06-1760-ag(L)

06-2750-ag (Con), 06-5358-ag (Con)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FOX TELEVISION STATIONS, INC., CBS BROADCASTING, INC., WLS TELEVISION, INC., KTRK TELEVISION, INC., KMBC HEARST-ARGYLE TELEVISION, INC., ABC, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents,

NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., NBC TELEVISION AFFILIATES, FBC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES, CENTER FOR THE CREATIVE COMMUNITY, INC., DOING BUSINESS AS CENTER FOR CREATIVE VOICES IN MEDIA, INC., ABC TELEVISION AFFILIATES ASSOCIATION,

Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS FCC AND UNITED STATES

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UNITED STATES COURT OF APPEALS FOR THE
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FOX TELEVISION STATIONS, INC., CBS BROADCASTING, INC., WLS TELEVISION, INC., KTRK TELEVISION, INC., KMBC HEARST-ARGYLE TELEVISION, INC., ABC, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

Respondents.

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

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES

STATEMENT OF JURISDICTION

The FCC had jurisdiction under 47 U.S.C. § 503 and 5 U.S.C. § 554(e) to hold that Fox's broadcast of the 2002 and 2003 *Billboard Music Awards* were indecent within the meaning of federal prohibitions against the broadcast of indecent material. *See* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999. Fox 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 ISSUES

The 2002 and 2003 *Billboard Music Awards* were broadcast in prime time by Fox to a nationwide audience. During the 2002 broadcast, the entertainer Cher uttered the F-Word; during the 2003 broadcast, the actress Nicole Richie uttered the F-Word and the S-Word. The Commission determined that the broadcasts violated federal statutory and regulatory restrictions against the broadcast of material that is "obscene, indecent or profane," *see* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999, but imposed no sanction.

The questions presented are:

1. Whether the Commission correctly determined that, when no sanction was imposed on Fox, it was unnecessary to inquire into Fox's state of mind before determining that the broadcasts were indecent?

2. Whether Commission properly held that the statutes and regulations upon which the Commission's order is based are sufficiently tailored to advance the government's substantial interests in protecting children from indecent material?

3. Whether the Commission rightly concluded that the statutes and regulations upon which the Commission's order is based are not unconstitutionally vague?

STATEMENT OF THE CASE

While receiving an award during the Fox Television Network's prime-time broadcast of the 2002 *Billboard Music Awards*, Cher, the entertainer, made the following statement: "I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em." The next year, while presenting an award during Fox's prime-time broadcast of the same awards show, Nicole Richie, a star on Fox's program *The Simple Life*, asked, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." The Commission ruled that these comments were indecent and profane in violation of federal law, but it imposed no sanction. Fox petitioned for review.

In a divided opinion, this Court vacated and remanded, concluding that the Commission's order was invalid under the Administrative Procedure Act because the FCC did not provide a reasoned explanation of its decision to change its prior policy that had exempted expletives from enforcement so long as they were not repeated. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007).

The Supreme Court reversed and remanded, finding the Commission's explanation of its policy change rational and its orders neither arbitrary nor capricious. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009). The case is before this Court on remand.

STATEMENT OF FACTS

I. THE COMMUNICATIONS ACT AND THE REGULATION OF BROADCAST INDECENCY.

The Communications Act of 1934 is designed "to maintain the control of the United States over all the channels of radio transmission" by "provid[ing] for the use of such channels" under licenses that are granted "for limited periods of time," 47 U.S.C. § 301, and that are issued and renewed only upon a finding by the FCC that "the public interest, convenience, and necessity" will thereby be served. 47 U.S.C. §§ 309(a), (k)(1)(A). 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)). In this respect, "[t]he licensee is in many ways a 'trustee' for the public in the operation of his channel." *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 478 (2d Cir. 1971).

"One of the burdens that licensees shoulder" is the prohibition on broadcasting indecent material during times of the day when children are likely to be in the audience. *Fox*, 129 S. Ct. at 1806. This obligation is embodied in the Communications Act's specific prohibition on the broadcast of "any obscene, indecent, or profane language." Pub. L. No. 73-416, § 326, 48 Stat. 1091, *codified in relevant part at* 18 U.S.C. § 1464. *See also* 47 C.F.R. § 73.3999.

A. Pacifica

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court upheld the constitutionality of the Commission's interpretation and enforcement of the prohibition against broadcast indecency. *Pacifica* involved a New York City radio station's afternoon broadcast of a monologue by the comedian George Carlin containing a series of highly vulgar words. *See id.* at 729-30. The Commission had concluded that the program violated 18 U.S.C. § 1464: The agency explained that while not obscene, the broadcast was indecent in that it "'describe[d], 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.'" *Citizen's Complaint Against Pacifica Found. Station WBAI (FM),* 56 FCC 2d 94, 98 (1975). The Supreme Court concluded that there was "no basis for disagreeing with the Commission's conclusion that indecent language was used in the broadcast." *Pacifica*, 438 U.S. at 741.

The Court then went on to reject petitioners' constitutional challenges to the Commission's order. "[O]f all forms of communication," the Court explained, "it is broadcasting that has received the most limited First Amendment protection." *Id.* at 748. "The reasons for these distinctions are complex," the Court stated, "but two have relevance to the present case." *Id*. "First, the broadcast media have

established a uniquely pervasive presence in the lives of all Americans." *Id*. This is because broadcast indecency "confronts the citizen, not only in public, but also in the privacy of the home," and because "the broadcast audience is constantly tuning in and out," so that "prior warnings cannot completely protect the listener or viewer from unexpected program content." *Id*. "Second, broadcasting is uniquely accessible to children, even those too young to read." *Id*. at 749. Not only can an indecent broadcast "enlarge[] a child's vocabulary in an instant," but unlike other forms of expression, broadcasting may not be "withheld from the young without restricting the expression at its source." *Id*. The Court accordingly held 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).

B. Subsequent Regulatory Developments

For a number of years after *Pacifica*, the Commission limited the exercise of its authority to regulate indecent broadcasts to the seven words used in the Carlin monologue. *See New Indecency Enforcement Standards to Be Applied to All Broadcast & Amateur Radio Licensees*, 2 FCC Rcd 2726, 2726 (1987). In a series of orders released in 1987, however, the Commission found that this limited enforcement policy was "unduly narrow as a matter of law and inconsistent with

our enforcement responsibilities under Section 1464." *Infinity Broad. Corp.*, 3 FCC Rcd 930 ¶ 5 (1987) ("*Infinity Reconsideration Order*"). The Commission explained that the prior policy's exclusive focus "on specific words . . . made neither legal nor policy sense," since it meant that "material that portrayed sexual or excretory activities or organs in as patently offensive a manner as the earlier Carlin monologue – and, consequently, of concern with respect to its exposure to children – would have been permissible to broadcast simply because it avoided certain words." *Id*. The Commission consequently chose to abandon its exclusive focus on the seven words and to apply instead the generic definition of indecency upheld in *Pacifica*, *i.e.*, "language that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Id.* ¶ 2 (citation omitted).

The D.C. Circuit upheld the Commission's decision to move beyond its narrow, post-*Pacifica* enforcement policies. *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988) (R.B. Ginsburg, J.) ("*ACT I*") ("[s]hort of the thesis that *only* the seven dirty words are properly designated indecent . . . some more expansive definition must be attempted"). The D.C. Circuit also rejected petitioners' contention that "the term 'indecent' is inherently unclear, and that the FCC's generic definition of indecency adds nothing significant in the way of clarification." *Id*. at 1338. Observing that the

Commission's broadcast indecency definition "is virtually the same definition" the Commission employed in the order the Supreme Court reviewed – and upheld – in *Pacifica*, the court of appeals "infer[red]" that the Supreme Court "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." *Id*. at 1338-39 (citations omitted). The D.C. Circuit therefore concluded that "the Supreme Court's disposition of *Pacifica*" foreclosed the lower courts "from addressing the [vagueness] question on the merits." *Id*. at 1338.

In its 1987 orders, the Commission also reiterated its prior suggestion that it would permit indecent broadcasts at those hours of the night "when it is reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized." *See Infinity Reconsideration Order*, 3 FCC Rcd at 937 ¶ 27 n.47. In 1992, Congress directed the Commission to promulgate regulations "to prohibit the broadcast[] of indecent programming" during certain late-night hours. *See* Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16, 106 Stat. 949, 953 (1992), 47 U.S.C. § 303 note. The Commission's current regulation on broadcast indecency forbids any "licensee of a radio or television broadcast station" to broadcast "any material which is indecent" during the hours "between 6 a.m. and 10 p.m." 47 C.F.R. § 73.3999(b).

Sitting *en banc*, the D.C. Circuit upheld the Commission's power to regulate broadcast indecency under the congressional grant. *See Action for Children's Television v. FCC*, 58 F.3d 654, 659-67 (D.C. Cir. 1995) (en banc) ("*ACT III*"). Emphasizing "the unique context of the broadcast medium," *id*. at 660, the court recognized two "independent" compelling government interests in regulating broadcast indecency: (i) "supporting parental supervision of what children see and hear on the public airwaves" and (ii) "the Government's own interest in the well-being of minors." *Id.* at 661-63. The court held that channeling indecent material to late-night hours is 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. At the same time, time-channeling does 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 Court again rejected as "meritless" petitioners' renewed vagueness challenge to the Commission's indecency rule, reaffirming its prior determinations that *Pacifica* "dispelled any vagueness concerns" associated with the Commission's definition of indecency. 58 F.3d at 659. *See also Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) (*ACT II*).

C. 2001 *Industry Guidance*

In 2001, the Commission issued a policy statement summarizing many of its prior decisions, intended "to provide guidance to the broadcast industry regarding [the Commission's] case law interpreting 18 U.S.C. § 1464 and [its] enforcement policies with respect to broadcast indecency." *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*"). The policy statement laid out in detail the Commission's analytical approach and emphasized that the agency's indecency decisions rested on "two fundamental determinations." *Id.* at 8002 ¶ 7. First, the Commission explained, "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 Commission explained that the inquiry into whether material is "patently offensive" requires consideration of its "full context" and is therefore "highly fact-specific." *Id.* at 8002-03 ¶ 9. Nonetheless, the Commission 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; (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.* Among the examples described in the *Industry Guidance* were a number of cases involving highly explicit and graphic descriptions of sexual or excretory organs or activities, including "references to the male genitals and to masturbation and to sodomy." *Id*. 8004 ¶ 13 (citation omitted). Other examples involved jokes about child sexual abuse, *id*. 8009 ¶ 19, and explicit discussions of group sex, *id*. 8010 ¶ 20.

II. PROCEEDINGS BELOW

A. The Broadcasts at Issue

(1) The 2002 *Billboard Music Awards*

The singer and actress Cher received an "Artist Achievement Award" at the December 9, 2002, *Billboard Music Awards* show. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 & March 8, 2005*, 21 FCC Rcd 13299 ¶ 56 (Nov. 6, 2006) ("*Remand Order*") (SPA-77). More than nine million people watched the broadcast, including more than 2.6 million children. *See id.* ¶ 59. When Cher accepted the award, she said:

> I've had unbelievable support in my life and I've worked really hard. I've had great people to work with. Oh, yeah, you know what? I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em. I still have a job and they don't.

Id. ¶ 56. Fox broadcast the *Billboard Music Awards* show, including these remarks, between 8 p.m. and 10 p.m. Eastern Standard Time. *See id.* ¶ 55. The network used a five-second delay for this broadcast and had a single employee operating a "delay button" to edit out objectionable material. *Id.* ¶ 32. According to Fox, the employee failed to edit Cher's comment, instead blocking dialogue that came afterwards. *See id.* ¶ 34. The Commission subsequently received complaints about the broadcast. *See id.* ¶ 55.

(2) The 2003 *Billboard Music Awards*

On December 10, 2003, Fox stations again broadcast the *Billboard Music Awards*. The broadcast attracted nearly ten million viewers, including more than 2.3 million children. *See id.* ¶ 18. Fox used a five-second delay for this broadcast and had a single employee in charge of deleting objectionable material – the same system that had failed the year before to block broadcast of Cher's use of the "F-Word." *Id.* ¶ 34.

Paris Hilton and Nicole Richie, stars of the Fox show *The Simple Life*, were selected to present an award. *See Id.* ¶ 13. *The Simple Life* was a "reality" show in which Hilton and Richie left their pampered lives in Beverly Hills to live on an Arkansas farm for 30 days. *Id.* ¶ 13 n.27.

The script had Hilton saying to Richie: "It feels so good to be standing here tonight." *Id*. ¶ 13. *See* J.A. 531. Richie was supposed to answer: "Yeah – instead of standing in mud and pig crap." *Remand Order* ¶ 31. Richie was then supposed to say: "Have you ever tried to get cow manure out of a Prada purse? It's not so freaking simple." *Id.*

Hilton and Richie departed from these lines, and the following dialogue between them was broadcast by Fox stations in the Eastern and Central time zones:

Paris Hilton:	Now Nicole, remember, this is a live show, watch the bad language.
Nicole Richie:	Okay, God.
Paris Hilton:	It feels so good to be standing here tonight.
Nicole Richie:	Yeah, instead of standing in mud and [audio blocked]. Why do they even call it "The Simple Life?" Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.

Id. ¶ 13. As this transcript indicates, Fox obscured the audio when Richie uttered the first vulgarism, but not when she uttered the next two. (The program was recorded for later broadcast in the Mountain and Pacific time zones; Fox deleted all the vulgar language from those broadcasts. *See id.* ¶ 32.).

Both Fox stations and the Commission received numerous complaints about this broadcast. For example, one mother reported that she was watching the show with her children and that after Richie's comment, her son "asked me Mommy what is fucking?" J.A. 913 (Complaint of R. Fench); *see also* J.A. 916 (Complaint

of C. Collins-Reyes (mother reporting that her son asked her "what f**king meant" after Richie's statement)). As another mother told the Commission, "[i]t is hard enough to teach your children manners and decent behavior without showing young adults on the TV using [expletives]." J.A. 917 (Complaint of A. Holmes).

B. Commission Proceedings

In a single, consolidated proceeding intended to "provide substantive guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard," *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664 ¶ 2 (2006) (*Omnibus Order*) (SPA 1), the Commission ruled that both *Billboard Music Awards* broadcasts were indecent. Applying the framework set out in the 2001 *Industry Guidance*, the Commission concluded that the expletives aired during the broadcasts were sexual or excretory references that fall within the subject-matter scope of the indecency definition. In particular, the Commission reaffirmed that the F-Word (used by both Richie and Cher) inherently "has a sexual connotation even if the word is not used literally" because "the word's power to 'intensify' and offend derives from its implicit sexual meaning." *Remand Order* ¶ 16. (Fox did not dispute that Richie's use of the S-Word referred to excrement. *Id*.). The Commission also concluded that both broadcasts were "patently offensive." *Id.* at

¶¶ 18, 58, 62. The Commission found that the language used in both broadcasts was not only graphic and shocking, *id*. at ¶¶ 17, 59 – particularly in the context of nationally televised awards programs viewed by a substantial number of children – but was also gratuitous. Indeed, the Commission noted, Fox did not argue that the expletives at issue "had any artistic merit or were necessary to convey any message." *Id*. at ¶ 17 n.44; *see also id*. at ¶ 59 n. 191. The vulgarity in this case thus does not "bear[] even the slightest resemblance" to expletives that are integral to the story in a broadcast such as the televised showing of the film *Saving Private Ryan*. *Id*. at ¶ 29.

The Commission rejected Fox's argument that the supposedly "fleeting and isolated" nature of the remarks made them non-actionable. *See id.* ¶¶ 19-27, 60-61. The Commission reaffirmed its decision in its 2004 *Golden Globe Order* to disavow prior statements that expletives had to be repeated to be actionable but that "descriptions or depictions of sexual or excretory functions" did not. *See id.* ¶ 23; *see Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975, 4980 ¶ 12 (2004) ("*Golden Globe Order*"). The Commission also explained that "categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context." *Remand Order* ¶ 23.

The Commission also rejected constitutional challenges to broadcast indecency enforcement. First, it noted that both the Supreme Court (implicitly) and the D.C. Circuit (explicitly) had rejected vagueness challenges to the Commission's indecency definition. *See id.* ¶ 43 (citing *Pacifica*, 438 U.S. at 739, 741, *ACT I*, 852 F.2d at 1339, and *ACT III*, 58 F.3d at 659). Second, it found that technological and marketplace developments have not undermined the Supreme Court's rationales for adopting a relaxed level of First Amendment scrutiny of broadcast regulation in *Pacifica*. *See Remand Order* ¶¶ 46-52. In particular, the Commission explained, while parental control devices such as the V-chip[1] "provide parents with some ability to control their children's access to broadcast programming," at the time of the two *Billboard Music Awards* broadcasts "most televisions [did] not contain a V-chip," "most parents who have a television with a V-chip are unaware of its existence or do not know how to use it," and "a V-chip is of little use, when, as here, the rating does not reflect the material that is broadcast." *Id*. at ¶ 51.

The Commission nonetheless declined to impose any sanction on Fox – in the case of the 2003 *Billboard Music Awards*, because it was acting under a limited

[1] The "V-chip" refers to the technology "designed to enable viewers to block display of all programs with a common rating" that manufacturers are required to furnish in every television set manufactured after January 1, 2000 having a screen size of 13 inches or larger. 47 U.S.C. § 303(x); 47 C.F.R. § 15.120(b).

remand from this Court, *id.* ¶ 53, and in the case of the 2002 *Awards*, because it was not clear at that time that "broadcasters could be punished for the kind of comment at issue," *id*. at 64. It therefore found no need to address whether Fox had the requisite intent to impose a forfeiture. *Remand Order* ¶¶ 54, 66 n.206. And because it imposed no sanction in either case, the Commission stated that it would "not require the licensees of any of the stations that broadcast the material to report our finding here to us as part of their renewal applications," and would "not consider the broadcast to have an adverse impact upon such licensees as part of the renewal process or in any other context." *Id.* ¶¶ 53, 66.

C. This Court's Decision.

A divided panel of this Court vacated and remanded. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007). With Judge Leval dissenting, the Court concluded that the Commission's order was "arbitrary and capricious under the Administrative Procedure Act" because the Commission had "failed to articulate a reasoned basis for [its] change in policy" exempting expletives from enforcement unless they were repeated. *Id*. at 447.

Although the Court did "not reach the other challenges" to FCC indecency enforcement, *id*. at 447, it expressed "skeptic[ism]" that the Commission could "provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster." *Id*. at 462. The Court recognized that it was bound by

Supreme Court precedent holding that "broadcast television has enjoyed less First Amendment protection than other media." *Id*. at 465. It nonetheless was "sympathetic" to the contention that the FCC's indecency standard is "unconstitutionally vague." *Id.* at 463. The Court also questioned whether the standard permitted the agency "to sanction speech based on its subjective view of the merit of that speech." *Id*. at 464. Finally, while the Court found that the Commission's arguments with regard to the ineffectiveness of the V-chip and other parental control devices were "not without merit," it expressed a belief that "technological advances may obviate the constitutional legitimacy" of the FCC's authority to regulate broadcast indecency. *Id*. at 466.

D. The Supreme Court's Reversal.

The Supreme Court reversed this Court's holding. The Court found that "the agency's reasons for expanding the scope of its enforcement activity were entirely rational." *FCC v. Fox Television Stations, Inc*., 129 S. Ct. 1800, 1812 (2009). In doing so, the Court emphasized that "the Commission's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words" conformed to "the context-based approach" that the Court "sanctioned in *Pacifica*." *Id*.

The Court also rejected the broadcasters' contention that by proceeding against expletives that were not repeated, the Commission had exceeded "the

farthest extent of its power" under *Pacifica*. *Id*. at 1815. The Court made clear it had "never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden," but instead had left that question "for another day." *Id*.; *see also id*. at 1817 (plurality opinion of Scalia J.) ("*Pacifica* . . . drew no constitutional line"). The Court likewise rejected the broadcasters' claim that the Commission's contextual analysis gives the agency "unbridled discretion," noting that *Pacifica* "approved Commission regulation based 'on a nuisance rationale under which context is all-important.'" *Id*. at 1815.

Recognizing that this Court had not actually ruled on the constitutionality of the Commission's orders, the Supreme Court "decline[d] to address the constitutional questions at this time" – although it observed that "any chilled references to excretory and sexual material 'surely lie at the periphery of First Amendment concern.'" *Id*. at 1819 (citation omitted). Further observing that "the Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media, such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children," the Supreme Court remanded the case "for further proceedings consistent with this opinion." *Id*.

SUMMARY OF ARGUMENT

The Commission correctly concluded that the vulgar expletives uttered by Cher and Nicole Richie during the broadcasts of the 2002 and 2003 *Billboard Music Awards* were inconsistent with contemporary community standards for the broadcast medium. Fox makes no attempt to show otherwise – on the contrary, it immediately deleted the offending language from the tape-delayed broadcasts in later time zones. Nor does Fox offer any justification, artistic or otherwise, for the use of the "F-Word" and the "S-Word" by either performer. Because the Supreme Court in *Fox* has now upheld the Commission's decision to expand broadcast indecency enforcement to fleeting expletives, Fox is left with no basis for challenging the Commission's determination that the broadcasts violated longstanding federal prohibitions against broadcasting indecent material.

Fox nevertheless maintains that the Commission erred by not making findings about Fox's scienter before concluding that *other* broadcasts containing indecent language similar to the language here could be subject to enforcement actions in the future. The scienter issue is not properly presented in this case. The order under review imposed no sanction on Fox; it simply provided guidance on what content would be considered indecent in the future. Because the Commission's decision was limited by its terms to the nature of the material rather

than the intent of the broadcaster, the Commission was not required to consider Fox's mental state.

Fox and the other networks also attempt to use the Commission's decisions concerning the content of the two *Billboard Music Awards* shows to launch a broad-based challenge to the constitutionality of the FCC's overall broadcast indecency regime. That effort runs headlong into the Supreme Court's decision in *Pacifica*, which rejected constitutional challenges to FCC broadcast indecency regulation under precedent, binding on this Court, that broadcast speech is properly subject to greater regulation under the First Amendment. Although *Pacifica* involved a broadcast in which expletives were repeated, the Supreme Court made clear in *Fox* that neither *Pacifica*, nor any other relevant judicial decision, limits the Commission's authority to that situation.

Nor is the Commission's broadcast indecency regime overbroad. Consistent with judicial and congressional direction, the Commission permits indecent programming during late night hours when adults remain able to listen or view but few children are in the audience. The current rules thus constitute a narrowly tailored means of advancing the government's substantial interest in protecting the well-being of children, and therefore satisfies the government's obligations under the First Amendment.

Fox argues that the V-chip is a constitutionally required less-restrictive means of shielding children from broadcast indecency. That argument fails for two threshold reasons. First, the First Amendment does not require the government to use the least restrictive means of regulating the speech of broadcasters, who have been granted special permission to use the limited public airwaves for free on the condition that they operate in the public interest. Second, because the V-chip technology depends on accurate ratings of television programs, and Fox did not accurately rate its *Billboard Music Awards* programs, the technology had no chance to work here. V-Chip issues thus are not even presented in this case. In any event, the Commission has amassed extensive evidence that the V-chip, particularly at the time of the broadcasts under review, was an ineffective alternative to indecency regulation.

Fox also contends that the Commission's definition of indecency is unconstitutionally vague. Fox again ignores *Pacifica*, which endorsed the same definition that the Commission applied here. The D.C. Circuit, moreover, has rejected vagueness challenges to the Commission's indecency definition on three separate occasions. Fox also cannot show that the regulatory framework applied in this case fails to give broadcast licensees a fair idea of what is prohibited. Indeed, the order on review – which imposed no sanction on Fox – was issued to precisely

to provide broadcasters additional notice of the Commission's prospective enforcement policies.

Improvements to the V-chip and other parental control tools may come about in the future. But on this record, Congress's direction that the Commission regulate indecency on broadcast television and radio – including the indecent language on the two broadcasts at issue – remains necessary to ensure that parents can construct "a relatively safe haven for their children." *Fox*, 129 S. Ct. at 1819.

STANDARD OF REVIEW

The Commission's decision must be affirmed unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In this regard, the Commission's interpretation of the federal broadcast indecency statutes is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Although constitutional claims present issues of law that are generally subject to de novo review, to the extent they involve the agency's regulation of broadcast speech, the court "must afford great weight to the decisions of Congress and the experience of the Commission." *CBS v. DNC*, 412 U.S. 94, 102 (1973).

ARGUMENT

I. HAVING IMPOSED NO FORFEITURE, THE COMMISSION WAS NOT REQUIRED TO INQUIRE INTO FOX'S STATE OF MIND.

Fox and the other networks do not attempt to challenge the Commission's determination that the 2002 and 2003 *Billboard Music Awards* were indecent within the meaning of Section 1464 and the Commission's rules. Instead, Fox contends that the Commission erred by failing to find that Fox had the necessary scienter. Fox Br. 22-37. This argument rests on a fundamental misunderstanding of the order on review and presents a purely hypothetical question not properly before the Court.[2]

The aim of the *Remand Order* was to explain what it was about the two *Billboard Music Awards* broadcasts that made them indecent, in order to provide "guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard." *Omnibus Order* ¶ 2. The

[2] Fox also contends that the Commission misconstrued the meaning of the term "profane." *Id*. at 38-41. However, the Supreme Court's holding that the Commission can find broadcasts with non-repeated expletives "indecent" in violation of 18 U.S.C. § 1464 has rendered unnecessary the Commission's separate finding that those same non-repeated expletives may violate the statute for the additional reason that they are "profane." Moreover, petitioners' other challenges to the Commission's order do not in any way turn on whether the broadcasts in question violate the Section 1464 prohibition on "profane" language in addition to its prohibition on language that is "indecent." Accordingly, the Court need not reach the merits of Fox's argument about the meaning of "profane" in Section 1464. Fox Br. 41.

Commission proposed no forfeiture for either of Fox's broadcasts and made clear that it would take no adverse action against Fox for having aired them. *See Remand Order* ¶ 53 ("In light of our decision not to impose a forfeiture, we will not require the licensees of any of the stations that broadcast the material to report our finding here to us as part of their renewal applications," and "will not consider the broadcast to have an adverse impact upon such licensees as part of the renewal process or in any other context"). *Accord id*. ¶ 66. The fact that the Commission imposed no sanction on Fox illustrates that its goal in discussing the two broadcasts was to offer them as examples of the kind of material that could lead to enforcement action in the future.

Fox tries to make something of the fact that the Commission concluded that the broadcasts were "in violation of Section 1464." Fox Br. 24 (quoting *Remand Order* ¶¶ 53, 66). But it is perfectly clear that the Commission meant by that conclusion that Fox's broadcasts violated the substantive prohibitions against indecent broadcasting; the agency nowhere suggested that it had made a finding that the state-of-mind prerequisites for imposition of a forfeiture or other enforcement action had been met. On the contrary, the Commission expressly stated that it was proposing "no sanction" on the broadcaster. *Remand Order* ¶¶ 53, 66. Fox's argument is an inconsequential pedantic quibble – that the

Commission's formulation should have been that Fox's broadcasts "were indecent within the meaning of" rather than they "violated" Section 1464.

The Commission is required to make a fact-specific inquiry into the mental state of an individual broadcaster (either the statutory requirement of willfulness or an implied requirement of scienter) only if it proposes to impose a forfeiture or other enforcement sanction. *See, e.g.*, 47 U.S.C. § 503(b)(1)(B) (authorizing monetary forfeiture only if failure to comply with statute or Commission rule is "willful or repeated"). Here, the Commission was under no obligation to inquire into Fox's intent in order to conclude that its broadcasts were indecent, because it proposed no sanction for the violations. Fox's extended discussion of what level of intent should be required before a broadcaster can be sanctioned for violating the prohibitions on indecency, Fox Br. 22-37, should be reserved for a case in which the Commission has actually imposed a sanction.

II. THE *REMAND ORDER* IS CONSTITUTIONAL.

A. Broadcast Speech Has Only Limited First Amendment Protection.

"[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748. The broadcast media have "established a uniquely pervasive presence in the lives of all Americans," and "[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." *Id.* at 748. In addition, "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content." *Id.* Moreover, "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749. Unlike written material, which might be "incomprehensible to a first grader," a broadcast can "enlarge[] a child's vocabulary in an instant." *Id.* And in contrast to indecent material sold in bookstores and movie theaters, indecent broadcast speech may not "be withheld from the young without restricting the expression at its source." *Id.*

Moreover, unlike wireless telephone companies and others who are required to pay often substantial sums at auction for spectrum licenses, *see* 47 U.S.C. § 309 (j), "'[a] licensed broadcaster 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 (citing *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981)). Among these obligations, imposed on broadcasters from the time federal licenses were first allocated, is the responsibility to refrain from airing indecent material when prohibited by with federal statutes and regulations. *See Fox*, 129 S. Ct. at 1806; 18 U.S.C. § 1464; 47 C.F.R. § 73.3999(b). Imposing that responsibility is a reasonable exercise of Congress's

power to condition the use of public resources. *Cf. National Endowment for the Arts v. Finley*, 524 U.S. 569, 572, 587-88 (1998) (upholding statutory provision conditioning federal arts funding on process that "tak[es] into consideration general standards of decency and respect for the diverse beliefs and values of the American public.").

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 "compelling" government interest and is the "least restrictive means" to further that interest. *See Sable Communications of Calif., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). But government restrictions on broadcast speech are not subject to this exacting standard. Instead, 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 available. *League of Women Voters*, 468 U.S. at 380, 381; *accord Prayze FM v. FCC*, 214 F.3d 245, 252 (2d Cir. 2000).[3]

The networks argue that the technological assumptions underlying *Pacifica* and the other cases holding that broadcast regulation is subject to lesser First

[3] Although the D.C. Circuit in *ACT III* stated that it was applying strict scrutiny in affirming 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.

Amendment scrutiny have been undermined in recent years, and are no longer valid. CBS Br. 19-27. *See* Fox Br. 51-52. However, "it is for the Supreme Court rather than a court of inferior jurisdiction to determine whether [a Supreme Court ruling] requires revision in light of technological and political developments" since the decision was rendered. *OneSimpleLoan v. U.S. Secretary of Educ.*, 496 F.3d 197, 203 (2d Cir. 2007). *See generally Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 484 (1989); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).[4]

In fact, the Supreme Court has since *Pacifica* reaffirmed that its cases "have permitted more intrusive regulation of broadcast speakers than of speakers in other media." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) (*Turner I*). *See also ACT III*, 58 F.3d at 660 ("the traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment."). And the Supreme Court has continued to recognize that "the inherent physical limitation on the number of speakers who may use the broadcast medium . . . require[s] some adjustment in traditional First Amendment analysis to

[4] The ABC Television Affiliates Association, although an intervenor supporting Fox, neverthless recognizes that "[i]t is not this Court's task to question or reexamine the continuing validity of the indecency statute . . . and *Pacifica*," or "reconsider the rationale supporting the 'special treatment given the regulation of broadcast indecency," and that this is instead "an undertaking for the Supreme Court." ABC Affiliates Br. 12-13.

permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees." *Turner I*, 512 U.S. at 638. *See also Reno v. ACLU*, 521 U.S. 844, 867 (1997) (broadcasting "as a matter of history ha[s] 'received the most limited First Amendment protection.'"). This Court accordingly – and quite rightly –concluded in its earlier decision that the arguments against a lesser standard of First Amendment scrutiny to broadcasting cannot hold sway "in light of Supreme Court precedent." 489 F.3d at 465.

The *Remand Order*, moreover, demonstrated that broadcast television continues to be both pervasive and accessible to children. "Despite the growing importance of cable television and alternative technologies, 'broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.'" *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 190 (1997) ("*Turner II*"). As the Commission recently found, "[i]n spite of the increase in the number of other types of media to which children are exposed, television remains the medium of choice among children." *In re Implementation of the Child Safe Viewing Act*, Report, FCC No. 09-69 (*CSVA Report*), p. 4 ¶ 8 (released Aug. 31, 2009). In 2003, 98.2% of households had at least one television. *See Remand Order* ¶ 49. And while almost 86% of households with television subscribe to a cable or satellite service, that still leaves millions of households that rely in whole or in part on over-the-air broadcasting. *See id*.

Indeed, according to estimates submitted by the National Association of Broadcasters (NAB) in 2007, as many as 19.6 million households containing 45.5 million television sets do not subscribe to cable or satellite services, and an additional 14.7 million households that subscribe to cable and satellite own 23.5 million television sets that are not connected to those services. Thirteenth Annual Report, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 542, 595 ¶ 108 (2009). Moreover, as the Commission observed, the number of cable and satellite service subscribers must take account of the fact that cable and satellite services by statute retransmit the programming aired by local broadcast stations, *see* 47 U.S.C. §§ 534, 535, and that a large disparity in viewership still exists between broadcast and cable television programs. *See Remand Order* ¶ 50.

The broadcast media also remain uniquely accessible to children. Two-thirds of children aged 8 to 18 surveyed for a March 2005 report had a television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections. *See id.* ¶ 49. Parents who subscribe to cable exercise some choice in their selection of a package of channels, and they may avoid subscribing to some channels showing programs that, in their judgment, are inappropriate for children. Indeed, upon the request of a subscriber, cable providers are required by statute to "fully block the audio and video programming of each channel carrying such

programming so that one not a subscriber does not receive it." 47 U.S.C. § 560 (2000); *see United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). In contrast, as the D.C. Circuit has observed, "broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters." *ACT III*, 58 F.3d at 660. As a result, members of the broadcast audience, unlike consumers who affirmatively subscribe to audio and video programming, "are confronted without warning with offensive material." *Id*. In short, *Pacifica*'s premises remain valid today.

B. The Government's Interests In Regulating Indecency Are Substantial.

It cannot reasonably be disputed that the government has a substantial – indeed, "compelling" – "interest in protecting the physical and psychological well-being of minors," nor that this interest "extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable*, 492 U.S. at 126. The government's interests in the "well-being of its youth" and in supporting "parent's claims to authority in their own household" can justify "the regulation of otherwise protected expression." *Pacifica*, 438 U.S. at 749 (citation omitted); *see also Carlin Communications, Inc. v. FCC,* 837 F.2d 546, 555 (1988) ("The interest in protecting minors from salacious matter is no doubt quite compelling"); *Dial Information Servs. Corp. of N.Y. v. Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991). Just as clearly, "the Government has a compelling interest in protecting

children under the age of 18 from exposure to indecent broadcasts." *ACT III*, 58 F.3d at 656.

The government's "interest in protecting the well-being, tranquility, and privacy of the home" is an additional interest "of the highest order in a free and civilized society." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (citation omitted). *See Pacifica*, 438 U.S. at 748 (an individual's "right to be left alone" at home "plainly outweighs the First Amendment rights of an intruder"). Indeed, the Supreme Court has "repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." *Id.* at 485; *see also Rowan v. United States Post Office Department*, 397 U.S. 728, 738 (1970) ("That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere"); *Hill v. Colorado*, 530 U.S. 703, 717 (2000) ("The right to avoid unwelcome speech has special force in the privacy of the home.").

Fox contends that the Commission's broadcast indecency regime is "quixotic" because "[c]hildren today are exposed to potentially offensive words from many sources other than broadcast television." Fox. Br. 57. *See also* CBS Br. 23 (given the "current media environment," it is "unrealistic to believe that enforcement of Section 1464 will prevent children from access to allegedly 'indecent' material."). Whether or not offensive language actually is more

prevalent today than in earlier times, that cannot be a reason for invalidating government's effort to support parents who wish to shield their own children. Indeed, the increased availability of offensive language makes the government's assistance to concerned parents all the more important. Thus, as the Supreme Court held in *Fox*, "[t]he Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children." *Fox*, 129 S. Ct. at 1819; *see also CSVA Report* ¶ 14 (broadcast indecency regulation "provides some measure of confidence to parents that their children will not encounter the same kind or amount of objectionable content on that medium that they might find elsewhere.").

Intervenor ABC Affiliates contends that the *Remand Order*'s application of the Commission's indecency enforcement policies to fleeting and isolated utterances "is unconstitutional under *Pacifica*." ABC Affiliates Br. 5-14. *See also* CBS Br. 7. But as the *Fox* opinion makes clear, the Supreme Court has "never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden." *Fox*, 129 S. Ct. at 1815. In fact, *Pacifica* expressly "left for another day" whether "an occasional expletive," such as that in "a telecast of an Elizabethan comedy," would be sanctionable. *Id.*; *see*

Pacifica, 438 U.S. at 750. *See also Fox*, 129 S. Ct. at 1817 (plurality opinion of Scalia, J.) ("*Pacifica* . . . drew no constitutional line.").

Nor is there any basis for finding in the Constitution a categorical exemption that would carve out from *Pacifica* all "fleeting and isolated" utterances, as CBS suggests. *See* CBS Br. 9-10. Under such a rule, broadcasters could gratuitously broadcast any number of highly offensive sexual or excretory terms in the middle of the afternoon, so long as they did so one at a time. *See Remand Order* ¶ 25. As the Supreme Court stated, "the agency's prediction . . . that a per se exemption for fleeting expletives would lead to increased use of expletives one at a time . . . makes entire sense." *Fox*, 129 S. Ct at 1814.

Fox also criticizes the Commission for not having addressed "whether there are any cognizable harms from even fleeting exposure to certain words." Fox Br. 56. In suggesting that the Commission was required to prove that children's behavior reflects what they see on television, Fox turns a blind eye to common sense. As the Supreme Court made clear in this case: "[I]t suffices to know that children mimic the behavior they observe – or at least the behavior that is presented to them as normal and appropriate," and thus that "[p]rogramming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives." *Fox*, 129 S. Ct. at 1813. *See Pacifica*, 438 U.S. at 749 (Carlin's indecent monologue "could have enlarged a child's

vocabulary in an instant"); J.A. 913 (Complaint of R. Fench) ("Mommy what is fucking?").

Moreover, as the Court observed in *Fox*, the Commission "had adduced no quantifiable measure of the harm caused by the language in *Pacifica*," and yet the Court had held there that the "government's interest in the 'well-being of its youth' . . . justified the regulation of otherwise protected expression." 129 S. Ct. at 1813. (citation omitted). The Supreme Court thus disposed of Fox's argument when it stated that "the Constitution itself demands of agencies no more scientifically certain criteria to comply with the First Amendment." *Id*.

C. The Indecency Rules Are Narrowly Tailored.

Lastly, the regulatory regime governing the broadcast of indecent matter is narrowly tailored to advancing the government's compelling interests in shielding children and protecting the privacy of the home from indecent speech, while at the same time allowing reasonable access to adults who desire to view or listen to such material. The Commission's rules implement the congressional directives in 18 U.S.C. § 1464 and the Public Telecommunications Act of 1992 by prohibiting radio or television stations from broadcasting indecent material "between 6 a.m. and 10 p.m." 47 C.F.R. § 73.3999(b). The rules thereby provide some assurance to parents that programs broadcast during that time will be safe for their children to watch. *Cf. Fox*, 129 S. Ct. at 1819 (broadcast indecency regulation provides

parents with "a relatively safe haven for their children"). Conversely, the rules establish a safe harbor period (from 10 p.m. to 6 a.m.) during which broadcasters may air (and adults may view) material that is not subject to Commission enforcement. The Commission's rules thereby channel indecent broadcasting to times of day in which few children are in the audience, but which nonetheless remain accessible to adult viewers and listeners. *See ACT III*, 58 F.3d at 667. In doing so, the Commission advances the government's compelling interests "without unduly infringing on the adult population's right to see and hear indecent material" over broadcast stations eight hours a day, and over other less regulated media at all times. *Id.* at 665. As the D.C. Circuit observed in *ACT III*, even apart from late-night viewing, adults who wish to view indecent material "will have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment, and the rental or purchase of readily available audio and video cassettes." *Id*. at 663.

As Justice Stevens observed in *Pacifica*, moreover, "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication," since "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language." 438 U.S. at 743 n.18 (plurality opinion of Stevens. J.). In the end, whatever small burdens on adult access to indecent broadcasting remain, it is "entirely appropriate that the marginal

convenience of some adults be made to yield to the imperative needs of the young." *ACT III*, 58 F.3d at 667.

D. The V-Chip Is Not an Adequate Less-Restrictive Alternative.

Fox contends (Br. 52-55) that regulation of broadcast indecency cannot survive First Amendment scrutiny because the V-chip is a constitutionally required less-restrictive alternative that permits parents to shield their children from broadcast indecency. This argument rests on flawed legal and factual premises. First, regulations of broadcast speech are subject only to intermediate scrutiny, *see League of Women Voters*, 468 U.S. at 380, and under that standard, "a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner I*, 512 U.S. at 662. Instead, "[s]o long as the means chosen are not substantially broader than necessary . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech-restrictive alternative." *Turner II*, 520 U.S. at 218.

Second, under any level of constitutional scrutiny, the proffered less-restrictive alternative "must be effective" in furthering the government's goals. *Dial Information Servs*., 938 F.2d at 1542. On the record here, the V-chip fails that test. The V-chip would not have been effective in preventing a child's exposure to the indecent language used by Nicole Richie and Cher, because Fox

did not rate the two broadcasts in question accurately – the 2002 *Billboard Music Awards* was rated TV-PG and the 2003 *Billboard Music Awards* was rated TV-PG(DL). *See Remand Order* ¶ 18 & n.47; ¶ 59 & n.190. The TV-PG rating (parental guidance suggested) is the most common rating for television programming, "and merely signifies that the program contains material that parents may find unsuitable for younger children, and that parents may want to watch the program with their younger children." *Id*. ¶ 18 n.47. The "D" signifies that the program may contain some "suggestive dialogue," and the "L" signifies that the program may contain some "infrequent coarse language." *Id*. Only in the context of a TV-MA rating (which neither broadcast had) would a "DL" descriptor signify that programming contained "crude indecent language." *Id*. *See generally* www.tvguidelines.org. Accordingly, even a parent with full knowledge of the V-chip and the television rating system seeking to use those tools to shield her child from the F-Word or the S-Word would have been unable to do so here. This case thus does not present the question of whether the availability of the V-chip renders broadcast indecency regulation unconstitutional.

Even aside from the inaccurate ratings at issue in this case, the Commission found that the V-Chip is not – and certainly was not at the time of the Fox broadcasts – an effective alternative to broadcast indecency regulation. The Commission's finding that a proffered alternative is ineffective must be upheld if it

is supported by "substantial evidence." *Information Providers' Coalition v. FCC*, 928 F.2d 866, 872, 873-74 (9th Cir. 1991).

Although the V-chip generally provides parents with "some ability to control their children's access to broadcast programming," the Commission found that this ability is too limited in practice for the technology to serve as an effective alternative to regulation. *Remand Order* ¶ 51. The Commission recently reaffirmed that "time channeling of indecent . . . broadcasts remains a vital tool for shielding children," and that "[e]vidence of the V-chip's limited efficacy in facilitating parental supervision of children's exposure to objectionable broadcast content has reinforced the necessity of the Commission's regulation." *CSVA Report* ¶ 14.

The evidence goes beyond a demonstration that the V-chip is not "a perfect solution" (Fox Br. 55); it shows that at present the V-chip "simply does not do the job of shielding minors" from the broadcast of material that is indecent, *Dial Info. Servs.*, 938 F.2d at 1542. Because it does not effectively further the government's compelling interests, the V-chip cannot be a less restrictive alternative.

The Commission identified several serious limitations on the effectiveness of the V-chip. First, and of greatest relevance to this case, a V-chip is of little or no use when the rating does not reflect the material that is broadcast. Studies demonstrate that the inaccurate ratings for the 2002 and 2003 *Billboard Music*

Awards are far from isolated problems, and that V-chip "content descriptors actually identify only a small minority of the full range of violence, sex, and adult language found on television." *Remand Order* ¶ 51 n.162. Inaccurate ratings are so common that a 2004 study found more coarse language broadcast during TV-PG programs than during those rated TV-14, just the opposite of what these age-based ratings would lead a viewer to believe. *See id*. Finally, even if V-chip content descriptors were accurately applied, they would not assist the majority of parents because they are not sufficiently understood. *See id*. *See CSVA Report* ¶ 25 (studies "raised concerns that parents lack a basic understanding of the TV Parental Guidelines"); *see also Violent Television Programming and Its Impact on Children*, 22 FCC Rcd 7929, 7944 ¶ 34 (2007) (only 12 percent of parents knew that "FV" stood for "fantasy violence"; almost as many thought it meant "family viewing").

In addition, most of the televisions in use at the time of the Fox broadcasts had no V-chip capability at all, and even today "most parents who have a television set with a V-chip are unaware of its existence or do not know how to use it." *Remand Order* ¶ 51. *See* S. Rep. No. 110-268, at 2 (2008), *reprinted in* 2009 U.S.C.C.A.N. 2196, 2197 (57% of parents who said they purchased a television since January 1, 2000 were "not aware that they have a V-Chip."). And recent studies show that only between 5 and 16 percent of all parents use the V-chip,

CSVA Report ¶ 17, perhaps because "many parents find 'programming the V-chip is a multi-step and often confusing process.'" *Id*. ¶ 19 (citation omitted).

Fox contends (Br. 53, 55) that the Commission's 1998 declaration that the voluntary ratings rules were "acceptable" and "in compliance with the specific requirements of Section 551(e)," *see Implementation of Section 551 of the Telecommunications Act of 1996, Video Programming Ratings*, Report and Order, 13 FCC Rcd 8232, 8233 ¶ 2 (1998), precludes the Commission from reexamining the issue. But the Commission in 1998 simply approved the ratings "rules"; it did not make any determination as to the sufficiency of their application or their implications for indecency enforcement. *Id*. On the contrary, the Commission emphasized that "to be useful, the rating system must be applied in a consistent and accurate manner," and 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. It 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," and it "view[ed] this commitment as an important element in the proposal" before it. *Id*. The Commission in 1998 simply granted the industry's request to "give the rating system a fair chance to work." *Id*. at 8246 ¶ 32. The Commission did not commit itself to turn a blind eye to the substantial evidence, accumulated since then, that the V-chip has proved ineffective in practice.

The Court has suggested that future hypothetical advances in technology may lessen or "obviate" the need for federal broadcast indecency enforcement. *See* 489 F.3d at 466. The Commission recently instituted a proceeding to further study what can be done to encourage the development and use of the V-chip and other parental control tools. *See Empowering Parents and Protecting Children in an Evolving Media Landscape*, Notice of Inquiry, FCC 09-94 ¶¶ 45-49 (Oct. 23, 2009). But for now – as at the time of the 2002 and 2003 *Billboard Music Awards* broadcasts at issue in this case – broadcast indecency regulation "remains a vital tool for shielding children from exposure to objectionable broadcast content," *CSVA Report* ¶ 14, as well as providing "conscientious parents" with "a relatively safe haven for their children" from "the coarsening of public entertainment in other media." *Fox*, 129 S. Ct. at 1819.

E. The Broadcast Indecency Regime Is Not Unconstitutionally Vague.

Fox also argues that the Commission's broadcast indecency regime is unconstitutionally vague. Fox Br. 42-50; *see* CBS Br. 11-15; ABC Affiliates Br. 15-19. Although this Court has expressed "sympathy" for that contention, 489 F.3d at 463, it is foreclosed by precedent and fails on the merits here.

As this Court has recognized, the Commission's rules rest on a definition of indecency that "passed muster" in the Supreme Court's decision in *Pacifica*. *Dial Information Servs.*, 938 F.2d at 1541 (rejecting vagueness challenge to law

prohibiting "indecent" telephone messages); *accord Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 874-75 (9th Cir. 1991). Indeed, as the D.C. Circuit has 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 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 1338-39 (citation omitted).

Fox contends (Br. 42) that "no court has ever reached a considered judgment that the FCC's regulation of indecency is not vague." That is not correct. The Supreme Court in *Pacifica* upheld the Commission's interpretation of the statutory prohibition on "indecent" material against constitutional challenge in the face of the networks' specific argument that if the term "indecent" were not construed to be synonymous with obscenity, "substantial questions of unconstitutional vagueness would be raised." *See* Brief for American Broadcasting Cos., *et al*., as Amici Curiae Supporting Respondent, *FCC v. Pacifica Found*., 438 U.S. 726 (1978) (No. 77-528), 1978 WL 206859 at 33-39. The Court nonetheless rejected in their entirety the constitutional attacks on the Commission's enforcement of federal broadcast indecency law. 438 U.S. at 748-51. *See also id*. at 742-43

(plurality opinion of Stevens, J.); *id*. at 761 n.4 (Powell, J., concurring). In light of the Supreme Court's disposition, the D.C. Circuit has three times dismissed the contention that the Commission's broadcast indecency regime was unconstitutionally vague. *ACT I*, 852 F.2d at 1338-39; *ACT II*, 932 F.2d at 1508; *ACT III*, 58 F.3d at 659. As the D.C. Circuit put the matter, "[c]onsideration of petitioners' vagueness challenge . . . is not open to lower courts, in view of the Supreme Court's 1978 *Pacifica* decision." *ACT I*, 852 F.2d at 1335.

Fox attempts (Br. 43-44) to escape the force of this precedent by pointing to the Supreme Court's decision in *Reno v. ACLU*, 521 U.S. 844 (1997), which invalidated a statute regulating indecency on the Internet. Fox's effort rests on a faulty premise, because the two indecency prohibitions at issue in *Reno* were *not* "nearly identical" to that applied by the Commission here. Fox Br. 43. One of the *Reno* prohibitions applied simply to "indecent" communications without "any textual embellishment at all." *Reno*, 521 U.S. at 871 n.35. The other prohibition covered Internet content that was "patently offensive as measured by contemporary community standards" without any medium-based qualification or a regulatory body to interpret the prohibition, *id.* at 860.

By contrast, the Commission is an expert agency that looks to "contemporary community standards *for the broadcast medium*," and has identified for broadcasts three "principal factors" that are "significant" to its

determination whether material is patently offensive. *Industry Guidance*, 16 FCC Rcd at 8002 ¶ 8 (emphasis added).[5] The Supreme Court in *Reno* thus noted that the Commission is "an agency that [has] been regulating radio stations for decades," and that in *Pacifica* the Commission had "targeted a specific broadcast that represented a rather dramatic departure from traditional program content." *Id.* at 867. "Community standards for the broadcast medium" is a time-tested concept; indeed, the major networks have personnel and policies dedicated to their enforcement, *Remand Order* ¶ 29. By contrast, "community standards" for the Internet was a novel concept, and it would have been difficult, if not impossible, to demonstrate "traditional program content" on that relatively new and dynamic medium. *Cf. Reno*, 521 U.S. at 867. As the *Reno* Court noted, "[n]either before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry." *Id.* at 868-69.

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[5] The three factors 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; (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.

Industry Guidance, 16 FCC Rcd at 8003 ¶ 10. The "patently offensive" standard at issue in *Reno* included no such elaboration. *See Reno*, 521 U.S. at 871 n.35.

The Court in *Reno* distinguished *Pacifica* on other bases as well, further undermining Fox's attempt to use the later case to erode the earlier one. The Court in *Reno* pointed out that the broadcast indecency rules merely "designate when – rather than whether – it would be permissible" to air indecent material, while the Internet prohibitions in *Reno* were categorical. *Id.* at 867. 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, unlike the Internet, broadcasting 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").

Fox contends (Br. 44) that the *Reno* Court distinguished *Pacifica* on "a different issue" – the level of First Amendment scrutiny – but the opinion makes clear that the *Reno* Court was disagreeing with the government's argument that *Pacifica* supported the constitutionality of the Internet indecency statute in all respects. 521 U.S. at 864. Thus, far from casting doubt on *Pacifica*'s vagueness holding, *Reno* recognizes its continuing validity.

In any event, even if Fox's vagueness challenge were not foreclosed by *Pacifica*, it would still fail.

"The Due Process Clause requires that laws be crafted with sufficient clarity to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,' and to 'provide explicit standards for those who apply them.'" *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 286 (2d Cir. 1997) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)); *accord Perez v. Hoblock*, 368 F.3d 166, 174 (2d Cir. 2004). Of course, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. "Limitations inherent in the English language often prevent the drafting of statutes 'both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.'" *Perez*, 368 F.3d at 175 (citation omitted). Thus, "[s]tatutes need not . . . achieve 'meticulous specificity'" if doing so "would come at the cost of 'flexibility and reasonable breadth.'" *Arriaga v. Mukasey*, 521 F.3d 219, 224 (2d Cir. 2008) (citations omitted). Likewise, "perfect clarity and precise guidance have never been required *even of regulations that restrict expressive activity*." *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)) (emphasis added). Even where First Amendment expression is concerned, facial vagueness challenges "may go forward only if the challenged regulation 'reaches a substantial amount of

constitutionally protected conduct.'" *Farrell v. Burke*, 449 F.3d 470, 496 (2d Cir. 2006) (citation omitted).

"The degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Thus, "[l]aws with civil consequences receive less exacting vagueness scrutiny," *Arriaga*, 521 F.3d at 223, "because the consequences of imprecision are qualitatively less severe." *Hoffman Estates*, 455 U.S. at 498-99. *Accord Perez v. Hublock*, 368 F.3d at 175. Nor, contrary to Fox's contention (Br. 44), is vagueness "independent" of "the appropriate level of First Amendment scrutiny." As this Court has held, the precision required by the Constitution is less exacting where, although Congress is legislating in an area implicating speech, it nevertheless has a degree of " breadth and greater flexibility" under the First Amendment. *See General Media*, 131 F.3d at 287 (rejecting vagueness challenge to Department of Defense regulation restricting sexually explicit material on military posts).

Most important, "[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). "[W]here a myriad of uncontemplated situations may arise," "it is not reasonable to require a legislature to elucidate in advance every act that requires sanction." *diLeo v. Greenfield*, 541

F.2d 949, 954 (2d Cir. 1976). Instead, a general phrase may be appropriate "to ensure that the legislature's inability to detail all matters meant to be proscribed does not permit clearly improper conduct to go uncorrected." *Id*.

By choosing the terms "obscene, indecent and profane," *see* 18 U.S.C. § 1464, Congress recognized that a wide variety of material, not easily specified in advance, could transgress the reasonable standards of behavior applicable to broadcasting. The Commission expanded upon the statute's meaning when it specified in its judicially approved *Pacifica* order that indecency consists of material that described "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.'" *Citizen's Complaint Against Pacifica Found. Station WBAI (FM)*, 56 FCC 2d 94, 98 (1975). In the years since the *Pacifica* case was decided, the Commission has not only issued numerous decisions applying its indecency analysis to specific factual situations, it has adopted additional administrative guidance identifying the factors that it examines in making indecency determinations. Among other things, the Commission's guidance makes clear that its indecency determinations rest on the "contemporary community standards for the broadcast medium," *Industry Guidance*, 16 FCC Rcd at 8002 ¶ 8, and not

(contrary to Fox's contention) on the "FCC's subjective opinion of the value of the speech." *See* Fox Br. 58; *see also* 489 F.3d at 464.

The Commission's elaborations of the indecency standards serve to further "narrow potentially vague or arbitrary interpretations" of its rules, *see Hoffman Estates*, 455 U.S. at 504, and have reduced any imprecision in the statute. *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"). Indeed, the indecency finding under review here was adopted precisely (and solely) to provide further guidance on the Commission's approach to indecency enforcement.

In addition, the broadcast indecency statutes and regulations apply to an industry long subject to government oversight, whose members have access to sophisticated legal counsel and can be expected to consult the available regulatory guidance. *Cf. Hoffman Estates*, 455 U.S. at 498 ("businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action."). To the extent there may be remaining uncertainty, the Commission has further addressed concerns of "fair notice," *id.*, by declining to sanction broadcasters in cases (such as this one) where "it was not clear at the time that broadcasters could be punished for the kind of comment at

issue," *Remand Order* ¶ 64. *See Pacifica*, 438 U.S. at 743. Last but not least, broadcasters who remain unsure in a particular case may air the programming in question during the post-10 p.m. safe harbor period to escape any risk of sanction. *See* 47 C.F.R. § 73.3999(b).

Ignoring each of these considerations, the networks contend that the Commission's broadcast indecency enforcement leaves them "without any guidelines that would enable them to understand what is forbidden and what it not," Fox Br. 47, and is otherwise "standardless." CBS Br. 14. In doing so, however, they merely take issue with the context-based approach to broadcast indecency analysis that the Supreme Court upheld in *Pacifica*. *See* 438 U.S. at 750. The Supreme Court in *Fox* flatly rejected the contention that the Commission's contextual approach to enforcement gives rise to "a standardless regime of unbridled discretion." *Fox*, 129 S. Ct. at 1815. As the Court found, "[t]he agency's decision to retain some discretion" not to proceed in all cases "does not render arbitrary or capricious its regulation of the deliberate and shocking uses of offensive language," particularly at "awards shows . . . that were expected to (and did) draw the attention of millions of children." *Id*. at 1814.

To conclude that federal broadcast indecency regulation is unconstitutionally vague would be particularly unwarranted in a case involving the broadcast of the F-Word and the S-Word uttered gratuitously during a nationally televised prime-

time awards show. The Commission has long imposed sanctions on the broadcast of precisely such language in enforcing 18 U.S.C. 1464, *see, e.g.*, *WUHY-FM, Eastern Educational Radio*, 24 FCC 2d 408, 415 ¶ 17 (1970). Moreover, the F-Word and the S-Word are two of the most prominent examples in the Carlin monologue found indecent in *Pacifica*. *See* 438 U.S. at 751-55. Fox plainly was not paralyzed by uncertainty about the advisability of airing these words on the evenings in question: The network promptly blocked them when the awards shows were broadcast on tape delay to later time zones. *Remand Order* ¶¶ 29, 62. Similarly, Fox and the other networks cannot credibly dispute that the broadcast of such language violates community standards for the broadcast medium: They commonly edit out such language even when uttered in programming aired during the late-night safe harbor, when there is no possibility of Commission enforcement. *See Remand Order* ¶ 29; *see also* Tom Shales, Say What?! Unintended Improv on 'SNL' Debut, WASHINGTON POST, Sept. 28, 2009, at C4 (reporting that NBC edited out utterance of the F-Word on *Saturday Night Live* when the show aired in other time zones, even though the show is broadcast after 10 p.m.).[6]

[6] The Supreme Court recognized that the "technological advances [that] have made it easier for broadcasters to bleep out offending words" are a factor that "further supports the Commission's stepped-up enforcement policy." *Fox*, 129 S. Ct. at 1813. Fox complains (Br. 48) of the "burdens of relying on delay technology," particularly on "smaller, local broadcasters." But as the plurality in *Fox* observed, it is doubtful that smaller broadcasters regularly sponsor live awards shows such as those at issue here, and the Commission understands that there are

CBS contends (Br. 15) that the FCC's indecency enforcement policies have had a "massive chilling effect" on speech. That cannot be true of the order in this case, which comports with the broadcasters' own actions to excise the gratuitous utterance of the F-Word and the S-Word from programs that fall within the late-night safe harbor. *See Remand Order* ¶ 29. Nor can such a chilling effect be shown by pointing to examples of broadcaster restraint that are not required by Commission policy. *See* CBS Br. 17 (describing ABC affiliate decisions not to air *Saving Private Ryan* in 2004 despite the fact that "FCC staff had ruled twice before that the film was *not* indecent"). Lastly, it must be acknowledged that, as the Supreme Court recently stated in *Fox*, "any chilled references to excretory and sexual material 'surely lie at the periphery of First Amendment concern.'" 129 S. Ct. at 1819 (citation omitted).

Recent legislation increasing the statutory maximum for indecency fines does not alter the constitutional calculus. *See* Fox Br. 49 (discussing Broadcast Indecency Enforcement Act, Pub. L. No. 109-235, 120 Stat. 491 (2006) (codified at 47 U.S.C. § 503(b)(2)(C)(ii))). The Commission did not impose a fine in this case. Furthermore, it stated that while the recent legislation would allow it "to

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different equities where "live coverage of a public event" is concerned. *Fox*, 129 S. Ct. at 1818 (plurality opinion of Scalia, J.). As for network programming, smaller stations can reasonably rely on the networks (which make no claim that they cannot afford such technology) to "cleanse[]" their feeds. *Id*.

impose appropriate fines in egregious cases," it did not believe "that a case similar to the '2003 Billboard Music Awards' arising in the future would merit the maximum fine," and it emphasized that it would "continue to follow a restrained enforcement policy in imposing forfeitures." *Remand Order* ¶ 53 n. 167. In fact, the Commission has yet to propose a fine for any broadcast with "fleeting" expletives. In any event, nothing in the Constitution precludes the government from imposing penalties that are sufficient to deter violations of law, even where expression is concerned. So long as the underlying prohibition comports with the Constitution, the fact that the penalty for its violation may be robust does not pose a problem under the First Amendment. *See Alexander v. United States,* 509 U.S. 544, 555-58 (1993).

To be sure, "[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 formulations afforded by human language and the critical role of context in the analysis, a perfectly precise description of indecency may be unattainable – at least if protection against patently offensive broadcasts is not to be circumvented at will by inventive radio "shock jocks" – or "potty-mouthed" awards presenters. *See Remand Order* ¶ 13 n.27. Petitioners have suggested no "better language" that could "effectively . . . carry out" Congress's purposes, *see United States v. Petrillo,* 332 U.S. 1, 7 (1947), and "a per se ban" on

certain words would, as this Court earlier recognized, "likely raise constitutional questions" of its own, 489 F.3d at 458 n.7. 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).

CONCLUSION

The petitions for review should be denied.

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CERTIFICATE OF COMPLIANCE

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06-1760-ag

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Fox Television Stations, Inc., Petitioners

v.

Federal Communications Commission and United States of America, Respondents.

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I, Jacob Lewis, hereby certify that on October 28, 2009, I filed the foregoing Brief for the Federal Communications Commission and the United States via Federal Express and an electronic copy in PDF format with the Clerk of the Court for the United States Court of Appeals for the Second Circuit.

I also hereby certify that on this date two true and correct copies of the foregoing document were served via first class United States Mail on the persons at the addresses below, and that an electronic copy of this document in PDF format was served on these persons via electronic mail.

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