides that use their own criteria to tell parents what may or may not be appropriate for their children to watch. For example, the Parents Television Council provides the "Family Guide to Prime Time Television,"[****] Common Sense Media provides its own ratings based on what their members think is appropriate for children in six age brackets covering toddlers to teenagers,[††††] and PSV Ratings provides a Family Media Guide that provides parents' own, individual views about suitability.

All of these alternatives, and the voluntary ratings systems that accompany them, serve the government's interests in protecting children and increasing parental control while being far

[‡‡‡] These after-market units can be programmed to block cable channels that parents do not wish to see in their home, or restrict the time of day or total numbers of hours that their children are allowed to watch television. These units include special remote controls that limit children to a certain group of channels. *Id.* at 10-12.

[§§§] *See* http://www.pauseparentplay.org/.

[****] Available online at http://www.parentstv.org/PTC/familyguide/main.asp.

[††††] Available online at http://www.commonsensemedia.org/tv-reviews/.

less restrictive in their effect on First Amendment rights. Two features of these alternatives are crucial: they allow more fine-grained blocking of violent programming, so that blocking can be done by subject matter, time, channel, program, show, and so on; and they accomplish this blocking by empowering parents rather than empowering government. As a result, these voluntary technologies impose a significantly smaller burden on First Amendment speech rights. These alternatives foreswear imposing burdens of any sort at the *source* of speech and instead strengthen the ability of each individual household to govern the content that reaches children. They do not restrict access to programming across the board, denying such access even to the vast majority of American households that contain no young children. Moreover, rather than depriving parents of their right to provide their children with violent programming that they think is appropriate or even necessary (such as war movies), parents will retain freedom to decide for themselves what is appropriate for their younger children.

On these grounds the Supreme Court has signaled approval of these voluntary measures as less restrictive alternatives to centralized regulations such as time channeling and unbundling. In *Denver Area*, in the course of invalidating mandatory segregation and blocking measures for cable television, the Court noted that voluntary user-initiated blocking technologies, including the V-chip, "are significantly less restrictive" and criticized Congress for not "explain[ing] why . . . [such] blocking alone . . . cannot adequately protect . . . children from ['indecent'] programming." 518 U.S. at 756. Four years later, in *Playboy,* the Court rejected mandatory scrambling and time-channeling provisions for pornography broadcast on cable in part because it was not persuaded that Congress had sufficiently considered the merits of voluntary user-initiated blocking. 529 U.S. at 822. Finally, in *Reno v. ACLU* the Court relied on the existence of less restrictive, potentially effective alternatives to content-based regulation – including

"tagging" indecent Internet material in a way that "facilitates parental control of material coming into their homes" – to strike down a congressional ban on indecent material on the Internet. 521 U.S. at 879. These precedents demonstrate the priority of these less restrictive means under the First Amendment.

Congress itself has recognized that these alternatives do present less restrictive means of protecting children. In the legislation requiring the V-chip and calling for a complementary voluntary rating system, Congress stated that the initiative was intended to "empower[] parents to limit the negative influences of video programming that is harmful to children," Pub. Law 104-104, § 551(a)(8), and found that "[p]roviding parents with timely information about the nature of upcoming video programming and with the technological tools that allow them easily to block violent, sexual, or other programming that they believe harmful to their children is a nonintrusive and narrowly tailored means of achieving that compelling governmental interest." *Id.* § 551(a)(9). Congress's own recognition of these less restrictive means to achieve the same goal is an especially compelling indication that mandatory restrictions would be unconstitutional. *See Boos v. Barry*, 485 U.S. 312, 329 (1988) (concluding that Congress's implementation of a less-restrictive measure "amply demonstrates that the [challenged speech restriction] is not crafted with sufficient precision to withstand First Amendment scrutiny"); *see also Denver Area*, 518 U.S. at 758 ( "Congress's different, and significantly less restrictive" V-chip solution suggests "that the more restrictive means are not 'essential.'").

**2. These less restrictive alternatives embody the parent- and individual-centered structures for regulating speech that the Supreme Court has recognized as preferred by the First Amendment.**

Mandatory government controls over speech content conflict at their core with the system of free expression established in this country – a system that eschews centralized controls of speech in favor of allowing individuals to decide for themselves what they will read, watch, or observe, and allowing parents and families to decide what their children should be exposed to as they mature. In this system, the government may step in to override personal choice only when individuals exposed to unwanted materials constitute a "captive audience." Short of that circumstance, the system leaves it to individual adults to avert their gaze from speech that they deem objectionable and to shield their children from such speech. *See, e.g.*, *Cohen v. California,* 403 U.S. 15, 21 (1971).

Within this system, the Supreme Court has preferred allowing *individuals*, but not the government, to impose their own "selective restrictions" on speech that "intrudes on the privacy of the home." *Erznoznik*, 422 U.S. at 209. A pair of Supreme Court decisions illustrates the basic principle. In *Rowan v. Post Office Department*, 397 U.S. 728, 737 (1970), the Supreme Court upheld a federal statute empowering individuals to give notice to the Post Office that they would rather not receive mailings from certain parties. But in *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 72 (1983), the Court invalidated a federal statute through which the government prohibited the mailing of unsolicited ads for contraceptives. The *Bolger* Court explained that it has "recognized the important interest in allowing addressees to give notice to a mailer that they wish no further mailings [citing *Rowan*]. But we have never held that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Id.*

The Supreme Court has only once allowed the FCC to curb speech being broadcast into the home. It did so nearly three decades ago in *Pacifica,* 438 U.S. 726 (1978), a decision that, as

discussed earlier, was explicitly limited to a unique situation: a comic monologue focused on words with explicit sexual meaning, presented in no broader literary or entertainment context than one highlighting their forbidden character, broadcast on the radio. But the Court upheld the regulation in *Pacifica* in large part because, under the technology available at the time, there was no other way to "protect the listener or viewer from unexpected program content," *Pacifica*, 438 U.S. at 748 – a concern that subsequent technological innovations have alleviated, at least as to television. *See supra* Part III(B)(1).

The parental controls now available observe the line established in *Rowan* and *Bolger* that allows individuals and parents to edit what comes into the home by voluntary blocking, but that does not allow the government to prevent government-defined content from going into the home in the first place. Such controls are not, of course, foolproof, and their use entails an investment of time and energy to supervise the television viewing of one's children. But the salient point is that, taken together, these voluntary, user-initiated controls essentially allow parents to prevent their children from watching television programming that *they* believe contains unacceptably violent content. This gives effect to the government's goal of protecting minor children from viewing such content to the degree the individual parents involved share that goal and think it applicable to their own children.

Moreover, these parental controls are *more* effective than government regulation at letting children see what their parents *want* them to see. In *Reno v. ACLU* and *Playboy*, the Supreme Court left no doubt that the government has no *independent* interest in protecting children from objectionable content beyond the interest of assisting those parents who desire to shield their children from such speech. *See Reno v. ACLU*, 521 U.S. at 865, 877-78; *Playboy,* 529 U.S. at 811, 813. The Commission may not, for example, substitute its judgment for that of

parents who might consider it entirely appropriate that their children be exposed to a realistic depiction of the life of police officers or hospital workers. Under our system, such judgments are for parents, not the government, to make. *See Troxel v. Granville,* 530 U.S. 57, 66 (2000) (collecting multiple opinions "recogniz[ing] the fundamental right of parents to make decisions concerning the care, custody, and control of their children"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

### 3. The FCC's criticisms of these alternatives do not save its proposals under the First Amendment.

The FCC Report acknowledges but criticizes a number of less restrictive alternatives, focusing primarily on the V-chip, cable blocking technologies, and the voluntary ratings system. These criticisms fail on both factual and legal grounds and do not excuse the government from its obligation to use the less restrictive means outlined above.

Inexplicably, the FCC Report simply ignores almost all of the alternative technologies discussed above – a silence that earns a sharp rebuke from Commissioner Adelstein. *See* FCC Report at 32-33. As a result, the Report never tackles the legal significance of the ever-improving voluntary blocking technologies now available to parents, even though the First Amendment mandates a careful appraisal of such alternatives.

Moreover, the FCC Report engages in a broad-brushed criticism of the V-chip and the voluntary ratings system without acknowledging a core analytic confusion that renders its criticisms incomplete and even incoherent. Blocking technology that fails to shield children from things the *government* might prefer they not see but that their parents *would* like them to see (or are at least *indifferent* about their seeing) cannot on that account be deemed

constitutionally ineffective. Yet much of the evidence cited by the FCC Report for the ostensible failings of existing alternatives focuses on statistics about parental inaction that give no indication that determined parents are *unable* to control what their children end up watching. For instance, the FCC reports that "only 15 percent of all parents have used the V-chip," and "20 percent of parents know they have a V-chip, but have not used it." FCC Report at 14. But these numbers, even if accurate, say nothing about whether parents are dissatisfied with the V-chip, whether they instead use one of the many other methods of controlling what their children watch, or whether, as the Supreme Court noted in *Playboy*, they simply responded to the "crisis" of television violence "with a collective yawn."[‡‡‡‡] 529 U.S. at 816. In other words, that the children of such parents may be seeing content that *the government* would rather they not see certainly does not establish that they are seeing content that *their parents* would rather they not see. Given the First Amendment's preference for parent- and individual-focused voluntary blocking over more restrictive forms of speech regulation, many of the FCC's criticisms are misdirected.

The FCC Report also fails to recognize the full legal import of the least-restrictive-means requirement. Even assuming, contrary to the evidence, that the alternatives listed above are not fully as effective as the FCC's proposals, those proposals would still flunk strict scrutiny because a method of achieving a compelling government interest must be recognized as a less restrictive means even if it is not absolutely effective. The Supreme Court has never required a guarantee that *no* inappropriate material will reach children, nor has it accepted the absence of such

[‡‡‡‡] In fact, the study cited by the FCC for its figures itself calls into question the FCC's conclusion that the V-chip is ineffective. The study reports, for instance, that "[t]he vast majority of parents who have used the V-Chip say they found it useful, including 61% who say it was 'very' useful and 28% who say 'somewhat' useful," and it notes that "[a]mong parents who are aware that they have a V-Chip but have chosen not to use it, 60% say the main reason is that an adult is usually nearby when their kids watch TV, and 20% say it's because they trust their children to make their own decisions." Kaiser Family Foundation, *Parents, Media and Public Policy*, at 7 (Fall 2004).

assurance as a basis to reject a less-restrictive alternative. In *Denver Area*, the Court stated: "No protection, we concede, short of an absolute ban, can offer certain protection against assault by a determined child. We have not, however, generally allowed this fact alone to 'justify reduc[ing] the adult population . . . to . . . only what is fit for children.'" 518 U.S. at 759. Accordingly, in *Sable Communication*, the Supreme Court invalidated a blanket prohibition on indecent and obscene commercial telephone messages transmitted interstate. Access code and screening options that were available to block children's access to such messages "provide[d] the means of dramatically reducing the number of calls from minors" and were described as having the potential to be "very effective" but "not foolproof." 492 U.S. at 130 n.10. Despite the fact that these options were still largely untested and could likely be overcome by "the most enterprising and disobedient young people," the Court still deemed them less restrictive means that invalidated the unquestionably *more* effective blanket prohibition. *Id.* at 130.

In any event, the V-chip and other technologies that could be used to block violent programming are substantially more accessible, and in significantly wider use, than other technologies that the Supreme Court has deemed effective and constitutionally preferred alternatives to content regulation. In *Reno v. ACLU*, the Court cited as an effective alternative software that was then just a "mere possibility," *Playboy*, 529 U.S. at 814 (discussing *Reno v. ACLU*), and that "would *soon* be widely available," *Reno v. ACLU*, 521 U.S. at 876-877 (emphasis added). To obtain that software, Internet users were required to affirmatively seek out and pay for it. The V-chip, by contrast, is already included in all but the smallest new televisions, with similar technology already ubiquitous for cable and satellite subscribers, and unlike Internet-blocking software, these technologies do not require periodic upgrades that must be paid for and installed.

Finally, the FCC Report criticizes certain existing technologies for being ineffective in part because parents remain ignorant of them. But the Supreme Court's decisions make clear that the proper response to lack of public awareness about a viable less-restrictive alternative is greater promotion and support of that alternative, not more burdensome content-based regulation. As Commissioner Adelstein notes, the FCC Report fails to explain why one should suppose that these voluntary technologies would be insufficient to serve parents' and children's interests if they were indeed properly publicized and supported. FCC Report at 32-33 ("Instead of rushing to conclude that . . . blocking technology does not adequately promote parental supervision and protect the well-being of children, the Commission has an obligation to advise Congress how we can attempt to improve their effectiveness. We fail to do so here.").

In *Denver Area*, for example, the government argued that cable "lockbox" technology was not a sufficiently effective alternative because "parents would have to discover that such devices exist," and, among other things, "learn how to block undesired programs." 518 U.S. at 758 (quoting government brief). The Court responded that this "list of practical difficulties would seem to call, not for" more intrusive regulation, "but, rather, for informational requirements, for a simple coding system, for readily available blocking equipment," and for other measures likely to increase effectiveness. *Id.* at 759. Similarly, in *Playboy*, the Court held that user-based blocking technology was a less restrictive alternative that rendered the statute at issue there unconstitutional, even though the evidence reflected that cable consumers had made "few requests for household-by-household blocking." 529 U.S. at 816; *id.* (noting that "fewer than 0.5% of cable subscribers requested full blocking"). Because the government had failed to show that blocking technology could not be effective "if publicized in an adequate manner," the Court concluded that the challenged legislation was invalid. *Id.*; *see also Ashcroft v. ACLU*, 542

U.S. at 669 (saying that Congress must "enact[] programs to promote use of filtering software" before declaring filtering software an ineffective alternative). Parental ignorance of less restrictive alternatives cannot justify content regulation.

### C. All of the FCC's proposals accordingly violate the First Amendment.

Applying the foregoing analysis shows that the particular proposals advanced by the FCC violate the First Amendment and would be struck down by the Supreme Court. In this section, I would like to highlight the most salient constitutional infirmities in each of the FCC's proposals.

#### 1. Time Channeling.

The FCC Report's time channeling proposal would essentially ban "impermissibly violent" television programming during specified times. None of the fatal constitutional objections elaborated in the preceding sections of this submission is avoided by confining that ban to a portion of the day or night.

***Vagueness***: A prohibition that would be unconstitutionally vague if imposed around the clock loses none of its vagueness if imposed only during specified times. The vagueness doctrine would invalidate the prohibition during the times in which it was operative as a ban.

***Over- and under-inclusiveness***: Every point made above about over- and under-inclusiveness remains fully valid when the prohibition is limited to stated times of day or night. The content- and viewpoint-based character of a regulation that triggers a demand for strict scrutiny and accordingly for an exceedingly close fit is not diminished in the least by its time-limited character.[§§§§] *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812-13

[§§§§] Although at first blush the relegation of violent content to the midnight hours may seem like a time or manner restriction, such restrictions are content-neutral *only* if they "are justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Here, by contrast, time-channeling legislation would almost certainly require television programming *with violent content* to be segregated to certain hours. Such identification

(2000) (applying strict scrutiny to time channeling of indecent cable television because "[i]t is of no moment that the statute does not impose a complete prohibition"). Indeed, the ill-fitting character of time channeling is so egregious that it would have to be struck down under the First Amendment even if one were to ignore altogether its content- and viewpoint-based operation.

Assuming for the sake of argument that young children are harmed by seeing certain kinds of violent television programming, and that avoiding this harm is a permissible governmental objective without regard to what a particular child's parents might believe, the fact would remain that time channeling responds to this concern far too broadly by denying such programming to vast swaths of the population that are not remotely the subjects of the government's concern. For example, nearly three-quarters of American television homes have no children under the age of twelve,[*****] yet time channeling would preclude everyone in those households from receiving violent television programming *at all* during times outside the safe harbor – even though those viewers are constitutionally entitled to receive that programming, and even though broadcasters and cablecasters are constitutionally entitled to transmit that programming to them. Moreover, even those households with children will have adults and older children whom the government cannot claim a compelling interest in protecting. Those viewers will also be denied programming to which they are constitutionally entitled. The inevitable effect of time channeling is that, during large segments of the day, available television programming would be limited to material deemed fit for minors. Even disregarding the constitutional objections to centralized determination of just what material meets that

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of subject matter "slips from the neutrality of time, place, and circumstance into a concern about content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 99 (1972) (internal quotation marks and citations omitted).

[*****] Nielsen Television Index, Universe Estimates 2007-2008.

description, the First Amendment does not permit the free speech rights of adults and older children to be casualties to the government's paternalism toward the young.

***Less restrictive alternatives.*** Nor would the time-limited facet of a proposed regulation escape the fatal criticism that individualized parental controls remain a constitutionally preferred less restrictive alternative for achieving any of the law's child-focused objectives. The availability of such individually tailored parental technologies for child-rearing with respect to television viewing was central, for reasons already discussed, to the Supreme Court's decision in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), to strike down a statute essentially requiring certain cable operators to time channel indecent content.

In fact, in certain ways, the V-chip and other blocking technologies are not only less restrictive but also significantly more effective than time channeling in empowering parents to control their children's viewing. As the Court explained in *Playboy*, blocking mechanisms enable parents to block programming deemed objectionable "at all times, even when they are not at home and even after 10 p.m."; by contrast, "[t]ime channeling does not offer this assistance." 529 U.S. at 825.

**2. Mandatory Ratings System.**

The FCC Report recommends that Congress could also respond to televised violence by reforming the current voluntary ratings and blocking system. The most significant component of the proposal is the Report's suggestion that Congress implement an official mandatory ratings system that would require stations to display the governmentally defined "appropriate" rating for each program. FCC Report at 17. Such a mandatory ratings system would likewise violate the First Amendment for at least two reasons.

First, the definitions and guidelines imposed by a mandatory ratings system would be inherently subjective, subject to arbitrary and inconsistent interpretation by authorities, and thus impermissibly vague. Mandatory ratings systems have been uniformly rejected by the Supreme Court under the vagueness doctrine because they vest so much power in whatever government body applies and enforces the ratings with fines or other punishments. Indeed, the Court is *more* vigilant about the "vice of vagueness" where "expression is sought to be subjected to licensing," and that "vice" is just as dangerous where the "regulation of expression is one of classification" – *i.e.*, mandatory ratings – "rather than direct suppression." *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 683, 688 (1968); *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 72 (1963). Like a time-channeling solution, any mandatory ratings scheme would suffer from all the problems of subjectivity and vagueness described in Part II(A), above, and would be unconstitutional on those grounds alone.

Second, a mandatory ratings system would impermissibly force broadcasters, cable/satellite operators, and other content providers to attach to their television programming a message stating a government viewpoint about that programming, thus "[m]andating speech that a speaker would not otherwise make." *Riley v. Nat'l Federation of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988). "[L]eading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. FAIR*, 126 S. Ct. 1297, 1308 (2006). "[T]his general rule . . . applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). Applying this rule, a plurality of the Supreme Court in *Pacific Gas & Elec. Co. v. Public Utility Comm'n*, 475 U.S. 1 (1986), struck down a regulation requiring a

privately owned utility to include with its monthly bills a newsletter written by a consumer group critical of utilities. The plurality found that compelling the inclusion of this newsletter imposed an unconstitutional burden on the utility's speech, since the regulation "impermissibly require[d] [the utility] to associate with speech with which [it] may disagree." *Id.* at 15. Similarly, in *Hurley*, the organizers of a St. Patrick's Day parade challenged a state statute that required the organizers to include a gay, lesbian, and bisexual group in the parade. A unanimous Supreme Court found this application of state anti-discrimination law unconstitutional. After holding that "[t]he selection of contingents to make a parade" is protected expression, 515 U.S. at 570, the Court held that, "[s]ince every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade." *Id.* at 572-73. Such a requirement violated "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573.

A mandatory ratings system would contravene this rule by requiring television content providers to attach to their programs a government-compelled message describing – and most likely evaluating – the programs' violent content. For example, content providers may be required to say that their program contains "violence inappropriate for children under the age of 17," or "violence appropriate for children only with adequate parental supervision," even if the content provider disagrees profoundly with the government's evaluation. Such mandatory ratings are no different from a government requirement that a television program promoting abstinence disclose that scientific studies show abstinence programs to be ineffective, or a requirement that a show on global warming say that there are still significant doubts about the

science behind climate change. Because such compelled speech forces speakers to affirm and disseminate beliefs with which they may disagree, they are forbidden by the First Amendment.

The FCC Report defends a mandatory ratings system by saying that "it merely requires the disclosure of truthful information about a potentially harmful product." FCC Report at 17. The Supreme Court has indeed recognized that, "in commercial advertising," the government may require businesses to disseminate "purely factual and uncontroversial information . . . so long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Off. of Disciplinary Counsel for Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985) (upholding state law requiring attorneys to disclose to contingent-fee clients that the clients may have to bear certain expenses even if they lose); *see also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114-16 (2d Cir. 2001) (upholding state law requiring mercury labeling). But this narrow exception to the compelled-speech doctrine is inapplicable for two reasons.

First, violence ratings most assuredly are *not* the sort of "purely factual and uncontroversial information" encompassed by this exception. At the very least, a rating represents a judgment about whether the program contains "violence" and, in all likelihood, a further judgment about whether that "violence" is "gratuitous," "excessive," or "harmful to children." These complex, highly subjective, and often controversial judgments cannot be passed off as simple factual statements and so do not fall under the *Zauderer* exception.[†††††] Accordingly, the Seventh Circuit found *Zauderer* inapplicable to a mandatory labeling program for "sexually explicit" video games, since it found that such labels "communicate[] a subjective

[†††††] Part of the controversy is essentially descriptive and deals with how something is most accurately characterized. But another part is normative: do the benefits of informing the prospective "consumer" of speech about what that consumer will encounter outweigh the costs of lost surprise, often a key element in dramatic productions?

and highly controversial message – that the game's content is sexually explicit." *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006).

Second, *Zauderer* has not been applied outside the commercial-speech context – where, as the Supreme Court has held, a lower standard of scrutiny may apply to speech that does "no more than propose a commercial transaction," *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) – but the vast majority of television programming to which mandatory ratings would be attached is not commercial speech. Television shows express ideas, they do not hawk wares.

Because strict scrutiny applies here, the availability of less restrictive means for the government to achieve its ends – namely, the existing voluntary ratings system, and the growing arsenal of voluntary blocking technologies – weighs heavily against the permissibility of a mandatory ratings system. The FCC Report gives two reasons for finding these other means ineffective: first, parents do not understand the voluntary system; and second, the ratings are often inaccurate. FCC Report at 15. The first problem cannot justify avoiding a less restrictive means; under *Playboy*, as discussed above, the government can respond to parental ignorance with a publicity campaign. One possible model is a cross-industry public education campaign on parental controls and ratings, brought in 2006 by a wide spectrum of content creators and broadcast/cable/satellite operators, that utilized public service announcements and educational websites such as TheTVBoss.org. The government could easily engage in a similar campaign here – and, under the First Amendment, Congress must exhaust that option before turning to content regulation. The Seventh Circuit relied on this reasoning to strike down the state law in *Blagojevich*: although the state attempted to justify mandatory labels by arguing that the game industry's voluntary rating system was not widely understood, the court held that the state was

required to adopt the less restrictive means of "a broader educational campaign about the [voluntary] system." 469 F.3d at 652.

The second asserted problem – allegedly inaccurate ratings – also cannot justify a more restrictive mandatory ratings system.[‡‡‡‡‡] For one thing, nothing about the centralized or governmentally dictated nature of a mandatory ratings system ensures that it will be more accurate – and, indeed, the FCC Report acknowledges that a government-run ratings system might not improve on accuracy. FCC Report at 17. The FCC Report also does not explain why cooperation with the industry – or even encouraging alternative ratings from private institutions – could not increase the accuracy of ratings. Moreover, parents need not rely simply on published ratings to protect their children. As noted above, available technologies allow parents to block specific programs and specific channels based on their own viewing of the content, on descriptions of the shows in TV channel listings, or on descriptions from friends or other sources.

Finally, even assuming that a mandatory ratings system would be considered content-neutral, it would still violate the First Amendment because it would not be narrowly tailored to the government's concerns. Rather than limiting the scope of its burdens to conveyers of violent television programming, a mandatory ratings system would compel speech from *all* speakers – even those who generate and distribute no violent content. For example, a content provider may be required to say that a program is "appropriate for children," even if the provider is afraid that this description will unfairly (and inaccurately) cause viewers to believe that the program is white-washed, infantile, or of little interest to adults. Whatever the government's power to

[‡‡‡‡‡] There is considerable doubt, to say the least, about whether parents in fact perceive ratings to be inaccurate. The Kaiser Family Foundation Survey cited by the FCC, *see* FCC Report at 16-18, states that "about half (52%) of those who have used the ratings saying that most shows are rated in a way that accurately reflects their content," and further notes that "[t]he vast majority of parents who have used the TV ratings say they find them useful," Kaiser Family Foundation, *Parents, Media and Public Policy*, at 5 (Fall 2004).

compel speech from providers of violent content, the First Amendment prohibits it from imposing such burdens on the free speech of other content providers who do not do anything remotely objectionable.

### 3. Mandatory Unbundling.

The FCC Report's final legislative proposal is for Congress to require cable and satellite operators to unbundle channels and to offer individual consumers the option to choose which channels they will receive. This unbundling could take one of two general forms. First, cable/satellite operators could provide consumers with a full slate of programming as a default, but empower consumers to "opt out" of any channels they do not wish to receive. Under this proposal, consumers either would not have to pay for opt-out channels, or would receive a refund for those channels. Alternatively, cable/satellite operators could reserve certain channels (such as those with violent content) or all channels (as in a complete à la carte regime) and require subscribers to "opt in" to those specific channels that they wish to receive. Both of these mandatory unbundling alternatives fail strict scrutiny.

#### a. First Amendment strict scrutiny applies to mandatory unbundling.

It is tempting to think of any unbundling requirement as a purely economic restriction not based on speech, but that view is flatly incorrect. Any unbundling requirement would be a speech-based and even a content-based regulation subject to strict scrutiny. The Supreme Court has recognized that "[c]able 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." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994). "[T]hrough original programming or by exercising editorial discretion over which stations or programs to

include in its repertoire, [cable/satellite operators] seek[] to communicate messages on a wide variety of topics and in a wide variety of formats." *Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986); *see also Hurley*, 515 U.S. at 570 ("Cable operators . . . are engaged in protected speech activities even when they only select programming originally produced by others."). More specifically, *Turner* recognized that requiring cable operators to bundle certain channels against their will "interfere[d] with [their] editorial discretion." 512 U.S. at 643-44. *Forbidding* them from bundling certain channels – especially if the decision is driven by the content of those channels – would have a similar effect: an operator's decision to include particular channels is at least as expressive as its decision to exclude others. *See Hurley*, 515 U.S. at 570 (holding that "[t]he selection of contingents to make a parade" is First Amendment speech).

In this regard, cable/satellite providers are no different from other speakers. A decision to combine or package expressive materials is a speech act distinct from the decisions to distribute its individual components, separately considered. For example, Tim O'Brien's *The Things They Carried* is ostensibly a collection of vignettes about the Vietnam War, each of which can be read and understood separately. Together, however, their cumulative effect is a devastating exploration of the effects of combat on young soldiers. Unlike a disaggregated set, a combination of materials allows direct comparisons between the individual pieces; it allows meaning to be created through repetition and parallelism; and it allows expression that derives from the very act of combination or juxtaposition. It makes no difference that – as some people undoubtedly believe – no distinct message can be attributed to cable/satellite providers' aggregation of channels. "[A] narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley*, 515 U.S. at 569-70. Otherwise, Congress could force

newspapers to distribute by the section and forbid recording companies from packaging different songs, artists, albums, or genres into a single compilation. Nor does it make a difference that cable operators combine not just their own content but also content provided by others. Speakers often speak by invoking the words of others, but doing so does not jeopardize their First Amendment rights. *See Hurley*, 515 U.S. at 570 (noting that newspaper editorial pages, like parades, are also "compilation[s] of speech generated by other persons").

It is true that in *Turner*, the Supreme Court applied only intermediate scrutiny – a standard lower than strict scrutiny – to uphold the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992, which required cable operators to carry the signals of certain local broadcast stations. But for a number of reasons the must-carry provisions are distinguishable from the unbundling proposed by the FCC Report.

First, the Supreme Court applied intermediate scrutiny in *Turner* because it found that the must-carry provisions were imposed "without reference to the content of speech"; not only was the statute content-neutral on its face, but Congress's manifest purpose was simply to "preserve access to free television programming." 512 U.S. at 643, 646. The various unbundling schemes proposed by the FCC Report and by earlier studies are quite different. Some past unbundling proposals have suggested requiring "themed tiers"; *i.e.*, each bundle of channels would be defined by a certain type of content, such as "sports," "news," or – for our purposes – "violent content." Legislation mandating such unbundling would be content-based on its face – since it would expressly premise cable/satellite operators' obligations upon the content of the channels they carried – and thus would be subject to strict scrutiny.

Even if the relevant bundles are defined in a content-neutral way, the *purpose* behind requiring bundling would render the law content-based. The FCC Report expressly recommends

unbundling as a way to reduce the availability of violent television programming. FCC Report at 21. This purpose requires evaluating even ostensibly content-neutral unbundling under strict scrutiny. "[E]ven a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys." *Turner*, 512 U.S. at 645. This is not to say that troublesome motives expressed by individual members of Congress can serve to invalidate a statute under the First Amendment if the statute is content-neutral on its face and serves content-neutral ends. *See United States v. O'Brien*, 391 U.S. 367, 382-83 (1968). But when the "asserted interest" offered to justify a specifically *speech*-burdening regulation is itself related to the suppression of that speech – as is the case here – strict scrutiny is appropriate even for facially content-neutral laws. *See United States v. Eichman*, 496 U.S. 310, 315 (1990) (striking down flag-burning statute when Congress's purpose was to suppress that form of expression).

Second, the Court in *Turner* found that requiring the bundling of broadcast channels would not "force cable operators to alter their own messages" because "there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Id.* at 655. Mandatory *unbundling,* however, raises distinct concerns because it directly intrudes upon a cable operator's speech by precluding speech achievable only by combining channels. For example, a cable operator may wish to provide a public service by bundling C-SPAN or local public-access channels with more popular fare such as ESPN. Similarly, a cable operator's decision to include adult channels – as much as another operator's decision to exclude those channels – is an exercise of its core editorial discretion. Although the must-carry provisions at issue in *Turner* did not block this type of editorial control, unbundling legislation would. Mandatory unbundling also interferes with the

speech rights of content *providers* in ways that the mandatory bundling in *Turner* did not. If cable/satellite operators are forbidden from transmitting certain content in a bundle, then content providers are concomitantly forbidden from offering that content in combination: *e.g.*, a media company that wants to package a family-friendly channel (which contains no violent programming) with a sports channel or a young adult channel (both of which contain some violent programming). By contrast, the must-carry provisions in *Turner* did not prevent content providers from packaging their products in this manner.

Finally, *Turner* relied in part on the special nature of the cable industry at the point in time when the opinion was decided. But the fact that cable providers bundle content does not in any way distinguish them from other forms of media. Bundles are ubiquitous in the marketplace of ideas, as in every other marketplace: musicians package songs into albums (including "greatest hit" albums that have no central theme or concept); authors collect volumes of short stories or essays; and newspapers include multiple unrelated sections (not to mention hundreds of unrelated articles) in a single issue. Many consumers would undoubtedly prefer to purchase such items piecemeal – and, under certain circumstances, the market has responded to give them that option, as with the iTunes Store – but à la carte consumption is hardly the rule, and I am aware of no law requiring these other forms of media to distribute their speech piece by piece. Moreover, no "monopoly power" possessed by cable providers distinguishes them from other forms of media. In many areas, for example, the realities of the marketplace allow only one newspaper to operate – but nobody proposes requiring such newspapers to sell their issues article by article, or section by section. Thus, imposing an unbundling requirement on cable providers would burden their editorial discretion through a regulatory regime to which no other medium is subject, even though the *reasons* for imposing unbundling rely upon no distinctive feature of

cable. Absent a "special characteristic" that would justify differential treatment, "[r]egulations that discriminate among media . . . often present serious First Amendment concerns" and are generally subject to strict scrutiny. *Turner*, 512 U.S. at 659-60.

**b. The First Amendment scrutiny of unbundling is unaffected by the involvement of money.**

Proponents of mandatory unbundling have at times suggested that unbundling can avoid strict scrutiny so long as it is only focused on the compensation that cable/satellite operators can hope to receive, rather than the content that they are empowered to convey. Thus, for instance, an opt-out unbundling program would allow cable/satellite operators to provide bundles however they saw fit, but it would simultaneously obligate them to return a portion of a consumer's subscription costs if the consumer decided to opt out of receiving certain channels.

Such a proposal cannot escape strict scrutiny. The freedom to speak is inseparable from the freedom to decide whether to charge for that speech or, instead, to distribute it without financial remuneration. To put the point another way, "freedom of speech" encompasses not only the right to make one's speech available without charge; it encompasses as well the right to decide for oneself whether to seek financial gain from one's speech by offering it at a price, or instead to provide one's own speech free of charge. This principle recognizes that, given the necessities of speakers' lives and business operations, speech will often be stillborn as a practical matter absent the concomitant opportunity to profit from speaking. Granting government the power to control compensation for specific types of speech would let the government drive speech from the marketplace – and hence from the public sphere – by removing one of the principal enablers for speaking or publishing. In this sense, one's right to profit from speech is similar to one's right to seek financial reward for one's labor, as protected by the Thirteenth

Amendment's prohibition on slavery, or to use one's private property for financial gain, as protected by the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments. The right to speak – or work, or own property – would be altogether hollow if the government could force people to give up any hope of compensation when engaging in these constitutionally protected activities.

The Supreme Court has recognized these basic principles. In *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964), the Court held that the First Amendment fully protected statements made in a commercial advertisement in the *New York Times*, even though the *Times* had been paid to publish that advertisement. Subsequent cases have directly recognized that the First Amendment protects the right to profit from speech as much as it protects the right to speak at all. For example, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims*, 502 U.S. 105 (1991), the Supreme Court found "presumptively inconsistent with the First Amendment" a state statute that denied accused or convicted criminals the income from works describing their crimes. *Id.* at 115. Similarly, in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), the Court struck down a federal law forbidding certain federal employees from accepting payment for speech unrelated to their employment. Nor should any of this seem surprising. After all, the First Amendment is most commonly invoked, not by uncompensated pamphleteers, but by the publishing industry and by journalists and authors who are paid for what they write and distribute.

Like the laws struck down in these cases, an unbundling requirement would operate to bar cable/satellite operators and content providers from deriving income from speech whose content is composed of bundles of distinct channels. Congress can no more impose such a burden than it could mandate that newspapers refund subscribers for any portion of the paper that

they do not wish to receive, or require musicians to refund their fans for any songs on an album that they dislike. Because the ability to profit from speech is joined at the hip with the production of speech, regulations of such income abridge First Amendment rights. *See McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring) ("The right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise.").

Some proposals have suggested that the government implement an unbundling requirement not by directly requiring unbundling but by withholding certain government benefits – such as approval of certain changes in media ownership – from cable/satellite operators who do not unbundle. Such a strategy would impose unconstitutional conditions on the exercise of operators' First Amendment rights to bundle content and to charge for that bundling. "[C]onditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963). In *Speiser v. Randall*, 357 U.S. 513 (1958), for example, the Supreme Court held that the government could not condition a tax exemption on an individual's agreement not to advocate the overthrow of the government. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Id.* at 518. The withholding of government benefits to discourage First Amendment speech is no different from and no more constitutional than the direct impediment of that speech.

**c. Unbundling's burdens on First Amendment rights cannot be justified.**

The burdens imposed by an unbundling requirement cannot be justified by the government's alleged interest in protecting children from televised violence. Indeed, unbundling is a singularly ineffective tool for achieving this end. For unbundling to be even *arguably* effective at shielding children from televised violence, violent content and non-violent content would have to be segregated into different channels. But they are not: as the broad examples given by groups like the Parents Television Council show, material which has been criticized as objectionably violent can be found on almost all cable/satellite channels, in the form of police procedurals, medical dramas, science fiction, physical comedy and cartoons, music videos, movies, and much else. Moreover, because an unbundling requirement would apply only to cable/satellite programming, it would leave untouched the many other media avenues by which children can become exposed to violent content – most prominently, the Internet. Thus, unbundling cannot effectively address the government's purported interest in limiting children's access to violent content.

Even if unbundling were effective, it would still impose an unjustifiable burden on First Amendment rights in light of better tailored and less restrictive means for the government to achieve its goals. In *Denver Area*, the Supreme Court specifically recognized the existence of such "significantly less restrictive" alternatives – including the V-chip – in striking down the unbundling statute at issue in that case, 518 U.S. at 756, and I have already highlighted the ever-increasing number of ways that parents can protect their children. By contrast, an unbundling requirement would impose restrictions on *all* channels and *all* cable/satellite operators, whether or not they contained or transmitted violent content. In light of less restrictive alternatives that are readily available, the First Amendment does not permit unbundling as a response to violent television programming.

As an economic matter, bundling allows at least some cable/satellite providers to promote new channels that have yet to find an audience and to support niche channels that have a devoted but numerically insignificant following. In this way, many believe, cable/satellite providers can ensure the continued existence of channels that would not, by themselves, justify their costs. This type of cross-subsidization and cross-marketing is common: magazines such as *Vanity Fair* use glossy spreads to support in-depth reporting; many newspapers undoubtedly rely on the greater popularity of sections such as sports and entertainment to prop up less popular sections; and musicians invariably leverage popular singles into sales for more obscure songs on their albums. From the perspective of some cable/satellite providers, being forced to unbundle would spell an end to their ability to engage in these salutary practices, potentially dooming untested or niche channels even if those channels contain no content that is in the least objectionable.

But the validity of this economic argument is beside the point of my First Amendment analysis. The crucial focus, rather, is on *who decides* whether and when to unbundle – on *who chooses* whether to link Content A with Content B in the marketplace of ideas, information, and expression. It is not simply the fact that unbundling might reduce the quantity and diversity of speech that puts mandatory unbundling on a collision course with the First Amendment. Even if, on balance, unbundling could be shown to *increase* that quantity and diversity, it is emphatically the *centralized governmental compulsion to unbundle* that the First Amendment forbids when, as here, there is no close fit to a compelling governmental objective. And this prohibition is underscored, not ameliorated, by the undeniable circumstance that this centralized determination is being driven in large part by a viewpoint-discriminatory and paternalistic concern with expressive content, rather than by content-neutral economic considerations, as in the case of the anti-tying prohibitions of the antitrust laws. The First Amendment does not tolerate such a

legislated shift from individualized determination of proper expression. Any regulation of television content must recognize that our system of government rightfully places this determination in the hands of individual families and parents, not those of Big Brother.

# IV. APPENDIX

The Ad Hoc Media Coalition

Motion Picture Association of America

National Association of Broadcasters

National Cable & Telecommunications Association

ABC, Inc.

CBS Corporation

Fox Entertainment Group

NBC Universal, Inc./NBC Telemundo License Co.