Before the

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Child Safe Viewing Act,	)	MB Docket No. 09-26
Examination of Parental Control Technologies	)	
for Video and Audio Programming	)	

REPLY COMMENTS OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., THE AMERICAN ADVERTISING FEDERATION, AND THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES

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The Association of National Advertisers, Inc. ("ANA"), the American Advertising Federation ("AAF"), and the American Association of Advertising Agencies ("AAAA"), [1] hereby reply to the comments on the Notice of Inquiry in the above-referenced matter. [2]

INTRODUCTION AND SUMMARY

In initial comments, ANA cautioned that this inquiry should be conducted as a genuine study of content selection technology and not as an prelude to rulemaking. Comments of the Association of National Advertisers, Inc. ("ANA Comments") at 3. Its comments further pointed out that proposals to extend the V-chip rating regime beyond programming to include advertisements exceeded congressional intent, *id*. at 4-5, and that the CSVA specifically directed the Commission not to include in its report parental control technologies that "affect the packaging or pricing of [ ] content." [3]

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[1] Descriptions of the AAF, AAAA and ANA appear in attached Appendix.

[2] *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, 24 FCC Rcd. 3342 (2009) ("*NOI*" or "*Notice*"). The *Notice* issued pursuant to the Child Safe Viewing Act of 2007, P.L. 110-452, 122 Stat. 5025 (December 2, 2008) ("CSVA").

[3] *See* CSVA § 2(a)(2). Given this statutory restriction, ANA's initial comments noted the *NOI* appears to go beyond the scope of the CSVA by raising the question of whether

While most substantive submissions in this proceeding provide the Commission with detailed descriptions of available parental control technologies and their capabilities, as well as sound suggestions for improving their effectiveness, some other commenters – predictably perhaps – treated the *NOI* as if it were a Notice of Proposed Rulemaking. They urge the Commission to adopt (or to propose to Congress) significant expansion of V-chip regulation, including extending ratings systems to restrict advertising. Some suggest "upgrading or 'opening up' existing V-chip technology [to] additional information and ratings" [4] describing such "efforts to … *expand* the V-chip" to be "of utmost importance," [5] while others argue that existing ratings "should be modified to take account of commercials and embedded advertising." [6]

Such proposals are unsound, impractical, and are neither statutorily authorized nor constitutionally defensible. Separately rating advertisements and potentially enabling their deletion from the programming they support will eviscerate the programs' economic viability while raising serious legal and administrative problems. None of the comments offer any substantial discussion to support the claim that rating advertisements is necessary (or even realistically possible), nor do they address the inevitable adverse effects of such proposed regulations. Moreover, proposals to expand the V-chip regime – and particularly schemes to rate advertisements and product placement – plainly conflict with the CSVA's mandate that the report to

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commercials should receive ratings separate from those associated with the programs in which they appear. ANA Comments at 4.

[4] Comments of Common Sense Media ("CSM Comments") at 2. *See also* Comments of Children's Media Policy Coalition ("CMPC Comments"), *passim*; Comments of Wi-LAN V-chip Corp. at 6 ("improvements could include a V-chip button on remote controls, more accurate ratings, more [ ] ratings … "). *Cf.*, Comments of Decency Enforcement Center for Television ("Decent TV Comments") at 2, 3 (favoring "direct regulation of content").

[5] Decent TV Comments at 4 (emphasis added).

[6] CMPC Comments at ii & § II.C.

Congress *not* include "parental control technologies that "affect the packaging or pricing of [ ] content." CSVA § 2(a)(2). If adopted, the proposals would undermine the economic viability of advertiser-supported media at a time when the national economy can least afford it. This effect is to be expected if the proposed regulations are implemented *and work as intended*. The more likely outcome, as explained below, is that the proposed rating scheme would be thoroughly unworkable and prove far more confusing than the current V-chip regime.

The fundamental flaw in proposals to bulk up and multiply the ratings systems encompassed within the FCC's regulatory regime is the assumption that the V-chip can – or should be – all things to all people. The V-chip regime was never designed to subsume or supplant the large and growing number of private sector media control technologies, nor was it intended to act as a filter that could block any type of programming content that might offend or discomfort any television viewer. Nevertheless, the underlying premise of most reform proposals, and perhaps a tacit assumption of some regulators, appears to be that the inability of the system to block all potentially objectionable content, and that anything short of universal use by the audience, renders the V-chip a failed or "orphaned" technology.

Nothing could be further from the truth. The record in this inquiry makes clear that a wide array of control technologies exist that are effective and easy to use. The *NOI* itself provides a good summary overview of the various options,[7] and initial comments provide significant factual details about alternative methods and technologies that give television viewers and other media consumers an unprecedented ability to tailor their viewing preferences.[8] The record con-

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[7] *See* ANA Comments at 2-3 (citing *NOI*, 24 FCC Rcd. at 3345, 3347-48, 3352-53, 3355-56, 3358-60).

[8] *See*, *e.g.*, Comments of Adam Thierer, Senior Fellow with the Progress & Freedom Foundation ("PFF") and the Director of PFF's Center For Digital Media Freedom, §§ II-III; Joint Comments of the National Association of Broadcasters, National Cable & Telecommunications Association, and Motion Picture Association of America ("NAB/NCTA/MPAA"), at 8-9. *See*

tains information on a wide range of alternatives that empower media consumers, including the TV Parental Guidelines and MPAA movie ratings, parental controls in cable operators' and other MVPD set-top boxes, the Family Safe Media website, the Weemote, video-on-demand ("VOD") options, and use of digital video recorders ("DVRs") to tailor programming choices. With regard to the latter, the Comments of TiVo Inc. explain how both DVR use generally and TiVo's "Kid-Zone" technology in particular offer highly customizable parental control over what children can watch. Comments confirm that "[DVRs, VOD], DVD players and the like all offer the ability" to establish a "protected electronic space where children can only watch the shows, ratings, and/or channels the parent has selected." Comments of Smart Television Alliance ("STA") at 5.

The bottom line is that existing tools are useful, the market is properly functioning to make more tools available, and consumers have a wide variety of options to use – or not – as personal preferences dictate. As one comment put it:

> I am perfectly happy with my options for selecting content that I find appropriate for my child. I find it is more than sufficient that programs are prefaced by ratings providing a general idea of the potentially objectionable content they contain. This gives me the opportunity to decide whether a particular work is, in my opinion, acceptable.

Comments of Bret Sadler at 1. Other commenters have different needs – and options available to meet them. *See supra* notes 7-8 and accompanying text.

While there always will be room for improvement, media education is the key to making existing tools more effective, including the V-chip and other market-based options. In this

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also Individual Comments of the Center for Democracy & Technology at 11 (advocating, *inter alia*, that "the Commission [ ] closely review the factual findings … issued after a full trial on the merits with numerous expert witnesses" in *ACLU v. Gonzales*, 478 F.Supp.2d 775 (E.D. Pa. 2007), *aff'd*, 543 F.3d 181 (3d Cir. 2008)); Comments of the Consumer Electronics Association, *passim*.; Supplemental Comments of the National Cable & Telecommunications Association ("NCTA") at 7-12 (providing additional details on set-top box functionality and use, as well as on cable operator provision of free channel blocking); Comments of DirecTV, Inc. at 2-3; Comments of DISH Network LLC at 4-7; Comments of the United States Telecom Association at 5-6; Comments of Verizon and Verizon Wireless at 5-6.

regard, "the most important challenge," according to various commenters, "is bridging the gap between … parental concern about ... programming ... and their actions in controlling what is watched by their children," which "gap is based on lack of knowledge." STA Comments at 6. Even those who advocate expanded V-chip ratings acknowledge "the issue is less about the inadequacies of the V-chip [ ] and more about educating parents." Comments of the Coalition for Independent Ratings at 4. Accordingly, it makes little sense to revamp the regulatory landscape in an effort to make the V-chip regime do more, as this would create yet another learning curve for parents. Instead, public policy should focus on education that informs consumers about the wide range of options available, evaluates the relative merits of each, and provides instruction on how to use them. [9]

Such educational efforts not only represent sound public policy, they are constitutionally preferred. [10] As explained below, proposals to expand the V-chip regime – and especially requirements for rating advertisements and product placement – would exceed the Commission's statutory authority and violate the First Amendment. Not only would such proposals fail to achieve their asserted objectives, they would be counterproductive and would impose immense burdens on advertiser-supported media.

I. IMPOSING V-CHIP RATINGS ON ADVERTISEMENTS WOULD UNDERMINE STATUTORY OBJECTIVES AND CREATE A BUREAUCRATIC NIGHTMARE

Expanding the V-chip regime to include additional types of "objectionable" content and rating advertisements in addition to programming would constitute a radical expansion of the

[9] The record shows that such education initiatives can be effective. *See, e.g.*, NAB/NCTA/MPAA Comments at 11-14.

[10] *See, e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (education campaigns may be both more effective at advancing government interests and more narrowly tailored than speech restrictions); *Educational Software Ass'n v. Foti*, 451 F.Supp.2d 823, 833 (M.D. La. 2006).

government's oversight of media content. The almost off-hand way in which such proposals are set forth in the comments suggests these problems have not been adequately thought through. In this regard, there is much the Commission can learn from its past experience with the V-chip system.

A. What is Past is Prologue

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. Some of the same advocacy groups that lobbied vociferously to require more information describing program content when the V-chip rating system was first considered now complain that "[m]any parents … find the program ratings system difficult to understand," and that they "seem less likely to understand the content-based descriptors." [11] They suggest that more parents would use the V-chip if only they understood the ratings so that the system would be less "confusing and frustrating." CMPC Comments at 5. However, such comments overlook the regulatory history of the V-chip ratings system and propose "solutions" that inevitably would make matters worse.

The voluntary ratings system initially proposed to implement the 1996 Telecommunications Act's V-chip requirements was simpler to understand than the system ultimately adopted. [12]

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[11] CMPC Comments at 3, 5; CSM Comments at 7; National Hispanic Media Coalition Comments ("NHMC") at 2 ("most parents do not understand the TV Parental Guidelines"). For example, CMPC cites a Kaiser Family Foundation Survey that reported that 51% of respondents understood that "V" indicates violence, 36% understood that "S" indicates sexual content, while only 2% understood that "D" indicates suggestive dialogue and 11% knew that "FV" indicates fantasy violence. CMPC Comments at 5.

[12] The Telecommunications Act of 1996 empowered the FCC to prescribe "guidelines and recommended procedures for the identification and rating of video programming that contains sexual, violent, and other indecent material about which parents should be informed before it is displayed to children." *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 551(b), codified at 47 U.S.C. § 303(w)(1). The law allowed one year for the industry

As originally proposed, the guidelines would have resembled the MPAA ratings system for motion pictures, but with six rating categories.[13] However, despite the broad public acceptance of the movie rating system on which this proposal was based, and its demonstrable ease of use, the guidelines immediately were criticized as providing too little information by some activists who are now participating in the current proceeding. In response, the industry agreed to include programming descriptors ("V" for violence, "S" for sexual content, "D" for suggestive dialogue, and "FV" for fantasy violence).[14] Indeed, as CMPC recounts here, the program ratings system developed by the broadcast, cable, and motion picture industries was "modified in response to concerns of various advocacy groups." CMPC Comments at 3. *See also* NAB/NCTA/MPAA Comments at 5-6.

It would be appropriate for those who now advocate for increased FCC involvement in V-chip ratings at least to acknowledge their role in making the rating system more complicated from the outset. Instead, they generally blame the industry for making the ratings categories

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to devise a program ratings system, and a proposal developed by NAB, NCTA, and MPAA was presented to the Commission in early 1997.

[13] The originally-proposed categories were: TV-Y (appropriate for all children), TV-Y7 (appropriate for children 7 and above), TV-G (appropriate for a general audience), TV-PG (parental guidance suggested), TV-14 (some material may be unsuitable for children under age 14), and TV-MA (program is designed for adult audiences and may be unsuitable for children under 17). *See Commission Seeks Comments on Industry Proposal for Rating Video Programming*, 12 FCC Rcd. 3260 (1997). The MPAA ratings system for motion pictures has consistently enjoyed a high level of public acceptance and use. *See* Comments of Motion Picture Association of America, Inc. ("MPAA"), at 3. *Cf.*, *id*. at 5 (discussing new MPAA initiatives leveraging the MPAA ratings). Nearly 80 percent of parents with children under 13 consistently report that the ratings system is "fairly useful" to "very useful." *Id*. at 3. Although the system is not without its critics, including some who think it is too restrictive and others who assert it is not strict enough, it is not argued that the public does not understand or use the MPAA ratings.

[14] *See Commission Seeks Comment on Revised Industry Proposal for Rating Video Programming*, 12 FCC Rcd. 20772 (CSB 1997) ("The revised industry proposal states that the revised guidelines are supported by leading family and child advocacy groups, as well as by television broadcasters, cable systems and networks, and television production companies.").

"confusing." *See, e.g.*, CMPC at 3-6. Even more ironically, they propose making the V-chip system far more complex by requiring use of additional ratings systems, and by increasing the number of content categories (and, presumably, associated content "descriptors") for the public to decipher. Some commenters, for example, advocate rewriting the V-chip technical standards to allow the use of multiple independent ratings systems in addition to the current ratings devised by industry. *See, e.g.*, CMPC Comments at 7-8; CSM Comments at 2, 5-6; NHMC Comments at 2. They further argue the required ratings should "not [be] limited to the violence, sex, and coarse language often featured in television programs," CMPC Comments at 9, but should include ratings categories for such diverse subjects as smoking, body image, alcohol beverages, prescription drugs, and other commercial matter. *Id*. at 9-10; CSM Comments at 6. Some suggest that rating information should appear in multiple languages, NHMC Comments at 2, and that the system should enable parents to select "good programming" as well as to block "bad programming." CMPC Comments at 13-14; CSM Comments at 8-9.

Among the most radical proposals would extend V-chip ratings to commercials and programs that contain product placement. Contrary to the Commission's rejection of any provision for rating commercial matter when V-chip ratings were initially approved, *see Implementation of Section 551 of the Telecommunication Act of 1996, Video Program Ratings*, 13 FCC Rcd. 8232, 8242-43 (1998) ("*TV Parental Guidelines Order*"), CMPC argues that "[c]ommercials should be assigned ratings in much the same way that television programs currently are, with the addition of a content descriptor identifying commercials that promote adult-oriented products such as alcohol or certain prescription drugs." CMPC Comments at 11. *See also id*. at 9-10 (describing "inappropriate advertisements" as "commercials for violent films, alcoholic beverages, or adult-oriented prescription drugs, such as Viagra"). And this proposal extends far beyond what might be described as "inappropriate advertising," to include "product placement and embedded adver-

tising techniques."[15] Indeed, product placement does not constitute formal advertising at all, much less "inappropriate advertising." *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 97 FCC.2d 255, ¶ 3 (1984) ("specific reference to a donor's product or service" does not constitute advertising "in the absence of comparative or qualitative language").

The theory underlying such proposals, evidently, is that parents who have trouble understanding that "FV" stands for fantasy violence will be able easily to navigate among multiple ratings systems and will grasp the different nuances between myriad new content categories. The plan to rate advertising or product placement assumes that viewers would not be confused by having multiple, overlapping ratings relating to the same programming, or by a burgeoning list of "descriptors" covering different aspects of a single program and its commercial breaks. Not only do such proposals ignore experience with the V-chip ratings system as it currently exists, they offer no explanation for how making the system more complicated will make it more likely to be used. Instead, the proposals simply tote up "wish lists" of programming or commercial matter that the respective commenters would prefer to block.

But there is an inherent trade-off between complexity and convenience for both parental tools and ratings. PFF Comments at 3. As the directors of Harvard Medical School's Center for Mental Health and Media have observed, "[n]o rating system will ever be able to scrutinize and label all potentially offensive or upsetting content. The more complicated a system becomes, the less likely busy parents are to understand it and actually use it." *Id*. (quoting Lawrence Kutner and Cheryl K. Olsen, GRAND THEFT CHILDHOOD: THE SURPRISING TRUTH ABOUT VIDEO GAMES

[15] *Id*. at 10 ("The current V-chip scheme's inability to allow parents to block such content is a serious flaw that should be addressed."); *id*. at 12-13 ("amending the current ratings system in this manner would impose a minimal burden").

186 (New York: Simon & Schuster, 2008)). For this reason alone, proposals to "reform" the V-chip would doom it to failure.

B. Rating Advertisements Would be Administratively Unmanageable

Proposals to expand V-chip ratings do not account for the fact that rating ads would be an overwhelming task. Based on data from Nielsen, several hundred thousand new and newly revised TV commercials appear each year, which are sold to fill what TNS Media Intelligence counts as over 82 million availabilities on ad-supported broadcast network, cable network, and other non-cable outlets. Ads are presented with network programming, with syndicated programming, and as spot advertising, and often are produced under significant time pressures. Requiring ratings on each of them would be highly disruptive and impossible to administer, based on sheer numbers alone. Indeed, those favoring rating ads "the same way that television programs currently are" confirm their expectation that someone examine each individual commercial and assign a rating to it. [16]

Another complicating factor is the fact that many commercials run in different iterations, for example, a 60-second version, the most commonly used 30-second spot, and the increasingly common 15-second cut-down. Ostensibly, not only would each ad need its own rating, each different version of the ad would potentially require being considered independently to apply the appropriate rating. Technical considerations pose another potential complicating factor. *See, e.g.*, Comments of DTV Innovations at 2 (discussing problems with "commercials being rated with V-chip information or other technology" with respect to program guides generally, and noting "the [ATSC] A/65 specification would require modification" while "legacy receivers are another concern").

[16] CMPC at 11 ("assignment of such ratings … would allow networks and distributors to make … decisions regarding what commercials would be appropriate for a given program[ ]").

As if this were not bad enough, the CMPC Comments seek to intertwine the present *NOI* with the Commission's "embedded advertising" rulemaking, *Sponsorship Identification Rules and Embedded Advertising*, 23 FCC Rcd. 10682 (2008), by having separate ratings assigned to product placements within a television program.[17] From an administrative standpoint, requiring separate, ad-specific ratings for product placements would mean that there potentially would be two separate ratings for any portion of a program in which a product placement (or other paid sponsorship mention) appears – the rating assigned to the show itself, and that assigned to the product placement. Not only do commenters fail to offer any suggestion how these potentially disparate ratings would operate as a technical matter (and, in particular, how a single filter like a V-chip would process them), they offer no good reason for having viewers potentially block an entire program – or, worse, to have a shot or scene in a program "go dark" due to an ad-rating assigned to a product placement – based simply on brief appearance of a good or service that happened to be supported by consideration. The complications are multiplied by the possibility of many different ratings being attached to a single program, assuming each of the advertisements is also separately rated.

Such a complicated proposal necessarily would involve layers of bureaucratic oversight. In this connection, CMPC proposes that the Oversight Monitoring Board be converted to a quasi-public tribunal to consider whether ratings for particular programs or advertisements are accurate. It advocates requiring broadcasters to transmit PSAs to educate parents about the Board and opening its meetings to the public. CMPC Comments at 9. Although this aspect of the CMPC proposal would not necessarily involve FCC oversight (not counting the compelled PSA part), it

[17] CMPC Comments at 12. These two proceedings are wholly unrelated, and there is no evidence in the record – in either this inquiry or the embedded advertising proceeding – that goods or services promoted via product placement are somehow contextually mismatched or age-inappropriate to programs in which they appear. Nor is there any evidence to suggest that product placement is itself "harmful" in some way that justifies any kind of rating requirement.

would create a bureaucratic morass to establish public "hearings" to assess every program or advertisement someone might consider to be annoying or "inappropriate." It is another example of how those seeking to expand the V-chip regime have not thought through the implications of the cumbersome processes that would be required for such granular oversight of media content.

II. REGULATORY PROPOSALS EXCEED THE FCC'S STATUTORY AND CONSTITUTIONAL AUTHORITY

A. Implementation of Expanded V-chip Mandates Would Entail a Vast Expansion of Authority

None of the proposals to expand the scope of V-chip ratings, including the suggestion that advertisements be rated, could be adopted under existing statutory authority. First, the statutory language makes clear that program ratings must be voluntary, 47 U.S.C. § 303(w)(1), a conclusion confirmed by the legislative history. The Conference Report stressed that Section 551(b)(1) of the Telecommunications Act, was not intended to create a regulatory mandate for ratings. *See* Conf. Rpt. 104-458, 104th Cong., 2d Sess. at 195 ("nothing in subsection (b)(1) authorizes, and the conferees do not intend that, the [FCC] require the adoption of the recommended rating system nor that any particular program be rated"). The same considerations apply to any proposal to force program providers to affix third party ratings to their programs. *See TV Parental Guidelines Order*, 13 FCC Rcd. at 8244 ("Congress intended that we evaluate only the single Industry proposal"). Likewise, efforts to expand V-chip ratings to include a broader range of content categories, or a separate rating for product placement, exceed the Act's contemplation of "rating[s] of video programming that contains sexual, violent, and other indecent material." 47 U.S.C. § 303(w)(1).

Any attempt to expand the Commission's statutory authority to implement the proposals set forth by regulatory advocates in this proceeding would quickly collide with constitutional limits. Imposing a statutory mandate to use particular ratings, or carry third party ratings, would

constitute compelled speech in violation of the First Amendment. In addition, the proposed expansion of content categories that would receive ratings presents a serious constitutional problem as well.

Any ratings scheme that calls for labeling speech pursuant to categories favored by the government or selected by third parties, not the program distributors, violates the compelled speech doctrine. As the U.S. Supreme Court has emphasized, "*all* speech inherently involves choices of what to say and what to leave unsaid, [and] one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say." *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 573-574 (1995) (emphasis in original) (quotation omitted). Generally, "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 61 (2006); *Harper & Row, Publ'rs., Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) ("freedom of thought and expression includes both the right to speak freely and the right to refrain from speaking at all") (quotation omitted). *See also Riley v. National Federation of the Blind of N.C., Inc.*, 487 U.S. 781, 796-797 (1988); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

This important principle fully applies to any governmental effort to require media companies or advertisers to include ratings or labels intended to warn consumers about programming content. Two circuit courts have invalidated state laws that required producers of video games to affix rating/warning labels to their products in order to limit access by minors. *See Video Software Dealer's Ass'n v. Schwarzenegger*, 556 F.3d 950, 966-67 (9th Cir. 2009); *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006). As the Seventh Circuit explained, the compelled rating scheme was unconstitutional because it "communicates a subjective and highly controversial message – that the game's content is sexually explicit." *Blagojevich*, 469 F.3d at 652. Accordingly, the court applied strict First Amendment scrutiny to invali-

date the law.[18] The same reasoning would doom any effort to make the V-chip rating requirement mandatory and/or to compel the use of multiple ratings.

Similarly, proposals to expand V-chip ratings to cover "diverse subjects [such] as smoking, body image, alcoholic beverages, prescription drugs, and other commercial matter," CMPC Comments at 9-10, would violate well-established First Amendment principles. This is illustrated by recently proposed legislation seeking to declare advertisements for erectile dysfunction medication "indecent," and to limit the broadcast of such commercial messages.[19] Regardless whether such advertisements may make some viewers uncomfortable, they fall far short of the FCC's indecency definition, and it is "elementary" that "[m]erely labeling something indecent does not make it so." *HBO, Inc.* v. *Wilkinson*, 531 F. Supp. 987, 996 (D. Utah 1982).

The First Amendment serves as a critical limit when government seeks to restrict advertisements out of a vague sense that children should not see them. As the Supreme Court stressed when it struck down a ban on advertising contraceptives:

> Appellants contend that advertisements of contraceptive products would be offensive and embarrassing to those exposed to them, and that permitting them would legitimize sexual activity of young people. But these are classically not justifications validating the suppression of expression protected by the First Amendment. At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.

Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977). *See also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot

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[18] *Id*. 652. The Ninth Circuit agreed that heightened scrutiny may apply if commercial speech is "inextricably intertwined" with protected speech, but found it unnecessary to decide whether to apply strict scrutiny. It held the California game labeling requirement could not even survive rational basis review. *Schwarzenegger*, 556 F.3d at 966-967 & n.20.

[19] On April 29, Congressman Jim Moran (D-Va.) introduced H.R. 2175, the "Families for ED Advertising Decency Act." The legislation would require the FCC to interpret and enforce its regulations to treat ads for "medication for the treatment of erectile dysfunction or for male enhancement" as "indecent material" prohibited on TV or radio from 6 a.m. to 10 p.m.

be limited to that which would be suitable for a sandbox."). This reasoning applies with special force to CMPC's proposal to require ratings for product placement, which is based not on any concern about "inappropriate content," but on the commenters' evident dislike of certain forms of sponsorship.

Proposals to expand the V-chip regime are further complicated by the need to extend the rules to multiple platforms, including broadcasting, cable, online communications, and other media that may evolve. For reasons noted above, a mandatory rating scheme would be unconstitutional even under the First Amendment standard traditionally applied to broadcasting. But even if such rules might be applied to the broadcast medium, any new regulations would have little effect on problems cited by regulatory advocates if the regime they propose does not also apply to other media.[20] Although cable networks have complied with the current voluntary regime, there is no basis for believing that mandatory ratings could be constitutionally imposed on them. The Supreme Court and other appellate courts have made clear that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation … does not apply in the context of cable regulation." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994). *See also United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000); *HBO, Inc. v. FCC*, 567 F.2d 9, 28 (D.C. Cir.). The same is true for online communications, where the Court has declared that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

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[20] *See, e.g.*, Lisa de Moraes, *From Station House to "Cat House"?*, WASH. POST, May 7, 2009 (explaining that Moran bill restricting ED advertisements would have little effect because 83 percent of children between ages 2 and 11 watch programs on cable). Given these facts, any regulation imposed on broadcasting alone would be invalid for the additional reason that the rule would be riddled with exemptions and exclusions. *E.g.*, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

B. No Significant Governmental Interest Supports Expansion of the V-chip Regime

Nothing in the record of this proceeding supports the radical overhaul of the V-chip regime some have proposed. To support a more regulatory approach, it is constitutionally required for proponents of new rules to go beyond "mere speculation or conjecture" and "demonstrate that the harms [they] recite[] are real and that [the] restriction[s] will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). In numerous cases, the Supreme Court has made clear it will not uphold restrictions on speech backed only by "unsupported assertions," *Ibanez v. Florida Dept. of Bus. & Prof. Reg.*, 512 U.S. 136, 143 (1994), or by "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing*, 514 U.S. at 490. By this standard, there is no basis for advocating changes to the current system, much less the radical overhaul that some commenters propose.

Considering the issue of ratings and advertisements, the comments do not substantiate the *NOI*'s questions about the need for new ratings or more ways to prevent children's exposure to "inappropriate or adult-oriented commercials." *NOI*, 23 FCC Rcd. at 3350. The few high-profile anecdotes mentioned in comments fall far short of establishing an important or substantial governmental interest. It is telling that the comments cite "top of mind" ads that are the same few examples repeatedly trotted out as evidence that exposure of children to "inappropriate ads" is rampant.[21] But as ANA has shown, there already exist multiple overlapping industry guide-

[21] *See, e.g.*, Decent TV Comments at 7 (citing Cialis and Viagra ads); CMPC Comments at 10 (citing "adult-oriented prescription drugs such as Viagra" and commercials for "violent films" and alcohol beverages). With respect to commercials for ED medications, it appears the greatest concern has arisen from governmentally-mandated warnings, rather than the subject matter of the ads. *See* Lisa de Moraes, *supra* n.20 ("those bits about warning men that if they have a four-hour erection they should seek immediate medical care, because it's actually not a good thing, are not something the ad agencies, the networks or the pharmaceutical companies necessarily want to see in those ads either – they're required by the FDA"). Obviously, it would be manifestly unjust for the government to adopt new rules in response to speech that another agency compels.

lines that address each of these categories of ads,[22] and the FTC's ongoing reviews have confirmed that the film, music, and video game industries comply with these standards.[23] Consequently, there is no evidence in the record – empirical, anecdotal, or otherwise – that the problem of "inappropriate" ads pose any problem that might justify a regulatory response.

C. Extending Ratings Requirements to Commercials Would Impose an Unconstitutional Burden on Advertisers and the Programs They Sponsor

Proposals to impose ratings on advertisements and product placement would be particularly burdensome, both for administrative reasons already described and because of the adverse economic impact. The First Amendment limits any regulation of commercial time that acts as a disincentive for speech, and courts have invalidated restrictions that diminished the economic viability of the medium at issue. *See, e.g.*, *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004) (striking down state law banning advertisers from purchasing alcohol beverage advertising in college newspapers). As then-Judge Alito explained, "[i]mposing a financial burden on a speaker based on the content of the speaker's expressions is a content-based restriction of expression and must be analyzed as such." *Id*. at 106. This holding followed from the Supreme Court's opinion in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims*

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[22] ANA Comments at 6-8 (citing PhRMA Guiding Principles, Direct to Consumer Advertisements About Prescription Medicines (revised Nov. 2005); www.caru.org/guidelines/guidelines.pdf; www.discus.org/pdf/61332_DISCUS.pdf; www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf ("*FTC 2007 Report*")).

[23] *Id*. It is notable that the CMPC Comments cite the FTC's *2000* report on marketing violent entertainment for the proposition that "excessively violent advertising … is, in fact, reaching children," CMPC Comments at 10, but avoid mentioning the FTC's 2007 finding that the state of affairs had changed considerably in recent years. *See FTC 2007 Report* at i ("The 2000 Report found that industry members routinely targeted children in their advertising … of violent entertainment [ ] and that children under age 17 could purchase these products relatively easily [and] called upon the industries to strengthen their self-regulatory programs" but as of 2007 "[a]ll three industries generally comply with [these] standards regarding the display of ratings and labels.").

Board, 502 U.S. 105 (1991), where the Court struck down a so-called "Son of Sam" law because it "impose[d] a financial disincentive" on "speech of a particular content." *Id*. at 116.

These constitutional principles limit governmental action even where the proposed restriction on advertising may not rise to the level of a "ban," and even where it may be imposed at the viewer's option. *E.g.*, *Playboy Entmt. Group*, 529 U.S. at 812 ("[I]t is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree."). In this case, the proposed regulatory regime would require separate product- or subject-matter-based ratings unique to ads so they could be deleted from the surrounding programming. And in the case of proposed ratings for any program that contains product placement, entire blocks of programming could be deleted with the flick of a switch. It is one thing when viewers simply choose not to watch by exercising their right to use the on/off switch. But it is quite another when the government prescribes which categories of programs should be engineered to be filtered out. As the Commission explained in rejecting a proposal for an advertising "detector signal," "ignoring the fundamentally commercial nature of [commercial television] is done at great risk." *Children's Advertising Detector Signal*, 100 FCC.2d ¶ 9. The risk here is a substantial burden not only on advertisers, but the programming providers dependent on them.

There is no doubt that any attempt to impose requirements for rating commercials would burden more speech than necessary. As a threshold matter, "[i]f the First Amendment means anything, it [is] that regulating speech must be a last – not first – resort," *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002), and the Supreme Court has "made clear that if the Government could achieve its interest in a manner that does not restrict speech, or that restricts less speech, the government must do so." *Id*. at 371. This requirement is particularly relevant to this inquiry in view of the far less burdensome alternative of consumer education, which courts

have held is constitutionally preferable to limits on speech. *44 Liquormart*, 517 U.S. at 507. *See also Blagojevich*, 469 F.3d at 652 (striking down labeling requirements for video games where "the State has not demonstrated that it could not accomplish this goal with a broader educational campaign about the ESRB system").

These are not abstract concepts. The United States is in the midst of its most significant economic crisis in several generations. *See* Bob Garfield, *Future May Be Brighter, But It's Apocalypse Now*, ADVERTISING AGE, March 23, 2009. Even in good times, the Commission has always recognized the need not to undermine advertiser support for the media it regulates. *See* Jonathan Levy, Marcelino Ford-Livene & Anne Levine, *Broadcast Television: Survivor in a Sea of Competition*, OPP Working Paper No. 37 at 7 (Sept. 2002). *See also Revision of Programming & Commercialization Policies*, 98 FCC.2d 1076 ¶ 66 (1984) (acknowledging the "fundamental, advertiser supported nature of commercial television"). But in the current economy, the last thing the Commission should consider is a speculative regulatory regime that would seek to target and eliminate advertising.

CONCLUSION

Based on the record compiled in this proceeding, the Commission should be well-equipped to report to Congress on the growing number of tools and strategies that individual households can use to tailor their media consumption to suit their personal preferences. In particular, the growth and diversity of market-based options should lead the Commission to conclude that the V-chip is unsuited to be revamped to become a universal solution to blocking all types of content that individuals may prefer to avoid. Instead, the diverse technologies and strategies are a positive development that permit parents to choose the approach that best meets their needs. However, because of the growing range of choices, the Commission may best assist consumers by promoting media education and by focusing on specific ways to inform parents of

strategies they might employ in making family media choices. Such an approach would best serve parents' needs while avoiding the bureaucratic burdens and constitutional confrontation that would come with more regulatory approaches to this issue.

Respectfully submitted,

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APPENDIX

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 $100 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.

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.