No. 08-0841-ag(L)

& 08-1424-ag(CON), 08-1781-ag(CON), 08-1966-ag(CON)

United States Court of Appeals for the Second Circuit

ABC Inc., KTRK Television, Inc., WLS Television, Inc, Citadel Communications, LLC, WKRN, G.P., Young Broadcasting of Green Bay, Inc., WKOW Television Inc., WSIL-TV, Inc., ABC Television Affiliates Association, Cedar Rapids Television Company, Centex Television Limited Partnership, Channel 12 of Beaumont Incorporated, Duhamel Broadcasting Enterprises, Gray Television License, Incorporated, KATC Communications, Incorporated, KATV LLC, KDNL Licensee LLC, KETV Hearst-Argyle Television Incorporated, KLTV/KTRE License Subsidiary LLC, KSTP-TV LLC, KSWO Television Company Incorporated, KTBS Incorporated, KTUL LLC, KVUE Television Incorporated, McGraw-Hill Broadcasting Company Incorporated, Media General Communications Holdings LLC, Mission Broadcasting Incorporated, Mississippi Broadcasting Partners, New York Times Management Services, Nexstar Broadcasting Incorporated, NPG of Texas, L.P., Ohio/Oklahoma Hearst-Argyle Television Inc., Piedmont Television of Huntsville License LLC, Piedmont Television of Springfield License LLC, Pollack/Belz Communication Company, Inc., Post-Newsweek Stations San Antonio Inc., Scripps Howard Broadcasting Co., Southern Broadcasting Inc., Tennessee Broadcasting Partners, Tribune Television New Orleans Inc., WAPT Hearst-Argyle Television Inc., WDIO-TV LLC, WEAR Licensee LLC, WFAA-TV Inc,. WISN Hearst-Argyle Television Inc.,

Petitioners,

v.

Federal Communications Commission and the United States of America,

Respondents,

Fox Television Stations, Inc., NBC Universal, Inc., NBC Telemundo License Co., CBS Broadcasting, Inc.,

Intervenors,

Center for Creative Voices in Media, Future of Music Coalition,

Amicus Curiae.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS FCC AND THE UNITED STATES

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JURISDICTIONAL STATEMENT

The Commission issued the Forfeiture Order on February 19, 2008. SPA-1. ABC paid the forfeiture on February 21, 2008, and timely filed its petition for review the same day. A-703. Subsequent petitions for review were timely filed by various ABC affiliates (and their association) in this Court as well as the U.S. Courts of Appeals for the Seventh Circuit and the D.C. Circuit. A-714, A-721, A-728. The latter two petitions were transferred to this Court and the cases were consolidated. This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1) and § 2343. *See AT&T Corp. v. FCC*, 323 F.3d 1081, 1085 (D.C. Cir. 2003).

ISSUE PRESENTED

The Commission imposed monetary forfeitures on a number of ABC television stations after determining that their broadcast of an episode of *NYPD Blue* containing images of an adult actress's naked buttocks violated federal restrictions against indecent broadcasting. The issues presented are:

1. Whether the Commission's indecency determination was arbitrary and capricious.

2. Whether the imposition of the forfeitures violated the First Amendment.

STATEMENT OF THE CASE

This is a suit challenging an FCC order imposing monetary forfeitures for violation of federal restrictions on indecent broadcasting. On February 25, 2003, a number of ABC television stations aired, before 10 p.m. local time, an episode of *NYPD Blue* that opened with a scene in which a naked adult actress is filmed from the rear, with her buttocks fully exposed. After receiving numerous complaints, examining a tape of the show, and considering the stations' arguments for why a penalty should not be imposed, the Commission determined that the broadcast was indecent, and that a monetary forfeiture of $27,500 per station was warranted. The network and the affiliated stations have filed for review.

STATEMENT OF FACTS

A. Statutory and Regulatory Background.

Since 1927, federal law has prohibited persons from engaging in broadcasting that is "obscene, indecent, or profane." Radio Act of 1927, ch. 169, § 29, 44 Stat. 1172; *see* Communications Act of 1934, Pub. L. No 73-416, § 326, 48 Stat. 1091. The prohibition is currently codified at 18 U.S.C. § 1464. The Supreme Court upheld the Commission's authority to regulate broadcast indecency under section 1464 in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *Pacifica* involved a challenge to a Commission order holding that a daytime radio broadcast of a George Carlin monologue, "Filthy Words," violated 18 U.S.C. § 1464. *See*

438 U.S. at 730. In his monologue, Carlin discussed the words that "you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." *Id*. at 729. The Commission found that the monologue was "indecent," a concept it defined as "intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience." *Id*. at 731-32 (quoting *Pacifica Found*., 56 FCC 2d 94, 98 (1975)).

On review, the Supreme Court rejected the contention that the Commission's action was "censorship" forbidden by the Communications Act, *id*. at 735-38, or by the First Amendment, *id*. at 748-51, and found "no basis for disagreeing with the Commission's conclusion that indecent language was used in [the] broadcast," *id*. at 741. The Court emphasized that "each medium of expression presents special First Amendment problems" and that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Id*. at 748. The Court concluded that the government's interest in safeguarding "the well-being of its youth and in supporting parents' claim to authority in their own household," combined with the "ease with which children may obtain access to broadcast material," justified the regulation of broadcast indecency. *See id*. at 749-50 (quotation marks omitted).

In the decade following *Pacifica*, the Commission took a "very limited approach to enforcing the prohibition against indecent broadcasts." *Infinity Broadcasting Corp. of Pa*., 3 FCC Rcd 930, 930 ¶ 4 (1987). "Unstated, but widely assumed, and implemented for the most part through staff rulings, was the belief that only material that closely resembled the George Carlin monologue would satisfy the [Commission's] indecency test." *Id*. In a series of orders issued in 1987, the Commission found that this "highly restricted enforcement standard . . . was unduly narrow as a matter of law and inconsistent with [its] enforcement responsibilities under Section 1464." *Id*. at 930 ¶ 5. As the Commission explained, the "approach, in essence, ignored an entire category of speech by focusing exclusively on specific words rather than the generic definition of indecency," which "made neither legal nor policy sense." *Id*. In *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988) ("*ACT I*"), the D.C. Circuit upheld the Commission's generic definition of indecency – *i.e.*, "material describ[ing] sexual and excretory activities and organs in a manner that [is] patently offensive according to contemporary community standards for the broadcast medium." *Infinity*, 3 FCC Rcd at 932 ¶ 19. In doing so, the Court emphasized that "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested." *ACT I*, 852 F.2d at 1338.

In section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 954, Congress directed the Commission to "promulgate regulations to prohibit the broadcasting of indecent programming" during certain times of the day. The constitutionality of the Commission's authority to promulgate rules implementing the 1992 Act was upheld by the D.C. Circuit, sitting *en banc*, in *Action for Children's Television v. FCC*, 58 F.3d 654, 669-70 (D.C. Cir. 1995) ("*ACT III*"), *cert. denied*, 516 U.S. 1043 (1996), insofar as the Commission prohibited "the broadcasting of indecent programs [from] the period from 6:00 a.m. to 10:00 p.m." Emphasizing the "unique context of the broadcast medium," 58 F.3d at 660, the *ACT III* court recognized two "independent" compelling interests in regulating broadcast indecency: (1) "supporting parental supervision of what children see and hear on the public airwaves," and (2) "the Government's own interest in the well-being of minors." *Id*. at 661-63. The court held that channeling indecent speech to late-night hours was the least restrictive means of furthering these interests. *See id*. at 664-67. Given the "substantially smaller number of children in the audience" during late-night hours, limiting broadcast indecency to those times "reduces children's exposure . . . to a significant degree." *Id*. at 667. Conversely, the court stated, time channeling did not "unnecessarily interfere with the ability of adults to watch or listen to such materials" because a large number of adults view television late at night and

because they have "many alternative ways of satisfying their tastes at other times." *Id*. The Commission's rules accordingly provide that "[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent." 47 C.F.R. § 73.3999(b).

In 2001, the Commission set out its general framework for analyzing broadcast indecency violations. *Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999 (2001). Under the *Industry Guidance*, a Commission indecency finding must be supported by "at least two fundamental determinations." 16 FCC Rcd at 8002 ¶ 7. "First, the material alleged to be indecent must fall within the subject matter scope of [the Commission's] indecency definition – that is, the material must describe or depict sexual or excretory organs or activities." *Id*. (citation omitted). "Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium." *Id*. ¶ 8. The "principal factors" in determining patent offensiveness are: "(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; [and] (3) *whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock*

value." *Id*. at 8003 ¶ 10. The Commission emphasized that in evaluating these factors, "the overall context of the broadcast in which the disputed material appeared is critical," and that "[e]ach indecency case presents its own particular mix of these, and possibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent." *Id*.

Any person who is determined by the Commission to have "willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter," 47 U.S.C. § 503(b)(1)(B), or to have "violated any provision of section . . . 1464 of title 18 [United States Code]," *id*. § 503(b)(1)(D), "shall be liable to the United States for a forfeiture penalty," *id*. § 503(b)(1). At the time of the broadcast here, the maximum amount of any single forfeiture the FCC could impose on a broadcast licensee was $27,500. *See Inflation Adjustment of Maximum Forfeiture Penalties*, 65 Fed. Reg. 60868, 60869 (2000).

B. Proceedings Below.

(1) The Episode.

On February 25, 2003, at 9:00 p.m. in the Central and Mountain time zones, ABC television stations broadcast an episode of *NYPD Blue* which opened with a scene of adult female nudity involving a woman preparing to take a shower.

Because the scene is the basis for the forfeitures that are challenged in this case, we describe it in detail.

As the Commission summarized the broadcast (a tape of which has been submitted as part of the agency record to this Court), the scene opens by showing "a woman wearing a robe . . . entering a bathroom, closing the door, and then briefly looking at herself in a mirror hanging above a sink." *Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue*," Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 1596, 1599 ¶ 9 (2008) ("*NAL*") (A-129). "With her back to the camera," the woman "removes her robe, thereby revealing the side of one of her breasts and a full view of her back." *Id*. "The camera shot includes a full view of her buttocks and her upper legs as she leans across the sink to hang up her robe." *Id*. As she walks from the mirror to the shower, "a small portion of the side of one of her breasts is visible," and while "[h]er pubic area is not visible . . . her buttocks are visible from the side." *Id*.

The camera then shifts to show a young boy getting out of bed and walking toward the bathroom, at which point "[t]he camera cuts back to the woman, who is now shown standing naked in front of the shower, her back to the camera." *Id*. ¶ 10 (A-129). The camera first shows the woman "naked from the back, from the

top of her head to her waist." *Id*. "[T]he camera then pans down to a shot of her buttocks, lingers for a moment, and then pans up her back." *Id*.

The boy then is shown opening the bathroom door. *Id*. As he does so, the woman "quickly turns to face" him. *Id*. "The camera initially focuses on the woman's face but then cuts to a shot taken from behind and through her legs, which serve to frame the boy's face as he looks at her." *Id*. The camera then immediately shifts to "a front view of the woman's upper torso," although a "full view of her breasts is obscured . . . by a silhouette of the boy's head and ears." *Id*. "After the boy backs out of the bathroom and shuts the door," the woman is shown "facing the door, with one arm and hand covering her breasts and the other hand covering her pubic area." *Id*. "The scene ends with the boy's voice, heard through the closed door, saying 'sorry'"; to which "the woman while looking embarrassed, responds, 'It's okay. No problem.'" *Id*.

(2) The Forfeiture.

The Commission received numerous complaints that the episode was indecent. *See, e.g.*, A-14 to A-24; A-340 to A-696. In response, the Commission's Enforcement Bureau issued a Letter of Inquiry (*LOI*). A-26 to A-31. ABC responded by supplying a tape of the broadcast as well as a list of stations that aired the episode before 10 p.m. local time. A-32 to A-42. It also provided a written submission contending that the episode was not indecent. A-43 to A-125.

After considering those materials, the Commission issued the *NAL*. A-126 to A-140. The Commission concluded that the broadcast was "apparently indecent," *NAL* ¶ 16 (A-131), because it "depict[ed] sexual organs and excretory organs – specifically, an adult woman's buttocks," that "in . . . context," was "patently offensive as measured by contemporary community standards for the broadcast medium." *NAL* ¶¶ 11, 12 (A-129). The Commission concluded that a forfeiture in the amount of $27,500 against each of the stations who aired the program before 10 p.m. and against whom complaints were made (52 in total) "would appropriately punish and deter the apparent violation in this case." NAL ¶ 18 (A-131); *see also* A-134 to A-139 (listing stations). The Commission gave the licensees against whom a forfeiture was proposed 17 days either to pay the forfeiture or file a written statement seeking its reduction or cancellation. NAL ¶ 22 (A-132).

ABC and a group of its Affiliates submitted lengthy responses to the *NAL*. *E.g.*, A-183 to A-256, A-257 to A-702. After considering those responses, the Commission issued the *Forfeiture Order*. SPA-1 to SPA-33. The Commission cancelled the forfeiture liability of seven stations, but found no basis for

cancellation of the proposed forfeiture against the remaining 45. *Forfeiture Order* ¶ 6 (SPA-3).[1]

In doing so, the Commission reaffirmed the *NAL*'s determination that the episode fell within the subject matter scope of the agency's indecency definition, in that it depicted or described "sexual or excretory organs or activities." *Forfeiture Order* ¶¶ 7-11 (SPA-3 to SPA-6). It rejected the contention that buttocks are not sexual or excretory organs, explaining that "[t]he Commission has consistently interpreted the term 'sexual or excretory organs' in its own definition of indecency as including the buttocks, which, though not physiologically necessary to procreation or excretion, are widely associated with sexual arousal and closely associated by most people with excretory activities." *Id.* ¶ 8 (SPA-4).

The Commission also reaffirmed its determination that "in context and on balance, the complained-of material is patently offensive as measured by contemporary community standards for the broadcast medium." *Id*. ¶ 12 (SPA-6). First, the Commission found that the episode contained a "close range," "fully visible" view of the actress's unclothed buttocks that was "sufficiently graphic and explicit to support an indecency finding." *Id*. ¶ 13 (SPA-6). Second, the

[1] The statute of limitations had expired for two of the stations because there had been an intervening license renewal. *Forfeiture Order* ¶ 34 (SPA-16). *See* 47 U.S.C. § 503(b)(6)(A). There were no complaints tied to the five other stations. *Forfeiture Order* ¶ 23 (SPA-11).

Commission stated, camera shots of the woman's buttocks were "repeated" within the scene, which "focuses on her nudity," and this provided additional support for a finding of patent offensiveness. *Id*. ¶ 15 (SPA-7). Third, the Commission determined that the scene was "pandering, titillating, and shocking." *Id*. ¶ 16 (SPA-7). Not only does the scene place the audience in the "voyeuristic position" of observing a naked woman preparing to shower, the Commission stated, but the second shot of the buttocks, where the camera "pans down her naked back to her buttocks, pauses for a moment and then pans up her back, highlights the salacious aspect of the scene." *Id*. In addition, "subsequent camera shots of the boy's shocked face from between the woman's legs, and of her naked, partially-obscured upper torso from behind his head" also contributed to the scene's "titillating and shocking nature." *Id*. (SPA-7 to SPA-8). The Commission accordingly concluded that the *NYPD Blue* episode was "actionably indecent." *Id*. ¶ 18 (SPA-9).

SUMMARY OF ARGUMENT

The FCC reasonably determined that the February 25, 2003 episode of ABC's television show *NYPD Blue* violated longstanding federal prohibitions against the broadcast of indecent material.

The show opened with a scene of a naked adult woman preparing to take a shower that focused on unobscured images of the woman's fully unclothed buttocks. After examining the scene in detail and in context, the Commission

determined that it contained a graphic, pandering and titillating depiction of sexual or excretory organs that was patently offensive in light of the community standards for the broadcast medium. The Commission therefore reasonably concluded that the broadcast of the scene during a time of day when children are likely to be in the audience was actionably indecent.

ABC and its Affiliates raise a host of administrative law and constitutional objections to the Commission's order. None are persuasive.

1. The Commission permissibly found that the images of an adult woman's naked buttocks in the episode depicted sexual or excretory organs within the meaning of the Commission's definition of indecency. As the Commission explained, its prior precedent, the child-protective purpose of broadcast indecency regulation, and common sense all support the conclusion that depictions of buttocks fall within the subject matter scope of the Commission's indecency definition. The Commission's determination was plainly reasonable, particularly given the highly deferential standard of review applicable to an agency's interpretation of its own rules.

The Commission also reasonably determined that the episode was, in context and on balance, patently offensive. Its opening scene contained images that graphically and repeatedly displayed the woman's buttocks in full view in a

context that placed the audience in a voyeuristic position and in a manner that was pandering, titillating and shocking.

Contrary to ABC's contention, a scene in an award-winning show can be indecent, even if it relates to the show's story-line. And while a parental advisory may be relevant, the Commission reasonably determined that the advisory ABC aired in this case did not outweigh the scene's offensiveness. Finally, the fact that the Commission determined in other cases that different broadcasts, involving different contexts, were not indecent, did not compel it to forego enforcement against ABC and its affiliates here.

2. The *Forfeiture Order* is also not procedurally deficient. Each of the forfeitures in this case were supported, in accordance with Commission policy, by a complaint from the market served by the station against whom a forfeiture was imposed. There is no requirement that a complainant state expressly that he or she viewed the show in question, nor is there any bar against a complainant taking advantage of an electronic form furnished by a third party. And the fact that the ABC Affiliates were given 17 rather than 30 days in which to respond to the Commission's *NAL* cannot possibly constitute a deprivation of their rights to due process.

3. The Commission's *Forfeiture Order* also does not violate the First Amendment. The Supreme Court in *Pacifica* settled that the Commission's

general power to exercise the authority Congress granted it to regulate broadcast indecency is consistent with the First Amendment. That decision also made clear, as the D.C. Circuit has recognized, that the Commission's definition of indecency is not unconstitutionally vague. The development of the V-chip has not undermined the force of this precedent, both because most televisions at the time of the broadcast were not equipped with that technology and because the Commission has amassed extensive evidence that the V-chip is ineffective in protecting children from indecent broadcast programming.

STANDARD OF REVIEW

Under the Administrative Procedure Act, the *Forfeiture Order* cannot be overturned unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The scope of review under this standard is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). So long as the agency has complied with its duty to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" *id*., its decision should be upheld. *Accord Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 455 (2d. Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008); *Cellular*

Phone Taskforce v. FCC, 205 F.3d 82, 89-90 (2d Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001).

This Court's review of the Commission's disposition of petitioners' constitutional claims is de novo. *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1367 (11th Cir. 2002), *cert denied*, 540 U.S. 937 (2003).

ARGUMENT

I. THE COMMISSION REASONABLY FOUND THAT PETITIONERS' AIRING OF THE FEBRUARY 25, 2003 EPISODE OF *NYPD BLUE* VIOLATED FEDERAL RESTRICTIONS ON BROADCAST INDECENCY.

A. The Episode Depicted Sexual or Excretory Organs.

ABC and its Affiliates contend that, regardless of its offensiveness, the *NYPD Blue* episode cannot be indecent because "the buttocks are not a sexual or excretory organ" within the meaning of the Commission's broadcast indecency definition. ABC Br. 14. *See also* Affiliates Br. 18-28. That contention flies in the face of Commission precedent, the purpose of the indecency inquiry, and defies common sense.

The Commission has "consistently interpreted the term 'sexual or excretory organs' in its own definition of indecency as including the buttocks." *Forfeiture Order* ¶ 8 (SPA-4).

Several published staff decisions that pre-dated the *NYPD Blue* episode provided ample notice that the subject matter scope of the Commission's indecency definition included depictions or descriptions of the buttocks. For example, in 2002 the Commission's Enforcement Bureau found that a highly tasteless joke involving sticking a knife up "a baby's ass," referred not only to "sexual activity associated with [a] child," but also "to a child's excretory organ." *Rubber City Radio Group*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 14745, 14745 ¶ 2, 14747 ¶ 6 (EB 2002). Likewise, in 2001 the Enforcement Bureau stated that a joke that included the line "[t]he wallet was found stuffed up the ass of a dead guy" contained "[a] reference to excretory organs." *Enforcement Bureau Letter Ruling on KLOU (FM), St. Louis, Missouri Indecency Complaint*, 2001 WL 102218 (2001). *See also Letter to Gregory P. Barber*, 5 FCC Rcd 3821, 3822 (1990) (radio show segment containing statement "I'd love to lick the matzo balls right off your butt" falls "squarely within" the Commission's indecency definition). *See Star Wireless, LLC v. FCC*, 522 F.3d 469, 474 (D.C. Cir. 2008) (published staff decision sufficient to put regulated entities on notice of rule interpretation).

Finally, the Commission in a 1994 NAL determined that a radio show segment in which Howard Stern described using an electric razor to "groom[] [his] buttocks hairs" contained "language that describes sexual and excretory activities

and organs in patently offensive terms." *Letter to Mel Karmazin*, 9 FCC Rcd 1746, 1751 (1994), *vacated pursuant to settlement, Infinity Broad. Corp.*, 10 FCC Rcd 12245 (1995). Although that NAL was vacated pursuant to a subsequent settlement, its conclusion remains persuasive evidence that the Commission's interpretation of its indecency definition to include buttocks as a sexual or excretory organ has been consistent over time.

The Commission has adhered to this position since the *NYPD Blue* episode was aired. In *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notice of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664, 2681 ¶ 63 (2006) (*"Omnibus Order"*), the Commission concluded that a music video featuring a "persistent visual focus on [a] female dancer's buttocks" was indecent. In doing so, the Commission made clear that "the buttocks . . . are sexual and excretory organs" within the meaning of the first prong of the Commission's indecency definition. *Id*. at 2681 ¶ 62. *See also id*. at 2718-19 ¶¶ 225-26 (episode of *America's Funniest Home Videos* that featured a "child's nude buttocks," although not indecent, "depict[ed] "both excretory and sexual organs"). Likewise, in *Entercom Kansas City License, LLC*, 19 FCC 25011, 25014 ¶ 7 (2004), the Commission found that a

radio segment containing comments by the hosts "about the contestants' genitalia, buttocks and breasts, describe or depict sexual or excretory organs."[2]

Despite this precedent, ABC and its Affiliates contend that the term "sexual or excretory organs" must be read as physiological descriptors that necessarily exclude the buttocks. ABC Br. 14-15, 18. Affiliates Br. 18-20. This is nonsense. "Sexual" simply means "of, relating to, or associated with sex." *Webster's Third New International Dictionary of the English Language Unabridged* 2082 (1963). "Excretory" likewise means "of, relating to, concerned with or serving for excretion." *Id*. at 794.[3] As the Commission explained in the *Forfeiture Order*, "[t]he buttocks, . . . though not physiologically necessary to procreation or excretion, are widely associated with sexual arousal and closely associated by most people with excretory activities." *Forfeiture Order* ¶ 8 (SPA-4). The Commission's interpretation thus fits comfortably within the plain language of its formulation of the subject matter scope of its broadcast indecency definition.

Moreover, no reasonable purpose would be served by giving the term "sexual or excretory organs" the narrow physiological reading that ABC and its

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[2] Contrary to ABC's suggestion (ABC Br. 16), there would have been no need for the Commission in *Entercom* to have identified buttocks (as well as breasts) in the quoted statement if it thought that only "genitalia" were sexual or excretory organs.

[3] The word "organ" can mean "the bodily parts performing a particular function or cooperating in a particular activity." *Id*. at 1589. Nothing about the meaning of the word excludes the buttocks, which are quite obviously a functioning part of the human body.

Affiliates urge. The term is an integral part of the Commission's framework for identifying material that is "patently offensive as measured by contemporary community standards for the broadcast medium" and therefore should not be broadcast "at times of the day when there is a reasonable risk that children may be in the audience." *Pacifica*, 438 U.S. at 732 (quoting 56 FCC 2d at 98). Technical physiological definitions have little place in such an inquiry, because patent offensiveness involves a social – not a medico-anatomical – analysis. As the Commission explained, "[i]n the context of interpreting and applying the statutory and regulatory proscription against indecent programming, it is appropriate to interpret these terms not in a medical sense but rather in the sense of organs that are closely associated with sexuality or excretion and that are typically kept covered because their public exposure is considered socially inappropriate and shocking." *Forfeiture Order* ¶ 9 (SPA-4 to SPA-5). The buttocks remain a part of the body that, in most circumstances, and even in modern society, is kept fully covered in public. *See, e.g., City of Erie v. Pap's AM*, 529 U.S. 277, 283 n.* (2000) (upholding ordinance banning public nudity, defined to include among other things, showing the "buttocks with less than a fully opaque covering"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 n.2 (1991) (same).[4]

[4] *See also Turner v. State*, 650 N.E. 2d 705, 708 (Ind. App. 1995), *cert. denied*, 516 U.S. 1162 (1996) ("G-string" insufficient to avoid public nudity statute); *Hart v. Commonwealth*, 441 S.E.2d 706, 707 (Va. App. 1994) (buttocks are "private parts"

Finally, the consequences that would flow from the contention by ABC and its Affiliates that the buttocks do not – but "kidneys" do (Affiliates Br. 20) – fall within the subject matter scope of the Commission's indecency definition would be bizarre. By taking depictions or descriptions of buttocks wholly outside the Commission's broadcast indecency framework, it would allow broadcasters to air material depicting or describing buttocks without limitation.

In addition, the logical result of the rule ABC and its affiliates advocate is that depictions of naked breasts would also fall completely outside the Commission's indecency definition. Breasts do not "play a role in reproduction" or "remove waste products from the body." ABC Br. 14. Nor do they appear in the ABC Affiliates' "biological[]" list of "sexual organs." Affiliates Br. 19. Thus, according to petitioners, breasts could be shown on broadcast television during any time of the day. That is obviously an absurd result. Breasts, like buttocks, are closely associated with sexual arousal, even though they are not necessary for reproduction. Indeed, "tits" were one of Carlin's "original seven words" that "you couldn't say on the public . . . airwaves," *Pacifica*, 438 U.S. at 751, *i.e.*, one of the

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within meaning of indecent exposure statute); *Commonwealth v. Quinn*, 789 N.E.2d 138, 144-45 (Mass. 2003) (exposure of buttocks can violate lewdness statute). The fact that some jurisdictions no longer include public exposure of the buttocks as actionable under their criminal indecent exposure statutes, *see State v. Fly*, 501 S.E.2d 656, 659 (N.C. 1998), does not change the social equation – persons do not ordinarily walk down public streets in with their buttocks fully exposed, nor are such images virtually ever seen on broadcast television.

words the Commission found "referred to excretory or sexual activities or organs," *id.* at 739. Because ABC's reading would logically permit the airwaves to be "filled with naked buttocks and breasts during daytime and prime time hours," it is "impossible to believe that ABC or the ABC Affiliates ever thought this to be the Commission's policy." *Forfeiture Order* ¶ 10 (SPA-5).

"An agency's interpretation of its own . . . regulation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v Shalala*, 512 U.S. 504, 512 (1994) (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)) (internal quotation marks omitted); *accord Fowlkes* v. *Adamec*, 432 F.3d 90, 97 (2d Cir. 2005). Moreover, a regulation, like a statute, "should be interpreted in a way that avoids absurd results." *Puello v. Bureau of Citizenship and Immigration Servs*., 511 F.3d 324, 330 (2d Cir. 2007) (citation omitted). In this case, the Commission's interpretation of the subject-matter scope of its indecency framework to include depictions or

descriptions of the buttocks is – at the very least – not plainly erroneous or foreclosed by the terms of the definition. It therefore controls.[5]

B. The Episode Was Patently Offensive.

The Commission also reasonably determined that the February 25, 2003 episode of *NYPD Blue* was, "in context and on balance . . . patently offensive as measured by contemporary community standards for the broadcast medium." *Forfeiture Order* ¶ 12 (SPA-6).

The episode was graphic. Its opening scene contained images of "a female actor naked from behind, with her buttocks fully visible at close range." *Id.* ¶ 13

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[5] The ABC Affiliates (but not ABC), argue that the "rule of lenity" requires that 18 U.S.C. § 1464 be read narrowly because it is a criminal statute. Affiliates Br. 25. But the Supreme Court made clear in *Pacifica* that "the validity of the civil sanctions" under 18 U.S.C. § 1464 "is not linked to the validity of the criminal penalty." *Pacifica*, 438 U.S. at 739 n.13. As originally enacted, the statutory prohibition on broadcast indecency was a freestanding part of the Communications Act; it was enforced through civil and criminal mechanisms found in other provisions. *See* Communications Act of 1934, Pub. L. No. 73-416, § 326, 48 Stat. 1091. When Congress codified criminal statutes in title 18 in 1948, it placed the ban on broadcast indecency there and combined it with the criminal enforcement provision, leaving other enforcement mechanisms with the rest of the Communications Act in Title 47. *See Pacifica*, 438 U.S. at 739 n.13. Because the 1948 re-codification did not produce any "substantive change," a court reviewing a civil application of Section 1464 "need not consider any question relating to the possible application of § 1464 as a criminal statute." *Id.* *See also Forfeiture Order* ¶ 11 (SPA-5 to SPA-6). Moreover, even where it applies, the rule of lenity "is a doctrine of last resort," and "cannot overcome a reasonable [agency] interpretation entitled to *Chevron* deference." *Mizrahi v. Gonzales*, 492 F.3d 156, 174-75 (2d Cir. 2007).

(SPA-6). She was "not wearing a g-string or other clothing," and the camera shots of her buttocks were not "pixillated or obscured." *Id*. The ABC Affiliates remarkably contend that because the Commission had not found any nude image to be "graphic and explicit" at the time of this broadcast, it could not do so here. Affiliates Br. 29-31. ABC does not join this argument, and for good reason: an unobscured shot of nudity is "graphic and explicit" under any definition of those terms, and no reasonable broadcaster could have interpreted the absence of a case exactly like this one preceding the *NYPD Blue* broadcast to mean that nudity could never be graphic or explicit.[6]

Second, the camera shots of the woman's naked buttocks were "repeated," and they "focuse[d] on her nudity." *Forfeiture Order* ¶ 15 (SPA-7). Indeed, "[a]t one point, when her buttocks already have been displayed once and she is about to step into the shower, the camera deliberately pans down her back to reveal another full view of her buttocks before panning up again." *Id*.

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[6] Likewise, the ABC Affiliates' argument that *any* indecency forfeiture for televised nudity represented a "radical change in enforcement practice" because the there had been none at the time of the *NYPD Blue* broadcast, Affiliates Br. 38, is specious. No reasonable licensee could have interpreted the absence of such forfeitures to mean that nudity was exempt from the federal proscriptions on indecency. *See also Industry Guidance*, 16 FCC Rcd at 8002 (explaining that material can be indecent if it "depict[s]" as well as "describe[s]" sexual or excretory organs).

Third, the actress's nudity "is presented in a manner that clearly panders to and titillates the audience." *Forfeiture Order* ¶ 16 (SPA-7). As the Commission explained, the scene places the audience "in the voyeuristic position of viewing an attractive woman disrobing as she prepares to step into the shower." *Id*. And after including a camera shot of the woman's naked buttocks as she removes her robe in front of the bathroom mirror, the scene provides the audience with "another full view of her naked buttocks as she stands in front of the shower." *Id*. "This second shot," the Commission emphasized, "in which the camera pans down her naked back to her buttocks, pauses for a moment and then pans up her back, highlights the salacious aspect of the scene," and "clearly suggest[s] that its interest lies at least partly in seeing the actress's naked buttocks." *Id*. The Commission also reasonably determined that subsequent camera shots, in which the boy's shocked face is seen from between the woman's legs, and the actress's naked (albeit partially-obscured) torso is shown from behind the boy's head, "also serve to heighten the titillating and shocking nature of the scene." *Id*. (SPA-7 to SPA-8).

ABC contends that the scene did not "dwell[] on or repeat[] at length" the images of the actress's unclothed buttocks (ABC Br. 20), and therefore the second factor of the Commission's indecency analysis "weighs against rather than in favor of deeming the broadcast indecent," *id*. at 22. But the Commission has long made clear that "[e]ach indecency case present its own particular mix" of factors, which

"must be balanced to ultimately determine whether the material is patently offensive and therefore indecent," and that "no single factor generally provides the basis for an indecency finding." *Industry Guidance*, 16 FCC Rcd at 8003 ¶ 10. Here, even if the second factor did not support a patent offensiveness finding, the Commission stated that it would have "still reach[ed] the same conclusion based on the strength of the first and third principal factors." *Forfeiture Order* ¶ 15 n.48 (SPA-7).[7]

In any event, while the Commission conceded that "a longer scene or additional depictions of nudity throughout the episode would weigh more heavily in favor of an indecency finding," it reasonably determined that "the focus on and

[7] The Third Circuit's recent decision in *CBS Corp. v. FCC*, No. 06-3575, 2008 WL 2789307 (July 21, 2008), provides no support for petitioners here because, unlike the 9/16-second nudity in the Super Bowl broadcast at issue in that case, the nudity here was not "fleeting" under any reasonable construction of the term. We respectfully disagree with the Third Circuit's conclusion (at *16) that the Commission had an indecency exemption for explicit but "fleeting" images of nudity or sexual activities. *See Industry Guidance*, 16 FCC Rcd at 8009, ¶ 19 ("[E]ven relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness."); *Pacifica Found.*, 2 FCC Rcd 2698, 2699 ¶ 13 (1987) ("When a complaint goes beyond the use of expletives . . . repetition of specific words or phrases is not necessarily an element critical to a determination of indecency."). Even if the Third Circuit were correct about "fleeting" material, however, its instruction that the Commission explain its "change" in policy would not cover broadcasts, like this one, with non-fleeting images.

repeated shots of the woman's naked buttocks provides some support for a finding of indecency under the second factor." *Forfeiture Order* ¶ 15 (SPA-7).[8]

ABC also contends that the episode did not pander, titillate, or shock because it is "devoid of any sexual or excretory connotation beyond the fact that buttocks were depicted." ABC Br. 22. ABC's contention hardly does its broadcast justice. As the Commission explained, the scene is fundamentally "voyeuristic" – the camera places the audience in a position where they can observe an actress disrobing in preparation for a shower. *Forfeiture Order* ¶ 16 (SPA-7). The initial camera shot of the actress's naked buttocks in full view is followed by a second camera shot, in which the camera pans down the actress's back to show her unclothed buttocks once again. *Id*. The editing and camera work thus direct the viewer's attention to the actress's naked buttocks in a manner that emphasizes the scene's "salacious aspect." *Id*. The subsequent camera shots confirm the shocking and titillating nature of the scene by showing the boy's shocked face from a viewpoint – "between the woman's legs" – designed to underscore that the actress is unclothed, and showing the actress's naked but partially-obscured torso from

[8] ABC emphasizes the "hour-long" length of the episode. ABC Br. 20. But the fact that the Commission did not find that other portions of the program (however long) were indecent cannot obscure the fact that the opening scene – which was far shorter and separated from the rest of the show by titles and a commercial break – was.

behind the boy's head. *Id*. (SPA-8). As the Commission explained, "[a]lthough the scene does not depict any sexual response in the child, his presence serves to heighten the shocking nature of the scene's depiction of her nudity." *Id*.

ABC's statement that material can be indecent "only if it is sexualized or has excretory connotations" (ABC Br. 23) is baseless. The Commission's indecency rules have long applied to "sexual or excretory organs," as well as to "sexual or excretory . . . activities." *E.g.*, *Industry Guidance*, 16 FCC Rcd at 8002 ¶ 7. The Commission has therefore made clear that depiction of a sexual or excretory organ alone can support an indecency determination, even if sexual or excretory activities are not themselves portrayed. *See Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751, 1752 ¶ 3 (2004) (exposure of penis). The implications of ABC's contention are also absurd, for it suggests that the Commission would be powerless to prohibit the broadcast of shows depicting persons who are completely naked working at an office, going grocery shopping, or engaging in other day-to-day tasks so long as they were not performing sexualized or excretory functions.

Nudity itself may not be "per se indecent," *see, e.g.*, *WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838, 1841 ¶ 11 (2000) (*Schindler's List*), but nudity is not necessarily decent. Rather, its context must be examined. Here, as the Commission reasonably found, the episode's depiction of an adult actress's

buttocks was patently offensive because it was "graphic, repeated, pandering, titillating and shocking," even if no sexual activity was portrayed, and was therefore "actionably indecent." *Forfeiture Order* ¶ 18 (SPA-9).

ABC contends that the Commission "all but ignored" important aspects of the context in which the *NYPD Blue* episode was aired, including the fact that the show was popular and award-winning, and that the complained-of scene related to one of the show's story lines. ABC Br. 25-26. That is not correct. The Commission recognized that "*NYPD Blue* was a longstanding television drama that garnered writing, directing, and acting awards, and that the scene in question related to a broad storyline of the show." *Forfeiture Order* ¶ 18 (SPA-9). The Commission found nonetheless that the nature of the scene in question rendered it patently offensive and indecent. *Id*.

The fact that *NYPD Blue* was a popular show that won awards for its programming cannot immunize it from federal broadcast indecency regulation. An award-winning show can engage in indecency. *Cf. Pacifica*, 438 U.S. at 730 (Commission found Carlin monologue indecent notwithstanding argument that he was "'a significant social satirist' . . . 'like Twain and Sahl'"). And because "[s]ome material that has significant social value may contain language and descriptions as offensive, from the perspective of parental control over children's exposure, as material lacking such value," even undoubted merit will not

"render . . . material *per se* not indecent." *ACT I*, 852 F.2d at 1340. *See Forfeiture Order* ¶ 18 (SPA-9). The Commission's indecency determinations also do not "turn on whether the program or the station that broadcast it happens to be popular in its particular market." *NAL* ¶ 15 (A-130).[9] "Indeed," the Commission has observed, "the fact that the program is watched by a significant number of viewers serves to increase the likelihood that children were among those who may have seen the indecent broadcasts, thereby increasing the public harm from the licensees' misconduct." *Id*.

Likewise, that the scene "related to the broad storyline of the show" (ABC Br. 26) cannot bar the Commission from fulfilling its responsibilities to enforce federal broadcast indecency laws. Putting aside the question of whether it was at all necessary to display (and pan up and down) an actress's unclothed buttocks in order to portray "the awkwardness and embarrassment that result when a child unintentionally walks in on a naked adult," *id*. at 27, thematic consistency cannot by itself place a scene outside the Commission's broadcast indecency rules. Much hard core pornography has a story line of some kind to which an explicit portrayal

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[9] *See, e.g., Entercom Kansas City License*, 19 FCC Rcd 25011, 25017 ¶ 14 (2004) ("Whether particular material is actionably indecent does not turn on whether the station that broadcast it (or the program) happens to be popular in its particular market"): *WQAM License Ltd. P'ship*, 15 FCC Rcd 2518, 2520 ¶ 9 n.7 (2000) ("a show's general popularity cannot insulate it from a determination that certain material it broadcast was indecent").

of sexual activity is arguably integral, yet ABC presumably would not contend that it could air such explicit adult fare in prime time because the explicit scenes "related to a broad storyline of the show." *Id*. at 26. Indeed, Carlin's expletives obviously "related to," ABC Br. 26, his theme of "contemporary society's attitude toward language," *Pacifica*, 438 U.S. at 730, but that did not stop the Supreme Court from affirming the Commission's conclusion that they were indecent.

ABC contends that it made a "reasonable artistic judgment" that the scene "would have lost much of its power" without the challenged nudity." ABC Br. 28. But much of that "power" results from the scene's patent offensiveness. In any event, ABC cannot exercise its artistic judgment in violation of federal law. Indeed, if the Commission were required to reflexively defer to a licensee's artistic judgment where broadcast indecency was concerned, there would be little left to the Commission's independent enforcement of the indecency rules. *See Infinity Broad.*, 3 FCC Rcd at 933 ¶ 26 (rejecting contention that licensee judgments, even if otherwise reasonable, can "preclude a finding that a licensee has violated its statutory duties").

ABC contends that an advisory at the beginning of the episode that the show contained "adult language and partial nudity," along with the show's rating of TV-

14(DLV), "undermines" the Commission's indecency determination. ABC. Br. 29-30.[10]

The Commission agreed that the advisory and the rating were "relevant" and "weigh[ed] against a finding of indecency." *Forfeiture Order* ¶ 18 (SPA-9). But even taking them into account, the Commission determined that the scene remained actionably indecent. *Id*. As the Supreme Court recognized in *Pacifica*, "because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." 438 U.S. at 748. Thus, even where, as here, the complained-of scene follows relatively closely upon the warning, *see* ABC Br. 31 n.11, it is possible for a viewer to come upon the scene without having been alerted to it by the advisory or the rating, *id*. (explaining that the warning was separated from the opening scene by a 30-second recap of prior episodes). The advisory in this case, moreover, was formulated in general terms – in particular, the phrase "partial nudity" would not necessarily have put viewers on notice that the opening scene contained unobscured views of an adult woman's naked buttocks. In the end, programming

[10] A rating of TV-14 is intended to inform parents (including those with televisions equipped with a "V-chip" blocking device) that the program contains some material that many parents would find unsuitable for children under 14 years of age. The content descriptors "DLV" are intended to identify, respectively, "suggestive dialogue," "coarse or crude language," and "violence." *See* www.tvguidelines.org/ratings.htm. *See also* Brief of Intervenor Fox Television Stations, *et al.* ("Fox Br.") 31 n.20.

can remain patently offensive even if the audience has been alerted to the general nature of its content. *See, e.g.*, *Omnibus Order*, 21 FCC Rcd at 2675 ¶ 38 (advisory prior to broadcast of film *Con El Corazon En La Mano*, which contained a violent rape scene in the first 15 minutes of the broadcast, did not insulate licensee from liability). The matter was one for the Commission to weigh under the circumstances presented by each case.

C. The Forfeiture Order Is Not Inconsistent With Commission Precedent.

The result in this case also is not inconsistent with Commission decisions finding other complained-of television broadcasts not to be indecent. *See* ABC Br. 31-37; Affiliates Br. 37-44. The ABC Affiliates devote over three pages to singling out the Commission's decision not to take action against stations that aired the movie *Schindler's List*. Affiliates Br. 38-41; *see also* ABC Br. 36. But as the Commission explained, the scenes of naked concentration camp prisoners "bear[] no contextual resemblance to the material in *NYPD Blue*." *Forfeiture Order* ¶ 17 (SPA-8). If the judiciary's admonition to the Commission to take account of context is to mean anything at all, *see Pacifica*, 438 U.S. at 750, then surely the Commission must be allowed to conclude that the nudity at issue here was presented in a pandering and titillating manner that bears no resemblance to the depiction of nude concentration camp prisoners being made to run around the camp by Nazi guards as "the sick are sorted from the healthy," *Forfeiture Order*

¶ 17 (SPA-8), to determine who will live and who will die, as well as the depiction of prisoners ”disrobing and entering the showers,” Affiliates Br. 39, to what viewers are led to believe will be their deaths.[11]

ABC and the Affiliates also cite (and attach to their briefs) a one-page letter by a branch chief in the Mass Media Bureau in 1999 stating that it had no basis for further action on a complaint regarding the airing of the movie *Catch-22*. In the letter, the branch chief noted that “the segment of the movie which included nudity was very brief and appeared in context of a full length drama, the primary theme of which was the horrors of war,” and concluded, without further analysis, that the material did not “rise to the level of patent offensiveness.” *Letter to Mr. David Molina from Norman Goldstein, Chief, Complaints and Political Programming Branch* (May 26, 1999).

Petitioners’ reliance on this staff decision is foreclosed because it was unpublished. A Commission rule provides that unpublished staff decisions “may

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[11] The ABC Affiliates claim that there is no “conceivable manner by which to differentiate the two programs” other than "artistic taste." Affiliates Br. 40; *see also id*. (claiming that the Commission “blindly ignore[d] the contextual similarities between” the two broadcasts). That the ABC Affiliates cannot even “conceiv[e]” of any relevant distinction between the portrayal of concentration camp prisoners being sorted to determine who will be sent to the gas chambers and the depiction of a nude woman about to take a shower at the beginning of a modern work day, if anything demonstrates why broadcast licensees should not have the last word on what is patently offensive in light of contemporary community standards for the broadcast medium.

not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission." 47 C.F.R. § 0.445(e). *See Forfeiture Order* ¶ 17 n.55 (SPA-9). ABC states that it *now* has actual notice of the Bureau's decision regarding *Catch-22* (ABC Br. 33), which is obviously the case since it has cited it. But the Commission's regulation clearly does not permit citation by a party with this kind of "notice"; if it did, it would serve no purpose as applied to parties before the Commission because the notice requirement would, by definition, always be satisfied. Instead, the rule was plainly intended to preclude use of unpublished orders except by parties that had notice of them *at the time they took a challenged action* (and can thus make a claim of reliance). Here, because neither ABC nor its affiliates claim that they had notice of the unpublished Bureau letter at the time of the *NYPD Blue* broadcast, they are barred by regulation from relying on the letter as precedent.[12]

[12] To the extent petitioners have a different interpretation of 47 C.F.R. § 0.445(e) or will now attempt to claim the kind of "notice" it clearly requires, such arguments would be barred because they were not presented to the Commission. *See* 47 U.S.C. § 405(a) (a petition for reconsideration is "a condition precedent to judicial review" where the party seeking review "relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass"); *Capitol Telephone Co. v. FCC*, 777 F.2d 868, 871 (2d Cir. 1985).

It is settled, moreover, that "an agency is not bound by unchallenged staff decisions." *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008). Thus, even if it could be shown that *Catch-22* was indistinguishable from *NYPD Blue* (which is not the case), it would not mean that the *Commission* has engaged in inconsistent decisionmaking. *Id*. at 770 (agency actions contrary to unchallenged staff decisions "cannot be deemed arbitrary and capricious").[13]

Indecency determinations are contextual, *see Pacifica*, 438 U.S. at 750, and contextual determinations are "highly fact-specific." *Industry Guidance*, 16 FCC Rcd at 8003 ¶ 9. The Commission's authority to conclude that a broadcast "[i]n context and on balance" is indecent, *Forfeiture Order* ¶ 18 (SPA-9), is not

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[13] The other Commission decisions ABC cites are not even remotely similar to *NYPD Blue*. The scene in *America's Funniest Home Videos* (ABC Br. 21, 24) showed the buttocks of a "naked infant" who had fallen on a pacifier. *Omnibus Order*, 21 FCC Rcd at 2718 ¶ 226. The scene in *Austin Powers* involved a "musical number," played for comic effect, in which the title character's naked torso was "blocked by objects, furniture, and, in one instance, by his hands." *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 FCC Rcd 1920, 1923 ¶ 6(g). No sexual or excretory organ was shown. Neither of the Commission decisions involving *Will and Grace* and *Two and a Half Men* (ABC Br. 23-24) involved nudity; the characters in the first were fully clothed, *see Omnibus Order*, 21 FCC Rcd at 2702 ¶ 156, and the hernia examination in the second took place off-camera, *id*. at 2703 ¶ 162. The complaints regarding the broadcast of the movie *Saving Private Ryan* concerned vulgar language, not images of sexual or excretory organs. *See Forfeiture Order* ¶ 17 n.54 (SPA-8). The episode of *Family Guy* (a cartoon) also neither contained nudity nor showed any sexual organ. *Omnibus Order*, 21 FCC Rcd at 2714 ¶ 202.

foreclosed by its conclusion that other broadcasts, involving greatly different circumstances, are not indecent.

D. The Complaints Were Bona Fide.

The ABC Affiliates – but not ABC – challenge the sufficiency of the complaints that triggered the indecency proceedings that led to the *Forfeiture Order*, contending that none were made by "a *bona fide* in-market or over-the-air viewer of the complained-of material on the subject station." Affiliates Br. 51. *See also* Fox Br. 4-18.

The governing statutes and regulation do not condition the Commission's authority to impose forfeitures for violation of broadcast indecency rules on the filing of complaints; indeed, they say nothing about complaints at all. *See* 18 U.S.C. § 1464; 47 U.S.C. § 503; 47 C.F.R. § 73.3999(b). However, the Commission as a matter of policy "limit[s] the imposition of forfeiture penalties to licensees whose stations serve markets from which specific complaints were received." *Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003*, Forfeiture Order, 23 FCC Rcd 3222, 3236 ¶ 38 (2008). It does so "in light of First Amendment values" and to "preserve[] limited Commission resources," while at the same time "vindicating the interests of local residents who are directly affected by a station's airing of indecent . . . material." *Complaints Regarding Various*

Television Broadcasts Between February 2, 2002 and March 8, 2005, Order, 21 FCC Rcd 13299, 13329 ¶ 76 (2006)("*Omnibus Remand Order"*). "[T]here is no requirement," however, "that a complaint include a statement that the complainant viewed the material alleged to be indecent." *Forfeiture Order* ¶ 21 (SPA-10).

To be sure, the Commission's 2001 *Industry Guidance* stated that complaints must "generally include" documentation such as transcripts or program excerpts, the date and time of the broadcast, and station call signs, 16 FCC Rcd at 8015 ¶ 24, and they are "usually" dismissed if they lack such information, *id*. at 8015 ¶ 25. But those requirements are to assist the Commission in conducting an investigation by allowing it to "be afforded as full a record as possible to evaluate allegations of indecent programming." *Id*. at ¶ 24.

In this case, as the Commission explained, each of the complaints "specifically identified the February 25, 2003 episode of *NYPD Blue*, each stated that the material was aired on stations affiliated with the ABC Network, and each provided a significant excerpt of the allegedly indecent material." *Forfeiture Order* ¶ 22 (SPA-10). *See* A-340 to A-696. In follow-up emails, Commission staff requested further information regarding "the television station over which the complainant saw the subject program, including, if available, the station's call letters or 'the city and town in which the station you watched is located.'" *Forfeiture Order* ¶ 22 (SPA-11). *See* A-340 to A-696. The responses to the

follow-up email "permitted the staff to ensure that there was a complainant in the market of each of the ABC stations against which a forfeiture [was] imposed." *Forfeiture Order* ¶ 22 (SPA-11).

The ABC Affiliates contend that the complaints were not "*bona fide*" because they consisted of "form emails ginned-up by an advocacy group long after the episode aired." Affiliates Br. 49. *See* Fox Br. 17. But the record shows that the complaints involving *NYPD Blue* were transmitted by numerous separate individuals, *see* A-14 to A-23 (listing complaints by name of complainant). Although the complainants may have used a form provided by a third party, there is no basis for contending that the complaints do not represent the sincerely-held opinions of those individuals.

Intervenor Fox contends that the complaints are not valid because they did not expressly identify the display of buttocks that the Commission found to be indecent. Fox Br. 4, 14-16. But a complaint does not have to be "letter perfect" or "provide an exact description of the allegedly indecent material." *Forfeiture Order* ¶ 22 n.68 (SPA-10). It is enough if it gives the Commission sufficient information upon which to make a determination that further investigation is warranted. In this case, each complaint identified the scene in the February 25, 2003 *NYPD Blue* episode in which "a young boy was exposed to full adult female nudity." *E.g.*,

A-340. That is the very scene that is the subject of the *Forfeiture Order*, and the complainants' descriptions were clearly sufficient to warrant further investigation.

Nor does the Commission have a requirement that a complaint be filed "contemporaneously" with the broadcast of the show in question, or within a "specified time frame." *Forfeiture Order* ¶ 24 (SPA-11). In this case, some of the complaints were filed as early as 3 ½ months from the date of the show; all were submitted within a year after it aired. *See* A-14 to A-24. Moreover, at least one ABC station received complaints the night (and the day after) the February 2003 episode aired. *See* A-124, A-125.[14]

The Commission's decision to initiate an investigation on the basis of the complaints in this case is also consistent with its decision to dismiss the complaints against Kansas City, Missouri station KMBC-TV in the *Omnibus Remand Order*. *See* ABC Affiliates Br. 53. In that case, all of the complaints were filed "by the same individual from Alexandria, Virginia," and "none of the complaints contain[ed] any claim that the out-of-market complainant actually viewed the complained-of broadcast on KMBC-TV or any other ABC affiliate where the

[14] *See* A-125 ("I was completely shocked when surfing channels at the 9:00p hour and stumbled across the beginning of the weekly program, NYPD Blue. The nudity on network television completely disgusted me"); A-124 ("Last night while I was on the phone, my husband was surfing the channels, all of a sudden he stopped on NYPD Blue. I looked up and there on the screen was a naked woman. . . . This should not be on public television.").

material was aired outside of the safe harbor." *Omnibus Remand Order*, 21 FCC Rcd at 13328-29 ¶ 75. Where "there is nothing in the record either to tie the complaints to [the station's] local viewing area (or the local viewing area of any station where the material was aired outside of the safe harbor), *or* to suggest that the broadcast programming at issue was the subject of complaints from anyone who viewed the programming on any station that aired the material outside of the safe harbor," the Commission will dismiss indecency proceedings against a television program. *Id*. (emphasis added.) But where, as here, the Commission received "affirmative statements from the complainants tying the complaints to a particular ABC station or affiliated station," dismissal is unwarranted under Commission policies. *Forfeiture Order* ¶ 23 (SPA-11).

E. The Affiliates Were Not Deprived Of Due Process.

The ABC Affiliates also contend that the Commission deprived them of constitutional due process because it failed to provide them with a reasonable opportunity to present their objections to the *NAL*. Affiliates Br. 57. That is not correct. The *NAL* was issued on January 25, 2008 (A-126), and the Commission gave ABC and the Affiliates until February 11, 2008, or almost 2 ½ weeks, in which to respond. A-132. In that time, the Affiliates were able to prepare and submit a 70-page opposition. A-257 to A-329. *See also id*. at A-183 to A-228 (46-page opposition of ABC, Inc.). Moreover, ABC was provided notice that the

Commission was investigating indecency complaints that had been lodged against the February 25, 2003 episode of *NYPD Blue* when the Enforcement Bureau sent it the LOI in February 2004. A-26. If ABC did not see fit to inform its affiliates of the *LOI* and its responses (the record does not resolve the issue), that failure can hardly be attributed to the Commission.

The Commission's rules state that parties will be provided "a reasonable period of time (usually 30 days from the date of the notice) to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture." 47 C.F.R. § 1.80(f)(3). The rule does not state a reasonable period of time will always be 30 days. *See Forfeiture Order* ¶ 28 (SPA-13). In this case, "potential statute of limitations concerns" led to the Commission's decision to provide the stations with fewer than 30 days in which to respond to the NAL. *See* 28 U.S.C. § 2462 (five-year statute of limitations for enforcement of "any civil fine, penalty, or forfeiture").

The Affiliates point to declarations that they submitting stating that because of the time that had elapsed between the broadcast and the NAL, "pertinent records of the broadcast may be non-existent or difficult to locate and that knowledgeable witnesses may not longer be readily available." Affiliates Br. 56 (emphasis added). But the principal record in this case is the tape of the episode, which speaks for itself and which the Affiliates do not contend was difficult to obtain.

And the information regarding which stations broadcast the program, and at what times, was provided by ABC in February 2004 as part of its response to the *LOI*. *See* A-33 to A-42. The Affiliates do not contend that any other records were actually unavailable. At worst, the Affiliates argue an "inconvenience," without constitutional significance, that they successfully surmounted. *Forfeiture Order* ¶ 27 (SPA-13).

II. THE FORFEITURE ORDER DOES NOT VIOLATE THE FIRST AMENDMENT.

ABC argues that the forfeitures imposed by the Commission violate the First Amendment. ABC Br. 37-60. But the Supreme Court in *Pacifica* and the D.C. Circuit (sitting *en banc*) in *ACT III* have flatly rejected First Amendment challenges to the FCC's regulation of broadcast decency, *Pacifica*, 438 U.S. at 750; *ACT III*, 58 F.3d at 667; the Third Circuit recently reaffirmed that "because of the unique nature of the broadcast medium," the "FCC's authority to restrict indecent broadcast content is . . . constitutionally permissible." *See CBS Corp*, 2008 WL 2789307, at *5. And while two members of this Court in *Fox* "question[ed] whether the FCC's indecency test can survive First Amendment scrutiny," 489 F.3d at 463, they candidly admitted that their observation was "dicta," *id*. at 462 n.12; *see United States v. Acosta*, 502 F.3d 54, 60-61 (2d Cir.

2007), *cert. denied*, 128 S. Ct. 1097 (2008) (court not "bound" by dicta in prior decisions).[15]

A. Government Has Broad Power To Regulate Broadcast Speech.

Outside the broadcast arena, a restriction on the content of protected speech will generally be upheld only if it satisfies strict First Amendment scrutiny – that is, if the restriction furthers a government interest that is "compelling" and is the "least restrictive means" to further that interest. *See Sable Comm'ns of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989). But regulation of the broadcast spectrum – a "scarce and valuable national resource" – "involves unique considerations." *FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 376 (1984). As a result, "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748. Even where regulation of broadcast speech that "lies at the heart of First Amendment protection" is concerned, the government's interest need only be "substantial" and the restriction need only be "narrowly tailored" to further that interest – not the least restrictive

[15] The Supreme Court has granted certiorari in *Fox*, *see* 128 S. Ct. 1647 (2008) (No. 07-582). Argument is scheduled for November 4, 2008.

available. *League of Women Voters,* 468 U.S. at 380, 381; *accord Fox*, 489 F.3d at 464-65; *Prayze FM v. FCC*, 214 F.3d 245, 252 (2d Cir. 2000).[16]

For one thing, not only have the broadcast media "established a uniquely pervasive presence in the lives of all Americans," but "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica*, 438 U.S. at 748. Moreover, "broadcasting is uniquely accessible to children, even those too young to read." *Id*. at 749. Unlike indecent material sold in bookstores and movie theaters, for example, indecent speech broadcast over the air may not "be withheld from the young without restricting the expression at its source." *Id*. "In light of these differences, radio and television broadcasts may properly be subject to different – and often more restrictive – regulation than is permissible for other media under the First Amendment." *ACT III*, 58 F.3d at 660.

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[16] ABC contends, nonetheless, that "strict scrutiny is applicable" to the *Forfeiture Order*. ABC Br. 56. Dicta in the *Fox* decision viewed the identical claim as foreclosed by the Supreme Court's recognition of the broadcast media as "exceptional" for First Amendment purposes. 489 F.3d at 464-65. And although the D.C. Circuit in *ACT III* said that it was applying strict scrutiny in affirming the Commission's indecency regulations, it stressed that in doing so it had "take[n] into account the unique context of the broadcast medium." 58 F.3d at 660.

B. The FCC's Indecency Rules Are A Narrowly Tailored Means of Advancing The Government's Substantial Interests.

It is well-settled that government "has a compelling interest in supporting parental supervision of what children see and hear on the public airwaves." *ACT III*, 58 F.3d at 661. Moreover, the government's own interest in "safeguarding the physical and psychological well-being of a minor" is also "compelling," since "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *ACT III*, 58 F.3d at 661 (quoting *New York v. Ferber*, 458 U.S. 747, 756-57 (1982)). *See Pacifica*, 438 U.S. at 749 (the government's interests in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" can "justif[y] the regulation of otherwise protected expression") (internal quotes omitted). Indeed, the government's child-protective interests "extend[] beyond shielding them from physical and psychological harm," *ACT III*, 58 F.3d at 662, to reach the regulation of materials that would "impair" minors' "ethical and moral development," *id*. (quoting *Ginsberg v. New York*, 390 U.S. 629, 641 (1968)).

The Commission's broadcast indecency regulation is also narrowly tailored to advance the government's compelling interests in protecting children. By prohibiting indecent broadcasting between the hours of "6 a.m. and 10 p.m.," 47 C.F.R. § 73.3999(b), indecent programming is channeled to the late hours of the

day when children are less likely to be in the broadcast audience. As the D.C. Circuit in *ACT III* explained, the Commission's 10 p.m. to 6 a.m. safe harbor protects children without "unnecessarily interfer[ing] with the ability of adults to watch or listen to" indecent material, "both because substantial numbers of [adults] are active" during those hours, "and because adults have so many alternative ways of satisfying their tastes at other times." 58 F.3d at 667. The Commission's safe harbor is thus "narrowly tailored to serve the Government's compelling interest in the well-being of our youth." *Id*.[17]

ABC contends that the *Pacifica* Court "left little doubt" that prohibiting broadcasts "with brief depictions of nudity or fleeting expletives would be constitutionally troubling." ABC Br. 40. That is not correct. *Pacifica* involved spoken words; the Court was not confronted by the broadcast of images, which have a starkly different and greater impact on the viewer. And even as to words, *Pacifica* expressly reserved the question of whether the Commission could sanction "an occasional expletive." 438 U.S. at 750. *United States v. Playboy Entm't Group, Inc*., 529 U.S. 803 (2000), cited by ABC (Br. 40), involved the regulation of cable television, not broadcasting. *See* 529 U.S. at 815. And although

[17] Indeed, the *ACT III* court found that a narrower midnight to 6 a.m. safe harbor would also be narrowly tailored. *Id*. However, it instructed the Commission to limit the ban to the period from 10 p.m. to 6 a.m. in order to eliminate the safe harbor's disparate treatment of two different categories of broadcasters. *Id*. at 669-70.

the statute at issue in that case was directed at "signal bleed" that undermined signal scrambling, and could reach instances in which sexually explicit images were unscrambled "for just a few seconds," *id*. at 819, the constitutional difficulty was that the government had failed to submit evidence "on the number of households actually exposed to [such] signal bleed and thus ha[d] not quantified the actual extent of the problem," *id*. at 820. In any case, the nudity in this case was not fleeting – it extended over a significant period of time and was the centerpiece of the opening scene of the episode. *Forfeiture Order* ¶ 49 (SPA-21).

C. The Order Is Not The Product of Unconstitutionally Vague or Subjective Policies.

ABC contends that the FCC's broadcast indecency policies are unconstitutionally "vague" and "subjective." ABC Br. 43-50. But the Commission's rules rest on a definition of indecency that "passed muster" in the Supreme Court's decision in *Pacifica*. *Dial Info. Servs. v. FCC*, 938 F.2d 1535, 1541 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992) (rejecting vagueness challenge to law prohibiting "indecent" telephone messages. As the D.C. Circuit explained, the FCC's definition of indecency "is virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case," so that when the Supreme Court "h[e]ld the Carlin monologue indecent," it necessarily signaled that it "did not regard the term 'indecent' as so vague that persons 'of common intelligence must necessarily guess at its meaning

and differ as to its application.'" *ACT I*, 852 F.2d at 1338; *accord Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) ("*ACT II*"); *ACT III*, 58 F.3d at 659.

To be sure, the Supreme Court in *Reno v. ACLU*, 521 U.S. 844 (1997), subsequently invalidated a statute regulating indecency on the Internet. *See* ABC Br. 46-47. But the Supreme Court in *Reno* expressly distinguished *Pacifica*, for three reasons. First, the Court noted that the Commission is "an agency that [has] been regulating radio stations for decades," and that the Commission's regulations simply "designate when – rather than whether – it would be permissible" to air indecent material." 521 U.S. at 867. The statute in *Reno*, by contrast, was not administered by an expert agency, and it contained "broad categorical prohibitions" that were "not limited to particular times." *Id*. Second, *Reno* involved a criminal statute, whereas the Commission has no power to impose criminal sanctions for indecent broadcasts. *See id*. at 867, 872. Third, the Court recognized that, unlike the Internet, the broadcast medium has traditionally "received the most limited First Amendment protection." *Id*. at 867; *see also id*. at 868 (acknowledging the precedent recognizing the "special justifications for regulation of the broadcast media that are not applicable to other speakers"). ABC erroneously contends that the *Reno* Court did not distinguish *Pacifica* on "the subject of vagueness" (Br. 47; *see also* Fox Br. 21); the opinion makes clear that

the Court in *Reno* was addressing the government's argument that *Pacifica* supported the constitutionality of the Internet indecency statute in all respects. 521 U.S. at 864.

Moreover, since *Pacifica* was decided, the Commission has adopted administrative guidance that serves to further "narrow potentially vague or arbitrary interpretations" of its rules. *See Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 504 (1982). The FCC's *Industry Guidance* identifies the factors that the FCC will examine in making indecency determinations, and it gives further content to the definition of indecency in 18 U.S.C. § 1464 and the Commission's rules. The Commission's elaboration of the indecency standard has reduced any vagueness inherent in the statute and the rule. *Cf. K-S Pharms., Inc. v. American Home Prods. Corp*., 962 F.2d 728, 732 (7th Cir. 1992) (noting that "specificity may be created through the process of construction," and that "[c]larity via interpretation is enough even when the law affects political speech"). Finally, if ABC was genuinely uncertain whether its broadcast would run afoul of the Commission's indecency rules, it need only have availed itself of the safe harbor and aired the program after 10 p.m. local time in all markets (rather than just some markets) to have avoided any risk of liability.

"The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the

nature of the enactment." *Flipside*, 455 U.S. at 498. As the Supreme Court has recognized, "[t]here are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision." *Smith v. Goguen*, 415 U.S. 566, 581 (1974). Thus, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).

Moreover, "[a] concept like 'indecent' is not verifiable as a concept of hard science." *Pacifica Found. v. FCC*, 556 F.2d 9, 33 (D.C. Cir. 1977) (Leventhal, J., dissenting). Given the variety of human expression and the critical role of context, a perfectly precise description of indecency is likely unattainable. Certainly the petitioners in this case have not suggested "any better language" that could "effectively . . . carry out" Congress's purposes. *United States v. Petrillo*, 332 U.S. 1, 7 (1947). *See also ACT I*, 852 F.2d at 1338 ("No reasonable formulation tighter than the one the Commission has announced has been suggested"). Because the Commission's formulation "is sufficiently defined to provide guidance to the person of ordinary intelligence in the conduct of his affairs," it satisfies the Constitution. *Dial Info. Servs.*, 938 F.2d at 1541 (quotation marks omitted).

ABC also contends that the "Commission's indecency determinations are based on Commissioners' subjective views of a program's merits (or even their personal tastes)." ABC Br. 48. ABC's argument on this point is inconsistent with

its earlier claim that the quality of a program is "relevant because 'merit is properly treated as a factor in determining whether material is patently offensive.'" *Id.* at 26 (quoting *ACT I*, 852 F.2d at 1340). In any event, ABC's argument is incorrect; "the Commission does not apply its own 'personal sensibilities'" in making indecency determinations. *Forfeiture Order* ¶ 42 (SPA-19). Instead, the Commission determines whether material is patently offensive by reference to "contemporary community standards for the broadcast medium." *Forfeiture Order* ¶ 12 (SPA-6); *Industry Guidance*, 16 FCC Rcd at 8002 ¶ 8. Like the jury in an obscenity case, the Commission is entitled to rely on its own knowledge of community standards in determining whether the material is patently offensive. *See Smith v. United States*, 431 U.S. 291, 305 (1977). In addition, the Commission has the advantage of being an expert agency that has accrued a "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium." *Forfeiture Order* ¶ 42 (SPA-19) (quoting *Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 ¶ 12 (2004)).

The differing results in this case and the broadcast of *Schindler's List* (ABC Br. 48) do not show that the Commission engages in subjective decisionmaking. They simply illustrate that context is crucial to indecency analysis. *See* pp. 33-34

supra (discussing *Schindler's List*). Indeed, the FCC's accounting for context was crucial to the Supreme Court's decision in *Pacifica* to uphold the agency's authority to regulate broadcast indecency. 438 U.S. at 750 (emphasizing that the Commission's decision "rested entirely on a nuisance rationale under which context is all-important"). As the plurality in *Pacifica* pointed out, "indecency is largely a function of context – it cannot be adequately judged in the abstract." *Id.* at 742.

D. The V-Chip Does Not Render The Forfeiture Order Unconstitutional.

Finally, ABC contends that the *Forfeiture Order* cannot be narrowly tailored because "V-Chip" technology, which attempts to provide a means for parents to block objectionable television programming, "constitute[s] a far less restrictive and more targeted way to prevent undesired viewing by children." ABC Br. 51. As an initial matter, under the intermediate First Amendment scrutiny applicable here, *see* p. 44 *supra*, as long as "the means chosen are not substantially broader than necessary to achieve the government's interest," government regulations are not invalid simply "because some alternative solution is marginally less intrusive on a speaker's First Amendment interests." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 217-18 (1997).

In any event, the Commission considered and rejected the contention that the V-Chip was an adequate alternative. Although the Commission "agree[d] that the

V-Chip provides some assistance in protecting children from indecent material," the agency concluded for several reasons that the V-Chip "does not eliminate the need for the Commission to enforce its indecency rules." *Forfeiture Order* ¶ 47 (SPA-20). And as this Court has recognized, a less restrictive but ineffective alternative cannot foreclose government regulation. *Dial Info. Servs.*, 938 F.2d at 1542.

First, and perhaps most importantly for present purposes, ABC is challenging the constitutionality of the forfeiture imposed in this case, and at the time the *NYPD Blue* episode aired in February 2003 a decided majority of television sets were not equipped with a V-chip, as ABC itself acknowledges. ABC Br. 51 (noting estimates that as of July 2005, only "119 million of the 280 million televisions in America had a V-chip"). The V-chip thus provided no alternative at all for millions of American households when *NYPD Blue* aired. This is in stark contrast to the blocking alternative at issue in *Playboy*, 529 U.S. at 816, which was available to all cable households upon request, or to the blocking and filtering software at issue in *Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004), that can be installed on any computer.[18]

[18] The upcoming February 2009 transition to digital over-the-air broadcasting on blocking technologies (ABC Br. 52) likewise has no relevance to the Commission's authority to impose a forfeiture on a broadcast which aired in February 2003.

Second, the Commission pointed out, "most parents who have a television set with a V-chip are unaware of its existence or do not know how to use it." *Forfeiture Order* ¶ 47 & n.136 (SPA-20). Indeed, a 2003 study found that only 27 percent of mothers could figure out how to program the V-Chip, and "many mothers who might otherwise have used the V-Chip were frustrated by an inability to get it to work properly." *Id*. at n. 136 (citing Annenberg Public Policy Center, *Parents' Use of the V-Chip to Supervise Children's Television Use* 4 (2003)).

Finally, "some categories of programming, including news and sports, are not rated" and therefore cannot be blocked; as to the remaining programming, the Commission has found that there are "serious questions about the accuracy of the television ratings on which the effectiveness of a V-Chip depends." *Forfeiture Order* ¶ 47 & n.138 (citing, among others, Henry J. Kaiser Family Foundation, *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* 5 (2004) (nearly 4 in 10 parents of children aged 2-17 stated that most television programs are not rated accurately)). ABC contends that the *NYPD Blue* episode was "accurately rated." ABC Br. 55. But the content descriptors in ABC's ratings simply signaled that the program might contain violence as well as coarse language and dialogue (*see* Fox Br. 31 & n.20); it nowhere hinted that the episode might contained images of a naked woman's buttocks. (The separate advisory would have been invisible to a V-chip, which works off the episode's rating).

ABC mistakenly contends that Congress (in 1996) and the Commission (in 1998) "found the V-Chip effective at protecting children from mature material." ABC Br. 53. On the contrary, Congress simply found that "[p]roviding parents . . . with the technological tools that allow them easily to block violent, sexual, or other programming that they believe harmful to their children" would be a narrowly tailored means of promoting a compelling government interest. Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(a)(9), 110 Stat. 56, 140. But as the Commission has explained, the V-Chip in practice has not proved to be a technological tool that allows parents "easily to block" harmful programming, and therefore does not satisfy the preconditions in Congress's statement.

Similarly, the Commission's 1998 declaration that the industry's V-chip ratings rules were "acceptable" and "in compliance with the specific requirements" of federal law, see *Implementation of Section 551 of the Telecommunications Act of 1996, Video Programming Ratings*, Report and Order, 13 FCC Rcd 8232, 8233 ¶ 2 (1998), approved the V-Chip ratings rules in the abstract; it did not make any determination as to the sufficiency of their application. *Id*. Indeed, the Commission at that time emphasized that "to be useful, the rating system must be applied in a consistent and accurate manner," and noted that the industry had committed "to independent scientific research and evaluation of the rating system

once the [V]-chip is in place." *Id*. at 8243 ¶ 22. And the Commission expressed its expectation "that the research and evaluation of the rating system, once the system has been in use, will allow for adjustments and improvements"; it "view[ed] this commitment as an important element in the proposal" before it. *Id*. The Commission in 1998 thus simply granted the industry's request to "give the rating system a fair chance to work," *id*. at 8246 ¶ 32; it did not commit to turn a blind eye to the substantial evidence, accumulated since then, that the V-Chip has proved ineffective in practice.[19]

* * * * *

ABC aired images of an adult actress's naked buttocks in the opening scene of the February 25, 2003 episode of *NYPD Blue* at a time (before 10 p.m.) when many children likely remained in the audience. Despite changing times, images of fully unclothed buttocks are still virtually never displayed in public or on broadcast television. The Commission's determination that the broadcast violated federal

[19] Nor did the Supreme Court in *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), "recognize[] that the V-Chip is a feasible and effective alternative to a ban on indecent speech." Fox Br. 32. Instead, the Court noted only that the then-upcoming V-chip requirement could provide a less restrictive alternative to the requirement for cable operators to segregate and block patently offensive programming that was at issue in that case. 518 U.S. at 755-56. The Court was in no position to opine upon the effectiveness of the V-chip as it has since been implemented. Indeed, its opinion understandably allowed for the possibility that the V-chip (among other alternatives) might "not adequately protect children from 'patently offensive' material." 518 U.S. at 757.

rules against broadcast indecency, and that monetary forfeitures were warranted, should be upheld.

CONCLUSION

The petitions for review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents FCC and the United States" contains 13949 words, as counted by the word count function of the word processing software, Microsoft Word 2003, with which this brief was prepared.

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ANTI-VIRUS CERTIFICATION

I hereby certify that on August 22, 2008, I scanned the pdf version of the foregoing brief for the Respondents FCC and United States using a current version of Symantec Antivirus and that no viruses were detected during that scan.

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Jacob M. Lewis

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ABC, Inc., et al., Petitioners,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing printed "Brief For Respondents FCC And The United States" was served this 22nd day of August, 2008, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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