

**Before the Federal Communications Commission
Washington, D.C. 20554**

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

COMMENTS OF MEDIA COALITION, INC.

Dear Commissioners,

These comments are submitted in response to the Federal Communications Commission (FCC) Notice of Inquiry dated October 23, 2009 and published November 24, 2009. The Media Coalition was established in 1973; its members are trade associations representing most of the publishers; movie, recording and video game manufacturers; booksellers; librarians; and recording, video and video game retailers and their customers in the United States.¹

The Notice of Inquiry (NOI) seeks comment on a broad range of complex legal and social science issues relating to the regulation of various kinds of content in electronic communication. The members of the Media Coalition understand that children today have access to a broader range of speech than ever before. We recognize the concern of some parents that their children may be consuming speech that they feel is inappropriate. While acknowledging these concerns, it is important to make clear that any government regulation of speech based on content is suspect. Generally, regulation by the government of speech based on its violent, profane or hateful content is not permissible, and sexual content can be restricted only if it meets a narrow three-prong test established by the Supreme Court. Court has allowed broader regulation solely for “indecent” sexual content on television and radio; this does not give the FCC authority to restrict other categories of speech on broadcast media. Also, the Supreme Court has declined to extend the indecency regime to any media other than television and radio. The rationale for

¹ The members of Media Coalition are: American Booksellers Foundation for Free Expression, Association of American Publishers, Comic Book Legal Defense Fund, Freedom to Read Foundation, Entertainment Consumers Association, Entertainment Merchants Association, Entertainment Software Association, Independent Book Publishers Association, Motion Picture Association of America, National Association of Recording Merchandisers, and Recording Industry Association of America. They are listed for identification purposes.

allowing greater restrictions on speech on licensed media does not apply to non-broadcast media.

The suggestion in the NOI that the “media effects” on minors is a justification for restricting such content in all electronic media and in advertisements for content is misguided. The debate is mixed at best about the effect on minors of viewing or listening to depictions or descriptions violence, sex or other content. Different researchers often look at the same data and reach very different conclusions. What is clear is that there is little correlation between the availability of such media content and actual crime statistics. It is important to remember, moreover, that minors have a First Amendment right to see and hear media except in very narrow instances. Any discussion of regulating content to protect minors must be considered in this context.

Finally, the NOI asks for comment on the regulation of advertising for products or material that is “inappropriate” for minors. The FCC has greater power to regulate advertisements than non-commercial speech, but this authority is predicated on the speech being untruthful, the product being advertised is illegal or the furtherance of a substantial government interest. There is no basis for restricting commercials for a legal product to prevent some possible future social harm. This is especially so with respect to commercial speech advertising First Amendment protected material.

CONTENT-BASED REGULATION OF SPEECH IS UNCONSTITUTIONAL EXCEPT IN VERY NARROW CIRCUMSTANCES

Speech is presumed to be protected by the First Amendment unless it falls into a few very narrow categories. As the Supreme Court stated in *Free Speech Coalition v. Ashcroft*, “As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children.” 535 U.S.1382, 1389 (2002). Content-based restrictions on speech are presumed to be invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The Supreme Court has never approved the restriction of speech based solely on content depicting or describing violent themes and has allowed sexual speech to be barred only in very limited and narrowly defined circumstances.

Regulation of Violent Content in any Medium Violates the First Amendment

Large Body of Case Law Barring Restrictions on Violent Content

Over 60 years ago the Supreme Court first struck down a law that barred distribution to minors of “true crime” publications that contained pictures of or articles about violence or criminal activity. *Winters v. New York*, 333 U.S. 507 (1948). Over the past decade numerous courts have created a significant body of case law that firmly establishes the principle that speech with violent themes or images is fully protected by the First

Amendment and may not be banned or restricted either for adults or minors. While most of the recent cases were challenges to laws restricting video games, the rulings were based on the content rather than on the medium. The rationale for enacting many of these laws -- that viewing such content caused minors to engage in subsequent antisocial behavior -- was the same as is suggested in the NOI. In several instances, legislators relied on some of the same social scientists and their research that are cited in the NOI to support such laws. These cases include:

- *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F. 3d 950 (9th Cir. 2009) (cert. pending as *Entertainment Merchants Ass’n v. Schwarzenegger*), found unconstitutional a law that limited distribution of video games with certain violent content and barred the requirement that they carry an “18” label on the cover.
- *Entertainment Software Ass’n v. Swanson*, 519 F. 3d 768 (8th Cir. 2008), enjoined a law that barred anyone under 17 from buying or renting a video game rated “Mature” or “Adults Only.”
- *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003), enjoined enforcement of a county ordinance that barred the sale or rental of video games with violent content.
- *American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), cert. denied, 534 U.S. 994 (2001), enjoined enforcement of a city ordinance that limited minors’ access to video games with violent content.
- *Eclipse Enterprises Inc. v. Gulota*, 134 F.2d 63 (2d Cir. 1997), found unconstitutional a law barring the sale to minors of trading cards of notorious criminals.
- *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684 (8th Cir. 1992), held that “unlike obscenity, violent expression is protected by the First Amendment.”
- *Entertainment Merchants Ass’n v. Henry*, No. 06-675, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007), found unconstitutional a law barring the dissemination to minors of video games with “inappropriate” violent content.
- *Entertainment Software Ass’n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006), found unconstitutional a law barring the dissemination to minors of video games with certain violent content.
- *Entertainment Software Ass’n v. Granholm*, 426 F. Supp. 2d (E.D. Mich. 2006), struck down a law barring the dissemination to minors of video games with certain violent content.
- *Entertainment Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005)(appealed on other grounds), found unconstitutional a law that banned the distribution to a minor of any video game with certain violent content, required such games be labeled as restricted to adults only, and required retailers to post signs explaining the industry rating system.
- *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp 2d 1180 (W.D. Wash. 2004), found unconstitutional a state law that barred dissemination to minors of video games that included violence against “peace officers.”
- *Bookfriends v. Taft*, 233 F.Supp.932 (S.D. Ohio 2002), ruled speech with violent content as fully protected by the First Amendment and enjoining enforcement of

Ohio's "harmful to juveniles" law that would have criminalized dissemination to a minor of any type of speech with violent content.

- *Davis-Kidd Booksellers, Inc. v. McWherter*, 886 S.W.2d 705 (Tenn. 1993) struck down a restriction on the sale to minors of material containing "excess violence."

Regulation of Sexual Content is Limited by Supreme Court Rulings

With the exception of the "indecent" standard for television and radio, government may restrict minors' access only to a narrow range of sexually explicit speech determined by a specific test. The mere presence of sexual content is not enough to make a book, movie, magazine or sound recording illegal. In *Ginsberg v. New York*, 390 U.S. 629 (1968) (as subsequently modified in *Miller v. California*, 413 U.S. 15 (1973)), the Supreme Court established a three-part test for determining whether material is "harmful to minors" and may therefore be banned for sale to minors. A recent law enacted in Illinois that barred the sale of video games with sexual content but omitted the third prong of the *Miller/Ginsberg* test was permanently enjoined by the U.S. District Court and the ruling was unanimously affirmed by the Seventh Circuit Court of Appeals. *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 642 (7th Cir. 2006), *aff'g*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005). There is no support in the case law for applying the indecency doctrine outside of television or radio.

Cable, Internet and Telephone Enjoy the Full Protection of the First Amendment

The FCC has specific authority to regulate aspects of the television, radio, telephone, cable and Internet industries. These industries are referred to as "electronic media" in the NOI. The ability to regulate these industries is limited to the grant of power from Congress in the Communications Act of 1934 and subsequent legislation. However, there is no basis for the proposition, nor do we think the NOI suggests, that the FCC has any statutory authority to regulate in any way other media that might be considered "electronic media," such as video games, DVDs, CDs and electronic books or the hardware used to access them.

Even with respect to the industries the FCC has some authority to regulate, the Supreme Court has repeatedly rejected efforts to impose lesser standards of First Amendment protection on content available via media other than television and radio. *See Reno v. ACLU*, 521 U.S. 844 (1997) (barring enforcement of indecency standard as applied to the Internet); *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996) (striking down provision requiring cable operators to block access to offensive programming); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (striking down portion of statute barring indecent telephone calls). The Supreme Court noted in *Reno v. ACLU* that regulation of broadcast television was predicated on "the history of extensive regulation for the broadcast medium . . . , the scarcity of available frequencies at its inception . . . , and its 'invasive' nature" 521 U.S. at 897. These justifications for imposing greater restrictions on broadcast television and radio do not apply to cable, Internet, or phone services that require one to take affirmative steps of ordering the service, and, unlike broadcast television, are neither scarce nor invasive.

Even television and radio enjoy a great deal of Constitutional protection. Beyond permitting the regulation of “indecentcy,” the Court has not sanctioned restrictions on any other category of speech on broadcast media outside the traditional categories of unprotected speech. Recently, some Justices have even begun to reconsider the rationale for treating television and radio differently from other media even in this limited respect. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (Thomas, dissenting).

In Practice, Greater Protection for Sexual Content on the Internet Than in Other Media

Protection for sexual speech on the Internet is greater than for sexual speech in any other medium. Courts have struck down a number of laws that applied obscene-for-minors laws to the Internet rather than allowing limitations of the rights of adults when user-control tools were available to restrict minors’ access to such content. In 1998, Congress passed the Child Online Protection Act (COPA) which banned disseminating to minors on the Internet material that met the *Miller/Ginsberg* test as obscene for minors. The Supreme Court upheld a preliminary injunction barring the enforcement of the law. The Court reasoned that the protection of minors from such content cannot trump the First Amendment rights of adults where parental controls were available that prevented minors from accessing such content. The parental control tools would be a less restrictive means for protecting minors than a law that would also infringe on the rights of adults. *Ashcroft v. ACLU*, 542 U.S. 656 (2004). The law was ultimately enjoined after a subsequent evidentiary trial and an appeal to the Third Circuit Court of Appeals confirmed the effectiveness of parental control tools. *Mukasey v. ACLU*, 534 F.2d 181 (3d Cir 2008), *cert. denied*, 129 S. Ct. 1032 (2009). The U.S. Supreme Court had previously declared unconstitutional a prior federal law that restricted the availability of matter inappropriate for minors on the Internet. *Reno v. ACLU*, 521 U.S. 844 (1997). Similar state laws banning sexual speech for minors on the Internet also have been held unconstitutional. *See, PSINet v. Chapman*, 63 F.3d 227 (4th Cir. 2004); *ABFFE v. Dean*, 342 F.3d 96 (2d Cir 2003); *Cyberspace Communications, Inc. v. Engler*, 238 F.3d 420 (6th Cir. 2000); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Southeast Booksellers v. McMasters* 282 F. Supp 2d 1180 (D.S.C. 2003); *ACLU v. Goddard*, Civ No. 00-0505TUC AM (D. Ariz. 2002); *ABFFE v. Strickland* 512 F. Supp. 2d 1082 (2007) (on appeal as *ABFFE v. Cordray*).

PREVENTION OF FUTURE SOCIAL HARM INSUFFICIENT BASIS TO CENSOR SPEECH

The NOI suggests that some speech should be regulated in electronic media to prevent some future social harm. Even if the media effects research demonstrated a more certain connection between consumption of media and future antisocial behavior, courts are reluctant to accept such a justification for restricting speech. The rare exceptions are the commission of a crime in creating the speech or that the speech intended to cause an imminent commission of a crime and is likely to do so. As the Supreme Court stated in *Ashcroft v. Free Speech Coalition*, “The Government may not prohibit speech because it

increases the chance an unlawful act will be committed ‘at some indefinite future time.’” 535 U.S. at 1397 (citing *Hess v. Indiana*, 414 U.S. 105, 108(1973)). Even where speech directly advocates actual violence or illegal activity, it may be banned only if intended to incite imminent unlawful activity and likely to do so. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

PARENTAL CONTROL TOOLS MUST NOT BE IMPOSED BY THE FCC

Educating minors about the benefits and risks of electronic media is a sensible goal as is providing parents with tools to address their concerns about the viewing and listening habits of their children. However, the government must be careful not to impose or mandate tools such as ratings or “safe harbors.”

Government-Mandated or Enforced Rating Systems Are Unconstitutional

The NOI suggests that parental control tools are appropriate to help parents restrict what their children view. It also raises questions concerning ways to enhance voluntary rating systems promulgated by different industries. While voluntary ratings exist to help parents determine what is appropriate for their children, a government-mandated rating system or enforcement of an existing rating system would likely be a violation of the First Amendment. Even government pressure on industries to change or amend a voluntary rating regime veers alarmingly close to a government-mandated system. Most recently in *ESA v. Swanson*, 443 F. Supp. 2d 1065 (D. Minn. 2006), the district court found unconstitutional a Minnesota law that barred anyone less than 17 years old from buying or renting a video game carrying a “Mature” or “Adults Only” rating under the video game industry’s voluntary rating system. Courts in many states have held it unconstitutional for the government to enforce the Motion Picture Association of America’s rating system or to financially punish a movie that carries specific rating designations. In *MPAA v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970), the court enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or child viewing as determined by a voluntary rating system created by the motion picture industry. In *Eastern Federal Corporation v. Wasson*, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20 percent on all admissions to view movies rated either “X” or unrated was an unconstitutional delegation of legislative power to a private trade association. *See also Swope v. Lubbers*, 560 F. Supp. 1328 (W.D. Mich. 1983) (use of motion picture rating system was improper as a basis for determination of constitutional protection); *Drive-In Theater v. Huskey*, 435 F.2d 228 (4th Cir. 1970) (sheriff enjoining from prosecuting exhibitors for obscenity based on “R” or “X” rating).

“Safe Harbor” Regulations Are Not the Least Restrictive Means

“Safe harbor” regulations are often proposed as a way to limit the viewing by minors of programming with violent content by restricting the broadcast of such content to hours when minors are less likely to be watching television. With the availability of the V-Chip and other similar technology, such a “safe harbor” restriction would not be the least

restrictive means to address the FCC's concern. Technology allows parents to make individual decisions for their children based on their age, maturity, and the nature of the television content, but it does not impose this decision on viewers outside of the household. A "safe harbor," by contrast, prevents adults from watching programs with violent or sexual content during prime viewing hours. It would prevent parents from making viewing decisions for their own children by, for example, denying them the flexibility to permit different viewing by a 17-year-old as opposed to an 8-year-old. Finally, unlike the V-Chip or similar controls or filters, parents cannot turn off a "safe harbor" regulation. In a recent case the Supreme Court has found that a limited technological solution is preferable to a broad governmental prohibition as long as the technological solution is not less effective. See *Ashcroft v. ACLU*, 542 U.S. 656 (2004). The fact that some or even many parents choose not to use the technological solution is not proof that it is less effective. See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 825 (2000).

The Rights of Minors to See and Listen to First Amendment-Protected Material

While parents have great influence over what media their children read, hear, or view, minors enjoy substantial First Amendment protections even if they are less than those enjoyed by adults. As noted above, there is a substantial body of case law that establishes minors' rights to view or hear content with violent themes. Minors also have the right to access sexual content unless the content meets the three-prong test for material obscene for minors. With respect to sexual content, the U.S. Supreme Court has ruled that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to them." *Erznoznick v. City of Jacksonville*, 422 U.S. 212-13 (1975). As noted above, the narrow category of material that is legal for adults but illegal for minors is the *Miller/Ginsberg* test which is specifically limited to sexually explicit material that is harmful to minors; it does not contemplate regulation of violent, profane, or "inappropriate" content as "harmful to minors."²

Other Resources Are Available to Educate Parents

For those parents who are concerned about their children's media habits, there are many resources available to help them determine whether material is appropriate for their children. In addition to industry rating systems, many organizations, including religious institutions and advocacy organizations, review and rate media for the specific types of content they consider objectionable. Also, many newspapers and television listing magazines include ratings or comments about programming that some might find objectionable.

² Although often referred to as "harmful to minors" laws, the Supreme Court's jurisprudence does not base this category of unprotected speech on actual harm to minors at all. Rather, the Supreme Court merely applied a "variable standard" for judging when otherwise First Amendment-protected material is obscene when a minor is the consumer, depending on the age and maturity of the minor. Obscenity itself has never been a determination based on perceived "harm" to an individual or society, but rather, on being "patently offensive" and lacking serious value.

RESEARCH DOES NOT SUPPORT THE CONCLUSION THAT MEDIA CAUSES ACTUAL ANTISOCIAL BEHAVIOR

There is a long history of blaming the media for antisocial behavior by minors. At one time or another, books, movies, opera, jazz, blues, rock and roll, heavy metal and rap music, television, radio, comic books, video games, Internet, and social networking have all been accused of causing such behavior among minors (and adults). Marjorie Heins' book, *Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth* (Hill and Wang 2001), offers an overview of the recurring argument for censoring speech to "protect" children. However, current research does not support the conclusion that restricting access of minors to media with violent or sexual content causes actual violence or sexually risky behavior.

Very Complex Problem with Many Factors and the Research Is Inconclusive at Best

As stated in the NOI the causes of violence are myriad and complex. The National Research Council's comprehensive 1993 report *Understanding and Preventing Violence* offered a matrix of the risk factors for violent behavior. Media with violent content is not cited as a factor. The Surgeon General's lengthy 2001 report *Youth Violence: A Report of the Surgeon General* extensively explored the causes of youth violence. The authors concluded that, despite a "diverse body" of research, it was not possible to come to a conclusion about the effect of media consumption on minors in either the short or long-term. In September 2000, the Federal Trade Commission released its report "Marketing Violent Entertainment to Children: A Review of the Self-Regulation and Industry Practices in the Motion Picture, Music Recording and Electronic Game Industries" which included an appendix that reviewed media effects research. The report stated that "[m]ost researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and that it is not the sole, or even the most important, factor in contributing to youth aggression, antisocial attitudes, and violence."

Research that claims there is a connection between the media and antisocial behavior receives most of the public attention, but most studies fail to find such a link. Jonathan Freedman's book *Media Violence and Its Effect on Aggression* (2002) is a meta-analysis of media effects studies. Freedman is the Vice-President and Principal of the University of Toronto Scarborough and has written extensively about the shortcomings of media effects research. In *Media Violence* he reviews every study or lab report he can locate and examines their conclusions. Sixty-three percent of the studies or reports concluded either that the research did not show a connection between media and antisocial behavior or that the result was mixed. After eliminating experiments with questionable measures of aggression, Freedman found 71 percent of the studies did not support these hypotheses that media exposure led to antisocial behavior. Christopher Ferguson, an Assistant Professor at the Behavioral, Applied Science and Criminal Justice Department at Texas A&M International University, published *School Shooting/Violent Video Game Link: Causal Relationship or Moral Panic?* in the "Journal of Investigative Offender Profiling"

in which he analyzed claims that violent content in video games causes minors to commit school violence. 5:25-37 (2008). Ferguson concluded that no significant relationship has been demonstrated in the existing literature between viewing video games with violent content and school shooting incidents. Much of this research is summarized in an amicus brief submitted by 33 media scholars in *Interactive Digital Software Ass'n v. St. Louis County* and is available here:

<http://www.mediacoalition.org/mediaimages/idsaacbrief.pdf>.

No Statistical Correlation Between Violent or Sexual Content and Actual Crime

Crime statistics do not support the claims that there is a correlation between violent or sexual content and the commission of crimes. Despite the explosive growth of media, crime statistics have not risen correspondently. In the past decade the media has grown exponentially, but crime in general and youth crime in particular has declined steadily in much of the country. Michael Males, a Senior Researcher for the Center on Juvenile and Criminal Justice and Sociology Lecturer at University of California at Santa Cruz, demonstrated the lack of correlation between media deemed to have violent content and actual crime statistics in his comment submitted on Notice of Inquiry MB Docket No. 04-261.

Judicial Review Finds Media Effects Research to be Unsubstantiated

Earlier we cited a series of successful challenges to state and local laws barring minors from buying or renting video games with violent images. In most of these cases lawyers for the respective states submitted social science research, public reports and statements from medical and psychology trade associations to justify the laws. In each case where the court examined social science research it ultimately concluded that the social science failed to establish a causal link between content with violent images and actual anti-social behavior.

Dr. Craig Anderson's research is frequently offered to support the premise that there is a causal link between violent content and violent behavior, and is cited in the NOI on this point. However, his work was submitted to the court in several of the video game cases as evidence of such a link. His research was most closely scrutinized in *Entertainment Software Ass'n v. Blagojevich* in which U.S. District Court Judge Kennelly heard testimony from Dr. Anderson regarding his research on media causing aggression in minors. The court also heard testimony from Dr. Jeffrey Goldstein and Dr. Dmitri Williams that challenged Dr. Anderson's conclusions based on their own research and their review of his work. Judge Kennelly concluded, "we agree with Dr. Goldstein and Dr. Williams that neither Dr. Anderson's testimony nor his research establish a solid causal link between violent video games exposure and aggressive thinking and behavior." 404 F. Supp. 2d. at 1066 *aff'd* 469 F.3d 641 (7th Cir. 2006). The Ninth Circuit added in *Video Software Dealers Ass'n v. Schwarzenegger*, "We note that other courts have either rejected Dr. Anderson's research or found it insufficient to establish a causal link between violence in video games and psychological harm. See *AAMA v. Kendrick*, 244 F.3d at 578; *Granholtz*, 426 F. Supp. 2d at 653; *Entm't Software Ass'n v. Hatch*, 443 F.

Supp. 2d 1065, 1069 & n.1 (D. Minn. 2006); *Blagojevich*, 404 F. Supp. 2d at 1063.” 556 F. 3d 950 at 963.

**REGULATION OF COMMERCIAL SPEECH TO ENCOURAGE
FUTURE SOCIAL GOOD LIKELY UNCONSTITUTIONAL**

The NOI asks whether the FCC should regulate or block minors from accessing “inappropriate advertisements.” Commercial speech is a category of speech that includes advertisements; it does not include general media content merely because it is sold commercially. The government can regulate commercial speech if it satisfies an “intermediate scrutiny” test rather than the “strict scrutiny” test that must be met by restrictions of noncommercial speech. The Court created a four-part test for judging the constitutionality of commercial speech restrictions in *Central Hudson v. Public Service Commission of New York* which asks:

1. Whether the speech concerns lawful activity and is not misleading;
2. Whether the asserted government interest is substantial; and if so,
3. Whether the regulation directly advances the governmental interest asserted;
and
4. Whether the regulation is no more extensive than necessary to serve that interest.

447 U.S. 557, 564 (1980). While “intermediate scrutiny” is not as exacting a standard as “strict scrutiny” the government still must identify a substantial government interest and demonstrate that regulation is in proportion to the interest. Cases since *Central Hudson* have drawn the standard for restricting commercial speech closer to the standard for noncommercial speech. See *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

Much of the regulation of commercial speech suggested by the NOI would not survive the *Central Hudson* test. Protecting minors is a substantial government interest but, there can be no legitimate government interest at all in barring minors from constitutionally protected speech that the government would rather they not receive. It is unlikely that such regulation would satisfy the other prongs of the test either. There is no suggestion that content referred to as “inappropriate” in the NOI is misleading. It is very likely that the speech is legal for minors too. As discussed earlier, speech with violent content is legal for minors and sexual speech is illegal only if it meets the very narrow definition of “obscene for minors.” A voluntary industry rating recommending such content only for adults or older minors does not make it illegal for a minor. These ratings have no legal effect and the government may not punish speech carrying such a rating. Nor would restrictions on “inappropriate” speech advance the governmental interest of protecting minors. The social science does not establish that viewing media prompts antisocial behavior and it has for that reason been repeatedly found to be inadequate to justify restricting speech with violent content. Even judged under a lower “intermediate scrutiny” standard, the research is very unlikely to satisfy the standard. Finally, if the

government cannot establish that the regulation directly advances the interest asserted, it is unnecessary to determine if the regulation is no more extensive than necessary.

Further, speech is unique among “goods” being advertised. The Court has acknowledged that advertisements for material protected by the First Amendment are treated differently than advertisements for general goods or services. *See, e.g. Bolger v. Young’s Drug Products Corp.*, 463 U.S. 60, 67 n. 14 (1983) (“Of course, a different conclusion may be appropriate in a case where the pamphlet advertises an activity itself protected by the First Amendment.”)

CONCLUSION

We recognize the challenges that parents face in raising their children in the information age. Nevertheless, except in very narrow instances, government-imposed or enforced restrictions on “inappropriate” content are contrary to the First Amendment. There is no basis for applying the restrictions allowed on television and radio broadcasts to other media, and there is no basis for the FCC to assume the power to do so. Furthermore, the rationale for these restrictions is questionable; the research does not support the claims that violent or sexual content leads to antisocial behavior nor are such conclusions supported by crime statistics. Finally, we question whether restricting truthful commercial speech to prevent a presumed future harm is permissible, particularly when the commercial speech promotes noncommercial speech. We believe this NOI may be well intentioned but that it is best to leave to individual parents the responsibility to determine the content to which their children are exposed.

Thank you for allowing us to share our views with the Commission.

MEDIA COALITION

Media Coalition is an association formed in 1973 that defends the First Amendment right to produce and distribute books, movies, magazines, recordings, videotape, and video games and defends the American public’s First Amendment right to have access to the broadest range of opinion and entertainment.