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

—against—

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA,
Respondents,

(*caption continued on inside front cover*)

ON PETITION FOR REVIEW FROM AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

**BRIEF FOR PETITIONERS
CBS BROADCASTING INC., ABC, INC., WLS TELEVISION, INC.,
AND KTRK TELEVISION, INC. AND INTERVENORS
NBC UNIVERSAL, INC. AND NBC TELEMUNDO LICENSE CO.**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 & 28(a)(1), Petitioners and Intervenors make the following disclosures:

CBS Broadcasting Inc. is an indirect, wholly owned subsidiary of CBS Corporation, a publicly held company.

ABC, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly traded corporation. WLS Television, Inc. and KTRK Television, Inc. are indirect, wholly owned subsidiaries of ABC, Inc.

NBC Universal, Inc. operates the NBC and Telemundo broadcast networks, as well as nonbroadcast television networks. NBC Universal, Inc. is owned by National Broadcasting Company Holding, Inc. (which is a wholly owned subsidiary of General Electric Company) and by Vivendi Universal, S.A., a publicly traded company. NBC Telemundo License Company is the licensee or controlling parent entity of the licensees of several full-power, television broadcast stations. It is a wholly owned subsidiary of NBC Telemundo, Inc., which is owned by both NBC Telemundo Holding Company (a wholly owned subsidiary of General Electric Company), and by NBC Universal, Inc.

General Electric Company has no parent company, and no publicly held company owns 10 percent or more of its stock.

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PRELIMINARY STATEMENT

Petitioners CBS Broadcasting Inc. ("CBS"), ABC, Inc., WLS Television, Inc., and KTRK Television, Inc. and Intervenors NBC Universal, Inc. and NBC Telemundo License Co. (together, the "Networks") hereby respond to this Court's August 5, 2009 Order seeking supplemental briefing in light of the Supreme Court's decision in *FCC v. Fox Television Stations, Inc.*, 556 U.S. __, 129 S. Ct. 1800 (2009) ("*FCC v. Fox*"), *reversing and remanding* 489 F.3d 444 (2d Cir. 2007) ("*Fox v. FCC*"). The Court narrowly held that the FCC's new policy of enforcing its broadcast indecency rules against "fleeting expletives" was not arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(a). However, it "decline[d] to address the constitutional questions at this time," remanding the case to resolve such issues, including whether the Commission's policy violates the First Amendment. *Id.* at 1819. As explained below, the record in this case makes abundantly clear that the FCC's indecency enforcement policy clearly fails constitutional scrutiny.[1]

QUESTIONS PRESENTED

1. Whether the FCC's enforcement of broadcast indecency rules against isolated, inadvertent, or fleeting expletives violates the First Amendment where the new

[1] The Networks incorporate by reference here the Statement of the Case, Statement of Facts, and recitation of Standard of Review in the concurrently filed Brief of Petitioner Fox Television Stations, Inc.

policy abandons more than three decades of restrained enforcement that served as the Commission's primary constitutional defense of its rules?

2. Whether the narrow exception to prevailing First Amendment doctrine set forth in *FCC v. Pacifica Found., Inc.*, 438 U.S. 726 (1978), is still valid where broadcasting is no longer "uniquely pervasive" or "uniquely accessible to children" because of advances in technology and evolution in the media environment?

INTRODUCTION AND SUMMARY OF ARGUMENT

The extensive record in this case already led this Court to be "skeptical that the Commission can provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster." *Fox v. FCC*, 489 F.3d at 462. The Court expressed sympathy for the Networks' contention that the FCC's indecency test lacks any limiting principles, and found it "increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children." *Id.* at 463, 465.

These initial views were expressed in dictum so as to "avoid reaching constitutional questions in advance of the necessity of deciding them." *Id.* at 462 (citation omitted). But now, "there is no way to hide the long shadow the First Amendment casts over what the Commission has done." *FCC v. Fox*, 129 S. Ct. at 1828 (Ginsburg, J., dissenting). In remanding the case to this Court, the Supreme Court expressly invited the Court to reach the constitutional issues presented. *Id.* at 1819. Moreover, a majority of the Justices – including a member of the five-Justice majority, Justice Thomas – expressed strong misgivings about whether the FCC's indecency policy

could withstand First Amendment scrutiny. *See id.* at 1820 (Thomas, J., concurring); *id.* at 1825 (Stevens, J., dissenting); *id.* at 1828 (Ginsburg, J., dissenting); *id.* at 1835 (Breyer, J., dissenting, joined by Justices Stevens, Ginsburg, and Souter). *See also id.* at 1824 (Kennedy, J., concurring in part and dissenting in part) (reserving judgment on constitutional issues).

On remand, this Court should hold that the FCC's indecency enforcement policy violates the First Amendment for the following reasons:

First, elimination of the "fleeting expletives" exception is unconstitutional under the First Amendment reasoning of *Pacifica*. The policy that fleeting, inadvertent, or unintentional expletives are "not actionable" was essential to *Pacifica's* narrow constitutional ruling. Consequently, the Commission's new strict enforcement approach fails to provide broadcasters with the "breathing space" needed to survive First Amendment scrutiny.

Second, seismic changes in the media environment during the past three decades, reinforced by a growing body of Supreme Court decisions, undermine entirely the rationale for treating broadcasting differently from the plethora of other media that pervades Americans' homes today. When *Pacifica* was decided, over-the-air radio and television were the only universally available electronic mass media, and parental control technologies were largely limited to the channel changer and the on-off switch. Cable television was in its infancy, with its first premium channels just emerging. The Internet was an obscure military research project, and cellular telephones, including mobile video

applications, were the stuff of science fiction. But as this Court recognized, those then-nascent technologies, including sophisticated content control systems, now constitute "today's realities." *Fox v. FCC*, 489 F.3d at 466. Current conditions compel the conclusions that the factual lynchpin of *Pacifica* – the assumption that broadcasting is a singularly "pervasive" medium, "uniquely accessible" to children – no longer holds true, and that the FCC's indecency policy therefore can no longer withstand scrutiny under the First Amendment.[2]

ARGUMENT

I. THE FCC'S NEW FLEETING EXPLETIVES POLICY IS UNCONSTITUTIONAL UNDER *PACIFICA*

A. The FCC Created a Restrained Enforcement Policy to Avoid a First Amendment Conflict

On its face, Section 1464 imposes a total ban on the broadcast of "any obscene, indecent, or profane language by means of radio communication." 18 U.S.C. § 1464. However, when the FCC first developed a standard to regulate broadcast "indecency" (distinct from "obscenity") in the 1970s, it recognized the inherent First Amendment tensions and adopted a cautious enforcement policy in deference to those constitutional restraints. *E.g., A Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C.2d 94, 103-04 (1975) ("*FCC Pacifica Order*") (concurring statement of Commissioners Robinson and Hooks) ("the First Amendment does not permit us to read

[2] The Networks also adopt the arguments presented in the Brief of Petitioner Fox Television Stations, Inc.

the statute broadly"). The Commission sought in various ways to moderate the statute's categorical language, such as extending substantial deference to licensees' editorial judgment, refraining from enforcement during times of the day when children were not likely to be in the audience (the "safe harbor"), and treating unplanned, inadvertent, or fleeting expletives as "not actionable."[3]

This Court's initial order canvassed the Commission's history of restraint in detail, *FCC v. Fox*, 489 F.3d at 447-51, and found that "[f]or decades broadcasters relied on the FCC's restrained approach to indecency regulation and its consistent rejection of arguments that isolated expletives were indecent." *Id.* at 461. Although this background was a central part of this Court's previous APA findings, it explains why elimination of the fleeting expletives exception also violates the First Amendment.

B. The Fleeting Expletives Exception Is Constitutionally Required

1. The Fleeting Expletives Exception Was Formulated, Defended, and Applied to Address Constitutional Doubts

Section 1464 unquestionably violates the First Amendment absent a narrowing construction. No court has ever upheld a total ban on indecent expression, and the FCC has never been granted unbridled discretion to determine what constitutes indecency. It has been a continuing source of tension, for example, that the Commission's definition

[3] This regulatory background was thoroughly briefed in this case, and has never been seriously disputed. *See* Brief of Petitioner CBS Broadcasting Inc. at 16-23; Brief of Petitioner Fox Television Stations, Inc. and Intervenor FBC Television Affiliates Association at 3-13; Brief of Former FCC Officials at 3-11.

of indecency, while based on *Miller v. California's* three-part test for obscenity, lacks the rigor of the *Miller* formulation. *See Miller*, 413 U.S. 15, 24 (1973). This difference between the respective legal standards was a principal reason the Supreme Court later held that an identical indecency standard applied to the Internet was unconstitutional. *Reno v. ACLU*, 521 U.S. 844, 872-75 (1997).

Upon initial review of the FCC's then-newly crafted indecency test, the D.C. Circuit reached the same conclusion later found in *Reno* – that the standard was overly broad and vague. *Pacifica Found. v. FCC*, 556 F.2d 9, 16-17 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978). It held that the test was unconstitutional because it "fails to meet the rigorous standards of the Supreme Court" as set forth in *Miller* and other cases, and that the FCC's lax standard "would prohibit the broadcast of Shakespeare's *The Tempest* or *Two Gentlemen of Verona*" along with "certain passages of the Bible" and the "works of Auden, Becket, Lord Byron, Chaucer, Fielding, Greene, Hemingway, Joyce, Knowles, Lawrence, Orwell, Scott, Swift, and the Nixon tapes." *Id.* at 16, 18.

In response to this ruling, the Commission presented its fleeting expletives policy as a centerpiece of its constitutional defense. In briefing to the Supreme Court, the FCC faulted the Court of Appeals for positing a "post-record parade of horribles" and stressed that the Commission's decision "must be read narrowly." Brief for the Federal Communications Commission at 26-27, *FCC v. Pacifica Found.*, No. 77-528, 1978 WL 206838 (U.S. Mar. 3, 1978) (citation omitted). It emphasized the non-fleeting "deliberate repetition of these words" in the Carlin monologue and noted that the case involved

"prerecorded language with the words repeated over and over [and] deliberately broadcast." *Id.* at 26.

The Supreme Court reversed on the limited basis sought by the FCC. It stressed the "specific factual context" of the *Pacifica* ruling, and quoted the FCC's reconsideration order, which pointed to the inequities of holding licensees responsible when "public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." *Pacifica*, 438 U.S. at 733 & n.7 (quoting *Petition for Reconsideration of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, 59 F.C.C.2d 892, 893 n.1 (1976) ("*Pacifica Reconsideration Order*")). Justices Powell and Blackmun, who supplied the crucial votes for *Pacifica's* slim majority, emphasized that "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word." *Pacifica*, 438 U.S. at 760-61 (Powell, J., concurring). Justice Powell's opinion articulated the "position taken by those Members who concurred in the judgments on the narrowest grounds," and should be considered the holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted).

In the intervening decades, until the policy change at issue in this case, the Commission consistently interpreted *Pacifica* as imposing a constitutional constraint on its ability to enforce indecency rules against fleeting expletives. Consequently, when it applied its indecency rules just after *Pacifica*, the FCC explained that "[w]e intend strictly to observe the narrowness of the *Pacifica* holding," because "the First Amendment and the 'no censorship' provision of Section 326 of the Communications Act severely limit

any role by the Commission and the courts in enforcing the proscription contained in Section 1464." *WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 (1978). Specifically, the FCC stressed that "the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the 'indecent' words in question," and it added that "[t]he opinion of the Court specifically stated that it was not ruling that 'an occasional expletive … would justify any sanction.'" *Id.* (quoting *Pacifica*, 438 U.S. at 750).

When the Commission expanded indecency enforcement beyond George Carlin's "seven dirty words" about a decade later, it nevertheless made clear "that [its] application of Section 1464 must be consistent with the constitutional principles derived from the *Pacifica* decision." *Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930, 931 (1987). In doing so, the agency understood that "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency," *Pacifica Radio*, 2 FCC Rcd. 2698, 2699 (1987), and that "[s]peech that is indecent *must* involve more than the isolated use of an offensive word." *Infinity Broad. of Pa.*, 2 FCC Rcd. 2705, 2705 (1987) (emphasis added).

In short, the fleeting expletives exemption was viewed as an essential First Amendment check on the FCC's enforcement authority as the indecency regime was formulated, defended in court, and applied for nearly three decades. As Justice Breyer observed in this case, the FCC "repeatedly made clear that it based its 'fleeting expletive' policy upon the need to avoid treading too close to the constitutional line as set forth in Justice Powell's *Pacifica* concurrence." *FCC v. Fox*, 129 S. Ct. at 1834 (Breyer, J., dissenting). Justice Ginsburg similarly noted that *Pacifica* "was tightly cabined" to meet

First Amendment concerns, and that the Commission's new policy represents a "bold stride beyond the bounds" of *Pacifica*. *Id.* at 1828-29 (Ginsburg, J., dissenting).

2. The FCC Cannot Constitutionally Jettison the Fleeting Expletives Exception

The Commission made no serious attempt in this case to justify its policy change in constitutional terms. It claimed only that its decision was "not inconsistent" with *Pacifica* because the Court "specifically reserved the question of 'an occasional expletive' and noted that it addressed only the 'particular broadcast' at issue in that case." *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 13299 ¶ 24 (2006) ("*Omnibus Remand Order*") (SPA 86-87). *See also Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* 19 FCC Rcd. 4975, 4982 (2004) ("*Golden Globe Awards")* (same). This brief reference is not just a statement of a change in policy; it is a complete reversal of the Commission's position regarding *Pacifica's* constitutional significance. The FCC inexplicably reinterpreted *Pacifica* as providing "an open door" to eliminating its fleeting expletives policy, when for three decades it read the case as "an insurmountable obstacle." *FCC v. Fox*, 129 S. Ct. at 1834 (Breyer, J., dissenting)

Thirty years of constitutional interpretation cannot be so easily discarded. The FCC's new interpretation that the Court "reserved" the ability to apply the policy expansively to include isolated words cannot be reconciled with *Pacifica's* facts or with its "emphatically narrow" holding. *See Sable Commc'ns v. FCC,* 492 U.S. 115, 127 (1989).

Justice Stevens, *Pacifica's* author and the sole member of the *Pacifica* Court still sitting, confirmed this conclusion: "the Commission's changed view of its statutory mandate certainly would have been rejected if presented to the Court at the time." *FCC v. Fox*, 129 S. Ct. at 1825 (Stevens, J., dissenting).

Constitutionally-based policies cannot be repealed at administrative whim. For example, Section 1464 bans broadcast indecency entirely, but the FCC interpreted the law as requiring only "time channeling," thus establishing a so-called "safe harbor" for indecent expression after 10 p.m. This "safe harbor" was entirely the FCC's creation, yet reviewing courts have held that the First Amendment precludes eliminating it. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1343 n.18 (D.C. Cir. 1988) ("*ACT I*") (indecency rules cannot be enforced constitutionally "unless the FCC adopts a reasonable safe harbor"); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1509-10 (D.C. Cir. 1991) ("*ACT II*") (First Amendment precludes even congressional repeal of the safe harbor).

The same constitutional limitation applies to the "safe harbor" of restrained enforcement regarding fleeting and inadvertent transmissions. Such policies are grounded in the basic principle that the "First Amendment needs breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963) (quoted in *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964)). *See Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 373 (1997). Broadcast licensees must be accorded the "widest journalistic freedom consistent with [their] public obligations," and in "perform[ing] its statutory

duties, the Commission must oversee without censoring." *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 110, 118 (1973).

C. Without the Policy of Restraint, FCC Enforcement Has Become Standardless and Unpredictable

The FCC's abandonment of restraint also renders the agency's indecency policy unconstitutionally vague and arbitrary. Without articulated standards and boundaries, the Commission increasingly attempts to justify its enforcement decisions by imposing arbitrary judgments on programming content. But such a content-based "contextual analysis" misreads *Pacifica*. When the Supreme Court discussed "context" as a critical factor, it focused on the licensee's intentional behavior, that is, whether the broadcast was "deliberate," "repeated," or involved "verbal shock treatment." *Pacifica,* 438 U.S. at 732; *id.* at 757 (Powell, J., concurring). The analysis turned on the "specific *factual* context" of the broadcaster behavior, and did not empower the Commission to become the arbiter of programming value. *Id.* at 742 (quoting *Pacifica Reconsideration Order*, 59 F.C.C.2d at 893) (emphasis added).

A majority of the Court in *Pacifica* expressly rejected a contextual approach that would permit the FCC to judge indecency by engaging in an ad hoc weighing of the relative merit of expression against its "offensiveness."[4] As Justice Powell explained, the

[4] *Pacifica*, 438 U.S. at 750. This contextual approach articulated in *Pacifica* considered "[t]he content of the program in which the language is used" to the extent that it might "affect the composition of the audience." Thus, the Court suggested that "an occasional expletive" during "a telecast of an Elizabethan comedy" would not be actionable because few children might be expected to tune in. Further illustrating this

government cannot "decide on the basis of its content which speech protected by the First Amendment is most 'valuable,' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection." *Pacifica*, 438 U.S. at 761 (Powell, J., concurring). *See also id.* at 762-63 (Brennan, J., dissenting) (the majority "refus[ed] to create a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content"). The suggestion that indecent speech lies "at the periphery of First Amendment concern" was confined to a plurality of three Justices, *id.* at 743 (plurality op.), and the Court has since expressly corrected this mistaken view. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002).

Now, with its ad hoc balancing approach, the FCC has assumed the unconstitutional role of government editor.[5] In this proceeding, the Commission noted that it must "weigh and balance" the contextual factors (including the relative "offensiveness" of the expression at issue) because "[e]ach indecency case presents its own particular mix of these, and possibly other, factors." *Omnibus Remand Order* ¶ 15

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point, it noted that "a prime-time recitation of Geoffrey Chaucer's *Miller's Tale* would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected" by it. *Id.* at 750 & n.29.

[5] Under the restrained enforcement policy, licensees were accorded broad discretion over programming and the FCC focused on "overall performance and good faith rather than on specific errors" in order to minimize First Amendment tensions. *Banzhaf v. FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968). *See Pacifica Reconsideration Order*, 59 F.C.C.2d at 892 ("the real solution to this problem [is] the 'exercise of licensee judgment'").

(quoting *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcasting Indecency*, 16 FCC Rcd. 7999, 8003 (2001)) (SPA 81-82). As a consequence, "[i]n particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent, or, alternatively, removing the broadcast material from the realm of indecency." *Id.*

The FCC's treatment of *The Early Show* in this proceeding provides a stark example of the inconsistent and arbitrary decisionmaking that has resulted from this approach. The Commission initially concluded that a woman's unexpected use of the word "bullshitter" during a live interview on the CBS morning news program was indecent. The use of the word was "shocking and gratuitous," the Commission found, "particularly during a morning news interview." *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 2664 ¶ 141 (2006) (SPA 40-41). On reconsideration, however, the Commission reversed itself entirely – holding that the use of the word during the live interview was not indecent specifically *because* the offending word was used "during a *bona fide* news interview." *Omnibus Remand Order* ¶ 71 (SPA 105). Put simply, the Commission reached diametrically opposite conclusions at different stages of this proceeding *for precisely the same reason* – that the word "bullshitter" was uttered during a news program. At the same time, the Commission ruled there is no exemption from the indecency rules for news. *Id.* No one can predict how the FCC may rule in any given case.

This Court's previous opinion in this case cogently presents other examples of the Commission's wildly inconsistent and seemingly capricious application of its highly subjective indecency standard. *See Fox v. FCC*, 489 F.3d at 463 (listing examples). To cite just one example, the Commission deemed the use of certain words acceptable within a broadcast of the movie *Saving Private Ryan* but deemed those same words indecent when broadcast within a documentary about blues musicians. *Id.* Time and again, particularly recently, the Commission has manipulated its "contextual analysis" to reach whatever result it chooses.

Such ever-changing and indeterminate factors do not provide "guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988). The Supreme Court has stressed repeatedly that "[w]ithout these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *Id. See Cox v. Louisiana*, 379 U.S. 536, 557 (1965) ("lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not").

Because of the Commission's standardless approach to enforcement, this Court expressed sympathy with the contention "that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague." *Fox v. FCC*,

489 F.3d at 463. Judge Pooler also correctly noted that "the FCC's indecency test raises the separate constitutional question of whether it permits the FCC to sanction speech based on [the agency's] subjective view of the merit of that speech," and added, "we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified 'context' of a broadcast indecency." *Id.* at 464. Accordingly, this Court should hold that the Commission's unpredictable approach to indecency enforcement violates the First Amendment.

D. The FCC's New Enforcement Policy Has Had a Massive Chilling Effect on Protected Speech

The aggressive and essentially untethered new approach to indecency enforcement articulated in *Golden Globe Awards* and reaffirmed in the *Omnibus Remand Order*, coupled with the FCC's content-based oversight of programming decisions and the threat of massive fines, has inevitably resulted in broadcasters exercising severe self-censorship of protected expression.[6] In this environment, even a large publicly held corporation cannot willingly subject itself to the threat of prosecution "for an error in judgment as to what is indecent." *ACLU v. Reno*, 929 F. Supp. 824, 856 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

To cite one example directly affecting CBS, when the network announced in 2006 that it would re-broadcast its Peabody Award-winning *9/11* documentary on the fifth

[6] As a result of recent amendments to the Communications Act, it is possible that "a single, fleeting instance of indecent speech" could result in a fine exceeding $65 million (A-32).

anniversary of the September 11 attacks without editing expletives actually spoken in real time by the participants in those tragic events, CBS affiliates serving roughly 10 percent of U.S. households decided they would either not broadcast the program at all or would delay its start until after 10 p.m., during the safe harbor – despite having previously broadcast the same documentary twice.[7] This incentive to self-censor resulted largely from a campaign mounted before the third airing of the program by the American Family Association, which encouraged its members to flood the FCC with complaints if the documentary was broadcast. The Commission's complaint-driven process has resulted in a "heckler's veto" that preemptively snuffs out constitutionally-protected speech.[8]

The Commission's erratic and subjective new approach also had a significant chilling effect on ABC affiliates when the ABC Television Network decided to re-air

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[7] *See* Jeremy Pelofsky, *Profanity Concerns Prompt CBS to Show '9/11' on Web*, REUTERS (Sept. 9, 2006); John Eggerton, *Pappas Won't Air CBS' 9-11 Doc*, BROADCASTING & CABLE (Sept. 7, 2006) (describing affiliate's decision to preempt the *9/11* documentary because affiliate believed that, "in the current regulatory climate, stations that air network programming with indecent or profane content are subject to significant fines and the threat of license revocation") (internal quotations omitted); John Eggerton, *Sinclair to Delay 9/11 Doc*, BROADCASTING & CABLE (Sept. 1, 2006) (describing Sinclair Broadcasting's belief that "the current rules, which promote censorship and impose excessive fines, coupled with the lack of clear or advance guidance from the FCC, impede broadcasters from airing programs that honor our heroes and memorialize significant events") (internal quotations omitted).

[8] *See Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134-135 (1992) ("Speech cannot be … punished or banned … simply because it might offend a hostile mob"). *See also Ashcroft v. ACLU*, 542 U.S. 656, 674 (2004) (Stevens, J., concurring) ("the Government may not penalize speakers for making available to the general … audience that which the least tolerant communities in America deem unfit for their children's consumption").

Saving Private Ryan in 2004. Although the FCC staff had ruled twice before that the film was *not* indecent, nearly 70 ABC-affiliated television stations declined to air the film again. "Without an advance waiver from the FCC," said Ray Cole, president of Citadel Broadcasting, "we're not going to present the movie in prime time." Lisa de Moraes, "*Saving Private Ryan": A New Casualty of the Indecency War,* WASH. POST (Nov. 11, 2004). After the broadcast, the Commission dismissed indecency complaints brought against ABC, ruling that *Saving Private Ryan* did not violate the indecency rules despite the fact that it contained numerous and repeated expletives. But that ruling came too late to prevent preemption of the film by ABC-affiliated television stations across the country. *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan*," 20 FCC Rcd. 4507 (2005).

The chill cast by the Commission's regulation of fleeting expletives is particularly invidious for live programming – be it news, sports, or entertainment. For the Networks, this is not merely a matter of conjecture: The Commission has pending a number of investigations concerning live broadcasts of sporting events which included expletives uttered unexpectedly by players or fans. For example, the FCC initiated an investigation of NBC's live broadcast of the USA-versus-China women's volleyball game in the 2004 Summer Olympic Games from Athens, Greece, for an American player's supposed utterance of the word "fuck" (picked up by a courtside microphone) after misplaying a

ball when the U.S. team was trailing 21-20 in a crucial game. *See* A-271. Five years later, the Commission has not closed the inquiry.

Such examples prompted this Court to express concern that the FCC's current approach to enforcement "creates an undue chilling effect on free speech, and requires broadcasters to 'steer far wider of the unlawful zone.'" *Fox v. FCC*, 489 F.3d at 463 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). This harsh assessment flows directly from the Commission's decision to abandon its formerly restrained indecency enforcement policy and to insert itself into licensees' editorial judgments.

II. *PACIFICA* IS A VERY NARROW HOLDING WHOSE UNDERLYING ASSUMPTIONS HAVE BEEN ECLIPSED BY LEGAL AND TECHNOLOGICAL DEVELOPMENTS

A. *Pacifica* Established Only a Narrow Exception to Established First Amendment Principles

The Supreme Court has reaffirmed repeatedly that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Reno v. ACLU*, 521 U.S. at 874 (quoting *Sable Commc'ns,* 492 U.S. at 126). Thus, this Court correctly noted in its initial decision that "*all* speech covered by the FCC's indecency policy is fully protected by the First Amendment." *Fox v. FCC*, 489 F.3d at 462 (citation omitted) (emphasis in original). Accordingly, the Supreme Court has invalidated laws restricting indecent expression in *every* medium other than broadcasting, including the Internet, *Reno v. ACLU*, 521 U.S. 844; cable television, *Playboy Entm't Group*, 529 U.S. 803; telephony, *Sable Commc'ns*, 492 U.S. 115; cinema, *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123,

130 n.7 (1973); print, *Butler v. Michigan*, 352 U.S. 380, 383 (1957); and the mail, *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60 (1983). In this regard, *Pacifica* represented a First Amendment exception, not the prevailing rule. And – as the Court made quite clear – it was a very limited exception, indeed.[9]

The Court reasoned primarily that the George Carlin monologue could be regulated "in the broadcasting context" (but not otherwise) because of technical limitations at the time that made broadcasting "unique." *Pacifica*, 438 U.S. at 748-50. In today's more technologically sophisticated media marketplace, the Court's rationale for treating broadcasting differently from all other media evaporates.

B. Technological Assumptions Underlying the *Pacifica* Exception Are No Longer Valid

The *Pacifica* holding was predicated on the fact that the various media have different characteristics, but the Court specified that only "two have relevance to the present case" – first, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and second, "broadcasting is uniquely accessible to

[9] The Court repeatedly stressed that "our review is limited to … the authority to proscribe this particular broadcast," and narrowed the issue "to the facts of this case." *Pacifica*, 438 U.S. at 742, 744. Subsequent decisions have reinforced that *Pacifica* is an "emphatically narrow holding." *Sable Commc'ns,* 492 U.S. at 127. *See also Bolger*, 463 U.S. at 73-74 (distinguishing unique characteristics of broadcasting); *Fabulous Associates v. Pennsylvania Pub. Util. Comm'n,* 896 F.2d 780, 783-85 (3d Cir. 1990) (same); *Cruz v. Ferre*, 755 F.2d 1415, 1421 (11th Cir. 1985) ("Recent decisions of the Court have largely limited *Pacifica* to its facts.").

children."[10] The Court explained that, as compared with other media, "[t]he ease with which children may obtain access to broadcast material … amply justif[ies] special treatment of indecent programming." *Pacifica*, 438 U.S. at 750. The Court also stressed that, unlike other media, broadcasting content could not "be withheld from the young without restricting expression at its source." *Id.* at 749. In other words, special rules could be applied to broadcasting only because no less restrictive means existed. *See ACT I*, 852 F.2d at 1340 n.12 ("[b]roadcasting is a unique medium [because] *it is not possible* simply to segregate material inappropriate for children, as one may do, *e.g.*, in an adults-only section of a bookstore") (emphasis added).

Technological developments have overtaken *Pacifica's* factual predicates. On both key issues – the "unique pervasiveness" of broadcasting and the inability of parents to control the broadcast content received in the home – there simply is no comparison between the media environment that shaped the Court's conclusions in *Pacifica* and today's reality. As the Commission has stated repeatedly, traditional media "have greatly evolved" and "new modes of media have transformed the landscape, providing more

[10] *Pacifica*, 438 U.S. at 748-49. *Pacifica* did not rely on "spectrum scarcity" to justify indecency regulation and the Commission has confirmed "it is the physical attributes of the broadcast medium, not any purported diminished First Amendment rights of broadcasters based on spectrum scarcity or licensing, that justify channeling of indecent material." *Pacifica Radio*, 2 FCC Rcd. at 2699. However, it is worth noting that the evolution of the media marketplace also has undermined the theory of spectrum scarcity upon which the Supreme Court relied in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Accordingly, Justice Thomas observed that the "transitory facts" underlying both *Pacifica* and *Red Lion* no longer justify the "deep intrusion into the First Amendment rights of broadcasters." *FCC v. Fox*, 129 U.S. at 1820 (Thomas, J., concurring).

choice, greater flexibility, and more control than at any other time in history." *E.g.*, *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, 13647-48 (2003).

1. Broadcasting is Not Uniquely Pervasive

As the record in this case amply demonstrates, the television and media marketplaces have been transformed over the past three decades by "[t]he proliferation of satellite and cable television channels." *Fox v. FCC*, 489 F.3d at 466. Today, almost ninety percent of television households subscribe to a multichannel programming service, such as a cable or satellite service. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd. 542 ¶ 8 (2009) ("*Thirteenth Annual Report*"). These services bring vast numbers of channels into the home alongside traditional broadcast channels. *Id.*; *see also Turner Broad. Sys. v. FCC*, 512 U.S. 622, 628 (1994). Broadcast programming and programming from cable or satellite networks sit side-by-side on the cable or satellite directory, a mere click of the remote away from each other. With respect to "how parents and children view television programming, and how pervasive and intrusive that programming is[,] … cable and broadcast television differ little at all." *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 748 (1996).

Just last month, the FCC thoroughly documented these and other transformative changes in a comprehensive report to Congress pursuant to the Child Safe Viewing Act. *See Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for*

Video or Audio Programming, FCC 09-69 (released Aug. 31, 2009) ("*CSVA Report*"). It was produced in response to a congressional mandate to study "the drastic changes in the media landscape that affect children." *Id.* ¶ 2. *See* Child Safe Viewing Act of 2007, Pub. L. No. 110-452, 122 Stat. 5025 (Dec. 2, 2008). Among other things, the Commission reported that multiple electronic alternatives provide a vast array of new content, as well as various platforms for accessing broadcast programming, in ways that can be personalized to the household or the individual users. *See CSVA Report* ¶ 2.

The Commission found, for example, that "[t]he number of suppliers of online video and audio is almost limitless." *Id.* ¶ 126. Internet-based video continues to increase significantly each year as the overall number of homes having access to the Internet continues to grow, with nearly 70 percent of U.S. households subscribing to Internet service. *Thirteenth Annual Report* ¶ 17. Approximately 60 percent of Internet users view and/or download videos online, with major Internet portals increasingly licensing both pre-existing and original content from traditional video providers.

Meanwhile, these same traditional video providers, including broadcast networks, continue to experiment with alternate programming options on alternate, out-of-the-home platforms. *Id.* ¶¶ 150-162. The Commission reported that "77 percent of teens in the U.S. have their own mobile phone[s]" which increasingly are used to access video content from the Internet and other sources. *CSVA Report* ¶ 2 & n.5. Consistent with this trend, mobile service providers now offer a range of video offerings for cell phones and other mobile devices, including from networks such as CNN, ESPN, MTV, Comedy

Central, Discovery, and Fox News. *Thirteenth Annual Report* ¶¶ 15, 142-149. The world in which broadcast radio and television were the only electronic mass media is long gone.

In the current media environment it is unrealistic to believe that enforcement of Section 1464 will prevent children from access to allegedly "indecent" material. Even if broadcast programming *per se* represented a sufficient "threat" to justify regulation, broadcast programming increasingly is available on unregulated platforms, including websites.[11] The very broadcasts at issue in this case, along with others that spurred the Commission to drop its fleeting expletives exception and regulate more aggressively, have been readily accessible on Youtube.com for years, free of *any* FCC oversight.[12] And even for broadcasts viewed in the traditional way – on a television set – it is unclear how "channeling" indecent programming to later at night provides much protection, since viewers routinely record programming to watch at any time they choose.[13]

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[11] Hulu, tv.com, and Youtube.com offer commercially supported network series and movies, as well as other programming. *See* www.hulu.com; www.tv.com; www.youtube.com. *See also* www.iTunes.com.

[12] *See*, *e.g.*, http://www.youtube.com/watch?v=M37wAoK0H2Q (Cher on Billboard Music Awards). Other examples include Bono's acceptance of a Golden Globe Award, which he described in unscripted enthusiasm as "fucking brilliant," *see* http://www.youtube.com/watch?v=CO1PQ1NguvU), and the so-called "wardrobe malfunction" from the 2004 Super Bowl halftime show. *See* http://www.youtube.com/watch?v=gOLbERWVR30.

[13] Nearly 80 percent of households own a VCR, *Thirteenth Annual Report* ¶ 165, and Nielsen reported DVR penetration of 30.6 percent as of March 2009. *How DVRs are Changing the National Landscape*, The Nielsen Company, April 2009, http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/04/dvr_tvlandscape_043009.pdf.

Given these developments, broadcast indecency regulations do not serve any constitutionally sufficient purpose. When the government acts to restrict speech, the First Amendment requires measures that "in fact alleviate [the identified] harms in a direct and material way." *Turner Broad. Sys., Inc.*, 512 U.S. at 664; *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997). A "prohibition that makes only a minute contribution to the advancement of a state interest can hardly be considered to have advanced the interest 'to a material degree.'" *Bad Frog Brewery v. New York State Liquor Auth.*, 134 F.3d 87, 99 (2d Cir. 1998). In an environment in which all types of content (including programming otherwise available via radio and television) are accessible through various media, singling out broadcasting for special restrictions does not protect children and "accomplishes only one thing – the suppression of … speech" on broadcast stations. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 396-97 (1984).

The "sacrifice [of] First Amendment protections for so speculative a gain is not warranted." *CBS v. DNC*, 412 U.S. at 127. Such considerations led the Court to invalidate indecency restrictions on leased and public access cable television channels because the provisions added minimal incremental protection in light of the "material broadcast on ordinary channels." *Denver Area*, 518 U.S. at 756-57. Similarly, the Court upheld an injunction barring enforcement of the Child Online Protection Act, in part, because the law restricting Internet speech would do nothing to protect children from

online content available from overseas websites. *Ashcroft v. ACLU*, 542 U.S. 656, 667-68 (2004). The same analysis applies here.[14]

2. Broadcasting is Not Uniquely Accessible to Children

This Court previously observed that a presumed "unique accessibility" of broadcasting no longer reflects reality, because "blocking technologies such as the V-chip have empowered viewers to make their own choices about what they do, and do not, want to see on television." *Fox v. FCC*, 489 F.3d at 466. These developments were most recently confirmed by the *CSVA Report*, which place *Pacifica's* outdated assumptions in bold relief.

Significant Commission findings in the *CSVA Report* include:

- The V-chip, which allows users to block the display of television programs based on their ratings category, provides a "baseline tool" that is available for all over-the-air viewers that own a V-chip-equipped television set or converter box.[15]

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[14] The Commission cannot dispute the facts set forth in the *CSVA Report*, although it seeks to blunt their legal and policy ramifications by asserting that "[t]elevision continues to have a 'uniquely pervasive presence in the lives of all Americans'" because it "remains the medium of choice among children." *CSVA Report* ¶ 8. This conclusory statement is at odds with the *Report's* factual findings, and it ignores the fact that non-broadcast "television" is not subject to the FCC's indecency rules. *Playboy Entm't Group*, 529 U.S. at 815. In any event, reviewing courts have an independent obligation to determine the constitutional implications of the facts. *Sable Commc'ns*, 492 U.S. at 129.

[15] *CSVA Report* ¶ 9. This finding is relevant to the programs at issue in the case since they were blockable using V-chip technology. The 2002 Billboard Music Awards presentation was rated "TV-PG," and the 2003 program was rated "TV-PG" with added descriptors of "D" and "L" (indicating the possibility of suggestive dialogue or language).

- Many "broadcast only" households with TV lacking V-chips now have V-chip capability through digital converter boxes. *CSVA Report* ¶ 11.
- Approximately 89 percent of TV households subscribe to a multichannel video service, and the parental control tools offered by cable, satellite, and telephone companies comprise a significant part of the technologies used by parents to monitor their children's television viewing. *Id.* ¶ 56.
- In addition to the V-chip, "there is a wide array of parental control technologies for television" including "VCRs, DVD players, and digital video recorders ('DVRs'), that permit parents to accumulate a library of preferred programming for their children to watch." *Id.* ¶ 10.
- A variety of other parental control tools are available to empower parents to monitor children's television use. *Id.* ¶ 84.
- Apart from the parental control tools, many multichannel video services offer subscribers the option of purchasing a bundle of "family friendly" channels. *Id.* ¶ 66.

The *CSVA Report* documents a wide variety of viewer control tools and strategies provided both by regulation and market forces as well as other programming options that give consumers a measure of choice undreamt of when the Supreme Court decided *Pacifica*. These findings expand upon and update the substantial information that already is part of the record in this case.[16]

The availability of technological alternatives for parental control of material entering the home was precisely the reason why the Supreme Court has struck down attempts to regulate indecency *in every case* decided since *Pacifica*. *See*, *e.g.*, *Sable Commc'ns,* 492 U.S. at 130-31 (technological approach to controlling minors' access to "dial-a-porn"

[16] *See, e.g.*, Brief of *Amici Curiae* Center for Democracy and Technology, *et al.*, at 23-24; Brief of Petitioner Fox Television Stations Inc., *et al.*, at 51-53; Brief for Intervenors NBC Universal, *et al.*, at 53-56.

messages required invalidation of indecency restrictions); *Denver Area*, 518 U.S. at 754-57; *Playboy Entm't Group*, 529 U.S. at 815-16 (existing and potential technical solutions led the Court to strike down indecency restrictions on cable television). With respect to the Internet, "the mere possibility that user-based Internet screening software would 'soon be widely available' was relevant to [the Court's] rejection of an overbroad restriction of indecent cyberspeech." *Playboy Entm't Group*, 529 U.S. at 814 (quoting *Reno v. ACLU,* 521 U.S. at 876-77). These holdings now are equally applicable to broadcasting.

C. The Law Must Adjust to the Changed Circumstances

Constitutional burdens "must be justified by current needs." *Northwest Austin Mun. Utility Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2512 (2009). Where "exceptional conditions" that justified a law in past decades cease to exist, courts must not shrink from their "duty 'as the bulwar[k] of a limited constitution against legislative encroachments.'" *Id.* at 2513, 2517-18 (quoting The Federalist No. 78, p. 526 (J. Cooke ed. 1961 (A. Hamilton)). The constitutional imperative to update the law is most pressing in this case because "the broadcast industry is dynamic in terms of technological change" and "solutions adequate a decade ago are not necessarily so now." *CBS v. DNC*, 412 U.S. at 102.

Applying this principle, courts have reassessed the constitutional validity of broadcast content restrictions as legal developments or technology altered the status quo. *See*, *e.g.*, *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999) (invalidating broadcast lottery statute after most states had changed their laws to permit

various forms of gambling); *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 882 (D.C. Cir. 1999) (rejecting retention of political broadcasting rule "to the extent that it relies on a thirty-year-old conclusion that the challenged rules survive First Amendment scrutiny"); *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000) (vacating rule). *Cf. Comcast Corp. v. FCC*, No. 08-1114, 2009 WL 2633763, at *1, *7-8 (D.C. Cir. Aug. 28, 2009) (vacating cable ownership rule on APA grounds because "[m]uch has changed in the subscription television industry since 1993" and leaving the rule in place "would continue to burden speech protected by the First Amendment").

As explained in detail above, none of *Pacifica's* technological assumptions remain valid. Accordingly, it does not entail overruling or demeaning *Pacifica* to hold that radically different circumstances today lead to a different conclusion about the constitutionality of the broadcast indecency rules. *Pacifica* simply did not set a standard to govern media that permit parents to exert control over video programming. Because broadcasting is no longer uniquely pervasive nor uniquely accessible to children, and because parents now have tools available for controlling their children's access to broadcast materials, cases decided since *Pacifica* are more relevant to deciding this case.[17] Accordingly, this Court should embrace the Supreme Court's invitation to assess the

[17] The Supreme Court has struck down indecency restrictions even in cases where it described *Pacifica* as "the closest analogy," but where technology provided "other means to protect children from similar 'patently offensive' material." *See Denver Area*, 518 U.S. at 747-48, 755. In doing so, it did not need to resolve whether strict First Amendment scrutiny or intermediate scrutiny was the applicable standard. *Id.* at 740.

constitutionality of the indecency rules and find that they can no longer survive First Amendment scrutiny.

CONCLUSION

For the foregoing reasons, the Networks respectfully request this Court to hold that the FCC's enforcement of the broadcast indecency rules is unconstitutional. At the very least, this Court should invalidate the FCC's policy that makes "fleeting expletives" actionable under 14 U.S.C. § 1464.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(5)-(7)

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I hereby certify that on this 16th day of September 2009, two copies of the foregoing Brief for Petitioners CBS Broadcasting Inc., ABC, Inc., WLS Television, Inc., and KTRK Television, Inc. and Intervenors NBC Universal Inc. and NBC Telemundo License Co. were sent by First Class mail, postage prepaid, to:

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