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.,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
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 FOR RESPONDENTS ABC, INC.; KTRK TELEVISION, INC.; AND WLS TELEVISION, INC.

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QUESTION PRESENTED

Whether the Federal Communications Commission's current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution.

RULE 29.6 STATEMENT

ABC, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly traded corporation.

KTRK Television, Inc. and WLS Television, Inc. are indirect, wholly owned subsidiaries of ABC, Inc.

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STATEMENT

1. Under 18 U.S.C. §1464, it is a criminal offense to broadcast "any … indecent … language." The Federal Communications Commission can impose civil forfeitures for violations of this provision. *See* 47 U.S.C. §503(b)(1). In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), this Court held in a splintered decision that the Commission had the authority to enforce §1464's indecency prohibition against a midday radio broadcast of George Carlin's "Filthy Words" monologue. The monologue consisted of seven expletives being "repeated over and over as a sort of verbal shock treat-

ment" for nearly twelve minutes. *Id.* at 757 (Powell, J., concurring in part and concurring in the judgment).

Section 1464's prohibition on indecent broadcasts implicates serious constitutional concerns, because "expression which is indecent but not obscene is protected by the First Amendment." *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). Recognizing this point, this Court, both in *Pacifica* itself and in later cases, has "emphasize[d] the narrowness of [*Pacifica*'s] holding." *Pacifica*, 438 U.S. at 750; *see also Reno* v. *ACLU*, 521 U.S. 844, 870 (1997) (noting "our 'emphatically narrow holding' in *Pacifica*" (quoting *Sable Commc'ns*, 492 U.S. at 127)). More specifically, the Court in *Pacifica* stated that the question before it was simply "whether the … Commission has *any* power to regulate a radio broadcast that is indecent but not obscene." 438 U.S. at 729 (emphasis added); *accord id.* at 744 (plurality opinion). And it stressed that its "review is limited to the question whether the Commission has the authority to proscribe this particular broadcast." *Id.* at 742 (plurality opinion).

Justices Powell and Blackmun, moreover, whose votes were necessary to uphold the Commission's indecency finding, made clear that the Court was not giving the Commission "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." *Pacifica*, 438 U.S. at 759-760 (Powell, J., concurring in part and concurring in the judgment). They also stated that they did not expect the Commission's indecency determination to chill broadcasters' expression because "the Commission may be expected to proceed cautiously, as it has in the past." *Id.* at 762 n.4 (citing the Commission's brief); *see also id.* at 771 (Brennan, J., dissenting) ("[T]o dispel the specter of … censorship, and to diffuse

Pacifica's overbreadth challenge, the FCC insists that it desires only the authority to reprimand a broadcaster on facts analogous to those present in this case.").[1]

The Commission initially adhered to *Pacifica*'s message regarding the need for restraint. For example, it brought no indecency-enforcement actions between 1978 and 1987. *See Infinity Broad. Corp. of Pa.*, 3 F.C.C.R. 930, 930 (¶4) (1987) (subsequent history omitted). And even when it chose in 1987 to expand indecency enforcement beyond Carlin's seven "filthy words," *see Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 (¶12) (1987) (subsequent history omitted), the Commission stated that "the First Amendment dictate[s] a careful and restrained approach" to regulation of broadcast indecency, *Infinity Broad. Corp. of Pa.*, 2 F.C.C.R. 2705, 2705 (¶6) (1987) (subsequent history omitted). In recent years, however, the Commission has abandoned this restraint, adopting a much more aggressive approach to broadcast-indecency enforcement. *See* Pet. App. 7a-8a & nn.2-3; *CBS Corp.* v. *FCC*, 535 F.3d 167, 177 (3d Cir. 2008), *vacated and remanded on other grounds*, 129 S. Ct. 2176 (2009).

2a. In 2008, the Commission issued a forfeiture order finding an episode of *NYPD Blue* indecent because it showed a woman's buttocks for seven seconds in a non-sexual context. *See* Pet. App. 126a-214a. *NYPD Blue*, which featured the lives of New York City police detectives, aired on the ABC Television Network from 1993 to 2005. Pet. App. 127a. The show was one of the

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[1] The United States filed a separate brief in *Pacifica*, arguing that the Commission's indecency finding was unconstitutional. *See* U.S. Br. 24-39, *Pacifica*, No. 77-528 (U.S. Mar. 27, 1978), *available at* 1978 WL 206846.

most acclaimed dramas in television history, garnering twenty Emmy awards, four Golden Globes, and two Peabodys, among other accolades.[2] Key to the show's success was its realistic portrayal of the dangers and difficulties faced by its characters in their professional and personal lives. One Peabody Award citation, for example, lauded the show for "provid[ing] gritty and realistic insight into the dilemmas and tragedies which daily confront those who spend their lives in law enforcement."[3]

To achieve this compelling realism, *NYPD Blue* employed coarse language; dramatic depictions of street violence; and mature themes, plotlines, and visual elements, including occasional nudity. To inform parents and others about the nature of the material being broadcast, ABC began almost every episode with a prominent visual and verbal advisory detailing the episode's mature content. After the TV Parental Guideline ratings were adopted in 1997, ABC also gave each episode a TV-14 rating, meaning "Parents Strongly Cautioned—This program contains some material that many parents would find unsuitable for children under 14 years of age."[4] Episodes were subsequently given appropriate content descriptors as well (language, violence, etc.), and coded to allow blocking with the V-chip,

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[2] *See* Primetime Emmy® Award Database—Emmys.com, http://www.emmys.com/award_history_search; HFPA—Awards Search, www.goldenglobes.org/browse/film/24682; Peabody Awards, www.peabody.uga.edu/winners/search.php (all Web pages cited in the brief were last visited May 23, 2011).

[3] Peabody Awards, http://www.peabody.uga.edu/winners/details.php?id=157.

[4] FCC V-Chip, http://fcc.gov/vchip.

a device that empowers viewers to block broadcasts based on their age rating or content descriptors, *see* FCC V-Chip, *supra* n.4; *see also infra* pp.26-27.

b. The episode at issue here was broadcast in February 2003, during the last hour of primetime television—from 10 to 11 pm in the Eastern and Pacific time zones and from 9 to 10 pm in the Central and Mountain time zones. *See* Pet. App. 127a. Like many episodes, it explored the personal life of a leading character, Detective Andy Sipowicz. As the show's regular viewers knew, Sipowicz's wife had died several seasons earlier, leaving him alone to raise their young son Theo. Sipowicz later became romantically involved with another detective, Connie McDowell. As their relationship developed, the two often worried about its effect on Theo, a theme addressed in multiple episodes. Shortly before the episode at issue here, Sipowicz and Theo moved into McDowell's apartment.

The broadcast began with a full-screen, eight-second visual and audio advisory informing viewers that "THIS POLICE DRAMA CONTAINS ADULT LANGUAGE AND PARTIAL NUDITY. VIEWER DISCRETION IS ADVISED."[5] The advisory and the program's opening frames also displayed a TV-14(DLV) rating. The episode thus would have been blocked from any television with a V-chip set for broadcasts bearing either that age rating or one of several content descriptions (intensely suggestive dialogue, strong coarse language, or intense violence). The advisory was followed by a 30-second recap of prior episodes and then immediately by the scene at issue.

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[5] A DVD copy of the episode was submitted with the petition.

The scene begins with McDowell entering her bathroom to take a shower. Like anyone preparing to shower, she turns on the water and disrobes. Moments later, Theo, first shown waking up and getting out of bed, opens the bathroom door, unaware that McDowell is inside. Both characters are startled and embarrassed. McDowell covers herself with her arms, and Theo quickly retreats, closing the door as he apologizes.

To convey vividly the embarrassment this encounter caused, the scene briefly depicts McDowell naked from behind and the side (hence the prominent advisory about partial nudity). In two shots before Theo opens the bathroom door, McDowell's buttocks are fully visible for five seconds and partially visible for two seconds. McDowell's pubic area is never shown, and her breasts are visible only from the side or otherwise obscured. At no point in the scene does either character engage in sexual or excretory activity, or display any sexual interest.[6]

3. Almost a year after the episode aired, FCC staff sent ABC a letter of inquiry stating that the episode had been the subject of (unspecified and undisclosed) indecency complaints. Pet. App. 127a. ABC promptly sent the Commission a tape and transcript of the episode, along with letters explaining why the episode contained no indecent material. *Id.*

Four years later, the Commission issued a notice of apparent liability, stating that the seven-second depic-

[6] During the scene's taping, the actress playing McDowell wore opaque fabric over her pubic area and parts of her breasts, obscuring them from the actor who played Theo. Both the actor's mother and a certified studio teacher/welfare worker were present during the rehearsal and filming of the relevant parts of the scene.

tion of McDowell's buttocks was indecent. *See* Pet. App. 215a-262a. The Commission reaffirmed that determination in a forfeiture order and imposed the then-maximum fine of $27,500 on each of the 45 stations—two owned by ABC, Inc. and 43 affiliated with the ABC network—that had broadcast the episode in the Central or Mountain time zone, for a total fine of nearly $1.24 million. *See* Pet. App. 126a-214a. (As noted, the episode aired at 10 pm in the Eastern and Pacific time zones, within the 10-pm-to-6-am "safe harbor." *See* 47 C.F.R. §73.3999(b).)

ABC paid the fine and sought review of the forfeiture order by the Second Circuit. While the case was pending, a different Second Circuit panel held, in *Fox Television Stations, Inc.* v. *FCC*, 613 F.3d 317 (2d Cir. 2010), another case challenging Commission indecency findings, that the Commission's indecency-enforcement policy is unconstitutionally vague. *See* Pet. App. 1a-34a. The panel assigned to ABC's challenge then directed the parties to file supplemental briefs addressing the impact of *Fox*. Petitioners' supplemental brief stated that there were no material factual distinctions between *Fox* and this case, and thus that under the *Fox* decision, "the Commission's indecency policy is unconstitutionally vague … as applied to … this case." Supp. Br. for the FCC and United States 3, *ABC, Inc.* v. *FCC*, No. 08-0841-ag (2d Cir. Aug. 23, 2010). The *ABC* panel agreed, invalidating the Commission's forfeiture order on the strength of *Fox*. *See* Pet. App. 124a.

ARGUMENT

I. THIS COURT'S REVIEW IS UNWARRANTED

Certiorari should be denied. In concluding that the Commission's current indecency policy is impermissibly vague and has a powerful chilling effect on broadcast-

ers' constitutionally protected expression, the court of appeals faithfully applied this Court's relevant precedent. Petitioners' critique of the Second Circuit's vagueness ruling is meritless, as is their claim that the ruling conflicts with *Pacifica* and with the D.C. Circuit's *Action for Children's Television* (*ACT*) decisions.

Furthermore, these cases would be a poor vehicle to address the Second Circuit's vagueness holding even if it otherwise warranted this Court's attention, because the Second Circuit's invalidation of the Commission's indecency findings is correct for three reasons independent of the vagueness holding. *First*, the availability of the V-chip, which empowers viewers to block unwanted programs effectively, means the government cannot rely on content-based speech restrictions rather than that less-restrictive alternative. *Second*, even under *Pacifica*, the First Amendment simply does not allow the government to proscribe the brief and nonsexual depiction of buttocks at issue here. *Third*, strict scrutiny is the proper standard here because *Pacifica* and other cases authorizing reduced First Amendment scrutiny of content-based restrictions on broadcasters' expression are not viable today.

Finally, in seeking to secure immediate review by this Court, petitioners greatly overstate the implications of the Second Circuit's decisions. The court of appeals has not prevented the Commission from enforcing the indecency statute. Indeed, the court expressly invited the Commission to develop a more consistent and restrained approach to indecency enforcement that could pass constitutional muster.[7]

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[7] ABC joins the *Fox* respondents' brief in opposition.

A. The Second Circuit's Vagueness Holding Is A Correct And Straightforward Application Of This Court's Precedent

1. The FCC's Current Enforcement Of §1464 Is Vague And Has A Severe Chilling Effect

The court of appeals correctly concluded that the Commission's current indecency policy is unconstitutionally vague. The Commission in recent years has applied its indecency standard in a starkly inconsistent and contradictory manner, leaving a body of incoherent decisions that provides broadcasters with no genuine guidance as to what constitutes impermissible indecency. *See Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). This inconsistent decisionmaking, moreover, appears to be driven by the commissioners' personal views about the merits of particular programming. That is wholly improper. *See Gentile* v. *State Bar of Nev.*, 501 U.S. 1030, 1051 (1991). And as the court of appeals explained, the Commission's vague policy has had a strong chilling effect on broadcasters' constitutionally protected expression. *See Reno*, 521 U.S. at 871-872 ("The vagueness of … a [content-based] regulation raises special First Amendment concerns because of its obvious chilling effect[.]").

a. This Court has already held language virtually identical to the Commission's indecency standard to be impermissibly vague. "The Commission defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium." Pet. App. 45a (¶15). In *Reno*, this Court addressed a statute banning on-line distribution of material that "in con-

text, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. §223(d)(1) (2003). The Court concluded that this standard "lacks the precision that the First Amendment requires when a statute regulates the content of speech," 521 U.S. at 874, noting particular concern with "the vagueness inherent in the open-ended term 'patently offensive,'" *id.* at 873.

In its orders here, the Commission dismissed *Reno* on the ground that "*Reno* expressly distinguished *Pacifica*." Pet. App. 77a (¶45), 173a (¶41). As the Second Circuit explained, however, *Reno* distinguished *Pacifica* regarding "'the level of First Amendment scrutiny that should be applied to this medium,' not … whether the statute was unconstitutionally vague. Broadcasters are entitled to the same degree of clarity as other speakers, even if restrictions on their speech are subject to a lower level of scrutiny." Pet. App. 21a (quoting *Reno*, 521 U.S. at 870). The Commission's indecency standard is therefore unconstitutionally vague unless there is a meaningful basis to distinguish it from the standard at issue in *Reno* (a case not even cited in the petition).

b. Petitioners argued below that the Commission had provided additional guidance to broadcasters by promulgating three principal patent-offensiveness factors (*reprinted in* Pet. 7) and by applying its generic indecency standard to a wide variety of different broadcasts. *See* Pet. App. 23a. The court of appeals stated that the three factors were indeed a potentially material distinction, and hence that *Reno* did not automatically control. *See* Pet. App. 21a. But the court went on to explain that in the myriad decisions petitioners invoked, the Commission had applied the three factors

(and its indecency standard more generally) in an inconsistent and contradictory manner, and that this impermissibly chilled constitutionally protected expression because broadcasters could not ascertain what material was prohibited and what was not. *See* Pet. App. 23a-34a.

That analysis was entirely correct. As this case shows, the Commission in recent years has engaged in patently inconsistent applications of its indecency standard in general and the patent-offensiveness factors in particular. For example, the Commission found that as to the seven-second display of buttocks here, the second patent-offensiveness factor—whether the material is dwelled on or repeated at length—"provides some support" for a patent offensiveness finding. Pet. App. 142a. Yet in another case, involving an eight-second depiction of buttocks, the Commission cited the depiction's "brevity" in deeming the material not indecent. *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C.R. 2664, 2719 (¶226) (2006) (subsequent history omitted) (hereafter *Omnibus Order*); *see also* Letter from David Molina to Norman Goldstein, FCC File No. 97110028 (May 26, 1999) (rejecting indecency complaint regarding a broadcast of the World War II movie *Catch-22* partly on the ground that the depictions of nudity—which exceeded 40 seconds—were "very brief"). The Commission has given no adequate explanation for this inconsistency, instead attempting to justify the different ultimate outcomes in the two cases on other grounds. But the fact that the Commission can point to some *other* difference between broadcasts does not justify its inconsistent application of one or more of the factors that purportedly give additional content to its indecency standard and thereby avoid the vagueness

"inherent" in it. *Reno*, 521 U.S. at 873. If the Commission is effectively ignoring the factors and simply making gestalt indecency determinations, then the factors are not a basis for distinguishing the Commission's indecency standard from the one in *Reno*.

Other instances of Commission inconsistency abound. *See* Pet. App. 26a. For example, the Commission has declared that every use of "fuck" or its many variants "inherently has a sexual connotation," and likewise that every use of "shit" or its many variants (including "bullshit") "invariably invokes a coarse excretory image." *Omnibus Order*, 21 F.C.C.R. at 2699 (¶138). Yet it has treated other comparable words differently. It has made clear, for instance, that the phrase "a lot of crap" is less likely to be deemed indecent because it (purportedly unlike "bullshit") is "fairly commonly used in a non-sexual, non-excretory manner." *Id.* at 2694 n.180 (¶120). The Commission has failed to explain this inconsistency, which leaves broadcasters with no way to know what other words three commissioners will decide "invariably" refer to sex or excrement and what words instead are "commonly used in a non-sexual, non-excretory manner."

Similarly, the Commission has declared that single uses of "dick" or "dickhead" in earlier *NYPD Blue* episodes were not patently offensive because they were neither "sufficiently vulgar, explicit, or graphic," nor "sufficiently shocking." *Omnibus Order*, 21 F.C.C.R. at 2696-2697 (¶127). Yet in the next breath it declared that individual uses of "bullshit" in *NYPD Blue* episodes *were* patently offensive, because each was "vulgar, graphic and explicit," and "shocking and gratuitous." *Id.* at 2697 (¶¶128, 130). Again, this form of

"analysis" does not inform broadcasters what is permitted and what is not.[8]

Most troubling is the Commission's related assertion that it can rest indecency determinations on its own artistic judgments. For example, the Commission declared that a broadcast of the World War II film *Saving Private Ryan*, which included pervasive use of "fuck," "shit," and other expletives, was not indecent because those expletives were "integral to the film[]" and "[e]ssential to the ability of the filmmaker to convey" his message, and because omitting them "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers." *Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 F.C.C.R. 4507, 4512-4513 (¶14) (2005). Yet the Commission held that much-more-limited expletives in *The Blues*, a documentary about jazz musicians, were indecent because the documentary's educational purposes "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives." *Omnibus Order*, 21 F.C.C.R. at 2686 (¶82). Similarly, the Commission held that a single "bullshit" in each of several earlier *NYPD Blue* episodes was indecent—even though "the expletives may have made some contribution to the authentic feel of the program"—because "we believe that purpose could have been fulfilled and all viewpoints expressed without the … expletives." *Id.* at 2698 (¶134).

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[8] The Commission later dismissed, on procedural grounds, the indecency complaints filed regarding these *NYPD Blue* broadcasts. Pet. App. 10a & n.5

The Commission's use of such artistic judgments in making indecency determinations is thoroughly antithetical to the First Amendment. As this Court has explained, "judgments about art … are for the individual to make, not for the Government to decree." *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000). Hence, "the Commission may not impose upon [broadcasters] its private notions of what the public ought to hear." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994). The use of artistic judgments also contributes to the fatal vagueness problem, as broadcasters cannot possibly predict which allegedly-indecent material three commissioners will (sometimes years later) deem artistically "essential" or "integral" to a particular broadcast, and hence not indecent. *See* Pet. App. 29a ("[I]t is hard not to speculate that the FCC was simply more comfortable with the themes in 'Saving Private Ryan.'").

In short, the Commission's current approach to indecency enforcement appears driven by its own regard for the merits of the particular broadcast at issue, and in each case the Commission reaches its desired result by adjusting, without adequate explanation, the weight it gives to the three patent-offensiveness factors, while also heavily weighting or instead ignoring other, often undefined "contextual considerations." *See* Pet. App. 24a ("[T]he Commission's reasoning [frequently] consisted of repetition of one or more of the factors without any discussion of how it applied them."). In the end, broadcasters know only that material will be deemed "indecent" when at least three commissioners find it "patently offensive." This is a textbook example of unconstitutional vagueness, and the court of appeals correctly struck it down. *See Gooding* v. *Wilson*, 405 U.S. 518, 528 (1972).

c. The Second Circuit's conclusion regarding vagueness is confirmed by the clear chilling effect—discussed at some length by the court yet ignored by petitioners—that the Commission's policy has on broadcasters' constitutionally protected expression. *See* Pet. App. 31a-34a. That effect is magnified by the Commission's use of its draconian forfeiture authority. Under 47 U.S.C. §503(b)(2)(C)(ii), the Commission may now impose a fine of up to $325,000 for each violation of §1464. As part of its more-aggressive approach to indecency enforcement, the Commission, which previously deemed this to be a per-broadcast limit, has reinterpreted it as a *per-station* limit. *See* Pet. App. 8a. Because network programs are frequently aired by scores of stations, forfeitures for a single broadcast could easily run into the tens of millions of dollars. *Id.* These circumstances inevitably cause broadcasters to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (internal quotation marks omitted).

In its order in *Fox*, the Commission responded to this concern by promising that it would "follow a restrained enforcement policy in imposing forfeitures in this area." Pet. App. 86a n.167 (¶53). But then in *ABC* the Commission imposed the then-maximum forfeiture (one-tenth of the current maximum) despite the brevity of the nudity; the lack of any sexual or excretory activity in the scene, and of any display of sexual interest by either character; ABC's use of a prominent viewer advisory and of a V-chip rating that enabled parents and others to block the program from their television sets; and the fact that the scene was part of a serious, non-sexual storyline in a long-running, highly acclaimed, award-winning program. The only one of these mitigat-

ing factors the Commission even mentioned in the forfeiture order was the advisory, which it brushed aside without explanation. *See* Pet. App. 183a (¶52).

Further, as justification for imposing the maximum sanction, the Commission pointed, with one exception, to nothing more than the very factors that make up the patent-offensiveness test, *i.e.*, that the scene was supposedly "graphic and shocking" and "shocking and titillating." Pet. App. 183a (¶52). The one exception was the fact that the show was pre-recorded. *See id.* Under this reasoning, the maximum forfeiture would be appropriate for *every* pre-recorded show the Commission deemed to satisfy its indecency standard. That approach cannot possibly be labeled "restrained." Pet. App. 86a n.167 (¶53). Indeed, it simply underscores the serious chilling effect of the Commission's vague (and quite unrestrained) indecency-enforcement policy. *See NAACP* v. *Button*, 371 U.S. 415, 433 (1963).

2. Petitioners' Arguments Regarding The Second Circuit's Vagueness Ruling Lack Merit

a. In attacking the Second Circuit's vagueness analysis, petitioners do not assert (with one exception, discussed *infra* pp.18-21) that the court misstated the basic framework of vagueness doctrine. For good reason: The court's discussion of vagueness law was entirely in accord with this Court's precedent (which the court of appeals repeatedly cited), including the point that although perfect clarity is not required, government restrictions on free speech are subject to "a more stringent vagueness test," *Hoffman Estates*, 455 U.S. at 499. Indeed, the Second Circuit's explication of vagueness doctrine is virtually identical to the one petitioners offer here. *Compare* Pet. 25, *with* Pet. App. 18a-19a.

Petitioners instead argue that the court of appeals erred because the existence of "close cases" does not render a statute or agency policy unconstitutionally vague. Pet. 28. That response is misdirected. The Second Circuit's vagueness ruling does not rest on the Commission's treatment of "close cases." Rather, it rests on the Commission's inconsistent and often contradictory treatment of cases, and the fact that these inconsistent rulings mean "broadcasters have no way of knowing what the FCC will find" indecent. Pet. App. 34a. The court, in other words, did not fault the Commission for its treatment of cases close to the indecency line, but rather for its treatment of cases close (sometimes extremely close) to each other. On that point, petitioners have notably little to say.

Petitioners do cite (Pet. 28 n.3) this Court's observation in *Fox* regarding *Saving Private Ryan*, a case the Second Circuit repeatedly invoked in discussing the Commission's inconsistencies. All this Court said, however, was that the Commission could reasonably conclude that the adult themes of *Saving Private Ryan* made it unlikely that children would be watching. *See FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1814 (2009). That is consistent with the discussion of context in *Pacifica*, where the Court explained that a program's content, like the time of day of the broadcast, might affect "the composition of the audience." 438 U.S. at 750. The statement in *Fox* does not, however, speak to the inconsistencies noted above (and by the Second Circuit), including as to the disparate treatment of *Saving Private Ryan* and *The Blues*, neither of which targeted younger viewers. *See supra* pp.11-14; Pet. App. 26a-27a. Nor does it distinguish *Saving Private Ryan* from *NYPD Blue*, which just as clearly was not presented as appropriate for "the most vulnerable,"

Fox, 129 S. Ct. at 1814, and which likewise included both a rating and an advisory that "would put parents on notice of potentially objectionable material," *id.*; *see supra* p.5 (discussing advisory).

Petitioners also imply that the court of appeals erred in even considering the Commission's application of the indecency standard in other cases, because "the language of the rule … determines whether a law or regulation is impermissibly vague." Pet. 27. But even if the patent-offensiveness factors alone rendered the otherwise-vague indecency standard facially clear (a point ABC certainly does not concede), petitioners offer neither logic nor authority to support the notion that the Constitution allows the government to promulgate a clear speech restriction and then apply it in a manifestly inconsistent way. That approach, no less than a facially vague restriction, impermissibly leaves the public unable to ascertain what speech is prohibited and thus chills constitutionally protected expression.

Moreover, petitioners are in no position to criticize the court of appeals for examining other indecency decisions. *See* Pet. 18, 23, 27-28. Petitioners themselves invoked these decisions below in an effort to escape the force of *Reno*, arguing that they provided additional (and adequate) guidance to broadcasters regarding what is indecent. *See* Pet. App. 23a. Indeed, petitioners do precisely the same here. *See* Pet. 26. The Second Circuit did not err in addressing that argument.

b. Petitioners also complain (Pet. 22-25) that the court of appeals erroneously failed to apply *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010), in that the court did not address whether the Commission's policy is unconstitutionally vague as applied to the facts of these specific cases. That argument is without merit.

To begin with, *Holder* rested in significant part on the fact that the challenged statute implicated national-security concerns. "Congress and the Executive," the Court stated, "are uniquely positioned to make principled distinctions" in that area. 130 S. Ct. at 2728. This was different, the Court elaborated, from cases like *Cohen* v. *California*, 403 U.S. 15 (1971), in which "the application of the statute turned on the offensiveness of the speech at issue," *Holder*, 130 S. Ct. at 2728. That, of course, is precisely the context here. And in that context, the Court reiterated, "'governmental officials *cannot* make principled distinctions.'" *Id.* (emphasis added) (quoting *Cohen*, 403 U.S. at 25). *Holder* thus reaffirmed the Court's longstanding view that the First Amendment normally does not tolerate government choices about what speech can be punished as subjectively offensive.

In any event, applying *Holder* as petitioners now urge would not change the outcome here. Indeed, petitioners do not even argue otherwise. *See* Pet. 23-24. That is undoubtedly because ABC had no notice that a seven-second, non-sexual display of adult buttocks, in the context of a serious storyline by an acclaimed series, could be deemed indecent. The text of the Commission's patent-offensiveness factors gave no such notice. The wholly non-sexual nature of the scene—a woman preparing for the quotidian activity of her morning shower before work, followed by a momentary and highly embarrassing encounter with a child—demonstrates that the scene did not "pander[,] … titillate, or … shock." *Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. §1464 & Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8003 (¶10) (2001) (emphasis omitted). And the nudity's brevity shows that it was not "dwell[ed] on or repeat[ed] at length."

Id. (emphasis omitted). In fact, the scene did not even satisfy the Commission's threshold indecency requirement, because it did not depict "sexual or excretory organs or activities." *Id.* at 8002 (¶7). By any definition that ABC had notice of when the episode aired in 2003, buttocks are not an organ.

Nor did Commission precedent give ABC any reason to think the scene could be declared indecent. The Commission had previously stated that even "full frontal nudity is not *per se* indecent." *Industry Guidance*, 16 F.C.C.R. at 8012 (¶21). It had also rejected indecency complaints involving much longer displays of nudity, including full frontal nudity (and, in unpublished decisions, sexualized nudity). *See WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838, 1841 (¶11) (2000); Letter from David Molina, *supra* p.11 (rejecting complaint regarding broadcast that involved extended, sometimes sexualized, frontal and rear nudity). Furthermore, Commission decisions finding depictions or descriptions of sexual or excretory organs indecent have emphasized that the material was "shocking, pandering, or titillating" because it was used in a sexualized or excretory fashion. *See Citadel Broad. Co.*, 16 F.C.C.R. 11839, 11840 (¶6) (2001) ("lyrics contain[ing] sexual references in conjunction with sexual expletives … appear intended to pander and shock"); *Industry Guidance*, 16 F.C.C.R. at 8010 (¶20) (citing *Rusk Corp. Radio Station KLOL(FM)*, 5 F.C.C.R. 6332 (1990), as deeming patently offensive an "[e]xplicit description … that focused on sexual activities in a lewd, vulgar, pandering and titillating manner"); *see also Omnibus Order*, 21 F.C.C.R. at 2703 (¶162).

In contrast, the Commission has repeatedly deemed not indecent references to sexual or excretory organs or activities that were not "eroticized,"

Omnibus Order, 21 F.C.C.R. at 2703 (¶162), or distinctly excretory. For example, the Commission concluded that a scene of *Will & Grace* showing a man and woman touching and adjusting another woman's clothed breasts as she prepared for a date was not shocking, pandering, or titillating because "the touching of the breasts is not portrayed in a sexualized manner." *Id.* at 2702 (¶158). Similarly, the Commission explained that the depiction of a baby's buttocks on *America's Funniest Home Videos* was not shocking, pandering, or titillating because it was "not sexualized in any manner." *Id.* at 2719 (¶226); *see also id.* at 2706 (¶¶175-176, 178) ("highly graphic and explicit" descriptions of "sexual practices," which "continue[d] at length" on an episode Oprah Winfrey, not patently offensive because done "to inform viewers," not in a "vulgar" way). Indeed, the forfeiture order cites no Commission precedent deeming material remotely like the scene at issue here to be indecent. *Holder* does not help petitioners.[9]

c. Petitioners also assert that any vagueness concerns are ameliorated because the Commission has "de-

[9] Petitioners are in any event poorly situated to complain about any aspect of the *ABC* panel's ruling, including its non-application of *Holder*. Following the Second Circuit's decision in *Fox*, the *ABC* panel directed the parties to file supplemental briefs addressing *Fox*'s impact on *ABC*. Petitioners' supplemental brief offered no criticism of the *Fox* decision, including for declining to apply *Holder*. Nor did petitioners argue that *Holder* required the *ABC* panel to uphold the Commission's forfeiture order. Instead, though stating that *Fox* and *ABC* involved "very different facts," Supp. Br. 3, petitioners asserted that the decision in *Fox* dictated the invalidation of the *ABC* forfeiture order, *see id.* Petitioners asked only that the *ABC* panel withhold any decision until after the disposition of any rehearing petition in *Fox*. *See id.* at 4. The panel did exactly that.

clin[ed] to sanction broadcasters in cases (such as *Fox*) where it was not clear at the time of the broadcast that the FCC regarded the pertinent material as indecent." Pet. 27. That argument fails.

The Commission did not impose monetary penalties in *Fox* because the indecency finding there rested on an acknowledged policy change, namely that even a single expletive used as an intensifier can be indecent. *See* Pet. App. 93a (¶60), 95a & n.199 (¶64). Most indecency cases, however, do not involve an avowed policy shift by the Commission. They instead involve, as the Second Circuit explained, inconsistent applications of the FCC's generic indecency standard—inconsistencies the Commission does not acknowledge and hence do not lead it to refrain from imposing fines. *ABC* itself is an example of this: As explained, the Commission had never before deemed material like the *NYPD Blue* scene here to be indecent, and in fact had found much longer and sexualized displays of nudity not indecent. Yet the Commission did not acknowledge any policy change in deeming the *NYPD Blue* scene indecent, and certainly did not decline to impose a forfeiture. To the contrary, it imposed the *maximum* penalty then authorized, resulting in a fine of well over $1 million. The Commission's decision not to impose a penalty in *Fox* does nothing to ameliorate the fatal vagueness with the Commission's indecency policy.

B. The Second Circuit's Decisions Do Not Conflict With *Pacifica* Or The D.C. Circuit's *ACT* Cases

Petitioners contend that the Second Circuit's decisions here conflict with *Pacifica* and with the D.C. Circuit's *ACT* cases. That is incorrect.

1. Petitioners' attempt to depict a conflict with *Pacifica* rests on a mischaracterization of the Second Circuit's decisions. The court's vagueness ruling was not driven by the Commission's use of a contextual approach in making indecency determinations. *See* Pet. 13-14, 17, 20. In fact, the court expressly stated in *Fox* that "[o]f course, context is always relevant, and we do not mean to suggest otherwise." Pet. App. 30a. What the court quite rightly faulted the Commission for was turning the notion of "context" into a smokescreen, an empty mantra that the Commission invokes in case after case to justify starkly inconsistent decisions. *See id.* ("It does not follow that the FCC can justify any decision to sanction indecent speech [merely] by citing 'context.'"). That analysis in no way conflicts with *Pacifica*, which of course long pre-dates those inconsistent decisions.

To the extent petitioners are arguing that *Pacifica* forecloses any vagueness challenge to the Commission's indecency regime (*e.g.*, Pet. 19-20), that argument lacks merit. No vagueness claim was advanced in *Pacifica*; the broadcaster argued instead that "indecency" necessarily entailed prurient appeal. *See* 438 U.S. at 739. And as discussed, *Pacifica* held only that the Commission is not without *any* authority to proscribe indecent but not obscene broadcasts. *See supra* pp.2-3.[10]

2. Equally meritless is petitioners' claim of a conflict between the decisions below and the *ACT* cases. In

[10] Petitioners quote dictum from this Court's decision in *Fox* regarding the reach of *Pacifica*. *See* 129 S. Ct. at 1815, *quoted in* Pet. 20. That dictum—which in any event concerned administrative rather than constitutional law—does not alter the "emphatically narrow holding" in *Pacifica* with which petitioners posit a conflict, *Sable Commc'ns*, 492 U.S. at 127.

1988, the D.C. Circuit rejected a facial vagueness challenge to the text of the Commission's indecency standard, *i.e.*, "[t]he generic definition of indecency." *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988) (*ACT I*). Subsequently, another D.C. Circuit panel, and then the en banc court, rejected the same vagueness challenge, each time on the strength of its prior case law. *See Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) ("*ACT I* precludes us from now finding the Commission's generic definition of indecency to be unconstitutionally vague."); *Action for Children's Television* v. *FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) (en banc) (*ACT III*) (similar).

Those cases do not conflict with the decisions below because the Second Circuit did not hold the "generic definition" of indecency to be vague. As explained, it instead held that the Commission's inconsistent and contradictory *application* of that standard—since the *ACT* decisions—has impermissibly left broadcasters with no way to know what material the Commission will deem indecent in the future. Petitioners respond to this point with the bald assertion that the Commission's decisions cannot justify a departure from the *ACT* cases because those decisions have "clarified the manner in which the Commission will apply its" indecency standard. Pet. 22. For the reasons given above (and by the Second Circuit), that assertion is manifestly incorrect. The Commission's decisions have left its indecency policy vague in a way and to an extent that did not remotely exist at the time of the *ACT* decisions. The Second Circuit's recognition of that fact does not conflict with those decisions—which also predate this Court's decision in *Reno*.

Petitioners suggest, however (Pet. 22), that the court of appeals in *Fox* acknowledged a conflict with the *ACT* decisions. It did not. The court stated that it dis-

agreed with those decisions "to the extent" they held all vagueness challenges foreclosed by *Pacifica*. Pet. App. 22a n.8. It offered this observation in answer to petitioners' contention that the *ACT* cases "preclude [respondents'] vagueness challenge." *Id.* As just explained, that contention is wrong; the *ACT* decisions do not bar all vagueness challenges, and hence do not conflict with the Second Circuit's vagueness holdings.

Even if there were a conflict, review would not be warranted here. The proper course would be to give the D.C. Circuit an opportunity to eliminate the shallow, 1-1, conflict by reconsidering its decades-old *ACT* decisions in light of *Reno*, the decisions below, and the Commission's abandonment of restrained indecency enforcement. Indeed, a vehicle for such reconsideration is already pending in the District Court for the District of Columbia. *See United States* v. *Fox Television Stations, Inc.*, No. 08-cv-584 (D.D.C.).

C. The Second Circuit's Judgment Is Correct Independent Of Its Vagueness Analysis

Petitioners' questions presented (Pet. I) are limited to whether the Second Circuit's vagueness holding is correct. While the answer is yes, the court's *judgment* was correct—and could be affirmed—on other, independent constitutional grounds that ABC advanced in the court of appeals. *See, e.g.*, *Yeager* v. *United States*, 129 S. Ct. 2360, 2370 (2009) (prevailing party may defend the judgment on any ground properly raised below). That being the case, this Court would not even need to reach the Second Circuit's vagueness ruling in order to affirm. These cases are thus a poor vehicle for addressing the vagueness question petitioners present.

1. The Second Circuit's judgment is correct because there exists an effective, far less restrictive, and broadly available way to support parents' efforts to control what their children watch on television—the only government interest advanced by the Commission as justifying broadcast-indecency regulation, *see ACT I*, 852 F.2d at 1343-1344 & n.20. Specifically, the V-chip allows viewers to block television programs based on their rating, which specifies both a program's overall age-appropriateness, from "TV-Y" for children's shows to "TV-MA" for adult programming, and its particular content, such as "intense violence (V)" or "strong coarse language (L)." FCC V-Chip, *supra* n.4. Both Congress and the Commission have found the V-chip effective at preventing children from unapproved viewing of mature programming. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, §551(a)(9), 110 Stat. 56, 140; *Implementation of Section 551 of the Telecomm. Act of 1996*, 13 F.C.C.R. 8232, 8243 (¶24) (1998). And with the 2009 switch to all-digital transmission of television signals, virtually every functioning television in America has a V-chip or equivalent blocking technology. *See, e.g.*, *Implementation of the Child Safe Viewing Act*, 24 F.C.C.R. 11413, 11418-11419 & n.20 (¶11) (2009) (hereafter *CSVA*).

This Court has repeatedly struck down content-based speech restrictions where a less restrictive alternative was (or even might have been) available. *See Ashcroft* v. *ACLU*, 542 U.S. 656, 667 (2004); *Playboy*, 529 U.S. at 815; *Reno*, 521 U.S. at 877-879; *Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 756, 758 (1996); *Sable Commc'ns*, 492 U.S. at 128-131. In one such case, the Court explained simply that "if a less restrictive means is available for the Government to achieve its goals, the Government *must* use it." *Playboy*, 529 U.S. at 815 (emphasis added). Contrary to

the Commission's view, moreover, *see* Pet. App. 177a & n.136 (¶47), this principle applies even if (unlike here) a less-restrictive technology is untested or not widely available, *see Reno*, 521 U.S. at 877; *Sable Commc'ns*, 492 U.S. at 128-131, or if many people are unaware of it or do not know how to use it, *see Playboy*, 529 U.S. at 816; *Denver Area*, 518 U.S. at 758-759.

The fact that these cases did not involve broadcasting, which under *Pacifica* receives reduced First Amendment protection, is immaterial. This Court has made clear that restrictions on broadcasters' expression must be narrowly tailored. *See, e.g.*, *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984). That requirement is not met here. The V-chip—whose effectiveness and availability are much greater than the technology in many of the cases just discussed—would restrict far less expression, while substantially accomplishing the government's goal of assisting parents in controlling what their children watch on television. Because "targeted blocking is a feasible and effective means of furthering its compelling interests," the government "cannot ban speech." *Playboy*, 529 U.S. at 815.

2. Independent of blocking technology, the Second Circuit's judgment in *ABC* is correct because even under *Pacifica*, the First Amendment simply does not allow the government to proscribe a seven-second nonsexual display of a woman's buttocks like the one at issue here.

Speech may constitutionally be regulated as indecent only if it genuinely has the capacity to threaten the "physical and psychological well-being of minors." *Sable Commc'ns*, 492 U.S. at 126. This Court has found that test met in very limited circumstances, and only where the material was highly sexualized. For example, the

Court has allowed regulation of the sale of pornographic magazines that are harmful to minors. *See Ginsberg* v. *New York*, 390 U.S. 629, 631-633 (1968). But it struck down an ordinance that banned films containing nudity from outdoor theaters—rejecting a protection-of-children rationale—partly because "[t]he ordinance is not directed at sexually explicit nudity." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213 (1975).

A second factor the Court has considered in deciding whether particular indecent material may be regulated is the material's duration, *i.e.*, how long children would be exposed to it. In *Erznoznik*, for example, a second reason the Court gave for striking down the ordinance was that it "sweepingly forbids … films containing any uncovered buttocks …, irrespective of … pervasiveness." 422 U.S. at 213. Similarly, in *Playboy* the Court struck down a statute regulating (highly sexual) cable-television programs after noting that the law reached material "as fleeting as an image appearing on a screen for just a few seconds." 529 U.S. at 819. And in *Pacifica* itself, the concurrence emphasized that the monologue's expletives—which were infused with sexuality—were "repeated over and over." 438 U.S. at 757 (Powell, J., concurring in part and concurring in the judgment). The concurrence also suggested that this factor was all but dispositive, stating that "certainly the Court's holding today[] does not speak to cases involving the isolated use of a potentially offensive word." *Id.* at 760-761. Indeed, the Commission took the same position; its briefing stressed that "its ruling carried with it the limiting condition[] of certain words repeated over and over." *ACT I*, 852 F.2d at 1337 (citing the Commission's *Pacifica* brief).

These decisions make clear that the *NYPD Blue* scene here cannot constitutionally be punished as inde-

cent. The nudity lasted only seven seconds (less than one percent of the length of the Carlin monologue), and was entirely non-sexual. Precedent aside, moreover, there is no serious argument—certainly the Commission has offered none—that viewing the scene could harm children. To be sure, the Court in *Pacifica* suggested that hearing the Carlin monologue could "enlarge[] a child's vocabulary in an instant." 438 U.S. at 749. But even if that is true, there is no analogous consequence here. Every child has seen buttocks (presumably for longer than seven seconds), and children could learn nothing about sex or excretion from the scene because it contains nothing on those topics. Particularly given the Commission's stark inability to articulate the harm to children from viewing this scene, the First Amendment does not allow its proscription. *See Denver Area*, 518 U.S. at 766 (plurality opinion) ("[Absent] a factual basis substantiating the harm[,] … we cannot assume that the harm exists." (citing *Turner Broad.*, 512 U.S. at 664-665)).

3. Finally, the Second Circuit's judgment is correct because *Pacifica*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), and other cases approving reduced First Amendment scrutiny for content-based restrictions on broadcasters' expression are not viable today. *See Fox*, 129 S. Ct. at 1819-1822 (Thomas, J. concurring); *ACT III*, 58 F.3d at 672-677 (Edwards, C.J., dissenting).

Pacifica asserted that broadcasting is "uniquely pervasive" and "uniquely accessible to children." 438 U.S. at 748, 749. This justification was questionable even in 1978. *See Fox*, 129 S. Ct. at 1820 (Thomas, J. concurring). But whatever was true 33 years ago, broadcast television is now neither uniquely pervasive nor uniquely accessible to children. Almost 90 percent of American households currently subscribe to cable or

satellite television services. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 F.C.C.R. 542, 546 (¶8) (2009). These bring dozen (often hundreds) of non-broadcast television channels into people's homes to the same extent—and with the same accessibility to children—as broadcast television. *See, e.g.*, *Denver Area*, 518 U.S. at 744-745 (plurality opinion). Similarly, "[t]he internet … has become omnipresent, offering access to everything from viral videos to feature films and, yes, even broadcast television programs." Pet. App. 15a (citing *CSVA*, 24 F.C.C.R. at 11468 (¶126)).[11]

Similarly, developments since *Red Lion* have rendered the predicate for that decision untenable today. In *Red Lion* the Court upheld an FCC requirement "that discussion of public issues be presented on broadcast stations, and that each side of those issues … be given fair coverage." 395 U.S. at 369. The Court's decision rested on "the scarcity of broadcast frequencies." *Id.* at 400; *see also NBC, Inc.* v. *United States*, 319 U.S. 190, 226 (1943). Over six years ago, however, a detailed analysis by the Commission's own staff explained that in light of the recent explosion of cable, Internet, and

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[11] Petitioners quote (Pet. 11-12) this Court's statement in *Fox* that the spread of other media could justify the Commission's decision to regulate broadcasters more strictly "so as to give conscientious parents a relatively safe haven for their children." 129 S. Ct. at 1819. That comment, however, was made in a discussion of administrative law. It is not reasoning this Court has ever embraced as a matter of First Amendment law, and indeed the First Amendment cannot possibly countenance the government singling out one group of speakers and restricting that group's speech because of the content or quantity of others' expression. *Cf. Citizens United* v. *FEC*, 130 S. Ct. 876, 898-899 (2010).

other media outlets, "[b]y no rational, objective standard can it still be said that, today in the United States, channels for broadcasting are scarce." Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting* 18 (Mar. 2005).[12] This observation holds true even looking only at over-the-air broadcast channels. The absolute number of such channels has more than doubled since *Red Lion* was decided, *see id.* at 12-13, while the recent switch from analog to digital television signals allows four times as many programs to be broadcast simultaneously over each channel, *Consumer Elecs. Ass'n* v. *FCC*, 347 F.3d 291, 293 (D.C. Cir. 2003) (Roberts, J.), *cited in Fox*, 129 S. Ct. at 1821 (Thomas, J., concurring). In 1984 this Court indicated a willingness to reconsider the scarcity rationale upon receiving "some signal from … the FCC that technological developments" make such reconsideration appropriate. *League of Women Voters*, 468 U.S. at 377 n.11. Since then, the Commission, in addition to issuing the staff report cited above, has stated that "we no longer believe that there is scarcity in the number of broadcast outlets available to the public." *Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, N.Y.*, 2 F.C.C.R. 5043, 5054 (¶74) (1987) (subsequent history omitted), *abrogated on other grounds*, *Repeal or Modification of the Personal Attack & Political Editorial Rules*, 15 F.C.C.R. 19973, 19979-19980 (¶¶16-18) (2000). That statement was correct.

Put simply, then, "[t]he extant facts that drove this Court to subject broadcasters to unique disfavor under the First Amendment simply do not exist today."

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[12] *Available at* http://www.fcc.gov/ownership/materials/already-released/scarcity030005.pdf.

Fox, 129 S. Ct. at 1822 (Thomas, J., concurring). Content-based restrictions on broadcasters' expression are thus properly subject to strict scrutiny. The indecency findings here could not possibly survive such scrutiny.

D. Petitioners Greatly Overstate The Consequences Of The Second Circuit's Ruling

Petitioners portray the implications of the Second Circuit's decisions in apocalyptic terms, declaring that the court of appeals has "preclude[d] the FCC from carrying out its statutory responsibility to" prohibit the "air[ing of] indecent material." Pet 18; *accord* Pet. 30. That too is wrong.

The heart of petitioners' consequences argument is the fact that the court of appeals "identified no alternative definition of actionable indecency that would provide the requisite clarity without creating countervailing practical and constitutional difficulties." Pet. 30; *see also* Pet. 21. But the court has no obligation to do the Commission's job for it. Furthermore, petitioners' complaint about the "practical … difficulties" of alternate approaches (Pet. 30) is plainly insubstantial. Free speech and due process rights may not be trampled anytime alternate approaches would create "practical … difficulties" for the government.

In any event, all that the Second Circuit deemed impermissible was the Commission's inconsistent and contradictory applications of its indecency standard in recent years. The court correctly concluded that this approach "hardly gives broadcasters notice of how the Commission will apply the factors in the future." Pet. App. 24a. That conclusion does not bar the Commission from attempting to articulate and apply, in a consistent and restrained fashion, a set of rules and policies that

not only provide broadcasters with clear guidance but also comport with First Amendment requirements regarding the availability of less restrictive alternatives and broad deference to broadcasters' editorial and artistic decisions.[13] Notably, in the ten months since *Fox* was decided, the Commission has not initiated any public rulemaking or other inquiry into this area. Petitioners' claim of dire consequences thus deserves no weight.[14]

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[13] In a fleeting parenthetical—supported by no authority—petitioners assert that the Commission currently gives weight to broadcasters' reasonable artistic judgments when deciding whether to impose sanctions. *See* Pet. 22. In recent years, however, the Commission has repeatedly stated that material it considers otherwise indecent may be deemed not indecent "where it is demonstrably essential to the nature of an artistic or educational work." *E.g.*, *Omnibus Order*, 21 F.C.C.R. at 2686 (¶82). A standard that exempts from sanction only material that licensees can demonstrate to be artistically "essential" is a far cry from deference to a licensee's "reasonable" judgment and imposes a severe burden on the exercise of First Amendment rights.

[14] Petitioners assert in passing that in light of the Second Circuit's decisions, "broadcasters may well believe that they have been freed of the … obligation not to air indecent programming." Pet. 29. Yet petitioners offer nothing to support this assertion, *i.e.*, nothing indicating that the airwaves have been flooded with indecent material in the ten months since *Fox* was decided. The absence of any such flood is just the latest piece of evidence belying the Commission's long-held, but quite mistaken, view of broadcasters as willing if not eager to air whatever the law permits, and its concomitant—and equally mistaken—view of itself as the only bulwark against the overrunning of the airwaves with indecent programming. (Another piece of evidence is the absence of any flood of indecent material during the "safe harbor" between 10 pm and 6 am local time, when such material has long been permissible. *See* 47 C.F.R. §73.3999(b).)

II. If Certiorari Is Granted, The Question Presented Should Encompass All Available Grounds For Affirmance

As discussed, petitioners' question presented is unduly narrow, focusing exclusively on the issue of vagueness rather than addressing more generally whether the Commission's current indecency policy violates the First or Fifth Amendment (or both). If the Court does grant review, it should do so on the question presented herein, because as noted the Court may affirm the judgments (and respondents can and will defend them) on any grounds raised below. Adopting ABC's question presented would ensure that the Court will receive adequate briefing from both sides on all relevant grounds, including those discussed above, *see* Part I.C.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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