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,

NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO.,
NBC TELEVISION AFFILIATES, FBC TELEVISION AFFILIATES ASSOCIATION,
CBS TELEVISION NETWORK AFFILIATES, CENTER FOR THE
CREATIVE COMMUNITY, INC., doing business as Center for Creative
Voices in Media, Inc., ABC TELEVISION AFFILIATES ASSOCIATION,

Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF *AMICUS CURIAE* MORALITY IN MEDIA, INC., IN SUPPORT OF RESPONDENTS

ROBERT W. PETERS
ROBIN S. WHITEHEAD
MORALITY IN MEDIA, INC.
475 Riverside Drive
New York, New York 10115
(212) 870-3222

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP Rule 26.1 *Amicus* organization states that it is a not for profit corporation which does not issue stock and which is not a subsidiary or affiliate of any publicly owned corporation.

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INTEREST OF *AMICUS CURIAE*

Morality in Media, Inc. (MIM), as *amicus curiae,* files this brief in support of the Respondents in this case, which is before this Court on appeal from an Order of the Federal Communications Commission. The written consents of the parties to the filing of this brief have been requested and all parties have consented thereto in writing.

MIM has an interest in this case as a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the U.S. and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by the Supreme Court in *Kaplan v. California,* 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 58 notes 7 and 8 (1973).

MIM focuses on legal and law enforcement issues related to obscenity, child pornography, the broadcasting and other mass communication of indecent material, and the display and dissemination to minors of materials which are harmful to minors. MIM has filed friend of the court briefs involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *State v. Harrold*, 593 N.W.2d 299 (Neb. 1999); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *United States v. Playboy*, 529 U.S. 803 (2000); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *City of Los Angeles v. Alameda Books, Inc. and Highland Books, Inc.*, 535 U.S. 425 (2002); *Ashcroft v. American Civil Liberties Union, et al.*, 535 U.S. 564 (2002), and 542 U.S. 656, 124 S. Ct. 2783 (2004). and *United States v. Williams*, 128 S. Ct. 1830 (2008). MIM has also filed a friend of the court brief in *Fox Television Stations, et al., v. FCC*, 489 F.3d 444 (2d Cir. 2007); and *CBS Corp, et al., v. FCC*, 2008 U.S. App. LEXIS 16692 (3rd Cir. 2008).

Amicus files this brief in support of the Respondents because it believes its brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties.

ARGUMENT

I. TO ESTABLISH SCIENTER, THE FCC IS NOT REQUIRED TO SHOW THAT A BROADCASTER HAS ACTUAL KNOWLEDGE OF AND INTENT TO BROADCAST INDECENT CONTENT

Petitioner, Fox Television Stations, Inc., argues in its *Petition for Review of Orders of the FCC* that "18 U.S.C. 1464 clearly requires *scienter*—that is, the broadcaster must have knowledge of and intent to broadcast the specific content that is alleged to be indecent—not just the intent to broadcast the program regardless of the actual content." Brief of Petitioner, p.22 *Amicus* disagrees and argues that the requirement of *scienter* in this case can be established by showing through direct or circumstantial evidence, that the Petitioner had knowledge, reason to know, an awareness, or notice of the general character or nature of the broadcast's content.

Petitioner bases its interpretation of the requisite *scienter* on various criminal *mens rea* and obscenity cases. As a general principle of law, the government must show that a defendant had a general knowledge or awareness of the overall character of the sexually explicit content of the item involved in order to show the requisite *scienter*. It is not required however, that the prosecution shows a direct knowledge of the precise contents of the material, or even that a defendant had ever personally viewed the material. If it is shown that a defendant, for instance in an obscenity case, was aware of its overall

character, such knowledge or notice is constitutionally sufficient to sustain a conviction.

The Supreme Court beginning with the case of *Rosen v. United States*, 161 U.S. 29 (1896), established that a defendant does not have to be aware of the legal status of the material but rather it must only be shown that the individual had "notice" of the material's contents. The Court at 41 stated:

> The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by *one who knew or had notice*, at the time, *of its contents*, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. [Emphasis added.]

The only *scienter* requirement ever ruled unconstitutional by the Supreme Court was the complete absence of *scienter*, as discussed in the case of *Smith v. California*, 361 U.S. 147 (1959). In the *Smith* case, the appellant was the proprietor of a bookstore. The question before the Court was whether the City of Los Angeles could impose "strict liability" for the distribution of obscene material, with no *scienter* requirement whatsoever. The Court held that the complete absence of a *scienter* requirement was not permissible. The Court in *Smith*, at 154, also stated that circumstantial evidence could show the required awareness:

> Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The

> *circumstances may warrant the inference that he was aware of what a book contained*, despite his denial. [Emphasis added.]

In *Mishkin v. New York*, 383 U.S. 502 (1966), the Supreme Court ruled on the constitutionality of the *scienter* definition of the New York obscenity statute, and whether proof of *scienter* in that case was adequate. The Court, at 510, accepted the definition of *scienter* as given to the statute by the New York Court of Appeals, which had defined the element of *scienter* as follows:

> A reading of the [New York] statute … as a whole clearly indicates that only those who are *in some manner aware of the character* of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised . . . . [Emphasis added.]

The Court held that this definition of *scienter* "fully meets the demands of the Constitution." *Mishkin*, at 511.

The *Mishkin* holding was reaffirmed in *Ginsberg* v. *New York*, 390 U.S. 629 (1968) where the Court was again faced with the sufficiency of a *scienter* requirement in another New York statute, that proscribed the "knowing" distribution of obscene materials to minors. "Knowingly" was defined in the statute as "knowledge" of, or "reason to know" of, the character and content of the material. Citing *Mishkin*, and the New York Court of Appeals' construction of the other similar statutory language, the Court rejected the challenge to the *scienter* provision.

In *Hamling v. United States*, 418 U.S. 87 (1974), the Court was faced with determining the constitutionality of the *scienter* element in a case involving convictions for mailing obscene materials in violation of federal law. In *Hamling*, the trial court charged the jury on *scienter* stating that the government must prove the defendants "knew the envelopes and packages containing the subject materials were mailed or placed...in Interstate Commerce, and ... *that they had knowledge of the character of the materials*." *Hamling*, at 119-20 (Emphasis added). The Court at 120-21 upheld the following instruction:

> Petitioners contend that this instruction was improper and that proof of *scienter* in obscenity prosecutions requires, "at the very least, proof both of knowledge of the contents of the material and awareness of the obscene character of the material."... In support of this contention, petitioners urge, as they must, that we overrule our prior decision in *Rosen v. United States*, 161 U.S. 29 (1896). *We decline that invitation, and hold that the District Court in this case properly instructed the jury on the question of scienter*. [Emphasis added.]

Thereafter in *Hamling*, at 123, the Court summarized its rulings on *scienter* in *Smith, Mishkin*, and *Ginsberg*, *supra*:

> It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the material he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law.

These Supreme Court cases on the issue of *scienter* in obscenity cases provide that it is constitutionally sufficient for the prosecution to prove *scienter* on the part of a defendant by showing, by direct or circumstantial evidence, that the defendant has knowledge, reason to know, an awareness, or notice of the general character or nature of the material's content.

In *Young v. Abrams*, 698 F.2d 131 (2d Cir. 1983), the appellant was convicted of obscenity in violation of N.Y. Penal Law § 235.05. Appellant argued that there was insufficient evidence to prove beyond a reasonable doubt that he knew the content and character of the film and that the presumption in § 235.10(a), that one who promoted obscene materials in the course of his business was presumed to know the content and character of the material, was unconstitutional. This Court, at 134, disagreed stating,

> …a person who promotes obscene material or possesses obscene material with intent to promote it in the course of his business *is presumed to do so with knowledge of its content and character*. In other words, if a person promotes that which you find to be obscene, the law says he is presumed to do that knowing what's in it. *Again, the law permits that, but does not require you to presume or infer knowledge in some circumstances*. That means after a consideration of all of the evidence in this case, you may presume or infer from the defendants promotion of obscene material or their possession of obscene material with intent to promote it in the course of this business, that they promoted it or possessed it with intent to promote it with knowledge of its content and character, or you may reject such presumption or inference. [Emphasis added.]

Other federal courts define a sufficient *scienter* requirement as knowledge or notice of "character" or "nature." *Ripplinger v. Collins*, 868 F.2d 1043, at 1055 (9th Cir. 1989) (Citing *Hamling*, the Court approved a jury instruction requiring only knowledge of the character of the material, and not of its specific contents); *United States v. Battista*, 664 F.2d 237, at 242 (6th Cir. 1981) (The *scienter* required is that appellants know the general nature and character of the film.); *United States v. Hill*, 500 F.2d 733, at 740 (5th Cir. 1974), *cert. den.*, 420 U.S. 952 (1975) (The evidence was sufficient for the jury to determine that the defendant had general knowledge that the material is sexually oriented, the only *scienter* required for conviction under 18 U.S.C. 1462 or 1465.); *United States v. Thevis*, 490 F.2d 76, at 77 (5th Cir. 1974), *cert. den.*, 419 U.S. 801 (1974) (Defendants' knowledge of the materials' sexual orientation is sufficient.); *United States v. Book Mart*, 490 F.2d 73, at 75 (5th Cir. 1974) (*Scienter* as to the exact content of the material transported, rather than a general knowledge that the material is sexually oriented, is not required to uphold a conviction under 18 U.S.C 1465.); *United States v. Groner*, 494 F.2d 499, at 501 (5th Cir. 1974), *cert. den.*, 419 U.S. 1010 (1974) (The government has met its burden of proving *scienter* under the statute if it proves that the appellant knew the nature of the materials he put in interstate commerce.).

Amicus argues that based upon the above case law, the requirement of *scienter* at issue in the instant case can be established by showing through direct or circumstantial evidence, that the Petitioner had knowledge, reason to know, an awareness, or notice of the general character or nature of the broadcast's content, rather than the broadcaster having knowledge of and intent to broadcast the specific content that is alleged to have been indecent.

II. IN *FCC V. PACIFICA FOUNDATION*, THE SUPREME COURT DID NOT HOLD THAT AN 'OCCASIONAL EXPLETIVE' COULD NEVER BE ACTIONABLE

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica*"), the Supreme Court upheld a Federal Communications Commission (FCC) determination that a 12 minute George Carlin monologue entitled "Filthy Words" was indecent as broadcast. The *Pacifica* Court emphasized the "narrowness of its holding,"[1] stating:

> This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction…[2]

In his concurrence, Justice Powell said that the holding "[D]id not speak to cases involving the isolated use of a potentially offensive word in the course

[1] *Id*. at 750.
[2] *Id*.

of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent."[3]

In emphasizing the narrowness of its holding, however, the *Pacifica* Court did not hold that a single expletive could never be actionable. That issue was not before the Court; and while the FCC chose to interpret *Pacifica* narrowly,[4] broadcasters took a different view as the following articles indicate:

> When it was the 'Seven Dirty Words,' we knew what they were and we didn't say them," says Rick Cummings, president of Emmis's radio division, referring to the forbidden words made famous by the comedian George Carlin uttering them…[5]

> In 1978, the FCC ruled that piss and six other words were indecent and forbidden when children are likely among a broadcast station's audience.[6]

III. CHILDREN DO NOT NEED TO HEAR A CURSE WORD REPEATED IN ORDER TO ENLARGE THEIR VOCABULARY

In distinguishing *Cohen v. California,* 403 U.S. 15 (1971), the *Pacifica* Court observed, "Although Cohen's written message might have been incomprehensible to a first grader, *Pacifica's* broadcast could have enlarged a

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[3] *Id*. at 760-761 (Powell, J., concurring).
[4] *Fox Television Stations v. FCC,* 489 F.3d 444, at 449, n.4 (2d Cir. 2007)["At the time, the Commission interpreted *Pacifica* as involving a situation 'about as likely to occur again as Haley's Comet.' Brief of *Amici Curiae* Former FCC Officials at 6 (quoting FCC Chairman Charles D. Ferris, Speech to New England Broadcasting Assoc., Boston, Mass, July 21, 1978)"].
[5] Ann Marie Squeo, "Firing of 'Love Sponge' Signals Cleanup of Shock Radio," *Wall Street Journal*, Feb. 25, 2004, p. B1.
[6] Bill McConnell, "Seven provisionally dirty words? Damn!", *Broadcasting & Cable*, July 8, 2002.

child's vocabulary in an instant."[7] A child need not hear a four-letter word repeated over and over again in order to enlarge his or her vocabulary.[8]

To their partial credit the broadcast TV networks have never aired programming as grossly vulgar as George Carlin's "Filthy Words" monologue. And yet, as the following surveys show, a large majority of parents are concerned about what their children hear on TV.

According to survey conducted by the Kaiser Family Foundation in 2007,[9] 77% of parents said they were concerned that their children are exposed to too much "adult language" in the media; and 32% of parents said that "inappropriate content" in TV was what concerned them "most" (only 21% said inappropriate content in the Internet was what concerned them "most").

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[7] *Pacifica*, 438 U.S. at 749.

[8] *See, e.g.*, "It's A Whabbit," Talaris Institute ("Sometime around 18 months, a big change occurs. Young children start to recognize familiar sounds and sound patterns quickly when they hear them, and they begin to piece these familiar sounds together like puzzle pieces to form new words. This helps children learn to say new words after hearing them only once or twice."), published at http://www.talaris.org/spotlight_wabbit.htm; *See also*, "Bring the learning fun of Sesame Street into your classroom," PBS Teachers ("In addition to engaging children in meaningful conversations, invite them to: * Repeat new words they hear on the show;"), available at http://www.pbs.org/teachers/earlychildhood/articles/sesamestreet.html

[9] "Parents, Children & Media," Kaiser Family Foundation, June 2007, p. 24, 22.

According to a survey conducted by Pew Research Center in 2005,[10] 69% of parents said they were concerned that their children hear "adult language" on TV. According to a survey conducted in 2002 by Public Agenda,[11] 90% of parents said "TV gets worse by the year in terms of bad language and adult themes," and 73% said they worried about "negative messages in the media."

It would be helpful to have "scientific proof" showing that children learn "bad words" from listening to broadcasting and that their exposure to or use of these words can result in various harms. But it would be foolish and unethical to expose children to an "isolated expletive" or to a barrage of expletives to determine whether or how such exposure affects them and others.

IV. NUISANCE RATIONALE PROVIDES A 'MIDDLE ROAD' BETWEEN BANNING ALL EXPLETIVES AND ALLOWING AT LEAST ONE IN EVERY BROADCAST PROGRAM, REGARDLESS OF CIRCUMSTANCES

When Congress enacted the Radio Act of 1927 and the Communications Act of 1934, it did not give broadcasters a right to use the public airwaves to use indecent language at least once in every program. Both Acts included a provision making it unlawful to "utter *any* obscene, indecent, or profane language by means of radio communications." [Emphasis supplied by *Amicus*]

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[10] Press Release, "Support for Tougher Indecency Measures…," Pew Research Center for People & Press, p.13, Apr. 19, 2005

[11] Press Release, "Parents in New Survey Report Limited Success Teaching Their Kids 'Absolutely Essential' Values," Public Agenda, Oct. 2, 2002.

When Congress enacted 18 U.S.C. 1464 in 1948, the law continued to prohibit "*any* obscene, indecent, or profane language." [Emphasis supplied]

While little is known about what prompted regulation of obscene, indecent or profane language in broadcasting, it is doubtful that it was incidents similar to the airing of the "Seven Dirty Words" monologue. In her monograph, "The Origins of the Ban on Obscene, Indecent or Profane Language of the Radio Act of 1927,"[12] Milagros Rivera Sanchez described the following incidents:

> The earliest complaint dates back to March 1920. Radio inspector S.W. Edwards asked Commissioner of Navigation A.J. Tyrer if the amateur license of Edgar Ferguson… should be suspended…Ferguson admitted to telling another amateur to "go to hell" over the air. [At p. 8]
>
> In the case of Clarence R. Whitte…the record showed that in February 1922 Acting Secretary of Commerce S. W. Stratton recommended that Whitte's license be suspended for two weeks for transmitting profane language over the air. Whitte had an argument with another amateur. When accused of monopolizing the air, Whitte said that anyone who said that was a "d[amn] liar." [At p. 9]

Perhaps it would be unwise at this late date to attempt to roll back the clock to 1927, 1934 or 1948 and to insist that when Congress said *any* obscene, indecent or profane language, it meant what it said. *Amicus* would also contend, however, that it would be just as unwise, if not more so, for the courts

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[12] *Journalism and Mass Communication Monographs*, p.149, Feb. 1995, Association for Education in Journalism and Mass Communication.

to now determine that broadcasters have a constitutional right to utter a single or "occasional" expletive, regardless of circumstances.

In a preceding decision, this Court was of the opinion that the FCC's warning about what broadcasters would do if they had a right to curse or swear at least once in each program was "divorced from reality."[13] But many TV broadcasters think they must compete with cable TV to succeed;[14] and when it comes to profanity, just about anything goes on cable.[15] And it isn't just TV broadcasters; it is also radio broadcasters who air "shock jocks." Furthermore, since broadcasters often refuse to delay live programming, they cannot control what a "celebrity" will say in an entertainment, "news" or sports program.

According to one study that examined "the types and amounts of offensive language on prime-time TV four years after age and content restrictions were implemented:"

> The broadcast industry claims that the content-and aged-based ratings systems adequately alert viewers to offensive content. This study

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[13] *Fox Television Stations v. FCC*, 489 F.3d 444, at 460 (2d Cir. 2007).
[14] *See, e.g.*, Barbara S. Kaye & Barry S. Saplosky, "Offensive Language in Prime-Time TV: Four Years After Television Age & Content Ratings," *Journal of Broadcasting & Electronic Media*, Dec. 2004 ["The fierce competition between cable and broadcast programs is also a contributing factor…Broadcast executives feel that bowing to network censors and advertisers puts their programs at a disadvantage to cable fare that is not subject to the same content restrictions (Armstrong, 2001; Farhi, 2002; Van Munching, 2001)"].
[15] *See, e.g.*, Ann Oldenburg, "Cussing on 'Deadwood' Sets Tongues A-Wagging," *USA Today*, May 2, 2004 ("On Sunday's show, there were at least 63 mentions of the f-word in the hour.").

> supports assertions that the warning systems give further license to broadcasters to include more profane television dialogue. The rate per hour of curse words jumped by 51% to about one such word every 8 minutes in prime time. Offensive language on prime-time television declined in 1997, but in the 4 years between 1997, when the age-and content-based alerts were first implemented, and 2001, each category of swearing increased. Mild-other words grew in frequency by 44% and excretory words spiked 547%.[16]
>
> According to a study conducted by Parents Television Council:
>
> Foul language during the Family Hour increased by 94.8% between 1998 and 2002 and by 109.1% during the 9:00 p.m. ET/PT time slot. Ironically, the smallest increase (38.7%) occurred during the last hour of prime time – the hour when young children are least likely to be in the viewing audience.[17]

Whatever the strength or weaknesses of arguments for prohibiting all obscene, indecent or profane words or for allowing at least one obscene, indecent or profane word in each broadcast program, there is a middle road between the two extremes – namely, when utterance of such language amounts to a nuisance, it can be prohibited in broadcasting.

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[16] Barbara S. Kaye & Barry S. Saplosky, "Offensive Language in Prime-Time TV: Four Years After Television Age & Content Ratings," *Journal of Broadcasting & Electronic Media*, Dec. 2004.

[17] Executive Summary, "The Blue Tube: Foul Language on Prime-Time Network TV," *Parents Television Council*, Sept. 15, 2003, p.5.

The *Pacifica* Court observed that the FCC's decision "rested entirely on a nuisance rationale"[18] and that the "concept requires consideration of a host of variables."[19]

Michigan v. Bennis[20] is also authority for the proposition that a single act is sufficient to constitute a nuisance when it contributes to an existing condition that is a public nuisance. *Amicus* contends that the problem of indecent language on broadcast TV is endemic and should be considered a nuisance,[21] especially during the prime time hours, as the following survey indicates:

> This Parents Television Council analysis of foul language on television is based on a comprehensive and exhaustive look at all primetime entertainment programming (sports and news programs excluded) on the major broadcast networks (ABC, CBS, Fox, NBC, CW, MyNetworkTV, UPN and WB) between 1998 and 2007… In total, nearly 11,000 expletives…were aired during primetime on broadcast TV in 2007 – nearly twice as many as in 1998. Milder expletives like hell, damn, crap, etc., are starting to take a back seat to harsher words. In 1998, 92% of the foul language on TV was comprised of milder expletives. In 2007, 74% of the foul language could be categorized as mild… The f-word aired only one time on primetime broadcast TV in all of 1998 – yet it

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[18] *Id*. at 750; see also, *Hess v. Indiana*, 414 U.S. 105, 108 (1973) ("In addition, there was no evidence to indicate Hess' speech amounted to a public nuisance in that privacy interests were invaded…*Cohen v. California, supra*, at 21."); *Rosenfeld v. New Jersey*, 408 U.S. 901, 903-909 (1972) (Powell, J., dissenting).

[19] *Pacifica*, at 750.

[20] 527 N.W.2d 483 (Mich. 1994), *aff'd., Bennis v. Michigan*, 516 U.S. 442 (1996).

[21] *Cf.*, E.L. Carter, et al., "Broadcast Profanity and the 'Right to be let alone': Can the FCC regulate non-indecent fleeting expletives…?", 31 *Hastings Comm. & Ent. L.J.* 1, 38 (2008) ("Clearly, not every profane utterance on broadcast TV would justify a finding of public nuisance, but the overall repetitiveness of profanity on TV generally might be called a nuisance.").

> appeared 1,147 times on primetime broadcast TV in 2007 on 184 different programs… The s-word, which appeared only two times in 1998, aired 364 times in 2007 on 133 different programs…[22]

For these reasons, *Amicus* contends while it is proper for the Commission to treat the frequency or duration of a description or depiction of sexual or excretory activities or organs as a "variable"[23] in determining whether programming is indecent, it would be misguided for this Court to determine that an occasional or isolated expletive can *never* be indecent.

V. IN *PACIFICA*, NEITHER THE SUPREME COURT NOR THE FCC DETERMINED THAT ONLY LITERAL USES OF EXPLETIVES WERE ACTIONABLE

On October 3, 2003, the FCC's Enforcement Bureau released an Order[24] denying 234 complaints regarding the live broadcast of the Golden Globe Awards. The complainants said that Bono had uttered the phrase, "this is really, really, fucking brilliant" or "this is fucking great."[25] The Bureau stated:

> As a threshold matter, the material aired during the Golden Globe Awards program *does not describe or depict sexual or excretory activities and organs*. The word "fucking" may be crude and offensive, but, in the context presented here, *did not describe sexual or excretory organs or activiti*es. Rather, the performer used the word "fucking" as an adjective or expletive to emphasize an exclamation. Indeed, in similar circumstances, we have found that offensive language used as an insult

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[22] Press Release, "PTC Finds Increase in Harsh Profanity on TV," *Parents Television Council*, Oct. 29, 2008.
[23] 438 U.S. at 750.
[24] *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 FCC Rcd. 19859.
[25] *Id.*

> rather than as a description of sexual or excretory activity or organs is *not within the scope of* the Commission's prohibition of indecent program content.[26] [Emphasis added by *Amicus*]

It is one thing for the FCC to determine that *how* an expletive is used (as an adjective, expletive, insult or description) is a variable in determining whether content is indecent. It is quite another for the FCC to determine that a vulgar term for sexual or excretory activities or organs, when used as an "adjective" (as in, "That c---k s----r is the best in the business") or as an "expletive to emphasize an exclamation" (as in, "Holy s--t, I won!") or as an "insult" (as in, "You mother f----r"), is *per se* not indecent. The latter determination is not only a departure from *Pacifica,* it is also a departure from common sense.

Nowhere did the FCC or the *Pacifica* Court say or hold that the seven "dirty words" were actionable only when Carlin meant to use them literally (as in, "Did you see those kids f-----g in the car seat?").

In fact, one of Carlin's uses of the s-word was quite similar to Bono's use of the f-word in the Golden Globe program. At one point during his monologue, Carlin stated, "S--t, I won the Grammy, man, for the comedy album."[27] As *Broadcasting & Cable* also observed in an editorial,[28] "But hasn't George Carlin's M-word always been an epithet rather than an accusation of incest?"

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[26] *Id*. at 19861.
[27] *Id.* at 752.
[28] "Curioser and Curioser," July 8, 2002.

Rather than focusing on whether Carlin used the words figuratively or literally, both the FCC and the Court looked to the plain meaning of the words. In its Declaratory Order,[29] the FCC noted that the monologue consisted of a:

> comedy routine, frequently interrupted by laughter from the audience, and that it was almost always totally devoted to the use of words as "shit" and "fuck," as well as "cocksucker," "motherfucker," "piss," and "cunt"…Thereafter, there is repeated use of the words "shit" and "fuck" in a manner designed to draw laughter from his audience.[30]
>
> ….the Commission concludes that words such as "fuck," "shit," "piss," "motherfucker," "cocksucker," "cunt," and "tit" *depict* sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly "indecent."[31] [Emphasis supplied by *Amicus*]
>
> In describing the Commission's action, the *Pacifica* Court said:
>
> The Commission identified several words that *referred to* excretory or sexual activities or organs, stated that the repetitive, deliberate use of those words in an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent.[32] [Emphasis supplied by *Amicus*]

VI. THE FCC'S DEFINITION OF "INDECENT" IS NOT VAGUE

In *Pacifica*,[33] the Supreme Court noted that the "normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." As defined by the Commission, however, the term "indecent" is

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[29] Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), New York, NY, 56 FCC2d 94, Released Feb. 21, 1975.
[30] *Id*. at 95.
[31] *Id*. at 99.
[32] *Pacifica*, 438 U.S. at 739.
[33] *Id.* at 740.

limited to language that, in context, depicts or describes, in a patently offensive manner, depictions and descriptions of sexual or excretory activities or organs.

Petitioner Fox Television Station's Brief states at page 42 that "no court has ever reached a considered judgment that the FCC's regulation of indecency is not vague." In *Dial Information Services v. Thornburgh*,[34] however, this Court held that the term "indecent" in the Helms Amendment,[35] was not vague since the term "had been defined clearly by the FCC."[36] "It is noteworthy," continued the Court of Appeals, "that the Commission's most recent definition of 'indecent' tracks one that it developed in the radio broadcast context and that passed muster in the Supreme Court."[37]

In *Action for Children's Television v. FCC*,[38] the D.C. Circuit stated, "[I]f acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction." Nevertheless, to ensure that broadcasters would not "forgo the broadcast of certain protected speech

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[34] 938 F.2d 1535 (1991), *cert. den.*, 502 U.S. 1072 (1992).
[35] The Helms Amendment prohibits providers of indecent telephone communications for commercial purposes from making their services available to persons under 18 years of age. 47 U.S.C. 223(b)(c).
[36] 938 F.2d at 1540.
[37] *Id*. at 1541.
[38] 852 F.2d 1332, at 1339 (1988).

altogether,"[39] the D.C. Circuit concluded that the FCC must establish "reasonably determined times at which indecent material safely may be aired."[40] At present this D.C. Circuit-mandated "safe harbor for the broadcast of (possibly) indecent material"[41] runs from 10 pm to 6 am, 365 days a year.

In *Denver Area Ed. Telecom. Consortium v. FCC*,[42] the Supreme Court rejected a vagueness challenge to 47 U.S.C. 532(h),[43] which includes language similar to the FCC's definition of "indecent" for broadcasting.

Petitioner Fox Television Station's Brief also states at page 43 that "a unanimous Supreme Court in *Reno* concluded that the nearly identical Communications Decency Act[44] was unconstitutionally vague." The *Reno* Court, however, expressly stated:

> In its appeal, the Government argues that the District Court erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague. While we discuss the vagueness of the CDA because of its relevance to the First Amendment overbreadth inquiry, we conclude that the judgment should be affirmed without reaching the Fifth Amendment issue.[45]

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[39] *Id.* at 1342.
[40] *Id.* at 1343.
[41] Id., at 1342.
[42] 518 U.S. 727, at 750-753 (1996).
[43] Section 532(h) permits cable TV operators to prohibit programming on leased access channels that the cable operator "reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."
[44] 47 U.S.C. 223.
[45] *Reno v. ACLU*, 521 U.S. 844, 864 (1997).

The *Reno* Court was also apparently confused by the fact that "each of the two parts of the CDA" used "a different linguistic form"[46] and about whether "the 'patently offensive' and 'indecent' determinations should be made with respect to minors or the population as a whole."[47] The *Reno* Court also stated:

> [T]he CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation…As a practical matter, this increased deterrent effect, coupled with the 'risk of discriminatory enforcement' of vague regulations, poses greater First Amendment concerns than those implicated by the civil regulation reviewed in *Denver Area Ed. Telecom. Consortium, Inc.* v. *FCC.*…

Following the *Reno* decision, the FCC also issued a policy statement to provide licensees with "interpretive guidance" about indecency enforcement.[48]

Amicus would add that there is "no 'bright line test' for recognizing sexual harassment"[49] but media companies are still responsible for determining what violates the law.

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[46] *Id.* at 870-871.
[47] *Id.* at 871.
[48] *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. 1464 & Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, 8008-09 (2001).
[49] "Attorneys Offer Tips on Investigating Charges of Sexual Harassment," *U.S.L.W.*, Vol. 67, No. 6, p. 2090 (8/18/98); see also, A.K. Blair, "Harassment Law: More Confused Than Ever," *Wall Street Journal*, July, 8 1998.

VII. FCC COMMISSIONERS ARE COMPETENT TO ASCERTAIN 'CONTEMPORY COMMUNITY STANDARDS' FOR THE BROADCAST MEDIA

The concept of utilizing community standards as the criterion for testing descriptions or depictions of sexual matters was first adopted by the Supreme Court in 1957 in *Roth v. United States*[50] when it laid down its test for determining whether a work is obscene. The *Roth* test was utilized in *Miller v. California*[51] for measuring prurient appeal and later, in *Smith v. United States,*[52] the Supreme Court said a jury must measure patent offensiveness against community standards. In *Hamling v. United States,*[53] the Court stated:

> A principal concern in requiring that a judgment be made on the basis of "contemporary community standards" is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group.

Hamling also said, quoting from *Roth*, "'It is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system.'"[54]

But it isn't just jurors who are deemed competent to ascertain community standards,[55] and there is no reason to conclude that five FCC

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[50] 354 U.S. 476.
[51] 413 U.S. 15 (1973).
[52] 431 U.S. 291 (1977).
[53] 418 U.S. 87, at 107 (1974).
[54] 418 U.S. at 101.

Commissioners, who are appointed by the President and confirmed by the Senate, are incapable of determining community standards for broadcasting. Comprised of three men and two women, one of whom is an African American, the current Commission is a diverse group politically and socially.[56]

Furthermore, despite the reality that most citizens never take the time to make a complaint about indecent content on TV,[57] the FCC currently has a backlog of indecency complaints in excess of 1.4 million; and in the first quarter of 2009 there were 181,080 indecency complaints.

Petitioner Fox Television Station's Brief nevertheless states at page 46, "Ironically, the 'community standard' that is supposed to be an objective measure of what the public thinks to provide a check on the FCC's discretion has become the opposite: a vehicle for the unfettered (and unpredictable) discretion of the FCC's current members and their particular sensibilities." If Petitioner is accusing Commissioners of deciding cases on the basis of their personal opinions, it has offered no evidence that this is so.

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[55] *Cf., Miami v. Florida Literary Distributing Corp*., 486 So. 2d 569, 572 (Fla. 1986), *cert. denied*, 479 U.S. 872 (1986) ("…we likewise can find no basis for distinguishing between the competence of a judge and a jury to ascertain the contemporary standards of the community wherein they sit.")

[56] The Commissioners' biographies are published on the www.fcc.gov website.

[57] *See, Time Poll,* Mar. 20, 2005 (While 58% said there was too much "cursing and sexual language" on TV, only 5% had "ever complained to a broadcaster or the government, or participated in a boycott or demonstration"), available at http://www.time.com/time/covers/1101050328/photoessay/poll1.html

VIII. BROADCASTING IS STILL 'UNIQUELY PERVASIVE'

In a preceding decision, this Court stated that it is "increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children"[58] and that the TV networks "rightly rest their constitutional arguments in part"[59] on *United States v. Playboy Entertainment Group*,[60] where the court applied "strict scrutiny" to a federal law that would have required cable TV operators to either completely scramble the signals for pay porn channels or to air the imperfectly scrambled signals only from 10 p.m. to 6 a.m.

When Congress enacted the Radio Act of 1927 and made it unlawful to "utter any obscene, indecent, or profane language by means of radio communications," however, it could not have been said that radio "had established a uniquely pervasive presence in the lives of all Americans."[61] By 1930, only 40% of all U.S. households had purchased radio receivers.[62]

Amicus would also contend that what justified broadcasting's special treatment in 1978 was not its "uniqueness" *per se* but rather that broadcasting had in fact become *pervasive,* unlike any other form of media. By 1978,

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[58] *Fox Television Stations*, 489 F.3d at 465.
[59] *Id.*
[60] 529 U.S. 803 (2000).
[61] *Pacifica*, 438 U.S. at 748.
[62] Steve Craig, "How America Adopted Radio: Demographic Differences in Set Ownership…in 1930-1950 U.S. Censuses." *Journal of Broadcasting & Electronic Media,* Vol. 48, No. 2, 2004.

televisions were in almost every home, and radios were in almost every home, car and truck. Portable radios could also be taken almost anywhere. Unlike newspapers, radio and TV could also be heard/watched by more than one person at a time and were readily accessible to anyone, including children, unable to read.

Furthermore, the concerns that justified regulation of broadcasting in the first place – namely, protecting children and the privacy of the home – were made even more pressing by the proliferation of new forms of electronic media, which also reach into the home and are accessible to children. The advent of cable TV, satellite TV and radio, the Internet, and wireless, not to mention videos and videogames, has made a parent's job tougher, not easier.[63]

IX. THE HOME IS STILL A SPECIAL PLACE

In *Pacifica*, the Supreme Court stated:

> And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection…The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder...[64]

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[63] *See, e.g.*, "Navigating the Children's Media Landscape: A Parent's and Caregiver's Guide," By American Institutes for Research, Prepared for Cable in the Classroom and National PTA, Apr. 4, 2004.

[64] 438 U.S. at 748.

On this point, Justice Powell agreed:

> A second difference, not without relevance, is that broadcasting -- unlike most other forms of communication -- comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds.... Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away…a different order of values obtains in the home.[65]

It would be an anomaly indeed if "patently offensive references to excretory and sexual organs and activities"[66] that could create or contribute to a "hostile work environment" for purposes of sexual harassment law,[67] can no longer amount to a "nuisance" for purposes of the broadcast indecency law. It would indeed be an anomaly if protecting adults from offensive remarks in the workplace is now a more pressing governmental concern than protecting adults and children in the home from broadcast indecency.

Amicus would also point out that in *Torres v. Pisano*,[68] this Court recognized that "a single episode of harassment, if severe enough, can establish a hostile work environment." Other courts have held that a single offensive

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[65] 438 U.S. at 759; *see also, Frisby v. Schultz*, 487 U.S. 474, 479, 484 (1988).
[66] 438 U.S. at 743.
[67] *See, e.g., Suders v. Easton*, 325 F.3d 432 (3rd Cir. 2003), *rev'd on other grounds, Pennsylvania State Police v. Suders*, 542 U.S. 129(2004); *Petrosino v. Bell Atlantic*, 385 F.3d 210 (2d Cir. 2004); *Ocheltree v. Scollon Productions*, 335 F.3d 325 (4th Cir. 2003).
[68] 116 F.3d 625, 631 n.4 (2d Cir. 1997), *cert. den.*, 522 U.S. 997 (1997).

remark can produce a hostile work environment. *See, Kwiatkowski v. Merrill Lynch*,[69] *Taylor v. Metzger*,[70] and *Reid v. O'Leary*.[71]

X. V-CHIP RATINGS SYSTEM HAS BEEN A FAILURE

In an opinion poll conducted in 1998 by Wirthlin Worldwide for Morality in Media,[72] 59% of adult Americans thought the FCC needed to work harder to enforce the broadcast indecency law; only 28% thought a rating system and V-Chip combination would be an effective alternative.

According to a 2001 Kaiser Family Foundation survey,[73] despite the fact that more than 80% of parents were "concerned that their children are being exposed to too much sex and violence on TV," only 7% of parents were using the V-Chip. In 2004, Kaiser found that only 15% of parents had used it.[74] In 2007, Kaiser found that only 16% of parents had used it.[75]

Undoubtedly, there are many reasons that parents don't use the V-Chip, including the cost of purchasing a new TV with a V-Chip, problems (including

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[69] A-2270-06 (N.J. Super. Ct. App. Div. 2008), *cert. den.*, 962 A.2d 530 (N.J. 2008).
[70] 706 A.2d 685 (N.J. 1998).
[71] 1996 U.S. Dist. LEXIS 10627 (D.D.C. July 15, 1996).
[72] Copy of MIM Release about the survey available from *Amicus*.
[73] News Release, "Few Parents Use V-Chip to Block TV Sex and Violence…" Kaiser Family Foundation, 2001.
[74] Kaiser Family Foundation, "Parents, Media and Public Policy," p. 7, 2004.
[75] Kaiser Family Foundation, "Parents, Children and Media," p. 30, 2007.

language and literacy barriers) with programming the V-Chip, parental naiveté (as in, "My child wouldn't be interested in that"), indifference and neglect.

Another problem with the V-Chip is that it over-blocks. Like the self-serving MPAA rating system it is based on, each TV rating – but especially the V-PG and R ratings – encompass programming that parents will regard as very good or totally unsuitable or somewhere in between. If a parent sees or reads about program that the parent objects to and then programs the V-Chip to block that program, all other programming in that category will also be blocked.

And just as a motion picture film rarely if ever receives an MPAA "NC-17" rating, these days a broadcast network program rarely if ever receives an "M" rating, which means that ALL broadcast programming is deemed suitable for children 14 years of age and older. Since, many children reach age 14 while still in grade school, this must mean that children are maturing much faster than they have in the past or that the TV rating system is in good measure a sham.

The V-Chip ratings system has also been criticized for failure to utilize content descriptors[76] and for doing a poor job of screening violent content in children's programming.[77]

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[76] Special Report, "The Ratings Sham II: TV Executives Still Hiding Behind a System that Doesn't Work," Parents Television Council, Apr. 16, 2007.
[77] Toni Fitzgerald, "Two profs beat up on kids TV ratings: Study finds more physical aggression in TV-Y and TV-7," *Media Life Magazine*, Mar. 6, 2009.

Furthermore, the V-Chip ratings system doesn't apply to sponsor ads, program promos, "news" programs or sports programs. And lastly, the V-Chip does not work with radio programming.

CONCLUSION

For all of the above reasons, *Amicus* respectfully requests this Court uphold the Commission's Order at issue in this appeal.

Respectfully submitted,

/s/ Robin S. Whitehead
Robert W. Peters
Robin S. Whitehead
Morality in Media, Inc.
475 Riverside Drive
New York, NY 10115
(212) 870-3222
Counsel for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,952 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Robin S. Whitehead
/s/ Robin S. Whitehead

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Fox Television Stations, Inc. v. Federal Communications Commission

I hereby certify that two copies of this Brief Of Amicus Curiae MORALITY IN MEDIA, INC., in Support Of Respondents were sent by First Class Regular Mail delivery to:

Carter G. Phillips
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
Attorneys for Petitioner
Fox Television Stations, Inc.

Austin Schlick
Joseph Palmore
Federal Communications Commission
Office of the General Counsel
Room 8-A741
445 12th Street, S.W.
Washington, DC 20554
(202) 418-2159
Attorneys for Respondent FCC

Wade H. Hargrove
Brooks Pierce McLendon Humphrey & Leonard, LLP
Wachovia Capital Center, Suite 1600
150 Fayetteville Street
P.O. Box 1800
Raleigh, NC 27602
Attorneys for Petitioner
KMBC Hearst-Argyle Television, Inc. and Intervenor ABC Television Affiliates Association

Robert A. Long
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 662-5612
Attorney for Intervenors
NBC Television Affiliates and CBS Television Network Affiliates

Robert Corn-Revere
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue. N.W.
Suite 200
Washington, DC 20006-3402
(202) 973-4200
Attorney for Petitioner
CBS Broadcasting Inc.

Thomas M. Bondy
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 7535 MAIN
Washington, DC 20530
Attorney for Respondent
United States of America

Seth P. Waxman
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 663-6000
Attorney for Petitioner
ABC Inc., WLS Television, Inc. KTRK Television

Miguel A. Estrada
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
(202) 955-8257
Attorney for Intervenor
NBC Universal, Inc. and NBC Telemundo License Co.

Andrew Jay Schwartzman
Media Access Project
1625 K Street, N.W.
Washington, DC 20006
(202) 232-4300
Attorney or Intervenor
Center for the Creative Community, Inc. d/b/a Center for Creative Voices in Media, Inc

I also certify that the original and nine copies were also shipped via Hand delivery to:

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New York, New York 10007
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/s/ Jacqueline Gordon

Sworn to me this

October 28, 2009

JACQUELINE GORDON
Notary Public, State of New York
No. 01GO6149165
Qualified in Kings County
Commission Expires July 3, 2010

/s/ Nadia R. Oswald Hamid

NADIA R. OSWALD HAMID
Record Press, Inc.
229 West 36th Street, 8th Floor
New York, New York 10018
(212) 619-4949

ANTI-VIRUS CERTIFICATION

Case Name: Fox Television Stations, Inc. v. Federal Communications Commission

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Jacqueline Gordon
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