No.

# In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, PETITIONERS

*v.*

FOX TELEVISION STATIONS, INC., ET AL.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, PETITIONERS

*v.*

ABC, INC., ET AL.

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

**PETITION FOR A WRIT OF CERTIORARI**


NEAL KUMAR KATYAL
*Acting Solicitor General*
*Counsel of Record*
TONY WEST
*Assistant Attorney General*
MALCOLM L. STEWART
*Deputy Solicitor General*
JOSEPH R. PALMORE
*Assistant to the Solicitor General*
THOMAS M. BONDY
ANNE MURPHY
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

AUSTIN C. SCHLICK
*General Counsel*
PETER KARANJIA
*Deputy General Counsel*
JACOB M. LEWIS
*Associate General Counsel*
NANDAN M. JOSHI
*Counsel*
*Federal Communications Commission*
*Washington, D.C. 20554*

## QUESTIONS PRESENTED

1. Whether the court of appeals erred in invalidating a finding by the Federal Communications Commission (FCC) that a broadcast including expletives was indecent within the meaning of statutory and regulatory prohibitions on indecent broadcasts, on the ground that the FCC's context-based approach to determining indecency is unconstitutionally vague in its entirety.

2. Whether the court of appeals erred in invalidating a finding by the FCC that a broadcast including nudity was indecent within the meaning of statutory and regulatory prohibitions on indecent broadcasts, on the ground that the FCC's context-based approach to determining indecency is unconstitutionally vague in its entirety.

## PARTIES TO THE PROCEEDING

Petitioners are the Federal Communications Commission and the United States of America.

The following respondents were petitioners in the court of appeals in *Fox Televisions Stations* v. *FCC* (App., *infra*, 1a-34a): Fox Television Stations, Inc., CBS Broadcasting Inc., WLS Television, Inc., KTRK Television, Inc., KMBC Hearst-Argyle Television, Inc., and ABC Inc.

The following respondents were intervenors in the court of appeals in *Fox Televisions Stations* v. *FCC*: NBC Universal, Inc., NBC Telemundo License Co., NBC Television Affiliates, FBC Television Affiliates Association, CBS Television Network Affiliates, Center for the Creative Community, Inc., doing business as Center for Creative Voices in Media, Inc., and ABC Television Affiliates Association.

The following respondents were petitioners in the court of appeals in *ABC, Inc.* v. *FCC* (App., *infra*, 118a-125a): ABC Inc., KTRK Television, Inc., WLS Television, Inc., Citadel Communications, LLC, WKRN, G.P., Young Broadcasting of Green Bay, Inc., WKOW Television Inc., WSIL-TV, Inc., ABC Television Affiliates Association, Cedar Rapids Television Company, Centex Television Limited Partnership, Channel 12 of Beaumont Incorporated, Duhamel Broadcasting Enterprises, Gray Television License, Incorporated, KATC Communications, Incorporated, KATV LLC, KDNL Licensee LLC, KETV Hearst-Argyle Television Incorporated, KLTV/KTRE License Subsidiary LLC, KSTP-TV LLC, KSWO Television Company Incorporated, KTBS Incorporated, KTUL LLC, KVUE Television Incorporated, McGraw-Hill Broadcasting Company Incorporated, Me-

dia General Communications Holdings LLC, Mission Broadcasting Incorporated, Mississippi Broadcasting Partners, New York Times Management Services, Nexstar Broadcasting Incorporated, 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., and WISN Hearst-Argyle Television Inc.

The following respondents were intervenors in the court of appeals in *ABC, Inc.* v. *FCC*: Fox Television Stations, Inc., NBC Universal, Inc., NBC Telemundo License Co., and CBS Broadcasting, Inc.

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## PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Federal Communications Commission and the United States, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in these cases.

## OPINIONS BELOW

The opinion of the court of appeals in *Fox Television Stations, Inc.* v. *FCC* (App., *infra*, 1a-34a) is reported at 613 F.3d 317. The order of the Federal Communications

Commission under review in *Fox* (App., *infra*, 35a-115a) is reported at 21 F.C.C.R. 13,299. The opinion of the court of appeals in *ABC, Inc.* v. *FCC* (App., *infra*, 118a-125a) is not published in the *Federal Reporter* but is available at 2011 WL 9307. The order of the Federal Communications Commission under review in *ABC* (App., *infra*, 126a-214a) is reported at 23 F.C.C.R. 3147.

## JURISDICTION

The judgment of the court of appeals in *Fox* was entered on July 13, 2010. A petition for rehearing was denied on November 22, 2010 (App., *infra*, 116a). On February 10, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari in *Fox* to and including March 22, 2011. On March 10, 2011, Justice Ginsburg further extended the time within which to file a petition for a writ of certiorari in *Fox* to and including April 21, 2011. The judgment of the court of appeals in *ABC* was entered on January 4, 2011. On March 25, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari in *ABC* to and including May 4, 2011. The jurisdiction of this Court in both *Fox* and *ABC* is invoked under 28 U.S.C. 1254(1).

## STATUTES AND REGULATIONS INVOLVED

Relevant statutory and regulatory provisions are set out in an appendix to this petition. App., *infra*, 263a-267a.

## STATEMENT

1. Under 18 U.S.C. 1464, it is unlawful to "utter[] any obscene, indecent, or profane language by means of radio communication." Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106

Stat. 954, directs that "[t]he Federal Communications Commission [FCC or Commission] shall promulgate regulations to prohibit the broadcasting of indecent programming" during specified hours of the day. The Commission has implemented those statutory provisions by adopting regulations that prohibit broadcast licensees from airing "any material which is obscene" or, "on any day between 6 a.m. and 10 p.m.[,] any material which is indecent." 47 C.F.R. 73.3999; see *Action for Children's Television* v. *FCC*, 58 F.3d 654, 669-670 (D.C. Cir. 1995) (en banc) (*ACT III*), cert. denied, 516 U.S. 1043 (1996). The Commission is authorized to enforce Section 1464 and its indecency regulation by, *inter alia*, imposing civil forfeitures, 47 U.S.C. 503(b)(1)(B) and (D), or taking account of violations during license renewal proceedings, see 47 U.S.C. 307, 309(k).

2. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*), this Court upheld the FCC's application of the same "definition of indecent speech that [the FCC] uses to this day." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1806 (2009) (*Fox*). At issue in *Pacifica* was the midday radio broadcast of George Carlin's "Filthy Words" monologue, which included repeated use of expletives. Responding to a listener complaint, the Commission determined that the broadcast of the Carlin monologue violated Section 1464 under a "concept of 'indecent' [that] is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience." *Pacifica*, 438 U.S. at 731-732 (quoting *In re Citizen's Complaint Against Pacifica Found. Station*

*WBAI(FM), New York, N.Y.*, 56 F.C.C. 2d 94, 98 (1975) (*Citizen's Complaint*). This Court concluded that the FCC's application of its definition of indecency to the Carlin monologue "as broadcast" did not violate the First Amendment. *Id.* at 735, 750-751.

The Court observed in *Pacifica* that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans" because "material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. at 748. The Court further observed that, because "broadcasting is uniquely accessible to children," indecent language can "enlarge[] a child's vocabulary in an instant." *Id.* at 749. The Court concluded that "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression" when that expression is disseminated through broadcast media. *Ibid.* (quoting *Ginsberg* v. *New York*, 390 U.S. 629, 639, 640 (1968)).

The Court in *Pacifica* emphasized that, under the nuisance rationale on which the Commission's decision rested, "context is all-important." 438 U.S. at 750; see *id.* at 742 (plurality opinion) ("indecency is largely a function of context"). The Court explained in particular that the "concept" of indecency used by the FCC "requires consideration of a host of variables," such as the "content of the program in which the language is used" and its effect on "the composition of the audience." *Id.* at 750.

3. For several years after *Pacifica*, the Commission followed an enforcement policy under which only "delib-

erate, repetitive use of the seven words actually contained in the George Carlin monologue" would be deemed actionably indecent. *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 12 (1987). In 1987, the Commission concluded that its post-*Pacifica* policy was "unduly narrow as a matter of law and inconsistent with [its] enforcement responsibilities under Section 1464." *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 930 ¶ 5 (1987) (*Infinity Order*). The Commission therefore announced that, in determining whether a particular broadcast was indecent, it would instead use the "generic definition of indecency" articulated in its 1975 *Pacifica* order. *Ibid.* The Commission stated that, in determining whether particular material met that definition, it would consider, *inter alia*, whether the words or depictions used are "vulgar" or "shocking," whether the broadcast of such material is isolated or fleeting, the character of the audience, and the merit of the complained-of program as it relates to the broadcast's patent offensiveness. *Id.* at 932 ¶ 16 (footnotes omitted). The Commission declined, however, to develop a "comprehensive index or thesaurus of indecent words or pictorial depictions" of patently offensive material, explaining that it would be impossible "to construct a definitive list that would be both comprehensive and not overinclusive in the abstract, without reference to the specific context." *Id.* at 932 ¶ 14.

In 1988, the D.C. Circuit upheld the Commission's decision to move away from a policy focused exclusively on the list of words from the Carlin monologue and to instead make indecency determinations based on its generic definition of indecency. See *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (*ACT I*) (R.B. Ginsburg, J.). The petitioners in *ACT I* argued that the

Commission had failed adequately to explain its policy change. The court of appeals rejected that argument, stating that unless "*only* the seven dirty words are properly designated indecent[,] * * * some more expansive definition must be attempted" and "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested." *Id.* at 1338.

The court in *ACT I* also rejected the contention that the Commission's definition of indecency was unconstitutionally vague. Observing that the "generic definition of indecency now employed by the FCC is virtually the same definition the Commission articulated" in *Pacifica*, and that this Court in *Pacifica* had held "the Carlin monologue indecent within the meaning of section 1464," the court "infer[red]" that "the term 'indecent' [is not] so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" 852 F.2d at 1338-1339 (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)). The court reaffirmed that holding in addressing two later challenges to FCC indecency enforcement. See *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) (*ACT II*) ("We have already considered and rejected a vagueness challenge to the Commission's definition of indecency."), cert. denied, 503 U.S. 913, 914 (1992); *ACT III*, 58 F.3d at 659 ("[W]e dismiss petitioners' vagueness challenge as meritless.").

4. In 2001, the Commission issued a policy statement "to provide guidance * * * regarding [its] case law interpreting 18 U.S.C. § 1464 and [its] enforcement policies with respect to broadcast indecency." *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 7999 ¶ 1

(2001) (*Industry Guidance*). That policy statement made clear that "[i]ndecency findings involve at least two fundamental determinations." *Id.* at 8002 ¶ 7. First, the material at issue "must fall within the subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities." *Ibid.* Second, "the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶ 8 (emphasis omitted).

The FCC's policy statement explained that the determination whether a broadcast is "patently offensive" turns on the "full context" in which the material is broadcast and is therefore "highly fact-specific." *Industry Guidance*, 16 F.C.C.R. at 8002-8003 ¶ 9 (emphasis omitted). The statement identified three "principal factors" that guide the analysis of patent offensiveness:

> (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; [and] (3) whether the material appears to pander or is used to titillate, [and] whether the material appears to have been presented for its shock value.

*Id.* at 8003 ¶ 10 (emphasis omitted).

4. In January 2003, the NBC network aired a live broadcast of the Golden Globe Awards. In accepting an award, the rock singer Bono exclaimed, "This is really, really f***ing brilliant. Really, really great." *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4976 n.4 (2004) (*Golden Globe*

*Awards Order*). The Commission concluded that Bono's remark was indecent even though his use of the F-Word was not "sustained or repeated." *Id.* at 4980 ¶ 12. In explaining that conclusion, the Commission acknowledged that it was departing from prior agency decisions holding that "isolated or fleeting use[s] of the 'F-Word' or a variant thereof in situations such as this [are] not indecent," and it made clear that such cases "are not good law to that extent." *Ibid.* Under its revised policy, the Commission explained, "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Ibid.* The Commission did not impose a sanction in the *Golden Globe Awards Order*, however, because the use of isolated expletives had not been proscribed by agency precedent at the time the broadcast occurred. *Id.* at 4981 ¶ 15.

5. The *Fox* case arises out of two broadcasts that aired before the Commission released the *Golden Globe Awards Order*. On December 9, 2002, Fox broadcast the 2002 Billboard Music Awards beginning at 8 p.m. Eastern Standard Time. During that broadcast, the entertainer Cher received an "Artist Achievement Award." In her acceptance speech, she stated: "I've had great people to work with. Oh, yeah, you know what? I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** 'em. I still have a job and they don't." App., *infra*, 89a.

Approximately one year later, on December 10, 2003, Fox again broadcast the Billboard Music Awards, which aired between 8 p.m. and 10 p.m. Eastern Standard Time. Nicole Richie and Paris Hilton, the stars of Fox's program "The Simple Life," presented one of the awards

that night. During their presentation, they engaged in the following exchange:

> Paris Hilton: Now Nicole, remember, this is a live show, watch the bad language.
>
> Nicole Richie: Okay, God.
>
> Paris Hilton: It feels so good to be standing here tonight.
>
> Nicole Richie: Yeah, instead of standing in mud and [audio blocked]. Why do they even call it "The Simple Life?" Have you ever tried to get cow s*** out of a Prada purse? It's not so f***ing simple.

App, *infra*, 42a-44a.

a. Following the two Billboard Music Awards broadcasts, the Commission received numerous complaints from viewers, and the agency issued an order concluding that both broadcasts contained "indecent" language as prohibited by 18 U.S.C. 1464 and the Commission's indecency regulation. *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664, 2665 ¶ 2 (2006) (*Omnibus Order*). The Commission did not impose any sanction because it concluded that, as in the *Golden Globe Awards* case, broadcast licensees did not have notice at the time of the broadcasts of the Commission's revised policy regarding the airing of isolated expletives.

After a voluntary remand from the Second Circuit (where petitions for review by Fox and other broadcasters had been consolidated), the Commission vacated the relevant portions of the *Omnibus Order* and substituted the order under review in *Fox*. App., *infra*, 35a-

115a. In that order, the Commission reaffirmed its conclusion that Fox's airing of the 2002 and 2003 Billboard Music Awards violated the prohibitions against the broadcast of indecent material. Applying the framework set out in its *Industry Guidance*, the Commission concluded that the expletives aired during the Billboard Music Awards were sexual or excretory references that fell within the subject-matter scope of the Commission's indecency policy. The Commission noted that Ms. Richie's use of the S-Word referred to excrement. *Id.* at 46a-47a. In addition, the Commission explained that the F-Word (used by both Ms. Richie and Cher) inherently "has a sexual connotation even if the word is not used literally" because "the word's power to 'intensify' and offend derives from its implicit sexual meaning." *Id.* at 47a-48a, 90a-91a (footnote omitted).

The Commission further concluded that both broadcasts were "patently offensive." The Commission found that the language used was not only graphic and shocking, particularly in the context of nationally televised awards programs viewed by substantial numbers of children, but also gratuitous. In that regard, the Commission noted that Fox had not argued that the expletives at issue "had any artistic merit or [were] necessary to convey any message." App., *infra*, 48a-49a & n.44, 91a-92a & n.191. The Commission adhered to its prior decision not to impose any sanction on Fox for the broadcasts. See *id.* at 85a-86a, 97a.

c. A divided panel of the court of appeals vacated the Commission's order and remanded the case to the agency for further proceedings. *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444 (2d Cir. 2007), rev'd, 129 S. Ct. 1800 (2009). The court concluded that the Commission's change of policy with regard to isolated expletives

was "arbitrary and capricious under the Administrative Procedure Act" because the agency had "failed to articulate a reasoned basis" for the shift. *Id.* at 447. In addition, the court of appeals in dicta made a number of "observations" questioning the constitutionality of the Commission's "'fleeting expletive' regime." *Id.* at 462.

d. This Court reversed. *Fox*, *supra*. Noting that "Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission," 129 S. Ct. at 1813, the Court found that "the agency's reasons for expanding the scope of its enforcement activity were entirely rational," *id.* at 1812.

The Court emphasized that "the Commission's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words" conformed to "the context-based approach" that the Court had "sanctioned in *Pacifica*." *Fox*, 129 S. Ct. at 1812. The Court rejected the broadcasters' argument that the Commission's contextual analysis gives the agency "unbridled discretion," noting that its decision in *Pacifica* "approved Commission regulation based on a nuisance rationale under which context is all-important." *Id.* at 1815 (internal quotation marks and citation omitted). The Court explained that "[t]he agency's decision to retain some discretion does not render arbitrary or capricious its regulation of the deliberate and shocking uses of offensive language at the award shows under review—shows that were expected to (and did) draw the attention of millions of children." *Id.* at 1814. The Court found that "[t]he Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so

as to give conscientious parents a relatively safe haven for their children." *Id.* at 1819. Because "[t]he Second Circuit did not definitively rule on the constitutionality of the Commission's orders," this Court "decline[d] to address the constitutional questions" and remanded the case to the court of appeals for further proceedings. *Ibid.*

e. On remand, the court of appeals did not limit its inquiry to the constitutionality of the Commission's isolated-expletives policy as applied to Fox's broadcasts of the 2002 and 2003 Billboard Music Awards. Instead, the court held that the "FCC's indecency policy is unconstitutional" in its entirety "because it is impermissibly vague." App., *infra*, 18a. The court therefore "grant-[ed] the petition for review and vacate[d]," not just "the FCC's order," but the entire "indecency policy underlying it." *Id.* at 2a.

In finding the Commission's policy unconstitutionally vague, the court of appeals did not understand itself to be constrained by *Pacifica*. The court observed that the decision in *Pacifica* had not expressly addressed vagueness, and it viewed this Court's decision as being "predicated on the FCC's [prior] 'restrained' enforcement policy." App., *infra*, 22a. For the same reason, the court of appeals declined to follow the decisions in the *Action for Children's Television* cases, in which the D.C. Circuit had repeatedly rejected vagueness challenges to the FCC's definition of indecent broadcasting. *Id.* at 22a n.8. "[T]o the extent the *ACT* cases held that a vagueness challenge was precluded by *Pacifica*," the court stated, "we are not bound by the DC Circuit and do not find it persuasive." *Ibid.*

The court of appeals did not question the FCC's determination that the words used in the Billboard Music

Awards shows—variants of the F-Word and the S-Word—are indecent in the context in which they were broadcast. The court understood "the FCC's current policy" to establish a "presumptive prohibition" on the use of the two words unless their use is "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance," or the words are uttered in the course of a "*bona fide* news" program. App., *infra*, 25a-26a (quoting *Omnibus Order*, 21 F.C.C.R. at 2686 ¶ 82). The court of appeals found, however, that the policy is unconstitutionally vague because "broadcasters are left to guess whether an expletive will be deemed 'integral' to a program or whether the FCC will consider a particular broadcast a '*bona fide* news interview.'" *Id.* at 27a. In reaching that conclusion, the court focused on what it perceived as disparate results reached in a series of FCC decisions addressing complaints about the use of indecent language in broadcast programs. *Id.* at 26a-29a.

The court of appeals recognized that the FCC had adopted a contextual approach to indecency, rather than a rigid rule prohibiting specified words, in part "because [the Commission] recognized that an outright ban on certain words would raise grave First Amendment concerns." App., *infra*, 27a. The court also acknowledged that because "[t]he English language is rife with creative ways of depicting sexual or excretory organs or activities * * * even if the FCC were able to provide a complete list of all such expressions, new offensive and indecent words are invented every day." *Id.* at 24a. In the court's view, however, the "flexibility" provided by the Commission's post-1987 policy "results in a standard that even the FCC cannot articulate or apply consis-

tently." *Id.* at 27a. On that basis, the court of appeals "str[uck] down the FCC's indecency policy" in its entirety. *Id*. at 34a.

6. The *ABC* case arises out of a February 25, 2003, broadcast, at 9:00 p.m. in the Central and Mountain time zones, of an episode of the television show *NYPD Blue* entitled *Nude Awakening*.[1] The show opens with "a woman wearing a robe * * * entering a bathroom, closing the door, and then briefly looking at herself in a mirror hanging above a sink." App., *infra*, 223a. "With her back to the camera," the woman "removes her robe, thereby revealing the side of one of her breasts and a full view of her back." *Ibid.* "The camera shot includes a full view of her buttocks and her upper legs as she leans across the sink to hang up her robe." *Ibid.* As she walks from the mirror to the shower, "a small portion of the side of one of her breasts is visible," and "her buttocks are visible from the side." *Ibid.*

The camera then shifts to show a young boy getting out of bed and walking toward the bathroom, at which point "[t]he camera cuts back to the woman, who is now shown standing naked in front of the shower, her back to the camera." App., *infra*, 223a-224a. The camera first shows the woman "naked from the back, from the top of her head to her waist." *Id*. at 224a. "[T]he camera then pans down to a shot of her buttocks, lingers for a moment, and then pans up her back." *Ibid.* Next, the boy is shown opening the bathroom door. *Ibid.* As he does so, the woman "quickly turns to face" him. *Ibid.* "The camera initially focuses on the woman's face but then cuts to a shot taken from behind and through her

[1] A recording of this episode, which was part of the record before the court of appeals, has been filed with the Clerk.

legs, which serve to frame the boy's face as he looks at her." *Ibid.*

The camera immediately shifts to "a front view of the woman's upper torso," although a "full view of her breasts is obscured * * * by a silhouette of the boy's head and ears." App., *infra*, 224a. "After the boy backs out of the bathroom and shuts the door," the woman is shown "facing the door, with one arm and hand covering her breasts and the other hand covering her pubic area." *Ibid.* "The scene ends with the boy's voice, heard through the closed door, saying 'sorry,'" to which "the woman while looking embarrassed, responds, 'It's okay. No problem.'" *Ibid.*

a. After issuing a letter of inquiry and a notice of apparent liability, the FCC in 2008 imposed an indecency forfeiture of $27,500 on each of several ABC-network-owned or -affiliated television stations. App., *infra*, 126a-214a. Applying the framework set out in its *Industry Guidance*, including the longstanding agency definition of indecency that this Court approved in *Pacifica*, the Commission first concluded that the depiction of an adult woman's naked buttocks in the episode constituted a depiction of sexual or excretory organs and thus fell within the subject-matter scope of the Commission's indecency policy. *Id.* at 132a-137a. The Commission then determined that "in context and on balance, the complained-of material is patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 138a.

In explaining its determination that the relevant broadcast material was patently offensive, the Commission observed that the episode contained a "close range," "fully visible" view of the actress's unclothed buttocks that was "sufficiently graphic and explicit to support an

indecency finding." *Id.* at 140a. The Commission further explained that camera shots of the woman's buttocks were "repeated" within the scene, which "focuses on her nudity." *Id.* at 142a. Finally, the Commission determined that the scene was "pandering, titillating, and shocking." *Id.* at 143a. The FCC explained that the scene placed the audience in the "voyeuristic position" of observing a naked woman preparing to shower, and that the manner in which the scene was shot "highlights the salacious aspect of the scene." *Id.* at 144a. The Commission also found that "subsequent camera shots of the boy's shocked face from between the woman's legs, and of her naked, partially-obscured upper torso from behind his head" contributed to the scene's "titillating and shocking nature." *Id.* at 144a. The Commission accordingly concluded that the *NYPD Blue* episode was "actionably indecent." *Id.* at 149a.

b. ABC and its affiliates sought review of the *Forfeiture Order* in the Second Circuit. On January 4, 2011, after denying the government's rehearing petition in *Fox*, the court of appeals issued a summary order in *ABC* vacating the Commission's order imposing the forfeitures. The court concluded that "there is no significant distinction between this case and *Fox*" 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.'" App., *infra*, 124a (citation omitted). As in *Fox*, the court of appeals did not address the question whether, on the facts of the case, the broadcasters had constitutionally sufficient notice that the relevant *NYPD Blue* episode was indecent. Rather, the court of appeals viewed the *ABC* case as controlled by the court's prior conclusion in *Fox* that the Commission's indecency policy is facially

unconstitutional. See *ibid*. ("*Fox*'s determination that the FCC's indecency policy is unconstitutionally vague binds this panel."). The court accordingly vacated the *Forfeiture Order* without addressing any of the other administrative-law or constitutional challenges raised by the *ABC* petitioners. *Id.* at 124a-125a.

**REASONS FOR GRANTING THE PETITION**

The court of appeals erred in "strik[ing] down" the Commission's "indecency policy" in *Fox* and then in applying that decision in *ABC*. App., *infra*, 34a, 124a-125a. Review of both decisions is warranted because they conflict with decisions of this Court and the D.C. Circuit, and because they effectively preclude the FCC from performing its statutory obligation to enforce prohibitions on broadcast indecency.

The court of appeals' decisions conflict with *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), in which this Court recognized that context is an "all-important" component of an effective and constitutional indecency regime. *Id*. at 750. While this Court held in *Pacifica* that the FCC's consideration of context was critical to the constitutionality of the indecency enforcement regime, the court of appeals found in these cases that the very same feature rendered the Commission's policy unconstitutionally vague. The Second Circuit's rulings also conflict with the D.C. Circuit's decisions in the *Action for Children's Television* cases, which held that *Pacifica* forecloses a vagueness challenge to the Commission's context-based indecency policy.

In addition, the court of appeals' approach is inconsistent with *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (*HLP*). That decision requires a court to focus its vagueness inquiry on the facts of the

case at hand, rather than on other applications not before the court. Notwithstanding that directive, the court of appeals failed entirely to ask whether Fox or ABC lacked adequate notice that the particular broadcasts at issue here would be considered indecent, instead examining other FCC orders involving different broadcasts.

Finally, the court's decisions—which involve both indecent expletives in live programming (*Fox*) and images of adult nudity in a scripted show (*ABC*)—preclude the FCC from carrying out its statutory responsibility to ensure that broadcasters honor their longstanding public interest obligation not to air indecent material. To comply with the court's vagueness determination, the Commission apparently would be required to sacrifice the "flexibility" that the court of appeals found unconstitutional, App., *infra*, 25a, and instead attempt to implement hard-and-fast rules prohibiting certain words and images with no meaningful consideration of context. Such a policy would be easily circumvented, however, and it would raise serious First Amendment problems of its own. If left to stand, the court of appeals' decisions would leave the FCC with no effective means to implement its longstanding statutory authority over indecent broadcasting.

## I. THE COURT OF APPEALS' RULINGS CONFLICT WITH DECISIONS OF THIS COURT AND THE D.C. CIRCUIT

A. In upholding the FCC's determination that the Carlin monologue was indecent, this Court in *Pacifica* recognized that the Commission's order "rested entirely on a nuisance rationale under which context is all-important." 438 U.S. at 750. Indeed, as the plurality portion of the opinion stressed, "indecency is largely a function of context" and "cannot be adequately judged in the ab-

stract." *Id.* at 742. Because this understanding of indecency "requires consideration of a host of variables," the Court explained, "a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy," or "a prime-time recitation of Geoffrey Chaucer's Miller's Tale," need not necessarily be treated like the Carlin monologue even if "an occasional expletive" were broadcast. *Id.* at 750 & n.29; see *id.* at 747 (plurality opinion of Stevens, J.) ("the constitutional protection accorded to a communication containing * * * patently offensive sexual and excretory language need not be the same in every context"). In *Fox*, this Court affirmed that "the Commission's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words" conformed to "the context-based approach" that the Court had "sanctioned in *Pacifica.*" *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1812 (2009); see *id.* at 1815 ("we have previously approved Commission regulation based 'on a nuisance rationale under which context is all-important'") (quoting *Pacifica*, 438 U.S. at 750).

The Court in *Pacifica* did not suggest that the Commission's context-based approach rendered the FCC's broadcast indecency policy unconstitutionally vague. Nor did the Court suggest that the Commission's definition of indecency—which then, as now, applied to "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs," 438 U.S. at 732 (citing *In re Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C. 2d 94, 98 (1975))—is unconstitutionally imprecise. The Court's statement that it found "no basis for disagreeing with the Commission's

conclusion that indecent language was used in [the] broadcast," *id.* at 741, further indicates that the Commission's standard did not "fail[] to provide" the Court with meaningful guidance on "what [was] prohibited," *United States* v. *Williams*, 553 U.S. 285, 304 (2008).

The Second Circuit concluded in *Fox* that *Pacifica* was not controlling because it thought *Pacifica* was predicated on a "'restrained' enforcement policy," which the court of appeals understood the FCC to have since abandoned. App., *infra*, 22a. But this Court has "never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden." *Fox*, 129 S. Ct. at 1815. In any event, the court of appeals' vagueness analysis is largely untethered to the relevant change in the Commission's indecency policy. The Commission's determination that "isolated" or "fleeting" expletives may be actionably indecent did not render the regulatory regime less determinate than it had been previously. Rather, the court of appeals held that the Commission's broadcast indecency policy is unconstitutionally vague because it gives the Commission too much "flexibility," and results in "a standard that * * * the FCC cannot articulate or apply consistently." App., *infra*, 27a. What the court below considered undue flexibility, however, is simply analysis of context—a longstanding feature of FCC indecency regulation that the Court in *Pacifica* viewed as a *virtue* of the Commission's approach.

Although the court of appeals faulted the Commission for not having "discernible standards by which individual contexts are judged," App., *infra*, 30a, the Commission's *Industry Guidance* in fact provides such standards. And even before the FCC issued that guidance, the D.C. Circuit noted that unless "*only* the seven dirty

words are properly designated indecent[,] * * * some more expansive definition must be attempted," and that "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested." *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338 (1991) (R.B. Ginsburg, J.). The court of appeals in this case did not identify any "tighter" definition of indecency by which the Commission could have provided clearer guidance to broadcasters while preserving consideration of the overall context in which particular words and images appear.

B. The court of appeals' decisions also conflict with the D.C. Circuit's decisions in the *Action for Children's Television* cases. As the D.C. Circuit explained in *ACT I*, "[t]he generic definition of indecency * * * employed by the FCC" after 1987 "is virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case." 852 F.2d at 1338. The D.C. Circuit "infer[red] from [*Pacifica*'s] holding 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." *Id.* at 1339 (internal quotation marks and citation omitted); see *ibid.* ("acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge" is "implicit in *Pacifica*"); *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) ("the Supreme Court's decision in *Pacifica* dispelled any vagueness concerns attending the [FCC's] definition"); *Action for Children's Television* v. *FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) (en banc) (dismissing vagueness challenges as "meritless"), cert. denied, 516 U.S. 1043 (1996).

The court below distinguished the D.C. Circuit's decisions on the ground that the court in *ACT I* "relied specifically on the FCC's restrained policy in reaching its decision." App., *infra*, 22a n.8. But the statement in *ACT I* to which the Second Circuit alluded referred only to the Commission's (still existing) policy of "giv[ing] weight to reasonable licensee judgments when deciding whether to impose sanctions." 852 F.2d at 1340 n.14. That statement was made only to support the D.C. Circuit's conclusion that the Commission's generic indecency definition "is not vulnerable to the charge that it is substantially overbroad," *id.* at 1340; it did not qualify the D.C. Circuit's vagueness analysis, which rested entirely on its understanding of *Pacifica*'s holding, see *id.* at 1338-1339. The FCC decisions following the *Action for Children's Television* cases—including the 2001 *Industry Guidance*—have further clarified the manner in which the Commission will apply its longstanding definition of indecency. The intervening FCC decisions on which the court of appeals relied therefore provide no basis for rejecting the D.C. Circuit's repeated findings that the Commission's indecency policy is not unconstitutionally vague.

The court of appeals also stated that "to the extent the *ACT* cases held that a vagueness challenge was precluded by *Pacifica*, we are not bound by the DC Circuit and do not find it persuasive." App., *infra*, 22a n.8. Review is warranted to resolve that conflict in the courts of appeals.

C. Finally, the court of appeals' opinion in *Fox* (which the court applied in *ABC*) conflicts with this

Court's decision in *HLP*, *supra*.[2] The Court in *HLP* made clear that courts must evaluate vagueness claims based on "the particular facts at issue." 130 S. Ct. at 2719. That ruling rests on the well-settled proposition that "'[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Ibid.* (quoting *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)); see *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 58-61 (1976) (declining to reach facial vagueness challenges to ordinances where the ordinances "unquestionably" applied to the litigants' own conduct); see *Pacifica*, 438 U.S. at 735 (focusing review on ruling that Carlin monologue was indecent "as broadcast"). The Court in *HLP* explained that this "rule makes no exception for conduct in the form of speech." 130 S. Ct. at 2719.

Under *HLP*, the court of appeals should have addressed the constitutionality of the Commission's indecency policy as applied to the facts of the actual broadcasts before it. If the court had done so, it would have rejected the vagueness challenges even if it thought the FCC's policy might be vague as applied to other broadcasts. Fox could not reasonably have believed (and has never claimed) that the gratuitous utterance of the F-Word and the S-Word comport with the community standards for the relevant broadcast medium, see *Pacifica*, 438 U.S. at 751 (noting Carlin's observation that the words are among those "you couldn't say on the public * * * airwaves"); see also *In re WUHY-FM,*

[2] The government brought *HLP* to the court of appeals' attention in a supplemental filing in the *Fox* case. In a footnote, the court of appeals in *Fox* dismissed the decision as "inapposite" on the ground that it arose in a "different procedural posture." App., *infra*, 30a n.9.

*Eastern Educ. Radio*, 24 F.C.C. 2d 408, 415 ¶ 17 (1970) (fining radio station for airing gratuitous utterances of the F-Word and S-Word in interview). Indeed, the network edited out the F- and S-Words when the awards shows were broadcast on tape delay in later time zones. App., *infra*, 61a, 94a.

The court of appeals in *Fox*, however, did not determine whether the Commission's indecency policy was unconstitutionally vague as applied to the facts of that case (*i.e.*, to the airing of those words during live awards shows with millions of children in the audience). Rather, to determine whether the Commission's policy provides adequate guidance "by which broadcasters can accurately predict" indecency determinations "in the future," App., *infra*, 22a, 24a, the court examined Commission indecency determinations involving different words and phrases, *id.* at 23a-24a ("pissed off," "dick" and "dickhead"), and starkly different contexts, *id.* at 26a (broadcast of the movie "Saving Private Ryan"), *id.* at 29a (documentary on "The Blues"). And by "strik[ing] down the FCC's indecency policy" in its entirety, *id.* at 34a, the court invalidated its application to even the most graphic broadcasts, see, *e.g.*, *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8004 ¶ 13 (2001) (graphic discussion of oral sex); *id.* at 8009 ¶ 19 (explicit joke about rape of a baby); *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 934 (1987) (extended narrative regarding anal sex).

The court of appeals in *ABC* likewise did not address whether the Commission's indecency policy was vague as applied to ABC's broadcast of scripted adult nudity. Instead, the court vacated the indecency sanction

against ABC based solely on its antecedent holding in *Fox* that the Commission's policy was facially vague. App., *infra*, 120a. Thus, under the Second Circuit's decisions, a broadcaster can evade liability for its indecent broadcasts even when the material at issue is "plainly prohibited" by the FCC's indecency policy (*HLP*, 130 S. Ct. at 2721), based solely on a claim that the policy may be vague "as applied to the conduct of others," *id*. at 2709 (internal quotation marks and citation omitted). The court of appeals' failure to adhere to the vagueness principles set forth in *HLP* warrants this Court's review.

## II. THE COMMISSION'S INDECENCY POLICY IS NOT UNCONSTITUTIONALLY VAGUE

A statute or rule is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304. Because "we can never expect mathematical certainty from our language," *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972), "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," *Williams*, 553 U.S. at 304 (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989)). Moreover, "[t]here are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision." *Smith* v. *Goguen*, 415 U.S. 566, 581 (1974); see *Pacifica Found*. v. *FCC*, 556 F.2d 9, 33 (D.C. Cir. 1977) (Leventhal, J., dissenting) ("[a] concept like 'indecent' is not verifiable as a concept of hard science"), rev'd, 438 U.S. 726 (1978).

By prohibiting the broadcast of "obscene, indecent, or profane language," 18 U.S.C. 1464, and by directing the FCC to "promulgate regulations to prohibit the broadcasting of indecent programming" during specified hours of the day, Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16, 106 Stat. 954, Congress recognized that a wide variety of material, not easily specified in advance, could transgress the reasonable standards of behavior applicable to broadcasters. The Commission clarified its understanding of the statutory terms when, in a definition that this Court approved in *Pacifica*, it identified indecency as material that describes "in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." See *Citizen's Complaint*, 56 F.C.C. 2d 98 ¶ 11.

In the 33 years since *Pacifica* was decided, the Commission has further elaborated on its enforcement policy by issuing numerous decisions applying its indecency analysis to specific factual situations. See *Industry Guidance*, 16 F.C.C.R. at 8004-8015 (collecting and summarizing decisions); see also, *e.g.*, *In re Complaints By Parents Television Council Against Various Broad. Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 F.C.C.R. 1931 (2005) (denying 15 separate indecency complaints). The agency's continued explanation and application of its indecency standards serve to further "narrow potentially vague or arbitrary interpretations" of its rules and of the statute. See *Hoffman Estates*, 455 U.S. at 504; see also *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 575 (1973) (rejecting vagueness challenge in light of "the longstanding interpretations of the statute by the agency charged with its interpretation and en-

forcement"). The Commission has provided further protection against unfair surprise by declining 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. *E.g.*, App., *infra*, 95a. And broadcasters that remain unsure whether particular material is covered can escape any risk of sanction by airing the material during the safe harbor after 10 p.m. See 47 C.F.R. 73.3999(b). These balanced rules have operated effectively for years to protect minors while providing adequate guidance to broadcasters.

Even apart from its error in going beyond the facts of *Fox* and *ABC*, the court of appeals had no sound basis for concluding that the Commission's indecency policy, as embodied in its 2001 *Industry Guidance*, failed to give "person[s] of ordinary intelligence" in the highly sophisticated broadcast industry "fair notice of what is prohibited." *Williams*, 553 U.S. at 304. Although the court acknowledged that "[i]t is the language of the rule * * * that determines whether a law or regulation is impermissibly vague" (App., *infra*, 21a), it did not focus on the guidance provided by the Commission's indecency definition. Instead, the court relied on what it considered to be inconsistent outcomes in a handful of indecency orders to conclude that "broadcasters have no way of knowing what the FCC will find offensive." App., *infra*, 34a; see *id.* at 23a-24a (different outcomes with regard to the use of different expletives gives broadcasters insufficient notice of how the Commission will apply its factors); *id.* at 26a ("little rhyme or reason" to Commission ruling that isolated expletive in Golden Globe

Awards was indecent while repeated use of F-Word and S-Word in "Saving Private Ryan" was not).[3]

The court of appeals ignored the settled principle that "the mere fact that close cases can be envisioned" does not render a statute (or an agency policy) unconstitutionally vague because "[c]lose cases can be imagined under virtually any statute." *Williams*, 553 U.S. at 305-306. Thus, an agency enforcement policy cannot be "automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within [its] language." *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963). At bottom, the court of appeals' vagueness analysis reflects a fundamental rejection of the contextual approach to indecency that the Court upheld in *Pacifica*, under which different circumstances can (unsurprisingly) produce different outcomes. Taking account of context does not establish "a standardless regime of unbridled discre-

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[3] In concluding that the FCC's context-driven, case-by-case approach to indecency "is not arbitrary or capricious," this Court in *Fox* specifically noted that contextual considerations supported the Commission's different treatment of expletives in the movie "Saving Private Ryan." 129 S. Ct. at 1814. The Court observed in particular that "[t]he frightening suspense and the graphic violence in the movie could well dissuade the most vulnerable from watching and would put parents on notice of potentially objectionable material." *Ibid.* (citation omitted). The Court concluded that "[t]he agency's decision to retain some discretion does not render arbitrary or capricious its regulation of the deliberate and shocking uses of offensive language at the award shows under review—shows that were expected to (and did) draw the attention of millions of children." *Ibid.* Yet, even after this Court in *Fox* unequivocally rejected the broadcasters' invocation of "Saving Private Ryan" as "supposed evidence of the Commission's inconsistency," *ibid.*, the court of appeals on remand adhered to its prior view that the FCC's treatment of that film could not be reconciled with FCC decisions concerning other broadcasts. See App., *infra*, 26a-27a.

tion." *Fox*, 129 S. Ct. at 1815. Nor does it otherwise render the Commission's indecency enforcement policy unconstitutionally vague.

### III. THE ADVERSE CONSEQUENCES OF THE COURT OF APPEALS' DECISIONS ARE SWEEPING AND UNAVOIDABLE

In "strik[ing] down the FCC's indecency policy," App., *infra*, 34a, and in later finding that its holding in *Fox* eviscerates all subsequently-reviewed indecency determinations, *id.* at 124a, the court of appeals has overturned the basic framework under which the Commission implements the longstanding statutory and regulatory prohibitions on indecent broadcasting. Indeed, as the decision in *ABC* shows, the Second Circuit's vagueness holding is not confined to particular uses of offensive language, but extends to every other context, including scripted displays of adult nudity. The court of appeals has effectively suspended the Commission's ability to fulfill its statutory indecency enforcement responsibilities unless and until the agency can adopt a new policy that surmounts the court of appeals' vagueness rulings. Accordingly, broadcasters may well believe that they have been freed of the public-interest obligation not to air indecent programming that they assumed when they were originally "granted the free and exclusive use of a limited and valuable part of the public domain." *Fox*, 129 S. Ct. at 1806 (quoting *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981)).

In the concluding paragraph of its opinion in *Fox*, the Second Circuit purported to limit the scope of its decision by stating: "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."

App., *infra*, 34a. But while the court of appeals condemned the purported absence of "discernible standards" in the Commission's current policy, *id.* at 30a, the court itself identified no alternative definition of actionable indecency that would provide the requisite clarity without creating countervailing practical and constitutional difficulties. See *ACT I*, 852 F.2d at 1338 (upholding FCC's generic indecency definition and observing that "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested").

Addressing the court of appeals' concerns by establishing a list of prohibited words is not a realistic option. As the Commission explained in 1987 when it abandoned that approach and adopted its contextual analysis, "[t]here is no way to construct a definitive list that would be both comprehensive and not over-inclusive in the abstract, without reference to the specific context." *Infinity Order*, 3 F.C.C.R. at 932 ¶ 14. The court of appeals itself recognized that while such an approach would have "the advantage of providing broadcasters with a clear list of words that [are] prohibited," App., *infra*, 24a, it would "mean[] that some indecent speech that did not employ [those] words [would] slip[] through the cracks," *ibid*.

As the court of appeals acknowledged, moreover, "an outright ban on certain words would raise grave First Amendment concerns." App., *infra*, 27a. Such an inflexible prohibition, even if limited to the most graphic expletives or images, would preclude the airing of valuable broadcast material. See *In re Complaints Against Various Television Licensees Regarding Their Broad. on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 F.C.C.R. 4507, 4513 ¶ 16 (2005) (concluding that broad-

cast of film "Saving Private Ryan," while containing numerous expletives, was not patently offensive in light of its "overall context"); *In re WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838, 1840, 1842 ¶¶ 9, 13 (2000) (concluding that broadcast of film "Schindler's List" containing "adult frontal nudity" was not patently offensive "based on the full context of its presentation"). A mechanical prohibition of specified broadcast material would also be inconsistent with the context-based approach this Court upheld in *Pacifica,* see 438 U.S. at 750, and such an approach would be difficult (if not impossible) to apply to indecent images.

In sum, the court of appeals' decisions preclude the Commission from effectively implementing statutory restrictions on broadcast indecency that the agency has enforced since its creation in 1934. That extraordinary hobbling of the Commission's enforcement efforts warrants this Court's review.[4]

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[4] The government is filing a single petition for a writ of certiorari because the court of appeals' judgments in *Fox* and *ABC* "involve identical or closely related questions." Sup. Ct. R. 12.4. Indeed, the court of appeals concluded that its disposition of *ABC* was controlled by its decision in *Fox* on the ground that "there [was] no significant distinction" between the two cases. App., *infra*, 124a. While the Court could appropriately grant certiorari only in *Fox* (the first question presented) and hold *ABC* (the second question presented), we believe the better course is to grant review of both judgments. The two cases present distinct contexts: *Fox* involves expletives in live programming, and *ABC* involves images of adult nudity in a scripted show. Simultaneous review of both judgments would thus allow the Court to evaluate how the FCC's indecency rules apply in different settings. This would be especially warranted given the court of appeals' decision to "strike down" the Commission's "indecency policy" in its entirety, *id.* at 34a, and with respect to all its applications, *id.* at 124a-125a.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

AUSTIN C. SCHLICK
*General Counsel*
PETER KARANJIA
*Deputy General Counsel*
JACOB M. LEWIS
*Associate General Counsel*
NANDAN M. JOSHI
*Counsel*
*Federal Communications Commission*

NEAL KUMAR KATYAL
*Acting Solicitor General*
TONY WEST
*Assistant Attorney General*
MALCOLM L. STEWART
*Deputy Solicitor General*
JOSEPH R. PALMORE
*Assistant to the Solicitor General*
THOMAS M. BONDY
ANNE MURPHY
*Attorneys*

APRIL 2011

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket Nos. 06-1760-ag, 06-2750-ag, 06-5358-ag

FOX TELEVISION STATIONS, INC., CBS BROADCASTING INC., WLS TELEVISION, INC., KTRK TELEVISION, INC., KMBC HEARST-ARGYLE TELEVISION, INC., ABC INC., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, RESPONDENTS,

NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., NBC TELEVISION AFFILIATES, FBC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES, CENTER FOR THE CREATIVE COMMUNITY, INC., DOING BUSINESS AS CENTER FOR CREATIVE VOICES IN MEDIA, INC., ABC TELEVISION AFFILIATES ASSOCIATION, INTERVENORS

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Argued: Jan. 13, 2010
Decided: July 13, 2010

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LEVAL, POOLER, and HALL, *Circuit Judges*.

POOLER, Circuit Judge:

This petition for review comes before us on remand from the Supreme Court. Previously we held, with Judge Leval dissenting, that the indecency policy of the

Federal Communications Commission ("FCC" or "Commission") was arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007). The Supreme Court reversed, upholding the policy under the APA and remanding for consideration of petitioners' constitutional arguments. *See Fox Television Stations, Inc. v. FCC*, 129 S. Ct. 1800, 1819 (2009) (Scalia, J.). We now hold that the FCC's policy violates the First Amendment because it is unconstitutionally vague, creating a chilling effect that goes far beyond the fleeting expletives at issue here. Thus, we grant the petition for review and vacate the FCC's order and the indecency policy underlying it.[1]

**BACKGROUND**

Section 1464 of Title 18 of United States Code 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." In 1960, Congress authorized the FCC to impose civil forfeitures for violations of Section 1464. *See* 47 U.S.C. § 503(b)(1)(D). It was not until 1975, however, that the FCC first exercised its authority to regulate speech it deemed indecent but not obscene. The speech at issue was comedian George Carlin's "Filthy Words" monologue, a 12-minute string of expletives broadcast on the radio at 2:00 in the afternoon.

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[1] We address only the petition for review filed in Docket No. 06-5358, te other two petitions having been previously dismissed as moot by this Court. *Fox*, 489 F.3d at 447 n.2.

The FCC brought forfeiture proceedings against the Pacifica Foundation, the broadcaster that had aired the Carlin monologue. *Citizen's Complaint Against Pacifica Found. Station WBAI (FM), N.Y, N.Y.*, 56 F.C.C. 2d 94 (1975). In finding that Pacifica had violated Section 1464, the Commission defined "indecent" speech as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." *Id.* at ¶ 11. Pacifica petitioned for review to the D.C. Circuit, which declared the FCC's indecency regime invalid. *See Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977). In finding the FCC's order both vague and overbroad, the court pointed out that the Commission's definition of indecent speech would prohibit "the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the Bible." *Id.* at 14. Such a result, the court concluded, amounted to unconstitutional censorship. *Id.* at 18.

In a plurality opinion authored by Justice Stevens, the Supreme Court reversed. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978). The Court limited its review to the question of whether the FCC could impose a civil forfeiture for the Carlin monologue and declined to address Pacifica's argument that the regulation was overbroad and would chill protected speech. *Id.* at 734-35, 743 ("Invalidating any rule on the basis of its hypothetical application to situations not before the Court is 'strong medicine' to be applied 'sparingly and only as a

last resort.'" (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973))). In limiting its review, the Court stressed the "specific factual context" of the Carlin monologue, *id.* at 742, focusing in particular on Carlin's deliberate and repetitive use of expletives to describe sexual and excretory activities.

The Court then went on to hold that the FCC could, at least in the situation before it, restrict indecent speech in the broadcast context that did not meet the legal definition of obscenity. *Id.* at 744 (concluding that "if the government has any such power [to restrict indecent speech], this was an appropriate occasion for its exercise"). Resting on a nuisance rationale, the Court first noted that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection" because of its "uniquely pervasive presence in the lives of all Americans." *Id.* at 748. Moreover, the nature of broadcast television—as opposed to printed materials—made it "uniquely accessible to children, even those too young to read." *Id.* at 749. The Court, however, "emphasize[d] the narrowness of [its] holding." *Id.* at 750. "[N]uisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." *Id.* at 750-51 (internal quotation marks omitted).

Justices Powell and Blackmun, who concurred in a separate opinion, also made clear that the FCC's regulatory authority was limited, stating that the Court's holding did not give 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). Nor, they explained, did the holding "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. Finally, they took the FCC at its word that it would "proceed cautiously," which they reasoned would minimize any chilling effect that might otherwise result. *Id.* at 761 n.4.

In the years after *Pacifica*, the FCC did indeed pursue a restrained enforcement policy, taking the position that its enforcement powers were limited to the seven specific words in the Carlin monologue. *See In re Application of WGBH Educ. Found.*, 69 F.C.C. 2d 1250, at ¶ 10 (1978); *Infinity Broadcasting Corp., et al.*, 3 F.C.C. Rcd. 930, at ¶ 5 (1987) ("*Infinity Order*"). No enforcement actions were brought between 1978 and 1987. *Infinity Order*, 3 F.C.C. Rcd. 930, at ¶ 4. Then, in 1987, the FCC abandoned its focus on specific words, concluding that "although enforcement was clearly easier under the standard, it could lead to anomalous results that could not be justified." *Id.* at ¶ 5. The FCC reasoned that under the prior standard, patently offensive material was permissible as long as it avoided certain words. This, the Commission concluded, "made neither legal nor policy sense." *Id.* The Commission instead decided to utilize the definition it had used in *Pacifica*, adopting a contextual approach to indecent speech.

Despite its move to a more flexible standard, the FCC continued to exercise restraint. In particular, it consistently held that a single, non-literal use of an ex-

pletive was not actionably indecent. *See, e.g., In re Application of WGBH Educ. Found*, 69 F.C.C.2d 1250, at ¶ 10 n.6. (noting that the single use of an expletive in a program that aired at 5:30pm "should not call for us to act under the holding of *Pacifica*"); *In re Regents of the Univ. of Cal.*, 2 F.C.C. Rcd. 2703, at ¶ 3 (1987) ("Speech that is indecent must involve more than an isolated use of an offensive word."); *L.M. Communications of S.C., Inc.*, 7 F.C.C. Rcd. 1595, 1595 (1992) (finding the single utterance of the F-word not indecent because it was a "fleeting and isolated utterance which, within the context of live and spontaneous programming, does not warrant a Commission sanction"); *In re Application of Lincoln Dweller, Renewal of the License of Stations KPRL(AM) and KDDB(FM)*, 8 F.C.C. Rcd. 2582, 2585 (1993) (The "use of a single expletive" did not warrant further review "in light of the isolated and accidental nature of the broadcast.").

In 2001, in an attempt to "provide guidance to the broadcast industry regarding . . . [its] enforcement policies with respect to broadcast indecency," the FCC issued a policy statement in which it set forth its indecency standard in more detail. *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464*, 16 F.C.C. Rcd 7999, at ¶ 1 (2001) ("Industry Guidance"). In *Industry Guidance*, the FCC explained that an indecency finding involved the following two determinations: (1) whether the material "describe[s] or depict[s] sexual or excretory organs or activities"; and (2) whether the broadcast is "patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at ¶¶ 7-8 (emphasis omitted). The FCC further explained that it considered the following three factors in determining whether a broadcast is

patently offensive: (1) "the explicitness or graphic nature of the description or depiction"; (2) "whether the material dwells on or repeats at length" the description or depiction; and (3) "whether the material appears to pander or is used to titillate, or whether the materials appears to have been presented for its shock value." *Id.* at ¶ 10 (emphasis omitted). The *Industry Guidance* reiterated that under the second prong of the patently offensive test, "fleeting and isolated" expletives were not actionably indecent. *Id.* at ¶ 18.

In 2004, however, the FCC's policy on indecency changed. During the 2003 Golden Globe Awards, U2 band member Bono exclaimed, upon receiving an award, "this is really, really, fucking brilliant. Really, really, great." *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C. Rcd. 4975, at ¶ 3 n.4 (2004) ("*Golden Globes Order*"). In response to complaints filed after the incident, the FCC declared, for the first time, that a single, nonliteral use of an expletive (a so-called "fleeting expletive") could be actionably indecent.[2]

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[2] The FCC's increased enforcement efforts—as well as Congress's decision to increase the maximum fines—were in large part caused by the broadcast of the 2004 Super Bowl, during which Justin Timberlake exposed Janet Jackson's breast for a fraction of a second during their halftime show, an event that came to be known as "Nipplegate." Frank Ahrens, *The Price for On-Air Indecency Goes Up*, Wash. Post (June 8, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060700287.html. The FCC imposed a $550,000 fine, which was overturned by the Third Circuit. *See CBS Corp. v. FCC*, 535 F.3d 167, 209 (3d Cir. 2008). After the Supreme Court issued its decision in *Fox*, it vacated the decision and remanded to the Third Circuit for reconsideration in light of *Fox*. *See FCC v. CBS Corp.*, 129 S. Ct. 2176 (2009). The Third Circuit has yet to issue a new decision.

Finding that "the 'F-Word' is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language," *id.* at ¶ 9, and therefore "inherently has a sexual connotation," *id.* at ¶ 8, the FCC concluded that the fleeting and isolated use of the word was irrelevant and overruled all prior decisions in which fleeting use of an expletive was held *per se* not indecent, *id.* at ¶¶ 8-12. The FCC also found that the broadcast was "profane" within the meaning of Section 1464, abandoning its previous interpretation of the term to mean blasphemy. *Id.* at ¶¶ 13-14.

At the same time that the FCC expanded its enforcement efforts to include even fleeting expletives, the FCC also began issuing record fines for indecency violations.[3] While the Commission had previously interpreted the maximum fines in the statute as applying on a per program basis, it began treating *each* licensee's broadcast of the same program as a separate violation, thereby multiplying the maximum fine the FCC could order for each instance of indecent speech. In addition, Congress amended Section 503(b)(2)(c)(ii) to increase the maximum fine permitted by a factor of 10—from $32,500 to $325,000—meaning that the fine for a single expletive uttered during a broadcast could easily run into the tens of millions of dollars. *See* 47 U.S.C. § 503(b)(2)(c)(iii).

NBC Universal, Inc. ("NBC"), along with numerous other parties, filed petitions for reconsideration of the *Golden Globes Order* before the FCC, raising statutory and constitutional challenges to the new policy. While the petitions for reconsideration were pending, the FCC

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[3] In 2003, the FCC imposed $440,000 in fines. In 2004, it imposed a record $8 million in fines. *See* Former FCC Commissioners Br. at 10 n.6.

applied the *Golden Globes Order* policy in *In Re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C. Rcd. 2664 (2006) ("*Omnibus Order*"), which the Commission stated was intended to "provide substantial guidance to broadcasters and the public" about what was considered indecent under the new policy. *Id.* at ¶ 2. In the *Omnibus Order* (which dealt with many more programs than are at issue in the present case), the Commission found four programs—the 2002 Billboard Music Awards, the 2003 Billboard Music Awards, various episodes of ABC's NYPD Blue, and CBS's The Early Show—indecent and profane under the Golden Globes standard.

All four programs involved what could be characterized as fleeting expletives. For instance, during the 2002 Billboard Music Awards, Cher, in an unscripted moment from her acceptance speech, stated: "People have been telling me I'm on the way out every year, right? So fuck 'em." *Id.* at ¶ 101. Similarly, during the 2003 Billboard Music Awards, Nicole Ritchie—on stage to present an award with Paris Hilton—made the following unscripted remark: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." *Id.* at ¶ 112 n.164. Episodes of NYPD Blue were found indecent based on several instances of the word "bullshit," *id.* at ¶ 125, while the CBS's The Early Show was found indecent on the basis of a guest's use of the word "bullshitter" to describe a fellow contestant on the reality TV show, Survivor: Vanuatu, *id.* at ¶ 137.

In finding these programs indecent and profane, the FCC reaffirmed its decision in the Golden Globes Order that any use of the word "fuck" was presumptively inde-

cent and profane, *id.* at ¶¶ 102, 107, further concluding that any use of the word "shit" was also presumptively indecent and profane, *id.* at ¶¶ 138, 143. It also held that the four broadcasts in question were "patently offensive" because the material was explicit, shocking, and gratuitous, notwithstanding the fact that the expletives were fleeting and isolated. *Id.* ¶¶ 106, 120, 131, 141.

Fox Television Stations, Inc. ("Fox"), CBS Broadcasting Inc. ("CBS"), and ABC Inc. ("ABC"), as well as several network affiliates, filed petitions for review of the Omnibus Order.[4] The FCC moved for a voluntary remand, which we granted, so that it could have the opportunity to address petitioners' arguments and could ensure that all licensees had a full opportunity to be heard before the FCC issued a final decision. After soliciting public comments, the FCC issued a second order on November 6, 2006. *See In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C. Rcd. 13299 (2006) ("Remand Order"). In the Remand Order, the FCC reaffirmed its finding that the 2002 and 2003 Billboard Music Awards were indecent and profane. However, the FCC reversed its finding with respect to The Early Show and dismissed the complaint against NYPD Blue on procedural grounds.[5]

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[4] ABC originally filed a petition for review in the D.C. Circuit, which was then transferred to this Court and consolidated with the Fox/CBS petitions for review.

[5] The Commission dismissed the complaints against NYPD Blue because the only person who complained of the material resided in the Eastern time zone, where NYPD Blue aired during the "safe harbor" period after 10pm. *Id.* at ¶ 75.

In the Remand Order, the FCC rejected the petitioners' argument that non-literal uses of expletives were not indecent, reasoning that "any strict dichotomy between expletives and descriptions or depictions of sexual or excretory functions is artificial and does not make sense in light of the fact that an expletive's power to offend derives from its sexual or excretory meaning." *Id.* at ¶ 23 (internal quotation marks omitted). However, the Commission did "not take the position that any occurrence of an expletive is indecent or profane under its rules," allowing that expletives that were "integral" to an artistic work or occurring during a "*bona fide* news interview" might not run afoul of the indecency standard. *Id.* at ¶ 70 (emphasis added). As such, it reversed its previous decision concerning the CBS's The Early Show because the utterance of the word "bullshitter" took place during a *bona fide* news interview. The Commission made clear, however, that "there is no outright news exemption from our indecency rules." *Id.* at ¶ 71.

Petitioners and intervenors,[6] which collectively represented all the major broadcast networks as well as local affiliates affected by the FCC's indecency policy (hereinafter, the "Networks"), returned to this Court for review of the Remand Order, making a variety of administrative, statutory, and constitutional arguments. In a 2-1 decision (with Judge Leval in dissent), we held that the FCC's indecency policy was arbitrary and capricious under the APA. *Fox*, 489 F.3d at 447. We reached this

[6] Intervenors included NBC Universal, Inc., NBC Telemundo License Co., NBC Television Affiliates, FBC Television Affiliates, CBS Television Networks Affiliation, and ABC Television Affiliates Association. On remand from the Supreme Court, the Center for Creative Voices and Future of Music Coalition, which represents the artistic community, filed a motion to intervene, which we granted.

decision because we believed that the FCC had failed to adequately explain why it had changed its nearly-30-year policy on fleeting expletives. *Id.* at 58. Moreover, we noted that the FCC's justification for the policy—that children could be armed by hearing even one fleeting expletive (the so-called "first blow" theory)—bore "no national connection to the Commission's actual policy," because the FCC had not instituted a blanket ban on expletives. *Id.*

Because we struck down the indecency policy on APA grounds, we declined to reach the constitutional issues in the case. We noted, however, that we were "skeptical that the Commission [could] provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster." *Id.* at 462. We expressed sympathy for "the Networks' contention that the FCC's indecency test [wa]s undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague." *Id.* at 463. We were also troubled that the FCC's policy appeared to permit it to "sanction speech based on its subjective view of the merit of that speech." *Id.* at 464. However, because it was unnecessary for us to reach them, we left those issues for another day. The FCC subsequently filed a writ of certiorari, which the Supreme Court granted.

In a 5-4 decision, the Supreme Court reversed our APA ruling, holding that the FCC's "fleeting expletive" policy was not arbitrary and capricious because "[t]he Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their

children." 129 S. Ct. at 1819. However, the Court declined to address the Networks' constitutional arguments, "see[ing] no reason to abandon our usual procedures in a rush to judgment without a lower court opinion," *id.*, and remanded for us to consider them in the first instance. Thus, after further briefing by the parties, intervenors, and amici, we now turn to the question that we deferred in our previous decision––whether the FCC's indecency policy violates the First Amendment.

## DISCUSSION

### I.

It is well-established that indecent speech is fully protected by the First Amendment. *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) ("Where obscenity is not involved, . . . the fact that protected speech may be offensive to some does not justify its suppression." (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977))). In most contexts, the Supreme Court has considered restrictions on indecent speech to be content-based restrictions subject to strict scrutiny. *See United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000). For instance, in *Reno v. ACLU*, the Supreme Court struck down the Communications Decency Act of 1996, finding that a provision criminalizing the knowing transmission of indecent speech through the internet was unconstitutionally vague and not narrowly tailored. 521 U.S. at 882. In *Playboy*, the Supreme Court confronted a provision of the Telecommunications Act of 1996 that prohibited cable television operators from broadcasting sexual content during certain hours. While recognizing that television "presents unique problems" not present in other mediums, the Court held unequivo-

cally that the restriction was subject to strict scrutiny, and struck it down because scrambling technology provided a less restrictive means of protecting minors from indecent content. 529 U.S. at 813, 827. Similarly, the Supreme Court in *Sable Communications of California, Inc. v. FCC* declared unconstitutional a provision of the Communications Act that prohibited the transmission of indecent commercial telephone messages, so-called "dial-a-porn," finding that a total ban was not the least restrictive means available. 492 U.S. 115, 131 (1989).

Broadcast radio and television, however, have always occupied a unique position when it comes to First Amendment protection. The categorization of broadcasting as different from all other forms of communication pre-dates *Pacifica. See, e.g., Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) ("Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them."(internal citation omitted)). And the Supreme Court has continuously reaffirmed the distinction between broadcasting and other forms of media since *Pacifica. See Reno*, 521 U.S. at 866-67; *Sable*, 492 U.S. at 127. However, it was in *Pacifica* that the Supreme Court gave its fullest explanation for why restrictions on broadcast speech were subject to a lower level of scrutiny, relying on the twin pillars of pervasiveness and accessibility to children. 438 U.S. at 748-49. While Pacifica did not specify what level of scrutiny applies to restrictions on broadcast speech, subsequent cases have applied something akin to intermediate scrutiny. *See FCC v. League of Women Voters*, 468 U.S. 364, 380 (1984).

The Networks argue that the world has changed since *Pacifica* and the reasons underlying the decision are no longer valid. Indeed, we face a media landscape that would have been almost unrecognizable in 1978. Cable television was still in its infancy. The Internet was a project run out of the Department of Defense with several hundred users. Not only did Youtube, Facebook, and Twitter not exist, but their founders were either still in diapers or not yet conceived. In this environment, broadcast television undoubtedly possessed a "uniquely pervasive presence in the lives of all Americans." *Pacifica*, 438 U.S. at 748.

The same cannot be said today. The past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus. Cable television is almost as pervasive as broadcast—almost 87 percent of households subscribe to a cable or satellite service—and most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control. *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd. 542, at ¶ 8 (2009). The internet, too, has become omnipresent, offering access to everything from viral videos to feature films and, yes, even broadcast television programs. *See In Re Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming*, 24 F.C.C. Rcd. 11413, at ¶ 126 (2009) ("*CSVA Report*") ("The number of suppliers of online video and audio is almost limitless."). As the FCC itself acknowledges, "[c]hildren today live in a media environment that is dramatically different from the one in which their parents and grandparents grew up decades ago." *In the Matter of Empowering Parents*

*and Protecting Children in an Evolving Media Landscape*, 24 F.C.C. Rcd. 13171, at ¶ 11 (2009).

Moreover, technological changes have given parents the ability to decide which programs they will permit their children to watch. Every television, 13 inches or larger, sold in the United States since January 2000 contains a V-chip, which allows parents to block programs based on a standardized rating system. 47 U.S.C. § 303(x). Moreover, since June 11, 2009, when the United States made the transition to digital television, anyone using a digital converter box also has access to a V-chip. *CSVA Report*, 24 F.C.C. Rcd. 11413, at ¶ 11. In short, there now exists a way to block programs that contain indecent speech in a way that was not possible in 1978. In fact, the existence of technology that allowed for household-by-household blocking of "unwanted" cable channels was one of the principle distinctions between cable television and broadcast media drawn by the Supreme Court in *Playboy*. The Court explained:

> The option to block reduces the likelihood, so concerning to the Court in Pacifica, that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem. The corollary, of course, is that targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt.

*Playboy*, 529 U.S. at 815 (internal citation omitted). We can think of no reason why this rationale for applying strict scrutiny in the case of cable television would not

apply with equal force to broadcast television in light of the V-chip technology that is now available.

Nevertheless, as we stated in our previous decision, we are bound by Supreme Court precedent, regardless of whether it reflects today's realities. The Supreme Court may decide in due course to overrule *Pacifica* and subject speech restrictions in the broadcast context to strict scrutiny. This Court, however, is "not at liberty to depart from binding Supreme Court precedent 'unless and until [the] Court reinterpret[s]' that precedent." *OneSimpleLoan v. U.S. Sec'y of Educ.*, 496 F.3d 197, 208 (2d Cir. 2007) (quoting *Agostini v. Felton*, 521 U.S. 203, 238 (1997)) (alterations in original). The Networks, although they may wish it otherwise, seem to concede that we must evaluate the FCC's indecency policy under the framework established by the Supreme Court in *Pacifica*. *See* ABC Television Affiliates Association Br. at 12-13.

There is considerable disagreement among the parties, however, as to what framework *Pacifica* established. The FCC interprets *Pacifica* as permitting it to exercise broad regulatory authority to sanction indecent speech. In its view, the Carlin monologue was only the most extreme example of a large category of indecent speech that the FCC can constitutionally prohibit. The Networks, on the other hand, view *Pacifica* as establishing the limit of the FCC's authority. In other words, they believe that only when indecent speech rises to the level of "verbal shock treatment," exemplified by the Carlin monologue, can the FCC impose a civil forfeiture. Because *Pacifica* was an intentionally narrow opinion, it does not provide us with a clear answer to this question. Fortunately, we do not need to wade into the

brambles in an attempt to answer it ourselves. For we conclude that, regardless of where the outer limit of the FCC's authority lies, the FCC's indecency policy is unconstitutional because it is impermissibly vague. It is to this issue that we now turn.[7]

**II.**

It is a basic principle that a law or regulation "'is void for vagueness if its prohibitions are not clearly defined.'" *Piscottano v. Murphy*, 511 F.3d 247, 280 (2d Cir. 2007) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). A law or regulation is impermissibly vague if it does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006) (quoting *Grayned*, 408 U.S. at 108). The First Amendment places a special burden on the government to ensure that restrictions on speech are not impermissibly vague. *See Perez v. Hoblock*, 368 F.3d 166, 175 n.5 (2d Cir. 2004) ("[A] law or regulation that 'threatens to inhibit the exercise of constitutionally protected rights,' such as the right of free speech, will generally be subject to a more stringent vagueness test.") (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982))). However, "'perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'" *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)).

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[7] Although, the Remand Order also found the broadcasts in question "profane," the FCC has abandoned that finding for the purposes of this appeal and has relied solely on its finding of indecency. *See* FCC Br. at 24 n.2. We therefore do not address its profanity finding further.

The vagueness doctrine serves several important objectives in the First Amendment context. First, the doctrine is based on the principle of fair notice. "'[W]e assume that man is free to steer between lawful and unlawful conduct" and we give him notice of what is prohibited "so that he may act accordingly.'" *Farrell*, 449 F.3d at 485 (quoting *Grayned*, 408 U.S. at 108). Notice is particularly important with respect to content-based speech restrictions "because of [their] obvious chilling effect on free speech." *Reno*, 521 U.S. at 872. Vague regulations "'inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.'" *Farrell*, 449 F.3d at 485 (quoting *Grayned*, 408 U.S. at 109)). Second, the vagueness doctrine is based "on the need to eliminate the impermissible risk of discriminatory enforcement." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991). "A vague law impermissibly delegates basic policy matters to [government officials] for resolution on an ad hoc and subjective basis. . . . " *Grayned*, 408 U.S. at 108-09 (emphasis added). Specificity, on the other hand, guards against subjectivity and discriminatory enforcement.

**A.**

The Networks argue that the FCC's indecency test is unconstitutionally vague because it provides no clear guidelines as to what is covered and thus forces broadcasters to "steer far wider of the unlawful zone," rather than risk massive fines. In support of their position, the Networks rely on the Supreme Court's decision in *Reno v. ACLU*, 521 U.S. 844 (1997). Section 223(a) of the Communications Decency Act ("CDA") prohibited transmitting "indecent" material to minors over the Internet

while section 223(d) prohibited material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *Id.* at 859-60 (quoting 47 U.S.C. § 223(d)). In addition to finding that the statute was not narrowly tailored, the Court found the statute unconstitutionally vague because "the many ambiguities concerning the scope of its coverage render[ed] it problematic for purposes of the First Amendment." *Id.* at 870. The Court found that the statute's use of the "general, undefined terms 'indecent' and 'patently offensive' cover[ed] large amounts of nonpornographic material with serious educational or other value. Because of the "vague contours" of the regulation, the Court held that "it unquestionably silence[d] some speakers whose messages would be entitled to constitutional protection." *Id.* at 874. The Networks argue that since Reno found this indecency regulation unconstitutionally vague, the FCC's identically-worded indecency test for broadcasting must fall as well.

FCC argues the opposite—that *Reno* forecloses a vagueness challenge to the FCC's policy. In *Reno*, the government argued that the CDA was "plainly constitutional" under the *Pacifica* decision. *Id.* at 864. The Supreme Court rejected this argument, distinguishing *Pacifica* on the grounds that (1) the FCC is an expert agency that had been regulating the radio for decades; (2) the CDA was a categorical ban on speech while the FCC's indecency regulation designated "when—rather than whether—it would be permissible to air such a program"; (3) the order at issue in Pacifica was not punitive; and (4) the broadcast medium had traditionally received the most limited First Amendment protection. *Id.* at 867. According to the FCC, because the Court

refused to find *Pacifica* controlling of the constitutional challenges to the CDA, we must find *Reno* equally inapplicable here.

As an initial matter, we reject the FCC's argument that *Reno* forecloses the Networks' vagueness challenge. When the Supreme Court distinguished *Pacifica* in *Reno*, it did so with respect to "the level of First Amendment scrutiny that should be applied to this medium," not to its analysis of whether the statute was unconstitutionally vague. *Id.* at 870. 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. It is the language of the rule, not the medium in which it is applied, that determines whether a law or regulation is impermissibly vague.

We also reject the Networks' argument that Reno requires us to find the FCC's policy vague. To be sure, the CDA's definition of indecency was almost identical to the Commission's, and language that is unconstitutionally vague in one context cannot suddenly become the model of clarity in another. However, unlike in *Reno*, the FCC has further elaborated on the definition of indecency in the broadcast context. For example, the FCC has outlined three factors that it purportedly uses to determine whether a broadcast is patently offensive, *Industry Guidance*, 16 F.C.C. Rcd. 7999, at ¶¶ 7-8, and has declared "fuck" and "shit" presumptively indecent, *Omnibus Order*, 2001 F.C.C. Rcd. 2664, at ¶¶ 102, 107. This additional guidance may not be sufficient to survive a vagueness challenge, but it certainly distinguishes the FCC policy from the one struck down in *Reno*.

Finally, we reject the FCC's argument that the Networks' vagueness challenge is foreclosed by *Pacifica*

itself. *Pacifica*, which did not reach the question of whether the FCC's policy was unconstitutionally vague, was an intentionally narrow opinion predicated on the FCC's "restrained" enforcement policy. *Pacifica*, 438 U.S. at 761 (Powell J., concurring). The FCC's policy has now changed and we would be hard pressed to characterize it as "restrained." Thus, the questions left unresolved by *Pacifica* are now squarely before us, as the Supreme Court itself indicated in its opinion above. *See Fox*, 129 S. Ct. at 1819 ("[W]hether [the FCC's policy] is unconstitutional, will be determined soon enough, perhaps in this very case.").[8]

**B.**

Having concluded that neither *Pacifica* nor *Reno* resolves the question, we must now decide whether the FCC's indecency policy provides a discernible standard by which broadcasters can accurately predict what speech is prohibited. The FCC set forth its indecency

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[8] The FCC also argues that the DC Circuit's *Action for Children's Television* cases preclude Networks' vagueness challenge, but this argument fails for the same reason its *Pacifica* argument fails. The DC Circuit, like the Supreme Court, relied specifically on the FCC's restrained policy in reaching its decision. *See Action for Children's Television v. FCC*, 852 F.2d 1332,1340 n.14 (D.C. Cir. 1988), superseded by 58 F.3d 654 (D.C. Cir. 1995) (en banc) ("[T]he potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy."). Moreover, to the extent the ACT cases held that a vagueness challenge was precluded by *Pacifica*, we are not bound by the DC Circuit and do not find it persuasive. To the extent that our opinion in *Dial Information Services Corp. v. Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991), held that the same definition of indecency was not impermissibly vague in the non-broadcast context, that holding was overruled by the Supreme Court's decision in *Reno*.

policy in its 2001 *Industry Guidance*, in which the FCC explained that an indecency finding involved the following two determinations: (1) whether the material "describe[s] or depict[s] sexual or excretory organs or activities"; and (2) whether the broadcast is "patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at ¶¶ 7-8. Under the policy, whether a broadcast is patently offensive depends on the following three factors: (1) "the explicitness or graphic nature of the description or depiction"; (2) "whether the material dwells on or repeats at length" the description or depiction; and (3) "whether the material appears to pander or is used to titillate, or whether the materials appears to have been presented for its shock value." *Id.* at ¶ 10 (emphasis added). Since 2001, the FCC has interpreted its indecency policy in a number of decisions, including *Golden Globes Order* and the orders on review here.

The FCC argues that the indecency policy in its *Industry Guidance*, together with its subsequent decisions, give the broadcasters sufficient notice as to what will be considered indecent. The Networks argue that the policy is impermissibly vague and that the FCC's decisions interpreting the policy only add to the confusion of what will be considered indecent.

We agree with the Networks that the indecency policy is impermissibly vague. The first problem arises in the FCC's determination as to which words or expressions are patently offensive. For instance, while the FCC concluded that "bullshit" in a "NYPD Blue" episode was patently offensive, it concluded that "dick" and "dickhead" were not. *Omnibus Order*, 21 F.C.C. Rcd 2664, at ¶¶ 127-128. Other expletives such as "pissed

off," up yours," "kiss my ass," and "wiping his ass" were also not found to be patently offensive. *Id.* at ¶ 197. The Commission argues that its three-factor "patently offensive" test gives broadcasters fair notice of what it will find indecent. However, in each of these cases, the Commission's reasoning consisted of repetition of one or more of the factors without any discussion of how it applied them. Thus, the word "bullshit" is indecent because it is "vulgar, graphic and explicit" while the words "dickhead" was not indecent because it was "not sufficiently vulgar, explicit, or graphic." This hardly gives broadcasters notice of how the Commission will apply the factors in the future.

The English language is rife with creative ways of depicting sexual or excretory organs or activities, and even if the FCC were able to provide a complete list of all such expressions, new offensive and indecent words are invented every day. For many years after *Pacifica*, the FCC decided to focus its enforcement efforts solely on the seven "dirty" words in the Carlin monologue. *See Infinity Order*, 3 F.C.C. Rcd. 930, at ¶ 5 (1987). This strategy had its limitations—it meant that some indecent speech that did not employ these seven words slipped through the cracks. However, it had the advantage of providing broadcasters with a clear list of words that were prohibited. Not surprisingly, in the nine years between *Pacifica* and the FCC's abandonment of this policy, not a single enforcement action was brought. This could be because we lived in a simpler time before such foul language was common. Or, it could be that the FCC's policy was sufficiently clear that broadcasters knew what was prohibited.

The FCC argues that a flexible standard is necessary precisely because the list was not effective—broadcasters simply found offensive ways of depicting sexual or excretory organs or activities without using any of the seven words. In other words, because the FCC cannot anticipate how broadcasters will attempt to circumvent the prohibition on indecent speech, the FCC needs the maximum amount of flexibility to be able to decide what is indecent. The observation that people will always find a way to subvert censorship laws may expose a certain futility in the FCC's crusade against indecent speech, but it does not provide a justification for implementing a vague, indiscernible standard. If the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so. And while the FCC characterizes all broadcasters as consciously trying to push the envelope on what is permitted, much like a petulant teenager angling for a later curfew, the Networks have expressed a good faith desire to comply with the FCC's indecency regime. They simply want to know with some degree of certainty what the policy is so that they can comply with it. The First Amendment requires nothing less.

The same vagueness problems plague the FCC's presumptive prohibition on the words "fuck" and "shit" and the exceptions thereto. Under the FCC's current policy, all variants of these two words are indecent unless one of two exceptions apply. The first is the "*bona fide* news" exception, which the FCC has failed to explain except to say that it is not absolute. The second is the artistic necessity exception, in which fleeting expletives are permissible if they are "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance."

*Omnibus Order*, 21 F.C.C. Rcd. 2664, at ¶ 82. In deciding whether this exception applies, the FCC "consider[s] whether the material has any social, scientific or artistic value." *In re 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 F.C.C. Rcd. 4507, at ¶ 11 (2005) ("*Saving Private Ryan*").

> As we stated in our previous opinion:
>
> Although the Commission has declared that all variants of "fuck" and "shit" are presumptively indecent and profane, repeated use of those words in "Saving Private Ryan," for example, was neither indecent nor profane. And while multiple occurrences of expletives in "Saving Private Ryan" was not gratuitous, a single occurrence of "fucking" in the Golden Globe Awards was "shocking and gratuitous." Parental ratings and advisories were important in finding "Saving Private Ryan" not patently offensive under contemporary community standards, but irrelevant in evaluating a rape scene in another fictional movie. The use of numerous expletives was "integral" to a fictional movie about war, but occasional expletives spoken by real musicians were indecent and profane because the educational purpose of the documentary "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives." The "S-Word" on The Early Show was not indecent because it was in the context of a "bona fide news interview," but "there is no outright news exemption from our indecency rules."

*Fox*, 489 F.3d at 463 (internal citations and emphasis omitted). There is little rhyme or reason to these deci-

sions and broadcasters are left to guess whether an expletive will be deemed "integral" to a program or whether the FCC will consider a particular broadcast a "*bona fide* news interview."

The FCC created these exceptions because it recognized that an outright ban on certain words would raise grave First Amendment concerns. In the *Omnibus Order*, the FCC "recognize[d] the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee." 21 F.C.C. Rcd. 2664, at ¶ 15. Likewise, in applying the "artistic necessity" exception, the FCC noted that it was obligated to "proceed with due respect for the high value our Constitution places on freedom and choice in what the people say and hear," particularly with respect to speech that has "social, scientific or artistic value." *Saving Private Ryan*, 20 F.C.C. Rcd. 4507, at ¶ 11 (internal quotation marks omitted). It is these same concerns that informed the FCC's original "restrained" enforcement policy, which had the advantage of prohibiting the most egregious instances of indecent speech while minimizing the burden on protected speech.

The FCC's current indecency policy undoubtedly gives the FCC more flexibility, but this flexibility comes at a price. The "artistic necessity" and "*bona fide* news" exceptions allow the FCC to decide, in each case, whether the First Amendment is implicated. The policy may maximize the amount of speech that the FCC can prohibit, but it results in a standard that even the FCC cannot articulate or apply consistently. Thus, it found the use of the word "bullshitter" on CBS's The Early Show

to be "shocking and gratuitous" because it occurred "during a morning television interview," *Omnibus Order*, 21 FCC Rcd 2664, at ¶ 141, before reversing itself because the broadcast was a "bona fide news interview." *Remand Order*, 21 FCC Rcd. 13299, at ¶ 68. In other words, the FCC reached diametrically opposite conclusions at different stages of the proceedings for precisely the same reason—that the word "bullshitter" was uttered during a news program. And when Judge Leval asked during oral argument if a program about the dangers of pre-marital sex designed for teenagers would be permitted, the most that the FCC's lawyer could say was "I suspect it would." With millions of dollars and core First Amendment values at stake, "I suspect" is simply not good enough.

With the FCC's indiscernible standards come the risk that such standards will be enforced in a discriminatory manner. The vagueness doctrine is intended, in part, to avoid that risk. If government officials are permitted to make decisions on an "ad hoc" basis, there is a risk that those decisions will reflect the officials' subjective biases. *Grayned*, 408 U.S. at 108-09. Thus, in the licensing context, the Supreme Court has consistently rejected regulations that give government officials too much discretion because "such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (internal quotation marks omitted); *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988) (permit scheme facially unconstitutional because "*post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether

the licensor is permitting favorable, and suppressing unfavorable, expression").

We have no reason to suspect that the FCC is using its indecency policy as a means of suppressing particular points of view. But even the risk of such subjective, content-based decision-making raises grave concerns under the First Amendment. Take, for example, the disparate treatment of "Saving Private Ryan" and the documentary, "The Blues." The FCC decided that the words "fuck" and "shit" were integral to the "realism and immediacy of the film experience for viewers" in "Saving Private Ryan," but not in "The Blues." *Fox*, 489 F.3d at 463. We query how fleeting expletives could be more essential to the "realism" of a fictional movie than to the "realism" of interviews with real people about real life events, and it is hard not to speculate that the FCC was simply more comfortable with the themes in "Saving Private Ryan," a mainstream movie with a familiar cultural milieu, than it was with "The Blues," which largely profiled an outsider genre of musical experience. But even if there were a perfectly benign way of explaining these particular outcomes, nothing would prevent the FCC from applying its indecency policy in a discriminatory manner in the future. As the Supreme Court explained in *Forsyth*:

> It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. Accordingly, the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether

> there is anything in the ordinance preventing him from doing so.

505 U.S. at 133 n.10 (internal quotation marks and citations omitted).

The FCC argues that its context-based approach is consistent with, indeed even required by, *Pacifica*. While *Pacifica* emphasized the importance of context in regulating indecent broadcasts, *see* 438 U.S. at 750, it did so in order to emphasize the limited scope of its holding, finding that the particular "context" of the Carlin monologue justified an intrusion on broadcasters rights under the First Amendment. It does not follow that the FCC can justify any decision to sanction indecent speech by citing "context." Of course, context is always relevant, and we do not mean to suggest otherwise in this opinion. But the FCC still must have discernible standards by which individual contexts are judged.

The FCC assures us that it will "bend over backwards" to protect editorial judgment, at least in the news context, but such assurances are not sufficient given the record before us. Instead, the FCC should bend over backwards to create a standard that gives broadcasters the notice that is required by the First Amendment.[9]

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[9] The FCC recently filed a letter pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure drawing our attention to certain language in the Supreme Court's recent decision in *Humanitarian Law Project v. Holder*, No. 08-1498, 2010 WL 2471055 (June 21, 2010). Given the entirely different procedural posture in *Humanitarian Law Project*, we conclude that it is inapposite to the issues before us here.

**III.**

Under the current policy, broadcasters must choose between not airing or censoring controversial programs and risking massive fines or possibly even loss of their licenses, and it is not surprising which option they choose. Indeed, there is ample evidence in the record that the FCC's indecency policy has chilled protected speech.

For instance, several CBS affiliates declined to air the Peabody Award-winning "9/11" documentary, which contains real audio footage—including occasional expletives—of firefighters in the World Trade Center on September 11th. Although the documentary had previously aired twice without complaint, following the *Golden Globes Order* affiliates could no longer be sure whether the expletives contained in the documentary could be found indecent. *See* Larry Neumeister, "Some CBS Affiliates Worry over 9/11 Show," *Associated Press*, Sept. 3, 2006. In yet another example, a radio station cancelled a planned reading of Tom Wolfe's novel I Am Charlotte Simmons, based on a single complaint it received about the "adult" language in the book, because the station feared FCC action. When the program was reinstated two weeks later, the station decided that it could only safely air the program during the "safe harbor" period.

The FCC's application of its policy to live broadcasts creates an even more profound chilling effect. In the case of the 2003 Billboard Music Awards broadcasts, Fox had an audio delay system in place to bleep fleeting expletives. It also pre-cleared the scripts of the presenters. Ritchie, however, departed from her script and used three expletives in rapid sequence. While the per-

son employed to monitor and bleep expletives was bleeping the first, the following two slipped through. Even elaborate precautions will not protect a broadcaster against such occurrences. The FCC argues that Fox should simply implement a more effective screening system, but, short of giving up live broadcasting altogether, no system will ever be one hundred percent effective.[10] Instead, Fox may decide not to ask individuals with a history of using profanity to present at its awards shows.[11] But, of course, this will not prevent someone who wins an award—such as Cher or Bono—from using fleeting expletives. In fact, the only way that Fox can be sure that it won't be sanctioned by the FCC is by refusing to air the broadcast live.

This chilling effect extends to news and public affairs programming as well. Broadcasters may well decide not to invite controversial guests on to their programs for fear that an unexpected fleeting expletive will result in fines. The FCC points to its "*bona fide* news" exception to show that such fears would be unfounded. But the FCC has made clear that it considers the decision to apply this exception a matter within its discretion. Otherwise, why not simply make an outright news exception? During the previous proceedings before this Court, ami-

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[10] Nor would such a system be costless 10 for broadcasters. For instance, Fox estimates that installing an audio delay system for all live programming would cost an estimated $16 million a year.

[11] Indeed, there is evidence in the record that broadcasters have made personnel decisions on the basis of the FCC's indecency policy. For instance, public radio personality Sandra Loh was fired after a single use of an expletive as "a precautionary measure to show the station had distanced itself . . . in case the FCC investigates." Greg Braxton, "KCRW Fires Loh Over Obscenity," *L.A. Times* (Mar. 4, 2004), *available at* http://articles.latimes.com/2004/mar/04/local/me-loh4.

cus curiae gave the example of a local station in Vermont that refused to air a political debate because one of the local politicians involved had previously used expletives on air. The record contains other examples of local stations that have forgone live programming in order to avoid fines. For instance, Phoenix TV stations dropped live coverage of a memorial service for Pat Tillman, the former football star killed in Afghanistan, because of language used by Tilliman's family members to express their grief. A station in Moosic, Pennsylvania submitted an affidavit stating that in the wake of the FCC's new policy, it had decided to no longer provide live, direct-to-air coverage of news events "unless they affect matters of public safety or convenience."[12] If the FCC's policy is allowed to remain in place, there will undoubtedly be countless other situations where broadcasters will exercise their editorial judgment and decline to pursue contentious people or subjects, or will eschew live programming altogether, in order to avoid the FCC's fines. This chill reaches speech at the heart of the First Amendment.

The chill of protected speech has even extended to programs that contain no expletives, but which contain reference to or discussion of sex, sexual organs, or excretion. For instance, Fox decided not to re-broadcast an episode of "That 70s Show" that dealt with masturbation, even though it neither depicted the act or discussed it in specific terms. The episode subsequently won an

[12] Nor are these concerns unfounded. The Commission currently has several pending investigations concerning expletives uttered during live news and sports programming. For instance, after a surprise win against Notre Dame, the University of Pittsburgh quarterback stated that he was "so fucking proud of our football team" on live television. The FCC's investigation into this incident is ongoing.

award from the Kaiser Family Foundation for its honest and accurate depiction of a sexual health issue. Similarly, an episode of "House" was re-written after concerns that one of the character's struggles with psychiatric issues related to his sexuality would be considered indecent by the FCC.

As these examples illustrate, the absence of reliable guidance in the FCC's standards chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature. Sex and the magnetic power of sexual attraction are surely among the most predominant themes in the study of humanity since the Trojan War. The digestive system and excretion are also important areas of human attention. By prohibiting all "patently offensive" references to sex, sexual organs, and excretion without giving adequate guidance as to what "patently offensive" means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive. To place any discussion of these vast topics at the broadcaster's peril has the effect of promoting wide self-censorship of valuable material which should be completely protected under the First Amendment.

## IV.

For the foregoing reasons, we strike down the FCC's indecency policy. 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. The petition for review is hereby GRANTED.

**APPENDIX B**

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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IN THE MATTER OF COMPLAINTS REGARDING
VARIOUS TELEVISION BROADCASTS BETWEEN
FEBRUARY 2, 2002 AND MARCH 8, 2005

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Released: Nov. 6, 2006
Adopted: Nov. 6, 2006

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**ORDER**

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By the Commission: Commissioner Adelstein concurring in part, dissenting in part, and issuing a statement.

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## I. INTRODUCTION

1. In this Order, we address complaints alleging that four television programs ("The 2002 Billboard Music Awards," "The 2003 Billboard Music Awards," "NYPD Blue," and "The Early Show") contained indecent and/or profane material.[1] After considering the comments submitted by broadcasters as well as other interested parties, we find that comments made by Nicole Richie during "The 2003 Billboard Music Awards" and by Cher during the "The 2002 Billboard Music Awards" are indecent and profane as broadcast but that the complained-of material aired on "The Early Show" is neither indecent nor profane. In addition, we dismiss on procedural grounds the complaints involving "NYPD Blue" as inadequate to trigger enforcement action.

## II. BACKGROUND

2. On March 15, 2006, the Commission released Notices of Apparent Liability and a Memorandum Opinion and Order ("*Omnibus Order*") resolving numerous complaints that television broadcasts aired between February 2, 2002, and March 8, 2005, contained indecent, profane, and/or obscene material.[2] Section III.A of the *Omnibus Order* proposed monetary forfeitures against six different television broadcasts for apparent violations of

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[1] For purposes of this Order, we refer to all of the complained-about episodes of "NYPD Blue" as a single "program."

[2] *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 (2006) ("*Omnibus Order*"), *pets. for review pending*, *Fox Television Stations, Inc. v. FCC*, No. 06-1760-AG (2d Cir. filed Apr. 13, 2006), *remanded and partially stayed*, Sept. 7, 2006 ("*Remand Order*").

our prohibitions against indecency and/or profanity.[3] Section III.C addressed twenty-eight broadcasts that we concluded did not violate indecency, profanity, and/or obscenity restrictions for various reasons.[4] In the portion of the *Omnibus Order* at issue here, Section III.B, the Commission considered complaints filed against four programs.

3. "*The 2002 Billboard Music Awards*." The Commission received a complaint concerning "The 2002 Billboard Music Awards" program that aired on Station WTTG(TV), Washington, DC, beginning at 8:00 p.m. Eastern Standard Time on December 9, 2002.[5] The complaint specifically alleged that during the broadcast Cher, an award winner, stated, "'People have been telling me I'm on the way out every year, right? So fuck 'em.'"[6]

4. "*The 2003 Billboard Music Awards*." The Commission received a number of complaints about the "The 2003 Billboard Music Awards" program that aired on Fox Television Network stations beginning at 8:00 p.m. Eastern Standard Time on December 10, 2003.[7] The complaints concerned a segment in which Nicole Richie, an award presenter, stated, "Have you ever tried to get

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[3] *Id.* at 2670-90 ¶¶ 22-99.

[4] *Id.* at 2700-20 ¶¶ 146-232.

[5] *Id.* at 2690 ¶ 101. *See* Letter from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003).

[6] *Id.* The Enforcement Bureau obtained a videotape of the broadcast that confirmed the allegation in the complaint. *Omnibus Order*, 21 FCC Rcd at 2690 ¶ 101.

[7] *Id.* at 2692 ¶ 112.

cow shit out of a Prada purse? It's not so fucking simple."[8]

5. "*NYPD Blue*." The Commission received complaints concerning the use of the term "bullshit" in several "NYPD Blue" episodes that aired on KMBC-TV, Kansas City, Missouri, beginning at 9:00 p.m. Central Standard Time on various dates between January 14 and May 6, 2003.[9]

6. "*The Early Show*." The Commission received a viewer complaint that Station KDKA-TV, Pittsburgh, Pennsylvania, licensed to CBS Broadcasting, Inc. ("CBS"), aired the word "bullshit" during "The Early Show" at approximately 8:10 a.m. Eastern Standard

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[8] *Id.* at ¶ 112 and n. 164.

[9] *Id.* at 2696 ¶ 125. The Commission provided the following descriptions of the complained-of portions of the broadcasts:

> 1/14/03 episode (Det. Sipowitz in response to his partner's arrest by Internal Affairs): "Alright, this is Bullshit!"
>
> 2/4/03 episode (Det. Sipowitz to street officer regarding that officer's partner framing Sipowitz's partner): "Over time—over what—bullshit, a beef!"
>
> 2/18/03 episode (stated by a suspect who bragged about, but now denies, killing his daughter): "I told people I killed Samia to try and get respect back. She had ashamed me and my community look at me as a fool." Det. 1: "You took credit for killing your daughter?! Bullshit!"
>
> 4/15/03 episode (Det. harassing suspect who had harassed prosecutor): "I'm hoping this bullshit about you trying to get under ADA Haywood's skin is a misunderstanding."
>
> 5/6/03 episode (Captain to Det. who harassed suspect in 4/15 episode): "He said you nearly assaulted his client last night.' Det.: 'Well, that's a bunch of bullshit."

*Id.* at n. 187.

Time on December 13, 2004.[10] A videotape obtained from CBS showed that during a live interview with Twila Tanner, a contestant on the CBS program "Survivor: Vanuatu," Ms. Tanner referred to another contestant as a "bullshitter."[11]

7. In Section III.B of the *Omnibus Order*, the Commission found that the broadcasts at issue apparently violated the statutory and regulatory prohibitions against airing indecent and profane material.[12] In light of the circumstances, however, the Commission did not initiate forfeiture proceedings against the relevant licensees.[13] All of the broadcasts discussed in Section III.B, except for the "The Early Show," preceded the *Golden Globe Awards Order*,[14] in which the Commission made clear that the isolated use of an offensive expletive

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[10] *Id.* at 2698-99 ¶ 137.

[11] *Id. See id.* at 2699 n.199 ("In commenting on the strategy employed by the fellow contestant, Ms. Tanner stated: 'I knew he was a bullshitter from Day One.' The interviewer, Julie Chen, recognized the inappropriateness of the language, stating: 'I hope we had the cue ready on that one . . . We can't say that word . . . There is a delay.'").

[12] *Id.* at 2690-2700 ¶¶ 100-45. *See* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999. However, with respect to complaints regarding the use of the words "dick" and "dickhead" in episodes of "NYPD Blue," the Commission found that in context the broadcasts of these terms were not patently offensive under its contextual analysis and based on FCC precedent. *Omnibus Order*, 21 FCC Rcd at 2696-97 ¶ 127.

[13] *Omnibus Order,* 21 FCC Rcd at 2690 ¶ 100.

[14] *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* Memorandum Opinion and Order, 18 FCC Rcd 19859 (Enf. Bur. 2003), review granted, 19 FCC Rcd 4975, 4981 ¶¶ 13-14 (2004) ("*Golden Globe Awards Order*"), *petitions for stay and recon. pending.*

could be actionably indecent.[15] The FCC also stated that its precedent at the time of "The Early Show" broadcast "did not clearly indicate that the Commission would take enforcement action against an isolated use" of "shit" (the "S-Word") or its variants.[16] Accordingly, consistent with its commitment to proceed with caution and restraint in this area, the Commission decided that it would not take any adverse action against any licensee as a result of these apparent violations.[17]

8. Following release of the *Omnibus Order*, several parties petitioned for judicial review of Section III.B, asserting a variety of constitutional and statutory challenges. Fox Television Stations, Inc. ("Fox") and CBS filed a joint petition for review in the United States Court of Appeals for the Second Circuit.[18] ABC Television Network ("ABC") and Hearst-Argyle Television, Inc. ("Hearst") filed a joint petition for review in the United States Court of Appeals for the D.C. Circuit, which later transferred the petition to the Second Circuit. The Second Circuit consolidated the petitions on June 14, 2006.[19]

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[15] *See Omnibus Order,* 21 FCC Rcd at 2692 ¶ 111, 2695 ¶ 124, 2698 ¶ 136.

[16] *Id.* at 2700 ¶ 145.

[17] *Id.* at 2690 ¶ 100.

[18] *See supra* n. 2 (noting pending petitions for review).

[19] The Second Circuit also granted motions to intervene in the Fox-CBS case by NBC Universal, Inc., NBC Telemundo License Co., NBC Television Affiliates, FBC Television Affiliates Association, CBS Television Network Affiliates Association, and the Center for Creative Community, Inc. Before transferring the ABC-Hearst case, the D.C. Circuit granted ABC Television Affiliates Association's motion to intervene.

9. At the same time, several parties complained to the Commission about the process the Commission followed in formulating Section III.B of the *Omnibus Order*. The Commission ordinarily provides broadcasters with an opportunity to file responses and raise arguments before imposing forfeiture liability.[20] With one exception, however, the FCC did not seek the views of the licensees affected by Section III.B of the *Omnibus Order* because the Commission did not impose any sanctions on them.[21] Following the release of the *Omnibus Order*, broadcasters complained that they should have had an opportunity to present their views before the Commission reached its decisions in Section III.B. Upon reflection, the Commission agreed and stated that it wanted to ensure that all of the affected licensees were afforded a full opportunity to be heard before the Commission issued a final decision with respect to the broadcasts at issue. Accordingly, on July 5, 2006, the Commission asked the Second Circuit for a voluntary remand of the case and stay of the briefing schedule. The Commission asked the court to remand the case for 60 days in order to afford interested parties an opportu-

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[20] *See* 47 U.S.C. § 503(b)(4)(A); *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, 8015-16 ¶¶ 26-27 (2001) ("*Indecency Policy Statement*").

[21] The Commission did send a narrow Letter of Inquiry ("LOI") regarding "The 2003 Billboard Music Awards" broadcast, receiving a limited response from Fox on January 30, 2004. Fox also responded to a supplemental LOI without presenting new legal arguments. The Commission did not send LOIs regarding the complained-of broadcasts of "The 2002 Billboard Music Awards," "NYPD Blue," and "The Early Show" prior to the court's remand.

nity to file responses and the Commission an opportunity to give the issues further consideration.

10. The Second Circuit granted the Commission's motion on September 7, 2006, remanding for a period of 60 days "for the entry of a further final or appealable order of the FCC following such further consideration as the FCC may deem appropriate in the circumstances."[22] On the same day, the Commission announced a two-week filing period for interested parties wishing to submit comments concerning the four cases.[23] The Enforcement Bureau separately issued Letters of Inquiry ("LOIs") to Fox, CBS, and KMBC Hearst-Argyle Television, Inc. on September 7, 2006, and to those broadcasters as well as other parties to the Second Circuit proceeding on September 18, 2006.

## III. DISCUSSION

11. Consistent with our commitment to consider the comments and LOI responses filed following the Second Circuit's *Remand Order* and to take a fresh look at the issues raised by the four programs at issue on remand, we vacate Section III.B of the *Omnibus Order* in its entirety and replace it with the decisions below.

### A. "The 2003 Billboard Music Awards"

12. *The Programming.* The Commission, Fox, stations licensed to Fox or its affiliated companies, and affiliates of the Fox Television Network all received a number of complaints from individual viewers and orga-

[22] *Remand Order* at 2.

[23] *See* Public Notice, *FCC Announces Filing Procedures In Connection With Court Remand of Section III.B of the Commission's March 15, 2006 Omnibus Order Resolving Numerous Broadcast Television Indecency Complaints*, DA 06-1739 (rel. Sept. 7, 2006).

nizations alleging that Fox stations aired indecent material during "The 2003 Billboard Music Awards" program on December 10, 2003 between 8 p.m. and 10 p.m. Eastern Standard Time.[24] The complainants alleged that Nicole Richie, who with Paris Hilton presented an award on the program, uttered language that was indecent and profane in violation of 18 U.S.C. § 1464 and the Commission's rule restricting the broadcast of indecent material. The complainants requested that the Commission impose sanctions against each station that aired the remarks.

13. The Bureau sent Fox a letter of inquiry on January 7, 2004.[25] Fox responded on January 30, 2004, attaching a transcript of the material at issue.[26] According to Fox, the program announcer introduced Paris Hilton and Nicole Richie, stars of the Fox Television Network show "The Simple Life,"[27] as follows: "To pre-sent the

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[24] FCC File Nos. EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091.

[25] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Fox Television Stations, Inc. (January 7, 2004).

[26] *See* Letter from John C. Quale, Counsel, Fox Television Stations, Inc., to Investigations and Hearings Division, Enforcement Bureau, FCC, File No. EB-03-IH-0617 (January 30, 2004) ("*Response*").

[27] "The Simple Life," which debuted on December 2, 2003, followed Ms. Hilton's and Ms. Richie's fish-out-of-water adventures upon being transplanted from Beverly Hills, California to an Arkansas farm for 30 days. A *New York Times* review described the show as "[a]n updated 'Green Acres'" featuring "Ms. Hilton, 22, of the hotel fortune, and Ms. Richie, also 22, daughter of the pop singer Lionel Richie." Alessandra Stanley, *With a Rich Girl Here and a Rich Girl There*, N.Y. Times, Dec. 2, 2003, at E1. The cover of the Simple Life DVD describes Ms. Hilton and Ms. Richie in the following manner: "They're Rich. They're Sexy. They're TOTALLY-OUT-OF-CONTROL!" Discussing Fox executives' original idea for the show in an interview, one executive touched

award for Top 40 Mainstream Track, here are two babes whose lives are anything but mainstream. From their hit TV series, 'The Simple Life,' please welcome Nicole Richie and Paris Hilton." Following that introduction, Paris Hilton and Nicole Richie walked onstage to present the award. Fox-owned stations and Fox affiliates in the Eastern and Central Time Zones then broadcast the following exchange between them:

> Paris Hilton: Now Nicole, remember, this is a live show, watch the bad language.
>
> Nicole Richie: Okay, God.
>
> Paris Hilton: It feels so good to be standing here tonight.
>
> Nicole Richie: Yeah, instead of standing in mud and [audio blocked]. Why do they even call it "The Simple Life?" Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.[28]

14. Fox contends that this broadcast was not actionably indecent. Although Fox concedes that it broadcast the F-Word, it argues that the word, in context, did not depict or describe sexual activities but rather, "at most," was a "vulgar expletive used to express emphasis," and

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on the same excretory theme as "The 2003 Billboard Awards" script, stating that "'[t]hey wanted to see stilettos in cow shit.'" *http://web.archive.org/web/20040215040316/http://www.tvweek.com/topstorys/112403simplelife.html*. Daily Variety's review of the premiere episode also described Ms. Richie's penchant for "bad language," labeling her as "potty-mouthed." Brian Lowry, *The Simple Life*, Daily Variety, Nov. 25, 2003 at 4.

[28] *See Response* at 3-4.

thus is outside the scope of the Commission's indecency definition.[29] As for the use of the S-Word, Fox does not deny that it was used in the excretory sense. It argues, however, that the dialogue "contained at most a passing reference to an excretory by-product (i.e., 'cow shit') and an expletive used for emphasis," that the dialogue lasted only 22 seconds, and that it was not pandering, titillating or shocking.[30] Therefore, Fox contends that the dialogue is not actionably indecent.

15. *Indecency Analysis*. 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.[31] Thus, indecency findings require two primary determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. Second, the material must be patently offensive as measured by contemporary community standards for the broadcast medium.[32] In our assessment of whether broadcast material is patently offensive, "the full context in which the

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[29] *Id.* at 12-13.

[30] *Id.*

[31] *Infinity Broadcasting Corporation of Pennsylvania*, Memorandum Opinion and Order, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (*citing Pacifica Foundation*, Memorandum Opinion and Order, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

[32] *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 8 (emphasis in original); *see Omnibus Order*, 21 FCC Rcd at 2667 ¶ 12.

material appeared is critically important."[33] Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length the descriptions; and (3) whether the material panders to, titillates or shocks the audience.[34] In examining these three factors, we must weigh and balance them to determine whether the broadcast material is patently offensive because "[e]ach indecency case presents its own particular mix of these, and possibly other, factors."[35] In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,[36] or, alternatively, removing the broadcast material from the realm of indecency.[37]

16. With respect to the first determination, Fox does not dispute that Ms. Richie's comment—"Have you ever tried to get cow shit out of a Prada purse?"—refers to excrement, and we conclude that it is clearly within the

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[33] *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 9 (emphasis in original).

[34] *Id.* at 8002-15 ¶¶ 8-23.

[35] *Id.* at 8003 ¶ 10.

[36] *Id.* at 8009 ¶ 19 (*citing Tempe Radio, Inc. (KUPD-FM)*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid) (extremely graphic or explicit nature of references to sex with children outweighed the fleeting nature of the references); *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid) (same)).

[37] *Indecency Policy Statement*, 16 FCC Rcd at 8010 ¶ 20 ("the manner and purpose of a presentation may well preclude an indecency determination even though other factors, such as explicitness, might weigh in favor of an indecency finding").

scope of our indecency definition. Fox does contend that Ms. Richie's use of the "F-Word"—in the statement "[i]t's not so fucking simple"—does not describe sexual activities and thus falls outside the scope of our indecency definition, but we disagree. A long line of precedent indicates that the use of the "F-Word" for emphasis or as an intensifier comes within the subject matter scope of our indecency definition.[38] Given the core meaning of the "F-Word," any use of that word has a sexual connotation even if the word is not used literally.

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[38] *See, e.g., Grant Broadcasting System II, Inc. Licensee WJPR-TV*, 12 FCC Rcd 8277, 8279 (Mass Media Bur. 1997) (NAL issued for non-literal uses of the "F-Word" and the "S-Word," such as "this fucking place is going to blow up"); *Pacifica Foundation, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 2698, 2699 ¶¶ 12-13 (1987) (subsequent history omitted) (distinguishing between the use of "expletives" and "speech involving the description or depiction of sexual . . . functions" but indicating that both fall within the subject matter scope of our indecency definition). The Enforcement Bureau's departure from this precedent in its *Golden Globe Awards* decision, *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards,"* Memorandum Opinion and Order, 18 FCC Rcd 19859 (Enf. Bur. 2003), was contrary to this precedent and thus appropriately overturned by the Commission. While the Bureau cited two cases for the proposition that the use of the "F-Word" did not necessarily fall within the subject matter scope of our indecency definition, both cases were inapposite. First, the "F-Word" was not even an issue in *Entercom*, which addressed the words "prick" and "piss," and, in any event, was a Bureau rather than a Commission decision. *See Entercom Buffalo License, LLC (WGR(AM))*, Order, 17 FCC Rcd 11997 (Enf. Bur. 2002). Second, in *Peter Branton*, the Commission did not rule that the some uses of the "F-Word" fell outside the subject matter scope of our indecency definition. Rather, we decided that the uses of the "F-Word" there were not "patently offensive" in the context of the news programming at issue in that case. *See Peter Branton*, 6 FCC Rcd 610 (1991), *appeal dismissed*, 993 F.2d 906 (D.C. Cir. 1993), *cert. den.* 511 U.S. 1052 (1994).

Indeed, the first dictionary definition of the "F-Word" is sexual in nature.[39] Moreover, it hardly seems debatable that the word's power to "intensify" and offend derives from its implicit sexual meaning.[40] Accordingly, we conclude that, as we stated in *Golden Globe*,[41] its use inherently has a sexual connotation and thus falls within the scope of our indecency definition. The material thus warrants further scrutiny to determine whether it is patently offensive as measured by contemporary community standards for the broadcast medium. Looking at the three principal factors in our contextual analysis, we conclude that it is.

17. We will first address the first and third principal factors in our contextual analysis—the explicitness or graphic nature of the material and whether the material panders to, titillates, or shocks the audience. The complained-of material is quite graphic and explicit. Ms. Richie's comment referring to excrement conveys a graphic image of Ms. Richie trying to scrape cow excrement out of her designer hand bag. Because of her use of the "S-Word," Ms. Richie's description also contained quite vulgar language. Furthermore, the vulgar description of excrement was coupled with the use of the "F-Word." As we have previously concluded, the "F-Word" is one of the most vulgar, graphic, and explicit words for sexual activity in the English language.[42]

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[39] *See, e.g.*, American Heritage College Dictionary 559 (4th ed. 2002) (defining the F-Word as "1: to have sexual intercourse with").

[40] *See* Robert F. Bloomquist, *The F-Word: A Jurisprudential Taxonomy of American Morals (In a Nutshell)*, 40 Santa Clara L. Rev. 65, 98 (1999) ("all F-word usage has at least an implicit sexual meaning").

[41] *See Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 8.

[42] *See id.*

Here, Ms. Richie's use of the "F-Word" coupled with her graphic and explicit description of the handling of excrement during a live broadcast of a popular music awards ceremony when children were expected to be in the audience was vulgar and shocking.[43] Her comments were also presented in a pandering manner. As part of their dialogue, Ms. Hilton reminded Ms. Richie to "watch the bad language," a comment that served to preview and highlight for the viewing audience Ms. Richie's remarks. Moreover, Fox does not argue that there was any justification for Ms. Richie's comments.[44]

18. We note that when the Supreme Court stressed the importance of context in *Pacifica*, it mentioned as relevant contextual factors the time of day of the broadcast, program content as it affects "the composition of the audience," and the nature of the medium.[45] All of these factors support the conclusion that the dialogue here was patently offensive in context. The complained-of material was broadcast early in prime time. The program's content was, as discussed above, graphic, explicit

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[43] To the extent that Fox argues that it did not present Ms. Richie's comment for "shock value," *see, e.g., Response* at 13, it fundamentally misunderstands the contextual analysis employed by the Commission. "In evaluating whether material is indecent, we examine the material itself and the manner in which it is presented, not the subjective state of mind of the broadcaster." *Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Order on Reconsideration, 21 FCC Rcd 6653, 6657-58 ¶ 12 (2006) ("*Super Bowl Order on Reconsideration*"), *pet. for review pending, CBS Corp. v. FCC*, No. 06-3575 (3d Cir. filed July 28, 2006).

[44] For example, Fox does not argue that Ms. Richie's remarks had any artistic merit or were necessary to convey any message.

[45] *See Pacifica,* 438 U.S. at 749-51.

and vulgar, both in its excretory description and its use of the "F-Word." The program was designed to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music stars. Although there is no requirement that we document the presence of children in the audience for a program that is subject to an indecency complaint and is aired between 6 a.m. and 10 p.m.,[46] we note that in this case a significant portion of the viewing audience for this program was under 18. According to Nielsen ratings data, during an average minute of "The 2003 Billboard Music Awards" broadcast, 2,312,000 (23.4%) of the 9,871,000 people watching the program were under 18, and 1,089,000 (11%) were between the ages of 2 and 11. In addition, we note that this program was rated TV-PG(DL). Such a rating would *not* have put parents or others on notice of such vulgar language, and the broadcast contained no other warnings to viewers that it might contain material highly unsuitable for children.[47]

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[46] *See Action for Children's Television* v. *FCC*, 58 F.3d 654, 665 (D.C. Cir. 1995) (en banc) ("*ACT III*") (holding that the Commission could rely on bright-line time channeling rule and rejecting contention that it was required to use "station-specific and program-specific data in assessing whether children are at risk of being exposed to broadcast indecency"), *cert. denied*, 516 U.S. 1072 (1996).

[47] Fox notes that its policy is to rate any programming containing the "F-Word" TV-MA. *See* Letter from John C. Quale to Marlene H. Dortch, Secretary, FCC, in FCC File Nos. EB-03-IH-0460, EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091 at 4 (filed Sept. 29, 2006) ("Fox Response to 9/18/2006 LOI"). The TV-MA rating (mature audience only) signifies that the program is specifically designed to be viewed by adults and therefore may be unsuitable for children under 17. In the context of a TV-MA rated program, an "L" would signify "crude indecent language." The TV-PG rating (parental guidance suggested), by contrast, merely signifies that the program contains material that

This no doubt helps explain the strong feelings that many of the complainants, particularly those who were watching the program with their children, expressed regarding the unexpectedly vulgar content.[48] In light of

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parents may find unsuitable for younger children, and that parents may want to watch the program with their younger children. TV-PG is the most common rating, covering a majority of the programs that are rated. *See* Nancy Signorielli, *Age-Based Ratings, Content Designations, and Television Content: Is There a Problem?*, 8 Mass Comm. & Soc'y 277, 293 (2005) (six in ten rated programs are rated TV-PG). The "D" signifies that the program may contain some suggestive dialogue, and the "L" signifies that the program may contain some infrequent coarse language. Moreover, we note that the TV-PG(DL) rating appeared only at the beginning and once in the middle of the program; thus, a viewer tuning into this 2-hour broadcast at another time may not even have been aware that it was rated TV-PG(DL). *See Pacifica*, 438 U.S. at 748 ("Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.").

[48] *See*, *e.g.*, e-mail complaint from individual to Fox station KMSP(TV), Minneapolis, dated December 10, 2003 ("I would appreciate it if you would pass on my intense opinion of the Billboard Awards and Nicole Ritchie (sic). We teach our kids that people like her have a potty mouth. My children were watching part of this program and happened to catch her vulgarity. We will not finish watching the awards nor will we continue to watch fox network in this household."); e-mail complaint from individual to Fox station WTVT(TV), Tampa, dated January 21, 2004 ("Fox insults my ears and those of my wife and children with the "f' word, etc. and we leave you for good . . . "); e-mail complaint from individual to Fox station KMSP(TV), Minneapolis, dated December 10, 2003 ("Why are you allowing that kind of language at 8:00 p.m. for all ages of people to hear? . . . It was disgusting and very disturbing . . . "); e-mail complaint from individual to Fox station KMSP(TV), Minneapolis, dated December 13, 2003 ("I was watching the event with my 12 and 13 y/o daughters . . . the amount of swearing that was done and the severity of some of the words was horrible . . . Watching TV has become very unpredictable these days . . . I do not feel it is a safe source of entertainment for our children. . . ."); 

all of these factors, we conclude that the first and third factors in our contextual analysis both weigh heavily in favor of a finding that the material is patently offensive.

19. With respect to the second factor in our contextual analysis—whether the complained-of material was sustained or repeated—Fox argues that the dialogue here was a "fleeting and isolated utterance" and that such material is not actionably indecent.[49] We disagree.

20. Fox's argument that a "fleeting and isolated utterance" is not actionably indecent is based largely on staff letters and dicta in decisions predating the Commission's *Golden Globe Awards Order*. For example, in a 1987 decision clarifying that our indecency definition was not restricted only to the seven words contained in the George Carlin monologue determined to be indecent in *Pacifica*, the Commission distinguished in dicta between "expletives"—words such as the "F-Word" or the "S-Word" used outside of their core sexual or excretory meanings—and descriptions of sexual or excretory functions. And, in so doing, the Commission suggested: "If a complaint focuses solely on the use of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite to a finding of in-

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complaint from individual to David Solomon, Chief of Enforcement Bureau, dated December 12, 2003 ("I was horrified to learn that some of the young children in the school that I teach in viewed the program. Several of these children are among those children who have social problems and are often in trouble. Is this what our children have to look toward for example on how to live? Would you want your children or grandchildren to mimic these entertainers ?????") All of these complaints except for the last one to the FCC's Enforcement Bureau are attached to Fox's January 30, 2004 *Response*.

[49] *Response* at 12, 13.

decency."[50] The Commission made clear, however, that repetition was *not* required when speech "involv[es] a description or depiction of sexual or excretory functions" and that "[t]he mere fact that specific words or phrases are not *repeated* does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[51] In this case, Ms. Richie's use of the "S-Word" clearly involved "a description of excretory functions."[52]

21. Subsequent to this 1987 guidance, there were several Bureau-level decisions finding the isolated use of an expletive not to be actionably indecent.[53] In no case, however, did the Commission itself, when evaluating an actual program, find that the isolated use of an expletive, such as the "F-Word," as broadcast was not indecent or could not be indecent. In our 2001 *Indecency Policy Statement*,[54] we explained that "where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency,"[55] but also noted "even relatively fleeting references may be found indecent where other factors contribute to a

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[50] *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699. *See also New Indecency Enforcement Standards To Be Applied to All Broadcast and Amateur Radio Licensees*, Public Notice, 2 FCC Rcd 2726 (1987).

[51] *See Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699 (emphasis added).

[52] *Id.*

[53] *See, e.g., Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶ 12 n.32 (listing Bureau-level decisions).

[54] *Indecency Policy Statement*, 16 FCC Rcd at 8008-09 ¶¶ 17-19.

[55] *Id.* at 8008 ¶ 17.

finding of patent offensiveness."[56] Then, in 2004, the Commission itself considered for the first time in an enforcement action whether a single use of an expletive could be indecent. And in evaluating the broadcast of the F-Word during "The Golden Globe Awards," we overturned the Bureau-level decisions holding that an isolated expletive could not be indecent and disavowed our 1987 dicta on which those decisions were based.

22. While it is important to understand the history of the Commission's decisions in this area, we reject Fox's suggestion that Nicole Richie's comments would not have been actionably indecent prior to our *Golden Globe* decision.[57] Rather, Ms. Richie's remarks would have been actionably indecent prior to our *Golden Globe* decision for three separate reasons. First, even under our pre-*Golden Globe* dicta, the offensive material here does not consist solely of the use of expletives; as discussed above, the "S-Word" was used here in its excretory sense and was integral to a graphic and vulgar description that clearly falls within the scope of our indecency rule. As we stated in our 1987 guidance, "repetitive use" was not required under such circumstances.[58] Second, the offensive language was "repeated" in that it included not one but two extremely graphic and offensive words. Third, there seems to be little doubt that

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[56] *Id.* at 8009 ¶ 19.

[57] In this respect, our decision differs from our suggestion in Section III.B of the *Omnibus Order*, now vacated, that prior to the Commission's decision in *Golden Globe* this broadcast would not have warranted enforcement action because it involved an "isolated use of expletives." *See Omnibus Order*, 21 FCC Rcd at 2695 ¶ 124. For the reasons discussed above, we do not believe that our prior suggestion accurately reflected the context of this broadcast or Commission precedent.

[58] *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2699.

Ms. Richie's comments were deliberately uttered and that she planned her comments in advance.[59] Ms. Hilton's opening remark to Ms. Richie that this was a live show and she should "watch the bad language" strongly suggests that the offensive language that followed was not spontaneous. Further, there is nothing in Ms. Richie's confident and fluid delivery of the lines, and her use of multiple offensive words, that suggests that any of the language was a spontaneous slip of the tongue. Thus, given the presence of a graphic description of excretory functions, the presence of multiple offensive words, and the deliberate nature of Ms. Richie's comments, we conclude that this broadcast would have been actionably indecent consistent with prior Commission guidance even in the absence of our *Golden Globe* decision.[60]

23. In addition, this broadcast is actionably indecent under the *Golden Globe Awards Order*.[61] In that Order, we stated that the "mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offen-

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[59] *See id.* (discussing "deliberate" use of expletives).

[60] For these reasons, Ms. Richie's comments differ significantly from the language involved in the two Bureau-level decisions finding fleeting expletives not to be indecent that were cited in the *Indecency Policy Statement*. *See Indecency Policy Statement*, 16 FCC Rcd at 8008-09 ¶ 18. Rather, they are more similar to the material in the *LBJS Broadcasting Company* Notice of Apparent Liability cited in the *Indecency Policy Statement* because they combine a graphic and vulgar description of sexual or excretory material with an expletive. *Id.* at 8009 ¶ 19, *citing LBJS Broadcasting Company*, 13 FCC Rcd 20956 (Mass Media Bur. 1998) (forfeiture paid) (finding broadcast apparently indecent for use of phrase "[s]uck my dick you fucking cunt").

[61] *See Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12.

sive to the broadcast medium is not indecent."[62] While, as explained above, Commission dicta and Bureau-level decisions issued before *Golden Globe* had suggested that expletives had to be repeated to be indecent but "descriptions or depictions of sexual or excretory functions" did not need to be repeated to be indecent, we believe that this guidance was seriously flawed. We thus reaffirm that it was appropriate to disavow it. To begin with, any strict dichotomy between "expletives" and "descriptions or depictions of sexual or excretory functions" is artificial and does not make sense in light of the fact that an "expletive's" power to offend derives from its sexual or excretory meaning.[63] Indeed, this is why it has long been clear that such words fall within the subject matter scope of our indecency definition, which since *Pacifica* has involved the description of sexual or excretory organs or activities.[64] Moreover, in certain cases, it is difficult (if not impossible) to distinguish whether a word is being used as an expletive or as a literal description of sexual or excretory functions. Finally, and perhaps most importantly, categorically requiring repeated use of expletives in order to find material indecent is inconsistent with our general approach to indecency enforcement, which stresses the critical nature of context.[65] In evaluating whether material is patently offensive, the Commission's approach has generally been to examine all factors relevant to that determination.[66] To the extent that Commission dicta had

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[62] *Id.*

[63] *See supra* para. 16.

[64] *Pacifica*, 438 U.S. at 742.

[65] *Indecency Policy Statement,* 16 FCC Rcd at 8002-03 ¶ 9.

[66] *Id.* at ¶¶ 9-10.

previously suggested that one of these factors—whether material had been repeated—would always be decisive in a certain category of cases, we believe that such dicta was at odds with the Commission's overall enforcement policy and was appropriately disavowed.

24. Turning back to "The 2003 Billboard Music Awards" broadcast, we believe that we need not ignore "the first blow" to the television audience in the circumstances presented here.[67] Nor do we think that *Pacifica* requires that approach. The major broadcast networks ("Networks") argue that the *Pacifica* Court "would have never approved" an indecency enforcement regime that applied to isolated and fleeting expletives.[68] But this claim finds no support in *Pacifica*, in which the Court specifically reserved the question of "an occasional expletive" and noted that it addressed only the "particular broadcast" at issue in that case.[69] Indeed, we think it significant that the "occasional expletive" contemplated by the Court was one that occurred in "a two-way radio conversation between a cab driver and a dispatcher,"—a conversation not broadcast to a wide audience—"or a telecast of an Elizabethan comedy," settings far removed from the broadcast at issue here.[70]

25. In explaining the special nature of the broadcast medium, the Supreme Court emphasized the "pervasive presence [of the broadcast medium] in the lives of all Americans" and that indecent broadcasts invade the

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[67] *Pacifica*, 438 U.S. at 748-49.

[68] Joint Comments of Fox, CBS, NBC Universal, Inc. and NBC Telemundo License Co. in DA 06-1739 at 3 (filed Sept. 21, 2006) ("*Joint Comments*").

[69] *Pacifica,* 438 U.S. at 742, 750.

[70] *Id.* at 750.

privacy of the home. It rejected the argument that one could protect oneself by turning off the broadcast upon hearing indecent language: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."[71] We believe that granting an automatic exemption for "isolated or fleeting" expletives unfairly forces viewers (including children) to take "the first blow." Indeed, it would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time. For example, broadcasters would be able to air any one of a number of offensive sexual or excretory words, regardless of context, with impunity during the middle of the afternoon provided that they did not air more than one expletive in any program segment.[72] Such a result would be inconsistent with our obligation to enforce the law responsibly. We do not believe that viewers of free television broadcasts utilizing the public airwaves should feel, as so many of the complaining viewers of "The 2003 Billboard Music Awards" clearly do, that they cannot safely allow their families to watch prime-time broadcasts.[73]

26. Nor, as discussed above, are the Networks correct in their suggestion that fleeting utterances have never before been regulated. On the contrary, our *Golden Globe Awards* decision was not the first time

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[71] *Id.* at 748-49.

[72] Such words could include grossly offensive sexual terms such as "cunt."

[73] *See* complaints listed in note 48 *supra*. Like the broadcast in *Pacifica*, Ms. Richie's statements "could have enlarged a child's vocabulary in an instant." *Pacifica*, 438 U.S. at 749.

that a fleeting utterance had been found to be indecent.[74] We have long recognized that "even relatively fleeting references may be found indecent" if the context makes them patently offensive.[75]

27. We thus conclude that the fact that the offensive dialogue here was relatively brief is not dispositive under these particular circumstances. This is not a case involving a single, spontaneously uttered expletive. Rather, it was two sentences, one of which contained a graphic excretory description and the other a vulgar expletive used to heighten the effect of the excretory description. And, as noted above, these statements were not spontaneous slips of the tongue, but rather were planned by the speaker and presaged by the introductory remark to "watch the bad language."

28. With respect to our analysis of the complained-of material, we emphatically reject the argument made by Fox and other broadcasters that the "contemporary community standards" employed by the Commission merely reflect the "subjective opinions" or "the tastes of the individuals with seats on the Commission."[76] Rather, as we have previously stated, in evaluating material, we rely on the Commission's "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens."[77]

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[74] *Indecency Policy Statement*, 16 FCC Rcd at 8009 ¶ 19.

[75] *See id.* (listing examples of isolated utterances found to be actionably indecent).

[76] *Joint Comments* at 10-11.

[77] *Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 ¶ 12 (2004).

29. In this case, moreover, our assessment of contemporary community standards for the broadcast medium is strongly bolstered by broadcasters' own practices. As mentioned above, during the 10:00 p.m.-6:00 a.m. "safe harbor," broadcasters are permitted to air indecent and profane material. Nevertheless, with rare exceptions, they do not allow the "F-Word" or the "S-Word" to be broadcast during that time period. Fox, for example, "generally prohibit[s] use of any form of the F-word or S-word during any day part, *including late-night programming*."[78] NBC also "does not broadcast the 'F-Word' and the 'S-Word'" during the "safe harbor" "except in unusual circumstances" and generally does not allow such language to be broadcast on its flagship late-night program "The Tonight Show with Jay Leno."[79] Similarly, ABC, even during safe harbor hours, "generally has not approved the broadcast of the 'f-word' and the 's-word.'"[80] For instance, during a recent broadcast of "Nightline," ABC deleted uses of the "F-Word" in a piece on actor Mark Wahlberg.[81] CBS, likewise, indicates that "[g]enerally speaking, broadcast[s] of the 'F-word' and 'S-word' are not permitted under CBS's Television Network Standards *at any time of [the] day*."[82]

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[78] Fox Response to 9/18/2006 LOI at 4 (emphasis added).

[79] Letter from F. William LeBeau to Marlene H. Dortch, Secretary, FCC, File Nos. EB-03-IH-0355, EB-03-IH-0460, EB-03-IH-0617, EB-04-IH-0295, EB-04-IH-0091, EB-05-IH-0007 at 4-5 (Sept. 29, 2006) ("NBC Response to 9/18/2006 LOI").

[80] Letter from John W. Zucker, Senior Vice President, ABC, Inc. to Marlene H. Dortch, Secretary, FCC, File No. EB-03-IH-0355 at 2 (Sept. 29, 2006) ("ABC Response to 9/18/2006 LOI").

[81] "Nightline," Sept. 29, 2006.

[82] Letter from Anne Lucey, Senior Vice President, CBS Corp. to Marlene H. Dortch, Secretary, FCC, File No. EB-05-IH-0007 at 2

Hearst also reports that its general policy, "which applies *at all times*, is that vulgar language such as the F-Word and the S-Word [is] not to be knowingly broadcast."[83] To be sure, each of the broadcasters avers that in certain contexts, such as the motion picture *Saving Private Ryan*, they do permit the broadcast of the "F-Word" and the "S-Word." However, none of these examples bears even the slightest resemblance to Nicole Richie's comments during "The 2003 Billboard Music Awards."[84] Indeed, in Congressional testimony, Fox's President of Entertainment recognized that the very comments at issue here—Ms. Richie's remarks—contained "inappropriate language."[85] Moreover, Fox edited out her comments in its broadcasts to the Mountain and Pacific Time Zones.

30. Taken as a whole, broadcasters' practices with respect to programming aired during the safe harbor reflect their recognition that airing the "F-Word" and the "S-Word" on broadcast television is generally offensive to the viewing audience and, in the usual case, not consistent with contemporary community standards for the broadcast medium. They also reinforce our conclusion that Nicole Richie's comments during "The 2003

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(Sept. 29, 2006) ("CBS Response to 9/18/2006 LOI") (emphasis added).

[83] Response of Hearst-Argyle Television, Inc., File No. EB-03-IH-0355 at 3 (Sept. 29, 2006) ("Hearst Response to 9/18/2006 LOI") (emphasis added).

[84] *See* ABC Response to 9/18/2006 LOI at 2; CBS Response to 9/18/2006 LOI at 2-3; Hearst Response to 9/18/2006 LOI at 4-5; NBC Response to 9/18/2006 LOI at 3-4; Fox Response to 9/18/2006 LOI at 4.

[85] *H.R. 3717, the 'Broadcast Decency Enforcement Act of 2004': Hearing Before the Subcommittee on Telecommunications and the Internet of the House Comm. on Energy & Commerce*, 107th Congress, (Feb. 26, 2004) (statement of Gail Berman).

Billboard Music Awards" were patently offensive under contemporary community standards. For all of these reasons, we conclude that, given the explicit, graphic, vulgar, and shocking nature of Ms. Richie's comments, they were patently offensive under contemporary community standards for the broadcast medium and thus indecent as broadcast.[86]

31. We also disagree that it would be inequitable to hold Fox responsible for airing offensive language during "The 2003 Billboard Music Awards" due to the live, unscripted nature of the material.[87] In disclaiming responsibility, Fox states that Nicole Richie's and Paris Hilton's scripted dialogue did not contain the "F-Word" or "S-Word." Rather, Ms. Richie's first scripted line read: "Yeah—instead of standing in mud and pig crap." When she spoke, she substituted "cow shit" (which was blocked out in the audio feed) for "pig crap" in that line. In the sentences at issue here, Ms. Richie was scripted to say "Have you ever tried to get cow manure out of a Prada purse? It's not so freaking simple."[88]

32. Fox also describes the measures it employed to delete objectionable material from the broadcast. It says that as in previous years—including during "The 2002 Billboard Music Awards" broadcast when it aired Cher's use of the phrase "fuck 'em"—it utilized a five-

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[86] The Networks also complain about the Commission's analysis of contemporary community standards in other pending proceedings, such as *The Blues: Godfathers and Sons*. *See Joint Comments* at 10. In the case of *The Blues*, the Commission has issued only a Notice of Apparent Liability for Forfeiture, *see Omnibus Order* at 2683-87 ¶¶ 7285, and we will address such issues in further proceedings in that case.

[87] *See Response* at 13.

[88] *Id.* at 6.

second delay that it normally used during the production of live entertainment programming. A Broadcast Standards employee monitored the broadcast and operated a "delay button" that enables an employee to edit out objectionable content before it airs. Fox also assigned a Broadcast Standards representative to the event to review the script, attend dress rehearsals and be present at the event, as it normally did for the production of live entertainment events. During "The 2003 Billboard Music Awards" program, the employee operating the delay button edited out the vulgar phrase "cow shit" the first time Ms. Richie said it, but failed to edit out the remaining offensive language discussed above. The program aired several hours later on stations in the Mountain and Pacific time zones, and Fox did remove the offensive language before it aired on those stations.[89]

33. As Fox points out, the FCC has long recognized that it may be inequitable to hold a licensee responsible for airing offensive speech during live coverage of a public event under some circumstances.[90] But the Commission has not hesitated to enforce its indecency standard

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[89] *Id.* at 8-9. Following this broadcast, Fox implemented a longer delay mechanism and a second delay button for all live broadcasts to serve as a back-up. *Id.* at 9. In its recent response to a LOI relating to the broadcast of "The 2002 Billboard Music Awards," Fox states that it now uses a total of four delay buttons for all live broadcasts of entertainment programming. In addition, it "recognizes that certain performers may present more risk of spontaneous objectionable content during live performances than others" and thus "has begun to tape in advance certain performances to air during otherwise 'live' broadcasts." See Letter from John C. Quale to Marlene H. Dortch, Secretary, FCC, File No. EB-03-IH-0460 at 6 (Sept. 21, 2006) ("Fox Response to 9/7/06 LOI").

[90] *Pacifica*, 438 U.S. at 733 n.7, *quoting Pacifica Foundation*, 59 FCC 2d at 893 n.1. *See Response* at 12.

where, as here, a licensee fails to exercise "reasonable judgment, responsibility and sensitivity to the public's needs and tastes to avoid patently offensive broadcasts."[91] Here, the original script for "The 2003 Billboard Music Awards" increased the likelihood that Ms. Richie would ad-lib offensive remarks; as noted above, it called for her to make excretory references to "pig crap" and "cow manure," and to substitute the euphemism "freaking" for the "F-Word."[92] Such a script

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[91] *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2700 ¶ 18. *See Liability of San Francisco Century Broadcasting, L.P.*, Memorandum Opinion and Order, 8 FCC Rcd 498, 499 ¶ 7 (1993) ("the mere fact that a show is live does not excuse a station from exercising its editorial responsibilities, especially where commonly available screening techniques can eliminate the element of surprise."), *citing Sound Broadcasting Corp.*, Notice of Apparent Liability, 6 FCC Rcd 2174 (Mass Media Bur. 1991); *Radio Station KFMH-FM, Muscatine, Iowa*, Notice of Apparent Liability, 9 FCC Rcd 1681, 1681-82 (Mass Media Bur. 1994) (rejecting contention that licensee should not be held responsible for broadcasting live and unscripted offensive material from an outside source where the broadcaster suspected "that the caller involved was the same person who had told the objectionable joke only eight minutes earlier" but "chose to place the call on the air rather than to discontinue the broadcast or to use precautions such as a delay device."); *L.M. Communications*, Notice of Apparent Liability, 7 FCC Rcd 1595 (Mass Media Bur. 1992) (rejecting argument that broadcaster should not be sanctioned for airing indecent material within live and unscripted programming where "the scatological material as broadcast involved a deliberate and repetitive use of the word 'crap' to heighten the audience's awareness of and attention to the subsequent use of the term 'shit' by the announcer.").

[92] *See* Response at 6; *see also Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Forfeiture Order, 21 FCC Rcd 2760, 2769 ¶ 19 (2006) (citing evidence that "there is always a risk that performers will ad-lib remarks or take unscripted actions, and that the risk level varies according to the nature of the performance.") (subsequent history omitted).

might have posed minimal risk in the hands of some performers. Relying on Ms. Hilton and Ms. Richie to avoid vulgar language, however, involved a substantially greater risk.[93] As Fox well knew, Ms. Richie frequently used indecent language in inappropriate contexts. For example, during the three episodes of "The Simple Life" that it broadcast in the days leading up to the "The 2003 Billboard Music Awards," Fox felt it necessary to bleep expletives (the "F-Word" or "S-Word") uttered by Ms. Richie no fewer than nine times.[94] Yet Ms. Richie was still selected as a presenter for the live, prime-time awards show, and Fox has not claimed it made any effort to caution Ms. Richie about its broadcast standards for the program or that it took any special precautions (beyond its standard five-second delay) to guard against her use of expletives on the air. Indeed, Fox does not even contend that it took any action against Ms. Richie after this episode.

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[93] *See supr*a note 27. As discussed above, Fox advertised Ms. Hilton and Ms. Richie as being "totally-out-ofcontrol" on the cover of the Simple Life DVD. Additionally, *The Los Angeles Times* review of the first episode of "The Simple Life" describes Ms. Hilton and Ms. Richie as "out-of-control." Carina Chocano, *Work for a Living? What a Concept*, L.A. Times, Dec. 2, 2003, at 1 (Calendar Section).

[94] *"The Simple Life*," Season 1, Episodes 1-3. In addition, Ms. Richie's penchant for cursing is highlighted in a scene during the first episode in which their host, reviewing the house rules with them, states "no cussing or bad language," at which point the camera focuses on Ms. Richie giggling helplessly at Ms. Hilton. Their penchant for vulgarity is also illustrated during the third episode in two scenes at a local fast food franchise where Ms. Richie and Ms. Hilton are working for the day. Directed to change the letters of a sign out front to read "Half Price Burgers All Day," they instead arrange the letters to read "1/2 Price Anal Salty Weiner Bugers." Later, standing on the curb in costumes of the restaurant's mascot, an animated milkshake, they stick up their respective middle fingers (which are pixilated) to passersby.

34. Even more significant, the particular five-second delay and editing system that Fox used in this case had already proved inadequate to delete Cher's offensive language during Fox's broadcast of "The 2002 Billboard Music Awards" the previous year. During that broadcast, Cher, when accepting an award, had stated, "'People have been telling me I'm on the way out every year, right? So fuck 'em.'"[95] According to Fox, the employee in charge of deleting objectionable material did not act quickly enough and ended up editing out dialogue that aired after Cher's comment.[96] Despite this failure, Fox took no additional precautions to avoid airing such material the next year.[97] The record also demonstrates that steps may be taken, such as adding "delay buttons" or lengthening the delay, that allow for far more effective editing of potentially objectionable content.[98] Here, Fox itself contends that the time delay and editing system that it used for "The 2003 Billboard Music Awards" was inadequate, maintaining that it imposed on the operator a "Herculean task" because he was "essentially trying to watch two programs at once—the live version occurring in real-time and the delayed version that was broadcast seconds later."[99] Then, if he heard or saw objectionable content, he was required to "press the appropriate audio and/or video delay buttons at the precise instant necessary to eliminate the objectionable content from the delayed feed" while at the same time "staying abreast of

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[95] *See infra* para. 56.

[96] *See* Fox Response to 9/7/06 LOI at 5.

[97] *See* Response at 5.

[98] *See, e.g., id.* at 8-9.

[99] Fox Response to 9/18/2006 LOI at 10 n. 21.

the continuing live feed."[100] In short, under these circumstances, Fox should have recognized the high risk that "The 2003 Billboard Music Awards" broadcast raised of airing indecent material. Nevertheless, Fox chose to rely on the same delay and editing system that had proved inadequate the previous year to delete an expletive during the same show. We are not persuaded, therefore, that Fox's efforts to edit out the offensive language were diligent or reasonable.

35. We recognize that no delay and editing system is foolproof and that there is always a possibility of human error in using delay equipment to edit live programming. The Commission can and will consider these facts in deciding what, if any, remedy is appropriate. In this case, however, as discussed above, we conclude that Fox's efforts to prevent and edit out Ms. Richie's comments were not diligent or reasonable.

36. Holding Fox responsible for airing indecent material in this case does not place live broadcasts at risk or impose undue burdens on broadcasters.[101] This case does not involve breaking news coverage that Fox and other broadcasters have traditionally presented in so-called "real time."[102] Nevertheless, Fox argues that

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[100] *Id.* By contrast, Fox states that its current time delay and editing system "relies upon technology to ensure that once an edit button is pressed, the potentially objectionable content is edited at the right time during the delayed feed." *Id.* As stated above, Fox's current system also utilizes more than one employee "to provide redundancy." *Id.* at 10.

[101] *See Joint Comments* at 12-16.

[102] Since this case does not involve breaking news or sports programming, we do not address issues involving such programming here. But as we recognize elsewhere in this Order, "in light of the important First Amendment interests at stake as well as the crucial role that context

"[t]he live presentation of awards shows . . . is what makes this content so compelling."[103] Fox, however, did not even decide to air the program live in much of the country. Rather, viewers in the Mountain Time Zone saw the program with a one-hour delay, and those in the Pacific Time Zone experienced a three-hour delay. We find it difficult to understand why viewers on the East Coast would no longer find "live programming" to be "compelling" with a ten-second delay while it is evidently acceptable to provide this programming to viewers in the western half of the country with a one-hour or three-hour delay. Moreover, with respect to awards shows as a whole, the record reflects that the vast majority of awards shows are not aired by major networks live in the Pacific Time Zone.[104] Rather, they are generally broadcast with a three-hour delay, thus undermining any assertion that it is important that viewers see the presentation of the awards without the comparatively minimal delay required to remove indecent language.

37. Under the circumstances, we fail to see how a delay of five, ten, or even fifteen seconds meaningfully affects the value of this programming or significantly implicates First Amendment values. In this vein, we

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plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming." *See infra*, § III.C.

[103] See *Joint Comments*, Appendix X (Declaration of Peter Ligouri) at ¶ 2.

[104] Of the 32 awards shows that were broadcast by the major networks and are discussed in the record, only the Academy Awards aired live in all time zones. *See* ABC Response to 9/18/2006 LOI at 2; NBC Response to 9/18/2006 LOI at 4 and Exh. C.; Fox Response to 9/18/2006 LOI at 3-4; CBS Response to 9/18/2006 LOI at 7.

note that so-called "live" programming is not literally live—viewers at home do not see an event at the very time that it is actually occurring. Rather, there is a natural delay caused by the time that it takes a signal to reach viewers. The record shows that digital signals, for example, may take up to 1.3 to 3.3 seconds to reach viewers over-the-air.[105] And, if viewers are receiving such signals through a cable operator or satellite provider, there may be an additional delay of up to 3 seconds.[106] Finally, if a viewer has a digital video recorder, there is another additional delay of approximately another half-second.[107] Thus, using a conservative estimate, a viewer may be watching an event more than three seconds after it occurs, even in the absence of any delay technology. In light of this, we fail to see how there is a meaningful adverse impact on a viewer's experience because he or she learns the winner of the Billboard Award for Top 40 Mainstream Track some eight to eighteen seconds after the winner is announced on stage in Las Vegas (with a delay) as opposed to after the normal three to six seconds (without one).

38. Finally, we note that our decision here will not deprive Fox of the ability to present such programming in substantially the same way that it has in the past. Fox has utilized a time delay and other procedures to

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[105] Fox Response to 9/18/2006 LOI at 11.

[106] *Id.*

[107] *Id. See* ABC Response to 9/18/2006 LOI at 7-8 (reporting that transmitting signals from ABC's New York Broadcast Center to affiliates results in less than a two second delay, that feeding live material from remote locations to ABC's New York Broadcast Center may cause an additional delay of up to a second, and that distribution of the signals to the consumers through cable and satellite systems may cause an additional delay).

avoid airing patently offensive material during live entertainment broadcasts such as "The 2003 Billboard Music Awards" for years before the Commission's decision in the *Golden Globe Awards Order*.[108] We also disagree that "delaying live broadcasts to edit potentially offensive language inevitably results in overbroad censorship of appropriate material."[109] As the D.C. Circuit observed, "some degree of self-censorship is inevitable and not necessarily undesirable so long as proper standards are available."[110] The possibility that an over-zealous broadcast standards employee may "dump" material that is not actionably indecent during the live presentation of an awards show does not outweigh the compelling interest in preventing patently offensive broadcasts such as the one that occurred in this case.

39. For all of these reasons, we conclude that Fox's broadcast of "The 2003 Billboard Music Awards" violated the prohibitions in 18 U.S.C. § 1464 and the Commission's rules against broadcast indecency and that it is not inequitable to hold Fox responsible for these violations.

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[108] *See Response* at 8; *see also* Fox Response to 9/7/06 LOI at 5. In addition, Fox uses delays for live entertainment broadcasts even after 10 p.m. *See id.* at 5-7. The Commission's indecency regulation does not apply at that time, *see* 47 C.F.R. § 73.3999(b), so Fox obviously has reasons apart from regulatory compulsion for using a delay.

[109] *Joint Comments* at 15.

[110] *Action for Children's Television v. FCC*, 59 F.3d 1249, 1261 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996) (*ACT IV*), *citing Pacifica*, 438 U.S. at 743. *See ACT III*, 58 F.3d at 666 ("Whatever chilling effects may be said to inhere in the regulation of indecent speech, these have existed ever since the Supreme Court first upheld the FCC's enforcement of section 1464 of the Radio Act.").

40. *Profanity Analysis*. Consistent with our decisions in the *Golden Globe Awards Order* and the *Omnibus Order*, we also find that the complained-of language in the program at issue violated Section 1464's prohibition on the broadcast of "profane" utterances.[111] In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" was profane within the meaning of Section 1464 because, in context, it constituted vulgar and coarse language "'so grossly offensive to members of the public who actually hear it as to amount to a nuisance.'"[112] Similarly, we concluded in the *Omnibus Order* that the "S-Word" is a vulgar excretory term so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane.[113] In certain cases, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[114] However, such circumstances are not present here: Fox does not contend that Ms. Richie's profane language was essential to informing viewers on a matter of public importance or that modifying the lan-

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[111] 18 U.S.C. § 1464.

[112] *Golden Globe Awards Order*, 19 FCC Rcd at 4981 ¶ 13, *quoting Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972).

[113] *Omnibus Order*, 21 FCC Rcd at 2686 ¶ 81 ("Like the 'F-Word,' [the 'S-Word'] is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home.").

[114] *Id.* at 2669 ¶ 19, *citing 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,"* Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005).

guage would have had a material impact on its function as a source of news and information. On the contrary, Fox sought (albeit unsuccessfully) to delete the profane language, and did remove it before the program aired on time delay in the Mountain and Pacific Time Zones.[115] It is undisputed that the complained-of material, including the "F-Word" and the "S-Word," was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination.[116] Because there was a reasonable risk that children may have been in the audience at the time of the broadcast on December 10, 2003,[117] the broadcast is legally actionable.

41. Contrary to the Networks' *Joint Comments*, we believe that our interpretation of "profane" as used in Section 1464 is appropriate.[118] The word has long carried a variety of meanings, including non-religious meanings.[119] Several courts have interpreted the word

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[115] *Response* at 8.

[116] *See Omnibus Order*, 21 FCC Rcd at 2666 ¶ 8.

[117] *See supra* para. 18 (noting that, according to Nielsen ratings data, 23.4% of the people watching an average minute of "The 2003 Billboard Music Awards" broadcast were under 18, and 11% were between the ages of 2 and 11).

[118] *See Joint Comments* at 28-32; Thomas Jefferson Center For the Protection of Free Expression Comments at 11-15 (Sept. 21, 2006).

[119] The 1891 edition of the Century Dictionary includes this definition of profane: "2. To put to a wrong use; employ basely or unworthily." Century Dictionary 4754 (1891 ed.). In an appendix to his concurring opinion in *Burstyn v. Wilson*, 343 U.S. 495, 533-40 (1952), Justice Frankfurter collected definitions of "sacrilege," "blasphemy," and "profane" dating to 1651. The earliest of these definitions of profane is "to apply any thing sacred to common use. To be irreverent to sacred persons or things. To put to a wrong use." *Id.* at 536, *quoting* Rider, A New Universal English Dictionary (London, 1759). The next is "To violate; to pollute.—To put to wrong use." *Id.* at 537, *quoting*

in a non-religious sense, consistent with the established rule that a court should construe a statute, if reasonably possible, to avoid constitutional problems.[120] Further,

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Kenrick, A New Dictionary of the English Language (London, 1773). Frankfurter's concurring opinion also notes that Funk & Wagnalls' New Standard Dictionary of the English Language, first copyrighted in 1913, includes a definition of "to profane" as "3. To vulgarize; give over to the crowd." *Id.* at 527 n. 48. Thus, we disagree that Congress clearly would have understood the term in 1927 to mean only blasphemous or sacrilegious. *Joint Comments* at 28.

[120] *See Tallman v. United States*, 465 F.2d at 286; *State v. Richards*, 896 P.2d 357, 364 (Id. App. 1995) (in rejecting a vagueness challenge to state statute proscribing telephone harassment through, *inter alia*, "obscene, lewd or profane language," construing "profane" to mean "characterized by abusive language . . . cursing or vituperation . . . "); *see also United States v. Hicks*, 980 F.2d 963, 970 n.9 (5th Cir. 1992) (angry reference to flight attendant as a "bitch" and angry admonition that she should get her "ass" to the plane's kitchen qualified as "profane"). We disagree with the Networks that Tallman addressed the word's meaning in dicta, and that the case actually refutes the Commission's interpretation because the Court cited with approval *Duncan v. United States*, 48 F.2d 128 (9th Cir.), *cert. denied*, 383 U.S. 863 (1931), and *Gagliardo v. United States*, 366 F.2d 720 (9th Cir. 1966). *See Joint Comments* at 31. *Tallman* held that the word "profane" in Section 1464 must be interpreted narrowly as, *inter alia*, "denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance" to preserve its validity in response to a facial constitutional challenge. *Tallman*, 465 F.2d at 286. The Court cited *Duncan* and *Gagliardo* solely as examples of prior judicial interpretations available to the trial judge had jury instructions on the word's meaning been necessary, without approving or even identifying such interpretations. *Id.* We also reject the Networks' argument that the rule of lenity counsels against the Commission's interpretation of "profane." *See Joint Comments* at 30, n.34. Among other things, the Networks make no showing that their preferred construction of the term is any narrower than the Commission's. Indeed, we think it likely that more broadcast speech would be considered "profane" under the Networks'

when viewed in its statutory context with the words "obscene" and "indecent," both of which have vulgar overtones, we believe that the word "profane" is reasonably interpreted in the related sense of "grossly offensive."[121] We do not read the cases cited by the Networks as precluding a non-religious interpretation. *Duncan* upheld a conviction for broadcasting profanity where the defendant "referred to an individual as 'damned,'" "used the expression 'By God' irreverently," and "announced his intention to call down the curse of God upon certain individuals."[122] But the court held only that this language was "within the meaning of that term" as used in the Ra-

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interpretation of the term than under ours. *See also infra* para. 54 (explaining that the *Pacifica* Court squarely rejected the argument that the FCC's civil authority to enforce Section 1464 must be interpreted in accordance with rules that apply to criminal statutes, such as the rule of lenity).

[121] *See State v. Richards*, 896 P.2d at 364 ("when words appear in a list or are otherwise associated, they should be given related meanings."), *citing Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985), *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303 (1961), 2A Norman J. Singer, Southerland's Statutes and Statutory Construction § 47.16 at 183 (5th ed. 1992); *United States v. Hicks*, 980 F.2d at 970 n.9 ("By 'profanity' or 'vulgarity,' we refer to words that, while not obscene, nevertheless are considered generally offensive by contemporary community standards."). The fact that the words "indecent" and "profane" in Section 1464 have "separate" meanings does not render our interpretation of profane "implausible." *See Joint Comments* at 31, *quoting Pacifica*, 438 U.S. at 739-40. We recognize that the two words have separate meanings, and the Commission interprets the two words differently. Our enforcement policy limiting the regulation of profane language to words that are sexual or excretory in nature or are derived from such terms stems from First Amendment considerations rather than the meaning of the word. *See Omnibus Order*, 21 FCC Rcd at 2669 ¶ 18.

[122] *Duncan*, 48 F.2d at 133-34 (the phrase "God damn it" uttered in anger was not profane under Section 1464).

dio Act of 1927, not that the provision *only* covered such language.[123] *Gagliardo* addressed the meaning of "profane" in Section 1464 only in *dict*a, because the government in that case did not contend that the words at issue were profane.[124] Finally, the fact that the Commission has a specific rule addressing "obscene" and "indecent" programming[125] plainly does not foreclose the agency from exercising in an adjudication its express statutory authority to take enforcement action against broadcasts that are "profane."[126]

42. *Constitutional Issues*. The Networks offer a variety of arguments attacking the constitutionality of the Commission's indecency framework as it relates to "The 2003 Billboard Music Awards" broadcast. We do not find any of these arguments to be persuasive.

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[123] *Id.* at 134. *Duncan* was decided before constitutional law evolved to the point that such language could not be proscribed. *See Burstyn v. Wilson*, 343 U.S. 495 (1952) (holding unconstitutional a New York statute authorizing state officials to license films for public exhibition unless the films are "sacrilegious").

[124] *Gagliardo*, 366 F.2d at 725 ("God damn it" uttered in anger not legally profane). The FCC did not address whether "profane" could be interpreted in a non-religious sense in *Raycom America, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 4186 (2003) (portions of "The West Wing" in which a character "'scream[ed] at God,' and made irreverent references toward the deity—'[y]ou're a sonofabitch, you know that?,' and 'have I displeased you, you feckless thug?'" not actionably profane), and *Warren B. Appleton*, 28 FCC 2d 36 (Broadcast Bur. 1971) ("damn" not actionably profane), because those cases involved language with religious connotations.

[125] 47 C.F.R. § 73.3999.

[126] 47 U.S.C. § 1464; 47 U.S.C. § 503(b)(1)(D). *See Joint Comments* at 32.

43. First, the Networks argue that our definition of indecency is unconstitutionally vague.[127] However, that definition is essentially the same as the one that we articulated in the order under review in *FCC v. Pacifica Foundation*.[128] The Supreme Court had no difficulty in applying that definition and using it to conclude that the broadcast at issue in that case was indecent.[129] We agree with the D.C. Circuit that "implicit in *Pacifica*" is an "acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge."[130]

44. The Networks suggest that the Supreme Court's more recent decision in *Reno v. ACLU*[131] has "undermine[d] any constitutional defense of the Commission's current approach" to indecency.[132] In *Reno*, the Court considered the constitutionality of the Communications Decency Act of 1996 (CDA), a statute that regulated indecency on the Internet and that contained a definition similar to ours.[133] Though the Court did not hold that the statute was "so vague that it violates the Fifth Amendment," it concluded that "the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment."[134]

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[127] *See, e.g., Joint Comments* at 7-8.

[128] *Pacifica*, 438 U.S. at 732.

[129] *See id.* at 739, 741.

[130] *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) ("*ACT I*"); *accord ACT III*, 58 F.3d at 659.

[131] 521 U.S. 844 (1997).

[132] *Joint Comments* at 7.

[133] *See* 47 U.S.C. § 223(d) (1994 Supp. II).

[134] *Reno*, 521 U.S. at 870.

45. *Reno* in no way undermines *Pacifica*. On the contrary, the Court in *Reno* expressly distinguished *Pacifica*, and it gave three different reasons for doing so. First, the Court noted that the Commission is "an agency that [has] been regulating radio stations for decades," and that the Commission's regulations simply "designate when—rather than whether—it would be permissible" to air indecent material.[135] The CDA, in contrast, was not administered by an expert agency, and it contained "broad categorical prohibitions" that were "not limited to particular times."[136] Second, the CDA was a criminal statute, whereas the Commission has no power to impose criminal sanctions for indecent broadcasts.[137] Third, unlike the Internet, the broadcast medium has traditionally "received the most limited First Amendment protection."[138] Thus, far from casting doubt on *Pacifica*'s vagueness holding, *Reno* recognizes its continuing vitality.

46. The Networks also argue that the more relaxed level of First Amendment scrutiny discussed in *Pacifica* should no longer apply to broadcasting in light of changes in the media marketplace. Specifically, they contend that because of the prevalence of other media, such as the Internet and cable and satellite television, "it is fanciful to believe that aggressive enforcement of § 1464 against broadcasters will be effective in prevent-

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[135] *Id.* at 867.

[136] *Id.*

[137] *See id.* at 867, 872; *see also Pacifica*, 438 U.S. at 750 (declining to decide whether an indecent broadcast "would justify a criminal prosecution").

[138] *Reno*, 521 U.S. at 867 (quoting *Pacifica*, 438 U.S. at 748).

ing children from being exposed to potentially offensive words."[139]

47. We disagree that technological changes have undermined the validity of the reasoning in *Pacifica*.[140] In *Pacifica*, the Court identified two reasons why broadcasting has received "the most limited First Amendment protection."[141] First, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home."[142] Second, "broadcasting is uniquely accessible to children, even those too young to read."[143]

48. Notwithstanding the growth of other communications media, courts have recognized the continuing validity of these rationales. In 1994, the Supreme Court reaffirmed that "our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."[144] And the D.C. Circuit has rejected precisely the argument advanced by the Networks here: "Despite the increasing availability of other means of receiving television, such as cable, . . . there can be no doubt that the traditional broadcast media are properly

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[139] *Joint Comments* at 22.

[140] In any event, the Commission has no authority to overrule *Pacifica*. Cf. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

[141] *Pacifica,* 438 U.S. at 748.

[142] *Id.*

[143] *Id.* at 749.

[144] *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994); *see also Reno*, 521 U.S. at 868 (recognizing "special justifications for regulation of the broadcast media").

subject to more regulation than is generally permissible under the First Amendment."[145]

49. The broadcast media continue to have "a uniquely pervasive presence" in American life. The Supreme Court has recognized that "[d]espite the growing importance of cable television and alternative technologies, 'broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.'"[146] Though broadcast television is "but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression."[147] In 2003, 98.2% of households had at least one television, and 99% had at least one radio.[148] The Networks correctly point out that almost 86% of households with television subscribe to a cable or satellite service.[149] That still leaves 15.4 million households that rely exclusively on broadcast television, hardly an inconsequential num-

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[145] *ACT III*, 58 F.3d at 660. *See also Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-02 (3d Cir. 2004) (rejecting argument that broadcast ownership regulations should be subjected to higher level of scrutiny in light of the rise of "non-broadcast media").

[146] *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 190 (1997) (*quoting U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)).

[147] *Id.* at 194.

[148] U.S. Census Bureau, *Statistical Abstract of the United States* 737 (2006).

[149] *Joint Comments* at 21 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 8 (2006) ("*Annual Assessment*")).

ber.[150] In addition, it has been estimated that almost half of direct broadcast satellite subscribers receive their broadcast channels over the air,[151] and many subscribers to cable and satellite still rely on broadcast for some of the televisions in their households.[152] All told, the National Association of Broadcasters ("NAB") estimates that there are an estimated 73 million broadcast-only television sets in American households.[153] Moreover, many of those broadcast-only televisions are in children's bedrooms. According to a 2005 Kaiser Family Foundation report, 68 percent of children aged eight to 18 have a television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections.[154]

50. In addition, the bare number of cable and satellite service subscribers does not reflect the large disparity in viewership that still exists between broadcast and cable television programs. For example, during the week of September 18, 2006, each of the top ten pro-

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[150] *Annual Assessment*, 21 FCC Rcd at 2508 ¶ 15; *see also* Comments of the Walt Disney Co. in MB Docket No. 04-210 at 2 (filed Aug. 11, 2004) ("Disney/ABC stresses that these customers [relying on broadcast only] represent a significant portion of our potential viewing audience.").

[151] *Media Bureau Staff Report Concerning Over-the-Air Broadcast Television Viewers*, No. 04-210, ¶ 9 (MB Feb. 28, 2005), *available at* 2005 WL 473322, at *2.

[152] *Annual Assessment*, 21 FCC Rcd at 2508 ¶ 15.

[153] *Id.* at 2552 ¶ 97. The NAB has properly characterized this number as "enormous." Reply Comments of the National Association of Broadcasters and the Association for Maximum Service Television, Inc. in MB Docket No. 04-210 at i (filed Sept. 7, 2004).

[154] *See* Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year-olds* 77 (2005).

grams on broadcast television had more than 15 million viewers, while only one program on cable television that week managed to attract more than 5 million viewers.[155] Similarly, of the 495 most-watched television programs during the 2004-2005 season, 485 appeared on broadcast television, and the highest-rated program on cable television was only the 257th most-viewed program of the season.[156]

51. The broadcast media are also "uniquely accessible to children." In this respect, broadcast television differs from cable and satellite television. Parents who subscribe to cable exercise some choice in their selection of a package of channels, and they may avoid subscribing to some channels that present programming that, in their judgment, is inappropriate for children. Indeed, upon the request of a subscriber, cable providers are required by statute to "fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it."[157] In contrast, as the D.C. Circuit has observed, "broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters."[158] The V-chip provides parents with some ability to control their children's access to broadcast programming. But most tele-

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[155] *See* Nielsen Media Research, "Top 10 Broadcast TV Programs for the Week of September 18, 2006;" Nielsen Media Research, "Top 10 Cable TV Programs for the Week of September 18, 2006."

[156] *See* Television Bureau of Advertising, "Season-to-Date Broadcast vs. Subscription TV Primetime Ratings: 2004-2005," *available at* http://www.tvb.org/rcentral/ViewerTrack/FullSeason/fs-b-c.asp?ms=2004-2005.asp.

[157] 47 U.S.C. § 560 (2000); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

[158] *ACT III*, 58 F.3d at 660.

visions do not contain a V-chip, and most parents who have a television set with a V-chip are unaware of its existence or do not know how to use it.[159] In addition, the effectiveness of a V-chip depends on the accuracy of program ratings; a V-chip is of little use when, as here, the rating does not reflect the material that is broadcast.[160] In light of the TV-PG rating given to "The 2003 Billboard Music Awards," even an informed use of a V-chip would not necessarily have protected children from Ms. Richie's vulgar comments,[161] and studies demonstrate that inaccurate ratings are far from an isolated problem. In a Kaiser Family Foundation survey, for example, nearly 4 in 10 parents of children aged 2-17 stated that most television programs are not rated accurately.[162]

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[159] *See Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6667 ¶ 37. In Congressional testimony shortly after the 2003 Billboard Music Awards, Fox's President of Entertainment acknowledged that the V-chip and television ratings were "underutilized." *H.R. 3717, the 'Broadcast Decency Enforcement Act of 2004': Hearing Before the Subcommittee on Telecommunications and the Internet of the House Comm. On Energy & Commerce*, 107th Congress, (Feb. 26, 2004) (statement of Gail Berman). According to a 2003 study, parents' low level of V-chip use is explained in part by parents' unawareness of the device and the "multi-step and often confusing process" necessary to use it. Annenberg Public Policy Center, *Parents' Use of the V-Chip to Supervise Children's Television Use* 3 (2003). Only 27 percent of mothers in the study group could figure out how to program the V-Chip, and "many mothers who might otherwise have used the V-Chip were frustrated by an inability to get it to work properly." *Id.* at 4.

[160] *See supra* para. 18, n. 46; *Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6667-68 ¶ 37.

[161] *See supra* para. 18, n.46.

[162] Henry J. Kaiser Family Foundation, *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* 5 (2004) ("Kaiser Survey"). Likewise in a study published in the journal *Pediatrics*, parents

concluded that half of television shows the industry had rated as appropriate for teenagers were in fact inappropriate, a finding the study authors called "a signal that the ratings are misleading." David A. Walsh & Douglas A. Gentile, *A Validity Test of Movie, Television, and Video-Game Ratings*, 107 Pediatrics 1302, 1306 (2001).

Academics who have studied the television rating system share parents' assessment that the ratings are often inaccurate. A 2002 study found that many shows that should carry content descriptors do not, therefore leaving parents unaware of potentially objectionable material. *See* Dale Kunkel, *et al., Deciphering the V-Chip: An Examination of the Television Industry's Program Rating Judgments*, 52 Journal of Communications 112 (2002). For example, the study found that 68 percent of prime-time network shows without an "L" descriptor contained "adult language," averaging nearly three scenes with such language per show. *See id.* at 132; *see also id.* at 131 (finding that 20 percent of shows rated TV-G—supposedly appropriate for all ages— included objectionable language, including "bastard," "bitch," "shit," and "whore"). In fact, "in all four areas of sensitive material—violence, sexual behavior, sexual dialogue, and adult language—the large majority of programs that contain such depictions are not identified by a content descriptor." *Id.* at 136. The study's authors concluded that "[p]arents who might rely solely on the content-based categories to block their children's exposure to objectionable portrayals would be making a serious miscalculation, as the content descriptors actually identify only a small minority of the full range of violence, sex, and adult language found on television." *Id.*

A 2004 study also raised serious questions about the accuracy of television ratings. It found that there was more coarse language broadcast during TV-PG programs than those rated TV-14, just the opposite of what these age-based ratings would lead a viewer to believe. Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 48 Journal of Broadcasting & Electronic Media 554, 563-64 (2004); *see also* Parents Television Council, *The Ratings Sham*: *TV Executives Hiding Behind A System That Doesn't Work* (April 2005) (study of 528 hours of television programming concluding that numerous shows were inaccurately and inconsistently rated); *Effectiveness of Media Rating Systems: Subcommittee of Science, Technology, and Space of the*

52. Broadcast television is also significantly different from the Internet. The Internet, unlike television, is not accessible to children "too young to read."[163] And parents who wish to control older children's access to inappropriate material can use widely available filtering software—an option that, whatever its flaws, lacks an

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*Senate Comm. On Commerce, Science & Transp.*, 107th Congress (2004) (statement of Ms. Patti Miller, director, Children and the Media Program for Children Now) ("Can parents depend on the accuracy of the ratings systems? Sadly, the answer is no.").

An economist studying the question of why broadcasters consistently "underlabel" their programs concluded that they are likely responding to economic incentives. *See* James T. Hamilton, *Who Will Rate the Ratings?, in The V-Chip Debate: Content Filtering from Television to the Internet* 133, 143, 149 (Monroe E. Price, ed. 1998). He found that programs with more restrictive ratings command lower advertising revenues. *See id.* at 143. The desire to charge more for commercials and fear of "advertiser backlash" over shows with more restrictive ratings "means that networks have incentives to resist the provision of content-based information." *Id.* at 149; *see also* Kunkel, 52 Journal of Communications at 114 ("[T]he prospect that applying 'higher' ratings to a program could reduce audience size raises a self-interest concern regarding the accuracy with which judgments about program ratings are determined.").

Finally, even assuming *arguendo* that the content descriptors were accurately applied, they would not assist the majority of parents because they are not sufficiently understood. The Kaiser Survey found that only 51% of parents understand that "V" stands for violence; only 40% understand "L" stands for language; only 37% understand "S" stands for sex; and only 4% understand that "D" stands for suggestive or sexual dialogue. Kaiser Survey at 6.

[163] *Pacifica*, 438 U.S. at 749. *See, e.g., Youth, Pornography, and the Internet*, ed. by Dick Thornburgh and Herbert S. Lin, p. 115 (National Academy Press 2002) ("As a general rule, young children do not have the cognitive skills needed to navigate the Internet independently. Knowledge of search strategies is limited if not nonexistent, and typing skills are undeveloped.").

effective analog in the context of broadcast television[164] in light of the numerous problems with the V-chip and program ratings discussed above.[165]

53. *No Sanction Proposed.* For the reasons stated above, we conclude that "The 2003 Billboard Music Awards" contained indecent and profane material in violation of Section 1464 and our rules. Fox stations broadcast indecent and profane language in an awards show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. Under the circumstances, however, we propose no forfeiture here. We originally declined to propose a sanction in this case because the broadcast occurred prior to the *Golden Globe Awards Order*. As discussed above, we believe on further consideration that the complained-of language was actionable under Commission decisions preceding the *Golden Globe Awards Order*. Nevertheless, we still decline to propose a forfeiture here. To begin with, proposing a sanction would require issuance of a notice of apparent

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[164] *See Reno*, 521 U.S. at 877. Filtering software, for example, can block access to a website based on the software's evaluation of the site's content. The V-chip, in contrast, does not evaluate television programs itself and therefore is only effective if the programs have been given accurate ratings. However, to the extent that filtering software is ineffective and children are still able to access indecent material on the Internet, we note that Congress has sought to address this problem through the Child Online Protection Act, a statute whose validity is still being litigated. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004) (affirming preliminary injunction). We note that the Networks also refer to the availability of video game consoles as another medium that, in their view, is as pervasive as television. *See Joint Comments* at 21-22. Video games differ from broadcast television in that games must be purchased individually, so a parent who purchases a video game console for a child retains the ability to determine which games the child will play.

[165] *See supra* para. 51 and nn. 159-162.

liability, which would not be "a further final or appealable order of the FCC," as required by the *Remand Order*.[166] In addition, even absent the requirement that we issue a "final or appealable order," we would not exercise our enforcement discretion to propose a forfeiture here given the limited remand under which we are proceeding. Accordingly, we find that no forfeiture is warranted in this case.[167] In light of our decision not to impose a forfeiture, we will not require the licensees of any of the stations that broadcast the material to report our finding here to us as part of their renewal applications, and we will not consider the broadcast to have an adverse impact upon such licensees as part of the renewal process or in any other context.

54. In light of our decision not to impose a forfeiture, we need not address whether the violations of Section 1464 and our rule were willful within the meaning of Section 503(b).[168] We disagree with the Networks, how

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[166] *Remand Order* at 2. *See* 47 U.S.C. § 503(b)(4)(C); *ACT IV*, 59 F.3d at 1254, citing *Pleasant Broadcasting Co. v. FCC*, 564 F.2d 496 (D.C. Cir. 1977).

[167] In light of recent legislation, the Networks raise the prospect of future fines in excess of $65 million for "a single, fleeting instance of indecent speech." *Joint Comments* at 16. We do not believe, however, that a case similar to "The 2003 Billboard Music Awards" arising in the future would merit the maximum fine permitted under the Broadcast Decency Enforcement Act. *See* Pub. L. 109-235, 102 Stat. 491 (June 15, 2006), *to be codified* at 47 U.S.C. § 503(b)(2)(C)(ii). While that Act, once we adopt implementing regulations, will provide the Commission with the flexibility to impose appropriate fines in egregious cases, the Commission will continue to follow a restrained enforcement policy in imposing forfeitures in this area.

[168] *See* 47 U.S.C. §§ 503(b)(1)(B) & (D). We also need not address whether responsibility would lie with independent Fox affiliates in addition to the licensees owned by Fox. *Cf. Complaints Against Va-*

ever, that Section 1464 is not violated unless a broadcaster acts with the state of mind required for a criminal conviction.[169] The Supreme Court has squarely rejected the argument that the FCC's civil authority to enforce Section 1464 must be interpreted in accordance with rules that apply to criminal statutes, explaining: "The legislative history of the provisions establishes their independence. As enacted in 1927 and 1934, the prohibition on indecent speech was separate from the provisions imposing civil and criminal penalties for violating the prohibition . . . Although the 1948 codification of the criminal laws and the addition of new civil penalties changed the statutory structure, no substantive change was apparently intended . . . Accordingly, we need not consider any question relating to the possible application of § 1464 as a criminal statute."[170] Thus, the *mens rea* necessary for a criminal conviction is not a prerequisite to the Commission's finding a Section 1464 violation.[171]

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*rious Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230, 19240-41 ¶ 25 (2004).

[169] *Joint Comments* at 24-26. We also reject, as contrary to the plain meaning of the Act, the Networks' contention that we may not impose forfeitures for violations of our indecency rule under section 503(b)(1)(B). While the Networks suggest that the Commission's indecency rule, 47 C.F.R. § 73.3999, merely represents a decision by the Commission to restate 18 U.S.C. § 1464, the indecency rule was adopted by the Commission pursuant to the direction of Congress. *See* Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949, Section 16 (1992).

[170] *Pacifica*, 438 U.S. at 739 n.13.

[171] The Networks' reliance on *FCC v. ABC*, 347 U.S. 284, 296 (1954), for the proposition that "'[t]here cannot be one construction for the

**B. "The 2002 Billboard Music Awards"**

55. *The Programming.* The Commission received a complaint alleging that WTTG(TV), Washington, DC, broadcast indecent material during "The 2002 Billboard Music Awards" program which aired at 8 p.m. Eastern Standard Time on December 9, 2002.[172] Specifically, the complainant alleged that while accepting an award, Cher stated: "People have been telling me I'm on the way out every year, right? So fuck 'em."[173] The "2002 Billboard

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Federal Communications Commission and another for the Department of Justice'" is misplaced. *Joint Comments* at 24. In that case, the Court rejected the broad construction urged by the Commission of a statutory prohibition against a "lottery, gift enterprise, or similar scheme" in part because "the same construction would likewise apply in criminal cases." *FCC v. ABC*, 347 U.S. at 296. In contrast, the intent required to impose civil penalties for Section 1464 violations has no impact on its possible application as a criminal statute. *See Pacifica*, 438 U.S. at 739 n. 13.

[172] FCC File No. EB-03-IH-0460. *See* Letter from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003). As noted in the *Golden Globe Awards Order*, the Commission's Enforcement Bureau had dismissed an earlier complaint concerning the same broadcast on the same station eight months earlier. *See* Letter from Charles Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, FCC to RadioEsq@aol.com, EB-02-IH-0861-MT (December 18, 2002), *cited in Golden Globe Awards Order*, 19 FCC Rcd at 4980 ¶ 12 n.32 (noting Bureau dismissal of complaint). However, Fox has raised no claim of administrative res judicata, and thus, because that defense has been waived, we need not consider it. *Cf. Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir. 1988).

[173] *See* Letter from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission (August 22, 2003).

Music Awards" was broadcast nationwide on the Fox Television Network.

56. Examination of a videotape of the broadcast reveals that Cher, a singer and actress, was presented with an "Artist Achievement Award" during "The 2002 Billboard Music Awards" program. Cher had been selected to receive this award at least three weeks before the broadcast.[174] In the course of her remarks accepting the award, she stated as follows: "I've had unbelievable support in my life and I've worked really hard. I've had great people to work with. Oh, yeah, you know what? I've also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck 'em. I still have a job and they don't."

57. Following the Second Circuit's remand, the Bureau sent Fox a letter of inquiry on September 7, 2006 concerning "The 2002 Billboard Music Awards" broadcast.[175] Fox responded on September 21, 2006.[176] Fox's response confirms that it broadcast the material described in the complaint.[177] Nevertheless, Fox argues that its broadcast of the "F-Word," in context, did not depict or describe sexual activities but rather, "at most,"

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[174] *See* Press Release, "Cher to Receive the Artist Achievement Award on the 2002 Billboard Music Awards Monday, Dec. 9 on Fox" (Nov. 14, 2002), attached to Letter from John C. Quale, Counsel of Fox, to Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, File No. EB-03-IH-0460 (September 21, 2006) ("Fox Response to 9/7/2006 LOI").

[175] *See* Letter from Benigno E. Bartolome, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Fox Television Stations, Inc., File No. EB-03-IH-0460 (September 7, 2006).

[176] *See* Fox Response to 9/7/2006 LOI.

[177] *Id.* at 2.

was a "vulgar expletive directed as an insult toward an individual or group against whom the speaker held deep-seated feelings of ill-will," and thus is outside the scope of the Commission's indecency definition.[178] Further, Fox argues that the complained-of material was not actionably indecent because it "contained at most the passing use of an expletive used to convey an insult," it "lasted only a couple of seconds out of a two-hour program," and Fox did not present it to pander to or titillate the audience, or for shock value.[179] Therefore, Fox contends that the dialogue is not actionably indecent.[180]

58. *Indecency Analysis*. With respect to the first prong of the indecency test, Fox contends that Cher's statement "fuck 'em" does not describe sexual activities and thus falls outside the scope of our indecency definition. We disagree. As discussed above, a long line of precedent indicates that both literal and non-literal uses of the "F-Word" come within the subject matter scope of our indecency definition.[181] Given the core meaning of the "F-Word," any use of that word has a sexual connotation.[182] Moreover, it hardly seems debatable that the word's power to insult and offend derives from its sexual

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[178] *Id*. at 10.

[179] *Id*.

[180] Fox also suggests that the complaint should be dismissed because it fails to specifically allege that the complainant viewed "The 2002 Billboard Music Awards." *See id*. at 2. We disagree. Our practice has never been to require such an allegation in order for a complaint to be considered. It is sufficient that the complaint originated from within the market of the station against which the complaint is filed. *See Indecency Policy Statement*, 16 FCC Rcd at 8015 ¶ 24; *see also Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6665 ¶ 30.

[181] *See supra* note 38.

[182] *See supra* para. 16.

meaning.[183] Here, for example, Cher's use of the "F-Word" to reference a sexual act as a metaphor to express hostility to her critics is inextricably linked to the sexual meaning of the term.[184] Accordingly, we conclude that, as we stated in *Golden Globe*,[185] its use falls within the scope of our indecency definition. The material thus warrants further scrutiny to determine whether it is patently offensive as measured by contemporary community standards for the broadcast medium. Looking at the three principal factors in our contextual analysis, we conclude that it is.

59. We will first address the first and third principal factors in our contextual analysis—the explicit or graphic nature of the material and whether the material panders to, titillates, or shocks the audience. As we have previously concluded, the "F-Word" is one of the most vulgar, graphic, and explicit words for sexual activity in the English language.[186] Moreover, the gratuitous use of this language during a live broadcast of a popular music awards ceremony when children were expected to be in the audience was vulgar and shocking. The complained-of material was broadcast in prime time, and the program was designed to draw a large nationwide audience that could be expected to include many children interested in seeing their favorite music

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[183] *See supra* note 40.

[184] *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 224 (1994) (explaining the sexual meaning of the metaphorical use of the "F-Word" as a verb).

[185] *See Golden Globe Awards Order*, 19 FCC Rcd at 4979 ¶ 8.

[186] *See id*.

stars.[187] As in the case of "The 2003 Billboard Music Awards,"[188] a significant portion of the viewing audience for this program was under 18. According to Nielsen ratings data, during an average minute of "The 2002 Billboard Music Awards" broadcast, 2,608,000 (27.9%) of the 9,361,000 people watching the program were under 18, and 1,186,000 (12.7%) were between the ages of 2 and 11. In addition, the program's TV-PG rating[189] would *not* have put parents or others on notice of such vulgar language, and the broadcast contained no other warnings to viewers that it might contain material highly unsuitable for children.[190] Furthermore, Fox does not argue that there was any justification for Cher's comment.[191] In light of all of these factors, we conclude that the first and third factors in our contextual analysis weigh in favor of a finding that the material is patently offensive.[192]

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[187] *See Pacifica*, 438 U.S. at 749-51 (identifying as relevant contextual factors the time of day of the broadcast, program content as it affects "the composition of the audience," and the nature of the medium). *See also supra* para. 18.

[188] *See supra* para. 18.

[189] Fox Response to 9/7/2006 LOI at 6.

[190] *See supra* n. 47. In the context of a broadcast rated "TV-PG," an "L" content description warning would not have alerted parents to the use of the "F-word." *See id*. Nonetheless, the "2002 Billboard Music Award," unlike the 2003 version of the same show, did not include even that inadequate "L" content descriptor. So parents relying on the ratings would not have expected even mild "coarse" language, much less the "F-Word."

[191] For instance, Fox does not contend that Cher's comment had any artistic merit or was necessary to convey any message.

[192] Fox's argument that it did not present Cher's comment for "shock value" misunderstands the contextual analysis employed by the Commission, under which "we examine the material itself and the manner

60. We next turn to the second factor in our contextual analysis—whether the complained-of material was sustained or repeated. Fox argues that this factor precludes a finding of indecency. As reviewed above, Commission dicta and Bureau-level decisions issued before our *Golden Globe* decision had suggested that expletives had to be repeated to be indecent but that such a repetition requirement would not apply to "descriptions or depictions of sexual or excretory functions." In this case, Cher did more than use the "F-Word" as a mere interjection or intensifier. Rather, she used the word to describe or reference a sexual act as a metaphor to express hostility to her critics. The fact that she was not literally suggesting that people engage in sexual activities does not necessarily remove the use of the term from the realm of descriptions or depictions. This case thus illustrates the difficulty in making the distinction between expletives on the one hand and descriptions or depictions on the other. Particularly in light of this lack of clarity, we acknowledge that it was not apparent that Fox could be penalized for Cher's comment at the time it was broadcast. This case also shows that the inquiry into whether a word is used an expletive rather than a description or depiction is wholly artificial. Whether used as an expletive, or as a description or depiction, the offensive nature of the "F-Word" is inherently tied to the term's sexual meaning.

61. In any event, under our *Golden Globe* precedent, the fact that Cher used the "F-Word" once does not remove her comment from the realm of actionable inde-

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in which it is presented, not the subjective state of mind of the broadcaster." *Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6657-58 ¶ 12.

cency.[193] We stated in *Golden Globe* that the "mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[194] To be sure, the fact that material is not repeated does weigh against a finding of indecency, and in certain cases, when all of the relevant factors are considered together, this factor may tip the balance in a decisive manner. This, however, is not one of those cases.

62. We believe that Cher's use of the "F-Word" here during a program aired in prime time was patently offensive under contemporary community standards for the broadcast medium. The patent offensiveness is compounded by the fact that the warnings accompanying the broadcast were inadequate and misleading.[195] We do not believe that the Commission should ignore "the first blow" to the television audience in the particular circumstances presented here.[196] Our determination, moreover, is consistent with the networks' own broadcast standards during the "safe harbor," which would not allow the broadcast of a single use of the "F-Word" under these circumstances.[197] Such standards reflect the networks' recognition that even a single use of the "F-Word" under most circumstances is not consistent with contemporary community standards for the broadcast medium. Indeed, Fox edited out Cher's comment in its broadcasts to the Mountain and Pacific Time Zones.

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[193] *See Golden Globe Awards Order,* 19 FCC Rcd at 4980 ¶ 12.

[194] *Id*.

[195] *See supra* para. 59.

[196] *Pacifica*, 438 U.S. at 748-49.

[197] *See supra* para. 29.

63. In sum, we conclude that, given the explicit, graphic, vulgar, and shocking nature of Cher's use of the "F-Word," Fox's broadcast was patently offensive under contemporary community standards for the broadcast medium.

64. Fox also argues that it should not be held responsible for airing Cher's comment. In particular, Fox argues that Cher's remarks were unscripted and that the five-second delay and editing system that it used for "The 2002 Billboard Music Awards" previously had been effective in preventing the airing of objectionable material.[198] We need not address these arguments, however, because we decide that it would not be equitable to sanction Fox for a different reason. Specifically, as discussed above, it was not clear at the time that broadcasters could be punished for the kind of comment at issue here.[199]

65. *Profanity Analysis*. Consistent with our decisions in the *Golden Globe Awards Order* and the *Omnibus Order*, we also find that Cher's use of the "F-Word" in the program at issue violated Section 1464's prohibition on the broadcast of "profane" utterances.[200] In the *Golden Globe Awards Order*, the Commission concluded that the "F-Word" was profane within the meaning of Section 1464 because, in context, it constituted vulgar and coarse language "'so grossly offensive to members of the public who actually hear it as to amount to a nui-

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[198] *See* Fox Response to 9/7/06 LOI at 4-6, 10.

[199] *See supra* para. 60; *see also Golden Globe Awards Order*, 19 FCC Rcd at 4982 ¶ 15.

[200] 18 U.S.C. § 1464.

sance.'"[201] In certain cases, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.[202] However, such circumstances are not present here: Fox does not contend that Cher's profane language was essential to informing viewers on a matter of public importance or that modifying the language would have had a material impact on its function as a source of news and information. On the contrary, Fox maintains that it attempted to delete the profane language, and did remove it before the program aired on time delay in the Mountain and Pacific Time Zones.[203] It is undisputed that the "F-Word" was broadcast within the 6 a.m. to 10 p.m. time frame relevant to a profanity determination.[204] Because it was broadcast at a time of day when there was a reasonable risk of children's presence in the audience (indeed, as detailed above, over two-and-a-half million viewers of the broad-

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[201] *Golden Globe Awards Order,* 19 FCC Rcd at 4981 ¶ 13, *quoting Tallman*, 465 F.2d at 286.

[202] *Omnibus Order* at 2669 ¶ 19, *citing 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*," Memorandum Opinion and Order, 20 FCC Rcd 4507, 4512-14 ¶¶ 13-18 (2005).

[203] Fox Response to 9/7/2006 LOI at 10.

[204] *See Omnibus Order*, 21 FCC Rcd at 2666 ¶ 8.

cast were under the age of 18),[205] the broadcast is legally actionable.

66. *No Sanction Proposed*. For the reasons stated above, we conclude that "The 2002 Billboard Music Awards" contained indecent and profane material in violation of Section 1464 and our rules. Fox stations broadcast indecent and profane language in an awards show that aired between 6 a.m. and 10 p.m. and was watched by people of all ages. Under the circumstances, however, we find that no forfeiture is warranted in this case for the reason set forth above.[206] In light of our decision not to impose a forfeiture, we will not require the licensees of any of the stations that broadcast the material to report our finding here to us as part of their renewal applications, and we will not consider the broadcast to have an adverse impact upon such licensees as part of the renewal process or in any other context.[207]

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[205] *See supra* para. 59 (noting that, according to Nielsen ratings data, 27.9% of the people watching an average minute of "The 2002 Billboard Music Awards" broadcast were under 18, and 12.7% were between the ages of 2 and 11); *see also Pacifica*, 438 U.S. at 749-50 (discussing government's interest in protecting children from "offensive expression")

[206] *See supra* para. 64. In light of our decision not to impose a forfeiture, we need not address whether the violations of Section 1464 and our rule were willful within the meaning of Section 503(b).

[207] The constitutional arguments raised by the Networks relating to the application of our indecency framework to "The 2002 Billboard Music Awards" are the same as the constitutional arguments that we have already addressed with respect to the "2003 Billboard Music Awards" broadcast. We reject those arguments for the same reasons given above. *See supra* para. 42-52.

**C. "The Early Show"**

67. "The Early Show" is a two-hour morning program that airs weekdays on the CBS Television Network. On December 13, 2004, the program devoted significant coverage to discussion of the CBS program "Survivor: Vanuatu," which had crowned its winner the prior evening. As part of that coverage, "The Early Show" co-host Julie Chen conducted a live interview with the final four contestants from "Survivor: Vanuatu." During that interview, Ms. Chen asked runner-up Twila Tanner whether she agreed with fourth-place finisher Eliza Orlins that Chris Daugherty, the winner of the program, would have prevailed had he been matched up in the finals against Ms. Orlins. Ms. Tanner then responded, "Not necessarily. I knew he was a bull-shitter from Day One."

68. A viewer subsequently filed a complaint with the Commission that Station KDKA-TV, Pittsburgh, Pennsylvania, which is licensed to CBS Broadcasting Inc., aired Ms. Tanner's comment at approximately 8:10 a.m. Eastern Standard Time, on December 13, 2004, and alleged that the comment was indecent and profane.[208] In response to the Commission's letter of inquiry, CBS does not deny that the comment in question was broadcast on KDKA-TV.[209] However, CBS argues, among other things, that the material is not actionable because it was spoken during a *bona fide* news interview.[210]

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[208] FCC File No. EB-05-IH-0007.

[209] *See* Letter From Robert Corn-Revere, Counsel to CBS, to Marlene H. Dortch, Secretary, FCC, File No. EB-05-IH-0007 (Sept. 21, 2006), at 1 ("CBS Response to 9/7/2006 LOI").

[210] *See id.* at 4.

69. In the *Omnibus Order*, we "recognize[d] the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment's free press guarantee."[211] Indeed, when we denied an indecency complaint regarding material that was aired during "The Today Show," which is a competitor of "The Early Show," we reiterated the need for the Commission to exercise caution with respect to news programming.[212]

70. This restrained approach is consistent with a long line of Commission precedent. For example, in *Peter Branton*, the Commission held that an NPR news story on John Gotti, which included a wiretap of a conversation in which Gotti repeatedly used variations of the "F-Word," was not indecent because "it was an integral part of a bona fide news story."[213] The Commission explained that "we traditionally have been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners."[214]

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[211] *Omnibus Order*, 21 FCC Rcd at 2668 ¶ 15.

[212] *Id*. at 2717 ¶ 218.

[213] *Peter Branton*, 6 FCC Rcd at 610. *See Infinity Broadcasting Corp. of Pennsylvania*, Memorandum Opinion and Order, 3 FCC Rcd 930, 937 n. 31 (1987), *vacated on other grounds sub nom. ACT I*, (noting that "context will always be critical to an indecency determination and . . . the context of a bona fide news program will obviously be different from the contexts of the three broadcasts now before us, and, therefore, would probably be of less concern."); *Indecency Policy Statement*, 16 FCC Rcd at 8002-03 (stating that "[e]xplicit language in the context of a bona fide newscast might not be patently offensive." ).

[214] *Peter Branton*, 6 FCC Rcd at 610.

71. In today's Order, we reaffirm our commitment to proceeding with caution in our evaluation of complaints involving news programming. To be sure, there is no outright news exemption from our indecency rules.[215] Nevertheless, in light of the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming.

72. Some critics have questioned whether the segments of "The Early Show" devoted to "Survivor: Vanuatu" are legitimate news programming or instead are merely promotions for CBS's own entertainment programming.[216] CBS nevertheless maintains in its LOI response that its interview of the "Survivor: Vanuatu"

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[215] *See, e.g., Evergreen Media Corporation of Chicago AM*, Memorandum Opinion and Order, 6 FCC Rcd 5950, 5951 (Mass Media Bur. 1991) (finding talk show segment discussing pornographic photographs of Vanessa Williams to be indecent and concluding that "[e]ven if it had been argued that the [show] in question was comparable to a news program, the Vanessa Williams segment contained vulgar material presented in a pandering and titillating manner unlike anything found in the *Branton* case."); *Pacific and Southern Company Inc. (KSD-FM)*, Notice of Apparent Liability, 6 FCC Rcd 3689 (Mass Media Bur. 1990) (forfeiture paid) (finding that "exceptionally explicit and vulgar" material that was "presented in a pandering manner" was indecent even though it "arguably concerned an incident that was at the time 'in the news.'").

[216] *See, e.g.*, Howard Rosenberg, *The Fact Is, the Joke is the News*, Broadcasting & Cable, Nov. 1, 2004, at 32 ("Even more common is the venerable, widespread practice of cross-promotion, as on The Early Show, a production of CBS News, which each Friday devotes a lengthy segment to 'covering' the previous night's Survivor episode on the network, as if who got bumped off was an actual news story. As a bonus, The Early Show folds itself into this fantasy from a special set outfitted to resemble Survivor.").

contestants was a "*bona fide* news interview." "The Early Show" is produced by CBS News and addressed a variety of other topics that morning, including a suicide bombing in Iraq, the withdrawal of Bernard Kerik as a candidate to serve as Secretary of Homeland Security, and the apparent poisoning of then-Ukrainian opposition leader Viktor Yushchenko, which clearly fall under the rubric of news programming. In light of these factors and our commitment to exercising caution in this area, we believe it is appropriate in these circumstances to defer to CBS's plausible characterization of its own programming. Accordingly, we find that, in the *Omnibus Order*, we did not give appropriate weight to the nature of the programming at issue (i.e., news programming).

73. Turning to the specific material that is the subject of the complaint, we can certainly understand that viewers may have been offended by Ms. Tanner's coarse language. Nevertheless, given the nature of her comment and our decision to defer to CBS's characterization of the program segment as a news interview, we conclude, regardless of whether such language would be actionable in the context of an entertainment program, that the complained-of material is neither actionably indecent nor profane in this context. Accordingly, we deny the complaint.

**D. "NYPD Blue"**

74. As discussed above, the Commission received complaints regarding several "NYPD Blue" episodes that aired on KMBC-TV, Kansas City, Missouri, and other unidentified ABC Television Network affiliates beginning at 9:00 p.m. Central Standard Time, in which

the "S-Word" was used.[217] In the *Omnibus Order*, the Commission found those broadcasts containing the "S-Word" to be apparently indecent and profane.[218] In its response to the Commission's letter of inquiry, KMBC Hearst-Argyle Television, Inc. ("Hearst"), licensee of KMBC-TV, does not dispute that it aired the complained-of material. Hearst argues, however, that the complaints should either be dismissed on procedural grounds or denied on the merits.

75. Raising an argument that we did not previously consider, Hearst contends that the Commission should dismiss the complaints as insufficient under the enforcement policy set forth in the *Omnibus Order*.[219] One complaint was filed against each of the "NYPD Blue" broadcasts at issue, and each of these complaints was filed by the same person. All of these complaints stated that the complained-of broadcast "originally aired at 9:00 p.m. CST on Kansas City affiliate KMBC" and was "also seen in homes across the country on ABC affiliates."[220] However, as Hearst accurately maintains, none of the complaints was filed by anyone residing in the market served by KMBC-TV. Nor were any of the complaints filed by anyone residing in a market where the complained-of material aired outside of the 10:00 p.m.-6:00 a.m. safe harbor. Instead, each complaint was filed by

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[217] FCC File No. EB-03-IH-0355.

[218] *Omnibus Order*, 21 FCC Rcd at 2696-98 ¶¶ 125-36.

[219] KMBC Hearst-Argyle Television, Inc. Response to Letter of Inquiry and Memorandum of Law, File No. EB-03-IH-0355 at 8 (Sept. 21, 2006) ("Hearst Response to 9/7/2006 LOI").

[220] *See* Letters from Lara Mahaney, Director of Corporate and Entertainment Affairs, PTC, to David Solomon, Chief, Enforcement Bureau, dated July 1 and July 3, 2003.

the same individual from Alexandria, Virginia, where, as Hearst points out,[221] the material was aired during the safe harbor.[222] In addition, none of the complaints contains any claim that the out-of-market complainant actually viewed the complained-of broadcasts on KMBC-TV or any other ABC affiliate where the material was aired outside of the safe harbor.[223] Thus, there is nothing in the record either to tie the complaints to Station KMBC-TV's local viewing area (or the local viewing area of any station where the material was aired outside of the safe harbor), or to suggest that the broadcast programming at issue was the subject of complaints from anyone who viewed the programming on any station that aired the material outside of the safe harbor.

76. We therefore agree with Hearst that we should dismiss the complaints regarding "NYPD Blue" pursuant to the enforcement policy that we announced in the *Omnibus Order*. There, the Commission stated that it would propose forfeitures only against licensees and stations whose broadcasts of actionable material were the subject of a viewer complaint filed with the Commission,[224] explaining that "[i]n the absence of complaints concerning the program filed by viewers of other stations, it is appropriate that we sanction only the licensee of the station whose viewers complained about that pro-

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[221] Hearst Response to 9/7/2006 LOI at 11, n.9.

[222] *See supra* note 217 and accompanying text. The letterhead of each complaint identified contact information for PTC's office in Alexandria, Virginia, as well as a PTC office in Los Angeles, California.

[223] *See id*.

[224] *Omnibus Order*, 21 FCC Rcd at 2673 ¶ 32, 2676 ¶ 42, 2687 ¶ 86.

gram."[225] In addition to demonstrating appropriate restraint in light of First Amendment values, this enforcement policy preserves limited Commission resources, while still vindicating the interests of local residents who are directly affected by a station's airing of indecent and profane material.

77. Based on consideration of Hearst's arguments, we agree that consistent application of our restrained enforcement policy requires us to apply the same approach to this case that we applied to the notices of apparent liability in the *Omnibus Order*. While this case does not involve the imposition of forfeitures against KMBC-TV or any other licensee, the sufficiency of a complaint is the first step rather than the last step in the Commission's analysis. Thus, as Hearst puts it, "[o]nly the dismissal of the NYPD Blue complaints will bring [this case] into harmony with the Commission's announced enforcement policy."[226] Accordingly, we dismiss these complaints.

## IV. ORDERING CLAUSES

78. Accordingly, IT IS ORDERED that Section III.B of the *Omnibus Order* is VACATED in its entirety.

79. IT IS FURTHER ORDERED that the complaints referenced in this Order involving "The 2003 Billboard Music Awards" and "The 2002 Billboard Music

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[225] *Id*. at 2687 ¶ 86. *See Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6665 ¶ 30 (under the enforcement policy announced in the *Omnibus Order*, "it is sufficient that viewers in markets served by each of the CBS Stations filed complaints with the Commission identifying the allegedly indecent program broadcast by the CBS Stations.").

[226] Hearst Response to 9/7/2006 LOI at 11.

Awards" are GRANTED to the extent set forth herein and OTHERWISE DENIED.

80. IT IS FURTHER ORDERED that the complaints referenced in this Order involving "The Early Show" are DENIED.

81. IT IS FURTHER ORDERED that the complaints referenced in this Order involving "NYPD Blue" are DISMISSED.

82. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Susan L. Fox, Esq., Vice President, Government Relations, The Walt Disney Company, 1150 17th Street, N.W., Suite 400, Washington, D.C. 20036.

83. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to John W. Zucker, Esq., Senior Vice President, Law-Regulation, ABC, Inc., 77 West 66th Street, New York, N.Y. 10024.

84. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Seth Waxman, Esq., Counsel to The Walt Disney Company, Wilmer, Cutler, Pickering, Hale & Dorr, LLP, 2445 M Street, N.W., Washington, D.C. 20037.

85. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Anne Lucey, Esq., Senior Vice President, Regulatory Policy, CBS Corporation, 601 Pennsylvania Ave., N.W., Suite 540, Washington, DC 20004.

86. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Re-

quested, to Robert Corn-Revere, Counsel to CBS Corp., Davis Wright Tremaine, LLP, 1500 K Street, N.W., Suite 450, Washington, D.C. 20005-1272.

87. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Mark J. Prak, Esq., Counsel to Hearst-Argyle Television, Inc., Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, 150 Fayetteville Street, Suite 1600 Wachovia Capitol Center, Raleigh, North Carolina 27601.

88. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to Maureen A. O'Connell, Esq., News Corporation, 444 North Capitol Street, N.W., Suite 740, Washington, D.C. 20001.

89. IT IS FURTHER ORDERED that a copy of this Order shall be sent Certified Mail, Return Receipt Requested, to John Quale, Esq., Counsel to Fox Television Stations, Inc., Skadden, Arps, Slate, Meagher & Flom, LLP, 1440 New York Ave., N.W., Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF**
**COMMISSIONER JONATHAN S. ADELSTEIN**
**CONCURRING IN PART, DISSENTING IN PART**

*Re: Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order

Today's *Order* is pursuant to a grant from the United States Court of Appeals for the Second Circuit of the Commission's voluntary remand request to reconsider portions of the March 15, 2006, *Omnibus Order*.[1] In that decision, I concurred in part and dissented in part because I believed the Commission had failed to develop a consistent and coherent indecency enforcement policy. It was my hope that the Commission would use this remand to clarify and rationalize our indecency regime,[2] but regulatory convenience and avoidance have prevailed instead. I am, therefore, compelled again to concur in part and dissent in part.

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[1] *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 (2006) ("*Omnibus Order*").

[2] Today's decision presumes that the general statement that the Commission's "collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups, and ordinary citizens," *and nothing more*, is sufficient to inform the public and broadcasters what we believe are the national, contemporary community standards of the broadcast medium. *In re Infinity Radio License, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 (2004); *compare, Reno v. ACLU*, 521 U.S. 844 (1997) (finding the terms "indecent", "patently offensive" and "in context" were so vague that criminal enforcement would violate the fundamental constitutional principles, but while recognizing "the history of extensive government regulation of broadcasting").

The proverbial "elephant in the room" looming over today's decision is the *Golden Globe Awards Order*,[3] which inexplicably has been pending reconsideration for more than two and one-half years. While the Commission has simply refused to review the *Golden Globe* case, we have relied upon, expanded and applied it more than any other indecency case in the past two years. As the foundational basis for the Commission's decision in the cases involved in this remand, we should review and finalize this watershed decision.[4]

As I stated in the *Omnibus Order*, "by failing to address the many serious concerns raised in the *Golden Globe Awards* case, before prohibiting the use of additional words, we fall short of meeting the [appropriate] constitutional standard and walking the tightrope of a restrained enforcement policy."[5] Today, we fail again. Litigation strategy should not be the dominant factor guiding policy when First Amendment protections are at stake.

In its remand request, the Commission asked the Second Circuit for an opportunity to consider the concerns of broadcasters before issuing a final decision. Yet

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[3] *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 18 FCC Rcd 19859 (Enf. Bur. 2003), *reversed*, 19 FCC Rcd 4975 (2004) ("*Golden Globe Awards Order*"), *petitions for stay and recon. pending* (since April 2004).

[4] *Golden Globe Awards Order* at ¶¶ 9, 12 and 14 (eviscerating our longstanding standard for "isolated or fleeting" expletives, establishing that any use of the "F-word" or a variation, in any context, "invariably invokes a coarse sexual image," and changing our 30-year standard of what constitutes profanity).

[5] *Omnibus Order*, Statement of Commissioner Jonathan S. Adelstein, concurring in part, dissenting in part, 21 FCC Rcd *at* 2726.

squandering this opportunity, the Commission fails to consider fully all concerns relating to an August 22, 2003, complaint against the December 9, 2002, broadcast of "The Billboard Music Awards" by WTTG(TV) in Washington, D.C. This *Order* does not adequately address the Enforcement Bureau's December 18, 2002, decision letter, which denied the same complaint on the merits.[6] No one filed either a petition for reconsideration or an application for review and, consequentially, the decision letter became a final order. It seems patently unfair for the Commission to re-adjudicate the same complaint, involving the same parties on the same cause of action, first in the initial decision letter, then in the *Omnibus Order*, and then again in today's *Order*. The Supreme Court has held that the principle of *res judicata* applies to an adjudicative administrative proceeding where the agency has properly resolved disputes of fact and the parties have had an adequate opportunity to litigate.[7] The Commission should not have re-adjudicated this complaint a second time in the *Omnibus Order*. Certainly today, the third time around, this complaint should be dismissed, or the Commission should reverse the Enforcement Bureau's decision letter and the resultant final order.

More broadly, today's *Order* notes that the Supreme Court in *Pacifica* stressed context and we have repeatedly said "the full context in which the material appeared is critically important." Yet the Commission's

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[6] The decision letter dismissing a complaint against the December 9, 2002, broadcast of "The Billboard Music Awards" by WTTG (TV), Washington, D.C., was referenced in footnote 32 of the *Golden Globe Awards Order*, and in footnote 9 of my Statement in that *Order*.

[7] *United States v. Utah Constr. & Min. Co.*, 384 U.S. 394, 422 (1966).

analyses of the 2002 and 2003 broadcasts of "The Billboard Music Awards" are limited exclusively to a few seconds of a two-hour program. No consideration whatsoever is given to the entirety of the program. While it is perfectly reasonable to conclude that, after considering the entire program, the vulgarity and shock value of a particular scene permeated and dominated the program, the Commission should consider the totality of the program, rather than limit our consideration to an isolated programming segment.

Similarly, the Commission's justification for denying the complaint against the December 12, 2004, broadcast of "The Early Show," and reversing its indecency and profanity findings reflect the arbitrary, subjective and inconsistent nature of the Commission's decision-making.[8] In the *Omnibus Order*, the Commission concluded that the use of the s-word was shocking "*particularly* during a morning news interview,"[9] and that this "vulgarity in a morning television interview is *of particular concern* and *weighs heavily* in our analysis."[10] Today, without any legal support found in American jurisprudence, the Commission, *sua sponte*, creates a new "plausible"[11] standard to determine the threshold question of

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[8] In the *Omnibus Order*, with respect to "The Early Show," the Commission said: "In rare contexts, language that is presumptively profane will not be found to be profane where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance. We caution, however, that we will find this to be the case only in unusual circumstances, and such circumstances are clearly not present here." *Omnibus Order*, ¶ 144.

[9] *See Omnibus Order*, 21 FCC Rcd at 2699 ¶ 141 [emphasis added].

[10] *Id.* [emphasis added].

[11] ¶ 72, supra.

whether a particular program segment qualifies as a "*bona fide* news interview."[12] While the Commission admits that "there is no outright news exemption from our indecency rules," it will nevertheless defer to a broadcaster's "plausible characterization of its own programming." I not only fail to find a legal basis for the Commission's latest invention,[13] I also fail to understand the justification for such a shift in reasoning. While the creation of this "infotainment" exception that can be invoked by a broadcaster's plausible characterization" may be convenient in this order today, it will surely create unintended consequences in future cases.

Even as applied, this new "plausible" standard is problematic. In this case, the CBS "Early Show" interview of contestants from the CBS program "Survivor: Vanuatu" was a cross promotion of a network's primetime entertainment programming on the same network's morning show. It stretches the bounds to argue this is legitimate news or public affairs programming. It is unreasonable to say that the latest contestant to be voted off the island or the latest contestant to hear "you're fired" or even "come on down" is "serious public affairs programming."[14] The network creates its own "reality" on a reality show, and we are somehow to believe that developments within its own artificial world

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[12] *Id*. [emphasis in original].

[13] Looking at this contorted reasoning one must wonder whether the Commission is attempting to avoid reconsideration of its policy enunciated in the *Omnibus Order* that, consistent with *Golden Globe*, any variant, of the S-word is inherently excretory. *Omnibus Order* at 2699 ¶ 139.

[14] *Peter Branton*, 6 FCC Rcd 610 (1991).

are news? The only news here is how far this Commission is willing to stretch the definition of "news."

I also dissent in part from the Commission's decision to dismiss numerous complaints against several nationally televised episodes of the ABC network program "NYPD Blue" because the complaints did not come from viewers who resided in the station's media market. While the Commission has not changed its decision on the merits of the complaints, it has relied on an arbitrary procedural change in our enforcement policy that creates an unnecessary disconnect between the basis of our indecency authority and our enforcement policy, and encourages letter-writing campaigns, which will further burden Commission resources.

The Commission has long maintained, and does not now dispute, that we enforce a national, contemporary community standard, not a local one. For instance, in an effort to justify its authority in today's *Order*, the Commission observes that the broadcast medium has a "special nature" and "a uniquely pervasive presence in American life."[15] The Commission points out the "the Supreme Court emphasized the 'pervasive presence [of the broadcast medium] in the lives of all Americans' and that indecent broadcasts invade the privacy of the home."[16] Yet, the Commission's new enforcement policy is inconsistent with the national standard we impose and the pervasiveness of the medium we regulate.

This new enforcement policy is also inconsistent with the Commission's reasoning in other sections of today's *Order*. For example, as an important factor weighing in

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[15] *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

[16] *See id*., citing *Rowan v. Post Office Dept*., 397 U.S. 728 (1970).

support of its finding that the 2002 and 2003 broadcasts of "The Billboard Music Awards" are indecent, the Commission cites Nielsen rating data on the total number of children under 18 and children between ages 2 and 11 who watched the programs, nationally. Yet based on our enforcement policy, the Commission will actually only protect children in the particular local media market where there is a complaint.[17]

The consequences of this new policy reveal its lack of logic. When the Commission determines a *national* network broadcast violates our *national* community standards, we will only fine the *local* station that has a complaint filed against it by a viewer in its media market. Although our obligation is to enforce the law to protect all children, we will only fine a local station that has the misfortune of being in a market where a parent or an adult made the effort to complain. This policy is misguided because a sufficient and valid complaint is truly the first, and an important, step in our indecency enforcement regime. The complaint and the complainant serve an important role, but the real party in interest is the Commission, acting on behalf the public, rather than the specific individual or organization that brings allegedly indecent material to our attention.

According to the new enforcement policy, even after we have determined the complained-of material is indecent, we will willfully blind ourselves to the potentially millions of children and households that watched the indecent program. The new policy would fine only the local station and only if the complainant is in its coverage area. Other stations will essentially be "sitting

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[17] *Order*, ¶¶ 18, 59 and 65.

ducks," waiting for an in-market viewer to file a complaint about the same program, in order for the Commission to act. I do not understand how we can say we are faithfully enforcing the law when we are aware of violations of the law that we simply choose to ignore.

This is not the restrained enforcement policy encouraged by the Supreme Court in *Pacifica*.[18] Restraint applies to the standard we use in our decision-making and the manner in which we decide what constitutes actionable, indecent material.[19] Restraint applies to the development of a coherent framework that is based on rational and principled distinctions.

The power to limit speech should be exercised responsibly, and with the utmost caution. While I agree

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[18] *Pacifica*, 438 U.S. at 763, POWELL J, *concurring in part and concurring in judgment.*

[19] The Commission claims that "the sufficiency of a complaint is the first step rather that the last step in the Commission's analysis." *Order*, ¶ 77. However, in the single complaint filed against the "The 2002 Billboard Music Awards," for example, the complainant does not even aver that she watched the program. Quite the contrary, the complaint was filed "on behalf of the Parents Television Council and its over 800,000 members." The complainant alleges, the broadcast "was seen in homes across the country on the Fox network, and in Washington DC." Based on the Commission's reasoning in today's *Order* and the *Golden Globe Awards Order*, this complaint does not state a *prima facie* case to justify Commission action. *See Order*, ¶¶ 40 and 65 (stating that "[i]n the *Golden Globe Awards Order*, the Commission concluded that the F-Word was profane within the meaning of Section 1464 because, in context, it contained vulgar and coarse language 'so grossly offensive to members of the public who *actually hear* it as to amount to a nuisance'") (emphasis added). *See also Order*, ¶ 75 (stating that complaints against "NYPD Blue" are justifiably dismissed because "none of the complaints contains any claim that the out-of market complainant actually viewed the complained-of broadcasts") (emphasis added).

with some aspects of today's *Order*, I respectfully cannot support our reasoning. For that reason, I concur in part and dissent in part.

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 06-5358-ag

FOX TELEVISION STATIONS, INC., ET AL.,
PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
RESPONDENTS

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[Filed: Nov. 22, 2010]

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 22nd day of November, two thousand and ten.

Respondents Federal Communications Commission and United States of America having filed a petition for panel rehearing, or, in the alternative, for rehearing *en bane,* and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/ CATHERINE O'HAGAN WOLFE
CATHERINE O'HAGAN WOLFE, Clerk

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Nos. 08-0841-ag (Lead), 08-1424-ag (Con),
08-1781-ag (Con) and 08-1966-ag (Con)

ABC, INC., KTRK TELEVISION, INC., WLS TELEVISION, INC., CITADEL COMMUNICATIONS, LLC, WKRN, G.P., YOUNG BROADCASTING OF GREEN BAY, INC., WKOW TELEVISION, INC., WSIL-TV, INC., ABC TELEVISION AFFILIATES ASSOCIATION, CEDAR RAPIDS TELEVISION COMPANY, CENTEX TELEVISION LIMITED PARTNERSHIP, CHANNEL 12 OF BEAUMONT INCORPORATED, DUHAMEL BROADCASTING ENTERPRISES, GRAY TELEVISION LICENSE , INCORPORATED , KATC COMMUNICATIONS , INCORPORATED , KATV LLC , KDN LICENSEE LLC , KETV HEARST-ARGYLE TELEVISION INCORPORATED, KLTV/KTRE LICENSE SUBSIDIARY LLC, KSTP-TV LLC, KSWO TELEVISION COMPANY INCORPORATED, KTBS INCORPORATED, KTUL LLC, KVUE TELEVISION INCORPORATED, MCGRAW-HILL BROADCASTING COMPANY INCORPORATED, MEDIA GENERAL COMMUNICATIONS HOLDINGS LLC, MISSION BROADCASTING INCORPORATED, MISSISSIPPI BROADCASTING PARTNERS, NEW YORK TIMES MANAGEMENT SERVICES, NEXSTAR BROADCASTING INCORPORATED, 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-ARGYEL TELEVISION, INC., WDIO- TV LLC, WEAR LICENSEE LLC, WFAA- TV INC., WISN HEARST-ARGYLE TELEVISION INC., PETITIONERS

*v.*

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, RESPONDENTS,

FOX TELEVISION STATIONS, INC., NBC UNIVERSAL, INC., NBC TELEMUNDO LICENSE CO., CBS BROADCASTING INC., INTERVENORS.

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**SUMMARY ORDER**

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PRESENT: RICHARD C. WESLEY, DEBRA A. LIVINGSTON, Circuit Judges, JANE A. RESTANI,[*] Judge.

Petition for review of a forfeiture order of the Federal Communications Commission. **UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the petition for review be **GRANTED** and the forfeiture order of the Federal Communications Commission ("FCC") be **VACATED**.

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[*] The Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

ABC, Inc. ("ABC") and the ABC Television Affiliates Association and ABC-affiliated television stations (collectively, "ABC Affiliates") petition for review of an order of the FCC determining that an episode of the ABC Television Network show *NYPD Blue* violated broadcast indecency standards because it depicted a woman's nude buttocks and imposing a forfeiture penalty against forty-four ABC-affiliated television stations. *See Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue"*, 23 FCC Rcd. 3147, 3147–48, 3171-75 (2008) ("*Forfeiture Order*"). Petitioners, supported by Intervenors Fox Television Stations, Inc. ("Fox"), NBC Universal, Inc. ("NBC"), NBC Telemundo License Co. ("Telemundo"), and CBS Broadcasting Inc., raise administrative and constitutional challenges to the *Forfeiture Order*.[1] Because *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 335 (2d Cir. 2010) (rehearing en banc denied), held that the indecency policy under which the *Forfeiture Order* was issued is unconstitutionally vague, we grant the petition for review and vacate the *Forfeiture Order*.

**BACKGROUND**

On February 25, 2003 at 9:00 p.m. in the Central and Mountain time zones, the ABC Television Network aired an episode of *NYPD Blue* that depicted an adult woman's nude buttocks for slightly less than seven seconds.[2]

[1] Amici curiae Center for Creative Voices in Media and Future of Music Coalition support Petitioners. Amici curiae Decency Enforcement Center for Television, Morality in Media, Inc., and Parents Television Council support Respondents, the FCC and the United States.

[2] The episode began with a warning that "THIS POLICE DRAMA CONTAINS ADULT LANGUAGE AND PARTIAL NUDITY.

*Forfeiture Order*, 23 FCC Rcd. at 3147-48 ¶¶ 2-3; *NYPD Blue: Nude Awakening*. In the episode, Connie McDowell (played by Charlotte Ross), who has recently moved in with Andy Sipowicz, disrobes as she prepares to shower, and her nude buttocks are visible. *Complaints Against Various Television Licensees Concerning Their Feb. 25, 2003 Broad. of the Program "NYPD Blue"*, 23 FCC Rcd. 1596, 1598-99 ¶¶ 9–10 (2008) ("*NAL*"); *NYPD Blue: Nude Awakening*. As McDowell turns toward the shower, the side of her buttocks and the side of one of her breasts are visible. *NAL*, 23 FCC Rcd. at 1599 ¶ 9. While she faces the shower, the camera pans down, again revealing her nude buttocks. *Id.* at 1599 ¶ 10. Sipowicz's young son, Theo, enters the bathroom and sees McDowell naked from the front. *See NAL*, 23 FCC Rcd. at 1599 ¶ 10; *NYPD Blue: Nude Awakening*. Theo blocks the audience's view of McDowell's nudity. *Id.* Each character reacts with embarrassment, and Theo leaves the room and apologizes. *Id.* McDowell, covering her breasts and pubic area, responds, "It's okay. No problem." *Id.* According to ABC and the ABC Affiliates, the scene was included to portray the awkwardness between a child and his parent's new romantic partner and their difficulties in adjusting to life together.

The FCC received indecency complaints regarding the episode, and in January 2008 the FCC issued a notice of apparent liability for forfeiture ("NAL") to ABC and the ABC Affiliates proposing the maximum forfeiture penalty of $27,500 against each station. *NAL*, 23 FCC Rcd. at 1596, 1601 ¶ 18, 1602 ¶ 23. In February

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VIEWER DISCRETION IS ADVISED." *NYPD Blue: Nude Awakening* (ABC television broadcast Feb. 25, 2003).

2008, the FCC issued the *Forfeiture Order*, determining that the depiction of the buttocks was indecent and imposing a penalty of $27,500 on each of forty-four ABC-affiliated stations. *See* 23 FCC Rcd. at 3147 ¶¶ 1-2, 3171–75. ABC and the ABC Affiliates petition this Court for review of the *Forfeiture Order*.

## JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). Under the APA, we may "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [or] contrary to constitutional right. . . . " 5 U.S.C. § 706(2)(A)–(B). "We review an agency's disposition of constitutional issues *de novo*." *Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 91 (2d Cir. 2009).

## DISCUSSION

Under 18 U.S.C. § 1464, "[w]hoever utters any obscene, indecent, or profane language by means of radio communication" is subject to a criminal penalty. 18 U.S.C. § 1464. A regulation pursuant to that statute provides that "[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent." 47 C.F.R. § 73.3999(b). The FCC may impose a forfeiture penalty when it determines that a licensee has violated 18 U.S.C. § 1464. 47 U.S.C. § 503(b)(1)(D). The FCC defines indecent material as "describ[ing] or depict[ing] sexual or excretory organs or activities" and "*patently offensive* as measured by contemporary community standards for the broadcast medium." *Industry*

*Guidance on the Comm'ns Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd. 7999, 8002 ¶¶ 7-8 (2001). In determining whether material is patently offensive, the FCC looks to three principal factors:

> (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.

*Id.* at 8002 ¶ 10. The context in which the material appears "is critical." *Id.*

Speech "which is indecent but not obscene," however, "is protected by the First Amendment." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The First and Fifth Amendments protect speakers "from arbitrary and discriminatory enforcement of vague standards" in laws and regulations. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998). Standards are unconstitutionally vague if they do not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited . . . " *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "The First Amendment places a special burden on the government to ensure that restrictions on speech are not impermissibly vague." *Fox*, 613 F.3d at 327.

In *Fox*, a panel of this Court struck down the FCC's indecency policy, holding that it violates the First Amendment because it is unconstitutionally vague. *Id.*

at 319, 330. The FCC and the United States concede that *Fox* "invalidated the [FCC]'s indecency policy in its entirety." Supplemental Br. for FCC and United States 3. Although they contend that the facts of this case are different from those of *Fox*, the FCC and the United States correctly recognize that "*Fox* does not turn on [factual] distinctions."[3] *Id.*

Indeed, there is no significant distinction between this case and *Fox*. In *Fox*, the FCC levied fines for fleeting, unscripted utterances of "fuck" and "shit" during live broadcasts. *Id.* at 322. Although this case involves scripted nudity, the case turns on an application of the same context-based indecency test that *Fox* found "impermissibly vague." *Id.* at 327. According to the FCC, "nudity itself is not *per se* indecent." *WPBN/WTOM License Subsidiary, Inc.*, Memorandum Opinion & Order, 15 FCC Rcd. 1838, 1841 ¶ 11 (2000). The FCC, therefore, decides in which contexts nudity is permissible and in which contexts it is not pursuant to an indecency policy that a panel of this Court has determined is unconstitutionally vague. *Fox*, 613 F.3d at 332.

Fox's determination that the FCC's indecency policy is unconstitutionally vague binds this panel. *See United States v. Jass*, 569 F.3d 47, 58 (2d Cir. 2009). Accord-

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[3] Only amicus curiae Parents Television 3 Council argues that this case is distinguishable from *Fox*. The Parents Television Council alleges that *Fox*'s holding "is restricted to FCC's fleeting expletive policy as it relates to live, unscripted broadcasts." Supplemental Br. for Parents Television Council at 4. Although certainly the facts of *Fox* relate to live, unscripted broadcasts, *Fox* clearly sweeps more broadly, holding that the "current policy fails constitutional scrutiny." *Fox*, 613 F.3d at 335.

ingly, we need not reach the administrative law or other constitutional challenges Petitioners raised.[4]

**CONCLUSION**

For the foregoing reasons, the petition for review is **GRANTED** and the forfeiture order of the FCC is hereby **VACATED**.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk of the Court

[4] Because the constitutional issue is decided, the "fundamental and longstanding principle of judicial restraint" that "requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them," *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46 (1988), is not implicated.

**APPENDIX E**

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

File Nos. EB-03-IH-0122 and EB-03-IH-0353[1]

IN THE MATTER OF
COMPLAINTS AGAINST VARIOUS TELEVISION
LICENSEES CONCERNING THEIR FEBRUARY 25, 2003
BROADCAST OF THE PROGRAM "NYPD BLUE"

Adopted: Feb. 19, 2008
Released: Feb. 19, 2008

**FORFEITURE ORDER**

By the Commission: Commissioner McDowell issuing a statement.

## I. INTRODUCTION

1. In this Forfeiture Order, issued pursuant to section 503 of the Communications Act of 1934, as amended (the "Act"), and section 1.80 of the Commission's rules,[2] we find that ABC Television Network ("ABC") affiliated stations and ABC owned-and-operated stations listed in Attachment A, *infra*, broadcast indecent material during

[1] The NAL Acct. No. and FRN number for each licensee subject to this Forfeiture Order are listed in Attachment A, *infra*.

[2] *See* 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

an episode of the program *NYPD Blue* on February 25, 2003, in willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.[3] Based on our review of the facts and circumstances in this case, we conclude that each station is liable for a forfeiture in the amount of $27,500.

## II. BACKGROUND

2. *NYPD Blue* was a weekly, hour-long program that ran on the ABC Television Network from 1993 through 2005. The Commission received numerous complaints alleging that certain affiliates of ABC and ABC owned-and-operated stations broadcast indecent material during the February 25, 2003 episode of *NYPD Blue* that aired at 9:00 p.m. in the Central and Mountain Standard Time Zones. After reviewing the complaints, the Enforcement Bureau (the "Bureau") sent a letter of inquiry to ABC on February 3, 2004.[4] As a result of its investigation, the Bureau received a response from ABC and a tape of the episode.[5]

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[3] *See* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999.

[4] *See* Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Susan L. Fox, ABC, Inc., dated February 3, 2004 ("*LOI*").

[5] *See* Letter from Susan L. Fox, ABC, Inc., to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 9, 2004; Letter from John W. Zucker, Senior Vice President, Law and Regulation, ABC, Inc., and Susan L. Fox, Vice President, Government Relations, The Walt Disney Company, to William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated February 17, 2004 ("*February 17 Response*").

3. ABC's response to the Bureau's letter of inquiry confirmed the inclusion in the program of a scene, referenced in the complaints, in which a woman and a boy, who plays the eight-year old son of another character on the show, are involved in an incident that includes adult female nudity.[6] Specifically, the woman's naked buttocks and a portion of her breasts were depicted in a scene in which she is shown disrobing and preparing to take a shower, and the boy unexpectedly enters the bathroom.[7] ABC also confirmed that 52 of the stations about which we had received complaints aired the material outside the "safe harbor."[8] In its responses to the letters of inquiry, ABC argued, without citing any authority, that the buttocks are not a sexual or excretory organ.[9] ABC conceded that the scene included back and side nudity, but contended that it was "not presented in

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[6] *See Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue,"* Notice of Apparent Liability for Forfeiture, FCC 08-25, at ¶¶ 9-10 (rel. January 25, 2008) ("*NAL*").

[7] *See id.*

[8] The "safe harbor" is that part of each day between 10:00 p.m. and 6:00 a.m. in which indecent programming may be broadcast. *See* 47 C.F.R. § 73.3999(b) (stating that "[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6:00 a.m. and 10:00 p.m. any material which is indecent.")

[9] *See February 17 Response* at 7.

a lewd, prurient, pandering, or titillating way."[10] ABC further asserted that the purpose of the scene was to "illustrate[ ] the complexity and awkwardness involved when a single parent brings a new romantic partner into his or her life," and that the nudity was not included to depict an attempted seduction or a sexual response from the young boy.[11] ABC also asserted that, because of the "modest number of complaints" the network received, and the program's generally high ratings, the contemporary community standards of the viewing community embrace, rather than reject, this particular material.[12]

4. On January 25, 2008, the Commission released the Notice of Apparent Liability for Forfeiture ("*NAL*"), finding that the material at issue apparently violated the broadcast indecency standard. Applying its two-prong indecency analysis, the Commission first found that the material depicted sexual or excretory organs or activities.[13] The Commission then concluded that the material, in context, was patently offensive as measured by contemporary community standards for the broadcast medium and thus satisfied the second prong of our indecency standard. In reaching this conclusion, we re-

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[10] *See id.* at 9.

[11] *See id.* at 3-4, 9-11.

[12] *See id.* at 9.

[13] *See NAL* at ¶ 11.

viewed each of the three principal factors relevant to a finding of patent offensiveness under our contextual analysis of indecency cases. We first determined that the material presented in the episode "contains explicit and graphic depictions of sexual organs."[14] Turning to the second principal factor in our patent offensiveness inquiry, the Commission found "that the broadcast dwells on and repeats the sexual material."[15] Finally, the Commission concluded that the material was shocking and titillating, explaining, among other things, that "the scene's depiction of adult female nudity, particularly the repeated shots of a woman's naked buttocks, is titillating and shocking."[16]

5. Accordingly, the *NAL* found the licensees of 52 stations that broadcast the episode apparently liable for forfeitures in the amount of $27,500 per station for broadcasting indecent material, in apparent willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules. In response to the *NAL*, numerous letters and pleadings were filed with the Commission.[17]

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[14] *Id.* at ¶ 12.

[15] *Id.* at ¶ 13.

[16] *Id.* at ¶ 14.

[17] *See* Attachment B, *infra,* for a list of these submissions. To the extent that any of the submissions sought an extension of time within which to file a substantive response to the *NAL*, those requests are

## III. DISCUSSION

6. The proposed forfeiture amount in this case was assessed in accordance with section 503(b) of the Communications Act,[18] section 1.80 of the Commission's Rules,[19] and the Commission's forfeiture guidelines set forth in its *Forfeiture Policy Statement*.[20] In assessing forfeitures, section 503(b) of the Act requires that we take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other matters as justice may require.[21] As discussed further below, we have examined the licensees' responses to the *NAL* pursuant to the aforementioned statutory factors, our rules, and the *Forfeiture Policy Statement*, and, with the exception of the seven stations listed in paragraph 56 hereof, we find no basis for cancellation or reduction of the forfeiture.

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hereby denied for the reasons discussed below in Section III.B.2 of this Order.

[18] *See* 47 U.S.C. § 503(b).

[19] *See* 47 C.F.R. § 1.80.

[20] *See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recons. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

[21] *See* 47 U.S.C. § 503(b)(2)(D).

### A. Application of Indecency Test to *NYPD Blue*

7. Indecency findings involve two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition, *i.e.*, "the material must describe or depict sexual or excretory organs or activities."[22] In the *NAL*, the Commission concluded that the programming at issue here is within the scope of our indecency definition because it depicts sexual and excretory organs, specifically, an adult woman's buttocks.[23] ABC and the ABC Affiliates contest this finding, arguing that the buttocks are not sexual or excretory organs and thus are outside the scope of indecency regulation. Relying primarily on medical texts, the ABC Affiliates argue that sexual organs are "biologically defined" as the genitalia or reproductive organs that are involved in reproduction.[24] Similarly, they argue that excretory organs include only the organs of the excretory system that eliminate urine and other waste products of metabolism, and that the "[t]he only external organs or structures of the

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[22] *See 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, 8002 ¶ 7 (2001) *("Indecency Policy Statement")*.

[23] *See NAL* at ¶ 11.

[24] *See* ABC Affiliates Response at 36-37.

excretory system are the penis in males, and the urethral opening in females, which appears between the walls of the labia."[25] ABC argues that the buttocks are not an excretory or sexual organ because they do not have a sexual or excretory physiological function.[26] In addition, both argue that the precedents cited in the *NAL* are inapposite and that the Commission has never treated mere depictions of naked buttocks as within the scope of its indecency definition.[27] All of these arguments lack merit.

8. The Commission has consistently interpreted the term "sexual or excretory organs" in its own definition of indecency as including the buttocks, which, though not physiologically necessary to procreation or excretion, are widely associated with sexual arousal and closely associated by most people with excretory activities.[28]

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[25] *Id.* at 37-38.

[26] *See* ABC Response at 15-16.

[27] *See* ABC Response at 16-21; ABC Affiliates Response at 39-44.

[28] *See, e.g.*, *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 2664, 2681 ¶ 62, 2718 ¶ 225 (2006) (*Omnibus Order)* ( finding buttocks are sexual and excretory organs within the subject matter scope of indecency definition); *Entercom Kansas City License, LLC*, Notice of Apparent Liability for Forfeiture, 19 FCC FCC Rcd 25011 ¶ 7 (2004) (comments concerning contestants' genitals, buttocks and breasts describe or depict sexual or excretory organs); *Rubber City Radio Group*, Notice of Ap-

Thus, the Commission has in many cases treated naked buttocks as coming within the scope of its indecency definition, even though it has not always concluded that particular depictions or descriptions were patently offensive and thus actionably indecent.[29]

9. The indecency standard that we are applying here was formulated by the Commission to enforce 18 U.S.C. § 1464 through administrative action.[30] The Commission has broad discretion to interpret and apply the standards and terminology it has developed, as long as it does so in a manner that is consistent with the stat-

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parent Liability for Forfeiture, 17 FCC Rcd 14745, 14747 ¶ 6 (Enf. Bur. 2002) (dialogue in complaint referring to a "baby's ass" referred to a child's excretory organ and thus came within the first prong of the indecency definition).

[29] *See id.* Similarly, the Commission also has consistently treated female breasts as sexual organs though, like the buttocks, they are not physiologically necessary to procreation. *See, e.g., Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show,* Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230 (2004) ("*Super Bowl NAL*"), *affirmed*, Forfeiture Order, 21 FCC Rcd 2760 (2006) ("*Super Bowl Forfeiture Order*"), *affirmed*, Order on Reconsideration, 21 FCC Rcd 6653 (2006), ("*Super Bowl Order on Reconsideration*"), on *appeal sub nom. CBS Corp. v. FCC*, No. 06-3575 (3d Cir. 2006).

[30] *See* 47 U.S.C. § 503(b)(1)(D).

ute and the Constitution.[31] In the context of interpreting and applying the statutory and regulatory proscription against indecent programming, it is appropriate to interpret these terms not in a medical sense but rather in the sense of organs that are closely associated with sexuality or excretion and that are typically kept covered because their public exposure is considered socially inappropriate and shocking.[32] We believe that it is ap

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[31] *See, e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (Court "shows great deference to the interpretation given the statute by the agency charged with its administration. . . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."); *Dana Corp. v. ICC,* 703 F. 2d 1297, 1300 (D.C. Cir. 1983) ("The [ICC] has not violated its own rules, given the broad discretion it is accorded in interpreting them"); *Solite Corp. v. EPA,* 952 F. 2d 473, 497 (D.C. Cir. 1991) ("EPA's determination . . . was thus the result of the Agency's interpretation and application of its own rules, and the interpretation was far from 'plainly wrong'"); *Chemical Waste Management, Inc. v. EPA,* 869 F.2d 1526, 1538-39 (D.C. Cir. 1989) ("[a]n agency's interpretation of its own regulations will be accepted unless it is plainly wrong"); *General Carbon Co. v. OSHRC,* 860 F.2d 479, 483 (D.C. Cir. 1988) ("petitioner, in asserting that the agency has misconstrued its own standards, has assumed a heavy burden. . . . This court has previously noted 'the high level of deference to be afforded an agency on review when the issue turns on the interpretation of the agency's own prior proclamations.").

[32] Under the "nuisance" rationale upheld by the Supreme Court in *Pacifica*, it is appropriate to treat as coming within the scope of the indecency definition those body parts that are considered socially inap-

propriate to use the terms sexual or excretory organs—as we have in the past—in a manner consonant with the purpose of the regulatory regime to protect children from indecent depictions of organs associated with sex and excretion and sexual and excretory activities. The purpose of indecency regulation, obviously, is not to regulate procreation or excretion, so we do not think a technical physiological definition is appropriate.[33]

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propriate to reveal in public for "[a]s Mr. Justic Sutherland wrote a 'nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) ("*Pacifica*"). Under its nuisance approach, the Commission has determined that daytime and primetime broadcast programming is the "wrong place" to display naked buttocks in a patently offensive manner.

[33] Indeed, the arguments presented by the ABC Affiliates demonstrate the absurdity of employing a technical physiological definition in the context of indecency regulation. First, the ABC Affiliates maintain, from a medical standpoint, that the skin is an excretory organ because it excretes perspiration. *See* ABC Affiliates Response at 37 & n.42. But it is preposterous to suggest that any display of skin falls within the subject matter scope of our indecency regulation, and the ABC Affiliates even disclaim the logical consequence of their own argument, stating that the "ABC Affiliates do not believe that the Commission intends . . . to proscribe depictions of skin as an excretory organ." *Id.* Such a concession indicates that the ABC Affiliates do not seriously believe their own argument—that the subject matter scope of our indecency regulation is to be determined through technical physiological

10. Moreover, if we interpreted these terms in the narrow physiological sense advocated by ABC and the ABC Affiliates, the airwaves could be filled with naked buttocks and breasts during daytime and prime time hours because they would be outside the scope of indecency regulation (at least if no sexual or excretory activities were shown or discussed). We find it impossible to believe that ABC or the ABC Affiliates ever thought this to be the Commission's policy. In short, while their Responses to the *NAL* are brimming with medical definitions and arguments, the respondents offer no legal or public policy reason for their argument, and we find it lacking in merit.

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definitions. Second, the ABC Affiliates draw a distinction between excretion, which they claim refers to the elimination of the waste products of metabolism from the body, and defecation, which refers to the elimination of feces, "undigested food and bacteria [that] have never been a part of the functioning of the body." *Id.* at 38. Thus, pursuant to the technical physiological definitions presented by the ABC Affiliates, sweating would be considered an "excretory activity" while defecating would not. Again, such an approach makes no sense in the context of indecency regulation, and no reasonable person would believe that the Commission would use such technical definitions in the context of indecency regulation. We note, for instance, that according to the logic of the ABC Affilates, two of the seven "Filthy Words" in the Carlin monologue at issue in *Pacifica*—"shit" and "tits"—would appear not to fall within the subject matter scope of our indecency definition.

11. Contrary to the ABC Affiliates' contention, the "rule of lenity" does not require that the Commission construe the indecency proscription in section 1464 narrowly even when it is imposing administrative sanctions for violations.[34] The Supreme Court made clear in *FCC v. Pacifica* that the removal of the indecency provision from the Communications Act and its codification in section 1464 of the criminal code in 1948 was not intended to effect any "substantive change."[35] The Court thus found it unnecessary to "consider any question relating to the possible application of § 1464 as a criminal statute."[36] It is similarly unnecessary here—all the more so because the term we are construing is one that appears in the standard formulated by this Commission for purposes of imposing administrative forfeitures.

12. Turning to the second aspect of our indecency test, we also find that, in context and on balance, the complained-of material is patently offensive as measured by contemporary community standards for the broadcast medium. In our analysis of the three principal factors involved in determining whether material is patently offensive, "the overall context of the broadcast in which the disputed material appeared is critical. Each

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[34] *See* ABC Affiliates Response at 44-45.

[35] *Pacifica*, 438 U.S. at 739 n.13.

[36] *Id.*

indecency case presents its own particular mix of these, and possibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent."[37] Each of the three principal factors contributes to a finding of patent offensiveness here. ABC points to factors that, it argues, mitigate the patent offensiveness of the disputed material, in particular the *NYPD Blue* series' "outstanding artistic and social merit," the relationship of the scene in question to a theme stretching across multiple episodes, and the parental advisory and rating at the beginning of the episode.[38] On balance, however, for the reasons discussed below, we find that the material is patently offensive as measured by contemporary community standards for the broadcast medium.

13. First, we find that the depiction of an adult woman's naked buttocks was sufficiently graphic and explicit to support an indecency finding. Indeed, we do not believe that the explicit and graphic nature of the material is reasonably debatable. Although the language-based

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[37] *Indecency Policy Statement*, 16 FCC Rcd at 8003 ¶ 10. *See id.* at 8002-8003 ¶ 9 ("contextual determinations are necessarily highly fact-specific, making it difficult to catalog comprehensively all of the possible contextual factors that might exacerbate or mitigate the patent offensiveness of particular material.").

[38] *See* ABC Response at 26; ABC Affiliates Response at 51-52, 54-55, 61-62.

examples that it provides are not entirely apposite, examination of the *Indecency Policy Statement* reveals that, in a case such as this one, the issue under the first principal factor is whether the visual depiction of the sexual or excretory organ is clear and unmistakable.[39] Here, the scene in question shows a female actor naked from behind, with her buttocks fully visible at close range. She is not wearing a g-string or other clothing, nor are the shots of her buttocks pixillated or obscured.[40] Thus, the material is sufficiently graphic and explicit to support an indecency finding.[41] Although the partial views of her naked breast from behind and from the side are not sufficiently graphic and explicit, in and

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[39] *See Indecency Policy Statement*, 16 FCC Rcd at 8004-8008 ¶¶ 13-16.

[40] *Cf. Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1920, 1927 ¶ 9 (2005) ("*PTC I*") (material that involved "characters whose sexual and/or excretory organs were covered by bedclothes, household objects, or pixilation" but did not "actually depict[ ] sexual or excretory organs" held not sufficiently graphic or explicit to support a patent offensiveness finding).

[41] *See Super Bowl Forfeiture Order*, 21 FCC Rcd at 2765-66 (broadcast of a female performer's breast was graphic and explicit); *Young Broadcasting of San Francisco*, Notice of Apparent Liability, 19 FCC Rcd 1751 (2004) (broadcast of performer's exposed penis was graphic and explicit).

of themselves, to support an indecency finding, they also add somewhat to the first factor's weight here.

14. The cases cited by the ABC Affiliates for the proposition that nudity is not necessarily graphic or explicit are easily distinguishable from this case.[42] ABC cites cases in which the Commission did not find depictions of naked buttocks to be patently offensive, but none held that the clear and unmistakable depiction of nudity was not sufficiently explicit to support a finding of patent offensiveness.[43] Rather, each held that the material at issue, in light of all of the relevant factors, was not patently offensive.[44] We emphasize that our finding with respect to explicitness does not represent a conclusion that the scene in question is pandering or titillating; that issue relates to our analysis of the third

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[42] *See* ABC Affiliates Response at 47. *See Omnibus Order* at 2716 ¶ 215 (scene from *The Today Show* was not graphic or explicit where "[t]he shot of the man's penis is not at close range, and the overall focus of the scene is on the rescue attempt, not on the man's sexual organ"); *Complaints by Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1931, 1938 ¶ 9 (2005) ("*PTC II*") ("rudimentary depiction of a cartoon boy's buttocks" was not sufficiently graphic or explicit to support a patent offensiveness finding).

[43] *See* ABC Response at 18-19.

[44] *See id.*

principal factor below. We simply conclude here that the disputed material's clear, unobscured, close-range visual depiction of a woman's buttocks was graphic and thus supports a finding of patent offensiveness.

15. Second, we find that the disputed material's repeated depictions of a woman's naked buttocks provide some support for a patent offensiveness finding. As set forth in the *Indecency Policy Statement*, the issue under the second principal factor is focus and repetition versus "passing or fleeting" reference to sexual or excretory material.[45] Here, the disputed scene includes repeated shots of a woman's naked buttocks and focuses on her nudity. At one point, when her buttocks already have been displayed once and she is about to step into the shower, the camera deliberately pans down her back to reveal another full view of her buttocks before panning up again. While we concede that a longer scene or additional depictions of nudity throughout the episode would weigh more heavily in favor of an indecency finding, we conclude here that the focus on and repeated shots of the woman's naked buttocks provides some support for a finding of indecency under the second factor.[46] In this regard, it is worth noting that our analysis under this factor is best viewed on a continuum rather than as a

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[45] *See Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 17.

[46] *See id.*

binary "all or nothing" determination. To be sure, the depiction here is not as lengthy or repeated as some of the cases cited by ABC and ABC Affiliates in which the Commission has indicated that this factor supported a finding of patent offensiveness (and thus does not provide as much support for a finding of patent offensiveness as was present in those cases).[47] However, this material does contain more shots or lengthier depictions of nudity, or more focus on nudity, than other cases involving nudity where the Commission has found that this factor did not weigh in favor of a finding of patent offensiveness.[48]

16. Third, we find that the scene's pandering, titillating, and shocking nature supports a patent offensiveness finding. The female actor's nudity is presented in a manner that clearly panders to and titillates the audience. The viewer is placed in the voyeuristic position of viewing an attractive woman disrobing as she prepares to step into the shower. Moreover, not only does the

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[47] *See* ABC Response at 21-24; ABC Affiliates Response at 48-50.

[48] In any event, even were we to conclude that the second principal factor in our contextual analysis does not support a finding a patent offensiveness, we would still reach the same conclusion based on the strength of the first and third principal factors. *See, e.g., Super Bowl Forfeiture Order*, 21 FCC Rcd at 2766 ¶ 12; *Young Broadcasting of San Francisco*, 19 FCC Rcd at 1755 ¶¶ 10, 12 (broadcast of performer's exposed penis was graphic and explicit).

scene include a shot of her naked buttocks as she removes her robe in front of the bathroom mirror, the scene goes farther, providing the audience with another full view of her naked buttocks as she stands in front of the shower. This second shot, in which the camera pans down her naked back to her buttocks, pauses for a moment and then pans up her back, highlights the salacious aspect of the scene, clearly suggesting that its interest lies at least partly in seeing the actress's naked buttocks. The subsequent camera shots of the boy's shocked face from between the woman's legs, and of her naked, partially-obscured upper torso from behind his head, also serve to heighten the titillating and shocking nature of the scene. We disagree with ABC's position that these shots convey "nothing sexual or lewd."[49] Although the scene does not depict any sexual response in the child, his presence serves to heighten the shocking nature of the scene's depiction of her nudity.[50]

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[49] ABC Response at 31.

[50] While the scene does not depict any sexual response in the child, the effect of the nudity on the child is joked about later in the episode. The woman, who is on the police force, is discussing with another policewoman whether seeing her naked might have a long-term impact on the boy when the older detective who is the boy's father walks into the squad room. The woman asks him: "How was he when you dropped him off at school?" He responds: "Dropped him off at a Hooters." When she looks perplexed, he adds: "He insisted," at which point she smiles and walks away.

17. Contrary to ABC's arguments, comparison of the instant scene to Commission precedents does not undermine our finding regarding the third principal factor. The disputed material is easily distinguishable from the nudity addressed by the Commission in *Schindler's List*.[51] In *Schindler's List*, the complainant conceded that the material he alleged to be actionably indecent was not presented to pander or titillate.[52] Indeed, the "full frontal nudity" that aired outside of safe harbor and was the subject of the complaint was, as the ABC Affiliates explain, a scene depicting concentration group prisoners "made to run around the camp fully nude as the sick are sorted from the healthy."[53] While the scene is certainly disturbing, it is neither pandering nor titillating and bears no contextual resemblance to the material in *NYPD Blue*.[54] Accordingly, we disagree with the

[51] *See WPBN/WTOM License Subsidiary, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 1838, 1840 (nudity in broadcast of *Schindler's List* not patently offensive when considered in context of World War II concentration camp).

[52] *See id.* at 1840 ¶ 6.

[53] ABC Affiliates Response at 57.

[54] Neither do we credit ABC's argument that the nudity here is presented in a similar manner to the expletives in *Saving Private Ryan*. *See* ABC Response at 27, (citing 20 FCC Rcd 4507) (In *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",* Memorandum Opinion and Order, 20

claim of the ABC Affiliates that it is "difficult to distinguish" the nudity here from the nudity in the *Schindler's List* scene.[55] Likewise, the *Will and Grace* episode

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FCC Rcd 4507 (2005), the Commission found that use of coarse, vulgar expletives in broadcast of *Saving Private Ryan* not patently offensive when considered in wartime context). The conclusion that the material here (a woman disrobing to reveal her naked buttocks) is presented in a pandering and titillating manner whereas the material in *Saving Private Ryan* (expletives uttered by soldiers in the midst of World War II) was not presented in a pandering and titillating manner is entirely unremarkable.

[55] *See* ABC Affiliates Response at 58. For the same reason, we reject the ABC Affiliates' assertion that the Commission has created a *per se* prohibition of nudity. We need not address Respondents' reliance on unpublished staff letters denying indecency complaints against broadcasts of the film *Catch-22* and other programs that contained nudity. *See* ABC Response at 18-19, 25-27; ABC Affiliates Response at 58-60. *See* 47 C.F.R. § 0.445(e) (unpublished opinions and orders of the Commission or its staff "may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission"); *Pathfinder Communications Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 9272, 9279 ¶ 13 & n.47 (2003); *see also Indep. Ins. Agents of America, Inc. v. Ludwig*, 997 F.2d 958, 962 (D.C. Cir. 1993) ("In the real world of agency practice, informal unpublished letters should not engender reliance.") (internal quotes and citations omitted).

cited by ABC is easily distinguishable because it presents no nudity.[56]

18. We also disagree with ABC's contention that we are refusing to defer to its artistic judgment, in contrast to cases such as *Schindler's List* and *Saving Private Ryan*.[57] We are not "second-guessing" an artistic decision by concluding that the nudity contained in *NYPD Blue* was graphic and presented in a pandering and titillating manner.[58] Art may very well be graphic, and we recognize that *NYPD Blue* was a longstanding television drama that garnered writing, directing, and acting awards, and that the scene in question related to a broad storyline of the show.[59] Our finding does not represent a conclusion that the disputed material lacked artistic or social merit. As the D.C. Circuit has recognized, however, "merit is properly treated as a factor in determining whether material is patently offensive, but it does not render such material per se not indecent."[60] Fur-

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[56] *See Omnibus Order*, 21 FCC Rcd at 2702 ¶ 158 ("the touching of the breasts is not portrayed in a sexualized manner, and does not appear to elicit any sexual response from Grace.").

[57] *See* ABC Response at 27; ABC Affiliates Response at 51-52.

[58] *See* ABC Affiliates Response at 52.

[59] *See* ABC Response at 26-27.

[60] *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 (D.C. Cir. 1988) ("ACT I")

ther, we agree with ABC that the parental advisory and rating at the beginning of the program is relevant and weighs against a finding of indecency.[61] As discussed above, however, we must weigh these factors along with the three principal factors above to ultimately determine whether the disputed material is patently offensive and therefore indecent. In context and on balance, we conclude that the graphic, repeated, pandering, titillating, and shocking nature of the scene's visual depiction of a woman's naked buttocks warrant a finding that it is patently offensive under contemporary community standards for the broadcast medium, notwithstanding any artistic or social merit and the presence of a parental advisory and rating. Therefore, it is actionably indecent.

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[61] As ABC points out, the Commission made clear in dismissing indecency complaints against broadcasts of *Schindler's List* and *Saving Private Ryan* that a prominent broadcast parental advisory, while not necessarily precluding an indecency finding, should be considered in assessing the degree to which the broadcaster is acting in a responsible manner and the degree to which the public may be surprised and offended by unexpected material. *See* ABC Response at 34-35 (citing 20 FCC Rcd at 4513 ¶¶ 15-16, 15 FCC Rcd at 1840 ¶ 6, 1842 ¶ 13); ABC Affiliates Response at 61-62.

### B. Procedural Arguments

19. ABC and the ABC Affiliates raise several procedural objections to the *NAL*, including attacks on the sufficiency of the complaints underlying the Commission's action and arguments that the parties have been denied their due process rights by the Commission because of an alleged delay in providing the complaints to them and the alleged truncated period afforded them to respond to the *NAL*. We address these arguments in turn.

#### 1. Sufficiency of Complaints

20. ABC and the ABC Affiliates contend that the complaints underlying the *NAL* did not meet the requirements of the Commission's indecency enforcement policy and should have been summarily dismissed.[62]

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[62] *See* ABC Response at 10-14 (citing *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13299 (2006) ("*Omnibus Remand Order*")); ABC Affiliates Response at 21-34 (citing *Omnibus Order,* 21 FCC Rcd at 2673 ¶ 32, 2676 ¶ 42, 2687 ¶ 86; *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Order, 21 FCC Rcd 13299, 13328-329 ¶¶ 74-77 (2006) ("*Omnibus Remand Order*")). In addition, Channel 12 of Beaumont, Inc. (Beaumont), which joined in the ABC Affiliates Response, filed a supplement directed to matters pertinent to Station KBMT(TV). *See* Beaumont Response.

Specifically, both ABC and the ABC Affiliates argue that the Commission failed to make an initial determination as to the sufficiency of each complaint in this case, as required by the *Omnibus Remand Order*. According to ABC and the ABC Affiliates, with one exception, the subject complaints in this case were identical "form" complaints generated by a single advocacy group. Furthermore, they claim there is no evidence that any of the complainants actually viewed the subject episode of *NYPD Blue* on the stations cited in the *NAL* or on any station.[63] For these reasons, ABC and the ABC affiliates argue that the complaints are not *bona fide,* actionable complaints and should have been dismissed for lack of sufficiency. Accordingly, they contend that the Commission should rescind the *NAL*.[64]

21. The arguments advanced by ABC and ABC Affiliates regarding the sufficiency of the complaints are without merit because they are based upon a flawed understanding of our indecency enforcement policy.[65] As the Commission clarified in the *Omnibus Remand Or-*

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[63] *See* ABC Response at 10-14; ABC Affiliates Response at 23-29; Beaumont Response at 4.

[64] *See* ABC Response at 10-14; ABC Affiliates Response at 21-34; Beaumont Response at 6.

[65] *See Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6665 ¶ 30.

*der*, it is sufficient that viewers in markets served by each of the ABC Stations filed complaints identifying the allegedly indecent episode of *NYPD Blue* at issue.[66] Moreover, and contrary to the arguments of ABC and the ABC Affiliates, there is no requirement that a complaint include a statement that the complainant viewed the material alleged to be indecent. The Commission has considered and rejected similar arguments.[67]

22. Each of the initial e-mail complaints received by the Commission specifically identified the February 25, 2003 episode of *NYPD Blue*, each stated that the material was aired on stations affiliated with the ABC Network, and each provided a significant excerpt of the allegedly indecent material.[68] Although the complainants

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[66] *See Omnibus Remand Order*, 21 FCC Rcd at 13323 ¶ 57, n.180, 13328-329 ¶75.

[67] *See Omnibus Remand Order*, 21 FCC Rcd at 13323 ¶ 57, n.180

[68] We reject the ABC Affiliates' argument that the complaints singularly concern the exposure of a child actor to adult female nudity on the set of *NYPD Blue* during production of the episode and cannot be read to raise a broadcast indecency issue. *See* ABC Affiliates Response at 24. There is no reasonable basis for this extremely narrow construction of the complaints. Indeed, many of the complaints specifically stated, "it is shameless that this kind of broadcast is going unchallenged by the FCC." We note, in this regard, that the Commission does not require that indecency complaints be "letter perfect," or provide an exact description of the allegedly indecent material. *See, e.g., Indecency Policy Statement*, 16 FCC Rcd at 8015 ¶ 24 & n.20 citing *Citicasters Co.*,

initially did not provide call letters of a specific ABC affiliate or other information identifying the market in which the complainant resided, Commission staff requested further information on these points in follow-up e-mails to the complainants. Specifically, the staff requested information about the television station over which the complainant saw the subject program,[69] including, if available, the station's call letters or "the city and town in which the station you watched is located."[70] The staff received numerous responses to the follow-up e-mails identifying the ABC Stations referenced in the *NAL*.[71] The follow-up emails permitted the staff to ensure that there was a complainant in the market of each of the ABC Stations against which a forfeiture is im-

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*Licensee of Station KSJO(FM), San Jose, California*, Notice of Apparent Liability, 15 FCC Rcd 19095 (Enf. Bur. 2000) (forfeiture paid). Once the Commission receives a valid complaint, it reviews the program material to determine whether it is indecent.

[69] *See* e-mail from William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission dated December 29, 2005.

[70] *Id.*

[71] Contrary to the ABC Affiliates' suggestion, there is no requirement that the complainant include a physical address matching the affiliate's television market. *See* ABC Affiliates Response at 23.

posed herein, consistent with the Commission's enforcement policy.[72]

23. Consequently, this complaint proceeding does not present the same issues as did the complaints against KMBC-TV discussed in the *Omnibus Order Remand* and which both ABC and the ABC Affiliates cite in their responses.[73] In that case, there were no complaints filed by anyone residing in the market served by KMBC-TV. Instead, the complaints were filed by a complainant residing outside the KMBC-TV market and there was nothing in the record to tie the complaints to KMBC-TV's local viewing area.[74] With respect to stations at issue in this Order, we have affirmative state-

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[72] *See Indecency Policy Statement*, 16 FCC Rcd at 8015, ¶ 24 (requirements generally for consideration of an indecency complaint). There is no merit in the contention that it was improper for the staff to seek additional clarifying information from the complainants. The staff exercises its reasonable discretion in determining whether a particular complaint warrants further inquiry or should be dismissed as insufficient. The decision here to seek further identifying information was well within that discretion. In any event, even if the initial complaints had been dismissed, our ordinary practice would have afforded the complainants the option to refile their complaints with additional information.

[73] *See* ABC Response at 10-11; ABC Affiliates Response at 28-29; Beaumont Response at 4.

[74] *See Omnibus Remand Order*, 21 FCC Rcd at 13328-329 ¶ 75.

ments from the complainants tying the complaints to a particular ABC station or affiliated station.[75]

24. Moreover, we find no merit in the argument by ABC and the ABC Affiliates that complaints which were not filed contemporaneously with the airing of the February 25, 2003, episode of *NYPD Blue* should be dismissed.[76] The Commission does not require complainants to file indecency complaints within a specified time frame.[77] Under these circumstances, we find that the *NAL* was consistent with our commitment to an appropriately restrained enforcement policy and recent Commission practice to limit the imposition of forfeiture penalties to licensees whose stations serve markets from which specific complaints are received.[78]

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[75] We do note, however, that we must exclude as insufficient under the enforcement policy set forth in the *Omnibus Order* the complaints against 5 stations from the NAL—specifically, WBRZ-TV, Baton Rouge, LA; WXOW-TV, LaCrosse, WI; KMBC-TV, Kansas City, MO, KHOG-TV, Fayetteville, AR, and WDAY-TV, Fargo, ND.

[76] *See* ABC Response at 12-13; ABC Affiliates Response at 23-24; Beaumont Response at 4-6.

[77] *See Indecency Policy Statement*, 16 FCC Rcd at 8015, ¶ 24.

[78] The ABC Affiliates argue that the Commission's production of the complaints, pursuant to numerous FOIA and informal requests, compounded the alleged injury to their due process rights and more specifically, that the Commission never provided copies of complaints respecting eight of the stations cited in the *NAL*. See ABC Affiliates

Response at 14-17, 22-23. Two of these stations, KTKA-TV and KFBB-TV, are no longer subject to forfeitures for reasons discussed elsewhere in this Order, and thus the argument as to them is moot. As to the remaining six stations, the Commission responded on an expedited basis to all requests for complaints concerning stations named in the *NAL* where the requesting party represented the station(s) whose complaints it sought. Our records reflect that the only party requesting the complaints for these six stations did not indicate that it represented these stations and the complaints were not, therefore, provided on an expedited basis. The complaints have now been provided, but any prejudice alleged to have resulted from the timing of their production must be attributed to the stations' failure to timely request them.

In addition, the ABC Affiliates point out that certain discrepancies among the responses to their FOIA requests for the underlying complaints—mainly, the format of the information provided—raised questions as to whether they had received copies of the genuine complaints. *See* ABC Affiliates Response at 22-23. We have since corrected any such deficiencies, to the extent they existed. We note, in this regard, that the parties have not established that they suffered any actual harm as a result of these discrepancies and that they were able to and did rely on the complaints in responding to the *NAL*. Moreover, in responding to the parties' requests for the underlying complaints, we explained that the copies we first produced were Access database versions of the complaints rather than the original Outlook e-mail versions. *See* E-mail from Ben Bartolome to Mark Prak, Wade Hargrove, and David Kushner, sent Monday, February 4, 2008, at 8:02 p.m. (attaching copies of complaints in Access Version) (copy of E-mail available in FCC record). The next day, we located and produced the original Outlook versions. *See* E-mail from Ben Bartolome to Mark Prak, Wade Hargrove, and David Kushner, sent Tuesday, February 5, 2008, at 4:54 p.m. (attaching copies of same complaints, but in Outlook version) (copy of E-mail avail-

**2. Notice and Length of Time to Respond to *NAL***

25. The ABC Affiliates contend that the length of time between when the episode aired and the *NAL* was issued, combined with the "unusually shortened" period of time they had for responding to the *NAL,* effectively deprived them of their administrative due process rights.[79] Beaumont, in a separate response, makes similar arguments.[80] More specifically, the ABC Affiliates claim that they did not know until the *NAL* was issued that there were pending complaints against the ABC affiliate stations concerning its broadcast of the subject *NYPD Blue* episode.[81] The ABC Affiliates note that although the Commission issued a letter of inquiry to ABC, Inc., concerning the indecency complaints the Commission had received,[82] the affiliates did not directly receive similar notice from the Commission and, therefore, did not have as much time as the ABC owned-and-operated stations to conduct a contemporaneous investi-

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able in FCC record). There is no question that the complaints we provided were "genuine."

[79] *See* ABC Affiliates Response at 9-21.

[80] *See* Beaumont Response at 5-6.

[81] *See* ABC Affiliates Response at 11-13.

[82] *See* Letter from William D. Freedman, Deputy Chief, Investigations & Hearings Division, Enforcement Bureau, FCC to Susan L. Fox, Esq., ABC Inc., dated February 3, 2004 ("Letter of Inquiry").

gation of the facts. As such, they assert that pertinent records may be non-existent or hard to locate, and knowledgeable witnesses may no longer readily be available.[83] Moreover, they argue that once the *NAL* was issued, they were afforded only 17 days, rather than the usual 30 days, in which to respond and that this shortened period further prejudiced their rights.[84]

26. We find no merit in ABC Affiliates' and Beaumont's due process arguments. Both parties fail to demonstrate that the Commission's process somehow impeded their ability to fully exercise their due process rights. The arguments advanced by the parties with respect to insufficient notice suggest a misunderstanding of the nature of the Commission's forfeiture process. Pursuant to section 1.80 of the Commission's rules, before imposing a forfeiture penalty, the Commission must provide each licensee with a written notice of apparent liability which includes an explanation of the nature of the misconduct, the rule section that the Commission believes was violated, and the proposed forfeiture amount. The *NAL* in this instance provided such required notice. There is no requirement that the Com-

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[83] *See* ABC Affiliates Response at 12.

[84] We note that potential statute of limitations concerns under 28 U.S.C. § 2462 warranted the Commission's action in providing Respondents a shorter time period than usual to respond to the *NAL*.

mission direct a letter of inquiry to a licensee as part of an investigation of alleged indecent programming aired by a broadcast station before issuing an *NAL*. Moreover, section 1.80 of the Commission's rules specifies that each licensee to which such notice is provided may file a written response demonstrating why a forfeiture penalty should not be imposed or should be reduced. By their responses to the *NAL* and various FOIA filings to obtain copies of complaints, the ABC Affiliates and other parties availed themselves of the opportunity to respond the Commission's concerns, belying their claims to the contrary.

27. Furthermore, as a practical matter we are not persuaded that the ABC Affiliates suffered any harm from the shortened *NAL* response period or the time period between the broadcast and the *NAL* under the circumstances involved here. The principal record involved here is the tape of the episode, which the ABC Affiliates do not maintain was difficult to obtain. In addition, while they argue that individual stations may have had difficulty determining whether they aired the episode within the "safe harbor," ABC provided that information to the Commission in 2004.[85] The parties' timely filings also contradict any potential claim that they have suffered actual harm and/or that the *NAL*

[85] *See supra*, ¶2.

response time was so inadequate as to jeopardize their due process rights. The ABC Affiliates claim that "pertinent records of the broadcast *may* be non-existent or difficult to locate, and knowledgeable witnesses *may* no longer be readily available." They do not argue that such records or witnesses *were*, in fact, impossible to locate or that any particular material relevant to their case could not be found. At best, the parties argue inconvenience, which, even if true, they clearly surmounted, considering the number, coordinated nature, and overall comprehensiveness of their filings.

28. Section 1.80 provides that the "[r]espondent will be afforded a reasonable period of time (*usually* 30 days from the date of the notice) to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture."[86] The Commission's rules do not state that the reasonable period of time will *always* be 30 days. A 30-day response period is not mandated. The rule only requires that the response period be reasonable, and the parties have not submitted evidence of actual harm or presented any persuasive arguments to convince the Commission that the 17 days afforded for a response in this case was not reasonable. Indeed, the evidence before us demonstrates that the ABC Affiliates were able to substantively respond to the

[86] *See* 47 C.F.R. § 1.80(f)(3) (emphasis added).

*NAL* and to fully incorporate in that response relevant materials, including the underlying complaints in this proceeding. Legal counsel from 20 law firms and/or companies coordinated and responded to the *NAL* in one, consolidated, 70-page brief, with exhibits, on behalf of the majority of ABC affiliated stations. Accordingly, we conclude that the period provided for the licensees' response was reasonable and that they were neither deprived of the required notice nor an opportunity to be heard.

29. The ABC Affiliates also complain that the quality of the notice received through the *NAL* does not meet the standards set forth in Section 1.80(f)(1)(ii) because it allegedly fails to "[s]et forth the nature of the act or omission charged against the respondent and the facts upon which such charge is based."[87] We find this argument wholly unpersuasive. The *NAL* set forth the episode, air date and time, and a sufficient description of the content and how it violated the Commission's indecency rules.[88] There is no requirement, as the ABC Affiliates suggest, that the Commission provide the underlying complaint itself as part of the notice. Accordingly, we reject this argument.

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[87] *See* ABC Affiliates Response at 21; 47 C.F.R. § 1.80(f)(1)(ii).

[88] *See* NAL at ¶¶ 9-19.

30. Finally, the ABC Affiliates' argument that their due process rights have been denied because they did not have the benefit of producing evidence in the context of an administrative hearing proceeding is misplaced.[89] As the Commission has previously stated:

> It is, of course, true that the complainant's statement is "untested," in that no evidentiary hearing has been held. However, the Communications Act of 1934, as amended ("Act") permits the imposition of a forfeiture without an evidentiary hearing. The Act also protects the rights of parties subject to a forfeiture assessed without a hearing by providing that such a forfeiture cannot be used to the prejudice of the party unless it is paid or a court of competent jurisdiction has issued a final order after a trial *de novo* requiring that the forfeiture be paid.[90]

Accordingly, given the foregoing, we deny the ABC Affiliates' and Beaumont's argument that the NAL should be rescinded based on any due process or insufficient notice grounds.

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[89] *See* ABC Affiliates Response at 10.

[90] *See Infinity Broadcasting Corporation of Los Angeles*, Memorandum Opinion and Order, 16 FCC Rcd 6867, 6869 ¶ 8 nn.2-3 (Enf. Bur. 2001), *affirmed*, *Memorandum Opinion and Order*, 17 FCC Rcd 9892 (2002).

### C. Other Arguments

#### 1. Broadcast Satellite Station

31. Gray Television Licensee, Inc. ("Gray"), argues that the Commission should dismiss the case as to its satellite station, KLBY(TV), Colby, KS, and remove it from liability for the forfeiture assessed in the *NAL*.[91] Gray explains that KLBY is a satellite station of Gray's full-power station, KAKE-TV, Wichita, KS, which is already subject to the *NAL*.[92] As such, Gray asserts that KLBY(TV) "offers little more than an extension of the signal of its parent station, and makes virtually no independent programming judgments about the programming it broadcasts."[93] Further, it states that it broadcasts less than one half hour a week of programming that differs from the full power station.[94] Gray contends that the Commission's treatment of KLBY here is inconsistent with its differential treatment of satellite stations in other arenas, such as their exemption from tele-

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[91] *See* Motion to Dismiss, filed by Gray Television Licensee, Inc., Licensee of Stations KAKE-TV, Wichita, Kansas and KLBY(TV), Colby, Kansas, on February 11, 2008 ("Gray Response").

[92] *See id.* at 2.

[93] *See id.*

[94] *See id.*

vision broadcast ownership restrictions.[95] Gray claims that subjecting it to forfeitures for both KAKE-TV and KLBY airing the same content would effectively make it more expensive to own satellite stations, which contrasts with the Commission's treatment in other contexts making it less burdensome to own satellite stations.[96] In making these arguments, Gray relies on precedent concerning ownership restrictions, the burdens an applicant must satisfy to own a satellite station, and limits on independent programming a satellite station may offer.[97]

32. Notably, however, Gray does not cite indecency enforcement rules or policy to support its theory. While the Commission might have eased certain burdens on those seeking to own satellite stations, it has not made the pronouncement that Gray suggests, in effect, that the Commission should not apply the same indecency

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[95] *See id.* at 1-2 (citing *Television Satellite Stations Review of Policy & Rules*, Second Further Notice of Proposed Rulemaking, 6 FCC Rcd 5010 ¶ 3 (1991); *Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12943 ¶ 90 (1999); *2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13710 ¶ 233 (2003); *Television Satellite Stations: Review of Policy & Rules*, Report and Order, 6 FCC Rcd 4212, 4215-16 ¶¶ 23-25 (1991)).

[96] *See id.* at 2.

[97] *See supra*, note 94.

rules to satellite stations as it does to full-service stations. Nor has the Commission concurred in Gray's implicit contention that when a satellite station's parent station is subject to forfeiture for the airing indecent programming, the satellite station should not be fined for carrying the same material.[98]

33. The Commission first authorized TV satellite operations in small or sparsely populated areas with insufficient economic bases to support full-service operations. As such, Gray is correct that KLBY offers "a

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[98] We note, in fact, that the Commission has previously imposed a forfeiture on a satellite station for violation of the indecency rules and has done so while concurrently imposing a forfeiture on the satellite station's parent station for airing the same programming. *See, e.g., Super Bowl NAL,* 19 FCC Rcd at 19235 ¶ 13 (finding satellite stations KCCO-TV and KCCW-TV and their parent station, WCCO-TV, apparently liable for forfeiture for their broadcast of the Super Bowl XXXVIII Halftime Show), *affirmed*, Forfeiture Order, 21 FCC Rcd 2760 (2006), *affirmed*, Order on Reconsideration, 21 FCC Rcd 6653 (2006), *pet. for review pending on different grounds, CBS Corp. v. FCC*, No. 06-3575 (3d Cir. Filed July 28, 2006).

On a related topic, we note that the Commission has specifically stated that it will apply indecency rules to the low power broadcast service. *See An Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 51 Rad. Reg. 2nd 476 ¶ 105 (1982) (noting that the statutory prohibitions against broadcast of obscene material apply to the low power service).

unique and irreplaceable service."[99] That does not mean, however, that KLBY is effectively exempt from the Commission's indecency regulation. In fact, the Commission abolished the limit on the amount of original local programming that a satellite station may originate.[100] This elimination cuts against Gray's argument because it *chooses* for its satellite station to carry most of the same programming aired by its full-service parent station rather than originate different programming. In any event, there is no reason why the viewers of a satellite station should not expect it to abide by the same content restrictions as a full-service station. Accordingly, Gray is no less responsible for the programming of its satellite station than for its full-service station. Therefore, we reject Gray's arguments on these points.

**2. Statute of Limitations**

34. Northeast Kansas Broadcast Service and KFBB Corporation correctly argue that the statute of limitations for the Commission to assess a forfeiture precludes it from assessing liability for KTKA-TV and KFBB-TV due to an intervening renewal grant for each station

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[99] *See* Gray Response at 2.

[100] *See Television Satellite Stations: Review of Policy & Rules*, Report and Order, 6 FCC Rcd 4212, 4215 ¶ 23 (1991) (eliminating 5% restriction on local programming by satellite television stations).

between the episode in question and the issuance of the *NAL*.[101] The Commission accordingly cancels the NAL insofar as it relates to these stations.

### D. Constitutional Issues

35. Respondents argue that imposition of a forfeiture in this case would violate the First Amendment. ABC contends that Commission's indecency standard is unconstitutional on its face. In support, it asserts that the justifications that existed for adopting the current indecency standard are no longer valid; the current indecency standard is impermissibly vague; the availability of new blocking technologies has rendered the current indecency standard overbroad; and the indecency standard is subjective in a way that violates the First Amendment. The ABC Affiliates assert that the Supreme Court's decision in *Pacifica* bars the Commission from regulating brief material; the Commission failed to follow the context-driven approach required by the First Amendment; a prohibition on all broadcast nudity is

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[101] *See* Response of Former Licensee, filed by Northeast Kansas Broadcast Service, Inc., Former Licensee of Station KTKA-TV, Topeka, Kansas, on February 6, 2008; Letter to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, filed by The Wooster Printing Company, Parent of the Former Licensee of Station KFBB-TV, Great Falls, Montana, filed on February 5, 2008.

overbroad; and the Commission must apply local, not national, community standards of patent offensiveness. For the reasons discussed below, we reject Respondents' arguments.

36. *Validity of Indecency Test.* ABC argues that the underpinnings of the Commission's current indecency standard date back to the Supreme Court's decision in *Federal Communications Commission v. Pacifica Foundation*,[102] and that the justifications upon which the Court relied in its decision—the uniquely pervasive presence of the broadcast medium and the unique accessibility of broadcasting to children—are no longer viable. In this regard, ABC argues that cable and satellite transmissions now reach the majority of the nation's television households and offer hundreds of channels as well as the signals of broadcast stations.[103]

37. We disagree with ABC's claim that the justifications upon which the Supreme Court relied in *Pacifica* are no longer valid and note that the D.C. Circuit has rejected this precise argument: "Despite the increasing availability of receiving television, such as cable . . . there can be no doubt that the traditional broadcast media are properly subject to more regulation than is gen-

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[102] *See* 438 U.S. 726 (1978).

[103] *See* ABC Response at 43 (citing *Fox Television Stations*, 489 F.3d at 464-66).

erally permissible under the First Amendment."[104] Notwithstanding ABC's arguments to the contrary, the broadcast media continue to have a "uniquely pervasive presence" in American life. The Supreme Court has recognized that "[d]espite the growing importance of cable television and alternative technologies, 'broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population."[105] In 2003, 98.2% of households had at least one television, and 99% had at least one radio.[106] Although the majority of households with television subscribe to a cable or satellite service, millions of households con-

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[104] *Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc) *cert. denied*, 516 U.S. 1043 (1996) ("*ACT III*"). *See also Prometheus Radio Project v. FCC*, 373 F.3d 372, 401-02 (3d Cir. 2004) (rejecting argument that broadcast ownership regulations should be subjected to higher level of scrutiny in light of rise of "non-broadcast media").

[105] *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 190 (1997) (*quoting U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)). *See id.* at 194 (though broadcast television is "but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression.").

[106] *See* U.S. Census Bureau, *Statistical Abstract of the United States* 737 (2006).

tinue to rely exclusively on broadcast television,[107] and the National Association of Broadcasters estimates that there are some 73 million broadcast-only television sets in American households.[108] Moreover, many of those broadcast-only televisions are in children's bedrooms.[109] Although the broadcast networks have experienced declines in the number of viewers over the last several years, the programming they offer remains by far the most popular and is available to almost all households.[110]

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[107] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2506-07 ¶ 8, 2508 ¶ 15 (2006).

[108] *See id.* at 2552 ¶ 97. It also has been estimated that almost half of direct broadcast satellite subscribers receive their broadcast channels over the air, *Media Bureau Staff Report Concerning Over-the-Air Broadcast Television Viewers*, 2005 WL 473322, No. 04-210, ¶ 9 (MB Feb. 28, 2005), and many subscribers to cable and satellite still rely on broadcast for some of the televisions in their households. *Annual Assessment*, 21 FCC Rcd at 2508 ¶ 15.

[109] *See* Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year-olds* 77 (2005). According to the Kaiser Family Foundation report, 68 percent of children aged eight to 18 have a television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections.

[110] A large disparity in viewership still exists between broadcast and cable television programs. For example, during the week of February 4, 2008, each of the top ten programs on broadcast television had more than 12.5 million viewers, while only two programs on cable television that week—both professional wrestling programs—managed to attract

Indeed, elsewhere in its response, ABC trumpets the fact that "*NYPD Blue* . . . enjoyed great popular success on the ABC Television Network, averaging more than 15 million viewers during its 12 years on the network."[111]

38. The broadcast media are also "uniquely accessible to children." In this respect, broadcast television differs from cable and satellite television. Parents who subscribe to cable exercise some choice in their selection of a package of channels, and they may avoid subscribing to some channels that present programming that, in their judgment, is inappropriate for children. Indeed, upon the request of a subscriber, cable providers are required by statute to "fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it."[112]

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more than 5 million viewers. *See* Nielsen Media Research, "Trend Index," available at http://www.nielsen.com/media/toptens_television.html (visited Feb. 14, 2008). Indeed, that same week, 90 of the top 100-rated programs appeared on broadcast channels, and the highest rated cable program was number 71. *See* Television Bureau of Advertising, "Top 100 Programs on Broadcast and Subscription TV: Households," *available at* http://www.tvb.org/nav/build_frameset.aspx (visited Feb. 14, 2008).

[111] ABC Response at 4.

[112] 47 U.S.C. § 560 (2000). *See also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

In contrast, as the D.C. Circuit has observed, "broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters."[113] The V-chip provides parents with some ability to control their children's access to broadcast programming, but it does not eliminate the need for the Commission to vigorously enforce its indecency rules. In particular, as explained in further detail below, we note that numerous televisions do not contain a V-chip, and most parents who have a television set with a V-chip are unaware of its existence or do not know how to use it.[114] Accordingly, there is no merit to ABC's claim that *Pacifica*—and more importantly, our indecency rules—are invalid, obsolete or outdated.

39. *Vagueness and Overbreadth.* ABC argues that the Commission's indecency standard is unconstitutionally vague, citing *Reno v. ACLU*.[115] *Reno* addressed the constitutionality of provisions of the Communications Decency Act ("CDA") that sought to protect minors from harmful material on the Internet. The Court determined that the CDA's indecency standard was impermissibly vague because it failed to define key terms, thereby provoking uncertainty among speakers and pre-

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[113] *ACT III*, 58 F.3d at 660.

[114] *See infra*, ¶ 47.

[115] *See* ABC Response at 40-41 (citing 521 U.S. 844 (1997)).

venting them from discerning what speech would violate the statute.[116] ABC asserts that, because the CDA definition of indecency was determined by the Court to be fatally imprecise, and the Commission's definition of indecency is similar to the CDA definition, it follows that the Commission's definition is similarly flawed.[117]

40. We reject ABC's arguments that the Commission's indecency standard is vague. That standard is essentially the same as the one used in the order that was reviewed in *Pacifica*,[118] and the Supreme Court had no difficulty applying that definition and using it to conclude that the broadcast at issue in that case was indecent. We therefore agree with the D.C. Circuit that "implicit in *Pacifica*" is an acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge."[119]

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[116] *Id.* at 871.

[117] ABC Response at 40.

[118] *See* 438 U.S. at 732.

[119] *See ACT I*, 852 F.2d at 1339; *accord ACT III*, 58 F.3d at 659. ABC also contends that "imposition of forfeitures in this case would be . . . inconsistent with the Commission's past treatment of similar broadcasts and similar material," thus rendering the Commission's indecency enforcement unconstitutionally vague. ABC Response at 39-40. As we explain above, *see supra* ¶¶ 13 - 18, there is no inconsistency, so this argument necessarily fails.

41. We also believe that ABC's reliance on *Reno* is without merit. The Court in *Reno* expressly distinguished *Pacifica*, giving three different reasons for doing so.[120] Thus, far from casting doubt on *Pacifica's* vagueness holding, *Reno* recognizes its continuing vitality.

42. We also reject ABC's claim that the "contemporary community standards for the broadcast medium" criterion is impermissibly subjective.[121] The "contemporary community standards for the broadcast medium" criterion—which was upheld by the Supreme Court in *Pacifica*—is that of an average broadcast listener or viewer.[122] Our approach to discerning community standards parallels that used in obscenity cases, where the

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[120] *See Reno v. ACLU*, 521 U.S. 844, 867 (1997). First, the Court noted that the Commission is "an agency that [has] been regulating radio stations for decades," and that the Commission's regulations simply "designate when—rather than whether—it would be permissible" to air indecent material." *Id.* The CDA, in contrast, was not administered by an expert agency, and it contained "broad categorical prohibitions" that were "not limited to particular times." *Id.* Second, the CDA was a criminal statute, whereas the Commission has no power to impose criminal sanctions for indecent broadcasts. *See id.* at 867, 872. Third, unlike the Internet, the broadcast medium has traditionally "received the most limited First Amendment protection." *Id.* at 867.

[121] *See* ABC Response at 41-42.

[122] *See Indecency Policy Statement*, 16 FCC Rcd at 8002, ¶ 8 and n.15.

jury is instructed to rely on its own knowledge of community standards in determining whether material is patently offensive.[123] Here, however, the Commission has the added advantage of being an expert agency, and as we have explained before, "[w]e rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium."[124] In applying this standard, the Commission does not apply its own "personal sensibilities,"[125] but at the same time it is settled that "merit is properly treated as a factor in determining whether material is patently offensive."[126]

43. The ABC Affiliates contend that the Commission's application of community standards "is unconstitutionally overbroad because it constitutes a national standard to determine whether broadcast material is patently offensive, rather than local community stan-

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[123] *See Smith v. United States*, 431 U.S. 291, 305 (1977).

[124] *See Infinity Radio License, Inc., Memorandum Opinion and Order*, 19 FCC Rcd 5022, 5026 ¶ 12, *recon. denied,* 19 FCC Rcd 16959 (2004).

[125] *See* ABC Response at 42.

[126] *See ACT I*, 852 F.2d at 1340.

dards."[127] Instead, the ABC Affiliates contend that the Commission must "examine[ ] the mores of the more than four dozen various geographic communities in which the *NYPD Blue* episode was viewed and for which the ABC Affiliates are being cited."[128]

44. This argument is unavailing. Our longstanding indecency test focuses on whether material is patently offensive as measured by contemporary community standards for the "broadcast medium" generally, rather than those of any particular community. That is the standard the Supreme Court affirmed in *Pacifica*, without any suggestion that the Commission erred by not determining whether broadcast of the Carlin monologue was patently offensive according to the community standards of New York, the only community in which there was a complaint about its broadcast.[129] If application of a national standard was appropriate in *Pacifica*, it clearly was in this case, which involves a national broadcast and complaints arising from many parts of the country.

45. For their contrary position, the ABC Affiliates rely principally on criminal obscenity prosecutions, which present distinct concerns not applicable to this non-criminal proceeding involving indecency, not ob-

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[127] *See* ABC Affiliates' Response at 69.

[128] *See* ABC Affiliates' Response at 69.

[129] *See Pacifica*, 438 U.S. at 729, 732.

scenity.[130] Even in the context of obscenity, however, the Supreme Court has said only that the First Amendment does not *require* juries to apply nationwide community standards. States therefore have the option of defining obscenity based on more localized community standards, but nothing in the Supreme Court's obscenity case law requires them to do so.[131] Indeed, a national standard actually facilitates national broadcasting, since it provides more certainty and avoids the necessity of tailoring national programming station-by-station based on the potentially disparate community standards of a nationwide television audience.[132]

46. ABC also asserts that television viewers today are able to effectively prevent reception of any program-

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[130] *See Pacifica*, 438 U.S. at 739 n.13 ("the validity of the civil sanctions [for violation of 18 U.S.C. § 1464] is not linked to the validity of the criminal penalty.").

[131] *See Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) ("*Miller* approved the use of such instructions [requiring application of state-specific community standards]; it did not mandate their use."); *see also Ashcroft v. ACLU*, 535 U.S. 564, 587-89 (2002) (O'Connor, J., concurring in part and concurring in the judgment) (a national community standard for evaluating possible indecency on the Internet would be "not only constitutionally permissible, but also reasonable").

[132] *See Ashcroft*, 535 U.S. at 591 (Breyer, J., concurring in part and concurring in the judgment) (First Amendment militates in favor of national, as opposed to local, community standards in evaluating possible indecency on the Internet).

ming that they consider unsuitable for children through the use of voluntary ratings of programs by the entertainment industry and so-called "V-Chip" technology.[133] The existence of a less intrusive solution, according to ABC, thus renders the Commission's regulatory scheme unconstitutionally overbroad.[134] Likewise, the ABC Affiliates state that the "V-chip is not itself dispositive of the legal issue in this case" but nonetheless claim that its availability creates "constitutional ramifications" militating against a finding of indecency here.[135]

47. We reject these arguments. While we agree that the V-chip provides some assistance in protecting children from indecent material, it does not eliminate the need for the Commission to enforce its indecency rules. Numerous televisions do not contain a V-chip, and most parents who have a television set with a V-chip are unaware of its existence or do not know how to use it.[136] In

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[133] *See* ABC Response at 43-45.

[134] *See id.* at 44.

[135] ABC Affiliates Response at 65-66.

[136] *See Super Bowl Order on Reconsideration*, 21 FCC Rcd at 6667 ¶ 37. According to a 2003 study, parents' low level of V-chip use is explained in part by parents' ignorance of the device and the "multi-step and often confusing process" necessary to use it. Annenberg Public Policy Center, *Parents' Use of the V-Chip to Supervise Children's Television Use* 3 (2003). Only 27 percent of mothers in the study group could figure out how to program the V-Chip, and "many mothers who

addition, we note that some categories of programming, including news and sports, are not rated and, therefore, are not subject to blocking by V-chip technology.[137] Finally, numerous studies have raised serious questions about the accuracy of the television ratings on which the effectiveness of a V-chip depends.[138] In this case, for example, the V-chip would have failed a parent attempting to shield her children from exposure to nudity by filtering out all programs with an "S" content descriptor

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might otherwise have used the V-Chip were frustrated by an inability to get it to work properly." *Id.* at 4.

[137] *See Implementation of Section 551 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 8232, 8242-43, ¶ 21 (1998).

[138] *See, e.g.*, Barbara K. Kaye & Barry S. Sapolsky, *Offensive Language in Prime-Time Television: Four Years After Television Age and Content Ratings*, 48 Journal of Broadcasting & Electronic Media 554, 563-64 (2004) (finding that there was more coarse language broadcast during TV-PG programs than those rated TV-14, just the opposite of what these age-based ratings would lead a viewer to believe); Henry J. Kaiser Family Foundation, *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* 5 (2004) (nearly 4 in 10 parents of children aged 2-17 stated that most television programs are not rated accurately); David A. Walsh & Douglas A. Gentile, *A Validity Test of Movie, Television, and Video-Game Ratings*, 107 Pediatrics 1302, 1306 (2001) (study finding that parents concluded that half of television shows the industry had rated as appropriate for teenagers were in fact inappropriate, "a signal that the ratings are misleading.").

(for "sexual situations") since ABC did not include such a descriptor for this program.[139]

48. The ABC Affiliates also argue that a finding of indecency in this case is unconstitutionally overbroad because it amounts to proscription of "*all* non-sexual nudity on television."[140] This argument is based on a false premise. As discussed above, our finding that the broadcast included a depiction of sexual or excretory organs—namely a woman's buttocks—was necessary, but not sufficient, to find the broadcast indecent.[141] We find the nudity here indecent because it was patently offensive when considered in light of contemporary community standards for the broadcast medium. In particular, we find that, in context, the material was shocking, pandering, and titillating.[142] This case therefore does not present the question whether a prohibition on broadcast of all "non-sexual nudity" would be constitutionally overbroad.

49. *Conflict with Pacifica.* The ABC Affiliates also argue that the "*Pacifica* decision makes it clear that the fleeting nature of the nudity depicted here . . . may

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[139] *See* ABC Response at 6.

[140] ABC Affiliates Response at 67.

[141] *See supra* ¶ 7 .

[142] *See supra* ¶ 16.

not be proscribed."[143] We reject this contention. As an initial matter, the ABC Affiliates are wrong factually: the nudity included in this broadcast was not fleeting.[144] Even if it were, however, *Pacifica* would pose no barrier to a finding of indecency. First, *Pacifica* involved spoken expletives, not images of nudity. Even if it were true that the Court in *Pacifica* had drawn the First Amendment line at the twelve minutes it took Carlin to complete his monologue, there is no reason to believe it would require the same amount of repetition in a case of nudity.[145] In any event, contrary to the ABC Affiliates' contention, *Pacifica* did not decide that regulation of brief expletives would be unconstitutional but instead expressly reserved the question.[146]

50. The ABC Affiliates also contend that a forfeiture here would conflict with *Pacifica*'s recognition that "'context is all-important'"[147] because of "the fact that the depiction of bare buttocks occurred in a gritty, real-

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[143] ABC Affiliates Response at 63.

[144] *See supra* ¶ 15.

[145] *Cf. United States v. Martin*, 746 F.2d 964, 971-72 (3d Cir. 1984) ("The hackneyed expression, 'one picture is worth a thousand words' fails to convey adequately the comparison between the impact of the televised portrayal of actual events upon the viewer of the videotape and that of the spoken or written word upon the listener or reader.")

[146] *See* 438 U.S. at 750.

[147] ABC Affiliates Response at 64 (quoting *Pacifica*, 438 U.S. at 750).

istic police drama unlikely to attract an audience of children, even at 9:00 p.m."[148] Contrary to the ABC Affiliates' contention, our finding of indecency takes full account of context and reflects careful application of three contextual factors we apply in all our indecency cases.[149] Moreover, it is settled that the Commission is permitted to regulate indecency between the hours of 6 a.m. and 10 p.m.—the time of day when children are most likely to be in the audience—and is not required to determine on a broadcast-by-broadcast basis whether children were watching.[150] The licensees could have, but did not, broadcast this episode of *NYPD Blue* after 10 p.m.—as their counterparts in the Eastern and Pacific time zones did—and not run afoul of the Commission's indecency regulations.

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[148] ABC Affiliates Response at 64-65.

[149] *See supra* ¶¶ 12 - 18.

[150] *See ACT III*, 58 F.3d at 665-66. As the D.C. Circuit explained, ratings data likely under-estimate the number of children in the audience for indecent programming because "[c]hildren will not likely record, in a Nielsen diary or other survey, that they listen to or view programs of which their parents disapprove." *Id.* at 665. In addition, the court noted that "changes in the program menu make yesterday's findings irrelevant today" and "such station-and program-specific data do not take 'children's grazing' into account." *Id.* at 665-66.

## IV. CONCLUSION

51. Section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80(a) of the Commission's rules, 47 C.F.R § 1.80, both state that any person who willfully or repeatedly fails to comply with the provisions of the Act or the rules shall be liable for a forfeiture penalty. For purposes of section 503(b) of the Act, the term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules.[151] Based on our determination that the stations in question willfully broadcast this episode of *NYPD Blue* and the material before us, we find that the ABC stations willfully violated 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules, by airing indecent programming during the *NYPD Blue* program on February 25, 2003.

52. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of $7,000 for the transmission of indecent or obscene materials.[152] The *Forfeiture*

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[151] *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4388 (1991).

[152] *See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Memorandum Opinion and Order, 12 FCC Rcd 17087, 17113 (1997), *recons. denied* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement");* 47 C.F.R. § 1.80(b).

*Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." For the following reasons, we find that $27,500, the maximum applicable forfeiture during the time the material was broadcast, is an appropriate proposed forfeiture for the material found to be apparently indecent in this case. The scene depicts a woman's naked buttocks in a graphic and shocking manner. The material was prerecorded, and ABC or its affiliates could have edited or declined the content prior to broadcast.[153] Although ABC included a warning, we find that a lower forfeiture is not warranted here in light of all the circumstances surrounding the apparent violation, including the shocking and titillating nature of the scene. On balance and in light of all of the circumstances, we find that a $27,500 forfeiture amount for each station would appropriately punish and deter the apparent violation in this case. Therefore, we find that each

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[153] *See Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America"* on April 7, 2003, Notice of Apparent Liability, 19 FCC Rcd 20191, 20196 ¶ 16 (2004).

licensee listed in the Attachment is apparently liable for a proposed forfeiture of $27,500 for each station that broadcast the February 25, 2003, episode of *NYPD Blue* prior to 10 p.m.[154]

53. Although we are informed that other stations not mentioned in any complaint also broadcast the complained-of episode of *NYPD Blue*, we propose forfeitures against only those licensees whose broadcasts of the material between 6 a.m. and 10 p.m. were actually the subject of viewer complaints to the Commission. This result is consistent with the approach set forth by the Commission in its most recent indecency orders.[155] As indicated in those orders, our commitment to an appropriately restrained enforcement policy justifies this more limited approach toward the imposition of forfei-

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[154] The fact that the stations in question may not have originated the programming is irrelevant to whether there is an indecency violation. *See Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates,* Notice of Proposed Rulemaking, 10 FCC Rcd 11951,11961, ¶ 20 (1995) (internal quotation omitted) ("We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.").

[155] *See Omnibus Order*, 21 FCC Rcd at 2673 ¶ 32; *Omnibus Remand Order,* 21 FCC Rcd at 13328-329 ¶¶ 74-77.

ture penalties. Accordingly, we propose forfeitures as set forth in the Attachment.

54. We have thoroughly considered all of the licensees' arguments as well as the factors listed in section 503(b)(2)(D) of the Act. On balance, we believe that a forfeiture penalty in the base amount of $27,500 against the stations listed in Attachment A is appropriate.

## V. ORDERING CLAUSES

55. **ACCORDINGLY, IT IS ORDERED**, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules,[156] that each of the ABC stations listed in Attachment A of this Forfeiture Order are liable for a forfeiture in the amount of $27,500 each for broadcasting indecent material, in willful violation of 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

56. **IT IS FURTHER ORDERED** that the NAL is cancelled as to Northeast Kansas Broadcast Service, Inc., for KTKA-TV; KFBB Corporation, for KFBB-TV; Louisiana Television Broadcasting, LLC, for WBRZ-TV; WXOW-WQOW Television, Inc., for WXOW-TV; KMBC Hearst-Argyle Television, Inc., for KMBC-TV; KHBS Hearst-Argyle Television, Inc., for KHOG-TV; and Fo-

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[156] 47 C.F.R. § 1.80.

rum Communications Company, for WDAY-TV, for the reasons discussed elsewhere in this *Order*.

57. **IT IS FURTHER ORDERED**, pursuant to section 1.80 of the Commission's rules, that each of the stations listed in Attachment A of this Forfeiture Order **SHALL PAY** the full amount of its respective forfeiture by the close of business on Thursday, February 21, 2008. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account number and FRN Number referenced in the Attachment. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank—Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payments by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in box 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer - Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington,

D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Any station that pays its forfeiture by close of business on February 21 shall so notify Ben Bartolome, Acting Chief of the Enforcement Bureau's Investigations and Hearings Division, by email (Ben.Bartolome@fcc.gov) by close of business that day. The Commission will ensure that each of the stations listed in Attachment A of the Forfeiture Order is notified immediately upon release by the Commission.

58. **IT IS FURTHER ORDERED** that the Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

59. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent, by Certified Mail/Return Receipt Requested, to each of the licensees identified in Attachment A hereto and to their respective counsel and representatives identified in Attachment B hereto.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**ATTACHMENT A**

**Forfeitures For February 25, 2003**
**Broadcasts Of *NYPD Blue***

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| Cedar Rapids Television Company, 2nd Avenue at 5th Street, NE, Cedar Rapids, IA 52401 | 0002589489 | 200832080013 | KCRG-TV Cedar Rapids, IA | 9719 | $27,500 |
| Centex Television Limited Partnership, P. O. Box 2522, Waco, TX 76702 | 0001675719 | 200832080014 | KXXV(TV) Waco, TX | 9781 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| Channel 12 of Beaumont, Inc., 525 Interstate Highway, 10 South, Beaumont, TX 77701 | 0006587307 | 200832080015 | KBMT(TV) Beaumont, TX | 10150 | $27,500 |
| Citadel Communications, LLC, 4 Pondfield Road, Suite 12, Bronxville, NY 10708 | 0003757481 | 200832080016 | KLKN(TV) Lincoln, NE | 11264 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| KLTV/KTRE License Subsidiary, LLC, 201 Monroe Street, RSA Tower 20th Floor, Montgomery, AL 36104 | 0015798341 | 20083208001 7 | KLTV(TV) Tyler, TX | 68540 | $27,500 |
| Duhamel Broadcasting Enterprises, 518 St. Joseph Street,, Rapid City, SD 57701 | 0002433340 | 20083208001 8 | KOTA-TV Rapid City, SD | 17688 | $27,500 |
| Gray Television Licensee Corp., 150 North West Street, Wichita, KS 67203 | 0002746022 | 20083208002 0 | KAKE-TV Wichita, KS | 65522 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| Gray Television Licensee, Inc., P. O. Box 10, Wichita, KS 67201 | 0002746022 | 200832080021 | KLBY(TV) Colby, KS | 65523 | $27,500 |
| KSTP-TV, LLC, 3415 University Avenue, West, St. Paul, MN 55114-2099 | 0009769621 | 200832080022 | KSTP-TV St. Paul, MN | 28010 | $27,500 |
| KATC Communications, Inc., 1103 Eraste Landry Road, Lafayette, LA 70506 | 0003822285 | 200832080023 | KATC(TV) Lafayette, LA | 33471 | $27,500 |
| KATV, LLC, P. O. Box 77, Little Rock, AR 72203 | 0001694462 | 200832080024 | KATV(TV) Little Rock, AR | 33543 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| KDNL Licensee, LLC, c/o Pillsbury Winthrop Shaw Pittman, LLP, 2300 N Street, NW, Washington, DC 20037-1128 | 0002144459 | 200832080025 | KDNL-TV St. Louis, MO | 56524 | $27,500 |
| KETV Hearst-Argyle Television, Inc., c/o Brooks, Pierce, et al, P. O. Box 1800, Raleigh, NC 27602 | 0003799855 | 200832080026 | KETV(TV) Omaha, NE | 53903 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| KSWO Television Company, Inc., P. O. Box 708, Lawton, OK 73502 | 0001699248 | 20083280030 | KSWO-TV Lawton, OK | 35645 | $27,500 |
| KTBS, Inc., P. O. Box 44227, Shreveport, LA 71104 | 0003727419 | 20083280031 | KTBS-TV Shreveport, LA | 35652 | $27,500 |
| KTRK Television, Inc., 77 W. 66th Street, Floor 16, New York, NY 10023-6201 | 0012480109 | 20083280032 | KTRK-TV Houston, TX | 35675 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| KTUL, LLC, 3333 S. 29th West Avenue, Tulsa, OK 74107 | 0001694413 | 200832080033 | KTUL(TV) Tulsa, OK | 35685 | $27,500 |
| KVUE Television, Inc., 400 South Record Street, Dallas, TX 75202 | 0001545581 | 200832080034 | KVUE(TV) Austin, TX | 35867 | $27,500 |
| McGraw-Hill Broadcasting Company, 1221 Speer Boulevard, Denver, CO 80203 | 0003476827 | 200832080036 | KMGH-TV Denver, CO | 40875 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| Media General Communication Holdings, LLC,, 333 E. Franklin Street, Richmond, VA 23219-2213 | 0015751217 | 200832080037 | WMBB (TV) Panama City, FL | 66398 | $27,500 |
| Mission Broadcasting, Inc., 544 Red Rock Drive, Wadsworth, OH 44281 | 0004284899 | 200832080038 | KODE-TV Joplin, MO | 18283 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| Mississippi Broadcasting Partners, c/o Anne Swanson, Dow Lohnes PLLC, 1200 New Hampshire Avenue, NW, Suite 800, Washington DC 20036-6802 | 0003828753 | 200832080039 | WABG-TV Greenwood, MS | 43203 | $27,500 |
| Nexstar Broadcasting, Inc., 909 Lake Carolyn Parkway, Suite 1450, Irving, TX 75039 | 0009961889 | 200832080040 | WDHN (TV) Dothan, AL | 43846 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| New York Times Management Services Co. c/o New York Times Co., 229 W.43rd Street, New York, NY 10036-3913 | 0003481587 | 200832080041 | WQAD-TV Moline, IL | 73319 | $27,500 |
| Nexstar Broadcasting, Inc., 909 Lake Carolyn Parkway, Suite 1450, Irving, TX 75039 | 0009961889 | 200832080042 | KQTV(TV) St. Joseph, MO | 20427 | $27,500 |
| NPG of Texas, L.P., 4140 Rio Bravo, El Paso, TX 79902 | 0006548028 | 200832080044 | KVIA-TV El Paso, TX | 49832 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| Ohio/Oklahoma Hearst-Argyle Television, c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602 | 0001587609 | 200832080045 | KOCO-TV Oklahoma City, OK | 12508 | $27,500 |
| Piedmont Television of Huntsville License, LLC, c/o Piedmont Television Holdings LLC, 7621 Little Avenue, Suite 506, Charlotte, NC 28226 | 0004063483 | 200832080046 | WAAY-TV Huntsville, AL<br><br>KSPR(TV) Springfield, MO | 57292<br><br>35630 | $55,000 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| Pollack/Belz Communications Co., Inc., 5500 Poplar Lane, Memphis, TN 38119-3716 | 0006096200 | 200832080047 | KLAX-TV Alexandria, LA | 52907 | $27,500 |
| Post-Newsweek Stations, San Antonio, Inc., c/o Post-Newsweek Stations, 550 West Lafayette Boulevard, Detroit, MI 48226-3140 | 0002149953 | 200832080048 | KSAT-TV San Antonio, TX | 53118 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| Scripps Howard Broadcasting Co., 312 Walnut Street, Cincinnati, OH 45202 | 0012487609 | 200832080049 | KNXV-TV Phoenix, AZ | 59440 | $27,500 |
| Southern Broadcasting, Inc., P. O. Box 1645, Tupelo, MS 38802 | 0005411632 | 200832080050 | WKDH (TV) Houston, MS | 83310 | $27,500 |
| Tennessee Broadcasting Partners, c/o Russell Schwartz, One Television Place, Charlotte, NC 28205 | 0003828696 | 200832080051 | WBBJ-TV Jackson, TN | 65204 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| Tribune Television New Orleans, Inc., 1 Galleria Boulevard, Suite 850, Metairie, LA 70001 | 0002847564 | 200832080052 | WGNO(TV) New Orleans, LA | 72119 | $27,500 |
| WAPT Hearst-Argyle TV, Inc., (CA Corp.), P. O. Box 1800, Raleigh, NC 27602 | 0005008867 | 200832080053 | WAPT(TV) Jackson, MS | 49712 | $27,500 |
| WDIO-TV, LLC, 3415 University Avenue West, St. Paul, MN 55114-2099 | 0004199139 | 200832080054 | WDIO-TV Duluth, MN | 71338 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| WEAR Licensee, LLC, Pillsbury, Winthrop, Shaw, Pittman, LLP, 2300 N Street, NW, Washington, DC 20037-1128 | 0004970935 | 200832080055 | WEAR-TV Pensacola, FL | 71363 | $27,500 |
| WFAA-TV, Inc., 4000 South Record Street, Dallas, TX 75202 | 0001651496 | 200832080056 | WFAA-TV Dallas, TX | 72054 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| WISN Hearst-Argyle TV, Inc. (CA Corp.), P. O. Box 1800, Raleigh, NC 27602 | 0003792603 | 200832080057 | WISN-TV Milwaukee, WI | 65680 | $27,500 |
| WKOW Television, Inc., P. O. Box 909, Quincy, IL 62306 | 0004383683 | 200832080058 | WKOW-TV Madison, WI | 64545 | $27,500 |
| WKRN, G.P., c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602 | 0005015037 | 200832080059 | WKRN-TV Nashville, TN | 73188 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Forfeiture Amount |
|---|---|---|---|---|---|
| WLS Television, Inc., 77 W. 66th Street, Floor 16, New York, NY 10023-6201 | 0003471315 | 200832080060 | WLS-TV Chicago, IL | 73226 | $27,500 |
| WSIL-TV, Inc., 500 South Hulen, Suite 101, Fort Worth, TX 76132-1989 | 0009000828137 | 200832080061 | WSIL-TV Harrisburg, IL | 73999 | $27,500 |
| Young Broadcasting of Green Bay, Inc., c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602 | 0004994984 | 200832080063 | WBAY-TV Green Bay, WI | 74417 | $27,500 |

**ATTACHMENT B**

**Pleadings Filed Responding to NAL**[157]

Responses to the Notices of Apparent Liability for Forfeiture:

- Opposition to Notice of Apparent Liability for Forfeiture of 50 Television Broadcast Stations Affiliated with the ABC Television Network and of the ABC Television Affiliates Association, filed on February 11, 2008, by Cedar Rapids Television Company, Licensee of Station KCRG-TV, Cedar Rapids, Iowa; Centex Television Limited Partnership, Licensee of Station KXXV(TV), Waco, Texas; Channel 12 of Beaumont, Inc., Licensee of Station KBMT(TV), Beaumont, Texas; Citadel Communications, LLC, Licensee of Station KLKN(TV), Lincoln, Nebraska; Duhamel Broadcasting Enterprises, Licensee of Station KOTA-TV, Rapid City, South Dakota; Forum Communications Company, Licensee of Station WDAY-TV, Fargo, North Dakota; Gray Television Licensee, Inc., Licensee of Stations KAKE-TV, Wichita, Kansas and KLBY(TV), Colby, Kansas; KATC Communications, Inc., Licensee of Station KATC(TV), Lafayette, Louisiana; KATV

[157] This list excludes any Freedom of Information Act requests.

LLC, Licensee of Station KATV(TV), Little Rick Arkansas; KDNL Licensee, LLC, Licensee of Station KDNL-TV, St. Louis, Missouri; Hearst-Argyle Television, Inc., Parent of the Licensee of Stations KETV(TV), Omaha, Nebraska, KHOG-TV, Fayetteville, Arkansas, KMBC-TV, Kansas City, Missouri, KOCO-TV, Oklahoma City, Oklahoma, WAPT(TV), Jackson, Mississippi, and WISN-TV, Milwaukee, Wisconsin; KLTV/KTRE License Subsidiary, LLC, Licensee of Station KLTV(TV), Tyler, Texas; KSTP-TV, LLC, Licensee of Station KSTP-TV, St. Paul, Minnesota; KSWO Television Co., Inc., Licensee of Station KSWO-TV, Lawton, Oklahoma; KTBS, Inc., Licensee of Station KTBS-TV, Shreveport, Louisiana; KTUL, LLC, Licensee of Station KTUL(TV),Tulsa, Oklahoma; KVUE Television, Inc., Licensee of Station KVUE(TV), Austin, Texas; Louisiana Television Broadcasting, LLC, Licensee of Station WBRZ-TV, Baton Rouge, Louisiana; McGraw-Hill Broadcasting Company, Licensee of Station KMGH-TV, Denver, Colorado; Media General Communication Holdings, LLC, Licensee of Station WMBB(TV), Panama City, Florida; Mission Broadcasting, Inc., Licensee of Station KODE-TV, Joplin, Missouri; Mississippi Broadcasting Partners, Licensee of Station WABG-TV, Greenwood, Mississippi; Lo-

cal TV Illinois License, LLC, Licensee of Station WQAD-TV, Moline, Illinois; Nexstar Broadcasting, Inc., Licensee of Stations WDHN(TV), Dothan, Alabama, and KQTV(TV), St. Joseph, Missouri; Northeast Kansas Broadcast Service, Inc., Former Licensee of Station KTKA-TV, Topeka, Kansas; NPG of Texas, L.P., Licensee of Station KVIA-TV, El Paso, Texas; Piedmont Television of Huntsville License, LLC, Licensee of Stations WAAY-TV, Huntsville, Alabama and KSPR(TV), Springfield, Missouri; Pollack/Belz Communications Co., Inc., Licensee of Station KLAX-TV, Alexandria, Louisiana; Post-Newsweek Stations, San Antonio, Inc., Licensee of Station KSAT-TV, San Antonio, Texas; Scripps Howard Broadcasting Company, Licensee of Station KNXV-TV, Phoenix, Arizona; Southern Broadcasting, Inc., Licensee of Station WKDH(TV), Houston, Texas; Tennessee Broadcasting Partners, Licensee of Station WBBJ-TV, Jackson, Tennessee; Tribune Company, Parent of the Licensee of Station WGNO(TV), New Orleans, Louisiana; WDIO-TV, LLC, Licensee of Station WDIO-TV, Duluth, Minnesota; WEAR Licensee, LLC, Licensee of Station WEAR-TV, Pensacola, Florida; WFAA-TV, Inc., Licensee of Station WFAA-TV, Dallas, Texas; WKOW Television, Inc., Licensee of Station WKOW-TV, Madison, Wisconsin; WKRN,

G.P., Licensee of Station WKRN-TV, Nashville, Tennessee; WSIL-TV, Inc., Licensee of Station WSIL-TV, Harrisburg, Illinois; WXOK-WQOW Television, Inc., Licensee of Station WXOW-TV, LaCrosse, Wisconsin; Young Broadcasting of Green Bay, Inc., Licensee of Station WBAY-TV, Green Bay, Wisconsin;

- Opposition of Channel 12 of Beaumont, Inc. to Notice of Apparent Liability for Forfeiture filed by Channel 12 of Beaumont, Inc. ("Beaumont"), Licensee of Station KBMT(TV), Beaumont, Texas, on February 11, 2008 ("Beaumont Response");
- Letter to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, filed by The Wooster Printing Company ("WPRC"), Parent of the former Licensee of Station KFBB-TV, Great Falls, Montana, filed on February 5, 2008 ("WPRC Response");
- Statement of Support filed by Max Media of Montana II LLC ("Max Media"), current Licensee of Station KFBB-TV, Great Falls, Montana, filed on February 11, 2008 ("KFBB Response");
- Opposition of ABC, Inc. to Notice of Apparent Liability for Forfeiture filed on February 11, 2008 by ABC, Inc. ("ABC"), Parent of the WLS

Television, Inc., Licensee of Station WLS-TV, Chicago, Illinois, and KTRK Television, Inc., Licensee of Station KTRK-TV, Houston, Texas ("ABC Response");

- Response of Former Licensee, filed by Northeast Kansas Broadcast Service, Inc. ("Northeast"), Former Licensee of Station KTKA-TV, Topeka, Kansas, on February 6, 2008 ("Northeast Response");

Requests for Extension of Time:

- Petition for Extension of Time filed by Channel 12 of Beaumont, Inc., Licensee of Station KBMT(TV), Beaumont, Texas, on February 4, 2008;

- Letter to Matthew Berry, General Counsel, Federal Communications Commission, cc: Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Request for Extension of Time on February 1, 2008 from Forum Communications Company, Licensee of Station WDAY-TV, Fargo, North Dakota; KVUE Television, Inc., Licensee of Station KVUE(TV), Austin, Texas; and WFAA-TV, Inc., Licensee of Station WFAA-TV, Dallas, Texas;

- Motion for Extension of Time filed by Pollack/ Belz Communications Co., Inc., Licensee of Station KLAX-TV, Alexandria, Louisiana, on February 1, 2008;
- Motion for Extension of Time filed by Post-Newsweek Stations, San Antonio, Inc., Licensee of Station KSAT-TV, San Antonio, Texas, on February 1, 2008;
- Motion for Extension of Time KLTV/KTRE License Subsidiary, LLC, Licensee of Station KLTV(TV), Tyler, Texas, on February 1, 2008;
- Letter to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Request for Extension of Time on February 1, 2008 from Centex Television Limited Partnership, Licensee of Station KXXV(TV), Waco, Texas; and KSWO Television Co., Inc., Licensee of Station KSWO-TV, Lawton, Oklahoma;
- Letter to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Request for Extension of Time, from Scripps Hoard Broadcasting Company, Licensee of Station KNXV-TV, Phoenix, Arizona, on February 1, 2008;

- Motion by ABC Television Affiliates Association and Named Licensees for Extension of Time to Response to Notice of Apparent Liability for Forfeiture and Letter to Matthew Berry, General Counsel, Federal Communications Commission, cc: Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Request for Extension of Time on February 1, 2008 from Cedar Rapids Television Company, Licensee of Station KCRG-TV, Cedar Rapids, Iowa; Citadel Communications, LLC, Licensee of Station KLKN(TV), Lincoln, Nebraska; Request for Extension of Time filed by Duhamel Broadcasting Enterprises, Licensee of Station KOTA-TV, Rapid City, South Dakota; KATV LLC, Licensee of Station KATV(TV), Little Rick Arkansas; Hearst-Argyle Television, Inc., Parent of the Licensee of Stations KETV(TV), Omaha, Nebraska; KHOG-TV, Fayetteville, Arkansas; KMBC-TV, Kansas City, Missouri; KOCO-TV, Oklahoma City, Oklahoma; WAPT(TV), Jackson, Mississippi; WISN-TV, Milwaukee, Wisconsin; KTBS, Inc., Licensee of Station KTBS-TV, Shreveport, Louisiana; KTUL, LLC, Licensee of Station KTUL(TV),Tulsa, Oklahoma; NPG of Texas, L.P., Licensee of Station KVIA-TV, El Paso, Texas; WKOW Television, Inc., Licensee of Station WKOW-TV, Madison, Wisconsin; WKRN,

G.P., Licensee of Station WKRN-TV, Nashville, Tennessee; WSIL-TV, Inc., Licensee of Station WSIL-TV, Harrisburg, Illinois; WXOK-WQOW Television, Inc., Licensee of Station WXOW-TV, LaCrosse, Wisconsin; Young Broadcasting of Green Bay, Inc., Licensee of Station WBAY-TV, Green Bay, Wisconsin; Tennessee Broadcasting Partners, Licensee of Station WBBJ-TV, Jackson, Tennessee; Mississippi Broadcasting Partners, Licensee of Station WABG-TV, Greenwood, Mississippi; Request for Extension of Time filed by Louisiana Television Broadcasting, LLC, Licensee of Station WBRZ-TV, Baton Rouge, Louisiana;

- Motion for Extension of Time of KSPT-TV and WDIO-TV filed on February 4, 2008 by KSTP-TV, LLC, Licensee of Station KSTP-TV, St. Paul, Minnesota; WDIO-TV, LLC, Licensee of Station WDIO-TV, Duluth, Minnesota.

**STATEMENT OF**

**COMMISSIONER ROBERT M. McDOWELL**

*RE:* *Complaints Against Various Television Licensees Concerning Their February 25, 2003 Broadcast of the Program "NYPD Blue"*, Forfeiture Order, File Nos. EB-03-IH-0122 and EB-03-IH-0353

While I agree with the substance of the Commission's decision today, I write separately to note my concerns about a procedural aspect to this proceeding. After the Commission issued its notice of apparent liability for forfeiture, the stations were given only 17 days to file a response—far shorter than the 30 days that is our usual practice. In this instance, the 52 stations, represented by the network and affiliates association, had the resources and wherewithal to prepare a comprehensive and timely response. That may not always be the case. I hope that in future proceedings, we will grant parties a more reasonable opportunity to respond to Commission charges.

**APPENDIX F**

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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File Nos. EB-03-IH-0122 and EB-03-IH-0353[1]

IN THE MATTER OF COMPLAINTS AGAINST VARIOUS TELEVISION LICENSEES CONCERNING THEIR FEBRUARY 25, 2003 BROADCAST OF THE PROGRAM "NYPD BLUE"

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Adopted: Jan. 25, 2008
Released: Jan. 25, 2008

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**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

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By the Commission: Commissioner Tate issuing a separate statement.

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[1] The NAL/Acct. No. and FRN number for each licensee subject to this Notice are enumerated in the Attachment.

## I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture ("NAL")*, issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the "Act"), and Section 1.80 of the Commission's rules,[2] we find that the ABC Television Network ("ABC") affiliated stations and ABC owned-and-operated stations listed in the Attachment to this *NAL* aired material that apparently violates the federal restrictions regarding the broadcast of indecent material.[3] Specifically, during the February 25, 2003 episode of the ABC program "NYPD Blue," aired at 9:00 p.m. Central Standard Time and Mountain Standard Time, these licensees each broadcast adult female nudity. Based upon our review of the facts and circumstances of this case, we conclude that each licensee listed in the Attachment is apparently liable for a monetary forfeiture in the amount of $27,500 per station for broadcasting indecent material in apparent violation of 18 U.S.C. § 1464 and Section 73.3999 of the Commission's rules.

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[2] *See* 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

[3] *See* 18 U.S.C. § 1464; 47 C.F.R. § 73.3999.

## II. BACKGROUND

2. Section 1464 of Title 18, United States Code, prohibits the broadcast of obscene, indecent, or profane programming.[4] The FCC rules implementing that statute, a subsequent statute establishing a "safe harbor" during certain hours, and the Act prohibit radio and television stations from broadcasting obscene material at any time and indecent material between 6 a.m. and 10 p.m.[5]

3. ***Indecency Analysis***. Enforcement of the provisions restricting the broadcast of indecent, obscene, or profane material is an important component of the Commission's overall responsibility over broadcast radio and television operations. At the same time, however, the Commission must be mindful of the First Amendment to the United States Constitution and Section 326 of the Act, which prohibit the Commission from censoring program material or interfering with broadcasters' free speech rights.[6] As such, in making indecency determina-

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[4] *See* 18 U.S.C. § 1464.

[5] *See* 47 C.F.R. § 73.3999.

[6] *See* U.S. CONST., amend. I; 47 U.S.C. § 326. *See also United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813-15 (2000).

tions, the Commission proceeds cautiously and with appropriate restraint.[7]

4. 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.[8]

> Indecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently*

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[7] *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1344, 1340 n.14 (1988) ("*ACT I*") (stating that "[b]roadcast material that is indecent but not obscene is protected by the First Amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people may say and hear," and that any "potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy.").

[8] *See Infinity Broadcasting Corporation of Pennsylvania*, Memorandum Opinion and Order, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (citing *Pacifica Foundation*, Memorandum Opinion and Order, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica*")).

*offensive* as measured by contemporary community standards for the broadcast medium.[9]

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[9] *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, 8002 ¶¶ 7-8 (2001) ("*Indecency Policy Statement*") (emphasis in original). In applying the "community standards for the broadcast medium" criterion, the Commission has stated:

> The determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.

*WPBN/WTOM License Subsidiary, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 1838, 1841 ¶ 10 (2000) ("*WPBN/WTOM MO&O*"). The Commission's interpretation of the term "contemporary community standards" flows from its analysis of the definition of that term set forth in the Supreme Court's decision in *Hamling v. United States*, 418 U.S. 87 (1974), *reh'g denied*, 419 U.S. 885 (1974). In *Infinity Broadcasting Corporation of Pennsylvania (WYSP(FM))*, Memorandum Opinion and Order, 3 FCC Rcd 930 (1987) (subsequent history omitted), the Commission observed that in *Hamling*, which involved obscenity, "the Court explained that the purpose of 'contemporary community standards' was to ensure that material is judged neither on the basis of a decisionmaker's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." *Id.* at 933 (citing 418 U.S. at 107). The Commission also relied on the fact that the Court in *Hamling* indicated that decisionmakers need not use any precise geographic area in evaluating material. *Id.* at 933 (citing 418 U.S. at 104-05). Consistent with *Hamling*, the Commission concluded that its evaluation of alleged-

5. In our assessment of whether broadcast material is patently offensive, "the *full context* in which the material appeared is critically important."[10] Three principal factors are significant to this contextual analysis: (1) the explicitness or graphic nature of the material; (2) whether the material dwells on or repeats at length depictions or descriptions of sexual or excretory organs or activities; and (3) whether the material panders to, titillates, or shocks the audience.[11] In examining these three factors, we must weigh and balance them on a case-by-case basis to determine whether the broadcast material is patently offensive because "[e]ach indecency case presents its own particular mix of these, and possibly, other factors."[12] In particular cases, one or two of the factors may outweigh the others, either rendering the broadcast material patently offensive and consequently indecent,[13]

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ly indecent material is "not one based on a local standard, but one based on a broader standard for broadcasting generally." *Id.* at 933.

[10] *Indecency Policy Statement*, 16 FCC Rcd at 8002 ¶ 9 (emphasis in original).

[11] *See id.* at 8002-15 ¶¶ 8-23.

[12] *Id.* at 8003 ¶ 10.

[13] *See id.* at 8009 ¶ 19 (*citing Tempe Radio, Inc (KUPD-FM)*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 21828 (Mass Media Bur. 1997) (forfeiture paid), and *EZ New Orleans, Inc. (WEZB(FM))*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 4147 (Mass Media Bur. 1997) (forfeiture paid) (finding that the extremely graphic or explicit nature of references to sex with children outweighed the

or, alternatively, removing the broadcast material from the realm of indecency.

6. ***Forfeiture Calculations***. This *NAL* is issued pursuant to Section 503(b)(1) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission or to have violated Section 1464 of Title 18, United States Code, shall be liable to the United States for a forfeiture penalty.[14] Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.[15] The legislative history to Section 312(f)(1) clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,[16] and the Commission has so interpreted the term in the Section 503(b) context.[17]

7. The Commission's *Forfeiture Policy Statement* establishes a base forfeiture amount of $7,000 for the

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fleeting nature of the references).

[14] *See* 47 U.S.C. § 503(b)(1)(B) & D. *See also* 47 C.F.R. 1.80(a)(1).

[15] *See* 47 U.S.C. § 312(f)(1).

[16] *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

[17] *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

transmission of indecent or obscene materials.[18] The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in Section 503(b)(2)(D) of the Act, such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[19] The statutory maximum forfeiture amount for violations that occurred in February 2003 is $27,500.[20]

## III. DISCUSSION

8. ***The Programming***. The Commission received numerous complaints alleging that certain affiliates of ABC and ABC owned-and-operated stations, as listed in

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[18] *See Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113 (1997), *recon. denied,* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); *see also* 47 C.F.R. § 1.80(b).

[19] *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01 ¶ 27.

[20] The statutory maximum amount for violations occurring after November 13, 2000, and before September 7, 2004, is $27,500. *See* 65 FR 60868-01 (2000); *see also Amendment of Section 1.80 of the Commission's Rules*, Order, 19 FCC Rcd 10945, 10946 ¶ 6 (2004) (amending rules to increase maximum penalties due to inflation since last adjustment of penalty rates).

the Attachment, broadcast indecent material during the February 25, 2003 episode of the ABC program "NYPD Blue" at 9:00 p.m. in the Central and Mountain Standard Time Zones.

9. The complaints refer to a scene at the beginning of the program, during which a woman and a boy, who appears to be about seven or eight years old, are involved in an incident that includes adult female nudity. As confirmed by a tape of the program provided by ABC, during the scene in question, a woman wearing a robe is shown entering a bathroom, closing the door, and then briefly looking at herself in a mirror hanging above a sink. The camera then shows her crossing the room, turning on the shower, and returning to the mirror. With her back to the camera, she removes her robe, thereby revealing the side of one of her breasts and a full view of her back. The camera shot includes a full view of her buttocks and her upper legs as she leans across the sink to hang up her robe. The camera then tracks her, in profile, as she walks from the mirror back toward the shower. Only a small portion of the side of one of her breasts is visible. Her pubic area is not visible, but her buttocks are visible from the side.

10. The scene shifts to a shot of a young boy lying in bed, kicking back his bed covers, getting up, and then walking toward the bathroom. The camera cuts back to the woman, who is now shown standing naked in front of

the shower, her back to the camera. The frame consists initially of a full shot of her naked from the back, from the top of her head to her waist; the camera then pans down to a shot of her buttocks, lingers for a moment, and then pans up her back. The camera then shifts back to a shot of the boy opening the bathroom door. As he opens the door, the woman, who is now standing in front of the mirror with her back to the door, gasps, quickly turns to face the boy, and freezes momentarily. The camera initially focuses on the woman's face but then cuts to a shot taken from behind and through her legs, which serve to frame the boy's face as he looks at her with a somewhat startled expression. The camera then jumps to a front view of the woman's upper torso; a full view of her breasts is obscured, however, by a silhouette of the boy's head and ears. After the boy backs out of the bathroom and shuts the door, the camera shows the woman facing the door, with one arm and hand covering her breasts and the other hand covering her pubic area. The scene ends with the boy's voice, heard through the closed door, saying "sorry," and the woman while looking embarrassed, responds, "It's okay. No problem." The complainants contend that such material is indecent and request that the Commission impose sanctions against the licensees responsible for broadcasting this material.

11. ***Indecency Analysis***. As an initial matter, we find that the programming at issue is within the scope of our indecency definition because it depicts sexual organs and excretory organs—specifically an adult woman's buttocks.[21] Although ABC argues, without citing any authority, that the buttocks are not a sexual organ,[22] we reject this argument, which runs counter to both case law[23] and common sense.

12. We also find that the material is, in the context presented here, patently offensive as measured by contemporary community standards for the broadcast medium. Turning to the first principal factor in our contex-

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[21] *See 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, 2681 ¶ 62, *vacated in part on other grounds*, 21 FCC Rcd 13299 (2006) (subsequent history omitted) ("*2006 Indecency Omnibus Order*").

[22] *See Response* at 7.

[23] *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (Supreme Court did not disturb a city's indecency ordinance prohibiting public nudity, where the buttocks was listed among other sexual organs/body parts subject to the ordinance's ban on nudity); *Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256, 269 (2d. Cir. 1999) (upholding state district court's determination that Time Warner's decision to not transmit certain cable programming that it reasonably believed indecent (some of which included "close-up shots of unclothed breasts and buttocks") did not run afoul of the Constitution).

tual analysis, the scene contains explicit and graphic depictions of sexual organs. The scene depicts multiple, close-range views of an adult woman's naked buttocks. In this respect, this case is similar to other cases in which we have held depictions of nudity to be graphic and explicit.[24]

13. Turning to the second factor in our contextual analysis, although not dispositive, we find that the broadcast dwells on and repeats the sexual material. We have held that repetition and persistent focus on sexual or excretory material is a relevant factor in evaluating the potential offensiveness of broadcasts.[25] Here, the

[24] *See, e.g., Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 19230, 19235 ¶ 13 (2004) ("*Super Bowl NAL")* (finding that a broadcast of a performer's exposed breast was graphic and explicit), *affirmed*, Forfeiture Order, 21 FCC Rcd 2760 (2006), *affirmed*, Order on Reconsideration, 21 FCC Rcd 6653 (2006), *appeal pending*. *See also Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1751, 1755 ¶ 11 (2004) ("*Young Broadcasting NAL"*) (finding that a broadcast of a performer's exposed penis was graphic and explicit), *NAL response pending.*

[25] *See Indecency Policy Statement*, 16 FCC Rcd at 8008 ¶ 17 (citing cases); *see also Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on April 7, 2003,* Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 20191, 20195 ¶ 11 (2004) ("*Married By America NAL*") (*NAL response pending*); *Entercom Seattle License, LLC,* Order on

scene in question revolves around the woman's nudity and includes several shots of her naked buttocks. The material is thus dwelled upon and repeated.

14. With respect to the third factor, we find that the scene's depiction of adult female nudity, particularly the repeated shots of a woman's naked buttocks, is titillating and shocking. ABC concedes that the scene included back and side nudity, but contends that it was "not presented in a lewd, prurient, pandering, or titillating way."[26] ABC asserts that the purpose of the scene was to "illustrate[] the complexity and awkwardness involved when a single parent brings a new romantic partner into his or her life," and that the nudity was not included to depict an attempted seduction or a sexual response from the young boy.[27] Even accepting ABC's assertions as to the purpose of the scene, they do not alter our conclusion that the scene's depiction of adult female nudity is titillating and shocking. As discussed above, the scene includes multiple, close-up views of the woman's nude buttocks, with the camera at one point panning down her naked back for a lingering shot of her buttocks. The partial views of the woman's breasts, as well as the camera shots of the boy's shocked face from

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Review, 19 FCC Rcd 9069, 9073-74 ¶ 13 (2004), *petition for recon. pending.*

[26] *See* Response at 9.

[27] *See id.* at 3-4, 9-11.

between her legs and of her upper torso from behind his head, are also relevant contextual factors that serve to heighten the titillating and shocking nature of the scene. Thus, we find that the scene in question, which included repeated and lingering images of a woman naked from the back, with close-up views of her naked buttocks, presented adult female nudity in a manner that shocks and titillates viewers.

15. Finally, we reject ABC's argument that, because of the "modest number of complaints" the network received,[28] and the program's generally high ratings,[29] the contemporary community standards of the viewing community embrace, rather than reject, this particular material. As a matter of clarification, while ABC may not have received many complaints about the program, the Commission received numerous complaints, including thousands of letters from members of various citizen advocacy groups. The Commission's indecency determinations are not governed by the number of complaints received about a given program, however, nor do they turn on whether the program or the station that broadcast it happens to be popular in its particular market.[30] Indeed, with respect to the latter factor, the fact that

[28] *See id.* at 9, n.7.

[29] *See id.* at 9.

[30] *See The Rusk Corporation*, Notice of Apparent Liability for Forfeiture, 8 FCC Rcd 3228, 3229 (1993) (forfeiture paid).

the program is watched by a significant number of viewers serves to increase the likelihood that children were among those who may have seen the indecent broadcasts, thereby increasing the public harm from the licensees' misconduct.

16. In sum, although the broadcast of nudity is not necessarily indecent in all contexts,[31] taking into account the three principal factors in our contextual analysis, we conclude that the broadcast of the material at issue here is apparently indecent. As reviewed above, the material in this episode was explicit, dwelled upon, and shocking, pandering and titillating. The complained-of material was broadcast by the licensees listed in the Attachment within the 6 a.m. to 10 p.m. time frame relevant to an indecency determination under Section 73.3999 of the Commission's rules.[32] Although ABC included in the program a warning that "this police drama contains adult language and partial nudity,"[33] the Supreme Court has ruled that such warnings are not necessarily effective

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[31] *Compare WPBN/WTOM MO&O*, 15 FCC Rcd at 1840-41 ¶¶ 8-13 (finding that nudity in the broadcast of the movie "Schindler's List" was not indecent because it was not patently offensive in context) *with Young Broadcasting NAL*, 19 FCC Rcd at 1756, ¶ 14 (finding that exposure of male genitalia was patently offensive because it was gratuitous and apparently intended to shock and titillate the audience).

[32] *See* 47 C.F.R. § 73.3999.

[33] Response at 10-11.

because the audience is constantly changing stations.[34] Therefore, notwithstanding the warning, there is a reasonable risk that children may have been in the audience and the broadcast is legally actionable.[35]

17. ***Forfeiture Calculation***. We find that the ABC affiliates and ABC owned-and-operated stations listed in the Attachment consciously and deliberately broadcast the programming at issue here. Accordingly, we find that each broadcast in apparent violation of 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 was willful within the meaning of Section 503(b)(1) of the Act, and subject to forfeiture.

18. We therefore turn to the proposed forfeiture amount, which is based on the factors enumerated in Section 503(b)(2)(D) of the Act and the facts and circumstances of this case. For the following reasons, we find that $27,500 is an appropriate proposed forfeiture for the material found to be apparently indecent in this case. The scene depicts a nude woman with her buttocks entirely exposed. The material was prerecorded, and ABC or its affiliates could have edited or declined the content prior to broadcast.[36] Although ABC included a

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[34] *See Pacifica*, 438 U.S. at 748-49.

[35] *See Action for Children's Television v. FCC*, 58 F. 3d 654, 660-63 (D.C. Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1072 (1996).

[36] *See Married By America NAL*, 19 FCC Rcd at 20196 ¶ 16.

warning, we find that a lower forfeiture is not warranted here in light of all the circumstances surrounding the apparent violation, including the shocking and titillating nature of the scene. On balance and in light of all of the circumstances, we find that a $27,500 forfeiture amount for each station would appropriately punish and deter the apparent violation in this case. Therefore, we find that each licensee listed in the Attachment is apparently liable for a proposed forfeiture of $27,500 for each station that broadcast the February 25, 2003, episode of "NYPD Blue" prior to 10 p.m.[37]

19. Although we are informed that other stations not mentioned in any complaint also broadcast the complained-of episode of "NYPD Blue," we propose forfeitures against only those licensees whose broadcasts of the material between 6 a.m. and 10 p.m. were actually the subject of viewer complaints to the Commission. This result is consistent with the approach set forth

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[37] The fact that the stations in question may not have originated the programming is irrelevant to whether there is an indecency violation. *See Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates,* Notice of Proposed Rulemaking, 10 FCC Rcd 11951,11961, ¶ 20 (1995) (internal quotation omitted) ("We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.").

by the Commission in its most recent indecency orders.[38] As indicated in those orders, our commitment to an appropriately restrained enforcement policy justifies this more limited approach toward the imposition of forfeiture penalties. Accordingly, we propose forfeitures as set forth in the Attachment.

## IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's rules, that the licensees of the stations that are affiliates of the ABC Television Network and of the stations owned and operated by ABC, as enumerated in the Attachment, are hereby NOTIFIED of their APPARENT LIABILITY FOR FORFEITURE in the amount of $27,500 per station for willfully violating 18 U.S.C. § 1464 and Section 73.3999 of the Commission's rules by their broadcast of the program "NYPD Blue" on February 25, 2003.

21. IT IS FURTHER ORDERED that a copies of this *NAL* shall be sent by Certified Mail, Return Receipt Requested, to John W. Zucker, Senior Vice President, Law & Regulation, ABC Inc., 77 West 66th Street, New York, New York 20024, and to Susan L. Fox, Vice President, Government Relations, The Walt Disney

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[38] *See 2006 Indecency Omnibus Order*, 21 FCC Rcd at 2673 ¶ 32.

Company, 1150 17th Street, N.W., Suite 400, Washington, D.C. 20036, and to the licensees of the stations listed in the Attachment, at their respective addresses noted therein.

22. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's rules, that not later than February 11, 2008, each licensee identified in the Attachment SHALL PAY the full amount of its proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of their proposed forfeiture.

23. Payment of the forfeitures must be made by check or similar instrument, payable to the order of the Federal Communications Commission. Payments must include the relevant NAL/Acct. No. and FRN No. referenced in the Attachment. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, Pennsylvania 15251-8340. Payment by overnight mail may be sent to Mellon Bank/LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, Pennsylvania 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

24. The responses, if any, must be mailed to Benigno E. Bartolome, Acting Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communi-

cations Commission, 445 12th Street, S.W., Room 4-C330, Washington D.C. 20554, and MUST INCLUDE the relevant NAL/Acct. No. referenced for each proposed forfeiture in the Attachment hereto.

25. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

26. Requests for payment of the full amount of this *NAL* under an installment plan should be sent to: Associate Managing Director—Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.[39]

27. Accordingly, IT IS ORDERED that the complaints in this *NAL* proceeding ARE GRANTED to the extent indicated herein, AND ARE OTHERWISE DE-

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[39] *See* 47 C.F.R. § 1.1914.

NIED, and the complaint proceeding IS HEREBY TERMINATED.[40]

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[40] Consistent with Section 503(b) of the Act and consistent Commission practice, for the purposes of the forfeiture proceeding initiated by this *NAL*, the only parties to such proceeding will be the licensees specified in the Attachment.

**ATTACHMENT**

**Proposed Forfeitures For February 25, 2003**
**Broadcasts Of "NYPD Blue"**

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| Cedar Rapids Television Company, 2nd Avenue at 5th Street, NE, Cedar Rapids, IA 52401 | 0002 5894 89 | 2008 3208 0013 | KCRG-TV Cedar Rapids, IA | 9719 | $27,500 |
| Centex Television Limited Partnership, P. O. Box 2522, Waco, TX 76702 | 0001 6757 19 | 2008 3208 0014 | KXXV(TV) Waco, TX | 9781 | $27,500 |

| **Licensee Name and Mailing Address** | **FRN No.** | **NAL Acct. No.** | **Station Call Sign and Community of License** | **Facility ID Nos.** | **Proposed Forfeiture Amount** |
|---|---|---|---|---|---|
| Channel 12 of Beaumont, Inc., 525 Interstate Highway, 10 South, Beaumont, TX 77701 | 0006 5873 07 | 2008 3208 0015 | KBMT(TV) Beaumont, TX | 10150 | $27,500 |
| Citadel Communications, LLC, 44 Pondfield Road, Suite 12, Bronxville, NY 10708 | 0003 7574 81 | 2008 3208 0016 | KLKN(TV) Lincoln, NE | 11264 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| KLTV/KTRE License Subsidiary, LLC, 201 Monroe Street, RSA Tower 20th Floor, Montgomery, AL 36104 | 0015798341 | 20083208 0017 | KLTV(TV) Tyler, TX | 68540 | $27,500 |
| Duhamel Broadcasting Enterprises, 518 St. Joseph Street,, Rapid City, SD 57701 | 0002433340 | 20083208 0018 | KOTA-TV Rapid City, SD | 17688 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| Forum Communications Company, 301 8th Street South, P. O. Box 2466, Fargo, ND 58103 | 0002 4800 85 | 2008 3208 0019 | WDAY-TV Fargo, ND | 22129 | $27,500 |
| Gray Television Licensee Corp., 1500 North West Street, Wichita, KS 67203 | 0002 7460 22 | 2008 3208 0020 | KAKE-TV Wichita, KS | 65522 | $27,500 |

| **Licensee Name and Mailing Address** | **FRN No.** | **NAL Acct. No.** | **Station Call Sign and Community of License** | **Facility ID Nos.** | **Proposed Forfeiture Amount** |
|---|---|---|---|---|---|
| Gray Television Licensee, Inc., P. O. Box 10, Wichita, KS 67201 | 0002 7460 22 | 2008 3208 0021 | KLBY(TV) Colby, KS | 65523 | $27,500 |
| KSTP-TV, LLC, 3415 University Avenue, West, St. Paul, MN 55114-2099 | 0009 7696 21 | 2008 3208 0022 | KSTP-TV St. Paul, MN | 28010 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| KATC Communications, Inc., 1103 Eraste Landry Road, Lafayette, LA 70506 | 0003 8222 85 | 2008 3208 0023 | KATC(TV) Lafayette, LA | 33471 | $27,500 |
| KATV, LLC, P. O. Box 77, Little Rock, AR 72203 | 0001 6944 62 | 2008 3208 0024 | KATV(TV) Little Rock, AR | 33543 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| KDNL Licensee, LLC, c/o Pillsbury Winthrop Shaw Pittman, LLP, 2300 N Street, NW, Washington, DC 20037-1128 | 0002 1444 59 | 2008 3208 0025 | KDNL-TV St. Louis, MO | 56524 | $27,500 |
| KETV Hearst-Argyle Television, Inc., c/o Brooks, Pierce, et al, P. O. Box 1800, Raleigh, NC 27602 | 0003 7998 55 | 2008 3208 0026 | KETV(TV) Omaha, NE | 53903 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| KFBB Corporation, L.L.C., c/o Wooster Republican Printing Company, 40 S Linden Ave, Alliance, OH 44601-2447 | 0011094281 | 2008320800027 | KFBB-TV Great Falls, MT | 34412 | $27,500 |

| **Licensee Name and Mailing Address** | **FRN No.** | **NAL Acct. No.** | **Station Call Sign and Community of License** | **Facility ID Nos.** | **Proposed Forfeiture Amount** |
|---|---|---|---|---|---|
| KHBS Hearst-Argyle Television, Inc., c/o Brooks, Pierce, et al, P. O. Box 1800, Raleigh, NC 27602 | 0001 5870 88 | 2008 3208 0028 | KHOG-TV Fayetteville, AR | 60354 | $27,500 |
| KMBC Hearst-Argyle Television, Inc., c/o Brooks, Pierce, et al, P.O. Box 1800, Raleigh, NC 27602 | 0001 6759 74 | 2008 3208 0029 | KMBC-TV Kansas City, MO | 65686 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| KSWO Television Company, Inc., P. O. Box 708, Lawton, OK 73502 | 0001 6992 48 | 2008 3208 0030 | KSWO-TV Lawton, OK | 35645 | $27,500 |
| KTBS, Inc., P. O. Box 44227, Shreveport, LA 71104 | 0003 7274 19 | 2008 3208 0031 | KTBS-TV Shreveport, LA | 35652 | $27,500 |
| KTRK Television, Inc., 77 W. 66th Street, Floor 16, New York, NY 10023-6201 | 0012 4801 09 | 2008 3208 0032 | KTRK-TV Houston, TX | 35675 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| KTUL, LLC, 3333 S. 29th West Avenue, Tulsa, OK 74107 | 0001 6944 13 | 2008 3208 0033 | KTUL(TV) Tulsa, OK | 35685 | $27,500 |
| KVUE Television, Inc., 400 South Record Street, Dallas, TX 75202 | 0001 5455 81 | 2008 3208 0034 | KVUE(TV) Austin, TX | 35867 | $27,500 |
| Louisiana Television Broadcasting, LLC, P. O. Box 2906, Baton Rouge, LA 70821 | 0001 7143 44 | 2008 3208 0035 | WBRZ-TV Baton Rouge, LA | 38616 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| McGraw-Hill Broadcasting Company, 123 Speer Boulevard, Denver, CO 80203 | 0003476827 | 200832080036 | KMGH-TV Denver, CO | 40875 | $27,500 |
| Media General Communication Holdings, LLC,, 333 E. Franklin Street, Richmond, VA 23219-2213 | 0015751217 | 200832080037 | WMBB(TV) Panama City, FL | 66398 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| Mission Broadcasting, Inc., 544 Red Rock Drive, Wadsworth, OH 44281 | 0004 2848 99 | 2008 3208 0038 | KODE-TV Joplin, MO | 18283 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| Mississippi Broadcasting Partners, c/o Anne Swanson, Dow Lohnes PLLC, 1200 New Hampshire Avenue, NW, Suite 800, Washington DC 20036-6802 | 0003 8287 53 | 2008 3208 0039 | WABG-TV Greenwood, MS | 43203 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| Nexstar Broadcasting, Inc., 909 Lake Carolyn Parkway, Suite 1450, Irving, TX 75039 | 0009 9618 89 | 2008 3208 0040 | WDHN(TV) Dothan, AL | 43846 | $27,500 |
| New York Times Management Services Co. c/o New York Times Co. 229 W. 43rd Street New York, NY 10036-3913 | 0003 4815 87 | 2008 3208 0041 | WQAD-TV Moline, IL | 73319 | $27,500 |

| **Licensee Name and Mailing Address** | **FRN No.** | **NAL Acct. No.** | **Station Call Sign and Community of License** | **Facility ID Nos.** | **Proposed Forfeiture Amount** |
|---|---|---|---|---|---|
| Nexstar Broadcasting, Inc., 909 Lake Carolyn Parkway, Suite 1450, Irving, TX 75039 | 0009 9618 89 | 2008 3208 0042 | KQTV(TV) St. Joseph, MO | 20427 | $27,500 |
| Northeast Kansas Broadcast Service, Inc., 2121 S.W. Chelsea Avenue, Topeka, KS 66604 | 0001 8417 66 | 2008 3208 0043 | KTKA-TV Topeka, KS | 49397 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| NPG of Texas, L.P., 4140 Rio Bravo, El Paso, TX 79902 | 0006548028 | 20083208 0044 | KVIA-TV El Paso, TX | 49832 | $27,500 |
| Ohio/Oklahoma Hearst-Argyle Television, c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602 | 0001587609 | 20083208 0045 | KOCO-TV Oklahoma City, OK | 12508 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| Piedmont Television of Huntsville License, LLC, c/o Piedmont Television Holdings LLC, 7621 Little Avenue, Suite 506, Charlotte, NC 28226 | 0004 0634 83 | 2008 3208 0046 | WAAY-TV Huntsville, AL<br><br>KSPR(TV) Springfield, MO | 57292<br><br>35630 | $55,000 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| Pollack/Belz Communications Co., Inc., 5500 Poplar Lane, Memphis, TN 38119-3716 | 0006096200 | 20083208 0047 | KLAX-TV Alexandria, LA | 52907 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| Post-Newsweek Stations, San Antonio, Inc., c/o Post-Newsweek Stations, 550 West Lafayette Boulevard, Detroit, MI 48226-3140 | 0002 1499 53 | 2008 3208 0048 | KSAT-TV San Antonio, TX | 53118 | $27,500 |
| Scripps Howard Broadcasting Co., 312 Walnut Street, Cincinnati, OH 45202 | 0012 4876 09 | 2008 3208 0049 | KNXV-TV Phoenix, AZ | 59440 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| Southern Broadcasting, Inc., P. O. Box 1645, Tupelo, MS 38802 | 0005 4116 32 | 2008 3208 0050 | WKDH(TV) Houston, MS | 83310 | $27,500 |
| Tennessee Broadcasting Partners, c/o Russell Schwartz, One Television Place, Charlotte, NC 28205 | 0003 8286 96 | 2008 3208 0051 | WBBJ-TV Jackson, TN | 65204 | $27,500 |

| **Licensee Name and Mailing Address** | **FRN No.** | **NAL Acct. No.** | **Station Call Sign and Community of License** | **Facility ID Nos.** | **Proposed Forfeiture Amount** |
|---|---|---|---|---|---|
| Tribune Television New Orleans, Inc., 1 Galleria Boulevard, Suite 850, Metairie, LA 70001 | 0002 8475 64 | 2008 3208 0052 | WGNO(TV) New Orleans, LA | 72119 | $27,500 |
| WAPT Hearst-Argyle TV, Inc., (CA Corp.) , P. O. Box 1800, Raleigh, NC 27602 | 0005 0088 67 | 2008 3208 0053 | WAPT(TV) Jackson, MS | 49712 | $27,500 |

| **Licensee Name and Mailing Address** | **FRN No.** | **NAL Acct. No.** | **Station Call Sign and Community of License** | **Facility ID Nos.** | **Proposed Forfeiture Amount** |
|---|---|---|---|---|---|
| WDIO-TV, LLC, 3415 University Avenue West, St. Paul, MN 55114-2099 | 0004 1991 39 | 2008 3208 0054 | WDIO-TV Duluth, MN | 71338 | $27,500 |
| WEAR Licensee, LLC, Pillsbury, Winthrop, Shaw, Pittman, LLP, 2300 N Street, NW, Washington, DC 20037-1128 | 0004 9709 35 | 2008 3208 0055 | WEAR-TV Pensacola, FL | 71363 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| WFAA-TV, Inc., 400 South Record Street, Dallas, TX 75202 | 0001651496 | 20083208 0056 | WFAA-TV Dallas, TX | 72054 | $27,500 |
| WISN Hearst-Argyle TV, Inc. (CA Corp.), P. O. Box 1800, Raleigh, NC 27602 | 0003792603 | 20083208 0057 | WISN-TV Milwaukee, WI | 65680 | $27,500 |
| WKOW Television, Inc., P. O. Box 909, Quincy, IL 62306 | 0004383683 | 20083208 0058 | WKOW-TV Madison, WI | 64545 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| WKRN, G.P., c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602 | 0005 0150 37 | 2008 3208 0059 | WKRN-TV Nashville, TN | 73188 | $27,500 |
| WLS Television, Inc., 77 W. 66th Street, Floor 16, New York, NY 10023-6201 | 0003 4713 15 | 2008 3208 0060 | WLS-TV Chicago, IL | 73226 | $27,500 |
| WSIL-TV, Inc., 5009 South Hulen, Suite 101, Fort Worth, TX 76132-1989 | 0002 8081 37 | 2008 3208 0061 | WSIL-TV Harrisburg, IL | 73999 | $27,500 |

| Licensee Name and Mailing Address | FRN No. | NAL Acct. No. | Station Call Sign and Community of License | Facility ID Nos. | Proposed Forfeiture Amount |
|---|---|---|---|---|---|
| WXOW-WQOW Television, Inc., P.O. Box 909, Quincy, IL 62306 | 0005012216 | 20083208 0062 | WXOW-TV La Crosse, WI | 64549 | $27,500 |
| Young Broadcasting of Green Bay, Inc., c/o Brooks Pierce et al, P. O. Box 1800, Raleigh, NC 27602 | 0004994984 | 20083208 0063 | WBAY-TV Green Bay, WI | 74417 | $27,500 |

**STATEMENT OF**
**COMMISSIONER DEBORAH TAYLOR TATE**

Our action today should serve as a reminder to all broadcasters that Congress and American families continue to be concerned about protecting children from harmful material and that the FCC will enforce the laws of the land vigilantly. In fact, pursuant to the Broadcast Decency Act of 2005, Congress increased the maximum authorized fines ten-fold. The law is simple. If a broadcaster makes the decision to show indecent programming, it must air between the hours of 10 p.m. and 6 a.m. This is neither difficult to understand nor burdensome to implement.

## APPENDIX G

1. 18 U.S.C. 1464 provides:

**Broadcasting obscene language**

Whoever 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.

2. 47 U.S.C. 312 provides in relevant part:

**Administrative sanctions**

**(a) Revocation of station license or construction permit**

The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 Title 18; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.

**(b) Cease and desist orders**

Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 Title 18, or (3) has violated or failed to observe any rule or regulation of the Commission au-

thorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

* * * * *

3. 47 U.S.C. 503 provides in relevant part:

**Forfeitures**

* * * * *

**(b) Activities constituting violations authorizing imposition of forfeiture penalty; amount of penalty; procedures applicable; persons subject to penalty; liability exemption period**

(1) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have—

(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission;

(B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter or under any treaty, convention, or oth-

er agreement to which the United States is a party and which is binding upon the United States;

(C) violated any provision of section 317(c) or 509(a) of this title; or

(D) violated any provision of section 1304, 1343, or 1464 of Title 18;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be in addition to any other penalty provided for by this chapter; except that this subsection shall not apply to any conduct which is subject to forfeiture under subchapter II of this chapter, part II or III of subchapter III of this chapter, or section 507 of this title.

* * * * *

4. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, provides:

FCC REGULATIONS.—The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—

(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and

(2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

The regulations required under this subsection shall be promulgated in accordance with section 553 of title 5, United States Code, and shall become final not later than 180 days after the date of enactment of this Act.

5. 47 C.F.R. 73.3999 provides:

**Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene and indecent material).**

(a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene.

(b) No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.