No. 10-1293

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the new, unrestrained indecency enforcement policy of the Federal Communications Commission (FCC) is unconstitutionally vague in violation of the First and Fifth Amendments or otherwise violates the First Amendment.

RULE 29.6 CORPORATE DISCLOSURE STATEMENTS

Pursuant to Supreme Court Rule 29.6, Respondents make the following disclosures:

Fox Television Stations, Inc. states that it is a wholly-owned subsidiary of News Corporation, a publicly-traded company. No entity holds 10 percent or more of News Corporation's stock.

CBS Broadcasting Inc. states that it is a wholly owned indirect subsidiary of CBS Corporation, which is a publicly traded corporation. CBS is aware that GAMCO Investors, Inc., a publicly-traded corporation, along with certain entities and persons affiliated therewith, filed a Schedule 13D with the Securities and Exchange Commission on March 15, 2011, which asserts ownership of 10.1% of CBS Corporation's Class A voting stock.

NBCUniversal Media, LLC was formerly known as NBC Universal, Inc. and is the indirect parent of NBC Telemundo License LLC, which itself was formerly known as NBC Telemundo License Co. NBCUniversal Media, LLC is a Delaware limited liability company and is indirectly owned 51% by Comcast Corporation and 49% by General Electric Company.

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INTRODUCTION

The petition in this case is startling: while alleging that the Second Circuit's ruling conflicts with decisions of this Court and the D.C. Circuit, petitioners ignore altogether the controlling precedent at the core of the Second Circuit's holding. In *Reno* v. *ACLU*, 521 U.S. 844, 859 (1997), this Court struck down a prohibition on indecency that was substantively identical to the FCC's definition of "indecent" here, and the Second Circuit framed its entire vagueness analysis in this case around that holding. Pet. App. 19a-22a. The petition, remarkably, does not cite *Reno* even once, much less explain why it does not control the proper disposition of this case.

Petitioners' willful blindness to *Reno* may be understandable considering the serious dilemma it poses. On the one hand, petitioners are relying heavily in this Court on the fact that the FCC's bare definition of broadcast indecency is unchanged since *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 729 (1978), and *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT I*), *superseded in part by Action for Children's Television* v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (*ACT III*). Pet. 19, 21. That historical continuity is the basis for petitioners' assertion that the Second Circuit's decision conflicts with those precedents. If the FCC's definition is all that matters, however, then *Reno*'s subsequent finding that an "almost identical" definition was unconstitutionally vague would be conclusive. Pet. App. 21a. "[L]anguage that is unconstitutionally vague in one context cannot suddenly become the model of clarity in another." *Id.*

Of course, the FCC has supplemented the bare definition of indecency over the last decade with a set

of decisions that substantially changed and expanded its indecency policy, and indeed, this Court's prior ruling in this case was premised on the fact that the FCC's policy had changed. *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810, 1812 (2009). Although petitioners vigorously assert that this Court should not consider these FCC decisions, those enforcement adjudications—including the original order in this case—were issued, in part, for the express purpose of purporting to provide guidance to the broadcast industry concerning the scope of the FCC's new policy. See, *e.g.*, *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 FCC Rcd. 2664, 2665, ¶¶ 1-3 (2006) (*Omnibus Order*); Pet. App. 23a. As the Second Circuit recognized, these enforcement actions "further elaborated on the definition of indecency in the broadcast context," and the Second Circuit recognized that even under *Reno* it had to consider whether this additional guidance dispelled the vagueness in the FCC's approach. Pet. App. 21a.

The FCC's "guidance" in these enforcement actions, however, leads directly to the other horn of petitioners' vagueness dilemma, because "[t]here is little rhyme or reason" to these decisions. Pet. App. 26a-27a. The FCC's new, more expansive prohibition on "indecency" has produced absurdly inconsistent and subjective decisions in which words and actions found to be unlawfully "offensive" in some instances are found to be non-actionable on others, producing "a standard that even the FCC cannot articulate or apply consistently." *Id.* at 27a.[1] Instead of dissipating

[1] Petitioners complain that the Second Circuit relied on the FCC's inconsistent case outcomes instead of the supposed "guidance provided by the Commission's indecency definition."

the vagueness inherent in the new indecency standards, the FCC's additional enforcement guidance has only increased the chill on broadcast speech—as the numerous examples of self-censorship identified by the Second Circuit illustrate. *Id.* at 31a-34a.

Nor can petitioners find refuge in the *Pacifica* Court's acknowledgement that the FCC can consider "context." The Second Circuit explicitly recognized the FCC's authority to take context into account. Pet. App. 30a. The court reaffirmed, however, that if the FCC chooses to take a context-based approach to indecency enforcement, it must do so through binding, predictable, and foreseeable objective criteria that give broadcasters notice of what is prohibited and that preclude arbitrary enforcement. *Id.* As the Second Circuit correctly held, the First and Fifth Amendments prohibit the FCC's approach here, in which the invocation of "context" is not grounded in any "discernible standards" and, thus, leads to an unacceptable risk of "subjective, content-based decision-making." *Id.* at 29a-30a.

In short, the Second Circuit's decision does not conflict with any decision of this or any other Court. Petitioners' attempt to manufacture a conflict with pre-*Reno* decisions that evaluated a now superseded and restrained indecency enforcement regime, while refusing to grapple head-on with the vagueness identified by the Second Circuit in the FCC's inconsistent indecency decisions, is untenable. The Second Circuit's routine application of well-settled

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Pet. 27. But that position simply leads back to *Reno*'s holding that the definition itself is unconstitutionally vague.

vagueness principles does not warrant further review in this Court. The petition should be denied.

STATEMENT OF THE CASE

A. The FCC's Initial Policy Of Indecency Enforcement.

1. Congress has made it a crime to "utter[ ] any obscene, indecent, or profane language by means of radio communication." 18 U.S.C. § 1464.[2] For decades after the enactment of § 1464, the FCC enforced this prohibition only in the most extreme cases. See, *e.g.*, *WUHY-FM, E. Educ. Radio*, 24 F.C.C.2d 408, 409-10, 413, ¶¶ 3-6, 12 (1970). In 1960, Congress authorized the FCC to impose monetary forfeitures for violations of § 1464. Communications Act Amendments, Pub. L. No. 86-752, § 7, 74 Stat. 889, 894 (1960) (codified at 47 U.S.C. § 503(b)(1)). But the FCC did not exercise this authority to enforce § 1464's ban on "indecent," as opposed to "obscene," language until 1975.

At that time, the FCC addressed a complaint involving the radio broadcast—at 2:00 in the afternoon—of George Carlin's "Filthy Words" monologue. *Citizens Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C.2d 94 (1975) (*Pacifica Order*). During the monologue, Carlin used the words "fuck" and "shit," "repeat[ing] them over and over again in a variety of colloquialisms," many of which vividly evoked sexual or excretory images. *Pacifica*, 438 U.S. at 729. In

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[2] Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162, 1172-73 (original enactment); Communications Act of 1934, ch. 652, § 326, 48 Stat. 1064, 1091; Act of June 25, 1948, ch. 645, § 1464, 62 Stat. 683, 769, 866 (transferring prohibition to U.S. Criminal Code).

ruling on the complaint, the FCC defined indecent speech as "language that describes, in terms patently offensive as measured by contemporary standards for the broadcast medium, sexual or excretory activities and organs" and broadcast "at times of the day when there is a reasonable risk that children may be in the audience." *Pacifica Order*, 56 F.C.C.2d at 98, ¶ 11. Under this definition, the Carlin broadcast was "indecent" and "could have been the subject of administrative sanctions" (although the FCC did not impose them). *Id.* at 99, ¶ 14.

On review of the order, this Court agreed with the FCC's position that "the repetitive, deliberate use of" certain "words that referred to excretory or sexual activities or organs . . . in an afternoon broadcast when children are in the audience" was indecent. *Pacifica*, 438 U.S. at 739, 741. Although a majority agreed that the monologue "was indecent within the meaning of § 1464," *id.* at 739, the Court fractured over the reasons why the FCC's action was constitutional under the First Amendment, *id.* at 729, 755, producing "an emphatically narrow holding," *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 127 (1989). Justices Powell and Blackmun, who supplied the crucial votes for *Pacifica*'s 5-4 majority,[3] indicated that the decision was limited to the "verbal shock treatment" caused by the repeated use of expletives in that broadcast. *Pacifica*, 438 U.S. at 757

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[3] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (omission omitted) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976)).

(Powell, J., concurring). They explained that the FCC's "holding, and certainly the Court's holding . . . , does not speak to cases involving the isolated use of a potentially offensive word." *Id.* at 760-61 (Powell, J., concurring); *accord id.* at 750 (opinion of the Court). They stressed that the FCC does not have "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). Both Justices voted to uphold the FCC's order only because the FCC "may be expected to proceed cautiously, as it has in the past," and because this restraint diminishes any "undue 'chilling' effect on broadcasters' exercise of their rights." *Id.* at 762 n.4.

2. For almost 30 years following *Pacifica*, the FCC interpreted the term "indecent" to prohibit only egregious broadcasts like Carlin's monologue. See, *e.g.*, *Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1251-52, 1254, ¶¶ 5-7, 10 (1978) ("We intend strictly to observe the narrowness of the *Pacifica* holding."). In 1987, the FCC adopted a broader definition of "indecent" to encompass more than the "seven dirty words" in Carlin's monologue while still only targeting speech that was functionally equivalent to the "verbal shock treatment" at issue in *Pacifica*.[4] The "deliberate and repetitive use" of certain language "in a patently offensive manner" remained "a requisite to a finding of indecency."

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[4] *Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 2699, ¶¶ 11-13 (1987), *aff'd on recon.*, *Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930 (1987); *Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703, 2703-04, ¶ 5 (1987); *Infinity Broad. Corp. Of Pa.*, 2 FCC Rcd. 2705, 2705-06, ¶¶ 7-9 (1987).

Pacifica Found., Inc., 2 FCC Rcd. 2698, 2699, ¶ 13 (1987).

The D.C. Circuit upheld the FCC's revised enforcement standard against several challenges. *ACT I*, 852 F.2d 1332. Although broadcasters had challenged the FCC's definition of "indecency" as unconstitutionally vague, the court concluded that "[c]onsideration of petitioners' vagueness challenge . . . is not open to lower courts, in view of the Supreme Court's 1978 *Pacifica* decision." *Id.* at 1335. Acknowledging that the *Pacifica* "Court did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague," the D.C. Circuit "infer[red] from [the Court's] holding that the Court did not regard" the indecency definition as unconstitutionally vague. *Id.* at 1338-39. The court summarized: "if acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction." *Id.* at 1339.

3. A decade after the D.C. Circuit's decision, this Court confronted a vagueness challenge to a prohibition substantively identical to the FCC's generic definition of indecency. In *Reno* v. *ACLU*, the Court affirmed the judgment that a prohibition on internet transmissions that "'depict[] or describe[], in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs'" is unconstitutionally vague. 521 U.S. at 859, 860, 870, 874.

At roughly the same time, the FCC negotiated the dismissal of a broadcaster's lawsuit[5] challenging the constitutionality of § 1464, in part by agreeing to "'publish industry guidance relating to its caselaw interpreting 18 U.S.C. § 1464 and the FCC's enforcement policies with respect to broadcast indecency.'" *Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd. 7999, 8016 n.23 (2001) (*Indecency Policy Statement*). Although it took nearly seven years, the FCC ultimately issued that "interpretive guidance" in the *Indecency Policy Statement*, in which the FCC affirmed that "indecent" material must (1) depict or describe sexual or excretory organs or activities, and (2) be "patently offensive" as measured by contemporary community standards for the broadcast medium. *Id.* at 8002, ¶¶ 7-8 (emphasis omitted). The FCC also distilled from its decisions three principal factors that guide its "patently offensive" determination: (a) the explicitness or graphic nature of the material; (b) the extent to which the broadcast dwells on or repeats the offensive material; and (c) the extent to which the material appears to pander or is used to titillate or shock. *Id.* at 8003, ¶ 10. This policy statement also reaffirmed the FCC's restrained approach to indecency enforcement. *Id.* at 8001, ¶ 5.

B. The FCC's New Indecency Enforcement Policy.

In 2004, the FCC abandoned its previously restrained approach to indecency enforcement and assigned to itself the role of public censor of the good

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[5] *See United States* v. *Evergreen Media Corp. of Chi.*, 832 F. Supp. 1179, 1180 (N.D. Ill. 1993).

taste of broadcast television. Pet. App. 7a. First, the FCC changed its stance on the indecency of broadcasting a fleeting expletive, finding that the "Golden Globe Awards Show" was indecent. *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4980, ¶ 12 (2004) (*Golden Globe Order*). At issue was a statement by the singer Bono that his receipt of an award was "'really, really fucking brilliant.'" *Id.* at 4976 n.4. The FCC concluded that the broadcast of Bono's statement fell within its definition of indecency, even though the expletive was fleeting and used as an intensifier, not a literal descriptor of sexual activities. *Id.* at 4978, ¶ 8.

Second, the FCC began imposing unprecedented fines for indecency violations. Pet. App. 8a. For the first time, the FCC applied the statutory penalty limit of $32,500 per violation to each network affiliate's broadcast of the same program.[6] This dramatically increased the aggregate fines that the FCC could (and did) impose on a single network

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[6] *See, e.g.*, *Complaints Against Various Licensees Regarding Their Broad. Of the Fox Television Network Program "Married By Am." on Apr. 7, 2003*, 19 FCC Rcd. 20191, 20191, 20195-96, ¶¶ 1, 14-16 (2004) ($1.2 million); *Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004, Broad. Of the Super Bowl XXXVII Halftime Show*, 19 FCC Rcd. 19230, 19237-40, ¶¶ 17-24 (2004) ($550,000), *aff'd*, 21 FCC Rcd. 2760 (2006); *Clear Channel Broad. Licenses, Inc.*, 19 FCC Rcd. 1768, 1777-79, ¶¶ 17-22 (2004) ($755,000); *Clear Channel Broad. Licenses, Inc.*, 19 FCC Rcd. 6773, 6780, ¶¶ 17-18 (2004) ($495,000); *AMFM Radio Licenses, L.L.C.*, 19 FCC Rcd. 5005, 5010-11, ¶ 14 (2004) ($247,500).

broadcast. *Id.* at 8a n.3 (noting fines for 2003 of $440,000 and fines for 2004 of $8 million).[7]

In response to the understandable uncertainty created by the FCC's sudden abandonment of its previously restrained enforcement approach, the FCC issued an *Omnibus Order* in February 2006 purportedly to provide guidance about its new indecency policy. *Omnibus Order*, 21 FCC Rcd. at 2665, ¶¶ 1-3. In it, the FCC ruled *inter alia* on the broadcasts at issue in this case, concluding that the live broadcasts of the 2002 and 2003 "Billboard Music Awards" by Fox Television Stations, Inc. (Fox) violated § 1464. In the 2002 broadcast, Cher had said that "'People have been telling me I'm on the way out every year, right? So fuck 'em.'" *Id.* at 2690, ¶ 101; Pet App. 88a. In the 2003 broadcast, presenter Nicole Richie had remarked: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." *Omnibus Order*, 21 FCC Rcd. at 2692-93, ¶ 112 & n.164; see also Pet. App. 9a, 44a. Citing the change in policy wrought in the *Golden Globe Order*, the FCC discounted the fact "'that specific words or phrases are not sustained or repeated'" and found both broadcasts actionably indecent, even though the expletives were unscripted. *Omnibus Order*, 21 FCC Rcd. at 2691, 2693, 2694, ¶¶ 104, 116, 118. The FCC also found that an interviewee's use of the word "bullshitter" on the CBS news program "The Early

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[7] Congress subsequently increased the statutory maximum tenfold. *See* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006) (codified at 47 U.S.C. § 503(b)(2)(C)(ii)) (increasing maximum fine from $32,500 per occurrence to $325,000). This means that under the FCC's approach, the aggregate penalties for a network broadcast of a single expletive could exceed $65 million.

Show" was indecent under its new policy, in part because it was uttered on a news show. *Id.* at 2698-700, ¶¶ 137-145.

Fox and CBS petitioned for review of the FCC's order, and NBC intervened. The FCC then sought voluntary remand to address the broadcasters' arguments in the first instance. Pet. App. 10a, 41a. On remand, the FCC reaffirmed its indecency findings against the "Billboard Music Awards" broadcasts. *Id.* at 10a, 70a, 95a. It reversed the indecency finding regarding "The Early Show," however, *because* the expletive was used in a "'*bona fide* news interview.'" *Id.* at 100a-101a.

C. The Preceding Decisions.

1. The broadcast networks petitioned the Second Circuit for review of both FCC orders, raising Administrative Procedure Act (APA), statutory, and constitutional challenges. Pet. App. 11a. The court in a divided 2-1 decision granted the petition on APA grounds, concluding that the FCC had not adequately justified the change in its indecency enforcement policy. *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444, 446-47 (2d Cir. 2007). In dicta, the court questioned whether any explanation for the FCC's change in policy "would pass constitutional muster," *id.* at 462, describing the FCC's test for actionable indecency as "undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague," *id.* at 463.

2. This Court by a narrow 5-4 majority reversed the Second Circuit's APA determination. It held that, contrary to the Second Circuit's reasoning, the APA does not impose a heightened requirement on agencies when they make a policy change. *Fox*, 129 S. Ct. at 1810-11. Judged under typical APA

principles, the FCC's "new enforcement policy and its order finding the broadcasts actionably indecent were neither arbitrary nor capricious." *Id.* at 1812. The majority expressly "decline[d] to address the constitutional questions" raised by the broadcasters and remanded. *Id.* at 1819.

3. On remand, the Second Circuit unanimously ruled that the FCC's new indecency enforcement policy is unconstitutional. While the court discussed several of the broadcasters' First Amendment challenges, Pet. App. 15a-18a, it ultimately struck down the FCC's new policy as unconstitutionally vague, *id.* at 2a, 18a.

At the outset, the Second Circuit rejected the FCC's arguments that this Court's decisions in *Pacifica* or *Reno* foreclosed the broadcasters' vagueness challenge. The court explained that *Pacifica* "did not reach the question of whether the FCC's policy was unconstitutionally vague." Pet. App. 22a. Moreover, *Pacifica* "was an intentionally narrow opinion predicated on the FCC's 'restrained' enforcement policy," and the Second Circuit "would be hard pressed to characterize" the new policy "as 'restrained.'" *Id.* As for *Reno*, the court explained that it did nothing to foreclose the broadcaster's vagueness challenge. *Id.* at 21a. To the contrary, *Reno* struck down a "definition of indecency [that] was almost identical to the [FCC's]." *Id.* Because the FCC has "further elaborated" on its indecency standard in various orders, however, the Second Circuit examined whether "[t]his additional guidance [is] sufficient to survive a vagueness challenge." *Id.* The court concluded that it was not.

Applying well-established law, the Second Circuit concluded that the FCC's new policy is not "clearly defined" so that a reasonable broadcaster would

"know what is prohibited." Pet. 18a (internal quotation marks omitted) (relying on cases citing *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972)). It explained that the FCC's "three-factor 'patently offensive' test" failed to give broadcasters fair notice of what the FCC will find indecent because, in applying those factors, the FCC has provided no reasoning to illuminate their application while reaching inconsistent decisions about the indecency of broadcasts involving expletives. *Id.* at 24a; *id.* at 26a-29a (illustrating contradictory FCC rulings); *id.* at 32a-33a (demonstrating inconsistent application of FCC's exceptions to indecency standard). "This hardly gives broadcasters notice of how the [FCC] will apply the factors in the future." *Id.* at 24a. Indeed, the FCC's policy has "result[ed] in a standard that even the FCC cannot articulate or apply consistently." *Id.* at 27a.

The Second Circuit also explained that "there is ample evidence in the record that the FCC's indecency policy has chilled protected speech." Pet. App. 31a. The court showed that, because of the FCC's vague policy, broadcasters had declined to air documentaries, book readings containing adult language, and numerous live broadcasts. *Id.* at 31a-32a. This "chilling effect," according to the court, "extends to news and public affairs programming as well." *Id.* Indeed, the chill "extended to programs that contain no expletives, but which contain reference to or discussion of sex, sexual organs, or excretion." *Id.* at 33a. Ultimately, the court concluded that "the absence of reliable guidance" by the FCC "chills a vast amount of protected speech dealing with some of the most important and universal themes in art and literature." *Id.* at 34a.

4. Shortly after the Second Circuit denied petitioners' rehearing en banc petition in *Fox* v. *FCC*, the court decided another petition for review of an indecency complaint decided under the FCC's new, expanded indecency enforcement regime. At issue was ABC Television Network's 2003 broadcast of an episode of the award-winning program *NYPD Blue*. Pet. App. 120a. In that episode, "an adult woman's nude buttocks" were depicted "for slightly less than seven seconds" in a scene that was intended "to portray the awkwardness between a child and his parent's new romantic partner and their difficulties in adjusting to life together." *Id.* at 120a-21a. The FCC found the "depiction of the buttocks was indecent" and fined "each of forty-four ABC-affiliated stations" for airing the episode. *Id.* at 122a.

In ruling on a vagueness challenge to the FCC's order, the Second Circuit noted that in *Fox* v. *FCC* it had recently "struck down the FCC's indecency policy, holding that it violates the First Amendment because it is unconstitutionally vague." Pet. App. 123a. According to the court, the FCC and United States "concede[d]" that *Fox* v. *FCC* controlled that case, and the court therefore held that "*Fox*'s determination that the FCC's indecency policy is unconstitutionally vague binds this panel." *Id.* at 124a.

Petitioners simultaneously seek certiorari in *Fox* v. *FCC* and *FCC* v. *ABC, Inc.*[8]

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[8] *See* Pet. 31 n.4. Fox, CBS, and NBC join the Brief in Opposition filed by ABC with respect to petitioners' request for certiorari in *FCC* v. *ABC, Inc.*

REASONS FOR DENYING THE PETITION

I. CERTIORARI IS UNWARRANTED BECAUSE THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY COURT OF APPEALS.

The Court should deny the petition because there is no conflict between the Second Circuit's vagueness decision below and the decisions of this Court or any court of appeals.

a. The Second Circuit applied well-established law to conclude that the FCC's new indecency policy is unconstitutionally vague. The court recognized first that, in *Reno*, this Court concluded that a definition of indecency "almost identical" to the FCC's generic definition was unconstitutionally vague. Pet. App. 21a ("[L]anguage that is unconstitutionally vague in one context cannot suddenly become the model of clarity in another."). Thus, the only question for the court was whether the FCC's "further elaborat[ion]" of that definition under its new indecency policy (in the form of guidance and orders), *id.*, has provided broadcasters with "'a reasonable opportunity to know what is prohibited,'" *id.* at 18a.

The court concluded correctly that the FCC's further elaboration "hardly gives broadcasters notice" of what is prohibited under the new policy, Pet. App. 24a, and has "result[ed] in a standard that even the FCC cannot articulate or apply consistently," *id.* at 27a. The FCC has adopted a presumption that all instances of certain expletives are indecent, unless some exception for "*bona fide* news" or artistic use applies. But there is no way for broadcasters to know whether the FCC will agree that a particular broadcast constitutes *bona fide* news or that some

expletive is artistically integral to a particular program. *Id.* at 26a-27a. Even the FCC cannot predict how these exceptions will apply in practice. In the *Omnibus Order*, for example, the FCC first found the broadcast of the word "bullshitter" on CBS's "The Early Show" was "'shocking and gratuitous'" and thus indecent because the program was a news show, only to later reverse itself, concluding that the broadcast was not indecent *because* it was "'bona fide news.'" *Id.* at 27a-28a. "In other words, the FCC reached diametrically opposite conclusions at different stages of the proceedings for precisely the same reason . . . ." *Id.* at 28a.

The court also demonstrated that the FCC had issued numerous other inconsistent orders under its new policy, without any reasoning that explained how the FCC applies its indecency factors. Pet. App. 24a, 26a, 27a-28a. The FCC's inconsistent determinations and failure to provide discernible standards led the Second Circuit to conclude—quite rightly—that the new indecency policy fails to give broadcasters "some degree of certainty what the policy is so that they can comply with it." *Id.* at 25a. These problems also raised grave concerns that the FCC's new indecency policy has led to the "subjective, content-based decision-making" that the First Amendment forbids. *Id.* at 29a; see also *id.* at 28a (discussing *Grayned*, 408 U.S. at 108-09, and *Forsyth Cnty., Ga.* v. *Nationalist Movement*, 505 U.S. 123, 130 (1992)).

In defending the FCC's policy, petitioners fault the Second Circuit for looking at the FCC's "inconsistent outcomes" and not merely the "guidance provided by the [FCC's] indecency definition." Pet. 27. But the FCC issued many of these decisions expressly purporting to give broadcasters guidance on the FCC's new, expanded indecency policy. See, *e.g.*,

Omnibus Order, 21 FCC Rcd. at 2665, ¶ 2 ("The cases we resolve today represent a broad range of factual patterns. Taken both individually and as a whole, we believe that they will provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard."). In other words, the FCC made clear that these decisions are an integral part of the FCC's policy. In any event, this additional guidance is the only ground to avoid the force of *Reno*'s vagueness analysis on the FCC's basic indecency definition.

The Second Circuit further showed that the FCC's indiscernible standard chills vast amounts of protected speech. Pet. App. 31a-34a. The court explained that broadcasters had declined to air various programs due to the FCC's vague policy, including a Peabody Award-winning documentary that contained real audio footage of firefighters in the World Trade Center on September 11th and readings from literary works involving adult language. *Id.* at 31a. Broadcasters have also, among other things, stopped airing certain live broadcasts and have even refused to air political debates because one of the local politicians had previously used expletives in public statements. *Id.* at 32a-33a. The chill, according to the court, also extended to programming containing no expletives but involving important subjects such as sexual health issues. *Id.* at 33a-34a.

The Second Circuit simply applied existing vagueness principles to the circumstances created by the FCC's new indecency policy. It did not purport to establish a new legal principle or standard. Rather, it correctly concluded only that the FCC's policy fails to let broadcasters "'know what is prohibited.'" Pet. App. 18a (relying on cases quoting *Grayned*, 408 U.S.

at 108). This is not a legal issue that warrants this Court's review.

b. Petitioners assert that this Court's review is justified because the decision below conflicts with this Court's decision in *Pacifica*. Pet. 17. But there is no conflict between *Pacifica* and the decision below, because *Pacifica* "did not reach the question of whether the FCC's policy was unconstitutionally vague." Pet. App. 22a; *ACT I*, 852 F.2d at 1338. There can be no conflict between the Second Circuit's vagueness decision and a precedent that has no vagueness holding.

Petitioners nonetheless suggest a holding on vagueness is implicit in the *Pacifica* opinion because the Court "did not suggest" that the FCC's "context-based approach" was vague, and because the Court did not "suggest" that the FCC's definition of indecency was "unconstitutionally imprecise." Pet. 19. But this Court does not decide fundamental questions of constitutional law by silence. Petitioners ignore the fact that *Pacifica* produced "an emphatically narrow holding." *Sable*, 492 U.S. at 127. The *Pacifica* Court warned at the outset of the decision that it was following the "settled practice [of] avoid[ing] the unnecessary decision of . . . issues" and was limiting its review to the FCC's "determination that the Carlin monologue was indecent as broadcast." *Pacifica*, 438 U.S. at 734-35. Moreover, the Court reaffirmed the "narrowness of [its] holding" in concluding only that the specific context of the Carlin broadcast at issue justified the FCC's intrusion on broadcasters' First Amendment rights. *Id.* at 750-51. Indeed, Justices Powell and Blackmun—who supplied the critical votes for affirmance—agreed only "that on the facts of this case, the [FCC's] order did not violate

respondent's First Amendment rights." *Id.* at 761 (Powell, J., concurring).

Moreover, petitioners' arguments concerning what the *Pacifica* Court may have thought about the precision of the FCC's definition of indecency are flatly at odds with this Court's holding in *Reno* v. *ACLU*. There, this Court agreed that a prohibition substantively identical to the FCC's definition of indecency is unconstitutionally vague. 521 U.S. at 860, 870, 874. Despite the Second Circuit's recognition of *Reno*'s importance to the vagueness inquiry here, Pet. App. 21a, petitioners wholly ignore *Reno*, failing to cite or even mention it a single time in their petition.[9]

Petitioners nonetheless claim that the decision below conflicts with *Pacifica*'s recognition of the importance of "context" in regulating indecency. Pet. 17, 18-19. The Second Circuit expressly recognized, however, that "context is always relevant" and did not "suggest otherwise in [its] opinion." Pet. App. 30a. But as the court explained, "[i]t does not follow that the FCC can justify any decision to sanction indecent speech by citing 'context.'" *Id.* The "FCC still must

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[9] Petitioners will likely attempt to avoid the force of *Reno*, as they did in the Second Circuit, by claiming that *Reno* itself distinguished *Pacifica* and the broadcast context when evaluating the vagueness of an indecency definition. *See Reno* v. *ACLU*, 521 U.S. at 866-67. In fact, *Reno* distinguished *Pacifica* for the limited purpose of determining the "'level of First Amendment scrutiny that should be applied to [the internet],' not to its analysis of whether the statute was unconstitutionally vague." Pet. App. 21a (quoting *Reno* v. *ACLU*, 521 U.S. at 870). *Reno*'s discussion of *Pacifica* had no bearing on the Court's vagueness analysis—nor could it, as *Pacifica* itself had no vagueness discussion that could be even possibly relevant to that issue.

have discernible standards by which individual contexts are judged." *Id.*[10] *Pacifica* is not to the contrary. Nothing in *Pacifica* suggested that by considering "context," the FCC could shirk the responsibility of providing some set of binding, predictable, and foreseeable objective criteria that provide the needed notice to the regulated community and preclude arbitrary enforcement by the FCC. The Second Circuit merely recognized that the FCC's invocation of "context" to justify its contradictory and inconsistent indecency decisions acted as a subterfuge for the "subjective, content-based decision-making" prohibited by the First Amendment. *Id.* at 29a-30a.

Moreover, petitioners fail to appreciate the ramifications of abandoning the restrained enforcement policy that the FCC followed in *Pacifica* and thereafter. The FCC no longer confines its indecency sanctions to the limited class of cases approaching the "verbal shock treatment" at issue in *Pacifica*, and it now asserts the authority to impose unprecedented fines for the broadcast of a single, unintentional and fleeting expletive. See Pet. App. 7a-8a & n.3. Yet, as the Second Circuit recognized, the FCC has not provided any discernible standard by which broadcasters can judge when the FCC might impose these massive fines, resulting in the chilling

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[10] Petitioner's suggestion that the FCC's *Indecency Policy Statement* provides discernible standards is amply refuted by the Second Circuit's decision, which found that the FCC cannot apply it consistently or with any reasoned basis. Nor was it incumbent on the Second Circuit to offer a "'tighter' definition of indecency." Pet. 21. The court did not need to usurp the FCC's regulatory authority in order to determine whether the FCC's policy is unconstitutionally vague.

of vast amounts of speech. *Pacifica*'s explicitly "narrow" decision did not purport to sanction a "context-based approach" that is detached from any predictable criteria.

Petitioners claim that "the court of appeals' vagueness analysis is largely untethered to" the FCC's change in policy. Pet. 20. Not so. The court recognized, as Justice Powell did in *Pacifica*, that a cautious approach to indecency enforcement would avoid "an undue 'chilling' effect on broadcasters' exercise of their rights." *Pacifica*, 438 U.S. at 762 n.4 (Powell, J., concurring). The abandonment of that restraint has greatly magnified the chilling effects of the indecency regime's vagueness.

c. Similarly, the decision below does not conflict with the D.C. Circuit's *ACT* decisions, as petitioners contend, Pet. 21. *ACT I* acknowledged that the *Pacifica* Court "did not address, specifically, whether the FCC's definition was on its face unconstitutionally vague," but it nonetheless "infer[red]" that the policy was not vague while "welcom[ing] correction" from "Higher Authority." *ACT I*, 852 F.2d at 1338-39. Since then, this Court has provided that "correction," holding that an indecency definition identical to the FCC's generic definition of indecency is unconstitutionally vague. *Reno* v. *ACLU*, 521 U.S. at 870-74. *Reno* thus undermines *ACT I* on the vagueness question and trumps any possible conflict between that decision and the one below.

In addition, there is no conflict with *ACT I* because the court in that case was considering whether the FCC's prior, more restrained indecency enforcement policy was vague. In *ACT I*, the D.C. Circuit considered the vagueness question through the prism of *Pacifica*, which did "not speak to cases involving the isolated use of a potentially offensive word in the

course of a radio broadcast, as distinguished from the verbal shock treatment" at issue there. *Pacifica*, 438 U.S. at 760-61 (Powell, J., concurring); see *id.* at 750 ("We have not decided that an occasional expletive . . . would justify any sanction . . . ."). Indeed, "a requisite to a finding of indecency" under the policy at issue in *ACT I* was still the "deliberate and repetitive use" of certain language "in a patently offensive manner." *Pacifica Found., Inc.*, 2 FCC Rcd. at 2699, ¶ 13. And in both cases, the FCC had indicated that it would proceed with restraint, diminishing the potential chill on broadcasters' speech. *Pacifica*, 438 U.S. at 762 n.4; *ACT I*, 852 F.2d at 1340 n.14.

The FCC's new expansive policy is not similarly restrained. The FCC now claims the authority to impose exorbitant sanctions on broadcasters for the broadcast of a single fleeting expletive. The FCC also claims for itself the authority to judge whether a particular scene or use of language is necessary in a particular broadcast, see, *e.g.*, Pet. App. 227a-228a, despite *Pacifica*'s rejection of such close supervision of content, *Pacifica*, 438 U.S. at 761 (Powell, J., concurring). Yet, it has provided no discernible guidance for broadcasters to predict when they might be punished, which, as the Second Circuit explained, has chilled vast amounts of speech. Pet. App. 31a-34a.

d. Finally, petitioners claim that the decision below conflicts with this Court's decision in *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010). Pet. 22-23. The Second Circuit considered petitioners' quotation of "certain language" from that decision but rightly concluded that the decision was "inapposite to the issues before" it. Pet. App. 30a n.9. Petitioners rely on snippets from the Court's decision in

Humanitarian Law Project about evaluating vagueness claims "on 'the particular facts at issue'" and about plaintiffs being unable to "'complain of the vagueness of the law as applied to the conduct of others'" when their conduct is clearly proscribed. Pet. 23. But petitioners cannot divorce these statements from the fundamental flaw that the *Humanitarian Law Project* Court identified in the lower court's decision. In that case, the lower court had erred in its vagueness analysis by "incorporat[ing] elements of First Amendment overbreadth doctrine." *Humanitarian Law Project*, 130 S. Ct. at 2719. That is, the lower court had evaluated the vagueness of the statutory terms at issue by "deciding how the statute applied in hypothetical circumstances" and concluding that the broad sweep of the language in those circumstances rendered the statute vague. *Id.* The Court explained that, unlike terms such as "indecent," which required "wholly subjective judgments," the statutory terms at issue clearly proscribed the conduct at issue and could not be rendered vague by their hypothetical application elsewhere. *Id.* at 2720. Indeed, the lower court's analysis was all the more problematic because the statute implicated national-security concerns, an area in which "Congress and the Executive are uniquely positioned to make principled distinctions," unlike the wholly distinct context in which "the statute turned on the offensiveness of the speech at issue" and "'governmental officials cannot make principled distinctions.'" *Id.* at 2728 (quoting *Cohen* v. *California*, 403 U.S. 15, 25 (1971)).

The flawed reasoning identified in *Humanitarian Law Project* appears nowhere in the Second Circuit's vagueness analysis. The court below did not decide whether "indecency" in § 1464 or even the FCC's definition of that term are vague by reference to

hypothetical scenarios not before the court. Rather, the court accepted the *Reno* Court's determination that the term "indecent" and a proscription "almost identical" to the FCC's generic definition of indecency are unconstitutionally vague. Pet. App. 21a. The only question for the court was whether the actual "further elaborat[ion]" by the FCC—including in the original order under review in this case—provided sufficient notice of what the FCC's new policy prohibits.[11] *Id.* In other words, the court reviewed the FCC's orders and rulings, including the FCC's flip-flop on CBS's "The Early Show" in the proceedings below, to determine what the terms of the policy are, and it concluded that the FCC's "further elaborat[ion]" had "result[ed] in a standard that even the FCC cannot articulate or apply consistently." *Id.* at 27a. Petitioners' quotations from *Humanitarian Law Project* are indeed "inapposite" here.

In any event, petitioners are wrong that if the Second Circuit had "applied" the FCC's indecency policy "to the fact of the actual broadcasts," "it would have rejected the vagueness challenges." Pet. 23. There is no way for Fox to know, for example, whether the live broadcast of an awards show is sufficiently newsworthy to qualify for the FCC's "*bona fide* news exception." After all, perhaps the most newsworthy broadcasts involve live coverage of live events. Moreover, the application of the indecency standard to programming like the "Billboard Music Awards" is especially unclear when even the FCC itself cannot seem to determine whether an expletive is more or less shocking because

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[11] The FCC issued many of those decisions and rulings expressly to provide guidance to broadcasters on what its indecency policy was. *See supra* at 2, 16-17.

it aired during a news program. Pet. App. 27a-28a. This uncertainty in the FCC's indecency policy opens the door to exactly the kind of subjective decision-making that the vagueness doctrine is intended to avoid. *Id.* at 28a. "[E]ven the risk of such subjective, content-based decision-making raises grave concerns under the First Amendment." *Id.* at 29a.

II. THE SECOND CIRCUIT'S DECISION DOES NOT PRECLUDE THE FCC FROM EFFECTIVELY IMPLEMENTING THE STATUTORY RESTRICTION ON BROADCAST INDECENCY.

Contrary to petitioners' claim, the Second Circuit's decision does not "preclude" the FCC "from effectively implementing statutory restrictions on broadcast indecency." Pet. 31. As petitioners acknowledge (at 29), the Second Circuit did "not suggest that the FCC could not create a constitutional policy." Pet. App. 34a. Indeed, the court did not purport to overturn *Pacifica*—under which the FCC has regulated indecent broadcasts for 30 years—or § 1464. Rather, the court struck down the FCC's new, expanded indecency enforcement policy, concluding that "[t]he First Amendment requires nothing less" than "some degree of certainty [about] what the [indecency] policy is." *Id.* at 25a. The Second Circuit's decision does not prohibit the FCC from regulating indecency by devising some other flexible approach that will meet its regulatory objectives, especially in light of the restraint shown by broadcasters in declining to air potentially offensive material even during the safe harbor period of 10 p.m. to 6 a.m. *Id.* at 60a (citing networks' policies against offensive language during all parts of the day).

Articulating some reasonably clear indecency standard may well be challenging. But that is a

necessary incident of the government's attempt to regulate the content of speech under the First Amendment. See *Reno* v. *ACLU*, 521 U.S. at 874 ("'expression which is indecent but not obscene is protected by the First Amendment.'" (quoting *Sable*, 492 U.S. at 126)); *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 827 (2000) (any regulation of indecency must be accomplished "in a way consistent with First Amendment principles"). It is not a burden that this Court can or should lift from the FCC's shoulders.

* * * *

In the event that this Court decides to grant the petition, the broadcast networks believe that it is important to highlight the other significant issues that will arise in addition to the vagueness question raised by petitioners. Before the Second Circuit, Fox and other broadcasters brought a number of challenges to the FCC's indecency regime, including a constitutional challenge to the FCC's very authority under *Pacifica* and *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). See Pet. App. 15a. As Fox explained, the media landscape has changed so dramatically that the factual underpinnings of those decisions are no longer valid. See *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). Fox and other broadcasters explained that technological changes and the proliferation of numerous other media sources no longer justify diminished scrutiny of the FCC's attempts to regulate the content of broadcast television. The Second Circuit recognized the significance of the dramatic changes in the media marketplace but felt "bound by Supreme Court precedent," leaving it to this Court to "decide in due course to overrule *Pacifica* and subject speech

restrictions in the broadcast context to strict scrutiny." Pet. App. 15a-17a.

If the Court grants certiorari to review the vagueness question, the broadcast networks intend to argue the obsolescence of *Pacifica* and *Red Lion*, as well as other, alternative bases for affirming the Second Circuit's judgment. *Nw. Airlines, Inc.* v. *Cnty. of Kent*, 510 U.S. 355, 364 (1994); see also *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982). By seeking review of the Second Circuit's constitutional holding, petitioners have necessarily put at issue the underlying constitutionality of regulating broadcast speech and whether the Court's decisions in *Pacifica* and *Red Lion* should be overruled. Indeed, members of this Court have already acknowledged the "long shadow" that these issues cast over this case. *Fox*, 129 S. Ct. at 1828-29 (Ginsburg, J., dissenting); *id.* at 1819-22 (Thomas, J., concurring). This Court is the only court that can resolve those fundamental questions, Pet. App. 17a, and given the persistent chill on broadcasters' speech from the FCC's current indecency regime, the First Amendment values at stake here should prompt the Court to bring finality to this litigation—whether on vagueness grounds or otherwise—if it grants certiorari in this case.

Nevertheless, because the Second Circuit's limited vagueness holding itself raises no issues worthy of this Court's review, and petitioners' claims to the contrary are mistaken, the Court should deny the petition.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully yours,

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