06-1760-ag(L)

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

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 FROM AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AND THE MEDIA INSTITUTE

IN SUPPORT OF PETITIONERS

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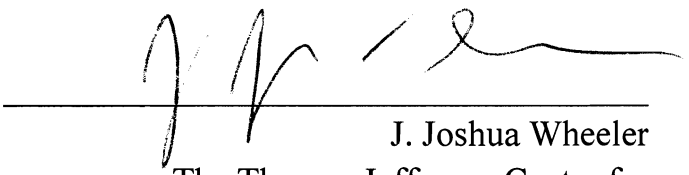
CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(a), the undersigned counsel for *amici curiae* states that **The Thomas Jefferson Center for the Protection of Free Expression** is a 501(c)(3) organization that has no corporate parent and no publicly-held company owns ten percent or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(a), the undersigned counsel for *amici curiae* states that **The Media Institute** is a 501(c)(3) organization that has no corporate parent and no publicly-held company owns ten percent or more of its stock.

DATED this 16th Day of September, 2009.



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CONSENT TO FILE

This brief is filed with the consent of all the parties in this matter.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

The Media Institute is an independent, nonprofit research organization located in Arlington, Virginia. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, a competitive communications industry, and journalistic excellence. The Institute has participated as *amicus curiae* in numerous court proceedings, including cases before the United States Supreme Court and federal courts of appeal.

STATEMENT OF THE CASE

This case pertains to an order of the Federal Communications Commission ("FCC") holding that music award programs broadcast by petitioners were in violation of the indecency and profanity provisions of 18 U.S.C. § 1464 because of two unscripted expletives uttered by a celebrity in presenting an award, and a spontaneous expletive uttered by an award winner in his acceptance speech. This Court held that the order in question represented an arbitrary and capricious change in policy in violation of 5 U.S.C. § 706(2)(A) of the Administrative Procedure Act. The FCC appealed the decision and a narrow majority of the Supreme Court reversed the judgment, finding the Commission's order neither arbitrary nor capricious, and remanded the case for further proceedings. The Supreme Court declined to address the constitutional questions now before this Court.

SUMMARY OF ARGUMENT

Three basic principles should guide the disposition of this case. First, the expression at issue here is fully protected by the First Amendment, since it falls within none of the exceptions the Supreme Court has recognized and consistently applied in free speech and free press cases. Second, the standards

which the Commission applied to these petitioners far exceed the limited scope of the Supreme Court's prior tolerance for regulation, even in the special circumstances of licensed broadcasting. Third, any vital and pertinent interests of our society may be effectively protected by standards that comport with the rigorous safeguards of the First Amendment. In light of these principles, *amici curiae* urge that this court adhere to its precedent and hold that the challenged regulations do not comport with the protections of the First Amendment.

I. THE EXPRESSION TARGETED BY THE CHALLENGED FCC ORDER IS FULLY PROTECTED UNDER THE FIRST AMENDMENT.

As this Court recognized when previously addressing this case, "*all* speech covered by the FCC's indecency policy is fully protected by the First Amendment." *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007) (citing *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989)). It was this vital premise that caused this Court to "question whether the FCC's indecency test can survive First Amendment scrutiny." *Fox Television*, 489 F.3d at 463. This Court must now squarely address the issue that it previously noted, namely, the constitutional question of whether "the FCC's indecency test

. . . permits the FCC to sanction speech based on its subjective view of the merit of that speech." *Id.* at 464.

As eloquently reaffirmed in *Texas v. Johnson*, 491 U.S. 397, 414 (1989), "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Thus, speech may not be banned simply because it concerns offensive or unwelcome subjects. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that 'sexual expression which is indecent but not obscene is protected by the First Amendment.'") (quoting *Sable*, 492 U.S. at 126); *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression.")

The Supreme Court's jurisprudence uniformly recognizes that all expression is presumptively protected by the First Amendment, save only where it falls within one of a small number of carefully defined exceptions, e.g., direct incitement to imminent lawless action, obscenity, or child pornography. Thus, as Justice Harlan recognized in *Cohen v. California*, 403 U.S. 15, 24 (1971),

even vulgar and widely offensive language may not be subject to governmental sanctions since "the constitutional right of free expression is powerful medicine in a society as diverse and populous as ours." Memorable from the *Cohen* ruling were such maxims as "one man's vulgarity is [often] another's lyric" and the premise that "words are often chosen as much for their emotive as their cognitive force." *Id*. at 25, 26. The Court also cautioned against "the facile assumption that one can forbid particular words without running a substantial risk of suppressing ideas in the process." *Id*. at 26.

This Court has similarly commented on the value of free expression and the wide-ranging nature of artistic expression. In *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996), this Court noted that categorizing visual arts as mere merchandise in order to restrict their distribution "demonstrate[s] an unduly restricted view of the First Amendment." Ten years later, this Court referred to "societal definitions of 'art'" as "a famously malleable concept the contours of which are best defined not by courts, but in the proverbial 'eye of the beholder.'" *Mastrovincenzo v. City of New York*, 435 F.3d 78, 90 (2d. Cir. 2006).

When it first addressed this case, this Court properly invoked a closely related principle – the Supreme Court's deep distrust of any regulatory regime that permits a government agency to "sanction speech based on its subjective

view of the merits of that speech." *Fox Television*, 489 F.3d at 464. Especially pertinent to this Court were such rulings as *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992), and *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988). *See Fox Television*, 489 F.3d at 464. The relevance of these precedents was the unavoidable recognition that the FCC action challenged here is part of a regulatory scheme in which a government agency asserts and exercises substantial discretion in regard to the content of protected speech.

While the Supreme Court has not directly revisited the status of vulgar or taboo language in any context such as that of the *Cohen* case, little doubt remains of the universal scope of *Cohen*'s protection for such unwelcome and uncivil language. The only possible exception to this doctrine could arise in the unique context of licensed broadcasting, discussed in Part II below.

Notably, however, even in the context of upholding time restrictions on broadcast content, persuasive precedent indicates that a "restriction on indecent speech will survive First Amendment scrutiny if the 'Government's ends are compelling [and its] means [are] carefully tailored to achieve those ends.' " *Action for Children's Television v. F.C.C.*, 58 F.3d 654, 659 (D.C. Cir. 1995) ("Act IV"), (quoting *Sable*, 492 U.S. at 126) (holding that the FCC could

require that indecent programs be "channeled" between the hours midnight and 6:00 a.m.)

In recognizing so powerful a presumption of protection, our First Amendment and the cases applying it are nearly unique even among the most protective of legal systems, many of which compel the speaker to identify a rationale for protection rather than placing, as we do, the burden on government to demonstrate a valid basis for regulation. The Supreme Court recently recalled the centrality to our constitutional jurisprudence of that delicate but vital balance. In striking down one part of the Child Pornography Prevention Act, Justice Kennedy's majority opinion cautioned that "the Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002).

The FCC order that is challenged here reveals both a deep distrust and a grave misunderstanding of this central premise of our First Amendment. Whatever might be the possible basis for regulation of broadcast material targeted as "indecent," the starting point of any analysis must be the presumption of constitutional protection, as much for that which offends and disgusts as that which pleases and delights. To invoke Justice Harlan's *Cohen* opinion once again: "most situations where the State has a justifiable interest in

regulating speech will fall within one or more of the various established exceptions . . . to the usual rule that governmental bodies may not prescribe the form or content of individual expression." *Cohen*, 403 U.S. at 24.

II. THE CHALLENGED ORDER SUBSTANTIALLY EXCEEDS PREVIOUSLY SANCTIONED SPEECH RESTRICTIONS.

The FCC's regulatory scheme for "fleeting expletives" goes much further in curtailing speech than previously sanctioned federal prohibitions on obscenity and indecency. The FCC's declaration that any use of certain vulgar or taboo words on the air is per se "patently offensive" and sanctionable, regardless of context, stands in direct tension with the long-standing principle that a work must be taken as a whole and evaluated in light of prevalent community standards. *Miller v. California*, 413 U.S. 15, 24 (1973). *See also Action for Children's Television*, 58 F.3d. at 657 (for language to be considered "indecent," it must be "in context, depict[] or describe[], in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.") (quoting *Pacifica Foundation v. FCC*, 556 F.2d 9, 94-98 (1975)). The Supreme Court recently reaffirmed this principle, stating that "pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene

community standards." *Ashcroft*, 535 U.S. at 235. As with sexually explicit content, the question of whether profanity contravenes community standards is likewise context-dependent.

Whatever may be the technical differences among expressive media, those differences have never been held to justify substantially different levels of constitutional expression. From the outset, the Supreme Court and other courts have acknowledged such differences and their regulatory consequences. Most notably in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), a bare majority of the Supreme Court sustained a very limited use of the Commission's statutory authority to sanction the broadcasting by licensees of material that could be deemed "indecent." Not only did the Commission itself recognize the very limited nature of the authority it was seeking; two Justices whose concurrence was vital to the result expressly cautioned that so narrow a ruling "does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered . . . here." *Id*. at 760-61 (Powell, J., concurring in part). Indeed, this Court has expressly noted the "narrowness of the *Pacifica* holding," and recognized that "Justice Powell's concurring opinion which gave the Court a majority also emphasized that the Court's holding was confined to the facts." *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 559-60 (2d Cir. 1988).

Justice Powell's concurring assumption that "the Commission may be expected to proceed cautiously, as it has in the past" proved prophetic. *Pacifica*, 438 U.S. at 761 n.4 (Powell, J., concurring in part). Until quite recently, the FCC had in fact honored that expectation in its sparing view of the authority conferred by *Pacifica*. *See Fox Television*, 489 F.3d at 449-50.

Even more significant than the Commission's regulatory course has been the Supreme Court's steadily narrowing construction of the FCC's authority and limited application of *Pacifica*. Notably, in *Sable Communications*, 492 U.S. at 126, the Supreme Court left no doubt that speech "which is indecent but not obscene is protected by the First Amendment" and may not be regulated in any context other than licensed broadcasting – specifically telephonic communications. *Id*. at 131. That view was forcefully reaffirmed in *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 822-23 (2000), with respect to cable broadcasting, and most notably with regard to the Internet in *Reno*.

This Court's precedents have stressed the narrow authority of the FCC to restrict the content of broadcast media. For instance, this Court recently observed that "[w]here expression is conditioned on governmental permission, such as a licensing system, . . . the First Amendment generally requires procedural protections to guard against impermissible censorship." *John Doe*,

Inc. v. Mukasey, 549 F.3d 861, 871 (2d Cir. 2008); *see also Hobbs v. County of Westchester*, 397 F.3d 133, 150 (2d Cir. 2005). This Court has also observed that it is the Government which bears the "heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression." *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 121 (2d Cir. 1984).

Such rulings as these evidence both the narrow authority of the FCC to regulate content, as well the anomalous status of licensed broadcasting under federal law. In *Denver Area Educational Telecommunications Consortium v. FCC*, Justice Thomas was joined by Justice Scalia and then-Chief Justice Rehnquist in observing that the current distinctions among media for First Amendment purposes were "dubious from their infancy" and have created increasing anomalies for communications entities, most especially those engaged in cable broadcasting. 518 U.S. 727, 813-14 (1996) (Thomas, J., concurring in part and dissenting in part). Dramatic changes in technology and the very nature of communications only serve to heighten such concerns, and at the very least counsel caution in validating possibly outmoded assumptions about the very nature of the regulatory field. *See id.* at 776-77 (Souter, J., concurring).

Even more compelling in some respects has been the Commission's own (until very recently) extremely narrow view of the scope of its authority over arguably "indecent" broadcast material. *See Fox Television*, 489 F.3d at 451. Despite an occasional rebuke for having strayed beyond those bounds – the "dial-a-porn" order invalidated in *Sable,* for example – it is notable that the other occasions which required the Supreme Court's intervention (to protect cable and the Internet) reflected the excessive zeal not of the Commission but rather of Congress. Consistent agency rulings during the quarter century that followed *Pacifica* amply validated Justice Powell's expectation that the Commission's enforcement of the indecency standard would be "restrained." *See Fox Television*, 489 F.3d at 448-51.

As this Court previously noted, the FCC's own consistent view of salacious broadcasts clearly exempted from sanctions material that was not "patently offensive" and did not describe or depict "sexual or excretory organs or activities," and thus would clearly have exempted "fleeting expletives." *Id.* at 450, 460-61; *see also Citizen's Complaint Against Pacifica Found. WBAI(FM), N.Y., N.Y.*, 56 F.C.C.2d 94, P 11 (1975). Nor was there any possible basis for the inclusion within the Commission's regulatory sights of broadcast material that was merely "profane" without the requisite elements of indecency; despite the presence of both terms in the statute as early as 1927,

they had never previously been disjoined in this manner. *Fox Television*, 489 F.3d at 461-62. It was not until 2004 that the Commission departed significantly from what had been its consistent interpretation and application of this Court's *Pacifica* standard. *Fox Television*, 489 F.3d at 461; *see also Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 F.C.C.R. 19859 (2004) ("*Golden Globes II*").

The *Pacifica* ruling must also be taken in the context of its time and its factual circumstances. In the three decades since *Pacifica*, the dominant position of licensed broadcasting has steadily eroded due to the ever-expanding options in television viewing. The diminishing impact of licensed broadcasting's content on national mores and values is evident in the fact that only 14% of American television households are limited to exclusively broadcast stations today (*In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 F.C.C.R. 2503, 2508 (2006)). Moreover, the always tenuous assumption that licensed broadcasters were uniquely capable of inflicting harm on unwary young listeners and viewers has long since been undermined if not wholly repudiated.

Further, community mores have significantly changed since *Pacifica*. Indicative of such a shift is *United States v. Various Articles of Obscene*

Merchandise, 709 F.2d 132, 134, 137 (2d Cir. 1983), where this Court determined – as early as 1983 – that magazines and videotapes constituting examples of "hard-core pornography" did not qualify as obscene given New York City's community standard of obscenity.

Meanwhile, it is worth recalling, as this Court has done previously, the ominous prospects that led the United States Court of Appeals for the District of Columbia Circuit to reject on First Amendment grounds the *Pacifica* order. The claimed FCC authority, warned that court, would prohibit "the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the Bible." *Fox Television*, 489 F.3d at 448 (quoting *Pacifica Foundation v. FCC*, 556 F.2d 9, 14 (D.C. Cir. 1975)). This Court has also previously observed that cases "where the price of freedom of expression is so high and the horizons of conflict between countervailing interests seemingly infinite . . . do not yield simplistic formulas or handy scales for weighing competing values." *James v. Board of Education*, 461 F.2d 566, 575 (2d Cir. 1972). Instead, "[t]he best one can hope for is to discern lines of analysis and advance formulations sufficient to bridge past decisions with new facts." *Id*. This Court extended this reasoning in *Pico v. Board of Education*, 638 F.2d 404, 413 (2d Cir. 1980)

(*aff'd* 457 U.S. 853), noting that "[s]uch considerations are relevant not only to our approach to the facts of the case before us, but also to an appreciation of the significance of past precedents." *Id.* *Pico* stated that "[i]n circumstances in which so many interests and public policies converge, relatively minor changes in the pattern of facts presented often deprive precedents of reliability and cast us more than we would choose upon our own judgment. It is a frustrating process which does not admit of safe analytical harbors." *Id.* (internal citations and quotations omitted). Adherence to these principles requires that *Pacifica* be interpreted in the context of its facts, as well as in light of the significant developments surrounding broadcasting that have occurred since 1978.

III. VALID NATIONAL INTERESTS RELATED TO BROADCAST CONTENT MAY BE ADEQUATELY PROTECTED IN WAYS THAT ARE CONSISTENT WITH FIRST AMENDMENT SAFEGUARDS.

Certain technical differences among communications media may warrant contrasting regulatory approaches. Thus, for example, a ban on the broadcast of material that is found to be legally obscene or to contain child pornography seems beyond challenge, assuming that administrative enforcement procedures adequately ensure due process – even though such actions may not (and logically cannot) duplicate all the procedures of a court in a criminal

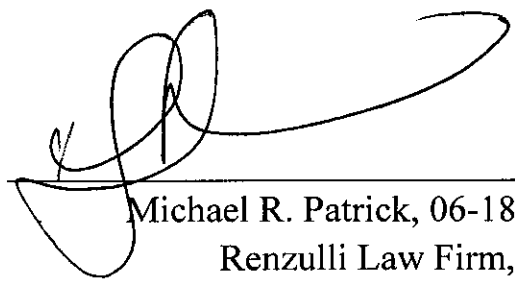
prosecution. Additionally, broadcasters may be required to document certain activities, including the content of certain material that airs on radio and television.

Viewer and listener interests may be, and are, protected in other ways that may be distinctive to the electronic media, but are also compatible with First Amendment safeguards. Notably, the Supreme Court's ruling in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), recognized the appropriateness of measures Congress had adopted to empower cable subscribers to determine the content of material which they received, and to block certain material that families might choose not to receive. When a plausible and less restrictive alternative to a content-based speech restriction exists, the Government must prove that this alternative cannot achieve its goals before proceeding with a more restrictive method. *Id*. at 816. In this case as well, less restrictive alternatives must be explored.

One example of a potentially viable alternative is a time-based restriction on broadcast. For instance, in *Action for Children's Television*, 58 F.3d 654 ("Act IV") a restriction on the broadcast of indecent television and radio to the hours of midnight to 6 a.m. was approved. Analogous possibilities merit consideration in this area.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this court to extend the protection of the First Amendment to the limited use of profanity in licensed broadcasting programs.



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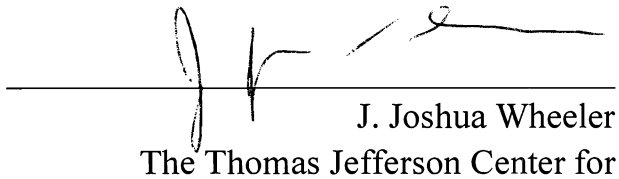

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the enclosed **AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION** and **THE MEDIA INSTITUTE** were mailed electronically* and first-class with postage prepaid on this 16th day of September, to each of the following:

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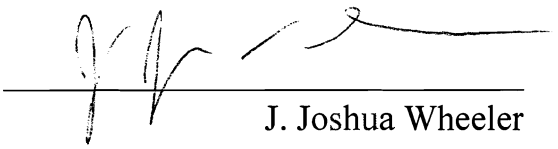

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