No. 10-1293

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

—v.—

FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE NEW YORK CIVIL LIBERTIES UNION, THE AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AFL-CIO, DIRECTORS GUILD OF AMERICA, MINNESOTA PUBLIC RADIO/AMERICAN PUBLIC MEDIA, THE NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE, THE NATIONAL COALITION AGAINST CENSORSHIP, THE NATIONAL FEDERATION OF COMMUNITY BROADCASTERS, PEN AMERICAN CENTER, SCREEN ACTORS GUILD, SOUTHERN CALIFORNIA PUBLIC RADIO, THE TULLY CENTER FOR FREE SPEECH, WASHINGTON AREA LAWYERS FOR THE ARTS, THE WOODHULL FREEDOM FOUNDATION, AND WRITERS GUILD OF AMERICA, WEST, IN SUPPORT OF RESPONDENTS

STEVEN R. SHAPIRO
Counsel of Record
CHRISTOPHER A. HANSEN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500
sshapiro@aclu.org

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are a diverse group of media, arts and advocacy organizations concerned about free expression in broadcasting. Many of the organizations have felt the real-world chilling effect of indecency censorship. Their individual statements of interest are set out in an addendum to this brief.

STATEMENT OF THE CASE

Federal law prohibits "obscene, indecent or profane" speech on broadcast radio and television. 18 U.S.C. § 1464. This case was brought to challenge a new rule promulgated by the FCC in 2004, presumptively banning even one "fleeting expletive" as indecent, and the agency's application of that rule to two broadcasts. On review, the court of appeals held that the fleeting expletives rule was arbitrary and capricious, in violation of the Administrative Procedures Act. *Fox Television Stations, Inc. v. FCC,* 489 F.3d 444 (2nd Cir. 2007) ("*Fox I*"). The court found that the FCC had not given a reasonable explanation for its dramatic change in policy – from its many statements over the years that a mere fleeting expletive would not be sufficient for an indecency finding, to a wholesale reversal in 2004,

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[1] The parties have filed blanket consents to the filing of *amicus curiae* briefs. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae,* its members or its counsel made a monetary contribution to its preparation or submission.

announcing that a single vulgarity is presumptively both indecent and profane.

In reversing the court of appeals decision, this Court found that the FCC's new policy was neither arbitrary nor capricious. *FCC v. Fox Television Stations, Inc.,* 129 S. Ct. 1800 (2009) ("*FCC*"). Specifically, the Court found that the FCC had acknowledged its change of course and had provided rational reasons for expanding its enforcement activities. The Court then declined to address the constitutional questions presented by the FCC's new rule; instead, it remanded the case, "see[ing] no reason to abandon our usual procedures in a rush to judgment without a lower court opinion." *Id.* at 1819.

On remand, the court of appeals held that the FCC's fleeting expletives policy was unconstitutionally vague and created a chilling effect that goes far beyond the fleeting expletives at issue in this case. *Fox Television Stations, Inc. v. FCC,* 613 F.3d 317, 319 (2nd Cir. 2010) ("*Fox II*"). It first noted that the speech covered by the FCC's indecency policy "is fully protected by the First Amendment." *Id.* at 325. The court expressed concern over the rationale for providing less protection for speech on broadcast television than on other media - including cable television and the Internet - as "[t]he past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus." *Id.* at 326. Nonetheless, the court concluded that "regardless of where the outer limit of the FCC's authority lies, the FCC's indecency policy is unconstitutional because it is impermissibly vague." *Id.* at 327. Pointing to the many inconsistencies and subjective elements of

Commission decision making, including the so called "exceptions" to the indecency policy, the court held that the indecency test fails to provide "broadcasters the notice that is required by the First Amendment." *Id*. at 333. The court concluded by finding that there was "ample evidence in the record that the FCC's indecency policy has chilled protected speech" and "promot[ed] wide self-censorship of valuable material which should be completely protected under the First Amendment." *Id*. at 334-35.

This Court granted certiorari to determine "[w]hether the [FCC's] current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution."

SUMMARY OF ARGUMENT

As a general proposition, the First Amendment protects indecent but non-obscene speech. This Court's decision in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), allowing the government to bar indecent speech from the broadcast airwaves, has always been a constitutional outlier. The time has come to declare the indecency provisions of 18 U.S.C. § 1464 unconstitutional. At the very least, the FCC's "fleeting expletive" rule must be struck down as a violation of the First Amendment.[2]

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[2] As the unconstitutionality of the "fleeting expletive" rule is fully discussed in Respondents' Briefs, *amici* do not address it here. *See, e.g.,* Brief of Respondent Fox Television Stations, Inc. et al. at 26-39; Brief of Respondent ABC Television Affiliates Ass'n et al. at 17-27; Brief of Respondent CBS Television Network Affiliates Ass'n et al. at 28-39. Likewise, *amici* endorse

Thirty years after *Pacifica*, it is abundantly clear that the authority to regulate indecent speech has produced a patchwork quilt of inconsistent and arbitrary decision making by the FCC that is utterly lacking in the precision that this Court has required in delineating the line between permissible and impermissible speech.

Even taken on its own terms, *Pacifica* does not confer the broad authority that the FCC has since claimed. More fundamentally, the factual and doctrinal premises that this Court relied on in *Pacifica* have been eroded over the past three decades. In 1978, cable television was still a rarity in most homes. This Court could not have anticipated, and did not anticipate, the Internet revolution and the development of communications platforms like Facebook and Twitter, that make it impossible any longer to characterize broadcast radio and television as "uniquely pervasive" and "uniquely accessible to children."

In *Reno v. ACLU*, 521 U.S. 844 (1997), this Court condemned an indecency test identical to the

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but do not separately address the arguments concerning the unconstitutionality of the application of the FCC's policies to nudity fully discussed in Respondents' Briefs. *See, e.g.,* Brief of Respondent ABC, Inc. et al. at 12-23; Brief of Respondent Fox Television Stations, Inc. et al. at 26-39; Brief of Respondent ABC Television Affiliates Ass'n et al. at 18-23, 34-42; Brief of Respondent CBS Television Network Affiliates Ass'n et al. at 28-39; *See also CBS Corp. v. FCC,* No. 06-3575, 2011 WL 5176139 (3rd Cir. Nov. 2, 2011) (holding, even in light of *FCC v. Fox,* 129 S. Ct. 1800 (2009), that the FCC acted arbitrarily when it failed to provide a reasoned explanation for its change in policy on fleeting images of nudity).

FCC's as both vague and overbroad. Although stopping just short of a holding on vagueness, the Court vividly outlined the evils of essentially standardless indecency enforcement. The FCC's attempts at clarification of its indecency policy have not cured the deficits pointed out in *Reno*, and have only led to more confusion and contradictory decisions.

New technologies have also created less burdensome alternatives to government censorship for parents who wish to shield their children from vulgar language or images on the airwaves. Hence, whether or not First Amendment strict scrutiny applies to the FCC's indecency regime, it is, today, an overly restrictive remedy for speech that some viewers and listeners find offensive.

ARGUMENT

I. THE FCC'S REGULATION OF INDECENT SPEECH UNDER 18 U.S.C. § 1464 HAS BEEN INCONSISTENT AND UNPREDICTABLE

A. FCC Enforcement Of The Indecency Ban Since *Pacifica* Has Been Inconsistent, Unpredictable, and Highly Subjective

In 1978, a bare majority of this Court approved the FCC's censorship of "indecent" speech on the airwaves, in the context of the "verbal shock treatment" of one satiric monologue. *Pacifica*, 438 U.S. at 756-57 (Powell, J., concurring). The Court justified its lenient standard of First Amendment scrutiny by noting the history of broadcast regulation (based on spectrum scarcity) and its description of

broadcasting as "uniquely pervasive" and "uniquely accessible to children." *Id.* at 748-49.

At the same time, the *Pacifica* Court emphasized the "narrowness" of its holding. *Id.* at 750-51; *see also Sable Commc'n of Cal., Inc. v. FCC,* 492 U.S. 115, 126-27 (1989); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 74 (1983). As Justice Breyer explained when this case was previously before the Court, "two Members of the [*Pacifica*] majority suggested that they could reach a different result, finding an FCC prohibition unconstitutional, were that prohibition aimed at the fleeting or single use of an expletive." *FCC*, 129 S.Ct. at 1833 (Breyer, J., dissenting).

Rather than test that proposition, the FCC followed a relatively restrained enforcement policy for the nine years following *Pacifica.* Then, in 1987, it expanded its indecency regime to embrace any sexual innuendo or other content that the commissioners considered offensive, regardless of whether there was "verbal shock treatment." Two of the three programs condemned under this new "generic" indecency standard had aired on noncommercial radio stations; one concerned homosexuality and AIDS. *New Indecency Enforcement Standards*, 2 FCC Rcd 2726 (1987); *Pacifica Found., Inc.*, 2 FCC Rcd 2698 (1987); *Regents of the Univ. of Cal.*, 2 FCC Rcd 2703, *on reconsideration*, 3 FCC Rcd 930 (1987).[3]

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[3] The new generic standard was a response to pressure from Morality in Media and other groups to reverse the Reagan Administration's "laissez faire" approach to indecency. *See* John Crigler & William Byrnes, *Decency Redux: The Curious*

The agency's indecency enforcement between 1987 and 2003 was sporadic and unpredictable. In 2001, it ruled that the African-American poet and theater artist Sarah Jones's "Your Revolution," broadcast on a noncommercial community station, was indecent. "Your Revolution" is a poetic protest against misogyny in hip-hop music. After Jones sued, and just before the FCC's brief was due in the court of appeals, the agency reversed itself and decided that the poem was not indecent after all, mooting Jones's challenge to the indecency standard. *KBOO Found.*, 18 FCC Rcd 2472 (2003).

Up to this point, the FCC did not consider "fleeting expletives" indecent. Indeed, when the musician Bono exclaimed "this is really fucking brilliant" at the 2003 televised Golden Globe Awards ceremony, the FCC initially ruled that it was not indecent because it did not refer to sexual or excretory functions. *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* 18 FCC Rcd 19859 (2003). However, a month after Janet Jackson's "wardrobe malfunction" at the 2004 Super Bowl half-time show, and quite plainly in response to the ensuing political uproar, the agency reversed gears. It announced that all uses of the word "fuck," even fleeting exclamations, necessarily refer to sex and therefore are presumptively indecent. *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* 19 FCC Rcd 4975, 4978-79 (2004) ("*Golden Globe Awards*"). The

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History of the New FCC Broadcast Indecency Policy, 38 CATH. U. L. REV. 329 (1989).

commissioners asserted that even though Bono used "fucking" as "an intensifier," not a sexual reference, any use of the word, or a variation, "invariably invokes a coarse sexual image." *Id.* at 4979. Previous agency rulings to the contrary were "no longer good law." *Id*. at 4980.

In an even more dramatic departure from prior practice, the FCC also ruled that Bono's exclamation was profane. Until *Golden Globe,* the agency had understood "profanity" to have a religious dimension. *See Fox I*, 489 F.3d at 466-67. In *Golden Globe*, however, it rejected all of its previous statements on the subject, and created a vague new profanity definition that essentially overlapped with the new fleeting expletives rule – "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance." *Golden Globe Awards,* 19 FCC Rcd at 4981.

It was not long after the FCC created these new rules that it announced an exception for the film "Saving Private Ryan," broadcast by many ABC stations on Veterans Day in 2004. Complaints had cited dialogue including "'fuck,' and variations thereof; 'shit,' 'bullshit,' and variations thereof, 'bastard,' and 'hell,'" as well as "Jesus" and "God damn." *Complaints Against Various Television Licensees Regarding Their Broad. on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCC Rcd 4507, 4509 (2005). The Commission found that the material, "in context, is not patently offensive, and therefore, not indecent," or profane. *Id.* at 4510. The FCC explained that the rough language was "integral to the film's objective of conveying the horrors of war

through the eyes of these soldiers," and that deleting or bleeping "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience." *Id.* at 4512-13.

This sensitivity to "the nature of the artistic work" did not extend, a year later, to the FCC's March 2006 order, which condemned a PBS documentary "The Blues," directed by Martin Scorsese, because of expletives. *Complaints Regarding Various Television Broad. Between February 2, 2002 and March 8, 2005,* 21 FCC Rcd 2664 (2006) ("*Omnibus Order*"). The commissioners refused to apply the "Saving Private Ryan" exception to "The Blues" because, they said, "we do not believe" that the station that aired the show "has demonstrated that it was essential to the nature of an artistic or educational work … or that the substitution of other language would have materially altered the nature of the work." *Id.* at 2685-86.[4]

The *Omnibus Order* addressed dozens of other programs containing coarse language or sexual situations. Its evaluation of "NYPD Blue," however, provided a striking example of unbridled subjectivity. The commissioners declared that "bullshit" (uttered by the one character) was profane and indecent, but "dick" and "dickhead" were not. *Id.* at 2696-98. Likewise, non-explicit suggestions of teenage sexual activity were deemed indecent in the CBS program

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[4] Commissioner Adelstein dissented because the "coarse language is a part of the culture of the individuals being portrayed," and "if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary." 21 FCC Rcd at 2728.

"Without a Trace," while explicit discussions of teenage sex on "Oprah" were not.[5] *Id.* at 2705-07.

The FCC's most recent intellectual acrobatics came after this case was remanded for reconsideration of the four indecency and profanity rulings that were before the court of appeals. The agency dismissed the case against "NYPD Blue" on a technical ground (the complainant did not reside in the time zone where the broadcast occurred). And it reversed itself on an utterance of "bullshitter" in "The Early Show" because, it now said, the show was a news interview, a context in which government should defer to producers' editorial judgment. Since the commissioners warned that "there is no outright news exemption from our indecency rules," this deference promised to be just as vague and unpredictable as the rest of the FCC's censorship regime. *Fox I,* 489 F.3d at 458 (quoting *Complaints Regarding Various Television Broad. Between February 2, 2002 and March 8, 2005,* 21 FCC Rcd 13229 ,13327 (2006) ("*Remand Order*")).

The unavoidable conclusion from even this brief review of indecency enforcement since *Pacifica* – and in particular since announcement of the fleeting expletives rule – is that the FCC's conduct has been woefully inconsistent and characterized by unpredictable detours and unprincipled reversals.

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[5] "Without a Trace" was the subject of a separate FCC ruling issued on the same date as the *Omnibus Order*. *Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broad. of the Program "Without a Trace,"* 21 FCC Rcd 2732 (2006).

B. FCC Enforcement, Both Before And After Its New Fleeting Expletives Rule, Has Chilled Valuable Expression

This Court has repeatedly warned that the overbreadth doctrine "prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 237 (2002). This is precisely what has happened as a result of the FCC's vague and shifting indecency regime.

In response to the fleeting expletives rule, PBS bleeped soldiers' language, and with it the reality of war reporting, from the documentaries "A Soldier's Heart" and "Return of the Taliban," and from a Frontline episode, "The New Asylums."[6] Language in PBS's "The Enemy Within" was purged even though it documented the specific words used by an informant to threaten a suspect.[7] PBS also decided to delay airing a World War II documentary by Ken Burns until after 10 p.m. due to concerns over two

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[6] Kara Canty, *FCC's Punishing Fines Have Chilling Effect on Broadcasters*, BALT. SUN, Oct. 13, 2006, *available at* http://www.kintera.org/site/apps/nlnet/content2.aspx?c=hrLQKWPGLuF&b=1368219&ct=3039413; Rebecca Dana, *@$#&*% Ken Burns! PBS Scrubbing G.I. Mouths With Soap,* N.Y. OBSERVER, Oct. 2, 2006, *available at* www.observer.com/node/52747; Louis Wiley, Jr., *Censorship at Work*, CURRENT.ORG, July 17, 2006, *available at* www.current.org/fcc/fcc0613indecency.shtml.

[7] Dana, *supra* n.6.

possibly indecent words.[8] The producers of "Masterpiece Theater" chose not to make available to PBS member stations the original version of the critically-acclaimed British series "Prime Suspect" because of concern over language, instead offering the public television stations a lightly or heavily edited version.[9] PBS similarly wondered whether to pixilate actress Helen Mirren's mouth as she uttered an inaudible "fuck" in another "Masterpiece Theater" production.[10]

In 2002, a documentary produced by American Public Media ("APM"), which chronicled "the sounds and voices of the World Trade Center and its surrounding neighborhood," was broadcast uncut on dozens of public radio stations. The program included a poem incorporating the word "bullshit." When the show was rebroadcast in September 2006, APM "felt that it had no choice but to alert its affiliates and to 'bleep' this word" from the poem. Comments of Minnesota Public Radio/American Public Media, FCC Remand Proceedings, DA 06-1739 (Sept. 21, 2006), Affidavit of Thomas Kigin, ¶10 (A-214-216).

CBS affiliates were extremely hesitant to air yet another World Trade Center documentary, "9/11,"

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[8] Elizabeth Jenson, *Soldier's Words May Test PBS Language Rules*, N.Y. TIMES, July 22, 2006, *available at* http://www.nytimes.com/2006/07/22/arts/television/22pbs.html.

[9] Jacques Steinberg, *Eye on F.C.C., TV and Radio Watch Words*, N.Y. TIMES, May 10, 2004, *available at* http://www.nytimes.com/2004/05/10/us/eye-on-fcc-tv-and-radio-watch-words.html?pagewanted=all&src=pm.

[10] Dana, *supra* n.6.

featuring real audio footage of firefighters on September 11th.[11] Although it contains occasional expletives, the award winning documentary had aired twice without complaint. Still, in 2006, at least two dozen CBS affiliates chose not to air the documentary or delay airing it until after 10 p.m.

Niagara Frontier Radio administers a radio reading service for the blind; by 2006, it had aired more than 150,000 hours of book readings to thousands of visually impaired listeners. It broadcast through a leased subcarrier of a local FM signal as well as a local ABC affiliate with a wider range. In 2005, the ABC station removed the program, citing a single complaint about the Tom Wolfe novel *I Am Charlotte Simmons*. When the program was reinstated two weeks later, the station would air it only after 10 p.m., thereby reducing both the hours that visually impaired listeners can enjoy the show and the size of the listening audience. Comments of Minnesota Public Radio/American Public Media, FCC Remand Proceedings, DA 06-1739 (Sept. 21, 2006), Affidavit of Robert Sikorski (A-265-271).

The widely syndicated program "Broadway's Biggest Hits," with more than 150,000 listeners, faced many dilemmas in the wake of the new indecency and profanity rules. In 2004, stations

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[11] *Worries Over Profanity in CBS' 9/11 Show*, Assoc. Press, Sept. 3, 2006, available at http://today.msnbc.msn.com/id/14657719/ns/today-entertainment/t/worries-over-profanity-cbs-show/.

fearful of FCC punishment were given a sanitized version of a song in the hit musical "A Chorus Line," which "humorously tells of how plastic surgery and improving one's 'tits and ass' can improve one's chances for a job." In the next two years, these concerns resulted in full review of the playlist and deletion of "well-known, popular and culturally and musically significant songs" from such shows as "Les Miserables," "The Producers," "Avenue Q," and "Miss Saigon." *Id.*, Affidavit of Stanley Wilkinson (A-239-247).

PBS was wary of airing "Eyes on the Prize," another award winning documentary, because of language.[12] The documentary, about the Civil Rights Movement, contains a scene where one of the members of the Student Non-Violent Coordinating Committee states, "If we can't sit at the table, let's knock the fucking legs off." He quickly adds, "Excuse me." PBS aired the documentary but offered edited versions to its member stations.

It will not avail the FCC to argue that in some or all of these instances, it might find that the vulgar words, "in context," were not indecent. Programmers – especially at noncommercial stations with limited budgets – cannot afford to risk an indecency fine,[13] or even to pay the legal costs incurred in responding to FCC investigations. Because the permissible

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[12] Gail Shister, *Shadow of Censorship Over 'Prize'*, PHILA. INQUIRER, Sept. 20, 2006, at C01.

[13] In 2006, Congress increased the fines for broadcast indecency tenfold, to $325,000 for each violation. Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006).

parameters are unclear and continue to shift, self-censorship of fiction, drama, history, and journalism occurs with increasing frequency. As the court of appeals noted below, "[t]here is little rhyme or reason to these decisions and broadcasters are left to guess whether an expletive will be deemed 'integral' to a program or whether the FCC will consider a particular broadcast a '*bona fide* news interview.'" *Fox II,* 613 F.3d at 332.

PBS President Paula Kerger explained: "When you have stations whose operating budgets are only a couple of million dollars, even the old fines, once you factor in all the legal work, were daunting. The fines now would put stations out of business."[14] Undoubtedly, there will be "countless other situations where broadcasters will exercise their editorial judgment and decline to pursue contentious people or subjects, or will eschew live programming altogether, in order to avoid the FCC's fines. This chill reaches speech at the heart of the First Amendment." *Id.* at 335. The FCC's presumptive ban on fleeting expletives, with exceptions to be invoked at the agency's discretion, has created a severe chill, especially in noncommercial broadcasting.

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[14] Quoted in Mark Dawidziak, *PBS: Language in Burns' 'War' Worth Fighting For*, SUN JOURNAL, July 31, 2006, *available at* http://www.sunjournal.com/node/175642. *See also* Kigin Affidavit, ¶5 (A-209) ("MPR simply cannot risk either huge fines or license revocation … if it were to guess wrong about what is now acceptable for broadcast.").

II. SECTION 1464 SHOULD BE DECLARED UNCONSTITUTIONAL INSOFAR AS IT AUTHORIZES THE FCC TO PROHIBIT INDECENT SPEECH

Justice Breyer has noted that sometimes it is wise to watch how a medium develops before imposing strict legal rules. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 740–42 (1996). We now have more than thirty years' experience with FCC censorship of broadcasting, long enough to conclude that its indecency regime cannot be reconciled with the First Amendment.[15]

A. Case Law Since *Pacifica* Has Recognized The Vagueness And Overbreadth Of The FCC's Indecency Test

Congress chose the FCC's indecency standard to regulate the Internet when it passed the 1996 Communications Decency Act (the "CDA"). Invalidating the CDA in *Reno v. ACLU*, this Court condemned the indecency test as both vague and overbroad. 521 U.S. 844 (1997).

This Court found the test "problematic" because such terms as "patently offensive" and "community standards" are left undefined. [16] The

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[15] Alternatively, this Court could preserve the constitutionality of § 1464 by construing it to ban only constitutionally unprotected obscenity from the airwaves. *See Manual Enter., Inc. v. Day,* 370 U.S. 478, 482-84 (1962) (construing statute banning "obscene, lewd, lascivious, indecent, filthy or vile" articles to cover only obscenity).

[16] The court of appeals, distinguishing the FCC's definition from the CDA, noted that the FCC has further elaborated on its

lack of definition creates "special First Amendment concerns because of its obvious chilling effect on free speech." *Id.* at 870-72. This Court explained the difference between "patently offensive" in the CDA, where it was troublesomely vague, and in obscenity law, where it is only one part of the definition of unprotected speech. The other, more specific requirements of the obscenity definition – that the expression appeal to "the prurient interest," lack serious value, and be "specifically defined by the applicable state law" – cabin the inherent vagueness of "patent offensiveness." *Id.* at 872-74. Without these additional safeguards, the CDA's ban on "patently offensive" speech "unquestionably silences some speakers whose messages would be entitled to constitutional protection." *Id.* at 874. Although the Court's discussion of vagueness fell just short of a square holding, this Court has recently cited *Reno* for the proposition that the indecency standard is unconstitutionally vague because it requires "wholly subjective judgments without statutory definitions,

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definition of indecency in *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency,* 16 FCC Rcd 7999 (2001), and in its fleeting expletives rule. However, as the foregoing examples demonstrate, the FCC, under these "guidelines" has been woefully inconsistent and routinely contradicted itself. Likewise, the FCC's declaration of "fuck" and "shit" as presumptively indecent equally does not solve the vagueness issues raised in *Reno* as exceptions are continually invoked at the agency's discretion. The court of appeals conceded that although the FCC has provided slightly more explanation of its definition of indecency than the definition in the CDA, "[t]his additional guidance [was not] sufficient to survive a vagueness challenge." *Fox II,* 613 F.3d at 329.

narrowing context, or settled legal meanings." *United States v. Williams,* 553 U.S. 285, 306 (2008) (citing *Reno*, 521 U.S. at 870-71 & n.35); *See also Ashcroft v. ACLU*, 535 U.S. 564, 578 (2002) (describing the indecency standard's "unprecedented breadth and vagueness").

Reno struck down the indecency standard on grounds of overbreadth. This Court reiterated that "[s]exual expression which is indecent but not obscene is protected by the First Amendment," 521 U.S. at 874 (quoting *Sable Commc'n,* 492 U.S. at 126), and noted that indecency "cover[s] large amounts of nonpornographic material with serious educational or other value." *Id.* at 877-78. "Where obscenity is not involved, . . . the fact that protected speech may be offensive to some does not justify its suppression." *Id.* at 874-75 (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977)). Following the time-honored rule that government cannot reduce the adult population to reading or viewing "only what is fit for children," *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957), this Court noted that there are less constitutionally burdensome ways to shield youngsters from material that may not be appropriate for them. 521 U.S. at 874-79.

Although *Reno* distinguished *Pacifica*, this Court's condemnation of the indecency standard on grounds of both vagueness and overbreadth cannot be reconciled with the FCC's broad-ranging, inconsistent, and whimsically discretionary application of that standard to broadcasters over the

past thirty years.[17] The Commission's use of the same indecency test that this Court condemned in *Reno, Ashcroft,* and *Williams* cannot be squared with a constitutional reading of section 1464.

B. Broadcasting Is No Longer "Uniquely Pervasive" And "Uniquely Accessible To Children" – The Characteristics That In *Pacifica* Were Said To Justify FCC Censorship Of Constitutionally Protected Expression

At the time *Pacifica* was decided, broadcasting was the only electronic mass medium. It has since become one among many, and indistinguishable to most viewers from cable television. "Indeed, we face a media landscape that would have been almost unrecognizable in 1978." *Fox II,* 613 F.3d at 326. Thus, the "uniquely pervasive" presence of broadcasting that this Court identified in *Pacifica* as the principal rationale for subjecting the medium to FCC censorship of non-obscene speech no longer exists. As the court of appeals recognized, "it is

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[17] As discussed in Respondents' Briefs, *Holder v. Humanitarian Law Project,* 130 S.Ct. 2705 (2010), ("*HLP*") does not draw the court of appeals' vagueness rulings into question. *HLP* established that an as-applied vagueness challenge must be evaluated on the basis of plaintiff's own speech rather than hypothetical speech of others. Here, the court of appeals analyzed the FCC's application of the new indecency policy to *actual* broadcasts not the imagined speech of others. *See e.g.,* Brief of Respondent Fox Television Stations, Inc. et al. at 51-53; Brief of Respondent ABC Television Affiliates Ass'n et al. at 48-50; Brief of Respondent CBS Television Network Affiliates Ass'n et al. at 26-27.

increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children." *Fox I,* 489 F.3d at 465. Justice Thomas noted, concurring with the previous decision in this case, that "the justifications relied on by the Court in … *Pacifica*—'spectrum scarcity, intrusiveness, and accessibility to children—neither distinguish broadcast from cable, nor explain the relaxed application of the principles of the First Amendment to broadcast'…technological advances have eviscerated the factual assumptions" underlying *Pacifica*. *FCC*, 129 S.Ct. at 1821 (Thomas, J., concurring) (internal citations omitted).

To be sure, broadcasting remains pervasive, but no longer uniquely so, given that about 90% of the nation's households receive *all* their TV programming through one, nonbroadcast, distributor (typically either cable or satellite).[18] Still more people are watching TV shows online through Internet TV services like Hulu or network websites, circumventing broadcast television altogether.[19]

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[18] *Satellite TV Penetration Up Significantly,* CONSUMERAFFAIRS.COM, Aug. 18, 2005, *available at* www.consumeraffairs.com/news04/2005/jdpower_satellite.html; *see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2506-07 (2006) (94.2 million out of a total of 109.6 million TV households receive all their video programming through an "MVPD" [multichannel video programming distributor] – either cable, satellite, or other nonbroadcast technology).

[19] Zach Pontz, *More turning to Web to watch TV, movies*, CNNTECH, Feb. 6, 2009, *available at* http://articles.cnn.com/2009-02-06/tech/internet.tv_1_hulu-internet-tv-joost?_s=PM:TECH; Saul Hansell, *More People Turn to the Web to Watch TV*, N.Y. TIMES, Aug. 1, 2005, *available at*

Indeed in response to this growing trend, at least one network that censored a show for regular broadcast because of fear of FCC fines, released the original uncut version online.[20] In the 30 years since *Pacifica*, there has been "an explosion of media sources" and rather than being a uniquely pervasive medium, "broadcast television has become only one voice in the chorus." *Fox II*, 613 F.3d at 326. This convergence of technology eliminates the justification for a government censorship system that is constitutionally off-limits for every other medium. *E.g., Reno*, 521 U.S. 844 (the Internet); *Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. 727 (public and leased access cable).

Underlying *Pacifica* was a history of lesser First Amendment protection for broadcasting. Government regulation was deemed justified in light of the limited capacity of the broadcast spectrum, and consequent scarcity of licenses. Whatever one thinks of the scarcity rationale in the modern media world, there is a categorical difference between structural rules designed to promote more speech, *see Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943) (approving FCC rules that curbed national networks' market power by prohibiting them from dictating the programming of affiliated stations), and censorship rules based on broad, shifting, and culturally driven criteria such as "patent offensiveness."

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http://www.nytimes.com/2005/08/01/technology/01video.html?pagewanted=all.

[20] Bill Carter, *WB Censors Its Own Drama for Fear of FCC Fines*, N.Y. TIMES, Mar. 23, 2006, *available at* http://www.nytimes.com/2006/03/23/arts/23bedf.html.

Moreover, as the court of appeals noted, technological developments since *Pacifica* make government control unnecessary in those instances in which parents wish to shield their children from programming they consider inappropriate. *Fox I,* 489 F.3d at 466; *See also Brown v. Entm't Merch. Ass'n,* 131 S. Ct. 2729, 2741-42 (2011) (noting that the real goal of the statute at issue was to support "what the state thinks parents *ought* to want" and observing that parental views vary widely). The FCC itself has recognized that v-chips and lockboxes are readily available blocking technologies. *Saving Private Ryan*, 20 FCC Rcd at 4508, nn.8-9. Every television 13 inches or larger sold in the United States after January 2000 contains a v-chip. *Fox II*, 613 F.3d at 326; 47 U.S.C. § 303(x). Further, when the country made the transition to digital television in 2009 anyone with a digital converter box also has access to a v-chip. *Id*. Indeed, this Court has held that lockboxes and other technologies were constitutionally less burdensome means of addressing parental concerns in striking down a time-channeling requirement for indecency on cable. *United States v. Playboy Entm't Grp.,* 529 U.S. 803, 809-15 (2000).

C. The FCC's Unbridled Discretion In Deciding Whether A Program Is "Patently Offensive," And Its Second-Guessing Of The Artistic Judgments Of Filmmakers And Programmers, Are Classic Hallmarks Of An Unconstitutional Censorship System

The FCC's record of enforcement demonstrates the evils of a vague, overly discretionary censorship

regime. As the court of appeals previously noted, the agency's subjective judgments embody the same arbitrariness and unpredictability that led to invalidation of licensing schemes in *Forsyth Cnty. v. Nationalist Movement,* 505 U.S. 123 (1992) and *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988). *See Fox I,* 489 F.3d at 464. Indeed, the indecency regime outdoes the licensing processes in those cases in the sheer breadth of the agency's claim of discretion to decide what, in the personal judgment of the commissioners, is patently offensive and what has sufficient artistic necessity, news value, or other merit to escape punishment.

With its contrasting decisions on "Saving Private Ryan," "The Blues," "The Early Show," and many other programs that were at issue in the *Omnibus Order*, the FCC has appointed itself the arbiter of both news value and artistic necessity. Under our constitutional system, it is not the role of government officials to second-guess artistic or editorial judgments. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (broadcasters' decisions "should be left to the exercise of journalistic discretion"); *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 256-258 (1974) (protecting newspaper's exercise of editorial judgment).[21] It is

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[21] The sole exception is obscenity law, where "serious value" is part of the three-part test for determining whether a work is constitutionally protected in the first place. *Miller v. California*, 413 U.S. 15, 24 (1973). Once expression *is* constitutionally protected, government officials cannot ban or burden content they dislike based on their assessments of artistic value or necessity. *Winters v. New York*, 333 U.S. 507, 510 (1948). Of course, government makes judgments about

the writer, artist or filmmaker who decides what is artistically necessary in a creative work. Considering the diverse attempts to define art – from Tolstoy's essay *What is Art?* to the Dada movement's "Anything is art if an artist says it is"[22] – the inherent subjectivity of the task alone makes it inappropriate for a government agency.

The FCC's disparate treatment of "The Blues" – an educational documentary film incorporating live footage of historically significant individuals who have influenced America's musical culture – and "Saving Private Ryan" – a brutally violent entertainment film concerning the experiences of fictional characters – is a striking illustration of the unbridled discretion that the agency claims. Although the Commission found variants on "fuck" and "shit" to be indecent in "The Blues," it absolved the far more frequent use of those words in "Saving Private Ryan" because it thought editing them "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience." It is unclear how the Commission arrived at these contrary conclusions. One possible explanation is that the cultural milieu of the mainstream movie "Saving Private Ryan" was more familiar to the commissioners than the largely African-American background of "The Blues." A similar dynamic can be seen in the Commission's

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artistic value in awarding prizes, *e.g., Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) – a context not relevant here.

[22] Leo Tolstoy, WHAT IS ART? (1897); MUSEUM OF MODERN ART, THREE GENERATIONS OF TWENTIETH-CENTURY ART (1972) 48 (quoting Marcel Duchamp).

earlier finding of indecency against Sarah Jones's "Your Revolution" – a poem that presumably speaks most directly to the experience of African-American women. Even without intending any racial or ethnic bias, decision makers in a subjective and discretionary censorship system may be more likely to find "patently offensive" those cultural expressions with which they are less familiar.

> From its censorship in 1987 of a program dealing with homosexuality and AIDS to its tone-deafness to the educational and artistic value of authentic colloquial language in "The Blues," the Commission's thirty years of indecency enforcement have borne out Justice Brennan's warning that allowing a government agency to ban what it considers "patently offensive" invites "an acute ethnocentric myopia" that has no place in our "land of cultural pluralism," where "there are many who think, act, and talk differently" from the commissioners of the FCC. *Pacifica*, 438 U.S. at 775 (Brennan, J., dissenting).

The FCC's efforts to distinguish among various words in its *Omnibus* and *Remand Orders* provide further examples of unbridled discretion. Whether "dickhead" or "pissed off" are more or less offensive than "bullshit" is simply a matter of taste, and the commissioners' efforts to rationalize their taste merely emphasize the arbitrary nature of the enterprise. The *Remand Order's* reversal on the use of "bullshitter" in "The Early Show," similarly, confuses rather than clarifies the agency's shifting standards. By changing its mind about its original indecency and profanity ruling but simultaneously warning that "there is no outright news exemption

from our indecency rules," the FCC leaves news broadcasters in as much limbo as documentary and feature producers as to when the FCC might find an exception to the fleeting expletives rule.

The FCC further assumes the linguistic expertise to decide that fleeting expletives – in particular, "fuck," "shit," and their many compounds and variations – always refer to sexual or excretory activities or organs even when they are merely used for color or intensity. But as "The Blues" and many other documentary films demonstrate, these words have many nonsexual and non-excretory meanings.

The court of appeals previously noted that "even the top leaders of our government have used variants of these expletives in a manner that no reasonable person would believe referenced 'sexual or excretory organs or activities.'" *Fox I,* 489 F.3d at 459-460 (citing President Bush's remark to British Prime Minister Blair that the UN should "get Syria to get Hezbollah to stop doing this shit," and Vice President Cheney's widely-reported "Fuck yourself" to Senator Patrick Leahy on the Senate floor). Justice Stevens noted that "[t]here is a critical distinction between the use of an expletive to describe a sexual or excretory function and the use of such a word for an entirely different purpose, such as to express an emotion. One rests at the core of indecency; the other stands miles apart." *FCC*, 129 S.Ct. at 1827 (Stevens, J., dissenting). The FCC's effort to elide this distinction by arguing that there is always a sexual or excretory "connotation" stretches its own definition of indecency (reference to sexual or excretory activities or organs) to the breaking point.

Scholarship supports the conclusion that expletives not only have a multitude of nonsexual or excretory meanings; they often have serious value. As Professor Timothy Jay explains, expletives are used for emphasis and emotive charge; they serve psychological and social purposes and communicate powerful messages wholly apart from their more literal meanings. Timothy Jay, WHY WE CURSE (2000). As Justice Ginsburg noted in dissenting to the Court's previous decision in this case, this Court has held that "'words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.'" *FCC*, 129 S.Ct. at 1829 (Ginsburg, J., dissenting) (quoting *Cohen v. California*, 403 U. S. 15 (1971)).

In 2004, Professor Jay submitted expert testimony in an FCC case involving a radio documentary, "Movin' Out the Bricks," which explored the lives of Chicago public housing residents, including one woman who described drug use as getting "fucked up and shit like that." Jay explained that in many contexts, "fuck" and "shit" are part of ordinary conversation and have no sexual or excretory connotation. In this case, they were essential to the documentary's authenticity. To clean up the woman's language would "undermine the listeners' understanding of the impact of public housing … If we substitute *inebriated* for *fucked up,* we erase the emotional impact." Timothy Jay,

Statement of Expert Opinion, *WBEZ-FM*, No. EB-04-IH-0323, (Sept. 21, 2004).

The First Amendment protects these expletives in literature, art, and political speech in part because of their emotive power. *See also Denver Area Educ. Telecomm. Consortium, Inc.,* 518 U.S. at 805 (opinion of Kennedy, J.) ("[i]n artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying 'otherwise inexpressible emotions.'") (quoting *Cohen,* 403 U.S. at 26, in part); *Morse v. Frederick,* 551 U.S. 393, 422 (2007) (Alito and Kennedy, JJ., concurring) (the First Amendment protects any speech "that can plausibly be interpreted as commenting on any political or social issue").

The FCC recites the mantra of "context" in an attempt to escape the irrationality of its flat presumption against two common words that it finds offensive, along with any of their variants. *See, e.g.,* Brief of Petitioner at 19-20, 30, 35. But as the foregoing examples demonstrate, the FCC's inscrutable and varying approach to regulating according to "context" means wielding essentially unbridled discretion. In claiming to know when an expletive should be allowed, the agency does not even purport to rely on data or any other evidence regarding when a child might be adversely affected, but instead finds it sufficient to rely on the personal tastes and cultural assumptions of the commissioners, as the record amply shows.

"Broadcasters are entitled to the same degree of clarity as other speakers" and the FCC cannot simply cite "context" to justify each decision to

sanction speech. *Fox II,* 613 F.3d at 329, 333. Although *Pacifica* discussed the relevance of context in regulating broadcast, it did so to emphasize the limited scope of its holding. 438 U.S. at 750; *Fox II,* 613 F.3d at 333. "[T]he FCC still must have discernible standards by which individual contexts are judged." 613 F.3d at 333.

How can it be permissible, for example, for a government agency to decide that a news program can use the word "bullshitter" but a police officer cursing during a fictional program such as "NYPD Blue" cannot? Why should it be possible that musicians would be barred from using vulgar words in a documentary, but perhaps allowed to use them on a news show?

Imposing on broadcasters the burden of demonstrating artistic or editorial necessity – as the FCC did in the case of "The Blues" – heightens the chill, compounding the injury. As this Court recognized in *Freedman v. Maryland*, 380 U.S. 51 (1965), the First Amendment has a procedural dimension, which prohibits laws or regulations that impose on speakers the burden of proving that their speech should not be censored. *See also Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004) ("[t]here is a potential for extraordinary harm and a serious chill upon protected speech" where prosecution is likely and "only an affirmative defense is available"). The FCC's notion that broadcasters should bear the burden of establishing artistic necessity turns the First Amendment upside down.

D. The Post 10-p.m. Safe Harbor Does Not Save the FCC's Censorship Regime

The post-10 p.m. safe harbor does not save the indecency regime from constitutional infirmity because it does not adequately protect the First Amendment rights of broadcasters, producers, directors, writers, and performers.

First, audiences are smaller late at night. TV viewing falls significantly after 10 p.m.; radio listening begins to shrink after 6 p.m. and drops to negligible levels by 10 p.m.[23] Second, the safe harbor realistically offers at most only two hours for programming that might run afoul of the FCC's rules, since most people are sleeping and not watching TV or listening to the radio from midnight to 6 a.m. It was not without reason that the D.C. Circuit referred to the safe harbor as "broadcasting Siberia." *Becker v. FCC*, 95 F.3d 75, 84 (D.C. Cir. 1996).

Consigning possibly indecent programs to the post-10 p.m. safe harbor is rarely an adequate substitute for earlier time slots. Southern California

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[23] The Nielsen website lists the ten most-watched broadcast TV shows every week. For the week of October 17, 2011, none of the ten most-watched shows aired at or after 10 p.m. *See* Nielsen Media Research, *Top Tens and Trends, Television,* http://www.nielsen.com/us/en/insights/top10s.html (last accessed 10/31/2011). For radio, listening peaks around 7 a.m., "remains[s] strong" through 6 p.m., and tapers off after that, with just a tiny fraction of the daytime audience by 10 p.m. ARBITRON, RADIO TODAY 89 (2010 ed.), *available at* http://www.arbitron.com/downloads/RadioToday_2010.pdf.

Public Radio ("SCPR"), for example, for years broadcast performances at LA Theater Works, typically on Saturday nights at 8 pm – "consistent with when the curtain typically rises on the live performances." Kigin Affidavit ¶8 (A-212-213). In 2004, SCPR aired Theater Works' production of "Dinah Was," a Tony Award-winning play about singer Dinah Washington. "Not surprisingly," APM official Thomas Kigin says, "given Ms. Washington's life and times, the play contains various commonplace 'swear' words and sexual expressions." Heightened FCC censorship and the threat of large fines, however, made SCPR nervous. First, it stopped the broadcasts entirely; then, having concluded "that it is neither appropriate nor feasible to edit the performances for language," SCPR moved the broadcasts to 10 p.m. even though "broadcasts at this late hour will attract only a fraction of the former audience for this series of outstanding theatrical events." *Id.*

The "safe harbor" is even less of an adequate alternative for live programming. A letter submission in the FCC's remand proceeding explained: "Live broadcast television is a direct link to the real world around us, and while sometimes unpredictable, is nonetheless one of the things that continues to bring Americans together to share historic moments." Center for Creative Voices in Media *et al.*, Letter to William Davenport, No. DA 06-1739 (Sept. 21, 2006).

A safe harbor might have made sense under the facts of *Pacifica,* where one "specific broadcast … represented a rather dramatic departure from traditional program content." *Reno*, 521 U.S. at 867.

But given the FCC's expanded and highly subjective censorship rules, and the pervasiveness of frank language in today's art, literature, news, and documentary programming, there is simply not enough time after 10 p.m. and before midnight to accommodate all of the constitutionally protected material that is endangered. This problem is exacerbated by the unpredictability and overbreadth of the FCC's indecency regime. Broadcasters, especially small or noncommercial broadcasters that cannot afford hundreds of thousands of dollars for a single indecency violation, must purge any expressive acts that might conceivably be offensive to a majority of FCC commissioners from their shows in order to air them before 10 p.m.[24]

As this Court recognized in *Reno*, programming that the FCC might consider indecent would have value for many minors. 521 U.S. at 877-78. Books by John Steinbeck and Toni Morrison, documentaries such as "The Blues," and news coverage that, the agency has warned in its *Remand Order*, might be found indecent are examples of valuable material that should not be consigned to the few available late-night hours.

In *Playboy,* this Court struck down a safe harbor requirement for sexually explicit material – a narrower category of speech than the potentially

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[24] Although time-shifting technologies such as TiVo make it possible to record late night programming for viewing at more convenient times, this technological advance has not led broadcasters to begin to air popular but potentially risky programs late at night; instead, they have self-censored in response to the fleeting expletives rule.

indecent speech at issue in this case. 529 U.S. at 812. *Playboy* involved cable TV, which enters the home exactly as broadcast television does for most Americans today. Indeed, the programming at issue in *Playboy* came into the home uninvited, largely in the form of "signal bleed." This Court nonetheless found that time channeling "silences … protected speech for two-thirds of the day." *Id.* "It is of no moment," this Court explained, "that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree." *Id.*

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

Respectfully submitted,

Steven R. Shapiro
Counsel of Record
Christopher A. Hansen
American Civil Liberties Union Foundation
125 Broad Street
New York, N.Y. 10004
(212) 549-2500
sshapiro@aclu.org

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ADDENDUM

STATEMENTS OF INTEREST

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization that has defended free speech principles since its founding in 1920. Of particular relevance here, the ACLU has participated in many of the leading cases challenging the government's efforts to restrict speech on the basis of "indecency," including *FCC v. Pacifica* and *Reno v. ACLU*.

The New York Civil Liberties Union (NYCLU) is a statewide affiliate of the national ACLU.

The American Booksellers Foundation for Free Expression (ABFFE) is the bookseller's voice in the fight against censorship. Founded by the American Booksellers Association in 1990, ABFFE's mission is to promote and protect the free exchange of ideas, particularly those contained in books, by opposing restrictions on the freedom of speech.

The American Federation of Television and Radio Artists, AFL-CIO, (AFTRA) are the people who entertain and inform America. In 32 Locals across the country, AFTRA members work as actors, journalists, singers, dancers, announcers, hosts, comedians, disc jockeys, and other performers across the media industries including television, radio, cable, sound recordings, music videos, commercials, audiobooks, non-broadcast industrials, interactive games, the Internet, and other digital media. The 70,000 professional performers, broadcasters, and recording artists of AFTRA are working together to protect and improve their jobs, lives, and communities in the 21st century. From new art forms

to new technology, AFTRA members embrace change in their work and craft to enhance American culture and society.

Directors Guild of America (DGA) was founded in 1936 to protect the economic and creative rights of directors. Over the years its membership has expanded to include the directorial team - Unit Production Managers, Assistant Directors, Associate Directors, Stage Managers and Production Associates. Today, through the collective voice of more than 14,500 members, the Guild seeks to protect the rights of directorial teams, to contend for their creative freedom and strengthen their ability to develop meaningful and lifelong careers in film, tape and digital media.

Minnesota Public Radio (MPR) is a regional public radio network that serves some 1,000,000 listeners each week across seven states on 43 public radio stations. In addition, as American Public Media (APM), it produces more nationally distributed news and documentary programming than any other station-based public radio organization, reaching approximately 16 million people per week.

The National Alliance for Media Arts and Culture (NAMAC) is the national service organization for the media arts, providing leadership training and professional development, organizational capacity building support, and original research about the field. With more than 300 member organizations serving an estimated 400,000 film, video, audio, and digital creators, NAMAC has a strong interest in ensuring that language or gestures central to the meaning of film and audio works

remain intact and are not eliminated or altered when presented to the public.

The National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of 50 national nonprofit organizations, including religious, educational, professional, artistic, labor and civil rights groups united in the conviction that freedom of thought, inquiry and expression are indispensable to a healthy democracy. The positions advocated by NCAC in this brief do not necessarily reflect the positions of each of its participating organizations.

The National Federation of Community Broadcasters (NFCB) represents over 200 community-oriented radio stations across the United States. Community radio is committed to airing diverse, authentic voices and finds the current FCC indecency regulations inconsistent and overbroad. Since most community radio stations operate on small budgets, they cannot afford the fines that can now be charged for an inadvertent broadcast of something that the Commission might decide is indecent or profane, which has a chilling effect on their editorial freedom and ability to serve their communities.

PEN American Center (PEN) is an organization of over 2,900 novelists, poets, essayists, translators, playwrights, and editors. As part of International PEN, it and its affiliated organizations are chartered to defend free and open communication within all nations and internationally. American PEN has taken a leading role in attacking rules that limit freedom of expression in this country.

Screen Actors Guild (SAG) is the nation's largest labor union representing working actors. Established in 1933, SAG represents over 125,000 performers who work in film and television, industrials, commercials, video games, music videos and other new media formats. SAG exists to enhance actors' working conditions, compensation and benefits and to be a powerful, unified voice on behalf of artists' rights throughout the world. As many of SAG's members perform on broadcast television, they are directly affected by the FCC's censorship system.

Southern California Public Radio (SCPR) is a public radio network that serves some 600,000 listeners each week across Los Angeles, Orange County, the Inland Empire and the Coachella Valley.

The Tully Center for Free Speech is an academic center based at the S.I. Newhouse School of Public Communications at Syracuse University in Syracuse, New York. The center is charged with educating students and the public about First Amendment, free speech and free press issues.

Washington Area Lawyers for the Arts (WALA) is the largest provider of pro bono legal services and legal education on arts-related matters in the Washington, D.C., metropolitan area, annually serving hundreds of artists and artistic organizations. Through the work of attorney volunteers who regularly counsel low-income artists, the organization has observed directly the chilling effects on artists' free expression rights caused by vague and overreaching government censorship.

The Woodhull Freedom Foundation (WFF) is a non-profit organization that works to affirm sexual freedom as a fundamental human right by protecting and advancing freedom of speech and sexual expression. WFF promotes sexuality as a positive personal, social and moral value through research, advocacy, activism, education and outreach.

Writers Guild of America, West (WGAW) is a labor organization and the collective bargaining representative of approximately 11,000 professional writers in the motion picture, television and new media industries. The court's decision will have a direct impact on the WGAW's members as content creators in broadcast television.