

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

COMMENTS OF ANDREW SEID,
ON FCC NOTICE OF INQUIRY REGARDING
EMPOWERING PARENTS AND PROTECTING CHILDREN
IN AN EVOLVING MEDIA LANDSCAPE

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I welcome this opportunity to submit these Comments in response to FCC 09-94, Notice of Inquiry released October 23, 2009, in which the Commission sought comments on empowering parents and protecting children in an evolving media landscape. I write on my own behalf as a concerned citizen and second-year law student at the Villanova University School of Law in order to express my understanding and opinion as to the limitations facing the Commission in implementing any regulations that may stem from this Notice of Inquiry. These comments are my own and do not represent the views or opinions of Villanova University School of Law. I am aware that the deadlines for both comment and reply-comment submissions has passed, but I would appreciate any consideration given to the analysis that follows.

SUMMARY

In this Notice of Inquiry¹ (NOI), the Commission asks for comments on two threshold questions: 1) “[W]hether [it] has the statutory authority to take any proposed actions” to regulate Internet-distributed media, and 2) “[W]hether [any proposed actions to regulate Internet-distributed media] would be consistent with the First Amendment.”² The answer to both questions is no.

¹ Federal Communications Commission, *Notice of Inquiry In the Matter of Empowering Parents and Protecting Children in an Evolving Media Landscape*, MB Docket No. 09-194, FCC 09-94 (rel. Oct 23, 2009)

² *Id.* ¶ 9.

Regarding the jurisdictional inquiry, the D.C. Circuit Court decided a case just over three weeks ago which has a deep impact regarding the authority that the FCC can establish over private Internet action.³ The court invalidated an order issued by the FCC which declared that the Commission had jurisdiction over Comcast Corporation, an Internet service provider (ISP) in regards to the company's network management practices.⁴ The court's reasoning in *Comcast Corp.*, when applied to actions likely to stem from this NOI, imposes the same strict limitations on the Commissions authority to take such actions.

In terms of the First Amendment implications, I compare what makes government regulation of broadcast media different from potential government regulation of the Internet. Specifically, while the Internet in many ways shares the pervasive nature of broadcast media that allows for such invasive government regulation in that platform, the Internet's unique ability to be extensively controlled by individual users provides for many less restrictive means of achieving government objectives that broad government regulation.

³ *Comcast Corp. v. Federal Communications Comm'n*, 2010 WL 1286658 *1 (C.A.D.C.).

⁴ *Id.* at 4

TABLE OF CONTENTS

Summary.....1

Discussion.....3

The FCC lacks jurisdiction to implement regulations discussed in this NOI.....4

The D.C. Circuit’s recent decision in Comcast v. FCC effectively kills FCC’s ability to implement regulations hinted at in this NOI.....4

Circuit Court’s Holding.....5

Ancillary Authority Can Not be Based Solely on Statements of Policy.....5

Every Exercise of Ancillary Authority Must Be Evaluated on its Own Terms.....8

How This Effects Regulations Likely to Come from this NOI.....9

Applying the Provisions Invoked in the Comcast Order to the Present NOI.....9

The Provisions Invoked by the FCC in this NOI Do Not Establish Ancillary Authority Over Internet-Distributed Media.....9

The First Amendment Prevents the Commission From Imposing Broad Regulation onto Private Internet Actors.....10

Why FCC v. Pacifica cannot be Superimposed onto the Internet.....10

There Are Less Restrictive Means than Government Regulation.....12

DISCUSSION

The FCC lacks jurisdiction to implement regulations discussed in this NOI

The FCC cannot regulate areas, actors, or industries in which Congress has not delegated it such authority.⁵ Congress has enacted various legislative acts, including the Communications Act of 1934⁶, that have granted the FCC authority to regulate multiple areas and industries including: radio and broadcast television⁷; common carrier services like landline telephones⁸; and cable television.⁹ Where there is no express delegation of authority, the Commission can still establish “ancillary” authority in areas where it can show that its actions are “reasonably ancillary to the ... effective performance of its statutorily mandated responsibilities.”¹⁰

The issue of whether and to what extent the FCC has jurisdiction over private actors on the Internet has been a subject of much debate and uncertainty. A recent decision coming out the D.C. Circuit Court, however, has lent some clarity to the issue and seems to leave the FCC unable to establish ancillary authority over much of the private activity happening on the Internet.¹¹

The D.C. Circuit’s recent decision in Comcast v. FCC effectively kills FCC’s ability to implement regulations hinted at in this NOI

On April 6, 2010, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion confirming that the FCC has an extremely limited – if non-existent – authority to regulate private actors on the Internet.¹² The court invalidated an order issued by the FCC that concluded the Commission had jurisdiction over Comcast’s network management practices.¹³ The Order was a response to a complaint filed by advocacy organizations, public interest groups, and law professors who claimed that Comcast violated the FCC’s Internet Policy Statement by interfering with it’s subscriber’s use of peer-to-peer networking applications.¹⁴

In finding the order to be invalid, the court held that the Commission lacked any ancillary authority to regulate Comcast’s network management practices.¹⁵ In the wake of this decision, it is likely that the FCC lacks the authority to impose the type of government regulation that many hope to result from this Notice of Inquiry.

⁵ *American Library Ass’n v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005)

⁶ 47 U.S.C. §151 (“Communications Act”)

⁷ 47 U.S.C. §301

⁸ 47 U.S.C. §201

⁹ 47 U.S.C. §521

¹⁰ *American Library Ass’n*, 406 F.3d at 692

¹¹ *Comcast Corp. v. Federal Communications Comm’n*, 2010 WL 1286658 *1 (C.A.D.C.).

¹² *Id.* at 36

¹³ *In re Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13,028 (2008) (“Order”).

¹⁴ *Comcast Corp.*, WL 1286658 at 3

¹⁵ *Id.* at 4.

Circuit Court's Holding

In the Order at issue, the FCC claimed that they had ancillary authority to regulate the Internet under §4(i) of the Communications Act of 1934, which authorized the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”¹⁶ The court applied the two-part test that it had established in *American Library Association* for determining what the Commission needed to show in order to establish ancillary authority:¹⁷

“The Commission ... may exercise ancillary jurisdiction only when two conditions are satisfied:

- 1) The Commission’s general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject, and
- 2) The regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”¹⁸

The court focused on the second prong of this test, as Comcast conceded in its petition for review of the Order that the first prong was met¹⁹. In its discussion, the court addressed, and ultimately dismissed, each statutory provision advanced by the Commission as being a “statutorily mandated responsibility” to which the Order was “reasonably ancillary” to. Of the seven statutory provisions offered by the Commission, five could also likely be raised by the FCC as a potential basis for ancillary authority to regulate the Internet in order to serve the objectives of this NOI. The likelihood of these five provisions being able to establish a basis for any ancillary authority needed to meet the objectives of this NOI, as well as other possible provisions not raised by the Commission in *Comcast v. FCC*, are discussed later. A look at the court’s analysis of these provisions in the context of the *Comcast* case will help better predict how the court might treat any potential regulation that comes out of this NOI.

Ancillary Authority Can Not be Based Solely on Statements of Policy

The court broke the provisions into two groups: provisions that it felt were clearly only setting forth congressional policy, and provisions where it could see a plausible argument that there was regulatory authority delegated to the Commission.²⁰ Provisions that merely state Congress’ policy do not confer any specific authority upon an agency, and therefore such provisions cannot be used as the sole basis for establishing ancillary authority.²¹

¹⁶ 47 U.S.C. §154(i)

¹⁷ *American Library Ass’n*, 406 F.3d at 691-692

¹⁸ *Id.*

¹⁹ *Comcast Corp. v. Federal Communications Comm’n*, 2010 WL 1286658 *1, 7-8 (C.A.D.C.) (Comcast admitted that its Internet service qualified as “interstate and foreign communication by wire” within the meaning of Title I of the Communications Act).

²⁰ *Id.* at 16

²¹ *Id.* at 23

There were two relevant provisions that the court held were clearly just policy statements²², and three which warranted further inquiry. The first of these three was found not to be a statement of policy.²³ The other two were not found to be statements of policy, but the court still dismissed them both as not being a sufficient basis for ancillary authority for other reasons.²⁴

First, the court discussed the Commission's reliance on §230(b) of the Communications Act, which grants civil immunity to Internet service providers who engage in "private blocking and screening of offensive material."²⁵ The provision specifically states that "it is the policy of the United States ... to [1)] promote the continued development of the Internet and other interactive computer services," and 2) "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet."²⁶

The second clearly policy provision the Commission relied upon was section 1 of the Communications Act of 1934. This provision simply lays out the reasons for creating the FCC and its general purpose, which is to "regulate interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service ... at reasonable charges."²⁷

These first two provisions were clearly policy statements, and the Commission conceded as such in their Order.²⁸ Despite acknowledging that it was not as facially obvious whether the other three relevant provisions cited by the Commission were mere policy statements or not, the court ultimately found that they were and thus the FCC could not base any ancillary authority on those provisions.²⁹ The first of these provisions, §706 of the Communications Act, mandated that the Commission take a specific action.³⁰ The court acknowledged that normally, statutory language that an agency "*shall engage*" in a particular action is a "direct mandate" and therefore is a statutorily mandated responsibility sufficient to base ancillary authority on.³¹ However, the FCC had previously issued an order – still binding today – which indicated that §706 "does not constitute an independent grant of authority," and instead "directs the Commission to use the authority granted in other provisions."³² Therefore, the court concluded, §706 is just a policy statement and can't be relied upon on its own to establish ancillary authority.³³

²² *Id.* at 18 (discussing §230(b) and §1 of the Communications Act of 1934).

²³ *Comcast Corp.*, WL 1286658 at 30 (discussing §706 of the Telecommunications Act of 1996)

²⁴ *Id.* at 33, 34 (discussing §257 and §201 of the Communications Act of 1934).

²⁵ 47 U.S.C. §230.

²⁶ 47 U.S.C. §230(b).

²⁷ 47 U.S.C. §151.

²⁸ *Comcast Corp.*, WL 1286658 at 18.

²⁹ *Id.* at 30-33

³⁰ 47 U.S.C. §1302(a) ("The Commission ... *shall encourage* the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing ... price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment") (emphasis added).

³¹ *Comcast Corp.*, WL 1286658 at 30

³² *Id.* at 30 (citing *In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,012, 24,045 ¶ 69, 47 ¶77 (1998).

³³ *Id.* at 31.

The second questionable provision, §257 of the Communications Act, directed the Commission to report to Congress on any market entry barriers for entrepreneurs and other small businesses trying to engage in telecommunications services and information services.³⁴ While this provision certainly imposes a statutorily mandated responsibility, the Commission can only act in a way that is “reasonably ancillary” to its responsibility to issue such a report.³⁵ The court gives the example of disclosure requirements for the purpose of data gathering for the report.³⁶ Justifying this provision as a basis for ancillary authority for any action outside the scope of preparing the report would “def[y] any plausible notion of ‘ancillariness.’”³⁷

The third provision which was not clearly a policy statement was §201 of the Communications Act, which authorized the Commission to engage in any “charges, practices, classifications, and regulations for an in connection with [common carrier] service.”³⁸ However, while the Commission cited this provision in its order, it did not include the provision in its appeal, and therefore the court did not address it other than to indicate its absence from the appeal.³⁹

The Circuit court quickly disposed of the Commission’s argument that, even if these provisions are merely policy statements, they should still be able to be used as the basis for ancillary authority. The FCC claimed that such provisions “declare the legislative will,” and that, coupled with an express grant of authority “to perform all actions necessary to execute and enforce all the provisions of the Communications Act,” such policy statements set forth “statutorily mandated responsibilities” that may serve as the basis for any ancillary authority.⁴⁰ The court discussed the three Supreme Court cases⁴¹ that the FCC cites in support of this contention, and ultimately found the Commission’s interpretation of these cases to be flawed.⁴²

In both *Southwestern Cable* and *Midwest Video I*, the Supreme Court sustained FCC regulations for which the Commission only provided general policy objectives to support its claim of ancillary authority.⁴³ However, in both cases the Court emphasized that the it was only recognizing authority that was reasonably ancillary to specific express grants of authority over the *regulation of television broadcast* that was delegated to the Commission in Title III of the Communications Act.⁴⁴

³⁴ 47 U.S.C. §257 (Enacted as part of the Telecommunications Act of 1996).

³⁵ *Comcast Corp. v. Federal Communications Comm’n*, 2010 WL 1286658 *1, 33 (C.A.D.C.).

³⁶ *Id.*

³⁷ *Id.* (citing *Motion Picture Ass’n of Am. v. FCC*, 309 F.3d 796, 801-02).

³⁸ *Id.* at 33 (citing 47 U.S.C. §201)

³⁹ *Id.* at 33-34.

⁴⁰ *Id.* at 18.

⁴¹ *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (“Midwest Video I”); and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (“Midwest Video II”).

⁴² *Comcast Corp.*, WL 1286658 at 19-22.

⁴³ *Southwestern Cable Co.*, 293 U.S. at 173-74 (Court sustained Commission’s order to restrict the geographic reach of cable television because it served the policy of “fostering local broadcast service”); *Midwest Video I*, 406 U.S. at 667-78 (Court sustained Commission’s order requiring cable companies to originate their own programming because it served the policy of “increasing the number of outlets for community self-expression and augmenting the public’s choice of programs and types of services”).

⁴⁴ *Comcast Corp.*, WL 1286658 at 19-20.

In *Midwest Video II*, the Court acknowledged this limitation to the Commission’s ancillary authority.⁴⁵ The Court rejected the Commission’s argument that it could impose regulations “so long as the rules promote statutory objectives,” and reiterated that mere policy statements were not enough to base ancillary authority off of.⁴⁶ The Court emphasized that “without reference to the provisions of the Act *directly governing broadcasting*, the Commission’s [ancillary] jurisdiction ... would be unbounded.”⁴⁷ The Circuit Court in *Comcast Corp.* held that these cases make it clear that the Commission will not be able to base any ancillary authority it claims to have merely on policy statements without tying that policy statement to specific authority delegated to it by Congress.⁴⁸ Because there is no statutorily mandated responsibility that the FCC could base any ancillary authority over Comcast’s Internet service on, the D.C. Circuit Court invalidated the FCC’s order.⁴⁹

Every Exercise of Ancillary Authority Must Be Evaluated on its Own Terms

The Commission also raised the argument that the discussion above regarding the establishment of a provision to serve as a valid basis for ancillary authority is moot because the Supreme Court’s decision in *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*⁵⁰ has already determined that the FCC has jurisdiction over Internet Service Providers.⁵¹ Rejecting this argument, the D.C. Circuit Court held that each exercise of ancillary authority must be determined on a “case-by-case basis.”⁵²

While the Supreme Court did hold in *Brand X* that the FCC was “free to impose special regulatory duties on [cable Internet providers]” under its Title I ancillary jurisdiction, this does not indicate a “claim of plenary authority over such providers.”⁵³ The court goes back to the guidance given by the Supreme Court in *Southwestern Cable* and *Midwest Video I* regarding how the Commission can go about establishing ancillary authority. In first establishing the Commission’s ancillary authority in *Southwestern Cable*, the Court expressly conditioned that it was acknowledging such authority only for that particular regulation.⁵⁴ In *Midwest Video I*, the Court re-emphasized this point, holding that its decision in *Southwestern Cable* “recogniz[ed] any sweeping authority over [cable] as a whole.”⁵⁵ In *Brand X*, the Court recognized the FCC’s ancillary authority to require cable Internet providers to unbundled the components of their services into an “information service” which was not subject to FCC regulation and a “telecommunications service” which was subject to regulation by the Commission. In the order at issue in *Comcast Corp.*, the FCC was trying to regulate the ISP’s network management practices, which is completely separate from anything dealt with in *Brand X*, and therefore any

⁴⁵ *Midwest Video II*, 440 U.S. at 702 (Court held that if Commission were allowed to impose public accommodation requirements on certain cable channels, it would make cable systems the equivalent of common carriers, and the Communications Act forbids common carrier regulation of cable providers).

⁴⁶ *Comcast Corp.*, WL 1286658 at 21

⁴⁷ *Midwest Video II*, 440 U.S. at 706.

⁴⁸ *Comcast Corp.*, WL 1286658 at 22

⁴⁹ *Id.* at 36

⁵⁰ 545 U.S. 967 (2005) (*Brand X*).

⁵¹ *Comcast Corp.*, WL 1286658 at 12.

⁵² *Id.* at 16.

⁵³ *Id.* at 14.

⁵⁴ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

⁵⁵ *National Ass’n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976).

conclusion that the Commission has some broad ancillary authority to regulate all aspects of ISP's practices runs afoul of the relevant case law.

How This Effects Regulations Likely to Come from this NOI

Applying the Provisions Invoked in the Comcast Order to the Present NOI

The provisions offered by the FCC to establish ancillary authority in the Comcast Order fail when applied here for the same reasons. As the *Comcast* holding emphasized, ancillary authority cannot be based merely on statements of policy.⁵⁶ Therefore any reliance on either §1 or §230(b) of the Communications Act, as in the *Comcast* decision, would have to be coupled with an express delegation of statutory authority over Internet-distributed media. Such a delegation has yet to come from Congress. The same goes for any reliance on §706 of the Communications Act which, while imposing a direct mandate upon the FCC, has been determined to be viewed as a mere policy statement and thus still reliant on “authority granted in other provisions.”⁵⁷

Regarding the Congressional report on market barriers mandated in §257 of the Communications Act, the Commission would still have no authority to issue any of the regulations that may come out of this NOI for the same reason articulated in the *Comcast* case – only actions reasonably ancillary to the issuance of such a report could trace their authority to §257.⁵⁸ The actual issuance of this NOI, as a means of gathering information regarding the current landscape of telecommunications services and information services, along with any agency action taken that is reasonably ancillary to preparing such reports, would be able to find a basis of ancillary authority in §257.

The Provisions Invoked by the FCC in this NOI Do Not Establish Ancillary Authority Over Internet-Distributed Media

The FCC references the Children's Television Act of 1990, in which Congress authorized the Commission to “prescribe standards applicable to commercial television broadcast licensees with respect to the time devoted to commercial matter in conjunction with children's television programming.”⁵⁹ The Children's Television Act, however, grants the FCC no jurisdiction to regulate Internet-distributed media. While the scope of the authority granted under the Act was broadened in 2004 to include Satellite television, this extension was valid because of clear, pre-existing statutory authority over Satellite television.⁶⁰ Extending such authority to the Internet would be rendered invalid because Congress has never delegated such authority.

In fact, the general approach towards Internet regulation that Congress has taken – and the FCC has usually followed – is one of “minim[al] ... government regulation,”⁶¹ and to

⁵⁶ *Comcast Corp.*, WL 1286658 at 7.

⁵⁷ See 47 U.S.C. §1302(a), *supra* note 26.

⁵⁸ *Comcast Corp.*, WL 1286658 at 33.

⁵⁹ 47 U.S.C. §303(a).

⁶⁰ 19 FCC Rcd 5647, ¶ 48 (2004)

⁶¹ 47 U.S.C. §230(a)(4)

ultimately “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*”⁶² Until Congress enacts legislation expressly delegating authority to regulate private Internet actors to the FCC, it will not be able to regulate this area.

The First Amendment Prevents the Commission From Imposing Broad Regulation onto Private Internet Actors

Any discussion of the First Amendment implications of a government regulation must begin with a presumption in favor of protecting speech. It is only where speech falls into a specific narrow category, carved out by case law and/or legislation, that it can be regulated or restricted by the government. Such categories include incitement, defamation, obscenity, and child pornography. Any government regulations that are created as a result of this Notice of Inquiry are likely to restrict speech that falls outside these unprotected categories.

One such category that may receive some government protection is speech that is likely to reach minors. The Courts have consistently found, and Congress has repeatedly established, that the government has a strong interest in protecting minors from inappropriate speech.⁶³ However, this interest is not absolute, and it must be balanced against the degree to which any such regulation infringes upon the First Amendment rights of minors as well as any resulting infringement upon the rights of adults.⁶⁴

In *FCC v. Pacific Foundation*, the Supreme Court upheld reprimands handed down by the FCC to a New York radio station that broadcast the comedian George Carlin’s “Filthy Words” routine on a weekday afternoon.⁶⁵ At the crux of the segmented plurality opinion was the fact that the constitutional limits of regulating speech often hinged on the surrounding context of that speech.⁶⁶ In *Pacifica*, the circumstance of issue was the fact that the vulgar broadcast was aired during a time of day when it was very likely minors would be able to hear it.⁶⁷

Why *FCC v. Pacifica* cannot be Superimposed onto the Internet

Two aspects of the Carlin radio broadcast, and all broadcast media in general, stood out as reasons for allowing greater regulation in that area: First, broadcast media is uniquely pervasive in that it can permeate the privacy of the home in ways that the spoken word or print media are unable to duplicate.⁶⁸ Second, and as a byproduct of its pervasive nature, broadcast media is uniquely accessible to children.⁶⁹

⁶² 47 U.S.C. §230(b)(2) (emphasis added).

⁶³ *FCC v. Pacifica Foundation*, 438 US 726, 732 (1978) (“*Pacifica*”)

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 768

⁶⁸ *Id.* at 730

⁶⁹ *Id.*

These two aspects of broadcast media seem to find a parallel in the Internet, and it would seem at first glance that the government's ability to regulate broadcast media in *Pacifica* would allow similar regulation of speech on the World Wide Web. This, however, is definitively not the case.

In order to protect the First Amendment rights that our Constitution bestows upon us, the public is required to sacrifice by having to put up with a lot of speech that it otherwise would prefer to avoid.⁷⁰ The depth of this sacrifice only goes so far, however, and *Pacifica* acknowledges that the public's ability to adequately avert themselves from such speech is a key factor in developing appropriate limitations to First Amendment jurisprudence.⁷¹

Broadcast media is situated in such a way that it can be regulated in ways that traditional media developed before it (e.g. spoken and written word) and after it (e.g. internet) cannot. Broadcast media is often heard inside the home, implicating privacy interests that Courts have found to outweigh the public's First Amendment interest in unfettered discourse.⁷² Additionally, citizens are often limited in their ability to control the specific content that they are exposed to via broadcast media. A person has no control over the content of any speech that is being broadcast from any particular channel or radio frequency. There are often certain broad categories that may provide some indication of the type of speech being broadcast from a specific station, but there is no guarantee that the content of that speech won't be a type that is patently offensive. The ability to change the channel or turn the broadcast off when confronted with such speech is certainly an effective protection, but relying on that for protection would be akin to relying on a person's ability to run away after getting punched in the face; The harm still happens. This is a key part of the Court's reasoning in *Pacifica* for finding FCC restrictions on broadcast media to be within constitutional limits.

Access to the Internet differs significantly from access to broadcast media. While the Internet certainly shares the "uniquely pervasive nature" of broadcast media in that it very often is accessed inside the home, the Internet is malleable and able to be controlled by the user in ways that broadcast media is not. This aspect of the Internet makes it extremely difficult for any government regulation to meet constitutional standards.

Unlike radio in *Pacifica*, which has "historically gotten the least amount of First Amendment protection because you couldn't effectively warn listeners to protect them from potentially offensive speech," protective measures can be put in place on the Internet by the user himself.⁷³ The Internet user rarely comes across specific content "by accident" because he or she can deliberately navigate to the specific websites that they are willing to be confronted with. Even in situations where the internet user is searching for information or content of which they are unsure exactly where to find it, there are a plethora of highly functional search engines that serve to function as a barrier between the user and the actual website or content. The user will be

⁷⁰ see *Cohen v. California*, 403 US 15 (1971) (Defendant was arrested and convicted of "disturbing the peace" for wearing a Jacket in public that with the words "F--k the Draft" (censorship added); Court overturned the conviction, reasoning that nothing was keeping anyone from turning away from the words, and therefore any negative impact on the public was minimal).

⁷¹ *Pacifica*, 438 US at 730.

⁷² *Id.*

⁷³ *Reno v. American Civil Liberties Union*, 521 US 844, 850 (1997). ("*Reno*")

alerted to any potential “accidental confrontations” with speech they may be find to be offensive by being able to read the descriptions of the potential web destinations provided by these increasingly sophisticated search engines.

There Are Less Restrictive Means than Government Regulation

As the Court in *Reno* stressed, any law that places a “burden on adult speech is unacceptable if *less restrictive alternatives* would be at least as effective in achieving” the same goals.⁷⁴ The ever-increasing ability of Internet users to control the content they are exposed to on the Internet is arguably more effective than any government attempt to regulate the area.

The Court has consistently recognized its ability to “adopt more stringent controls on communicative materials available to youths.”⁷⁵ However, there is an upper limit to how much the government can restrict speech on the rationale that it must protect the nation’s children. This upper limit was discussed by Justice Powell in his concurrence in *Pacifica*. He addresses concerns raised by the dissenters that the holding in this case would effectively “reduce ... the adult population to hearing only what is fit for children,” nonetheless concluding that the regulation at issue did not unduly burden adults’ ability to access the speech at issue.⁷⁶ Nothing in the holding prevents willing adults from buying Carlin’s record, going to his shows, or listening to his comedy routine on broadcast media during hours when fewer children are likely to be in the audience.⁷⁷

Courts before and since have used this reasoning to both uphold and reject government regulation of speech aimed at protecting minors. The Warren Court held in *Ginsberg v. NY*⁷⁸ that restrictions on the distribution of non-obscene pornography to minors was not unconstitutional, in part because it did not infringe upon the ability of willing adults to procure such materials. The Court conceded that the same restrictions would have been unconstitutional if they had applied to distribution of such material to adults.⁷⁹ Likewise, in *Young v. American Mini Theaters*⁸⁰, the Court upheld a zoning ordinance that regulated where certain purveyors of “sexually explicit” movies and books could operate. Again, the crux of the issue was that willing adults were not significantly restricted in their ability to view the speech.⁸¹

The Internet is unlike broadcast media in that it *can* be manipulated on very specific terms. What is also unique about the Internet is that the user can virtually be in complete control of every aspect of their exposure to the Internet. In other words, the Internet is an extremely personal form of media in that the individual user can dictate their own Internet experience. Therefore, several strategies have developed in order to protect minors from any questionable content on the Internet that are much less restrictive than the government coming in and dictating how individuals can interact with the Internet. The most important of these strategies are those

⁷⁴ *Reno*, 521 US at 870 (emphasis added).

⁷⁵ *Pacifica*, 438 US at 757.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 390 US 629, 635 (1968).

⁷⁹ *Id.*

⁸⁰ 427 US 50, 70 (1976).

⁸¹ *Id.*

in which parents and caregivers can help to develop safe media skills among the children of this nation.

One of the major aims of this NOI is to gather information on new and developing products, services, and techniques that parents and caregivers can adopt to help keep kids safe and to help teach kids to develop safe media habits. Many of the comments that have been sent in response to this NOI are from trade organizations, software manufacturers, and public policy groups going into extensive detail about the positives and negatives associated with each strategy, service, or product. I am encouraged by the FCC's clear intentions to support the continued development of this growing market as indicated in §230(b) of the Communications Act.⁸² The increasing amount of individual-based content control, coupled with the Commission's express indication of their policy to help develop such methods clearly indicates that there are a plethora of means less restrictive than imposing government regulation on private Internet actors that will protect minors from potentially harmful content while not unduly infringing upon adult's ability to lawfully access such information. Therefore, government regulation would violate First Amendment protections.

⁸² 47 U.S.C. §230(b) ("It is the policy of the United States to ... encourage the development of technologies which maximize user control over what information is received by individuals, families and schools who use the Internet.")