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

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BRIEF FOR NATIONAL RELIGIOUS BROADCASTERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

CRAIG L. PARSHALL
Counsel of Record
GENERAL COUNSEL,
NATIONAL RELIGIOUS
BROADCASTERS
9510 Technology Dr.
Manassas, VA 20110
cparshall@nrb.org
(703)330-7000
Attorney for the Amicus Curiae

JOSEPH C. CHAUTIN III
ELISE M. STUBBE
HARDY, CAREY, CHAUTIN &
BALKIN, LLP
Co-Counsel
1080 West Causeway
Approach,
Mandeville, LA 70471
(985)629-0777

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes, Regulations and Legislative History

FCC Orders

Other Sources

INTEREST OF THE AMICUS[1]

The Amicus herein, National Religious Broadcasters ("NRB") is a non-profit membership association with offices in Manassas, Virginia and Washington, D.C. It represents the interests of Christian broadcasters and communicators throughout the nation. The President and CEO of NRB is Frank Wright, Ph.D. The vast majority of our members are broadcasters in the television and radio industry, and include both commercial and non-commercial stations and networks. For more than half a century, the mission of NRB has been to help protect and defend the rights of Christian media and to insure that the channels of electronic communication stay open and accessible for Christian broadcasters to proclaim the Gospel of Jesus Christ, and to minister to the spiritual welfare of the United States.

NRB supports the Petitioners in this case because the Court of Appeals for the Second Circuit has committed a serious error by invalidating the indecency policy of the Federal Communications Commission ("FCC" or "Commission") on First

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[1] The parties have consented to the filing of this brief in letters of consent on file with the Clerk which consent to the filing of all amicus curiae briefs in support of either party or of neither party. No counsel for any party had any role in authoring this brief, and no one other than the *amicus curiae* provided any monetary contribution to its preparation or submission.

Amendment grounds, ruling that the subject policy was void for vagueness. Admittedly, NRB believes that as a general rule the Commission should leave broadcasters, including religious stations, free to produce and generate broadcast content without unnecessary or unreasonable interference. On the other hand, NRB believes that the welfare of America, its families, and its youth, will be detrimentally affected by electronic mass communications which are allowed to contain, during children's viewing hours of 6 am to 10 pm, unrestrained indecency, whether in language or imagery.

We also believe that reversal of the Court of Appeal's decision will further a rational paradigm of free speech values, and will maintain the reasonable balance that has been struck by this Court between that expansive field of expression currently protected from government prohibition, and the short list of those types of speech that fall into narrow, well-defined exceptions which can be subjected constitutionally to content-based government sanction. The broadcasting of indecent content during children's viewing hours fits squarely within those well-established First Amendment exceptions, and the Commission's policy gives ample, sufficiently clear notice to broadcasters of what is prohibited.

SUMMARY OF ARGUMENT

The Court of Appeals failed to address a lynchpin feature of the indecency policy of the FCC. In determining whether broadcast content is "indecent," the Commission's regulation measures the "patently offensive" nature of that content by the yardstick of

"contemporary community standards for the broadcast medium," an element ignored by the Court of Appeals in its decision that the policy was unconstitutionally vague. As a result, the lower court reached its conclusion without considering the fact that this "community standards" element provided the necessary notice to broadcasters of what was prohibited.

This Court has previously affirmed the constitutionality of a "community standards" approach in the context of on-line obscenity aimed at children, in *Ashcroft v. ACLU*, 535 U.S. 564 (2002). Further, the key elements in the FCC's policy here are strikingly similar to other elements of the law under review that was upheld in *Ashcroft*, namely: that there be a gratuitous sexual component of the communication, and also that exemptions apply to content containing *serious social value*, thus excluding, in words of the Commission, such things as "bona fide news" coverage, or where the otherwise indecent content is justified by "artistic necessity," the Commission having pledged itself to give due deference to expression with "social, scientific, or artistic value."

The "community standards for the broadcast medium" language in the Commission's policy clearly gives broadcasters adequate notice of those boundaries where acceptable content ends and indecency begins. This is illustrated by current examples of the broadcast industry continuing to sanction on-air staff who use verbal crudity similar to the language at issue in this case, even when it is clear that the Commission's policy would be inapplicable: as when the incident occurs after 10 pm

at night (when the policy does not apply) or under circumstances where one of the FCC's explicit exemptions would otherwise protect the language that was used.

The Court of Appeals also miscalculated the supposed harm that the Commission's indecency policy imposes on broadcasters. The lower court failed to appreciate, first, that the rule is not a total prohibition, but is a limited policy, geared to those hours when children are most likely to be within a television viewing audience, and that it ceases to apply to programs after 10 pm. Second, the lower court reasoned, wrongly, that the Commission has in the past reached supposedly different outcomes when applying its indecency policy to allegedly similar programs. However, those two broadcasts that contained profane language – the airing of the highly realistic World War II movie "Saving Private Ryan" and a television documentary called "The Blues" which dwelt on a musical genre – can be easily distinguished.

There was logic to the FCC's application of the artistic necessity exemption to "Saving Private Ryan" which portrayed men in a life-and-death conflict, just as there was also a reasoned basis for the Commission's refusal to apply that exemption to the program about blues music because the extreme language there was neither compelled by, nor critically integral to that subject. Third, the Court of Appeals underestimated and in some instances failed to recognize the practical tools that are available to broadcasters and which make the blocking or avoidance of indecent content highly feasible and not cost-prohibitive. Such tools include delayed

broadcasts, or the use of minimal, seconds-long delay together with the "bleeping" of profanity, as well as standard indemnity agreements with on-air talent that shift the burden of indecency fines and attorneys fees from the station to the policy-violating person.

Reversal of the Court of Appeals decision will also restore vitality to the legal logic and common sense inherent in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). The lower court disempowered the force of *Pacifica* by emphasizing a perceived decrease in broadcast prevalence since the time of that decision together with an increased influence of cable and satellite television viewing in American homes. Yet, as we point out, those trends are neither fully accurate nor are they static. Current data shows that broadcasting content is on the rise by some three and a half million viewers compared to 2010. At the same time, studies show a significant decrease in the penetration by cable television within viewing markets.

Moreover, the Court of Appeals also failed to recognize that traditional broadcast content continues to be pervasive even among Americans who have cable or satellite systems, as a result of FCC-mandated "must carry" rules applicable to cable, or "carry one-carry all" rules for satellite transmission. Thus, if in the future indecent content is allowed to proliferate on over-the-air broadcasts, that kind of troublesome content will necessarily find its way into the homes of cable and satellite viewers as well. If the FCC's policy is invalidated in this case, then even those families who intentionally avoid the purchase of viewing packages that contain indecent

material in their subscriptions to cable or satellite systems will still have offensive content entering their homes, this time from unregulated broadcast content that is transmitted through must – carry, or carry one – carry all rules. The "safe haven" for children's viewing that was recognized and upheld in *Pacifica* would, in that event, not only be eradicated for over-the-air broadcast audiences but would be eliminated to a certain degree for cable and satellite viewers as well.

This Court can reaffirm the vitality of *Pacifica* without resorting to the "scarcity of spectrum" factor mentioned in *Red Lion Broad. Co., v. FCC*, 395 U.S. 367 (1969). *Spectrum scarcity* is neither a lynch-pin nor an integral aspect of the Commission's authority to regulate indecency. Instead, as pointed out by this Court in *Pacifica*, such authority inheres in the FCC's position as overseer of the "public interest" in broadcast communications.

Lastly, reversal of the decision of the Court of Appeals for the Second Circuit would be consistent with the First Amendment paradigm outlined in this Court's recent decision in *Brown v. Entertainment Merchants Assn.*, 564 U.S. ___, 131 S. Ct. 2729 (2010) and also with the long line of cases that have upheld indecency restrictions on expression in the case of minors. In *Brown*, this Court stressed the narrow, limited list of those exceptions – like obscenity – where the content of communications can be prohibited without running afoul of the First Amendment. Because indecent content carried over broadcast airwaves during children's viewing hours is legally tantamount to obscenity, both can be restricted constitutionally without imperiling the

generous breadth of the Free Speech provisions of the First Amendment regarding other forms of expression. In several cases in other contexts this Court has reaffirmed that a form of indecent speech that would be otherwise unrestricted for adults can be prohibited when it is made available to children.

While NRB stands zealously committed to the free speech, religious freedom, and free press liberties of communicators, we would stress that those rights must be properly understood jurisprudentially before they can be properly applied. The exceptions of the First Amendment must be historically understood in the context of the intentions of our Founders and as illustrated through America's history and traditions and of course in the precedents of this Court. This Court has wisely been loathed to create new exceptions to the First Amendment – as illustrated by the *Brown* decision. The corollary to that is also true: this Court should be loathed to abandon its very short list of narrow, well-defined, historically recognized exceptions to free speech, which in this case includes indecent expression when it is reasonably defined and appropriately regulated by the Federal Communications Commission.

For all of these reasons, this Court should reverse the decision of the Second Circuit Court of Appeals.

ARGUMENT

I. THE COURT OF APPEALS FATALLY IGNORED THE "COMMUNITY STANDARDS" ELEMENT OF THE FCC RULES

A. The "community standards" element is an integral and constitutionally valid part of the FCC policy

As the Court of Appeals noted in its decision, the policy of the FCC *measures* the legality of a given broadcast, and whether it is "patently offensive," only by reference to "contemporary community standards for the broadcast medium." *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 322 (2d Cir. 2010). The question not answered by the Court of Appeals was whether this "community standards" element provided the sufficient notice to broadcasters, thus giving them a "reasonable opportunity to know what is prohibited." See: *Fox Television Stations*, 613 F.3d at 327, citing *Farrell v. Burke*, 449 F3d 470, 485 (2d Cir. 2006) for the "void for vagueness" principle.

It is difficult to understand how the FCC's policy could be properly analyzed without dealing with the "community standards" element, yet the Court of Appeals failed to analyze that issue. After all, the FCC's foundational 2001 policy expressly stated that the question of "whether the broadcast is 'patently offensive'" is to be "*measured by* contemporary community standards for the broadcast medium." *Fox Television Stations*, 613 F.3d at 322 (emphasis added).

This Court has upheld the validity of regulations that prohibit certain indecent expression based on a "community standards" approach. In *Ashcroft v. ACLU*, 535 U.S. 564 (2002) this Court upheld the constitutionality of the Child Online Protection Act (COPA), which outlawed "indecent and patently offensive communications" over the World Wide Web if they are deemed "harmful to minors;" that phrase was fashioned after the obscenity test of *Miller v. California*, 413 U.S. 15 (1973), to-wit: the material proscribed is that which (a) an "average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;" (b) depicts specified sexual content or actions "in a manner patently offensive with respect to minors," and (c) "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." *Ashcroft*, 535 U.S. at 570, citing 47 U.S.C. § 231 (e)(6) (COPA) (internal quotation marks omitted).

It is clear that the FCC's indecency policy has relied on the substance of the *Miller* test as incorporated into the COPA, an approach which was validated in *Ashcroft*. While the First Amendment infirmity that was claimed (and rejected) in *Ashcroft* was one of *overbreadth*, and the basis of the Second Circuit's opinion here was that the FCC's policy was void for *vagueness*, that distinction does not undermine our analogy to *Ashcroft*. There is a functional inter-relation between the overbreadth

analysis and the vagueness test, the later being subsumed on some occasions into the former. [2]

It is clear that key elements of the FCC policy are strikingly similar to the COPA law upheld in *Ashcroft*. For instance, the policy at issue here incorporates the "contemporary community standards" element in determining whether a broadcast is "patently offensive." Likewise, in construing COPA this Court determined that the question of whether a communication is "'patently offensive' … is also a question of fact to be decided by … applying contemporary community standards." *Ashcroft*, 535 U.S. at 576, n. 7.

In addition, the FCC policy here further incorporates two critical elements similar to those two tests which Congress had added to COPA and which this Court in *Ashcroft* found to be central to its decision upholding the Internet obscenity law there; elements which were found missing, by contrast, in the law under review in *Reno v. ACLU*, 521 U.S. 844 (1997), where this Court struck down on First Amendment grounds the provisions of the Communications Decency Act of 1996 (CDA) – Congress' first attempt to protect children from pornographic material on the Internet. In *Ashcroft* this Court noted that COPA had successfully adopted two prongs of the *Miller* test: the first prong, the

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[2] " … the vagueness of a law affects overbreadth analysis. The Court has long recognized that ambiguous meanings cause citizens to " 'steer far wider of the unlawful zone' … than if the boundaries of the forbidden areas were clearly marked." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 6 (1982), reh. den. 456 U.S. 950 (citations omitted).

"prurient interest test," is further defined as "material …[which is] in some sense erotic." *Ashcroft*, *supra* at 579, citing *Erznoznik v. Jacksonville*, 422 U.S. 205, 213, n. 10 (1975).

This *prurient interest* test is materially similar to the criteria in the FCC policy; for, as the Court of Appeals noted, that policy provides that a broadcast which "describe[s] or depict[s] sexual or excretory organs or activities," may be determined to be "patently offensive," if, in part, "the material appears to pander or is used to titillate …" *Fox Television Stations*, 613 F.3d 317, 321-22 (2d Cir. 2010).

The second critical *Miller* element present in COPA (and also identifiable in the FCC policy here) was the exemption for "works with serious literary, artistic, political, or scientific value." *Ashcroft* at 578. Both of these two elements – the *prurient interest* test and the *serious value* exemption - were found lacking in the CDA, thus causing it to be invalidated in *Reno*. *Id*. at 578.

A version of the *serious value* exemption can likewise be identified in the FCC policy: exempted from the policy are communications that are part of "bona fide news" coverage, or which fit into the "artistic necessity exception," i.e. where the objectionable content is "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance." *Fox, supra* at 331. The FCC has pledged itself to giving due deference to expression that has "social, scientific, or artistic value." *Id*. at 332, citing *Saving Private Ryan, 21 FCC Rcd. 4507, at P 11.* We see nothing in the FCC's treatment of

the offending communications at issue here that casts doubt on the Commission's commitment to proper free speech calibrations in applying its policy.

The Court of Appeals favorably cited *Reno's* warnings about the First Amendment protection that is to be afforded even "indecent" expression. *Fox,* 613 F.3d at 325. Yet, in the final analysis, for the reasons stated above, the FCC policy here more closely resembles the pornography restriction upheld in *Ashcroft*, than the law struck down in *Reno*, and should be upheld for many of the same reasons.

B. "Community standards" counsel in favor of the FCC rulings

The Court of Appeals opined on the creative ways in which current society invents new forms of crudity, and suggested that perhaps "foul language [is] common" more so now as compared to a few decades ago in the immediate aftermath of *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). Yet the societal evidence confirms a different point: that both the media, and the culture at large still continue to recognize traditional boundaries of decency in ways that are strikingly applicable to this case. Such evidence should not be necessary, given the fact that the FCC is an agency deemed to possess expertise in broadcasting matters, and deference to its judgments is the starting point. Nevertheless, this data is further corroboration that the Commission has properly gauged "community standards" for broadcasters when it comes to indecency. [3]

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[3] There is a difference of opinion among two Circuits regarding whether a national rather than a local "community standard"

In the years since the FCC's last policy refinement in 2004, broadcasting stations and programmers have continued to treat on-air profanity as a forbidden practice, even when it concerns broadcasts that are likely to occur *after* the hours regulated by the FCC policy (6 am to 10 pm) or where there is no probable threat of Commission action against them because the circumstances clearly indicate that the policy would not be applicable.

This year an NBC national television news analyst was suspended for use of a word "d—k" during a discussion of the President's news conference.[4] There could have been little chance of an FCC sanction for that on-air comment, firstly, because it fit squarely within the Commission's exemption for "bona fide news" coverage; secondly because that was the same word uttered in a different broadcast for which the FCC found no violation of its policy, a point noted by the Court of

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should be applied in on-line obscenity cases. See: *United States v. Little*, 365 Fed. Appx. 159 (11th Cir. 2010); *United States v. Kilbride*, 584 F.3d 1240, 1252-54 (9th Cir. 2009). But this distinction is irrelevant here: The FCC policy implies a national broadcasting standard, the Commission is presumed to possess the expertise to determine that national standard, and the Respondent broadcasters are obviously engaged in national broadcasting.

[4] "NBC News Analyst Suspended for Obama Obscenity," FoxNews.com, June 30, 2011; http://nation.foxnews.com/nbc-news/2011/06/30/nbc-news-analyst-utters-obama-obscenity-live-air.

Appeals. *Fox*, 613 F.3d at 330. The fact remains that, quite apart from fear of any FCC sanctions, broadcasters are concerned about the sensibilities of viewers, as well as about journalistic standards, ratings, and the potential loss of advertising dollars if they air profane content.

This type of voluntary enforcement among broadcasters of a "community standard" regarding the avoidance of profanity is a widespread practice. A New York television station terminated a reporter for using an on-air, four-letter profanity (the firing was later amended to employee discipline in arbitration); the station's spokesperson stated that the reporter "violated a universally recognized taboo in the broadcast industry." [5] In another instance, an on-air TV anchor's use of a single profanity, even though it occurred at a non-sanctionable time after 10 pm, forced her to publicly apologize for using a "word that many people find offensive." [6] Public apologies are customary, including among affiliates of Fox, one of the respondents, for inadvertent profanity even when it occurs in the late evening hours when the FCC policy doesn't apply. [7] Apologies are also routinely offered even when they are clearly not punishable because they involve an innocent slip-

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[5] "Station Erred in Firing Reporter Who Cursed, Arbitrator Says," New York Times.com, June 1, 2006.

[6] "NBC anchor under fire after using F-word on live TV," The Daily Voice.com, May 14, 2008.

[7] "Fox 5's Ernie Anastos tells weatherman to 'Keep F---ing that chicken' on the air; says he's sorry," New Daily News.com, September 17, 2009.

of-the tongue. [8] CNN has enforced a no-profanity rule with one particular comedian known for her use of crude language, even though she appears during the network's New Year's Eve special, at hours not reachable by the FCC's policy. [9]

Similar standards exist in the radio industry regardless of the technical application, or inapplicability, of the FCC indecency policy, and even include a suspension of a radio host for profanity used off-the-air at a station-sponsored event. [10] And, of course, similar examples for the lack of tolerance for profanity and public depictions of nudity exist in legal contexts: degrading profanity in the workplace, together with posted images of sexually suggestive nudity, have been found to support charges of sexual harassment. [11] Public

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[8] "WDBJ slip-up a viral sensation," The Roanoke Times, Roanoke.com, June 11, 2011.

[9] "Kathy Griffin: If I Curse on New Year's Eve CNN Will Immediately Yank Me Off Live TV," Mediaite.com, December 18, 2010.

[10] "Karel and engineer fired in one-paragraph e-mail and three-minute phone call," Examiner.com, November 11, 2008 (termination for profanities when the staff wrongly thought the microphone was off); " 'Mob' talk dooms radio show," New York Post.com, April 23, 2011 (cancellation of program for profanity during call-in show); "Air America Host Suspended for Clinton Slur," The New York Times.com, April 4, 2008 (program host suspended for "abusive, ad hominem language" at a public event, though not on the air).

[11] *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811-12 (11th Cir. 2010). See also: *Beach v. Yellow Freight Sys.*, 312 F.3d 391, 394-95 (8th Cir. 2002); *Tutman v. WBBM-TV,*

officials, like firemen and teachers, have been terminated or suspended over the displays of nude photographs in the work place, or showing music videos to students that contain sexually-charged nudity. [12] With these common standards being enforced nation-wide in other social situations, it is hard to believe that broadcasters can claim that they are left only to guess that what "indecency" means, particularly in the context of the FCC's detailed rules.

II. THE COURT OF APPEALS MISJUDGED THE SUPPOSED "HARM" TO FREE SPEECH

The Court of Appeals described a parade of free speech *horribles* supposedly resulting from the FCC policy, both "chilling effects" that were alleged to have actually taken place, and those that may occur in the future. *Fox Television Stations,* 613 F.3d 317, 333-35 (2010). [13] Amicus Curiae National Religious Broadcasters is particularly sensitive to the needs of

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Inc./CBS, Inc., 209 F.3d 1044, 1046-47 (7th Cir. 2000); *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 482-83 (3rd Cir. 1997).

[12] Laura Fisherman, "Victoria Firefighters Terminated Over Nude Photos at Station," Houston Employment Laws Blog.com, April 13, 2011; Shannon Halligan, "Teacher resigns over racy music video," WWLP.com, June 22, 2011.

[13] To the extent the lower court considered future *hypothetical* "burdens" on broadcasters who want to venture into indecent content during the regulated time periods, it fails to meet the high legal hurdle established by this Court: as invalidating the FCC policy should be considered "strong medicine" to be used "only as a last resort." *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978) (citations omitted).

broadcasters and public communicators to enjoy the full panoply of First Amendment rights. Because we represent Christian broadcasters and communicators, we also have the unique status of regularly advocating a *triumvirate* of those rights: not only free speech and freedom of the press, but freedom of religion as well. Nevertheless, despite our heightened concern for First Amendment rights as a general matter, we do not see them violated here, and we conclude that the "chilling effects" relied on by the lower court are illusory.

The Court of Appeals contends that the "chilling effect" of the subject policy is evidenced by the supposed disparity of outcomes in the application of the FCC policy. The court contrasted the result in "Saving Private Ryan," a "mainstream movie," as against the outcome for "The Blues," a music documentary. *Id.* at 333-35 (2010). Both involved profanity, though the court emphasized that the Commission permitted it in the former (a highly graphic depiction of the Normandy Invasion during World War II) yet it rebuked it in the later, a contrast that bewildered the lower court. *Id.* at 333.

Yet the distinction made by the Commission had a reasoned basis: profanity could easily be viewed as *integral* to the visceral responses of soldiers caught in the middle of unimaginable brutality; on the other hand, while crude language might be a *chosen* trademark among some musicians, it could hardly be said that inclusion of profanity was *compelled by*, or *essential to* a documentary that had as its real subject matter an exploration of a particular musical genre.

It also must be underscored that the policy at issue is not a total ban on indecency. [14] Significantly, there was a near-total absence of discussion by the Court of Appeals of the actual time limitations of the FCC policy, which only restricts indecent content during those hours where children are most likely to be watching television or listening to the radio. [15] As this Court noted in its previous decision regarding the FCC policy: it was one "which Congress has instructed the Commission to enforce between the hours of 6 am and 10 pm Public Telecommunications Act of 1992, § 16(a), 106 Stat. 954, note following 47 U.S.C. § 303." *FCC v. Fox Television Stations, Inc.*, 556 U.S. ___, 129 S. Ct. 1800, 1806 (2009). Thus, as the Court of Appeals noted, stations are free to slot controversial matter *after* 10 pm, as one station did for the on-air reading of a novel because of a complaint regarding its "adult language." [16] *Fox Television Stations*, *supra* at 334.

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[14] The Court of Appeals opines that it "can think of no reason" why the rationale in *United States v. Playboy Entertainment Group*, *Inc.*, 529 U.S. 803 (2000) which applied "strict scrutiny" to regulations for cable television pornography, should not apply here to broadcast content. *Fox,* at 327. But the obvious "elephant in the room" here is the fact that unlike *Playboy* which involved a "total ban" on speech, *Id*. at 325, the subject policy is in this case is time-of-day limited.

[15] We found only one mention, and that was only a partial one in a footnote: a fleeting reference to the fact that the hours after 10:00 pm are within the "safe harbor" (exempt from indecency restrictions). *Id.* at 324, n.5.

[16] The inference by the lower court that the station's stated concern over the "language" of the book violating the FCC policy was the sole motivating factor in rescheduling the

There are also practical tools, standard in the industry, to shift the burden of those financial costs connected with the broadcast of indecent material where the offending party disregards the policies and warnings of the station. The University of California lists a set of broadcast guidelines as an example which includes this: "Among other things, broadcasters should notify on-air talent, personalities, and guests that reimbursement of FCC fines and attorneys fees, as well as termination, may result from talent's utterance or depiction of obscene, indecent, or profane material during a broadcast." [17]

Of course, broadcasters have still other options available to insure effective compliance with FCC policy: delayed broadcast of potentially indecent content rather than live transmission; and use of minimal broadcast transmission delay plus the

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program is questionable, given the artistic value exception in the FCC rule; nevertheless, for reasons other than merely the "language" of the book (i.e. the subject matter of the novel itself) the FCC policy may not have had much "chilling effect" if at all. The novel, "I am Simmons," by Tom Wolfe presented graphic sexual content that would also have made it, on the whole, a problematic choice for programming consideration during children's listening hours. According to one reviewer, the novel portrayed a "vision of eroticism" on college campuses that was "dark," and the plot centered on one particular "sex-crazed, alcohol-drenched" college campus. Cristina Nehring, "Big Wolfe on Campus," New York Magazine Book Review, Nymag.com, May 21, 2005.

[17] DowLohnes, "Obscenity, Indecency, and Profanity: Guidelines For Broadcasters," June 2006 accessed at: http://www.ucop.edu/irc/services/documents/guidelines.pdf.

"bleeping" of expletives. [18] The First Amendment rights vaunted by the lower court are best preserved by legal decisions that rightly discern the difference between real threats and mere shadows. The Court of Appeals has based its decision on perceived burdens to broadcasters that are more shadow than substance.

III. REVERSAL WILL FOSTER FIRST AMENDMENT VALUES

A. The *Pacifica* case was misapplied by the Court of Appeals

In its decision, the Court of Appeals goes to great lengths to describe the changes in the "media landscape" in America, mentioning the influence of cable television, satellite services, and the Internet; that line of argument being only relevant to the question of whether the assumptions underlying this Court's ruling in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), are still valid, notably the "pervasiveness" of over-the-air broadcasts into the homes of American families and the "accessibility to children" of that content. *Fox Television Stations,* 613 F.3d 326-27. The network respondents had argued below that those assumptions are passé and therefore *Pacifica* is no longer authority, *inter alia*, for the application of the intermediate level of scrutiny that has been applied in its wake. The Court of Appeals formally declined to nullify *Pacifica*, but

[18] "The fact that technological advances have made it easier for broadcasters to bleep out offending words further supports the Commission's stepped-up enforcement policy." *FCC v. Fox Television Stations*, 129 S.Ct. at 1813.

accomplished nearly the same result by reducing it to practical oblivion, calling it "an intentionally narrow opinion," and having "limited scope." *Id*. at 327 and 333. The Court of Appeals has strongly suggested that the basis of *Pacifica* is to be questioned. It's sympathy to the argument of the networks reveals a misunderstanding both about the current prevalence of broadcasting and about *Pacifica* itself.

The lower court's reference to a perceived increasing dominance of cable television cited above and its views on the changes in the "media landscape" underlay its low view of *Pacifica's* vitality. Yet recent data is showing an interesting development that contradicts the court's assumptions. Studies are now demonstrating an increase in over-the-air broadcast viewing by more than three and a half million viewers in the last year. [19] At the same time, cable television preference has been declining to the lowest point since 1989. [20]

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[19] According to data from Knowledge Networks' 2011 Ownership Survey and Trend Report, a part of the *The Home Technology Monitor*, the number of Americans now relying exclusively on over-the-air (OTA) television broadcasting in their home increased to 45.6 million, up from 42 million one year previously. "Over-the-air TV homes increase 10% to 46 million," Rapid TV News.com, August 6, 2011.

[20] According to Nielsen NTI data, "… [w]ired cable penetration … declined to 60.6% in May 2011 from 61.1% in May 2010 – the last time wired-cable penetration has been any lower was in November 1989," "30.9% of American TV Households Now Subscribe to Alternate Delivery, an All-Time High, While Wired Cable Hits 21-Year Low," TVB Local Media Marketing Solutions, TVB.org, June 9, 2011.

As these very recent trends suggest, there is an inherent problem that comes with charting a legal course by the ever-changing winds of technology and consumer preference. To the extent that the Court of Appeals concluded that *Pacifica* is of limited value because over-the-air broadcast content is no longer pervasive in American households, that conclusion must be rejected.

The lower court also failed to recognize the prevalence of over-the-air broadcast content that enters homes through carriage by both cable television companies and satellite services pursuant to "must carry" regulations. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992") amended the Communications Act to mandate carriage of commercial and non-commercial television broadcast signals on cable systems. Pub. L. No. 102-385, 106 Stat. 1460 (1992). Mandatory carriage of commercial broadcasts are covered by 47 USC § 534(a) which provides, in part: "each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section." The statute also defines "local commercial television station" and "qualified low power station". The FCC has no discretion in determining these definitions or the number of channels that cable operators are to devote to local stations. [21]

[21] Must-carry obligations of cable operators were upheld in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 190 (1997) ("Turner II"), where it was noted that despite the growth of cable, "broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's

Regarding mandated carriage of non-commercial broadcasts, 47 USC § 535(a) provides that "in addition to the carriage requirements set forth in section 534 of this title, each cable operator of a cable system shall carry the signals of qualified noncommercial educational television stations in accordance with the provisions of this section."

Satellite systems have similar obligations, (denominated as "carry one – carry all"). Pursuant to authority under the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Pub. L. No. 106-113, 113 Stat. 1501. 47 U.S.C. § 338, *et seq*, the FCC implemented rules at 47 C.F.R. § 76.66 that require that satellite carriers which provide secondary transmission in the local market of a television broadcast station of a primary transmission of that station, "shall carry" on request "all television broadcast stations within that local market …"

"Must carry" regulations are also relevant to this Court's "safe harbor" reasoning regarding indecency rules. In its prior decision, this Court upheld the reasonableness of a Commission rationale that the existence of "other media such as cable, justify a more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe harbor for their children." *FCC v. Fox Television Stations,* 129 S. Ct. at 1819. Because broadcast content is still a presence in the homes of a sizable number of American homes, the reasoning of *Pacifica*

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population," quoting from *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) ("Turner I").

still holds, and the need for a "safe harbor" still exists.

Moreover, the prevalence of broadcast content carried on cable and satellite systems through must-carry regulations is an added argument for the cogency of this "safe harbor" approach. Those parents who carefully choose "family friendly" viewing options through their cable or satellite subscriptions, and refuse to buy programs and channels that are likely to be filled with profanity or nudity or both, will have their viewing preferences countermanded if the respondents have their way in this case. This would occur because "must carry" regulations would continue to cause local broadcast content to be brought into their homes on either cable or satellite systems, while the content would then include the kind of profane, indecent fare that those parents were trying to flee.

While the Court of Appeal emasculated *Pacifica*, by noting its "narrow" and "limited" reach, those observations regarding its minimal scope are actually beside the point. This Court has determined that "we have never held that *Pacifica* represented the outer limits of permissible regulation" when it comes to indecency. *Id.* at 1815. In fact the Court of Appeals appears to concede this, concluding that it reached its First Amendment conclusions "regardless of where the outer limit of the FCC's authority lies …" to formulate indecency rules. *Fox Television Stations*, 613 F.3d at 327.

Lastly, this Court need not utilize, let alone address, the so-called "spectrum scarcity" rationale articulated in *Red Lion Broadcasting Co., v. FCC,*

395 U.S. 367, 400-01 (1969) in order to uphold the basic logic of the *Pacifica* decision. While *Pacifica* did refer to *Red Lion*, it did so only in passing, referencing the refusal in *Red Lion* to invalidate other FCC regulations on the basis of vagueness. *Pacifica*, *supra* at 742. "Spectrum scarcity" as a doctrine has admittedly come under criticism. [22] Yet it need not be a relevant factor let alone a lynchpin here. The foundation for the constitutional aspect of the ruling in *Pacifica* was the recognition of the "uniquely pervasive presence" that television has in the average American home; and how television broadcasts are "uniquely accessible to children." *Supra* at 748, n. 26 and 749. Moreover, the FCC's authority to enforce an indecency policy that prohibits indecent speech and nudity during children's viewing hours does not depend on any particular view of the technology of broadcast "spectrum," but rather is firmly rooted in its obligation to oversee the "public interest" in broadcast communications. *Supra* at 741, n. 16.

B. The *Brown* case counsels reversal of the Court of Appeals

The ability of government to restrict those forms of indecent content that sweep minors within its reach is a narrow, but well-defined exception to the generous breadth of the Free Speech clause of the First Amendment. When this Court hews to such long-standing, and consistently applied exceptions, it

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[22] See generally: Thomas W. Hazlett, Sarah Oh, Drew Clark, *The Overly Active Corpse of Red Lion,* Northwestern Journal of Technology and Intellectual Property, Fall 2010.

also, as a necessary corollary, reinforces the breathing room created for all other speech that is protected. Overly-inventive obliteration of traditional exceptions to the First Amendment is as dangerous a judicial practice, on balance, as is the undisciplined creation of new exceptions. Both approaches evidence a Free Speech jurisprudence that has left its moorings and is drifting away from the history, and traditions that undergird the Constitution.

This Court avoided this dilemma by refusing to recognize novel exceptions to the First Amendment in its recent decisions in *Brown v. Entertainment Merchants Assn.*, 564 U.S. ___, 131 S.Ct. 2729 (2010) (refusing to uphold a new free speech exception for violent video games marketed to minors) and in *United States v. Stevens*, 559 U.S. ___, 130 S.Ct. 1577 (2010) (depiction – as opposed to commission – of animal cruelty held to have First Amendment protection). The legislative provisions reviewed in those cases were invalidated, not because they lacked appealing policy; but rather because they attempted to expand the traditional list of narrow exceptions to the First Amendment by carving out new categories of unprotected speech hitherto unrecognized by constitutional precedent, or by American history or tradition.

In *Brown*, the Court cited those "limited areas – such as obscenity … incitement … and fighting words …" where the content of speech can be restricted; areas which represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Brown*, 131 S. Ct.

2729, 2733, quoting from *Chaplinsky v. New Hamphire*, 315 U.S. 568, 571-572 (1942).

Like obscenity, indecent content generated by broadcast stations in violation of FCC policy, is part of those "well-defined and narrowly limited classes of speech" which can be punished without offending the First Amendment. Indecent expression "surely lie[s] at the periphery of First Amendment concern." *Pacifica*, 438 U.S. at 743.

Similar to the traditional treatment of obscenity, indecency which has minors within its trajectory is also a category of expression which can be prohibited without offending the First Amendment. *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding state statute banning sale of sexually-oriented materials to minors even if it could not similarly prohibit the sale to adults); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (upholding suspension of high school student who made indecent innuendos during an assembly speech with a "captive" audience of 14-year olds, noting that "the otherwise absolute interest of the speaker in reaching an unlimited audience [may be limited] where the speech is sexually explicit and the audience may include children;" and *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (school board may remove books in public school library that are "vulgar").

This Court's most current Free Speech jurisprudence strikes a prudent balance between those handful of well-established, narrowly drawn categories of expression that can be forbidden based on content (including indecency and obscenity), and

the wide range of all other expression that cannot. The FCC's policy follows that balance, and should be upheld.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

CRAIG L. PARSHALL
Counsel of Record
GENERAL COUNSEL,
NATIONAL RELIGIOUS
BROADCASTERS
9510 Technology Dr.
Manassas, VA 20110
cparshall@nrb.org
(703)330-7000

JOSEPH C. CHAUTIN III
ELISE M. STUBBE
HARDY, CAREY, CHAUTIN &
BALKIN, LLP
Co-Counsel
1080 West Causeway
Approach,
Mandeville, LA 70471
(985)629-0777

Attorneys for Amicus Curiae