SUPPLEMENTAL BRIEF FOR THE FCC AND THE UNITED STATES

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

06-3575

CBS CORPORATION, CBS BROADCASTING, INC., CBS
TELEVISION STATIONS INC., CBS STATIONS GROUP OF
TEXAS L.P., AND KUTV HOLDINGS, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS
COMMISSION

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SUPPLEMENTAL BRIEF FOR THE FCC AND THE UNITED STATES

INTRODUCTION AND SUMMARY

On May 4, 2009, the Supreme Court vacated this Court's decision overturning the Commission's imposition of a $550,000 forfeiture on CBS for its broadcast of the 2004 Super Bowl halftime show, at which Justin Timberlake famously tore off part of Janet Jackson's bustier, briefly exposing her breast to a nationwide audience of tens of millions.

This Court had ruled that the FCC's decision was arbitrary and capricious under the Administrative Procedure Act because it embodied an unexplained change from prior policy exempting fleeting material from indecency enforcement. *CBS Corp. v. FCC*, 535 F.3d 167, 188-89 (3d Cir. 2008). The Court remanded the matter to the agency to determine whether CBS acted recklessly by failing "to exercise proper control over the unscripted content of its program." *Id*. at 207. The Supreme Court granted the government's petition for a writ of certiorari, vacated this Court's judgment, and remanded the case for further consideration in light of *FCC v. Fox Television Stations, Inc*., 129 S. Ct. 1800 (2009).

The *Fox* decision directly supports the Commission's view that the Commission's prior broadcast indecency exemption for fleeting material applied only to expletives, not images. In upholding the Commission's decision to expand the scope of its indecency policies to encompass fleeting expletives, 129 S. Ct. at 1812, the Supreme Court expressly recognized that those policies had until then "preserved a distinction between literal and nonliteral (or 'expletive') uses of evocative language" *id*. at 1807. While "'deliberate and repetitive use'" was necessary to an indecency finding "when a complaint focuses solely on the use of nonliteral expletives," a "literal 'description *or depiction* of sexual or excretory functions'" had to be "examined in context to determine whether it is patently offensive." *Id*. (quoting *Pacifica Found*., 2 FCC Rcd 2698, 2699 ¶ 13 (1987)

(emphasis added)). Indeed, the Supreme Court's understanding of the limited nature of the fleeting expletive exemption was integral to its determination that the Commission's decision to eliminate the exemption was "entirely rational." 129 S. Ct at 1812.

An image quite clearly is not an expletive; it is (paradigmatically) a "depiction." Thus, as the *Fox* Courts interpretation of the pertinent regulatory history now makes clear, the repetition requirement that exempted fleeting expletives from enforcement has no logical application to images.

We thus respectfully urge the Court not to adhere to its prior APA holding. Instead, we suggest that the Court – consistent with the second part of its prior opinion – remand the case to the agency so that it can determine whether CBS's violation of federal indecency prohibitions was "willful" because it was reckless. As this Court noted, a "broadcaster's failure to use available preventative technology, such as a delay mechanism, when airing live programming may, depending on the circumstances, constitute recklessness." 535 F.3d at 207. A remand is appropriate to permit the Commission, now with the benefit of this Court's illumination of the legal standard, to determine whether there is adequate record support for its prior conclusion that by televising the 2004 Super Bowl halftime show, CBS "failed to take adequate precautions to prevent the airing of

unscripted indecent material." *Forfeiture Order*, 21 FCC Rcd 2760, 2770 ¶ 20 (2006).

STATEMENT OF JURISDICTION

The FCC had jurisdiction under 47 U.S.C. § 503(b). CBS filed a timely petition for review, and this Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATEMENT OF THE ISSUE

Whether the Commission properly imposed a forfeiture on CBS after concluding that the network's broadcast of Janet Jackson's exposed breast during the 2004 Super Bowl halftime show willfully violated the federal statutory and regulatory prohibitions against broadcast indecency.

STATEMENT OF THE CASE

During CBS's broadcast of the 2004 Super Bowl halftime show, Justin Timberlake ripped off part of the bustier of fellow performer Janet Jackson, exposing her breast to tens of millions of television viewers. The Commission concluded that the broadcast violated federal statutory and regulatory prohibitions against the broadcast of indecent material, and it imposed a $550,000 forfeiture. CBS paid the forfeiture under protest and petitioned for review. This Court reversed the Commission's decision and remanded the case to the Commission. *CBS Corp. v. FCC*, 535 F.3d 167, 209 (3d Cir. 2008). The Supreme Court subsequently granted the government's petition for a writ of certiorari, vacated this

Court's decision, and remanded the case for further proceedings in light of *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009). *See FCC v. CBS Corp.*, 129 S. Ct. 2176 (2009).

STATEMENT OF RELATED CASES

Respondents are unaware of any case in this Court or any other court or agency that involves the administrative decisions under review here. The U.S. Court of Appeals for the Second Circuit has before it, on remand from the Supreme Court, network broadcasters' challenges to FCC's indecency determinations concerning two different broadcasts. *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *reversed and remanded*, 129 S. Ct. 1800 (2009). The same court has heard argument in a separate challenge to a third broadcast. *See ABC Inc. v. FCC*, No. 08-0841-ag (2d Cir. argued Feb. 5, 2009). And the government has filed suit to enforce a forfeiture imposed by reason of a fourth broadcast. *See United States v. Fox Television Stations, Inc.*, No. 1:08-cv-00584-PLF (D.D.C. docketed Apr. 4, 2008).

STATEMENT OF FACTS

This case concerns the Commission's imposition of a $550,000 forfeiture on CBS for its February 1, 2004, broadcast of the Super Bowl XXXVIII halftime show – an event which has now taken its place in television history. At the halftime show's finale, which aired at approximately 8:30 p.m. on the East Coast,

Janet Jackson performed a duet with Justin Timberlake entitled "Rock Your Body." During the song, Timberlake repeatedly grabbed Jackson and rubbed against her in a sexually suggestive manner. *See Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd 2760, 2762 ¶ 4 (2006) ("*Forfeiture Order*") (The *Forfeiture Order* is reproduced beginning at J.A. 0006.). As Timberlake did this, he asked Jackson to allow him to "rock your body" and "just let me rock you 'til the break of day." *Id.* At the culminating moment of both the song and the halftime show, Timberlake sang the lyric, "gonna have you naked by the end of this song" and simultaneously pulled off the right portion of Jackson's bustier, clearly exposing her breast to a nationwide television audience. *See id.*

Soon after the incident, CBS issued a statement that expressed "deep[] regret[]," emphasized that "[t]he moment did not conform to CBS broadcast standards," and "apologize[d] to anyone who was offended." J.A. 101. Viacom's president and chief operating officer subsequently told a congressional committee that "everyone at CBS and everyone at MTV was shocked and appalled . . . by what transpired" and that the material "went far beyond what is acceptable standards for our broadcast network." *The Broadcast Decency Act of 2004*: *Hearings on H.R. 3717 Before the Subcomm. on Telecomm. and the Internet of the*

House Comm. on Energy and Commerce on H.R. 3717, 108th Cong., 2d Sess. 37 (2004) (statement of Mel Karmazin) ("*Hearings*").

A. Commission Proceedings

The Commission received "an unprecedented number" of complaints about the nudity broadcast during the halftime show. *See Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230, 19239 ¶ 2 (2004) ("*NAL*") (J.A. 511). Many were from parents who had assumed that the Super Bowl and its halftime show would be appropriate to watch with their children. *See, e.g.*, J.A. 770 ("My [seven-year-old] daughter was so embarrassed that she could not even speak out loud. She whispered, Oh my goodness, Mommy, did you see that?").[1]

The Commission issued a letter of inquiry, asking CBS to provide a tape of the broadcast and information about its production. After considering CBS's written responses, the Commission issued a Notice of Apparent Liability, concluding that CBS had apparently violated the statutory and regulatory

[1] *See also* J.A. 694 ("My five and seven year old were old enough to understand the humiliation of ripping her clothes off and the forum was ridiculously inappropriate"); J.A. 691 ("My family including my children (ages 12, 10, 7) were watching the Super Bowl half-time show when Janet Jackson and Justin Timberlake revealed one of Janet's breasts. This is unacceptable behavior for this time of day and this type of forum."); J.A. 771 ("Have you tried to explain to a child or adolescent why it is okay to rip off anyone's clothes, male or female?").

restrictions on broadcast indecency, and proposing a forfeiture of $550,000 against the television stations the network owned and operated. *See NAL* ¶ 24.

After considering CBS's response to the *NAL*, the Commission reaffirmed its tentative conclusions in a forfeiture order. In doing so, the Commission applied the factors outlined in a 2001 policy statement. *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) ("*Industry Guidance*"). In that policy statement, the Commission had explained that the agency's indecency decisions rested on "two fundamental determinations." *Id*. at 8002 ¶ 7. First, "the material alleged to be indecent must fall within the subject matter scope of our indecency definition – that is, the material must describe or depict sexual or excretory organs or activities." *Id*. Second, "the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium." *Id*. at 8002 ¶ 8. The policy statement also identified three "principal factors" that were "significant" to the agency's determination whether material is patently offensive: "(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 stressed 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.*

Applying this framework, the Commission found that CBS's broadcast of the Super Bowl halftime show fell within the scope of its indecency definition because the broadcast of "an exposed female breast" depicted a sexual organ. *Forfeiture Order* ¶ 9. Next, the Commission found that the material was patently offensive as measured by contemporary community standards for the broadcast medium. *See id.* ¶¶ 10-14.

The Commission first found that the material broadcast was graphic and explicit. *See id.* ¶ 11. In reaching that conclusion, the Commission relied on *Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd 1751 (2004) (*Young Broadcasting*), released shortly before CBS's Super Bowl broadcast, which had found an apparent indecency violation when a television station briefly aired images of a performer's penis. Stating that "a scene showing nude sexual organs is graphic and explicit if the nudity is readily discernible," the Commission found that the image of Jackson's "nude breast [was] clear and recognizable to the average viewer." *Forfeiture Order* ¶ 11. The Commission further found that the explicitness of the image was reinforced by the presence of Jackson and

Timberlake (the show's headline performers) in the center of the screen and by the fact that Timberlake's dramatic ripping off of Jackson's bustier drew the viewer's attention to what was exposed. *Id.*

Second, the Commission concluded that the broadcast of Jackson's exposed breast was shocking and pandering. It noted that the exposure of Jackson's breast occurred just as Timberlake sang "gonna have you naked by the end of this song" and after "repeated references to sexual activities" and sexually suggestive choreography. *Id.* ¶ 13 (footnote omitted). The display was particularly "shocking to the viewing audience," the Commission stated, because it occurred "during a prime time broadcast of a sporting event that was marketed as family entertainment and contained no warning that it would include nudity." *Id.*

Third, while the Commission acknowledged that the image of Jackson's breast was "fleeting," *see id.* ¶ 12,[2] it observed that its policy statement had made clear that "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness." *Id*. (quoting *Industry Guidance*, 16 FCC Rcd at 8009 ¶ 19). In this case, the Commission concluded that the "brevity" of the exposure was outweighed by its explicitness and shocking nature. *Id.*

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[2] The Commission accepted CBS's assertion that the nudity lasted for "9/16 of a second." *Id*. ¶ 8 n.27.

The Commission also determined that the violation was "willful" and could therefore provide a basis for the imposition of a monetary forfeiture. *Id.* ¶¶ 15-25; *see* 47 U.S.C. § 503(b)(1). Among other things, the Commission explained, CBS "consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast." *Forfeiture Order* ¶ 15. Although CBS was "acutely aware of the risk of unscripted indecent material in this production," it "failed to take adequate precautions that were available to it to prevent that risk from materializing." *Id.* ¶ 17. The Commission emphasized that a news item posted on the MTV website four days before the Super Bowl quoted Jackson's choreographer as promising that the halftime show would deliver "some shocking moments," but that CBS chose not to investigate these statements or determine what "shock[]" Jackson's choreographer intended. *Id.* ¶ 19. The agency also noted that National Football League officials "specifically expressed concerns to CBS about the costume that Jackson would wear during the halftime show," and "raised concerns about Timberlake's scripted line 'gonna have you naked by the end of this song' that anticipated the stunt resulting in the broadcast nudity." *Id.*

The Commission subsequently denied CBS's request for reconsideration of the forfeiture order. *See Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd 6653 (2006) ("*Reconsideration Order*") (J.A. 0040).

B. This Court's Prior Decision.

On review, this Court affirmed the Commission's authority "to restrict indecent broadcast content," explaining that such restrictions are "constitutionally permissible because of the unique nature of the broadcast medium." *CBS Corp. v. FCC*, 535 F.3d 167, 175 (3d Cir. 2008) (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 750-51 (1978)). The Court nevertheless held that the Commission's forfeiture order was invalid under the Administrative Procedure Act because it constituted an unexplained departure from a policy "that isolated or fleeting material did not fall within the scope of actionable indecency." *Id.* at 174-75. The Court rejected, as against "the balance of the evidence," the Commission's "contention that its restrained enforcement policy for fleeting material extended only to fleeting words and not to fleeting images." *Id.* at 188. Reviewing the Commission's precedents, the Court held that the Commission's decisions "treated broadcasted images and words interchangeably," so "it follow[ed] that the Commission's exception for fleeting material . . . likewise treated images and words alike." *Id.*

The Court refused to credit the Commission's reliance on its explanation in the 2001 policy statement that "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness." *Industry Guidance*, 16 FCC Rcd at 8009 ¶ 19. In the Court's view, "[t]he 'relatively fleeting references' identified by that sentence are distinguishable from

the truly 'fleeting' broadcast material the FCC had included in its fleeting material policy." 535 F.3d at 180. The Court also disagreed with the Commission's view that its decision in *Young Broadcasting* exemplified the agency's "preexisting . . . policy of treating fleeting images differently from fleeting words." 535 F.3d at 186. Instead, the Court concluded that the decision was "best understood as the Commission's initial effort to abandon its restrained enforcement policy on fleeting material." *Id*. at 187. The Court did not discuss the Commission's 1987 determination (cited by the Commission at p. 25 of its brief) that "deliberate and repetitive use . . . is a requisite to a finding of indecency" only where "a complaint focuses solely on the use of expletives," but not where "speech involving the description or depiction of sexual or excretory functions" is concerned. *Pacifica*, 2 FCC Rcd at 2699 ¶ 13.

The Court also questioned the Commission's finding that CBS had the requisite mental state to be liable for Jackson and Timberlake's performance. 535 F.3d at 189. The Court stated that liability could not be premised on a respondeat superior theory because "Jackson and Timberlake were independent contractors rather than employees of CBS." *Id*. at 198. It also rejected the contention that CBS broadcast licensees could be held vicariously liable for violating a non-delegable duty not to broadcast indecent material. *Id*. at 200-03. Instead, the Court determined that "[r]ecklessness would appear to suffice as the appropriate

scienter threshold for the broadcast indecency regime," *id*. at 206, and it suggested that a "broadcaster's failure to use available preventative technology, such as a delay mechanism, when airing live programming may, depending on the circumstances, constitute recklessness," *id*. at 207. The Court stated that it could not determine from the existing record whether CBS had acted recklessly in failing to employ a video delay technology in this case. *Id*. at 208. The Court accordingly vacated and remanded the FCC's decision "for further proceedings consistent with this opinion." *Id*. at 209.[3]

C. The *Fox* Decision.

A month after CBS's broadcast of the 2004 Super Bowl halftime show, the Commission changed its policy concerning fleeting expletives. The previous year, NBC had presented a live broadcast of the Golden Globe Awards, at which the rock singer Bono used the F-Word while receiving an award. The FCC determined that the broadcast was indecent. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975 (2004) (*Golden Globe Awards Order*). At that time, it disavowed, as "no

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[3] Judge Rendell dissented in part. *Id*. at 209-10. She disagreed with the majority's decision to discuss, "in dicta," "the level of scienter required" to establish a violation of the Commission's broadcast indecency rules. *Id*. at 209. She also disagreed with the decision to remand the case, stating that the agency was free to explain its change in policy "in the next case or issue a declaratory ruling." *Id*. at 210.

longer good law," "prior Commission and staff action" that had "indicated that isolated or fleeting broadcasts of the 'F-Word' . . . are not indecent or would not be acted upon," and stated "that the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Id.* at 4980 ¶ 12.

Two years later, the FCC applied the new policy articulated in the *Golden Globe Awards Order* when it concluded that two broadcasts of the Billboard Music Awards that included isolated uses of expletives were indecent. *Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 FCC Rcd. 13299 (2006). In reaffirming that the fleeting nature of an utterance would no longer preclude a finding of indecency, the Commission reasoned that "categorically requiring repeated use of expletives in order to find material indecent" would be "inconsistent with our general approach to indecency enforcement" and its "stress[] [on] the critical nature of context." *Id.* at 13308 ¶ 23. The Second Circuit granted petitions for review and vacated that order, concluding that the Commission had violated the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, because it had failed to provide an adequate explanation for its change in policy. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007).

D. Developments in the Supreme Court.

The government filed petitions for Supreme Court review of the Second Circuit's decision in *Fox* and this Court's decision in *CBS*. In its petition in *Fox*, the government argued that, contrary to the Second Circuit's holding, the Commission had "provided a thorough, reasoned explanation for its change in policy" regarding fleeting expletives. Petition for a Writ of Certiorari, *FCC v. Fox Television Stations, Inc*., No. 07-582, at 15. In its petition in *CBS*, the government continued to maintain that the FCC had not changed its policy concerning indecent visual depictions, and that this Court had mistakenly "relied on a purported 'fleeting images' exemption to indecency enforcement that in fact has never existed." Petition for a Writ of Certiorari, *FCC v. CBS Corp*., No. 08-653, at 13. Because the issues raised by both the *Fox* and *CBS* decisions "concern APA challenges to the FCC's enforcement of broadcast-indecency prohibitions," "involve the contours of the Commission's indecency policies over the past three decades," and relate to "the deference due to the Commission's actions and interpretations under the APA," the government urged that its petition in *CBS* "be held [by the Supreme Court] pending the disposition of *Fox*," and then disposed of accordingly. *Id*. at 14. CBS opposed the government's request for Supreme Court review. Brief in Opposition, *FCC v. CBS Corp*., No. 08-653, at 25-26.

On April 28, 2009, the Supreme Court issued its decision in *Fox*, reversing the Second Circuit and remanding for further proceedings. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009). Characterizing the broadcasters' administrative law challenges as "quibble[s] with the Commission's policy choices," rather than with "the explanation it has given," the Court declined to "'substitute [our] judgment for that of the agency,'" and ruled that the Commission's orders were "neither arbitrary nor capricious." *Id.* at 1819 (citation omitted).

In a passage that is particularly noteworthy for present purposes, the Supreme Court made clear in *Fox* that it understood the limited nature of the Commission's exception to indecency enforcement for "expletives" – that is, vulgarities that are not used literally to describe or depict sexual or excretory activities or organs. As the Court observed, when the Commission "expanded its enforcement beyond the 'repetitive use of specific words or phrases,' it preserved a distinction between literal and nonliteral (or 'expletive') uses of evocative language." 129 S. Ct. at 1807 (citing *Pacifica*, 2 FCC Rcd at 2699 ¶ 13). The Court pointed out the Commission's explanation that "each literal 'description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive,' but that 'deliberate and repetitive use ... is a requisite to a finding of indecency' when a complaint focuses solely on the use

of nonliteral expletives." *Id*. (citing *Pacifica*, 2 FCC Rcd at 2699 ¶ 13). *See id*. at 1809 (referring to the Commission's establishment of a "strict dichotomy between 'expletives' and 'descriptions or depictions of sexual or excretory functions'") (citation omitted)

On May 4, 2009, the Supreme Court granted the government's petition for a writ of certiorari in this case, vacated this Court's judgment and remanded the matter "for further consideration in light of" its decision in *Fox*. *FCC v. CBS Corp*., 129 S. Ct. 2176 (2009). On June 4, 2009, this Court ordered "a new round of briefing in light of the Supreme Court's decision in *Fox*."

SUMMARY OF ARGUMENT

The Supreme Court's decision in *Fox* confirms that there is not, and has never been, an exemption to federal broadcast indecency proscriptions for "fleeting images." The Commission's decision to impose a forfeiture on CBS for televising images of Janet Jackson's breast during the 2004 Super Bowl halftime show thus did not depart from prior agency policy, and there was no change in course that the Commission was obligated to explain.

1. More than 20 years ago, the Commission stated that "deliberate and repetitive use in a patently offensive manner" was "a requisite to a finding of indecency" *only* where "a complaint focuses solely on the use of expletives." *Pacifica*, 2 FCC Rcd at 2699 ¶ 13. By contrast, "speech involving the description

or depiction of sexual or excretory functions must be examined in context to determine whether it is" indecent. *Id*. The Commission's 2001 policy statement on indecency subsequently underscored that "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness." *Industry Guidance*, 16 FCC Rcd at 8009 ¶ 19. The Commission's decision in *Young Broadcasting* stands clearly for this proposition. In a decision issued shortly before CBS's Super Bowl broadcast, the Commission proposed to impose an indecency forfeiture on a broadcaster who aired an image of a performer's penis, even though that image was displayed for "less than a second." 19 FCC Rcd at 1755.

2. In *Fox*, the Supreme Court made clear that it understood that the Commission's prior indecency policies had preserved a "distinction between literal and nonliteral" uses of language, according to which "description[s]" or "depiction[s]" remained subject to contextual examination, but complaints involving "nonliteral expletives" would be entertained only if there was "deliberate and repetitive use." 129 S. Ct. at 1807. This understanding of Commission policy was integral to the Court's decision to uphold the Commission's elimination of the exemption for fleeting "expletives" on the grounds that this decision was reasonable and consistent with the agency's general refusal to "create safe harbors for particular types of broadcasts." *Id*. at 1813. *Fox*'s recognition that the

Commission's prior indecency exemption for fleeting material extended only to "nonliteral expletives" and not to descriptions or depictions cannot be reconciled with this Court's prior determination that the Commission's policy applied to all fleeting images and words. Quite clearly, a policy that includes expletives and that does not extend to descriptions or depictions cannot extend to images, which by their very nature, "depict." The Commission's order thus did not depart from prior policy.

3. The Commission should also be given an opportunity on remand to determine whether CBS's indecency violation was willful. The Commission found that CBS failed to take adequate precautions to prevent the airing of indecency during the halftime show even though CBS was acutely "[a]ware of the risk of visual and spoken deviations from the script and staging." *Forfeiture Order* ¶ 20. This Court agreed that CBS's violation could be willful if "reckless," 535 F.3d at 206, and that "[a] broadcaster's failure to use available preventative technology, such as a delay mechanism, when airing live programming may, depending on the circumstances, constitute recklessness." *Id.* at 207. The evidence in this case strongly suggests that CBS had access to video delay technology at the time of the 2004 Super Bowl. The network successfully implemented a video delay at the Grammy Awards, which was broadcast just a week after the Super Bowl. This Court nevertheless found the evidence "regarding the availability, history and other

details of video delay technology" too "scant" to determine whether video delay technology was available at the time of the halftime show. *Id*. at 208. As the Court recognized in its prior decision, the Commission should be afforded the opportunity on remand to determine whether CBS was reckless not to use video delay technology for this broadcast.

STANDARD OF REVIEW

Under the Administrative Procedure Act, agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). That standard of review is "narrow"; while the agency must "examine the relevant data and articulate a satisfactory explanation for its action," it is settled that "a court is not to substitute its judgment for that of the agency," and must "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Fox*, 129 S. Ct. at 1810 (citations omitted).

The Commission's interpretation of the federal broadcast indecency statutes is due deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). "If a statute is ambiguous," the court is required "to accept the agency's construction" so long as it is "reasonable." *National Cable & Telecomm. Ass'n v. Brand X Internet Servs., Inc.*, 545 U.S. 967, 980 (2005). Likewise, an agency's interpretation of its own rules is "controlling" unless

"plainly erroneous or inconsistent with the regulation." *Auer v. Robbins,* 519 U.S. 452, 461 (1997) (citations and quotation marks omitted). Finally, an agency's interpretation of its own precedent must be upheld if "reasonable." *Boca Airport, Inc. v. FAA*, 389 F.3d 185, 190 (D.C. Cir. 2004) (quoting *Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998)).

ARGUMENT

I. THE COMMISSION REASONABLY CONCLUDED THAT THE HALFTIME SHOW WAS INDECENT.

The Commission properly determined that CBS's broadcast of the 2004 Super Bowl halftime show violated federal proscriptions on broadcast indecency. A broadcast licensee is "'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'" *Fox*, 129 S. Ct at 1806 (quoting *CBS. Inc. v. FCC*, 453 U.S. 367, 395 (1981)). Among a licensee's public-interest obligations, first embodied in the Radio Act of 1927, is the responsibility to refrain from airing descriptions or depictions of sexual or excretory organs that are patently offensive under the community standards for the broadcast medium during times when children are likely to be in the audience. *See id.*; *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). The Commission reasonably determined in this case that the graphic and shocking, albeit brief, exposure of Janet Jackson's bare right breast to a nationwide audience composed of millions of children and adults was indecent.

This Court's prior determination that the Commission's decision was an unexplained departure from past policy exempting fleeting images from its indecency rules was, as the Supreme Court's decision in *Fox* makes clear, based on a misunderstanding of Commission rules and precedent. The Commission has never exempted fleeting *images* – as opposed to fleeting *expletives* – from regulation.

A. The Exposure of Janet Jackson's Breast To A Nationwide Audience Was Patently Offensive Under Community Standards for Broadcasting.

The Commission properly applied its longstanding analytic framework in concluding that CBS's broadcast of the 2004 Super Bowl halftime show was indecent.

As a threshold matter, there can be no question (and CBS has not disputed) that the display of Janet Jackson's naked right breast fell within the subject-matter scope of the Commission's indecency test in that it "describe[d] or depict[ed]" a "sexual or excretory organ." *Forfeiture Order* ¶ 9; *Industry Guidance*, 16 FCC Rcd at 8002 ¶ 7.

The Commission therefore proceeded to the next step of its indecency inquiry, which asks whether the material was "patently offensive as measured by contemporary community standards for the broadcast medium." *Industry Guidance*, 16 FCC Rcd at 8002 ¶ 8 (emphasis omitted). The Commission

evaluated CBS's broadcast by assessing three factors – the explicitness of the material, whether the material was dwelled upon or repeated, and whether the material was shocking or titillating. *Forfeiture Order* ¶¶ 11-13; *see Industry Guidance*, 16 FCC Rcd at 8003 ¶ 10.

The Commission properly found that the image of Timberlake ripping off a portion of Jackson's bustier to expose her bare breast was graphic and explicit because the exposure was "clear and recognizable to the average viewer." *Forfeiture Order* ¶ 11. As the Commission explained, the nudity was "readily discernible"; Jackson and Timberlake were at the center of the screen, and Timberlake's ripping motion drew attention to Jackson's breast as he exposed it. *Id*. The Commission also correctly found that the broadcast material was "pandering, titillating and shocking to the viewing audience." *Id*. ¶ 13. As the Commission explained, the exposure of Jackson's breast was the culminating moment of a duet with sexualized lyrics and choreography and occurred just as Timberlake sang "gonna have you naked by the end of this song." *Id*. The shocking nature of the material was heightened by its inclusion in a highly prominent broadcast that was "marketed as family entertainment and contained no warning that it would include nudity." *Id*. Indeed, a CBS executive conceded that everyone at the network was "shocked" by the incident. *See supra* at 6.

The Commission acknowledged that the image of Jackson's breast was "fleeting." *Forfeiture Order* ¶ 12. But it explained that "'even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness.'" *Id.* (quoting *Industry Guidance*, 16 FCC Fcd at 8009 ¶ 19). In this case, the Commission found, the "brevity" of the nudity was "outweighed" by its graphic and shocking nature. *Id.* The Commission therefore concluded that "in context and on balance," CBS's broadcast of the 2004 Super Bowl halftime show "was patently offensive under contemporary community standards for the broadcast medium and thus indecent." *Id.* ¶ 14.

B. There Was Never A "Fleeting Image" Exception to Indecency Enforcement.

This Court's prior opinion acknowledged the Commission's "authority to regulate indecent broadcast content." 535 F.3d at 174. It also did not dispute the Commission's determination that CBS's broadcast of the 2004 Super Bowl halftime show was patently offensive under community standards for the broadcast medium. The Court nonetheless found the Commission's decision to be an unexplained departure from what it perceived as an agency policy that "isolated or fleeting material" of all types – images as well as words – "did not fall within the scope of actionable indecency." *Id.* As we explain below, there was no such per se rule immunizing fleeting images from indecency enforcement. The Commission's decision in this case therefore did not diverge from prior policy.

The agency did not have a duty to explain why it did not adhere to a policy that never existed.

The Commission set forth the contours of its indecency analysis for fleeting material in its 1987 *Pacifica* order, which the Commission cited in its prior brief (at 25), but the Court's prior opinion did not discuss. "While speech that is indecent must involve more than an isolated use of an offensive word," the Commission stated in *Pacifica*, "repetitive use of specific words or phrases is not an absolute requirement for a finding of indecency." *Pacifica*, 2 FCC Rcd at 2699 ¶ 13. Instead, the Commission stated, "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency" only where "a complaint focuses solely on the use of expletives." *Id.* By contrast, "[w]hen 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." *Id.* Accordingly, "speech involving the description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive." *Id.* *Pacifica* thus made clear that repetition was essential to a finding of indecency *only* where expletives (nonliteral vulgar language) were concerned. By contrast, "depictions" or verbal "descriptions" of sexual or excretory functions did not have to be repeated to be found indecent.

An image is quite clearly not an "expletive." Instead, it is (by definition) a "depiction." *See, e.g., American Heritage Dict. of the English Lang*. 487 (4th ed. 2000) ("depict" means "[t]o represent in a picture or sculpture"). The Commission's 1987 decision in *Pacifica* put broadcasters on notice that the requirement that indecent expletives be repeated in order to be actionably indecent had no application to depictions, including indecent images.

In *Fox*, the Supreme Court recognized the Commission's distinction between expletives and depictions; indeed, the distinction was integral to the Court's decision. The Supreme Court made clear that it understood that the Commission's policies had "preserved a distinction between literal and nonliteral (or 'expletive') uses of evocative language." *Id*. at 1807 (citing *Pacifica*, 2 FCC Rcd at 2699 ¶ 13). The Court was likewise aware that the Commission had explained that "each literal 'description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive,' but that 'deliberate and repetitive use ... is a requisite to a finding of indecency' *when a complaint focuses solely on the use of nonliteral expletives*," *id*. (emphasis added), *i.e.*, not in all cases. In another portion of its opinion, the Court referred to the "strict dichotomy between 'expletives' and 'descriptions or depictions of sexual or excretory functions.'" *Id.* at 1809.

It was on the basis of this "strict dichotomy" in the Commission's prior policy that the Court upheld the Commission's recent decision to eliminate the exception for fleeting expletives. Thus, in upholding the Commission's change in policy as "entirely rational," the Court found it "certainly reasonable" for the Commission "to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words, requiring repetitive use to render *only* the latter indecent." 129 S. Ct. at 1812 (emphasis added). In doing so, the Court necessarily recognized that the Commission had up until then established an exception that applied "only" to "nonliteral uses of offensive words," *id*., and thus did not cover images.

The Supreme Court also explained that the Commission's decision to eliminate its exception for fleeting expletives was entirely consistent with its general approach to indecency, which "has declined to create safe harbors for particular types of broadcasts." *Id*. at 1813.[4] As the Court stated, "[t]he Commission could rationally decide it needed to step away from its old regime where nonrepetitive use of an expletive was per se nonactionable because that was 'at odds with the Commission's overall enforcement policy.' *Id*. (citation omitted).

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[4] Thus, in its 1987 order in *Pacifica*, the Commission disavowed any suggestion that indecency findings would be limited "to deliberate, repetitive use of the seven words actually contained in the George Carlin monologue determined to be indecent in [*FCC v*.] *Pacifica*, [438 U.S. 726 (1978)]." 2 FCC Rcd at 2699 ¶ 12.

This Court's prior determination that the Commission's exception for fleeting expletives broadly covered all "fleeting material," 535 F.3d at 188, thus flies in the face of the Commission's historically narrow approach to such safe harbors recognized by the Supreme Court in *Fox*.

This Court's understanding that the Commission had a generally applicable exception to indecency enforcement covering fleeting images is also inconsistent with the Commission's discussion of its indecency analysis in the 2001 policy statement. As the Commission there explained, one factor for assessing the patent offensiveness of allegedly indecent programming is "whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities." *Industry Guidance*, 16 FCC Rcd at 8003 ¶ 10 (emphasis omitted). At the same time, the Commission emphasized, "[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*. The Commission thus explained that while the "passing or fleeting" nature of "sexual or excretory references" would "tend[] to weigh against a finding of indecency," *id*. at 8008 ¶ 17, "even relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness," *id*. at 8009 ¶ 19. The examples the Commission gave of matter found not indecent "because it was fleeting and isolated" involved the passing use of expletives, *id*. at

8008-8009 ¶ 18; the examples of "fleeting references . . . found indecent" involved descriptions of sexual activities, *id*. at 8009 ¶ 19.

In its prior opinion, this Court stated that the indecent fleeting references identified by the Commission in its policy statement were "distinguishable from . . . truly 'fleeting' broadcast material . . . such as a brief glimpse of nudity or isolated use of an expletive." 535 F.3d at 180. But each example identified by the Commission in 2001 was very brief, consisting of statements of only two sentences in length. *Industry Guidance*, 16 FCC Rcd at 8009 ¶ 19. Moreover, the advice to which the examples were appended made clear that the "relatively fleeting" nature of a reference would not immunize it from an indecency determination "where other factors contribute to a finding of patent offensiveness." *Id*. There is no basis in the Commission's orders for the view that the agency created two categories – "relatively fleeting" material that could be indecent, *id.*, and "'truly fleeting'" material that could not, 535 F.3d at 180. We also note that the Super Bowl halftime show did not involve only "a brief glimpse of nudity." *Id*. "Rather," as the Commission explained, "it showed a man tearing off a portion of a woman's clothing to reveal her naked breast during a highly sexualized performance and while he sang "gonna have you naked by the end of this song." *Forfeiture Order* ¶ 13 (distinguishing the case of a "broadcast in which a woman's dress strap breaks, accidentally revealing her breast for a fraction of a second").

The Commission's order in *Young Broadcasting*, which was issued just days before the 2004 Super Bowl took place, clarified even further the Commission's policy toward indecent images. In that case, the Commission proposed to impose a forfeiture on a broadcast licensee for televising an image of a performer's penis for "less than a second." *Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd 1751, 1755 ¶ 12 (2004). As in this case, the Commission explained that, "although the actual exposure . . . was fleeting," *id.*, "the weight of the pandering, titillating and shocking manner of presentation, coupled with the graphic and explicit nature of the . . . nudity," made the broadcast indecent. *Id.* at 1757 ¶ 14. The Commission's decision in *Young Broadcasting* demonstrates unmistakably that while the agency (formerly) had a fleeting-expletives exception to its indecency enforcement policy, that exception did not apply to images of nudity, however briefly displayed.

This Court dismissed *Young Broadcasting* "as the Commission's initial effort to abandon its restrained enforcement policy on fleeting material." 535 F.3d at 187. That characterization begs the relevant question, because it assumes that the Commission's exception for fleeting expletives extended to images in the first place. Why the Commission would have "abandoned" that policy *sub silentio* is also left entirely unexplained. The more straightforward interpretation is that the

Commission in *Young Broadcasting* refrained from discussing a fleeting nudity exemption because no such exemption existed.

The panel's prior determination that the Commission had previously recognized an "exception for fleeting material" that "treated images and words alike," 535 F.3d at 188, rested on its view that the agency had "consistently applied identical standards and engaged in identical analyses" regardless of whether indecency complaints "were based on words or images." *Id*. at 184. It found the Commission's reliance on *Young Broadcasting* "unavailing," for example, because the decision made "no distinction, express or implied, between words and images in reaching its indecency determination." *Id*. at 186. The Court likewise stated that the Commission had not treated the nudity in a broadcast of the film *Schindler's List* "differently – factually or legally – from a complaint for indecency based on a spoken utterance." *Id*. at 184 (citing *In re WPBN/WTOM License Subsidiary, Inc*., 15 FCC Rcd 1838, 1841 (2000)).

It was error for the panel to engage in a de novo review of the Commission's "characterization of its policy history." 535 F.3d at 183. Instead, the panel should have asked whether the Commission's interpretation of its own rules and precedents was reasonable, and, if so, deferred to the Commission's view. *Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998). The reasonableness of the Commission's interpretation becomes clear when one focuses not the

Commission's general analytic framework for evaluating broadcast indecency, which applies equally to words and images, but instead on the agency's specific statements regarding fleeting material, which have expressly distinguished between expletives and other material. *See Pacifica*, 2 FCC Rcd at 2699 ¶ 13. Whether material is dwelled upon has always been a relevant factor under the Commission's three-part test for patent offensiveness, *see Industry Guidance*, 16 FCC Rcd at 8003 ¶10, but only in a narrow category of cases – those involving expletives – was repetition required. *Pacifica*, 2 FCC Rcd at 2699 ¶ 13. That requirement, which until the *Golden Globes Awards Order* effectively exempted isolated expletives from indecency enforcement, had no application to other material, including sexually explicit images or nudity. That is why the Commission in *Young Broadcasting* expressly rejected the contention that the indecent images at issue were "equivalent to other instances in which the Commission has ruled that fleeting remarks in live, unscripted broadcasts do not meet the indecency definition." 19 FCC Rcd at 1755 ¶ 12.

The Commission's decision to grant a license renewal in *WGBH Educational Found.*, 69 FCC 2d 1250 (1978), does not suggest a different policy toward fleeting visual images. The panel correctly stated that the Commission's indecency analysis in *WGBH* "made no distinction between words and images (nudity or otherwise)." 535 F.3d at 185. But the full story is that although the

objecting party in that case complained that the licensee had broadcast a variety of allegedly indecent material, including "nudity," 69 FCC 2d at 1250 ¶ 2, the Commission's order did not discuss the allegation of nudity at all, *id*. at 1254 ¶ 10 & n.6 (examining the complained-of "words").

Likewise, nothing of significance can be gleaned from the various unpublished staff decisions dismissing indecency complaints involving "sexually explicit imagery" that were attached to CBS's August 13, 2007 Rule 28(j) letter. *See* 535 F.3d at 185. As this Court recognized, "the FCC summarily rejected each of these complaints as 'not actionably indecent.'" *Id*. The use of the same summary rejection form reflects a matter of administrative convenience and does not provide evidence that the agency treated words and images alike for all purposes: the staff's analysis was nowhere set forth in the letters.[5]

The panel's exclusive focus on the Commission's general indecency framework, rather than the agency's actual treatment of fleeting material, is also at odds with the commonsense distinction between the very different impacts associated with broadcast words and broadcast images. "The hackneyed expression, 'one picture is worth a thousand words' fails to convey adequately the

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[5] In any event, even if FCC staff had expressly engaged in such treatment, unpublished staff decisions that are not endorsed by the Commission are not binding on the agency. *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008); 47 C.F.R. § 0.445(e).

comparison between the impact of the televised portrayal of actual events upon the viewer . . . and that of the spoken or written word upon the listener or reader." *United States v. Martin*, 746 F.2d 964, 971-972 (3d Cir. 1984). *See Regan v. Time, Inc*., 468 U.S. 641, 678 (1984) (Brennan, J., concurring in part and dissenting in part) ("illustrations are an extremely important form of expression for which there is no genuine substitute."). Given that difference, there is no basis to assume that because the Commission permitted an exemption for isolated expletives, it would necessarily allow a parallel exemption for televised pictures of sexual organs or activities.

By the same token, the panel's suggestion that the Commission's *Golden Globe Awards Order* "excis[ed] only one category of fleeting material – fleeting expletives – from the policy," thereby leaving "a residual policy on [all] other categories of fleeting material," including images, "in effect," 535 F.3d at 181, makes little sense. If that were the case, it would suggest that the Commission left the more egregious category (fleeting images) unregulated, while extending the indecency prohibition to fleeting expletives. On the contrary, as the Supreme Court made clear in *Fox*, the Commission's decision to eliminate the fleeting expletives exception did not create an anomaly, but instead rationalized indecency enforcement by eliminating an exception that was otherwise "at odds with the Commission's overall enforcement policy." 129 S. Ct. at 1813 (citation omitted).

II. THE COMMISSION SHOULD BE PERMITTED TO PROVE THAT CBS'S VIOLATION WAS WILLFUL BECAUSE IT WAS RECKLESS.

While we ask the Court to revisit its prior APA holding in light of *Fox* and conclude that the Commission's imposition of a forfeiture on CBS did not involve a change in agency policy, we agree with the Court that a remand is required for the agency to examine whether CBS may properly be held liable for the halftime incident. *See* 535 F.3d. at 189-208.

Section 503 of the Communications Act authorizes the Commission to impose forfeitures on anyone who "violated any provision of section . . . 1464, 47 U.S.C. § 503(b)(1)(D), or on anyone who has "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," *id*. 503(b)(1)(B). The Act defines "willful" as the "conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f). *See* H.R. Conf. Rep. No. 97-765, at 51 (1982) *reprinted in* 1982 U.S.C.C.A.N. 2261, 2295 (definition applicable to section 503 as well as section 312).

The Court found the Commission's interpretation of the statutory scheme "unclear." "The FCC's orders," the Court stated, "may be read as penalizing a violation of 18 U.S.C. § 1464 under section 503(b)(1)(B)," or they "may be understood as penalizing CBS's violation of the indecency provision of 47 C.F.R.

§ 73.3999 under section 503(b)(1)(B) but not penalizing CBS's violation of the indecency provision of 18 U.S.C. § 1464." 535 F.3d at 204.

The *Forfeiture Order* sets out the agency's determination that CBS "willfully violat[ed]" *both* "18 U.S.C. § 1464 and section 73.3999 of the Commission's rules." *See Forfeiture Order* ¶ 38 (ordering clause). To be sure, "[u]nlike section 503(b)(1)(B), the language of section 503(b)(1)(D) does not include the term 'willful.'" 535 F.3d at 205. But rather than exploring whether a lower standard of scienter might be applicable to enforce section 1464 by itself, the Commission generally (and in this case) has applied the Communications Act's willfulness standard to civil enforcement in all cases that involve both a violation of that statute and of the Commission's indecency rule. *See Forfeiture Order* ¶¶ 15-25 (finding CBS's violation "willful" without distinguishing between its statutory and regulatory violation). The *Forfeiture Order* is not entirely clear on this point, however, and a remand would provide the Commission with an opportunity to explain its position on these questions.

Likewise, a remand would afford the Commission an opportunity to determine whether the facts here support finding CBS liable under the legal standard articulated by the Court for broadcast indecency cases. Here, the Commission found that CBS willfully violated federal indecency proscriptions because it "consciously and deliberately broadcast the halftime show, whether or

not it intended to broadcast nudity, and because it consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast." *Forfeiture Order* ¶ 15. As the Commission explained, CBS "was acutely aware of the risk of unscripted indecent material" in the halftime show, "but failed to take adequate precautions that were available to it to prevent that risk from materializing." *Id.* ¶ 17. The loudest alarm bells were sounded in the public comments of Jackson's choreographer, who was quoted – in a story posted on the MTV website three days before the Super Bowl – as promising that Jackson's performance would include "some shocking moments," adding "I don't think the Super Bowl has ever seen a performance like this." *Id.* ¶ 19; J.A. 507. These statements, by a person intimately familiar with Jackson's planned performance, should have at the very least put CBS on notice that Jackson and Timberlake might be planning to diverge from their script. But rather than inquiring about what "shocking" surprises were in store, CBS made a "calculated decision . . . to rely on a five-second audio delay that would enable it to bleep offensive language but would not enable it to block unscripted visual moments." *Forfeiture Order*, ¶ 20. In holding CBS responsible for its broadcast under these circumstances, the Commission observed that "[a] contrary result would permit a broadcast licensee to stage a show that 'pushes the envelope,' send that show out over the air waves, knowingly taking the risk that performers will engage in offensive unscripted acts

or use offensive unscripted language, and then disavow responsibility – leaving no one legally responsible for the result." *Id.* ¶ 22.

In its prior decision, this Court held that "scienter is the constitutional minimum showing for penalizing the speech or expression of broadcasters," 535 F.3d at 205, but that "[r]ecklessness would appear to suffice as the appropriate scienter threshold," *id.* at 206. As the Court explained, "scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct," *id.* (citing *Carter v. United States*, 530 U.S. 255, 269 (2000)), and that "[i]n some circumstances, recklessness is considered a sufficiently culpable mental state for the purposes of imposing liability for an act." *Id.* (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 (1976)). CBS does not take issue with this Court's determination that a broadcaster can engage in a willful violation of federal indecency prohibitions by being reckless. *See* CBS Supp. Br. 8.

This Court went on to hold that "[i]n the broadcast indecency context, a broadcaster might act recklessly if it fails to exercise proper control over the unscripted content of its programming." 535 F.3d at 207. In particular, the Court held, "[a] broadcaster's failure to use available preventative technology, such as a delay mechanism, when airing live programming may, depending on the circumstances, constitute recklessness." *Id.* The Court was unable, however, to

resolve definitively whether CBS was reckless in this case because it could not determine whether video delay technology was available at the time of the halftime show. *Id*. at 208 & n.36.

The Commission had pointed to CBS's use of a video delay for the 2004 Grammy Awards only seven days after the Super Bowl[6] as strong evidence that the broadcaster could have employed such technology at the time of the halftime show. *Forfeiture Order* ¶ 20. This Court was less sure: "the state of the art even shortly after the Halftime Show does not necessarily refute CBS's contention that video delay technology was newly created for the awards show as a reaction to the Halftime Show incident but otherwise unavailable prior to that time." 535 F.3d at 208. Now that the Court has identified this issue as "central" to the recklessness inquiry, *see id*. at 208 n.36, the Commission should have the opportunity to examine it on remand and place it in the context of CBS's overall conduct.

It is well settled that the proper disposition under the Administrative Procedure Act where a court is dissatisfied with an agency's explanation of its decision is a remand to the agency for further proceedings. Thus, in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985), the Supreme Court explained: "If the record before the agency does not support the agency action, if

[6] The 46th annual Grammy Awards were broadcast by CBS the following Sunday, February 8, 2004. *See* www.cbs.com/specials/46grammys.

the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." That is the proper course here.[7]

CBS contends that "even if the Commission were to find that CBS had been 'reckless'" in broadcasting the halftime show, a remand would be "futile," because "the broadcast of a fleeting image . . . was not actionably indecent under the then-existing rules." CBS Supp. Br. 8. But as we have shown in Part I, *supra*, the Commission's (now-withdrawn) exemption for fleeting expletives never applied to images at all. If this Court agrees with our contention, the Commission's inquiry into recklessness on remand could lead to a determination that CBS "willfully"

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[7] The Commission also determined that CBS was responsible for the actions of Jackson and Timberlake under principles of respondeat superior, *see Forfeiture Order* ¶¶ 23-25, and in light of the "nondelegable nature of broadcast licensees' responsibility for their programming," *Reconsideration Order* ¶ 23. In its prior decision, this Court rejected both arguments, holding that Jackson and Timberlake "were acting as independent contractors," 535 F.3d at 198, and that "the First Amendment requires that the FCC prove scienter when it seeks to hold a broadcaster liable for indecent material," even though a broadcaster may not "sidestep its obligations . . . to avoid the broadcast of indecent material, through routine delegation to third parties." *Id.* at 200. The government did not petition the Supreme Court to review these rulings, and no longer presses those contentions in this Court.

violated federal broadcast indecency prohibitions.[8] Moreover, as this Court earlier recognized, a remand will allow the Commission to clarify its "interpretation and application" of its statutory authority to impose broadcast indecency forfeitures pursuant to 47 U.S.C. § 503(b)(1), as well as to perform its broadcast indecency policymaking role by taking action, even if "declaratory in nature," to further spell out its broadcast indecency rules. *See* 535 F.3d at 209. A remand therefore is not futile.[9]

CONCLUSION

The Commission's determination that CBS's broadcast of the 2004 Super Bowl halftime show violated federal broadcast indecency prohibitions should be affirmed. The Commission's determination that CBS's conduct was "willful"

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[8] CBS's reliance (Supp. Br. 7-8) on *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009), is misplaced. That case held that the word "knowingly" as employed in the federal criminal identity theft statute requires that the government prove the defendant knew the means of identification he used belonged to another person. 129 S. Ct. at 1894. Here, the Communications Act makes clear that a violation need only be "willful," a term defined to include "omission[s]" as well as "commission[s]," "irrespective of any intent to violate" the provisions of the Act or the Commission's rules thereunder. 47 U.S.C. § 312(f).

[9] We agree with CBS (Supp. Br. 9) that there is no need at this time for this Court to address CBS's constitutional arguments. Those arguments are of continuing significance only if the Commission determines on remand that the broadcaster's conduct in airing the exposure of Janet Jackson's breast was reckless. If the Commission makes such a determination, CBS will be free to seek further review and press its constitutional claims in any subsequent appeal. In any event, CBS's constitutional arguments fail for the reasons we provided previously. *See* FCC Br. 51-61.

should be remanded to permit the Commission to determine whether video delay technology was available to CBS at the time of the broadcast and whether CBS's conduct was therefore reckless.

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SEPTEMBER 15, 2009

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

CBS CORPORATION, CBS BROADCASTING, Inc., CBS Television Stations Inc., CBS Stations Group of Texas L.P., and KUTV Holdings, Inc.,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

06-3575

COMBINED CERTIFICATE OF COMPLIANCE

Pursuant to the type-volume limitations of Fed. R. App. P. 32, I hereby certify that the accompanying "Supplemental Brief for the FCC and the United States" has been prepared in a proportionally spaced typeface (14 point Times New Roman) using Microsoft Word 2003 and contains 9879 words.

Pursuant to 3d Cir. L.A.R. 31.1(c), I further certify that the text of the electronic version of the brief is identical to the text in the paper copies, and that the submitted PDF has been scanned for viruses with Symantec Endpoint Protection version 11 and that no virus has been detected.

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SEPTEMBER 15, 2009

06-3575

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CBS Corporation, Petitioner

v.

Federal Communications Commission and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Lori Alexiou, hereby certify that on September 15, 2009, I electronically filed the foregoing Supplemental Brief for the FCC and the United States with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system and causing ten paper copies sent by first-class U.S. mail. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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