

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Empowering Parents and Protecting Children) MB Docket No. 09-194
in an Evolving Media Landscape)

REPLY COMMENTS OF THE NATIONAL MEDIA AND ADVERTISERS

**American Advertising Federation
American Association of Advertising Agencies
Association of National Advertisers, Inc.
CBS Corporation
Direct Marketing Association
Discovery Communications, LLC
Fox Entertainment Group
Grocery Manufacturers Association
Illinois Broadcasters Association**

**Interactive Advertising Bureau
Maine Association of Broadcasters
NBC Universal, Inc.
Pennsylvania Association of Broadcasters
Promotion Marketing Association
Texas Association of Broadcasters
Viacom Inc.
The Walt Disney Company
Washington State Association of Broadcasters**

Robert Corn-Revere
Ronald G. London
John R. Eastburg
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW, Suite 200
Washington, D.C. 20006-3402
(202) 973-4200

Counsel

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EXECUTIVE SUMMARY

The Commission's comprehensive Notice of Inquiry ("*NOI*"), *Empowering Parents and Protecting Children in an Evolving Media Landscape*, starts where its *Child Safe Viewing Act Report* to Congress left off, by recognizing that the media environment in which we live has been transformed into a world of abundance. Consumers now have a dizzying array of media choices over multiple platforms, ranging from traditional broadcasting to the Internet and wireless broadband, a development that has profound implications for media policy. At the same time, the Commission has found that a large and growing number of tools and strategies exist to enable individuals to tailor their media consumption to meet their particular needs, including the desire to shield their children from unwanted material.

This *Inquiry* is both timely and necessary. The Commission is seeking information on a wide range of subjects, including the extent of media use by children, its potential impact on them, and the effectiveness of user empowerment tools and strategies to deal with these issues. At the same time, many commentators have treated the *NOI* as an invitation to submit a variety of regulatory "wish lists" that would not serve the public interest but would vastly expand the Commission's jurisdiction. National Media and Advertisers, a diverse array of media companies, content providers, advertisers, and trade associations, jointly submit these reply comments to address issues raised by some of the initial commenters and to answer questions presented in the *Notice*.

Market Developments, Industry Initiatives, and Self-Regulation

The *NOI* is grounded in the assumption that media exposure causes or significantly contributes to various social problems, including crime, aggressive behavior, childhood obesity, smoking, drug use, and other disfavored behaviors. In fact, it is a media-centric analysis of a wide array of social issues. This assumption is unwarranted and tends to divert

attention from direct actions that would help to address multifaceted problems that require more holistic solutions. This fact has both policy and constitutional implications, for the Supreme Court has cautioned that if the First Amendment means anything, it is that regulating speech must be a last – not a first – resort. Accordingly, the Commission should broaden its analysis to consider direct actions that are being undertaken to address the underlying problems.

Media companies and advertisers have participated in a wide range of industry initiatives and self-regulatory programs to address many of the issues raised in the *NOI*. For example, industry groups have created tools to choose content, screening or blocking tools to exclude unwanted material, and television time management tools. They have created a variety of ratings systems. And they have provided parents with dozens of options for filtering and monitoring Internet content. At the same time, industry groups also have enacted a range of self-regulatory measures regarding advertising to children and families. As just two examples, the Children’s Advertising Review Unit (“CARU”) enforces guidelines for age-appropriate advertising, and the Children’s Food and Beverage Advertising Initiative (“CFBAI”) encourages healthier dietary choices.

Companies also have taken direct action to promote health and nutrition, by reformulating thousands of products and by developing healthier menu items, including smaller portion sizes. They have worked to introduce school curriculum changes to promote better nutrition and to stress physical education among children. These measures are supported by a widespread campaign of public service announcements, and media companies have donated half a billion dollars to this effort.

Direct action also is the most effective way to reduce the acquisition and consumption of products that are illegal for children, such as alcohol and tobacco. All fifty states make it illegal

for minors to acquire such products, and these limits are backed by federal law. Enforcement of these laws has been extremely effective in preventing sales to minors. However, recent studies have shown that such direct measures may be neglected where the government's focus is shifted to more symbolic efforts, such as attempts to limit media influences.

Evaluating Children's Issues in Context

National Media and Advertisers agree that addressing children's needs is a very important policy goal, but submit that it is equally important that children's issues not dictate overall media policy. Nearly two-thirds of households in the United States do not include minors, and the percentage with children has been declining steadily since 1960. In light of this fact, where potential policy choices may affect the availability or content of media and advertising to the majority of U.S. households without children, the Commission should not lose sight of the Communications Act's overriding mandate to make service available, "so far as possible, to all the people of the United States ... Nationwide." 47 U.S.C. § 151. Indeed, the Commission recently launched a *Future of Media Inquiry* to "assess whether all Americans have access to vibrant, diverse sources of news and information that will enable them to enrich their lives, their communities and our democracy."

The FCC has long recognized the public interest inherent in maintaining a healthy economic environment for media, and has recognized the essential role of advertising in making communications technology available and affordable to Americans. This was true for over-the-air broadcasting and cable television, and the Commission recognized that it is equally true for emerging interactive media in its recently announced *Connecting America: The National Broadband Plan*, FCC, Mar. 16, 2010 at 52-53.

A significant tension must be dispelled if media policy is to balance the imperative need to ensure service to all Americans while also addressing the children's issues identified in the

NOI. The risk to the economic underpinnings of media increases significantly to the extent the Commission considers proposals of some commenters to extend rating and filtering regimes to include advertisements, to expand the Commission’s jurisdiction to newer media, or to alter the definition of programming deemed to be “directed to children” to include general audience programming or programs directed to older teens. Any effort to regulate content characterized as “directed toward” children simply because it “may be viewed” by them would inappropriately treat advertising in general audience programming like broadcast indecency – programming that can be regulated when there is a reasonable likelihood that children might be in the audience. Such proposals not only underscore the tensions highlighted here but also contravene the basic principle enunciated frequently by the Supreme Court that the government cannot reduce the adult population to only what is fit for children.

Shifting Rationales

Existing broadcast regulations are predicated on a perceived need to address problems of scarcity, most notably spectrum scarcity, but also a scarcity of certain types of programs or a lack of tools for parents to control the content to which children are exposed. The *NOI*, conversely, expresses concern about the “problem” of abundance – a multitude of content options, of platforms on which to receive them, and of means to exercise dominion over what media enters the home. If the age of media scarcity is over, as the Commission itself has found, it should at least recognize that existing justifications for regulation have been undermined. If the FCC wishes to perpetuate old rules or make new ones based on the idea of abundance, it will need to articulate that new theory and acknowledge that it is the exact opposite of the FCC’s historic rationale for regulation.

Given the vast changes in the media environment and the fundamental shift in traditional justifications for FCC jurisdiction and regulation, it is vital that the Commission properly frame

the questions it hopes to answer. It must first address the threshold question of the extent of its authority to make policy in areas covered by the *NOI*, because there are constitutional limits to the government’s ability to regulate outside its traditional domain. Second, it should explore how programming will be supported in this new media environment, particularly since various proposals seek to restrict several types of advertising or sponsorship. Third, the Commission should address how to best empower members of the public to make individual programming choices without government intervention.

The explosion of media options and rapidly increasing flexibility in tailoring the amount, content, and means for consuming electronic media should make regulatory intervention less necessary than ever before. As the Supreme Court underscored just this Term, “[r]apid changes in technology – and the creative dynamic inherent in the concept of free expression – counsel against [regulation] that restricts [] speech in certain media or by certain speakers.” *Citizens United v. FEC*, 130 S. Ct. 876, 912-13 (2010).

Critical Examination is Required

Although the *NOI* mentions some potential benefits of children’s access to media, the prevailing presumption of the *Notice* appears to be that the electronic media generally pose a danger from which children must be shielded. After briefly discussing benefits of electronic media for children, the *NOI* lingers on the presumed risks, giving pride of place to “exploitive advertising” and “inappropriate content.” However, contrary to a number of statements in the *Notice* and some of the comments filed in response, the academic debate regarding media effects is both intense and polarized. A recent interdisciplinary review conducted by the British government of the scientific literature found that the debate over theory and method, and limitations of the research itself, make it difficult to sum up the evidence. In particular, it found little agreement about the widely-debated issue of the effects of advertising on obesity – noting, for instance, that

the U.S. Institute of Medicine found insufficient evidence to establish a causal relationship between advertising and adiposity. The British government study also found that the relationship between marketing and children's physical health remains a contested issue and that, despite the great deal of research already completed, the evidence is mixed and inconclusive, and widespread disagreement persists about its value. Consequently, it cautioned that research in this field does not generate findings that regulators can mechanistically turn into policy.

There is no question that the rate of obesity has increased in the general population, as it has for children, but there is little evidence that advertising causes obesity. Children's exposure to advertising has decreased during the period of rising obesity rates, and advertising for food and restaurants overall has decreased compared to that for other products. Obesity results from an imbalance in calories taken in and energy expended, not from exposure to advertising. Vast variations in obesity rates among states that have essentially the same level of advertising – for example, fewer than 10 percent of Oregon children were obese in 2007, compared with nearly 22 percent of Mississippi children – strongly indicate that media messages do not cause obesity. In this regard, the available research suggests that while children's calorie intake in fact has remained more or less steady over the past 30 years, the number of calories they burn through exercise has declined. Thus, it is far more plausible to conclude that rising obesity levels are linked to an increase among children in sedentary activities that do not burn the same calories as vigorous exercise.

Even among those researchers who conclude that advertising has an impact, most reviews of the research agree that the impact is small. One frequently quoted figure is that exposure to television advertising accounts for some two percent of the variation in children's food choices, which itself is only one factor in obesity. Recent reviews of the literature found very little evidence supporting the magnitude of the effect, and that this lack of support is crucial for policy

purposes. This is because what matters is not so much whether there is *an* effect, but rather whether the effect is large enough to be of practical significance, especially relative to other factors.

The same critical review of the scientific literature should be brought to bear on claims of adverse effects from children's exposure to other "inappropriate" content. Research claims often are exaggerated, and there is no scientific consensus, as some have suggested. It should be noted that concern about "inappropriate content," including not just advertising but programming themes that might give children "the wrong idea" about a long list of life choices, is an exceedingly expansive and unmanageable category for regulatory purposes. Different individuals derive different lessons from the same material, and it is difficult to imagine trying to devise a universal rule or filter that could shield children from such content, however it may be defined. Such decisions should be left to household rules and individual filtering and blocking decisions.

Drawing on Previous Research

Given the expansive scope of the *NOI*, the Commission should not attempt to reinvent the wheel. Other major studies and task forces have covered much of the same ground, including the COPA Commission, the Thornburgh Commission, the Byron Commission, the Internet Safety Technical Task Force, and the "Point Smart. Click Safe." Working Group. The Commission should incorporate the findings from these prior reviews into this inquiry, as well as those from the recent UK study, issued by the Department for Children, Schools and Families and the Department for Culture, Media and Sport, entitled *THE IMPACT OF THE COMMERCIAL WORLD ON CHILDREN'S WELLBEING – REPORT OF AN INDEPENDENT ASSESSMENT* (December 2009).

These studies, the collective product of hundreds of experts, agreed on four key principles that the Commission should consider: (1) educating children and parents about media use is the *primary* solution for most concerns about media risks; (2) parents should be empowered with an array of tools for controlling content, but there is no quick fix or silver bullet;

(3) industry can help parents with self-regulatory measures and best practices to increase the efficacy of content management tools; and (4) inflexible, top-down government mandates quickly become outdated and do not work in a rapidly evolving media landscape, while technological mandates tend to stifle innovation.

Setting Realistic Benchmarks

The *NOI* asks whether the parental empowerment tools and strategies currently in use are effective in protecting children. Some comments suggest that such tools are not effective because too few parents use them or because the ratings they employ do not meet the commenters' criteria for "inappropriate" content. However, parents may choose to use a given control technology, or not, for many reasons. They may not like the one technology mandated by the government, the V-chip, and may prefer instead to use another of the many private alternatives provided by the market. Some parents simply may use one of the many available ratings systems to help guide their programming selections without finding it necessary to program that choice into their television or other receiving device. Others may be parents of older teens, who feel less of a need to use control technologies. As the Supreme Court has held, it is not sufficient for critics of voluntary empowerment tools simply to state that too few parents use the V-chip or some other option where it is just one of many available tools and strategies.

The number and diversity of parental control options is a strength of the current environment, not a "problem" to be regulated. The Third Circuit's decision in *ACLU v. Mukasey* recently explained the value of this diverse approach, finding that some filtering programs "offer only a small number of settings, while others are highly customizable, allowing a parent to make detailed decisions about what to allow and what to block ... by, among other things, enabling parents to choose which categories of speech they want to be blocked ... and

which age setting they want the product to apply.” The court observed that filtering “can be used by parents even if they have more than one child[, *e.g.*] if a family has four children, many filtering products will enable the parent to set up different accounts for each child, to ensure that each child is able to access only the content that the parents want that particular child to access.” This flexibility allows parents to tailor empowerment technology “to their own values and needs and to the age and maturity of their children” as opposed to a “one size fits all” approach.”

This capability would not be improved by an attempt to fashion universal ratings. No ratings system will ever be able to scrutinize and label all potentially offensive or upsetting content, not only due to the sheer quantity and variation of available material and the rapid evolution of technologies, but also because there will always be a trade-off between sophistication and simplicity; between intricacy and ease of use. Ratings are by definition subjective – and should be – so that consumers can choose a product or service that best matches their family’s values.

National Media and Advertisers agree with the Commission and nearly all commenters that recognize the value of media literacy initiatives. Education regarding media literacy helps parents to make individualized choices about what is appropriate for their own children, and it helps children develop personal mechanisms for making smart choices about media on their own. A variety of literacy initiatives already have been undertaken by industry, non-profits, and government agencies.

Limits of FCC Jurisdiction

The *NOI*’s broad focus on the “evolving media landscape” seeks comment on a wide array of content platforms, many of which are not subject to traditional media regulation. It seeks comment on all electronic communication channels and means of content delivery, including broadcasting, multichannel platforms, prerecorded content and various playback devices, the Internet, video games, and wireless services. And it cogently asks “whether the Commission has

statutory authority to take any proposed actions and whether those actions would be consistent with the First Amendment.” However, the Commission’s ability to regulate is sharply limited by the Communications Act and the First Amendment.

The Communications Act does not confer authority on the FCC to regulate content on most of the media platforms identified in the *Notice*. Expanding beyond existing limits presents special problems, especially because courts have categorically rejected the extraordinary proposition that the FCC possesses *plenary* authority to act within a given area simply because Congress endowed it with *some* authority in that area. Nor can the Commission assert jurisdiction over programming content based on ancillary authority.

The First Amendment also limits the Commission’s authority to regulate media content. The Supreme Court has characterized the extent to which the FCC and Congress may actually influence the programming offered by broadcast stations as “minimal.” And whatever FCC authority over broadcast content may have existed at its historical apex has been eroded by media abundance and convergence. Content-based regulation outside broadcasting is subject to strict scrutiny, and presumed invalid. And the Commission’s constitutional authority to regulate most of the content categories over which the *NOI* expresses concern – such as violent content – is also strictly limited.

Finally, while filtering and other voluntary private-sector alternatives are accepted by the courts as less restrictive alternatives to direct regulation, this does not mean the First Amendment permits the government to regulate such labeling or filtering regimes. Private sector ratings historically have been considered a constitutionally benign way of informing consumers in advance about the nature of a particular media product. But an entirely different analysis applies when a voluntary, private system is incorporated into government regulation. When that happens, it no longer operates as a voluntary system, but is infused with state action and is

subject to constitutional limits. For that reason, courts have uniformly invalidated various efforts to incorporate ratings into law.

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REPLY COMMENTS OF THE NATIONAL MEDIA AND ADVERTISERS

The National Media and Advertisers hereby submit reply comments in response to the Commission’s Notice of Inquiry and to initial comments submitted in this proceeding.¹ These Reply Comments are offered by a diverse array of media companies, content providers, advertisers, and trade associations to articulate a broad consensus on issues raised in the *NOI*. The parties to this joint filing share important characteristics relevant to the present inquiry. All support the protection and advancement of robust and diverse content and viewpoints that lie at the heart of many FCC initiatives, and in helping to ensure that the media environment offers something for all interests, tastes, and needs among members of the American public. The National Media and Advertisers share the conviction that media policy should not be seen as a panacea that can solve complex problems involving childhood, and that regulatory solutions often have significant unintended consequences that can undermine the goals of those who propose them.

INTRODUCTION

This inquiry has an extraordinarily broad focus, asking questions, collecting and noting existing data – and in some cases making assumptions – about all aspects of “the current

¹ *Empowering Parents and Protecting Children in an Evolving Media Landscape*, 24 FCC Rcd. 13171 (2009) (“*NOI*” or “*Notice*”). Descriptions of the corporations and associations that make up the National Media and Advertisers reflecting their interests in this proceeding are provided in Attachment 1 to these Comments.

children’s media landscape.” *NOI* ¶ 5. It asks questions about all electronic communication channels and other means of delivering content, including broadcast television and radio, multichannel video programming distributors (“MVPDs”), the Internet, video games, and all manner of audio and/or video, wireless, and nonnetworked devices.² It also recognizes the extent to which convergence provides further choice by making the same content available on multiple platforms and/or by creating or allowing linkages of related content across different communication channels. *See, e.g., id.* ¶¶ 3, 42. The *Notice* seeks comment on a wide variety of content areas, including commercial and non-commercial material, and poses numerous questions about media use and its impact. Although the *Notice* briefly acknowledges the benefits of media to children, including its delivery of educational content and the evolution of developmental materials to engage children interactively,³ it appears to presume that a broad range of media content poses a danger to children that requires a regulatory solution. In stark contrast with the underlying premises of most previous efforts to regulate media, it begins with the understanding that media platforms are abundant, content is diverse, and numerous tools exist that enable individualized control over exposure in the household.⁴

Given the breadth of the Commission’s *Notice*, it comes as no surprise that some commenters seek very broad governmental remedies indeed, including a constitutional amendment to

² *See, e.g., id.* ¶ 2 (“From television to mobile devices to the Internet, electronic media offer children today avenues ... their parents could never have envisioned.”). *See also id.* ¶¶ 11-49.

³ *See generally id.* ¶ 6 & §§ IIA-B; *id.* ¶ 2 (“[t]he new media [are] participatory in nature”).

⁴ *Id.* ¶¶ 2, 11-13, 44. *See also Implementation of the Child Safe Viewing Act: Examination of Parental Control Technologies for Video or Audio Programming*, 24 FCC Rcd. 11413 (2009) (“*CSVA Report*”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd. 542, 544 (2009) (“*Thirteenth Annual Report*”). *See also id.* at 545 (noting the “offering [of] nonvideo services in conjunction with [] traditional video services”).

limit First Amendment protection for sexually-oriented expression.⁵ Others have suggested that content filters should be modified to permit the blocking of advertisements⁶ and that product placement should be more stringently regulated, not just on the broadcast medium, but in video games and movie theaters as well.⁷ The Rudd Center for Food Policy & Obesity, for example, argues that “[t]o the full extent of its power, the FCC should regulate food marketing to children and adolescents, and Congress should enhance the FCC’s power accordingly.”⁸ The Children’s Media Policy Coalition likewise calls on the Commission to prohibit interactivity with any commercial matter during children’s programming,⁹ while others seek regulatory solutions on platforms that are beyond the Commission’s traditional jurisdiction,¹⁰ or for content that is not currently subject to regulation.¹¹ Simply put, many commentators have treated the *NOI* as an invitation to submit wish lists of a variety of regulatory proposals that would vastly expand the Commission’s jurisdiction.

⁵ Comments of Morality in Media at 28 (“MIM Comments”).

⁶ Comments of Common Sense Media at 3 (“CSM Comments”); Comments of the U.S. Conference of Catholic Bishops at 5, 7-8 (“Catholic Bishops Comments”); Comments of the So We Might See Coalition at 5-6 (“So We Might See Comments”); Comments of Parents Television Council at 9 (“PTC Comments”).

⁷ Comments of Rudd Center for Food Policy & Obesity at 2 (“Rudd Center Comments”); Comments of the Food Marketing to Children Workgroup at 11 (“Food Marketing Workgroup Comments”); Comments of the Center for Media Literacy at 28 (“CML Comments”).

⁸ Rudd Center Comments at 5. *See also* Food Marketing Workgroup Comments at 14-15.

⁹ Comments of the Children’s Media Policy Coalition at 27 (“Children’s Coalition Comments”).

¹⁰ *See, e.g.*, Comments of Rep. Joe Baca (“Baca Comments”) at 1-3 (advocating regulation of video games that depict violence).

¹¹ *See, e.g.*, Catholic Bishops Comments at 7 (advocating regulation to control portrayals of illegal drug use, alcohol abuse, and smoking).

The Commission acknowledges that this *Notice* overlaps with and expands upon other proceedings that address issues and questions that are raised here.¹² Likewise, signatories to these comments jointly and/or separately filed material in related FCC dockets. These prior comments were filed in various proceedings over a span of years, and the Commission decided not to incorporate the material filed in all of these inquiries and rulemakings into the record being compiled here.¹³ Thus, to ensure a complete record and for ease of reference in this proceeding, the National Media and Advertisers hereby submit as attachments to these comments various submissions in these prior related inquiries and rulemakings.¹⁴ These attachments will be cited in the discussion below where relevant.

I. THE INQUIRY SHOULD ACKNOWLEDGE THE BENEFITS OF DIRECT ACTION TO ADDRESS SOCIAL PROBLEMS

In line with the breadth of this inquiry, the *Notice* identifies a host of social problems and asks how best to address them, ranging from crime and aggressive behavior, to childhood obesity, smoking, drug use, sexual solicitation, bullying, and loss of privacy. *NOI* §§ II.C.1 & 2. Of course, because the FCC is asking the questions, it focuses on how to address the myriad issues through communications policy. However, this orientation at once reinforces an unwarranted presumption that media exposure causes or is a major contributor to a number of social

¹² See *NOI* ¶ 10 (“we will incorporate the comments filed in the CSVA proceeding ... into the record on this NOI”); *id.* ¶ 27 n.36. See also *NOI* ¶ 36 n.62 (noting related NPRMs on interactive advertising in *Children’s Television Obligations of Digital Television Broadcasters*, MM Docket No. 00-167, 19 FCC Rcd. 22943 (2004), and embedded advertising in *Sponsorship Identification Rules and Embedded Advertising*, MB Docket No. 08-90, 23 FCC Rcd. 10682 (2008) (“*Sponsorship ID NOI/NPRM*”).

¹³ For example, the record in the *Sponsorship ID NOI/NPRM* is not being incorporated. *NOI* ¶ 36 n.62.

¹⁴ Attachment 2 hereto provides an index of cited filings and the short-forms used for them.

problems, while understating the importance of taking direct action to address the actual problems, rather than by regulating expression related to the issues.

In this regard, the Commission should heed findings of a number of expert reports, conducted both in the U.S. and abroad, that have examined the impact of online communications on children. Those reports are discussed in greater detail later in these reply comments. *See Section V infra.* The findings common to the various studies is that regulatory solutions are not likely to be effective in protecting children and that education combined with individual empowerment tools provides a more effective means of serving the needs of children and families. Excessive focus on media policy also may divert resources from more direct and effective actions. Such conclusions are relevant beyond the online context. A more recent interdisciplinary study conducted by the British government on the wellbeing of children in the commercial world, across all media platforms, found that policymakers should keep the broader context in mind:

Proposals to increase the regulation of advertising need to be assessed both in terms of their likely impact and effectiveness, and in terms of their potential unintended consequences – for example, in justifying the withdrawal of funding for children’s content. In addition, a disproportionate focus on advertising is likely to distract attention from other factors which may have more impact on the issue concerned.¹⁵

¹⁵ *See* Department for Children, Schools and Families and the Department for Culture, Media and Sport, *THE IMPACT OF THE COMMERCIAL WORLD ON CHILDREN’S WELLBEING – REPORT OF AN INDEPENDENT ASSESSMENT* (December 2009) at 14 (“IMPACT OF THE COMMERCIAL WORLD”). This report was the product of a year-long review by an independent multidisciplinary panel of experts in the fields of psychology, sociology, history, education, media studies, and marketing. Panel members had conducted a range of previous research projects relating to such issues as children’s uses of television, the Internet and other media; children’s responses to advertising and marketing; parent’s views and concerns; the strategies and practices of children’s marketers; the history of childhood; and children’s social experiences within the family, the peer group, and schools. *Id.* at 21. The Report is available at: www.childrensfoodcampaign.net/ImpactofCommercialWorldonChildrensWellbeingDec09.pdf.

The National Media and Advertisers do not suggest there are no problems to be solved, or that it is unnecessary to take action. Quite the contrary, the commenters consistently have, as the colloquial expression goes, “put their money where their mouth is” to deal with many issues that relate to the governmental interests motivating the *NOI*. Such actions recognize the underlying problems are multifaceted and require a far more direct and holistic approach than simply regulating media messages. At the same time, unfortunately, governmental initiatives that directly address the underlying issues have been allowed to atrophy. *See, e.g., CBS News, Obesity Up, Phys Ed. Down; \$\$ Woes Forcing Schools to Cut PE Programs, Even As Obesity Grows*, <http://wap.cbsnews.com/site?t=C12EDWQFiAW2w.WQiXVDVg&sid=cbsnews>. This fact has important constitutional ramifications. In line with the basic principle that “regulating speech must be a last – not first – resort” in formulating media policy, *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002), the Commission should fully survey the direct actions that are being taken (or, in some cases, not taken) to address the social problems identified in the *Notice*.

A. Market Developments, Industry Initiatives, and Self-Regulation

Self-regulatory initiatives developed by a variety of industries have established voluntary, age-based frameworks to help ensure that the content and other goods and services that children consume are lawful and acceptable to their parents. Some tools and strategies have emerged as marketplace developments in response to a demonstrated demand, while others represent industry efforts to work cooperatively to address social problems. These measures are reinforced by public service announcements (“PSAs”) voluntarily undertaken and financially underwritten by advertisers and the media, as well as by efforts to improve media literacy. The purpose of these efforts is to increase viewer awareness and encourage people to make better or more

informed choices, while empowering them to select or avoid media inputs based on their individual choices.

1. Promoting Programming Choice

The Commission's recent *CSVA Report* to Congress found that industry and private groups provide myriad ways for individual households to control their media consumption, including selection tools to choose content affirmatively, and screening or blocking methods to exclude unwanted material. *See CSVA Report, supra* n.4. This *Notice* begins by incorporating the record from the CSVA proceeding and urging commenters to read the *CSVA Report*, and its key findings are an important predicate for the current *Inquiry*. While the *CSVA Report* found that the government-mandated V-chip provides what it described as a "baseline tool," it also confirmed that the marketplace provides a range of blocking technologies that enables parents to help guide children's television viewing. *Id.* at 11417-20. The Commission found that "there is a wide array of parental control technologies for television, including tools offered by MVPDs, as well as VCRs, DVD players, and [DVRs] that permit parents to accumulate a library of preferred programming for [] children[.]" *Id.* at 11418. It also noted that MVPDs "can support a broad array of filtering tools and rating schemes." *Id.* at 11424.

With respect to multichannel video providers in particular, the *CSVA Report* found that "cable and satellite providers offer controls that allow parents to block channels that they do not want their children to watch," *id.* at 11438, and more specifically:

Both analog and digital cable boxes allow parents to block channels and lock the settings with passwords. Newer digital boxes offer more extensive filtering capabilities that allow programs to be blocked by rating, channel, or program title. The current generation of digital cable set-top boxes also permits parents to set up their controls so that children are unaware that a particular channel or program is available on a particular television set. * * * * Some boxes also allow customers to block access to an entire service, such as VOD, and allow customers to block content based on time and day.

Id. at 11439. Using these tools, “[p]rograms can be blocked according to the TV Parental Guidelines’ age-based restrictions or content descriptors, or by a combination of the two,” or “according to MPAA ratings” for movies.”¹⁶

Further, citing general agreement that “there are a number of independent providers currently offering ratings for [TV] content,” the Commission recognized a robust variety of independent systems that leverage MVPD controls, and that third-party ratings services such as Common Sense Media ratings and TV Firewall are becoming available through MVPD platforms.¹⁷ The *CSVA Report* also described options like TVGuardian and CC+ that allow parents to avoid having to go without whole channels or programs they might otherwise wish to enjoy, in favor of filtering out material they find objectionable within programs, such as objectionable language, violence, nudity, etc. *Id.* at 11447-48. These options can be tailored to the level of sensitivity of the user, allowing parents to customize to the specific type(s) of content they find objectionable – such as sexual terms, racial/hate slurs, offensive religious references, etc. – and they are reported to operate at an “accuracy level of only slightly less than 100 percent.” *Id.* at 11445, 11447.

¹⁶ *Id.* at 11440. The *CSVA Report* similarly reflects that “[s]atellite providers also offer parental control capabilities through their set-top boxes” that are asserted as being not only “more effective and user-friendly than the V-chip” but also a “key marketing and subscriber retention tool.” *Id.* at 11441. Further, MVPDs offer family-friendly tiers that allow subscribers to receive service designed to be appropriate for all ages. *See id.* at 11449. *Cf.* Comments of the National Cable & Telecommunications Association at 14 & n.52.

¹⁷ *CSVA Report*, 24 FCC Rcd. at 11430-31, 11440-41. The *CSVA Report* noted more than a dozen “independent providers that offer some form of rating, blocking, or filtering of content for television, as well as numerous providers of similar services for movies, video games, music and the Internet.” *Id.* at 11430-31. *See also id.* at 11435. It further reported that emerging third-party options assist in building libraries of media content that parents deem acceptable for their children, and that will allow “white listing” content selected by them as well, *id.* at 11440-41, which some parents use to affirmatively create sources of acceptable programs rather than using the V-chip or similar filters to block programs. *Id.* at 11444 (discussing TiVo KidZone).

The Commission additionally reported that there are a variety of other kinds of parental control tools available by which to monitor television use, including “after-market television time management tools that allow parents to restrict the time of day or aggregate number of hours children watch programming, as well as remote controls for children (*e.g.*, the Weemote),” that can be used with “devices such as VCRs, DVD players and VOD services.” *Id.* at 11449-50. The *CSVA Report* also cited blocking technologies “applicable to various distribution platforms, including DVD players, VCRs, and similar non-networked devices, such as digital audio players and portable media players,” *id.* at 11465-66, including one “unique DVD player that eliminates profanity, violence, and nudity from certain movies” and allows through a monthly membership application of the editing to new/future releases. *Id.* at 11466.

Industry groups also have established ratings systems such as the MPAA ratings for movies in theatrical release and on television, and in their DVD and online formats as well, V-chip ratings for programming on TV, parental advisory labels for prerecorded music, and ESRB ratings on video games. *See generally, e.g., id.* at 11418-19, 11424-25. The MPAA’s ratings apply to the films themselves and trailers and advertising for them, and its website allows parents to search for ratings, and content descriptions, for any movie rated since the system was established in 1968.¹⁸ Likewise, the MPAA, NAB and NCTA-devised TV Parental Guidelines rate television programs both on the basis of age and on the basis of content.¹⁹ Similarly, the

¹⁸ *See* www.tvguidelines.org. Though voluntary, by October 1, 1997, almost all broadcast and cable networks were utilizing the Parental Guidelines. In addition to the five universally recognized ratings – G, PG, PG-13, R, and NC-17 – the ratings regime includes more specific explanations of the potentially objectionable content in a movie.

¹⁹ *See* Joel Federman, *Rating Sex and Violence in the Media: Media Ratings and Proposals for Reform*, A Kaiser Family Foundation Report (November 2002), at 8. The ratings also appear in a range of PSAs industry groups have created to teach parents about methods for controlling programming that reaches their children. For example, the “Cable Puts You in Control” initiative, sponsored by NCTA, includes a \$250 million public service campaign, a website entitled

video game industry developed the ESRB as a voluntary self-regulating body tasked with rating video games from EC (Early Childhood) to AO (Adults Only), along with more than thirty different “content descriptors” to provide individualized information about each game. See www.esrb.org/ratings/ratings_guide.jsp.

The online industry also has provided an array of filtering and monitoring software to allow parents to customize the Internet content their children can access. In cataloging nearly fifty such products, the Progress and Freedom Foundation (“PFF”) observed that “[a]t a minimum, these software tools let parents block access to adult websites and typically let parents impose time management constraints on their children’s ... Internet usage.”²⁰ It added that, increasingly, “software packages also include far more robust monitoring tools that let parents see each website their children visit, view every e-mail or instant message that they send and receive, or even record every word that they type into their word processors.” *Parental Controls & Online Protection* at 120. Many ISPs, web browsers, and operating systems similarly contain their own parental controls. See *id.* at 134-131. See also *supra* at 7-12. Further, PSAs such as those described above are not limited to broadcast media – for example, Yahoo! “[d]onates millions of dollars worth of public service announcements on child safety issues through banner ads and sponsored links.” PointSmart Report, *infra* note 93, at 58.

The *NOI* seeks to evaluate the effectiveness of such parental controls, and these reply comments suggest criteria in Section VI below for performing this assessment. Briefly, the Commission should recognize that the multiplicity of tools and ratings systems is a significant

Control Your TV, and educational materials to teach parents how to block content they consider inappropriate for their children. See www.controlyourtv.org.

²⁰ Adam Thierer, *Parental Controls & Online Protection: A Survey of Tools and Methods*, PFF, *Special Report*, Ver. 4, (Summer 2009) at 120 (“*Parental Controls & Online Protection*”).

strength, not a drawback, because it allows particular tools to better meet the needs of individual households. A search for a common rating system would undermine this value. The *Inquiry* should acknowledge that success is to be measured by the ability of parental empowerment tools and strategies to meet individual needs, and not by a simple tally of how many parents avail themselves of a particular option.

A number of commenters, however, have concluded that voluntary measures as they currently exist are inadequate to serve the needs of parents. Common Sense Media suggests that “most parents do not understand what the different industry rating system codes mean” and that “[e]ncouraging industry rating systems to use a common code would help more parents understand the ratings, and would increase usage of the parent control tools that rely on those ratings.” Common Sense Media Comments at 2. At the same time, other commenters criticize the ratings regimes as *not complicated enough*.²¹ Parents Television Council finds inconsistency “in how different networks rated shows with similar content,” adding that “[i]n many instances the content rating did not accurately reflect the amount of adult-themed content within the show.” Parents Television Council Comments at 3.

These comments reflect common misconceptions about the nature of voluntary ratings and filtering systems. The fact that different tools provide different approaches to defining and filtering content, and provide solutions with varying levels of complexity, allows families to select the method that best meets their needs. Trying to find a one-size-fits all approach, or dictating additions to ratings systems, is not the answer, as the unfortunate experience with the

²¹ See So We Might See Coalition Comments at 4 (“We understand that DTV allows for updates to existing TV content ratings and the addition of new ratings. We are disappointed that to date this option has not been used by broadcasters ...”); Coalition for Independent Ratings Comments at 6 (“DTV has the functionality through RRT5 to expand and enhance the existing TV ratings but to date this has not been done.”).

V-chip attests.²² If people are unaware of the options available to them, the appropriate response is a public education campaign. Commenters who complain that ratings are not “accurate” can – and do – have their own ratings systems, a fact that simply underscores the inherently subjective nature of the exercise. We believe strongly that parents should be allowed to use the rating system that best reflects their individual values.

Other commenters criticize current voluntary approaches because they are just that – voluntary. *Morality in Media*, for example, states that “many parents cannot or will not use available technology,” and that “many parents are not part of the solution; *they are part of the problem.*” *Morality in Media, Inc. Comments* at 3, 5 (emphasis original). The U.S. Conference of Catholic Bishops proposes that people should be able to buy media products such as televisions and video games “with the parental controls already set.” U.S. Conference of Catholic Bishops *Comments* at 6. However, such recommendations confuse parental empowerment with regulation, and fundamentally alter the nature of the current *Inquiry*. Legal limitations on such regulatory approaches are discussed *infra* in Section VII.

2. Advertising and Self-Regulation

In addition to industry initiatives that enhance individual choice over programming, the advertising industry has adopted self-regulatory programs directed toward the needs of children. Advertisers have long understood that children are not miniature adults and that advertising material that may be appropriate for adults might be inappropriate or even deceptive for children. The Children’s Advertising Review Unit (“CARU”) specifically contains detailed provisions to

²² See Appendix A, *ANA/AAF/AAAA CSVA Reply*, at 6-10 (describing the history of V-chip ratings and the “inherent trade-off between complexity and convenience for both parental tools and ratings”). See also *id.* at 6 (“Proposals to reform the V-Chip rating system are reminiscent of Catch-22: Commenters argue that the V-chip is underutilized because parents fail to understand the rating system, and they propose ‘fixing’ the problem by making ratings far more complex.”).

take into consideration these special factors. The CARU Guidelines “take into account the special vulnerabilities of children [12 and under]” and restrict age-inappropriate advertising by requiring that ads “not portray or encourage behavior inappropriate for children (*e.g.*, violence or sexuality) or [] material that could unduly frighten or provoke anxiety.”²³ Similarly, MPAA film ratings apply to films themselves, trailers, and advertising. Its website allows parents to search for ratings and content descriptions for any movie rated since the system was established in 1968.²⁴

The CARU Guidelines also set “high standards ... to assure that advertising directed to children is not deceptive, unfair or inappropriate for its intended audience” and require that “only age appropriate videos, films and interactive software [can be] advertised to children.” As explained in more detail in the next section, this program has been expanded in conjunction with the Children’s Food and Beverage Advertising Initiative (“CFBAI”) to “shift[] the mix of ad[] messaging directed to children under 12 to encourage healthier dietary choices.”²⁵

These self-regulatory mechanisms work in combination with other industry codes that take into account the particular needs of children. This includes voluntary self-regulatory codes governing both advertising and marketing that the Distilled Spirits Council, Wine Institute, and Beer Institute have had in place for decades, the overriding principle of which has been and is to

²³ See www.caru.org/guidelines/guidelines.pdf at 3, 13. Further, the National Advertising Review Council (“NARC”), formed by the AAF, AAAA and ANA as a forum to review national ad claims, has two investigative branches in its National Advertising Division (“NAD”) and in CARU, as well as a National Advertising Review Board (“NARB”), a peer-group appeals body from which *ad hoc* panels form to adjudicate cases not resolved at the NAD/CARU level.

²⁴ These ratings not only inform parents about what media products they may find acceptable for their children, but also help ensure ads for them are age-appropriate. The FTC has found that the respective industries generally comply with these voluntary standards of ratings and labels. See www.ftc.gov/os/2009/12/P994511violententertainment.pdf.

direct beverage alcohol advertising to adults age 21 years and older in a responsible and appropriate manner. These codes apply to all print and electronic media (including the Internet and other online communications), and contain both content provisions and a placement standard that require alcohol be advertised and marketed only “in [media] where at least 70 percent of the audience is reasonably expected to be above the legal purchase age,” and “not ... in any manner directed or primarily appealing to persons below the legal purchase age.”²⁶

Purveyors of other products not intended for children have developed even more stringent guidelines. For example, concern over ads for erectile-dysfunction treatments led to adoption of industry guidelines to limit the exposure of children to such ads, such as those developed by the Pharmaceutical Research and Manufacturers of America (“PhRMA”) to provide that “advertisements containing content that may be inappropriate for children should be placed in programs or publications that are reasonably expected to draw an audience of approximately 90 percent adults (18 years or older).” See www.phrma.org/direct_to_consumer_advertising.

Notwithstanding these industry programs, a number of commenters argue that such measures do not go far enough, calling for the Commission to adopt new rules allowing ads to be rated and blocked. Thus, one commenter urges the Commission to promote tools giving parents

²⁵ See www.caru.org/guidelines/guidelines.pdf at 3, 13. See also www.bbb.org/us/about-children-food-beverage-advertising-initiative.

²⁶ *Code of Responsible Practices for Beverage Alcohol Advertising and Marketing*, http://www.discus.org/pdf/61332_DISCUS.pdf (governing placement and content of brand communications for producers and marketers of distilled spirits, malt beverages and wines); http://www.beerinstitute.org/BeerInstitute/files/ccLibraryFiles/Filename/000000000384/2006AD_CODE.pdf; <http://www.wineinstitute.org/initiatives/issuesandpolicy/adcode/details>. DISCUS’s *Code*, for example, has been in place over 75 years and provides for a Code Review Board that is charged with reviewing ad complaints, as well as an Outside Advisory Board that provides “pre-vetting” of ad copy, tie-breaking votes in the event there is not a majority decision of the Board on a complaint, and overall guidance about the *Code*’s revisions and review process. DISCUS issues semi-annual, public reports of complaint decisions as a means of making the review process more transparent and understandable to the public at large.

“the ability to block advertising that contains content they deem inappropriate.” So We Might See Coalition Comments at 5-6. Indeed, they encourage the Commission to do so “not only in broadcast television but on other media platforms as well.” Likewise, the Parents Television Council urges the Commission to correct “a severe oversight” by requiring ads “to carry a content rating in order to block offensive or age-inappropriate material.” PTC Comments at 9. *See also* CSM Comments at 3 (complaining that ads cannot be blocked unless they are rated).

However, as various signatories among the National Media and Advertisers have explained in related dockets, such a regulatory approach is unworkable and unwise. Requiring many thousands of advertisements to be rated because some may be offensive is a clear example of regulatory overkill, as very few ads give rise to controversy in this regard. *See* Appendix B, *ANA CSVA Comments*, at 6-11. Moreover, development of separate systems for rating commercials might enable viewers to more broadly block advertisements altogether while consuming the surrounding content, a possibility that would quickly diminish the value of – and thus price paid for – ad availabilities. This would choke off a vital revenue stream on which broadcast and cable programs (among others) depend. *Id.* Moreover, such proposals exceed the Commission’s statutory authority. *See* Appendix A, *ANA/AAF/AAA CSVA Reply*, at 12-19.

3. Promoting Children’s Health and Nutrition

Industry groups also have taken significant steps to promote health and nutrition through education, self-regulation, and the introduction of healthier products.

The Ad Council: As supporters of the Ad Council, many industry groups have contributed to the success of communications efforts combating obesity in America. The Ad Council has partnered with the Department of Health and Human Services (“DHHS”) since 2004 on obesity prevention public services ads. The “Small Steps” campaign launched in 2004 and expanded to target children the following year. www.adcouncil.org/default.aspx?id=45. Last Sep-

tember, DHHS and the Ad Council launched a new series of PSAs featuring characters from the film “Where the Wild Things Are” and have recently released a multimedia campaign to support the First Lady’s Let’s Move initiative featuring Warner Brothers’ Looney Tunes and Scholastic’s Maya & Miguel characters. *See* www.smallstep.gov/kids/html/watch_tv_ads_wtwta.html. Since the launch of the “Small Steps” campaign, there have been almost 12 million visits to the DHHS campaign’s website, www.smallstep.gov. According to tracking studies conducted by the Ad Council, the various campaigns are having a significant impact on attitudes and behaviors. *See* www.adcouncil.org/default.aspx?id=304. A 2007 survey “found that 52% of adult respondents reported being physically active 3-4 times per week for at least 30 minutes, compared to just 45% at that benchmark in 2003. The proportion of respondents who reported that they eat foods that are good for them ‘pretty much all the time’ increased significantly from 12% in 2003 to 22% in 2007.” *Id.* A significant number of the respondents reported that their eating habits and activity levels are much healthier. *See* www.adcouncil.org/default.aspx?id=304.

Media companies (broadcast, cable, online, print and outdoor) have donated almost half a billion dollars to this effort. The Ad Council’s childhood obesity prevention campaign has received more than \$179 million in donated media support, *see* www.adcouncil.org/newsDetail.aspx?id=312, and the adult obesity campaign has received more than \$318 million in donated media support. Millions of dollars of time and talent also have been donated by marketers and advertising agencies in the development and creation of the PSAs. More information is available at www.adcouncil.org.

In 2005, the Ad Council created and launched its Coalition for Healthy Children to harness the combined strengths of corporate marketers such as PepsiCo and McDonald’s, media companies such as Cartoon Network and Univision, non-profit groups such as the American Diabetes Association and YMCA, foundations such as the Robert Wood Johnson Foundation,

and government bodies. See <http://www.healthychildcoalition.org/>. The Coalition has crafted messages for adults and children based on five basic strategies – physical activity, food choices, food portions, balance between food and activity, and role modeling – that members have agreed to incorporate into their ads, packaging, websites and other consumer communications.

School Curriculum Changes: One of the most important new initiatives from food manufacturing companies is the creation of a pilot nutrition and physical education curriculum for ten elementary and middle schools in metropolitan Kansas City. This innovative venture was created by the Healthy Schools Partnership – a joint effort of the American Council for Fitness and Nutrition (“ACFN”) and the American Dietetic Association Foundation (“ADAF”). These groups asked the nationally recognized leader in training physical education teachers, PE4Life, to build a new methodology to teach physical education and nutrition in the schools. The program’s unique feature is bringing registered dietitians alongside physical education teachers to emphasize the concept of energy balance. See www.acfn.org/healthy-schools-partnership.

In the fall of 2008, ADAF worked with the Dr. Robert C. and Veronica Atkins Center for Weight and Health at the University of California at Berkeley to study the effectiveness of the program. They found students in the program had a significantly higher understanding of the importance of eating fruits and vegetables and were actually eating more fruits and vegetables at school. PE4Life has also found that the program had increased academic achievement and decreased disciplinary problems in the schools. See www.acfn.org/healthy-schools-partnership/accomplishments-results. As a result of this success, the food manufacturing companies that launched this program have recently committed 20 million additional dollars to expand the pilot curriculum to schools in four states. See www.healthyweightcommit.org/news/HWC-help-achieve-energy-balance. Government policy should be aimed at promoting and expanding successful programs like these.

Self-regulation: In addition, commenters here participate in important self-regulatory initiatives regarding children’s media, such as those addressed in the *Notice*. For example, signatories among the National Media and Advertisers participated on the Task Force on Media and Childhood Obesity, the mission of which was to promote healthy dietary choices and lifestyles for children through advertising by its members. *See NOI* ¶ 39. *See also* www.fcc.gov/obesity.

At the same time, the marketing community has completed a comprehensive review of the CARU guidelines. That effort, led by Jodie Bernstein, former Director of the FTC’s Bureau of Consumer Protection, updated the guides and addressed concerns about ads in new media and interactive games. *See* www.caru.org/guidelines/guidelines.pdf. CARU continues to review ads for a broad range of products, including food and beverage ads, to make sure they comply with the guidelines. *See, e.g.,* www.caru.org/news/index.aspx. As part of the review of the CARU guidelines, industry groups, food marketers and the Council of Better Business Bureaus (“CBBB”) launched the Children’s Food and Beverage Advertising Initiative (“CFBAI”) in November 2006. The goal of the CFBAI is to change the mix of food and beverage products marketed to children to encourage healthier diet choices and healthy lifestyles. The 16 companies that currently are participating in the Initiative carry out more than two-thirds of all food, beverage and restaurant TV advertising directed to children under age 12. *See* www.bbb.org/us/children-food-beverage-advertising-initiative.

Through commitments of the CFBAI participants, the landscape of children’s advertising is significantly different than several years ago. A far larger amount of child-directed advertising than before is for “better for you” products, and many of those products or meals include fruit and vegetables, whole grains and low-fat dairy. CFBAI participants use science-based nutrition standards to govern what appears in their child-directed advertising. Companies continue to

reformulate and add products that meet nutrition standards. And four participants do not engage in child-directed advertising for their food and beverage products. See www.bbb.org/us/storage/0/Shared%20Documents/Aug_Product_List_final1%5B1%5D.pdf. In addition, these self-regulatory efforts are dynamic and continue to evolve. See, e.g., Comments of the Council of Better Business Bureau, through its Children’s Food and Beverage Advertising Initiative (“BBB/CFBAI Comments”), at 4 n.5 & 15-16 (acknowledging that “our work is not done” and reporting enhancements to CFBAI “Core Principles” announced in December 2009 to make them more comprehensive, as well as plans to continue to strengthen them, including a Nutrition Science Review and incorporating reports by bodies such as IOM). More information about the CFBAI is available at www.bbb.org/us/children-food-beverage-advertising-initiative.

Product Changes: Finally, food and restaurant companies have responded through product reformulations and new menu options. A range of new, healthier products have been introduced and restaurants have reduced portion sizes and developed healthier menu options.²⁷ Parents have more choices in restaurants and supermarkets than ever before, including the opportunity to purchase foods that are healthier for their kids.²⁸

Some commenters criticize these industry efforts to support health and nutrition. The Rudd Center, for example, argues that “[v]irtually no research has demonstrated that” media

²⁷ See prepared Remarks of Elaine D. Kolish, *Is Food Marketing to Children Getting Any Healthier?*, Dec. 14, 2009, at 2 (“Dozens and dozens of products have been reformulated, at considerable cost, to meet company pledges and new products or meal combinations that meet the companies’ standards have been introduced” in response to CFBAI guidelines).

²⁸ See Remarks of Elaine D. Kolish, *supra* note 27, at 2 (“Dozens and dozens of products have been reformulated”). See also, e.g., BBB/CFBAI Comments at 14 (highlighting changes in cereal, soups and canned pastas, and fast food restaurant categories); www.citizen-times.com/article/20100323/LIVING/303230005/1004/ADVERTISING; <http://online.wsj.com/article/SB125176231048474323.html>; www.nytimes.com/2009/06/16/health/16well.html.

literacy and education “reduce the risks associated with food marketing exposure.” Of course, commenters who work in the field disagree. *See, e.g.,* Center for Media Literacy Comments at ii. Criticism also targets industry efforts to make food marketed to children healthier, arguing that “companies have chosen to primarily reformulate existing products to somewhat improve the nutrition quality of [] nutrient-poor foods traditionally marketed to children.” Rudd Center Comments at 3. But it is unrealistic to expect – either by voluntary pledge or administrative fiat – that food companies all will become green grocers. Food companies should be applauded for their efforts to make the foods kids *want* healthier, not demonized for them.

Other comments criticize self-regulatory regimes as insufficiently effective, with one arguing that “only incremental progress has been made in changing what foods are marketed to children.” Food Marketing to Children Workgroup Comments at 7. But “incremental progress” is in the eye of the beholder. The Workgroup concedes that “participating food and beverage companies are highly compliant in meeting their individual pledges” regarding marketing to children. *Id.* And some would consider more than incremental the Workgroup’s finding of a 10 percent drop in “advertisements for high-calorie and low-nutrient foods” and a 65 percent drop in “[t]he number of ad[s] for foods that exceeded two or more limits for problem nutrients” in the four brief years after CFBAI was implemented. *Id.* at 8-9. Regulation is highly unlikely to increase the rate of progress. *See* Common Sense Media Comments at 4 (noting that industry efforts generally are more nimble than regulation).

B. Direct Regulation of Unlawful Activities

Although the *Notice* necessarily focuses on media policy, the Commission should not lose sight of the fact that direct measures addressing unlawful activities are far more effective than are attempts to control messages about disfavored activities. Indeed, such direct action is constitutionally preferred, as the fact that regulating conduct generally can “advance the Govern-

ment's asserted interest in a manner less intrusive to [] First Amendment rights, indicates that [a speech regulation] is more extensive than necessary." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995). This applies with particular force with regard to the acquisition or consumption of products and services that are illegal for children.

Such limits on alcohol, tobacco, and gambling establishments, to name a few, exist in virtually all states and/or are reinforced at the federal level.²⁹ For example, all 50 states ban tobacco sales to minors, and the restrictions are backed by federal law. Such direct measures restricting conduct play a vital role in helping reduce smoking, as shown by one of the keystones to enforcement, the "Synar Amendment."³⁰ The *2008 Synar Report* calls enforcement of such laws "extremely effective in reducing and preventing ... sales to minors."³¹ Similarly, all states adopted a minimum drinking age after Prohibition (typically tied to the age of majority), and since adoption of the National Minimum Drinking Age Act, which required states to raise their

²⁹ See, e.g., 23 U.S.C. § 158 (requiring that States prohibit those under 21 from purchasing or publicly possessing alcoholic beverages as a condition of receiving federal highway funds); American Lung Association, *State Legislated Actions on Tobacco Issues (SLATI) Overview*, <http://slati.lungusa.org/StateLegislateAction.asp> (noting that "[a]ll 50 states and [D.C.] prohibit the sale of tobacco products to minors"); Federal Trade Commission, *FTC Warns Consumers About Online Gambling and Children*, www.ftc.gov/opa/2002/06/onlinegambling.shtm (noting that "[e]very state prohibits gambling by minors").

³⁰ The Synar Amendment (§ 1926) in the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321 (1992), reinforces limits on youth access to tobacco by requiring states to enact and enforce laws prohibiting sales and distribution to minors, and to conduct annual, random, unannounced inspections of retail outlets and report findings to DHHS, or face losing up to 40 percent of federal Substance Abuse Prevention and Treatment Block Grant funding. *FFY 2008 Annual Synar Reports*, Substance Abuse and Mental Health Services Administration ("SAMHSA") at 3 (*available at* <http://prevention.samhsa.gov/tobacco/synarreportfy2008.pdf>) ("*2008 Synar Report*").

³¹ *Id.* at 2. Under Synar, the national weighted average retailer violation rate dropped by 75 percent, from 40.1 percent in 1997 to 9.9 percent in 2008, and was accompanied by a nearly 50 percent reduction in youth tobacco use. SAMHSA Center for Substance Abuse Prevention, Tobacco/Synar, at 3 (*available at* <http://prevention.samhsa.gov/tobacco/fctsheets.aspx>).

ages for purchase and public possession of alcohol or lose ten percent of federal highway funds, 23 U.S.C. § 158, purchasers/consumers of alcohol must be 21 nationwide.³²

Moreover, it has been shown that their enforcement can be highly effective in curtailing undesirable youth conduct. For example, DOJ's Office of Juvenile Justice and Delinquency Prevention has found that "[v]igorous use of compliance checks" has "been repeatedly demonstrated to reduce sales of alcohol to minors" and that "zero-tolerance" laws for drivers younger than 21, now in place in every state, "can be very effective, especially if they are well publicized and enforced."³³ However, as the UK study on the impact of commercialism found, such direct measures may be neglected where government attention is refocused on symbolic issues, such as media influences. *See* IMPACT OF THE COMMERCIAL WORLD at 104-105.

II. THE COMMISSION SHOULD EVALUATE CHILDREN'S ISSUES IN CONTEXT WITH OVERALL MEDIA POLICY

A. Media Policy Must Focus on the Needs of All Americans

The National Media and Advertisers agree that children's needs are an important policy goal, but submit that it is equally important that children's issues not dictate overall media policy. The *NOI* expresses concern over "children's exposure to media content that may be inappropriate, such as offensive language, obscenity, indecency, profanity, or other content that is unsuitable for minors, as well as concern about exposure to content that could influence children to engage in behaviors that pose risks." *NOI* ¶ 30. At the same time, census data reveals that

³² *See, e.g.,* www.nhtsa.dot.gov/people/injury/research/FewerYoungDrivers/appendix.htm; www.nhtsa.dot.gov/people/injury/research/FewerYoungDrivers/iv_what_caused.htm#a.%20minimum.

³³ *See* Pacific Institute of Research and Evaluation, *Strategies to Reduce Underage Alcohol Use: Typology and Brief Overview*, www.udetc.org/documents/strategies.pdf, at 25-29.

nearly two-thirds of households in the United States do not include minors, and the percentage with children has been declining steadily since 1960.³⁴

Where potential policy choices may affect the availability of media to the majority of U.S. households without children, the Commission should not lose sight of the Communications Act's overriding mandate to make available, "so far as possible, to all the people of the United States ... Nationwide ... radio communication service." 47 U.S.C. § 151. U.S. media policy must address a host of issues arising from the proliferation of new media forms. Accordingly, the Commission recently launched another broad inquiry on the future of media to "assess whether all Americans have access to vibrant, diverse sources of news and information that will enable them to enrich their lives, their communities and our democracy."³⁵ The inquiry took particular note of "chilling" business conditions arising from the changing media landscape, as well as the "layoffs of thousands of journalists," and suggested that these trends "could have dire consequences for our democracy and the health of communities, hindering citizens' ability to hold their leaders and institutions accountable." *Id.* at 384-85. A section of the *Future of Media Inquiry* is devoted to assessing business models and financial trends in the new media environment, and asks how trends in advertising affect the viability of different business models. *Id.* at 388. It also asks about trends for advertising among new media, including online and mobile platforms. *Id.* at 391.

³⁴ U.S. Census Bureau, *Profiles of General Demographic Characteristics, 2000 Census of Population and Housing* (May 2001) (only 36.0 percent of U.S. households have children under age 18). See also *Playboy Entm't Group, Inc. v. United States*, 30 F. Supp.2d 702, 723 (D. Del. 1998) ("two-thirds of all households in the [U.S.] have no children"), *aff'd*, *Playboy Entm't Group*, 529 U.S. 803 (2000); Adam Thierer, *Who Needs Parental Controls? Assessing the Relevant Market for Parental Control Technology* (Feb. 2009) at 4 (between 1960 and 2007, the number of U.S. households with children under 18 declined from 48.7 percent to 31.7 percent).

³⁵ See *FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age*, 25 FCC Rcd. 384 (2010) ("*Future of Media Inquiry*").

The *Future of Media Inquiry* acknowledges a number of ongoing FCC proceedings – including this one – and it states that its analysis “will draw heavily from those efforts.” *Id.* at 386. *See also id.* at 9-10 (listing eight rulemakings and inquiries “of possible relevance to this study”). But this should work both ways. Commission findings about the health of various media, including assessment of the viability of business models and need for advertiser support, should also be an important consideration in its evaluation of children’s media policies as well.

In this regard, the FCC has long recognized the public interest inherent in maintaining a healthy economic environment for media. The Communications Act charges the FCC not only with maintaining over-the-air broadcasting service for all citizens, 47 U.S.C. § 151, but it also is “the policy of the United States to encourage the provision of new technologies and services to the public.”³⁶ These twin statutory goals – making broadcast content widely available to consumers and encouraging new technology – require a regulatory environment that accommodates both subscription and advertiser-supported media. Historically, most U.S. mass media was financed by the sale of advertising time.³⁷ Because of this, the Commission has acknowledged repeatedly that ad support is essential for preservation of a healthy system of media broadcast to widely dispersed audiences across the nation. *See id.* As the Commission noted more than 60 years ago as to over-the-air broadcasting, “[a]dvertising represents the only source of revenue for most American [] stations and therefore is an indispensable part of our system of broadcasting.”

Public Service Responsibility of Broadcast Licensees at 208-09. It found that:

³⁶ *Id.* § 157(a). These objectives appear in the Telecommunications Act of 1996’s preamble, which describes the Act’s purpose as “promot[ing] competition and reduc[ing] regulation ... to secure lower prices and higher quality services for ... and encourage [] rapid deployment of new [] technologies.” Pub. L. No. 104-104, Preamble, 110 Stat. 56 (1996).

³⁷ Jonathan Levy, Marcelino Ford-Livene & Anne Levine, *Broadcast Television: Survivor in a Sea of Competition*, OPP Working Paper No. 37 at 7 (Sept. 2002); *Revision of Programming & Commercialization Policies*, 98 FCC.2d 1076 ¶ 66 (1984).

The problem of program service is intimately related to economic factors. A prosperous broadcasting industry is obviously in a position to render a better program service to the public than an industry which must pinch and scrape to make ends meet. Since the revenues of American broadcasting come primarily from advertisers, the terms and conditions of program service must not be such as to block the flow of advertising revenues into broadcasting.³⁸

The Commission likewise has recognized the importance of ad revenues to cable networks.³⁹ In the early 1980s, broadcast channels enjoyed a 90 percent share of the TV audience; since then, cable channels have “slowly and steadily expanded their share of the audience, to more than 55 percent.”⁴⁰ Ad-supported cable represents most of cable’s share, with about 48

³⁸ *Public Service Responsibility of Broadcast Licensees* at 224. An FCC Office of Plans and Policy Working Paper made a similar point. See Florence Setzer and Jonathan Levy, *Broadcast Television in a Multichannel Marketplace*, OPP Working Paper No. 26, 6 FCC Rcd. 3996, 4069 (1991) (“Sale of advertising time and payments from advertiser-supported networks comprise, for practical purposes, the sole sources of revenue for broadcast stations. Consequently the state of the overall advertising market, and competition from other advertising media, crucially affect the health of broadcast television.”).

³⁹ *Thirteenth Annual Report*, 24 FCC Rcd. at 594 (nonbroadcast programming experienced 11.4 percent increase in ad revenue in 2005). See also, e.g., OPP Working Paper No. 37 at 23 (“cable is likely to make further inroads into [] broadcast advertising share”).

⁴⁰ Brian Stelter, *Cable Networks Trying to Build on Their Gains in Ratings*, N.Y. TIMES, May 26, 2008, at C5. In the 1984-85 season, broadcast networks had an 86.7 percent share, down to 67.4 percent by the 1989-90 season. George Winslow, *No Slacking for Cable*, MULTICHANNEL NEWS, May 19, 2008, at 53. By the 1999-2000 season, broadcast’s share was down to 53.4 percent, and cable had increased its share to 46.6 percent. *Id.* Advertiser-supported basic cable networks garnered a larger audience share over the broadcast networks for the first time in 2002 – 48 percent of prime time compared to 45 percent. Allison Romano, *Cable’s Big Piece of the Pie*, BROAD. & CABLE, Dec. 30, 2002 (citing Nielsen Media Research).

Annual FCC video competition reports have tracked this phenomenon. In the first such report, issued in 1995, the four broadcast networks (ABC, CBS, NBC and Fox) had 72 percent of the prime time audience during the 1993-94 season, *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd. 7442 (1994), but their audience shares have continued to fall since that time, while “nonbroadcast channels’ collective audience share continues to grow.” *Thirteenth Annual Report*, 24 FCC Rcd. at 593. By the FCC’s *Thirteenth Annual Report*, all broadcast stations had a combined prime time audience share of just 45 percent (2005-06 season). *Id.*

percent of the audience.⁴¹ The importance of advertising to media growth is not limited to cable or over-the-air broadcasting. Nearly two decades ago, OPP Working Paper No. 26 explained that “[a]llowing networks ... to apply their expertise in acquiring and distributing [content] in ways they find advantageous, both within broadcasting *and in other media*, will improve [their] ability to provide service the public values,” such that “rules that restrict ... networks’ ability to deliver service should be reconsidered.” 6 FCC Rcd. at 4102-03 (emphasis added). While these observations were made in the context of the mass media that prevailed at the time – over-the-air broadcasting and cable television – it is no less true of the other platforms that have evolved since then. The Commission has recognized in proceeding after proceeding the importance of these economic considerations as a fundamental component of the public interest.⁴²

The Commission also should be aware of the role of advertising in supporting nationwide broadband adoption. Internet service providers made clear in the Commission’s broadband proceedings that advertising is essential to their efforts to provide affordable, nationwide broadband access.⁴³ Advertising is critical to the success of broadband because “the amazing array of” ad-

⁴¹ Stelter, *supra* note 40, at C5 (by April 2008, ad-supported cable channels averaged a 48 percent share of the total television audience). *See also* James Hibberd, *DVRs Blamed for Ratings Slump, Nielsen Says Number of Viewers Unchanged*, ELEC. MEDIA, June 11, 2007, at 3 (citing “erosion in viewership for broadcast prime time and pay cable,” including that “[b]roadcast prime is down 3 percent ... and pay cable is down a steep 12 percent” while “[a]d-supported cable is up 3 percent,” which “suggest[s] ... viewers migrating to basic cable”).

⁴² *See, e.g., 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 23 FCC Rcd. 2010 (2008) (relaxing cross-ownership rules given adverse financial conditions at newspapers). *Cf. Application for Consent to the Transfer of Control of Licenses of XM Satellite Radio Holdings*, 23 FCC Rcd. 12348, 12365 (2008) (in public interest analyses, the FCC may “consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry”).

⁴³ *See, e.g., Charter Communications Comments*, GN Docket Nos. 09-47, 09-51 and 09-137, Jan. 22, 2010, at 2 (“One means of promoting the affordability of broadband services is to foster

supported content “available on the Internet has convinced more and more Americans to go online using a broadband connection every year.”⁴⁴ Indeed, Internet advertising is a \$24 billion industry, allowing everything from email to news to job sites to be provided free of cost to consumers.⁴⁵ As the Commission recently recognized, “monetization” of online information – *i.e.*, using it, among other things, to refine ad strategies – has been “a major driver of innovation for the Internet [and] benefited consumers,” including by spurring “phenomenal growth” of online content. *Connecting America: The National Broadband Plan*, FCC, Mar. 16, 2010 at 52 (“*National Broadband Plan*”). *See also id.* at 53 (“Whole new categories of Internet applications and services, including search, social networks, blogs and user-generated content sites, have emerged and ... operate in part because of the potential value of targeted online advertising.”).

In addition to examining such economic considerations, the *Future of Media Inquiry* highlighted the need to consider constitutional values underlying media policy, noting that “[a]ny time the government reviews the structure of the news media, it must do so with great sensitivity to the paramount need to protect free speech and an independent press.” *Id.* at 2. Adopting the Hippocratic Oath of physicians as its watchword, the Commission stressed, “First, do no harm.” *Id.* This cautionary principle applies equally to the instant proceeding.

an environment in which service providers have flexibility to seek more revenue from sources other than subscribers, such as advertisers.”).

⁴⁴ U.S. Chamber of Commerce Comments, GN Docket Nos. 09-47, 09-51, and 09-137, Jan. 22, 2010, at 2 (citing Senate testimony of Verizon Communications, Inc. Executive Vice President Thomas J. Tauke).

⁴⁵ *Id.* (citing Thomas M. Leonard and Paul H. Rubin, *In Defense of Data Information and the Costs of Privacy*, Technology Policy Institute, May 2009, available at: <http://www.techpolicyinstitute.org/files/in%20defense%20of%20data.pdf>).

B. Children’s Issues Should Not Override Other Policy Objectives

A significant tension must be dispelled if media policy is to balance the imperative need to ensure service to all Americans while also addressing the children’s issues identified in the *NOI*. The Commission’s goal to limit “children’s exposure to media content that may be inappropriate,” *NOI* ¶ 30, appears to rest on the assumption that a broad range of commercial speech is *per se* inappropriate or harmful. *Id.* ¶ 34 (“Exposure to excessive and exploitive advertisements is a significant risk children face from electronic media.”). Of course, framed in this way, the question as presented is quite loaded, since no one seeks to defend “excessive” or “exploitive” advertising. The problem with the *Notice*, and with a number of comments submitted thus far in response, is the apparent assumption that virtually any advertisement or promotion that children may see is inherently “excessive” and “exploitive.”⁴⁶

Not only does this seem to lack perspective, it appears to disregard the Commission’s past understanding that “the need to protect children” should not be permitted to “freeze present standards and ... discourage creative developments” in media. *Complaint of The Polite Society, Inc. Against Station WLS-TV, Chicago, IL*, 55 FCC.2d 810 ¶ 9 (1975). Recognizing such policy tensions, the Commission rejected a proposal that would have permitted parents to block advertisements automatically in children’s programming – something like an “Ad-chip” – because “ignor[ing] the fundamentally commercial nature of the commercial broadcasting system is done at great risk.”⁴⁷ More recently, the UK government’s comprehensive study of the impact of the commercial world on children found that “[t]he commercial world provides, and has always

⁴⁶ See, e.g., Rudd Center Comments at 4; Children’s Media Policy Coalition Comments at 2; Food Marketing Workgroup Comments at 14-15.

⁴⁷ *Petition for Rulemaking Pertaining to a Children’s Advertising Detector Signal*, 100 FCC.2d 163 ¶ 9 (1985). See also *Children’s Television Programming and Advertising Practices*, 96 FCC.2d 634, 654 n.9 (1984).

provided, most of the media that children use; and without advertising or subscription revenue, these media *would not exist*.” IMPACT OF THE COMMERCIAL WORLD at 76 (emphasis added).

The risk is increased significantly to the extent the Commission considers expanding the media that would be covered by advertising restrictions or by altering the definition of programming deemed to be “directed to children.” The *Notice* hints at regulation of material “aired during children’s television programming or during *general audience programming* that may be viewed by children, such as sports,” *NOI* ¶ 40 (emphases added), and also asks whether it is “feasible to block advertisements that may be inappropriate for children on various media platforms.” *Id.* The *Notice* cites the Children’s Television Act, 47 U.S.C. §§ 303a-303b (“CTA”), as “an example of governmental action to ensure that one type of medium – television – limits the amount of advertising viewed by children.” *NOI* ¶ 37. But the example of the CTA does not suggest that the concept of children’s programming should be expanded.

The Commission has defined “children’s programming” as that which is “originally produced and broadcast primarily for an audience of children 12 years old and younger.” 47 C.F.R. §§ 73.670 note 2, 76.225, note 2. The CTA thus governs programs *specifically* and *primarily* aimed at the special needs of children, not simply general interest programming that children (among others) may choose to watch. Just as the Commission historically has defined children’s programming as that “designed for children twelve years old and under,” *see, e.g., Petition of Action for Children’s Television*, 53 FCC 2d 161, 162 (1975), it likewise has been clear that the definition does not “include programs originally produced and broadcast for an adult audience which may subsequently be broadcast during hours when children constitute a sizeable portion of the viewing audience.” *Id.* at 162.

With respect to the *Notice*’s inquiry regarding “general audience programming,” the Commission previously rejected precisely that expansion of what constitutes “children’s

programming.” In *Petition of Action for Children’s Television*, 63 FCC 2d 26 (1977), the Commission declined to effectuate proposals that called for defining “children’s programming” as including “the 35 national television programs most watched by children under 12 years of age,” and similar audience-based measures. *Id.* at 27-28. In doing so, it noted that “a thorough review of the various definitional proposals” regarding children’s programming “persuaded us that the only sensible and meaningful definition [is] one based on the audience for which the program was intended.” *Id.* at 28. It reasoned that a definition based on eventual audience would unreasonably require broadcasters “to determine, prior to broadcast, whether a particular program” would have enough children in the audience to qualify as children’s programming. *Id.* at 29. Almost fifteen years later, the Commission added that an approach excluding “programs originally produced for a general audience that might nevertheless be significantly viewed by children” was “well established, thereby providing certainty, and is consistent with legislative intent, industry practice, and the statutory purpose of protecting children.” *Policies and Rules Concerning Children’s Television Programming*, 6 FCC Rcd. 2111, 2112 (1991) (footnotes omitted). All of these observations remain true today.

Additionally, any effort to regulate content characterized as “directed toward” children simply because it “*may be viewed*” by them would inappropriately treat advertising in general audience programming like broadcast indecency – programming that can be regulated when there is a reasonable likelihood that children might be in the audience.⁴⁸ As we discuss below

⁴⁸ See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). Comments filed in the CSVA proceeding illustrate the serious policy deficiencies of such an approach. See Appendix B, *ANA CSVA Comments*, at 6-8. Ad-rating and -blocking regimes are unnecessary given voluntary industry efforts to ensure ads are appropriate for their audience, and they threaten to undermine commercial support for over-the-air broadcasting and other ad-supported media by allowing ads to be blocked while passing through the programming in which it appears. *Id.* at 8-11. Moreover, reviewing and rating “several hundred thousand new and newly revised TV commercials” each year would be virtually impossible. Appendix B, *ANA/AAF/AAAA CSVA Reply*, at 10; *CSVA*

in more detail, there is no legal support for doing so even if the inquiry is limited to over-the-air broadcasting, let alone other media for which indecency regulations have always been rejected. But from a more general policy perspective, expanding the regulable category of programming or advertising “directed to children” to include general audience programs necessarily would limit programming that is available to adults. This provides a stark example of the tension created if children’s issues begin to dominate the Commission’s approach to media policy in general, and it contravenes the basic principle that the government cannot “reduc[e] the adult population to only what is fit for children.”⁴⁹

The same concern applies to proposals that the FCC should extend special protections in the food advertising area to those under age seventeen.⁵⁰ Expanding the age range of “children” that would need protection from advertising messages would inappropriately infantilize older teenagers and would have radical implications for media policy. In the increasingly complex and expanding media universe in which we all live, the ability to partition advertising into age-restricted ghettos simply is not possible, and any attempt to do so would have significant ramifications for the audience at large. Furthermore, it takes an analytical contortionist to accept the view that teenagers are incapable of handling various types of food advertising but are ready to take on other major complex societal responsibilities. Seventeen-year-olds generally are allowed to drive by themselves and stand at the threshold of being allowed to vote, to marry and

Report, 24 FCC Rcd. 11428. And even if there were statutory authority for such a scheme – and there is not – it would raise serious constitutional concerns both as to broadcast and other platforms where FCC authority is far more circumscribed. Appendix B, *ANA/AAF/AAAA CSVA Reply*, at 12-19.

⁴⁹ See, e.g., *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 759 (1996) (quoting *Sable Comm’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989), quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983), quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)) (internal quotes and editing omitted).

to enter the military. There is no justification for the government to treat a 17-year-old as being the same as a 7-year-old with regard to advertising or for exposure to any other media content. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 878 (1997) (“the strength of the Government’s interest in protecting minors is not equally strong” for a 17-year-old as for younger persons).

The UK government’s interdisciplinary study of children in the commercial world found that “[c]hildren are neither the helpless victims imagined by some campaigners nor the autonomous ‘media savvy’ consumers celebrated by some.” Rather, their engagement with the commercial world is part of their everyday social experience, and it is very much mediated by other social relationships with family and friends.” *IMPACT OF THE COMMERCIAL WORLD* at 64. The study found that “children learn to distinguish between television advertisements and programmes at a fairly early age (around three or four),” *id.* at 85, and that young people reported that “they did not take advertisements and marketing messages at face value, and would want to discuss with their family and friends before acting on the information provided.” *Id.* at 39. This occurs through what the study called “consumer socialization,” which is “the processes by which young people acquire skills, knowledge, and attitudes relevant to their functioning as consumers in the marketplace.” *Id.* at 67. It found the most important phase of this development is between the ages of seven and eleven years. *Id.*

Accordingly, it would be misguided to attempt to screen children from advertising until they reach the age of eighteen. Not only is “protection from” commercial messages through the teen years unwarranted based on social science research, any attempt to hermetically seal children in advertising-free cocoons until the age of majority would handicap their ability to cope with the world they will face as adults. The UK study found that through exposure to media,

⁵⁰ *See* Food Marketing Workgroup Comments at 14. *Cf. NOI ¶¶* 11-13.

along with family and friends, children “gradually develop a range of skills and knowledge to deal with the commercial world, that helps prepare them for their role as adult consumers.” *Id.* at 70. The Commission previously has stressed the importance of understanding that “children will grow into adults capable of fully participating in [] deliberative” thought. *Policies And Rules Concerning Children’s Television Programming*, 11 FCC Rcd. 10660, 10731 (1996). However, as Judge Richard Posner warned, “[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.” *American Amusement Machine Association v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001). As set forth more fully below, it makes far more sense to focus on media literacy and education than it does to skew media policy toward regulation.

III. THE *NOI* SIGNALS A FUNDAMENTAL SHIFT IN THE FCC’S APPROACH TO REGULATION

The *Notice* suggests the FCC may be changing its perspective significantly as to when government intervention is appropriate or necessary to regulate media content. Existing regulations are predicated on a perceived need to address problems of scarcity, most notably spectrum scarcity, but also a scarcity of certain types of programs or a lack of tools for parents to control the content to which children are exposed. The present *NOI*, conversely, expresses concern about the “problem” of abundance – a multitude of content options, of platforms on which to receive them, and of means to exercise dominion over what media enters the home. If the age of media scarcity is over, as the Commission itself has found, it should at least recognize that existing justifications for regulation have been undermined. If the FCC wishes to perpetuate old rules or make new ones based on the idea of abundance, it will need to articulate that new theory and acknowledge that it is the exact opposite of the FCC’s historic rationale for regulation.

A. Existing Media Regulations Rest on the Concept of Scarcity

The CTA reflected Congress' belief that there was too little educational programming. In enacting the law, Congress said that the “objective of this legislation is to increase the amount of educational and informational [] television available to children.”⁵¹ The ability of Congress and the FCC to craft regulations in this area in turn was based on spectrum scarcity, as that concept was understood when broadcasting was the only electronic mass medium.⁵² Similarly, regulation of “negative” speech – *i.e.*, indecency or other types of content the Commission considers inappropriate for children – is predicated on a different kind of scarcity – a lack of parental empowerment options. The Commission historically sought to justify regulation to discourage certain types of content on the premises that the broadcast medium has a “uniquely pervasive presence” and is “uniquely accessible to children.”⁵³ Such content regulations presume that “parents lack the *ability*, not the will, to monitor what [] children see.”⁵⁴

⁵¹ *Children's Television Programming*, 11 FCC Rcd. at 10671 (quoting S. Rep. No. 227, 101st Cong., 1st Sess. 1 (1989)). *See also* Statement of Julius Genachowski, Chairman, FCC, Before the United States Senate Committee on Commerce, Science and Transportation Hearing on “Rethinking the Children's Television Act For A Digital Media Age,” 2009 WL 2194549, July 22, 2009 (“*Chairman's Rethinking the CTA Testimony*”); John Eggerton, *Genachowski Speaks of Dangers Posed By Youths' Increased Screen Time*, [www.broadcastingcable.com/article/445024-Genachowski Speaks of Dangers Posed By Youths Increased Screen Time.php?nid=2228&source=link&rid=6416594](http://www.broadcastingcable.com/article/445024-Genachowski_Speaks_of_Dangers_Posed_By_Youths_Increased_Screen_Time.php?nid=2228&source=link&rid=6416594).

⁵² H.R. Rep. No. 101-437, at 8, *reprinted in* 1990 U.S.C.C.A.N. 1605, 1612-13 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388-89 (1969); *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981)). *See also Children's Television Programming*, 11 FCC Rcd. at 10729.

⁵³ *Pacifica*, 438 U.S. at 750. *See also FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1806 (2009). *Pacifica* did not rely on “spectrum scarcity,” and the Commission has confirmed that “it is the physical attributes of the broadcast medium, not any purported diminished First Amendment rights ... based on spectrum scarcity or licensing, that justify [regulating] indecent material.” *Pacifica Radio*, 2 FCC Rcd. 2698, 2699 (1987).

⁵⁴ *Ashcroft v. ACLU*, 542 U.S. 656, 669 (2004) (emphasis added). *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 n.12 (D.C. Cir. 1988) (“Broadcasting is a unique medium [because] it is not possible simply to segregate material inappropriate for children, as one may do, *e.g.*, in an adults-only section of a bookstore.”).

B. The Commission Should Rethink its Regulatory Approaches in Response to Abundance

The present *Notice* and *CSVA Report* on which it builds make clear the Commission must realign its regulatory focus. In comparison to the times of *Pacifica* and *Red Lion*, when broadcasting was the sole major electronic mass medium, there are now a multiplicity of electronic media platforms and parental control technologies and strategies. The Commission has thoroughly documented that we have entered an age of media abundance.

1. The Technological Assumptions Underlying Prior Regulations Are No Longer Valid

Today, almost ninety percent of television households subscribe to a multichannel programming service, such as a cable, satellite, or telco-provided service. *Thirteenth Annual Report*, 24 FCC Rcd. at 546. These services bring hundreds upon hundreds of channels of video programming into the home alongside traditional broadcast channels. *Id.* The *NOI* notes that the Commission thoroughly documented these and other transformative changes in its *CSVA Report* to Congress last year. *See generally CSVA Report*. It found that “[t]he number of suppliers of online video and audio is almost limitless.” 24 FCC Rcd. at 11468. Internet-based video continues to increase significantly each year as the overall number of homes having access to the Internet continues to grow, with nearly 70 percent of U.S. households subscribing to Internet service. *Thirteenth Annual Report*, 24 FCC Rcd. at 549-50. Approximately 60 percent of Internet users view and/or download videos online, with major Internet portals increasingly licensing both pre-existing and original content from traditional video providers.

Meanwhile, traditional video providers, including broadcast networks, continue to experiment with alternative programming on alternate, out-of-the-home platforms. *Id.* at 613-20. The Commission reported that “77 percent of teens in the U.S. have their own mobile phone[s]” which they increasingly use to access video content from the Internet and other sources. *CSVA*

Report, 24 FCC Rcd. at 11414 & n.5. Consistent with this trend, mobile services now offer a range of video offerings for cell phones and other mobile devices, including from networks such as CNN, ESPN, MTV, Comedy Central, Discovery, and Fox News. *Thirteenth Annual Report*, 24 FCC Rcd. at 549, 610-12. In this new environment, there is little relevance to the CTA's premise that "in 1990 [] market forces were not producing [] sufficient ... educational and informational programming." *Chairman's Rethinking the CTA Testimony*.

Comments in this proceeding confirm that there is a growing abundance of educational information and programming from a wide variety of sources. They note that the Internet represents "an extraordinary advance in the availability of educational and informational resources to our citizens." PFF Comments at 4 (citing 47 U.S.C. § 230(a)). At the same time, educational programming abounds in broadcast media. *See, e.g.*, National Association of Broadcasters Comments at 8-16. A variety of non-broadcast programming also serves the educational and informational needs of children and otherwise appeals to younger audiences. Entire networks dedicated to enriching children's programming have evolved – including Sprout, Nick Jr., Playhouse Disney, and Discovery Kids, to name just a few. And that does not even take into account E/I programs that MVPDs make available on-demand, or various other programming networks dedicated to child-friendly and family fare such as Disney Channel, Nickelodeon, The Hallmark Channel, ABC Family, The National Geographic Channel, and family-oriented offerings in premium suites such as HBO Family, SHO Family Zone, and Starz Kids & Family. This has led some commenters to ask "whether the CTA is still necessary in an era of staggering media abundance, including educational content for children." PFF Comments at 5.

These changes in the media landscape also have greatly enhanced the ability of individual households to exert control over their media consumption. As summarized in the *Notice*, the *CSVA Report* confirmed that broadcasting is no longer uniquely accessible:

- The V-chip, which allows users to block the display of television programs based on their ratings category, provides a “baseline tool” that is available for all over-the-air viewers that own a V-chip-equipped television set or converter box. *CSVA Report*, 24 FCC Rcd. at 11417.
- Many “broadcast only” households with TVs lacking V-chips now have V-chip capability through digital converter boxes. *Id.* at 11418.
- Approximately 89 percent of TV households subscribe to a multichannel video service, whose parental control tools comprise a significant part of the technologies parents use to monitor children’s television viewing. *Id.* at 11438.
- In addition to the V-chip, “there is a wide array of parental control technologies for television” including “VCRs, DVD players, and digital video recorders (‘DVRs’), that permit parents to accumulate a library of preferred programming for their children to watch.” *Id.* at 11418.

The growing multitude of choices is explored *supra* at 7-12, and in other sources as well, including Adam Thierer, *Parental Controls & Online Protection: A Survey of Tools and Methods*,” PFF, *Special Report*, Ver. 4, Summer 2009.

The availability of technological alternatives for parental control of material entering the home was precisely the reason why the Supreme Court struck down attempts to regulate non-broadcast media in every case decided since *Pacifica*. *See, e.g., Sable Commc’ns*, 492 U.S. at 130-31 (technological approach to controlling minors’ access to “dial-a-porn” messages required invalidation of indecency restrictions); *Denver Area*, 518 U.S. at 754-57; *Playboy Entm’t Group*, 529 U.S. at 815-16 (existing and potential technical solutions led Court to strike down indecency restrictions on cable television). With respect to the Internet, “the mere possibility that user-based Internet screening software would ‘soon be widely available’” was relevant to the Court’s “rejection of an overbroad restriction of indecent cyberspeech.” *Id.* at 814 (quoting *Reno*, 521 U.S. at 876-77).

2. The Commission Must Frame its Questions to Address Broader Public Interest Objectives

Given the vast changes in the media environment and the fundamental shift in traditional justifications for FCC jurisdiction and regulation, it is vital that the Commission properly frame

the questions it hopes to answer. The *Notice* asks commenters to address very broadly children’s media usage, the risks presented by particular programming, the extent of use of parental control technologies, and the FCC’s jurisdiction to take action.⁵⁵ It invited commenters to suggest “new actions the Commission or industry can take to address the issues posed here,” and – necessarily – poses the question “whether the Commission has the statutory authority to take any proposed actions and whether those actions would be consistent with the First Amendment.” *NOI* ¶ 9.

The Commission must address the question of its authority at the outset, because findings in the *CSVA Report* and the *Annual Video Competition Reports* undermine the traditional justifications for regulation. But it is even more imperative to address the question of the FCC’s authority first because the *Notice* seeks proposals for regulation outside the Commission’s established jurisdiction. It urges commenters “to consider the full range of electronic media platforms, including broadcast television and radio, MVPDs, audio devices, video games, wireless devices, nonnetworked devices, and the Internet.” *Id.* The jurisdictional question is critical because there are constitutional limits to the government’s ability to regulate outside its traditional domain. *See, e.g., Reno*, 521 U.S. at 870. *See also Future of Media Inquiry* at 2 (“In sorting through these trends, the starting point is the First Amendment.”).

Where governmental policies may be warranted, the Commission should focus on two overarching questions inherent in its general mandate to serve the public interest:

First, how will programming be supported in this new media environment? This is an important question because the *Notice* seeks input on how to harness “the favorable effects of media on children” and ensure “that all children receive the benefits of electronic media.” *NOI* ¶¶ 23-24. The Commission is on the right track in asking whether “sufficient marketplace

⁵⁵ Looking only to the questions asked, the *NOI* runs more than six single-spaced pages.

incentives exist to create educational content for children” or what kind of “action” may be needed to increase these incentives. *Id.* ¶ 25. It is vital that, while seeking to empower parents to reap the benefits of electronic media for their children while protecting them from potential harmful impacts, the FCC keep sight of the need for economic support for all media content. And this is true not just where the FCC seeks to ensure that educational and other enriching content is produced for children. To the extent that all media, including that intended for general audiences, can see its financial underpinnings threatened by excessively regulatory measures, the Commission must consider how to balance these interests. This is particularly necessary in these challenging economic times, in which ad-supported media face greater economic concerns in light of a deep recession, increasing competition, and rapid technological change.

The Commission has long acknowledged that “revenues from the sale of commercial time provide [] financing for program production,” and that undermining “sponsorship of programs ... could have a very damaging effect on the amount and quality of [the] programming.” *E.g., Action for Children’s Television v. FCC*, 564 F.2d 458, 467 (D.C. Cir. 1977) (quoting *Children’s Television Report and Policy Statement*, 50 FCC 2d 1, 11 (1974)). “Eliminating the economic base and incentive for [] programs would inevitably result in some curtailment ... of effort in this area,” such that “it seems unrealistic, on the one hand, to expect ... program service ... and, on the other hand, to withdraw a major source of [its] funding.” *Id.* This basic fact, originally expressed vis-à-vis children’s programs, is true of all content, including subscription and other services or platforms that may rely on multiple revenue streams, and even content that is not “advertiser supported” must be funded to be produced.

Second, the Commission should address how members of the public can best be empowered to make individual programming choices. The explosion of media options and rapidly increasing flexibility in tailoring the amount, content, and means for consuming electronic media

should make regulatory intervention less necessary than ever before. In this proceeding, the Commission seeks to build on *CSVA Report* findings regarding parental empowerment tools to determine their effectiveness based on such factors as consumer awareness, pace of adoption, ease of use, understanding or ratings, and innovation. *NOI* ¶ 44. It also asks whether current laws should be updated “to reflect this convergence and to keep pace with changes in technology.” *Id.* ¶ 41.

The Commission is correct to seek more information on the growing array of parental tools and strategies that enable individuals to control their families’ media consumption, but it should be far more cautious about viewing these developments as an opportunity for new regulatory solutions. As explained in greater detail below, the Commission must not be misled into believing that control technologies have “failed” if people have chosen not to use a particular government-sanctioned tool, or if they make content selections that are disfavored by policymakers. *See infra* at 65-70. The important point is that people now have choices that did not exist when the original rationales for regulation were created.

As the Supreme Court underscored just this Term, “[r]apid changes in technology – and the creative dynamic inherent in the concept of free expression – counsel against [regulation] that restricts [] speech in certain media or by certain speakers.” *Citizens United v. FEC*, 130 S. Ct. 876, 912-13 (2010). Purely from the perspective of preserving the broadest range of content and greatest freedom for choosing how much, which, and how to consume, government should be extremely circumspect in adopting policies that may influence such choices. And even if that were not the case economically or philosophically, it is mandatory under the First Amendment.

IV. THE COMMISSION SHOULD CRITICALLY EXAMINE THE ASSUMPTION THAT MEDIA MESSAGES ARE DANGEROUS

Although it mentions some potential benefits, the prevailing presumption of the *Notice* appears to be that the electronic media generally pose a danger from which children must be shielded. It purports to “explore the many positive impacts on children that media may have,”

NOI ¶ 6, and lists several such benefits. *See generally id.* ¶¶ 17-27. Chief among these are the educational content that electronic media allow children to access,⁵⁶ the skill sets that interacting with electronic media helps children to develop (apart from the content delivered), *e.g.*, *NOI* ¶ 19, and the communication channels and social vistas that electronic media open to them. *Id.* ¶¶ 20-21. But the *Notice* quickly turns to “risks of electronic media for children,” *id.* § II.C, and lists in detail the various ways exposure to media might harm children, and how those threats should be averted. *Id.* ¶¶ 28-54.

This tilt toward assumed dangers is evident from the focus on “inappropriate content,” *e.g.*, *NOI* ¶¶ 7, 28, 34, 40, including “offensive language, obscenity, indecency, profanity, or other content that is unsuitable for minors,” as well as “content that could influence children to engage in behaviors that pose risks.” *Id.* ¶ 30. In cataloging apparent dangers, the *Notice* ranks “exposure to exploitive advertising” and “exposure to inappropriate content” as numbers one and two on a list of “risks of electronic media for children.” Other problems, such as “sexual predation” and “fraud and scams,” are ranked far down the list, as numbers six and seven. *Id.* ¶¶ 7, 28-29. However, the underlying presumption that media content and advertising is a “danger” requires a far more rigorous analysis than has been done to date.⁵⁷ As a minimum constitutional requirement, any regulatory response would require that the government demonstrate, at minimum, that “the recited harms are real, not merely conjectural, and that the

⁵⁶ *See id.* ¶¶ 18, 25-27. Even here, however, the *Notice* seems to backslide, suggesting there are questions about the amount of educational content. *See, e.g., id.* ¶ 25. As the discussion above makes clear, there are a greater quantity and range of options than ever before for children to acquire educational and enriching content. *See supra* § III.B.1.

⁵⁷ *See, e.g., Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (“*Turner I*”); *Rubin v. Coors Brewing*, 514 U.S. at 487. *Cf. Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 392 (2000) (“We have never accepted mere conjecture as adequate to carry a First Amendment burden . . .”).

regulation will in fact alleviate these harms in a direct and material way.” *Turner I*, 512 U.S. at 664 (plurality op.); *VSDA v. Schwarzenegger*, 556 F.3d 950, 962 (9th Cir. 2009).

A. Policy Debates Should Not Oversimplify Research Findings

The *Notice* cites a number of studies that point to “significant concerns,” including the possibilities that advertising will influence children’s consumption of products, including “unhealthy food that can promote obesity,” that “inappropriate content” could influence children “to engage in behaviors that pose risks to their health,” and that “heavy exposure of children to violent media content may increase the likelihood of future aggressive and violent behavior.” *NOI* ¶¶ 29-30. Such concerns are echoed in a number of the initial comments filed in this proceeding.⁵⁸ These specific issues are addressed below, but it is first necessary to consider whether, and to what extent, such research may form the basis for sound policy. The Commission correctly seeks comment about the research, *NOI* ¶ 32, but does so with the underlying presumption that media is to blame for various social harms.⁵⁹

One major problem of citation to social science research in policy debates over media regulation is the misleading tendency to characterize the results as representing a scientific consensus regarding the issue at hand. This was noted by the UK government’s interdisciplinary study on the impact of the commercial world on children:

For a variety of reasons, evidence from research on these issues is quite problematic. There have been long-running and often heated debates among researchers on the issue of media effects, which to some extent recur in research

⁵⁸ See, e.g., Rudd Center Comments at 1-2; Baca Comments at 2; Food Marketing Workgroup Comments at 14-15.

⁵⁹ Thus, for example, it seeks comment on “these and other possible risks,” asks what academic researchers know today about the risks of media exposure, whether the risks vary based on factors such as socio-economic status, what are the most reliable studies, etc. *NOI* ¶ 32. Missing from this list of questions is anything that might suggest a skeptical review of the research, or doubt that such findings provide an adequate basis for regulation.

on the commercial world more broadly. Researchers frequently disagree about fundamental issues to do with focus, method and theory – about how the key questions are to be framed, what might count as an answer, and what the implications of these answers might be in terms of what should be done. In this area, there has been a particular “stand-off” between researchers in the tradition of psychological effects research – which is particularly prominent in the United States – and researchers within disciplines such as sociology, anthropology and cultural studies.

IMPACT OF THE COMMERCIAL WORLD at 72. Simply put, “[d]ifferent researchers and theorists sometimes see things quite differently because of their experiences and perspectives,” and “when it comes to research design, psychologists think quite differently than public health people, who think differently than biologists, who think differently than psychiatrists.”⁶⁰ Unfortunately, the limited perspective of much of the research presented in policy debates often leads to the spurious claim that “the debate is over” or that “the debate should be over” regarding media effects. *Pennsylvania Task Force* at 12.

Even when accepted on its own terms, the social science research “is often equivocal and contradictory.” IMPACT OF THE COMMERCIAL WORLD at 72. In addition to “fundamental methodological and theoretical criticisms,” the “sizes of effects in such studies are frequently small; although far-reaching claims are often made on the basis of what amounts to quite flimsy evidence.” *Id.* And this problem exists even among those studies that were published, which is to say, those studies that claimed to find an effect. It is important to acknowledge there is a “file drawer problem” in the social science literature, such that “[s]tudies that fail to find statistically

⁶⁰ Lawrence Kutner and Cheryl K. Olson, GRAND THEFT CHILDHOOD (2008) at 63. *See also* Joint State Government Commission of the Commonwealth of Pennsylvania, THE REPORT OF THE TASK FORCE ON VIOLENT INTERACTIVE VIDEO GAMES (Dec. 2008) p. 9 (“Researchers differ on how definitive social science can be ...”) (“*Pennsylvania Task Force*”). As the UK study explained, “there have been long-running and often heated debates among researchers on the issue of media effects” in which the North American psychological effects tradition “has been seriously challenged on methodological and theoretical grounds, both by researchers in Media and Cultural Studies and by other psychologists.” IMPACT OF THE COMMERCIAL WORLD at 124-125.

significant results are less likely to be accepted for publication.” Accordingly, “the published record is an unknown fraction of all research, and it tends to consist of those studies with statistically significant results.”⁶¹ As Dr. Lawrence Kutner has explained, “[t]he file drawer problem is an open secret among academic researchers. The editors of academic journals generally think that positive results are more interesting and more likely to be cited by future researchers, which is one measure of a journal’s influence and prestige.”⁶² Consequently, “the extant literature in peer-reviewed publications may provide a biased sample of all the studies actually carried out, portraying more positive findings than actually exist.”⁶³

Another significant danger of misplaced reliance on research is the tendency of U.S. policymakers to rely most heavily (if not exclusively) on studies that follow the behaviorist tradition of seeking to measure psychological effects of media exposure. The stimulus-response, cause-and-effect school of thought predominates among those seeking further government regulation, but it is not without controversy. Academic critics of this approach cite a fundamental theoretical problem – media and commercial messages “do not have singular meanings that will be the same for all who encounter them.” IMPACT OF THE COMMERCIAL WORLD at 72, 74. The UK study discussed a number of particular shortcomings of such research, such as the

⁶¹ Jeffrey Goldstein, *Effects of Electronic Games on Children*, Testimony before the Senate Committee on Commerce, Science, and Transportation, The Impact of Interactive Violence on Children (March 21, 2000).

⁶² Kutner & Olsen, *supra*, at 81. See also *Pennsylvania Task Force* at 21; IMPACT OF THE COMMERCIAL WORLD at 72 (“Critics of effects research point out that journals tend only to publish studies that show positive results (in this case, studies that claim to prove negative effects [of media exposure]”).

⁶³ Christopher J. Ferguson, *Evidence for Publication Bias in Video Game Violence Effects Literature: A Meta-Analytic Review*, Vol. 12, AGGRESSION AND VIOLENT BEHAVIOR (2007) p. 473. It is called “the file drawer problem” because studies that fail to find adverse effects “remain unpublished, locked away in the researcher’s files.” *Id.* See also *id.* at 476-480 (finding evidence of bias for both experimental and non-experimental research).

lack of generalizability to the real world of laboratory experiments and the “social desirability bias” of questionnaires, but it found that “the most significant problem ... is the confusion between correlation and causation.”⁶⁴ It noted, for example, that:

[I]t might be possible to show that people who (claim to) watch a lot of television also (claim to) have more “materialistic” attitudes. But this does not in itself prove that television causes materialistic attitudes: it might equally be the case that people who are predisposed towards materialistic attitudes tend to seek out television as a form of entertainment, or indeed, that there are other factors ... that explain both types of behaviour.

Id. Researchers who reject this model point out that it regards audiences – including children – as being “passive and ignorant victims of media influence.”⁶⁵

Accordingly, contrary to the assumptions of some who have responded to the *NOI*, the academic debate regarding media effects is both intense and polarized. The UK review of the literature thus found that the debate over theory and method, “and the limitations of the research itself, make it difficult to sum up the evidence.” *Id.* at 75. In particular, it found “genuinely little agreement” about the “widely-debated issue” of “the effects of advertising on obesity.” *Id.* It also found that the relationship between marketing and children’s physical health “remains a contested issue,” and that despite the great deal of research that has been done, “the evidence is mixed and inconclusive, and there is widespread disagreement about its value.” *Id.* at 111.

⁶⁴ *IMPACT OF THE COMMERCIAL WORLD* at 73 (“Associations between phenomena may be interesting and important to identify, and they may tell us a great deal. However, they are not evidence of a causal connection, and [] should not be presented as such, or mistaken for one.”).

⁶⁵ *Id.* at 74. The same critique applies to studies that purport to measure other media effects such as an increased tendency toward aggression. “Their logic assumes that the subjects of these experiments – usually college students who participate to earn some spending money or to get extra credit for a class – cannot tell fantasy from reality and don’t know that ‘punishing’ someone with a mild electric shock or a 9 mm pistol will lead to different outcomes. Can someone who delivers a brief blast of noise really be said to have the same malicious intent as someone who shoots a convenience store clerk or stabs someone in a bar fight?” Kutner & Olsen, *supra*, at 65.

Consequently, it cautioned that “research in this field does not generate findings that can be mechanistically translated into policy.” *Id.* at 75.

In the United States, however, constitutional limits require an agency proposing content regulation to “demonstrate[] a compelling interest in preventing” a concrete harm, and to prove that any regulation is narrowly tailored to further that interest and that there are no less restrictive alternatives that would further the interest. *VSDA v. Schwarzenegger*, 556 F.3d at 965 (citing *Playboy*, 529 U.S. at 813). As cases involving attempts to regulate “violent” video games show, social science data has been insufficient to support content restrictions. *See infra* at 87.

In this regard, it is significant that, at a recent forum featuring FCC Chairman Genachowski, media executives, and child development experts, held to mark release of a new Kaiser Family Foundation report on minors’ media use,⁶⁶ panelists indicated that “[n]ew data showing a surge in media use by kids have thrown the methods of researchers and policy makers into question.” Josh Wein, *Research, Policies for Kids Media Unclear as Usage Surges*, *Comm. Daily*, Jan. 21, 2010, at 8. As Professor Donald Roberts of Stanford University opined, there is a clear need to “‘sit back and reassess and say that we don’t even know what some of the questions are,’ in light of the [new] findings.” *Id.* Moreover, even family health advocates admit “[t]he government’s role in helping parents sort all this out is [] unclear.”⁶⁷

⁶⁶ See <http://event.netbriefings.com/event/kff/Archives/20jan10media/index.html>; www.kff.org/entmedia/mh012010pkg.cfm (announcing release of *Generation M²: Media in the Lives of 8- to 18-Year-Olds*, Kaiser Family Foundation, Jan. 2010) (reporting on “third wave” of studies of children’s media use that examined current use patterns among youth, and documenting changes in habits since prior “two waves of the study, in 1999 and 2004”).

⁶⁷ *Id.* (quoting Victoria Rideout, Kaiser Family Foundation Vice President and Director of its Program for Study of Media Health).

These general concerns are true with respect to the particular areas of “risk” set forth in the *NOI*.

B. Media Exposure and Obesity

The *NOI* identifies advertisements “of particular concern for children” as including “those that promote unhealthy food, thereby contributing to childhood obesity.” *NOI* ¶ 34. This premise, reflected in a number of the initial comments,⁶⁸ appears to be based on the assumption that exposure to programming and advertisements necessarily has a causal effect on the principal factors that contribute to obesity. Thus, Chairman Genachowski recently suggested that “childhood obesity rates have tripled over the past 30 years” because “[a] child has to watch ten hours of children’s television programs to find one truly healthy food ad,” but that in the same time period “he or she would have seen 75 other food ads, 55 for unhealthy foods.”⁶⁹ However, the available research, as well as empirical data, does not support the assumption of a causal

⁶⁸ See, e.g., Rudd Center Comments at 1-2; Food Marketing Workgroup Comments at 14-15.

⁶⁹ Chairman Julius Genachowski, *Digital Opportunity: A Broadband Plan for Children and Families*, Speech presented at the National Museum of American History, Washington, D.C., March 12, 2010. The Chairman’s assertion appears to have been drawn from Kunkel, D., McKinley, C., Wright, P., *The Impact of Industry Self-Regulation on the Nutritional Quality of Foods Advertised on Television to Children*, Children Now, available at www.childrennow.org/uploads/documents/adstudy_2009.pdf. But as CFBAI director Elaine D. Kolish noted at the time, the definitions for “healthy” versus “unhealthy” used in the study are too simplistic to be meaningful. For example, all sugar-sweetened cereals – including nutritious, lightly sweetened cereals like Cheerios – are placed in the category the Chairman refers to as “unhealthy foods.” Prepared Remarks of Elaine D. Kolish, *Is Food Marketing to Children Getting Any Healthier?*, Dec. 14, 2009, at 3. And even if they were accurate, the figures offer a snapshot that ignores the progress made by CFBAI participants, as “[d]ozens and dozens of products have been reformulated, at considerable cost, to meet company pledges and new products or meal combinations that meet the companies’ standards have been introduced.” *Id.* at 2. In this regard, CFBAI members use criteria consistent with government standards, including standards which recommend avoiding all added sugars or caloric sweeteners. More fundamentally, however, the Chairman’s statement merely assumes the causal effect of the advertisements.

effect. See Institute of Medicine, *Food Marketing to Children and Youth: Threat or Opportunity?* (McGinnis et al., 2006) (“IOM Study”) at 8-9.

There is no question the rate of obesity has increased in the general population, as it has for children. But there is little evidence that advertising causes obesity.⁷⁰ Moreover, to explain the increasing rates of obesity, one would have to assume that children have been exposed to an increasing amount of food advertising during the past several decades (and for “unhealthy foods,” however that may be defined). But such an assumption is incorrect. The FTC’s Bureau of Economics has found that children see fewer ads on television than they did twenty years ago, as well as fewer food advertisements.⁷¹ Children’s exposure to advertising has decreased during the period of rising obesity rates, and for a variety of reasons: the number of hours per day that children watch television has decreased significantly since the 1970s, the amount of PSAs and cross-promotion for other programming has increased, other forms of “screen time” have replaced television viewing among young people, and technologies, such as DVRs, allow

⁷⁰ See, e.g., Comments of the Mercatus Center, George Mason University, Public Interest Comment on Food Industry Marketing to Children, FTC File No. P064504 (Dec. 21, 2006) at 5 (“Mercatus Center Comments”); IMPACT OF THE COMMERCIAL WORLD at 104-12 (“a surprisingly small amount of reliable evidence relates specifically to ad[s] (as opposed to children’s viewing in general) and to obesity (as opposed to children’s brand preference or other aspects of diet”).

⁷¹ Federal Trade Commission, *Perspectives on Marketing, Self-Regulation, and Childhood Obesity: A Report on a Joint Workshop of the Federal Trade Commission and the Department of Health and Human Services* (April 2006) at note 66; Mercatus Center Comments at 6. See also Todd J. Zywicki, Debra Holt, and Maureen K. Ohlhausen, Obesity and Advertising Policy, 12 Geo. Mason L. Rev. 979, 993-997 (2004) (“Zywicki, Holt, & Ohlhausen”) (estimates by Kunkel, et al. assume children “were viewing approximately ninety-four ads per hour”). “[W]hat is clear is that some of the estimates that are often quoted appear to be implausible.” *Id.* at 997.

commercial skipping. Thus, between 1977 and 2004, the number of paid ads children viewed on television dropped by an average of 13 percent.⁷²

Additionally, the composition of the ads themselves has changed. Advertising for food and restaurants overall has decreased, compared to all advertising, supplanted by advertising for movies, DVDs, video and computer games, as cross-promotions for other programs. Mercatus Center Comments at 6. The proportion of advertising for restaurants and food had already been decreasing by that time, dropping from 64 percent of advertising in children's and family programming in the 1970s to 46 percent in the 1990s. Spending on food advertising likewise dropped between the mid-1990s and 2004.⁷³

More fundamentally, however, the behavioral model fails to account for the fact that different people respond to commercial messages in different ways. IMPACT OF THE COMMERCIAL WORLD at 74. There is a clear intermediary role of parents in making food purchasing and dietary decisions for children, especially younger ones. Mercatus Center Comments at 7. Bottom line, “[p]arents have a much greater influence on the diets of their children than advertisements do.” *Id.* See *Zywicki, Holt, & Ohlhausen* at 999. The UK study, for example, noted that “research suggests that advertising and promotion are much less

⁷² Mercatus Center Comments at 5-6. See *Zywicki, Holt, & Ohlhausen* at 998 (“There were declines in the percentages of all three food categories during this period, with the largest decline, eleven percentage points, in candies and snacks.”).

⁷³ *Id.* ANA and GMA have issued several reports using Nielsen data that show how these categories declined over the years. Most recently, GMA's presentation at the FTC's *Sizing Up Food Marketing and Childhood Obesity* workshop on December 15, 2009, reviewed the trend of decreasing exposure to food, beverage and restaurant ads since 1977, and in particular showed that from 2007 to 2008, the typical child saw in children's programs 8 percent fewer food, beverage and restaurant ads, and 14 percent fewer food and beverage ads. See www.ftc.gov/bcp/workshop/sizingup/presentations/Sophos.pdf.

important than other factors, such as price, availability and family influences.” *IMPACT OF THE COMMERCIAL WORLD* at 104. *See generally id.* at 104-112.

A major methodological shortcoming of the behavioral research is that it does not purport to assess media impact directly, and “what researchers measure is in fact the total amount of television viewing (often as estimated by parents).” *Id.* at 107. And, while total amount of television viewing is positively correlated with increases in obesity, this says nothing about the cause. Obesity is the result – obviously – from “a long-term imbalance between energy intake and energy expenditure.” *Mercatus Center Comments* at 8. However, the available research suggests that “while children’s calorie intake has in fact remained more or less steady over the past 30 years, the number of calories they burn through exercise has declined.” *IMPACT OF THE COMMERCIAL WORLD* at 107.

Thus, it is far more plausible to conclude that rising obesity levels are linked to the fact that sedentary activities do not burn the same calories as vigorous exercise. The UK study observed that “[w]atching television is a sedentary activity, which does not burn a great many calories. People who watch a lot of television (or, indeed, read a lot of books) tend to do less exercise, and are more likely to prefer other sedentary activities.” *Id.* Academic articles that studied such trends have found sedentary activities are more strongly linked to being overweight and that experiments which reduced children’s screen time resulted in a lowering of the body-

mass index.⁷⁴ In that regard, screen time that typically *does not include advertising* is likewise linked to increasing rates of obesity.⁷⁵

To the extent “screen time” or simple lack of exercise is the most important link to obesity, it raises profound policy questions for the Commission. It would mean that the impact on obesity would be the same whether a child is watching a commercial for powdered donuts or an episode of *Mr. Wizard* – or, for that matter, reading a textbook on quantum physics. Regardless whether the Commission would prefer to promote science instruction over sugary breakfast food, the goal of reducing obesity would best be served not by changing media policy, but by restoring physical education instruction in the schools.

Ultimately, the available research does not support the confident premise of the *NOI* or of various commenters that there is a demonstrated link between food ads and obesity. Todd Zywicki, former Director of the FTC’s Office of Policy Planning at the FTC, conducted a comprehensive review of existing literature and found “little theoretical or empirical foundation to support the ‘advertising causes obesity’ thesis or the inference that restrictions on food advertising would meaningfully reduce the incidence of childhood obesity.” He found “the evidence does not support the proposition that children are exposed to more food advertising today than twenty years ago and that this has caused the increased rate of childhood obesity.” *Zywicki, Holt, & Ohlhausen* at 1001. This conclusion was confirmed by the recent UK government

⁷⁴ See, e.g., Patricia M. Anderson and Kristin F. Butcher, *Childhood Obesity: Trends and Potential Causes*, THE FUTURE OF CHILDREN (Spring 2006) at 26-28. See also Robert C. Klesges *et al.*, *Effects of Television on Metabolic Rate: Potential Implications for Childhood Obesity*, 91 PEDIATRICS 281 (1993); F.B. Hu *et al.*, *Television Watching and Other Sedentary Behaviors in Relation to Risk of Obesity and Type 2 Diabetes Mellitus in Women*, 289 JOURNAL OF THE AMERICAN MEDICAL ASSN. 1785 (2003).

⁷⁵ See Nicolas Stettler *et al.*, *Electronic Games and Environmental Factors Associated With Childhood Obesity in Switzerland*, 12 OBESITY RESEARCH 896 (2004); *Zywicki, Holt, & Ohlhausen* at 1001.

review of the scientific literature, which found that, despite the large volume of research in the area, “there is very little that is both *directly relevant* and *reliable*.” *IMPACT OF THE COMMERCIAL WORLD* at 108 (emphasis in original).

This most recent review of the literature warned against claims of a scientific consensus regarding any adverse impact of advertising. It canvassed several reviews of the research evidence relating to advertising and obesity over the past ten to fifteen years and, far from a consensus, found that “these reviews disagree – in some cases, quite profoundly – in their overall conclusions,” and that the various reviews of the literature “tell conflicting stories.” *IMPACT OF THE COMMERCIAL WORLD* at 106. It attributed the overly confident claims of “consensus” to the fact that “the reviews themselves are careful and qualified” but that “the conclusions contained in the executive summaries are very different.” *Id.* at 108. It cites, for example, the 2006 review of the U.S. Institute of Medicine as “the most recent comprehensive review in this area” and notes IOM’s conclusion that television influences food and beverage preferences of younger children (ages 2 to 11). But it adds: “Even so, the ultimate conclusion of the [IOM] report is that there is insufficient evidence to establish a causal relationship between the viewing of television advertising and adiposity; and so it says little about the *relative importance* of different factors.” *Id.* at 108-109 (emphasis in original). The *IOM Study*, in fact, found the evidence indicated that advertising “does *not* influence the usual dietary intake of teens ages 12-18 years.” *IOM Study* at 9 (emphasis in original).

Even among researchers who conclude that advertising has an impact, “most reviews of the research agree that the impact is small.” One frequently quoted figure is that “exposure to television advertising accounts for some 2% of the variation in children’s food choice,” which

itself is “only one factor in obesity.”⁷⁶ The UK review of the literature found there was “very little evidence” supporting the magnitude of the effect and that this lack of support is “crucial” for policy purposes. This is because “what matters is not so much whether there is *an* effect, but rather whether the effect is large enough to be of practical significance, especially relative to other factors.” *Id.* at 109 (emphasis in original).

Empirical evidence provides additional reason to be skeptical of those who assert a causal connection between food advertising and obesity. The amount of advertising for food products is relatively uniform across the United States. Television viewers in Jackson, Mississippi see most of the same food and beverage commercials as are seen by viewers in Boulder, Colorado. Yet there are significant differences in obesity levels across the country, even in closely contiguous areas. According to 2008 figures from the Centers for Disease Control and Prevention, the state with the lowest rate of obesity among adults was Colorado, at 18.5 percent. By contrast, the rate of obesity among adults was 30.3 percent in Oklahoma, 27.4 percent in Kansas and 26.6 percent in Nebraska. Five other states (Alabama, Mississippi, South Carolina, Tennessee and West Virginia) had adult obesity rates equal to or greater than 30 percent. *See* CDC, <http://www.cdc.gov/obesity/data/trends.html>. Similarly, CDC numbers from 2007 indicated that 9.6 percent of children in Oregon were obese, while in Mississippi the rate was 21.9 percent. <http://nschdata.org/DataQuery/DataQueryResults/AllStates.aspx?q=500&r1=999&r2=-1>. This supports the conclusion that food marketing is not a primary factor in the growth of obesity among children or other groups, or obesity rates would be far more uniform across the country.

⁷⁶ *Id.* at 109. *See, e.g.,* Ruth N. Bolton, *Modeling the Impact of Television Food Advertising on Children’s Diets*, 6 CURRENT ISSUES & RES. ADVERTISING 173, 187-191 (1983) (finding an effect on caloric intake of 1.5 percent).

This is also verified by the experience of other countries that have attempted to address the problem of obesity by restricting advertising. For example, Quebec banned food advertising to children in the 1980s and has similar obesity rates to the rest of Canada. Similarly, Sweden banned all advertising in children's programs about fifteen years ago, yet has similar childhood obesity rates as the rest of Europe.⁷⁷ Conversely, in the Netherlands and certain other European countries, where there are no ad restrictions and relatively high levels of food advertising, obesity levels are lower than in either Quebec or Sweden.⁷⁸ In fact, childhood obesity is becoming a serious challenge in countries like Ghana and Haiti, which do not have as extensive media operations or significant amounts of food advertising as the U.S. Nothing in this experience suggests that changes in media policy would help combat the obesity problem in the United States.

C. Media Exposure and Violence

The *NOI* states that “studies have indicated that heavy exposure of children to violent media content may increase the likelihood of future aggressive and violent behavior.” It makes this point as if the matter is settled, yet supports it by relying almost entirely on the Commission's 2007 Report to Congress on violent programming.⁷⁹ However, at the time it was adopted, Commissioners McDowell and Adelstein criticized the *Violent Programming Report*

⁷⁷ See David Ashton, *Food Advertising and Childhood Obesity*, J. ROYAL SOCIETY OF MEDICINE (Feb. 2004) p. 51-52.

⁷⁸ See Advertising Education Forum, *Food Advertising and Obesity. 3 Case Studies* (2003), available at www1.ftc.gov/os/comments/FoodMarketingtoKids/516960-00012.pdf.

⁷⁹ *NOI* ¶ 30 & n.47 (citing *Violent Programming and its Impact on Children*, Report, 22 FCC Rcd. 7929, 7931-39 (2007) (“*Violent Programming Report*”). The *Notice* also cites a single study on media effects and aggression: Soledad Liliana Escobar-Chaves and Craig A. Anderson, *Media and Risky Behaviors in The Future of Children, Children and Electronic Media*, Princeton University and the Brookings Institution (Spring 2008).

for its failure to analyze effectively the media violence literature.⁸⁰ More recently, the UK review of the media effects literature found that the evidence of a causal link between violent media content and violent behavior “is weak and inadequate.” *IMPACT OF THE COMMERCIAL WORLD* at 123. *See also Pennsylvania Task Force* at 7-26.

If the result of the current *Inquiry* is to provide any basis for future policy, the Commission will need to do more than simply recite its “findings” from the 2007 *Violent Programming Report*. This is so because the 2007 report relied on previous – and inconclusive – analyses of the Surgeon General and the FTC.⁸¹ Moreover, the Commission’s 2007 report downplayed the Surgeon General’s reservation that “many questions remain regarding the short- and long-term effects of media violence, especially on violent behavior,” as well as the conclusion that “it is not yet possible to describe accurately how much exposure, of what types, for how long, at what ages, for what types of children, or in what types of settings will predict violent behavior in adolescents and adults.” *Id.* The FCC similarly submerged the FTC’s findings that “[m]ost researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and it is not the sole, or even necessarily the most important, factor contributing to youth aggression, anti-social attitudes and violence.” *Id.*

If the Commission intends to adopt any changes to its rules or policies based on its assumptions about the impact of media violence, it would first need to reopen its 2007 inquiry (or commence a different proceeding) and perform a more complete analysis. This would be

⁸⁰ *See Violent Programming Report*, 22 FCC Rcd. at 7957 (Statement of Commissioner Adelstein); *id.* at 7965 (Statement of Commissioner Robert M. McDowell).

⁸¹ *See Violent Programming Report*, 22 FCC Rcd. at 7931-35, 7938-39 (citing *Youth Violence: A Report of the Surgeon General* (2001) (“2001 SG Report”). *See also id.* at 7934 (quoting Federal Trade Commission, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Games Industries* (2000)).

necessary because any such regulations necessarily would implicate the First Amendment,⁸² and the FCC's report to Congress failed to answer the most difficult questions.⁸³

The Media Association Comments, filed jointly by several parties represented here and/or trade associations to which they belong, thoroughly analyzed the media effects literature to which the Commission briefly makes reference in its current *Notice*.⁸⁴ That analysis showed that claims of effects from violent content are grossly overstated. While the evidence of a causal link between exposure to violent media and undesirable behavior often is described as overwhelming, it is in fact weak and inconsistent, and research findings often are mischaracterized, in some cases reaching conclusions that are the opposite of what is reported. *Id.* § II.B. & App. Nor is there evidence that exposure to violent imagery leads to “desensitization.” *Id.* at 13 & App. at 7, 12, 45-46.

⁸² Reviewing courts have uniformly invalidated governmental restrictions on violent content and rejected claims of an asserted link between exposure to media and antisocial conduct. *VSDA v. Schwarzenegger*, 556 F.3d at 962-64, *aff'g*, 401 F.Supp.2d 1034 (N.D. Cal. 2005); *Entertainment Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008), *aff'g*, 443 F.Supp.2d 1065 (D. Minn. 2006); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 958-59 (8th Cir. 2003), *aff'g*, 200 F.Supp.2d 1126 (E.D. Mo. 2006); *American Amusement*, 244 F.3d at 578-79; *Entertainment Software Ass'n v. Chicago Transit Auth.*, ___ F.Supp.2d ___, 2010 WL 99470 *10 (N.D. Ill.); *Entertainment Software Ass'n v. Granholm*, 426 F.Supp.2d 646, 652-54 (E.D. Mich. 2006); *Video Software Dealers Ass'n v. Maleng*, 325 F.Supp.2d 1180, 1182 (W.D. Wa. 2004). *Cf. Eclipse Enters., Inc. v. Gullota*, 942 F.Supp. 801, 811 (E.D.N.Y. 1996).

⁸³ As Commissioner Adelstein explained, “[t]he difficult question is precisely which violent programming, if any, the government can regulate in the interest of protecting children. That question – the most challenging Congress faces – is never answered here.” *Violent Programming Report*, 22 FCC Rcd. at 7960 (Statement of Commissioner Adelstein).

⁸⁴ A copy of the Media Association Comments filed in the 2007 proceeding is attached as Appendix C to this submission for ease of reference if the Commission chooses to proceed further in this area. The comments included an *Inquiry on the Effects of Televised Violence* by University of Toronto Professor Jonathan L. Freedman. This review of the research available in this area concluded that “evidence does not support the hypothesis that exposure to film or television violence causes children or adults to be aggressive.”

In addition, the Media Association Comments demonstrated that empirical data undercuts the asserted link between fictional and real-world violence. If such hypotheses were sound, expansion of violent media should be reflected by increases in real-world aggression and violent crime. Contrary to the theoretical effects, however, as depictions of violence in the media increased, violent crime – and youth violence in particular – declined significantly.⁸⁵ These trends have continued. According to FBI statistics, since 1995, the juvenile crime rate has dropped by 36 percent, and the juvenile murder rate has plummeted by 62 percent.⁸⁶ In the face of such real world experience, changes in media policy will require more than just a reference to the Commission’s prior report.

D. Media Exposure and “Inappropriate Content”

In addition to the issues of obesity and violence, the *Notice* expresses a general concern about a broader range of “media content that may be inappropriate,” including “offensive language, obscenity, indecency, profanity, or other content that is unsuitable for minors,” as well as “content that could influence children to engage in behaviors that pose risks to their health.” *NOI* ¶ 30. *See also id.* ¶¶ 7, 28, 31. For example, the Commission suggests that exposure to programming or advertising may influence minors to begin smoking, use alcohol, or engage in other risky behaviors.

Such concerns are based on the same behavioral model discussed earlier, in which children are viewed as passive receptacles for messages and as especially susceptible to media influences.

⁸⁵ *See id.* § II.C. *See also* Letter from Robert Corn-Revere, on behalf of the Media Associations, to Marlene H. Dortch, Secretary, FCC, in MB Docket No. 04-261, Nov. 2, 2004 (discussing and submitting DOJ press release *FBI Releases Crime Statistics for 2003*).

⁸⁶ Adam Thierer, *Violent Video Games & Youth Violence: What Does Real World Evidence Suggest?* Technology Liberation Front (February 9, 2010) (available at <http://techliberation.com/2010/02/09/violent-video-games-youth-violence-what-does-real-world-evidence-suggest/>).

However, the UK review of the literature found that the effect of such “inappropriate” material, whether positive or negative, is “weak and inconclusive.” *IMPACT OF THE COMMERCIAL WORLD* at 125. It noted that in the context of this debate, children “are portrayed ... as vulnerable and helpless victims, rather than in any way resilient or competent,” and “[t]he possibility that most children (and their parents) are reasonably well-adjusted and doing fairly well is rarely entertained.”⁸⁷ Moreover, the probability that young people will engage in risky behaviors is based on a broad range of factors in which the influence of family and friends is far more significant. Accordingly, for tobacco use, the UK study found that “there is little indication ... of the relative importance of promotion as compared with other influences.” It also found advertising does not increase the total consumption of alcohol, but rather ads are “a relatively insignificant aspect of the broader picture, particularly as compared with the influence of family and friends.” *Id.* at 109-110.

It also should be noted that concern about “inappropriate content,” including not just advertising but programming themes that might give children bad ideas about a long list of life choices, is an exceedingly expansive and unmanageable category for regulatory purposes. Different individuals derive different lessons from the same material, and it is difficult to imagine trying to devise a universal rule or filter that could shield children from such content, even if it could be clearly defined. Nor is it at all certain that attempting to do so would help children. As Judge Posner cautioned, “[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.” *Kendrick*, 244 F.3d at 577.

⁸⁷ *Id.* at 28. *Morality in Media* typifies this mindset, asserting that “many parents are not part of the solution; *they are part of the problem.*” *Comments of Morality in Media* at 5 (emphasis original).

As the UK study noted, “exposure to apparently ‘inappropriate’ material may have positive consequences,” and “negative effects of media may be impossible to separate from their positive effects.” This is because “[a]pparently ‘inappropriate’ content may also provide valuable opportunities for learning and identity formation, as well as offering important forms of cultural experience.” *IMPACT OF THE COMMERCIAL WORLD* at 126. In this broad area of “inappropriate content,” it would be impossible for the government to form a common standard or rating that captures all of the influences that individual households might deem important. Such decisions should be left to “household rules” and individual filtering and blocking decisions.

V. THE COMMISSION SHOULD INCORPORATE THE FINDINGS OF PREVIOUS REVIEWS OF STRATEGIES FOR PROTECTING CHILDREN

Given the expansive scope of this *Inquiry*, the Commission should not attempt to reinvent the wheel. Other major studies and task forces, such as the UK’s interdisciplinary review of children and commercialism cited above, have covered much the same ground. *See generally* *IMPACT OF THE COMMERCIAL WORLD*, *supra*. In addition, similar inquiries assessing child safety were launched as online communication became a more prominent medium, and, indeed, are ongoing now. Five such studies are relevant to questions presented in the Notice,⁸⁸ and their findings offer important lessons about protecting children from inappropriate content. They include:

- The **COPA Commission** studied a range of child-protective tools and strategies, including: “filtering and blocking services; labeling and rating systems; age verification efforts; the possibility of a new top-level domain for harmful to minors material; ‘greenspaces’ containing only child-appropriate materials; Internet monitoring and time-limiting technologies; acceptable use policies and

⁸⁸ A sixth study, the Online Safety and Technology Working Group, was authorized in 2008 under the “Protecting Children in the 21st Century Act.” The National Telecommunications and Information Administration (“NTIA”) appointed 35 members from the Departments of Justice and Education, the FTC and FCC, and elsewhere, with the goal of studying current online safety efforts. It will report to Congress in June 2010. *See* www.ntia.doc.gov/advisory/onlinesafety.

family contracts; online resources providing access to protective technologies and methods; and options for increased prosecution against illegal online material.”⁸⁹

- The **Thornburgh Commission**, convened by the National Research Council in 2001 and led by former U.S. Attorney General Richard Thornburgh,⁹⁰ was a response to a congressional mandate requiring “a study of computer-based technologies and other approaches to the problem of the availability of pornographic material to children on the Internet.” 18 U.S.C. § 1470. The result was the 450-page report *Youth, Pornography and the Internet*.
- The **Byron Commission**, produced by the British government in 2007 and led by British Psychologist Tanya Byron, conducted “an independent review of the risks children face from the internet and video games,” ultimately presenting the Prime Minister with the *Byron Report* in 2008.⁹¹
- The **Internet Safety Technical Task Force** (“ISTTF”), initiated in 2008 through a partnership between industry groups and 50 state attorneys general and chaired by Professor John Palfrey, “brought together leaders from Internet service providers, social network sites, academia, education, child safety and public policy [] organizations, and technology development” to issue the *ISTTF Report*.⁹²
- The **“Point Smart. Click Safe.” Working Group**, convened by the Internet KeepSafe Coalition (iKeepSafe) and Common Sense Media in partnership with Cable in the Classroom and NCTA in 2008, sought to “develop a set of ‘best’ practice recommendations that could be implemented by providers of online content, applications and connectivity/access.”⁹³

⁸⁹ See COPA Commission, *Report to Congress*, October 20, 2000, www.copacommission.org (“COPA Commission Report”), at 7. The COPA Commission, created by the Child Online Protection Act in 1998, sought “to evaluate the accessibility, cost, and effectiveness of protective technologies and methods, as well as their possible effects on privacy, First Amendment values and law enforcement.”

⁹⁰ *Youth, Pornography and the Internet* (“Thornburgh Report”) (Washington, DC: National Academy Press, 2002), www.nap.edu/html/youth_internet, at viii-ix.

⁹¹ *Safer Children in a Digital World: The Report of the Byron Review* (“Byron Report”), March 27, 2008, www.dcsf.gov.uk/byronreview/pdfs/Final%20Report%20Bookmarked.pdf, at 1.

⁹² *Enhancing Child Safety & Online Technologies: Final Report of the Internet Safety Technical Task Force to the Multi-State Working Group on Social Networking of State Attorneys General of the United States* (“ISTTF Report”), Dec. 31, 2008, at 10, <http://cyber.law.harvard.edu/pubrelease/isttf>, at 4, 7.

⁹³ *PointSmart.ClickSafe: Task Force Recommendations for Best Practices for Online Safety and Literacy* (“PointSmart Report”), www.pointsmartclicksafe.org/report, at v. The *PointSmart Report* noted that “[w]hile other working groups had looked at these issues from various techni-

These studies consulted hundreds of experts on issues related to child safety and technology, drawn from government, academia, industry, and elsewhere. Despite this diversity of personnel and approaches, however, the studies' findings were remarkably consistent. The National Media and Advertisers believe that four key lessons can be learned from these reviews:

(1) Education is the Primary Solution for Most Concerns About Media Risks. The *NOI* expresses concern that some “parents may be unaware of the benefits and risks of electronic media technologies, leaving their children in danger of being left behind in the digital revolution or left unsupervised as they navigate this challenging media landscape.” *NOI* ¶ 4. The prior studies anticipate this, concluding that the most important tool for addressing concern about adverse media effects on minors is education, including media literacy, awareness-building, and assistance with parenting. As the Thornburgh Commission put it, in terms recently echoed by the FCC’s *National Broadband Plan*:

Swimming pools can be dangerous for children. To protect them, one can install locks, put up fences and deploy pool alarms. All of these measures are helpful, but by far the most important thing that one can do for one’s children is to teach them to swim.”

Thornburgh Report at 9.⁹⁴ See also *National Broadband Plan* at 57 (quoting same language).

The COPA Commission similarly found that educating children and parents about media use is “an essential part of an overall solution” and “can be highly effective in giving caregivers needed information about online risks and protection methods, and access to technologies and ways to

cal, business and safety perspectives and international task force groups have met on the protection of children on the Internet specifically, this [] group primarily focused on internet safety practices in the domestic arena.” *Id.*

⁹⁴ It added that “the fundamental issue is how to teach a young person to make wise choices, to stay in control of his or her online experiences, to be critical and skeptical about the underlying messages in advertising and romanticized and sexualized images, and to report other users soliciting personal information or harassing them.” *Id.*

get help.”⁹⁵ The Byron Commission added that, because “no amount of effort to reduce potential risks to children will eliminate [them] completely,” it is essential to “build children’s resilience to the material to which they may be exposed so that they have the confidence and skills to navigate these new media waters more safely.”⁹⁶

(2) Parents Should be Empowered with a Diverse Array of Content Management Tools, But There is No Quick Fix or Silver Bullet. “Any comprehensive package of reform to minimize risks to children on the internet must help parents – who are in the best position to know and understand the individual differences between their children – develop their skills around e-safety.”⁹⁷ At the same time, “[t]here is no ‘silver bullet,’” and “policies that claim to make the internet completely safe are undesirable because they discourage children and parents from taking an informed approach to managing the risks,” lulling “parents into a false sense of security and leaving children exposed to a greater level of risk than they would otherwise be.” *Byron Report* at 81. The *ISTTF Report* agreed that “[t]echnology can play a helpful role, but there is no one technological solution or specific combination of technological solutions to the problem of online safety for minors. Instead, a combination of technologies, in concert with parental oversight, education, social services, law enforcement, and sound policies by social network sites and service providers may assist in addressing specific problems that minors face

⁹⁵ *COPA Commission Report* at 18. As an added benefit, “[f]amily education imposes little or no cost on publishers of otherwise lawful harmful to minors materials and creates little adverse impact on privacy, First Amendment values, or law enforcement.” *Id.*

⁹⁶ *Byron Report* at 5, 7. See also *ISTTF Report* at 9 (concluding that “technology can work only in tandem with educational and law enforcement efforts”); *PointSmart Report* at 25 (recommending that “[b]asic information and education about the digital landscape must be in place and available to all children, parents, educators, and caregivers so they can understand the various risks, ... and what options they have in services and terms of use”).

online.” *ISTTF Report* at 6. The Thornburgh Commission likewise found “there is no single or simple answer to controlling the access of minors to inappropriate material on the Web,” especially since technology evolves at a rapid pace.⁹⁸

(3) Industry Can Help with Self-Regulatory Measures and Best Practices to Increase the Efficacy of Content Management Tools. The studies made clear that industry has a role to play in protecting minors from inappropriate content, providing self-regulatory measures and best-practices that can include, for example, “[v]oluntarily providing, offering, or enabling user empowerment technologies to assist end-users.” *COPA Commission Report* at 45. As ISTTF recognized, “any use of technology to enhance safety for minors online must be in tandem with” such things as “industry adoption of best practices[.]” *ISTTF Report* at 35-36. Thus, for example, the *ISTTF Report* describes efforts made by social networking sites to allow users to protect children, including restricting users registered as minors from accessing certain content, providing parental controls, reviewing online spaces for inappropriate and illegal content, and offering educational resources and online safety tips for their users. *Id.* at 24-26. The *PointSmart Report* likewise identified “a broad set of meaningful recommended best practices which can be adopted and implemented by companies in order to demonstrate and enhance their commitment to users and the public at large, to online safety and digital literacy.” *PointSmart Report* at 5. Reiterating that “there is no ‘silver bullet’ – no single technology or approach that has proved effective” in preventing children from accessing inappropriate material, it created a comprehensive set of best practices for industry, dealing with a range of children’s activity

⁹⁷ *Byron Report* at 10. See also *COPA Commission Report* at 41 (“[j]ust as we provide children with firm rules for crossing the street and [] for dealing with a variety of unfamiliar situations, we need to provide them with rules and guidelines to facilitate their online learning.”).

⁹⁸ *Thornburgh Report* at 222. See *id.* at 221 (“exclusive – or even primary – reliance on technological measures ... would be an abdication of parental and community responsibility”).

online – including identity authentication, age verification, content screening, and safe searching – and providing the best response to problems. *Id.* at 24-29.

(4) Inflexible, Top-Down Government Mandates Quickly Become Outdated and Do Not Work, While Technological Mandates also Stifle Innovation. The various studies of online safety recognized a role for government action, but not as the predominant solution to perceived concerns. For example, the *PointSmart Report* “suggest[ed] that voluntary activity strongly supported by industry is likely to be significantly more effective than legislated or mandated solutions.” *PointSmart Report* at 8 (“‘light touch’ regulation ... is the superior approach for encouraging resource-rich companies to design progressive and innovative solutions”). The COPA Commission similarly emphasized repeatedly the risks inherent in sliding from voluntary efforts into government mandates,⁹⁹ while the Byron Commission recommended a cooperative and self-regulatory approach over “[g]overnment attempts to regulate industry,” which carry “a serious risk that the beneficial joint working arrangements would be lost, with industry retreating to a defensive stance.”¹⁰⁰ The ISTTF agreed, concluding that government control over technological decisions would be counterproductive and would stifle innovation.¹⁰¹

* * * *

These key findings suggest that if the FCC does anything here, it should focus on collaborative, multifaceted approaches that empower individual families. As the COPA Com-

⁹⁹ See *COPA Commission Report* at 23 (mandatory rating and filtering schemes raise significant First Amendment concerns). See also *id.* at 28-29, 31.

¹⁰⁰ *Byron Report* at 69 (top-down mandates “may struggle to frame effective legislation given fast-changing technology” and may “become over prescriptive [or] stifle innovation”).

¹⁰¹ ISTTF Report at 27. See also *id.* at App. F (statement of Institute for Policy Innovation) (“[W]here government at all levels ... has avoided layering in new regulation [] a discernable benefit to the technology marketplace has continued. Largely because innovation so rapidly

mission concluded, “a combination of public education, consumer empowerment technologies and methods, increased enforcement of existing laws, and industry action are needed” to protect children. *COPA Commission Report* at 9. The Thornburgh Commission agreed, finding that “neither technology nor policy can provide a complete – or even a nearly complete – solution.” Thornburgh Report at 12. Instead, it found that:

While both technology and public policy have important roles to play, social and educational strategies to develop in minors an ethic of responsible choice and the skills to effectuate these choices and to cope with exposure are foundational to protecting children from negative effects that may result from exposure to inappropriate material or experiences on the Internet.

The National Media and Advertisers agree. All involved – parents, government, industry, educators, and others – have a role in ensuring children are protected from inappropriate content, on all platforms. It is significant that previous studies have shown this constitutionally preferred method is also the most feasible – a cooperative, multifaceted effort that emphasizes educating children and families, rather than hoping, in vain, for a technological or regulatory quick fix.

VI. POLICY RECOMMENDATIONS MUST SET REALISTIC BENCHMARKS FOR ASSESSING PARENTAL EMPOWERMENT TOOLS AND STRATEGIES

A central question the *Notice* poses is whether parental empowerment tools and strategies are effective in protecting children. In addressing this issue, the *NOI* focuses principally on “the level of awareness among parents of [household media rules and parental controls] and how effective [they] have been in combating risks.” *NOI* ¶ 41. A number of comments suggest that such tools are not effective, either because too few parents use them, or because the ratings they employ do not meet the commenters’ criteria for “inapp-

outpaces legislation or regulation they simply are not an effective means of problem solving, or worse, they freeze innovation and therefore the related economy.”).

ropriate” content.¹⁰² However, it is imperative in this proceeding that the Commission clearly identify and explain its benchmark for measuring effectiveness. It is not sufficient, for example, simply to state that not enough parents use the V-chip or some other option where it is just one of many available tools and strategies. As explained below, and as courts have widely recognized, the multiplicity of parental control tools outlined above and described elsewhere is a significant strength of the current media environment.

A. Usage Rates Do Not Measure Effectiveness

The Commission exhaustively examined the burgeoning market for parental empowerment tools for various communications platforms in its *CSVA Report*, which served as the starting point for this *Inquiry*. Drawing on that data, this *Notice* pointed to the “wide range of parental control tools that exist and are available today with respect to over-the-air television, cable and satellite television, audio-only programming, wireless services, non-networked devices such as DVD players, video games, and the Internet.” *NOI* ¶ 44. And it identified fifteen criteria by which it analyzed these technologies, focusing on five areas for further study: the level of consumer awareness, pace of adoption, ease of use, understanding of ratings systems, and pace of innovation. *Id.* However, despite its overall awareness of the myriad tools and strategies available for the broadcast medium that now empower parents, as well as the many technologies available

¹⁰² See, e.g., *Morality in Media Comments* at 5 (many parents “are part of the problem” because they are naïve, neglectful, or “feel use of technology to filter or monitor a child’s use of the Internet is problematic for one reason or another”); *PTC Comments* at 3 (“In many instances the content rating [does] not accurately reflect the amount of adult-themed content within the show.”); *U.S. Conference of Catholic Bishops Comments* at 7 (“Media ratings systems need to be expanded to include not only violent, sexual and language content but also illegal drug use, alcohol abuse, and smoking.”).

for other media, the primary thrust of its analysis of effectiveness was whether enough parents use the V-chip.¹⁰³

Parents may choose to use a given control technology, or not, for many reasons. They may not like the one technology mandated by the government and may prefer to use another of the many private alternatives provided by the market. Some parents simply may use one of the many available ratings systems to help guide their programming selections without finding it necessary to program that choice into their television or other receiving device. Others may be parents of older teens, who feel less of a need to use control technologies. As the Third Circuit has explained:

[T]he circumstance that some parents choose not to use filters does not mean that filters are not an effective alternative to [regulation]. Though we recognize that some of those parents may be indifferent to what their children see, others may have decided to use other methods to protect their children – such as by placing the family computer in the living room, instead of their children’s bedroom – or trust that their children will voluntarily avoid harmful material on the Internet. Studies have shown that the primary reason that parents do not use filters is that they think they are unnecessary because they trust their children and do not see a need to block content.

ACLU v. Mukasey, 534 F.3d 181, 203 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009).

Whatever the reason may be, it is not legitimate to assume that a technology has “failed” or that it is not “effective” based on the percentage of parents or other viewers who use it. If “empowering parents” is to be anything more than a euphemism, it must include entrusting parents with the ability to decline to employ such measures. If the

¹⁰³ See *NOI* ¶¶ 45-49; *CSVA Report*, 24 FCC Rcd. at 11416-49. The Commission also found that “[e]vidence of the V-chip’s limited efficacy in facilitating parental supervision of children’s exposure to objectionable broadcast content has reinforced the necessity of the Commission’s regulation [of indecency].” *NOI* ¶ 14. Although it is possible that the fact that the Commission was in litigation at the time over the constitutionality of its broadcast indecency rules may have affected its assessment of V-chip “effectiveness,” its ultimate conclusion seemed to hinge on little more than the percentage of parents who reported using the V-chip.

technology is widely available and it works when used, then it is fully effective. *Playboy*, 529 U.S. at 823-826. The Supreme Court affirmed this analysis in *United States v. Playboy Entertainment Group*. There, the government argued that house-by-house blocking of indecent “signal bleed” was ineffective and that blanket indecency rules were necessary because “fewer than 0.5% of cable subscribers” availed themselves of the option. *Playboy*, 529 U.S. at 816. But the Court disagreed, finding that the blocking option worked when used and that the usage rate did not determine its “effectiveness.” The fact that the public greeted the signal bleed issue with a “collective yawn” was equally probative of the possibility that the public did not consider it to be a serious a problem. *Id.* at 816, 823-26.

For the same reason, data regarding the usage rate for the V-chip does not suggest it is not an effective or useful tool, since it is equally plausible that the parents surveyed used other available technologies, enforced household rules, or used a combination of strategies. Another possibility is that most parents may not have the same level of concern about the possible exposure of their children to advertisements or “inappropriate content” as some of the commenters in this proceeding. The Commission has noted repeatedly that more than two-thirds of children ages 8 to 18 have televisions in their bedrooms, *CSVA Report*, 24 FCC Rcd. at 11416-17; *NOI* ¶ 11 n.7, which may suggest parents are more comfortable with their children’s viewing choices than some advocates of regulation may assume. Some have argued that limiting children’s “alone time” with media may be the best way to shield children from the influence of the media.¹⁰⁴ This may or may not be good parenting advice, but the fact

¹⁰⁴ See *Study: Children Overwhelmed by Media*, Parents Television Council, www.parentstv.org/PTC/news/articles/2010/kaiser.asp.

that most parents do not follow it indicates that those who advocate media regulation have heightened sensitivities to potential media effects compared to the general population.¹⁰⁵

Although the *NOI* cites studies indicating that most parents “‘closely’ monitor their children’s media use” impose restrictions on both the amount and content of viewing, and that the percentage of attentive parents is increasing, *NOI* ¶ 43 & n.73, it asks whether some parents are “unaware of the risks from electronic media use or choose not to be engaged in their children’s media use.” *Id.* ¶ 42. Some commenters go further, asserting that parents “*are part of the problem*” because they choose inappropriate content and generally fail to use parental empowerment tools. *Morality in Media Comments* at 5 (emphasis in original). But these two possibilities present very different policy choices. If parents merely are unaware of the risks, then a rational response would be to provide information via media literacy initiatives, as discussed below. If, on the other hand, the Commission were to agree with some commenters that parents are making bad choices, this is not a problem that government is well-equipped to address.

Whatever the reason(s) a parent may choose not to use some or even all parental controls, the Commission may not conclude that those tools are ineffective because families may fail to recognize or act in accordance with (the government’s or advocacy groups’ idea of) their own interests. *See Ashcroft II*, 542 U.S. at 669 (regulation may not rest on presumptions that “parents lack the ... will, to monitor what [] children see”). Government cannot rely on the “unhelpful, self-evident generality that voluntary measures require voluntary action,” or claim that “voluntary blocking

¹⁰⁵ *See, e.g.,* *IMPACT OF THE COMMERCIAL WORLD* at 25 (“Concerns about the harmful effects of popular culture on children and young people have a very long history, dating back well before electronic technology. These concerns reflect much more general anxieties about the future direction of society; but, as several studies have shown, they can also be inflamed and manipulated by those with much broader political, moral or religious motivations. These concerns occasionally reach the level of a ‘moral panic,’ in which particular social groups and practices are publicly demonized – often on the basis of what are ultimately found to be quite spurious accusations.”).

requires a consumer to take action, or may be inconvenient, or may not go perfectly every time.” *Playboy*, 529 U.S. at 823-824. Such judgments “are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.” *Id.* at 818. The parental empowerment tools discussed in the *CSVA Report* and in this *Notice* expand “the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.” *Id.* The Court has made clear that “Congress may not require [parental empowerment tools] to be used.” *Ashcroft II*, 542 at 669.

To be clear, commenters who suggest that parents are “part of the problem” simply fail to grasp the appropriate role of government in this area. The Supreme Court has long held that parents have a constitutional right to “bring up children” and “to control the education of their own.” *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). Parental choices about “the upbringing of children” are among the rights the Court has ranked “of basic importance in our society” that must be sheltered from unwarranted government “usurpation, disregard, or disrespect.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (internal quotation marks and citation omitted). This includes parental decisions about parental supervision of media usage by their children. *Miller v. Mitchell*, ___ F.3d ___, No. 09-2144, slip op. at 22-25 (3d Cir. March 17, 2010) (affirming injunction barring state interference with parental choice regarding “sexting,” the practice of “sending or posting sexually suggestive text messages and images”). Such matters are not the government’s business.

Additionally, it is unrealistic to suggest that parental control technologies must be “fail-safe” or “foolproof.” *Sable*, 492 U.S. at 129 &130 n.10. Parental control technologies are not to be deemed ineffective by the simple truth that no provision “short of an absolute ban can offer certain protection against ... a determined child.” *Denver Area*, 518 U.S. at 759. *See also Playboy*, 529 U.S. at 826. Ultimately, the Commission must measure the success

of parental control options by asking “compared to what?” The relevant legal inquiry in this regard is whether “alternatives would be at least as effective in achieving the [government’s] purpose that [a regulation] was enacted to serve.” *ACLU v. Mukasey*, 534 F.3d at 198 (quoting *Ashcroft II*, 542 U.S. at 665). This requires not merely showing empowerment tools are “flawed” in some respects, but that they are less effective than regulatory alternatives. *Ashcroft II*, 542 at 669.

B. Multiple and Diverse Empowerment Tools Best Support Individual Choice

The *CSVA Report* found that “there is no single universal rating technology or system that applies across all media sectors,” *CSVA Report*, 24 FCC Rcd. at 11487, and the *Notice* asks whether the creation of a uniform rating system that would apply to various platforms would be “an appropriate objective.” *NOI* ¶ 48. Picking up on these findings, various commenters urge the Commission to adopt a uniform content ratings system so as to enhance the ability of parents to understand and use empowerment technologies.¹⁰⁶ However, any attempt to standardize and regulate rating and blocking technologies would be unrealistic and unworkable. More fundamentally, doing so would not be a worthwhile objective because it would sacrifice the most important characteristic of the current diverse array of options – the ability to meet individual needs.

As the Commission documented in the *CSVA Report*, different parental control devices are designed to operate differently. Some block or “blacklist” access to content targeted as meeting predetermined criteria, others establish “whitelist” parameters that once satisfied allow material to pass through, while yet others facilitate affirmative selection of specific titles, materials, etc., from which a pool or library of content that is

¹⁰⁶ *E.g.*, So We Might See Coalition Comments at 4; Common Sense Media Comments at 2.

acceptable (to the selector) can be created, maintained, and expanded. *See generally, e.g., CSVA Report*, 24 FCC Rcd. at §§ II, VI-VII & 11494-95. Within these categories (blacklisting, whitelisting, etc.), various content controls use different criteria, operate at different levels of specificity (*e.g.*, per-channel, per-program, or per-word or image), and are designed to empower parents in distinct ways. *See NOI* ¶ 44 (“technologies vary greatly with respect to [a number of] criteria”) (citing *CSVA Report*, 24 FCC Rcd. at 11415).

This variation provides flexibility that makes the number and diversity of parental control options a strength of the current environment, not a “problem” to be regulated. *See, e.g., PFF CSVA Comments* at 6-7. The fact that different mechanisms of even the same type (*e.g.*, blocking tools) result in control over different aspects of targeted content does not mean those that are more inclusive, or that block more – or less – are superior or inferior. Because different degrees of control will appeal to the needs of different users, the Commission should view the different capabilities as a strength.

The Third Circuit recognized the value of this diverse approach, finding that “[s]ome filtering programs offer only a small number of settings, while others are highly customizable, allowing a parent to make detailed decisions about what to allow and what to block” by “enabling parents to choose which categories of speech they want to be blocked ... and which age setting they want the product to apply.” *ACLU v. Mukasey*, 534 F.3d at 200. The court also observed that filtering can be used by parents even if they have more than one child. Thus, “if a family has four children, many filtering products will enable the parent to set up different accounts for each child, to ensure that each child is able to access only the content that the parents want that particular child to access.” *Id.* This flexibility allows parents to tailor

empowerment technology “to their own values and needs and to the age and maturity of their children” as opposed to a “one size fits all” approach. *Id.* at 203.

This capability would not be improved by an attempt to fashion universal ratings. “[N]o rating system will ever be able to scrutinize and label all potentially offensive or upsetting content,” not only due to the sheer quantity and variation of available material (even in a single medium, let alone across all media) and/or rapid evolution of technologies, markets, and expression, but also because “there will always be a trade-off between sophistication and simplicity; between intricacy and ease-of-use.” *PFF CSVA Comments* at 3 (quoting Kutner & Olson, *supra*, at 186). *See also* Appendix A, *ANA/AAF/AAAA CSVA Reply*, at 2-10. Moreover, as the Commission recognized long ago, “the question of what is appropriate for family viewing is entirely subjective.” *Broadcast of Violent, Indecent, and Obscene Material*, 51 FCC.2d 418, 419 n.5 (1975). Ratings are by definition subjective – and should be – so that consumers can choose a product or service that best matches their family’s values.¹⁰⁷

Finally, content control tools and/or household rules are not the solution to every perceived problem. The *Notice* presupposes in observing that household rules may not prevent children from being exposed to unwanted ads because it does not block them in advance. But as the *Thornburgh Report* found, education is the most effective way to enable children to deal with messages they encounter. *See supra* at 60. Determined children “are bound to find ways to circumvent any technological measures,” the report found, but “to the extent social and

¹⁰⁷ *See PFF CSVA Comments* at 3 (“[M]edia rating and content-labeling efforts are not an exact science; they are fundamentally subjective exercises. Ratings are based on value judgments [] by humans who all have somewhat different values. Those doing the rating ... evaluate artistic expression and assign labels to it that provide the rest of us with [] rough proxies about what is in [a] particular piece of art, or what age group should (or should not) be consuming it. In a sense ... all rating systems will be inherently ‘flawed’ since humans have different perspectives and values that they will use to label or classify content.”).

educational strategies can reduce the desire and motivation for seeking out inappropriate material or engaging in inappropriate activities, such behavior can be reduced.” *Thornburgh Report* at 224. “When technological protection does not work, or when it is not present, the individual [] must rely on his or her own internal resources to cope with the issue, whether it is in choosing to refrain from ‘getting into trouble’ or knowing how to cope with whatever trouble arises.” *Id.* Sometimes, the answer is not preventing content that may raise concerns for some parents from reaching children – rather, it may be preferable to equip children with the intellectual, emotional, and/or social skills to deflect such adverse effects.

C. The Commission Should Encourage Media Literacy Initiatives

As noted above, media literacy education is valuable in its own right as a strategy for protecting children. But it also is an appropriate policy response for any findings that parents lack awareness of risks, or competence, in using empowerment tools. Studies show that education regarding media literacy presents the greatest opportunity in this regard, because it helps parents make individualized choices about what is appropriate for their own children, and it helps children develop personal mechanisms for making smart choices about media on their own. The *Notice* likewise notes that education provides families the best of all worlds by “enabl[ing] children to enjoy the benefits of electronic media while avoiding the potential harms.” *NOI* ¶ 50.

A variety of literacy initiatives already have been undertaken by industry, non-profits, and government agencies. The *Notice* lists the Center for Media Literacy “CML MediaLit Kit,” Common Sense Media’s Parent and Teacher Media Education Program, training materials from the National Institute on Media and the Family, and offerings from NetSmartz, CyberSmart!, and i-SAFE Inc., among others. *Id.* ¶ 53 n.101. A few other notable examples include:

- The **National Association for Media Literacy Education (NAMLE)** is “a national membership organization dedicated to advancing the field of media literacy education in the United States” with over 600 educator members. See www.amlainfo.org.

Initially funded by AOL Time Warner, Discovery Communications, and Sesame Workshop, NAMLE now receives support from media companies, foundations, universities, the Office of National Drug Control Policy, and the Department of Education. *See id.*

- **TV Watch**, a broad coalition including networks, the U.S. Chamber of Commerce, and non-profits, is “dedicated to using all communications available to educate parents about the existing tools to manage their children’s television consumption; and to give voice to the majority of Americans who believe responsibility – not more regulation – is the solution.” *See* www.televisionwatch.org.
- **“Pause-Parent-Play”** is a cooperative created by “members of Congress, corporations, entertainment companies and family groups ... with the goal of helping parents and caregivers easily control what children watch, hear and play – from TV and movies to video games and music.” *See* www.pauseparentplay.org.
- **OnGuardOnline.gov** is a collaboration between industry and government groups that provides practical tips from the federal government and the technology industry to help consumers be on guard against Internet fraud, to secure their computer, and to protect their personal information. *See* www.onguardonline.gov/index.html.

Some jurisdictions have gone further, mandating media literacy as part of a standardized educational curriculum. In Canada, for example, media literacy is required and every province has mandated media education in its curriculum. In 1993, five provinces joined to develop curriculum frameworks for Grades K to 12. *See* www.media-awareness.ca. This standard curriculum “contains a strong media education component,” in which “an understanding of media texts is treated as an important language skill.” Thus, for example, the English Language Arts framework requires that students “will listen, speak, read, write, view, and represent to comprehend and respond personally and critically to oral, print, and other media texts.” Other provinces have

developed similar, but distinct, media education programs in schools.¹⁰⁸ *Id.* The Media Awareness Network (MNet), a Canadian non-profit organization supported by industry and non-profit groups, as well as the Canadian government, complements media literacy education by providing “one of the world’s most comprehensive collections of media and digital literacy resources.” *See* www.media-awareness.ca. There are accordingly numerous models in place for the FCC to commend or support as preferable alternatives to regulation that restricts access to any media content or platform.

VII. POLICY RECOMMENDATIONS MUST RECOGNIZE THE LIMITS OF FCC AUTHORITY

The *NOI*’s broad focus on the “evolving media landscape” seeks comment on a wide array of content platforms, many of which are not subject to traditional media regulation. The *Notice* seeks comment on all electronic communication channels and means of content delivery – including broadcasting, multichannel platforms, prerecorded content and various playback devices, the Internet, video games, and wireless services – and cogently asks “whether the Commission has statutory authority to take any proposed actions and whether those actions would be consistent with the First Amendment.”¹⁰⁹ As shown below, the Commission faces significant limits in this regard.

¹⁰⁸ Similar, if more limited, efforts also are in place in some U.S. states. The *Notice* “note[s] that several states include online safety as a part of their required school curriculum.” *NOI* ¶ 52 n.99 (citing Virginia, California, and Illinois initiatives).

¹⁰⁹ *NOI* ¶ 9. It also hints, however, that the Commission at least suspects the answer, insofar as the *Notice* recognizes the FCC “has varying degrees of statutory authority with respect to different media,” and that “compatibility ... with the First Amendment” must be achieved for any action. *Id.* ¶ 58.

A. Statutory Limits of the FCC's Authority

The Communications Act does not confer authority on the FCC to regulate all media platforms identified in the *Notice*, or to regulate most types of content it targets. In this regard, the Commission's acknowledgement it "has varying degrees of statutory authority" is an understatement. *Id.* ¶ 58. The FCC, like other agencies, "literally has no power to act ... unless and until Congress confers power upon it." *Louisiana PSC v. FCC*, 476 U.S. 355, 374 (1986). "It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated ... by Congress." *American Library Ass'n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) ("*ALA v. FCC*"). Here, Congress has not authorized the FCC to regulate all media for the purpose of "empowering parents."

The FCC has broad jurisdiction over broadcast radio and TV, but even there its power is not unlimited.¹¹⁰ The Commission also has jurisdiction over cable, satellite and wireline and wireless telephony, but its authority in those spheres, especially as relates to content-delivery, has significant constraints.¹¹¹ Expanding beyond those limits presents special problems, especially insofar as courts have "categorically rejected" the "extraordinary proposition ... that [the FCC] possesses *plenary* authority to act within a given area simply because Congress [] endowed it with *some* authority ... in that area." *ALA v. FCC*, 406 F.3d at 708 (emphasis original).

As to the remaining platforms – such as the Internet, video games, and prerecorded video or audio and their associated playback devices – the Communications Act confers no authority

¹¹⁰ See generally, e.g., *ALA v. FCC* (jurisdiction over technical standard for TV receivers did not confer authority to establish "broadcast flag" rules); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002); *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000).

¹¹¹ E.g., *MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (FCC cannot regulate content without express statutory authority); *Midwest Video Corp. v. FCC*, 440 U.S. 689 (1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 28 (D.C. Cir. 1977).

on the Commission to regulate these media. *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 164 (1968) (the FCC “ha[s] not been given plenary authority over ‘any and all enterprises which happen to be connected with one of the many aspects of communications.’”). That the Act is silent as to these platforms cannot be viewed as anything but a denial of statutory authority over them, as it is “entirely untenable” that the FCC may adopt rules in a particular area simply “because Congress did not expressly foreclose the possibility.” *MPAA v. FCC*, 309 F.3d at 805. In this regard, the Kaiser Foundation has observed that the FCC faces “jurisdictional challenges” effecting change across the broad scope of media platforms implicated by the *Notice* and that “it’s not clear how [it] can assert [] policies over new platforms.”¹¹²

Nor can the Commission assert jurisdiction based on ancillary authority or on the CSVA. Absent an express grant of authority, the Commission in the past has asserted it could extend its rules under its ancillary jurisdiction,¹¹³ but evolving law has restricted the use of ancillary jurisdiction.¹¹⁴ Regardless of any asserted “salutary” objectives the FCC might seek to pursue, the Communications Act “does not give [it] unlimited authority to act as it sees fit.” *MPAA*, 309 F.3d at 798, 807. Nor do general grants of power in Sections 4(i) and 303(r) provide authority to regulate content, as any regulation arising out of the *Notice* surely would. Such “necessary and proper” public interest provisions “cannot carry the weight” of authorizing regulation of program content “if the agency does not otherwise have the authority to promulgate [] regulations.” *Id.* at

¹¹² *Research, Policies for Kids Media Unclear as Usage Surges*, *supra*, at 8 (quoting Victoria Rideout of Kaiser Family Foundation).

¹¹³ *See, e.g., Amendment of Part 74, Subpart K, of the Commission’s Rules and Regulations Relative to Community Antenna Television Systems*, 20 FCC.2d 201, 220 (1969).

¹¹⁴ *See, e.g., Midwest Video*, 440 U.S. at 706-07; *HBO v. FCC*, 567 F.2d 9 (D.C. 1977); *ALA v. FCC*, *supra* at 76. *Cf. ACLU v. FCC*, 823 F.2d 1567 n.32 (D.C. Cir. 1987) (“skeptical” review is appropriate where agency asserts power in “new arenas”).

806. Moreover, the Child Safe Viewing Act’s mandate for the Commission to “study” and “report” on certain matters does not confer authority to adopt regulations.¹¹⁵

Any regulations arising out of the instant *Notice* necessarily would implicate media content, making the need to identify a specific grant of statutory authority absolutely critical.¹¹⁶ This is true not only because “such regulations invariably raise First Amendment issues,” *id.* at 805, but also because the Communications Act contains specific provisions expressly limiting content-regulation. *See* 47 U.S.C. §§ 326; 544(f). *See also* *MPAA*, 309 F.3d at 805.

The absence of specific authority applies not just to the different media platforms, but also to most content categories discussed in the *Notice*. There are significant limits on FCC statutory authority to regulate broadcast content,¹¹⁷ and even where it has some jurisdiction over children’s programs, the ability to impose similar regulation on cable has never been judicially approved.¹¹⁸ Further, the only statutory authority that exists for “indecent, profanity, offensive

¹¹⁵ *MPAA*, 309 F.3d at 802. *See also id.* at 807 (“Congress authorized and ordered the Commission to *produce a report* – nothing more, nothing less Once [it] completed the task of preparing the report ... its delegated authority ... ended.”) (emphasis in original).

¹¹⁶ *See MPAA*, 309 F.3d at 807. *See also id.* at 803 (while Section 151 authorizes “regulations ... consistent with the public interest,” any argument that it authorizes “regulations [that] significantly implicate program content” is “very frail”).

¹¹⁷ *See CBS v. FCC*, 453 U.S. at 395 (“the broadcasting industry ... is entitled under the First Amendment to exercise ‘the widest journalistic freedom’”) (quoting *Columbia Broad. Sys., Inc. v. Dem. Nat’l Comm.*, 412 U.S. 94, 110 (1973)).

¹¹⁸ For the purpose of the CTA’s commercial limits, the term “commercial television broadcast licensee” includes cable operators. 47 U.S.C. § 303a(d). The extension of such restrictions to cable and other non-broadcast platforms has never been tested, however, and “key differences” between broadcasters and other content providers cast doubt on the constitutionality of enforcing such content regulations on the latter. *See Playboy*, 529 U.S. at 815 (citing “key difference” between cable and broadcasting in striking down indecency regulations imposed on cable operators); *Turner I*, 512 U.S. at 637 (“the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable”). *Cf.* Appendix D, *National Media Provider Sponsorship ID Comments*, § II.D (questioning application of sponsorship ID provisions to cable).

language, sexual content, and sexual behavior,” *see NOI* ¶¶ 28, 30, appears in 18 U.S.C. § 1464, which applies only to the far narrower categories of “obscenity, indecency, and profanity” aired on broadcast television and radio. There is no statutory mandate whatsoever with regard to “violent” programming, Appendix C, *Media Association Violent Programming Comments*, § V, nor for content that “impacts health” or implicates “tobacco use, sexual behavior, or drug and alcohol use.” *See NOI* ¶¶ 28, 30. Under *MPAA v. FCC, et al.*, this absence of express statutory authority makes clear the Commission would be unable on its own to extend regulation to these new areas. The FCC’s authority to regulate “consistent with the public interest” does not confer “unlimited authority to act as it sees fit with respect to all aspects of television transmission.” *MPAA*, 309 F.3d at 798, 807.

B. Constitutional Limits of the FCC’s Authority

Even if the FCC’s statutory authority was more expansive, the First Amendment sharply limits the Commission’s ability to regulate media content. Its most obvious grant of authority applies to over-the-air broadcasts, but even in that context, the Supreme Court has characterized as “minimal” the “extent to which the FCC and Congress [may] actually influence the programming offered by broadcast stations.” *Turner I*, 512 U.S. at 637. As the Court explained, its “cases have recognized that Government regulation over the content of broadcast programming must be narrow,” and that broadcast licensees “retain abundant discretion over programming choices.” *Id.* at 651 (citing *FCC v. League of Women Voters of Cal.*, 468 U.S., 364 378-380 (1984); *CBS v. DNC*, 412 U.S. at 126). Whatever FCC authority over broadcast content may have existed at its historical apex, the phenomena of media abundance and convergence have eroded substantially the theoretical underpinnings for government authority over broadcasting, and resulted in communication channels over which the FCC holds no constitutional power to restrict content.

1. Constitutional Justifications for FCC Authority Over Broadcast Content are Waning

The very premise of this *Notice* presumes that the traditional justifications for broadcast regulation have been eroded. *See supra* § III. The *CSVA Report* and *Thirteenth Annual Report* both document that the vast number of cable, satellite, and other channels entering the home undermines any notion that broadcasting is “uniquely pervasive.” Similarly, the *CSVA Report* places *Pacifica’s* outdated assumptions about broadcasting’s “unique accessibility” in stark relief. *CSVA Report*, 24 FCC Rcd. at 11417-19, 11438, 11449-50. Given current realities as documented by the Commission, *Pacifica’s* status as a basis of constitutional support for FCC control over broadcast content appears increasingly shaky, and its support for regulation of other media is nonexistent.

Regarding *Red Lion*, the *National Media Provider Sponsorship ID Comments* thoroughly explored how the “evolving media landscape” reduces the latitude afforded the FCC under this case, steeped as it is in “‘commercially acceptable technology’ as of 1969.”¹¹⁹ Since then, passage of time and changing conditions have eroded the FCC’s constitutional authority to regulate broadcast content.¹²⁰ Without repeating analyses that appear in the attached Appendix, suffice it to say the vast changes that the media marketplace has undergone support a conclusion that “the scarcity rationale for government regulation no longer applies,” *id.* (quoting Communications Act of 1995, H. Rep. No. 104-204, at 54 (1995)), and call into serious question *Red Lion’s* rationale. As the National Media and Advertisers explained, the FCC itself has

¹¹⁹ App. D § III.A.4 (quoting *News Am. Publ’g, Inc. v. FCC*, 844 F.2d 800, 811 (D.C. Cir. 1988) (quoting *Red Lion*, 395 U.S. at 388); *Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987); *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968)).

¹²⁰ *See id.* (citing *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999); *Radio-Television News Directors’ Ass’n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000) (*per curiam*); *Anti-Defamation League of B’nai B’rith v. FCC*, 403 F.2d 169, 172 (D.C. Cir. 1968)).

reached the same conclusion over the years.¹²¹ Accordingly, even as to broadcasting, the constitutionality of the regulatory intervention suggested by the *Notice* and proposed by certain commenters is highly doubtful.

2. There is No Constitutional Authority to Impose Content Regulations on Non-Broadcast Media Platforms

For non-broadcast platforms the First Amendment imposes an essentially insurmountable barrier to regulating media content. Content-based regulation outside broadcasting is subject to strict scrutiny, which virtually always requires invalidation of the challenged law or rule.¹²² As the *Turner I* Court held, “the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in cases elaborating it, does not apply” to its most proximate competing platform, cable.¹²³ The Court explained that the “spectrum scarcity” rationale for broadcast content regulation is inapplicable to cable, 512 U.S. at 638-39, and that “fundamental technological differences between broadcast and cable,” that justified the “more relaxed standard” of *Red Lion* “is inapt when determining [] First Amendment validity” for cable. *Id.* at 637. *See also Time Warner Entm’t Co. v. FCC*, 56 F.3d 151, 181 (D.C. Cir. 1995).

¹²¹ *See id.* (citing *Meredith Corp.*, 809 F.2d at 867 (citing *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC.2d 143 (1985); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 660-66 (D.C. Cir. 1989)). *See* John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* (Media Bureau Staff Research Paper, March 2005) at 8).

¹²² Content-based regulations subject to strict scrutiny are “presumptively invalid,” *see e.g.*, *ISDA v. St. Louis*, 329 F.3d at 958; *see also Eclipse Enters.*, 134 F.3d at 67; *Video Software Dealer’s Ass’n v. Webster*, 968 F.2d 684, 689 (1992), and “[a]s is well known, strict scrutiny readily, and almost always, results in invalidation.” *Vieth v. Jubelirer*, 541 U.S. 267, 294 (2004).

¹²³ *Turner I*, 512 U.S. at 637. *See also Playboy*, 529 U.S. at 815; *Denver Area*, 518 U.S. 727; *HBO*, 567 F.2d at 28.

The same easily can be said of every other non-broadcast medium mentioned in the *Notice*. The Supreme Court held that online communications cannot be subjected to the lower level of protection that historically applied to broadcasting. *Reno*, 521 U.S. at 876-877. It also has made clear that content regulation of film and similar media are subject to strict scrutiny and rarely withstand constitutional review.¹²⁴ Similarly, courts unanimously have rejected attempts to regulate video game content, which receives the same First Amendment protection as books, film, and electronic mass media. *See, e.g., Kendrick*, 244 F.3d at 577-78. *See also supra* at 87 & note 134. Additionally, the pervasiveness and accessibility characteristics that *Pacifica* articulated are not present for non-broadcast platforms, given the subscription nature of the services and/or availability of technological means of controlling whether they enter the home. The availability of such technological controls was precisely why the Supreme Court invalidated content regulation in every non-broadcast electronic medium.¹²⁵

Nor do the facts that some media are “evolving” or are new to the “landscape” change the equation. As the Supreme Court recently held, “[t]he Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating ... when the Bill of Rights was adopted.” *Citizens United v. FEC*, 130 S. Ct. at 906. *See also Joseph Burstyn*, 343 U.S. at 503 (“Each method [of

¹²⁴ *See, e.g., 12 200-ft. Reels of Film, supra; Joseph Burstyn*, 343 U.S. 495, 501 (1952); *Maryland v. Freedman*, 380 U.S. 51 (1965); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); *Ashcroft I*, 535 U.S. 234. *See also VSDA v. Webster*, 968 F.2d at 689-91.

¹²⁵ *Reno v. ACLU*, 521 U.S. 844 (Internet); *Playboy*, 529 U.S. 803 (cable); *Sable*, 492 U.S. 115 (telephony). *See also 12 200-ft. Reels*, 413 U.S. 123, 130 n.7 (1973) (film/ cinema); *id.* (print and photos/graphic material); *Butler*, 352 U.S. at 383 (same); *Hamling v. United States*, 418 U.S. 87, 113-114 (1974) (same); *Bolger*, 463 U.S. 60 (mail).

expression] tends to present its own peculiar problems ... [b]ut the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary.”).

3. There is No Constitutional Authority for Regulating Most Content Categories Described in the *NOI*

The *Notice* asks about altering FCC policies to deal with speech in a number of different content categories, including “offensive language, sexual content, violence, [and] hate speech,” and media that “impact health,” including those implicating “tobacco use, sexual behavior, or drug and alcohol use.” *NOI* ¶ 28. However, there is no legal support for expanding regulation to speech in these subject areas.¹²⁶

The Commission's constitutional authority to regulate broadcast indecency currently is under review in the circuit courts.¹²⁷ Even if the FCC's limited ability to regulate in this area is upheld, there is no good argument for extending the regime to other subjects. With respect to media violence, “[m]aterial limited to forms of violence is ... given the highest degree of [First Amendment] protection,” *Sovereign News Co. v. Falke*, 448 F.Supp. 306, 394 (N.D. Ohio 1977), and “every court that has considered the issue has invalidated attempts to regulate materials solely based on violent content, regardless of whether [it] is called violence, excess violence, or included within the definition of obscenity.” *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 531 (Tenn. 1993). The attached *Media Association Violent Programming Com-*

¹²⁶ Although early cases articulated a limited set of categories of unprotected speech (“the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting words’”), *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942), that list has been significantly narrowed over the years such that some scholars deem categorical approaches to be “discredited and abandoned.” Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* 2-70 (1997). More recently, courts have been loath to create new categories of unprotected speech. *United States v. Stevens*, 533 F.3d 218 (3d Cir. 2008) (*en banc*), *cert. granted*, 129 S. Ct. 1984 (2009).

¹²⁷ See *Fox Television Stations, Inc. v. FCC*, Nos. 06-1760, *et al.* (2d Cir. argued Jan. 13, 2010); *CBS Corp. v. FCC*, No. 06-3575 (3d Cir. argued Feb. 23, 2010); *ABC Inc. v. FCC*, Nos. 08-841 *et al.* (2d Cir. argued Feb. 5, 2009).

ments thoroughly explore all aspects of the constitutionality of regulating violent content, giving all the reasons why doing so would violate the First Amendment¹²⁸ and canvassing the unanimous court decisions on the subject.¹²⁹ There is no likelihood the FCC could craft regulations targeting violent content that would survive First Amendment scrutiny, and potential regulation of “hate speech” is likewise constitutionally infirm.¹³⁰ Nor is there any valid basis for regulating expression based on arguments that it may foster the “wrong” attitudes or behavior.¹³¹

Although there is somewhat more latitude for government regulation of advertising than for noncommercial speech, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980), the First Amendment does not permit the government to lower

¹²⁸ App. C § IV. As shown in the *Media Association Violent Programming Comments* and elsewhere herein, every court that has considered the matter has concluded the government cannot constitutionally regulate “violent” content, either because definitions of what qualifies for regulation is insurmountably vague; because there is insufficient evidence of an impact from viewing “violent” content to demonstrate an interest that is compelling and/or could be advanced by regulation; because less restrictive alternatives to regulation exist, because the regulations were overbroad or underinclusive or both; because regulatory efforts compelled speech and/or acted as prior restraints, or for several or all these reasons. See cases cited *supra*, note 82. See also *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) *aff’d mem.*, 475 U.S. 1001 (1986); *Eclipse Enters.*, 942 F.Supp. at 806-07.

¹²⁹ Cases decided since the Media Associations proffered this analysis have reaffirmed this point. See Letter from Robert Corn-Revere, Counsel to the Media Associations, to Marlene H. Dortch, Secretary, FCC, Dec. 7, 2005, MB Docket No. 04-261; *VSDA v. Schwarzenegger*, 556 F.3d 950; *ESA v. Swanson*, 519 F.3d 768; *ESA v. Blagojevich*, 469 F.3d 641; *ESA v. Granholm*, 426 F.Supp.2d 646, all *supra* note 82.

¹³⁰ See, e.g., *Virginia v. Black*, 538 U.S. at 359 (“hate speech” may be punished only if it constitutes a “true threat”). See also *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). Importantly, speech transmitted through the mass media or posted online to be consumed at a time and place of its audience’s choosing generally lacks the immediacy and the directedness required for a “true threat.” See, e.g., *United States v. White*, 638 F.Supp.2d 935 (N.D. Ill. 2009); *Sheehan v. Gregoire*, 272 F.Supp.2d 1135 (W.D. Wash. 2003).

¹³¹ See, e.g., *Eclipse Enters.*, 942 F.Supp. at 807 (citing *Zamora v. CBS*, 480 F.Supp. 199 (S.D. Fla. 1979); *DeFilippo v. NBC, Inc.*, 446 A.2d 1036 (R.I. 1982); *Bill v. Superior Court*, 187 Cal.Rptr. 625 (1982); *Olivia N. v. NBC*, 178 Cal. Rptr. 888, 894 (Cal. App. 1st Dist. 1981)). See also *Herceg v. Hustler Magazine, Inc.*, 565 F.Supp. 802, 804-05 (S.D. Tex. 1983).

the overall level of discourse in the marketplace to what it believes is appropriate “for the sand-box.” *Butler v. Michigan*, 352 U.S. 380. In this proceeding, the *NOI*’s questions are focused on what the Commission characterizes as “excessive” or “exploitive” advertising for children, but there is no suggestion the ads at issue are untruthful or misleading. Instead, the evident concern is that advertisements may cause children (or, more precisely, the parents who make most purchasing decisions) to buy and consume products that will affect them adversely. However, as explained *supra* in Section IV, the causal premise underlying the *Inquiry* is far from established.

Moreover, the concerns set forth in the *Notice* provide a dubious basis for restricting commercial speech, particularly to the extent the Commission considers expanding the concept of advertising that is “directed to children.” It is “[p]recisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching [that] they usually rest solely on the offensive assumption that the public will respond irrationally to the truth,” and it is why courts must be “skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.” *44 Liquor-mart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1986) (pl. op.).

Additionally, the government cannot impose broad bans on advertising directed to adults because of the possibility that children may see it. *Bolger*, 463 U.S. 60; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). Thus, the government may not sweep away adults’ First Amendment rights, even in the context of advertising for adult products, simply by asserting an interest in protecting children. *Lorillard*, 533 U.S. at 555. To quarantine the general public in order to shield juveniles from commercial messages “is to burn the house to roast the pig.” *Butler*, 352 U.S. at 526. Although commercial speech restrictions are not subjected to the strictest scrutiny, the First Amendment requires that “if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so.” *Western States*, 535

U.S. at 371. Importantly, as detailed above, the government’s objectives are best achieved through the less restrictive alternative of media literacy and education.

C. Constitutional Limits on Filtering and Ratings Solutions

The *Notice* laudably concentrates on the use of parental empowerment tools, including ratings and filtering technology, as the way to shield children from material their parents want them to avoid. *NOI* ¶¶ 44-49. *See generally CSVA Report*. This focus is consistent with the growing recognition that “targeted blocking is less restrictive than banning” speech, and the government cannot ban speech “if targeted blocking is a feasible and effective means of furthering its compelling interests.” *Playboy*, 529 U.S. at 815. *See Ashcroft II*, 542 U.S. at 665; *Mukasey*, 534 F.3d at 198-204. While we appreciate the fact that a significant purpose of this *Notice* is to determine whether parental empowerment tools are in fact “a feasible and effective means” of furthering the government’s interest, the *NOI* also asks what steps Congress or the Commission should take to give parents access to multiple ratings systems, and whether a uniform ratings system should be created. *NOI* ¶¶ 48-49. In response, various commenters propose government policies to regulate ratings systems.¹³²

As it reviews this issue, the Commission should be aware of the fact that adopting policies to oversee or control ratings or parental empowerment tools changes their essential nature as an *alternative* to government regulation. Indeed, the U.S. government generally looks favorably on the availability of filtering options that parents and other end-users can deploy, *see*, e.g., Pub. L. 104-104, 110 Stat. 56, §551(a)(9) (Feb. 8, 1996); 47 U.S.C. § 230(b)(3)-(4), (c), but at the same time, the Commerce Secretary and the U.S. Trade Representative lodged a human

¹³² *See, e.g.*, CSM Comments at 2; So We Might See Comments at 4. *Cf.* Campaign for a Commercial Free Childhood Reply Comments at 11 (arguing “Commission should institute a rule that movies and tie-ins for movies with a PG-13 or more restrictive rating should not be advertised” during certain times).

rights protest when China announced it would require all computers to have “Green Dam” blocking technology.¹³³

This distinction between encouragement and mandates is crucial in any legal analysis of filtering or ratings systems. Private sector ratings historically have been considered a constitutionally benign way of informing consumers in advance about the nature of a particular media product, and the MPAA film classification system is a paradigmatic example of a successful system. But an entirely different analysis applies when such a voluntary, private system is incorporated into government regulation. When that happens, it no longer operates as a private and voluntary system, but is infused with state action and is subject to constitutional limits. For that reason, courts have uniformly invalidated various local and state efforts to incorporate MPAA ratings into local law.¹³⁴

Courts similarly have struck down efforts to compel the use of labels or ratings. Most recently, the Ninth and Seventh Circuits invalidated state laws that required retailers to affix government-specified labels on large stickers on “violent” and “sexually explicit” video games. Both held the requirement to communicate “a subjective and [] controversial message” regarding game content through “a state-designated label” was too “opinion-based” to withstand consti-

¹³³ See Office of the United States Trade Representative, *Secretary Gary Locke and USTR Ron Kirk Call on China To Revoke Mandatory Internet Filtering Software*, Press Release, June 24, 2009, available at www.ustr.gov/about-us/press-office/press-releases/2009/june/secretary-gary-locke-and-ustr-ron-kirk-call-china-rev.

¹³⁴ E.g., *Neiderhiser v. Borough of Berwick*, 840 F.2d 213 (3d Cir. 1988); *Drive-in Theaters v. Huskey*, 305 F.Supp. 1232, 1236 (W.D.N.C. 1969) (a local authority cannot restrict speech based on ratings “devised in Hollywood or New York for material which [it] had never seen”) (emphasis original), *aff’d* 435 F.2d 228 (4th Cir. 1970); *Engdahl v. City of Kenosha*, 317 F.Supp. 1133 (E.D. Wis. 1970); *MPAA v. Specter*, 315 F.Supp. 824 (E.D. Pa. 1970); *Swope v. Lubbers*, 560 F.Supp. 1328, 1334 (W.D. Mich. 1983); *Gascoe, Ltd. v. Newtown Township*, 699 F.Supp. 1092 (E.D. Pa. 1988); *Borger v. Bisciglia*, 888 F.Supp. 97, 100 (E.D. Wis. 1995); *State v. Watkins*, 191 S.E. 2d 135 (S.C. 1972); *Potter v. State*, 509 P.2d 933, (Okla. Ct. Crim. App. 1973).

tutional scrutiny. *ESA v. Blagojevich*, 469 F.3d at 652; *VSDA v. Schwarzenegger*, 556 F.3d at 967. The cases applied the basic First Amendment principle that mandating speech “that a speaker would not otherwise make” necessarily “alters the content of the speech.” *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). In this regard, it is important to note that in establishing V-chip requirements, Congress was careful to provide for a ratings system to be devised by the industry, not by government.¹³⁵

The same principles limit the government’s ability to require filtering technologies. Courts have held that the government may support and promote the use of filtering.¹³⁶ But they have drawn a sharp distinction between efforts to encourage the use of filters and imposing mandates. *See e.g., Ashcroft II*, 542 U.S. at 669 (acknowledging that “Congress may not require [filtering] to be used”). Thus, in *Mainstream Loudoun v. Board of Trustees of the Loudoun County Pub. Library*, 24 F.Supp.2d 552 (E.D. Va. 1998), the court held that requiring the use of content filters in a public library violates the First Amendment. *See also Mainstream Loudoun v. Board of Trustees of the Loudoun County Pub. Library*, 2 F.Supp.2d 783, 792 (E.D. Va. 1998) (denying motion to dismiss) (“the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge”) (citation omitted). Accordingly, any policies that may eventually result from this proceeding must avoid government mandates that either require filters to be used or dictate how they should work.

¹³⁵ *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 551(b), codified at 47 U.S.C. § 303(w)(1). Although the law would have allowed the FCC to establish a ratings system if it declined to approve the one devised by industry, that provision has never been judicially tested or approved.

¹³⁶ *E.g., Ashcroft II*, 542 U.S. at 669-70; *United States v. American Library Assn., Inc.*, 539 U.S. 194 (2003); *Mukasey*, 534 F.3d at 198-199.

CONCLUSION

The National Media and Advertisers agree parents should be empowered to help youth navigate the “evolving media landscape,” but cannot endorse any government role beyond aiding them to discover, understand, and use to the extent they see fit, the myriad content control tools and strategies that exist, and striving to make children more media literate and savvy.

Respectfully submitted,

**American Advertising Federation
American Association of Advertising Agencies
Association of National Advertisers, Inc.
CBS Corporation
Direct Marketing Association
Discovery Communications, LLC
Fox Entertainment Group
Grocery Manufacturers Association
Illinois Broadcasters Association
Interactive Advertising Bureau
Maine Association of Broadcasters
NBC Universal, Inc.
Pennsylvania Association of Broadcasters
Promotion Marketing Association
Texas Association of Broadcasters
Viacom Inc.
The Walt Disney Company
Washington State Association of Broadcasters**

By /s/ Robert Corn-Revere

Robert Corn-Revere
Ronald G. London
John R. Eastburg
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW, Suite 200
Washington, D.C. 20006-3402
(202) 973-4200
Counsel

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ATTACHMENT A

National Media and Advertisers

American Advertising Federation. Headquartered in Washington, D.C., the American Advertising Association (“AAF”) is the trade association that represents 50,000 professionals in the advertising industry. AAF’s 130 corporate members are advertisers, agencies and media companies that comprise the nation’s leading brands and corporations.

American Association of Advertising Agencies. Founded in 1917, the American Association of Advertising Agencies (“AAAA”) is the national trade association representing the advertising business in the United States. AAAA’s nearly 450 members represent virtually all the large, multi-national advertising agencies, as well as hundreds of small and mid-sized agencies, which together maintain 13,000 offices throughout the country. Its membership produces approximately 75 percent of the total advertising volume placed by agencies nationwide.

Association of National Advertisers, Inc. The Association of National Advertisers, Inc. (“ANA”) leads the marketing community by providing its members insights, collaboration and advocacy. ANA’s membership includes over 350 companies with 9,000 brands that collectively spend over \$250 billion in marketing communications and advertising annually in the U.S. The ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs and advance, promote and protect all advertisers and marketers. For more information, visit www.ana.net.

CBS Corporation. CBS Corporation (NYSE: CBS.A and CBS) is a mass media company with constituent parts that reach back to the beginnings of the broadcast industry, as well as newer businesses that operate on the leading edge of the media industry. The Company, through its many and varied operations, combines broad reach with well-positioned local businesses, all of which provide it with an extensive distribution network by which it serves audiences and

advertisers in all 50 states and key international markets. It has operations in virtually every field of media and entertainment, including broadcast television (CBS and The CW — a joint venture between CBS Corporation and Warner Bros. Entertainment), cable television (Showtime Networks and CBS College Sports Network), local television (CBS Television Stations), television production and syndication (CBS Television Studios, CBS Studios International and CBS Television Distribution), radio (CBS Radio), advertising on out-of-home media (CBS Outdoor), publishing (Simon & Schuster), interactive media (CBS Interactive), music (CBS Records), licensing and merchandising (CBS Consumer Products), video/DVD (CBS Home Entertainment) and motion pictures (CBS Films).

Direct Marketing Association. Founded in 1917, The Direct Marketing Association (“DMA”), representing companies from dozens of vertical industries in the U.S. and 48 other nations – including nearly half of Fortune 100 companies, is the leading global trade association of businesses and nonprofit organizations using multichannel direct marketing tools and techniques. In 2009, commercial and nonprofit marketers spent \$149.3 billion on direct marketing, representing 54.3% of all U.S. ad expenditures, that will generate approximately \$1.783 trillion in incremental sales, accounting for 8.3% of total U.S. gross domestic product. DMA advocates standards for responsible marketing, promotes relevance as the key to reaching consumers with desirable offers, and provides cutting-edge research and education to improve results throughout the end-to-end direct marketing process.

Discovery Communications, LLC. Discovery Communications, LLC (“Discovery”) is a leading global media and entertainment company that provides television programming across multiple platforms in the United States and over 170 other countries. Discovery’s worldwide networks include the Discovery Channel, TLC, Animal Planet, Science Channel, Planet Green, Discovery Health, and HD Theater. Discovery also develops and sells consumer and educational

products and services in the United States and around the world, and operates a diversified portfolio of website properties and other digital services.

Fox Entertainment Group. Fox Entertainment Group (“Fox”) owns and operates businesses in all segments of broadcast, cable and film entertainment, including a broadcast network (FOX); 19 local television stations; an extensive collection of entertainment, news and entertainment cable programming networks (including Fox News, Fox Business Network, Fox Sports Net, Fuel, FX and National Geographic, among others); film and television studios (including Twentieth Century Fox Film and Twentieth Century Fox Television); and syndication (Twentieth Television).

Grocery Manufacturers Association. The Grocery Manufacturers Association (“GMA”) represents the world’s leading food, beverage and consumer products companies by promoting sound public policy, championing initiatives that increase productivity and growth, and helping to ensure the safety and security of consumer packaged goods. The GMA board of directors is comprised of chief executive officers from the Association’s member companies. The \$2.1 trillion food, beverage and consumer packaged goods industry employs 14 million workers and contributes over \$1 trillion in added value to the nation’s economy. For more information, visit www.gmaonline.org.

Interactive Advertising Bureau. Founded in 1996 and having headquarters in New York City and a Public Policy office in Washington, D.C., the Interactive Advertising Bureau (“IAB”) is comprised of more than 375 leading media and technology companies responsible for 86% of online advertising in the United States. As part of its mission dedicated to growth of the interactive advertising marketplace, the IAB educates marketers, agencies, media companies, and the wider business community about the value of interactive advertising. Working with its

member companies, the IAB evaluates and recommends standards and practices and fields critical research on interactive advertising.

NBC Universal, Inc. NBC Universal, Inc. (including its commonly controlled affiliates, such as NBC Telemundo License Co.) owns and operates multiple businesses in the broadcast, cable and film industries, including the NBC and Telemundo (Spanish-language) broadcast networks; 26 local television stations; a number of news and entertainment nonbroadcast channels (including MSNBC, CNBC, USA, Bravo, and SyFy, among others) exhibited by cable systems, direct broadcast satellite systems and other multichannel video programming distributors; film and television studios (including Universal Pictures, Focus Features, and Universal Media Studios); and television syndication (NBC Universal Television Distribution).

Promotion Marketing Association. Established in 1911, the Promotion Marketing Association, Inc. (“PMA”) is the premier not-for-profit organization and resource for research, education and collaboration for marketing professionals. Representing the over \$1 trillion integrated marketing industry, the organization is comprised of Fortune 500 companies, top marketing agencies, law firms, retailers, service suppliers and academia, representing thousands of brands worldwide. Championing the highest standards of excellence and recognition in the promotion and integrated marketing industry globally, PMA’s objective is to foster a better understanding of promotion and integrated marketing and its role in the overall marketing process. The PMA is headquartered in New York City with its affiliate, the PMA Educational Foundation, Inc. Its four pillars are: Resources. Education. Networking. Community.

State Broadcasters Associations. Each named state broadcast association is a trade association of the radio and television broadcasters who serve that state. These associations not only represent the interests of the broadcasters before Federal, state and local decision makers, but also engage in educational and informational efforts to educate and inform their members

and the public at large about business, regulatory, technology and other issues of importance to broadcast stations, the greater broadcast industry and the public served by that industry.

Viacom Inc. Viacom, consisting of BET Networks, MTV Networks and Paramount Pictures, is the world's leading entertainment content company. It engages audiences on television, motion picture and digital platforms through many of the world's best known entertainment brands, including MTV, VH1, CMT, Logo, Nickelodeon, Nick at Nite, Nick Jr., COMEDY CENTRAL, Spike TV, TV Land, BET, Rock Band, AddictingGames, Atom, Neopets, Shockwave and Paramount Pictures. Viacom's global reach includes approximately 170 channels and 430 digital media properties in more than 160 countries and territories.

The Walt Disney Company. The Walt Disney Company ("Disney"), together with its subsidiaries and affiliates, is a leading diversified international family entertainment and media enterprise. Disney's enterprises implicated by this rulemaking include the ABC Television Network, the ABC Owned Television Station Group, and the Disney ABC Cable Networks Group (including Disney Channel and Disney XD).

ATTACHMENT B

Appendix	Short Form	Filing	Docket	Date
A	<i>ANA/AAF/AAAA CSVA Reply</i>	Reply Comments of the Association of National Advertisers, Inc., American Advertising Federation, and American Association of Advertising Agencies	MB 09-26	May 18, 2009
B	<i>ANA CSVA Comments</i>	Comments of the National Association of Advertisers, Inc.	MB 09-26	Apr. 16, 2009
C	<i>Media Association Violent Programming Comments</i>	Comments of the Media Associations	MB 04-261	Oct. 15, 2004
D	<i>National Media Provider Sponsorship ID Comments</i>	Comments of the National Media Providers	MB 08-90	Sept. 22, 2008