THIRD SUPPLEMENTAL BRIEF FOR THE FCC AND THE UNITED STATES

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

06-3575

CBS CORPORATION, CBS BROADCASTING, INC., CBS TELEVISION STATIONS INC., CBS STATIONS GROUP OF TEXAS L.P., AND KUTV HOLDINGS, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

TONY WEST
ASSISTANT ATTORNEY GENERAL

THOMAS M. BONDY
ANNE MURPHY
ATTORNEYS, CIVIL DIVISION
APPELLATE STAFF

U.S. DEPARTMENT OF
JUSTICE
WASHINGTON, D.C. 20530

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

NANDAN M. JOSHI
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418–1740

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Administrative Decisions

Statutes and Regulations

Others

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

06-3575

CBS CORPORATION, CBS BROADCASTING, INC., CBS TELEVISION STATIONS INC., CBS STATIONS GROUP OF TEXAS L.P., AND KUTV HOLDINGS, INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

THIRD SUPPLEMENTAL BRIEF FOR THE FCC AND THE UNITED STATES

STATEMENT OF THE ISSUES

The underlying issue in this case is whether the Commission lawfully imposed a forfeiture on CBS for willfully violating federal statutory and regulatory prohibitions against broadcast indecency by airing images of Janet Jackson's exposed breast during the 2004 Super Bowl halftime show.

This Court's post-argument letter of November 23, 2010, directed the parties to file briefs addressing the following question:

Assuming we reach the issue of scienter, and assuming recklessness is the minimum standard of culpability for imposition of a civil forfeiture penalty, is the standard for recklessness the one commonly used in the civil context or the one commonly used in the criminal context?

BACKGROUND

1. Federal law prohibits the broadcast of "indecent . . . language by means of radio communication." 18 U.S.C. § 1464. *See generally FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). FCC regulations prohibit television and radio licensees from broadcasting "any material which is indecent" between the hours of 6 a.m. and 10 p.m. 47 C.F.R. § 73.3999(b).

Under the Communications Act, the FCC is empowered to impose a monetary "forfeiture penalty" on any person who has "willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter," 47 U.S.C. § 503(b)(1)(B), or who has "violated any provision of section 1304, 1343, 1464, or 2252 of title 18," *id*. § 503(b)(1)(D). The Act defines the "term 'willful', when used with reference to the commission or omission of any act," to "mean[] the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter." 47 U.S.C. § 312(f).

2. On February 1, 2004, CBS broadcast the Super Bowl XXXVIII halftime show, which culminated with Justin Timberlake tearing off part of Janet Jackson's bustier and exposing her breast to a nationwide television audience. The Commission ruled that the broadcast was indecent and that CBS should be held liable for a monetary forfeiture in the amount of $550,000. *See Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 FCC Rcd 2760 (2006) ("*Forfeiture Order*") (J.A. 6), *on recon.*, 21 FCC Rcd 6653 (2006) ("*Reconsideration Order*") (J.A. 40). The Commission found that "CBS acted willfully because it consciously and deliberately broadcast the halftime show, whether or not it intended to broadcast nudity, and because it consciously and deliberately failed to take reasonable precautions to ensure that no actionably indecent material was broadcast." *Forfeiture Order*, 21 FCC Rcd at 2768 ¶ 15 (J.A. 14).

3. On initial review, this Court remanded for further explanation of the basis for the Commission's willfulness determination. *CBS Corp. v. FCC*, 535 F.3d 167, 189-209 (3d Cir. 2008), *vacated*, 129 S. Ct. 2176 (2009). The Court recognized that "the Commission's interpretation of the Communications Act, including the relevant forfeiture provisions of 47 U.S.C. § 503(b)(1), would be entitled to considerable deference." *Id.* at 204. The Court nevertheless concluded that "further clarification from the FCC is necessary before it may be determined

whether the agency correctly concluded that CBS's actions constituted a 'willful' violation of the indecency provisions," *id.* at 205.

Ruling that "scienter is the constitutional minimum showing" for an indecency forfeiture, *CBS*, 535 F.3d at 205, the Court found that "[r]ecklessness would appear to suffice as the appropriate scienter threshold for the broadcast indecency regime," *id.* at 206. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007) ("where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well."). In this regard, the Court stated that a "broadcaster's failure to use available preventative technology, such as a delay mechanism, when airing live programming may, depending on the circumstances, constitute recklessness." *CBS*, 535 F.3d at 207. The Court found, however, that it was unclear from the record whether CBS "acted recklessly and not merely negligently when it failed to implement a video delay mechanism for the Halftime Show broadcast." *Id.* at 208. The Court remanded for further explanation because it was "unable to decide whether the Commission's determination that CBS acted 'willfully' was proper in light of the scienter requirement." *Id.*

4. After the government petitioned for a writ of certiorari, the Supreme Court (in *FCC v. CBS Corp.*, 129 S. Ct. 2176 (2009)) vacated this Court's decision and remanded the case for further proceedings in light of *FCC v. Fox Television*

Stations, Inc., 129 S. Ct. 1800 (2009), which had described the exception to the Commission's broadcast indecency policies as limited to "nonliteral expletives." *Id*. at 1807. This Court held argument in the remand proceeding on February 23, 2010.

SUMMARY OF ARGUMENT

The recklessness standard that applies to forfeiture penalties for violations of federal indecency restrictions is the one commonly used in the civil context. Although broadcast indecency violations can carry both civil and criminal penalties, the Communications Act has from the beginning distinguished between the *mens rea* needed for criminal liability and the state of mind required for the imposition of civil sanctions by the FCC. The Supreme Court in *Pacifica* concluded that none of the amendments to the Communications Act since the statute's enactment altered the "independence" of the criminal and civil provisions applicable to indecency violations. 438 U.S. at 739 n.13. Application of a civil recklessness standard, moreover, is critical to ensure that broadcasters cannot engage in an end-run around federal indecency restrictions with respect to the broadcast of live events.

Nor does the First Amendment require the application of criminal recklessness to civil indecency forfeitures. Contrary to CBS's argument, the reckless disregard standard set forth in *New York Times Co. v. Sullivan*, 376 U.S.

254 (1964), is limited to the context of speech involving public figures and matters of public concern. Such core political speech receives the greatest constitutional protection. By contrast, patently offensive sexual (or excretory) displays, such as those at issue here, " 'surely lie at the periphery of First Amendment concern.' " *Fox*, 129 S. Ct. at 1819 (quoting *Pacifica*, 438 U.S. at 743 (plurality op.)). The First Amendment concerns that caused the Court to fashion an "actual malice" standard for scienter in *New York Times* thus have no application to this case.

ARGUMENT

THE CIVIL RECKLESSNESS STANDARD APPLIES TO INDECENCY FORFEITURES IMPOSED UNDER 47 U.S.C. § 503

The FCC is authorized to impose a civil "forfeiture penalty" on any person who has "willfully or repeatedly failed to comply with any" FCC regulation, 47 U.S.C. § 503(b)(1)(B), or who has "violated . . . section . . . 1464," *id.* § 503(b)(1)(D). In this case, the FCC found CBS civilly liable for the broadcast of indecent content during the Super Bowl halftime show because the evidence showed that CBS had "knowledge of the risks [of an indecent broadcast] and [made] conscious and deliberate omissions of the acts necessary to address them." *Reconsideration Order*, 21 FCC Rcd at 6662 ¶ 23 (J.A. 49). As we have previously explained, the Commission's finding that CBS willfully violated federal

indecency restrictions "was, in substance, a finding that CBS was reckless." FCC Second Supp. Br. 13.

In the prior opinion in this case, this Court concluded that "[r]ecklessness would appear to suffice as the appropriate scienter threshold for the broadcast indecency regime." 535 F.3d at 206. As discussed below, the appropriate recklessness standard to be applied is the one commonly used in the civil context. The statutory history of Section 503(b), as discussed in *Pacifica*, makes clear that the state of mind needed to support civil sanctions always has been distinct from the *mens rea* required for criminal liability. Importing a criminal recklessness standard into Section 503(b) would be inconsistent with *Pacifica* and the longstanding statutory scheme. Nothing in the First Amendment requires such a result.

A. THE STATUTORY HISTORY SHOWS THAT DISTINCT STATE-OF-MIND REQUIREMENTS APPLY TO CIVIL AND CRIMINAL ENFORCEMENT OF FEDERAL INDECENCY RESTRICTIONS

As originally enacted, the prohibition against the broadcast of indecency was located in Section 326 of the Communications Act. *See* Communications Act of 1934, ch. 652, § 326, 48 Stat. 1064, 1091. Different sections of the Act authorized civil and criminal penalties. Section 312 authorized the FCC to revoke the license of a broadcaster for a "violation" of any provision of the Act, including the indecency ban. *Id.* § 312, 48 Stat. at 1086-87 ("Any station license may be

revoked . . . for violation of . . . this Act").[1] Section 501, by contrast, authorized a broadcaster to be held criminally liable for violating the Act only if the violation was "willful[] and knowing[]." *Id.* § 501, 48 Stat. at 1100. Thus, the Act expressly required a heightened *mens rea* showing as a precondition to criminal liability, but left to the Commission's judgment the state of mind needed to justify administrative sanctions.[2]

In 1948, the broadcast indecency prohibition was moved from Section 326 of the Communications Act to 18 U.S.C. § 1464 in connection with the codification of the criminal code. Act of June 25, 1948 (1948 Act), ch. 645, 62 Stat. 683, 769. As codified, Section 1464 did not contain any express *mens rea* standard. As the Supreme Court explained in *Pacifica*, however, "[a]lthough the 1948 codification of the criminal laws . . . change[d] the statutory structure, no substantive change was apparently intended." 438 U.S. at 739 n.13.

Congress subsequently amended the Communications Act to address the FCC's civil enforcement powers, but chose not to import the criminal *mens rea*

[1] The Commission also could enforce the broadcast indecency restriction pursuant to its public interest authority by denying license renewals. Communications Act § 309(a), 48 Stat. at 1085.

[2] The precursor to the Communications Act – the Radio Act of 1927 – employed a similar framework, *see* ch. 169, §§ 14 (license revocation), 29 (indecency restriction), and 33 (criminal prohibition), 44 Stat. 1162, 1168, 1173, although the text of that statute did not expressly specify the *mens rea* standard for the provision imposing criminal liability.

standard into the administrative setting. Instead, it adopted a new formulation that authorized civil sanctions, ultimately including revocation and monetary forfeitures, for "willful or repeated" violations of the Communications Act. *See* 47 U.S.C. §§ 312(a)(4), 503(b)(1)(B).[3] The "willful or repeated" standard – first adopted in 1952 as an amendment to Section 312 (*see* Communications Act Amendments, 1952, ch. 879, § 10, 66 Stat. 711, 716) – was designed to "dispel any fear that the revocation or suspension sanction would be utilized by the Commission with respect to conduct which is inadvertent." *Amending Communications Act of 1934, Hearings Before the H. Comm. on Interstate and Foreign Commerce*, 82d Cong. 100 (1951) (Statement of Hon. Wayne Coy, Chairman, FCC).

In *Pacifica*, the Supreme Court surveyed the statutory history of these provisions and found that although the "statutes authorizing civil penalties incorporate § 1464, a criminal statute," "the validity of the civil sanctions is not linked to the validity of the criminal penalty"; rather, the legislative history "establishes their independence." 438 U.S. at 739 n.13. *Pacifica* accordingly

[3] Sections 312(a) and 503(b)(1) do not expressly state that a violation of "section . . . 1464" need be "willful or repeated." 47 U.S.C. §§ 312(a)(6), 503(b)(1)(D). In this case, the Commission implicitly concluded that CBS's willful behavior was sufficient for liability under Section 503(b)(1)(D). *Forfeiture Order*, 21 FCC Rcd at 2767 ¶ 15 (J.A. 13). It therefore had no need to address whether CBS could have been held liable under a lesser *mens rea* standard. *See* FCC Second Supp. Br. at 8.

stated that in cases involving the FCC's civil enforcement authority, courts "need not consider *any* question relating to the possible application of § 1464 as a criminal statute." *Id.* (emphasis added). *Pacifica* thus makes clear that the Commission's civil enforcement of the prohibition against broadcast indecency is not affected in any respect by the prohibition's current placement in the Criminal Code.

In civil cases, a person is reckless if he "acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). Criminal recklessness, on the other hand, attaches "when a person disregards a risk of harm of which he is aware." *Id.* at 837. In other words, "[u]nlike civil recklessness, criminal recklessness also requires subjective knowledge on the part of the offender" with regard to the risk of harm arising from his actions or failures to act. *Safeco Ins.*, 551 U.S. at 68. Here, there can be no serious dispute that a forfeiture under Section 503(b)(1) is civil in nature. As the Court recognized in *Pacifica*, "[e]ven the strongest civil penalty at the Commission's command does not include criminal prosecution." 438 U.S. at 747 n.25.

CBS has argued that "[i]t is untenable to suggest differing levels of *scienter* apply depending on whether the FCC seeks to fine a broadcaster as opposed to

referring the matter to DOJ for prosecution." CBS Further Supp. Br. 11. But, as *Pacifica* recognizes, the manner in which Congress granted the Commission's civil enforcement authority "establishes the[] independence" of the Communication Act's civil sanctions from any potential criminal penalties, 438 U.S. at 739 n.13.[4]

In sum, as *Pacifica* recognizes, Congress has distinguished between civil and criminal enforcement mechanisms in the Communications Act and has adopted and maintained distinct state-of-mind standards for these very different types of proceedings. In light of *Pacifica*'s analysis of the statutory history and structure, it would be error to read a criminal recklessness standard into Section 503(b)(1).

Application of a civil recklessness standard is also critical to the FCC's ability to effectively enforce federal indecency restrictions against broadcast licensees. As this Court previously recognized, if the scienter threshold for

[4] CBS contends (CBS Further Supp. Br. 11) that *FCC v. ABC*, 347 U.S. 284, 296 (1954), prohibits different state-of-mind standards for civil and criminal enforcement of Section 1464 because the result would be different constructions of Section 1464 for civil and criminal purposes. Justice Stewart, however made exactly the same argument in his dissent in *Pacifica*. 438 U.S. at 780 n.8. Specifically, Justice Stewart disagreed with the "Court's statement" in footnote 13 of the majority opinion "that it need not consider the meaning of § 1464 would have in a criminal prosecution" because, he argued, *ABC* precludes adopting "one construction for the Federal Communications Commission and another for the Department of Justice." *Id.* (citation omitted). The *Pacifica* majority implicitly rejected that argument, however, concluding instead that the statutory history showed that the civil and criminal enforcement provisions governing broadcast indecency retained their historical "independence." *Id.* at 739 n.13.

indecency forfeitures were set at an "actual knowledge or intent standard," it would "creat[e] an end-around indecency restrictions"; broadcasters would have no duty to "exercise proper control over the unscripted content of [their] programming" or to "use available preventative technology, such as a delay mechanism, when airing live programming." *CBS*, 535 F.3d at 206, 207; *see also Forfeiture Order*, 21 FCC Rcd at 2771 ¶ 22 (J.A. 17) (expressing concern that broadcast licensees would " 'push[] the envelope' " and "then disavow responsibility – leaving no one legally responsible for the result"). But these very concerns likewise would arise under a criminal recklessness standard, which focuses on the subjective state of mind of the broadcaster. Under a subjective approach, a broadcaster would no longer be responsible for addressing risks "so obvious that it should be known." *Farmer*, 511 U.S. at 836. Instead, liability would hinge on whether the broadcaster subjectively "draw[s] the inference" that such risks exist. *Id.* at 837. Putting aside the "conceptual difficulty" of ascertaining the subjective state of mind of a large corporation like CBS, *cf. id.* at 841, a subjective standard would exempt licensees from any duty to ascertain the risks of an indecent broadcast in the context of a live event and would instead reward those broadcasters that elect to remain willfully blind to the obvious risks presented in those situations.

The example of *Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd 1751 (2004), which this Court cited as "indicative of recklessness" (*CBS*, 535 F.3d

at 207 n.35), is illustrative. There, a San Francisco television station broadcast a live interview with "two male performers who tour with the stage production 'Puppetry of the Penis,' . . . in which they appear nude in order to manipulate and stretch their genitalia to simulate a wide variety of 'installations,' including objects, architecture, and people." 19 FCC Rcd at 1752 ¶ 3. The host of the show agreed to let the performers demonstrate; "[a]s the performers stood and apparently turned away from the camera to demonstrate their act to the show's hosts, the penis of one was fully exposed on-camera." *Id.* As this Court explained, the broadcaster in *Young* "presented inherently risky programming," it knew that the performers were "nude below their overcoats," and it knew that they "employed nudity as a central part of their act." *CBS*, 535 F.3d at 207 n.35. Nonetheless, under the criminal law's subjective recklessness standard, the broadcaster in *Young* would have no responsibility to take adequate precautions to address the risks that its actions created in the absence of sufficient evidence that the broadcaster was actually "aware" of such risks. *Farmer*, 511 U.S. at 837. The fact that those risks were "so obvious that [they] should be known," *id.* at 836, would presumably not provide an adequate ground to impose a forfeiture.

At a minimum, if the Court cannot find that statutory history and *Pacifica* unambiguously call for a civil recklessness standard in this case, it should allow the Commission to address this issue on remand. The Court has recognized that

"the Commission's interpretation of the Communications Act, including the relevant forfeiture provisions of 47 U.S.C. § 503(b)(1), would be entitled to considerable deference." *CBS*, 535 F.3d at 204. And in our prior filings, we have argued that a remand is appropriate to provide the FCC an opportunity to address the relationship between Section 503(b)(1)(B), which authorizes the Commission to impose monetary forfeitures for "willful[] or repeated[]" failures to comply with the Act or the regulations promulgated thereunder, and Section 503(b)(1)(D), which authorizes the Commission to impose such forfeitures on persons who have "violated . . . section . . . 1464" of title 18, *see* FCC Supp. Br. 37. Given the current posture, the Commission should have an opportunity in the first instance to consider any argument that a criminal recklessness standard should apply to civil sanctions for violations of federal indecency restrictions.

B. THE FIRST AMENDMENT DOES NOT REQUIRE THE APPLICATION OF A CRIMINAL RECKLESSNESS STANDARD TO CIVIL INDECENCY FORFEITURES

Separate from any issue of statutory construction, CBS has argued that the First Amendment requires "[h]eightened *mens rea* requirements" that are "the functional equivalent of the showing necessary for criminal liability." CBS Further Supp. Br. 12. Specifically, CBS contends that the "reckless disregard" standard set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964), should

apply to civil indecency forfeitures. CBS Further Supp. Br. 10 n.7, 12. That argument lacks merit.

At issue in *New York Times* was the application of First Amendment principles to state-law defamation actions. The Supreme Court held that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280. The Court has stated that the *New York Times* recklessness standard "is a subjective one"; the reckless disregard standard asks whether " 'the defendant actually had a 'high degree of awareness of . . . probable falsity.' " *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

Contrary to CBS's argument, the *New York Times* standard does not establish a general scienter threshold for all civil cases implicating the First Amendment. Even within the sphere of civil defamation actions, the reckless-disregard standard is not a universal constitutional minimum that applies regardless of the nature of the speech at issue or the broader factual context. For example, states are allowed to set a fault threshold below that required under *New York Times* in defamation suits brought by individuals who are not public figures. *See*

Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986). Thus, as this Court has recognized, *New York Times* did not create a one-size-fits-all scienter threshold for all civil cases implicating speech; instead, the Supreme Court "has implicitly recognized the need for balancing when a novel issue arises." *See U.S. Healthcare v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 928 (3d Cir.), *cert. denied*, 498 U.S. 816 (1990).

The considerations that led the Supreme Court to adopt a subjective recklessness standard in defamation actions against public figures are wholly absent here. As this Court has explained, "[a]lthough speech is generally protected, the Supreme Court has 'long recognized that not all speech is of equal First Amendment importance . . .; [i]t is speech on "matters of public concern" that is "at the heart of the First Amendment's protection."'" *U.S. Healthcare*, 898 F.2d at 928 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-759 (1985), quoting in turn *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). Such speech "occupies the highest rung of the hierarchy of First Amendment values." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted). And it is "[t]o provide breathing space for true speech on matters of public concern" that "the Court has been willing to insulate even *demonstrably* false speech from liability, and has imposed additional requirements

of fault upon the plaintiffs in a suit for defamation." *Hepps*, 475 U.S. at 778 (internal citation and quotation marks omitted).

Indecent speech does not occupy the same place in the constitutional hierarchy. Patently offensive displays of sexual or excretory material "are no essential part of any exposition of ideas," *Pacifica*, 438 U.S. at 746 (plurality op.) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)), and such displays " 'surely lie at the periphery of First Amendment concerns.' " *Fox*, 129 S. Ct. at 1819 (quoting *Pacifica*, 438 U.S. at 743 (plurality op.)). Indeed, in *Hustler Magazine v. Falwell*, the Supreme Court expressly distinguished "the sort of expression" to which the *New York Times* standard applies from "speech that is vulgar, offensive, and shocking" and that, under *Pacifica*, "is not entitled to absolute constitutional protection under all circumstances." 485 U.S. 46, 56 (1988) (internal quotation marks omitted) (quoting *Pacifica*, 438 U.S. at 747).

Moreover, the First Amendment analysis must take account of the government's "competing interests" concerning the regulation of broadcast indecency. *U.S. Healthcare*, 898 F.2d at 930. Although broadcasters engage in speech, they are not like other speakers. A broadcast licensee is " 'granted the free and exclusive use of a limited and valuable part of the public domain,' " in exchange for which it agrees to be " 'burdened by enforceable public obligations,' " including the obligation not to broadcast indecent material. *Fox*, 129 S. Ct. at 1806

(quoting *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981)). The government has a substantial interest in ensuring that broadcasters live up to the responsibilities that they have assumed.

In short, broadcasts of patently offensive sexual and excretory displays are not the "sort of expression" for which the *New York Times* standard was fashioned, *Hustler*, 485 U.S. at 56, and for the reasons given above, that standard is ill-suited to the task of civilly enforcing the public interest responsibilities of broadcast licensees. There is therefore no reason for this Court not to apply an objective recklessness standard – the one commonly used in the civil context – to the civil forfeiture provisions at issue in this case.

CONCLUSION

For the foregoing reasons and those given in prior filings, the Commission's determination that CBS's broadcast of the 2004 Super Bowl halftime show was indecent within the meaning of federal law prohibitions against the broadcast of indecent material should be affirmed. The Court should hold that the recklessness standard to be applied here is the one commonly used in the civil context; in the alternative, the Court should remand to allow the FCC to determine in the first instance the appropriate recklessness standard to be applied under Section 503(b).

Respectfully submitted,

TONY WEST
ASSISTANT ATTORNEY GENERAL

THOMAS M. BONDY
ANNE MURPHY
ATTORNEYS, CIVIL DIVISION
APPELLATE STAFF

U.S. DEPARTMENT OF
JUSTICE
WASHINGTON, D.C. 20530

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

/s/ Nandan M. Joshi
NANDAN M. JOSHI
COUNSEL

FEDERAL COMMUNICATIONS
COMMISSION
WASHINGTON, D.C. 20554
(202) 418–1740 (TELEPHONE)
(202) 418–2819 (FAX)

DECEMBER 22, 2010

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

CBS CORPORATION, CBS BROADCASTING, INC., CBS TELEVISION STATIONS INC., CBS STATIONS GROUP OF TEXAS L.P., AND KUTV HOLDINGS, INC.,	)	
PETITIONERS,	)	
V.	)	06-3575
FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF America,	)	
RESPONDENTS.	)	

COMBINED CERTIFICATE OF COMPLIANCE

Pursuant to the type-volume limitations of Fed. R. App. P. 32, I hereby certify that the accompanying "Third Supplemental Brief for the FCC and the United States" has been prepared in a proportionally spaced typeface (14 point Times New Roman) using Microsoft Word 2003 and contains 4111 words.

Pursuant to 3d Cir. L.A.R. 31.1(c), I further certify that the text of the electronic version of the brief is identical to the text in the paper copies, and that the submitted PDF has been scanned for viruses with Symantec Endpoint Protection version 11 and that no virus has been detected.

/S/ Nandan M. Joshi
NANDAN M. JOSHI
COUNSEL
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418–1740 (TELEPHONE)
(202) 418–2819 (FAX)

DECEMBER 22, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CBS Corporation, CBS Broadcasting, Inc., CBS Television Stations Inc., CBS Stations Group of Texas L.P., and KUTV Holdings, Inc., Petitioners,

v.

Federal Communications Commission and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Nandan Joshi, hereby certify that on December 22, 2010, I electronically filed the foregoing Third Supplemental Brief for the FCC and the United States with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Robert Corn-Revere, Esq.
Davis, Wright & Tremaine
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20005
Counsel for: CBS Corporation, CBS Broadcasting Inc., CBS TV Stations Inc., CBS Stations Group TX, KUTV Holdings Inc.

Jerome J. Shestack
WolfBlock
1650 Arch Street
22nd Floor
Philadelphia, PA 19103
Counsel for: CBS Corporation, CBS Broadcasting Inc., CBS TV Stations Inc., CBS Stations Group TX, KUTV Holdings Inc.

Nancy Winkelman
Schnader Harrison Segal & Lewis
1600 Market Street
Suite 3600
Philadelphia, PA 19103
Counsel for: CBS Corporation, CBS Broadcasting Inc., CBS TV Stations Inc., CBS Stations Group TX, KUTV Holdings Inc., Henry Geller, Glen Robinson

Thomas M. Bondy
Eric D. Miller
United States Department of Justice
Civil Division
Room 7535
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Counsel for: USA

John B. Morris, Jr.
Center for Democracy & Technology
1634 I Street, N.W.
Suite 1100
Washington, D.C. 20006
Counsel for: CTR Democracy & Tech, Adam Thierer

Andrew J. Schwartzman, Esq.
Media Access Project
1625 K Street, N.W.
Suite 1000
Washington, D.C. 20006
Counsel for: Center for Creative Voices in Media

Carter G. Phillips
Sidley Austin
1501 K Street, N.W.
Washington, D.C. 20005
Counsel for: Fox TV Stations Inc.

Christopher T. Craig
Sparks & Craig
6862 Elm Street
Suite 360
McLean, VA 22101
Counsel for: Parents TV Council

Thomas B. North
No. 11
1387 North State Street
St. Ignace, MI 49781
Counsel for: Thomas B. North

David P. Affinito
Dell'Italia, Affinito & Santola
18 Tony Galento Plaza
Orange, NJ 07050
Counsel for: Morality Media Inc.

Steven H. Aden
Alliance Defense Fund
801 G Street, N.W.
Suite 509
Washington, D.C. 20001
Counsel for: Morality Media Inc.

/s/ Nandan Joshi