No. 08-1448

IN THE
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, Governor of the State of California, and EDMUND G. BROWN, JR., Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF BROADCASTERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The National Association of Broadcasters ("NAB") is a non-profit, incorporated association of radio and television stations and broadcast networks that serves and represents the American broadcast industry.[1] NAB frequently files briefs as an *amicus curiae* in cases that present issues of interest to its members, including issues arising under the First Amendment.[2]

NAB has an interest in the questions presented in this case because their resolution may affect the scope of the government's authority to regulate violence in television programming. For decades, the federal government has examined violent content on television but failed to develop a workable and constitutional definition of "violence" for purposes of any potential regulation. The government has also failed, despite repeated attempts, to establish a causal connection between violence on television and antisocial behavior or youth aggression.

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[1] Pursuant to Rule 37.6, *amicus* NAB affirms that no counsel for a party authored the brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* NAB, its members, or its counsel made such a monetary contribution. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

[2] NAB participated as *amicus curiae* in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), and *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), among others.

The history of government efforts to address violence on television sheds light on the issues in this case. California Civil Code sections 1746-1746.5 impose restrictions and a labeling requirement on the sale or rental of "violent video games" to minors. California's assertion that "violent" content in video games is harmful to children founders on the same shoals that the federal government has repeatedly faced in the television context—both with respect to defining the violent content to be regulated and establishing a causal link between violent content and real world harm.

It also is instructive for purposes of this case to underscore that the federal government's inability to find a basis for regulating television violence has not left parents without options to oversee the programming viewed by their children. An effective system of parent empowerment and industry self-regulation has given parents the ability to control their children's access to video content without any need for the government to define and regulate "violent" content or control its dissemination. Parental blocking solutions such as the V-chip for television, used in conjunction with a standardized, industry-monitored rating system, are an effective way to alleviate the government's concerns without imposing speech restrictions.

The video game industry, like the television industry, has adopted a voluntary and widely used rating system for video games, supported by technology that allows parents to limit a child's access to games based on the ratings. The California regulatory scheme simply ignores this less restrictive approach to achieving its putative goal of child

protection. In so doing, it runs roughshod over the First Amendment rights of content producers, retailers, and consumers.

In sum, NAB has an interest in ensuring that laws like the California statute are not upheld, because they do not advance a compelling government interest, they chill protected speech by using vague terms to constrain the distribution of content, and they do not utilize the least restrictive means to achieve the state's objective.

SUMMARY OF THE ARGUMENT

1. The federal government's attempts to regulate violence on television support the conclusion that the California law violates the First Amendment. By imposing a labeling requirement and restrictions on the sale of video games, the California law intrudes on the First Amendment rights of video game producers, distributors, and retailers. To justify this intrusion, the State must demonstrate that the alleged harm is real, and that the law will directly alleviate it. In addition, the law must provide sufficient guidance so that regulated parties know what conduct is prohibited. The California law fails both requirements.

Despite many attempts, the federal government has never formulated a definition of "violence" that is not unconstitutionally vague. The first attempt simply counted the number of punches thrown and shots fired during a television program. This "violence index" was inadequate because, among other reasons, it did not differentiate violent incidents in a detective show from those in a cartoon. Congress also attempted to define "violence" during

the 1970s by directing the FCC to identify the steps it could take to protect children from "excessive violence." But the FCC informed Congress that it could not do so without raising "serious constitutional questions." Because decisions regarding which programs were excessively violent would be "highly subjective," the FCC concluded that governmental efforts to regulate in this area "could lead to extreme results unacceptable to the American people." Most recently, in 2007, the FCC again declined to define "violence" despite a congressional request that it do so. The FCC concluded that "developing a definition would be challenging" because "violent programming cannot be sufficiently defined to give affected parties the requisite notice to be able to predictably comply with any such regulation."

The California law does not identify and define the objective characteristics of unacceptably "violent" content. Instead, it regulates content based on vague terms, such as "appealing to the deviant and morbid interest of minors." The statute, which borrows much of its language from judicial and regulatory definitions of "obscene" materials, is unconstitutionally vague because it forces retailers to judge whether a particular video game is too violent to sell or rent to minors and it subjects them to a civil fine if a court later decides that their judgment was incorrect.

Similarly, government studies have been unable to establish a causal relationship between television violence and youth behavior. In 1954, the federal government considered whether crime programs on television were encouraging juvenile delinquency.

Despite endorsing the view that a causal relationship existed, the congressional subcommittee studying the issue acknowledged that there was no research supporting this conclusion. A committee convened by the Surgeon General considered the issue in 1972, but its report was inconclusive. The Surgeon General reconsidered the issue in 2001, and concluded that television violence might at most cause a short-term increase in aggressive behavior, but that there is no evidence that it causes real-life violence. In 2007, the FCC took the position that media violence can increase aggressive behavior in children. It did so based on the Surgeon General's 2001 report, but failed to recognize that the report made clear that any such effects are short-lived and that television violence does not cause real-life violence.

These decades of study have failed to establish a causal link between violence on television and real world harm. Likewise, there is no evidence establishing that violent video games cause actual violence. Without clear evidence of such a causal connection, the California law's infringement on First Amendment rights is impermissible.

2. The California law is not narrowly tailored to achieve the government's purported interest because rating systems and blocking technologies can limit children's access to particular content without restricting free speech rights.

The television industry, like the video game industry, has established a voluntary system for rating its programming. The rating system uses age-based ratings (similar to the motion picture ratings), and also provides specific information about the

content of television programs. This system, adopted at Congress's urging, has been endorsed by the FCC and many prominent advocacy groups.

In conjunction with the development of the ratings systems, the FCC adopted technical requirements for the V-chip. This technology permits parents to restrict their children's viewing options by blocking programming according to the age-based categories (such as TV-14) or content labels (such as V for violence). Every television 13 inches or larger manufactured in the last decade contains a V-chip.

The rating systems and blocking technologies provide an effective solution to limiting youth exposure to violent media content. A 2007 study showed that most parents were aware of the television ratings system, and that a majority of them had used the system. Similarly, most parents are aware of the V-chip, and the number of parents using the V-chip is increasing. Because technology can effectively limit children's access to violent media without unduly restricting speech, content-based regulations, such as California's prohibition on violent video game sales to minors, are not narrowly tailored. The more constitutionally appropriate role for government is to continue promoting technological tools that assist parents in monitoring their children's use of media.

ARGUMENT

I. The History Of Government Efforts To Regulate Violence On Television Supports The Conclusion That California's Law Violates The First Amendment.

To justify a labeling requirement and restrictions on the sale of video games, California must do more than simply recite the truism that the state has a compelling interest in the well being of minors. Because labeling requirements and sale restrictions have an impact on First Amendment rights, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994). The Constitution also demands that such laws provide "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

In the broadcast context, the federal government has struggled for decades to develop a viable definition of "violence" on television. In the most recent effort, the Federal Communications Commission ("FCC") conducted a multi-year inquiry into "violent" programming on television and its effect on children. The FCC concluded that defining violence in a way that would provide clear notice to those being regulated would be "challenging," and referred the issue back to Congress without proposing a definition. FCC, *Report: In the Matter of*

Violent Television Programming and Its Impact on Children at 18 (April 25, 2007) ("2007 FCC Report").

The federal government also has tried for decades without success to establish the existence of a causal link between depictions of violence on television and actual harm to children. Although Congress and the FCC have repeatedly studied the issue, they have failed to establish that violent television content produces youth aggression.

Viewed against this backdrop of government efforts to regulate violence on television, California's ban on sales of violent video games to minors cannot pass constitutional muster. The statute fails to provide a constitutionally adequate definition of the content it is seeking to regulate; fails to demonstrate that it is addressing a real and provable harm; and lacks a real-world mechanism for enforcing the vague and undefined standards it imposes on video game producers, distributors, and retailers.

A. Decades of Examining Violence On Television Have Failed To Produce A Satisfactory Definition Of "Violence."

The First Amendment requires that laws restricting speech provide regulated parties with "a reasonable opportunity to know what is prohibited, so that [they] may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The federal government's decades-long effort to study violence on

television has demonstrated its inability to define "violence" in a way that meets this standard.[3]

The federal government made an early attempt to define violence during the 1970s. In 1972, the Scientific Advisory Committee on Television and Social Behavior, appointed by the Surgeon General, issued a report on the effects of entertainment violence on children's behavior. *See* Television and Growing Up: The Impact of Televised Violence, Report to the Surgeon General (1972). The report defined violence as the "overt expression of physical force against others or self, or the compelling of action against one's will on pain of being hurt or killed." *Id.* at 3.

In response to the report by the Surgeon General's committee, the Senate Subcommittee on Communications requested the creation of a "violence index" to measure the amount of violence on television. *See* Nancy Signorielli, *Violence in the Media* 8-10 (2005). This index counted the number of times a character punched someone or shot a gun, but drew no distinctions based on the type of violence or its context. *See* David Trend, *The Myth of Media Violence* 4 (2007). This measure of violence failed to give policymakers specific guidance as to which "violent" acts warranted regulatory intervention because it gave equal weight to violent incidents in

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[3] The Ninth Circuit did not find it necessary to reach Respondents' vagueness challenge to the California law, but the difficulties regulators have encountered in seeking to define "violent" media content help to illuminate the other First Amendment issues in this case.

cartoons and in detective, science fiction, and comedy programs such as *Columbo*, *Star Trek*, and *Get Smart*. *Id.*

Two years later, in 1974, the House Appropriations Committee directed the FCC "to submit a report to the Committee by December 31, 1974, outlining the specific, positive actions taken or planned by the [FCC] to protect children from programming of excessive violence and obscenity." *See* H.R. Rep. No. 1139, 93d Cong., 2d Sess. 15 (1974). In response to this directive, the FCC determined that the "judgments concerning the suitability of particular types of programs for children are highly subjective" and would "rais[e] serious constitutional questions." FCC, *Report on the Broadcast of Violent, Indecent, and Obscene Material*, 51 F.C.C. 2d 418, 419 (1975).

The FCC recognized that "no reform short of a wholesale proscription" of all violent material would "provide absolute assurance that children or particularly sensitive adults will be insulated from objectionable material." *Id.* at 423. But under this absolutist approach, "many traditional children's films should be banned because they include some element of violence—for example, episodes in *Peter Pan* when Captain Hook is eaten by a crocodile or in *Snow White* where the young heroine is poisoned by the witch." *Id.* at 419 n.5. As a result, the FCC concluded that any "attempt at drafting" rules defining the scope of entertainment violence "could

lead to extreme results which would be unacceptable to the American public." *Id.* at 419.[4]

During the 1980s, despite some calls for regulation, very few specific recommendations for government restrictions on television programming came out of the House or Senate committees. *See* Cynthia A. Cooper, *Violence on Television: Congressional Inquiry, Public Criticism and Industry Response* 102-03 (1996). These attempts at regulating television violence languished because, among other reasons, Congress recognized that the First Amendment placed substantial constraints on its authority to legislate the content of television. *Id.*

More recent examinations of violence on television have made clear that an absolutist approach to defining violence is overly simplistic. During the mid-1990s, a consortium of research universities conducted the National Television Violence Study, analyzing more than 10,000 hours of broadcast material. Trend, *supra*, at 4. This study

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[4] Although it did not take formal regulatory action, the FCC was found to have pressured television broadcasters to air only "family-friendly" programming during the 8:00-9:00 p.m hour of primetime. *See* Signorielli, *supra*, at 11; Cooper, *supra*, at 81. In 1976, a federal district court struck down the FCC's "Family Viewing Hour" policy on the ground that it violated the First Amendment. *Writers Guild of Am., W., Inc. v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976). According to the court, this policy, which was tied to the FCC's power to revoke the licenses of stations that did not follow it, constituted direct and unconstitutional censorship of content. *Id.* at 1141-43. Although the Ninth Circuit ultimately vacated the decision on jurisdictional grounds, the "Family Viewing Hour" was never reinstated. *See Writers Guild of Am., W., Inc. v. FCC*, 609 F.2d 355 (9th Cir. 1979).

was the first to find that the *context* in which violence appears is important to understanding its impact. It concluded that the reason for the violence, the characters involved, the consequences of the violence, and the relevant audience are all factors that should be included in any definition or measurement of television "violence." *Id.* at 4-5.

The acknowledgment that context matters to any regulatory definition of violence is crucial to understanding the complicated nature of any governmental efforts to define "violent" media content. Even among those who advocate regulation of violent programming, there is little consensus on what constitutes violence. For example, some researchers regard all depictions of potential harm as violence, including comic violence, accidents, or "acts of nature." Signorelli, *supra*, at 56. Others believe the focus should be on the infliction of overt physical pain, hurting, or killing. *Id.* Without an agreed-upon understanding of which violent depictions should be considered "acceptable" and which are appropriate subjects for regulation, the federal government has been unable to formulate a narrowly tailored regulation of supposedly harmful media content.

Most recently, the FCC's 2007 Report on violent television programming and its effect on youth sought to determine whether it is possible to define violence in a way that gives regulated entities fair notice of what speech is subject to regulation. The FCC's Report was issued in response to a congressional request that the agency consider whether it is in the public interest for the government to adopt a definition of "'excessively

violent programming that is harmful to children,'" and whether the government could formulate and implement such a definition "in a constitutional manner." Letter from Hon. Joe Barton, Chairman, U.S. House of Rep. Comm. on Energy & Commerce, to Hon. Michael K. Powell, Chairman, FCC (Mar. 5, 2004) ("House Commerce Committee Letter").

After receiving comments on whether or how excessive violence could be defined, the FCC found itself unable to propose a definition of "violence." The FCC noted the concerns expressed by commenters that "violent programming cannot be sufficiently defined to give affected parties the requisite notice to be able to predictably comply with any such regulation." 2007 FCC Report at 18. Rather than proposing or even suggesting a definition, the FCC could only conclude that "developing a definition would be challenging," and expressed its view that Congress is in a better position than the FCC to undertake the definitional task. *Id.*

Reflecting these definitional "challenges," the California statute at issue in this case makes no serious effort to identify and define the objective characteristics of content that is unacceptably "violent." Instead, it regulates content using vague terms: depictions that "appeal[] to a deviant or morbid interest of minors," "[are] patently offensive to prevailing standards in the community as to what is suitable for minors," or cause the game to "lack serious literary, artistic, political, or scientific value for minors." Cal. Civ. Code § 1746(d)(1)(A). As a result, the statute leaves retailers to decide whether particular video games are too violent to sell or rent

to minors, and subjects them to a civil penalty if a court determines after the fact that their judgments were incorrect. *Id.* § 1746.1(a). Faced with the prospect of severe penalties for violating vague and amorphous statutory prohibitions, retailers will be induced to err on the side of refusing to sell videos to minors, and producers and distributors will have little choice but to designate content that should otherwise be acceptable as unavailable to minors. The California statute thus is a classic example of a vague law that has an unconstitutional chilling effect. *See, e.g.*, *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968) (striking down an ordinance classifying films as suitable or unsuitable for young persons on vagueness grounds, and noting that vagueness concerns are not eliminated simply because the ordinance "was adopted for the salutary purpose of protecting children").

Rather than attempting to define violence in concrete terms, the California statute instead borrows the judicial and regulatory definitions used in the context of obscene materials. Decades of precedent, however, make clear that violent material is distinct from obscene content. *See Winters v. New York*, 333 U.S. 507 (1948). Based on this distinction, numerous courts have held, both with respect to video games and other media, that laws restricting violent materials using a modified obscenity standard are unconstitutionally vague. *See Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574-75 (7th Cir. 2001); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 687 (8th Cir. 1992).

Last Term, the Court struck down a federal law that criminalized the commercial creation, sale, or possession of certain depictions of animal cruelty. In so doing, the Court noted that "there is substantial disagreement on what types of conduct are properly regarded as cruel." *United States v. Stevens*, 130 S. Ct. 1577, 1588-89 (2010). Decades of government attempts to study and define "violence" in the broadcast industry demonstrate that there is no significant agreement on a workable definition of violent content, and any definition is even less likely to provide notice to those being regulated than the term "cruel" provided in *Stevens*.

B. Decades of Government Study Have Failed To Establish A Causal Connection Between Violence In The Media And Actual Harm To Youth.

The problem with regulating "violence" on television is not merely the government's inability to define the term. The government also must demonstrate that televised "violence" causes the harm meant to be redressed. Without clear evidence of such a causal connection, government regulation that infringes on speech is unwarranted.

The subject of violent content in television programming has received attention almost from the beginning of television broadcasting. Each time public attention has focused on the media, regulators have studied the issue in an attempt to establish that media violence produces real world harm. This pattern, repeated over a period of decades, has failed to establish that violence in the media is causally connected to antisocial behavior or youth aggression.

Congress studied the issue in 1954 when the Senate Subcommittee to Investigate Juvenile Delinquency in the United States considered whether crime programs on television were encouraging juvenile delinquency. *See* Signorielli, *supra*, at 4. The subcommittee limited its study to anecdotal evidence—for example, playing a 60-minute compilation of fist and gun fights from the CBS show *Hopalong Cassidy*, which CBS protested was taken out of context and represented only a small fraction of the program's content. Lawrence Laurent, *Senator Asks TV Policing to Keep Children From Seeing Gruesome Acts*, Washington Post at 8 (Oct. 20, 1954). Although it ultimately endorsed the view that exposure to violence on television caused crime and violence in the real world, Drew Pearson, *TV-Crime Report Alarms Networks*, Washington Post at 71 (Feb. 11, 1955), the subcommittee acknowledged the absence of any supporting research and called for scientific inquiry into the influence of television on children's behavior, C.P. Trussel, *Senate Unit Asks Curb on TV Crime*, N.Y. Times at 21 (Aug. 26, 1955).

Over the ensuing decades, criticism of depictions of violence on television continued to surface, often in response to widely publicized violent incidents. Cooper, *supra*, at 135. In 1968, just days after Robert Kennedy was assassinated, the White House established the National Commission on the Causes and Prevention of Violence (NCCPV). Signorielli, *supra*, at 7-8. Although the NCCPV did not engage in a study of (or gather meaningful data related to) violence on television, it nevertheless declared that television violence encouraged violent behavior and

desensitized children to violence in real life. Cooper, *supra*, at 57. Based on this conclusion, the NCCPV called for a reduction in programming, including cartoons, that involved any degree of violence. *Id.*

Around the same time, the Surgeon General attempted to determine whether there was evidence of a causal link between violent programming and youth behavior. The committee convened by the Surgeon General issued its final report in 1972. *See* Television and Growing Up: The Impact of Televised Violence, Report to the Surgeon General (1972). This report, however, "was marred by inconclusive results, controversy surrounding the committee make-up, and a weak set of recommended actions." Cooper, *supra*, at 69.

Citing the attack on a female jogger in Central Park by a gang of youths in 1989, Congress held hearings to consider the Television Violence Act of 1989, which extended antitrust exemptions to the television industry to allow broadcasters to cooperatively develop and implement standards aimed at reducing television violence. *Id.* at 111. Although Congress still lacked evidence sufficient to establish that television violence caused aggressive behavior, the bill was enacted as the Television Program Improvement Act of 1990, Pub. L. No. 101-650, § 501, 104 Stat. 5127, which was to be in effect for three years. *See* Signorielli, *supra*, at 13.

In 1993, as the expiration date for the 1990 Act approached, Congress held hearings to consider additional government regulation of television programming. Signorielli, *supra*, at 14. During the hearings, various bills were introduced to reduce violent programming. Cooper, *supra*, at 123-24.

Legal scholars and commentators testified that each of these bills violated the First Amendment, and none were enacted. *Id.* at 127-30.

Congress, however, continued to consider a less intrusive proposal to require the installation of parental control devices, known as V-chips, in new television sets, which would work in conjunction with a standardized rating system to allow parents to decide what their children could watch. Signorielli, *supra*, at 15. The V-chip proposal was implemented by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Signorielli, *supra*, at 15. In addition to requiring V-chips, the 1996 Act called upon the television industry to establish a voluntary system for rating television programming. Pub. L. No. 104-104, § 551, 110 Stat. 56, 139 (1996).

In December 1996, the television industry announced the creation of TV Parental Guidelines, a voluntary, age-based system to provide parents with information about TV programs and help them make informed decisions about programs that are appropriate for their children. *See* Part II *infra*. In 1997, the industry supplemented the age-based ratings with specific information about the content of TV programs, through the use of coded "content descriptors" that demarcate violence, sexual content, and coarse language. *Id.*

In the wake of the Columbine shootings in 1999, the Surgeon General again examined whether television violence is causally linked to aggressive behavior. Signorielli, *supra*, at 90. The Surgeon General's 2001 report concluded that exposure to television violence might at most cause a short-term increase in aggressive behavior among some

children, but that it has little or no role in causing real-life violence. *See* Dep't of Health & Human Services, *Youth Violence: A Report of the Surgeon General*, ch 3 (2001), *available at* http://www.surgeon general.gov/library/youthviolence/toc.html.

In 2004, Congress sought still another study of the issue. *See* House Commerce Committee Letter. The House asked the FCC to investigate what, if any, are "the effects of viewing violent programming on children and other segments of the population." *See* FCC, *Notice of Inquiry in the Matter of Violent Television Programming and Its Impact on Children* at 2 (July 28, 2004).

In 2007, the FCC issued a report detailing its findings. The FCC commissioned no studies of its own, and "very little new information on the issue was submitted into the record." *See* 2007 FCC Report at 3, 4. The FCC cited the Surgeon General's report for the conclusion that "on balance, research provides strong evidence that exposure to violence in the media can increase aggressive behavior in children." *Id.* The FCC's Report did not address the Surgeon General's conclusions that any such effects are short-lived, and that there is no evidence that violence on television causes "real world" violent behavior.

In 2002, Professor Jonathan Freedman reviewed the existing research on this issue, and found that none of the available evidence supported the hypothesis that exposure to violence in films or television causes children or adults to be aggressive. Jonathan L. Freedman, *Inquiry on the Effects of Televised Violence: What Does The Scientific*

Research Show? (2002). After reviewing the 2007 FCC Report, Professor Freedman concluded:

> Rather than analyzing the conflicting evidence and opinion, the report simply comes down on the side of those who believe that television violence is harmful. There is no careful analysis of the research, there is no careful explanation of their conclusions; there seems to be mainly an acceptance of that view because more of those they talked with favored it than favored the other view.

Jonathan L. Freedman, *Television Violence and Aggression: Setting The Record Straight,* The Media Institute/Policy Views 2 (May 2007), *available at* http://www.mediainstitute.org/comments/FreedmanTelevisionViolence.pdf.[5]

In sum, the 2007 FCC Report is only the most recent of the government's series of failed attempts to establish a causal relationship between television violence and youth behavior. Decades of study of violence on television have not established adequate empirical support for a government speech

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[5] Other researchers have reached similar conclusions. *See, e.g.*, Christopher J. Ferguson, *Media Violence Effects: Confirmed Truth or Just Another X-File?*, 9 J. of Forensic Psychol. 103-126 (2009); Christopher J. Ferguson & John Kulburn, *The Public Health Risks of Media Violence: A Meta-Analytic Review*, 154 J. of Pediatrics 759-63 (2009); Joanne Savage, *Does Viewing Violent Media Really Cause Criminal Violence? A Methodological Review*, 10 Aggression and Violent Behavior 99-128 (2004).

restriction. *See* Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 Nw. U. L. Rev. 1487, 1553 (1995) ("The heart of the problem is that available research does not supply a basis upon which one could determine with adequate certainty whether a particular 'violent' program will cause harmful behavior.").[6] The evidence that violent video games cause real-world violence is similarly lacking.

II. Less Restrictive Alternatives Allow Parents To Monitor And Control Their Children's Exposure To Video Games And Television.

Even when the "Government's ends are compelling," the "means must be carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). A blanket ban on video game sales to minors is not "carefully tailored" because less restrictive alternatives are readily available. In particular, programming data and technology can assist parents in limiting children's

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[6] Empirical evidence regarding violent crime rates also provides no support for restrictions on speech. Proponents of regulation assert that violence on television continues to increase (particularly in light of the proliferation of cable and premium channels), but the rates of violent crimes have declined significantly since 1993. *See* U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *available* at http://bjs.ojp.usdoj.gov/content/glance/cv2.cfm. If allegedly pervasive violent programming causes violent crime and the amount of violent programming is increasing, then the crime rates should also be increasing, not decreasing.

exposure to content they deem inappropriate without restricting free speech rights.

As discussed in detail in Respondents' brief, the video game industry has developed a voluntary and widely-used rating system for video games. The Entertainment Software Rating Board ("ESRB") assigns independent age ratings and content descriptors for video games. Pet. App. 10. These ratings are used in conjunction with technology on current-generation game consoles that include parental controls allowing parents to limit a child's playing of games based on the game's rating.

The Federal Trade Commission, which monitors the entertainment industries' self-regulatory efforts, has praised the ESRB's rating system. FTC, *Marketing Violent Entertainment to Children: A Sixth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Gaming Industries*, at iii (Dec. 2009). The success of the rating system can be attributed to a number of factors. Ninety-four percent of parents say ESRB's ratings are "moderately easy" to "very easy" to understand. *See* Peter D. Hart Research Associates, *Awareness & Use* (March 2008). The system is comprehensive, and its careful design has led to widespread use of the ESRB's ratings. For example, as many as 89 percent of parents with children who play video games are aware of the ESRB's rating system, and 76 percent of those parents check the rating every time or most of the time when buying and renting games. *Id.*

In the broadcast context, industry's efforts to assist parents in restricting access to television programming they deem inappropriate for their

children have been similarly successful and effective. Like its video game counterpart, the broadcast rating system is widely available and easy to use. V-chip technology (and similar technology built into every major cable and satellite operators' consumer set-top boxes) allows parents to control the content of programming available to their children without direct government regulation of the content itself.

A. Government Has Played A Constructive Role In Developing And Encouraging This Voluntary Blocking Technology.

In the Telecommunications Act of 1996, Congress called upon the television industry to establish a voluntary system for rating television programming. Pub. L. No. 104-104, § 551, 110 Stat. 56, 139. In drafting the 1996 Act, Congress was sensitive to the First Amendment implications of government-imposed restrictions on speech. Rather than restricting speech, it offered the television industry an opportunity to establish a voluntary system for rating programs. *See* Telecommunications Act of 1996, §§ 551(b) & (e); *see also* S. Conf. Rep. No. 104-230, at 195 (1996). Congress expressly found that providing parents with information about the content of video programming and the technological tools to block programming was a "nonintrusive and narrowly tailored means" of promoting the "governmental interest in empowering parents." Telecommunications Act of 1996, § 551(a)(8) & (9), 110 Stat. at 140.

In December 1996, the television industry announced the creation of the TV Parental Guidelines, a voluntary, age-based system to provide

parents with information about TV programs and help them make informed decisions about programs that are appropriate for their family's viewing. The Guidelines are modeled after familiar motion picture ratings, so they are easily recognizable and simple to use. They include four categories for programs: TV-G (General Audience), TV-PG (Parental Guidance Suggested), TV-14 (Parents Strongly Cautioned — may be unsuitable for children under 14), and TV-MA (Mature Audience Only — may be unsuitable for children under 17). The Guidelines also contain two categories for children's programming: TV-Y (All Children) and TV-Y7 (Directed to Children aged 7 and older).

In 1997, the industry supplemented the age-based ratings with specific information about the content of television programs. Working collaboratively with children's and medical groups, the industry enhanced the information provided by the TV Parental Guidelines by adding five content descriptors: "FV" for fantasy violence in children's programming; "V" for violence; "S" for sexual content; "D" for suggestive dialogue; and "L" for strong language in programming designed for the general audience.

A key component of the ratings system is the TV Parental Guidelines Monitoring Board ("Monitoring Board"). The Monitoring Board is composed of representatives from cable and broadcast networks, broadcast stations, and syndicators, as well as children's advocacy groups. The Monitoring Board works with interested parties (including content producers, distributors, and consumers) to ensure

that there is uniformity and consistency in the application of the Guidelines to TV programming.

The television industry submitted the TV Parental Guidelines to the FCC in 1997. A number of prominent advocacy groups, including educational, medical, and children's organizations and associations, endorsed the Guidelines. *See* FCC, *Commission Finds Industry Video Programming Rating System Acceptable*, Report No. GN 98-3 (Mar. 12, 1998). On March 12, 1998, the FCC issued an order finding that the TV Parental Guidelines satisfied Section 551(e) of the 1996 Act. *See* FCC, *Implementation of Section 551 of the Telecommunications Act of 1996, Video Programming Ratings*, Report and Order, 13 FCC Rcd. 8232 ¶¶ 18-19 (1998).

Today, the program ratings and content descriptors are familiar to TV viewers. The ratings icons and associated content descriptors appear for 15 seconds in the upper-left corner of the TV screen at the beginning of all rated programming. If the program is more than one hour in length, the icon reappears at the beginning of the second hour. Many broadcast and cable networks also display the ratings icon after each commercial break to alert viewers of the TV rating throughout the program.

Simultaneously with the development of Guidelines, the FCC adopted technical requirements for the V-chip. *Id.*; *see also* 47 C.F.R. § 15.120(b). Every television 13 inches or larger sold in the United States since January 2000 contains a V-chip, which allows parents to block programs based on the standardized rating system. 47 U.S.C. § 303(x). Since June 12, 2009 when the United States made

the transition to digital television, anyone using a digital converter box also has access to a V-chip. FCC, *Implementation of the Child Safe Viewing Act, Examination of Parental Control Technologies for Vidio or Audio Programming,* Report and Order, 24 F.C.C. Rcd. 11413, at ¶ 11 (2009).

Cable networks and broadcast stations encode the ratings information in their program streams so it can be "read" by television sets and other retail devices equipped with the V-chip. Consumers can block programs with certain ratings by following an onscreen menu of options available on their V-chip-equipped TV sets. Using the Guidelines, parents can block programming according to the age-based categories (such as TV-14) or content labels (such as V for violence). The V-chip works in a hierarchical manner, so that when a parent chooses to block programming with a certain age-based rating, all programming with ratings above that level are blocked automatically.

Other technological innovations, in addition to the V-chip, enable parents to customize the TV viewing experience for their families. For example, cable and satellite distributors include robust parental controls in the set-top boxes they make available to their customers. These additional controls enable parents to block programming based on a number of factors, including program ratings and content descriptors, as well as day and date, program title, and channel.

These widely available technologies empower parents to monitor their children's television viewing. They involve far less intrusion on First

Amendment rights than government attempts to ban or regulate television broadcasts directly.

B. Blocking Technologies Provide An Effective Solution To Concerns About Violent Television Programming.

Narrow tailoring requires the government to prove that a "plausible, less restrictive alternative . . . . will be ineffective to achieve its goals." *See United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000). Solutions such as the V-chip and other blocking mechanisms in the broadcast context present workable, tailored ways to assist parents in supervising their children's viewing habits without suppressing the content of television programming for everyone.

In 2006, the broadcast industry launched a multi-year, $340 million advertising campaign with the Ad Council and others to encourage parents to take a more active role in their children's television viewing and help educate parents about the Guidelines and the V-chip. Those educational efforts, as well as efforts led by the FCC and other public and private entities, have been successful.

A 2007 report issued by the Kaiser Family Foundation found that an overwhelming majority of parents are aware of the TV Parental Guidelines. The Foundation found that 81 percent of parents have heard of the TV ratings, and 53 percent reported using the ratings system. *See* The Henry J. Kaiser Foundation, *Parents, Children & Media: A Kaiser Family Foundation Survey*, at 8, 20 (June 2007) ("2007 Kaiser Report"). Almost 90 percent of parents who used the ratings system found it to be

very useful (49 percent) or somewhat useful (40 percent). *Id.* at 21.

Likewise, parental awareness of the V-chip has grown over the last decade. The 2007 Kaiser Report found that 70 percent of parents were aware of the V-chip, up from 63 percent two years earlier. *Id.* at 8; *see also* Luntz, Maslansky Strategic Research & Hart Research, *TV Watch Survey of Parents Topline*, at 5 (June 2007) (finding that 69 percent of surveyed parents are aware of the V-chip), *available at* http://www.televisionwatch.org/junepollresults.pdf.

The proportion of parents who have used the V-chip also has increased. Seven percent of parents used the V-chip in 2001. *See* Kaiser Family Foundation, News Release, *Few Parents Use V-Chip To Block TV Sex and Violence, But More than Half Use TV Ratings to Pick What Kids Can Watch* (July 24, 2001). That number had increased to 16 percent by 2006, and nearly three out of four parents (71 percent) who had tried the V-chip found it "very useful." 2007 Kaiser Report at 10. Thus, the industry has found a way to give parents control over what television shows are available to their children. Parents who are interested in controlling what their children watch have multiple, simple means to do so.[7]

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[7] The fact that the V-chip is still gaining momentum does not diminish its constitutional status as a viable less restrictive alternative. In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Court identified as a less restrictive means to banning indecent speech on the internet "possible alternatives" such as technology systems that would allow parents to prevent their children from accessing sexually (...continued)

Although use of the V-chip and the program ratings system has increased, it is clear that some parents have decided not to use either tool. That does not mean that these tools are failing to fulfill their intended purpose. Parents may use other available blocking technology. *Id.* (25 percent of parents use parental controls provided through their cable or DBS provider). Among parents aware of the V-chip but who have chosen not to use it, 50 percent report that they usually monitor their children's television viewing in person and 14 percent say that they "trust their children to make their own decisions." *Id.* at 7. In such cases, any asserted interest in preventing children from watching violent programming is minimized by consistent parental oversight.

In sum, technology that can limit youth access to violent media has proven to be effective. The development and implementation of blocking technology in the broadcast industry is a model for a "least restrictive means" of limiting youth exposure to media violence without unduly restricting speech. Especially in light of the impossibility of defining "violent" media content in an objective, precise and constitutionally acceptable manner, the government should continue its constitutionally appropriate role in developing and promoting technological tools to

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explicit material on the internet, which "will soon be widely available." *Id.* at 877, 879. Likewise, in *Playboy*, 529 U.S. 803, the Court held that voluntary blocking regime for sexually explicit content was a less restrictive alternative, even though fewer than 0.5% of cable subscribers had taken steps to block such content. *Id.* at 816, 823-24.

assist parents in monitoring their children's use of media. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 669 (2004) ("Congress undoubtedly may act to encourage the use of [parental] filters.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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