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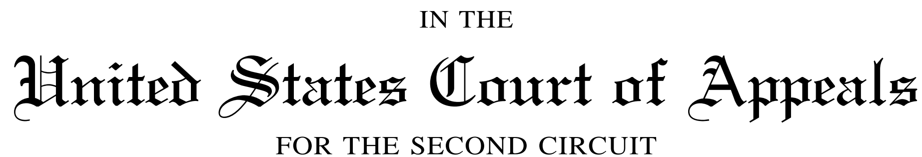

FOR THE SECOND CIRCUIT

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

Petitioners,

—against—

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA,

Respondents,

(*caption continued on inside front cover*)

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

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

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Adam Thierer, *Who Needs Parental Controls? Assessing the Relevant Market for Parental Control Technologies* (Progress & Freedom Foundation, Feb. 2009), *available at* http://www.pff.org/issues-pubs/pops/2009/pop16.5parentalcontrolsmarket.pdf 11

From the FCC's brief one would never know a majority of Justices in *FCC v. Fox Television Stations, Inc.*, 556 U.S. __, 129 S. Ct. 1800 (2009) ("*FCC v. Fox*") expressed grave doubts about the constitutionality of the agency's new approach to broadcast indecency, specifically the elimination of a "safe harbor" for the inadvertent broadcast of fleeting expletives. The Commission ignores the constitutional reservations in *Fox* and confuses the Court's administrative law findings with the First Amendment issues that are the focus of this remand. For the reasons set forth herein and in petitioners' other briefs, this Court should reverse the FCC's decision below, this time on constitutional grounds.

ARGUMENT

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

A. *Pacifica* Does Not Foreclose This Constitutional Inquiry

The FCC seeks to avoid constitutional review in this remand proceeding, yet argues that the Supreme Court in *FCC v. Pacifica Foundation, Inc.*, 438 U.S. 726 (1978) "left for another day" whether the FCC may constitutionally ban "an occasional expletive." FCC Br. at 34. That day has arrived. By arguing that *Pacifica* did not rule on whether the First Amendment requires an exemption for fleeting expletives, the FCC acknowledges that circuit courts are free to decide this constitutional question. If not, the Supreme

Court's remand here, with the explicit invitation to address the First Amendment issue, makes no sense.[1]

The Commission's argument that *Pacifica* put off deciding whether "an occasional expletive" during "a telecast of an Elizabethan comedy" falls far short of supporting the constitutionality of its newly restrictive policies. *See* FCC Br. at 34. As part of the Court's discussion of the "narrowness" of its holding, this passage warned only that *Pacifica* cannot be read as authority for sanctioning such isolated expletives. *Pacifica*, 438 U.S. at 750. *See also id.* at 760-61 (Powell, J., concurring) (*Pacifica* holding "does not speak to cases involving the isolated use of a potentially offensive word . . . as distinguished from the verbal shock treatment administered . . . here").

For the past 30 years, the FCC has articulated, defended and applied a fleeting expletives exemption as essential to the constitutionality of its enforcement of the indecency rules.[2] Yet, now, in this case, the FCC relies on *Pacifica* as *permission* to expand its enforcement authority to include fleeting expletives. Given the historic FCC assurances and practices of restraint that were integral to *Pacifica*'s narrow decision, this

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[1] As explained below, this is entirely separate from the issue whether broadcasting generally enjoys less First Amendment protection or whether the technological assumptions underlying *Pacifica* remain valid. Even if this Court chooses not to reach those issues, it can and should find that the FCC's decision violates the First Amendment.

[2] *See* Brief of Petitioners CBS Broadcasting Inc. ("CBS"), ABC, Inc., WLS Television, Inc., and KTRK Television, Inc. and Intervenors NBC Universal, Inc. and NBC Telemundo License Co. ("Network Br.") at 5-11, *Fox Television Stations v. FCC*, 489 F.3d 444 (2d Cir. 2007) (No. 06-1760).

new assertion of authority is precisely what prompted the constitutional warnings that the FCC now tries to ignore.[3] The Commission makes no attempt to explain how its new-found interpretation is not "an open door" for restricting constitutionally-protected speech. *FCC v. Fox*, 129 S. Ct. at 1834 (Breyer, J., dissenting).

Indeed, as Petitioners have persuasively demonstrated, *Pacifica* should be read to foreclose the FCC from penalizing isolated expletives. Network Br. 4-18. Even if *Pacifica* left fleeting expletives unresolved, however, this Court should not hesitate to address the issue now, just as the D.C. Circuit clarified the constitutional mandate underlying the safe harbor of time channeling over two decades ago. As with the repetitive use of expletives, *Pacifica* described the "time of day" of a broadcast as part of the "host of variables" in its contextual analysis. *Pacifica*, 438 U.S. at 750. Nevertheless, in applying *Pacifica*, the D.C. Circuit had no trouble concluding that the First Amendment *requires* adoption of a "reasonable safe harbor rule." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1343 n.18 (D.C. Cir. 1988) ("*ACT I*"); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1509-10 (D.C. Cir. 1991) ("*ACT II*"). This Court should likewise find once and for all that elimination of the fleeting expletives exception is unconstitutional.

The FCC argues the Supreme Court did not "draw a line" on fleeting expletives, FCC Br. at 18-19, and that neither *Pacifica* nor any other relevant judicial decision "limits

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[3] *See FCC v. Fox*, 129 S. Ct. at 1825 (Stevens, J., dissenting); *id.* at 1834 (Breyer, J., dissenting); *id.* at 1828-29 (Ginsburg, J., dissenting). *See also id.* at 1820 (Thomas, J., concurring).

the Commission's authority" regarding fleeting expletives. *Id.* at 21, 34. But the language the agency quotes from *Fox* relates *solely* to the Court's holding that *Pacifica* is no "administrative-law shield" under the APA. *See FCC v. Fox*, 129 S. Ct. at 1815. The Court stressed that the lawfulness of the FCC's newly restrictive policy "under the Constitution is a separate question to be addressed in a constitutional challenge." *Id.* at 1812.

The FCC's newly articulated opposition to a "fleeting expletives exception" hypothesizes that such a safe harbor would permit broadcasters to intentionally broadcast expletives with impunity so long as they do it one at a time. FCC Br. at 35. This baseless hypothetical is disproven by experience; as this court has pointed out, even when free to do so during the "safe harbor" hours of 10 p.m. and 6 a.m., or during other hours prior to the Commission's change in its fleeting expletives policy, "broadcasters have never barraged the airwaves with expletives." *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 460-61 (2d Cir. 2007). It also ignores the Commission's own findings in this very case.[4] The Commission cannot use imaginary problems to justify this incursion against constitutionally-protected speech.

[4] *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 13299, 13310 (2006) ("*Omnibus Remand Order*"). In addition, of course, this case does not involve the intentional airing of repeated expletives, as did *Pacifica*, but instead involves expletives uttered spontaneously and unexpectedly during live programming. *See* Network Br. at 11.

B. Elimination of the Restrained Enforcement Policy Has Left the Commission Without Constitutional Moorings

The Commission fails to grasp that eliminating bright lines for "non-actionable" indecency has caused debilitating uncertainty for broadcasters and, as a result, substantial chilling of speech. The FCC adopted its restrained enforcement policy precisely because the indecency definition lacked the rigor of other First Amendment tests, such as the *Miller* test for obscenity. *A Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C.2d 94, 103-04 (1975) ("*FCC Pacifica Order*") (concurring statement of Commissioners Robinson and Hooks). Reviewing courts gave the FCC the benefit of the doubt, but only to the extent the Commission proceeded "cautiously, as it has in the past." *ACT I*, 852 F.2d at 1339 n.10 (*citing Pacifica*, 438 U.S. at 761 n.4 (Powell, J., concurring)). Accordingly, the Commission's claim that it is today defending the "same indecency standard" the Supreme Court approved in *Pacifica* in the 1970s is incorrect, since the FCC has now abandoned many of the limiting principles – such as the treatment of fleeting expletives – that governed the rules at the time of *Pacifica* and for decades thereafter.

Again, it is instructive to analogize to the time-based "safe harbor" that the D.C. Circuit held was constitutionally required to provide adequate First Amendment "breathing space." The safe harbor rule does not permit the FCC to make subjective *ad hoc* conclusions about the degree to which words or images aired between 10 p.m. and 6 a.m. are "offensive" or instead "essential to the nature of an artistic or educational

work or essential to informing viewers on a matter of public importance."[5] Rather, the safe harbor exception is designed to function as a bright-line rule that gives broadcasters clear guidance, without *ex post facto* rationalizations. The exclusion of fleeting expletives was meant to function in the same way, barring the FCC from *post hoc* determinations to impose massive fines for an inadvertent slip of the tongue or unexpected utterance during live programming, thus avoiding casting an enormous chill on the ability and willingness of broadcasters to air live programming.[6]

The FCC attempts to justify this amorphous approach to content regulation based on its status as an "expert agency" that looks to "contemporary community standards *for the broadcast medium*." FCC Br. at 45-46 (emphasis in original). And it asserts that the numerous decisions issued since *Pacifica* have clarified and narrowed the scope of its indecency rules, thus "reduc[ing] any imprecision in the statute." *Id.* at 50-51. However, nothing could be further from the truth. The Commission's decisions demonstrate that

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[5] *Complaints Against Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 2664, 2686 (2006) ("*Omnibus Order*").

[6] The FCC's claim that its zero tolerance approach does not unduly burden broadcasters because they can delay and screen live programming grossly underestimates the equipment and manpower costs, and unrealistically assumes infallible application of the "dump" button. Its claim that small broadcasters would be unlikely to air live award shows, such as those at issue in this case, likewise ignores that broadcasters, large and small, seek to serve the public interest in live coverage of a wide variety of events, including local sports, parades, press conferences, and breaking news.

the more the FCC says on the subject of indecency, the more expansive and less understandable the law becomes.[7]

The Commission may be an expert agency, but not on matters of programming content or community tolerance. The FCC's statutory creation was based on the agency's specialized knowledge of the technical and spectral aspects of radio.[8] Neither the FCC's original order formulating the indecency standard nor the Supreme Court's decision in *Pacifica* contains *a single reference* to the FCC as an "expert agency."[9] Thus, amici Former FCC Officials explained that "[t]he question of indecency does not entail any special expertise, and even if it did the FCC has not exercised any."[10]

Similarly, "community standards for the broadcast medium" is not "a time-tested concept" as the Commission baldly asserts. FCC Br. at 45-46. Former Commissioner Jonathan Adelstein has stated that this claim is "*nothing more*" than an unsupported claim that the agency has some "collective experience and knowledge" of community

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[7] In addition to eliminating the exception for fleeting expletives, the FCC expanded the concept of indecency by changing what it means by the "depiction or description of sexual or excretory organs or activities" to include a far broader array of expression and also claimed new authority to regulate profanity. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4981-82 (2004).

[8] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 638 n.37 (D.C. Cir. 1976).

[9] *See generally Pacifica*, 438 U.S. 726; *FCC Pacifica Order*, 56 F.C.C.2d 94.

[10] *See* Brief of Former FCC Officials as Amicus Curiae in Support of Petitioners at 20, *Fox Television Stations v. FCC*, 489 F.3d 444 (2d Cir. 2007) (No. 06-1760), 2006 WL 5100104, at *20.

standards, and that the FCC has "failed to develop a consistent and coherent indecency enforcement policy" as a result.[11] And former FCC General Counsel Bruce Fein has explained that "[f]ive Commissioners sitting in Washington, D.C. … have but the faintest idea of what passes for patent offensiveness outside their own parochial experiences. They make indecency rulings more by visceral reaction and political calculation than by evenhanded and predictable standards."[12]

As the FCC has abandoned the bright lines of its restrained enforcement policy, its indecency standard has grown more nebulous, vague and unpredictable. Under its current standardless regime, for example, it has concluded that a broadcast contains "unmistakably patently offensive sexual references" on one occasion,[13] while the very *same* program is non-graphic or "oblique" the next.[14] It has held an expletive is "shocking and gratuitous" because it occurred "during a [ ] news interview," *Omnibus Order,* 21 FCC

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[11] *Omnibus Remand Order*, 21 FCC Rcd. at 13331 & n.2 (statement of Commissioner Adelstein, concurring in part and dissenting in part) (emphasis in original) (citation omitted).

[12] *See* Bruce Fein, *Shielding Children From Indecency*, Wash. Times, Apr. 29, 2005, *available at* www.washingtontimes.com/news/2005/apr/28/20050428-095319-1915r/. The Commission makes much of the fact that broadcasters have their own standards and practices and erroneously concludes that "community standards" are therefore well-understood. FCC Br. at 53-54. But a broadcaster's establishment of its own creative and editorial standards in no way provides justification for the government to impose those or other standards on that broadcaster or others.

[13] *KBOO Found.*, 16 FCC Rcd. 10731, 10733 (Enf. Bur. 2001); *Citadel Broad. Co.*, 16 FCC Rcd. 11839, 11839, 11840 (Enf. Bur. 2001).

[14] *KBOO Found.*, 18 FCC Rcd. 2472, 2474 (Enf. Bur. 2003); *Citadel Broad. Co.*, 17 FCC Rcd. 483, 486 (Enf. Bur. 2002).

Rcd. at 2699, then reversed itself because that program involved "news." *Omnibus Remand Order*, 21 FCC Rcd. at 13327-28. In short, the FCC has shown it may manipulate its *ad hoc* review of content to reach whatever result the five commissioners sitting at the time may want. Clearly, this result is profoundly incompatible with the Constitution. *See HBO, Inc. v. Wilkinson*, 531 F. Supp. 987, 993 n.9 (D. Utah 1982) (striking down indecency standard because it "permitted a judge to get out of the formula any value judgment that he chose to put in").

The FCC's *ad hoc* approach, devoid of legal or even commonsense moorings, underscores why a principal thrust of First Amendment jurisprudence rejects the concept of the "expert censor." Any administrative framework that "creates an agency . . . charged particularly with reviewing speech . . . breed[s] an 'expertise' tending to favor censorship." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988). Across time and in connection with all media, the Court has held firmly that "a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158 (1946). In decision after decision, the Court has made quite clear that "esthetic and moral judgments about art and literature … are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000).

With respect to broadcasting, the Supreme Court quoted the FCC itself for the proposition that the agency is constrained by Section 326 and the First Amendment so

that the Commission "may not impose upon [broadcast licensees] its private notions of what the public ought to hear." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 650 (1994) (*quoting Commission En Banc Programming Inquiry*, 44 F.C.C. 2303, 2307-08 (1960)). The FCC until recently had in place a restrained indecency enforcement policy that was predicated on this very premise. And the Supreme Court in *Pacifica* , in turn, relied on the Commission's promises of restraint, rather than the *ad hoc* balancing approach the FCC now defends. *See* Network Br. at 11-15. Consequently, this Court now should rule that the First Amendment bars the Commission from eliminating its fleeting expletives exception.

II. THE FCC'S CONSTITUTIONAL RATIONALE FOR BROADCAST INDECENCY NO LONGER SUPPORTS ACROSS-THE-BOARD RESTRICTIONS

A. FCC Attempts to Avoid the Implications of *Pacifica*

The FCC does not specifically defend the narrow constitutional justifications for broadcast regulation set forth in *Pacifica* based on unique "pervasiveness" and "accessibility," but instead seeks primary support for its rules by arguing that broadcasting generally receives less First Amendment protection because of spectrum scarcity and public licensing. FCC Br. at 26-30. However, there is at least one major drawback to this strategy – over two decades ago the Commission itself rejected these factors as a basis for indecency regulation.

The agency explained that enforcement of Section 1464 "must be consistent with the constitutional principles derived from [ ] *Pacifica*," *Infinity Broad. of Pa.*, 3 FCC Rcd.

930, 931 (1987), and noted that "it is the physical attributes of the broadcast medium [as of 1987], not any purported diminished First Amendment rights of broadcasters based on spectrum scarcity or licensing," that serve as the government's justification for channeling indecent material.[15] A plurality of the Supreme Court similarly stated that spectrum scarcity has "little to do with a case that involves the effects of television viewing on children." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 748 (1996).

Pacifica's rationale for regulation was based not on spectrum scarcity or licensing, but rather on the supposedly "unique" pervasiveness and accessibility of broadcasting – factors that no longer support universal speech restrictions. Because more than two-thirds of American households do not have any children under the age of eighteen, blanket rules restricting speech in the interest of protecting children are inherently overbroad and courts almost always strike them down.[16] The Supreme Court has held that household-by-household solutions are constitutionally required because they allow

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[15] *Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 2699 (1987). *See also Infinity Broad. of Pa.*, 3 FCC Rcd. at 936 n.11 ("Our April 1987 rulings expressly rejected [the scarcity] rationale.").

[16] Network Br. at 18-19 (collecting cases). According to the U.S. Census Bureau, 68 percent of U.S. households do not have minors, and the percentage of homes with children has been declining steadily since 1960. Adam Thierer, *Who Needs Parental Controls? Assessing the Relevant Market for Parental Control Technologies* (Progress & Freedom Foundation, Feb. 2009) at 2-4, *available at* http://www.pff.org/issues-pubs/pops/2009/pop16.5parentalcontrolsmarket.pdf. *See Playboy Entm't Group, Inc. v. United States*, 30 F. Supp. 2d 702, 723 (D. Del. 1998) ("two-thirds of all households in the United States have no children"), *aff'd*, *Playboy Entm't Group*, 529 U.S. at 803.

the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners. *Playboy Entm't Group*, 529 U.S. at 815; *Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004). *See also ACLU v. Mukasey*, 534 F.3d 181, 203-04 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009). As a consequence, "the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests."[17]

Pacifica permitted a narrow exception for broadcast regulation only because, at the time, no technology existed "to segregate material inappropriate for children," and time channeling was the only available means of limiting access by minors. *See ACT I*, 852 F.2d at 1340 n.12; Network Br. at 20. But this is no longer true, as shown by the Commission's own detailed factual findings in a proceeding completed just this summer. Network Br. at 20-27. In addition to its Report to Congress under the Child Safe Viewing Act, the FCC even more recently launched an inquiry based on its understanding that children live in a "dramatically different" media environment in which they "have

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[17] *Playboy Entm't Group*, 529 U.S. at 815. The FCC's claim that it must regulate to protect the "tranquility of the home," FCC Br. at 33, does not alter this constitutional rule. *Compare Rowan v. U.S. Post Office Dep't,* 397 U.S. 728, 729-30 (1970) (upholding statute allowing individual households to block sexually provocative mailings), with *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 75 (1983) (rejecting blanket ban on mailing unsolicited contraceptive advertisements as a First Amendment violation).

access to a wide array of electronic media technologies" as well as an array of parental empowerment tools that did not previously exist.[18]

The Commission tries to ignore these undeniable facts and instead cites the conclusory statement in the *CSVA Report* that time channeling remains "a vital tool" to protect children. *See* FCC Br. at 40, 43 (*quoting CSVA Report*, 24 FCC Rcd. at 11420). As explained above, the FCC's broadcast indecency rules would have been invalidated long ago if the FCC had not employed a "safe harbor" approach to indecency regulation instead of a total ban. But the existence of a safe harbor does not mean that the FCC is free to jettison the necessary First Amendment "breathing space." It cannot constitutionally prohibit all indecency – including fleeting expletives – outside of that safe harbor period, when there also exist effective alternatives for screening media content to protect children that do not require censorship of everyone else. By choosing the more restrictive solution, rather than acknowledging the growing availability of numerous less restrictive alternatives, the FCC greatly restricts protected speech, particularly live programming.[19]

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[18] *Empowering Parents and Protecting Children in an Evolving Media Landscape*, Notice of Inquiry, FCC 09-94 (rel. Oct. 23, 2009) ¶¶ 11, 44 ("*Children's Media Inquiry*"). *See also Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, 24 FCC Rcd. 11413 (2009) ("*CSVA Report*").

[19] When the First Amendment is at stake, as it is here, reviewing courts must independently review the *facts* to ensure that the agency's decision is constitutionally sound. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); *Tunick v. Safir*, 209 F.3d 67, 70 (2d Cir. 2000). The court cannot simply accept the FCC inferences in conducting this review, but must exercise "independent judgment on the facts bearing on an issue of

B. The Underlying Justifications for Blanket Regulation Are No Longer Valid

1. The Commission Asks the Wrong Questions About Parental Empowerment Tools

The Commission now does not even acknowledge the myriad and growing number of parental empowerment tools and strategies set forth in its own *CSVA Report*, and instead discusses what it perceives to be the deficiencies of the V-chip. FCC Br. at 38-43. Most notably, those deficiencies include parental ambivalence about this particular tool. Yet, the FCC's myopic focus does not address whether the basic premise of *Pacifica* is still valid and asks only whether the V-chip is the "least restrictive means" of protecting minors from indecent broadcasts. *Id.* at 38. However, the Supreme Court has already made clear that the existence of – and even just the prospect of developing – parental empowerment tools is sufficient to invalidate indecency restrictions under even intermediate First Amendment scrutiny.[20]

That many parents have chosen not to employ the V-chip may mean nothing more than that they do not see the need to use it. *See Playboy Entm't Group*, 529 U.S. at 816,

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constitutional law." *Sable Commc'ns v. FCC*, 492 U.S. 115, 129 (1989). Bare assertions of a policy preference, like the FCC's description of time channeling as a "vital tool" to protect children, cannot justify more restrictive speech regulation. *Id.* at 129-30; *Playboy Entm't Group*, 529 U.S. at 823.

[20] *Denver Area*, 518 U.S. at 756-59. The FCC's attempt to limit consideration to empowerment tools that existed "at the time of the 2002 and 2003 . . . broadcasts at issue in this case," FCC Br. at 43, misstates the relevant inquiry. Any review of parental empowerment must look forward, not backward. *Reno v. ACLU*, 521 U.S. 844, 854-55 (1997); *Playboy Entm't Group*, 529 U.S. at 814; *Denver Area*, 518 U.S. at 756.

819-20. Many parents may prefer to use one or more of the many other tools described in the *CSVA Report*, or they may rely on their own family household rules and supervision. Some, perhaps, may be indifferent to their children's viewing choices.[21] The government cannot rely on the "unhelpful, self-evident generality that voluntary measures require voluntary action." *Playboy Entm't Group*, 529 U.S. at 823. For that reason, courts have held that parental empowerment tools may be fully effective less restrictive alternatives even if they are greeted with a "collective yawn" from the public. *Id.* at 816. In *Playboy*, for example, the Supreme Court struck down indecency regulations despite the fact that "fewer than 0.5% of cable subscribers" requested the alternative of house-by-house blocking. *Id.* at 816, 823-26.

The FCC seems not to understand that the relevant question under *Pacifica* and subsequent cases is whether parents have available to them the *option* to use such less restrictive measures. Courts do not require perfection from such alternatives. *Ashcroft*, 542 U.S. at 665. Indeed, a growing number of decisions make clear that a flexible approach that employs a variety of voluntary private-sector alternatives combined with minimal regulatory requirements (such as the V-chip) that permit households to make individual choices are both more protective and less restrictive than rules that cut off

[21] *Mukasey*, 534 F.3d at 203. In this regard, the FCC's point that two-thirds of children aged 8-18 have television sets in their bedrooms, FCC Br. at 31, does not support across-the-board rules. The government has no interest whatsoever in telling families where they should – or should not – place televisions, and no legitimate claim for regulating broadcasters based on those private choices.

information at its source. *Id.* at 667; *Playboy Entm't Group*, 529 U.S. at 815-16; *Mukasey*, 534 F.3d at 203-04. Such measures generally are more effective than the government's across-the-board time-based safe harbor because "[t]ime channeling, unlike blocking, does not eliminate [indecency] around the clock," and "it is hardly unknown for [children] to be unsupervised in front of the television set after 10 p.m." *Playboy Entm't Group*, 529 U.S. at 826.

2. The Commission's Reliance on Broadcasting as "Safe Haven" is Disconnected From Reality

The Commission's repeated references to broadcasting as a "relatively safe haven" have nothing to do with *Pacifica's* analysis of "pervasiveness" and relate only to the sufficiency of the FCC's explanation for its policy change under the APA. *FCC v. Fox*, 129 S. Ct. at 1819. The FCC cites this "safe haven" language extensively, FCC Br. at 19, 22, 33, 36, 43, yet does not even attempt to reconcile this claim with its own extensive findings in the *CSVA Report* about transformative changes in the media landscape, including broadcasting's co-existence with hundreds of video programming platforms.

Not only can children today receive programming from myriad programming sources that did not exist at the time of *Pacifica* in 1978, in almost ninety percent of households, broadcast television channels are merely a click on the remote control away from dozens or hundreds of cable or satellite channels, none of which are subject to the indecency rules. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd. 542, 546 (2009). Additionally, the Commission has

found that "children can now access television programming and the Internet on their mobile devices outside the home, where no parent is present." *Children's Media Inquiry* ¶ 41. Such developments mean that the "safe harbor" is no "safe haven," since children have ready access to numerous platforms and also may watch broadcast programming aired after 10 p.m. anytime, on demand, via various devices. Network Br. at 21-24. Indeed, nearly 20 years ago the FCC concluded that the "proliferation of VCRs" undermines the effectiveness of time channeling because "a majority of households with children have VCRs" that permit "delayed viewing" of programming at any hour.[22]

In short, the Commission's position on broadcasting's supposedly unique "pervasiveness" or "accessibility" is both outmoded and incoherent. The FCC cannot continue to impose broad blanket restrictions based on this legal fiction. This is not to suggest that the Commission lacks all power to regulate in this area, but its exercise of authority must be done in a way that is "consistent with First Amendment principles." *Playboy Entm't Group*, 529 U.S. at 827.

CONCLUSION

For the foregoing reasons, the Networks respectfully request this Court to hold that the FCC's enforcement of the broadcast indecency rules is unconstitutional.

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[22] *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd. 5297, 5307 (1990), *rev'd*, *ACT II*, 932 F.2d at 1510.

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

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,580 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November 2009, two copies of the foregoing Reply Brief for Petitioners CBS Broadcasting Inc., ABC, Inc., WLS Television, Inc., and KTRK Television, Inc. and Intervenors NBC Universal Inc. and NBC Telemundo License Co. were sent by First Class mail, postage prepaid, to:

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In accordance with Local Rule 25, I further certify that on this date a copy of this reply brief in PDF format was emailed to the Clerk's Office at agencycases@ca2.uscourts.gov and to the counsel listed above, and that the PDF brief has been scanned for viruses and no viruses were detected.

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