No. 06-1760(L)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FOX TELEVISION STATIONS, INC., et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

NBC UNIVERSAL, INC., et al.,

Intervenors.

On Remand from the Supreme Court of the United States

BRIEF FOR *AMICI CURIAE* FORMER FCC COMMISSIONERS AND OFFICIALS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE AND AUTHORITY TO FILE

Amici are former commissioners and officials of the FCC who oppose its indecency enforcement policy.[1] We are a bipartisan group with different views about some issues of radio and television regulation, such as the fairness doctrine, but we are of one view on the issue now before this Court: the discriminatory and arbitrary enforcement of controls on indecent broadcast speech violates the First Amendment.

Mark Fowler, currently a wireless radio project investor and entrepreneur, was Chairman of the FCC from 1981 to 1987. Jerald Fritz, Sr. Vice President and General Counsel for Allbritton Communications Company, served as Legal Advisor and Chief of Staff to FCC Chairman Mark Fowler from 1981 to 1987. Henry Geller, retired, served as General Counsel of the FCC from 1964 to 1970, as special assistant to the Chairman in 1970 and was Administrator of the National Telecommunications and Information Administration from 1978 to 1981. Newton N. Minow, Senior Counsel at Sidley & Austin, LLP, and was Chairman of the FCC from 1961 to 1963. James H. Quello, a communications policy consultant, was FCC Commissioner from 1974 to 1997 and served as interim Chairman in 1993.

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[1] *Amici curiae* have authority to file this brief pursuant to Fed. R. App. P. 29(a), the parties having granted their consent.

Glen O. Robinson, the David A. and Mary Harrison Distinguished Professor of Law Emeritus at the University of Virginia, was FCC Commissioner from 1974 to 1976. Kenneth G. Robinson, a Washington, D.C. communications attorney, was Senior Legal Advisor to FCC Chairman Alfred Sikes from 1989 to 1993, as well as senior policy advisor to five Assistant Secretaries of Commerce for Communications and Information.

As former FCC commissioners and officials, *amici* have been personally associated with the indecency controversy in the past, and we have some sympathy for the FCC's concerns. Indeed, two of us joined in the Commission's original *Pacifica* decision,[2] and a third participated in an earlier decision that partly anticipated *Pacifica*.[3] However, the FCC's enforcement policies have destroyed any expectations some of us had for moderation and restraint in this endeavor and caused us to rethink our earlier involvement in this censorial regime.

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2 *Pacifica Foundation Station WBAI(FM)*, 56 F.C.C.2d 94 (1975).

3 *Eastern Educational Radio*, 24 F.C.C.2d 408 (1970).

SUMMARY OF ARGUMENT

When the issue was presented to this Court previously, two of us filed an amicus brief urging that the Court overturn the FCC's policy on First Amendment grounds. Although the Court chose a narrower ground to overturn the FCC—that it had violated the Administrative Procedure Act—a majority of the Court expressed strong doubt that the FCC's fleeting expletive policy could pass constitutional muster. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 467 (2d Cir. 2007). When the Supreme Court granted *certiorari* in the case the two original amici joined with other FCC commissioners and officials in supporting this Court's decision.

In doing so we urged the Supreme Court not to confine itself to the narrow administrative law question but to address the First Amendment question that we believed to be inseparable from the administrative law issue. The Supreme Court nevertheless chose to isolate the administrative law issue from the constitutional issue, reversing on the former and remanding for "further proceedings consistent with our decision." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009). The only issue to be considered in "further proceedings" is the constitutional question that a majority of this court addressed (in *dicta*) in its previous proceeding.

Notwithstanding our plea to the Supreme Court to treat the First Amendment issue as inseparably bound to the administrative law issue, we acknowledge that separating the two issues at least has the virtue of sharply focusing on what has always been the key question about indecency regulation: Is it constitutional to regulate speech simply because (a) it appears in an over-the-air broadcast medium and (b) because it is deemed "indecent" (defined essentially as any word or image that describes, depicts or connotes sexual or excretory activities in an offensive manner)? Twenty one years ago, the Supreme Court in *Pacifica* gave a guardedly affirmative answer, but the FCC's arbitrary and excessive enforcement policies have exceeded anything contemplated by the Court in *Pacifica* and should be struck down.

Invalidating the fleeting expletive policy alone would only slightly raise the temperature of the chill on broadcast speech caused by the FCC's recent enforcement actions, however. Broadcasters would gain some protection against the occasional "oops" moment on live broadcasts, but the Commission still would be free to roam the landscape of broadcast programming in search of indefinable words and images that it deems "indecent" – pitting its "artistic judgment" against that of broadcast programmers. The Court therefore should not confine its scrutiny to the narrow issue of fleeting expletives but should evaluate the entire range of

enforcement actions exemplified by the orders encompassed in the FCC's Omnibus Remand Order now before this Court.

In doing so the Court must take special note of the discriminatory impact of the FCC's indecency regime insofar as it is confined to broadcast media. The result of this discrimination has been to imbalance inter-media competition by imposing more stringent content controls on one group of competitors (broadcasters) than on others (cable, satellite, internet). If such special treatment was ever justified because of the unique influence or pervasiveness of broadcasting, changes in the electronic media environment have made it no longer even remotely credible. The First Amendment demands a more compelling explanation, and none has been forthcoming from the FCC.

ARGUMENT

I. THE FCC'S EVOLVING STANDARDS OF INDECENCY

In the earlier brief that two of the present *amici* filed in this Court we noted that until its 1975 decision in *Pacifica Foundation Station WBAI(FM)*, 56 F.C.C.2d 94 (1975), the FCC interpreted 18 U.S.C. § 1464 as an obscenity statute, governed by the constitutional definition and constraints of *Miller v. California*, 413 U.S. 15 (1973). The statutory proscription of "indecent or profane" language was treated as synonymous with obscenity. Although some of the pre-1975 cases might have been debatable candidates for the application of *Miller*, they had never forced the Commission to consider a different standard under the rubric of indecency or profanity.

Pacifica was different: George Carlin's monologue on the seven words that "you couldn't say on the public, ah, airwaves," clearly did not satisfy the first prong of *Miller's* definition of obscenity, requiring that the material "appeals primarily to the prurient interest." Confronted on the one hand with a choice of declaring Carlin's monologue to be obscene and inviting certain reversal in court, and on the other hand dismissing the complaint as *damnum absque injuria*, the FCC proceeded to invent a third option, which was to give independent significance to "indecency" but prescribe a different scope for its regulation than that applied to obscenity. Traditionally, obscenity has been treated as unprotected

speech and as such subject to total suppression. Once such speech was properly identified, it was treated as non-speech for First Amendment purposes.[4] In contrast, the FCC's approach to indecent speech called for a kind of time-and-place regulation; the time being the period when children were likely to be in the audience (subsequently fixed at between the hours of 6 a.m. and 10 p.m.), the place being radio and television broadcasts.

The Commission's move was novel, and even radical in light of established jurisprudence, but it was at least limited in scope. Except where it qualified as obscenity, indecent language was generally confined to that describing "sexual or excretory activities and organs" in a manner that was "patently offensive" as measured by contemporary community standards for the broadcast medium, at times of day when there is a reasonable risk that children may be in the audience. 56 F.C.C.2d at 97-98. The Commission made clear that it was concerned only with "clear-cut, flagrant cases" and emphasized "that it would be inequitable to hold a licensee responsible for indecent language" when "public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic

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[4] *See Roth v. United States*, 354 U.S. 476 (1957). In light of *ACLU v. Ashcroft*, 542 U.S. 656 (2004), there appears to be some doubt whether the Supreme Court still treats obscenity as completely beyond the pale of First Amendment protection, but that question is not in issue here.

editing." *Petition for Reconsideration of a Citizen's Complaint against Pacifica Foundation Station WBAI(FM)*, 59 F.C.C.2d 892, 893 n.1 (1976). This announced policy of restraint was critical to how this Court viewed the new doctrine when it affirmed the FCC in 1978. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). As Justice Powell noted in a concurring opinion, "the Commission may be expected to proceed cautiously, as it has in the past." *Id*. at 756, 760, 761.

And it did. Immediately after the Supreme Court affirmed its authority to regulate, the FCC rejected a petition by Morality in Media to deny a license renewal for one of the foremost educational stations in the country on the ground that it had consistently broadcast "offensive, vulgar and otherwise harmful material to children." *WGBH Educ. Found.*, 69 F.C.C.2d 1250 (1978). The Commission held that the Court's decision "affords this commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of the *Pacifica* holding." *Id*. at 1436. To underscore the point, then-Chairman Charles Ferris announced that another case like Pacifica was "about as likely to occur again as Halley's Comet." Charles D. Ferris, Chairman, FCC, Address to New England Broadcasters Assoc. (July 21, 1978).

Pace Ferris the optimist, Halley's Comet turned out to be the wrong benchmark; the Comet makes a periodic appearance about every 76 years, but indecency returned to the FCC in just nine. In 1987, the FCC was drawn back into the indecency issue by the appearance of "shock radio" that was designed to push the limits of provocative programming beyond what Carlin had attempted a decade earlier. Despite its deliberately provocative character the FCC responded with restraint. It revised its post-*Pacifica* view that the enforcement policy was limited to the precise seven words of Carlin's famous monologue and reinstated the original "generic" policy instead. The Court of Appeals for the District of Columbia affirmed the FCC's generic policy, albeit not without reservation and with an admonition to the FCC to proceed cautiously. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). Echoing Justice Powell in his *Pacifica* concurrence, the Court pointedly noted its assumption that "the potential chilling effect of the FCC's generic definition will be tempered by the Commission's restrained enforcement policy." *Id*. at 1340 n.14. As we noted in our previous brief, that decision was the first of a series of decisions in which the D.C. Court of Appeals made clear that a policy of reining in a small number of broadcast provocateurs should not become a vehicle for an unconstitutional morals crusade against the broadcast industry.

In response, the Commission continued to view indecency as a problem of controlling a small number of rogue broadcasters and broadcast personalities like Howard Stern, whose syndicated talk show accounted for a considerable share of fines paid for indecent broadcasting.[5] But the years of restraint were about to end. In a few years the FCC would embark on an aggressive program of indecency enforcement that would have brought a smile to the face of Anthony Comstock himself.

II. THE RETURN OF ANTHONY COMSTOCK

It began in 2004. In that one year the FCC would bring more enforcement actions than in the entire prior history of the indecency doctrine.[6] It also greatly expanded the scope of what constituted indecency, as for example in its

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5 In 1995, Infinity Broadcasting paid a then-record sum of $1.7 million to settle indecency complaints over a series of Howard Stern Shows. Paul Farhi, *Stern "Indecency" Case Settled; After 7-Year Fight With FCC, Broadcasting Firm to Pay $1.7 Million*, WASH. POST, Sept. 2, 1995, at F1. That was not the last of it. The Howard Stern Show continued to draw fines. For example, a single show on April 9, 2003 resulted in the Commission issuing a notice of apparent liability, to Clear Channel stations carrying the show, for fines aggregating $495,000. *Clear Channel Broadcasting Licensees, Inc.*, 19 FCC Rcd 6773 (2004).

6 In 2004, the FCC issued assessed nearly $8 million in proposed fines and settlements, compared to $440,000 a year earlier. So far the 2004 total is the high water mark for annual collection. *See Indecency Complaints and NALs*: 1993-2006, http://www.fcc.gov/eb/oip/ComplStatChart.pdf.

extraordinary and unprecedented ruling in the Golden Globe Awards decision that a single, spontaneous exclamation — "Fucking brilliant" — by Bono upon receiving the award was indecent. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975 (2004) *("Golden Globe")*. To magnify the impact still further, the FCC decided that each utterance of a forbidden word may be counted as a separate violation, instead of looking at a particular program as a single, integrated unit. *See Clear Channel Broadcasting*, 19 FCC Rcd at 6779.

The Commission's crusade also moved beyond the traditional targets for indecency enforcement. With a few exceptions those targets for enforcement were radio talk shows that deliberately and repeatedly followed a pattern of provocative programming. In its new phase, however, the Commission undertook a close inspection of movies, regular television series, live events, and even educational documentaries, to locate objectionable language or images. Even critically honored television programs like "Without a Trace" and "NYPD Blue" have become targets of indecency patrols. *See, e.g., Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program "Without a Trace*," 21 FCC Rcd 2732 (2006) (finding violation and proposing forfeiture of $32,000 for each CBS owned or affiliated station carrying program); *Omnibus Order*, 21 FCC Rcd 2664, 2696-98 (finding violation but

imposing no forfeiture for "NYPD Blue" program).[7] "NYPD Blue" has been targeted twice. *See Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue*," 23 FCC Rcd 3147, 3156 (2008) ("NYPD Blue") *appeal pending*, Nos. 08-0841-ag(L), 08-1424-ag(CON), 08-1781-ag(CON), 08-1966-ag(CON) (2d Cir.) (imposing forfeiture of $1.43 million for briefly depicting backside nudity).

The enforcement orders now before the Court exemplify the character of the new Comstockean regime.

To begin, the Commission has unmoored indecency from its original meaning of language that described or depicted sexual or excretory activities. In the new version indecency can mean as little as the casual use of an expletive. For example, in the *Omnibus Order* the Commission found that the documentary, "The Blues: Godfathers and Sons," broadcast by a noncommercial educational station, was indecent because of the use of the F-word or S-word by some of the artists being interviewed. 21 FCC Rcd at 2684-85. Citing its earlier decision in *Golden*

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[7] The Commission's remand decision in the Omnibus Order dismissed the complaints against "NYPD Blue" on a procedural ground; however, this dismissal does not alter the substance of its earlier finding that the program contained indecent and profane language. *See Omnibus Remand Order*, 21 FCC Rcd 13299, 13328-29 (2006).

Globe, the Commission held that "any use of [the F-word] or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition." It went on to say that the S-word similarly "has an inherently excretory connotation." *Id*. at 2684.

The Commission's new "inherency doctrine" is preposterously out of touch with the way language is used and understood today. It may be that Twila Tanner (in a live interview) describing a fellow contestant on "Survivor: Vanuatu" as a "bullshitter" was vulgar. *Id*. at 2698-2700. However, only a silly literalist would think that she was describing an excretory function. Given the Commission's view that excretory words inherently satisfy at least the first prong of its indecency test, presumably the same holds for the word "poop" — a word that is prominent in the title of a number of popular children's books, such as, "Everyone Poops," "Where's the Poop," "The Dog Poop Initiative," "The Truth About Poop." No doubt the Commission would say that while "poop" satisfies the first prong, it does not satisfy the second, "patently offensive," prong. For example, words like "ass" and "piss" and their derivatives are included in the Commission's catalog of "sexual or excretory activities," but they have been ruled not patently offensive — at least in the context presented. *See Omnibus Order*, 21 FCC Rcd at 2710-13. But just where is this line drawn? According to the Commission, it is offensive to call someone a "bullshitter," *id*. at 2698-2700, but it is all right to call him an

"ass," *see id*. at 2712, or even a "dickhead," *id*. at 2696. You may never say "fuck ´em" — even in an off-handed way, *id*. at 2690-92 — but it is at least sometimes ok to say "up yours" with all deliberate intensity, *id*. at 2712.

When Cher (in another live broadcast) answered her critics by exclaiming "fuck ´em," *id*. at 2690-92, any viewer would understand that as a crude insult, not as an invitation for sexual activity. As Justice Stevens aptly observed in his dissenting opinion in this case, "As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent. But that is the absurdity the FCC has embraced in its new approach to indecency." 129 S.Ct. 1800, 1827.

In an attempt to bolster its expansive definition of indecency, the Commission in its 2004 *Golden Globe Awards* order, and again throughout the *Omnibus Order and Omnibus Remand Order* in this case, declared that the F-word and S-word, and derivative words, are not only indecent, but also "profane" within the meaning of 18 U.S.C. § 1464. It defined "profane" to mean any language "so grossly offensive as to constitute a nuisance." *See, e.g., Omnibus Order*, 21 FCC Rcd at 2699. As this Court previously found, the interpretation of "profane" so completely overlaps "indecent" as to render the latter superfluous. 489 F.3d at

467. We agree. However, the important point of the observation is not that it undermines the FCC's statutory interpretation, as this Court correctly held. The important lesson it teaches is just how ambiguous and subjective the process of content surveillance has become. The Commission has in effect inflated section 1464 to cover any language the Commission thinks constitutes a nuisance.

The concept of arresting a "nuisance" was always central to *Pacifica*, but there is a difference between an organizing concept and a set of rules for implementing it. In its original formulation the FCC did not claim that it had a free-roaming power to regulate the broadcast program schedule according to whether, in the FCC's *ad hoc* judgment, a particular program was a "nuisance." In fact it was once so concerned about opening a Pandora's box of enforcement demands that it limited the category of offending words to those of the original Carlin monologue. That limitation was arbitrary, but at least it reflected an appreciation of the First Amendment dangers of allowing the policy to drift onto an open sea with no compass other than the label "nuisance" to guide it. Even when the Commission abandoned the seven-word limitation in favor of a more "generic" policy, it was mindful of the need to articulate limits on the scope of that policy and to adhere to restraint in its enforcement. Unfortunately, since 2004 the FCC seems to have concluded that it needs no compass other than its own *ad hoc* judgments, based on little more than its own subjective consideration of "context."

The FCC professes to consider the offending words (or images) in "context." On its face that is unexceptionable. Unfortunately, in the FCC's hands "context" has become an excuse for shifting, subjective and arbitrary judgments. In the name of context the Commission mechanically recites that the offending language is "gratuitous" and "shocking," presumably to distinguish these cases from "Saving Private Ryan," where the repeated use of the same words is deemed to be "essential" to the artistic work. *See, e.g., Omnibus Order*, 21 FCC Rcd at 2685, 2688-89, 2692, 2696-99. Employing an artistic standard unknown to real artistic directors, the FCC determines that the S-word is "essential" when it is part of a war film, but "gratuitous" when it is part of a television series about gritty police work in New York City. *See id*. at 2696-98 (distinguishing "NYPD Blue" from "Saving Private Ryan").

The FCC's semantics apparently derives from the school of Lewis Carroll.[8] "Context" has now become a tool not for limiting the reach of the Commission's

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[8] "'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less'

'The question is,' said Alice, 'whether you can make words mean different things.'
'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'"

Lewis Carroll, *Through the Looking-Glass* 94 (Random House 1946).

indecency regime, which was its original purpose, but for expanding it. This new expansiveness exposes the deeply troubling vagueness of indecency as a basis for regulation, as a majority of this Court noted in its earlier opinion: "[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." *Fox Television*, 489 F.3d at 464.

What is at stake here is not simply the problem of assuring fair notice and equal treatment to broadcasters who have to discern the elusive, and shifting, boundaries of indecency/profanity. Equally important is the loss of speech from self-censorship by risk-averse broadcasters who choose to steer clear of the landmines that the FCC's uncertain jurisprudence has created by avoiding anything that might conceivably give offense. And it will not be simply the Bono's and the Cher's the broadcasters will have to avoid.

Consider, for example, the recent PBS telecast of the acclaimed stage production of "King Lear" starring Ian McKellen. A famous scene in the stage play has the mad king disrobe to display full frontal nudity. This prompted a question whether this scene would be included in the TV production given its scheduled airtime of 9 p.m. Before program aired the CEO of PBS remarked that "it's what I think about it and what the FCC will allow." Lisa de Moraes, *Nude*

Developments at PBS? You'll Have to Stay Tuned, WASH. POST, July 14, 2008, at C1. As it turned out the nude scene was cut from the TV production for reasons that were not clearly explained. McKellen was certain Shakespeare intended Lear to start removing his clothes, but thought "there might be some PBS rules" about it. Lisa de Moraes, *"Lear" Without Learing*, WASH. POST, January 8, 2009, at C07. However, PBS's CEO had previously said the only "rules" were what she thought about it and what the FCC might think about it, and in the end it appears the latter was controlling. If so, it is difficult to fault PBS (or the Shakespeare company that produced the drama – it doesn't matter who) for pulling the plug on McKellan's doing a "full Monty." The FCC had previously ruled that a rear view of a nude woman was "titillating" and "shocking" – see "NYPD Blue", 23 FCC Rcd at 3168. It is possible the FCC would distinguish between the frontal nudity of an old man (McKellen was then 69) and the rear nudity of a young woman, or would say that Shakespeare is different.[9] But since there was no way to test those possibilities prior to the event, one cannot blame the producers or the network if

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[9] In *Pacifica* the Supreme Court hinted that an "Elizabethan telecast" might warrant some special latitude. *Pacifica*, 438 U.S. at 751. Why the Elizabethan age might warrant such a dispensation was not explained; such is the elusiveness of "context."

they thought that a risk of a fine up to $325,000 was too high an ante for such a bet.

III. VOX POPULI AND THE POLITICS OF INDECENCY REGULATION

The FCC's enforcement actions make it appear that there has been some rampant growth in broadcast indecency, and indeed a casual inspection of the number of recorded public complaints might suggest as much.[10] The number of complaints is misleading, however, and the FCC's reference in the *Omnibus Order*, 21 FCC Rcd at 2665, to "hundreds of thousands of complaints between February 2002 and March 2005" is completely disingenuous. The FCC is fully aware that the overwhelming percentage of recent complaints target a handful of programs, and most of them are computer-generated electronic complaints provided by activist groups such as the Parents Television Council.[11] In some

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[10] In 2004, the number of complaints was reported to be just over 1.4 million, of which a large percentage was generated by an email campaign by Parents Television Council and other activist citizen groups. In 2005, the number of complaints fell to just over 233,000. In 2006, the number rose again, with just over 275,000 reported for the first quarter of 2006. *See Indecency Complaints and NALs*: 1993-2006, http://www.fcc.gov/eb/oip/ComplStatChart.pdf. The FCC's website does not show more recent statistics.

[11] This is fully documented in a study of indecency complaints by the Progress and Freedom Foundation. *See* Adam Thierer, *Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process, Progress on*

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cases the FCC's complaint count has even included duplicate complaints from the same person to different commissioners and staff as separate complaints. To further underscore the artificiality of the complaint process, the FCC recently has ruled that it will act on complaints even if the complainant does not claim to have watched or heard the program. *See* "*NYPD Blue*," 23 FCC Rcd at 3156. The Commission's policy of acting only on complaints has become so artificial that it naturally prompts the question, why does the FCC not simply turn the monitoring function over directly to the Parent's Television Council? The answer is simple: the FCC already has.[12]

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Point no. 12.22, November 2005, www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf. A Freedom of Information Act request by the Wall Street Journal revealed that of some 6500 complaints filed against an episode of "Without a Trace" (for which CBS and its affiliates drew record fines, 21 FCC Rcd 2732 (2006)), all but three of the complaints were computer-generated form letters provided by Parents Television Council. Amy Schatz, *Networks Fight Rising Number of FCC Fines*, WALL ST. J., May 19, 2006, at B1.

[12] Parents Television Council has been in the front of the recent indecency campaign, but it is not alone. Other activists include Morality in Media, American Family Association, American Decency Association, Family Research Council, Christian Coalition, and American Values — to give only a partial list. For many of these groups the indecency issue is part of a more general religious and moral agenda. *See, e.g.*, http://www.ouramericanvalues.org/about.php. (describing the group's purpose as "defending life, traditional marriage, and equipping our children with the values necessary to stand against liberal education and cultural

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Adding to the influence of activist crusaders like the Parents Television Council, the FCC has also been influenced by congressional pressure. In 2003 and 2004, the Senate and House adopted resolutions that not only declared the FCC should be more vigorous in its enforcement of indecency but should specifically overrule its enforcement bureau's finding of no violation in the *Golden Globe Awards* case. S. Res. 283, 108th Cong. (2003); H.R. Res. 500, 108th Cong. (2004). The FCC responded, both in the *Golden Globe Awards* case and in this case. Shortly thereafter, Congress reaffirmed its desire for tougher enforcement by enacting the Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, § 2, 120 Stat. 491 (2006), *amending* 47 U.S.C. § 503(b), to authorize increased forfeiture penalties.

Of course, we expect agencies to respect congressional directives, but the agency must still conform its actions to the rule of law. Since Congress cannot direct how the law should be enforced, *see Bowsher v. Synar*, 478 U.S. 714 (1986), the FCC is owed no deference for being responsive to Congress's wishes or

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forces"); *see also* Kimberly Zarkin, *Anti-Indecency Groups and the Federal Communications Commission: A Study in the Politics of Broadcast Regulation* 71-80 (2003) (describing American Family Association campaigns against programs that it deems to be pro-homosexuality, anti-family or anti-Christian).

directives on that score. And quite apart from separation of powers principles the First Amendment allows no deference to Congress or the FCC on matters implicating direct regulation of speech content. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989).

If political pressure from Congress does not justify the FCC's enforcement actions, neither does the clamor of public groups. Members of the public have a right to complain; that is part of their First Amendment rights. But if the First Amendment means anything, it means that their right to complain is not a license to deprive speakers of their right to speak or listeners/viewers of their right to hear or see the speaker's message.[13] It is no response to say that speakers or listeners/viewers are not deprived of their rights because the affected speech is not censored but simply moved to a different time in the broadcast day. Such "time zoning" necessarily affects the accessibility of the speech to audiences desiring to hear or view it, and this in turn affects the producer's decision whether it is worthwhile to produce it.

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[13] While the First Amendment is formally directed at the right to speak, a corollary of that right is that others are permitted to hear (or view) the speech that might be suppressed by regulation. Thus, it is not only the rights of broadcasters or program producers that are at stake here, but also the rights of listeners and viewers.

IV. BEYOND FLEETING EXPLETIVES

From the beginning the sole source of constitutional authority for regulating indecency has been the Supreme Court's decision in *Pacifica*. However, as Justice Stevens (the author of *Pacifica*) observed in his dissenting opinion in this case, nothing in the Court's *Pacifica* opinion authorized the kind of sweeping interpretation of indecency entailed by the FCC's fleeting expletive policy. 129 S. Ct. at 1827. This Court should declare that the fleeting expletive policy exceeds the authority given by *Pacifica* and violates the First Amendment.

But for the Court to stop at that point would, as Macbeth put it, "scotch the snake not kill it." Confining enforcement to repeated occurrences of "offensive" words or images may ameliorate the burden placed on live broadcasts, but that does little to address the more fundamental problem of the FCC's vague context-based standards, and the subjective, arbitrary manner of its enforcement. These will continue to chill broadcast program producers regardless of whether the "offense" is singular or repeated.

The Supreme Court has remanded this case for "further proceedings;" the only issue to be addressed by such proceedings is the First Amendment question. To address that question meaningfully requires this Court to extend its scrutiny beyond the fleeting expletives policy to evaluate more generally the Commission's indecency regime. Of course, a lower court is not free to disregard a clearly

applicable Supreme Court decision however infirm it may appear to be, but it can and should interpret the applicability and scope of that decision in light of current conditions and subsequent Court precedent.[14]

A central consideration underlying the Court's decision in *Pacifica* was that broadcasting was considered to be "uniquely pervasive." A majority of this Court previously expressed skepticism about whether this label could still hold true today. 489 F.3d at 465 ("it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children"). That skepticism is well grounded. As of June 2006, the latest date for which official figures are available nearly 87% of television households received their television programs from cable or satellite (classified by the FCC as "multi-channel video program distributors" or "MVPD").[15] *Annual Assessment of the Status of Competition in*

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[14] And it may respectfully express a critical view of a Supreme Court decision it believes to be overtaken by events and later decisions. *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996), provides the model. On the question whether a prior Supreme Court decision was still good law, Judge Posner first noted that a lower court may not anticipate the overruling of a Supreme Court decision, but went on to criticize the Court's decision as "unsound when decided," and "inconsistent with later decisions" and to declare that "it should be overruled. The Supreme Court agreed. *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

[15] This percentage has continued to increase; based on past trends, it is likely to be at least a point or two higher today than in 2006.

the Market for the Delivery of Video Programming 24 FCC Rcd 542, 546 (2009). With only 13% of TV households relying on over-the-air broadcast service it makes no sense whatsoever to continue to regard broadcast programs as "uniquely pervasive." *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 744-45 (1996) (Breyer, J.) (plurality) (finding the pervasiveness factors cited in *Pacifica* applicable to cable television).[16]

In the internet age the same observation holds for online viewing. Some of the same programs that the FCC has labeled indecent when broadcast can be seen on YouTube. Indeed, because they are archived, they can be seen and seen again. No one knows how many children saw the 2003 Golden Globe award show when Bono exclaimed the F-word on receiving the award. But it is a fair guess that a larger number will see it on YouTube, where it has been archived since 2007. *See* http://www.youtube.com/watch?v=COlPQlNguvU. Yet in *Reno v. ACLU*, 521 U.S. 844 (1997), the Court ruled that *Pacifica* could have no application to the internet. Among other things, the Court in *Reno* reasoned that the internet, unlike

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[16] In light of the broadcasting-is-different mantra it bears emphasizing here that the foremost technological feature that has been thought to make broadcasting different from other media — the use of scarce spectrum — was not part of the indecency doctrine. *See Pacifica*, 438 U.S. at 770 n.4 (Brennan, J., dissenting) (noting that both the majority opinion by Justice Stevens and the concurring opinion by Justice Powell "rightly refrain from relying on the notion of 'spectrum scarcity' to support their result").

broadcasting, is not "invasive" and does not "appear on one's computer screen unbidden." *Id*. at 849.[17]

This idea that broadcasting is invasive is a curious one, conjuring the image of hapless captives of the TV screen who are unable to defend themselves even with a remote control that can change channels faster than a speeding bullet. Be that it no longer makes sense to distinguish between broadcasting and cable on this basis. Yet in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), the Court held that cable content controls were unconstitutional absent a showing that it was the least restrictive means of accomplishing the objective of protecting children. No consideration was given to the invasiveness/surprise element. In the *Omnibus Remand Order*, 21 FCC Rcd at 13319, the Commission claimed that cable was different from broadcasting in that "parents who subscribe to cable exercise some choice in their selection of a package of channels, and they may avoid subscribing to some channels that present programming that, in their judgment, is inappropriate for children." However, that ignores the fact that cable operators package channels in tiers, not individual channels (except for pay-per-

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[17] The relationship, if any, between "invasiveness" and "pervasiveness" is confusing. A medium may be pervasive without being invasive, and vice versa. In any case neither concept can support the kind of distinctions that are currently being drawn among media.

view). More importantly cable channels are essentially like broadcast channels in presenting a mix of programming, so the viewer's options are essentially the same for both media.

The same is true for streaming video on the internet, which has become increasingly popular in recent years – even perhaps to the point of being considered "pervasive" (or "invasive"?).[18] In 1997 it might have been plausible to suppose that children would not stumble upon offensive language or images online because most users searched for discrete content. In today's era of streaming internet video the element of surprise is as likely for streaming online video as it is for broadcast video. The reality is the internet is becoming an alternative platform for viewing programs that are seen on conventional TV. Hulu illustrates. *See* http://www.hulu.com/. Hulu (a joint venture of NBC, Fox, and ABC, with some additional outside investment) offers commercially supported streaming video of regular TV shows and movies from broadcast networks and other sources

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[18] Video streaming is especially popular with children. The most recent monthly viewing data from Nielsen Online shows that in April 2008 there were 8 million children age 2-11 who viewed an average of 51 streams and 118 minutes of online video per person per month, and 11.6 million teens who viewed an average of 74 streams and 132 minutes. The amount of viewing by each group exceeded that of the larger adult population of online viewers (75.1 million). *See* http://www.nielsen-online.com/pr/pr_080609.pdf.

(including a number of cable networks). Except for the smaller screen size of the display terminal there is no important difference between watching an episode of the "Heroes" on conventional TV and watching it as a video stream on the internet. Of course, any broadcast-based programs that appear on Hulu are subject to indecency controls *if* they are *broadcast* during the hours of 6 a.m. to 10 p.m. But a program that was broadcast during the safe harbor period is available on Hulu any time, with no restrictions on content.

Perhaps the more salient lesson to be drawn from the internet-cable-broadcast comparison goes to the importance of private alternatives to government control. In *Playboy Entm't*, 529 U.S. at 826, the Court held that the government must show the absence of effective alternative private means of controlling offensive content before imposing government controls. In *ACLU v. Ashcroft*, 542 U.S. 656, 670 (2004) the Court upheld a preliminary injunction against enforcement of the Child Online Protection Act, 47 U.S.C. § 231(a) (1) on the ground that blocking and filtering technology appeared to provide an effective and less restrictive alternative to direct government control.[19]

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[19] The Supreme Court remanded for further hearings on the question whether available filtering technology was an effective and less restrictive alternative. On remand the lower court confirmed that it was. *See ACLU v.*

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Equivalent technology is available for television broadcasting, such as the V-chip device. In its *Omnibus Remand Order*, 21 FCC Rcd at 13319-20, the FCC dismissed the V-chip as a solution to broadcast indecency on the ground that most television sets do not contain the device; parents are unaware of it or do not know how to use it; and in any event it will not work where the program is not accurately rated, or cannot be rated for unanticipated utterances. As this Court noted in its previous opinion, the Commission's dismissal of V-chip and similar technologies must be evaluated by today's technology. 489 F.3d at 466. Today's technology includes digital television sets that provide a simple and effective means of filtering. The fact that some viewers choose not to avail themselves of them is not relevant. As the Supreme Court emphasized in *ACLU v. Ashcroft*, 542 U.S. at 669-70, it is not actual use but the *availability* of individualized filtering devices that makes them a less restrictive alternative. The Government does not have a compelling interest in doing what informed and empowered parents can do for themselves in protecting children. *See Playboy Entm't*, 529 U.S. at 526.

The fact that indecency controls have not been imposed on other electronic media that provide the same program content, in essentially the same manner, as

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Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *affirmed sub nom. ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008).

broadcast media not only impermissibly discriminates against one type of speaker (broadcasters and broadcast programmers), but also undermines the credibility of any claim of compelling governmental interest by reason of its under-inclusiveness. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 51-52 (1994). The FCC's indecency regime manages the remarkable achievement of being both over-inclusive, in its overbroad and subjective definition of "indecent," and under-inclusive, in its singling out only one of several electronic media to achieve its objective.

CONCLUSION

It is reported that Anthony Comstock, as secretary of the New York Society for the Suppression of Vice (which he organized in 1873), was responsible for the destruction of 160 tons of literature and pictures. The Columbia Encyclopedia, Sixth Edition 2008, http://www.encyclopedia.com/topic/Anthony_Comstock.aspx. In the digital information age we do not measure censorship by tonnage so we cannot compare Comstock's record with modern regulatory achievements. Anyway it would be meaningless for we no longer assess the impact of censorship by what existing material is destroyed; we measure it by what will never be created. Sadly we have no way to keep statistics on the amount or quality of expression that is squelched before it is uttered. Happily the First Amendment does not place such a record-keeping burden on those invoking its protection.

When the Government regulates speech for its content, the requisite effect is presumed, and it is the Government's burden to prove that the effect is outweighed by a compelling interest that is effectively served by the regulation and cannot be achieved by less restrictive means. The FCC has failed to meet that burden.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume requirement of Rule 32(a)(7)(C) in that it contains 6,964 words of text in Times New Roman, 14-point font.

Pursuant to Second Circuit Interim Rule 25.1(6), I hereby certify that a virus scan was run on the electronic version of this brief using this Firm's Symantec AntiVirus 8.1 software, and no virus was detected.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of September, 2006, caused a true and correct copy of the foregoing Brief of *Amici Curiae* Former FCC Commissioners and Officials In Support of Petitioners to be served by electronic mail and first-class mail, postage pre-paid on:

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