

EXECUTIVE SUMMARY

Testimony of

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(Titles used for identification purposes only)

On behalf of the

AD HOC MEDIA COALITION

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“Impact of Media Violence on Children”

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The FCC's report on television violence concludes that there is evidence – concededly 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 discusses 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. I believe the First Amendment invalidates, and would be invoked by the Supreme Court to overturn, a law adopting any of the FCC's proposals. Although parents can have a legitimate interest in restricting the television their children watch, the FCC makes a basic error in thinking that the solution is more intrusive governmental control over the free flow of speech, rather than more narrowly tailored and far less restrictive alternatives to facilitate parental control.

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

The Supreme Court held in *Winters v. New York*, 333 U.S. 507 (1948), and lower courts have repeatedly reaffirmed, that depictions of violence in whatever medium are protected by the First Amendment. This legal principle, acknowledged by the FCC, recognizes that, from the ancient myths and the Bible to the present day, depictions of physical violence have always played an integral role in expression and story-telling. From news documentaries to police and hospital dramas, depictions of violence and its consequences are often the most effective way to portray honestly our world and its history, and they add power, credibility, and dramatic weight to both nonfiction and fictional story-telling.

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

The FCC implicitly acknowledges the expressive importance of depictions of violence by suggesting that Congress regulate only a distinct subset of such depictions that – in the FCC's opinion – cross the line from "permissibly" to "impermissibly" violent. But any attempt to draw such a distinction would be unconstitutional.

First, any definition of "impermissibly" violent programming would be unconstitutionally vague. The Due Process Clause requires laws to be specific about what they prohibit – to give the innocent fair warning and to avoid "delegat[ing] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Laws regulating speech must meet an especially strict ban on vagueness, *Smith v. California*, 361 U.S. 147, 151 (1959), to avoid "chill[ing]" protected speech as citizens "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden

areas were clearly marked,” *Grayned*, 408 U.S. at 109. And this principle is not relaxed just because a challenged law “was adopted for the salutary purpose of protecting children.”

Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 689 (1968).

The FCC suggests several possible definitions of “impermissible” violence, ranging from “depictions of physical force against an animate being that, in context, are patently offensive,” to “outrageously offensive or outrageously disgusting violence,” to “intense, rough or injurious use of physical force or treatment either recklessly or with an apparent intent to harm.” None of these definitions is specific enough to give broadcasters, cable/satellite operators, or regulators any real sense of what they prohibit, much less the precise guidance the Court demands in such circumstances. These definitions’ operative terms are “classic terms of degree,” *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1049-49 (1991), measuring a *quality* of speech rather than delineating a discrete *category* of speech. They therefore do not offer the guidance needed by broadcasters, cable/satellite operators, and regulators. And they impermissibly delegate essentially boundless, subjective discretion to the FCC or prosecutors to regulate television programming – discretion that could be exercised by individual enforcement agents “to pursue their personal predilections.” *Smith*, 415 U.S. at 575. On similar grounds, the Supreme Court has found statutes containing phrases like “patently offensive,” “moral and proper,” and “prejudicial to the best interests of the people” to be unconstitutionally vague. *See Reno v. ACLU*, 521 U.S. 844, 873 (1997); *Interstate Circuit*, 390 U.S. at 682. Like these phrases, the proposed definitions of impermissible violence have no historically or legally established meaning and so provide too little guidance for those acting or regulating under them.

The FCC’s optimism about coming up with a definition that would not be void for vagueness fails to grapple realistically with the Court’s First Amendment precedents. The

Report glancingly cites a single Supreme Court opinion upholding the FCC's regulation of broadcast "indecentcy," *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), to suggest that a clear enough definition of violence could be developed. But *Pacifica* is inapposite. The Court has treated *Pacifica* as standing for "an emphatically narrow holding," *Sable Comm'n, Inc. v. FCC*, 492 U.S. 115, 127 (1989), that did not expressly consider whether the FCC's definition of "indecentcy" was unacceptably vague. And, in a more recent decision, *Reno v. ACLU*, 521 U.S. at 873, the Court found too vague a federal statute prohibiting indecent online content, even though the definition used there was identical to the FCC's. *See also Fox Television Stations, Inc. v. FCC*, --- F.3d ---, No. 06-1760, slip op. at 31 (2d Cir. June 4, 2007) ("[W]e are skeptical that the FCC's identically worded indecentcy test could nevertheless provide the requisite clarity to withstand constitutional scrutiny."). Finally, even if existing definitions of "indecentcy" could avoid being deemed fatally vague, the only reason would be the antiquity of the regulations involved and their reliance on long-standing concerns with personal modesty and open expressions of sexuality. Prohibitions on depictions of violence enjoy no similar provenance.

Second, any plausible definition of "impermissible" television violence will engage in unconstitutional viewpoint discrimination. The drive to regulate televised violence flows in large part from concerns about what a particular depiction appears to *say* about the use of violence – *e.g.*, whether it appears to glamorize or condemn such use, or whether the violence is used for a good or bad purpose. But any restriction on violent programming reflecting these concerns would trigger, and almost certainly fail, the strictest First Amendment scrutiny because "[t]he government may not regulate [speech] based on hostility – or favoritism – towards the underlying message expressed." *RAV v. City of St. Paul*, 505 U.S. 377, 386 (1992).

Third, a definition of impermissible television violence covering *enough* violent content to accomplish Congress's goals will reach far *more* speech than may permissibly be suppressed. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). Whatever interests Congress may assert to prevent young children from seeing televised violence, they do not justify prohibiting adults or older children from seeing these protected depictions. But most regulations of violent television programming would do just that, since fewer than one in six American television homes contain a child under six, nearly three-quarters of American television homes contain no children under twelve, and even households with young children also include adults and older children.¹ Congress may not restrict "the level of discourse reaching [people's homes] . . . to that which would be suitable for a sandbox." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983); see also *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

Finally, even if the proponents of government control in this context were right in all they assert about the effects of television violence and could devise regulations that were viewpoint-neutral and not unduly vague or overinclusive, those regulations would be self-defeating and too ineffectual to pass constitutional muster. See *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994). A large part of the problem is that the proponents' asserted goals are internally inconsistent and sometimes flatly at odds. The stated interest in protecting children from frightening material, for example, would suggest that any depiction of violence should be cartoonish and sanitized; but this would contradict and compromise the asserted interests in making children understand the consequences of violence and in avoiding material that the proponents fear children might imitate. Moreover, if violent depictions in such contexts as news or sports were exempted in

¹ 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.

order to avoid unthinkable overinclusiveness, the effect would be to prevent Congress's goals from being meaningfully served: if young children would imitate the fisticuffs on a detective drama, why would they not imitate the hard-hitting tackles on televised football games?

Patchwork regulation that selectively targets some speech while exempting other speech just as likely to cause the same effects has long been condemned for sacrificing First Amendment rights without coherent justification. 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).

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

As a result of these problems, all of the options presented in the Report flunk even the intermediate scrutiny test that governs content-neutral regulations. But because each of the proposals imposes content-based restrictions, all are subject to, and fail, strict scrutiny under the First Amendment.

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*, 505 U.S. at 382. 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 argues that strict scrutiny is inapplicable to child-protective regulation of "violent content" on television. Every facet of the argument fails.

First, the FCC claims depictions of violence receive reduced First Amendment protection because they are analogous to “indecent” or “obscene” content. But the analogy to “indecent” is unavailing because, contrary to the FCC’s assertions, regulations of “indecent” are themselves subject to strict scrutiny. *See, e.g., Playboy*, 529 U.S. at 813 (applying strict scrutiny to a time channeling requirement for cable television operators who primarily carried “sexually-oriented programming”).

The analogy to “obscenity” also fails. Although obscenity is indeed subject to reduced First Amendment protection, 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), and has strongly cautioned against expanding the extremely limited categories of expression that, like obscenity, are subject to a lower standard of review. *See RAV*, 505 U.S. at 383.

Second, the FCC contends that a lower level of scrutiny applies to regulations intended to protect minors. The FCC’s 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 materials to minors. But *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. *Id.* at 638. Because no depiction of violence can be analogized to obscenity, *Ginsberg*’s holding is inapplicable.

Furthermore, the idea that children’s special malleability counts *in favor* of government control turns the First Amendment on its head. If anything, the vulnerability of children cuts *against* centralized government control. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 211 (1972) (striking down law requiring Amish adolescents to attend school); *Meyer v. Nebraska*, 262 U.S.

390, 402 (1923) (striking down law forbidding the teaching of foreign languages to young children). Such centralized control may flout the wishes not only of children but also of their parents, who may have different ideas about the types of programming that are appropriate for their children to view. *See American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

Finally, the FCC contends that regulations of broadcast television are subject to less than strict scrutiny. But the precedents supporting this proposition – *Red Lion v. FCC*, 395 U.S. 367 (1969), and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) – have been thoroughly eroded by more recent developments. These early precedents assumed that broadcast could not be blocked and so was “uniquely accessible to children,” but advances in voluntary blocking technology for broadcast, such as the V-chip, have made it more like cable television, regulation of which is subject to strict scrutiny in part because “[c]able systems ha[ve] the capacity to block unwanted channels on a household-by-household basis.” *Playboy*, 529 U.S. at 815. Nor is spectrum scarcity any longer a substantial concern, now that advances in technology have allowed ever more channels to be transmitted simultaneously over the air, and the development of alternative media such as the Internet have vitiated any asserted government need to regulate broadcasting to promote program diversity.

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.

Even if the goal of limiting children’s access to violent television programming were a compelling interest, regulating speech for that purpose remains “unacceptable if less restrictive alternatives would be at least as effective in achieving [that] legitimate purpose.” *Reno v. ACLU*, 521 U.S. at 874. Many such alternatives now empower parents to control the availability of violent television programming to children, including V-chips (and similar blocking

technologies), family-friendly cable and satellite bundles, time-shifting technologies, after-market solutions to limit the channels and times that children can watch television, and non-governmental ratings systems. The Supreme Court has signaled approval of these voluntary measures as less restrictive alternatives to centralized regulations such as time channeling and unbundling. *See, e.g., Playboy*, 529 U.S. at 822; *Denver Area Telecommunications Consortium v. FCC*, 518 U.S. 727, 756 (1996); *cf. Reno v. ACLU*, 521 U.S. at 879.

By empowering parents rather than government to control what children see, all of these alternatives better fit the First Amendment's preferred framework for protecting the household from unwanted speech: namely, individual choice. *Compare Rowan v. Post Off. Dep't*, 397 U.S. 728, 737 (1970) (upholding law empowering *individuals* to give notice to the Post Office that they would rather not receive mailings from certain parties), *with Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (invalidating law through which the *government* prohibited the mailing of unsolicited ads for contraceptives). Worse still, permitting *government* to control television content prevents some parents from letting their children see what they want them to see, contravening "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

The FCC's criticisms of these alternatives miss the point. First, the Report simply ignores almost all the alternative technologies discussed above. Second, the FCC's conclusions about the alleged ineffectiveness of the V-chip and the voluntary ratings system rest on evidence most of which shows, at best, that children are seeing things the *government* might prefer they not see – not that determined *parents* are unable to control what their children watch.

The FCC also ignores the settled principles that a method of achieving a compelling government interest must be recognized as a less restrictive means even if its effectiveness is

questionable, *see Denver Area*, 518 U.S. at 759, and that, whenever the government can increase an alternative's effectiveness, it must do so before resorting to content regulation. In *Denver Area*, for example, the Court responded to the government's concerns about the difficulty of using voluntary blocking technologies by saying 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 similar measures. 518 U.S. at 759.

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

1. Time Channeling.

The FCC Report's time channeling proposal would ban "impermissibly violent" television programming during specified times. Because this ban relies upon a distinction between permissible and impermissible television violence, it falls to the same vagueness concerns as a total ban. Because time channeling would deny certain programming across virtually all waking hours to the two-thirds of American television households that have no children, as well as to parents and older children in households with children, it is also fatally overinclusive. Finally, the availability of voluntary blocking technologies has already been invoked by the Supreme Court to strike down a time channeling statute in *Playboy*, the reasoning of which applies with full force here.

2. Mandatory Ratings System.

A government-run mandatory ratings system would be impermissibly vague, for the reasons already noted. *See Interstate Circuit*, 390 U.S. at 683, 688 (holding a mandatory ratings system void for vagueness). It would also violate the First Amendment by forcing broadcasters, cable/satellite operators, and other content providers to attach to their television programming a

message stating a government viewpoint about that programming, impermissibly “[m]andating speech that a speaker would not otherwise make.” *Riley v. Nat’l Federation of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

The FCC defends mandatory ratings as “merely requir[ing] the disclosure of truthful information about a potentially harmful product,” citing *Zauderer v. Off. of Disciplinary Counsel for Sup. Ct. of Ohio*, 471 U.S. 626 (1985). FCC Report at 17. But this narrow exception to the compelled-speech doctrine is inapplicable outside the commercial-speech context, and the vast majority of television programming is not commercial speech. Moreover, this exception allows mandatory disclosure only of “purely factual and uncontroversial information,” *id.* at 651, but ratings represent *judgments* about whether programs contain “impermissible” (*i.e.*, “gratuitous,” “excessive,” etc.) violence. See *Entertainment Software Ass’n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (finding *Zauderer* inapplicable even to a statute requiring labeling of “sexually explicit” video games).

A mandatory ratings system is thus subject to the same least-restrictive-means requirement as other speech regulations, which means that the existing voluntary ratings system and the growing arsenal of voluntary blocking technologies doom mandatory ratings. Such a system would also not be narrowly tailored, because it would compel speech from *all* speakers, even those who generate and distribute no violent content.

3. Mandatory Unbundling.

The FCC Report’s final legislative proposal – mandatory unbundling – is also subject to strict scrutiny. “Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.” *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994). An unbundling requirement, like a

bundling requirement, “interfere[s] with . . . editorial discretion” regardless of whether the channels contain the cable/satellite operators’ own content or the content of others. *Id.* at 643-44; *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.”). A decision to combine expressive materials – as in a music album, a book anthology, or a newspaper – is a speech act distinct from the distribution of its individual components, even if no distinct message can be attributed to the aggregation. *See Hurley*, 515 U.S. at 569-70.

Nevertheless, proponents of unbundling have attempted to evade strict scrutiny in at least three ways. First, they cite *Turner*, a Supreme Court case applying intermediate scrutiny to the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. But, unlike the FCC’s proposals, the must-carry provisions were imposed “without reference to the content of speech.” 512 U.S. at 643, 646. By contrast, some unbundling proposals have required “themed tiers” and thus would be content-based on their face. Moreover, the FCC’s and Congress’s transparent *purpose* for requiring bundling, at least in the current context, would be to address the violent content of cable/satellite channels, and “even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys.” *Id.* at 645.

The Court in *Turner* also found that requiring the bundling of broadcast channels would not “force cable operators to alter their own messages.” *Id.* at 655. Mandatory *unbundling*, however, raises distinct concerns because it directly precludes speech achievable only by combining channels. Mandatory unbundling also interferes with the speech rights of content *providers* by preventing them from offering their content in combination: *e.g.*, a media company that wants to package a violence-free family-friendly channel with a sports channel.

Turner's holding finally relied on "special characteristics of the cable medium," such as its threat to free broadcast television. *Id.* at 661. But that aspect of must-carry is not present here. The fact that cable providers bundle content is not unique: musicians package songs into albums, authors collect volumes of short stories or essays, and newspapers include multiple unrelated sections. Imposing an unbundling requirement on cable/satellite operators would thus burden their editorial discretion through a regulatory regime to which no other medium is subject, despite engaging in the same practice. "Regulations that discriminate among media . . . often present serious First Amendment concerns" and are generally subject to strict scrutiny. *Id.* at 659-60.

Second, proponents of unbundling have attempted to evade strict scrutiny by focusing 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 bundling but also require a refund if a consumer opts out of receiving certain channels. Such a proposal cannot escape strict scrutiny. The freedom to speak is inseparable from the freedom to charge for that speech. "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." *McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring); see, e.g., *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995) (invalidating law forbidding federal employees from accepting payment for job-unrelated speech); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims*, 502 U.S. 105, 115 (1991) (invalidating law denying criminals the income from works about their crimes); *N.Y. Times v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that the First Amendment fully protects statements made in a fundraising advertisement).

Applying strict scrutiny, mandatory unbundling does not meet the stringent requirements of the First Amendment. It fails to achieve “in a direct and effective way” the government’s interests in protecting children from television violence, *Edenfield v. Fane*, 507 U.S. 761, 773 (1993), because violent content and non-violent programs are not segregated into different channels. And, 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, such as the Internet.

Even if unbundling were effective, it would still impose an unjustifiable burden on speech in light of better tailored and less restrictive means for the government to achieve its goals. In *Denver Area*, for example, 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.

The economic arguments both for and against unbundling are beside the point of my First Amendment analysis. It is not unbundling as such, but the *centralized governmental compulsion to unbundle* that the First Amendment forbids. The determination of proper expression rightfully rests in the hands of individual families and parents, not those of Big Brother.

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.