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 of an Order of the
Federal Communications Commission

Brief of *Amicus Curiae* American Civil Liberties Union, New York Civil Liberties Union, American Booksellers Foundation For Free Expression, American Federation Of Television And Radio Artists, Directors Guild Of America, First Amendment Project, Minnesota Public Radio/American Public Media, National Alliance For Media Arts And Culture, National Coalition Against Censorship, National Federation Of Community Broadcasters, PEN American Center, Screen Actors Guild, Washington Area Lawyers For The Arts, Woodhull Freedom Foundation, Writers Guild of America, East, Writers Guild of America, West In Support of Petitioners

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CORPORATE DISCLOSURE STATEMENT

All of the *amici* organizations are nonprofit organizations which do not issue stock and which are not subsidiaries or affiliates of any publicly owned corporations.

DATED: September 16, 2009

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The *amici curiae* organizations, representing broadcasters, writers, directors, performers, and organizations concerned about free expression in broadcasting, file this brief pursuant to F.R.A.P 29. See the Addendum for a description of each organization. All parties have consented to the filing of this brief.

INTRODUCTION

Federal law prohibits "obscene, indecent or profane" speech on broadcast radio and television. 18 U.S.C. § 1464. This case challenges a new rule promulgated by the FCC in 2004, presumptively banning even one "fleeting expletive" as indecent, and the agency's application of that rule to two broadcasts. This court previously held the rule invalid under the Administrative Procedure Act. *Fox Television v. FCC*, 489 F.3d 444 (2d Cir. 2007). The Supreme Court reversed. *FCC v. Fox Television*, 129 S.Ct. 1800 (2009).

Although this Court's 2007 decision did not include holdings on the constitutional issues presented by the FCC's application of the statute, the decision addressed those issues extensively in dicta. The Court expressed doubt that the FCC's interpretation of the statute to prohibit "fleeting expletives" would pass constitutional muster. *Fox*, 489 F.3d at 463. The

Court expressed sympathy for the argument that the FCC's interpretation was "undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague," noting that in *Reno v. ACLU*, 521 U.S. 844, 874 (1997), the Supreme Court's had suggested that a prohibition of "indecency" on the Internet was unconstitutionally vague. *Id.* at 463. "[W]e 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. Finally, the Court noted that the rationale for providing less protection for speech on broadcast television than on other media—including books, cable television, and the Internet—was increasingly suspect. *Id.* at 464-465.

For the reasons stated below, this Court's prior suggestions that the FCC's interpretation of the statute is unconstitutional were correct. This Court should vacate both of the FCC's orders and declare the FCC's interpretation of the statute unconstitutional.

ARGUMENT

I. THE FCC'S ASSERTION OF BROAD, DISCRETIONARY CENSORSHIP POWER UNDER 18 U.S.C. § 1464 CREATES INSURMOUNTABLE CONSTITUTIONAL PROBLEMS

A. FCC Enforcement Since *Pacifica* Has Been Unpredictable, Inconsistent, and Highly Subjective

1. The indecency regime, culminating in the new "fleeting expletives" rule, has not been narrow and restrained, as contemplated by *Pacifica*

In 1978, a bare majority of the Supreme Court approved the FCC's censorship of "indecent" speech on the airwaves, in the context of the "verbal shock treatment" of one satiric monologue. *FCC v. Pacifica Foundation*, 438 U.S. 726, 757 (1978) (Powell, J., concurring). The decision turned on a very lenient standard of First Amendment scrutiny, applicable to broadcasting, the Supreme Court said, largely because it is "uniquely pervasive" and "uniquely accessible to children." *Id.* at 748-49.

The Supreme Court in *Pacifica* emphasized the "narrowness" of the holding. *Id.* at 750-51; see also *Sable Communications v. FCC,* 492 U.S. 115, 126 (1989); *Bolger v. Youngs Drug Products Corp*., 463 U.S. 60, 74 (1983). This narrowness was important, given the breadth of the agency's definition of indecency, which remains unchanged today: "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." *Pacifica,* 438 U.S. at 732.

This narrowness goes directly to the decision's relevance to fleeting expletives, as Justice Breyer pointed out in his dissent to the decision above, noting that even among the narrow *Pacifica* majority, "two Members of the

majority suggested that they could reach a different result, finding an FCC prohibition unconstitutional, were that prohibition aimed at the fleeting or single use of an expletive." *FCC*, 129 S.Ct. at 1833 (Breyer, J., dissenting).

For the next nine years, the FCC followed the restrained enforcement policy that it had promised the Supreme Court in *Pacifica*. *Fox*, 489 F.3d at 448-451. In 1987, however, it expanded its indecency regime to embrace any sexual innuendo or other content that the commissioners considered offensive, regardless of whether there was "verbal shock treatment." Two of the three programs condemned under this new "generic" indecency standard had aired on noncommercial radio stations; one concerned homosexuality and AIDS. *New Indecency Enforcement Standards*, 2 FCC Rcd 2726 (1987); *Pacifica Foundation*, 2 FCC Rcd 2698 (1987); *Regents of the U. of California*, 2 FCC Rcd 2703, on reconsideration, 3 FCC Rcd 930 (1987).[1]

The agency's indecency enforcement between 1987 and 2003 was sporadic and unpredictable. In 2001, it ruled that the African-American poet and theater artist Sarah Jones's "Your Revolution," broadcast on a noncommercial community station, was indecent. "Your Revolution" is a

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[1] The new generic standard was a response to pressure from Morality in Media and other groups to reverse the Reagan Administration's "laissez faire" approach to indecency. *See* John Crigler & William Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329 (1989).

poetic protest against misogyny in hip-hop music. After Jones sued, and just before the FCC's brief was due in the court of appeals, the agency reversed itself and decided that the poem was not indecent after all, mooting Jones's challenge to the indecency standard. *KBOO Foundation*, 18 FCC Rcd 2472 (2003).

Up to this point, the FCC did not consider "fleeting expletives" indecent. It changed its policy after two incidents: the musician Bono's exclamation, "this is really fucking brilliant" at the 2003 televised Golden Globe Awards ceremony and, a few months later, the singer Janet Jackson's "wardrobe malfunction" at the 2004 Super Bowl half-time show.

The FCC initially ruled that Bono's exclamation was not indecent because it did not refer to sexual or excretory functions. *Complaints Against Various Licensees Regarding Their Airing of the "Golden Globe Awards,"* 18 FCC Rcd 19859 (2003). However, a month after the Super Bowl incident, and quite plainly in response to the ensuing political uproar, the agency reversed gears and announced that all uses of the words "fuck," even fleeting exclamations, necessarily refer to sex and therefore are presumptively indecent. *"Golden Globe Awards,"* 19 FCC Rcd 4975, 4978-79 (2004). The commissioners asserted that even though Bono used "fucking" as "an intensifier," not a sexual reference, any use of the word, or

a variation, "invariably invokes a coarse sexual image." *Id.* at 4979. Previous agency rulings to the contrary were "no longer good law." *Id*. at 4980.

In an even more dramatic departure from prior practice, the FCC also ruled that Bono's exclamation was profane. Until *Golden Globe*, the agency had understood "profanity" to have a religious dimension. *See Fox*, 489 F.3d at 466-467. In *Golden Globe*, however, it rejected all of its previous statements on the subject, and created a vague new profanity definition that essentially overlapped with the new fleeting expletives rule – "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance." *Golden Globe*, 19 FCC Rcd at 4981.

It was not long after the FCC created these new rules that it announced an exception for the film "Saving Private Ryan," broadcast by many ABC stations on Veterans Day in 2004. Complaints had cited dialogue including "'fuck,' and variations thereof; 'shit,' 'bullshit,' and variations thereof, 'bastard,' and 'hell,'" as well as "Jesus" and "God damn." *Complaints Against Various Licensees Regarding Their Broadcast of the Film "Saving Private Ryan,"* 20 FCC Rcd 4507, 4509 (2005). The Commission found that the material, "in context, is not patently offensive and therefore, not indecent," or profane. *Id.* at 4510. The FCC explained

that the rough language was "integral to the film's objective of conveying the horrors of war through the eyes of these soldiers," and that deleting or bleeping "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience." *Id.* at 4512-13.

This sensitivity to "the nature of the artistic work" did not extend, a year later, to the FCC's March 2006 *Omnibus Order*, which condemned a PBS documentary "The Blues," directed by Martin Scorsese, because of expletives. The commissioners refused to apply the "Saving Private Ryan" exception to "The Blues" because, they said, "we do not believe" that the station that aired the show "has demonstrated that it was essential to the nature of an artistic or educational work … or that the substitution of other language would have materially altered the nature of the work." *Omnibus Order*, 21 FCC Rcd 2664, 2685-86 (2006) (SPA 24-25).[2]

The *Omnibus Order* addressed dozens of other programs containing coarse language or sexual situations. Non-explicit suggestions of teenagers' sexual activity were indecent in the CBS program "Without a Trace," but explicit discussions of teen sex on "Oprah" were not. *Id.* at 2705-09 (SPA

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[2] Commissioner Adelstein dissented because the "coarse language is a part of the culture of the individuals being portrayed," and "if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary." 21 FCC Rcd at 2728 (SPA 73).

47-49); *Complaints Against Various Licensees Concerning Their December 31, 2004 Broadcast of "Without a Trace,"* 21 FCC Rcd 2732 (2006).[3] Fleeting expletives by celebrities at Billboard Award shows were indecent and profane; expletives on other shows, including "Fuck Cops!" (visible on graffiti), "pissed off," "up yours," "kiss my ass," and "wiping his ass" were not. 21 FCC Rcd at 2690-95, 2709-13 (SPA 31-36, 51-56).

The *Omnibus Order's* evaluation of "NYPD Blue" provided a striking (if amusing) example of unbridled subjectivity. The commissioners declared that "bullshit" (uttered by the one character) was profane and indecent, but "dick" and "dickhead" were not. *Id.* at 2699-2700 (SPA 37-41). According to the FCC, "bullshit, …whether used literally or metaphorically, is a vulgar reference to the product of excretory activity and therefore falls within the first prong of our indecency definition." And it is patently offensive (the second prong of their definition) because the "S-Word" (again, whether used literally or not) is "one of the most vulgar, graphic and explicit descriptions of excretory activity in the English language." *Id.* at 2697 (SPA 24). The FCC found that "Dickhead," in contrast, was not "patently offensive,"

[3] *Without a Trace* was the subject of a separate ruling issued on the same date as the Omnibus Order.

reasoning in circular fashion that ”Dickhead” is “not sufficiently vulgar, explicit, or graphic.” *Id.* at 2696 (SPA 37).

The FCC’s most recent intellectual acrobatics came after this case was remanded for reconsideration of the four indecency and profanity rulings that were before this court. The agency dismissed the case against “NYPD Blue” on a technical ground (the complainant did not reside in the time zone where the broadcast occurred). And it reversed itself on an utterance of “bullshitter” in “The Early Show” because, it now said, the show was a news interview, a context in which government should defer to producers’ editorial judgment. Since the commissioners warned that “there is no outright news exemption from our indecency rules,” this deference promised to be just as vague and unpredictable as the rest of the FCC’s censorship regime. *Fox*, 489 F.3d at 458 (quoting *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, FCC 06-166 (Nov. 6, 2006) (“Remand Order”)). The unavoidable conclusion from even this brief review of indecency enforcement since *Pacifica* – and in particular since announcement of the fleeting expletives rule – is that the FCC’s conduct has been woefully inconsistent and characterized by unpredictable detours and unprincipled reversals. 18 U.S.C. § 1464,

interpreted as it must be to avoid First Amendment difficulties, cannot support the FCC's censorship practice.

2. The FCC's unbridled discretion in deciding whether a program is "patently offensive," and its second-guessing of the artistic judgments of filmmakers and programmers, are classic hallmarks of an unconstitutional censorship system

The FCC's record of enforcement demonstrates the evils of a vague, overly discretionary censorship regime. As this court previously noted, the agency's subjective judgments embody the same arbitrariness and unpredictability that led to invalidation of licensing schemes in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) and *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988). *See Fox*, 489 F.3d at 464. Indeed, the indecency regime outdoes the licensing processes in these cases in the sheer breadth of the agency's claim of discretion to decide what, in the personal judgment of the commissioners, is patently offensive and what has sufficient artistic necessity, news value, or other merit to escape punishment.

With its contrasting decisions on "Saving Private Ryan," "The Blues," "The Early Show," and many other programs at issue in the *Omnibus Order*, the FCC has appointed itself the arbiter of both news value and artistic necessity. Under our constitutional system, it is not the role of government officials to second-guess artistic or editorial judgments. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (broadcasters'

decisions "should be left to the exercise of journalistic discretion"); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256-258 (1974) (protecting newspaper's exercise of editorial judgment).[4] It is the writer, artist or filmmaker who decides what is artistically necessary in a creative work. The question "What is art?" is one of the oldest in human history. Considering the diverse attempts to define it – from Tolstoy's essay *What is Art?* to the Dada movement's "Anything is art if an artist says it is"[5] – the inherent subjectivity of the task alone makes it inappropriate for a government agency.

The FCC's disparate treatment of "The Blues" – an educational documentary film incorporating live footage of historically-significant individuals who have influenced America's musical culture – and "Saving

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[4] The sole exception is obscenity law, where "serious value" is part of the three-part test for determining whether a work is constitutionally protected in the first place. *Miller v. California*, 413 U.S. 15, 24 (1973). Once expression *is* constitutionally protected, government officials cannot ban or burden content they dislike based on their assessments of artistic value or necessity. *Winters v. New York*, 333 U.S. 507, 510 (1948). Of course, government makes judgments about artistic value in awarding prizes, *e.g.*, *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) – a context not relevant here.

[5] Leo Tolstoy, WHAT IS ART? (1897); MUSEUM OF MODERN ART, THREE GENERATIONS OF TWENTIETH-CENTURY ART (1972) 48 (quoting Marcel Duchamp), *excerpt reprinted at* www.moma.org/collection/browse_results.php?object_id=81631 (visited 11/6/06).

Private Ryan" – a brutally violent entertainment film concerning the experiences of fictional characters – is a striking illustration of the unbridled discretion that the agency claims. Although the Commission found variants on "fuck" and "shit" to be indecent in "The Blues," it absolved the far more frequent use of those words in "Saving Private Ryan" because it thought editing them "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience." It is unclear how the Commission arrived at these contrary conclusions. One possible explanation is that the cultural milieu of the mainstream movie "Saving Private Ryan" was more familiar to the commissioners than the largely African-American background of "The Blues." A similar dynamic can be seen in the Commission's earlier finding of indecency against Sarah Jones's "Your Revolution" – a poem that presumably speaks most directly to the experience of African-American women. Even without intending any racial or ethnic bias, decision makers in a subjective and discretionary censorship system may be more likely to find "patently offensive" those cultural expressions with which they are less familiar.

From its censorship in 1987 of a program dealing with homosexuality and AIDS to its tone-deafness to the educational and artistic value of authentic colloquial language in "The Blues," the Commission's thirty

years of indecency enforcement have borne out Justice Brennan's warning that allowing a government agency to ban what it considers "patently offensive" represents "an acute ethnocentric myopia" that has no place in our "land of cultural pluralism," where "there are many who think, act, and talk differently" from the commissioners of the FCC. *Pacifica*, 438 U.S. at 775 (Brennan, J., dissenting).

The FCC's efforts to distinguish among various words in its *Omnibus* and Remand Orders provide further examples of unbridled discretion. Whether "dickhead" or "pissed off" are more or less offensive than "bullshit" is simply a matter of taste, and the commissioners' efforts to rationalize their taste merely emphasize the arbitrary nature of the enterprise. The Remand Order's reversal on the use of "bullshitter" in "The Early Show," similarly, confuses rather than clarifies the agency's shifting standards. By changing its mind about its original indecency and profanity ruling but simultaneously warning that "there is no outright news exemption from our indecency rules," the FCC leaves news broadcasters in as much limbo as documentary and feature producers as to when it might find an exception to the fleeting expletives rule.

The FCC further assumes the linguistic expertise to decide that fleeting expletives – in particular, "fuck," "shit," and their many compounds

and variations – always refer to sexual or excretory activities or organs even when they are merely used for color or intensity. But as "The Blues" and many other documentary films demonstrate, these words have many nonsexual and non-excretory meanings.

This court previously noted that "even the top leaders of our government have used variants of these expletives in a manner that no reasonable person would believe referenced 'sexual or excretory organs or activities.'" *Fox*, 489 F.3d at 459-460 (citing President Bush's remark to British Prime Minister Blair that the UN should "get Syria to get Hezbollah to stop doing this shit," and Vice President Cheney's widely-reported "Fuck yourself" to Senator Patrick Leahy on the Senate floor). Justice Stevens noted that "[t]here is a critical distinction between the use of an expletive to describe a sexual or excretory function and the use of such a word for an entirely different purpose, such as to express an emotion. One rests at the core of indecency; the other stands miles apart." *FCC*, 129 S.Ct. at 1829 (Stevens, J., dissenting). The FCC's effort to elide this distinction by arguing that there is always a sexual or excretory "connotation" stretches its own definition of indecency (reference to sexual or excretory activities or organs) to the breaking point.

Scholarship supports the conclusion that expletives not only have a multitude of nonsexual or excretory meanings; they often have serious value. As Professor Timothy Jay explains, expletives are used for emphasis and emotive charge; they serve psychological and social purposes and communicate powerful messages wholly apart from their more literal meanings. Timothy Jay, WHY WE CURSE (2000). As Justice Ginsburg noted in dissenting to the decision above, the Supreme Court has previously held that "'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.'" *FCC*, 129 S.Ct. at 1829 (Ginsburg, J., dissenting) (quoting *Cohen v. California*, 403 U. S. 15, 26 (1971)).

In 2004, Professor Jay submitted expert testimony in an FCC case involving a radio documentary, "Movin' Out the Bricks," which explored the lives of Chicago public housing residents, including one woman who described drug use as getting "fucked up and shit like that." Jay explained that in many contexts, "fuck" and "shit" are part of ordinary conversation and have no sexual or excretory connotation. In this case, they were

essential to the documentary's authenticity. To clean up the woman's language would "undermine the listeners' understanding of the impact of public housing … If we substitute *inebriated* for *fucked up*, we erase the emotional impact." Timothy Jay, Statement of Expert Opinion, *WBEZ-FM*, No. EB-04-IH-0323, (Sept. 21, 2004).[6]

The First Amendment protects these expletives in literature, art, and political speech in part because of their emotive power. *See also Denver Area Ed. Telecommunications Consortium v. FCC*, 518 U.S. 727, 805 (1996) (opinion of Kennedy, J.) ("[i]n artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying 'otherwise inexpressible emotions.'") (quoting *Cohen* in part); *Morse v. Frederick*, 127 S. Ct. 2618, 2636 (2007) (Alito and Kennedy, JJ., concurring) (the First Amendment protects any speech "that can plausibly be interpreted as commenting on any political or social issue").

Underlying the fleeting expletives rule is the FCC's assumption that all uses of these versatile and common words, whether in art, literature, documentary, news, or ordinary conversation, are harmful to minors – or

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[6] The WBEZ case is still under investigation. *Amici* will supply a copy of Professor Jay's Statement at the court's request.

almost all uses: the commissioners reserve for themselves the power to create an exception. The agency's position in the Supreme Court illustrated the irrationality of this approach when it assumed harm from a child's asking a parent the meaning of "fuck" or a variant, whether uttered by a celebrity at an awards show, an actor in a romantic comedy, or President Bush. *See* Brief of Petitioner-Appellant at 10, 18, *FCC v. Fox*, No. 07-582. But children ask their parents the meaning of words all the time; generally, we consider that a good thing. It is the parent's job to teach the child that highly charged vulgar words are not appropriate in polite conversation – not the government's job to make sure children do not hear these words at all. There has never been any evidence that merely hearing a vulgar word is harmful to a child. In today's world, children hear these words from many sources. The important point is that they learn when the words are appropriate and when they are not.

The FCC recites the mantra of "context" in an attempt to escape the irrationality of its flat presumption against two common words that it finds offensive, along with any of their variants. But as the foregoing examples demonstrate, the FCC's inscrutable and varying approach to regulating according to "context" means wielding essentially unbridled discretion. In claiming to know when an expletive should be allowed, the agency's does

not even purport to rely on data or any other evidence regarding when a child might be adversely affected, but instead finds it sufficient to rely on the personal tastes and cultural assumptions of the commissioners, as the record amply shows.

How can it be permissible, for example, for a government agency to decide that a news program can use the word "bullshitter" but a police officer cursing during a fictional program such as "NYPD Blue" cannot? Why should it be possible that musicians would be barred from using vulgar words in a documentary, but perhaps allowed to use them on a news show?

Imposing on broadcasters the burden of demonstrating artistic or editorial necessity – as the FCC did in the case of "The Blues" – heightens the chill, compounding the injury. As the Supreme Court recognized in *Freedman v. Maryland*, 380 U.S. 51 (1965), the First Amendment has a procedural dimension, which prohibits laws or regulations that impose on speakers the burden of proving that their speech should not be censored. *See also Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004) (*Ashcroft II*) ("[t]here is a potential for extraordinary harm and a serious chill upon protected speech" where prosecution is likely and "only an affirmative defense is available"). The FCC's notion that broadcasters should bear the burden of establishing artistic necessity turns the First Amendment upside down.

Justice Breyer has noted that sometimes it is wise to watch how a medium develops before imposing strict legal rules. *Denver Area Ed. Telecommunications Consortium*, 518 U.S. at 740–42. We now have more than thirty years' experience with FCC censorship of broadcasting, long enough to conclude that the indecency regime cannot be reconciled with the First Amendment and thus can no longer be treated as authorized by 18 U.S.C. § 1464.

3. FCC enforcement, both before and after its new fleeting expletives rule, has chilled valuable expression

The Supreme Court has repeatedly warned that the overbreadth doctrine "prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 237 (2002) (*Ashcroft I*). This is precisely what has happened as a result of the FCC's vague and shifting indecency regime.

In response to the fleeting expletives rule, PBS bleeped soldiers' language, and with it the reality of war reporting, from the documentaries "A Soldier's Heart" and "Return of the Taliban," and from a Frontline episode,

"The New Asylums."[7] Language in PBS's "The Enemy Within" was purged even though it documented the specific words used by an informant to threaten a suspect.[8] A TV station in Boston stated it would "probably have to edit references to sexual activities in a coming *Masterpiece Theater* production, 'Casanova.'"[9] PBS similarly wondered whether to pixilate actress Helen Mirren's mouth as she uttered an inaudible "fuck" from the driver's seat in another *Masterpiece Theater* production.[10]

In 2002, a documentary produced by American Public Media ("APM"), which chronicled "the sounds and voices of the World Trade Center and its surrounding neighborhood," was broadcast uncut on dozens of public radio stations. The program included a poem incorporating the word "bullshit." When the show was rebroadcast in September 2006, APM "felt that it had no choice but to alert its affiliates and to 'bleep' this word" from the poem. Comments of Minnesota Public Radio/American Public Media,

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[7] Kara Canty, *FCC'S Punishing Fines Have Chilling Effect on Broadcasters*, BALTIMORE SUN, Oct. 13, 2006, www.freepress.net/news/18315 (last accessed 9/15/2009); Rebecca Dana, *@$#&% Ken Burns!* NEW YORK OBSERVER, Oct. 2, 2006, www.observer.com/node/52747 (last accessed 9/15/2009); Louis Wiley, Jr., *Censorship at Work*, CURRENT.ORG, July 2006, www.current.org/fcc/fcc0613indecency.shtml (last accessed 9/15/2009).

[8] Wiley, *supra* n.13.

[9] Elizabeth Jenson, *Soldier's Words May Test PBS Guidelines*, NEW YORK TIMES, July 22, 2006, at A13.

[10] Dana, *supra* n. 7.

FCC Remand Proceedings, DA 06-1739 (Sept. 21, 2006), Affidavit of Thomas Kigin, ¶10 (A-447-449).

Niagara Frontier Radio administers a radio reading service for the blind; by 2006, it had aired more than 150,000 hours of book readings to thousands of visually impaired listeners. It broadcast through a leased subcarrier of a local FM signal as well as a local ABC affiliate with a wider range. In 2005, the ABC station removed the program, citing a single complaint about the Tom Wolfe novel *I Am Charlotte Simmons*. When the program was reinstated two weeks later, the station would air it only after 10 p.m., thereby reducing both the hours that visually impaired listeners can enjoy the show and the size of the listening audience. *Id.*, Affidavit of Robert Sikorski (A-492-497).

The widely syndicated program *Broadway's Biggest Hits*, with more than 150,000 listeners, faced many dilemmas in the wake of the new indecency and profanity rules. In 2004, stations fearful of FCC punishment were given a sanitized version of a song in the hit musical *A Chorus Line*, which "humorously tells of how plastic surgery and improving one's 'tits and ass' can improve one's chances for a job." In the next two years, these concerns resulted in full review of the playlist and deletion of "well-known, popular, and culturally and musically significant songs" from such shows as

Les Miserables, *The Producers*, *Avenue Q*, and *Miss Saigon*. *Id.*, Affidavit of Stanley Wilkinson (A-469-475).

It will not avail the FCC to argue that in some or all of these instances, it might find that the vulgar words, "in context," were not indecent. Programmers – especially at noncommercial stations with limited budgets – cannot afford to risk an indecency fine,[11] or even to pay the legal costs incurred in responding to FCC investigations. Because the permissible parameters are unclear and continue to shift, self-censorship of fiction, drama, history, and journalism occurs with increasing frequency. PBS President Paula Kerger explained: "When you have stations whose operating budgets in some cases are only a couple of million dollars, even frankly the old fines, once you factor in all the legal work and so forth, were daunting. The fines now would put stations out of business."[12] The FCC's presumptive ban on fleeting expletives, with exceptions to be invoked at the

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[11] In 2006, Congress increased the fines for broadcast indecency tenfold, to $325,000 for each violation. Broadcast Indecency Enforcement Act, Pub.L. 109-235, 120 Stat. 491 (2006).

[12] Quoted in Matea Gold, *PBS "War" Battle Plans*, LOS ANGELES TIMES, July 27, 2006, www.freepress.net/news/16755 (visited 11/6/06). See also Kigin Affidavit, ¶5 (A-443) ("MPR simply cannot risk either huge fines or license revocation …. if it were to guess wrong about what is now acceptable for broadcast").

agency's discretion, has created a severe chill, especially in noncommercial broadcasting.

B. The Post 10-p.m. Safe Harbor Does Not Save the FCC's Censorship Regime

The plurality in *Pacifica* pointed to the post-10 p.m. safe harbor as saving the indecency regime from constitutional infirmity. There are several reasons why today the safe harbor does not adequately protect the First Amendment rights of broadcasters, producers, directors, writers, and performers.

First, audiences are smaller late at night. TV viewing falls significantly after 10 p.m.; radio listening begins to shrink after 6 p.m. and drops to negligible levels by 10.[13] Second, the safe harbor realistically offers at most only two hours for potentially risky programming, since most people are sleeping and not watching TV or listening to the radio from midnight to 6 a.m. It was not without reason that the D.C. Circuit referred to the safe

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[13] The Nielsen website lists the ten most-watched broadcast TV shows every week. For the week of October 30, 2006, only one of the ten most-watched shows aired at or after 10 p.m. *See* Nielsen Media Research, *Top TV Ratings* (Nov. 10, 2006), www.nielsenmedia.com (visited 11/10/06). For radio, listening peaks around 7 a.m., "remains strong" through 6 p.m., and tapers off after that, with just a tiny fraction of the daytime audience by 10 p.m. ARBITRON, RADIO TODAY (2005 ed.), at 6, (visited 9/15/2009).

harbor as "broadcasting Siberia." *Becker v. FCC*, 95 F.3d 75, 84 (D.C. Cir. 1996).

Consigning possibly indecent programs to the post-10 p.m. safe harbor is rarely an adequate substitute for earlier time slots. Southern California Public Radio ("SCPR"), for example, for years broadcast performances at LA Theater Works, typically on Saturday nights at 8 pm – "consistent with when the curtain typically rises on live performances." Kigin Affidavit ¶8 (A-445-446). In 2004, SCPR aired Theater Works' production of "Dinah Was," a Tony Award-winning play about singer Dinah Washington. "Not surprisingly," APM official Thomas Kigin says, "given Ms. Washington's life and times, the play contains various commonplace 'swear' words and sexual expressions." Heightened FCC censorship and the threat of large fines, however, made SCPR nervous. First, it stopped the broadcasts entirely; then, having concluded "that it is neither appropriate nor feasible to edit the performances for language," SCPR moved the broadcasts to 10 p.m. But their future was uncertain, for SCPR and Theater Works agree "that broadcasts at this late hour will attract only a fraction of the former audience for this series of outstanding theatrical events." *Id.*

The "safe harbor" is even less of an adequate alternative for live programming. A letter submission in the FCC's remand proceeding

explained: "Live broadcast television is a direct link to the real world around us, and while sometimes unpredictable, is nonetheless one of the things that continues to bring Americans together to share historic moments." Center for Creative Voices in Media *et al.*, Letter to William Davenport, No. DA 06-1739 (Sept. 21, 2006). Spontaneous news coverage largely happens before 10 p.m.

A safe harbor might have made sense under the facts of *Pacifica*, where one "specific broadcast … represented a rather dramatic departure from traditional program content." *Reno*, 521 U.S. at 867. But given the FCC's expanded and highly subjective censorship rules, and the pervasiveness of frank language in today's art, literature, news, and documentary programming, there is simply not enough time after 10 p.m. and before midnight to accommodate all the of the constitutionally protected material that is endangered. This problem is exacerbated by the unpredictability and overbreadth of the FCC's indecency regime. Broadcasters, especially small or noncommercial broadcasters that cannot afford hundreds of thousands of dollars for a single indecency violation, must purge any expressive acts that might conceivably be offensive to a

majority of FCC commissioners from their shows in order to air them before 10 p.m.[14]

As the Supreme Court recognized in *Reno*, programming that the FCC might consider indecent would have value for many minors. 521 U.S. at 877-78. Books by John Steinbeck and Toni Morrison, documentaries such as "The Blues," and news coverage that, the agency has warned in its Remand Order, might be found indecent are examples of valuable material that should not be consigned to the few available late-night hours.

In *U.S. v. Playboy Entertainment Group*, 529 U.S. 803 (2000), the Supreme Court struck down a safe harbor requirement for sexually explicit material – a narrower category of speech than the potentially indecent speech at issue in this case. *Playboy* involved cable TV, which enters the home exactly as broadcast television does for most Americans today. Indeed, the programming at issue in *Playboy* came into the home uninvited, largely in the form of "signal bleed." The Supreme Court found, however, that time channeling "silences … protected speech for two-thirds of the

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[14] Although time-shifting technologies such as TiVo make it possible to record late night programming for viewing at more convenient times, it is questionable how many people take advantage of this option. Certainly, this technological advance has not led broadcasters to begin to air popular but potentially risky programs late at night; instead, they have self-censored in response to the fleeting expletives rule.

day." *Id.* at 812. "It is of no moment," the Supreme Court explained, "that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree." *Id.*

Whatever the acceptability of time-channeling in the era of *Pacifica*, it is not adequate today to secure First Amendment rights, given subsequent Supreme Court jurisprudence.

II. SECTION 1464 SHOULD BE CONSTRUED TO BAN ONLY CONSTITUTIONALLY UNPROTECTED OBSCENITY

The foregoing sections not only show why 18 U.S.C. § 1464 cannot be construed to permit the fleeting expletives rule; they also show that the entire indecency regime, in light of thirty years' experience, can no longer be justified under any constitutionally permissible construction of the statute. Indeed, the Supreme Court has already held that the FCC's indecency standard is unconstitutionally overbroad, and has essentially held that it is unconstitutionally vague as well.

A. Case Law Since *Pacifica* Has Recognized the Vagueness and Overbreadth of the FCC's Indecency Test

Congress chose the FCC's indecency standard to regulate the Internet when it passed the 1996 Communications Decency Act (the "CDA"). Invalidating the CDA in *Reno v. ACLU*, the Supreme Court condemned the indecency test as both vague and overbroad.

The Supreme Court found the test "problematic" because such terms as "patently offensive" and "community standards" are left undefined. The lack of definition creates "special First Amendment concerns because of its obvious chilling effect on free speech." *Reno*, 521 U.S. at 870-72. The Supreme Court explained the difference between "patently offensive" in the CDA, where it was troublesomely vague, and in obscenity law, where it is only one part of the definition of unprotected speech. The other, more specific requirements of the obscenity definition – that the expression appeal to "the prurient interest," lack serious value, and be "specifically defined by the applicable state law" – cabin the inherent vagueness of "patent offensiveness." *Id.* at 872-74. Without these additional safeguards, the CDA's ban on "patently offensive" speech "unquestionably silences some speakers whose messages would be entitled to constitutional protection." *Id.* at 874. Although the Court's discussion of vagueness fell just short of a square holding, the Supreme Court has recently cited *Reno* for the proposition that the indecency standard is unconstitutionally vague because it requires "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *United States v. Williams*, 128 S. Ct. 1830, 1846 (2008) (citing *Reno*, 521 U.S. at 870-71 & n. 35); *See*

also Ashcroft II, 535 U.S. at 578 (describing the indecency standard's "unprecedented breadth and vagueness").

Reno struck down the indecency standard on grounds of overbreadth. The Supreme Court reiterated that "[s]exual expression which is indecent but not obscene is protected by the First Amendment," 521 U.S. at 874; *See also Sable Communications*, 492 U.S. at 126, and noted that indecency "cover[s] large amounts of nonpornographic material with serious educational or other value." 521 U.S. at 877-78. Following the time-honored rule that government cannot reduce the adult population to reading or viewing "only what is fit for children," *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957), the Supreme Court noted that there are less constitutionally burdensome ways to shield youngsters from material that may not be appropriate for them. 521 U.S. at 874-79.

Although *Reno* distinguished *Pacifica*, the Supreme Court's condemnation of the indecency standard on grounds of both vagueness and overbreadth cannot be reconciled with the FCC's broad-ranging, inconsistent, and whimsically discretionary application of that standard to broadcasters over the past thirty years. The Commission's use of the same indecency test that the Supreme Court condemned in *Reno, Ashcroft II*, and *Williams* cannot be squared with a constitutional reading of section 1464.

B. Broadcasting Is No Longer "Uniquely Pervasive" and "Uniquely Accessible to Children – The Characteristics That in *Pacifica* Were Said to Justify FCC Censorship of Constitutionally Protected Expression

At the time *Pacifica* was decided, broadcasting was the only electronic mass medium. It has since become one among many, and indistinguishable to most viewers from cable television. Thus the "uniquely pervasive" presence of broadcasting that the Supreme Court identified in *Pacifica* as the principle rationale for subjecting the medium to FCC censorship of non-obscene speech no longer exists. As this court recognized, "it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children." *Fox*, 489 F.3d at 465. As Justice Thomas noted, concurring with the decision above, "the justifications relied upon by the Court in … *Pacifica*—spectrum scarcity, intrusiveness, and accessibility to children—neither distinguish broadcast from cable, nor explain the relaxed application of the principles of the First Amendment to Broadcast…[t]echnological advances have eviscerated the factual assumptions" underlying *Pacifica*. *FCC*, 129 S.Ct. at 1821 (Thomas, J., concurring).

To be sure, broadcasting remains pervasive, but no longer uniquely so, given that about 90% of the nation's households receive *all* their TV programming through one, nonbroadcast, distributor (typically either cable

or satellite).[15] This convergence of technology eliminates the justification for a government censorship system that is constitutionally off-limits for every other medium. *E.g.*, *Reno*, 521 U.S. 844 (the Internet); *Denver Area Ed. Telecommunications Consortium*, 518 U.S. 727 (public and leased access cable).

Underlying *Pacifica* was a history of lesser First Amendment protection for broadcasting. Government regulation was deemed justified in light of the limited capacity of the broadcast spectrum, and consequent scarcity of licenses. Whatever one thinks of the scarcity rationale in the modern media world, there is a categorical difference between structural rules designed to promote more speech, see *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943) (approving FCC rules that curbed national networks' market power by prohibiting them from dictating the programming of affiliated stations), and censorship rules based on broad, shifting, and culturally driven criteria such as "patent offensiveness."

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[15] *Satellite TV Penetration Up Significantly*, CONSUMERAFFAIRS.COM, Aug. 18, 2005, www.consumeraffairs.com/news04/2005/jdpower_satellite.html (visited 11/6/06); see also *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2506-07 (2006) (94.2 million out of a total of 109.6 million TV households receive all their video programming through an "MVPD" [multichannel video programming distributor] – either cable, satellite, or other nonbroadcast technology).

Moreover, as this court noted, technological developments since *Pacifica* make government control unnecessary in those instances in which parents wish to shield their children from programming they consider inappropriate. *Fox*, 489 F.3d at 466. The FCC itself has recognized that v-chips and lockboxes are readily available blocking technologies. *Saving Private Ryan*, 20 FCC Rcd at 4508, nn. 8-9. Similarly, the Supreme Court held that lockboxes and other technologies were constitutionally less burdensome means of addressing parental concerns in striking down a time-channeling requirement for indecency on cable. *Playboy*, 529 U.S. at 809-15. The same reasoning applies here. Just as the courts have long recognized that section 1464 cannot be read literally to impose a total ban on non-obscene broadcast speech, but must include a safe harbor,[16] so section 1464 can no longer be read to permit a federal agency's unbridled discretion to censor non-obscene speech that it considers "patently offensive."

[16] See *Action for Children's Television v. FCC*, 932 F.2d 1504, 1509-10 (D.C. Cir. 1991) (*"ACT II"*); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1343 (D.C. Cir. 1988) (*"ACT I"*).

CONCLUSION

For all these reasons, *amici* respectfully ask the Court to vacate the Remand Order and enjoin the FCC's entire indecency and profanity regime.

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Respectfully submitted,

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ADDENDUM – *AMICI* ORGANIZATIONS

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization that has defended free speech principles since its founding in 1920. Of particular relevance here, the ACLU has participated in many of the leading cases challenging the government's efforts to restrict speech on the basis of "indecency," including *FCC v. Pacifica* and *Reno v. ACLU*.

The New York Civil Liberties Union (NYCLU) is a statewide affiliate of the national ACLU.

The American Booksellers Foundation for Free Expression (ABFFE) is the bookseller's voice in the fight against censorship. Founded by the American Booksellers Association in 1990, ABFFE's mission is to promote and protect the free exchange of ideas, particularly those contained in books, by opposing restrictions on the freedom of speech.

The American Federation of Television and Radio Artists, AFL-CIO (AFTRA) is a national labor organization with a membership of over 70,000 professionals working in the news, entertainment, advertising and sound recordings industries. AFTRA's membership includes news reporters, anchors, sportscasters, talk show hosts, announcers, disc jockeys, producers, writers and other on-air and off-air broadcast employees; royalty artists and background singers whose sound recordings are played on radio stations; and other performers on radio and broadcast TV.

The Directors Guild of America (DGA) represents more than 13,400 directors and members of the directorial team working in U.S. cities and abroad. Their creative work is represented in feature films, television, commercials, documentaries, and news. The DGA's mission is to protect the economic and creative rights of directors and the directorial team.

The First Amendment Project (FAP) is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. Among FAP's clients are several independent, nonprofit broadcast content-providers that are threatened by the ambiguities and inconsistencies

in the FCC's policies and whose ability to report on issues of local and national significance is thus compromised.

Minnesota Public Radio (MPR) is a regional public radio network that serves some 650,000 listeners each week across seven states on 37 public radio stations. In addition, as American Public Media (APM), it produces more nationally distributed news and documentary programming than any other station-based public radio organization, reaching some 14 million people per week.

The National Alliance for Media Arts and Culture (NAMAC) is the national service organization for the media arts, providing leadership training and professional development, organizational capacity building support, and original research about the field. With more than 300 member organizations serving an estimated 400,000 film, video, audio, and digital creators, NAMAC has a strong interest in ensuring that language or gestures central to the meaning of film and audio works remain intact and are not eliminated or altered when presented to the public.

The National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of 50 national nonprofit organizations, including religious, educational, professional, artistic, labor and civil rights groups united in the conviction that freedom of thought, inquiry and expression are indispensable to a healthy democracy. The positions advocated by NCAC in this brief do not necessarily reflect the positions of each of its participating organizations.

The National Federation of Community Broadcasters (NFCB) represents over 200 community-oriented radio stations across the United States. Community radio is committed to airing diverse, authentic voices and finds the current FCC indecency regulations inconsistent and overbroad. Since most community radio stations operate on small budgets, they can not afford the fines that can now be charged for an inadvertent broadcast of something that the Commission might decide is indecent or profane, which has a chilling affect on their editorial freedom and ability to serve their communities.

PEN American Center (PEN) is an organization of over 2,900 novelists, poets, essayists, translators, playwrights, and editors. As part of International PEN, it and its affiliated organizations are chartered to defend free and open communication within all nations and internationally. American PEN has taken a leading role in attacking rules that limit freedom of expression in this country.

Screen Actors Guild (SAG) represents approximately 120,000 professional actors, many of whom perform on broadcast television and radio, and are thus directly affected by the FCC's censorship system. SAG is committed to protecting the creative rights of its members and enforcing its collective bargaining agreements throughout the world.

Washington Area Lawyers for the Arts (WALA) is the largest provider of pro bono legal services and legal education on arts-related matters in the Washington, D.C., metropolitan area, annually serving hundreds of artists and artistic organizations. Through the work of attorney volunteers who regularly counsel low-income artists, the organization has observed directly the chilling effects on artists' free expression rights caused by vague and overreaching government censorship.

The Woodhull Freedom Foundation (WFF) is a non-profit organization that works to affirm sexual freedom as a fundamental human right by protecting and advancing freedom of speech and sexual expression. WFF promotes sexuality as a positive personal, social and moral value through research, advocacy, activism, education and outreach.

Writers Guild of America, West (WGAW) is a labor organization and the collective bargaining representative of approximately 11,000 professional writers in the motion picture, television and new media industries. The court’s decision will have a direct impact on the WGAW’s members as content creators in broadcast television.

The Writers Guild of America, East (WGAE) is a labor union representing professional writers in film, television and radio. Its members write for entertainment, for network and local news operations, for independent stations in major cities, and for any other media production

companies which are signatory to Guild agreements. Its members are very concerned about censorship and the impact of the FCC's regulations on artistic freedom and the quality of their work.

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This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:

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DATED: September 16, 2009

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I hereby certify that on this 16th day of September, 2009, I electronically filed the foregoing Brief of *Amicus Curiae* with the Clerk of Court using the email address agencycases@ca2.uscourts.gov and mailed the required copies via Federal Express. Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, a copy of the brief was also served by electronic mail and two hardcopies by first-class mail, postage pre-paid, to each of the following:

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