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

OPPOSITION OF PETITIONER FOX TELEVISION STATIONS, INC. TO PETITION FOR REHEARING AND REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

RULE

ADMINISTRATIVE DECISIONS

INTRODUCTION

In 2004, the Federal Communications Commission launched a new campaign against purportedly indecent content in broadcast programming, abandoning a restrained enforcement policy that had stood for 25 years. In its stead, the FCC ushered in a new indecency enforcement regime under which a wide range of broadcast content would suddenly be declared to violate 18 U.S.C. § 1464. As part of its new indecency policy, the Commission issued a number of indecency orders and forfeitures, many of which—like the original order under review here—purported to provide the broadcast industry with general guidance as to what content the FCC would now find to be impermissibly indecent.[1] But the FCC's new indecency policy failed to provide consistent outcomes and rationales, leaving broadcasters with no meaningful signposts that would help them avoid multi-million-dollar fines from the FCC.

Fox Television Stations, Inc. ("Fox") and other broadcasters responded by challenging the FCC's new indecency policy on administrative, statutory and constitutional grounds. This court originally held that the FCC had failed to adequately explain its change in enforcement policy as required by the

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[1] *See, e.g.*, *Complaints Against Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 FCC Rcd. 2664, ¶ 1 (2006) ("*Omnibus Order*") (SPA-2) (ironically explaining order as an attempt to provide "guidance from the Commission about our rules" so that broadcasters would no longer "lack certainty regarding the meaning of our indecency and profanity standards").

Administrative Procedure Act, while also expressing doubts that the FCC's new policy could withstand constitutional scrutiny. *See Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444, 462 (2d Cir. 2007) ("*Fox 1*"). The Supreme Court reversed the APA ruling without reaching Fox's constitutional arguments, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("*Fox 2*"), although some Justices noted that "there is no way to hide the long shadow the First Amendment casts" over the FCC's regulation of indecency. *Id.* at 1828 (Ginsburg, J., dissenting). On remand to this court, a panel unanimously concluded that the FCC's current policy is impermissibly vague. *Fox Television Stations, Inc.* v. *FCC*, ___ F.3d ___, No. 06-1760-ag (2d Cir. July 13, 2010) ("*Fox 3*").

The FCC now asks the full court to rehear this case, claiming both that the panel's ruling somehow conflicts with cases including *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), and that the panel's decision signals the end of all enforcement of the broadcast indecency statute. Neither of these exaggerated claims warrants further review by this Court. The outcome of the panel's routine application of vagueness principles to the FCC's indecency policy is unsurprising in light of the expansion of the enforcement policy beyond the boundaries of *Pacifica* and the constellation of contradictory decisions that have come out of the agency, and there are no precedents that require a different result. Rehearing *en banc* is therefore not required to preserve the uniformity of the Court's opinions.

Fed. R. App. P. 35(a)(1). And, contrary to the FCC's over-reading of the panel opinion, the panel expressly acknowledged that the FCC could still attempt to craft a new indecency policy, provided it does so with sufficient clarity and respect for the First Amendment. The panel's decision therefore does not produce a result of such exceptional importance that this case should be reheard *en banc*. *Id.* 35(a)(2).

STATEMENT OF THE CASE

In *Pacifica*, a fractured Supreme Court narrowly upheld the FCC's authority to regulate broadcast indecency pursuant to 18 U.S.C. § 1464. As Justice Powell explained in his separate, controlling opinion, the Court approved "only the Commission's holding that [George] Carlin's [seven dirty words] monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion." 438 at 755-56 (Powell, J., concurring). Indeed, Justices Powell and Blackmun, who supplied the crucial votes for *Pacifica*'s 5-4 outcome, stressed that the FCC does not have "unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes." *Id.* at 759-60 (Powell, J., concurring). Both Justices were concerned that the FCC's indecency standard could lead broadcasters to self-censor protected speech, but they voted to uphold the FCC's order because "the Commission may be expected

to proceed cautiously, as it has in the past." *Id*. at 756, 760, 762 n.4 (Powell, J., concurring).

The Court's decision in *Pacifica* was thus "emphatically narrow." *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 127 (1989). And for roughly 25 years, the FCC carefully observed the limited scope of its authority under § 1464.[2] In 2001, the FCC articulated new criteria it would use to determine whether broadcast content was indecent, along with case comparisons designed to "illustrate the various factors that have proved significant in resolving indecency complaints."[3] The FCC then changed course and started applying these criteria to reach novel and unexpected results, beginning with its 2004 indecency finding based on Bono's fleeting statement during the *Golden Globe Awards* that his award was "fucking brilliant."[4] As the FCC abandoned its policy of restraint and dramatically expanded its broadcast indecency enforcement program, it failed to provide clear and consistent guidance to broadcasters, creating instead substantial

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[2] *See, e.g., WGBH Educ. Found.*, 69 F.C.C.2d 1250, ¶ 10 (1978) ("We intend strictly to observe the narrowness of the *Pacifica* holding.").

[3] *Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, ¶¶ 1, 10 (2001).

[4] *See Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975 (2004); *see also Complaints Against Various Television Licensees Concerning their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII Halftime Show*, 19 FCC Rcd. 19230, ¶¶17-24 (imposing $550,000 fine).

confusion about exactly what content would now be found to be indecent and thus expose broadcasters to massive forfeitures.

In 2006, the FCC attempted to alleviate some of the acknowledged confusion surrounding its new indecency policy by issuing the *Omnibus Order*. In that order, the FCC resolved indecency complaints involving a substantial number of different broadcasts, in an attempt to illustrate what is and is not permissible under the new, expanded policy. Some of those indecency complaints involved Fox's 2002 and 2003 live broadcasts of the *Billboard Music Awards*, and the FCC found certain celebrities' utterances of unscripted, fleeting expletives during those shows to be indecent under the new policy. *See Omnibus Order* ¶¶ 106, 120 (SPA-32, 35). The *Omnibus Order* only increased the confusion about the scope of the policy, however, because there was no discernable consistency to the FCC's rulings either within the *Omnibus Order* or compared with other still-valid FCC indecency precedents.

Fox and the other broadcast networks responded to the new chill on their free speech rights by challenging the FCC's *Omnibus Order* in this Court. After a voluntary remand to the FCC—in which the FCC reversed itself on some of the broadcasts at issue in the *Omnibus Order*[5]—this Court, by a 2-1 vote, initially concluded that the FCC's failure to justify adequately the change in its indecency

[5] *Complaints Against Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 FCC Rcd. 13299 (2006) ("*Remand Order*") (SPA-77).

enforcement policy was arbitrary and capricious in violation of the APA. *See Fox 1*, 489 F.3d at 446-47. In dicta, the Court also questioned whether any reasoned explanation for the FCC's change in policy with respect to fleeting expletives "would pass constitutional muster." *Id.* at 462. The panel majority recognized that indecent speech is fully protected by the First Amendment and described the FCC's test for whether such speech could be prohibited as "undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague." *Id.* at 463. In particular, this Court questioned how broadcasters could possibly know whether the broadcast of an expletive would be sanctioned based on the FCC's conflicting case law that appeared to reflect the FCC's "subjective view of the merit" of the particular program at issue. *Id.* at 463-64 (comparing inconsistent results).

A divided Supreme Court reversed and remanded the case for further consideration. *See Fox 2*, 129 S. Ct. 1800. The Supreme Court found that the FCC adequately justified its change in policy for purposes of the APA, *id.* at 1812, but it did not reach the constitutional arguments, instead remanding to allow this Court to "definitively rule on the constitutionality of the Commission's orders." *Id.* at 1819.

Consistent with its preliminary views in *Fox 1*, the panel evaluated the constitutional issues and held on remand that, at a minimum,[6] the FCC's new indecency enforcement policy was unconstitutionally vague. *Fox 3*, slip op. at 23.

[6] The panel did not address Fox's other constitutional arguments.

The panel's decision was a straightforward application of routine constitutional principles to the FCC's content-based regulation of speech. "The First Amendment requires nothing less" than "some degree of certainty [about] what the [indecency] policy is so that [broadcasters] can comply with it." *Id.* at 24. Although the FCC has articulated criteria that it purports to apply in making indecency determinations, the panel observed that those factors "hardly give[] broadcasters notice of how the Commission will apply the factors in the future." *Id.* at 23. The FCC's indecency policy "results in a standard that even the FCC cannot articulate or apply consistently." *Id*. at 26. The panel therefore found that the FCC's newly expanded indecency policy is unconstitutionally vague and struck it down. *Id*. at 32.

Although the specific broadcasts at issue in this case involved the use of fleeting expletives, the panel's opinion necessarily swept more broadly. The Court could not determine the constitutional validity of the FCC's decision on the broadcasts in question without addressing the entire policy that led to that decision, for several reasons. First, the scope of the panel's vagueness holding was required in part by the breadth of the FCC's new policy, which "creat[ed] a chilling effect that goes far beyond the fleeting expletives at issue here." *Id*. at 1. More fundamentally, the panel examined how the FCC had applied its new indecency policy in numerous other cases because the FCC has repeatedly suggested that

those other cases provide broadcasters with sufficient guidance to distinguish between content that is and is not allowed on television. *See, e.g.*, *Omnibus Order* ¶ 2 (SPA-2) (resolving "a broad range of factual patterns" to "provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard"); FCC Remand Br. 50-51 (arguing that the FCC's "numerous decisions applying its indecency analysis to specific factual situations" serve to eliminate any vagueness inherent in the indecency standard). As the FCC has itself emphasized, it is important to consider these various indecency decisions—"[t]aken both individually and as a whole," *Omnibus Order* ¶ 2 (SPA-2)—in order to understand the boundaries of its new indecency policy. The panel credited the FCC's attempts to provide additional guidance, but at the end of the day, correctly decided that the FCC's various indecency decisions are too inconsistent and ultimately irreconcilable to provide any meaningful guidance to broadcasters.

This is evident from the recent indecency decisions cited by the panel. *See Fox 3*, slip op. at 27-28 (comparing contradictory FCC rulings on various expletives); *id*. at 31 (describing inconsistent application of FCC's "bona fide news" and artistic necessity exceptions). For example, the FCC found that the broadcast of the movie *Saving Private Ryan*—which contained numerous instances of the words "fuck" and "shit"—was not indecent, because the expletives in the program were

"integral to the film's objective" and deleting them would "diminish[] the power, realism, and immediacy of the film experience."[7] Yet the FCC also found that the documentary *The Blues: Godfathers and Sons*—which included interviews with blues musicians who used the words "fuck" and "shit"—was indecent.[8] There is no way to reconcile these two applications of the FCC's indecency policy; it is inconceivable that "expletives could be more essential to the 'realism' of a fictional movie than to the 'realism' of interviews with real people about real life events." *Id.* at 28.

Unsurprisingly, the imprecision of the expanded indecency policy has chilled speech and led to widespread self-censorship by broadcasters. Broadcasters have declined to air such content as the Peabody Award-winning "9/11" documentary that contained raw footage of firefighters reacting to the September 11th attack and a live political debate where one of the politicians involved had previously used expletives on air. *See id.* at 29, 31 (citing examples). "[T]he absence of reliable guidance in the FCC's standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature." *Id.* at 32. To prevent this unconstitutional chill and remedy the

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[7] *Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 FCC Rcd. 4507, ¶ 14 (2005).

[8] *See Omnibus Order* ¶ 78 (SPA-25).

impermissible vagueness in the Commission's approach, the panel struck down the FCC's indecency policy and granted Fox's petition for review. *See id.*

ARGUMENT

En banc review is disfavored and ordinarily will not be permitted unless rehearing is required to maintain uniformity in this Court's decisions or to resolve a question of exceeding importance. Fed. R. App. P. 35(a). Neither condition is satisfied in this case. The FCC's argument that the panel's vagueness analysis was erroneous, FCC Pet. at 10-12, is both mistaken and irrelevant to whether *en banc* review should be granted. The FCC's suggestion that the panel opinion somehow conflicted with *Pacifica* or other vagueness decisions at least invokes an appropriate consideration under FRAP 35, *see id.* at 12-14, but an examination of the purported conflicts reveals no actual threat to the uniformity of this Circuit's law. Finally, the FCC acts as though the sky is now falling because the panel struck down its expanded indecency enforcement policy. *Id.* at 14-15. The panel expressly acknowledged, however, that the FCC may try again, and the panel's opinion therefore does not create the kind of exceptionally significant issue for which *en banc* review is warranted.

1. The panel's vagueness analysis was undoubtedly correct. "[S]tandards of permissible statutory vagueness are strict in the area of free expression." *NAACP* v. *Button*, 371 U.S. 415, 432 (1963); *see also Holder* v. *Humanitarian Law Project*,

130 S. Ct. 2705, 2719 (2010) ("[W]hen a statute 'interferes with the right of free speech or of association, a more stringent vagueness test should apply.'"). 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, Inc.*, 455 U.S. 489, 499 (1982)). Applying these principles in this case, the panel found that the FCC's conflicting indecency decisions "hardly give[] broadcasters notice of how the Commission will apply the [patent offensiveness] factors in the future." *Fox 3*, slip op. at 23.

The FCC contends that *Humanitarian Law Project* blocks Fox's vagueness challenge based on its claim that the content of Fox's two broadcasts at issue here was "'clearly proscribed.'" FCC Pet. at 11. This argument ignores the fact that the FCC's new prohibition on isolated instances of "fuck" or "shit" was part of a change in its indecency policy, the justification for which the agency litigated all the way to the Supreme Court. *See Fox 2*, 129 S. Ct. at 1812 (noting that the FCC "forthrightly acknowledged that its recent actions have broken new ground"). Fox could hardly have known that its content was "clearly proscribed" when that content would have been permissible under the agency's prior policy that proscribed only repetitive expletives. *See, e.g.*, *Remand Order* ¶ 60 (SPA-102)

(recognizing that "it was not apparent that Fox could be penalized for Cher's comment at the time it was broadcast"). It also makes no difference that Fox voluntarily edited the content in question for later broadcasts. Fox maintains its own standards and practices for its broadcast content that are distinct from the FCC's indecency requirements, and its business judgment to impose these internal standards on content that was unscripted and unexpected is not a concession that the original, unedited broadcasts were actionably indecent.

2. The panel's vagueness holding creates no conflict with *Pacifica* or any other decision that would warrant rehearing by this Court. *Pacifica* contains no vagueness holding. *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988) ("*ACT*") (noting that the Supreme Court did not rule on vagueness). Moreover, despite the FCC's protests, the panel did not hold that the FCC cannot take account of context in enforcing § 1464. To the contrary, the panel expressly recognized that "context is always relevant" to indecency determinations, and "we do not mean to suggest otherwise in this opinion." *Fox 3*, slip op. 28. But as the panel recognized, "[i]t does not follow that the FCC can justify any decision to sanction indecent speech by citing 'context.'" *Id.* The FCC attempts to do just that with the specious suggestion that the substance of its indecency policy is unchanged since *Pacifica*, FCC Pet. at 13, despite the FCC's having gone all the way to the Supreme Court to justify what it acknowledged was

a change in policy. *Fox 2*, 129 S. Ct. at 1812. The FCC's expanded indecency policy has now moved so far beyond the narrow holding of *Pacifica* that there is simply no way for this Court's analysis of the indecency policy to conflict with the actual decision in *Pacifica*.

Similarly, the panel's vagueness holding creates no conflict with *ACT* or *Dial Information Services Corp. of N.Y.* v. *Thornburgh*, 938 F.2d 1535 (2d Cir. 1991).[9] *ACT* frankly acknowledged that "the Court did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague" but then simply "infer[red]" that the policy was not vague while welcoming correction by "Higher Authority" if it had misunderstood. *ACT*, 852 F.2d at 1338-39. *ACT* also expressly relied on the FCC's formerly restrained approach to indecency enforcement, a policy that the agency has now abandoned. *See Fox 3*, slip op. at 22 n.8 (citing *ACT*, 852 F.2d at 1340 n.14). *Dial Information Services* in turn relied on *ACT* to find that a similar FCC definition of indecency in an analogous statutory scheme was not vague, without engaging in any independent vagueness analysis. *Dial Info. Servs.*, 938 F.2d at 1541 (citing *ACT*, 852 F.2d at 1338-39). More importantly, both *ACT* and *Dial Information Services* preceded the Supreme Court's opinion in *Reno*, which held that an indecency definition identical to the

[9] The FCC has prudently abandoned its prior argument that *Pacifica* itself forecloses a vagueness challenge to indecency enforcement. *See Fox 3*, slip op. 21. Because *Pacifica* did not address vagueness, there is no possible conflict between the panel's vagueness analysis and that Supreme Court precedent.

FCC's broadcast indecency policy was unconstitutionally vague. *Reno* v. *ACLU*, 521 U.S. 844, 870-74 (1997). *Reno* thus undermines both *ACT* and *Dial Information Services* on the vagueness question, and this Court must apply that controlling precedent in this case. Even if the additional guidance provided by the FCC in its various indecency decisions means that *Reno* does not directly compel a vagueness finding in this case, *see Fox 3*, slip op. 21, *Reno* trumps any possible conflict between the panel decision and both *ACT* and *Dial Information Services*.

3. Contrary to the Commission's over-reading, the panel's opinion does not make FCC enforcement of the broadcast indecency statute impossible. The panel opinion "do[es] not suggest that the FCC could not create a constitutional policy." *Id.* at 32. The panel did not overturn *Pacifica*—under which the FCC has regulated indecent broadcasts for 30 years—or the underlying indecency statute. Nowhere does the panel demand "extreme precision," as the FCC now pretends. FCC Pet. at 14. Rather, "[t]he First Amendment requires nothing less" than "some degree of certainty [about] what the [indecency] policy is." *Fox 3*, slip op. 24. That degree of certainty may not entail a bright-line prohibition on certain words or images, as the FCC now suggests. FCC Pet. at 14-15. The FCC may devise some more flexible approach to regulating indecency that will meet its regulatory objectives, especially in light of the restraint shown by broadcasters in declining to air potentially offensive material even during the safe harbor period from 10 p.m.

to 6 a.m. *See Remand Order* ¶ 29 (SPA-88) (citing networks' policies against offensive language during all parts of the day). Articulating some reasonably clear indecency standard may well be challenging for the FCC. Such a regulatory burden, however, is a necessary cost imposed by the First Amendment whenever the government attempts to control the content of speech. It is a not a burden that the *en banc* court can or should lift from the FCC's shoulders.

CONCLUSION

For the foregoing reasons, the petition for rehearing and rehearing *en banc* should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
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This 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 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,*
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September 21, 2010

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