No. 10-1293

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, PETITIONERS

v.

ABC, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

Cases: Page

Statutes:

Miscellaneous: Page

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In a case involving expletives (*Fox*), the Second Circuit "str[uck] down the FCC's indecency policy" in its entirety on the ground that the policy was facially vague. Pet. App. 34a. In a second case involving scripted adult nudity (*ABC*), the court of appeals confirmed the breadth of its prior decision by overturning the Commission's order on the ground that *Fox* "binds this panel." *Id.* at 124a. The court of appeals' holding that the FCC's "indecency policy" is unconstitutionally vague

in its entirety conflicts with the D.C. Circuit's recognition that, in light of this Court's decision in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*), such a "vagueness challenge * * * is not open to lower courts." *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1335 (1988) (*ACT I*) (R.B. Ginsburg, J.). The court of appeals also erred by facially invalidating the FCC's indecency policy based on perceived inconsistencies between adjudications not before the court, without inquiring whether the Commission's policy was vague as applied to the particular broadcasts at issue. See *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (*HLP*). The Second Circuit's decisions effectively disable the Commission from enforcing the prohibition on broadcast indecency that has existed since the early years of broadcast communications. This Court's review is warranted.

1. In *Pacifica*, this Court rejected a constitutional challenge to an FCC indecency finding. The Court observed with approval that, under the FCC's approach to resolving issues of broadcast indecency, "context is all-important." 438 U.S. at 750. The Court also found "no basis for disagreeing with the Commission's conclusion that indecent language was used in [the] broadcast" before it, *id.* at 741, a holding irreconcilable with the view that the Commission's standard for determining indecency was unconstitutionally vague. Although the FCC has since expanded its indecency policy to cover isolated offensive words and images where circumstances warrant, it has adhered since *Pacifica* to the view that the presence or absence of indecency turns in part on the context in which particular words or images appear. See *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1812 (2009) (*Fox*) (explaining that "the Commission's

decision to look at the patent offensiveness of even isolated uses of sexual and excretory words" conformed to "the context-based approach" that the Court had "sanctioned in *Pacifica*"). The D.C. Circuit has repeatedly recognized that *Pacifica* forecloses any vagueness challenge to the FCC's indecency policy. See *Act I*, 852 F.2d at 1337-1338; *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) (*ACT II*), cert. denied, 503 U.S. 913, 914 (1992); *Action for Children's Television* v. *FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) (en banc) (*ACT III*), cert. denied, 516 U.S. 1043 (1996).

Fox contends that this Court's decision in *Reno* v. *ACLU*, 521 U.S. 844 (1997), which held that the Communications Decency Act's regulation of indecent expression on the Internet was unconstitutionally vague, "trumps any possible conflict." Fox Br. in Opp. 21; see ABC Br. in Opp. 9-10. Fox professes to find it "startling" and "remarkabl[e]" that the government did not discuss *Reno* in its petition for certiorari because, according to Fox, that decision was "at the core of the Second Circuit's holding." Fox Br. in Opp. 1.

In *Fox*, however, the Second Circuit "*reject[ed]* the Networks' argument that *Reno* requires us to find the FCC's policy vague." Pet. App. 21a (emphasis added). The court explained that "[u]nlike in *Reno*," where no federal agency was charged with administering the challenged statute or clarifying the scope of the relevant indecency prohibition, "the FCC has further elaborated on the definition of indecency in the broadcast context," both in *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999 (2001) (*Industry Guidance*), and in its reported decisions. Pet. App. 21a. Such agency interpretations

(many of which are subject to review for internal consistency under the Administrative Procedure Act) can clarify an otherwise vague statutory standard. See *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 575 (1973). As the court of appeals correctly concluded in *Fox*, "[t]his additional guidance * * * certainly distinguishes the FCC policy from the one struck down in *Reno*." Pet. App. 21a.

Respondents are also wrong in contending that the statutory provision at issue in *Reno* was "substantively identical to the FCC's definition of 'indecent' here." Fox Br. in Opp. 1. One of the prohibitions struck down in *Reno* applied to "indecent" communications without "any textual embellishment at all." 521 U.S. at 871 n.35. The other prohibition covered all Internet content that was "patently offensive as measured by contemporary community standards." *Id.* at 860. Given the relatively new and dynamic nature of the Internet when *Reno* was decided, it would have been difficult to identify "community standards" or "traditional program content" with respect to that medium. Cf. *Reno*, 521 U.S. at 867; see *id.* at 868-869 ("Neither before nor after the enactment of the [Communications Decency Act] have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.").

By contrast, the Commission has long experience examining "contemporary community standards *for the broadcast medium*," and it has identified for broadcasters three "principal factors" that are "significant" to its determination whether material is patently offensive. *Industry Guidance*, 16 F.C.C.R. at 8002 ¶ 8 (emphasis added). The Court in *Reno* noted that the Commission has "been regulating radio stations for decades," and

that in *Pacifica* the Commission had "targeted a specific broadcast that represented a rather dramatic departure from traditional program content." 521 U.S. at 867. Unlike the Internet communications at issue in *Reno*, broadcast media are subject to longstanding and well-established community standards. Indeed, the major networks have personnel and policies designed to ensure compliance with those standards, even in time periods when FCC regulations do not apply. Pet. App. 60a-61a.

Fox also contends (Br. in Opp. 21-22) that the D.C. Circuit in the *ACT* cases approved only "the FCC's prior, more restrained indecency enforcement policy," which was limited to "the 'deliberate and repetitive use' of" offensive language. The court in the *ACT* cases, however, was reviewing the FCC's decision to *move away* from its post-*Pacifica* indecency policy that had proscribed only such material. See Pet. 4-6. The D.C. Circuit in the *ACT* cases reviewed three decisions of the Commission, "each of which declared 'indecent' material which would not have been so identified under the prior FCC standard." *ACT I*, 852 F.2d at 1336. The court explained that the Commission had decided to "measure[] broadcast material against the generic definition of indecency" because its previous "deliberately-repeated-use-of-dirty-words policy" was "'unduly narrow as a matter of law' and inconsistent with [the agency's] obligation responsibly to enforce" the prohibition on indecent broadcasting. *Id.* at 1337-1338. It was that broader indecency policy that the D.C. Circuit upheld against a vagueness challenge. *Id.* at 1338-1339.

2. The Second Circuit also disregarded this Court's admonition in *HLP* that courts must evaluate vagueness challenges based on the facts of the case before them, rather than on other applications not before the court.

Notwithstanding that directive, the court of appeals failed entirely to ask whether Fox or ABC had received adequate notice that the particular broadcasts at issue here would be considered indecent. Instead, the court conducted a compare-and-contrast exercise limited to other FCC orders involving different broadcasts. See Pet. 24. Respondents adopt the court of appeals' flawed methodology by alleging inconsistencies between other FCC adjudications involving programs unlike those at issue here. See Fox Br. in Opp. 17; ABC Br. in Opp. 11-13; ABC Affiliates Br. in Opp. 18-20 n.20.

Fox (Br. in Opp. 15-16) and ABC (Br. in Opp. 10-11) contend that the Commission's elaboration of its indecency policy through its policy statement and decisions have rendered enforcement less certain. But it should come as no surprise that, under a contextual analysis, "words and actions found to be unlawfully 'offensive' in some instances" will be "found to be non-actionable [in] others." Fox Br. in Opp. 2. This Court observed in *Pacifica* that "a prime-time recitation of Geoffrey Chaucer's Miller's Tale" need not be equated for indecency purposes with the George Carlin "Filthy Words" monologue, even if both include offensive language. 438 U.S. at 750 & n.29.

In any event, respondents do not show how purported inconsistencies between other FCC rulings deprived them of notice that the particular broadcasts at issue here might be considered indecent. For example, Fox does not identify any case in which the Commission has found that the concededly gratuitous use of the F-word in a prime-time awards show was not indecent. Fox asserts (Br. in Opp. 24) that there was "no way" for it to have known "whether the live broadcast of an awards show is sufficiently newsworthy to qualify for"

favorable treatment as a "bona fide" news program. During the nearly five years this case has been pending, however, Fox has never contended that the Billboard Music Awards show was a news program, or that its uncertainty on that question led it to broadcast the expletives that the FCC found to be indecent. Nor has the network ever contended that the expletives used by Nicole Richie and Cher were anything other than gratuitous. See Pet. App. 71a, 95a.

ABC likewise contends (Br. in Opp. 19) that it had "no notice" that its broadcast of adult nudity in NYPD Blue "could be deemed indecent." But the network cannot seriously claim that nudity is "traditional program content" on prime-time broadcast television (*Reno*, 521 U.S. at 867), or that its repeated shots of an actress's buttocks as she prepared to shower were the equivalent of "a scene in [the film Schindler's List] depicting concentration [camp] prisoners 'made to run around the camp fully nude as the sick are sorted from the healthy.'" Pet. App. 145a.

ABC also argues (Br. in Opp. 11) that the Commission was inconsistent in distinguishing for indecency purposes between the relevant NYPD Blue episode and another program that involved an "eight-second depiction of buttocks." But the program that the FCC found not to be indecent involved the depiction of an infant. See *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C.R. 2664, 2718-2719, ¶¶ 224-226 (2006). ABC's refusal to acknowledge the difference between broadcast images of a nude adult and images of a nude infant illustrates the hostility to the FCC's longstanding "context-based approach" (*Fox*, 129 S. Ct. at 1812) that underlies both the net-

works' position and the court of appeals' decisions in these cases.

3. The court of appeals invalidated the Commission's context-based indecency enforcement policy as unconstitutionally vague even though it recognized that the greater certainty provided by a less flexible policy, such as a list of banned words, would raise its own "grave First Amendment concerns." Pet. App. 27a. Fox acknowledges (Br. in Opp. 25) that articulating an indecency policy that could satisfy the court of appeals "may well be challenging," and neither the Second Circuit nor any of the respondents has suggested a workable standard that could withstand the court of appeals' review. To be sure, the courts need not and should not "usurp the FCC's regulatory authority" (*id.* at 20 n.10) or "do the Commission's job for it" (ABC Br. in Opp. 32). But a decision that finds an agency's interpretation of a statute to be unconstitutionally vague *and* frankly acknowledges that a clearer standard would likely *also* be unconstitutional has the same practical effect as invalidation of the statute itself. That judgment warrants this Court's review.

4. ABC contends that if certiorari is granted, the questions presented should be broadened to include "all available grounds for affirmance." ABC Br. in Opp. 34; see Fox Br. in Opp. 26-27. None of the alternative grounds that respondents identify warrants this Court's review.

First, ABC contends (Br. in Opp. 26-27) that the availability of "V-chip" blocking technology supports the judgment below. That argument is not ripe for this Court's consideration, however, because the court of appeals did not address it. See *Fox*, 129 S. Ct at 1819

(This Court is "one of final review, 'not of first view.'") (citation omitted).

In any event, these cases are poor vehicles for considering the relevance (if any) of the V-chip to the constitutionality of television broadcast indecency regulation. Fox does not contend that the Billboard Music Awards shows were accurately rated to apprise viewers that the F-Word and S-Word would be uttered. See Pet. App. 50a, 92a. ABC's TV-14 (DLV) rating of the relevant NYPD Blue episode ("D" for suggestive or sexual dialogue, "L" for language, and "V" for violence, *id.* at 84a n.162) likewise would not have apprised viewers employing the V-chip system that nudity would be aired. See *id.* at 178a-179a. And while ABC's broadcast began with an advisory (invisible to a V-chip) stating that the program contained, *inter alia*, "partial nudity," such warnings do not provide adequate notice to the many viewers who tune into ongoing programs. *Pacifica*, 438 U.S. at 748.

In any event, ABC's argument about the V-chip rests on a flawed legal premise. Content-based regulations of broadcast speech are subject only to intermediate scrutiny, see *FCC* v. *League of Women Voters*, 468 U.S. 364, 380 (1984), under which "a regulation need not be the least speech-restrictive means of advancing the Government's interests," *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 662 (1994). Instead, "[s]o long as the means chosen are not substantially broader than necessary * * * the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech-restrictive alternative." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 218 (1997) (citation omitted). In addition, the Commission has determined that the V-chip is not an ade-

quate substitute for its time-channeling regulation of indecency because, *inter alia*, networks often inaccurately rate their shows. See Pet. App. 81a-83a & nn.159, 162; see also *id.* at 177a-179a. That fact-intensive conclusion does not warrant this Court's review.

This Court likewise should not review respondents' contention that the First Amendment bars the government from penalizing ABC's broadcast of pre-scripted adult nudity in the relevant NYPD Blue episode because *Pacifica* "established the constitutional limits of the FCC's authority to regulate broadcast indecency." ABC Affiliates Br. in Opp. 26; see ABC Br. in Opp. 27-29. The *ABC* panel issued no episode-specific First Amendment decision because it relied entirely on *Fox*'s vagueness holding, see Pet. App. 124a-125a, and the *Fox* panel expressly declined to address the networks' claim that *Pacifica* established the limit of the FCC's regulatory authority, see *id.* at 17a-18a. The episode-specific constitutional claim would be most appropriately addressed by the court of appeals on remand in the first instance if this Court reverses the Second Circuit's vagueness determination. See *Fox*, 129 S. Ct. at 1819. In any event, this Court has "never held that *Pacifica* represented the outer limits of permissible regulation." *Id.* at 1815.

Finally, there is no sound reason for this Court to reconsider its decisions in *Pacifica* and in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). Accord ABC Affiliates Br. in Opp. 26; see also Center for Creative Voices in Media Br. in Opp. 1-7. "[T]he principles of *stare decisis* weigh heavily against overruling" this Court's precedents, and "even in constitutional cases, the doctrine carries such persuasive force that [the Court] ha[s] always required a departure from precedent to be supported by some 'special justification.'"

Dickerson v. *United States*, 530 U.S. 428, 443 (2000) (internal citation omitted). That principle is especially weighty here, where generations of "conscientious parents" have relied on the "regulation of broadcast programs" to ensure a "relatively safe haven for their children" in an increasingly coarse media environment. *Fox*, 129 S. Ct. at 1819.

Despite the changes in the media landscape since *Pacifica* was decided, broadcasting remains an extremely pervasive—and invasive—medium that continues to be highly accessible to children. See Pet. App. 78a-85a. In addition, intervening "technological advances have made it easier for broadcasters to bleep out offending words," *Fox*, 129 S. Ct. at 1813, and "the proliferation of numerous other media sources" (Fox Br. in Opp. 26) has increased the opportunities for dissemination to adults of programming not appropriate for children. Those changes reduce the burdens that regulation of broadcast indecency may entail.

Finally, broadcast regulation, including limits on indecent programming, reflects an exchange between broadcasters and the public. A broadcast licensee is "granted the free and exclusive use of a limited and valuable part of the public domain," but "when he accepts that franchise it is burdened by enforceable public obligations." *Fox*, 129 S. Ct. at 1806 (quoting *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981)). Respondents identify no sound constitutional basis for relieving the networks of those public obligations while they continue to enjoy free use of the public airwaves.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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