06-1760-ag(L)

06-2750-ag (Con), 06-5358-ag (Con)

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,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA,

Respondents,

NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., NBC TELEVISION AFFILIATES, FBC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES, CENTER FOR THE CREATIVE COMMUNITY, INC., 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

REPLY BRIEF OF PETITIONER FOX TELEVISION STATIONS, INC.

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The FCC's response in this case is predicated on two stunning assertions. First, the FCC believes that because broadcasters accept an FCC license to use the public airwaves, the FCC may impose any obligation on broadcasters it desires—including an obligation to avoid airing whatever material the FCC deems to be indecent under its poorly-articulated, context-based standard. FCC Br. at 27. Taken to its logical extreme, the FCC's theory would produce shockingly indefensible results and render the First Amendment a dead letter in the broadcasting context. The Supreme Court has long held that broadcasters do not give up their free speech rights when they accept a broadcasting license. *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 389 (1969) (recognizing that the First Amendment is not "irrelevant to public broadcasting"; to the contrary, it "has a major role to play"); *cf.* 47 U.S.C. § 326 (prohibiting the FCC from "interfer[ing] with the right of free speech by means of radio communication"). The FCC may wish that broadcast licensing implied a limitless indecency enforcement authority, but the constitution does not permit the agency to exercise such arbitrary power. *See Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994) (noting that under "the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government"); *O'Connor* v. *Pierson*, 426 F.3d 187, 201 (2d Cir. 2005) (same).

Second, the FCC repeatedly chides Fox for not defending the "artistic merit" of the fleeting and isolated expletives at issue here. FCC Br. at 15, 20. But the notion that a broadcaster is under any obligation to defend the merits of its speech in the face of the government's content-based censorship stands the First Amendment on its head—it is the FCC that must justify its indecency enforcement regime, not Fox that must justify the value of its speech. *United States* v. *Playboy Entm't Servs., Inc.*, 529 U.S. 803, 817 (2000) ("When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed."). As a majority of justices found in *Pacifica*, content-based restrictions on speech cannot be based upon the government's view of the importance of that speech. *FCC* v. *Pacifica Found.*, 438 U.S. 726, 761 (1978) (Powell, J., concurring); *id*. at 762-63 (Brennan, J., dissenting); *id*. at 777-79 (Stewart, J., dissenting); *see also Playboy Entm't*, 529 U.S. at 826 ("We cannot be influenced, moreover, by the perception that the regulation in question is not a major one because the speech is not very important.").

Equally striking is the FCC's refusal to defend its order finding that Fox's broadcasts at issue violated 18 U.S.C. § 1464. The Commission attempts completely to evade Fox's argument that *scienter* is required by both § 1464 and the First Amendment with the mistaken claim that the FCC can ignore a

broadcaster's state of mind where the FCC does not impose a forfeiture—a claim that Fox has already shown to be wrong. Fox Br. at 34-35. Similarly, although the FCC now concedes that its constitutionally problematic profanity analysis is superfluous, the agency nonetheless asks this Court to leave in place the profanity findings in the order under review. And as to Fox's other constitutional arguments, the FCC repeatedly attempts to rely on the Supreme Court's recent decision in *FCC* v. *Fox*, even though that opinion plainly did not reach any constitutional issues at all. *See FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("We decline to address the constitutional questions at this time."). The FCC has done nothing to allay this Court's prior and legitimate skepticism about the constitutionality of the new indecency regime, *see Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444, 462 (2d Cir. 2007), *vacated* 129 S. Ct. 1800 (2009), and this Court should now hold that the FCC's current enforcement approach violates Fox's First Amendment rights.

I. BECAUSE 18 U.S.C. § 1464 REQUIRES SCIENTER, THE FCC CANNOT IGNORE FOX'S STATE OF MIND WHEN FINDING AN INDECENCY VIOLATION.

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

Morissette v. *United States*, 342 U.S. 246, 250 (1952). Yet the FCC would dispense with the requirement of intent to violate § 1464 in this case because of the fig leaf that it did not impose a forfeiture against Fox. This is a non sequitur. *Scienter* is an element of § 1464; there can be no violation of that statute without *scienter*. Whether or not it proposes a forfeiture, the FCC must first find *scienter* before it can declare a broadcast to be indecent in violation of § 1464. The FCC's effort to evade the *scienter* requirement in this case is based on fundamental misunderstandings of both its own order and § 1464.

First, the fact that the *Remand Order* found that Fox's broadcasts were "in violation of Section 1464" is no "quibble" (FCC Br. at 25)—it is the ultimate finding made by the FCC in this case. *See Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 & Mar. 8, 2005*, 21 FCC Rcd. 13299, ¶¶ 53, 66 (2006) ("*Remand Order*") (SPA-99, 104). The agency cannot recast its actual finding for purposes of litigation. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943) (invoking the fundamental rule that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained"). Moreover, with respect to the 2003 Billboard Awards broadcast, the FCC made the further claim that "the complained-of language was actionable under Commission precedents" and that the only reason it did not fine Fox was because of the "limited remand" under

which it was proceeding. *See Remand Order* ¶ 53 (SPA-99). This ruling fails to make the necessary *scienter* finding and therefore must be set aside.

Second, and more importantly, *scienter* is a required element of any indecency violation, and the FCC cannot find that a broadcast violated § 1464 without making a determination that the broadcaster acted with the requisite state of mind. Section 1464 itself requires *scienter*, and Congress could not, consistent with the First Amendment, authorize the FCC to make indecency findings without considering *scienter*. Fox Br. at 22-28 (citing numerous cases). The FCC has no answer to these arguments. FCC Br. at 24-26. Nor does the FCC have any response to the numerous court decisions holding that *scienter* is required for a violation of § 1464. *See, e.g., CBS Corp.* v. *FCC*, 535 U.S. 167, 201 (3d Cir. 2008), *vacated*, 129 S. Ct. 2176 (2009); *United States* v. *Smith*, 467 F.2d 1126 (7th Cir. 1972); *Tallman* v. *United States*, 465 F.2d 282, 285 (7th Cir. 1972); *Gagliardo* v. *United States*, 366 F.2d 720, 724 (9th Cir. 1966). Instead, the FCC simply reasserts that it can issue forfeitures for violations that are "willful or repeated" under 47 U.S.C. § 503(b)(1)(B). FCC Br. at 26. But the FCC completely ignores Fox's argument that it cannot rely on that statutory provision in the indecency context. Fox Br. at 34-35.[1]

[1] In places, the FCC suggests but does not argue that it could rely on § 16 of the Public Telecommunications Act of 1992, Pub. L. No. 102–356, § 16, 106 Stat. 949, 953 (1992), and its own rule, 47 C.F.R. § 73.3999, to make indecency findings.

It makes no difference whether the general aim of the *Remand Order* was to provide guidance to the broadcasting industry about the FCC's new indecency standards (though the FCC's brief tellingly cites the *Omnibus Order—not* the *Remand Order*—for this point). FCC Br. at 24. If the FCC wants to provide guidance, it should pursue rulemaking. If it chooses to declare individual broadcasts to be in violation of a criminal statute, then it must make the requisite findings. The FCC concedes that it did not make a finding of *scienter* and that is reason enough to set aside the order in this case.

II. THE COURT SHOULD VACATE THE FCC'S CONCEDEDLY UNNECESSARY PROFANITY FINDINGS.

In its opening brief, Fox argued that the FCC's profanity findings were contrary to law because, among other reasons, the FCC's novel interpretation of "profane" in § 1464 equated "profane" with "indecent" and was thus impermissibly superfluous. Fox Br. at 40-41. The FCC has no response whatsoever to this and Fox's other arguments regarding the agency's profanity findings. FCC Br. at 24 n.2. Instead, the FCC now concedes that its separate profanity findings against Fox's broadcasts are "rendered unnecessary" by its

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FCC Br. at 8, 27, 36. Fortunately for the FCC, it does not really press this argument, because it is wrong. *See FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1806 (2009) (noting that Public Telecommunications Act of 1992 merely instructs the FCC when to enforce § 1464); *CBS Corp.* v. *FCC*, 535 F.3d 167, 201-02 (3d Cir. 2008) (describing history and limited purpose of Public Telecommunications Act and § 73.3999), *vacated* 129 S. Ct. 2176 (2009); Fox Br. at 32-35.

findings that non-repeated expletives violate § 1464 because they are indecent. *See id*. These concededly unnecessary profanity findings, however, remain part of the order under review, *see Remand Order* ¶¶ 40, 65 (finding that Fox's broadcasts violated § 1464 because they were profane) (SPA-92, 103), so the Court should vacate them for all the reasons discussed in Fox's opening brief. Fox Br. at 37-41.

III. THE FCC'S CENSORSHIP OF ISOLATED USES OF POTENTIALLY OFFENSIVE WORDS IS UNCONSTITUTIONAL.

A. Content-Based Regulation of Isolated Uses of Potentially Offensive Words on Broadcast Television is Not Exempt from Constitutional Scrutiny.

The FCC does little to dispel the "long shadow" the First Amendment casts over its effort to punish broadcasters for the isolated use of a potentially offensive word. *FCC* v. *Fox*, 129 S. Ct. at 1828 (Ginsburg, J., dissenting). While emphasizing that broadcasting historically has been given a lesser degree of First Amendment protection than other media, FCC Br. at 26-28, the FCC ignores the actual boundaries of *Pacifica* and the Supreme Court's other precedents in this area. *Pacifica* itself "does not speak to cases involving the isolated use of a potentially offensive word." *Pacifica Found.*, 438 U.S. at 760-61 (Powell, J., concurring); *accord id*. at 750 (plurality opinion); FCC Br. at 34-35. *Action for Children's Television* v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995), did not address indecency enforcement against isolated and fleeting uses of potentially offensive words, so that case does not provide authority for the FCC's sweeping new

enforcement regime. And, despite the FCC's repeated citations to *FCC* v. *Fox*, that opinion expressly did not reach any of Fox's constitutional challenges to the FCC's current indecency regime. *See FCC* v. *Fox*, 129 S. Ct. at 1819. Given the limits of these decisions, they provide no constitutional support for the FCC's newly-expanded enforcement policy.

While the FCC may have an interest in shielding children from the ill effects of indecency, the government's interest in censoring broadcast content wanes when the material at issue falls short of the verbal shock treatment typified by the George Carlin routine at issue in *Pacifica*. The Supreme Court repeatedly has rejected the view that the government can regulate merely vulgar or offensive speech. *See, e.g.*, *Houston* v. *Hill*, 482 U.S. 451 (1987) (overturning conviction for shouting expletives at a police officer); *Lewis* v. *New Orleans*, 415 U.S. 130 (1974) (invalidating statute making it unlawful "to curse or revile or to use obscene or opprobrious language"); *Plummer* v. *City of Columbus*, 414 U.S. 2, 3 (1973) (overturning conviction under statute prohibiting use of "menacing, insulting, slanderous or profane language"); *Rosenfeld* v. *New Jersey*, 408 U.S. 901 (1972) (reversing conviction for uttering "loud and offensive or profane or indecent language" in a public place); *Cohen* v. *California*, 403 U.S. 15, 26 (1971) (holding that state cannot criminalize "the simple public display . . . of this single four-letter expletive"). *Pacifica* and the other cases relied upon by the FCC (FCC Br. at 32)

did not involve isolated uses of potentially offensive words, and they did not hold that there is a substantial—much less compelling—governmental interest in preventing children from hearing those words even once. *Cf. Dial Info. Servs. Corp. of N.Y.* v. *Thornburgh*, 938 F.2d 1535, 1537 (2d Cir. 1991) (involving indecent telephone services that "are in fact purveyors of pornography"); *Carlin Commcn's, Inc.* v. *FCC*, 837 F.2d 546, 548 (2d Cir. 1988) (involving dial-a-porn services).

Nor does the government's interest in protecting the privacy of the home (FCC Br. at 61-62) justify trampling the free speech rights of broadcasters and listeners. The governmental interest in protecting the sanctity of the home has been limited to behavior meant to shock the audience or disturb the peace. *See Hill* v. *Colorado*, 530 U.S. 703, 735-36 (2000) (Souter, J., concurring) (citing cases). An occasional expletive on broadcast television falls in neither category and thus cannot justify an abridgement of the First Amendment. If parents wish to prevent their children from ever hearing a potentially offensive word on television—which truly is quixotic, given the numerous places such words are heard daily, *see* Joint Network Comments 20 (A-36)—they can use technologies like the V-Chip to block potentially offensive programming from their homes, or they can simply turn off their sets.

B. The FCC's Censorship of Potentially Offensive Words is Not Narrowly-Tailored.

In advocating a more relaxed standard for evaluating whether its indecency regime is narrowly-tailored, the FCC cites *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994) ("*Turner I*"), and *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 218 (1997) ("*Turner II*"). FCC Br. at 29-30. Both of those cases, however, provide the legal framework for evaluating *content-neutral regulations* that are "unrelated to the suppression of free expression." *Turner I*, 512 U.S. at 662; *Turner II*, 520 U.S. at 217-18. That is not this case. FCC indecency enforcement is content-based regulation of speech. *See Pacifica*, 438 U.S. at 744 (plurality opinion) ("It is equally clear that the Commission's objections to the broadcast were based in part on its content."). "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest." *Playboy Entm't*, 529 U.S. at 813. This is true even for broadcasting. *See id*. (equating cable programming with broadcast media); *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 748 (1996) (plurality opinion) (distinguishing *Turner I* because the "distinction . . . between cable and broadcast television . . . . has little to do with a case that involves the effects of television viewing on children.").[2] "[E]ven where speech is indecent and enters the home,

[2] Of course, the fact that expletives are freely used on non-broadcast channels makes the FCC's extreme effort to shield children from isolated words especially

the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *Playboy Entm't*, 529 U.S. at 814.

The FCC bears the burden of showing that a proffered less restrictive alternative—like the V-Chip—is ineffective to protect children. *See Ashcroft* v. *ACLU*, 542 U.S. 656, 665 (2004) ("[T]he burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute."). The FCC cannot carry this burden because of its own prior conclusions. *See Implementation of Section 551 of the Telecommunications Act of 1996*, 13 FCC Rcd. 8232 (1998) ("*Video Programming Ratings Order*"). Congress directed the FCC to determine whether the TV Parental Guidelines used by the V-Chip were "acceptable,"[3] which the FCC understood requires the Guidelines to achieve the overall goal of Congress, *i.e.*, providing a comprehensive ratings system for programming containing violent, sexual or other indecent material. *See id.* ¶¶ 19-20. The FCC concluded that the voluntary ratings system met the Congressional goal "of achieving an *effective* method by which the rating system, when used in conjunction with the v-chip technology, will provide parents with useful tools to

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hopeless. The viewing public—particularly children—while watching cable or satellite television, does not distinguish between a broadcast channel and a non-broadcast channel.

[3] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(e), 110 Stat. 56, 142.

block programming they believe harmful to their children." *Id*. ¶¶ 2, 24 (emphasis added).

Given the FCC's finding that the TV Parental Guidelines are effective, it cannot now rely on a litigation strategy that attacks the effectiveness of the V-Chip. The *Video Programming Ratings Order* did not merely approve the "rules," FCC Br. at 42, but rather made an administrative finding that the TV Parental Guidelines, and hence the V-Chip, are effective to protect children. If the V-Chip were really ineffective, or if the implementation of the TV Parental Guidelines required some improvements, then the voluntary rating system would not be "acceptable," and the FCC would be in default of its statutory obligation. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 551(b), (e), 110 Stat. at 140, 142.

The FCC's factual claims regarding the ratings of Fox's broadcasts and parents' actual use of the V-Chip, FCC Br. at 38-42, are red herrings that have no relevance to the constitutional sufficiency of the V-Chip as a less restrictive alternative to censorship. As the Supreme Court has recognized, in considering less restrictive alternatives to outright bans on speech, "[i]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time." *Playboy Entm't*, 529 U.S. at 824; *see also Sable Commc'ns* v. *FCC*, 492 U.S. 115, 128 (1989). Targeted blocking like that enabled

by the V-Chip is necessarily more narrowly tailored than a broad ban at the source as a means of restricting the exposure of children to isolated uses of potentially offensive words. *Playboy Entm't*, 529 U.S. at 815; Fox Br. at 52-53. And the Supreme Court has invalidated content-based regulation of speech where blocking technology is an available alternative—even where that alternative is less than perfectly effective. *See Ashcroft* v. *ACLU*, 542 U.S. at 668 (finding an imperfect alternative to be constitutionally less restrictive). Thus, even if some programming were incorrectly rated,[4] imperfect implementation of the ratings scheme does nothing to undermine the constitutional sufficiency of the V-Chip.

The FCC parses the details of the parental ratings system to claim that the only way the ratings could have put parents on notice of the potentially offensive words included in Fox's broadcasts would have been if the programs had been rated TV-MA(DL) FCC Br. at 39. This claim depends, however, on a spurious distinction between "infrequent coarse language" (indicated by an "L" descriptor

[4] The FCC relies on several studies to support its claim that the broadcast ratings are inaccurate, *see Remand Order* ¶ 51 n.162 (SPA-97), but all of the cited studies are fatally flawed. For example, one study cited by the FCC based its conclusion on purportedly "dirty words" that the Commission itself has concluded are not indecent. *See* Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 48 J. of Broad. & Elec. Media 554, 560-61 (2004). Similarly, another of the FCC's studies was based on nothing more than a survey of parents, and even it recognized that "the vast majority of parents who have used the TV ratings say they find them useful." Henry J. Kaiser Family Foundation, *Parents, Media and Public Policy: A Kaiser Family Foundation Survey*, 5 (2004).

with a TV-PG rating) and "crude indecent language" (indicated by an "L" descriptor with a TV-MA rating). As a practical matter, any parent concerned about her child's possible exposure to a fleeting and isolated expletive could use the V-Chip to block any program with an "L" descriptor, or every program rated TV-PG (*i.e.*, programs containing "material that parents may find unsuitable for younger children").[5]

The FCC's recent reports purporting to demonstrate that many parents do not understand the ratings system or know how to use the V-Chip are similarly irrelevant as a constitutional matter. The FCC complains that parents are either unaware of the existence of the V-Chips in their televisions or else do not understand the ratings system. FCC Br. at 41-42. But the Supreme Court has rejected the argument that a targeted blocking tool like the V-Chip is a less restrictive alternative simply because few people opted to use it. *Playboy Entm't*, 529 U.S. at 816, 823 (finding that the public's "collective yawn" greeting a targeted blocking tool did not invalidate it as a less restrictive alternative). The remedy for parental ignorance of the V-Chip is not content-based regulation of speech. *See id*. at 823-24.

[5] The 2002 Billboard Awards broadcast was rated TV-PG, and the 2003 Billboard Awards broadcast was rated TV-PG(DL). *Remand Order* ¶¶ 59, 18 (SPA-102, 83-84).

For purposes of the constitutional analysis, the V-Chip is an effective, less restrictive alternative to content-based regulation. And even if it were not, the FCC would be statutorily obligated to make it so. Under no circumstances, however, can the FCC simply dispense with the V-Chip in favor of censoring whatever speech it deems indecent.

C. The Current Indecency Regime is Unconstitutionally Vague.

According to the FCC, its definition of indecency "passed muster" in *Pacifica* and therefore is not vague. FCC Br. at 43. A citation to *Pacifica* for this alleged vagueness holding is conspicuously absent from the FCC's brief, for good reason: *Pacifica* explicitly declined to consider a vagueness challenge to the FCC's regime. *See Pacifica*, 438 U.S. at 742-43 (plurality opinion); *id*. at 761 n.4 (Powell, J., concurring) (expecting the FCC to "proceed cautiously" in regulating indecency, and therefore "not foresee[ing] an undue 'chilling' effect on broadcasters' exercise of their rights"). The best evidence that the Supreme Court did not *sub silentio* hold that the FCC's indecency policy was not unconstitutionally vague is the FCC's need to rely solely on an *amicus* brief filed in *Pacifica*, FCC Br. at 44, to argue that the question was somehow presented. But it is clear that the *amicus* submission did not put the vagueness issue before the Court. *See United Parcel Serv.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981) (noting that the Supreme Court does not consider arguments raised only by *amici*).

The FCC also attempts to rely on *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*"), which rejected a vagueness challenge based on the "seeming approval" of the Supreme Court in *Pacifica*. *Id*. at 1339; *see also Dial Info.*, 938 F.3d at 1541 (relying on *Pacifica*). But *ACT I* itself acknowledged that *Pacifica* had not addressed the vagueness challenge. *See ACT I*, 852 F.2d at 1338. The cases on which the FCC relies are based on little more than inferences and assumptions from silence in Supreme Court opinions; they provide no basis for preventing this Court from considering Fox's vagueness challenge on its merits.

While there is no vagueness holding in *Pacifica*, there is plainly one in *Reno* v. *ACLU*, 521 U.S. 844 (1997). That case struck down the Communications Decency Act's ("CDA") definition of "indecent," which was essentially identical to the FCC's broadcast indecency definition. *See id*. at 870-74; Fox Br. at 43-44. Thus, in the only decision of the Supreme Court to address a vagueness challenge to an indecency regulation, the Supreme Court concluded that a definition like that at issue here was unconstitutionally vague. The FCC futilely attempts to distinguish its indecency standard from the one at issue in *Reno*, FCC Br. at 45-46, but it is hard to see how "contemporary community standards for the broadcast medium" is really any different in operation than mere "contemporary community standards." The FCC's supposed expertise in this area cannot fill this explanatory

gap because the FCC has never articulated what those standards might be, instead doing nothing more than vaguely invoking its "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens." *Remand Order* ¶ 28 (SPA-87-88). Nor do the FCC's three "principal factors" make the indecency standard any less vague, because, as recent history demonstrates, those factors are so limitlessly flexible that they provide the FCC with boundless enforcement discretion. At bottom, the FCC's current indecency standard for fleeting and isolated expletives is so vague that it amounts to nothing more than "we know it when we hear it."

Reno did distinguish *Pacifica* in some respects, *see, e.g.*, *Reno*, 521 U.S. at 866-67, but it did so in deciding the different question of what "level of First Amendment scrutiny. . . should be applied to [the internet]." *Id*. at 870. The FCC's assertion that *Reno* addressed *Pacifica*'s application to the CDA "in all respects," FCC Br. at 47, is simply incorrect. *Reno* was the first case involving the First Amendment in cyberspace, *see Reno*, 521 U.S. at 849-53 (describing the internet), and Parts IV-V of the Court's opinion rejected the government's claim that the internet should receive only the same degree of First Amendment

protection as broadcasting. *See id*. at 866-67, 868-70.[6] In Part VI, however, the Court made the separate determination that the CDA was so vague it violated the First Amendment. *See id*. at 870-74. In this distinct section addressing vagueness, *Pacifica* did not figure in the Court's substantive analysis at all—nor could it, since *Pacifica* did not consider vagueness. Indeed, the only mention of *Pacifica* in the *Reno* Court's vagueness discussion was the rhetorical question of whether or not a speaker would know if "a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape" would constitute a violation of the CDA. *Id*. at 871. The *Pacifica* decision was simply irrelevant to *Reno*'s vagueness analysis.

The FCC argues at length that its inherently vague indecency enforcement regime is nonetheless constitutionally permissible because statutes do not need to achieve "meticulous specificity," FCC Br. at 48-50, but it cannot escape the fact that "standards of permissible statutory vagueness are strict in the area of free expression." *NAACP* v. *Button*, 371 U.S. 415, 432 (1963); *see also Smith* v. *Goguen*, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the doctrine demands a

[6] Although *Reno* distinguished the treatment of broadcasting and the internet, in the indecency context, the FCC "do[es] not believe that any purported diminished First Amendment rights of broadcasters justify more expansive restrictions than would apply to other media." *Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 2699 (1987).

greater degree of specificity . . . ."). As this Court has recognized, regulations "that implicate constitutionally protected rights, including the freedoms protected by the First Amendment, are subject to 'more stringent' vagueness analysis." *General Media Commc'ns, Inc.* v. *Cohen*, 131 F.3d 273, 286 (2d Cir. 1997) (quoting *Village of Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982)). The vagueness analysis is no less stringent here because the FCC enforces § 1464 with civil forfeitures. FCC Br. at 49. Section 1464 is itself a criminal statute and "[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice." *FCC* v. *ABC*, 347 U.S. 284, 296 (1954). And, contrary to the FCC's suggestion (FCC Br. at 49), vagueness analysis does not vary with the level of First Amendment scrutiny. *General Media*, on which the FCC relies, recognized no such variability based on the application of strict versus intermediate scrutiny but instead turned on the peculiar power of Congress to regulate the operations of the United States military. *See General Media*, 131 F.3d at 287.

Despite the wishful thinking of the FCC, FCC Br. at 50-51, its prior decisions (including the *Indecency Policy Statement*) fail to provide the necessary specificity to save the indecency standard, especially in the context of its novel, expanded regime that now includes isolated uses of potentially offensive words. Merely identifying various factors that can be applied in a limitless manner to

reach any result does not narrow the range of broadcast speech that can be subject to the FCC's censorship, and it is not enough for the FCC to invoke "context" when that is merely shorthand for the unbridled discretion of five Commissioners to decide what speech they approve and what speech they don't approve. Broadcasters thus are faced with a situation in which the FCC permits a program like *Saving Private Ryan* while it sanctions fewer instances of the *very same words* in the broadcasts at issue here. *Compare Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 FCC Rcd. 4507, 4509 ¶ 4 (2005) ("*Saving Private Ryan*") *with Remand Order* ¶ 3, 4 (SPA-78). Indecency enforcement is now so unpredictable that it does not give broadcasters fair notice of what is and is not allowed—the very indeterminacy that marks an unconstitutionally vague regulation. *See United States* v. *Williams*, 128 S. Ct. 1830, 1846 (2008).[7]

Furthermore, Fox's decision to edit the West Coast broadcasts of the programs at issue here, FCC Br. at 53, is more a reflection of the chilling effect of the FCC's unbridled enforcement practices and Fox's own broadcast standards than it is a sign that the FCC's regime is not vague. Despite what the FCC thinks,

[7] Given the FCC's frequent reliance on *FCC* v. *Fox*, FCC Br. at 52, it bears repeating that the Supreme Court's recent decision did not actually address Fox's constitutional vagueness arguments and thus plainly does not control the issue before this Court. *See FCC* v. *Fox*, 129 S. Ct. at 1819.

FCC Br. at 54, the chilling effect of its vague indecency regime is evident in broadcasters' decisions to refrain from showing programming like *Saving Private Ryan* or the Peabody award-winning *9/11* documentary. Indeed, broadcasters self-censored *Saving Private Ryan* despite prior FCC staff rulings that it was not indecent precisely because of the uncertainty created by the FCC's intervening *Golden Globe Order* that found but a single expletive to be indecent. *See Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975 (2004). Many broadcasters similarly self-censored the *9/11* documentary despite having twice before aired the same program, again out of fear engendered by the agency's new enforcement policy against fleeting and isolated expletives. As these examples demonstrate, broadcasters have had no choice but to act as if the FCC will enforce a total ban on potentially offensive words, so as to "steer far wider of the unlawful zone," *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958), and to restrict their expression "to that which is unquestionably safe." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964). This chilling state of affairs is not only intolerable, it is inherent in the FCC's expanded regime. The FCC will never be able to develop the sort of intelligible standards for distinguishing among scores of borderline cases involving an isolated or fleeting use of potentially offensive words that would give the industry sufficient guidance as to what is prohibited. This is precisely what the First Amendment prohibits.

CONCLUSION

For the foregoing reasons, the *Remand Order* should be vacated.

Respectfully submitted,

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

This reply brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this reply brief contains 5283 words (as determined by the Microsoft Word 2007 word-processing system used to prepare the brief), excluding the parts of the reply brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This reply brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this reply brief has been prepared in a proportionally spaced typeface using the Microsoft Word 2007 word-processing system in 14-point Times New Roman font.

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Fox Television Stations, Inc. v. *FCC,*
Case No. 06-1760-ag (L)

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November 12, 2009

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I hereby certify that two true and correct copies of the foregoing document were served via first class United States Mail on the persons, at the addresses, and on that date that appear below, and that an electronic copy of this document PDF format was served on these persons via electronic mail on the date that appears below.

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