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## Tobacco and the Small Screen: Why the TVOMB Should Restructure the Parental Guidelines

Courtney Leavitt

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# **Tobacco and the Small Screen: Why the TVOMB Should Restructure the Parental Guidelines**

COURTNEY LEAVITT\*

## **ABSTRACT**

*This article summarizes the creation and workings of the TV Parental Guidelines and the Oversight Monitoring Board, potential First Amendment issues of a required rating system, and possible solutions to the problems of the current rating system. The TV Parental Guidelines and the Oversight Monitoring Board were created to fulfill requirements of the Telecommunications Act of 1996. The TV Parental Guidelines are meant to empower parents to control the content viewed by their children with useful ratings. However, the accuracy of ratings and understanding of the system are limited. Further, the complaint process is complex, with little authority to enforce any decisions. Taking into account First Amendment concerns, this article finishes with possible solutions to deficiencies of the TV Parental Guidelines and the functioning of the Oversight Monitoring Board.*

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## ISSUE

In 2020, The Truth Initiative found that tobacco imagery exposure through episodic program streaming can triple a young person's odds of vaping.<sup>1</sup> Similarly, the U.S. Surgeon General concluded in 2012 that smoking in theatrically released movies causes young people to start smoking.<sup>2</sup> Yet, 51 percent of films in 2019 included smoking imagery.<sup>3</sup> Despite this, the TV Parental Guidelines rating system, which is used by most major streaming companies, does not take tobacco into account when assigning maturity ratings.<sup>4</sup>

## DISCUSSION

### I. THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996 (the "1996 Act") authorized the Federal Communications Commission (FCC) to create guidelines and recommend procedures for identifying and rating video programs containing "sexual, violent, or other indecent material."<sup>5</sup> Congress intended that the rating system inform parents about programming content.<sup>6</sup> However, this section would only take effect if, after one year of the date of enactment, distributors of video programming had not, "(A) established voluntary rules for rating video programming . . . and (B) agreed voluntarily to broadcast signals that contain ratings of such programming."<sup>7</sup> The 1996 Act also required all televisions to be equipped with a V-chip, a feature that allows viewers to block programs with a common rating.<sup>8</sup>

In 1998, the FCC found that the National Association of Broadcasters (NAB), National Cable Television Association (NCTA), and Motion Picture Association of America (MPAA)<sup>9</sup> (collectively, "the Industry") had

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1. *Straight to Vape: Pervasive Tobacco Imagery in Popular Shows Poses New Threat, Making Youth More Prone to E-cigarette Use*, TRUTH INITIATIVE, 2-3 (Aug. 2020), <https://truthinitiative.org/sites/default/files/media/files/2020/08/While-You-Were-Streaming-Straight-To-Vape-FINAL.pdf>.

2. *Smoking in the Movies*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 1, 2016), [https://smokefreemedia.ucsf.edu/sites/default/files/2021-01/CDC%20-%20Fact%20Sheet%20-%202015\\_0.pdf](https://smokefreemedia.ucsf.edu/sites/default/files/2021-01/CDC%20-%20Fact%20Sheet%20-%202015_0.pdf).

3. Jonathan R. Polansky & Stanton A. Glantz, *What is Hollywood Hiding? How the Entertainment Industry Downplays the Danger to Kids from Smoking on Screen*, UCSF CTR. FOR TOBACCO CONTROL RSCH. & EDUC., 12 (Apr. 2020), <https://escholarship.org/uc/item/3pw661mg>.

4. *Ratings, TV PARENTAL GUIDELINES MONITORING BD.*, <http://www.tvguidelines.org/ratings.html> (last visited Apr. 1, 2021); Polansky & Glantz, *supra* note 3, at 11.

5. Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(b), 110 Stat. 56 (1996) (codified as 47 U.S.C. § 303).

6. *Id.*

7. 1996 Act, § 551(e)(1).

8. *See* 1996 Act, § 551(c).

9. The MPAA changed its name to the Motion Picture Association in 2019. *See Who We Are*, MOTION PICTURE ASS'N (2021), <https://www.motionpictures.org/who-we-are/>.

established, “acceptable voluntary ratings rules,” pursuant to The Act requirements.<sup>10, 11</sup> The FCC also found that, “the concomitant agreement to voluntarily broadcast signals containing ratings pursuant to the *TV Parental Guidelines*,” was in compliance with the Act.<sup>12</sup> The FCC did not evaluate alternative ratings systems.<sup>13</sup> It noted that while most video distributors had voluntarily agreed to broadcast the signals, it was not necessary that, “every video programming distributor nationwide agree to transmit the ratings.”<sup>14</sup>

## II. THE OVERSIGHT MONITORING BOARD AND THE RATING SYSTEM

The Television Oversight Monitoring Board (TVOMB) was created pursuant to the FCC’s 1998 approval of the voluntary rating system. Up to 24 members may serve on the TVOMB,<sup>15</sup> including the chairman – a rotating position held by the head of the MPAA, NCTA, or NAB – up to 18 Industry representatives from the broadcast, cable, and creative communities, and 5 non-industry members.<sup>16</sup> Board members from the industry are appointed by the NAB, NCTA, and MPAA, and non-industry members are appointed by the Board chairman.<sup>17</sup> In 2020, the TVOMB Board had 16 members.<sup>18</sup>

The FCC’s 1998 approval committed the Board to reviewing the rating system guidelines “on a regular basis,” and to ensuring that “uniformity and consistency” are maintained to “the greatest extent possible.”<sup>19</sup> Individual

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10. *Implementation of Section 551 of the Telecommunications Act of 1996, Video Programming Ratings*, 13 FCC Rcd. 8232, ¶ 2 (1998) [hereinafter *Implementation Order*].

11. The current rating system uses a combination of ratings and descriptors. Possible ratings are TV-Y (all children), TV-Y7 (directed to older children), TV-Y7-FV (directed to older children – fantasy violence), TV-G (general audience), TV-PG (parental guidance suggested), TV-14 (parents strongly cautioned), TV-MA (mature audiences only). Possible descriptors are D (suggestive dialogue, usually talk about sex), FV (fantasy violence, children’s programming only), L (coarse or crude language), S (sexual situations), and V (violence). An example rating could be TV-PG-DS, with PG indicating the appropriate audience, and DS indicating the show may contain violence, sex, adult language or suggestive dialogue. See *The TV Parental Guidelines*, TV PARENTAL GUIDELINES MONITORING BD., [tvguidelines.org/resources/TheRatings.pdf](http://www.tvguidelines.org/resources/TheRatings.pdf) (last visited April 12, 2021).

12. *Id.*

13. *Id.*

14. See *Implementation of the Consolidated Appropriations Act of 2019, Report on Television Ratings and The Oversight Monitoring Board*, 34 FCC Rcd. 3205 (4), ¶ 28-29 (2019) [hereinafter *FCC Report on Television Ratings, 2019*] (noting that NBC and BET did not agree to broadcast the signals, and that, “participation must be sufficiently ubiquitous to achieve Congress’s goals in enacting Section 551”).

15. *Implementation Order*, 13 FCC Rcd. 8232.

16. *Annual Report 2020*, TV PARENTAL GUIDELINES MONITORING BD., 3, [http://www.tvguidelines.org/resources/TV\\_Parental\\_Guidelines\\_2020AnnualReport.pdf](http://www.tvguidelines.org/resources/TV_Parental_Guidelines_2020AnnualReport.pdf) (last visited Apr. 14, 2021).

17. *Id.*

18. *Id.* The 2020 Board Members were ABC, A+E Networks, AMC Networks, American Academy of Pediatrics, Call for Action, Discovery, Inc., Entertainment Industries Council, Fox Corporation, Hulu, Lifetime Networks, National PTA, NBC Universal, Sony Pictures Entertainment, WarnerMedia, Univision, ViacomCBS.

19. *FCC Report on Television Ratings, 2019*, 34 FCC Rcd. ¶ 8.

networks have final authority on the assignment of ratings, but are encouraged to consult with other networks to ensure consistency.<sup>20</sup> The Industry representatives also committed to “independent, scientific research and evaluation” once the V-chip was in the marketplace.<sup>21</sup> The Monitoring Board meets annually, “to consider and review correspondence sent to the Monitoring Board, discuss current research, and review any other issues relevant to the TV Parental Guidelines.”<sup>22</sup>

### III. TELEVISION PARENTAL GUIDELINE DEFICIENCIES

#### A. THE FCC’S AUTHORITY OVER THE RATING SYSTEM IS LIMITED

Over twenty years later, Congress directed the FCC to report on the accuracy of the rating system “and the ability of the TV Parental Guidelines Oversight Monitoring Board to address public concerns” through its enactment of the 2019 Consolidated Appropriations Act (the 2019 Act).<sup>23</sup> In response, a joint statement from the television industry (the Industry) argued that “any authority the Commission had regarding the television rating system expired in March 1998, when the Commission found that the Guidelines satisfied Section 551 . . . .”<sup>24</sup> They further argued, “Congress did not authorize the FCC to regulate the rating system . . . and the First Amendment would prohibit such FCC interference.”<sup>25</sup> In short, the Industry argued that the FCC did not retain any authority to regulate the television rating system.

The FCC did not seem to disagree. In its 2019 report,<sup>26</sup> the FCC clarified, in the 1996 Act, “Congress gave the Commission authority to establish a rating system, but only if program distributors failed . . . to develop a voluntary rating system that was acceptable to the Commission.”<sup>27</sup> The 2019 Act directed the FCC to review only the established TV Parental Guidelines and not take additional action. The FCC’s findings are discussed in Section III, *infra*.

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20. *Id.* ¶ 21.

21. *Id.* ¶ 8.

22. *Id.* ¶ 9.

23. Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, Explanatory Statement (H.R. REP. NO. 116-9, Division D, Title V, at 259 (Conf. Rep.)), 133 Stat. 13 (2019).

24. National Association of Broadcasters, NTCA – The Internet & Television Association, and The Motion Picture Association of America, Comment Letter on TV Parental Guidelines Report, MB Docket No. 19-41 at 8 (Mar. 19, 2019), <https://ecfsapi.fcc.gov/file/10319008190251/NAB-NCTA-MPAA%20TV%20Ratings%20Reply%20Comments.pdf>.

25. *Id.* at 2.

26. Since the guidelines were approved in 1997, the FCC has requested comment on the TV Parental Guidelines three times: Violent Television Programming and Its Impact on Children, 69 FR 49899-01 (Aug. 12, 2004); Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming, 74 FR 11334-01 (Mar. 17, 2009); Empowering Parents and Protecting Children in an Evolving Media Landscape, 74 FR 61308-01 (Nov. 24, 2009).

27. *FCC Report on Television Ratings, 2019*, 34 FCC Red. ¶ 3.

## B. THE ACCURACY OF THE RATING SYSTEM HAS NOT BEEN THOROUGHLY STUDIED

Pursuant to the 2019 Act, Congress directed the FCC to review and report on the accuracy of the rating system within 90 days. In that time, the FCC received 1,770 comments, which demonstrated disagreement between industry representatives and advocacy groups,<sup>28</sup> and between certain individuals over the efficacy and accuracy of the system.<sup>29</sup> The FCC did not make specific findings regarding “the extent to which the rating system matche[d] the video content that is being shown,” as requested by Congress due to the limited time frame, but instead summarized the public comments.<sup>30</sup>

The Parents Television Council (PTC), Concerned Women for America (CWA), National Religious Broadcasters, Focus on Family, and multiple individuals commented, in general, that the ratings system is inconsistent and inaccurate. For example, commenters from PTC alleged that programs containing violence were not denoted with “V” for violence consistently, and CWA stated that, “graphic sexual scenes, violence, and other mature content are ‘routinely’ rated as appropriate for children,” instead of receiving a mature audience rating.<sup>31</sup> Non-industry commenters also noted the issue of ratings creep, which is a shift overtime for more mature content to receive lower age-based ratings.<sup>32</sup> There was also concern that creators are incentivized to apply lenient ratings because sponsors of television programming prefer not to advertise on programs with a TV-MA (mature audiences only) rating.<sup>33</sup>

## C. PUBLIC UNDERSTANDING OF THE RATING SYSTEM MAY BE LIMITED

There is disagreement about the extent to which the general public understands the TV Parental Guidelines. In its 2019 public comments, the Campaign for a Commercial-Free Childhood (CCFC) cited a Kaiser Family Foundation survey from 2007 of 1,000 parents that found while most parents (87%) have heard of TV ratings, most do not understand what they mean (only 30% of parents with children ages 2-6 could name any rating for children’s shows).<sup>34</sup> In comparison, a 2020 study conducted by Hart

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28. Advocacy groups who argue the system is not accurate enough include PTC, National Religious Broadcasters, and focus on Family.

29. *FCC Report on Television Ratings, 2019*, 34 FCC Rcd. 3205 (4).

30. *Id.* ¶ 14.

31. *Id.* ¶ 15.

32. *Id.* ¶ 17 n.67 (referring to comments made by Media Researchers citing studies from 2008 and 2014 demonstrating ratings creep, which may affect individuals who rate programs).

33. *Id.* ¶ 19.

34. *Id.* ¶ 19 n.71 (citing Victoria Rideout, *Parents, Children & Media, A Kaiser Family Foundation Survey*, HENRY J. KAISER FAMILY FOUND., 8 (June 2007), <https://files.eric.ed.gov/fulltext/ED542901.pdf>).

Research Associates, funded by the TVOMB, found that 89% of parents find the TV rating system helpful, 77% of parents reported using the system often or sometimes, and 80% had a favorable opinion of the system.<sup>35</sup> In the same study, 39% of parents reported seeing inaccurate ratings, although the frequency of these inaccuracies was not high in their opinion.<sup>36</sup>

These surveys are difficult to compare because (1) they were conducted 13 years apart; and (2) the Kaiser Family Foundation studied understanding of the system while Hart Research studied parental opinion of the system. The complicated complaint process in combination with possible misunderstanding of the ratings system may make it difficult for the Board to address public concerns. Additional research is necessary to actually review the accuracy of the system.

#### D. THE ABILITY OF THE TVOMB TO ADDRESS PUBLIC CONCERNS IS LIMITED BY THE COMPLAINT PROCESS

The public may submit questions or complaints regarding TV ratings to an email address, P.O. Box, or phone number provided on the TVOMB website.<sup>37</sup> When the Board receives a rating complaint, the Board acknowledges its receipt and forwards it to the network that aired the program.<sup>38</sup> If the TVOMB receives multiple complaints regarding the same program, the issue is flagged for NAB, NCTA, and MPAA, and they discuss whether to take further action.<sup>39</sup> If “it is clear there is widespread concern” about a program’s rating because complaints continue, the Board chairman determines if the issue needs to be brought before the Board for adjudication.<sup>40</sup> During adjudication, the program distributor is given an opportunity to explain the program’s rating, then the Board votes on whether the program is correctly rated.<sup>41</sup> If the Board decides a program is incorrectly rated, the program distributor has two options: (1) change the rating on future airings, which concludes the proceedings; or (2) refuse to change the rating,

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35. *Key Findings from 2020 TV Ratings Research Among Parents*, HART RSCH. ASSOCS., <http://www.tvguidelines.org/resources/KeyFindings2020Research.pdf> (last visited Mar. 29, 2021).

36. *Id.*

37. *FCC Report on Television Ratings, 2019*, 34 FCC Rcd. ¶ 10. *See also Contact Us*, TV PARENTAL GUIDELINES MONITORING BD., <http://www.tvguidelines.org/contactUs.html> (last visited Mar. 29, 2019) (giving a brief overview of the adjudication process).

38. *FCC Report on Television Ratings, 2019*, 34 FCC Rcd. ¶ 10. Although comments may not receive a response if they relate to the content of the program, not the rating consistency, as that would be out of the Board’s purview. *Id.* ¶ 25.

39. Examples of “further action” may include outreach to the program’s distributor to highlight the complaint, and other industry parties may be asked if the rating is similar to their rating of similar programs. *See FCC Report on Television Ratings, 2019*, 34 FCC Rcd. ¶ 10.

40. *Id.* ¶ 11 (citing Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, NAB, Rick Chessen, Senior Vice President Legal and Regulatory Affairs and Chief Legal Officer, NCTA, and Neil Fried, Senior Vice President, Congressional and Regulatory Policy & Senior Counsel, MPAA, to Marlene H. Dortch).

41. *Id.*

which results in a public announcement of the Board's views.<sup>42</sup> Regardless of the outcome, the Board does not require the program distributor to change the rating.

In its 2019 report, the FCC acknowledged commenters' concerns regarding this complaint-taking process. For example, PTC stated that it successfully had a rating changed three times, but most of the time, its comments did not receive a response.<sup>43</sup> Commenters were also concerned that parents were unaware that "it is up to them to make complaints," and if they did attempt to make a complaint, they would not know to send it to the TVOMB.<sup>44</sup> For example, viewers incorrectly sent complaints to TV stations, networks, the Commission, or advocacy groups.<sup>45</sup> Further, commenters, including PTC, CWA, and Kovel, complained of the lack of transparency regarding Board meetings and decisions. They contended that there is no public record of Board meetings or decisions.<sup>46</sup> Finally, commenters asserted the TVOMB does not adequately address viewers concerns because the Board primarily represents the Industry.<sup>47</sup>

#### IV. FIRST AMENDMENT CONCERNS

##### A. A BRIEF BACKGROUND ON FREE SPEECH PROTECTIONS UNDER THE FIRST AMENDMENT

The First Amendment precludes Congress from "abridging the freedom of speech" and has been incorporated against the states.<sup>48</sup> Content-based speech restrictions<sup>49</sup> must withstand strict scrutiny.<sup>50</sup> A content-based restriction, "focuses *only* on the content of the speech and the direct impact that speech has on its listeners."<sup>51</sup> Strict scrutiny requires the statute to be "narrowly tailored to promote a compelling Government interest" without a less restrictive alternative to serve that interest.<sup>52</sup> In comparison, "[a] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of

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42. *Id.*

43. *Id.* ¶ 25.

44. *Id.*

45. *Id.*

46. *Id.* ¶ 26.

47. *Id.* ¶ 27.

48. *See* *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947).

49. *See* *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 811-12 (2000) (internal quotations omitted) (explaining that Section 505 of the Telecommunications Act of 1997 is, "the essence of content-based regulation" because it only applies to channels primarily dedicated to "sexually explicit adult programming or other programming that is indecent," and the, "overriding justification for the regulation is concern for the effect of the subject matter on young viewers").

50. *Sable Commc'ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

51. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

52. *Playboy Ent. Grp.*, 529 U.S. at 813 (citing *Sable*, 492 U.S. 115); *Reno v. Am. C.L. Union*, 521 U.S. 844, 874 (1997).

free speech and does not burden substantially more speech than necessary to further those interests.”<sup>53</sup>

Commercial speech, described as “expression related solely to the economic interests of the speaker and its audience,”<sup>54</sup> is subjected to a four-part test to determine whether a regulation of commercial speech is constitutional.<sup>55</sup> First, it must be determined whether the speech is protected by the First Amendment.<sup>56</sup> Commercial speech is protected when it concerns lawful activity and is not misleading.<sup>57</sup> Second, the government “must assert a substantial interest” in limiting the commercial speech.<sup>58</sup> Third, “[T]he restriction must directly advance the state interest involved.”<sup>59</sup> Fourth, the regulation must be no more extensive than necessary, but it does not have to be the least restrictive means available.<sup>60</sup> “Almost all of the restrictions disallowed under *Central Hudson’s* fourth prong have been substantially excessive, disregarding ‘far less restrictive and more precise means.’”<sup>61</sup>

Product advertising is a “less vigorously protected” form of speech.<sup>62</sup> In a challenge to Section 6 of the Public Health and Cigarette Smoking Act of 1969, which made it unlawful to electronically advertise cigarettes, the Court stated, “[p]etitioners, themselves, have lost no right to speak – they have only lost an ability to collect revenue from others for broadcasting their commercial messages.”<sup>63</sup> The government may require commercial disclosure of “purely factual and uncontroversial information” in advertisements.<sup>64</sup> “An advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”<sup>65</sup>

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53. See *Playboy Ent. Grp.*, 529 U.S. at 813 (citing *Sable*, 492 U.S. 115); *Reno v. Am. C.L. Union*, 521 U.S. 844, 874 (1997).

54. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 562 (1980).

55. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 562-66.

56. *Id.*

57. *Id.* at 563. In comparison, “the government may ban forms of communication more likely to deceive the public than to inform it [citations omitted] or commercial speech related to illegal activity.”

58. *Id.* at 564.

59. *Id.* A restriction may not be sustained if, “it provides only ineffective or remote support for the government’s purpose.”

60. *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 477 (1989).

61. *Id.* at 479. See, e.g., *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

62. *Capital Broad. Co. v. Mitchell*, 333 F. Supp. 582, 584 (D.D.C. 1971), *aff’d sub nom.* *Capital Broad. Co. v. Kleindienst*, 405 U.S. 1000 (1972), and *aff’d sub nom.* *Nat’l Ass’n of Broads. v. Kleindienst*, 405 U.S. 1000 (1972).

63. *Id.*

64. *Zauderer*, 471 U.S. at 651.

65. See *id.* (holding that it was deceptive for plaintiff to refer to contingent-fee arrangements without noting the client’s liability for costs, and that it reasonable enough to support a requirement that liability for costs be disclosed).

## B. FIRST AMENDMENT LAW APPLIED TO TELEVISION AND MOVIE RATING SYSTEMS

Congress and the Industry appear to agree that any government-mandated ratings must withstand First Amendment challenges. Congressional debate over the 1996 Act suggested that the First Amendment limits the government from imposing ratings.<sup>66</sup> In its 2019 comments to the FCC, the Industry asserted any FCC regulation of the TV Parental Guidelines would violate the First Amendment.<sup>67</sup>

In *Forsyth v. Motion Picture Association of America, Inc.*, California’s Northern District found applying ratings to in-theater movies was in itself conduct in furtherance of the constitutional right of free speech.<sup>68</sup> There, plaintiff parents sought a legal determination that any movie depicting tobacco use must be assigned an “R” rating or higher, with “narrow exceptions.”<sup>69</sup> The Classification and Rating Administration (CARA),<sup>70</sup> which oversees these movie ratings, counter-claimed on anti-SLAPP grounds that its film ratings certify “*in its opinion*” that films warrant a particular level of parental caution.<sup>71</sup> The court dismissed the case, finding that it violated CARA’s First Amendment rights. The Industry similarly argued in its response to the FCC’s call for comments in 2019 that “rating programs is not an ‘objective’ science” but that it reflects speech-protected “editorial judgement” based on various factors.<sup>72</sup> Government rating regulations, however, may withstand Constitutional challenges, including passing the strict scrutiny test, if properly created. The U.S. Supreme Court has recognized “a compelling interest in protecting the physical and psychological well-being of minors.”<sup>73</sup> The D.C. Circuit recognized that, “parents have the right to control what comes into their homes and what thus becomes available to their children,”<sup>74</sup> and “the government has a substantial interest in facilitating their ability to do so.”<sup>75</sup> The D.C. Circuit found that a

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66. Mr. Fields of Texas stated that, “[b]ut as soon as the FCC tries to make a distinction for rating purposes between what is bad violence’ that should be blocked and what is good violence’ that should not be blocked, it is squarely in the business of regulating speech based on its content or perceived value to society and therefore squarely in violation of the first amendment.” Conference Report on S. 652, Telecommunications Act of 1996, H.R. REP. NO. 104-353, at H1155 (1996) (Conf. Rep.).

67. Joint Reply Comments of the National Association of Broadcasters, NTCA – The Internet & Television Association, and The Motion Picture Association of America, MB Docket No. 19-41 at p. 2 (2019).

68. *Forsyth v. Motion Picture Ass’n of America, Inc.*, No. 16-cv-00935-RS, 2016 WL 6650059, at \*4 (N.D. Cal. Nov. 10, 2016).

69. *Id.* at \*1.

70. 1996 Act, § 551; *History of Ratings*, THE CLASSIFICATION AND RATING ADMIN., <https://www.filmratings.com/History> (last visited Apr. 5, 2021).

71. *Id.*

72. *FCC Report on Television Ratings, 2019*, 34 FCC Rcd. ¶ 21.

73. *Sable Commc’ns*, 492 U.S. at 126.

74. *Time Warner Ent. Co., L.P. v. FCC*, 93 F.3d 957, 982 (D.C. Cir. 1996).

75. *Id.*

statute requiring content ratings disclosure on premium channel previews was constitutional because “the provision simply requires operators to disclose certain information before offering free previews of premium channels.”<sup>76</sup>

In lawsuits challenging the constitutionality of indecency provisions of the Cable and Television Consumer Protection and Competition Act of 1992 (CTCPA), the U.S. Supreme Court found the voluntary television rating system and use of the V-chip are a less restrictive alternative to requiring cable system operators to “segregate[e] and bloc[k] ‘patently offensive’ sex-related material” from appearing on leased channels, but not on other channels.<sup>77</sup>

More legal research should be done regarding how the First Amendment would apply to an involuntary rating system, or to limited requirements created by the FCC.

## V. POSSIBLE SOLUTIONS

### A. CONDUCT ADDITIONAL RESEARCH INTO THE EFFICACY AND ACCURACY OF THE SYSTEM

As discussed *supra*, Section II, there has been little independent research into the efficacy and accuracy of the TV rating system. With regard to efficacy, it is unclear whether parents actually understand the meanings of ratings, and whether parents know how to make a complaint about a particular rating. With regard to accuracy, a broad study that looks at ratings as applied across broadcasters would be useful to address issues such as ratings creep and advertising incentives for lower ratings. Congress acknowledged this need for further research in the Consolidated Appropriations Act of 2019 but did not give the FCC adequate time to conduct a thorough analysis of the TV Parental Guidelines. Congress should call again upon the FCC to conduct a comprehensive review and allow sufficient time and resources to complete its work.

The TVOMB could commission its own robust and impartial review of the TV Parental Guidelines and share the results with the public. In 1998, the TVOMB committed to conducting independent scientific research of the rating system yet has done the bare minimum to fulfill that commitment. Although the FCC’s 2019 report appears to have spurred the TVOMB to take a more active role in ensuring the efficacy and accuracy of its rating system in the future,<sup>78</sup> Congress, the Industry, and consumers should encourage the

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76. *Id.* at 982. *See also* Zauderer, 471 U.S. at 651 (stating that the government may be able to require their disclosure in advertisements as “purely factual and uncontroversial information”).

77. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 753-56 (1996) (discussing CTCPA § 10(b)); *see also* *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *rev’d and remanded sub nom.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

78. TV PARENTAL GUIDELINES MONITORING BD., *supra* note 16, at 3.

Board to further study the accuracy and efficacy of the TV Parental Guidelines.

B. REQUIRE ROBUST REVIEW, AND TRANSPARENCY OF COMPLAINTS, MEETINGS, AND DECISIONS

There are many possible improvements that could be made to the TVOMB and the current rating system. For example, TVOMB meeting agendas, decisions, and rating complaints, discussed *supra*, Section III(D), could be made public, so that consumers can follow the ratings process, know when complaints are made, and if any action is taken. TVOMB could host an “online lookup” tool so parents can easily find a program’s ratings.<sup>79</sup> Furthermore, TVOMB should meet multiple times a year to address consumer concerns and ensure that ratings are applied consistently. In addition, TVOMB could revamp its Board to better represent the Industry *and* consumers. The Board committed to having 5 non-industry members, yet in 2020, only three members were not part of the Industry.<sup>80</sup> These positions, and additional seats, should be filled by non-industry members.

C. SUGGESTIONS AND RECOMMENDATIONS MADE BY THE TRUTH INITIATIVE AND UCSF CENTER FOR TOBACCO CONTROL RESEARCH AND EDUCATION

In 2018 and 2019, the Truth Initiative released reports tracking tobacco imagery in streaming programs.<sup>81</sup> The 2019 report found “tobacco on the small screen more than doubled,” noting “200 tobacco incidents on programs rated TV-Y7 and TV-PG.”<sup>82</sup> The Truth Initiative suggested: states change their film production subsidy policies to provide tax and other incentives for productions that do not promote tobacco use; mature ratings be used for programs with tobacco content; anti-tobacco advertisements air before programs that feature tobacco; content creators and distributors exclude tobacco imagery from their future content; and additional research be conducted into the impact of youth exposure to tobacco imagery.<sup>83</sup>

In 2020, the University of California, San Francisco, Center for Tobacco Control Research and Education produced a broad report on movie ratings and the TV Parental Guidelines and the accessibility of those ratings

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79. Polansky & Glantz, *supra* note 3, at 12 (noting that, “[w]ithout this data, it is effectively impossible for the FCC or any other stakeholder to review the appropriateness of ratings . . . or to hold this self-regulation scheme accountable”).

80. *FCC Report on Television Ratings, 2019*, 34 FCC Rcd. ¶ 8.

81. *While You Were Streaming*, TRUTH INITIATIVE (Jan. 2018), <https://truthinitiative.org/sites/default/files/media/files/2019/03/Smoking-in-Streaming-Final-Report.pdf>; *While You Were Streaming: Smoking on Demand*, TRUTH INITIATIVE (June 2019), <https://truthinitiative.org/sites/default/files/media/files/2019/07/WUWS-SOD-FINAL.pdf>.

82. *While You Were Streaming: Smoking on Demand*, TRUTH INITIATIVE, 7 (June 2019), <https://truthinitiative.org/sites/default/files/media/files/2019/07/WUWS-SOD-FINAL.pdf>.

83. *Id.*

and parental controls on each of the major streaming platforms.<sup>84</sup> The authors recommended: assigning an R or TV-MA rating to theatrically released films and streamed movies and programs that depict tobacco imagery, with limited exceptions; running a strong, straightforward warning, such as “Smoking on screen harms young viewers,” before content with tobacco imagery; streaming companies offering a common parental control interface, that allows parents to block content with tobacco imagery; and creating a publicly available a database of ratings for all movies and programs.<sup>85</sup>

### CONCLUSION

Parents have an interest in controlling the programming their children watch and limiting youth exposure to tobacco imagery. Despite this, the TV Parental Guidelines rating system is difficult for parents to understand and does not safeguard young viewers from tobacco imagery. Although the FCC has limited control over ratings and any government-required changes must withstand First Amendment challenges, there are many improvements that could be implemented without any action by Congress or the FCC.

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84. Polansky & Glantz, *supra* note 3, at 12.

85. *Id.* at 30-31.

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