



**THE
FUTURE
OF
FREE
SPEECH**

Comments to the Federal Communications Commission

**RE: In the Matter of Further Empowering Parents to Protect Their Children
and Make Informed Choices About TV Programs Their Children Watch**

MB Docket No. 19-41

May 21, 2026

Comments of:

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In the Matter of Further Empowering Parents to Protect Their Children and Make Informed Choices About TV Programs Their Children Watch

The Future of Free Speech is an independent, nonpartisan think tank located at Vanderbilt University. We work to reaffirm freedom of expression as the bedrock of free and thriving societies through actionable research, empowering tools, and principled advocacy. The Future of Free Speech seeks to create a world where everyone's right to freedom of expression is protected by law and reinforced by a culture that tolerates diverse viewpoints.

I. The Public Notice is Unconstitutionally Vague.

The threshold problem with this proceeding is that the Public Notice does not clearly identify what the Commission is asking about. The Notice deploys three different and undefined formulations to describe the content at issue:

- It first refers to “controversial gender identity issues” being “included or promoted in children’s programs.”
- It then refers to “transgender and gender non-binary programming” rated as appropriate for children.
- Finally, it asks whether programs rated TV-Y, TV-Y7, and TV-G “may contain the discussion or promotion of gender identity themes.”¹

“Transgender and gender non-binary programming” appears to sweep in any program in which a transgender or non-binary character appears, regardless of whether that character’s identity is the subject of any storyline. Under the Commission’s definition, it remains unclear when a character that is non-binary would cross into a “theme” or “promotion.” “Controversial gender identity issues” is conditioning the descriptor on a

¹ FCC’s Media Bureau Seeks Comment on Further Empowering Parents to Protect Their Children and Make Informed Choices About the TV Programs Their Children Watch, Public Notice, DA 26-392, MB Docket No. 19-41 (rel. Apr. 22, 2026).



contested judgment about what is or is not controversial, and the Notice doesn't provide any guidance or clarity on that either. A government inquiry that seeks to influence speech must give regulated parties fair notice of what speech is at stake, both so they can respond meaningfully and so that other branches of government can assess whether the agency has stayed within its jurisdiction.²

The vagueness in the Notice also makes informed public comment impossible. It is unclear whether the Commission is proposing a descriptor for the mere on-screen presence of a transgender or non-binary person, a descriptor for storylines centered on gender identity, a descriptor for any program a member of the public might characterize as controversial, or some combination of all three.

An administrative record built on that unclear and vague foundation cannot satisfy the reasoned agency action. Courts have repeatedly required that an agency's framing of an issue "fairly apprise interested persons of the subjects and issues" on which the comment is sought³ and have vacated agency action where the agency's notice failed that test.⁴ Any rule that emerged from this notice would also fail the more general requirement that agency action rest on reasoned decision-making and a record that supports it.⁵

II. The Inquiry Singles Out a Viewpoint and Triggers Strict Scrutiny

Even if the Commission cured the vagueness identified above, the inquiry as framed would still fail First Amendment review.

² See *FCC v. Fox Television Stations*, 567 U.S. 239, 253 to 254 (2012); *Grayned v. City of Rockford*, 408 U.S. 104, 108 to 109 (1972) (vague laws affecting speech are doubly problematic because they chill protected expression and invite arbitrary enforcement).

³ *United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980) (quoting *Am. Iron & Steel Inst. V. EPA*, 568 F.2d 284, 293 (3d Cir. 1977)).

⁴ See *CSX Transportation, Inc. v. Surface Transp. Bd.*, 584 F.3d 1076 (D.C. Cir. 2009); *Time Warner Cable Inc. v. FCC*, 729 F.3d 137 (2d Cir. 2013).

⁵ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).



The Notice asks whether one specific kind of content — programming with “discussion” or “promotion” of transgender and gender non-binary identity “themes” — should be singled out with a special government-encouraged warning label. A topic is generally not featured in programming without involving the people whose lives it concerns. In other words, a descriptor for gender identity themes cannot, in practice, be applied to anything other than programs in which transgender or gender non-binary persons appear, or in which their existence is acknowledged.

Placing that descriptor alongside descriptors like V (violence), L (language), S (sexual situations) would tell parents and the programmers who must apply the rating that the discussion of these persons belongs in the same family as graphic violence, coarse language, and explicit sexual conduct. If what the Commission is in substance proposing is that any program featuring or discussing transgender and gender non-binary persons be flagged with a content warning, that is the stigmatization and marginalization of an entire segment of the population through the machinery of the ratings system, and it is the kind of viewpoint targeting forbidden by the First Amendment.

Government action that targets speech because of its subject matter or viewpoint is presumptively unconstitutional and must satisfy strict scrutiny.⁶ The Notice does not ask a content-neutral question about the accuracy of ratings. It identifies one category of expression — the discussion of gender identity issues — and asks whether that content alone should trigger a different rating or descriptor. Programs depicting cisgender or heteronormative family structures are not proposed for any analogous flag. The Supreme Court has held that the government may not “prescribe what shall be orthodox” in matters of opinion or identity.⁷

⁶ *Iancu v. Brunetti*, 588 U.S. 388 (2019); *Matal v. Tam*, 582 U.S. 218 (2017); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

⁷ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).



III. The Notice Compels Speech

In *NIFLA v. Becerra*, the Supreme Court held that the government cannot conscript private speakers into delivering state-preferred messages on contested social issues, even under the guise of consumer information.⁸ The proposed descriptor would do exactly that.

The TVOMB is composed of private media companies, trade associations, and nonprofit representatives.⁹ Networks and producers attach the resulting ratings to their own creative work. Requiring or pressuring those private actors to attach a government-encouraged warning to depictions of transgender and gender non-binary persons compels them to adopt and broadcast a government viewpoint about those persons, namely that their depiction is a fact requiring disclosure on par with violence or sexual content.

The TVOMB exists in the shadow of Section 551(e), which authorizes the Commission to impose its own ratings if the industry's voluntary system is found inadequate. The Notice expressly raises the prospect of the Commission acting if industry does not adjust. That is the regulatory leverage that converts voluntary labeling into compelled speech.

IV. The Inquiry Is Coercion of a Private Actor Under *Vullo*

In *NRA v. Vullo*¹⁰, and earlier in *Bantam Books, Inc. v. Sullivan*¹¹, the Supreme Court held that government officials may not use regulatory leverage to coerce private actors into suppressing or labeling disfavored speech. *Vullo* articulated four factors relevant to the

⁸ Nat'l Inst. of Family & Life Advocates (*NIFLA*) v. *Becerra*, 585 U.S. 755, 766, 771 (2018) “the First Amendment, subject only to narrow and well understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals” (quoting *Turner Broadcasting*); at 771 compelled disclosure on contested topics raises particular constitutional concern because it can be used to suppress speech the government disfavors: the Court emphasizes that “by compelling individuals to speak a particular message, such notices alter the content of their speech.”

⁹ TV Parental Guidelines Monitoring Board, About Us, <https://www.tvguidelines.org/aboutUs.html> (last visited May 20, 2026).

¹⁰ 602 U.S. 175, 189 to 191 (2024).

¹¹ 372 U.S. 58, 66 to 67 (1963).



coercion inquiry: (1) the speaker’s authority over the regulated party, (2) the nature of the message (whether reasonably perceived as a threat or merely persuasion), (3) whether the message was communicated through formal regulatory channels, and (4) whether the regulated party in fact responded to the pressure.¹²

All of those factors apply in this case: (1) the Commission has direct statutory authority over the broadcasters, MVPDs, and (in adjacent contexts) the corporate parents of streaming services represented on the TVOMB, and Section 551(e) gives it specific authority to displace the voluntary ratings system; (2) the Notice’s framing, which characterizes depictions of transgender persons as “controversial” content that “undermines” parents and asks whether the Commission should act if industry does not respond, is reasonably perceived as a regulatory threat rather than an exchange of views; (3) this communication is occurring through an official Public Notice in a formal docket, the most formal regulatory channel available; (4) as we don’t believe the Commission is opening the docket to waste taxpayers money, the logical reason is that the very purpose of opening the docket is to elicit a response from the regulated industry.

The fourth *Vullo* factor asks whether the regulated party has responded to the pressure. At this stage, the comment period remains open, and the TVOMB has not had occasion to respond; that does not defeat the coercion claim. The unconstitutional state action under *Bantam Books* and *Vullo* is the regulator’s use of its leverage to pressure private speech, regardless of whether the leverage ultimately succeeds.

V. Less Restrictive Alternatives Are Already Available and Constitutionally Required

Where the government’s stated interest is informing parents, the First Amendment requires the least restrictive means.¹³ Parents who wish to avoid any specific category of content already have robust tools, none of which require the government to single out particular subjects for warning. Every major streaming platform offers granular parental controls, kid profiles, and per-title restrictions. Independent review services, including

¹² *Vullo* 602 U.S. at 189 to 191.

¹³ *United States v. Playboy Entertainment Group*, 529 U.S. 803, 813 (2000).



Common Sense Media¹⁴, Plugged In,¹⁵ and the Parents Television and Media Council,¹⁶ among others, provide detailed, viewpoint-diverse content descriptions for individual parents to consult. The existence of these private, viewpoint-neutral tools is fatal to any claim that government-encouraged labeling of disfavored content is necessary.

VI. Conclusion

If the FCC's ultimate end goal is that any programming that shows an LGBTQ+ individual will be slapped with a scarlet letter, then that represents a classic case of targeting particular classes with First Amendment suppression. The First Amendment does not permit the federal government to brand a category of human existence as a content warning.

Respectfully submitted,

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¹⁴ Common Sense Media, Age-Based Media Reviews, <https://www.common sense media.org/> (last visited May 20, 2026).

¹⁵ Plugged In, <https://www.pluggedin.com/> (last visited May 20, 2026).

¹⁶ Parents Television and Media Council, <https://www.parentstv.org/> (last visited May 20, 2026).