No. 06-1760-AG (L)

In the

United States Court of Appeals
for the Second Circuit

FOX TELEVISION STATIONS, INC., *et al.*,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents,

NBC UNIVERSAL, INC., *et al.*,
Intervenors

On Petition for Review of an Order
Of the Federal Communications Commission
On Remand From the Supreme Court of the United States

BRIEF FOR AMICUS CURIAE PARENTS TELEVISION COUNCIL IN SUPPORT OF FEDERAL COMMUNICATIONS COMMISSION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure Rule 26.1, *amicus curiae* Parents Television Council (PTC), respectfully submits this corporate disclosure statement.

PTC does not have a parent company and no publicly held company owns 10% or more of stock in PTC.

INTEREST OF AMICUS CURIAE AND AUTHORITY TO FILE

PTC is a corporation qualified under United States Internal Revenue Code Section 501(c)(3) as a charitable, non-profit, non-stock research and education foundation dedicated to improving the content of entertainment programming with emphasis on prime time television. PTC is supported by charitable contributions from its members and supporters residing throughout the United States.

Founded in 1995 to ensure that children are not constantly assaulted by sex, violence and profanity on television and in other media, PTC is a national grassroots organization with members across the United States, and works with television producers, broadcasters, networks and sponsors in an effort to stem the flow of harmful and negative messages targeted at children. Central to PTC's mission is working with elected and appointed government officials and agencies to enforce broadcast decency standards, including the filing of complaints with the

FCC and prosecuting such complaints at the agency and in the federal courts of the United States.

PTC submits this brief as *amicus curiae* in support of the FCC's determination in Sections IIIA and IIIB of its 2006 Order that the broadcasts at issue were indecent. *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 2664 (2006)("*2006 Order*").

PTC has obtained the written consent of all parties to file this *amicus* brief.

SUMMARY OF ARGUMENT

This case is about what Fox broadcast two years in a row on the Billboard Music Awards, a program it knew was of interest chiefly to younger viewers. It ran teasing advertisements for its 2003 broadcast and it approved an edgy script that all but invited Nicole Richie to say what she said on that broadcast. Fox now professes surprise at what happened, and confusion about what it can broadcast in the future. That is nonsense. Fox knew what it was doing. If it honestly believed it could safely broadcast occasional or fleeting expletives it would not have had in place a delay system for both the broadcasts at issue here, and it would not have deleted

what Cher and Nicole Richie said when it rebroadcast the challenged programs in later time zones.

Rather than the facts, Fox, the other respondents, intervenors, and their *amici* want this case to be about other, grander things - artistic freedom, the value of live broadcasting, and a fight against what they claim is the FCC's subjective opinion about what is worthy of broadcast on network television. Things are not as dire as Fox and the others on its side claim. The FCC has not decreed that Cher and Nicole Ritchie can never use foul language on network television. It has simply enforced the 10 p.m. to 6 a.m. safe harbor rule.

Fox and others also urge this Court to strike down the FCC's indecency enforcement regime as unconstitutional, something this Court must not do, as explained below. The Court should decide this case on the facts of the broadcasts at issue, and not on the imagined parade of horribles touted by Fox and the others on its side.

ARGUMENT

The Challenged Broadcasts

This case did not arise in a vacuum. For years, the FCC enforced 18 U.S.C. § 1464 ("Section 1464") with a light hand in part because the broadcasters showed some restraint in what they put on the air.

But in recent years, the broadcasters – including Fox – have begun to broadcast edgier, racier fare. Viewers in turn began to complain about some of that broadcasting and, in 2001, the FCC issued a much-needed policy statement aimed at helping the broadcast industry avoid violations of Section 1464. *In re 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*). That *Guidance* made clear that fleeting expletives, in context, *could* violate Section 1464. *Id*. ¶¶ 17, 19. The *Guidance* did not say that every isolated utterance *would* constitute a violation; it simply said that, hereafter, challenged broadcasts of isolated expletives would be judged in context.

NBC – one of the Intervenors in this case - ignored the FCC's *Industry Guidance*. In January 2003 it broadcast the Golden Globe Awards, during which the singer Bono in accepting an award said on prime time television, "This is really, really fucking brilliant. Really, really great." *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program*, 19 FCC Rcd. 4975 (2004). The FCC found that in context Bono's comment was indecent, but it did not impose any sanction on NBC because the Commission's prior administrative

precedent had suggested that a fleeting broadcast of a single expletive like Bono's was not indecent. *Id*. ¶¶ 12, 15.

Fox, too, ignored the *Industry Guidance*. On December 9, 2002 it broadcast the Billboard Music Awards, which aired at 8 p.m. on the East Coast. The entertainer Cher received an award and during her acceptance speech she taunted her critics, and concluded, "People have been telling me I'm on the way out every year, right? So fuck 'em. I still have a job and they don't." *2006 Order* ¶55. FOX gave its 2002 broadcast only a TV-PG (parental guidance suggested) rating.[1] According to Nielsen ratings data, just under 28% of the almost 10 million viewers of the 2002 Billboard Music Awards were under 18, and 12.7% of those were between the ages of 2 and 11. *Id*.¶59. The bland rating that Fox assigned to that broadcast would not have alerted parents that their children might be exposed to Cher's foul language. Fox edited out Cher's comment in its rebroadcast of the Billboard Music Awards in the Mountain and Pacific Time Zones, *Id.* ¶ 62, and it did not claim before the FCC that Cher's comment had any artistic merit or was necessary to convey a message. *Id*. n.191.

The next year, almost to the day, Fox again broadcast the Billboard Music Awards, again in prime time, at 8 p.m. on the East Coast.

[1] An explanation of Fox's ratings system is found in the FCC's 2006 Order at ¶ 18 n.47.

And again it broadcast the same word that Cher had used the year before, and another to boot. This time, Paris Hilton and Nicole Richie, the stars of a show called "The Simple Life," were teamed to present an award. Fox's script writers teased the audience about Cher's expletive of the year before on the same show by having Ms. Hilton warn Ms. Richie to "watch the bad language." "It feels so good to be standing here tonight," Ms. Hilton continued. Without missing a beat, Ms. Richie replied, "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." *2006 Order* ¶13. Fox edited out Ms. Richie's comments in its rebroadcast of the Billboard Music Awards in the Mountain and Pacific Time Zones, *Id.* ¶29 and it conceded before the FCC that Nicole Richie's language during that broadcast did not have any artistic merit and did not convey any message. *Id*. ¶17 n.44.

Again, according to the Nielsen ratings, the audience included a significant number of viewers under 18 (23.4%) and a large audience between the ages of 2 and 11 (11%). *2006 Order* ¶18. And again, despite its experience the year before with Cher, Fox again mislabeled its program. This time, it rated it as TV-PG(DL), the "D" meaning that the program may contain some suggestive dialogue, the "L" that it may contain some

infrequent coarse language. *Id.* ¶18 n. 47. There was nothing *suggestive* about Ms. Richie's language; it was explicit, and her comments can only charitably be described as coarse.

Fox knew what was likely to happen. In the course of three episodes of "The Simple Life" it had broadcast in the days leading up to the 2003 Billboard Music Award show, Fox had had to bleep Ms. Richie nine times. *Id.* ¶33. In addition, the actual script Ms. Richie was to follow in the 2003 Billboard Music Awards show used the words "cow manure" and "freaking," which was catnip to Ms. Richie. *Id*. The Court should therefore take with a grain of salt Fox's protests of wide-eyed surprise that Ms. Richie decided to "go blue" on the air, as she had so often done on "The Simple Life."

This Case Is Not About Creative Judgment Or The Value Of Live Broadcasting

In 2002, when Cher shouted "Fuck 'em" on stage, she was giving a verbal middle finger to her critics. She used the word in its literal sense, not as an intensifier, and she used it gratuitously. The same is true of what Nicole Richie said in 2003. Fox's professed concern over the FCC's enforcement regime posing a threat to creative judgment (Fox Brief at 59) is out of place here. For as Fox readily conceded to the FCC, there was nothing creative about what either Cher or Nicole Richie said.

This case also does not herald the death of live broadcasting. Fox and the other broadcasters continue to broadcast breaking news live. Fox points to no real record evidence to the contrary, and instead worries about what *might* happen, not what *has* happened. As for awards shows, Fox broadcast the 2003 Billboard Music Awards show live only on the East Coast. The other time zones saw that program on a one or three-hour delay. *2006 Order* ¶36. In addition, the FCC record shows that the majority of awards shows are not aired live at all. *Id*. n. 104. In short, there is no evidence that viewers have been denied live broadcasting they might otherwise have seen but for the FCC's indecency enforcement regime.

The FCC Is Not Seeking To Impose Its Subjective Opinion On What Can Be Broadcast

The FCC found that what Cher and Nicole Richie said on the Billboard Music Awards shows was indecent in the context of those broadcasts. Attention to context in considering a challenged broadcast is not, as Fox argues, tantamount to the FCC's imposition of its subjective opinion on the merits of broadcast television content. Fox Brief at 58. Context is a familiar tool of constitutional adjudication - from "time, place and manner" restrictions on speech, to the old saw about shouting fire in a crowded theater. As is true with obscenity, there can be no fixed rule of what is and is not indecent, the FCC's definition of indecency therefore

provides that a fleeting expletive may – not shall – be considered indecent based on the context of a particular broadcast. "Context is all-important," the Supreme Court held in *FCC v. Pacifica Found.*, like a pig in a parlor – the right thing in the wrong place. 438 U.S. 726, 750 (1978). *See FCC v Fox Television Stations, Inc.* (describing the Commission's examination of the broadcasts at issue in this case as fitting "with the context-based approach we sanctioned in *Pacifica.*"). 129 S. Ct. 1800, 1812 (2009).

The FCC has not decreed in this case that the challenged language may never be used in broadcast television. Indeed, based on context, the Commission has found unobjectionable the same language at issue here used repeatedly in *Saving Private Ryan*. Fox professes to be confused by this apparent inconsistency and frets that it is cannot know what it can safely broadcast. Fox and other broadcasters exercise discretion every day in deciding what to air; they understand context and judgment. Fox knows that there is a world of difference between the gratuitous and tawdry outbursts of celebrities during awards shows and the use of coarse language for dramatic effect during combat scenes in *Saving Private Ryan*.

Fox knew full well that it was playing with fire during both the 2002 and 2003 broadcasts. It knew in 2002 that performers often go off script and it took steps – such as they were – to guard against it. It had in

place a 5-second delay during the 2002 broadcast, *2006 Order* ¶64, and still it did not prevent Cher's gratuitous outburst. It used the same ineffective measure for the broadcast of the same show in 2003. Fox fully understood its obligations under the FCC's enforcement regime. Its serial failures to prevent the same unscripted indecency on the same show two years in a row do not suggest confusion; they suggest laxity.

This Court May Not Find The FCC's Enforcement Regime Unconstitutional

Pacifica does not permit this Court to find the FCC's enforcement regime unconstitutional. This Court recognized in its dicta the last time this case was before it that as long as *Pacifica* is still good law, the Court is not free to declare the Commission's enforcement regime unconstitutional. Despite what Fox and others say, *Pacifica* is still good law.

Pacifica and its context-based approach to indecency regulation underpins the Supreme Court's decision in this case. Writing for the majority, Justice Scalia (joined by four others) relied on *Pacifica* in several places in his opinion upholding the Commission's enforcement regime against a challenge under the Administrative Procedure Act ("APA"). In addition, Justice Stevens noted in a footnote in his dissent that he and Justice Thomas – who wrote separately to say that he believed the holding of

Pacifica was open to serious question – disagreed "about the continuing wisdom of *Pacifica*." 129 S. Ct. at 1828 n.5. Justice Stevens also noted that *Pacifica* permits the Commission to regulate words that describe sex or excrement, *Id*. at 1827, which is just how Cher and Nicole Richie used the words they did in this case. Thus, *Pacifica* is not, as Fox and the others would have it, a quaint outlier that is not long for this world.

The uniquely pervasive nature of broadcast television was important to the outcome in 1978 in *Pacifica, 438* U.S. at 748, and broadcasting is still uniquely pervasive. All those who have a television receive the broadcast networks, but not everyone who has a television gets cable. It is true that access to cable has expanded greatly in the last several years, but those who have cable do not have all available channels, and are in fact likely to have only a selected universe of cable channels. In that way, cable users have some control over what they see on cable television. All cable television users, however, also get broadcast television, which must be carried as part of a cable television package. 47 C.F.R. § 76.51, *et seq*. In that way, broadcast television is unique: those who purchase cable television access have some say over what they get on cable, but they have no say over whether they get broadcast television.

Broadcast television's pervasiveness can be seen as well in the huge advantage it has in viewership when compared to cable and satellite. In September 2006, each of the top ten broadcast programs had more than 15 million viewers; only one cable program had even 5 million viewers. *2006 Order* ¶ 50. During the 2004-2005 season, of the 495 most-watched programs, 485 of them were on broadcast television and the highest-rated cable program rated only 257 on the list of most-watched programming. *Id*. With broadcasting that far ahead of its competition, it is safe to say that it is not only pervasive; it is uniquely pervasive.

For the same reason, it is still uniquely accessible to children. The FCC noted in its *2006 Order* that a 2005 Kaiser Family Foundation report found that some 68% of children between the ages of eight and 18 have a television set in their bedrooms, and almost half of those are broadcast-only. *Id*. ¶49, citing Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year-olds* 77 (2005).

The Supreme Court also recognized that broadcasting can be intrusive, noting that indecent material over the airwaves confronts a viewer "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.*[2] This Court should be sensitive to the understandable desire of those in the viewing public who do not want in their living rooms entertainers like Cher and Nicole Richie mouthing gratuitous crudities in prime time. It is no answer to say that viewers can simply turn off their televisions or watch something else. After all, the airwaves belong to the viewers, not to the broadcasters. The broadcasters, on the other hand, have many other channels available to them to ensure that Cher and Nicole Richie are heard by those who want to hear them before 10 p.m. After that time, of course, Fox is free to broadcast an unedited version of the challenged broadcasts.

The Supreme Court's holding in *Reno v. ACLU,* 521 U.S. 844, 117 S.Ct. 2329 (1997) in no way overtakes *Pacifica*. The Supreme Court in *Reno* expressly distinguished the facts in that case from those in *Pacifica:* (a) in *Pacifica*, as here, the Court was dealing with regulation of speech by the FCC, an agency with longstanding expertise in broadcast regulation, concerning an order that designated when – not whether – the challenged speech could air. That was not true in *Reno*, which involved a flat proscription of speech unsupervised by an agency with expertise in such

[2] It is also worth recalling Justice Powell's observation in his concurrence in *Pacifica* that "broadcasting – unlike most other forms of communication – comes directly into the home, the one place people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds." *438 U.S.* at 759 (citations omitted).

matters; (b) in *Pacifica*, as here, the Commission's order was not punitive. Indeed, here, the Commission did not even assess a civil penalty against Fox for its 2002 and 2003 broadcasts. The law at issue in *Reno* was a criminal statute; and (c) *Pacifica* dealt with an order that applied to a broadcast medium that as matter of history had received the most limited First Amendment protection. 521 U.S. at 867. The same is true here. *Reno* is therefore not an invitation to work around the holding of *Pacifica.*

Fox and the other broadcasters tout technology as the solution to the problem of broadcast indecency. For them, it is a simple matter for viewers to use the v-chip or some other technology to avoid programming they do not want to see. That is a neat solution from their standpoint. It permits them to broadcast whatever they want at any time and is a backdoor repeal of Section 1464.

PTC contends that the technology argument cuts the other way. Section 1464 is directed at the broadcasters, not at the recipients of broadcasts. In addition to its unique pervasiveness and intrusiveness, broadcast television is different from other media in another way. Broadcasters are granted the free and exclusive use of a limited and valuable part of the public domain in return for certain obligations, among them the duty to comply with Section 1464. Available technology makes it relatively

simple for Fox and the other broadcasters to do that. The 5-second delay technology that proved so inadequate in this case can easily be lengthened to 10 seconds or even a bit longer. Access to such technology and its easy use was a contributing factor in the Supreme Court's decision in this case upholding the Commission's enforcement regime under the APA. 129 S.Ct at 1813. It is not unreasonable to insist that broadcasters who have the free and voluntarily use of an important part of the public domain take minimal steps to use more effectively the technology they are already using. Broadcasters who are serious about their obligations under Section 1464 should not object to such a requirement.

After all, they have the free use of the airwaves; they control what goes out over those airwaves, and they reap huge financial gain from their use. It is simply wrong for the broadcasters to argue that the remedy for broadcast indecency is not at the source but at the receiving end, through use of v-chip or other technology whose cost is to be borne by the viewers. *See, e.g.,* Fox Brief at 52. There is something wrong with a business model that imposes on the customer the costs of compliance with a statute aimed at protecting that customer.

CONCLUSION

These are bad facts for Fox. It made the same mistake two years in a row on the same awards show. It did not claim that the challenged language had any artistic merit or conveyed a message of any kind, and the language was used literally and gratuitously. Although the FCC found that the 2002 and 2003 broadcasts were indecent, it did not assess a monetary penalty against Fox for what it did. Fox's President of its Entertainment Division even admitted in testimony to Congress that Ms. Richie's comments on national television included "inappropriate language." *2006 Order* ¶29.

Now, though, Fox claims its artistic prerogatives are at risk, that the future of live television programming hangs in the balance and that it does not know what it can safely broadcast in the future. If the FCC had proscribed outright the broadcast in any circumstances of the words at issue in this case, Fox and the others on its side here might have a real grievance. But the FCC has not done that and has instead given the broadcasters room to exercise their judgment while at the same time trying to give some meaning to Section 1464.

The professed concerns of Fox and the other parties in this case are a proxy for their desire to escape the strictures of Section 1464. They

want to compete freely with cable television and other media, all of which, they claim, have an unfair advantage because they are not subject to the indecency restrictions of the statute. Granting them what they want would let them have the benefits of the free and exclusive use of the public's airwaves with none of the Congressionally-imposed burdens, and thereby tilt the playing field in their favor and against all others.

This Court should uphold what little the FCC has done here about these tawdry broadcasts and end this matter.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,576 words (as determined by the Microsoft Word 2003 word-processing system used to prepare the brief), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Word 2003 word-processing system in 14-point Times New Roman font.

/s/ *Robert R. Sparks, Jr* .
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ANTI-VIRUS CERTIFICATION FORM

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief for Amicus Curiae Parents Television Council in Support of Federal Communications Commission, was served by electronic mail upon the parties listed on the attached Service List this 28th day of October, 2009.

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