# No. 06-1760-ag (L)

**Nos. 06-2750-ag (Con.), 06-5358-ag (Con.)**

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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FOX TELEVISION STATIONS, INC. ET AL.,

*Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION ET AL.,

*Respondents*.

[Complete Caption Appears on Inside Cover]

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ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION
ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

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**BRIEF FOR INTERVENOR**
**ABC TELEVISION AFFILIATES ASSOCIATION**

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September 16, 2009

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

*Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA,

*Respondents*,

NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., NBC TELEVISION AFFILIATES, FBC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES, CENTER FOR THE CREATIVE COMMUNITY, INC., D/B/A CENTER FOR CREATIVE VOICES IN MEDIA, INC., ABC TELEVISION AFFILIATES ASSOCIATION, FUTURE OF MUSIC COALITION,

*Intervenors*.

## Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Intervenor ABC Television Affiliates Association submits the following disclosure statement:

The ABC Television Affiliates Association is a non-profit trade association of approximately 170 television stations affiliated with the ABC Television Network and represents its member stations before the FCC, Congress, and the courts. The ABC Television Affiliates Association has issued no shares of stock or debt securities to the public and has no parent company, subsidiaries, or affiliates that have issued shares or debt securities to the public.

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## Glossary

| | |
|---|---|
| APA | Administrative Procedure Act, 5 U.S.C. §§551 *et seq*. and §§701 *et seq*. |
| FCC | Federal Communications Commission |
| *Omnibus Order* | *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664, *vacated in part*, 21 FCC Rcd 13299 (2006), *vacated and remanded sub nom. Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *rev'd and remanded*, 556 U.S. ---, 129 S. Ct. 1800 (2009) |
| *Remand Order* | *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13299 (2006), *vacated and remanded sub nom. Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *rev'd and remanded*, 556 U.S. ---, 129 S. Ct. 1800 (2009) |
| *Golden Globes Order* | *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd 4975 (2004) |
| *Policy Statement* | *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, Policy Statement, 16 FCC Rcd 7999 (2001) |

## JURISDICTIONAL STATEMENT

Intervenor ABC Television Affiliates Association ("ABC Affiliates") adopts as if fully set forth herein the Jurisdictional Statement included in the Brief of Petitioner Fox Television Stations, Inc. and Intervenor FBC Television Affiliates Association (Nov. 22, 2006) at p. 1 (hereinafter "Fox Brief"). This Court continues to have jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1) following remand from the United States Supreme Court.

This Court has jurisdiction to consider ABC Affiliates' arguments as an intervenor pursuant to 47 U.S.C. § 402(e) and 28 U.S.C. § 2348.

## STATEMENT OF THE ISSUE

Whether the FCC's "fleeting expletives" policy is inconsistent with *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and violates the First Amendment.

## STATEMENT OF THE CASE

The Commission's newly expanded "fleeting expletives" indecency enforcement policy is once more before this Court following a remand from the United States Supreme Court. On June 4, 2007, this Court vacated the *Remand Order* and remanded the matter to the Commission to provide "a reasoned analysis for its new approach to indecency and profanity." *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 467 (2d Cir. 2007). The United States Supreme Court granted

certiorari, 552 U.S. ---, 128 S. Ct. 1647 (2008), and on April 28, 2009, reversed and remanded. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. ---, 129 S. Ct. 1800 (2009). The Supreme Court determined that the Commission had adequately acknowledged and explained the reasons for its newly expanded broadcast indecency enforcement policy such that it satisfied the APA. *See id.*, 129 S. Ct. at 1812-13.

The Supreme Court's decision sets the stage for the determination whether the Commission's "fleeting expletives" policy violates the First Amendment. *See id.* at 1819. In its prior review of the *Remand Order*, this Court declined to address the constitutional challenges to the Commission's expanded indecency policy but expressed "skeptic[ism] that the Commission can provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster." *Fox*, 489 F.3d at 462. The question is now squarely presented.

## STATEMENT OF FACTS

ABC Affiliates adopt as if fully set forth herein the Statement of Facts included in the Fox Brief at pp. 3-18.

## SUMMARY OF ARGUMENT

In its current posture, this case presents the constitutional question this Court discussed but declined to decide in its prior review of the *Remand Order*: Whether

the Commission's new broadcast indecency enforcement policy, which punishes the utterance of even an isolated, fleeting, non-scripted expletive with fines potentially totaling millions of dollars, is consistent with the First Amendment. The Supreme Court's decision in *Pacifica* decisively answers the question in the negative. *Pacifica* makes clear that the Commission's authority to regulate otherwise-protected indecent speech does not include the authority to proscribe the broadcast of an isolated, fleeting, and unrepeated "indecent"—but nevertheless constitutionally protected—word. This Court's task, then, begins and ends with the straightforward application of *Pacifica*.

Even if *Pacifica* were not determinative, the Commission's new "fleeting expletives" policy could not withstand constitutional scrutiny, because the Commission's indecency standard is fatally vague as applied to the momentary and isolated words at issue in the *Remand Order*. Neither the Commission's reliance on "context" nor its reference to a "contemporary community" standard provides a discernable, objective standard to guide broadcasters' conduct. Instead, the Commission's actions invite entirely subjective, wholly arbitrary decision-making on matters of speech by a federal agency—the very antithesis of the protection of speech the First Amendment demands.

## STANDARD OF REVIEW

The constitutional challenge to the FCC's fleeting expletives policy is subject to *de novo* review. *See Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1313 (D.C. Cir. 1988). This Court "should make an independent assessment of a citizen's claim of constitutional right when reviewing agency decision-making." *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 410 (5th Cir. 1999) (internal quotation marks and citation omitted); *cf. Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499-508 (1984) (appellate court is obligated to conduct independent review to prevent forbidden intrusion on free expression).

## ARGUMENT

The Supreme Court's determination that the FCC has, as a matter of administrative law, adequately acknowledged and explained the dramatic change in its "fleeting expletives" enforcement policy clears the way for this Court to address directly the constitutionality of that policy under *Pacifica* and the First Amendment. The task before the Court is straightforward: It must apply settled precedent to determine the constitutionality of the Commission's newly expanded indecency regulatory scheme. Because *Pacifica* unequivocally establishes that the FCC cannot, consistent with the First Amendment, proscribe the broadcast of an isolated and unrepeated expletive, this Court must strike down the "fleeting expletives" enforcement policy under the First Amendment and *Pacifica*. It need

not—indeed, cannot—go further.

## I. The Commission's "Fleeting Expletives" Policy Is Unconstitutional Under *Pacifica*

### A. *Pacifica* Does Not Sanction the Commission's Regulation of an Isolated and Unrepeated Expletive

*Pacifica* supplies the analytical framework that guides this Court's consideration of the constitutionality of the Commission's new fleeting expletives policy. That case did not simply validate the FCC's regulation of the daytime broadcast of George Carlin's "Filthy Words" monologue; it established the constitutional limits of the Commission's authority to regulate broadcast indecency. In particular, in a portion of the opinion that commanded a majority of the Court, *Pacifica* noted that its "narrow[]" holding does not sanction the exercise of Commission regulatory authority over an isolated, fleeting expletive: The *Pacifica* Court expressly did not "decide[] that an occasional expletive in [an Elizabethan comedy] would justify any sanction . . . ." *Pacifica*, 438 U.S. at 750.

Any doubt about the narrow scope of the regulatory authority endorsed by *Pacifica* is eliminated by the separate concurring opinion of Justice Powell, without which there would have been no majority. Writing separately to underscore that *Pacifica* should not be read to confer upon the Commission "an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from *momentary*

exposure to it in their homes," *id*. at 759-60 (Powell, J., concurring in part and concurring in the judgment) (emphasis added), Justice Powell approved of FCC regulatory authority of only the narrowest scope: "The Commission's holding, and certainly the Court's holding today, 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 by respondent here." *Id*. at 760-61 (Powell, J., concurring in part and concurring in the judgment) (emphases added). Justice Powell's opinion, then, makes clear where *Pacifica* drew the line between permissible regulation of speech and unlawful censorship: *Pacifica* allowed the Commission to regulate the "verbal shock treatment" administered by the Carlin monologue but did not approve the suppression of any other categories of protected speech, including "isolated" offensive words.

That *Pacifica* determines that the First Amendment does not tolerate a finding of indecency or profanity in the case of an isolated and fleeting expletive is bolstered by Justice Brennan's opinion:

> Having insisted that it seeks to impose sanctions on radio communications only in the limited circumstances present here, I believe that the FCC is estopped from using either this decision or its own orders in this case, 56 F.C.C.2d 94 (1975) and 59 F.C.C.2d 892 (1976), as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the *relentless repetition*, *for longer than a brief interval*, of "language that describes, in terms patently offensive as measured by contemporary

> community standards for the broadcast medium, sexual or excretory activities and organs." 56 F.C.C.2d, at 98. *For surely broadcasters are not now on notice that the Commission desires to regulate any offensive broadcast other than the type of "verbal shock treatment" condemned here*, or even this "shock treatment" type of offensive broadcast during the late evening.

*Pacifica*, 438 U.S. at 772 n.7 (Brennan, J., dissenting) (emphases added). Justice Brennan would have held that the Commission lacks *all* authority to regulate supposedly indecent (as opposed to obscene) material, because indecent speech is fully protected by the First Amendment. *See id*. at 771 (Brennan, J., dissenting) (noting that plurality and concurring opinions "do no more than permit the Commission to censor the afternoon broadcast of the 'sort of verbal shock treatment' . . . involved here" but otherwise seek to "insure that the FCC's regulation of *protected speech* does not exceed these bounds" (emphasis added)).

Indeed, it cannot be overstated that protection of indecent speech is the background rule against which *Pacifica* operated and in light of which the Court carved out an exceedingly narrow exception. *See, e.g.*, *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("[E]xpression which is indecent but not obscene is protected by the First Amendment . . . ."); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."); *United States v. Playboy Entm't Group*,

529 U.S. 803, 814 (2000); *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Action for Children's Television v. FCC*, 59 F.3d 1249, 1253 (D.C. Cir. 1995). In fact, the Supreme Court has explained that even indecent or offensive language serves an emotive purpose entitled to constitutional protection:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.

*Cohen v. California*, 403 U.S. 15, 26 (1971) (reversing state court conviction for disturbing the peace based on defendant's display of jacket bearing the words "Fuck the Draft"). It is difficult to discern any distinction of constitutional significance between the emotive message conveyed by Mr. Cohen's jacket and the message conveyed by Cher's use of the identical word during the 2002 Billboard Music Awards broadcast. If the former is fully protected by the First Amendment despite its potential to offend, so, too, is the latter.

Justice Scalia, writing for the 5-4 majority in *FCC v. Fox*, suggested in dicta that *Pacifica* left open the question whether the FCC can regulate "fleeting"

expletives consistent with the First Amendment.[1] *FCC v. Fox*, 129 S. Ct. at 1815; *see also id*. at 1817-18 (opinion of Scalia, J.).[2] Not so. *Pacifica* necessarily assumed the application of First Amendment protection to the indecent speech the FCC sought to regulate and approved of Commission prohibition of broadcast indecency in only the narrowest of circumstances—leaving all indecent speech *other than* the "verbal shock treatment" at issue there fully protected against regulation. *See Pacifica*, 438 U.S. at 760-61 (Powell, J., concurring in part and concurring in the judgment) (Court's opinion should not be read to sanction the regulation of "the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment" administered by the Carlin monologue). For nearly thirty years after *Pacifica*, the FCC itself read

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[1] Because *FCC v. Fox* was decided wholly on APA grounds, the Court's musings about the meaning and reach of *Pacifica* are *obiter dicta*. *See, e.g.*, *United States v. Morgan*, 380 F.3d 698, 702 n.3 (2d Cir. 2004).

[2] The dissenting Justices disagreed with the majority's reading of *Pacifica*. *See FCC v. Fox*, 129 S. Ct at 1825 (Stevens, J., dissenting) (disagreeing that the Commission is empowered to "punish the broadcast of *any* expletive that has a sexual or excretory origin"; noting that "*Pacifica* was not so sweeping, and the Commission's changed view of its statutory mandate certainly would have been rejected if presented to the Court at the time" (emphasis in original)); *id*. at 1827-28 (Stevens, J., dissenting) (Commission's new fleeting expletives policy "bears no resemblance to what *Pacifica* contemplated"); *id*. at 1829 (Ginsburg, J., dissenting) (noting that *Pacifica* "was tightly cabined, and for good reason"); *id*. at 1833 (Breyer, J., dissenting) (*Pacifica* "considered the location of th[e] constitutional line").

the case to draw a firm constitutional line between deliberate, repetitive expletives of the kind at issue in *Pacifica*, on the one hand, and isolated, fleeting "offensive words," on the other. And the Commission limited its enforcement actions accordingly. *See, e.g.*, *Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254, ¶ 10 (1978) (expressing Commission's "inten[tion] strictly to observe the narrowness of the *Pacifica* holding," which "relied in part on the repetitive occurrence of the 'indecent' words" in the Carlin monologue); *Pacifica Found.*, 2 FCC Rcd 2698, 2699, ¶ 13 (1987) ("deliberate and repetitive use [of expletives] in a patently offensive manner is a requisite to a finding of indecency"); *Infinity Broad.*, 2 FCC Rcd 2705, 2705, ¶ 7 (1987) ("Speech that is indecent *must* involve more than the isolated use of an offensive word." (emphasis added)).[3] With the *Golden Globes Order*, followed by the *Omnibus Order* and *Remand Order*, the Commission's reading of *Pacifica* changed dramatically, but *Pacifica*'s holding has not.

Applying *Pacifica* to the broadcasts at issue in the *Remand Order* requires rejection of the Commission's attempt to expand its regulatory authority over

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[3] *See also, e.g.*, Congressional Research Service Report for Congress, *Regulation of Broadcast Indecency: Background and Legal Analysis* 19-20 (updated Dec. 2, 2005) (concluding that "*Pacifica* did not hold that the First Amendment permits the ban . . . of an occasional expletive on broadcast media . . . even if such programs contain 'indecent' language").

otherwise-protected "indecent" speech. It is impossible to equate the pre-recorded 12-minute Carlin monologue at issue in *Pacifica*—a "verbal shock treatment" "repeated over and over," *Pacifica*, 438 U.S. at 757 (Powell, J., concurring in part and concurring in the judgment)—with the momentary, fleeting, and isolated broadcast of even the "F-word" in the middle of a live two-hour television awards show broadcast in the evening.[4] *Pacifica*'s narrowly-circumscribed approval of the Commission's proscription of the Carlin monologue confirms that the Commission's new policy prohibiting the broadcast of even an isolated, unrepeated expletive cannot be squared with the First Amendment.

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[4] The analysis is unchanged by the FCC's argument that, absent a rule prohibiting the broadcast of even an isolated expletive, broadcasters would flood the airwaves with indecent language, uttered one word at a time. *See Remand Order* ¶ 25. That argument ignores the reality that prevailed during the FCC's decades-long period of regulatory restraint, during which it affirmatively *required* repetition as a prerequisite to a determination of indecency. *See* pp. 9-10, *supra*. The FCC can point to no evidence that broadcasters took advantage of the FCC's restrained regulatory policy to broadcast a constant stream of expletives "one at a time." But even if the FCC's hypothesis could be credited in the utter absence of historical evidence, the agency's speculation that its new "fleeting expletives" rule is suddenly necessary to prevent such a deluge of indecency does not bring the new indecency policy within the *Pacifica* framework: The Commission cannot regulate otherwise-protected speech in order to *prevent* a *potential* flood of indecency that it believes would be tantamount to the Carlin monologue. The First Amendment does not abide such government censorship or chill. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

### B. Because *Pacifica* Answers the Question Before the Court, the Court's Constitutional Analysis Must End with the Application of Settled Precedent

This Court's task is simple: It is to rule on the constitutionality of the Commission's new fleeting expletives policy within the framework established by *Pacifica* for the regulation of broadcast indecency. This Court need not—indeed, it *cannot*—go further, particularly when constitutional issues are involved. *See, e.g.*, *OneSimpleLoan v. U.S. Sec'y of Educ.*, 496 F.3d 197, 208 (2d Cir. 2007) (Court is "bound to follow Supreme Court precedent as it currently exists" and is "not at liberty to depart from binding Supreme Court precedent 'unless and until [the] Court reinterpret[s]' that precedent" (quoting *Agostini v. Felton*, 521 U.S. 203, 238 (1997)) (alterations in original)), *cert. denied*, 128 S. Ct. 1220 (2008); *In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985*, 767 F.2d 26, 29 (2d Cir. 1985) ("[T]he doctrine that courts should not unnecessarily decide broad constitutional issues is a hoary one."); *Fine v. City of New York*, 529 F.2d 70, 76 (2d Cir. 1975) (reciting "the familiar principle that [the Court] should not reach out to decide constitutional questions unnecessarily") (citing cases). *Cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995) (courts should decide a case on the narrower ground of adjudication when constitutional questions are involved).

It is not this Court's task to question or reexamine the continuing validity of the indecency statute, 18 U.S.C. § 1464, and *Pacifica*; that is an undertaking for the

Supreme Court. In particular, this Court cannot reconsider the rationale supporting the "special treatment" given the regulation of broadcast indecency, *see Pacifica*, 438 U.S. at 748-50; *see also id*. at 757-60 (Powell, J., concurring in part and concurring in the judgment), nor can it revisit the congressionally-mandated public trustee regulatory framework for broadcast media the Supreme Court approved in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), as some parties have urged it to do. Nor should the Court delve into the issues surrounding the assertions that broadcast media are no longer "uniquely pervasive" and the broadcast spectrum no longer "scarce." *Cf. Fox*, 489 F.3d at 465 (observing that, "[w]hatever merit these arguments may have, they cannot sway us in light of Supreme Court precedent").

Despite the fact that there may have been, as some parties have observed, an increase in recent years in the number of broadcast stations and in audio and video distribution technologies, broadcast spectrum itself is necessarily a limited and scarce resource. The laws of physics have not changed. It remains impossible for more than one entity to operate, without destructive interference, at the same time on a specific broadcast channel in the same local area. In just the last two years alone, the FCC has repeatedly observed the limited nature and scarcity of spectrum in various contexts, from broadcasting to wireless to satellite. *See, e.g.*, *Fostering Innovation and Investment in the Wireless Communications Market, A National*

*Broadband Plan for Our Future*, Notice of Inquiry, GN Docket No. 09-157, 2009 WL 2712033 (Aug. 27, 2009), ¶ 44 (discussing the nature of "the limited spectrum resource" for wireless services); *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Notice of Proposed Rulemaking, 24 FCC Rcd 5239 (2009), ¶ 20 (observing that "spectrum scarcity may limit the opportunities for new radio service"); *Second Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services*, Second Report, 23 FCC Rcd 15170 (2008), ¶ 63 (stating that "[a]lthough technological advances have steadily increased the ability to fit more users into any given band, radio spectrum remains a finite resource" and noting "the fact that spectrum is scarce"); *Creation of a Low Power Radio Service*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 21912 (2007), ¶ 50 (observing that the "demand for new radio stations has increased dramatically while the spectrum for such stations has become increasingly scarce, particularly in many mid-sized communities and in virtually all urbanized areas. . . . [T]he primary licensing impediment is the nation's 'maxed out' spectrum situation.").

Plainly the technical validity of claims that broadcast spectrum is no longer scarce is dubious, but it is neither necessary nor appropriate for this Court to consider such claims in this case, where the single constitutional issue before the

Court is addressed and resolved by binding Supreme Court precedent.

## II. The Commission's Fleeting Expletives Policy Is Unconstitutionally Vague

*Pacifica* makes plain that the Commission's authority to regulate broadcast indecency is tightly circumscribed by the protections afforded by the Constitution, and it expressly does not sanction the Commission's new policy penalizing the broadcast of an isolated, momentary, and unrepeated expletive. The determination that the Commission's new fleeting expletives policy is unconstitutional under *Pacifica* ends the case. But even if *Pacifica* were not determinative, the Commission's proscription of the "fleeting expletives" at issue here would not survive constitutional scrutiny, because its indecency standard—which proscribes language that the Commission finds, "in context," to be "patently offensive as measured by contemporary community standards for the broadcast medium," *Omnibus Order* ¶ 12 (second quotation, *Policy Statement* ¶ 8 (emphasis omitted)); *see also Remand Order* ¶ 15—is fatally vague as applied to the isolated, momentary, and unscripted expletives at issue in the *Remand Order*.

The Commission insists that its indecency standard appropriately takes account of the "context" of the broadcast materials. *See Policy Statement* ¶ 10 (declaring that the "full context" in which the challenged material appears is "critically important"); *Remand Order* ¶ 15. Writing for the majority, Justice

Scalia lauded, again in dicta, the Commission's "context-based approach." *FCC v. Fox*, 129 S. Ct. at 1812, 1814, 1815; *see also id*. at 1818 n.7 (opinion of Scalia, J.). But the FCC's supposedly "contextual" standard is, in fact, no standard at all. The Commission alone decides what constitutes the benchmark "context" in a particular case, with no objective criteria available to broadcasters to guide their conduct. Here, the Commission decided that the relevant "context" of the challenged material was the prime-time broadcast of "a popular music awards ceremony" that was "designed to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music stars." *Remand Order* ¶¶ 17, 18; *see also id*. ¶ 59. The Commission's "contextual" analysis apparently discounts, at least in *this* case, the facts that the broadcasts were live and unscripted and that the performers spontaneously uttered momentary, isolated expletives (despite the weight those facts would have been given under prior Commission and Bureau decisions). The application of the Commission's supposedly contextual analysis to these fleeting utterances makes plain the vagueness inherent in the Commission's indecency standard: "Context" is infinitely malleable, amounting to whatever the Commission wants it to be and leading to whatever result the Commission desires. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who

apply them."); *United States v. Nadi*, 996 F.2d 548, 550 (2d Cir. 1993) (law is unconstitutionally vague as applied where, *inter alia*, it fails to "provide[] explicit standards for those who apply it").

The "contemporary community standards" upon which the Commission purports to ground its indecency determinations likewise invites arbitrary and entirely subjective decision-making—and resulted in just such a standardless, wholly subjective determination of indecency in this case. In the *Remand Order*, the Commission made no attempt to define the "contemporary community" relevant to its indecency finding, much less to explain how that hypothetical community's standards were violated by the momentary and isolated bits of "indecent" language at issue in the *Remand Order*. Those failures underscore the flaws in the "community"-based indecency standard.

The Commission claims to be capable of identifying the relevant "community" from its "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens." *Remand Order* ¶ 28. Although the Commission claims that its "contemporary community" "is not a local one" tied to "any particular geographic area," *Policy Statement* ¶ 8 (quotations omitted), it offers no objective criteria by which a "community" reflecting the sensibilities of an average—and supposedly national—"broadcast viewer or listener," *id.*, is to be identified or

defined, and no explanation for how it believes it can derive an objective national standard from the sorts of *ad hoc* "interaction[s]" cited in the *Remand Order*. In fact, a "community" standard that derives from the Commission's (unspecified) interactions with "ordinary citizens" is almost certain to result in the application an inherently *local* standard to *national* television broadcasts like the ones at issue here, and a standard based on interactions with "public interest groups" will necessarily reflect the settled biases of those groups rather than the opinions of an "average" viewer. In all events, the "community" upon which the Commission purports to base its indecency finding will be far from reflective of the average, contemporary member of the national broadcast audience. *Cf. Reno*, 521 U.S. at 874 n.39 (noting that "'our Nation is simply too big and too diverse for th[e] Court to reasonably expect that . . . standards [for what is 'patently offensive'] could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists'" (quoting *Miller v. California*, 413 U.S. 15, 30 (1973)).

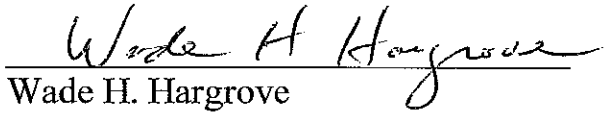
At best, the Commission's "interaction"-based "community" standard will result in the application of the standard of one community (whose "ordinary citizens" either fortuitously or deliberately engaged in "interactions" with the Commission) or one discrete segment of the national community (whose biases are given voice by public interest groups who petition the Commission) to material broadcast in another local community—whose "standards for the broadcast

medium" might be quite different indeed. At worst, the Commission's "contemporary community" consists of the five Commissioners themselves, who alone decide what "the contemporary community" wants to see and hear. *Cf. Playboy Entm't Group*, 529 U.S. at 818 ("Judgments [about art and literature] are for the individual to make, not for the Government to decree . . . ."). In either event, the "contemporary community" standard, applied to the fleeting expletives at issue in the *Remand Order*, vests limitless discretion in the Commission to restrict speech it disfavors. That regulatory "standard" is the very essence of vagueness.

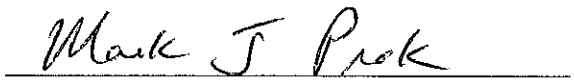
## CONCLUSION

For the foregoing reasons, ABC Affiliates respectfully request the Court to hold the Commission's "fleeting expletives" regulatory policy unlawful under *Pacifica* and the First Amendment and not to revisit the bases underlying *Pacifica* or to hold the indecency statute to be facially contrary to the First Amendment.

Respectfully submitted,



Wade H. Hargrove



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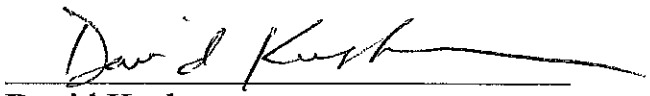

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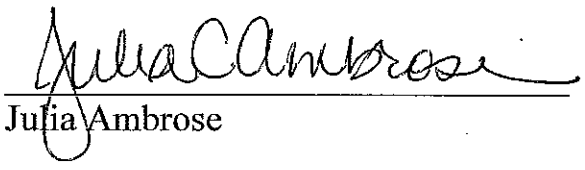

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## Certificate of Compliance

I, David Kushner, hereby certify that the foregoing Brief for Intervenor ABC Television Affiliates Association complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6). The Brief contains 4,385 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as determined by the word count feature of Microsoft Office Word 2003. The Brief has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman.

This the 16th day of September, 2009.

David Kushner

**Antivirus Certification**

I, David Kushner, hereby certify that the PDF version of the Brief for Intervenor ABC Television Affiliates Association was scanned for viruses and that no virus was detected prior to emailing it to the Court. The virus scan was performed using Symantec AntiVirus Version 10.1.5.5000.

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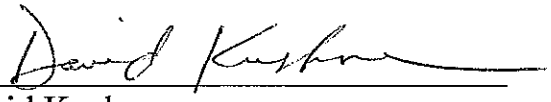

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## Certificate of Service

The undersigned, of the law firm of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., hereby certifies that s/he has caused two copies of the foregoing **Brief for Intervenor ABC Television Affiliates Association** to be placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

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