No. 10-1293

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL., PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

ABC, INC., ET AL.

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

BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

JOSEPH R. PALMORE
Assistant to the Solicitor General

THOMAS M. BONDY
ANNE MURPHY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

AUSTIN C. SCHLICK
General Counsel

PETER KARANJIA
Deputy General Counsel

JACOB M. LEWIS
Associate General Counsel

NANDAN M. JOSHI
Counsel

Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

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

Respondents who were petitioners in the court of appeals in *Fox Televisions Stations* v. *FCC* (Pet. App. 1a-34a) are: Fox Television Stations, Inc., CBS Broadcasting Inc., WLS Television, Inc., KTRK Television, Inc., KMBC Hearst-Argyle Television, Inc., and ABC Inc.

Respondents who were intervenors in the court of appeals in *Fox Televisions Stations* v. *FCC* are: NBC Universal, Inc., NBC Telemundo License Co., NBC Television Affiliates, FBC Television Affiliates Association, CBS Television Network Affiliates, Center for the Creative Community, Inc., doing business as Center for Creative Voices in Media, Inc., and ABC Television Affiliates Association.

Respondents who were petitioners in the court of appeals in *ABC, Inc.* v. *FCC* (Pet. App. 118a-125a) are: ABC Inc., KTRK Television, Inc., WLS Television, Inc., Citadel Communications, LLC, WKRN, G.P., Young Broadcasting of Green Bay, Inc., WKOW Television Inc., WSIL-TV, Inc., ABC Television Affiliates Association, Cedar Rapids Television Company, Centex Television Limited Partnership, Channel 12 of Beaumont Incorporated, Duhamel Broadcasting Enterprises, Gray Television License, Incorporated, KATC Communications, Incorporated, KATV LLC, KDNL Licensee LLC, KETV Hearst-Argyle Television Incorporated, KLTV/KTRE License Subsidiary LLC, KSTP-TV LLC, KSWO Television Company Incorporated, KTBS Incorporated, KTUL LLC, KVUE Television Incorporated, McGraw-Hill Broadcasting Company Incorporated, Media General Communications Holdings LLC, Mission

Broadcasting Incorporated, Mississippi Broadcasting Partners, New York Times Management Services, Nexstar Broadcasting Incorporated, NPG of Texas, L.P., Ohio/Oklahoma Hearst-Argyle Television Inc., Piedmont Television of Huntsville License LLC, Piedmont Television of Springfield License LLC, Pollack/Belz Communication Company, Inc., Post-Newsweek Stations San Antonio Inc., Scripps Howard Broadcasting Co., Southern Broadcasting Inc., Tennessee Broadcasting Partners, Tribune Television New Orleans Inc., WAPT Hearst-Argyle Television Inc., WDIO-TV LLC, WEAR Licensee LLC, WFAA-TV Inc., and WISN Hearst-Argyle Television Inc.

Respondents who were intervenors in the court of appeals in *ABC, Inc.* v. *FCC* are: Fox Television Stations, Inc., NBC Universal, Inc., NBC Telemundo License Co., and CBS Broadcasting, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Constitution, statutes and regulation: Page

Miscellaneous:

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 10-1293

FEDERAL COMMUNICATIONS COMMISSION, ET AL., PETITIONERS

v.

FOX TELEVISION STATIONS, INC., ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

ABC, INC., ET AL.

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

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in *Fox Television Stations, Inc.* v. *FCC* (Pet. App. 1a-34a) is reported at 613 F.3d 317. The order of the Federal Communications Commission under review in *Fox* (Pet. App. 35a-115a) is reported at 21 F.C.C.R. 13,299. The opinion of the court of appeals in *ABC, Inc.* v. *FCC* (Pet. App. 118a-125a) is not published in the *Federal Reporter* but is available at

404 Fed. Appx. 530. The order of the Federal Communications Commission under review in *ABC* (Pet. App. 126a-214a) is reported at 23 F.C.C.R. 3147.

JURISDICTION

The judgment of the court of appeals in *Fox* was entered on July 13, 2010. A petition for rehearing was denied on November 22, 2010 (Pet. App. 116a). On February 10, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari in *Fox* to and including March 22, 2011. On March 10, 2011, Justice Ginsburg further extended the time within which to file a petition for a writ of certiorari in *Fox* to and including April 21, 2011. The judgment of the court of appeals in *ABC* was entered on January 4, 2011. On March 25, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari in *ABC* to and including May 4, 2011. The petition for a writ of certiorari in both cases was filed on April 21, 2011, and was granted on June 27, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant statutory and regulatory provisions are set out in an appendix to the petition for a writ of certiorari. See Pet. App. 263a-267a.

STATEMENT

1. Since before the first broadcast stations appeared in 1921, federal law has provided that the radio spectrum may be used only with a federal license and only in compliance with federal regulatory requirements. See Act of Aug. 13, 1912, ch. 287, §§ 1-3, 37 Stat. 302-303; *National Broad. Co.* v. *United States*, 319 U.S. 190, 210-211 (1943). To better effectuate that policy, Congress adopted a

comprehensive regime of broadcast regulation in the Radio Act of 1927, ch. 169, 44 Stat. 1162, which it later incorporated in significant part into the Communications Act of 1934 (Communications Act), ch. 652, 48 Stat. 1064, 47 U.S.C. 151 *et seq.*; see 47 U.S.C. 301-399b (2006 & Supp. III 2009). This regulatory regime serves "to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. 301; see Radio Act of 1927, § 1, 44 Stat. 1173 (same). Such licenses do not "create any right, beyond the terms, conditions, and periods of the license" itself. 47 U.S.C. 301.

Broadcast licenses are issued only to serve "the public interest, convenience, and necessity." 47 U.S.C. 309(a). Under this regime, a "licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1806 (2009) (*Fox*) (quoting *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981)); see 47 U.S.C. 301 (prohibiting broadcasting "except under and in accordance with [the Communications Act] and with a license"). Since 1927, one of those "enforceable public obligations" (*Fox*, 129 S. Ct. at 1806) has been the prohibition on "utter[ing] any obscene, indecent, or profane language by means of radio communication." 18 U.S.C. 1464; see Radio Act of 1927, § 29, 44 Stat. 1173; Communications Act § 326, 48 Stat. 1091.

2. In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*), the Court rejected a constitutional challenge to the FCC's exercise of its longstanding statu-

tory authority to regulate broadcast indecency. At issue in *Pacifica* was the midday radio broadcast of George Carlin's "Filthy Words" monologue, which discussed "the words you couldn't say on the public * * * airwaves, * * * the ones you definitely wouldn't say, ever." *Id.* at 729. Responding to a listener complaint, the Commission concluded that the Carlin monologue was "indecent" and that its broadcast therefore violated Section 1464. *Id.* at 732. In reaching that conclusion, the Commission applied a "concept of 'indecent' [that] is intimately connected with the exposure of children to language that describes, in terms patently offensive 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." *Id.* at 731-732 (quoting *In re Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y.*, 56 F.C.C. 2d 94, 98 (1975)); see *Fox*, 129 S. Ct. at 1806 (noting that the FCC's "definition of indecent speech" at issue in *Pacifica* is the same one the agency "uses to this day").

In rejecting a First Amendment challenge to the FCC's conclusion that broadcast of the Carlin monologue was indecent, the Court noted that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748. The Court explained that "[t]he reasons for these distinctions are complex," but that two of them had particular relevance to that case. *Ibid.* First, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans" because "material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the

First Amendment rights of an intruder." *Ibid.* (citation omitted); see *ibid.* ("Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."). Second, the Court observed that "broadcasting is uniquely accessible to children," and that broadcasts of indecent language can "enlarge[] a child's vocabulary in an instant." *Id.* at 749. Accordingly, the Court concluded that in this context "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression." *Ibid.* (quoting *Ginsberg* v. *New York*, 390 U.S. 629, 639, 640 (1968)).

The Court in *Pacifica* emphasized that the constitutionality of the FCC's regulatory authority over indecent broadcasting rested on the agency's use of "a nuisance rationale under which context is all-important." 438 U.S. at 750. That "concept requires consideration of a host of variables," including the "time of day" and the "content of the program in which the language is used," which "will also affect the composition of the audience." *Ibid.* The Court explained that, under the agency's contextual approach, the words that rendered the Carlin monologue indecent might not support the same result if they appeared in "a telecast of an Elizabethan comedy." *Ibid.*

3. For several years after *Pacifica*, the Commission implemented an enforcement policy under which only "deliberate, repetitive use of the seven words actually contained in the George Carlin monologue" would be deemed actionably indecent. *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 12 (1987). That "approach permitted the unregulated broadcast of any material that did not contain Carlin's 'filthy words,' no matter how the

material might affect children exposed to it." *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988) (*ACT I*) (R.B. Ginsburg, J.).

In 1987, the Commission reassessed its broadcast indecency enforcement policy in cases involving three different radio broadcasts. One was a morning broadcast by "shock jock" Howard Stern, which contained "explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation, and testicles." *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 932 ¶ 20 (1987) (*Infinity Order*). Another was an evening airing of excerpted portions of a theatrical play that "contained the concentrated and repeated use of vulgar and shocking language to portray graphic and lewd depictions of excretion, anal intercourse, ejaculation, masturbation, and oral-genital sex." *Id.* at 932 ¶ 18. The third involved the evening broadcast of a song that contained "both lewd references to the male genitals and lewd descriptions of intercourse and oral-genital sex." *Id.* at 933 ¶ 22.

The Commission concluded that each of those broadcasts was indecent even though not all of them used the expletives included in the Carlin monologue. The Commission found that its post-*Pacifica* focus on "the repeated use, for shock value, of words similar to or identical to those satirized in the Carlin 'Filthy Words' monologue" was "unduly narrow as a matter of law and inconsistent with [its] enforcement responsibilities under Section 1464." *Infinity Order*, 3 F.C.C.R. at 930 ¶¶ 4-5. The Commission therefore announced that, in determining whether a particular broadcast was indecent, it would instead use the "generic definition of indecency" articulated in its 1975 *Pacifica* order. *Id.* at 930 ¶ 5. The Com-

mission further explained that, in applying that definition, it would consider, *inter alia*, whether the words or depictions used are "vulgar" or "shocking," whether the broadcast of such material is isolated, the character of the audience, and the merit of the program as it relates to the broadcast's patent offensiveness. *Id.* at 932 ¶ 16 (footnotes omitted). The Commission declined to develop a "comprehensive index or thesaurus of indecent words or pictorial depictions," explaining that it would be impossible "to construct a definitive list that would be both comprehensive and not over-inclusive in the abstract, without reference to the specific context." *Id.* at 932 ¶ 14.

In 1988, the D.C. Circuit upheld "the generic definition the FCC has determined to apply, case-by-case, in judging indecency complaints." *ACT I*, 852 F.2d at 1334. The parties challenging the FCC's policy in that case argued that the Commission had failed adequately to explain its decision to adopt that policy in place of its post-*Pacifica* focus on repetitive use of the words in the Carlin monologue. *Id.* at 1338. The court of appeals rejected that argument, stating that unless "*only* the seven dirty words are properly designated indecent[,] * * * some more expansive definition must be attempted," and "[n]o reasonable formulation tighter than the one the Commission has announced has been suggested." *Ibid.*

The D.C. Circuit also rejected the contention that the Commission's "indecency enforcement standard is facially invalid because unconstitutionally vague." *ACT I*, 852 F.2d at 1334; see *id.* at 1338-1339. The court observed that the "generic definition of indecency now employed by the FCC is virtually the same definition the Commission articulated" in *Pacifica*, and that this Court in *Pacifica* had held "the Carlin monologue indecent

within the meaning of section 1464." *Id.* at 1338-1339. The D.C. Circuit "infer[red]" from *Pacifica* that this Court "did not regard the term 'indecent' as so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Id.* at 1338-1339 (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)).

In a later portion of the same decision, the D.C. Circuit remanded the Commission's tentative determination that indecent material could be broadcast only after midnight, finding that the Commission had "failed to consider fairly and fully what time lines should be drawn." *ACT I*, 852 F.2d at 1341. The same court subsequently invalidated a congressional directive to enforce Section 1464 "on a 24 hour per day basis." *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1507 (D.C. Cir. 1991) (emphasis omitted), cert. denied, 503 U.S. 913 (1992) (*ACT II*). The D.C. Circuit later upheld a 10 p.m. to 6 a.m. statutory safe harbor for indecent broadcasts. See *Action for Children's Television* v. FCC, 58 F.3d 654, 656 (1995) (en banc), cert. denied, 516 U.S. 1043 (1996) (*ACT III*); Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 954. The FCC's current regulations thus provide that "[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent." 47 C.F.R. 73.3999(b). There is no regulation of indecent material broadcast during the 10 p.m. to 6 a.m. safe harbor.

4. In 2001, the Commission issued a policy statement "to provide guidance * * * regarding [its] case law interpreting 18 U.S.C. § 1464 and [its] enforcement policies with respect to broadcast indecency." *In re Industry Guidance on the Commission's Case Law Interpreting*

18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, 16 F.C.C.R. 7999, 7999 ¶ 1 (2001) (*Industry Guidance*). That policy statement explained that "[i]ndecency findings involve at least two fundamental determinations." *Id.* at 8002 ¶ 7. First, the material at issue "must fall within the subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities." *Ibid.* (citation omitted). Second, "the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium." *Id.* at 8002 ¶ 8 (emphasis omitted).

The policy statement explained that the determination whether a broadcast is "patently offensive" depends on the "full context" in which the material is broadcast and is therefore "highly fact-specific." *Industry Guidance*, 16 F.C.C.R. at 8002-8003 ¶ 9 (emphasis omitted). The agency identified three "principal factors" that guide the analysis of patent offensiveness:

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; [and] (3) whether the material appears to pander or is used to titillate, [and] whether the material appears to have been presented for its shock value.

Id. at 8003 ¶ 10 (emphasis omitted).

5. In January 2003, the NBC network aired a live broadcast of the Golden Globe Awards. During the broadcast, the singer Bono stated, in accepting an award, "This is really, really f***ing brilliant. Really, really great." *In re Complaints Against Various Broad. Li-*

censees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4976 n.4 (2004) (*Golden Globe Awards Order*). The Commission concluded that the broadcast was indecent even though Bono's use of the F-Word was not "sustained or repeated." *Id.* at 4980 ¶ 12. The Commission acknowledged that it was departing from prior agency decisions holding that "isolated or fleeting use[s] of the 'F-Word' or a variant thereof in situations such as this [are] not indecent," and it made clear that such cases "are not good law to that extent." *Ibid.* Under its revised policy, the Commission explained, "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *Ibid.* Because the Commission's analysis reflected an acknowledged departure from its prior indecency enforcement policy, the FCC declined to impose any sanction. *Id.* at 4981-4982 ¶ 15.

6. The *Fox* case arises out of two broadcasts that aired before the Commission released the *Golden Globe Awards Order*. On December 9, 2002, Fox broadcast the 2002 Billboard Music Awards beginning at 8 p.m. Eastern Standard Time. The program was viewed by millions of children, including more than one million under age 11. Pet. App. 92a. During that broadcast, the entertainer Cher received an "Artist Achievement Award." In her acceptance speech, she stated: "I've had great people to work with. Oh, yeah, you know what? I've also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** 'em. I still have a job and they don't." *Id.* at 89a.

Approximately one year later, on December 10, 2003, Fox again broadcast the Billboard Music Awards, which

aired between 8 p.m. and 10 p.m. Eastern Standard Time. Like the 2002 broadcast, the program was viewed by millions of children. Pet. App. 50a. Nicole Richie and Paris Hilton, the stars of Fox's program "The Simple Life," presented one of the awards that night. During their presentation, they engaged in the following exchange:

Paris Hilton:	Now Nicole, remember, this is a live show, watch the bad language.
Nicole Richie:	Okay, God.
Paris Hilton:	It feels so good to be standing here tonight.
Nicole Richie:	Yeah, instead of standing in mud and [audio blocked]. Why do they even call it "The Simple Life?" Have you ever tried to get cow s*** out of a Prada purse? It's not so f***ing simple.

Id. at 42a-44a.

a. Following the two Billboard Music Awards broadcasts, the Commission received complaints from viewers, *e.g.*, J.A. 194-203, and the agency issued an order concluding that both broadcasts contained "indecent" language. J.A. 101-103, 105-110. As in the *Golden Globe Awards* case, the Commission did not impose any sanction because Fox had aired the relevant broadcasts before the Commission announced its revised policy regarding the airing of isolated expletives. J.A. 105, 112-113.

Fox and other broadcasters filed petitions for review, which were consolidated in the Second Circuit. The Commission obtained a voluntary remand from that

court to provide a further opportunity to consider the broadcasters' challenges to the Commission's order. The Commission subsequently vacated the relevant portions of the prior order and substituted the order under review in *Fox*. See Pet. App. 35a-115a. In that order, the Commission reaffirmed its conclusion that Fox's airing of the 2002 and 2003 Billboard Music Awards violated the prohibitions against the broadcast of indecent material before 10 p.m.

Applying the framework set out in its *Industry Guidance*, the Commission concluded that the expletives aired during both Billboard Music Awards broadcasts were sexual or excretory references that fell within the subject-matter scope of the Commission's indecency policy. Pet. App. 46a-48a, 90a-91a. The Commission further concluded that both broadcasts were "patently offensive." The Commission found that the language used was not only graphic and shocking, particularly in the context of nationally televised awards programs viewed by substantial numbers of children, but also gratuitous. In that regard, the Commission noted that Fox had not argued that the expletives at issue "had any artistic merit or were necessary to convey any message." *Id.* at 48a-49a & n.44, 91a-92a & n.191. The Commission adhered to its prior decision not to impose any sanction on Fox for the broadcasts. See *id*. at 85a-86a, 97a.

b. A divided panel of the court of appeals vacated the Commission's order and remanded the case to the agency for further proceedings. *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444 (2d Cir. 2007), rev'd, 129 Ct. 1800 (2009). The court concluded that the Commission's change of policy regarding isolated expletives was "arbitrary and capricious under the Administrative Procedure

Act" because the agency had "failed to articulate a reasoned basis" for the shift. *Id.* at 447.

c. This Court reversed. Noting that "Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission," *Fox*, 129 S. Ct. at 1813, the Court found that "the agency's reasons for expanding the scope of its enforcement activity were entirely rational," *id.* at 1812. The Court emphasized that "the Commission's decision to look at the patent offensiveness of even isolated uses of sexual and excretory words" conformed to "the context-based approach" that the Court had "sanctioned in *Pacifica.*" *Ibid.* The Court explained that "[t]he agency's decision to retain some discretion does not render arbitrary or capricious its regulation of the deliberate and shocking uses of offensive language at the award shows under review—shows that were expected to (and did) draw the attention of millions of children." *Id.* at 1814. Because "[t]he Second Circuit did not definitively rule on the constitutionality of the Commission's orders," this Court "decline[d] to address the constitutional questions" and remanded the case to the court of appeals for further proceedings. *Id.* at 1819.

d. On remand, the court of appeals did not limit its inquiry to the constitutionality of the Commission's isolated-expletives policy as applied to Fox's broadcasts of the 2002 and 2003 Billboard Music Awards. Instead, the court held that the "FCC's indecency policy is unconstitutional" as a whole "because it is impermissibly vague." Pet. App. 18a. The court therefore "grant[ed] the petition for review and vacate[d]," not just "the FCC's order," but the entire "indecency policy underlying it." *Id.* at 2a.

The court of appeals understood "the FCC's current policy" to establish a "presumptive prohibition" on the use of the F- and S-Words unless their use is "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance," or the words are uttered in the course of a "bona fide news" program. Pet. App. 25a-26a (quoting J.A. 90). The court did not suggest that the broadcasts before it were news programs or that Fox had included the expletives in order to inform viewers or express an artistic message. The court nevertheless concluded that the FCC's policy is unconstitutionally vague because "broadcasters are left to guess whether an expletive will be deemed 'integral' to a program or whether the FCC will consider a particular broadcast a '*bona fide* news interview.'" *Id.* at 27a.

The court of appeals recognized that the FCC had adopted a contextual approach to indecency, rather than a rigid rule prohibiting specified words, in part because "an outright ban on certain words would raise grave First Amendment concerns." Pet. App. 27a. The court also acknowledged that "[t]he English language is rife with creative ways of depicting sexual or excretory organs or activities," so that "even if the FCC were able to provide a complete list of all such expressions, new offensive and indecent words are invented every day." *Id.* at 24a. In the court's view, however, the "flexibility" of the FCC's contextual approach to indecency enforcement "results in a standard that even the FCC cannot articulate or apply consistently." *Id.* at 27a. On that basis, the court of appeals "str[uck] down the FCC's indecency policy" in its entirety. *Id.* at 34a.

6. The *ABC* case arises out of a February 25, 2003, broadcast, at 9:00 p.m. in the Central and Mountain time

zones, of an episode of the television show NYPD Blue entitled *Nude Awakening*.[1] The show opens with "a woman wearing a robe * * * entering a bathroom, closing the door, and then briefly looking at herself in a mirror hanging above a sink." Pet. App. 223a. "With her back to the camera," the woman "removes her robe, thereby revealing the side of one of her breasts and a full view of her back." *Ibid.* "The camera shot includes a full view of her buttocks and her upper legs as she leans across the sink to hang up her robe." *Ibid.* As she walks from the mirror to the shower, "a small portion of the side of one of her breasts is visible," and "her buttocks are visible from the side." *Ibid.*

The camera then shifts to show a young boy getting out of bed and walking toward the bathroom, at which point "[t]he camera cuts back to the woman, who is now shown standing naked in front of the shower, her back to the camera." Pet. App. 223a-224a. The camera first shows the woman "naked from the back, from the top of her head to her waist." *Id.* at 224a. "[T]he camera then pans down to a shot of her buttocks, lingers for a moment, and then pans up her back." *Ibid.* Next, the boy is shown opening the bathroom door. *Ibid.* As he does so, the woman "quickly turns to face" him. *Ibid.* "The camera initially focuses on the woman's face but then cuts to a shot taken from behind and through her legs, which serve to frame the boy's face as he looks at her." *Ibid.*

The camera immediately shifts to "a front view of the woman's upper torso," although a "full view of her breasts is obscured * * * by a silhouette of the boy's

---

[1] A recording of this episode, which was part of the record before the court of appeals, has been filed with the Clerk.

head and ears." Pet. App. 224a. "After the boy backs out of the bathroom and shuts the door," the woman is shown "facing the door, with one arm and hand covering her breasts and the other hand covering her pubic area." *Ibid.* "The scene ends with the boy's voice, heard through the closed door, saying 'sorry,'" to which "the woman while looking embarrassed, responds, 'It's okay. No problem.'" *Ibid.*

a. After receiving viewer complaints and issuing a notice of apparent liability regarding the program, the FCC imposed an indecency forfeiture of $27,500 on each of several ABC network-owned stations or affiliates. Pet. App. 126a-214a. Applying the framework set out in its *Industry Guidance*, including the longstanding agency definition of indecency that this Court approved in *Pacifica*, the Commission first concluded that the depiction of an adult woman's naked buttocks in the episode constituted a depiction of sexual or excretory organs and thus fell within the subject-matter scope of the Commission's indecency policy. *Id.* at 132a-137a.

The Commission then determined that "in context and on balance, the complained-of material is patently offensive as measured by contemporary community standards for the broadcast medium." Pet. App. 138a. In explaining that determination, the Commission observed that the episode contained a "close range," "fully visible" view of the actress's unclothed buttocks that was "sufficiently graphic and explicit to support an indecency finding." *Id.* at 140a. The Commission further explained that camera shots of the woman's buttocks were "repeated" within the scene, which "focuses on her nudity." *Id.* at 142a. Finally, the Commission determined that the scene was "pandering, titillating, and shocking." *Id.* at 143a. The FCC explained that the scene placed the

audience in the "voyeuristic position" of observing a naked woman preparing to shower, and that the manner in which the scene was shot "highlights the salacious aspect of the scene." *Id.* at 143a-144a. The Commission also found that "subsequent camera shots of the boy's shocked face from between the woman's legs, and of her naked, partially-obscured upper torso from behind his head," contributed to the scene's "titillating and shocking nature." *Id.* at 144a.

b. ABC and its affiliates sought review of the *Forfeiture Order* in the Second Circuit. After denying the government's rehearing petition in *Fox*, the court of appeals issued a summary order in *ABC* vacating the Commission's order. The court concluded that "there is no significant distinction between this case and *Fox*" because "[a]lthough this case involves scripted nudity, the case turns on an application of the same context-based indecency test that *Fox* found 'impermissibly vague.'" Pet. App. 124a (citation omitted). As in *Fox*, the court of appeals did not address the question whether, on the facts of the case, the broadcaster had constitutionally sufficient notice that the relevant material could be considered indecent.

SUMMARY OF ARGUMENT

The FCC's indecency enforcement policies are consistent with the Fifth and First Amendments, both as applied to the broadcasts at issue here and on their face.

1. a. In addressing respondents' vagueness challenges, the court of appeals never asked what should have been the dispositive question: whether Fox and ABC had fair notice that the expletives and nudity in the broadcasts under review could violate the Commission's indecency standards. Instead, the court in *Fox* invali-

dated the FCC's policy in its entirety, based on the policy's application to broadcasts not before the court and on perceived inconsistencies between those applications. The court in *ABC* likewise did not consider the particular broadcast at issue but relied solely on the prior decision in *Fox*. That approach was incorrect. Even in adjudicating First Amendment challenges, courts must "consider whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2718-2719 (2010) (internal citation omitted and brackets in original) (*HLP*).

b. Any as-applied vagueness challenge regarding the particular broadcasts here would fail. Fox could not reasonably have believed that the concededly gratuitous broadcast of the F-Word and the S-Word, during primetime awards shows with millions of children in the audience, would not be considered indecent. Those words have long been a focus of the FCC's indecency enforcement efforts, and they featured prominently in the Carlin monologue itself. The networks' own internal standards generally prohibit broadcast of those words, and Fox edited them out of the relevant awards-show broadcasts when they aired on tape delay in later time zones. In finding the FCC's enforcement standards to be unconstitutionally vague, the court of appeals relied on FCC indecency orders involving news, public affairs programming, or artistic necessity. Those orders did not create any meaningful uncertainty as to the legal status of Fox's own broadcasts, however, because there is no reasonable argument that Fox's awards-show broadcasts fell into any of those categories.

ABC likewise had constitutionally sufficient notice that its broadcast of adult nudity in the NYPD Blue episode would be considered indecent. As the Court explained in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), the Commission long ago warned broadcasters that "the televising of nudes might well raise a serious question of" unlawful indecency, even if the images lack "prurient appeal." *Id.* at 741 & n.16 (quoting *Enbanc Programing Inquiry*, 44 FCC 2303, 2307 (1960)). Although the FCC has not categorically treated all images of nudity as indecent, the "voyeuristic" (Pet. App. 143a) images contained in ABC's broadcast cannot reasonably be analogized (as ABC suggests) to a scene involving nude concentration camp prisoners in a broadcast of the film "Schindler's List."

c. Even if the court of appeals had been authorized to conduct what amounted to facial vagueness review, the court erred in finding the FCC's indecency enforcement regime to be unconstitutionally vague. In carrying out its statutory duty to enforce the prohibition on the broadcast of indecent material, the Commission employs a definition of indecency—and a contextual approach to applying it—that this Court upheld in *Pacifica*.

The Commission has provided further guidance to broadcasters as to the types of material that may be found indecent, not only through specific rulings in particular cases, but in a comprehensive policy statement issued in 2001. The FCC enforces its broadcast indecency regulation only against broadcast licensees, who are highly sophisticated entities that operate in a heavily regulated market. Those licensees can reasonably be expected both to pay particular attention to the agency's explication of its indecency standard and to be familiar with "contemporary community standards *for the broad-*

cast medium." *Pacifica*, 438 U.S. at 732 (emphasis added). Indeed, the major networks have personnel and internal rules dedicated to compliance with those standards.

Broadcasters that nonetheless remain uncertain about whether particular material is indecent are free to air it during the regulatory safe harbor after 10 p.m. Further mitigating any vagueness concerns, the Commission has consistently declined to impose penalties in cases in which a broadcaster lacked fair notice that the Commission's indecency policy might apply.

Although the FCC could in theory respond to the court of appeals' vagueness holdings by compiling a list of categorically prohibited words or images, such an approach would be inconsistent with the contextual analysis of indecency that the Commission has long applied and that this Court "sanctioned in *Pacifica*." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1812 (2009). Abandoning consideration of context would be both over- and under-inclusive, since it would require sanctioning even those broadcasts that are unlikely to attract child viewers, while permitting broadcasts of grossly offensive material that avoids the listed words and images.

2. The FCC indecency determinations at issue here are consistent with the First Amendment principles announced in *Pacifica*, and there is no basis for overruling that decision.

a. Although Fox's broadcasts did not involve repetition of offensive language to the degree present in *Pacifica*, this Court "ha[s] never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden." *Fox*, 129 S. Ct. at 1815. A single expletive uttered by a celebrity during an awards show can "enlarge[] a child's vocabu-

lary in an instant," *Pacifica*, 438 U.S. at 749, and "[p]rogramming replete with one-word indecent expletives will tend to produce children who use (at least) one word indecent expletives." *Fox*, 129 S. Ct. at 1813. The First Amendment does not prevent the government from safeguarding against that outcome in furtherance of its compelling interest in protecting children.

The First Amendment likewise does not bar application of the FCC's indecency policy to ABC's broadcast of adult nudity. Contrary to ABC's contention, the Constitution does not provide blanket immunity for broadcast nudity that is not "highly sexualized" or that appears on screen for only seven seconds. ABC Br. in Opp. 27. Nor does the First Amendment require the FCC to present scientific evidence of harm from such material. "The Commission had adduced no quantifiable measure of the harm caused by the language in *Pacifica*, and [this Court] nonetheless held that the 'government's interest in the well-being of its youth . . . justified the regulation of otherwise protected expression.'" *Fox*, 129 S. Ct. at 1813 (quoting *Pacifica*, 438 U.S. at 749) (some internal quotation marks omitted).

b. Respondents have identified no sound basis for overruling this Court's decision in *Pacifica*. Both with respect to indecent speech and more generally, this Court has long applied less demanding First Amendment scrutiny to regulation of broadcast speech than to regulation of other communications media. That established rule has historically been premised on the scarcity of available broadcast frequencies, the pervasive presence of broadcast media, and the unique accessibility of broadcast programming to children. Those characteristics of broadcasting remain true today.

Because of "the unique physical limitations of the broadcast medium," *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994) (*Turner I*), the number of would-be broadcasters has long exceeded the number of available frequencies. Federal allocation of specific frequencies along the spectrum therefore has been essential to effective broadcast communication. A broadcast license thus carries with it substantial benefits that would not be available in a wholly unregulated market, and the licensee's acceptance of those benefits has historically carried with it an enforceable obligation to operate the franchise in a manner that serves the public interest. Despite the intervening technological developments that respondents identify, there continue to be more would-be broadcasters than available frequencies.

Even with the rise of alternative transmission platforms like cable, broadcast programming maintains a dominant presence in American life and culture. Millions of households in which television sets are present do not subscribe to cable or satellite services and therefore receive only broadcast programming. Broadcast programming also remains uniquely accessible to children, in part because its availability to children does not depend on any affirmative conduct by parents (such as subscription to a particular cable channel) beyond the initial acquisition of a television or radio.

The expansion of alternate transmission platforms does not render the FCC's broadcast-indecency regime obsolete. To the contrary, the current availability of a great range of programming alternatives mitigates any First Amendment concerns regarding broadcast regulation, since both viewing adults and content creators have a greater range of opportunities (as compared to those

that existed when *Pacifica* was decided) to access and convey programming that is not appropriate for children.

The "V-Chip" is not an effective substitute for the FCC's indecency-enforcement rules, and its existence does not undermine *Pacifica*. The V-Chip does not work with radio broadcasts at all, and the television ratings on which it depends are frequently inaccurate. Indeed, with respect to the particular broadcasts at issue in this case, the V-Chip would not have assisted parents because the ratings for the programs did not reflect the content that the FCC found indecent.

The Commission's indecency-enforcement rules remain a reasonable and constitutional implementation of the government's compelling interest in protecting children from harmful exposure to sexual or excretory words and images. Generations of parents have relied on indecency regulation to safeguard broadcast television as a relatively safe medium for their children. The rise of alternative communications media has strengthened, not undermined, that reliance interest.

Broadcasters have no substantial countervailing reliance interest. Regulation of indecent material has been a defining feature of broadcasting since the medium's very inception, and it is one of the enforceable public obligations that broadcasters accept in return for their free use of the public's airwaves. *Fox*, 129 S. Ct. at 1806. And under the Commission's rules, broadcasters are not entirely disabled from broadcasting indecent material, but are simply required to channel it to the hours (after 10 p.m.) when it is unlikely to reach large numbers of children. That measured approach to indecency enforcement strikes a reasonable balance between the government's compelling interest in protecting children and the speech rights of adults.

ARGUMENT

I. THE COMMISSION'S INDECENCY DETERMINATIONS ARE CONSISTENT WITH THE FIFTH AMENDMENT

This case involves challenges to two FCC adjudicatory orders finding three particular broadcasts indecent. Rather than determining whether those specific indecency findings were constitutionally infirm, however, the court of appeals struck down the FCC's "indecency policy" in its entirety, based on the assertedly inconsistent manner in which that policy had been applied to *other* broadcasts. Pet. App. 2a, 34a. In taking that approach, the court of appeals disregarded this Court's repeated admonitions that vagueness analysis should focus on the facts of the case at hand. In any event, the court of appeals erred in finding that the FCC's indecency policy is facially vague.

A. The Court Of Appeals Erred In Finding The FCC's Indecency Enforcement Policy Unconstitutionally Vague Based On Broadcasts Not Before The Court

As this Court recently emphasized, a court confronted with a vagueness challenge should "consider whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2718-2719 (2010) (quoting *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). "That rule makes no exception for conduct in the form of speech." *Id.* at 2719. Accordingly, "even to the extent a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amend-

ment for lack of notice." *Ibid.*; see *Parker* v. *Levy*, 417 U.S. 733, 755-757 (1974).

With respect to respondents' vagueness challenges, the only question properly before the court of appeals therefore was whether the particular broadcasts at issue—the 2002 and 2003 Billboard Music Awards and the *Nude Awakening* episode of NYPD Blue—were "clearly proscribed" by the FCC's indecency policy. *HLP*, 130 S. Ct. at 2719. The court of appeals simply ignored that controlling question.[2] Instead, like the Ninth Circuit in *HLP*, the court in effect applied overbreadth analysis to petitioners' Fifth Amendment vagueness challenge by "consider[ing] the [FCC policy's] application to facts not before it." *Ibid.*; see pp. 28-30, *infra* (discussing court of appeals' comparisons among various orders other than the ones under review). The court of appeals never explained how other Commission orders (all of which were issued *after* the broadcasts in this case) could have deprived Fox of notice that the gratuitous use of the F-Word and S-Word on its prime-time awards show broadcasts would be considered indecent. The court of appeals in *ABC* likewise did not "consider whether" the FCC's policy was "vague as applied to the particular facts at issue," 130 S. Ct. at 2718-2719, namely the scripted adult nudity in the opening scene of *Nude Awakening*. Instead, the *ABC* court vacated the Commission's indecency sanction based solely on its antecedent holding of facial vagueness in *Fox*. Pet. App. 120a.

By "strik[ing] down the FCC's indecency policy" in its entirety, Pet. App. 34a, the court precluded the policy's

---

[2] The court of appeals' only response to the government's reliance on *HLP* was the unelaborated statement that the case was "inapposite" because of its "entirely different procedural posture." Pet. App. 30a n.9.

application not only to the broadcasts at issue here, but also to a hypothetical rebroadcast of the Carlin monologue itself, and to the most graphic and explicit material that has come before the Commission, see, *e.g.*, *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 F.C.C.R. 7999, 8004 ¶ 13 (2001) (graphic discussion of oral sex), 8009 ¶ 19 (explicit joke about rape of a baby); *In re Infinity Broad. Corp.*, 3 F.C.C.R. 930, 934 (1987) (extended narrative regarding anal sex). Judicial review of the particular adjudicatory orders before the court of appeals should not have produced that sweeping result.

B. The FCC's Indecency Policy Is Not Unconstitutionally Vague As Applied To The Broadcasts At Issue Here

1. The Fifth Amendment's Due Process Clause requires that laws be crafted with sufficient clarity to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and to "provide explicit standards for those who apply them." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972)). "Condemned to the use of words," however, "we can never expect mathematical certainty from our language." *Id.* at 110. "[M]ost statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell our prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952). Moreover, "[t]here are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision." *Smith* v.

Goguen, 415 U.S. 566, 581 (1974). Thus, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *United States* v. *Williams*, 553 U.S. 285, 304 (2008) (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 794 (1989)). And "the mere fact that close cases can be envisioned" does not "render[] a statute vague." *Id.* at 305.

In prohibiting the broadcast of "obscene, indecent, or profane language," 18 U.S.C. 1464, and in directing the FCC to "promulgate regulations to prohibit the broadcasting of indecent programming" during specified hours of the day, Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 954, Congress recognized that a wide variety of material, not easily specified in advance, could transgress the reasonable standards of behavior applicable to the broadcast industry. The Commission's indecency-enforcement regime therefore appropriately reflects the recognition that a "concept like 'indecent' is not verifiable as a concept of hard science." *Pacifica Found*. v. *FCC*, 556 F.2d 9, 33 (D.C. Cir. 1977) (Leventhal, J., dissenting), rev'd, 438 U.S. 726 (1978).

2. The FCC's established enforcement practices would have given a reasonable broadcaster in Fox's position fair warning that gratuitous use of the F-Word and the S-Word during a nationally televised prime-time awards show with millions of children in the audience could be considered indecent. The Commission has long imposed sanctions on the broadcast of precisely such language. See, e.g., *In re WUHY-FM, Eastern Educ. Radio*, 24 F.C.C. 2d 408, 415 ¶ 17 (1970). Indeed, the F-Word and the S-Word are two of the most prominent examples of expletives in the Carlin monologue found

indecent in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). See *id.* at 751-755.[3]

The networks' internal standards, which apply even during hours of the day when the FCC's indecency regulation does not, recognize that "airing the 'F-Word' and the 'S-Word' on broadcast television is generally offensive to the viewing audience and, in the usual case, not consistent with contemporary community standards for the broadcast medium." Pet. App. 61a. And when the awards shows at issue in this case were broadcast on tape delay to later time zones, Fox blocked the expletives in question. *Id.* at 61a, 94a. That action concretely demonstrated Fox's awareness that broadcast of the expletives in this context was inconsistent with contemporary community standards for the broadcast medium.

None of the purported inconsistencies between other FCC indecency adjudications discussed in the court of appeals' opinion would have deprived Fox of fair notice that the language at issue in this case could be considered indecent. Fox could not have relied on any of these orders because they all came after Fox's 2002 and 2003 broadcasts. In any event, none of those orders is inconsistent with the FCC's indecency determination with respect to Fox's awards-show broadcasts.

The court of appeals found it problematic that the FCC had "concluded that 'bulls***' in a 'NYPD Blue' episode was patently offensive" but that "dick," "dickhead," "pissed off," "up yours," "kiss my ass," and "wiping his ass" were not. Pet. App. 23a-24a. In making that

[3] To be sure, Fox did not have reasonable notice at the time of the broadcasts that the Commission would consider non-repeated expletives indecent. Respondents cannot establish unconstitutional vagueness on that basis, however, because the Commission did not impose a sanction where Fox lacked such notice. See p. 31, *infra*.

distinction, the Commission reasonably assessed the graphic nature and social acceptability of these words. J.A. 115-116, 153-154. More to the point, the Commission's conclusion that "bulls***" was indecent but that other arguably offensive words were not would not have deprived Fox of notice that the word "cows***" would be considered indecent. To the contrary, the Commission has made clear that the word "s***" and its variants are sufficiently graphic to support an indecency finding, even though other offensive words may not be. Moreover, the court of appeals' comparison says nothing about the "F-Word," which appeared in both Fox broadcasts and is widely recognized as "one of the most vulgar, graphic, and explicit words for sexual activity in the English language." Pet. App. 48a.

The court of appeals also perceived that the Commission had acted inconsistently by, on the one hand, finding a broadcast of the film "Saving Private Ryan" not indecent because the expletives it included were "integral to the 'realism and immediacy of the film experience for viewers'" while, on the other hand, reaching a different conclusion with respect to a documentary on blues musicians. Pet. App. 29a (citation omitted). Any perceived inconsistency in application of what the court of appeals described as an "artistic necessity" exception, *id.* at 27a, however, has no relevance to any as-applied vagueness challenge that Fox could plausibly assert here. Fox has never claimed that it broadcast the expletives at issue because of artistic necessity or that they were integral to a message it wanted to convey. To the contrary, Fox edited the expletives out of the broadcasts in later time zones the same evening. *Id.* at 61a.

The court of appeals also perceived an inconsistency between the FCC's determination that "multiple occur-

rences of expletives in 'Saving Private Ryan' was not gratuitous" and the agency's conclusion that "a single occurrence of 'f***ing' in the Golden Globes Awards was 'shocking and gratuitous.'" Pet. App. 26a (quoting *Fox Television Stations, Inc.* v. *FCC*, 489 F.3d 444, 463 (2d Cir. 2007), rev'd, 129 S. Ct. 1800 (2009)). The court had made precisely the same criticism in its first decision in this case, and this Court explained why the court of appeals was wrong. The FCC's context-based approach

> could support the Commission's finding that a broadcast of the film Saving Private Ryan was not indecent —a finding to which the broadcasters point as supposed evidence of the Commission's inconsistency. The frightening suspense and the graphic violence in the movie could well dissuade the most vulnerable from watching and would put parents on notice of potentially objectionable material.

FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1814 (2009). The Court observed that there was no inconsistency between a judgment finding such a broadcast not indecent and a contrary conclusion regarding "the deliberate and shocking uses of offensive language at the award shows under review—shows that were expected to (and did) draw the attention of millions of children." *Ibid.*

The court of appeals also criticized the Commission's approach to "news and public affairs programming," where the FCC has recognized the "need for caution" in regulating indecent material but has not adopted an "outright news exception" to its indecency-enforcement regime. Pet. App. 27a, 32a.[4] Any uncertainty regarding

[4] The Commission has concluded that a categorical "news" exception is unwarranted because it might permit broadcast of explicit and vulgar

the application of FCC indecency standards to news programs is irrelevant to the proper disposition of this case. Despite Fox's current assertion that the matter is "unclear" (Br. in Opp. 24), there is no serious argument that the live broadcast of a Billboard Music award for "Top 40 Mainstream Track" by Nicole Richie and Paris Hilton (Pet. App. 43a-44a) was "news" or "public affairs programming." In any event, Fox did not make that claim before the Commission or the court of appeals, and it has therefore been waived.

Finally, the Commission has provided additional protection against unfair surprise by declining to sanction broadcasters in cases where it was not clear at the time of the broadcast that the FCC would regard the pertinent material as indecent. See, *e.g.*, Pet. App. 95a (declining to impose penalty on Fox for the 2002 Billboard Music Awards broadcast aired before the Commission had abandoned its previous policy exempting isolated expletives from the prohibitions on indecent broadcasts). That policy of forbearance "precludes any argument that [the Commission] is arbitrarily punishing parties without notice of the potential consequences of their action." *Fox*, 129 S. Ct. at 1813.

3. ABC likewise had sufficient notice that its broadcast of the nude adult images in the *Nude Awakening* episode of NYPD Blue might violate the FCC's indecency standards. More than 50 years ago, the Commis-

---

material during times when children are likely to be in the audience, so long as there is some arguable basis for connecting the material to a news or public affairs issue. See, *e.g.*, *Industry Guidance*, 16 F.C.C.R. at 8013 ¶ 22 (graphic description "of the alleged rape of Jessica Hahn by the Rev. Jim Bakker" was indecent even though it "concerned an incident that was at the time 'in the news'") (internal quotation marks omitted).

sion warned broadcasters that, although "a nudist magazine may be within the protection of the First Amendment," the "televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. 1464." *Enbanc Programing Inquiry*, 44 FCC 2303, 2307 (1960). This Court's decision in *Pacifica* reinforced that warning. The Court there held that "prurient appeal" was not a prerequisite to a finding of indecency, and it quoted the FCC's prior reference to the "televising of nudes" as an example of material that could be indecent even though it lacked "prurient appeal." *Pacifica*, 438 U.S. at 741 & n.16.

ABC also complains that it had insufficient notice because the Commission had previously "rejected indecency complaints involving much longer displays of nudity, including full frontal nudity." Br. in Opp. 20. But the only published Commission order it cites in support of that proposition, *In re WPBN/WTOM License Subsidiary, Inc.*, 15 F.C.C.R. 1838 (2000), involved a scene from the film "Schindler's List" in which "concentration [camp] prisoners [were] 'made to run around the camp fully nude as the sick are sorted from the healthy.'" Pet. App. 145a (internal citation omitted). As the Commission explained, although that scene was "certainly disturbing," it was "neither pandering nor titillating." *Ibid.* ABC could not reasonably have believed that the Commission's determination regarding *Schindler's List* dictated a like finding with respect to the opening scene of *Nude Awakening*, in which "[t]he viewer is placed in the voyeuristic position of viewing an attractive woman disrobing as she prepares to step into the shower." *Id.* at 143a, 145a.

C. The FCC's Indecency Policy Is Not Unconstitutionally Vague On Its Face

Even if it had been appropriate for the court of appeals to conduct facial vagueness review of the FCC's overall indecency policy, the court erred in its disposition of respondents' Fifth Amendment challenges.

1. The FCC's generic definition of indecency—"language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs," *Pacifica*, 438 U.S. at 732 (citation omitted)—was before this Court in *Pacifica* and is the same one the FCC "uses to this day," *Fox*, 129 S. Ct. at 1806. Based on that generic definition, this Court in *Pacifica* found "no basis for disagreeing with the Commission's conclusion that indecent language was used in" the Carlin monologue. 438 U.S. at 741. It is thus clear that "the Court [in *Pacifica*] did not regard the term 'indecent' as so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) (R.B. Ginsburg, J.) (citation omitted). During the ensuing years, the agency has provided additional guidance that further clarifies the standard. In the 2001 *Industry Guidance*, for example, the Commission comprehensively described its approach to indecency enforcement, see pp. 8-9, *supra*, and the FCC has further elaborated on its standard in a number of reported decisions involving individual adjudications. See, *e.g.*, *In re Complaints By Parents Television Council Against Various Broad. Licensees Regarding Their Airing of Allegedly Indecent Material*, 20 F.C.C.R. 1931 (2005).

In rejecting vagueness challenges in other contexts, this Court has relied on "the longstanding interpretations of [a] statute by the agency charged with its interpretation and enforcement." *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 575 (1973). Such reliance is particularly appropriate here. The FCC's broadcast indecency policy is not enforced against members of the general public, but rather applies only to broadcast licensees, who are highly sophisticated participants in a heavily regulated industry. And the Commission proscribes only material that is inconsistent with "contemporary community standards *for the broadcast medium*." *Industry Guidance*, 16 F.C.C.R. at 8002 ¶ 8 (emphasis added). The parties who are regulated by the FCC's indecency regime thus have particular expertise and experience in applying to their own broadcasts the standards the FCC applies in its enforcement capacity.

Indeed, the major networks have dedicated personnel and policies to ensure compliance with those community standards for the broadcast medium. In this case, the Commission canvassed the networks' own practices during the 10 p.m. to 6 a.m. safe harbor (when the FCC's indecency regulation does not apply) and found that, "with rare exceptions, [the networks] do not allow the 'F-Word' or the 'S-Word' to be broadcast during that time period." Pet. App. 60a. The Commission reasonably determined that "broadcasters' practices with respect to programming aired during the safe harbor reflect their recognition that airing the 'F-Word' and the 'S-Word' on broadcast television is generally offensive to the viewing audience and, in the usual case, not consistent with contemporary community standards for the broadcast medium." *Id.* at 61a.

2. Theoretically, the FCC could provide broadcast licensees with even greater clarity by promulgating an exhaustive list of words or images that are prohibited regardless of context. As the court of appeals recognized, however, such "an outright ban on certain words would raise grave First Amendment concerns." Pet. App. 27a. That rigid approach would also be inconsistent with *Pacifica*, where the Court emphasized with approval the Commission's reliance on "a nuisance rationale under which context is all-important" and under which "a host of variables" must be considered. 438 U.S. at 750.

An inflexible approach to indecency enforcement, relying solely on the presence or absence of particular disfavored words, would be significantly under-inclusive as well. In particular, it would undermine effective enforcement of Section 1464 by permitting broadcast of material that is highly offensive but does not include the prohibited words. See *Infinity Order*, 3 F.C.C.R. at 932 ¶ 14. The Commission in 1987 explained that such a rigid policy was not viable, and the soundness of that conclusion is confirmed by the graphic nature of material before the Commission that did not include any of Carlin's expletives. See *id.* at 934-935.

3. Two additional factors reinforce the conclusion that the FCC's indecency standards are not unconstitutionally vague. First, many if not most of the broadcasts that are close to the indecency line are likely to be contrary to the networks' own standards, and in any event are far removed from typical broadcast fare. See p. 34, *supra*; cf. *Fox*, 129 S. Ct. at 1819 (explaining that, to the extent "the Commission's orders may cause some broadcasters to avoid certain language that is beyond the Commission's reach under the Constitution, * * * [such]

chilled references to excretory and sexual material 'surely lie at the periphery of First Amendment concern'") (quoting *Pacifica*, 438 U.S. at 743 (plurality op.)). Second, a broadcaster who is uncertain whether particular material is indecent can avoid any danger of liability by airing the material after 10 p.m. See *Reno* v. *ACLU*, 521 U.S. 844, 867 (1997) (explaining that the Commission's regulatory scheme "designates when—rather than whether—it would be permissible to air" indecent material); 47 C.F.R. 73.3999(b). For both those reasons, the unavoidable lack of complete precision in the FCC's definition of indecency is unlikely to foreclose a substantial amount of broadcast speech.

II. THE COMMISSION'S INDECENCY DETERMINATIONS ARE CONSISTENT WITH THE FIRST AMENDMENT

Application of the FCC's indecency policy to the three broadcasts at issue in this case is consistent with the First Amendment principles articulated by this Court in *Pacifica*. The Court should decline respondents' invitation to overrule that case. Given the unique nature of both broadcasting and the regime of broadcast licensing, the FCC's regulation channeling broadcast indecency to the hours after 10 p.m. is consistent with the First Amendment.

A. As Applied To The Broadcasts At Issue In This Case, The Commission's Indecency Enforcement Policy Is Consistent With The First Amendment

1. The First Amendment did not prohibit the FCC from concluding that the prime-time airing of the F-Word and S-Word during Fox's Billboard Music Awards broadcasts—"shows that were expected to (and did) draw the attention of millions of children," *Fox*, 129 S. Ct. at 1814—was indecent. The authority of Congress

and the FCC to regulate broadcast indecency is not limited to indecent speech that "rises to the level of 'verbal shock treatment,' exemplified by the Carlin monologue." Pet. App. 17a. Although Fox's broadcasts did not involve the repeated use of offensive language that occurred in *Pacifica*, this Court "ha[s] never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden." *Fox*, 129 S. Ct. at 1815.

This Court's First Amendment precedents do not suggest that a constitutional line exists between indecent language that is brief and indecent language that is not. Granting "complete immunity for fleeting expletives," *Fox*, 129 S. Ct. at 1814, "would as a matter of logic permit broadcasters to air expletives at all hours of a day so long as they did so one at a time," Pet. App. 58a. But even an isolated use of an offensive word can "enlarge[] a child's vocabulary in an instant." *Pacifica*, 438 U.S. at 479. In this case, "it suffices to know that children mimic the behavior they observe—at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives." *Fox*, 129 S. Ct. at 1813.

2. Applying a variation of Fox's "fleeting expletives" argument to its broadcast of adult nudity, ABC contends (Br. in Opp. 27) that "the First Amendment simply does not allow the government to proscribe a seven-second non-sexual display of a woman's buttocks like the one at issue here." In particular, ABC argues that its prime-time broadcast of NYPD Blue is constitutionally immune from the FCC's indecency-enforcement regime because the nudity in that broadcast was not "highly sexualized"

and was displayed for "only seven seconds." *Id.* at 27, 29.

The Court held in *Pacifica*, however, that the doctrine of constitutional avoidance did not require inclusion of "prurient appeal" as a component of indecency. 438 U.S. at 740-741 & n.17. The Court upheld the Commission's indecency determination with respect to the Carlin monologue, which can hardly be described as "highly sexualized." The Court also noted, with apparent approval, the Commission's longstanding view that "the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. § 1464." *Id.* at 741 n.16 (quoting *Enbanc Programing Inquiry*, 44 FCC at 2307).

As the Commission observed, the NYPD Blue episode "contain[s] more shots or lengthier depictions of nudity, or more focus on nudity, than other cases involving nudity" that the agency has adjudicated. Pet. App. 143a. Moreover, the nudity was repeated and was not fleeting—it extended over several seconds and was the centerpiece of the opening scene of the *Nude Awakening* episode. *Id.* at 180a. ABC's argument logically suggests that broadcasters have a First Amendment right to air entirely gratuitous full frontal nudity, provided that they do so in intermittent bursts of fewer than seven seconds. Nothing in this Court's precedents supports that result.

ABC is likewise wrong in arguing that the nudity in NYPD Blue is beyond the reach of the FCC's enforcement authority because it does not "genuinely" have the "capacity" to harm children. Br. in Opp. 27. In upholding regulation of indecent material in the interest of protecting children, this Court has not required "scientific" proof that dissemination of the materials to minors would actually have the feared effect. *Ginsberg* v. *New York*, 390 U.S. 629, 641 (1968); see *id.* at 641-643. As this Court

explained in *Fox*, "[t]he Commission had adduced no quantifiable measure of the harm caused by the language in *Pacifica*, and [this Court] nonetheless held that the 'government's interest in the "well-being of its youth" . . . justified the regulation of otherwise protected expression.'" 129 S. Ct. at 1813 (quoting *Pacifica*, 438 U.S. at 749 (quoting *Ginsberg*, 390 U.S. at 639, 640)); see also *Action for Children's Television* v. *FCC*, 58 F.3d 654, 661-662 (D.C. Cir. 1995) (en banc), cert. denied, 516 U.S. 1043 (1996) ("[T]he Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech.").

ABC further contends that nudity is harmless to children because "[e]very child has seen buttocks (presumably for longer than seven seconds)." Br. in Opp. 29. The asserted dramatic purpose for the relevant NYPD Blue scene, however, was to "convey vividly the embarrassment" a boy feels when he walks in on a naked adult woman in the bathroom. *Id.* at 6; see *id.* at 6 n.6 (emphasizing broadcaster's precautions to protect the child actor from seeing adult nudity while filming). In any event, exposure to nude *strangers* in one's own home is not a typical childhood experience. The assumption that every child has seen nude buttocks does not negate the interests of parents in controlling the circumstances under which their children view such images.

In addition, neither the fact that NYPD Blue was "critically-lauded" (ABC Affiliates Br. in Opp. 29), nor the existence of a plausible storyline rationale for the indecent scene (*i.e.*, the broadcaster's desire to "[t]o convey vividly the embarrassment this encounter caused," ABC Br. in Opp. 6) renders the Commission's finding of

indecency unconstitutional. The Commission has stated that a conclusion that "material has * * * social, scientific or artistic value * * * may militate against finding that it was intended to pander, titillate or shock." *In re Complaints Against Various Television Licensees Regarding Their Broad. on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 F.C.C.R. 4507, 4512 ¶ 11 (2005). But the First Amendment does not require the FCC to establish an across-the-board exception for artistic necessity in this context. As the D.C. Circuit has explained, the Commission's indecency-enforcement regime is "designed to protect unsupervised children," and "some material that has significant social value may contain language and descriptions as offensive, from the perspective of parental control over children's exposure, as material lacking such value." *ACT I*, 852 F.2d at 1340. The understanding that some worthwhile material may be unsuitable for broadcast radio and television, at least during hours when children are likely to be in the audience, is implicit in the *Pacifica* Court's observation that "a 'nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard.'" 438 U.S. at 750 (quoting *Euclid* v. *Amber Realty Co.*, 272 U.S. 365, 388 (1926)); see *ACT I*, 852 F.2d at 1340 n.13 (noting that the "Carlin monologue itself may be an example of indecent material possessing significant social value").

B. Regulation Of Broadcast Indecency Does Not Violate The First Amendment

Respondents more broadly contend (*e.g.*, ABC Br. in Opp. 29) that this Court should overrule *Pacifica* and invalidate Congress's determination that indecent broad-

casting should be regulated. "[E]ven in constitutional cases," however, *stare decisis* "carries such persuasive force" that the Court has "always required a departure from precedent to be supported by some 'special justification.'" *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996) (citation omitted). No such special justification is present here.

The Commission's indecency-enforcement policy implements Congress's determination that "indecent material is harmful to children," *Fox*, 129 S. Ct. at 1813, and furthers the government's long-recognized "interest in protecting minors from exposure to vulgar and offensive spoken language," *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 684 (1986), and images, *Ginsberg*, 390 U.S. at 631-632, 637-643. The policy achieves its objective not by banning the radio or television broadcast of indecent material, but by requiring broadcasters to channel such material to the 10 p.m. to 6 a.m. "safe harbor" hours, when children are less likely to be in the broadcast audience. See *Sable Commc'ns* v. *FCC*, 492 U.S. 115, 127 (1989) ("*Pacifica* is readily distinguishable from these cases, most obviously because it did not involve a total ban on broadcasting indecent material."); *ACT III*, 58 F.3d at 666 (Time-channeling "provide[s] a period in which radio and television stations may let down their hair without worrying whether they have stepped over any line other than that which separates protected speech from obscenity."). In this way, the indecency regime serves the compelling governmental interest of protecting children, while imposing a minimal burden on adults.

1. This Court has "long recognized that each medium of expression presents special First Amendment problems." *Pacifica*, 438 U.S. at 748 (citation omitted). "And

of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Ibid.*; see *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994) ("[O]ur cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."). This Court's decisions identify three primary rationales—the scarcity of available broadcast frequencies, the pervasive presence of the broadcast media, and the unique accessibility of broadcast programming to children—for the established rule that broadcast speech may be subject to greater content-based restrictions (with respect to indecency and otherwise) than other forms of communication. Those rationales remain fully applicable today.

a. In applying the First Amendment to broadcast television and radio, this Court has attached significance to "the unique physical limitations of the broadcast medium." *Turner I*, 512 U.S. at 637. "As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all. The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters." *Id.* at 637-638 (citation omitted); see, *e.g.*, *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 386-388 (1969); *National Broad. Co.* v. *United States*, 319 U.S. 190, 226 (1943); *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940).

Broadcast licensees have thus received important government assistance, *i.e.*, the license itself (which authorizes use of a valuable public resource without charge)

and the availability of government enforcement mechanisms to prevent others from making unauthorized use of the licensee's allotted frequency or otherwise interfering with the licensee's use of the spectrum. The licensee's acceptance of those benefits has historically carried with it an enforceable obligation to operate the franchise in a manner that serves the public interest. See, *e.g.*, *Fox*, 129 S. Ct. at 1806; *FCC* v. *League of Women Voters*, 468 U.S. 364, 377 (1984); *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981). To be sure, a broadcaster's acceptance of a license does not constitute a waiver of all First Amendment protection. See *League of Women Voters*, 468 U.S. at 376-381. But, in light of the distinct physical attributes of broadcast media and the benefits licensees obtain from the government, restrictions on broadcast speech have long been subjected to less demanding First Amendment scrutiny than comparable restrictions on other forms of communication.

Respondents contend (*e.g.*, ABC Br. in Opp. 30-31) that intervening technological developments have rendered the spectrum-scarcity rationale obsolete. It remains true, however, that "there are more would-be broadcasters than frequencies available in the electromagnetic spectrum." *Turner I*, 512 U.S. at 637. And, as explained below (and as the continuing desire of media entities like respondents to maintain a broadcast presence reflects), broadcast media reach far greater numbers of viewers and listeners than do their cable competitors. Broadcast licensees thus continue to receive important benefits from the federal regulatory scheme, even though they face competition from a greater range of alternative media than they did when *Pacifica* was decided. So long as the federal government must exercise selectivity in allocating limited spectrum among numer-

ous licensees (and broadcasters benefit from the use of a valuable public resource without charge), it may constitutionally require licensees to accept content-based restrictions that could not be imposed on other communications media.

b. Even apart from the scarcity of broadcast spectrum and the nature of broadcast licensing, the Court in *Pacifica* explained that regulation of broadcast indecency appropriately reflected the "uniquely pervasive presence in the lives of all Americans" established by broadcasting. 438 U.S. at 748. Given that pervasiveness, "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home." *Ibid.* Broadcasting remains a pervasive medium of communications. In 2008, more than 98 percent of households owned a television; the average household had nearly three. U.S. Census Bureau, *Statistical Abstract of the United States: 2011*, at 712, Tbl. 1131, http://www.census.gov/compendia/statab/ (Statistical Abstract); see Pet. App. 79a. In addition, the average household also owned eight radio sets, with 99 percent of U.S. households owning at least one. Statistical Abstract 712, Tbl. 1131.

Although substantial numbers of households now subscribe to cable or satellite, Pet. App. 15a (87 percent), broadcast programming has retained a dominant position in the media universe. Broadcast television continues to be used in approximately 19.6 million households (containing 45.5 million television sets) who do not subscribe to cable or satellite services, and in 14.7 million more households that subscribe to cable and satellite but that own 23.5 million television sets that are not connected to those services. See Thirteenth Annual Report, *In re Annual Assessment of the Status of Competition in the*

Market for the Delivery of Video Programming, 24 FCC Rcd 542, 595 ¶ 108 (2009). Moreover, almost half of direct broadcast satellite subscribers access broadcast channels "over the air," *i.e.*, not through the satellite service. Pet. App. 80a. The National Association of Broadcasters (NAB) recently informed the Commission that "99% of the public relies on local television stations (whether received over-the-air or via cable, telephone wires or satellite) for diverse programming services" and that "[n]o other information platform can match the reach and reliability of free, over-the-air broadcasting." *In re Innovation in the Broad. Television Bands: Allocations, Channel Sharing & Improvements to VHF: Comments of the Nat'l Ass'n of Broadcasters and the Ass'n for Maximum Serv. Television, Inc.*, ET Docket No. 10-235 (filed Mar. 18, 2011), at 3, http://fjallfoss.fcc.gov/ecfs/document/view?id=7021034736.

Even households that subscribe to cable and satellite often use those technologies to access broadcast programming. "[O]f the 495 most-watched television programs during the 2004-2005 season, 485 appeared on broadcast television, and the highest-rated program on cable television was only the 257th most-viewed program of the season." Pet. App. 81a; see TVB Local Media Marketing Solutions, *TV Basics*: *A Report on the Growth and Scope of Television*, *Top 100 TV Programs of '09-'10 Season* 11 (2010) ("Broadcast dominated the 2009-10 season, taking 98 of the top 100 programs * * * as well as taking 302 of the top 312 programs.") (http://www.tvb.org/media/file/TVB_FF_TV_Basics.pdf). The continuing dominance of broadcast programming—despite the growth of non-broadcast means of accessing it—is in part attributable to regulatory design. Cable and satellite services are required by statute to retransmit the pro-

gramming aired by local broadcast stations, see 47 U.S.C. 534, 535, and to provide them favored channel positions, 47 U.S.C. 534(b)(6). In enacting these provisions, "Congress sought to preserve the existing structure of the Nation's broadcast television medium while permitting the concomitant expansion and development of cable television, and, in particular, to ensure that broadcast television remains available as a source of video programming for those without cable." *Turner I*, 512 U.S. at 652.

c. As when *Pacifica* was decided, the broadcast media remain "uniquely accessible to children." *Pacifica*, 438 U.S. at 749. The Commission recently found that "[i]n spite of the increase in the number of other types of media to which children are exposed, television remains the medium of choice among children." *In re Implementation of the Child Safe Viewing Act*, Report, 24 F.C.C.R. 11,413, 11,416 ¶ 8 (2009) (*CSVA Report*).[5] "According to a 2005 Kaiser Family Foundation Report, 68 percent of children aged eight to 18 have a television set in their bedrooms, and nearly half of those sets do not have cable or satellite connections." Pet. App. 80a; see *CSVA Report*, 24 F.C.C.R. at 11,416-11,417 ¶ 8 (citing a 2008 report indicating that two-thirds of children ages 8 to 18 surveyed—and one-third of children younger than eight—had a television set in their bedrooms).

Broadcast programming is particularly accessible to children because its availability to young viewers and listeners does not depend on any affirmative conduct by

[5] Radio broadcasting also continues to play an important role in children's media consumption. Seventy-five percent of minors have a radio in the bedroom. See Henry J. Kaiser Family Foundation, *Generation M2: Media in the Lives of 8- to 18-Year-Olds* (Jan. 2010) at 9, http://www.kff.org/entmedia/upload/8010.pdf.

their parents beyond the initial acquisition of a television or radio. By contrast, "[p]arents who subscribe to cable exercise some choice in their selection of a package of channels, and they may avoid subscribing to some channels that present programming that, in their judgment, is inappropriate for children." Pet. App. 81a. And as this Court explained in *Reno*, indecency on the Internet is not analogous to broadcasting because the Internet "requires the listener to take affirmative steps to receive the communication." 521 U.S. at 870 (quoting *Sable*, 492 U.S. at 128). Thus, while "[o]ther forms of offensive expression may be withheld from the young without restricting the expression at its source," the "ease with which children may obtain access to broadcast material * * * amply justif[ies] special treatment of indecent broadcasting." *Pacifica*, 438 U.S. at 749, 750; see *id.* at 758-759 (Powell, J., concurring) (broadcasters "cannot reach willing adults without also reaching children.").

3. Respondents also contend that reconsideration of *Pacifica* is warranted by (a) the proliferation of new technological alternatives to broadcast programming and (b) the development of "V-Chip" technology. Those arguments lack merit.

a. Far from undermining *Pacifica*, the rise of alternative means of video distribution has reduced the burden on speech imposed by broadcast indecency regulation. See *ACT III*, 58 F.3d at 667 ("[A]dults have so many alternative ways of satisfying their tastes" that "it seems entirely appropriate that the marginal convenience of some adults be made to yield to the imperative needs of the young."). The Court in *Pacifica* found (in 1978) that the burdens of broadcast indecency regulation were acceptable because "[a]dults who feel the need" to hear or view material that the FCC regarded as indecent

could "purchase tapes and records or go to theaters and nightclubs." 438 U.S. at 750 n.28. Those options remain, but in today's media environment, there are many more as well: adults who want to access such material can do so on a cable-only channel or over the Internet or by renting a DVD. In addition, such material can be broadcast during the post-10 p.m. safe harbor, and (unlike in 1978) it can be viewed by an adult at any time of day by using a digital video recorder.

The availability of these alternative platforms also reduces the burden of broadcast indecency regulation on those who produce programming, who now have multiple means, unavailable at the time *Pacifica* was decided, to disseminate material that is inappropriate for pre-10 p.m. broadcast television. Indeed, each of the major television broadcast networks is affiliated with a cable video distribution network, cable programmer, or both.[6] "[T]echnological advances" have further reduced the burdens of broadcast indecency regulation by "ma[king]

[6] The Commission recently approved a transaction involving NBC Universal (NBCU) and Comcast Corporation that created a joint venture controlling "two broadcast television networks (NBC and Telemundo), 26 broadcast television stations, and NBCU's cable programming (such as CNBC, MSNBC, Bravo, and USA Network)." *In re Applications of Comcast Corp., Gen. Elect. Co. & NBC Universal, Inc.*, 26 F.C.C.R. 4238, 4239-4240, 4243 ¶¶ 1, 8 (2011). The News Corporation owns not only the Fox broadcast network but also cable channels such as FX, the Fox News Channel, and the National Geographic Channel. News Corp., *Annual Report 2010* at 14-15, http://www.newscorp.com/Report2010/AR2010.pdf. The CBS Corporation owns the Showtime cable channel. See CBS Corp., *Our Portfolio*, http://www.cbscorporation.com/portfolio.php?division=101. The Disney/ABC Television Group is part of a joint venture that owns the A&E Network, among other cable channels. See Disney/ABC Television Group, *Overview*, http://www.disneyabctv.com/division/index_facts.shtml.

it easier to bleep out offending words," *Fox*, 129 S. Ct. at 1813, "without adulterating the content of a broadcast," *id.* at 1808.

Notwithstanding the greater range of available video-programming options, the FCC's broadcast-indecency regime continues to serve its original purpose. That is most obviously true with respect to the many millions of households (see pp. 44-45, *supra*) whose televisions receive *only* broadcast programming. But even with respect to households that receive additional video communications through non-broadcast sources, "[t]he Commission could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children." *Fox*, 129 S. Ct. at 1819.

b. In suggesting that broadcasting is no longer uniquely accessible to children, the court of appeals and respondents place great weight on the availability of the "V-Chip," which is intended to "allow[] parents to block programs based on a standardized rating system." Pet. App. 16a; see ABC Br. in Opp. 26, 27. V-Chip technology provides no basis for overruling *Pacifica*, however, because it has not meaningfully altered "[t]he ease with which children may obtain access to broadcast material." 438 U.S. at 750. Both in the orders under review here and in a subsequent report to Congress, the Commission documented in detail the V-Chip's deficiencies and explained why it is inadequate as a substitute for broadcast indecency regulation. See Pet. App. 81a-83a; *id.* at 171a, 177a-179a; *CSVA Report*, 24 F.C.C.R. 11,418-11,438 ¶¶ 11-55; cf. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 218-223 (1997) (*Turner II*) (deferring to congressio-

nal judgments about inadequacy of proffered alternatives to challenged regulation).

V-Chips often fail to perform their intended function because particular programming is inaccurately rated. V-Chip "content descriptors actually identify only a small minority of the full range of violence, sex, and adult language found on television." Pet. App. 83a n.162. Inaccurate ratings are so common that a 2004 study found more coarse language broadcast during TV-PG programs than during those rated TV-14, just the opposite of what those age-based ratings would lead a viewer to believe. See *ibid.*

Indeed, none of the three programs at issue in this case was rated in a manner that would have alerted viewers to its potentially objectionable content. The 2002 Billboard Music Awards was rated TV-PG, and the 2003 Billboard Music Awards was rated TV-PG(DL). See Pet. App. 50a, 92a. The TV-PG rating (parental guidance suggested) is the most common rating for television programming, "and merely signifies that the program contains material that parents may find unsuitable for younger children, and that parents may want to watch the program with their younger children." *Id.* at 50a-51a n.47. The "D" signifies that the program may contain some "suggestive dialogue," and the "L" signifies that the program may contain some "infrequent coarse language." *Id.* at 51a n.47. Only in the context of a TV-MA rating (which neither broadcast had) would a "DL" descriptor signify that programming contained "crude indecent language." *Ibid.*; see generally The TV Parental Guidelines, www.tvguidelines.org. ABC's TV-14 (DLV) rating of the relevant NYPD Blue episode ("D" for suggestive or sexual dialogue, "L" for language, and "V" for violence, Pet. App. 84a n.162 (citation omitted))

likewise would not have apprised viewers employing the V-Chip system that nudity would be aired. See *id.* at 178a-179a.

In addition, no radios have a V-Chip, and most of the televisions in use at the time of the broadcasts at issue did not have one either. Pet. App. 81a-82a. Even today, "most parents who have a television set with a V-Chip are unaware of its existence or do not know how to use it." *Id.* at 82a; see S. Rep. No. 268, 110th Cong., 2d Sess. 2 (2008) (Fifty-seven percent of parents who said they had purchased a television since January 1, 2000, were "not aware that they have a V-Chip."). Recent studies show that only between 5% and 16% of all parents use the V-Chip, *CSVA Report*, 24 F.C.C.R. at 11,421-11,422 ¶ 17, perhaps because "many parents find 'programming the V-Chip is a multi-step and often confusing process.'" *Id.* at 11,422 ¶ 19 (citation omitted). Those considerations amply support the Commission's recent determination that "time channeling of indecent * * * broadcasts remains a vital tool for shielding children," and that "[e]vidence of the V-Chip's limited efficacy in facilitating parental supervision of children's exposure to objectionable broadcast content has reinforced the necessity of the Commission's regulation." *Id.* at 11,420 ¶ 14.

4. If all broadcast indecency regulation were held to be prohibited by the First Amendment, Congress and the Commission would lack "any power to regulate erotic telecasts unless they were obscene under *Miller* v. *California*, 413 U.S. 15 [(1973)]," thereby allowing "[a]nything that could be sold at a newsstand for private examination [to be] publicly displayed on television." *Pacifica*, 438 U.S. at 744 n.19 (plurality op.). Such material would include extremely graphic descriptions and images. See, *e.g.*, pp. 6, 26 *supra*. Permitting broadcast of such mate-

rial would upset parents' settled expectations and inappropriately free broadcast licensees of a restraint of which they were fully aware when they secured their licenses.

Since the very beginning of broadcast communications in the 1920s, parents have understood that these media, subject to indecency regulation from their inception, would be relatively safe for their children. That understanding was confirmed by this Court more than 30 years ago when it rejected the contention that "the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances." *Pacifica*, 438 U.S. at 744 (plurality op.); see *id.* at 756 (Powell, J., concurring). In the decades before and after *Pacifica*, millions of Americans grew up and raised children with the understanding that (as George Carlin put it) there are certain words one generally "couldn't say on the public * * * airwaves." *Id.* at 751; see *Reno*, 521 U.S. at 867 (explaining that the Commission has "been regulating radio stations for decades," and that in *Pacifica* the Commission "targeted a specific broadcast that represented a rather dramatic departure from traditional program content.").

The regime of broadcast-indecency regulation upheld in *Pacifica* has thus "become part of our national culture." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). The rise of alternative, unregulated media platforms has not rendered that regulation obsolete, since many households remain broadcast-only and since broadcast indecency regulation "give[s] conscientious parents a relatively safe haven for their children." *Fox*, 129 S. Ct. at 1819; see *CSVA Report*, 24 F.C.C.R. at 11,420 ¶ 14 ("[R]egulation of broadcast television provides some measure of confidence to parents that their children will

not encounter the same kind or amount of objectionable content on that medium that they might find elsewhere.").

During the same 80-plus-year period in which parents' reliance interests were established, broadcast licensees have reciprocally understood their obligation not to "dramatic[ally] depart[] from traditional program content," *Reno*, 521 U.S. at 867, during times of day when children are likely to be in the audience. Broadcasters have been "granted the free and exclusive use of a limited and valuable part of the public domain," and in return for that benefit they accept "enforceable public obligations," including the modest requirement that they not broadcast indecent material before 10 p.m. *Fox*, 129 S. Ct. at 1806 (internal citation omitted).

As this Court has noted, a "universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional." *Nevada Comm'n on Ethics* v. *Carrigan*, 131 S. Ct. 2343, 2347-2348 (2011) (quoting *Republican Party* v. *White*, 536 U.S. 765, 785 (2002)). While that principle has often led the Court to examine "[e]arly congressional enactments," see, *e.g.*, *id.* at 2348 (internal citation omitted), the founding era for broadcast communication was the 1920s. Since that time, Congress and the Commission have made indecency regulation one of broadcasting's defining features. That longstanding judgment is entitled to this Court's respect.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

AUSTIN C. SCHLICK
General Counsel
PETER KARANJIA
Deputy General Counsel
JACOB M. LEWIS
Associate General Counsel
NANDAN M. JOSHI
Counsel
Federal Communications Commission

DONALD B. VERRILLI, JR.
Solicitor General
TONY WEST
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
JOSEPH R. PALMORE
Assistant to the Solicitor General
THOMAS M. BONDY
ANNE MURPHY
Attorneys

SEPTEMBER 2011