Case No. 10-1293

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS,
v.
FOX TELEVISION STATIONS, INC., ABC INC., ET AL.,
RESPONDENTS

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

Amicus Brief of Decency Enforcement
Center for Television Supporting Petitioners

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LIMITED QUESTION PRESENTED

The Supreme Court has **limited certiorari** to the question of:

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

PARTIES TO THE PROCEEDING

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

Respondents who were petitioners in the court of appeals below are Fox Television Stations, Inc.; ABC Inc.; CBS Broadcasting, Inc.; WLS Television, Inc.; KTRK Television, Inc.; KMBC Hearst-Argyle Television, Inc.; Citadel Communications, L.L.C.; 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; KATC 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; 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 Licensee LLC; Piedmont Television of Springfield License LLC; Pollack/Belz Communications 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.

Respondents who were intervenors in the court of appeals below are NBC Universal, Inc.; NBC Telemundo License Co.; NBC Television Affiliates; FBC Television Affiliates Association; CBS Television Affiliates; Center for Creative Community, Inc., doing business as Center for Creative Voices in Media; and Future of Music Coalition.

CORPORATE DISCLOSURE STATEMENT

Decency Enforcement Center for Television, a Michigan non-profit, IRC 501 (c) (3) tax exempt, corporation has no parent company, and no publicly held company owns 10% or more of its stock. (Decency Enforcement Center for Television is incorporated on a non-stock basis).

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae Decency Enforcement Center for Television (hereafter "Decent TV") files this brief supporting petitioners. Decent TV was incorporated for the express purpose of legally defending human and civil rights secured by decency laws, especially those for broadcast television. Decent TV speaks for, and advocates from the perspective of 1) the over 30 million Americans who have one or more televisions, but do not have cable/satellite service, or any effective content "blocking technology", 2) those millions of Americans who, even after the "digital conversion", still do not have a "V-chip", the technology in some larger televisions and some digital conversion boxes, and 3) those who have a V-chip, but the operation of which is circumvented by the broadcast networks' false ratings and failure to assign ratings, upon which the V-chip programming entirely relies.

Decent TV therefore advocates for the tens of millions of Americans who rely solely on the laws

[1] No counsel for any party authored this brief in whole or part, nor did counsel for any party make any monetary contribution intended to fund the preparation or submission of this brief. U.S. Supreme Court Rule 37.6. Written consent was filed and served by principal Respondents Fox, ABC, CBS, NBC, and ABC Affiliates, and filed by Petitioner.

and rules of the United States government, including the Federal Communications Commission, to protect themselves from indecency in the sanctity of their own homes. Decent TV is further representative of ALL Americans in the sense that 1) they must rely on those federal laws to protect themselves and their families from broadcast television indecency in the many everyday public places in which broadcast television is present, but where citizens cannot program a "V-chip", and 2) citizens are constantly within range of one or more broadcast radio stations, for which there is no "V-chip" or other blocking technology in existence. Decent TV advocates against finding that the Radio Communications Act, 18 U.S.C. 1464 is unconstitutional.

American citizens cannot be expected to rely on the principal parties to make all necessary arguments, especially with word limitations. Decent TV filed an amicus brief in this Court in the first round in this case (in 2008), and its arguments were consistent with the eventual court decision. Decent TV filed amicus briefs in the Second Circuit in these (now consolidated) cases, as well as other federal court cases. There is a critical right of American citizens to fully protect their own

interests by participating in the process of the courts, to ensure that their necessary arguments are advanced for consideration, as recognized in U.S. Supreme Court Rule 37.

SUMMARY OF ARGUMENT

The Supreme Court has granted certiorari "**limited to**" the Question Presented, as to Federal Communications Commission's (hereafter, "FCC's") "current indecency-enforcement regime", defined by Respondents as 2001 "Industry Guidance" policy, and 2004 update.

That limit precludes review of broadcast indecency law from legislative or judicial branches - whether *Pacifica*, other case law, level of scrutiny, or 18 U.S.C. 1464. The 2nd Circuit only addressed vagueness of FCC policies. No party has presented any pleading or brief - in any court - requesting review of anything other than executive branch policy or level of scrutiny for policy.

The limited certiorari also prevents the Court from receiving briefs or arguments for fair review of underlying authority for policy.

FCC's "current indecency-enforcement regime" is not unconstitutionally vague. This Court should reverse the 2nd Circuit. But, if it affirms the 2nd Circuit, that includes remand to the FCC. This Court under its Rule 14.1(a) should not consider constitutional issues other than the vagueness of policy. But if it does, policy does not otherwise violate the First Amendment.

The 2nd Circuit erred by finding FCC's 2004 *Golden Globe* policy vague, because it post-dated and was not applied to the subject broadcasts.

The 2001 Industry Guidance was consistent with *Pacifica* when the subject TV programs were aired, the relevant time frame for review, and does not violate the First Amendment.

This Court should follow *Pacifica* due to stare decisis. Broadcasting remains **uniquely** pervasive, regardless of other media, because, as defined in *Pacifica*, it is still the ONLY medium that pervades the lives of **ALL** (100%) of Americans, and confronts them all in public and privacy of home. Viewers' First Amendment rights outweigh those of broadcasters. Broadcasting alone uses public airwaves, which are a public place, unlike private media subscribed to only by consenting adults. These foundational factual findings from *Pacifica* are not challenged, are permanent, and are unchangeable.

Pacifica rejected technology as any substitute for direct regulation of broadcast indecency, by ruling that the on/off button and prior warnings do not prevent a "first blow" of indecency, or protect listeners' constitutional rights.

The "V-chip" for broadcast TV has no legal

significance. Respondents promised the public and Congress to never use the V-chip for any court challenge to FCC regulation, and must be held to that. Unlike Supreme Court cases as to other media and blocking technologies, this is not a case of first impression, and there is a long history of statutory regulation found to be constitutional.

V-chips do not exist in TV's with under 13 inch screen size, or many larger televisions or digital converter boxes. Respondents circumvent the V-chip by failing to rate many programs, and mis-rating the rest at least 68% of the time, in order to not lose advertising revenue. The V-chip is ineffective, and Respondents have not presented any evidence to support their arguments, tacitly admitting their error rate. The two subject Fox programs prove that even a properly programmed V-chip does not work to block adult material, proving Petitioners' findings regarding these shows.

Supreme Court cases as to other blocking technologies are distinguished for many reasons. There is no basis for applying strict scrutiny to broadcasting.

In the alternative, if the Court were to overturn *Pacifica,* 18 U.S.C 1464 is constitutional on a "24/7" basis.

No Respondent has challenged 18 U.S.C. 1464's broadcast indecency ban, and the same is permanently constitutional.

Even the Supreme Court lacks power to find unconstitutional 1) all "direct regulation of broadcast indecency", as opposed to a specific statute, 2) all "direct regulation of broadcast content", which includes obscenity, which has no constitutional protection, or 3)any future attempts of Congress to directly regulate broadcasting through new legislation. Deregulation of broadcast content by judicial fiat would constitute handing de facto ownership of the public airwaves over to broadcasters without compensation.

ARGUMENTS

I.THE UNDERLYING LEGISLATIVE AND JUDICIAL AUTHORITY FOR THE "FEDERAL COMMUNICATIONS COMMISSION'S CURRENT INDECENCY-ENFORCEMENT REGIME" IS OUTSIDE THE SCOPE OF THE QUESTION PRESENTED AND LIMIT OF CERTIORARI, AND SHOULD NOT REVIEWED.

The Supreme Court granted certiorari "**limited to**" the Question Presented. The Question Presented by FCC's petition, under this Court's Rule 14.1(a), was tailored to the 2nd Circuit's rulings in two cases, consolidated here. Respondent ABC TV violated that rule by presenting its own question without filing an objection. The Court adopted ABC's question, but also **limited** certiorari.

The subject of the Question Presented is clear:

> 1)"**indecency-enforcement**" regime, e.g., the regime enforcing indecency law (rather than law itself), 2) specifically, "current" regime, and 3) that of the "Federal Communications Commission." The Question Presented is prefaced with "the Federal Communications Commission's", in the possessive.

The phrase "Federal Communications Commission's current indecency-enforcement

regime" has consistently been defined by Respondents in their briefs as the FCC's 2001 "Industry Guidance", and 2004 *"Golden Globe Order"*.

The limit of certiorari to the "current indecency-enforcement regime" of FCC, an executive branch agency, precludes review of underlying authority for that policy from the separate legislative or judicial branches - whether *FCC v Pacifica Foundation, 438 U.S. 726,* other case law (including that as to level of scrutiny), federal statute, or general direct regulation of broadcast indecency or content. This Court's Rule 14.1(a) states, "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." The Supreme Court will generally limit its consideration of the case "to the questions specifically brought forward by the petition." *Yee v. Escondido, 503 U.S. 519; Duckworth v. Eagan, 492 U.S. 195; General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175.* Where the Court, in granting certiorari, has limited the question to be considered, matters not within the scope of that question cannot thereafter be presented - and further, such **limitations are specific.** *Beck v. Washington, 369 U.S. 541.* (Exceptions are: the Court may consider plain error not included in the Question Presented (Rule 24.1)

and jurisdictional issues).

In addition, in order to be considered by this Court, those questions must properly arise in the record, *Tyrel v. District of Columbia, 243 U.S.* 1, and must have been urged and briefed below, *California v. Taylor, 353 U.S. 553.* This Court has declared it "will not ordinarily consider" issues not considered by the court below. *Adickes v. Kress & Co., 398 U.S. 144.* The 2nd Circuit expressly did not consider any constitutional issue other than "vagueness" of current FCC policies. No party has filed any petition or reply brief requesting that anything other than FCC executive policy/regime be reviewed.

Respondents must be held to their own briefs, pleadings, definitions, and admissions which reveal their constitutional challenges have consistently been directed to changes in FCC indecency policy, but not to underlying authority for FCC policy.

The case precedents Respondents cite, that a prevailing party may urge any grounds in support of a judgment in their favor, are trumped by this Court limiting certiorari to the Question Presented.

The Question Presented does not mention or encompass any **court's** or **Congress'** broadcast indecency regime, which are **not** FCC's regime, nor

therefore within the scope of the Question Presented.

The limit on certiorari prevents the Court from receiving adequate briefs or arguments upon which to base any decision outside the scope of the question as to FCC policy, and any such Court review would be unfair to the parties.

The most important words in this case are: "limited to." Primary Respondents have stated their intent to now argue for reconsideration of *Pacifica, supra*, and constitutionality of "direct regulation of broadcast content" (see pp.26-27 of Fox Reply Brief; p.29 of ABC's). That is extremely troubling, because no Respondent has ever challenged the direct regulation of ALL broadcast content, to include even obscenity.

Is Fox now going to, for the first time, challenge the ban on broadcast obscenity, without any pleadings, evidence, or record in the lower court, and in an indecency case at that? (FCC has not found any subject broadcast to be obscene). The statutory ban on obscenity IS direct regulation of broadcast content, but not at issue in this case, and not relevant. Fox may make a Trojan Horse argument, asking the Court to rule direct regulation of broadcast "content" unconstitutional, and thereby unintentionally also approve future obscenity.

Respondents' intended arguments are beyond the limit on certiorari and the scope of the Question Presented as to **FCC's** regime. Rule 24.1 prohibits Respondents from adding in their briefs questions not included in the Question Presented.

The Supreme Court disapproves of "the practice of smuggling additional questions into a case" after it grants certiorari. *Irvine v. California, 347 U.S. 128.* If Respondents were allowed to argue that 18 U.S.C. 1464 is unconstitutional, it would beg the question of: just what was the limit on certiorari, if the result could be unlimited judicial power?

It is most critical the Court restrain itself to the specific Question Presented as to FCC regime, and NOT underlying authority - as it restrained itself to administrative law the first time this case was decided.

"The only check upon our own exercise of power is in our own sense of self-restraint." *U.S. v. Butler, 297 U.S. 1 (Justice Stone's dissenting opinion).*

II.THE FEDERAL COMMUNICATIONS COMMISSION'S CURRENT INDECENCY-ENFORCEMENT REGIME DOES NOT VIOLATE THE FIRST AMENDMENT.

Respondents' definition of "FCC's current indecency-enforcement regime" as FCC policy is contained in their briefs. As examples, see Fox's Reply Brief in Opposition (to petition), p.27, referring to alleged "chill" from "new policy" discussed on p. 17, and FCC's 2001 "*Industry Guidance*", updated by 2004 "*Golden Globe Order*"; also Intervenor CBS's Supplemental Brief, p.1, in the 2nd Circuit ABC case. Full policy titles are: *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. 1464 and Enforcement Policies Regarding Broadcast Indecency (2001)* and *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Award" Program (2004).*

The 2nd Circuit, in Fox, found FCC's current policies unconstitutionally vague in determining which words are indecent, noting inconsistencies in FCC determinations. Then it applied that decision in ABC (without deciding in either case whether the programs were indecent).

The 2nd Circuit erred by finding policy vague as applied NOT to the subject TV programs or

language in them, but two FCC *Omnibus Orders* regarding OTHER programs. *Omnibus Orders* are not policy. It was error to find "vagueness" based on TV programs and language in *Omnibus Orders* not appealed to court. And, the *Omnibus Orders* appear to have been issued AFTER the subject TV programs, were not relevant to then-policy, nor could Fox have relied upon them.

This Court may apply the 2001 Industry Guidance to Fox's two broadcasts and determine if that policy is vague. If it is, the 2nd Circuit could also be affirmed as to the ABC case. The 2nd Circuit remanded to FCC for new policy-making, and there would be no reason for this Court to do anything further. See ABC's 2nd Circuit Supplemental Brief, p.8, referring to the "vagueness decision": "The binding precedent established in the *Fox* Court entitles petitioners to all the relief they have sought. There is thus no need to address any other issue."

The 2nd Circuit also erred by including FCC's *Golden Globe Order* in regime it found vague. The two subject Fox programs found indecent were broadcast in 2002 and 2003, when the 2001 Industry Guidance applied. FCC did not make the findings until after the 2004 *Golden Globe Order,* so did not apply that policy, which was therefore not before the 2nd Circuit.

The 2nd Circuit said it did not find persuasive the one "vagueness" precedent, from the DC Circuit, *Action for Childrens' Television v. FCC, 852 F. 2d 1332*. Then Court of Appeals Judge Ruth Bader Ginsburg, writing for the Court, upheld FCC's current definition of broadcast "indecency", and prior policy, against vagueness challenges.

The 2nd Circuit stated "we do not suggest that the FCC could not create a constitutional policy" and that under *Pacifica, supra,* the consideration of "context" has been a policy "choice" of the FCC, not a court requirement. Pet. App. 30a. If this Court affirms the 2nd Circuit, FCC has the choice, on remand, of abandoning context as a factor.

Amicus argues for reversal of the 2nd Circuit instead, and possible remand only to expressly consider Respondents' remaining constitutional challenges to the 2001 FCC policy, notwithstanding the broader Question Presented, adopted by this Court. "It is always prudent to avoid passing unnecessarily on an undecided constitutional question." *Steel Co. v. Citizens for a Better Environment, 523 U.S. 83.* (Quoted in ABC TV's 2nd Circuit Supplemental Brief, p.8).

The Question Presented, as adopted, goes beyond the vagueness ruling of the 2nd Circuit.

Unless Respondents show the 2001 Industry Guidance was inconsistent with *Pacifica,* it must be constitutional. The policy expressly relied upon *Pacifica.* It is possible the FCC erred in meeting *Pacifica,* but Respondents do not identify how.

The FCC's "current" regime, in the Question Presented, is as of the time of those broadcasts, the only relevant time frame, and when *Pacifica* clearly applied.

III.NO RESPONDENT HAS RAISED IN THE LOWER COURT ANY CONSTITUTIONAL CHALLENGE TO THE DIRECT REGULATION OF BROADCAST INDECENCY OR THE UNDERLYING AUTHORITY FOR THE FCC REGIME

On p.26 of its Reply Brief, Fox says it, in the 2nd Circuit, "challenged the FCC's very authority under *Pacifica*, and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)", citing Pet. App. 15a. However, the only statement on Pet. App. 15a, from the 2nd Circuit, about any challenge is: "The networks argue that the world has changed since *Pacifica* and the reasons underlying the decision

are no longer valid." But, Fox's 2nd Circuit brief ONLY challenged the "FCC's current regime" - NOT the underlying authority for it.

And, ABC's 2nd Circuit briefs alleged a "changed world" ONLY to argue that level of judicial scrutiny be modified, NOT as any challenge to FCC authority – entirely different matters.

Fox's Reply Brief, p.29, also falsely claims Petitioners have "put at issue the underlying constitutionality of direct regulation of broadcast content." "Direct regulation of broadcast content" was never challenged by primary Respondents in the 2nd Circuit. Now that Fox is in the Supreme Court, it is over-reaching all the way for its vision of utopia –complete deregulation of content broadcast. This amicus expects Fox and ABC will arrange their briefs' arguments FIRST toward permanent elimination of content regulation (even obscenity), which are NOT before the Court, and only secondarily argue the Question Presented, as limited by the Court to FCC regime/policy.

ABC's Reply Brief, p.25, cites *Yeager v. U.S.*, 129 S. Ct. 2360. A prevailing party may defend its judgment on any grounds, BUT ONLY if it was "properly raised below." No challenge to direct regulation of broadcast content or indecency, or to FCC's underlying authority, has been raised below,

AT ALL. It is now too late, under this Court's precedents.

Fox's 2nd Circuit brief, p.3, admits the FCC regime **enforces** the statutory regime of 18 U.S.C. 1464, so they are two DIFFERENT and separate regimes - administrative and statutory.

ABC **only** argued the V-chip in the 2nd Circuit to vacate the indecency finding as to the specific NYPD Blue program. ABC did NOT argue the V-chip for its separate argument that the level of scrutiny should change, as it now does for the first time in its Reply Brief. ABC did not make that latter V-chip argument in the 2nd Circuit, and *Yeager* precludes it in this Court as grounds to defend the judgment.

A constitutional challenge to the underlying authority for FCC policy would not even be within the scope of ABC's OWN Question Presented! In violating Rule 14 anyway, ABC could have drafted a Question that encompassed the underlying authority within its scope, but failed to do so. Nothing was more fair to ABC than allowing it to frame the Question, but it must now at least be held to the specific scope of that question (*Beck, supra*) and also the issues that it properly raised in the 2nd Circuit (*Yeager, supra*). At some point, Respondents must be held accountable to some

semblance of laws, rules, limits, and/or their own promises and actions.

IV.THIS COURT SHOULD APPLY, AND NOT DISTURB, ITS *PACIFICA* PRECEDENT, DUE TO BOTH STARE DECISIS AND UNCHANGED FACTUAL BASIS; IN THE ALTERNATIVE, IF *PACIFICA* WERE OVERTURNED, 18 U.S.C. 1464 IS CONSTITUTIONAL ON A "24/7" BASIS

These remaining arguments are made in the alternative. This is amicus' only briefing opportunity. These arguments must be raised here, prospectively, in the event Respondents violate Rule 24 by attempting to add to the Question Presented a challenge to underlying authority for FCC regime. Also, word limits prevent full arguments, so amicus summarizes its alternative arguments on underlying authority. Amicus requests further briefing IF the Court were to consider underlying authority for FCC policy, beyond the limited certiorari. Such full briefing would be critically necessary for the Court to receive sufficient information and arguments needed to make a decision thereon, and for the protection of all Americans.

A. This Court should follow its *Pacifica* precedent

Stare decisis dictates this Court follow *Pacifica, supra*, in which it established the constitutionality of statutory broadcast indecency restrictions, and FCC regulation. The judicial restraint argument on p.12 applies. First Amendment case precedent is very important, and should be adhered to by each individual Justice of the Court, under his/her oath of office. In the instance of broadcast indecency, *Pacifica* is the only direct Supreme Court precedent.

See Intervenor Respondent ABC Affiliates' Reply Brief, p.30: "In particular, it is unnecessary for the Court to reconsider the 'special treatment' given the regulation of broadcast indecency…", and, "It is a long- settled jurisprudential rule that the Court 'will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied' ", citing *Kremens v. Bartley, 431 U.S. 119.* Further citing Justice Branheis' concurrence in *Ashwander v. Tennessee Valley Authority, 297 U.S. 288,* that the "Court will not anticipate a question of constitutional law in advance of the necessity of deciding it", ABC Affiliates went on to say, "the Court should not reach out to address …. the principles underlying

the Court's decisions in *Pacifica* and *Red Lion* that are unnecessary to resolution of this case."

The FCC regime protects First Amendment rights of broadcast viewers and listeners, which *Pacifica* permanently established as **outweighing** broadcasters' rights.

There is a constitutional right of government to place reasonable regulations on speech. Neither the First Amendment nor 18 U.S.C. 1464 have been amended since the latter was found constitutional in *Pacifica.* Constitutionality of the statute is a function of that statute and the First Amendment. In the absence of amendment, the Supreme Court's finding of constitutionality of 18 U.S.C. 1464 in *Pacifica* is permanent. Respondents have not cited any law to the contrary. The only thing of legal significance that has changed since *Pacifica* is FCC policy.

Unlike other cases in which this Court has sustained First Amendment challenges to indecency statutes for non-broadcast technologies (internet, telephone, and cable television), this is NOT a case of first impression.

However, this Court has, in *Reno v. ACLU, 521U.S. 844 (1997)* re-confirmed the constitutional viability of broadcast indecency restrictions, by

distinguishing broadcasting from the private subscription-only medium of the internet.

Supreme Court decisions are not "obsolete", as Respondents' refer to *Pacifica* and *Red Lion* in their Reply Briefs with obvious disdain, but instead are current law.

This Court, in *Pacifica,* expressly defined "pervasiveness" and why it is "unique" for broadcasting, based on facts that by their nature CANNOT possibly change. This Court does not need to take amicus' word for this; it has its own words from *Pacifica*:

"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, where the individual's right to be left alone plainly outweighs the First Amendment rights of the intruder. *Rowan v Post Office Dept., 397 U.S. 728, 990 S. Ct. 1484, 25 L.Ed. 2d 736.*"

Primary Respondents' Reply Briefs argue against *Pacifica*, alleging that "changes in the media landscape", "technological changes and the proliferation of numerous other media sources" impact the "factual underpinnings" of the decision.

In U.S. jurisprudence, we apply the law to the facts, not vice versa. In the Court of Appeals, CBS argued changes in facts can change constitutionality of a statute, but none of the cases it cited supported that argument.

Primary Respondents seek to eliminate all laws that make them accountable for their indecency by alleging two "changed facts": 1) proliferation of other media, and 2) the "V-chip" (discussed later).

Since *Pacifica*, there have been new media, but they are not relevant to broadcasting. In brief after brief, Respondents have stubbornly persisted in misrepresenting to courts what "pervasiveness" means, claiming that new media renders broadcasting less "pervasive", as if it is somehow a market share comparison between media. They know better, because numerous amicus briefs, served upon them, have pointed out that other media have nothing to do with "pervasiveness", PURSUANT TO THE SUPREME COURT'S DEFINITION. And, the 2nd Circuit has twice erred in findings by falling for those misrepresentations. *Pacifica* tells us "pervasiveness" is the extent to which a medium, particularly broadcasting, "pervades" or is present in the lives of "all Americans", and "confronts citizens not only in public, but in the privacy of the home."

Pervasiveness is a characteristic of the nature of the individual medium itself - regardless of any other media – according to this Court.

The key word in *Pacifica's* "pervasiveness" leg is "**uniquely.**" While cable TV, internet and other media have themselves become more "pervasive" since *Pacifica*, this case is not about pervasiveness of those mediums. Broadcasting is **uniquely** pervasive in and of itself, due to its nature.

Pacifica's finding that broadcasting "is a uniquely pervasive presence in the lives of **ALL** Americans" cannot be understated. **"ALL"**, by all legal and ordinary definitions, means 100%. TV broadcasting is still present in the lives of **ALL** Americans. Even those with no TV at home encounter it in public. The Supreme Court found that is why broadcasting is **uniquely** pervasive. So, legally, it makes no difference if even 99% of Americans subscribe to cable TV. Cable still does not have broadcasting's **unique** pervasiveness into the lives of **ALL** Americans. Even if 100% of all Americans subscribed to it, cable would not be pervasive **in the same unique way as broadcasting**. The same applies for other media.

Respondents would like to say, "87% is close

enough." That is not the law from this Court, or the definition of "**ALL**." And the 13% or so who choose not to subscribe to cable cannot be forced to receive daytime indecency. It is this Court's job to protect minorities.

Respondents refer to 87% of Americans subscribing to cable/satellite TV as if they all subscribe to indecency. But the cable industry's published statistics show that less than 50% of subscribers have ever subscribed to any "premium" channel, like Playboy, Cinemax, HBO, or Showtime, that have more indecency than broadcasting. Basic cable generally has less indecency than network television, so less than 44% of Americans have ever subscribed to TV indecency, contrary to the image portrayed by Respondents. Indecency cannot be imposed on the other 56+%, to whom is may be a most important personal life choice to avoid it.

Broadcasting is **unique** because it alone uses the public airwaves, a fact that also has not changed, and cannot, no matter how many statistics Respondents cite. The airwaves are owned by the citizens, not the broadcasters. They are a public place, NO DIFFERENT than a public street, sidewalk or park. They go into the home, without a consenting adult having to subscribe to anything or pay a fee. A broadcast TV or radio merely needs a power source.

Pacifica was not based just on accessibility of broadcasting in the home, but in all public places. Broadcasting goes into schools, day care centers, nursing homes, restaurants, lodging places, and stores (including electronic stores where televisions are on for all to see and hear).

Pacifica's "unique pervasiveness" leg was not based on other media, technical limitations, or parental control, but solely on the nature of broadcasting. Broadcast television and radio are still the ONLY media that indiscriminately go into the homes of "**ALL AMERICANS."**

Some additional factual findings in *Pacifica* are:

> "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent radio is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place."

Let us look at these facts specifically. First, the broadcast audience "is constantly tuning in and

out." Respondents have not challenged this fact, nor can they, because it simply has not changed. Therefore, it remains just as true now as in 1978 that "prior warnings" cannot protect the viewer. To the extent the subject NYPD Blue show was preceded by a content warning, for example, such has been rejected by *Pacifica*. The basis for that law has not changed.

Next, the Supreme Court found no one need take any "first blow" of indecency, no more than one need take a physical assault of another nature. Consistent with realities of life, a) there is no constitutional immunity for assault, even for indecency types of assault, and b) a harm that has already taken place cannot be avoided, so must be prevented. The most important thing recognized by *Pacifica* is that harm must be prevented in the first place - zero tolerance.

Pacifica was also expressly based just as much on the rights of non-consenting adults as it was on protection of children.

All of the above facts are just as true now as in 1978, but Respondents never talk about THOSE facts that legally DO matter.

Instead, Respondents keep referring to the "V-chip" (to be discussed later), and other private media

subscribed to by consenting adults, neither of which are relevant.

Respondents would like the law to ignore any difference between private subscription media, like cable or internet, and public broadcasting, so they can use their broadcasts to compete with them. But they are completely different industries. The broadcasters may as well try to use the airwaves to compete with adult theaters and bookstores.

B. In this Court's first decision in this case, then-Justice Stevens favored the "continued wisdom of *Pacifica"*, and disagreed with Justice Thomas' concurrence, which contained a flawed legal and factual basis

In this Court's first decision in this case, on administrative law, seven justices declined to address constitutional matters, or *Pacifica*. Two justices, Stevens and Thomas, did comment. Justice Stevens, dissenting, wrote favorably of the "continued wisdom of *Pacifica"*, and disagreed with Justice Thomas' questions about that case. Justice Stevens "was there" – part of the *Pacifica* decision – and understood it.

Perhaps because no constitutional issues were briefed, argued, or before the Court, Justice

Thomas' concurrence contained numerous errors of law and fact, and a misunderstanding of *Pacifica*. Those errors and misunderstandings were as follows:

1. Justice Thomas stated *Pacifica* was based on scarcity of spectrum space. In the 2nd Circuit Fox case, Intervenors ABC, CBS, NBC, et al correctly stated in their brief, at p.20, fn.10:

   "*Pacifica* did not rely on 'spectrum scarcity' to justify indecency regulation and the Commission has confirmed that 'it is the physical attributes of the broadcast medium, not any purported diminished First Amendment rights of broadcasters based on spectrum scarcity or licensing, that justify channeling indecent material.'"

   The 2nd Circuit Fox case brief of Intervenor ABC Affiliates, at p.13, pointed out that scarcity and limits on spectrum space are "laws of physics" that " have not changed" due to any evolution of the media marketplace. The facts and laws of physics, admitted by Respondents, prove the continued viability of both *Pacifica* and *Red Lion*,

while disproving the comments of Justice Thomas.

2. Justice Thomas stated cable TV is no more intrusive than broadcast TV, ignoring the indisputable fact that cable TV does not "intrude" at all. It only goes where "invited", by subscription by a consenting adult! Broadcasting, on the other hand, does "intrude" upon everyone, everywhere – as correctly and expressly found by this Court in *Pacifica*, which correctly alluded to broadcasters as "intruders."

3. Justice Thomas also misunderstood the "unique pervasiveness" analysis of *Pacifica*, perhaps having been misled by the continued mischaracterizations of it by the networks and the 2nd Circuit, as discussed in the prior arguments. Justice Thomas also relied upon unilateral comments of former commissioner Furchgott-Roth, that were also contrary to the above laws. Justice Thomas also ignored the fundamental, yet most critical, distinction between the airwaves owned by the public, licensed for use as a privilege, and other means of delivery of

subscription media over privately owned cable and wireless systems.

4. Justice Thomas said the meaning of the law cannot turn on "modern necessity" or facts – which amicus argued above. But then Justice Thomas himself proposed to upset legal precedence, due not only to factual developments, but false facts at that. A true textual approach to this issue would necessarily restore literal meaning to 18 U.S.C. 1464 by prohibiting ALL broadcast indecency (under policy that is not vague) "24/7" as a reasonable restriction of speech in a public place, consistent with many Supreme Court precedents. It must also necessarily apply to *Pacifica's* reference to **ALL AMERICANS** as meaning 100%.

5. Justice Thomas' concurrence was based in large part on unofficial, personal opinion of one FCC staffperson named Berresford, which is not legal authority, is contrary to law and fact, and cannot possibly form any basis for change in law.

C. In the alternative, if this Court were to overturn *Pacifica*, the indecency prohibition in 18 U.S.C. 1464 is constitutional 24 hours a day

If this Court were to overturn *Pacifica*, it should continue to find the indecency prohibition in 18 U.S.C. 1464 constitutional, but that the "time channeling" ("safe harbor") FCC policy, allowing nighttime indecent broadcasts, was wrongly upheld. Current and most recent FCC policies since 1978, permitting indecent broadcasts after 10 p.m., resulted from *Pacifica.*

But *Pacifica* clearly reveals this Court did not decide on "time channeling" on its own. The Court did act properly by not going beyond the relief requested by FCC or any amicus. But the FCC, as the case "prosecutor", did not ask to enforce nighttime restrictions. However, FCC never had ANY authority to implement a "time channeling" policy or argue for it in court. Its Congressional mandate was, and still is, to enforce 18 U.S.C. 1464 as written, prohibiting indecent broadcasting at any time. The statute does not hint of "time channeling." FCC illegally deviated from its mandate, which *Pacifica* and later cases perpetuated.

The First Amendment applies to Congressional

acts, and if those are unconstitutional, it is for the courts alone to say. The failure of FCC administrations in the late 20th century to enforce 18 U.S.C. 1464 as written caused a mess of administrative and judicial law. This "parade of horribles" has caused irreparable and incomprehensible damage to millions of Americans and the nation's society.

If it goes beyond the Question Presented as to FCC regime, to questions as to FCC underlying authority not raised by Respondents, and reconsiders *Pacifica*, then the Court can and should find 18 U.S.C. 1464 constitutional 24 hours a day as argued by this amicus. *Turner v. Rogers, 131 S. Ct. 2507.* This would restore constitutional and statutory order to the legal situation, and begin to prevent further decline of American society and decency.

V. *PACIFICA* REJECTED TECHNOLOGY AS ANY SUBSTITUTE FOR DIRECT REGULATION OF BROADCAST INDECENCY, AND THE "V-CHIP" HAS NO LEGAL SIGNIFICANCE, ESPECIALLY SINCE RESPONDENTS ACTIVELY CIRCUMVENT ITS TECHNICAL ABILITY TO BLOCK THEIR PROGRAMS

A. This Court in *Pacifica* rejected technology as any substitute for direct regulation of broadcast indecency

The "V-chips" of 1978, and many years before and after, were the on/off and channel buttons, same as for radio. This Court, in *Pacifica*, decided:

> "To say that one may avoid further offense by turning off the radio when he hears indecent radio is like saying that the remedy for an assault is to run away after the first blow."

Pacifica recognized listeners could partially control what was heard on the radio by the on/off button, and certainly also the channel dial, but completely rejected arguments that such parental controls rendered direct regulation of broadcast indecency unconstitutional. Today, for broadcast TV, the additional "V-chip" may prevent some programming, but the legal principle is unchanged, as are citizens' rights to not take a "first blow" of

indecency. *Pacifica* rejected technology as a substitute for law; technology does not conversely have any power to reject *Pacifica* as the law. As a nation, we serve the law; not technology.

B. The V-chip has no legal significance

Congress intended the V-chip legislation to compliment and supplement (not supplant) direct regulation of broadcasting. Due to public outcry about exponential increases in broadcast television indecency, Congress provided this additional tool to viewers. During the process, Congress and the President repeatedly and clearly stated this intent in public. None of the congressional records or presidential statements cited by NBC in the 2nd Circuit supported their argument the V-chip would be more effective and less intrusive than direct regulation.

In 2006, Congress greatly increased the indecency fines, refuting any argument that it intended the V-chip to replace regulation.

It was also the intent of all four Respondent networks, reported to the public through their respective news bureaus, that the V-chip not replace regulation. The networks agreed with Congress that, in exchange for V-chip legislation, and a promise by some Congressional leaders of a

three-year moratorium on further legislation, they would never under any circumstances use the V-chip or TV ratings to argue in court against FCC regulation. Parents Television Council prophetically warned that they would renege. Now, here are Respondents, poised to argue to the Supreme Court that the V-chip negates the need for policy - exactly what they promised the nation they would never do. They must be held accountable to their promises to the public and Congress, which contractually estop them from any legal challenge based on the V-chip.

The argument that a V-chip for TV has undermined *Pacifica*, a radio case, is nonsensical. There is no V-chip or other blocking technology for broadcast radio. The necessity for direct regulation from that fact is discussed later.

Even if there were some conflict between 18 U.S.C. 1464 and the V-chip legislation, it would at most be a legislative issue for Congress to resolve. There is no constitutional crisis or judicial issue from the V-chip. If there is any statutory conflict, it is the V-chip legislation that needs to be repealed as a dismal and total failure.

The V-chip is a creature of law, unlike the

technologies in *Reno, supra*; *Ashcroft v. ACLU, 542 U.S.* 656; *Sable v. FCC, 492 U.S. 115*; and *U.S. v. Playboy Entertainment Co., 529 U.S. 803.* Those narrow decisions are all distinguishable because they involved new media and had no case precedent, like we have herein. In those cases, there was no public resource (such as the airwaves), and no regulatory agency like the FCC with a body of developed policies and community standards, and a Congressional mandate. Enforcement of 18 U.S.C. 1464 is THE reason Congress created the FCC, and that remains its core, central function.

Reno addressed a **criminal** statute providing for incarceration.

The argument that FCC should have a new policy that just says "V-chip" makes no sense. The V-chip does not carry out Congress' mandate to the FCC, and does not involve any governmental role. The V-chip is a technology, not a policy.

C. Respondents prevent the V-chip from blocking programming by mis-rating most shows, and the V-chip is ineffective

The V-chip is not only ineffective, it is worthless and useless, a failed experiment gone awry.

There is no V-chip in televisions with less than a 13 inch screen. Pet. App. 16a. In the 2nd Circuit, Respondents cited statistics of the number of TV's sold since that legislation, but have not broken down the number with small screens, rendering those statistics useless. And, generally smaller televisions end up in the smallest childrens' bedrooms. So, how can the V-chip be effective for those TV's in which it does not exist?

Contrary to Respondents' arguments, many digital televisions do NOT have V-chips. FCC investigation found 7 manufacturers do not install V-chips in their TV's sold in the U.S. *Funai Corp.,* Notice of Apparent Liability for Forfeiture, 22 FCC Recd. 19663 (2007). Therefore, the V-chip does not exist for purchasers of those televisions as well.

Digital converter boxes for analog TV's, some of which do not have V-chips anyway, had not been invented at the time of the subject indecent TV programs, so are not legally relevant to the outcome of this case.

In *Reno, Ashcroft, Sable,* and *Playboy*, all *supra*, the technologies did not involve reliance upon ratings assigned by humans, much less those employed by adversarial parties, as do the TV ratings upon which the V-chip relies. The FCC has found the V-chip ineffective partly for that

reason. Pet. App. 85a. The V-chip is, unlike those other technologies, NOT a "parental control", but rather, a "network control."

Respondents fail to rate many of their programs at all, rendering the V-chip nonexistent to block them.

When programs are assigned TV ratings, they are mis-rated BY RESPONDENTS at least 68% of the time (Pet. App. 83a), sometimes off by TWO ratings (i.e., TV MA material rated TV PG)! That is even when, unlike the two subject Fox live shows, the network has produced the exact scripted content. Programs are mis-rated as suitable for children, when they are not according to the clear rating criteria – almost never the opposite. This mis-rating is done deliberately by Respondents, in order to not reduce the audience size and thereby lower advertising rates. The V-chip is controlled by a financial incentive.

A .320 batting average is great for a baseball player, but pathetic for rating of TV programs under clear criteria. While Respondents are in this Court touting the V-chip as an effective substitute for direct regulation, they are simultaneously acting to keep it from working or blocking their programs.

This evidence in the record, alone, is sufficient for

the FCC to meet its burden of proving ineffectiveness of the V-chip. On the other hand, there is NO evidence or record of effectiveness.

Respondents have tacitly admitted their 68% error rate by not citing anything to the contrary at any time. On remand in 2006, FCC had a 60 day comment period, and no Respondent presented any evidence.

Respondents have thereby circumvented and thwarted the technical function of the V-chip by assigning false ratings. Is this field of law now going to be built entirely on a lie, as well?

V-chips do NOT block all indecent material, as Respondents argue. There is no "indecent" setting on the V-chip.

Respondents cite *Sable, supra*, requiring blocking technology be "effective" to achieve a compelling governmental interest, but the V-chip, even where it exists, is nowhere near effective under *Sable.*

Respondents have also cited *Playboy, supra*, to say technology does not have to be 100% perfect. Setting aside that the record shows the V-chip is less than 32% perfect, *Playboy* is misapplied. In *Playboy,* there were faulty blocking mechanisms that allowed "signal bleed" of some visual/audio of

the cable Playboy Channel into homes of cable subscribers who had not subscribed to that channel. First, because it was cable, there could only be a problem if there was a subscription to begin with. Second, only a small percentage of subscribers had the problem. This Court found that the law was unconstitutional expressly because, by statute, BLOCKING TECHNOLOGY HAD TO BE INSTALLED FOR FREE WITHIN 24 HOURS OF A FREE PHONE CALL FROM THE SUBSCRIBER TO THE PROVIDER.

So, to apply *Playboy* to this broadcasting case, the V-chip could only possibly be effective if Respondents installed them for free within 24 hours of a free phone call to them by any U.S. resident. They have not been bound to that, unlike in *Playboy.*

ABC's Reply Brief has the audacity to say that the V-chip is more effective than blocking technology for some other media, without ANY evidence!

It is not enough to meet *Sable* or *Playboy* for everyone to just throw up their hands and say to viewers and children, "Oh well, we tried! We put some technology out there before we eliminated direct regulation, even if it doesn't work." That would accomplish nothing.

Citizens do not have any burden or responsibility to pay the cost of V-chips to AVOID indecency. That would be perverted and backwards. Decency must remain the norm, and indecency the exception.

How are citizens to use a V-chip to protect themselves, their children, and their established constitutional rights from any "first blow" of TV indecency in public places, such as restaurants, where they do not have access to program a V-chip? Respondents have not answered this, because they cannot.

By challenging direct regulations, and controlling the V-chip through mis-ratings, Respondents seek to become the sole arbiters of what everyone, even their opponents in this court case, must see or hear, without any escape, even in the home.

It is the laws and FCC that are protecting people FROM RESPONDENTS. Fox, the television network, seeks to guard the henhouse - and without any accountability or consequences when they slaughter all of the hens. As a corollary, would the U.S. build a missile defense system that relies on security ratings assigned by North Korea, Iran, and Red China, and then based on that, find the military is unconstitutional?

But the Court need not surmise about "effectiveness." This case has absolute proof the V-chip does not work at all, in the two subject Fox awards programs. Both programs were rated "TV –PG", but contained unedited expletives clearly requiring "TV-MA" rating for "adults only" under the criteria. Even diligent parents who programmed their V-chip to block TV-MA material were still confronted, along with their children, with TV-MA material. It does not matter that Fox probably did not know that third parties would utter those expletives in live programs. The point is, the V-chip did not work, does not work, and is not a basis for any Court ruling, unlike blocking technology for other media.

Any FCC statement of V-chip effectiveness, in its 1998 Implementation record, was merely prediction before actual implementation. FCC could not predict Respondents would deliberately render the V-chip ineffective with false ratings. Respondents' arguments are negated by their own actions.

Parents, government, and broadcasters all have roles in protecting children from indecency. However, the networks are now shirking their responsibilities, while trying to permanently eliminate any government role and keep parents from blocking indecent programming. They now want to force indecency on children, rather than

protect them. The regime they want is that neither direct regulation NOR V-chip can stop their indecency.

The most effective and diligent parents cannot protect their children without government help. It is harder for working parents and single parents. Plus, neglected children have the same right to be protected as children who have diligent parents. It bears reminding that by law, everyone under 18 years of age is a child unless emancipated.

VI.THERE IS NO BASIS UPON WHICH TO APPLY STRICT SCRUTINY TO BROADCAST RESTRICTIONS.

Primary Respondents want strict scrutiny applied to broadcasting. The existence of other media to which strict scrutiny has been applies is not any reason to apply it to broadcasting. And, the V-chip has been distinguished from other blocking technologies above.

Unlike the *Reno, Ashcroft, Sable* and *Playboy* cases, this Court has already scrutinized the broadcast indecency restrictions, in *Pacifica*. There is not only legal authority for lesser scrutiny of broadcast restrictions, it is authority from this High Court.

This Court in 1997, in *Reno*, expressly reconfirmed the special treatment for broadcasting. Respondents have cited no legal authority for their proposition that the level of scrutiny for a medium, once established, be continually reconsidered.

Respondents ignore the infinite legal difference between scrutiny to be applied to government attempts to regulate privately owned and distributed media (cable TV, internet, or telephone in the *Playboy, Reno, Ashcroft,* and *Sable* cases) that is subscribed to by paying, consenting, private adults, versus regulation of the government's own airwaves, held in trust for its citizens and public use, that go into EVERY citizens home and public place, no different than any other public place. Respondents' arguments are akin to saying that the legality of nudist colonies should eliminate all indecent exposure laws, or that there is no legal difference between consensual adult sex and forceful, unsolicited sexual assault.

These are the reasons the 2nd Circuit said it "could not think of."

Respondents seek *Reno's* strict scrutiny, but distance this case from *Reno's* explicit exemption of broadcasting from that scrutiny. They cannot have it both ways. Either way, *Reno* does not apply to broadcasting. Nor do *Ashcroft, Sable,* or *Playboy*.

VII.NO RESPONDENT HAS EVER CHALLENGED 18 U.S.C. 1464, AND ITS INDECENCY RESTRICTIONS ARE PERMANENTLY CONSTITUTIONAL.

No Respondent has ever challenged 18 U.S.C 1464 in the Court of Appeals. *Yeager, supra*, cited by ABC, precludes any challenge in this Court, as not having been properly raised.

18 U.S.C. 1464 is part of the "Radio Communications Act", passed in 1927, and amended in 1934. Television usage became widespread afterward, and the Act has apparently been applied to TV as a form of radio transmission. Deference to Congress is required. If this Court were to ever (wrongfully) find 18 U.S.C. 1464's indecency provisions unconstitutional, it would necessarily apply to both radio and TV, as the statutory restrictions are either constitutional, or they are not. Yet, there is no V-chip for broadcast radio. The net result would leave the nation without ANY protection from radio indecency – "anything goes."

Intervenor Respondent ABC Affiliates' Reply Brief, at p.30, correctly states, "In particular, it is unnecessary for the Court to reconsider …… the congressionally-mandated public trustee regulatory framework for broadcast media the Court approved

in *Red Lion".*

Unlike direct regulations ruled unconstitutional for non-broadcast media, this statute is not recent. For over 80 years, all Americans, consciously and subconsciously, have completely relied upon 18 U.S.C. 1464 for protection against indecency. Most Americans have never known life WITHOUT the foundational daily fact of that protection, as they go about their affairs at home and in public places. It is well known that there are just some things that cannot be shown or said in broadcasting. Because of that statute, people are free to have radio or TV on, without fear, no matter who they are with or where they are, during daytime hours. To strike down the statute would be the greatest travesty in U.S. judicial history, pulling the rug out from all citizens' safety.

Government has a "legitimate state interest" in maintaining "a decent society." *Paris Adult Theater I v. Slaton, 413 U.S. 59-60.* It is impossible to maintain a decent society if the pervasive public place known as the "broadcast airwaves" is full of indecency.

The courts have found that virtually nothing is legally obscene. For example, the infamous

XXX-rated movie "Deep Throat", full of explicit oral sex, is not obscene. Respondents are asking for a legal "right" to broadcast such hard-core pornographic, but not obscene, programs during the daytime.

America's citizens have every right to regulate THEIR public airwaves, through their Congressional representatives, to protect themselves from indecency. Broadcasters use airwaves as a free, licensed privilege, which carries some obligations.

VIII. EVEN THE SUPREME COURT LACKS POWER TO FIND UNCONSTITUTIONAL ALL "DIRECT REGULATION OF BROADCAST INDECENCY OR CONTENT", OR PREVENT CONGRESS FROM NEW ATTEMPTS TO DIRECTLY REGULATE BROADCASTING.

Primary Respondents' Reply Briefs argue that direct regulation of broadcast indecency, or even "content", are unconstitutional. The most the Supreme Court could ever do is find a statute unconstitutional, as it did in *Reno* and other cases. Congress has constitutional power to pass new legislation that addresses any constitutional issues,

and cannot be precluded from direct regulation of the public airwaves.

Respondents wish for a finding that all direct regulation of broadcast "content" is unconstitutional, but that is impossible, as it would include obscenity, which is not speech, nor entitled to constitutional protection.

Direct regulation is not a real issue in this case, since direct regulation of broadcast obscenity is constitutional. And broadcast indecency is already allowed during safe harbor hours. So, the only issue is daytime indecency. Respondents have not presented any reason why same should be permitted now.

If direct federal regulation of the airwaves were to ever end, the federal government would no longer be "pre-empting the field", and any state or municipality would be free to pass its own direct restrictions on broadcasting coming into or going out of that place. That would be subject to state, not federal, court jurisdiction, and would result in a confusing mish-mash of laws across the nation.

CONCLUSION

This amicus requests the Court to stick to its limit of certiorari to the Question Presented, and ONLY address issues of constitutionality of the FCC 2001 Industry Guidance policy. It is requested that policy be held not vague, and constitutional. If this Court finds policy unconstitutional, affirmation of the 2nd Circuit remands the case to the FCC for further policy making procedures.

Beyond FCC policy, there are no other constitutional issues before this Court, especially as to underlying authority for FCC regime. This Court would have to ignore ALL of the following: 1) its limit on certiorari, 2) its own rules, 3) all its case precedents, 4) ABC's own limitations on the scope of its Question Presented, 5) Respondents' failure to raise any issues beyond FCC policy, 6) the 2nd Circuit's decision only going to vagueness of FCC policy, 7) the 2nd Circuit's errors, 8) stare decisis, 9) the unchanged facts underlying *Pacifica*, 10) *Reno's* confirmation of special treatment of broadcasting, 11) the lack of any legal authority to change the level of scrutiny, 12) the lack of existence of any V-chip for radio, or for many TV's and digital converter boxes, 13) Respondents' prevention of the V-chip from blocking their programs, AND 14) this Court's lack of power-

in order to invalidate direct statutory regulation of broadcast indecency or content.

This Court should decline Respondents' invitation to join them in never playing by any laws, rules, or limits.

Wherefore, the judgment of the U.S. Court of Appeals for the Second Circuit should be reversed, and judgment directed in favor of Petitioners, affirming its determination.

Respectfully submitted,

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