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No. 10-1293

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,
v.
FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* AMERICAN ACADEMY OF PEDIATRICS, AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, BENTON FOUNDATION, CHILDREN NOW, AND UNITED CHURCH OF CHRIST OFFICE OF COMMUNICATION, INC. IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations concerned with the well-being of children. They have long recognized that media can have both beneficial and harmful effects on children. *Amici* advocate before Congress and the FCC for policies designed to ensure that children have access to high quality educational programming specifically designed for children and to limit children's exposure to programming with inappropriate violence, sexuality, and commercialism.

The American Academy of Pediatrics ("AAP") is an organization of 60,000 pediatricians committed to the attainment of optimal physical, mental, and social health and well-being for all infants, children, adolescents, and young adults. The AAP offers resources to help educate parents about the effects of media on their children and give them ideas for maintaining a healthy approach to media for their children.

The American Academy of Child and Adolescent Psychiatry ("AACAP") comprises over 7,500 child and adolescent psychiatrists and other physicians dedicated to improving the quality of life for children, adolescents, and families affected by mental, behavioral, or developmental disorders. AACAP supports the development of dedicated children's televi-

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[1] All parties to this case have filed letters consenting to the filing of *amicus curiae* briefs in support of either party or of neither party. No counsel for a party authored this brief, either in whole or in part, and no party, counsel for a party, or any other person other than *amici curiae* or their members or counsel made a monetary contribution intended to fund the preparation or submission of this brief.

sion programming and tools to help parents protect their children from the negative mental health effects of viewing inappropriate content.

The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest.[2] It pursues this mission by seeking policy solutions that support the values of access, diversity and equity, and by demonstrating the value of media and telecommunications for improving the quality of life for all.

Children Now is a national organization for people who care about children and want to ensure that they are the top public priority. In particular, Children Now works to ensure that broadcast television serves children's interests by maximizing its educational value and minimizing its negative health effects.

The Office of Communication, Inc. of the United Church of Christ, ("OC, Inc."), is the media justice arm of the United Church of Christ, a faith community rooted in justice with 5,700 local congregations across the United States. OC, Inc. works to promote public interests in the media, especially for people of color, women, and children.

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[2] These comments reflect the institutional view of the Foundation and, unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors, or advisors.

SUMMARY OF ARGUMENT

Amici agree with respondents that the FCC's current indecency enforcement regime is unconstitutionally vague. The regime leaves parents without a clear idea of what their children might see or hear while watching broadcast television. Accordingly, the Court should affirm the court of appeals on vagueness grounds.

The Court need not and should not go beyond vagueness to resolve this case. In particular, there is no need for the Court to revisit the long-standing precedents of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Disturbing *Red Lion* could endanger the Children's Television Act of 1990 ("CTA"). The CTA and the FCC rules implementing it have succeeded in increasing the quantity of educational programming for children and limiting advertising on children's programs. They also prevent advertisers from taking unfair advantage of children's immaturity. Experience with deregulation indicates that in the absence of such regulations, market forces provide insufficient incentives for broadcasters to carry children's educational programming or limit harmful advertisements during children's programming.

The CTA and underlying FCC rules are premised on *Red Lion*'s holding that conditioning the award of broadcast licenses on serving the public interest is consistent with the First Amendment. Any action casting doubt on *Red Lion* could lead to challenges to the CTA and related FCC rules. Although substantial research demonstrates the educational

value of children's programming and the harms associated with children viewing inappropriate content, it is uncertain whether this research would satisfy strict scrutiny.

Amici further agree with respondents that the FCC's indecency enforcement in the present cases is not justified under *Pacifica*. But there is no need to revisit *Pacifica* because the premises underlying *Pacifica*—that broadcast television is pervasive and uniquely accessible to children—continue to be valid.

Finally, should the Court choose to evaluate the FCC's indecency regime under a heightened level of scrutiny, it should reject the proposition that the V-Chip and underlying ratings provide an equally effective, less-restrictive alternative to government regulation. Despite the availability of V-Chip functionality in most television sets and strong promotional and educational efforts, very few parents are aware of the V-Chip's existence, know how to use it, or understand the ratings system. Moreover, the impossibility of accurately and consistently rating the vast number of television programs makes the system unreliable and thus ineffective as an alternative to government regulation.

ARGUMENT

I. The Court should affirm the court of appeals' holding that the FCC's indecency policy is unconstitutionally vague.

Amici agree with respondents ABC, Inc., et al., ("ABC, Inc.") that the Commission has not articulated a policy that is "sufficiently clear and consistent to place broadcasters on notice of what material will be deemed indecent." ABC, Inc. Br. at 14. The

FCC's indecency policy also fails to provide parents with a clear idea of what they can expect their children to see or hear while watching broadcast television programming. Affirming the court of appeals' finding of vagueness likely will result in more restrained FCC enforcement of the indecency prohibition or prompt the FCC to adopt new standards through a rulemaking.[3] Either result would afford parents greater certainty and the ability to make reasonable viewing choices for their children than under the FCC's current enforcement policy.

II. The Court should not disturb *Red Lion* or *Pacifica*.

Amici further agree with respondents Center for Creative Voices in Media, et al. ("CCV") that the Court need not and should not revisit the longstanding precedents set in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). CCV Br. at 6-8. Affirming the lower court on vagueness grounds would eliminate the need to revisit these cases.

A. Disturbing *Red Lion* could endanger laws and regulations designed to benefit children.

Amici agree with respondents Fox Television Stations, Inc. ("Fox") and CCV that the scarcity doctrine has never been the basis for indecency enforcement. Fox Br. at 36; CCV Br. at 9, 22-28. Accordingly, not only is revisiting *Red Lion* unnecessary, doing so could endanger many FCC policies premised

[3] *See Fox Television Stations, Inc. v. FCC,* 613 F.3d 317, 331 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011).

on *Red Lion*. CCV Br. at 28-37. Of particular concern to *amici* is that disturbing *Red Lion* could serve as an invitation to challenge the Children's Television Act of 1990 ("CTA"), which requires television stations to provide educational programming for children and limit the amount and type of advertising during children's programs.

1. The CTA and the rules implementing it are premised on *Red Lion*.

In *Red Lion*, the Court unanimously upheld the constitutionality of the FCC's authority to license broadcast stations. Because the Court viewed licensing as essential to the productive use of the spectrum, it concluded that granting licenses to some while denying licenses to others did not violate the First Amendment. 395 U.S. at 388-89. The Court reasoned that nothing in the First Amendment prevented the government from requiring a licensee to "to conduct himself as a proxy or fiduciary with obligations" to present the views of others in the community. *Id.* at 389. It added that:

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is *the right of the viewers and listeners, not the right of the broadcasters, which is paramount*. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."

Id. at 390 (internal citations omitted) (emphasis added).

Five years after *Red Lion*, in a 1974 policy statement, the FCC spelled out its expectations regarding broadcasters' obligations to serve children. *Children's Television Report and Policy Statement*, 50 F.C.C. 2d 1 (1974), *aff'd sub nom. Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir 1977). The FCC noted that the "landmark decision in *Red Lion* gave considerable support to the principle that the FCC could properly interest itself in program categories." *Id.* at 4. It concluded that language about the paramount First Amendment rights of the viewers "clearly points to a wide range of programming responsibilities on the part of the broadcaster" including "a special obligation to serve children." *Id.* at 5. It also found that "because of their immaturity and their special needs, children require programming specifically designed for them." *Id.*

The 1974 policy statement also set forth broadcasters' responsibilities in advertising to children. Research on child development and psychology found that children lacked the "sophistication or experience needed to understand that advertising is not just another form of informational programming." *Id.* at 15. In response, the FCC urged broadcast stations to voluntarily limit the amount of advertising on children's programs, required that program and commercial content be clearly separated, and prohibited practices such as "host selling" that took unfair advantage of children. *Id.* at 8-18.[4]

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[4] The FCC defines host-selling as "the use of 'program talent or other identifiable program characteristics to deliver commer-

Congress codified broadcasters' special obligation to children in the Children's Television Act of 1990. Congress found that "it has been clearly demonstrated that television can assist children to learn important information, skills, values, and behavior, while entertaining them and exciting their curiosity to learn about the world around them." Children's Television Act of 1990, Pub. L. No. 101-437 § 101(2) [hereinafter *CTA*]. Congress further found that "as part of their obligation to serve the public interest, television station operators and licensees should provide programming that serves the special needs of children." *Id.* Thus, the CTA requires the FCC to "consider the extent to which the licensee . . . has served the educational and informational needs of children through the licensee's overall programming" when evaluating the renewal application of any commercial or non-commercial television license. 47 U.S.C. § 303b(a)(2) (2006). The CTA also directed the FCC to adopt rules limiting the number of minutes of commercial time in children's programs (whether or not educational) on both broadcast and cable television. § 303a(a).

When debating the CTA, both the Senate and House Reports closely examined the constitutionality of imposing an affirmative obligation on licensees to serve the special needs of children. The House Report concluded that requiring the FCC to consider children's programming when renewing licenses was "clearly constitutional under tests established in *Red*

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cials' during or adjacent to children's programming featuring that character." *Children's Television Act*, FCC.GOV (last visited Nov. 7, 2011), http://www.fcc.gov/guides/childrens-educational-television.

Lion and subsequent cases." H.R. REP. NO. 101-385, at 11 (1989). Likewise, the Senate Committee concluded that "it is well within the First Amendment strictures to require the FCC to consider, during the license renewal process, whether a television licensee has provided programming specifically designed to serve the educational and informational needs of children in the contexts of its overall programming." S. REP. NO. 101-227, at 16 (1989).

The FCC also relied on *Red Lion* in adopting rules to implement the CTA. For example, in 1996, the FCC adopted a processing guideline for renewing broadcast licenses under which a broadcast station that aired on average three hours per week of children's educational or informational programming would be found to have met its obligations under the CTA. *Policies and Rules Concerning Children's Television Programming*, 11 FCC Rcd. 10660, 10662 (1996). In rejecting broadcasters' arguments that this guideline violated the First Amendment, the FCC relied on *Red Lion* and subsequent cases. *Id.* at 10729-30.

In 2004, the FCC revised the guideline to account for the fact that when television stations transitioned from analog to digital broadcasting that they would be able to provide additional "multicast" channels of free video programming over existing spectrum. The FCC amended the license renewal processing guidelines so that DTV broadcasters that chose to multicast would be expected to proportionately increase the amount of children's educational programming. *Children's Television Obligations of Digital Television Broadcasters,* 19 FCC Rcd. 22943, 22950 (2004). On reconsideration, the FCC rejected

broadcasters' arguments that the revised guidelines violated the First Amendment, noting that under *Red Lion*, "[i]t is well established that the broadcast media do not enjoy the same level of First Amendment protection as do other media." 21 FCC Rcd. 11065, 11072-73 n.41 (2006).

2. The CTA and underlying FCC rules have benefited children.

The CTA and the regulations implementing it have increased the amount of educational programming available to children. The FCC's review of the processing guidelines three years after implementation found that broadcasters had increased the quantity of children's educational programming and aired, on average, four hours per week from 1997 to 1999. FCC, THREE YEAR REVIEW OF THE IMPLEMENTATION OF THE CHILDREN'S TELEVISION RULES AND GUIDELINES 1997-1999 1 (2001), *available at* http://transition.fcc.gov/mb/policy/cetv.html. A more recent report by the Government Accountability Office found that:

> The amount of core children's programming aired by commercial broadcast stations in the television markets we reviewed increased significantly from 1998 to 2010, with the increases ranging from 73 percent in the smallest market (Butte-Bozeman, Montana), to 477 percent in the largest market (New York, New York). . . . [T]he average weekly hours aired more than doubled for six markets. As a result, viewers of broadcast television in these markets have more educational and informational core children's programming

> formational core children's programming available to them.[5]

This same GAO Study found that the FCC actively enforced the children's advertising limits and policies.[6]

Independent studies confirm that increased children's programming benefits the long-term well-being of children. One study by the Corporation for Public Broadcasting found that "kids who watch Sesame Street in preschool spend more time reading

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[5] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-659, CHILDREN'S TELEVISION ACT: FCC COULD IMPROVE EFFORTS TO OVERSEE ENFORCEMENT AND PROVIDE PUBLIC INFORMATION 8 (2011) [hereinafter "GAO Report"]. Many other studies have shown that most broadcasters are meeting or exceeding the FCC's three-hour guideline. *See, e.g.,* BARBARA J. WILSON, ET AL. EDUCATIONALLY/INSUFFICIENT? AN ANALYSIS OF THE AVAILABILITY & EDUCATIONAL QUANTITY OF CHILDREN'S E/I PROGRAMMING 11-12 (2008) (analysis of a stratified sample of stations in 2007 found that stations aired an average of 3.32 hours per week of children's E/I programming); AMY B. JORDAN, IS THE THREE-HOUR RULE LIVING UP TO ITS POTENTIAL? 3 (2000) (noting that broadcast stations offered, on average, 3.4 hours of core education programming per week).

[6] GAO Report, *supra* note 5, at 15. It found that "for the last two renewal cycles in 1996 and 2004, the FCC issued about 7,000 violations to over 600 stations, and assessed civil penalties totaling almost $3 million. Most of these violations were advertising length violations— advertisements aired during children's programming that exceeded 10.5 minutes per hour on weekends or 12 minutes per hour on weekdays. The remaining violations concerned other advertising problems—such as host-selling or failure to create a clear distinction between program content and advertising—or problems with a broadcast station's public inspection file—such as the station not including all the required children's programming documents in the file." *Id.* at 15 (citations omitted).

for pleasure in high school, and they obtain higher grades in English, math, and science." CORPORATION FOR PUBLIC BROADCASTING, FINDINGS FROM READY TO LEARN: 2005-2010 5 (2011). Other programs, such as *Mister Rogers' Neighborhood*, have increased the propensity towards positive behavior and values, including: "sympathy, task persistence, empathy, and imaginativeness." ALETHA C. HUSTON ET. AL., BIG WORLD, SMALL SCREEN 65 (1992).

When the FCC deregulated television in the 1980s, stations aired less educational programming for children and more advertising during children's programs. It was for this reason that Congress passed the CTA. The Senate Report reviewed substantial evidence and concluded that "despite the FCC's contention that market forces should be sufficient to ensure that commercial stations provide educational and informational children's programming, the facts demonstrate otherwise." S. Rep. No. 101-227, at 9. Similarly, the House Commerce Committee found that commercial time during children's broadcasting had increased in the five years since the FCC eliminated the advertising limits and that "total reliance on the market to hold advertising to an acceptable level during children's programming" had led to increased commercialization. H.R. Rep No. 101–385, at 8-9.[7]

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[7] There is a market failure in children's programming because US broadcasting is largely a commercial system that relies on advertising revenue. As the FCC found in adopting the processing guideline, "small audiences with little buying power, such as children's educational television audiences, are unlikely to be able to signal the intensity of their demand for such programming in the broadcasting market." Therefore, broadcasters

3. Disturbing *Red Lion* may result in constitutional challenges to the CTA and FCC rules that benefit children.

If the Court were to disturb *Red Lion*, it could invite constitutional challenges to the CTA or the rules implementing it. To meet strict scrutiny, the government would need to show that its rules are "justified by a compelling government interest and [are] narrowly drawn to serve that interest." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)). To do this, the government would have to identify "an actual problem in need of solving" and show that "the curtailment of speech must be actually necessary to the solution." *Id.* at 2738. In *Brown*, the Court found that the government failed to meet this demanding standard because it lacked studies showing that playing violent video games caused minors to act aggressively. *Id.* at 2738-39.

In adopting the processing guidelines in 1996, the FCC concluded that its rules implementing the CTA were "constitutional under the traditional First Amendment standard" applied to the broadcast media. It added: "But even if evaluated under a heightened standard, our rules would pass muster because the interest advanced is compelling and our regulations are narrowly tailored." *Policies and Rules Concerning Children's Television Program-*

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may have to forgo potentially more profitable programming to show children's educational television. *Policies and Rules Concerning Children's Television Programming*, 11 FCC Rcd. at 10674.

ming, 11 FCC Rcd. at 10732**.** While *amici* agree with the FCC, the recent *Brown* decision suggests that it is very difficult to make a satisfactory showing that a regulation is narrowly tailored to a compelling interest.

If, for example, the CTA's advertising limits were challenged, the FCC might have difficulty producing sufficient evidence to establish a compelling governmental interest. As this Court noted in *FCC v. Fox Television Stations, Inc.*:

> There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency. It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. It is something else to insist upon obtaining the unobtainable. Here it suffices to know that children mimic the behavior they observe-or at least the behavior that is presented to them as normal and appropriate. . . . Congress has made the determination that indecent material is harmful to children. . . .

129 S. Ct. 1800, 1813 (2009) (citations omitted). While there is empirical research demonstrating that certain advertising techniques are unfair to

children, it is not certain that a court would find a sufficiently strong causal link to satisfy strict scrutiny.[8]

B. Disturbing *Pacifica* is unnecessary and could harm children.

Amici agree with respondents CCV and CBS Television Network Affiliates Association and NBC Television Affiliates ("CBS and NBC Affiliates") that the FCC's indecency enforcement in the present cases is not justified by *Pacifica*. *See, e.g.,* CCV Br. at 10-14; CBS and NBC Affiliates Br. at 32. *Amici* do not agree, however, that the premises underlying *Pacifica*—the pervasiveness of broadcast media and its unique accessibility to children—are no longer valid and that *Pacifica* should be disturbed. *See Pacifica*, 438 U.S. at 748-50.

A substantial number of Americans depend on over-the-air broadcasting. A recent study found that 46 million out of 110 million households relied on over-the-air television broadcasting as their primary means of receiving television programming, up from 42 million households a year earlier. Phil Kurz, *46 Million Americans Still Watch TV Exclusively over the Air, says Report*, BROADCASTENGINERING.COM, http://broadcastengineering.com/ott/americans-still-watch-tv-exclusively-over-the-air-06082011/ (June 08, 2011). Another recent study found that low-income households with children are particularly de-

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[8] *See, e.g.*, DALE KUNKEL & JESSICA CASTONGUAY, *Children in Advertising: Content, Comprehension, and Consequences*, *in* HANDBOOK OF CHILDREN AND THE MEDIA (DOROTHY G. SINGER & JEROME L. SINGER eds., 2011).

pendent on broadcast television. It found that while 98% of children under age eight in households with incomes of $30,000 or less have a television, only 53% have cable, and only 48% have a computer. COMMON SENSE MEDIA, ZERO TO EIGHT: CHILDREN'S MEDIA USE IN AMERICA 20-23 (2011). Thus, broadcast television remains a pervasive and important part of American society that is uniquely accessible to young children. Accordingly, *Pacifica* provides a viable and important basis for the FCC to protect children from daytime broadcasts of repetitive excretory and sexual references.

III. The V-Chip does not provide an effective less-restrictive alternative means for protecting children from inappropriate content.

Should the Court choose to evaluate the FCC's indecency regime under a heightened level of scrutiny, *amici* urge the Court to reject the argument of ABC, Inc. that the V-Chip provides a less speech-restrictive means for protecting children from inappropriate broadcast content. *See, e.g.,* ABC, Inc. Br. at 42. The mere existence of a possible alternative means of accomplishing a government interest is not enough. Rather, the less-restrictive alternative must be "*at least as effective* in achieving the legitimate purpose that the statute was enacted to serve." *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (emphasis added). Experience has shown that the V-Chip and its underlying ratings scheme have not and cannot provide an effective tool for protecting children from inappropriate content.

A. The V-Chip and underlying TV ratings were intended to provide a tool for parents to protect their children from indecent broadcast content.

Section 551 of the Telecommunications Act of 1996 was intended to provide parents "with the technological tools that allow them to easily block violent, sexual, or other programming that they believe harmful to their children." Telecommunications Act of 1996, Pub. L. No. 104-104 § 551(a)(9), 100 Stat. 56 (codified in scattered sections of 47 U.S.C.). To work, section 551's system requires that broadcast video programming be embedded with ratings and that television sets come equipped with a device, known as the V-Chip, capable of decoding those ratings, thus permitting parents to configure the V-Chip in their television to block programming they believe is inappropriate for their children.

More specifically, section 551 required all new television sets with screens 13 inches or larger to be equipped with the V-Chip starting in January 2000. 47 U.S.C. § 303(x) (2006). It provided program distributors a year to develop a voluntary ratings system subject to FCC review. § 551(e)(1)(A).

Several industry trade associations, including the National Association of Broadcasters ("NAB"), the National Cable Television Association ("NCTA") and the Motion Picture Association of America ("MPAA") developed a ratings system that they submitted to the FCC in January 1997. Many parents groups, public health organizations, and members of Congress expressed concerns about the industry proposal because it called only for age-based ratings, and not content-based ratings that would alert par-

ents to the specific type of material they could expect their children to view in a particular program. *Implementation of Section 551*, 13 FCC Rcd. 8232 at ¶ 5 (1998) [hereinafter *Implementation of Section 551*]. Indeed, *amicus* Children Now urged the FCC to reject the industry's original proposal because the ratings did not "tell parents why a program was rated the way it was, preventing parents from making the very decision the Telecommunications Act empowered them to make." Children Now, Comment to *Industry Proposal for Rating Video Programming*, FCC Docket No. 97-55 at 5 (Apr. 8, 1997), http://fjallfoss.fcc.gov/ecfs/document/view?id=1808820001 [hereinafter *Children Now Comment*].

Subsequent negotiations between industry representatives and several children's advocacy groups—including AAP and Children Now—resulted in a revised set of Parental Guidelines filed with the FCC in August 1997. Under the revised guidelines, each program receives one of six ratings based on age as well as any of five applicable content-based descriptors: "V" for "violence," "S" for "sexual situations," "L" for coarse "language," "D" for suggestive "dialogue," and "FV" for "fantasy violence."[9] There are a total of 44 different possible ratings combinations.

The FCC found the revised ratings system acceptable. *Implementation of Section 551*, 13 FCC Rcd. 8232 at ¶ 31 (1998). It based its determination

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[9] The age-based categories are as follows: TV-Y (suitable for all children); TV-Y7 (directed to children age 7 and older); TV-G (general audience); TV-PG (parental guidance suggested); TV-14 (parents strongly cautioned); and TV-MA (mature audience only).

in part on a joint statement of the industry and advocacy groups asking that the FCC "give the rating system a fair chance to work and allow parents an opportunity to understand and use the system." *Id.* at ¶ 32. It also noted that the industry had pledged to "educate the public and parents about the V-Chip and the TV Parental Guideline System [and] encourage publishers of TV periodicals, newspapers and journals to include the ratings with their program listings." *Id.* at Attachment: Agreement on Modifications to the TV Parental Guidelines.

Amici agree that Congress intended the V-Chip to provide a narrowly tailored means of achieving a compelling government interest. ABC, Inc. Br. at 43. Congressman Markey, who sponsored the V-Chip amendment in the House of Representatives, predicted that "[i]n [just] two years there will be 25 million homes with a V-Chip" that "parent[s] can use to protect their children." 141 CONG. REC. H8481-01 (1995) (statement of Rep. Edward Markey). Shortly before passage of the Telecommunications Act in February 1996, President Clinton urged Congress in his State of the Union Address to adopt the V-Chip "so that parents can screen out programs they believe are inappropriate for their children." William Clinton, President of the United States, 1996 State of the Union Address (Jan. 22, 1996).

Children's advocacy groups initially shared this enthusiasm. For example, the AACAP hailed the V-Chip as "an important commitment, by legislators to parents and to child advocates." 141 CONG. REC. S8225-01 (1995) (letter introduced by Sen. Kent Conrad). Children Now noted that the V-Chip had been "[c]hampioned by children's advocates and pol-

icy makers from both sides of the aisle, [and] was destined to forever change the way children view television." *Children Now Comments* at 1.

B. In practice, the V-Chip has not provided parents with an effective tool to protect their children.

Amici disagree with the claim that the V-Chip provides an *effective* alternative. *See, e.g.,* ABC, Inc. Br. at 44. It is true that most households have televisions equipped with V-Chips. *Implementation of the Child Safe Viewing Act*, 24 FCC Rcd. 11413, 11418 (2009) [hereinafter *CSVA Report*] (noting that many households with older TV sets now have V-Chip capability through their DTV converter box). Numerous studies show, however, that parents are not using this tool.

Congressional concern over the effectiveness of the V-Chip and the associated ratings led Congress to pass the Child Safe Viewing Act of 2007 ("CSVA"). The CSVA directed the FCC "to examine the existence, availability and use of parental empowerment tools already in the market." Pub. L. No. 110-452 § 2(a)(3). The Senate Report on the CSVA specifically cited studies finding that the V-Chip was not widely used and that many parents were unaware of its existence. S. REP. NO. 110-268, at 2 (2008).

The FCC's Report to Congress pursuant to the CSVA stated 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." *CSVA Report*, 24 FCC Rcd. at 11420. The Report summarized numerous studies finding

that the V-Chip was rarely used, that parents lacked a basic understanding of the ratings, and that the ratings are inaccurately applied. *Id.* at 11420-27.

For example, a 2007 study from the Kaiser Family Foundation found that 67% of parents were "interest[ed] in closely monitoring their child's media use," but only 43% of those who had purchased a V-Chip-equipped television since 2000 were even aware that their television contained V-Chip technology. KAISER FAMILY FOUNDATION, PARENTS, CHILDREN, AND MEDIA: A KAISER FAMILY FOUNDATION SURVEY 9 (2007) [hereinafter KAISER 2007]. The same study found that only 16% of parents had utilized the V-Chip, a mere 1% increase since 2004 despite the massive educational campaigns that had taken place in the interim. *Id.* In contrast, 85% of parents with children who play video games are aware of the Entertainment Software Ratings Board ("ESRB") video game ratings system, which was first implemented in 1994, and 65% of parents regularly check a game's rating before making a purchase. ESRB, *ESRB Survey: Parental Awareness, Use & Satisfaction*, ESRB.ORG (last visited Nov. 5, 2011), http://www.esrb.org/about/awareness.jsp.

Additional studies have found that even when parents are aware that they have the V-Chip, they may experience difficulty using it effectively. Programming the V-Chip can be a challenge; one study noted that users must cycle through at least five screens to turn on the V-Chip's functionality and "must move quickly or programming menus disappear." AMY JORDAN & EMORY WOODARD, PARENTS' USE OF THE V-CHIP TO SUPERVISE CHILDREN'S TELEVISION USE 3 (2003). The same study found that "many

mothers who might otherwise have used the V-Chip were frustrated by an inability to get it to work properly," and that only 27% of mothers felt able to block out a specific type of program upon request. *Id.*

Parents also have trouble understanding the ratings system. Studies focusing on parental comprehension of the ratings show that many parents are unaware of or confused about the meaning of the ratings system. The 2007 Kaiser Study found that among parents with children aged 2-6, only three in ten could name any of the ratings used for children's programming. KAISER 2007 at 9. Moreover, 9% of parents mistakenly believed that "FV" denoted that a program was suitable for "family viewing," and only 11% were aware that "FV" actually denoted that a program contained "fantasy violence." *Id.* at 8.

Parents have even less familiarity with the rating system's content-based descriptors. The 2007 Kaiser Study found that only about half of those surveyed understood that "V" indicated "violence," only 36% knew that "S" stood for "sex," and only 2% knew that "D" indicated "suggestive dialogue." *Id.* at 9.

Pediatrics, the official journal of the AAP, recently published the results of three studies of television ratings. One study found that parents were much less familiar with and less likely to use TV ratings than movie or video game ratings. Douglas A. Gentile, et al. *Parents Evaluation of Media Ratings a Decade After the Television Ratings Were Introduced*, 128 Pediatrics 36, 38 (2011). A second study found that only 5% of parents felt that television ratings were always accurate. *Id.* Together, these studies show that parents "do not think the existing ratings accurately provide the information they want

[and] although they want detailed content rating they also want age-based ratings." *Id.* at 42. While parents generally agreed on the types of content they wanted to know about, they lacked consensus on the appropriate ages for different types of content. As a result, age-based ratings "are clearly not going to be perceived as accurate for all, or even most, parents." *Id.*

1. Despite significant promotional efforts, many parents remain unaware of or unable to use the V-Chip and/or do not know what the underlying ratings mean.

Respondent ABC, Inc. claims that a less-restrictive alternative cannot be dismissed solely based on the lack of public use or awareness. ABC, Inc. Br. at 45 (citing *U.S.* v. *Playboy Entertainment Group*, 529 U.S. 803 (2000)). *Playboy*, however, presented a very different set of facts than the present case. *Playboy* concerned the constitutionality of a different section of the Telecommunications Act, section 505, *codified at* 47 U.S.C. § 561 (2006), which required cable channels whose content was "primarily dedicated to sexually oriented programming" to fully scramble their signals to eliminate signal bleed into homes that did not subscribe to those channels. 529 U.S. at 805. The Court held that section 505 was unconstitutional in large part because parents could request that their cable operator block any undesired specific channel from their service, thus providing a less speech-restrictive alternative. Although this alternative was not widely used, the Court found "no evidence that a *well-promoted* voluntary blocking provision would not be capable at least of informing

parents to the problem of signal bleed . . . and about their rights to have the bleed blocked." *Id.* at 805. (emphasis added).

In contrast, the V-Chip has been heavily promoted for over a decade. When the FCC approved the ratings in 1998, it relied on industry promises to promote the V-Chip and ratings to parents. In the following years, both industry and children's advocacy groups made significant efforts to educate the public about the V-Chip. For example, in 1999, the NAB, NCTA and MPAA teamed up with the Kaiser Family Foundation to create the "V-Chip Education Project," which consisted of "a series of PSA's, a booklet with information about the V-Chip, a toll-free phone number and a website." *CSVA Report*, 24 FCC Rcd. at 11438. In 2005, the NCTA, along with Cable in the Classroom, developed the "Control Your TV" initiative, a $250 million campaign designed to inform parents about the V-Chip. CABLE PUTS YOU IN CONTROL, http://controlyourtv.org (last visited Nov. 8, 2011). The following year, several industry associations worked with the Ad Council to launch a $340 million national multi-media campaign called the "TV Boss." *CSVA Report*, 24 FCC Rcd. at 11438. Thus, unlike in *Playboy*, an extensive campaign to promote an alternative has been tried and has failed.

2. The V-Chip's underlying ratings are neither accurately nor consistently applied.

Even if there were greater public awareness of the V-Chip and underlying ratings, the system cannot be effective because the ratings underlying the V-Chip's operation are applied inaccurately and inconsistently. Studies have shown that many programs

are not accurately rated and that a large amount of objectionable content reaches children.[10] For example, one study examined ratings over four years and found more instances of crude language during programs rated TV-PG than in those rated TV-14. Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 4 J.BROAD. & ELEC. MEDIA 554, 567 (2004).

Another study examined 2,757 television shows and found that 79% of the shows contained violence but no V (violence) descriptor rating, 91% contained offensive language but no L (offensive language) rating, and 92% contained sexual content but no S (sexual scenes) rating. DALE KUNKEL ET. AL., *Assessing the Validity of V-Chip Rating Judgments: The Labeling of High-Risk Programs*, *in* THE ALPHABET SOUP OF TELEVISION PROGRAM RATINGS 51-68 (Bradley Greenberg ed., 2001). A third study analyzed 1,332 television shows to determine the risk of harmful effects on youth. It found that the industry-assigned ratings generally did not match the degree of risk.

[10] It is also important to note that not all categories of programming are rated and therefore not all broadcast programs can be blocked by the V-Chip. Both news and sports programs are not rated. FCC Br. at 51. Further, there is no V-Chip for radio. 93% of people ages 12 and older listen to radio each week. ARBITRON, RADIO TODAY 2011: HOW AMERICA LISTENS TO RADIO 2 (2011). This study found that "teen consumption of radio each week is stronger and getting stronger." *Id.* at 104. On average teens spent between 7 and 10 hours per week listening to radio. *Id.* at 106. The study also found that that peak listening rates occurred between 6am and 10pm. *Id.* This period falls outside of the "safe-harbor period" during which broadcast may air unregulated programming. *See* 47 C.F.R. § 73.3999(b).

For example, more than two-thirds of children's shows with high-risk violent content were rated as TV-Y, the youngest rating, which generally does not include content descriptors. Gentile, 128 PEDIATRICS at 37 (2011). Finally, a survey of parents who use the television ratings system showed that only 52% thought that shows were rated accurately. VICTORIA RIDEOUT, PARENTS MEDIA AND PUBLIC POLICY: A KAISER FAMILY FOUNDATION SURVEY 5 (2004).

Respondent ABC, Inc. asserts that just because some programs are inaccurately rated does not prevent the V-Chip from being an adequate substitute. ABC, Inc. Br. at 47 (citing *Brown*, 131 S. Ct. at 2741 (recognizing that the existence of some "gaps" in effectiveness of video game ratings systems is insufficient to justify a government ban on the sale of video games to minors)). Television ratings, however, are substantially less effective than video game ratings.

Unlike the ESRB, which rates approximately 1,000 video games per year,[11] no single board determines the ratings for all television programs. Having a single ratings body is practically impossible because many more television programs are produced each year than motion pictures or video games. For example, a single network, NBC, *alone* broadcasts 5,000 hours of TV programming each year.[12] As a re-

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[11] *Frequently Asked Questions*, ESRB.ORG (last visited Nov. 5, 2011), ESRB.org/ratings/faq.jsp. In 2010, ESRB rated 1,638 titles. *Id.* Similarly, the MPAA has a single board that reviews and rates 800 to 900 films each year. *Reasons for Movie Ratings: The Classification and Rating Administration,* FILMRATINGS.COM (last visited Nov. 5, 2011), filmratings.com?filratings_CARA/#/about.

[12] *NBC Television Network*, COMCAST.COM (last visited Nov. 3,

sult, each broadcast station is individually responsible for rating the programming it airs. *CSVA Report*, 24 FCC Rcd. at 11425 (*citations omitted*).

The problems inherent in rating large numbers of programs have been exacerbated by the lack of any meaningful oversight of the television rating process. The FCC's approval of the ratings was premised in part on the creation of a Monitoring Board to hear complaints over potentially incorrectly rated programs. *Implementation of Section 551,* 13 FCC Rcd. at ¶ 10. In practice, however, the Board has not effectively served this function. Several *amici* representatives have served on the Board and are unaware of any situation in which the Board has taken action against an incorrectly rated program. And even if the Board did find that a broadcaster incorrectly rated a program, the Board has no authority to alter the rating or sanction the broadcaster.

Dale Kunkel, an expert on children's media, testified before Congress that "[u]nless media ratings can consistently and accurately label the content that poses the greatest risk of harm to children, such systems cannot accomplish much help for parents." *Hearing on Media Ratings Before the S. Comm. On Gov. Affairs*, 107th Cong. (2001) (Statement of Dale Kunkel, Professor, University of California Santa Barbara). Over the last decade, it has become clear that the consistent and accurate application of the ratings, which parents so strongly desire, has failed to become a reality and thus, the V-Chip is not and

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2011),
www.comcast.com/corporate/about/pressroom/NBCUniversal/television.html.

never will be an equally effective alternative to regulation.

CONCLUSION

For the above reasons, *amici* urge the Court to uphold the court of appeals' decision on the narrow vagueness grounds upon which it was decided.

Respectfully submitted,

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NOVEMBER 9, 2011