No. 10-1293

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Petitioners,

—v.—

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

Respondents.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Petitioners,

—v.—

ABC, INC., *et al.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF MORALITY IN MEDIA, INC. IN SUPPORT OF PETITIONERS

PATRICK A. TRUEMAN
Counsel of Record
ROBERT W. PETERS
Co-Counsel
MORALITY IN MEDIA, INC.
475 Riverside Drive
New York, New York 10115
(212) 870-3222
p.trueman@verizon.net

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INTEREST OF AMICUS CURIAE[1]

Morality in Media, Inc. ("MIM") as *amicus curiae*, files this brief in support of the Petitioner in this case, which is before this Honorable Court on the merits under the provisions of Rule 37.

MIM is a New York nonprofit corporation organized in 1962 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. MIM has an interest in this case because it is concerned about the breakdown of standards of decency in the mainstream entertainment media and because this case will in significant measure determine whether or how the FCC goes about regulating broadcast indecency.

MIM has filed friend of the court briefs in this Court involving various First Amendment issues, including: *FCC v. Fox TV Stations*, 129 S. Ct. 1800 (2009) and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); and in *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); *National Endowment*

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus* has made a monetary contribution to the preparation or submission of this brief.

for the Arts v. Finley, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *U.S. v. Playboy*, 529 U.S. 803 (2000); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *City of L.A. v. Alameda Books, Inc. and Highland Books, Inc.*, 535 U.S. 425 (2002); *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002) and 542 U.S. 656 (2004); and *U.S. v. Williams*, 553 U.S. 285 (2008).

Amicus is filing this brief in support of the Petitioner because we believe our brief contains relevant matter and alternative arguments that should be heard and may not be presented to the Court by the parties.

SUMMARY OF ARGUMENT

When Congress enacted the Radio Act of 1927 and the Communications Act of 1934, it did not define "indecent." Broadcasters were presumed to know what is meant by "decency." In response to Court decisions, the FCC later defined "indecent," clarified the definition and provided a "safe harbor" for indecency. Courts have repeatedly held that the FCC definition (also used in other laws) is not unconstitutionally vague. That possible stiff fines for violations of the law may deter some lawful conduct is not a reason to invalidate it.

If the inability to define *indecent* with "ultimate, god-like precision" means that the FCC can no longer regulate indecency, then depictions of "hard-core" sexual conduct can be shown on

broadcast TV because not all depictions of "hard-core" sex are obscene under the *Miller* test.

If *precision* is constitutionally required with respect to enforcement of the broadcast indecency law, it should also be required with respect to claims of sexual harassment involving a "hostile work environment." The latter concept is anything but *precise;* but employers, *including broadcasters*, must still determining what is or isn't acceptable *workplace* behavior. Broadcasters should also be responsible for determining what is "indecent."

Despite their protestations, the problem is not that the broadcast TV networks can no longer discern contemporary community standards. *The problem is that they long ago stopped caring much about these standards*. Decades ago, the networks adhered to a voluntary industry code that reflected community standards. Later, they had standards departments that kept programming somewhat in check. Today, they push the envelope and then complain they don't know whether the FCC will deem this or that violation of community standards actionable. If the networks were genuinely concerned about standards, there are steps they can now take to remedy the current situation.

Serious value is an important variable that the FCC considers when determining whether content violates the indecency law. It has rightly rejected the notion that if a work has merit, it is per se not indecent. If a broadcaster disagrees with an FCC ruling involving content with alleged "serious value," the appropriate remedy would be to

appeal that determination. The Supreme Court has stated that a determination about serious value is "particularly amenable to appellate review."

When Congress enacted the Radio Act of 1927, it did not give broadcasters a right to use the public airwaves to curse at least once. Perhaps it would be unwise to roll back the clock and to insist that when Congress said "*any* obscene, indecent or profane language," it meant what it said. It would also be unwise to determine that broadcasters have a right to utter at least one expletive, regardless of circumstances. There is a "middle road" between prohibiting all expletives and allowing at least one – namely, when utterance of one or more expletives amounts to a nuisance, it is actionable.

The Court below questioned whether the broadcast media are still "uniquely pervasive and uniquely accessible to children" and indicated that "strict scrutiny" should apply when evaluating challenges to the indecency law. *Amicus* contends that it was not broadcasting's "uniqueness" *per se* that justified its special treatment in 1978 but rather that unlike any other form of media then in existence, broadcasting had become pervasive and readily accessible to children. It is still pervasive and readily accessible to children *and government still has a necessary protective role to play*.

ARGUMENT

I. THE FCC'S BROADCAST INDECENCY ENFORCEMENT POLICY IS NOT UNCONSTITUTIONALLY VAGUE

In an early obscenity case, *Rosen v. United States*, 161 U.S. 29, 42 (1896), Petitioner asked the trial court to instruct the jury that he should be acquitted if he entertained a reasonable doubt about whether the publication referred to in the indictment was obscene, to which the Supreme Court replied, in part:

> Everyone who uses the mails of the United States for carrying...publications *must take notice of what, in this enlightened age, is meant by decency...* in social life, and what must be deemed obscene... [*Italics* added]

When Congress enacted the Radio Act of 1927 and the Communications Act of 1934, it apparently thought that broadcasters must also "take notice of what is...meant by decency," because while both Acts included a provision making it unlawful to "utter any obscene, indecent, or profane language by means of radio," neither Act defined the term "indecent." Nor did Congress define "indecent" when it enacted 18 USC 1464, making it a crime to broadcast "indecent" language.

As this Court observed in *Bethel School District v. Fraser*, 478 U.S. 675, 681-682 (1986), there is also a prohibition on use of "indecent language" in the House of Representatives, "where

some of the most vigorous political debates in our society are carried on." This prohibition remains in effect; and until this day the House has not felt constrained to provide a definition of "indecent."

Nevertheless, Nicholas Johnson, dissenting in *Eastern Educ. Radio (WUHY-FM)*, 24 FCC 2d 408, at 422, 424 (1970), criticized the FCC for ignoring: "decades of First Amendment law carefully fashioned by the Supreme Court into the recognized concepts of 'vagueness'...I believe it is our responsibility to adopt *precise*...guidelines...to follow in this murky area." [*Italics* added]

In *Citizen's Complaint Against Pacifica Foundation Station WBAI*, 56 FCC 2d 94, 99 (1975), the FCC acted to "clarify the standards which the Commission utilizes to judge indecent language," stating in part (at 98):

> [T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offense as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience... When the number of children in the audience is reduced to a minimum...a different standard might...be used. The definition...would remain the same... However, we would also consider whether the material has serious...value...

In *FCC v. Pacifica*, 438 U.S. 726, 731 (1978), this Court did not address the contention made in the lower court that 18 USC 1464 is vague but did observe that the FCC intended to "clarify the standards" it utilized in considering complaints about indecent speech on the airwaves.

In *In re Infinity Broadcasting Corp. of Pa.*, 3 FCC Rcd. 930, at 931-932 (1987), the FCC provided further clarification of its indecency definition:

> "Patently offensive" is a phrase that must, of necessity, be construed with reference to specific facts. We cannot and will not attempt to provide petitioners with comprehensive index or thesaurus of indecent words or pictorial depictions that will be considered patently offensive... We note...that the phrase "patently offensive" is also used in the obscenity context and that the courts insist on construing that phrase with reference to specific facts...The fact that its meaning can only be given greater specificity on a case-by-case basis does not make the term "patently offensive" unconstitutionally vague in the indecency context any more than it does in the obscenity context...Broadcasters may not reasonably expect to relieve themselves of this legal obligation by demanding that we exercise their editorial judgment for them.

In concluding that the obscenity test was not unconstitutionally vague, the Court in *Miller v. California*, 413 U.S. 15, 27 (1973) stated in part:

> If the inability to define regulated materials with ultimate, god-like precision altogether removes the power...to regulate, then "hard core" pornography may be exposed without limit to the juvenile, the passerby...[2]

The *Miller* Court also stated (*id.*, at 26, n.9): "The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged..."

In *Action for Children's TV v. FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995), *cert. den.*, 516 U.S. 1043 (1996), the D.C. Circuit stated:

> [W]e dismiss petitioners' vagueness challenge as meritless. The FCC's definition of indecency in the new regulations is identical to the one at issue in *ACT II,* where we stated that "the Supreme Court's decision in *Pacifica* dispelled any vagueness concerns attending the [Commission's] definition" as did our holding in *ACT I*... Petitioners fail to provide any convincing reasons why we should ignore this precedent.

In *Dial Inform. Services v. Thornburgh*, 938 F.2d 1535, 1540 (2nd Cir. 1991), *cert. den.*, 502 U.S.

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[2] And if the FCC's inability to define *indecent* with "ultimate, god-like precision" means that it can no longer regulate broadcast indecency, then "hard-core" sexual conduct can also be shown on broadcast TV during the family hour because not all depictions of "hard-core" sexual conduct are obscene under the three part *Miller* obscenity test.

1072 (1992), the 2nd Circuit held that "indecent" as used in 47 USC 223(b)(2) had been "defined clearly" by the FCC and was not unconstitutionally vague.

In *Denver Area Educational Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996), this Court also rejected a vagueness challenge to 47 USC 532(h), which includes language patterned after the FCC's definition of "indecent" for broadcasting.

Respondent Fox TV Stations states (*Brief in Opposition*, at 7) that in *Reno v. ACLU*, 521 U.S. 844 (1997) "this Court confronted a vagueness challenge to a prohibition substantially identical to the FCC's generic definition of indecency" and affirmed the judgment that the prohibition was "unconstitutionally vague." The *Reno* Court, however, also stated the following:

> [T]he Government argues that the District Court erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague. While we discuss the vagueness of the CDA because of its relevance to the First Amendment overbreadth inquiry, we conclude that the judgment should be affirmed without reaching the Fifth Amendment issue. [*Id.,* at 864]
>
> [T]he CDA is a criminal statute...[T]his increased deterrent effect, coupled with the "risk of discriminatory enforcement" of vague regulations, poses greater First Amendment concerns than those implicated by the civil

> regulation reviewed in *Denver Area Ed. Telecomm. Consortium...* [*Id.*, at 871-872])

In *Village of Hoffman Estates v. The Flipside, Hoffman Estates*, Inc., 455 U.S. 489, 498-499 (1982), the Court also stated:

> The degree of vagueness that the Constitution tolerates...depends in part on the nature of the enactment...Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by...resort to an administrative process...[3]

Following *Reno*, the FCC also issued a *Policy Statement* to provide licensees with "guidance" regarding its case law and enforcement policies with respect to broadcast indecency.[4] While there are significant differences between the three "principal factors"[5] set forth in the *Policy Statement* and the three prongs of the *Miller v. California* obscenity test,[6] there are also parallels. The first factor is similar to the "patently offensive sexual conduct" prong of the *Miller* test; the second

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[3] See, e.g., *Citizen's complaint against Pacifica Foundation Station,* 56 FCC 2d, at 99 ("There are several reasons why we are issuing a declaratory order... A declaratory order is a flexible procedural device admirably suited to...clarify the standards which the Commission utilizes to judge 'indecent language.' If not satisfied by the Commission's action on reconsideration, judicial review may be sought...").

[4] *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. 1464 & Enforcement Policies Regarding Broadcast Indecency,* 16 FCC Rcd. 7999 (2001).

[5] *Id.,* at 8003.

[6] *Miller*, 413 U.S. at 24.

factor is similar to the "appeal to the prurient interest" prong of the *Miller* test; the third factor is similar to the "lacking in serious value" prong of the *Miller* test. To some extent, therefore, these "principal factors" alleviate vagueness concerns expressed in *Reno* (521 U.S. at 872-873):

> The Government argues that the statute is no more vague than the obscenity standard this Court established in *Miller v. California*... The Government's reasoning is also flawed. Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague...Each of *Miller's* additional two prongs...limits the uncertain sweep of the obscenity definition.

Furthermore, unlike the law in *Reno*, the broadcast indecency law has since 1988 provided broadcasters with a "safe harbor" for indecency. In *Action for Children's TV v. FCC,* 852 F.2d 1332, 1342-1343 (1988), the D.C. Circuit concluded:

> Facing the uncertainty generated by a less than precise definition of indecency *plus* the lack of a *safe harbor for the broadcast of (possibly) indecent material*, broadcasters surely would be more likely to avoid such programming altogether...We conclude that... the FCC must afford...notice of reasonably determined times at which indecent material...may be aired. [*Italics* added]

A "safe harbor" from 10 p.m. to 6 a.m. has been in place since 1995, and had ABC aired the *NYPD Blue* episode at issue at 10 p.m. *in all time zones*, it would not have been fined. Fox also could have delayed airing the "Billboard Music Awards" program until 10 p.m. in all time zones.

Respondent ABC, Inc. (*Brief in Opposition,* at 15), states that the 2nd Circuit's "conclusion" about vagueness is "confirmed by the clear chilling effect" the FCC's policy has on "constitutionally protected expression," an effect that is "magnified" by fact that the FCC can now impose a much larger fine for each violation of 18 USC. 1464.

Broadcasting, however, is now dominated by media giants for whom the previous maximum fine was a readily affordable cost of doing business. Now, in an appropriate case, the FCC can levy a much larger fine that will hopefully get the attention of corporate executives. Furthermore, that a potential stiff penalty for unlawful conduct may deter some lawful conduct is not a reason to invalidate the broadcast indecency law.[7]

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[7] *Pacifica,* 438 U.S., at 743 ("[T]he Commission's order may lead some broadcasters to censor themselves. At most, however, the...definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities."); *cf.*, *Alexander v. U.S.,* 509 U.S. 544, 555-556 (1993)("applying RICO's forfeiture provisions to businesses dealing in expressive materials"); E. Volokh, "What speech does 'hostile work environment' harassment law restrict?" 85 *Geo L.J.* 627, 635-637 (1997)("Steering Wide of the Unlawful Zone").

II. IT ISN'T JUST BROADCASTERS WHO MUST USE COMMONSENSE WHEN ASSESSING OFFENSIVE REFERENCES TO SEXUAL ORGANS & ACTIVITIES

The FCC is not only a regulator; it is also an employer. Posted on its new www.fcc.gov website, under the headline, "Understanding Workplace Harassment (FCC Staff): Workplace Harassment is a Form of Discrimination," we find the following:

> **Hostile work environment harassment...**
> [A]ctions that may create sexual hostile environment harassment include:
>
> - Leering, i.e., staring in a sexually suggestive manner
> - Making offensive remarks about looks, clothing, body parts
> - Touching in a way that may make an employee feel uncomfortable, such as patting, pinching or intentional brushing against another's body
> - Telling sexual or lewd jokes, hanging sexual posters, making sexual gestures...
> - Sending, forwarding or soliciting sexually suggestive letters, notes, emails or images...
>
> The anti-discrimination statutes are not a general civility code...The...harassment... [must be] sufficiently severe or pervasive to create a hostile work environment...

If *precision* is constitutionally required for enforcement of the broadcast indecency law, it should also be required with respect to claims of sexual harassment involving a "hostile work environment." If broadcasters are entitled to know in advance *precisely* what is or isn't permitted, then employers and employees are entitled know in advance *precisely* what is or isn't permitted.

The First Amendment makes no distinction between what ordinary citizens say and display in a workplace and what broadcasters say and display over the airwaves. And the "hostile work environment" concept *is anything but precise,*[8] as the following commentary indicates:

M.J. Frank, "The social context variable in hostile environment litigation," 77 *Notre Dame L. Rev.* 437, at 491, 494 (2002):

> Since courts first construed Title VII as outlawing harassment in the workplace, judges and scholars have criticized the vague standard for distinguishing between unpleasant banter and a full-blown case of harassment. One would think that, in time, as the courts addressed more cases, they would be able to discover some guiding principles. But as yet, this has not proven true...Anyone capable of reading the Federal

[8] *Harris v. Forklift Systems*, 510 U.S 17, 22-23 (1993)("This is not, and by its nature cannot be, a mathematically precise test... [W]ether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances.").

> Reporter would have to agree with the sentiments of one district court that attempted to reconcile the conflicting decisions: "The courts deciding summary judgment motions have reached a broad range of conclusions regarding what actions actually constitute a hostile environment." Put more bluntly, many decisions which purport to apply the same standard for defining a hostile environment are inconsistent with one another...

It would be an anomaly indeed if offensive references to sexual organs and activities uttered in a workplace can be punished to protect adults, but not if broadcast into millions of homes to protect not only adults[9] but also children. It would also be an anomaly indeed if employers must assess the sexual content of radio programs broadcast into the workplace to determine whether they contribute to or create a hostile work environment,[10] but broadcasters, have no responsibility to assess whether the same content is indecent as broadcast.

The "hostile work environment" concept also applies in schools, and on January 19, 2001, the U.S. Department of Education (Office for Civil Rights) issued a document entitled, "Revised

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[9] *Pacifica*, 438 U.S. at 748-749; *id.*, at 755 (Powell, J. concurring in Part IV-C of Mr. Justice Stevens' opinion).

[10] See, *Reeves v. C.H. Robinson Worldwide*, 594 F.3d 798, 804 (11th Cir. 2010) ("Nearly every day, Reeves's co-workers tuned the office radio to a crude morning show. Reeves claimed this program featured...regular discussions of women's anatomy, a graphic discussion of how women's nipples harden in the cold and conversations about the size of women's breasts...").

Sexual Harassment Guidance." That document reads in small part as follows:

> OCR considers..."the constellation of surrounding circumstances, expectations, and relationships." Schools should also use these factors to evaluate conduct *in order to draw commonsense distinctions* between conduct that constitutes sexual harassment and conduct that does not... It is the totality of the circumstances in which the behavior occurs that is critical in determining whether a hostile environment exists. [*Italics* added]

If schools – *and broadcasters too in their capacity as employers*[11] – must use "commonsense" when determining what constitutes to a hostile work environment, why must broadcasters be treated as persons of "infirm mentality"[12] when determining what violates the indecency law?

III. BROADCASTERS WHO HAVE IGNORED CONCERNS ABOUT PROGRAMMING SHOULD NOT BE HEARD TO COMPLAIN ABOUT THE FCC'S INDECENCY POLICY

Despite their protestations, the problem is not that the broadcast TV networks can no longer discern contemporary community standards. *The problem is that they long ago stopped caring much about these standards*. More than two decades ago the networks drastically downsized their standards

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[11] See, *Lyle v. WB TV Productions*, 132 P.3d 211 (Cal. 2006).

[12] *Rosenfeld v. New Jersey*, 408 U.S. 901, at 907, n.1 (1972) (Powell, J., dissenting).

departments;[13] and after doing so programs became more vulgar and sexual, as these studies show:

P. Kloer, "It's 8 p.m. Do you know what your kids are watching?" *Atlanta Journal-Const.* (10/23/95):

> Welcome to TV's family hour, 1995-style. Topics include syphilis, menstruation, condoms, prostitutes and pornography. And those are the jokes. An erosion of standards in recent years in the hour from 8 to 9 p.m., when many young children watch TV, has become a mudslide this season..."[W]when you cuss at somebody, it's a form of verbal assault," says Barbara Kaye, assistant professor of TV studies at Southern Illinois University, who has tracked prime-time profanity...Kaye's research found that use of

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[13] See, e.g., "Television networks censured for 'censor' cutbacks," *Broadcasting*, 9/19/88, where we read in part:

> At one of the three broadcast networks, it is called broadcast standards; at another, program practices; and at a third, broadcast standards and practices...Now, cuts at...ABC, CBS and NBC have started rumblings on Madison Avenue...The rumblings from the advertising community got louder last week with news that two trade association presidents...sent letters to the chief executive officers of ABC, CBS and NBC. Both letters said that cutbacks in standards and practices departments were weakening the network's oversight of commercial material and consequently would also weaken the 'self regulation' which they enjoyed...The combined staff reductions...at the broadcast networks have cut those departments by at least half... Meanwhile, neither the number of programs nor commercials aired is reduced...").

> profanity on TV nearly doubled from 8 to 9 p.m. between 1990 and 1994 – to an average of once every eight minutes on ABC, CBS, NBC and Fox. In addition, in 1990 profanity was more prevalent from 10 to 11 p.m., but by 1994, the earlier time slot had caught up.

D. Kunkel, et al., "Sexual messages on family hour TV," Children Now & Kaiser Family Fdn. (12/11/96):

> [T]he study assesses how messages about sexuality in the "Family Hour" have changed over time by comparing the winter of 1996 sample to a week of network programs that were aired in 1976 and 1986...In 1996, 75% of the programs included some type of sexual content, compared to 65% in 1986 and 43% in 1976...In 1976, only 9% of all programs sampled contained any scene with a primary emphasis on a sexual message; by 1986, 23% of programs included such scenes; and in 1996, 30% of all "Family Hour" programs featured [such] scenes... [pp. 4, 8]

For years now, the broadcast TV networks have also ignored the many opinion polls[14] showing that most adults are concerned about and/or offended by sexual and vulgar content on TV and that they support enforcement of the broadcast indecency law. Their response to these polls has

[14] See, "What the American public thinks about sex, vulgarity & violence on TV," Morality in Media, 2011, available at *http://www.moralityinmedia.org/full_article.php?article_no=255*.

been to provide even more vulgar and sexual content, as the following surveys show:

B.S. Kaye & B. S. Saplosky, "Offensive language in prime-time TV: Four years after TV...ratings," *J Broadcast Electron,* (Dec. 2004):

> The broadcast industry claims that the content- and aged-based ratings systems adequately alert viewers to offensive content. This study supports assertions that the warning systems give further license to broadcasters to include more profane TV dialogue. The rate per hour of curse words jumped by 51% to about one such word every 8 minutes in prime-time. Offensive language on prime-time TV declined in 1997, but in the 4 years between 1997, when the age- and content-based alerts were first implemented, and 2001, each category of swearing increased. Mild-other words grew in frequency by 44% and excretory words spiked 547%.

Release, "Number of sexual scenes on TV nearly doubled since 1998," Kaiser Family Fdn. (11/9/05):

> The number of sexual scenes on TV has nearly doubled since 1998, according to *Sex on TV 4*, a biennial study released today by the Kaiser Family Foundation...The study examined a representative sample of more than 1,000 hours of programming...All sexual content was measured, including talk about sex and sexual behavior. The study found

> that 70% of all shows include some sexual content, and that these shows average 5.0 sexual scenes per hour, compared to 56% and 3.2 scenes per hour respectively in 1998, and 64% and 4.4 scenes per hour in 2002. These increases combined represent nearly twice as many scenes of sexual content on TV since 1998 (going from 1,930 to 3,780 scenes in the program sample totaling a 96% increase between 1998 and 2005)... During prime time hours sex is even more common with nearly 8 in 10 shows including sexual content, averaging 5.9 sexual scenes per hour.[15]

Decades ago, the TV networks adhered to a voluntary industry code that reflected community standards. They later had "standards departments" that kept programming somewhat in check. Today, the networks push the envelope and then complain they don't know whether the FCC will deem this or that violation of community standards actionable.

If the networks were genuinely concerned about community standards, they would revitalize their standards departments, pay attention to studies and surveys conducted by others, and if needed, conduct their own.[16] They would also

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[15] The Findings section of the *Sex on TV 4* Report states at page 46 that network prime time shows presented sexual content "with somewhat greater frequency than the levels found across the television landscape overall."

[16] M. Greppi, "NBC executives defend their program ways," *N.Y. Post* (7/17/89) ("Tartikoff said NBC is spending more than $100,000 on a study designed to see if the public's taste has... taken a conservative swing...").

listen to mainstream advertisers who don't want to offend viewers with programming they sponsor.[17]

They would also (gasp) *exercise common sense*, because even assuming that adults have become as jaded as the TV networks apparently think, much of their audience consists of children.[18] And here, not just Fox but also ABC had reason to know children would be in the viewing audience. See, e.g., J. Zaslow, "Straight Talk" ("Kim Delaney: She stars in one of TV's most risqué dramas, *NYPD Blue*. But she's horrified that young fans tune in"), *USA Weekend Magazine*, 2/20-22/98:

> Kim Delaney is disturbed when kids recognize her as a star of *NYPD Blue.* Given its raw language, gruesome crimes and explicit love scenes, Delaney says the police drama unquestionably deserves its...TV-14 rating...Recently, when Delaney volunteered to help serve meals to the needy in Los Angeles, "all these little kids were saying they watched the show. I said, 'What are you doing up [at 10 p.m.]? You're not supposed to know who I am!' They just shrugged."

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[17] See, e.g., "Context matters...," Assoc. of Ntl. Advertisers Alliance for Family Entertainment, 8/5/11, available at http://www.ana.net/afe ("[A] group of leading national advertisers...is working hard to provide consumers with entertainment options the entire family can watch without anyone being embarrassed or grabbing for the remote...").

[18] Unlike in the obscenity law area, where a jury ordinarily does not consider children when determining "community standards" (*Pinkus v. U.S.*, 436 U.S. 293, 298 (1978)), the FCC properly considers children when determining whether broadcast content is "patently offensive."

IV. FCC'S CURRENT POLICY ON CONTENT WITH 'SERIOUS VALUE' DOES NOT VIOLATE THE FIRST AMENDMENT

For decades the FCC has assessed the "value" or "merit" of programming when making determinations about broadcast indecency;[19] and in *Action for Children's TV,* 852 F.2d at 1340, the D.C. Circuit held that while "merit is properly treated as a factor in determining whether content is patently offensive...it does not render such material *per se* not indecent." Were it not so, broadcasters could air content that appealed to the prurient interest *and* depicted hardcore sexual conduct, as long as the content, when taken as a whole, had serious value and was therefore not obscene.

Respondent ABC, Inc. nevertheless questions the FCC's ability to "rest indecency determinations on its own artistic judgments." *Brief in Opposition,* at 13-14. If jurors in obscenity cases are deemed capable of assessing "serious value,"[20] however, surely FCC Commissioners can also make such determinations. Furthermore, the FCC is not the only federal agency that must balance artistic value with decency concerns. The National Endowment for the Arts must make similar determinations.[21]

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[19] See, e.g., *Eastern Educ. Radio,* 24 FCC 2d, at 412 (the term "indecent" is applicable and the standard for its applicability is that "the material broadcast is (a) patently offensive...*and (b) is utterly without redeeming social value*.").

[20] See, *Pope v. Illinois*, 481 U.S. 497 (1987); *Hamling v. U.S*, 418 U.S. 87, 100 (1974)("Expert testimony is not necessary to enable the jury to judge the obscenity of material...").

[21] *NEA v. Finley*, 524 U.S. 569 (1998); see also *Advocates for the Arts v. Thomson*, 532 F.2d 792, 796-797 (1st Cir. 1976).

If ABC disagrees with an FCC ruling involving content with alleged "merit" or "serious value," the appropriate remedy would be to appeal that determination. As this Court stated in *Smith v. United States*, 431 U.S. 291, 305 (1977), a determination about serious value is "particularly amenable to appellate review."

Respondent ABC, Inc. also criticizes the FCC for differentiating between the routine vulgarities heard weekly on its *NYPD Blue* program with the intense vulgarity heard in an early scene of *Saving Private Ryan*. *Brief in Opposition*, at 13.

Amicus did not agree with the FCC's determination that the broadcast of an unedited version of *Private Ryan* during primetime hours did not violate the indecency law. Little would have been lost by bleeping the vulgarity,[22] but much would have been gained in terms of maintaining a decent society and shielding children too young to understand the reason for the cursing.

But *Amicus* does not doubt that Steven Spielberg's purpose in airing intense vulgarity in an early scene of *Private Ryan* was laudable – namely, to depict the reality and horror of war. Had an *NYPD Blue* episode depicted a horrifically violent scene where cursing took place, the FCC may have treated the episode as it treated *Private Ryan*. But the cursing in *NYPD Blue* was of a

[22] *Pacifica*, 438 U.S. at 743, n.18 ("A requirement that indecent language be avoided will have its primary effect on the form rather than the content of serious communication...")

different kind, as the following commentary by David Hinckley ("Potty-mouths filling the air," *Daily News*, 5/2/03) shows:

> Feeling empty because with the Super Bowl...over, there are no office pools? Here's a suggestion: Guess which *NYPD Blue* character will say the S-word this week. It's a lock to happen. Every new episode of the long-running ABC series, you can absolutely count on it, usually right around 10:30. The S-word is such a regular character, you half-expect to see it get a screen credit...For *NYPD Blue* viewers...the S-word isn't a big leap. Ten years ago, "a–h–" was unheard on prime-time TV. Now, thanks largely to [*NYPD Blue*], it's as common as lottery ads...

ABC, Inc. has also criticized the FCC for differentiating between the gratuitous nudity depicted in the *NYPD Blue* scene at issue here with the disturbing nudity depicted in *Schindler's List*. *Brief for Petitioners*, at 22, 24, 27-28. Former *Newark Star-Ledger* TV critic Alan Sepinwall described that *NYPD Blue* scene as follows in his "Farewell to *NYPD Blue*: Best Moments Ever:"[23]

> *And here's to you, Mrs. Sipowicz* (in "Nude Awakening"): I didn't have room to mention it in the Best Nude Scenes list for *The Star-Ledger*, so I'll slip it in here: Theo walking in on a stark-naked Connie in the Sipowicz family bathroom was arguably the show's

[23] Available at www.stwing.upenn.edu/~sepinwal/bestmoments.htm.

> most explicit nude scene (even with her hands trying to cover the naughty bits, I think we saw more of Charlotte than we ever saw of Kim or Amy or anyone else)...

Amicus did not agree with the FCC's determination that the broadcast of an unedited version of *Schindler's List* during primetime hours did not violate the broadcast indecency law. Little would have been lost by blurring the nudity,[24] but much would have been gained in terms of maintaining a decent society for all Americans and shielding children too young to comprehend the "political message" behind the nudity.

But *Amicus* does not doubt that Steven Spielberg's purpose in showing nudity in *Schindler's List* was laudable – namely, to depict the humiliation of forced nudity experienced by those who suffered in Nazi concentration camps. Had the camera lingered on a woman's private parts in a titillating manner, the FCC might have decided the matter differently.

When it comes to the matter of "serious value" and *NYPD Blue*, an editorial in *Electronic Media*[25] made an important distinction when it said this of *NYPD Blue's* co-creator Steven Bochco: "What Mr. Bochco wants...is not simply the ability to deal with adult issues, because he already has

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[24] *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000)("Being 'in a state of nudity' is not an inherently expressive condition").

[25] Viewpoint, "Hold the line in prime time," 2/24/92.

that. What he wants is the license to include bare-breasted women and explicit language..."

Amicus would add that in an FCC case where the program involved a *serious presentation about sex*, in contrast to vulgar, titillating or pandering references to or depictions of sex, the FCC determined that the content was not indecent. See, *Industry Guidance,* 16 FCC Rcd, at 8011 ("KING-TV, Seattle, "Teen Sex: What about the kids?").

V. THE FCC'S CURRENT POLICY ON 'FLEETING EXPLETIVES' DOES NOT VIOLATE THE FIRST AMENDMENT

When Congress enacted the Radio Act of 1927, Congress did not give broadcasters a right to use the public airwaves to curse or swear at least once in each program (or however often). That Act included a provision making it unlawful to "utter *any* obscene, indecent, or profane language by means of radio communications." [*Italics* added]

While little is known about what prompted regulation of obscene, indecent or profane language in broadcasting, it is highly unlikely that it was the airing of something comparable to the George Carlin "Seven Dirty Words" monologue. In her monograph, "The origins of the ban on obscene, indecent or profane language of the Radio Act of 1927,"[26] Milagros Rivera Sanchez stated:

The earliest complaint dates back to March

[26] *Journalism Comm Monogr* 149, February 1995.

> 1920. The Radio inspector S.W. Edwards asked the Commissioner of Navigation A.J. Tyrer if the amateur license of E. Ferguson...should be suspended for three months. Ferguson admitted telling another amateur to "go to hell over the air." [At 7-8]
>
> Ms. Rivera Sanchez also observed:
>
> The Congressional records and debates do not provide any evidence that members of Congress were concerned about the First Amendment implications of banning the use of obscene, indecent or profane language from the airwaves…The fact that there was little discussion...is perhaps an indication that at least some free speech advocates did not consider offensive language deserving of First Amendment protection. [At 21]

There is another explanation for the lack of discussion, other than the thinking that such speech was not "deserving" of protection – namely, that Members of Congress and just about everyone else back then understood that the "main purpose" of the First Amendment's freedom of speech and of the press provisions was "'to prevent all such *previous restraints* upon publications'" and not to "prevent the subsequent punishment of such as may be deemed contrary to the public welfare." *Near v. Minnesota*, 283 U.S. 697, 714 (1931).[27]

When the Court said "the prevention and

[27] See also, *Pacifica*, 438 U.S. at 735-738.

punishment" of the "lewd and obscene, the profane" had never been thought to raise a "Constitutional problem,"[28] they would have also understood that those terms encompassed indecent language.[29]

Perhaps it would be unwise to roll back the clock and to now insist that when Congress said "*any* obscene, indecent or profane language," it meant what it said. *Amicus* contends, however, that it would be *very unwise* to now determine that broadcasters have a right to utter at least one expletive, *regardless of circumstances*.

The 2nd Circuit said the FCC had little to fear if broadcasters were given a right to curse at least once. *Fox TV Stations v. FCC*, 489 F.3d 444, 460 (2d Cir. 2007). But the broadcast TV networks say they must compete with cable, *and on some cable channels indecency is rampant*. Last year CBS launched a new series, *$#*! My Dad Says;* and earlier this year it was reported that ABC planned to air a pilot, *Good Christian B–s.*[30] Furthermore, they cannot predict in live programming what a celebrity will say; and the problem isn't limited to TV. It includes broadcast radio "shock jocks."

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[28] *Chaplinsky v. N.H.*, 315 U.S. 568, 571-572 (1942).

[29] *Rosenfeld v. New Jersey*, 408 U.S. 901, 911 (1973) (Rehnquist, J., dissenting) (use of the f word is "'lewd and obscene' and 'profane' as those terms are used in *Chaplinsky v. New Hampshire...* the leading case in the field"); see also, *Bethel School District*, 478 U.S. at 678, where a prohibition on "use of obscene, profane language" was applied to a student speech that was deemed "indecent, lewd..."

[30] L. Rice, "Kristen Chenoweth joins 'Good Christian' pilot at ABC," www.insidetv.ew.com, 3/14/11.

Amicus would contend that there is a constitutional "middle road" between prohibiting all expletives and allowing at least one – namely, when utterance of one or more expletives amounts to a nuisance, it is actionable. In *Chaplinsky,* 315 U.S. at 571-572, n.4-5, this Court twice cited *Free Speech in the United States*, by Zechariah Chafee, Jr. (1941) where Chafee stated in part, at 149-150:

> But the law punishes a few classes of words like obscenity, profanity...[P]roperly limited they fall outside the protection of the free speech clauses...[P]rofanity, indecent talk and pictures...have a very slight social value as a step towards truth, which is...outweighed by the social interest in order, morality, the training of the young and the peace of mind of those who hear and see... *The man who swears in a street car is as much of a nuisance as the man who smokes there*. [*Italics* added]

In 12 *Am. Jur. 2d* Blasphemy and Profanity 10 ("As common-law nuisance"), we also find the following:

> In view of the requirement of a public nuisance, a single act of profane swearing is generally insufficient as a basis of the offense under the common law, although it is conceivable that under particular circumstances even a single oath may amount to such a nuisance. The use of profane and vulgar words in a public place on a single occasion, whereby the public at large was offended and annoyed, may

amount to a public nuisance rendering profanity punishable under the common law.

The *Pacifica* Court recognized that indecent language could amount to a "nuisance" and upheld the FCC's authority to regulate indecent language when it does.[31] While *Pacifica* emphasized the "narrowness" of its holding, it did not hold that a single expletive could never be actionable.[32] For one thing, *unlike* the indecent language that has proliferated on primetime TV,[33] the George Carlin monologue was an aberration.[34] For another, *unlike* an annual media awards program airing on a major broadcast TV network, the one-time airing

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[31] 438 U.S. at 750; *id.*, at 761 (Powell, J., concurring in Part IV-C of Justice Stevens' opinion); see also, See also, *Rosenfeld v. New Jersey*, 408 U.S. 901, 906 (1972)(Powell, J., dissenting)("The Model Penal Code...also recognizes a distinction between utterances which may threaten physical violence and those which may amount to a public nuisance, recognizing that neither category falls within the protection of the First Amendment.").

[32] 438 U.S. at 750 ("This case does not involve a two-way radio conversation...or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction..."); *Id.*, at 755 (Powell, J. concurring in Part IV-C of Mr. Justice Stevens' opinion).

[33] See, e.g., Release, "PTC finds increase in harsh profanity on TV," Parents Television Council, 10/29/08 ("[N]early 11,000 expletives...were aired during primetime on broadcast TV in 2007 – nearly twice as many as in 1998...The f-word aired only once on primetime...in all of 1998 – yet it appeared 1,147 times on primetime...in 2007...The s-word, which appeared only two times in 1998, aired 364 times in 2007...").

[34] *Fox TV Stations*, 489 F.3d at 449, n.4 ("At the time, the FCC interpreted *Pacifica* as involving a situation 'about as likely to occur again as Haley's Comet.'").

of the Carlin monologue on a radio station wasn't likely to attract a large audience of children.

Nor did the Court in *Hess v. Indiana*, 414 U.S. 105, 108 (1973), hold that the speech at issue was protected by the First Amendment because the f-word was uttered only once. The *Hess* Court said there was no evidence to indicate that defendant's "speech amounted to a public nuisance in that privacy interests were being invaded."

In *Torres v. Pisano*, 116 F.3d 625, 631 n.4 (1997), *cert. den.*, 522 U.S. 997 (1997), the Court below also recognized that "a single episode of harassment, if severe enough, can establish a hostile work environment."[35]

VI. STRICT SCRUTINY' IS NOT THE APPROPRIATE STANDARD FOR REVIEW OF BROADCAST REGULATION

In *Fox TV Stations*, 489 F.3d at 465, the Court below said it is "increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children" and that the TV networks "rightly rest their constitutional arguments in part" on *United States v. Playboy*, 529 U.S. 803 (2000), where this Court applied

[35] See also, *Suders v. Easton*, 325 F.3d 432, 444, n.7 (3rd Cir. 2003), *rev'd on other grounds*, *Penn. State Police v. Suders*, 542 U.S. 129 (2004)("'we cannot state...that a single non-trivial incident of discrimination can never be egregious enough to compel a reasonable person to resign...'").

"strict scrutiny" to a needed law[36] that would have required cable operators to completely scramble the signals for pay porn channels or air the imperfectly scrambled signals only after 10 p.m.

When Congress enacted the Radio Act of 1927, however, radio had not established a "uniquely pervasive presence in the lives of all Americans."[37] By 1930, only 40% of U.S. households had purchased radio receivers;[38] and car radios weren't mass produced until after 1927.[39]

Amicus would also contend that in 1978 it was not broadcasting's "uniqueness" per se that justified its special treatment *but rather that broadcasting had in fact become pervasive and readily accessible to children, unlike any other form of media in existence*. By 1978, TVs were in almost every home, and radios were in almost every home and car.[40] Children could also carry portable radios by hand; and unlike newspapers, broadcasting was accessible to children too young to read.

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[36] See, R. Peters, "Once Again, U.S. Supreme Court thinks It knows better than Congress," 10 *Nexus J. Op.* 5, 9-13 (2005).
[37] *Pacifica*, 438 U.S. at 748.
[38] Steve Craig, "How America adopted radio: Demographic differences in set ownership…in 1930-1950 U.S. Censuses." *J Broadcast Electron,* Vol. 48, No. 2, 2004.
[39] See, e.g., "This Day in HISTORY (Automotive: September 26, 1928: First day of work at the Galvin Manufacturing Corp.)," www.history.com ("...In 1930, Galvin would introduce the...the first mass-produced commercial car radio.").
[40] The complainant in *Pacifica,* 438 U.S., at 730, "heard the broadcast while driving with his young son."

Today, if anything, broadcasting is even more pervasive[41] *and remains readily accessible to children.* Televisions made before 2000 or with monitors less than 13 inches are not equipped with a V-Chip. The V-Chip also does not block network promos, sponsor ads, sports and "news" programs. Nor does it block *any* broadcast radio programs.

The V-Chip is also only as good as the rating system it utilizes; and many programs aren't properly rated.[42] Many parents also find the ratings inadequate for other reasons.[43] In addition, the only way to block a particular program is to block all programs rated the same. Since almost all primetime entertainment programs are rated TV-PG or TV-14, using the V-Chip to block just a few programs can result in blocking most programs.

Many children also grow up in homes with parents who don't speak English fluently or who are illiterate or disabled. Some parents don't use the V-Chip because they find it is difficult to use or because of unawareness, fatigue, indifference or neglect. Even if parents use the V-Chip, children will often have access to TVs outside the home.

In *Ginsberg v. N.Y.*, 390 U.S. 629, at 639-640 (1968), the Court stated that *two* governmental interests justified the law's limitations upon the availability of sex materials to minors:

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[41] Programming is now re-broadcast on cable, satellite and the Internet.
[42] Special Report, "The Ratings Sham II: TV executives still hiding behind a system that doesn't work," PTC, 4/16/07.
[43] S. Gordon, "Parents find media rating systems inadequate," *HealthDay News*, 6/21/11.

> The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations...upon the availability of sex material to minors...The legislature could properly conclude that parents…are entitled to the support of laws designed to aid discharge of [their] responsibility…The State also has an independent interest in the well-being of its youth… "[T]he knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of..."

Few would disagree with the assertion that parents should be the first line of defense when it comes to protecting children; but when it comes to shielding children from inappropriate mass media content, even diligent parents often fail at the task. Ratings and technology can certainly help but are not the whole answer. Nor is government the whole answer, *but government has a necessary role to play*; and the warning enunciated in *Columbia Broadcasting v. Democratic National Committee*, 412 U.S. 94, 102-103 (1973) is still relevant today:

> Thus, in evaluating the First Amendment claims of respondents, we must afford great weight to the...experience of the Commission. Professor Chafee aptly observed: "Once we get away from the bare words of the [First] Amendment, we must construe it as part of a Constitution which creates a government for

> the purpose of performing several very important tasks. The [First] Amendment should be interpreted so as not to cripple the regular work of the government..."

Among those *very important tasks* are maintaining a decent society,[44] protecting the privacy of the home,[45] and protecting children.[46]

CONCLUSION

For all of the above reasons, your *Amicus* prays that this Honorable Court reverse the judgment of the court below and declare that the FCC's current broadcast indecency enforcement regime is constitutional.

Respectfully submitted,

Patrick A. Trueman
Counsel of Record
for Amicus Curiae

Robert W. Peters
Co-Counsel

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[44] *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 59 (1973).

[45] *Frisby v. Schultz*, 487 U.S. 474, 484 (1988)("State's interest in protecting the...privacy of the home is certainly of the highest order in a free and civilized society.").

[46] In *Graham v. Florida*, 130 Sup. Ct. 2011, 2026 (2010), this Court again recognized that juveniles have a "lack of maturity and an underdeveloped sense of responsibility" and that they are "more vulnerable...to negative influences." Surely broadcast indecency is among these "negative influences."