

No. 10-1293

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**In the Supreme Court of the United States**

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FEDERAL COMMUNICATIONS COMMISSION, ET AL.,  
PETITIONERS

*v.*

FOX TELEVISION STATIONS, INC., ET AL.

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

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**BRIEF OF THE CATO INSTITUTE,  
CENTER FOR DEMOCRACY & TECHNOLOGY,  
ELECTRONIC FRONTIER FOUNDATION,  
PUBLIC KNOWLEDGE, AND TECHFREEDOM  
AS *AMICI CURIAE* IN SUPPORT OF  
RESPONDENTS**

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## **QUESTION PRESENTED**

Whether the Federal Communications Commission's current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.

II

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici curiae* submit this brief in support of Respondents, urging the Court to affirm the judgment below that the FCC's regulatory framework for broadcast television content is unconstitutional. *Amici* are nonprofit public interest organizations that advocate for consumer and citizen interests on a wide range of issues. Although *amici* often appear on opposite sides of technology policy debates, they are united in their commitment to the First Amendment and its preference for technological empowerment over paternalistic censorship. *Amici* have a substantial interest in this case because the FCC's indecency-enforcement regime is fundamentally inconsistent with First Amendment rights and inserts the heavy hand of government into the individual choices of consumers and parents.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes

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<sup>1</sup> No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae* and their counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

the annual *Cato Supreme Court Review*, and files *amicus* briefs.

The Center for Democracy & Technology is a nonprofit public interest organization focused on privacy and other civil liberties issues affecting the Internet, other communications networks, and associated technologies. The Center for Democracy & Technology represents the public's interest in an open Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

The Electronic Frontier Foundation is a nonprofit member-supported organization based in San Francisco, California, that works to protect free speech and privacy rights in an age of increasingly sophisticated technology.

Public Knowledge is a nonprofit public interest organization devoted to protecting citizens' rights in the emerging digital culture. It is focused on the intersection of intellectual property, media, technology, and the law. Public Knowledge seeks to guard the rights of consumers, innovators, and creators at all layers of our culture through legislative, administrative, grassroots, and legal efforts, including regular participation in intellectual property, free speech, and telecommunications cases.

TechFreedom is a nonprofit, nonpartisan public policy think tank that works on a wide range of information technology policy issues, including free speech, child protection, and privacy. TechFreedom works to promote the progress of technology that improves the human condition and expands individual capacity to choose. TechFreedom

envisions a bright future where technology enhances freedom and freedom enhances technology.

### SUMMARY OF ARGUMENT

In the modern media environment, the FCC no longer has the constitutional authority to regulate speech under a reduced standard of scrutiny based on *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), when the same speech, if communicated by any medium other than broadcast television, would receive full First Amendment protection. The Second Circuit recognized as much. See, e.g., Pet. App. 15a-17a. Petitioners defend the FCC's actions based on *Pacifica*, though that case's factual underpinnings have withered in the 33 years since it was decided.

*Pacifica* is based on an archaic and unrealistic conception of broadcast television. The state of media and technology today directly challenges *Pacifica*'s assumption that broadcast television is a unique medium that deserves only watered-down First Amendment protection. The Second Circuit hit the nail on the head when it concluded that "we face a media landscape that would have been almost unrecognizable in 1978." Pet. App. 15a. In 1978, nearly all Americans relied on broadcasting to deliver a limited range of video media to their homes, and were largely powerless to control their children's access to that media. Technological advances over the last 33 years have brought new types of media into existence, combined elements of older media with new types of media in new delivery systems, and brought about a dramatic increase in the ability of consumers to control the content of media received in their homes.



Today's world of converged, customizable video media would have seemed like science fiction to the *Pacifica* court. But it is precisely the kind of world this Court contemplated in 2000 when it declared: "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000).

It is well past time for the law to recognize how much the world has changed by ending the FCC's censorship of speech that is broadcast on television. The factual basis on which *Pacifica* rests no longer holds true. *Pacifica*'s "pervasiveness" doctrine and its consideration of broadcast television as an "intruder in the home" are relics of a bygone technological era and no longer justify affording regulation of such speech diminished scrutiny. Put simply, we no longer live in the world where *Pacifica* was decided.

In light of the dual developments of media platform convergence and consumer control, it is no longer appropriate to apply different legal standards to the same content based solely on the medium consumers use to access it. Broadcast media no longer has "unique" characteristics that justify affording diminished protection to speech that, in other contexts, would be fully protected under the First Amendment. Because over-the-air broadcasting is just one of countless ways Americans access content (including indecent content, if they choose), it no longer makes sense to accord broadcast speech any less First Amendment protection than other forms of media. Instead, speech that is broadcast should be extended the same full First Amendment protection

that this Court has afforded speech on the Internet. See *Reno v. ACLU*, 521 U.S. 844 (1997).

## ARGUMENT

*Pacifica* accorded broadcast television limited First Amendment protection because of two characteristics the Court understood the medium to have at the time: first, broadcast television had a “uniquely pervasive presence in the lives of all Americans”; second, broadcast television intruded into the privacy of the home, where it could easily be accessed by children. *Pacifica*, 438 U.S. at 748-750. Today, broadcast television is no longer uniquely pervasive because technology has transformed how Americans receive information and entertainment; and it is no longer invasive because technology has empowered consumers to control the broadcasting content to which they and their children are exposed.

### **A. The Convergence Of Modern Communications Technologies Means That Broadcast Television Is No Longer A “Uniquely Pervasive” Medium**

*Pacifica* largely rests on the finding that “broadcast media have established a uniquely pervasive presence in the lives of all Americans.” 438 U.S. at 748. When *Pacifica* was decided in 1978 (and only a small percentage of households had cable television), there really were only two ways to deliver content to the public in their homes: broadcast (television and radio) and paper (newspapers, magazines, and the like). Cf. *id.* at 749 n.27. Over thirty years later, however, the proliferation of new media technologies has radically transformed, and continues to transform, how entertainment and news

content is delivered to the home. The characteristics of various media are converging; as they converge, the distinctions among various types of content and delivery methods are blurring.

The proliferation of satellite and cable television channels as well as Internet-based video outlets has eroded the “unique[ness]” of broadcast media. *Pacifica*, 438 U.S. at 748. The media environment has changed profoundly: Americans—adults and children alike—are increasingly accessing new video content through cable, telephone, and satellite operators such as Comcast’s Xfinity, EchoStar’s DISH Network, AT&T’s UVerse, Verizon’s FIOS, and DirecTV; over the Internet on popular websites such as YouTube, iTunes, and Hulu; via podcasts<sup>2</sup>; by online video streaming through services such as Netflix; and through DVD purchases and rentals.<sup>3</sup> All these media come into the home as invited guests, not as intruders.

These new technologies have largely displaced traditional broadcasting. Not only are more people accessing video content by means besides broadcast television, but broadcast content is increasingly available through these new media technologies. Individuals routinely access broadcast programming

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<sup>2</sup> A “podcast” is an audio or video file, usually in MP3 format, made for download to a portable player or personal computer. See Definition of “podcast,” Urban Dictionary, <http://www.urbandictionary.com/define.php?term=podcast>.

<sup>3</sup> See, e.g., Tom Rosenstiel et al., *How People Learn About Their Local Community*, Pew Internet & American Life Project (Sept. 26, 2011), available at <http://pewinternet.org/~media/Files/Reports/2011/Pew%20Knight%20Local%20News%20Report%20FINAL.pdf>.

through cable and satellite services. And network programming is increasingly available on the Internet. For example, entire episodes of popular network shows such as *MasterChef* (Fox), *Parks and Recreation* (NBC), *Dancing with the Stars* (ABC), and *Survivor* (CBS) can be viewed on the networks' websites for free.<sup>4</sup> Indeed, broadcasters are now sometimes posting their content online *before* its release on broadcast platforms. As early as March 2005, NBC debuted its situation comedy *The Office* on the Internet a week before the show premiered on network television.<sup>5</sup> More recently, NBC launched a series of “webisodes” of the show—short vignettes featuring the show’s characters—that are *only* available online.<sup>6</sup>

Network shows and other broadcast programming are also now available on a number of websites such as iTunes and YouTube. NBC, an intervenor in this case, helped to start its own popular website and subscription service, Hulu.com (described as “a hub for network TV shows and movies”<sup>7</sup>) and Hulu Plus

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<sup>4</sup> See FOX Broadcasting Company Full Episodes, <http://www.fox.com/full-episodes/>; NBC Video Library Full Episodes, <http://www.nbc.com/video/library/full-episodes/>; ABC Full Episodes, <http://abc.go.com/watch>; CBS Video, <http://www.cbs.com/video/>.

<sup>5</sup> Anne Becker, *NBC's Office Gets Web Broadcast*, *Broadcasting & Cable* (Mar. 16, 2005), <http://www.broadcastingcable.com/article/CA511340.html>.

<sup>6</sup> NBC.com, *The Office*, [http://www.nbc.com/The\\_Office/webisodes/](http://www.nbc.com/The_Office/webisodes/).

<sup>7</sup> Jeremy Caplan et al., *Best Inventions of 2008*, *Time Magazine*, [http://www.time.com/time/specials/packages/article/0,28804,1852747\\_1854195\\_1854116,00.html](http://www.time.com/time/specials/packages/article/0,28804,1852747_1854195_1854116,00.html) (ranking Hulu.com

(“a sweeping vision of the future of online, on-demand television viewing”).<sup>8</sup> Furthermore, many broadcast programs can be downloaded through video game consoles,<sup>9</sup> viewed as streaming content by using external devices such as Roku or Apple TV,<sup>10</sup> or accessed directly on new Internet-ready televisions.<sup>11</sup> And complete seasons of most broadcast shows are available for rental or purchase on DVD shortly after the TV season comes to a close.<sup>12</sup>

These new forms of media are rapidly gaining on traditional broadcast television. Well over three-quarters of all Americans use the Internet,<sup>13</sup> up from

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the fourth best invention of 2008 and opining, “When cable eventually dies, websites like Hulu will be held responsible.”).

<sup>8</sup> Brian Stelter, *Hulu Unveils Subscription Service for \$9.99 a Month*, N.Y. Times Media Decoder (June 29, 2010, 1:24 PM), <http://mediadecoder.blogs.nytimes.com/2010/06/29/hulu-unveils-subscription-service-for-9-99-a-month/>.

<sup>9</sup> Barbara Ortutay, *Microsoft Brings TV to Xbox 360*, USA Today (Oct. 5, 2011), <http://www.usatoday.com/tech/news/story/2011-10-05/xbox-tv-on-demand/50670406/1>.

<sup>10</sup> Marvin Ammori, *Copyright’s Latest Communications Policy: Content Lock-Out and Compulsory Licensing for Internet Television*, 18 CommLaw Conspectus 375, 377, 391 (2010).

<sup>11</sup> See, e.g., Nick Wingfield and Don Clark, *Internet-Ready TVs Usher Web Into Living Room*, Wall St. J. (Jan. 5, 2009), <http://online.wsj.com/article/SB123111603391052641.html>.

<sup>12</sup> See, e.g., Joe Flint, *‘True Blood,’ Anyone? That’s the Question HBO Is Getting Ready to Ask As It Offers Repeats of Its Sexy, Violent Beast to Commercial Cable Networks*, San Jose Mercury News, at 3D (July 25, 2010) (“[M]ost TV shows are now released on DVD long before they’re available in reruns \* \* \*”), available at 2010 WLNR 15029270.

<sup>13</sup> *Demographics of Internet Users*, Pew Internet & American Life Project Surveys (Apr. 26-May 22, 2011),

about half in 2000, and under a third in 1997.<sup>14</sup> “As of May 2011, six in ten \* \* \* American adults have a high-speed broadband connection at home.”<sup>15</sup> And nearly three quarters of adults on the web use video-sharing websites.<sup>16</sup> The FCC itself recognizes that “substantial numbers of households now subscribe to cable or satellite \* \* \* (87%).” FCC Brief 44 (citing Pet. App. 15a). Netflix subscriptions, which provide subscribers “unlimited TV episodes and movies instantly over the Internet” through their computers or televisions, start at \$7.99 per month.<sup>17</sup> Currently, there are over 20 million Netflix subscribers (most in the United States).<sup>18</sup> A basic Roku device, which allows access to Internet content on a television, is less than \$60.<sup>19</sup> New DVD players are readily

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<http://www.pewinternet.org/Static-Pages/Trend-Data/Whos-Online.aspx> (finding that 78% of all Americans use the Internet).

<sup>14</sup> *Internet Adoption, 1995-2011*, Pew Internet & American Life Project Surveys (Mar. 2000-May 2011), <http://www.pewinternet.org/Static-Pages/Trend-Data/Internet-Adoption.aspx>.

<sup>15</sup> *Broadband and Dial-Up Adoption, 2000-2011*, Pew Internet & American Life Project Surveys (Mar. 2000-May 2011), <http://www.pewinternet.org/Trend-Data/Home-Broadband-Adoption.aspx>.

<sup>16</sup> Kathleen Moore, *71% of Online Adults Now Use Video-Sharing Sites*, Pew Internet & American Life Project 2 (July 25, 2011), <http://www.pewinternet.org/~media/Files/Reports/2011/Video%20sharing%202011.pdf>.

<sup>17</sup> Netflix, <http://www.netflix.com/HowItWorks> (click “How Does Netflix Work?”)

<sup>18</sup> Nextflix, <http://ir.netflix.com>.

<sup>19</sup> Roku, <http://shop.roku.com/>.

available for under \$35,<sup>20</sup> and DVDs are widely rented at automated supermarket kiosks for as little as one dollar.<sup>21</sup> This stands in stark contrast to the state of technology during the decade when *Pacifica* was decided—when the Internet “as we understand it today was not widely available for consumer and commercial use,”<sup>22</sup> and primitive VCRs “cost an average of \$1,955.”<sup>23</sup> To say that times have changed since this Court found “broadcast media [to] have established a uniquely pervasive presence in the lives of all Americans” (*Pacifica*, 438 U.S. at 748) is a drastic understatement.

As the FCC and its *amici* note, a small proportion of households still rely on over-the-air broadcast signals for video programming. See, e.g., FCC Br. 44-45; Parents Television Council Amicus Br. 7. But the number who do so exclusively has dwindled from almost the entire television-viewing public in 1978 to (at most) 15 percent of it,<sup>25</sup> and perhaps as low as eight percent,<sup>26</sup> as consumers increasingly access

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<sup>20</sup> Walmart, [http://www.walmart.com/catalog/product.do?product\\_id=10771165&findingMethod=rr](http://www.walmart.com/catalog/product.do?product_id=10771165&findingMethod=rr).

<sup>21</sup> Redbox, <http://www.redbox.com/> (click “Find a Location”).

<sup>22</sup> Jeffrey Stavroff, *Damages in Dissonance: The “Shocking” Penalty for Illegal Music File-Sharing*, 39 Cap. U.L. Rev. 659, 714 (Summer 2011).

<sup>23</sup> Julie Macedo, *Meet the Television of Tomorrow. Don’t Expect to Own It Anytime Soon*, 6 UCLA Ent. L. Rev. 283, 308 n.140 (1999).

<sup>25</sup> Parents Television Council Amicus Br. 7.

<sup>26</sup> *Cord Cutting and TV Service: What’s Really Going On?* Consumer Electronics Association, (May 2011), available at [http://www.cesweb.org/shared\\_files/ECD-TOC/CEACordCuttingAnalysis.pdf](http://www.cesweb.org/shared_files/ECD-TOC/CEACordCuttingAnalysis.pdf)

broadcast content using numerous non-broadcast platforms. Given the affordability of non-broadcast alternatives,<sup>27</sup> that a small percentage of households still chooses to rely exclusively on the traditional broadcast medium likely reflects consumer choice as much as lack of access to alternatives. In any event, eight and 15 percent are figures more often associated with the description “rare” than “pervasive.”

**B. Consumers’ Increasing Ability To Control The Content Available In Their Households Means Broadcasting Is No Longer An Invasive Harm To Children**

Not only are new technologies changing the way people watch programs, they are changing the way content is controlled by the consumer. Consumers now have unprecedented freedom of choice to avoid exposure to inappropriate content, and, thus, it is simply no longer true that “[p]atently offensive, indecent material presented over the airwaves confronts the citizen” like an “intruder” in the home. *Pacifica*, 438 U.S. at 748. Today, unlike in 1978, viewers can effectively shield themselves and their children from content they deem undesirable using a wide variety of mechanisms.

One of the main factors *Pacifica* cited to justify regulation of broadcast television was the Court’s

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<sup>27</sup> The average price of basic subscription video service was just \$17.65 per month in 2009, with basic satellite service, which reaches remote areas, being slightly cheaper at \$17.29. Federal Communications Commission, Report on Cable Industry Prices 8-9 (Feb. 14, 2011), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-11-284A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-284A1.pdf).



view that “broadcasting is [a medium] uniquely accessible to children.” See 438 U.S. at 749. But today, children are leading the shift away from broadcast television to a variety of new (and largely unregulated) media outlets and technologies such as websites, blogs, social networking services, iPads, iPods, MP3 players, smart phones, other mobile devices, and cable and satellite networks.<sup>28</sup> It is no surprise that Internet access among the young exceeds that of older generations. Upward of 87% of U.S. children ages 12 to 17 use the Internet.<sup>29</sup> And when children watch broadcast content, they do so increasingly using non-broadcast platforms.<sup>30</sup>

In the Internet context, there is a large and ever-increasing number of tools available to parents to allow them to exercise control over what content their children access. The development and proliferation of parental control technology has flourished in the absence of government regulation of online content. Internet Service Providers such as Comcast, Verizon, and Charter provide an array of parental control

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<sup>28</sup> See Mary Madden, *Internet Penetration and Impact*, Pew Internet & American Life Project 3-4 (April 2006), available at [http://www.pewinternet.org/~media/Files/Reports/2006/PIP\\_Internet\\_Impact.pdf.pdf](http://www.pewinternet.org/~media/Files/Reports/2006/PIP_Internet_Impact.pdf.pdf); Amanda Lenhart, Mary Madden, Paul Hitlin, *Teens and Technology: Youth Are Leading the Transition to a Fully Wired and Mobile Nation*, Pew Internet & American Life Project 1 (July 27, 2005), available at [http://www.pewinternet.org/~media/Files/Reports/2005/PIP\\_Teens\\_Tech\\_July2005web.pdf.pdf](http://www.pewinternet.org/~media/Files/Reports/2005/PIP_Teens_Tech_July2005web.pdf.pdf).

<sup>29</sup> Lenhart et al., *supra* note 28, at 2.

<sup>30</sup> *Id.* at 2-3.

features to their subscribers.<sup>31</sup> Numerous software filtering and other tools are available, often as free downloads, and websites such as [www.GetNetWise.org](http://www.GetNetWise.org) provide information to help parents compare available tools.<sup>32</sup> Parental controls are also being bundled into the leading operating systems provided by Microsoft and Apple.<sup>33</sup> And falling computer storage costs means it is easier than ever to archive preferred media content on computer systems—and thus increasingly a personal computer can supplement or even replace a television.<sup>34</sup>

As for traditional television sets, even the most basic ones have built-in content controls to allow parents to regulate their children's exposure to inappropriate programming. The V-Chip has been installed in all television sets with screens 13 inches or larger made since 2000 and allows parents to block

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<sup>31</sup> Xfinity, <http://xfinity.comcast.net/constantguard/>; Verizon, <http://parentalcontrolcenter.com/>; <http://www.myaccount.charter.com/customers/support.aspx?supportarticleid=1678>.

<sup>32</sup> Adam Thierer, *Parental Controls & Online Child Protection: A Survey of Tools and Methods* 113-143 (Summer 2009), available at <http://www.pff.org/parentalcontrols/Parental%20Controls%20&%20Online%20Child%20Protection%20%5BVERSION%204.0%5D.pdf>

<sup>33</sup> Microsoft Windows Security and Safety, <http://windows.microsoft.com/en-US/windows-vista/products/features/security-safety>; Apple OS X Security, <http://www.apple.com/macosx/what-is/security.html>.

<sup>34</sup> Melissa J. Perenson, *The Hard Drive Turns 50*, PCWorld (Sept. 13, 2006), [http://www.pcworld.com/article/127104/the\\_hard\\_drive\\_turns\\_50.html](http://www.pcworld.com/article/127104/the_hard_drive_turns_50.html).

broadcast content based on ratings.<sup>35</sup> The ratings use age-based designations<sup>36</sup> as well as several specific content descriptors (for coarse language, sex, and violence) to permit parents to tailor the programming to which their children will have access.<sup>37</sup> These ratings are displayed prominently at the beginning of

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<sup>35</sup> *Signal Bleed – How to Prevent Viewing of Scrambled Cable TV Programs*, Federal Communications Commission, <http://www.fcc.gov/guides/signal-bleed-how-prevent-viewing-scrambled-cable-tv-programs>.

<sup>36</sup> The ratings system offers the following age-based designations:

“TV-Y” — All Children

“TV-Y7” — Directed to Children Age 7 and Older

“TV-Y7-FV” — Directed to Older Children Due to Fantasy Violence

“TV-G” — General Audience

“TV-PG” — Parental Guidance Suggested

“TV-14” — Parents Strongly Cautioned

“TV-MA” — Mature Audience Only

The TV Parental Guidelines, <http://www.tvguidelines.org/ratings.htm>.

<sup>37</sup> The ratings system also uses the following content labels:

“D” — Suggestive Dialogue

“L” — Coarse or Crude Language

“S” — Sexual Situations

“V” — Violence

“FV” — Fantasy Violence

*Ibid.*

programs, in onscreen menus and interactive guides, and in local newspaper listings.<sup>38</sup>

Another critical development has been the rapid rise of technologies such as DVD players, digital video recorders (“DVRs”), and video on demand (“VOD”) services. These technologies give parents the ability to accumulate libraries of preferred (or even pre-screened) programming for their children and determine exactly when that programming will be viewed. Using these tools, households can tailor programming to their specific needs and values. These new technologies are so effective in providing parents control that one of petitioner’s *amici* proudly—and, in light of its position before this Court, ironically—tells its members to “[g]o ahead, give your kids the remote,” because with these technologies, “you’ll never have to worry again about what your children are watching on TV.”<sup>39</sup>

Ownership of such content controls is rapidly increasing as their costs plummet. In just seven

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<sup>38</sup> Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, 15 *CommLaw Conspectus* 431, 472 (2007).

<sup>39</sup> Parents Television Council Online Store, <http://www.parentstv.org/store/default.asp>. *Amicus* the Parents Television Council (“PTC”) also features the message that, “[w]ith TiVo KidZone, PTC-recommended programming is always at your fingertips.” *Ibid.* The PTC also touts other user empowerment tools, too—such as SkyAngel, Clear Play, and Power Cop. The strong endorsement of these technologies on the PTC’s website stands in jarring contrast to that group’s assertion in its brief that “[t]he technology available to viewers is not an effective bulwark against indecent broadcasting.” See Parents Television Council *Amicus* Br. 14.

years, the percentage of households with a DVD player climbed from 13% in 2000 to 83% in 2007.<sup>40</sup> DVRs and VOD are experiencing similarly rapid growth as the price of units has fallen from more than \$1,000 only a few years ago to less than \$100 today.<sup>41</sup> It is estimated that two out of five U.S. households had a DVR last year,<sup>42</sup> up from one in every five households in 2007 and one in every 13 households in 2005.<sup>43</sup> And for the 86% of U.S. households subscribing to cable or satellite television services (Pet. App. 15a), the cost is even lower, as most video service providers now offer DVR functionality bundled into their cable and satellite set-top boxes. Meanwhile, “nearly 90% of U.S. digital cable subscribers had access to VOD, and 46% of all basic cable customers were offered the service” as of March 2007.<sup>44</sup> Some forecasts estimate that each

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<sup>40</sup> *U.S. Consumer Sales and Forecasts, 2003-2008*, Consumer Electronics Association (July 2007).

<sup>41</sup> Compare Comments of the Progress & Freedom Foundation and the Electronic Frontier Foundation before the Federal Communications Commission, No. 09-194, 40 (Feb. 24, 2010), available at <http://ecfsdocs.fcc.gov/filings/2010/02/24/6015538029.html>, with Tivo Product Information, <http://www.tivo.com/products/home/index.html>.

<sup>42</sup> *DVRs Now In 40% of U.S. TV Households*, Leichtman Research Group (Sept. 27, 2010), <http://www.leichtmanresearch.com/press/092710release.html>.

<sup>43</sup> *DVRs Now In Over One of Every Five U.S. Households*, Leichtman Research Group (Aug. 21, 2007), <http://www.leichtmanresearch.com/press/082107release.html>.

<sup>44</sup> Adam Thierer, *Parental Control Perfection? The Impact of the DVR and the VOD Boom on the Debate over TV Content Regulation*, Progress & Freedom Foundation, Progress on Point (Oct. 11, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1029764](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1029764) (internal citations omitted).

home will be watching nearly two hours of on-demand content nightly by the end of 2012.<sup>45</sup> These technologies—unimaginable in 1978—are already well within reach of most Americans.

A variety of other technologies empower parents to control their children’s viewing of content historically delivered by broadcast to televisions whose only parental controls were the on/off switch and the power cord. The vast majority of the television-viewing public who are cable and satellite subscribers (Pet. App. 15a) have even more options to filter or block unwanted broadcast programming: set-top boxes offer locking functions for individual channels, preventing children from accessing those channels or programs without a password,<sup>46</sup> and parental controls are also usually intuitive and readily accessible.<sup>47</sup> For example, DirecTV has the “Locks & Limits feature built into [its] equipment,” which allows parents to “block specific movies based

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<sup>45</sup> Scott Sleek, *Video on Demand Usage: Projections and Implications*, Pike & Fischer (Oct. 2007), available at <http://www.roadbandadvisoryservices.com/researchReportsBriefsInd.asp?repId=541>.

<sup>46</sup> A comprehensive survey of the content controls that cable television providers make available to their subscribers can be found on the “Control Your TV” website of the National Cable and Telecommunications Association. See Control Your TV, <http://controlyourtv.org/Intro.aspx>.

<sup>47</sup> A new industry sponsored campaign entitled “The TV Boss,” <http://www.thetvboss.org/>, offers easy-to-understand tutorials explaining how to program the V-Chip or cable and satellite set top box controls. As part of the effort, several public service announcements and other advertisements have aired or been published reminding parents that these capabilities are at their disposal.

on their MPAA rating, lock out entire channels, [and] set limited viewing hours.”<sup>48</sup> Just as with the V-Chip, parents can access the restricted content—whether for their own enjoyment or to pre-screen it for their children—by entering a personal identification number.<sup>49</sup> In addition, specialized remote controls can also limit children to channels approved by their parents.<sup>50</sup> And independent screening tools such as TVGuardian offer features like a “Foul Language Filter” that can filter out profanity (even from broadcast signals) based on closed captioning.<sup>51</sup> It was these types of user controls that led the Court to find “a key difference between cable television and the broadcasting media,” and to apply strict scrutiny to regulation of cable TV content. *Playboy*, 529 U.S. at 815.

Even as these parental empowerment technologies improve and proliferate, an increasing number of households are simply taking a more active role in setting and enforcing rules for what their children watch.<sup>52</sup> A 2003 Kaiser Family Foundation survey

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<sup>48</sup> Thomas W. Hazlett, *Shedding Tiers for a la Carte? An Economic Analysis of Cable TV Pricing*, 5 J. on Telecomm. & High Tech. L. 253, 266 n.39 (Fall 2006) (citation omitted).

<sup>49</sup> *Ibid.*

<sup>50</sup> See Weemote, <http://weemote.com/>.

<sup>51</sup> See TVGuardian Foul Language Filter, <http://tvguardian.com/>.

<sup>52</sup> See, e.g., *ACLU v. Mukasey*, 534 F.3d 181, 203 (3d Cir. 2008) (“Though we recognize that some \* \* \* parents may be indifferent to what their children see, others may have decided to use other methods to protect their children—such as by placing the family computer in the living room, instead of their children’s bedroom \* \* \* .); *ibid.* (“Studies have shown that the

found that “[a]lmost all” parents have set “rules about their children’s use of media.”<sup>53</sup> That is particularly true of parents with young and impressionable children.<sup>54</sup> A similar percentage of parents had similar rules for video game and computer usage.<sup>55</sup> As the Census Bureau found, “[p]arents are taking a more active role in the lives of their children than they did 10 years ago,” particularly with regard to rules respecting what their children watch.<sup>56</sup> Rather than modern media being like an unwanted “intruder in the home,” *Pacifica*, 438 U.S. at 748, technology has increasingly

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primary reason that parents do not use filters is that they think they are unnecessary because they trust their children and do not see a need to block content.”).

<sup>53</sup> *Zero to Six: Electronic Media in the Lives of Infants, Toddlers and Preschoolers*, Kaiser Family Foundation, 9 (Oct. 28, 2003), <http://www.kff.org/entmedia/3378.cfm>.

<sup>54</sup> *The Media Family: Electronic Media in the Lives of Infants, Toddlers, Preschoolers and Their Parents*, Kaiser Family Foundation, 20 (May 24, 2006), <http://www.kff.org/entmedia/7500.cfm>.

<sup>55</sup> *Ibid.*

<sup>56</sup> The Census Bureau report measured how many families imposed three specific types of household media rules: restrictions on the type of programming allowed, the number of hours watched, and time and day viewing was allowed. It found the percentage of families imposing all three types of rules rose from 1994 to 2004 for the three different age groups surveyed: enforcement in families with children 3 to 5 years of age rose from 54% to 64.7%, 6 to 11 years of age rose from 60.3% to 70.5%, and 12 to 17 years of age rose from 40.2% to 46.7%. Jason Fields et al., *A Child’s Day: Home, School, and Play (Selected Indicators of Child Well-Being)*, U.S. Census Bureau Household Economic Studies 17 (Feb. 2001), available at <http://www.census.gov/prod/2001pubs/p70-68.pdf>.



empowered modern families to allow only invited guests.

The FCC and its *amici* contend that this array of technological developments is not enough to stem the concerns raised in *Pacifica*. The FCC focuses its attention almost exclusively on the V-Chip rather than the many other devices available to parents at low cost, see FCC Br. 49-52, claiming that the V-Chip is ineffective in essence because not enough parents use it or know how to use it. See *id.* at 51. Meanwhile, the FCC's *amicus*, the PTC, *seems* to suggest that even the most foolproof technological development could not undercut the FCC's regulatory authority because "it is respondents, not their audience, who are obliged to take steps to avoid broadcasts of indecent material." Parent Television Council Amicus Br. 5.

Those arguments do not pass muster. As a factual matter, the FCC's focus on the percentage of parents who use the V-Chip ignores the fact that many parents have children who are either too young or too old for use of the V-Chip to be necessary, while others prefer to use other tools and methods to control their children's media consumption.<sup>57</sup> Regardless, the constitutional significance of user empowerment technologies as less restrictive alternatives to government speech controls is not diminished because parents must take steps to use them, some

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<sup>57</sup> Adam Thierer, *Who Needs Parental Controls? Assessing the Relevant Market for Parental Control Technologies*, The Progress & Freedom Foundation (February 2009), available at <http://www.pff.org/issues-pubs/pops/2009/pop16.5parentalcontrolsmarket.pdf>.

parents choose not to, or they do not always function perfectly.

If parents choose not to use the many available tools for controlling media in their house, the FCC cannot constitutionally claim that this gives the government the right to act *in loco parentis*. That conclusion follows from this Court's holding that governmental action to promote parents' voluntary efforts to protect their children from sexual content is a less restrictive alternative to statutorily mandated blocking. See, e.g., *Playboy*, 529 U.S. at 827. In *Playboy*, the Court found a statute requiring cable companies to scramble sexually explicit programming unconstitutional in light of the less restrictive alternative of governmental promotion of voluntary blocking of the signal upon requests by parents. *Id.* at 822. As the Court observed, "targeted blocking [initiated by parents] enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id.* at 815. In language directly relevant here, the Court continued:

It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.

*Id.* at 824.<sup>58</sup> Consequently, the FCC’s insistence on perfect, effortless, and universally used tools is misplaced. And the PTC is simply wrong that “[t]hose who contend that viewers who want to avoid indecent broadcasting should use a technology filter have it backwards.” Parents Television Council Amicus Br. 12. This Court has never suggested that it is appropriate to restrict protected expression simply to spare those who disapprove of the message the minor inconvenience of avoiding it.

**C. Because Broadcasting Is No Longer Uniquely Pervasive Or Intrusive, Broadcast Speech Merits The Same First Amendment Protections As Other Media**

As the Second Circuit recognized below, the Court has consistently applied strict scrutiny to indecency regulations outside the broadcasting context. Pet. App. 13a-14a. The First Amendment generally prohibits the regulation of speech based on content, and even “indecent” speech has inherent First Amendment protection. See *id.* at 13a; see also *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). But in *Pacifica*, this Court appeared to apply a lower level of scrutiny, stating that, “of all forms of

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<sup>58</sup> Following this Court’s reasoning in *Playboy*, the Third Circuit overturned another content regulation statute—the Child Online Protection Act (“COPA”)—and held that Internet content filters are both more effective and less restrictive than COPA. *ACLU*, 534 F.3d at 202-203. The appeals court emphasized that “filters are more flexible than COPA because parents can tailor them to their own values and needs and to the age and maturity of their children and thus use an appropriate flexible approach differing from COPA’s ‘one size fits all’ approach.” *Id.* at 203.

communication, it is broadcasting that has received the most limited First Amendment protection,” and thereby concluding that the FCC may lawfully censor broadcast content that is indecent but not obscene. *Pacifica*, 438 U.S. at 748.

The *Pacifica* Court concluded that broadcasting deserved only limited First Amendment protection because it was a “pervasive” and uncontrollable medium that intruded into the privacy of the home, and therefore easily accessible by children. *Id.* at 748-750; see also *Reno*, 521 U.S. at 869 (concluding that the Internet is not “invasive,” contrasting *Pacifica*). And *perhaps* it was in 1978.

But, as described above, three decades later, technological advances have undermined the two factual predicates of the FCC’s legal authority to regulate broadcast indecency. The convergence of broadcast and other forms of media undercuts the uniqueness of broadcast television as an “intruder” in the home, and the emergence of parental control tools for both broadcast and new media has undermined the legal underpinnings of the FCC’s authority to regulate broadcast content. These developments have undermined the sole justification for relegating broadcast speech to an inferior category deserving something less than ordinary First Amendment protection. Like the Internet and other means of mass communication, broadcast television “is entitled to the highest protection from governmental intrusion” absent some supportable factual “basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.” *Reno*, 521 U.S. at 863, 870 (analyzing the state of technology in

deciding what level of scrutiny to apply to the Internet).<sup>59</sup>

Under strict scrutiny, the FCC's regulatory regime cannot pass constitutional muster: No matter how compelling the government's interest in child protection or how narrowly tailored the FCC's censorship, governmental speech controls must yield to widely available parental controls as less restrictive means to achieve that goal. *Sable*, 492 U.S. at 126 (“[The government may only] regulate the content of constitutionally protected speech [e.g., indecency] in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.”). Thus, this Court has applied strict scrutiny to restrictions on both cable TV and the Internet and squarely endorsed the use of technological controls as a less restrictive means to further a legitimate governmental objective. See *Reno*, 521 U.S. at 877 (noting the significance of “user based” alternatives to governmental regulation of speech on the Internet); *Playboy*, 529 U.S. at 814-815 (noting the same for cable television); accord *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (holding that California's regulation of violent video games fails strict scrutiny because of parental

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<sup>59</sup> Indeed, even in broadcasting, all other content based restrictions on speech have been examined under strict scrutiny. See, e.g., *FCC v. League of Women Voters of Cal.*, 486 U.S. 364, 376-378 (1984) (holding content-based broadcasting regulations subject to strict scrutiny); see also *Playboy*, 529 U.S. at 815 (noting that, although cable regulation is generally examined under intermediate scrutiny, strict scrutiny applies to content based regulation of indecent cable programming) (discussing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189-190 (1997)).

controls for video games). The same conclusion is warranted here.

### CONCLUSION

Whatever “legal logic and common sense” (Nat’l Religious Broadcasters Amicus Br. 5) *Pacifica* might once have had was built on factual foundations that have long since collapsed. Traditional broadcasting has been largely replaced by other video delivery media that are *invited* into the home. The broadcast content censored by the FCC is just one of many kinds of video content available to consumers over a growing array of converged media. At the same time, technology has empowered Americans to control the programming that they and their children are exposed to. This is the digital “revolution” this Court celebrated for “expand[ing] the capacity to choose.” *Playboy*, 529 U.S. at 818. There is no room in this world for *Pacifica*’s watered-down protections. Content broadcast over television deserves the same full constitutional protection afforded to Internet content in *Reno v. ACLU*. Consequently, the judgment of the Second Circuit should be affirmed.

Respectfully submitted.

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