

No. 10-1293

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED
STATES OF AMERICA,

Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,

Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED
STATES OF AMERICA,

Petitioners,

v.

ABC, INC., ET AL.,

Respondents.

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

**BRIEF OF *AMICI CURIAE* AMERICAN
COLLEGE OF PEDIATRICIANS AND THE
CHRISTIAN MEDICAL AND LEGAL
ASSOCIATION IN SUPPORT
OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

AMERICAN COLLEGE OF PEDIATRICIANS (the “College”) is a not-for-profit national medical association of pediatricians and other healthcare professionals who specialize in the care of infants, children, and adolescents. The College was formed in 2002 to promote the welfare of children and is dedicated to ensuring all children reach their optimal physical and emotional well-being.

CHRISTIAN MEDICAL AND DENTAL ASSOCIATION (“CMDA”) is a nonprofit national organization of Christian physicians and allied healthcare professionals with over 16,000 members. The genesis of the CMDA was formed in 1931. In addition to CMDA’s physician members, CMDA has associate members from a number of allied healthcare professions, including nurses and physician assistants.

Amici’s members believe that children are the future of our nation and should be reared in the best possible family environment and supported by physicians committed to ensuring their optimal health and well-being.

¹ The parties have consented to the filing of amicus curiae briefs, copies of which have been filed with the Court. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation of or submission of this brief.

Amici are dedicated to educating parents, pediatricians, policy makers, and society about factors that are most likely to enhance a child's well-being. To that end, *Amici* publish position papers and policy statements on issues affecting children, families, and society using evidenced-based medical research and expert opinion to assist parents and influence childrearing. Consistent with that goal, *Amici* have filed briefs *amicus curiae* in cases dealing with parenting and the welfare of children.

SUMMARY OF THE ARGUMENT

A great societal interest exists in preserving standards of decency, particularly, as this court has reasoned, for programming broadcast into the home due to its uniquely pervasive presence and unique accessibility to children. As the courts have drifted away from protecting the societal interest in decency, television broadcasters have become more emboldened to produce indecent material.

Pertinent to *amici's* interest is the devastating effect exposure to indecent programming has upon children and adolescents in our country. Scientific data plainly concludes that exposure to sexually-explicit or violent programming creates a high indicia of a host of emotional and physical deficits.

Amici ask the Court to recognize the important societal interest in protecting the standards of decency so long recognized in this country and to allow for the appropriate protection of the health detriments of children caused by exposure to indecency.

ARGUMENT

Introduction

Expanding free speech protection to various forms of indecent expression unwittingly triggered a vast cultural change in America. Our culture has been coarsened. Certainly, “[t]elelevision is a primary and effective sex educator, regardless of whether the information is accurate or wanted.” E.P. Benedek, M.D. and C. Brown, Ed.M., *No Excuses: Televised Pornography Harms Children*. Harvard Review of Psychiatry, 7:236-240, 238 (1999). Families, in the best interest of their children, attempt to shelter them from internet and television exposure to sexual material that they are not emotionally or psychologically ready to handle. More individuals are trapped in an addiction to sexually explicit materials, which fraudulently promises pleasure, but in fact undermines personal well-being and marital happiness. More and more women and children are abused as the exploited tools of gratification in pornographic images.

This degradation was accelerated, if not caused, by judgments that eroded the traditional legal support for moral decency. Scientific studies of the effect of television and sexual programming on children demonstrates the consequences of the move away from enforcing moral decency. The societal harms flowing from these decisions were predictable, indeed, were predicted in dissents and the precedents abandoned. Now that the predictions have come true, *Amici* respectfully submit that it is time for the Court to restore First Amendment free

speech jurisprudence to its traditional moorings. Upholding the enforcement authority of the Federal Communications Commission (the “FCC”) in this case would be a first step in reversing decades of decline. Should this Court affirm the elimination of the FCC’s enforcement, *Amici* fear that the effects of such a ruling would result in no restriction on the public airwaves and abrogate any broadcast decency standards.

I. Traditionally, American Law Protected Moral Decency as an Important Societal Value.

From the Founding until relatively recent times, American courts balanced individual free speech rights against society's interest in moral order. Indeed, the Founders considered the protection and advancement of morality to be a fundamental justification for protecting the freedoms of speech and press. First Continental Congress, Appeal to the Inhabitants of Quebec, 1774, quoted in THE HERITAGE GUIDE TO THE CONSTITUTION, 311-12 (Edwin Meese III, et al., eds., Washington, DC: Regnery Publishing, 2005). Free speech was not unlimited; it was to be protected to the extent that it furthered the search for truth and an increase in virtue among citizens and their officials. *Id.* at 312.

Early in the history of the Republic, courts consistently recognized the importance of protecting the virtue of society in general and the young in particular:

Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful... and shall we form an exception in these particulars to the rest of the civilized world?

People v. Ruggles, 8 Johns 290 (Sup. Ct. N.Y. 1811). In a similar vein, the Pennsylvania Supreme Court wrote:

The destruction of morality renders the power of the government invalid.... The corruption of the public mind, in general, and debauching the manners of youth, in particular, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences.... No man is permitted to corrupt *the morals of the people*.

Commonwealth v. Sharpless, 1815 WL 1297, *8-9 (Sup. Ct. Pa. 1815) (emphasis added).

Likewise, this Court noted that because the fundamental purpose of the free speech guarantee was to foster the attainment of truth and public virtue, many forms of expression were simply considered outside the scope of First Amendment protection.

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.

These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by *the social interest in order and morality*.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (citations omitted; emphasis added).

This Court traditionally applied the First Amendment's freedom of speech guarantee in a way that fostered the explication of ideas. Expressions that did not make a constructive contribution to the exposition of ideas--such as profanity, blasphemy or fighting words--were simply not entitled to First Amendment protection. Accordingly, as recently as 1957, Supreme Court decisions followed the long-established view that indecency could not be condoned under the guise of free speech:

The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel and all of those States made either blasphemy or profanity, or both, statutory crimes.

Roth v. United States, 354 U.S. 476, 482 (1957) (citations omitted). The First Amendment safeguarded freedom of speech to assure society's interest in an unfettered interchange of ideas. *Id.* at 484. "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956." *Id.* at 484-485 (citations omitted).

Roth recognized that obscenity could be prosecuted without any showing of antisocial conduct posing a clear and present danger to public order. *Id.* at 486-87. The Court affirmed two obscenity convictions explicitly based on the "common conscience of the community." *Id.* at 490. To the *Roth* court, material was obscene if it had a substantial tendency to deprave or corrupt. *Id.* at 486. Thus, as of 1957, this Court continued to apply the First Amendment in a way that protected public morality as well as the free expression of socially worthwhile ideas. Protection of public decency remained a viable rationale for legislative action.

Justice Harlan, concurring in part in *Roth*, emphasized the right of a state legislature to protect public morality:

It seems to me clear that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual

conduct which a State may deem obnoxious to the *moral fabric* of society.... The State can reasonably draw the inference that over a long period of time, the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on *moral standards*. And the State has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity.

Id. at 501-02 (Harlan, concurring in part and dissenting in part; emphasis added). As of the time of this Court's decision in *Roth*, obscenity jurisprudence not only upheld notions of public morality, but allowed individual States the flexibility to determine their own moral standards.

II. In Modern Times, Supreme Court Decisions Have Elevated The Individual Interest In Free Expression Above the Societal Interest in Moral Decency.

The States' power to set moral standards began to diminish with *Jacobellis v. Ohio*, 378 U.S. 184 (1964), in which the Court determined that a national obscenity standard should apply. *Jacobellis* also held that obscenity was a question of law for the Supreme Court to decide, and so that deference to the findings of State juries and legislatures was inappropriate. *Id.* at 194-95. *Jacobellis* also turned the obscenity focus away from what was perceived to be good for the social moral order as a whole and toward perceived harm to children, instead. *Id.* at 195. *Jacobellis* tended to reduce the protection of

public decency by removing local control and focusing on the effect of pornography upon recipients (such as children) as opposed to the effect on moral decency in general.

Dissenting in *Jacobellis*, Chief Justice Warren viewed the task of the Court as "to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely...." *Id.* at 199. The Chief Justice acknowledged "society's right to maintain its moral fiber." *Id.* at 202. He believed the reconciliation of interests would best be served by the application of local community standards as opposed to a national obscenity test. *Id.* at 202-03.

The moral conscience of the community, which was from the founding of the nation central to the Court's construction of the First Amendment, continued to fade from prominence. In *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the Court reversed field on the importance of social value in the definition of obscenity. Previously, lewd and obscene materials were not considered to be within the First Amendment's protection precisely because they were "of such slight social value as a step to truth...." *Roth v. United States*, 354 U.S. at 485. But in *Memoirs*, the Court adopted the converse proposition, to wit, that if an otherwise obscene communication contained any material of redeeming social value, then it could not be banned without violating the First Amendment. *Memoirs vs. Massachusetts*, 383 U.S. 413, 419 (1966) (plurality opinion). After *Memoirs*, pornographers immunized their movies and books against obscenity convictions

by injecting small amounts of material that might be deemed to have "redeeming social value." By this contrivance, publishers of indecent material cloaked themselves with First Amendment protection.

In the late 1960s, the Court handed down dozens of decisions that "elevated pornography and other assaults on decency to the level of a First Amendment right. The Supreme Court reversed dozens of judges, juries, and appellate courts in sixteen states, made laws against obscenity unenforceable, and lowered drastically the standards of decency in communities throughout America." Phyllis Schlafly, *The Morality of First Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 95, 97 (2008). Many of these decisions were issued *per curiam*, without any recitation of the pornographic material being granted First Amendment protection, and simply citing *Redrup v. New York*, 386 U.S. 767 (1967) (*per curiam*), as their sole justification. At least 27 Supreme Court pornography decisions were issued anonymously during this period, "suggest[ing] that the Justices could not defend the obscenity that they used the First Amendment to protect." Schlafly, *supra*, at 99.

While adopting an "anything goes" approach for pornography sold to adults, the Court applied a more stringent standard for material being sold to minors. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld a conviction under a New York criminal obscenity statute that prohibited the sale of obscene material to minors under 17 years of age. In doing so, the Court determined that the "girlie" magazines were not obscene for adult viewers, citing

Redrup v. New York. Nevertheless, the Court held the conviction proper because the magazines were being sold to children under 17. The Court recognized that the state legislature could reasonably find that minors' exposure to such material might be harmful. *Ginsberg*, 390 U.S. at 639.

Ironically, the *Ginsberg* decision tended to weaken, rather than strengthen, legislative efforts to protect decency. Just as the "redeeming social value" test was turned on its head to expand First Amendment protection of pornography, the "danger to children" test tended to open the floodgates to pornography aimed at adults. In both cases, the Court's rationale tended to broaden the protection of indecent material and reject public decency as a legitimate legislative interest.

The motion picture industry responded overnight to the new, more permissive treatment of pornography. "The results of the Academy Awards reflected this abrupt change. In 1965, the Best Picture was *The Sound of Music*; in 1969, the Best Picture was *Midnight Cowboy*, an X-rated film about a homeless male hustler. This new freedom brought obscene language, near-total nudity, graphic sex scenes, and sadistic violence to neighborhood movie theatres." Schlafly, *supra*, at 99-100 (footnote omitted).

Miller v. California, 413 U.S. 15 (1973), and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), attempted to slow the growth of pornography. In *Miller*, the Court overruled the *Memoirs* test that to

sustain a conviction for obscenity, a prosecutor must prove that the material in question is "utterly without redeeming social value." *Miller*, 413 U.S. at 21. The Court attempted to restore the presumption that obscene material lacked redeeming social value. "It was nearly impossible, however, to turn back the tide of pornography; the damage was already done and continues to this day." *Schlaflly, supra*, at 101.

In *Paris Adult Theatre*, 413 U.S. 49 (1973), the Court attempted to reaffirm the lost emphasis on general decency as a valid legislative concern:

In particular, we hold that there are legitimate State interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby.... [The public has an interest] in the quality of life and the total community environment....

Id., 413 U.S. at 57-58 (citations omitted). The Court said that while an individual may be entitled to read an obscene book in private, making the obscene book available to him inevitably intrudes upon other citizens. *Id.* at 59 (citation omitted).

The cause of public decency suffered a setback in *Cohen v. California*, 403 U.S. 15 (1971), a case that "threw First Amendment protection around a man who wore into a courthouse a jacket suggesting, with a short Anglo-Saxon verb, that the reader perform a sexual act of extreme anatomical implausibility with the Selective Service System." Robert H. Bork,

COERCING VIRTUE, 61-62 (Washington, DC: AEI Press, 2003). Although the jacket was undeniably offensive and was being worn in a public place where women and children were present, the Court found that California's effort to excise this scurrilous epithet was unconstitutional. The Court rationalized its decision by saying that people in the courthouse could simply avert their eyes. *Cohen*, 403 U.S. at 21. The Court emphasized the importance of freedom of speech:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope of use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id. at 24 (citation omitted). The Court did not explain, however, how the profanity at issue might help produce a more capable citizenry or comport with human dignity.

The *Cohen* Court was unable to distinguish between the vulgar word at issue and words that might acceptably be used to further public discourse. "For, while the particular four-letter word being litigated here is perhaps more distasteful than most

others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric." *Id.* at 25. Thus did the Court inject moral relativism into First Amendment jurisprudence. Robert H. Bork, *SLOUCHING TOWARDS GOMORRAH*, 99 (New York: Regan Books, 1997).

III. Up through the 1990s, the Court recognized the role that public morality must play in its jurisprudence. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), this Court held in a plurality opinion that state laws were rightly attuned to issues of public morality. *Id.* at 569. *Barnes* questioned whether an Indiana law outlawing public nudity violated the First Amendment. Chief Justice Rehnquist, writing for the plurality, held that it is well within the States' police power to fashion laws that serve to protect and enforce public morality. *Id.* While the proprietors of the strip club argued that nude dancing was artistic expression protected by the First Amendment, the Court, relying on *Roth*, rejected that notion. *Id.* **The Pornographic Trend Has Debased Our Society.**

By failing to distinguish between offensive vulgarities and expressions that contribute to the exposition of ideas, seemingly "the Court, without any authority in the Constitution or any law, has forced Americans to adopt the Court's view of morality rather than their own." Bork, *GOMORRAH*, *supra*, at 114. As such, the Court itself, in its "solicitude for aberrant individuals," has infringed

upon the right of society at large to maintain the majority's notions of decency and not have such content thrust upon them. Bork, GOMORRAH, *supra*, at 105. This is what the late Senator Daniel Patrick Moynihan called "defining deviancy down." Daniel Patrick Moynihan, *Defining Deviancy Down*, THE AMERICAN SCHOLAR, 17 (Winter 1993), cited in BORK, GOMORRAH, *supra*, at 3. Judge Bork described the cultural decline as follows:

With each new evidence of deterioration, we lament for a moment, and then become accustomed to it. We hear one day of the latest rap song calling for killing policemen or the sexual mutilation of women;... then of the latest homicide figures for New York City, Los Angeles, or the District of Columbia; of the collapse of the criminal justice system...; of the rising rate of illegitimate births; the uninhibited display of sexuality and the popularization of violence in our entertainment; worsening racial tensions; ... -- the list could be extended almost indefinitely.

So unrelenting is the assault on our sensibilities that many of us grow NUMB, finding resignation to be the rational, adaptive response to an environment that is increasingly polluted and apparently beyond our control.

BORK, GOMORRAH, *supra*, at 2-3.

Modern American culture no longer possesses the disciplinary tools of shame and stigma to restrain the most primitive human emotions. BORK, GOMORRAH, *supra*, at 125. It is not surprising that the cultural decline has spread to television.

Television, not surprisingly, displays the same traits as the movies and music.... Language is increasingly vulgar.... Recreational sex... is pervasive and is presented as acceptable about six times as often as it is rejected.... Television takes a neutral attitude toward adultery, prostitution and pornography. It 'warns against the dangers of imposing the majority's restrictive sexual morality on these practices. The villains in TV's moralist plays are not deviants and libertines but Puritans and prudes.' The moral relativism of the Sixties is now television's public morality.

BORK, GOMORRAH, *supra*, at 127 (citation omitted).

While the Court expanded First Amendment protection for pornography and other vulgar expressions, it has restricted First Amendment protections for religious expressions. *Engel v. Vitale*, 370 U.S. 421 (1962) (forbidding voluntary, non-denominational school prayer); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (forbidding voluntary Bible reading to open the school day); *Stone v. Graham*, 449 U.S. 39 (1980) (prohibiting posters of the Ten Commandments in schools); and *Wallace v. Jaffree*, 472 U.S. 38 (1984)

(forbidding one-minute period of silence in school). As the Court gradually adopted an expansive view of the so-called "wall of separation between church and state," its willingness to apply traditional moral values under the Free Speech clause diminished. This, in turn, led to some surprising outcomes. For example, because the Court's rationale in forbidding child pornography was only to protect child victims, and not to vindicate any societal moral interest, virtual (simulated) child pornography is protected as free speech. *U.S. v. Williams*, 553 U.S. 285 (2008); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249-51 (2002).

IV. This Court has Determined that Televised Indecency Harms Children.

Constitutional law presumes that indecent material is harmful to children. *FCC v. Pacifica Foundation*, 438 U.S. 749 (1978). As the Court noted in *Pacifica*, the government's interest in the well-being of its youth justified the Federal Communication Commission's regulation of indecent language even though the FCC had not quantified any measure of harm caused by the indecent language. *FCC v. Fox TV Stations, Inc.*, __ U.S. __, 129 S.Ct. 1800, 1813-1814 (2009) (citing *Pacifica*, 438 U.S. 749 (1978); *Ginsberg v. New York*, 390 U.S. 629 (1968)).

The presumption is evident throughout indecency case law. In *Sable*, this Court stated: "We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors

from the influence of literature that is not obscene by adult standards.” *Sable Commun. of Cal., Inc., v. Fed. Commun. Commn*, 492 U.S. 115 (1989). In *Reno*, this Court drew a distinction between indecent material for adults versus children, again presuming that indecent material is harmful to children. *Reno v. ACLU*, 521 U.S. 844 (1997).

This Constitutional presumption that indecency harms children is further validated by common sense and the great weight of numerous studies regarding the effects of media on children. In this context, consider then the impact of the ruling below and the potential result of the elimination of any indecency restrictions on broadcast television programming.

The average American child or teenager watches nearly three hours of television per day. Policy Statement, American Academy of Pediatrics, Committee on Public Education, *Children, Adolescents, and Television*, PEDIATRICS, Vol. 107 No. 2 (Feb. 2001) at 423. About one-third of 2- to 7-year-olds and about two-thirds of 8- to 18-year-olds have television sets in their bedrooms. *Id.* Because v-chips (assuming that v-chip technology even operates as intended) are only installed in TVs with screens above 13 inches, and because smaller TVs tend to get consigned to kids’ bedrooms, the development of v-chip technology does not effectively guard children from unsuitable program content. *Id.* According to scientific research, teenagers with bedroom TVs are more likely to engage in substance use and sexual activity. Policy Statement, American Academy of Pediatrics, *Sexuality, Contraception, and*

the Media, PEDIATRICS, Vol. 126, No. 3 (Sept. 2010) at 579. Because these teenagers are more likely to have televisions without v-chips (or effective v-chip technology) only exacerbates this problem.

Surely there can be no real dispute to the premise that children and adolescents are vulnerable to TV messages. *Children, Adolescents, and Television*, PEDIATRICS, Vol. 107 No. 2 at 423. Younger children cannot discriminate between televised fiction and reality. *Id.* In the teen years, TV becomes an integral part of the cultural environment, in effect a “super peer,” influencing norms, perceptions and behaviors. Kunkel, D., *et al.*, *Sex on TV 4*, Kaiser Family Foundation, 2005, at 5. Thus, the content of the programming on television plays an enormous role in the life of children and adolescents and becomes a tremendous influence on behavior.

More than 75% of prime-time TV programs present sexual material, typically without any hint of risk or responsibility. *Sexuality, Contraception, and the Media*, PEDIATRICS, Vol. 126 No. 3 at 576-77. Approximately 14% of TV programs either show or strongly suggest acts of intercourse. Collins, R.L., *et al.*, *Watching Sex on Television Predicts Adolescent Initiation of Sexual Behavior*, PEDIATRICS, Vol. 114, No. 3, Sept. 2004 at e281, <http://stopteenpregnancy.org/pdf/Watching%20Sex%20on%20TV%20Predicts%20Adolescent%20Initiation%20of%20Sexual%20Behavior.pdf>. The amount of sexual TV content nearly doubled from the 1997-98 season to 2004-05, making sex on TV “nearly ubiquitous.” Kunkel, D., *et al.*, *Sex on TV 4*, Kaiser

Family Foundation, 2005, at 58. This data is derived from a time where decency regulations were in place. It is troubling to contemplate the amount of sexually explicit programming that will be broadcast should the resulting decision of this Court in effect eliminate any indecency regulation.

As this Court previously recognized, for good reason there is not a significant number of empirical studies on the topic of exposure to children of indecent programming. Yet, this Court has pointed out that common sense alone establishes that indecency is harmful to children:

There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency...Here it suffices to know that children mimic the behavior they observe-or at least the behavior that is presented to them as normal and appropriate...Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity.

FCC v. Fox TV Stations, Inc., __ U.S. __, 129 S. Ct. 1800, 1813 (2009).

Despite the practical limitations of conducting such studies, some empirical research has been completed which demonstrates the effect of indecent programming, with very troubling findings. The results of televised indecent programming most concerning to *Amici* as well as any clinician or parent are:

modeling and imitation of language heard and behaviors observed in televised pornography; negative interference with children's normal sexual development; emotional reactions such as nightmares and feelings of anxiety, guilt, confusion, and/or shame; stimulation of premature sexual activity; development of unrealistic, misleading, and /or harmful attitudes toward sex and adult male-female relationships; and undermining of family values with resultant conflict between parents and children.

E.P. Benedek, M.D. and C. Brown, Ed.M., *No Excuses: Televised Pornography Harms Children*. HARVARD REVIEW OF PSYCHIATRY 1999; 7:236-240, 239.²

² Use of the term “pornographic” often creates confusion and inconsistency. For the purposes of the scientific study cited here, the term “pornographic” refers to material “predominantly sexually explicit and intended primarily for the purpose of sexual arousal.” *Id.* at 237.

Longitudinal studies show that sexual material on television harms children in multiple ways. Scientific research reveals negative health effects in the areas of violent and aggressive behavior, premature sexuality, and poor school performance. *Children, Adolescents, and Television*, PEDIATRICS, Vol. 107, No. 2, at 423.

Children up to nine years of age are unable to completely discern the difference between sexual activity and violence “because they do not understand what sex is, and sexual behavior looks violent to them because of the intense, repetitive and unfamiliar movements.” E.P. Benedek, M.D. and C. Brown, Ed.M., *No Excuses: Televised Pornography Harms Children*. *Harvard Review of Psychiatry* 1999; 7:236-240, 237. Thus, when children view explicit sexual activity on television they “may perceive it as violence [which] may be as traumatizing as seeing actual violence, and sleep disturbance, nightmares, and regressive behavior may result.” *Id.*

Not surprisingly, as any parent knows, children frequently imitate the language and sounds that they observe, even those heard on television. Such behavior is observable “even in infants as young as 14 months of age [who] incorporate behaviors that they see on television.” *Id.*, at 238. Accordingly, “modeling theory” provides a further causal link between harmful exposure to televised pornography and early sexual activity.

The potential harm to children in being exposed to indecent programming is not limited to modeling

the behavior. Rather, exposure to sexually laden content shapes adolescent attitudes and mores. Psychologists have pointed out that children learn how to have relationships based on what they see, and when they see heavy doses of indecent sexual content, it harms their ability to develop more caring relationships:

The problem is that the sexualized childhood is harming young children at the time when the foundations for later sexual behavior and relationships are being laid...They are forced to deal with sexual issues when they are too young, when the way they think leaves them vulnerable to soaking up the messages that surround them with few resources to resist. Girls learn to judge themselves and others based on how they look; in essence they learn to see themselves as objects. And boys learn to judge them this way as well. The resulting objectification undermines their ability to have connected, caring relationships, which will, in turn, harm their ability to have caring relationships in which sex is a part when they grow up.

Diane E. Levin, Ph.D. and Jean Kilbourne, Ed.D. *So Sexy So Soon: The New Sexualized Childhood and what Parents Can Do to Protect Their Kids*, 63-64 (Ballantine Books, N.Y. 2008).

Because of the predominance of sexual content on TV, there is also a strong correlation between childhood and adolescent TV viewing and early sexual activity. *Watching Sex on Television Predicts*

Adolescent Initiation of Sexual Behavior, PEDIATRICS, Vol. 114, No. 3, at e281. The heavier the dose of sexual material on television, the earlier the initiation of intercourse and other such activities.

Adolescence is an important stage in sexual development when young people “begin to consider which sexual behaviors are enjoyable, moral, and appropriate for their age group.” *Sexuality, Contraception, and the Media*, PEDIATRICS, Vol. 126, No. 3 at 576. Exposure of children to sexual activity “may legitimize certain sexual behavior and counteract societal prohibitions concerning such conduct.” E.P. Benedek, M.D. and C. Brown, Ed.M., at 238.

Scientific studies show that sexual content in TV and other media tends to encourage earlier sexual activity in young people. *Sexuality, Contraception, and the Media*, PEDIATRICS, Vol. 126, No. 3 at 578. Those exposed to sexual material in early adolescence are twice as likely to have early sexual intercourse. *Id.* Thus, it is not surprising that children who view adult programs are likely to have intercourse earlier than those who have not been subjected to these programs. *Id.*

In a separate national study of nearly 1800 adolescents ages 12 to 17, researchers concluded that “watching sex on TV predicts and may hasten adolescent sexual initiation.” *Watching Sex on Television Predicts Adolescent Initiation of Sexual Behavior*, PEDIATRICS, Vol. 114, No. 3, at e280. The results showed that heavy exposure to sexual

content³ on TV related strongly to teen's initiation of intercourse or their progression to more advanced sexual activities apart from intercourse in the following year. Those who watched the greatest amount of sexual content were twice as likely than those who viewed the least amount to initiate sexual intercourse during the following year or to progress to more-advanced levels of other sexual activity. *Id.*, at e287. "Reducing the amount of sexual content in entertainment programming, reducing adolescent exposure to this content, or increasing references to and depictions of possible negative consequences of sexual activity could appreciably delay the initiation of coital and noncoital activities." *Id.*, at e280.

It is important to recognize that TV programs containing mere discussions about sex were just as likely to accelerate teen sexual activity as those with actual depictions of sexual acts. *Sex on TV* 4, at 6. Observing talk about sex has been shown to influence adolescent viewers' beliefs about normative sexual patterns and practices, expectations about how sexual relationships evolve and attitudes toward casual sex. *Id.* at 57. *See also Watching Sex on Television Predicts Adolescent Initiation of Sexual Behavior*, PEDIATRICS, Vol. 114, No. 3, at e287 ("It apparently makes little difference whether a TV show presents people talking about whether they

³ In this study, the term "sexual content" measured three kinds of sexual content on TV: 1) sexual behavior, such as kissing, intimate touching, and implied and depicted intercourse, 2) talk about sexual plans or desires or about sex that has occurred, and expert advice, and 3) talk about behavior showing the risks of or the need for safety in regard to sexual activity. *Id.* e282.

have sex or shows them actually having sex. Both affect perceived norms regarding sex, and this sexual behavior”).

The results of increased sexual activity in adolescence are far reaching. In surveys, most of the young people who have become sexually active wish they had waited, indicating that they were not yet emotionally ready. *Id.* More recent, a 2009 study found that two-thirds of sexually experienced teenagers in the United States say they wish they had waited longer to have intercourse for the first time. Martino, S.C. et al., *It's better on TV: does television set teenagers up for regret following sexual initiation?* PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 41(2):92-100 (June 2009).

Earlier sexual activity increases the likelihood of accidental pregnancy and the United States has one of the highest rates of teen pregnancy in the world. Policy Statement, American Academy of Pediatrics, *Sexuality, Contraception, and the Media*, PEDIATRICS, Vol. 126, No. 3 (Sept. 2010) at 576. The birthrate among unwed girls ages 15-19 ranged from 13 to 16 per thousand in the period 1951-63. From 1963 to 1993, the rate soared from approximately 15 per thousand to 45 per thousand. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, STATISTICAL ABSTRACT OF THE UNITED STATES, cited in David Barton, ORIGINAL INTENT, 242 (Aledo, TX: WallBuilder Press, 2000). The birthrate among unwed girls ages 15-19 peaked at almost 60 per thousand in 1990. Statistical Abstract of the United States, <http://www.census.gov/compendia/statab/tables/08s0083.xls>.

Further, early exposure to sexual media doubles the risk of teen pregnancy. *Sexuality, Contraception, and the Media*, PEDIATRICS, Vol. 126, No. 3 at 578. Frequency of exposure to sexual themes on TV is a correlative predictor of early pregnancy. Chandra, A., *et al.*, *Does Watching Sex on Television Predict Teen Pregnancy? Findings from a National Longitudinal Survey of Youth*, PEDIATRICS, Vol. 122, No. 5 (Nov. 1, 2008) at 1047-54. The study authors concluded, “Our results suggest that television may have a substantial role in the high rates of teenage pregnancy in the United States. High rates of exposure corresponded to twice the rate of observed pregnancies seen with low rates of exposure.” *Id.*

Another important consequence of the rising tide of sexual material on television is an increase in venereal diseases. One out of every four sexually active teenagers contracts a sexually transmitted disease (STD) annually. *Sexuality, Contraception, and the Media*, PEDIATRICS, Vol. 126, No. 3 at 576. Young people between 15 and 24 years of age comprise only one-fourth of the sexually active population, but they are responsible for almost half of the STD diagnoses per year. *Id.* Incidence of gonorrhea in the 10-14 age group was below 18 cases per 100,000 population from 1956 to 1963. From 1963 to 1993, it increased dramatically, reaching 70 cases per 100,000 in 1990. U.S. CENTER FOR DISEASE CONTROL AND DEPARTMENT OF HEALTH AND HUMAN SERVICES, cited in BARTON, ORIGINAL INTENT, *supra*, at 244.

Likewise, family stability as measured by two-parent households decreased. During the period 1950-1963, single parent households in the United States were fewer than 5 million. By 1994, this number exceeded 12 million. STATISTICAL ABSTRACT OF THE UNITED STATES, DEPARTMENT OF COMMERCE CENSUS BUREAU, cited in Barton, ORIGINAL INTENT, *supra*, at 246. By 2006 the United States had over 19 million single parent households, 14 million headed by unmarried women. <http://www.census.gov/compendia/statab/tables/08s0058.xls>.

The consequences of children and adolescents being confronted with the ever increasing graphic nature of sexual material on television have very real consequences for individuals, their families, and for society as a whole. The scientific data is unambiguous on this point. The crux of the matter is that as the Court increased Constitutional protection for individual expression without regard to morality, sexual material proliferated on television and in other media. It is time to recognize the error in this move. Sex on TV has had negative societal consequences, particularly on American children.

V. To the Extent the FCC Seeks To Enforce the Societal Value of Moral Decency, This Court Should Support this Effort.

It is against this background that *Amici*, the American College of Pediatricians and the Christian Medical and Dental Association, respectfully submit that the Court reconsider the reasoning behind its

prior rulings in the area of public decency. By giving First Amendment priority to purveyors of indecent speech, the Court has unwittingly condoned a coarsening of our society. This obviously affects not only American children -- middle school assignments often include books containing sex, immoral behavior and profanity, Schlafly, *supra*, at 102 -- but society as a whole. It is not only children who are debased by an environment of sexual immorality. As we have seen, "over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards." *Roth v. United States*, 354 U.S. at 502 (Harlan, J., concurring in part and dissenting in part).

Legislative restrictions on vulgar expressions are essential to the maintenance of public decency, because unrestrained human desires often tend toward the indecent. Writing about unsavory entertainment, Judge Bork said:

The entertainment industry is not forcing depravity on an unwilling American public. The demand for decadence is there. That fact does not excuse those who sell such degraded material any more than the demand for crack cocaine excuses the crack dealer. But we must be reminded that the fault is in ourselves, in human nature not constrained by external forces.

Bork, GOMORRAH, *supra*, at 132. The "external forces" necessary to restrain the baser desires -- governmental limits on vulgar and obscene

expressions -- have largely been abrogated by the decisions of this Court. They can only be restored by this Court.

The Federal Communications Commission's challenged action is only a tiny step in the direction of restoring moral decency in modern American culture. The FCC only attempts to regulate indecent broadcasts between the hours of 6 a.m. and 10 p.m., though the relevant statute makes no such distinction. 18 U.S.C. 1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."). Even fleeting vulgarities contribute to the coarsening of our culture. To the extent the Commission has determined that even a fleeting expletive constituted a harmful blow to public decency, its finding should be sustained.

It is futile to argue that society cannot legislate morality. In fact, all legislation is an expression of a society's morality. By striking down so many legislative pronouncements designed to support public morality, this Court "has dictated *immorality* through First Amendment jurisprudence." Schlafly, *supra*, at 95.

By expanding protection of pornography and other vulgarities while restricting public religious expression, this Court has had a profound effect on what one scholar has termed our "moral ecology." Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford Univ. Press, 1994). The Founders considered public morality

indispensable to the maintenance of a free society. As President John Adams stated:

[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion.... Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.

John Adams, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, 229 (Charles Frances Adams, ed., Boston: Little, Brown and Company, 1854), Vol. IX, cited in Barton, ORIGINAL INTENT, *supra*, at 319. In a similar vein, Benjamin Franklin said, "[o]nly a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters." Benjamin Franklin, THE WORKS OF BENJAMIN FRANKLIN, 297 (Jared Sparks, ed., Boston: Tappan, Whittimore and Mason, 1840), Vol. X, cited in Barton, ORIGINAL INTENT, *supra*, at 321. The wisdom of our Founders and the cultural decline of the last fifty years suggest that the societal interest in decency and virtue is worthy of legal protection. To the extent the challenged FCC decision is an effort to support public morality, the public interest demands that it be sustained.

CONCLUSION

For the foregoing reasons, the *Amici* request the Court reverse the court below and hold that the FCC's broadcast indecency regulations are constitutional.

Respectfully submitted,

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