WASHINGTON
LEGISLATIVE OFFICE

June 19, 2013

Marlene H. Dortch
Secretary,
Office of the Secretary,
Federal Communications Commission
445 12th St. SW, Room TW-A325,
Washington, DC 20554

Re: GN Docket No. 13-86, DA 13-581

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Dear Secretary Dortch:

We write to offer comments in response to the Federal Communications Commission's (the "Commission" or the "FCC") Notice of April 19, 2013, seeking input on changes to the Commission's enforcement of its broadcast indecency policies.[1] As explained in more detail below, we urge the Commission to indeed limit its enforcement of the broadcast indecency rules to the most egregious cases of misconduct,[2] and to define "egregiousness" with reference to the constitutional definition of obscenity.

The ACLU is one of the premier free speech advocacy organizations in the country. We have been involved in the debate over government efforts to regulate "indecent" media since enforcement began, including participation in *FCC v. Pacifica*, 438 U.S. 726 (1978), and our direct suit in *Reno v. ACLU*, 521 U.S. 844 (1997), in which the Supreme Court voted unanimously to invalidate the indecency provisions of the Communications Decency Act. We also appeared as amicus curiae in both *FCC v. Fox Televisions Stations, Inc.* ("*Fox I*"), 556 U.S. 502 (2009), and *FCC v. Fox Television Stations, Inc.* ("*Fox II*"), 132 S. Ct. 2307 (2012), where we urged the Court to find 18 U.S.C. § 1464 (2006) unconstitutional as applied to merely "indecent" or "profane" speech.[3]

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[1] FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More Than One Million Complaints); Seeks Comments on Adopting Egregious Cases Policy, 78 Fed. Reg. 23,563 (Apr. 19, 2013) (the "Notice").

[2] Adopting an "egregious cases" policy would address the FCC's questions about the appropriate treatment of both "isolated" expletives and "non-sexual" nudity, and would return the Commission to its enforcement posture prior to the *Pacifica* decision.

[3] Section 1464, the basis of the FCC's authority to regulate broadcast indecency, was originally passed as part of the Radio Act of 1927. It bars "any obscene, indecent, or profane language by means of radio communication."

We applaud the Commission for opening this proceeding. The indecency enforcement record since the turn of the millennium showcases—in stark terms—the dangers presented by the grant to the government of authority to regulate speech based on terms as inherently unbounded as "indecency." Numerous instances of broadcaster self-censorship and arbitrary FCC enforcement highlight the deeply inconsistent and necessarily subjective results that indecency regulation produces as a matter of course.

In one now infamous instance, numerous CBS affiliates, fearful of an enforcement action, refused to air or aired during the 10:00pm to 6:00am safe harbor period an award-winning documentary on the 9/11 attacks featuring actual audio recordings of responding emergency personnel containing some profanity.[4] Other affiliates of the same network aired the documentary without penalty, and, indeed, the documentary had been aired without incident twice before the controversy.

In another case arising out of the Omnibus Order challenged in the *Fox* cases, the FCC issued a notice of apparent liability and forfeiture for a Ken Burns PBS documentary featuring African-American hip hop and blues artists swearing.[5] By contrast, the Commission exempted an uncensored broadcast of the World War II drama Saving Private Ryan from enforcement despite extensive profanity, because omitting the expletives would "alter[] the nature of the artistic work and diminish[] the power, realism and immediacy of the film experience for viewers."[6] The Commission compared the broadcast of Saving Private Ryan to an episode of N.Y.P.D. Blue, where it found the terms "dick" and "dickhead" not profane, but an isolated use of the term "bullshit" gratuitous and in violation of the indecency statute and rules.[7]

As these instances demonstrate, indecency regulation is constitutionally untenable. The First Amendment demands that the government draw clear, bright lines between speech that is permissible and that which can lawfully be restricted—like incitement to violence or perjury—because it is inherently harmful. The indecency standards are necessarily the antithesis of these bright lines. By design, the statute vests vast authority in the FCC to restrict speech based on subjective and shifting factors that are expressly founded on the government's disapproval of the speech at issue. No other form of speech restriction runs so unabashedly counter to the first

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4 *CBS Stations Fearful of Airing 9/11 Documentary*, Broadcast Engineering, Sept. 10, 2006, http://bit.ly/179r32e.

5 *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd. 2664, 2686-87 (2006) [hereinafter *Omnibus Order*]; *see also Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCC Rcd. 4507 (2005).

6 *Omnibus Order*, 21 FCC Rcd. at 2698.

7 *Id.*

principle of the First Amendment—that democratic government, to survive, must be denied the power to impose content- or viewpoint-based restrictions on speech.[8]

The current state of our broadcast media also supports a relaxation or elimination of indecency regulation. In 1970, the year the FCC issued its first fine for indecency, analog television and radio broadcasts were, quite literally, the only mass distributed electronic media available.[9] Today, as a proportion of all media consumed, over-the-air broadcasting is dramatically less pervasive, and yet remains essential to millions of Americans as their primary source of news, entertainment and public safety information. So, on the one hand, the children who the indecency regime is meant to protect can (and do) use the internet or cable television to access "profane" and "indecent" content. On the other, millions of primarily minority and low income adult Americans continue to endure the forced sterilization of their media.

For these reasons, as elaborated below, we urge the Commission to resist calls for new indecency actions and to, at the very least, return to its enforcement posture before *Pacifica*, where regulatory intervention was limited to, as the Commission puts it in the title of the Notice, only the most egregious cases. If the Commission does adopt an "egregious cases" policy, we urge it define egregiousness with reference to the legal definition of obscenity.[10]

I. Indecency Regulation Since *Pacifica* Has Been Inconsistent and Unpredictable, Resulting in a Serious Chilling Effect on Creative, Social and Political Speech That Is Entitled to Full First Amendment Protection

Pacifica is—to say the least—an unusual case in First Amendment jurisprudence. In 1978, a bare majority of the Supreme Court permitted enforcement of § 1464 against the "verbal shock treatment" of a satirical George Carlin monologue, in a documentary program exploring the use

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[8] *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[9] Home Box Office, the first provider of original cable programming, did not launch until 1972. *See Our Story*, Nat'l Cable & Telecomm. Assoc., http://www.ncta.com/who-we-are/our-story.

[10] That is: material that the average person, applying contemporary community standards, would find, as a whole, (1) appeals to the prurient interest; (2) depicts or describes sexual conduct or excretory functions in a patently offensive way; and (3) lacks serious literary, artistic, political, or scientific value. *See Miller v. California*, 413 U.S. 15, 24 (1973). We continue to agree with Justice Douglas's dissent in *Miller* that there is no constitutional exception from the freedoms of speech or press to allow for "obscenity" regulation. Nevertheless, to the extent the Court has adopted the *Miller* test as the vehicle for determining what speech qualifies as obscene—and therefore subject to lesser First Amendment protection—that is the only acceptable standard the FCC may apply in indecency cases. *See id.* at 40-41 (Douglas, J., dissenting). There is assuredly no jurisprudential avenue for exempting merely "indecent" speech from the full protection of the First Amendment.

of language, which featured the repeated use of seven expletives.[11] Rather than rely on the traditional approach to review of a government restriction on speech, the Court founded its decision by analogizing—as the FCC had done—to the law of nuisance.[12]

The Court cited four considerations in providing for special treatment of the broadcast medium: (1) unsupervised children have access to broadcast media; (2) broadcast media receivers are in the home, where there is a heightened expectation of privacy; (3) unconsenting adults may unwittingly stumble across offensive language on broadcast; and (4) the scarcity of the electromagnetic spectrum has historically warranted a greater degree of regulation.[13] In other words, the Court held that the content of broadcast media may be policed by the government to a greater degree than other forms of media because broadcast is uniquely pervasive, uniquely accessible to children and uniquely limited in terms of the amount of content the electromagnetic spectrum can carry ("spectrum scarcity").

Crucially, the Court emphasized the "narrowness" of its holding,[14] and, as is often overlooked, the Commission's enforcement was remarkably restrained. In response to the mid-afternoon broadcast of the "Filthy Words" monologue, which was a very deliberate attempt to catalogue the "words you couldn't say on the public, ah, airwaves,"[15] the Commission issued a declaratory order granting the complaint, declined to impose formal sanctions and associated the order with the offending station's file, effectively saying "don't do it again."[16]

Following the decision, the FCC narrowly applied the *Pacifica* standard: it would only enforce § 1464 against the seven Carlin monologue words.[17] In the late 1980s, however, it adopted the "generic" indecency standard requiring language depicting sexual or excretory functions in a patently offensive way at a time when there is a "reasonable risk" a child may be in the

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[11] *FCC v. Pacifica Found.*, 438 U.S. 726, 756 (1978) (Powell, J., concurring). Both Justices Powell and Blackmun who were in the majority suggested in Justice Powell's concurrence they would reach a different result in the face of FCC action against isolated instances of "indecent" content. *Id.* at 761.

[12] *Id.* at 731-32.

[13] *Id.* at 731 n.2.

[14] *Id.* at 749.

[15] *Id.* at 751 (Appendix to Opinion of the Court). The monologue was broadcast as part of a program on the contemporary use of language and had been preceded by a warning that the program could contain content offensive to some. *Id.* at 729-30.

[16] *Id.* at 731. The Commission stated that it would associate the order with the file and "in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." *Id.*

[17] *New Indecency Standards to be Applied to all Broad. and Amateur Radio Licensees*, 2 FCC Rcd. 2726, 2729 (1987).

audience.[18] In doing so, the Commission undertook several enforcement actions, including one condemning "innuendo and double entendre" on the drive-time Howard Stern show and another against a program dealing with homosexuality and the AIDS crisis.[19]

The new "generic" standard led to a period of "sporadic and unpredictable" enforcement,[20] in which each action had to involve a highly "contextual" and "fact intensive" inquiry requiring the FCC to consider factors such as whether the material "dwells on or repeats" the sexual or excretory content, whether it "pander[s] or titillate[s]" and whether it was broadcast for "shock value."[21] Finally, in 2004, the Commission responded to the tumult over the Janet Jackson incident at the Super Bowl by further expanding its indecency enforcement regime beyond *Pacifica* to include isolated instances of "indecent" or "profane" content—the so-called "fleeting expletives" rule that prompted the litigation in *Fox I* and *Fox II*.[22]

As the ACLU has documented in its submissions to the Supreme Court in these two cases, the subjective nature of the FCC's shifting indecency standards has necessarily resulted in a significant "chill" on broadcasters, with clear instances (beyond the 9/11 documentary noted in the introduction to these comments) of broadcaster self-censorship. In the *Pacifica* decision, the Supreme Court dismissed the concern over self-censorship, arguing that the only speech deterred would "surely lie at the periphery of First Amendment concern."[23] The record shows, however, numerous instances of self-censorship involving speech—including creative, social and political speech—that is squarely within the amendment's sweep. For instance:

- PBS was forced to sanitize the Ken Burns documentary on World War II, "The War," because of four cases of profanity in its 14-hour run-time, including instances where soldiers related, factually, the meaning of the common military slang "snafu" (situation normal, all fucked up) and "fubar" (fucked up beyond all repair/recognition/reason).[24]

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[18] *Id.*

[19] *Infinity Broads. Corp.*, 2 FCC Rcd. 2705, 2706 (1987); *Pacifica Found. Inc.*, 2 FCC Rcd. 2698, 2698 (1987).

[20] Br. of Amici Curiae of the Am. Civil Liberties Union et al. at 7, *Fox II*, 132 S. Ct. 2307 (2012).

[21] *WQAM License Ltd. P'ship*, 15 FCC Rcd. 2518, 2519-20 (2000).

[22] *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4978-79 (2004) [hereinafter *Golden Globe Awards*] (reversing previous decision not to proceed against entertainer Bono's exclamation after receiving Golden Globe award that "this is really fucking brilliant").

[23] *Pacifica*, 438 U.S. at 743.

[24] Paul Farhi, *Fearing Fines, PBS to Offer Bleeped Version of 'The War'*, Wash. Post, Aug. 31, 2007, http://wapo.st/11yUPo7.

- An ABC affiliate in Buffalo airing audiobooks for the visually impaired over its audio feed interrupted the service after a single complaint about sexual language in the Tom Wolfe book I Am Charlotte Simmons. When reinstated, the affiliate would only air the program during the safe harbor period.[25]

- In a case involving the chilling of indisputably political speech, PBS offered concerned affiliates an edited version of the civil rights documentary "Eyes on the Prize" to bleep out the famous statement by James Forman advocating a more aggressive approach to the movement: "[i]f we can't sit at the table, let's knock the fucking legs off."[26]

In addition to highlighting how far afield the indecency regime has strayed from what was permitted under *Pacifica*, the inconsistency, arbitrariness and chilling effect are all hallmarks of an unconstitutionally vague and overbroad law. Indeed, the Supreme Court found the indecency test the Commission applies in broadcast indecency cases unconstitutionally vague and overbroad for precisely those reasons in *Reno v. ACLU*.[27] In a more recent case, the Supreme Court cited *Reno* in explaining that the indicia of unconstitutional vagueness include a statute requiring "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings."[28] Notably, while the *Reno* Court distinguished *Pacifica*, it did so on the grounds that, at the time of the *Pacifica* decision, (1) the Carlin broadcast "represented a rather dramatic departure from traditional program content," (i.e., "verbal shock treatment"); (2) the *Pacifica* complaint was only about the time of broadcast, not a blanket prohibition; (3) the *Pacifica* order was not punitive; and (4) the uniquely pervasive nature of broadcast at the time justified greater regulation.[29]

With respect to (1), we note again the extent to which the indecency regime has been used to punish and suppress isolated instances of creative, social and political speech that in no way resemble the Carlin monologue. On (2), aggressive enforcement of the indecency regime has resulted in the total suppression of protected speech in several cases, and the technological advancements since *Pacifica* render the safe harbor wholly ineffective in preventing access by children to "indecent" content. Regarding (3), the indecency regime has expanded from the *Pacifica* declaratory order, which was appended to the licensee's file with an admonition to "not do it again," to the levying of potential fines that could, in one fell swoop, bankrupt a PBS affiliate.[30] And, on (4), as we will address directly below, the nature of the broadcast medium

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[25] Br. of Amici Curiae of the Am. Civil Liberties Union et al. at 13, *Fox II*, 132 S. Ct. 2307 (2012).

[26] *Id.* at 14.

[27] 521 U.S. 844, 871-72 (1997) (citing discriminatory enforcement and chilling effect as matters of special concern for vague statute implicating First Amendment).

[28] *United States v. Williams*, 553 U.S. 285, 306 (2008).

[29] *Reno*, 521 U.S. at 867.

[30] Elizabeth Jensen, *Soldiers' Words May Test PBS Language Rules*, N.Y. Times, July 22, 2006, http://nyti.ms/1113J9P.

has changed dramatically since 1978, so much so that the facts that drove the *Pacifica* Court no longer apply.

In short, the inconsistency and arbitrariness of indecency enforcement, which has expanded far beyond what was envisioned in *Pacifica*, suggest strongly that the current indecency enforcement regime would not withstand constitutional scrutiny even under the uniquely lax approach of the *Pacifica* court.

II. The Broadcast Medium is No Longer Uniquely Pervasive and Uniquely Accessible to Children, But Is Still an Essential Source of News and Entertainment for Millions of Adult Americans

When *Pacifica* was decided, broadcast television and radio were the only truly "mass" electronic media in the United States. The only real competitor, cable television, was still in its infancy. The first pay cable channel, Home Box Office, had been introduced only three years earlier, and C-SPAN only a year earlier. In total, only 9.4 million Americans subscribed to a cable service in 1978, and many of those customers were using cable to access over-the-air broadcast signals.[31]

By contrast, as of the end of 2011, cable, satellite and telephone television services had 101.2 million subscribers.[32] Broadband internet penetration and adoption is even higher, providing another avenue to both video and audio media.[33] Over 90 percent of American households have access to fixed broadband services, and almost 65 percent of Americans with access subscribe.[34] Even AM/FM radio broadcasts no longer dominate the audio-only side of mass electronic media. As of November 1, 2012, Sirius XM Radio had 23 million subscribers. By February 2010, at least half the population had listened to online radio with an online radio weekly audience of about 43 million.[35] Justice Thomas recognized this changed media landscape in *Fox I*, noting that even if the state of the art circa *Pacifica* justified the speech restriction, "dramatic technological advances have eviscerated the factual assumptions underlying" that decision, both in terms of pervasiveness of the medium and spectrum scarcity.[36]

Although broadcast is now far less pervasive than it was almost 35 years ago, it remains a crucial link to the outside world for millions of Americans, including—disproportionately—minorities

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[31] Nat'l Cable & Telecomm. Ass'n, Industry Data, http://www.ncta.com/industry-data.

[32] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 27 FCC Rcd. 8610, 8618 n.33 (2012).

[33] Though, as the Commission recognizes, significant gaps remain in both broadband deployment and adoption. *Inquiry Concerning the Deployment of Advance Telecomms.*, 27 FCC Rcd. 10,342 (2012).

[34] *Id.* at 10,370, 10,386-87. That doesn't include the significant number of Americans who are able to access broadband internet services at libraries, community centers and retail establishments.

[35] *2010 Quadrennial Regulatory Review*, 26 FCC Rcd. 17,489, 17,514 n.154 (2011).

[36] 129 S. Ct. at 1821 (Thomas, J., concurring).

and lower-income families.[37] For instance, while 17.8% of the population as a whole relies on over-the-air broadcast television, that number is 28% for Asian-Americans, 23% for African-Americans and 33% for Spanish-speaking homes.[38] Similarly, 26% of homes with an annual income under $30,000 are broadcast-only, while only 11% of $75,000+ homes rely solely on the medium. There is no cognizable reason why the government should be in the business of policing profane or indecent content to a greater degree on lower-income and minority-owned televisions than they do for whites or the more affluent.

These technological developments have rendered the "access to children" rationale for *Pacifica* equally obsolete. Children are venturing online at an increasingly rapid clip, and 95 percent of children are reportedly active online.[39] Furthermore, federally mandated child-protection devices, such as the V-Chip (installed in virtually every television sold since 2000 in the United States), provide parents with significantly more control over the primary concern of the Court in *Pacifica*: that children would inadvertently be exposed to sexual or excretory material because of the uniquely pervasive and uniquely accessible nature of the medium.

Right now, on broadcast television and radio, the current indecency regime sanitizes content to that which is acceptable for children to watch and hear. Despite the fact that children are no longer at the mercy of the medium, and may indeed access voluminous amounts of "indecent" content through their iPhone, laptop or game console, we continue to subject those families who rely exclusively on broadcast to an inferior product than others. The government can no longer limit the adult population to hearing or viewing "only what is fit for children."[40]

III. The Current Indecency Regime Cannot Be Saved Under *Pacifica*, Cannot Withstand Traditional Constitutional Review of a Content-Based Speech Restriction, Does Not Fall Into One of the Categorical Exceptions That Receive Less First Amendment Scrutiny, and Should Be Limited to Obscenity

As discussed above, the current indecency regime has expanded greatly from the narrow enforcement authority contemplated in *Pacifica*, and cannot be justified under the Court's reasoning in that (35-year-old) decision. For the same reasons (broadcast is no longer uniquely pervasive, no longer uniquely accessible to children and no longer justified by spectrum scarcity), the government can likely no longer show that § 1464 is the least restrictive means of serving any compelling government interest.[41]

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[37] Press Release, Nat'l Assoc. of Broads., Over-the-Air TV Viewership Soars to 54 Million Americans (June 18, 2012), http://bit.ly/ZuLsFI.

[38] *Id.*

[39] *See, e.g.*, Sarah D. Sparks, *Online Socialization is Hot Topic among Researchers*, Educ. Week, Apr. 24, 2013.

[40] *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957).

[41] *Cf. United States v. Playboy Enter. Group*, 529 U.S. 803, 827 (2000) (finding channel blocking on cable a less restrictive alternative than time-channeling); *Sable Commc'ns v. FCC*, 492 U.S. 115 (1989).

Additionally, "indecency" is not one of the narrow, "traditional" categories of content-based speech restrictions that the Supreme Court has identified as deserving of less constitutional protection. The indecency statute is indisputably a content-based restriction on speech.[42] In enforcing the statute, the FCC must make two inherently subjective judgments about the programming in question. First, does the speech depict sexual or excretory organs or activities? Second, is the broadcast patently offensive as measured by contemporary community standards for the broadcast medium?

The examples in the discussion above of inconsistent and arbitrary enforcement actions illustrate in practice how the two-pronged indecency standard applied by the Commission essentially boils down to a government decision about whether the message conveyed is disfavored enough that it should be subject to potentially criminal government sanction, which is the classic "tell" for a content-based restriction.

As the Supreme Court has repeatedly reaffirmed, "from 1791 to the present," the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations."[43] Those categories—including obscenity, defamation, fraud, incitement, fighting words and speech integral to criminal conduct—have never included indecency, and the Supreme Court has expressed its distaste with establishing a "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[44]

In sum, under current First Amendment law, the only constitutional application of § 1464 would be against legally obscene speech, which is likely to be exceedingly rare on advertiser-supported over-the-air broadcast television or radio.

IV. Conclusion

Again, we commend the Commission for opening this important comment period. Following the Supreme Court's decisions in *Fox I* and *Fox II*, the FCC is well positioned to revisit the indecency regime, and to make important changes to ensure it complies with the First Amendment and sound media policy. Under the law, as it stands today, the FCC's current approach to both profane and indecent speech would not be supported by the narrow decision in *Pacifica*. Likewise, it would be unlikely to withstand full scrutiny as a content-based restriction

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[42] *See Playboy*, 529 U.S. at 812-13 ("Not only does § 505 single out particular programming content for regulation, it also singles out particular programmers.").

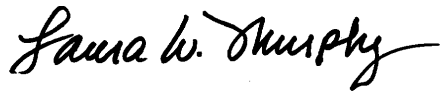
[43] *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

[44] *Id.* at 1584-85. Granted, the Court acknowledged that there may be some categories that have been historically unprotected and yet not considered by the courts. *Id.* "Indecent" speech, however, has been considered numerous times by the courts, and, indeed, the one case upholding an indecency restriction—*Pacifica*—is and long has been a "constitutional outlier." Br. of Amici Curiae of the Am. Civil Liberties Union et al. at 3, *Fox II*, 132 S. Ct. 2307 (2012).

on speech. And, finally, it does not fall within one of the traditional categories of content-based restrictions deserving of less constitutional protection. In short, the only constitutionally sound application of 18 U.S.C. § 1464 is against legal obscenity, and we urge the Commission to fashion an "egregious cases" policy with exactly that in mind.

Please do not hesitate to contact Legislative Counsel/Policy Advisor Gabe Rottman at 202-544-1681 or grottman@dcaclu.org if you have any questions or comments.

Sincerely,



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