No. 10-1293

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION ET AL.,
Petitioners,
v.
FOX TELEVISION STATIONS, INC. ET AL.,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION ET AL.,
Petitioners,
v.
ABC, INC. ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ABC TELEVISION AFFILIATES ASSOCIATION ET AL.

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May 23, 2011

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Additional Respondents Joining in Brief in Opposition

Citadel Communications, LLC, WKRN, G.P., Young Broadcasting of Green Bay, Inc., WKOW Television, Inc., WSIL-TV, Inc., Cedar Rapids Television Company, Centex Television Limited Partnership, Channel 12 of Beaumont, Inc., Duhamel Broadcasting Enterprises, Gray Television Licensee, Inc., KATC Communications, Inc., KATV, LLC, KDNL Licensee, LLC, KETV Hearst-Argyle Television, Inc., KLTV/KTRE License Subsidiary, LLC, KSTP-TV, LLC, KSWO Television Company, Inc., KTBS, Inc., KTUL, LLC, KVUE Television, Inc., McGraw-Hill Broadcasting Company, Inc., Media General Communications Holdings, LLC, Mission Broadcasting, Inc., Mississippi Broadcasting Partners, New York Times Management Services, Nexstar Broadcasting, Inc., NPG of Texas, L.P., Ohio/Oklahoma Hearst-Argyle Television, Inc., Piedmont Television of Huntsville License, LLC, Piedmont Television of Springfield License, LLC, Pollack/Belz Communication Company, Inc., Post-Newsweek Stations, San Antonio, Inc., Scripps Howard Broadcasting Co., Southern Broadcasting, Inc., Tennessee Broadcasting Partners, Tribune Television New Orleans, Inc., WAPT Hearst-Argyle Television, Inc., WDIO-TV, LLC, WEAR Licensee, LLC, WFAA-TV, Inc., WISN Hearst-Argyle Television, Inc.

Question Presented

In February 2008, the Federal Communications Commission imposed indecency fines totaling more than $1.2 million for the February 2003 television broadcast of a single episode of the long-running, award-winning adult police drama *NYPD Blue*. The challenged episode, which aired in the last hour of prime time, included fewer than seven seconds of non-sexualized nudity in the form of an actress's buttocks. The Commission deemed the brief nudity "indecent" under its revised indecency standard.

The Petition seeks this Court's review of the decisions of the United States Court of Appeals for the Second Circuit that the FCC's revised indecency standard is unconstitutionally vague in its entirety. As it concerns the indecency finding related to *NYPD Blue*, the Court should consider instead the following question if the Petition is granted:

> Whether the FCC's determination that the brief, non-sexualized depiction of adult buttocks in the February 25, 2003, episode of *NYPD Blue* was actionably indecent is consistent with the limitations of the Due Process Clause and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Corporate Disclosure Statement

Pursuant to Sup. Ct. R. 29.6, Respondents make the following disclosures[*]:

ABC Television Affiliates Association is a non-profit trade association of approximately 160 television stations affiliated with the ABC Television Network and represents its member stations before the FCC, Congress, and the courts. ABC Television Affiliates Association has issued no shares of stock or debt securities to the public and has no parent company, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Cedar Rapids Television Company, licensee of Television Station KCRG-TV, Cedar Rapids, Iowa, is a direct, wholly-owned subsidiary of The Gazette Company. The Gazette Company, which is a privately-held corporation, has no parent company, and no publicly-held company owns more than 10% of its stock.

Centex Television Limited Partnership, licensee of Television Station KXXV(TV), Waco, Texas, is a limited partnership whose partners are KSWO Television of Texas, Inc. (which is wholly owned by KSWO Television Co., Inc.) and Lawton Cablevision, Inc., and no publicly-held company owns shares in any of the partners.

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[*] Respondents' names in bold are the names of the parties as they originally appeared below. Many Respondents have since undergone corporate restructurings. All relevant entities are included in these disclosures.

Channel 12 of Beaumont, Inc., former licensee of Television Station KBMT(TV), Beaumont, Texas, has been dissolved. Channel 12 of Beaumont, Inc.'s sole shareholder was Texas Telecasting, Inc., which remains in existence and is a 100% subsidiary of Texas Television, Inc., which is a privately-held corporation, and no stockholder is a publicly-held company.

Citadel Communications, LLC, licensee of Television Station KLKN(TV), Lincoln, Nebraska, is a privately-held limited liability company. No member of Citadel Communications, LLC, is a corporation. Citadel Communications Company, Ltd., which is also a limited liability company, is the only member of Citadel Communications, LLC that is not a natural person, and only one interest holder in Citadel Communications Company, Ltd.—C.C.C. Communications Corporation—is a corporation, and no stockholder of that corporation is a publicly-held company.

Duhamel Broadcasting Enterprises ("DBE"), licensee of Television Station KOTA-TV, Rapid City, South Dakota, is a privately-owned corporation, and no stockholder of DBE is a publicly-held company.

Gray Television Licensee, LLC (f/k/a **Gray Television Licensee, Inc.**), licensee of Television Station KAKE-TV, Wichita, Kansas, and licensee of Television Station KLBY(TV), Colby, Kansas, is a subsidiary of Gray Television Group, Inc., which is, in turn, a subsidiary of WVLT-TV, Inc. The corporate parent of WVLT-TV, Inc. is Gray Television, Inc., a publicly-held company traded on the New York Stock Exchange.

KATC Communications, Inc., licensee of Television Station KATC(TV), Lafayette, Louisiana, is a wholly-owned subsidiary of Cordillera Communications, Inc. Cordillera Communications, Inc. is, in turn, a wholly-owned subsidiary of Evening Post Publishing Company ("Evening Post"). Evening Post is a privately-held company. No publicly-held company has a 10% or greater direct or indirect ownership interest in Evening Post or in KATC Communications, Inc.

KATV, LLC, licensee of Television Station KATV(TV), Little Rock, Arkansas, is a wholly-owned subsidiary of Allbritton Communications Company, which is, in turn, wholly owned by Allbritton Group, Inc., which is wholly owned by Perpetual Corporation. All of the shares of Perpetual Corporation are indirectly owned by or for the benefit of Joe L. Allbritton, Barbara B. Allbritton, and Robert L. Allbritton.

KDNL Licensee, LLC, licensee of Television Station KDNL-TV, St. Louis, Missouri, is an indirect wholly-owned subsidiary of Sinclair Broadcast Group, Inc., a publicly-held company traded on NASDAQ.

KETV Hearst Television Inc. (f/k/a **KETV Hearst-Argyle Television, Inc.**), licensee of Television Station KETV(TV), Omaha, Nebraska, is a wholly-owned subsidiary of Hearst Properties Inc., which is a wholly-owned subsidiary of Hearst Television Inc. Hearst Television Inc. is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a

privately-held corporation, and no shareholder is a publicly-held company.

KLTV/KTRE License Subsidiary, LLC, licensee of Television Station KLTV(TV), Tyler, Texas, is a wholly-owned subsidiary of KLTV/KTRE LLC, which is a wholly-owned subsidiary of TV-3, LLC, which is a wholly-owned subsidiary of Raycom TV Broadcasting, LLC, which is a wholly-owned subsidiary of Raycom TV Broadcasting, Inc. Raycom TV Broadcasting, Inc. is, in turn, owned by Raycom Media, Inc. and Liberty Corporation. Liberty Corporation is a wholly-owned subsidiary of Raycom Media, Inc. Raycom Media, Inc. is a privately-owned corporation, and no publicly-held company owns more than 10% of its stock.

KSTP-TV, LLC, licensee of Television Station KSTP-TV, St. Paul, Minnesota, is a wholly-owned subsidiary of Hubbard Broadcasting, Inc., which is a privately-owned corporation. No shareholder with 10% or greater interest in Hubbard Broadcasting, Inc. is publicly traded.

KSWO Television Co., Inc., licensee of Television Station KSWO-TV, Lawton, Oklahoma, is a privately-owned corporation, and no shareholder is a publicly-held company.

KTBS, LLC (f/k/a **KTBS, Inc.**), licensee of Television Station KTBS-TV, Shreveport, Louisiana, is a privately-owned limited liability company, and no interest holder is a publicly-held company.

KTUL, LLC, licensee of Television Station KTUL(TV), Tulsa, Oklahoma, is a wholly-owned subsidiary of Allbritton Communications Company,

which is, in turn, wholly owned by Allbritton Group, Inc., which is wholly owned by Perpetual Corporation. All of the shares of Perpetual Corporation are indirectly owned by or for the benefit of Joe L. Allbritton, Barbara B. Allbritton, and Robert L. Allbritton.

KVUE Television, Inc., licensee of Television Station KVUE(TV), Austin, Texas, is a direct, wholly-owned subsidiary of Belo Corp., a publicly-held company traded on the New York Stock Exchange.

McGraw-Hill Broadcasting Company, Inc., licensee of Television Station KMGH-TV, Denver, Colorado, is a wholly-owned subsidiary of The McGraw-Hill Companies, Inc., which is a publicly-held company traded on the New York Stock Exchange. No other publicly-held company has a 10% or greater direct or indirect ownership interest in McGraw-Hill Broadcasting Company, Inc.

Media General Communications Holdings, LLC, former licensee of Television Station WMBB(TV), Panama City, Florida, is a limited liability company the sole member of which is Media General Operations, Inc. Media General Operations, Inc. is a wholly-owned subsidiary of Media General Communications, Inc., which is, in turn, a wholly-owned subsidiary of Media General, Inc. ("Media General"). Media General is an independent, publicly-held company traded on the New York Stock Exchange. It has no parent companies. GAMCO Investors, Inc., a publicly-held company that trades on the New York Stock Exchange, indirectly owns more than 10% of Media General through its wholly-owned subsidiaries GAMCO Asset Management Inc. and

Gabelli Funds, LLC and through its majority-owned subsidiary Gabelli Securities, Inc.

Mission Broadcasting, Inc., licensee of Television Station KODE-TV, Joplin, Missouri, is a privately-owned corporation, and no shareholder is a publicly-held company.

Mississippi Broadcasting Partners, former licensee of Television Station WABG-TV, Greenwood, Mississippi, is a partnership whose 99% partner is Mississippi Telecasting Company, Inc. and whose 1% partner is Bahakel Broadcasting Company. Mississippi Telecasting Company, Inc. is a wholly-owned subsidiary of Greenwood Broadcasting Company, Inc. Greenwood Broadcasting Company, Inc. and Bahakel Broadcasting Company are both wholly-owned subsidiaries of Bahakel Communications, Ltd., which is a privately-held corporation, and no shareholder is a publicly-held company.

New York Times Management Services, former licensee of Television Station WQAD-TV, Moline, Illinois, was, prior to its dissolution, a Massachusetts Business Trust wholly owned by NYT Broadcast Holdings, LLC. The trustee of New York Times Management Services was NYT Group Services, LLC, which is a limited liability company, the sole member of which is The New York Times Company. NYT Broadcast Holdings, LLC is a limited liability company the sole member of which is NYT Holdings, Inc. NYT Holdings, Inc. is a wholly-owned subsidiary of NYT Capital, LLC, which is, in turn, a wholly-owned subsidiary of The New York Times Company. Until 2007, The New York Times Company indirectly owned

nine television stations, including WQAD-TV, which was licensed to New York Times Management Services. The New York Times Company has issued two classes of stock, Class A and Class B. The New York Times Company's Class A stock is publicly traded on the New York Stock Exchange. No publicly-held company has a 10% or greater direct or indirect ownership interest in The New York Times Company.

Nexstar Broadcasting, Inc., licensee of Television Station KQTV(TV), St. Joseph, Missouri, and licensee of Television Station WDHN(TV), Dothan, Alabama, is a wholly-owned subsidiary of Nexstar Finance Holdings, Inc., which is, in turn, a wholly-owned subsidiary of Nexstar Broadcasting Group, Inc. Nexstar Broadcasting Group, Inc. is a publicly-held company traded on the NASDAQ.

NPG of Texas, L.P., licensee of Television Station KVIA-TV, El Paso, Texas, is a wholly-owned subsidiary of NPG Holdings, Inc., which is a wholly-owned subsidiary of News-Press & Gazette Company. No shareholder is a publicly-held company.

Ohio/Oklahoma Hearst Television Inc. (f/k/a **Ohio/Oklahoma Hearst-Argyle Television, Inc.**), licensee of Television Station KOCO-TV, Oklahoma City, Oklahoma, is a wholly-owned subsidiary of Hearst Television Inc., which is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a privately-held corporation, and no shareholder is a publicly-held company.

Piedmont Television of Huntsville License, LLC, former licensee of Television Station WAAY-TV, Huntsville, Alabama, was, prior to dissolution, a privately-owned limited liability company, and no shareholder was a publicly-held company.

Piedmont Television of Springfield License, LLC, former licensee of Television Station KSPR(TV), Springfield, Missouri, was, prior to dissolution, a privately-owned limited liability company, and no shareholder was a publicly-held company.

Pollack/Belz Communication Company, Inc., licensee of Television Station KLAX-TV, Alexandria, Louisiana, is a privately-owned corporation, and no shareholder is a publicly-held company.

Post-Newsweek Stations, San Antonio, Inc., licensee of Television Station KSAT-TV, San Antonio, Texas, is a wholly-owned subsidiary of Post-Newsweek Stations, Inc., which is a wholly-owned subsidiary of The Washington Post Company, a publicly-held company traded on the New York Stock Exchange.

Scripps Media, Inc., licensee of Television Station KNXV-TV, Phoenix, Arizona, is the successor through merger to **Scripps Howard Broadcasting Co.**, both companies being wholly-owned subsidiaries of The E.W. Scripps Company, a publicly-held company traded on the New York Stock Exchange.

Southern Broadcasting, Inc., licensee of Television Station WKDH(TV), Houston, Mississippi, is a privately-owned corporation, and no shareholder is a publicly-held company.

Tennessee Broadcasting Partners, licensee of Television Station WBBJ-TV, Jackson, Tennessee, is a partnership whose 99% partner is Jackson Telecasters, Inc. and whose 1% partner is Bahakel Broadcasting Company. Jackson Telecasters, Inc. and Bahakel Broadcasting Company are both wholly-owned subsidiaries of Bahakel Communications, Ltd., which is a privately-held corporation, and no shareholder is a publicly-held company.

Tribune Television New Orleans, Inc., licensee of Television Station WGNO(TV), New Orleans, Louisiana, is a wholly-owned subsidiary of Tribune Broadcasting Company, which is a wholly-owned subsidiary of Tribune Company. All three companies are privately held, and no shareholder is publicly held.

WAPT Hearst Television Inc. (f/k/a **WAPT Hearst-Argyle Television, Inc.**), licensee of Television Station WAPT(TV), Jackson, Mississippi, is a wholly-owned subsidiary of Hearst Television Inc., which is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a privately-held corporation, and no shareholder is a publicly-held company.

WDIO-TV, LLC, licensee of Television Station WDIO-TV, Duluth, Minnesota, is a wholly-owned subsidiary of Hubbard Broadcasting, Inc., which is a privately-owned corporation. No shareholder with 10% or greater interest in Hubbard Broadcasting, Inc. is publicly traded.

WEAR Licensee, LLC, licensee of Television Station WEAR-TV, Pensacola, Florida, is an indirect wholly-owned subsidiary of Sinclair Broadcast Group, Inc., a publicly-held company traded on the NASDAQ.

WFAA-TV, Inc., licensee of Television Station WFAA-TV, Dallas, Texas, is a direct, wholly-owned subsidiary of Belo Corp., a publicly-held company traded on the New York Stock Exchange.

WISN Hearst Television Inc. (f/k/a **WISN Hearst-Argyle Television, Inc.**), licensee of Television Station WISN-TV, Milwaukee, Wisconsin, is a wholly-owned subsidiary of Hearst Television Inc., which is a wholly-owned subsidiary of Hearst Broadcasting, Inc., which is, in turn, a wholly-owned subsidiary of Hearst Holdings, Inc., which is a wholly-owned subsidiary of The Hearst Corporation. The Hearst Corporation is a privately-held corporation, and no shareholder is a publicly-held company.

WKOW Television, Inc., licensee of Television Station WKOW-TV, Madison, Wisconsin, is a wholly-owned subsidiary of Quincy Newspapers, Inc. ("QNI"). QNI is a privately-owned corporation, and no shareholder with 10% or greater interest is a publicly-held company.

WKRN, G.P., licensee of Television Station WKRN-TV, Nashville, Tennessee, is a general partnership whose general partners are Young Broadcasting of Nashville LLC ("Young Nashville") and YBT, Inc. ("YBT"). Young Nashville is a wholly-owned subsidiary of Young Broadcasting of Knoxville, Inc., which is a wholly-owned subsidiary of Young

Broadcasting LLC ("YBL"). YBT is also a wholly-owned subsidiary of YBL. The sole member of YBL is New Young Broadcasting Holding Co., Inc. ("New Young"). New Young is a privately-held company and no shareholder with 10% or more interest is publicly traded.

WSIL-TV, Inc., licensee of Television Station WSIL-TV, Harrisburg, Illinois, is a privately-owned corporation, and no shareholder is a publicly-held company.

Young Broadcasting of Green Bay, Inc., licensee of Television Station WBAY-TV, Green Bay, Wisconsin, is a wholly-owned subsidiary of Young Broadcasting LLC, the sole member of which is New Young Broadcasting Holding Co., Inc. ("New Young"). New Young is a privately-held company, and no shareholder with 10% or more interest is publicly traded.

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BRIEF IN OPPOSITION OF RESPONDENTS ABC TELEVISION AFFILIATES ASSOCIATION ET AL.

Introduction

These cases involve whether the Federal Communications Commission ("FCC" or "Commission") may proscribe under 18 U.S.C. § 1464 instances of fleeting expletives and momentary glimpses of buttocks. The decisions below held the FCC's indecency enforcement policy so standardless as to be unconstitutionally vague.

The Government contends that these decisions constitute an "extraordinary hobbling" of the FCC's ability to police broadcast indecency and "preclude" the FCC from "effectively implementing statutory restrictions" that the agency has enforced since 1934. Pet. 31. Not true. The decisions below leave untouched the constitutionality of Section 1464. What has changed is not the ability of the FCC to enforce the statutory prohibition but, rather, *how* the agency may enforce it. The decisions below require the FCC to develop standards that give fair notice to broadcasters of what is, or is not, indecent within the meaning of the statute and the limits of the First Amendment.

The Government contends that this is a "difficult (if not impossible)" task. Pet. 31. Again, not true. For 30 years following *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the FCC enforced an indecency policy with restraint. That policy was not toothless,[1]

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[1] For example, that policy resulted in instances of

and it was sensitive to the constitutional limits of the FCC's reach. Putting aside that 30-year history, even if the task were "difficult," the Constitution demands no less.

The Government also contends that the decisions below conflict with decisions of the D.C. Circuit that foreclose the lower courts from holding the FCC's indecency enforcement policy to be unconstitutionally vague. *See* Pet. 21-22. However, the Government fails entirely to cite, let alone consider, this Court's intervening decision in *Reno v. ACLU*, 521 U.S. 844 (1997), which found a definition of "patently offensive" that is virtually identical to the FCC's definition of indecency to be vague.

The Government further contends that this Court's recent decision in *Holder v. Humanitarian Law Project*, --- U.S. ---, 130 S. Ct. 2705 (2010), restricted the ability of the court below to reach a determination that the FCC's indecency enforcement policy is unconstitutionally vague because it was bound to apply the agency's policy to the "facts of the actual broadcasts before it." Pet. 23. But *Holder* did not rein in the contours of the Due Process Clause's vagueness jurisprudence, and it does not preclude vagueness determinations based upon factual circumstances vis-à-vis hypothetical situations. In fact, the decisions below are consistent both with *Holder* and with other determinations by this Court

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multi-million dollar settlements for indecency violations. *See Viacom Inc.*, 19 FCC Rcd 23100 (2004) (adopting Consent Decree agreeing to $3,500,000 settlement); *Clear Channel Communications, Inc.*, 19 FCC Rcd 10880 (2004) (adopting Consent Decree agreeing to $1,750,000 settlement).

finding restrictions on speech to be unconstitutionally vague.

The Government's hyperbole, failure to acknowledge relevant cases, and misconstruction of precedent suggest that the Government recognizes that it does not have good reasons for this Court to take these cases. While the Government has spiced up its Petition in an effort to entice the Court—for example, by citing the title of the challenged *NYPD Blue* episode, *Nude Awakening* (Pet. 14), which was never broadcast to viewers, and by detailing partial shots of the actress's breasts (Pet. 14), which were *not* part of the FCC's indecency finding—the Court should reject the Government's solicitation and permit the remand to the agency to formulate an indecency enforcement policy consistent with the Constitution.

Statement of the Case

1. *NYPD Blue* ran for 12 television seasons on the ABC Television Network at 10:00 p.m. Eastern/Pacific Time, 9:00 p.m. Central/Mountain Time, from September 1993 through March 2005. Distinctive from the outset,[2] *NYPD Blue* was one of the most lauded shows in television history: Among other accolades, the gritty police drama garnered 84 Emmy nominations and 20 Emmy awards, including Outstanding Drama Series and

[2] The pilot episode itself ended with a dimly-lit lovemaking scene containing partial male and female nudity. *See* NYPD Blue, Wikipedia, *available at* http://en.wikipedia.org/wiki/Nypd_blue; NYPD Blue, Museum of Broadcast Communications, *available at* http://www.museum.tv/archives/etv/N/htmlN/nypdblue/nypdblue.htm.

Outstanding Writing for a Drama Series,[3] two Peabody Awards, three Humanitas Awards for Best Writing, a National Board of Review award for Best Television Series, awards from Viewers for Quality Television for Best Drama and acting, and many Golden Globe awards. Despite its realistic portrayal of adult situations, including occasional partial nudity, the show was never found to have crossed the legal line during its long television broadcast run.

The indecency determination that precipitated this litigation arose from one brief scene containing adult female rear nudity in an episode of *NYPD Blue* that aired on February 25, 2003, during the show's tenth season. The scene in question was part of a broader story arc, developing over many months, involving the relationship between lead character Andy Sipowicz and fellow detective Connie McDowell. Sipowicz, a widower, is struggling to raise his 8-year-old son Theo at the same time that his relationship with McDowell is becoming serious. Eventually, Sipowicz and McDowell decide to move in together, which leads to the scene in question.

In the 57-second scene, McDowell has entered the bathroom and is preparing to shower when Theo, just getting out of bed and unaware she is in the bathroom, opens the door and sees McDowell. Both are surprised and embarrassed. McDowell covers herself with her hands and arms, Theo exits and says "sorry," and McDowell, still covering herself,

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[3] *See* Advanced Primetime Awards Search, Academy of Television Arts & Sciences, *available at* http://www.emmys.tv/awards/awardsearch.php.

says through the now-closed door, "It's okay, no problem." No sexual or excretory activities or organs are depicted or described during the scene.[4]

The challenged scene, placed in context, is integral to the episode's storytelling of the awkwardness and discomfiture accompanying the introduction of a new romantic partner into the life of a single parent and his only child, specifically, and the multifaceted aspects of humanity through interrelationships, more generally. Drama requires conflict and resolution, and the *NYPD Blue* storytellers exercised editorial discretion in choosing to illustrate those broad lessons in the scene involving McDowell and Theo.

Mindful of the episode's content, the network voluntarily applied a rating of TV-14-DLV to the challenged *NYPD Blue* episode. The TV-14 rating means

> Parents Strongly Cautioned—This program contains some material that many parents would find unsuitable for children under 14 years of age. Parents are strongly urged to exercise greater care in monitoring this program and are cautioned against letting children under the age of 14 watch unattended.[5]

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[4] *See* note 21, *infra*.

[5] The TV Parental Guidelines, *available at* http://www.tvguidelines.org. The purpose of these voluntary program ratings is two-fold. *First*, program ratings alert parents to the type of material that a program contains so that they can exercise their own independent, contemporaneous

The "D" designation means "intensely suggestive language." The "L" designation means "strong coarse language." The "V" designation means "intense violence."

In addition, the episode was preceded by a visual and audio warning that stated, "THIS POLICE DRAMA CONTAINS ADULT LANGUAGE AND PARTIAL NUDITY. VIEWER DISCRETION IS ADVISED."

The episode aired at 10:00 p.m. in the Eastern and Pacific time zones and 9:00 p.m. in the Central and Mountain time zones—the last hour of prime time but, in the Central and Mountain time zones, outside the FCC's regulatory "safe harbor" for broadcast indecency. *See* 47 C.F.R. § 73.3999(b).

2. Four years and 11 months after the episode was broadcast,[6] and several years after the series had ended its long television run, the FCC, on January 25, 2008, issued a Notice of Apparent Liability for Forfeiture ("*Notice*")[7] declaring its intent to challenge this particular episode as indecent.[8] On

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judgment about whether that type of material is appropriate for their children to watch. *Second*, program ratings enable parents with a V-chip-equipped television set to block the type of programs that they have determined in advance to be unsuitable for their unsupervised children.

[6] A five-year statute of limitations was about to run. *See* 28 U.S.C. § 2462.

[7] *Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue"*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 1596 (2008) (Pet. App. 215a).

February 11, 2008, oppositions to the *Notice* were filed by ABC, Inc. and its two cited owned-and-operated stations and by the ABC Television Affiliates Association and 50 cited member stations.

The *Notice* invoked the FCC's longstanding definition of "broadcast indecency" as

> language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.

Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 FCC Rcd 7999, ¶ 4 (2001) ("*Policy Statement*") (quotations omitted). With respect to the "patently offensive" component of the indecency standard, the *Policy Statement* identified three "principal factors" that inform the analysis of patent offensiveness:

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[8] The issuance of the *Notice* deviated from the Commission's standard practice, which is to send a letter of inquiry to a broadcast licensee to commence an indecency investigation and to provide the licensee a copy of any viewer complaint. The FCC never sent a letter of inquiry to any of the cited ABC affiliates nor did the *Notice* include any of the complaints. Copies of the complaints were provided only after various affiliates submitted formal FOIA requests and just days before a response was due, and, even then, the FCC failed to provide complaints by the filing deadline against eight stations it had already found apparently liable.

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.

Policy Statement, ¶ 10 (emphases omitted).

Despite its insistence that its indecency standard relies on "context," the FCC's presumptive indecency finding failed to contextualize the scene at issue. Most importantly, the nudity in question was brief and entirely non-sexual. During the scene, McDowell, standing in front of a mirror, removes her robe as she prepares for her shower, and McDowell's full buttocks are visible for approximately 2 2/3 seconds. McDowell then walks toward the shower and is seen in profile with her buttocks visible from one side for approximately 1.9 seconds. The scene shifts to Theo getting out of bed and walking to the bathroom; the camera then cuts back to McDowell preparing to step into the shower. McDowell's full buttocks are visible again for approximately 2 1/4 seconds. Thereafter, Theo and McDowell are both surprised and embarrassed, and McDowell's nudity is subsequently covered in the remainder of the scene.[9] In sum, McDowell's full buttocks are visible

[9] Although the Petition makes repeated mention of partial shots of the actress's breast, *see* Pet. 14-15, the FCC's indecency determination was predicated on the brief depiction of her

for less than 5 seconds, and her buttocks are visible from the side for less than 2 seconds, which, together, constitute approximately 12% of the entire 57-second scene and less than 0.25% of the entire hour-long episode. In opposition to the *Notice*, the ABC affiliates emphasized that the exceedingly brief nudity at issue is manifestly not "dwelled on or repeated."

The FCC likewise failed to give weight to the fact that a later scene shows McDowell worrying about the incident, reading a book about raising children, and expressing her embarrassment to a colleague. She also asks Sipowicz whether Theo was all right when Sipowicz dropped him off at school, and he attempts to put her at ease. Other story lines in the episode also deal with family and relationships: A man learns that his wife, the mother of his two children, is having an affair and plotting to have him murdered. A detective learns of his father's suicide after they quarreled. McDowell and another detective learn to sympathize with the victim of a petty theft after discovering the victim's only child had been recently killed by a drunk driver. Moreover, subsequent episodes continue the story arc dealing with Theo's adjustment to a new parental figure. The FCC's supposedly "contextual" analysis failed to give appropriate consideration to this brief scene as a part of the larger story arc.[10]

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buttocks. *See* Pet. App. 148a.

[10] *Cf. Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.7 (1975) ("Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. . . . [A] motion picture must be considered as a whole,

The FCC likewise ignored critical contextual factors that its own orders have cited, including "the character of the audience" and "the merit of the complained-of program as it relates to the broadcast's patent offensiveness." Pet. 5 (citing *Infinity Broad. Corp. of Pa.*, 3 FCC Rcd 930, 932 ¶ 16 (1987)). *NYPD Blue* was in its tenth television season when the challenged episode aired. It had received numerous awards for its gritty, realistic portrayal of adult situations, occasionally containing partial nudity, and the show's format and content were well-known to its nationwide television viewing audience. With 212 episodes preceding this one, *NYPD Blue* had established a "brand": Viewers knew what *NYPD Blue* was about and the type of material it was likely to contain.

Finally, the FCC gave no weight to the voluntary self-rating and audio and visual subject matter advisory that ABC provided to viewers—a significant component of the "context" of the broadcast.

Notwithstanding the prominent viewer advisory, the show's long history, the brevity of the scene, the non-sexualized nature of the nudity, and the many other relevant measures of "context," the FCC found the challenged scene indecent. In a final order dated February 19, 2008 (the "*Forfeiture Order*"), the FCC imposed an indecency forfeiture of $27,500 on each of 45 television stations—fines totaling $1,237,500.[11]

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and not as isolated fragments or scenes of nudity.").

[11] *Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue"*, Forfeiture Order, 23 FCC Rcd 3147 (2008) (Pet.

ABC timely paid all of the forfeitures imposed by the Commission, and all Respondents sought judicial review of the *Forfeiture Order*.[12]

3. The United States Court of Appeals for the Second Circuit vacated the FCC's indecency determination, relying on its prior decision in *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010) (Pet. App. 1a).[13] *See ABC, Inc. v. FCC*, 404 Fed. Appx. 530 (2d Cir. 2011) (summary order) (Pet. App. 118a). Applying this Court's long-settled vagueness jurisprudence, the *Fox* panel had held, in July 2010, that "the FCC's policy violates the First Amendment because it is unconstitutionally vague,

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App. 126a). The FCC imposed forfeitures on 43 television stations affiliated with the ABC Television Network (the "ABC Affiliates") as well as two ABC owned-and-operated television stations.

[12] In addition to the constitutional issues discussed below, the ABC Affiliates also challenged the *Forfeiture Order*'s indecency determination as arbitrary and capricious under the Administrative Procedure Act because the brief nudity at issue did not satisfy the FCC's own multi-factor indecency standard articulated in the *Policy Statement*. The ABC Affiliates further argued that the *Order* was arbitrary and capricious given its reliance on form complaints generated by an advocacy group that lacked any indicia that a *bona fide* viewer of the program on each of the cited stations actually complained about the broadcast. Finally, the Affiliates contended that the *Forfeiture Order* deprived them of due process in light of the remarkable delay between the broadcast and the *Notice*, the FCC's belated and incomplete production of the underlying "viewer complaints," and the truncated schedule the agency imposed upon the Affiliates' response.

[13] Respondent ABC Television Affiliates Association has also participated as an intervenor in the *Fox* case.

creating a chilling effect that goes far beyond" its treatment of fleeting materials. *Fox*, Pet. App. 2a.

The Second Circuit concluded that "*Fox*'s determination that the FCC's indecency policy is unconstitutionally vague binds this panel." *ABC*, Pet. App. 124a. That is so, the court reasoned, because "[a]lthough this case involves scripted nudity, the case turns on an application of the same context-based indecency test that *Fox* found 'impermissibly vague.'" *Id*.

Reasons for Denying the Writ

The Government seeks this Court's review of the Second Circuit's decisions in both *Fox* and *ABC* on the grounds that (1) the judgment that the FCC's indecency standard is unconstitutionally vague in its entirety conflicts with decisions of this Court and the United States Court of Appeals for the D.C. Circuit and (2) the decisions below effectively preclude the enforcement of the statutory prohibition on broadcast indecency contained in 18 U.S.C. § 1464.[14] Neither claim has merit.

I. No Conflict of Authority Warrants This Court's Review

The decisions below involved a straightforward application of long-settled constitutional principles to the FCC's content-based regulation of speech (fleeting expletives in *Fox*; fleeting nudity in *ABC*).

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[14] The statute provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1464.

Nothing in either of those decisions is inconsistent with the application of those principles by this Court or any federal court of appeals, and nothing in the Petition requires this Court's review.

A. There Is No Split of Authority Among the Circuits

The *Action for Children's Television* decisions[15] of the D.C. Circuit provide the sole basis for the Government's contention that a conflict of authority exists among the courts of appeals. *See* Pet. 17, 21-22. Contrary to the Government's suggestion, however, there is no conflict of authority among the federal courts of appeals that warrants review.

To begin with, this Court's 1997 decision in *Reno v. ACLU*, 521 U.S. 844 (1997), significantly altered the legal landscape in the years after the D.C. Circuit's decisions in the *ACT* cases but before the Second Circuit's decisions below.

Reno examined the proscriptions contained in the Communications Decency Act against transmitting "indecent" messages or sending or displaying "patently offensive" material to minors over the Internet.[16] The Court there found these terms to contain so "many ambiguities" as to render their

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[15] *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT I*); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (*ACT II*); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (*ACT III*).

[16] The proscriptions are codified in various provisions of 47 U.S.C. § 223.

vagueness "problematic for purposes of the First Amendment" because such vagueness has an "obvious chilling effect on free speech." *Reno*, 521 U.S. at 870 (first two quotations), 872 (third quotation). Significantly, the CDA's definition of "patently offensive" is virtually indistinguishable from the FCC's definition of indecency.

Obviously, the D.C. Circuit's vagueness rulings could not have been informed by *Reno*. But the Second Circuit's subsequent vagueness rulings follow directly from it. Because the Second Circuit simply decided the vagueness issue in keeping with the later-decided *Reno*, any conflict with the *ACT* cases does not warrant review.

But even had *Reno* not intervened, there would be no conflict between the decisions of the D.C. and Second Circuits, because those courts were effectively considering two very different indecency enforcement schemes. The regulatory indecency policy applied by the FCC in a "restrained" fashion in the 1980s and early 1990s (and at issue in the *ACT* cases) was quite different than the far broader (and more subjective) enforcement policy under consideration in the *ABC* and *Fox* cases.[17] This very

[17] The FCC first articulated its multi-pronged "patent offensiveness" test in the *Policy Statement* in 2001, several years after the D.C. Circuit's 1995 decision in *ACT III*. The *Policy Statement* reiterated in 2001, however, that "fleeting and isolated" expletives would not be found actionably indecent under the second prong of the patently offensive test. *See Policy Statement*, ¶ 18. The FCC continued to act with "restraint" even under its flexible indecency standard until 2004. *See Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd 4975, ¶ 12 (2004) ("*Golden Globes Order*")

different—and far from "restrained"—current indecency policy both played a significant part in the Second Circuit's decisions and distinguishes the *ACT* cases. The Second Circuit recognized as much. *See Fox*, Pet. App. 22a n.8.

ACT I discussed at some length the FCC's now-abandoned "restrained enforcement policy" and expressly noted its importance to the court's constitutional analysis in that case. *See ACT I*, 852 F.2d at 1340 n.14 (noting the FCC's "assur[ance]" to the court "that it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case" so that "the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy"). *ACT II* did likewise. *See ACT II*, 932 F.2d at 1506 (noting that "[t]he Commission, by its own account . . . 'took a very limited approach to enforcing the prohibition against indecent broadcasts'" after *Pacifica*). The FCC concedes that it has abandoned its former restraint—and both orders at issue in the Petition reflect the FCC's new, far broader indecency "standard." In effect, then, the Second Circuit considered a *different* indecency policy than the one at issue in the *ACT* cases—and found that new, altered policy unconstitutionally vague. The decisions of the two courts are readily distinguishable and thus pose no conflict, but, to the

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(declaring for the first time that even a fleeting expletive could be found actionably indecent under the FCC's "contextual" standard). The FCC's indecency policy, at least since 2004, has lacked any indicia of the agency's former "restraint."

extent there is any conflict, it is so insubstantial that it does not merit this Court's review.

Finally, the *ACT* cases did not purport to reach a considered conclusion that the FCC's indecency enforcement policy is not unconstitutionally vague. *ACT I assumed* the absence of fatal vagueness from the facts of the *Pacifica* decision. *See ACT I*, 852 F.2d at 1338-39 ("infer[ring] from [*Pacifica*] that the Court did not regard the term 'indecent' as so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application'" but "welcom[ing] correction" from "Higher Authority" if the court had misread *Pacifica*).[18] (And, even so, *ACT I* acknowledged that "vagueness is inherent in" the indecency standard. *Id*. at 1344.) *ACT II* simply reiterated, without analysis, *ACT I*'s vagueness discussion. *See ACT II*, 932 F.2d at 1508 ("We have already considered and rejected a vagueness challenge to the Commission's definition of indecency." (citing *ACT I*)). And *ACT III* placed the same (misplaced) reliance on *Pacifica*. *See ACT III*, 58 F.3d at 659 ("The FCC's definition of indecency in the [challenged] regulations is identical to the one at issue in *ACT II*, where we stated that 'the Supreme Court's decision in *Pacifica* dispelled any vagueness concerns attending the [Commission's] definition,' as did our holding in *ACT I*."). The Second Circuit correctly noted in *Fox* (*see* Pet. App. 22a n.8) that the *ACT* decisions pose no conflict.

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[18] *See also ACT I*, 852 F.2d at 1338 (noting that *Pacifica* "did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague" (footnote omitted)).

B. The Decisions Below Do Not Conflict with Decisions of This Court

Contrary to the Government's argument, the Second Circuit's decisions also do not conflict with this Court's decisions in *Pacifica* or *Holder v. Humanitarian Law Project*, --- U.S. ---, 130 S. Ct. 2705 (2010). Quite the contrary, since *Pacifica*, in fact, establishes that the Commission's new and infinitely malleable "context-based" indecency standard runs afoul of the First Amendment, as discussed more fully in Section II, *infra*.

To begin with, *Pacifica* was silent as to whether the agency's indecency definition was unconstitutionally vague while predicated on the Commission's promise to enforce that definition in a restrained manner. *Pacifica* considered only whether the FCC's indecency definition was unconstitutional *as applied* to the 12-minute Carlin monologue broadcast in the middle of the afternoon at a time when children were in the audience. That is all that was before the Court in *Pacifica*—and all that the Court there decided. *See Pacifica*, 438 U.S. at 735 (declaring that "the focus of our review must be on the Commission's determination that the Carlin monologue was indecent as broadcast"); *id.* at 742 (noting that "our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast"); *id.* at 755-56 (Powell, J., concurring in part and concurring in the judgment) (agreeing that "[t]he Court today reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock

in the afternoon, and not the broad sweep of the Commission's opinion").

Holder, likewise, poses no conflict. The Second Circuit correctly found *Holder* "inapposite" given "the entirely different procedural posture" in which the case arose. *Fox*, Pet. App. 30a n.9. *See Holder*, 130 S. Ct. at 2714, 2720; *id.* at 2716 (noting that the *Holder* plaintiffs did "not challenge the [disputed] statutory terms in all their applications"); *id.* at 2718 (addressing "the question whether the material-support statute, as applied to plaintiffs, is impermissibly vague under the Due Process Clause of the Fifth Amendment"). The *Holder* passages quoted in the Petition express the Court's admonition that the vagueness challenge must be evaluated on the basis of the plaintiffs' own speech and acts, not on the basis of hypothetical speech or actions by others.[19] *See id.* at 2718-19.

But in this case, unlike *Holder*, the broadcasters' vagueness challenges *are* predicated on their *own* speech (which the FCC has punished under its indecency standard), not on the hypothetical speech of others.[20] (*Holder*, it bears noting, was a

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[19] That distinction explains the Government's carefully-worded suggestion that the Second Circuit's "*approach*"—not its analysis or its judgment—"is inconsistent with" *Holder*. Pet. 17 (emphasis added).

[20] The Petition's suggestion that the Second Circuit "failed entirely to ask whether Fox or ABC lacked adequate notice that the particular broadcasts at issue here would be considered indecent" (Pet. 18) is flatly wrong. That is precisely the question the Second Circuit addressed (*see Fox*, Pet. App. 22a-23a), and it answered that question in the negative based on its determination that the FCC's "standard" is one that even

the FCC itself has been wholly unable to articulate or apply with any consistency. The court illustrated that point by "examining other FCC orders involving different broadcasts" (Pet. 18), but it did so—quite appropriately—to determine whether the FCC's prior orders give broadcasters sufficient notice of where the FCC draws the indecency line. Those orders, several of which the Second Circuit referenced, make clear that broadcasters, in fact, lack the constitutionally-mandated notice. *Compare WPBN/WTOM License Subsidiary, Inc.*, 15 FCC Rcd 1838, ¶¶ 11, 13 (2000) (finding broadcast nudity, including two extended scenes containing full frontal nudity, in *Schindler's List* not indecent); Letter from Norman Goldstein to David Molina, File No. 97110028 (May 26, 1999) (dismissing indecency complaint challenging depiction of full buttocks for 30 seconds in broadcast of the movie *Catch-22* on the ground that the televised nudity was "very brief"); and *WGBH Educ. Found.*, 69 F.C.C.2d 1250, ¶¶ 2, 10 (1978) (dismissing complaint challenging scenes of nudity in *Monty Python's Flying Circus* given absence of evidence that the broadcaster had engaged in the type of repeated shock treatment necessary to trigger action under *Pacifica*) *with Forfeiture Order*, ¶ 18 (finding less than seven seconds of adult rear nudity actionably indecent); *compare Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, 21 FCC Rcd 2664, ¶ 141 (2006) ("*Omnibus Order*") (finding woman's use of the term "bullshitter" during live interview indecent because it aired "during a morning news interview") *with Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13299, ¶¶ 71-73 (2006) ("*Omnibus Remand Order*") (finding the same use of the term "bullshitter" *not* actionably indecent *because* it was used "during a *bona fide* news interview"); *compare Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 FCC Rcd 4507, ¶ 14 (2005) (finding numerous expletives uttered during television broadcast of the fictional movie *Saving Private Ryan* not indecent because deletion of the expletives "would have altered the nature of the artistic work

"preenforcement challenge," 130 S. Ct. at 2722, while the broadcasters' challenge here is a post-enforcement one.) But nothing in *Holder*'s analysis or holding precludes a party from challenging the Commission's indecency policy, just as the broadcasters have done in this litigation.

Unlike *Holder*, the broadcasts at issue in these cases were not "clearly proscribed" by the FCC's indecency standard. *Cf. Holder*, 130 S. Ct. at 2719 (noting that "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice" and "certainly cannot do so based on the speech of others"). Indeed, the broadcasters' vagueness challenge to the indecency standard is not predicated on an argument that the standard "applies to a substantial amount of protected expression"—essentially an overbreadth challenge[21]—but instead on the very argument that

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and diminished the power, realism and immediacy of the film experience for viewers") *with Omnibus Order*, 21 FCC Rcd at ¶ 82 (finding expletives used by real musicians during PBS documentary *The Blues: Godfathers and Sons* indecent because the educational purpose of the film "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives").

[21] Respondents observe that there may be overbreadth issues with the FCC's indecency enforcement policy as well. For instance, in *ABC* the FCC has sanctioned the brief depiction of buttocks but, anatomically, buttocks have no sexual or excretory function and, therefore, ought to fall outside the narrowing construction the FCC has given to Section 1464's prohibition against the broadcast of "indecent" language. *Compare* W.D. Gardner & W.A. Osburn, ANATOMY OF THE HUMAN BODY 223-25 (3d ed. 1978) (describing buttocks as part of the muscular system) *with* R.T. Francouer, COMPLETE

Holder made clear the plaintiffs in that case could have made (but did not): that the FCC itself has been unable to interpret and apply the "standard" in a consistent manner so that "'person[s] of ordinary intelligence'" can have "'fair notice of what is prohibited.'" *Holder*, 130 S. Ct. at 2720 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). The inconsistency and unpredictability inherent in the FCC's indecency decisions give broadcasters no certain basis for determining at the outset whether their (constitutionally protected) speech will be found to run afoul of the FCC's ever-shifting "contextual" analysis.

In any event, *Holder* distinguished the statute at issue in that case from statutes (like Section 1464) that proscribe "indecent" speech—statutory language the Court has elsewhere found to be unconstitutionally vague under the "more stringent vagueness test" applicable to regulation of speech. *See Holder*, 130 S. Ct. at 2719, 2720.[22] Moreover, it is significant that Section 1464 is a *criminal* statute, which the rule of lenity requires be construed narrowly, *see*, *e.g.*, *United States v. Bass*, 404 U.S.

DICTIONARY OF SEXOLOGY 588 (2d ed. 1995) (defining sexual organs biologically) *and* Gordon Alexander, GENERAL BIOLOGY 203-04 (2d ed. 1962) (describing excretory system in humans).

[22] *Holder* described terms such as "indecent" as inviting "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Holder*, 130 S. Ct. at 2720. *Holder*'s general observation rings true here. Even the agency's purported narrowing construction (in the form of its multi-factor standard for patent offensiveness) empowers the FCC to make "wholly subjective" and hopelessly inconsistent judgments about the artistic merit of constitutionally protected speech. *See* note 20, *supra*.

336, 348 (1971); *Liparota v. United States*, 471 U.S. 419, 427 (1985), and which is subject to a particularly strict test for vagueness where First Amendment interests are implicated, *see, e.g.*, *NAACP v. Button*, 371 U.S. 415, 432-33 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), which *Holder* distinguished, supports the Second Circuit's decisions in these cases. As *Holder* noted, "the asserted vagueness in [the challenged] state bar rule was directly implicated by the facts before the Court." *Holder*, 130 S. Ct. at 2721 (citing *Gentile*, 501 U.S. at 1049-51). The fatal vagueness inherent in the rule challenged in *Gentile* is the same flaw the Second Circuit identified in the FCC's indecency standard: a party potentially subject to the challenged rule "must guess at its contours." *Gentile*, 501 U.S. at 1048. The Second Circuit's vagueness ruling with respect to the FCC's standard is fully consistent with this Court's vagueness determination in *Gentile*.

C. Allowing the Second Circuit's Remand to the FCC to Proceed, Rather Than Granting the Petition, Is the Appropriate Course

Review is also not warranted by the Government's assertion that the Second Circuit's decisions effectively preclude the FCC from

performing its statutory obligation to enforce prohibitions on broadcast indecency. *See* Pet. 18, 31. The decisions below did not purport to hold Section 1464 unconstitutional or to disturb in any other respect the FCC's regulatory authority to enforce the statutory prohibition. They simply established that the FCC's most recent attempt to enforce the prohibition by means of its multi-factor "contextual" standard cannot be reconciled with the Constitution. The Second Circuit was emphatic that its decisions should not be read to suggest that *no* indecency enforcement regime could be created in keeping with the First Amendment, only that the FCC's present attempt did not comport with the constraints imposed by the Constitution.

The Second Circuit directed the FCC, on remand, to create an indecency standard that provides the certainty required by the First Amendment. *See Fox*, Pet. App. 30a ("[T]he FCC should bend over backwards to create a standard that gives broadcasters the notice that is required by the First Amendment." (footnote omitted)); *id*. 34a ("We do not suggest that the FCC could not create a constitutional policy. We hold only that the FCC's current policy fails constitutional scrutiny."). Allowing the Second Circuit's remand to enable the Commission to develop a more precise indecency standard prior to this Court's constitutional review—one that will provide broadcasters with the notice required by the First Amendment—is appropriate.

And that task is not an impossible one, contrary to the contention in the Petition. Indeed, for nearly 30 years, the FCC applied an indecency enforcement regime with restraint, such that it was subject to few

legal challenges, let alone a finding of unconstitutionality.[23] From the time of the Commission's 1975 adjudication that led to this Court's *Pacifica* decision until the agency's abrupt change of policy in the *Golden Globes Order*[24] in 2004, the FCC's refusal to find a single, non-literal expletive actionably indecent comported with *Pacifica*'s holding.[25] Only since 2004, when the FCC first departed from its longstanding policy in favor of a subjective approach that leaves broadcasters (and

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[23] The FCC's indecency determinations during this period were resolved by agreement with broadcasters or by the payment of fines imposed by the agency. *See, e.g.*, note 1, *supra* (citing cases). This does not mean, however, that broadcasters conceded that the policy was constitutional or that the FCC applied its policy in a manner consistent with constitutional limitations in every case.

[24] *See Golden Globes Order*, 19 FCC Rcd at ¶¶ 8-12 (finding indecent singer Bono's exclamation upon winning a 2003 Golden Globe Award that "this is really, really, fucking brilliant").

[25] Indeed, for nearly thirty years after *Pacifica*, the FCC itself read the case to draw a firm constitutional line between deliberate, repetitive language of the kind at issue in *Pacifica*, on the one hand, and isolated instances of "indecent" language, on the other. And the FCC limited its enforcement actions accordingly. *See*, *e.g.*, *WGBH Educ. Found.*, 69 F.C.C.2d 1250, ¶ 10 (1978) (expressing FCC's "inten[tion] strictly to observe the narrowness of the *Pacifica* holding," which "relied in part on the repetitive occurrence of the 'indecent' words" in the Carlin monologue); *Pacifica Found.*, 2 FCC Rcd 2698, ¶ 13 (1987) ("deliberate and repetitive use [of expletives] in a patently offensive manner is a requisite to a finding of indecency"); *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd 2705, ¶ 7 (1987) ("Speech that is indecent *must* involve more than the isolated use of an offensive word." (emphasis added)). Beginning with the *Golden Globes Order*, the FCC's reading of *Pacifica* changed dramatically, but *Pacifica*'s holding has not.

courts) perpetually bewildered about what constitutes "indecency," have the contours of the indecency policy come under sustained legal attack. History itself therefore demonstrates the groundlessness of the Government's suggestion (*see* Pet. 29-31) that the FCC's regulatory task after the Second Circuit's rulings is an impossible one.

The Petition makes much of breasts and buttocks and nudity and expletives but that, alone, does not make these cases worthy of the Court's review. There is no conflict among circuits, no conflict with this Court's opinions, and no significant issue of constitutional import. The Petition should be denied.

II. If the Court Grants the Petition, It Should Also Consider Whether Settled Constitutional Principles, As Applied to the Facts of This Case, Permit the FCC to Proscribe the *NYPD Blue* Broadcast

Although the ABC Affiliates maintain that nothing in the Petition warrants review by this Court, should the Court grant the Petition to consider whether the FCC's new indecency enforcement policy is unconstitutionally vague in its entirety, the ABC Affiliates respectfully request that the Court also agree to consider the related question whether the FCC's determination in this case that the brief, non-sexualized depiction of adult buttocks as broadcast in this particular episode of *NYPD Blue* is actionably indecent is consistent with the limitations of the Due Process Clause and *Pacifica* as applied to the facts of this case. An answer to

that question, were the Court to grant the Petition, will provide necessary guidance to the FCC in any attempt by the agency to formulate an indecency standard that comports with the First Amendment, and the question itself is closely related to—indeed, is essentially encompassed within—the question the Government has asked the Court to review: whether the FCC's indecency policy is unconstitutional "in its entirety." It is, however, unnecessary and, in light of this Court's longstanding jurisprudential rule against deciding constitutional issues unnecessarily, inappropriate to go beyond the application of *Pacifica* to decide other constitutional issues not essential to the decision in this case. In particular, there is no need to resolve the broader First Amendment issues surrounding regulation of broadcast indecency and the congressionally-mandated public trustee regulatory framework this Court approved in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

1. Respondents submit that the FCC's application of its indecency policy in *ABC* cannot be sustained in light of this Court's decision in *Pacifica*. *Pacifica* supplies the analytical framework that determines the constitutionality of the FCC's decision, and it makes clear that the fleeting nature of the nudity depicted in the challenged episode of *NYPD Blue* may not be proscribed.

This Court's decision in *Pacifica* did not simply validate the FCC's regulation of the daytime broadcast of George Carlin's "Filthy Words" monologue; it established the constitutional limits of the FCC's authority to regulate broadcast indecency. In particular, in a portion of the opinion that

commanded a majority of the Court, *Pacifica* noted that its "narrow[]" holding does not sanction the exercise of Commission regulatory authority over an isolated expletive or a fleeting image: This Court in *Pacifica* expressly did not "decide[] that an occasional expletive in [an Elizabethan comedy] would justify any sanction . . . ." *Pacifica*, 438 U.S. at 750.

Any doubt about the narrow scope of the regulatory authority endorsed by *Pacifica* is eliminated by the separate concurring opinion of Justice Powell, without which there would have been no majority. Writing separately to underscore that *Pacifica* should not be read to confer upon the FCC "an 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 in part and concurring in the judgment) (emphasis added), Justice Powell approved of FCC regulatory authority of only the narrowest scope:

> The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the *isolated* use of a potentially offensive word in the course of a radio broadcast, as distinguished from the *verbal shock treatment* administered by respondent here.

Id. at 760-61 (Powell, J., concurring in part and concurring in the judgment) (emphases added). *See also id.* at 771 (Brennan, J., dissenting) (noting that

the plurality and concurring opinions "do no more than permit the Commission to censor the afternoon broadcast of the 'sort of verbal shock treatment' . . . involved here" but otherwise seek to "insure that the FCC's regulation of *protected speech* does not exceed these bounds" (emphasis added)). Justice Powell's opinion, then, makes clear where *Pacifica* drew the line between permissible regulation of speech and unlawful censorship: *Pacifica* allowed the FCC to regulate the "verbal shock treatment" administered by the Carlin monologue but did not approve the suppression of other categories of protected speech, including "isolated" offensive words or glimpses of nudity.

Pacifica carved out only an exceedingly narrow *exception* to the background rule of full constitutional protection for indecent speech. *See*, *e.g.*, *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("[E]xpression which is indecent but not obscene is protected by the First Amendment . . . ."); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."); *United States v. Playboy Entm't Group*, 529 U.S. 803, 814 (2000); *Reno*, 521 U.S. at 874. The Second Circuit previously acknowledged the protection of even indecent speech as the background rule against which *Pacifica* operated. *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007) ("*all* speech covered by the FCC's indecency policy is fully protected by the First Amendment" (emphasis in original)), *rev'd on other grounds*, --- U.S. ---, 129 S. Ct. 1800 (2009). Read in light of this settled rule, then, *Pacifica*

approved of FCC prohibition of broadcast indecency in only the narrowest of circumstances—leaving all indecent speech *other than* the "verbal shock treatment" (or its visual equivalent) at issue there fully protected against regulation.

Applying *Pacifica* to the *NYPD Blue* broadcast at issue requires rejection of the FCC's attempt to expand its regulatory authority over otherwise-protected "indecent" speech. It is impossible to equate the pre-recorded 12-minute Carlin monologue at issue in *Pacifica*—a "verbal shock treatment" "repeated over and over," *Pacifica*, 438 U.S. at 757 (Powell, J., concurring in part and concurring in the judgment)—with the momentary, fleeting, and isolated glimpse of an actress's buttocks in an hour-long, critically-lauded prime time adult drama, preceded by visual and auditory warnings about mature subject matter, that had been on the air for a decade and was broadcast at a time of night when children were unlikely to be in the audience.[26] *Pacifica*'s narrowly-circumscribed approval of the FCC's proscription of the Carlin monologue confirms that the FCC's new indecency policy prohibiting the broadcast of even an isolated, unrepeated expletive or fleeting glimpse of adult nudity cannot be squared with the First Amendment.

Pacifica compels the conclusion that the *Forfeiture Order* cannot constitutionally proscribe the fleeting and non-sexualized depiction of buttocks.

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[26] Those same considerations compel the conclusion that the FCC's multi-factor indecency standard is unconstitutionally vague *as applied* to the *NYPD Blue* episode at issue, for the reasons noted above.

For essentially the same reasons, *Pacifica* compels the conclusion that the fleeting expletives at issue in the *Fox* case likewise cannot be constitutionally proscribed. These straightforward, determinative applications of *Pacifica* are another reason why the Court should deny the Petition, but, should the Court choose to grant the Petition, it should also consider and apply settled First Amendment and vagueness jurisprudence to the specific broadcasts in issue.

2. Because the judgments below can be upheld either on the grounds set forth by the Second Circuit or by application of settled constitutional principles to the *NYPD Blue* broadcast and to the *Fox* award shows broadcasts, it is neither necessary nor appropriate for the Court to go beyond those bases to decide these cases. In particular, it is unnecessary for the Court to reconsider the "special treatment" given the regulation of broadcast indecency, *see Pacifica*, 438 U.S. at 748-50; *see also id.* at 757-60 (Powell, J., concurring in part and concurring in the judgment), or the congressionally-mandated public trustee regulatory framework for broadcast media the Court approved in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). It is a long-settled jurisprudential rule that the "Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Kremens v. Bartley*, 431 U.S. 119, 136 (1977) (internal quotation marks and citation omitted); *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (same); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985) (same); *see generally Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288,

346-47 (1936) (Brandeis, J., concurring) (declaring that the "Court will not anticipate a question of constitutional law in advance of the necessity of deciding it" (internal quotation marks and citation omitted)). Consistent with these long-established prudential principles, the Court should not reach out to address additional constitutional issues such as the principles underlying the Court's decisions in *Pacifica* and *Red Lion* that are unnecessary to the resolution of this case.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 23, 2011